Article

From International Law to Law and Globalization

PAUL SCHIFF BERMAN*

International law’s traditional emphasis on state practice has long been questioned, as scholars have paid increasing attention to other important—though sometimes inchoate—processes of international norm development. Yet, the more recent focus on transnational law, governmental and non-governmental networks, and judicial influence and cooperation across borders, while a step in the right direction, still seems insufficient to describe the complexities of law in an era of globalization. Accordingly, it is becoming clear that “international law” is itself an overly constraining rubric and that we need an expanded framework, one that situates cross-border norm development at the intersection of legal scholarship on comparative law, conflict of laws, civil procedure, cyberlaw, and the cultural analysis of law, as well as traditional international law. Moreover, this new scholarship must be truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars. Such insights afford a more nuanced idea of how people actually form affiliations, construct communities, and receive and develop legal norms,

* Professor, University of Connecticut School of Law. For useful comments during the process of writing this Article, I owe thanks to Laura Dickinson, Mark Drumbl, Robert W. Gordon, Mark W. Janis, Janet Koven Levit, Sally Engle Merry, Jeremy Paul, Austin Sarat, and Susan Silbey. I also acknowledge the valuable research assistance of Shannon Bratt, Marilee Corr, Ronald Crawley, Emily Dean, Joshua Horton, and Jennifer Montgomery.
often with little regard for the fixed geographical boundaries of the nation-state system. This Article refers to such a broader frame of analysis as “law and globalization.” Although “globalization” is, of course, a controversial term, the idea of law and globalization nevertheless provides a useful lens for viewing the plural ways in which legal norms are disseminated in the Twenty-first Century. This Article sketches the contours of what it might mean to emphasize law and globalization, rather than simply international law. It suggests four important ways in which the study of law and globalization enlarges the traditional focus of international law and then identifies ten areas of conceptual inquiry that are already coalescing within the scholarly literature to form the core of a study of law and globalization.

INTRODUCTION ................................................................................. 487

I. ENLARGING THE FOCUS OF INTERNATIONAL LAW .............. 492
   A. Law Beyond Governmental Institutions ....................... 492
      1. Legal Consciousness............................................... 493
      2. The Role of Bureaucrats........................................... 497
      3. Governmental and Non-governmental Networks 500
      4. Legal Pluralism ....................................................... 507
   B. Law Beyond Territorial Borders ..................................... 511
   C. Law Beyond the Public Law/Private Law Distinction .......... 518
   D. Law Beyond Sovereignty ............................................. 523

II. LAW AND GLOBALIZATION: TEN AREAS OF STUDY .......... 530
   A. Jurisdictional Rules and the Problem of Physical Location ........................................... 530
   B. “Juripersuasion” and the Articulation of Norms .................................. 533
   C. Plural Sources of Legal and Quasi-legal Authority ................................ 538
   D. Cosmopolitanism and Law .............................................. 540
   E. The Sociological and Psychological Processes of Legal Consciousness ......................... 542
   F. The Role of Non-Governmental Organizations .................. 546
   G. The Importance of Institutions ........................................ 549
I. INTRODUCTION

Over the past two decades, it has become increasingly clear that, in order to understand the cross-border development of legal norms, we need to move beyond the limiting framework of international law. In an earlier generation, scholars seeking to study law on the world stage focused primarily on only two types of normative systems: those promulgated by nation-states and those promulgated among nation-states.1 With nation-states as the only relevant players, the law governing the global system was, of necessity, exclusively international. And international law, not surprisingly, emphasized bilateral and multilateral treaties between and among states, the activities of the United Nations, the pronouncements of international tribunals, and (somewhat more controversially) the norms that states had obeyed for long enough that such norms could be deemed customary.2 This was a legal universe with two guiding principles. First, law was deemed to reside only in the acts of official, state-sanctioned entities. Second, law was seen as an exclusive function of state sovereignty.3

---

2. See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.S. No. 993 (stating that the primary sources of international law are international treaties and conventions, customary practices of states accepted as law, and general principles of law common to most legal systems).
3. Of course, this is an over-simplified vision of international law. Obviously, non-state sources—including the idea of natural law itself—have long played a key role in the development of international legal principles. See generally David J. Bederman, Religion and the Sources of International Law in Antiquity, in The Influence of Religion on the Development of International Law 3 (Mark W. Janis ed., 1991) (tracing the role of religion in the Near East during the empires of Egypt, Babylon, Assyria, Hittites, Mittani, Israelites, Greek city-states, Indian states before 150 B.C., and Mediterranean powers before 168 B.C.). Indeed, prior to Bentham, these non-state sources, including the universal common law of jus gentium, were arguably far more important than the norms generated by states. See Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L.J. 2599, 2604 (1997) (reviewing Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance With International Regulatory Agreements (1995) and
Both principles, however, have eroded over time. The rise of a conception of international human rights in the post-World War II era transformed individuals into international law stakeholders, possessing their own entitlements against the state. But even apart from individual empowerment, scholars have more recently come to recognize the myriad ways in which the prerogatives of nation-states are cabined by transnational and international actors. Whereas F.A. Mann could confidently state in 1984 that “laws extend so far as, but no further than the sovereignty of the State which puts them into force,” many international law scholars have, at least since the end of the Cold War, argued that such a narrow view of how law operates transnationally is inadequate. Thus, the past fifteen years have seen increasing attention to the important—though sometimes inchoate—processes of international norm development. Some scholars have sought to define and understand “transnational legal process,” the ways in which nation-states over time come to internalize international or transnational norms. Others have studied non-


6. See, e.g., Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181
traditional legal actors such as non-governmental organizations (NGOs) and their role in defining (and sometimes enforcing) legal standards.\footnote{See, e.g., Joel R. Paul, Holding Multinational Corporations Responsible Under International Law, 24 Hastings Int’l & Comp. L. Rev. 285, 285–86 (2001) (observing that “private individuals and non-governmental organizations acting both internationally and domestically are contributing to the emergence of new international norms. These new international norms confer greater rights and obligations on private individuals and firms, shifting the focus of international law.”).} And even with regard to classic legal actors such as courts, scholars have noted the increasing willingness of judges to apply international norms transnationally,\footnote{See, e.g., M. Cherif Bassiouni, Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, 42 Va. J. Int’l L. 81 (2001); Leila Nadya Sadat, Redefining Universal Jurisdiction, 35 New. Eng. L. Rev. 241–63 (2001); Henry J. Steiner, Three Cheers for Universal Jurisdiction—Or Is It Only Two?, 5 Theoretical Inquiries in L. 199 (2004). For an exhaustive discussion of universal jurisdiction, including legislative (as well as judicial) enactments, see Luc Reydam, Search Term End Universal Jurisdiction: International and Municipal Legal Perspectives (2003).} to engage in a transnational judicial dialogue,\footnote{See, e.g., Anne-Marie Slaughter, Judicial Globalization, 93 Geo. L.J. (forthcoming 2005). See also Janet Koven Levit, Going Public With Transnational Law: The 2002–2003 Supreme Court Term, 39 Tulsa L. Rev. 155 (2003).} and even to adopt conceptions of universal jurisdiction.\footnote{See, e.g., Harold Hongju Koh, How Is International Human Rights Law Enforced?, 74 Ind. L.J. 1397 (1999); Koh, supra note 3.}

Yet, this new emphasis on transnational legal processes, governmental and non-governmental networks, and judicial influence and cooperation across borders, while a step in the right direction, still seems insufficient to describe the complexities of law in an era of globalization. Accordingly, scholars are coming to recognize that international law itself needs an expanded focus, one that situates cross-border norm development at the intersection of legal scholarship on conflict of laws, civil procedure, cyberlaw, comparative law, and the cultural analysis of law, as well as traditional international law. Moreover, this new scholarship must be truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars. Such insights afford a more nuanced idea of how people actually form affiliations, construct communities, and receive and develop legal norms, often with little
regard for the fixed set of geographical boundaries that constitute the nation-state system.

An interdisciplinary study of these processes of international, transnational, and subnational norm development and interpenetration does not, of course, render either traditional international law or the idea of nation-state sovereignty irrelevant, but it does complicate the picture significantly, prompting the need for a more comprehensive set of inquiries. I call this broader frame of analysis “law and globalization.” And although I recognize the controversial nature of the term “globalization,” I believe the idea of law and globalization provides a useful lens for viewing the way legal norms are constructed and disseminated in an era when the prerogatives of territorially delimited nation-states, while not completely unimportant, have become less salient than they once were.11

To some, the very mention of globalization will seem old hat. After all, theorizing about globalization has been a cottage industry both in academia and in the popular media for many years now. Yet, although globalization has been an object of study for quite some time, most of this work has taken place in fields other than law. Perhaps because legal scholars are so focused on the official organs of legal power—nation-state governments—they have been less likely to embrace ideas about norm-development in non-state arenas. Thus, an emphasis on law and globalization may encourage legal scholars to draw upon insights from other academic disciplines. In addition, even solely within the legal academy, the idea of law and globalization may be a useful rubric for conceptualizing areas of commonality among a variety of fields, thereby drawing traditional international law scholars into greater dialogue with scholars focusing on conflict of laws, civil procedure, cyberlaw, cultural analysis of law, international business transactions, trade finance, and other legal topics. In any event, regardless of the label, the main point is that the idea of international law, as traditionally conceived, seems insufficient to capture the variety of scholarly approaches that are emerging, and a new conceptual framework may be useful.

11. Paul, supra note 7, at 286 (observing that “[g]lobalization . . . has displaced colonialism and then the cold war as the organizing principle of the international system”). I recognize, of course, that the purported “stable” system of sovereignty, territoriality, and world order that globalization supposedly challenges may never have actually existed. Instead, such systems have most likely always been contested and in flux. Yet, one of the benefits of studying law and globalization is that such study helps us to be reflective both about the categories we are presupposing and about the way in which discourse about globalization might actually validate, legitimate, and reinforce this mythical time of order. See Susan Bibler Coutin et al., In the Mirror: The Legitimation Work of Globalization, 27 LAW & SOC. INQUIRY 801 (2002).
In this Article, I sketch the contours of what it might mean to emphasize law and globalization, rather than simply international law. To do so, I suggest in the first Part of this Article four important ways in which the study of law and globalization enlarges the traditional focus of international law. First, studying law and globalization allows us to expand our conception of what counts as law, thereby recognizing many non-governmental fora where legal (or quasi-legal) norms are articulated and disseminated. Second, law and globalization can turn the legal gaze to the insights of interdisciplinary scholarship concerning people’s relationships to concepts such as space, place, borders, distance, and community affiliation. Third, by looking at broader processes of international norm development, law and globalization can bridge the traditional doctrinal divide between public and private international law. Fourth, law and globalization can contribute to the growing recognition among international law scholars that the classic conception of inviolate nation-state sovereignty may be unhelpful in an increasingly diffuse world of transnational governmental and non-governmental networks, extraterritorial jurisdictional assertions, rhetorical statements of legal norms, and permeable borders.

Once international law’s traditional focus has been expanded, a new scholarly agenda can emerge. Indeed, this new agenda is already emerging, as a wide range of scholars have, over the past few years, begun to take a broader view of the various processes that constitute the transnational normative order. Accordingly, in the second Part of this Article, I identify ten areas of conceptual inquiry that I believe are already coalescing to form the core of a study of law and globalization. Yet, although nearly all of these areas of study have been subjects of discussion and debate in the international law literature, they are rarely deployed as overarching frameworks for a more holistic understanding of law in an interconnected world. Thus, simply identifying these core fields of inquiry may help re-orient international law scholarship around a different set of possible theoretical questions.12 Significantly, this list includes the contested idea of globalization itself.

Using these ten tropes, a wide variety of scholars—some of whom are working in the international law tradition and some not, some of whom focus on so-called public international law and some not, some of whom are law professors and some not—are grappling

12. Cf., e.g., Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 Am. J. Int’l L. 1, 20 (1985) (“A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.”).
with a contemporary world of transnational law-making, cross-border interaction, and norm penetration among multiple communities. Taken together, this emerging scholarship helps point the way from the study of international law to the study of law and globalization. And its insights allow us to chart a course for a new transnational century, where networks of governmental and non-governmental actors (including horrific new networks such as transnational terrorist organizations) disseminate alternative normative systems across a diffuse and constantly shifting global landscape.

I.  **ENLARGING THE FOCUS OF INTERNATIONAL LAW**

A.  **Law Beyond Governmental Institutions**

International law scholarship has traditionally located international law in the acts of official governmental bureaucratic entities, such as the treaties and agreements entered into by nation-states, the declarations and protocols of the United Nations (UN) or other affiliated bodies, and the rulings of international courts and tribunals.\(^\text{13}\) Because of this relatively narrow focus, scholars of international law historically have tended to ignore the multifaceted ways in which legal norms are disseminated, received, resisted, and imbibed “on the ground” in daily life, thereby missing much of the complexity of how law operates. In addition, the emphasis on “official” law may, paradoxically, have contributed to the pervasive uneasiness in international law scholarship that international law might not really be law at all. If law resides only in the official acts of a government with coercive power (as the traditional view of international law believes), then many of the mechanisms of international law, which lack such coercive power, cannot be law. Thus, making “law” synonymous with “government” may lead scholars to over-emphasize the actions of nation-states, because only at the nation-state level can a government with coercive power be found. The rest of international “law,” on this view, amounts to a mere set of rhetorical statements that are obeyed only when

---

13. See, e.g., BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 2 (3d ed. 1999) ("Public international law primarily governed the activities of governments in relation to other governments."). Of course, this is not a complete account of the scope of international law or international law scholarship. See supra, note 3.
convenient to those holding the reins of coercive power.\textsuperscript{14}

But of course, as international law scholars are increasingly coming to recognize, there is no need to see law as necessarily encapsulated only by formal governmental acts. Indeed, with regard to domestic law, sociolegal scholars have argued for many decades that law cannot simply be understood as the pronouncements of official bodies such as legislators and courts. They have therefore long since turned their gaze from “law on the books” to “law in action.”\textsuperscript{15} In this section, I briefly summarize this scholarship, noting four areas in which the insights of sociolegal scholars can inform the study of law and globalization. First, sociolegal scholars have emphasized the significance of legal consciousness—the ways in which people imbibe, transform, and resist legal norms over time. Second, these scholars have studied the role of lower-level bureaucrats in the way law is actually implemented in daily life. Third, the importance of networks of governmental and/or non-governmental actors has become an increasingly fruitful area of research. Fourth, scholarship on legal pluralism has explored the variety of community affiliations people recognize in their lives, as well as the multiple and sometimes conflicting norms generated by such communities. Each of these areas of study can help expand the traditional scope of international law scholarship.

1. Legal Consciousness

Over the past four decades, sociolegal scholars have increasingly emphasized that law is best understood not as an autonomous system of official rules, but rather as “a distinctive

\textsuperscript{14} See, e.g., Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005) (suggesting that international law is simply a product of states pursuing their interests on the international stage and that international legal norms, therefore, cannot pull states towards compliance contrary to their interests). This vision, however, assumes that states simply have a pre-existing set of interests, which they then pursue in the international arena. In contrast, I argue that the interests are themselves shaped over time by changes in legal norms (and accompanying changes in legal consciousness). As a result, the very articulations of international or transnational norms that Goldsmith and Posner deem to be mere rhetoric are inevitably part of what ultimately constitutes a nation-state’s vision of its own long-term self-interest. Thus, although it is certainly true that international legal norms will not always dictate nation-state behavior, the idea that they have no constraining effect is unconvincing to anyone who takes the idea of legal consciousness seriously. For further discussion of scholarship concerning legal consciousness, see Section I.A.1, infra.

\textsuperscript{15} For a discussion of the applicability of U.S. sociolegal scholarship to international law, see Laura A. Dickinson, Introduction to Empirical Approaches to International Human Rights Law (Laura A. Dickinson ed., forthcoming 2005).
manner of imagining the real." On this view, law operates as much by influencing modes of thought as by determining conduct in any specific case. It is a constitutive part of culture, shaping and determining social relations. For example, “[l]ong before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests—roles that already embed a variety of juridical notions.” Indeed, we cannot escape the categories and discourses that law supplies. These categories may include ideas of what is public and what is private, who is an employer and who is an employee, what precautions are “reasonable,” who has “rights,” and so on. In short, “it is just about impossible to describe any set of ‘basic’ social practices without describing the legal relations among the people involved—legal relations that don’t simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship.”

Because this view of law focuses on the way that legal categories and ideas suffuse social life, scholars have studied the “legal consciousness” of ordinary citizens, exploring both how people think about the law and the ways in which largely inchoate ideas

17. See, e.g., Susan S. Silbey, Making a Place for Cultural Analyses of Law, 17 Law & Soc. Inquiry 39, 41 (1992) (arguing that “law is a part of the cultural processes that actively contribute in the composition of social relations”).
19. Robert W. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 105 (1984) (“[I]n actual historical societies, the law governing social relations—even when never invoked, alluded to, or even consciously much thought about—has been such a key element in the constitution of productive relations that it is difficult to see the value . . . of trying to describe those relations apart from law.”).
20. Indeed,

[perhaps the most stunning example of law’s constitutive powers is the willingness of persons to conceive of themselves as legal subjects, as the kind of beings the law implies they are—and needs them to be. Legal subjects think of themselves as competent, self-directing persons who, for example, enter bargained-for exchanges as free and equal agents.

about the law can affect decisions they make.\textsuperscript{23} Sally Engle Merry observes legal consciousness in “the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world.”\textsuperscript{24} These understandings are often taken for granted. This is because legal consciousness may be so much a part of an individual’s worldview that it is present even when law is seemingly absent from an understanding or construction of life events.\textsuperscript{25} Thus, “[w]e are not merely the inert recipients of law’s external pressures. Rather, we have imbibed law’s images and meanings so that they seem our own.”\textsuperscript{26} Law is an often unnoticed, but nevertheless crucial, presence

\begin{itemize}
\item \textsuperscript{24} Merry, supra note 23, at 5. See also, e.g., Austin Sarat & Jonathan Simon, Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship, 13 YALE J. L. & HUMAN. 3, 19 (2001) (“Law is part of the everyday world, contributing powerfully to the apparently stable, taken-for-granted quality of that world and to the generally shared sense that as things are, so must they be.”); Gordon, supra note 19, at 101 (arguing that we should “treat legal forms as ideologies and rituals whose ‘effects’—effects that include people’s ways of sorting out social experience, giving it meaning, grading it as natural, just, and necessary or as contrived, unjust and subject to alteration—are in the realm of consciousness”).
\item \textsuperscript{25} David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 STAN. L. REV. 575, 604 (1984) (“Law, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense.”). See also JEAN COMAROFF, BODY OF POWER, SPIRIT OF RESISTANCE: CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE 4–5 (1985) (arguing that consciousness is “embedded in the practical constitution of everyday life, part and parcel of the process whereby the subject is constructed by external sociocultural forms.”).
\item \textsuperscript{26} Sarat & Kearns, supra note 20, at 29. See also Gordon, supra note 19, at 109 (“[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.”).
\end{itemize}
in our ideas of what is fair, appropriate, or natural.27

In considering legal consciousness, moreover, we must remember that law is not simply the official texts of treaties, judicial opinions, and legislative acts that embody formal legal rules, nor is it just the formal legal institutions of courts, lawyers and police. Accordingly, instead of focusing solely on laws and official legal actors,28 legal consciousness research examines the wide variety of "quasi-legal" discourses, such as abstract (and often intuitive) ideas of street justice, due process, civil disobedience, retribution, deterrence, and rights, all of which are frequently invoked in public discussions and dinner-table conversations alike.

Finally, the study of legal consciousness also makes clear that the relationship between law and culture is not unidirectional. While legal categories do shape broader social discourse, at the same time law talk, diffused throughout society, becomes a source of alternative conceptions of law:

Legality operates through social life as persons and groups deliberately interpret and invoke law’s language, authority, and procedures to organize their lives and manage their relationships. In short, the commonplace operation of law in daily life makes us all legal agents insofar as we actively make law, even when no formal legal agent is involved.29

This focus on law in everyday life30 recognizes that people interpret

27. See Gordon, supra note 19, at 111 (“In short, the legal forms we use set limits on what we can imagine as practical options: Our desires and plans tend to be shaped out of the limited stock of forms available to us: The forms thus condition not just our power to get what we want but what we want (or think we can get) itself.”). Indeed, scholars have noted that people’s judgments about praise and blame will often match the corresponding legal categories, even when those people are not familiar in detail with legal rules and doctrines. See, e.g., THE ALLOCATION OF RESPONSIBILITY (Max Gluckman ed., 1972).

28. For example, Gordon notes that, if law is only “a bunch of discrete events that occur within certain specialized state agencies . . . how on earth are we going to characterize all the innumerable rights, duties, privileges, and immunities that people commonly recognize and enforce without officials anywhere nearby?” Gordon, supra note 19, at 107. Thus, slavery may begin as a temporary arrangement during an emergency harvesting season, then slowly become a taken-for-granted custom over the next few years, and only much later become codified into official legislation. According to Gordon, a scholar “who began her account of slave law . . . with the codifications would rightly be accused of leaving out the most important part of the story.” Id. at 108. Instead, he contends that “the legal institution of slavery” begins whenever we find “the ordinary practices and discourses of [the] society assuming or appealing to the collectively shared and maintained notions of right and obligation that support that institution, the moment when power becomes institutionalized as ‘right.’” Id.

29. EWICK & SILBEY, supra note 23, at 20.

30. See, e.g., LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993).
their experiences by drawing on a collaboration of law and other social structures. These interpretations may be widely varied and will, of course, depend in part on each person’s social class, previous contact with the law, and political standing. Nevertheless, legal consciousness constitutes an ongoing interaction between official norms as embodied in the common sense categories of daily life and each individual’s ongoing participation in the process of constructing legality. Accordingly, legal consciousness includes the ways in which individuals themselves deploy, transform, or subvert official legal understandings and thereby “construct” law on the ground.

We all always take part in the construction of legal consciousness, even as we are also inevitably affected by the legal categories of the social structures around us.

These varied processes of legal consciousness have not often been the subject of international legal scholarship. Instead, international law scholars have tended to study formal legal mechanisms and have largely ignored the more inchoate development of ideas about legality within populations. Of course, formal legal rules are often relevant to the formation of legal consciousness, but they are only the tip of the iceberg. Any comprehensive study of the development of international and transnational norms must consider a more complex web of psychological and sociological phenomena.

2. The Role of Bureaucrats

In shifting the focus away from the formal acts of governments at the macro level, sociolegal scholars have turned their attention not only to the legal consciousness that permeates everyday


33. “Legality” is defined as those meanings, sources of authority, and cultural practices that are in some sense legal although not necessarily approved or acknowledged by official law. The concept of legality offers the opportunity to consider “how, where and with what effect law is produced in and through commonplace social interactions . . . . How do our social roles and statuses, our relationships, our obligations, prerogatives, and responsibilities, our identities, and our behaviors bear the imprint of law?” Ewick & Silbey, supra note 23, at 20. See also Sarat & Kearns, supra note 20, at 55. (“[L]aw is continuously shaped and reshaped by the ways it is used, even as law’s constitutive power constrains patterns of usage.”).

34. See, e.g., Bumiller, supra note 23, at 30–32; McCann, supra note 23; Merry, supra note 23, at 9; Ewick & Silbey, supra note 23, at 731–49.
life, but also to the ways that law actually ends up being applied (or subverted) through the discretionary acts of lower-level bureaucrats. This scholarship reveals that law is almost never “delivered” on the ground in the pure form that treaties, legislation, or constitutional court decisions would indicate. Thus, international law scholars are in danger of missing how norms actually operate if they over-emphasize the grand statements made at the highest levels of government.  

Legal scholars and policymakers have an unfortunate tendency to assume that legal norms, once established, simply take effect and constitute a legal regime. As Carol Weisbrod has observed, even theorists who position themselves in opposition to prevailing legal norms tend to privilege official legal pronouncements as the relevant site for locating (or changing) law. Yet, scholarship on the operation of law in bureaucratic settings has emphasized the degree to which the imperatives of bureaucracies and the exercise of discretion by individual agents often affect (or even determine) the operation of law. As Theda Skocpol has pointed out, the state is “not just [. . . ] a set of formal offices, but . . . sets of relationships among all who ‘participated in some identifiable behavioral interaction connected with state actions.’” Contemporary sociolegal scholarship therefore recognizes that important aspects of legal life occur within bureaucratic settings, such as law firms, regulatory agencies, and corporations. 

For example, in order to meet statutory goals, individual

---


36. See, e.g., JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 73 (1960) (“Taking law as central we develop theories of the state as a legal order or as the ‘rule of law.’”).

37. See Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 995–96 (1990) (“[F]eminist legal scholars, like others in legal academic life, tend to address the powerful and to translate the question ‘What is to be Done?’ into the question ‘What should the State, acting through its judges, do?’” (internal citation omitted)).


agents of law enforcement—whether police officers, court officials, or members of administrative agencies—must always exercise discretion. Although statutes (or treaties) theoretically limit the range of permissible official action, they rarely if ever can determine precisely how the statutory mandates are accomplished. Thus, enforcement agents, in choosing which cases to act on and which to let go, which inquiries to follow up on and which to ignore, which presumptive litigants to take seriously and which to treat as undeserving of judicial attention, necessarily “become the agents of clarification and elaboration of their own authorizing mandates.”

By working out authorizing norms in organizational settings, these bureaucrats largely determine how a given law actually operates on the ground, in ways that may support, supplement, resist, or supplant the formal requirements of that law.

Moreover, in elaborating statutory mandates, bureaucracies inevitably modify the goals they were designed to serve. For example, research indicates that members of organizations may cope with various political, social, and environmental pressures (e.g., too many cases to process) by developing routines and simplifications that economize on resources. In addition, when evaluating their own effectiveness, they are apt to develop metrics that their procedures are more likely to meet. In this process, “they may alter the concept of their job, redefine their clientele, and effectively displace the organization’s stated mandate.”

Even in more explicitly “legal” contexts such as courts, where we might expect the formal statutory mandates to hold most sway, research indicates that the discretionary acts of lower-level court officers often determine the dispensation of justice. For example, Barbara Yngvesson studied “show cause” hearings held in a western Massachusetts criminal court. These hearings mark the earliest phase of the criminal procedure in cases in which there has been no arrest. They are conducted by the court clerk, who has the discretionary power either to allow a complaint application and issue a criminal charge, or to deny it and handle the matter “informally” in the hearing itself. As Yngvesson notes,

[I]n local conflicts the clerk acts both as “gatekeeper,” keeping what is “not legal” out of the court proper, and

40. Silbey, supra note 38, at 850 (internal citation omitted).
41. Id. at 851 (internal citation omitted).
42. See Barbara Yngvesson, Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town, 22 LAW & SOC’Y REV. 409 (1988) [hereinafter Yngvesson, Making Law at the Doorway]. See also YNGVESSON, supra note 23.
as a peacemaker. The clerk’s position at the court also allows him to play what one clerk defined as a local “watchdog” role, controlling “problem” people and “brainless” behavior in the communities in the court’s jurisdiction.43

As such, the informal interactions between the clerk and the litigants construct the “law” in actual practice and also function as a site for the imposition and contestation of social prejudices, class differences, and moral judgment about the litigants and their claims.

These various studies conducted in the domestic arena offer important insights for international law scholars. Institutional bureaucracies are a fundamental part of both international organizations and the domestic governments that often implement international norms. This research, therefore, taken together, provides an important reminder that law is not just a set of legal rules, treaties, or international standards, but a myriad of local social and institutional interactions. Moreover, these interactions exert tremendous influence on how justice is actually administered. International law scholars, therefore, must take account of lower-level bureaucrats and their exercise of discretionary power, as well as the internal structures of organizational bureaucracies.

3. Governmental and Non-governmental Networks

In thinking about forms of international cooperation in the Twenty-first Century, scholars have been drawn to the study of networks, both those among governmental authorities44 and those

43. Yngvesson, Making Law at the Doorway, supra note 42, at 410.
44. See, e.g., ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); George A. Bermann et al., Introduction to TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 1, 1 (George A. Bermann et al. eds., 2000) [hereinafter TRANSATLANTIC REGULATORY COOPERATION] (“While national authorities are still the principal actors in the regulatory arena, regulation is increasingly an international affair.”); Kalypso Nicolaïdis, Regulatory Cooperation and Managed Mutual Recognition: Elements of a Strategic Model, in TRANSATLANTIC REGULATORY COOPERATION, supra, at 571 (“Regulatory cooperation deserves analytical attention both in its own right and as a forerunner for the effect of interdependence on other policy areas and international governance in general.”); Paul B. Stephan, Regulatory Cooperation and Competition: The Search for Virtue, in TRANSATLANTIC REGULATORY COOPERATION, supra, at 202 (“By almost any standard of measurement, international regulatory cooperation has grown significantly in the last two decades and promises to expand even further.”). See also TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY (Mark A. Pollack & Gregory C. Shaffer eds., 2001); Scott C. Fulton & Lawrence I. Sperling, The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere, 30 INT’L LAW. 111 (1996); Sol Picciotto, Networks in International Economic Integration: Fragmented States
connecting non-governmental entities. Indeed, because the system of liberal institutionalism—in which states enter into treaties and create formal international organizations—is perceived to be waning, the study of networks provides a theoretical explanation for the continued (and perhaps increasing) interdependence among states. Similarly, the rise of a global (and internet-savvy) civil society has drawn attention to the roles that networks of NGOs may play in formulating norms transnationally.

With regard to government networks, interest among political scientists dates back at least to 1974, when Joseph Nye and Robert Keohane defined “trans-governmental relations” as “sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments.” Noting that foreign relations is often conducted through the formal and informal interactions of bureaucrats from various countries, they attempted to discern both the conditions under which trans-governmental networks are most likely to form, and the various types of interactions that can take place between international organizations and trans-governmental networks.


47. Id. at 42.

Slaughter traces this scholarly turn to a series of specific influences. For example, the 1990s saw the creation of the Financial Stability Forum, a network composed of three trans-governmental organizations—The Basle Committee on Banking Supervision, The International Organization of Securities Commissioners, and the International Association of Insurance Supervisors—along with other national and international officials responsible for financial stability around the world. These “organizations” did not seem to fit the classic model for international organizations; they were neither composed of states nor constituted by treaty, they did not enjoy legal personality, and they had no physical headquarters or stationery. In addition, scholars noted the emergence of a new “multi-layered regulatory system,” concentrated among Organisation for Economic Co-operation and Development countries. This system involved trans-governmental networks formed to develop strategies for regulatory cooperation in response to deepening economic and financial integration and increasing interdependence across a wide range of issues. Then, in the wake of the completion of the single market in 1992, the European Union itself emerged as a “regulatory state” and sought to harmonize (or at least reconcile) the regulations of its diverse and growing members through a series of networks located in the Council of Ministers. Finally, scholars noted the emergence of a system of “transatlantic governance” to help foster and manage the increasingly dense web of transatlantic economic cooperation. The growing focus on networks, therefore was seen as part of a broader shift from “government” to “governance.”

Of course, this proliferation of regulatory networks has been controversial. For example, regulation via governmental networks

50. Id. at 1046.
51. See id. at 1047 n.17.
52. See id. at 1047 n.19.
53. Id. at 1047.
54. See id. at 1048; Mark A. Pollack & Gregory C. Shaffer, Transatlantic Governance in Historical and Theoretical Perspective, in Transatlantic Governance in the Global Economy, supra note 44, at 3, 3–5.
55. Picciotto, supra note 44, at 1039.
may reduce transparency and impede political accountability.\textsuperscript{57} Networks also may be subject to capture by powerful interests, such as stakeholders from regulated industries or economically dominant nation-states.\textsuperscript{58} Nevertheless, it is difficult to discount the importance of these networks for understanding governance in the Twenty-first Century.

In addition to these regulatory networks, we see networks of judges as well.\textsuperscript{59} Indeed, the growing willingness of judges to consider transnational norms may stem in part from the increase in face-to-face interaction among judges from around the world. Foundation and government funding have provided the impetus for a wide variety of “rule of law” programs that include judicial seminars and training sessions.\textsuperscript{60} Such events have offered opportunities for interaction. In addition, judges themselves have organized meetings with their counterparts from around the world. For example, in recent years several delegations of United States Supreme Court Justices have met with top jurists in France, Germany, England, and India.\textsuperscript{61} In 1998, Justices O’Connor, Kennedy, Ginsburg, and Breyer traveled to Brussels to meet with judges from the European Court of Justice (ECJ),\textsuperscript{62} and in 2000, several members of the ECJ visited the U.S. Supreme Court Justices in Washington.\textsuperscript{63} Elsewhere, judges from European constitutional courts have met every two to three years since the 1980s,\textsuperscript{64} Worldwide Common Law Judiciary Conferences

\textsuperscript{57} See Raustiala, supra note 44, at 5 n.14.


\textsuperscript{59} See, e.g., Levit, supra note 9; Slaughter, supra note 9; Waters, supra note 9.


\textsuperscript{61} See Slaughter, supra note 9, at 1120.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id.
have been held since 1995, and formal transnational organizations of judges have been established in the Americas and in the Baltics. Additionally, in recent years Chief Justice Rehnquist and the U.S. Judicial Conference created a Committee on International Judicial Relations, the purpose of which is to “coordinate the federal judiciary’s relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations and the establishment and expansion of the rule of law and administration of justice.” Such efforts may help judges see their work as part of a common transnational enterprise.

While many political scientists and international relations scholars have focused primarily on networks of governmental actors, scholars at the intersection of law and anthropology, along with theorists interested in global civil society and the role of “norm entrepreneurs” in shaping governmental policy, have stressed the


66. See Slaughter, supra note 9, at 1120 (describing the creation and mission of the Organization of Supreme Courts of the Americas).

67. See Hon. Rait Maruste, Estonia: Leading Central Europe in Judicial Reform, INT’L JUD. OBSERVER, Jan. 1996, at 2, 3 (“To promote cooperation, Estonian judges have joined their colleagues in Latvia and Lithuania to form the Association of Judges of the Baltic States . . . .”).

68. See Slaughter, supra note 9, at 1121–22 (noting the international outreach efforts of various NGOs and law schools).


71. See Ethan A. Nadelmann, Global Prohibition Regimes: The Evolution of Norms in International Society, 44 INT’L ORG. 479, 482 (1990) (defining “transnational moral entrepreneurs” as nongovernmental transnational organizations who (1) “mobilize public opinion and political support both within their host country and abroad;” (2) “stimulate and assist in the creation of like-minded organizations in other countries;” (3) “play a significant role in elevating their objective beyond its identification with the national interests of their government;” and (4) often direct their efforts “toward persuading foreign audiences, especially foreign elites, that a particular prohibition regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society”). See also Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 929 (1996) (describing similar domestic concept of “norm entrepreneurs” who “can alert people to the existence of a shared complaint and can suggest a collective solution . . . by (a) signalling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial”).
importance of non-governmental networks as well. Such networks are seen as part of the wide variety of “complex, postnational social formations.” Simply listing examples gives a sense of the scope. Diaspora communities play an increasing role in the global flow of capital. Transnational philanthropic movements such as Habitat for Humanity send volunteers around the globe to build new environments. Global public policy networks, ranging in subject matter from crime to fisheries to public health, have emerged during the past decade, bringing together loose alliances of government agencies, international organizations, corporations, and NGOs. In addition, such global public policy networks form only one part of a “nascent international civil society” that includes NGOs as well as business and trade union networks, often operating in conjunction


72. Arjun Appadurai, *Patriotism and Its Futures*, in *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* 158, 158, 167 (1996) [hereinafter MODERNITY AT LARGE] (noting that “[t]hese formations are now organized around principles of finance, recruitment, coordination, communication, and reproduction that are fundamentally postnational and not just multinational or international.”).

73. See, e.g., Anupam Chander, Diaspora Bonds, 76 N.Y.U. L. Rev. 1005, 1060–74 (2001) (describing a debt instrument offered by a homeland government to raise capital principally from its diaspora); id. at 1012 n.29 (summarizing a World Bank report on diasporas’ important role in facilitating the dissemination of information and capital across borders).

74. Appadurai, supra note 72, at 167.

75. See Wolfgang H. Reinicke, The Other World Wide Web: Global Public Policy Networks, FOREIGN POL’Y, Winter 1999/2000, at 44–45 (“[G]lobal public policy networks have emerged over the last decade, experimenting with new ways to gather knowledge and disseminate information on specific issues.”).

with corresponding networks of government regulators.\textsuperscript{77}

In contrast to the growth of global civil society, the development of transnational terrorist networks such as Al Qaeda is a much darker example of non-governmental networks. (The networks surrounding human trafficking and the global narcotics trade are other examples.) Such organizations can mobilize personnel and deploy money around the world, functioning as quasi-state entities.\textsuperscript{78} Indeed, it is significant that the United States has been willing to treat Al Qaeda almost as if it were a sovereign state to be fought in a “war.” NATO invoked Article V of the North Atlantic Treaty, which pledges each signatory country to defend the others in the event of an armed attack,\textsuperscript{79} thereby treating the events of September 11, 2001 more as a military action than a criminal one.\textsuperscript{80} In addition, the Bush administration has repeatedly asserted the authority to try Al Qaeda

\textsuperscript{77} See Edwards, supra note 76, at 178–79 (asserting that “building upwards from new experiments in local politics and constitutional reform at the national level” will help in constructing international civil societies). See also John Vogler, The Global Commons: Environmental and Technological Governance 20–41 (2d ed. 2000) (using “regime analysis” to review such complex international cooperative efforts).

\textsuperscript{78} See Foreign & Commonwealth Office, U.K., Responsibility for the Terrorist Atrocities in the United States, 11 September 2001: An Updated Account 2 (Nov. 14, 2001) (“Al Qaida is a terrorist organisation with ties to a global network . . . . [The organization] includes training camps, warehouses, communications facilities and commercial operations able to raise significant sums of money to support its activity.”), available at http://www.pm.gov.uk/files/pdf/culpability_document1.pdf; Sam Dillon, Indictment by Spanish Judge Portrays a Secret Terror Cell, N.Y. TIMES, Nov. 20, 2001, at A1 (describing the formation and emergence of a European Al Qaeda cell); Susan Sachs, An Investigation in Egypt Illustrates Al Qaeda’s Web, N.Y. TIMES, Nov. 20, 2001, at A1 (describing the ease with which Al Qaeda “move[s] money around the globe”); Benjamin Weiser & Tim Golden, Al Qaeda: Sprawling, Hard-to-Spot Web of Terrorists-in-Waiting, N.Y. TIMES, Sept. 30, 2001, at B4 (discussing the training and mobilization of Al Qaeda militants). Other terrorist (or revolutionary) movements have similarly global links. See, e.g., Vladimir Kucherenko, Cause and Effect Nature of Globalization and Terror Argued, WORLD NEWS CONNECTION, Sept. 13, 2001, 2001 WL 27854157 (citing “the Tamil movement fighting in Sri Lanka and southern India,” “[t]he guerrilla armies of Latin America which work closely with the drugs barons; the Kosovo terrorists in cahoots with the Albanian mafia in Europe; certain Arab groups; and the Chechen bandit[s]” as examples of quasi-state entities that utilize global technology to facilitate the flow of money and coordination of their activities).

\textsuperscript{79} The North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246, declares:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them . . . will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

\textsuperscript{80} See NATO to Support U.S. Retaliation, CNN.COM (Sept. 12, 2001), at http://www.cnn.com/2001/WORLD/europe/09/12/nato.us/index.html (reporting that NATO had invoked Article V in response to the September 11 attacks, the first invocation of the provision in fifty-two years).
operators before military commissions, apparently based in part on
the belief that the attacks on the World Trade Center and Pentagon
were not simply crimes, but violations of the laws of war, which have
customarily been reserved for state entities.\textsuperscript{81} Regardless of whether
or not this conceptualization of Al Qaeda is correct, it is clear that, in
both beneficial and destructive ways, non-governmental networks are
sure to be an important force in shaping norms for the new century.

4. Legal Pluralism

International law scholars seeking to understand the
multifaceted role of law in settings beyond governmental institutions
must also take seriously the insights of legal pluralism. In general,
theorists of pluralism start from the premise that people belong to (or
feel affiliated with) multiple groups and understand themselves to be
bound by the norms of these multiple groups.\textsuperscript{82} Such groups can, of
course, include familiar political affiliations, such as nation-states,
counties, towns, and so on. But many community affiliations, such as
those held by transnational or subnational ethnic groups, religious
institutions, trade organizations, unions, internet chat groups, and a
myriad of other “norm-generating communities”\textsuperscript{83} may at various
times exert tremendous power over our actions even though they are
not part of an “official” state-based system. Legal pluralists have
therefore tended to study those situations in which two or more of
these normative systems occupy the same social field.\textsuperscript{84} Of course,

\textsuperscript{81} See, e.g., Hearing on Military Tribunals Before the Subcomm. on the Judiciary
(Dec. 4, 2001) (testimony of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes),
2001 WL 1591408, at *17 (“As the president’s order [establishing military commissions]
recognizes, we must call these attacks by the rightful name, ‘war crime.’”). To be sure, the
administration has also attempted to prosecute alleged “terrorists” through standard domestic
law channels, but even in this context, the government has sought various restrictions on due
process because of the nature of the charges and the alleged terrorist inclinations of the
defendant. Paradoxically, while treating suspected Al Qaeda operatives as equivalent to
enemy soldiers for purposes of the military commissions, the Bush administration has
rejected the idea that these operatives are entitled to the rights of soldiers provided by the
Geneva Conventions. See Donald H. Rumsfeld, Department of Defense News Briefing (Jan.

\textsuperscript{82} See, e.g., Avigail I. Eisenberg, Reconstructing Political Pluralism 2 (1995)
(pluralist theories “seek to organize and conceptualize political phenomena on the basis of the
plurality of groups to which individuals belong and by which individuals seek to advance
and, more important, to develop, their interests”).

\textsuperscript{83} Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and

\textsuperscript{84} See, e.g., 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
legal pluralism includes within its purview the non-governmental networks discussed in the previous section. However, pluralism is a broader category because it also addresses a variety of other forms of non-state normative ordering. Moreover, the literature on legal pluralism is almost completely distinct from that on networks, so separate treatment seems warranted.

Historically, legal pluralists focused on the overlapping normative systems created during the process of colonization. Early Twentieth-Century studies of indigenous law among tribes and villages in colonized societies noted the simultaneous existence of both indigenous law and European law. More recent work has defined the idea of a “legal system” sufficiently broadly to include many non-official forms of normative ordering. On this view, non-state communities assert lawmaking power through more informal networks and organizations and through the slow accretion of social custom itself. Thus, “not all the phenomena related to law and not all that are law-like have their source in the government.”

Indeed, prior to the rise of the state system, much lawmaking took place in autonomous institutions and within smaller units such as cities and guilds, while large geographic areas were left largely unregulated. Even in modern nation-states, we see a whole range of non-state lawmaking in tribal or ethnic enclaves, religious organizations, corporate bylaws, social customs, private regulatory
bodies, and a wide variety of groups, associations, and non-state institutions. 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. Moreover, “private ‘closely knit’ homogenous micro-societies can create their own norms that at times trump state law and at other times fill lacunae in state regulation, but nonetheless operate autonomously.” Finally, lawmaking authority over sports activity is generally left to non-state entities (ranging from referees to doping authorities) whose decisions are not usually reviewable except within the system established by the sports authority or league or through 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 84, 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 perspective).

89. 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).


91. See F.W. MAITLAND, Trust and Corporation, in MAITLAND: SELECTED ESSAYS 141, 189–95 (H.D. Hazeltine et al. eds., 1936) (1905) (describing the sophisticated non-legal means of enforcing order among members of these institutions).


93. See, e.g., Ga. High Sch. Ass’n v. Waddell, 285 S.E.2d 7, 9 (Ga. 1981) (holding that a dispute over a referee’s decision affecting the outcome of a high school football game was nonjusticiable). But see PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001) (ruling that a golf association had violated the Americans with Disabilities Act by preventing a partially disabled golfer from using a golf cart to compete); Bart Aronson, Pinstripes and Jailhouse Stripes: The Case of “Athlete’s Immunity,” FindLaw Corporate Counsel Center (Nov. 3, 2000), at http://writ.corporate.findlaw.com/aronson/20001103.html (criticizing the blanket refusal to apply criminal law sanctions to athletes’ actions during sporting events). For further discussion of the “folk law of games or sports,” see Gordon Woodman, Introduction,
international arbitral panels.94

Significantly, even if the jurisdiction of these non-state actors is formally limited to the boundaries of the particular communities to which they belong, the norms they articulate often seep into the decisions of state legal institutions. The most obvious example of state law’s recognition of non-state lawmaking is in the common law’s ongoing incorporation of social custom and practice. As scholars have recognized, “[d]ecisionmakers work under a continuing pressure to incorporate customary rules into their decisions.”95 Sometimes such incorporation is explicit, as when a statute is interpreted (or even supplanted) by reference to industry custom96 or when a law of sales that would accord with merchant reality was adopted in the Uniform Commercial Code.97 Even when the impact of non-state norms is unacknowledged, state-sponsored law may only be deemed legitimate to the extent that its official pronouncements reflect the “common understandings of private laws and customs.”98 Indeed, the invention of legal fictions often indicates that official norms are being adjusted to more closely reflect the dictates of non-state norms and practices.

Thus, legal pluralists refuse to focus solely on who has the formal authority to articulate norms or the coercive power to enforce them. Instead, they aim to study empirically which statements of authority tend to be treated as binding in actual practice and by whom. On this view, “all collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word ‘law.’”99 Accordingly, the nation-state is denied any special status as a law-giver. As Robert Cover has argued,

---

95 Weyrauch & Bell, supra note 87, at 330.
96 See, e.g., Fuller, supra note 89, at 57–59 (arguing that the act of interpretation permits courts to adjust official legal norms to match custom or usage); James Willard Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin 1836–1915, at 289–94 (1964) (describing the ways in which local norms in the Wisconsin lumber industry played a significant role in the way contract law was applied).
98 Weyrauch & Bell, supra note 87, at 329.
although

[S]uch “official” behavior and “official” norms is not
denied the dignity of “law”... it must share the
dignity with thousands of other social understandings.
In each case the question of what is law and for whom
is a question of fact about what certain communities
believe and with what commitments to those beliefs.100

Studies of the international legal order, therefore, must address the
interplay of a wide variety of normative commitments and law-giving
entities.

Taken together, these four inquiries point the way toward a
broader conception of how law operates in society and effects
consciousness in everyday life, apart from simply the official acts of
governmental institutions. However, such sites of law have not
generally been emphasized in international law scholarship. By
moving beyond an exclusive focus on formal governmental
institutions, therefore, the study of law and globalization opens up
new avenues of research and complicates understandings about the
interaction between official legal pronouncements and lived
experience.

B. Law Beyond Territorial Borders

International law scholars seeking to understand the changing
world in which legal rules operate would also do well to look beyond
their own academic disciplines (law and political science) to embrace
the vast literature in anthropology, sociology, critical geography, and
cultural studies concerning globalization. This literature challenges
the idea of nation-states as the only relevant form of community
affiliation, rigorously questions the assumed naturalness of territorial
borders, and helps to reveal the more inchoate ways in which norms
are articulated and disseminated among multiple, often embedded,
communities. As such, these scholars provide a more complicated
picture of the world than the top-down rules of international law
generally envision.

In the past two decades, for example, anthropologists and
sociologists have increasingly turned their attention to the myriad
questions of space, place, boundaries, diasporas, migrations, and

100. Id.
cultural and economic “intertwinedness” of globalization. And while it is beyond the scope of this Article to summarize all of this work, it may be useful to highlight some of the insights of this scholarship, particularly concerning communities, cultures, and territorial boundaries.

As many scholars have pointed out, the historical tendency has been to connect the realm of meaning-construction processes with the particularities of place. Anthropology in fact had frequently been premised on the idea that a world of human differences could be conceptualized as a diversity of separate societies each with its own culture. This central assumption made it possible, beginning in the early years of the Twentieth Century, to speak not only of “culture,” but of “a culture.” The implicit starting point was the presumed existence of separate, individuated worldviews that could be associated with particular “peoples,” “tribes,” or “nations.”101

This individuated conception of community, still so powerful in legal discussions of the nation-state, no longer fits the understanding of anthropologists or the practice of ethnography. “In place of such a world of separate, integrated cultural systems... political economy has turned the anthropological gaze in the direction of social and economic processes that connected even the most isolated of local settings with a wider world.”102 As many commentators have observed, cultural difference no longer can be based on territory because of the mass migrations and transnational culture flows of late capitalism.103 Thus, the task recently has been to

---

101. See Akhil Gupta & James Ferguson, Culture, Power, Place: Ethnography at the End of an Era, in CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 1, 1 (1997) [hereinafter CULTURE, POWER, PLACE] (describing conceptions of “culture”); Ulf Hannerz, TRANSNATIONAL CONNECTIONS: CULTURE, PEOPLE, PLACES 20 (1996) (“The idea of an organic relationship between a population, a territory, a form as well as a unit of political organization, and... cultures has... been an enormously successful one, spreading throughout the world... at least as a guiding principle.”). See also George W. Stocking, Jr., RACE, CULTURE, AND EVOLUTION 202–03 (1968) (discussing Franz Boas’s influence in defining “culture”).


103. See, e.g., Arjun Appadurai, Disjuncture and Difference in the Global Cultural Economy, in MODERNITY AT LARGE, supra note 72, at 27, 27–29, 33 (proposing a set of non-territorial “scapes” to replace “landscapes” as fields of inquiry); Hannerz, supra note 101, at 8 (“As people move with their meanings, and as meanings find ways of traveling even when people stay put, territories cannot really contain cultures.”); Roger Friedland & Deirdre Boden, NowHere: An Introduction to Space, Time and Modernity, in NOWHERE: SPACE, TIME AND MODERNITY 1, 42 (Roger Friedland & Deirdre Boden eds., 1994) (“The circulation of populations and symbols is progressively undercutting the essential relation between territory and culture, the link between place and identity.”). See also John Tomlinson, GLOBALIZATION AND CULTURE 106–49 (1999) (discussing the mundane ways in which deterritorialization is experienced in everyday life).
understand “the way that questions of identity and cultural difference are spatialized in new ways.”

Accordingly, anthropologists have argued that we live increasingly in the “global cultural ecumene” of a “world in creolization.” Similarly, sociologists have attempted to replace their traditional emphasis on bounded “societies” with “a starting point that concentrates upon analysing how social life is ordered across time and space.” In both disciplines, one can see increasing efforts to explore the “intertwined processes of place making and people making in the complex cultural politics of the nation-state.”

Nevertheless, the assumption that a culturally unitary group (a “tribe” or a “people” or even a “citizenship”) is naturally tied to “its” territory is difficult to shake because such assumptions are so deeply ingrained in the modern consciousness. For example, as Akhil Gupta and James Ferguson have pointed out, simply the fact that contemporary maps refer to a collection of “countries” constructs a picture of space as inherently fragmented along territorial lines, where different colors correspond to different national societies, all of which are made to seem fixed in place. Looking at such maps,

---


105. Ulf Hannerz, Notes on the Global Ecumene, PUB. CULTURE, Spring 1989, at 66; Robert J. Foster, Making National Cultures in the Global Ecumene, 20 ANN. REV. ANTHROPOLOGY 235 (1991). See also Appadurai, supra note 103, at 28 (arguing that “an overlapping set of ecumenes [has begun] to emerge, in which congeries of money, commerce, conquest, and migration . . . create durable cross-societal bonds”); Arjun Appadurai & Carol A. Breckenridge, Editors’ Comments, PUB. CULTURE, Fall 1988, at 1, 1 (“The emergent public cultures of many nation-states . . . constitute the centers of new forms of cosmopolitanism in many linguistic and cultural ecumenes.”).


108. Gupta & Ferguson, supra note 101, at 4. See also Giddens, supra note 107 (“|A|ll associations of place, people, and culture are social and historical creations to be explained [or justified], not given natural facts.”).


110. Id. at 34. See also Richard T. Ford, Law’s Territory (A History of Jurisdiction), 97 MICH. L. REV. 843, 866–67 (1999) (linking the emergence of jurisdiction to the development of cartography).
“schoolchildren are taught such deceptively simple-sounding beliefs as that France is where the French live, America is where the Americans live, and so on.” Yet we all know that not only Americans live in America and, of course, the very question of what constitutes a “real American” is contested and variable. Nonetheless, “we assume a natural association of a culture (‘American culture’), a people (‘Americans’), and a place (‘the United States of America’),” and we therefore “present associations of people and place as solid, commonsensical, and agreed on, when they are in fact contested, uncertain, and in flux.” This naturalization of jurisdiction means that “space itself becomes a kind of neutral grid on which cultural difference, historical memory, and societal organization [are] inscribed.” As a result, although the social and political construction of space is a fundamental aspect of legal ordering, the constructed nature of the enterprise disappears from analytical purview.

Geographers, though they too historically tended to assume a “natural” bond between a people, the land, and a set of legal institutions, are also increasingly recognizing the power and politics of the construction of space in society as well as the symbolic

111. Gupta & Ferguson, supra note 109, at 33, 40.
112. Id.
113. Id. at 34.
114. See, e.g., ELLEN CHURCHILL SEMPLE, INFLUENCES OF GEOGRAPHIC ENVIRONMENT 51 (1911) (“Human activities are fully intelligible only in relation to the various geographic conditions which have stimulated them in different parts of the world. . . . Therefore anthropology, sociology, and history should be permeated by geography.”), reprinted in FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 215, 216–17 (Albert Kocourek & John H. Wigmore eds., 1918).
significance of maps. Indeed, “[a]lthough the color map of the political world displays a neat and ordered pattern of interlocking units (with only a few lines of discord), it is not surprising that the real world of national identities is one of blotches, blends, and blurs.” First, many people inhabit border areas, where “[t]he fiction of cultures as discrete, objectlike phenomena occupying discrete spaces becomes implausible.” Such people may feel an affiliation with the state controlling the area, the nation with which most inhabitants identify, or the borderland itself. Second, many others live a life of border crossings: migrant workers, nomads, and members of the transnational business and professional elite. For these people, it may be impossible to find a unified cultural identity. Finally, many people cross borders on a relatively permanent basis, including immigrants, refugees, exiles, and expatriates. For them, the disjuncture of place and culture is especially clear. Immigrants invariably transport their own culture with them to the new location and, almost as invariably, shed certain aspects of that culture when they come in contact with their new communities. Diasporas therefore are both “transnational” because members of a single diaspora may live in many different countries, and “extremely national” in their continued cultural and political loyalty to a homeland.

116. See, e.g., Thongchai, supra note 115, at 129–30 (“[M]apping became a lethal instrument to concretize the projected desire on the earth’s surface . . . . A map anticipated a spatial reality, not vice versa. In other words, a map was a model for, rather than a model of, what it purported to represent.”); Alan K. Henrikson, The Power and Politics of Maps, in Reordering the World: Geopolitical Perspectives on the Twenty-First Century 49 (George J. Demko & William B. Wood eds., 1994) (“To formulate a political plan, diplomats must have a geographical conception, which requires the cartographic image of a map.”). Indeed, maps are often persuasive precisely because, though they always constitute an attempt to portray the world in a specific way, the interests underlying that attempt tend to remain unacknowledged. See Diane M. Bolz, ‘Follow Me . . . I Am the Earth in the Palm of Your Hand,’ SMITHSONIAN, Feb. 1993, at 112, 113 (“[M]aps are convincing because the interest they serve is masked.”). See generally Denis Wood, The Power of Maps 1 (1992) (discussing the ability of maps to represent the past and the interests served in their creation).

In the thrall of such “cartohypnosis,” people “accept subconsciously and uncritically the ideas that are suggested to them by maps.” S.W. Boggs, Cartohypnosis, 15 Dep’t St. Bull. 1119, 1119 (1946); Ford, supra note 110, at 856 (“[J]urisdiction is a function of its graphical and verbal descriptions; it is a set of practices that are performed by individuals and groups who learn to ‘dance the jurisdiction’ by reading descriptions of jurisdictions and by looking at maps.”).


118. Gupta & Ferguson, supra note 109, at 34.

119. Kaplan, supra note 117, at 38. See generally Modern Diasporas in International Politics (Gabriel Sheffer ed., 1986) (examining the influence of ethnic diasporas on international and trans-state politics).
place, diasporas (the number of which is increasing due largely to labor immigration) pose an implicit threat to territorially based nation-states. In sum, we see that “[p]rocesses of migration, displacement and deterritorialization are increasingly sundering the fixed association between identity, culture, and place.”

We also may feel the growing significance of “remote” forces on our lives, whether those forces are multinational corporations, global terrorist organizations, world capital markets or distant bureaucracies such as the European Union. The increased access to media also affects deterritorialization because one is no longer limited to the perspectives offered within one’s “home culture.” Thus, the “typical” life of a suburban family in the United States may become as familiar to world citizens inundated by American film and television as their own “home” life. And, of course, those with less power to influence the processes of globalization—those forced to cross borders for work, those bankrupted through global competition, those affected by environmental degradation, and many others—experience this deterritorialization in even more insidious ways.

These ideas of space and community complicate the presumed naturalness of nation-state communities. The transformation of states into nation-states requires that members of a sovereign entity come to think of themselves not simply as subjects of governmental power but as somehow bound to the other subjects within one community. Benedict Anderson therefore has famously referred to nation-states as “imagined communities”—“imagined 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.”

This formulation does not imply that such imagined communities are somehow “false” or “fabricated” in a negative

120. Akhil Gupta, The Song of the Nonaligned World: Transnational Identities and the Reinscription of Space in Late Capitalism, in CULTURE, POWER, PLACE, supra note 101, at 179, 196.

121. See TOMLINSON, supra note 103, at 116 (describing the choice of perspectives available through new media and the resultant overlaps between national and local perspectives).

122. See id. at 119 (“For where are these places except in our cultural imagination, our repertoire of ‘textual locations’ built up out of all the millions of images in films . . . we have encountered? And do we really require any of them to correspond all that closely with our ‘real’ locality?”).

123. BENEDICT ANDERSON, IMAGINED COMMUNITIES 6 (rev. ed. 1991) (internal citation omitted). 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).
sense. Anderson argues that all communities larger than “primordial villages” (and perhaps even those) are imagined. Thus, nation-states are not illegitimate just because their inhabitants imagine and construct psychological bonds of affiliation. Nevertheless, the fact that those bonds are constructed means that they are neither natural nor inevitable; they are merely one particular way of imagining community among many. As such, we must turn our attention to the ways in which conceptions of “community” are constructed within social life, on how membership in a community is marked and attributed, and on how notions of community are given meaning. In doing so, we recognize that community formation is a psychological process, not a naturally occurring phenomenon based on external realities.

Significantly, without this kind of expanded vision of community there is no way to conceptualize a nation-state as a

124. Some commentators have a more negative view of the way in which nationalist movements fabricate many of the “traditions” they purport to restore. See, e.g., FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 269 (1992) (noting the “deliberate fabrications of nationalists, who had a degree of freedom in defining who or what constituted a . . . nation”) (internal citation omitted); Anthony D. Smith, Introduction: Ethnicity and Nationalism, in ETHNICITY AND NATIONALISM 1, 3 (Anthony D. Smith ed., 1992) (discussing “modernist” theories of nationalism that rely on notions of “imagined community” and “invented traditions”).

125. See ANDERSON, supra note 123, at 6 (suggesting that even communities characterized by “face-to-face contact” are imagined).

126. See NIGEL RAPPORT & JOANNA OVERING, SOCIAL AND CULTURAL ANTHROPOLOGY 62 (2000) (discussing modern anthropological views regarding community). In a similar vein, Gregory Bateson and Jürgen Ruesch argued that the relationship between “individual,” “family,” “community,” “nation,” and world can best be understood through a study of the social and psychological processes of human communication. See GREGORY BATESON & JÜRGEN RUESCH, COMMUNICATION: THE SOCIAL MATRIX OF PSYCHIATRY 5 (1951) (“[C]ommunication is the only scientific model which enables us to explain physical, intrapersonal, interpersonal, and cultural aspects of events within one system.”). Likewise, Fredrik Barth observed that social groups are not naturally joined as communities; they achieve an identity by defining themselves as different from other groups and by erecting boundaries between them. See FREDRIK BARTH, Introduction to ETHNIC GROUPS AND BOUNDARIES 9, 15 (Fredrik Barth ed., 1969) (“The boundaries to which we must give our attention are of course social boundaries. . . .”). Anthony Cohen extended Barth’s critique, arguing that community must be seen as a symbolic construct, not a natural one. See ANTHONY P. COHEN, THE SYMBOLIC CONSTRUCTION OF COMMUNITY 14 (1985) (discussing the “essentially symbolic nature of the idea of community itself”). In Cohen’s vision, community derives not from the type of external characteristics Redfield and others had posited, but from internal perceptions of a boundary that separates one social group from another. Thus, communities and their boundaries exist not as geography but as “repositories of meaning” in the minds of their members, and these socially constructed repositories of meaning come to be expressed as a community’s distinctive social discourse. Id. at 98.

127. See, e.g., Gupta & Ferguson, supra note 101, at 13 (arguing that “community” is “a categorical identity that is premised on various forms of exclusion and constructions of otherness”).
community. Yet at the same time, if communities are based not on fixed attributes like geographical proximity, 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. Thus, the very same conception of community upon which the nation-state relies also provides the basis for critiquing the hegemony of the nation-state as the only relevant community under discussion. Such interdisciplinary insights regarding questions of territory, boundaries, and community definition help to de-center the state-based focus of international law.

C. Law Beyond the Public Law/Private Law Distinction

Law and globalization, because it looks beyond state-to-state lawmaking, challenges the purported disciplinary distinction between public and private international law. This distinction, of course, has long been problematic. Canonically, public law consists “of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another.”128 Private law, in contrast, is defined as “[t]hat portion of the law which defines, regulates, enforces, and administers relationships among individuals, associations, and corporations.”129 And building from this distinction, two groups of scholarship have formed, often having seemingly little to do with each other. Thus, scholars of international business transactions, or trade, or conflict of laws have had surprisingly little overlap with those teaching and writing in the area of classic public international law and international human rights.130

129. Id. at 1196.
Yet, the public/private distinction in international law is difficult to maintain in light of the extensive critique of all public/private distinctions that has been mounted by legal realists,131 critical legal studies scholars,132 and feminist theorists.133 As Robert Post has pointed out, “legal realists relentlessly demonstrated that rules of ‘private’ property actually structured social relations and thus were subject to evaluation in terms of the social structures they


132. See, e.g., Duncan Kennedy, The Stages in the Decline of the Public/Private Distinction, 130 U. PA. L. REV. 1349, 1349 (1982) (“The history of legal thought since the turn of the century is the history of the decline of a particular set of distinctions . . . state/society, public/private, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, [and] freedom/coercion.”). For example, Frances Olsen has argued that:

Both laissez faire and nonintervention in the family are false ideals. As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so. The staunchest supporters of laissez faire always insisted that the state protect their property interests and that courts enforce contracts and adjudicate torts. They took this state action for granted and chose not to consider such protection a form of state intervention. Yet the so-called “free market” does not function except for such laws; the free market could not exist independently of the state. The enforcement of property, tort, and contract law requires constant political choices that may benefit one economic actor, usually at the expense of another. As Robert Hale pointed out more than a half century ago, these legal decisions “are bound to affect the distribution of income and the direction of economic activities.” Any choice the courts make will affect the market, and there is seldom any meaningful way to label one choice intervention and the other laissez faire. When the state enforces any of these laws it must make political decisions that affect society.


133. For example, feminists have long argued that, as a result of the artificial line drawn between the public and private sphere, certain gender-specific issues have been left out of the human rights arena. See generally Hilary Charlesworth et al., Feminist Approaches to International Law, 85 AM. J. INT’L L. 613, 614 (1991) (“In this article we question the immunity of international law to feminist analysis—why has gender not been an issue in this discipline?—and indicate the possibilities of feminist scholarship in international law.”). See also, e.g., Karen Engle, After the Collapse of the Public/Private Distinction: Strategizing Women’s Rights, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143. 143 (Dorinda Dallmeyer ed., 1993) (“Over the last fifteen years, women’s rights advocates—generally feminists of one stripe or another—have staged a multitiered critique of public international law, focusing largely on its exclusion of women.”); Celina Romany, Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, 6 HARV. HUM. RTS. J. 87 (1993) (“Women are subjects of a system of familial terror with diverse modalities of violence, yet human rights discourse has been inaccessible to women.”); Elizabeth M. Schneider, The Violence of Privacy, 23 CONN. L. REV. 973 (1991) (describing how battering in discourse has been consistently considered a “private” issue rather than a “public” one).
created.”134 From this perspective, government is always in the background, creating and enforcing the rules of property, contract, tort, employment, and so on. These rules inevitably regulate social life by establishing and maintaining the type of “private” relationships deemed appropriate or desirable. And of course, such regulation is always directed toward the achievement of public goals. Accordingly, Post argues, “[a]ll private law . . . ultimately involves ‘the relations between the state and the people who compose it.””135

Moreover, the boundary between public and private international law, though often treated as distinct, has been blurred from its inception. When Jeremy Bentham first coined the phrase “inter-national law,” thereby placing the public law of nations in its own category, “deep interpenetration of domestic and international systems and strong blending of public and private remained key features of the legal system.”136 For example, Blackstone’s Commentaries declared that the common law fully internalized the law of nations, which Blackstone described as “a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.”137

The shift in focus from international law to law and globalization provides a new impetus for erasing the artificial boundary between public and private in international law. As Ralph Steinhardt pointed out over a decade ago, “the concerns, the actors, and the processes of ‘public’ international law have been expanded—’privatized’—in this century.”138 Thus, conflicts law and international business transactions have become a staple of state-to-state relations, and non-state or private actors have taken an increasingly important role in the articulation and enforcement of international standards.139

135. Id. (quoting BLACK’S LAW DICTIONARY 1230 (6th ed.1990)).
136. Koh, supra note 3, at 2609.
137. 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (emphasis added). And, as Mark Janis notes, Blackstone is the more reliable reporter on actual practice because while Bentham was attempting mostly to reform the law, Blackstone was more focused on restating it. See M.W. Janis, Jeremy Bentham and the Fashioning of “International Law,” 78 AM. J. INT’L L. 405, 410 n.31 (1984).
139. Id. at 543. See also, e.g., CARTER & TRIMBLE, supra note 13, at 19–20 (“The distinctions between public and private international law have become increasingly artificial
For example, just as in traditional public law areas such as human rights, we are witnessing in private international law the proliferation of international tribunals. Thus, commentators have noted the increasing role of the World Trade Organization (WTO) appellate tribunals in creating an international common law of trade, as well as the new prominence of other specialized trade courts developed in connection with free trade agreements. These courts are amassing a body of legal rules that in many cases challenge traditional prerogatives of nation-state sovereignty and may override domestic court decisions, or at least act in dialectical relationship with national courts. In addition, again as in the public law context, non-governmental organizations and international civil society groups are becoming increasingly active in the WTO process, attempting to use the appellate panels to further the aims of environmental or labor movements.

Moreover, though only state parties can be the formal litigants in the WTO dispute resolution process, other free trade panels permit private parties to challenge domestic governmental regulations as many states and their instrumentalities have entered the marketplace in a major way . . . and as commerce and foreign policy have become increasingly intertwined.

140. 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.”).

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


144. See, e.g., Ernst-Ulrich Petersmann, Theories of Justice, Human Rights and the Constitution of International Markets, 37 LOY. L.A. L. REV. 407, 455 (2003) (“[T]he increasing ‘global justice campaigns’ by non-governmental organizations (NGOs) which influence international rule-making ever more actively (e.g., on the International Criminal Court, environmental agreements, WTO negotiations), illustrate the emergence of a new international ‘civil society.’”).
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. Similarly, the convention on the international sale of goods allows transacting parties to opt out of any nation-state law and instead choose a sort of “merchant law” reminiscent of the feudal era’s lex mercatoria. And of course, international trade association groups and their private standard-setting bodies wield a tremendous influence in creating voluntary standards that become industry norms. Such norms often have strong public policy
ramifications. In sum, as Michael Reisman has pointed out, the term “private” in “private international law” is a “misnomer, for what is transpiring is a fundamental interstate competition for power that falls squarely within the province of public international law.” Thus, the distinction between state policy and private agreement, though always problematic, seems increasingly irrelevant.

D. Law Beyond Sovereignty

Finally, a focus on law and globalization may allow international law scholars to move beyond debilitating assumptions and polarizing debates about nation-state sovereignty. Sovereignty is, of course, a notoriously difficult word to analyze (or even define). Yet, the previous three sections, taken together, at least suggest that the classic Nineteenth-Century conception of sovereignty may be outmoded:

[This was] an order in which the state was the only player, and the need to protect its sovereignty was paramount. There were relatively few rules of international law—and certainly no rules protecting

Associations (ICCA) have set industry standards in conjunction with other NGOs and environmental organizations such as Greenpeace. See Lee A. Tavis, Corporate Governance and the Global Social Void, 35 Vand. J. Transnat’l L. 487, 508–09 (2002) (“This [standard setting] reflects a complicated inter-relationship among the members of a private sector regime (ICCA), and other non-governmental organisations (Greenpeace), and governmental institutions (IFCS and individual governments).”) (internal quotations omitted).

149. For example, in the wake of the scandal surrounding Enron Corporation, the governmental reforms incorporated into the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.), 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. See Jenny Wiggins, Enron—Wall Street and regulators; S&P outlines ratings overhaul in light of Enron, FIN. TIMES, Jan. 26, 2002, available at http://specials.ft.com/enron/FT3DYSSOWWC.html (discussing changes in U.S. corporate governance and debt rating in the post–Enron world). See also Troy A. Paredes, After The Sarbanes-Oxley Act: The Future of The Mandatory Disclosure System, 81 WASH. U. L.Q. 229, 236 (2003) (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”). 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. 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).

150. REISMAN, supra note 4, at i.
fundamental human rights or the environment which could be invoked to override immunity or to claim an interest in activities beyond a state’s territory.  

As discussed above, the premises of this conception are all being reconsidered. Thus, an emphasis on legal consciousness, pluralism, and law beyond official governmental institutions exposes processes of normative development that are not beholden to the edicts of nation-states. Likewise, the permeability of borders and the fluidity of community affiliations challenge ideas of inviolate nation-state sovereignty. And the erosion of the distinction between public and private international law undermines the privileged place of nation-states as the only players in the public international law arena. It is not surprising then that, over the past fifteen years, many international law theorists have shifted their attention to the variety of ways in which the prerogatives of nation-state sovereignty may be affected (and limited) by norms articulated, disseminated, and enforced transnationally or internationally.  

151. Sands, supra note 8, at 529. See also Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory [and] . . . no State can exercise direct jurisdiction and authority over persons or property without its territory.”) (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, ch. 2 (1869)).

Significantly, the classic conception of inviolate nation-state sovereignty has been attacked by scholars with very different ideological and theoretical commitments. For example, international law triumphalists, such as Louis Henkin, have complained for years that talk of sovereignty “pollutes” the air because “[g]overnments raise iron curtains of ‘sovereignty’ to resist international cooperation and frustrate international norms and institutions, to conceal atrocities behind state boundaries, to prevent their investigation and discovery, to preclude judgment and condemnation under international law, and reaction by international institutions.”153 Such a conception of nation-state sovereignty, according to Henkin, is not just misguided, but historically inaccurate as well, because sovereignty is an internal concept, related only to the source of legitimate authority within a state. Thus, sovereignty is not “per se a normative conception in international law.”154 Instead, Henkin contends that universal human values have displaced state values at the core of international law.

Political scientist Stephen Krasner, though starting from an international relations realist perspective, agrees with Henkin that conceptions of inviolate nation-state sovereignty are ahistorical.155 Indeed, Krasner goes so far as to claim that international law principles of state sovereignty have never provided powerful checks on the behavior of nation-states.156 Rather, according to Krasner, though there has been much talk about sovereignty over the past two hundred years, such talk has not been a significant limitation on the ability of powerful rulers to violate sovereignty principles when it was in their interest to do so.157 Yet, though he eschews notions of inviolate nation-state sovereignty, Krasner, unlike Henkin, still locates the state at the center of all international relations. Indeed, whereas Henkin rejects nation-state sovereignty because he sees it as aggrandizing state power at the expense of international or universal norms, Krasner views sovereignty as a purported (and historically ineffectual) limitation on states’ power to intervene in each other’s

154. *Id.* at 6. See also Henkin, supra note 4, at 31 (“[S]overeignty’ is a mistake, indeed a mistake built upon mistakes, which has barnacled an unfortunate mythology.”).
156. *Id.* at 24 (“[T]he most important empirical conclusion of the present study is that the principles associated with both Westphalian and international legal sovereignty have always been violated.”).
157. See id. (arguing that sovereignty is best understood as “organized hypocrisy” in that rulers adhere to conventional norms and principles only when it is in their interests to do so).
affairs. Krasner assumes that the self-interested acts of national rulers are the principal determinants of state behavior and that, therefore, international law norms (including norms about inviolate nation-state sovereignty) are always necessarily a set of tools serving the instrumental aims of the powerful.\footnote{158}

Finally, scholars taking a postmodern perspective likewise challenge the idea of unfettered nation-state sovereignty, even though they reject both the triumphalist and instrumentalist views.\footnote{159} Such “constructivists” emphasize that states are always the products of cultural and interpretive systems.\footnote{160} Thus, the interests of nation-states are not simply pre-existing givens to be pursued, but are themselves shaped by a variety of forces, including the norms and institutions of international law itself.\footnote{161} “Through processes of social learning and persuasion, actors ‘internalize’ new norms and rules of appropriate behavior and redefine their interests and identities accordingly.”\footnote{162} In this conception, the state is embedded in a wider institutional environment, and governmental and non-governmental actors alike are part of the feedback loop that both constructs and responds to non-national norms.

While the Nineteenth-Century vision of the sovereign nation-state (to the extent it actually existed) has therefore been challenged from all sides, the resulting debates have too often devolved into a perceived dichotomy between the imperatives of “international law” on the one hand and the importance of “nation-state sovereignty” on the other. For some, the post-Cold War era has represented a new moment of international and transnational activity in both public and private international law that sharply curtailed the prerogatives of nation-states.\footnote{163} For others, the idea of such a “transnational

\footnote{158} Id. at 7 (“Rulers, not states—and not the international system—make choices about policies, rules, and institutions.”). See also Goldsmith & Posner, supra note 14 (espousing a similar view). But see supra note 14 (challenging this view).


\footnote{160} See, e.g., Gabriel A. Almond & Sidney Verba, The Civic Culture (1963); Pierre Bourdieu, Rethinking the State: Genesis and Structure of the Bureaucratic Field, in State/Culture: State Formation After the Cultural Turn 53 (George Steinmetz ed., 1999).

\footnote{161} See, e.g., The Power of Human Rights: International Norms and Domestic Change (Thomas Risse et al. eds., 1999).


\footnote{163} See, e.g., Sands, supra note 8.
moment”164 was overblown from the start and, in any event, has faded into a pre-9/11 past, leaving nation-state sovereignty once again in its rightful place at the core of the international order.165

Such a dichotomy seems too schematic, obscuring the complicated and multifaceted set of ideas captured in the word “sovereignty,”166 and ignoring the dynamic process of international and transnational norm development. Accordingly, the globalization debate about the changing nature of sovereignty must progress beyond the polarizing question of whether the Westphalian system of sovereign nation-states is dying or not. Instead, scholars and political theorists can turn their attention to the ways in which sovereignty might be changing in a world of interlocking governance structures and systems of communication. While nation-states may not disappear, their sovereignty may well become diffused in order to accommodate various international, transnational, or non-territorial norms.167 Thus, scholars must continue to travel the path blazed by Abram and Antonia Chayes, who argued that the “new sovereignty” involves nation-state participation in a wide range of international and transgovernmental regimes, networks, and institutions, all of which


165. See, e.g., Dominique Moïsi, Early Winners and Losers in a Time of War, FIN. TIMES (U.S. ed.), Nov. 19, 2001, at 15 (“In the post-cold-war global age, the state’s legitimacy and competence appeared to be waning. Caught between the emergence of civil society and the growing power of transnational corporations, the state appeared to be fighting a rearguard battle. Now, with security a priority, it is back with a vengeance.”).

166. For example, Stephen Krasner identifies four different conceptions of sovereignty. See Krasner, supra note 155, at 9–25. First, there is Westphalian sovereignty, which, in Krasner’s scheme, roughly corresponds to the international law principle of territorial sovereignty. This is a political organization based on “the exclusion of external actors from domestic authority structures.” Id. at 20. Second, he identifies international legal sovereignty, which is defined as “the practices associated with mutual recognition, usually between territorial entities that have formal judicial independence.” Id. at 3. This notion of sovereignty concerns international law principles mandating various forms of mutual respect for other sovereign entities. Third, domestic sovereignty concerns the ability of the political authority of a state to exercise coercive power within its own borders. See id. at 4. And fourth, interdependence sovereignty implicates “the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.” Id.

167. See, e.g., Reisman, supra note 4, at xxi (“If the so-called globalization of many sectors of the economy does not . . . signal the end of the state, it certainly does signal an exacerbated identity crisis.”); Hannah L. Buxbaum, Conflict of Economic Laws: From Sovereignty to Substance, 42 VA. J. INT’L L. 931, 942–54 (2002) (discussing ways in which “regulatory power traditionally enjoyed by sovereign states has shifted” to the supranational level, to private actors, and to “informal networks constituted among sub state-level agencies in different countries”); Anne-Marie Slaughter, Sovereignty and Power, supra note 152, at 288 (“[T]he state is not losing power so much as changing the way that it exercises its power.”).
have become necessary for governments to accomplish what they once could do on their own within a defined territory.  

Indeed, if we assume that nation-states will remain active players in the world of power politics, the challenge for scholars is to extend the Chayes’ vision by developing yet further possibilities for understanding sovereignty. Such revolutions in conceptions of sovereignty have, according to Daniel Philpott, historically resulted from “revolutions in ideas about justice and political authority.” This is because revolutions in ideas bring about what Philpott calls “crises of pluralism.” If this analysis is correct, then it is not surprising that scholars are gravitating to those areas where the reality of human interaction, with its plural sources of norms, seems to be chafing against the strictures traditional conceptions of sovereignty impose.

For example, those studying legal issues involving online communication have attempted to reinvigorate long-running debates about how a territorially-based system of sovereignty should regulate activity that so easily crosses geographical boundaries. Because online transactions often involve participants in widely dispersed physical locations, multiple sovereignties frequently attempt to assert conflicting normative orders over the same activity, arguably leading to “crises of pluralism” (or at least challenges to jurisdictional schemes based on territory). Likewise, the growth of transnational corporate activity has renewed interest in the feudal idea of lex mercatoria and other plural forms of law that operate outside the nation-state system. Some have even suggested systems in which


170. Id.


172. See Berman, supra note 171, at 327–66 (outlining these various challenges to territorial conceptions of jurisdiction).

companies could choose among the laws of various nation-states to determine the applicable norms of securities\(^{174}\) or bankruptcy\(^{175}\) regulation. Meanwhile, international human rights lawyers and scholars have continued to explore expanded conceptions of criminal jurisdiction that are less dependent on territorial borders or the prerogatives of nation-state sovereignty.\(^{176}\) Still others have attempted to articulate theories of sovereignty based on the sociology of institutions in order to study how pluralist processes of norm inculcation might operate in actual practice.\(^{177}\)

While all of these efforts offer promising avenues for research, it is possible that the rubric of sovereignty itself may unduly limit our ability to think creatively about the way 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 inter-penetration 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. As a result, the study of law and globalization invokes not only the diffusion of norms across territorial borders, but also the fact that legal articulations often cross the supposed conceptual border between “official” law on the one hand, and political rhetoric or non-official legal pronouncements on the other. Holding onto a fixed dividing line between the two may prevent us from seeing the broader ways in which legal norms develop and spread. Transnationalism frequently involves the articulation of legal norms even without the literal power to enforce those norms. Yet, the mere articulation of such norms may often have important, though less obvious, persuasive power.


\(^{176}\) See supra note 9.

\(^{177}\) See, e.g., Goodman & Jinks, supra note 162.
Because sovereignty may not be a capacious enough idea to
capture such rhetorical processes, it may ultimately be an unhelpful
classical notion of inviolate state prerogatives has been removed from the scene. In the end, scholars
may need to move “beyond sovereignty” and construct new tropes for
analyzing law in a global era.

II. LAW AND GLOBALIZATION: TEN AREAS OF STUDY

If it is true that scholars in international law and related
disciplines have been, over the past fifteen years, staking out a new
field of study, what are the contours of this more comprehensive
approach? Having broadened the traditional international law focus
to include legal scholarship in other areas as well as a range of legal
and interdisciplinary work far beyond the traditional emphasis on
state-to-state relations, treaties, and other formal international
instruments, scholars are left to define a new set of conceptual
inquiries that constitute the study of law and globalization. There
undoubtedly are many such new theoretical inquiries, and more will
be developed over time. But here are some themes that I see being
played out in this emerging field.

A. Jurisdictional Rules and the Problem of Physical Location

Increased interaction across territorial borders has brought to
the fore many complicated questions about legal jurisdiction—both
civil and criminal—along with their often-related choice-of-law
issues. Historically, international law scholars have tended to analyze
questions of jurisdiction by reference to physical location. Yet
physical location seems increasingly unimportant as a way of
determining whether a given act or actor should fall within the
dominion of a particular community. As a result, we see courts
around the world struggling to develop jurisdictional models to
account for the fact that people enter relationships and cause harms
without regard to the territorial boundaries of the Westphalian nation-
state system. And, because jurisdiction may be asserted in one
physical location over activities or parties located in a different
physical location, the issue of jurisdiction is deeply enmeshed with
precisely the fixed conception of territorial boundaries that
contemporary events are challenging.
The problem, of course, is that local communities are now far more likely to be affected by activities and entities with no local presence. Cross-border interaction obviously is not a new phenomenon, but in an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all. Thus, although it is not surprising that local communities might feel the need to apply their norms to extraterritorial activities based simply on the local harms such activities cause, assertions of jurisdiction on this basis will almost inevitably tend toward a system of universal jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries. Such a system, for better or worse, would jettison any idea that the application of legal norms to a party depends in some way on the party’s having consented to be governed by those norms. \textsuperscript{178} Even more importantly, while courts, policy makers, and scholars are scrambling simply to adapt existing jurisdictional models to the new social context in order to “solve” these tensions in particular situations, they are doing so without giving sufficient consideration to the theoretical basis for the exercise of legal jurisdiction in an increasingly interconnected world.

A focus on law and globalization, in contrast, can open up new avenues for discussion by emphasizing forms of community affiliation that may not be tied to the physical location of a particular person or object. Such scholarship may explore ways in which conceptions of legal jurisdiction and choice of law become the locus for debates both about community definition and related ideas about space, distance, and identity. And while contemporary frameworks for thinking about jurisdictional authority often unreflectively accept the assumption that nation-states defined by fixed territorial borders are the only relevant jurisdictional entities, scholars of law and globalization can study how people actually experience allegiance to community or understand their relationship to geographical distance and territorial borders.

The present historical moment provides an opportunity to ask such questions. The twin forces of increasing globalization more generally, and the rise of the internet particularly, have posed challenges—not necessarily unsolvable challenges—but challenges nonetheless, and jurisdictional schemes based on territorial boundaries have had difficulty coping with such challenges. From

\textsuperscript{178} Cf. Reisman, supra note 4, at xvii (noting that an effects theory of jurisdiction “is little more than a restatement of the essential problem that gives rise to the part of the law known as international “jurisdiction”).
concerns over extraterritorial content regulations, trademark rules, taxation schemes, and criminal investigations regarding internet transactions, to controversies surrounding universal and transnational criminal jurisdiction for human rights violations, to arguments about the legitimacy of various international tribunals to the U.S. government’s assertion (now rejected by the U.S. Supreme Court) that the U.S. military base at Guantanamo Bay, Cuba was not within the jurisdiction of U.S. courts, we see similar questions of jurisdiction arising again and again. And, instead of continuing to invoke such old criteria for jurisdiction as the physical presence of people or things in a geographical location, law and globalization scholars should be at the forefront of thinking about how communities are appropriately defined in today’s world and whether there might be new ways of delimiting the scope of legal jurisdiction or developing hybrid jurisdictional or choice-of-law models. Such models

179. See, e.g., Berman, supra note 171, at 337–42.


187. For example, reflecting some of the ideas about territoriality and community definition discussed previously (see supra notes 101–127 and accompanying text), some U.S. courts, in analyzing their jurisdiction over defendants based on content posted online, have eschewed a focus on the number of “contacts” with a locality and have instead analyzed the community affiliation of the defendant. Thus, a defendant who operates a website that does not create substantive community ties in a distant jurisdiction might not be subject to suit there even if there are internet contacts with that jurisdiction. See, e.g., Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2003) (ruling that Virginia courts do not have jurisdiction over Connecticut newspapers, regardless of internet contacts, because content of the newspapers’ websites was “decidedly local”); Bensusan Restaurant Corp. v. King, 126 F.2d 25 (2d Cir. 1997) (concluding that Missouri cabaret could not be sued in New York for domain name trademark violation because cabaret was of “local character”); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997) (analyzing whether Florida corporation, through its website, had created any substantive ties to Arizona, rather than focusing on the number of contacts). See also Berman, supra note 171, at 512–33 (discussing the implications of a community affiliation analysis).

188. See, e.g., Brian Concannon Jr., Beyond Complementarity: The International
would ask judges to use the insights of comparative law and take seriously their judicial role as transnational legal actors who function as part of an interlocking multinational legal system.

B. “Jurispersuasion” and the Articulation of Norms

While the previous section addressed ways in which doctrinal rules of legal jurisdiction might evolve to reflect the realities of community definition and cross-border interaction, law and globalization scholars might also investigate the broader question of whether jurisdiction provides a more appropriate framework for understanding law in a global era than sovereignty does. As discussed previously, sovereignty may be a concept ill-suited to an understanding of globalization because sovereignty tends to focus our attention on who possesses coercive enforcement power. In contrast, jurisdiction implicates the more expansive idea of norm articulation and persuasion. Indeed, the word “jurisdiction” derives from Latin roots literally meaning “to speak the law,” and we must therefore look not so much at the power to enforce legal norms, but at the ability to


189. See, e.g., Paul Schiff Berman, Towards a Cosmopolitan Vision of Conflicts of Law: Re-Defining Governmental Interests in a Global Era, 153 U. Pa. L. Rev. (forthcoming 2005) (articulating choice-of-law and judgment recognition principles that take seriously the interlocking nature of multinational governance); Buxbaum, supra note 167 (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 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); Gunther Teubner & Andreas Fischer-Lescano, Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, 25 Mich. J. Int’l L. 999, 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).
articulate them. This is a crucial distinction because in a world of law and globalization the mere speaking of legal norms may, over time, persuade others to enforce them.

Accordingly, law and globalization scholars may re-conceive the assertion of jurisdiction (or juris-persuasion, if you will) as simply a mechanism that opens the space for articulation of a norm. If this is how we look at jurisdiction, then we can uncouple it from enforcement. Enforcement depends on whether those who assert jurisdiction can persuade those who possess coercive power (e.g. the police force and the military) to enforce the judgment issued. This is, of course, the root of the old truism that a constitutional court can never get too far ahead or behind popular opinion or it risks losing its legitimacy.

From this perspective, law is not merely the coercive command of a sovereign power, but a language for imagining alternative future worlds. Moreover, various norm-generating communities—not just the sovereign—are always contesting the shape of such worlds. Jurisdiction becomes the way a community—any community—seizes the language of law, attempts to construct itself as a coherent community, and offers a norm, thereby asserting its “soft” power.

This idea of legal jurisdiction as rhetorical persuasion is played out repeatedly in a world of law and globalization, because entities without literal enforcement power often exert normative force through the assertion of jurisdiction. Such assertions of jurisdiction often have real impact despite the lack of enforcement 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, sparked new

190. See Cover, supra note 83, at 43.
192. See Sugarman, supra note 8, at 116 (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/icOBEdiocesejudgment/icobe_ijudgment_20020214.PDF, (finding that “[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.”).
human rights activity in Chile itself, and may ultimately lead to domestic prosecution of Pinochet.193 Likewise, Spanish efforts to prosecute members of the Argentine military have served to strengthen the hands of reformers within the Argentine government, most notably the new President Nestor Kirschner.194 And even in the United States, the Oklahoma Court of Criminal Appeals recently stayed an execution195 based in part on a prior decision of the International Court of Justice (ICJ) concerning the Vienna Convention on Diplomatic Relations,196 even though the ICJ had no means of enforcing its decision in Oklahoma.

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.197 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 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/icobejudgment_20020214_al-khasawneh.PDF (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), at http://www.icj.org/article.php?sid=166 (“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.”).

193. 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.”).

194. 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.


197. See Ahdieh, supra note 143.
corpus jurisdiction may influence state court interpretations of U.S.
constitutional norms in criminal cases. In turn, the decisions of
national courts may also come to influence international tribunals.
This dialectical relationship, if it emerges, will exist without an
official hierarchical relationship based on coercive power.

Turning to the realm of online regulation, when a French court
asserted jurisdiction over internet service provider Yahoo!, ordering
the company to block Nazi memorabilia and Holocaust-denial
material from being accessed through Yahoo! in France, the
prosecution (as in the Pinochet case) was technically unsuccessful in
the sense that Yahoo! immediately sought a U.S. court order declaring
the French order unenforceable. Yet, at the same time Yahoo!
“voluntarily” capitulated to the French order, perhaps moved by the
public pressure the French court decision had engendered. 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, the order acknowledged that the Tribunal might have difficulty

198. See id. at 2034.
199. 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,
(outlining remedies available under Chapter 11).

http://www.juriscom.net/tx/tgiparis20001120.htm. For discussions of the case, see
Berman, supra note 171, at 337–42, 516–21; Joel R. Reidenberg, Yahoo and Democracy on
the Internet, 42 JURIMETRICS J. 261 (2002).

2d 1181 (N.D. Cal. 2001). This decision was subsequently reversed by the Ninth Circuit on
the ground that the district court could not obtain personal jurisdiction over the original
French plaintiffs until they actually sought to enforce the judgment or otherwise engaged
in activity in California. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme, 379
F.3d 1120 (9th Cir. 2004).

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

203. See, e.g., Troy Wolverton & Jeff Pelline, Yahoo to Charge Auction Fees, Ban Hate
4352889.html (noting that Yahoo!’s new policy regarding hate-related materials followed
action by the French court). It does appear that although Yahoo! has removed much of the
offending material, the company has not fully complied with the French orders, leaving some
items—such as copies of Mein Kampf, coins, and stamps—still available through

tcpd.gc.ca/search/files/t460_1596de.pdf. See also Peter Cameron, Hate Web Sites Have “No
Place in Canadian Society”: Commission, LONDON FREE PRESS, Jan. 19, 2002, at B5
enforcing its ruling.\textsuperscript{205} Nevertheless, the Tribunal stated that there would be “a significant symbolic value in the public denunciation” 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.”\textsuperscript{206} In the aftermath of this ruling, Zündel was deported from the United States to Canada for breaching the terms of his visitor’s permit.\textsuperscript{207} 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.\textsuperscript{208} Thus, the Commission’s ruling may have had a very real impact, even though the Commission itself acknowledged it had no enforcement power.

Elsewhere, the existence of governmental and judicial networks 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.

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.

Of course, such jurisdictional pluralism may empower

\textsuperscript{205} See Citron v. Zündel, supra note 204, para. 298 (“We are extremely conscious of the limits of the remedial power available in this case.”). \textit{See also} Cameron, supra note 204 (quoting a Commission spokesperson as acknowledging that “[w]e have no experience with enforcing compliance in cases involving the Internet”).

\textsuperscript{206} Citron v. Zündel, supra note 204, para. 300.


\textsuperscript{208} 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”).
iliberal “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 jurispruasion does not mean that the reality of coercive power (or the importance of sovereign nation-states) will suddenly disappear. 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. 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. 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-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.

C. Plural Sources of Legal and Quasi-legal Authority

The expanded vision of jurisdiction described above rests in part on the idea that the state does not hold a monopoly on normative assertions, or jurispruasion. Rather, a variety of non-state communities are constantly asserting claims to legal authority and articulating alternative norms that often take hold over time. And while international law has often neglected these plural sources of normative authority, the study of law and globalization more explicitly includes such legal (and quasi-legal) entities within its purview. This shift has many implications for future scholarship.
Perhaps most importantly, an acknowledgment of legal pluralism suggests a way out of the endless debates about whether international or transnational articulations of norms can be regarded as law at all. This argument generally rests on the fact that, because there is no enforcement power apart from nation-states, international norms are only law to the extent states choose to enforce them. Legal pluralists, in contrast, look to whether members of various shifting and overlapping communities feel themselves bound by articulated norms, regardless of the enforcement power that may or may not lie behind those norms.209 Accordingly, scholars of law and globalization can study the degree to which various international and transnational norms may have significant binding effects despite lack of enforcement power.

In addition, legal pluralism focuses attention on the fact that many transnational or subnational forms of community may be even more powerful and hold more significant normative force than the official rules laid down by governmental entities. For this reason, those studying international law compliance issues must consider how various non-state norms might affect the way in which an international norm is received and transformed on the ground. To take an obvious example, the governmental ratification of an international gender equality norm will not be sufficient to affect actual gender equality within that state if there are strong non-state norms (e.g., local customs, religious doctrines) that resist such formal equality. In other contexts, we see that international civil society groups or private standard-setting bodies may have far more leverage with transnational corporations than individual state governments.210 In both cases, compliance cannot be measured by reference to governmental acts alone.

Finally, even formal state-sanctioned courts might adopt rules that acknowledge multiple community affiliations. For example, in choosing the substantive legal norms to apply to a transnational dispute, a court might take into account the fact that the parties have distant community affiliations211 or are citizens of countries with

209. See, e.g., Roderick A. MacDonald, Metaphors of Multiplicity: Civil Society, Regimes, and Legal Pluralism, 15 Ariz. J. Int’l & Comp. L. 69, 71 (1998) (“[A] legal pluralistic approach frees the legal imagination from structuralist thinking; it frees legal conceptions of normativity from the assumptions of Weberian formal-rationality; and it frees legal notions of relationships from their anchorage in official institutions of third-party dispute resolution.”).

210. See supra notes 148–149 and accompanying text.

211. See, e.g., Chander, supra note 73 (arguing that India’s securities laws should be applied to purchases of Indian debt instruments by members of the Indian diaspora, even though the purchases were made in the United States).
conflicting laws\textsuperscript{212} and therefore seek to blend a variety of transnational norms. Similarly, in the constitution of so-called “hybrid” domestic/international courts to address past atrocities in post-conflict societies, judges are often drawn from a variety of communities within the society as well as from the international community at large.\textsuperscript{213} These developments reflect the increasing need for official law to acknowledge (and sometimes accommodate) people’s affiliations with multiple communities.

D. Cosmopolitanism and Law

The plural vision at the heart of these first three areas of inquiry lays the groundwork for a fourth: the possibility of a cosmopolitan conception of law. Scholars of law and globalization are ideally situated to undertake this inquiry.

Although cosmopolitanism is often confused with a kind of utopian universalism, cosmopolitanism is actually a useful trope for conceptualizing law and globalization precisely because it recognizes that people have multiple affiliations, extending from the local to the global (and many non-territorial affliations as well). For example, Martha Nussbaum has stressed that cosmopolitanism does not require one to give up local identifications, which, she acknowledges, “can be a source of great richness in life.”\textsuperscript{214} Rather, following the Stoics, she suggests that we think of ourselves as surrounded by a series of concentric circles:

The first one encircles the self, the next takes in the immediate family, then follows the extended family, then, in order, neighbors or local groups, fellow city-dwellers, and fellow countrymen—and we can easily add to this list groupings based on ethnic, linguistic, historical, professional, gender, or sexual identities. Outside all these circles is the largest one, humanity as

\begin{thebibliography}{9}
\bibitem{212} See, e.g., Dinwoodie, \textit{supra} note 189 (arguing that national courts should decide international copyright cases through the construction of copyright norms that reflect the values of all interested systems, national and international, that may have a prescriptive claim on the outcome).
\end{thebibliography}
Therefore, we need not relinquish special affiliations and identifications with the various groups of which we may feel a part. In this vision, people could be “cosmopolitan patriots,” accepting their responsibility to nurture the culture and politics of their home community, while at the same time recognizing that such cultural practices are always shifting, as people move from place to place. “The result would be a world in which each local form of human life is the result of long-term and persistent processes of cultural hybridization—a world, in that respect, much like the world we live in now.”

Thus, cosmopolitanism is emphatically not a model of international citizenship in the sense of international harmonization and standardization, but is instead a recognition of multiple refracted differences where people acknowledge links with the “other” without demanding assimilation or ostracism. Cosmopolitanism seeks “flexible citizenship,” in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances, including non-territorial communities. 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.”

A cosmopolitan conception of law, therefore, aims to capture a middle ground between strict territorialism on the one hand and expansive universalism on the other. As we have seen, a territorialist approach fails to account for the wide variety of community affiliations and social interactions that defy territorial boundaries. A

---

215. Id.

216. Id. ("We need not think of [local affiliations] as superficial, and we may think of our identity as constituted partly by them.").


218. Id. at 92.

219. 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”).

more universalist perspective, by contrast, which seeks to imagine people as world citizens first and foremost, might seem to be a useful alternative. But such universalism tends to presuppose a world citizenry devoid of both particularist ties and normative discussion about the relative importance of such ties. Thus, universalism cuts off debate about the nature of overlapping communities just as surely as territorialism does.

A cosmopolitan conception, in contrast, makes no attempt to deny the multirooted nature of individuals within a variety of communities, both territorial and non-territorial. Thus, although a cosmopolitan conception might acknowledge the potential importance of asserting universal norms in specific circumstances, it does not require a universalist belief in a single world community. As a result, cosmopolitanism offers a promising rubric for analyzing law in a world of diverse normative voices.

E. The Sociological and Psychological Processes of Legal Consciousness

Even if one stays within the parameters of mainstream debates about the efficacy of international law, an approach emphasizing law and globalization, with its focus on legal consciousness, may have much to contribute. These debates often center on states: Do states comply with international law? If so, why do they comply? And, is it possible that, even when states formally comply (i.e., by signing treaties), such compliance nevertheless hides a lack of real change in their internal behavior? Studying legal consciousness allows scholars to recognize (and perhaps document) ways in which norms may become inculcated in the everyday lives and thoughts of people, regardless of official governmental compliance with international law norms.

Compliance has, of course, long been a prominent issue in international law. Because international norms often have no formal enforcement power behind them, scholars have wondered whether such norms have any real effect. For years, however, this debate was characterized more by competing ideological commitments than reliance on data. Thus, champions of international law essentially took it on faith that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”

221. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis omitted). See
international law matters was until recently so widely accepted among international lawyers that there have been relatively few efforts to examine its accuracy. On the other side, those skeptical of international law have viewed such norms as irrelevant to the power politics that are often seen as the true engine of norm development on the world stage. This approach assumes that states are motivated primarily by their geopolitical interests and that international law exists and is complied with only when it is in the interests of powerful states to do so. These powerful states may then coerce less powerful states into accepting the regime, but in any event the norms of international law are largely immaterial. Even so-called “neorealists,” who have substituted rational choice theory for a pure emphasis on power, nevertheless retain the focus on states, which are treated as unitary rational actors seeking primarily to ensure their own preservation and dominate others. Such a focus acknowledges the

also Chayes & Chayes, supra note 168, at 3 (“[F]oreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations.”); Abram Chayes & Antonia Handler Chayes, On Compliance, 47 INT’L ORG. 175, 176 (1993); Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 CAL. L. REV. 1823 (2002); Koh, supra note 3, at 2599.


[T]he first empirical task is to determine whether, as is often asserted by international lawyers, most States and other subjects of international law conform to most legal rules most of the time. We have impressions which may rise to the level of “anecdata,” but in many areas we simply do not have systematic studies to show whether or not most States conform to most international law rules most of the time . . .

Id. at 346 (citations omitted)).


224. See, e.g., Krasner, supra note 155, at 7; Goldsmith & Posner, supra note 14. But see supra note 14 (challenging this view).

225. See, e.g., Kenneth N. Waltz, Theory of International Politics 118 (1979) (viewing states as “unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination”).
efficacy of international law norms only to the extent that it is in the rational self-interest of states to acknowledge such norms.

In an attempt to get beyond this intractable ideological dispute, international law scholars have begun to explore the possibility of taking a more empirical approach to questions about international law compliance.226 For example, scholars of both international law and international relations have attempted to conduct empirical studies within the fields of international trade,227 international environmental law,228 and increasingly, international human rights229 regarding the conditions under which compliance with international treaty obligations is most likely to occur. Yet, even these empirical studies are largely concerned with the degree to which states are formally implementing various policies or practices to comply with the requirements of the treaties those states have signed. Thus, the focus remains limited to the official mechanisms of law.

The past decade has also seen the emergence of what may be a promising theoretical framework for studying the way in which transnational and international norms are internalized by domestic legal systems over time. Dubbed “transnational legal process,” this framework has the advantage of taking seriously the idea that norms may seep into a legal system in ways more complicated than simply the formal rules or policies enacted by the official organs of government.230 And some useful work in this vein has used

226. Indeed, during the past two years alone, sessions on empirical approaches to international law have been convened at the annual meetings of both the Law and Society Association and the American Society of International Law. See Program of the Annual Meeting of the Law & Society Ass’n, Sess. 3216: Roundtable—Empirical Approaches to International Human Rights Law, at 47 (June 7, 2003); Panel—Empirical Work in Human Rights, 98 AM. SOC’Y INT’L L. PROC. 197 (2004).


230. See, e.g., Koh, Transnational Legal Process, supra note 6.
institutional sociology to try to understand, in a more nuanced way, how it is that bureaucracies actually internalize norms.231 Yet, more is needed to fully flesh out the idea of transnational legal process in order to see how norm internalization actually takes place outside of the official organs of government.232 Thus, while it seems intuitively correct to say that “[i]nternational articulation of rights norms has reshaped domestic dialogues in law, politics, academia, public consciousness, civil society, and the press,”233 it is another matter entirely to try to study this “re-shaping” process on the ground in concrete settings.

For example, many African countries, responding in part to pressure from international human rights activists, have recently enacted laws forbidding the practice known as female genital circumcision.234 But perhaps the best place to trace changes in legal consciousness about such circumcisions is in the variety of local settings where the practice had been widespread. Local human rights groups have mobilized religious leaders to convince those who perform the female circumcisions that the practice is wrong.235 In addition, where once those who performed the circumcisions were venerated in their communities and well-paid for their work, those emblems of social status are disappearing.236 These developments are, of course, not necessarily unrelated to changes in official law, but it seems clear that, if one wants to understand the possible effects of international law norms over time, studying simply the acts of national parliaments is insufficient.237 Moreover, armed with a more

231. See, e.g., Goodman & Jinks, supra note 162.

232. For an example of such scholarship in the context of trade, see Janet Koven Levit, The Dynamics of International Trade Finance Regulation: the Arrangement on Officially Supported Export Credits, 45 HARV. INT’L L.J. 65 (2004).


234. Leigh A. Trueblood, Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory, 28 DENV. J. INT’L L. & POL’Y 437, 465 (2000) (describing how the efforts of international organizations, NGOs, and other groups have led many countries, including Cameroon, Egypt, Kenya, Sudan, Burkina Faso, and Ivory Coast, to pass legislation against female genital circumcision).

235. See Tina Rosenberg, Mutilating Africa’s Daughters: Laws Unenforced, Practices Unchanged, N.Y. TIMES, July 5, 2004, at A14 (“One strategy that has proved effective [in decreasing female genital circumcision] is persuading religious leaders to dispel the widespread belief that Islam calls for circumcision.”).

236. Id.

237. For a more contextualized analysis of the practice, see, for example, Christine J. Walley, Searching for “Voices”: Feminism, Anthropology, and the Global Debate over Female Genital Operations, 12 CULTURAL ANTHROPOLOGY 405 (1997).
complex understanding of how cultural changes occur, we could conceptualize the human rights monitoring process “as a gradual cultural transformation rather than as law without sanctions confronting intractable cultural differences.”

Legal consciousness scholarship therefore provides a model for international law scholars to follow as they broaden their gaze to include not only official governmental behavior but also the attitudes, aspirations, and lay understandings of justice that circulate in everyday life. Such effects probably cannot be quantified, but they certainly can be studied qualitatively. And given that one of the key aspects of law and globalization is the articulation of norms across borders, international law scholars need to consider how such norms may affect legal consciousness over time, not just in the halls of government, but in the streets of cities and towns, the shopping aisles of local markets, the meeting halls of communities, and the living rooms of homes around the world.

F. The Role of Non-Governmental Organizations

As discussed previously, law and globalization scholars are increasingly taking account of non-governmental organizations as an important normative force on the international scene. Interestingly, civil society initiatives function sometimes as an aspect of globalization by challenging nation-state sovereignty, particularly with regard to human rights norms, and other times as an organized resistance to globalization, particularly with regard to economic, trade, environmental, and labor policy. Transnational networks of lawyers also work to challenge many of the perceived injustices of globalization.

Such transnational policy efforts have been deployed with increasing frequency. For example, the international anti-apartheid movement was perhaps the first successful global civil society effort to combine shareholder, consumer, and governmental action,

238. Merry, supra note 70, at 974.


persuading many corporations, universities, and pension funds to divest themselves of South African investments long before official national sanctions were in place. Since then, similar boycott efforts have resulted in changes to tuna-fishing practices so as to protect dolphins, a decision by the French government to suspend its nuclear testing program, and alterations in Shell Oil’s decommissioning of a rig in the North Atlantic.

In addition, NGOs increasingly formulate global standards of corporate behavior. These “codes of conduct” have appeared most prominently with regard to human rights, environmental protection, and fair labor standards. As *The Economist* has observed, “a multinational’s failure to look like a good global citizen is increasingly expensive in a world where consumers and pressure groups can be quickly mobilised behind a cause.” In response, prominent corporate leaders, including AT&T, Federal Express, Honeywell, and Time Warner, have established Business for Social Responsibility—“[a] global nonprofit organization that helps member countries achieve commercial success in ways that respect ethical values, peoples, communities, and the environment.”

Furthermore,
especially in the wake of the global movement against sweatshops, NGOs have been able to persuade many corporations to accept independent monitoring of adopted standards.

More controversially, NGOs often claim to represent a global polity, and international organizations may include NGOs in their deliberative processes as a way of overcoming what might otherwise be deemed a “democratic deficit.” Some argue, however, that NGOs are more appropriately seen as interest groups focused on specific issues than as representatives of “bottom-up” constituencies. On the other hand, claims of democratic deficit tend to privilege those actors who can derive their authority, no matter how tenuously, from a voting polity, which is not necessarily the only way to develop norms that may be deemed legitimate over time. Thus, one question for scholars is how exactly to conceive of NGOs and their proper institutional role. Another promising avenue of scholarship explores how funding decisions by foundations and governments (mostly from industrialized countries) affect the activities of NGOs, which may rely on such funding for substantial efficiency, innovation and corporate social responsibility”.

Many prominent apparel companies, including Nike, Adidas, and the Gap, began to experience the full force of NGO and media rage [regarding sweatshops], with a barrage of stories and Internet-based campaigns aimed against their products. Students lobbied their universities to sever business ties with companies that employed sweatshop labor. As a result, several firms changed their behavior, raising standards abroad and inviting independent monitors to assess their progress. A growing number of companies even hired vice presidents for “corporate social responsibility.”).

For a recent argument that American corporations affiliated with sweatshops abroad might be liable under the Thirteenth Amendment’s prohibition of slavery, see Tobias Barrington Wolff, The Thirteenth Amendment and Slavery in the Global Economy, 102 COLUM. L. REV. 973 (2002).

248. See Spiro, supra note 241, at 962 (remarking that corporations reacted positively to proposed independent monitoring). For an overview of the various forms the imposition of human rights norms have taken, see Chris Avery, Business and Human Rights in a Time of Change, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 17 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

249. Cf. e.g., Peter L. Lindseth, Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community, 99 COLUM. L. REV. 628, 633 (1999) (noting that such a deficit occurs whenever normative power is transferred to “agents that are not electorally responsible in any direct sense to the ‘people’ whose ‘sovereignty,’ or at least some portion of it, the agents are said to exercise”).

portions of their budgets. And researchers are developing models for conceptualizing the role of NGOs as norm entrepreneurs who draw upon transnational networks of nonprofits, scholars, foreign governments, and multilateral institutions to place issues on the agendas of nation-state governments. All of this research helps to focus attention on these important actors in the development of international and transnational norms.

G. The Importance of Institutions

As discussed previously, it is not sufficient for international law scholars to study broad declarations of formal law without also considering the institutional bureaucratic mechanisms that will implement the law, as well as the demands those bureaucratic actors are likely to face. This realization may perhaps account for the increasing scholarly interest in NGOs, because one of the most important roles that NGOs play in the international system is to scrutinize local bureaucratic actors and apply various forms of pressure. Likewise, scholars are recognizing that official international institutions, such as the UN, can also pressure local bureaucracies, for example, by creating international commissions of inquiry concerning alleged atrocities, or threatening prosecutions in international courts. Such declarations can empower reformers within local bureaucracies, who can then argue for institutional changes as a way of staving off international interference.

251. Indeed, as Sally Merry points out:

[In many other areas of international activity, the sharp disparities in resources between North and South radically limit the ability of some NGOs to participate in the [international treaty] process. It is common for North foundations and governments to fund NGOs from the South. . . . Human rights documents create the legal categories and legal norms . . . but the dissemination of these norms and categories depends on NGOs seizing this language and using it to generate public support or governmental discomfort. This is a fragile and haphazard process, very vulnerable to existing inequalities among nations and the availability of donors.

Merry, supra note 70, at 973.


253. 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
In addition, a focus on institutions allows us to see that nation-states are not unitary actors pursuing their “self-interest” on the world stage. Rather, they are organizational entities embedded in a wider social environment of international norms. Indeed, even “the organizational form of the modern state” may be defined by “worldwide models constructed and propagated through global cultural and associational processes.” On this view, states are themselves creatures of international orthodoxy and custom, and they tend to reflect those values. Thus, we see the bureaucratic institutions of the nation-state facing pressures from the international, the subnational, and the transnational. The way in which these pressures affect bureaucracies over time is an important topic for sociological and legal inquiry.

H. The Privatization of State Functions

One of the reasons that it is so important to conceive of law beyond the state is that the state itself is increasingly delegating authority to private actors who exist in a shadowy world of quasi-public/quasi-private authority. The issue of private parties exercising forms of governmentally authorized power has long been a subject of U.S. constitutional law jurisprudence and scholarship, but international law scholars are only just beginning to consider such issues. Thus, for example, P.W. Singer notes that many military activities—including combat, surveillance, training, and interrogation functions—are increasingly being contracted out to private companies. Yet, both domestic and international accountability mechanisms have historically been premised on such roles being played by governmental actors. And the literature on privatization in the domestic context often focuses on the U.S. constitutional doctrines of “state action” or nondelegation of congressional authority to administrative agencies. Neither of these analytical frameworks is precisely applicable to the international context. Thus, over the coming decade, scholars of law and globalization undoubtedly will

explore the many ramifications of this new trend in governance.

I. The Multidirectional Interaction of Local, National, and International Norms

Both international law triumphalists and international law critics tend to share in common a top-down vision of international law. From this perspective, international norms are imposed on nation-states or local actors, and the challenge (or the fear) is the degree to which various populations imbibe the international norm. As the preceding discussions should make clear, however, the reality is far more complicated. Nation-state bureaucracies may imbibe institutional roles from each other. The “international community” is not a monolithic entity, but a collection of interests. “Local” norms are always contested, even within their communities, and “local” actors may well invoke “non-local” norms for strategic or political advantage. Moreover, local actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back “up” so that, over time, the “international” norm is transformed as well. And on and on.

Thus, the local, the national, and the international are all constantly shifting concepts. Accordingly, scholars of law and globalization must study the back and forth of the feedback loops: How do local actors access the power of NGOs? How are governmental and foundation funding decisions made, and how do funding priorities affect the projects undertaken around the world? How are global norms deployed locally? Do local concerns get strategically transformed by elected elites at the national level? How do UN bureaucracies foster the creation of a cadre of “local” actors who are more aligned with other UN officials than with those in their “home” countries? What role do Western universities play in the creation of national and local norms given that many “local” elites are educated abroad? Only through a more fine-grained, nuanced understanding of the way legal norms are passed on from one group to the other and then transformed before spreading back again can law and globalization scholars begin to approach the multifaceted ways in which legal norms develop.

J. The Problematics of Globalization

No analysis of law and globalization is possible without
acknowledging the contested nature of both the terms “law” and “globalization.” This Article obviously takes a broad view of what counts as law, including within its purview not only official norms articulated by state sanctioned regulatory bodies and courts, but also “non-official” legal norms that often bind subnational, transnational, or international communities. With regard to globalization, the vast debates concerning its meaning, its importance, and even its existence could fill many volumes. Therefore, I will be content merely to hint at some of the major questions.

First, of course, is the question of what exactly globalization is. For purposes of this Article, however, I have not attempted to articulate a single definition because part of the premise of law and globalization is that multiple definitions and meanings for globalization will be salient for different populations. Thus, I have used the term to refer generally to the intensification of global interconnectedness, in which capital, people, commodities, images, and ideologies move across distance and physical boundaries with increasing speed and frequency. And I have been content to acknowledge that the existence of many different visions of globalization is a fundamental part of globalization itself.

Second, there is the question of whether globalization is really a new phenomenon at all. Certainly, interrelations among multiple populations across territorial boundaries have existed for centuries. For example, some argue that the pre-1914 era was in fact the high-water mark for economic interdependence, although there is also evidence that the post-1989 era surpasses that period. Yet, again I do not think such arguments need detain us here. First of all, it seems clear that something is going on, given the pervasiveness of the ideology of market capitalism, the speed of commodity, capital, and

257. See, e.g., Anthony Giddens, Runaway World: How Globalization Is Reshaping Our Lives 24–37 (2000) (pointing to the increased level of trade, finance, and capital flows, and describing the effects of the weakening hold of older nation-states); Saskia Sassen, Globalization and Its Discontents (1998) (analyzing globalization and its economic, political, and cultural effects on the world); Edwards, supra note 76, at 5–6 (“Globalisation challenges the authority of nation states and international institutions to influence events, while the scale of private flows of capital, technology, information and ideas makes official transfers look increasingly marginal.”); Appadurai, supra note 103, at 27–29 (“[T]oday’s world involves interactions of a new order and intensity. . . . [W]ith the advent of the steamship, the automobile, the airplane, the camera, the computer and the telephone, we have entered into an altogether new condition of neighbourliness, even with those most distant from ourselves . . . .”).

personal movement, the ubiquity of global media, and so on. Whether such developments are truly new (or greater than ever before) seems less important than understanding the consequences of the phenomena. Moreover, I see the term “globalization” as also signifying the attitude about the world that tends to come into being as a result of frequent use of the term itself. Indeed, in a certain sense it does not really matter whether, as an empirical matter, the world is more or less “globalized” than it used to be. More important is the fact that people—whether governmental actors, corporations, scholars, or general citizens—think and act as if the world is more interconnected and treat globalization as a real phenomenon.

Third, there is the criticism that globalization is merely a continued hegemonic imposition on developing nation-states of the values, economic orthodoxies, and norms of the industrialized world. In law this challenge often takes the form of a critique of international human rights as an imposition of Western norms on “local” culture. “Such claims reflect a familiar story about the production and reception of legal consciousness, in which the West is the primary site of legal production—exporting such goodies as secularism and the ‘rule of law’—and the Third World is the happy receptor of such knowledge and structures.” I believe there is certainly some truth to the charge that globalization is a new form of empire or hegemony, and particularly with regard to trade liberalization and open markets, there seems to be little possibility for a rival ideology to survive. Turning to law, it is certainly the case that the “international human rights revolution” since World War II is in some ways modeled on U.S. rights-based constitutionalism.

Yet, this is only one part of a much more complicated story. After all, as previously discussed, norms cross borders in both directions. And it is simplistic to think that “local” people have “culture,” which is juxtaposed with an “international” conception of

259. For example, David G. Post has argued that if one created a map plotting all activities that have an effect on a particular country, such a map 300 years ago, 100 years ago, or even 50 years ago would show most of the effects to be clustered fairly closely within and around the territorial borders of the country. In contrast, Post contends, now a country is very likely to be affected by activity elsewhere in the world with no pattern based on geography at all. See David G. Post, Against “Against Cyberanarchy”, 17 BERKELEY TECH. L.J. 1365, 1381–84 (2002).

260. Of course, it may be that globalization actually helps to legitimize a mythical prior stable order, which can be defined as the presumed order that globalization’s flows of people, money, and information is supposedly destabilizing. See Coutin et al., supra note 11. Yet, even if this is true, the study of globalization would still be important because only through such study could this legitimation process be exposed and interrogated.

This vision of culture as a static homogenous system, resistant to change, differs dramatically from models of culture developed in the anthropological literature over the last two decades. These models emphasize “culture as an historical product, constantly being made and remade and rife with internal conflicts and differences.” Indeed, it is often various local constituencies that are trying to mobilize ideas such as international human rights to contest local customs or practices.

In addition, even a legal body such as the WTO dispute resolution system, which undoubtedly has functioned as a tool of industrialized nations, nevertheless creates a legal form whose use cannot be entirely controlled, even by the powerful. Thus, we see developing nations (particularly the larger ones, such as Brazil and India) beginning to use the WTO process against the United States and the European Union. Likewise, the idea of criminal accountability for atrocities, though imposed as victors’ justice at Nuremberg, has spawned an entire human rights system that can be invoked even against the powerful. For example, the Bush administration has faced widespread criticism and pressure (both within the United States and throughout the world) because of its failure to state unequivocally that it was bound by the Geneva Conventions in its treatment of prisoners captured in Iraq and Afghanistan.

Of course, power is always an important factor, and there is no doubt that those with military might can more easily control international legal processes: witness the bilateral agreements that the United States has induced other nations to sign, agreeing that U.S. citizens will not be handed over to appear before the International

---

262. See, e.g., Walley, supra note 237, at 418–23 (discussing the binary opposition between “rights” and “culture” in Euro-American literature opposing female genital operations and arguing that such a formulation constructs African women as “oppressed victims of patriarchy, ignorance, or both, not as social actors in their own right”).

263. Merry, supra note 70, at 946. On the other hand, as Merry points out, international human rights activists often acknowledge the “importance of building on national and local cultural practices and religious beliefs to promote transformations of marriage, family, and gender stereotypes. They argue that reforms need to be rooted in existing practices and religious systems if they are to be accepted.” Id. at 947. This more fluid conception of culture therefore co-exists with “the portrayal of culture as an unchanging and intransigent obstacle.” Id.

264. See Cover, supra note 99, at 199 (“It is true that the particular proceedings at Nuremberg and Tokyo were limited to trials of Axis defendants. But, the precedent . . . was one which could not be so circumscribed.”).

Criminal Court. However, the creation of legal forms at least provides a rhetorical avenue whereby those with less power may be able to articulate opposing visions and generate alternative normative systems that may have effect over time. Thus, while hegemonic power is always present, law and globalization can also be counter-hegemonic, at least at times.

CONCLUSION

Over the course of the Twentieth Century, international law lost its privileged place as the primary conceptual framework for understanding the cross-border development of norms. The introduction of universal human rights standards, the recognition of interdependence among nation-states, the development of international courts and institutions, the growing diffusion of people, money, and information across territorial borders, and the increasing interest in normative development and legal consciousness outside of formal governmental spheres have collectively eroded the foundations of traditional positivist public international law, which had often been conceived only as a set of rules entered into by nation-states to govern their relationships with each other. Moreover, these developments have brought forth new academic energy, pushing international law into fresh areas of conceptual inquiry.

Of course, this scholarly innovation is likely to proceed regardless of the label. Yet, sometimes a change in the overarching theoretical framework can help to re-orient an emerging discourse, accentuating important points of contact among scholars with different disciplinary backgrounds and methodological commitments. It is my hope, therefore, that the idea of law and globalization

---


267. See, e.g., Reisman, supra note 4, at xiii (noting that transnational decision processes, like all law-making, have “an inevitable political dimension” in the sense that participants “use their effective power . . . to secure the legal confirmation of arrangements which they believe will discriminate in their favor,” but that, “as in all law-making, the plurilateral or multilateral character of the process often reduces or contains the power of the strongest actors and forces compromises”).
encourages international law scholars to conceive of their work more broadly and to engage in a dialogue with those working in related fields both within law and elsewhere in academia.

Only such a comprehensive interdisciplinary approach will allow us to conceptualize a world populated not only by states, but a whole variety of normative communities. Indeed, without a broader conception of law that acknowledges non-sovereign (and even non-governmental) articulations of norms, we are apt to ignore such articulations altogether or deny them the status of law and thereby miss the real force these norms have and the way in which they interpenetrate official legal doctrine. Rather than focusing solely on the nation-state, therefore, the study of law and globalization may help us to recognize that, 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.