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## Understanding Global Legal Pluralism: From Local to Global, From Descriptive to Normative

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# UNDERSTANDING GLOBAL LEGAL PLURALISM: FROM LOCAL TO GLOBAL, FROM DESCRIPTIVE TO NORMATIVE

Paul Schiff Berman

As a scholarly project, global legal pluralism has been extraordinarily successful, and it is not difficult to see why. Legal pluralists had long observed that, in any given social context, people are regulated by multiple different legal and quasi-legal regimes and that these regimes are sometimes associated with formal state law, but sometimes they are not.<sup>1</sup> Global legal pluralism took that insight and applied it to the post–Cold War international and transnational arena at just the right moment. Circa 1998, international and transnational institutions were proliferating, industry standard-setting bodies and corporate codes of conduct were taking on new prominence, and the rise of online interaction meant that social life was increasingly deterritorialized and that almost any piece of electronic data or any online interaction could implicate multiple regulatory regimes.<sup>2</sup> This complex web of regulatory bodies included some regimes that were state-based,

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<sup>1</sup> For a discussion of the emergence of global legal pluralism from earlier scholarship on legal pluralism, see Paul Schiff Berman, “The New Legal Pluralism,” *Annual Review of Law & Social Science* 5 (2009): 225–42.

<sup>2</sup> See, e.g., Paul Schiff Berman, “Legal Jurisdiction and the Deterritorialization of Social Life,” in *Research Handbook on the Law of Virtual and Augmented Reality*, eds. Woodrow Barfield and Marc Jonathan Blitz (Cheltenham: Edward Elgar Publishing, 2019), 662–84.

some that were built and maintained by nonstate actors, some that fell within the purview of local authorities and jurisdictional entities, and some that involved international courts, tribunals, arbitral bodies, and regulatory organizations.<sup>3</sup>

Global legal pluralism provided scholars with a theoretical lens for conceptualizing the complex interactions among these various legal and quasi-legal entities. Most importantly, the pluralist perspective allowed theorists to extricate themselves from intractable and largely fruitless debates about what should count as law and what should not. For example, many international relations theorists, as well as scholars influenced by game theory and other formalist models of power, argued that international law was not truly law, given the absence of coercive enforcement.<sup>4</sup> Likewise, those focused only on official lawmaking bodies tended to

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<sup>3</sup> For a more detailed discussion of this context, see Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (New York: Cambridge University Press, 2012).

<sup>4</sup> See, e.g., Edward Hallett Carr, *The Twenty Years' Crisis, 1919–1939: An Introduction to The Study of International Relations* (New York: Harper Perennial, 1964), 85–88 (rejecting internationalism/cosmopolitanism and stating that the principles commonly invoked in international politics were “unconscious reflexions of national policy based on a particular interpretation of national interest at a particular time”); Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005) (using game theory and rational choice modeling in an effort to show that international law has no independent valence); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th ed. (1948; New York: Alfred A. Knopf, 1973), 5 (noting that the “main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power”); Kenneth N. Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley Publishing Company, 1979), 122 (arguing

miss the potent power of non-state law-making, such as industry-specific regulatory entities or standard-setting organizations.<sup>5</sup> Meanwhile, networks of nongovernmental organizations (NGOs) promulgating rules, standards, ratings, transparency metrics, and the like wielded important influence that was often missed by those only willing to look at state-based law.<sup>6</sup> And corporations, particularly online platforms such as Facebook, Google, Microsoft, and Apple, increasingly deployed the tools of transnational legal enforcement more effectively than territorially bounded nation-states.<sup>7</sup>

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that “although states may be disposed to react to international constraints and incentives,” they do so only if such actions conform with the state’s internal interests); Robert H. Bork, “The Limits of ‘International Law,’” *National Interest* 18 (Winter 1989–1990): 3–10, 3 (arguing against the importance of international law); Francis A. Boyle, “The Irrelevance of International Law: The Schism Between International Law and International Politics,” *California Western International Law Journal* 10 (1980): 193–219, 201 (arguing that World War II itself made clear that states cannot rely solely on international law to protect their interests).

<sup>5</sup> See, e.g., Janet Koven Levit, “A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments,” *Yale Journal of International Law* 30, no. 1 (2005): 125–209.

<sup>6</sup> See, e.g., Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago: University of Chicago Press, 2016).

<sup>7</sup> See, e.g., Jennifer Daskal, “Borders and Bits,” *Vanderbilt Law Review* 71 (2018): 179–240; see also Paul Schiff Berman, “Legal Jurisdiction and the Deterritorialization of Data,” *Vanderbilt Law Review* 71 (2018): 11–32.

Global legal pluralism applied the insights of sociolegal scholarship and turned its gaze away from abstract questions of legitimacy and toward empirical questions of efficacy and more complex accounts of institutionalized collective action. Thus, pluralists de-emphasized the supposedly clear distinctions between a norm, a custom, a law, a standard, a moral command, a sociological consensus, a psychological imperative, and the like. Instead, a pluralist approach focused on both enacted law and what has sometimes been called “implicit” or “interactional” law, the purposive practices that groups of people enter into that impact their practical sense of binding obligation.<sup>8</sup> In addition, pluralists recognized that both enacted and interactional legal norms tend to seep into consciousness, such that the mere existence of these commands, whether enforced or not, may sometimes alter the power dynamics or options placed on the table in policy discussions. Of course, questions of legitimacy and efficacy are inextricably linked, but pluralists argue that once we come to recognize multiple sources of transnational and nonstate authority, it is difficult to maintain any single abstract conception of law. At best, authority is always relative and always contested, and our models for describing law should reflect that pluralism.<sup>9</sup>

Global legal pluralism also allowed scholars to emphasize the constant interaction *among* these legal and quasi-legal systems. If authority and jurisdiction are never absolute but are

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<sup>8</sup> See Wibren Van Der Burg, *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Farnham: Ashgate Publishing, 2014), 98–105 (drawing on theorist Lon Fuller to develop a theory of interactional law).

<sup>9</sup> See Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford: Oxford University Press, 2013).

instead always relative and contested, then we need to study that contestation, see how regulatory norms move across territorial borders, analyze networks of influence, and try to tease out changes in legal consciousness over time—the often unnoticed and subtle shifts in people’s taken-for-granted sense of the way things are or have to be.<sup>10</sup> Significantly, these changes in legal consciousness can be influenced by norms that are articulated even without coercive power behind them.

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<sup>10</sup> See, e.g., Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore: Johns Hopkins University Press, 1988), 30–32 (examining “the role of legal ideology in structuring mass consciousness”); Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998), 45 (defining “legal consciousness” and arguing that “every time a person interprets some event in terms of legal concepts or terminology—whether to applaud or to criticize, whether to appropriate or to resist—legality is produced” and “repeated invocation of the law sustains its capacity to comprise social relations”); Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994), 7 (“Legal (or rights) consciousness . . . refers to the ongoing, dynamic process of constructing one’s understanding of, and relationship to, the social world through use of legal conventions and discourses.”) (emphasis in original); Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990), 5 (arguing that “[l]egal consciousness is expressed by the act of going to court as well as by talk about rights and entitlements” and that such “[c]onsciousness develops through individual experiences”); Susan S. Silbey, “Making a Place for Cultural Analyses of Law,” *Law & Social Inquiry* 17, no. 1 (Winter 1992): 39–48, 42 (noting that “law contributes to the articulation of meanings and values of daily life”).

Finally, moving from the descriptive to the normative, communities drawing on the insights of global legal pluralism might sometimes affirmatively seek to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue rather than dictating norms hierarchically. Such an approach is not derived from any overarching universal set of substantive truths and does not require a commitment to particular substantive values. They only require a pragmatic willingness to engage with other possible normative systems and potentially to restrain one's own voice for the sake of forging more workable, longer-lasting relationships and harmony among multiple communities. In this way, law becomes a forum for dialogue across difference. Thus, global legal pluralism provided a useful framework for both designing and evaluating legal institutions and procedures, separate from their substantive aims.

In short, during the past two decades, a rich body of work has established pluralism as an important descriptive and normative framework for understanding a world of overlapping jurisdictional assertions, both state and nonstate. During that time, there has been a veritable explosion of scholarship on legal pluralism, soft law, global constitutionalism, the relationships among relative authorities, and the fragmentation and reinforcement of territorial boundaries.

Some of this work explicitly references legal pluralism and draws on the robust literature theorizing the interaction of legal and quasi-legal systems. However, some does not. Indeed, a number of the contributors to this volume would surely not have identified their work as grappling with issues of legal pluralism prior to my inviting them to participate in this project. But in many ways, that is precisely the point. Legal pluralism simply is the reality underlying the work of any scholar or policymaker who seeks to address the contestation among norm-

generating communities, the interaction of legal authorities, or the ways in which norms seep across territorial borders and are used, transformed, or contested locally. The goal of this volume is to encourage scholars studying different substantive areas of law to use global legal pluralism as a theoretical framework that might help them to conceptualize both the descriptive and normative issues they face.

## *1 From Local to Global*

Legal pluralism historically focused on particularized geographical locations of contestation. Anthropologists situated themselves in local context and analyzed the complex dynamics of legal jurisdictional overlap in specific settings. Likewise, historians of empire largely emphasized situations in which imperial legal regimes attempted (with varying degrees of success) to displace local regimes. And political theorists analyzed church-state relations, again in specific contexts. Legal pluralism was an exercise in “thick description,” rooted in a detailed analysis of the day-to-day dynamics of legal systems and their challenges, as well as the acts of resistance by local agents on the ground.

The move from legal pluralism to *global* legal pluralism thus faces significant challenges. How, after all, can a very particularized, context-dependent scholarship of thick description be useful in conceptualizing anything “global”? Or, to put it another way, how can any theory of pluralism possibly *be* global? Aren’t those two words fundamentally in tension with each other? Any descriptive or normative approach that purports to be global seems by definition to ignore or attempt to eliminate pluralism. Likewise, any approach emphasizing pluralism is intrinsically about diversity and contestation and therefore cannot possibly be global.

So, how to respond?

To begin, I think it is important to understand that global legal pluralism is not a global theory in one sense. It certainly does not purport to offer one definition of law or one legal regime that would or could operate on a global scale. Such a universalist approach would be antithetical to the whole notion of pluralism. More fundamentally, pluralists properly recognize that *no* legal regime could ever be global. As Hans Lindahl has observed, there is no way to conceptualize a normative legal order, even of the most inclusive sort, that does not somehow exclude as well as include because there will always be some who resist and refuse to recognize that order.<sup>11</sup> Thus, it is impossible to offer any descriptive or normative account of law, no matter how deferential to pluralism, that will not effectively eliminate some of the pluralism by creating boundaries between what is included and what is excluded. Indeed, there may be no way out of this conundrum if one wants to posit any sort of account of how law or legal institutions ought to be conceptualized. Clearly “global” cannot mean “universal.”

However, that does not mean that the word “global” is not useful in this context. As the chapters in this book make abundantly clear, legal pluralism is not only a local phenomenon. Local communities are affected by, and in turn strategically deploy, foreign legal norms and jurisdictional assertions as well as globally produced normative tropes and rhetorical styles. Meanwhile, the transnational arena is replete with normative systems and jurisdictional claims

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<sup>11</sup> Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018), 2 (“No global legal order is universal or universalisable because unification and pluralisation are the two faces of the single, ongoing process of setting the boundaries of legal orders, global or otherwise.”).

by a variety of governmental and nongovernmental entities. Legal pluralism provides a useful way of conceptualizing the interaction of all these various norm assertions and their potential efficacy.

But then we need a word to describe this nonlocal legal pluralism. It is not “international” because the analysis is not limited to the interactions of territorially defined nation-states. And it is not, as discussed previously, universal. The question therefore is whether the word “global” captures something essential that would otherwise be missed.

I think it does. As I have argued elsewhere,<sup>12</sup> global legal pluralism occupies a crucial cosmopolitan middle ground between what we might call sovereigntist territorialism on the one hand and universalism on the other. Thus, neither “international” nor “universal” fits the bill. It is worth taking a moment to understand why. Recall that the central insight of global legal pluralism is that we live in a world of hybrid legal spaces, where multiple normative regimes may govern (or at least strongly influence) our activities and where authority tends to be relative, not absolute.

Sovereigntist territorialism represents a retreat from this messy hybrid world of multiple, overlapping normative authority. Instead, the state-centric view of the world rests on the convenient fiction that nation-states exist in autonomous, territorially distinct spheres and that activities therefore fall under the legal jurisdiction of only one regime at a time. For example, traditional legal rules have tied jurisdiction to territory: a state could exercise complete authority within its territorial borders and no authority beyond it. In the twentieth

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<sup>12</sup> See Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, *supra* note 3.

century, such rules were loosened, but territorial location has remained the principal touchstone for assigning legal authority. Accordingly, if one could spatially ground a dispute, one could most likely determine the legal rule that would apply. But consider such a system in today's world. Should the U.S. government be able to sidestep the U.S. Constitution when it houses prisoners in "offshore" detention facilities in Guantanamo Bay or elsewhere around the world? Should spatially distant corporations that create serious local harms be able to escape local legal regulation simply because they are not physically located in the jurisdiction? How can we best understand the complex relationships among international, regional, national, and subnational legal systems? Does it make sense to think that satellite transmissions, online interactions, and complex financial transactions have any territorial locus at all? When the U.S. government seeks to shut down the computer of a hacker located in Russia, does the virus transmitted constitute an act of war or a violation of Russia's sovereignty? And in a world where nonstate actors such as industry standard-setting bodies, NGOs, religious institutions, ethnic groups, terrorist networks, and others exert significant normative pull, can we build a sufficiently capacious understanding of the very idea of law to address the incredible array of overlapping authorities that are our daily reality?

Thus, a simple model that looks only to territorial delineations among official state-based legal systems is now simply untenable (if it was ever useful to begin with). Thankfully, debates about globalization are no longer centered on the polarizing question of whether the nation-state is dying or not. But one does not need to believe in the death of the nation-state to recognize both that physical location can no longer be the sole criterion for conceptualizing legal authority and that nation-states must work within a framework of multiple, overlapping jurisdictional assertions by state, international, and even nonstate communities. Each of these types of overlapping jurisdictional assertions creates a potentially hybrid legal space

that is not easily eliminated. The influence and application of foreign norms or foreign decision-making bodies may be useful and productive or alien and threatening, but in any event they are inevitable and cannot be willed away by fiat.

As with sovereigntist territorialism, universalism also represents a retreat from the hybrid legal spaces of a pluralist world. Here, instead of responding to normative difference by seeking to impose a single local authority, we see the desire to erase normative difference altogether. Indeed, international legal theory has long yearned for an overarching set of commitments that would establish a more peaceful and harmonious global community. This supposed new world order variously focuses on the religiously based natural law principles of international human rights or the neoliberal ideology of free trade and its need to harmonize rules that regulate commerce.

One cannot discount the importance of universalism. Certainly since World War II we have seen the creation of a dizzying array of international institutions, multilateral and bilateral treaties, conventions, cross-border regulatory coordination efforts, and the like. In one way or another, all of this activity represents the desire to harmonize conflicting norms. And on many fronts, both in public and private law, norms have converged, either through hegemonic imposition or global embrace. Moreover, such harmonization has important benefits because it tends to lower transaction costs and uncertainty as to what norms will be applied to any given activity. Yet there are reasons to question both the desirability and, more importantly, the feasibility of universalism, at least in some contexts. This is because universalism is based on the premise that people are fundamentally the same despite differences in culture and circumstance. In contrast, legal pluralism--founded as it is on anthropological observation (and celebration) of cultural difference--rejects the idea that we

should ever expect or necessarily encourage uniformity. From such a perspective, universalism's efforts to dissolve the multi-rootedness of community affiliation into one overarching identity is inherently problematic because it fails to capture the extreme emotional ties people still feel to distinct national or local communities.

In addition, universalism inevitably erases diversity. Indeed, the whole point of a universalist or harmonization solution is to combat diversity or fragmentation. Yet, although one can appreciate the goal, erasing diversity may involve the silencing of less powerful voices in the global conversation. Thus, the presumed universal may also be the hegemonic. This argument is most often heard by those who resist international human rights norms or international trade agreements because they may run roughshod over important local practices, customs, or perspectives. Critics contend that seemingly universal norms tend to become a Western or Northern imperialist imposition on less powerful communities or a corporate globalist imposition of free market ideology over environmental or labor concerns. In these debates we see replayed the insistence on universal imposition on the one hand and the pristine integrity of the local community on the other. Both positions are retreats from pluralism. In contrast, a global legal pluralist vision focuses on the interactions between these two positions: the ways in which local actors deploy the universalist language of human rights or economic empowerment or environmental stewardship to advance positions strategically, the ways in which so-called local voices interact with seemingly international ones to create change to internationalist regimes and assumptions, and so on. Only through this sort of interactive vision can we avoid reifying either the universal or the local. The word "global" invokes this multi-rooted process rather than dissolving it into sovereigntist territorialism or universalism.

## *2 From Sovereignty to Authority*

Instead of focusing on sovereign states, pluralists tend to think in terms of multiple authorities. Moreover, they realize that all authority is relative, not absolute. This is particularly true in the face of growing transnational and nonstate claims to authority. In such a world, a burgeoning collection of authorities inevitably overlaps, interacts, negotiates, and accommodates. These authorities inhabit jurisdictional spheres that are often contested, and so the goal of most pluralist projects, at root level, is to describe and conceptualize the interactions.

This idea of relative authority, however, immediately sets up a theoretical conundrum because at least some conceptions of authority depend as a definitional matter on that authority being absolute, *not* relative. Indeed, some argue that a relative authority is not a true authority at all. For example, Joseph Raz in *The Authority of Law* argues that central to “the uniqueness of law” is law’s claim to comprehensive authority and supremacy.<sup>13</sup> According to Raz, “[s]ince all legal systems claim to be supreme with respect to their subject-community, none can acknowledge any claim to supremacy over the same community which may be made by another legal system.”<sup>14</sup>

The problem is that even if Raz’s approach were supportable as an abstract philosophical matter (itself a debatable assumption), an absolutist conception of legal authority is often simply inadequate to fully describe or analyze the transnational world of tangled legal and quasi-legal obligations and influences we see around us. Not surprisingly, pluralists challenge such a

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<sup>13</sup> Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2011), 117–21.

<sup>14</sup> *Ibid.*, 119.

conception. For example, Nicole Roughan in *Authorities* directly addresses Raz's argument that a legal system by its nature must claim supremacy over other legal systems.<sup>15</sup> To Roughan, Raz's argument suffers from both empirical and analytical difficulties.

As an empirical matter, she argues that the supremacy claim runs counter to actual legal practice in Europe, which features "many *prima facie* legal systems, including those of municipal states, that do not claim supremacy over all others, or even claim subjection to others."<sup>16</sup> Other pluralists agree. For example, Nico Krisch surveys what he calls "the pluralist structure of post national law," finding, in instance after instance, a more fluid frame that has no categorical separation among legal spheres, but that also does not fully merge them or even define "the degree of authority" that the norms of these different spheres possess.<sup>17</sup> Likewise, Keith Culver and Michael Giudice detail many areas where legal hierarchies are not stable, including federal and quasi-federal states as well as states that maintain domains of overlap among concurrent authorities.<sup>18</sup>

Turning to Raz's more fundamental, analytical claim, Roughan argues that what pluralists need to develop, in order to combat Raz's monist conception, is an "account of law that explains

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<sup>15</sup> Roughan, *supra* note 9.

<sup>16</sup> *Ibid.*, 155.

<sup>17</sup> Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010), 12; see also Krisch's chapter in this volume.

<sup>18</sup> Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford: Oxford University Press, 2010).

how different supremacy claims can be integrated and mutually recognized while upholding the authority of law.”<sup>19</sup> Her idea of relative authority aims to provide such an account. She argues that a legal system need not recognize another system as superior; it only needs to “recognize the relativity of its own claim to the claim of others, and of their claims to its own.”<sup>20</sup> Thus, instead of seeing supremacy as a necessary precondition to law, Roughan offers a model of relative authorities that must “cooperate, coordinate, or tolerate one another if they are to have legitimacy.”<sup>21</sup> In this model, the claim to legitimate authority actually occurs *through* interdependence and interaction. It is not reduced authority; instead, authority is linked to its interdependence with other similarly relative authorities.

The pluralist model of relative overlapping authorities, therefore, is not necessarily a claim that traditional municipal legal systems have a diminished authority in the twenty-first century, though that might be true in some circumstances. Indeed, sometimes a claim to relative authority may actually be stronger than a similar claim to absolute authority. For example, Krisch describes instances when lower courts within European countries have invoked the authority of the European Court of Human Rights to increase their own authority within the domestic judicial system.<sup>22</sup> In such cases, by intertwining their authority with others they may actually increase their authority rather than reduce it. Likewise, if a state works with other states to create

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<sup>19</sup> Roughan, *supra* note 9, at 157.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, 8.

<sup>22</sup> Nico Krisch, “The Open Architecture of European Human Rights Law,” *Modern Law Review* 71, no. 2 (Mar. 2008): 183–216.

institutions that intertwine those states together, the power of each individual state may be increased through interdependence. Or a private arrangement created by nonstate actors can build authority by imbricating its regime with state entities.<sup>23</sup> Or a state-based court system can seek to require private corporations to enforce its regulatory rulings, thus expanding the court's jurisdictional reach.<sup>24</sup> Or political actors in a local bureaucracy can increase their power and influence by invoking nonlocal opinion or pressure.<sup>25</sup> In all of these cases mastering the negotiation among relative authorities can actually increase power. Thus, the nation-state may emerge as powerful or more so, but it will derive its authority not from its autonomy but from its relationships with other authorities. Those other authorities, while they can be state-based, also include a much broader set of possible bodies, some associated with the state and some not.

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<sup>23</sup> See, e.g., Levit, *supra* note 5, at 156–57 (describing how informal rules adopted by a trade association to govern export credit insurance was ultimately adopted as a standard by the World Trade Organization).

<sup>24</sup> See, e.g., Paul Schiff Berman, “Yahoo! v. Licra, Private International Law, and the Deterritorialisation of Data,” in *Global Private International Law: Adjudication without Frontiers*, eds. Horatia Muir Watt et al. (Cheltenham: Edward Elgar Publishing, 2019), 398–99 (describing a European Court of Justice ruling that Google must alter its search algorithms so that search results do not include websites that are deemed to run counter to European data privacy regulations).

<sup>25</sup> See, e.g., Laura 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*, ed. Jane Stromseth (Ardsley, NY: Transnational Press, 2003) (describing how local actors in Indonesia leveraged the threat of an international commission of inquiry to push for internal Indonesian investigation of alleged human rights abuses).

### *3 Global Legal Pluralism as a Descriptive Project*

Legal pluralism has generally been a descriptive enterprise. Anthropologists, historians, and other social scientists have seen legal pluralism as simply a reality, neither good nor bad, neither desirable nor undesirable. Instead, as noted previously, they have defined their task principally as an exercise in thick description: cataloging the inevitable hybridity that arises when multiple legal or quasi-legal systems occupy the same social space as well as the resulting strategic interactions that occur among those navigating the various regimes.

As a descriptive matter, global legal pluralism, like legal pluralism generally, represented an important alternative to liberal legalism. To begin, pluralists are far more likely than traditional liberals even to *notice* the pluralism of legal and quasi-legal norms that exist apart from the state. After all, most liberal theorists begin their analysis with the state: how it is formed, how it is justified, and the philosophical underpinnings for its operations. Nonstate actors are surely important to this inquiry in that they clash with the liberal state, and of course the state, under liberalism, should often reach positions of accommodation with these nonstate actors. But what is being described is fundamentally the state and how *it* views the nonstate.

In contrast, pluralism assumes that the relevant inquiry is the entire range of legalities that course through the everyday experience of people. This means that the lived reality of communities and day-to-day perceptions of legitimacy and efficacy are far more important than philosophical models. In addition, a pluralist perspective is more likely to see individuals and groups, rather than just the state, as having agency and therefore playing crucial roles in navigating the interaction of normative systems and using those systems strategically.

For example, in the classic colonial interaction, a quasi-liberal, state-based legality was layered on top of an indigenous legal system. A liberal theorist would focus on the newly imposed system and on how it either accommodated or refused to accommodate local communities. This view is akin to what John Griffiths famously called weak legal pluralism, because it assumes a preexisting legitimate system that gets to decide how much to accommodate or tolerate competing systems.<sup>26</sup> In contrast, strong legal pluralism would start from the observation that the colonial system rarely, if ever, wiped out the indigenous system altogether, and would instead focus on the interaction of these legal systems and the ways in which local actors used both systems strategically to gain leverage.

This is only one of many possible examples. But the point is that where liberalism only sees state legal systems and the challenges they face, pluralists focus on *interactions* among a much wider range of legal and quasi-legal systems. And *global* legal pluralism recognizes that nation-states must work within a framework of multiple, overlapping jurisdictional assertions by state, international, and nonstate communities.

Just as important, pluralists are much less likely to insist on positivist definitions of law and are therefore more willing to notice law even in the absence of coercive power. This is especially significant in the global arena where statements of legal norms may be highly effective

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<sup>26</sup> John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism* 24, no. 1 (1986): 1–55.

regardless of formal enforcement power.<sup>27</sup> For example, liberal sovereigntists sometimes insist that international, transnational, and nonstate legal norms have no independent valence and that instead states simply pursue their own interests.<sup>28</sup> In contrast, pluralists unpack the idea of a state interest, recognizing that conceptions of proper policy do not simply arise in a vacuum. Rather, they are developed by human beings operating with various sets of assumptions, ideas about justice, conceptions of global strategy, and beliefs about morality. These assumptions, ideas, and cognitive categories are themselves shaped in part by legal consciousness. Accordingly, the legal norms that are “in the air” at any given moment of history—including international, transnational, and nonstate legal norms—may well affect how both policymakers and ordinary citizens think about the state’s interests.<sup>29</sup>

Thus, legal pluralism provides a richer account of how law actually operates, both domestically and internationally, than the positivist vision of liberal sovereigntism. We imbibe legal norms and cognitive categories even when we are not consciously aware of the norm in question. We are persuaded by legal norms even when those norms are not literally enforceable. We act in accordance with law because doing so has become habitual, not necessarily because we seek to avoid sanction. We conceive of our interrelations with others in terms of law because our

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<sup>27</sup> E.g., Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010) (describing the ability of legal norms to promote adherence even in the absence of enforcement mechanisms).

<sup>28</sup> See generally Goldsmith and Posner, *supra* note 4.

<sup>29</sup> Paul Schiff Berman, “Seeing Beyond the Limits of International Law,” review of *The Limits of International Law*, by Jack L. Goldsmith and Eric A. Posner, *Texas Law Review* 84 (2006): 1265–306.

long-term interests require that we do so, even when our short-term interest might seem to counsel otherwise. And the existence of a legal norm alters the constitutive terms of our relationships with others as well as the costs of noncompliance. All of these factors may be overcome in some circumstances. But the mere fact that legal norms are sometimes violated doesn't mean that those norms have no constraining force at all. And only by thinking more broadly about changes in legal consciousness and the complicated social, political, and psychological factors that enter into the conceptualization of state interests can we begin to understand how nonstate law operates.

In addition, instead of treating the state as a unitary "personality" with a single set of interests, pluralists recognize that the real world is far messier, with a vast number of constituencies both within the governmental bureaucracy and outside it. This cacophony of voices is important because many of these voices, when advocating policy positions, can use the moral authority or persuasive power of international, transnational, and nonstate norms for leverage. These norms therefore become a tool of empowerment for particular actors. And given that any state policy decision is inevitably the result of a contest among various bureaucratic power centers, all of which are themselves influenced by outside pressure groups, lobbyists, NGOs, and the like, a more complex understanding of the global legal arena would need to explore ways in which plural legal norms empower specific interests both within and without the state policymaking apparatus.

In short, global legal pluralism offers a more complicated descriptive account of the interaction of normative systems, the strategic action of individuals and groups in deploying these multiple systems to pursue their interests, and the subtle processes by which even norms without coercive power can change legal consciousness and have impact over time. These nuances are often elided in the traditional liberal legal analysis.

## *4 Global Legal Pluralism and International Law*

For many years, international law triumphalists hoped that the rise of international legal institutions would resolve the messy world of relative authority, regime collision, and fragmentation by creating one overarching, hierarchically superior set of norms that most people would follow most of the time. And yet, precisely as legal pluralism scholarship would predict, the hierarchy, once articulated, was immediately contested. Thus, international law, though it often has very real impact,<sup>30</sup> ends up being one voice among many, all competing for authority. In addition, again as legal pluralism scholarship predicts, it quickly becomes clear that international law itself is not one entity. Instead, different international legal regimes, promulgated for very different reasons and administered by different tribunals and regulatory bodies, often conflict and collide with each other, leading to the need for negotiation, contestation, and hybrid provisional compromises.<sup>31</sup>

Legal pluralists, though they are more willing than international relations realists to see the importance of international law, part ways from committed internationalists because legal pluralists are unwilling to be confined by a single formalist definition of law or a preexisting hierarchy of legitimacy among legal orders; instead, they recognize that any such definition or hierarchy is likely to derive from a particular subject position and therefore will accord certain social action the mantle of law while denying other social action the same respect. Indeed, for

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<sup>30</sup> See *ibid.*

<sup>31</sup> Margaret A. Young, ed., *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012).

years, pluralists wrestled with trying to define law before effectively giving up the project as inevitably fraught and biased, privileging some instantiations of law over others.<sup>32</sup> Accordingly, pluralists turned the focus to observing sociological fact: where do we see “institutionalised and authoritatively mediated collective action?”<sup>33</sup> What is it that individuals and communities come to consider to be law over time? What pronouncements of decision makers do they defer to, what rules do they obey, and whose decisions are they willing to enforce? And what practices do they enter into that impact their practical sense of binding obligation?

This approach allows us to include a variety of “emergent” systems within our purview and to conceptualize the possible creation of global law from below, born not of treaties and nation-states, but of more inchoate orders, such as the Basel Committee for Banking Supervision, the International Accounting Standards Board, the consumer-based Clean Clothes Campaign, international standard-setting bodies, the Codex Alimentarius, and even the law promulgated and imposed by online platforms such as Google or Facebook.<sup>34</sup>

The problem with this capacious, nonessentialist vision of law, from the point of view of internationalists, is that they have spent decades trying to convince committed nation-state sovereigntists that international law is *superior* law that should act as an independent constraint on states. Then along come legal pluralists who claim that seemingly everything and anything is law and it is a free-for-all, and that law is followed or not followed based on sociological and

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<sup>32</sup> See Sally Engle Merry, “Legal Pluralism,” *Law & Society Review* 22, no. 5 (1988): 869–96, 869–75.

<sup>33</sup> This formulation is drawn from Lindahl, *supra* note 11, at 1.

<sup>34</sup> See *ibid.*, at 2.

political factors, and the only way to tell what is actually law is to watch and see how the norms are articulated and which norms come to be treated as law. After all, if every instance of “institutionalised and authoritatively mediated collective action” gets to be called law, then there is no way to authoritatively determine which of those many legal regimes is superior to the others. Hans Kelsen would roll over in his grave!<sup>35</sup>

Ironically, in some contexts the pluralist perspective on law is actually helpful in defending the importance of international law. For example, as mentioned previously, some international relations and formalist scholars make polemical arguments against the very existence of international law, based on the fact that it often does not have independent coercive power behind it. Thus, according to these scholars, international law is simply an epiphenomenon of state power: states follow international law when it is in their interest to do so, and they ignore it when it is not.<sup>36</sup>

Against such assertions, legal pluralism offers an alternative way of understanding how law actually operates. From a pluralist perspective, law is not only that which coercively forces individuals (or states) to do things that they do not want to do. Indeed, pluralists argue, coercive power is not the only way that law can have an effect, either domestically or internationally. 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

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<sup>35</sup> See generally Hans Kelsen, *Pure Theory of Law*, trans. Max Knight, 1967 (Berkeley: University of California Press, 1960).

<sup>36</sup> See Goldsmith and Posner, *supra* note 4.

important or valuable and what are effective and/or legitimate means of obtaining those valued goods.”<sup>37</sup> As a result, law has an impact not merely (or perhaps even primarily) because it keeps us from doing what we want. Rather, law changes what we want in the first place.

Thus, law operates as much by influencing modes of thought as by determining conduct in any specific case.<sup>38</sup> It is a constitutive part of culture, shaping and determining social relations<sup>39</sup> and providing “a distinctive manner of imagining the real.”<sup>40</sup> Indeed, “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.”<sup>41</sup> In this vision of law, the fact that international legal norms do not have coercive power behind them is not determinative because coercive power is not the only way that law constrains.<sup>42</sup>

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<sup>37</sup> Martha Finnemore, *National Interests in International Society* (Ithaca: Cornell University Press, 1996), 15.

<sup>38</sup> See *supra* note 10 and accompanying text.

<sup>39</sup> See, e.g., Ewick and Silbey, *supra* note 10, at 41 (arguing that “law is a part of the cultural processes that actively contribute in the composition of social relations”).

<sup>40</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 173.

<sup>41</sup> Robert W. Gordon, “Critical Legal Histories,” *Stanford Law Review* 36 (Jan. 1984): 57–125, 103.

<sup>42</sup> For an elaboration of this argument regarding the efficacy of international law, see Berman, “Seeing Beyond the Limits of International Law,” *supra* note 28.

Yet, even though legal pluralism provides a cogent set of arguments to defend the *efficacy* of international law, this is insufficient to international law triumphalists because legal pluralism has no means of supporting the *legitimacy* of international law as superior law. After all, if there are many normative communities in the world all asserting forms of jurisdiction, who gets to decide which assertions are permissible and which aren't? In short, who gets to decide who gets to decide?

To a legal pluralist, however, this is a nonsensical question. After all, let us assume that we could get most people to agree that a particular assertion of jurisdiction was legitimate, whatever that might mean. Inevitably there would be some community somewhere that would resist this jurisdictional claim. And *from that community's perspective* the assertion of jurisdiction would be illegitimate.

Of course, we are accustomed to thinking of jurisdictional assertions as the unique province of a sovereign entity. But jurisdiction is more appropriately understood as a site of contestation and engagement among multiple relative authorities. Indeed, the assertion of jurisdiction itself can open space for the articulation of norms that function as alternatives to, or even resistance to, established power.

For example, in seventeenth-century England, common law courts began to issue writs of prohibition in order to prevent the rival Court of High Commission from hearing certain cases.<sup>43</sup>

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<sup>43</sup> See Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke (1552–1634)* (Boston: Little, Brown & Company, 1957), 295 (explaining how Sir Edward Coke attacked the Ecclesiastical High Commission through writs of prohibition); Sir Edward Coke, *The*

In response, some critics argued that the common law courts were overreaching and that the question of which court had proper jurisdiction to hear a case could only be resolved by the king because the authority of all judges derived from him.<sup>44</sup> In *Prohibitions del Roy*, Lord Coke describes himself as having replied to such characterizations of the king's authority:

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[T]rue it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his Realm of England With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et Lege* [that the King should not be under man, but under God and the Law].<sup>45</sup>

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Thus, Coke refused to place the king beyond or above the domain of law.

By challenging the king and affirming the jurisdiction of the common law courts, Coke asserted the primacy of law even over sovereign power. In doing so, however, he also stripped the courts of the very “institutional protection . . . that ordinarily stands behind” courts and

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Twelfth Part of the Reports of Sir Edward Coke, KT. 42, 4th ed. (1655; London: E. Nutt et al., 1738) (discussing the use of writs in Nicholas Fuller's Case).

<sup>44</sup> See, e.g., *ibid.*, at 63 (describing the debate as to who had authority to decide jurisdiction in *Prohibitions del Roy*, 77 Eng. Rep. 1342 (K.B. 1607)); see also *ibid.*, at 303–04 (discussing the debate over the king's “absolute power and authority” to decide legal disputes).

<sup>45</sup> *Ibid.*, at 65.

enforces their orders.<sup>46</sup> After all, who is to enforce legal jurisdiction when the king stands in opposition? This story makes clear both that alternative normative bodies can exercise power separate from (and perhaps contrary to) the governing power of the state and that the exercise of such power is risky and always contingent on broader acceptance by communities (and coercive authorities) over time. Nevertheless, despite the risk, the rhetorical assertion of jurisdiction itself can have an important effect.<sup>47</sup> For example, Coke’s memorialization of this jurisdictional assertion in his treatise was undoubtedly part of the Enlightenment movement to limit the power of kings and assert a higher rule of law. Thus, one can see a direct line from Coke to Thomas Paine, who declared that in the new United States of America, “law is [K]ing.”<sup>48</sup>

It is, of course, a commonplace to say that courts lack their own enforcement power, making them dependent on the willingness of states and individuals to follow judicial orders. As discussed previously, this observation is often used as an argument for the irrelevance of

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<sup>46</sup> Robert Cover, “The Folktales of Justice: Tales of Jurisdiction,” in *Narrative, Violence, and the Law: The Essays of Robert Cover*, eds. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1993), 173–202, 186.

<sup>47</sup> There is some evidence that Coke’s version of his actions is not accurate and that he actually capitulated to the king’s authority. See Bowen, *supra* note 42, at 305–06 (observing that some historians have rejected Coke’s account, relying on other seventeenth-century evidence, which indicates that Coke actually threw himself on the mercy of the king). Even if this is so, however, the rhetorical assertion of jurisdiction in his treatise might still have persuasive value over time.

<sup>48</sup> Thomas Paine, “Common Sense,” in *The Complete Writings of Thomas Paine*, ed. Philip S. Foner (1776; repr., New York: Citadel Press, 1945), 1, 29.

international law itself: because it is not state law, so the argument goes, it is subject to the realpolitik demands of pure power and is perhaps not really law at all. Similarly, we might think the claims to jurisdictional authority by nonstate communities are not really law because the power of these nonstate communities might depend on the willingness of states to carve out zones of jurisdictional autonomy for such communities.

But it is important to recognize that neither of these examples is fundamentally different from how law *always* operates, even when articulated by nation-state authorities. Indeed, courts can only ever exercise authority to the extent that someone with coercive power chooses to carry out the legal judgments issued.

Thus, the essence of law is that it makes aspirational judgments about the future, the power of which depends on whether the judgments accurately reflect evolving norms of the communities that must choose to obey them. If this is so, then we might view extraterritorial lawmaking as substantially similar to lawmaking within territorial bounds. For example, if a French court issues a judgment against a U.S. corporation, it might be true that the court's command is only literally enforceable if an American authority will agree to enforce it,<sup>49</sup> but the same court's decision against the corporation's French subsidiary is similarly dependent on the enforcement power of a sovereign. After all, if the executive branch of the French government

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<sup>49</sup> See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001), *rev'd*, 433 F.3d 1199 (9th Cir. 2006) (refusing to enforce French court judgment ordering Yahoo! to take steps to block hate speech illegal in France from being viewed in France). For further discussion of the *Yahoo!* case, as well as more recent, similar cases, see Berman, "*Yahoo! v. Licra*, Private International Law, and the Deterritorialisation of Data," *supra* note 24, at 393–405.

were to refuse to enforce the order against the subsidiary, that order would have no more force than the order against the American parent. Finally, regardless of whether a U.S. sovereign entity ever enforces the French court's order, the court might never need literal enforcement from a U.S. court. If the U.S. corporation wishes to continue commercial activity in France, the corporation may choose to comply "voluntarily" anyway.<sup>50</sup>

So, if the assertion of jurisdiction is always an assertion of community dominion, then all legal decisions rely on both that particular community's acquiescence and the willingness of other entities to recognize, enforce, or comply with the jurisdictional assertion. In this vision, we come to understand that all jurisdictional assertions depend largely on the rhetorical force of their articulation of norms to entice allegiance. Jurisdiction is really "jurispersuasion," the power to speak law and try to convince others to follow that law over time.

This should not really be such a radical idea. We can all think of examples where jurisdictional assertions and legal pronouncements are contested, resisted, subverted, disobeyed, and transformed over time. Likewise, no state or empire has ever been able to govern absolutely with no resistance. And of course there are always and forever many places in the world where state institutions and governments have far less actual power than other legal and quasi-legal entities.

The key point is that in order to resolve a normative conflict there is no way to get outside of social context in order to play God and simply decree that one set of norms or one decision

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<sup>50</sup> See Berman, "*Yahoo! v. Licra*, Private International Law, and the Deterritorialisation of Data," *supra* note 24, at 395 (noting such voluntary compliance).

maker is authoritative and the rest are not. Or perhaps another way to put it is that one can *try* to make such a decree, but there is no reason to believe that such a decree will be universally accepted. To the contrary, as soon as one makes such a decree, that too will be resisted, contested, and subverted. There is no end to the contestation. And that is perhaps the core descriptive insight of legal pluralism.

International law triumphalists may well be concerned about this reality. And *as a political matter* I may personally agree that certain international norms should be followed by populations. And I, for one, hope nation-states sufficiently imbibe these norms and that they seep into consciousness, hardening into the taken-for-granted sense of just “how things are.” For example, the idea of individual human rights may have become part of legal consciousness in that way, and people around the world are now far more likely to frame their claims in the language of rights than a century ago.

But again, notice that we are back in the realm of politics and sociological reality. If a norm seeps into legal consciousness, then it functions effectively as law, whether it’s an international law norm, a nation-state norm, or a nonstate norm. But as to abstract claims of legitimacy or superiority, legal pluralism recognizes that any such claims are only ever partial and contested. And if that serves to frustrate both nation-state sovereigntists and international law triumphalists, so be it. It is the world we actually live in. The sovereigntist and internationalist models of legitimacy are merely distorted simplifications of reality.

## *5 Global Legal Pluralism as a Normative Project*

As a descriptive enterprise, global legal pluralism is now far less controversial than it once was. In particular, even the most diehard legal positivist would now likely acknowledge that sub-, supra-, or non-state normative systems do impose real constraints that have real impacts. Thus, legal pluralists might be tempted simply to declare victory on the thick description front and stop there.

And yet one might choose to go further and pursue a more normative path. After all, a richer descriptive account of the world is also in part a celebration of possibility. If “the way things are” is not natural and inevitable, but instead culturally constructed and contingent, then that means alternatives are open to us. Legal pluralism is in some sense neither about the state or the local, but is instead a fundamental celebration of the values of diversity, multiplicity, compound and flexible identities, and resistance to the seemingly natural state of things. In addition, legal pluralism could be seen to support the idea that law can be a productive terrain of contestation, a forum for dialogue across difference.

Consider the philosopher Iris Marion Young’s idea of “unassimilated otherness,” which she posited as the relation among people in the ideal “unoppressive city.”<sup>51</sup> Young envisioned ideal city life as the “‘being-together’ of strangers.”<sup>52</sup> These strangers may remain strangers and continue to “experience each other as other.” Indeed, they do not necessarily seek an overall group identification and loyalty. Yet they are open to “unassimilated otherness.” They belong to

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<sup>51</sup> See Iris Marion Young, “The Ideal of Community and the Politics of Difference,” in

Feminism/Postmodernism, ed. Linda J. Nicholson (New York: Routledge, 1990), 300, 317 (“Our political ideal is the unoppressive city.”).

<sup>52</sup> *Ibid.*, at 318–19.

various distinct groups or cultures and are constantly interacting with other groups. But they do so without seeking either to assimilate or to reject those others. Such interactions instantiate an alternative kind of community, one that is never a hegemonic imposition of sameness but that nevertheless prevents different groups from ever being completely outside one another. In a city's public spaces, Young argues, we see glimpses of this ideal. "The city consists in a great diversity of people and groups, with a multitude of subcultures and differentiated activities and functions, whose lives and movements mingle and overlap in public spaces." In this vision, there can be community without sameness, shifting affiliations without ostracism.

This is the idealism that could be seen to be at the core of global legal pluralism. And yet at this moment in history, that precise set of ideals is under attack. Indeed, if states can be hegemonic and oppressive, it seems clear that nationalists can be even more so. In Europe, we see a pushback against the loose integration of the European Union in favor of tribalism. This is particularly troubling because the decades since 1945 have been by far the most peaceful and economically prosperous in Europe's many centuries of history, and we should not allow the governance pluralism that characterizes the European Union to be lightly tossed aside because of vague calls for border protection and nation-state sovereignty. At the same time, worldwide we see communities refusing to allow increased migration and diversification, instead calling for more stringent policing of borders, the building of walls, and so on. And of course religious intolerance and sectarian prejudice fuel numerous conflicts around the world. Most recently, Donald Trump's assault on all the institutions of democratic governance and the rise of the far right in Europe represent existential threats to the post-World War II order and perhaps the ideal of democratic multiculturalism itself.

Given this context, might scholars wish to do more than just describe? Can we engage with this flight from the ideals of diversity and make the case for institutions that, however imperfectly, embed pluralist ideals and values into their design? If so, it might be useful to pursue what it might look like to think of global legal pluralism as an explicitly normative project.

But that simply raises more questions. What might it mean for legal pluralists to play out some of the normative implications of their work for theories of law, policy, and institutional design? Do legal pluralists have something distinctive to add to contemporary law and governance debates? Or would asking such questions ultimately undermine the core insights of legal pluralism by committing scholars to particular modes of governance hierarchy, transforming strong legal pluralism back into weak legal pluralism? And if so, is that a trade-off we can bear as scholars in exchange for policy relevance? And even if we were willing to make such a trade-off, is a legal pluralist position inherently in tension with any effort at systemic reform because legal pluralism recognizes that any system will always be partial, contested, and contingent? Or might systemic reform that is partial, contested, and contingent nevertheless be better than no reform at all?

Most fundamentally, legal pluralists might be able to mount a clear-throated defense of legal rules and governance institutions that foster interaction and dialogue among those multiple norm-generating communities, rather than dissolving diversity either into universalism, on the one hand, or tribalism, on the other. And we need that defense right now, if only to name the values of diversity, dialogue, and communication across difference that are at the core of the world we might be on the brink of losing in the global retreat into authoritarian populism.

In considering the idea that legal pluralism might be a *normatively desirable* approach to the design of legal systems and procedures, we might ask (as summarized previously) whether legal or governmental systems might sometimes affirmatively seek to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems by developing procedural mechanisms, institutions, and practices that aim to bring those communities and systems into dialogue rather than dictating norms hierarchically. Further, global legal pluralism suggests that such an approach might be normatively desirable regardless of context, making it potentially a globally generalizable theory.

For example, while constitutions traditionally try to demarcate clear hierarchical lines of authority among different decision makers, a more pluralist constitutional design might, instead, create increased opportunities for dialectical legal interactions. Along these lines, an institution such as federalism, which allows for creative contestation both among states and between the federal government and the states as a whole, can be seen as opening space for dialogue.<sup>53</sup> Or a court's practice of publishing dissenting opinions can be seen as a mechanism that gives voice to contestation, allowing the dissenting voice to be heard in the marketplace of ideas.<sup>54</sup>

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<sup>53</sup> See, e.g., Robert M. Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation," *William & Mary Law Review* 22 (1981): 639–82, 682 (arguing that, although it might seem perverse "to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict," we should "embrace" a system "that permits the tensions and conflicts of the social order" to be played out in the jurisdictional structure of the system).

<sup>54</sup> Cf. James Boyd White, "Constituting a Culture of Argument: The Possibilities of American Law," in *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and*

Turning to the international and transnational realm, as discussed previously, some who study international law fail to find real “law” because they are looking for hierarchically based commands backed by coercive power.<sup>55</sup> In contrast, a pluralist approach understands that interactions among various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts nor simply the dialogue that often occurs under the doctrine of comity.<sup>56</sup>

Legal pluralism as a normative project might therefore specifically seek to identify those procedures, institutions, and practices that provide frameworks for managing diversity without dissolving it into universality. And although managing diversity is in some sense also the goal of liberal legality, it may be that legal pluralism offers a distinctive and perhaps sometimes a more effective approach. In order to construct such an approach, we might use Hannah Arendt’s idea of “bearing with strangers” to think of how law could also build models of dialogue across difference rather than either walling difference off, on the one hand, or dissolving difference altogether, on the other. From there, we can develop a set of principles that might be built into legal procedures, institutions, and practices that take seriously this pluralist approach.

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Community (Chicago: University of Chicago Press, 1984), 231–74 (describing the importance of law as a forum for argument).

<sup>55</sup> See *supra* note 4 and accompanying text.

<sup>56</sup> See generally Robert B. Ahdieh, “Dialectical Regulation,” *Connecticut Law Review* 38, no. 5 (2006): 863–927.

Global legal pluralism also recognizes the possibility that at least sometimes this pluralism of normative authority may be *preferable* to a system that imposes a single authority, because the reality of legal pluralism empowers individuals to strategically operate among normative and procedural regimes. In a world of multiple overlapping legal and quasi-legal systems, there are multiple ports of entry. An argument unheard in one forum can gain traction in another. A norm articulated in one place can be persuasive elsewhere. The powerless in one system can access power in another. As Robert Cover recognized decades ago, there are inherent advantages to a system “that permits tensions and conflicts of the social order” to be “played out in the overlapping jurisdictional structure of the system itself.”<sup>57</sup> Of course, powerful repeat players can also strategically use such a plural system to shop for desired norms. Thus, the mere existence of global legal pluralism does not magically level the playing field among parties of disparate power or render such power disparities irrelevant. But there can be little doubt that jurisdictional pluralism opens up discursive space, providing opportunities for agency that may not have existed otherwise.

Global legal pluralism as a normative project is not strongly universalist in the sense of insisting on a single set of norms. Instead, it is simply suggesting a set of possible procedural values that should be considered, recognizing that even these procedural values might sometimes be overridden based on other possible values. Yet, even these comparatively weak proceduralist

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<sup>57</sup> Cover, “The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation,” *supra* note 52.

commitments undeniably incorporate Habermasian dialogic values.<sup>58</sup> And given that these values are asserted as part of a global normative theory, albeit a proceduralist one, for committed pluralists this normative global legal pluralism is overly liberal and not really pluralist at all.<sup>59</sup>

I have argued elsewhere why I think global legal pluralism as a normative project, though potentially consonant with liberalism, is nevertheless distinct from liberalism because it emphasizes participatory and dialogic values that are not as core to the liberal model.<sup>60</sup> But I cannot deny that it certainly does espouse a set of dialogic values. And this proceduralist version of pluralism is liberal to the following extent: what I am seeking are procedures, institutions, and practices that bring multiple norm-generating communities into greater dialogue with each other. For example, the margin of appreciation doctrine formulated by the European Court of Human Rights (ECHR) creates an iterative, interactive process among communities that would not exist as strongly if the ECHR simply tried to impose an international norm hierarchically on the one hand, or fully deferred to local norms on the other. Likewise, a hybrid court or tribunal with members of multiple communities sitting next to each other will tend to create more dialogue

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<sup>58</sup> See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: Massachusetts Institute of Technology Press, 1996).

<sup>59</sup> See, e.g., Alexis Galán and Dennis Patterson, “The Limits of Normative Legal Pluralism,” review of *Global Legal Pluralism: A Jurisprudence of Law beyond Borders*, by Paul Schiff Berman, *International Journal of Constitutional Law* 11, no. 3 (July 2013): 783–800.

<sup>60</sup> Paul Schiff Berman, “How Legal Pluralism Is and Is Not Distinct from Liberalism: A Reply to Alexis Galán & Dennis Patterson,” *International Journal of Constitutional Law* 11 (2013): 801–08.

among those communities in reaching an outcome. Or a choice-of-law doctrine that requires decision makers to look to norms other than those of their own community in order to find possible rules of decision will likely result in more thoughtful consideration of those alternative communities, regardless of the ultimate outcome of the case. In each of these circumstances, the goal is to make decision makers more restrained in their exercise of jurisprudential power and more accommodating of difference. And of course, these same principles could be, and sometimes are, adopted by nonstate communities in managing their interactions with others.

But it is obviously true that some communities don't even want to join the dialogue. Other communities wish to exclude certain segments of the population (e.g., women) from the conversation. Some might even question whether rational dialogue is what is needed to make decisions. For example, if a religious leader seeks merely to impose an asserted universal truth by fiat, there is little room for the conversation, deference, and accommodation that a more pluralist mechanism would hopefully engender. Accordingly, a proceduralist vision of pluralism contains a bias that favors inclusion, participation, and conversation, and some illiberal communities will reject it on that basis.

Thus, as some critics have pointed out, the sorts of procedural mechanisms, institutional designs, and discursive practices that I advocate require "a larger normative environment in which pluralism has to be negotiated."<sup>61</sup> This is true and, as noted previously, that normative environment is one in which reasoned discourse among multiple worldviews is both accommodated and fostered as much as possible. Accordingly, there must at least be agreement

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<sup>61</sup> See Galán and Patterson, *supra* note 58, at 793.

among the different normative communities to participate in the common enterprise. If they refuse to participate, then it seems to me there is little that can be done within the legal arena.

In my book, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*,<sup>62</sup> I draw on theorist Chantal Mouffe's distinction between "adversaries" and "enemies."<sup>63</sup> Adversaries are willing to enter the same social space and contest substantive normative disagreements; enemies are unwilling even to engage. The goal of my procedural pluralism is to encourage as many normative communities as possible to become adversaries rather than enemies. I argue that a system that routinely squelches alternative voices is likely to create more enemies over time, whereas one that seeks to allow multiple voices to be heard and tries for accommodation as much as possible will be more successful at turning at least some of those enemies into adversaries. Again, if this simply means bringing more enemies into the ambit of a liberal legal order that seeks maximum accommodation and deference to plural norms from plural communities, then I am happy to embrace that form of pluralism (and that form of liberalism).

But some want legal pluralism to be something far more radical (and far more impractical). So, for example, in my book I make what I think is a relatively moderate and restrained argument that liberal communities might try to open limited space for sharia courts to operate so long as those courts do not trench upon fundamental values of the liberal community.<sup>64</sup> And it should be noted that even that moderate and restrained version of the argument draws fire from

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<sup>62</sup> See Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, *supra* note 3, at 214.

<sup>63</sup> Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), 13.

<sup>64</sup> See Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, *supra* note 3, at 225.

critics across the political spectrum, from rights advocates worried about illiberal practices to nation-state sovereigntists worried about giving any authority at all to nonstate communities. Yet Alexis Galán and Dennis Patterson, in an article critiquing my book,<sup>65</sup> want to push much further than I do. They claim that it's not really pluralism unless I go all the way and advocate that liberal communities allow sharia courts to operate *regardless* of whether or not they violate fundamental values of the liberal community.<sup>66</sup> However, just because one embraces insights from legal pluralism does not mean that the values of pluralism must necessarily and always trump any other values a community might hold. It simply cannot be that legal pluralism is only a true normative position if it is pursued to the exclusion of all other values, interests, and commitments.

Galán and Patterson treat my balancing of the values of pluralism with other values as ambivalence. They correctly note that my book celebrates pluralism as a descriptive fact, that I appreciate the existence of multiple overlapping communities, and that I resist universalizing tendencies that reduce diversity. But they see all of that as inconsistent with my effort to encourage the creation of legal mechanisms to manage this pluralism. However, these positions are not inconsistent at all. Indeed, they are likely to be our only hope of addressing the reality of pluralism without either squelching alternative views on the one hand, or having no legal order at all on the other.

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<sup>65</sup> Galán and Patterson, *supra* note 58, at 798.

<sup>66</sup> See *ibid.*, at 797 (arguing that my version of pluralism “cannot constitute a serious normative position”).

I acknowledge that striking this balance is extraordinarily difficult and perhaps impossible to achieve fully. But that does not mean it is incoherent or analytically inconsistent to try. And most importantly my book simply argues that it is normatively desirable for communities to make the effort. Indeed, I am far less concerned with how individual cases are decided or how individual institutions or mechanisms are designed than I am in trying to ensure that whoever reaches those decisions considers the values of legal pluralism as part of the calculus. So, yes, legal pluralism gets subsumed within a broader set of values held by any given decision maker or community, but that does not mean that factoring in the values of pluralism does not create long-term changes in the way the decision maker or community tackles procedural or institutional design challenges.

Indeed, as discussed previously, it is *not possible* to create any truly pluralist normative order given that pluralism assumes that there will inevitably be resistance to any normative order, however inclusive. Thus, there can be no such thing as normative global legal pluralism in a pure sense. As soon as any normative regime is articulated, it cannot be fully plural. But that doesn't mean that a legal system that is more self-conscious in its effort to accommodate plural voices might not still be preferable to one that is not.

The response, therefore, to the objections of the strong pluralists is similar to the response to the committed internationalists. The concerns of both groups are correct, but there is no way to fully extricate oneself from such concerns. Any honest descriptive account of law must recognize that in the face of *any* assertion of law, even the most global and all-encompassing, pluralism is never defeated; what is legitimately law to one group will be illegitimate to others. At the same time, any normative institutional design decision or procedural choice or judicial or legislative

rule will always and necessarily be “jurispathic,” as Robert Cover would say,<sup>67</sup> thereby choosing one law over another and striking a blow to pluralism.

So, what to do in response to these two opposite critiques, both of which are accurate? My answer is to recognize the conundrum and therefore always to be self-conscious about one’s assertions of legitimacy or legality or one’s exercises of hegemonic power. This emphatically does not mean that one should never make such assertions; only that one should be aware of the reasons that such assertions are inevitably problematic. Lindahl calls such an approach “restrained collective self-assertion,”<sup>68</sup> and it is likely the most persuasive way of understanding how authority works in a world where authority is only ever relative, not absolute.

Many of the chapters in this volume explore institutional instances of restrained collective self-assertion, providing examples of institutional designs, procedural mechanisms, and discursive practices that maintain space for consideration of multiple norms from multiple communities: margins of appreciation, complementarity, subsidiarity, zones of autonomy, hybrid participation agreements, reciprocal recognition, and so on. All of these mechanisms (and many more) can be understood as ways that legal, governmental, or quasi-governmental regulatory systems can seek to create or preserve spaces for productive interaction among multiple, overlapping communities and legal systems.

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<sup>67</sup> Robert M. Cover, “The Supreme Court, 1982 Term—Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983): 4–68, 53 (describing judges as inevitably “people of violence” because their interpretations “kill” off competing normative assertions).

<sup>68</sup> Lindahl, *supra* note 11, at 287.

Significantly, deploying these pluralist procedural mechanisms, institutional designs, or discursive practices does not require a commitment to any overarching universal set of substantive values, although as discussed previously they do perhaps require a commitment to the liberal value of dialogue across difference. Restrained collective self-assertion means only a pragmatic willingness to engage with other possible normative systems and potentially to restrain one's own jurisprudential voice for the sake of forging more workable, longer-lasting relationships and harmony among multiple communities.

Significantly, *restrained* collective self-assertion does not mean *no* collective self-assertion. Sometimes, of course, such deference to the "other" will not be possible; this proceduralist normative vision of legal pluralism only seeks to embed habitual practices in which deference is *considered* and *attempted*, not in which it is always *implemented*.

Restrained collective self-assertion seeks to, at least, draw the participants to the contestation into a shared social space. This approach builds on Ludwig Wittgenstein's idea that agreements are reached principally through participation in common forms of life, rather than through agreement on substance.<sup>69</sup> Or, as Mouffe put it, we need to transform "enemies"—who have no common symbolic space—into "adversaries."<sup>70</sup> Adversaries, according to Mouffe, are "friendly enemies: . . . friends because they share a common symbolic space but also enemies

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<sup>69</sup> Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe, 3rd ed. (Malden: Blackwell Publishing, 1967), § 241.

<sup>70</sup> Mouffe, *supra* note 62, at 13.

because they want to organize this common symbolic space in a different way.”<sup>71</sup> Ideally, law—and particularly legal mechanisms that foster restraint in collective self-assertion—can function as the sort of common symbolic space that Mouffe envisions and can therefore play a constructive role in transforming enemies into adversaries.

Restrained collective self-assertion is *global* in the sense that it aims to force consideration of what is necessary to have a smoothly functioning trans-community legal order, what U.S. Supreme Court Justice Harry Blackmun once called “the systemic value of reciprocal tolerance and goodwill.”<sup>72</sup> On the other hand, it is *pluralist* because it demands that the assertion of “self” always be conscious of the “other” that is potentially being excluded. Any assertion of jurisdiction and any legal decision is inevitably jurispathic: it “kills off” one interpretation as it asserts another.<sup>73</sup> The key point is to make decision makers self-conscious about their necessary jurispathic actions.<sup>74</sup>

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<sup>71</sup> Ibid.

<sup>72</sup> See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

<sup>73</sup> See Cover, “The Supreme Court, 1982 Term—Foreword: Nomos and Narrative,” *supra* note 66 and accompanying text.

<sup>74</sup> See Judith Resnik, “Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover,” *Yale Journal of Law & Humanities* 17 (2005): 17–53, 25 (“[Cover] wanted the state’s actors . . . to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.”).

This global legal pluralist framework, therefore, aims simultaneously to celebrate both local variation and international order, recognizing the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange. Of course, actually doing that in difficult cases is a Herculean and perhaps impossible task. Certainly, mutual agreement about contested normative issues is unlikely and possibly even undesirable. Thus, the challenge is to develop ways to seek mutual accommodation, while keeping at least some play in the joints so that diversity is respected as much as possible. Such play in the joints also allows for the jurisgenerative possibilities inherent in having multiple lawmaking communities and multiple norms.<sup>75</sup> Always, the focus is on trying to forge the Wittgensteinian sort of shared social space that Mouffe describes for transforming enemies into adversaries.

Taken together, these principles provide a set of normative criteria for evaluating the ways in which legal systems interact. In addition, the principles could inform a community (whether state-based or not) that wishes to design mechanisms, institutions, or practices for addressing pluralism. Of course, such criteria are not exclusive. For example, a procedure or practice that manages pluralism well but denies certain norms of fundamental justice might be deemed problematic, regardless of its embrace of pluralism. Thus, I do not say that embracing pluralism always overrides other concerns. After all, many legal and quasi-legal orders are repressive and profoundly illiberal, and their norms may be resisted on those grounds. Instead, the important point is simply that pluralist considerations should always at least be part of the design,

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<sup>75</sup> See Seyla Benhabib, “Democratic Iterations: The Local, the National, and the Global,” in *Another Cosmopolitanism*, ed. Robert Post (Oxford: Oxford University Press, 2006), 45–82, 49 (discussing and defining “jurisgenerative processes”).

inculcating habits of mind that promote deference and restraint. Accordingly, decision makers should always ask: Are there other normative systems at play here? Should I restrain my jurisprudential voice? Is there some other decision maker who might more appropriately speak to this issue? Are there ways I could develop a hybrid decisional framework that brings more voices to the table? And how can I design ongoing practices, procedures, or institutional arrangements to constitutionally embed these inquiries?

## *6 Global Legal Pluralism and Cosmopolitanism*

Cosmopolitanism is often thought to be the opposite of pluralism because cosmopolitanism is seen as a justification for universal overarching norms that govern beyond and above the state. In this conception, cosmopolitanism is equated with universalism, and if that is the definition of cosmopolitanism then it does seem to be antithetical to pluralism. Certainly, from a pluralist perspective there are reasons to question both the desirability and the feasibility of universalism, at least in some contexts.

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

In addition, universalism inevitably erases diversity. This is a problem for three reasons. First, such erasure may involve the silencing of less powerful voices. Thus, the presumed universal may also be the hegemonic. Second, preserving legal diversity can be seen as a good in

and of itself because it means that multiple forms of regulatory authority can be assayed in multiple local settings. Just as states in a federal system function as “laboratories” of innovation, so too the preservation of diverse legal spaces makes innovation possible. Third, a legal system that provides mechanisms for mediating diversity without dissolving difference necessarily also provides an important model for mediating diversity in day-to-day social life. For example, one argument for a strongly speech-protective interpretation of the First Amendment of the U.S. Constitution is that the effort required to tolerate the provocative speech of others is the same effort required to tolerate others more generally.<sup>76</sup> Thus, a legal system that demands tolerance of diversity rather than its erasure is more likely to create the context for a tolerant society than one that, in contrast, seeks uniformity as its goal.

Nevertheless, even if one rejects these normative arguments and embraces universalism as a goal, it is difficult to believe that, as a practical matter, harmonization processes will ever fully bridge the significant differences that exist among states, let alone the variety of nonstate orders at play in the world. This is because many differences both in substantive values and attitudes about law arise from fundamentally different histories, philosophies, and worldviews. People are therefore likely to be either unable or unwilling to trade in their perspectives for the sake of universal harmony. Moreover, even if they were so inclined, it would be difficult to develop a process for determining which norms should be elevated to universal status and which should give way. Thus, when harmonization is possible, it is usually a slow, laborious undertaking, limited to codifying normative convergences that have already occurred over time. As a result,

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<sup>76</sup> E.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment* (New York: Vintage, 1966).

harmonization is generally backward-looking, and in a rapidly changing world, harmonization processes will tend to lag behind social, technological, and economic realities. Accordingly, even the most optimistic universalist would have to acknowledge that normative conflict is at the very least a constant transitional reality that will require hybrid processes to address.

But perhaps we can view cosmopolitanism as something different from universalism. After all, cosmopolitanism does not necessarily require a belief in a single global welfare or even a single universal set of governing norms, nor does it necessarily require that global welfare always dominate over state welfare. Indeed, properly understood, cosmopolitanism need not be incompatible with pluralism at all. To the contrary, a more nuanced understanding of cosmopolitan theory offers a useful framework for conceptualizing the interplay of multiple actors precisely because it recognizes that people have multiple affiliations, extending from the local to the global (and many nonterritorial 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.”<sup>77</sup> Rather, following the Stoics, she suggests that we should think of ourselves as surrounded by a series of concentric circles:

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The first one encircles the self, the next takes in the immediate family, then follows the extended family, then, in order, neighbours or local groups, fellow city-dwellers, and

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<sup>77</sup> Martha C. Nussbaum, “Patriotism and Cosmopolitanism,” in *For Love of Country?*, ed. Joshua Cohen (Boston: Beacon Press, 1996), 3–20, 9.

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 a whole.<sup>78</sup>

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

In this vision, people could be “cosmopolitan patriots,” 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 or are increasingly affected by spatially distant actors.<sup>79</sup> “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.”<sup>80</sup>

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,” in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances, including

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<sup>78</sup> Ibid.

<sup>79</sup> Kwame Anthony Appiah, “Cosmopolitan Patriots,” in *Cosmopolitics: Thinking and Feeling Beyond the Nation*, eds. Pheng Cheah and Bruce Robbins (Minneapolis: University of Minnesota Press, 1998), 91–116.

<sup>80</sup> Ibid., at 92.

nonterritorial communities.<sup>81</sup> 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.”<sup>82</sup>

In recent years, Patrick Glenn has offered a rich account of the role of nation-states within this kind of multiplicity.<sup>83</sup> He argues that there never has been and never will be a nation-state that was not ultimately cosmopolitan in character because all states exist as part of a world of relative overlapping authorities. In the end, he argues that we should look to the structural ways that states operate in, and adapt to, this cosmopolitan reality. And in doing so, he focuses on many of the same sorts of procedures and institutions that global legal pluralism has explored over the past two decades. A cosmopolitan pluralist conception of law, therefore, might be seen to capture the middle ground between strict territorialism on the one hand and expansive universalism on the other. A territorialist approach fails to account for the wide variety of community affiliations and social interactions that defy territorial boundaries. A 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

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<sup>81</sup> Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham: Duke University Press, 1999).

<sup>82</sup> Bruce Robbins, “Introduction Part I: Actually Existing Cosmopolitanism,” in *Cosmopolitics: Thinking and Feeling Beyond the Nation*, eds. Pheng Cheah and Bruce Robbins (Minneapolis: University of Minnesota Press, 1998), 1–19, 3.

<sup>83</sup> H. Patrick Glenn, *The Cosmopolitan State* (Oxford: Oxford University Press, 2013).

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 pluralist conception, in contrast, makes no attempt to deny the multi-rooted nature of individuals within a variety of communities, both territorial and nonterritorial. Thus, although a cosmopolitan pluralist 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, cosmopolitan pluralism offers a promising rubric for analyzing law in a world of diverse normative voices.

Moreover, in this conception, cosmopolitanism and pluralism are in no way incompatible. Cosmopolitanism recognizes multiple affiliations and overlapping community identification as well as multiple legal systems, whereas pluralism recognizes that these legal and quasi-legal systems can include both state and nonstate entities. Thus, the evolution of global legal pluralism is fully compatible with cosmopolitan theory, at least as understood in this more nuanced framework.

## *7 Global Legal Pluralism, the Rule of Law, and Democracy*

As global legal pluralism has successfully put forth an alternative conception of the global legal order, we have seen challenges to the idea that pluralism provides a useful conceptual framework. These challenges most often focus on two dimensions: first, whether a pluralist framework undermines the stability and predictability that are the hallmarks of the rule of law; and second, whether recognizing the potential validity of transnational, international, and

nonstate law fundamentally undermines democratic principles by recognizing the importance of norms articulated beyond the state polity.

With regard to rule of law, the concern is that any theory that leaves supremacy claims undecided is simply a recipe for chaos. Yet to some degree there is no way to escape this chaos because any claim to superior authority will inevitably be contested and ultimately only be relative, not absolute. And this is a particular problem if one tries to establish more hierarchical, absolutist structures. They don't have the flexibility to adapt to change, challenge, and contestation. Pluralist structures, in contrast, often represent "a hybrid between hierarchical and network forms of order."<sup>84</sup> As Krisch argues, such a hybrid "allows for regimes with an internally hierarchical structure, but denies them ultimate supremacy, and thus navigates between routine hierarchies and exceptional disruptions, to be solved eventually only through consensual forms."<sup>85</sup> Thus, perhaps counterintuitively, the flexibility inherent in pluralist structures can be a source of stability because tensions in the social order have space to play out in the legal governance structure itself. Pluralism provides openings for multiple actors and multiple voices and thus provides safety valves that more hierarchically based institutions may lack. As such, we may find pluralist structures to be more stable than hierarchical ones over time.<sup>86</sup>

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<sup>84</sup> Krisch, *Beyond Constitutionalism*, *supra* note 17, at 239.

<sup>85</sup> *Id.*

<sup>86</sup> Daniel Halberstam, "Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance," in *Constitutional Pluralism in the European Union and Beyond*, eds. Matej Avbelj and Jan Komárek (Oxford: Hart, 2012), 85–126.

As to democracy, some maintain that only territorially defined nation-state communities can legitimately claim to exercise democratically grounded power. But such a statement assumes much of what global legal pluralism seeks to challenge, and it is far from clear that the imperatives of democratic sovereignty necessarily render any consideration of transnational, international, or nonstate jurisdictional assertions illegitimate. First, it is no threat to sovereignty for a nation-state to decide that its sovereign interests are advanced overall by deciding to defer to norms or decisions of other institutions (whether state-based or not) that limit what it can otherwise do. Second, some nonstate norms, such as international human rights norms, may actually strengthen domestic democracy, properly understood. This is because constitutional democracy already includes within it the idea that “all people (and not merely the majority) can associate themselves with the project of self-government.”<sup>87</sup> Thus, obedience to nonstate norms that minimally protect minority interests or multilateral institutions that help guard against capture of government by minority factions actually enhances democracy rather than subverts it.<sup>88</sup> Third, at least when nonstate norms influence or are formally incorporated into domestic law, such incorporation often occurs through the actions of *domestic* political actors on either the

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<sup>87</sup> Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge, MA: Harvard University Press, 2002), 19.

<sup>88</sup> Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996); Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, “Democracy-Enhancing Multilateralism,” *International Organization* 63 (Winter 2009): 1–31; Jamie Mayerfeld, “The Democratic Legitimacy of International Human Rights Law,” *Indiana International and Comparative Law Review* 19 (2009): 49–88.

national or local level,<sup>89</sup> and it is unclear how there could be democracy objections to such influence. Finally, and most fundamentally, legal norms have always migrated across territorial boundaries, and precepts that come to be thought of as constitutive of a community can often be traced historically to ideas borrowed from other sources outside that community.<sup>90</sup> “Ideas, norms, and practices do not stop at the lines people draw across land,”<sup>91</sup> and nonstate norms are always translated into local vernacular.<sup>92</sup> This process of “vernacularization” and the debate about ideas, norms, and practices that go along with it are and always have been part of democratic discourse, not in opposition to it. As Seyla Benhabib has argued:

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The spread of cosmopolitan norms . . . has yielded a . . . political condition [in which] the local, the national and the global are all imbricated in one another. Future democratic iterations will make their interconnections and interdependence deeper and wider. Rather

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<sup>89</sup> Judith Resnik, “Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism,” *Emory Law Journal* 57 (2007): 31–92.

<sup>90</sup> E.g., Judith Resnik, “The Internationalism of American Federalism: Missouri and Holland,” *Missouri Law Review* 73 (2008): 1105–47.

<sup>91</sup> Judith Resnik, Joshua Civin, and Joseph Frueh, “Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs),” *Arizona Law Review* 50 (2008): 709–86.

<sup>92</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

than seeing this situation as undermining democratic sovereignty, we can view it as promising the emergence of new political configurations and new forms of agency.<sup>93</sup>

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Indeed, if democracy is understood not just as majoritarian preference but as dialogue across difference, pluralist structures can actually enhance, rather than undermine, democracy.

In short, pluralist structures provide multiple ports of entry and multiple opportunities for contestation. Such forms of contestation and counterdemocracy sit alongside typical electoral processes and may be seen to be part of the character of a multidimensional democratic system. As Krisch points out, “[e]lections will probably remain central to any conceptualization of democracy, but some of the weight they carry domestically might, in the post national sphere, be borne by other, contestatory mechanisms.”<sup>94</sup>

These are not complete answers to either the challenge about certainty or the challenge about democracy. But they do indicate that global legal pluralism does have a range of possible responses to those challenges. Further research will be needed to empirically evaluate the force of these challenges in a variety of factual settings and to further build philosophical underpinnings for pluralism that respond to these concerns.

## *8 The Politics of Global Legal Pluralism*

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<sup>93</sup> Seyla Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2008), 74.

<sup>94</sup> Krisch, *Beyond Constitutionalism*, *supra* note 17, at 271.

The politics of global legal pluralism are complex and multifaceted. As noted at the outset, global legal pluralism builds upon earlier scholarship focused on legal pluralism in more localized settings. And as a descriptive project this scholarship eschewed normative statements either advocating for or against different aspects of legal pluralism.

This is not to say, of course, that legal pluralism as a scholarly project was (or ever could be) devoid of implicit values and normative biases. Indeed, one might say that two strong normative undercurrents have always animated legal pluralism. First, legal pluralism was an attack on legal centralism, the idea that law was the sole province of the state and its formal institutions.<sup>95</sup> Pluralists sought to undermine the assumption of state power, discovering agency and subversive opportunities among those presumed to be marginalized. As such, legal pluralism was a way of critiquing the power of the state and even at times celebrating resistance to state hegemony. Second, legal pluralism often had an implicit pro-local bias, particularly in its emphasis on forms of resistance to colonial state power. Perhaps echoing cultural anthropology's more general celebration of the local, legal pluralists tended to make the local, the indigenous, and the anticolonial populations the heroes of the narrative. Likewise, left-wing writers on development issues have sometimes used concepts drawn from legal pluralism to celebrate resistance to transnational elites, such as the World Bank.<sup>96</sup>

Of course, there is nothing intrinsically progressive or better or more enlightened about the "local." And local communities can themselves reflect significant power asymmetries.

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<sup>95</sup> See Griffiths, *supra* note 25.

<sup>96</sup> Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

Moreover, “community” is not a static concept. Communities are always changing, and contestation *within* communities is ever-present. Indeed, legal pluralists increasingly chart the ways in which local actors use the language of nonlocal legal tropes to gain leverage within their community.

Legal pluralism has also sometimes been seen as supporting a more reactionary politics. As Grégoire Mallard describes in his chapter in this volume, French anthropologists played prominent roles in French colonial administrations, thus aligning themselves with colonial power. Moreover, Mallard reveals that some of these pluralists resisted the idea that Algeria could vote for independence on the ground that Algeria was not one coherent political community, but rather many communities. Thus, a perfectly plausible descriptive observation was transformed into a political weapon for maintaining colonial rule. According to Mallard, this association of legal pluralism with colonialism taints the idea of legal pluralism in French academic circles to this day.

If global legal pluralism’s descriptive project is politically charged, its normative project is even more fraught. This is true even though global legal pluralism does not advocate any specific substantive norms, focusing instead on the emancipatory, jurisgenerative potential of legal procedures, institutions, and practices that provide a constructive forum for dialogue across difference. Despite the seeming absence of strong normative content, global legal pluralism is subject to attack from committed internationalists, committed nation-state sovereigntists, and even committed pluralists.

As discussed previously, those advocating strong international legal rules worry that global legal pluralism undermines hard-won victories by “robbing” international law of its intrinsic

superiority and therefore giving too much play to local community sentiment, which internationalists tend to view as backward, regressive, and parochial. On the other hand, nation-state sovereigntists object to pluralism's insistence on relative rather than absolute authority as well as the important role of nonstate norms in challenging the hegemony of the state. Finally, committed pluralists see global legal pluralism's normative project as overly indebted to liberal legality and the potentially constructive role of formal legal institutions in navigating difference, thereby jettisoning too much of legal pluralism's radical critique of legal centralism.

Thus, the evolution of global legal pluralism is on a different trajectory from the original legal pluralists. Indeed, global legal pluralism as a normative project derives from a different context and has different substantive aims from those of what we might call "classic" legal pluralism. Importantly, the classic legal pluralists were principally engaged in critique of a dominant view of legality, and they were doing it primarily from the perspective of thicker description. It is no accident that many of the original legal pluralists were social scientists, not law professors or legal philosophers. And while these authors did likely have a normative sympathy for counterhegemonic legalities, such normative commitments were generally unstated and implicit.

In contrast, many global legal pluralists are actually trying to advocate a plausible set of institutional arrangements and procedural mechanisms in order to make dominant legal and governmental entities more pluralist in orientation. That is a very different starting point, and it is therefore not surprising that these scholars do indeed tend to embrace aspects of liberal legality as a given. Thus, it is undoubtedly true that the new generation of global legal pluralism scholarship has not severed ties with classic state-based legal theory (and its limits), but it is also true that this new generation is no longer *aiming* to completely sever such ties in the name of

radical critique; this new work is instead trying to introduce more pluralist frameworks into hegemonic structures in order to make them more accommodating to hybridity. And that means there will be limitations on the range of hybridity, the language used, and the sorts of arguments entertained. But, these scholars would argue, the result is still better than if no pluralism had been introduced into the framework at all.

Some may not agree. They may say that it's not a truly pluralist vision unless it goes all the way and rejects (or at least challenges) the discourse of law itself. It is fine to make that argument. But I think such critics should at least also acknowledge that such a position makes it difficult to put forward a practical program with a chance of being implemented in a state-based world. Accordingly, the pragmatic programmatic recommendations of constitutional pluralism or global legal pluralism is not an un-self-conscious adoption of hegemonic frameworks, but a conscious choice to participate in a discourse about institutional design that otherwise would not be available without adopting certain assumptions and conventions.

Does this evolution mean that global legal pluralism is not truly pluralism at all? Certainly the new variants of legal pluralism are less engaged in radical critique and so are willing to countenance liberal legal hegemony even while seeking to open more space for alternative voices within the framework. And it is likewise fair and appropriate to criticize these approaches for precisely that choice. But I think it is unduly doctrinaire and closed-minded to say that such approaches cannot rightly call themselves pluralist or draw on an earlier tradition, even if that tradition was somewhat different. The nature of scholarly threads is that an idea put forth in one context and with one aim can be appropriated and developed in another context for slightly different purposes. And of all people *pluralists* should understand that.

We can perhaps criticize global legal pluralism for not being sufficiently counterhegemonic, but as we do so, we need to first acknowledge that the goals (and institutional roles) of the new pluralism may be fundamentally different from the old, which accounts for much of the difference. Second, we need to recognize that at least some of this pluralism work is keenly aware that, as noted previously, the pluralist vision is often consistent with liberalism even though it is a structurally different framework; there is no lack of self-consciousness or self-suspicion in that. And, third, we must understand that whether or not a scholar is an “heir” to an earlier strand of scholarship is not for a purist gatekeeper to regulate. Ideas morph in plural ways, and the recent moves to global legal pluralism are just a few of the many plural variants of pluralism, which is as it should be.

Finally, given that we live in an era with more displaced peoples than perhaps ever in human history,<sup>97</sup> it is necessary to consider the politics of global legal pluralism as it pertains to borders and migration. On the one hand, some, such as Peter Spiro in his chapter in this volume, argue that legal pluralism, because it focuses on norm-generating communities, must necessarily defer to the way in which those communities choose to define themselves. Accordingly, so the argument goes, legal pluralism offers no way to combat exclusionary immigration policies, the building of walls to fortify borders, and so on. On the other hand, global legal pluralism as a normative project favors institutional arrangements that encourage dialogue across difference. And of course more open immigration is a quintessential mechanism for creating such dialogue across difference. Moreover, if communities are ever-shifting anyway, there is no reason to reify

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<sup>97</sup> See generally United Nations High Commissioner for Refugees, “Global Trends: Forced Displacement in 2017,” <https://www.unhcr.org/5b27be547.pdf>.

any particular definition of community and freeze it in place. The ongoing diversification of communities can therefore be seen as an aim of global legal pluralism.

Assimilationist policies form another flashpoint for the politics of global legal pluralism. In order to effectuate Young's vision of unassimilated otherness, subcommunities should not be coerced into complete conformity with a more dominant group. This approach might place legal pluralists in opposition to strongly secular policies such as those in France that discourage or disallow indicia of religious belief to be displayed or discussed in the public arena. However, if part of the goal is to place different communities in dialogue with each other, required language instruction might be considered an appropriate intervention.

Even this brief discussion suggests the many complications inherent in defining a single politics of global legal pluralism. As either a descriptive or normative project, global legal pluralism can be deployed in the service of many different political agendas and can be seen to support many different political programs, which of course should not be surprising given the capacious view of law that global legal pluralism represents.

This returns us to the core point that global legal pluralism is neither fully global nor fully pluralist. To the extent it refuses, as a descriptive matter, to anoint some legal assertions as necessarily hierarchically superior to others, it is not fully global and will always be subject to criticism from committed internationalists. And to the extent it embraces as a normative matter institutional designs, procedural mechanisms, and discursive practices to effectuate an overarching goal of fostering dialogue across difference, it is asserting a global procedural value of dialogue and therefore is not fully pluralist. Indeed, given the broad (and often undefined) vision of law embraced by legal pluralists, it is perhaps not properly considered "legal" either!

But for all that, it may be that global legal pluralism is the best we can do to conceptualize the actual operation of norms in the world. Global legal pluralism asks us to adopt as capacious a definition of law and authority as possible, while pushing for any collective self-assertion to be self-conscious and restrained, all in order to keep the dialogue alive.

In this vision, communities assert law as part of a conversation that never ends; they wield authority as part of an endless Mobius strip of contestation, they make choices amid the pluralism, and those choices inevitably squelch some voices and honor others. It is the self-recognition of our own limitations as authorities that encourages us to act in a self-restrained manner and in deference to other perspectives and points of view, at least to the extent we can. And, at the end of the day, that is probably the best that law can ever do: foster dialogue across difference and inculcate habits of self-restraint in imposing norms, turning as many enemies into adversaries as possible.

Descriptive global legal pluralism helps us see areas of contestation more clearly and comprehensively, instead of exclusively focusing on the state. And normative global legal pluralism proposes a set of social institutions, procedures, and practices for channeling conflict while seeking jurisgenerative solutions that honor all the community affiliations in play to the extent possible. These solutions are never perfect, of course, but that should not deter us from the effort. At its best, law is not just rules, but a complex set of intellectual, social, political, and ethical practices. And these practices are the best we imperfect human beings can do to mediate conflict, seek common discourse, and strike provisional compromises. As a result, it seems to me that it is worth the effort to keep law alive and pursue both the insights and the underlying values

of global legal pluralism as we hang on to our humanity and diversity during the conflicts still to come.\*

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\* Some material in this Introduction is derived from Paul Schiff Berman, “The Evolution of Global Legal Pluralism,” in *Authority in Transnational Legal Theory: Theorising Across Disciplines*, eds. Roger Cotterrell and Maksymilian Del Mar (Cheltenham: Edward Elgar Publishing, 2016), 151–90; Paul Schiff Berman, “Can Global Legal Pluralism Be Both ‘Global’ and ‘Pluralist’?,” *Duke Journal of Comparative & International Law* 29, no. 3 (2019): 381–403; and Paul Schiff Berman, “Global Legal Pluralism as a Normative Project,” *University of California at Irvine Law Review* 8 (2018): 149–81.