The New Legal Pluralism

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Abstract

Scholars studying interactions among multiple communities have often used the term legal pluralism to describe the inevitable intermingling of normative systems that results from these interactions. In recent years, a new application of pluralist insights has emerged in the international and transnational realm. This review aims to survey and help define this emerging field of global legal pluralism. I begin by briefly describing sites for pluralism research, both old and new. Then I discuss how pluralism has come to be seen as an attractive analytical framework for those interested in studying law on the world stage. Finally, I identify advantages of a pluralist approach and respond to criticisms, and I suggest ways in which pluralism can help both in reframing old conceptual debates and in generating useful normative insights for designing procedural mechanisms, institutions, and discursive practices for managing hybrid legal/cultural spaces.

INTRODUCTION

We live in a world of multiple, overlapping normative communities. Some of those communities—such as federal, state, and municipal governments—are formal legal entities often wielding coercive force in the service of a bureaucratically administered set of legal norms. Others, however, are nonstate communities created through religious, tribal, ethnic, or other affiliations. Scholars studying interactions among these multiple communities have often used the term legal pluralism to describe the inevitable intermingling of these normative systems.[1]

The study of plural normative systems has arisen from a variety of different scholarly traditions. Perhaps the earliest analyses of the clashes between state and nonstate authority were those penned by lawyers, philosophers, and theologians interested in the respective realms of church and state authority (see, e.g., Figgis 1913). Likewise, historians studying the regulatory role of nonstate entities such as jockey clubs and stock exchanges noted that these entities often wield more power than does formal state law (see, e.g., Maitland 1936). Anthropologists used the idea of legal pluralism to conceptualize the relationship between colonial and indigenous legal systems (see, e.g., Pospisil 1981). And social norms theorists (see, e.g., Ellickson 1991) and scholars in behavioral law and economics (see, e.g., Jolls et al. 1998) have become interested in varieties of informal law that often regulate behavior as much as or more than official governmental pronouncements.

In recent years, a new application of pluralist insights has emerged in the international and transnational realm. This new legal pluralism research was born in the decades following the collapse of the bipolar Cold War order in 1989. During this period, it became clear that a single-minded focus on state-to-state relations or universal overarching norms was inadequate to describe the reality of the emerging global legal system, with its web of jurisdictional assertions by state, international, and nonstate normative communities (e.g., Teubner 1997). As one commenter puts it:

> The nation-state and the interstate system are the central political forms of the capitalist world system, and they will probably remain so for the foreseeable future. What has happened, however, is that they have become an inherently contested terrain, and this is the central new fact on which the analysis must focus: the state and the interstate system as complex social fields in which state and nonstate, local and global social relations interact, merge and conflict in dynamic and even volatile combinations (de Sousa Santos 2002, p. 94).

Legal pluralism provided a useful alternative framework because pluralism had always sought to identify hybrid legal spaces, where multiple normative systems occupied the same social field. And although pluralists had often focused on clashes *within* one geographical area—where formal bureaucracies encountered indigenous ethnic, tribal, institutional, or religious norms—the pluralist framework proved highly adaptive to analysis of the hybrid legal spaces created by a different set of overlapping jurisdictional assertions (state versus state, state versus international body, state versus nonstate entity) in the global arena.[2]

This review aims to survey and help define this emerging field of global legal pluralism.

[1]The history of legal pluralism is a matter of some debate. Some associate the term with legal anthropology (see, e.g., Tamanaha 1993, Merry 1988), whereas others (see, e.g., F. Benda-Beckmann 1997) trace the use of the term to lawyers (Hooker 1975). Still others see legal pluralism as deriving from church/state conflicts-of-law analysis (see, e.g., Galanter 1981, p. 28). For discussions of the history of legal pluralism, see Griffiths 1986; Merry 1988; Vanderlinden 1989; de Sousa Santos 1987; Benda-Beckmann 1997; Tamanaha 1993, 2008.

[2]In that sense, we might more accurately refer to the global legal system as a multiscalar legal system. For example, Osofsky (2007) has argued that the term multiscalar more accurately captures the variety of normative communities with input at different levels of the legal hierarchy than does the word global.

I begin by briefly describing sites for pluralism research, both old and new. Then I discuss how pluralism has come to be seen as an attractive analytical framework for those interested in studying law on the world stage. Finally, I identify advantages of a pluralist approach and respond to criticisms, and I suggest ways in which pluralism can help both in reframing old conceptual debates and in generating useful normative insights for designing procedural mechanisms, institutions, and discursive practices for managing hybrid legal/cultural spaces.

CHANGING SITES OF LEGAL PLURALISM

As noted above, 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. 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" (Cover 1983, p. 43), may at various times exert tremendous power over our actions even though they are not part of an official state-based system. Indeed, as scholars of legal pluralism have long noted, "not all the phenomena related to law and not all that are law-like have their source in the government" (Moore 1986, p. 15).

Just as importantly, legal pluralists have studied those situations in which two or more state and nonstate normative systems occupy the same social field and must negotiate the resulting hybrid legal space (see, e.g., Merry 1988, 2007; Moore 1973; Weisbrod 2002; Engel 1980; Tamanaha 2000; Benda-Beckmann 2002; Benda-Beckmann 2001; Galanter 1981; Griffiths 1986). Such spaces were, of course, the norm before the rise of the modern state system. For example, the Roman Empire allowed local laws to remain in force, and the medieval period in Europe likewise had at least three systems of statutory law—Roman law, canon law, and Germanic Lombard law—alongside statutes of municipalities and independent states (Ullmann 1969, p. 71). Combine this with a robust set of legal regimes that depended on personal religious, ethnic, or commercial affiliation (Morrall 1980), and one has a daunting web of legal systems. Indeed, seen against this backdrop, it is clear that legal pluralism was long the obvious norm, not something that needed to be "unearthed" by scholars.

The success of state-building and its surrounding ideology in the seventeenth and eighteenth centuries has undoubtedly rendered legal pluralism less visible, although it is perhaps no less vibrant. Thus, Eugen Ehrlich's classic depiction of "living law" in rural Austria documented the ways in which local customary law continued its influence (or even dominance) despite sweeping claims of state authority (Ehrlich 1936). Meanwhile, canon law and other spiritual codes continued to exist in uneasy relationship with the state legal system (Weisbrod 1980, Galanter 1981).

In the twentieth century, anthropologically oriented legal pluralists focused on the overlapping normative systems created during the process of colonization (Merry 1988, pp. 869–72). Early studies of indigenous law among tribes and villages in colonized societies noted the simultaneous existence of both local law and European law (Malinowski 1926). Indeed, British colonial law actually incorporated Hindu, Muslim, and Christian personal law into its administrative framework (Merry 2007). This early pluralist scholarship focused on the hierarchical coexistence of what were imagined to be quite separate legal systems, layered one on top of the other. Thus, for example, when Leopold Pospisil (1981) documented the way in which Kapauku Papuans responded to the imposition of Dutch law, it was relatively easy to identify the two distinct legal fields because Dutch law and Kapauku law were extremely different. As a result, Pospisil could readily describe the degree of penetration of Dutch law, the areas in which the Kapauku had

appropriated and transformed Dutch law, and the areas in which negotiations between the two legal systems formed part of a broader political struggle. Despite the somewhat reductionist cast of the model, these pioneering studies established the key insights of legal pluralism: a recognition that multiple normative orders exist and a focus on the dialectical interaction between and among these normative orders (Merry 1988, p. 873).

In the 1970s and 1980s, anthropological scholars of pluralism complicated the picture in three significant ways. First, they questioned the hierarchical model of one legal system simply dominating the other and instead argued that plural systems are often semiautonomous, operating within the framework of other legal fields but not entirely governed by them (Moore 1973, Kidder 1979). As Sally Engle Merry recounts, this was an extraordinarily powerful conceptual move because it placed "at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and dependent on it" (Merry 1988, p. 873). Second, scholars began to conceptualize the interaction between legal systems as bidirectional, with each influencing (and helping to constitute) the other (Fitzpatrick 1984). This was a distinct shift from the early studies, which had tended only to investigate ways in which state law penetrated and changed indigenous systems and not the other way round. Third, scholars defined the idea of a legal system sufficiently broadly to include many types of nonofficial normative ordering, and they therefore argued that such legal subgroups operate not only in colonial societies, but in advanced industrialized settings as well (Merry 1988, pp. 870–71).

Of course, finding nonstate forms of normative ordering is sometimes more difficult outside the colonial context because there is no obvious indigenous system, and the less formal ordering structures tend to "blend more readily into the landscape" (Merry 1988, p. 873). Thus, pluralists argued that, in order to see nonstate law, scholars would first need to reject what John Griffiths called "the ideology of legal centralism," the exclusive positivist focus on state law and its system of lawyers, courts, and prisons (Griffiths 1986, p. 2). Instead, pluralists turned to documenting "forms of social regulation that draw on the symbols of the law, to a greater or lesser extent, but that operate in its shadows, its parking lots, and even down the street in mediation offices" (Merry 1988, p. 874).

Meanwhile, scholars drawing more from political theory than from anthropology have long focused on the fact that, 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 remained largely unregulated [Ehrlich 1936 (1962), von Gierke 1934, von Gierke & Heiman 1977]. And, like the anthropologists, these researchers observed a wide range of nonstate lawmaking even in modern nation-states: in tribal or ethnic enclaves (Weyrauch & Bell 1993), religious organizations (Weisbrod 1980), corporate bylaws, social customs (Fuller 1968), private regulatory bodies, and various groups, associations, and nonstate institutions (Laski 1919, Ellickson 1991, Macaulay 1963). As these studies make clear, "private, closely knit, homogenous microsocieties can create their own norms that at times trump state law and at other times fill lacuna[e] in state regulation, but nonetheless operate autonomously" (Levit 2005, p. 184).

More recently, a new group of legal pluralists has emerged under the rubric of social norms theory. Interestingly, however, these scholars rarely refer to the anthropologists and political theorists who have long explored pluralism, perhaps because social norms theory has emerged as a branch of behavioral law and economics. The study of social norms, in its broadest formulation, focuses on the variety of "rules and standards that define the limits of acceptable behavior"; such social norms "may be the product of custom and usage, organizational affiliations, consensual undertakings and individual conscience" (Jones 1994, p. 545). In addition, "norm entrepreneurs," defined as individuals or groups that try to influence popular

opinion in order to inculcate a social norm, may consciously try to mobilize social pressure to sustain or create social norms (Nadelmann 1990, Finnemore & Sikkink 1998). And while some pluralists think that this broader category of social norms dilutes legal pluralism's historic focus on more stable religious, ethnic, or tribal groupings (Tamanaha 1993, Dane 1991), social norms theory has the benefit of including larger transnational communities that may be based on long-term rhetorical persuasion rather than on face-to-face interaction. Indeed, social norms theory tends to emphasize the process whereby norms are internalized through guilt, self-bereavement, a sense of duty, and a desire for esteem, or simply by slowly altering categories of thought and the set of taken-for-granted ideas that constitute one's sense of the way things are.[3]

In part because legal pluralists of all stripes have seen themselves in opposition to so-called legal centralists, who focus on formal state law, there has historically been little space within the pluralist literature for examining state-to-state relations. Yet jurisdictional overlap of a sort that is very familiar to scholars of pluralism is now a staple of the global legal arena. The growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, which will inevitably lead to multiple assertions of legal authority over the same act, without regard to territorial location. In addition, nation-states must also often share legal authority with one or more international and regional courts, tribunals, and regulatory entities. Indeed, the Project on International Courts and Tribunals (**http://www.pict-pcti.org**) has identified approximately 125 international institutions, all issuing decisions that have some effect on state legal authority, although those effects are sometimes deemed binding, are sometimes considered merely persuasive, and often fall somewhere between the two. Finally, nonstate legal (or quasi-legal) norms continue to add to the pluralism of the global arena. Given increased migration and global communication, it is not surprising that people feel ties to, and act based on affiliations with, multiple communities in addition to their territorial ones. Such communities may be ethnic, religious, or epistemic, transnational, subnational, or international, and the norms asserted by such communities frequently challenge territorially based authority. These nonstate legal regimes often influence (or are incorporated into) state or international regimes (Levit 2005, Weisbrod 1999).

Interestingly, for a long time social scientists paid little attention to these various forms of global legal pluralism, perhaps for the same reason as international relations realists: They did not see international law as "real" law worthy of study. Thus, just as realist scholars treated international law merely as an epiphenomenon of political power, social scientists—with some exceptions, of course—saw no formal mechanisms of coercive enforcement and therefore tended to train their gaze on domestic imposition of (and resistance to) normative orders. In addition, some social scientists may have reflexively resisted the claims of international law, viewing such claims as hegemonic impositions of Western norms onto indigenous communities. Accordingly, global legal pluralism has attracted legal scholars at least as much as it has attracted social scientists. It is to this new body of scholarship that this review now turns.

THE RISE OF GLOBAL LEGAL PLURALISM

Those who study international public and private law have not, historically, paid much attention to legal pluralism [although there have certainly been exceptions (e.g., Kingsbury 1998)]. This is because the emphasis traditionally has been on state-to-state relations. Indeed, international law has generally emphasized

[3]See studies of legal consciousness (e.g., Ewick & Silbey 1998) and of the way in which legal consciousness research can inform our understanding of how international law can be effective even without coercive sanctions (Berman 2006).

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 long enough that such norms could be deemed customary. 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.[4]

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 (1984, p. 20) 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 argued, at least since the end of the Cold War, that such a narrow view of how law operates transnationally is inadequate. Thus, the past 20 years have seen increasing attention to the important—though sometimes inchoate—processes of international norm development (Berman 2005, pp. 488–89). Such processes inevitably lead scholars to consider overlapping transnational jurisdictional assertions by nation-states, as well as norms articulated by international bodies, nongovernmental organizations (NGOs), multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on.

In this consideration, U.S. scholars of global legal pluralism have hearkened back to the insights of Robert Cover. Like other legal pluralists, Cover refused to privilege the legitimacy or authority of state lawmaking as compared to other normative communities. Thus, he argued that "all collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word 'law'" (Cover 1992, p. 176). This formulation deliberately denies the nation-state any special status as a lawgiver. According to Cover, although

> the status of such "official" behavior and "official" norms is not denied the dignity of "law" . . . it must share the dignity with thousands of other social understandings. In each case the question of what is law and for whom is a question of fact about what certain communities believe and with what commitments to those beliefs (Cover 1992, p. 176).

Of course, Cover was not blind to the fact that some lawgivers wield the power of coercive violence. Indeed, Cover frequently sought to make judges more aware of the violence they do, going so far as to say that judges are inevitably "people of violence." Cover argued that "[b]ecause of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office" (Cover 1983, p. 53). In this vision, judges use the force of the state to crush competing legal conceptions pushed by alternative normative communities.

At the same time, Cover's vision opens up the possibility of creative alternatives because he

[4]Of course, this is an oversimplified vision of international law. Nonstate sources—including the idea of natural law itself—have long played a key role in the development of international legal principles. Indeed, prior to Bentham, these nonstate sources, including the universal common law of jus gentium, were arguably far more important than the norms generated by states (Koh 1997, p. 2604). For example, during the Middle Ages, treaties—which are usually viewed today as the positive law of state interaction—were deemed subject to the overarching jurisdiction of the church because they were sealed by oaths. Even later, no less a theorist than Vattel, while repudiating natural law's religious underpinnings, continued to ground international law in the laws of nature (de Vattel 1797). In the nineteenth century, although positivism reigned both in the United States and abroad, transnational nonstate actors nevertheless played important roles. Natural law principles continue to undergird many international law doctrines, such as jus cogens norms (Janis 2003). Thus, the focus on nonstate norm generation is not a new phenomenon, but I argue that it is reemerging as a significant branch of scholarship within international law and that it may even call for a reclassification of international law itself.

located within legal forms a space for resistance, contestation, and adaptation. For example, in his one foray into international law, he acknowledged that the Nuremberg War Crimes trials were a form of victors' justice (Cover 1992, pp. 196–97). However, he then argued that, once the legal form of having trials for crimes against humanity was created, this form could be appropriated by other normative communities and used against the powerful. Thus, he described the trial of the Vietnam War organized by Bertrand Russell and Jean-Paul Sartre as an attempt to appropriate the Nuremberg form. Moreover, Cover acknowledged the impact of legal enunciations, whether state based or not, on legal consciousness. He therefore defended the Nuremberg trials based on "the capacity of the event to project a new legal meaning into the future." Such legal meaning was then available for others to use and build upon in subsequent iterations.

Finally, Cover identified jurisdictional politics as an important locus for the clash of normative visions. According to Cover, law is "a bridge in normative space" that "connects the world-that-is . . . with worlds-that-might-be" (Cover 1992, p. 176). Indeed, he made clear that it is in the assertion of jurisdiction itself that these norm-generating communities seize the language of law and articulate visions of future worlds. If jurisdiction is, literally, the ability to speak as a community, then, he suggested, we can begin to develop a "natural law of jurisdiction" (Cover 1983, p. 58), in which communities claim the authority to use the language of law based on a right or entitlement that is separate from the particular sovereignties of the present moment. Such jurisdictional assertions are significant because, even though they lack coercive power, they open a space for the articulation of legal norms that are often subsequently incorporated into official legal regimes. Indeed, once we recognize that the state does not hold a monopoly on the articulation and exercise of legal norms, then we can see law as a terrain of engagement, where various communities debate different visions of alternative futures.

The importance of multiple jurisdictional assertions is a key part of Cover's (1981) essay, "The Uses of Jurisdictional Redundancy." Although this essay was focused on the variety of official law pronouncers in the U.S. federal system, Cover celebrated the benefits that accrue from having multiple overlapping jurisdictional assertions. Such benefits included greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation. And though Cover acknowledged that it might seem perverse "to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict," he nevertheless argued that we should "embrace" a system "that permits tensions and conflicts of the social order" to be played out in the jurisdictional structure of the system (1981, p. 682). Thus, Cover's pluralism, though here focused on U.S. federalism, can be said to embrace the creative possibilities inherent in multiple overlapping jurisdictions asserted by both state and nonstate entities in whatever context they arise.

Although Cover, like other legal pluralists, focused primarily on domestic legal processes, his insights have proved to be inspirational to succeeding generations of scholars considering the role that plural sources of norms can play in the international and transnational sphere. For example, in the 1990s Harold Hongju Koh tackled the perennial question of why states obey international law even in the absence (usually) of obviously coercive sanctions. In a series of influential articles, Koh (1996, 1997, 1998, 1999) identified what he called "transnational legal process," which emphasizes iterative practices of states that are spurred by norm entrepreneurs both inside and outside governments and that become habitual over time. Significantly, the major innovation of Koh's vision was that it wedded a process-based focus on norm articulation to a Cover-like embrace of the potentially jurisgenerative power of international and transnational legal norms. Cover had defined jurisgenerative processes as those in which interpretive "communities do create law and do give meaning to law through their

narratives and precepts" (Cover 1983, p. 40). Koh invoked this jurisgenerative role of international and transnational law in multiple articles. Thus, by deploying Cover's pluralism, transnational legal process emerged as a way to explain the impact of international law even when it was not backed by obvious coercive power.

Building further on Koh's approach has required scholars to delve deeper into legal pluralism and to take its insights even more firmly to heart. Although Koh's transnational legal process framework ushered in an influential perspective on international law, that framework is now being expanded in significant ways, reflecting an ever-deepening pluralist orientation. In the following subsections, I briefly describe some of the sites of study for a pluralist approach. This new scholarship, as I have argued elsewhere (Berman 2005), begins to turn the focus of inquiry from international law—traditionally conceived as state-to-state interactions—to law and globalization, a more multivalent study.

The Multidirectional Interaction of Local, National, and International Norms

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

This top-down conception, however, captures only part of the picture of how law operates globally. After all, nation-state bureaucracies may imbibe institutional roles from one another (Goodman & Jinks 2004). Moreover, the so-called international community is not a monolithic entity, but rather a collection of interests. Similarly, local norms are always contested, even within their communities (Sunder 2003), and local actors may well invoke non-local norms for strategic or political advantage (Merry & Stern 2005) or "vernacularize" them for a local audience (Merry & Goodale 2007). In addition, local actors deploying or resisting national or international norms may well subvert or transform them, and the resulting transformation is sure to seep back up so that, over time, the international norm is transformed as well (Rajagopal 2003, 2005; de Sousa Santos & Rodriguez Garavito 2005). And on and on.

Thus, the local, the national, and the international are all constantly shifting concepts (Benhabib 2008, p. 74). Accordingly, scholars of global legal pluralism study the back and forth of the feedback loops: How do local actors access the power of NGOs? How do global scripts get replayed in local contexts? 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? Are local concerns strategically transformed by elected elites at the national and international 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 scholars begin to approach the multifaceted ways in which legal norms develop.

Nonstate International Lawmaking

A more pluralist account of international law also recognizes the wide variety of nonstate actors engaged in the establishment of norms that operate internationally and transnationally. For example, as Levit (2005) has noted in the context of transnational trade finance, rules

embodied in various informal standards, procedures, and agreements that bind banks and credit agencies have the force of law even without any official governmental involvement. She also points out that more formal lawmaking institutions such as the World Trade Organization (WTO) have, over time, appropriated these norms into their official legal instruments.

In some circumstances, official legal actors may delegate lawmaking authority to nonstate entities or recognize the efficacy of nonstate norms. For example, commercial litigation, particularly in the international arena, increasingly takes place before nonstate arbitral panels (Dezalay & Garth 1996). Likewise, nongovernmental standard-setting bodies, from Underwriters Laboratories, Inc. (which tests electrical and other equipment) to the Motion Picture Association of America (which rates the content of films) to the Internet Corporation for Assigned Names and Numbers (which administers the Internet domain-name system), construct detailed normative systems with the effect of law. Meanwhile, regulation of much financial market activity is left to private authorities such as stock markets or trade associations like the National Association of Securities Dealers. These international trade-association groups and their private standard-setting bodies wield tremendous influence in creating voluntary standards that become industry norms.

The proliferation of international tribunals also, of course, creates the opportunity for plural norm creation. Thus, commentators have noted the increasing role of WTO appellate tribunals in creating an international common law of trade (Bhala 1998/1999), as well as the new prominence of other specialized trade courts developed in connection with free trade agreements (Ahdieh 2004). Moreover, although only state parties can be formal litigants in the WTO dispute-resolution process, free trade panels permit private parties to challenge domestic governmental regulations directly. In addition, a number of international conventions, although 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 to choose a sort of merchant law reminiscent of the feudal era's lex mercatoria (Gillette 2004).

Accordingly, a more comprehensive conception of the global legal order must attend to the jurisdictional assertions and articulations of legal (or quasi-legal) norms by nonsovereign communities. Such jurisdictional assertions are significant because, although they often lack state-backed coercive power, they may in fact carry real coercive force, and even when they do not have any coercive force at all they may open a space for the articulation of legal norms that are often subsequently incorporated into official legal regimes. Thus, as Cover recognized, law is not simply a mechanism of state control; it is also a locus for various communities to advance alternative visions.

Dialectical Legal Interactions

As noted above, some scholars of international law fail to find real law there because they are looking for hierarchically based commands backed by coercive power. In contrast, those who take a pluralist approach understand that interactions among various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts nor simply the dialogue that often occurs under the doctrine of comity (Ahdieh 2004). In the international context, for example, we may see treaty-based courts exert an important influence even as national courts retain formal independence, much as U.S. federal courts exercising habeas corpus jurisdiction may well influence state court interpretations of U.S. constitutional norms in criminal cases. 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. For example, in 2003 a North American Free Trade Agreement (NAFTA) panel determined that a particular Mississippi state appellate procedure violated international norms of due process and constituted an unfair trade practice. In future Mississippi cases concerning the same procedure, the state court will therefore face a form of choice-of-law decision, with the state court determining what weight to give the NAFTA tribunal action. Likewise, within the European Union, we see a similar dialectical dance between the European Court of Human Rights and the various state constitutional courts (Krisch 2008). And of course court-to-court dialectical regulation is only the tip of the iceberg, as transnational and intersystemic regulation (both within and among states) takes on a similar dialectical dynamic (Ahdieh 2006, Burke-White 2004).

Conflicts of Law

More than 15 years ago, German theorist Gunther Teubner (1993) called for the creation of an "intersystemic conflicts law" derived not just from collisions among the nation-states of public international law, but from what he described as "collisions between distinct global social sectors." Since then, the web of intersystemic lawmaking Teubner described has only grown more complex. In a world of extraterritorial and nonterritorial effects, local populations increasingly attempt to assert dominion (or, in legal terms, jurisdiction) over territorially distant acts or actors. At the same time, nonlocal actors invoke the jurisdiction of international or transnational tribunals in order to avoid the consequences of local legal proceedings. In both circumstances, battles over globalization are often fought on the terrain of conflict of laws.

For example, online communication creates the possibility (and perhaps even the likelihood) that content posted online by a person in one physical location will violate the law in some other physical location. This poses an inevitable problem of extraterritoriality. Will the person who posts the content be required to conform her activities to the norms of the most restrictive community of readers? Alternatively, will the restrictive community of readers, which has adopted a norm regarding Internet content, be subjected to the proscribed material regardless of its wishes? The answers to these questions depend both on whether the community of readers asserts the jurisdictional authority to impose its norms on the foreign content provider and whether the home country of the content provider chooses to recognize the norms imposed (Berman 2002). Cross-border environmental (Sands 2001, Osofsky 2007, Osofsky & Levit 2008) and trade regulation (Ahdieh 2004, Trujillo 2007) raises similar issues.

Just as local communities affected by distant corporate activity may seek to assert jurisdiction over those allegedly causing the harm, corporations may seek to *avoid* local jurisdiction by invoking the competing jurisdiction of international tribunals. For example, as noted above, under NAFTA and other similar agreements special panels can pass judgment on the due process provided in local legal proceedings. Although these panels cannot directly review or overturn local judgments, they can levy fines against the federal government signatories to the agreement, thereby undermining the impact of the local judgment. Meanwhile, in the realm of human rights, criminal defendants convicted in state courts in the United States have proceeded (through their governments) to the International Court of Justice (ICJ) to argue that they were denied the right to contact their consulate, as required by treaty. Again, although the ICJ judgments are technically unenforceable in the United States, at least one state court followed the ICJ's command anyway (Berman 2008). In a similar vein, the very creation of a commission of inquiry (Dickinson 2003) or the mere assertion of jurisdiction in one place over an alleged human rights abuser elsewhere (Burke-White 2008) can spur activity in the abuser's home community, thereby sparking greater possibilities for enforcement.

In each of these circumstances, we see a dialectical dance arising from the fact that multiple communities are asserting jurisdiction over the same activities. Such dances are likely to become the norm as a variety of communities claim an interest in regulating distant behavior having extraterritorial effects or as parties claim a community affiliation beyond the local. Thus, there is an increasing global instantiation of the jurisdictional redundancy Cover celebrated in the domestic realm (Resnik 2006; 2008a,b,c).

All of these extraterritorial jurisdictional assertions inevitably increase the pressure on choice-of-law doctrines as well. For example, Chander (2001) has observed that many members of the Indian-American diaspora purchase bonds issued by their home country. The purchase of these bonds obviously reflects the enduring tie these members of the Indian diaspora have to their homeland. Thus, one might argue that, even when the bonds are purchased in the United States, the purchases should be governed by Indian, rather than U.S., securities laws because the bond sale reflects a substantive (and voluntary) tie between the purchasers and the Indian government. Likewise, multinational copyright disputes could be adjudicated through the application of hybrid legal norms drawn from a variety of relevant countries (Dinwoodie 2000).

Meanwhile, a fluidly plural system makes it more likely that authorities in one territorial location will be asked to enforce a judgment issued elsewhere. Or, particularly in multiethnic states, there may be a variety of conflicting adjudicatory authorities within the same state, and the question becomes whether the different authorities will at least recognize one another's judgments, even without recognizing each other's legitimacy (Baylis 2007). The criteria for making these sorts of enforcement decisions are uncertain and likely to change over time. Within the United States, the Constitution's Full Faith and Credit Clause (Article IV, Section 1) requires that a valid judgment issued by one state be enforced by every other state even if the judgment being enforced would be illegal if issued by the rendering state. Of course, within a single, relatively homogenous country, the idea of one state enforcing another state's judgment does not seem so significant because the variations from state to state are likely to be relatively minor. In contrast, transnational recognition of judgments is more controversial.

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

In any event, it is clear that, in a world of plural normative assertions, one crucial question will be whether a community's articulation of norms is sufficiently persuasive to convince those wielding coercive power to enforce such norms. For example, if a community purports to adjudicate a dispute, its judgment is not necessarily self-executing, particularly if the losing party is territorially distant. Thus, some entity with police power must enforce the judgment. Accordingly, the question becomes not whether a community can assert jurisdiction, but whether other communities are willing to give deference to the judgment rendered and enforce it as if it were their own. Indeed, as Cover himself acknowledged (1992, p. 187), even at the moment that a community daringly asserts its own legal jurisdiction, it is immediately forced to acknowledge that its invention is limited by the willingness of others to accept the judgment as normatively legitimate. Such

jurisdictional politics form an inevitable part of a global system less defined by Westphalian delineations of authority based on clear territorial boundaries.

The Disaggregation of the State

One of the reasons that it is so important to conceive of law beyond the state level 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, Singer (2003) 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. Meanwhile, 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 (Dickinson 2010). Likewise, studies of transnational regulatory networks, intersystemic regulation, and the role of NGOs and industry standards in shaping norms reflect the growing disaggregation of state-based governance models. Thus, over the coming decades, a pluralist approach to international law will undoubtedly explore the many ramifications of this new trend in governance.

Obviously, this quick survey does not even begin to describe the range of inquiries opened up, or illuminated, by a global legal pluralist framework. But perhaps most fundamentally, no matter what the particular object of study may be, a pluralist account encourages a more microempirical analysis of how transnational, international, and nonstate norms are articulated, deployed, changed, and resisted in thousands of different local settings. Such studies focus on the extent to which such norms have real impact on the ground. Therefore, a pluralist approach provides an important alternative both to traditional doctrinal international law and to rational choice and realist models of law's impact.

ADVANTAGES OF A PLURALIST APPROACH AND RESPONSES TO CRITICISMS

As discussed above, legal pluralism can help international law find a more comprehensive framework for conceptualizing the clash of normative communities in the modern world. Consider, for example, Sally Falk Moore's idea of the "semiautonomous social field," which she describes as one that

> can generate rules and customs and symbols internally, but that . . . is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semiautonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance (Moore 1973, p. 720).

Notice that, following Moore's idea, we can conceive of a legal system as both autonomous and permeable; outside norms affect the system but do not dominate it fully. The framework thus captures a dialectical and iterative interplay that we see among normative communities in the international system, an interplay that rigidly territorialist or positivist visions of legal authority do not address.

Even more fundamentally, legal pluralists have observed ways in which state law and other normative orders mutually constitute one another. Thus, for example, the family and its legal order are obviously shaped by the state, but the state in turn is shaped by the family and its

legal order because each is part of the other (Fitzpatrick 1984). And although pluralists historically focused primarily on the state's relationship to internal nonstate law within its borders, the framework is equally cogent in studying external dialectical interactions both with other states and with various international or transnational legal communities. Indeed, recent international law scholarship emphasizes ways in which states are changed simply by the fact that they are part of an international network of states (Goodman & Jinks 2004). Such an insight echoes pluralism's coconstitutive approach.

In addition, pluralism offers possibilities for thinking about spaces of resistance to state law. Indeed, by recognizing at least the semiautonomy of conflicting legal orders, pluralism necessarily examines limits to the ideological power of state legal pronouncements. Pluralists do not deny the significance of state law and coercive power, of course, but they do try to identify places where state law does not penetrate or penetrates only partially, and where alternative forms of ordering persist to provide opportunities for resistance, contestation, and alternative vision. Such an approach encourages international law scholars to treat the multiple sites of normative authority in the global legal system as a set of inevitable interactions to be managed, not as a problem to be solved. And again, although pluralists historically studied only nonstate alternatives to state power, the international law context adds state-to-state relations and their overlapping jurisdictional assertions to the mix, providing yet another set of possible alternative normative communities to the web of pluralist interactions.

Finally, pluralism frees scholars from needing an essentialist definition of law. For example, with legal pluralism as our analytical frame, we can get beyond the endless debates both about whether international law is law at all and whether it has any real effect. Indeed, the whole debate about law versus nonlaw is largely irrelevant in a pluralist context because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status. Thus, we can resist positivist reductionism and set nation-state law within a broader context. Moreover, an emphasis on social norms allows us to see more readily how nonstate legal orders can have significant impact on the world. After all, if a statement of norms is ultimately internalized by a population, that statement will have important binding force, often even more so than a formal law backed by state sanction. Accordingly, by taking pluralism seriously we can more easily understand how the contest over norms creates legitimacy over time, and we can put to rest the idea that norms not associated with nation-states necessarily lack significance. Indeed, 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.

Of course, there are differences among forms of ordering, particularly given that some legal forms have coercive state power behind them while others do not. Also, disparities in political and economic power strongly affect how much influence any particular normative community is likely to have. But even those differences are not completely determinative. After all, even if formal legal institutions have a near monopoly on legitimate use of force, there are many other forms of effective coercion and inducement wielded by nonstate actors (Weber 1954). In addition, official legal rules that are contrary to prevailing customary or community norms often have little or no real-world effect, at least not without the willingness (or capability) of coercive bodies to exercise sustained force to impose such rules. Thus, obedience to norms frequently reflects sociopolitical reality more than the status of those norms as law. As a result, "[d]efining the essence of law or custom is less valuable than situating these concepts in particular sets of relations between particular legal orders, in particular historical contexts" (Merry 1988, p. 889).

In any event, the important point is that scholars studying the global legal scene need

not rehash long and ultimately fruitless debates (both in philosophy and in anthropology) about what constitutes law. They can instead take a nonessentialist position: treating as law that which people view as law (Tamanaha 2000). This formulation turns the what-is-law question into a descriptive inquiry concerning which social norms are recognized as authoritative sources of obligation and by whom. Indeed, the question of what constitutes law is itself revealed as a terrain of contestation among multiple actors (Nader 2002).

Interestingly, global legal pluralism has been criticized both by committed international law proponents and by committed nation-state sovereigntists. For those who have worked for decades trying to convince governments, policy makers, and populations to treat international legal rules as authoritative and hierarchically binding positive law, a pluralist framework may seem to undermine their efforts (e.g., Koskenniemi 2006). Even those less committed to international norms and institutions as a philosophical matter may nevertheless seek universal harmonization of norms in order to simplify the seeming chaos of pluralism (e.g., Bhagwati 1996, pp. 32–34). Sovereigntists, for their part, seek to draw clear lines of demarcation between spheres of authority and worry, on both a practical and a philosophical level, about the influence of norms not adopted by a governmental unit within a polity [e.g., Posner & Sunstein 2006, p. 133 (citing articles)].

In response to these concerns, pluralists offer answers that are both descriptive and normative. As a descriptive matter, pluralists argue that legal fragmentation and the contest among plural sources of norms are not realities that a hierarchically situated actor can choose to permit or reject; pluralism is simply a fact because multiple communities assert norms that have impact. Thus, regardless of what international law proponents say, there will always be resistance to universal norms because there are multiple communities with different normative commitments. As a result, although harmonization regimes are certainly important and influential, they will never occupy the entire field. Likewise, a sovereigntist rejection of foreign, international, or nonstate influence and authority is unlikely to be fully successful in a world of global interaction and cross-border activity. Indeed, seen from the point of view of U.S. historical practice, "sovereigntists have a dismal track record, in that American law is constantly being made and remade through exchanges, some frank and some implicit, with normative views from abroad. Laws, like people, migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere" (Resnik 2008a, pp. 63–64). Accordingly, instead of bemoaning either the fragmentation of law or the messiness of jurisdictional overlaps, we should accept them as necessary consequences of the fact that communities can be neither homogenized into a single universal collective nor hermetically sealed off from one another.

More normatively, we can go further and consider the possibility that this jurisdictional messiness may, in the end, provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and nonstate communities (Berman 2007). In addition, jurisdictional redundancy allows alternative ports of entry for strategic actors who might otherwise be silenced. Thus, following the insights of legal pluralism, we may view normative conflict among multiple, overlapping legal systems as not only unavoidable but sometimes even desirable, both as a source of alternative ideas and as a site for discussion about community definition and creative innovation. Accordingly, instead of trying to stifle legal conflict either through a reimposition of territorialist prerogative or through universalist harmonization schemes, communities might seek (and increasingly are creating) a wide variety of procedural mechanisms and institutions for managing, without eliminating, pluralism. Such mechanisms and institutions may help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor, seeking ways of reconciling competing norms, and deferring to other approaches if possible. Moreover, when

deference is impossible (because some instances of legal pluralism are repressive, violent, and/or profoundly illiberal), procedures for managing pluralism can at least require an explanation.

Although it is beyond the scope of this review to engage in a more detailed discussion of the many such procedural mechanisms and institutions for managing pluralism currently in place,[5] the crucial antecedent point is that, although people may never reach agreement on norms, they may at least acquiesce in procedures that take pluralism seriously, rather than ignoring it through assertions of territorially based power or dissolving it through universalist imperatives. Processes for managing pluralism seek to preserve the spaces of opportunity for contestation and local variation that legal pluralists have long documented, and therefore a focus on pluralism may be both normatively preferable and more practical precisely because agreement on substantive norms is so difficult.

CONCLUSION

Although legal pluralism (and pluralist scholarship) is clearly not new, only in recent years has pluralism come to be used as a framework for conceptualizing the multiple conflicting jurisdictional assertions (both state and nonstate) that characterize the global legal arena. By studying the many local settings in which the norms of multiple communities—geographical, ethnic, national, and epistemic—become operative, scholars can gain a far more nuanced understanding of the international and transnational legal terrain. This is a world in which claims to coercive power, abstract notions of legitimacy, and arguments about legal authority are only part of an ongoing conversation, not the final determining factors. It is a world in which jurisgenerative practices flower, creating opportunities for contestation and creative adaptation. And although we may not like all the norms being articulated at any given moment, it will do no good to ignore them or to insist on their lack of authority. In a plural world, law is an ongoing process of articulation, adaptation, rearticulation, absorption, resistance, deployment, and on and on. It is a process that never ends, and international law scholars would do well to study the multiplicity and engage in the conversation, rather than impose a top-down framework that cannot help but distort the astonishing variety of law on the ground.

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