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## A Pluralist Approach to International Law

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# Article

## A Pluralist Approach to International Law

Paul Schiff Berman<sup>†</sup>

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### I. INTRODUCTION

The New Haven School of International Law offered a significant, process-based rejoinder to the realism and positivism that had dominated international relations theory in the United States since the close of World War II. Whereas international relations realists viewed international law as merely a product of state power relations,<sup>1</sup> and positivists dismissed international law entirely because it lacked both sovereign commands and a rule of recognition,<sup>2</sup> scholars of the New Haven School studied law as a social

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1. See, e.g., EDWARD HALLETT CARR, *THE TWENTY YEARS’ CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 80 (Palgrave 2001) (1939) (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”); GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 95 (1984) (“[T]he belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints” is a perspective that “runs like a red skein through our foreign policy of the last fifty years.”); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 5 (5th ed. rev. 1978) (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”).

2. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994).

process of authoritative decisionmaking.<sup>3</sup> Such a study necessarily expanded the state-focused perspective of both the realists and positivists by drawing attention to ongoing interactions among variously situated bureaucratic and institutional actors.

Now, in the first decade of the twenty-first century, the gaze has widened still further, as international law scholars (and those studying law and globalization more generally) increasingly recognize that we inhabit a world of multiple normative communities, some of which impose their norms through officially sanctioned coercive force and formal legal processes, but many of which do not. These norms have varying degrees of impact, of course, but it has become clear that ignoring such normative assertions altogether as somehow not “law” is not a useful strategy. Accordingly, what we see emerging is an approach to international law drawn from legal pluralism.<sup>4</sup>

As such, this new international law scholarship owes a debt not only to Myres McDougal, Harold Lasswell, Michael Reisman and the other practitioners of the New Haven School, but to another Yale Law School professor whose name is rarely associated with international law: Robert Cover. Cover, like other legal pluralists,<sup>5</sup> insisted that law does not reside solely in the coercive commands of a sovereign power. Instead, Cover argued that law is constantly constructed through the contest among various norm-generating communities.<sup>6</sup> Thus, although “official” norms articulated by sovereign entities obviously count as “law,” to Cover such official assertions of prescriptive or adjudicatory jurisdiction are only some of the many ways in which normative commitments arise.<sup>7</sup>

3. See, e.g., Symposium, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266 (1985).

4. See, e.g., Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classification, Typological Interpretations, and Bibliographical Resources*, in LAW AND THE SOCIAL SCIENCES 15 (Leon Lipson & S. Wheeler eds., 1986) (“[N]ot all the phenomena related to law and not all that are law-like have their source in the government.”). For further discussions of legal pluralism, see CAROL WEISBROD, *EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE* (2002); David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425; Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 28-34 (1981); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); and Sally Engel Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 870 (1988). For more detailed discussions of legal pluralism in the international context, see BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* (2002); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. (forthcoming 2007); Sally Engle Merry, *International Law and Sociological Scholarship: Towards a Spatial Global Legal Pluralism*, STUD. IN L. POL. & SOC'Y (forthcoming 2007); Balakrishnan Rajagopal, *The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT'L L. 345 (2005); and Gunther Teubner, “*Global Bukowina*”: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

5. See *supra* note 4.

6. See generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 43-46 (1983) [hereinafter Cover, *Nomos and Narrative*]; Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985) [hereinafter Cover, *Folktales of Justice*].

7. See Cover, *Nomos and Narrative*, *supra* note 6, at 43 (“The position that only the state creates law . . . confuses the status of interpretation with the status of political domination.”). See also Cover, *Folktales of Justice*, *supra* note 6, at 181 (arguing that “all collective behavior entailing

Cover's insights are crucial for understanding today's global legal pluralism. For example, the Project on International Courts and Tribunals has identified approximately 125 international institutions, all issuing decisions that have some effect on state legal authorities, though those effects are sometimes deemed binding, sometimes merely persuasive, and often fall somewhere between the two.<sup>8</sup> Meanwhile, scholars have sought to define and understand "transnational legal process," the ways in which nation-states come to internalize international or transnational norms, even when those norms are not directly backed by coercive power.<sup>9</sup> Others have studied non-traditional legal actors such as nongovernmental organizations (NGOs) and their role in defining (and sometimes enforcing) legal standards.<sup>10</sup> And, many non-state communities seek to inculcate norms transnationally, subnationally, or supranationally, whether through various forms of private ordering, industry standard-setting, political lobbying, or other means. This messy world, where official, quasi-official, and unofficial norms are pursued by multiple communities controlling various means of coercive and persuasive authority, would have been very familiar to Cover.

This Article discusses Cover's work and its relationship to the New Haven School of International Law, while arguing that Cover's emphasis on norm-generating communities—rather than nation-states—and his celebration of "jurisdictional redundancy"<sup>11</sup> provide a useful analytical framework for understanding the plural normative centers that are the focus of much current international law scholarship. Moreover, a pluralist perspective on international law provides a powerful critique to the latest incarnation of realism, now newly dressed up in the trappings of rational choice theory.<sup>12</sup> Following Cover, international law scholars can extricate themselves from endless debates about whether or not international law should count as law. Instead, the focus can shift to the variety of normative assertions, the impact of such assertions on legal consciousness, and the way these norms are deployed by actors both within and without governmental bureaucracies. Accordingly, I suggest that, if a "new" New Haven School is emerging, it would do well to embrace Robert Cover as an important intellectual forbear.

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systematic understandings of our commitments to future worlds" can lay equal claim to the word "law") (emphasis added).

8. See Project on International Courts and Tribunals, *The International Judiciary in Context* (Nov. 2004), available at [http://www.pict-pcti.org/publications/synoptic\\_chart/synop\\_C4.pdf](http://www.pict-pcti.org/publications/synoptic_chart/synop_C4.pdf).

9. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996). See also Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2604 (1997) (book review).

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

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

12. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). For a critique along the lines I have in mind, see Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing GOLDSMITH & POSNER, *supra*).

Finally, I argue that translating Cover's ideas to the international realm provides a useful site for testing Cover's insight that law can be "jurisgenerative" and not just "jurispathic."<sup>13</sup> If judges in nation-state courts are inevitably "people of violence" because their interpretations "kill off" competing normative assertions,<sup>14</sup> the international and transnational arenas may provide important contrasts. Without as much coercive power in evidence, those asserting norms in the international or transnational arena are less likely to be able to kill off opposing interpretations; more often they must use rhetorical persuasion to inculcate ideas over time. For example, to the extent that international human rights are now an important element of global legal consciousness, it is because of a long process of rhetorical persuasion, treaty codification, and other forms of "soft law" slowly changing the international consensus, not because of positivist decree. Thus, even as Cover's insights help us to understand the global plural order today, this plural system also illuminates Cover's own work by providing an important example of how law can (at least sometimes) function as the jurisgenerative bridge to "alterity"<sup>15</sup> that Cover posited.

Part II of this Article attempts a bridge of its own, between Cover's work and that of the original New Haven School of International Law. While briefly summarizing some of the core insights of both, I point to several important similarities (as well as obvious differences) between Cover's work and that of McDougal, Lasswell, et al. Part III then argues that Harold Hongju Koh's theory of transnational legal process—arguably the genesis of the "new" New Haven School approach—arises directly from a combination of the original New Haven School's focus on international law as social process and Cover's focus on jurisgenerative norm-generating communities. By joining these two perspectives, Koh turned the gaze of international law scholarship towards the ways in which international and transnational norms are internalized into the practices (and sometimes the formal laws) of nation-states. Part IV suggests six ways in which scholars are building on Koh's transnational legal process framework, pushing the model in more pluralist directions. This pluralist vision effectively shifts the scholarly focus yet again, from "international law" to the more capacious idea of "law and globalization."<sup>16</sup> Finally, Part V considers the idea that the global legal arena might, at least some of the time, be "jurisgenerative," opening up spaces for contestation and creative innovation and effecting important changes in legal consciousness over time. This jurisgenerative vision, which, I argue, is a core underlying component of the emerging "new" New Haven School, sharply contrasts with rational choice models that ignore such jurisgenerative pluralist processes.

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13. Cover, *Nomos and Narrative*, *supra* note 6, at 25.

14. *Id.* at 53.

15. *Id.* at 9 ("Alterity" can be understood as "the 'other than the case,' the counter-factual propositions, images, shapes of will and evasion with which we charge our mental being and by means of which we build the changing, largely fictive milieu for our somatic and our social existence.").

16. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005).

## II. PROCESS AND PLURALISM: THE NEW HAVEN SCHOOL OF INTERNATIONAL LAW AND THE WORK OF ROBERT COVER

At first blush, it may seem odd to tie the work of Robert Cover to that of the New Haven School. After all, although Cover's teaching career at Yale overlapped those of McDougal, Lasswell, and Reisman, it does not appear that any member of the New Haven School ever so much as cited Cover. And, for his part, Cover did not focus much on international law at all, aside from a brief section on the Nuremberg trials in his essay *The Folktales of Justice: Tales of Jurisdiction*.<sup>17</sup> Yet, for the purpose of articulating a pluralist approach to international law, we can see some core similarities between the two bodies of work.

Turning first to the New Haven School, it is impossible to accurately encapsulate in a few short paragraphs the vast literature produced by McDougal, Lasswell, Reisman, and their associates.<sup>18</sup> However, some of the key conceptual moves championed by the New Haven School open the door to a pluralist approach. Most importantly, the New Haven School offered a kind of socio-legal realism to combat the power-based realism that had dominated the early Cold War period.<sup>19</sup> Thus, instead of assuming, as the power-based realists did, that states simply pursue unitary sets of interests (generally global domination and riches) and that international law is only instrumental,<sup>20</sup> the New Haven School argued that rules—along with the legal and political processes that inevitably accompany such rules—matter.<sup>21</sup> At the same time, however, rules did not matter to the New Haven School because of

17. Cover, *Folktales of Justice*, *supra* note 6, at 197-202.

18. Whether referred to as "Policy-Oriented Jurisprudence," "Configurative Jurisprudence," "Law, Science, and Policy," or "The New Haven School," the principal statement of the jurisprudence is found in Lasswell and McDougal's two-volume treatise, HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992). For earlier versions of the approach, see HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935); HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* (1950); and MYRES S. MCDUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* (1960). Other key statements of the jurisprudence include: Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203 (1943); Harold D. Lasswell & Myres S. McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 *U. FLA. L. REV.* 486 (1966-67); Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 *S. CAL. L. REV.* 362 (1971); Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 *RECUEIL DES COURS* 137 (1953); Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 *VA. J. INT'L L.* 188 (1968). For discussions of the New Haven School of International Law, see, for example, Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 *YALE L.J.* 1991 (1995) (reviewing HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992)); William L. Morison, *Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL* 3 (W. Michael Reisman & Burns H. Weston eds., 1976); W. Michael Reisman, *The View From the New Haven School of International Law*, 86 *AM. SOC'Y INT'L L. PROC.* 118 (1992); Symposium, *supra* note 3.

19. I am grateful to Janet Koven Levit for this particularly succinct formulation. I note that, although many of the ideas that came to be associated with the New Haven School were first developed prior to World War II, the School's stance in the Cold War era is an important part of its influence.

20. See *supra* note 1.

21. McDougal, *International Law, Power, and Policy*, *supra* note 18, at 9-10 (arguing that international relations realism "underestimates the role of rules, and of legal processes in general, and over-emphasizes the importance of naked power").

some sort of positivist reverence for such rules as “law.” Rather, rules were deemed important because they formed part of a “world constitutive process” in which political decisions were reached.<sup>22</sup>

Accordingly, the New Haven School scholars turned their attention to an empirical analysis of how the messy process of decisionmaking in the international realm actually occurs. Again and again, New Haven School writings refer to law as a social process, not either a set of sovereign commands or a reflection of the unitary interests of nation-states. And though the School’s actual empirical analysis of the world constitutive process of authoritative decisionmaking was dauntingly complex, the significant move was that it turned the focus to the interactive process itself.

In addition, the New Haven School recognized the potential importance of a wide variety of actors in this world constitutive process. Thus, the social processes studied by the New Haven School purported to embrace “all the interactions and interdeterminations of peoples across state lines.”<sup>23</sup> Indeed, Reisman went so far as to explicitly turn Austinian positivism on its head, arguing that we should focus not on how the commanded should view the command of the sovereign, but instead on the ways in which we are all sovereign decision-makers at one time or another.<sup>24</sup> Accordingly, Reisman argued, we must consider the process by which sovereigns (meaning all of us) reach decisions in the first place.<sup>25</sup> Not surprisingly, this diffusion of sovereign power was accompanied by an interest in what were dubbed “microlegal processes,” such as the “laws” implicated by everyday encounters.<sup>26</sup> In this turn, the New Haven School might even be said to embrace Eugen Ehrlich’s conception of a “living law” regulating social life largely independent of “official,” state-based law.<sup>27</sup>

It is true, of course, that most of the New Haven School work did not go quite that far, and its policy orientation tended to keep it grounded in what were referred to as “authoritative” decisions that contributed to “world public order.”<sup>28</sup> These references to “authority” and “order” (as well as other ideas such as “effective power”<sup>29</sup>) arguably reinserted a hierarchy of law in which states wielding coercive sanctions were given pride of place. Thus, it would be over-reaching to say that the New Haven School was fully pluralist in orientation. But in its two principal conceptual moves, it did open the door for a pluralist approach. First, it turned the attention from grand theorizing about geo-political power games to empirical analysis of how decisionmaking

22. Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 254-55 (1967) (referring to a process by which interactions among communities create “reciprocal demands, expectations, identities and operational patterns” which then lead to “specialized institutional practices” that have real force in “sustaining stable contact, or restoring severed relations”).

23. MCDOUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER*, *supra* note 18, at x.

24. Michael Reisman, *A Jurisprudence from the Perspective of the “Political Superior,”* 23 N. KY. L. REV. 605, 605-08 (1996).

25. *Id.* at 607.

26. *See generally* W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

27. *See* EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 14-38 (Walter L. Moll trans., 1936).

28. MCDOUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER*, *supra* note 18, at x.

29. *Id.*

actually occurs on the ground. And second, it suggested that the decisionmaking process includes a large variety of actors beyond unitary sovereign states.

Robert Cover's approach to law opened the door to multivalent processes still further. Like other legal pluralists,<sup>30</sup> Cover refused to give state lawmaking any more legitimacy or authority than other normative communities. Thus, he argued that "*all* collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word 'law.'"<sup>31</sup> This formulation deliberately denies the nation-state any special status as a law-giver. According to Cover, although

such "official" behavior and "official" norms is not denied the dignity of 'law' . . . it must share the dignity with thousands of other social understandings. In each case the question of what is law and for whom is a question of fact about what certain communities believe and with what commitments to those beliefs.<sup>32</sup>

Of course, Cover was not blind to the fact that some law-givers wield the power of coercive violence. Indeed, Cover frequently sought to make judges more aware of the violence they do, going so far as to say that judges are inevitably "people of violence."<sup>33</sup> Cover argued that, "[b]ecause of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office."<sup>34</sup> In this vision, judges use the force of the state to crush competing legal conceptions pushed by alternative normative communities.

But at the same time, Cover's vision opens up the possibility of creative alternatives, and he locates within legal forms a space for resistance, contestation, and adaptation. For example, in his one foray into international law, he acknowledges that the Nuremberg War Crimes trials were a form of victors' justice.<sup>35</sup> But then he argues that once the legal form of having trials for crimes against humanity was created, it could be appropriated by other normative communities and used against the powerful.<sup>36</sup> Thus, he describes Bertrand Russell and Jean-Paul Sartre's trial of the Vietnam War as an attempt to appropriate the Nuremberg form.<sup>37</sup> Moreover, Cover acknowledges the impact of legal enunciations, whether state-based or not, on legal consciousness. He therefore defends the Nuremberg trials based on "the capacity of the event to project a new legal meaning into the future."<sup>38</sup> Such legal meaning was then available for others to use and build upon in subsequent iterations.

Finally, Cover identified jurisdictional politics as an important locus for the clash of normative visions. According to Cover, law is "a bridge in

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30. See *supra* note 4.

31. Cover, *Folktales of Justice*, *supra* note 6, at 181.

32. *Id.* at 182.

33. Cover, *Nomos and Narrative*, *supra* note 6, at 53.

34. *Id.*

35. See Cover, *Folktales of Justice*, *supra* note 6, at 199 ("The War Crimes tribunals of 1946 . . . employed the forms of jurisdiction in the interests of power.").

36. See *id.* at 200.

37. See *id.* at 200-02.

38. *Id.* at 198.



normative space” that connects the world that is with worlds that might be.<sup>39</sup> In *The Folktales of Justice: Tales of Jurisdiction*, he makes it clear that it is in the assertion of jurisdiction itself that these norm-generating communities seize the language of law and articulate visions of future worlds.<sup>40</sup> If jurisdiction is, literally, the ability to speak as a community, then, he suggested, we can begin to develop a “natural law of jurisdiction,”<sup>41</sup> where communities claim the authority to use the language of the law based on a right or entitlement that precedes the particular sovereignties of the present moment. Such jurisdictional assertions are significant because, even though they lack coercive power, they open a space for the articulation of legal norms that are often subsequently incorporated into official legal regimes. Indeed, once we recognize that the state does not hold a monopoly on the articulation and exercise of legal norms, we can see law as a terrain of engagement, where various communities debate different visions of alternative futures.

The importance of multiple jurisdictional assertions is a key part of Cover’s essay, *The Uses of Jurisdictional Redundancy*.<sup>42</sup> Although this essay was focused on the variety of “official” law pronouncers in the U.S. federal system, Cover celebrated the benefits that accrue from having multiple overlapping jurisdictional assertions. Such benefits included greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation.<sup>43</sup> And though Cover acknowledged that it might seem perverse “to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict,” he nevertheless argued that we should “embrace” a system “that permits tensions and conflicts of the social order” to be played out in the jurisdictional structure of the system.<sup>44</sup> Thus, Cover’s pluralism, though here focused on U.S. federalism, can be said to embrace the creative possibilities inherent in multiple overlapping jurisdictions asserted by both state and non-state entities in whatever context they arise.

Most importantly, as will be discussed in Part V, both the practitioners of the New Haven School and Robert Cover open up conceptual space that is foreclosed by realist and positivist visions of international law. And though Cover’s pluralism is obviously more open-ended than the more pragmatic policy orientation of McDougal, Lasswell, Reisman, et al., the important points for the current generation of international law theorists are that we need to think of international law as a global interplay of plural voices, many of which are not associated with the state, and that we need to focus on how norms articulated by a wide variety of communities end up having important impact in actual practice, regardless of the degree of coercive power those communities wield. These important conceptual legacies form the foundation of the pluralist account of international law that is, increasingly, the core

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39. *Id.* at 181.

40. *See* Cover, *Folktales of Justice*, *supra* note 6.

41. Cover, *Nomos and Narrative*, *supra* note 6, at 58.

42. *See* Cover, *The Uses of Jurisdictional Redundancy*, *supra* note 11.

43. *See id.*

44. *Id.*

perspective of the “new” New Haven School of International Law that has emerged over the past decade.

### III. TRANSNATIONAL LEGAL PROCESS: A BLENDING OF PROCESS AND PLURALISM

If there is a “new” New Haven School, then its roots spring in part from Harold Koh’s melding of the original New Haven School with the legal pluralism of Robert Cover. Unfortunately, those who study international public and private law have not, historically, paid much attention to Robert Cover’s work or to the scholars of legal pluralism more generally.<sup>45</sup> This is because the emphasis traditionally has been on state-to-state relations. Indeed, international law has generally emphasized bilateral and multilateral treaties between and among states, the activities of the United Nations, the pronouncements of international tribunals, and (somewhat more controversially) the norms that states have obeyed for long enough that such norms could be deemed customary.<sup>46</sup> This was a legal universe with two guiding principles. First, law was deemed to reside only in the acts of official, state-sanctioned entities. Second, law was seen as an exclusive function of state sovereignty.<sup>47</sup>

Both principles, however, have eroded over time. The rise of international human rights in the post-World War II era transformed individuals into international law stakeholders, possessing their own entitlements against the state.<sup>48</sup> But even apart from individual empowerment,

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45. There are some exceptions. *See, e.g.*, William D. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2004); Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili’s Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT’L L. 713 (1998).

46. *See, e.g.*, Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (stating that the primary sources of international law are international treaties and conventions, customary practices of states accepted as law, and general principles of law common to most legal systems).

47. Of course, this is an over-simplified vision of international law. Obviously, non-state sources—including the idea of natural law itself—have long played a key role in the development of international legal principles. *See generally* David J. Bederman, *Religion and the Sources of International Law in Antiquity*, in *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 3 (Mark W. Janis ed., 1991) (tracing the role of religion in the Near East during the empires of Egypt, Babylon, Assyria, Hittites, Mittani, Israelites, Greek city-states, Indian states before 150 B.C., and Mediterranean powers before 168 B.C.). Indeed, prior to Jeremy Bentham, these non-state sources, including the universal common law of *jus gentium*, were arguably far more important than the norms generated by states. *See Koh, Why Do Nations Obey International Law?*, *supra* note 9, at 2605 (noting that medieval legal scholars viewed the law of nations, understood as *jus naturae et gentium*, as a universal law binding upon all mankind). In the nineteenth century, though positivism reigned both in the United States and abroad, transnational non-state actors nevertheless played important roles. *See id.* at 2612 (noting the work of William Wilberforce and the British and Foreign Anti-Slavery Society; Henry Dunant and the International Committee of the Red Cross; and Christian peace activists, such as America’s William Ladd and Elihu Burritt, who promoted public international arbitration and permanent international criminal courts). And, of course, natural law principles continue to undergird many international law doctrines, such as *jus cogens* norms. *See* MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 53 (2003).

48. *See, e.g.*, Louis Henkin, *Human Rights and State “Sovereignty,”* 25 GA. J. INT’L & COMP. L. 31, 33 (1996) (“At mid-century, the international system began a slow, hesitant move from state values towards human values.”); W. Michael Reisman, *Introduction to JURISDICTION IN INTERNATIONAL LAW*, at xi, xii (W. Michael Reisman ed., 1999) (noting that “since the Second World War, an increasing number of international norms of both customary and conventional provenance . . . now restrict or

scholars have come to recognize the myriad ways in which the prerogatives of nation-states are cabined by transnational and international actors. Thus, we have seen increasing attention to the important—though sometimes inchoate—processes of international norm development. Such processes inevitably lead scholars to consider non-state norms, including norms articulated by international bodies, NGOs, multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on.

The scholars of the New Haven School, by focusing on the social processes of international and transnational politics, helped usher in this less power-based, less formalist account of international legal mechanisms. Koh's subsequent study of transnational legal process kept the emphasis on processes of norm articulation and decisionmaking, but wedded this process-based analysis to a Cover-like embrace of the potentially jurisgenerative power of international and transnational legal norms. Cover had defined jurisgenerative processes as those in which interpretive "communities do create law and do give meaning to law through their narratives and precepts."<sup>49</sup> Koh invoked this jurisgenerative role of international and transnational law in multiple articles. First, in a 1994 lecture, Koh argued that the interaction among multiple transnational actors was

what Robert Cover calls "jurisgenerative." It not only generated law—the domestic private law of letters of credit, the domestic public law of executive power, the international private law of dispute-resolution, and the public international law of diplomatic relations law—but generated new interpretations of those rules and internalized them into domestic law that now guides and channels those actors' future conduct.<sup>50</sup>

Subsequently, in a 1997 essay on why nations obey international law, Koh again invoked Cover to explain how an "epistemic community" was formed around a specific interpretation of the Antiballistic Missile Treaty and the ways in which this community successfully pushed the internalization of its preferred interpretation into U.S. governmental policy.<sup>51</sup> Finally, in a 1998 lecture on domestic internalization of international law, Koh once more invoked the jurisgenerative power of international law, arguing that "[i]f nations regularly participate in transnational legal interactions in a particular issue area, even resisting nations cannot insulate themselves forever from complying with the particular rules of international law that govern that area."<sup>52</sup>

Koh's repeated references to Cover are significant. Indeed, the entire idea of transnational legal process that Koh has championed can be seen as a

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displace specific law-making and applying competences of states"). *But see* JANIS, *supra* note 47, at 177 (noting that even after Nuremberg, international law derived primarily from state practice); GEORG SCHWARZENBERGER, *INTERNATIONAL LAW* 34-36 (1957) (same).

49. Cover, *Nomos and Narrative*, *supra* note 6, at 40.

50. Koh, *Transnational Legal Process*, *supra* note 9, at 186 (footnote omitted).

51. Koh, *Why Do Nations Obey International Law?*, *supra* note 9, at 2648 (quoting Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *INT'L ORG.* 1, 3 (1992) (book review)).

52. Harold Hongju Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 641-42 (1998).

canny effort to combine the process and policy orientation of McDougal, Lasswell, Reisman, et al., with Cover's emphasis on multiple norm-generating communities and the impact of law on consciousness. From this intellectual amalgam, transnational legal process emerged as a way to explain the impact of international law even when it was not backed by obvious coercive power.

#### IV. A PLURALIST APPROACH TO INTERNATIONAL LAW: SIX SITES OF STUDY

Building further on Koh's approach requires delving deeper into Cover's legal pluralism and taking its insights even more firmly to heart. While Koh's transnational legal process framework ushered in what has arguably become a "new" New Haven School perspective on international law, that framework is now being expanded in significant ways, reflecting an ever-deepening pluralist orientation. This Part briefly describes some of the sites of study for a pluralist approach to international law. This new scholarship, I have argued elsewhere, begins to turn the focus of inquiry from "international law"—traditionally conceived as state-to-state interactions—to "law and globalization," a more multivalent study.<sup>53</sup>

##### A. *The Multidirectional Interaction of Local, National, and International Norms*

Both international law triumphalists and international law critics tend to share in common a top-down vision of international law. From this perspective, international norms are imposed on nation-states or local actors, and the challenge (or the fear) is the degree to which various populations imbibe the international norm. Even the transnational legal process paradigm, though it acknowledges an important role for non-state norm entrepreneurs, tends to focus ultimately on the ways in which state actors internalize international norms, thereby emphasizing a more top-down model.

This top-down conception, however, captures only part of the picture of how law operates globally. After all, nation-state bureaucracies may imbibe institutional roles from each other. Moreover, the "international community" is not a monolithic entity, but a collection of interests. Similarly, "local" norms are always contested, even within their communities, and "local" actors may well invoke "non-local" norms for strategic or political advantage. In addition, local actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back "up" so that, over time, the "international" norm is transformed as well.

Thus, the local, the national, and the international are all constantly shifting concepts. Accordingly, scholars of law and globalization must study the back and forth of the feedback loops: How do local actors access the power of NGOs? How are governmental and foundation funding decisions made, and how do funding priorities affect the projects undertaken around the world? How are global norms deployed locally? Do local concerns get

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53. See Berman, *From International Law to Law and Globalization*, *supra* note 16.

strategically transformed by elected elites at the national level? How do U.N. bureaucracies foster the creation of a cadre of “local” actors who are more aligned with other U.N. officials than with those in their “home” countries? What role do Western universities play in the creation of national and local norms given that many “local” elites are educated abroad? Only through a more fine-grained, nuanced understanding of the way legal norms are passed on from one group to the other and then transformed before spreading back again can law and globalization scholars begin to approach the multifaceted ways in which legal norms develop.

### B. *Non-state International Lawmaking*

A more pluralist account of international law also recognizes the wide variety of non-state actors engaged in the establishment of norms that operate internationally and transnationally. Thus, “not all the phenomena related to law and not all that are law-like have their source in the government.”<sup>54</sup> Indeed, prior to the rise of the state system, much lawmaking took place in autonomous institutions and within smaller units such as cities and guilds, while large geographic areas were left largely unregulated.<sup>55</sup> Even in modern nation-states, we see a whole range of non-state lawmaking in tribal or ethnic enclaves,<sup>56</sup> religious organizations,<sup>57</sup> corporate bylaws, social customs,<sup>58</sup> private regulatory bodies, and a wide variety of groups, associations, and non-state institutions.<sup>59</sup> For example, in England bodies such as the church, the

54. Sally Falk Moore, *Legal Systems of the World*, in *LAW AND THE SOCIAL SCIENCES* 15 (Leon Lipson & S. Wheeler eds., 1986). See also Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443 (1992) (“[L]egal pluralism is at the same time both: social norms *and* legal rules, law *and* society, formal *and* informal, rule-oriented *and* spontaneous.”). But see Brian Z. Tamanaha, *The Folly of the ‘Social Scientific’ Concept of Legal Pluralism*, 20 *J. L. & SOC’Y* 192, 193 (1993) (arguing that such a broad view of “law” causes law to lose any distinctive meaning).

55. See EHRLICH, *supra* note 27, at 14-38 (analyzing and describing the differences between legal and non-legal norms). See generally OTTO GIERKE, *ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES* (George Heiman ed. & trans., 1977) (setting forth a legal philosophy based on the concept of association as a fundamental human organizing principle); OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800* (Ernest Barker trans., Cambridge Univ. Press 1934) (1913) (presenting a theory of the evolution of the state and non-state groups according to the principle of natural law).

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

57. See, e.g., CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* (1980) (examining the contractual underpinnings of four nineteenth-century American religious utopian communities: the Shakers, the Harmony Society, Oneida, and Zoar). As Marc Galanter has observed, the field of church and state is the “*locus classicus* of thinking about the multiplicity of normative orders.” Galanter, *supra* note 4, at 28. See also Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, *KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* 228-56 (Diana Tietjens Meyers, Kenneth Kipriis & Cornelius F. Murphy, Jr. eds., Cornell Univ. Press 1993) (1988) (analyzing church-state relations in the United States from a pluralist perspective).

58. See, e.g., LON L. FULLER, *ANATOMY OF THE LAW* 43-49 (1968) (describing “implicit law,” which includes everything from rules governing a camping trip among friends to the customs of merchants).

59. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (drawing on an empirical study of relations among cattle ranchers to develop a theory of non-legal norms as a source of social control); Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 *YALE L.J.* 1545 (1989) (surveying the sources of popular perceptions of the law); Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and*

stock exchange, the legal profession, the insurance market, and even the Jockey Club opted for forms of self-regulation that included machinery for arbitrating disputes among their own members.<sup>60</sup> Moreover, “private, closely knit, homogenous micro-societies can create their own norms that at times trump state law and at other times fill lacunae in state regulation but nonetheless operate autonomously.”<sup>61</sup> Thus, as Janet Koven Levit has noted in the context of transnational trade finance, rules embodied in various informal standards, procedures, and agreements that bind banks and credit agencies have the force of law even without any official governmental involvement.<sup>62</sup> In addition, she points out that more formal lawmaking institutions such as the World Trade Organization (WTO) have, over time, appropriated these norms into their official legal instruments.<sup>63</sup>

In some circumstances, official legal actors may delegate lawmaking authority to non-state entities or recognize the efficacy of non-state norms. For example, commercial litigation, particularly in the international arena, increasingly takes place before non-state arbitral panels.<sup>64</sup> Likewise, nongovernmental standard-setting bodies, from Underwriters Laboratories (which tests electrical and other equipment) to the Motion Picture Association of America (which rates the content of films) to the Internet Corporation for Assigned Names and Numbers (which administers the Internet domain name system), construct detailed normative systems with the effect of law. Regulation of much financial market activity is left to private authorities such as stock markets or trade associations like the National Association of Securities Dealers. These international trade association groups and their private standard-setting bodies wield a tremendous influence in creating voluntary standards that become industry norms.<sup>65</sup> For example, in the wake

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*Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987) (discussing the concept of legality as reflected in popular culture); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (presenting empirical data on non-legal dispute settlement in the manufacturing industry).

60. See F.W. Maitland, *Trust and Corporation*, in MAITLAND: SELECTED ESSAYS 141, 189-95 (H.D. Hazeltine et al. eds., 1936) (1904) (describing the sophisticated non-legal means of enforcing order among members of these institutions).

61. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005). See also, e.g., Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1 (2004) (using game theory to argue that the existence of pre-existing networks enhances a private legal system's ability to enforce norms); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992) (discussing the system of “private lawmaking” in the New York Diamond Dealers Club).

62. See Levit, *supra* note 61.

63. *Id.*

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

65. For example, the Fair Labor Association (formerly the Apparel Industry Partnership) has created the standards now accepted as the norm in the apparel industry. See Fair Labor Association, *Workplace Code of Conduct and Principles of Monitoring*, <http://www.fairlabor.org/all/code> (providing a set of standards defining decent and humane working conditions) (last visited Mar. 27, 2007). Likewise, in the chemical industry, groups such as the Canadian Chemical Manufacturers Association and the International Council of Chemical Associations (ICCA) have set industry standards in

of the scandal surrounding Enron Corporation, the governmental reforms incorporated into the Sarbanes-Oxley Act of 2002<sup>66</sup> received most of the attention, but changes involving the way corporate debt is rated by Moody's and Standard & Poor's (both private corporations) may be even more significant over the long term.<sup>67</sup> Likewise, while international labor standards are difficult to establish at the governmental level, several private companies in the apparel industry, responding to calls for global responsibility and the setting of norms, have adopted codes of conduct and participated in the United Nations' Global Compact.<sup>68</sup>

The proliferation of international tribunals also, of course, creates the opportunity for plural norm creation. Thus, commentators have noted the increasing role of WTO appellate tribunals in creating an international common law of trade,<sup>69</sup> as well as the new prominence of other specialized trade courts developed in connection with free trade agreements.<sup>70</sup> Moreover, though only state parties can be formal litigants in the WTO dispute resolution process, free trade panels permit private parties to challenge domestic governmental regulations directly.<sup>71</sup> In addition, a number of international conventions, though signed by state parties, empower private actors to develop international norms. For example, the Convention on the Settlement

conjunction with other NGOs and environmental organizations such as Greenpeace. *See* Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 508-09 (2002) ("This [standard setting] reflects a complicated inter-relationship among the members of a private sector regime (ICCA), and other non-governmental organisations (Greenpeace), and governmental institutions (IFCS) and individual governments.") (quoting Virginia Hanfler, *Private Sector International Regimes*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 121, 129 (Richard A. Higgott et al. eds., 2000)).

66. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

67. *See* Jenny Wiggins, *Enron—Wall Street and Regulators: S&P Outlines Ratings Overhaul in Light of Enron*, FIN. TIMES, Jan. 26, 2002, available at <http://specials.ft.com/enron/FT3DYSSOWWC.html> (discussing changes in U.S. corporate governance and debt rating in the post-Enron world). *See also* Troy A. Paredes, *After the Sarbanes-Oxley Act: The Future of the Mandatory Disclosure System*, 81 WASH. U. L.Q. 229, 236 (2003) ("Institutional Shareholder Services, Governance Metrics International, Standard & Poor's, and others have started grading the corporate governance structures of companies, just as Standard & Poor's or Moody's grade their debt.").

68. *See* Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 208 (2004) (noting this phenomenon but discussing difficulties in holding private corporations to such codes).

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

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

71. For example, under NAFTA's Chapter 11, private investors have standing to challenge a NAFTA government's regulatory decisions. *See* Greg Block, *Trade and Environment in the Western Hemisphere: Expanding the North American Agreement on Environmental Cooperation into the Americas*, 33 ENVTL. L. 501, 507 (2003) ("NAFTA's Chapter 11 establishes rules pertaining to investments and investors, including a dispute settlement mechanism allowing private investors to challenge NAFTA governments directly for breach of the investment provisions of Chapter 11."). For an argument that non-governmental organizations (including business groups) should be granted formal WTO standing, *see, for example*, Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996); and G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 907-22 (1995).

of Investment Disputes between States and Nationals of Other States permits private creditors to sue debtor states in an international forum.<sup>72</sup> Similarly, the Convention on the International Sale of Goods allows transacting parties to opt out of any nation-state law and instead choose a sort of “merchant law” reminiscent of the feudal era’s *lex mercatoria*.<sup>73</sup>

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

### C. *Dialectical Legal Interactions*

Some who study international law fail to find real “law” there because they are looking for hierarchically-based commands backed by coercive power. In contrast, a pluralist approach understands that interactions between various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity.<sup>74</sup> In the international context, for example, we may see treaty-based courts exert an important influence even as national courts retain formal independence, much as U.S. federal courts exercising habeas corpus jurisdiction may well influence state court interpretations of U.S. constitutional norms in criminal cases.<sup>75</sup> In turn, the decisions of national courts may also come to influence international tribunals. This dialectical

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72. See Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331 (1972), reprinted in ARON BROCHES, *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 188, 198 (1995) (observing that the Convention “firmly establishes the capacity of a private individual or a corporation to proceed directly against a State in an international forum, thus contributing to the growing recognition of the individual as a subject of international law”); IGNAZ SEIDL-HOHENVELDERN, *COLLECTED ESSAYS ON INTERNATIONAL INVESTMENTS AND ON INTERNATIONAL ORGANIZATIONS* 374 (1998) (noting that the “Convention attempts to encourage foreign investors to invest in developing countries by granting to them, in case of a dispute with the host country, a status equal to that enjoyed by that State”). See generally G. Richard Shell, *The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 25 U. PA. J. INT’L ECON. L. 703, 715 (2004) (discussing private party participation in dispute settlements before the ICSID and the International Labor Organization).

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

74. For a detailed analysis of such dialectical regulation, see Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

75. See *id.* at 2034.



relationship, if it emerges, will exist without an official hierarchical relationship based on coercive power. For example, a North American Free Trade Agreement (NAFTA) panel recently determined that a particular Mississippi state appellate procedure violated international norms of due process and constituted an unfair trade practice.<sup>76</sup> In a subsequent Mississippi case concerning the same procedure, the state court will therefore face a form of choice-of-law decision, with the state court determining what weight to give the NAFTA tribunal action. And, of course, court-to-court dialectical regulation is only the tip of the iceberg, as various transnational and inter-systemic regulation takes on a similar dialectical dynamic.<sup>77</sup>

#### D. *Conflicts of Law*

More than ten years ago, German theorist Gunther Teubner called for the creation of an “inter-systemic conflicts law,” derived not just from collisions between the distinct nations of private international law, but from what he described as “collisions between distinct global social sectors.”<sup>78</sup> Since then, the web of inter-systemic lawmaking Teubner described has only grown more complex. In a world of extraterritorial and non-territorial effects, we will see local populations increasingly attempt to assert dominion (or, in legal terms, jurisdiction) over territorially distant acts or actors. At the same time, we will see non-local actors invoke the jurisdiction of international or transnational tribunals in order to avoid the consequences of local legal proceedings. In both circumstances, battles over globalization will often be fought on the terrain of conflict of laws.

For example, online communication creates the possibility (and perhaps even the likelihood) that content posted online by a person in one physical location will violate the law in some other physical location. This poses an inevitable problem of extraterritoriality. Will the person who posts the content be required to conform her activities to the norms of the most restrictive community of readers? Or, alternatively, will the restrictive community of readers, which has adopted a norm regarding Internet content, be subjected to the proscribed material regardless of its wishes? The answers to these questions depend both on whether the community of readers asserts the jurisdictional authority to impose its norms on the foreign content provider and whether the home country of the content provider chooses to recognize the norms imposed.

Thus, in the celebrated case involving France’s efforts to prosecute Yahoo! for allowing French citizens to download Nazi memorabilia and

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76. *Loewen Group v. United States*, ICSID Case No. ARB(AF)/98/3, para. 119 (2003), available at [www.state.gov/documents/organization/22094.pdf](http://www.state.gov/documents/organization/22094.pdf).

77. For a more detailed discussion of intersystemic regulation, see Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006).

78. GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 100 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans., 1993); see also Andreas Fischer-Lescano & Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1000 (2004) (making a similar claim).

Holocaust denial material,<sup>79</sup> there was little doubt that it could take such actions with regard to Yahoo.fr, Yahoo!'s French subsidiary.<sup>80</sup> However, Yahoo! argued that the French assertion of jurisdiction over the U.S.-based Yahoo.com was improper in its scope.<sup>81</sup> According to Yahoo!, in order to comply with the injunction it would need to remove the pages from its servers altogether (not just for the French audience), thereby denying such material to non-French citizens, many of whom have the right to access the materials under the laws of their countries.<sup>82</sup> Most importantly, Yahoo! argued that such extraterritorial censoring of American web content would run afoul of the First Amendment of the U.S. Constitution.<sup>83</sup> Thus, Yahoo! and others<sup>84</sup> contended that the French assertion of jurisdiction was an impermissible attempt by France to impose global rules for Internet expression.<sup>85</sup>

Yet the extraterritoriality charge runs in both directions. If France is *not* able to block the access of French citizens to proscribed material, then the United States will effectively be imposing First Amendment norms on the entire world. Indeed, we should not be surprised that as the Internet itself becomes less U.S.-centered, a variety of content norms will begin competing for primacy.<sup>86</sup> And though geographical tracking software might seem to solve the problem by allowing websites to offer different content to different users, such a solution is probably illusory, because it would still require the sites to analyze the laws of all jurisdictions to determine what material to filter for which users.<sup>87</sup> Cross-border environmental<sup>88</sup> and trade regulation<sup>89</sup> raise similar issues.

79. *L'Association Union des Etudiants Juifs de France [UEJF] [Unified Jewish Student Union Association of France] v. Yahoo!, Inc.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000, Ordonnance de référé [order for summary judgment], Nos. 00/05308, 00/05309, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm>.

80. Similarly, Google.com has succumbed to pressure from the Chinese government to maintain a censored version of its Web site in China. See *Google Censors Itself for China*, BBC NEWS, Jan. 25, 2006, <http://news.bbc.co.uk/1/hi/technology/4645596.stm>.

81. See *UEJF v. Yahoo!, Inc.*, T.G.I. Paris, Nov. 20, 2000, Ordonnance de référé (Order for Summary Judgment), No. 00/05308, at 3, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf>.

82. *Id.*

83. *Id.*

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

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

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

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

88. See, e.g., TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca M. Bratspies & Russell A. Miller eds., 2006); Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 536 (2000).

Just as local communities affected by distant corporate activity may seek to assert jurisdiction over those allegedly causing the harm, corporations may seek to *avoid* local jurisdiction by invoking the competing jurisdiction of international tribunals. For example, as noted previously, under NAFTA and other similar agreements, special panels can pass judgment on the due process provided in local legal proceedings.<sup>90</sup> And though the panels cannot directly review or overturn local judgments, they can levy fines against the federal government signatories of the agreement,<sup>91</sup> thereby undermining the impact of the local judgment. Meanwhile, in the realm of human rights, we have seen criminal defendants convicted in state courts in the United States proceed (through their governments) to the International Court of Justice (ICJ) to argue that they were denied the right to contact their consulate, as required by treaty.<sup>92</sup> Again, although the ICJ judgments are technically unenforceable in the United States, at least one state court followed the ICJ's command anyway.<sup>93</sup>

In each of these cases, we see a dialectical dance created by the fact that multiple communities are asserting jurisdiction over the same activities. Such dances are likely to become the norm, as a variety of communities claim an interest in regulating distant behavior having extraterritorial effects (as in *Yahoo!*), or as parties claim a community affiliation beyond the local (as in the trade and human rights examples). Thus, there is an increasing global instantiation of the jurisdictional redundancy Cover celebrated in the domestic realm.<sup>94</sup>

All of these extraterritorial jurisdictional assertions inevitably increase the pressure on choice-of-law doctrines as well. For example, Anupam Chander has observed that many members of the Indian-American diaspora purchase bonds issued by their home country of India.<sup>95</sup> The purchase of these bonds obviously reflects the ongoing tie these members of the Indian diaspora feel for their "homeland." Thus, one might argue that, even when the bonds are purchased in the United States, the purchases should be governed by Indian, rather than U.S., securities laws because the bond sale reflects a substantive (and voluntary) tie between the purchasers and the Indian government. Likewise, multinational copyright disputes could be adjudicated through the application of hybrid legal norms drawn from a variety of relevant countries.<sup>96</sup>

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

90. See North American Free Trade Agreement art. 1135, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289, 605 (entered into force Jan. 1, 1994) (outlining remedies available under Chapter 11).

91. *Id.*

92. See *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 581 (Mar. 31).

93. *Torres v. Oklahoma*, 120 P.3d 1184 (Okla. Crim. App. 2005) (order granting stay of execution and remanding case for evidentiary hearing).

94. See Cover, *The Uses of Jurisdictional Redundancy*, *supra* note 11.

95. See Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001).

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

Meanwhile, a fluidly plural system makes it more likely that authorities in one territorial location will be asked to enforce a judgment issued elsewhere. The criteria for making such an enforcement decision are uncertain and likely to change over time. Within the United States, the Constitution's Full Faith and Credit Clause requires that a valid judgment issued by one state be enforced by every other state even if the judgment being enforced would be *illegal* if issued by the rendering state.<sup>97</sup> But of course, within a single, relatively homogenous country, the idea of one state enforcing another state's judgment does not seem so significant because the variations from state to state are likely to be relatively minor. In contrast, transnational recognition of judgments will be more controversial.

Yet, while the decision to enforce a judgment surely will be less automatic when the judgment at issue was rendered by a foreign (or international) tribunal, many of the same principles are still relevant. Thus, courts could acknowledge the importance of participating in an interlocking international legal system, where litigants cannot simply avoid unpleasant judgments by relocating. Moreover, deference to other lawmaking bodies will have long-term reciprocal benefits. Particularly when the parties have no significant affiliation with the enforcing community, there is little reason for a court to insist on following domestic public policies in the face of such competing "conflicts values" and therefore deny enforcement. And though the doctrine of comity has long been used to capture these values,<sup>98</sup> thinking of the issue as a matter of judgment recognition (instead of comity) may discourage courts from reflexively invoking public policy to avoid unpopular foreign judgments.

In any event, it is clear that, in a world of plural normative assertions, one crucial question will be whether a community's articulation of norms is sufficiently persuasive to convince those wielding coercive power to enforce such norms. For example, if a community purports to adjudicate a dispute, its judgment is not necessarily self-executing, particularly if the losing party is territorially distant. Thus, some entity with police power must enforce the judgment. Accordingly, the question becomes not whether a community can assert jurisdiction, but whether other communities are willing to give deference to the judgment rendered and enforce it as if it were their own. Indeed, as Cover himself acknowledged, even at the moment that a community daringly asserts its own legal jurisdiction, it is immediately forced to acknowledge that its invention is limited by the willingness of others to

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

98. See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) ("[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.").

accept the judgment as normatively legitimate.<sup>99</sup> Such jurisdictional politics form an inevitable part of a global system less defined by Westphalian delineations of authority based on clear territorial boundaries.

### E. *Procedural Mechanisms for Managing Hybrid Legal Spaces*

These spheres of complex overlapping legal authority are, not surprisingly, sites of conflict and confusion. In response to this hybrid reality, communities might seek to “solve” such conflicts either by imposing the primacy of territorially-based sovereign state authority or by seeking universal harmonization. Thus, on the one hand, communities may try to seal themselves off from outside influence by retreating from the rest of the world and becoming more insular (as some religious groups seek to do<sup>100</sup>); by building walls, both literal<sup>101</sup> or regulatory,<sup>102</sup> to protect the community from outsiders; by taking measures to limit outside influence (proposed U.S. legislation seeking to discipline judges for citing foreign or international law is but one prominent example<sup>103</sup>); or by imposing territorially-based jurisdictional or choice-of-law rules.<sup>104</sup> At the other extreme, we see calls for harmonization of norms,<sup>105</sup> more treaties,<sup>106</sup> the construction of international governing bodies,<sup>107</sup> and the creation of “world law.”<sup>108</sup>

99. As Cover points out, though law is a bridge to an alternative set of norms, the bridge begins not in “alterity” but in reality. Therefore there are real constraints on the engineering of that bridge. See Cover, *Folktales of Justice*, *supra* note 6, at 191 (“If law . . . is a bridge from *reality* to a new world there must be some constraints on its engineering. Judges must dare, but what happens when they lose that reality?”).

100. See, e.g., WEISBROD, *THE BOUNDARIES OF UTOPIA*, *supra* note 57 (discussing such communities).

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

102. See, e.g., Ben Elgin & Bruce Einhorn, *The Great Firewall of China*, BUSINESSWEEK ONLINE, Jan. 12, 2006, [http://www.businessweek.com/technology/content/jan2006/tc20060112\\_434051.htm](http://www.businessweek.com/technology/content/jan2006/tc20060112_434051.htm) (describing China’s efforts to control internet content entering the country).

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

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

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

106. See, e.g., Erin Ann O’Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883 (2005) (calling for international harmonization of online consumer protection laws).

107. See, e.g., Posting of Circle ID Reporter to [http://www.circleid.com/posts/interview\\_with\\_united\\_nations\\_head\\_secretariat\\_of\\_wgig](http://www.circleid.com/posts/interview_with_united_nations_head_secretariat_of_wgig) (July 30, 2004) (interviewing Markus Kummer, Head Secretariat of the U.N. Working Group on Internet Governance, and quoting him as saying that a “United Nations umbrella would be a prerequisite to give the necessary political legitimacy to Internet governance”).

108. See, e.g., Harold J. Berman, *World Law*, 18 FORDHAM INT’L L.J. 1617-22 (1995); Harold J. Berman, *World Law: An Ecumenical Jurisprudence of the Holy Spirit*, Emory Public Law Research Paper No. 05-4, at 5, <http://ssrn.com/abstract=666143> (Feb. 2005) (“[I]t is obvious that there cannot be a world community without a body of world law to maintain both order and justice among its different constituents.”).

However, both sovereigntist territorialization and universalism may sometimes be normatively unattractive options and are, in any event, doomed to succeed only partially, if at all. However, these are not the only two strategies available for responding to hybridity. In addition, following the insights of legal pluralism, we need to understand that normative conflict among multiple, overlapping legal systems is often unavoidable and might even sometimes be desirable both as a source of innovation and as a site for discourse among multiple community affiliations. Thus, instead of trying to stifle legal conflict either through a reimposition of territorialist prerogative or through universalist harmonization schemes, communities might seek (and increasingly are creating) a wide variety of procedural mechanisms and institutions for managing, without eliminating, hybridity. Such mechanisms and institutions may help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to other approaches, if possible. Moreover, when deference is impossible (because some instances of legal pluralism are repressive, violent, and/or profoundly illiberal<sup>109</sup>), procedures for managing hybridity can at least require an explanation of why the decisionmaker refuses to defer.

Although I leave to another day a more detailed discussion of the many such procedural mechanisms and institutions for managing hybridity currently in place,<sup>110</sup> the crucial antecedent point is that, although people may never reach agreement on *norms*, they may at least acquiesce in *procedures* that take pluralism seriously, rather than ignoring it through assertions of territorially-based power or dissolving it through universalist imperatives. Processes for managing hybridity seek to preserve the spaces of opportunity for contestation and local variation that legal pluralists have long documented, and therefore a focus on hybridity may be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult.

#### F. *The Disaggregation of the State*

One of the reasons that it is so important to conceive of law beyond the state is that the state itself is increasingly delegating power to private actors who exist in a shadowy world of quasi-public/quasi-private authority. The issue of private parties exercising forms of governmentally authorized power has long been a subject of U.S. constitutional law jurisprudence and scholarship, but international law scholars are only just beginning to consider such issues. Thus, for example, P.W. Singer notes that many military activities—including combat, surveillance, training, and interrogation functions—are increasingly being contracted out to private companies.<sup>111</sup> Yet, both domestic and international accountability mechanisms have historically

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109. See, e.g., SANTOS, *supra* note 4, at 89 (“To my mind there is nothing inherently good, progressive, or emancipatory about ‘legal pluralism’. Indeed, there are instances of legal pluralism that are quite reactionary. Suffice it to mention here the . . . legal orders established by armed groups—e.g., paramilitary forces in connivance with repressive states—in the territories under their control.”).

110. See Berman, *Global Legal Pluralism*, *supra* note 4.

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

been premised on such roles being played by governmental actors. And the literature on privatization in the domestic context often focuses on the U.S. constitutional doctrines of “state action” or non-delegation of congressional authority to administrative agencies.<sup>112</sup> Neither of these analytical frameworks is precisely applicable to the international context.<sup>113</sup> Likewise, studies of transnational regulatory networks, inter-systemic regulation, and the role of NGOs and industry standards in shaping norms reflect the growing disaggregation of state-based governance models. Thus, over the coming decade, a pluralist approach to international law undoubtedly will explore the many ramifications of this new trend in governance.

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Obviously this quick survey does not even begin to exhaust the range of inquiries opened up, or illuminated, by a pluralist approach to international law. But perhaps most fundamentally, no matter what the particular object of study may be, a pluralist account encourages a more micro-empirical analysis of how transnational, international, and non-state norms are articulated, deployed, changed, and resisted in thousands of different local settings. Such studies focus on the extent to which such norms have real impact on the ground. Therefore, a pluralist approach provides an important alternative to rational choice models of law’s impact. It is to this jurisgenerative vision of the global plural order that this Article now turns.

## V. GLOBAL LEGAL PROCESSES AS JURISGENERATIVE

A pluralist approach to the global legal system invites consideration of the “jurisgenerative,” or law-creating, role that such norms can play. Cover described a “jurisgenerative process” as one in which interpretive communities “create law and . . . give meaning to law through their narratives and precepts.”<sup>114</sup> Cover was thinking of small, closely-knit communities operating in insular, usually religiously-based units.<sup>115</sup> A pluralist approach to international law expands the vision of jurisgenerative norms to a variety of transnational, subnational, or epistemic “communities.” As noted previously, Koh drew on this idea of jurisgenerativity in his analysis of transnational legal process. A pluralist approach to international law goes even further and builds the idea of law-creation through articulation of norms into the very fabric of analysis. Such an expanded conception of jurisgenerative processes contributes to international law scholarship in at least two important ways.

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

113. For a detailed analysis of privatization in the international context, see LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE* (forthcoming 2007).

114. Cover, *Nomos and Narrative*, *supra* note 6, at 40.

115. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602 n.2 (1986) (arguing that legal interpretation or “the creation of legal meaning is an essentially cultural activity which takes place (or *best* takes place) among smallish groups”).

First, it extricates international law scholars from fruitless debates about whether international law is really law at all, or which legal rules should be deemed “legitimate.” As we have seen, legal pluralism provides international law scholars with a more comprehensive framework for conceptualizing the clash of normative communities in the modern world. This framework frees scholars from needing to differentiate so much between “law” and “non-law” or “legitimate” and “illegitimate” jurisdictional assertions. Such differentiations are less consequential in a pluralism context because the relevant question is the normative commitments of communities, not the formal status of those commitments. If, after all, a statement of norms is slowly internalized by a population, that statement will have important binding force, often even more so than a formal law backed by state sanction.<sup>116</sup> Accordingly, by taking pluralism seriously we will more easily see the way in which the contest over norms creates legitimacy over time, and we can put to rest the idea that norms not associated with nation-states have no binding authority.<sup>117</sup> As a result, instead of focusing solely on who has the formal authority to articulate norms or the coercive power to enforce them, we can turn the gaze to an empirical study of which statements of authority tend to be *treated* as binding in actual practice and by whom.

A second advantage of thinking about global legal norms as potentially jurisgenerative is that such thinking generates useful responses to rational choice arguments that focus solely on the interests of nation-states. These rational choice models aim to support the idea that international and transnational legal norms have no independent valence whatsoever and are therefore obeyed when it is in the interests of nation-states to do so and ignored when it is not.<sup>118</sup> In this view, international norms are simply epiphenomena of state interest. However, such models necessarily assume both that state interests exist independently of the social context within which the interests are formed and that the state is a unitary entity with a single, definable set of interests. Both assumptions are challenged by a pluralist conception that emphasizes jurisgenerative practices.

As to the idea of state interests, the whole point of jurisgenerativity is that norms can emerge that change the social context in which interests are developed. Thus, a policymaker’s idea of what is in the state’s interest is always and necessarily affected by ideas of appropriate action, and these ideas are likely to be shaped—even if unconsciously—by jurisgenerative processes, including the norms of international, transnational, and non-state legal assertions.<sup>119</sup> Moreover, such government officials, especially in a democracy, are at least somewhat responsive to popular opinion, and such opinion is also

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116. Thus, the best definition of law may be a non-essentialist one: to define law as that which people treat as law. See Brian Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC’Y 296, 313 (2000).

117. See Berman, *Seeing Beyond the Limits of International Law*, *supra* note 12, at 1278 (critiquing the work of Jack Goldsmith and Eric Posner in part on this ground).

118. See, e.g., GOLDSMITH & POSNER, *supra* note 12, at 13.

119. As Andrew Moravcsik puts it: “Societal ideas, interests, and institutions influence state behavior by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments.” Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (1997).



likely to be shaped by a variety of forces, again including the moral pull of international legal norms. As sociolegal scholars have long described, legal norms can effect changes in legal consciousness that in turn alter the categories of our thought, such that they help determine what we are likely to see as a viable policy option in the first place.<sup>120</sup>

Accordingly, the mere assertion of jurisdiction and articulation of a norm (even without literal enforcement power), can have such great impact that it effectively alters legal consciousness over time. As Martha Finnemore has noted, “[s]ocially constructed rules, principles, norms of behavior, and shared beliefs may provide states, individuals, and other actors with understandings of what is important or valuable and what are effective and/or legitimate means of obtaining those valued goods.”<sup>121</sup> Finnemore goes on to identify instances when an international regime without enforcement power nevertheless influenced nation-state decisionmaking. Thus, she writes:

Prior to the actions of UNESCO, most states, especially less developed countries, had no notion that they needed or wanted a state science bureaucracy. Similarly, European heads of state were not particularly concerned about treatment of the war wounded until Henri Dunant and the International Committee of the Red Cross made it an issue. Global poverty alleviation, while long considered desirable in the abstract, was not considered a pressing responsibility of states, particularly of developed states, until the World Bank under Robert McNamara made it a necessary part of development.<sup>122</sup>

And of course ideas of what is “right,” “just,” “appropriate,” and in one’s interest all will inevitably come to reflect internalized norms. Accordingly, the persuasive power of even unenforceable norms may cause states to develop interests they might not otherwise have, while shifting both popular opinion and the content of unconscious conceptions of “the way things are.”

As to the idea that states even have single, definable sets of interests, a pluralist approach emphasizing jurisgenerativity focuses on the far messier reality of state policy formation, in which multiple bureaucrats with various spheres of authority, political ideologies, institutional loyalties, and interests advance competing agendas. Indeed, this is precisely the messy reality that formed the core study of the original New Haven School. Recognizing 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, or even non-state norms for leverage. The existence of such norms therefore becomes a tool of empowerment for particular actors. These actors deploy international law arguments strategically, and may gain more of a foothold for their views because of international law. As a result, international law has a significant impact in domestic foreign policy debates because it may change the relative power of different interest groups seeking to shape that policy. And, of course, that is not even counting the myriad forces *outside* of government—NGOs, editorial writers, campaign contributors, political movements, and so on—that all exert influence on government actors and all may themselves be influenced by and

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120. For a more detailed discussion of legal consciousness scholarship and its relation to international law, see Berman, *supra* note 12, at 1280-95.

121. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 15 (1996).

122. *Id.* at 12.

may consciously deploy the norms of international law in order to press varying agendas.

For example, although the celebrated efforts of Spanish Judge Baltasar Garzón to try former Chilean leader Augusto Pinochet<sup>123</sup> were not literally “successful” because Pinochet was never extradited to Spain,<sup>124</sup> the attempted prosecution strengthened the hands of human rights advocates within Chile itself and provided the impetus for a movement that led to a Chilean Supreme Court decision stripping Pinochet of his lifetime immunity.<sup>125</sup> Likewise, Spanish efforts to prosecute members of the Argentine military have bolstered reformers within the Argentine government, most notably President Nestor Kirchner. In August 2003 Judge Garzón sought extradition from Argentina of dozens of Argentines for human rights abuses committed under the Argentine military government in the 1970s.<sup>126</sup> In addition, Garzón successfully sought extradition from Mexico of one former Argentine Navy lieutenant who was accused of murdering hundreds of people.<sup>127</sup> In the wake of Garzón’s actions, realist observers complained that such transnational prosecutions were illegitimate because Argentina had previously conferred amnesty on those who had been involved in the period of military rule and therefore any

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123. Judge Garzón issued an arrest order based on allegations of kidnappings, torture, and planned disappearances of Chilean citizens and citizens of other countries. Court Order, Spanish Request to Arrest General Pinochet (Audiencia Nacional, Oct. 16, 1998), *reprinted in* THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 57-59 (Reed Brody & Michael Ratner eds., 2000) [hereinafter THE PINOCHET PAPERS]. On October 30, 1998, the Spanish National Court ruled unanimously that Spanish courts had jurisdiction over the matter based both on the principle of universal jurisdiction (that crimes against humanity can be tried anywhere at any time) and the passive personality principle of jurisdiction (that courts may try cases if their nationals are victims of crime, regardless of where the crime was committed). Order of the Criminal Chamber Affirming Spain’s Jurisdiction (Audiencia Nacional, Nov. 5, 1998), *reprinted in* THE PINOCHET PAPERS, *supra*, at 95, 95-107. The Office of the Special Prosecutor alleged that Spaniards living in Chile were among those killed under Pinochet’s rule. *Id.* at 106.

124. Pinochet was physically in Great Britain. The British House of Lords ultimately ruled that Pinochet was not entitled to head-of-state immunity for acts of torture and could be extradited to Spain. *R v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet* (No. 3), [2000] 1 A.C. 147, 204-05 (H.L. 1999) (appeal taken from Q.B.) (holding that the International Convention Against Torture, incorporated into United Kingdom law in 1988, prevented Pinochet from claiming head-of-state immunity after 1988, because the universal jurisdiction contemplated by the Convention is inconsistent with immunity for former heads of state). Nevertheless, the British government refused to extradite, citing Pinochet’s failing health. *See* Jack Straw, Secretary of State Statement in the House of Commons (Mar. 2, 2000), *in* THE PINOCHET PAPERS, *supra* note 123, at 481, 482 (“[I]n the light of th[e] medical evidence . . . [I] conclude[d] that no purpose would be served by continuing the Spanish extradition request.”). Pinochet was eventually returned to Chile.

125. *See Chile’s Top Court Strips Pinochet of Immunity*, N.Y. TIMES, Aug. 27, 2004, at A3 (“Chile’s Supreme Court stripped the former dictator Augusto Pinochet of immunity from prosecution in a notorious human rights case on Thursday, raising hopes of victims that he may finally face trial for abuses during his 17-year rule.”).

126. *See* Larry Rohter, *Argentine Congress Likely to Void ‘Dirty War’ Amnesties*, N.Y. TIMES, Aug. 21, 2003, at A3 (recounting Garzón’s extradition request).

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

prosecution would infringe on Argentina's sovereign "choice" to grant amnesty.<sup>128</sup>

But the amnesty decision was not simply a unitary choice made by some unified "state" of Argentina; it was a politically contested act that remained controversial within the country.<sup>129</sup> And the Spanish extradition request itself gave President Kirchner more leverage in his tug-of-war with the legal establishment over the amnesty laws. Just a month after Garzón's request, both houses of the Argentine Congress voted by large majorities to annul the laws.<sup>130</sup> Meanwhile the Spanish government decided that it would not make the formal extradition request to Argentina that Garzón sought, but it did so based primarily on the fact that Argentina had begun to scrap its amnesty laws and the accused would therefore be subject to domestic human rights prosecution.<sup>131</sup> President Kirchner therefore could use Spain's announcement to increase pressure on the Argentine Supreme Court to officially overturn the amnesty laws.<sup>132</sup>

Finally, on June 14, 2005 the Argentine Supreme Court did in fact strike down the amnesty laws, thus clearing the way for domestic human rights prosecutions.<sup>133</sup> Not only was the pressure exerted by Spain instrumental in these efforts, but it is significant that the Argentine Court cited as legal precedent a 2001 decision of the Inter-American Court of Human Rights striking down a similar amnesty provision in Peru as incompatible with the American Convention on Human Rights and hence without legal effect.<sup>134</sup> So, in the end, the "sovereign" state of Argentina made political and legal choices to repeal the amnesty laws just as it had previously made choices to create them. But in this change of heart we can see the degree to which international legal pronouncements, even if they are without any literal constraining effect, may significantly alter the domestic political terrain.

Thus, a pluralist approach to international law, because it emphasizes jurisgenerative processes, provides a compelling alternative to top-down

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

129. The Argentine army, for example, made known its desire for amnesty for human rights abuses through several revolts in the late 1980s. The Argentine Congress granted amnesty after one such uprising in 1987. See Joseph B. Treaster, *Argentine President Orders Troops To End Revolt*, N.Y. TIMES, Dec. 4, 1988, at A3 (describing an army revolt in Buenos Aires staged in demand of amnesty for officers convicted and standing trial for human rights abuses).

130. Editorial, *Argentina's Day of Reckoning*, CHI. TRIB., Apr. 24, 2004, at C26.

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

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

133. Corte Suprema de Justicia [CSJN], June 14, 2005, "Simón, Julio Héctor y otros / privación ilegítima de la libertad," Causa No. 17.768, S.1767.XXXVIII (Arg.), <http://www.derechos.org/nizkor/arg/doc/nulidad.html>. See also Press Release, Human Rights Watch, Argentina: Amnesty Laws Struck Down (June 14, 2005), available at <http://hrw.org/english/docs/2005/06/14/argent11119.htm>.

134. See *supra* note 133.

models that focus solely on coercive power and the interests of nation-states. By cataloging the complex reality of multiple interests, multiple normative assertions, and multiple effects, we can see how norms articulated by international, transnational, non-state, and epistemic communities influence both policy decisions and categories of thought over time. Taking Cover's insights into the arena of global legal processes frees scholars to conduct detailed empirical analyses of the inevitable conflicts of norms articulated by multiple communities. Such analyses will necessarily go beyond both the simplified models of rational choice realists and the triumphalism that can afflict international law proponents, who have sometimes simply assumed that international law affects state behavior without the essential process-based micro analyses.

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

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

Nevertheless, while it does not offer substantive norms, a pluralist approach may favor procedural mechanisms and institutions that provide opportunities for plural voices. Such procedures can potentially help to channel (or even tame) normative conflict to some degree by bringing multiple actors together into a shared social space. This commitment can, of course, have strong normative implications because it asks decisionmakers and institutional designers to at least consider the independent value of pluralism. For example, we might favor a hybrid domestic-international

tribunal over either a fully domestic or fully international one because it includes a more diverse range of actors, or we might favor complementarity or subsidiarity regimes because they encourage dialogue among multiple jurisdictions, and so on. But Cover, and pluralism more generally, denies that a single “world public order” of the sort contemplated by the New Haven School is achievable, even assuming it were desirable.

Interestingly, while applying Cover’s insights to the global arena has benefits for scholars of law and globalization, such an application may also provide a useful site for testing Cover’s ideas. After all, as noted previously, Cover generally assumed that “official” norm givers—most notably nation-state courts—were jurispathic. Thus, in Cover’s view, these judges necessarily were forced to impose one normative worldview, thereby “kill[ing]” alternative interpretations.<sup>135</sup> In contrast, Cover did not focus as much on the possibility that official law itself could sometimes act in a way that was jurisgenerative.<sup>136</sup> Transferring Cover’s insights to the international arena tests that notion because in the realm of international law, we find statements of norms that are generally accompanied by less coercive power. In such a context, the question is whether law can be jurisgenerative without being jurispathic. An international legal pronouncement generally does not “kill off” competing interpretations; it simply adds new voices to debates. This is not always the case, of course.<sup>137</sup> And it is also true that jurispathic activity is inevitable, as Cover recognized,<sup>138</sup> in *any* adjudication of conflict. But at the very least asking the question would encourage scholars to tease out the interplay of jurisgenerative and jurispathic activities in the global arena and to think about institutional designs for handling the hybrid reality of a plural normative order.<sup>139</sup>

## VI. CONCLUSION

The New Haven School of International Law opened up the study of international law to social processes of decisionmaking and the importance of actors beyond nation-states. As such, the scholars of this era provided a

135. See Cover, *Nomos and Narrative*, *supra* note 6, at 53.

136. See Robert C. Post, *Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 *YALE J.L. & HUMAN.* 9, 15 (2005) (“In retrospect, Cover’s refusal to theorize public reason seems a great blind spot of *Nomos and Narrative*. It virtually guarantees that Cover will characterize the state as jurispathic and incapable of jurisgenesis.”). *But see* Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 *YALE J.L. & HUMAN.* 17, 26 (2005) (“[U]nlike Robert Post, . . . I read Cover as endlessly fascinated with the interactions between the state and paideic communities—and with the potential for such interactions themselves to be jurisgenerative moments.”).

137. See, e.g., Kim Lane Scheppele, *The International State of Emergency: Challenges to Constitutionalism After September 11*, at 3-4 (Sept. 21, 2006) (unpublished manuscript, prepared for the Yale Legal Theory Workshop) (describing Security Council resolutions, backed by threat of sanctions, requiring countries to enact antiterrorism legislation and adjust antiterrorism policies regardless of domestic constitutionally-based concerns), available at [http://www.law.yale.edu/documents/pdf/Intellectual\\_Life/scheppele\\_itw.pdf](http://www.law.yale.edu/documents/pdf/Intellectual_Life/scheppele_itw.pdf).

138. See Cover, *Nomos and Narrative*, *supra* note 6, at 53 (observing that, when judges kill law by asserting that “this one is the law and destroy or try to destroy the rest,” judges both do violence and enable peace).

139. For further discussion of procedural mechanisms and institutional designs for addressing hybridity, see Berman, *Global Legal Pluralism*, *supra* note 4.

significant and necessary response to international relations realists of the time. Now, however, as the study of state-to-state international law transforms into the study of law and globalization more generally, scholars interested in law in the global arena might wish to study Robert Cover's legal pluralism alongside the insights of McDougal, Lasswell, Reisman, and their colleagues. And while Harold Hongju Koh's Transnational Legal Process framework was erected from an artful combination of Cover and the New Haven School, it may now be time to take Cover's pluralist insights even more firmly to heart. By studying the many local settings in which the norms of multiple communities—geographical, ethnic, national, and epistemic—become operative, scholars can gain a far more nuanced understanding of the international and transnational legal terrain. This is a world in which claims to coercive power, abstract notions of legitimacy, and arguments about legal authority are only part of an ongoing conversation, not the final determining factors. It is a world where jurisgenerative practices proliferate, creating opportunities for contestation and creative adaptation. And though we may not like all the norms being articulated at any given moment, it will do no good to ignore them or insist on their lack of authority. In a plural world, law is an ongoing process of articulation, adaptation, re-articulation, absorption, resistance, deployment, and on and on. It is a process that never ends, and international law scholars would do well to study the multiplicity and engage in the conversation, rather than impose a top-down framework that cannot help but distort the astonishing variety on the ground.