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CONFLICT OF LAWS, GLOBALIZATION, AND COSMOPOLITAN PLURALISM

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More than ten years ago, German theorist Gunther Teubner called for the creation of an "intersystemic conflicts law,"[1] derived not just from collisions between the distinct nation-states of private international law, but from what he described as "conflicts between autonomous social subsystems."[2] Since then, the web of intersystemic lawmaking Teubner described has only grown more complex. 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,[3] though those effects are sometimes deemed binding, sometimes merely persuasive, and often fall somewhere between the two. Likewise, cross-border interaction, spurred on by global communications over the Internet, has increased the likelihood that authorities in one location will seek to regulate actors elsewhere, and conflicts regimes based on territoriality seem insufficient to address such legal activities. Finally, we see many non-state communities seeking to inculcate norms transnationally, subnationally, or supranationally, whether through various forms of private ordering, industry standard-setting, political lobbying, or other means.

The collision of these multiple legal and quasi-legal normative systems requires, as Teubner suggested, a broader approach to conflict of laws, one that includes scholars from other disciplines as well as legal scholars focusing on areas beyond conflicts. Moreover, we need to think of conflict of laws not just as a series of legal puzzles about whether jurisdiction is appropriate under *x* circumstances, or how a particular choice-of-law problem should be resolved, or under what conditions a court should

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† Professor, University of Connecticut School of Law. This article is an edited version of a talk given at the Association of American Law Schools (AALS) Annual Conference, January 2005, as part of a session devoted to a consideration of my work that was sponsored by the AALS Section on Conflict of Laws. I am grateful to Section Chair Robert Sedler for giving me the opportunity to engage in an enormously fruitful dialogue concerning these ideas. Thanks also to the other panel participants for extremely thoughtful and wide-ranging responses to my work.

1. GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM 100 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed. 1993).

2. *Id.* at 107; *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 plea).

3. *See* Project on International Courts and Tribunals, *available at* http://www.pict-pcti.org (last visited Oct. 31, 2005).

recognize the normative judgment of another community. These are all important questions, of course, but I think conflicts is potentially a broader topic than that, engaging interdisciplinary scholars concerned with citizenship, community affiliation, and the social construction of place, and interacting with legal scholars studying so-called "public" international law, trade law, and non-state law-making and norm-creation.

For the past several years, I have been exploring what it might mean to adopt this sort of broad conflicts perspective.[4] In this brief symposium contribution, I seek to summarize my thoughts so far and point the way towards future scholarship. In addition, because this symposium issue sets my approach in dialogue with a group of diverse authors—most of whom are not conflicts scholars—this volume, taken as a whole, enacts precisely the sort of inquiry I believe necessary to understand law in an increasingly interlocking world. At the very least, I hope that we can explore interrelationships among academic disciplines that offer fruitful ways of thinking about conflicts in an era of globalization.

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Of course, once one mentions globalization, one immediately invites endless preliminary debate about whether or not globalization is a real phenomenon and what the word even means. So, at the outset I just want to bracket several questions that inevitably arise: What is globalization? Is it really new? Hasn't there been cross border interaction forever? And, somewhat more to our point, isn't it true that globalization creates no new problems for conflict of laws because well-settled principles of jurisdiction and choice of law already recognize the possibility that an entity can create cross border legal harm?

I want to bracket these questions because I don't really think one needs to be convinced that globalization is a completely new phenomenon to think that this might be an auspicious time to consider the social meanings embedded in conflicts rules, or the ways that judges applying conflicts rules might come to see themselves as transnational actors. Moreover, relying on "well-settled" principles of conflict of laws is an insufficient answer

4. *See* Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005) [hereinafter Berman, *Cosmopolitan Vision*]; Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) [hereinafter Berman, *Globalization*]; *see also* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005) [hereinafter Berman, *From International to Global*] (linking conflict of laws to broader questions of law and globalization).

because such principles are themselves always in flux, often in response to changes in social reality itself. Indeed, it is something of a truism to note that, in the twentieth century, jurisdiction and choice-of-law rules became more flexible and less rigidly tied to territory.[5] Such changes reflect, at least to some degree, changes in communications technologies, the rise of trains, automobiles, and airplanes, and the increasing nationalization—and later internationalization—of corporate economic activity.[6] Accordingly, simply relying on "well-settled" propositions of conflict of laws is inadequate because the well-settled propositions of the nineteenth century were different from the well-settled propositions of the twentieth century, which are likely to be different from the well-settled propositions still to come in the twenty-first century.[7]

Finally, it seems clear that, over the past decade or so, courts and commentators are at the very least having some difficulty wrestling with the reality of cross-border interaction. In my own field, cyberlaw, we've seen as many as eight distinct tests for how best to apply the *International Shoe* "minimum contacts" framework[8] to web-based contacts.[9] When one sees so much change in a common-law doctrine over such a short period of time,

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5. *Compare* Pennoyer v. Neff, 95 U.S. 714 (1877) (holding that states have complete authority within their territorial boundaries but no authority outside those boundaries), *with* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing a test for determining whether an assertion of personal jurisdiction comports with the Due Process Clause of the U.S. Constitution based on whether the defendant had sufficient contacts with the relevant state "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"). *Compare* RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS § 378 (1934) ("The law of the place of wrong determines whether a person has sustained a legal injury") *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. 2(c) (1971) (providing a more flexible inquiry aimed at determining the place with the "most significant relationship" to the dispute in question).

6. *See, e.g.*, Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L.J. 627 (1991); *see also* Berman, *Globalization*, *supra* note 4, at 468-71.

7. For a similar argument, *see* David G. Post, *Against "Against Cyberanarchy,"* 17 BERKELEY TECH. L.J. 1365, 1371-73 (2002).

8. *Int'l Shoe Co.*, 326 U.S. at 316.

9. These tests include: (1) finding jurisdiction everywhere a website can be viewed; (2) finding jurisdiction only where content is uploaded; (3) finding jurisdiction only where servers are located; (4) finding jurisdiction anywhere effects are felt; (5) basing jurisdiction on number of web "hits"; (6) basing jurisdiction on the degree to which the website in question is commercial and interactive; (7) finding jurisdiction if a website "targets" a jurisdiction; (8) basing jurisdiction on whether the site is "of local character" or if instead it is meant for a more general audience. For a discussion of jurisdiction doctrine concerning the Internet, see Berman, *Globalization*, *supra* note 4, at 447-58; *see also* Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001).

it's a sign that courts aren't comfortable with the paradigm they're using. Likewise, the proliferation of international tribunals, the increasingly dialectical relationship between national and international legal norms, and the concerns about the ability of transnational commercial activity to evade regulatory jurisdiction or substantive legal restrictions all seem to indicate that *something* is going on and that there are, at the very least, challenges present. Maybe in the end those challenges are not truly new, and maybe current doctrine can address the challenges perfectly well. I certainly am not arguing that globalization creates a "crisis" that must be "solved" by a new conflicts paradigm. But I do think that in moments of flux, when an established doctrine is at least unstable, we have a window of opportunity to think more carefully about what that doctrine might mean. Accordingly, my work is seeking to imagine conflicts schemes less tied to territory that might better respond to these various challenges.

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I approach conflict of laws from a somewhat different starting point than many. Instead of thinking only about how best to resolve disputes and instead of assuming that states provide the only possible relevant normative systems, I ask a series of broader, more anthropological, questions. What does it mean in social and symbolic terms for a community to say that it is a coherent community and then to purport to extend its dominion over a geographically distant act or actor? What are the variety of communities that might seek to articulate norms governing particular behavior? And what might happen if those resolving disputes came to see themselves, not simply as members of a particular territorially-bounded community, but as part of a cross-border, transnational legal system? These questions lead to a broader theoretical framework for thinking about conflict of laws, a framework with two observations at its core.

First, conflict of laws is not just about the appropriate boundaries for state regulation or the efficient allocation of governing authority. In addition, it is the locus for debates about community definition, sovereignty, and legitimacy. Moreover, the idea of legal jurisdiction (prescriptive and adjudicatory) both reflects and reinforces social conceptions of space, distance, and identity. Too often, however, contemporary frameworks for thinking about jurisdictional authority unreflectively take as their starting point the assumption that nation-states defined by fixed territorial borders are the only relevant jurisdictional entities, without any sustained discussion of how people actually experience allegiance to community or understand their relationship to geographical

distance and territorial frontiers. And, by side-stepping these questions, legal thinkers are ignoring a voluminous literature in anthropology, cultural studies, and political philosophy concerning such issues.[10]

This literature challenges the assumption that there is somehow a "natural" tie between a culturally or ethnically unified community and a physical location. Instead, it suggests that social and political processes tend to construct ideas of physical location rather than vice-versa.[11] In addition, even a cursory review of the historical record reveals that the idea of sovereign nation-states operating within fixed territorial boundaries is a result of specific historical and political events occurring in the seventeenth and eighteenth century, rather than some pre-ordained social arrangement.[12]

However, once the ideas of geographical territory and the nation-state are no longer treated as givens for defining community, an entirely new set of questions can be asked. How are communities appropriately defined in today's world? In what ways might we say that the nation-state is an *imagined* community, to use Benedict Anderson's famous phrase,[13] and what other imaginings are possible? After all, without an expanded vision of community formation as a psychological process, rather than a naturally occurring phenomenon based on external facts, there is no way even to conceptualize the nation-state as a community.[14] Yet, at the same time, if communities are based not on fixed attributes like geographical proximity,

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10. *See* Berman, *Globalization*, *supra* note 4, at 486-551 (surveying some of this literature).

11. *Id.* at 442 ("Legal discussions of jurisdiction are often predicated on a seemingly unproblematic division of space, particularly on the idea that societies, nations, and cultures occupy 'naturally' discontinuous spaces. This assumption ignores the possibility that territorial jurisdiction often *produces* political and social identities rather than reflecting them."); *see also* Henri Lefebvre, *Reflections on the Politics of Space*, *in* 8 ANTIPODE 30, 31 (1979) ("Space is not a scientific object removed from ideology or politics; it has always been political and strategic."); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 844 (1999) ("Jurisdictions define the identity of the people that occupy them.")

12. *See* Berman, *Globalization*, *supra* note 4, at 500-10 (surveying some of the historical literature).

13. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (Verso rev. ed. 1991) (arguing that nation-states are imagined communities "because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion").

14. *See* Berman, *Globalization*, *supra* note 4, at 463-64 ("Rather than a reified, natural structure in the relations among people, Anderson (as well as other theorists) focus on the ways conceptions of "community" are constructed within social life . . . [t]hus, community formation is viewed as a psychological process, not as a naturally occurring phenomenon based on external realities."); *see also* ERNEST GELLNER, THOUGHT AND CHANGE 168 (1964) ("Nationalism is not the awakening of nations to self-consciousness: it *invents* nations where they do not exist . . . .") (emphasis added).

shared history, or face-to-face interaction, but instead on symbolic identification and social psychology, then there is no intrinsic reason to privilege nation-state communities over other possible community identifications that people might share. So then we might ask: How do people actually experience membership in multiple, over-lapping communities? Should citizenship be theorized as one of the many subject positions occupied by people as members of diverse, sometimes non-territorial, collectivities? In what ways is our sense of place and community membership constructed through social forces? And how might law respond to the changing social context of community membership and place-making? By asking these questions, we begin to open space for more pluralist conceptions of jurisdiction that will attend to the wide variety of ways in which people construct community affiliation and identity, particularly given that courts themselves help to shape those constructions over time.

So that's the first observation. The second observation is that adjudicatory and prescriptive jurisdiction can be conceptualized as mechanisms that open space for articulation of a norm. These assertions of jurisdiction are the way a community—any community—can articulate a position rhetorically on the world stage of law. If this is how we look at jurisdiction, then we can uncouple it from enforcement. Enforcement depends on whether those who assert jurisdiction can rhetorically persuade those who possess coercive power (the police force, the military) to enforce the judgment issued. This is true even within one jurisdiction. It is, of course, a commonplace to say that courts lack their own enforcement power, making them dependent on the willingness of states and individuals to follow judicial orders.[15] And, because courts can only exercise authority to the extent that someone with coercive power chooses to carry out the legal judgments issued, judges need, in a sense, to rhetorically persuade others within the government that what they have to say should have force.

Thus, the essence of law is that it makes aspirational judgments about the future, the power of which depends on whether the judgments accurately reflect evolving norms of the communities that must choose to obey them. If this is so, then we might view extraterritorial or non-state lawmaking as substantially similar to state lawmaking within territorial bounds. Accordingly, it is not only the state that might assert jurisdiction, but any community that purports to use the language of law to articulate a

15. *Cf., e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 246 (4th ed. rev. by Sanford Levinson 2005) (noting that the U.S. Supreme Court has maintained its power in part because "it is hard to find a single historical instance when the Court stood firm for very long against a really clear wave of popular demand").

norm as a group. Acknowledging community affiliations that exist apart from the nation-state therefore becomes crucial. And by analyzing the social meaning of our affiliations across space, we can think about various alternative conceptions of community:[16]

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

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

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

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This theoretical framework leads to both descriptive and normative conclusions. My descriptive point is that, by looking at conflict of laws, we

16. For further discussion of these multiple forms of community, *see* Berman, *Globalization*, *supra* note 4, at 472-85, 527-46.

will see how cultural conceptions of community definition, boundaries, space, and distance are both constructed and reflected. For example, by recognizing the jurisprudential change from *Pennoyer v. Neff*[17] to *International Shoe*,[18] or from the First Restatement of Conflicts[19] to the Second,[20] we can glimpse cultural changes within the United States.[21] Moreover, in thinking about alternative conceptions of community that are subnational, transnational, or supranational, we gain a better understanding of the world of experience on which the legal world is mapped and can better develop a rich descriptive account of what it means for a juridical body to assert jurisdiction over a controversy. Jurisdiction, choice of law, and judgment recognition, therefore, become the terrain of engagement for debates about the appropriate definition of community and the articulation of norms. Accordingly, sociolegal scholars could fruitfully turn their attention to conflict of laws as a site of further research.[22]

More normatively, I suggest a way of thinking about conflict of laws that reflects the plurality of voices and communities asserting various forms of normative authority and conceives of judges within a broader framework of transnational law-making. I call this approach a *cosmopolitan pluralist* vision of conflict of laws. In order to explore what I mean by "cosmopolitan pluralism," let me discuss each word in turn.

COSMOPOLITANISM

When I use the term cosmopolitanism, it's important to recognize at the outset that I don't mean universalism. People often assume that the two words are synonymous.[23] But, I see cosmopolitanism actually as a middle

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17. 95 U.S. 714 (1877).

18. 326 U.S. 310 (1945).

19. RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS §378 (1934).

20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6 (1971).

21. *See, e.g., supra* note 6 and accompanying text.

22. *Cf.* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 91 (1999) (encouraging those studying law as a cultural system to move "away from normative inquiries into particular reforms and toward thick description of the world of meaning that is the rule of law"); *see also* Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 L. & POL'Y 97, 97 (1988) (arguing that sociolegal scholars would benefit from resisting the demand for normative proposals). *But see* Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1134 (2002) (book review) (arguing that "the cultural analysis of law is *both* a vital field of academic knowledge in its own right *and* a way of shedding new light on practical questions concerning legal rules and institutions.").

23. *See, e.g.*, Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867, 879 (2004) ("Rather than aspiring to *universal cosmopolitanism*, statelessness may well foster

ground between universalism on the one hand and strict territorialism on the other. To me, the advantage of cosmopolitanism as a choice-of-law framework is precisely the fact that cosmopolitanism seeks to understand issues of multiple community affiliation. Indeed, cosmopolitanism starts from the premise that community affiliations are always plural and can be detached from mere spatial location.[24]

Thus, while the cosmopolitan worldview I am describing obviously rejects any strict reliance on territorial location and geographical borders, it also rejects the goal of universalism, the idea that we are all members of one global community. I don't think it makes sense to see ourselves solely as citizens of the world and therefore to dissolve the multi-rootedness of community affiliation into one global community. Even if such a perspective were feasible, I don't think it would be desirable because it fails to capture the extreme emotional ties people still feel to distinct transnational or local communities.[25] Therefore, universalism tends to ignore the very attachments people hold most deeply. Rather, I would want to encourage recognition of multiple identifications. And these multiple identifications can include identities based on citizenship within nation-states themselves. I am not one of those who believes that the nation-state is necessarily dying. Indeed, although I just stated that the nation-state is an imagined community, socially constructed and historically contingent, it is still a particularly powerful imagined community and one that generates real feelings of loyalty and attachment.[26] So cosmopolitanism is useful precisely

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reversion to a selfish individualism.") (emphasis added); Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1046 (2001) ("The cosmopolitan model . . . dissolves the multirootedness of diasporas into a global identity."); Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 534 (1994) ("If I were a European right now, I hope I would have the guts to stand up for rootless cosmopolitanism: forget this nationalistic claptrap, and let us build a world worthy of free and equal human beings.").

24. For a sampling of the scholarship in this area, *see generally* JESSICA BERMAN, MODERNIST FICTION, COSMOPOLITANISM, AND THE POLITICS OF COMMUNITY 1-27 (2001); COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION (Pheng Cheah & Bruce Robbins eds., 1998) GLOBALIZATION (Arjun Appadurai ed., 2001); ULF HANNERZ, TRANSNATIONAL CONNECTIONS: CULTURE, PEOPLE, PLACES (1996); MARTHA C. NUSSBAUM ET AL., FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM (Joshua Cohen ed., 1996); BRUCE ROBBINS, FEELING GLOBAL: INTERNATIONALISM IN DISTRESS (1999).

25. *See, e.g.*, Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 374 (1996) ("The powerful pull of loyalty exerted by the imagined nation demonstrates that, even in the age of science, a loyalty system based on romantic myths of shared history and kinship has a capacity to endure . . . .").

26. *See* Sheldon Pollock et al., *Cosmopolitanisms*, 12 PUB. CULTURE 577, 579 (2000) (describing the power of the imagined nation of Pakistan "to address the experience of cultural and political displacement that colonialism had meant for many Muslims in South

because it is a framework that pays attention to these multi-rooted connections. Universalism, in contrast, cuts off debate about the nature of overlapping communities just as surely as territorialism does.

My conception of cosmopolitanism takes off from political philosopher Iris Marion Young's idea of the "unoppressive city."[27] Young envisions ideal city life as the "'being-together' of strangers."[28] These strangers may remain strangers and continue to "experience each other as other."[29] Indeed, they do not necessarily seek an overall group identification and loyalty. Yet, they are open to "unassimilated otherness."[30] They belong to various distinct groups or cultures and are constantly interacting with other groups. But they do so without seeking either to assimilate or to reject those others. Such interactions instantiate an alternative kind of community,[31] one that is never a hegemonic imposition of sameness but that nevertheless prevents different groups from ever being completely outside one another.[32] 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."[33] In this vision, there can be community without sameness, shifting affiliations without ostracism. And although Young does not describe her ideal as cosmopolitan, this idea of "unassimilated otherness" and multiple community affiliations fits comfortably with what I describe as cosmopolitan.

Thus, cosmopolitanism is emphatically not a model of international

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Asia" and arguing that although "the nationalist search for home and authenticity may have been modern . . . it was not, for that reason, inauthentic or illegitimate in itself.").

27. *See* Iris Marion Young, *The Ideal of Community and the Politics of Difference, in* FEMINISM/POSTMODERNISM 300, 317 (Linda J. Nicholson ed., 1990) ("Our political ideal is the unoppressive city."); *see also* Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048-49 (1996) (invoking Young's ideal city to reclaim the idea of community as "the being together of strangers," rather than limiting community to "feelings of identity or unity").

28. Young, *supra* note 27, at 318.

29. *Id.*

30. *Id.* at 319.

31. 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* Frug, *supra* note 27, at 1049 ("Unlike Young, I do not cede the term community to those who evoke the romance of togetherness.").

32. *See* Young, *supra* note 27, 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.").

33. *Id.*

citizenship in the sense of international harmonization and standardization, but instead is a recognition of multiple refracted differences where (as in Young's ideal city) people acknowledge links with the "other" without demanding assimilation or ostracism. Cosmopolitanism seeks "flexible citizenship,"[34] in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances. The cosmopolitan worldview shifts back and forth from the rooted particularity of personal identity to the global possibility of multiple overlapping communities. "[I]nstead of an ideal of detachment, actually existing cosmopolitanism is a reality of (re)attachment, multiple attachment, or attachment at a distance."[35]

A conflicts regime built on cosmopolitan principles, therefore, asks courts to consider the variety of normative communities with possible ties to a particular dispute. In employing such a framework, judges must see themselves as part of an interlocking network of domestic, transnational, and international norms. Recognizing the "complex and interwoven forces that govern citizens' conduct in a global society,"[36] courts can develop a jurisprudence that reflects this cosmopolitan reality.

PLURALISM

Turning to the pluralist part of cosmopolitan pluralism, I am thinking here of legal pluralism: the idea that law does not reside solely in the coercive commands of a sovereign power.[37] Rather, law is constantly constructed through the contest of various norm-generating communities.[38]

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

35. ROBBINS, *supra* note 24, at 3.

36. Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 550 (2000).

37. *See, e.g.*, Sally Falk Moore, *Legal Systems of the World*, *in* LAW AND THE SOCIAL SCIENCES 11 (Leon Lipson & Stanton 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* Sally Engel Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988); *see also* CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); David Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425; Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 28-34 (1981); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986).

38. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and*

As Robert Cover argued two decades ago, "*all* collective behavior entailing systematic understandings of our commitments to future worlds" can "lay equal claim to the word law."[39] Thus, although "official" norms articulated by sovereign entities obviously count as "law," a pluralist framework acknowledges that such official assertions of prescriptive or adjudicatory jurisdiction are only some of the many ways in which normative commitments arise. Accordingly, a more comprehensive conception of conflict of laws must attend to the jurisdictional assertions of nonsovereign communities as well.[40] Such jurisdictional assertions are significant because, even though they may 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, then we can see law as a locus for various communities to debate different visions of alternative futures. And conflict of laws necessarily becomes a flashpoint for this debate because it is in the assertion of jurisdiction itself that these norm-generating communities seize the language of law and articulate visions of future worlds. If jurisdiction is, literally, the ability to speak as a community, then we can begin to develop a "natural law of jurisdiction,"[41] where communities claim authority based on a right or entitlement that precedes the particular sovereignties of the present moment.

By acknowledging the ways in which the language and forms of law are deployed by individuals and communities, both inside and outside the territorial bounds of the state system, the cosmopolitan pluralist conception of conflict of laws recalls not only Robert Cover, but also the pioneering work of Myres McDougal, Harold Lasswell, and the New Haven School of International Law. These scholars argued that international legal regimes were not concerned primarily with fixed rules but with procedures for

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Narrative, 97 HARV. L. REV. 4, 43 (1983) [hereinafter Cover, Nomos *and Narrative*] ("The position that only the state creates law . . . confuses the status of interpretation with the status of political domination."); *see also* Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow et al. eds., 1992) [hereinafter Cover, *Folktales of Justice*] (arguing that law functions as a "bridge in normative space," a way of connecting the "world-that-is" with various imaginings of "worlds-that-might-be").

39. Cover, *Folktales of Justice*, *supra* note 38, at 176 (emphasis added).

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

41. Cover, Nomos *and Narrative*, *supra* note 38, at 58.

interaction.[42] Thus, the School saw international law as a "world constitutive process of authoritative decision," rather than a set of coercive requirements.[43] Not surprisingly, these scholars focused attention on the idea of jurisdiction itself, analyzing the ways in which processes of international order could be applied to new places, such as Antarctica[44] and outer space.[45] Indeed, they emphasized that jurisdiction is asserted not through "naked force or calculations of expediency . . . [but by] participants established by community expectation . . . [making] reasoned decisions, justified by relation to policy criteria established by community expectation."[46] Moreover, they recognized that people form multiple community attachments and argued that "[t]he individual should be able to become a member of, and to participate in the value processes of, as many bodies politic as his capabilities will permit."[47] Building on these observations, a cosmopolitan pluralist framework emphasizes the process of interaction among a wide variety of norm-generating communities that are based on the entire panoply of multiple overlapping affiliations and attachments people actually experience in their daily lives, from the local to the global (including some affiliations not based on territory at all). In this vision, as in the work of the New Haven School, a jurisdictional assertion is part of an international process of community definition and norm creation.

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The cosmopolitan pluralist perspective approach offers *state-sanctioned* courts an approach to questions of jurisdiction that considers the social

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42. *See* Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 9 (1959) ("Within the decision-making process our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions."); *see also* Cover, Nomos *and Narrative*, *supra* note 38, at 58 ("Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not.").

43. Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decisions*, 19 J. LEGAL EDUC. 253, 255 (1967).

44. *See generally* EMILIO J. SAHURIE, THE INTERNATIONAL LAW OF ANTARCTICA (1992) (describing the laws of Antarctica as they relate to the international legal order).

45. *See generally* MYRES S. MCDOUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE (1963) (outlining a framework for the study of law and public order in space).

46. *Id.* at 95.

47. Myres S. McDougal et al., *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900, 903 (1974).

meaning of community definition and the construction of space. Such courts would look not to a mechanical counting of contacts or delineation of territory, but a more nuanced analysis of community affiliation, contact, and effect. This approach, I argue, is not only more satisfying conceptually, but also identifies and makes explicit the sort of analysis judges are already beginning to use intuitively as they struggle to fashion jurisdictional rules in difficult cases. In addition, it asks judges to conceive of their project more broadly, taking into account a more general interest in a smoothly functioning international legal order and (in the words of Justice Blackmun) the need to "reflect the systemic value of reciprocal tolerance and good will."[48] According to this vision, judges owe their allegiance to a transnational and international systems of norms and not simply to their own domestic law.

Second, a cosmopolitan pluralist framework also provides a way of both recognizing and evaluating *non-state* jurisdictional assertions that bind sub-, supra-, or transnational communities. Such non-state jurisdictional assertions include a wide range of entities, from official transnational and international regulatory and adjudicative bodies, to non-governmental quasi-legal tribunals, to private standard-setting or regulatory organizations.

Prior to the rise of the state system, much lawmaking took place in autonomous institutions and groups, such as cities and guilds, and large geographic areas were left largely unregulated.[49] Even in modern nation-states, we see a whole range of non-state lawmaking in tribal or ethnic enclaves,[50] religious organizations,[51] corporate bylaws, social customs,[52]

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48. Société Nationale Industrielle Aérospatiale v. U. S. District Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

49. *See* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 14-38 (Walter L. Moll trans., 1936) (analyzing and describing the differences between legal and nonlegal norms); *see generally* OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES (George Heiman ed. & trans.,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).

50. *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).

51. *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 37, at 28; *see also* Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1988) (analyzing church-state relations in the United States from a pluralist

private regulatory bodies, and a wide variety of groups, associations, and non-state institutions.[53] For example, in England, bodies such as the church, the stock exchange, the legal profession, the insurance market, and even the Jockey Club opted for forms of self-regulation that included machinery for arbitrating disputes among their own members.[54]

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.[55] Likewise, non-governmental standard-setting bodies, from Underwriters Laboratories (which tests electrical and other equipment) to the Motion Picture Association of America (which rates the content of films) to the Internet Corporation for Assigned Names and Numbers (which administers the Internet domain name system), construct detailed normative systems with the effect of law. Regulation of much financial market activity is left to private authorities such as stock markets or trade associations like the National Association of Securities Dealers. These international trade association groups and their private standard-setting bodies wield a tremendous influence in creating voluntary standards that become industry norms.[56] For example, in the wake of the scandal surrounding Enron

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perspective).

52. *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).

53. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (drawing on an empirical study of relations among cattle ranchers to develop a theory of nonlegal norms as a source of social control); Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987) (discussing the concept of legality as reflected in popular culture); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (presenting empirical data on nonlegal dispute settlement in the manufacturing industry); Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 YALE L.J. 1545 (1989) (surveying the sources of popular perceptions of the law).

54. *See* F.W. Maitland, *Trust and Corporation*, *in* MAITLAND: SELECTED ESSAYS 141, 189-95 (H.D. Hazeltine et al. eds., Cambridge University Press, 1936) (1905) (describing the sophisticated nonlegal means of enforcing order among members of these institutions).

55. *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).

56. For example, the Fair Labor Association (formerly the Apparel Industry Partnership) has created the standards now accepted as the norm in the apparel industry. *See Workplace Code of Conduct and Principles of Monitoring*, Fair Labor Ass'n, *available at* http://www.fairlabor.org/all/code/FLA_PRINCIPLES_OF_MONITORING.pdf (last visited Nov. 1, 2005) (providing a "set of standards defining decent and humane working

Corporation, the governmental reforms incorporated into the Sarbanes-Oxley Act of 2002[57] 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.[58] 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.[59]

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,[60] as well as the new prominence of other specialized trade courts developed in connection with free trade agreements.[61] These courts are amassing a body of legal rules that, in many cases, challenge

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conditions"). Likewise, in the chemical industry, groups such as the Canadian Chemical Manufacturers Association and the International Counsel of Chemical Associations (ICCA) have set industry standards in conjunction with other NGOs and environmental organizations such as Greenpeace. *See* Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 509 (2002) ("This [standard setting] reflects a complicated inter-relationship among the members of a private sector regime (ICCA), and other non-governmental organizations (Greenpeace), and governmental institutions (IFCS and individual governments)") (internal quotations omitted).

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

58. *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 (last visited Nov. 1, 2005) (discussing changes in U.S. corporate governance and debt rating in the post–Enron world); *see also* Troy A. Paredes, *After The Sarbanes-Oxley Act: The Future of The Mandatory Disclosure System*, 81 WASH. U. L.Q. 229, 236 (2003) (noting that "Institutional Shareholder Services, GovernanceMetrics International, Standard & Poor's, and others have started grading the corporate governance structures of companies, just as Standard & Poor's or Moody's grade their debt").

59. *See* Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 207 (2004) (noting this phenomenon but discussing difficulties in holding private corporations to such codes).

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

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

traditional prerogatives of nation-state sovereignty and may override domestic court decisions,[62] or at least act in dialectical relationship with national courts.[63] Moreover, though only state parties can be the formal litigants in the WTO dispute resolution process, free trade panels permit private parties to challenge domestic governmental regulations directly.[64] In addition, a number of international conventions, though signed by state parties, empower private actors to develop international norms. For example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States permits private creditors to sue debtor states in an international forum.[65] Similarly, the convention on the

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

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

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

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

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*.[66]

Finally, non-state assertions of jurisdiction may sometimes take the guise of more formal legal proceedings. For example, in 1933, as five Communists accused by Hitler of setting fire to the Reichstag building in Berlin were tried in Germany, Arthur Garfield Hays, counsel for the American Civil Liberties Union, helped to organize a "Counter Trial" in London.[67] This "trial" used the formalities of legal process to enact a "publicly deliberative drama."[68] According to Hays, the Counter Trial helped "to engage 'public opinion' and to set a 'valuable precedent' by which the actions of the German tribunal could be measured."[69] Even the German court ultimately felt the need to refute the findings of the London proceedings in order to combat the international impact of the Counter Trial.[70] According to Arthur Koestler, the Counter Trial "was a unique event in criminal history" because it caused the German court to "concentrate its efforts on refuting accusations by a third, extraneous party."[71] The following year, Hays and others organized a trial styled the "Case of Civilization Against Hitler" as part of a rally at Madison Square Garden in New York City.[72]

The "Women's International War Crimes Tribunal 2000" represents a more recent, though similar, use of legal forms to construct an alternative history. This self-styled "peoples' tribunal,"—convened in Tokyo from

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Labor Organization).

66. *See, e.g.*, Clayton Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157, 159 (2004) (noting that the Convention "explicitly incorporates trade usages into contracts that it governs, permits usages to trump conflicting CISG [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).

67. *See* Louis Anthes, *Publicly Deliberative Drama: The 1934 Mock Trial of Adolph Hitler for "Crimes Against Civilization,"* 42 AM. J. LEGAL HIST. 391, 398-99 (1998) (describing the trial).

68. *Id.* at 393. Anthes defines this term as "the improvising of legal formality to foster debate." *Id.*

69. *Id.* at 399.

70. *Id.* (noting that in doing so, the German court was apparently seeking "to minimize the loss of international goodwill").

71. ARTHUR KOESTLER, THE INVISIBLE WRITING: BEING THE SECOND VOLUME OF ARROW IN THE BLUE, AN AUTOBIOGRAPHY 200 (1954).

72. *See* Anthes, *supra* note 67, at 391-94 (describing the trial in terms of both culture and politics).

December 8 to 12, 2000—heard evidence concerning the criminal liability for crimes against humanity of both Japan and its high-ranking military and political officials for rape and sexual slavery arising out of Japanese military activity in the Asia-Pacific region during the 1930s and 1940s.[73] Likewise, people's tribunals have been formed at various times to consider the legality of the Vietnam War,[74] the Soviet military intervention in Afghanistan, the Indonesian occupation of East Timor, and the alleged genocide of Armenians by the Turks in the period from 1915 through 1919.[75]

In some ways, of course, such assertions of jurisdiction are purely symbolic acts. Yet, by claiming authority to articulate norms, these tribunals insisted that "'law is an instrument of civil society' that does not belong to governments, whether acting alone or in institutional arenas."[76] Moreover, the reports issued by such tribunals provide a valuable alternative source of evidence and jurisprudence pertaining to contested applications of international law. And even these "quasi-legal" fora can constitute a form of public acknowledgment to the survivors that serious crimes were committed against them.[77]

Thus, calling the tribunals "extralegal" or "symbolic" does nothing to lessen their claims to produce norms or to affect people. After all, even state entities pursue trials that are largely symbolic, such as the French trial against Klaus Barbie.[78] Likewise, in the past three decades, we have also

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73. Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335 (2001).

74. *See* Cover, *Folktales of Justice*, *supra* note 38, at 198-201 (describing this non-state tribunal as arising from a lack of state opposition to the war). For the report of this tribunal, see AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL (John Duffett ed., 1968).

75. Richard Falk, *The Rights of Peoples (in Particular Indigenous Peoples)*, *in* THE RIGHTS OF PEOPLES 17, 28-29 (James Crawford ed., 1988).

76. Chinkin, *supra* note 73, at 339 (quoting Falk, *supra* note 75, at 29).

77. Of course, such tribunals' impact undoubtedly depends in part on the power and resources of the entities or individuals sponsoring and publicizing them.

78. Indeed, Guyora Binder has argued that many of those most interested in the trial viewed its role as pedagogical or symbolic. *See* Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1322 (1989) (observing that the trial was viewed by some as "an occasion for self-improvement"). Binder quotes French government officials referring to the proceedings as "a pedagogic trial," Israeli governmental officials describing the trial as "justice that has educational significance," a *New York Times* editorial expressing hope that the trial would "educate a new generation," a statement from a representative of French Resistance veterans that he hoped the trial would "deepen our understanding," and a comment from Nazi hunter Simon Wiesenthal that "the trial would be 'a proper history lesson,' and that its true significance was 'symbolic.'" *Id.*

seen the rise of truth commissions, the primary aim of which is story-telling in order to create a record of past abuses.[79] Lawsuits in the United States seeking reparations for slavery[80] serve as another example of the way in which juridical mechanisms can be used to affect collective memory. Finally, one might see the creation of the International Criminal Court (a new form of international jurisdiction-assertion) as evidence that the norms these non-state tribunals sought to inculcate have taken hold.

Of course, such jurisdictional pluralism may empower *illiberal* "communities" (from intolerant ethnic groups to transnational corporations), thereby causing problems for less powerful communities. Yet, it is important to recognize that a more expansive understanding of how jurisdiction operates does not mean that the reality of coercive power (or the importance of sovereign nation-states) suddenly disappears. After all, in order for the legal norms of a non-state community to be enforced, such norms must be adopted by those with coercive power, and abhorrent assertions of community dominion are unlikely to achieve widespread acceptance. Thus, the enforcement arena would provide a powerful incentive to communities not to move too far away from a developing international consensus. In a sense, this is how even state-sanctioned courts operate because they lack their own enforcement power. As mentioned previously, courts always issue decisions at the sufferance of their "sovereign," and if they choose to defy the entity that enforces their judgments, they must appeal to a broad base of popular support or risk being treated as politically irrelevant.[81] Likewise, a non-state jurisdictional assertion must make a strong case to the governments of the world and other political actors that the assertion of community dominion is appropriate and that the substantive norms expressed are worth adopting. A broader conception of what counts as a jurisdictional assertion does not imply that all such assertions (much less all normative rules imposed) are justified; it only argues that we extend the term jurisdiction to these non-

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79. *See, e.g.*, PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 32-33 (2001) (listing twenty truth commissions established since 1982 and listing twenty-one truth commissions convened between 1974 and 2001); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 52-54 (1998) (recounting the creation of several truth commissions contemporaneously with the establishment of South Africa's in 1995).

80. *See, e.g.*, Joe R. Feagin & Eileen O'Brien, *The Growing Movement for Reparations*, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 341 (Roy L. Brooks ed., 1999) (describing the growing reparations movement within the United States).

81. *Cf.*, *e.g.*, MCCLOSKEY, *supra* note 15, at 247 (noting that the U.S. Supreme Court "has seldom lagged far behind or forged far ahead of America").

state norm-producing acts. In this way, multiple communities can attempt to claim the mantle of law, making it more likely that we will at least *notice* these alternative visions, regardless of whether such visions are ultimately adopted broadly or roundly rejected. Thus, whether good or bad, this process of transnational (or non-national) norm development is a phenomenon that scholars and policymakers must address.

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

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So, how would a cosmopolitan pluralist vision of conflict of laws work in operation? In the remainder of this essay, I will turn to that question, but I do so with some caveats at the outset. First, I think it is important not to focus too narrowly on debating how this framework might or might not affect the outcome in particular cases and therefore miss the larger issues that the cosmopolitan pluralist framework is meant to address. Second, I assume that actual conflicts rules will always arise through a common law case-by-case process (even in civil law countries), so I am not here attempting to provide systematic doctrinal answers to specific problems. Third, I do not imagine that my approach is really a new paradigm that results in changed doctrine in all cases. Indeed in some cases I think my approach is only trying to provide a conceptual basis for what judges are already doing intuitively. Nevertheless, I recognize that applying a cosmopolitan pluralist approach to some specific factual settings may be helpful, and so I offer a few examples.

JURISDICTION

A cosmopolitan conception of community recognizes the interrelatedness of peoples and cultures around the world while nevertheless attending to local variations among groups and the wide variety of ways that individuals come to understand their identification with those groups. This view imagines overlapping webs of relation, some woven out of local affiliation and some unbounded by geography. Cosmopolitan communities

are rooted in the local "as a structure of feeling, a property of social life, and an ideology of situated community," while still remaining unbordered.[82] Instead of an ideal of detachment or universalism, cosmopolitanism recognizes multiple attachments across time and space.

Moreover, there are always multiple norm-generating communities; the assertion of jurisdiction is therefore the act that sets these normative views in conflict. Accordingly, a cosmopolitan pluralist conception of jurisdiction would provide all the multiple attachments we might call "community" an opportunity to establish both their claim to community status and their particular normative commitments on the legal stage of jurisdiction. Jurisdiction thus becomes the locus for debates about the appropriate definition of community and the articulation of norms.

In practice, this means that territorially-based limitations on the assertion of jurisdiction are inappropriate because they reify arbitrary boundaries and foreclose debate about either community definition or the evolution of substantive norms. In a cosmopolitan pluralist conception of jurisdiction, courts could not simply dismiss assertions of jurisdiction based on a mechanical counting of contacts with a geographically based sovereign entity. This is just as well because such jurisdictional tests are routinely acknowledged as problematic in a contemporary world of interconnection and cross-border interaction.[83] Instead, jurisdiction must be based on whether the parties before the court are appropriately conceptualized as members of the same community, however that community is defined. Thus, rather than simply counting contacts with a geographical territory, judges employing a cosmopolitan approach would look at substantive community connections. Might the defendant have ties with the community despite not being a citizen? Might there be ties between the plaintiff and defendant based on ethnicity or other affiliations? Might there be significant effects created even by a territorially distant actor?

To some degree, this is what judges are already doing. For example, as previously discussed, American courts have struggled in recent years to apply the *International Shoe* minimum-contacts test in cyberspace.[84] This struggle has resulted in a series of analytical frameworks quickly taken up and just as quickly discarded.[85] The instability of the doctrine indicates that courts are straining against the existing jurisdictional tests because those tests are in tension with a felt imperative about when the assertion of

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82. ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 189 (1996).

83. *See, e.g., supra* notes 8-9 and accompanying text.

84. *Id.*

85. *See supra* note 9.

jurisdiction seems appropriate.

Surveying the development of American jurisdiction jurisprudence, we saw a similar instability during the decades between *Pennoyer*[86] and *International Shoe*.[87] During that transitional period, courts used *Pennoyer*'s territorial framework, but repeatedly carved out legal fictions to respond to social change.[88] Ultimately, *International Shoe* recognized the fictions and codified a new framework based not on pure territorial power but on contacts.[89] Since *International Shoe*, courts have used the language of minimum contacts, but have in fact used the *International Shoe* test as a proxy for analyzing the "fairness" of asserting jurisdiction.[90] Now, with regard to cases involving cyberspace contacts, courts are continuing to articulate the *International Shoe* test and to use the language of contacts, but they increasingly appear to be responding to a somewhat different concern: community affiliation. And just as they used *Pennoyer*'s presence idea and kept expanding it even while citing it, courts now use *International Shoe*'s language of contacts, but I think they are really thinking about community affiliation.

For example, in a recent Internet case, a court ruled that there was no jurisdiction in Virginia over a web site for a Connecticut newspaper because the newspaper site was "of local character," despite the presence of multiple contacts in Virginia.[91] Similarly, in an Internet domain name dispute between corporations based in Florida and Arizona, the Ninth Circuit ruled

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86. 95 U.S. 714.

87. 326 U.S. 310.

88. *See* Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts, From* Pennoyer *to* Denckla*: A Review*, 25 U. CHI. L. REV. 569, 585-86 (1958) (describing the difficulty in applying *Pennoyer*'s principles to a world facing changes in economic activity, means of transportation, and communication).

89. In *International Shoe*, the Court admitted that:

> [S]ome of the decisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, with consent being implied from its presence in the state through the acts of its authorized agents. But more realistically, it may be said that those authorized acts were of such a nature as to justify the fiction.

326 U.S. at 318 (citations omitted).

90. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality opinion) (using *International Shoe*'s "traditional notions of fair play and substantial justice" language to support the need for a separate inquiry (in addition to minimum contacts) that focuses on "the burden on the defendant, the interests of the forum State, . . . the plaintiff's interest in obtaining relief[,] . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies . . . and the shared interest of the several States in furthering fundamental substantive social policies") (internal quotation marks and citation omitted).

91. *See* Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002).

that physical contacts with the forum state were unnecessary if the defendant "has created continuing obligations to forum residents."[92] Although the court ultimately declined to exercise jurisdiction, its analysis focused on whether or not the Florida corporation, through its web site, had created any substantive ties to Arizona, rather than on the number of contacts.[93] Indeed, in reviewing the Internet cases, it is clear that in some instances the idea of jurisdiction based on the viewing of a web site in a distant location seems attenuated despite the existence of a "contact" between the site and its viewer.[94] In other cases, however, courts are aware of the potentially deleterious effects of a far-off web site on a community and, hence, feel compelled to assert jurisdiction.[95] In either instance, a contacts-based framework does not seem to capture the true analytical tug-of-war that is taking place.

A jurisdictional analysis focusing on community affiliation, however, has the virtue of placing the core questions of jurisdiction front and center. Courts would be able to articulate the substantive concerns about both overly broad and overly narrow assertions of jurisdiction and thereby begin to delineate jurisdictional norms that respond to the social meaning of community affiliation. So in part the cosmopolitan framework merely makes explicit an inquiry that the current framework obscures.

But sometimes the analysis might be substantially different. For example, France's celebrated efforts to assert jurisdiction over the U.S. internet service provider Yahoo![96] brought howls of objection from those who believed that, although the court could exercise jurisdiction over yahoo.fr, Yahoo!'s French subsidiary, such an assertion of jurisdiction over

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92. Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417 (9th Cir. 1997).

93. *Id.* at 420.

94. *See, e.g.*, Winfield Collection, Ltd. v. McCauley, 105 F. Supp. 2d 746, 751 (E.D. Mich. 2000) (refusing to assert jurisdiction over an out-of-state defendant despite web-based sales in the forum state).

95. *See, e.g.*, U.S. v. Am. Library Ass'n, 539 U.S. 194 (2003); Richardson v. Schwarzennegger, 2004 EWHC 2422 (Q.B. Oct. 29, 2004), *available at* http://portal.nasstar.com/75/files/Richardson-v-Schwarzenegger%20QBD%2029%20Oct%202004.pdf; Down Jones & Co. v. Gutnick, 210 C.L.R. 575 [Austl.], *available at* http://www.4law.co.il/582.htm; La Ligue Contre Le Racisme et L'Antisémitisme v. Yahoo!, T.G.I. Paris, (May 22, 2000), *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis 2000522.htm (last visited Nov. 1, 2005); GlobalSantaFe Corp. v. Globalsantafe.com, 250 F. Supp. 2d 610 (E.D. Va. 2003).

96. The court ordered the internet service provider Yahoo! to block Nazi memorabilia and holocaust denial material from being accessed in France through its service. *See* T.G.I. Paris, *supra* note 95. For discussions of the case, see Berman, *Globalization*, *supra* note 4, at 337–42, 516–21; Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261 (2002).

yahoo.com would be impermissibly extraterritorial because Yahoo! was a U.S. corporation without contacts in France.[97] Yet a community-based analysis would suggest piercing the corporate form and analyzing Yahoo!'s numerous substantive connections to France.[98] Thus, it should not matter, for example, whether the share certificate indicating yahoo.com's ownership of yahoo.fr was located in France or, instead, in Switzerland. Such territorial formalisms simply cannot form a rational basis for making jurisdictional judgments.

A focus on community membership might also lead us to rethink the cases in which U.S. courts have dismissed, on forum non conveniens grounds, human rights claims brought by foreign nationals against American corporations.[99] In these cases, courts have applied the so-called public and private interest factors laid out by the U.S. Supreme Court in the 1947 case of *Gulf Oil Corp. v. Gilbert*.[100] The difficulty with the *Gilbert*

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97. *See, e.g.*, Carl S. Kaplan, *Experts See Online Speech Case as Bellwether*, N.Y. TIMES, Jan. 5, 2001, *available at* http://www.nytimes.com/2001/01/05/technology/05CYBERLAW.html?pagewanted=print (last visited Nov. 1,2005) (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").

98. *See* Berman, *Cosmopolitan Vision*, *supra* note 4, at 1878; Reidenberg, *supra* note 96, at 267.

99. *See* Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 502-03 n.35 (2002) (collecting cases). For discussions of corporate responsibility to obey human rights norms, see generally Chris Avery, *Business and Human Rights in a Time of Change*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

100. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). *Gilbert*'s private interest factors are:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, . . . witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id. at 508. In delineating the public interest factors, the court noted the following:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in

factors, however, is that they leave little, if any, room for argument that American society and American courts have a social responsibility to provide an American hearing for alleged misconduct of U.S.-based multinationals.[101] In contrast, a conception of jurisdiction based on community membership and responsibility would offer more space to consider such an argument.

Other aspects of traditional minimum-contacts inquiries would also be less important under a community-based approach. For example, the purported inconvenience to the defendant of having to defend a suit far from home can be part of the analysis of whether a defendant should be deemed a member of the community, but it no longer takes on such significance as an independent factor. This is appropriate because in a world of rapid transportation, instant wireless communication, and even virtual courtrooms, defending a lawsuit in a distant physical location is far less burdensome (both literally and psychically) than it once was. Likewise the "foreseeability" of being brought into a particular court, though often invoked in U.S. Supreme Court doctrine,[102] is of little help given that, in an increasingly interconnected world, it is always foreseeable that activity in one place will have effects in many far away locations. Moreover, as many scholars have pointed out, "foreseeability" is a circular test because whether one foresees being subject to jurisdiction in a particular court depends in large part on what courts have previously determined is reasonably foreseeable.[103] Thus, little is lost by jettisoning this analytical metric.

> having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09.

101. *Cf.* Blumberg, *supra* note 99, at 509 ("International human rights cases are tort cases arising in a foreign jurisdiction, and the private interest factors exert a near irresistible pressure for foreign trial where the events took place.").

102. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("[T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

103. *See, e.g.*, David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 136 (1998) ("The purposeful availment requirement stems from the notion that defendants should be able to plan their conduct knowing where that conduct will subject them to jurisdiction. But . . . [d]efendants only have reasonable expectations about where they will be haled into court because courts have created such expectations.") (citation omitted); Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1118 (1996) (opining that a forseeability inquiry amounts to nothing more than the idea that "defendants should reasonably anticipate being haled into any court into which they should reasonably anticipate being haled"); *but*

Nevertheless, it is important to emphasize that a community-based analysis would not necessarily result in broader assertions of jurisdiction than under current jurisdictional schemes. For example, a cosmopolitan approach might require that the plaintiff have community ties with the forum, which might well make forum-shopping more difficult because plaintiffs could not simply choose the community with the most convivial law regardless of social ties. Likewise, a community-based approach might not permit so-called transient-presence jurisdiction, where the defendant is present within the physical boundaries of a territory only briefly, or for an unrelated reason.[104] Such transient-presence jurisdiction is generally permissible under territorial schemes, leading to such ludicrous activities as service of process in an airplane as it flies over a territorial jurisdiction.[105] By inquiring about substantive ties to a community rather than formal contacts with a location, a community-based approach would render such jurisdictional assertions more amenable to challenge. Finally, there might be occasions when a "minimum contacts" inquiry would find, say, that a couple of web "hits" in a jurisdiction would be sufficient to render a defendant subject to suit there. A community-based approach, however, would go beyond counting contacts to inquire about the substantive bonds formed between the member of the forum community and the territorially distant actor.

The last jurisdiction case I will mention is *Rasul vs. Bush*,[106] the recent case involving federal court jurisdiction over the detainees at Guantanamo Bay Naval Base. Although the U.S. Supreme Court decided the case in terms of habeas corpus, we can think of it as a case involving the nature of legal jurisdiction because at root level the issue in *Rasul* is whether U.S. courts have jurisdiction over this offshore regulatory haven. And that kind of a question is functionally equivalent to the one that arises when corporations attempt to avoid local taxation or other regulatory regimes simply by relocating beyond the territorial bounds of a jurisdiction. The

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cf. Luther L. McDougal III, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 10 (1982) (noting the impossibility of predicting how a court will rule on the "fairness" element of minimum contacts). For a discussion of this problem within a more general analysis of circularity in constitutional adjudication, see Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 64-65 (2001).

104. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604, 610-19 (1990) (Scalia, J., joined by Rehnquist, C.J., White, Kennedy, JJ.) (finding jurisdiction based on mere transient presence consonant with traditional practice at the time of the adoption of the Fourteenth Amendment).

105. *See, e.g.*, Grace v. MacArthur, 170 F. Supp. 442, 447 (E.D. Ark. 1959) (permitting assertion of jurisdiction in such circumstances).

106. 542 U.S. 466 (2004).

only difference is that here we have the U.S. government operating offshore and claiming that the mere physical location of the base deprives courts of jurisdiction. An exclusive focus on territory makes that kind of an argument possible. In contrast, a case such as *Rasul* is easy if you look at community affiliation because you have a facility completely controlled by the U.S. government, staffed by U.S. military officers acting at the behest of U.S. governmental policy.[107] Thus, to say that the facility is somehow not affiliated with the United States is insupportable, and U.S. court jurisdiction would clearly be justified.

Most importantly, the cosmopolitan pluralist approach to jurisdiction requires that courts make explicit an inquiry that current jurisdictional rules obscure. If jurisdiction is in part about the assertion of community dominion over a distant actor,[108] then courts should consider the nature of the community that has allegedly been harmed, the relationship of the dispute to that community, and the social meaning of asserting dominion over the actor in question.

Accordingly, the jurisdictional inquiry becomes a site for discussion both about the nature of community affiliation and the changing role of territorial borders. The precise contours of the jurisdictional norms that would develop from this process are impossible to predict and would undoubtedly evolve over time. The crucial point, however, is that these discussions would not be truncated by a formulaic test that bears scant relationship to the core questions underlying the social meaning of jurisdiction.

CHOICE OF LAW

Turning to choice of law,[109] the cosmopolitan approach would borrow elements from each of the three major choice of law methods of the twentieth century: vested rights,[110] governmental interests,[111] and substantivism.[112] While eschewing the rigid formalism of the vested rights

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107. *Id.* at 471.

108. *See* Berman, *Globalization*, *supra* note 4, at 474-78 (discussing jurisdiction as the assertion of community dominion over the parties).

109. *See* Berman, *Cosmopolitan Vision*, *supra* note 4, at 1839-67.

110. *See, e.g.*, JOSEPH BEALE, A TREATISE ON CONFLICT OF THE LAWS (1935); RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS (1934).

111. *See, e.g.*, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

112. *See, e.g.*, Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974); *see also* Arthur Taylor von Mehren, *Choice of Law and the*

approach and its reification of territorial location as the basis for choice-of-law decisions,[113] cosmopolitanism does recognize the importance of thinking about choice-of-law separately from the substantive norm to be applied. Thus, courts applying a cosmopolitan approach should discuss the possibly relevant community affiliations and consider their relative importance before turning to an application of substantive law. In this way, choice-of-law becomes the terrain for debate about the proper scope of community dominion in an era when pure territorial borders no longer adequately delimit community boundaries.

Likewise, while rejecting Brainerd Currie's own parochial *application* of his governmental interest approach (where the local party generally has its law applied),[114] a cosmopolitan framework is firmly grounded in an expanded notion of governmental interests. Indeed, as courts consider multiple community affiliations[115] and develop hybrid rules for resolving multistate disputes,[116] they do so not because they are *ignoring* the policy

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Problem of Justice, 41 LAW & CONTEMP. PROBS. 27 (1977).

113. BEALE, *supra* note 110.

114. CURRIE, *supra* note 111

115. *See, e.g.*, Berman, *Globalization*, *supra* note 4 (advocating such an approach); Brian Concannon Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View From Haiti*, 32 COLUM. HUM. RTS. L. REV. 201 (2000) (discussing ways in which the International Criminal Court's complementarity regime, supplemented with other forms of aid, can support local prosecutions); Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991) (claiming that "nearly unanimous agreement" exists with regard to resolving multinational financial disputes in a cooperative, central forum); DeNeen L. Brown, *Canadians Allow Islamic Courts to Decide Disputes*, WASH. POST, Apr. 28, 2004, at A14 (discussing an Islamic Court of Civil Justice in Ontario, staffed by arbitrators trained in both Sha'ria and Canadian civil law).

116. *See, e.g.*, Paul Schiff Berman, *Cosmopolitan Vision*, *supra* note 4 (articulating choice-of-law and judgment recognition principles that take seriously the interlocking nature of multinational governance); Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, (2002) (contrasting traditional model of conflicts analysis, based on territorial sovereignty, with a "substantivist" approach and suggesting a choice-of-law model combining elements of both); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000) (arguing that national courts should decide international copyright cases not by choosing an applicable law, but by devising an applicable solution, reflecting the values of all interested systems, national and international, that may have a prescriptive claim on the outcome); Fischer-Lescano & Teubner, *Regime Collisions*, *supra* note 2, at 1020 (2004) (arguing for "reorienting the traditional conflicts law away from conflicts between national legal orders, and refocusing them upon conflicts between sectoral regimes, such as is the case in the context of collisions between ICANN and national courts, ICTY and ICJ, WTO and WHO"); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171 (2004) (arguing that U.S. courts are not precluded from enforcing a foreign judgment, even if that judgment would be unconstitutional if issued by a U.S. court in the first instance).

choices of their home state, but because they are *effectuating* their state's broader interest in taking part in a global community.[117] Thus, a cosmopolitan approach is ultimately moored to a more comprehensive understanding of how governments must operate in an interconnected world.

Finally, because the cosmopolitan approach is grounded in a conception of governmental interests, it avoids some of the concerns about democratic legitimacy that the substantive law method raises.[118] Moreover, by treating choice of law as an *a priori* discussion of community definition and affiliation, cosmopolitanism rejects the single-minded focus on substantive rules that is the hallmark of the substantive law method. Yet, cosmopolitanism, like the substantive law method, asks courts resolving multistate disputes to see themselves as international and transnational actors who are engaging in an international dialogue about legal norms. Accordingly, they must consider how best to construct a world system of law (and not just pursue parochial interests) and they may develop hybrid norms for resolving multistate disputes.

A cosmopolitan approach to cross-border adjudication, therefore, allows courts to engage in a dialogue with each other concerning the appropriate definition of community affiliation and the appropriate scope of prescriptive jurisdiction. In addition, it asks courts to develop intersystemic norms, thereby harnessing the generative potential of transnational litigation. Whereas treaties and other formal instruments of international law-making are cumbersome and slow to adjust to changing

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117. As I elaborate in greater detail elsewhere:

> [E]ven if one is concerned only with purely power-driven state interest, one might easily imagine a state to have interests beyond simply allowing its citizen to win a particular case. Indeed, from a long-term geopolitical perspective, whether or not an individual citizen wins a lawsuit is actually of very little interest to a state. Instead, states may have an interest in being seen to comply with an agreed-upon international order. States benefit from a shared world system, with its interlocking set of reciprocal benefits and burdens. If a state is too parochial in pursuit of its short-term interests, it may damage its longer-term goals by creating a lack of trust in other states. As economists have long recognized, repeat players tend to benefit from cooperative rather than parochial behavior. Accordingly, a state that refuses to defer to foreign norms will likely find that its norms receive less deference from others in the future. Currie, therefore, ignores the possibility that states might benefit from establishing a system of multilateral choice-of-law rules that each state would obey rather than asking whether a state has a short-term interest in each particular case.

Berman, *Cosmopolitan Vision*, *supra* note 4, at 1850-51 (footnotes omitted).

118. *See* Berman, *Cosmopolitan Vision*, *supra* note 4, at 1854 ("[A] method that asks judges to craft international or hybrid law unmoored to the positive law of their own states is likely to run into significant objections from the perspective of democratic legitimacy.").

technologies or social conditions, transnational common-law adjudication is far more dynamic. As a result, international private law litigation can serve public values as forums for debates about community affiliation and as generators of new common law international norms.

In order to see how such a conception might work, consider the recent Fourth Circuit decision involving a web site with the domain name www.barcelona.com.[119] In that case, Mr. Joan Nogueras Cobo ("Nogueras"), a Spanish citizen, registered barcelona.com with the Virginia-based domain name registrar, Network Solutions.[120] Subsequently, Nogueras formed a corporation under U.S. law, called Bcom, Inc.[121] Despite the U.S. incorporation, however, the company had no offices, employees, or even a telephone listing in the United States.[122] Nogueras (and the Bcom servers) remained in Spain.[123] The Barcelona City Council asserted that Nogueras had no right to use barcelona.com under Spanish trademark law and demanded that he transfer the domain name registration to the City Council.[124] However, the Fourth Circuit ruled against the city, applying U.S. trademark law because the domain name was registered with an American registrar company.[125]

Using a cosmopolitan framework, the court would have reached the opposite result because the dispute concerned a Spanish individual and a Spanish city fighting over a Spanish domain name that itself refers to a Spanish city. The idea that this dispute should be adjudicated under U.S. law because of the location of the domain name registry company or because the Spanish citizen created a dummy corporation in the United States does not take into account what is really happening. A U.S. court taking a cosmopolitan approach, therefore, would need to be restrained and not assume that U.S. trademark law should apply extraterritorially.

To take another example, Anupam Chander has written about many members of the Indian-American diaspora who purchase bonds issued by their home country of India.[126] The purchase of these bonds obviously reflects the ongoing tie these members of the Indian diaspora feel to their "homeland." Thus, using a cosmopolitan framework, one might argue that, even when these bonds are purchased in the United States, the purchases

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119. Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona, 330 F.3d 617 (4th Cir. 2003).

120. *Id.* at 620.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Barcelona.com, Inc.*, 330 F.3d at 620.

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

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.

RECOGNITION OF JUDGMENTS

Finally, with regard to recognition of judgments,[127] consider *Telnikoff v. Matusevitch*,[128] a case decided a few years ago by the Maryland Supreme Court. This was a libel action between two British citizens concerning writings that appeared in a British newspaper.[129] After a complicated sequence of proceedings in the United Kingdom, a jury ruled for the plaintiff and ordered damages.[130] However, Matusevitch moved to Maryland and subsequently sought a declaratory order that the British libel judgment could not be enforced in the United States, pursuant to the First Amendment.[131] The Maryland Supreme Court ultimately ruled that, because British libel law violates the speech-protective First Amendment standards laid out by the U.S. Supreme Court in *New York Times v. Sullivan*[132] and its progeny, the British judgment violated Maryland public policy and could not be enforced.[133] Reaching a similar conclusion, a federal district court in the United States ruled that a U.S. court could not enforce the French judgment issued against Yahoo! because such a ruling would contravene the First Amendment.[134]

But the decision to enforce a foreign judgment is very different from the decision to issue a judgment in the first place. Indeed, in the domestic context, the U.S. Constitution's Full Faith and Credit Clause[135] 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.[136] Of course, within a single, relatively homogenous country, the idea

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127. *See* Berman, *Cosmopolitan Vision*, *supra* note 4, at 1868-70.

128. Telnikoff v. Matusevitch,702 A.2d 230 (Md.1997).

129. *Id.* at 232.

130. *Id.* at 233-34.

131. *Id.* at 235.

132. 376 U.S. 254 (1964).

133. *Telnikoff*, 702 A.2d at 249.

134. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006).

135. *See, e.g.*, Baker v. General Motors Corp., 522 U.S. 222, 233 (1998) (making clear that there is no public policy exception to the Full Faith and Credit due judgments).

136. *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

of one state enforcing another state's judgment does not seem quite so significant because the variations from state to state are likely to be relatively minor.

Yet, while the decision to enforce a judgment surely will be less automatic when the judgment at issue was rendered by a *foreign* court, many of the same principles are still relevant. Most importantly, what we might call the "conflicts values" that underlie the Full Faith and Credit command should be part of the judgment recognition calculus. Thus, courts should acknowledge the importance of participating in an interlocking international legal system, where litigants cannot avoid unpleasant judgments simply by relocating. Indeed, in a cosmopolitan world, there is no need for inherent suspicion of foreign judgments. As in the choice-of-law context, deference to other courts will have long-term reciprocal benefits.[137] In the face of such competing conflicts values, there is little reason for a court to insist on following domestic public policies, particularly when the parties have no significant affiliation with the forum state (as in *Telnikoff*).

This is not to say, of course, that foreign judgments should always be enforced. Even in a cosmopolitan system, one would expect that judges might sometimes interpose local public policies where they would not in the domestic state-to-state setting. However, if we acknowledge the importance of the conflicts values effectuated by strong judgment recognition, we will necessarily reject the idea that a court is simply *unable* to enforce a judgment because such a judgment could not have been issued by the court in the first instance. Instead, we will appreciate that enforcing a foreign judgment is fundamentally different from issuing an original judgment; indeed, judgment recognition implicates an entirely distinct set of concerns about the role of courts in a multistate world.

PLURAL SOURCES OF LAW-MAKING AUTHORITY

Finally, turning to pluralism, we can think of jurisdiction, choice of law, and judgment recognition not only concerning official nation-state tribunals, but also concerning a whole panoply of other norm-generating bodies. The decisions of these plural bodies may have important impact

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(1935) (stating "[i]n 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).

137. *See supra* note 117 and accompanying text.

even if they lack coercive power. Thus, a Spanish judge's efforts to prosecute former Chilean leader Augusto Pinochet, although not literally "successful" because Pinochet was never extradited, nevertheless helped create a new precedent in international law regarding head-of-state immunity,[138] sparked new human rights activity in Chile itself, and may ultimately lead to domestic prosecution of Pinochet.[139] Likewise, Spanish efforts to prosecute members of the Argentine military have served to strengthen the hands of reformers within the Argentine government, most notably President Nestor Kirschner.[140] Even in the United States, the Oklahoma Court of Criminal Appeals recently stayed an execution[141] based in part on a prior decision of the International Court of Justice (ICJ)

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138. *See* David Sugarman, *From Unimaginable to Possible: Spain, Pinochet, and the Judicialization of Power*, 3 J. SPANISH CULTURAL STUDS. 107, 116 (2002) (arguing that "[t]he Pinochet precedent signals a larger potential role for domestic courts and the extension of the obligations of governments to adhere to minimum standards of human rights."). Such bold assertions of jurisdiction, not surprisingly, have provoked a backlash. For example, the International Court of Justice subsequently halted a Belgian prosecution of the former Foreign Affairs Minister of the Democratic Republic of Congo, citing the need for governmental immunity in some circumstances. *See* Arrest Warrant of 11 April 2000 (Congo v. Belg.), General List No. 121, para. 70 (Feb. 14, 2002), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.PDF (last visited Oct. 31, 2005) ("[G]iven the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister of Foreign Affairs."). On the other hand, this decision was sharply criticized. *See, e.g.*, Arrest Warrant of 11 April 2000 (Congo v. Belg.) (Al-Khasawneh, J., dissenting), *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobeijudgment_20020214_al-khasawneh.PDF (last visited Dec. 2, 2005) (criticizing the majority on the ground that there are no exceptions to the immunity of high-ranking state officials when they are accused of crimes against humanity); Press Release, *International Commission of Jurists, International Court of Justice's Ruling on Belgian Arrest Warrant Undermines International Law* (Feb. 15, 2002), *available at* http://www.icj.org/article.php3?id_article=2622&lang=en (last visited Dec. 2, 2005) ("International humanitarian law and international human rights law have accorded national States jurisdiction over persons committing international crimes in order to combat impunity. Yesterday's decision is one that might have been expected sixty years ago, but not in the light of present-day law.").

139. *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.").

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

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

concerning the Vienna Convention on Diplomatic Relations,[142] even though the ICJ had no means of enforcing its decision in Oklahoma. Finally, scholars are recognizing that official international institutions, such as the United Nations, can pressure local bureaucracies, for example, by creating international commissions of inquiry concerning alleged atrocities, or threatening prosecutions in international courts. Such declarations can empower local reformers, who can then argue for institutional changes as a way of staving off international interference.[143] Indeed, the complementarity regime of the new International Criminal Court seems premised in part on this sort of interaction.[144]

In the trade context, although ad hoc tribunals convened under Chapter 11 of the North American Free Trade Agreement (NAFTA) have no authority to directly reverse the decisions of national courts or create formally binding precedent, Robert Ahdieh has argued that, over time, we may see the interactions between the NAFTA panels and national courts take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity.[145] Instead, Ahdieh predicts that international courts are likely to exert an important influence even as the national courts retain formal independence, much as U.S. federal courts exercising habeas corpus jurisdiction may influence state court interpretations of U.S. constitutional norms in criminal cases.[146] In turn, the decisions of national courts may also come to influence international tribunals. This dialectical relationship, if it emerges, will again exist without

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

143. *See, e.g.*, Laura A. Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia, in* ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 319, 358–61 (Jane Stromseth ed., 2003) (discussing ways in which international pressure on Indonesia, in the period just after East Timor gained its independence, strengthened the hand of reformers within the Indonesian government to push for robust domestic accountability mechanisms for atrocities committed during the period leading up to the independence vote).

144. Under the International Criminal Court's complementarity regime, the ICC may not consider a case if a state with jurisdiction is investigating or prosecuting the case, unless that state is "unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute of the International Criminal Court, at arts. 17, UN Doc. A/CONF.183/9 (1998), corrected through Jan. 16, 2002, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf. Thus, the threat of ICC intervention may pressure local states to investigate or prosecute human rights abuses more thoroughly than they otherwise would.

145. *See* Ahdieh, *supra* note 63.

146. *See id.* at 2034.

an official hierarchical relationship based on coercive power.[147] For example, a NAFTA panel recently determined that a particular Mississippi state appellate procedure violated international norms of due process and therefore constituted an unfair trade practice.[148] In a subsequent Mississippi case concerning the same procedure, the state court would face a form of choice-of-law decision, with the state court determining what weight to give the NAFTA tribunal action. The answer to that question may depend in part on whether the suit in question feels predominantly "of local character" or whether the relevant community ties are to the North American trade community writ large. At least that is the sort of inquiry cosmopolitan pluralism would envision.

Turning to the realm of online regulation, the French prosecution of Yahoo! (as in the *Pinochet* case) was technically unsuccessful in the sense that Yahoo! immediately sought a U.S. court ruling that the French order was unenforceable.[149] Yet, at the same time Yahoo! "voluntarily" capitulated to the French order,[150] perhaps moved by the public pressure the French court decision had engendered.[151] Similarly, when a Human Rights Tribunal in Canada ordered Ernst Zündel, a former Canadian resident then living in the United States, to remove anti-Semitic hate speech from his California-based Internet site,[152] the order acknowledged that the Tribunal

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

148. Loewen Group v. United States, ICSID Case No. ARB(AF)/98/3, 4 J. WORLD INVESTMENT 675, 702, P 119 (NAFTA Ch. 11 Arb. Trib. 2003).

149. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). This decision was subsequently reversed by the Ninth Circuit on other grounds. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisémitisme, 433 F.3d 1199 (9th Cir.).

150. *See* Press Release, Yahoo!, Yahoo! Enhances Commerce Sites for Higher Quality Online Experience (Jan. 2, 2001), *available at* http://docs.yahoo.com/docs/pr/release675.html (Last visited Dec. 12, 2005) (announcing new product guidelines for its auction sites that prohibit "items that are associated with groups which promote or glorify hatred and violence").

151. *See, e.g.*, Troy Wolverton & Jeff Pelline, *Yahoo to Charge Auction Fees, Ban Hate Materials*, CNET News.com, Jan. 2, 2001, *available at* http://news.com.com/2100-1017-250452.html (last visited Dec. 12, 2005) (noting that Yahoo!'s new policy regarding hate-related materials followed action by the French court).

152. Citron v. Zündel (Can. Human Rights Trib. Jan. 18, 2002), *available at* http://www.chrt-tcdp.gc.ca/search/files/t460_1596de.pdf (Last visited Dec. 13, 2005). *See also* Peter Cameron, *Hate Web Sites Have 'No Place in Canadian Societys.' Commission*, LONDON FREE PRESS, Jan. 19, 2002, at B5 (describing a ruling that "an Internet site that promotes hate against any group contravenes the Canadian Human Rights Act" because

might have difficulty enforcing its ruling.[153] Nevertheless, the Tribunal stated that there would be "a significant symbolic value in the public denunciation"[154] of Zündel's actions and a "potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles enunciated in [our] decision."[155] In the aftermath of this ruling, Zündel was deported from the United States to Canada for breaching the terms of his visitor's permit.[156] Though the deportation decision had no formal connection to the Commission's ruling, it seems likely that the publicity generated by the Commission played a role.[157] Thus, the Commission's ruling may have had a very real impact, even though the Commission itself acknowledged it had no enforcement power.[158]

Elsewhere, the existence of governmental and judicial networks[159] means that the rhetoric of legal opinions is more likely to influence others despite the fact that those opinions are not literally binding authority beyond their own community. Even the normative statements of non-state entities may have authoritative impact on various sub-communities, and again may have rhetorical impact more broadly. Certainly, once we acknowledge the importance of changes in legal consciousness over time, it becomes clear that *enforcement* power is not the only factor in determining the *normative* power a jurisdictional assertion might have.

Pluralism would also require us to consider possibly relevant non-governmental norms. For example, it is worth noting that there was a third set of community norms in the barcelona.com case: not just those of the United States and Spain, but also the norms that had been articulated by an arbitrator sanctioned by the World Intellectual Property Organization before the case even reached the U.S. federal district court.[160] This arbitrator and the norms he articulated were a product of the Uniform Dispute Resolution Policy promulgated by the Internet Corporation for Assigned Names and

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"[h]ate messaging and propaganda have no place in Canadian Society").

153. *See* Citron v. Zündel, *supra* note 152 para. 298 at 100 ("We are extremely conscious of the limits of the remedial power available in this case."); *see also* Cameron, *supra* note 152 (quoting a Commission spokesperson as acknowledging that "[w]e have no experience with enforcing compliance in cases involving the Internet").

154. Citron v. Zündel, *supra* note 152, para. 300.

155. *Id.* at para. 300 at 100.

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

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

158. *See id.*

159. *See* Berman, *From International Law*, *supra* note 4, at 115-22.

160. *See Barcelona.com*, 330 F.3d at 621.

Numbers (ICANN).[161] ICANN might be thought of as an Internet-based governing body,[162] and arguably the U.S. court could have deferred to this non-state community affiliation. On the other hand, one might think that ICANN lacks the democratic accountability necessary to be a legitimate governing body[163] and that any tie between a web site operator and ICANN

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161. *See id.* ("Every domain name issued by Network Solutions, Inc. is issued under a contract, the terms of which include a provision requiring resolution of disputes through the UDRP. In accordance with that policy, the City Council filed an administrative complaint with ... WIPO..., an ICANN-authorized dispute-resolution provider located in Switzerland.").

162. *See* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 20 (2000) ("For almost two years, the Internet Corporation for Assigned Names and Numbers (ICANN) has been making domain name policy under contract with the Department of Commerce."); David G. Post, *Governing Cyberspace, or Where is James Madison When We Need Him?*, *available at* http://www.temple.edu/lawschool/dpost/icann/comment1.html (June 1999) ("[N]otwithstanding the [U.S.] government's (and ICANN's) protestations to the contrary, this is about nothing less than Internet governance writ large."). Indeed, at the press conference convened in 1998 to unveil the Department of Commerce White Paper that led to the creation of ICANN, Becky Burr, DoC spokeswoman, stated:

> We are looking for a globally and functionally representative organization, operated on the basis of sound and transparent processes that protect against capture by self-interested factions, and that provides robust, professional management. The new entity's processes need to be fair, open, and pro-competitive. And the new entity needs to have a mechanism for evolving to reflect changes in the constituency of Internet stakeholders.

Press Release, Becky Burr, Associate Administrator, National Telecommunications and Information Administration's Office of International Affairs, Press Conference Remarks, Commerce Department Releases Policy Statement on the Internet Domain Name System (June 5, 1998), *available at* http://www.ntia.doc.gov/ntiahome/press/dnsburr.htm (last visited Jan. 3, 2006).

163. For criticisms of ICANN from the perspective of democratic legitimacy and administrative transparency, see, for example, Froomkin, *supra* note 162, at 18; Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 188 (2000); Post, *supra* note 162; Centre for Global Studies, *Enhancing Legitimacy in the Internet Corporation for Assigning Names and Numbers: Accountable and Transparent Governance Structures*, Markle Foundation, *available at* http://www.markle.org/downleadable_assets/icann_enhancelegitemacy.pdf(Sept. 18, 2002) (last visited Dec. 12, 2005). For similar criticisms of WIPO, see, for example, A. Michael Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617 (1999):

> As an international body all too willing to take up the reins of global governance, WIPO attempted to create global e-commerce friendly rules by a process that, left to itself, seemed likely to consist predominantly of meeting with commercial interest groups and giving little more than lip service to privacy and freedom of expression concerns.

Id. at 618. For criticism of the UDRP system on the ground that the arbitration system is fundamentally biased in favor of trademark holders, see Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J.

is largely involuntary[164] and therefore not a cognizable community affiliation. In any event, the existence of the WIPO arbitration in this case reminds us that non-state entities may be an important source of norms and must at least be considered in any conflicts analysis.

Such a pluralist conflicts jurisprudence looks to a variety of possible legal sources.[165] First, courts can consider the multiple domestic norms of nation-states affected by the dispute. And, in determining which national norms to give greatest salience, courts would analyze the community affiliations of the parties and the effect of various rules on the polities of the affected states. Moreover, whereas most traditional choice-of-law regimes require a choice of one national norm, a cosmopolitan pluralist approach permits judges to develop a hybrid rule that may not correspond to any particular national regime. Second, international treaties, agreements, or other statements of evolving international or transnational norms may provide relevant guidance. Third, courts should consider community affiliations that are not associated with nation-states, such as industry standards, norms of behavior promulgated by non-governmental organizations, community custom, and rules associated with particular activities, such as Internet usage. Fourth, courts should take into account traditional conflicts principles. For example, choice-of-law regimes should not develop rules that encourage a regulatory "race to the bottom" by making it easy to evade legal regimes.

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INT'L L. 903, 903-13 (2002) (noting that the system is biased in favor of trademark holders); MICHAEL GEIST, *Fundamentally Fair.Com? An Update on Bias Allegations and the ICANN UDRP* 8 (2002), *available at* http://aix1.uottawa.ca/~geist/fairupdate.pdf (Last visited Dec. 13, 2005) (updating study, responding to methodological criticisms, and stating that bias continues). All of these criticisms might be relevant in determining whether a court should consider or defer to norms articulated through thie UDRP process.

164. As Michael Froomkin describes:

> Anyone who wishes to have a domain name visible to the Internet at large must acquire it from a registrar who has the right to inscribe names in an ICANN-approved domain name registry. ICANN determines which registries are authoritative. This power to make and break registries allows ICANN to require registries (and also registrars) to promise to subject all registrants to a mandatory third-party beneficiary clause in which every registrant agrees to submit to ICANN's UDRP upon the request of aggrieved third parties who believe they have a superior claim to the registrant's domain name.

A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOKLYN L. REV. 605, 612 (2002).

165. For a discussion along similar lines, see Dinwoodie, *supra* note 36, at 555-56.

Finally, I want to suggest that jurisdiction might actually be a better model than sovereignty for understanding how law operates in an interconnected world. After all, at root level, sovereignty is almost always premised on coercive power: who has it, who can exercise it, who can rightfully claim it. But the changing structures of norm development and interpenetration we see around us do not always rely on coercive power. Rather we see various forms of rhetorical persuasion, informal articulations of legal norms and networks of affiliation that may not possess literal enforcement power. Coercive power obviously exists, and it is certainly an important (and often the dominant) factor. Yet the mere articulation of norms (as in many of the examples discussed so far) may have significant, though less obvious, persuasive power. Indeed, even though one can trace the entire international human rights system and now the World Trade Organization system to the acts of powerful nations, the legal forms thus created are not so easily circumscribed, and they can sometimes—not always, but sometimes—be used back against the forces of power.[166] Thus, human rights arguments can sometimes be deployed to constrain powerful actors, and there are signs that developing countries, particularly the larger ones such as Brazil and India, are beginning to use the World Trade Organization to pursue trade sanctions against the United States and European Union.

Much more work needs to be done, of course. In particular, I hope in my future scholarship to take on even more directly Teubner's call for an "inter-systemic" conflicts paradigm that accounts for relationships among multiple social sectors and not just multiple courts. Such a system would analyze the ways in which various norm-generating communities (both state and non-state) interact and would attempt to discern patterns that might help shape useful ways of conceptualizing this interaction.[167]

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166. Of course, some scholars doubt that international law ever acts as an independent constraint on nation-states. *See e.g.*, JACK L. GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). According to this view, each state single-mindedly pursues its rational state interest and therefore obeys international legal norms only to the extent that such norms serve those pre-existing interests. Yet, as I argue elsewhere, *see* Paul Schiff Berman, *Seeing Beyond the Limits of International Law* (reviewing JACK L. GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005), 84 TEX. L. REV. ___ (2006, forthcoming), this view ignores the degree to which even unenforceable normative assertions may both change legal consciousness over time and empower members of state bureaucracies to lobby for certain policies. Thus, the very determination of what is in a state's interest is itself influenced by the content of international and transnational legal norms.

167. *See* Paul Schiff Berman, *Conflict of Laws and the Challenge of Legal Pluralism* (forthcoming).

Nevertheless, I hope that I have at least challenged conflicts scholars to engage with a series of fundamental issues that I believe are at the heart of globalization. The cosmopolitan pluralist approach I propose asks courts both to be in dialogue with each other and to take seriously the rhetorical assertions of norms of non-state communities so that courts more fully engage in a "world constitutive process."[168] This is not a uniform universal vision that requires cumbersome international harmonization. Indeed, there is nothing neat about the process at all. In a world of permeable borders, multiple affiliations, and overlapping interests, law is diffused in myriad ways, and the construction of legal communities is always contested, uncertain, and open to debate.

Conflict of laws, therefore, will never be a unified, stable system that solves the various cross-community disputes in the world, nor should it be. Accordingly, instead of seeking programmatic solutions to specific conflicts problems, we need to expand our conception of what the study of conflict of laws is. Drawing on interdisciplinary scholarship as well as work in other areas of law, conflicts scholars should have as part of their core mission the conceptualization and preservation of a world of plural legal voices engaged in ongoing conversation and dispute. Indeed, the real goals of conflict of laws, I believe, are first to make sure that the interaction among these voices is as robust as possible and second to study more comprehensively the changing definitions of community, physical and social space, borders, citizenship, and affiliation that will always be contested through conflicts challenges. With these goals in mind, conflict of laws scholars will be ideally situated to offer both descriptive and normative insights about the complex and interwoven world of law in the twenty-first century.

168. Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decisions*, 19 J. LEGAL EDUC. 253, 255 (1967).