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Dialectical Regulation, Territoriality, and Pluralism

PAUL SCHIFF BERMAN*

I. INTRODUCTION

Scholarly and policy debates about territoriality—and the often twinned idea of nation-state sovereignty—appear to have progressed beyond the polarizing question of whether the Westphalian system of nation-states is dying or not. Instead, theorists are turning their attention to the ways in which territoriality and sovereignty might be *changing* in an increasingly interconnected world of interlocking governance structures and systems of communication. There is a growing understanding that, although nation-states may not disappear, their sovereignty may well become diffused in new ways in order to accommodate various international, transnational, or non-territorial norms.[1] So, now the task becomes differentiating the ways in which territoriality and sovereignty are diminishing as salient factors from ways in which they remain important.

Such differentiation reveals a hybrid world where human behavior and communal groupings are less influenced by territory, even as coercive power tends to remain primarily the province of territorially-based sovereigns. This hybridity poses challenges for governance, as multiple state and non-state regulators with multiple territorial loci are inevitably

* Professor, University of Connecticut School of Law. The ideas contained here are developed in much further detail in Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005), Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005); and Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); *see also* Paul Schiff Berman, *Conflict of Laws and the Challenge of Legal Pluralism* (forthcoming). An earlier version of this Essay was presented at a conference on territoriality and law at UCLA Law School. I thank Kal Raustiala and the other participants at the conference for useful comments and criticisms.

[1] *See, e.g.*, Miles Kahler, *Territoriality and Conflict in an Era of Globalization*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 1, 2 (Miles Kahler & Barbara Walter eds., 2006, forthcoming) ("No universal shift in the location of governance has taken place. Rather, national governments, which have remained bounded territorial units, have adapted in order to retain the effectiveness and accountability demanded by their constituents. New forms of governance have emerged in the face of competing demands . . . .").

pulled to exercise forms of authority, even over behavior or actors that are spatially distant. Accordingly, we need models for understanding the new plural order of multiple and interlocking governance structures, models that go beyond the relatively rigid legal doctrines of jurisdiction, choice of law, and judgment recognition, and that complicate the simplifying assumptions bound up in rational choice approaches to international and transnational law.

Robert Ahdieh's provocative and generative essay, *Dialectical Regulation*,[2] attempts such a model. He argues that intersystemic regulation is now a significant legal reality, and he attempts to tease out the circumstances under which we might expect to see these intersystemic regulatory systems take hold. In addition, he analyzes the types of interactions we would expect to see among these multiple regulatory authorities. Such interactions might be hierarchical, as when one court directly overturns another, or when one regulatory authority preempts another. At the other end of the spectrum, the interactions may be merely dialogic, with multiple regulators offering norms and engaging in either formal or informal conversations that may come to influence each other over time. In between (and most intriguingly), Ahdieh aims to define dialectical regulation, in which regulators exist in some kind of formal structural relationship to each other but do not directly review each other's decisions. In these circumstances, Ahdieh suggests, we will see a dialectical relationship form, in which regulators pay significant attention to the precedents of their counterparts, even though they are not fully bound by them.

In constructing his taxonomy, Ahdieh starts in the right place: by identifying his role as that of poet rather than lawyer. He acknowledges that "[i]n negotiating the overlap of regulatory authority across jurisdictional lines, the traditional lawyerly task has been one of line-drawing."[3] But he rightly rejects such an exercise because it tends either to ignore the existence of overlap among regulatory authorities or to insist on rigid definitions of jurisdiction that attempt to eliminate whatever overlap might exist. Such a reimposition of singularity is, according to Ahdieh, "neither viable nor wise."[4] Instead, Ahdieh's poetic task is to embrace the idea of multiple regulatory authority operating in a far messier, complicated web of interrelationships.

Just so. One need only survey some of Ahdieh's various examples of intersystemic regulation to realize that what he describes is fast becoming

[2] Robert Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006).
[3] *Id.* at 871.
[4] *Id.* at 872.

Electronic copy available at: http://ssrn.com/abstract=1411383

the norm—not the exception—and that rigid conceptions of jurisdiction, choice of law, and judgment recognition are unlikely to capture this dynamic process. Accordingly, the job of scholars is increasingly to recognize this multiplicity and try to conceptualize the interactions, rather than insist upon simplifying assumptions. Ahdieh therefore provides a useful service by attempting to map out when intersystemic regulation is most likely to occur, how these regulatory relationships might operate, and why we might (at least sometimes) embrace, rather than resist, what Robert Cover famously has termed "jurisdictional redundancy."[5] This is a significant project, and it suggests many fruitful avenues of study for future research.

At the same time, my invocation of Cover indicates one way in which Ahdieh, even operating in full poetic mode, may not sufficiently embrace multiplicity. Ahdieh's analysis of intersystemic regulation is generally limited to governmental authorities, whether at the federal, state, or international level. But a more comprehensive discussion of both jurisdictional redundancy and intersystemic regulation must acknowledge (as Cover did) the wide variety of *non-state* normative communities that purport to exercise forms of jurisdiction to regulate behavior.[6] Sometimes these non-state normative assertions wield forms of coercive power and sometimes not, but even when they do not, the norms articulated by non-state communities often have significant persuasive power over time, and they either are adopted by state authorities,[7] or they seep into legal consciousness and become part of the accepted vision of the "way things are."[8] In any event, these plural forms of community affiliation and law-making are part of the dialectical regulatory process that Ahdieh rightly identifies.

Legal pluralism is an increasingly important field of study for the same reason that Ahdieh's dialectical regulation is: multiple regulatory actors are empowered in a world defined by the simultaneous *erosion* of and

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[5] Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 649 (1981).

[6] *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 43 (1983) [hereinafter Cover, Nomos *and Narrative*] ("The position that only the state creates law . . . confuses the status of interpretation with the status of political domination."); *see also* Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow et al. eds., 1992) [hereinafter Cover, *Folktales of Justice*] (arguing that "all collective behavior entailing systematic understandings of our commitments to future worlds" can lay equal claim to the word "law").

[7] *See, e.g.*, *infra* note 81 and accompanying text.

[8] *See, e.g.*, *infra* notes 63–67 and accompanying text. For further discussion of legal consciousness in considering the efficacy of international law, see Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)).

persistence of territoriality as a relevant framework for understanding legal authority. Thus, while I leave to another day a comprehensive analysis of how legal pluralism should affect our understanding of dialectical regulation,[9] here I attempt to go back one conceptual step to survey the changing dynamics of territoriality that are intimately bound up in the intersystemic regulatory scheme Ahdieh discusses.

I start by observing two ways in which territoriality may be *eroding* as an organizing social force. These challenges to territoriality arise first because distant acts increasingly affect local communities, and second because the tie between "community" and "place" is loosening. On the other hand, I also note one significant way in which territoriality and sovereignty are likely to *persist*: the realm of coercive enforcement. Finally, I suggest several consequences for law that will likely flow from this hybrid reality where deterritorialized activities and affiliations combine with territorialized power. One consequence is surely the rise of the sort of dialectical regulation Ahdieh analyzes, but we also see challenges to the formal schemes of jurisdiction, choice of law, and judgment recognition that are so familiar to conflicts scholars. And, as noted above, plural, non-state law-making and its interaction with state regimes will also inevitably contribute to the sort of intersystemic processes Ahdieh seeks to explore. Each of these three areas seems worthy of greater study. So, while Ahdieh has made a great start on the first endeavor, far more work is necessary to develop a more comprehensive cartography of this world of plural normative centers, with their many and varied interactions across territorial space.

II. TWO CHALLENGES TO TERRITORIALITY AND SOVEREIGNTY

A. *Deterritorialization of Effects*

It has become a truism to observe that we are increasingly affected by activities and decisions that take place far from us in a spatial sense.[10]

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[9] For further discussion of this issue, see Berman, *Conflict of Laws and the Challenge of Legal Pluralism*, *supra* note *.

[10] *See, e.g.*, ARJUN APPADURAI, *Disjuncture and Difference in the Global Cultural Economy*, *in* MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 27, 29 (1996) ("[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. . ."); *see also, 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).

Such deterritorialized effects have always been present to some extent, of course. One need only look at the history of empire to realize that the strings of governance were often pulled by far-off rulers. But at least in the pre-modern world such political arrangements, perhaps because of the slow pace of transportation and communications, rarely meant strong centralized control of distant realms. Rather, the social construction of space was organized around many centers, with a patchwork of overlapping and incomplete rights of government.[11] Thus, although cross-border interaction obviously is not a new phenomenon, we may justifiably think something is different in an electronically connected world where the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all.

Indeed, the globalization of capital, the movement of people and goods across borders, the reach of global corporate activity, the impact of worldwide non-governmental organizations (NGOs), and the development, in recent decades, of over a hundred international or transnational tribunals all make it far more likely that local communities will be affected by activities and entities with no local presence. As a thought experiment, one can imagine an "effects map," in which one identifies a territorial locality and plots on a map every action that has an effect on that locality.[12] Five hundred years ago, such effects would almost surely have been clustered around the territory, with perhaps some additional effects located in a particular distant imperial location. A hundred years ago, those effects might have begun spreading out. But today, while locality is surely not irrelevant, the effects would likely be diffused over many corporate, governmental, technological, and migratory centers.

This deterritorialization of effects is felt on an everyday, intuitive level. For example, the "local" shopping mall is not experienced as truly local at all; nearly "everyone who shops there is aware that most of the shops are chain stores," identical to stores elsewhere and that the mall itself closely resembles innumerable other malls around the globe.[13] Thus, while experiencing a "local" place, we recognize the absent forces that structure our experience. Such forces include the steady decline in local ownership of public spaces, which can itself be linked to the globalization of capital.[14]

Similarly, we may feel the growing significance of "remote" forces on

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[11] *See, e.g.*, John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 149 (1993).

[12] This thought-experiment is derived from David G. Post, *Against "Against Cyberanarchy,"* 17 BERKELEY TECH. L.J. 1365, 1371–73 (2002).

[13] ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 140–41 (1990).

[14] *See* JOHN TOMLINSON, GLOBALIZATION AND CULTURE 107–08 (1999).

our lives, whether those forces are multinational corporations, world capital markets, or distant bureaucracies. As John Tomlinson has observed: "People probably come to include distant events and processes more routinely in their perceptions of what is significant for their own personal lives. This is one aspect of what deterritorialization may involve: the ever-broadening horizon of relevance in people's routine experience . . . ."[15] 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. And though the effects may often seem to flow in only one direction (industrialized centers affecting non-industrialized peripheries), one need only consider migratory labor patterns and immigration, the rapid spread of diseases like the avian flu, and the bi-directional impact of labor outsourcing to realize that deterritorialization affects us all.

B. *Deterritorialization of Community Affiliations*

"Community," of course, is a notoriously difficult world to define, and I will not attempt to do so here.[16] But we need not agree upon a definition of community to recognize that, whatever the definition is, we can no longer think of communities as culturally unified groups naturally tied to a territory. And while such a definition may never have been entirely accurate, the deterritorialization of community identification remains an important trend.

Significantly, this deterritorialization is occurring even as legal discussions of jurisdiction continue to be predicated on a seemingly unproblematic division of space, particularly on the idea that societies, nations, and cultures occupy "naturally" discontinuous spaces. This assumption obviously ignores the possibility that territorial jurisdiction often *produces* political and social identities rather than reflecting them. Indeed, it sidesteps the fact that the very idea of territoriality—the "geographic strategy to control people and things by controlling area"[17]—is itself socially rooted.

Historically, anthropologists and others have conceptualized human differences as a diversity of separate societies each with its own culture. This central assumption made it possible, beginning in the early years of the 20th century, to speak not only of "culture," but of "*a* culture." The implicit starting point was the presumed existence of separate, individuated

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[15] *Id.* at 115.

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

[17] ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 5 (1986).

worldviews that could be associated with particular "peoples," "tribes," or "nations." This conception of community, still so powerful in legal discussions, no longer fits the understanding of anthropologists or the practice of ethnography. As Akhil Gupta and James Ferguson have noted: "In place of such a world of separate, integrated cultural systems . . . political economy 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."[18] Accordingly, anthropologists have argued that we live increasingly in the "global cultural ecumene"[19] of a "world in creolization."[20] 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 . . . ."[21] In both disciplines, therefore, 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 . . . ."[22]

Geographers, though they too historically tended to assume a "natural" bond between a people, the land, and a set of legal institutions, have also come to recognize the power and politics of the construction of space in society as well as the symbolic significance of maps as "almost the perfect representation[s] of the state."[23] 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."[24] First, many people inhabit border areas, where "[t]he fiction of cultures as discrete, objectlike phenomena occupying discrete spaces becomes implausible . . . ."[25] 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

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[18] Akhil Gupta & James Ferguson, *Culture, Power, Place: Ethnography at the End of an Era*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 1, 2 (Akhil Gupta & James Ferguson eds., 1997).

[19] *E.g.*, APPADURAI, *supra* note 10, 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").

[20] *E.g.*, Ulf Hannerz, *The World in Creolisation*, 57 AFR. 546, 547 (1987) (arguing that "a macro-anthropology of culture is apparently required, to provide us with an improved overall understanding of how ideas and their public manifestations are organized, in those social structures of considerable scale and complexity which now encompass Third World lives just as certainly as they encompass our own").

[21] GIDDENS, *supra* note 13, at 64.

[22] Gupta & Ferguson, *supra* note 18, at 4.

[23] Alan K. Henrikson, *The Power and Politics of Maps*, *in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 59 (George J. Demko & William B. Woods eds., 1994).

[24] 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).

[25] Gupta & Ferguson, *supra* note 18, at 34.

workers, nomads, and members of the transnational business and professional elite. For these people, it may be impossible to find a unified cultural identity. For example, "[w]hat is 'the culture' of farm workers who spend half a year in Mexico and half in the United States?"[26] 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.[27] By creating communities of interest rather than place, diasporas (the number of which is increasing largely due to labor immigration) pose an implicit threat to territorially based nation-states.[28] In sum, we see that "[p]rocesses of migration, displacement, and deterritorialization are increasingly sundering the fixed association [among] identity, culture, and place."[29]

Acknowledging community affiliations that exist apart from the nation-state therefore becomes crucial. And by analyzing the social meaning of our affiliations across space, we can think about various alternative conceptions of community:[30]

Sub-national communities. These include political identifications more local than the nation-state—such as provinces, states, towns, and voting districts—or affiliations that form around specific functions or activities—such as water regions, geographical areas, block associations, bowling leagues, religious institutions, and schools—or commonalities that derive from a purported ethnic identification that is not coterminous with the nation-state, such as Basques in Spain, Sikhs in India, Tamils in Sri Lanka, or even white supremacist militias in the United States. Interestingly, while historically considered sub-national, many of these affiliations are increasingly transnational as well.

Transnational communities. These are communities of interest that cut across nation-state boundaries. Perhaps the most important

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[26] *Id.*

[27] Kaplan, *supra* note 24, at 38.

[28] *See* Robin Cohen, *Diasporas and the Nation-State: From Victims to Challengers*, 72 INT'L AFF. 507, 517 (1996) (suggesting that people primarily identify with others based on shared opinions, tastes, ethnicities, religions, and other interests and could therefore become indifferent toward their nation-state).

[29] Akhil Gupta, *The Song of the Nonaligned World: Transnational Identities and the Reinscription of Space in Late Capitalism*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 179, 196 (Akhil Gupta & James Ferguson eds., 1997).

[30] For further discussion of these multiple forms of community, see Berman, *The Globalization of Jurisdiction*, *supra* note *, at 527–45.

transnational force in recent years has been the multinational corporation itself. In addition, we see international monetary funds, free trade regions, global commodities markets, and a nascent international civil society that includes non-governmental organizations such as the Rockefeller and Soros Foundations, Amnesty International, Oxfam, and Greenpeace, as well as business and trade union networks and cooperative efforts of government actors including banking regulators, law-enforcement officials, intelligence agencies, judiciaries, and other local authorities. And a darker example of transnational affiliation, of course, is the development of transnational terrorist organizations such as al-Qaeda.

Supranational communities. Whereas transnationalism binds people to communities of interest *across* territorial borders, supranationalism asserts the primacy of governing norms that exist *above* the nation-state. Perhaps the most obvious example of such affiliation is the United Nations, which insistently invokes an overarching narrative of world community (a narrative that often provokes resistance). Another that has drawn considerable attention in recent years is the effort to construct a European identity operating beyond the individual nation-states on the continent. Meanwhile, the World Trade Organization (WTO) and other trade-related tribunals create a supranational community of interest regarding commercial activity.

It is unclear, of course, whether technological shifts like the development of online communication will, over time, increase or lessen this proliferation of community affiliations. Benedict Anderson, in discussing the rise of nationalism, famously focused on the development of "print capitalism" and the ways in which wide dissemination of news helped cement feelings of loyalty to one's nation-state.[31] Following this paradigm, one might think that greater global communication would increase feelings of homogenization and shared community affiliation. On the other hand, online communication is so decentralized that people may affiliate only with their particular networks and receive their information from a rapidly diffusing set of sources. Thus, I suspect that we are likely to see both the continued persistence of non-state or sub-state community affiliation *along with* the increasing development of supra-state bonds. These changes challenge territorially-based nation-state sovereignty from both "above" and "below." This is particularly true because sub-state, supra-state, or non-territorial affiliations may

[31] *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 36 (rev. ed. 1991) (arguing that the new order of print-capitalism "made it possible for rapidly growing numbers of people to think about themselves, and to relate themselves to others, in profoundly new ways").

sometimes be more deeply felt than bonds of loyalty to nation-states, and non-state communities may wield significant forms of sanction, ranging from community disapprobation to shunning to excommunication to banishment.

III. THE PERSISTENCE OF TERRITORIALITY AND SOVEREIGNTY

Despite the deterritorialization of effects and community affiliation, territoriality and sovereignty do, of course, remain significant. And one area where territoriality and sovereignty continue to be particularly salient is the realm of coercive power and collective violence. After all, physical violence generally must act on a territorially-located body, and even coercive sanctions such as fines are enforced on a person (or possibly a bank account, which is less territorially-based but is still generally deemed to be "located" somewhere in physical space). Sanctions on corporations are not so tied to geography because they are legal entities with no corporeal location, but even with corporations there are usually only a handful of territorially-based regulators that can seize assets or levy fines sufficient to encourage compliance with norms (though global consumer boycotts and the like may be exceptions).

In any event, generally an individual or group wishing to assert a norm on the public stage must rhetorically persuade those who possess coercive power (the police force, the military) to enforce the judgment issued. This is true even *within* a nation-state. It is, of course, a commonplace to say that courts lack their own enforcement power, making them dependent on the willingness of other branches of government to follow judicial orders. And, because courts can only exercise authority to the extent that someone with coercive power chooses to carry out the legal judgments issued, judges need in a sense to rhetorically persuade others within the government that what they say should be enforced.

Likewise, in the transnational or supranational context, efforts to impose norms will often need to enlist local authorities and piggy-back on local state enforcement powers.[32] For example, a judgment rendered

[32] Enforcement based on spatial location, of course, need not be synonymous with enforcement by states. Crime syndicates, for example, wield tremendous coercive power but are not generally an arm of the state. Nevertheless, the idea that the state holds a monopoly on the legitimate use of violence is a founding principle of liberalism and one that is not likely to be seriously attacked anytime soon, at least as an aspiration. Thus, even though criminals, terrorists, militias, guerrillas, warlords and many others (particularly in failed or weak states) may wield coercive power (and may even use violence to de-legitimate the state by challenging the state's monopoly on violence, *see generally* THE LEGITIMIZATION OF VIOLENCE (David E. Apter ed., 1997) (collecting essays analyzing political violence used to overthrow tyrannical regimes, achieve independence or territorial autonomy, or impose beliefs), the power to fine, imprison, physically punish, and conduct military operations remains largely a state-based power. And although it is true that in recent years both prisons and military activities have been increasingly privatized, such private contractors are still hired by (and at least nominally monitored by) the state. For a discussion of the implications of

against a distant defendant will generally require recognition and enforcement in the defendant's home country. This same dynamic plays out with regard to the International Criminal Court, because the court's ability to try human rights abusers will depend both on the ability of local authorities to capture the individuals sought and the willingness of nation-states to hand the accused over to the court. And of course, the WTO relies on nation-states to impose trade sanctions in order to effectuate its judgments.

Thus, international human rights norms often have power only to the extent that those norms are internalized by nation-states or deployed by local actors. Accordingly, a Spanish judge's efforts to prosecute former Chilean leader Augusto Pinochet cannot be evaluated solely based on whether the transnational prosecution actually took place. In addition, it may be equally or more significant that the Spanish prosecution sparked new human rights activity in Chile itself, and may ultimately lead to *domestic* prosecution of Pinochet.[33] 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 Kirchner.[34]

Indeed, scholars are recognizing that official international institutions, such as the United Nations, are often most effective to the extent that they can pressure local bureaucracies.[35] Moreover, international legal norms at times provide local actors with increased leverage to press causes within their countries.[36] For example, as late as 1994, women in Hong Kong were

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foreign affairs privatization on international law, see Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 384 (2006); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005).

[33] *See Chile's Top Court Strips Pinochet of Immunity*, N.Y. TIMES, Aug. 27, 2004, at A3, *available at* LEXIS, News Library, NYT File ("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.").

[34] *See* Editorial, *Argentina's Day of Reckoning*, CHI. TRIB., Apr. 24, 2004, at C26, *available at* LEXIS, News Library, CHTRIB File (discussing Kirchner's signing of a decree allowing international prosecution of dozens of Argentine military officers accused by Spanish prosecutor Baltasar Garzón 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.*

[35] *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 the independence vote).

[36] Of course, such local actors do not only "use" international law as "given" to them, but also, through their social movements, shape the international legal norms themselves. For an argument that human rights discourse has been fundamentally shaped by "Third World" resistance to development,

unable to inherit land.[37] That year a group of rural indigenous women joined forces with urban women's groups to demand legal change. As detailed by Sally Engle Merry and Rachel E. Stern, "[t]he indigenous women slowly shifted from seeing their stories as individual kinship violations to broader examples of discrimination."[38] Ultimately, the women learned to protest these unjust customary laws in the language of international human rights and gender equality. Having done so, they were successful at getting the inheritance rules overturned. This same story has been replicated numerous times around the world as indigenous movements, assisted by a global network of NGOs and activists, use international norms to influence local political or judicial actors. In each case, the reality of territorial enforcement means that the supranational or transnational normative assertion must be in some way "localized" and translated into locally enforceable law. Thus, the local territorial nexus remains crucial, but it does not in any way eliminate or delegitimize the transnational or international normative assertion. And in the end, this sort of territorial/non-territorial hybrid is precisely what a plural order will entail.

IV. SOME POSSIBLE LEGAL CONSEQUENCES

In this final section, I suggest three likely consequences for law that result from the hybrid reality discussed above, in which deterritorialized effects and affiliation combine with the persistent territoriality of coercive enforcement.

A. *The Rise of Dialectical Regulation*

The first consequence, of course, is the rise of intersystemic and dialectical regulation that Ahdieh discusses. As Ahdieh argues, we may see the interactions between various tribunals and regulatory authorities taking 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.[39] In the international context, for example, we may see treaty-based courts exert an important influence even as national courts retain formal independence, much as U.S. federal courts exercising habeas corpus jurisdiction may well influence state court

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see generally BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003).

[37] Sally Engle Merry & Rachel E. Stern, *The Female Inheritance Movement in Hong Kong: Theorizing the Local/Global Interface*, 46 CURRENT ANTHROPOLOGY 387, 387 (2005).

[38] *Id.* at 399.

[39] *See* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2033–34 (2004).

interpretations of U.S. constitutional norms in criminal cases.[40] 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. For example, a panel convened pursuant to the North American Free Trade Agreement (NAFTA) recently determined that a particular Mississippi state appellate procedure violated international norms of due process. [41] Such a procedure, according to the tribunal, constituted an unfair trade practice. In a subsequent Mississippi case concerning the same procedure, the state court will therefore face a form of choice-of-law decision, with the court determining what weight to give the NAFTA tribunal action. And, as Ahdieh points out, court-to-court dialectical regulation is only the tip of the iceberg, as various transnational and intersystemic regulation takes on a similar dialectical dynamic.

B. *The Increasing Importance of Conflict of Laws*

Just as the combination of extraterritorial effects and affiliations on the one hand and territorialized power on the other gives rise to dialectical regulation, it also inevitably puts pressure on the three doctrines traditionally grouped under the rubric of conflict of laws: jurisdiction, choice of law, and judgment recognition.[42] In a world of extraterritorial and non-territorial effects, we will see local populations increasingly attempt to assert dominion (or, in legal terms, jurisdiction) over territorially distant acts or actors. At the same time, we will see non-local actors invoke the jurisdiction of international or transnational tribunals in order to avoid the consequences of local legal proceedings. In both circumstances, battles over globalization will often be fought on the terrain of conflict of laws.

For example, as mentioned previously, online communication creates the possibility (and perhaps even the likelihood) that content posted online by a person in one physical location will violate the law in some other physical location. This poses an inevitable problem of extraterritoriality. Will the person who posts the content be required to conform her activities to the norms of the most restrictive community of readers? Or, alternatively, will the restrictive community of readers,

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[40] *See id.* at 2034–35.

[41] Loewen Group v. United States, 7 ICSID (W. Bank) 421, ¶ 119 (ICSID Case No. ARB(AF)/98/3) (NAFTA Ch. 11 Arb. Trib. 2003). Publicly released documents on all NAFTA disputes are available online at http://www.naftalaw.org.

[42] For a more detailed discussion of these conflicts issues, see generally Berman, *Towards a Cosmopolitan Vision of Conflict of Laws*, *supra* note *; Berman, *The Globalization of Jurisdiction*, *supra* note *.

which has adopted a norm regarding Internet content, be subjected to the proscribed material regardless of its wishes? The answers to these questions depend both on whether the community of readers asserts the jurisdictional authority to impose its norms on the foreign content provider and whether the home country of the content provider chooses to recognize the norms imposed.

Thus, in the celebrated case involving France's efforts to prosecute Yahoo! for allowing French citizens to download Nazi memorabilia and Holocaust denial material,[43] Yahoo! argued that the French assertion of jurisdiction was impermissibly extraterritorial in scope.[44] According to Yahoo!, in order to comply with the injunction it would need to remove the pages from its servers altogether (not just for the French audience), thereby denying such material to non-French citizens, many of whom have the right to access the materials under the laws of their countries.[45] Most importantly, Yahoo! argued that such extraterritorial censoring of American web content would run afoul of the First Amendment of the U.S. Constitution.[46] Thus, Yahoo! and others[47] contended that the French assertion of jurisdiction was an impermissible attempt by France to impose global rules for Internet expression.[48]

Yet, the extraterritoriality charge runs in both directions. If France is *not* able to block the access of French citizens to proscribed material, then the United States will effectively be imposing First Amendment norms on the entire world. Indeed, we should not be surprised that as the Internet itself becomes less U.S.-centered, a variety of content norms will begin competing for primacy.[49] And though geographical tracking software might seem to solve the problem by allowing websites to offer different content to different users, such a solution is probably illusory because it would still require the sites to analyze the laws of all

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[43] Tribunal de grande instance [T.G.I.] Paris, May 22, 2000, *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm.

[44] *See* T.G.I. Paris, Nov. 20, 2000, *available at* http://www.eff.org/legal/Jurisdiction_and_sovereignty/LICRA_v_Yahoo/20001120_fr_int_ruling.en.pdf., at *3.

[45] *Id.* at *5, *7, *10, *20.

[46] *Id.* at *18.

[47] *See, e.g.*, Carl S. Kaplan, *Experts See Online Speech Case as Bellwether*, N.Y. TIMES, Jan. 5, 2001, *available at* http://www.nytimes.com/2001/01/05/technology/05CYBERLAW.html (quoting the warning of Barry Steinhardt, associate director of the American Civil Liberties Union, that if "litigants and governments in other countries . . . go after American service providers . . . we could easily wind up with a lowest common denominator standard for protected speech on the Net").

[48] As Greg Wrenn, associate general counsel for Yahoo!'s international division, put it: "[w]e are not going to acquiesce in the notion that foreign countries have unlimited jurisdiction to regulate the content of U.S.-based sites." *Id.*

[49] *See* Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002) (arguing that the French *Yahoo!* decision signals that the Internet regulatory framework must recognize values adopted by different states and can no longer be dictated by primarily U.S.-based technical elites).

jurisdictions to determine what material to filter for which users.[50] Cross-border environmental[51] and trade regulation[52] raise similar issues.

Just as local communities affected by distant corporate activity may seek to assert jurisdiction over those allegedly causing the harm, corporations may seek to *avoid* local jurisdiction by invoking the competing jurisdiction of international tribunals. For example, as noted previously, under NAFTA and other similar agreements, special panels can pass judgment on the due process provided in local legal proceedings.[53] And though the panels cannot directly review or overturn local judgments, they can levy fines against the federal government signatories of the agreement,[54] thereby undermining the impact of the local judgment. Meanwhile, in the realm of human rights, we have seen criminal defendants convicted in state courts in the United States proceed (through their governments) to the International Court of Justice (ICJ) to argue that they were denied the right to contact their consulate, as required by treaty.[55] Again, although the ICJ judgments are technically unenforceable in the U.S., at least one state court followed the ICJ's command anyway.[56]

In each of these cases, we see a dialectical dance similar to the one Ahdieh identifies, created by the fact that multiple communities are asserting jurisdiction over the same activities. Such dances are likely to become the norm, as a variety of communities claim an interest in regulating distant behavior having extraterritorial effects (as in *Yahoo!*), or as parties claim a community affiliation beyond the local (as in the trade and human rights examples).

All of these extraterritorial jurisdictional assertions inevitably increase the pressure on choice-of-law doctrines as well. For example, Anupam Chander has observed that many members of the Indian-American diaspora

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[50] Indeed, one member of an expert panel appointed by the *Yahoo!* court to explore the feasibility of geographical filtering subsequently argued that such filtering, though technically feasible, would impose a tremendous burden on services such as Yahoo! because such services would be required "to maintain a huge matrix of pages versus jurisdictions to see who can and can't see what." Ben Laurie, An Expert's Apology (Nov. 21, 2000), http://www.apache-ssl.org/apology.html.

[51] *See, e.g.*, TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Bratspies & Miller eds. 2006); Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 535–36 (2001).

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

[53] *See* North American Free Trade Agreement, U.S.-Can.-Mex., ch. 19, Dec. 17, 1992, 32 I.L.M. 289, 684–85, 687–91 (entered into force Jan. 1, 1994) (outlining remedies available under Chapter 11).

[54] *Id.* at art. 1135.

[55] *See Avena and Other Mexican Nationals* (*Avena*), (Mex. v. U.S.), 43 I.L.M. 581 (Mar. 31, 2004).

[56] *See, e.g.*, Torres v. Oklahoma (*Torres II*), No. 2004-442 (Okla. Crim. App. May 13, 2004) (remanding case for evidentiary hearing in light of ICJ ruling).

purchase bonds issued by their home country of India.[57] The purchase of these bonds obviously reflects the ongoing tie these members of the Indian diaspora feel for their "homeland." Thus, one might argue that, even when the bonds are purchased in the United States, the purchases should be governed by Indian, rather than U.S., securities laws because the bond sale reflects a substantive (and voluntary) tie between the purchasers and the Indian government. Likewise, multinational copyright disputes could be adjudicated through the application of hybrid legal norms drawn from a variety of relevant countries.[58]

Meanwhile, the reality of local territorial enforcement makes it more likely that authorities in one territorial location will be asked to enforce a judgment issued elsewhere. The criteria for making such an enforcement decision is uncertain and likely to change over time. Within the United States, for example, the Constitution's Full Faith and Credit Clause requires that a valid judgment issued by one state be enforced by every other state even if the judgment being enforced would be *illegal* if issued by the rendering state.[59] But of course, within a single, relatively homogenous country, the idea of one state enforcing another state's judgment does not seem so significant because the variations from state to state are likely to be relatively minor. In contrast, transnational recognition of judgments will be more controversial.

Yet, while the decision to enforce a judgment surely will be less automatic when the judgment at issue was rendered by a foreign (or international) tribunal, many of the same principles are still relevant. Thus, courts could acknowledge the importance of participating in an interlocking international legal system, where litigants cannot simply avoid unpleasant judgments by relocating. Moreover, deference to other courts will have long-term reciprocal benefits. Particularly when the parties have no significant affiliation with the enforcing community, there is little reason for a court to insist on following domestic public policies in the face of such competing "conflicts values" and therefore deny enforcement. And though the doctrine of comity has long been used to capture these values,[60]

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[57] *See* Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1006, 1066–74 (2001).

[58] *See, e.g.*, Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000) (advocating this approach).

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

[60] *See* Hilton v. Guyot, 159 U.S. 113, 164 (1895) ("[Comity] is the recognition which one nation

thinking of the issue as a matter of judgment recognition (instead of comity) may discourage courts from reflexively invoking public policy to avoid unpopular foreign judgments.

In any event, it is clear that judgment recognition is increasingly the place where deterritorialized jurisdictional assertions meet the reality of territorial enforcement. If coercive power remains local, then the crucial question will be whether a distant community's articulation of norms is sufficiently persuasive to convince those wielding coercive power to enforce such norms. For example, if a community purports to adjudicate a dispute, its judgment is not necessarily self-executing, particularly if the losing party is territorially distant. Thus, some entity with police power must enforce the judgment. Accordingly, the question becomes not whether a community can assert jurisdiction, but whether other communities are willing to give deference to the judgment rendered and enforce it as if it were their own. Indeed, even at the moment that a community daringly asserts its own legal jurisdiction, it is immediately forced to acknowledge that its invention is limited by the willingness of others to accept the judgment as normatively legitimate.[61]

Yet, sometimes the mere assertion of jurisdiction and articulation of a norm (even without literal enforcement power) has such great impact that it effectively alters legal consciousness over time.[62] As Martha Finnemore has noted, "[s]ocially constructed rules, principles, norms of behavior, and shared beliefs may provide states, individuals, and other actors with understandings of what is important or valuable and what are effective and/or legitimate means of obtaining those valued goods."[63] Similarly, legal consciousness scholars have long argued that law operates as much by influencing modes of thought as by determining conduct in any specific case. They argue that we cannot escape the categories and discourses that law supplies.[64] These categories may

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allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws").

[61] As Robert Cover points out, though law is a bridge to an alternative set of norms, the bridge begins not in "alternity" but in reality. Therefore there are real constraints on the engineering of that bridge. *See* Cover, *Folktales of Justice*, *supra* note 6, at 187 ("If law . . . is a bridge from *reality* to a new world there must be some constraints on its engineering. Judges must dare, but what happens when they lose that reality?").

[62] For further discussion of legal consciousness in considering the efficacy of international law, see generally Berman, *supra* note 8.

[63] MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 15 (1996).

[64] 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.").

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.[65] 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."[66]

Thus, even a jurisdictional assertion without enforcement power can affect legal consciousness. For example, as noted previously, the attempted prosecution of Augusto Pinochet in Spain, while not literally "successful," prompted an international debate (and new legal precedent) concerning head-of-state immunity, perhaps altering norms of behavior. Moreover, the transnational prosecution helped change the legal and political climate in Chile concerning prevailing norms of accountability for past human rights abuses. Similarly, we can identify instances when an international regime without enforcement power nevertheless influenced nation-state decision-making. Thus,

> [p]rior to the actions of UNESCO, most states, especially less developed countries . . ., had no notion that they needed or wanted a state science bureaucracy. Similarly, European heads of state were not particularly concerned about treatment of the war wounded until Henri Dunant and the International Committee of the Red Cross made it an issue. Global poverty alleviation, while long considered desirable in the abstract, was not considered a pressing responsibility of states, particularly of developed states, until the World Bank under Robert McNamara made it a necessary part of development.[67]

And of course, ideas of what is "right," "just," "appropriate," and in one's interest all will inevitably come to reflect internalized norms. Accordingly, the persuasive power of even unenforceable norms may cause states to

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[65] 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)).

[66] Gordon, *supra* note 64, at 103.

[67] FINNEMORE, *supra* note 63, at 12.

develop interests they might not otherwise have, while shifting both popular opinion and the content of unconscious conceptions of "the way things are."

C. *The Need to Study Plural Law-Making Communities*

Finally, because of the erosion of territoriality and the increased salience of non-territorial affiliations, we must wrestle with the fact that we all always inhabit a world of multiple normative communities. Some of those communities impose their norms through officially sanctioned coercive force and formal legal processes. But many other normative communities articulate norms without formal state power behind them. These norms have varying degrees of impact, but it would be foolish to ignore them as somehow not "law." Indeed, legal pluralists have long noted that law does not reside solely in the coercive commands of a sovereign power.[68] Rather, law is constantly constructed through the contest of these various norm-generating communities.[69] Thus, although "official" norms articulated by sovereign entities obviously count as "law," such official assertions of prescriptive or adjudicatory jurisdiction are only some of the many ways in which normative commitments arise.

This pluralist framework will become increasingly important. Indeed, the study of international and transnational norm development already extends far beyond nation-states. For example, the Project on International Courts and Tribunals has identified approximately 125 international institutions,[70] all issuing decisions that have some effect on state legal authorities, though those effects are sometimes deemed binding, sometimes merely persuasive, and often fall somewhere between the two. Meanwhile, scholars have sought to define and understand "transnational legal process," the ways in which nation-states come to internalize international or transnational norms, even when those norms are not directly backed by coercive power.[71] Others have studied non-traditional legal actors such as

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[68] *See, e.g.*, Sally Falk Moore, *Legal Systems of the World*, *in* LAW AND THE SOCIAL SCIENCES 11, 15 (Leon Lipson & Stanton Wheeler eds., 1986) ("[N]ot all the phenomena related to law and not all that are lawlike have their source in the government."). For further discussions of legal pluralism, see CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425 (1980); Marc Galanter, *Justice in Many 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 L. & SOC'Y REV. 869, 870 (1988).

[69] *See generally* Cover, *Folktales of Justice*, *supra* note 6; Cover, Nomos *and Narrative*, *supra* note 6.

[70] PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, THE INTERNATIONAL JUDICIARY IN CONTEXT (2001), http://www.pict-pcti.org/research/systemic_issues/synoptic_chart.html (follow "version 2.0" hyperlink).

[71] *See generally* Harold Hongju Koh, Lecture, *How Is International Human Rights Law*

NGOs and their role in defining (and sometimes enforcing) legal standards.[72] In addition, many non-state communities seek to inculcate norms transnationally, sub-nationally, or supranationally, whether through various forms of private ordering, industry standard-setting, political lobbying, or other means.

Indeed, prior to the rise of the state system, much lawmaking took place in autonomous institutions and groups, such as cities and guilds, and large geographic areas were left largely unregulated.[73] Even in modern nation-states, we see a whole range of non-state lawmaking in tribal or ethnic enclaves,[74] religious organizations,[75] corporate bylaws, social customs,[76] private regulatory bodies, and a wide variety of groups, associations, and non-state institutions.[77] For example, in England,

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Enforced?, 74 IND. L.J. 1397 (1999); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)); Harold Hongju Koh, Lecture, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (hereinafter Koh, *Transnational Legal Process*).

[72] *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.").

[73] *See* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 14–38 (Walter L. Moll trans., Russell & Russell 1962) (1936) (analyzing and describing legal and nonlegal norms). *See generally* OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES (George Heiman ed. & trans., 1977) (discussing non-state associations); OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800 (Ernest Barker trans., Beacon Press 1960) (1934) (discussing the co-evolution of state and non-state normative associations).

[74] *See, e.g.*, Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 360–67 (1993) (delineating the subtle interactions between the legal system of the Romani people and the norms of their host countries).

[75] *See, e.g.*, CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980) (examining four 19th-century American religious utopian communities: the Shakers, 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 68, at 28; *see generally* 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).

[76] *See, e.g.*, LON L. FULLER, ANATOMY OF THE LAW 43–49 (Greenwood Press 1976) (1968) (describing "implicit law," which includes everything from rules governing a camping trip among friends to the customs of merchants).

[77] *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, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545 (1989) (surveying the sources of popular perceptions of the law); 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).

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.[78] 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."[79] Thus, as Janet Koven Levit has noted in the context of transnational trade finance, rules embodied in various informal standards, procedures, and agreements that bind banks and credit agencies have the force of law even without any official governmental involvement.[80] In addition, she points out that more formal law-making institutions such as the WTO have, over time, appropriated these norms into their official legal instruments.[81]

In some circumstances, official legal actors may delegate lawmaking authority to non-state entities or recognize the efficacy of non-state norms. For example, commercial litigation, particularly in the international arena, increasingly takes place before non-state arbitral panels.[82] Likewise, non-governmental standard-setting bodies, from Underwriters Laboratories (which tests electrical and other equipment) to the Motion Picture Association of America (which rates the content of films) to the Internet Corporation for Assigned Names and Numbers (which administers the Internet domain name system), construct detailed normative systems with the effect of law. Regulation of much financial market activity is left to private authorities such as stock markets or trade associations like the National Association of Securities Dealers. These international trade association groups and their private standard-setting bodies wield a tremendous influence in creating voluntary standards that become industry

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[78] *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 nonlegal means of enforcing order among members of these institutions).

[79] 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, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724 (2001) (describing the private commercial legal system employed by the cotton industry); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992) (discussing a system of "private lawmaking" employed in the New York Diamond Dealers Club).

[80] *See generally* Levit, *supra* note 79.

[81] *Id.* at 128–29.

[82] *See, e.g.*, YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 5–9 (1996) (noting the "tremendous growth" in international commercial arbitration over the past twenty-five to thirty years).

norms.[83] For example, in the wake of the scandal surrounding Enron Corporation, the governmental reforms incorporated into the Sarbanes-Oxley Act of 2002,[84] 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.[85] 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.[86]

The proliferation of international tribunals also, of course, creates the opportunity for plural norm creation. Thus, commentators have noted the increasing role of WTO appellate tribunals in creating an international common law of trade,[87] as well as the new prominence of other specialized trade courts developed in connection with free trade agreements.[88] Moreover, though only state parties can be the formal litigants in the WTO dispute resolution process, free trade panels permit private parties to challenge domestic governmental regulations directly.[89]

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[83] 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*, FAIR LABOR ASS'N, *available at* http://www.fairlabor.org/all/code/ (providing a set of standards seeking to define what constitutes decent and humane working conditions) (last visited April 17, 2006). Likewise, in the chemical industry, groups such as the Canadian Chemical Manufacturers Association and the International Counsel of Chemical 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).

[84] Pub. L. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

[85] *See* Jenny Wiggins, *Enron—Wall Street and Regulator: S&P Outlines Ratings Overhaul in Light of Enron*, FIN. TIMES, Jan. 26, 2002, 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").

[86] *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).

[87] *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.").

[88] *See, e.g.*, Homer E. Moyer, Jr., *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)).

[89] 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*

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.[90] 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*.[91]

Accordingly, a more comprehensive conception of the global legal order must attend to the jurisdictional assertions and articulations of legal (or quasi-legal) norms by nonsovereign communities.[92] Such jurisdictional assertions are significant because, though they often lack state-backed coercive power, they may in fact carry real coercive force. And, even when they do not have any coercive force at all, they may open a space for the articulation of legal norms that are often subsequently incorporated into official legal regimes. Indeed, once we recognize that the state does not hold a monopoly on the articulation and exercise of legal norms, then we can see law as a locus for various communities to debate different visions of alternative futures.

Americas, 33 ENVT'L. 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).

[90] *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).

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

[92] Cover argues that such a capacious understanding of "law" would "deny to the nation state any special status for the collective behavior of its officials or for their systematic understandings of some special set of 'governing' norms." Cover, *Folktales of Justice*, *supra* note 6, at 176. According to Cover, such "official" norms may count as law, but they must share that title with "thousands of other social understandings." *Id.*

V. CONCLUSION

The rise of intersystemic regulation that Robert Ahdieh identifies follows from the hybrid territoriality of the contemporary world, where we see the deterritorialization of effects and affiliations, combined with territorially-based enforcement. Together, such territorial realities bring forth a multivocal process of interaction among a wide variety of norm-generating communities that are based on the entire panoply of multiple overlapping affiliations and attachments people actually experience in their daily lives, from the local to the global (including some affiliations not based on territory at all). In this vision, a jurisdictional assertion becomes part of an international process of community definition and norm creation.

Accordingly, rational-choice understandings of how international law works or pure theory debates about sovereignty tend to be unhelpful because they usually focus too much on the persistence of coercive enforcement power, while paying insufficient attention to the other side of the equation: the deterritorialization of effects and affiliations. Moreover, such rational choice models tend to miss the role of rhetorical persuasion, informal articulations of legal norms, changes in legal consciousness, and networks of affiliation that may not possess literal enforcement power.[93] Thus, they fail to fully consider not only the diffusion of norms across *territorial* borders, but also the fact that legal articulations often function beyond the supposed *conceptual* borders between law and political rhetoric.

Ultimately, we should conceptualize legal jurisdiction and the assertion of regulatory authority more capaciously as juris*persuasion*, focusing not so much on the power to *enforce* legal norms, but the ability to *articulate* them. The assertion of jurisdiction is the way a community—any community—seizes the language of law, attempts to construct itself as a coherent community, offers a norm to regulate that community, and asserts its "soft" power. This view recognizes the variety of normative communities to which people belong, affords a more nuanced understanding of the changing role of nation-states in a complex and increasingly networked international order, and takes seriously ways in which even non-state communities exert normative force.

Ahdieh's model of intersystemic regulation thus has power both as a description of current regulatory trends and as a normative vision of how law must operate in a world of multiple jurisdictional assertions and multiple assertions of norms. And while the non-state realm of plural law-making deserves a more systematic treatment than Ahdieh has time to give it here, I have no doubt that any future analysis will need to grapple with the

[93] I develop this argument in Berman, *supra* note 8.

taxonomy Ahdieh proposes. As both poet and scholar, therefore, Ahdieh has performed an important service, and those of us interested in intersystemic law-making will surely draw on his insights for years to come.