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TOWARDS A JURISPRUDENCE OF HYBRIDITY

Paul Schiff Berman*

INTRODUCTION

Debates about non-state normative communities often devolve into clashes between two polarized positions. On the one hand, we see the desire to eradicate difference through forced obeisance to a single overarching state norm. On the other, we see claims of complete autonomy for non-state lawmaking, as if such non-state communities could plausibly exist in isolation from the communities that both surround and intersect them.

Neither of these positions takes seriously the importance of engagement and dialogue across difference. Navigating difference doesn't require either assimilation or separation; it requires negotiation. Legal pluralists have long charted this process of negotiation,¹ noting, for example, that colonial legal

* © 2010 Paul Schiff Berman, Dean and Foundation Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. This Essay is based on a presentation delivered at the Non-State Governance Symposium, held at the University of Utah in February 2009. I am grateful to participants in that symposium for useful comments and suggestions. Portions of this Essay have appeared in Paul Schiff Berman, *The New Legal Pluralism*, 5 ANNUAL REV. OF L. & SOC. SCIENCE 225 (2009); Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1151 (2008); Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); and Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PENN. L. REV. 311 (2002). For a video of the author's remarks at the Non-State Governance Symposium, visit <http://www.ulaw.tv/watch/631/non-state-governance-symposium-paul-berman>.

¹ See, e.g., Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources*, in LAW AND THE SOCIAL SCIENCES 11, 15 (Leon Lipson & Stanton Wheeler eds., 1986) (“[N]ot all the phenomena related to law and not all that are lawlike have their source in government.”). For further discussions of legal pluralism, see generally BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 85–98 (2d ed. 2002); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002); Keebet von Benda-Beckmann, *Transnational Dimensions of Legal Pluralism*, in BEGEGNUNG UND KONFLIKT EINE KULTURANTHROPOLOGISCHE BESTANDSAUFNAHME 33 (2001); 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, 27–34 (1981); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. IN L., POL. & SOC'Y (SPECIAL ISSUE) 149 (2008); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y

systems did not eradicate indigenous systems (even when they tried to).² Instead, there was a layering and intermingling of systems. And, just as important, actors strategically used the variety of fora to gain leverage and make their voices heard.

But legal pluralists have usually stopped at the descriptive. Thus, while they have catalogued the myriad ways in which state and non-state lawmaking interact, they have not taken the next step and attempted to articulate the normative jurisprudence that might flow from these observations. After all, it is one thing to say that as a descriptive matter interactions among legal and quasi-legal systems operating in the same social field inevitably occur; it is quite another to argue (as I will attempt to do here) that such messy interactivity is actually a potentially *desirable* feature to build into legal and political systems.

I call this messy interactivity a jurisprudence of hybridity, and I argue that such a jurisprudence may actually be preferable to either a hierarchical jurisprudence whereby the hegemonic state imposes a universal norm, or a separatist jurisprudence whereby non-state communities attempt to maintain complete autonomy.³ Why do I prefer a jurisprudence of hybridity? First, such a jurisprudence acknowledges the reality that people hold multiple community affiliations, rather than dissolving that multiplicity into either universality or separatism. Second, developing procedural mechanisms, institutions, or discursive practices that acknowledge hybridity helps to ensure that multiple communities are at least taken seriously and given a voice. Third, providing space for multiple communities may result in better substantive decisions because there is more space for variations and experimentation.⁴

REV. 869, 870 (1988); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973); Balakrishnan Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT'L L. 345 (2005); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC'Y 296 (2000); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

² See, e.g., Leopold Pospisil, *Modern and Traditional Administration of Justice in New Guinea*, 19 J. LEGAL PLURALISM 93 (1981) (examining the change from a traditional to a modern legal system in New Guinea).

³ This is a position I advance at greater length in Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

⁴ In focusing on the pluralist opportunities inherent in jurisdictional redundancy, I echo the insights of Robert Cover. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981). Although his essay was focused particularly 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. 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

Of course, acknowledging non-state community affiliations does not necessarily mean that they are the *same* as state communities. Most important, states usually (though not always) possess greater access to coercive power such as armies, police officers, and the like. Thus, it will often be agents of the state who determine the parameters of accommodation to non-state norms, so one should not naively assume that there is no hierarchy here.

Moreover, building mechanisms for acknowledging and accommodating multiple community affiliations does not mean states should always *defer* to those communities. For example, some community norms are sufficiently repressive, violent, and/or profoundly illiberal that they might not be followed. I argue here only that such norms should be *considered*, not that they should always win. But if they are considered, then when a decision maker refuses to defer, that decision maker will at least be required to justify why deference is impossible. As we will see, requiring such justifications acknowledges and respects community norms even when they don't win and forces the decision maker to offer a compelling justification on the other side of the ledger to explain why deference is impossible. It seems to me that this process of acknowledgment and justification is a good thing.

In this Essay, I start by referencing work of sociologists and political theorists analyzing interpersonal and societal communication, and I contrast a vision whereby difference is overcome by assuming commonality with one in which "otherness" is seen as an inevitable part of human interaction. I argue that it is unwise to attempt to "overcome" difference by trying to forge sameness. Yet, it is equally unwise, in a globally integrated world, to expect that walls of separation (either literal or conceptual) will be effective. Thus, we should aspire to a state of unassimilated otherness in an integrated community. In such a state, we seek communication across difference rather than annihilation of difference.

Then, I turn to law and survey three different procedural mechanisms that are or could be examples of a jurisprudence of hybridity with regard to non-state communities. First, I examine the idea of building margins of appreciation into constitutional jurisprudence to allow some scope for local and non-state community variation. Second, I explore the possibility that limited autonomy or participation regimes can help ensure some scope for non-state norms. And third, I suggest that thinking of non-state norms through the prism of conflict of laws doctrines—jurisdiction, choice of law, and recognition of judgments—might be preferable to the more mechanistic ways in which clashes between state and non-state norms are often judged.

The excruciatingly difficult case-by-case questions concerning how much to defer and how much to impose are probably impossible to answer definitively and are, at any rate, beyond the scope of this Essay. The crucial antecedent point, however, is that although people may never reach agreement on *norms*, they may

structure of the system. *Id.* at 682. Thus, Cover's pluralism, though here focused on U.S. federalism, can be said to include the creative possibilities inherent in multiple overlapping jurisdictions asserted by both state and non-state entities in whatever context they arise.

at least acquiesce in *procedures, institutions, or practices* that take hybridity seriously, rather than ignoring it through assertions of either universalist state imperatives or inflexible conceptions of non-state autonomy. A jurisprudence of hybridity, in contrast, seeks to preserve the spaces of opportunity for contestation and local variation that legal pluralists have long documented, and therefore a focus on hybridity may at times be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult. And again, the claim is only that the independent values of pluralism should always be factored into the analysis, not that they should never be trumped by other considerations.

Of course, one thing that a jurisprudence of hybridity will *not* do is provide an authoritative metric for determining which norms should prevail in this messy hybrid world. Nor does it answer the question of who gets to decide. Indeed, pluralism fundamentally challenges both the positivist and natural rights-based assumption that there can ever be a single answer to such questions. For example, as noted previously, the state's efforts to squelch a non-state community are likely only to be partial, 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.⁵ Likewise, there is no external position from which one could make a definitive statement as to who is authorized to make decisions in any given case. Rather, a statement of authority is itself inevitably open to contest. Power disparities matter, of course, and those who wield coercive force may be able to silence competing voices for a time. But even that sort of temporary silencing is rarely the end of the story, either. Thus, instead of the unitary answers assumed by universalism and separatism, a jurisprudence of hybridity is a "jurisgenerative" model⁶ focusing on the creative interventions offered by various normative communities, drawing on a variety of normative sources in ongoing political, rhetorical, and legal iterations.⁷

At the same time, mechanisms, institutions, and practices of the sort discussed in this Essay require actors to at least be willing to take part in a common set of discursive forms. This is not as idealistic as it may at first appear. Indeed, as

⁵ Lauren Benton, *Making Order out of Trouble: Jurisdictional Politics in the Spanish Colonial Borderlands*, 26 L. & SOC. INQUIRY 373, 375–76 (2001) (describing jurisdictional politics in seventeenth-century New Mexico and observing that, while "the crown made aggressive claims that royal authority and state law superseded other legal authorities," in reality, "[j]urisdictional disputes became not just commonplace but a defining feature of the legal order").

⁶ See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11–15 (1983).

⁷ Cf. SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 49 (2006) ("Whereas natural right philosophies assume that the principles that undergird democratic politics are impervious to transformative acts of popular collective will, and whereas legal positivism identifies democratic legitimacy with the correctly generated legal norms of a sovereign legislature, jurisgenerative politics is a model that permits us to think of creative interventions that mediate between universal norms and the will of democratic majorities.").

Jeremy Waldron has argued, “[t]he difficulties of inter-cultural or religious-secular dialogue are often exaggerated when we talk about the incommensurability of cultural frameworks and the impossibility of conversation without a common conceptual scheme. In fact, conversation between members of different cultural and religious communities is seldom a dialogue of the deaf”⁸ Nevertheless, it is certainly true that some normative systems deny even this limited goal of mutual dialogue. Such systems would (correctly) recognize the liberal bias within the hybrid vision I explore here, and they may reject the vision on that basis. For example, although abortion rights and antiabortion activists could, despite their differences, be said to share a willingness to engage in a common practice of constitutional adjudication, those bombing abortion clinics are not similarly willing; accordingly, there may not be any way to accommodate such actors even within a more pluralist, hybrid framework. Likewise, communities that refuse to allow even the participation of particular subgroups, such as women or minorities, may be difficult to include within the pluralist vision I have in mind. Of course, these groups are undeniably important forces to recognize and take account of as a descriptive matter. But from a normative perspective, an embrace of a jurisprudence of hybridity need not commit one to a worldview free from judgment, where all positions are equivalently embraced. Thus, I argue not necessarily for undifferentiated inclusion, but for a set of procedural mechanisms, institutions, and practices that are more likely to expand the range of voices heard or considered, thereby creating more opportunities to forge a common social space than either statism or separatism.⁹

I. SELF, OTHER, AND THE NEGOTIATION OF DIFFERENCE

Sociological studies of communication often start from the idea that interpersonal interaction requires both parties in an encounter to believe (or at least assume) that the other is not truly other at all.¹⁰ According to this view, most associated with Alfred Schutz,¹¹ differences in individual perspectives are overcome only if each party tacitly believes that he/she could effectively trade places with the other. As Schutz describes it, “I am able to understand other

⁸ Jeremy Waldron, *Public Reason and “Justification” in the Courtroom*, 1 J.L., PHIL. & CULTURE 107, 112 (2007).

⁹ This focus on jurisgenerative structures, rather than on the necessary inclusion of, or deference to, all points of view, may differentiate a jurisprudence of hybridity from multiculturalism.

¹⁰ My discussion here relies heavily on Z.D. Gurevitch, *The Other Side of Dialogue: On Making the Other Strange and the Experience of Otherness*, 93 AM. J. SOC. 1179 (1988).

¹¹ See generally ALFRED SCHUTZ, ON PHENOMENOLOGY AND SOCIAL RELATIONS (Helmut R. Wagner ed., 1970) [hereinafter SCHUTZ, ON PHENOMENOLOGY]; ALFRED SCHUTZ, COLLECTED PAPERS I: THE PROBLEM OF SOCIAL REALITY (Maurice Natanson ed., 4th ed. 1973) [hereinafter SCHUTZ, PROBLEM]; Alfred Schutz, *The Stranger: An Essay in Social Psychology*, 49 AM. J. SOC. 499 (1944).

people's acts only if I can imagine that I myself would perform analogous acts if I were in the same situation"¹² Thus, differences in perspective are reduced to differences in situation. Any possibly more fundamental differences are suppressed to facilitate dialogue.

As a result, the deliberate "assuming away" of the unfamiliar is seen as a constant part of everyday life. The unfamiliar is relegated to the category of "strange," and "strangeness" necessarily is placed elsewhere, somewhere other than the interaction at hand.¹³ Moreover, Harold Garfinkel and other ethnomethodologists have argued that individuals do not simply passively maintain these assumptions, but are constantly engaged in a joint enterprise aimed at sustaining this familiarity.¹⁴ In all of these studies, the emphasis is on "the human production of common worlds of meaning as the only axis on which dialogue rotates."¹⁵

But is that all there is to the experience of the other? Is it really imperative constantly to assume that our fellow human beings are fundamentally identical to us? After all, as Z.D. Gurevitch has argued, "[u]nder this principle, if a dialogue is to take place, strangeness as a phenomenon of everyday interaction must be considered negatively, namely, as that part of an encounter that must be constantly 'assumed away' by the participants."¹⁶ Thus, we are left with a world in which people are classified either as familiar or as strangers. And, even more problematic, these studies suggest that it will be simply impossible to bridge the communication gap with those deemed strangers. Yet, as Georg Simmel noted long ago, the stranger is never truly distant,¹⁷ so there will need to be some way of bridging gaps short of assuming away strangeness altogether.

To seek an alternative formulation, we might turn to political philosophy. Hannah Arendt, for example, offers a different way of conceptualizing the encounter with the stranger. Instead of assuming commonality, she seeks, in "Understanding and Politics," the quality that "makes it bearable to live with other people, strangers forever, in the same world, and makes it possible for them to bear with us."¹⁸ Note that for Arendt the task is how to "bear with" strangers, even

¹² SCHUTZ, ON PHENOMENOLOGY, *supra* note 11, at 181.

¹³ See Gurevitch, *supra* note 10, at 1180 (summarizing arguments in SCHUTZ, PROBLEM, *supra* note 11).

¹⁴ See Harold Garfinkel, *Studies of the Routine Grounds of Everyday Activities*, in STUDIES IN SOCIAL INTERACTION 1, 3 (David Sudnow ed., 1972).

¹⁵ Gurevitch, *supra* note 10, at 1180.

¹⁶ *Id.* at 1181–82.

¹⁷ See GEORG SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 402–08 (Kurt H. Wolff ed. & trans., 1950) (describing the phenomenon of how a stranger, who appears distant, is actually very near).

¹⁸ HANNAH ARENDT, *Understanding and Politics (The Difficulties of Understanding)*, in ESSAYS IN UNDERSTANDING 307, 322 (Jerome Kohn ed., 1994).

while recognizing that they will forever be strange.¹⁹ Significantly, this task is very different from the more intimate communication relationships studied in the sociological literature discussed above. After all, if strangers are “forever strange,” their strangeness cannot be overcome through psychological assumptions; a different strategy is necessary.

Arendt’s strategy for bearing with strangers is more than just mutual indifference and more than just toleration. It “involves a mental capacity appropriate for an active relation to that which is distant,”²⁰ which Arendt locates in King Solomon’s gift of the “understanding heart.”²¹ Understanding, according to Arendt, “is the specifically human way of being alive; for every single person needs to be reconciled to a world into which he was born a stranger and in which, to the extent of his distinct uniqueness, he always remains a stranger.”²² And what does “understanding” entail for Arendt? This is a bit difficult to pin down, but she makes clear that it is not gained through direct experience of the other, and it is not just knowledge of the other.²³ Instead, understanding starts from the individual situated apart from others. Thus, instead of “feeling your pain,” understanding involves determining what aspects of the pain people feel has to do with politics, and what politics can do to resolve our common dilemmas. Moreover, “[u]nderstanding can be challenged and is compelled to respond to an alternative argument or interpretation.”²⁴ In short, understanding in Arendt’s formulation looks a lot less like empathy and a lot more like judging.²⁵

This more distanced conception of the encounter with the stranger appears to have something in common with Iris M. Young’s vision of “unassimilated otherness,” which she posits as the relation among people in the ideal “unoppressive city.”²⁶ Young envisions ideal city life as the “‘being-together’ of strangers.”²⁷ These strangers may remain strangers and continue to “experience each other as other.”²⁸ Indeed, they do not necessarily seek an overall group identification and loyalty. Yet, they are open to “unassimilated otherness.”²⁹ They belong to various distinct groups or cultures and are constantly interacting with

¹⁹ In focusing on Arendt’s idea of “bearing with strangers,” I draw from the analysis in Phillip Hansen, *Hannah Arendt and Bearing with Strangers*, 3 CONTEMP. POL. THEORY 3 (2004).

²⁰ *Id.* at 3.

²¹ ARENDT, *supra* note 18, at 322.

²² *Id.* at 308.

²³ *See id.* at 313.

²⁴ Jean Bethke Elshtain, *Judging Rightly*, FIRST THINGS 49, 49 (November 1994) (reviewing ARENDT, *supra* note 18).

²⁵ *See* ARENDT, *supra* note 18, at 313.

²⁶ *See* Iris Marion Young, *The Ideal of Community and the Politics of Difference*, 12 SOC. THEORY & PRACTICE 1, reprinted in FEMINISM/POSTMODERNISM 300, 317, 319 (Linda J. Nicholson ed., 1990) (“Our political ideal is the unoppressive city.”).

²⁷ *Id.* at 318.

²⁸ *Id.*

²⁹ *Id.* at 319.

other groups. But they do so without seeking either to assimilate or to reject those others. Such interactions instantiate an alternative kind of community,³⁰ one that is never a hegemonic imposition of sameness but that nevertheless prevents different groups from ever being completely outside one another.³¹ In a city's public spaces, Young argues, we see glimpses of this ideal: "The city consists in a great diversity of people and groups, with a multitude of subcultures and differentiated activities and functions, whose lives and movements mingle and overlap in public spaces."³² In this vision, there can be community without sameness, shifting affiliations without ostracism.

This discussion does not, of course, even scratch the surface concerning the myriad ideas and writings available about the encounter between Self and Other. Yet, for our purposes, we can at least establish one possible dichotomy that might be useful. At the most general level, the analyses discussed above suggest that, in responding to the other, we can pursue at least two possible strategies, which are very different from each other. We can seek commonality and assume away perceived difference, or we can acknowledge entrenched difference and attempt to bridge gaps.

Each of these strategies has its analogue in law. We could assume that in the encounter with other communities our choices are limited to either full commonality or complete separation. If so, then in the consideration of non-state community norms we end up with a debate among the statist and separatist positions. And we would be forced simply to draw lines between the two. But the alternative, represented here by Arendt and Young, posits a hybrid reality. Here, the idea is to build legal structures that foster dialogue across difference, negotiation without assimilation. Is such a hybrid jurisprudence possible? Let us see.

II. A JURISPRUDENCE OF HYBRIDITY

Now we turn to explore three possible mechanisms that might form components of a jurisprudence of hybridity. Each of these mechanisms is premised on the idea of multiple community affiliation. Therefore, instead of insisting that one affiliation necessarily trumps the others, we seek ways of fostering dialogue and mutual accommodation if possible. And if accommodation is not possible, a

³⁰ Young resists using the word "community" because of the "urge to unity" the term conveys, but acknowledges that "[i]n the end it may be a matter of stipulation whether one chooses to call . . . [her vision] 'community.'" *Id.* at 320; *see also* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1049 (1996) ("Unlike Young, I do not cede the term community to those who evoke the romance of togetherness.").

³¹ *See* Young, *supra* note 26, at 319 (positing that a group of strangers living side by side "instantiates social relations as difference in the sense of an understanding of groups and cultures that are different, with exchanging and overlapping interactions that do not issue in community, yet which prevent them from being outside of one another").

³² *Id.*

jurisprudence of hybridity at least requires an explanation of why it is impossible to defer.

A. *Margins of Appreciation*

One mechanism of accommodation can be drawn from the jurisprudence of the European Court of Human Rights (ECHR): the oft-discussed “margin of appreciation” doctrine.³³ The idea here is to strike a balance between deference to national courts and legislators on the one hand, and maintaining “European supervision” that “empower[s] the ECHR to give the final ruling” on whether a challenged practice is compatible with the Convention, on the other.³⁴ Thus, the margin of appreciation allows domestic polities some room to maneuver in implementing ECHR decisions to accommodate local variation. How big that margin is depends on a number of factors including, for example, the degree of consensus among the member states. Thus, in a case involving parental rights of transsexuals, the ECHR noted that because there was as yet no common European standard and “generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation.”³⁵

Affording this sort of variable margin of appreciation usefully accommodates a limited range of pluralism. It does not permit domestic courts to fully ignore the supranational pronouncement (though domestic courts have sometimes asserted greater independence³⁶). Nevertheless, it does allow space for local variation, particularly when the law is in transition or when no consensus exists among member states on a given issue. Moreover, by framing the inquiry as one of local consensus, the margin of appreciation doctrine disciplines the ECHR and forces it to move incrementally, pushing towards consensus without running too far ahead of it. Finally, the margin of appreciation functions as a signaling mechanism through which “the ECHR is able to identify potentially problematic practices for the contracting states before they actually become violations, thereby permitting the states to anticipate that their laws may one day be called into question.”³⁷ And,

³³ A particular useful, succinct summary can be found in Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 316–17 (1997). My discussion here largely tracks theirs.

³⁴ *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 276 (1979).

³⁵ *X v. United Kingdom*, 24 Eur. Ct. H.R. 143, 169 (1997); *see also* *Otto-Preminger Inst. v. Austria*, 19 Eur. Ct. H.R. 34 (ser. A) at 58 (1995) (finding that the lack of a uniform European conception of rights to freedom of expression “directed against the religious feelings of others” dictates a wider margin of appreciation).

³⁶ *See, e.g.*, Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MOD. L. REV. 183, 196–97 (2008) (discussing the interaction between the ECHR and state constitutional courts).

³⁷ Helfer & Slaughter, *supra* note 33, at 317 (citing Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, 141 (1993)) (noting that the Convention “puts other less progressive states on notice that the laws may no longer be compatible with the Convention if their nationals were to

of course, there is reverse signaling as well, because domestic states, by their societal evolution away from consensus, effectively maintain space for local variation. As Laurence Helfer and Anne-Marie Slaughter have observed, “The conjunction of the margin of appreciation doctrine and the consensus inquiry thus permits the ECHR to link its decisions to the pace of change of domestic law, acknowledging the political sovereignty of respondent states while legitimizing its own decisions against them.”³⁸ A similar sort of interaction could be established by a constitutional court adopting some form of the classic concept/conception distinction³⁹ with regard to the adoption of norms by other actors. Thus, an entity such as the ECHR could, for example, articulate a particular concept of rights while recognizing that the way this right is implemented is subject to various alternative conceptions. Thus, legal regimes could usefully adopt margins of appreciation with regard to non-state community norms. Such a flexible approach might allow communities more leeway in trying to make statements of rights work within a particularized community context.

B. Limited Autonomy Regimes

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

In a useful summary, Henry Steiner has delineated three distinct types of autonomy regime.⁴⁰ The first allows a territorially concentrated ethnic, religious, or

challenge them.”). For an example of this type of signaling, see J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 81 (2d ed. 1993) (1986) (interpreting the ECHR’s statement in *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 19 (1986), that “[t]he need for appropriate legal measures [to protect transsexuals] should therefore be kept under review having regard particularly to scientific and societal developments” as a “strong hint that while British practice currently satisfied [the Convention], the Court’s duty to interpret the Convention as a living instrument may lead it to a different conclusion in the future.”).

³⁸ Helfer & Slaughter, *supra* note 33, at 317.

³⁹ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 71 (1986) (discussing the difference between “concept” and “conception” as “a contrast between levels of abstraction at which the interpretation of the practice can be studied”).

⁴⁰ Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1541–42 (1991) (identifying three different types of autonomy regimes for ethnic minorities including a power-sharing regime, a territorial regime, and an autonomy regime).

linguistic minority group limited autonomy within the nation-state.⁴¹ The precise contours of this autonomy can vary considerably from situation to situation. However, such schemes can include the creation of regional elective governments, command of local police, control over natural resources, management of regional schools, and so on.⁴² With regard to language, communities may be empowered to create language rights within their regions.⁴³

Of course, non-state normative communities are often dispersed throughout a state, making it difficult to create specific local zones of autonomy.⁴⁴ In such cases, other potential autonomy regimes may be more effective.⁴⁵ A second possibility, therefore, involves direct power-sharing arrangements.⁴⁶ “Such regimes carve up a state’s population in ethnic terms to assure one or several ethnic groups of a particular form of participation in governance or economic opportunities.”⁴⁷ Thus, we may see provisions that set aside a fixed number of legislative seats, executive branch positions, or judicial appointments to a particular religious or ethnic minority group.⁴⁸ In addition, legislators who are members of a particular minority group may be granted the ability to veto proposed measures adversely affecting that group.⁴⁹ Alternatively, states may enact rules requiring formal consultation

⁴¹ See, e.g., WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP* 156–59 (2001) (arguing that the creation of linguistically homogeneous, separate institutions for minority subgroups within a larger federal structure will foster the participation of minority groups in democracy by giving them the autonomy to control cultural policy).

⁴² See Steiner, *supra* note 40, at 1542 (listing examples).

⁴³ See, e.g., Wouter Pas, *A Dynamic Federalism Built on Static Principles: The Case of Belgium*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* 157, 158–59 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004) (“[I]n 1970, the Belgian State was divided into four territorial linguistic regions: The Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital, and the German-speaking region. . . . The authorities in each region may, in principle, only use the official language of that region in their dealings with citizens. In some municipalities, where a significant number of the inhabitants speak another language, special provisions were enacted to give individuals the right to continue to use their own language in their relations with the local authorities.”) (citation omitted).

⁴⁴ See, e.g., Cristina M. Rodriguez, *Language and Participation*, 94 *CAL. L. REV.* 687, 744 (2006) (“Devolution to minority-run institutions will not help secure rights for disparate ethnic groups spread out over a nation’s territory . . .”).

⁴⁵ See *id.*

⁴⁶ See, e.g., Ivo D. Duchacek, *Federalist Responses to Ethnic Demands: An Overview*, in *FEDERALISM AND POLITICAL INTEGRATION* 59, 67, 71 (Daniel J. Elazar ed., 1979) (arguing that fostering democratic pluralism and an open political system is one way to meet ethnic demands); Arend Lijphart, *The Power-Sharing Approach*, in *CONFLICT AND PEACEMAKING IN MULTIETHNIC SOCIETIES* 491 (J. Montville ed. 1990).

⁴⁷ Steiner, *supra* note 40, at 1541.

⁴⁸ *Id.* at 1541–42.

⁴⁹ *Id.*

before decisions are taken on issues that particularly impact minority communities.⁵⁰

Finally, a third autonomy regime contemplates the reality that members of an ethnic community may invoke the idea of a personal law that is carried with the individual, regardless of territorial location. This personal law is often religious in character, and it reflects a primary identification with one's religious or ethnic group, rather than the territorially delimited community of the nation-state.⁵¹ Accordingly, state law may seek to create what are essentially margins of appreciation to recognize forms of autonomy for these identities.⁵² "Like power sharing, a personal law can provide an important degree of autonomy and cohesion even for minorities that are territorially dispersed."⁵³

The question of accommodation to personal law is not a new one, nor is it limited to religious groups. In ancient Egypt, foreign merchants in commercial disputes were sometimes permitted to choose judges of their own nationality so foreigners could settle their dispute "in accordance with their own foreign laws and customs."⁵⁴ Greek city-states adopted similar rules.⁵⁵ Later, legal systems in England and continental Europe applied personal law to foreign litigants, judging many criminal and civil matters based not on the territorial location of the actors, but on their citizenship.⁵⁶ In the ninth century, for example, King Edgar allowed Danes to be judged by the laws of their homeland.⁵⁷ Likewise, William the Conqueror granted eleventh-century French immigrants the right to be judged by rules based on their national identity.⁵⁸ Foreign merchants trading under King John, in the twelfth and thirteenth centuries, were similarly governed by the law of their home communities.⁵⁹

As noted previously, the relationship between state and personal law frequently arose in colonial settings where western legal systems were layered on top of the personal laws and customs of indigenous communities. Indeed, in the colonial context, margins of appreciation and other forms of accommodation were

⁵⁰ *Id.* at 1542.

⁵¹ See, e.g., Chibli Mallat, *On the Specificity of Middle Eastern Constitutionalism*, 38 CASE W. RES. J. INT'L L. 13, 47 (2006) (contrasting the "personal model" with the "territorial model").

⁵² Chibli Mallat calls this scheme "'communitarian' (or personal) federalism." *Id.* at 51.

⁵³ Steiner, *supra* note 40, at 1542.

⁵⁴ COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 193 (1911).

⁵⁵ See DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 220, 222–24 (H. H. Scullard ed., 1978) (noting that the Athenian legal system provided "xenodikai" or "judges of aliens" to handle an influx of cases involving foreign citizens in the first half of the fifth century).

⁵⁶ See MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 7 (1994).

⁵⁷ *Id.* at 8.

⁵⁸ *Id.* at 10.

⁵⁹ *Id.* at 12–13.

often invoked as governing legal principles. For example, English courts were empowered to exercise the jurisdiction of the English courts of law and chancery only “as far as circumstances [would] admit.”⁶⁰ Likewise, with respect to personal laws, the Straits Settlements Charter of 1855 allowed the courts of judicature to exercise jurisdiction as an ecclesiastical court “so far as the religions, manners and customs of the inhabitants admit.”⁶¹ “By the end of the colonial era, indigenous law was recognized as law proper by all the colonial powers.”⁶²

Today, particularly in countries with a large minority Muslim population, many states maintain space for personal law within a nominally Westphalian legal structure. These nation-states—ranging from Canada to the United Kingdom to Egypt to India to Singapore—recognize parallel civil and religious legal systems, often with their own separate courts.⁶³ And civil legal authorities are frequently called on to determine the margin of appreciation to be given to such personal law. For example, the Indian Supreme Court has famously attempted to bridge secular and Islamic law in two decisions involving Muslim women’s right to maintenance after divorce.⁶⁴ At the same time, issues arise concerning the extent to which members of a particular religious or ethnic community can opt *out* of their personal law and adopt the law of the nation-state. For example, in 1988 a Sri Lankan court decided that a Muslim couple could adopt a child according to state regulation but could not confer inheritance rights on their adopted child because Islamic Law did

⁶⁰ *Siak v. Drashid*, [1946] 1 MALAYAN L.J. 147, 152 (App. Ct. Sept. 13, 1941).

⁶¹ ROLAND ST. JOHN BRADDELL, *THE LAW OF THE STRAITS SETTLEMENTS: A COMMENTARY* 17 (3d ed. 1982). Interestingly, in the era prior to the Age of Empire, English courts would only defer to indigenous laws of Christian communities. For example, in *Calvin’s Case*, 7 Co. Rep. 1 a, [18a] (1608), *reprinted in* 77 Eng. Rep. 377, 398 (1932), Lord Coke stated that if a King conquers a Christian kingdom, “he may, at his pleasure, alter the laws of the kingdom, but until he [does] so the ancient laws . . . remain. But if a Christian king should conquer the kingdom of an infidel, and bring them under his subjugation, [then] ipso facto, the laws of the infidels are abrogated, for that they are not only against Christianity but against the law of God and of nature, contained in the decalogue” However, by at least 1774, that distinction appears to have fallen into disrepute. *See, e.g.*, *Campbell v. Hall*, (1774) 98 Eng. Rep. 848 (K.B.) at 882 (“Don’t quote the distinction [between Christians and non-Christians] for the honour of my Lord Coke.”).

⁶² DAVID PEARL, *INTERPERSONAL CONFLICT OF LAWS IN INDIA, PAKISTAN, AND BANGLADESH* 26 (1981). Pearl excludes Germany and notes that the recognition of indigenous law created an internal conflicts of law regime, which seems implicitly to recognize some sort of autonomous legitimacy for indigenous practices.

⁶³ *See* Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari’a and the Convention Compatible?*, 44 AM. U. L. REV. 1949, 1984 (1995); DeNeen L. Brown, *Canadians Allow Islamic Courts to Decide Disputes: Sharia Gains Foothold in Ontario*, WASH. POST, Apr. 28, 2004, at A14 (discussing an Islamic Court of Civil Justice in Ontario, staffed by arbitrators trained in both Sharia and Canadian civil law).

⁶⁴ *See* *Latifi v. Union of India*, A.I.R. 2001 S.C. 3958, 3973; *Mohammed Ahmed Khan v. Shah Bano Begum*, (1985) 3 S.C.R. 844 (India).

not recognize adoption.⁶⁵ Even outside of the context of Islamic law, the United States Supreme Court has at times deferred to the independent parallel courts maintained by Indian populations located within U.S. territorial borders.⁶⁶ And beyond judicial bodies, we will increasingly see other governmental entities, such as banking regulators, forced to oversee forms of financing that conform to religious principles.⁶⁷ These sorts of negotiations, like all the limited autonomy regimes surveyed in this section, reflect official recognition of essential hybridity that the state cannot wish away.

C. *Conflicts of Laws*

Because non-state lawmaking is not usually conceived of as law, we do not usually think of clashes between state and non-state law through the prism of conflicts of law jurisprudence. But we could. Indeed, the three classic legal doctrines often grouped together under the rubric of conflict of laws—jurisdiction, choice of law, and judgment recognition—are specifically meant to manage hybrid legal spaces. However, although these doctrines are where one would most expect to see creative innovations springing forth to address hybridity, they have only infrequently been used in this way. Thus, it may be helpful to consider how communities could use choice-of-law and judgment recognition doctrines to manage the reality of multiple community affiliation.

To illustrate, I explore two well-known cases in which the U.S. Supreme Court was forced to determine how state-based lawmaking would interact with the norms of a religious community. First, in *Bob Jones University v. United States*, the Court addressed an IRS decision to deny tax-exempt status to a religious school that interpreted Christian scriptures to forbid “interracial dating and marriage.”⁶⁸ Second, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the question was whether a general state statute forbidding certain narcotics should be applied to an Indian tribe’s religious practice that included the use of peyote.⁶⁹ To my mind, viewing these conflicts as choice-of-law questions makes the analytical framework more coherent (though, it should be noted, no less difficult).

Turning to *Bob Jones*, the Internal Revenue Service had interpreted Section 501(c)(3) of the Internal Revenue Code, which gives tax-exempt status to qualifying charitable institutions, to apply to schools only if such schools have a “racially nondiscriminatory policy as to students.”⁷⁰ Accordingly, the Service denied tax exemption to Bob Jones University, which had not admitted blacks at

⁶⁵ See, e.g., *Ghouse v. Ghouse*, (1988) 1 Sri L.R. 25, 28.

⁶⁶ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71–72 (1978).

⁶⁷ See, e.g., Tavia Grant, *Sharia-Compliant Finance Is Increasingly Popular*, GLOBE & MAIL (Toronto), May 7, 2007, <https://secure.globeadvisor.com/servlet/ArticleNews/story/RTGAM/20070507/wrislam07>.

⁶⁸ 461 U.S. 574, 580–82 (1983).

⁶⁹ 494 U.S. 872, 874 (1990).

⁷⁰ *Bob Jones*, 461 U.S. at 579.

all until 1971, and had admitted them thereafter but had forbidden interracial dating, interracial marriage, the espousal of violation of these prohibitions, and membership in groups that advocated interracial marriage.⁷¹ Crucial to the case was the fact that the university grounded its rule not on racial attitudes, but on Biblical scripture. The school therefore considered the exclusion of interracial dating to be a principal tenet of its religious community.⁷² Nevertheless, although the text of section 501(c)(3) did not speak to racial discrimination at all, the Supreme Court upheld the IRS determination, finding the service's interpretation of the code provision to be permissible.⁷³

Robert Cover, in his article *Nomos and Narrative*, has famously criticized the reasoning of the *Bob Jones* decision, even while agreeing with the Court's result. According to Cover, the Court assumed "a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional."⁷⁴ In particular, Cover argued that, by grounding its decision on an interpretation of the Internal Revenue Code, the Court had sidestepped the crucial constitutional question of whether Congress could grant tax exemptions to schools that discriminated on the basis of race.⁷⁵ This was a problem for Cover because he believed that if a state legal authority were going to "kill off" the competing normative commitment of an alternative community, it should do so based on a profound normative commitment of its own.⁷⁶ By avoiding the constitutional question, Cover complained, the Court had disserved both the religious community—whose normative commitments would be placed at the mercy of mere public policy judgments—and disserved racial minorities—who "deserved a constitutional commitment to avoiding public subsidization of racism."⁷⁷

In contrast, had the clash between the university's religious rule and the IRS code, or between the religious rule and the United States Constitution, been viewed as a choice-of-law decision, two aspects of the case would have been clarified. First, the Court would have analyzed and defined the relevant community affiliations at stake. Second, the Court would have been forced to grapple with the strength of its commitment to the principle of nondiscrimination, just as Cover urged. As a result, instead of simply asserting federal law, a conflicts analysis encourages negotiation among the different norms advanced by different communities.

A more cosmopolitan and pluralist vision of conflict of laws recognizes that people and groups hold multiple community affiliations and takes those affiliations seriously. Thus, when a non-state legal practice is largely internal and primarily

⁷¹ *Id.* at 580–81.

⁷² *Id.* at 580.

⁷³ *Id.* at 595.

⁷⁴ Cover, *supra* note 6, at 66.

⁷⁵ *Id.*

⁷⁶ *See id.* at 53–60.

⁷⁷ *Id.* at 67.

reflects individuals' affiliation with the non-state community, the practice should be given more leeway than when the state itself is part of the relevant affiliation. In this case, the issue at stake was a tax exemption, a quintessentially state matter. Indeed, Bob Jones University was asking for a particular benefit for charitable organizations that was contained in the United States tax code. Therefore, for these purposes the place of the university within the nation-state was the most salient tie, making application of the federal law more justifiable. In contrast, as we shall see, other non-state normative commitments do not implicate the nation-state so directly.

Moreover, even if the relevant community tie were largely with the religious community itself, certain norms might be held so strongly by the nation-state community that such norms would be applied *regardless* of the community affiliation. In choice-of-law analysis, this is usually called the public policy exception, and it allows courts to refuse to apply foreign law that would otherwise apply, if those legal norms are sufficiently repugnant. However, as noted previously, application of the public policy exception is rare, both as a normative and descriptive matter. Thus, if a court asserts such an exception, it must justify the use of public policy grounds by reference to precisely the sorts of deeply held commitments that Cover envisioned. In the *Bob Jones* case, for example, it might be that the nation-state's deep commitment to eradicating racial discrimination would independently justify overriding the religious norms, regardless of the community affiliation analysis.

Accordingly, a conflicts approach would not simply throw the claim of protected religious insularity to the mercy of political or bureaucratic judgments. Taking the ban on interracial dating seriously as law and performing a choice-of-law analysis would create the obligation to engage in crucial line drawing. And although the community affiliation and public policy exception analyses *in this case* might justify application of state law, that will not always be the case.

Consider, by way of contrast, *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Supreme Court refused to extend First Amendment protection to the religious use of peyote.⁷⁸ There, unlike the tax exemption at issue in *Bob Jones*, the Indian tribe was not negotiating its relationship with the state; rather the use of peyote was part of a purely internal religious practice open primarily (or exclusively) to members of that community. Thus, a choice-of-law analysis based on community affiliation might well result in deference to the non-state norm. Moreover, the normative commitment to drug enforcement is perhaps better characterized as a governance choice than as an inexorable normative command. As such, the public policy exception is arguably less appropriate in this context than when addressing racial discrimination. Applying these principles, a choice-of-law analysis might well have permitted the religious practice in *Smith*.

In the end, however, I am less concerned with the particular outcome than with the analytical framework. Conceiving of these clashes between religious and

⁷⁸ 494 U.S. 872 (1990).

state-based norms in conflicts terms reorients the inquiry in a way that takes more seriously the non-state community assertion. As a result, courts must wrestle both with the nature of the multiple community affiliations potentially at issue and with the need to articulate truly strong normative justifications for not deferring to the non-state norm. Both consequences make the choice-of-law decision a constructive terrain of engagement among multiple normative systems, rather than an arm of state government imposing its normative vision on all within its coercive power.

Of course, this vision is not unproblematic. Two related objections immediately present themselves. First, a choice-of-law rule that tends to defer to non-state norms when they implicate only internal community affiliation might be seen to rest on the often-criticized distinction between public and private action. Indeed, the idea of deference in this context might come to look like the classic state deference to family privacy or autonomy.⁷⁹ And just as family privacy was often invoked to shield domestic violence and gender hierarchy, so too may deference to “internal” community norms become deference to fundamentally illiberal norms.

Second, as in the family context, we may make a mistake by assuming that the non-state community at issue is monolithic. Indeed, it may be that some members of the relevant community would prefer to have the *state* norm applied to their situation. As Judith Resnik has noted, Cover’s vision of multiple norm-generating communities did not address the problem of conflict “*within* [such] communities about their own practices and authoritative interpretations.”⁸⁰ Yet, such “contestation from within”⁸¹ (which is likely to occur along the fault lines of power hierarchies within the community) is an almost inevitable part of community norm creation. Thus, the choice-of-law question becomes, in part, a question of whose voices within a community are heard by which speakers of nation-state power.

As to the concern that too much deference to “private” norms within a community will overly empower illiberal communities, it is important to remember that, because of the public policy exception, these norms, if sufficiently abhorrent, need not be applied by the state authority. After all, a lynch mob may also be a statement of community norms, but it need not for that reason necessarily be embraced. The object of a choice-of-law analysis is not to blindly follow non-state community norms, but to ensure that if a state asserts its own norms it does so self-consciously. Indeed, simply identifying the state’s jurispathic power does not necessarily mean that we must reject all exercises of that power.⁸² Even Cover recognized the utility of a state court’s speaking in “imperial mode.”⁸³ He noted that, when judges kill off competing law by asserting that “*this one* is law,” they

⁷⁹ See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 836–37 (1985).

⁸⁰ Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 27 (2005).

⁸¹ *Id.*

⁸² See *id.* at 25.

⁸³ See Cover, *supra* note 6, at 13–14.

may do violence to the competing visions, but they also enable peace both because too much law is too chaotic to sustain and because some laws are simply too noxious to be applied.⁸⁴ The point then is simply to make sure that the imposition of imperial, jurispactic law is not done blindly or arrogantly, but with intentionality and a respect for the other sources of law-making that are being displaced.⁸⁵ A conflicts analysis at least opens space for such self-consciousness and care.

More difficult is the problem of how to respond to Resnik's arguments about inevitable conflicts within a non-state community concerning the content of that community's norms. Certainly the existence of significant disagreement within the community might be factored into the decision of whether to apply the state norm. Thus, if some substantial portion of the non-state community were clamoring for the application of *state* law, such clamoring might blunt somewhat the need to defer to the non-state norm.

More important, in thinking about how to address disputes within a non-state community, we must distinguish between two types of challenges. One concerns the proper understanding of what the content of the community's law *actually is*, and the other concerns what that law *ought to be*. For example, in *Santa Clara Pueblo v. Martinez*, a woman who was a member of an Indian tribe challenged her tribe's refusal to consider her children to be tribal members.⁸⁶ She did so, however, not based on an argument that the tribe had improperly interpreted its own community law (which based tribal membership on the father's tribal membership, not the mother's). Instead, she argued that the tribe's law was inconsistent with a federal equal protection statute.⁸⁷ Thus, the case did not present a contestation about the content of the community's norms; it merely raised a choice-of-law issue about whether the tribal law or the federal statute should govern. And however difficult the resolution of that choice-of-law question might be, it does not raise the conundrum of how to determine the appropriate content of the non-state norms in the first place.

Finally, in those relatively infrequent situations when the actual content of the non-state norm *is* at issue, courts can seek evidence to determine that community's governing norm. Historical documentation, anthropological testimony, and evidence of ongoing practice might all be relevant. And again, to the extent that there are concerns that the non-state norm is the product of hierarchy, those concerns can be factored into the choice-of-law inquiry itself; they do not render it impossible to determine the content of the norm.

⁸⁴ *See id.* at 53.

⁸⁵ *See* Resnik, *supra* note 80, at 25 (“[Cover] wanted the state’s actors . . . to be uncomfortable in their knowledge of their own power, respectful of the legitimacy of competing legal systems, and aware of the possibility that multiple meanings and divergent practices ought sometimes to be tolerated, even if painfully so.”).

⁸⁶ 436 U.S. 49, 49 (1978).

⁸⁷ *Id.* at 51.

CONCLUSION

A jurisprudence of hybridity does not, of course, make it any easier to reach actual decisions in individual cases. Indeed, determining when to defer to a non-state norm and when not, when to allow a margin of appreciation and when to insist on a state norm, when to carve out zones of autonomy and when to encroach on them—these are all issues that are probably impossible ever to resolve satisfactorily. And I do not suggest that merely adopting a more inclusive set of jurisprudential or institutional mechanisms will eliminate clashes between state and non-state normative communities. Such clashes are both inevitable and unlikely ever to be dissolved.

But the relevant question, it seems to me, is not whether law can eliminate conflict, but whether it has a chance of mediating disputes among multiple communities. And this question becomes increasingly important as normative communities increasingly overlap and intersect. Accordingly, instead of bemoaning the messiness of jurisdictional overlaps, we should accept them as a necessary consequence of the fact that communities cannot be hermetically sealed off from each other. Moreover, we can go further and consider the possibility that this jurisdictional messiness might, in the end, provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and non-state communities. In addition, jurisdictional redundancy allows alternative ports of entry for strategic actors who might otherwise be silenced.

Most fundamentally, all of this interaction is elided or ignored if we continue to think and speak as if legal and quasi-legal spheres can be formally differentiated from each other. Instead, we need to accept and perhaps even celebrate, the potentially jurisgenerative and creative role law might play in a plural world. Indeed, it is only if we take multiple affiliation seriously, if we seek dialogue across difference, if we accept unassimilated otherness, that we will have some hope of navigating the hybrid legal spaces that are all around us.