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Paul Schiff Berman
University of Connecticut, paul.berman@law.uconn.edu

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Article

From International Law to Law and Globalization

PAUL SCHIFF BERMAN*

International law's traditional emphasis on state practice has long been questioned, as scholars have paid increasing attention to other important—though sometimes inchoate—processes of international norm development. Yet, the more recent focus on transnational law, governmental and non-governmental networks, and judicial influence and cooperation across borders, while a step in the right direction, still seems insufficient to describe the complexities of law in an era of globalization. Accordingly, it is becoming clear that "international law" is itself an overly constraining rubric and that we need an expanded framework, one that situates cross-border norm development at the intersection of legal scholarship on comparative law, conflict of laws, civil procedure, cyberlaw, and the cultural analysis of law, as well as traditional international law. Moreover, this new scholarship must be truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars. Such insights afford a more nuanced idea of how people actually form affiliations, construct communities, and receive and develop legal norms,

* Professor, University of Connecticut School of Law. For useful comments during the process of writing this Article, I owe thanks to Laura Dickinson, Mark Drumbl, Robert W. Gordon, Mark W. Janis, Janet Koven Levit, Sally Engle Merry, Jeremy Paul, Austin Sarat, and Susan Silbey. I also acknowledge the valuable research assistance of Shannon Bratt, Marilee Corr, Ronald Crawley, Emily Dean, Joshua Horton, and Jennifer Montgomery.

often with little regard for the fixed geographical boundaries of the nation-state system. This Article refers to such a broader frame of analysis as "law and globalization." Although "globalization" is, of course, a controversial term, the idea of law and globalization nevertheless provides a useful lens for viewing the plural ways in which legal norms are disseminated in the Twenty-first Century. This Article sketches the contours of what it might mean to emphasize law and globalization, rather than simply international law. It suggests four important ways in which the study of law and globalization enlarges the traditional focus of international law and then identifies ten areas of conceptual inquiry that are already coalescing within the scholarly literature to form the core of a study of law and globalization.

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I. INTRODUCTION

Over the past two decades, it has become increasingly clear that, in order to understand the cross-border development of legal norms, we need to move beyond the limiting framework of international law. In an earlier generation, scholars seeking to study law on the world stage focused primarily on only two types of normative systems: those promulgated *by* nation-states and those promulgated *among* nation-states.[1] With nation-states as the only relevant players, the law governing the global system was, of necessity, exclusively inter*national*. And international law, not surprisingly, 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.[2] 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.[3]

1. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

2. *See, e.g.*, Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993 (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).

3. 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 before 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 the norms generated by states. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and

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.[4] 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,"[5] 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. Some scholars have sought to define and understand "transnational legal process," the ways in which nation-states over time come to internalize international or transnational norms.[6] Others have studied non-

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 after Bentham, no less a theorist than Vattel, while repudiating natural law's religious underpinnings (*see* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 61 (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, at *lviii* (1797). 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 norm-generation is not a new phenomenon, but I argue that it is re-emerging as a significant branch of scholarship within international law and might even call for a reclassification of international law itself.

4. *See, e.g.*, W. MICHAEL REISMAN, *Introduction* to JURISDICTION IN INTERNATIONAL LAW, at 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* MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 5–6 (1999); GEORG SCHWARZENBERGER, INTERNATIONAL LAW 34–36 (1957) (both noting that even after Nuremberg, international law derived primarily from state practice).

5. F.A. MANN, THE DOCTRINE OF INTERNATIONAL JURISDICTION REVISITED AFTER TWENTY YEARS 20 (1984).

6. *See, e.g.*, Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181

traditional legal actors such as non-governmental organizations (NGOs) and their role in defining (and sometimes enforcing) legal standards.[7] And even with regard to classic legal actors such as courts, scholars have noted the increasing willingness of judges to apply international norms transnationally,[8] to engage in a transnational judicial dialogue,[9] and even to adopt conceptions of universal jurisdiction.[10]

Yet, this new emphasis on transnational legal processes, governmental and non-governmental networks, and judicial influence and cooperation across borders, while a step in the right direction, still seems insufficient to describe the complexities of law in an era of globalization. Accordingly, scholars are coming to recognize that international law itself needs an expanded focus, one that situates cross-border norm development at the intersection of legal scholarship on conflict of laws, civil procedure, cyberlaw, comparative law, and the cultural analysis of law, as well as traditional international law. Moreover, this new scholarship must be truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars. Such insights afford a more nuanced idea of how people actually form affiliations, construct communities, and receive and develop legal norms, often with little

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(1996) [hereinafter Koh, *Transnational Legal Process*]. S*ee also* Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Koh, *supra* note 3.

7. *See, e.g.*, Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 285–86 (2001) (observing that "private individuals and non-governmental organizations acting both internationally and domestically are contributing to the emergence of new international norms. These new international norms confer greater rights and obligations on private individuals and firms, shifting the focus of international law.").

8. *See, e.g.*, Philippe Sands, *Turtles and Torturers, The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527 (2001); David Sugarman, *From Unimaginable to Possible: Spain, Pinochet, and the Judicialization of Power*, 3 J. SPANISH CULTURAL STUDS. 107 (2002).

9. *See, e.g.*, Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. (forthcoming 2005). *See also* Janet Koven Levit, *Going Public With Transnational Law: The 2002–2003 Supreme Court Term*, 39 TULSA L. REV. 155 (2003).

10. *See, e.g.*, M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001); Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW. ENG. L. REV. 241–63 (2001); Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 THEORETICAL INQUIRIES IN L. 199 (2004). For an exhaustive discussion of universal jurisdiction, including legislative (as well as judicial) enactments, see LUC REYDAMS, SEARCH TERM END UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003).

regard for the fixed set of geographical boundaries that constitute the nation-state system.

An interdisciplinary study of these processes of international, transnational, and subnational norm development and interpenetration does not, of course, render either traditional international law or the idea of nation-state sovereignty irrelevant, but it does complicate the picture significantly, prompting the need for a more comprehensive set of inquiries. I call this broader frame of analysis "law and globalization." And although I recognize the controversial nature of the term "globalization," I believe the idea of law and globalization provides a useful lens for viewing the way legal norms are constructed and disseminated in an era when the prerogatives of territorially delimited nation-states, while not completely unimportant, have become less salient than they once were.[11]

To some, the very mention of globalization will seem old hat. After all, theorizing about globalization has been a cottage industry both in academia and in the popular media for many years now. Yet, although globalization has been an object of study for quite some time, most of this work has taken place in fields other than law. Perhaps because legal scholars are so focused on the official organs of legal power—nation-state governments—they have been less likely to embrace ideas about norm-development in non-state arenas. Thus, an emphasis on law and globalization may encourage legal scholars to draw upon insights from other academic disciplines. In addition, even solely within the legal academy, the idea of law and globalization may be a useful rubric for conceptualizing areas of commonality among a variety of fields, thereby drawing traditional international law scholars into greater dialogue with scholars focusing on conflict of laws, civil procedure, cyberlaw, cultural analysis of law, international business transactions, trade finance, and other legal topics. In any event, regardless of the label, the main point is that the idea of international law, as traditionally conceived, seems insufficient to capture the variety of scholarly approaches that are emerging, and a new conceptual framework may be useful.

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11. Paul, *supra* note 7, at 286 (observing that "[g]lobalization . . . has displaced colonialism and then the cold war as the organizing principle of the international system"). I recognize, of course, that the purported "stable" system of sovereignty, territoriality, and world order that globalization supposedly challenges may never have actually existed. Instead, such systems have most likely always been contested and in flux. Yet, one of the benefits of studying law and globalization is that such study helps us to be reflective both about the categories we are presupposing and about the way in which discourse about globalization might actually validate, legitimate, and reinforce this mythical time of order. *See* Susan Bibler Coutin et al., *In the Mirror: The Legitimation Work of Globalization*, 27 LAW & SOC. INQUIRY 801 (2002).

In this Article, I sketch the contours of what it might mean to emphasize law and globalization, rather than simply international law. To do so, I suggest in the first Part of this Article four important ways in which the study of law and globalization enlarges the traditional focus of international law. First, studying law and globalization allows us to expand our conception of what counts as law, thereby recognizing many non-governmental fora where legal (or quasi-legal) norms are articulated and disseminated. Second, law and globalization can turn the legal gaze to the insights of interdisciplinary scholarship concerning people's relationships to concepts such as space, place, borders, distance, and community affiliation. Third, by looking at broader processes of international norm development, law and globalization can bridge the traditional doctrinal divide between public and private international law. Fourth, law and globalization can contribute to the growing recognition among international law scholars that the classic conception of inviolate nation-state sovereignty may be unhelpful in an increasingly diffuse world of transnational governmental and non-governmental networks, extraterritorial jurisdictional assertions, rhetorical statements of legal norms, and permeable borders.

Once international law's traditional focus has been expanded, a new scholarly agenda can emerge. Indeed, this new agenda is *already* emerging, as a wide range of scholars have, over the past few years, begun to take a broader view of the various processes that constitute the transnational normative order. Accordingly, in the second Part of this Article, I identify ten areas of conceptual inquiry that I believe are already coalescing to form the core of a study of law and globalization. Yet, although nearly all of these areas of study have been subjects of discussion and debate in the international law literature, they are rarely deployed as overarching frameworks for a more holistic understanding of law in an interconnected world. Thus, simply identifying these core fields of inquiry may help re-orient international law scholarship around a different set of possible theoretical questions.[12] Significantly, this list includes the contested idea of globalization itself.

Using these ten tropes, a wide variety of scholars—some of whom are working in the international law tradition and some not, some of whom focus on so-called public international law and some not, some of whom are law professors and some not—are grappling

12. *Cf., e.g.*, Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1, 20 (1985) ("A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.").

with a contemporary world of transnational law-making, cross-border interaction, and norm penetration among multiple communities. Taken together, this emerging scholarship helps point the way from the study of international law to the study of law and globalization. And its insights allow us to chart a course for a new transnational century, where networks of governmental and non-governmental actors (including horrific new networks such as transnational terrorist organizations) disseminate alternative normative systems across a diffuse and constantly shifting global landscape.

I. ENLARGING THE FOCUS OF INTERNATIONAL LAW

A. Law Beyond Governmental Institutions

International law scholarship has traditionally located international law in the acts of official governmental bureaucratic entities, such as the treaties and agreements entered into by nation-states, the declarations and protocols of the United Nations (UN) or other affiliated bodies, and the rulings of international courts and tribunals.[13] Because of this relatively narrow focus, scholars of international law historically have tended to ignore the multifaceted ways in which legal norms are disseminated, received, resisted, and imbibed "on the ground" in daily life, thereby missing much of the complexity of how law operates. In addition, the emphasis on "official" law may, paradoxically, have contributed to the pervasive uneasiness in international law scholarship that international law might not really be law at all. If law resides only in the official acts of a government with coercive power (as the traditional view of international law believes), then many of the mechanisms of international law, which lack such coercive power, cannot be law. Thus, making "law" synonymous with "government" may lead scholars to over-emphasize the actions of nation-states, because only at the nation-state level can a government with coercive power be found. The rest of international "law," on this view, amounts to a mere set of rhetorical statements that are obeyed only when

13. *See, e.g.*, BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 2 (3d ed. 1999) ("Public international law primarily governed the activities of governments in relation to other governments."). Of course, this is not a complete account of the scope of international law or international law scholarship. *See supra*, note 3.

convenient to those holding the reins of coercive power.[14]

But of course, as international law scholars are increasingly coming to recognize, there is no need to see law as necessarily encapsulated only by formal governmental acts. Indeed, with regard to domestic law, sociolegal scholars have argued for many decades that law cannot simply be understood as the pronouncements of official bodies such as legislators and courts. They have therefore long since turned their gaze from "law on the books" to "law in action."[15] In this section, I briefly summarize this scholarship, noting four areas in which the insights of sociolegal scholars can inform the study of law and globalization. First, sociolegal scholars have emphasized the significance of legal consciousness—the ways in which people imbibe, transform, and resist legal norms over time. Second, these scholars have studied the role of lower-level bureaucrats in the way law is actually implemented in daily life. Third, the importance of networks of governmental and/or non-governmental actors has become an increasingly fruitful area of research. Fourth, scholarship on legal pluralism has explored the variety of community affiliations people recognize in their lives, as well as the multiple and sometimes conflicting norms generated by such communities. Each of these areas of study can help expand the traditional scope of international law scholarship.

1. Legal Consciousness

Over the past four decades, sociolegal scholars have increasingly emphasized that law is best understood not as an autonomous system of official rules, but rather as "a distinctive

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14. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (suggesting that international law is simply a product of states pursuing their interests on the international stage and that international legal norms, therefore, cannot pull states towards compliance contrary to their interests). This vision, however, assumes that states simply have a pre-existing set of interests, which they then pursue in the international arena. In contrast, I argue that the interests are themselves shaped over time by changes in legal norms (and accompanying changes in legal consciousness). As a result, the very articulations of international or transnational norms that Goldsmith and Posner deem to be mere rhetoric are inevitably part of what ultimately constitutes a nation-state's vision of its own long-term self-interest. Thus, although it is certainly true that international legal norms will not always *dictate* nation-state behavior, the idea that they have no constraining effect is unconvincing to anyone who takes the idea of legal consciousness seriously. For further discussion of scholarship concerning legal consciousness, see Section I.A.1, *infra*.

15. For a discussion of the applicability of U.S. sociolegal scholarship to international law, see Laura A. Dickinson, *Introduction* to EMPIRICAL APPROACHES TO INTERNATIONAL HUMAN RIGHTS LAW (Laura A. Dickinson ed., forthcoming 2005).

manner of imagining the real."[16] On this view, law operates as much by influencing modes of thought as by determining conduct in any specific case. It is a constitutive part of culture, shaping and determining social relations.[17] For example, "[l]ong before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests—roles that already embed a variety of juridical notions."[18] Indeed, we cannot escape the categories and discourses that law supplies.[19] These categories may include ideas of what is public and what is private, who is an employer and who is an employee, what precautions are "reasonable," who has "rights," and so on.[20] In short, "it is just about impossible to describe any set of 'basic' social practices without describing the legal relations among the people involved—legal relations that don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship."[21]

Because this view of law focuses on the way that legal categories and ideas suffuse social life,[22] scholars have studied the "legal consciousness" of ordinary citizens, exploring both how people think about the law and the ways in which largely inchoate ideas

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16. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 187 (1983).

17. *See, e.g.*, Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 LAW & SOC. INQUIRY 39, 41 (1992) (arguing that "law is a part of the cultural processes that actively contribute in the composition of social relations").

18. PAUL KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 124 (1999).

19. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 105 (1984) ("[I]n actual historical societies, the law governing social relations—even when never invoked, alluded to, or even consciously much thought about—has been such a key element in the constitution of productive relations that it is difficult to see the value . . . of trying to describe those relations apart from law.").

20. Indeed,

> [p]erhaps the most stunning example of law's constitutive powers is the willingness of persons to conceive of themselves as legal subjects, as the kind of beings the law implies they are—and needs them to be. Legal subjects think of themselves as competent, self-directing persons who, for example, enter bargained-for exchanges as free and equal agents.

Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21, 28 (Austin Sarat & Thomas R. Kearns eds., 1993) (citing Peter Gabel & Jay M. Feinman, *Contract Law as Ideology*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 172–84 (David Kairys ed., 1982)).

21. Gordon, *supra* note 19, at 103.

22. *See* Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law & Society Tradition*, 21 LAW & SOC. INQUIRY 903, 907 (1996) ("Law and Society scholarship depicts the law as a culturally and structurally embedded social institution.").

about the law can affect decisions they make.[23] Sally Engle Merry observes legal consciousness in "the way people conceive of the 'natural' and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world."[24] These understandings are often taken for granted. This is because legal consciousness may be so much a part of an individual's worldview that it is present even when law is seemingly absent from an understanding or construction of life events.[25] Thus, "[w]e are not merely the inert recipients of law's external pressures. Rather, we have imbibed law's images and meanings so that they seem our own."[26] Law is an often unnoticed, but nevertheless crucial, presence

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23. Indeed, various studies have explored the legal consciousness of average citizens. *See*, *e.g.*, KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY (1988); PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990); BARBARA YNGVESSON, VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT (1993); Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW ENG. L. REV. 731 (1992); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055 (2000); Austin Sarat, *". . .The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUMAN. 343 (1990); Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1998–99).

24. MERRY, *supra* note 23, at 5. *See also, e.g.*, Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J. L. & HUMAN. 3, 19 (2001) ("Law is part of the everyday world, contributing powerfully to the apparently stable, taken-for-granted quality of that world and to the generally shared sense that as things are, so must they be."); Gordon, *supra* note 19, at 101 (arguing that we should "treat legal forms as ideologies and rituals whose 'effects'—effects that include people's ways of sorting out social experience, giving it meaning, grading it as natural, just, and necessary or as contrived, unjust and subject to alteration—are in the realm of consciousness").

25. David M. Trubeck, *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."). *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.").

26. Sarat & Kearns, *supra* note 20, at 29. *See also* Gordon, *supra* note 19, at 109 ("[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.").

in our ideas of what is fair, appropriate, or natural.[27]

In considering legal consciousness, moreover, we must remember that law is not simply the official texts of treaties, judicial opinions, and legislative acts that embody formal legal rules, nor is it just the formal legal institutions of courts, lawyers and police. Accordingly, instead of focusing solely on laws and official legal actors,[28] legal consciousness research examines the wide variety of "quasi-legal" discourses, such as abstract (and often intuitive) ideas of street justice, due process, civil disobedience, retribution, deterrence, and rights, all of which are frequently invoked in public discussions and dinner-table conversations alike.

Finally, the study of legal consciousness also makes clear that the relationship between law and culture is not unidirectional. While legal categories do shape broader social discourse, at the same time law talk, diffused throughout society, becomes a source of alternative conceptions of law:

> Legality operates through social life as persons and groups deliberately interpret and invoke law's language, authority, and procedures to organize their lives and manage their relationships. In short, the commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no formal legal agent is involved.[29]

This focus on law in everyday life[30] recognizes that people interpret

27. *See* Gordon, *supra* note 19, at 111 ("In short, the legal forms we use set limits on what we can imagine as practical options: Our desires and plans tend to be shaped out of the limited stock of forms available to us: The forms thus condition not just our power to get what we want but what we want (or think we can get) itself."). Indeed, scholars have noted that people's judgments about praise and blame will often match the corresponding legal categories, even when those people are not familiar in detail with legal rules and doctrines. *See, e.g.*, THE ALLOCATION OF RESPONSIBILITY (Max Gluckman ed., 1972).

28. For example, Gordon notes that, if law is only "a bunch of discrete events that occur within certain specialized state agencies . . . how on earth are we going to characterize all the innumerable rights, duties, privileges, and immunities that people commonly recognize and enforce without officials anywhere nearby?" Gordon, *supra* note 19, at 107. Thus, slavery may begin as a temporary arrangement during an emergency harvesting season, then slowly become a taken-for-granted custom over the next few years, and only much later become codified into official legislation. According to Gordon, a scholar "who began her account of slave law . . . with the codifications would rightly be accused of leaving out the most important part of the story." *Id.* at 108. Instead, he contends that "the legal institution of slavery" begins whenever we find "the ordinary practices and discourses of [the] society assuming or appealing to the collectively shared and maintained notions of right and obligation that support that institution, the moment when power becomes institutionalized as 'right.'" *Id.*

29. EWICK & SILBEY, *supra* note 23, at 20.

30. *See, e.g.*, LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993).

their experiences by drawing on a collaboration of law and other social structures.[31] These interpretations may be widely varied and will, of course, depend in part on each person's social class, previous contact with the law, and political standing.[32] Nevertheless, legal consciousness constitutes an ongoing interaction between official norms as embodied in the common sense categories of daily life and each individual's ongoing participation in the process of constructing legality.[33] Accordingly, legal consciousness includes the ways in which individuals themselves deploy, transform, or subvert official legal understandings and thereby "construct" law on the ground.[34] We all always take part in the construction of legal consciousness, even as we are also inevitably affected by the legal categories of the social structures around us.

These varied processes of legal consciousness have not often been the subject of international legal scholarship. Instead, international law scholars have tended to study formal legal mechanisms and have largely ignored the more inchoate development of ideas about legality within populations. Of course, formal legal rules are often *relevant* to the formation of legal consciousness, but they are only the tip of the iceberg. Any comprehensive study of the development of international and transnational norms must consider a more complex web of psychological and sociological phenomena.

2. The Role of Bureaucrats

In shifting the focus away from the formal acts of governments at the macro level, sociolegal scholars have turned their attention not only to the legal consciousness that permeates everyday

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31. *See, e.g.*, David Engel & Frank Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 LAW & SOC'Y REV. 7 (1996); Sarat, *supra* note 23.

32. *See, e.g.*, Carroll Seron & Frank Munger, *Law and Inequality: Race, Gender . . . and of Course, Class*, 22 ANN. REV. SOC. 187 (1996); Davina Cooper, *Local Government Legal Consciousness in the Shadow of Juridification*. 22 J. L. SOC'Y 506 (1995).

33. "Legality" is defined as those meanings, sources of authority, and cultural practices that are in some sense legal although not necessarily approved or acknowledged by official law. The concept of legality offers the opportunity to consider "how, where and with what effect law is produced in and through commonplace social interactions . . . . How do our social roles and statuses, our relationships, our obligations, prerogatives, and responsibilities, our identities, and our behaviors bear the imprint of law?" EWICK & SILBEY, *supra* note 23, at 20. *See also* Sarat & Kearns, *supra* note 20, at 55. ("[L]aw is continuously shaped and reshaped by the ways it is used, even as law's constitutive power constrains patterns of usage.").

34. *See, e.g.*, BUMILLER, *supra* note 23, at 30–32; MCCANN, *supra* note 23; MERRY, *supra* note 23, at 9; EWICK & SILBEY, *supra* note 23, at 731–49.

life, but also to the ways that law actually ends up being applied (or subverted) through the discretionary acts of lower-level bureaucrats. This scholarship reveals that law is almost never "delivered" on the ground in the pure form that treaties, legislation, or constitutional court decisions would indicate. Thus, international law scholars are in danger of missing how norms actually operate if they over-emphasize the grand statements made at the highest levels of government.[35]

Legal scholars and policymakers have an unfortunate tendency to assume that legal norms, once established, simply take effect and constitute a legal regime.[36] As Carol Weisbrod has observed, even theorists who position themselves in opposition to prevailing legal norms tend to privilege official legal pronouncements as the relevant site for locating (or changing) law.[37] Yet, scholarship on the operation of law in bureaucratic settings has emphasized the degree to which the imperatives of bureaucracies and the exercise of discretion by individual agents often affect (or even determine) the operation of law.[38] As Theda Skocpol has pointed out, the state is "not just [. . .] a set of formal offices, but . . . sets of relationships among all who 'participated in some identifiable behavioral interaction connected with state actions.'"[39] Contemporary sociolegal scholarship therefore recognizes that important aspects of legal life occur within bureaucratic settings, such as law firms, regulatory agencies, and corporations.

For example, in order to meet statutory goals, individual

35. Some international law scholars have, in recent years, sought to analyze the relationship between governmental acts and on-the-ground changes in behavior. *See* Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties* (Harvard Law School, Public Law Working Paper No. 56, March 2003), *available at* http://www.ssrn.com/abstract=391643; Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. (forthcoming 2005).

36. *See, e.g.*, JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 73 (1960) ("Taking law as central we develop theories of the state as a legal order or as the 'rule of law.'").

37. *See* Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 995–96 (1990) ("[F]eminist legal scholars, like others in legal academic life, tend to address the powerful and to translate the question 'What is to be Done?' into the question 'What should the State, acting through its judges, do?'" (internal citation omitted)).

38. This discussion largely tracks a useful summary of the early literature provided in Susan Silbey, *Case Processing: Consumer Protection in an Attorney General's Office*, 15 LAW & SOC'Y REV. 849, 850 (1980–81). For a more recent discussion, see, for example, Suchman & Edelman, *supra* note 22, at 907, and ALFRED BLUMROSEN, MODERN LAW: THE TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY (1993).

39. Theda Skocpol, *Social History and Historical Sociology: Contrasts and Complementarities*, 11 SOC. SCI. HIST. 17, 26 (1987) (internal citation omitted).

agents of law enforcement—whether police officers, court officials, or members of administrative agencies—must always exercise discretion. Although statutes (or treaties) theoretically limit the *range* of permissible official action, they rarely if ever can determine precisely how the statutory mandates are accomplished. Thus, enforcement agents, in choosing which cases to act on and which to let go, which inquiries to follow up on and which to ignore, which presumptive litigants to take seriously and which to treat as undeserving of judicial attention, necessarily "become the agents of clarification and elaboration of their own authorizing mandates."[40] By working out authorizing norms in organizational settings, these bureaucrats largely determine how a given law actually operates on the ground, in ways that may support, supplement, resist, or supplant the formal requirements of that law.

Moreover, in elaborating statutory mandates, bureaucracies inevitably modify the goals they were designed to serve. For example, research indicates that members of organizations may cope with various political, social, and environmental pressures (e.g., too many cases to process) by developing routines and simplifications that economize on resources. In addition, when evaluating their own effectiveness, they are apt to develop metrics that their procedures are more likely to meet. In this process, "they may alter the concept of their job, redefine their clientele, and effectively displace the organization's stated mandate."[41]

Even in more explicitly "legal" contexts such as courts, where we might expect the formal statutory mandates to hold most sway, research indicates that the discretionary acts of lower-level court officers often determine the dispensation of justice. For example, Barbara Yngvesson studied "show cause" hearings held in a western Massachusetts criminal court.[42] These hearings mark the earliest phase of the criminal procedure in cases in which there has been no arrest. They are conducted by the court clerk, who has the discretionary power either to allow a complaint application and issue a criminal charge, or to deny it and handle the matter "informally" in the hearing itself. As Yngvesson notes,

> [I]n local conflicts the clerk acts both as "gatekeeper," keeping what is "not legal" out of the court proper, and

40. Silbey, *supra* note 38, at 850 (internal citation omitted).

41. *Id*. at 851 (internal citation omitted).

42. *See* Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town*, 22 LAW & SOC'Y REV. 409 (1988) [hereinafter Yngvesson, *Making Law at the Doorway*]. *See also* YNGVESSON, *supra* note 23.

> as a peacemaker. The clerk's position at the court also allows him to play what one clerk defined as a local "watchdog" role, controlling "problem" people and "brainless" behavior in the communities in the court's jurisdiction.[43]

As such, the informal interactions between the clerk and the litigants construct the "law" in actual practice and also function as a site for the imposition and contestation of social prejudices, class differences, and moral judgment about the litigants and their claims.

These various studies conducted in the domestic arena offer important insights for international law scholars. Institutional bureaucracies are a fundamental part of both international organizations and the domestic governments that often implement international norms. This research, therefore, taken together, provides an important reminder that law is not just a set of legal rules, treaties, or international standards, but a myriad of local social and institutional interactions. Moreover, these interactions exert tremendous influence on how justice is actually administered. International law scholars, therefore, must take account of lower-level bureaucrats and their exercise of discretionary power, as well as the internal structures of organizational bureaucracies.

3. Governmental and Non-governmental Networks

In thinking about forms of international cooperation in the Twenty-first Century, scholars have been drawn to the study of networks, both those among governmental authorities[44] and those

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43. Yngvesson, *Making Law at the Doorway*, *supra* note 42, at 410.

44. *See, e.g.*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); George A. Bermann et al., *Introduction* to TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 1, 1 (George A. Bermann et al. eds., 2000) [hereinafter TRANSATLANTIC REGULATORY COOPERATION] ("While national authorities are still the principal actors in the regulatory arena, regulation is increasingly an international affair."); Kalypso Nicolaïdis, *Regulatory Cooperation and Managed Mutual Recognition: Elements of a Strategic Model*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra*, at 571 ("Regulatory cooperation deserves analytical attention both in its own right and as a forerunner for the effect of interdependence on other policy areas and international governance in general."); Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra*, at 202 ("By almost any standard of measurement, international regulatory cooperation has grown significantly in the last two decades and promises to expand even further."). *See also* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (Mark A. Pollack & Gregory C. Shaffer eds., 2001); Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT'L LAW. 111 (1996); Sol Picciotto, *Networks in International Economic Integration: Fragmented States*

connecting non-governmental entities.[45] Indeed, because the system of liberal institutionalism—in which states enter into treaties and create formal international organizations—is perceived to be waning, the study of networks provides a theoretical explanation for the continued (and perhaps increasing) interdependence among states. Similarly, the rise of a global (and internet-savvy) civil society has drawn attention to the roles that networks of NGOs may play in formulating norms transnationally.

With regard to government networks, interest among political scientists dates back at least to 1974, when Joseph Nye and Robert Keohane defined "trans-governmental relations" as "sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments."[46] Noting that foreign relations is often conducted through the formal and informal interactions of bureaucrats from various countries, they attempted to discern both the conditions under which trans-governmental networks are most likely to form, and the various types of interactions that can take place between international organizations and trans-governmental networks.[47]

After the end of the bi-polar Cold War order, scholars began focusing on what was seen to be an era of complex, multi-level, global governance, tied together by networks.[48] Anne-Marie

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and the Dilemmas of Neo-Liberalism, 17 NW. J. INT'L L. & BUS. 1014 (1996–97); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Gregory Shaffer, *The Power of E.U. Collective Action: The Impact of E.U. Data Privacy Regulation on U.S. Business Practice*, 5 EUR. L.J. 419 (1999); Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUDIES 347 (2001); Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199 (Gregory H. Fox & Brad R. Roth eds., 2000); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281 (1998).

45. *See, e.g.*, Julie Mertus, *From Legal Transplants to Transformative Justice: Human Rights and the Promise of Trans-National Civil Society*, 14 AM. U. INT'L L. REV. 1335 (1999).

46. Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 43 (1974).

47. *Id*. at 42.

48. *See generally* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999); GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); JAMES N. ROSENAU, ALONG THE DOMESTIC-FOREIGN FRONTIER: EXPLORING GOVERNANCE IN A TURBULENT WORLD (1997); Gerry Stoker, *Governance as Theory: Five Propositions*, 155 INT'L SOC. SCI. J. 17 (1998).

Slaughter traces this scholarly turn to a series of specific influences.[49] For example, the 1990s saw the creation of the Financial Stability Forum, a network composed of three trans-governmental organizations—The Basle Committee on Banking Supervision, The International Organization of Securities Commissioners, and the International Association of Insurance Supervisors—along with other national and international officials responsible for financial stability around the world.[50] These "organizations" did not seem to fit the classic model for international organizations; they were neither composed of states nor constituted by treaty, they did not enjoy legal personality, and they had no physical headquarters or stationery.[51] In addition, scholars noted the emergence of a new "multi-layered regulatory system," concentrated among Organisation for Economic Co-operation and Development countries.[52] This system involved trans-governmental networks formed to develop strategies for regulatory cooperation in response to deepening economic and financial integration and increasing interdependence across a wide range of issues. Then, in the wake of the completion of the single market in 1992, the European Union itself emerged as a "regulatory state" and sought to harmonize (or at least reconcile) the regulations of its diverse and growing members through a series of networks located in the Council of Ministers.[53] Finally, scholars noted the emergence of a system of "transatlantic governance" to help foster and manage the increasingly dense web of transatlantic economic cooperation.[54] The growing focus on networks, therefore was seen as part of a broader shift from "government" to "governance."[55]

Of course, this proliferation of regulatory networks has been controversial.[56] For example, regulation via governmental networks

49. *See* Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1046–48 (2003).

50. *Id.* at 1046.

51. *See id.* at 1047 n.17.

52. *See id.* at 1047 n.19.

53. *Id.* at 1047.

54. *See id.* at 1048; Mark A. Pollack & Gregory C. Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, *in* TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, *supra* note 44, at 3, 3–5.

55. Picciotto, *supra* note 44, at 1039.

56. *See, e.g.*, Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 44, at 469; Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, *in* TRANSATLANTIC REGULATORY COOPERATION, *supra* note 44, at 521; Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997); José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001).

may reduce transparency and impede political accountability.[57] Networks also may be subject to capture by powerful interests, such as stakeholders from regulated industries or economically dominant nation-states.[58] Nevertheless, it is difficult to discount the importance of these networks for understanding governance in the Twenty-first Century.

In addition to these regulatory networks, we see networks of judges as well.[59] Indeed, the growing willingness of judges to consider transnational norms may stem in part from the increase in face-to-face interaction among judges from around the world. Foundation and government funding have provided the impetus for a wide variety of "rule of law" programs that include judicial seminars and training sessions.[60] Such events have offered opportunities for interaction. In addition, judges themselves have organized meetings with their counterparts from around the world. For example, in recent years several delegations of United States Supreme Court Justices have met with top jurists in France, Germany, England, and India.[61] In 1998, Justices O'Connor, Kennedy, Ginsburg, and Breyer traveled to Brussels to meet with judges from the European Court of Justice (ECJ),[62] and in 2000, several members of the ECJ visited the U.S. Supreme Court Justices in Washington.[63] Elsewhere, judges from European constitutional courts have met every two to three years since the 1980s,[64] Worldwide Common Law Judiciary Conferences

57. *See* Raustiala, *supra* note 44, at 5 n.14.

58. *See, e.g.*, Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744 (1999) (arguing that international harmonization efforts are often the product of rent-seeking by various industry groups). As Stephen Toope argues, "[n]etworks. . . . are sites of power, and potentially of exclusion and inequality." Stephen Toope, *Emerging Patterns of Governance and International Law*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 96–97 (Michael Byers ed., 2000). Similarly, David Kennedy has questioned whether we should celebrate the "disaggregation of the state and the empowerment of diverse actors in an international 'civil society' without asking who will win and who will lose by such an arrangement." David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 412 (2000).

59. *See, e.g.*, Levit, *supra* note 9; Slaughter, *supra* note 9; Waters, *supra* note 9.

60. *See, e.g.*, Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 184–93 (1999) (surveying governmental and non-governmental rule of law programs); Joseph P. Nadeau, *Judges Abroad, Algeria 2001: Quest for Democracy*, JUDGES J., 38, 38–40 (Summer 2001) (describing one judge's participation in an advocacy training program held in Algiers and sponsored by the U.S. Agency for International Development, several foundations and NGOs).

61. *See* Slaughter, *supra* note 9, at 1120.

62. *Id.*

63. *Id.*

64. *Id.*

have been held since 1995,[65] and formal transnational organizations of judges have been established in the Americas[66] and in the Baltics.[67] Less formal meetings have also been convened by various aid agencies, NGOs, and law schools.[68] Additionally, in recent years Chief Justice Rehnquist and the U.S. Judicial Conference created a Committee on International Judicial Relations, the purpose of which is to "coordinate the federal judiciary's relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations and the establishment and expansion of the rule of law and administration of justice."[69] Such efforts may help judges see their work as part of a common transnational enterprise.

While many political scientists and international relations scholars have focused primarily on networks of governmental actors, scholars at the intersection of law and anthropology,[70] along with theorists interested in global civil society and the role of "norm entrepreneurs" in shaping governmental policy,[71] have stressed the

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65. *Justices, Judges from Common Law Countries Meet in Williamsburg and Washington*, INT'L JUD. OBSERVER, Sept. 1995, at 1, 3; *Judges from Ten Common-Law Countries Meet in Washington for Five-Day Conference*, INT'L JUD. OBSERVER, June 1997, at 1, 1.

66. *See* Slaughter, *supra* note 9, at 1120 (describing the creation and mission of the Organization of Supreme Courts of the Americas).

67. *See* Hon. Rait Maruste, *Estonia: Leading Central Europe in Judicial Reform*, INT'L JUD. OBSERVER, Jan. 1996, at 2, 3 ("To promote cooperation, Estonian judges have joined their colleagues in Latvia and Lithuania to form the Association of Judges of the Baltic States . . . .").

68. *See* Slaughter, *supra* note 9, at 1121–22 (noting the international outreach efforts of various NGOs and law schools).

69. Hon. Michael M. Mihm, *International Judicial Relations Committee Promotes Communication, Coordination*, INT'L JUD. OBSERVER, Sept. 1995, at 1, 4.

70. *See, e.g.*, ANNELISE RILES, THE NETWORK INSIDE OUT (2000); Sally Engle Merry, *Constructing a Global Law: Violence Against Women and the Human Rights System*, 28 LAW & SOC. INQUIRY 941 (2003).

71. *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) "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 also* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929 (1996) (describing similar domestic concept of "norm entrepreneurs" who "can alert people to the existence of a shared complaint and can suggest a collective solution . . . by (a) signalling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial").

importance of non-governmental networks as well. Such networks are seen as part of the wide variety of "complex, postnational social formations."[72] Simply listing examples gives a sense of the scope. Diaspora communities play an increasing role in the global flow of capital.[73] Transnational philanthropic movements such as Habitat for Humanity send volunteers around the globe to build new environments.[74] Global public policy networks, ranging in subject matter from crime to fisheries to public health, have emerged during the past decade, bringing together loose alliances of government agencies, international organizations, corporations, and NGOs.[75] In addition, such global public policy networks form only one part of a "nascent international civil society"[76] that includes NGOs as well as business and trade union networks, often operating in conjunction

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Current work on international norm entrepreneurs builds on seminal articles on the subject both in international relations and international law. *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).

72. ARJUN APPADURAI, *Patriotism and Its Futures*, *in* MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 158, 158, 167 (1996) [hereinafter MODERNITY AT LARGE] (noting that "[t]hese formations are now organized around principles of finance, recruitment, coordination, communication, and reproduction that are fundamentally postnational and not just multinational or international.").

73. *See, e.g.*, Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1060–74 (2001) (describing a debt instrument offered by a homeland government to raise capital principally from its diaspora); *id.* at 1012 n.29 (summarizing a World Bank report on diasporas' important role in facilitating the dissemination of information and capital across borders).

74. APPADURAI, *supra* note 72, at 167.

75. *See* Wolfgang H. Reinicke, *The Other World Wide Web: Global Public Policy Networks*, FOREIGN POL'Y, Winter 1999/2000, at 44–45 ("[G]lobal public policy networks have emerged over the last decade, experimenting with new ways to gather knowledge and disseminate information on specific issues.").

76. MICHAEL EDWARDS, FUTURE POSITIVE: INTERNATIONAL CO-OPERATION IN THE 21ST CENTURY 179 (1999). *See also* RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 138 (1999) (describing "global civil society"); THOMAS PRINCEN & MATHIAS FINGER, ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL 10 (1994) (noting that environmental NGOs are shifting from operating solely at the national level to operating at the local and global levels); MARTIN SHAW, GLOBAL SOCIETY AND INTERNATIONAL RELATIONS 5–9 (1995) (arguing that the only way to discuss society is in the international context); Richard Falk, *An Inquiry into the Political Economy of World Order*, 1 NEW POL. ECON. 13, 24 (1996) (describing "grassroots globalism" as a "movement of social forces, with a transnational democratising outlook"); Miguel Darcy de Oliveira & Rajesh Tandon, *An Emerging Global Civil Society*, *in* CITIZENS STRENGTHENING GLOBAL CIVIL SOCIETY 1, 2 (Miguel Darcy de Oliveira & Rajesh Tandon eds., 1994) (discussing the extension of "solidarity and responsibility to the public sphere on a global scale"); Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311, 312–13 (1995) (describing global civil society as "world collective life," which "exists above the individual and below the state, but across national boundaries").

with corresponding networks of government regulators.[77]

In contrast to the growth of global civil society, the development of transnational terrorist networks such as Al Qaeda is a much darker example of non-governmental networks. (The networks surrounding human trafficking and the global narcotics trade are other examples.) Such organizations can mobilize personnel and deploy money around the world, functioning as quasi-state entities.[78] Indeed, it is significant that the United States has been willing to treat Al Qaeda almost as if it were a sovereign state to be fought in a "war." NATO invoked Article V of the North Atlantic Treaty, which pledges each signatory country to defend the others in the event of an armed attack,[79] thereby treating the events of September 11, 2001 more as a military action than a criminal one.[80] In addition, the Bush administration has repeatedly asserted the authority to try Al Qaeda

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77. *See* EDWARDS, *supra* note 76, at 178–79 (asserting that "building upwards from new experiments in local politics and constitutional reform at the national level" will help in constructing international civil societies). *See also* JOHN VOGLER, THE GLOBAL COMMONS: ENVIRONMENTAL AND TECHNOLOGICAL GOVERNANCE 20–41 (2d ed. 2000) (using "regime analysis" to review such complex international cooperative efforts).

78. *See* Foreign & Commonwealth Office, U.K., *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001: An Updated Account* 2 (Nov. 14, 2001) ("Al Qaida is a terrorist organisation with ties to a global network . . . . [The organization] includes training camps, warehouses, communications facilities and commercial operations able to raise significant sums of money to support its activity."), *available at* http://www.pm.gov.uk/files/pdf/culpability_document1.pdf; Sam Dillon, *Indictment by Spanish Judge Portrays a Secret Terror Cell*, N.Y. TIMES, Nov. 20, 2001, at A1 (describing the formation and emergence of a European Al Qaeda cell); Susan Sachs, *An Investigation in Egypt Illustrates Al Qaeda's Web*, N.Y. TIMES, Nov. 20, 2001, at A1 (describing the ease with which Al Qaeda "move[s] money around the globe"); Benjamin Weiser & Tim Golden, *Al Qaeda: Sprawling, Hard-to-Spot Web of Terrorists-in-Waiting*, N.Y. TIMES, Sept. 30, 2001, at B4 (discussing the training and mobilization of Al Qaeda militants). Other terrorist (or revolutionary) movements have similarly global links. *See, e.g.*, Vladimir Kucherenko, *Cause and Effect Nature of Globalization and Terror Argued*, WORLD NEWS CONNECTION, Sept. 13, 2001, 2001 WL 27854157 (citing "the Tamil movement fighting in Sri Lanka and southern India;" "[t]he guerrilla armies of Latin America which work closely with the drugs barons; the Kosovo terrorists in cahoots with the Albanian mafia in Europe; certain Arab groups; and the Chechen bandit[s]" as examples of quasi-state entities that utilize global technology to facilitate the flow of money and coordination of their activities).

79. The North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246, declares:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

80. *See NATO to Support U.S. Retaliation*, CNN.COM (Sept. 12, 2001), *at* http://www.cnn.com/2001/WORLD/europe/09/12/nato.us/index.html (reporting that NATO had invoked Article V in response to the September 11 attacks, the first invocation of the provision in fifty-two years).

operatives before military commissions, apparently based in part on the belief that the attacks on the World Trade Center and Pentagon were not simply crimes, but violations of the laws of war, which have customarily been reserved for state entities.[81] Regardless of whether or not this conceptualization of Al Qaeda is correct, it is clear that, in both beneficial and destructive ways, non-governmental networks are sure to be an important force in shaping norms for the new century.

4. Legal Pluralism

International law scholars seeking to understand the multifaceted role of law in settings beyond governmental institutions must also take seriously the insights of legal pluralism. In general, theorists of pluralism start from the premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups.[82] 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 "norm-generating communities"[83] may at various times exert tremendous power over our actions even though they are not part of an "official" state-based system. Legal pluralists have therefore tended to study those situations in which two or more of these normative systems occupy the same social field.[84] Of course,

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81. *See, e.g.*, *Hearing on Military Tribunals Before the Subcomm. on the Judiciary* (Dec. 4, 2001) (testimony of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes), 2001 WL 1591408, at *17 ("As the president's order [establishing military commissions] recognizes, we must call these attacks by the rightful name, 'war crime.'"). To be sure, the administration has also attempted to prosecute alleged "terrorists" through standard domestic law channels, but even in this context, the government has sought various restrictions on due process because of the nature of the charges and the alleged terrorist inclinations of the defendant. Paradoxically, while treating suspected Al Qaeda operatives as equivalent to enemy soldiers for purposes of the military commissions, the Bush administration has rejected the idea that these operatives are entitled to the rights of soldiers provided by the Geneva Conventions. *See* Donald H. Rumsfeld, Department of Defense News Briefing (Jan. 11, 2002) *available at* http://www.dod.gov/news/Jan2002/t01112002_t0111sd.html).

82. *See, e.g.*, AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 2 (1995) (pluralist theories "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 important, to develop, their interests").

83. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 43 (1983).

84. *See, e.g.*, CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); David Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425; Marc Galanter, *Justice in Many*

legal pluralism includes within its purview the non-governmental networks discussed in the previous section. However, pluralism is a broader category because it also addresses a variety of other forms of non-state normative ordering. Moreover, the literature on legal pluralism is almost completely distinct from that on networks, so separate treatment seems warranted.

Historically, legal pluralists focused on the overlapping normative systems created during the process of colonization. Early Twentieth-Century studies of indigenous law among tribes and villages in colonized societies noted the simultaneous existence of both indigenous law and European law. More recent work has defined the idea of a "legal system" sufficiently broadly to include many non-official forms of normative ordering. On this view, non-state communities assert lawmaking power through more informal networks and organizations and through the slow accretion of social custom itself. Thus, "not all the phenomena related to law and not all that are law-like have their source in the government."[85]

Indeed, 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 unregulated.[86] Even in modern nation-states, we see a whole range of non-state lawmaking in tribal or ethnic enclaves,[87] religious organizations,[88] corporate bylaws, social customs,[89] private regulatory

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Rooms: Courts, Private Ordering, and Indigenous Law, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 28–34 (1981); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988).

85. Sally Falk Moore, *Legal Systems of the World*, *in* LAW AND THE SOCIAL SCIENCES 15 (Leon Lipson & S. Wheeler eds., 1986). *See also* Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 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).

86. *See* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 14–38 (Walter L. Moll trans., 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) (1913) (presenting a theory of the evolution of the state and non-state groups according to the principle of natural law).

87. *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).

88. *See, e.g.*, CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980) (examining the contractual underpinnings of four Nineteenth-Century American religious utopian

bodies, and a wide variety of groups, associations, and non-state institutions.[90] 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.[91] Moreover, "private 'closely knit' homogenous 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."[92] Finally, lawmaking authority over sports activity is generally left to non-state entities (ranging from referees to doping authorities) whose decisions are not usually reviewable except within the system established by the sports authority or league[93] or through

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 84, at 28. *See also* Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988) (analyzing church-state relations in the United States from a pluralist perspective).

89. *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).

90. *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).

91. *See* F.W. MAITLAND, *Trust and Corporation*, *in* MAITLAND: SELECTED ESSAYS 141, 189–95 (H.D. Hazeltine et al. eds., 1936) (1905) (describing the sophisticated non-legal means of enforcing order among members of these institutions).

92. 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). *See also, 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*, 21 J. LEG. ST. 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).

93. *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 Corporate Counsel Center (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 law of games or sports," see Gordon Woodman, *Introduction*,

international arbitral panels.[94]

Significantly, even if the jurisdiction of these non-state actors is formally limited to the boundaries of the particular communities to which they belong, the norms they articulate often seep into the decisions of state legal institutions. 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."[95] Sometimes such incorporation is explicit, as when a statute is interpreted (or even supplanted) by reference to industry custom[96] or when a law of sales that would accord with merchant reality was adopted in the Uniform Commercial Code.[97] 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."[98] 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.

Thus, 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. On this view, "all collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word 'law.'"[99] Accordingly, the nation-state is denied any special status as a law-giver. As Robert Cover has argued,

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in PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS 18 (A. Allott & Gordon Woodman eds., 1985).

94. *See, e.g.*, James A.R. Nafziger, *Dispute Resolution in the Arena of International Sports Competition*, 50 AM. J. COMP. L. 161 (2002).

95. Weyrauch & Bell, *supra* note 87, at 330.

96. *See, e.g.*, FULLER, *supra* note 89, 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, at 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).

97. *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).

98. Weyrauch & Bell, *supra* note 87, at 329.

99. ROBERT M. COVER, *The Folktales of Justice: Tales of Jurisdiction*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow et al. eds., 1992) (footnote omitted).

although

> [S]uch "official" behavior and "official" norms is not denied the dignity of "law" . . . it must share the dignity with thousands of other social understandings. In each case the question of what is law and for whom is a question of fact about what certain communities believe and with what commitments to those beliefs.[100]

Studies of the international legal order, therefore, must address the interplay of a wide variety of normative commitments and law-giving entities.

Taken together, these four inquiries point the way toward a broader conception of how law operates in society and effects consciousness in everyday life, apart from simply the official acts of governmental institutions. However, such sites of law have not generally been emphasized in international law scholarship. By moving beyond an exclusive focus on formal governmental institutions, therefore, the study of law and globalization opens up new avenues of research and complicates understandings about the interaction between official legal pronouncements and lived experience.

B. Law Beyond Territorial Borders

International law scholars seeking to understand the changing world in which legal rules operate would also do well to look beyond their own academic disciplines (law and political science) to embrace the vast literature in anthropology, sociology, critical geography, and cultural studies concerning globalization. This literature challenges the idea of nation-states as the only relevant form of community affiliation, rigorously questions the assumed naturalness of territorial borders, and helps to reveal the more inchoate ways in which norms are articulated and disseminated among multiple, often embedded, communities. As such, these scholars provide a more complicated picture of the world than the top-down rules of international law generally envision.

In the past two decades, for example, anthropologists and sociologists have increasingly turned their attention to the myriad questions of space, place, boundaries, diasporas, migrations, and

100. *Id.*

cultural and economic "intertwinedness" of globalization. And while it is beyond the scope of this Article to summarize all of this work, it may be useful to highlight some of the insights of this scholarship, particularly concerning communities, cultures, and territorial boundaries.

As many scholars have pointed out, the historical tendency has been to connect the realm of meaning-construction processes with the particularities of place. Anthropology in fact had frequently been premised on the idea that a world of human differences could be conceptualized as a diversity of separate societies each with its own culture. This central assumption made it possible, beginning in the early years of the Twentieth Century, to speak not only of "culture," but of "*a* culture." The implicit starting point was the presumed existence of separate, individuated worldviews that could be associated with particular "peoples," "tribes," or "nations."[101]

This individuated conception of community, still so powerful in legal discussions of the nation-state, no longer fits the understanding of anthropologists or the practice of ethnography. "In place of such a world of separate, integrated cultural systems . . . political economy has turned the anthropological gaze in the direction of social and economic processes that connected even the most isolated of local settings with a wider world."[102] As many commentators have observed, cultural difference no longer can be based on territory because of the mass migrations and transnational culture flows of late capitalism.[103] Thus, the task recently has been to

101. *See* Akhil Gupta & James Ferguson, *Culture, Power, Place: Ethnography at the End of an Era*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 1, 1 (1997) [hereinafter CULTURE, POWER, PLACE] (describing conceptions of "culture"); ULF HANNERZ, TRANSNATIONAL CONNECTIONS: CULTURE, PEOPLE, PLACES 20 (1996) ("The idea of an organic relationship between a population, a territory, a form as well as a unit of political organization, and . . . cultures has . . . been an enormously successful one, spreading throughout the world . . . at least as a guiding principle."). *See also* GEORGE W. STOCKING, JR., RACE, CULTURE, AND EVOLUTION 202–03 (1968) (discussing Franz Boas's influence in defining "culture").

102. Gupta & Ferguson, *supra* note 101, at 2.

103. *See, e.g.*, Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, *in* MODERNITY AT LARGE, *supra* note 72, at 27, 27–29, 33 (proposing a set of non-territorial "scapes" to replace "landscapes" as fields of inquiry); HANNERZ, *supra* note 101, at 8 ("As people move with their meanings, and as meanings find ways of traveling even when people stay put, territories cannot really contain cultures."); Roger Friedland & Deirdre Boden, *NowHere: An Introduction to Space, Time and Modernity*, *in* NOWHERE: SPACE, TIME AND MODERNITY 1, 42 (Roger Friedland & Deirdre Boden eds., 1994) ("The circulation of populations and symbols is progressively undercutting the essential relation between territory and culture, the link between place and identity."). *See also* JOHN TOMLINSON, GLOBALIZATION AND CULTURE 106–49 (1999) (discussing the mundane ways in which deterritorialization is experienced in everyday life).

understand "the way that questions of identity and cultural difference are spatialized in new ways."[104]

Accordingly, anthropologists have argued that we live increasingly in the "global cultural ecumene"[105] of a "world in creolization."[106] Similarly, sociologists have attempted to replace their traditional emphasis on bounded "societies" with "a starting point that concentrates upon analysing how social life is ordered across time and space. . . ."[107] In both disciplines, one can see increasing efforts to explore the "intertwined processes of place making and people making in the complex cultural politics of the nation-state."[108]

Nevertheless, the assumption that a culturally unitary group (a "tribe" or a "people" or even a "citizenry") is naturally tied to "its" territory is difficult to shake because such assumptions are so deeply ingrained in the modern consciousness.[109] For example, as Akhil Gupta and James Ferguson have pointed out, simply the fact that contemporary maps refer to a collection of "countries" constructs a picture of space as inherently fragmented along territorial lines, where different colors correspond to different national societies, all of which are made to seem fixed in place.[110] Looking at such maps,

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104. Gupta & Ferguson, *supra* note 101, at 3. *See also* AUSTIN SARAT & THOMAS R. KEARNS, *The Unsettled Status of Human Rights: An Introduction*, *in* HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES 1, 13 (Austin Sarat & Thomas R. Kearns eds., 2001) (noting "a new understanding of culture in which an awareness of internal plurality, fragmentation, and contestation replaces former tendencies to speak of cultures as . . . unified wholes").

105. Ulf Hannerz, *Notes on the Global Ecumene*, PUB. CULTURE, Spring 1989, at 66; Robert J. Foster, *Making National Cultures in the Global Ecumene*, 20 ANN. REV. ANTHROPOLOGY 235 (1991). *See also* Appadurai, *supra* note 103, at 28 (arguing that "an overlapping set of ecumenes [has begun] to emerge, in which congeries of money, commerce, conquest, and migration . . . create durable cross-societal bonds"); Arjun Appadurai & Carol A. Breckenridge, *Editors' Comments*, PUB. CULTURE, Fall 1988, at 1, 1 ("[T]he emergent public cultures of many nation-states . . . constitute the centers of new forms of cosmopolitanism in many linguistic and cultural ecumenes.").

106. Ulf Hannerz, *The World in Creolisation*, 5 AFR. 546 (1987).

107. ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 64 (1990).

108. Gupta & Ferguson, *supra* note 101, at 4. *See also* GIDDENS, *supra* note 107 ("[A]ll associations of place, people, and culture are social and historical creations to be explained [or justified], not given natural facts.").

109. *See* Akhil Gupta & James Ferguson, *Beyond "Culture": Space, Identity, and the Politics of Difference*, *in* CULTURE, POWER, PLACE, *supra* note 101, at 33, 35 (challenging "the national habit of taking the association of citizens of states and their territories as natural").

110. *Id.* at 34. *See also* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 866–67 (1999) (linking the emergence of jurisdiction to the development of cartography).

"schoolchildren are taught such deceptively simple-sounding beliefs as that France is where the French live, America is where the Americans live, and so on."[111] Yet we all know that not only Americans live in America and, of course, the very question of what constitutes a "real American" is contested and variable. Nonetheless, "we assume a natural association of a culture ('American culture'), a people ('Americans'), and a place ('the United States of America')," and we therefore "present associations of people and place as solid, commonsensical, and agreed on, when they are in fact contested, uncertain, and in flux."[112] This naturalization of jurisdiction means that "space itself becomes a kind of neutral grid on which cultural difference, historical memory, and societal organization [are] inscribed."[113] As a result, although the social and political *construction* of space is a fundamental aspect of legal ordering, the constructed nature of the enterprise disappears from analytical purview.

Geographers, though they too historically tended to assume a "natural" bond between a people, the land, and a set of legal institutions,[114] are also increasingly recognizing the power and politics of the construction of space in society[115] as well as the symbolic

111. Gupta & Ferguson, *supra* note 109, at 33, 40.

112. *Id.*

113. *Id.* at 34.

114. *See, e.g.*, ELLEN CHURCHILL SEMPLE, INFLUENCES OF GEOGRAPHIC ENVIRONMENT 51 (1911) ("[H]uman activities are fully intelligible only in relation to the various geographic conditions which have stimulated them in different parts of the world. . . . Therefore anthropology, sociology, and history should be permeated by geography."), *reprinted in* FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 215, 216–17 (Albert Kocourek & John H. Wigmore eds., 1918).

115. *See* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 42 (1994) ("Recent geographic scholarship . . . has adopted what might be regarded as a relational view of space. Drawing on those such as Lefebvre, some theorists regard space as both socially produced and as socially constitutive, and as deeply implicated in power relations . . . ." (citation omitted)). For examples of such critical geography, see JOHN A. AGNEW, PLACE AND POLITICS: THE GEOGRAPHICAL MEDIATION OF STATE AND SOCIETY (1987); CULTURAL ENCOUNTERS WITH THE ENVIRONMENT: ENDURING AND EVOLVING GEOGRAPHIC THEMES (Alexander B. Murphy & Douglas L. Johnson eds., 2000); ALLAN PRED, MAKING HISTORIES AND CONSTRUCTING HUMAN GEOGRAPHIES (1990); ALLAN PRED & MICHAEL JOHN WATTS, REWORKING MODERNITY: CAPITALISM AND SYMBOLIC DISCONTENT (1992); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); WINICHAKUL THONGCHAI, SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION (1994); Doreen Massey, *Politics and Space/Time*, NEW LEFT REV., Nov.–Dec. 1992, at 65; Allan Pred, *Place as Historically Contingent Process: Structuration and the Time-Geography of Becoming Places*, 74 ANNALS ASS'N AM. GEOGRAPHERS 279 (1984); N.J. Thrift, *On the Determination of Social Action in Space and Time*, 1 ENV'T & PLAN. D: SOC'Y & SPACE 23 (1983).

significance of maps.[116] Indeed, "[a]lthough the color map of the political world displays a neat and ordered pattern of interlocking units (with only a few lines of discord), it is not surprising that the real world of national identities is one of blotches, blends, and blurs."[117] First, many people inhabit border areas, where "[t]he fiction of cultures as discrete, objectlike phenomena occupying discrete spaces becomes implausible."[118] Such people may feel an affiliation with the state controlling the area, the nation with which most inhabitants identify, or the borderland itself. Second, many others live a life of border *crossings*: migrant workers, nomads, and members of the transnational business and professional elite. For these people, it may be impossible to find a unified cultural identity. Finally, many people cross borders on a relatively permanent basis, including immigrants, refugees, exiles, and expatriates. For them, the disjuncture of place and culture is especially clear. Immigrants invariably transport their own culture with them to the new location and, almost as invariably, shed certain aspects of that culture when they come in contact with their new communities. Diasporas therefore are both "transnational" because members of a single diaspora may live in many different countries, and "extremely national" in their continued cultural and political loyalty to a homeland.[119] Indeed, by creating communities of interest rather than

116. *See, e.g.*, THONGCHAI, *supra* note 115, at 129–30 ("[Mapping] became a lethal instrument to concretize the projected desire on the earth's surface. . . . A map anticipated a spatial reality, not vice versa. In other words, a map was a model for, rather than a model of, what it purported to represent."); Alan K. Henrikson, *The Power and Politics of Maps*, *in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 49, 49 (George J. Demko & William B. Wood eds., 1994) ("To formulate a political plan, diplomats must have a geographical conception, which requires the cartographic image of a map."). Indeed, maps are often persuasive precisely because, though they always constitute an attempt to portray the world in a specific way, the interests underlying that attempt tend to remain unacknowledged. *See* Diane M. Bolz, *'Follow Me . . . I Am the Earth in the Palm of Your Hand,'* SMITHSONIAN, Feb. 1993, at 112, 113 ("[Maps] are convincing because the interest they serve is masked."). *See generally* DENIS WOOD, THE POWER OF MAPS 1 (1992) (discussing the ability of maps to represent the past and the interests served in their creation). In the thrall of such "cartohypnosis," people "accept subconsciously and uncritically the ideas that are suggested to them by maps." S.W. Boggs, *Cartohypnosis*, 15 DEP'T ST. BULL. 1119, 1119 (1946); Ford, *supra* note 110, at 856 ("[J]urisdiction is a function of its graphical and verbal descriptions; it is a set of practices that are performed by individuals and groups who learn to 'dance the jurisdiction' by reading descriptions of jurisdictions and by looking at maps.").

117. David H. Kaplan, *Territorial Identities and Geographic Scale*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE 31, 35 (Guntram H. Herb & David H. Kaplan eds., 1999).

118. Gupta & Ferguson, *supra* note 109, at 34.

119. Kaplan, *supra* note 117, at 38. *See generally* MODERN DIASPORAS IN INTERNATIONAL POLITICS (Gabriel Sheffer ed., 1986) (examining the influence of ethnic diasporas on international and trans-state politics).

place, diasporas (the number of which is increasing due largely to labor immigration) pose an implicit threat to territorially based nation-states. In sum, we see that "[p]rocesses of migration, displacement and deterritorialization are increasingly sundering the fixed association between identity, culture, and place."[120]

We also may feel the growing significance of "remote" forces on our lives, whether those forces are multinational corporations, global terrorist organizations, world capital markets or distant bureaucracies such as the European Union. The increased access to media also affects deterritorialization because one is no longer limited to the perspectives offered within one's "home culture."[121] Thus, the "typical" life of a suburban family in the United States may become as familiar to world citizens inundated by American film and television as their own "home" life.[122] And, of course, those with less power to influence the processes of globalization—those forced to cross borders for work, those bankrupted through global competition, those affected by environmental degradation, and many others—experience this deterritorialization in even more insidious ways.

These ideas of space and community complicate the presumed naturalness of nation-state communities. The transformation of *states* into *nation*-states requires that members of a sovereign entity come to think of themselves not simply as subjects of governmental power but as somehow bound to the other subjects within one community. Benedict Anderson therefore has famously referred to nation-states as "imagined communities"—"*imagined* 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."[123]

This formulation does not imply that such imagined communities are somehow "false" or "fabricated" in a negative

120. Akhil Gupta, *The Song of the Nonaligned World: Transnational Identities and the Reinscription of Space in Late Capitalism*, *in* CULTURE, POWER, PLACE, *supra* note 101, at 179, 196.

121. *See* TOMLINSON, *supra* note 103, at 116 (describing the choice of perspectives available through new media and the resultant overlaps between national and local perspectives).

122. *See id.* at 119 ("For where *are* these places except in our cultural imagination, our repertoire of 'textual locations' built up out of all the millions of images in films . . . we have encountered? And do we really *require* any of them to correspond all that closely with our 'real' locality?").

123. BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (rev. ed. 1991) (internal citation omitted). *See also* ERNEST GELLNER, THOUGHT AND CHANGE 168 (1964) ("Nationalism is not the awakening of nations to self-consciousness: it *invents* nations where they do not exist . . . .") (emphasis added).

sense.[124] Anderson argues that *all* communities larger than "primordial villages" (and perhaps even those) are imagined.[125] Thus, nation-states are not illegitimate just because their inhabitants imagine and construct psychological bonds of affiliation. Nevertheless, the fact that those bonds are constructed means that they 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.[126] In doing so, we recognize that community formation is a psychological process, not a naturally occurring phenomenon based on external realities.[127]

Significantly, without this kind of expanded vision of community there is no way to conceptualize a nation-state as a

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124. Some commentators have a more negative view of the way in which nationalist movements fabricate many of the "traditions" they purport to restore. *See, e.g.*, FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 269 (1992) (noting the "deliberate fabrications of nationalists, who had a degree of freedom in defining who or what constituted a . . . nation") (internal citation omitted); Anthony D. Smith, *Introduction: Ethnicity and Nationalism*, *in* ETHNICITY AND NATIONALISM 1, 3 (Anthony D. Smith ed., 1992) (discussing "modernist" theories of nationalism that rely on notions of "imagined community" and "invented traditions").

125. *See* ANDERSON, *supra* note 123, at 6 (suggesting that even communities characterized by "face-to-face contact" are imagined).

126. *See* NIGEL RAPPORT & JOANNA OVERING, SOCIAL AND CULTURAL ANTHROPOLOGY 62 (2000) (discussing modern anthropological views regarding community). In a similar vein, Gregory Bateson and Jürgen Ruesch argued that the relationship between "individual," "family," "community," "nation," and world can best be understood through a study of the social and psychological processes of human communication. *See* GREGORY BATESON & JÜRGEN RUESCH, COMMUNICATION: THE SOCIAL MATRIX OF PSYCHIATRY 5 (1951) ("[C]ommunication is the only scientific model which enables us to explain physical, intrapersonal, interpersonal, and cultural aspects of events within one system."). Likewise, Fredrik Barth observed that social groups are not naturally joined as communities; they achieve an identity by defining themselves as different from other groups and by erecting boundaries between them. *See* FREDRIK BARTH, *Introduction* to ETHNIC GROUPS AND BOUNDARIES 9, 15 (Fredrik Barth ed., 1969) ("The boundaries to which we must give our attention are of course social boundaries. . . ."). Anthony Cohen extended Barth's critique, arguing that community must be seen as a symbolic construct, not a natural one. *See* ANTHONY P. COHEN, THE SYMBOLIC CONSTRUCTION OF COMMUNITY 14 (1985) (discussing the "essentially symbolic nature of the idea of community itself"). In Cohen's vision, community derives not from the type of external characteristics Redfield and others had posited, but from internal perceptions of a boundary that separates one social group from another. Thus, communities and their boundaries exist not as geography but as "repositories of meaning" in the minds of their members, and these socially constructed repositories of meaning come to be expressed as a community's distinctive social discourse. *Id.* at 98.

127. *See, e.g.*, Gupta & Ferguson, *supra* note 101, at 13 (arguing that "community" is "a categorical identity that is premised on various forms of exclusion and constructions of otherness").

community. Yet at the same time, if communities are based not on fixed attributes like geographical proximity, shared history, or face-to-face interaction, but instead on symbolic identification and social psychology, *then there is no intrinsic reason to privilege nation-state communities over other possible community identifications that people might share*. Thus, the very same conception of community upon which the nation-state relies also provides the basis for critiquing the hegemony of the nation-state as the only relevant community under discussion. Such interdisciplinary insights regarding questions of territory, boundaries, and community definition help to de-center the state-based focus of international law.

C. Law Beyond the Public Law/Private Law Distinction

Law and globalization, because it looks beyond state-to-state lawmaking, challenges the purported disciplinary distinction between public and private international law. This distinction, of course, has long been problematic. Canonically, public law consists "of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another."[128] Private law, in contrast, is defined as "[t]hat portion of the law which defines, regulates, enforces, and administers relationships among individuals, associations, and corporations."[129] And building from this distinction, two groups of scholarship have formed, often having seemingly little to do with each other. Thus, scholars of international business transactions, or trade, or conflict of laws have had surprisingly little overlap with those teaching and writing in the area of classic public international law and international human rights.[130]

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128. BLACK'S LAW DICTIONARY 1230 (6th ed. 1990).

129. *Id*. at 1196.

130. There are, of course, exceptions. *See, e.g.*, Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 5 (1999) (arguing that trade policy must be "situate[ed] . . . within the system of public international law"); Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401 (2002) (arguing that country-of-origin designations in US trade laws perpetuate "this chimera of nationality in a world of internationality"); Sara Dillon, *A Farewell to "Linkage": International Trade Law and Global Sustainability Indicators*, 55 RUTGERS L. REV. 87 (2002) (drawing on the international human rights literature to suggest reforms of traditional conceptions of international trade).

Yet, the public/private distinction in international law is difficult to maintain in light of the extensive critique of *all* public/private distinctions that has been mounted by legal realists,[131] critical legal studies scholars,[132] and feminist theorists.[133] As Robert Post has pointed out, "legal realists relentlessly demonstrated that rules of 'private' property actually structured social relations and thus were subject to evaluation in terms of the social structures they

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131. *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927) (describing the public/private distinction in the context of property (as public) and sovereignty (as private)); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935) (comparing public "political power" with forms of privately wielded power).

132. *See, e.g.*, Duncan Kennedy, *The Stages in the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982) ("The history of legal thought since the turn of the century is the history of the decline of a particular set of distinctions . . . state/society, public/private, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, [and] freedom/coercion."). For example, Frances Olsen has argued that:

> Both laissez faire and nonintervention in the family are false ideals. As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so. The staunchest supporters of laissez faire always insisted that the state protect their property interests and that courts enforce contracts and adjudicate torts. They took this state action for granted and chose not to consider such protection a form of state intervention. Yet the so-called "free market" does not function except for such laws; the free market could not exist independently of the state. The enforcement of property, tort, and contract law requires constant political choices that may benefit one economic actor, usually at the expense of another. As Robert Hale pointed out more than a half century ago, these legal decisions "are bound to affect the distribution of income and the direction of economic activities." Any choice the courts make will affect the market, and there is seldom any meaningful way to label one choice intervention and the other laissez faire. When the state enforces any of these laws it must make political decisions that affect society.

Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 836–37 (1985) (citation omitted).

133. For example, feminists have long argued that, as a result of the artificial line drawn between the public and private sphere, certain gender-specific issues have been left out of the human rights arena. *See generally* Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 614 (1991) ("In this article we question the immunity of international law to feminist analysis—why has gender not been an issue in this discipline?—and indicate the possibilities of feminist scholarship in international law."). *See also, e.g.*, Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, *in* RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143. 143 (Dorinda Dallmeyer ed., 1993) ("Over the last fifteen years, women's rights advocates—generally feminists of one stripe or another—have staged a multitiered critique of public international law, focusing largely on its exclusion of women."); Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law,* 6 HARV. HUM. RTS. J. 87 (1993) ("Women are subjects of a system of familial terror with diverse modalities of violence, yet human rights discourse has been inaccessible to women."); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991) (describing how battering in discourse has been consistently considered a "private" issue rather than a "public" one).

created."[134] From this perspective, government is always in the background, creating and enforcing the rules of property, contract, tort, employment, and so on. These rules inevitably regulate social life by establishing and maintaining the type of "private" relationships deemed appropriate or desirable. And of course, such regulation is always directed toward the achievement of public goals. Accordingly, Post argues, "[a]ll private law . . . ultimately involves 'the relations between the state and the people who compose it.'"[135]

Moreover, the boundary between public and private international law, though often treated as distinct, has been blurred from its inception. When Jeremy Bentham first coined the phrase "inter-national law," thereby placing the public law of nations in its own category, "deep interpenetration of domestic and international systems and strong blending of public and private remained key features of the legal system."[136] For example, Blackstone's Commentaries declared that the common law fully internalized the law of nations, which Blackstone described as "a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, *and the individuals belonging to each*."[137]

The shift in focus from international law to law and globalization provides a new impetus for erasing the artificial boundary between public and private in international law. As Ralph Steinhardt pointed out over a decade ago, "the concerns, the actors, and the processes of 'public' international law have been expanded—'privatized'—in this century."[138] Thus, conflicts law and international business transactions have become a staple of state-to-state relations, and non-state or private actors have taken an increasingly important role in the articulation and enforcement of international standards.[139]

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134. *See* Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES L. 323, 324 (2001).

135. *Id*. (quoting BLACK'S LAW DICTIONARY 1230 (6th ed.1990)).

136. Koh, *supra* note 3, at 2609.

137. 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (emphasis added). And, as Mark Janis notes, Blackstone is the more reliable reporter on actual practice because while Bentham was attempting mostly to reform the law, Blackstone was more focused on restating it. *See* M.W. Janis, *Jeremy Bentham and the Fashioning of "International Law,"* 78 AM. J. INT'L L. 405, 410 n.31 (1984).

138. Ralph G. Steinhardt, *The Privatization of Public Law*, 25 GEO. WASH. J. INT'L L. & ECON. 523, 544 (1991).

139. *Id.* at 543. *See also, e.g.*, CARTER & TRIMBLE, *supra* note 13, at 19–20 ("The distinctions between public and private international law have become increasingly artificial

For example, just as in traditional public law areas such as human rights, we are witnessing in private international law the proliferation of international tribunals. Thus, commentators have noted the increasing role of the World Trade Organization (WTO) appellate tribunals in creating an international common law of trade,[140] as well as the new prominence of other specialized trade courts developed in connection with free trade agreements.[141] These courts are amassing a body of legal rules that in many cases challenge traditional prerogatives of nation-state sovereignty and may override domestic court decisions,[142] or at least act in dialectical relationship with national courts.[143] In addition, again as in the public law context, non-governmental organizations and international civil society groups are becoming increasingly active in the WTO process, attempting to use the appellate panels to further the aims of environmental or labor movements.[144]

Moreover, though only state parties can be the formal litigants in the WTO dispute resolution process, other free trade panels permit private parties to challenge domestic governmental regulations

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as many states and their instrumentalities have entered the marketplace in a major way . . . and as commerce and foreign policy have become increasingly intertwined.").

140. *See, e.g.*, Raj Bhala, *The Myth About Stare Decisis and International Trade Law* (Part One of a Trilogy), 14 AM. U. INT'L L. REV. 845, 850 (1999) ("In brief, there is a body of international common law on trade emerging as a result of adjudication by the WTO's Appellate Body. We have yet to recognize, much less account for, this reality in our doctrinal thinking and discussions.").

141. *See, e.g.*, Homer E. Moyer, *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW. 707 (1993) (describing the emergence of a binational panel process stemming from Chapter 19 of the North American Free Trade Agreement (NAFTA)).

142. *See generally* William J. Davey, *Has the WTO Dispute Settlement System Exceeded Its Authority?*, 4 J. INT'L ECON. L. 79 (2001). *See also* CLAUDE E. BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 9 (2001) (expressing concern that expansive judicial lawmaking at the WTO might diminish U.S. sovereignty); Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA and International Harmonization of Standards*, 50 U. KAN. L. REV. 823, 825 (2002) ("Expansive international rules strongly enforced through international dispute resolution bodies have significant implications for the laws and policies domestic governments may establish, as well as for the processes domestic governments use to make policy.").

143. *See* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004) (arguing that NAFTA tribunals and U.S. state courts operate in dialectical relationship to each other).

144. *See, e.g.*, Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 455 (2003) ("[T]he increasing 'global justice campaigns' by non-governmental organizations (NGOs) which influence international rule-making ever more actively (*e.g.*, on the International Criminal Court, environmental agreements, WTO negotiations), illustrate the emergence of a new international 'civil society.'").

directly.[145] In addition, a number of international conventions, though signed by state parties, empower private actors to develop international norms. For example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States permits private creditors to sue debtor states in an international forum.[146] Similarly, the convention on the international sale of goods allows transacting parties to opt out of any nation-state law and instead choose a sort of "merchant law" reminiscent of the feudal era's *lex mercatoria*.[147] And of course, international trade association groups and their private standard-setting bodies wield a tremendous influence in creating voluntary standards that become industry norms.[148] Such norms often have strong public policy

145. For example, under NAFTA's Chapter 11, private investors have standing to challenge a NAFTA government's regulatory decisions. *See* Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation in the Americas*, 33 ENVTL. L. 501, 507 (2003) ("NAFTA's Chapter 11 establishes rules pertaining to investments and investors, including a dispute settlement mechanism allowing private investors to challenge NAFTA governments directly for breach of the investment provisions of Chapter 11."). For an argument that non-governmental organizations (including business groups) should be granted formal WTO standing, see, for example, Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996), and G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829 (1995).

146. *See* ARON BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 198 (1995) (observing that the Convention "firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law."); IGNAZ SEIDL-HOHENVELDERN, COLLECTED ESSAYS ON INTERNATIONAL INVESTMENTS AND ON INTERNATIONAL ORGANIZATIONS 374 (1998) (noting that the "Convention attempts to encourage foreign investors to invest in developing countries by granting to them, in case of a dispute with the host country, a status equal to that enjoyed by that State."). *See generally* G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 25 U. PA. J. INT'L ECON. L. 703, 715 (2004) (discussing private party participation in dispute settlements before the ICSID and the International Labor Organization).

147. *See, e.g.*, Clayton 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).

148. For example, the Fair Labor Association (formerly the Apparel Industry Partnership) has created the standards now accepted as the norm in the apparel industry. *See Workplace Code of Conduct and Principles of Monitoring*, Fair Labor Ass'n, *at* http://www.fairlabor.org/html/CodeofConduct (providing a "set of standards defining decent and humane working conditions). Likewise, in the chemical industry, groups such as the Canadian Chemical Manufacturers Association and the International Counsel of Chemical

ramifications.[149] In sum, as Michael Reisman has pointed out, the term "private" in "private international law" is a "misnomer, for what is transpiring is a fundamental interstate competition for power that falls squarely within the province of public international law."[150] Thus, the distinction between state policy and private agreement, though always problematic, seems increasingly irrelevant.

D. Law Beyond Sovereignty

Finally, a focus on law and globalization may allow international law scholars to move beyond debilitating assumptions and polarizing debates about nation-state sovereignty. Sovereignty is, of course, a notoriously difficult word to analyze (or even define). Yet, the previous three sections, taken together, at least suggest that the classic Nineteenth-Century conception of sovereignty may be outmoded:

> [This was] an order in which the state was the only player, and the need to protect its sovereignty was paramount. There were relatively few rules of international law—and certainly no rules protecting

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Associations (ICCA) have set industry standards in conjunction with other NGOs and environmental organizations such as Greenpeace. *See* Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 508–09 (2002) ("This [standard setting] reflects a complicated inter-relationship among the members of a private sector regime (ICCA), and other non-governmental organisations (Greenpeace), and governmental institutions (IFCS and individual governments).") (internal quotations omitted).

149. For example, in the wake of the scandal surrounding Enron Corporation, the governmental reforms incorporated into the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.), received most of the attention, but changes involving the way corporate debt is rated by Moody's and Standard & Poor's (both private corporations) may be even more significant over the long term. *See* Jenny Wiggins, *Enron—Wall Street and regulators; S&P outlines ratings overhaul in light of Enron*, FIN. TIMES, Jan. 26, 2002, *available at* http://specials.ft.com/enron/FT3DYSSOWWC.html (discussing changes in U.S. corporate governance and debt rating in the post–Enron world). *See also* Troy A. Paredes, *After The Sarbanes-Oxley Act: The Future of The Mandatory Disclosure System*, 81 WASH. U. L.Q. 229, 236 (2003) (noting that "Institutional Shareholder Services, GovernanceMetrics International, Standard & Poor's, and others have started grading the corporate governance structures of companies, just as Standard & Poor's or Moody's grade their debt"). Likewise, while international labor standards are difficult to establish at the governmental level, several private companies in the apparel industry, responding to calls for global responsibility and the setting of norms, have adopted codes of conduct and participated in the United Nations' Global Compact. *See* Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 207 (2004) (noting this phenomenon but discussing difficulties in holding private corporations to such codes).

150. REISMAN, *supra* note 4, at i.

> fundamental human rights or the environment which could be invoked to override immunity or to claim an interest in activities beyond a state's territory.[151]

As discussed above, the premises of this conception are all being reconsidered. Thus, an emphasis on legal consciousness, pluralism, and law beyond official governmental institutions exposes processes of normative development that are not beholden to the edicts of nation-states. Likewise, the permeability of borders and the fluidity of community affiliations challenge ideas of inviolate nation-state sovereignty. And the erosion of the distinction between public and private international law undermines the privileged place of nation-states as the only players in the public international law arena. It is not surprising then that, over the past fifteen years, many international law theorists have shifted their attention to the variety of ways in which the prerogatives of nation-state sovereignty may be affected (and limited) by norms articulated, disseminated, and enforced transnationally or internationally.[152]

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151. Sands, *supra* note 8, at 529. *See also* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory [and] . . . no State can exercise direct jurisdiction and authority over persons or property without its territory.") (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, ch. 2 (1869)).

152. *See, e.g.*, MATTHEW HORSMAN & ANDREW MARSHALL, AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER, ix (1994) ("The traditional nation-state, the fruit of centuries of political, social and economic evolution, is under threat."); George J. Demko & William B. Wood, *Introduction: International Relations Through the Prism of Geography*, in REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 3, 10 (George J. Demko & William B. Wood eds., 1994) ("Once sacrosanct, the concept of a state's sovereignty—the immutability of its international boundaries—is now under serious threat."); KENICHI OHMAE, THE END OF THE NATION STATE, viii (1995) (suggesting that the practice of liberal democracy in the West and the notion of national sovereignty are being called into question by globalization); Steve Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. J. INT'L L. & POL'Y 299, 306–07 (2002) (arguing that the "ortho-politics" model of the sovereign state system is of declining relevance for World Trade Organization policy analysis and should be replaced by a "cosmopolitics" of direct participation by nonstate actors); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF. (Sept./Oct. 1997), at 184–86 (arguing that "[t]he state is not disappearing, it is disaggregating"); Peter J. Spiro, *Globalization and the Foreign Affairs Constitution*, 63 OHIO ST. L.J. 649, 667–73 (2002) (arguing that the decentralization of governmental structures and activity is undermining sovereignty and the state system); Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 363–65 (2002) (arguing that international institutions are increasingly the source of norms previously supplied by states). *See also, e.g.*, SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996); Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. J. INT'L L. 303 (2004); John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 786 (2003); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004) [hereinafter Slaughter, *Sovereignty and Power*]; Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1969 (1997) (book

Significantly, the classic conception of inviolate nation-state sovereignty has been attacked by scholars with very different ideological and theoretical commitments. For example, international law triumphalists, such as Louis Henkin, have complained for years that talk of sovereignty "pollutes" the air because "[g]overnments raise iron curtains of 'sovereignty' to resist international cooperation and frustrate international norms and institutions, to conceal atrocities behind state boundaries, to prevent their investigation and discovery, to preclude judgment and condemnation under international law, and reaction by international institutions."[153] Such a conception of nation-state sovereignty, according to Henkin, is not just misguided, but historically inaccurate as well, because sovereignty is an *internal* concept, related only to the source of legitimate authority *within* a state. Thus, sovereignty is not "*per se* a normative conception in international law."[154] Instead, Henkin contends that universal human values have displaced state values at the core of international law.

Political scientist Stephen Krasner, though starting from an international relations realist perspective, agrees with Henkin that conceptions of inviolate nation-state sovereignty are ahistorical.[155] Indeed, Krasner goes so far as to claim that international law principles of state sovereignty have *never* provided powerful checks on the behavior of nation-states.[156] Rather, according to Krasner, though there has been much *talk* about sovereignty over the past two hundred years, such talk has not been a significant limitation on the ability of powerful rulers to violate sovereignty principles when it was in their interest to do so.[157] Yet, though he eschews notions of inviolate nation-state sovereignty, Krasner, unlike Henkin, still locates the state at the center of all international relations. Indeed, whereas Henkin rejects nation-state sovereignty because he sees it as *aggrandizing* state power at the expense of international or universal norms, Krasner views sovereignty as a purported (and historically ineffectual) *limitation* on states' power to intervene in each other's

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review).

153. Louis Henkin, *The Mythology of Sovereignty*, AM. SOC'Y INT'L L. NEWSL., Mar. 1993, at 1.

154. *Id.* at 6. *See also* Henkin, *supra* note 4, at 31 ("'[S]overeignty' is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology.").

155. *See generally* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

156. *Id.* at 24 ("[T]he most important empirical conclusion of the present study is that the principles associated with both Westphalian and international legal sovereignty have always been violated.").

157. *See id.* (arguing that sovereignty is best understood as "organized hypocrisy" in that rulers adhere to conventional norms and principles only when it is in their interests to do so).

affairs. Krasner assumes that the self-interested acts of national rulers are the principal determinants of state behavior and that, therefore, international law norms (including norms about inviolate nation-state sovereignty) are always necessarily a set of tools serving the instrumental aims of the powerful.[158]

Finally, scholars taking a postmodern perspective likewise challenge the idea of unfettered nation-state sovereignty, even though they reject both the triumphalist and instrumentalist views.[159] Such "constructivists" emphasize that states are always the products of cultural and interpretive systems.[160] Thus, the interests of nation-states are not simply pre-existing givens to be pursued, but are themselves shaped by a variety of forces, including the norms and institutions of international law itself.[161] "Through processes of social learning and persuasion, actors 'internalize' new norms and rules of appropriate behavior and redefine their interests and identities accordingly."[162] In this conception, the state is embedded in a wider institutional environment, and governmental and non-governmental actors alike are part of the feedback loop that both constructs and responds to non-national norms.

While the Nineteenth-Century vision of the sovereign nation-state (to the extent it actually existed) has therefore been challenged from all sides, the resulting debates have too often devolved into a perceived dichotomy between the imperatives of "international law" on the one hand and the importance of "nation-state sovereignty" on the other. For some, the post-Cold War era has represented a new moment of international and transnational activity in both public and private international law that sharply curtailed the prerogatives of nation-states.[163] For others, the idea of such a "transnational

158. *Id.* at 7 ("Rulers, not states—and not the international system—make choices about policies, rules, and institutions."). *See also* GOLDSMITH & POSNER, *supra* note 14 (espousing a similar view). *But see supra* note 14 (challenging this view).

159. *See generally* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324 (1998) (reviewing books taking constructivist approach); James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943 (1998).

160. *See, e.g.*, GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE (1963); Pierre Bourdieu, *Rethinking the State: Genesis and Structure of the Bureaucratic Field, in* STATE/CULTURE: STATE FORMATION AFTER THE CULTURAL TURN 53 (George Steinmetz ed., 1999).

161. *See, e.g.*, THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999).

162. Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1752 (2003).

163. *See, e.g.*, Sands, *supra* note 8.

moment"[164] was overblown from the start and, in any event, has faded into a pre-9/11 past, leaving nation-state sovereignty once again in its rightful place at the core of the international order.[165]

Such a dichotomy seems too schematic, obscuring the complicated and multifaceted set of ideas captured in the word "sovereignty"[166] and ignoring the dynamic process of international and transnational norm development. Accordingly, the globalization debate about the changing nature of sovereignty must progress beyond the polarizing question of whether the Westphalian system of sovereign nation-states is dying or not. Instead, scholars and political theorists can turn their attention to the ways in which sovereignty might be *changing* in a world of interlocking governance structures and systems of communication. While nation-states may not disappear, their sovereignty may well become diffused in order to accommodate various international, transnational, or non-territorial norms.[167] Thus, scholars must continue to travel the path blazed by Abram and Antonia Chayes, who argued that the "new sovereignty" involves nation-state participation in a wide range of international and transgovernmental regimes, networks, and institutions, all of which

164. *See* Khachig Tölölyan, *Rethinking Diaspora(s): Stateless Power in the Transnational Moment*, 5 DIASPORA 3 (1996).

165. *See, e.g.*, Dominique Moïsi, *Early Winners and Losers in a Time of War*, FIN. TIMES (U.S. ed.), Nov. 19, 2001, at 15 ("In the post-cold-war global age, the state's legitimacy and competence appeared to be waning. Caught between the emergence of civil society and the growing power of transnational corporations, the state appeared to be fighting a rearguard battle. Now, with security a priority, it is back with a vengeance.").

166. For example, Stephen Krasner identifies four different conceptions of sovereignty. *See* KRASNER, *supra* note 155, at 9–25. First, there is Westphalian sovereignty, which, in Krasner's scheme, roughly corresponds to the international law principle of territorial sovereignty. This is a political organization based on "the exclusion of external actors from domestic authority structures." *Id.* at 20. Second, he identifies international legal sovereignty, which is defined as "the practices associated with mutual recognition, usually between territorial entities that have formal judicial independence." *Id.* at 3. This notion of sovereignty concerns international law principles mandating various forms of mutual respect for other sovereign entities. Third, domestic sovereignty concerns the ability of the political authority of a state to exercise coercive power within its own borders. *See id.* at 4. And fourth, interdependence sovereignty implicates "the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state." *Id.*

167. *See, e.g.*, REISMAN, *supra* note 4, at xxi ("If the so-called globalization of many sectors of the economy does not . . . signal the end of the state, it certainly does signal an exacerbated identity crisis."); Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substanc*e, 42 VA. J. INT'L L. 931, 942–54 (2002) (discussing ways in which "regulatory power traditionally enjoyed by sovereign states has shifted" to the supranational level, to private actors, and to "informal networks constituted among sub state-level agencies in different countries"); Anne-Marie Slaughter, *Sovereignty and Power*, *supra* note 152, at 288 ("[T]he state is not losing power so much as changing the way that it exercises its power.").

have become necessary for governments to accomplish what they once could do on their own within a defined territory.[168]

Indeed, if we assume that nation-states will remain active players in the world of power politics, the challenge for scholars is to extend the Chayes' vision by developing yet further possibilities for understanding sovereignty. Such revolutions in conceptions of sovereignty have, according to Daniel Philpott, historically resulted from "revolutions in ideas about justice and political authority."[169] This is because revolutions in ideas bring about what Philpott calls "crises of pluralism."[170] If this analysis is correct, then it is not surprising that scholars are gravitating to those areas where the reality of human interaction, with its plural sources of norms, seems to be chafing against the strictures traditional conceptions of sovereignty impose.

For example, those studying legal issues involving online communication have attempted to reinvigorate long-running debates about how a territorially-based system of sovereignty should regulate activity that so easily crosses geographical boundaries.[171] Because online transactions often involve participants in widely dispersed physical locations, multiple sovereignties frequently attempt to assert conflicting normative orders over the same activity, arguably leading to "crises of pluralism" (or at least challenges to jurisdictional schemes based on territory).[172] Likewise, the growth of transnational corporate activity has renewed interest in the feudal idea of *lex mercatoria* and other plural forms of law that operate outside the nation-state system.[173] Some have even suggested systems in which

168. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 4 (1995).

169. DANIEL PHILPOTT, REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS 4 (2001).

170. *Id.*

171. *See, e.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Joel P. Trachtman, *Cyberspace, Sovereignty, Jurisdiction, and Modernism*, 5 IND. J. GLOBAL LEGAL STUD. 561, 562 (1998).

172. *See* Berman, *supra* note 171, at 327–66 (outlining these various challenges to territorial conceptions of jurisdiction).

173. *See, e.g.*, Robert Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 216–17 (1994); Richard Epstein, *The Empirical And Theoretical Underpinnings of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989); *Avner Greif, Institutions and Impersonal Exchange: The European Experience* (May 2004) (Stanford Law School, John M. Olin Program in Law and Economics, Working Paper No. 284, 2004), *available at* http://www.ssrn.com (last visited July 15, 2004); Avner Greif et al., C*oordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745

companies could choose among the laws of various nation-states to determine the applicable norms of securities[174] or bankruptcy[175] regulation. Meanwhile, international human rights lawyers and scholars have continued to explore expanded conceptions of criminal jurisdiction that are less dependent on territorial borders or the prerogatives of nation-state sovereignty.[176] Still others have attempted to articulate theories of sovereignty based on the sociology of institutions in order to study how pluralist processes of norm inculcation might operate in actual practice.[177]

While all of these efforts offer promising avenues for research, it is possible that the rubric of sovereignty itself may unduly limit our ability to think creatively about the way law operates in an interconnected world. After all, at root level sovereignty is almost always premised on coercive power: who has it, who can exercise it, who can rightfully claim it. But the changing structures of norm development and inter-penetration we see around us do not always rely on coercive power. Rather, we see various forms of rhetorical persuasion, informal articulations of legal norms, and networks of affiliation that may not possess literal enforcement power. As a result, the study of law and globalization invokes not only the diffusion of norms across *territorial* borders, but also the fact that legal articulations often cross the supposed *conceptual* border between "official" law on the one hand, and political rhetoric or non-official legal pronouncements on the other. Holding onto a fixed dividing line between the two may prevent us from seeing the broader ways in which legal norms develop and spread. Transnationalism frequently involves the articulation of legal norms even without the literal power to enforce those norms. Yet, the mere articulation of such norms may often have important, though less obvious, persuasive power.

(1994); Gillian Hadfield, *Privatizing Commercial Law*, REG. 40, 41–42 (2001); Paul Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990). *See also supra* notes 145–149 and accompanying text; REISMAN, *supra* note 4, at xii (noting that "[c]oupled with the growth of *lex mercatoria*, modern arbitration has, in many economic sectors, removed the issue of legislative conflicts of jurisdiction from states and assigned them to a network of private tribunals").

174. *See, e.g.*, Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 231–33 (1996) (discussing the principle of "portable reciprocity").

175. *See, e.g.*, Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 4 (1997).

176. *See supra* note 9.

177. *See, e.g.*, Goodman & Jinks, *supra* note 162.

Because sovereignty may not be a capacious enough idea to capture such rhetorical processes, it may ultimately be an unhelpful concept for understanding these forms of norm development and governance, even after the simplistic classical notion of inviolate state prerogatives has been removed from the scene. In the end, scholars may need to move "beyond sovereignty" and construct new tropes for analyzing law in a global era.

II. LAW AND GLOBALIZATION: TEN AREAS OF STUDY

If it is true that scholars in international law and related disciplines have been, over the past fifteen years, staking out a new field of study, what are the contours of this more comprehensive approach? Having broadened the traditional international law focus to include legal scholarship in other areas as well as a range of legal and interdisciplinary work far beyond the traditional emphasis on state-to-state relations, treaties, and other formal international instruments, scholars are left to define a new set of conceptual inquiries that constitute the study of law and globalization. There undoubtedly are many such new theoretical inquiries, and more will be developed over time. But here are some themes that I see being played out in this emerging field.

A. Jurisdictional Rules and the Problem of Physical Location

Increased interaction across territorial borders has brought to the fore many complicated questions about legal jurisdiction—both civil and criminal—along with their often-related choice-of-law issues. Historically, international law scholars have tended to analyze questions of jurisdiction by reference to physical location. Yet physical location seems increasingly unimportant as a way of determining whether a given act or actor should fall within the dominion of a particular community. As a result, we see courts around the world struggling to develop jurisdictional models to account for the fact that people enter relationships and cause harms without regard to the territorial boundaries of the Westphalian nation-state system. And, because jurisdiction may be asserted in one physical location over activities or parties located in a different physical location, the issue of jurisdiction is deeply enmeshed with precisely the fixed conception of territorial boundaries that contemporary events are challenging.

The problem, of course, is that local communities are now far more likely to be affected by activities and entities with no local presence. Cross-border interaction obviously is not a new phenomenon, but in an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all. Thus, although it is not surprising that local communities might feel the need to apply their norms to extraterritorial activities based simply on the local harms such activities cause, assertions of jurisdiction on this basis will almost inevitably tend toward a system of universal jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries. Such a system, for better or worse, would jettison any idea that the application of legal norms to a party depends in some way on the party's having consented to be governed by those norms.[178] Even more importantly, while courts, policy makers, and scholars are scrambling simply to adapt existing jurisdictional models to the new social context in order to "solve" these tensions in particular situations, they are doing so without giving sufficient consideration to the theoretical *basis* for the exercise of legal jurisdiction in an increasingly interconnected world.

A focus on law and globalization, in contrast, can open up new avenues for discussion by emphasizing forms of community affiliation that may not be tied to the physical location of a particular person or object. Such scholarship may explore ways in which conceptions of legal jurisdiction and choice of law become the locus for debates both about community definition and related ideas about space, distance, and identity. And while contemporary frameworks for thinking about jurisdictional authority often unreflectively accept the assumption that nation-states defined by fixed territorial borders are the only relevant jurisdictional entities, scholars of law and globalization can study how people actually experience allegiance to community or understand their relationship to geographical distance and territorial borders.

The present historical moment provides an opportunity to ask such questions. The twin forces of increasing globalization more generally, and the rise of the internet particularly, have posed challenges—not necessarily unsolvable challenges—but challenges nonetheless, and jurisdictional schemes based on territorial boundaries have had difficulty coping with such challenges. From

178. *Cf.* REISMAN, *supra* note 4, at xvii (noting that an effects theory of jurisdiction "is little more than a restatement of the essential problem that gives rise to the part of the law known as international "jurisdiction").

concerns over extraterritorial content regulations,[179] trademark rules,[180] taxation schemes,[181] and criminal investigations[182] regarding internet transactions, to controversies surrounding universal and transnational criminal jurisdiction for human rights violations,[183] to arguments about the legitimacy of various international tribunals[184] to the U.S. government's assertion[185] (now rejected by the U.S. Supreme Court[186]) that the U.S. military base at Guantanamo Bay, Cuba was not within the jurisdiction of U.S. courts, we see similar questions of jurisdiction arising again and again. And, instead of continuing to invoke such old criteria for jurisdiction as the physical presence of people or things in a geographical location, law and globalization scholars should be at the forefront of thinking about how communities are appropriately defined in today's world and whether there might be new ways of delimiting the scope of legal jurisdiction[187] or developing hybrid jurisdictional[188] or choice-of-law[189] models. Such models

179. *See, e.g.*, Berman, *supra* note 171, at 337–42.

180. *See, e.g.*, Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: Problems with the Anticybersquatting Consumer Protection Act*, 17 BERKELEY TECH. L.J. 989 (2002).

181. *See, e.g.*, Richard Jones & Subhajit Basu, *Taxation of Electronic Commerce: A Developing Problem*, 16 INT'L REV. L. COMPUTERS & TECH. 35, 38 (2002).

182. *See, e.g.*, Patricia L. Bellia, *Chasing Bits Across Borders*, 2001 U. CHI. LEGAL F. 35 (2001).

183. *Compare, e.g.*, Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433 (2002), *with* Curtis Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

184. *Compare, e.g.*, Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415 (2004), *with* Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, DÆDALUS 47 (Winter 2003).

185. *See* Brief of Respondents, Rasul v. Bush, 2004 WL 425739.

186. *See* Rasul v. Bush, 124 S. Ct. 2686 (2004).

187. For example, reflecting some of the ideas about territoriality and community definition discussed previously (see *supra* notes 101–127 and accompanying text), some U.S. courts, in analyzing their jurisdiction over defendants based on content posted online, have eschewed a focus on the number of "contacts" with a locality and have instead analyzed the community affiliation of the defendant. Thus, a defendant who operates a website that does not create substantive community ties in a distant jurisdiction might not be subject to suit there even if there are internet contacts with that jurisdiction. *See, e.g.*, Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2003) (ruling that Virginia courts do not have jurisdiction over Connecticut newspapers, regardless of internet contacts, because content of the newspapers' websites was "decidedly local"); Bensusan Restaurant Corp. v. King, 126 F.2d 25 (2d Cir. 1997) (concluding that Missouri cabaret could not be sued in New York for domain name trademark violation because cabaret was of "local character"); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) (analyzing whether Florida corporation, through its website, had created any substantive ties to Arizona, rather than focusing on the number of contacts). *See also* Berman, *supra* note 171, at 512–33 (discussing the implications of a community affiliation analysis).

188. *See, e.g.*, Brian Concannon Jr., *Beyond Complementarity: The International*

would ask judges to use the insights of comparative law and take seriously their judicial role as transnational legal actors who function as part of an interlocking multinational legal system.

B. "Jurispersuasion" and the Articulation of Norms

While the previous section addressed ways in which doctrinal rules of legal jurisdiction might evolve to reflect the realities of community definition and cross-border interaction, law and globalization scholars might also investigate the broader question of whether jurisdiction provides a more appropriate framework for understanding law in a global era than sovereignty does. As discussed previously, sovereignty may be a concept ill-suited to an understanding of globalization because sovereignty tends to focus our attention on who possesses coercive enforcement power. In contrast, jurisdiction implicates the more expansive idea of norm articulation and persuasion. Indeed, the word "jurisdiction" derives from Latin roots literally meaning "to speak the law," and we must therefore look not so much at the power to *enforce* legal norms, but at the ability to

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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 regime, supplemented with other forms of aid, can support local prosecutions); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991) (claiming that "nearly unanimous agreement" exists with regard to resolving multinational financial disputes in a cooperative, central forum); DeNeen L. Brown, *Canadians Allow Islamic Courts to Decide Disputes*, WASH. POST, Apr. 28, 2004, at A14 (discussing an Islamic Court of Civil Justice in Ontario, staffed by arbitrators trained in both Sha'ria and Canadian civil law).

189. *See, e.g.*, Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflicts of Law: Re-Defining Governmental Interests in a Global Era*, 153 U. PA. L. REV. (forthcoming 2005) (articulating choice-of-law and judgment recognition principles that take seriously the interlocking nature of multinational governance); Buxbaum, *supra* note 167 (contrasting traditional model of conflicts analysis, based on territorial sovereignty, with a "substantivist" approach and suggesting a choice-of-law model combining elements of both); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000) (arguing 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); Gunther Teubner & Andreas Fischer-Lescano, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1020 (2004) (arguing for "reorienting the traditional conflicts law away from conflicts between national legal orders, and refocusing them upon conflicts between sectoral regimes, such as is the case in the context of collisions between ICANN and national courts, ICTY and ICJ, WTO and WHO"); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004) (arguing that U.S. courts are not precluded from enforcing a foreign judgment, even if that judgment would be unconstitutional if issued by a U.S. court in the first instance).

articulate them. This is a crucial distinction because in a world of law and globalization the mere speaking of legal norms may, over time, persuade others to enforce them.

Accordingly, law and globalization scholars may re-conceive the assertion of jurisdiction (or juris*persuasion*, if you will) as simply a mechanism that opens the space for articulation of a norm. If this is how we look at jurisdiction, then we can uncouple it from enforcement. Enforcement depends on whether those who assert jurisdiction can persuade those who possess coercive power (*e.g.* the police force and the military) to enforce the judgment issued. This is, of course, the root of the old truism that a constitutional court can never get too far ahead or behind popular opinion or it risks losing its legitimacy.

From this perspective, law is not merely the coercive command of a sovereign power, but a language for imagining alternative future worlds. Moreover, various norm-generating communities—not just the sovereign—are always contesting the shape of such worlds.[190] Jurisdiction becomes the way a community—any community—seizes the language of law, attempts to construct itself as a coherent community, and offers a norm, thereby asserting its "soft" power.[191]

This idea of legal jurisdiction as rhetorical persuasion is played out repeatedly in a world of law and globalization, because entities without literal enforcement power often exert normative force through the assertion of jurisdiction. Such assertions of jurisdiction often have real impact despite the lack of enforcement power. Thus, a Spanish judge's efforts to prosecute former Chilean leader Augusto Pinochet, although not literally "successful" because Pinochet was never extradited, nevertheless helped create a new precedent in international law regarding head-of-state immunity,[192] sparked new

190. *See* Cover, *supra* note 83, at 43.

191. *See* JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 9 (2002).

192. *See* Sugarman, *supra* note 8, at 116 (arguing that "[t]he Pinochet precedent signals a larger potential role for domestic courts and the extension of the obligations of governments to adhere to minimum standards of human rights."). Such bold assertions of jurisdiction, not surprisingly, have provoked a backlash. For example, the International Court of Justice subsequently halted a Belgian prosecution of the former Foreign Affairs Minister of the Democratic Republic of Congo, citing the need for governmental immunity in some circumstances. *See* Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121, para. 70 (Feb. 14, 2002), *available at*

http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF, (finding that "[G]iven the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister of Foreign Affairs."). On the

human rights activity in Chile itself, and may ultimately lead to domestic prosecution of Pinochet.[193] Likewise, Spanish efforts to prosecute members of the Argentine military have served to strengthen the hands of reformers within the Argentine government, most notably the new President Nestor Kirschner.[194] And even in the United States, the Oklahoma Court of Criminal Appeals recently stayed an execution[195] based in part on a prior decision of the International Court of Justice (ICJ) concerning the Vienna Convention on Diplomatic Relations,[196] even though the ICJ had no means of enforcing its decision in Oklahoma.

In the trade context, although ad hoc tribunals convened under Chapter 11 of the North American Free Trade Agreement (NAFTA) have no authority to directly reverse the decisions of national courts or create formally binding precedent, Robert Ahdieh has argued that, over time, we may see the interactions between the NAFTA panels and national courts 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.[197] Instead, Ahdieh predicts that international courts are likely to exert an important influence even as the national courts retain formal independence, much as U.S. federal courts exercising habeas

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other hand, this decision was sharply criticized. *See, e.g.*, Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Al-Khasawneh, J., dissenting), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobeijudgment_20020214_al-khasawneh.PDF (criticizing the majority on the ground that there are no exceptions to the immunity of high-ranking state officials when they are accused of crimes against humanity); Press Release, *International Commission of Jurists, International Court of Justice's Ruling on Belgian Arrest Warrant Undermines International Law* (Feb. 15, 2002), *at* http://www.icj.org/article.php?sid=166 ("International humanitarian law and international human rights law have accorded national States jurisdiction over persons committing international crimes in order to combat impunity. Yesterday's decision is one that might have been expected sixty years ago, but not in the light of present-day law.").

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

194. *See Argentina's Day of Reckoning*, CHI. TRIB., Apr. 24, 2004, at C26 (discussing Kirchner's signing of a decree allowing international prosecution of dozens of Argentine military officers accused by Spanish prosecutor Baltasar Garzon of genocide and torture). Kirchner also successfully lobbied the Argentine Congress to repeal amnesty laws and statutes of limitations that had stymied all domestic prosecutions of officers accused of involvement in Argentina's "dirty war." *Id*.

195. Torres v. Oklahoma (*Torres II*), No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (order granting stay of execution and remanding case for evidentiary hearing).

196. Avena and Other Mexican Nationals, (Mex. v. U.S.), 43 I.L.M. 581 (Mar. 31, 2004).

197. *See* Ahdieh, *supra* note 143.

corpus jurisdiction may influence state court interpretations of U.S. constitutional norms in criminal cases.[198] In turn, the decisions of national courts may also come to influence international tribunals. This dialectical relationship, if it emerges, will exist without an official hierarchical relationship based on coercive power.[199]

Turning to the realm of online regulation, when a French court asserted jurisdiction over internet service provider Yahoo!, ordering the company to block Nazi memorabilia and Holocaust-denial material from being accessed through Yahoo! in France,[200] the prosecution (as in the Pinochet case) was technically unsuccessful in the sense that Yahoo! immediately sought a U.S. court order declaring the French order unenforceable.[201] Yet, at the same time Yahoo! "voluntarily" capitulated to the French order,[202] perhaps moved by the public pressure the French court decision had engendered.[203] Similarly, when a Human Rights Tribunal in Canada ordered Ernst Zündel, a former Canadian resident then living in the United States, to remove anti-Semitic hate speech from his California-based Internet site,[204] the order acknowledged that the Tribunal might have difficulty

198. *See id.* at 2034.

199. To be sure, Chapter 11 tribunals do have the power to issue damage awards that private litigants can then enforce against federal authorities, but this power is not exercised against state courts directly. *See* North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 1135, 107 Stat. 2057, 32 I.L.M. 289, 605 (entered into force Jan. 1, 1994) (outlining remedies available under Chapter 11).

200. *See* T.G.I. Paris, Nov. 20, 2000, *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm. For discussions of the case, see Berman, *supra* note 171, at 337–42, 516–21; Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002).

201. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). This decision was subsequently reversed by the Ninth Circuit on the ground that the district court could not obtain personal jurisdiction over the original French plaintiffs until they actually sought to enforce the judgment or otherwise engaged in activity in California. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120 (9th Cir. 2004).

202. *See* Press Release, Yahoo!, *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 which promote or glorify hatred and violence").

203. *See, e.g.*, Troy Wolverton & Jeff Pelline, *Yahoo to Charge Auction Fees, Ban Hate Materials*, CNET News.com, Jan. 2, 2001, at http://news.cnet.com/news/0-1007-200-4352889.html (noting that Yahoo!'s new policy regarding hate-related materials followed action by the French court). It does appear that although Yahoo! has removed much of the offending material, the company has not fully complied with the French orders, leaving some items—such as copies of *Mein Kampf,* coins, and stamps—still available through www.yahoo.com. *See* Yahoo!, Inc. v. La Ligue, 379 F.3d at 1122.

204. Citron v. Zündel (Can. Human Rights Trib. Jan. 18, 2002), *at* http://www.chrt-tcdp.gc.ca/search/files/t460_1596de.pdf. *See also* Peter Cameron, *Hate Web Sites Have "No Place in Canadian Society": Commission*, LONDON FREE PRESS, Jan. 19, 2002, at B5

enforcing its ruling.[205] Nevertheless, the Tribunal stated that there would be "a significant symbolic value in the public denunciation" of Zündel's actions and a "potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles enunciated in our decision."[206] In the aftermath of this ruling, Zündel was deported from the United States to Canada for breaching the terms of his visitor's permit.[207] Though the deportation decision had no formal connection to the Commission's ruling, it seems likely that the publicity generated by the Commission played a role.[208] Thus, the Commission's ruling may have had a very real impact, even though the Commission itself acknowledged it had no enforcement power.

Elsewhere, the existence of governmental and judicial networks means that the rhetoric of legal opinions is more likely to influence others despite the fact that those opinions are not literally binding authority beyond their own community. Even the normative statements of non-state entities may have authoritative impact on various sub-communities, and again may have rhetorical impact more broadly. Certainly, once we acknowledge the importance of changes in legal consciousness over time, it becomes clear that *enforcement* power is not the only factor in determining the *normative* power a jurisdictional assertion might have.

This more fluid model of multiple affiliations, multiple jurisdictional assertions, and multiple normative statements captures more accurately than the classical model of territoriality and sovereignty the way legal rules are being formed and applied in today's world. Whether or not the nation-state is dying, we will need to come to grips with the diffusion of law across borders and will also need to understand that the normative statements law inscribes cannot be so easily bounded off from the world of political rhetoric.

Of course, such jurisdictional pluralism may empower

(describing a ruling that held "an Internet site that promotes hate against any group contravenes the Canadian Human Rights Act" because "hate messaging has no place in Canadian Society").

205. *See Citron v. Zündel*, *supra* note 204, para. 298 ("We are extremely conscious of the limits of the remedial power available in this case."). *See also* Cameron, *supra* note 204 (quoting a Commission spokesperson as acknowledging that "[w]e have no experience with enforcing compliance in cases involving the Internet").

206. *Citron v. Zündel*, *supra* note 204, para. 300.

207. *See* Colin Nickerson, *Denier of Holocaust is Deported to Canada; US Move Sparks Anger*, BOSTON GLOBE, Feb. 21, 2003, at A8.

208. *See id*. (noting both that Zündel's "wife is a US citizen—a status often sufficient to win at least a stay of deportation for someone in Zündel's position" and that "the INS moved with unusual speed on a fairly minor violation").

illiberal "communities" (from intolerant ethnic groups to transnational corporations), thereby causing problems for less powerful communities. Yet, it is important to recognize that a more expansive understanding of jurispersuasion does not mean that the reality of coercive power (or the importance of sovereign nation-states) will suddenly disappear. After all, in order for the legal norms of a non-state community to be enforced, such norms must be adopted by those with coercive power, and abhorrent assertions of community dominion are unlikely to achieve widespread acceptance. Thus, the enforcement arena would provide a powerful incentive to communities not to move too far away from a developing international consensus. In a sense, this is how even state-sanctioned courts operate because they lack their own enforcement power. Courts always issue decisions at the sufferance of their "sovereign," and if they choose to defy the entity that enforces their judgments, they must appeal to a broad base of popular support or risk being treated as politically irrelevant. Likewise, a non-state jurisdictional assertion must make a strong case to the governments of the world and other political actors that the assertion of community dominion is appropriate and that the substantive norms expressed are worth adopting. A broader conception of what counts as a jurisdictional assertion does not imply that all such assertions (much less all normative rules imposed) are justified; it only argues that we extend the term jurisdiction to these non-state norm-producing acts. In this way, multiple communities can attempt to claim the mantle of law, making it more likely that we will at least *notice* these alternative visions, regardless of whether such visions are ultimately adopted broadly or roundly rejected. Thus, whether good or bad, this process of transnational (or non-national) norm development is a phenomenon that scholars and policymakers must address.

C. Plural Sources of Legal and Quasi-legal Authority

The expanded vision of jurisdiction described above rests in part on the idea that the state does not hold a monopoly on normative assertions, or jurispersuasion. Rather, a variety of non-state communities are constantly asserting claims to legal authority and articulating alternative norms that often take hold over time. And while international law has often neglected these plural sources of normative authority, the study of law and globalization more explicitly includes such legal (and quasi-legal) entities within its purview. This shift has many implications for future scholarship.

Perhaps most importantly, an acknowledgment of legal pluralism suggests a way out of the endless debates about whether international or transnational articulations of norms can be regarded as law at all. This argument generally rests on the fact that, because there is no enforcement power apart from nation-states, international norms are only law to the extent states choose to enforce them. Legal pluralists, in contrast, look to whether members of various shifting and overlapping communities feel themselves bound by articulated norms, regardless of the enforcement power that may or may not lie behind those norms.[209] Accordingly, scholars of law and globalization can study the degree to which various international and transnational norms may have significant binding effects *despite* lack of enforcement power.

In addition, legal pluralism focuses attention on the fact that many transnational or subnational forms of community may be even more powerful and hold more significant normative force than the official rules laid down by governmental entities. For this reason, those studying international law compliance issues must consider how various non-state norms might affect the way in which an international norm is received and transformed on the ground. To take an obvious example, the governmental ratification of an international gender equality norm will not be sufficient to affect actual gender equality within that state if there are strong non-state norms (e.g., local customs, religious doctrines) that resist such formal equality. In other contexts, we see that international civil society groups or private standard-setting bodies may have far more leverage with transnational corporations than individual state governments.[210] In both cases, compliance cannot be measured by reference to governmental acts alone.

Finally, even formal state-sanctioned courts might adopt rules that acknowledge multiple community affiliations. For example, in choosing the substantive legal norms to apply to a transnational dispute, a court might take into account the fact that the parties have distant community affiliations[211] or are citizens of countries with

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209. *See, e.g.*, Roderick A. MacDonald, *Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism*, 15 ARIZ. J. INT'L & COMP. L. 69, 71 (1998) ("[A] legal pluralistic approach frees the legal imagination from structuralist thinking; it frees legal conceptions of normativity from the assumptions of Weberian formal-rationality; and it frees legal notions of relationships from their anchorage in official institutions of third-party dispute resolution.").

210. *See supra* notes 148–149 and accompanying text.

211. *See, e.g.*, Chander, *supra* note 73 (arguing that India's securities laws should be applied to purchases of Indian debt instruments by members of the Indian diaspora, even though the purchases were made in the United States).

conflicting laws[212] and therefore seek to blend a variety of transnational norms. Similarly, in the constitution of so-called "hybrid" domestic/international courts to address past atrocities in post-conflict societies, judges are often drawn from a variety of communities within the society as well as from the international community at large.[213] These developments reflect the increasing need for official law to acknowledge (and sometimes accommodate) people's affiliations with multiple communities.

D. Cosmopolitanism and Law

The plural vision at the heart of these first three areas of inquiry lays the groundwork for a fourth: the possibility of a cosmopolitan conception of law. Scholars of law and globalization are ideally situated to undertake this inquiry.

Although cosmopolitanism is often confused with a kind of utopian universalism, cosmopolitanism is actually a useful trope for conceptualizing law and globalization precisely because it recognizes that people have multiple affiliations, extending from the local to the global (and many non-territorial affiliations as well). For example, Martha Nussbaum has stressed that cosmopolitanism does *not* require one to give up local identifications, which, she acknowledges, "can be a source of great richness in life."[214] Rather, following the Stoics, she suggests that we think of ourselves as surrounded by a series of concentric circles:

> The first one encircles the self, the next takes in the immediate family, then follows the extended family, then, in order, neighbors or local groups, fellow city-dwellers, and fellow countrymen—and we can easily add to this list groupings based on ethnic, linguistic, historical, professional, gender, or sexual identities. Outside all these circles is the largest one, humanity as

212. *See, e.g.*, Dinwoodie, *supra* note 189 (arguing that national courts should decide international copyright cases through the construction of copyright norms that reflect the values of all interested systems, national and international, that may have a prescriptive claim on the outcome).

213. *See, e.g.*, Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003) (describing the creation of courts composed of both domestic and international judges to try human rights violators in post-conflict societies).

214. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, *in* FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 9 (Joshua Cohen ed., 1996).

a whole.[215]

Therefore, we need not relinquish special affiliations and identifications with the various groups of which we may feel a part.[216]

In this vision, people could be "cosmopolitan patriots,"[217] accepting their responsibility to nurture the culture and politics of their home community, while at the same time recognizing that such cultural practices are always shifting, as people move from place to place. "The result would be a world in which each local form of human life is the result of long-term and persistent processes of cultural hybridization—a world, in that respect, much like the world we live in now."[218]

Thus, cosmopolitanism is emphatically not a model of international citizenship in the sense of international harmonization and standardization, but is instead a recognition of multiple refracted differences where people acknowledge links with the "other" without demanding assimilation or ostracism. Cosmopolitanism seeks "flexible citizenship,"[219] in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances, including non-territorial communities. The cosmopolitan worldview shifts back and forth from the rooted particularity of personal identity to the global possibility of multiple overlapping communities. "[I]nstead of an ideal of detachment, actually existing cosmopolitanism is a reality of (re)attachment, multiple attachment, or attachment at a distance."[220]

A cosmopolitan conception of law, therefore, aims to capture a middle ground between strict territorialism on the one hand and expansive universalism on the other. As we have seen, a territorialist approach fails to account for the wide variety of community affiliations and social interactions that defy territorial boundaries. A

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215. *Id.*

216. *Id.* ("We need not think of [local affiliations] as superficial, and we may think of our identity as constituted partly by them.").

217. Kwame Anthony Appiah, *Cosmopolitan Patriots*, *in* COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION 91 (Pheng Cheah & Bruce Robbins eds., 1998) [hereinafter COSMOPOLITICS].

218. *Id.* at 92.

219. *See* AIHWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 6 (1999) (describing how "the cultural logics of capitalist accumulation, travel, and displacement that induce subjects to respond fluidly and opportunistically to changing political-economic conditions" foster a form of transnationality she calls "flexible citizenship").

220. Bruce Robbins, *Introduction Part I: Actually Existing Cosmopolitanism*, *in* COSMOPOLITICS, *supra* note 217, at 1, 3.

more universalist perspective, by contrast, which seeks to imagine people as world citizens first and foremost, might seem to be a useful alternative. But such universalism tends to presuppose a world citizenry devoid of both particularist ties and normative discussion about the relative importance of such ties. Thus, universalism cuts off debate about the nature of overlapping communities just as surely as territorialism does.

A cosmopolitan conception, in contrast, makes no attempt to deny the multirooted nature of individuals within a variety of communities, both territorial and non-territorial. Thus, although a cosmopolitan conception might acknowledge the potential importance of asserting universal norms in specific circumstances, it does not require a universalist belief in a single world community. As a result, cosmopolitanism offers a promising rubric for analyzing law in a world of diverse normative voices.

E. The Sociological and Psychological Processes of Legal Consciousness

Even if one stays within the parameters of mainstream debates about the efficacy of international law, an approach emphasizing law and globalization, with its focus on legal consciousness, may have much to contribute. These debates often center on states: Do states comply with international law? If so, why do they comply? And, is it possible that, even when states formally comply (i.e., by signing treaties), such compliance nevertheless hides a lack of real change in their internal behavior? Studying legal consciousness allows scholars to recognize (and perhaps document) ways in which norms may become inculcated in the everyday lives and thoughts of people, regardless of official governmental compliance with international law norms.

Compliance has, of course, long been a prominent issue in international law. Because international norms often have no formal enforcement power behind them, scholars have wondered whether such norms have any real effect. For years, however, this debate was characterized more by competing ideological commitments than reliance on data. Thus, champions of international law essentially took it on faith that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[221] Indeed, as one scholar has noted, "the claim that

221. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted). *See*

international law matters was until recently so widely accepted among international lawyers that there have been relatively few efforts to examine its accuracy."[222] On the other side, those skeptical of international law have viewed such norms as irrelevant to the power politics that are often seen as the true engine of norm development on the world stage.[223] This approach assumes that states are motivated primarily by their geopolitical interests and that international law exists and is complied with only when it is in the interests of powerful states to do so.[224] These powerful states may then coerce less powerful states into accepting the regime, but in any event the norms of international law are largely immaterial. Even so-called "neorealists," who have substituted rational choice theory for a pure emphasis on power, nevertheless retain the focus on states, which are treated as unitary rational actors seeking primarily to ensure their own preservation and dominate others.[225] Such a focus acknowledges the

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also CHAYES & CHAYES, *supra* note 168, at 3 ("[F]oreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations."); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175, 176 (1993); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Koh, *supra* note 3, at 2599.

222. Hathaway, *supra* note 35, at 1937. *See also* S.M. Schwebel, *Commentary*, *in* COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 39, 39 (M.K. Bulterman & M. Kuijer eds., 1996) ("Compliance is a problem which lawyers tend to avoid rather than confront."); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998). Kingsbury comments that:

> [T]he first empirical task is to determine whether, as is often asserted by international lawyers, most States and other subjects of international law conform to most legal rules most of the time. We have impressions which may rise to the level of "anecdata," but in many areas we simply do not have systematic studies to show whether or not most States conform to most international law rules most of the time . . .

Id. at 346 (citations omitted)).

223. *See, e.g.*, Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT'L L.J. 193 (1980) (arguing against the importance of international law); Jack Goldsmith, *Should International Human Rights Law Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327, 337 (2000) ("Nations that increase protection for their citizens' human rights rarely do so because of the pull of international law."); Robert H. Bork, *The Limits of "International Law,"* NAT'L INT., Winter 1989–1990, at 3 (arguing against the importance of international law). *See also, e.g.*, EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS 1919–1939 (Harper & Row 1946) (1939); HANS J. MORGENTHAU, POLITICS AMONG NATIONS (3d ed. 1966); Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940).

224. *See, e.g.*, KRASNER, *supra* note 155, at 7; GOLDSMITH & POSNER, *supra* note 14. *But see supra* note 14 (challenging this view).

225. *See, e.g.*, KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 118 (1979) (viewing states as "unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination").

efficacy of international law norms only to the extent that it is in the rational self-interest of states to acknowledge such norms.

In an attempt to get beyond this intractable ideological dispute, international law scholars have begun to explore the possibility of taking a more empirical approach to questions about international law compliance.[226] For example, scholars of both international law and international relations have attempted to conduct empirical studies within the fields of international trade,[227] international environmental law,[228] and increasingly, international human rights[229] regarding the conditions under which compliance with international treaty obligations is most likely to occur. Yet, even these empirical studies are largely concerned with the degree to which states are formally implementing various policies or practices to comply with the requirements of the treaties those states have signed. Thus, the focus remains limited to the official mechanisms of law.

The past decade has also seen the emergence of what may be a promising theoretical framework for studying the way in which transnational and international norms are internalized by domestic legal systems over time. Dubbed "transnational legal process," this framework has the advantage of taking seriously the idea that norms may seep into a legal system in ways more complicated than simply the formal rules or policies enacted by the official organs of government.[230] And some useful work in this vein has used

226. Indeed, during the past two years alone, sessions on empirical approaches to international law have been convened at the annual meetings of both the Law and Society Association and the American Society of International Law. *See* Program of the Annual Meeting of the Law & Society Ass'n, Sess. 3216: *Roundtable—Empirical Approaches to International Human Rights Law*, at 47 (June 7, 2003); *Panel—Empirical Work in Human Rights*, 98 AM. SOC'Y INT'L L. PROC. 197 (2004).

227. *See, e.g.*, ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW (Ernst-Ulrich Petersmann & Gunther Jaenicke eds., 1992); ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM (1993); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555 (1996).

228. *See, e.g.*, Philippe Sands, *Compliance with International Environmental Obligations*, *in* IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW 48 (James Cameron et al. eds., 1996); INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter M. Haas et al. eds., 1993); ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY (1994); Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 119 (1995).

229. *See, e.g.*, Hathaway, *supra* note 35; Goodman & Jinks, *Measuring the Effects of Human Rights Treaties*, *supra* note 35; Goodman & Jinks, *How to Influence States: Socialization and International Human Rights Law, supra* note 35.

230. *See, e.g.*, Koh, *Transnational Legal Process*, *supra* note 6.

institutional sociology to try to understand, in a more nuanced way, how it is that bureaucracies actually internalize norms.[231] Yet, more is needed to fully flesh out the idea of transnational legal process in order to see how norm internalization actually takes place outside of the official organs of government.[232] Thus, while it seems intuitively correct to say that "[i]nternational articulation of rights norms has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society, and the press,"[233] it is another matter entirely to try to study this "re-shaping" process on the ground in concrete settings.

For example, many African countries, responding in part to pressure from international human rights activists, have recently enacted laws forbidding the practice known as female genital circumcision.[234] But perhaps the best place to trace changes in legal consciousness about such circumcisions is in the variety of local settings where the practice had been widespread. Local human rights groups have mobilized religious leaders to convince those who perform the female circumcisions that the practice is wrong.[235] In addition, where once those who performed the circumcisions were venerated in their communities and well-paid for their work, those emblems of social status are disappearing.[236] These developments are, of course, not necessarily unrelated to changes in official law, but it seems clear that, if one wants to understand the possible effects of international law norms over time, studying simply the acts of national parliaments is insufficient.[237] Moreover, armed with a more

231. *See, e.g.*, Goodman & Jinks, *supra* note 162.

232. For an example of such scholarship in the context of trade, see Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: the Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L.J. 65 (2004).

233. Douglass Cassel, *Does International Human Rights Law Make a Difference?* 2 CHI. J. INT'L L. 121, 122 (2001).

234. Leigh A. Trueblood, *Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory,* 28 DENV. J. INT'L L. & POL'Y 437, 465 (2000) (describing how the efforts of international organizations, NGOs, and other groups have led many countries, including Cameroon, Egypt, Kenya, Sudan, Burkina Faso, and Ivory Coast, to pass legislation against female genital circumcision).

235. *See* Tina Rosenberg, *Mutilating Africa's Daughters: Laws Unenforced, Practices Unchanged,* N.Y. TIMES, July 5, 2004, at A14 ("One strategy that has proved effective [in decreasing female genital circumcision] is persuading religious leaders to dispel the widespread belief that Islam calls for circumcision.").

236. *Id.*

237. For a more contextualized analysis of the practice, see, for example, Christine J. Walley, *Searching for "Voices": Feminism, Anthropology, and the Global Debate over Female Genital Operations*, 12 CULTURAL ANTHROPOLOGY 405 (1997).

complex understanding of how cultural changes occur, we could conceptualize the human rights monitoring process "as a gradual cultural transformation rather than as law without sanctions confronting intractable cultural differences."[238]

Legal consciousness scholarship therefore provides a model for international law scholars to follow as they broaden their gaze to include not only official governmental behavior but also the attitudes, aspirations, and lay understandings of justice that circulate in everyday life. Such effects probably cannot be quantified, but they certainly can be studied qualitatively.[239] And given that one of the key aspects of law and globalization is the articulation of norms across borders, international law scholars need to consider how such norms may affect legal consciousness over time, not just in the halls of government, but in the streets of cities and towns, the shopping aisles of local markets, the meeting halls of communities, and the living rooms of homes around the world.

F. The Role of Non-Governmental Organizations

As discussed previously, law and globalization scholars are increasingly taking account of non-governmental organizations as an important normative force on the international scene. Interestingly, civil society initiatives function sometimes as *an aspect of globalization* by challenging nation-state sovereignty, particularly with regard to human rights norms, and other times as *an organized resistance to globalization*, particularly with regard to economic, trade, environmental, and labor policy. Transnational networks of lawyers also work to challenge many of the perceived injustices of globalization.[240]

Such transnational policy efforts have been deployed with increasing frequency. For example, the international anti-apartheid movement was perhaps the first successful global civil society effort to combine shareholder, consumer, and governmental action,

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238. Merry, *supra* note 70, at 974.

239. *See, e.g.*, Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005) (discussing the interaction of international and local criminal law norms in Afghanistan and Rwanda).

240. *See* Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3, 4 (Austin Sarat & Stuart Scheingold eds., 2001) ("[D]emocratization and globalization confront cause lawyers with new issues and new burdens while altering their resources and their tactical and strategic options.").

persuading many corporations, universities, and pension funds to divest themselves of South African investments long before official national sanctions were in place.[241] Since then, similar boycott efforts have resulted in changes to tuna-fishing practices so as to protect dolphins,[242] a decision by the French government to suspend its nuclear testing program,[243] and alterations in Shell Oil's decommissioning of a rig in the North Atlantic.[244]

In addition, NGOs increasingly formulate global standards of corporate behavior. These "codes of conduct" have appeared most prominently with regard to human rights, environmental protection, and fair labor standards. As *The Economist* has observed, "a multinational's failure to look like a good global citizen is increasingly expensive in a world where consumers and pressure groups can be quickly mobilised behind a cause."[245] In response, prominent corporate leaders, including AT&T, Federal Express, Honeywell, and TimeWarner, have established Business for Social Responsibility—"[a] global nonprofit organization that helps member countries achieve commercial success in ways that respect ethical values, peoples, communities, and the environment."[246] Furthermore,

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241. *See* Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 959 (1996) (detailing how interest groups, even "[w]here stymied by national regulators[,] . . . can accomplish equivalent results by commanding consumer preferences, which in turn works to constrain corporate or state behavior").

242. *See Stop This Carnage: Hundreds of Our Dolphins Are Dying*, W. MORNING NEWS (U.K.), Feb. 7, 2002, at 1 (reporting that "wall of death" nets regularly threatened dolphins a decade ago, but now successful public awareness campaigns have led to changes in tuna-fishing techniques, and tuna manufacturers routinely label their tuna containers as "dolphin safe"); 45 NOAA SEAPOWER (Jan. 1, 2002), *available at* 2002 WL 13922711 (reporting a "notable success" in forging "international cooperation that allows 'dolphin-safe' tuna to be harvested, while ensuring the health of dolphin stocks"). For a discussion of the tuna-dolphin controversy as part of a consideration of the potential role of unilateral trade sanctions in protecting environmental resources, see 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).

243. *See Greenpeace International Founder Dies in Car Crash*, ENV'T NEWS SERVICE (Mar. 23, 2001), *at* http://ens-news.com/ens/mar2001/2001-03-23-12.asp (crediting Greenpeace with creating pressure that helped push the French government to end its nuclear testing program).

244. *See* Allan Pulsipher & William Daniel IV, *Onshore-Only Platform Disposition Needs Exceptions*, OIL & GAS J. 64 (2001) (reporting that Shell's decision to cancel its plan for an "at-sea disposition" of an oil rig followed an unexpectedly fierce campaign featuring public boycotts).

245. *Multinationals and Their Morals*, ECONOMIST, Dec. 2, 1995, at 18.

246. *Mission*, Business for Social Responsibility, *at* http://www.bsr.org/meta/about/mission.cfm. Similarly, the World Business Council for Sustainable Development evinces a commitment "[t]o provide business leadership as a catalyst for change toward sustainable development, and to promote the role of eco–

especially in the wake of the global movement against sweatshops,[247] NGOs have been able to persuade many corporations to accept independent monitoring of adopted standards.[248]

More controversially, NGOs often claim to represent a global polity, and international organizations may include NGOs in their deliberative processes as a way of overcoming what might otherwise be deemed a "democratic deficit."[249] Some argue, however, that NGOs are more appropriately seen as interest groups focused on specific issues than as representatives of "bottom-up" constituencies.[250] On the other hand, claims of democratic deficit tend to privilege those actors who can derive their authority, no matter how tenuously, from a voting polity, which is not necessarily the only way to develop norms that may be deemed legitimate over time. Thus, one question for scholars is how exactly to conceive of NGOs and their proper institutional role. Another promising avenue of scholarship explores how funding decisions by foundations and governments (mostly from industrialized countries) affect the activities of NGOs, which may rely on such funding for substantial

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efficiency, innovation and corporate social responsibility". *About the WBCSD*, *at* http://www.wbcsd.ch/templates/TemplateWBCSD1/layout.asp?type=p&MenuId=NjA&doOpen=1&ClickMenu=LeftMenu.

247. *See* Ethan B. Kapstein, *The Corporate Ethics Crusade*, FOREIGN AFF., Sept.–Oct. 2001, at 105, 109 (noting that:

> Many prominent apparel companies, including Nike, Adidas, and the Gap, began to experience the full force of NGO and media rage [regarding sweatshops], with a barrage of stories and Internet-based campaigns aimed against their products. Students lobbied their universities to sever business ties with companies that employed sweatshop labor. As a result, several firms changed their behavior, raising standards abroad and inviting independent monitors to assess their progress. A growing number of companies even hired vice presidents for "corporate social responsibility.").

For a recent argument that American corporations affiliated with sweatshops abroad might be liable under the Thirteenth Amendment's prohibition of slavery, see Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002).

248. *See* Spiro, *supra* note 241, at 962 (remarking that corporations reacted positively to proposed independent monitoring). For an overview of the various forms the imposition of human rights norms have taken, see Chris Avery, *Business and Human Rights in a Time of Change*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 17 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

249. *Cf., e.g.*, Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 633 (1999) (noting that such a deficit occurs whenever normative power is transferred to "agents that are not electorally responsible in any direct sense to the 'people' whose 'sovereignty,' or at least some portion of it, the agents are said to exercise").

250. *See, e.g.*, Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91 (2000).

portions of their budgets.[251] And researchers are developing models for conceptualizing the role of NGOs as norm entrepreneurs who draw upon transnational networks of nonprofits, scholars, foreign governments, and multilateral institutions to place issues on the agendas of nation-state governments.[252] All of this research helps to focus attention on these important actors in the development of international and transnational norms.

G. The Importance of Institutions

As discussed previously, it is not sufficient for international law scholars to study broad declarations of formal law without also considering the institutional bureaucratic mechanisms that will implement the law, as well as the demands those bureaucratic actors are likely to face. This realization may perhaps account for the increasing scholarly interest in NGOs, because one of the most important roles that NGOs play in the international system is to scrutinize local bureaucratic actors and apply various forms of pressure. Likewise, scholars are recognizing that official international institutions, such as the UN, can also pressure local bureaucracies, for example, by creating international commissions of inquiry concerning alleged atrocities, or threatening prosecutions in international courts. Such declarations can empower reformers within local bureaucracies, who can then argue for institutional changes as a way of staving off international interference.[253]

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251. Indeed, as Sally Merry points out:

> [I]n many other areas of international activity, the sharp disparities in resources between North and South radically limit the ability of some NGOs to participate in the [international treaty] process. It is common for North foundations and governments to fund NGOs from the South. . . . Human rights documents create the legal categories and legal norms . . . but the dissemination of these norms and categories depends on NGOs seizing this language and using it to generate public support or governmental discomfort. This is a fragile and haphazard process, very vulnerable to existing inequalities among nations and the availability of donors.

Merry, *supra* note 70, at 973.

252. *See, e.g.*, Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES. L. 47 (2004). *See also supra* note 71.

253. *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 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

In addition, a focus on institutions allows us to see that nation-states are not unitary actors pursuing their "self-interest" on the world stage. Rather, they are organizational entities embedded in a wider social environment of international norms. Indeed, even "the organizational form of the modern state" may be defined by "worldwide models constructed and propagated through global cultural and associational processes."[254] On this view, states are themselves creatures of international orthodoxy and custom, and they tend to reflect those values. Thus, we see the bureaucratic institutions of the nation-state facing pressures from the international, the subnational, and the transnational. The way in which these pressures affect bureaucracies over time is an important topic for sociological and legal inquiry.

H. The Privatization of State Functions

One of the reasons that it is so important to conceive of law beyond the state is that the state itself is increasingly delegating authority to private actors who exist in a shadowy world of quasi-public/quasi-private authority. The issue of private parties exercising forms of governmentally authorized power has long been a subject of U.S. constitutional law jurisprudence and scholarship, but international law scholars are only just beginning to consider such issues. Thus, for example, P.W. Singer notes that many military activities—including combat, surveillance, training, and interrogation functions—are increasingly being contracted out to private companies.[255] Yet, both domestic and international accountability mechanisms have historically been premised on such roles being played by governmental actors. And the literature on privatization in the domestic context often focuses on the U.S. constitutional doctrines of "state action" or nondelegation of congressional authority to administrative agencies.[256] Neither of these analytical frameworks is precisely applicable to the international context. Thus, over the coming decade, scholars of law and globalization undoubtedly will

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the independence vote).

254. Goodman & Jinks, *supra* note 162, at 1752.

255. *See* P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521 (2004).

256. For some recent examples of this literature, see Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

explore the many ramifications of this new trend in governance.

I. The Multidirectional Interaction of Local, National, and International Norms

Both international law triumphalists and international law critics tend to share in common a top-down vision of international law. From this perspective, international norms are imposed on nation-states or local actors, and the challenge (or the fear) is the degree to which various populations imbibe the international norm.

As the preceding discussions should make clear, however, the reality is far more complicated. Nation-state bureaucracies may imbibe institutional roles from each other. The "international community" is not a monolithic entity, but a collection of interests. "Local" norms are always contested, even within their communities, and "local" actors may well invoke "non-local" norms for strategic or political advantage. Moreover, local actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back "up" so that, over time, the "international" norm is transformed as well. And on and on.

Thus, the local, the national, and the international are all constantly shifting concepts. Accordingly, scholars of law and globalization must study the back and forth of the feedback loops: How do local actors access the power of NGOs? How are governmental and foundation funding decisions made, and how do funding priorities affect the projects undertaken around the world? How are global norms deployed locally? Do local concerns get strategically transformed by elected elites at the national level? How do UN bureaucracies foster the creation of a cadre of "local" actors who are more aligned with other UN officials than with those in their "home" countries? What role do Western universities play in the creation of national and local norms given that many "local" elites are educated abroad? Only through a more fine-grained, nuanced understanding of the way legal norms are passed on from one group to the other and then transformed before spreading back again can law and globalization scholars begin to approach the multifaceted ways in which legal norms develop.

J. The Problematics of Globalization

No analysis of law and globalization is possible without

acknowledging the contested nature of both the terms "law" and "globalization." This Article obviously takes a broad view of what counts as law, including within its purview not only official norms articulated by state sanctioned regulatory bodies and courts, but also "non-official" legal norms that often bind subnational, transnational, or international communities. With regard to globalization, the vast debates concerning its meaning, its importance, and even its existence could fill many volumes. Therefore, I will be content merely to hint at some of the major questions.

First, of course, is the question of what exactly globalization is. For purposes of this Article, however, I have not attempted 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. Thus, I have used 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.[257] And I have been content to acknowledge that the existence of many different visions of globalization is a fundamental part of globalization itself.

Second, there is the question of whether globalization is really a new phenomenon at all. 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.[258] Yet, again I do not think such arguments need detain us here. First of all, it seems clear that *something* is going on, given the pervasiveness of the ideology of market capitalism, the speed of commodity, capital, and

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257. *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); SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS (1998) (analyzing globalization and its economic, political, and cultural effects on the world); EDWARDS, *supra* note 76, at 5–6 ("Globalisation challenges the authority of nation states and international institutions to influence events, while the scale of private flows of capital, technology, information and ideas makes official transfers look increasingly marginal."); Appadurai, *supra* note 103, at 27–29 ("[T]oday's world involves interactions of a new order and intensity. . . . [W]ith the advent of the steamship, the automobile, the airplane, the camera, the computer and the telephone, we have entered into an altogether new condition of neighborliness, even with those most distant from ourselves . . . .").

258. *See* Miles Kahler & David Lake, *Globalization and Governance*, *in* GLOBALIZING AUTHORITY: ECONOMIC INTEGRATION AND GOVERNANCE 10–14 (Miles Kahler & David Lake eds., 2003). *See also* Richard Baldwin & Philippe Martin, *Two Waves of Globalization: Superficial Similarities, Fundamental Differences* (Nat'l Bureau of Econ. Research, Working Paper No. 6904, 1999).

personal movement, the ubiquity of global media, and so on.[259] Whether such developments are truly new (or greater than ever before) seems less important than understanding the consequences of the phenomena. Moreover, 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.[260]

Third, there is the criticism that globalization is merely a continued hegemonic imposition on developing nation-states of the values, economic orthodoxies, and norms of the industrialized world. In law this challenge often takes the form of a critique of international human rights as an imposition of Western norms on "local" culture. "Such claims reflect a familiar story about the production and reception of legal consciousness, in which the West is the primary site of legal production—exporting such goodies as secularism and the 'rule of law'—and the Third World is the happy receptor of such knowledge and structures."[261] I believe there is certainly some truth to the charge that globalization is a new form of empire or hegemony, and particularly with regard to trade liberalization and open markets, there seems to be little possibility for a rival ideology to survive. Turning to law, it is certainly the case that the "international human rights revolution" since World War II is in some ways modeled on U.S. rights-based constitutionalism.

Yet, this is only one part of a much more complicated story. After all, as previously discussed, norms cross borders in both directions. And it is simplistic to think that "local" people have "culture," which is juxtaposed with an "international" conception of

259. For example, David G. Post has argued that if one created a map plotting all activities that have an effect on a particular country, such a map 300 years ago, 100 years ago, or even 50 years ago would show most of the effects to be clustered fairly closely within and around the territorial borders of the country. In contrast, Post contends, now a country is very likely to be affected by activity elsewhere in the world with no pattern based on geography at all. *See* David G. Post, *Against "Against Cyberanarchy"*, 17 BERKELEY TECH. L.J. 1365, 1381–84 (2002).

260. Of course, it may be that globalization actually helps to legitimize a mythical prior stable order, which can be defined as the presumed order that globalization's flows of people, money, and information is supposedly destabilizing. *See* Coutin et al., *supra* note 11. Yet, even if this is true, the study of globalization would still be important because only through such study could this legitimation process be exposed and interrogated.

261. Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1459 (2003).

rights.[262] This vision of culture as a static homogenous system, resistant to change, differs dramatically from models of culture developed in the anthropological literature over the last two decades. These models emphasize "culture as an historical product, constantly being made and remade and rife with internal conflicts and differences."[263] Indeed, it is often various local constituencies that are trying to mobilize ideas such as international human rights to contest local customs or practices.

In addition, even a legal body such as the WTO dispute resolution system, which undoubtedly has functioned as a tool of industrialized nations, nevertheless creates a legal form whose use cannot be entirely controlled, even by the powerful. Thus, we see developing nations (particularly the larger ones, such as Brazil and India) beginning to use the WTO process against the United States and the European Union. Likewise, the idea of criminal accountability for atrocities, though imposed as victors' justice at Nuremberg, has spawned an entire human rights system that can be invoked even against the powerful.[264] For example, the Bush administration has faced widespread criticism and pressure (both within the United States and throughout the world) because of its failure to state unequivocally that it was bound by the Geneva Conventions in its treatment of prisoners captured in Iraq and Afghanistan.[265]

Of course, power is always an important factor, and there is no doubt that those with military might can more easily control international legal processes: witness the bilateral agreements that the United States has induced other nations to sign, agreeing that U.S. citizens will not be handed over to appear before the International

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262. *See, e.g.*, Walley, *supra* note 237, at 418–23 (discussing the binary opposition between "rights" and "culture" in Euro-American literature opposing female genital operations and arguing that such a formulation constructs African women as "oppressed victims of patriarchy, ignorance, or both, not as social actors in their own right").

263. Merry, *supra* note 70, at 946. On the other hand, as Merry points out, international human rights activists often acknowledge the "importance of building on national and local cultural practices and religious beliefs to promote transformations of marriage, family, and gender stereotypes. They argue that reforms need to be rooted in existing practices and religious systems if they are to be accepted." *Id*. at 947. This more fluid conception of culture therefore co-exists with "the portrayal of culture as an unchanging and intransigent obstacle." *Id.*

264. *See* Cover, *supra* note 99, at 199 ("It is true that the particular proceedings at Nuremberg and Tokyo were limited to trials of Axis defendants. But, the precedent . . . was one which could not be so circumscribed.").

265. *See, e.g.*, Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptation of 9/11,* 6 U. PA. J. CONST. L. 1001, 1063–64 (2004) (describing criticism and pressure).

Criminal Court.[266] However, the creation of legal forms at least provides a rhetorical avenue whereby those with less power may be able to articulate opposing visions and generate alternative normative systems that may have effect over time. Thus, while hegemonic power is always present, law and globalization can also be counter-hegemonic, at least at times.[267]

CONCLUSION

Over the course of the Twentieth Century, international law lost its privileged place as the primary conceptual framework for understanding the cross-border development of norms. The introduction of universal human rights standards, the recognition of interdependence among nation-states, the development of international courts and institutions, the growing diffusion of people, money, and information across territorial borders, and the increasing interest in normative development and legal consciousness outside of formal governmental spheres have collectively eroded the foundations of traditional positivist public international law, which had often been conceived only as a set of rules entered into by nation-states to govern their relationships with each other. Moreover, these developments have brought forth new academic energy, pushing international law into fresh areas of conceptual inquiry.

Of course, this scholarly innovation is likely to proceed regardless of the label. Yet, sometimes a change in the overarching theoretical framework can help to re-orient an emerging discourse, accentuating important points of contact among scholars with different disciplinary backgrounds and methodological commitments. It is my hope, therefore, that the idea of law and globalization

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266. *See, e.g.*, Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers Immunity*, N.Y. TIMES, Aug. 10, 2002, at A1 (reporting Bush administration warning that nations could lose military assistance if they become members of the ICC without entering into a bilateral agreement with the United States pledging that they will not deliver U.S. troops to the Hague for prosecution by the ICC). *See also* Coalition For the International Criminal Court, *Factsheet: US Bilateral Immunity Agreements or So-Called "Article 98" Agreements*, *available at* http://www.iccnow.org/pressroom/factsheets/FS-BIAsAug2004. (last visited Jan. 21, 2005) (stating that, as of Aug. 1, 2004, over eighty countries had signed Bilateral Immunity Agreements with the United States).

267. *See, e.g.*, REISMAN, *supra* note 4, at xiii (noting that transnational decision processes, like all law-making, have "an inevitable political dimension" in the sense that participants "use their effective power . . . to secure the legal confirmation of arrangements which they believe will discriminate in their favor," but that, "as in all law-making, the plurilateral or multilateral character of the process often reduces or contains the power of the strongest actors and forces compromises").

encourages international law scholars to conceive of their work more broadly and to engage in a dialogue with those working in related fields both within law and elsewhere in academia.

Only such a comprehensive interdisciplinary approach will allow us to conceptualize a world populated not only by states, but a whole variety of normative communities. Indeed, without a broader conception of law that acknowledges non-sovereign (and even non-governmental) articulations of norms, we are apt to ignore such articulations altogether or deny them the status of law and thereby miss the real force these norms have and the way in which they interpenetrate official legal doctrine. Rather than focusing solely on the nation-state, therefore, the study of law and globalization may help us to recognize that, in a world of permeable borders, multiple affiliations, and overlapping interests, law is diffused in myriad ways, and the construction of legal communities is always contested, uncertain, and open to debate.