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ARTICLES

THE GLOBALIZATION OF JURISDICTION

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> Supposing however that the Act [at issue] had said in terms, that though a person sued in the island [of Tobago] had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the Court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?[1]

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> [This] is a plea to grant all collective behavior entailing systematic understandings of our commitments to future worlds equal claim to the word "law." The upshot of such a claim, of course, is to deny to the nation state any special status for the collective behavior of its officials or for their systematic understandings of some special set of "governing" norms. The status of such "official" behavior and "official" norms is not denied the dignity of "law." But 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.[2]

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> Citizenship ought to be theorized as one of the multiple subject positions occupied by people as members of diversely spatialized, partially overlapping, or nonoverlapping collectivities. The structures of feeling that constitute nationalism need to be set in the context of other forms of imagining community, other means of endowing significance to space in the production of location and "home."[3]

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> In this context, what we need—we, who aspire to be academics, who aspire to work things out—is permission to work things out freely. We need a space where we can experiment with ideas without condemnation reigning [sic] down around us. . . .
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> . . . [T]his is cyberspace, where no one has the right to declare truth is on their side; and where no one should claim the right to condemn. This is a space where we need the space to try out different, and even heretical, ideals. In this space, the heroes will be lunatics . . . or crazies . . . .

Meeting of the Association for the Study of Law, Culture, and the Humanities, at the University of Pennsylvania School of Law; at the Junior Faculty Workshop convened at Northeastern University School of Law; and at faculty workshop sessions held at Georgetown University Law Center, American University's Washington College of Law, University of Wisconsin Law School, Washington & Lee Law School, Chicago-Kent School of Law, and the University of Connecticut School of Law. I am grateful to participants at all of these sessions for their useful feedback. I also acknowledge the diligent research assistance of Monica Debiak, Lynn Fountain, Dave Gaetano, Sarah Gessner, Lorene Park, Jeffrey Pease, Dorothy Puzio, Allison Rohrer, Marianne Sadowski, Shuyuan Tang, and Heather Wood.

[1] Buchanan v. Rucker, 103 Eng. Rep. 546, 547 (K.B. 1808).

[2] Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 173, 176 (Martha Minow et al. eds., 1992) (footnote omitted).

[3] Akhil Gupta, *The Song of the Nonaligned World: Transnational Identities and the Reinscription of Space in Late Capitalism*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY 179, 193 (Akhil Gupta & James Ferguson eds., 1997).

> . . . We need to imagine these problems differently, and we need to encourage people to imagine them differently.[4]

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[4] Lawrence Lessig, *Foreword* to Symposium, *Cyberspace and Privacy: A New Legal Paradigm?*, 52 STAN. L. REV. 987, 998-99 (2000).

INTRODUCTION

In the past decade, the terms "cyberspace" and "globalization" have become buzzwords of a new generation. And it is probably not surprising that the two have entered the lexicon simultaneously. From its beginning, the Internet heralded a new world order of interconnection and decentralization,[5] while the word "globalization"[6] conjured for many the specter of increasing transnational and supranational governance as well as the growing

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[5] *See, e.g.*, DEIRDRE M. CURTIN, POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY 4 (1997) ("Just think of how global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility—and legitimacy—of applying laws based on geographic boundaries to this new sphere.").

[6] I use the term "globalization" to mean both the worldwide process of liberalizing state controls on the international movement of goods, services, and capital and the social, economic, and political consequences of liberalization. *See generally* SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS (1998) (analyzing globalization and its economic, political, and cultural effects on the world). In addition, when I speak of globalization, I also mean the attitude about the world that tends to come into being as a result of frequent use of that term. 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. *See, e.g.*, *infra* note 7 (citing sources describing various scholars' view of globalization).

mobility of persons and capital across geographical boundaries.[7] Thus, both terms have reflected a perception that territorial borders might no longer be as significant as they once were.[8]

On the other hand, nation-state governments have been quick to reassert themselves. For example, there was a heady moment circa 1995 when it seemed as if the rise of cyberspace might cause us to rethink the relevance of nation-state boundaries. Most famously, David Johnson and David Post argued that cyberspace could not legitimately be governed by territorially based sovereigns and that the online world should create its own legal jurisdiction (or multiple jurisdictions).[9] Predictably, nation-states pushed in the opposite direction, passing a slew of laws purporting to regulate almost every conceivable online activity from gambling[10] to chat rooms[11] to auc-

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[7] *See, e.g.*, MICHAEL EDWARDS, FUTURE POSITIVE: INTERNATIONAL CO-OPERATION IN THE 21ST CENTURY 5-6 (1999) ("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."); 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); Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, *in* MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 27, 27-29 (1996) ("[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 neighborliness, even with those most distant from ourselves.").

[8] *See, e.g.*, MATHEW HORSMAN & ANDREW MARSHALL, AFTER THE NATION-STATE: CITIZENS, TRIBALISM AND THE NEW WORLD DISORDER, at ix (1994) ("The traditional nation-state, the fruit of centuries of political, social and economic evolution, is under threat."); George J. Demko & William B. Wood, *Introduction: International Relations Through the Prism of Geography*, *in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY 3, 10 (George J. Demko & William B. Wood eds., 1994) ("Once sacrosanct, the concept of a state's sovereignty—-the immutability of its international boundaries—-is now under serious threat."); Seyla Benhabib, *Strange Multiplicities: Democracy and Identity in a Global Era: Lecture 1*, at 33 (on file with author) ("In the era of globalization, the integrative powers of the nation-state . . . are challenged.").

[9] David R. Johnson & David Post, *Law and Borders—-The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); *see also, e.g.*, David Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 165-71 (1996) (arguing that cyberspace should be governed through decentralized processes whereby network access providers decide what rules to impose and individual users choose which online communities to join).

[10] *E.g.*, Interactive Gambling Act, 2001, pts. 2 & 2A (Austl.) (prohibiting online gambling services to customers in Australia and other designated countries), *available at* http://www.noie.gov.au/projects/confidence/Archive/gambling/banact.pdf (last visited Oct. 22, 2002); *see also* Humphrey *ex rel.* Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715, 721 (Minn. Ct. App. 1997) (asserting personal jurisdiction over nonresident corporation and its principal for deceptive trade practices, false advertising, and consumer fraud in connection with an Internet gambling site); Vacco *ex rel.* People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 851-54 (N.Y. Sup. Ct. 1999) (enforcing state and federal laws to ban foreign corporation; its Antiguan subsidiary; and their principals, officers, and directors

tion sites,[12] and seeking to enforce territorially based rules regarding trademarks,[13]
contractual relations,[14] privacy norms,[15] "indecent" content,[16] and crime,[17] among others.

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from operating or offering gambling over the Internet).

[11] *E.g.*, 47 U.S.C. § 254(*l*)(1)(A)(ii) (2001) (requiring schools and libraries to adopt and implement policies to ensure the safety and security of minors when using chat rooms); NEV. REV. STAT. § 176A.413 (2001) (restricting ownership and use of online chatrooms by people previously convicted of cyber-stalking).

[12] *E.g.*, IND. CODE §§ 26-2-8-101 to -302 (2001) (containing the Uniform Electronic Transactions Act, which facilitates the use of online auction sites by giving legal effect to electronic signatures and contracts); N.C. GEN. STAT. §§ 66-311 to -330 (2001) (same); T.G.I. Paris, Nov. 20, 2000, http://www.juriscom.net/txt/jurisfr/cti/tgiparis200001120.pdf (enjoining Yahoo.com from permitting French users' access to Nazi memorabilia via Yahoo!'s auction sites). For further discussion of this case, see *infra* text accompanying notes 77-84.

[13] *E.g.*, Anticybersquatting Consumer Protection Act, Pub. L. No. 106-113, 113 Stat. 1501 (1999) (codified as amended in scattered sections of 15, 16, and 28 U.S.C.) (providing for the "registration and protection of trademarks used in commerce"); Rachel Ross, *China Demands Jurisdiction over Domain Names in Chinese*, TORONTO STAR, Nov. 13, 2000, LEXIS, Tstar File (reporting that China is seeking to ensure that it controls the distribution and administration of all Chinese-character domain names).

[14] *E.g.*, Electronic Transactions Act, 1999 (Austl.) (creating a regulatory regime intended to support and encourage business and consumer confidence in the use of electronic commerce), http://www.law.gov.au/publications/ecommerce/; UNIF. COMPUTER INFO. TRANSACTIONS ACT, 7 U.L.A. 200 (2002) (providing a model uniform state law to govern online contracts), *available at* http://www.law.upenn.edu/bll/ulc/ucita/cita10st.doc.

[15] *E.g.*, Electronic Communications Privacy Act, 18 U.S.C. § 2701(a)(1) (2000) (prohibiting unauthorized access to a "facility through which an electronic communication service is provided"); Data Protection Act, 1998, c. 29 (Eng.) (requiring technical and organizational measures against unauthorized or unlawful processing of personal data and against accidental loss of, destruction of, or damage to personal data), http://www.hmso.gov.uk/acts/acts1998/19980029.htm.

[16] *See, e.g.*, 18 U.S.C. § 2252A (2000) (prohibiting the receipt or distribution of sexually explicit photos of minors by any means including by computer); Reno v. ACLU, 521 U.S. 844, 885 (1997) (striking down, on First Amendment grounds, provisions of the Communications Decency Act, 47 U.S.C. § 223 (Supp. II 1996), that criminalized certain content transmitted via online communication); ACLU v. Reno, 217 F.3d 162, 181 (3d Cir. 2000) (affirming, on First Amendment grounds, preliminary injunction preventing the enforcement of the Child Online Protection Act, 47 U.S.C. § 231 (Supp. IV 1998), which also criminalized certain content sent via online communication), *vacated sub nom.* Ashcroft v. ACLU, 122 S. Ct. 1700 (2002); Regina v. Pecciarich, [1995] O.R.3d 748 (Prov. Ct.) (Can.) (holding that the distribution of child pornography by uploading photos to an electronic bulletin board was in violation of criminal statutes).

[17] *E.g.*, Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000) (applying federal law to newly discovered forms of computer abuse and providing civil remedies for certain types of computer crimes); Regulation of Investigatory Powers Act, 2000, c. 23 (Eng.) (defining criminal penalties for interception of traffic on all postal and telecommunications networks and any action that may cause the content of a message to become known to people other than

Yet these assertions of national authority have raised many of the legal conundrums regarding nation-state sovereignty, territorial borders, and legal jurisdiction that Johnson and Post predicted.[18] For example, if a person posts content online that is legal where it was posted but is illegal in some place where it is viewed, can that person be subject to suit in the far-off location? Is online activity sufficient to make one "present" in a jurisdiction for tax purposes? Is a patchwork of national copyright laws feasible given the ability to transfer digital information around the globe instantaneously? How might national rules regarding the investigation and definition of criminal activity complicate efforts to combat international computer crime? Should the law of trademarks, which historically has permitted two firms to retain the same name as long as they operated in different geographical areas, be expanded to provide an international cause of action regarding the ownership of an easily identifiable domain name? And, if so, should such a system be enforced by national courts (and in which country) or by an international body (and how should such a body be constituted)? And on and on.

In the meantime, on the globalization front, annual meetings of the world's industrialized countries have become sites for the expression of uncertainty and resentment about the effect of international trade and monetary policy on local labor forces, the environment, and nation-state sovereignty.[19] Similar debates recur in the context of international human rights, where, increasingly, countries are asserting extraterritorial jurisdiction to try those accused of genocide and crimes against humanity in international or foreign domestic courts.[20]

Although all of these issues, questions, and conundrums arise in a variety of doctrinal areas and may involve a wide range of different legal and

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the sender or intended recipient); *see also* Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 446, 448 (E.D. Va. 1998) (holding that defendants who harvested e-mail addresses of AOL members using an extractor program and then used those addresses to send unauthorized bulk e-mail advertising their pornographic web sites were in violation of federal and state statutes).

[18] *See* Johnson & Post, *supra* note 9, at 1371-76 (suggesting that the unique nature of cyberspace, particularly the absence of any physical location, creates regulatory and jurisdictional problems for governments).

[19] *See, e.g.*, *After Genoa*, THE NATION, Aug. 6, 2001, at 3 (quoting French President Chirac as saying, "[t]here is no demonstration drawing 100,000, 150,000 people without having a valid reason"); Michael Hardt & Antonio Negri, *What the Protesters in Genoa Want*, N.Y. TIMES, July 20, 2001, at A21 (arguing that "[t]he protests themselves have become global movements, and one of the clearest objectives is the democratization of globalizing processes"); Jerry Useem, *There's Something Happening Here*, FORTUNE, May 15, 2000, at 234 (describing a "new breed of economic activism [that] has appeared not only in Seattle but also in Davos, Switzerland; the City, London; and now Washington, D.C.").

[20] *See infra* Part I.I (describing transnational and international human rights activity).

policy concerns, they have at least one common element: they all touch on the idea of legal jurisdiction—the circumstances under which a juridical body can assert authority to adjudicate or apply its legal norms to a dispute.[21] And, in each of these cases, the question is complicated by the fact that jurisdiction may be asserted in one physical location over activities or parties located in a different physical location. Thus, 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.

Even more important, while courts, policy makers, and scholars are

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[21] Under international law, the concept of jurisdiction is generally divided into three categories: (1) jurisdiction to prescribe, i.e., to apply a community's norms to a dispute (which I will also call choice of law); (2) jurisdiction to adjudicate, i.e., to subject persons or things to legal process; and (3) jurisdiction to enforce, i.e., to induce or compel compliance with a determination reached. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987). In speaking of the assertion of jurisdiction in this Article, I refer to the first two categories. It is true that some of the policy concerns underlying jurisdiction and choice of law might be different. For example, the question of adjudicative jurisdiction implicates issues of convenience to the parties in deciding a case in a given location, whereas choice of law addresses the actual norms to be applied. Nevertheless, both involve the symbolic assertion of a community's dominion over a dispute and therefore many of the same concerns about territorial borders, community definition, and the nation-state apply to debates about both adjudicatory jurisdiction and choice of law. The third category, enforcement jurisdiction, is separately addressed in this Article, not so much as a question of jurisdiction, but as the corollary question of recognition and enforcement of judgments. In addition, this Article focuses primarily on jurisdiction over parties (what in the United States is known as personal jurisdiction, *see generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (describing the minimum requirements necessary for a court to assert personal jurisdiction)), rather than jurisdiction over particular subject matter. Subject matter jurisdiction is a separate inquiry that addresses both which *type* of court in a given location is permitted to hear a case and what constitutes a legitimate "case" for adjudicative purposes. Although my analysis here may have significant implications for subject matter jurisdiction, exploration of those implications is beyond the scope of this Article.

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. I aim to take a different approach. I believe the time is ripe to take a step back and reflect on the jurisdictional principles we are seeking to adapt. By doing so, I attempt to lay the groundwork for a theoretical model that will allow us better to understand and evaluate the increasing globalization of legal jurisdiction.

To construct such a model, we first need to remind ourselves that conceptions of legal jurisdiction (by which I mean to include both the jurisdiction to decide a dispute and the determination that a jurisdiction's law will apply)[22] are more than simply ideas about the appropriate boundaries for state regulation or the efficient allocation of governing authority. Jurisdiction is also the locus for debates about community definition, sovereignty, and legitimacy. Moreover, the idea of legal jurisdiction both reflects and reinforces social conceptions of space, distance, and identity. Too often, however, contemporary frameworks for thinking about jurisdictional authority unreflectively accept the assumption that nation-states defined by fixed territorial borders are the only relevant jurisdictional entities, without examining how people actually experience allegiance to community or understand their relationship to geographical distance and territorial borders. Moreover, by side-stepping these questions of community definition, borders, and the experience of place, legal thinkers are ignoring a voluminous literature in anthropology, cultural studies, and the social sciences concerning such issues.[23]

Indeed, even a cursory examination reveals that our current territorially based rules for jurisdiction (and conflict of laws) were developed in an era when physical geography was more meaningful than it is today and during a brief historical moment when the ideas of nation and state were being joined by a hyphen to create an historically contingent Westphalian order.[24] Yet if

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[22] *See supra* note 21 (discussing international law's tripartite classification scheme for jurisdiction in international law).

[23] *Cf.* Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT'L L. & POL. 567, 568 n.2 (2000) (noting that, although the term "postnational" has crept into other disciplines, international law scholars have been slow to use it, having "only recently caught on to 'globalization'").

[24] The Peace of Westphalia ended the Thirty Years War. *See* Treaty of Peace Between Sweden and the Empire *and* Treaty of Peace between France and the Empire, Oct. 14, 1648, 1 Consol. T.S. 119, 119-356 [hereinafter Westphalia Treaties] (outlining agreements among almost every state in Europe at that time); *Leo Gross*, *The Peace of Westphalia, 1648-1948*, *in* 1 ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 3, 5 (1984) (explaining that the Thirty

the ideas of geographical territory and the nation-state are no longer treated as givens for defining community,[25] an entirely new set of questions can be asked. How are communities appropriately defined in today's world? In what ways might we say that the nation-state is an *imagined* community,[26] and what other imaginings are possible? How do people actually experience the idea of membership in multiple, overlapping communities? Should citizenship be theorized as one of the many subject positions occupied by people as members of diverse, sometimes non-territorial, collectivities? In what ways is our sense of place and community membership constructed through social forces? And if ideas such as "place," "community," "member," "nation," "citizen," "boundary," and "stranger"[27] are not natural and inevitable, but are instead constructed, imagined, and (sometimes) imposed, what does that say about the presumed "naturalness" of our geographically based jurisdiction and choice-of-law rules?

This Article will ask these questions, drawing on humanities and social science literature that complicates many of the premises most lawmakers and legal scholars take for granted concerning jurisdiction. This literature insists that we recognize the constructed nature of our ideas about boundaries and community definition and that we acknowledge the historical contingency of the nation-state. Moreover, by analyzing the social meaning of our affiliations across space, we can think about alternative conceptions of community that are subnational, transnational, supranational, or cosmopolitan. Such an analysis provides a better understanding of the world of experience on which the legal world is mapped and is therefore essential in order to develop a richer descriptive account of what it means for a juridical

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Years War began partly because of religious intolerance and that the Peace of Westphalia "consecrated the principle of toleration"). Westphalia is generally thought to have ushered in an international legal order based on individual state sovereignty. *See infra* notes 594-600 and accompanying text (discussing the terms of the treaties and how the sovereign state became the primary political unit). The historically contingent nature of the nation-state is discussed further *infra* at Part IV.B.

[25] *See* Gupta, *supra* note 3, at 179 ("The nation is so deeply implicated in the texture of everyday life and so thoroughly presupposed in academic discourses on 'culture' and 'society' [and jurisdiction] that it becomes difficult to remember that it is only one, relatively recent, historically contingent form of organizing space in the world.").

[26] *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES (rev. ed. 1991) (analyzing the nation-state as an imagined community).

[27] *See, e.g.*, Georg Simmel, *The Stranger*, *in* THE SOCIOLOGY OF GEORG SIMMEL 402, 402 (Kurt H. Wolff ed., 1950) (arguing that the stranger "is fixed within a particular spatial group, or within a group whose boundaries are similar to spatial boundaries," but that "his position in this group is determined, essentially, by the fact that he has not belonged to it from the beginning, that he imports qualities into it, which do not and cannot stem from the group itself").

body to assert jurisdiction over a controversy.[28]

In addition, moving from the descriptive to the normative, I set about the task of theorizing the idea of jurisdiction in a way that might take into consideration the contested and constantly shifting process by which people imagine communities and their membership in them. I argue that, just as a rigidly territorial conception of jurisdiction eventually gave way in the first part of the twentieth century to the idea of jurisdiction based on contacts with a sovereign entity, so too a contacts-based approach must now yield to a conception of jurisdiction based on community definition. In this Article, I offer one such conception, which I call a cosmopolitan pluralist conception of jurisdiction.

A *cosmopolitan*[29] approach allows us to think of community not as a geographically determined territory circumscribed by fixed boundaries, but as "articulated moments in networks of social relations and understandings."[30] This dynamic understanding of the relationship between the "local" community and other forms of community affiliation (regional, national, transnational, international, cosmopolitan) permits us to conceptualize legal jurisdiction in terms of social interactions that are fluid processes, not motionless demarcations frozen in time and space. A court in one country might therefore appropriately assert community dominion over a legal dispute even if the court's territorially based contacts with the dispute are

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

[29] By "cosmopolitan," I refer to a multivalent perspective that recognizes the wide variety of affiliations people feel toward a range of communities, from the most local to the most global. I therefore distinguish cosmopolitanism from a universalist vision (often associated with cosmopolitanism), which sees people solely, or primarily, as members of one world community. *See infra* text accompanying notes 778-782 (explaining cosmopolitanism's recognition of the "multi-rootedness" of individuals). Cosmopolitanism, as I use the term, involves an ideal of multiple attachments; it does not necessarily entail the erasure of nonglobal community affiliations. *See, e.g.*, Bruce Robbins, *Introduction Part I: Actually Existing Cosmopolitanism*, *in* COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION 1, 3 (Pheng Cheah & Bruce Robbins eds., 1998) ("[I]nstead of an ideal of detachment, actually existing cosmopolitanism is a reality of (re)attachment, multiple attachment, or attachment at a distance.").

[30] DOREEN MASSEY, SPACE, PLACE, AND GENDER 154 (1994).

minimal.[31] Conversely, a country that has certain "contacts" with a dispute might nevertheless be unable to establish a tie between a local community and a distant defendant sufficient to justify asserting its dominion.

A cosmopolitan interrogation of conceptions of community, therefore, might rein in some assertions of jurisdiction over distant acts while permitting other extraterritorial assertions of jurisdiction that are currently unrecognized. Accordingly, the cosmopolitan pluralist conception of jurisdiction I propose seeks to capture a middle ground between strict territorialism on the one hand and a system of complete universal jurisdiction on the other. In any event, the jurisdictional inquiry would no longer be based on a reified counting of contacts with, effects on, or interests of a territorially-bounded population. Rather, courts would take seriously the multiple definitions of community that might be available, the symbolic significance of asserting jurisdiction over an actor, and the normative desirability of conceptualizing the parties before the court as members of the same legal jurisdiction.[32]

In addition, if nation-states are imagined, historically contingent communities defined by admittedly arbitrary geographical boundaries, and if those nation-states—-because of transnational flows of information, capital, and people—-no longer define unified communities (if they ever did), then there is no conceptual justification for conceiving of nation-states as possessing a monopoly on the assertion of jurisdiction. Instead, any comprehensive theory of jurisdiction must acknowledge that *non-state* communities also assert various claims to jurisdictional authority and articulate alternative norms that are often incorporated into more "official" legal regimes. This *pluralist*[33] understanding of jurisdiction helps us to see that law is not merely the coercive command of a sovereign power, but a language for

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[31] Of course, even if a court asserted jurisdiction over a dispute, other doctrines, such as standing or causation, might still lead a court to limit the scope of the available relief.

[32] This broader conception of jurisdiction would necessarily affect choice of law as well, but a more detailed exploration of how these ideas apply to choice of law must await further elaboration in a future project.

[33] Political pluralism includes "theories that 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." AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 2 (1995). Thus, I use the term to refer to situations where "two or more legal systems coexist in the same social field," Sally Engel Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 870 (1988), even if one or both of those legal systems is not an "official," state-based system. For further discussions of legal pluralism, see CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); David Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425; Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 28-34 (1981); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986).

imagining alternative future worlds. Moreover, various norm-generating communities (not just the sovereign) are always contesting the shape of such worlds.

Of course, not all assertions of jurisdiction ultimately possess the coercive force we often associate with law. One of the obvious reasons that nation-states have been the primary jurisdictional entities of the past several hundred years is that those states have wielded the power to enforce their judgments. In contrast, many jurisdictional assertions may never have such coercive force behind them. Crucial to my argument, however, is the distinction between the assertion of jurisdiction and the ability to enforce a judgment. The assertion of jurisdiction opens a space for the articulation of a norm. Then, communities asserting jurisdiction must convince those with greater coercive power to enforce those norms. For example, when a Spanish judge chose to assert jurisdiction over former Chilean dictator Augusto Pinochet,[34] that seizure of jurisdiction had no literal power unless the judge could rhetorically persuade other countries to recognize the judgment.[35] Although the Spanish prosecution ultimately did not proceed,[36] the rhetorical

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[34] Spanish magistrate Baltasar Garzon issued an arrest order stating that Pinochet was "the leader of an international organization created . . . to conceive, develop, and execute the systematic planning of illegal detentions, [kidnappings], torture, forced relocations, assassinations and/or disappearances of numerous persons, including Argentines, Spaniards, Britons, Americans, Chileans, and other nationalities." Anne Swardson, *Pinochet Case Tries Spanish Legal Establishment*, WASH. POST, Oct. 22, 1998, at A27. On October 30, 1998, the Spanish National Court ruled unanimously that Spanish courts had jurisdiction over the matter based both on the principle of universal jurisdiction (that crimes against humanity can be tried anywhere at any time) and the passive personality principle of jurisdiction (that courts may try cases if their nationals are victims of crime, regardless of where the crime was committed). For an English translation of the opinion, see S Audiencia Nacional, Nov. 5, 1998 (No. 173/98), *reprinted in* THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 95, 107 (Reed Brody & Michael Ratner eds., 2000) [hereinafter PINOCHET PAPERS]. The Office of the Special Prosecutor had alleged that Spaniards living in Chile were among those killed under Pinochet's rule. PINOCHET PAPERS, *supra*, at 106; *see also infra* text accompanying notes 186-88 (discussing the *Pinochet* case).

[35] In this instance, Pinochet was physically in Great Britain. The British House of Lords ultimately ruled that Pinochet was not entitled to head-of-state immunity for acts of torture and could be extradited to Spain. *See* Regina v. Bow St. Metro. Stipendiary Magistrate, 1 A.C. 147 (H.L. 1999) (holding that the International Convention Against Torture, incorporated into United Kingdom law in 1988, prevented Pinochet from claiming head-of-state immunity after 1988, because the universal jurisdiction contemplated by the Convention is inconsistent with immunity for ex-heads of state).

[36] The British government refused to extradite, citing Pinochet's failing health, *see* Foreign Secretary Jack Straw, Statement in the House of Commons (Mar. 2, 2000), *in* PINOCHET PAPERS, *supra* note 34, at 481, 482 ("[I]n the light of th[e] medical evidence . . . I conclude[d] that no purpose would be served by continuing the Spanish extradition request."), and Pinochet was returned to Chile where, after domestic proceedings, he was deemed mentally unfit to stand trial, *see Pinochet Unfit for Trial, Chilean Court Rules*, N.Y. TIMES, July 10, 2001, at A2 ("An appeals court ruled that Gen. Augusto Pinochet, 85, is mentally unfit to stand trial

force of the assertion of jurisdiction has changed the environment for future international human rights prosecutions.[37] In a very real sense then, the assertion of jurisdiction has shaped the future world.

Thus, if a community asserts jurisdiction, it must—if it wants its judgment enforced—convince others of the justice of its ruling and the legitimacy of its assertion of community dominion. As a result, jurisdiction becomes the rhetorical site for discussions of multiple overlapping and shifting conceptions of community, and recognition of judgments becomes the terrain on which these alternative conceptions of community vie for persuasive power and legitimacy.

The cosmopolitan pluralist jurisdictional framework I propose, therefore, has two distinct normative components. First, it offers *state-sanctioned* courts an approach to questions of jurisdiction that attends to the social meaning of community definition and the construction of space. This approach, I argue, is not only more satisfying conceptually, but also identifies and makes explicit the sort of analysis judges are already intuitively beginning to use as they struggle to fashion jurisdictional rules in difficult cases. Second, my framework provides a way of both recognizing and evaluating *non-state* jurisdictional assertions that bind sub-, supra-, or transnational communities. Such non-state jurisdictional assertions include a wide range of entities, from official transnational and international regulatory and adjudicative bodies, to non-governmental quasi-legal tribunals, to private standard-setting or regulatory organizations. More broadly, the idea of a non-state jurisdictional assertion seeks to capture the development of transnational common law through the accretion of norms in practice.

My discussion proceeds in five parts. First, I describe some of the challenges that the rise of cyberspace and globalization pose to a legal system based on territorially based jurisdiction and fixed borders. The existence of such challenges suggests that, in a wide variety of legal settings, the rise of online interaction (and global interconnectedness more broadly) has raised difficult questions about the extraterritorial assertion of legal norms or adjudicatory authority. Second, I summarize several leading theories regarding how to adapt (if necessary) existing legal doctrine to address these challenges. These theories include schemes that seek large changes in contemporary legal regimes, as well as arguments that cyberspace and globalization

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[37] *See* Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT'L L. & POL. 527, 536 (2001) ("In a way that was not necessarily predictable, a national court . . . [has] made a connection between international law and a broader set of values than those to which states have given express approval."); *see also infra* Parts I.I, V.B.3.

present no true practical problem at all, and a number of positions in between. Although both the challenges and the responses have been major topics in the legal literature over the past few years, I believe that simply surveying conceptual difficulties that cut across a variety of doctrinal areas affords a more comprehensive view of the way in which territorially based understandings of legal rules have become problematic. Third, I argue that these various theories are unsatisfying because they fail to pay sufficient attention to the social meaning of legal jurisdiction and community definition. Then I begin to develop a more complex portrait of jurisdiction and its social meaning by identifying four different ways in which jurisdiction operates to constitute communities and define borders. Fourth, I survey some of the literature from other disciplines that complicates our understanding of the nation-state, community definition, territorial borders, and belonging. This literature reveals that far from having fixed geographical boundaries, community alliances are multiple, overlapping, and often contested, and that they frequently operate at a sub-, supra-, or transnational level. Moreover, the definition of community emerges as a politically charged (and sometimes hegemonic) social construction. Fifth, drawing on this literature, I begin to construct a cosmopolitan pluralist model for understanding the globalization of jurisdiction. In this model, jurisdictional assertions and contests about judgment recognition are placed at the center of debates about community definition and norm development. Finally, I discuss how such a conception might operate—and in some cases already is operating—in both cyberspace and international law practice, revisiting a few of the challenges discussed in Part I. This discussion suggests ways in which a cosmopolitan pluralist framework might contribute both to a more satisfying framework for state-sanctioned courts considering jurisdictional issues and a more detailed understanding of the wide variety of non-state assertions of jurisdiction.

One must always be wary of claims that the environment we live in today is radically different from anything that has come before. And, undoubtedly, some of the breathless quality of globalization and cyberspace literature is unwarranted. Indeed, by some measures, the world was just as "global" and interconnected at the end of the nineteenth century as it is today,[38] and we have been communicating over wires across nation-state borders for over a hundred years. In addition, although nation-states are historically contingent, they are, of course, significantly embedded in historical, social, and political contexts and continue to exert a powerful

[38] *See, e.g.*, Nicholas D. Kristof, *At This Rate, We'll Be Global in Another Hundred Years*, N.Y. TIMES, May 23, 1999, at 5 (suggesting that labor, goods, and capital moved across nation-state borders at least as much in the period from 1860 to 1900 as in the 1990s).

psychological and symbolic hold on the psyche of many. Thus, the idea of nation-state sovereignty is not likely to end anytime soon, though the nature of that sovereignty certainly is shifting.

It is not my intention, however, to prove conclusively that the twin engines of globalization and online interaction are necessarily creating an entirely new *crisis* that must be "solved" by revisiting the concept of legal jurisdiction (though I do not rule out that possibility either). Nor does my argument depend on any idea that the nation-state is dying or that it will cease to function as a primary means of defining political community anytime soon. Nevertheless, although it is dubious to assume that everything has changed in the past decade, it is also dubious to assume that nothing has. And while people in almost any given geographical location undoubtedly have always been affected by extraterritorial activities to some degree, in the past those effects were far more likely to be at least somewhat related to geographical proximity than they are today.[39] Even a cursory glance at a major newspaper on most days indicates, at the very least, that territorially based sovereigns are facing *challenges* regulating in this new environment.[40]

Such periods of challenge and adaptation are also moments of opportunity. Just as the increasing use of legal fictions in an area of law often indicates that the area is in flux, so too the widespread acknowledgment that new social developments challenge traditional legal rules indicates that those rules may benefit from reexamination. Thus, my aim in this Article is more limited: to lay out some of the conceptual challenges nation-states currently face in attempting to maintain distinctive territorially based regulatory regimes; to enrich our descriptive understanding of what it means in social as well as legal terms to assert jurisdiction over a territorially distant act or actor; to consider whether territorially based legal regimes fit people's experience of place, borders, and community affiliation; and to begin constructing a model that might allow the jurisdictional inquiry to correspond more accurately to this lived experience.

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[39] *See* David G. Post, *Against "Against Cyberanarchy*," 18 BERKELEY TECH. L.J. (forthcoming 2002) (manuscript at 18, on file with author) ("A plot of the location of all events and transactions taking place *in cyberspace* that have an effect on persons and property in [any particular location] will have virtually no geographic structure at all."), *available at* http://www.temple.edu/lawschool/dpost/Cyberanarchy.PDF (last visited Dec. 4, 2002).

[40] *See, e.g.*, T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197, 201-02 (2000) (noting that "there is no reason to assume that the nation-state form will be around forever" and identifying "serious challenges to nation-state sovereignty from three directions[:] supra-national norms and structures [(including international human rights and trade law),] subnational groups . . . demanding (and receiving) increasing degrees of autonomy, [and] 'transnationalism'—the presence within state borders of communities of non-nationals with significant ties across borders").

Although I offer one possible alternative approach to jurisdiction, it is less important that others embrace this particular framework than that whatever models they develop attend to the social meaning of legal jurisdiction as an important field of discourse and study. Indeed, those who argue that we need not change our jurisdictional framework at all will at least be forced to articulate a coherent understanding of community from which that framework arises and then test the framework against the experience of people who supposedly belong to such communities. Thus, if scholars wish to defend the nation-state as the only relevant jurisdictional entity or adopt a particular test for evaluating various assertions of jurisdiction, they must justify their normative choices; they cannot simply assume the jurisdictional world they assert is natural or inevitable.

In the end, this Article is premised on the belief that a more nuanced appreciation of the social meaning of jurisdiction helps bring together central strands of thought within cyberspace law, international law, civil procedure, and the cultural analysis of law. By viewing the problem of jurisdiction from all of these disciplinary perspectives at once, we can see that the traditional doctrinal boundaries interfere with a fuller understanding of jurisdictional rules. Indeed, it seems to me that cyberspace legal theory and international law increasingly are merging and that the place of intersection is the domain of jurisdiction and its social meaning. Like civil procedure, international law has long since moved away from a model of strict territoriality, yet its conceptualization of jurisdictional rules is similarly unsuccessful in addressing the broad range of legal challenges and the multitude of community affiliations at play in today's world. Even the recent U.S. government efforts to detain and possibly prosecute suspected Al Qaeda terrorists can perhaps more usefully be analyzed through a conception of legal jurisdiction and community membership that focuses on social meaning.[41] Thus, the idea of jurisdiction provides a particularly fruitful cross-disciplinary site for investigating the effects of globalization on legal systems.

I. TEN CHALLENGES

This Part surveys some of the conceptual challenges that have arisen in the past few years concerning the extraterritorial assertion of legal norms or adjudicatory authority to activity that, in one way or another, creates effects across borders. Although the list of challenges is by no means exhaustive,

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[41] *See infra* text accompanying notes 930-43 (applying a cosmopolitan pluralist model to the question of determining the community membership of U.S. citizens accused of aiding Al Qaeda terrorists).

my goal is to suggest that in a wide array of doctrinal areas the rise of online communication and global interconnectedness has forced courts and policy makers to wrestle with the difficulty of mapping a jurisdictional system based on fixed borders onto a world that resists—-in a myriad of ways—-such neat divisions.[42] Moreover, many of the examples also challenge territorially based assumptions about nation-state sovereignty. Indeed, the traditional understanding of inviolate national boundaries has been called into question by the increase of cross-border interaction and the rise of transnational and international administrative and judicial bodies. Thus, the precise contours of both extraterritorial adjudication and nation-state sovereignty are in flux.

For those who follow the legal literature on Internet-related developments, none of these scenarios—except possibly the challenge of international human rights—is new. Indeed, many of these issues have been explored by various scholars during the past several years, and many "solutions" to the challenges have been proposed. Nevertheless, although some (or perhaps all) of these challenges might be resolved without rethinking the concept of jurisdiction, I believe the existence of so many challenges creates the space for such rethinking to occur. To take one example, discussed in more detail below,[43] it certainly is the case that U.S. courts are capable of adapting the *International Shoe* minimum contacts test[44] to the online environment. And perhaps this approach is best. But it seems to me that, before the new adaptations become too entrenched, we might take this moment of transition to ask the fundamental questions that a narrow focus on adaptation never permits one to ask. Moreover, as I discuss later in the Article,[45] there is at least some evidence that courts and policymakers are already embracing more flexible understandings of jurisdiction and national boundaries, and not simply adapting settled jurisdictional and choice-of-law rules. Thus, the time for reexamination is now. The challenges discussed below may give some sense of why.

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[42] Such a jurisdictional system includes both adjudicatory jurisdiction and prescriptive jurisdiction (or choice of law). In this Article, I refer to both inquiries as issues of jurisdiction writ large. *See supra* note 21 (outlining the classification scheme for jurisdiction and discussing the types of jurisdiction treated in this Article).

[43] *See infra* Part II.J.1 (discussing various efforts to apply the *International Shoe* minimum contacts test to online interaction).

[44] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing a test for determining whether an assertion of personal jurisdiction comports with the Due Process Clause of the U.S. Constitution based on whether the defendant had sufficient contacts with the relevant state "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'").

[45] *Infra* Part II.J.1.

A. *The Challenge of "Minimum Contacts" in Cyberspace*

The U.S. Supreme Court's *International Shoe* test for determining whether an assertion of personal jurisdiction comports with the Due Process Clause of the U.S. Constitution asks whether the defendant has sufficient contact with the relevant state "such that . . . maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[46] This "minimum contacts" test is satisfied as long as the "quality and nature of the activity" of the defendant within the forum state is sufficient "in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[47] Although this test is obviously a matter of U.S. constitutional law and therefore not binding on courts elsewhere, it provides a useful starting point because the problems of extraterritorial activity affect all territorially based jurisdictional systems, even those that define the scope of jurisdiction (or choice of law) somewhat differently.

Since 1945, the minimum contacts test has provided the framework for determining the outer limits of personal jurisdiction under the U.S. Constitution.[48] Nevertheless, although the test's flexibility is its greatest strength, such flexibility has meant that the minimum contacts analysis does not provide a clearly defined rule because it relies instead on a highly particularized, fact-specific inquiry. Accordingly, it is difficult to be certain in advance how many and what sort of contacts will be enough for a state to exercise personal jurisdiction under the Federal Constitution. The Supreme Court has variously looked to whether defendants have "purposefully avail[ed]" themselves of the state's laws,[49] whether they could "reasonably

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[46] *Int'l Shoe*, 326 U.S. at 316.

[47] *Id.* at 319.

[48] The minimum contacts test, of course, establishes only the outer limit for the exercise of personal jurisdiction. Although states cannot assert jurisdiction *beyond* that which the Federal Constitution allows, they may choose to exercise *less* than the full authority granted by the Constitution. Some states have crafted their own statutes that voluntarily restrict their jurisdiction over out-of-state defendants beyond that which the Federal Constitution requires. *See, e.g.*, N.Y. C.P.L.R. 302 (McKinney 2002) (restricting New York's jurisdiction more than is required by the Federal Constitution); *see also* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 75 (5th ed. 2001) (noting that "legislatures adopting these [jurisdictional] statutes . . . presumably do not wish to reach the Constitutional limit"). In those states, courts may exercise personal jurisdiction only if the case falls within the limits of the state statute *and* jurisdiction is permitted under the Federal Constitution. *See* LARRY L. TEPLY & RALPH V. WHITTEN, CIVIL PROCEDURE 277 (1994) ("In addition to the issues of constitutional validity that arise whenever any long-arm statute is applied to the facts of a specific case, there also exist questions of statutory applicability that must be worked out on a case-by-case basis.").

[49] *See* Hanson v. Denckla, 357 U.S. 235, 253 (1958) ("[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.").

anticipate" that they would be sued there,[50] or whether the interests of the state in adjudicating a dispute outweighed the defendants' concerns about increased cost, inconvenience, or potential bias.[51] In addition, some members of the Court have indicated that a state may assert personal jurisdiction even when the only link to the forum state is that a corporation "'delivers its products into the *stream of commerce* with the expectation that they will be purchased by consumers in the forum State.'"[52]

Not surprisingly, the growth of the Internet has added new wrinkles to the minimum contacts test. After all, when I post information on a website, it is immediately accessible throughout the world. Have I then "purposely availed" myself of any jurisdiction where someone views that website? Can I "reasonably anticipate" that the information posted will be viewed elsewhere? Have I placed my site into the "stream of commerce" and if so, does that mean I should be amenable to suit wherever the site is available?

B. *The Challenge of E-Commerce*

If a consumer purchases goods online, what law should apply to the transaction, and which jurisdiction will adjudicate any subsequent dispute? In many cases, the consumer will not know whether the website she has just accessed is "located" on a server just down the street or on a different continent (and indeed a single website may have elements that reside on multiple

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

[51] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985) (allowing a court to consider establishment of minimum contacts "in light of other factors," such as "'the burden on the defendant'" and "'the forum State's interest in adjudicating the dispute'" (quoting *World-Wide Volkswagen*, 444 U.S. at 292)).

[52] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 119-20 (1987) (Brennan, J., concurring in part and concurring in the judgment) (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 298). In *Asahi*, four Justices indicated that simply placing a product into the stream of commerce would *not* be sufficient to establish jurisdiction wherever that product happened to end up. *Id.* at 112 (O'Connor, J., joined by Rehnquist, C.J., Powell, Scalia, JJ.). Instead, these Justices would require some sort of "additional conduct" by the defendant that would demonstrate that the defendant had the specific "intent or purpose to serve the market" in the state exercising jurisdiction. *Id.* Four other Justices (including Justice Brennan) disagreed, arguing that simply placing a product into the stream of commerce was sufficient. *Id.* at 117 (Brennan, J., concurring in part and concurring in the judgment). The ninth Justice, Justice Stevens, found that, based on the facts of the case, jurisdiction was improper under either test and therefore declined to choose between them. *Id.* at 121-22 (Stevens, J., concurring in part and concurring in the judgment). As a result, neither rationale achieved a majority, and the Supreme Court has not directly addressed the stream-of-commerce question since.

servers in multiple locations). For example, if a French consumer accesses a "Swedish" website, has she somehow "entered" Sweden for purposes of jurisdiction and choice of law?

Moreover, the possibility that the site itself might require the consumer to agree to contractual terms that include choice-of-law and forum selection clauses may not fully resolve the dilemma.[53] Some countries may determine that such "clickstream" agreements are enforceable,[54] while others might view them as not being true bargains because the bargaining power among the participants might be unequal.[55] Or countries might determine that consumer protection issues implicate public values that cannot simply be contracted away by parties to a transaction.[56] If so, which jurisdiction's consumer protection law should apply?

The European Union (EU), in an attempt to address these challenges, adopted a directive[57] in early summer 2000 enshrining the "country of origin" principle for such sales. Under the directive, the law of the country of the merchant or service provider applies in the event of a dispute.[58] Several

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[53] *Cf.* Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 204-06 (2d Cir. 1955) (Frank, J., dissenting) (arguing that a choice-of-law provision in a contract of adhesion should not be honored). *See generally*, Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1089-90 (1953) (arguing that American courts should justify not enforcing choice-of-law provisions in adhesion contracts by recognizing that the principle of party autonomy has no place in conflicts law, rather than by misconstruing contract law).

[54] *See, e.g.*, Kilgallen v. Network Solutions Inc., 99 F. Supp. 2d 125, 129 (D. Mass. 2000) (holding that forum selection clauses are enforceable unless proven unreasonable under the circumstances); Forrest v. Verizon Communications, Inc., 805 A.2d 1007, 1010-11 (D.C. 2002) (holding that a consumer received adequate notice of the forum selection clause in an electronic contract); Rudder v. Microsoft Corp., [1999] 2 C.P.R.4th 474 (Ont. Super. Ct. J.) (holding that to find the forum selection clause unenforceable would undermine the integrity of any agreement entered into through the web).

[55] *See, e.g.*, Specht v. Netscape Communications Corp., No. 01-7870, 2002 WL 31166784, at *2-4 (2d Cir. Oct. 1, 2002) (ruling that Internet users could not be bound by a license agreement mandating arbitration when the provision was buried on the second page of a free software download program); Comb v. PayPal, Inc., No. C-02-1227JF, 2002 WL 2002171, at *6-9 (N.D. Cal. Aug. 30, 2002) (refusing to enforce an arbitration clause in an electronic contract on grounds of procedural and substantive unconscionability).

[56] *See, e.g.*, Williams v. Am. Online, Inc., No. 00-0962, 2001 WL 135825, at *3 (Mass. Super. Ct. Feb. 8, 2001) (refusing to enforce forum selection clause contained in America Online's Terms of Service agreement in part because "[p]ublic policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars should not have to pursue AOL in Virginia").

[57] A directive by the European Union is binding legislation on the Member States as to the result(s) achieved, but allows national authorities the choice of various methods of implementation. *See* TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, art. 249, O.J. (C 340) 2 (1997) [hereinafter EC TREATY].

[58] *See* Council Directive 2000/31, art. 22, 2000 O.J. (L 178) 1, 4 ("[I]nformation society services should . . . be subject to the law of the Member State in which the service provider is established.").

months later, however, the European Commission[59] indicated that it might adopt the so-called Rome II Regulation, which would reverse the directive and make the laws of the *consumer's* country apply in cross-border e-commerce disputes, absent contractual provisions to the contrary.[60] Since then, under heavy pressure from business interests, the EU has backed off the idea of enacting Rome II.[61] These flip-flops demonstrate how contentious the question of jurisdiction over e-commerce activities has become.

C. *The Challenge of International Taxation*

Historically, taxation regimes have been based on geography and have depended on the traditional nation-state structure.[62] Thus, the issue of who gets to collect a tax generally boils down to questions such as: Where did the transaction take place? Where did the income stream arise? Where is the company located? Needless to say, these questions can be quite difficult to resolve in the context of digital transactions. Indeed, one commentator has noted: "[T]he basic assumption underlying economic governance in the

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[59] The European Commission is the EU's functional equivalent to the executive branch in the United States. *See* EC TREATY, *supra* note 57, at arts. 211-19 (establishing the European Commission and describing its powers and duties).

[60] *See* Communication from the Commission to the Council and the European Parliament on E-commerce and Financial Services, COM(01)66 final at 8 (holding that, in the absence of a choice-of-law provision in a consumer contract, the contract is governed by the law of the consumer's "habitual residence").

[61] *See* John Duckers, *Regulation Tide Begins to Recede*, BIRMINGHAM POST, Feb. 15, 2002, at 24, 2002 WL 13710809 (reporting that the European Commission has "shelved" its Rome II negotiations, indicating that "'business is making its voice heard in Europe's corridors of power'" (quoting Andrew Sparrow, Partner, Lee Crowder Solicitors)); Paul Meller, *Europe Panel Is Rethinking How It Views E-Commerce*, N.Y. TIMES, June 27, 2001, at W1 (noting the EC's reversal on the country-of-destination approach).

[62] *See* Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 277-82 (2001) (discussing the history of, and justifications for, the focus in tax policy on the prerogatives and interests of nation-states). In fact, most modern countries have based their tax policies on traditional notions of a nation-state's sovereign authority over its subjects. *See* Stephen G. Utz, *Tax Harmonization and Coordination in Europe and America*, 9 CONN. J. INT'L L. 767, 769 (1994) [hereinafter Utz, *Tax Harmonization*] ("Until recently, discussions of tax policy usually assumed that a taxing sovereign could . . . [tax] almost exclusively . . . the economic conduct of its own citizens."). Early tax policy analysts assumed that the geographically fixed nation-state possessed inherent taxing authority, reflecting the unrivalled view that "nations were natural units and that within their bounds national governments were sovereign for all purposes." STEPHEN G. UTZ, TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPAL DEBATES 56 (1993). Under this vision, nation-states "claim full taxing authority over people, property, and transactions 'within' their territory." *Id.* at 195.

modern era is that, regardless of how international the world economy, any transaction can be located precisely in two dimensional geographic space."[63] He goes on to state bluntly, however, that "[g]eography does not map on cyberspace."[64]

For example, imagine a company that provides online data services or that transmits wireless messages via satellite. Should the profits from these services be taxed in any country where the business has customers? The overwhelming majority of bilateral income tax agreements allow taxation if a business maintains a "permanent establishment" (PE) in a particular jurisdiction, but otherwise does not allow taxation of "business profits" derived from that jurisdiction.[65] In an e-commerce world, the need to have such a permanent establishment is dramatically reduced. A company may maintain no particular physical presence in the country at issue. Or the only presence may be a server located in the country, but normally that server is owned or operated by someone else. Are the electronic signals passing through the server sufficient to create a presence or "permanent establishment" so as to justify taxation?

The Committee on Fiscal Affairs of the Organization for Economic Cooperation and Development (OECD), which administers the model income tax convention that forms the basis of most bilateral agreements, recently attempted to clarify the definition of what constitutes a "permanent establishment" (PE):

> [T]he clarification states that a web site cannot, in itself, constitute a PE; that a web site hosting arrangement typically does not result in a PE for the enterprise that carries on business through that web site; that an Internet service provider normally will not constitute a dependent agent of another enterprise so as to constitute a PE for that enterprise and that while a place where computer equipment, such as a server, is located may in certain circumstances constitute a permanent establishment, this requires that the functions performed at that place be significant as well as an essential or core part of the business activity of the enterprise.[66]

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[63] Stephen J. Kobrin, *Taxing Internet Transactions*, 21 U. PA. J. INT'L ECON. L. 666, 671 (2000).

[64] *Id.*

[65] *See, e.g.*, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL art. 7, § 1 (Org. for Econ. Cooperation & Dev. Comm. on Fiscal Affairs 1997) (stating that an enterprise of one state doing business in another shall not be taxed in the second state unless it has a permanent establishment there).

[66] Press Release, Technical Advisory Group, Organization for Economic Cooperation and Development, OECD Progresses Towards Achieving an International Consensus on the Tax Treatment of E-Commerce (Dec. 2, 2001), *at* http://www.oecd.org/EN/document/0,,EN-document-590-17-no-12-6697-590,00.html; *see also* OECD Committee on Fiscal Affairs, *Clarification on the Application of the Permanent Establishment Definition*

While this clarification may sound reasonable, it poses a major problem for developing countries that rely on tax revenue from foreign investment because corporations can now more easily avoid local taxation by maintaining only an "e-presence" in a given country.[67]

Turning from income taxes to consumption taxes, while local governments can impose a tax on residents' purchases from distant vendors, they will find it difficult to impose an obligation on those vendors to collect the tax absent a physical presence in the locality.[68] In addition, increasing e-commerce may lead to the gradual elimination of intermediaries, who have been crucial for identifying taxpayers.[69] Finally, although so-called "low value" shipments across borders historically have been granted de minimis relief from customs duties and taxes, the rise of e-commerce may increase the number of direct orders from foreign suppliers, leading either to substantial loss of tax revenue or higher customs collection costs.[70] Thus, as with income taxes, there are fears that e-commerce will result in an erosion of the consumption tax base, which might disproportionately affect the economies

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in E-Commerce: Changes to the Commentary on the Model Tax Convention on Article 5 para. 3., Organization for Economic Co-operation and Development 3 (Dec. 22, 2000), *at* http://www.oecd.org/daf/fa/e_com/ec_1_PE_Eng.pdf (providing the language used in the press release). Similarly, language on taxation in the Restatement of Foreign Relations Law requires that corporations have a physical presence within a jurisdiction before a state can tax its income. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 412 (1987) (noting that a state may tax corporations if they have a physical presence within the state or conduct business within the state).

[67] Even within the United States, the issue of physical nexus is controversial. For example, California's State Board of Equalization recently issued an opinion asserting that Borders.com can be required to collect California sales tax despite the fact that Borders.com has no property or employees in California. *See* Borders Online, Inc., SC OHA 97-638364 56270, at 4 (Cal. Bd. Equalization Sept. 26, 2001) (mem.), http://www.boe.ca.gov/legal/pdf/borders.pdf) (holding that Borders.com's in-state authorized representatives for receiving product returns created a "substantial nexus" between Borders.com and the state). The board based its opinion on the fact that Borders Books stores—a separate corporation that does have a physical presence in California—accepts returns of books purchased online at Borders.com, thus establishing the requisite "nexus" between the two. *Id.* at 5. While it is beyond the scope of this Article to debate whether this particular determination is justified, the tenuous nature of the nexus inquiry is clear.

[68] *See* Richard Jones & Subhajit Basu, *Taxation of Electronic Commerce: A Developing Problem*, 16 INT'L REV. L. COMPUTERS & TECH. 35, 38 (2002) ("Whereas states can impose a tax on residents' purchases from out-of-state vendors, they cannot impose an obligation on those vendors to collect the tax unless the vendor has a substantial presence, or nexus, in the state.").

[69] *See id.* at 37 (arguing that e-commerce "leads to the gradual elimination of intermediaries, such as wholesalers or local retailers, who in the past have been critical for identifying taxpayers, especially private consumers").

[70] *See id.* at 37-38 (explaining the challenge that tax and customs authorities face from an increase in "low value" shipments since the amount of tax due on such shipments is lower than the cost of collection).

of developing countries.[71]

Stephen J. Kobrin, Director of the Wharton School's Institute of Management and International Studies, recently offered an example of the difficulties.[72] Assume a software programmer in India is working in real time to upgrade a bank's computer system in New York; using the bank's servers, which are in New Jersey; so that the bank's accounting office, located in Ireland, can function more efficiently. Certainly an economically valuable service is being rendered, but where does the taxable transaction take place?[73]

Kobrin argues that in discussions of Internet taxation issues such as this one, four assumptions are generally at work. First, taxation should be economically neutral—that is, it should not influence the location or form of economic activity. Second, transactions that are either doubly or triply taxed, or not taxed at all, should be avoided. Third, there should be an equitable distribution of tax revenue. Fourth, fiscal sovereignty based on geographically defined nation-states should be maintained.[74] As the question of permanent establishment indicates, however, it will be difficult to satisfy all four of these principles simultaneously. Indeed, given the nongeographic nature of digital transactions, "it may be impossible to resolve 'jurisdictional' issues, distribute revenue, or even collect sufficient revenues to sustain governmental activities while maintaining the practice or principle of mutually exclusive jurisdiction-—political and economic control exercised through control over geography."[75] According to Kobrin, an efficient and just tax system may ultimately require a far greater degree of international cooperation and redistribution than we have seen in global tax policy thus far.[76]

D. *The Challenge of Extraterritorial Regulation of Speech*

Cyberspace creates the possibility (and perhaps even the likelihood) that content posted online by a person in one physical location will violate

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[71] *See id.* at 41 (discussing a study indicating that, although developing countries account for only sixteen percent of world imports of digitized goods, their share of tariff revenue loss for such goods is almost double that of industrialized countries).

[72] Kobrin, *supra* note 63, at 670-71.

[73] *See id.* (posing a hypothetical that presents the same problem).

[74] *Id.* at 672.

[75] *Id.*

[76] *See id.* ("In the digital age, effective, efficient, and just tax systems may require substantive international cooperation."); *see also* Jones & Basu, *supra* note 68, at 49 (arguing that the OECD is "dominated by the U.S. and the developed world," resulting in "solutions devised for and beneficial to the developed world"). *See generally* Utz, *Tax Harmonization*, *supra* note 62, at 767-72 (describing the difficulties of forging international tax policy).

the law in some other physical location. In such circumstances there is an inevitable problem of extraterritoriality. Will the person who posts the content be required to conform her activities to the norms of the most restrictive community of readers? Or, alternatively, will the 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 in part on whether the community of readers asserts the jurisdictional authority to impose its norms on the foreign content provider.

Recently, a French court addressed this jurisdictional issue and claimed the power to regulate the content of an American website accessible in France. On May 22, 2000, the Tribunal de Grande Instance de Paris issued a preliminary injunction against Yahoo.com, ordering the site to take all possible measures to dissuade and prevent access in France of Yahoo! auction sites that sell Nazi memorabilia or other items that are sympathetic to Nazism or constitute holocaust denial.[77] Undisputedly, selling such merchandise in France would violate French law,[78] and Yahoo.fr, Yahoo!'s French subsidiary, complied with requests that access to such sites be blocked.[79] What made this action noteworthy was the fact that the suit was brought not only against Yahoo.fr, but against Yahoo.com, an American corporation, and the fact that the court sought to enjoin access to non-French websites stored on Yahoo!'s non-French servers.

Of course, one can easily see why the court and the complainants in this action would have taken this additional step. Shutting down access to web pages on Yahoo.fr does no good at all if French citizens can, with the click of a mouse, simply go to Yahoo.com and access those same pages. On the other hand, Yahoo! argued that the French assertion of jurisdiction was impermissibly extraterritorial in scope.[80] According to Yahoo!, in order to comply with the injunction it would need to remove the pages from its servers altogether (not just for French people), thereby denying such material to non-French citizens, many of whom have the right to access the materials under the laws of their countries.[81] Most important, Yahoo! argued that

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[77] T.G.I. Paris, May 22, 2000, http://www.juriscom.net/txt/jurisfr/cti/tgiparis2000522.htm. An example of the type of auction page at issue can be found at http://www.legalis.net/jnet/illustration/yahoo_auctions.htm (last visited Oct. 22, 2002).

[78] *See* CODE PÉNAL [C. PÉN.] art. R. 645-1 (Fr.) (prohibiting the public display of Nazi memorabilia except for the purposes of an historical film, show, or exhibit).

[79] *See* T.G.I. Paris, Nov. 20, 2000 (noting that Yahoo! France had posted warnings on its site that through Yahoo! U.S., the user could access revisionist sites, the visiting of which is prohibited and punishable by French law), http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm.

[80] *Id.*

[81] *Id.*

such extraterritorial censoring of American web content would run afoul of the First Amendment of the U.S. Constitution.[82] Thus, Yahoo! and others[83] contended that the French assertion of jurisdiction was an impermissible attempt by France to impose global rules for Internet expression.[84]

Interestingly, an Australian case decided the previous year had adopted this same logic in refusing to enjoin material posted on the Internet by a person in the United States that was allegedly defamatory under Australian law.[85] According to the court, "Once published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of the publication."[86] The court went on to explain:

> The difficulties are obvious. An injunction to restrain defamation in NSW [New South Wales] is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory and country of the world. Yet that would be the effect of an order restraining publication on the Internet. It is not to be assumed that the law of defamation in other countries is coextensive with that of NSW, and indeed, one knows that it is not. It may very well be that, according to the law of the Bahamas, Tazhakistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court.[87]

Thus, the court adopted precisely the type of argument Yahoo! made before the French investigating judge and declined to make a ruling that it saw as unavoidably extraterritorial in scope.[88]

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[82] *Id.*

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

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

[85] *See* Macquarie Bank Ltd. v. Berg (N.S.W.S. Ct. June 2, 1999) (refusing to grant an order restraining the publication of allegedly defamatory material on the Internet because such an order would impose the defamation laws of New South Wales on other countries), http://www.austlii.edu.au/au/cases/nsw/supreme_ct.

[86] *Id.* at para. 12.

[87] *Id.* at para. 14.

[88] *But see* Gutnick v. Dow Jones & Co., (V.S. Ct. Aug. 28, 2001) (asserting jurisdiction over an American publisher for publishing on its website an article allegedly defaming an Australian citizen), http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/

The French judge took a different tack, however, and decided to investigate the empirical basis for Yahoo!'s position. Thus, the court engaged a panel of three technical experts to determine whether Yahoo! could, under existing technology, identify and filter out French users from the auction sites in question, while maintaining access to those sites for other users.[89] The panel, though partially divided,[90] ultimately concluded that for approximately seventy percent of the French users of Yahoo.com, identifying the location of the user would be feasible.[91] Armed with that information, the court then reissued its injunction.[92] Meanwhile, a group of Auschwitz survivors initiated a separate action in France against Yahoo! CEO Timothy Koogle because of the availability of Nazi-related goods on the site.[93]

Rather than filter out French users, Yahoo! decided to remove the auction sites from its servers altogether. Although Yahoo! claimed that its decision was "voluntary" and unrelated to the French court ruling,[94] civil liber-

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vic/VSC/2001/305.html?query=title+%28+%22gutnick%22+%29.

[89] *See* T.G.I. Paris, Aug. 11, 2000 (ordering the formation of a panel of technical experts to determine whether Yahoo could identify and filter out French users from the sites found to violate French law), http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord_tgi-paris_110800.htm.

[90] One of the three members, Vinton Cerf, objected to the part of the experts' report recommending that Yahoo! be forced to ask users their location upon accessing the site. *See* T.G.I. Paris, Nov. 20, 2000 (providing Cerf's objections), http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm. According to Cerf, such a requirement would be both ineffectual (because users could lie and because Yahoo! could not force sites accessed through Yahoo! to ask about location) and an invasion of privacy. *Id.* In addition, Cerf argued that any order should not extend to French citizens who are not in French territory at the time of their access to the Internet because the court's jurisdiction as to those individuals is unclear. *Id.* Although a second member of the expert panel, Ben Laurie, did not dissent from the recommendation, he subsequently posted to the web an open letter, titled "An Expert's Apology." Open Letter from Ben Laurie, An Expert's Apology (Nov. 21, 2000), *at* http://www.apache-ssl.org/apology.html. In the letter, Laurie explained that though the panel had attempted to answer the narrow question posed by the court (to what extent was it technically possible for Yahoo! to comply with the court's order), the expert report did not necessarily reflect his policy opinion on the question. *Id.* Laurie also argued that any geographical filtering would be "inaccurate, ineffective and trivially avoid[able]" and would impose a tremendous burden on services such as Yahoo!, which would be required "to maintain a huge matrix of pages versus jurisdictions to see who can and can't see what." *Id.*

[91] *See* T.G.I. Paris, Nov. 6, 2000 (setting forth the report of court-appointed experts), http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001106-rp.htm.

[92] *See* T.G.I. Paris, Nov. 20, 2000, *supra* note 90 (ordering Yahoo! to comply with the court's order of May 22, 2000).

[93] *See, e.g.*, *French Auschwitz Group Sues Yahoo!*, REUTERS, Jan. 23, 2001, *at* http://news.zdnet.co.uk/story/0,,t269-s2083893,00.html (reporting that the group seeks "a symbolic one franc of damages").

[94] *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

tarians viewed Yahoo!'s capitulation as evidence that the French court had successfully engaged in extraterritorial censorship.[95] Indeed, on its face, the French ruling looked like the classic 1808 case in which Lord Ellenborough ruled that a default judgment against a British citizen issued in Tobago should not be enforced and asked rhetorically, "Can the island of Tobago pass a law to bind the rights of the whole world?"[96]

Although in conflict with the Australian defamation case, the French judgment is not anomalous. Shortly after the French court ruling, Italy's highest court, in an appeal of an online defamation case, ruled that Italian courts can assert jurisdiction over foreign-based websites and shut them down if they do not abide by Italian law.[97] The court determined, as in *Yahoo!*, that Italian courts have jurisdiction either when an act or omission has actually been committed on Italian territory or when simply the *effects* or consequences of an act are felt in Italy.[98] Likewise, Germany's second-highest court ruled that an Australian website owner—-whose website questioning the Holocaust is illegal in Germany but not in Australia—-could be jailed for violating German speech laws.[99] Germany's interior minister subsequently announced that he was examining "the possibilities of using [German] civil laws to sue the creators of right-wing web sites based in the

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groups which promote or glorify hatred and violence"). *But cf.* Troy Wolverton & Jeff Pelline, *Yahoo to Charge Auction Fees, Ban Hate Materials*, CNET NEWS.COM, Jan. 2, 2001, *at* http://news.cnet.com/news/0-1007-200-4352889.html (noting that Yahoo!'s new policy regarding hate-related materials followed action by the French court).

[95] *See, e.g.*, Center for Democracy and Technology, *A Briefing on Public Policy Issues Affecting Civil Liberties Online*, 6 CDT POLICY POST (Nov. 21, 2000), *at* http://www.cdt.org/publications/pp_6.20.shtml (discussing the dangerous precedent set for countries seeking to restrict free expression outside their borders); *see also* Jen Muehlbauer, *Borderless Net, RIP?*, INDUSTRY STANDARD, Nov. 21, 2000, *at* http://thestandard.com/article/display/0,1151,20331,00.html (criticizing the French court's ruling on the ground that it imposed international censorship on the Internet).

[96] Buchanan v. Rucker, 103 Eng. Rep. 546, 547 (K.B. 1808).

[97] Cass., 27 dec. 2000, *translated at* http://www.cdt.org/speech/international/001227italiandecision.pdf; *see also Italy: Foreign 'Net Sites Can Be Closed*, UPI, Jan. 10, 2001, LEXIS, UPI File (reporting decision and noting that "[i]t was not immediately clear, however, how [an order to shut down a foreign web site] could be implemented or enforced"). The case was brought by a Jewish man who said he was defamed by a number of websites that claimed he was holding his two daughters captive in the city of Genoa and was preventing them from practicing Judaism. Cass., 27 dec. 2000, *supra*. In fact, the man had been granted sole custody of the girls after his wife had taken them to Israel and married an ultra-orthodox rabbi. *Id.*

[98] Cass., 27 dec. 2000, *supra* note 97.

[99] *See Australian Faces Trial for Holocaust Denial*, REUTERS, Dec. 14, 2000, *at* http://www.zdnet.com.au/newstech/news/story/0,2000025345,20107617,00.htm ("[T]he Federal Supreme Court in Germany ruled that the former school teacher could be charged with inciting racial hatred under German law because the offending material, which denied the deaths of millions of Jews during the Nazi era, could be accessed by German Internet users.").

USA that have an effect in Germany."[100] Even in Australia, a second ruling has been issued in a separate online defamation case that contradicts the earlier one.[101]

Most recently, the Canadian Human Rights Tribunal ordered Ernst Zündel, a former Canadian resident now living in the United States, to remove anti-Semitic hate speech from his California-based Internet site.[102] The Tribunal's order recognized that the Tribunal might have difficulty enforcing its ruling, but determined 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 [its] decision."[103]

For its part, Yahoo! continued its legal battle and recently won a judgment in U.S. District Court in California declaring that the French court ruling cannot be recognized or enforced in the United States largely because the French judgment ran counter to the First Amendment.[104] An appeal of that judgment is still pending.[105] No matter how the American case is ultimately resolved, though, the French court's willingness to assert its norms over cyberspace content originating elsewhere demonstrates some of the difficulties that result from the ease with which online content crosses territorial borders.

E. *The Challenge of the Dormant Commerce Clause*

In the United States, courts have begun to invoke many of the same ex-

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[100] Ned Stafford, *German Official Seeks Help to Shut U.S.-Based Hate Sites*, NEWSBYTES, Aug. 6, 2001, LEXIS, Newsbytes File.

[101] Gutnick v. Dow Jones & Co. (V.S. Ct. 2001), http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VSC/2001/305.html?query=title+%28+%22gutnick%22+%29.

[102] Citron v. Zündel (Canadian Human Rights Trib. Jan. 18, 2002), http://www.chrt-tcdp.gc.ca/decisions/docs/citron-e.htm; *see also* Peter Cameron, *Hate Web Sites Have "No Place in Canadian Society": Commission*, LONDON FREE PRESS, Jan. 19, 2002, at B5 (describing a ruling that held "an Internet site that promotes hate against any group contravenes the Canadian Human Rights Act" because "hate messaging has no place in Canadian Society").

[103] Citron v. Zündel, para. 57 (Canadian Human Rights Trib. Jan. 18, 2002), http://www.chrt-tcdp.gc.ca/decisions/docs/citron-e.htm; *see also* Cameron, *supra* note 102 (quoting a Commission spokesperson as acknowledging that "[w]e have no experience with enforcing compliance in cases involving the Internet").

[104] Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Cal. 2001).

[105] Similar issues of regulatory "spillover" from one jurisdiction to another have been raised in the United States in the context of the so-called "dormant" Commerce Clause. *See infra* Part I.E.

traterritoriality concerns raised by *Yahoo!* to strike down state regulation of Internet activity under the so-called "dormant" Commerce Clause.[106] Generally speaking, the dormant Commerce Clause limits state regulations based on their effects outside the state.[107] Thus, as in the jurisdictional inquiry, the dormant Commerce Clause analysis is premised upon the importance of fixed geographical boundaries and the presumed danger of extraterritorial regulation. In the cyberspace context, such an emphasis on territorial boundaries threatens the validity of many state efforts to regulate Internet activity. For example, in one of the first cases to apply the dormant Commerce Clause to cyberspace, *American Library Association v. Pataki*,[108] a federal district court enjoined enforcement of a New York statute that prohibited the intentional use of the Internet "to initiate or engage" in certain pornographic communications deemed to be "harmful to minors."[109] The court reasoned that, because materials posted to the web anywhere are accessible in New York, application of the statute might chill the activities of non-New York content providers and force them to conform their behavior to New York's standard.[110] Moreover, according to the court, because states regulate pornographic communications differently, "a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and

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[106] The Commerce Clause grants Congress the power "To regulate Commerce with Foreign nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Implicit in this affirmative grant is the negative or "dormant" Commerce Clause—-the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce. This idea is usually traced to Justice Johnson's concurrence in *Gibbons v. Ogden*, where he stated:

> And since the power to [regulate commerce] necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J., concurring).

[107] The Supreme Court has formulated the dormant Commerce Clause analysis as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citation omitted).

[108] 969 F. Supp. 160 (S.D.N.Y. 1997).

[109] *Id.* at 183-84 (enjoining enforcement of N.Y. PENAL LAW §§ 235.20(6), 235.21(3) (McKinney 2000)).

[110] *Id.* at 177.

possibly was unaware were being accessed."[111] Thus, the court determined that the New York statute impermissibly regulated interstate commerce.

Other courts have struck down state Internet regulations concerning pornographic content on similar grounds. For example, courts have used the dormant Commerce Clause to issue preliminary injunctions against the enforcement of a New Mexico statute criminalizing dissemination by computer of materials harmful to minors,[112] a Virginia law regulating pornographic communications,[113] and a Michigan statute criminalizing the use of computers to distribute sexually explicit materials to minors.[114]

But the reach of the dormant Commerce Clause has extended far more broadly than that. Indeed, as commentators have pointed out, under the logic of *American Library*, "nearly every state regulation of Internet communications will have the extraterritorial consequences the court bemoaned," including "state antigambling laws, computer crime laws, various consumer protection laws, libel laws, licensing laws, and many more."[115] A court in California, for example, invalidated, under the dormant Commerce Clause, a state law regulating "junk" e-mail.[116] Likewise, the First Circuit ruled that a Massachusetts cigar advertising law, if applied to Internet advertising, would violate the dormant Commerce Clause,[117] and a federal district

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[111] *Id.* at 168-69.

[112] *See* ACLU v. Johnson, 194 F.3d 1149, 1160-63 (10th Cir. 1999) (deciding that the statute, N.M. STAT. ANN. § 30-37-3.2(A) (Michie 1998), violates the Commerce Clause because it regulates conduct that occurs wholly outside of New Mexico, burdens interstate and foreign commerce unreasonably, and subjects "interstate use of the Internet to inconsistent state regulation").

[113] *See* PSINet, Inc. v. Chapman, 108 F. Supp. 2d 611, 626 (W.D. Va. 2000) ("[Virginia Code] § 18.2-391 constitutes an undue burden on interstate commerce because it attempts to regulate commercial conduct wholly outside of Virginia's borders.").

[114] *See* Cyberspace Communications, Inc. v. Engler, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999) ("The Act is, as a direct regulation of interstate commerce, a per se violation of the Commerce Clause.").

[115] Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 787 (2001).

[116] *See* Ferguson v. Friendfinders, Inc., 115 Cal. Rptr. 2d 258, 267-68 (Cal. App. Dep't Super. Ct. 2002) (affirming the lower court's ruling sustaining demurrer); *see also* Evan Hansen, *Court Kills Key Parts of Bulk Email Law*, CNET NEWS.COM, June 9, 2000, *at* http://news.com.com/2100-1023-241711.html?legacy=chet (discussing *Ferguson v. Friendfinders*); Carl S. Kaplan, *In Spam Case, Another Defeat for State Internet Laws*, N.Y. TIMES , Mar. 24, 2000, *at* http://www.nytimes.com/library/tech/00/03/cyber/cyberlaw/24law.html (discussing the "string of decisions questioning the ability of states to enforce their own Internet laws"). *But see* State v. Heckel, 24 P.3d 404 (Wash. 2001) (upholding, in the face of a dormant Commerce Clause challenge, a Washington state law that prohibits both the transmission of commercial electronic mail from an Internet domain without permission of a third party who owns the domain and the transmission of e-mail that is false or misleading).

[117] Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 56-57 (1st Cir. 2000) (holding that requir-

court in Illinois similarly enjoined enforcement of a state statute prohibiting advertising of certain controlled substances, in part because the pharmaceutical company challenging the ban would not be able to comply with the statute unless it canceled all Internet advertising.[118]

Scholars are divided on whether the emerging dormant Commerce Clause jurisprudence in cyberspace is justified,[119] but it is clear that the same concerns about cross-border regulation of the Internet that appear in the international context raise challenges within a federal system as well. The most recent wrinkle on this question is the Jurisdictional Certainty Over Digital Commerce Act,[120] which was recently introduced in Congress. The bill would reserve to Congress exclusively the right to regulate "commercial transactions of digital goods and services conducted through the Internet,"[121] thus seemingly preempting all state regulation of online activity.[122]

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ing warnings on interstate advertisement is unconstitutional), *aff'd in pt., rev'd in pt. on other grounds sub nom.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); *see also* Carl S. Kaplan, *Ruling Favors Tobacco Companies*, N.Y. TIMES ON THE WEB, Nov. 17, 2000, *at* http://www.nytimes.com/2000/11/17/technology/17CYBERLAW.html (discussing a ruling in the Southern District of New York "that a New York law effectively banning the direct sale of cigarettes to New Yorkers via the Internet is likely to be unconstitutional"); *cf.* Santa Fe Natural Tobacco Co. v. Spitzer, No. 00 Civ. 7274 (LAP), 2001 U.S. Dist. LEXIS 7548, at *97 (S.D.N.Y. June 8, 2001) (permanently enjoining, on dormant Commerce Clause grounds, enforcement of a state law that effectively prohibits Internet and mail order sales of cigarettes).

[118] *See* Knoll Pharm. Co. v. Sherman, 57 F. Supp. 2d 615, 623 (N.D. Ill. 1999) ("[O]verwhelming evidence has been submitted showing that the practical effect of a ban against advertising Meridia in Illinois would . . . force the removal of advertising in nationally distributed publications and broadcasts . . . . There is no technological or commercially realistic means to black Illinois out of a national advertising market.").

[119] *Compare* Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123-34 (1996) (arguing that the dormant Commerce Clause is an appropriate and "significant check to individual states' regulation of Internet activity"), Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1593-96 (1999) (arguing that dormant Commerce Clause problems can be avoided by focusing on federal regulation and prosecution), Glenn Harlan Reynolds, *Virtual Reality and "Virtual Welters": A Note on the Commerce Clause Implications of Regulating Cyberporn*, 82 VA. L. REV. 535, 540 (1996) (pointing out that state regulation of the Internet on obscenity grounds probably violates the dormant Commerce Clause), *and* David Post, *Gambling on Internet Laws*, AM. LAW., Sept. 1998, at 95 (arguing that state attempts to regulate the Internet likely violate the Constitution), *with* Goldsmith & Sykes, *supra* note 115, at 827 (highlighting the errors made when courts have applied the dormant Commerce Clause to the Internet).

[120] H.R. 2421, 107th Cong. (2001).

[121] *Id.*

[122] For a discussion of the bill, see Margaret Kane, *Digital Commerce Sparks Tax Tango*, CNET NEWS.COM, July 20, 2001, *at* http://news.cnet.com/news/0-1007-200-6614719.html.

F. *The Challenge of International Copyright*

In the online environment, works such as videos, recordings of musical performances, and texts can be posted anywhere in the world, retrieved from databases in foreign countries, or made available by online service providers to subscribers located throughout the globe. Our system of international copyright protection, however, historically has been based on the application of national copyright laws with strictly territorial effects and on the application of choice-of-law rules to determine which country's copyright laws would apply.[123]

Such a network of national codes may have sufficed in an era when the distribution or performance of works occurred within easily identifiable and discrete geographic boundaries. However, "instant and simultaneous worldwide access to copyrighted works over digital networks . . . fundamentally challenges territorial notions in copyright"[124] and complicates traditional choice-of-law doctrine because it is often difficult to determine where particular acts have occurred in order to determine which copyright law to apply.[125] Thus, as one commentator has asked: "[I]f authors and their works are no longer territorially tethered, can changes in the fundamental legal conceptions of existing regimes for the protection of authors be far behind?"[126] These changes, though not literally concerned with the scope of adjudicatory jurisdiction, are arguably necessary precisely because copyright laws, like laws concerning jurisdiction, rely upon geographical boundaries among nation-states that may not be maintainable in the new online context.[127]

For example, let us assume that a publisher produces a web page that resides on a server in Holland.[128] The web page includes photos taken by

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[123] *See* Paul Edward Geller, *International Intellectual Property, Conflicts of Laws and Internet Remedies*, 22 EUROP. INTELL. PROP. REV. 125, 126-27 (2000) (describing reliance of copyright treaties on national treatment and reliance of classic conflicts rule for intellectual property disputes on the "place of infringing acts").

[124] Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L L. 799, 800-01 (1998) (footnote omitted).

[125] *See* Geller, *supra* note 123, at 126 ("The points where acts of infringement begin and end become indistinguishable as transactions cross multiple borders simultaneously in global, interactive networks." (footnote omitted)).

[126] Jane C. Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347, 348-49 (1999).

[127] *See, e.g.*, Geller, *supra* note 123, at 126-27 (describing the "ambiguity of territoriality" with regard to the application of intellectual property laws).

[128] This example is drawn from Ginsburg, *supra* note 126, at 349-50, and is based on a controversy in France involving "the unauthorized scanning and uploading to a cybercafe's website of *Le Grand Secret*, a banned biography of the late French President [François] Mit-

both American and French authors. Some of the photos are taken from magazines that the publisher has scanned and uploaded without permission and other photos are simply copied from other websites, again without permission. Assume further that the photographers now claim that the publisher has violated U.S. copyright law on a theory similar to the one used by the French court in *Yahoo!*: that the photos are available to be accessed by U.S. users via the website.

This scenario raises a number of challenges. First, with respect to the photos that were simply copied from other sites, were those photos ever "published" and what are their countries of origin? Both of these are important considerations under many copyright regimes. Second, which country's copyright law applies? If we use Holland's, where the website resides, we will encourage web publishers seeking to evade onerous copyright regimes simply to locate their sites in a less restrictive jurisdiction. On the other hand, if we are free to use the law of any country where the work is accessible, then again we potentially have the *Yahoo!* dilemma that the law of the most restrictive country would in effect apply extraterritorially throughout the world.

G. *The Challenge of Domain Names as Trademarks*

Historically, the boundaries of trademark law have been delineated in part by reference to physical geography. Thus, if I own a store in New York City called "Berman's," I will not, as a general matter, be able to prevent a person in Australia from opening a store that is also called "Berman's," even if I have previously established a trademark in my name. The idea is that customers would be unlikely to confuse the two stores because they are in markets that are spatially distinct.[129] In the online world such clear spatial boundaries are collapsed because, as the domain name system is currently organized, there can be only one bermans.com domain name, and it can only point to one of the two stores.

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terand," *id.* at 349 n.3.

[129] *See* Hanover Milling Co. v. Metcalf, 240 U.S. 403, 415 (1915) ("But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote the one from the other, the question of prior appropriation is legally insignificant . . . [except in cases of bad faith]."), *quoted in* United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 101 (1918). This is not an absolute rule, of course, because "famous or well-known marks may well leap oceans and rivers, cross national borders, and span language barriers to achieve international recognition." Dan L. Burk, *Trademark Doctrines for Global Electronic Commerce*, 49 S.C. L. REV. 695, 720 (1998); *see, e.g.*, Vaudable v. Montmarte, Inc., 193 N.Y.S.2d 332 (N.Y. Sup. Ct. 1959) (enjoining the use by a restaurant in New York of the name and décor of Maxim's Restaurant in Paris). Nevertheless, the likelihood-of-confusion standard historically has tended to imbed a geographical limitation.

In the early to mid-1990s, as corporations and entrepreneurs began to understand the potential value of a recognizable domain name, pressure increased to create trademark rights in domain names. For example, one early Internet domain name dispute involved the Panavision Corporation, which holds a trademark in the name "Panavision."[130] In 1995, Panavision attempted to establish a website with the domain name panavision.com, but found that the name had already been registered to Dennis Toeppen.[131] When contacted by Panavision, Toeppen offered to relinquish the name in exchange for $13,000.[132] Panavision sued, arguing that Toeppen's registration violated trademark law despite the fact that Toeppen's Panavision site (which included photographs of the city of Pana, Illinois) could hardly be confused with the Panavision Corporation.[133] The Ninth Circuit agreed with the trial court that Panavision's inability to use the panavision.com website "diminished the 'capacity of the Panavision marks to identify and distinguish Panavision's goods and services on the Internet.'"[134] In so doing, the court was, in effect, expanding the geographical reach of trademark law, at least with regard to domain names. While I still could not sue the Berman's store in Australia for violating my trademark, I might now have a cause of action concerning the bermans.com domain name if the Australian store registered the name ahead of me.

The U.S. Congress subsequently enacted legislation confirming this expansion of trademark law. Under pressure from trademark holders, Congress first passed the Federal Trademark Dilution Act[135] and then the Anticybersquatting Consumer Protection Act (ACPA), which provides an explicit federal remedy to combat so-called "cybersquatting."[136] According to the congressional reports, the ACPA is meant to address cases like *Panavision*, where non-trademark holders register well-known trademarks as domain names and then try to "ransom" the names back to the trademark owners.[137]

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[130] Panavision Int'l v. Toeppen, 141 F.3d 1316, 1318-19 (9th Cir. 1998).

[131] *Id.* at 1319.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 1326 (quoting Panavision Int'l v. Toeppen, 945 F. Supp. 1296, 1304 (C.D. Cal. 1996)).

[135] Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, 109 Stat. 985 (codified at 15 U.S.C. §§ 1125, 1127 (Supp. 1996)).

[136] Anticybersquatting Consumer Protection Act of 1999, Pub. L. No. 106-113, § 3001, 113 Stat. 545, 548-49 (1999); *see* H.R. REP. NO. 106-479, at 115 (1999) (detailing the Act).

[137] *See* H.R. REP. NO. 106-412, at 5-7 (1999) (noting that "[s]ometimes these pirates put pornographic materials on theses sights [sic] in an effort to increase the likelihood of collecting ransom by damaging the integrity of a [trade]mark"); S. REP. NO. 106-140, at 4-7 (1999) (highlighting testimony regarding attempts to ransom domain names to the highest bidder).

Nevertheless, even if one believes that reining in "cybersquatters" is a laudable goal (and even that goal has been debated),[138] there can be little doubt that the application of trademark law to domain names has meant that trademark law has become unmoored to physical geography and is now more likely to operate extraterritorially. Potentially, even those who are legitimately using a website that happens to bear the name of a famous mark held by an entity across the globe could be forced to relinquish the name.[139] In addition, as Graeme Dinwoodie has noted, this unmooring of trademarks from territory creates the possibility that individual countries will interpret their trademark laws expansively, thereby reducing trademark rights "to their most destructive form": the mutual ability to block (or at least inter-

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[138] For example, Yochai Benkler has argued that the strong protection of trademarks in domain names has "maintain[ed] the value of brand names at the expense of the efficiency of electronic commerce." Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1256 (2000). According to Benkler, the current approach assumes that consumers will, for the foreseeable future, seek out websites primarily by typing into their browser a uniform resource locator (URL) such as http://www.brandname.com, rather than by using search engines or product review sites. This assumption is then employed to justify permitting the owner of the trademark in a brand name to control use of that brand name in a URL. *Id.* at 1256-57. Such a legal determination, however, does not just *assume* a static model for the digital environment where customer habits, browser configurations, and search engines will continue as they are, but also *enforces* such a static model backed by the power of law. *Id.* at 1257. As Benkler points out:

> The private stakes for those corporations who have invested in building brand recognition and plan to recoup their investments by exercising some price discipline using the value of their brand name as a search-cost saving device for consumers are obvious. The public benefits of protecting these costs by encouraging consumers not to take advantage of the reduced search costs in the electronic commerce environment are more questionable.

Id. He suggests that we might instead "accept the declining importance of trademarks [in the digital environment,] . . . limit legal protection to situations where competitors try to use a mark to confuse consumers, and . . . abandon the notion of dilution as protection of goodwill, which developed to protect the famous marks most useful in the old environment." *Id.* at 1249; *cf.,* Manchester Airport PLC v. Club Club Ltd., Case No. D2000-0638, WIPO Arbitration and Mediation Center Administrative Panel Decision (Aug. 22, 2000), *at* http://www.arbiter.wipo.int/domains/decisions/html/2000/d2000-0638.html (stating that respondent attempted to sell the domain name to the complainant "for an amount well in excess of the registration fees," but noting that "selling a domain name is not per se prohibited by the ICANN [Internet Corporation for Assigned Names and Numbers] Policy (nor is it illegal or even, in a capitalist system, ethically reprehensible)").

[139] In response to this problem, the World Intellectual Property Organization adopted, in the fall of 2001, a Joint Recommendation calling for a definition of "use" for purposes of trademark law that would protect legitimate users of marks who disclaimed any intent to engage in commerce in a particular country. Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs on the Internet art. 2 (2001), http://www.wipo.org/about-ip/en/index.html?wipo_content_frame=/about-ip/en/trademarks.html.

fere with) the online use of marks recognized in other countries.[140]

Moreover, each of the parties claiming ownership in a trademark could sue in a different country, and, because of differences in substantive law, each party could win.[141] Thus, with the increasing scope of trademark law in cyberspace, the next question becomes: how shall any domain name decision be enforced? The ACPA attempts to address this problem by providing in rem jurisdiction over the domain name itself wherever that name is registered.[142] Thus, for example, if people register domain names online via a website owned by Network Solutions, a domain name registrar[143] corporation located in Virginia, they potentially can be forced, under the ACPA, to defend a trademark action in Virginia whether or not they have ever set foot in Virginia or knew Network Solutions was a Virginia corporation. This in rem provision has proven to be controversial,[144] however, and it remains to

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[140] *See* Graeme B. Dinwoodie, Private International Aspects of the Protection of Trademarks 27, Paper Presented at the WIPO Forum on Private International Law and Intellectual Property (Jan. 30-31, 2001) (WIPO Doc. No. WIPO/PIL/01/4 2001) (noting that "[t]his 'mutual blocking' capacity is neither efficient nor a positive contribution to the globalization of markets or the development of ecommerce"), http://www.wipo.org/pil-forum/en/documents/doc/pil_01_4.doc. Catherine T. Struve and R. Polk Wagner have also raised the specter that realspace sovereigns may increasingly attempt to segment the domain system itself, to insure that any trademark action involving domain names will have the requisite territorial nexus to support the assertion of jurisdiction. Catherine T. Struve & R. Polk Wagner, *Realspace Sovereigns in Cyberspace: The Case of Domain Names*, 17 BERKELEY TECH. L.J. 989, 1031-1034 (2002). As Struve and Wagner point out, such territorially based segmentation of the domain name system would result in "the dramatic reduction in utility provided by the system itself." *Id.* at 1031.

[141] *See, e.g.,* Mecklermedia Corp. v. D.C. Cong. G.m.b.H., 1998 Ch. 40, 53 (Eng.) (noting that the cause of action for using trademarked language is different in Germany and England and, thus, simultaneous proceedings could continue).

[142] *See* 15 U.S.C. § 1125(d) (2000) ("In an in rem action . . . a domain name shall be deemed to have its situs in the judicial district in which . . . the domain name registrar . . . is located.").

[143] A registrar is one of several entities, for a given top-level domain (such as .com, .edu, .gov, .uk, etc.) that is authorized by the Internet Corporation for Assigned Names and Numbers to grant registration of domain names. DAVID BENDER, COMPUTER LAW § 3D.05[3], at 3D-104.

[144] *Compare* FleetBoston Fin. Corp. v. Fleetbostonfinancial.com, 138 F. Supp. 2d 121, 135 (D. Mass. 2001) (finding that in rem provisions of ACPA violate due process when domain name registration paper is subsequently transferred to a district other than the district where the domain name registry, registrar, or other domain name authority is located), Heathmount A.E. Corp. v. Technodome.com, 106 F. Supp. 2d 860, 865-66 (E.D. Va. 2000) (finding that the registration of a domain name, without further contact, does not constitute sufficient minimum contacts for the purposes of in personam jurisdiction), *and* Am. Online, Inc. v. Chih-Hsien Huang, 106 F. Supp. 2d 848, 855-59 (E.D. Va. 2000) (finding that filing an online domain name registration agreement with Network Solutions is not sufficient contact with Virginia to justify in personam jurisdiction), *with* Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 224-25 (4th Cir. 2002) (ruling that because the lawsuit concerns the property itself, assertion of in rem jurisdiction comports with due process), Caesars World,

be seen whether courts will find that such assertions of jurisdiction comport with constitutional due process guarantees.[145]

In the meantime, domain name trademark disputes are increasingly resolved through online arbitration under the auspices of the Internet Corporation for Assigned Names and Numbers, a not-for-profit corporation that administers the domain name system,[146] and the World Intellectual Property Organization, a United Nations administrative body. While the ability of these organizations to govern domain names transcends geographical borders, they face their own legitimacy problems because they are quasi-governmental entities exercising de facto governing power over the Internet without structures of democratic accountability or transparency that some think may be necessary.[147] Thus, even this alternative to the problem of territorially based Internet governance faces substantial challenges.

Inc. v. Caesars-Palace.com, 112 F. Supp. 2d 502, 504 (E.D. Va. 2000) (finding sufficient contacts for purposes of in rem jurisdiction because the domain name was registered in the state), *and* Lucent Techs., Inc. v. Lucentsucks.com, 95 F. Supp. 2d 528, 531 n.5 (E.D. Va. 2000) (finding that registration is sufficient minimum contact for in personam jurisdiction). For a more detailed discussion of the ACPA in rem provisions, see Struve & Wagner, *supra* note 140, at 1006-19.

[145] The resolution of this question probably rests ultimately on whether courts interpret the U.S. Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), to have extended the constitutional requirements of *International Shoe* to all in rem actions (or at least those that do not involve real property). Some courts read *Shaffer* narrowly. *See, e.g.*, *Caesars World*, 112 F. Supp. 2d at 504 ("[U]nder *Shaffer*, there must be minimum contacts to support personal jurisdiction only in those in rem proceedings where the underlying cause of action is unrelated to the property which is located in the forum state."). Even some members of the U.S. Supreme Court have taken that approach. *See* Burnham v. Superior Court, 495 U.S. 604, 620-21 (1990) (Scalia, J., joined by Rehnquist, C.J., Kennedy, J.) (limiting *Shaffer* to quasi in rem actions unaccompanied by in-state service of process). On the other hand, dicta in *Shaffer* suggests that the Supreme Court intended its holding to extend the minimum contacts test of *International Shoe* to all in rem jurisdiction, not solely to the subcategory of in rem cases specifically at issue in *Shaffer* itself. *See, e.g., Shaffer*, 433 U.S. at 212 (stating that, henceforth, "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." (emphasis added) (footnote omitted)); *id.* ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification."). Thus, *Shaffer* may be taken to stand for the proposition that Congress cannot avoid the constitutional requirements of fair play and substantial justice simply by calling an action "in rem" and limiting recovery to the res itself.

[146] For a brief description of ICANN and its history, see generally *Developments in the Law—-The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1657-80 (1999). For a more detailed discussion of many issues surrounding the development of ICANN and the idea of internet governance, see generally MILTON L. MUELLER, RULING THE ROOT: INTERNET GOVERNANCE AND THE TAMING OF CYBERSPACE (2002).

[147] For example, a recent study of ICANN and WIPO's Uniform Dispute Resolution Policy suggests that the arbitration system is fundamentally biased in favor of trademark holders. *See* Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT'L L. 903, 903-13 (2002) [hereinafter Geist, *Fair.com?*]

H. *The Challenge of International Computer Crime*[148]

In the past few years, the increasing problem of computer crime has captured public attention. In the year 2000 alone, several incidents illuminated the scope of the challenge. In February, the websites of at least eight major U.S.-based Internet companies were crippled by so-called "denial of service" attacks unleashed by a computer hacker.[149] A few months later, the "I Love You" virus infected forty-five million computers worldwide.[150]

(noting that the system is biased in favor of trademark holders); Steven Bonisteel, *Law Expert Charges Bias in Domain-Dispute Arbitrations*, NEWSBYTES, Aug. 20, 2001 (on file with author) ("[T]rademark holders who launch complaints under [WIPO's Uniform Dispute Resolution Policy] win in an overwhelming majority of cases.") *see also* MICHAEL GEIST, FUNDAMENTALLY FAIR.COM? AN UPDATE ON BIAS ALLEGATIONS AND THE ICANN UDRP 8 (2002), *at* http://aix1.uottawa.ca/~geist/fairupdate.pdf (updating study, responding to methodological criticisms, and stating that bias continues). For criticisms of ICANN from the perspective of democratic legitimacy and administrative transparency, see, for example, A. Michael Froomkin, *Wrong Turn in Cyberspace, Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 18 (2000) [hereinafter Froomkin, *Wrong Turn in Cyberspace*]; Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 188 (2000); David Post, *Governing Cyberspace, or "Where Is James Madison when We Need Him?,"* ICANN Watch, *at* http://www.icannwatch.org/archive/governing_cyberspace.htm (June 6, 1999); Centre for Global Studies, *Enhancing Legitimacy in the Internet Corporation for Assigning Names and Numbers: Accountable and Transparent Governance Structures*, Markle Foundation, *at* http://www.markle.org/News/ICANN_Final_Sept18.pdf (Sept. 18, 2002). In addition, see generally www.ICANNWatch.org (last visited Nov. 20, 2002). For similar criticisms of WIPO, see, for example, A. Michael Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617, 618 (1999):

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

[148] This subsection is largely derived from Patricia L. Bellia, *Chasing Bits Across Borders*, 2001 U. CHI. LEGAL F. 35 (2001). For another recent article, which addresses similar issues in the context of international computer fraud, see generally Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267 (2002).

[149] The targeted sites included Amazon.com, Buy.com, CNN.com, eBay, E*Trade, MSN.com, Yahoo!, and ZDNet. *See* Charles Cooper, *New Cybersport: Taking Out Web Sites?*, ZDNET NEWS, Feb. 9, 2000, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2435899,00.html (listing targeted sites). For a description of the attacks, see *Internet Denial of Service Attacks and the Federal Response: Joint Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary and the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 35-37 (2000) (statement of Michael A. Vatis, Director, National Infrastructure Protection Center, Federal Bureau of Investigation); *Cybercrime: Hearing Before a Subcomm. of the S. Comm. on Appropriations*, 106th Cong. 23-37 (2000) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation).

[150] *See Electronic Communications Privacy Act of 2000, Digital Privacy Act of 2000 and Notice of Electronic Monitoring Act: Hearing on H.R. 5018, H.R. 4987, and H.R. 4908 Be-*

And in November, FBI investigators conducted a controversial sting operation in which they lured two Russians suspected of participating in a hacking ring to the United States, captured their passwords, and then used the passwords to connect to a Russian computer network and download incriminating data from the hackers' Russian servers, all before obtaining a search warrant.[151]

Moreover, criminal conduct involving computers extends far beyond crimes perpetrated against computer networks, such as hacking. For example, computer networks can be used to facilitate online forms of traditional crimes, such as gambling,[152] child pornography,[153] fraud,[154] and software piracy.[155] In addition, a computer may simply contain evidence relevant to

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fore the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. 16-27 (2000) (statement of Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division, Department of Justice) (describing the reach and cost of the "I Love You" virus); Paul Festa & Joe Wilcox, *Experts Estimate Damages in the Billions for Bug*, CNET NEWS.COM, May 5, 2000, *at* http://news.cnet.com/news/0-1003-200-1814907.html (describing the cost of the "I Love You" virus as exceeding several billion dollars).

[151] *See* Mike Carter, *E-sting Nets 2 Russian Hackers; FBI Alleges Pair Stole Credit Info*, SEATTLE TIMES, Apr. 23, 2001, at A1 (outlining how the two hackers were caught); Robert Lemos, *FBI "Hack" Raises Global Security Concerns*, CNET NEWS.COM, May 1, 2001, *at* http://news.cnet.com/news/0-1003-202-5785729.html (discussing the concerns that some security experts and lawyers have over the techniques used by the FBI); Robert Lemos, *FBI Nabs Russian Hackers*, ZDNET NEWS, Apr. 23, 2001, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,508199,00.html (discussing the indictment of the two Russians). In May 2001, a district court denied a motion to suppress the evidence downloaded from the Russian servers. United States v. Gorshkov, No. CR00-500C, 2001 WL 1024026, at *5 (W.D. Wash. May 23, 2001).

[152] *See generally* NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT ch. 5 (1999) (describing the emergence, rapid growth, and various forms of Internet gambling and recommending methods of federal regulation), *available at* http://govinfo.library.unt.edu/ngisc/reports/5.pdf.

[153] *See* PRESIDENT'S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET, THE ELECTRONIC FRONTIER: THE CHALLENGE OF UNLAWFUL CONDUCT INVOLVING THE USE OF THE INTERNET app. C (2000) (addressing online child pornography, child luring, and related offenses and discussing federal laws and initiatives to protect children), *available at* http://www.cybercrime.gov/append.pdf.

[154] *See* Robin Fields, *Fake Emulex Release Was Sent via E-Mail*, L.A. TIMES, Aug. 31, 2000, at C3 (describing how e-mail and the Internet were used to distribute a false press release); John F.X. Peloso & Ben A. Indek, *Overview of SEC's Response to the Internet in Securities Markets*, N.Y. L.J., Oct. 19, 2000, at 3 (explaining various SEC actions taken in response to the rise in cases of Internet securities fraud).

[155] PRESIDENT'S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET, *supra* note 153, at app. I (discussing software piracy and intellectual property theft and describing federal laws and initiatives to prevent such crimes). The question of extraterritoriality in combating such piracy has arisen in the prosecution of Russian computer programmer Dmitry Sklyarov for violations of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.). Sklyarov was accused of violating the Act based on his activities in Russia, where they were legal. *See Rus-*

a criminal investigation.[156] Certainly, with the heightened interest of governments worldwide in combating terrorism, tracking crime through electronic means is increasingly a priority.

In these circumstances, nation-state borders may be inconsequential both to the commission of the crime and the location of the relevant evidence. The denial of service attacks on U.S. websites originated in Canada.[157] The "I Love You" virus originated in the Philippines.[158] Gambling,[159] child pornography,[160] or "spam"[161] operations targeting users in one jurisdiction will often locate their servers elsewhere. And, as online activities become ubiquitous, even cases that do not otherwise have a computer component will increasingly require electronic evidence that may or may not be located within the jurisdiction. Indeed,

> [t]he physical location of electronic evidence . . . often depends upon the fortuity of network architecture: an American subsidiary of a French corporation may house all of its data on a server that is physically located in France; two

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sian Police Say Programmer Arrested in U.S. Broke No Russian Laws, SiliconValley.com (July 27, 2001) (on file with author). For more on the Sklyarov controversy, see, for example, Lawrence Lessig, *Jail Time in the Digital Age*, N.Y. TIMES, July 30, 2001, at A17 (commenting on Skylarov's plight).

[156] Commentators frequently distinguish among these three types of criminal conduct: computer as target, computer as tool, and computer as incidental storage of material related to the crime. For examples of the use of this classification scheme, see PRESIDENT'S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET, *supra* note 153, at 7-9; Bellia, *supra* note 148, at 37 n.11; Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L.J. 931, 934 (1996); Marc D. Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J.L. & TECH. 465, 468-69 (1997); Michael A. Sussmann, *The Critical Challenges from International High-Tech and Computer-Related Crime at the Millennium*, 9 DUKE J. COMP. & INT'L L. 451, 455 (1999).

[157] *See Canada Broadens Its Case Against Suspected Hacker*, N.Y TIMES, Aug 4, 2000, at C5 (highlighting a Canadian youth's denial-of-service attacks, which paralyzed several U.S. websites, including Yahoo!, Amazon, and eBay).

[158] *See ISP Tracks "Love" Bug Through Caller ID*, CNET NEWS.COM, May 15, 2000, *at* http://news.cnet.com/news/0-1003-200-1877238.html (stating that virus apparently originated in Manila); *"Love" Bug Release May Have Been Accidental*, CNET NEWS.COM, May 11, 2000, *at* http://news.cnet.com/news/0-1003-200-1855997.html (reporting that a Filipino computer student may have accidentally released the virus).

[159] *See, e.g.*, People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 847 (N.Y. Sup. Ct. 1999) (involving an Antiguan corporation that installed computer servers in Antigua "to allow users [from] around the world to gamble from their home computers").

[160] *See, e.g.*, *Crackdown on Net Child Porn*, CNET NEWS.COM, Sept. 2, 1998, *at* http://news.cnet.com/news/0-1005-200-332841.html (describing coordinated, world-wide raids on pedophiles operating on the Internet, resulting in the arrest of over one hundred people in twelve countries).

[161] *See, e.g.*, Declan McCullagh, *Spam Oozes Past Border Patrol*, WIRED.COM, Feb. 23, 2001, *at* http://www.wired.com/news/print/0,1294,41860,00.html (reporting that an increasing amount of unsolicited commercial e-mail sent to the U.S. is originating from overseas sites and flowing through non-U.S. servers).

> Japanese citizens might subscribe to America Online and have their electronic mail stored on AOL's Virginia servers.[162]

Or, a criminal might deliberately store computer files in a jurisdiction that affords greater privacy protection.[163]

Moreover, as the FBI sting operation involving the Russian hackers demonstrates, the jurisdictional challenges of international computer crime include not only the *enforcement* of criminal laws across borders, but also the *investigation* of the crimes themselves. As one commentator has observed:

> A state conducting a cross-border search and the target state are likely to have different perspectives on the issue. The searching state may view its actions as merely advancing a claimed power to regulate extraterritorial conduct causing harmful effects within its own borders. The target state, however, may view a remote cross-border search itself as extraterritorial conduct with harmful local effects.[164]

Indeed, the target state might well decide that it needs to protect its citizens from the extraterritorial investigations of other countries either by imposing privacy or property protections that limit the scope of investigations or by attempting to bar the investigations altogether.[165] Thus, as computers are increasingly involved in international criminal activities, we can expect continued debate about whether, and under what circumstances, cross-border searches, international investigations, and extraterritorial enforcement actions are permissible or legitimate.[166]

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[162] Bellia, *supra* note 148, at 56 (citation omitted).

[163] *See* Jonathan I. Edelstein, Note, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 231, 265-66 (1996) (discussing the possibility of countries' using anonymous remailers and computer secrecy laws to create database havens for criminals).

[164] Bellia, *supra* note 148, at 42.

[165] *See id.* at 42-43 ("The target state may believe that principles of territorial sovereignty likewise permit it to 'regulate' this harmful extraterritorial conduct—-for example, by invoking certain privacy or property protections that prohibit the searching officials' conduct or by objecting to such conduct through diplomatic channels.").

[166] In the United States, the Supreme Court has made clear that crimes can only be prosecuted in the district where the acts constituting the criminal offense occurred. *See* United States v. Cabrales, 524 U.S. 1, 8 (1998) (ruling that a money laundering charge could only be prosecuted in the district where the alleged acts of laundering took place, not in the district where the crimes generating the money allegedly occurred). Needless to say, determining the precise geographic location of criminal acts that occur in cyberspace may pose difficulties under the *Cabrales* standard.

I. *The Challenge of International and Transnational Human Rights Enforcement*

International law has traditionally been viewed as a set of rules agreed upon by countries and meant to govern the relations among them.[167] Indeed, until the twentieth century, the state was the primary entity in international law, and the need to protect its sovereignty was paramount. As one commentator has observed, "[t]here were relatively few rules of international law—-and certainly no rules protecting 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."[168] For example, in 1876, when an American citizen asked a New York state court to assert jurisdiction over Buenaventura Baez, the former President of the Dominican Republic, for injuries caused by Baez when he was President, the court refused to hear the case despite the fact that Baez was physically present in New York at the time.[169] According to the court, Baez was immune from jurisdiction because such immunity was "essential to preserve the peace and harmony of nations."[170]

The world of international law looks very different today. As Peter J. Sprio notes, "[w]e appear to be in the midst of a sweeping away of foundations that had been in place if not for a millennium then at least for several centuries."[171] Increasingly, international law is no longer simply the preserve of nation-states, effective over a narrow range of issues. Rather, we have seen the creation of regional and global institutions, treaties, and other international obligations that have established limits on sovereign autonomy.[172] Moreover, non-state actors, including non-governmental organiza-

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[167] *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 2 (2d. ed. 1995) (describing how international law was defined in James Brierly's classic treatise, *The Law of Nations*, as "the body of rules and principles of action which are binding upon civilized states in their relations with one another").

[168] Sands, *supra* note 37, at 529.

[169] Hatch v. Baez, 14 N.Y. Sup. Ct. 596, 599-600 (N.Y. Gen. Term 1876).

[170] *Id.* at 600.

[171] Spiro, *supra* note 23, at 567.

[172] *See, e.g.*, Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 441 (2000) (arguing that "[t]he development of international human rights and the more recent growth of an 'international civil society' reflect an international system that is slowly but surely embracing the rule of law" and that, when global institutions and rules exist, individuals and groups have the space to "challenge the prerogatives of state sovereignty (along with its cynical politics and reliance on military and economic power), with moral authority and the slow but sure evolution of binding rules and effective judicial processes"). Philippe Sands has made a similar observation:

> Regional and global institutions were created [in the twentieth century]. Treaties and other international obligations were adopted across a broad range of subject areas,

tions (NGOs), multinational corporations, worldwide religious movements, subnational governmental and administrative bodies, and regional and international institutions, are playing a larger role.[173] What arises from these changes is "the development of a new consciousness of international public law governing legal relations beyond the nation-state, available to influence public and administrative law at the national level and accessible to an emergent international civil society."[174]

These developments challenge international law's traditional jurisdictional framework, which, though different from the U.S. minimum contacts approach, is similarly problematic because it is so focused on the nation-state, its boundaries, and its prerogatives. Indeed, the two most common traditional bases for jurisdiction in international law are territory (jurisdiction over activities within a state's borders)[175] and nationality (jurisdiction over a state's citizens).[176] Thus, jurisdictional debates historically have been limited to whether territorial sovereignty should be impinged upon even to admit a principle of jurisdiction based on nationality.[177] A focus

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> establishing limits on sovereign freedoms. New standards were adopted seeking to protect and promote fundamental human rights and, more recently, conserve the environment. Gradually, new actors emerged with an international voice, of which corporations and NGOs were to become the most active. Inherent in these developments—-but not explicitly conceived—-were the seeds for change . . . .

Sands, *supra* note 37, at 530.

[173] *See* Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 305 (2001) ("[T]he most striking change in the law since I graduated from law school more than two decades ago is the rise of a body of law that is genuinely transnational—neither fish nor fowl, in the sense that it is neither traditionally domestic nor traditionally international."); *see also Boutros Boutros-Ghali*, *An Agenda for Democratization: Democratization at the International Level*, U.N. GAOR, 51st Sess., Agenda Item 41, at para. 73, U.N. Doc. A/51/761 (1996) (observing that international relations "are increasingly shaped not only by the States themselves but also by an expanding array of non-State actors on the 'international' scene").

[174] Sands, *supra* note 37, at 530; *see also* Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425, 425 (1999) (arguing that "globalization is transforming traditional conceptions and constructions of sovereignty," and that "the conventional image of a sovereignty associated with exclusive territorial jurisdiction . . . is no longer theoretically or empirically serviceable in the face of the internationalization of economic and social activity"); Phillip R. Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1946 (1997) ("[T]he new conditions loosely associated under the platitudinous rubric of 'globalism' pose new and quite visible challenges to national sovereignty.").

[175] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (1987). For a discussion of territorial jurisdiction, see BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 728-33 (2d ed. 1995).

[176] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987). For a discussion of jurisdiction based on nationality, see CARTER & TRIMBLE, *supra* note 175, at 728, 733-34.

[177] For example, in discussing the territoriality principle, Lord Macmillan stated: "It is

solely on territoriality or nationality, however, is unduly narrow and fails to respond adequately to increasing cross-border interaction, flexible community affiliations, and awareness of the transnational effects of seemingly local activities. For example, even though the territorial basis for jurisdiction permits some extraterritorial application by including within its scope "conduct outside [a state's] territory that has or is intended to have substantial effect within its territory,"[178] such a definition is likely to be overinclusive, because so much activity can be deemed to have cross-border effects.[179] Two other less often invoked international law bases of jurisdiction, the protective principle[180] and the passive personality principle,[181] contemplate ex-

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an essential attribute of the sovereignty of this realm, as it is of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits, and in all causes, civil and criminal, arising within these limits." Compania Naviera Vascongada v. Steamship Christina, 1938 App. Cas. 485 (appeal taken from Eng.); *see also Gross*, *supra* note 24, at 3 (articulating the notion of a Westphalian legal order based on "states exercising untrammeled sovereignty over certain territories and subordinated to no earthly authority"); Harold G. Maier, *Jurisdictional Rules in Customary International Law*, *in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 64, 67 (Karl M. Meessen ed., 1996) (asserting that the territoriality principle "is the most universally recognised [principle] because control over defined territory is not only a legal prerequisite for statehood but is also essential to permit a state's government to be responsible to other nations for internal compliance with its external community commitments").

[178] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987); *see also, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945) ("[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.").

[179] For example, the application of U.S. antitrust and securities laws to acts committed abroad has generated resistance from foreign courts as well as the passage of "blocking statutes" aimed at limiting the extraterritorial reach of U.S. laws. *See* CARTER & TRIMBLE, *supra* note 175, at 738 (stating that foreign countries have responded to the controversial practice of applying U.S. laws extraterritorially by passing statutes that make it "illegal to comply with extraterritorial judicial orders and forbidding enforcement of judgments based on extraterritorial application of law"). Although the Restatement of Foreign Relations invokes a reasonableness standard to limit jurisdictional assertions, *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1987) ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."), such a standard is unlikely to be effective absent a more detailed theoretical framework for determining when a jurisdictional assertion is reasonable. For more discussion of the use of an "effects test" for determining jurisdiction in cases involving online interaction, see *infra* text accompanying notes 432-443.

[180] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987) ("[A] state has jurisdiction to prescribe law with respect to . . . certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."). Under the protective principle, a state may assert jurisdiction over conduct occurring outside its territory and not performed by its nationals if such conduct threatens the security of the state or certain other classes of state functions, such as counterfeiting the state's seal or currency, espionage, or per-

traterritorial jurisdiction, but they do so based solely on the prerogative of a state to exercise jurisdiction for reasons of national security or in response to harm to one of its citizens abroad. Accordingly, none of the established bases of jurisdiction under international law sufficiently comes to grips with the increasingly non-territorial nature of international activity.

The most striking challenge to international law's traditional jurisdictional scheme has been the increasing willingness of states to apply principles of universal jurisdiction.[182] As Mary Robinson, former United Nations High Commissioner on Human Rights, recently explained, "universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—-and even obliged—-to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim."[183] While the principle of universal jurisdiction has long existed, it is rapidly becoming a significant challenge to the assumed prerogatives of national sovereignty.[184]

Similarly, we are seeing an erosion of longstanding sovereignty principles that gave heads of state immunity from prosecution before foreign or international tribunals.[185] For example, on October 16, 1998, a magistrate in London issued a provisional warrant for the arrest of Senator Augusto Pinochet Ugarte, pursuant to an extradition request arising from a prosecution initiated by Spanish judge Juan Garzon, who asserted universal jurisdiction over acts of genocide, hostage taking, and torture while Pinochet was Chile's head of state.[186] Although Pinochet claimed immunity, the British

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jury before consular officials. *See id.* § 402 cmt. f (identifying section 402(3) as the protective principle and discussing its application).

[181] *See id.* § 402 cmt. g (explaining that under the passive personality principle, a state may exercise jurisdiction whenever one of its nationals is harmed, even if the harm occurred completely beyond the state's borders). This principle is not widely recognized beyond circumstances involving international terrorism or other organized attacks on a state's nationals because of their nationality. *Id.*

[182] Universal jurisdiction derives from the idea that some crimes are "recognized by the community of nations" to be "of universal concern" and therefore can be prosecuted anywhere. *Id.* at §404.

[183] Mary Robinson, *Foreword* to THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 15-16 (2001).

[184] *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348-49 (1991) (discussing the increasing use of transnational public law litigation invoking "claims of right based not solely on domestic or international law, but rather, on a body of 'transnational' law that blends the two"); *see also* Robinson, *supra* note 183, at 25 (offering a set of "principles to guide, as well as to give greater coherence and legitimacy to, the exercise of universal jurisdiction").

[185] *See* Amber Fitzgerald, *The Pinochet Case: Head of State Immunity Within the United States*, 22 WHITTIER L. REV. 987, 1011-12 (2001) (citing cases that indicate an "international trend of denying immunity to heads of state").

[186] *See* Provisional Arrest Warrant by Nicholas Evans, Metropolitan Magistrate, Bow

House of Lords ruled, in contrast to the New York court ruling in *Baez* a century before,[187] that Pinochet had no entitlement to claim immunity for the crimes of which he was accused.[188]

Pinochet appears not to be an isolated case. In February 2000, a Senegalese court indicted Chad's exiled former dictator, Hissène Habré, on torture charges and placed him under virtual house arrest, marking the first time an African country had brought human rights charges against another country's head of state.[189] Likewise, Slobodan Milošević, the former Serbian leader, was compelled to stand trial before an international tribunal.[190]

Street Magistrates' Court, London, England for Augusto Pinochet Ugarte (Oct. 16, 1998), *in* PINOCHET PAPERS, *supra* note 34, at 61 (asserting Spanish jurisdiction over Augusto Pinochet Ugarte). Although the House of Lords, in its final decision, ultimately determined that the International Convention Against Torture (rather than general principles of universal jurisdiction) provided its source of jurisdiction, Regina v. Bow St. Metro. Stipendiary Magistrate (No. 3), 1 A.C. 147, 189 (H.L. 1999), the convention itself can be seen as codifying the principles of universal jurisdiction, *see id.* at 201 ("[I]f the states with the most obvious jurisdiction . . . do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.").

[187] Hatch v. Baez, 14 N.Y. Sup. Ct. 596, 599-600 (N.Y. Gen. Term 1876); *see supra* text accompanying notes 169-170 (discussing the *Baez* case).

[188] *Bow St. Metro. Stipendiary Magistrate*, 1 A.C. at 205. For the various Spanish and English court documents in the *Pinochet* case, see generally PINOCHET PAPERS, *supra* note 34. For further discussion of the case, see generally THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS (Diana Woodhouse ed., 2000); J. Craig Barker, *The Future of Former Head of State Immunity After* Ex Parte Pinochet, 48 INT'L & COMP. L.Q. 937 (1999); Andrea Bianchi, *Immunity Versus Human Rights: The* Pinochet *Case*, 10 EUR. J. INT'L L. 237 (1999); Michael Byers, *Decisions of British Courts During 1999 Involving Questions of Public or Private International Law*, 1999 BRIT. Y.B. INT'L L. 277, 277-95; Byers, *supra* note 172; Christine M. Chinkin, *International Decision, United Kingdom House of Lords:* Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet Ugarte*: Spanish Request for Extradition*, 93 AM. J. INT'L L. 703 (1999); Hazel Fox, *The Pinochet Case No. 3*, 48 INT'L & COMP. L.Q. 687 (1999); Colin Warbrick, *Extradition Law Aspects of* Pinochet 3, 48 INT'L & COMP. L.Q. 958 (1999).

[189] Reed Brody, *The Prosecution of Hissène Habré—An "African Pinochet,"* 35 NEW ENG. L. REV. 321, 333-34 (2001). An appeals court subsequently quashed the indictment. *Id.* at 330. In March 2001, Senegal's highest court ruled that Senegal had no jurisdiction to pursue crimes not committed in the country. Press Release, Human Rights Watch, Senegal Bars Charges Against Ex Chad Dictator (Mar. 20, 2001), *at* http://www.hrw.org/press/2001/03/habre0320.htm. For background on the case, see Brody, *supra*; Inbal Sansani, *The Pinochet Precedent in Africa: Prosecution of Hissène Habré*, 8 HUM. RTS. BRIEF, Winter 2001, at 32.

[190] *See, e.g.*, R. Jeffrey Smith, *Serb Leaders Hand over Milosevic for Trial by War Crimes Tribunal*, WASH. POST, June 29, 2001, at A1 (discussing the extradition of former Yugoslav president Milošević "to face a U.N. tribunal in the Netherlands on charges of crimes against humanity committed during the Kosovo conflict of 1999"); *see also* Peter Finn, *Tribunal Lives up to Its Promise*, WASH. POST, June 29, 2001, at A1 ("When the war crimes tribunal for the former Yugoslavia was created by the United Nations in 1993, its underlying promise was that no one . . . was beyond the reach of international justice. Today, in the most dramatic moment in its history, the tribunal made good on that pledge.").

In addition, over the past two decades, aliens have begun to bring human rights suits in the United States against foreign and U.S. governments and officials under the Alien Tort Claims Act (ATCA).[191] Although the jurisdictional reach of this Act is governed by the same due process/minimum contacts limitations as all other suits, the Act does grant federal courts original subject matter jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[192] Enacted as part of the Judiciary Act of 1789, this statute, according to a 1980 ruling by the Second Circuit, permits federal courts to hear suits by aliens alleging torture committed by officials of foreign governments.[193] Later decisions have upheld suits for genocide; war crimes; summary execution; disappearance; prolonged arbitrary detention; and cruel, inhuman, or degrading treatment.[194] More recently, Congress passed the Torture Victim Protection Act of 1991 (TVPA),[195] which reinforces and expands the ATCA by defining specific causes of action for torture and summary execution and by permitting U.S. citizens as well as aliens to bring suit.[196] Successful suits have been brought under these statutes against various members of the Guatemalan military,[197] the estate of former Philippine leader Ferdinand Marcos,[198] and Serbian leader Radovan Karadžić.[199] Although these are civil cases, and many of the monetary judgments issued may never actually be paid, the suits have strong symbolic and emotional value to the victims—they may deter potential defendants from entering U.S. territory, and they reinforce the principle of universal, or at least transnational, jurisdiction.[200]

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[191] 28 U.S.C. § 1350 (2000).

[192] *Id.*

[193] Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

[194] *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 343-48 (1996) (summarizing ATCA cases); *see also* William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1 (discussing "the growing use of the American legal system to judge rights and wrongs all over the globe").

[195] Pub. L. No. 102-256, 106 Stat. 73 (1992).

[196] *Id.*

[197] *See* Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) (holding that the alien plaintiffs could establish subject matter jurisdiction and a federal private cause of action for tortious violations of international law under the ATCA).

[198] *See* Hilao v. Estate of Marcos, 103 F.3d 789, 791-92 (9th Cir. 1996) (approving the district court's assertion of federal jurisdiction under the ATCA).

[199] *See* Kadic v. Karadžić, 70 F.3d 232, 241-44 (2d Cir. 1995) (finding subject matter jurisdiction exists under the ATCA to bring claims of genocide, war crimes, and torture against the Bosnian-Serb leader).

[200] *See* STEPHENS & RATNER, *supra* note 194, at 234-38 (emphasizing the substantial nonmonetary impact of ATCA and TVPA claims).

International human rights suits against former and current governmental officials have been brought in courts outside the United States as well. For example, in addition to the *Pinochet* and *Habré* cases, lawyers representing survivors of the 1982 Israeli invasion of Lebanon have asked a Belgian court to indict Israeli Prime Minister Ariel Sharon, who was then the Defense Minister, for war crimes.[201] Indeed, the Israeli government takes the threat of foreign assertions of jurisdiction over human rights claims so seriously that it recently issued an advisory to all government, security, and army officials, warning them that foreign travel could subject them to lawsuits.[202] Although the International Court of Justice recently 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,[203] the sharp criticism this decision evoked[204] demonstrates that the overall landscape for international human rights suits has

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[201] *See The Complaint Against Ariel Sharon for His Involvement in the Massacres at Sabra and Shatila*, The Palestinian Society for the Protection of Human Rights & the Environment, *at* http://www.mallat.com/articles/complaintenglish.htm (last visited Nov. 18, 2002) (claiming grave violations of international humanitarian laws). For press coverage of the case, see, for example, Nicholas Blanford, *Sharon Begins to Take War-Crimes Lawsuit Seriously*, CHRISTIAN SCI. MONITOR, July 30, 2001, at 7; Clyde Haberman, *Israel Is Wary of Long Reach in Rights Cases*, N.Y. TIMES, July 28, 2001, at A1; Constant Brand, *Court Asked to Indict Sharon over Palestinian Massacre*, INDEP., June 18, 2001, http://www.independent.co.uk/story.jsp?story=78822.

[202] *See* Blanford, *supra* note 201 ("Israel is taking the threat of possible prosecutions so seriously that it has begun to draw a map of countries where Israeli leaders could face trial for war crimes.").

[203] *See* Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), General List No. 121, ¶ 70 (Feb. 14, 2002), *at* http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020214.pdf ("[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.").

[204] For example, the dissenting judges in this case forcefully objected to the majority's position that there are no exceptions to the immunity of high-ranking state officials, even when they are accused of crimes against humanity. Democratic Republic of the Congo v. Belgium (Al-Khasawneh, J., dissenting), *at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_al-khasawneh.pdf; *see also, e.g.*, 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.").

changed.

Finally, a permanent International Criminal Court (ICC) has now been established,[205] after languishing during the Cold War era because of concerns about incursions on national sovereignty.[206] The court's jurisdiction is limited only to the most serious crimes, such as war crimes, genocide, and crimes against humanity.[207] Further, the court is intended to function only in cases where there is little or no prospect of offenders being duly tried in national courts.[208] Nevertheless, the ICC represents another step along the path away from the national sovereignty paradigm that has traditionally dominated international relations.[209]

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[205] Rome Statute of the International Criminal Court, art. 5, para. 1, U.N. Doc. A/CONF.183/9 (1998), *available at* http://www.un.org/icc.

[206] *See* Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 383 (1992) ("[S]ome sovereign states . . . were not prepared to live by a universally binding rule of international criminal law."); Robert Rosenstock, Remarks Made at the Pace International Law Review Symposium (Oct. 23, 1993), *in* 6 PACE INT'L L. REV. 83, 84 (1994) ("The split between East and West was such as to make any creation of an institution such as an International Criminal Court . . . all but unattainable."). Indeed, the United Nations Committee on International Criminal Jurisdiction first submitted a draft statute for an international criminal court as early as 1953. Revised Draft Statute for an International Criminal Court (Annex to the Report of the 1953 Committee on International Criminal Jurisdiction), U.N. GAOR, 9th Sess., Supp. No. 12, at 23, U.N. Doc. A/2645 (1954).

[207] Rome Statute of the International Criminal Court, *supra* note 205, at art. 5, para. 1.

[208] *See, e.g.*, *id.* at art. 20, para. 3 (stating that the ICC does not have jurisdiction to retry someone who has been tried in another court for conduct proscribed by the Rome Statute "unless the proceedings in the other court . . . were not conducted independently or impartially in accordance with the norms of due process . . . and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice").

[209] The Bush administration continues to object to the ICC on the ground that it will unduly interfere with U.S. sovereignty. *See, e.g.*, Norman Kempster, *U.S. May Back Creation of Special Atrocity Tribunals*, L.A. TIMES, Aug. 2, 2001, at A4 ("Opponents of a global [war crimes] court have raised concerns that such a tribunal could be used to prosecute American soldiers who are carrying out humanitarian missions."); *Why America Says No*, OMAHA WORLD-HERALD, July 22, 2001, at 18A (supporting the Bush administration's opposition to a permanent ICC because America's potential exposure to misuse of the court is greater than that of most other nations); *Bush Administration Ponders Position Towards International Criminal Court*, 17 INT'L ENFORCEMENT L. REP. (2001) (describing the Bush administration's resistance to the ICC on the ground that the court "infring[es] on the United States sovereignty and maneuverability in national security policies"), http://www.globalpolicy.org/intljustice/icc/2001/05icc.htm; Jim Lobe, *Rights-US: Republicans Urge Clinton to Oppose ICC*, Inter Press Service, *at* http://www.oneworld.org/ips2/jul98/22_32_097.html (July 23, 1998) (describing Republican senators' opposition to the ratification of the Rome Treaty, particularly to the court's jurisdiction over the actions of a state that did not join the treaty); Brett D. Schaefer, *Overturning Clinton's Midnight Action on the International Criminal Court*, EXECUTIVE MEMORANDUM (Heritage Found., D.C.), Jan. 9, 2001 (arguing that the U.S. should not ratify the Rome Treaty because it contains "significant flaws that threaten the rights of Americans and legitimate activities of the U.S. military"), *at* http://

J. *The Challenge of International Trade*

We can see similar incursions to traditional ideas of nation-state sovereignty in the area of international commercial relations. Indeed, although this field is often considered a part of "private international law," international trade issues are increasingly seen to implicate important societal values such as environmental protection and labor standards. Therefore, it may be that the traditional distinction between "public" and "private" international law should be revisited.[210]

Traditionally, international law did not recognize the legitimacy of public-law-type claims in international commercial disputes. For example, in 1893, when the U.S. government tried to prevent British fur traders from trapping seals, arguing that the seals were in danger of extinction, an international arbitral tribunal overwhelmingly rejected the claim because there was no basis in international law for the U.S. to apply its standards of conservation to measures taking place outside its territory.[211] Likewise, in the

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www.heritage.org/Research/InternationalOrganizations/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=3411; Press Release, Office of U.S. Representative Ron Paul, Paul Introduces Resolution Opposing International Criminal Court (Feb. 7, 2001) (introducing H.R. Con. Res. 23, a resolution calling for Congress and the President to oppose the ICC, and "pointing out the threat to U.S. sovereignty posed by a court with international jurisdiction"), *at* http://www.house.gov/paul/press/press2001/pr020701.htm.

[210] According to *Black's Law Dictionary*, public law consists generally "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." BLACK'S LAW DICTIONARY 1230 (6th ed. 1990). 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." *Id.* at 1196. As Robert Post has pointed out, however, this distinction is difficult to maintain in light of the American legal realist critique challenging the so-called public/private distinction. *See* Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES L. 323, 324 (2001) (noting that "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 created"). From this perspective, government is always in the background, regulating social life to establish and maintain the type of "private" relationships deemed appropriate or desirable. Moreover, such regulation is always directed toward the achievement of public goals. "All private law therefore ultimately involves 'the relations between the state and the people who compose it.'" *Id.* (quoting BLACK'S LAW DICTIONARY, *supra*, at 1230).

[211] *See* 1 JOHN BASSETT MOORE, HISTORY & DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 755-961 (Washington, Government Printing Office 1898) (containing records from *Pacific Fur Seal Arbitration* (U.S. v. Gr. Brit.)); *see also* Sands, *supra* note 37, at 529 (summarizing the case). Until the Shrimp/Turtle case, discussed *infra* text accompanying notes 213-18, tribunals had generally followed these same principles. Indeed, as recently as the early 1990s, the territorial sovereignty doctrine in international trade disputes seemed alive and well. *See* GATT Dispute Set-

nineteenth century there were no international organizations and no permanent international courts, and if one state refused to submit a trade claim to arbitration, the possibilities for enforcement were minimal.[212]

Yet, here too the assumption that national sovereignty trumps other claims is under attack. Indeed, the same week that Pinochet was arrested in London, the appellate body of the World Trade Organization (WTO) handed down a decision that, for the first time, recognized that one country can have a legitimate legal interest in activities carried out in another country, at least when those activities are harmful to migratory endangered species.[213] This case arose from a U.S. government decision to ban the import of shrimp harvested in the waters of India, Malaysia, the Philippines, and Thailand because the shrimp were being caught using a method that incidentally killed sea turtles. The four Asian countries objected to the U.S. ban, arguing that it violated WTO free trade rules. Contrary to the decision in the seal case,[214] the WTO appellate body ruled that the U.S. measures were "provisionally justified" because the U.S. had a legal interest in the protection of the sea turtles.[215] In other words, as in the human rights cases,

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tlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, 898 (1994) (finding that the U.S., in pursuit of its environmental objectives, could not "impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction"); United States Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155-205 (1993) (noting that although a party can adopt its own conservation policies, the panel rejects the extrajurisdictional application of those policies); *see also* Benedict Kingsbury, *The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 1, 20-21 (1994) ("The GATT Secretariat . . . treat[s] territory (and perhaps nationality) as the essential basis for jurisdiction regardless of the trans-boundary or extra-jurisdictional dimensions of many environmental and economic interests. . . . The WTO model is of state environmental autonomy (from trade measures) within territorially-defined spheres of jurisdiction."); Torsten H. Strom, *Another Kick at the Can: Tuna/Dolphin II*, 33 CANADIAN Y.B. INT'L L. 149, 160 (1995) (describing the panel's "fear of extrajurisdictionality and unilateralism"); Friedl Weiss, *The Second Tuna GATT Panel Report*, 8 LEIDEN J. INT'L L. 135, 148-49 (1995) ("[U]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided." (citations omitted)); Stephen Fleischer, Note, *The Mexico-U.S. Tuna/Dolphin Dispute in GATT: Exploring the Use of Trade Restrictions to Enforce Environmental Standards*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 515, 547-48 (1993) (discussing the Panel's ruling that the United States may not employ unilateral trade restrictions to impose conservation policies on other members).

[212] *See* Sands, *supra* note 37, at 529-30 (describing the international legal order at the close of the nineteenth century).

[213] Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, at 75 (Oct. 12, 1998), http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm.

[214] *See supra* note 211 and accompanying text (discussing that case).

[215] Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, *supra* note 213, at 51.

there is increasing recognition that "what one state does or permits to be done within its territory can be of legitimate interest in another state, however distant."[216]

Not only does this decision represent a change in the way we conceive of state sovereignty, it is also significant that this case (and most of the human rights cases discussed previously) originated with non-state actors, rather than with actions taken by the executive branch of a sovereign state. Thus, in the Shrimp/Turtle case, the U.S. export restrictions at issue[217] were the result of legal proceedings initiated in federal courts by the Earth Island Institute, a non-governmental organization.[218] In the *Pinochet* case, the extradition request was the result of an investigation and charges initiated by a judge based on a complaint brought by non-state actors.[219]

Non-state actors can also initiate transnational legal proceedings under Chapter 11 of the North American Free Trade Agreement (NAFTA),[220] which authorizes individuals and corporations to file claims with arbitral panels[221] (rather than national courts) if the complainant's government is

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[216] Sands, *supra* note 37, at 535. For an empirical analysis of the efficacy of unilateral trade sanctions to protect the global environmental commons, see Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1 (1999).

[217] *See* Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342 (Apr. 19, 1996) (revising guidelines used to determine whether a shrimp import prohibition should apply to a nation).

[218] *See* Earth Island Inst. v. Christopher, 948 F. Supp. 1062, 1070 (Ct. Int'l Trade 1996) (denying motion to stay judgment clarifying embargo pending appeal), *vacated sub nom.* Earth Island Inst. v. Albright, 147 F.3d 1352 (Fed. Cir. 1998); Earth Island Inst. v. Christopher, 942 F. Supp. 597, 617 (Ct. Int'l Trade 1996) (clarifying that an embargo enacted by Congress in response to earlier legal proceedings does not allow entry into the U.S. of any shrimp harvested by citizens or vessels of nations not certified under 16 U.S.C. 1537 (2000)), *vacated sub nom. Earth Island Inst.*, 147 F.3d at 1352; Earth Island Inst. v. Christopher, 922 F. Supp. 616, 627 (Ct. Int'l Trade 1996) (denying federal officials' request for extension of time for enforcing the Endangered Species Act (ESA) internationally), *vacated sub nom. Earth Island Inst.*, 147 F.3d at 1352; Earth Island Inst. v. Christopher, 913 F. Supp. 559, 575 (Ct. Int'l Trade 1995) (holding that federal officials are required to enforce the ESA on a worldwide basis), *vacated sub nom. Earth Island Inst.*, 147 F.3d at 1352.

[219] For a description of the process in Spain and links to Spanish official documents relating to the *Pinochet* case, see the websites of Diplomatie Judiciaire, *at* http://www.diplomatiejudiciaire.com/Chili/Pinochet.htm, and Derechos Human Rights, *at* http://www.derechos.org/nizkor/chile/juicio/eng.html. For materials relating to the *Pinochet* case, beginning with the general's arrest, see PINOCHET PAPERS, *supra* note 34.

[220] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993), *available at* http://www.nafta-sec-alena.org/english/index.htm.

[221] Article 1120 of NAFTA provides that investor claimants may seek relief under one of three sets of arbitral rules: (1) the International Centre for the Settlement of Investment Disputes (ICSID) Rules; (2) the ICSID Additional Facility Rules; or (3) the United Nations Centre for International Trade Law (UNCITRAL) Arbitration Rules. 32 I.L.M. at 643.

alleged to have "expropriated" the complainant's investment.[222] Moreover, to take this step, no prior authorization is required from either the North American Free Trade Commission or the Canadian, Mexican, or U.S. governments.[223] NAFTA's arbitration panels are even permitted to award the complainant monetary damages if it is determined that the government violated or is violating NAFTA's investment provisions.[224]

Elsewhere, we see the widespread use of international non-governmental regulatory frameworks. For example, the Apparel Industry Partnership, a joint undertaking of non-governmental organizations, international clothing manufacturers, and American universities, has established its own quasi-governmental (but non-state) regulatory regime to help safeguard public values concerning international labor standards. The partnership has adopted a code of conduct on issues such as child labor, hours of work, and health and safety conditions, along with a detailed structure for monitoring compliance (including a third-party complaint procedure).[225] In the Internet

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[222] The relevant language of Article 1110 provides that "[no] party may directly or indirectly . . . expropriate an investment . . . or take a measure tantamount to . . . expropriation . . . except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation." 32 I.L.M. at 641. For these purposes, Article 201 defines "measure" to include "any law, regulation, procedure, requirement or practice." 32 I.L.M. 298. For analyses of NAFTA's Chapter 11 investment expropriation provisions, see David A. Gantz, *Reconciling Environmental Protection and Investor Rights Under Chapter 11 of NAFTA*, 31 Envtl. L. Rep. (Envtl. L. Inst.) 10,646 (2001); Paul S. Kibel, *Awkward Evolution: Citizen Enforcement at the North American Environmental Commission*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10,769 (2002); J. Martin Wagner, *International Investment, Expropriation and Environmental Protection*, 29 GOLDEN GATE U. L. REV. 465 (1999); Daniel A. Seligman, *The Treaty Itself Undermines Environmental Protection*, ENVTL. F., Mar./Apr. 2001, at 36.

[223] *See* Kibel, *supra* note 222, at 10,775 (highlighting the strong enforcement mechanism for trade-investment law compared to the weak enforcement mechanism for environmental law under NAFTA due to the fact that under Chapter 11, corporations can force countries into binding arbitration without prior approval from either the Commission or any of the governments involved).

[224] *See id.* (noting that the monetary damages power under Chapter 11 has resulted in troubling environmental outcomes as corporations have challenged and won large settlements from governments over environmental regulation); *see also* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment: NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine,* 78 N.Y.U. L. REV. (forthcoming 2003) (arguing that NAFTA tribunal decisions exceed U.S. regulatory takings laws in several substantive and procedural respects, particularly in adoption of a broader definition of property, imposition of a higher level of scrutiny over the political process, and institution of procedural advantages as compared to litigation under the U.S. Fifth Amendment); Steve Louthan, Note, *A Brave New* Lochner *Era? The Constitutionality of NAFTA Chapter 11*, 34 VAND. J. TRANSNAT'L L. 1443, 1445 (2001) (arguing that Chapter 11 constitutes "the most significant evisceration of state police power since the Supreme Court freed the states from *Lochner*'s shackels in 1937").

[225] *See Workplace Code of Conduct*, Apparel Industry Partnership (providing a "set of

context, the "TRUSTe" coalition of service providers, software companies, privacy advocates, and other actors has developed (and monitors) widely adopted privacy standards for websites.[226] Similarly, the Global Business Dialogue on Electronic Commerce has formed a series of working groups to develop uniform policies and standards regarding a variety of e-commerce issues.[227] And, of course, the Internet Corporation for Assigned Names and Numbers, discussed previously,[228] is a non-state governmental body administering the domain name system.

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I do not mean to suggest that any of the challenges surveyed in this section are unsolvable. Nor do I argue that these challenges, even taken together, mean that nation-states are on an inevitable path toward irrelevance or dissolution.[229] Indeed, in the next section, I will provide an overview of various approaches that have been advanced to meet these challenges.

Nevertheless, although this tour through the contemporary legal landscape has necessarily been brief, it should lead even the most skeptical observer to believe that the challenges discussed are real ones that require our attention. Moreover, these challenges share a common tendency to complicate or unsettle our traditional assumption that the world order is and must be built from the ideas of territorially based state sovereignty and fixed, impermeable borders. And if that is true, then this moment of unsettledness, when we are struggling to adapt to changes across a wide variety of doctrinal areas, provides an opportunity to rethink the assumption rather than simply try to stabilize it.

II. TEN RESPONSES

For those scholars, judges, and policy makers who have confronted cyberspace legal issues during the past decade, most of the ten challenges dis-

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standards defining decent and humane working conditions"), *at* http://www.dol.gov/esa/nosweat/partnership/report.htm (last visited Oct. 23, 2002).

[226] *See The TRUSTe Program: How It Protects Your Privacy*, TRUSTe, *at* http://www.truste.org/consumers/users_how.html (last visited Nov. 18, 2002) (describing its program to ensure the protection of customer privacy).

[227] *See* Global Business Dialogue on Electronic Commerce, *at* http://www.gbde.org (describing working groups as "a framework through which consensus continues to be achieved between companies of different countries, cultures and sectors . . . using the tools of the digital medium with minimal bureaucroacy [sic]").

[228] *See supra* text accompanying notes 146-47 (discussing ICANN).

[229] *See, e.g.*, Michael Mann, *Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying*, 122 DÆDALUS 115, 139 (1993) ("The nation-state is not hegemonic, nor is it obsolete, either as a reality or as an ideal.").

cussed in the previous section are not new. To the contrary, numerous articles, judicial decisions, and domestic and international legislative and administrative bodies have wrestled with these challenges, and the debate about appropriate responses has been robust. In this Part, I identify ten responses that appear to have received the most attention, summarize each of the arguments, and briefly describe some of the criticisms most often raised about each response. Significantly, however, though both the responses and the criticisms are widely varied, they are primarily grounded either in political philosophy and its abstract conceptions of sovereignty and democratic models of governance, or legal policy analysis, which focuses on the development of effective and efficient rules. None attempts to explore in detail either the social meaning of jurisdiction or the multiple conceptions of space, borders, and community allegiance that people experience on the ground and that might complicate the governance models being discussed.[230] Thus, although many arguments for and against the various strategies are outlined here, the debates are being waged within an overly limited field of analysis. Neither the responses nor the critiques they have engendered go far enough in articulating a rich descriptive account of jurisdiction in a global era.

A. *E Pluribus Cyberspace*

David Johnson and David Post were among the first legal scholars to think seriously about the issues of jurisdiction and sovereignty in cyberspace. Since 1996 they have staked out a simple but radical position. They argue (both in co-authored articles and in articles written by Post alone) that cyberspace should be deemed a distinct "place" for purposes of law-making sovereignty,[231] and that the law applicable to interactions in cyberspace

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[230] Even David Johnson and David Post, who come the closest to this sort of inquiry, focus on jurisdiction as an issue primarily concerning the legitimate scope of sovereignty as a matter of political philosophy and efficient organization. *See infra* notes 231-48 and accompanying text (discussing the arguments Johnson and Post have put forth).

[231] *See* Johnson & Post, *supra* note 9, at 1378-79 (arguing that cyberspace is a unique "space" and cannot be governed by laws that rely on traditional territorial borders, instead requiring creation of a distinct and separate doctrine to be applied to cyberspace); *see also* Post, *supra* note 9 (arguing that the nature of the Internet destroys the significance of physical location, eliminating the possibility of a single, uniform legal standard); David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 VAND. J. ENT. L. & PRAC. 70, 74-75 (2000) [hereinafter Post, *Black Holes*] (applying a theory of decentralized lawmaking to the regulation of junk e-mail); David G. Post, *The "Unsettled Paradox": The Internet, the State, and the Consent of the Governed*, 5 IND. J. GLOBAL LEGAL STUD. 521, 527 (1998) (using the dilemma of Internet governance to question the basis of state sovereignty); David G. Post & David R. Johnson, *"Chaos Prevailing on Every Continent": Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1084-90

"will not, could not, and should not be the same law as that applicable to physical, geographically-defined territories."[232] Thus, they contend that cyberspace should be its own jurisdictional entity. Given the onslaught of territorially based regulation in cyberspace, this idea seems almost quaint a mere six years after it was written. Nevertheless, the set of concerns Johnson and Post articulate still haunt the cyberspace regulatory landscape.

Post's article *Governing Cyberspace*[233] summarizes what I am calling the "e pluribus cyberspace" view quite nicely. Post starts with the question: When is it legitimate for a court, or a territorial sovereign, to exercise jurisdiction over someone? His answer is that "[l]aw-making sovereignty . . . is defined . . . by control over a physical territory."[234]

(1998) (using a problem-solving dilemma to argue in favor of decentralized decision making over the Internet); David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L. art. 3, *at* http://warthog.cc.wm.edu/law/publications/jol/articles.post.
shtml [hereinafter Post, *Anarchy*] (examining the various groups and organizations that can impose substantive rules on the Internet and arguing that the lack of physical borders in cyberspace prevents effective rule making by centralized governments).

[232] Johnson & Post, *supra* note 9, at 1402. Others have expressed similar skepticism about the ability of territorial sovereigns to regulate cyberspace, at least in traditional forms. *See* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 205 (1997) (recognizing the difficulties states have in regulating the global network, but arguing that certain private filtering and control mechanisms will ultimately facilitate far greater state regulation); John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207, 234-35 (1997) (contending that national regulation of the Internet is inappropriate and that a consensual regime of user self-regulation should be adopted); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 926 (1996) (arguing that the transnational nature of the Internet requires governance by a collection of state, business, technical, and citizen forces).

[233] Post, *supra* note 9.

[234] *Id.* at 158. For this proposition, Post cites the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government . . . .") and MALCOLM N. SHAW, INTERNATIONAL LAW 276-314 (3d ed. 1991) ("International law is based on the concept of the state [which] in its turn lies upon the foundation of sovereignty [which itself] is founded upon the fact of territory. Without territory, a legal person cannot be a state."). Post, *supra* note 9, at 158 n.10. Nevertheless, this vision of sovereignty may be overly simplistic. *See, e.g.*, Henry H. Perritt, Jr., *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*, 5 IND. J. GLOBAL LEGAL STUD. 423, 424-25 (1998) (arguing that the "Internet as a threat to sovereignty" thesis only threatens a "Realist" theory of international relations, not the "liberal tradition of international relations" that already accounts for the interaction of non-state actors across borders); *see also, e.g.*, Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 723 (1995) (distinguishing the liberal theory of international relations from realism, on the grounds that realism assumes "that the primary actors are states, and define[s] states as monolithic units identifiable only by the functional characteristics that constitute them as states"). The question of how we might complicate the concept of sovereignty will be taken up later in this Article. *Infra* Part IV.

Starting from this premise, Post then argues that cyberspace destroys the significance of physical location in three ways. First, he notes, events in cyberspace do not merely cross geographical boundaries the way pollution does; they "ignore the existence of the boundaries altogether."[235] For example, the "cost and speed of message transmission from one point on the net to any other is entirely independent of physical location: messages can be transmitted between physical locations without any distance- or location-based degradation, decay, or delay."[236] Second, even if in some cases there are physical connections to a geographical locality, such as a server, many cyberspace transactions "consist of continuously changing collections of messages that are routed from one network to another across the global net, with no centralized location at all."[237] Third, Post argues that it is incoherent to discuss physical location with respect to cyberspace because "the net enables simultaneous transactions between large numbers of people who do not and *cannot* know the physical location of the other party."[238] Moreover, according to Post, even if one tried to premise jurisdiction on whether an act had a substantial effect within a particular state's territory (as Italy's highest court has attempted),[239] the formulation would be incoherent because "[t]he effects of cyberspace transactions are felt *everywhere*, simultaneously and equally in all corners of the global network."[240]

The problem, Johnson and Post contend, is that "[t]raditional legal doctrine treats the [Internet] as a mere transmission medium that facilitates the exchange of messages sent from one legally significant geographical location to another, each of which has its own applicable laws."[241] Instead, "[m]any of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of [c]yberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between [c]yberspace and the 'real world.'"[242] Thus, they argue for the creation of an indigenous law of cyberspace. According to Johnson and Post, such a law not only

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[235] Post, *supra* note 9, at 159.

[236] *Id.* at 160.

[237] *Id.*

[238] *Id.* at 161.

[239] *See supra* notes 97-98 and accompanying text (relating the facts of an Internet jurisdiction case before the Italian Court of Cassation). American courts elaborating a test for minimum contacts in cyberspace have also attempted to base jurisdiction on the effects of online activity. *See infra* text accompanying notes 432–443 (providing a sampling of such cases).

[240] Post, *supra* note 9, at 162.

[241] Johnson & Post, *supra* note 9, at 1378.

[242] *Id.*

would sidestep most of the territorial dilemmas we encountered in the previous Section, it would also allow for new law to develop that would take into account many of the distinctive features of online interaction.[243]

Finally, Johnson and Post summon a radically decentralized vision of law formation and enforcement wherein cyberspace will be its own self-regulating jurisdiction.[244] In his subsequent article, *Anarchy, State, and the Internet*,[245] for example, Post argues that communities in cyberspace will be governed by "rule-sets." These rule-sets are the underlying restrictions on behavior that are either promulgated in a contractual document (such as America Online's Terms of Service Agreement) or embedded in the architecture of the website (such as a screen that prevents the user from accessing information unless personal information or a credit card number is provided). Post envisions a kind of free market in law, whereby users will "vote" with their browsers and only frequent those parts of cyberspace with rule-sets to their liking.[246] Thus, one could theoretically opt out of the "law" of eBay and go somewhere else. Similarly, if AOL's terms of service are distasteful, other Internet Service Providers (ISPs) are available. In Post's view, this will mean that "[t]he 'law of the Internet' . . . emerges, not from the decision of some higher authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join."[247] In addition, to the extent necessary, territorial sovereigns would enforce cyberspace law as a matter of comity.[248]

While their "e pluribus cyberspace" view is provocative and has forced scholars to grapple with important dilemmas, the Johnson and Post approach is problematic in several respects. First, they appear to have severely underestimated the ability of territorially based sovereigns to regulate cyberspace. Indeed, their implicit vision of the state and its exercise of power is unduly limited. As James Boyle has pointed out,[249] their cyber-

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[243] *See id.* at 1380-87 (applying the theory to various substantive areas of cyberspace regulation).

[244] *See id.* at 1396-1400 (arguing that as the development of distinct "rule-sets" in cyberspace proceeds, groups will come together to define the conduct and content acceptable in their "area" of cyberspace).

[245] Post, *Anarchy*, *supra* note 231.

[246] *See* Post, *supra* note 9, at 169 (arguing that subscribers' ability to "vote with their electrons" creates a veritable free market wherein subscribers will be able to choose a set of rules that orders their online experience according to their preferences); *see also* Post, *Black Holes*, *supra* note 231, at 70-73 (applying his approach to the problem of junk e-mail).

[247] Post, *supra* note 9, at 167.

[248] *See* Johnson & Post, *supra* note 9, at 1391-95.

[249] *See* Boyle, *supra* note 232, at 184-85 (positing that cyber-libertarians can only conceive of the law as "command[s] backed by threats, issued by a sovereign who acknowledges

libertarian approach only makes sense if one has an "Austinian"[250] positivist vision of a lumbering state asserting sovereign prerogatives only by enacting laws and arresting people who disobey them. From that perspective, perhaps, states may face difficulties regulating cyberspace (though the recent success of authorities in China and elsewhere to censor online content[251] suggests that states may have maintained even this type of regulatory power). But enacting laws and arresting people is neither the only nor even the most effective way in which states regulate. Boyle posits a more subtle "Foucauldian"[252] view, in which government regulates by changing the architecture of the space itself.[253] Thus, by affecting how the "code" of cyberspace is constructed, governments might well be able to control online behavior even more effectively than they control behavior in the "real world."

Second, even as a matter of political theory, the Johnson and Post conception of sovereignty as necessarily tied to physical power and territorial

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no superior, directed to a geographically defined population which renders that sovereign habitual obedience").

[250] *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Isaiah Berlin et al. eds., Weidenfeld & Nicholson 1954) (1832) (presenting a positivist theory of law, whereby law is seen as merely the command of the sovereign).

[251] *See, e.g.*, SHANTHI KALATHIL & TAYLOR C. BOAS, THE INTERNET AND STATE CONTROL IN AUTHORITARIAN REGIMES: CHINA, CUBA, AND THE COUNTERREVOLUTION 4-10 (Carnegie Endowment for Int'l Peace, Working Paper No. 21, 2001) (detailing the success of Chinese authorities in curtailing potentially challenging uses of the Internet), *available at* http://www.ceip.org/files/pdf/21kalathilboas.pdf; Chen May Yee, *Playing by Strict Rules Online*, ASIAN WALL ST. J., June 22, 2001, at N1 (describing Yahoo! China's acquiescence in removing Taiwanese content at the behest of the Chinese government); *Freedom of Expression and the Internet in China*, Human Rights Watch (Aug. 1, 2001), *at* http://www.hrw.org/backgrounder/asia/china-bck-0701.htm (describing the success of Chinese efforts to curb Internet use through regulation and enforcement actions). *But see* Jennifer Lee, *Punching Holes in Internet Walls*, N.Y. TIMES, Apr. 26, 2001, at G1 (describing efforts of various web services to help users circumvent government restrictions and technical gateways).

[252] *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978) (exploring how the eighteenth-century development of the panopticon prison architecture, with its centralized and omniscient gaze, pervaded the mass psyche by conditioning individuals to internalize discipline and behave as if the authoritative, punitive gaze were always watching them).

[253] Lawrence Lessig's discussion of cyberspace regulation and policy takes a similar approach. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 43-60 (1999) (describing ways in which government can regulate by controlling or dictating technical architecture); *see also* Boyle, *supra* note 232, at 202-04 (discussing potential means for regulating cyberspace through hardware and regulatory solutions); Alan Hunt, *Foucault's Expulsion of Law: Toward a Retrieval*, 17 LAW & SOC. INQUIRY 1, 8 (1992) (describing Foucault's belief that law—understood as centralized juridical state power—had lost its importance in modernity and had been eclipsed by power that is specific, local, fragmentary, and dispersed).

boundaries may be overly simplistic. As we will see later in this Article, alternative conceptions of sovereignty pose challenges to the Johnson and Post view.[254]

Third, their vision of competing rule-sets makes sense if, and only if, alternative rule-sets are always available. For example, it is all well and good to say that a user who does not like AOL's terms of service can go elsewhere. But if there are no other ISPs or, more realistically, if all other providers with similar capabilities to AOL also have the same terms of service, the rule-set competition is meaningless.[255] Johnson and Post seem to assume that, in cyberspace, the cost to start a competing service or website will always be low enough that options will continue to be available. This assumption may or may not be true, particularly as the online market becomes dominated by large multinational content providers that could effectively monopolize a given market. Johnson and Post might argue that antitrust laws would prevent such an accretion of market power. Such laws, however, would require the involvement of the state (or perhaps multiple states) in the regulation of anticompetitive activities in cyberspace, which Johnson and Post wish to avoid.

Finally, the need for antitrust enforcement illustrates a larger problem underlying Johnson and Post's libertarian approach. They appear to assume that some state will be there to enforce underlying background rules, most particularly rules of contract and property. Both the legal realists, in their attacks on laissez-faire in the 1920s and 1930s,[256] and members of the Critical Legal Studies movement, in their efforts to challenge the public-private distinction,[257] however, have repeatedly argued that this sort of assumption

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[254] *Infra* Part IV.

[255] *See* Patricia Fusco, *Top U.S. ISPs by Subscriber: Q2 2001—Market Insights*, ISP Planet (Aug. 17, 2001), *at* http://www.isp-planet.com/research/rankings/usa_history_q22001.html (indicating that AOL's market share in the United States is one-third and that "it would take United Online, EarthLink and MSN combined to rival AOL's current market share"). As a practical matter, the switching costs may also be more burdensome for most consumers than Johnson and Post assume.

[256] *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 11-30 (1927) (discussing the treatment of property in American courts in a critique of laissez-faire philosophy); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 199 (1935) (arguing for an expanded role of the Fourteenth Amendment to curb the abuses of laissez-faire). *See generally* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998) (discussing the work of Robert Hale and the realist critique of libertarianism and the laissez-faire tradition).

[257] *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 242-68 (1987) (describing the Critical Legal Studies approach to the role of law in creating society and society's actors); Kenneth M. Casebeer, *Toward a Critical Jurisprudence—A First Step by Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379, 380 (1983)

undermines the whole idea of "private ordering" because it presupposes a "public" regime of enforcement and policing as well as a baseline of background rights. If this is the case, the Johnson and Post scheme will run into the very jurisdictional problems they seek to avoid because territorial sovereigns will inevitably be called upon to establish and enforce those background rights. Although a detailed discussion of this longstanding public-private debate is far beyond the scope of this Article, it is worth recognizing that the issue resurfaces in the context of cyberspace.[258]

B. *Coase in Cyberspace*

The Johnson and Post approach assumes that contract law increasingly will become the primary law of cyberspace. Without embracing the entirety of Johnson and Post's vision, a number of other scholars have similarly argued that the best response to the conundrums of cyberspace governance is to rely on the fact that cyberspace, by reducing both transaction costs and barriers to entry and exit, enables a more perfect Coasean world.[259] Such a world, premised on contractual relations, seems to offer a way around jurisdictional puzzles by allowing parties to construct their own legal relations, opt for a particular set of legal rules, and designate the forum of their choice for dispute resolution.

Nevertheless, this vision has been controversial because it does not provide sufficient space for public, noncontractual values. The battle has been particularly fierce in the field of intellectual property.[260] Increasingly, the

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(critiquing "the public-private distinction in constitutional law"); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010-14 (1985) (considering the development of contract doctrine in light of the public-private distinction and the realist critique); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350-57 (1982) (reviewing the decline of the public-private distinction in six stages); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 842-58 (1985) (contending that the distinction between public and private action is meaningless in the family law context because court actions take the form of state-sponsored policy decisions); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1196 (1985) (describing the "public/private" metaphor for representing the social world as "one of the primary representational constructs for the liberty of contract jurisprudence").

[258] For further discussions of the public-private distinction with respect to cyberspace, see Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263 (2000); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.–KENT L. REV. 1295, 1295 (1998).

[259] *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (examining legal solutions to the problem of harmful effects in an ideal market with no transaction costs).

[260] For a sampling of articles staking out positions concerning the use of contract and other "private ordering" models for regulating intellectual property, see generally Tom W.

creators of intellectual products are relying less on traditional intellectual property regimes to enable them to limit access to their material, and more on a combination of contractual rights and technological protections.

For example, if I purchase a book from a bookstore, American copyright law grants me various entitlements. Under the so-called "first sale" doctrine, I can sell it to a used bookstore or give it to a friend to read.[261] Likewise, under the fair use doctrine, I can create my own parody of the book or excerpt passages for critical or educational use.[262] And there are various other copyright doctrines that aim to strike a balance between granting incentives to copyright holders and allowing the broadest possible dissemination of information.[263]

Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 579-600 (1998); James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2010-21 (2000); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1101-18 (1998); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000) [hereinafter Cohen, *Perfect Curve*]; Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 108-13 (1997); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1218-40 (1998); David Friedman, *In Defense of Private Orderings: Comments on Julie Cohen's "* Copyright and the Jurisprudence of Self-Help,*"* 13 BERKELEY TECH. L.J. 1151, 1163-71 (1998); Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 876-93 (1997); Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 844-60 (1998); Maureen A. O'Rourke, *Copyright Preemption After the* ProCD *Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 81-91 (1997).

[261] *See* 17 U.S.C. § 109(a) (2000) ("[T]he owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . ."). For a discussion of the history of the first sale doctrine and concerns that the doctrine may be overly restricted in the digital environment, see generally JESSICA LITMAN, DIGITAL COPYRIGHT 81-83 (2001).

[262] Fair use, which began life as a judge-made defense to copyright infringement, is now statutorily recognized under U.S. law. *See* 17 U.S.C. § 107 (2000) ("[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as . . . teaching . . . is not an infringement of copyright.").

[263] For example, the U.S. Supreme Court has made clear that, in order to serve both First Amendment goals and the Copyright Clause's stated objective of "promot[ing] the Progress of Science and the useful Arts," U.S. CONST. art. I, § 8, cl. 8, copyright doctrine "assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991). This conception underlies the traditional copyright distinction between ideas, which are not copyrightable, and the expressions of those ideas, which are copyrightable, *see* Baker v. Selden, 101 U.S. 99, 104 (1879) (holding that the publication of an accounting system is copyrightable, but not the system itself), as well as the doctrine that expression must have a "modicum" of originality in order to be protected, *see Feist Publ'ns*, 499 U.S. at 345 ("The sine qua non of copyright is originality."). Whether or not these doctrines sufficiently protect First Amendment values has been the subject of debate. *See, e.g.*, Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (arguing that copyright doctrines must be subjected to independent First Amendment scru-

If the same book were downloaded in electronic format, however, the set of entitlements could well be different. Thus, the copyright holder could provide me with a copy of the book only if I agree to various conditions. These conditions, furthermore, could be unrelated to the rights that users hold under copyright law. For example, I could be required to agree to purchase my electronic copy on the condition that I neither give it to a friend nor sell it to a third party. Such concessions would be extracted through a license whereby I would be required to "click" an icon indicating agreement to a set of terms.

So far, nothing about the Internet context has substantially changed the analysis. After all, the bookstore theoretically could have made the same demands. But with an electronic version, individualized agreements are more feasible because transaction costs are lower. More significantly, technology increasingly makes it possible for the owner actually to enforce such agreements. For example, the electronic file could be encoded with information that would make it impossible for me to distribute the file electronically to someone else without paying additional money. Alternatively, it could be coded so that the product can be used only a prescribed number of times or for a prescribed period of time.

Such agreements, and the technology to enforce them, would be governed by contract law, not copyright law. Thus, a coded work could prevent me from electronically excerpting a passage even if it were for scholarly or educational purposes. My "fair use" rights under copyright law would be irrelevant because the contract would be enforced through technological self-help. According to one commentator:

> Programs might be tied to unique identifier numbers embedded in software or hardware. Content providers will declare that content is not being "sold," merely licensed subject to numerous restrictions. Self-help sub-routines might be used to encrypt user-files in the event of contractual violation, with the key only being provided on payment of a fee and a return to proper behavior. Digital fingerprints and watermarks will help to identify texts. Encryption will be used to protect programs against decompilation, or to scramble source code so that it cannot be parsed.[264]

Moreover, although theoretically I could develop a tool to circumvent the protection, the controversial Digital Millennium Copyright Act makes such circumvention (even for fair use purposes) a crime.[265]

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tiny).

[264] Boyle, *supra* note 260, at 2025.

[265] *See* 17 U.S.C. § 1201 (2000) (setting forth the relevant provisions regarding circumvention of copyright protection systems). Critics have argued that the Digital Millennium Copyright Act (DMCA) has overly enhanced the ability of copyright owners to wield elec-

There are, of course, certain advantages to a contractarian system such as this. Most significantly, scholars have pointed out that content providers, armed with technological protection, could engage in finely-grained price discrimination, potentially permitting more people to access material at a price closer to what they are able to afford.[266] To conceptualize this, assume there is a book that person A values at $10, person B values at $20, and person C values at $30. If the book is priced at $20, B and C will buy it, but A will not. The producer has lost $20 that might have been reaped from the sale: the $10 A would have spent, as well as the additional $10 C would have been willing to pay. In addition, A will not be able to buy the book, which we might see as a social loss. If, however, the producer were able to identify these individual valuations and could charge different prices to different customers, both the producer's loss and the social loss would disappear. Now C would be charged the full $30, and A could get the book for $10.

This hypothetical scenario assumes, of course, that a producer would be able to determine various buyers' actual valuations. Historically, one way of doing so has been by creating a variety of different versions of a product

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tronic protective measures to control new kinds of exploitation of their works. *See, e.g.*, LITMAN, *supra* note 261, at 81-86 (describing ways in which technological self-help, enforced by the DMCA, could lead to the overexpansion of copyright); Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTELL. PROP. REV. 236, 237-39 (1999) (arguing that the DMCA will likely improperly narrow the fair use doctrine); Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1683-86 (1999) (expressing concern about recent expansion of private rights in copyright law); Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. COPYRIGHT SOC'Y USA 193, 204-07 (2000) (arguing that the balance between incentives for copyright holders and public access has shifted toward "a free market in property rights rooted in the natural entitlement of creators"); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y USA 365, 387-89 (2000) (arguing that Congress inappropriately granted a "natural law monopoly" in the DMCA "comprised of rights for the creator to the exclusion of any duties"); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 566 (1999) (arguing that certain provisions of the DMCA are overbroad and warning of "its potential for substantial unintended detrimental consequences"); Yochai Benkler, *The Battle over the Institutional Ecosystem in the Digital Environment*, 44 COMM. ASS'N COMPUTING MACHINERY 84, 86 (2001) (arguing that "the expansion of exclusive private rights in information tilts the institutional ecosystem within which information is produced against peer production and in favor of industrial production"). *But see, e.g.*, Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1616-17 (2001) (arguing that proper "resolution of tensions between the exercise of control under copyright on the one hand and the availability of new technology on the other . . . notwithstanding current critiques, supports a continued role for control in a new technological environment," and suggesting that "the logic underlying [the DMCA] is consistent with earlier approaches to copyright/technology conflicts").

[266] *See, e.g.*, Fisher, *supra* note 260, at 1239-40 (setting forth a hypothetical whereby technology could be used to maximize returns while differentially charging consumers).

with different price points. Some versions may have stripped down features. Some versions simply may be available sooner. The methods can also be combined: hardcover books are generally distributed first at a higher cost, and lower-cost paperbacks are distributed some time later.

Obviously, these mechanisms result in only rough approximations. Moreover, there is nothing to prevent a secondary used book market from developing, thereby skewing the price discrimination altogether. Thus, "[e]ffective price discrimination requires restrictions on transfer of the work to other users; price discrimination will not work if high-value arbitrageurs can obtain low-cost access from redistributors."[267] Accordingly, advocates of such a contractarian approach argue that copyright owners need to be able to contract around some of the ground rules of copyright law. They argue that there will be greater access to information and more incentive to create original material if contract is allowed free reign.

There are, however, at least three problems with this approach. First, the contractual price discrimination model may well favor certain types of new creation over others. For example, fair use of copyrighted expression would no longer be permitted, and new creation that uses existing uncopyrightable material would suddenly be subject to licensing schemes. Second, such a model assumes that access to information is a purely private matter implicating concerns only about efficiency and agreement among parties. However, "licensing decisions designed to maximize individual or private welfare may not maximize society's."[268] Thus, the public as a whole may benefit from access to information that no one individual would value sufficiently to purchase. And even if an individual were to purchase the information, there is no guarantee that the information would be disseminated to those who could not afford it. Third, online licensing contracts are often not true bargains. Rather, they are simply "clickstream" agreements that are entered into by parties of different bargaining power and sophistication. Indeed, the recent battle over proposed Article 2B of the Uniform Commercial Code and the subsequent Uniform Computer Information Transactions Act (UCITA) has been waged in part over the issue of whether such contracts should be binding in all circumstances.[269] Finally, as discussed previously,

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[267] Cohen, *Perfect Curve*, *supra* note 260, at 1804.

[268] *Id.* at 1809.

[269] UCITA was formerly draft Article 2B of the U.C.C., until the American Law Institute withdrew its support. UCITA would enforce these so-called "clickwrap" licenses in the mass-market context where the licensee manifests assent either before or during the initial use. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT § 209, 7 U.L.A. 288 (1999) ("A party adopts the terms of a mass-market license . . . only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information."), *available at* http://www.law.

these contractual "solutions" do not actually remove the need for state intervention because some government must always be in the background to enforce any contractual agreement.

C. *A World of Online Passports*

In response to the French lawsuit concerning access to Nazi memorabilia, Yahoo! argued that it could not feasibly block French users from accessing the offensive websites without censoring those sites altogether.[270] According to Yahoo!, "no existing technology could effectively keep all French users from seeing" the sites at issue.[271] Ultimately, the French court appointed a panel of three experts to test Yahoo!'s technical argument.[272]

The panel estimated that, for approximately seventy percent of those accessing the web from France, the Internet Protocol (IP) address of the user is associated with a French Internet Service Provider and can be filtered accordingly.[273] The IP addresses for French users of America Online, however, would appear to originate in Virginia, where the headquarters of AOL's network is located.[274] Similarly, IP addresses on the private networks of large corporations might indicate the location of the server rather than the user.[275] Finally, the panel noted that users could actively conceal

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upenn.edu/bll/ulc/ucita/cita10st.doc. One of the principal points of contention about both Article 2B and UCITA is that they would make most of their default rules subject to change by "agreement of the parties," including provisions on choice of law, choice of forum, the remedies to be awarded, and the implied warranties of noninfringement, merchantability, and program content. Thus, as Mark Lemley has argued, "a software vendor with a good lawyer can quite easily enforce *virtually whatever terms it likes* simply by putting them 'conspicuously' in a multi-page document that the user cannot even see (much less agree to) until after buying, installing, and beginning to run the software." Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 122 (1999). And, although there is the possibility of such a contract being deemed unconscionable, that possibility is relatively remote given courts' general reluctance to void contracts on unconscionability grounds.

[270] *See* Angela Doland, *French Oppose Yahoo! on Nazi Items*, ASSOCIATED PRESS, July 24, 2000 ("[A]n expert witness called by Yahoo! testified [at today's hearing] . . . that it would be technically impossible to keep French cybernauts off the disputed Web sites."), http://www.codoh.com/newsdesk/2000/000724ap.html.

[271] *Id.*

[272] T.G.I. Paris, Aug. 11, 2000, http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord_tgi-paris_110800.htm (ordering the formation of a panel of technical experts to determine whether Yahoo! could identify and filter out French users from the sites found to violate French law).

[273] Document de travail sur le rapport d'expertise, T.G.I. Paris, Nov. 6, 2000, http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001106-rp.htm (presenting the report of the three experts who tested whether Yahoo! could identify and filter out French users).

[274] *Id.*

[275] *Id.*

their location by using "anonymization sites" that replace the user's IP address with a different one from another location.[276] Thus, the panel concluded that one hundred percent geographical identification was infeasible.[277]

Nevertheless, in imposing its order the French court appeared to embrace the position that, even if Yahoo! could not block all French users from sites displaying Nazi memorabilia, enough users could be identified so as to make the judgment effective. Thus, although for years cyber-libertarians have argued that cyberspace is unregulatable by geographically based sovereigns, the *Yahoo!* decision reflects the idea that, even if perfect regulation is impossible, such regulation can still be effective. After all, the fact that locks can be picked does not render locks useless as regulatory devices.[278]

Moreover, the technology to zone cyberspace based on physical geography is rapidly improving. In the past several years, companies such as DoubleClick, Akamai, NetGeo, Digital Island, Quova, and Digital Envoy have been racing to compile databases that match up the 4.3 billion possible Internet "locations" with physical geography.[279] Significantly, although commentators initially warned that governments might try to impose a digital identification requirement on cyberspace,[280] it appears to be private industry and not government that is leading the charge. For businesses, geographical tracking permits marketing campaigns tailored to customers in specific locations[281] and the ability to sell more targeted advertising.[282] Nevertheless, once the technology exists, government regulators may insist (just as the French judge in *Yahoo!* did) that sites employ this technology to enforce local laws.

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[276] *Id.*

[277] *Id.*

[278] This example is drawn from LESSIG, *supra* note 253, at 57.

[279] *We Know Where You Live*, FORBES.COM (Nov. 13, 2000), *at* www.forbes.com/global/2000/1113/0323130a_print.html; *see* Michael Geist, *E-Borders Loom, for Better or Worse*, TORONTO GLOBE & MAIL, June 28, 2001 (discussing Internet content providers' growing interest in determining the physical location of web resources and the people who access them), http://www.globetechnology.com/servlet/GAMArticleHTMLTemplate?tf=globetechnology/; Stefanie Olsen, *Geographic Tracking Raises Opportunities, Fears*, CNET NEWS.COM (Nov. 8, 2000), *at* http://news.cnet.com/2102-1023-248274.html (discussing Internet providers' efforts to "pinpoint the physical location of Web surfers").

[280] *See, e.g.*, LESSIG, *supra* note 253, at 49-53 (discussing the alternatives governments could use to impose digital identification).

[281] *See* Olsen, *supra* note 279 ("[A] traditional retailer such as Banana Republic could hawk swimming suits to Web visitors from Los Angeles as it pushes parkas to online shoppers from New York.").

[282] *See* Geist, *supra* note 279 ("[N]ational and global Web sites may now use geographic identification technology to guarantee advertisers that their ads will only be displayed to a local audience.").

If geographical tracking technology becomes more accurate and more widely used, then it is not hard to envision a cyberworld of digital passports, where users entering a website are immediately identified by country (or state, city, town, or zip code) and then offered content that has been zoned for members of that geographical community. A recent legal battle concerning iCraveTV.com, a Canadian corporation, illustrates how this would work. In 1999, the company began offering a streaming version of seventeen Canadian and American broadcast television stations online, uncut, and uninterrupted.[283] When challenged, the company argued that such retransmission was permitted under Canadian copyright law,[284] and that the site was intended for Canadian viewers only.[285] Nevertheless, the steps taken by the site to block access to Americans were trivially easy to circumvent. First, a potential user was required to enter his or her local area code. If the area code entered were not a Canadian area code, the user would be denied access to the service.[286] Users who negotiated the first step were then confronted with two icons: "I'm in Canada" and "Not in Canada" and were asked to click one.[287] Ultimately, a federal judge in Pittsburgh ruled that "acts of [United States copyright] infringement were committed within the United States when United States citizens received and viewed defendants' streaming of the copyrighted materials."[288] The judge issued a temporary restraining order against the Internet company,[289] which subsequently settled the case[290] and later went out of business.[291] Since that time, however,

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[283] *See* Nat'l Football League v. TVRadioNow Corp., 53 U.S.P.Q.2d (BNA) 1831, 1834 (W.D. Pa. 2000) (alleging that "defendants have captured United States programming from television stations in Buffalo, New York and elsewhere, converted these television signals into . . . data and streamed them over the Internet from [their] website"). For more details on the allegations, see John Borland, *Broadcasters Win Battle Against iCraveTV.com*, CNET NEWS.COM, Jan. 28, 2000, *at* http://news.cnet.com/news/0-1004-200-1535528.html (reporting on the legal battle between the Internet-based television company and American broadcasters).

[284] Because the suit was ultimately decided under U.S. law and then settled, this contention was never tested. For a discussion of the Canadian law with regard to this case, see Michael A. Geist, *iCraveTV and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 225-37 (2000).

[285] *See TVRadioNow Corp.*, 53 U.S.P.Q.2d (BNA) at 1834 (recounting the defense arguments).

[286] *See* Geist, *supra* note 284, at 225-26 (noting that "this approach was viewed, with some justification, as rather gimmicky since iCraveTV's own Toronto area code was posted on the site").

[287] *Id.* at 226.

[288] *TVRadioNow Corp.*, 53 U.S.P.Q.2d (BNA) at 1834-35.

[289] *Id.* at 1833.

[290] *See* Etan Vlessing, *iCraveTV Settles, Wraps Webcast*, 361 HOLLYWOOD REP., Feb. 29, 2000, at 4.

[291] *Panel II: Digital Video*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 338

a new corporation called JumpTV.com has announced its intention to launch a similar service in Canada, claiming that it will use geographic identification technology to ensure that only Canadians will be able to access

the site.[292] In a world of digital passports, a company like JumpTV could go one step farther and automatically "read" the digital identification of each user attempting to access the site, which would more effectively block access to those without Canadian identification.

Geographical tracing and digital identification technology therefore appear to "solve" the problem raised in cases such as *Yahoo!* and *TVRadioNow*. Using this technology, website operators or Internet Service Providers can simply allow access to some users while denying access to others, based on the geographical location of the user.

Nevertheless, at least three difficulties remain. First, website operators arguably would be required to monitor continuously the laws of every jurisdiction in order to determine which users to admit.[293] Second, Internet users (and regulators) worried about online privacy may balk at technology that would pierce geographical anonymity and link physical location to other data, such as the sites that the user visits. Such links might lead to increased invasion of privacy by marketers.[294] Even more ominous is the possibility that the loss of geographical anonymity might make people more reluctant to visit certain sites, for fear that they may be identified.[295] Finally, if, as in *Yahoo!*, a website operator in the United States refuses to block French citizens accessing the site, how will France enforce its wishes? Thus, the jurisdictional puzzle may not be completely solved.

(2001) (remarks of Jeffrey Cunard).

[292] *See* Geist, *supra* note 279 ("Canada's JumpTV has garnered considerable publicity from its plans to use geographic identification technology to limit its Internet retransmission of TV signals to Canadians."); Ed Hore, *JumpTV Wants to Put TV Signals on the Internet*, LAW. WKLY., Jan. 12, 2001.

[293] *See* Open Letter from Ben Laurie, *supra* note 90 (arguing that geographical filtering would impose a tremendous burden on services such as Yahoo!, which would be required "to maintain a huge matrix of pages versus jurisdictions to see who can and can't see what").

[294] *See, e.g.*, Jessica Litman, *Privacy and E-Commerce*, 7 B.U. J. SCI. & TECH. L. 223, 225 (2001) (arguing that cases such as *Yahoo!* and *TVRadioNow*, which give ISPs some responsibility for controlling access to people in different geographic areas, will exacerbate privacy concerns because, if an ISP has to know where you are, then there will be greater incentives to link web profiles with physical locations).

[295] *See, e.g.*, Jonathan D. Glater, *Hemming in the World Wide Web*, N.Y. TIMES, Jan. 7, 2001, § 4, at 5 ("'A lot of times people are looking for information on the Internet that they wouldn't want people to know they're looking for.'" (quoting Shari Steele, a lawyer for the not-for-profit Electronic Frontier Foundation)).

D. *You Enforce My Laws, I'll Enforce Yours*

Lawrence Lessig, in his book *Code and Other Laws of Cyberspace*,[296] offers a theory of international regulation of cyberspace activity that attempts to solve the question that the technological response in the previous Section leaves open: even if a website operator could easily identify the territorial location of each user, what is it that would compel a website operator to enforce the laws enacted in other jurisdictions? One answer, of course, is that, at least for commercial sites, the desire to operate internationally will exert a strong persuasive force, as Yahoo!'s "voluntary" capitulation to the French order demonstrates. Nevertheless, Lessig's approach goes farther than that by involving governments in a series of reciprocal enforcement arrangements.

Lessig starts by outlining the standard cyber-libertarian argument that the Internet is unregulatable.[297] This argument, reminiscent of the Johnson and Post approach discussed previously,[298] proceeds along the following lines: Suppose the legislature of New York passes a statute banning online gambling. In the wake of the legislation, New York's Attorney General moves to shut down all gambling sites located on servers in New York. The sites can simply move their servers to Connecticut, and New York citizens can still access online gambling activities as easily as before. If the New York Attorney General is persistent, she may decide to seek prosecution in Connecticut as well and may be able to persuade the Connecticut Attorney General to shut down the servers, even if Connecticut does not have the same anti-gambling policy as New York. But then the website operators simply move their servers offshore, to the Grand Caymans or the Bahamas, or somewhere else where they will not be prosecuted. It is still no more difficult for American citizens to gain access to the gambling sites, and territorial regulation appears to have failed.[299]

Lessig answers this dilemma with the concept of reciprocal enforcement. According to Lessig, "[e]ach state [or nation] would promise to enforce on servers within its jurisdiction the regulations of other states for citizens from those other states, in exchange for having its own regulations

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[296] LESSIG, *supra* note 253.

[297] *See id.* at 54-55 (describing Minnesota's attempt to enforce a law banning gambling online and recounting the argument that it is "practically impossible for geographically limited governments to enforce their rules over actors on the [Internet]").

[298] *Supra* text accompanying notes 231-58.

[299] *Cf.* LESSIG, *supra* note 253, at 54-55 (explaining that "[n]o matter what Minnesota does, it seems the [Internet] helps its citizens beat the government").

enforced in other jurisdictions."[300] Lessig argues that although states do not necessarily have the same regulatory goals, they all at least have some laws that they wish to have enforced extraterritorially. Thus, New York may have an interest in preventing its citizens from accessing gambling sites, while Florida may have an interest in restricting access to pornography. In Lessig's scheme, Florida would simply require servers within Florida to block the access of New Yorkers to gambling sites, in exchange for New York's keeping Florida citizens away from New York servers offering content deemed impermissible in Florida. According to Lessig, "[w]ith a simple way to verify citizenship, a simple way to verify that servers are discriminating on the basis of citizenship, and a federal commitment to support such local discrimination, we could easily imagine an architecture that enables local regulation of Internet behavior."[301] Indeed, such architecture would be similar to the online passports discussed in the previous Section. Moreover, Lessig envisions this system of reciprocal enforcement operating internationally as well. He states, albeit without explanation, that "[t]here is the same interest internationally in enforcing local laws as there is nationally—indeed, the interest is most likely even higher."[302]

A selective certification system would, as Lessig observes, "dramatically increase the power of local governments to impose requirements on their citizens."[303] Websites would condition access on the presentation of digital certificates, and rules imposed by local jurisdictions would be enforced by sites worldwide.

> The effect, in short, would be to *zone* cyberspace based on the qualifications carried by individual users. It would enable a degree of control of cyberspace that few have ever imagined. Cyberspace would go from being an unregulable space to, depending on the depth of the certificates in the space, the most regulable space imaginable.[304]

Nevertheless, one wonders whether countries would be as quick to sign up for this kind of mutual enforcement scheme as Lessig imagines. Take the *Yahoo!* case, for example. Had Yahoo! not chosen to comply with the French order, how likely is it that the U.S. government or its courts would have required Yahoo! to block access to French users? After all, the American commitment to First Amendment values is quite strong, and any governmental efforts to help France enforce its order would surely be met by fierce opposition (and lawsuits) within the United States. Indeed, the fed-

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[300] *Id.* at 55.
[301] *Id.* at 55-56.
[302] *Id.* at 56.
[303] *Id.* at 56-57.
[304] *Id.* at 57.

eral district court order declaring the French judgment unenforceable in the United States articulated such First Amendment concerns as part of its justification.[305]

Moreover, Yahoo! and other businesses would likely argue that the zoning scheme Lessig envisions would be costly to enforce even if the technology to identify users geographically were cheap. As the U.S. Chamber of Commerce recently argued in an amicus brief filed in Yahoo!'s U.S. declaratory judgment action:

> Technology alone is not the issue. . . . Under the French court's jurisdictional theory . . . each individual or company with a presence on the internet would have to constantly monitor the laws of every country in the world, search out content that might be prohibited by one or more of those countries, and implement some sort of blocking software that would screen different categories of material from users in different countries. This would be obviously too burdensome for even enormous companies like Yahoo!, and would literally be a death knell for smaller companies and non-profit organizations.[306]

Such arguments might well persuade jurisdictions to forgo reciprocal enforcement in many cases.

Finally, as the discussion of *Yahoo!* indicates,[307] there is very little global consensus about what constitutes appropriate web material. France and Germany want to block Nazi sites; states within the U.S. try to prosecute gambling sites;[308] and governments in China, Saudi Arabia, Singapore

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[305] It is unclear, however, whether or not the mere enforcement of a foreign order should be deemed sufficient state action to trigger constitutional concerns. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the U.S. Supreme Court ruled that judicial enforcement of racially restrictive covenants would violate the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1. *Kramer*, 334 U.S. at 20-21. On the other hand, *Shelley*'s logic "consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1697 (2d ed. 1988). This question, of course, implicates longstanding debates about the coherence of trying to draw a distinction between "private" and "public" action for constitutional purposes. For a discussion of such debates, see Berman, *supra* note 258. I am grateful to Mark Rosen for noting some of the problems inherent in the application of the state action doctrine to the judicial enforcement of foreign "unconstitutional" judgments.

[306] Brief of Amici Curiae Chamber of Commerce of the United States et al. at 6-7, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (No. 00-21275).

[307] *Supra* Part I.D.

[308] *See, e.g.*, Humphrey *ex rel.* State v. Granite Gates Resorts, Inc., 568 N.W.2d 715, 721 (Minn. Ct. App. 1997) (affirming the exercise of jurisdiction over a non-resident corporation and its principal for deceptive trade practices, false advertising, and consumer fraud in connection with an Internet gambling site); Vacco *ex rel.* People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 854 (N.Y. Sup. Ct. 1999) (declaring that the Attorney General of New York is entitled to injunctive relief against a non-resident corporation and subsidiaries

and elsewhere try to block access to sites for political or religious reasons.[309] Countries may be able to regulate such sites within their borders, but they may well find it difficult to convince other countries to enforce their restrictions, even in the reciprocal scheme Lessig envisions. Moreover, efforts to enforce local norms might run counter to the current trend of increasing international norm-creation in the human rights area.[310] Thus, many would argue that other nations' "sensitivities should not serve as an excuse to block sites that promote the protection of human rights."[311]

Lessig recognizes both that the "architecture" he describes may never be universally enforced and that some individuals-—if they desire it enough-—will probably always be able to avoid technologies of identity. Nevertheless, he argues that even partial control would have powerful effects. According to Lessig, "it is as likely that the majority of people would resist these small but efficient regulators of the [Internet] as it is that cows would resist wire fences."[312]

An even more fundamental objection to this approach, one that Lessig himself seems to share,[313] is more normative. A cyberspace where individuals could only access content that was approved by their government would be a very different cyberspace from the one most people have experienced so far. Indeed, many of the most highly touted features of the Internet are functions of its relatively open architecture. Thus, observers have

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for offering Internet gambling to residents of New York).

[309] *See, e.g.*, Mary Kwang, *Internet Dreams: China's New Generation*, STRAITS TIMES (Singapore), July 16, 2001 (quoting a Washington-based official of Human Rights Watch as complaining that "'China's attempts to control access to the Internet through politically-motivated regulations and detentions blatantly violate users' rights to free expression'"); Tan Tarn How, *Foreign Websites That Refuse to Register "Can Be Blocked,"* STRAITS TIMES (Singapore), Sept. 1, 2001 (reporting that Singapore's government may block access to foreign websites that do not register in Singapore as political websites as required by a new law that limits political campaigning by websites during an election); *Tougher Regulations on Internet Cafes Planned*, MIDDLE EAST NEWSFILE (Saudi Arabia), Sept. 9, 2001, at LEXIS, Moclip File (describing regulations on Internet cafés that would bar access to websites deemed offensive to Islam and the political system).

[310] *See supra* Part I.I (discussing the challenge that international and transnational human rights enforcement poses for jurisdiction).

[311] Glater, *supra* note 295 (quoting William F. Schulz, Executive Director of U.S. Operations for Amnesty International).

[312] LESSIG, *supra* note 253, at 57.

[313] Lessig addresses the reader directly to make this point:

> Stop. Don't turn away. I know at least some of the thousands of reasons you have for rejecting the structure I've just described. Some of those reasons are normative-—you hate the world I am describing. Or you hate the idea that cyberspace would become like this world. *I do too*. I am not promoting an idea, I am arguing that this is the world we are moving to.

Id. at 56.

lauded the Internet's power (or at least potential) to democratize where people get their news;[314] to make more accessible all forms of political[315] and artistic expression;[316] to alert the international community about environmental[317] and human rights abuses[318] occurring anywhere in the world; and to facilitate political organizing.[319] Without these benefits, we may lose some of the attributes

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[314] *See, e.g.*, ANDREW L. SHAPIRO, THE CONTROL REVOLUTION 34-38 (1999) (describing the way in which the Internet facilitated resistance to a 1995 *Time* magazine article about the availability of pornography online); *see also id.* at 40-43 (citing Matt Drudge's online reporting of the Clinton-Lewinsky affair as an example of shifting power away from exclusive reliance on mainstream news sources).

[315] *See, e.g.*, Glater, *supra* note 295 ("[T]he Web allowed Amnesty International to get information into China about the Universal Declaration of Human Rights and about Chinese human rights violations, despite the government's efforts to block them." (quoting William F. Schulz, Executive Director of U.S. Operations for Amnesty International)).

[316] *See, e.g.*, John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, Electronic Frontier Foundation, *at* http://www.eff.org/Publications/John_Perry_Barlow/idea_economy.article (last visited Nov. 20, 2002) ("[A]ll the goods of the Information Age—all of the expressions once contained in books or film strips or records or newsletters—will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light . . . .").

[317] *See, e.g.*, *Environmentalists Use High Tech to Delay Dolphin Massacre; Internet Images Key to Strategy, Says BlueVoice.org Director*, ASCRIBE NEWSWIRE, Oct. 26, 2001, LEXIS, Ascrbe File ("'The Internet is absolutely crucial to [the] strategy of stopping these . . . environmental abuses.'" (quoting Hardy Jones, Executive Director of BlueVoice.org)); Jeffrey B. Gracer, *Green Risks on the Rise*, LATINFINANCE, Sept. 2000, LEXIS, Lafn File ("As a result of, among other things, democratization and the Internet, the days of environmental impunity in the region are numbered. Opposition political parties, the media, local and international non-governmental organizations (NGOs), and indigenous groups are effectively shining the spotlight on companies and projects with significant environmental impacts."); Graham Searjeant, *Globalisation Can Work Better if We Try*, TIMES (London), Jan. 25, 2001, LEXIS, Ttimes File ("The global power of information, often via the Internet, is already helping Western consumers to voice their views on distant environmental abuse . . . ."); Mel Wilson & Rosie Lombardi, *Globalization and Its Discontents: The Arrival of Triple-Bottom Line Reporting*, IVEY BUSINESS JOURNAL, Sept./Oct. 2001, LEXIS, Allnews File (linking the rise in anti-globalization sentiment with the rise of the Internet in the mid-1990s, when "[r]eport after report about the alleged environmental and human rights misdeeds of corporations appeared in mainstream media, as advocacy groups used the Internet to organize and publicize their causes").

[318] As William F. Schulz, Executive Director of Amnesty International's United States Operations, puts it:

> Now it is virtually impossible for a violation to take place, or at least violations in public, in any part of the world without being known almost instantaneously around the world. There has been virtually no development in the last five years that has been any more important to the success of the human rights movement than the growth of the Web.

Glater, *supra* note 295.

[319] *See* Henry H. Perritt, Jr., *The Internet Is Changing the Public International Legal*

that have made the Internet both so popular and so significant.

E. *Teaching the World to Sing in Perfect Harmony I: Treaties*

One obvious response to the challenges of globalization and online communication is to seek increased international harmonization of legal regimes. After all, if a universal substantive law were applied around the world, many of the concerns about borders, conflicting law, and impermissible extraterritorial regulation would disappear. Nevertheless, as the discussions in the next two sections indicate, international norms are often difficult both to establish practically and to justify normatively.

The classical model of international harmonization is through bilateral and multilateral treaties. Two examples of such a treaty-based approach will suffice to indicate its limitations. First, I will examine an older treaty, the Berne Convention for the Protection of Literary and Artistic Works,[320] which was designed to harmonize the various national copyright regimes. Second, I will outline the debates concerning the still-ongoing Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which is being developed under the auspices of the Hague Conference on Private International Law.[321]

1. The Berne Convention

During the first meetings in 1883 to form the Berne Convention, an attempt was made to institute a uniform international copyright system.[322] By

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System, 88 KY. L.J. 885, 899 (1999-2000) (arguing that "[t]he Internet's low economic barriers to entry provide a voice to political actors who otherwise would be denied effective access to the public arena," and that "[b]ecause the Internet gives them access, and is inherently global, these actors can find like-minded people in other states, thus enabling them to build political movements across national lines").

[320] Paris Act Relating to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, *concluded* July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. The first version of the Berne Convention was concluded in 1886, and after several revisions the Convention was ultimately concluded in 1971. *See generally* SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 3-125 (1987) (tracing the development of the Berne Convention).

[321] *See* Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, *at* http://www.hcch.net/e/workprog/jdgm.html. Because the Hague Convention focuses on the enforcement of individual nation-state judgments, it is not truly aimed at the harmonization of *substantive norms*. Nevertheless, the Convention does seek to harmonize nation-state *procedural rules* for recognition and enforcement of judgments. Moreover, the controversies surrounding the Convention illustrate some of the difficulties such formal international efforts are likely to encounter, even when the goal is something less than substantive harmonization.

[322] *See* Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copy-*

the time the Convention concluded three years later, however, that ambition had been rebuffed, and the Berne Convention stopped far short of true harmonization.[323] Instead, the participating countries agreed to a system of "national treatment," whereby member states agreed to give authors from other signatory states the same rights as those states apply to domestic authors.[324] Moreover, the Convention established a set of minimum requirements for copyright protection to which all signatory states must adhere.[325] While this idea of minimum standards could in theory have resulted in a strong set of international norms, the actual minimum requirements set by the Convention were extremely weak and relatively easy to meet.[326]

Thus, the Convention allowed great latitude for signatory states to develop their own copyright regimes and create their own norms regarding, for example, how to define the "author" for purposes of copyright protection[327]

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right Laws to a Supranational Code?, 47 J. COPYRIGHT SOC'Y USA 265, 268 (2000) ("The German delegation, in a diplomatic questionnaire, asked whether it might be better to abandon the national treatment principle in favor of a treaty that would codify the international law of copyright and establish a uniform law among all contracting states."). According to Ginsburg, "[a]lthough most participating countries viewed the proposition as a desirable one, they voted against it because it would have required great modifications of their domestic laws, which many countries could not implement all at once." *Id.*

[323] *See* Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 490 (2000) ("Proponents of this universalist vision were rebuffed. . . . Instead, pragmatism prevailed."); Ginsburg, *supra* note 322, at 269 ("In general, in comparison to the universalist draft adopted at the 1883 Conference, the . . . draft of 1884 moved away from the idea of a comprehensive uniform international law of copyright."). *But see id.* at 270 ("Although the Convention did not achieve every goal outlined at the first Congress of 1858, it represented a major step towards international copyright protection. . . . [It also] la[id] the groundwork for later evolution toward the more universalist ideal expressed in earlier drafts.").

[324] *See* Berne Convention, *supra* note 320, at 35 ("Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals . . . .").

[325] *See* Dinwoodie, *supra* note 323, at 490-91 (discussing minimum substantive standards agreed upon in the Berne Convention).

[326] *See* RICKETSON, *supra* note 320, at 53, 73-74 (noting that in order to include as many countries as possible, the conference elected to set up a flexible convention).

[327] *See* STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 4.46 (2d ed. 1989) ("The Convention does not define the term 'author' which it uses throughout. . . . In the absence of convention law it is, therefore, for national legislation to decide who the owner of the copyright is."). For example, U.S. copyright law, taking a market-oriented approach, recognizes employers as authors of works prepared by employees within the scope of their employment, *see* 17 U.S.C. § 201(b) (2000) (providing that "the employer or other person for whom the work is prepared is considered the author" of a work made for hire); 17 U.S.C. § 101 (2000) (defining "work made for hire" to include "a work prepared by an employee within the scope of his employment"), whereas French law, focusing on the moral rights of the creator, treats the employee as the author regardless of the employment relationship, *see* Law No. 92-597 of July 1, 1992, J.O., July 3, 1992, p.4; D.S.L. 1997

and how to carve out exceptions to copyright to respond to free speech concerns[328] or effectuate other social policies.[329] Throughout the twentieth century, "[t]he process of public international copyright lawmaking tended to be slow and unwieldy because it operated by way of consensus among . . . countries with a diverse range of social and economic perspectives."[330] As a result, changes to the Berne Convention have generally represented mere codifications of commonly accepted policies that, in many cases, had already been implemented in the national laws of most member states before being incorporated into the Convention.[331] Moreover, such changes have always been developed through the laborious process of treaty revision.[332]

2. The Hague Convention

The Hague Convention has been beset by similar difficulties. The treaty got its start in 1992, when the United States approached the other countries that belong to the Hague Conference on Private International Law and suggested that the conference attempt to harmonize international rules for enforcement of judgments across borders.[333] Almost ten years later, that goal continues to elude convention delegates, largely because of a lack of consensus about adjudicatory jurisdiction generally, and about jurisdiction over online commercial transactions in particular.[334] Indeed, the disagree-

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(amended Mar. 27, 1997) (Fr.) (providing for copyright ownership by employers only with respect to software).

[328] For example, U.S. copyright law, unlike the law in most civil law countries, permits unauthorized parodies of copyrighted works under the rubric of fair use. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594 (1994) (holding that a rap group could, under the fair use doctrine, create a parody of another song even if the use was commercial).

[329] *See* Dinwoodie, *supra* note 323, at 492 ("Although these different [national] approaches inevitably privilege many similar acts—-such as core educational or research uses, or uses implicating free speech concerns—many also reflect the exigencies of national cultural policy (or political demands)."); *see also* Sam Ricketson, *The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties*, 1999 INTELL. PROP. Q. 56, 93 (using Australian copyright law as a "test case" in order to demonstrate that "the present Berne text, together with the useful overlay of implied minor exceptions, do[es] provide national legislators with a reasonable degree of flexibility").

[330] Dinwoodie, *supra* note 323, at 492-93 (citation omitted).

[331] *See id.* at 493 (arguing that the agreements produced were codifications of commonly held policies).

[332] *See id.* at 494 (describing treaty revision as "a means of updating the [C]onvention").

[333] *See* Marc E. Hankin, *Proposed Hague Convention Would Help IP Owners*, NAT'L L.J., July 23, 2001, at C20 (describing the U.S. government's request "that the Hague Conference on Private International Law, of which the United States is a member state, negotiate and draft a convention on jurisdiction and the enforcement of judgments in foreign countries").

[334] *See, e.g.*, Paul Hofheinz, *Birth Pangs for Web Treaty Seem Endless*, WALL ST. J., Aug. 16, 2001, at A11 ("Should a German shopper be able to sue a U.S. Internet retailer in a Munich court if he is unhappy with something he bought online? Delegations from 53 coun-

ments are now so entrenched that at the most recent meeting of delegates, the primary agreement reached was to have an informal working group develop a new draft text to be submitted in 2003.[335]

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Both of these attempts at international harmonization reveal the principal drawback of attempting to establish international norms through multilateral treaties. Almost by definition, these treaties will demand prior consensus among many countries with different social policies and economic interests. Thus, the treaties will tend merely to codify painstakingly developed conventional wisdom about recognized problems.[336] As a result, such treaties are rarely the best mechanism for developing new solutions to emerging issues on which there are widely divergent traditions and interests. Yet "technological pressures demand a rapidity of lawmaking, a dynamic disposition, and a forward-looking perspective."[337] Accordingly, the classical model of public international lawmaking may not be the appropriate mechanism for achieving international harmonization in a fast-changing world.

F. *Teaching the World to Sing in Perfect Harmony II: Supranational Administrative/Adjudicative Bodies*

Given the cumbersome nature of public international lawmaking, international harmonization efforts, unsurprisingly, have shifted in recent years to a somewhat more dynamic model, particularly in fields of rapid technological development. For example, since the 1994 Uruguay Round Revision of the General Agreement on Tariffs and Trade (GATT),[338] commercial trade issues that were formerly hashed out through diplomatic channels are now addressed by WTO dispute resolution panels in a more adjudicatory

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tries have worked on an answer for more than two years, and it continues to elude them.").

[335] Andrea Schulz, *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, *at* ftp://ftp.hcch.net/doc/jdgm_pd19e.doc (Aug. 19, 2002).

[336] *See, e.g.*, Pamela Samuelson & Suzanne Scotchmer, *The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions*, 17 HASTINGS COMM. & ENT. L.J. 763, 765 (1995) (arguing that "both the strengths and weaknesses of [one international treaty] stem from [the treaty's] essentially backwards-looking character").

[337] Dinwoodie, *supra* note 323, at 494.

[338] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL TEXTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 33 I.L.M. 112 (1994) [hereinafter DSU] (establishing the rules and procedures to be used in WTO dispute settlement proceedings).

fashion.[339] Likewise, the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) adjudicates fifty-eight percent of the trademark disputes filed under the Internet Corporation for Assigned Names and Numbers's Uniform Dispute Resolution Policy.[340]

The advantages of the more dynamic model are obvious. International institutions with some form of adjudicatory body can react far more quickly to new developments without the need for diplomatic conferences or complete consensus.[341] And if the amount of activity is a sign of success, then it appears that the more dynamic model is catching on. In the first three years of the WTO dispute settlement system, as many cases were filed as in the entire forty-seven-year period preceding the Uruguay Round.[342]

Nevertheless, there are several reasons to resist this dynamic model. First, the Dispute Settlement Understanding of the WTO makes clear that its rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."[343] Although the panels may, over time, expand their ability to "interpret" (and thereby define or change) international law, the governing documents seem designed to constrain any truly creative administrative or judicial role.

Second, as the violent protests at international gatherings over the last few years[344] indicate, bodies such as the WTO and the WIPO face serious objections from the perspective of procedural transparency and democratic legitimacy.[345] Perhaps because they were developed in the context of inter-

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[339] *See* Dinwoodie, *supra* note 323, at 502 ("The diplomatic model of the GATT gave way to the judicial model of the WTO, reflecting an attempt to shift from a power-based to a rule-based procedure."); *see also* Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT'L L. 171, 171-72 (1998) (describing the shift to a rule-based model of dispute settlement within the WTO); Kim Van der Borght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223, 1224-25 (1999) (describing the ways in which the Uruguay Round changed the nature of the dispute settlement process "from a power-based to a rule-based procedure"). To the extent that parties perceive WTO rulings as more readily enforceable, this perception could also help account for the increase in actions filed.

[340] Geist, *Fair.Com?*, *supra* note 147.

[341] *See* Dinwoodie, *supra* note 323, at 494-95 (arguing that "efforts to enable international institutions to react more quickly to new developments without the need for diplomatic conferences or complete consensus" are one aspect of the new public international model).

[342] *See* Chua, *supra* note 339, at 172 (reporting in 1998 that "GATT dispute settlement panels resolved more than 100 cases between 1947 and 1994," but "[s]ince the implementation of the DSU in 1995, the WTO has received over 100 trade disputes with 28 cases proceeding to a dispute settlement panel" (citations omitted)).

[343] DSU, *supra* note 338, at art. 3.2.

[344] *See supra* note 19 (citing sources that discuss such protests).

[345] As David Post has argued:

> [T]he problem of scale in governmental institutions is one we have to think about again, because I don't see any good solutions, right now at least, to how we build

national diplomacy, these bodies assume a model of mediation, negotiation, conciliation, and secrecy that might make us pause before endowing them with the power to create international norms.[346] For example, many observers have urged that the procedures of these bodies be made more transparent, through open hearings, greater access to the submissions of parties, and the ability of non-state parties to participate.[347] Even beyond procedural issues, however, WTO panels face the objection that they are not accountable to any electorate. Although all unelected adjudicatory bodies are insulated from democratic pressures to some extent, accountability is usually built into the system at some stage in the process, through, for example, appointment, confirmation, or removal of decision makers. In contrast, WTO panel members are selected through an obscure process,[348] and no democratically accountable official is involved.[349]

> global institutions that have the trust of the people who are subjected to their rules and regulations. I think this is related to what we might call the Seattle phenomenon (or the WTO protests), if you will. I think there is a very real phenomenon that is going to play itself out on the Net as people ask themselves: Who or what are these international institutions who have the authority to make the rules for this global environment? It's an essential problem and a very difficult one.

Thomas E. Baker ed., *A Roundtable Discussion with Lawrence Lessig, David G. Post & Jeffrey Rosen*, 49 DRAKE L. REV. 441, 443 (2001).

[346] *See* David Palmeter, *National Sovereignty and the World Trade Organization*, 2 J. WORLD INTELL. PROP. 77, 80-81 (1999) (arguing that the WTO's diplomatic model does not fit a traditional legalistic model).

[347] *See* Van der Borght, *supra* note 339, at 1241-42 (describing WTO procedures and suggested reforms); *see also* Sands, *supra* note 37, at 543-46 (praising recent decisions of the WTO Appellate Body that have begun to permit non-state actors to play a role in WTO proceedings).

[348] Article 8 of the DSU, *supra* note 338, provides the rules for the composition of panels. The WTO Secretariat proposes nominations to the panel, which can be disputed only for compelling reasons. *Id.* at art. 8(6). The Secretariat maintains a list of qualified governmental and non-governmental individuals. *Id.* at art. 8(4). The qualifications are general. The panelists must be

> well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a [WTO] Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Id. at art. 8(1). Further, the panel members should be "selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience." *Id.* at art. 8(2). The panelists generally cannot be from the disputant country, *id.* at art. 8(3), and must "serve in their individual capacities and not as government representatives, nor as representatives of any organization," *id.* at art. 8(9).

[349] *See* Dinwoodie, *supra* note 323, at 506 (pointing out the poor representational legitimacy of the WTO panels because they are "insulated from democratic pressures"); David M.

Thus, we see a "democratic deficit"[350] because lawmakers lack electoral responsibility to the "'people' whose 'sovereignty'" they exercise.[351] As one commentator has argued, "the GATT is not the world constitution, and the WTO is not the World Supreme Court. They both fail to adhere to some of the essential standards required of institutions that would claim to exercise prescriptive authority over individuals throughout the world."[352] Not surprisingly, such unmoored legal authority faces resistance on the ground.

Third, the structure of the WTO process, in which complaints are brought by countries rather than by individual parties, may tend to produce norms skewed toward a limited range of interests. For example, in the copyright context, the United States Trade Representative may well take the position in disputes before the WTO or WIPO that greater copyright protection is beneficial to U.S. industry as a whole. This position would ignore those who might advocate a lower level of protection in order to create greater distributional equity between countries or to protect non-trade interests, such as privacy or free speech. In addition, the lack of procedural transparency or democratic accountability may make such international administrative/adjudicative bodies more readily subject to industry capture. For example, a recent study of domain name trademark decisions reached by WIPO's Arbitration and Mediation Center found that WIPO arbitrators

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Driesen, *What Is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279, 315-16 (2001) (explaining that the WTO lacks democratic legitimacy because the officials are not selected by citizens or legislative bodies, but generally by the GATT Secretariat); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT'L L. 191, 213-14 (2000) (observing that the denial of citizen participation in the WTO has raised the concern that "some type of democratic process is needed to counter growing popular opposition to many of its initiatives").

[350] *See* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 85 (2000) ("The [democratic] deficit refers to the extent that international agencies increasingly have been allocated legislative competencies directly compromising domestic law and policies that have been established through duly appointed processes so as to ensure transparency, accountability and the opportunity for citizens to be heard."); *see also* Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451, 456-72 (1999) (outlining the democratic deficit critique); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 628 (1999) (arguing that the European Community's "'democratic deficit' flows primarily from an inability to establish democratically-legitimate hierarchical supervision over supranational technocrats–-a problem bound up with the historical relationship between demos, democracy and national political institutions as cultural symbols of popular sovereignty").

[351] *See* Lindseth, *supra* note 350, at 633 (arguing that supranational institutions raise questions of democratic legitimacy due to the "transfer of normative power to agents that are not electorally responsible" to the people they represent).

[352] Dinwoodie, *supra* note 323, at 505.

ruled in favor of the trademark holders 82.2% of the time.[353]

Fourth, the very advantage of these bodies—their ability to address new issues in a changing environment—may also be a disadvantage. After all, a decision of a WTO dispute resolution body may not only establish international norms, but also may entrench those norms, freezing them in place and preempting the ability of various countries to experiment with different approaches. Such international norms may tend to frustrate more local efforts to tailor trade policy to particular social, cultural, or economic conditions. For example,

> different countries with varying educational practices and literacy rates may permit or prohibit quite different copying practices. The manner in which authors are compensated may differ from country to country depending upon established labor and employment practices. The ways in which works are exploited, and thus need to be protected, may hinge upon social customs unique to particular countries. The extent of reasonable copying privileges may reflect the level of access to public libraries. Commitments to free expression, and hence use of a work in that cause without the need for permission, may vary in intensity depending upon the political development of the society in question. Unqualified respect for the integrity of artistic works might be affected by different notions of property. And market mechanisms necessary to support schemes for compensating authors might be more feasible in certain cultures than in others.[354]

Whether or not one believes that international norms should subsume local variations, it is surely problematic that such overarching norms might be established by marginally accountable bodies with input often from only two litigating countries.

Finally, some critics have suggested that the very goal of harmonization may be misguided. For example, Paul Stephan has pointed out two common outcomes of the harmonization process,[355] neither of which is normatively desirable. First, Stephan contends that international-harmonization efforts are often the product of rent seeking by various industry groups. He suggests that many harmonization efforts in commercial law are initiated by particular industries seeking particular legal rules. The resulting international norms are usually drafted by industry experts and, not surprisingly, benefit the industry seeking the change. Second, he observes a tendency among the various parties to an international harmonization effort to adopt

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[353] Geist, *Fair.com?*, *supra* note 147, at 6. Geist also found that, in cases where the parties opt for a single arbitrator rather than a panel of three (90% of the total), the complainant wins 84.4% of the time. *Id.* at 18.

[354] Dinwoodie, *supra* note 323, at 513-14 (footnote omitted).

[355] Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 744 (1999).

relatively vague standards in order to smooth over major policy disagreements. These standards, because they are couched in such general language, become a license for domestic decision makers to exercise broad discretion in interpreting international norms. As a result, the law may well become even less certain than it was before, thus foiling the harmonization effort altogether. Accordingly, Stephan argues that "[t]he political economy of [the harmonization] process results too often either in rules written for the benefit of particular industries and other interest groups, or in the suppression of conflict that in turn increases legal risk."[356] Instead, he envisions a system that would allow parties virtually unlimited power to choose among national rules through private contractual agreements.[357] Whether or not one embraces Stephan's alternative, his criticism of international harmonization should at least raise doubts regarding the efficacy of the enterprise.

G. *A Return to Lex Mercatoria*

Given the problems inherent in both treaty-based and agency-based efforts to harmonize legal regimes, one possible alternative is to consider the role national courts might play in developing international norms. In several recent articles, Graeme Dinwoodie has advocated this approach, particularly with regard to copyright law.[358] Essentially, Dinwoodie asks courts to develop an international common law, resurrecting the "lex mercatoria"[359] that for centuries governed international trade.[360]

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[356] *Id.*

[357] *Id.* at 789.

[358] *See* Dinwoodie, *supra* note 323, at 475 (arguing for national courts to be enlisted in the "task of copyright internationalization by sketching a new choice-of-law methodology"); *see also* Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733, 777-81 (2001) (suggesting an enhanced role for private litigation in the development of international copyright norms and the revision of choice-of-law methodology to permit national courts to consider international norms).

[359] Lex mercatoria has been defined as "'a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.'" Philip J. McConnaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427, 473 n.167 (2001) (quoting Berthold Goldman, *The Applicable Law: General Principles of Law-—The Lex Mercatoria*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 116 (Julian D.M. Lew ed., 1987)). Lex mercatoria is not a monolithic body of law and is neither purely national nor purely international. *See* Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 672-74 (1999) (explaining the sources of lex mercatoria). It appears to have developed during the middle ages, when transnational merchants resolved their disputes in specialized merchant courts that applied customary transnational commerce norms and

Dinwoodie starts from the observation that all current approaches to choice of law force courts to localize international disputes and therefore resolve them under the law of one country or another.[361] This process forecloses courts from considering international norms that might exist "separate and apart from domestic policy objectives."[362] As Dinwoodie points out, however, international disputes often "implicate interests beyond those at stake in purely domestic disputes."[363] Thus, he recommends that national courts develop a substantive common law for addressing multistate cases.

Many decades ago, conflict-of-laws theorist David Cavers wrote that, in a conflicts analysis, "[t]he court is not idly choosing a law; it is determining a controversy."[364] He therefore reasoned that a court could not "choose wisely without considering how that choice will affect that controversy."[365] Building on Cavers, Dinwoodie argues that the judicial role often involves choices among many different substantive solutions and that courts should be free to generate legal standards in multistate cases the same way they do in purely domestic cases.[366] Moreover, "statutory rules enacted by a national legislature are rarely enacted with an eye to international disputes or

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trade practices rather than any particular national positive law. *See* Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 356 (2001) (describing the origins of lex mercatoria); Philip J. McConnaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 COLUM. J. TRANSNAT'L L. 595, 610 n.31 (2001) ("'[L]ex mercatoria' . . . refer[s] generally to the norms, principles and customs that emanate from cross-border commerce without reference to any given national law."). This hybrid practice governed exporters and importers, shippers, banks, and marine insurance companies. *See* Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 157 n.47 (1994) (describing persons engaged in international commerce as an example of an effective international community). The principal advantage of lex mercatoria is that it eliminates uncertainties regarding which jurisdiction's law will apply to a given dispute, *see* Maniruzzaman, *supra*, at 680 (stating that one of the goals of lex mercatoria is to "get rid of the cumbersome exercise of applying conflict rules"), although as with all common law doctrines, uncertainties may remain with regard to the substantive norms to be applied.

[360] *See* Dinwoodie, *supra* note 323, at 522 (noting that international copyright norms may be developed by reference to lex mercatoria); *see also* Boaventura De Sousa Santos, *Law: A Map of Misreading: Toward a Postmodern Conception of Law*, 14 J.L. SOC'Y 279, 287 (1987) (describing the re-emergence of lex mercatoria as an example of one way in which "[t]ransnational capital has . . . created a transnational legal space, a supra-state legality").

[361] *See* Dinwoodie, *supra* note 323, at 475 ("Each of these approaches requires courts to decide issues raised by such disputes according to a single national law.").

[362] *Id.*

[363] *Id.* at 476.

[364] David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 189 (1933).

[365] *Id.*

[366] *See* Dinwoodie, *supra* note 323, at 548 ("[D]omestic courts frequently develop the law in a way that does not involve the application of a single pre-articulated rule; they should be free to do so also in multinational cases.").

conduct."[367] As a result, these legislative choices inevitably reflect domestic priorities, and there is no particular reason to apply them reflexively in international conflicts. Finally, Dinwoodie argues that, when a dispute is multinational, it will always implicate interests in at least two different countries. When courts arbitrarily (or even not so arbitrarily) choose to apply one country's laws over the other, they are responding only to one country's interests.[368] In Dinwoodie's view, courts instead should develop an appropriate rule "from an amalgam of national and international norms."[369] This hybrid form of lawmaking would respond to "the reality of modern life" by reflecting "the complex and interwoven forces that govern citizens' conduct in a global society."[370]

Significantly, Dinwoodie's argument reaches back to conflict-of-laws approaches that predate the rise of the Westphalian order of independent sovereign states.[371] Indeed, he observes that the idea of a substantive body of international common law norms "declined in significance with the rise of nation-states and with positivistic demands for a clear connection between law and a sovereign."[372] Dinwoodie argues, however, that these approaches may once again be worth considering given "the relative decline of the nation-state."[373] Thus, like the arguments I make in this Article, Dinwoodie's call for the re-development of a lex mercatoria is a response to changing conceptions of national sovereignty.

H. *The Triumph of NGOs*

Because the various questions about extraterritorial lawmaking and jurisdictional limitations arise primarily with regard to *public* governmental institutions exercising *sovereign* powers, some commentators have looked to *private*, non-governmental organizations wielding *quasi-governmental* power. As Henry Perritt has recently argued, "jurisdictional uncertainties associated with transnational commerce on the Internet can be reduced

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[367] *Id.* at 548-49.

[368] *See id.* at 552 ("If the dispute implicates substantial interests of both State A and State *B*, it is inequitable to treat such facts (automatically) in the same way as either a dispute wholly implicating the interests of State A or wholly implicating the interests of State *B*.")

[369] *Id.* at 550.

[370] *Id.* at 544-50.

[371] *See supra* note 24 and accompanying text (describing the centrality of the idea of state sovereignty in the Westphalian order).

[372] Dinwoodie, *supra* note 323, at 544.

[373] *Id.*

when rules are made and enforced by private rather than public institutions."[374]

Perritt advocates public-private hybrid governance structures. In his model, public law sets minimum general standards and provides enforcement power, while multiple "private regulatory regimes can work out detailed rules, first-level dispute resolution, and rule enforcement machinery."[375] And, like the contractarian model discussed previously,[376] Perritt believes that this sort of hybrid governance system could exercise jurisdiction through contractual agreement, thereby side-stepping legitimacy concerns.[377]

Perritt offers three examples of his hybrid model. First, he points to the Internet Corporation for Assigned Names and Numbers (ICANN), the not-for-profit corporation that administers the Internet domain name system and provides an online dispute resolution forum for adjudicating domain name conflicts.[378] Second, he notes that the recent agreement between the European Union and the United States concerning privacy protection envisions several private regulatory regimes.[379] Third, he argues that credit card companies will provide dispute resolution mechanisms for virtually all credit card based Internet commerce.[380]

Each of these regulatory regimes is a form of government, with private intermediaries performing roles traditionally filled by governmental entities. For example, ICANN promulgates rules for issuance and retention of domain names,[381] administrative panels of WIPO adjudicate these controversies using ICANN regulations,[382] and domain name registrars revoke or

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[374] Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. INT'L ECON. L. 563, 574 (2000).

[375] *Id.* at 575; *see generally* Perritt, *supra* note 319, at 890-94 (highlighting the differences between public and private law).

[376] *See supra* Part II.B.

[377] *See* Perritt, *supra* note 374, at 575 (describing the benefits of contract-based jurisdiction).

[378] *See* Perritt, *supra* note 319, at 940-44 (discussing the scope of ICANN's regulatory responsibilities).

[379] *See id.* at 932-40 (commenting on the procedures envisioned by the European Commission and the United States in enforcing compliance with the safe harbor rules).

[380] *See* Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 691-92 (2000) (discussing the most common form of alternative dispute resolution for consumer disputes—the credit card chargeback).

[381] *See Uniform Domain-Name Dispute-Resolution Policy*, ICANN, *at* http://www.icann.org/udrp/udrp.htm (last updated Aug. 26, 2001) ("Under the policy, most types of trademark-based domain-name disputes must be resolved by agreement, court action, or arbitration before a registrar will cancel, suspend, or transfer a domain name.").

[382] *See Supplemental Rules for Uniform Domain Name Dispute Resolution Policy*, WIPO, *at* http://arbiter.wipo.int/domains/rules/supplemental.html (in effect as of Dec. 1,

transfer domain names in accordance with panel decisions.[383] Likewise, current privacy regulatory regimes depend upon private third parties who will certify that an Internet site complies, thereby immunizing members from public regulatory action.[384] With credit card purchases, the credit card issuers themselves function as intermediaries, refusing to pay merchants who fail to deliver merchandise or revoking credit from consumers who fail to pay for products purchased.[385]

Nevertheless, such private regulatory bodies raise serious concerns about accountability and transparency. For example, in the United States, under the Supreme Court's traditional interpretation of the so-called "state action doctrine,"[386] these private entities need not comply with constitutional norms.[387] Similarly, one wonders how well minority rights will be protected in these private regimes and by what mechanisms such entities

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1999) ("These Supplemental Rules are to be read and used in connection with the Rules for Uniform Domain Name Dispute Resolution Policy, approved by [ICANN] on October 24, 1999.").

[383] *See* Registrar Accreditation Agreement § II(k), ICANN, *at* http://www.icann.org/nsi/icann-raa-04nov99.htm (approved Nov. 4, 1999) ("[The] Registrar shall have . . . a policy and procedure for resolution of disputes concerning SLD [second-level domain] names. In the event that ICANN adopts a policy or procedure for resolution of disputes concerning SLD names that by its terms applies to Registrar, Registrar shall adhere to the policy or procedure.").

[384] *See, e.g.*, BBBOnline, *at* http://www.bbbonline.org (last visited Nov. 20, 2002) (offering a process by which to file a complaint against an offending website for use of personally identifiable information); TRUSTe, at http://www.truste.org (last visited Nov. 20, 2002) (outlining TRUSTe's policy of certifying a subject website with a visible logo and inclusion of a privacy statement that adheres to privately established privacy policies).

[385] *See* Perritt, *supra* note 374, at 577 ("[C]redit card issuers are intermediaries adjusting disputes between merchants and consumers."); *see also* Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 101-02 (1987) (describing the rights of card issuers to cancel a cardholder's account under certain circumstances).

[386] The state action doctrine has its genesis in an 1883 U.S. Supreme Court decision overturning Reconstruction-era civil rights legislation. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) (holding that "individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment," but that the amendment governs the conduct of the states and those that act in their stead). In its least nuanced form, the doctrine rests on the observation that most constitutional commandments proscribe only the conduct of governmental actors. For example, the Fourteenth Amendment provides that "No *State* shall . . . ." U.S. CONST. amend. XIV, § 1 (emphasis added). As a result, the Supreme Court has often refused to apply these constitutional provisions to so-called "private action." Thus-—and again to express the doctrine in its least subtle form-—the state cannot constitutionally exclude African-Americans from a government housing facility, but the Constitution is silent with regard to an individual's choice to exclude African-Americans from her home. Similarly in cyberspace, so the doctrine might go, the activities of private corporations, such as America Online, ICANN, or the other bodies that Perritt describes, are not subject to the Constitution because they are not state actors.

[387] For a discussion of such concerns, see generally Berman, *supra* note 258.

will ensure impartial decision making and fair procedure.[388] While these same concerns arise in the public arena,[389] there are likely to be far fewer democratic checks on private entities.

I. *Challenge? What Challenge?*

Over the past several years, Jack Goldsmith has consistently attempted to refute the Johnson and Post view that the rise of cyberspace requires us to rethink issues of sovereignty and territoriality. Indeed, according to Goldsmith, the Internet and globalization produce no true conceptual challenges at all. Rather, he argues that "territorial regulation of the Internet is no less feasible and no less legitimate than territorial regulation of non-Internet transactions."[390]

Goldsmith takes on two related contentions: first, that territorial regulation is unfeasible because individuals can easily avoid the sovereign's regulatory reach; and second, that territorial regulation means that a website will be subject to the laws of all jurisdictions simultaneously. Both claims, he argues, are exaggerated because they fail to distinguish between a state's

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[388] *See* Perritt, *supra* note 374, at 578-79 (questioning whether minority rights will be protected by ICANN). ICANN, for example, has faced particularly searching questions on these issues. *See, e.g.*, Geist, *Fair.com?*, *supra* note 147, at 912 (finding that six panelists in ICANN arbitration sided with the complaining party in ninety-five percent of cases); Froomkin, *Wrong Turn in Cyberspace*, *supra* note 147, at 24 (arguing that ICANN "give[s] overwhelming weight to corporate voices" in its internal structure); *see also* David McGuire, *Internet Governance Group Approves Massive Reform Plan*, NEWSBYTES, June 28, 2002, *at* http://www.computeruser.com/news/02/06/29/news1.html (reporting on controversial ICANN plan to eliminate "a mechanism under which rank-and-file users would have been permitted to elect a portion of the ICANN board, an approach favored by many public interest groups").

[389] *See, e.g.*, CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787, at 69-74 (1966) (describing the concern of the delegates to the Constitutional Convention that the method for electing members to Congress protect minority rights); Lindseth, *supra* note 350, at 633-35 (discussing the European Community's "democratic deficit").

[390] Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475, 475 (1998) [hereinafter Goldsmith, *Territorial Sovereignty*]; *see also* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200-01 (1998) [hereinafter Goldsmith, *Against Cyberanarchy*] (asserting that territorially based regulation of cyberspace is "feasible and legitimate from the perspective of jurisdiction"); Jack Goldsmith, *The Internet, Conflicts of Regulation, and International Harmonization*, *in* GOVERNANCE OF GLOBAL NETWORKS IN THE LIGHT OF DIFFERING LOCAL VALUES 197, 197-99 (Christoph Engel & Kenneth H. Keller eds., 2000) [hereinafter Goldsmith, *Conflicts of Regulation*] (arguing that the local effects of Internet activity render local regulation legitimate). Others share Goldsmith's view. *See, e.g.*, Josef H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1205-08 (2000) (arguing that the U.S. can regulate the Internet, but that there is a lack of "jurisdictional predictability" when one is uncertain of whether she is availing herself of the forum).

prescriptive jurisdiction and its *enforcement* jurisdiction. According to Goldsmith, "prescriptive jurisdiction is a country's power to apply its laws to particular transactions."[391] The question of whether or not that regulation will actually be enforced, however, depends upon the country's ability to induce or compel compliance with the law through its enforcement jurisdiction.[392]

Thus, Goldsmith argues, just because individuals may try to evade a nation's enforcement jurisdiction by, say, relocating off-shore, does not render the idea of regulating the harms caused by those individuals illegitimate. Goldsmith acknowledges that the regulation of a local act might not be efficacious if the individual subject to the regulation is not present within the jurisdiction. But he argues that the sovereign will still be able to enforce its regulation "to the extent that the agents of the acts have a local presence or local property against which local laws can be enforced."[393]

Moreover, even if the content provider has no local presence or property, the sovereign will be able to regulate harms indirectly. For example, the sovereign may take action against end users within their enforcement power or intermediaries that operate within their territory, such as Internet Service Providers or manufacturers of hardware or software. These actions may either encourage local intermediaries to enforce the local laws against foreign parties or may induce local parties to include devices to block objectionable content.[394] In either scenario, the local jurisdiction turns out to have more extraterritorial power than originally envisioned.[395]

Likewise, Goldsmith argues that there is nothing inherently illegitimate about a local regulation that happens to affect behavior extraterritorially. As he says, "It is uncontroversial that pollution emitted in State *A* that wafts into State *B* can be regulated in State *B*."[396] Though one might think notice is a more severe problem in the Internet context—where the material that "wafts" from jurisdiction to jurisdiction may do so all over the globe simultaneously and unknowingly—Goldsmith argues that geographical filtering

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[391] Goldsmith, *Conflicts of Regulation*, *supra* note 390, at 198.

[392] *Id.*

[393] Goldsmith, *Territorial Sovereignty*, *supra* note 390, at 479.

[394] For example, a lawsuit filed in France seeks an order requiring French ISPs to block access to an American portal that allegedly hosts "hate Web sites." *See* Ned Stafford, *French ISPs Fight to Avoid Blocking Nazi, Racist Content*, NEWSBYTES, Sept. 4, 2001, *at* http://www.infowar.com/law/01/law_090501a_j.shtml (detailing the French case).

[395] *See* Goldsmith, *Territorial Sovereignty*, *supra* note 390, at 481-82 (enumerating various regulatory means employed to combat local harms caused by extraterritorial content providers); Goldsmith, *Conflicts of Regulation*, *supra* note 390, at 199 (arguing that a country can indirectly regulate offshore content by regulating other actions and entities within its borders).

[396] Goldsmith, *Territorial Sovereignty*, *supra* note 390, at 484.

technology will allow content providers to ensure that material deemed objectionable in a jurisdiction never reaches that jurisdiction.[397] Moreover, according to Goldsmith, as long as the content provider never sets foot in the jurisdiction, enforcement power will be lacking.[398]

Goldsmith's analysis, however, is subject to several normative objections. First, Goldsmith's conclusion that the Internet poses no new jurisdictional issues is premised on the idea that extraterritorial regulation has existed for a long time—which is, of course, true. But the very idea that Goldsmith takes to be settled and uncontroversial—-that transactions "can legitimately be regulated [by] the jurisdictions where significant effects of the transaction are felt"[399]—-was not always so. To the contrary, as Goldsmith himself acknowledges, prior to the twentieth century it was "settled" law that a state had *no* power to regulate beyond its borders at all.[400] Moreover, as we shall see later in this Article, the shift in jurisdictional law to give states limited extraterritorial reach was itself at least partly a response to changes in communications and transportation technology.[401] In short, what we take to be "settled" law shifts over time based on societal changes. Thus, it is not sufficient simply to rely on what seems to be settled law at this particular moment in history without at least considering the possibility that the rise of online interaction and the increasing globalization of transportation and commerce might require new shifts in those settled jurisdictional rules.[402]

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[397] *See id.* (noting that "content providers can take steps-–such as conditioning access to content on presentation of geographic identification–-to control content flow geographically"); *see also* Goldsmith, *Conflicts of Regulation*, *supra* note 390, at 201-02 ("Content flow can today be regulated geographically though a variety of means ranging from conditioning access to content on geographical identification, to centralized filtered servers, to mandated end-user filtering, to the imposition of severe penalties for uploading or downloading certain information.").

[398] Goldsmith, *Territorial Sovereignty*, *supra* note 390, at 485 ("The vast majority of individuals who transact on the Internet have no presence or assets in the jurisdictions that wish to regulate their information flows.").

[399] Goldsmith, *Against Cyberanarchy*, *supra* note 390, at 1208.

[400] *Id.* at 1206-08 (discussing the repudiation of "hermetic territorialism" in the twentieth century).

[401] *See infra* text accompanying notes 483-94 (examining the relationship between changes in American social and political life and shifts in jurisdictional rules). This same shift has occurred in international law. *See* Goldsmith, *Against Cyberanarchy*, *supra* note 390, at 1209 (noting that "it seems clear that customary international law . . . permits a nation to apply its law to extraterritorial behavior" when such behavior has "substantial local effects").

[402] *See* David G. Post, *Against "Against Cyberanarchy," supra* note 39, at 10 (noting that people "one hundred, or even 50, years ago might have made an argument very much like Goldsmith's," pointing to what seemed at the time to be settled law to argue that "rail transport, or the telephone, or radio broadcasting, would (and should) have *no* effect on our analysis of jurisdictional problems").

For example, even if we have come to accept the reality of extraterritorial regulation, it is reasonable to think that international disputes heretofore generally involved relatively large and sophisticated parties. Such parties were likely to have some presence in the enforcing jurisdiction and possess the resources to arrange their affairs to avoid "entering" a jurisdiction with unfavorable laws. Neither of these assumptions is necessarily true with regard to the Internet. For example, it may be prohibitively expensive for a small business or individual to filter out users from selected jurisdictions. One might not want the threat of extraterritorial regulation to curtail such actors from posting content.

Goldsmith's response to this objection might point out that the small player is protected by the fact that the distant jurisdiction will have no means of enforcing any judgment. Such an argument, however, assumes that this individual not only has no presence or assets in the foreign jurisdiction, but will *never* have such a presence or maintain such assets. This regime could easily have a chilling effect on travel. For example, if France has a judgment outstanding against me for material posted on the Internet, I must now avoid any travel to France. This is to say nothing, of course, about the very real danger of international extradition.

Second, Goldsmith assumes that a jurisdiction can pursue claims against intermediaries as a way of enforcing regulations against distant parties, but such regulation has very real costs. For example, service providers might find that the threat of liability makes them filter online activity more aggressively or causes them to spend a tremendous amount of money attempting to intercept the flow of messages in order to investigate them. Indeed, this is precisely why U.S. Internet Service Providers have lobbied for and received immunity for defamatory e-mail and websites carried on their services.[403]

Goldsmith appears to recognize this problem. He acknowledges that the need to filter information to conform with the law of multiple jurisdictions "places [an] enormous burden on content providers that might signifi-

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[403] *See* 47 U.S.C. § 230(c)(1) (Supp. V 1999) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see also* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (concluding that Congress enacted this provision because of the "threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium"). *But see* Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 631-43 (2001) (arguing that courts are institutionally better positioned to make liability decisions regarding Internet Service Providers and that the blanket immunity provided by section 230 therefore is misguided).

cantly curtail Internet activity."[404] But, he cheerfully responds, "there is nothing sacrosanct about Internet speed, or about a foreign content provider's right to send information everywhere in the world with impunity."[405] Thus, Goldsmith's analysis embeds the normative assumption that the distinctive benefits of the Internet should be jettisoned so that the existing jurisdictional framework can be preserved. Many will not share that normative viewpoint, however, and Goldsmith's analysis offers them little consolation.

Finally, despite Goldsmith's claims that these extraterritorial enforcement problems are exaggerated and mostly hypothetical, many of the challenges discussed in this Article belie that assertion. Indeed, Yahoo.com appears to have capitulated to the French court order regarding Nazi memorabilia despite having no presence in France,[406] and the very real tax dilemmas discussed previously[407] indicate that the jurisdictional problems raised by online activity are not at all hypothetical. In addition, the problems of extraterritorial regulatory evasion will likely persist as well. For example, in a recent case involving the Digital Millennium Copyright Act,[408] an American defendant was enjoined from posting information that allowed circumvention of the encrypted code on digital video disks.[409] Such an order, however, will necessarily have only limited power over non-U.S. sites, and the defendant immediately posted links to those sites.[410] Goldsmith's assurance that this is not a problem may not satisfy those seeking to regulate online activity, be they governments or private parties.

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[404] Goldsmith, *Territorial Sovereignty*, *supra* note 390, at 485.

[405] *Id.*

[406] *See supra* Part I.D (discussing the French court's injunction against Yahoo!). While Yahoo! had a French subsidiary, the existence of the subsidiary would not usually be considered sufficient to bring suit against the parent corporation. *See* Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 495 (2002) (noting that parent corporations are generally deemed to be "liable only for conduct traceable to their own officers, directors, and employees," not those of their foreign subsidiaries). For further discussion of this aspect of the *Yahoo!* case, see *infra* Part V.B.2.

[407] *Supra* Part I.C.

[408] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.)

[409] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 441-42, 459-60 (2d Cir. 2001).

[410] *See* Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 BERKELEY TECH. L.J. 1273, 1323 (2001) ("[A]ll of the defendants were enjoined from posting the [infringing] utility, but they were not enjoined from posting links to sites that carried the utility. [The defendants] continued to post their links, and described their acts in doing so as 'electronic civil disobedience.'").

J. *Common Law Evolution*

One reason we need not radically rethink conceptions of jurisdiction, Goldsmith might argue, is that courts are perfectly capable of adapting established legal doctrine to new contexts. Thus, we can simply leave it to the common law process[411] to develop the guidelines necessary for addressing the challenges of globalization and the Internet.

Certainly judges have attempted to do just that. Faced with a set of new questions raised by increased online interaction, courts have tried to craft useful solutions to questions of jurisdiction and choice of law by adapting established legal frameworks. Nevertheless, even a brief glimpse at evolving U.S. case law reveals that the fit between traditional doctrines and new contexts is imperfect at best.

1. Personal Jurisdiction

In the area of personal jurisdiction,[412] U.S. courts have, since 1945, attempted to apply the Supreme Court's flexible due process standard first articulated in *International Shoe Co. v. Washington*.[413] Thus, courts ask whether the defendant had sufficient contacts with the relevant state such that jurisdiction is consistent with "traditional notions of fair play and substantial justice."[414] As transportation and interstate commerce have continued to grow in the decades since 1945, the Supreme Court has many times been called upon to determine how far to expand the reach of personal jurisdiction.[415]

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[411] This can even be said for civil law countries, where judges must often engage in "gap-filling" and interpretation. *See* Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 236 (1999) (arguing that "'civil law judging is less alien to [the common law] tradition than is usually supposed . . . [because c]odes can be notoriously vague'" and are often sufficiently general that they require extensive judicial elaboration (quoting E-mail from Peter Lindseth, Associate Director, European Legal Studies Center, Columbia University, to Peter L. Strauss, Betts Professor of Law, Columbia University (Apr. 14, 1998))).

[412] Some have argued that the adjudicatory jurisdiction question is not as difficult a challenge as the question of how a judgment will be enforced. *See, e.g.*, Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1354 (2001) (breaking the issue of Internet jurisdiction into three "layers": adjudicatory jurisdiction, choice of law, and enforcement of judgments); *see also* Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 INT'L LAW. 1121, 1123 (1998) ("The real problem is turning a judgment supported by jurisdiction into meaningful economic relief. The problem is not the adaptability of *International Shoe*—obtaining jurisdiction in a theoretical sense. The problem is obtaining meaningful relief."). For further discussion of the relationship of jurisdiction to choice of law and recognition of judgments, see *infra* Part V.C.

[413] 326 U.S. 310 (1945).

[414] *Id.* at 316 (internal quotation marks omitted).

[415] Indeed, the Supreme Court issued at least twelve major personal jurisdiction deci-

By 1995, questions about personal jurisdiction based on Internet contacts were beginning to arise in district courts around the country. At first, it appeared that at least some courts would find that the exercise of personal jurisdiction was proper even over defendants whose only contact with the relevant state was an online advertisement available to anyone with Internet access. For example, in *Inset Systems, Inc. v. Instruction Set, Inc.*,[416] a federal district court in Connecticut ruled that it had proper jurisdiction over the defendant, a Massachusetts-based provider of computer technology, even though the company, Instruction Set, maintained no offices in Connecticut and did not conduct regular business there. The court ruled that the defendant's promotional website, because it was *accessible* in Connecticut, supported the exercise of jurisdiction in the state.[417] According to the court, the website advertisements were directed to all states within the United States. Therefore, Instruction Set had "purposefully availed itself of the privilege of

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sions between 1976 and 1990 alone. *See* Burnham v. Superior Court, 495 U.S. 604, 619 (1990) (Scalia, J., joined by Rehnquist, C.J., White, Kennedy, JJ.) (ruling that personal jurisdiction existed when a nonresident defendant was served with process while temporarily visiting the forum state for reasons unrelated to the suit); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 103-11 (1987) (holding that personal jurisdiction did not exist because the forum state's long-arm statute did not permit service of process on the defendant, an alien corporation); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-16 (1987) (dividing on the question of whether the action of placing a product in the "stream of commerce" automatically subjects a party to personal jurisdiction); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-11 (1985) (determining that out-of-state class members can be subject to personal jurisdiction despite not having minimum contacts with the forum state); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-76 (1985) (holding that personal jurisdiction can be asserted based on contractual relations with a forum state even without physical contact so long as the out-of-state party had fair notice that she might be subject to suit there); Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 413-16 (1984) (ruling that contacts unrelated to the cause of action are insufficient to form a basis for personal jurisdiction unless those contacts are "continuous and systematic"); Calder v. Jones, 465 U.S. 783, 788-89 (1984) (holding that a court may exercise personal jurisdiction over a nonresident party that commits a tortious act that it knows will have an effect in the forum state); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-80 (1984) (ruling that a publisher's regular circulation of magazines in the forum state was sufficient to permit that state to assert jurisdiction); Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707-09 (1982) (determining that the "minimum contacts" standard for personal jurisdiction is met when a party fails to comply with court-ordered discovery); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295-98 (1980) (holding that personal jurisdiction could not be exercised over a party who sold a product that was later transported by a consumer into the forum state when the party did not serve, directly or indirectly, the market in that forum state); Kulko v. Superior Court, 436 U.S. 84, 94 (1978) (ruling that a state could not exercise personal jurisdiction over a nonresident merely because he acquiesced in his daughter's desire to live with her mother in the forum state); Shaffer v. Heitner, 433 U.S. 186, 207-12 (1977) (holding that the "minimum contacts" standard articulated in *International Shoe* must be applied to quasi in rem actions).

[416] 937 F. Supp. 161 (D. Conn. 1996).

[417] *Id.* at 163-65.

doing business within Connecticut."[418] Similarly, other courts have at times indicated that the posting of a website accessible within a state, even without any further contacts, might be sufficient to justify jurisdiction.[419]

Although the U.S. Supreme Court has yet to address the issue of personal jurisdiction based on Internet contacts, most lower courts, perhaps concerned over the broad implications of cases like *Instruction Set*, have attempted to craft a more moderate rule. The most influential case thus far has been *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*[420] There, the district court applied a "sliding scale" to Internet contacts in order to determine the "nature and quality of commercial activity that an entity conducts over the Internet."[421] On one end of the court's spectrum was a "passive" website, where a defendant has simply posted information on the Internet "available to those who are interested."[422] According to the court, such a site, absent additional contact with the forum state or its citizens, would not be enough to support jurisdiction.[423] At the other end of the spectrum, the court placed "active" websites, where the defendant "enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet."[424] The existence of

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[418] *Id.* at 165.

[419] For example, in *Maritz, Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), the court found jurisdiction in Missouri over a California corporation. Although defendant's web server was located in California, the court noted that the disputed website was "continually accessible to every internet-connected computer in Missouri." *Id.* at 1330. According to the court,

> CyberGold has consciously decided to transmit advertising information to all Internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant.

Id. at 1333. Similarly, in *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997), the Minnesota Court of Appeals ruled that the state Attorney General's office could sue an online gambling service in Minnesota even though the service was based outside of the state. Relying on *Instruction Set* and *Maritz*, the court determined that the defendants had "purposefully availed themselves of the privilege of doing business in Minnesota," *id.* at 721, based on a finding that "computers located throughout the United States, including Minnesota, accessed appellants' websites," *id.* at 718. *See also* Telco Communications v. An Apple a Day, 977 F. Supp. 404, 407 (E.D. Va. 1997) (holding that a website available twenty-four hours a day in the forum state constituted "a persistent course of conduct" in the state); Heroes, Inc. v. Heroes Found., 958 F. Supp. 1, 5 (D.D.C. 1996) (suggesting that the existence of a website might be deemed a "sustained contact" with the forum because "it has been possible for a . . . resident [of the forum] to gain access to it at any time since it was first posted").

[420] 952 F. Supp. 1119 (W.D. Pa. 1997).

[421] *Id.* at 1124.

[422] *Id.*

[423] *Id.*

[424] *Id.*

an active site would be sufficient to establish jurisdiction anywhere the site is accessed.[425] In between, the court identified a middle ground "occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."[426] Thus, *Zippo* attempted to chart a course for analyzing minimum contacts in cyberspace.

Although other courts quickly latched onto the *Zippo* framework,[427] ul-

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[425] *Id.*

[426] *Id.*

[427] For a sampling of decisions utilizing *Zippo*, see Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1296-97 (10th Cir. 1999); Nida Corp. v. Nida, 118 F. Supp. 2d 1223, 1229-30 (M.D. Fla. 2000); Biometics, LLC v. New Womyn, Inc., 112 F. Supp. 2d 869, 873 (E.D. Mo. 2000); Search Force Inc. v. DataForce Int'l, Inc., 112 F. Supp. 2d 771, 776-77 (S.D. Ind. 2000); Tech Heads, Inc. v. Desktop Serv. Ctr., Inc., 105 F. Supp. 2d 1142, 1149 (D. Or. 2000); McRae's, Inc. v. Hussain, 105 F. Supp. 2d 594, 599-600 (S.D. Miss. 2000); Standard Knitting, Ltd. v. Outside Design, Inc., No. 00-2288, 2000 U.S. Dist. LEXIS 8633, at *5-6 (E.D. Pa. June 21, 2000); Citigroup, Inc. v. City Holding Co., 97 F. Supp. 2d 549, 565-66 (S.D.N.Y. 2000); Am. Eyewear, Inc. v. Peeper's Sunglasses & Accessories, Inc., 106 F. Supp. 2d 895, 900-01 (N.D. Tex. 2000); Berthold Types Ltd. v. European Mikrograf Corp., 102 F. Supp. 2d 928, 932-34 (N.D. Ill. 2000); Lofton v. Turbine Design, Inc., 100 F. Supp. 2d 404, 410 (N.D. Miss. 2000); Roche v. Worldwide Media, Inc., 90 F. Supp. 2d 714, 717 (E.D. Va. 2000); Ameritech Servs., Inc. v. SCA Promotions, Inc., No. 99C4160, 2000 U.S. Dist. LEXIS 3067, at *13 (N.D. Ill. Mar. 6, 2000); Butler v. Beer Across Am., 83 F. Supp. 2d 1261, 1268 (N.D. Ala. 2000); Online Partners.Com, Inc. v. Atlanticnet Media Corp., No. Civ. A. c98-4146SIENE, 2000 U.S. Dist. LEXIS 783, at *5 (N.D. Cal. Jan. 20, 2000); Quokka Sports, Inc., v. Cup Int'l Ltd., 99 F. Supp. 2d 1105, 1111 (N.D. Cal. 1999); J.B. Oxford Holdings, Inc. v. Net Trade, Inc., 76 F. Supp. 2d 1363, 1367 (S.D. Fla. 1999); Colt Studio, Inc. v. Badpuppy Enter., 75 F. Supp. 2d 1104, 1108-09 (C.D. Cal. 1999); Harbuck v. Aramco, Inc., No. CIV. A. 99-1971, 1999 U.S. Dist. LEXIS 16892, at *17 (E.D. Pa. Oct. 21, 1999); CIVIX-DDI LLC v. Microsoft Corp., 52 U.S.P.Q.2d (BNA) 1501, 1504-05 (D. Colo., 1999); Brown v. Geha-Werke GmbH, 69 F. Supp. 2d 770, 777-78 (D.S.C. 1999); Hasbro, Inc. v. Clue Computing, Inc., 66 F. Supp. 2d 117, 128 (D. Mass. 1999), *aff'd*, 232 F.3d 1 (1st Cir. 2000); Hurley v. Cancun Playa Oasis Int'l Hotels, No. Civ.A. 99-574, 1999 U.S. Dist. LEXIS 13716, at *8 (E.D. Pa. Aug. 31, 1999); Coastal Video Communications, Corp. v. Staywell Corp., 59 F. Supp. 2d 562, 570 (E.D. Va. 1999); Decker v. Circus Circus Hotel, 49 F. Supp. 2d 743, 747-48 (D.N.J. 1999); Int'l Star Registry of Illinois v. Bowman-Haight Ventures, Inc., No. 98 C 6823, 1999 U.S. Dist. LEXIS 7009, at *11-16 (N.D. Ill. May 6, 1999); Resnick v. Manfredy, 52 F. Supp. 2d 462, 467 (E.D. Pa. 1999), *aff'd* in part, *rev'd* in part, 238 F.3d 248 (3d Cir. 2001); Barrett v. Catacombs Press, 44 F. Supp. 2d 717, 724-728 (E.D. Pa. 1999); Fix My PC, L.L.C. v. N.F.N. Assocs., 48 F. Supp. 2d 640, 643 (N.D. Tex 1999); Origin Instruments Corp. v. Adaptive Computer Sys., Inc., No. CIV.A. 3:97-CV-2595-L, 1999 U.S. Dist. LEXIS 1451, at *8 (N.D. Tex. Feb. 3, 1999); F. McConnell & Sons, Inc. v. Target Data Sys., Inc., 84 F. Supp. 2d 961, 971 (N.D. Ind. 1999); ESAB Group, Inc. v. Centricut, LLC, 34 F. Supp. 2d 323, 330 (D.S.C. 1999); LFG, LLC v. Zapata Corp., 78 F. Supp. 2d 731, 736 (N.D. Ill. 1999); Grutkowski v. Steamboat Lake Guides & Outfitters, Inc., No. Civ.A. 98-1453, 1998 U.S. Dist. LEXIS 20255, at *10 (E.D. Pa. Dec. 28, 1998); K.C.P.L., Inc. v. Nash, 49 U.S.P.Q.2d (BNA) 1584, 1588-89 (S.D.N.Y. 1998); Atlantech Distribution, Inc. v. Credit Gen. Ins. Co., 30 F. Supp. 2d 534, 537 (D. Md. 1998); Patriot Sys., Inc. v. C-Cubed Corp., 21 F. Supp. 2d 1318,

timately this sliding scale analysis has proven to be unstable and difficult to apply. First, drawing the distinction between an active and passive site is often problematic. For example, if my website includes only a list of articles I have written, that site appears to be passive under the *Zippo* decision. If I then include a sentence at the bottom of the site inviting readers to e-mail their comments about my articles, or providing links to other sites where the full text of the articles can be found, is the addition of that extra material enough to transform my passive site into an active one? And while the active/passive distinction was difficult to draw in 1997 when *Zippo* was decided, the line between active and passive sites is even more blurry now and is likely to become increasingly so in the future, as websites grow ever more complex and sophisticated.[428] Ultimately, most sites probably will fall into the middle ground, and "examining the level of interactivity and commercial nature of the exchange of information"[429] is unlikely to yield predictable or consistent results. Moreover, some sites that seem passive may sell advertising based on the number of "hits" they receive or may collect and market data about the user,[430] both of which may seem to render the site more active. Finally, few large organizations or corporations will spend the money necessary[431] to create a sophisticated website without including some mechanism to earn money back from the site. If all such sites are

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1324 (D. Utah 1998); Vitullo v. Velocity Powerboats, Inc., No. 97 C 8745, 1998 U.S. Dist. LEXIS 7120, at *15 (N.D. Ill. Apr. 24, 1998); Blumenthal v. Drudge, 992 F. Supp. 44, 55-56 (D.D.C. 1998); Blackburn v. Walker Oriental Rug Galleries, Inc., 999 F. Supp. 636, 638 (E.D. Pa. 1998); Tel. Audio Prods., Inc. v. Smith, Civil Action No. 3:97-CV-0863-P, 1998 U.S. Dist. LEXIS 4101, at *9 n.5 (N.D. Tex. Mar. 26, 1998); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 742-43 (W.D. Tex. 1998); Mieczkowski v. Masco Corp., 997 F. Supp. 782, 786-87 (E.D. Tex. 1998); Mallinckrodt Med., Inc. v. Sonus Pharm., Inc., 989 F. Supp. 265, 273 (D.D.C. 1998); Agar Corp. Inc. v. Multi-Fluid Inc., Niv. A. No. 95-5105, 1997 U.S. Dist. LEXIS 17121, at *7 (S.D. Tex. June 25, 1997); Smith v. Hobby Lobby Stores, Inc., 968 F. Supp. 1356, 1365 (W.D. Ark. 1997); Resuscitation Techs., Inc. v. Cont'l Health Care Corp., 1997 U.S. Dist. LEXIS 3523, at *11 (S.D. Ind. Mar. 24, 1997); Jewish Def. Org., Inc. v. Superior Court, 85 Cal. Rptr. 2d 611, 621 (Cal. Ct. App. 1999).

[428] As Geist states:

> When the test was developed in 1997, an active website might have featured little more than an email link and some basic correspondence functionality. Today, sites with that level of interactivity would likely be viewed as passive, since the entire spectrum of passive versus active has shifted upward with improved technology. In fact, it can be credibly argued that . . . websites must constantly re-evaluate their positions on the passive versus active spectrum as web technology changes.

Geist *supra* note 412, at 1379-80.

[429] *Zippo Dot Com*, 952 F. Supp. at 1124.

[430] *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1226-29 (1998) (discussing the use of "cookies" to track website users and the selling of that information to advertising companies).

[431] *See* David Legard, *Average Cost to Build E-Commerce Site: $1 Million*, INDUS. STANDARD, May 31, 1999, http://www.thestandard.com/article/0,1902,4731,00.html.

deemed interactive under the *Zippo* framework, however, they will all subject the site owner to universal jurisdiction, returning us to a solution like the one reached in *Instruction Set*.

Perhaps because of these difficulties, courts already appear to be shifting away from the *Zippo* approach (even while sometimes continuing to cite *Zippo* itself) toward a test based on the effect of the activity within the jurisdiction.[432] This test derives from the U.S. Supreme Court's 1984 decision in *Calder v. Jones*,[433] a suit in which a Florida publisher allegedly defamed a California entertainer. In that case, the Court reasoned that, because the plaintiff lived and worked in California and would suffer emotional and perhaps professional harm there, the publisher had deliberately caused harmful effects in California and, accordingly, California could assert jurisdiction over the case.[434] Thus, under *Calder*'s "effects test," personal jurisdiction may be based on "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered—and which the defendant knows is likely to be suffered—-in the forum state."[435]

Courts have applied the effects test not only to Internet libel cases,[436] but to a broad range of other Internet-related cases as well. For example, in a trademark suit brought against a California corporation, the plaintiff argued that jurisdiction was appropriate in Texas because the defendant owned an undisputedly interactive website that was accessible in Texas.[437]

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[432] For a sampling of cases that appear to turn on an effects analysis, see Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998); Neogen Corp. v. Neo Gen Screening, Inc., 109 F. Supp. 2d 724 (W.D. Mich. 2000), *rev'd*, 282 F.3d 883 (6th Cir. 2002); People Solutions, Inc. v. People Solutions, Inc., No. 3:99-CV-2339-L, 2000 WL 1030619 (N.D. Tex. July 25, 2000); Winfield Collection, Ltd. v. McCauley, 105 F. Supp. 2d 746 (E.D. Mich. 2000); Search Force v. DataForce Int'l, 112 F. Supp. 2d 771 (S.D. Ind. 2000); Euromarket Designs, Inc. v. Crate & Barrel, Ltd., 96 F. Supp. 2d 824 (N.D. Ill. 2000); Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Army Navy Outfitters—Manhattan, Inc., 96 F. Supp. 2d 919 (E.D. Mo. 2000); Nissan Motor Co. v. Nissan Computer Corp., 89 F. Supp. 2d 1154 (C.D. Cal. 2000), *aff'd*, 246 F.3d 675 (9th Cir. 2000); Neato, Inc. v. Great Gizmos, No. 3:99CV958, 2000 WL 305949 (D. Conn. Feb. 24, 2000); Rothschild Berry Farm v. Serendipity Group LLC, 84 F. Supp. 2d 904 (S.D. Ohio 1999); Bochan v. La Fontaine, 68 F. Supp. 2d 701 (E.D. Va. 1999); Millennium Enters., Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907 (D. Or. 1999); Blakey v. Cont'l Airlines, Inc., 751 A.2d 538 (N.J. 2000).

[433] 465 U.S. 783 (1984).

[434] *Id.* at 789-90.

[435] Core-Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1486 (9th Cir. 1993).

[436] *See, e.g.*, Planet Beach Franchising Corp. v. C3Ubit, Inc., No. Civ. A. 02-1859, 2002 WL 1870007, at *3 (E.D. La. Aug. 12, 2002) (using the effects test to justify assertion of personal jurisdiction over an out-of-state defendant based on an allegedly defamatory article posted on defendant's website); *Blakey*, 751 A.2d 538 (using the effects test to determine that jurisdiction existed over nonresident defendants who allegedly posted defamatory messages on the electronic bulletin board of their New Jersey-based employer).

[437] *People Solutions, Inc.*, 2000 WL 1030619 at *3-4.

Although the court acknowledged the interactivity of the site,[438] it refused to assert jurisdiction absent evidence that residents of Texas had actually purchased from the site.[439]

Likewise, in a case alleging copyright infringement in the design of craft patterns, a Michigan plaintiff sued a Texas defendant in Michigan.[440] According to the plaintiff, the Michigan court could properly exercise jurisdiction because the defendant both maintained an interactive website accessible to Michigan residents and, on two occasions, had sold patterns to Michigan residents.[441] Nevertheless, the court ruled that jurisdiction was not proper in Michigan. Rejecting the *Zippo* framework, the court refused to accept the idea "that the mere act of maintaining a website that includes interactive features ipso facto establishes personal jurisdiction over the sponsor of that website anywhere in the United States."[442] Furthermore, the court deemed the two Michigan sales an insufficient basis for jurisdiction because they were sold in an eBay auction and therefore the defendant had no say over where the products would be purchased.[443]

The discussion of the sales on eBay may signal yet another shift in the case law. Instead of focusing either on the interactivity of the website or the ultimate effect a defendant's activities may cause in a jurisdiction, courts may base jurisdictional decisions on whether a defendant deliberately targets individuals in any particular state. One commentator, advocating such a targeting inquiry, has argued:

> Unlike the *Zippo* approach, a targeting analysis would seek to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction. Targeting would also lessen the reliance on effects analysis, the source of considerable uncertainty since Internet-based activity can ordinarily be said to create some effects in most jurisdictions.[444]

At least one court of appeals (the Ninth Circuit) has embraced a targeting analysis, ruling that jurisdiction is proper "when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state."[445] Likewise, OECD Con-

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[438] *Id.* at *3.

[439] *Id.* at *4.

[440] *Winfield Collection*, 105 F. Supp. 2d at 747.

[441] *Id.* at 748.

[442] *Id.* at 751.

[443] *See id.* (stating that the results of the auction sale, over which defendant had little control, did not create personal jurisdiction).

[444] Geist, *supra* note 412, at 1345-46; *see also* Perritt, *supra* note 374, at 573 ("The concept of targeting is the best solution to the theoretical challenge presented by difficulties in localizing conduct in Internet markets.").

[445] Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000);

sumer Protection Guidelines,[446] Securities and Exchange Commission regulations on Internet-based offerings,[447] the American Bar Association Global Cyberspace Jurisdiction Project's Report on Global Jurisdiction Issues Created by the Internet,[448] and the Hague Conference on Private International Law's Draft Convention on Jurisdiction and Foreign Judgments[449] all include references to targeting as a basis for the exercise of jurisdiction.

Nevertheless, targeting too ultimately may prove to be an unstable test. Even if courts embrace this approach they will need to identify criteria to be used in assessing whether a website has actually targeted a particular jurisdiction. This will not be an easy task. For example, the American Bar Association Internet Jurisdiction Project, a global study on Internet jurisdiction released in 2000, referred to the language of the site as one potentially significant way of determining whether a site operator has targeted a particular jurisdiction.[450] With the development of new language translation capabilities, however, website owners may soon be able to create their sites in any language they wish, knowing that users will automatically be able to view

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see also Am. Info. Corp. v. Am. Infometrics, Inc., 139 F. Supp. 2d 696, 700 (D. Md. 2001) (ruling that "[a] company's sales activities focusing generally on customers located throughout the United States and Canada without focusing on and targeting the forum state do not yield personal jurisdiction" (internal quotation omitted)).

[446] *See* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDELINES FOR CONSUMER PROTECTION IN THE CONTEXT OF ELECTRONIC COMMERCE 14 (2000) ("Businesses should take into account the global nature of electronic commerce and, wherever possible, should consider various regulatory characteristics of the markets they target."), *at* http://www.oecd.org/pdf/M00000000/M00000363.pdf.

[447] The regulation of offers is a fundamental element of federal and some U.S. state securities regulatory schemes. Absent the transaction of business in the United States or with U.S. persons, however, our interest in regulating solicitation activity is less compelling. We believe that our investor protection concerns are best addressed through the implementation by issuers and financial service providers of precautionary measures that are reasonably designed to ensure that offshore Internet offers are not targeted to persons in the United States or to U.S. persons.

Interpretation: Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, Securities and Exchange Commission, http://www.sec.gov/rules/interp/33-7516.htm (Mar. 23, 1998) (internal citations omitted); *see also Interpretation: Use of Electronic Media*, Securities and Exchange Commission, (May 4, 2000) (providing guidance in applying federal securities law to electronic media), http://www.sec.gov/rules/interp/34-42728.htm.

[448] American Bar Association Global Cyberspace Jurisdiction Project, *A Report on Global Jurisdiction Issues Created by the Internet*, 55 BUS. LAW. 1801 (2000) [hereinafter ABA, *Global Jurisdiction*].

[449] Hague Conference on Private International Law, *supra* note 321, at art. 7, version 0.4a ("[A]ctivity shall not be regarded as being directed to a State if the other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State.").

[450] ABA, *Global Jurisdiction*, *supra* note 448, at 1923-24.

the site in the user's chosen language.[451] As one commentator notes, "[w]ithout universally applicable standards for assessment of targeting in the online environment, a targeting test is likely to leave further uncertainty in its wake."[452] Thus, although the adaptation process continues, it is unclear whether the results will be satisfying either conceptually or practically.

2. Choice of Law

In the area of choice of law, we can see a similar process at work. For example, with regard to international copyright cases, Article 5 of the Berne Convention and the broader principle of national treatment have long established a relatively stable set of choice-of-law rules based upon territoriality.[453] Under this regime, courts are asked to apply the law of the place where the copying or other allegedly infringing act occurred. In a world of digital technology and global commerce, however, the assumption that we can necessarily fix a place of origin or a place of infringement has been undermined.[454]

In response, courts have been forced to adapt. For example, in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*,[455] several Russian-language newspapers located in Russia sued a U.S. corporation that was tak-

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[451] *See* Geist, *supra* note 412, at 1384 n.224 (describing a new automatic translation service offered by the search engine Google); *see also* http://www.google.com/machine_translation.html (last visited Nov. 20, 2001) (stating that pages published in Italian, French, Spanish, German, or Portuguese can be translated into English).

[452] Geist, *supra* note 412, at 1384.

[453] Berne Convention, *supra* note 320, at art. 5(1), 1161 U.N.T.S. at 35 ("Authors shall enjoy . . . the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."); *see also id.* at art. 5(2), 1161 U.N.T.S. at 35 ("[T]he extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."). It is commonly understood that this regime "implicates a rule of territoriality." Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc). Of course, one could read Article 5(2) as creating a rule of *lex fori* because the forum can be seen as "the country where protection is claimed." Nevertheless, the usual reading of the provision is that it refers to the country where the infringement is alleged to have occurred. *See* Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 24-25 (1999) (noting that, at least until recently, "the weight of opinion" favored this interpretation); *see also* Dinwoodie, *supra* note 323, at 533 n.196 (citing Austin and stating that the accepted reading of article 5(2) is that it refers to the country where infringement is alleged to have occurred).

[454] *See e.g.*, Dinwoodie, *supra* note 323, at 535 ("The place where an act of alleged infringement 'occurs' has become difficult to determine in the digital environment; concepts such as 'place of publication' or 'country of origin' lose meaning in a global and digital world, where geography holds less significance.").

[455] 153 F.3d 82 (2d Cir. 1998).

ing articles from those newspapers, rearranging them, and creating a Russian-language newspaper for U.S. distribution.[456] The Second Circuit declined to apply exclusively the territorial place of infringement rule derived from Article 5(1) of the Berne Convention.[457] Rather, the court developed a choice-of-law rule as a matter of federal common law. Looking to the Restatement (Second) of Conflicts of Law, under which courts use the law of the place with the most significant relationship to the parties and the transaction,[458] the Second Circuit applied Russian copyright law to the question of who holds the copyright,[459] but applied American law to the infringement question.[460]

Nevertheless, even the more flexible analysis of the Second Restatement may ultimately be unsatisfying in complex cases. Indeed, commentators have often criticized the Second Restatement's "most significant relationship" test because it tends to devolve into an unguided list of governmental interests with a conclusory decision appended.[461] Moreover, such a list will almost always include the forum jurisdiction, particularly in the digital world where publication may occur simultaneously in multiple countries.[462] Thus, given that courts tend to prefer applying their own

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[456] *Id.*

[457] *Id.* at 89-90.

[458] *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 6, 145, 222 (1971) (articulating the "most significant relationship" test and listing the choice-of-law principles according to which courts should determine the place with the most significant relationship to the dispute).

[459] *See Itar-Tass*, 153 F.3d at 90 (applying the "law of the state with 'the most significant relationship' to the property of the parties").

[460] It is unclear whether the court reached this second conclusion by applying a fixed rule of *lex loci delicti* or by using a broader interest analysis akin to the Second Restatement approach. *See id.* at 91 (stating "[t]o whatever extent *lex loci delicti* is to be considered only one part of a broader 'interest' approach, the United States law would still apply").

[461] Even in the U.S. domestic context, scholars have criticized the Second Restatement approach. *See, e.g.*, William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1388-89 (1997) (summarizing scholarly criticisms of the Second Restatement); Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 359-60 (1997) (commenting that contacts are often "counted up . . . at most with conclusory and arbitrary pronouncements concerning their relative value"); *see also* James A. Meschewski, *Choice of Law in Alaska: A Survival Guide for Using the Second Restatement*, 16 ALASKA L. REV. 1, 19 (1999) (complaining that the lack of guidance prevents any effective restraint on judicial decision making and results in conclusory statements of the most relevant contacts).

[462] Nat'l Football League v. TVRadioNow Corp., 53 U.S.P.Q.2d (BNA) 1831, 1834-35 (W.D. Pa. 2000) (holding that where defendants originated the streaming of copyrighted programming over the Internet from a website in Canada, public performances occurred in the United States because users in the United States could access the website and receive and view the defendants' streaming of the copyrighted material).

laws,[463] we may find that this flexible approach begins to look simply like the old *lex fori*, where the law of the forum jurisdiction always applied. Such a rule may encourage uncertainty because one will not know in advance which jurisdiction's copyright law may be applied to a given online posting or transaction.[464] To combat this uncertainty, some scholars have proposed that courts use the law of the place where a website server is located.[465] Because websites may contain elements stored on multiple servers, however, locating a website may be difficult. Moreover, because servers can easily be located anywhere, such a scheme may result in a regulatory race to the bottom.[466] Thus, as with adjudicatory jurisdiction, the evolution of choice-of-law rules in this new environment is still a work-in-progress.

III. THE NEED TO CONSIDER THE SOCIAL MEANING OF LEGAL JURISDICTION

The ten responses discussed in Part II undoubtedly do not exhaust the number of approaches that judges, government regulators, legislators, and

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[463] *See, e.g.*, Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 192 (2000) (providing various examples and noting that, at least in the domestic context, there is a "marked tendency" for courts to choose to apply their own law).

[464] *See* DAVID CAVERS, THE CHOICE OF LAW PROCESS 22-23 (1965) (arguing that a forum law solution makes it impossible to know what law will apply until after one acts); *see also* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987) (arguing that a *lex fori* approach is inconsistent with the rule of law because it repudiates the idea that laws reflect norms that exist apart from their enforcement); Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1587-1602 (1985) (describing the move away from *lex fori* approaches among both commentators and courts). *But see* Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics,'* 34 MERCER L. REV. 593, 595 (1982-1983) (arguing that the application of forum law produces the most "functionally sound and fair results"); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 599 (1983-1984) (arguing that forum preference vindicates widely shared policy concerns because the interests of the plaintiff and the forum are aligned).

[465] *See, e.g.*, Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153, 173 (1997) ("[T]he court should either apply the law of the place of the server or of the defendant's domicile."). Interestingly, this proposal contrasts with the recent OECD tax recommendations, which take the position that a server is not sufficient to constitute presence in a jurisdiction for tax purposes. *Supra* text accompanying note 66.

[466] Scholars seeking to localize an international copyright dispute at a particular point, such as the place of the server, have incorporated in their proposed tests a range of caveats to prevent such "races" from occurring. *See, e.g.*, Ginsburg, *supra* note 465, at 161 (providing alternative tests to be used if a country's copyright laws are not adequate). But, as Graeme Dinwoodie has pointed out, "these (necessary) caveats inevitably detract from the gains in certainty provided by the localizing rule. If certainty and predictability are the reasons for adopting an arbitrary and inflexible rule, this approach becomes less attractive when the principal advantages are imperiled." Dinwoodie, *supra* note 323, at 540 (footnote omitted).

academics have devised or might devise to address the challenges of cyberspace and increasing transborder interaction.[467] More important, the purpose of this survey is neither to embrace nor reject *any* of the responses as a normative policy matter. Indeed, although I have noted some of the pros and cons of the various suggestions, I do not intend, in the remainder of this Article, to offer an alternative policy formulation that will "solve" all of their purported shortcomings. As a result, I will not return to most of these specific policy issues.

Instead, by surveying this landscape of critical debate we may emerge with two observations. First, the wide range of opinion, like the wide range of challenges discussed in Part I, indicates that these issues are in flux and that the time is therefore ripe for rethinking core assumptions underlying the application of legal authority and norms across borders. Second, and even more fundamentally, the scope of the debate suggests that the discussion has not been framed broadly enough. While these responses are varied (and often at odds with one another), they all seem to revolve around either political theory questions about when a judicial or administrative exercise of authority is legitimate, or legal policy questions about the most efficient or effective system for solving specific legal dilemmas. Even approaches that advocate decentralized authority (Johnson and Post)[468] or the creation of transnational norms (Dinwoodie and Perritt)[469] do so based largely on literature from political philosophy and law.

There is more to the assertion of jurisdiction or the extraterritorial imposition of norms, however, than simply questions of political legitimacy or efficient dispute resolution. The assertion of jurisdiction, like all legal acts, can also be viewed as a meaning-producing cultural product. What does it mean, after all, to say that some person, corporation, or activity is subject to a community's jurisdiction? And how does the idea of jurisdiction relate to conceptions of geographic space, community membership, citizenship, boundaries, and self-definition? Although largely ignored in the debates over Internet jurisdiction and the rise of transnational governing bodies,

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[467] For example, I have not detailed the various proposals about how best to apportion taxes for Internet transactions. For a discussion of these proposals, see RICHARD D. POMP & OLIVER OLDMAN, STATE AND LOCAL TAXATION 13-1 to 13-97 (4th ed. 2001); Arthur J. Cockfield, *Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation*, 85 MINN. L. REV. 1171 (2001); Charles E. McClure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Laws*, 52 TAX L. REV. 269 (1997); Christopher J. Schafer, *Federal Legislation Regarding Taxation of Internet Sales Transactions*, 16 BERKELEY TECH. L.J. 415 (2001); William V. Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U. L. REV. 649 (2001).

[468] *Supra* Part II.A.

[469] *Supra* Part II.G-H

these foundational issues must be considered seriously if we are to develop a richer descriptive account of the role of legal jurisdiction in a global era.

This Part begins to develop such an account by isolating four specific aspects of jurisdiction that are often overlooked: the way in which jurisdictional rules reflect and construct social conceptions of space, the role of jurisdictional rules in establishing community dominion over a transgressor, the process by which the assertion of jurisdiction symbolically extends community membership to those brought within its ambit, and the way in which assertions of jurisdiction can open space for the articulation of norms that challenge sovereign power. Part IV then deepens the inquiry by interrogating further both the presumed tie between a physical location and a community, and the assumption that the nation-state is the only appropriate community for jurisdictional purposes. Only after displacing these assumptions will we be in a position to construct a more nuanced normative model for understanding and addressing the globalization of jurisdiction.

A. *Jurisdiction and the Social Construction of Space*

It has become commonplace for cultural critics and others to identify the ways in which social structures shape and constrain conduct, yet the link between social structures and physical spaces has received less attention.[470] Nevertheless, "[t]he production of space and place is both the medium and the outcome of human agency and social relations."[471] This cultural construction of space includes the boundaries drawn between "public" and "private" spaces; the decisions a community makes about land use and zoning; the appropriation and transformation of "nature" as both a concept and as a physical description; the local autonomy of governmental units; the use of specialized locations for the conduct of economic, cultural, and social practices; the creation of patterns of movement within a community; and "the formation of symbolically laden, meaning-filled, ideology-projecting sites and areas."[472]

In addition, *topological* space, which consists of the formal boundary lines we have chosen, is distinctively different from *social* space, which in-

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[470] For two notable exceptions within legal scholarship, see Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L.J. 627 (1991); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999). Kogan's work, although it predated the rise of cyberspace, specifically addressed the social significance of adjudicative jurisdiction and so is particularly relevant here. My discussion in this Section is heavily indebted to Kogan's argument.

[471] ALLAN PRED, MAKING HISTORIES AND CONSTRUCTING HUMAN GEOGRAPHIES 10 (1990).

[472] *Id.*

cludes the meanings given to space (both local and nonlocal), to the distances between delineated spaces, and to the time necessary to traverse those distances.[473] For example, a one-hundred-mile automobile trip may seem like a greater journey to residents of the northeastern United States, who are accustomed to relatively short distances between destinations, than to residents of the West, where cities and towns are more dispersed. Similarly, a one-thousand-mile trip carries a very different social meaning today, in the age of relatively inexpensive air travel, than it did one hundred years ago, even if the topological space remains the same.[474] And of course America's well-documented postwar demographic shift from city to suburb is not merely a change of topology, but a politically and symbolically significant cultural transformation.[475]

Moreover, the construction of legal spaces and the delineation of boundaries is always embedded in broader social and political processes.[476] "Legal categories are used to construct and differentiate material spaces which, in turn, acquire a legal potency that has a direct bearing on those using and traversing such spaces."[477] For example, in the history of European conquest of Australia, the naming of particular spaces-—rivers, mountains, capes, bays, and so on-—became a central point of political contest.[478] The Europeans believed that the aboriginals did not classify or name the landscape and transformed that purported "spatial deficiency" into a "legal deficiency": if the aboriginals did not name their places, so the thinking went,

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[473] Kogan, *supra* note 470, at 634.

[474] John Tomlinson describes this shift as follows:

> In a globalized world, people in Spain really do continue to be 5,500 miles away from people in Mexico, separated, just as the Spanish conquistadors were in the sixteenth century, by a huge, inhospitable and perilous tract of ocean. What connectivity means is that we now experience this distance in different ways. We think of such distant places as routinely accessible, either representationally through communications technology or the mass media, or physically, through the expenditure of a relatively small amount of time (and, of course, of money) on a transatlantic flight. So Mexico City is no longer meaningfully 5,500 miles from Madrid: it is eleven hours' flying time away.

JOHN TOMLINSON, GLOBALIZATION AND CULTURE 4 (1999).

[475] For the socio-political history of American suburbanization, see JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER (1992); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

[476] *See* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER, at xi (1994) ("The legal representation of space must be seen as constituted by—and in turn constitutive of-—complex, normatively charged and often competing visions of social and political life under law.").

[477] *Id.* at 54.

[478] *See* PAUL CARTER, THE ROAD TO BOTANY BAY: AN EXPLORATION OF LANDSCAPE AND HISTORY (1988) (describing European exploration and subsequent naming of various Australian geographical features).

their "grasp of it [was] so tenuous . . . [that] it was hardly a crime to take possession of it."[479] To take another example, Jeremy Waldron has observed that increasing restrictions on the use of public spaces for activities such as sleeping or washing denies homeless people any opportunity to perform those acts because there is neither a public nor a private space to do so.[480]

The social meaning of geographical space also includes the way in which an individual or community perceives those who are *outside* the community's topological or social boundaries. As people develop attitudes of familiarity toward the spaces in which they reside and conduct their daily activities, they may also come to view unfamiliar people and locations as frighteningly alien. Alternatively, the outside "other" can be seen as inviting, friendly, and hospitable, or as mysterious, exotic, and romantic.[481] There are a seemingly infinite variety of attitudes one may hold toward unfamiliar social spaces. Such attitudes are embedded in context and shaped and influenced by manifold factors including politics, socio-economic relationships, and the extent of contact that one has with the "other."[482]

Thus, jurisdictional rules have never simply emerged from a utilitarian calculus about the most efficient allocation of governing authority. Rather, the exercise of jurisdiction has always been part of the way in which societies demarcate space, delineate communities, and draw both physical and symbolic boundaries. Such boundaries do not exist as an intrinsic part of the physical world; they are a social construction. As a result, the choice of jurisdictional rules reflects the attitudes and perceptions members of a community hold toward their geography, the physical spaces in which they live, and the way in which they define the idea of community itself.

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[479] *Id.* at 64; *see also* ROBERT D. SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 6-8 (1986) (describing similarly loose conceptions of territoriality among members of the Chippewa tribe at the time Europeans settled in the United States).

[480] Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 315 (1991) ("Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions [such as sleeping] may be performed by the homeless person.").

[481] As Stuart Hall has described:

> To be English is to know yourself in relation to the French, and the hot-blooded Mediterraneans, and the passionate, traumatized Russian soul. You go round the entire globe: when you know what everybody else is, then you are what they are not. Identity is always, in that sense, a structured representation which only achieves its positive through the narrow eye of the negative.

Stuart Hall, *The Local and the Global: Globalization and Ethnicity*, *in* CULTURE, GLOBALIZATION AND THE WORLD-SYSTEM: CONTEMPORARY CONDITIONS FOR THE REPRESENTATION OF IDENTITY 19, 21 (Anthony D. King ed., 1997).

[482] Kogan, *supra* note 470, at 637.

In order to convey this basic idea, it might be useful to give an admittedly oversimplified, functionalist account of the change in American jurisdictional rules over time. In this account, the territorially based jurisdictional principle articulated in the nineteenth century by the U.S. Supreme Court in *Pennoyer v. Neff*[483]—which held that states have complete authority within their territorial boundaries but no authority outside those boundaries[484]—derives in part from a particular understanding of social space in the United States at that time. As historian Robert Wiebe has famously observed, "America during the nineteenth century was a society of island communities."[485] With weak communication and limited interaction, these "islands" felt widely dispersed, and it is not surprising that local autonomy became "[t]he heart of American democracy."[486] Even though France had long since developed a centralized public administration, Wiebe argues that Americans still could not even conceive of a distant managerial government. In such a climate, geographical loyalties tended to inhibit connections with a whole society. "Partisanship . . . grew out of lives narrowly circumscribed by a community or neighborhood. For those who considered the next town or the next city block alien territory, such refined, deeply felt loyalties served both as a defense against outsiders and as a means of identification within."[487]

As the nineteenth century progressed, so this story goes, massive socioeconomic changes brought an onslaught of seemingly "alien" presences into these island communities. Immigrants were the most obvious group of outsiders, but perhaps just as frightening was the emergence of powerful distant forces such as insurance companies, major manufacturers, railroads, and the national government itself. Significantly, these threats appear to have been conceived largely in spatial terms. According to Wiebe, Americans responded by reaffirming community self-determination and preserving old ways and values from "outside" invasion.[488]

Given such a social context, it is not surprising that the jurisdictional rules of the period emphasized state territorial boundaries. Indeed, it is likely that the burdens of litigating in another state far exceeded simply the time and expense of travel, substantial as those burdens were. Just as im-

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[483] 95 U.S. 714 (1877).

[484] *See id.* at 722 (ruling that a State has power to decide the "civil *status* and capacities of its inhabitants" and to regulate how property may be handled, but that "no State can exercise direct jurisdiction and authority over persons or property without its territory").

[485] ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877-1920, at xiii (1967).

[486] *Id.*

[487] *Id.* at 27.

[488] *Id.* at 52-58. For a fictional account of this period that gives texture to this description, see WILLA CATHER, MY ANTONIA (Houghton Mifflin Co. 1926) (1918).

portant was the *psychic* burden of being forced to defend oneself in a foreign state, which may have felt little different from the idea of defending oneself in a foreign country. An 1874 Pennsylvania state court decision issued shortly before *Pennoyer* illustrates the extent of this psychic burden.[489] In the case, a resident of New York had contested jurisdiction in Pennsylvania. The court acknowledged that the Pennsylvania courthouse was only "a few hours' travel by railroad" from New York, but nevertheless ruled that the defendant could not be sued personally, in part because "nothing can be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear."[490] The court disregarded the relatively slight literal burden in the case at hand, and instead focused on the specter of being "dragged" to a "distant state" located "thousands of miles" away. Indeed, the decision seemed to equate other states with foreign countries, referring to a "defendant living in a remote state or foreign country . . . [who] becomes subject to the jurisdiction of this, to him, foreign tribunal."[491] These passages indicate that the psychic significance of defending oneself in another state was at least as important as the literal difficulties of travel.

Both the literal and psychic burdens associated with out-of-state litigation changed as a result of the urban industrial revolution at the turn of the twentieth century, a revolution that profoundly altered American social space. Increasingly, economic and governmental activities were administered from afar by impersonal managers at centralized locations. In such a world, another state was likely to be viewed less as a foreign country and more as yet another distant power center, just one of many "anonymous, bureaucratic, regulatory bodies in an increasingly complex society."[492]

In addition, advances in transportation and communications helped to weaken territoriality as the central category in which Americans understood their space. "As long as daily lives were focused to a large extent on the local, a state boundary symbolized the edge of the world and everything outside that boundary was alien and foreign."[493] With increased mobility, however, Americans regularly crossed state boundaries by train, by car, and by airplane, which inevitably diminished the sense that other places were alien. The rise of radio and television meant that events in other states could become a regular part of one's daily consciousness. "Physical dis-

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[489] *Coleman's Appeal*, 75 Pa. 441 (1874).

[490] *Id.* at 457 (1874).

[491] *Id.* Indeed, for juridical purposes, other states had, since the founding, been treated much like foreign countries, even for some time after the Civil War.

[492] Kogan, *supra* note 470, at 651 (citations omitted).

[493] *Id.* at 652.

tance as a social barrier began to be bypassed through the shortening of communication 'distance.'"[494] These communication and transportation advances reinforced the functional interdependence that characterized the United States throughout the twentieth century. As a result, almost all of us are now regularly affected by people, institutions, and events located far away.

In this altered social space, the call to defend a lawsuit in the courts of another state remained an imposition, but the burdens were no longer perceived in stark territorial terms. In other words, though many economic and practical burdens remained, the psychic burden was no longer as strong. Thus, it is not surprising that *International Shoe* substituted a flexible "fairness" test for the more rigidly territorial scheme of *Pennoyer*.

As previously stated, this is an oversimplified account of the shift in American jurisdictional rules. For the purposes of this discussion, however, it makes the essential point clearly enough: changes in political and social conceptions of space form at least part of the context for changes in jurisdictional understandings. Thus, although some might ask why we need to rethink our ideas about legal jurisdiction, the reality is that jurisdictional rules are always evolving, and this evolution has always responded to changing social constructions of space, distance, and community.

With the rise of global capitalism and the Internet, the question becomes whether the sense of social space has shifted once again. Arguably, people around the world now share economic space to a greater degree than ever before, in large part because of the increase in online interaction. Modern electronic communications, record-keeping, and trading capacities have allowed the world financial markets to become so powerful that the actions of individual territorial governments often appear to be ineffectual by comparison.[495] Essential services, such as computer programming, can easily be "shipped" across nation-state boundaries and can even be produced multinationally. The international production and distribution of merchandise means that communities around the country—and even around the world—increasingly purchase the same name-brand goods and shop at the same stores. Online communities (to the extent that we are willing to call them communities) ignore territoriality altogether and instead are organized around shared interests. People fly more than ever, carry telephones and laptops with them as they travel, and keep in touch by e-mail.

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[494] JOSHUA MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR 116 (1985).

[495] *See infra* notes 701-04 and accompanying text (discussing the extent of global corporate and financial market activity and the impact of this activity on governmental institutions, such as central banks).

All of these changes radically reshape the relationship of people to their geography.[496] As Joshua Meyrowitz observed nearly twenty years ago, electronic media create "a nearly total dissociation of physical place and social 'place.' When we communicate through telephone, radio, television, or computer, where we are physically no longer determines where and who we are socially."[497] Meyrowitz pointed out that, historically, communication and travel were synonymous, and it was not until the invention of the telegraph that text messages could move more quickly than a messenger could carry them.[498] Thus, "informational differences between different places began to erode."[499] Moreover, many of the boundaries that define social settings by including and excluding participants-—including walls, doors, barbed wire, and other physical and legal barriers—-are less significant in a world where "the once consonant relationship between access to information and access to places has been greatly weakened."[500]

Given such changes, it is possible that the psychic burden of foreign jurisdiction is less significant today because of our increased contact with for-

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[496] Some have conceptualized this shift as a change in the way we experience and represent space and time. *See, e.g.*, ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY 64 (1990) (describing the problem of today's higher level "time-space distanciation" which has stretched local and distant social forms); TOMLINSON, *supra* note 474, at 4-5 (describing the way airline journeys transform "spatial experience into temporal experience"). In that regard, it is interesting to link this change to shifts in the arts. For example, in visual arts, Friedland and Boden have observed that the fall of the linear perspective of early Renaissance painting occurred along with the rediscovery of Euclidean geometry and the emergence of spatial representation, such as maps. Roger Friedland & Deirdre Boden, *NowHere: An Introduction to Space, Time and Modernity*, *in* NOWHERE: SPACE, TIME AND MODERNITY 1, 2 (Roger Friedland & Deirdre Boden eds., 1994) (citing Denis Cosgrove, *Prospect, Perspective, and the Evolution of the Landscape Idea*, *in* 10 TRANSCRIPTS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 45, 46-48 (1985)). In the late nineteenth century, the impressionists "fragmented light (and thus time)." *Id.* at 1-2. Then, postimpressionists such as Cézanne built "a new language, abandoning linear and aerial perspective and making spatial dispositions arise from the modulations of color." Id. at 2 (citing CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 468 (1989)). The cubists went still further, "providing simultaneous images of the same moment from different points in space and multiple views of a single scene at various points in time." *Id.* at 2; *see also* Stephen Kern, *Cubism, Camouflage, Silence, and Democracy: A Phenomenological Approach*, *in* NOWHERE: SPACE, TIME AND MODERNITY, *supra* at 163, 167 (describing how artists such as "Picasso and Braque gave space the same colors, texture and substantiality as material objects and made objects and space interpenetrate so as to be almost indistinguishable"). Likewise the development of the modern novel—with books such as MARCEL PROUST, REMEMBRANCE OF THINGS PAST (C.K. Scott Moncrieff & Terence Kilmartin trans., 1954); JAMES JOYCE, FINNEGANS WAKE (1939); and VIRGINIA WOOLF, MRS. DALLOWAY (1925)—also mined changes in the equation between space and time.

[497] MEYROWITZ, *supra* note 494, at 115.

[498] *See id.* at 116 (describing the impact of telegraphic technology).

[499] *Id.*

[500] *Id.* at 117.

eign places. On the other hand, we may feel the need to cling even more tenaciously to localism in the face of the encroaching global economic system.[501] Moreover, in either scenario the "we" is problematic. After all, different social groups, and different individuals, have very different degrees of exposure to and control over global flows of information, capital, and human migration.[502] Nevertheless, the important point is that if jurisdictional rules both reflect and construct social space, further investigation is needed in order to better comprehend the relationship between community affiliation, physical location, and personal identity in a world where the importance of territorial borders and of geographical distance is being challenged.

B. *Jurisdiction and the Assertion of Community Dominion*

When a transgressor behaves in some way contrary to society's moral code, the community can come to view the transgressor in one of two ways. First, the community can close ranks by defining itself in opposition to the transgressor and by treating the transgression purely as an *external* threat. Or, second, the community can claim dominion over the transgression by conceptualizing the transgressor as a member of the community who has committed what might be considered an *internal* offense.

The definition of a threat as internal or external is, in part, a question of jurisdiction. When a community exercises legal jurisdiction, it is symbolically asserting its dominion over an actor. This jurisdictional reach can serve to transform what otherwise might have been considered an external threat into an internal adjudication. Accordingly, the assertion of jurisdiction can be seen as one way that communities domesticate chaos.

I have written previously about the surprisingly widespread and elaborate practice in medieval Europe and ancient Greece of putting on trial ani-

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[501] *Cf.* GIDDENS, *supra* note 496, at 65 ("The development of globalised social relations probably serves to diminish some aspects of nationalist feeling linked to nation-states (or some states) but may be causally involved with the intensifying of more localised nationalist sentiments.")

[502] Doreen Massey refers to this as the "power geometry of time–space compression." MASSEY, *supra* note 30, at 149. She contrasts those who are "in charge" of time-space compression—"the jet-setters, the ones sending and receiving the faxes and the e-mail, holding the international conference calls . . . distributing the films, controlling the news, organizing the investments"—-with those who do a lot of physical moving, but are not "in charge" of the process in the same way. *Id.* These people include those such as undocumented migrant workers who cross borders illegally or those who lose their jobs to less expensive labor abroad, or those whose livelihood is affected by global currency fluctuations. Thus, social conceptions of space, distance, and community definition are, of course, themselves varied and contested.

mals and inanimate objects that caused harm to human beings.[503] Although such trials may seem far removed from any discussion of contemporary jurisdictional rules, I believe they illuminate the symbolic content of such rules. In deciding how to respond to acts of violence or depredation caused by animals, communities were faced with a choice of whether to view the acts as internal or external threats. Random acts of violence caused by insensate agents undoubtedly brought a deep feeling of lawlessness: not so much the fear of laws being broken, but the far worse fear that the world might not be a lawful place at all.[504] To combat such a fear, it may have been essential to view the animals not as uncontrollable natural forces belonging to the outside world, but as members of the community who could actually break the community's laws. By asserting dominion over the animals, members of communities could assure themselves that, even if the social order had been violated, at least there was *some* order, and not simply undifferentiated chaos.

Just as the animal trials implicitly communicated a symbolic message that nonhuman transgressors were nevertheless subject to human control, so too our contemporary notions of jurisdiction continue to be linked to how we define both the limits of the community and who should be within its dominion. This exercise of jurisdiction, in and of itself, can be part of the process of healing after the breach of a social norm. For example, a person injured by a defective product may feel powerless to affect the behavior of a distant, seemingly uncontrollable corporation. Indeed, while animals may have been viewed as an uncontrollable "other" in medieval Europe, the products of global capitalism today likewise may seem to be external forces of destruction that obey only their own law. By bringing the corporation within local jurisdiction, the individual and the community may feel they have regained some control over their world.

Finally, the need to assert community dominion may also be a significant part of the desire to use legal and quasi-legal proceedings to respond to atrocities such as war crimes, genocide, or crimes against humanity. For

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[503] *See* Paul Schiff Berman, *An Observation and a Strange but True "Tale": What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 HASTINGS L.J. 123 (2000) [hereinafter Berman, *Transformative Potential of Law*] (using a discussion of animal trials to explore overlooked social benefits of legal proceedings); Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994) (surveying the history of animal trials and analyzing their role in helping a community heal after a breach of the social order).

[504] Nicholas Humphrey, *Foreward* to E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS, at xxv (paperback ed., Faber & Faber Ltd. 1987) (1907) (articulating the strong fear of Greeks and medieval Europeans that "God was playing dice with the universe").

example, the trial of accused Nazi war criminal Klaus Barbie, held in France several years ago, arguably was concerned less with punishing the individual (who, after all, was extremely old and in failing health at the time of the trial), than about asserting France's authority and sense of control after a horrific and chaotic human tragedy.[505]

The rise of online communication may create increased pressure to assert community dominion over the activities of outsiders. A foreign website can easily breach community boundaries and threaten community order. For example, material that a community might wish to ban nevertheless may be readily accessible from websites outside the bounds of that community. Likewise, a community that adopts strict consumer protection laws to regulate corporate activity may feel threatened when outside businesses can ignore the local laws through Internet sales.[506] These "external" threats appear to flout local norms.

It is against this backdrop that we may understand the seemingly extreme position of the district court in the *Instruction Set* case discussed earlier in this Article.[507] There the court ruled that, if an individual's website is accessible in a community, then the community can claim dominion over that individual.[508] Similarly, the French court in *Yahoo!* appears to have conceptualized the website as a force that had "entered" France and was therefore subject to the community's laws.

Thus, the impulse to assert jurisdiction over an outsider who "invades" a community via the Internet is tied to the need to assert dominion in order to domesticate external chaos. On the other hand, the jurisdictional puzzle will look quite different if online interaction is conceived not as foreign websites "sending" information into a community, but rather as members of a community choosing to "travel" to a foreign site to obtain information. Accordingly, linguistic metaphors for conceptualizing online interaction may also help determine the way people develop intuitions about jurisdictional questions.

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[505] *See* Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1322 (1989) (describing the intent of the trial as "pedagogical").

[506] Such e-commerce issues have caused the European Union to change course several times in recent years regarding jurisdiction over Internet sales. *See supra* text accompanying notes 57-61 (discussing such changes).

[507] Inset Systems, Inc. v. Instruction Set, Inc., 937 F. Supp 161 (D. Conn. 1996); *see also supra* text accompanying notes 416-418 (discussing the *Instruction Set* case).

[508] *Instruction Set,* 937 F. Supp. at 165.

C. *Jurisdiction and the Extension of Community Membership*

The previous Section discussed how the exercise of jurisdiction functions in part as a symbolic assertion of community *dominion*. A corollary to this observation is that the exercise of jurisdiction also symbolically extends a form of community *membership*. As discussed above, a true outsider is either fought as an external threat or ignored entirely. By exercising jurisdiction, a community constructs a narrative whereby the outsider is not truly an outsider, but is in some way a member of that community and subject to its norms.

A rather extreme example of this phenomenon is the death sentence issued by an Islamic leader against author Salman Rushdie. Chances are that if I had written the same novel as Rushdie, I would not have been treated in the same way. Instead, it is likely that I would have been dismissed as a total outsider or targeted in an ad hoc fashion as a purely external threat. The death sentence therefore reflects the fact that Rushdie was considered a *member* of the Islamic community. Even this violent exercise of jurisdiction acted to extend community membership.

Similarly, by prosecuting war criminals or human rights abusers we are insisting that the defendants are members of the world community. Accordingly, the assertion of jurisdiction can be seen as an educative tool and not simply an exercise of coercive power. The community, in effect, tells the defendants that they share a membership bond with others and therefore cannot simply impose their will with impunity. Meanwhile, the assertion of jurisdiction also implicitly delivers a message to the public that the defendants are neither sub-human nor the agents of chaotic fate, but are instead members of the world community to be considered in their full humanity and punished according to human law.

This idea of jurisdiction as the assertion of community membership may also have relevance in evaluating the usefulness of alternative legal procedures aimed at restorative justice, such as the growing use of truth commissions as a mechanism for societal reconciliation.[509] For example,

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[509] For example, truth commissions have been established in countries including Argentina, Bolivia, Chile, El Salvador, Guatemala, Haiti, the Phillipines, Rwanda, Somalia, South Africa, Uganda, and Uruguay. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 291-97 (2001) (listing twenty truth commissions established since 1982); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 53-54 (1998) (describing the establishment of truth commissions in African and South American countries); Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 377-78 (1997) (providing a brief history of truth commissions and detailing their establishment in particular countries). Indeed, "truth commissions have proliferated, and now every nation emerging from dictatorship or war wants one. This year Nigeria, Ghana, Sierra

the Truth and Reconciliation Commission (TRC) proceedings in South Africa have attempted to restore psychic membership in the South African community to both victims and perpetrators. The TRC required that those perpetrators seeking amnesty both acknowledge the community's jurisdiction by appearing before the commission and then address that community by recounting their misdeeds in an open forum.[510] Likewise, victims who for years were not recognized as full-fledged members of the South African community were given an opportunity to speak about their pain and to enter into the community's legal system instead of remaining outside of it. The TRC proceedings, therefore, implicitly expressed the hope that victims, perpetrators, and spectators could all be integrated into the new South African community.

Even in more commonplace legal proceedings, the idea of asserting community membership through jurisdiction may be important. For example, while a community may need to assert its dominion over the products of a distant corporation in order to feel some control over seemingly random misfortune, a multinational corporation may come to conceive of itself as a corporate citizen of many different localities because of the potential exercise of local jurisdiction. Accordingly, the exercise of jurisdiction may encourage corporate officials to rethink their sense of responsibility to communities far beyond the boundaries of their corporate headquarters.

In addition, the ability to assert the jurisdiction of a court may give people some sense of *their own* membership in the community. Prison inmates bringing civil rights actions against abusive guards, for example, may feel validated simply because they are able to invoke the jurisdiction of a court. Regardless of outcome, the fact that the inmates' grievances are aired and considered, however briefly, may give marginal members of society a greater sense of community affiliation.[511] As a result, the assertion of community dominion may be beneficial both for the community, which can assert its control over otherwise uncontrollable behavior, and for the individual, who achieves a form of community membership through the legal process. Even a criminal defendant is implicitly deemed to be a member of the community who has gone astray (and therefore retains certain rights)

Leone, Peru, Panama, East Timor, Yugoslavia, Bosnia and South Korea all began commissions or have them under way." Tina Rosenberg, *Designer Truth Commissions*, N.Y. TIMES, Dec. 9, 2001, § 6 (Magazine), at 66; *see also* HAYNER, *supra*, at 5 (discussing the possibility of truth commissions in Indonesia, Colombia, and Bosnia).

[510] *See* MINOW, *supra* note 509, at 55-57 (describing the conditions attached to the TRC's grant of amnesty).

[511] *See* Roland Acevedo, *Thoughts of an Ex-Jailhouse Lawyer*, N.Y. L.J., Aug. 5, 1998, at 2 (describing the psychological benefit prison inmates receive from being able to bring a lawsuit in court even if the suit is ultimately unsuccessful).

rather than a purely external pariah (who has no rights).[512]

The assertion of community membership is relevant to discussions of Internet jurisdiction as well. As discussed previously, the growth of electronic communications is closely linked to our increasing global economic and psychological interdependence.[513] Online interaction contributes to our awareness of outsiders and our sense of connection with them. People develop friendships and business relationships regardless of physical proximity; they may even fall in love online. Many of the psychic bonds that in a previous era were shared only within the confines of one's local community now stretch far beyond any single geographical location. Given this change in economic and psychological interdependence, it would not be surprising to see the definition of community membership change as well. And if jurisdiction is one of the ways we express our intuitions about community membership, then jurisdictional rules, in turn, must evolve. Otherwise, we will risk being trapped in a legal doctrine that no longer represents the reality of modern life, just as the United States was trapped during the first half of the twentieth century when courts struggled to expand the strict territorial rule of *Pennoyer*.

D. *Jurisdiction and the Assertion of Alternative Norms*

We are accustomed to thinking of jurisdictional assertions as the unique province of a sovereign entity. The assertion of jurisdiction, however, can also open space for the articulation of norms that function as alternatives to, or even resistance to, sovereign power. For example, in seventeenth-century England, common law courts began to issue writs of prohibition in order to prevent the rival Court of High Commission from hearing certain cases.[514] In response, some critics argued that the common law courts were overreaching and that the question of which court had proper jurisdiction to hear a case could only be resolved by the king because the authority of all

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[512] *But see* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 1-3 (2001) (charting the retreat in the United States and Britain, since the early 1970s, from a crime control model concerned with criminal rehabilitation to an "official policy of punitive sentiments and expressive gestures that appear oddly archaic and downright anti-modern").

[513] *See* MEYROWITZ, *supra* note 494, at 115–17 (discussing the relationship between electronic media and the erosion of social boundaries).

[514] *See* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 295 (1956) (explaining how Sir Edward Coke attacked the Ecclesiastical High Commission through writs of prohibition); 12 EDWARD COKE, REPORTS OF SIR EDWARD COKE 42 (E. Nutt et al. eds., 4th ed. 1738) (1655) (discussing the use of writs in *Nicholas Fuller's Case*).

judges derived from him.[515] In *Prohibitions del Roy*, Lord Coke describes himself as having replied to such characterizations of the king's authority:

> [T]rue it was, that God had endowed his Majesty with excellent Science, and great Endowments of Nature; but his Majesty was not learned in the Laws of his Realm of England. . . . With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; to which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et Lege* [that the King should not be under man, but under God and the Law].[516]

Thus, Coke refused to place the king beyond or above the domain of law.

By challenging the king and affirming the jurisdiction of the common law courts, Coke asserted the primacy of law even over sovereign power. In doing so, however, he also stripped the courts of the very "institutional protection . . . that ordinarily stands behind" courts and enforces their orders.[517] After all, who is to enforce legal jurisdiction when the king stands in opposition? This story makes clear both that courts can exercise power separate from (and perhaps contrary to) the governing power of the state and that the exercise of such power is risky and always contingent on broader acceptance by communities (and coercive authorities) over time. Nevertheless, despite the risk, the rhetorical assertion of jurisdiction itself can have an important effect.[518] For example, Coke's memorialization of this jurisdictional assertion in his treatise was undoubtedly part of the Enlightenment movement to limit the power of kings and assert a higher rule of law. Thus, one can see a direct line from Coke to Thomas Paine, who declared that, in the new United States of America, "law is King."[519]

It is, of course, a commonplace to say that courts lack their own enforcement power, making them dependent on the willingness of states and individuals to follow judicial orders. This observation is often used as an argument for the irrelevance of international law itself: because such "law"

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[515] *See, e.g.*, 12 COKE, *supra* note 514, at 63 (describing the debate as to who had authority to decide jurisdiction in *Prohibitions del Roy*, 77 Eng. Rep. 1342 (K.B. 1607)); *see also* BOWEN, *supra* note 514, at 303-04 (discussing the debate over the king's "absolute power and authority" to decide legal disputes).

[516] 12 COKE, *supra* note 514, at 65.

[517] Cover, *supra* note 2, at 186.

[518] There is some evidence that Coke's version of his actions is not accurate and that he actually capitulated to the king's authority. *See* BOWEN, *supra* note 514, at 305-06 (observing that some historians have rejected Coke's account, relying on other seventeenth-century evidence, which indicates that Coke actually threw himself on the mercy of the king). Even if this is so, however, the rhetorical assertion of jurisdiction in his treatise might still have persuasive value over time.

[519] THOMAS PAINE, *Common Sense*, *in* THE COMPLETE WRITINGS OF THOMAS PAINE 1, 29 (Philip S. Foner ed., 1945) (1776).

is subject to the realpolitik demands of pure power, so the argument goes, it is not really law at all.[520] Domestic law is substantially similar, however, because courts can only exercise authority to the extent that someone with coercive power chooses to carry out the legal judgments issued.[521]

Thus, the essence of law is that it makes aspirational judgments about the future, the power of which depends on whether the judgments accurately reflect evolving norms of the communities that must choose to obey them. If this is so, then we might view extraterritorial lawmaking as substantially similar to lawmaking within territorial bounds. To take the French prosecution of Yahoo! as an example,[522] it is true that the court's command is only enforceable if an American authority will agree to enforce it, but the same court's decision against Yahoo!'s French subsidiary is similarly dependent on the enforcement power of a sovereign. After all, if the executive branch of the French government were to refuse to enforce the order against the subsidiary, that order would have no more force than the order against the American parent.

If the assertion of jurisdiction is always an assertion of community dominion, then all judicial decisions rely on both that particular community's acquiescence and the willingness of other communities to recognize and enforce the jurisdictional assertion. This is a sort of "natural law of jurisdiction"[523] in which jurisdictional assertions depend solely on the rhetorical

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[520] This position is most often associated with so-called "international relations realists." *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993) (describing the "Realist challenge" embodied in "the defiant skepticism . . . that international law could ever play more than an epiphenomenal role in the ordering of international life"). From the realist perspective, states in the international realm always act only in their own national interest. Thus, law is irrelevant. The only relevant laws are the "laws" of politics, and politics is a "struggle for power." *See* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 4, 26-27 (1949) ("International politics cannot be reduced to legal rules and institutions.").

[521] Of course, the question of whether there is a fundamental difference between international and domestic law has been a subject of debate within political theory. *See generally* Kimberly Hutchings, *Political Theory and Cosmopolitan Citizenship*, *in* COSMOPOLITAN CITIZENSHIP 3 (Kimberly Hutchings & Roland Dannreuther eds., 1999) (providing an overview of the various positions in this debate). That debate is beyond the scope of this Article. I note only that many of the international relations realist objections to international law have been made by American legal realists and critical legal studies scholars with regard to domestic law as well. *See, e.g.*, Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1477-78 (2002) (linking international relations realist claims to arguments made by critical legal theorists about domestic law).

[522] *See supra* Part I.D (analyzing the *Yahoo!* case).

[523] Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 58 (1983). See *infra* text accompanying notes 783-93 for a discussion of a "natural law of jurisdiction" and the role of norms in creating legal legitimacy.

force of their articulation of norms to entice allegiance. Thus, a court asked to enforce a prior court's judgment would always need to consider whether the prior judgment properly spoke for a relevant community and whether the substantive norms articulated in the judgment are attractive in order to determine if the jurisdictional assertion and the substantive norms should be recognized.

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Having identified four ways in which the assertion of jurisdiction both constructs and reflects social meaning, what remains to be investigated more fully is the extent to which accepted notions of legal jurisdiction actually accord with the social meanings at play in the contemporary world. Territorially fixed boundaries remain the primary way of differentiating jurisdictional space, and nation-states remain the primary jurisdictional community. How well does this legal conception actually map onto social space? The answer to such a question cannot be left in the legal arena, where the discussion is often limited to debates about historical precedent, political philosophy, or economic efficiency. Instead, the relationship between jurisdiction and social understandings of space, borders, and community is a topic that should engage theorists from a variety of disciplines. Such theorists might help forge a more complex account of the world onto which jurisdictional rules are imposed. They also might point the way to alternative conceptions of jurisdiction grounded in, and reflective of, this more complex view of the world. New conceptions of jurisdiction could allow for a more pluralist understanding of the variety of community affiliations people experience in their lives. This Article next considers some of this scholarship in order to challenge the authority of physical location, territorial boundaries, and nation-state sovereignty that is usually assumed in contemporary jurisdictional schemes.

IV. THE NATION-STATE AND THE SOCIAL/HISTORICAL CONSTRUCTION OF SPACE, COMMUNITY, AND BORDERS

This Part surveys the vast literature in anthropology, sociology, political science, and cultural studies concerning conceptions of borders, territoriality, nation-state sovereignty, and the cultural construction of place and belonging. First, I will address the assumption that there is somehow a "natural" tie between a culturally or ethnically unified community and a physical location and suggest that social and political processes tend to construct ideas of physical location as well as to be constructed by them. Therefore, no jurisdictional scheme is necessarily more "natural" than any other. Second, I will survey the historical rise of the modern conception of the nation-

state, revealing that the idea of sovereign nation-states operating within fixed territorial boundaries is a relatively recent development and a result of specific historical and political processes. Third, I will explore in more detail the idea of community itself and the ways in which we might think of the nation-state as an imagined community built on a set of narrative constructions. Fourth, I will consider several forms of community affiliation that offer alternatives to the nation-state.

Taken together, this literature challenges any idea that national boundaries somehow naturally or inevitably define jurisdiction. Instead, these authors interrogate assumptions about identity, territoriality, community, and sovereignty and reveal that the purported straightforward tie between geographical boundaries, community, personal identity, and nation-state sovereignty is problematic, contingent, socially constructed, and contested. The analyses suggest that the conception of territorially based jurisdiction is not an ineradicable fixture of political organization. This necessarily brief overview thus opens space for creatively imagining more pluralistic conceptions of jurisdiction that will attend to the wide variety of ways in which people construct community affiliation and identity.

A. *The Unmooring of Cultures, Peoples, and Places*

Legal discussions of jurisdiction are often predicated on a seemingly unproblematic division of space, particularly on the idea that societies, nations, and cultures occupy "naturally" discontinuous spaces. This assumption ignores the possibility that territorial jurisdiction often *produces* political and social identities rather than reflecting them.[524] Indeed, the very idea of territoriality—which we can think of as a "geographic strategy to control people and things by controlling area"[525]—is itself socially rooted.[526] Thus,

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[524] *See* Ford, *supra* note 470, at 844 ("Jurisdictions define the identity of the people that occupy them."). As Henri Lefebvre has observed, "Space is not a scientific object removed from ideology or politics; it has always been political and strategic." Henri Lefebvre, *Reflections on the Politics of Space*, *in* 8 ANTIPODE 30, 31 (1979).

[525] SACK, *supra* note 479, at 5.

[526] It is the socially constructed nature of territoriality that permits theorists to discuss "deterritorialization" with respect to globalizing processes. For examples of the literature on deterritorialization, see NÉSTOR GARCÍA CANCLINI, HYBRID CULTURES: STRATEGIES FOR ENTERING AND LEAVING MODERNITY (Christopher L. Chiappari & Silvia L. López trans., 1995); MIKE FEATHERSTONE, UNDOING CULTURE: GLOBALIZATION, POSTMODERNISM AND IDENTITY (1995); GLOBALIZATION AND TERRITORIAL IDENTITIES (Zdravko Mlinar ed., 1992); SERGE LATOUCHE, THE WESTERNIZATION OF THE WORLD (Rosemary Morris trans., 1996); JAMES LULL, MEDIA, COMMUNICATION, CULTURE: A GLOBAL APPROACH (1995); ARMAND MATTELART, MAPPING WORLD COMMUNICATION: WAR, PROGRESS, CULTURE (Susan Emanuel & James A. Cohen trans., 1994); DAVID MORLEY & KEVIN ROBINS, SPACES OF IDENTITY: GLOBAL MEDIA, ELECTRONIC LANDSCAPES AND CULTURAL BOUNDARIES

conceptions of territoriality depend on "how people use . . . land, how they organize themselves in space, and how they give meaning to place."[527] Absent a rigorous attempt to develop a social understanding of how space is actually constructed, the power of topography tends to obscure the topography of power.[528]

In recent years, anthropologists, among others, have increasingly challenged the assumed correlation between a people, a culture, and a physical place. Historically, anthropology had 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."[529]

This individuated conception of community, still so powerful in legal discussions, 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 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."[530] 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 capital-

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(1995); Appadurai, *supra* note 7.

[527] SACK, *supra* note 479, at 2.

[528] *See* Akhil Gupta & James Ferguson, *Beyond "Culture": Space, Identity, and the Politics of Difference*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY , *supra* note 3, at 33, 35 ("The presumption that spaces are autonomous has enabled the power of topography successfully to conceal the topography of power."); *see also* LIISA H. MALKKI, PURITY AND EXILE: VIOLENCE, MEMORY, AND NATIONAL COSMOLOGY AMONG HUTU REFUGEES IN TANZANIA 5 (1995) (referring to "ways in which the contemporary system of nation-states composes a hegemonic topography"); *cf.* Ford, *supra* note 470, at 859 ("The ideological foundation of nation-states is primarily . . . organicism; nations are thought to represent 'a people' who are both distinctive and relatively homogenous. The French are united not only by language but by something called 'culture': a set of practices, significant artifacts, beliefs, styles, a certain je ne sais quoi.").

[529] *See* Akhil Gupta & James Ferguson, *Culture, Power, Place: Ethnography at the End of an Era*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY, *supra* note 3, at 1, 1 (describing conceptions of "culture"); *see also* 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."); GEORGE W. STOCKING, JR., RACE, CULTURE, AND EVOLUTION 202-03 (1968) (discussing Franz Boas's influence in defining "culture").

[530] Gupta & Ferguson, *supra* note 529, at 2.

ism.[531] Thus, the task recently has been to understand "the way that questions of identity and cultural difference are spatialized in new ways."[532]

Accordingly, anthropologists have argued that we live increasingly in the "global cultural ecumene"[533] of a "world in creolization."[534] 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 . . . ."[535] In both disciplines, therefore, 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."[536]

Nevertheless, the assumption that a culturally unitary group (a "tribe" or a "people" or even a "citizenry") is naturally tied to "its" territory is difficult to shake because such assumptions are so deeply ingrained in the modern consciousness.[537] For example, 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.[538]

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[531] *See, e.g.*, HANNERZ, *supra* note 529, 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."); Appadurai, *supra* note 7, at 33 (proposing a set of non-territorial "scapes" to replace "landscapes" as fields of inquiry); Friedland & Boden, *supra* note 496, at 42 ("The circulation of populations and symbols is progressively undercutting the essential relation between territory and culture, the link between place and identity."); *see also* TOMLINSON, *supra* note 474, at 106-49 (discussing the mundane ways in which deterritorialization is experienced in everyday life).

[532] Gupta & Ferguson, *supra* note 529, at 3; *see also* Austin Sarat & Thomas R. Kearns, *The Unsettled Status of Human Rights: An Introduction*, *in* HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES 1, 13 (Austin Sarat & Thomas R. Kearns eds., 2001) (noting "a new understanding of culture in which an awareness of internal plurality, fragmentation, and contestation replaces former tendencies to speak of cultures as . . . unified wholes").

[533] 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 7, 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 ("[T]he emergent public cultures of many nation-states . . . constitute the centers of new forms of cosmopolitanism in many linguistic and cultural ecumenes.").

[534] Ulf Hannerz, *The World in Creolisation*, 5 AFR. 546 (1987).

[535] GIDDENS, *supra* note 496, at 64.

[536] Gupta & Ferguson, *supra* note 529, at 4; *see also id.* ("[A]ll associations of place, people, and culture are social and historical creations to be explained [or justified], not given natural facts.").

[537] *See* Gupta & Ferguson, *supra* note 528, at 40 (challenging "the national habit of taking the association of citizens of states and their territories as natural").

[538] *Id.* at 34; *see also* Ford, *supra* note 470, at 866-67 (linking the emergence of jurisdic-

Looking at such maps, "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."[539] 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."[540] 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."[541] 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.[542]

Geographers, though they too historically tended to assume a "natural" bond between a people, the land, and a set of legal institutions,[543] are increasingly recognizing the power and politics of the construction of space in society[544] as well as the symbolic significance of maps.[545] Maps often func-

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tion to the development of cartography).

[539] Gupta & Ferguson, *supra* note 528, at 40.

[540] *Id.*

[541] *Id.* at 34.

[542] *See* Ford, *supra* note 470, at 854 (observing that "jurisdictional space may serve to obscure social relations and the distribution of resources").

[543] *See, e.g.*, ELLEN CHURCHILL SEMPLE, INFLUENCES OF GEOGRAPHIC ENVIRONMENT 51 (1911) ("[H]uman 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).

[544] *See* BLOMLEY, *supra* note 476, at 42 ("Recent geographic scholarship . . . has adopted what might be regarded as a relational view of space. Drawing on those such as Lefebvre, some theorists regard space as both socially produced and as socially constitutive, and as deeply implicated in power relations . . . ." (citation omitted)). For examples of such critical geography, see JOHN A. AGNEW, PLACE AND POLITICS: THE GEOGRAPHICAL MEDIATION OF STATE AND SOCIETY (1987); CULTURAL ENCOUNTERS WITH THE ENVIRONMENT: ENDURING AND EVOLVING GEOGRAPHIC THEMES (Alexander B. Murphy & Douglas L. Johnson eds., 2000); PRED, *supra* note 471; ALLAN PRED & MICHAEL JOHN WATTS, REWORKING MODERNITY: CAPITALISMS AND SYMBOLIC DISCONTENT (1992); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); WINICHAKUL THONGCHAI, SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION (1994); Doreen Massey, *Politics and Space/Time*, NEW LEFT REV., Nov.-Dec. 1992, at 65; Allan Pred, *Place as Historically Contingent Process: Structuration and the Time-Geography of Becoming Places*, 74 ANNALS ASS'N AM. GEOGRAPHERS 279 (1984); N.J. Thrift, *On the Determination of Social Action in Space and Time*, 1 ENV'T & PLAN. D: SOC'Y & SPACE 23 (1983).

tion as "almost the perfect representation[s] of the state."[546] Most maps both evenly cover the territory of a country and hierarchically organize it with the most significant places "symbolically at the center, and . . . states on the periphery marked down, through the use of symbols, as inferior orders of government."[547] In addition, many social and cultural groupings—such as ethnic or religious ties—might not be reflected in state-sponsored maps at all.[548] These cartographic "silences"[549] may be the result of "deliberate exclusion, willful ignorance, or even actual repression."[550] As contemporary debates about the distortions caused by various "projections" of the

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[545] *See, e.g.*, THONGCHAI, *supra* note 544, at 129-30 ("[Mapping] 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, *supra* note 8, at 49, 49 ("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 ("[Maps] 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); *see also* Ford, *supra* note 470, 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.").

[546] Henrikson, *supra* note 545, at 59.

[547] *Id.*

[548] *Id.*; *see also* Ford, *supra* note 470, at 853 (observing that jurisdictional lines tend to define an abstract area that is "conceived . . . independently of any specific attribute of that space").

[549] *See* J.B. Harley, *Silences and Secrecy: The Hidden Agenda of Cartography in Early Modern Europe*, 40 IMAGO MUNDI 57, 57 (1988) (describing "the dialogue that arises from intentional or unintentional suppression of knowledge in maps").

[550] Henrikson, *supra* note 545, at 59. For example, the removal or alteration of the place names of conquered peoples or minority groups establishes a silence of subordination. *See* Harley, *supra* note 549, at 66 ("Conquering states impose a silence on minority or subject populations through their manipulation of place names."). As one commentator has observed, cartography has always been "a teleological discourse, reifying power, reinforcing the status quo, and freezing social interaction within charted lines." J.B. Harley, *Maps, Knowledge, and Power*, *in* THE ICONOGRAPHY OF LANDSCAPE 277, 302-03 (Denis Cosgrove & Stephen Daniels eds., 1988).

world make clear,[551] our cartographic representations are socially constructed and politically fraught.[552]

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."[553] First, many people inhabit border areas, where "[t]he fiction of cultures as discrete, objectlike phenomena occupying discrete spaces becomes implausible."[554] Such people may feel an affiliation with the state controlling the area, the nation with which most inhabitants identify, or the borderland itself.[555] Second, many others live a life of

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[551] *See, e.g.*, ARNO PETERS, THE EUROPE-CENTERED CHARACTER OF OUR GEOGRAPHICAL VIEW OF THE WORLD AND ITS CORRECTION (1979) (analyzing the size and position of countries on world maps and the Euro-centrism inherent in such maps); Arthur H. Robinson, *Arno Peters and His New Cartography*, 12 AM. CARTOGRAPHER 103 (1985) (criticizing the "Peters Projection"); *see also* Henrikson, *supra* note 545, at 63-64 (describing the "battle of the maps" pitting the Peters projection against the Mercator projection).

[552] *See* J.M. ROBERTS, THE TRIUMPH OF THE WEST 127 (1985) ("Maps . . . are always more than mere factual statements. They are translations of reality into forms we can master; they are fictions and acts of imagination communicating more than scientific data. So they reflect changes in our pictures of reality.").

[553] David H. Kaplan, *Territorial Identities and Geographic Scale*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE 31, 35 (Guntram H. Herb & David H. Kaplan eds., 1999).

[554] Gupta & Ferguson, *supra* note 528, at 34. Chicana writer and poet Gloria Anzaldúa has captured one experience of a "borderland" existence:

> I am a border woman . . . . I have been straddling that *tejas*–Mexican border, and others, all my life. It's not a comfortable territory to live in, this place of contradictions. Hatred, anger, and exploitation are the prominent features of this landscape.
>
> However, there have been compensations for this *mestiza*, and certain joys. Living on borders and in margins, keeping intact one's shifting and multiple identity and integrity, is like trying to swim in a new element . . . . There is an exhilaration in being a participant in the further evolution of humankind . . . .

GLORIA ANZALDÚA, *Preface* to BORDERLANDS/LA FRONTERA: THE NEW MESTIZA (1987).

[555] *See* ANSSI PAASI, TERRITORIES, BOUNDARIES AND CONSCIOUSNESS: THE CHANGING GEOGRAPHIES OF THE FINNISH-RUSSIAN BORDER (1996) (studying the territorial and social consequences of imposed frontiers); Jena Gaines, *The Politics of National Identity in Alsace*, 21 CAN. REV. STUD. NATIONALISM 99 (1994) (discussing cultural issues emerging in Alsace resulting from the French-German struggles in the region); Oren Yiftachel, *Regionalism Among Palestinian-Arabs in Israel*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE, *supra* note 553, at 237, 237 (addressing "the role of territory, geographical scale, and location as complementing other factors in the political mobilization and identity formation among the Arabs"). Residents of borderland regions, because they are often so physically removed from the state center, are often psychologically, as well as physically, isolated. *See* STEIN ROKKAN & DEREK URWIN, ECONOMY, TERRITORY, IDENTITY: POLITICS OF WEST EUROPEAN PERIPHERIES 3 (1983) ("When we say that one area is peripheral to another, this not just an abstract matter of geographical location: the peripherality will be expressed concretely in the daily life of the inhabitants of the area, and in the nature 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. For example, "[w]hat is 'the culture' of farm workers who spend half a year in Mexico and half in the United States?"[556] Finally, many people cross borders on a relatively permanent basis, including immigrants, refugees, exiles, and expatriates.[557] 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.[558] Indeed, such clashes of former culture and present community have led to questions about the so-called "cultural defense" to certain crimes.[559] And the divided loyalty of diaspora communities can cause host

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their links with groups in the centre."). These regions, therefore, provide fertile ground for the introduction of disparate cultural influences. Not surprisingly, states often put extra effort into securing border communities both culturally and ideologically. For example, the Dominican Republic forcibly expelled Haitians from border communities and then attempted to reeducate the remaining population to make the region more "Dominican." *See* John P. Augelli, *Nationalization of Dominican Borderlands*, 70 GEOGRAPHICAL REV. 19, 24 (1980) ("[T]he basic aims of the nationalization program were to stamp the Dominican national identity on both people and land of the frontier provinces . . . ."); *see also* George W. White, *Transylvania: Hungarian, Romanian, or Neither?*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE, *supra* note 553, at 267, 280-84 (discussing efforts by the Romanian and Hungarian states to eradicate the national influences of the other in the borderland of Transylvania).

[556] Gupta & Ferguson, *supra* note 528, at 34.

[557] *Id.*

[558] Kaplan, *supra* note 553, 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).

[559] So-called "cultural defenses" use evidence about a defendant's cultural background to negate or to mitigate criminal liability (with a concomitant sentence reduction). For example, in one early use of a cultural defense in the United States, a court in Fresno, California took into account a husband's tribal custom of marriage by capture (which involves the kidnap and rape of an intended wife) in permitting a guilty plea to misdemeanor false imprisonment rather than rape and kidnapping. *See* Rorie Sherman, *"Cultural" Defenses Draw Fire*, NAT'L L.J., Apr. 17, 1989, at 3 (reporting recent usage of the "cultural defense," including the Fresno case, *People v. Moua*, No. 315972 (Cal. Super. Ct. 1985)). To its supporters, the "cultural defense is an argument for tolerance of foreign cultures due to a lack of moral basis for punishment." Andrew M. Kanter, Note, *The* Yenaldlooshi *in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411, 413 (1995). *But see, e.g.*, Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 144 (1994) ("Permitting the defense promotes an unfair policy towards the majority to whom the defense is unavailable, and the defense violates principles of legality . . . . [O]pponents assert that a recognition of the cultural defense would, in essence, condone and even encourage[] the

countries to view members of these communities as potential threats.[560] By creating communities of interest rather than place, diasporas (the number of which is increasing due largely to labor immigration)[561] pose an implicit threat to territorially based nation-states.[562] In sum, we see that "[p]rocesses of migration, displacement and deterritorialization are increasingly sundering the fixed association between identity, culture, and place."[563]

In addition, the presumed tie between a territory and a culture fails to account for the obvious cultural differences that exist *within* a locality. "'Multiculturalism' is both a feeble recognition of the fact that cultures have lost their moorings in definite places and an attempt to subsume this plurality of cultures within the framework of a national identity."[564] Thus, even people who remain in seemingly familiar and ancestral places are likely to find that their relation to place continues to change over time. The illusion of a natural and essential connection between the place and the culture will therefore be consistently challenged.[565]

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violence toward women that is practiced throughout the world."); Neal A. Gordon, Note, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809, 1831 (2001) ("The cultural defense is . . . condescending toward other cultures—it excuses action based on foreign cultures by likening it to insanity . . . . [T]he defense isolates cultural groups with a patronizing wink. This isolation may lead in turn to a balkanized law and reinforce the idea that minorities should be treated differently."). Of course, there are many further questions about what gets presented as "culture" and why, as well as the relationship between supposed rationality on the one hand and assumed cultural imperatives on the other. *See, e.g.*, Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 58 (1994) ("The 'cultural defense' presents several complex problems inherent in essentializing a culture and its effect on a particular person's behavior.").

[560] *See* Kaplan, *supra* note 553, at 38 (noting that host communities "remain circumspect about any external loyalties and identities").

[561] *Id.*

[562] *See* Robin Cohen, *Diasporas and the Nation-State: From Victims to Challengers*, 72 INT'L AFF. 507, 517 (1996) (suggesting that people primarily identify with others based on shared opinions, tastes, ethnicities, religions, and other interests and are indifferent toward their nation-state); *see also* James Clifford, *Diasporas*, 9 CULTURAL ANTHROPOLOGY 302, 307 (1994) ("Diasporas are caught up with and defined against . . . the norms of nation-states . . . ."). For a provocative attempt to frame a "diasporan model" of citizenship and the nation-state, see Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005 (2001).

[563] Gupta, *supra* note 3, at 196.

[564] Gupta & Ferguson, *supra* note 528, at 35. Even the idea that there are "subcultures" within a society tends

> to preserve the idea of distinct "cultures" . . . within the same geographical and territorial space. Conventional accounts of ethnicity, even when used to describe cultural differences in settings where people from different regions live side by side, rely on an unproblematic link between identity and place. While such concepts are suggestive because they endeavor to stretch the naturalized association of culture and place, they leave the tie between culture and place largely intact.

Id.

[565] For example, Gupta and Ferguson argue that for the contemporary English, "'Eng-

We can see the everyday effects of deterritorialization in all areas of the world and all sectors of the economy. For example, the "local" shopping mall is not experienced as truly local at all; nearly "everyone who shops there is aware that most of the shops are chain stores," identical to stores elsewhere and that the mall itself closely resembles innumerable other malls around the globe.[566] Thus, while experiencing a "local" place, we recognize the absent forces that structure our experience. Such forces include the steady decline in local ownership of public spaces, which can itself be linked to the globalization of capital.[567]

Similarly, we may feel the growing significance of "remote" forces on our lives, whether those forces are multinational corporations, world capital markets, or distant bureaucracies such as the European Union. As John Tomlinson has observed: "People probably come to include distant events and processes more routinely in their perceptions of what is significant for their own personal lives. This is one aspect of what deterritorialization may involve: the ever-broadening horizon of relevance in people's routine experience . . . ."[568] The increased access to media also affects deterritorialization because one is no longer limited to the perspectives offered from within one's "home culture."[569] 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.[570] 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.

Ironically, although actual places and localities are increasingly blurred and indeterminate, *ideas* of culturally and ethnically distinct places may be-

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lishness[]' . . . is just as complicated and nearly as deterritorialized a notion as Palestinian-ness or Armenian-ness, for 'England' ('the real England') refers less to a bounded place than to an imagined state of being or a moral location." *Id.* at 38; *see also* RAYMOND WILLIAMS, TOWARDS 2000, at 177 (1983) (illustrating the cosmopolitan existence of a typical English person experiencing everyday life); TOMLINSON, *supra* note 474, at 113-16 (updating Williams's story from the early 1980s to the late 1990s).

[566] GIDDENS, *supra* note 496, at 140-41.

[567] TOMLINSON, *supra* note 474, at 107-08.

[568] *Id.* at 115.

[569] *See id.* at 116 (describing the choice of perspectives available through new media and the resultant overlaps between national and local perspectives).

[570] *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?").

come even more important.[571] Imagined communities attach themselves to imagined places; displaced peoples cluster around remembered or idealized homelands in a world that seems increasingly to deny such firm territorialized anchors in their actuality. Indeed, one of the primary illusions of nationalism is the presumption that one's nation has existed from time immemorial. In case after case, however, it turns out that most national traditions are inventions of the past two hundred years, and the principle of nationality itself, "despite its trappings of misty antiquity, is a defining feature of modernity."[572] Thus, in the next two Sections I first explore the particular social and historical context surrounding the rise of the nation-state, and then survey the many ways that nations imagine themselves as natural and inevitable communities rather than as historically contingent and ideologically contested ones.

B. *The Historical Contingency of the Nation-State*

As discussed in the preceding Section, we tend to assume a correspondence between territory, governance, and people. Yet, by looking at the historical rise of the nation-state, we can see that these ties are both relatively recent[573] and the result of a particular sequence of events. Thus, instead of simply asserting the inevitability of nation-state sovereignty, we must attempt to understand "why certain forms of organizing space—-specific boundaries, particular places—-attain the singular importance that they do in a given historical context."[574] This Section briefly surveys this context.

The words "nation" and "state" are frequently used as synonyms, despite the significant difference between them. For example, the United *Nations* actually represents the *states* of the world, not national groups. Similarly, inter*national* relations really refers to inter*state* relations. Whereas a

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[571] Gupta & Ferguson, *supra* note 528, at 39.

[572] Jonathan Rée, *Cosmopolitanism and the Experience of Nationality*, *in* COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION, *supra* note 29, at 77, 81. Indeed, as Rée points out, the two "national groups in Europe that have the greatest claims to many centuries of continuous existence are, significantly, those with no securely held collective territory . . . [: the] Romanies and [the] Jews." *Id.* at 89 n.10.

[573] *See* Immanuel Wallerstein, *The National and the Universal: Can There Be Such a Thing as World Culture?*, *in* CULTURE, GLOBALIZATION AND THE WORLD-SYSTEM: CONTEMPORARY CONDITIONS FOR THE REPRESENTATION OF IDENTITY, *supra* note 481, at 91, 92 ("A world consisting of . . . nation-states came into existence even partially only in the sixteenth century. Such a world was theorized and became a matter of widespread consciousness even later, only in the nineteenth century. It became an inescapably universal phenomenon later still, in fact only after 1945.").

[574] Gupta, *supra* note 3, at 194-95; *see also id.* at 195 ("[Only by] stepping 'outside' the nation (and the problematic of nationalism) [can we] see how nations are created and reproduced as a consequence of the global interstate system.").

state is an explicitly political entity based on physical dominion over a place,[575] a nation implies a "natural" ethnic or cultural unity.[576] Yet, as the last Section suggested, there is no necessary tie between culture and geographical territory. Accordingly, "[n]either nations nor states exist at all times and in all circumstances."[577]

Moreover, state and nation need not evolve together. In some countries, a formal state came into being prior to a sense of nationhood; in others, national identity may have preceded the emergence of a state structure.[578] As a result, "a state territory may contain several groups who define themselves as separate from the majority nation, or a nation may extend far beyond the boundaries of the existing state."[579] For example, the main unifying element of the United States is not an ethnic identity but simply the fact of being born within U.S. territorial borders. Not surprisingly, U.S. citizenship, which is based on birth, is distinctly different from, say, German or Italian citizenship, which is based on blood relation (a rough proxy for ethnic similarity).

The history of the nation-state in the West is relatively familiar, and I will only sketch its broad outline here.[580] Pre-modern states were not based

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[575] Max Weber understood the state as "a human community that (successfully) claims the *monopoly of the legitimate use of physical force within a give territory*." Max Weber, Politics as a Vocation, Speech at Munich University (1918), *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1958). Ernest Gellner, modifying Weber's definition slightly, argues that "[t]he 'state' is that institution or set of institutions specifically concerned with the enforcement of order (whatever else they may also be concerned with)." ERNEST GELLNER, NATIONS AND NATIONALISM 4 (1983). Regardless of which definition one adopts, for our purposes the salient point is that the state is a political (not a natural) entity.

[576] *See* GELLNER, *supra* note 575, at 7 ("Two men are of the same nation if and only if they share the same culture, where culture in turn means a system of ideas and signs and associations and ways of behaving and communicating . . . . [and] if they *recognize* each other as belonging to the same nation.").

[577] *Id.* at 6.

[578] *See* David H. Kaplan & Guntram H. Herb, *Introduction: A Question of Identity*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE, *supra* note 553, at 1, 3 (noting the disconnected evolutions of "nation" and "state").

[579] *Id.*

[580] This history is a bit distorted because it focuses on Western Europe. Nevertheless, the European experience is the basis for most scholarship on nationalism and sovereignty and, by most accounts, was the foundation for the law of nations as we conceive it today. *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 9 (1979) ("Despite its claims to universality, the early law of nations had its origins in the European State-system."); *see also* JAMES MAYALL, NATIONALISM AND INTERNATIONAL SOCIETY 1 (1990) ("[T]he global system of world politics is historically derived from the European states-system as it developed between the seventeenth and twentieth centuries."). For an account of how the European model of statehood spread to other continents and cultures, see ROBERT H. JACKSON, QUASI-STATES 59-81 (1990).

principally on territorial sovereignty. Indeed, medieval Europe was in some ways an archetype for nonexclusive territorial rule; its "patchwork of overlapping and incomplete rights of government . . . [was] inextricably superimposed and tangled."[581] In spite of this fragmentation, however, "[m]edieval actors viewed themselves as the local embodiments of a universal community,"[582] a *Respublica Christiana* "in which each individual found his definition, identity and purpose, where all lived in common under the same law and morals and where none was severed or independent in his authority or beliefs."[583] Moreover, political power arose not from the sacrosanct notion of borders, but from personal allegiances between subjects and a wide variety of authorities,[584] including the Pope, the Holy Roman Emperor, and various nobles, kings, and clerics.[585] This was a different conception from that of sovereign *states* fixed in place.[586] In this world, the social construction of space was "organised concentrically around *many centres* depending upon current political affiliations, rather than a singular centre with established territorial boundaries."[587]

Commentators trace the origin of modern Western territorial states to the emergence of European mercantile capitalism in the fourteenth and fifteenth centuries.[588] Increasing wealth in Europe resulted in larger and more

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[581] John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 149 (1993) (quoting JOSEPH R. STRAYER & DANA C. MUNRO, THE MIDDLE AGES 395–1500, at 115 (4th ed. 1959) (internal quotations omitted)).

[582] CURTIN, *supra* note 5, at 8 (emphasis omitted).

[583] Daniel Philpott, *Sovereignty: An Introduction and Brief History*, 48 J. INT'L AFF. 353, 360 (1995); *see also* Ronald A. Brand, *External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1687-88 (1995) (discussing the medieval concept of *Respublica Christiana*).

[584] Guntram H. Herb, *National Identity and Territory*, *in* NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE, *supra* note 553, at 9-10.

[585] *See* J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107, 111 (1994) (noting the overlapping system of medieval political jurisdictions). Anthony Giddens describes this as the "absolutist state," in which a "political order [is] dominated by a sovereign ruler, monarch or prince, in whose person are vested ultimate political authority and sanctions, including control of the means of violence." ANTHONY GIDDENS, SOCIAL THEORY AND MODERN SOCIOLOGY 170-71 (1987).

[586] *See* WALTER ULLMANN, PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES 139 (1978) (arguing that, in the medieval period, sovereign rulers actually possessed little sovereign power). Indeed, Curtin has noted that "the word 'state' did not exist in political parlance until the 1500's." CURTIN, *supra* note 5, at 9 n.27. *But see* HEINRICH MITTEIS, THE STATE IN THE MIDDLE AGES: A COMPARATIVE CONSTITUTIONAL HISTORY OF FEUDAL EUROPE 3-18 (1975) (arguing that the reality of the state preexisted by several centuries the conscious formulation of the modern idea of the state).

[587] CURTIN, *supra* note 5, at 9.

[588] *See, e.g.*, GIDDENS, *supra* note 585, at 171 (describing a close connection between "the ascendency to power of the bourgeoisie" and the "gradual transformation of the absolutist

complex economies, which in turn required greater central control and administration.[589] In addition, the declining influence of the church and the development of more sophisticated military technology allowed rulers to begin to assert more exclusive control over geographical territory.[590] Overseas discoveries also spurred the development of territorially based sovereignty because demarcating territory allowed for exclusive and unambiguous claims to possessions in the new world.[591] Scholars such as Francisco de Vitoria in Spain and Hugo Grotius in Holland emerged in the sixteenth century to articulate a theory of territorial sovereignty in which any political authority exercising control over territory was entitled to govern that territory without outside intervention.[592]

Ultimately, the Protestant Reformation weakened the central authority of the Pope,[593] bringing on the Thirty Years War, which culminated in the Treaties of Westphalia, signed in 1648.[594] Under these treaties, each coun-

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state into the nation-state"); Herb, *supra* note 584, at 10 (noting that, around the fifteenth century, mercantilism contributed to the shift in a territorial definition of powers); Alexander B. Murphy, *International Law and the Sovereign State: Challenges to the Status Quo*, *in* REORDERING THE WORLD: GEOPOLITICAL PERSPECTIVES ON THE TWENTY-FIRST CENTURY, *supra* note 8, at 209, 209-10 (linking the rise of territorial sovereignty to the rise of mercantilism).

[589] *See* Jouni Häkli, *Territoriality and the Rise of the Modern State*, 172 FENNIA 1, 43-45 (1994) (detailing the development of state administrative branches).

[590] *See* JEAN GOTTMANN, THE SIGNIFICANCE OF TERRITORY 36-40 (1973) (discussing community in terms of spatial territory and identifying the declining role of religion).

[591] *See* Herb, *supra* note 584, at 11 ("Overseas discoveries also revealed the advantages of using a territorial definition of power, because it allowed for the exclusive and unambiguous claims to new possessions without the need to know what these exactly entailed."). For example, in the 1494 Treaty of Tordesillas Spain and Portugal divided their colonial spheres using a line of longitude. SACK, *supra* note 479, at 131-32.

[592] Murphy, *supra* note 588, at 210.

[593] *See* Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1084 (1996) ("By most accounts, the idea of the sovereign state, an entity exercising 'supreme legitimate authority within a [defined] territory,' grew out of the Protestant Reformation." (quoting Philpott, *supra* note 583, at 357)); *see also* JACKSON, *supra* note 580, at 50 ("Sovereign states first came into view when medieval Christendom fractured under the combined impact of the Renaissance and the Reformation.").

[594] Westphalia Treaties, *supra* note 24, at 119-356. Leo Gross has called Westphalia the "majestic portal" leading from the medieval world to modernity. *Gross*, *supra* note 24, at 10. Others, however, have observed that Westphalia did not create a system of sovereign states *ex nihilo*, but rather consolidated three hundred years of evolution toward such a system. *See, e.g.*, Philpott, *supra* note 583, at 360-64 (arguing that Westphalia "elevated" but did not create the sovereign state). For an argument that Westphalia did not even constitute a decisive break with the medieval order, see Stephen D. Krasner, *Westphalia and All That*, *in* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE 235 (J. Goldstein & R. Keohane eds., 1993). For further discussion of Westphalia, see generally HANS KOHN, THE IDEA OF NATIONALISM 188 (1944); Alfred-Maurice de Zayas, *Peace of Westphalia (1648)*, *in* 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 536-39 (1984). On the Thirty Years War,

try agreed to honor each others' territorial boundaries and to refrain from interfering with the internal affairs of another state, thereby codifying the territorial power of individual sovereign states[595] and limiting the prerogatives of the Pope and Emperor.[596] The treaties gave states the "authority to form alliances . . . without imperial or papal approval,"[597] and the power to determine the religions that would be practiced within their territories.[598] Moreover, "as it came to be practiced," Westphalia "removed all legitimate restrictions on a state's activities within its territory."[599] Thus, the sovereign state became the principal political unit, and the control of territory became the primary criterion for assessing the existence of such a state.[600] Subsequently, public international law has developed to harmonize and prevent conflicts among these new actors in human history.[601]

Although Westphalia established a system of state territorial sovereignty, it was not until the Enlightenment that a separate conception of nation emerged. Whereas the right to control territory had previously been viewed as the right of a *monarch*, the contractarian philosophy of Locke, Montesquieu, and Rousseau grounded political power in the consent of the *people* of a given territory.[602] Thus, the legitimacy of modern states depended on the loyalty of this territorially bounded group of people.[603] Such

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see generally GEOFFREY PARKER, EUROPE IN CRISIS, 1598-1648 (1979); C.V. WEDGWOOD, THE THIRTY YEARS WAR (1938).

[595] *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 113 (1990) ("The notion of the sovereign equality of states may be said to have made its debut, in modern Western civilization, with the Peace of Westphalia."); Brand, *supra* note 583, at 1688 (explaining that the Peace of Westphalia formalized "[a] new era of equal sovereigns"); Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269, 271 (1978) (noting the "Westphalian emphasis on territorial sovereignty and sovereign equality").

[596] *See* CURTIN, *supra* note 5, at 11 ("This post-medieval epoch was characterised by the coexistence of a multiplicity of states each sovereign within its territory, equal to one another and free from any external earthly authority.").

[597] Movsesian, *supra* note 593, at 1085.

[598] Although this principle of *cuius regio, euis religio* (whose the region, his the religion) had been recognized in the Peace of Augsburg one hundred years earlier, it was not put into practice until Westphalia. Philpott, *supra* note 583, at 363.

[599] *Id.* at 364.

[600] *See* CURTIN, *supra* note 5, at 11 ("[Westphalia] made the sovereign state the legitimate political unit and implied that basic attributes of statehood such as the existence of a government with *control* of its territory were the criteria for becoming a state.").

[601] *See id.* ("The new multistate system rested on international law and the balance of power, a law operating *between* rather than above states and a power operating *between* rather than above states.").

[602] *See* MALCOLM ANDERSON, FRONTIERS: TERRITORY AND STATE FORMATION IN THE MODERN WORLD 38 (1996) (discussing the contractarian notion that political authority rests in the will of the people).

[603] *See* CURTIN, *supra* note 5, at 13-14 ("Sovereignty shifted from the person of the

groups came to be conceived as culturally cohesive communities with common interests and bonds known as nations, and the political institutions they formed were called nation-states.[604] "The Enlightenment ushered in an era in Europe during which sovereign nation-states were assumed to be the political geographic ideal. . . . The notion of territorial sovereignty thus acquired a new kind of legitimacy, one premised on the ideological bedrock of 'national' rights."[605]

As discussed in more detail in the next Section,[606] these new states used their administrative power to encourage social cohesion and identification with the state through the enforcement of uniform languages, the establishment of compulsory education, and the institution of rhetorical and symbolic efforts to erase local differences and imagine a coherent community.[607] These efforts formed the roots of nationalism, which can be defined as a political movement seeking to unite people to a sovereign state based on common ancestry or culture.[608] Nationalism "reordered the psychologi-

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monarch, identified with a 'divine cosmos[,]' to the territory of the state and state institutions[,] . . . and the loyalty of citizens became something that had to be won by modern states (legitimacy).").

[604] *See id.* at 15 ("The governing people became a transformed political subject, namely a people of *citizens* which came to be identified with the *Nation*."); Herb, *supra* note 584, at 11 (discussing the development of *nations* and *nation-states*); Murphy, *supra* note 588, at 210 (explaining that during the Enlightment people came to be understood as "a culturally cohesive community (a nation) that was entitled to control its own affairs"). It has been suggested that this development occurred in Europe during the eighteenth century:

> The French Revolution . . . marked a watershed: in its aftermath, the nation was not just the king, his territory, and his subjects . . . . [T]he cradle of the modern nation-state and of the principles of nationalism . . . was not strictly the country but . . . all its people. The nation was a pact between the sovereign people and the state . . . .

HORSMAN & MARSHALL, *supra* note 8, at 5-6. *But see* ANTHONY D. SMITH, NATIONALISM AND MODERNISM 36 (1998) (arguing that the growth of nationalism can be traced to a period well before the onset of industrialization in many European regions).

[605] Murphy, *supra* note 588, at 210.

[606] *Infra* text accompanying notes 657-75.

[607] *See* Herb, *supra* note 584, at 11 (discussing state enforcement of a uniform language and compulsory education as an effort to eliminate local differences); *see also* John Borneman, *State, Territory, and National Identity Formation in the Two Berlins, 1945-1995*, *in* CULTURE, POWER, PLACE: EXPLORATIONS IN CRITICAL ANTHROPOLOGY, *supra* note 3, at 93, 97 (arguing that "[c]ontemporary state narratives about a national identity are constructed in a long conversation between states and their residents," that the state proposes a model life course in its laws and policy statements "using tools including educational institutions, housing regulations, fiscal and monetary policy, and marital laws," and that "[t]he citizen reflects on and responds to this model life course in everyday experiences and ritual encounters"). *But cf.* SMITH, *supra* note 604, at 40 (cautioning against using a neo-Marxist "top-down" framework whereby elites simply transmit nationalist sentiment to the "masses"); *infra* note 660 (discussing Smith's views on the application of neo-Marxist theory to nationalism).

[608] *See* JOHN BREUILLY, NATIONALISM AND THE STATE 2 (2d ed. 1994) ("The term 'nationalism' is used to refer to political movements seeking or exercising state power and justi-

cal allegiances of Europe and gave to the state an emotional appeal it had previously lacked."[609] By fostering a sense of "belonging,"[610] of shared participation in a unique, sometimes mythical heritage,[611] eighteenth and nineteenth century nationalism provided the basis for powerful new political identities to replace the medieval unity of the *Respublica Christiana*.[612] Indeed, as one commentator has argued, the idea that nationality equals identity became a "social fact or social construction that is taken for granted, a cognitive frame in which to threaten nationality is to threaten identity."[613] Thus, political and social identity itself came to be linked powerfully with territory.[614]

Nevertheless, although the American and French Revolutions provided a context for conceiving of a territorially based "people" as a unified "nation," problems arose in applying similar conceptions elsewhere. The nation-state system did not track the ethnic identities of its human subjects. Therefore, the map of the post-Westphalian Europe showed a mosaic of

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fying such action with nationalist arguments."); GELLNER, *supra* note 575, at 1 ("Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent."); WILLIAM PFAFF, THE WRATH OF NATIONS 197 (1993) ("Nationalism is the political . . . expression of a form of group identity attached to an existing state, or to a community which is not yet a recognized nation-state but which believes that it should become one."). For other discussions of nationalism, see ANDERSON, *supra* note 26; MICHAEL BILLIG, BANAL NATIONALISM (1995); GIDON GOTTLIEB, NATION AGAINST STATE (1993); LIAH GREENFELD, NATIONALISM (1992); E. J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780 (1990); MICHAEL IGNATIEFF, BLOOD AND BELONGING (1993); KOHN, *supra* note 594; ANTHONY D. SMITH, THE ETHNIC ORIGINS OF NATIONS (1986); YAEL TAMIR, LIBERAL NATIONALISM (1993); Lea Brilmayer, *The Moral Significance of Nationalism*, 71 NOTRE DAME L. REV. 7 (1995); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996). For an essay summarizing recent scholarship on nationalism, see Tony Judt, *The New Old Nationalism*, N.Y. REV. BOOKS, May 26, 1994, at 44.

[609] Movsesian, *supra* note 593, at 1086; *see also* KOHN, *supra* note 594, at 4 (asserting that nationalism "changed" the state "by animating it with a new feeling of life and with a new religious fervor"); HAROLD J. LASKI, *The Foundations of Sovereignty*, *in* THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS 1, 15 (1921) ("Here the significance of nationality became apparent, for it gave to the glorification of the state an emotional penumbra it could have secured in no other fashion.").

[610] *See* Alan Branthwaite, *The Psychological Basis of Independent Statehood*, *in* STATES IN A CHANGING WORLD 46, 51 (Robert H. Jackson & Alan James eds., 1993) (discussing how statehood gives a group a sense of security and belonging).

[611] *See infra* text accompanying notes 633–43 (discussing the social construction of community in the modern nation-state).

[612] See STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996) for arguments that state sovereignty continues to be a social construction.

[613] CURTIN, *supra* note 5, at 15; *see also* HORSMAN & MARSHALL, *supra* note 8, at 10 (noting the contemporary view that the nation-state is "natural and eternal").

[614] *See* CURTIN, *supra* note 5, at 15 ("[T]he identification of citizenship with residence in a particular territorial space became the central fact of *political identity*.").

sovereign powers controlling multiethnic societies. This arrangement has continued to create tension and conflict. In Central and Eastern Europe, for example, two different identities formed: one based on ethnic affiliation and the other based on territorial boundaries. Unfortunately, though these two identities are quite distinct, they were conflated in the territorial settlements following World War I, which attempted to create new nation-states such as Czechoslovakia and Yugoslavia. In addition, the United Nations was established to ensure the territorial integrity of the existing system of states and therefore, until very recently, tended to recognize only those self-determination movements brought forth by a majority operating within existing colonial boundaries (such as Nigeria), rather than ethnic minorities operating within those states.[615]

Even this cursory survey reveals first that the idea of nation-states existing within fixed territorial boundaries is a relatively recent phenomenon, and second that the link between nation and state is contingent and often tenuous. Thus, although it is admittedly difficult to imagine an international geopolitical order that is not based on a network of nation-states operating in bounded spaces, history suggests that the nation-state system is neither immutable nor inevitable. Moreover, to the extent that nations and states do not coincide, alternative conceptions of identity and community that are *not* based on state boundaries will continue to challenge the hegemony of this system.

C. *The Nation-State as an Imagined Community*

If legal jurisdiction is both a symbolic assertion of community dominion and a way of demarcating community boundaries, then it is essential that we consider more carefully what it means to say that a coherent community exists and how such a community might be defined. This consideration reveals the act of imagination necessary to equate community with state as well as the ongoing tug-of-war between nostalgic and transformative visions of community in mediating the relationship between Self and World.

The concept of "community" is one of the most widely used in the social sciences. However, a precise definition has been predictably elusive. Even as far back as 1955, one study compiled ninety-four social-scientific attempts at definition and found that the only substantive overlap among

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[615] For an argument for the right to personal self-determination similar to the right of nation-states, see Francis A. Gabor, *Quo Vadis Domine: Reflections on Individual and Ethnic Self-Determination Under an Emerging International Legal Regime*, 33 INT'L LAW. 809, 811-14 (1999).

them was that all the definitions dealt with human beings![616]

To many, the word "community" conjures up Norman Rockwell-like images of a small, face-to-face congregation of people sharing common values, backgrounds, and worldviews. Such a vision seems at odds with much broader appropriations of the word, such as "the American community" or "the world community." Thus, it is not surprising that in much sociological and anthropological literature, community and state are often juxtaposed. For example, Ferdinand Tönnies, writing in the 1880s, described ways in which *gemeinschaft*-—the community of intimacy, close personal knowledge, and stability-—was being superceded by *gesellschaft*—the political society dominated by social relations that were artificial, contractual, ego-focused, short-term, and impersonal.[617] Tönnies viewed the small, rural community of the past as a site of solidarity and unity, while portraying contemporary society as incapable of creating such bonds.[618] His conception of *gemeinschaft* was firmly grounded in physical proximity, where community derives from shared territory, blood ties, and constant interaction among community members, rather than shared values or interests.[619] In contrast, according to Tönnies, the modern period of *gesellschaft* offered no face-to-face community, but only a set of associations invented for the rational achievement of mutual goals (e.g., corporations, political parties, and trade unions).[620]

Other social scientists of the late nineteenth and early twentieth centuries echoed this juxtaposition. Henry Maine's work, though not specifically focused on the nature of community, also contrasted a society founded on personal relationships and blood-based hierarchies with a more "modern" social form based on individual freedom to enter into legal agreements.[621] Maine saw this transformation from "status" to "contract" as a shift from defining social relations through kinship networks to defining them based on individual will.[622] Similarly, Emile Durkheim argued that "earlier" communities were characterized by "mechanical solidarity," in which soci-

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[616] George A. Hillery, Jr., *Definitions of Community: Areas of Agreement*, 20 RURAL SOC. 111, 118 (1955).

[617] *See* FERDINAND TÖNNIES, GEMEINSCHAFT UND GESELLSCHAFT [COMMUNITY & SOCIETY] 202-05 (Charles Loomis trans., 1988 ed.) (describing the "order of *Gesellschaft*").

[618] *See id.* at 65 (contrasting the essential unity of individuals in the *gemeinschaft* with the essential separation of individuals in the *gesellschaft*).

[619] *Id.* at 42-44.

[620] *Id.* at 64-65.

[621] *See* HENRY SUMNER MAINE, ANCIENT LAW 165 (Univ. of Ariz. Press 1986) (1864) ("[T]he movement of the progressive societies has hitherto been a movement from Status to Contract." (emphasis omitted)).

[622] *See id.*

ety was founded upon likeness and unable to tolerate dissimilarity.[623] In contrast, Durkheim viewed "modern" society as based on "organic solidarity," in which differences are integrated into a collaborative, harmonious whole.[624]

For many twentieth-century scholars, community remained a term reserved only for pre-industrial forms of affiliation. For example, Raymond Williams, considering the rise of modernity and its challenge to earlier conceptions of community, wrote:

> The growth of towns and especially of cities and a metropolis; the increasing division and complexity of labour; the altered and critical relations between and within social classes: in changes like these any assumption of a knowable community—-a whole community wholly knowable-—became harder and harder to sustain.[625]

Similarly, Robert Redfield attempted to define community as necessarily small in scale, homogenous in both activities and states of mind, self-sufficient, and conscious of its distinctiveness.[626] Redfield almost seemed to find a kind of nobility and purity in these small (generally agrarian) communities. In contrast, he viewed urban societies far more negatively. To Redfield, cities were based in "impersonal institutions [and] what has been called atomization of the external world."[627]

Other anthropologists, while perhaps not quite as nostalgic as Redfield, have similarly viewed communities as inherently local. Ronald Frankenberg suggested that members of a community must have common work, economic, and religious interests.[628] Such communities, in his view, require people to live face-to-face, in a small group of people, sharing multistranded relations with one another and maintaining a sentimental attachment to a physical locality and the group itself.[629] David Minar and Scott Greer also

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[623] EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 88-92 (W.D. Halls trans., The Free Press 1984) (1893).

[624] *Id.* at 101-05. Nevertheless, Durkheim observed that this harmony did not yet exist. *See id.* at lv (expressing the need for a "corporative institution"). In his later work, Durkheim retreated from even this qualified stance, calling instead for new communal relationships to counteract a modern tendency toward debilitating anomie. *See* EMILE DURKHEIM, SUICIDE 361-92 (John A. Spaulding & George Simpson trans., The Free Press 1951) (1897) (finding the roots of anomie in "the lack of collective forces at certain points in society" and the "state of disaggregation").

[625] RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 165 (1973).

[626] ROBERT REDFIELD, THE LITTLE COMMUNITY AND PEASANT SOCIETY AND CULTURE 4 (1960).

[627] *Id.* at 5.

[628] *See* RONALD FRANKENBERG, COMMUNITIES IN BRITAIN 238 (1966) ("Community implies having something in common.").

[629] *See id.* at 237-54 (examining the concept of community and the changes in face-to-

emphasized geographical proximity.[630] They argued that the realities of living in a locale give rise to common problems, which lead to the development of organizations for joint action and activities, which in turn produces common attachments, feelings of interdependence, common commitment, and increasing homogeneity.[631] Even recent work by communitarian theorists such as Amitai Etzioni demonstrates a similar view of community. Attempting to stem what he sees as the multicultural drift away from the common values of a liberal democracy, Etzioni clings to the notion that communities of the past shared common beliefs and values and asks contemporary members of society to recommit to those commonalities.[632]

These ideas of community do not fit comfortably with the sprawling nature of the modern industrialized state. Yet 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 refers 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."[633]

This formulation does not imply that such imagined communities are somehow "false" or "fabricated" in a negative sense.[634] Anderson argues that *all* communities larger than "primordial villages" (and perhaps even those) are imagined.[635] Thus, nation-states are not illegitimate just because

face relationships); *see also* NIGEL RAPPORT & JOANNA OVERING, SOCIAL AND CULTURAL ANTHROPOLOGY 61 (2000) (discussing Frankenberg's and other theorists' approaches to community).

[630] *See* DAVID MINAR & SCOTT GREER, THE CONCEPT OF COMMUNITY 47 (1969) ("[P]lace is important to community for certainly most of the social systems to which we would apply the concept [of community] are geographic entities of one sort or another.").

[631] *See id.* (discussing the effects of living in the same locale).

[632] *See* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 253-67 (1994) (articulating the rights and social responsibilities of individuals under a communitarian vision of society).

[633] ANDERSON, *supra* note 26, at 6; *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)).

[634] 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"); 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").

[635] *See* ANDERSON, *supra* note 26, at 6 (suggesting that even communities characterized by "face-to-face contact" are imagined).

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.

This is a very different vision of community. Rather than a reified, natural structure in the relations among people, Anderson (as well as other theorists[636]) focus on the ways 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.[637] Thus, community formation is viewed as a psychological process, not as a naturally occurring phenomenon based on external realities.[638]

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

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[636] Social psychological research on group identities, which indicates that groups do not exist because of external factors but only because of members' identification with the group, echoes this symbolic understanding of community. *See* HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES 229 (1981) (relying on a definition of intergroup community based on whether people feel they are a group). According to this research, the process of group identification proceeds in three stages: First, individuals categorize themselves as part of an ingroup, assigning themselves a social identity and distinguishing themselves from the relevant outgroup. Second, they learn the norms associated with such an identity. Third, they assign these norms to themselves, and "thus their behaviour becomes more normative as their category membership becomes salient." MICHAEL A. HOGG & DOMINIC ABRAMS, SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES 172 (1988).

[637] *See* RAPPORT & OVERING, *supra* note 629, at 62 (discussing modern anthropological views regarding community). In a similar vein, Gregory Bateson and Jurgen 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 & JURGEN 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.

[638] *See, e.g.*, Gupta & Ferguson, *supra* note 529, at 13 (arguing that "community" is "a categorical identity that is premised on various forms of exclusion and constructions of otherness").

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*. These other identifications will be explored in the next Section, but for now it is important to recognize that 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.

According to Anderson, the nation-state historically has had three distinct imagined features. First, the nation is imagined as limited, with finite boundaries.[639] He argues that "[n]o nation imagines itself coterminous with mankind. The most messianic nationalists do not dream of a day when all the members of the human race will join their nation."[640] Second, the nation is imagined as sovereign in order to replace the divinely ordained dynas-

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[639] For example, a comparison of medieval and modern maps indicates very different conceptions of boundaries and place-ness. The older maps tend to depict Jerusalem at the center, ROBERTS, *supra* note 552, at 128; they typically indicate an incompleteness to the world, with distant lands only sketched in and then fading off without clear endpoints; and they not only are imprecise as to boundaries but seem to treat boundaries as relatively insignificant, *see* BILLIG, *supra* note 608, at 20 ("Mediaeval maps represent a world unobsessed with boundaries."). Kingdoms and empires are depicted in general areas, and little effort is made to define the precise point where one begins and the other ends. *See* ROBERTS, *supra* note 552, at 127-30 (reviewing the features of medieval maps). In contrast, the modern map, like the modern conception of sovereignty, is firmly territorial, with precisely drawn boundaries. *See* BILLIG, *supra* note 608, at 20 (recognizing that modern maps depict the world as territorially divided).

Moreover, the evidence seems to indicate that the lack of clear territorial boundaries was not only part of medieval map making but of medieval consciousness as well. As one commentator points out, medieval Europe consisted of a series of small overlapping power structures with no single authority controlling a "clear-cut territory or the people within it." Michael Mann, *European Development: Approaching a Historical Explanation*, *in* EUROPE AND THE RISE OF CAPITALISM 6, 11 (Jean Baechler et al. eds., 1988). In addition, medieval monarchs tended to divide their estates among their heirs, meaning that territories would often change shape with each new generation. *See* BILLIG, *supra* note 608, at 20 (discussing the transitory nature of territorial boundaries in medieval Europe). The feudal structure rested on loyalties to local lords, not to distant monarchs, and if kings raised armies, they did so through the local lords. *See id.* (discussing the methods by which kings raised armies). Not surprisingly, the mass of inhabitants of what is now France or England did not think of themselves as English or French and had little conception of a territorial nation-state to which they owed allegiance. *See, e.g.*, 1 FERNAND BRAUDEL, THE IDENTITY OF FRANCE (HISTORY AND ENVIRONMENT) 18 (Siân Reynolds trans., Collins 1988) (1986) (arguing that "the *modern* notion of *la patrie*, the fatherland, had scarcely appeared in the sixteenth century"); HUGH SETON-WATSON, NATIONS AND STATES: AN ENQUIRY INTO THE ORIGINS OF NATIONS AND THE POLITICS OF NATIONALISM 25-30 (1977) ("One can hardly speak of an English or a French nation before the thirteenth century . . . .").

[640] ANDERSON, *supra* note 26, at 7.

ties[641] that began to give way to modern states in the period of the Enlightenment and afterwards.[642] Third, the nation is imagined as a community:

> [R]egardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings.[643]

Thus, Anderson highlights the social, historical, and psychological forces that construct conceptions of nationhood.

Moreover, even in seemingly less multiethnic states, the composition of a nation appears to be a political, rather than a natural, process. Although many commentators have assumed that countries such as China, Korea, and Japan are ethnically homogenous,[644] recent scholarship has challenged this claim. For example, one study argues that Japanese identity and much of Japanese officialdom have evolved through interaction with both internal others (minorities) and external others (foreigners), who were just as important for Japanese self-identification as were internal "cultural" construc-

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[641] According to Anderson, it is no coincidence that the eighteenth century, with its rationalist secularism and its challenge to divine rule, was also the century when nationalism arose. While stopping just short of drawing a causal link between the decline of religious belief and the rise of nationalism, *see id.* at 12 ("I am not claiming that the appearance of nationalism towards the end of the eighteenth century was 'produced' by the erosion of religious certainties, or that this erosion does not itself require a complex explanation."), Anderson does argue that the "[d]isintegration of paradise" required "a secular transformation of fatality into continuity, contingency into meaning. . . . [F]ew things were (are) better suited to this end than an idea of nation," *id.* at 11.

[642] *See id.* (stating that the Enlightenment marked "the dawn of the age of nationalism"). Anderson links this transformation to changing conceptions of borders. Monarchy, he argues, "organizes everything around a high centre. Its legitimacy derives from divinity, not from populations, who, after all, are subjects, not citizens." *Id.* at 19. Thus, since states were defined by their centers, "borders were porous and indistinct, and sovereignties faded imperceptibly into one another." *Id.* According to Anderson, this loose sense of territoriality helps to explain how "pre-modern empires and kingdoms were able to sustain their rule over immensely heterogeneous, and often not even contiguous, populations for long periods of time." *Id.* In contrast, modern state sovereignty is "fully, flatly, and evenly operative over each square centimetre of a legally demarcated territory." *Id.* Similarly, Giddens argues that, whereas the boundaries of empires and absolutist states were diffuse, the nation-state "is a set of institutional forms of governance maintaining an administrative monopoly over a territory with demarcated boundaries." GIDDENS, *supra* note 585, at 171-72. Indeed, according to Giddens, although all states seem to have been associated with territoriality, "[w]hat is specifically late European is the fixing of very precise boundaries that actually *do* effectively mark the realm of the administration of the state." *Id.* at 172.

[643] ANDERSON, *supra* note 26, at 7.

[644] *See, e.g.*, HOBSBAWM, *supra* note 608, at 66 ("China, Korea and Japan . . . are indeed among the extremely rare examples of historic states composed of a population that is ethnically almost or entirely homogeneous.").

tions.[645] Similarly, movements to define distinctive features of Japanese culture and identity were launched in the 1970s and 1980s in opposition to Western influence because the business and administrative elite were concerned about too *little* Japanese homogeneity.[646]

So, how is national community formed? Anderson traces the ascendancy of the nation-state to the development of what he calls "print-capitalism."[647] He argues that the old orders of religiously unified communities, divinely determined monarchs, and static cosmologies were slowly challenged by "the impact of economic change, 'discoveries' (social and scientific), and the development of increasingly rapid communications."[648] According to Anderson, the new order of print-capitalism "made it possible for rapidly growing numbers of people to think about themselves, and to relate themselves to others, in profoundly new ways."[649]

Anderson argues that the development of the printing press and the relative ease with which literary works came to be disseminated laid the basis for national consciousness in three distinct ways. First, the spread of printed languages meant that there were "unified fields of exchange" operating "below" Latin, but "above" the locally distinct spoken vernaculars.[650] Thus, "[s]peakers of the huge variety of Frenches, Englishes, or Spanishes, who might find it difficult or even impossible to understand one another in conversation, became capable of comprehending one another via print and paper."[651] In the process, according to Anderson, these readers became aware of a broader community of readers to which they belonged that was beyond the local, but not as large as the world.[652] Newspapers enabled the nation to be represented by the juxtaposition of stories from different "parts," which

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[645] *See* Emiko Ohnuki-Tierney, *A Conceptual Model for the Historical Relationship Between the Self and the Internal and External Others: The Agrarian Japanese, the Ainu, and the Special-Status People*, *in* MAKING MAJORITIES: CONSTITUTING THE NATION IN JAPAN, KOREA, CHINA, MALAYSIA, FIJI, TURKEY, AND THE UNITED STATES 31 (Dru C. Gladney ed., 1998) [hereinafter MAKING MAJORITIES] (examining the relationships between Japanese majority groups and foreigners).

[646] *See* Kosaku Yoshino, *Culturalism, Racialism, and Internationalism in the Discourse on Japanese Identity*, *in* MAKING MAJORITIES, *supra* note 645, at 13, 13 (linking the "resurgence of cultural nationalism" to "the vast number of publications that the Japanese cultural elites produced to define and redefine the distinctiveness of Japanese society, culture, and national character").

[647] *See* ANDERSON, *supra* note 26, at 36 (suggesting that print-capitalism offered a "new way of linking fraternity, power and time meaningfully together").

[648] *Id.*

[649] *Id.*

[650] *Id.* at 44.

[651] *Id.*

[652] *Id.*

were then assimilated within one polity.[653] The newspaper also allowed the nation to differentiate itself from others by the presentation of "international" and "foreign" news as something separate from "domestic" or "national" news.[654] Second, according to Anderson, the rise of print-capitalism allowed languages to become more fixed, therefore further cementing identity based on shared linguistic tradition.[655] Third, Anderson argues that those vernaculars that were closest to the print languages rose in status and began to form something approaching an "official" language that would be understood by a broader group.[656]

Other theorists have explored the myriad ways in which national identification, once introduced, is continually reinforced in the modern era. For example, Michael Billig has studied what he calls "banal nationalism": the everyday habits of life that serve subconsciously to remind citizens of their affiliation with a particular nation-state in a world of nation-states.[657] Billig writes:

> In so many little ways, the citizenry are daily reminded of their national place in a world of nations. However, this reminding is so familiar, so continual, that it is not consciously registered as reminding. The metonymic image of banal nationalism is not a flag which is being consciously waved with fervent passion; it is the flag hanging unnoticed on the public building.[658]

Thus, Anderson's conception of nation-state as imagined community allows us to see that, although we often reserve the term "nationalist" for extremist groups seeking recognition from a modern state,[659] the state itself often op-

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[653] *Id.*

[654] *See* BILLIG, *supra* note 608, at 118-19 (describing the way in which newspapers segregate the news "so that nationhood operates . . . as a context for awareness").

[655] *See* ANDERSON, *supra* note 26, at 44-45 (arguing that because "the printed book kept a permanent form," nations could create "that image of antiquity so central to the subjective idea of the nation").

[656] *See id.* at 45 (observing that "[c]ertain dialects inevitably were 'closer' to each print-language and dominated their final forms").

[657] *See generally* BILLIG, *supra* note 608 (examining the powerful presence of nationalism in everyday life).

[658] *Id.* at 8. Similarly, Gupta has observed:

> In addition to practices oriented externally—that is, toward other states—some of the most important features that enable the nation to be realized are flags, anthems, constitutions and courts, a system of political representation, a state bureaucracy, schools, public works, a military and police force, newspapers, and television and other mass media.

Gupta, *supra* note 3, at 185.

[659] *See* BILLIG, *supra* note 608, at 5 (observing that both popular and academic writings associate nationalism "with those who struggle to create new states or with extreme right-wing politics," so that "[a]ccording to customary usage, [the American President] is not a nationalist; but separatists in Quebec or Brittany are; so are the leaders of extreme right-wing

erates as a nationalist enterprise, encouraging identification in a community that matches the state's geographical borders. This nation-state nationalism is often overlooked because we assume that such nationalism is "natural." Accordingly, we believe that "[t]he separatists, the fascists and the guerrillas are the problem of nationalism. The ideological habits, by which 'our' nations are reproduced as nations, are unnamed and, thereby, unnoticed."[660]

In response to the inherently imagined nature of their existence, nations make claims upon something called national "identity." Such national identity is formed through self-categorization: articulating attributes that make "us" of one group different from "them" in another group.[661] One such at-

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parties such as the Front National in France").

[660] *Id.* at 6. Anthony D. Smith has argued that some scholarship on nationalism relies too much on a "top down" method whereby elites manipulate "the people" into feelings of nationalist identification. SMITH, *supra* note 604, at 95-96. Instead, Smith argues that "[t]he passion that the nation could evoke, especially in time of danger, the sacrifices it could command from 'the poor and unlettered' as well as the middle classes, cannot be convincingly explained by the propaganda of politicians and intellectuals, or the ritual and pageantry of mass ceremonies." *Id.* at 130. While I believe Smith's objection to be valid, my argument here (and Billig's as well, I think) is not that the masses are manipulated by some devious elites to believe in nationalism, but rather that nationalism is a socially constructed, constitutive, and self-perpetuating phenomenon, and all members of society are simultaneously agents and recipients of nationalist sentiment. Thus, Smith's objections to a neo-Marxist view of nationalism seem to have less weight with regard to Billig's more Foucauldian approach.

[661] *See* BILLIG, *supra* note 608, at 60-61 (observing that feeling patriotic about one's nation requires preexisting assumptions about what a nation is and what patriotism means). Ernest Gellner and Anthony Giddens likewise emphasize that nation-states are not founded on "objective" criteria. Rather, identification with a national community is a phenomenon of social psychology. Indeed, on the first page of *Nations and Nationalism*, Gellner asserts that "[n]ationalism is primarily a political principle, which holds that the political and the national unit should be congruent." GELLNER, *supra* note 575, at 1. According to Gellner, nationalism cannot exist as a concept unless it is taken for granted that the state is the legitimate political entity. *See id.* at 4 (opining that "nationalism emerges only in milieux in which the existence of the state is already very much taken for granted"). Accordingly, the national state becomes linked with a national culture that comes to be seen as the "natural repositor[y] of political legitimacy." *Id.* at 55. Gellner not only links national consciousness to the existence of the state, but also highlights the political reasons it becomes necessary to make the bridge between nation and state appear natural.

Giddens has focused on the new forms of governance that arose concurrent to the rise of the nation-state. *See* ANTHONY GIDDENS, THE NATION-STATE AND VIOLENCE 118 (1985) ("A 'nation' . . . only exists when a state has a unified administrative reach over the territory over which its sovereignty is claimed."). He defines the nation-state as "a set of institutional forms of governance maintaining an administrative monopoly over a territory with demarcated boundaries (borders), its rule being sanctioned by law and direct control of the means of internal and external violence." *Id.* at 121. In Giddens's view, the nation-state is a "bounded power-container": fixed boundaries and ability to wreak official violence are its key attributes. *Id.* at 120. He argues, moreover, that nation-states cannot exist in isolation, but only as part of a worldview that sees "a complex of other nation-states" knitted together in a world system. GIDDENS, *supra* note 585, at 171.

Accordingly, we have a system of nations who go to war against each other. "In this new

tribute is the telling of a unified national "history." Indeed, it is no coincidence that the ascendency of nation-states was accompanied by the creation of national historical tales[662] and the rise of the professional historian.[663] These state-funded historians were a mechanism by which states bolstered their power and integrated linguistically and ethnically diverse populations.[664] Thus, as Edward Said has made clear, nation-states are interpretive communities as well as imagined ones.[665]

For example, when Scots get together to celebrate their national identity, they appear to be steeped in tradition, with men wearing kilts, each clan having its own tartan, and bagpipes wailing.[666] By means of these symbols, they show their loyalty to seemingly ancient rituals—rituals whose origins go far back into antiquity. Yet, as Hugh Trevor-Roper has argued, these symbols of Scottishness were actually a creation of the Industrial Revolu-

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world of nations-at-war, there was little room for a Duke of Burgundy or an Earl of Warwick to march into the fray at the head of a private retinue." BILLIG, *supra* note 608, at 21. Rather, local warlords appear in places where state authority has disappeared. *See id.* (pointing to Beirut and Somalia as examples of states where warlords have emerged). Finally, the geographical boundedness of nations and the nation-state's monopolization of violence are both constantly reflected in rhetoric, symbolic imagery, and habits of thinking until they appear to be not only the primary means of organizing political community, but the most natural ways of doing so.

[662] *See, e.g.*, LINDA COLLEY, BRITONS: FORGING THE NATION 1707-1837, at 5-6 (1992) (describing the "invention" of a British national identity in the eighteenth and early nineteenth centuries); Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1983) ("'Traditions' which appear or claim to be old are often quite recent in origin and sometimes invented.").

[663] *See* Friedland & Boden, *supra* note 496, at 10 ("[T]he professional historian emerged in the nineteenth century at the same time that states were struggling to create a unified nation in the territories over which they claimed sovereignty.").

[664] *See id.* (observing that "historians were funded by the state, which saw the creation of a 'national' history as a way to bolster its power and integrate linguistically and culturally diverse populations under its control").

[665] *See* EDWARD W. SAID, THE WORLD, THE TEXT, AND THE CRITIC 11 (1983) (tying the state to "the entire matrix of meanings we associate with 'home,' belonging and community"); *see also* Friedland & Boden, *supra* note 496, at 10 ("[T]erritorial historicity is the core of the nation-state's legitimacy and an element in the narrative of modernity."); Gupta, *supra* note 3, at 191 ("[Nationalism is] a distinctively modern cultural form [that] attempts to create a new kind of spatial and mythopoetic metanarrative . . . ."). Such national histories "tell of a people passing through time—'our' people, with 'our' ways of life, and 'our' culture." BILLIG, *supra* note 608, at 71. *See generally* MARGARET WETHERELL & JONATHAN POTTER, MAPPING THE LANGUAGE OF RACISM: DISCOURSE AND THE LEGITIMATION OF EXPLOITATION (1992) (discussing the use of discourse in studying racism). Pop cultural forms may also tell nationalist histories. *See, e.g.*, PURNIMA MANKEKAR, SCREENING CULTURE, VIEWING POLITICS: AN ETHNOGRAPHY OF TELEVISION, WOMANHOOD, AND NATION IN POSTCOLONIAL INDIA 165 (1999) (discussing the relationship between a nationally broadcast television dramatization of an important Hindu epic tale and the consolidation of Hindu nationalism in subsequent years).

[666] Hugh Trevor-Roper, *The Invention of Tradition: The Highland Tradition of Scotland*, *in* THE INVENTION OF TRADITION, *supra* note 662, at 15, 15.

tion.[667] Indeed, the short kilt was invented by an English industrialist to allow Highlanders to work in factories.[668] Moreover, Anthony Giddens observes that even the notion of a "tradition" is itself the product of modernity. In medieval times, by contrast, there was no separate conception of tradition "precisely because tradition and custom were everywhere."[669] Thus, the idea of a traditional national culture is an imagined narrative, passed on like an inheritance from one generation to the next.[670] Through such an invention of tradition, the nation becomes conceptualized in kinship terms: the nation is a "family" passing down identity over time, living in the "motherland" or "fatherland."[671]

This reference to land brings forth a final crucial attribute in the imagining of a national community: the idea of a homeland. Indeed, this tie between group identity and land is essential to the modern idea of the nation-state. After all, many peoples "have nurtured a sense of their own communal distinctiveness 'in the specific history of the group, and, above all, in the myths of group origins and group liberation.'"[672] Nationhood, however, requires the added element of place. Thus, what makes a nation-state distinctive is the imagining of an overall "country" in which lived-in localities are united within a wider homeland. The inhabitants of that homeland will generally be personally familiar with only a small part of the land, but the nation is conceived as a totality. Thus, of necessity it must be *imagined* as a totality, rather than directly apprehended. Yet, again and again, these "images of virgin territories, self-evident boundaries, and datable original occupation turn out to be mere mirages: territorial claims become more obscure, not clearer, the further you dig into their past."[673]

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[667] *See id.* (characterizing the concept of a distinct Highland tradition as a retrospective invention).

[668] *Id.* at 21-22.

[669] GIDDENS, *supra* note 7, at 57.

[670] *See* Étienne Balibar, *Is There a 'Neo-Racism'?*, *in* ÉTIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 17, 24-25 (1991) (discussing the way in which conceptions of national culture inscribe racist assumptions). For a further discussion of the "racialization" of the idea of national culture, see MARTIN BARKER, THE NEW RACISM: CONSERVATIVES AND THE IDEOLOGY OF THE TRIBE (1981); TEUN A. VAN DIJK, ELITE DISCOURSE AND RACISM (1993).

[671] *See* NIRA YUVAL-DAVIS, GENDER & NATION 15 (1997) (arguing that in a "naturalized image of the nation, . . . nations not only are eternal and universal but also constitute a natural extension of family and kinship relations"); Gary R. Johnson, *In the Name of the Fatherland: An Analysis of Kin Term Usage in Patriotic Speech and Literature*, 8 INT'L POL. SCI. REV. 165, 168-71 (1987) (discussing the use of terms such as "motherland" and "fatherland" "to inspire in the listener or reader a feeling of unity with his or her fellow citizens").

[672] BILLIG, *supra* note 608, at 74 (citation omitted) (quoting ANTHONY D. SMITH, THE ETHNIC REVIVAL 65 (1981)).

[673] Rée, *supra* note 572, at 81; *see also* Sheldon Pollock et al., *Cosmopolitanisms*, 12

Finally, as the social psychological literature suggests, there can be no "us" without a "them." Accordingly, the national community can only be imagined by also imagining foreigners.

> The structures of feeling that enable meaningful relationships with particular locales, constituted and experienced in a particular manner, necessarily include the marking of "self" and "other" through identification with larger collectivities. To be part of a community is to be positioned as a particular kind of subject, similar to others within the community in some crucial respects and different from those who are excluded from it.[674]

For some nations, the claim to ancient roots will often involve the nostalgic invocation of a continuous chain of racial inheritance deriving from an imagined, biologically pure past.[675] For others, it will be founded in stories about exceptionalism: that which makes our nation superior to all others on the planet. In either case, the imagined community of the nation-state is very different from the localism of the small agrarian community discussed earlier.

Thus, we see again that the nation-state is a particular type of imagined community, one that could not have existed prior to modernity and the increasing awareness of an international system. The nation-state, socially constructed and historically contingent, is only one way of parsing the modern world, however. In the next Section, I will consider several alternative visions.

D. *Conceptions of Subnational, Transnational, Supranational, and Cosmopolitan Identities*

Although nation-states have become the dominant form of organizing space in the contemporary world, there are other ways of imagining community and constructing identity. As we have seen, not only are processes of place-making always contested and unstable, but relations between places are continuously shifting as a result of the political and economic reorganization of space in the world system. Moreover, "[j]ust as the formation of nation-states was one of the defining characteristics of an earlier era, their rapid and often radical transformation is one of the defining characteristics of ours."[676] Thus, we need to look at nation-state sovereignty against the

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PUB. CULTURE 577, 579 (2000) ("Pakistan[,] . . . while definitely imagined from as early as the 1920s as a homeland for the Muslims of the Indian subcontinent, had only the vaguest geographical referent for a long time in its career as a concept.").

[674] Gupta & Ferguson, *supra* note 529, at 17.

[675] Rée, *supra* note 572, at 81.

[676] Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, *in* CAUSE LAWYERING AND THE STATE IN

backdrop of alternative transnational, international, or subnational identities, as well as possible ways of imagining community that are not based on physical territory at all.[677] As Akhil Gupta has pointed out, "[t]he structures of feeling that constitute nationalism need to be set in the context of other forms of imagining community, other means of endowing significance to space in the production of location and 'home.'"[678]

1. Subnational Communities

Subnational communities can include political identifications that are more local than the nation-state, such as provinces, states, towns, and voting districts; affiliations that form around specific functions or activities, such as water regions, geographical areas, block associations, bowling leagues, religious institutions, and schools; or commonalities that derive from a purported ethnic identification that is not coterminous with the nation-state, such as Basques in Spain, Sikhs in India, Tamils in Sri Lanka, or even white supremacist militias in the United States. All of these communities are often spatially localized and therefore may play a more tangible role in everyday life than broader community allegiances.

It is unclear whether all subnational community identification is on the rise. Certainly, commentators have noted an increase in subnational political identifications in the wake of the Soviet Union's collapse and the internationalization of economic activity.[679] Most often this rise in "tribalism" is viewed as a response to globalization: the argument is that people "seek a level of comfort in their communities to withstand the complexity and atomization that modern capitalism has wrought on their lives and to free themselves from domination by 'alien' elites."[680] Thus, Richard Falk suggests that one response to economic globalization is a form of "backlash politics that looks either to some pre-modern traditional framework as viable and virtuous . . . or to ultra-territorialists that seek to keep capital at home and exclude foreigners to the extent possible."[681] These responses tend to emphasize a "sacred religious or nationalist community of the saved

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A GLOBAL ERA 3, 3 (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter CAUSE LAWYERING].

[677] Gupta & Ferguson, *supra* note 529, at 17; *see also* Gupta, *supra* note 3, at 181 ("[W]e need to pay attention to the structures of feeling that bind people to geographical units larger or smaller than nations or that crosscut national boundaries.").

[678] Gupta, *supra* note 3, at 193.

[679] *See, e.g.*, HORSMAN & MARSHALL, *supra* note 8, at 185 (explaining the increasingly global nature of economic transactions).

[680] *Id.*

[681] RICHARD FALK, PREDATORY GLOBALIZATION 142 (1999).

that is at war with an evil 'other,' either secularist or outsider."[682] Such subnational communities are therefore viewed as oppositional and reactive. Alternatively such communities may grow more salient not in opposition to global events, but simply to fill a power vacuum in moments when the nation-state loses authority. Thus, for example, the dissolution of Yugoslavia quickly degenerated into tribalism and a war waged among people allied to various imagined ethnic and historical communities.[683] If every nation-state is multiethnic at least to some degree, then constructed communities along those ethnic cleavages will always be available.

We might also view subnational communities in a less negative light, as the building blocks of civil society. My seemingly fanciful inclusion of bowling leagues as an example of subnational affiliation was not accidental. Robert Putnam recently has argued that the decline of bowling leagues and other localized civic group activities in the United States is a serious problem that has harmed the American polity.[684] According to Putnam, such groups foster the development of "social networks and the norms of reciprocity and trustworthiness that arise from them."[685] Without these social networks, Putnam argues, core societal institutions suffer.[686]

Those promoting *global* civil society initiatives also tend to focus on subnational affiliations. For example, Michael Edwards, Director of the Ford Foundation's Governance and Civil Society Unit, stresses three ways in which communities might respond to global problems such as income inequality or environmental degradation. First, in the realm of formal politics, he suggests that various forms of civic, business, governmental, and donor groups might collaborate to develop regional initiatives for economic development or natural resources management.[687] Second, in the economic realm, subnational coalitions can help markets "work to the benefit of

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[682] *Id.* The Islamic fundamentalist regimes in Iran, Algeria, and Afghhanistan in recent years are examples of the backlash Falk describes. *See, e.g.*, GIDDENS, *supra* note 7, at 66 ("One might think that fundamentalism has always existed. This is not so—it has arisen in response to the globalising influences we see all round us.").

[683] *See* HORSMAN & MARSHALL, *supra* note 8, at 188 (describing the return to tribal rule in Yugoslavia after the collapse of the Soviet bloc).

[684] *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 27-28 (2000) ("[O]ur schools and neighborhoods don't work so well when community bonds slacken, [and] our economy, our democracy, and even our health and happiness depend on adequate stocks of social capital.").

[685] *Id.* at 19.

[686] *See id.* at 288-89 (arguing that social capital built from local groups "allows citizens to resolve collective problems more easily," provides the trust required for economic transactions, and serves as a conduit for the free flow of information necessary to a functioning democracy).

[687] *See* EDWARDS, *supra* note 7, at 136.

smaller [communities] by reducing the benefits that are siphoned off by intermediaries."[688] Accordingly, "peasant foresters in Mexico [have begun] to negotiate higher prices directly with the timber companies, [and] rubber tappers in Brazil have been able to retain a higher" price for their produce, solely by organizing themselves into coordinated groups.[689] According to Edwards, collective community action of this sort "stimulates both equity and efficiency, and builds a sense of solidarity among people who are sharing risks as well as benefits."[690] Finally, he argues that local pressure groups, membership associations, and specialized authorities are essential to "build the preconditions for democracy by injecting a wider range of views and voices into the political arena."[691]

Similarly, Richard Falk advocates "globalization-from-below" as the best response to "globalization-from-above."[692] He notes, for example, that green parties in Europe in the 1980s were able to expose the drawbacks of global capitalism, particularly in the environmental arena.[693] Other local affiliations have formed around specific encroachments, such as the siting of a nuclear power plant or dam, which have mobilized residents or areas facing displacement or loss of livelihood.[694] Nevertheless, though these subnational affiliations have had some success,[695] Falk ultimately concludes that *transnational* civil soci-

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[688] *Id.* at 151.

[689] *Id.* (citation omitted); *see also* MEDIATING SUSTAINABILITY: GROWING POLICY FROM THE GRASSROOTS (Jutta Blauert & Simon Zadek eds., 1998) (exploring ways that rural communities have sought to influence policies affecting their livelihoods and the quality of their natural environment through collaboration and mediation involving producer organizations, non-governmental organizations, and advisers); CHICO MENDES, FIGHT FOR THE FOREST 10-27 (1989) (describing how rural Brazilian rubber tappers formed a union to effect political, social, and economic change).

[690] EDWARDS, *supra* note 7, at 151.

[691] *Id.* at 178.

[692] *See* FALK, *supra* note 681, at 127-36 (comparing top-down hierarchical politics with bottom-up participatory politics).

[693] *See id.* at 143 ("This green movement often exhibited tactical brilliance in its moves to expose the deficiencies of global trends, especially their dangers to the environment.").

[694] *See id.* (explaining how specific incidents have spurred local populations to act to protect their way of life or income).

[695] *See, e.g.*, BRUCE RICH, MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT 283-93 (1994) (describing ways in which "local populations long marginalized from the grand narrative of modern history are mobilizing to defend ecological balance and fight against the destruction of resources upon which their survival depends"); Vandana Shiva, *People's Ecology: The*

ety efforts are likely to be even more effective.[696]

2. Transnational Communities

Turning to such transnational affiliations, we can differentiate them from international affiliations because transnational communities do not necessarily envision common world membership or global governmental institutions. Rather, transnational communities are communities of interest that cut across nation-state boundaries.

Perhaps the most important transnational force in recent years has been the transnational corporation itself.[697] "[T]he global capitalist system increasingly operates on bases other than [the] national, and effective means of asserting political control over the transnational economy and of requiring [transnational corporations] to be accountable to political institutions have yet to be developed."[698] Cities were once used as trading centers to connect firms. In that context, "[m]arket geographies were so powerful that what was produced was determined by where it was produced."[699] Now, it is *corporate* geography, rather than *territorial* geography, that determines what is produced and where. "Because of their newfound capacity to instantaneously coordinate production and distribution around the globe, to downsize and subcontract, factories and firms have lost their dependence on particular cities or regions."[700]

Examples of such transnational corporate activity abound. Indeed, the volume of production by transnational corporations outside their "home bases" now exceeds the volume of all world trade, indicating that trade within firms, rather than among them, is a growing proportion of world commerce.[701] Sales figures for many transnationals rank higher than the

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Chipko Movement, *in* TOWARDS A JUST WORLD PEACE: PERSPECTIVES FROM SOCIAL MOVEMENTS 253 (Saul H. Mendlovitz & R.B.J. Walker eds., 1987) (discussing the emergence of grassroots ecological movements in India).

[696] *See* FALK, *supra* note 681, at 143-44 (opining that transnational organizations such as Greenpeace will likely be most successful in effecting change).

[697] *Cf.* Sarat & Scheingold, *supra* note 676, at 5 ("[T]he hallmark of globalization as it is generally understood is the worldwide spread of corporate capitalism and neoliberal values." (citation omitted)).

[698] HORSMAN & MARSHALL, *supra* note 8, at 172.

[699] Friedland & Boden, *supra* note 496, at 12.

[700] *Id.* at 13; *see also* Donald A. Palmer & Roger Friedland, *Corporation, Class and City System*, *in* INTERCORPORATE RELATIONS 145, 147 (Mark S. Mizruchi & Michael Schwartz eds., 1987) (arguing that corporate elites are the dominant force in creating intracity links).

[701] *See* HORSMAN & MARSHALL, *supra* note 8, at 201 (explaining that transnational corporations produce more goods abroad than in their home countries).

gross domestic products of some countries.[702] And because money can so easily be transferred through global capital markets around the world,[703] central banks are severely limited in their ability to affect national monetary policy.[704]

Regional trading blocs and free-trade zones create another form of transnational economic space that is both related to geography and yet beyond the bounds of nation-states. These zones have proliferated in recent years.[705] Although NAFTA is perhaps the most familiar to Americans, trade groups now exist in South America[706] and Southeast Asia[707] (not to mention the European Union itself), and others cut across even regional identification.[708]

All of this commercial activity inevitably affects cultural identification. "In the transnational public sphere, peoples' identities as citizens of a nation are multiply refracted by their inventive appropriation of goods, images, and ideas distributed by multinational corporations."[709] Arjun Appadurai high-

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[702] *See* U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 32 tbl.1.1 (1999) (collecting statistics).

[703] *Cf.* Ted C. Fishman, *The Joys of Global Investment*, HARPER'S, Feb. 1997, at 35, 36 ("[T]he desire for international stocks remains so strong that nearly every American investor owns them . . . .").

[704] *See, e.g.*, SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION, at xi-xii (1996) (noting that "[s]tate sovereignty, nation-based citizenship, the institutional apparatus in charge of regulating the economy, such as central banks and monetary policies—all of these institutions are being destabilized and even transformed as a result of globalization and the new technologies"); David G. Oedel, *Puzzling Banking Law: Its Effects and Purposes*, 67 U. COLO. L. REV. 477, 537 (1996) (observing that the "general significance of centralized supervision of the money supply is rapidly declining in the modern global economy"); Dani Rodrik, *Governance of Economic Globalization*, *in* GOVERNANCE IN A GLOBALIZING WORLD 347, 351 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) ("A familiar result of open economy macroeconomics is that countries cannot simultaneously maintain independent monetary policies, fixed exchange rates, and an open capital account.").

[705] *See* William H. Lash, III, *The Decline of the Nation State in International Trade and Investment*, 18 CARDOZO L. REV. 1011, 1012 (1996) (citing statistics illustrating the growth of trade within regional free-trade associations).

[706] The Andean Community (CAN) includes Bolivia, Colombia, Ecuador, Peru, and Venezuela. *Who Are We?*, Andean Community, *at* http://www.comunidadandina.org/ingles/who.htm (last visited Nov. 18, 2002).

[707] The Association of Southeast Asian Nations (ASEAN) includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. *Member Countries*, Association of Southeast Asian Nations, *at* http://www.aseansec.org/74.htm (last visited Nov. 18, 2002).

[708] For example, the Asia-Pacific Economic Cooperation group (APEC) includes Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Taipei, Taiwan, Thailand, the United States, and Vietnam. *Member Economies*, Asia-Pacific Economic Cooperation, *at* http://www1.apecsec.org.sg (last visited Nov. 18, 2002).

[709] Gupta, *supra* note 3, at 193-94.

lights international fashion as one field in which the global impact goes far beyond "cross-national-style cannibalism" to the "systematic transnational assemblage[] of production, taste transfer, pricing, and exhibition."[710] Elsewhere, we see concerns about the impact of American food, clothing, or mass entertainment and the postcolonial imposition of homogenized taste that were so memorably captured by Benjamin Barber in the title of his 1995 book, *Jihad vs. McWorld*.[711]

Nevertheless, in many areas it is increasingly difficult to define corporate activity with a particular national moniker. Even leaving aside transnational mergers such as Daimler-Chrysler, is an automobile sold by an "American" corporation really a U.S. product, when most of its component parts are manufactured and assembled abroad? Do jobs created by Japanese plants in the United States reflect the health of the American economy or the Japanese economy?[712] Does a film released by the Sony corporation (nominally Japanese) represent American mass culture?

Moreover, the modern corporation, the central bank, the free-trade region, and the global commodities market form only one area in which transnational affiliation has become significant. The impact of transnationalism is far broader. Indeed, looking more closely, we can see a wide variety of "complex, postnational social formations."[713] Simply listing examples gives a sense of the scope. Diaspora communities play an increasing role in the globalization of capital.[714] Transnational philanthropic movements such as

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[710] Arjun Appadurai, *Patriotism and Its Futures*, *in* MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION, *supra* note 7, at 158, 167.

[711] BENJAMIN BARBER, JIHAD VS. MCWORLD (1995). On the other hand, Aihwa Ong has argued that globalization has not led to cultural homogenization:

> The dispersal of Coke, McDonald's Restaurants, and American TV soap operas to villages in West Africa or to Cairo, Beijing, or Sydney is not bringing about a global cultural uniformity; rather, these products have had the effect of greatly increasing cultural diversity because of the ways in which they are interpreted and the way they acquire new meanings in local reception or because the proliferation of cultural difference is superbly consonant with marketing designs for profit making.

AIHWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 10 (1999). For further discussion of this "cultural imperialism" question, see IEN ANG, LIVING ROOM WARS: RETHINKING MEDIA AUDIENCES FOR A POSTMODERN WORLD (1996); Stuart Hall, *Cultural Identity and Diaspora*, *in* IDENTITY: COMMUNITY, CULTURE, DIFFERENCE 222 (J. Rutherford ed., 1990); Hannerz, *supra* note 533.

[712] This example is taken from Kenichi Ohmae, *The End of the Nation State*, *in* THE GLOBALIZATION READER 207, 208 (Frank J. Lechner & John Boli eds., 2000).

[713] Appadurai, *supra* note 7, at 167; *see also id.* ("These formations are now organized around principles of finance, recruitment, coordination, communication, and reproduction that are fundamentally postnational and not just multinational or international.").

[714] *See, e.g.*, Chander, *supra* note 562, at 1060-74 (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 dissemina-

Habitat for Humanity send volunteers around the globe to build new environments.[715] The emergence of a diffuse, overarching European identity, while not replacing national identification, has begun to create "'a shift towards multiple loyalties, with the single focus on the nation supplanted by European and regional affiliations above and below.'"[716] 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.[717]

In addition, such global public policy networks form only one part of a "nascent international civil society"[718] that includes NGOs; business and trade union networks; and cooperative efforts of government actors including banking regulators, law-enforcement officials, intelligence agencies, judiciaries, and other local authorities.[719] Such 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

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tion of information and capital across borders).

[715] Appadurai, *supra* note 7, at 167.

[716] HORSMAN & MARSHALL, *supra* note 8, at 179 (quoting WILLIAM WALLACE, THE TRANSFORMATION OF WESTERN EUROPE 33 (1990)); *see also* Lindseth, *supra* note 350, at 682 ("The notion of multiple membership in overlapping *demoi* may in fact be an accurate reflection of the undoubted fragmentation of power and sovereignty in the modern state, of which the [European Community] is both an agent and a consequence." (citation omitted)).

[717] *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.").

[718] EDWARDS, *supra* note 7, at 179; *see also* FALK, *supra* note 681, at 138 (describing "global civil society"); THOMAS PRINCEN & MATHIAS FINGER, ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL 10 (1994) (noting that environmental NGOs have shifted from operating solely at the national level to operating at the local and global levels); MARTIN SHAW, GLOBAL SOCIETY AND INTERNATIONAL RELATIONS 5-9 (1995) (arguing that the only way to discuss society is in the international context); Richard Falk, *An Inquiry into the Political Economy of World Order*, 1 NEW POL. ECON. 13, 24 (1996) (describing "grassroots globalism" as a "movement of social forces, with a transnational democratising outlook"); Miguel Darcy de Oliveira & Rajesh Tandon, *An Emerging Global Civil Society*, *in* CITIZENS STRENGTHENING GLOBAL CIVIL SOCIETY 1, 2 (Miguel Darcy de Oliveira & Rajesh Tandon eds., 1994) (discussing the extension of "solidarity and responsibility to the public sphere on a global scale"); Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311, 312-13 (1995) (describing global civil society as "the collective life," which "exists above the individual and below the state, but across national boundaries").

[719] *See* EDWARDS, *supra* note 7, at 179 (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).

as *an organized resistance to globalization*, particularly with regard to economic, trade, environmental, and labor policy. While some NGOs, such as Amnesty International, monitor the activities of the nation-state, others "work to contain the excesses of nation-states . . . by assisting refugees, monitoring peace-keeping arrangements, organizing relief in famines, and doing the unglamourous work associated with oceans and tariffs, international health and labor."[720] Transnational networks of lawyers also work to challenge many of the perceived injustices of globalization.[721]

Such transnational policy efforts have been deployed with increasing frequency. The international anti-apartheid movement was perhaps the first successful global civil society effort to combine shareholder, consumer, and governmental action, persuading many corporations, universities, and pension funds to divest themselves of South African investments long before official national sanctions were in place.[722] Similar boycott efforts have resulted in changes to tuna-fishing practices so as to protect dolphins,[723] a decision by the French government to suspend its nuclear testing program,[724] and alterations in Shell Oil's decommissioning of a rig in the North Atlantic.[725]

In addition, NGOs increasingly formulate global standards of corporate

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[720] Appadurai, *supra* note 7, at 168.

[721] *See* Sarat & Scheingold, *supra* note 676, at 4 ("[D]emocratization and globalization confront cause lawyers with new issues and new burdens while altering their resources and their tactical and strategic options.").

[722] *See* Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957, 959 (1996) (detailing how interest groups, even "[w]here stymied by national regulators[,] . . . can accomplish equivalent results by commanding consumer preferences, which in turn works to constrain corporate or state behavior").

[723] *See Stop This Carnage: Hundreds of Our Dolphins Are Dying*, W. MORNING NEWS (U.K.), Feb. 7, 2002, at 1 (reporting that "wall of death nets" regularly threatened dolphins a decade ago, but now successful public awareness campaigns have led to changes in tuna-fishing techniques, and tuna manufacturers routinely label their tuna containers as "dolphin safe"); 45 NOAA SEAPOWER (Jan. 1, 2002) (reporting a "notable success" in forging "international cooperation that allows 'dolphin-safe' tuna to be harvested, while ensuring the health of dolphin stocks"), 2002 WL 13922711. For a discussion of the tuna-dolphin controversy as part of a consideration of the potential role of unilateral trade sanctions in protecting environmental resources, see Parker, *supra* note 216.

[724] *See Greenpeace International Founder Dies in Car Crash*, ENV'T NEWS SERVICE (Mar. 23, 2001), *at* http://ens-news.com/ens/mar2001/2001-03-23-12.asp (crediting Greenpeace for creating pressure that helped push the French government to end its nuclear testing program).

[725] *See* Allan Pulsipher & William Daniel IV, *Onshore-Only Platform Disposition Needs Exceptions*, OIL & GAS J., Jan. 15, 2001, at 64, 64 (reporting that Shell's decision to cancel its plan for an "at-sea disposition" of an oil rig followed an unexpectedly fierce campaign and public boycott).

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."[726] In response, prominent corporate leaders, including AT&T, Federal Express, Honeywell, and AOL TimeWarner, 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."[727] Furthermore, especially in the wake of the global movement against sweatshops,[728] NGOs have been able to persuade many corporations to accept independent monitoring of adopted standards.[729]

Finally, in the area of human rights, NGOs have actively pursued transnational public law litigation,[730] while continuing to lobby on behalf of humanitarian intervention around the globe. Indeed, in the last fifteen years we have seen that various events, "such as the Chernobyl nuclear disaster, the mistreatment of Kurds in Iraq, the starvation and [lawlessness] in Somalia in 1992-1993, and the brutal human rights abuses in [Kosovo]," have all

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[726] *Multinationals and Their Morals*, ECONOMIST, Dec. 2, 1995, at 18.

[727] *Mission*, Business for Social Responsibility, *at* http://www.bsr.org/meta/about/mission.cfm (last visited Nov. 18, 2002). Similarly, the World Business Council for Sustainable Development evinces a "shared commitment to sustainable development via the three pillars of economic growth, ecological balance and social progress." *About Us*, World Business Council for Sustainable Development, *at* http://www.wbcsd.ch/aboutus/index.htm (last visited Nov. 24, 2002).

[728] Many prominent companies

> 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.

Ethan B. Kapstein, *The Corporate Ethics Crusade*, FOREIGN AFF., Sept.-Oct. 2001, at 105, 105. 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).

[729] *See* Spiro, *supra* note 722, at 962 (remarking that corporations reacted positively to proposed independent monitoring). For an overview of the various forms the imposition of human rights norms has 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).

[730] *See, e.g.*, Jane Perlez, *Indonesia's Guerrilla War Puts Exxon Under Siege*, N.Y. TIMES, July 14, 2002, at A3 (describing a lawsuit brought in the United States by the International Labor Rights Fund on behalf of Indonesian villagers who claim that Exxon is involved in human rights abuses in connection with the operation of its plant in the province of Aceh).

brought international intervention in defiance of the old idea that national borders and sovereignty were sacrosanct.[731] Former Secretary General of the United Nations Boutros Boutros-Ghali has even gone so far as to state that "the time of absolute and exclusive sovereignty . . . has passed."[732]

In contrast to the development of global civil society, the development of transnational terrorist organizations such as Al Qaeda is a much darker example of transnational affiliation. Such organizations can mobilize personnel and deploy money around the world,[733] functioning as quasi-state entities. 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,[734] thereby treating the attack more as a military action than a criminal one.[735]

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[731] Demko & Wood, *supra* note 8, at 10.

[732] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General*, U.N. SCOR, 47th Sess., at 5, U.N. Doc. S/24111 (1992).

[733] *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).

[734] 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.

[735] *See NATO to Support U.S. Retaliation*, CNN.COM (Sept. 12, 2001), *at* http://www.cnn.com/2001/WORLD/europe/09/12/nato.us (reporting that NATO had invoked Article V in response to the September 11 attacks, the first invocation of the provision in fifty-two years).

The Bush administration has asserted the authority to try Al Qaeda operatives 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.[736] Moreover, although some argue that the September 11, 2001 attacks signal a reassertion of the primacy of the nation-state as the locus for ensuring security and world order,[737] both the attacks and the responses necessary to combat global terrorism demonstrate the need for increasing transnational and international cooperation. As Harold Hongju Koh has argued, the real challenge in the face of these attacks is to figure out how to use "the constructive face of globalization to overcome its most destructive face."[738]

3. Supranational Communities

Whereas transnationalism binds people to communities of interest *across* territorial borders, supranationalism asserts the primacy of governing norms that exist *above* the nation-state. Perhaps the most obvious example of such affiliation is the United Nations, which insistently evokes an overarching narrative of world community.[739] Another example that has drawn considerable attention in recent years is the effort to construct a European identity that operates beyond the individual nation-states on the continent.

In the post-Maastricht European Union, the line between a "national" and a European unit has become increasingly blurred.[740] We now see a common currency, the ability to travel without visas, and the development

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[736] *See, e.g.*, *Hearing on Military Tribunals Before the S. Comm. on the Judiciary* (Dec. 4, 2001) (testimony of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes) ("As the president's order [establishing military commissions] recognizes, we must call these attacks by the rightful name, 'war crime.'"), 2001 WL 1591408, at *17.

[737] *See, e.g.*, Dominique Moïsi, *Early Winners and Losers in a Time of War*, FIN. TIMES (U.S.), 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.").

[738] Harold Hongju Koh, *Preserving American Values: The Challenge at Home and Abroad*, *in* THE AGE OF TERROR: AMERICA AND THE WORLD AFTER SEPTEMBER 11, at 145, 147 (Strobe Talbott & Nayan Chanda eds., 2001).

[739] Nevertheless, as Gupta points out, this supranational ideal is still premised on the idea "of the world as a body of equal but different nation-states." Gupta, *supra* note 3, at 185. Thus, the United Nations does not fully challenge the system of nation-state sovereignty.

[740] *See* ALLAN M. WILLIAMS, THE EUROPEAN COMMUNITY: THE CONTRADICTIONS OF INTEGRATION 206 (2d ed. 1994) (arguing that "the importance of the Single European Act was not to be seen in any resultant institutional changes but in that it reopened the debate about the inevitabilitiy of [European Community] integration, or the survival of the nation-state" (internal quotation marks omitted)).

of a European parliament, along with a European administrative and judicial bureaucracy, the relaxation of trade barriers, tariffs, and taxation, and the free movement of labor.[741] Such practices certainly resemble the activities and concerns of traditional nation-states.[742] Though it may be unlikely that the nation-states constituting Europe will disappear,[743] the shift is nevertheless a real and important one. Indeed, we may be seeing the emergence of a hybrid form of governance that is neither a unified federation nor a single European state, but is perhaps some combination of the two. As one commentator points out, "[t]his tension between a federation and a confederation, between *integration* and *interdependence*, has been implicit in the notion of 'Europe' since the beginning."[744]

In order to understand whether the European Union is really inculcating notions of supranational community, one might look to the schools that have been established for the fifteen thousand children of the employees of the European Community. The explicit aim of these schools is to "'create a whole new layer of identity in these kids.'"[745] According to reports, "[g]raduates emerge [from these schools] superbly educated, usually trilingual, with their *nationalism muted—and very, very European*."[746] This seems to be the intent. Indeed, the schools strive to educate students "not as products of a motherland or fatherland but as Europeans."[747]

This effort has been contentious, particularly in the study of history, where textbooks from a particular country tend to portray events in the past

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[741] *See generally* Paul Teague, *Between Convergence and Divergence: Possibilities for a European Community System of Labour Market Regulation*, 132 INT'L LABOUR REV. 391 (1993) (examining the influences for and against the establishment of a new European labor market regulation).

[742] *Cf.* CURTIN, *supra* note 5, at 42 (describing the "usurping of national legislative power by the European Community" as "direct and striking").

[743] *See* Lindseth, *supra* note 350, at 680-83 (describing the "continued pull of the nation-state" in Europe); *cf.* Alec Stone, *Ratifying Maastricht: France Debates European Union*, 11 FRENCH POL. & SOC'Y 70, 85 (1993) (arguing that the idea of "Europe" has arrived "as a *domestic* political issue").

[744] Gupta, *supra* note 3, at 186. Alan Milward and Vibeke Sørensen argue that while the European Union may be integrationist with respect to its plans for monetary union, its immigration, defense, and foreign policies are based on a model of interdependence. Alan S. Milward & Vibeke Sørensen, *Interdependence or Integration? A National Choice*, *in* THE FRONTIER OF NATIONAL SOVEREIGNTY: HISTORY AND THEORY 1945-1992, at 20, 30 (Alan S. Milward et al. eds., 1993); *see also* Étienne Balibar, *Racism and Politics in Europe Today*, 186 NEW LEFT REV. 5, 16 (1991) ("The state today in Europe is *neither national nor supranational*, and this ambiguity does not slacken but only grows deeper over time.").

[745] Glynn Mapes, *Polyglot Students Are Weaned Early off Mother Tongue*, WALL ST. J., Mar. 6, 1990, at A1 (quoting Desmond Swan, Professor of Education at University College, Dublin).

[746] *Id.* (emphasis added).

[747] *Id.*

from that country's point-of-view.[748] Nevertheless, "[t]he European Community schools are creating new sets of relationships between peoples and spaces, forging a different type of identity in their students."[749] It will be interesting to see whether these schools ultimately adopt a broader cosmopolitan perspective or whether they simply reconstruct Europe as a "homeland" that, while not national, is nevertheless viewed as a territorial fortress to be protected from "outsiders."[750] Sadly, the evidence thus far indicates that a coordination of immigration policies is leading to precisely this kind of "fortress" mentality, whereby "Europe" must be defended against immigrants.[751] Thus, though the European Community schools are engaged in the reconstruction of an identity not based on old nation-state boundaries, new territorial boundaries may be substituted.

4. Cosmopolitan Communities

Another way of constructing supranational identity is to view the relevant community as truly global and plural—a cosmopolitan community.[752] We can think of cosmopolitanism as an extension of Anderson's idea of the nation-state as an imagined community. Anderson argued that the rise of print capitalism allowed people to feel as though they were part of the same community with others whom they would never meet, thus providing the basis for imagining the nation-state.[753] Cosmopolitanism takes this argu-

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[748] *See id.* (quoting one European school history teacher as saying that such textbooks "tend to be blinkered histories of the great powers").

[749] Gupta, *supra* note 3, at 186-87.

[750] *See* Carlos Closa, *The Concept of Citizenship in the Treaty on European Union*, 29 COMMON MKT. L. REV. 1137, 1141 (1992) ("Within the community framework, the enjoyment of certain rights and privileges depends on the person holding the citizenship or nationality of a member state which is still the predominant criteria [sic]."); Dietrich Thränhardt & Robert Miles, *Introduction* to MIGRATION AND EUROPEAN INTEGRATION: THE DYNAMICS OF INCLUSION AND EXCLUSION 1, 3 (Robert Miles & Dietrich Thränhardt eds., 1995) (challenging the "popular conception" of Europe as a "fortress" because the "fortress . . . is constantly breached by 'illegal' immigrants"); *cf.* Biddy Martin & Chandra T. Mohanty, *Feminist Politics: What's Home Got to Do with It?*, *in* FEMINIST STUDIES/CRITICAL STUDIES 191, 192 (Teresa de Lauretis ed., 1986) (discussing the challenge of finding different ways to conceptualize community).

[751] *See* Gupta, *supra* note 3, at 187 (asking, "Will Europe become a 'fortress' to be defended against immigrants?").

[752] For a sampling of the scholarship in this area, see generally JESSICA BERMAN, MODERNIST FICTION, COSMOPOLITANISM, AND THE POLITICS OF COMMUNITY 1-27 (2001); COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION, *supra* note 29; GLOBALIZATION (Arjun Appadurai ed., 2001); HANNERZ, *supra* note 529; MARTHA C. NUSSBAUM ET AL., FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM (Joshua Cohen ed., 1996); BRUCE ROBBINS, FEELING GLOBAL: INTERNATIONALISM IN DISTRESS (1999).

[753] For a discussion of Anderson's analysis of the relationship between the rise of print

ment a step further.

> If people can get as emotional as Anderson says they do about relations with fellow nationals they never see face-to-face, then now that print-capitalism has become electronic- and digital-capitalism, and now that this system is so clearly transnational, it would be strange if people did *not* get emotional in much the same way, if not necessarily to the same degree, about others who are *not* fellow nationals, people bound to them by some transnational sort of fellowship.[754]

Thus, a sense of diminishing distance among peoples may lead to greater identification across borders.

Indeed, a cosmopolitan perspective may cause us to feel connected to others in a way that breeds empathy and, perhaps, political engagement. Cosmopolitans recognize that "[w]e are connected to all sorts of places, causally if not always consciously, including many that we have never traveled to, that we have perhaps only seen on television—including the place where the television itself was manufactured."[755] If we truly feel that connection, we may be more likely to concern ourselves with the plight of those who manufactured the product.

Cosmopolitanism can be traced at least as far back as the Stoics, who argued that each of us dwells in two communities: "the local community of our birth, and the community of human argument and aspiration that 'is truly great and truly common, in which we look neither to this corner nor to that, but measure the boundaries of our nation by the sun.'"[756] Recognizing the dangers of factionalism that come from allegiance to the political life of a group, the Stoics contended that only by placing primary allegiance in the world community can mutual problems be addressed.

Martha Nussbaum has recently elaborated on the Stoic ideal in an essay touting the cosmopolitan perspective. According to Nussbaum, cosmopolitanism does not require one to give up local identifications, which, she acknowledges, "can be a source of great richness in life."[757] 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

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capitalism and the nation-state, see *supra* notes 647-56 and accompanying text.

[754] Robbins, *supra* note 29, at 7.

[755] *Id.* at 3.

[756] Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, *in* NUSSBAUM ET AL., *supra* note 752, at 3, 7 (quoting Roman playwright Lucius Annaeus Seneca).

[757] *Id.* at 9.

> groupings based on ethnic, linguistic, historical, professional, gender, or sexual identities. Outside all these circles is the largest one, humanity as a whole.[758]

The task then, is to draw the circles together. Therefore, we need not relinquish special affiliations and identifications with the various groups. "We need not think of them as superficial, and we may think of our identity as constituted partly by them."[759] But, Nussbaum argues, "we should also work to make all human beings part of our community of dialogue and concern, base our political deliberations on that interlocking commonality, and give the circle that defines our humanity special attention and respect."[760]

In this vision, people could be "cosmopolitan patriots,"[761] 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 was the result of long-term and persistent processes of cultural hybridization—a world, in that respect, much like the world we live in now."[762]

Iris Young has used the ideal of the "unoppressive city" as a model for a similarly multifaceted understanding of community.[763] She argues that "community" is always a politically problematic term because "those motivated by it will tend to suppress differences among themselves or implicitly to exclude from their political groups persons with whom they do not iden-

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[758] *Id.* One could also imagine the circle expanding still farther to include nonhuman animals, *see, e.g.*, PETER SINGER, ANIMAL LIBERATION 8 (2d ed. 1990) ("If a being suffers there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering . . . of any other being."), and the environment, *see, e.g.*, Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450 (1972) ("Originally each man had regard only for himself and those of a very narrow circle about him; later . . . 'his sympathies became more tender and widely diffused, extending . . . finally to the lower animals.'" (quoting CHARLES DARWIN, DESCENT OF MAN 119-21 (2d ed. 1874))). For a comparison of the two movements, see Megan A. Senatori, *The Second Revolution: The Diverging Paths of Animal Activism and Environmental Law*, 8 WIS. ENVTL. L.J. 31 (2002).

[759] Nussbaum, *supra* note 756, at 9.

[760] *Id.*

[761] Kwame Anthony Appiah, *Cosmopolitan Patriots*, *in* COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION, *supra* note 29, at 91.

[762] *Id.* at 92.

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

tify."[764] Thus "[t]he desire for community relies on the same desire for social wholeness and identification that underlies racism and ethnic chauvinism on the one hand and political sectarianism on the other."[765] Instead, she envisions ideal city life as the "'being-together' of strangers."[766] These strangers may remain strangers and continue to "experience each other as other."[767] Indeed, they do not necessarily seek an overall group identification and loyalty. Yet, they are open to "unassimilated otherness."[768] They belong to various distinct groups or cultures and are constantly interacting with other groups. But they do so without seeking either to assimilate or to reject those others. Such interactions instantiate an alternative kind of community,[769] one that is never a hegemonic imposition of sameness but that nevertheless prevents different groups from ever being completely outside one another.[770] In a city's public spaces, Young argues, we see glimpses of this ideal: "The city consists in a great diversity of people and groups, with a multitude of subcultures and differentiated activities and functions, whose lives and movements mingle and overlap in public spaces."[771] In this vision, there can be community without sameness, shifting affiliations without ostracism.[772]

Although Young does not refer to her vision as cosmopolitan, it fits comfortably within the alternative understanding of community I am sketching here. Cosmopolitanism is emphatically not a model of international citizenship in the sense of international harmonization and standardization, but instead is a recognition of multiple refracted differences where (as in Young's ideal city) people acknowledge links with the "other" without de-

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[764] Young, *supra* note 763, at 300.

[765] *Id.* at 302.

[766] *Id.* at 318.

[767] *Id.*

[768] *Id.* at 319.

[769] Young resists using the word "community" because of the "urge to unity" the term conveys, but acknowledges that "[i]n the end it may be a matter of stipulation" whether one chooses to call her vision "community." *Id.* at 320; *see also* Frug, *supra* note 763, at 1049 ("Unlike Young, I do not cede the term community to those who evoke the romance of togetherness.").

[770] *See* Young, *supra* note 763, at 319 (positing that a group of strangers living side by side "instantiates social relations as difference in the sense of an understanding of groups and cultures that are different, with exchanging and overlapping interactions that do not issue in community, yet which prevent them from being outside of one another").

[771] *Id.*

[772] This vision is not exclusive to Western thought. *See, e.g.*, Pollock et al., *supra* note 673, at 586 (noting "the Asia-wide circulation of Sanskrit poetry in the first millennium whereby participation in a translocal culture, uneven and restricted by life chances though it was, neither required enforcement at the point of a sword nor entailed the obliteration of everything already in place").

manding assimilation or ostracism. Cosmopolitanism seeks "flexible citizenship,"[773] in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances. These allegiances could also include non-territorial communities, such as those found in Internet chatrooms. The cosmopolitan worldview shifts back and forth from the rooted particularity of personal identity to the global possibility of multiple overlapping communities. It requires a "translation or transmutation of *cosmopolitanism*, usually understood as a detached, individual view of the global, into the more collective, engaged, and empowered form of worldliness that is often called *internationalism*."[774]

Thus, cosmopolitanism forms perhaps the strongest alternative vision to the territorially bounded sovereignty of the nation-state. But what would a system of legal jurisdiction look like in a world based on cosmopolitan pluralism? The next Part takes up this question.

V. A COSMOPOLITAN PLURALIST CONCEPTION OF JURISDICTION

As we have seen, the story of jurisdiction is a story of social space and community definition. But the very ideas of space and community are themselves narrative constructions that are always contested.[775] Thus, the problem with assuming that nation-state identities are the relevant matrix for understanding community is that such a conception "serves to foreclose a richer understanding of location and identity that would account for the relationships of subjects to multiple collectivities."[776] Rather, we must recognize that the ability of people to confound the established spatial orders, either through physical movement or through their own conceptual and political acts of reimagination or jurisdiction-making, means that space and community affiliation can never be "given" and that the process of their sociopolitical construction must always be considered. A jurisdictional system whose objects are no longer conceived as "automatically and naturally anchored in space" can therefore "pay particular attention to the way spaces

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[773] *See* ONG, *supra* note 711, at 6 (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").

[774] ROBBINS, *supra* note 752, at 5.

[775] *See* BERMAN, *supra* note 752, at 3-4 (arguing that, when we speak of community, we necessarily "move in a realm of being-in-common that rests upon the border between 'I' and 'we,' a border that may not necessarily coincide with the political boundaries that surround us").

[776] Gupta, *supra* note 3, at 196.

and communities are made, imagined, contested, and enforced."[777] In this final Part, I attempt to sketch the contours of such a multivalent jurisdictional system, which I call a cosmopolitan pluralist conception of jurisdiction.

The cosmopolitan pluralist conception of jurisdiction aims to capture a jurisdictional middle ground between strict territorialism on the one hand and expansive universalism on the other. As we have seen, a territorialist approach to jurisdiction fails to account for the wide variety of community affiliations and social interactions that defy territorial boundaries. A more universalist perspective, by contrast, which seeks to imagine people as world citizens first and foremost, might seem to be a useful alternative. After all, universalism recognizes (and indeed celebrates) non-national identification.[778] This alternative, though attractive in its idealism, strikes me as misguided for several reasons: First, it asks that we see ourselves *solely* as citizens of the world and therefore dissolves the multirootedness of community affiliation into one global community. Second, it fails to capture the extreme emotional ties people still feel to distinct transnational or local communities.[779] Thus, universalism tends to ignore the very attachments

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[777] Gupta & Ferguson, *supra* note 529, at 47. One might also extend the approach offered here to consider the ways in which ideas such as "the Self" and "the subject matter" are also "made, imagined, contested, and enforced." *Id.* Thus, for example, the doctrines of standing and subject matter jurisdiction might be analyzed more closely in order to consider possibilities of fragmented, partial, or multiple assertions of jurisdiction over aspects, parts, or elements of the individual or the subject matter. Although such exploration is beyond the scope of this Article, a recognition of the social meaning of legal jurisdiction opens space for consideration of these important issues by focusing on the socially constructed nature of the assertion of legal authority. Indeed, with regard to subject matter jurisdiction, an analysis of the relationship between state and tribal courts might be fruitful. For example, the Indian Child Welfare Act establishes presumptive tribal court jurisdiction over child custody proceedings involving an Indian child, even if the child does not reside in Indian country. *See* 25 U.S.C. § 1911(a) (2000) ("Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child."). Thus, the statute seems to evince a vision of tribal community membership not based on territory. In addition, the question of tribal court jurisdiction over non-Indians has long been controversial. Although the U.S. Supreme Court has denied tribes' criminal jurisdiction over non-Indians, *e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978), and has also denied tribes' jurisdiction over non-Indians in many civil cases, *e.g.*, Montana v. United States, 450 U.S. 544, 565-67 (1981), a more flexible understanding of the multiple nature of community affiliation would likely support the idea of concurrent state and tribal court jurisdiction.

[778] *See, e.g.*, Pollock et al., *supra* note 673, at 581 ("Modernity has never fallen short of making universalist claims to world citizenship, based on the spectacular success of the Enlightenment as a pedagogical and political project.").

[779] *See* Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 374 (1996) ("The powerful pull of loyalty exerted by the imagined nation demonstrates that, even in the age of science, a loyalty system based

people hold most deeply. Third, as Anupam Chander has pointed out, the aspiration that we become solely citizens of the world is at least partly based on an internationalization of John Rawls's theory of justice[780] and is therefore subject to the same criticism Rawls has long faced: that his theory assumes a Self detached from the social and cultural context that makes such a Self possible.[781] Fourth, an ongoing system of comprehensive universal jurisdiction poses such a strong challenge to our current notions of nation-state sovereignty that, as a practical matter, it seems unlikely to be adopted widely in the foreseeable future. Fifth, and perhaps most important, a universalist conception of jurisdiction 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 of jurisdiction, in contrast, makes no attempt to deny the multirootedness of individuals within a variety of communities, both territorial and non-territorial. Indeed, the basic tenet of cosmopolitanism, as I define it, is the acknowledgment of multiple communities, rather than the erasure of all communities except the most encompassing. Thus, although a cosmopolitan conception of jurisdiction acknowledges the potential importance of asserting universal jurisdiction in specific circumstances,[782] it does not require a universalist belief in a single world community.

In addition, a truly *pluralist* conception of jurisdiction recognizes that law does not reside solely in the coercive commands of a sovereign power. Rather, law is constantly constructed through the contest of various norm-generating communities.[783] As Robert Cover argued nearly two decades ago, "*all* collective behavior entailing systematic understandings of our

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on romantic myths of shared history and kinship has a capacity to endure . . . .").

[780] *See* Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, 41 NOMOS 12, 36 (1999) (noting that a number of philosophers take a global version of Rawls's theory of justice as their starting point).

[781] *See* Chander, *supra* note 562, at 1047 (criticizing cosmopolitanism because it embraces an image of the Self that "removes the aspects that make the self special"). Chander ascribes this position to cosmopolitanism. While I agree with his critique, I believe he is actually targeting what I call "universalism." As this Part makes clear, I view cosmopolitanism as the recognition of multiple attachments, not the desire for a single world citizenry.

[782] *See supra* Part I.I (discussing the assertion of universal jurisdiction over alleged human rights violators).

[783] *See* Cover, *supra* note 523, at 43 ("The position that only the state creates law . . . confuses the status of interpretation with the status of political domination."); *see also* Cover, *supra* note 2, at 176 (arguing that law functions as a "bridge in normative space," a way of connecting the "world-that-is" with various imaginings of "worlds-that-might-be").

commitments to future worlds" can lay equal claim to the word "law."[784] Thus, although "official" norms articulated by sovereign entities obviously count as "law," a pluralist framework acknowledges that such official assertions of jurisdiction are only one of the many ways in which normative commitments arise. Accordingly, a more comprehensive conception of jurisdiction must attend to the jurisdictional assertions of nonsovereign communities as well.[785] 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. And the idea of jurisdiction necessarily becomes a locus for this debate because it is in the assertion of jurisdiction itself that these norm-generating communities seize the language of law and articulate visions of future worlds. If jurisdiction is, literally, the ability to speak as a community, then we can begin to develop a "natural law of jurisdiction,"[786] where communities claim the authority to use the language of the law based on a right or entitlement that precedes the particular sovereignties of the present moment.

By acknowledging the ways in which the language and forms of law are deployed by individuals and communities both inside and outside the territorial bounds of the state system, the cosmopolitan pluralist conception of jurisdiction recalls not only Robert Cover,[787] but also the pioneering work of Myres McDougal, Harold Lasswell, and the New Haven School of International Law. These scholars argued that international legal regimes were not concerned primarily with fixed rules but with procedures for interaction.[788]

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[784] Cover, *supra* note 2, at 176 (emphasis added).

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

[786] Cover, *supra* note 523, at 58.

[787] Cover, of course, wrote long before the rise of the Internet or the burgeoning interest in globalization. Yet I believe that his evocative musings on the nature of jurisdiction provide a useful starting point for developing a more conceptually satisfying understanding of legal jurisdiction in the twenty-first century.

[788] *See* Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 9 (1959) ("Within the decision-making process our chief interest is in the legal process, by which we mean the making of authoritative and controlling decisions."); *see also id.* ("Authority is the structure of expectation con-

Thus, the School saw international law as a "world constitutive process of authoritative decision," rather than a set of coercive requirements.[789] Not surprisingly, these scholars focused attention on the idea of jurisdiction itself, analyzing the way in which processes of international order could be applied to new places, such as Antarctica[790] and outer space[791]—the "cyberspaces" of a previous generation. Indeed, they emphasized that jurisdiction is asserted not through "naked force or calculations of expediency . . . [but by] participants established by community expectation . . . [making] reasoned decisions, justified by relation to policy criteria established by community expectation."[792] Moreover, they recognized that people form multiple community attachments and argued that "[t]he individual should be able to become a member of, and to participate in the value processes of, as many bodies politic as his capabilities will permit."[793] Building on these observations, a cosmopolitan pluralist framework emphasizes the process of interaction among a wide variety of norm-generating communities that are based on the entire panoply of multiple overlapping affiliations and attachments people actually experience in their daily lives, from the local to the global (including some affiliations not based on territory at all). In this vision, as in the work of the New Haven School, a jurisdictional assertion is part of an international process of community definition and norm creation.

This Part first develops the cosmopolitan pluralist framework for analyzing questions of jurisdiction and recognition of judgments. It then applies that framework to a few of the jurisdictional conundrums discussed in Part I. I conclude with some thoughts about the ways in which cyberspace legal issues and traditional international law concerns are converging, both in debates about jurisdiction and in the creation of a transnational common law.

A. *The Cosmopolitan Pluralist Jurisdictional Framework*

As previously discussed, a cosmopolitan conception of community rec-

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cerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not.").

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

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

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

[792] *Id.* at 95.

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

ognizes the interrelatedness of peoples and cultures around the world while nevertheless attending to local variations among groups and the wide variety of ways that individuals come to understand their identification with those groups. This view imagines overlapping webs of relation, some woven out of local affiliation and some unbounded by geography. Cosmopolitan communities are rooted in the local "as a structure of feeling, a property of social life, and an ideology of situated community," while still remaining unbordered.[794] Instead of an ideal of detachment or universalism, cosmopolitanism recognizes multiple attachments across time and space.

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

In practice, this means that territorially based limitations on the assertion of jurisdiction are inappropriate because they reify arbitrary boundaries and foreclose debate about either community definition or the evolution of substantive norms. In a cosmopolitan pluralist conception of jurisdiction, courts could not simply dismiss assertions of jurisdiction based on a mechanical counting of contacts with a geographically based sovereign entity. This is just as well because, as we have seen, such jurisdictional tests are routinely acknowledged as problematic in a contemporary world of interconnection and cross-border interaction. Instead, jurisdiction must be based on whether the parties before the court are appropriately conceptualized as members of the same community, however that community is defined.[795] Then a court subsequently asked to enforce a judgment would need to address in a more nuanced way both the question of whether the assertion of jurisdiction that led to the judgment was legitimate and whether the substantive norms announced by the prior court should be deemed enforceable.

Although the cosmopolitan pluralist conception implies the possibility for jurisdictional assertions by non-state communities (and I will address such assertions in detail below), it in no way denies the continued importance of nation-states or state-sanctioned courts. After all, cosmopolitanism

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[794] Appadurai, *supra* note 7, at 189.

[795] Such an inquiry is not so different from those undertaken in cases that hinge on the legitimacy of tribal identification. For a discussion of the issues involved in such cases, see, for example, JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 277-346 (1988).

recognizes *multiple* attachments, and there can be little doubt that, even if—as I have argued—the nation-state is an imagined community, socially constructed and historically contingent, it is still a particularly powerful imagined community and one that generates real feelings of loyalty and attachment.[796] People obviously are far more willing to die for their nation-state than, say, for their bowling league. In addition, as a practical matter, state-sanctioned courts and nation-state boundaries are likely to be an enduring part of the political landscape for the foreseeable future. Thus, I begin by looking at the implications of a cosmopolitan conception of jurisdiction for assertions of jurisdiction by such state-sanctioned courts. I then consider the broader question of jurisdictional assertions by non-state communities.

1. A Jurisdictional Framework for State-Sanctioned Courts

A cosmopolitan pluralist conception of jurisdiction would change the analytical framework for assessing jurisdiction in several respects from that which is currently used in most courts, both in the United States and elsewhere. The changes are actually not so dramatic, however, because courts have already begun to use an analysis of community ties as the rubric for determining jurisdiction even while purporting to count contacts. Thus, in many respects the cosmopolitan pluralist framework merely makes explicit the analytical steps judges are already using implicitly.

Under most current jurisdictional analyses, a court assumes that the plaintiff is appropriately within the court's jurisdiction because the plaintiff, by bringing the lawsuit, has voluntarily submitted to its jurisdiction and is physically present within its territorial bounds. A court employing a community-based jurisdictional analysis, however, would need to determine if either (1) the plaintiff can appropriately be defined as a member of the community asserting jurisdiction, or (2) even if the plaintiff is not a community member, the issue the plaintiff raises is of such significance to the community that jurisdiction can be justified.[797]

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[796] *See* Pollock et al., *supra* note 673, at 579 (describing the power of the imagined nation of Pakistan "to address the experience of cultural and political displacement that colonialism had meant for many Muslims in South Asia" and arguing that although "the nationalist search for home and authenticity may have been modern . . . it was not, for that reason, inauthentic or illegitimate in itself").

[797] This inquiry is sometimes captured by a court's consideration of the plaintiff's standing to bring suit. The doctrine of standing, however, often incorporates other inquiries—such as whether the plaintiff suffered sufficient harm—that are distinct from an investigation of the nexus between the dispute and the community where the court sits. *See, e.g.*, Whitmore v.

As to the first inquiry—the plaintiff's community membership—a number of factors may be relevant. Some are familiar from current jurisdictional analyses: What is the plaintiff's citizenship? Where is the plaintiff usually found? But others are significantly different. For example, while jurisdictional inquiries often look only to the citizenship or primary residence of the party,[798] a community-based model might find relevant community ties anywhere the party resides for a significant period of time, regardless of whether or not it is a primary residence. In addition, the presence of a relevant subcommunity within the jurisdiction might be a factor (for example, if the plaintiff has ties to others within the community based on common kinship, ethnicity, or interests).

Even if the plaintiff does not possess such ties, jurisdiction would still be appropriate if the issue raised in the suit is of great importance to the community. For example, as we have seen, grave human rights violations might trigger various forms of universal or transnational jurisdiction.[799] Jurisdiction might also be appropriate over a defendant who is a member of the community even if the plaintiff is not, because the community still has an obligation to police one of its own.

Turning to the defendant, under a community-based analysis jurisdiction is proper if (1) the defendant can be deemed a member of the same community as the plaintiff, *or* (2) the defendant can be deemed a member of the forum community. Thus, for example, if plaintiff and defendant are bound by ethnic ties or are linked through transnational networks, jurisdiction might be appropriate even if the defendant lacked specific ties with the territorial location of the court. Conversely, even if plaintiff and defendant were not particularly linked, if the defendant can be deemed a member of the community where the court sits, jurisdiction would also be proper.

In order to determine the community affiliation of the defendant, courts

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Arkansas, 495 U.S. 149, 155-56 (1990) (listing the various requirements to establish proper standing).

[798] *See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 463 (1940) ("The state which accords [a defendant] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."); *cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11 (1971) ("Every person has a domicil at all times and . . . no person has more than one domicil at a time.").

[799] *See supra* text accompanying notes 186-204 (describing international human rights suits brought against the likes of Chile's ex-head of state, Augusto Pinochet; Chad's Hissène Habré; and the former Serbian president, Slobodan Milošević). Although a cosmopolitan conception of jurisdiction rejects a universalist approach that seeks to make world community citizenship the only relevant jurisdictional affiliation, *see supra* text accompanying note 782 (defining cosmopolitanism as "the acknowledgement of multiple communities, rather than the erasure of all communities except the most encompassing"), it in no way denies the importance of local communities' asserting universal jurisdiction in specific cases.

again could consider a variety of factors. These include the citizenship and residence of the defendant, the amount of activity the defendant conducts in the forum community, and the extent of the defendant's impact on the community. The jurisdictional analysis in criminal cases would be similar, focusing on the defendant's own community identification as well as the extent of the defendant's community activities or the impact of defendant's activities on the community. Such traditional factors as "purposeful availment" or "volitional contacts" could be substantially retained, but recast as an analysis of whether the defendant has become aligned with or bound to the community at issue.

In all of these inquiries, the determination of community affiliation contains both a subjective and an objective element. The felt and expressed bonds of individuals are relevant to the calculus, but such bonds might have objective indicia, such as citizenship, travel patterns, telephone records, social activities, financial transactions, and so forth. In addition, a community severely affected by transnational activity might see fit to assert community dominion even over a distant actor, based solely on the impact of the defendant's activities.

I have already discussed the uncertainty in U.S. law concerning jurisdiction based on a product's presence in a territorial location because of the "stream of commerce."[800] A community-based analysis, because it focuses less on the amount of volitional contact with a territorial entity, would likely result in the assertion of jurisdiction over such a territorially distant defendant if its products regularly end up in a given community and cause harm there. In such circumstances, courts following this approach would recognize that the reality of global capitalism means that companies form transnational bonds with consumers territorially removed from them.

Other aspects of traditional minimum-contacts inquiries would also be less important under a community-based approach. For example, the purported inconvenience to the defendant of having to defend a suit far from home can be part of the analysis of whether a defendant should be deemed a member of the community, but it no longer takes on such significance as an independent factor. This is appropriate because in a world of rapid transportation, instant wireless communication, and even virtual courtrooms, defending a lawsuit in a distant physical location is far less burdensome (both literally and psychically) than it once was. Likewise the "foreseeability" of being brought into a particular court, though often invoked in U.S. Supreme

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[800] *See supra* note 52 and accompanying text (discussing the U.S. Supreme Court's stream-of-commerce decision, *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987)).

Court doctrine,[801] is of little help given that, in an increasingly interconnected world, it is always foreseeable that activity in one place will have effects in many far away locations. Moreover, as many scholars have pointed out, "foreseeability" is a circular test because whether one foresees being subject to jurisdiction in a particular court depends in large part on what courts have previously determined is reasonably foreseeable.[802] Thus, little is lost by jettisoning this analytical metric.

Nevertheless, it is important to emphasize that a community-based analysis would not necessarily result in broader assertions of jurisdiction than under current jurisdictional schemes. For example, the requirement that the plaintiff have community ties with the forum might well make forum-shopping more difficult because plaintiffs could not simply choose the community with the most convivial law regardless of social ties. Likewise, a community-based approach might not permit so-called transient-presence jurisdiction, where the defendant is present within the physical boundaries of a territory only briefly, or for an unrelated reason.[803] Such transient-presence jurisdiction is generally permissible under territorial schemes, leading to such ludicrous activities as service of process in an airplane as it flies over a territorial jurisdiction.[804] By inquiring about substantive ties to a community rather than formal contacts with a location, a community-based approach would render such jurisdictional assertions more amenable

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

[802] *See, e.g.*, David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 136 (1998) ("The purposeful availment requirement stems from the notion that defendants should be able to plan their conduct knowing where that conduct will subject them to jurisdiction. But . . . [d]efendants only have reasonable expectations about where they will be haled into court because courts have created such expectations." (citation omitted)); Burk, *supra* note 119, at 1118 (opining that a forseeability inquiry amounts to nothing more than the idea that "defendants should reasonably anticipate being haled into any court into which they should reasonably anticipate being haled"); *cf.* Luther L. McDougal III, *Judicial Jurisdiction: From a Contacts to an Interest Analysis*, 35 VAND. L. REV. 1, 10 (1982) (noting the impossibility of predicting how a court will rule on the "fairness" element of minimum contacts). For a discussion of this problem within a more general analysis of circularity in constitutional adjudication, see Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 64-65 (2001).

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

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

to challenge. Finally, there might be occasions when a "minimum contacts" inquiry would find, say, that a couple of web "hits" in a jurisdiction would be sufficient to render a defendant subject to suit there. A community-based approach, however, would go beyond counting contacts to inquire about the substantive bonds formed between the member of the forum community and the territorially distant actor.

Most important, the cosmopolitan pluralist approach to jurisdiction requires that courts make explicit an inquiry that current jurisdictional rules obscure. If jurisdiction is in part about the assertion of community dominion over a distant actor, then courts should consider the nature of the community that has allegedly been harmed, the relationship of the dispute to that community, and the social meaning of asserting dominion over the actor in question. Accordingly, the jurisdictional inquiry becomes a site for discussion both about the nature of community affiliation and the changing role of territorial borders. The precise contours of the jurisdictional norms that would develop from this process are impossible to predict and would undoubtedly evolve over time. The crucial point, however, is that these discussions would not be truncated by a formulaic test that bears scant relationship to the core questions underlying the social meaning of jurisdiction.

2. A Jurisdictional Framework for Non-State Communities

A truly pluralist conception of jurisdiction also allows us to make sense of *non-state* assertions of jurisdiction. Consider the bold (or utopian) impulse of a non-state actor to assert jurisdiction:

> Imagine yourself a tribunal. Pretend you have an audience—a community of some sort that will recognize you as a tribunal. Now, go all the way. What grandeur of transformation of the normative universe would you perform? Will you simply issue a general writ of peace? A warrant for justice notwithstanding facts and law? Will you order everyone to be good? Perhaps, perhaps you will judge the dead? Or even bring God as a defendant? The possibilities are endless and the question arises whether or why one should or should not try something outlandish, impossible, or just plain daring.[805]

The idea of imagining oneself a tribunal sounds fanciful. After all, we might think, people cannot simply construct their own legal jurisdiction. But that is true only if we accept a reified conception of jurisdiction based on state sovereigns acting within an unchanging set of legal boundaries. Such a conception, however, has been challenged throughout this Article both because it is normatively unjustifiable as a way of capturing actual community identifications and social understandings of space, and because

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[805] Cover, *supra* note 2, at 187.

it fails to describe adequately the increasingly extraterritorial and non-state nature of actual legal practice. Moreover, by imagining the creation of jurisdiction we can see the transformative way in which alternative assertions of legal jurisdiction can be linked to the articulation and development of alternative norms and community definitions.

Looking more closely at the process of jurisdiction-creation, we can imagine a non-state community coming together and purporting to adjudicate a dispute.[806] Obviously, its judgment is not self-executing; some entity with police power must enforce it. Thus, 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. This is the process of judgment recognition familiar to those who study conflict of laws. A tribunal asserts jurisdiction over a dispute, and then other jurisdictions must decide whether to confer legitimacy on that tribunal by recognizing and enforcing its judgment. Thus, even at the moment that a community daringly invents 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.[807]

We have already seen how formal international tribunals, though established by agreements of nation-states, can contribute to the generation of international human rights standards that ultimately limit state prerogatives.[808] Here the process of jurisdictional assertion and rhetorical persuasion has helped to develop norms over time. For example, one of the great accomplishments of the war crimes tribunals established after World War II was "the capacity of the event to project a new legal meaning into the future."[809]

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[806] Robert Cover offers the example of a group of Jews in a small city in Galilee in 1538. This group attempted to constitute a Jewish court even though its authority to do so was dubious. Significantly, the leaders of the group apparently determined that they could not assert jurisdiction on their own. Thus, they proclaimed their act in a message sent to Jerusalem seeking recognition. *Id.* at 190-92. Cover suggests that such approval was necessary not only as a matter of religious doctrine, but also because, without assent from Jerusalem, it was hardly likely that the rest of Judaism would take the experiment seriously. *Id.* at 193.

[807] As Cover points out, though law is a bridge to an alternative set of norms, the bridge begins not in "alternity" but in reality. Therefore there are real constraints on the engineering of that bridge. *See id.* at 187 ("If law . . . is a bridge from *reality* to a new world there must be some constraints on its engineering. Judges must dare, but what happens when they lose that reality?").

[808] *Supra* note 172 and accompanying text.

[809] Cover, *supra* note 2, at 196. Robert Jackson, chief prosecutor at the Nuremberg trials, made a similar argument at the time:

> We have also incorporated [the trial's] principles into a judicial precedent. "The power of the precedent," Mr. Justice Cardozo said, "is the power of the beaten path." One of the chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these

As Charles Wyzanski, who originally opposed the creation of the Nuremberg tribunals, later acknowledged, "the outstanding accomplishment of the trial, *which could never have been achieved by any more summary executive action*, is that it crystalized the concept that there already is inherent in the international community a machinery both of the expression of international criminal law and for its enforcement."[810] Significantly, Wyzanski's statement reveals that he came to believe not only that the tribunals were legitimate, but also that they served a norm-creating function that went beyond the realm of political or military power and that could not have been achieved through the use of such power. Thus, sometimes the assertion of legal jurisdiction, even more than the assertion of military or political muscle, may help inculcate norms for the future.[811]

Moreover, these norms, once created and developed into a functioning body of human rights law, are not so easily circumscribed. Therefore, although it has been said that the Nuremberg and Tokyo trials after World War II themselves represented mere victors' justice,[812] the norms established in those trials have helped spawn a large body of human rights norms and a working consensus (fragile though it sometimes is) regarding enforcement of those norms.[813] I have already discussed the case of Augusto Pinochet, in which a Spanish judge asserted jurisdiction over the former Chilean dictator and almost succeeded in convincing the world to accede to that assertion.[814] Other transnational human rights actions, both criminal and civil, have been attempted or are pending around the world, and the International Criminal Court, though controversial, has been established. This normative universe of human rights enforcement through legal apparatus is a direct result of the jurisdiction-creation at Nuremberg.

> rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction.

REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 437 (Int'l Org. & Conference Series II, U.S. Dep't of State Publ'n No. 3080, 1945).

[810] Charles E. Wyzanski, Jr., *Nuremberg in Retrospect*, 178 ATLANTIC MONTHLY 56 (1946) (emphasis added), *reprinted in* THE NEW MEANING OF JUSTICE 137, 144 (1965).

[811] For a recent article using Cover's work to support the idea that international trials help create and develop norms, see Dickinson, *supra* note 521, at 1477-90.

[812] *See, e.g.*, MONTGOMERY BELGION, VICTORS' JUSTICE 42-131 (1949) (arguing that the alleged crimes were acts of war in which both sides were engaged and therefore did not warrant criminal punishment).

[813] *See* Cover, *supra* note 2, at 196-97 (noting the precedents created by the Nuremberg and Tokyo trials).

[814] *See supra* notes 34-37, 186-88 and accompanying text (discussing the international reaction to the attempt to prosecute Pinochet in Spain).

Formal international trials such as those held at Nuremberg are not the only ways in which non-state legal jurisdiction can be created and exercised, however. Non-state communities also assert lawmaking power through more informal networks and organizations and through the slow accretion of social custom itself. Prior to the rise of the state system, much lawmaking took place in autonomous institutions and groups, such as cities and guilds, and large geographic areas were left largely unregulated.[815] Even in modern nation-states, we see a whole range of non-state lawmaking in tribal or ethnic enclaves,[816] religious organizations,[817] corporate bylaws, social customs,[818] private regulatory bodies, and a wide variety of groups, associations, and non-state institutions.[819] 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.[820] Even more

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[815] *See* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 14-38 (Walter L. Moll trans., 1936) (analyzing and describing the differences between legal and nonlegal norms). *See generally* OTTO GIERKE, ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES (George Heiman ed. & trans., Univ. of Toronto Press 1977) (n.d.) (setting forth a legal philosophy based on the concept of association as a fundamental human organizing principle); OTTO GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800 (Ernest Barker trans., Cambridge Univ. Press 1934) (1913) (presenting a theory of the evolution of the state and non-state groups according to the principle of natural law).

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

[817] *See, e.g.*, CAROL WEISBROD, THE BOUNDARIES OF UTOPIA (1980) (examining the contractual underpinnings of four nineteenth-century American religious utopian communities: the Shakers, the Harmony Society, Oneida, and Zoar). As Marc Galanter has observed, the field of church and state is the "*locus classicus* of thinking about the multiplicity of normative orders." Galanter, *supra* note 33, 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).

[818] *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).

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

[820] *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 nonlegal means of enforcing order among members of these institutions).

informally, day-to-day human encounters such as interacting with strangers on a public street, waiting in lines, and communicating with subordinates or superiors are all governed by what Michael Reisman has called "microlegal systems."[821] Thus, law is found not only in the formal decisions of judges, legislators, and administrators, but also

> "any place and any time that a group gathers together to pursue an objective. The rules, open or covert, by which they govern themselves, and the methods and techniques by which these rules are enforced is the law of the group. Judged by this broad standard, most lawmaking is too ephemeral to be even noticed. But when conflict within the group ensues, and it is forced to decide between conflicting claims, law arises in an overt and relatively conspicuous fashion. The challenge forces decision, and decisions make law."[822]

In some circumstances, official legal actors may delegate lawmaking authority to non-state entities or recognize the efficacy of non-state norms. For example, commercial litigation, particularly in the international arena, increasingly takes place before non-state arbitral panels.[823] Likewise, non-governmental standard-setting bodies, from Underwriters Laboratories (which tests electrical and other equipment) to the Motion Picture Association of America (which rates the content of films) to the Internet Corporation for Assigned Names and Numbers (which administers the Internet domain name system), construct detailed normative systems with the effect of law. Regulation of much financial market activity is left to private authorities such as stock markets or trade associations like the National Association of Securities Dealers. And, to take a rather mundane example, lawmaking authority over sports events is generally left to non-state entities (such as referees) whose decisions are not usually reviewable except within the system established by the sports authority or league.[824]

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[821] For discussions of verbal and nonverbal cues that govern social behavior, see Michael Reisman, *Lining up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417 (1985); Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 DENV. J. INT'L L. & POL'Y 165 (1983); Michael Reisman, *Rapping and Talking to the Boss: The Microlegal System of Two People Talking*, *in* CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY 61 (Inst. of Comparative Law in Japan, Chuo Univ. ed., 1988).

[822] Weyrauch & Bell, *supra* note 816, at 328 (quoting THOMAS A. COWAN & DONALD A. STRICKLAND, THE LEGAL STRUCTURE OF A CONFINED MICROSOCIETY, at i (Univ. of Cal., Berkeley, Internal Working Paper No. 34, 1965)).

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

[824] *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

Significantly, the jurisdiction of all of these non-state actors may be formally limited to their particular bounded communities, but 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."[825] Sometimes such incorporation is explicit, as when a statute is interpreted (or even supplanted) by reference to industry custom[826] or when a law of sales that would accord with merchant reality was adopted in the Uniform Commercial Code.[827] Even when the impact of non-state norms is unacknowledged, however, state-sponsored law may only be deemed legitimate to the extent that its official pronouncements reflect the "common understandings of private laws and customs."[828] Indeed, the invention of legal fictions often indicates that official norms are being adjusted to reflect more closely the dictates of non-state norms and practices.

In addition, non-state assertions of jurisdiction may sometimes take the guise of more formal legal proceedings. For example, in 1933, as five Communists accused by Hitler of setting fire to the Reichstag building in Berlin were tried in Germany, Arthur Garfield Hays—counsel for the American Civil Liberties Union—helped to organize a "Counter Trial" in London.[829] This "trial" used the formalities of legal process to enact a "publicly deliberative drama."[830] According to Hays, the Counter Trial helped

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).

[825] Weyrauch & Bell, *supra* note 816, at 330.

[826] *See, e.g.*, FULLER, *supra* note 818, 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).

[827] *See* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503-19 (1987) (describing Karl Llewellyn's initial drafts of what later became Article 2 of the Uniform Commercial Code).

[828] Weyrauch & Bell, *supra* note 816, at 329.

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

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

"to engage 'public opinion' and to set a 'valuable precedent' by which the actions of the German tribunal could be measured."[831] Even the German court ultimately felt the need to refute the findings of the London proceedings in order to combat the international impact of the Counter Trial.[832] According to Arthur Koestler, the Counter Trial "was a unique event in criminal history" because it caused the German court to "concentrate its efforts on refuting accusations by a third, extraneous party."[833]

The following year, Hays and others organized a trial styled the "Case of Civilization Against Hitler" as part of a rally at Madison Square Garden in New York City.[834] Twenty thousand people in attendance and thousands more listening live over the radio heard an indictment, testimony from nearly two dozen witnesses, a summation by a former New York Court of Appeals judge, and a judgment of the court pronounced by a local minister.[835] Newspaper accounts the following day reported that Hitler had been found guilty of high "crime against civilization"[836] and that the trial "rendered solemn judgment that the Nazi government stood convicted before the world."[837] Thus, non-state assertions of jurisdiction may mobilize popular opinion in resistance to state-sanctioned norms and may also create a context for telling a counternarrative about historical events.

The "Women's International War Crimes Tribunal 2000" represents a more recent, though similar, use of legal forms to construct an alternative history. This self-styled "peoples' tribunal"—convened in Tokyo from December 8 to 12, 2000—heard evidence concerning the criminal liability for crimes against humanity of both Japan and its high-ranking military and political officials for rape and sexual slavery arising out of Japanese military activity in the Asia-Pacific region during the 1930s and 1940s.[838] Frustrated by the denials of Japanese government officials[839] and by failure in lawsuits before state-sanctioned courts,[840] survivors of these alleged offenses turned

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[831] *Id.* at 399.

[832] *See id.* (noting that in doing so, the German court was apparently seeking "to minimize the loss of international goodwill").

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

[834] *See* Anthes, *supra* note 829, at 391-94 (describing the trial in terms of both culture and politics).

[835] *Id.* at 391-92.

[836] *Nazis "Convicted" of World "Crime" by 20,000 in Rally*, N.Y. TIMES, Mar. 8, 1934, at 1.

[837] *Id.*

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

[839] *See id.* (describing Japan's continued official denial of legal responsibility).

[840] *See, e.g.*, *Japan Overturns Sex Slave Ruling*, BBC NEWS (Mar. 29, 2001), *at*

to international NGOs.[841] After initial conferences were held in Tokyo and Seoul, an International Organizing Committee for the tribunal was formed.[842]

Indictments were presented by prosecution teams from ten countries, including North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands.[843] Indeed, "[t]he shared experience of Japanese colonization brought North and South Korean prosecutors together with a joint indictment—an expression of common purpose that continues to be unthinkable at the governmental level."[844] The prosecution presented evidence for three days.[845] More than seventy-five survivors were present. Many of those present gave evidence, and other survivors recorded video interviews or signed affidavits that were entered into evidence by the prosecution.[846] The panel of judges "represented a broad geographical distribution, expertise in diverse and relevant areas of domestic and international law, a mix of practitioner, judicial, and academic expertise, and . . . an equitable gender balance."[847]

After the closing of evidence and argument, the judges began deliberating, assisted by a team of legal advisers.[848] They prepared a preliminary judgment, which was presented to an audience of more than one thousand people.[849] The judgment found Emperor Hirohito "guilty of the charges on the basis of his command responsibility."[850] In addition, the panel ruled that Japan was "responsible under international law applicable at the time of the events for violation of its treaty obligations and principles of customary international law relating to slavery, trafficking, forced labor, and rape, amounting to crimes against humanity."[851] The judges subsequently pro-

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http://news.bbc.co.uk/1/hi/world/asia-pacific/1249236.stm (discussing the decision by Hiroshima's High Court to overturn the only successful claim for compensation in Japanese courts).

841 *See* Chinkin, *supra* note 838, at 336 (noting that the primary NGO was a group called Violence Against Women in War Network, Japan, "which was founded in 1998 after the International Conference on Violence Against Women in War and Armed Conflict Situations was held in Tokyo in 1997").

842 *Id.*

843 *Id.*

844 *Id.*

845 *Id.* at 337.

846 *Id.*

847 *Id.* at 338.

848 *Id.*

849 *Id.*

850 *Id.*

851 *Id.*

posed a range of reparations and made other recommendations.[852]

Other non-state tribunals have similarly sought to inculcate the norms embodied in international or international human rights law. For example, the 1967 "International War Crimes Tribunal" convened by Bertrand Russell and Jean-Paul Sartre purported to adjudicate whether the United States had violated international law in prosecuting the Vietnam War.[853] Likewise, "private citizens of high moral authority" from several countries established a "Permanent People's Tribunal" in Italy in the 1970s.[854] This tribunal existed for a number of years and examined a series of alleged violations of international law to which there had been inadequate official response, including the Soviet military intervention in Afghanistan, that of Indonesia in East Timor, and the alleged genocide of Armenians by the Turks in the period from 1915 through 1919.[855] In 1984, another People's Tribunal was convened to gather evidence concerning the Armenian genocide.[856] A recent film, *The Trials of Henry Kissinger* (based on a 2001 book of the same name by Christopher Hitchens), assembles historians, politicians, and others to assess the former U.S. Secretary of State's criminal responsibility for U.S. military activities in Vietnam and Cambodia.[857]

In some ways, of course, such assertions of jurisdiction are purely symbolic acts. Yet, by claiming authority to articulate norms, these tribunals insisted that "'law is an instrument of civil society' that does not belong to governments, whether acting alone or in institutional arenas."[858] Moreover, the reports issued by such tribunals provide a valuable alternative source of evidence and jurisprudence pertaining to contested applications of international law. And even these "quasi-legal" fora can constitute a form of public acknowledgment to the survivors that serious crimes were committed against them.[859]

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[852] *Id.*

[853] *See* Cover, *supra* note 2, at 198-201 (describing this non-state tribunal as arising from a lack of state opposition to the war). For the report of this tribunal, see AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL (John Duffett ed., 1968).

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

[855] *Id.* at 28-29.

[856] *See generally* THE PERMANENT PEOPLES' TRIBUNAL, A CRIME OF SILENCE: THE ARMENIAN GENOCIDE (1985).

[857] *See* Ronnie Scheib, *Film Review:* The Trials of Henry Kissinger, VARIETY, July 15-21, 2002, at 27 ("Is Henry Kissinger, America's revered elder statesman and Nobel Peace Prize winner, a war criminal? That's the question posed by this startling BBC docu[mentary] that starts with the accusations leveled by Christopher Hitchens in his recent book.").

[858] Chinkin, *supra* note 838, at 339 (quoting Falk, *supra* note 854, at 29).

[859] Of course, such tribunals' impact undoubtedly depends in part on the power and re-

Thus, calling the tribunals "extralegal" or "symbolic" does nothing to lessen their claims to produce norms or to affect people. After all, even state entities pursue trials that are largely symbolic, such as the French trial against Klaus Barbie[860] and the proposed Spanish trial of Pinochet himself. In the past three decades, we have also seen the rise of truth commissions, the primary aim of which is story-telling in order to create a record of past abuses.[861] Lawsuits in the United States seeking reparations for slavery[862] serve as another example of the way in which juridical mechanisms can be used to affect collective memory. Finally, one might see the creation of the International Criminal Court[863] (a new form of international jurisdiction-assertion) as evidence that the norms these non-state tribunals sought to inculcate have taken hold.

Of course, some communities may embrace norms that many would find undesirable. For example, white supremacist militia groups might well attempt to assert jurisdiction over their perceived enemies. Other communities might seek to impose norms that conflict with evolving international human rights standards. Hierarchy and oppression abound within many communities, and merely uttering the talismanic word "community" does not transform human behavior into sweetness and light. Thus, any theory of jurisdiction that requires deference to these sorts of alternative normative visions would likely prove unacceptable.

Yet, it is important to recognize that, in order for the legal norms of a

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sources of the entities or individuals sponsoring and publicizing them.

[860] Indeed, Guyora Binder has argued that many of those most interested in the trial viewed its role as pedagogical or symbolic. *See* Binder, *supra* note 505, at 1322 (observing that the trial was viewed by some as "an occasion for self-improvement"). Binder quotes French government officials referring to the proceedings as "a pedagogic trial," Israeli governmental officials describing the trial as "justice that has educational significance," a *New York Times* editorial expressing hope that the trial would "educate a new generation," a statement from a representative of French Resistance veterans that he hoped the trial would "deepen our understanding," and a comment from Nazi hunter Simon Wiesenthal that "the trial would be 'a proper history lesson,' and that its true significance was 'symbolic.'" *Id.*

[861] *See, e.g.*, HAYNER, *supra* note 509, at 32 (listing twenty-one truth commissions convened between 1974 and 2001); MINOW, *supra* note 509, at 52-54 (recounting the creation of several truth commissions contemporaneously with the establishment of South Africa's in 1995).

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

[863] Despite U.S. resistance to the ICC, *see supra* note 209 (describing the Bush administration's objections to the ICC), an overwhelming percentage of the world's countries have signed the ICC treaty, and the court held its first assembly in September 2002, Elizabeth Becker, *U.S. Presses for Total Exemption from War Crimes Court*, N.Y. TIMES, Oct. 9, 2002, at A6.

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, such as the decision to apply the norms of merchants or the pronouncements of the permanent people's tribunals, 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. The cosmopolitan pluralist conception of jurisdiction does not imply that all assertions of jurisdiction (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.[864]

B. *Application of the Framework*

I leave to another day the task of applying the cosmopolitan pluralist conception of jurisdiction to all ten problems identified earlier. Indeed, given that the framework described above explicitly relies on the common law development of jurisdictional norms, a programmatic mapping of the contours of the framework is inappropriate. Nevertheless, by focusing on a few particularly rich examples, we can gain some sense of the conceptual space opened up by this framework and the useful insights that may result. Thus, I return to three sites: the American jurisprudence of minimum contacts in cyberspace; the French prosecution of Yahoo!; and the question of jurisdiction in international human rights law, focusing in particular on the Spanish prosecution of Augusto Pinochet and the assignment of community membership in the detention and prosecution of accused Al Qaeda supporters. I choose these because they derive from doctrinal areas (cyberspace law, civil procedure/conflict of laws, international law) that are usually treated as quite distinct. Indeed, I believe we lose a great deal because we

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[864] *Cf.* Cover, *supra* note 2, at 176 (referring to law as the bridge in normative space that connects reality to "alternity").

tend to segregate these questions into different areas of law rather than viewing the problem of jurisdiction as a whole. By exploring these examples, we may begin to appreciate important ways in which international law and cyberspace law are converging around common questions concerning the social meaning of legal jurisdiction.

1. The Minimum Contacts Inquiry

As previously discussed, American courts have struggled in recent years to apply the *International Shoe* minimum-contacts test in cyberspace.[865] This struggle has resulted in a series of analytical frameworks quickly taken up and just as quickly discarded. The instability of the doctrine indicates that courts are straining against the existing jurisdictional tests because those tests are in tension with a felt imperative about when the assertion of jurisdiction seems appropriate.

Surveying the development of American jurisdiction jurisprudence, we saw a similar instability during the decades between *Pennoyer*[866] and *International Shoe*.[867] During that transitional period, courts used *Pennoyer*'s territorial framework, but repeatedly carved out legal fictions to respond to social change.[868] Ultimately, *International Shoe* recognized the fictions and codified a new framework based not on pure territorial power but on contacts.[869] Since *International Shoe*, courts have used the language of minimum contacts, but have in fact used the *International Shoe* test as a proxy for analyzing the "fairness" of asserting jurisdiction.[870] Now, with regard to

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[865] *See supra* Part II.J.1 (surveying various judicial attempts to establish a workable test for personal jurisdiction in cyberspace cases, and concluding that no approach has yet proven sucessful).

[866] Pennoyer v. Neff, 95 U.S. 714 (1877).

[867] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

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

[869] In *International Shoe*, the Court admitted that

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

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

[870] *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (plurality opinion) (using *International Shoe*'s "traditional notions of fair play and substantial justice" language to support the need for a separate inquiry (in addition to minimum contacts) that focuses on "the burden on the defendant, the interests of the forum State, . . . the plaintiff's interest in obtaining relief[,] . . . the interstate judicial system's interest in obtaining the

cases involving cyberspace contacts, courts are continuing to articulate the *International Shoe* test and to use the language of fairness, but they increasingly appear to be responding to a somewhat different concern: Is this far-off website operator properly considered a member of my community?

Indeed, a survey of the cyber-jurisdiction case law from the past few years indicates that courts may be analyzing cases through the lens of community definition and the social meaning of legal jurisdiction, even while continuing to use the language of fairness and minimum contacts. For example, in *Bensusan Restaurant Corp. v. King*,[871] the Second Circuit construed New York's long-arm statute for conferring jurisdiction over a foreign domiciliary. The court concluded that an owner of a Missouri cabaret called "The Blue Note" could not be sued in New York for trademark infringement, despite the fact that the cabaret's website included an unauthorized link to the website of a famous New York jazz club also called "The Blue Note."[872] The court rebuffed the plaintiff's efforts to show a number of contacts between New York and the Missouri Blue Note (including the website itself),[873] concluding instead that the Missouri club was of "local character" and therefore not subject to jurisdiction in New York.[874] By focusing on the "character" of the Missouri business, the court appears implicitly to have concluded that the Missouri club was properly deemed a community member of Missouri, despite its contacts with New York.

Similarly, in *Cybersell, Inc. v. Cybersell, Inc.*,[875] an Internet domain name dispute between corporations based in Florida and Arizona, the Ninth Circuit eschewed a strict reliance on minimum contacts. Instead, the court ruled that physical contacts with the forum state were unnecessary if the defendant "has created continuing obligations to forum residents."[876] Although the court ultimately declined to exercise jurisdiction, its analysis focused on whether or not the Florida corporation, through its website, had created any substantive ties to Arizona, rather than on the number of contacts.

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most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies" (internal quotation marks and citation omitted)).

[871] 126 F.3d 25 (2d Cir. 1997).

[872] *Id.* at 27.

[873] The plaintiff attempted to establish New York's jurisdiction over the Missouri website by focusing on the booking of nationally recognized acts at the Missouri club and the revenues earned from customers who, although students of the University of Missouri, were domiciliaries of other states. *Id.* at 29.

[874] *Id.*

[875] 130 F.3d 414 (9th Cir. 1997).

[876] *Id.* at 417.

Finally, although many courts have formally adopted the *Zippo*[877] test that looks to the degree of interactivity of the website,[878] courts have often refused to assert jurisdiction despite the undisputedly interactive nature of the site in question when there were insufficient community ties to the forum.[879] In the same vein, an "effects" test that finds jurisdiction anywhere the impact of a website is felt seems to make judges uneasy, perhaps because the test seems divorced from an analysis of community affiliation. Thus, in some cases the idea of jurisdiction based on the viewing of a website in a distant location seems attenuated despite the existence of a "contact" between the site and its viewer.[880] In other cases, however, courts are aware of the potentially deleterious effects of a far-off website on a community and, hence, feel compelled to assert jurisdiction.[881] In either instance, a contacts-based framework does not seem to capture the true analytical tug-of-war that is taking place.

A jurisdictional analysis focusing on community affiliation, however, has the virtue of placing the core questions of jurisdiction front and center. Courts would be able to articulate the substantive concerns about both overly broad and overly narrow assertions of jurisdiction and thereby begin to delineate jurisdictional norms that respond to the social meaning of community affiliation. Thus, in *Bensusan*, the court could have inquired further into the question of the Missouri nightclub's community ties to New York. For example, is the community of musicians and audience members sufficiently interrelated that it would make sense to say that there is a common community affiliation between The Blue Note in New York and the one in Missouri? Indeed, the fact that the Missouri club named itself The Blue Note (probably as a homage to the New York club) and posted a link to the New York club on its website indicates a felt connection between the two parties because of the musical heritage that they share. On the other hand, further inquiry might indicate no real overlap in the community of audience members (who are, presumably, the consumers of the website at issue in the case) and predominantly local ties in Missouri. Additionally, a court could ask to what degree the purported harm suffered by the New

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[877] Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997).

[878] *See supra* note 427 (listing cases applying the *Zippo* test).

[879] *See supra* notes 432-43 and accompanying text (discussing cases in which courts have departed from the *Zippo* test and instead have applied an "effects" test based on the Supreme Court's opinion in *Calder v. Jones*, 465 U.S. 703, 751 (1984)).

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

[881] *See, e.g.*, *supra* notes 416-19 and accompanying text (discussing some courts' willingness to extend jurisdiction based on Internet contacts).

York club implicates core notions of community such that it is necessary to assert New York's community dominion over the Missouri club.

Similarly, in *Cybersell* a community-based approach would go beyond a mechanical counting of web "hits" in Arizona of a Florida-based website.[882] Instead, the inquiry would focus on whether the Florida website had created ties with the Arizona community and the degree to which it was necessary for Arizona to assert dominion over a harmful (though territorially distant) actor.

2. The *Yahoo!* Case

The *Yahoo!* case[883] illustrates the way a community-based analysis changes the structure of the jurisdictional debate. The French court's decision to assert jurisdiction over Yahoo.com for material on its non-French servers set off alarms because the ruling raised the specter of website operators' being subject to suit anywhere their sites are accessed.[884] Theoretically, this could lead to a form of universal jurisdiction because sites are routinely accessible throughout the world, potentially permitting almost any governmental entity to assert jurisdiction. And as discussed previously, geographical filters may be ineffective[885] and overly burdensome while greatly diminishing the value of online communication.[886]

We have seen three main alternative theoretical approaches in response to such a jurisdictional problem. First, the Johnson and Post approach would deny the sovereign authority of territorially based governments, such as France, to regulate Yahoo!.[887] Second, the Lessig approach would look for reciprocal governmental agreements whereby different countries agree to police each other's norms with respect to online transactions.[888] Third, the Goldsmith approach would assume that the French judgment is unen-

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[882] *See supra* text accompanying notes 875-76 (discussing *Cybersell*).

[883] For a discussion of the decision by a French court to issue an injunction against Yahoo!, see *supra* Part I.D.

[884] *See supra* note 95 and accompanying text (discussing the extraterritorial impact of the French court's decision).

[885] *See supra* text accompanying note 273 (noting that only about seventy percent of French Internet users could be filtered).

[886] *See supra* notes 293-95 and accompanying text (explaining the difficulty of using geographical location as the basis for permitting access to websites); *see also supra* text accompanying notes 313-19 (speculating that filters might diminish certain benefits of cyberspace communication by zoning content based on geography).

[887] *See supra* Part II.A (discussing arguments put forth by Johnson and Post in favor of decentralized decision making over the Internet).

[888] *See supra* Part II.D (examining Lessig's approach to the regulation of cyberspace through reciprocal enforcement).

forceable in the United States (or elsewhere), making the power of the French judgment dependent on the enforceability of the order within France itself.[889]

In analyzing the way in which a cosmopolitan pluralist conception of jurisdiction differs from each of these three approaches, it is essential to emphasize once more that the question of jurisdiction has two different components: first, the assertion of jurisdiction by one community; and second, the willingness of other communities to recognize and enforce the judgment that results from the initial jurisdictional assertion. Of course, these two inquiries often overlap. For example, if the second community decides that the initial assertion of jurisdiction was invalid, it will be reluctant to enforce the judgment rendered. Nevertheless, for a cosmopolitan conception of jurisdiction, the distinction is crucial because the assertion of jurisdiction represents not only an effort to impose coercive authority but also the very ability to assert community dominion, articulate norms, and thereby generate debate. This jurisdictional assertion, therefore, may have an important symbolic or rhetorical value in and of itself, even if the judgment rendered does not initially persuade other communities to enforce the norms articulated. Indeed, in a cosmopolitan pluralist conception, the assertion of jurisdiction is first and foremost a mechanism for opening space for debate about community affiliation and substantive norms. Such norms, even if they are not able to persuade others in the near term, may gain traction over time and may ultimately be accepted more broadly. In contrast, if jurisdiction is not asserted at all, courts cannot reach the "merits" and no substantive norms are articulated.

Accordingly, a cosmopolitan pluralist approach would take seriously the Johnson and Post challenge to the legitimacy of France's assertion of jurisdiction. Instead of simply denying the ability of territorially based sovereigns to exercise jurisdiction, however, it would require the French court to articulate the rationale for treating Yahoo.com as a member of the French community. Such an approach would allow us to see that the French assertion of jurisdiction in this case was not the wholly arbitrary exercise of territorial jurisdiction that has often been portrayed. Rather, Yahoo! is a sophisticated, multinational operator, with a business plan aimed at reaching web users worldwide,[890] a marketing strategy touting its "global footprint,"[891]

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[889] *See supra* Part II.I (presenting Goldsmith's view that the regulation of cyberspace does not present new conceptual challenges).

[890] *See* Yahoo! Inc., 1999 Annual Report Form 10-K (filed with the SEC Mar. 30, 2000) [hereinafter Yahoo! 1999 Annual Report] ("Yahoo! Inc. . . . is a global Internet communications, commerce and media company that offers a comprehensive branded network of services to more than 120 million users each month worldwide."),

and a French subsidiary in which it owns a seventy percent ownership stake.[892] Indeed, Yahoo! exerted substantial control over this subsidiary, dictating some of the links and content of the French site and requiring the subsidiary to maintain links to its United States-based site.[893] Moreover, Yahoo! routinely profiled French users in order to target them with advertisements written in French.[894] These facts might well make the assertion of jurisdiction in France reasonable.

Assuming the French assertion of jurisdiction is legitimate, the Lessig and Goldsmith approaches concern the extent to which such a judgment should be enforceable outside of France. Lessig's approach envisions the United States government agreeing to enforce the French judgment so long as France agrees to police French websites for content that the U.S. government deems objectionable. As discussed previously, however, such an agreement seems unlikely, particularly in a case like *Yahoo!* that implicates core First Amendment values under the U.S. Constitution.[895] Indeed, U.S. government enforcement of the French judgment could trigger a separate First Amendment lawsuit.[896] Goldsmith, however, moves too far in the other direction, assuming that if the French court is unable to satisfy its judgment by acting against Yahoo!'s French assets no further action will be possible. In making such an assertion, Goldsmith assumes a rigidly formalist world of nation-state sovereignties whereby a judgment in one country will necessarily remain unrecognized elsewhere.

In contrast, a cosmopolitan pluralist conception acknowledges that norms articulated by a court in one country might well be recognized and adopted in another country depending on the logic of the jurisdictional assertion and the force of the norms.[897] At the same time, however, a com-

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http://www.sec.gov/Archives/edgar/data/1011006/0000912057-00-014598-d1.html.

[891] *See* Press Release, Yahoo! Inc., Yahoo! Reports Fourth Quarter, Year End 2000 Financial Results (Jan. 10, 2001), *at* http://docs.yahoo.com/docs/pr/4q00pr.html (stating that Yahoo! "remained committed to broadening its global footprint and maintaining a leadership position worldwide").

[892] Yahoo! 1999 Annual Report, *supra* note 890.

[893] *See* Yahoo! France License Agreement, art. 3 (Nov. 1, 1996), *in* Yahoo! Inc., 1997 Annual Report Form 10-K (filed with the SEC Mar. 30, 1997) (setting forth the terms of the licensing agreement between Yahoo! Inc. and Yahoo! France), http://www.sec.gov/Archives/edgar/data/1011006/0000912057-97-011353.txt.

[894] *See* T.G.I. Paris, May 22, 2000, http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm (describing Yahoo!'s practice of profiling and targeting French users).

[895] *See supra* Part II.D (recognizing that U.S. enforcement of the French order might raise First Amendment issues).

[896] *But see supra* note 305 (questioning whether mere enforcement of a foreign judgment is sufficient to be deemed state action under U.S. constitutional law).

[897] The enforcing court might also consider the extent to which the rendering court's judgment actually can be said to represent the voice of the "community" it claims to reflect.

munity-based conception of jurisdiction would require the original court to set forth a rationale for asserting community dominion over the case, a rationale that subsequently would be scrutinized by courts asked to enforce the judgment elsewhere.

Turning again to *Yahoo!*, under a cosmopolitan pluralist approach, a U.S. district court faced with the question of whether the French judgment was enforceable in the United States[898] should have paid greater attention to the various facts tying Yahoo! to France and rendering assertion of French community dominion reasonable. On the other hand, the U.S. court may have been correct in deciding that the judgment was unenforceable because First Amendment norms, a core component of the American constitutional order, would forbid U.S. enforcement. Such an enforceability question, however, is not as easy as the district court assumed. Indeed, in a cosmopolitan pluralist approach, the French court, by asserting jurisdiction and articulating a norm against neo-Nazi hate speech, would force an American court to grapple with the contested question of the degree to which hate speech, particularly speech that could be deemed an incitement[899] or a threat,[900] is necessarily protected by the First Amendment.[901] A U.S. court might also consider possible tensions between the First Amendment and many countries' interpretations of international human rights norms regarding hate speech.[902]

For example, a court's decision in country *A* might be roundly criticized by the executive or legislature in that country. Such displeasure could range from public denouncement, to a decision not to bring future legal actions based on the judgment, to an outright refusal to enforce the judgment. In such cases of interbranch conflict, an enforcing court in country *B* might consider these nonjudicial actions when assessing the authoritative force of the initial community's assertion of jurisdiction and its resolution of the dispute.

[898] *See supra* text accompanying note 104 (discussing the U.S. district court's decision not to enforce the French judgment against Yahoo! on First Amendment grounds).

[899] *See, e.g.*, Berhanu v. Metzger, 850 P.2d 373, 373-76 (Or. 1993) (upholding a jury finding that racist teachings of a white supremacist group, coupled with the paramilitary training of skinheads, was sufficient to impose vicarious liability on the group's leader in a civil wrongful death action following a murder committed by members of the group).

[900] *See, e.g.*, Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1088 (9th Cir. 2002) (en banc) (plurality opinion) (ruling, over the dissent of five judges, that actions of anti-abortion activist organizations in publicly disclosing in a suggestive website display the names and addresses of abortion providers constituted true "threats of force" and thus were not protected speech under the First Amendment).

[901] *See, e.g.*, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGAUGE 249-80 (1989) (arguing that certain threats and incitements should be deemed speech that *does* something rather than *says* something and should therefore fall outside a principle of free speech); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 35-38 (1993) (arguing that racist speech should not be protected under the First Amendment).

[902] *See, e.g.*, COMM'N TO STUDY GLOBAL NETWORKS & LOCAL VALUES, NAT'L

Thus, by employing a cosmopolitan pluralist conception of jurisdiction and judgment recognition, the U.S. court could first give some deference to the French assertion of community dominion and take seriously the fact that strict territoriality does not accurately capture the nature of community affiliation in today's world; and second consider the substantive norms articulated by the French court and weigh them against competing normative systems. Such an approach would recognize that the assertion of jurisdiction and the norms deriving therefrom are part of a fluid cosmopolitan system of multiple attachments and multiple norms. Moreover, the alernative approach—the assignment of a single jurisdictional membership to Yahoo! based on a formal territorial analysis—does not adequately capture the social meaning of jurisdiction and community definition.

Because the assertion of jurisdiction opens up space for articulating alternative norms, a more fluid conception of jurisdictional rules might also serve a democratizing function. For example, the Internet for many years was largely an American creation, and its architecture (both technical and legal) tended to embed American values such as free speech within it. *Yahoo!* raised the possibility that other countries might begin to challenge America's legal dominance by advancing alternative normative visions about the shape of online regulation.[903] If multiple communities are affected by online activity (and almost inevitably multiple communities *will* be affected), then giving the court systems of those communities greater latitude to weigh in on the best regulatory approach may be desirable. The French jurisdictional assertion therefore creates an opportunity for ongoing international debate about the appropriate rules for speech in online interaction. This debate is important (and might have long-term consequences)

RESEARCH COUNCIL, GLOBAL NETWORKS AND LOCAL VALUES: A COMPARATIVE LOOK AT GERMANY AND THE UNITED STATES 108-14 (2001) (comparing U.S. and German hate speech laws); Kevin Boyle, *Hate Speech: The United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 493-97 (2001) (describing the tension between First Amendment and international standards, particularly as embodied in the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, and the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195); Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INT'L L. 179, 182-214 (2001) (comparing various approaches to hate speech in Germany, the United States, and postconflict transitional societies); Wendy McAuliffe, *Europe Hopes to Outlaw Hate Speech Online*, CNET NEWS.COM (Nov. 12, 2001), *at* http://news.com.com/2100-1023-275708.html (describing the Council of Europe's Parliamentary Assembly's unanimous vote to draft a protocol defining and outlawing hate speech on computer networks).

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

even if in this particular instance a U.S. court decides not to enforce the French order.

The Canadian Human Rights Commission's recent decision ordering American resident Ernst Zündel to remove anti-Semitic hate speech from his California-based website provides a similar example of the way even possibly unenforceable decisions may nevertheless be important.[904] Indeed, the Commission's order explicitly acknowledged the difficulty of enforcement, but insisted that there was "a significant symbolic value in the public denunciation" of Zündel's actions and a "potential educative and ultimately larger preventative benefit [to be] achieved by open discussion of the principles" enunciated in its decision.[905] By refusing to dismiss the case on jurisdictional grounds, the Commission was able to articulate norms that might have persuasive value in Canada and elsewhere over time. And if a U.S. court subsequently were to refuse to enforce the order on First Amendment grounds (as in *Yahoo!*),[906] such a decision would likewise provide an opportunity for debate about both the most appropriate community to exercise dominion over Zündel and the most attractive normative stance with regard to Internet freedom of expression.

For this same reason, a cosmopolitan pluralist conception of jurisdiction might prompt rethinking about how best to handle lis pendens issues in the international context. Generally, if two parties to a suit each file complaints in different jurisdictions, the suit filed second in time is suspended until the first suit has reached a judgment, at which time the second case is dismissed altogether.[907] In a cosmopolitan understanding of jurisdiction, however, the prospect of multiple communities reaching varying decisions in the same dispute is not a problem; indeed, it might even foster greater norm development because other jurisdictions would need to determine which of the judgments to recognize.

One might think that foreign enforcement of judgments is more automatic than I have posited because of treaties that, for example, require enforcement of foreign countries' judgments or (in the criminal context) re-

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[904] *See* Citron v. Zündel (Canadian Human Rights Trib. Jan. 18, 2002), http://www.chrt-tcdp.gc.ca/decisions/docs/citron-e.htm (discussing the Canadian order that required Zündel to remove hate speech from his website).

[905] *Id.*

[906] For discussion of a federal district court's order declaring the French judgment in *Yahoo* unenforceable, partly because of First Amendment concerns, see *supra* text accompanying note 305.

[907] *See* Hague Conference on Private International Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, June 6-22, 2001, at art. 21, http://www.hcch.net/e/workprog/jdgm.html (discussing the Convention's procedural rules with regard to the enforcement of judgments for nation-states).

quire extradition of defendants in one country when wanted in another. However, local public policy exceptions to the enforcement of foreign judgments are relatively commonplace, especially when the foreign judgment flies in the face of the enforcing state's regulatory regime.[908] Even in the arbitration context, the principal treaty on the enforcement of arbitral awards also contains a public policy exception.[909] Thus, although as a practical matter the question of enforcement often will be automatic, on the most controversial questions the process of rhetorical persuasion I describe will be applicable.

Conceiving of jurisdiction in terms of community membership and dominion would not only lead to more explicit discourse regarding subsequent enforcement of judgments, but might change the outcome of the original court's jurisdictional analysis as well. For example, in a recent case brought in California, the plaintiffs alleged that they were subject to forced labor in the construction of an oil pipeline in Myanmar and sued the company allegedly responsible for the pipeline.[910] The Ninth Circuit dismissed the case for lack of jurisdiction because the defendant was a French corporation, despite the fact that the corporation was directly involved in the operations and decision making of a California-based subsidiary.[911] Had the court focused on community membership in a more comprehensive way, it might have pierced the parent-subsidiary relationship to consider enterprise liability, recognizing the importance of bringing the nominally French corporation within the dominion of California, particularly since the French corporation was conducting major business activities in California and the underlying substantive issues implicated international humanitarian norms.

Similarly, a focus on community membership might lead us to rethink the scores of cases in which American courts have dismissed, on forum non

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[908] *See, e.g.*, Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 664-65 (N.Y. Sup. Ct. 1992) (declining to enforce an English money judgment for libel against a newspaper whose activities would have been protected by the First Amendment in the United States). *See generally* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 35-42 (2d ed. 1996) (examining lawsuits involving foreign parties in U.S. courts).

[909] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 5, § 2(b), 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 42 (authorizing nonenforcement if enforcement would be contrary to the public policy of the enforcing state); *id.* § 1(b) (authorizing nonenforcement if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"); *see also* Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141 (2d Cir. 1992) (invoking Article 5, Section 1(b) to deny enforcement of an arbitral award made by the U.S.-Iran Claims Tribunal).

[910] Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001).

[911] *Id.* For a discussion of *Unocal*, focusing on the law of corporate groups, see Blumberg, *supra* note 406, at 498-99.

conveniens grounds, human rights claims brought by foreign nationals against American corporations.[912] In these cases, courts have applied the so-called public and private interest factors that were laid out by the U.S. Supreme Court in the 1947 case of *Gulf Oil Corp. v. Gilbert*.[913] The difficulty with the *Gilbert* factors, however, is that they leave little, if any, room for argument that American society and American courts have a social responsibility to provide an American hearing for alleged misconduct of U.S.-based multinationals.[914] In contrast, a conception of jurisdiction based on community membership and responsibility would offer more space to consider such an argument.

A cosmopolitan pluralist approach to jurisdiction might encourage forum-shopping if plaintiffs have more jurisdictions available to hear their claims. As previously discussed, however, under the approach I suggest assertions of jurisdiction will not necessarily be more broad than under current jurisdictional rules,[915] particularly given recent trends toward an expansive, effects-based jurisdictional scheme.[916] Indeed, a court focusing on the defi-

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[912] *See* Blumberg, *supra* note 406, at 502 n.35 (collecting cases). For discussions of corporate responsibility to obey human rights norms, see generally Avery, *supra* note 729; Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

[913] 330 U.S. 501 (1947). *Gilbert*'s private interest factors are:

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

Id. at 508-09. In delineating the public interest factors, the court noted the following:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id.

[914] *Cf.* Blumberg, *supra* note 406, at 509 ("International human rights cases are tort cases arising in a foreign jurisdiction, and the private interest factors exert a near irresistable pressure for foreign trial where the events took place.").

[915] *See supra* text accompanying notes 803–04 (discussing possible limitations on jurisdictional assertions under a cosmopolitan pluralist approach).

[916] *See supra* text accompanying notes 432-43 (identifying cases that permit effects-based jurisdiction and discussing application of the effects test).

nition of community might *refuse* jurisdiction in situations where an inquiry analyzing solely the contacts with, effects on, or interests of a geographical territory would counsel in favor of asserting jurisdiction. And because a cosmopolitan pluralist vision requires that the plaintiff establish a connection with the community where the court sits,[917] the ability to pick a forum arbitrarily is limited. Moreover, the idea that forum-shopping is necessarily such an evil that it provides a sufficient reason, in and of itself, to choose one jurisdictional scheme over another deserves closer scrutiny. As Larry Kramer has pointed out, "[t]he assumption that it is unfair to allow plaintiffs to [forum-shop] presupposes a 'correct' or 'fair' baseline defining how often the plaintiff's choice ought to prevail."[918] After all, if it is legitimate to have different jurisdictional entities applying distinct bodies of law, why should the law *not* vary depending on where a suit is brought, and why is it necessarily unfair to give plaintiffs this choice? Brainerd Currie, arguably the most influential American choice-of-law theorist, downplayed the importance of forum-shopping, particularly if preventing it requires sacrificing substantive policies.[919] And even if one believes forum-shopping is a problem, it is difficult to evaluate this concern without empirical data. For example, other factors beyond choices about substantive norms may well have a strong impact on forum choice. If most plaintiffs consult a local attorney, how many attorneys are willing or able to file suit and litigate in a foreign jurisdiction? How might the existence (or nonexistence) of regular referral arrangements affect this choice? Thus, on both normative and empirical grounds there is at least some cause to question the reflexive concern about excessive forum-shopping without further exploration of the extent of the problem.[920]

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[917] *See supra* text accompanying notes 797–98 (discussing the need to focus on the plaintiff's connections to the forum).

[918] Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 313 n.117 (1990).

[919] *See* Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 128, 169 (1963) (suggesting that, at least in some circumstances, forum-shopping is "positively commendable" and arguing that "we need to take a harder and closer look at the ideal of uniformity and the condemnation of forum-shopping"). Currie has, of course, been criticized for emphasizing the policies underlying substantive laws to the exclusion of more general choice-of-law policies, such as the need to minimize forum-shopping and enhance uniformity and predictability. *See, e.g.*, Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 502-07 (1960) (criticizing Currie's approach on the grounds that it multiplies the number of potential conflict situations and does not provide an adequate framework for addressing such conflicts); Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975) (arguing that Currie's approach to multistate situations is "simplistic").

[920] Larry Kramer has argued that assertions of unfairness regarding plaintiffs' power to shop for a forum "rest[] on an unarticulated—and unexplained—assumption about what each

Finally, the mere assertion of jurisdiction will not lead to a nightmarish world of multiple liability around the globe because enforcement will remain a contested issue. Just because a tribunal asserts jurisdiction does not mean that its judgment will be recognized and enforced elsewhere. But whereas Goldsmith assumes that a judgment issued by one sovereign will necessarily be *un*enforceable elsewhere, a cosmopolitan pluralist approach requires that the enforcing court scrutinize the original judgment both for its assertion of community dominion and for its substantive norms. Therefore, if the decision persuades other communities, it will be entitled to recognition. And even if it fails to persuade in the particular case, a cosmopolitan pluralist conception explicitly contemplates the possibility that the norm, through its rhetorical force, may subsequently achieve wider acceptance and enforcement. To use the *Yahoo!* example again, the French court must persuade the American court both that the affiliations between Yahoo! and France and the needs of French citizens justify the assertion of French community dominion over Yahoo!, and that, in this instance, the norms embodied in the First Amendment must yield to concerns about hate speech and neo-Nazi propaganda or memorabilia. What neither court could do in a cosmopolitan pluralist understanding, however, is simply throw out the case for lack of jurisdiction. Eschewing the formalistic application of mechanical jurisdictional rules ensures that substantive discussion of both community definition and evolving substantive norms will always take place.[921]

3. International Human Rights

Turning to international law, we can see the cosmopolitan pluralist approach similarly operating to encourage development of customary norms that transcend nation-state boundaries. Replacing the rigidly statist view of

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party is entitled to expect in a 'fair' system." Kramer, *supra* note 918, at 313-14 n.117. He "share[s] the intuition that it is 'unfair' if plaintiffs can always choose among the potentially applicable laws," but is "loath to rely on an intuition that [he] cannot satisfactorily defend simply because it is widely shared." *Id.* at 314 n.117. Of course, to the extent forum-shopping creates uncertainty, parties may attempt to contract around the problem through forum-selection and choice-of-law clauses (at least in contractually based cases), or may contractually choose nonlitigation alternatives. These "solutions" depend in part, however, on the law applied to the contractual provisions. *See supra* note 55 and accompanying text (recognizing that contractual agreements might not be enforceable due to the invocation of public policies concerning parties' unequal bargaining power).

[921] Courts are not the only forum for such debate, of course, but adjudicatory processes form a useful site for discourse because they are premised on the idea of multivocal conversation and the evolution of norms. *See* Berman, *Transformative Potential of Law*, *supra* note 503, at 171-73 (arguing that courts (and legal discourse more generally) provide a forum for dialogue among multiple narratives). A detailed review of the longstanding debates about the institutional benefits and limitations of courts, however, is beyond the scope of this Article.

international law, a cosmopolitan pluralist approach recognizes multiple interconnections among shifting communities acting transnationally.

The *Pinochet* case provides a useful example of the way in which a cosmopolitan pluralist model can operate. A Spanish judge asserted jurisdiction over the former Chilean dictator based on Spain's ties to complainants affected by Pinochet's alleged human rights abuses and on a general principle of accountability for gross violations of human rights.[922] This assertion of jurisdiction, however—like the Canadian Human Rights Commission's decision about Ernst Zündel[923]—carried with it no enforcement power unless the Spanish judge could rhetorically persuade other countries (in this case Great Britain, where Pinochet was undergoing medical treatment) to recognize the jurisdictional assertion and extradite Pinochet.[924] Although Pinochet ultimately was not extradited and was instead returned to Chile, Spain's assertion of jurisdiction (and the formal recognition given to the jurisdictional assertion by the British House of Lords) has created an important shift in international human rights norms, reinforcing the idea that even heads of state can be held accountable for acts perpetrated in the past.[925]

Moreover, the assertion of jurisdiction over Pinochet strengthened the hands of human rights advocates within Chile itself and provided the impetus for a movement to strip Pinochet of his immunity there and begin prosecution of him locally.[926] Although that effort may be stymied because of Pinochet's failing health,[927] the case against Pinochet appears to have stimulated a new round of human rights enforcement actions in South America. For example, in Argentina, one judge has recently authorized the arrest of former military dictator Leopoldo Fortunato Galtieri after ruling that two

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[922] *See supra* text accompanying notes 186–88 (discussing the assertion of jurisdiction over Pinochet).

[923] *See supra* notes 904-05 and accompanying text (describing the Commission's refusal to dismiss the case on jurisdictional grounds).

[924] Although the extradition request was made pursuant to an international treaty, *see supra* note 186 (noting that the British House of Lords found jurisdiction based on the International Convention Against Torture), extradition agreements generally contain public policy exceptions that often come into play in controversial cases such as this one. Thus, the extradition in the *Pinochet* case was certainly not automatic, and rhetorical persuasion was necessary.

[925] *See supra* text accompanying notes 185-209 (describing legal developments that have eroded the assumption that heads of state are immune from suit).

[926] *See Pinochet Said Serene About Ruling Stripping Him of Immunity*, DEUTSCHE PRESSE-AGENTUR, June 13, 2002, LEXIS, DPA File [hereinafter *Pinochet Serene*] (reporting on the Chilean Supreme Court's ruling that Pinochet should be stripped of lifetime immunity).

[927] *See* Heather Walsh, *Chilean Court Upholds Ruling that Pinochet Unfit to Stand Trial*, BLOOMBERG NEWS, July 1, 2002, LEXIS, Allbbn File ("Chile's Supreme Court upheld a ruling that blocked former dictator Augusto Pinochet from being tried on charges he covered up army killings, saying he was mentally unfit to face prosecution.").

amnesty laws protecting former military officers from prosecution were unconstitutional.[928] Meanwhile, another Argentinian judge has finally convinced Chilean lower courts to allow her to interrogate five former members of Pinochet's secret police in an investigation of the murder of a former Chilean general and his wife in Argentina in 1974.[929]

These activities demonstrate the rhetorical power of a jurisdictional assertion even when literal enforcement power is lacking. Indeed, a cosmopolitan pluralist approach to jurisdiction allows us to divorce the assertion of jurisdiction and the subsequent articulation of norms from the pure power of the sovereign state. Because the international system is fluid and dependent on changes in custom, which in turn harden into law over time, it is essential to maintain a jurisdictional model that can account for such alternative repositories of power and influence.

A corollary to the assertion of jurisdiction is the assignment of jurisdictional membership. While there have always been confusions about how to classify and regulate people who feel loyalties to multiple communities, such questions are even more urgent given the globalization of communication and transportation, as well as growing economic integration across territorial borders. These phenomena make it clearer than ever that law attaches labels of citizenship and other types of community membership without sufficient consideration for the ways in which people actually experience community.

Nowhere are these concerns more pressing today than in the assertion of jurisdiction and assignment of community membership with regard to those accused of aiding Al Qaeda terrorists. Indeed, much of the debate about the appropriate treatment of accused terrorists springs from the fact that the U.S. government has accorded itself unilateral authority to assign community membership to detainees and then to act based on the legal consequences of that membership. For example, Yasser Hamdi is a U.S. citizen[930] who contends that he has been held since the fall of 2001 in military detention without any formal charges and without being provided any of the rights of citizens.[931] To date he has not even been permitted to meet with an

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[928] *See Galtieri Arrested in Argentina on Human Rights Abuse Charges*, DEUTSCHE PRESSE-AGENTUR, July 11, 2002, LEXIS, DPA File (reporting Galtieri's arrest).

[929] *See Pinochet Serene*, *supra* note 926 (noting that approval of Judge Servini's interrogation of former secret police is pending in an appeals court).

[930] *See* Hamdi v. Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002) (indicating that Hamdi was born in Louisiana).

[931] *See id.* at 283 (recounting Hamdi's argument that judicial review is necessary to determine whether he "could be detained indefinitely without charges or counsel on the government's say-so").

attorney.[932] Civil libertarians and others urge that although Hamdi is of Saudi Arabian ethnicity, he is an American citizen under the Fourteenth Amendment because he was born within U.S. territorial boundaries.[933] Therefore, they argue, he is entitled, as a citizen (and thus, a member of the American community), to the full panoply of constitutional rights accorded other criminal suspects.[934] In response, the government essentially argues that Hamdi has given up his American citizenship and therefore is not entitled to any of the rights American citizens enjoy.[935]

In support of this sort of detention power (as well as the power to try accused Al Qaeda operatives before military commissions without any right of appeal to an independent judicial body), government officials cite the U.S. Supreme Court's approval of a military commission's power to try a group of submariners who had fought for Germany during World War II.[936] Although one of those defendants was an American citizen, the Court permitted the use of a military commission because "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction"[937] attempt to attack the United States are no longer entitled to the civil liberties that community membership in the United States entails.[938] The problem, of course, is determining at what point (and based on what evidence) it can be said that someone like Hamdi has "associated" himself with Al Qaeda or the Taliban such that his citizenship rights can be stripped away.

A cosmopolitan pluralist model of jurisdictional affiliation would rec-

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[932] *See id.* at 284 (reversing and remanding the district court's order permitting Hamdi access to counsel).

[933] *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States . . . are citizens of the United States . . . .").

[934] *See, e.g.*, Editorial, *Justice Detained*, N.Y. TIMES, June 10, 2002, at A24 ("The Bush administration's post-Sept. 11 assault on civil liberties reached a new low recently when the Justice Department argued in court that an American-born detainee, who may be a United States citizen, should not be allowed to talk to a lawyer.").

[935] *See* Katharine Q. Seelye, *Lawyer Asks for Access to Prisoner Born in U.S.*, N.Y. TIMES, June 21, 2002, at A16 ("In a broad assertion of presidential authority that could ultimately be tested in the Supreme Court, the government said in court papers on Wednesday that anyone it designated an 'enemy combatant' did not have to be provided the legal protections accorded most American citizens.").

[936] *See Ex parte* Quirin, 317 U.S. 1, 45 (1942) (concluding that "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission" and that such offenders "not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury").

[937] *Id.* at 37-38.

[938] *See, e.g.*, *id.* at 44 (stating that trying "citizen offenders against the law of war" without a jury is not repugnant to Article III, Section 2 of the Constitution).

ognize that all people have multiple attachments and that sympathy (or even some form of association) with groups that the U.S. government opposes cannot be enough to strip an American of his community membership and the rights that accompany such membership. Thus, although some news accounts about Hamdi refer to him as an "American-born Saudi,"[939] a cosmopolitan pluralist approach recognizes that community membership is a fluid process and that the community designations surrounding the hyphen can just as easily be reversed, rendering Hamdi a Saudi Arabian-American. Moreover, in light of the Fourteenth Amendment's citizenship command, this conception of multiple community ties (United States by birth, Saudi Arabia by ethnicity) is both completely appropriate and constitutionally embedded.

In addition, by de-emphasizing the importance of territorial borders, a cosmopolitan pluralist conception would not permit the U.S. military to evade constitutional scrutiny merely by locating a detention facility offshore in Guantanamo Bay.[940] Just as a community-based approach to offshore website regulation or offshore tax enforcement would look beyond formal territorial boundaries and instead consider the substantive ties to a community, so too an offshore detention center controlled and operated by the U.S. government is properly considered an arm of the U.S. community and should be subject to the community's norms (including the U.S. Constitution).[941] While noncitizen detainees who have never set foot in the United States normally might not have sufficient community ties to invoke the aid

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[939] *See, e.g.*, *Saudi Kept from Lawyers*, N.Y. TIMES, June 14, 2002, at A26 ("A federal appeals court in Richmond has again blocked a meeting between an American-born Saudi captured in Afghanistan and lawyers seeking to represent him.").

[940] *Cf.* Rasul v. Bush, 215 F. Supp. 2d 55, 72 (D.D.C. 2002) (ruling that federal courts have no jurisdiction over claims based on military detentions in Guantanamo Bay).

[941] An important statement of this principle can be found in *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. Berlin 1979). In that case, a foreign national accused of hijacking a Polish aircraft abroad was tried under German substantive law in Berlin in a court created by the United States. The U.S. court held that, despite the use of German substantive law, the foreign national was entitled to jury trial as a matter of U.S. constitutional right because the U.S. court must act in accordance with the Constitution even when situated beyond U.S. territorial borders. *Id.* at 247-51. According to the court, "[i]t is a first principle of American life—not only life at home but life abroad—that everything American public officials do is governed by, measured against, and must be authorized by the United States Constitution." *Id.* at 244; *see also* DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 307-08 (D.C. Cir. 1989) (Ginsburg, R.B., J., dissenting in part) ("[J]ust as our flag carries its message . . . both at home and abroad, so does our Constitution and the values it expresses." (alteration in original) (citation and internal quotation marks omitted)); *cf.* United States v. Balsys, 524 U.S. 666, 701-02 (1998) (Ginsburg, J., dissenting) (expressing the view that "the Fifth Amendment privilege against self-incrimination prescribes a rule of conduct generally to be followed by our Nation's officialdom" and "should command the respect of United States interrogators, whether the prosecution reasonably feared by the examinee is domestic or foreign").

of U.S. courts, the fact that the U.S. government has confined them in military detention camps should, under a community-based understanding of jurisdiction, bring even these noncitizens within federal court jurisdiction.

Kenneth Anderson has recently used a community-based approach to argue that the detainees should be classified not as "criminals," but as "enemies" who should be deemed external to the U.S. community and therefore external to the protections of U.S. law.[942] Accordingly, Anderson argues, military commissions are the appropriate forum for bringing such detainees to justice. Aside from the many moral or policy reasons for rejecting Anderson's argument,[943] a cosmopolitan pluralist approach to jurisdiction, even assuming the detainees are deemed external to the U.S. community, would still accord the detainees membership in some other matrix of community affiliations, including the community of international justice. Therefore, the appropriate forum for trying such external enemies would be an international tribunal, not a U.S. military one. In addition, permitting the executive branch unilaterally to determine who is within the domestic community and who is an enemy serves to deprive even community members of their membership rights because they will always be at risk that their community membership may be extinguished at the whim of the President, as the *Hamdi* case illustrates. As discussed above, in a non-territorial approach to legal norms, U.S. constitutional requirements follow U.S. governmental actors wherever they go; thus, a military commission proceeding, even if held outside U.S. territorial borders, must be subject to constitutional protections and nonmilitary judicial oversight.

Finally, though one can see the President's proposed use of military commissions[944] as an example of jurisdiction creation of the sort contemplated in a cosmopolitan pluralist framework, there is, as always, the question of recognition. The long-term willingness of others to accept such a tribunal depends on its ability to convince others of the legitimacy of its norms and procedures. Indeed, for better or worse, we see in the military

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[942] *See* Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 609-11 (2002) (arguing that U.S. district courts, which treat crime as "a *deviation from* domestic legal order," are ill-suited to handle those who are not criminals within this order, but enemies of it).

[943] *See, e.g.*, Anne-Marie Slaughter, *Beware the Trumpets of War: A Response to Kenneth Anderson*, 25 HARV. J.L. & PUB. POL'Y 965, 966 (2002) (arguing that "Anderson would turn back the clock on one of the most important legal developments over the past half-century—the individualization of international law").

[944] *See* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833, § 1(e)-(f) (Nov. 16, 2001) (providing for trials before military tribunals without many procedural protections guaranteed by the U.S. Constitution or international law).

commissions another example of the way in which assertions of jurisdiction open a space for debate. In this case, the creation of military jurisdiction has become a flashpoint of dispute.[945] The tribunals face serious attacks on their legitimacy under both domestic constitutional[946] and international[947] law. In addition, it remains unclear whether other countries will be willing to extradite suspects given the limited due process protections of the tribunal and the possibility of an eventual death sentence.[948] Moreover, we are likely to see communities—including nation-states, religious organizations, transnational NGOs, and others—disagree with the proposed commissions and use various forms of diplomatic pressure, as well as transnational lobbying and activism efforts, to resist this jurisdictional assertion. Indeed, the administration has already qualified the original order authorizing the commissions,[949] and these qualifications appear aimed at responding to some of the criticisms already leveled. Ultimately, even a country as militarily pow-

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[945] *Compare* Dickinson, *supra* note 521 (arguing that military commissions violate U.S. and international law, whereas multilateral legal process advances U.S. strategic interests, and suggesting various options for introducing an international component into the accountability process), Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002) (arguing against the use of military commissions and advocating U.S. domestic criminal trials for terrorist acts committed on U.S. soil), *and* Slaughter, *supra* note 943 (advocating the use of international tribunals), *with* Anderson, *supra* note 942 (defending military commissions' authority to try detainees at Guantanamo Bay Naval Base), Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002) (defending the constitutionality of the President's authority to establish military tribunals with jurisdiction over terrorists involved in the September 11 attacks), *and* Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328 (2002) (arguing that the jurisdiction of military commissions over Al Qaeda terrorists is valid).

[946] *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that the President has no constitutional authority to deny constitutional rights to persons facing military tribunals when no immediate threats to the nation or the Constitution are present).

[947] *See, e.g.*, Koh, *supra* note 945, at 338-39 (indicating that the tribunals violate the International Covenant on Civil and Political Rights, *supra* note 902, and the Third Geneva Convention, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135). Although the regulations for the proposed commissions promulgated by the Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002) [hereinafter Military Commission Order], http://www.defenselink.mil/news/mar2002/d2002o32lord.pdf, address some of the objections under U.S. constitutional and international law, on further examination, the "rights" conveyed by the DOD regulations are not enforceable rights at all, *see, e.g.*, Dickinson, *supra* note 521, at 1416-18 (describing the inadequacy of the regulations).

[948] Dickinson, *supra* note 521, at 1450-52.

[949] *See* Anderson, *supra* note 942, at 592-93 ("[T]he Bush Administration has moved to mollify opponents by promising additional regulations outlining the actual procedures for the military commissions (to be drafted by the General Counsel of the Department of Defense)."); *see also* Military Commission Order, *supra* note 947 (prescribing procedures for trials before military commissions).

erful as the United States may find itself stymied by coordinated resistance in the development of norms (as the United States encountered when it attempted to insist on permanent immunity for U.S. peacekeepers before the new International Criminal Court).[950] The point is that the mere assertion of jurisdiction does not itself make the assertion legitimate—the body asserting jurisdiction always must convince others.

C. *The Convergence of Cyberspace Law and International Law in the Development of Transnational Common Law Norms*

As indicated by the conceptual tie between offshore websites and offshore military commissions, a cosmopolitan pluralist conception of jurisdiction allows us to see ways in which legal issues in cyberspace and international law are converging. Since 1995, cyberspace law theorists have considered the possibility that the rise of online interaction could pave the way for a revival of lex mercatoria, wherein thousands of individual transactions slowly harden into a form of customary law that eventually is adopted as state sovereign law. Perhaps the most detailed articulation of this approach is Graeme Dinwoodie's application of the substantive law method to questions of choice of law.[951] Dinwoodie explicitly argues for lex mercatoria,[952] suggesting that the judicial role in multistate cases should permit common law development just as in domestic cases.[953] By definition, a dispute involving multiple communities means that multiple norms will be available to apply. Instead of using mechanical choice-of-law rules to choose one set of norms or the other, Dinwoodie argues that courts should be free to develop an appropriate rule from an amalgam of these norms.

Ironically, this "bottom-up" conception of law formation, embodied in lex mercatoria, was the pre-Westphalian international law. Although a more statist conception has reigned in the centuries since Westphalia, international law is increasingly adopting a weakened conception of state prerogatives. As discussed previously, universal and transnational jurisdiction,

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[950] *See, e.g.*, Serge Schmemann, *U.S. Peacekeepers Given Year's Immunity from New Court*, N.Y. TIMES, July 13, 2002, at A3 ("The dispute evolved, however, into the first public test of wills between the administration of a lone superpower generally suspicious of multilateral institutions and a galaxy of smaller nations increasingly looking to such organizations."); *see also id.* (quoting a European diplomatic saying that "[t]he United States learned it can't shout loud and make everyone move").

[951] *See supra* Part II.G (referring to the development of a body of transnational law to resolve disputes according to customary norms rather than positive law).

[952] *See supra* note 359 (describing lex mercatoria as a hybrid practice governing transnational merchants).

[953] *See* Dinwoodie, *supra* note 323, at 548 (arguing that a middle ground between the laws of different nations should be sought through common law).

though controversial, have been invoked in the area of human rights law.[954] In addition, many individual countries have shown their willingness to relinquish aspects of their sovereign adjudicatory authority to transnational or international bodies, whether it be an international court, such as the European Court of Justice, or an administrative body, such as the WTO. Meanwhile, private parties engaged in transnational business activity often eschew the law of either party's nation-state and instead opt for the norms of the international business community embodied in the UN Convention on Contracts for the International Sale of Goods.[955] Although territoriality and nation-state sovereignty are not likely to disappear in the foreseeable future, the traditional image of the state may be changing. Agencies of the state are now likely to be linked in networks to private actors as well as international or transnational agencies. Mixed coalitions of governments, non-governmental agencies, and (sometimes) transnational corporations will help redefine the role of government. In short, global networks will become more complex. "[G]overnance will require extensive networked cooperation, and hierarchical rules are likely to become less effective."[956] In this altered framework, the old distinction between public and private international law is rapidly eroding.

Thus, as cyberlaw scholars increasingly recognize the regulatory role of sovereign states, and international law increasingly recognizes the importance of non-state entities' forging customary norms, cyberlaw's traditional focus on bottom-up norm creation and international law's traditional focus on top-down norms articulated by sovereign states are both weakening. Moreover, it seems to me that the two fields are converging in the domain of jurisdiction. And this convergence is driven by the development of a transnational common law system of lawmaking based on cosmopolitan pluralist principles.

Such a transnational common law could take a number of different forms. I have already noted Graeme Dinwoodie's proposal that domestic courts explicitly look to international norms in interpreting the law governing multistate disputes.[957] Anne-Marie Slaughter has observed similar phe-

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[954] *See supra* Part I.I (discussing expansive assertions of jurisdiction in human rights litigation).

[955] Apr. 11, 1980, 1489 U.N.T.S. 3.

[956] Robert O. Keohane & Joseph S. Nye Jr., *Introduction*, *in* GOVERNANCE IN A GLOBALIZING WORLD, *supra* note 704, at 1, 19.

[957] *Supra* Part II.G. Dinwoodie's application of the substantive law method, like a cosmopolitan pluralist conception of jurisdiction, also rests on the idea of multiple overlapping spheres of prescriptive authority. *See* Dinwoodie, *supra* note 323, at 551 n.252 (claiming that no single country's laws have exclusive application in international contexts where multiple countries' laws speak to a substantive legal issue).

nomena occurring somewhat less explicitly in the development of what she calls "judicial globalization."[958] These transnational court interactions include the emergence of "judicial comity" in transnational litigation, nascent efforts at constitutional cross-fertilization, and increasing face-to-face meetings among judges around the world.[959]

Although comity has existed as an international law concept for a long time, judicial comity reflects deference not simply to foreign law or foreign national interests, but to foreign courts as well, accompanied by a recognition that foreign courts are "co-equals in the global task of judging."[960] We can see the roots of this type of judicial comity in the United States as far back as Justice Blackmun's separate opinion in the 1987 case *Société Nationale Industrielle Aérospatiale v. United States District Court*.[961] In that opinion, Justice Blackmun articulated a strong form of comity "under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill."[962] In this vision, judges owe their allegiance to an international system of norms, not simply to their own domestic law.[963] And when there is a conflict among multiple norms, "a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws."[964] Likewise, in a more recent case, the Second Circuit ruled that a U.S. discovery statute "contemplates international cooperation, and such cooperation presupposes an on-going dialogue between [sic] the adjudicative bodies of the world community."[965] This statement is distinctive both because its focus on "adjudicative bodies of the world community" seems to transcend individual territorial courts and because it emphasizes dialogue among courts rather than mere deference. Thus, we see a move "from passive ac-

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[958] *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000) (describing a "diverse and messy process of judicial interactions" involving multiple nations).

[959] *See id.* at 1112-23 (describing "horizontal" relations among national courts as examples of judicial globalization).

[960] *Id.* at 1112-13.

[961] 482 U.S. 522, 547 (1987).

[962] *Id.* at 555 (Blackmun, J., concurring in part and dissenting in part).

[963] As then-Chief Judge Breyer has written, the appropriate inquiry for judges is how to "help the world's legal systems work together, in harmony, rather than at cross purposes." Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 950 (1st Cir. 1991).

[964] *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 555; *see also* Dinwoodie, *supra* note 323, at 551 n.252 ("[C]hoice of law methods fail to recognize . . . that the limits of prescriptive jurisdiction should be set by a claim to have some but not exclusive application to a set of facts. The substantive law method, by giving prescriptive effect to both laws, permits this normative limitation to be recognized." (parentheses omitted)).

[965] Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1101 (2d Cir. 1995).

ceptance to active interaction, from negative comity to positive comity."[966] Moreover, there is at least some evidence that the idea of such dialogue is not simply a rhetorical flourish, but a practical reality. For example, in bankruptcy law, judges increasingly communicate directly with each other to resolve transnational insolvency issues, even in the absence of international treaties or guidelines.[967] Employing such judicial comity, either or both courts in *Yahoo!* might have sought to construct a rule that attempted to balance free speech concerns and emerging international human rights norms. Such a rule then might have helped frame future judicial, legislative, and non-governmental regulatory activities on similar issues around the world.[968]

Legal cross-fertilization also is not a new phenomenon (particularly between imperial powers and their colonies),[969] but in the past decade we have seen an increase in the willingness of courts (especially those outside the United States) to use foreign materials in interpreting constitutional norms. For example, as one British scholar has noted, "[s]everal senior members of

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[966] Slaughter, *supra* note 958, at 1114.

[967] For example, in simultaneous insolvency proceedings involving Maxwell Communication Corporation, judges in both the United States and Great Britain appointed administrators who developed a set of joint procedures, which were then memorialized in a "Protocol" approved by both courts. *See* Maxwell Communication Corp. v. Barclays Bank, 170 B.R. 800, 802 (Bankr. S.D.N.Y. 1994) ("The joint administrators in England and the examiner in New York, subject to the jurisdiction of both courts, have carried out the administration . . . in unprecedented cooperation with each other."); *see also* Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037, 1073-84 (1997) (describing the communications between U.S. and British courts during *Maxwell Communication*). *See generally* Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457, 461 (1991) (claiming that "nearly unanimous agreement" exists with regard to resolving multinational financial disputes in a cooperative, central forum). Of course, transjudicial relations will not always be so solicitous. *See, e.g.*, Slaughter, *supra* note 958, at 1114-15 (providing examples of conflicts between judges from different jurisdictions). Nevertheless, even if judges spar over governing procedures and norms, the resulting judicial dialogue creates a useful forum for developing transnational common law over time.

[968] Because state-sanctioned courts are, by definition, creatures of their own nation-state, one might think that any application of external norms is illegitimate. However, if (as in a contractarian model) courts derive their legitimacy ultimately from the people, it is important to recognize that "the people" are cosmopolitan citizens with multiple overlapping affiliations, many of which extend beyond the nation-state. In addition, at least in the United States, international law is the foundation of the American common law. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and . . . resort must be had to the customs and usages of civilized nations . . . .").

[969] *See* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537-41 (1988) (describing the way in which the legal ideas expounded in the U.S. Constitution influenced the framing of the French Declaration of the Rights of Man and of the Citizen, ultimately spreading to other continents through imperial rule).

the British judiciary have recently suggested that they are . . . increasingly prepared to accord persuasive authority to the constitutional values of other democratic nations when dealing with ambiguous statutory or common law provisions which impact upon civil liberties issues."[970] Even some of the current U.S. Supreme Court Justices have stated their willingness to consider rulings from abroad as persuasive authority.[971] Indeed, the recent case of *Atkins v. Virginia*, in which the Court declared the execution of mentally retarded people to be unconstitutional,[972] provides an illustration of the way in which transnational norms can develop and then harden into state law. In 1994, Justice Blackmun famously dissented from the denial of certiorari in a capital case, flatly declaring that the "death penalty experiment has failed" and proclaiming that he would no longer "tinker with the machinery of death."[973] Although no other Justice joined Blackmun's opinion, the language of Blackmun's dissent was subsequently used as persuasive authority by the South African Constitutional Court in its decision barring capital punishment.[974] In turn, the U.S. Supreme Court's *Atkins* decision relied in part upon a growing international consensus against the death penalty, a consensus that included the South African Constitutional Court decision.[975]

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[970] Ian Loveland, *The Criminalization of Racist Violence?*, *in* A SPECIAL RELATIONSHIP? AMERICAN INFLUENCES ON PUBLIC LAW IN THE UK 253, 275 (Ian Loveland ed., 1995).

[971] *See, e.g.*, Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, FED. LAW., Sept. 1998, at 20, 20 ("I know from my experience at the Supreme Court that we often have a lot to learn from other jurisdictions."); Elizabeth Greathouse, *Justices See Joint Issues with the EU*, WASH. POST, July 9, 1998, at A24 (quoting Justice O'Connor as expressing her willingness to consult the decisions of the European Court of Justice "and perhaps use them and cite them in future decisions"); *id.* (quoting Justice Breyer's statement that "[l]awyers in America may cite an EU ruling to our court to further a point and this increases the cross-fertilization of U.S.-EU legal ideas"). Among lower court judges, Judge Calabresi has perhaps led the way toward embracing foreign authority, observing that the United States no longer holds a "monopoly on constitutional judicial review" and arguing that "[w]ise parents do not hesitate to learn from their children." United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995).

[972] 122 S. Ct. 2242, 2252 (2002).

[973] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

[974] State v. Makwanyane, 1995 (3) SALR 391, 422 (CC) (referring to "the difficulties experienced in the United States in the designing of a system [of capital punishment] that avoided arbitrariness *and* delays" and citing *Callins*); *see also id.* at 456 (Ackermann, J.) (accepting and endorsing the views of Justice Blackmun); *id.* at 471 (Kentridge, Acting J.) (citing Justice Blackmun's dissent in *Callins* as authority); *id.* at 491 (Mahomed, J.) (agreeing with Justice Blackmun that arbitrariness is "inherent in the process").

[975] *See Atkins*, 122 S. Ct. at 2249 n.21 ("Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (citing Brief of Amicus Curiae European Union at 4, McCarver v. North Carolina, 533 U.S. 975 (2001) (No. 00-8727) (acknowledging the South African Constitutional Court ruling), 2001 WL 648609, at *8 n.9)).

This increasing willingness 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 for a wide variety of "rule of law" programs that include judicial seminars, training programs, and educational materials have provided fora for interaction.[976] In addition, judges themselves have organized meetings with their counterparts around the world. For example, in recent years several delegations of Supreme Court Justices have met with top jurists in France, Germany, England, and India.[977] In 1998, Justices O'Connor, Kennedy, Ginsburg, and Breyer traveled to Brussels to meet with judges from the European Court of Justice (ECJ),[978] and in 2000, several members of the ECJ visited the Supreme Court Justices in Washington.[979] Elsewhere, judges from European constitutional courts have met every two to three years since the 1980s,[980] Worldwide Common Law Judiciary Conferences have been held since 1995,[981] and formal transnational organizations of judges have been established in the Americas[982] and in the Baltics.[983] Less formal meetings have also been convened by various aid agencies, NGOs, and law schools.[984] Additionally, Chief Justice Rehnquist and the U.S. Judicial Conference have created a new Committee on International Judicial Relations, the stated 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 ex-

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[976] *See, e.g.*, Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L ECON. L. 179, 184-93 (1999) (surveying governmental and non-governmental rule of law programs); Joseph P. Nadeau, *Judges Abroad, Algeria 2001: Quest for Democracy*, JUDGES J., Summer 2001, at 38, 38-40 (describing one judge's participation in an advocacy training program held in Algiers and sponsored by the U.S. Agency for International Development and several foundations and NGOs).

[977] Slaughter, *supra* note 958, at 1120.

[978] *Id.*

[979] *Id.*

[980] *Id.*

[981] *Judges from Ten Common-Law Countries Meet in Washington for Five-Day Conference*, INT'L JUD. OBSERVER, June 1997, at 1, 1; *Justices, Judges from Common Law Countries Meet in Williamsburg and Washington*, INT'L JUD. OBSERVER, Sept. 1995, at 1, 1.

[982] *See* Slaughter, *supra* note 958, at 1120 (describing the creation and mission of the Organization of Supreme Courts of the Americas).

[983] *See* Hon. Rait Maruste, *Estonia: Leading Central Europe in Judicial Reform*, INT'L JUD. OBSERVER, Jan. 1996, at 2, 3 ("Estonian judges have joined their colleagues in Latvia and Lithuania to form the Association of Judges of the Baltic States . . . .").

[984] *See* Slaughter, *supra* note 958, at 1121-22 (noting the international outreach efforts of various NGOs and law schools).

pansion of the rule of law and administration of justice."[985] Such efforts to promote awareness of the judiciary around the world may help judges see their work as part of a common transnational enterprise.

These forms of "judicial globalization" do not exhaust the ways in which transnational norms might arise. For example, a cosmopolitan pluralist approach to jurisdiction might attempt to accommodate multiple community affiliations, both in cyberspace and in international law more generally, by attempting to insure that the legal decision makers asked to resolve a conflict always include members of the various normative communities represented in that conflict. Indeed, this is not a new idea. From 1190 until 1870, English law used the so-called "mixed jury," or "jury *de medietate linguae*," with members of two different communities sitting side by side to settle disputes when people from the two communities came into conflict.[986] Sir Edward Coke attributed this practice "to the Saxons, for whom 'twelve men versed in the law, six English and an equal number of Welsh, dispense justice to the English and Welsh.'"[987] Regional differences, however, were not the only type of community variation recognized in the mixed-jury custom. Mixed juries were also used in disputes between Jews and Christians,[988] city and country dwellers,[989] and merchants and nonmerchants.[990] In the United States, the custom of mixed juries was imported from England

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[985] Hon. Michael M. Mihm, *International Judicial Relations Committee Promotes Communication, Coordination*, INT'L JUD. OBSERVER, Sept. 1995, at 1, 1.

[986] Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury* De Medietate Linguae*: A History and Proposal for Change*, 74 B.U. L. REV. 777, 781 (1994); *see also* MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE 8 (1994) (explaining the practice of mixed juries in early England).

[987] CONSTABLE, *supra* note 986, at 17 (quoting SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 234 (1628)).

[988] *See id.* at 18-21 (noting that half–Jewish, half-Christian juries heard suits between Jews and non-Jews in England during the twelfth and thirteenth centuries); Ramirez, *supra* note 986, at 783-84 (arguing that mixed juries originated in part from the king's desire to protect Jewish capital, which was subject to high assessments and escheatment to the crown, rather than lose it to Christians in an unfair trial).

[989] *See* CONSTABLE, *supra* note 986, at 17 (recounting an action involving a country-dweller in twelfth century London that required that at least one of the jurors be of "the county in which the foreigner dwells" (citation omitted)).

[990] *See id.* at 23-25 (exploring the evolution of "mixed merchant juries" in early England); Ramirez, *supra* note 986, at 784-86 (recognizing the king's regard for foreign merchants, which prompted the use of mixed juries in order to promote a "perception of fairness" to outsiders and attract their capital and goods). Indeed, mixed juries for merchants apparently helped spawn the lex mercatoria on which Dinwoodie's conception builds. *See* CONSTABLE, *supra* note 986, at 23-25 (arguing that mixed juries helped establish the legal customs of the merchant community).

and used in disputes between settlers and indigenous people[991] and in other interjurisdictional disputes at least through the beginning of the twentieth century.[992] Karl Llewellyn's proposal that merchant experts sit as a tribunal to hear commercial disputes relies on a similar idea that specialized communities may possess relevant knowledge or background that should be called upon in rendering just verdicts.[993] And the principles underlying mixed juries can still be found today. Indeed, the line of U.S. Supreme Court decisions involving peremptory challenges of jurors could be seen as responding in part to a felt imperative that jury panels reflect both racial and gender diversity.[994] More explicitly, international tribunals are generally staffed by judges from multiple countries, and recent international efforts to create hybrid domestic-international courts in postconflict situations place local judges alongside international ones.[995] The custom of the mixed jury could be revived and expanded to encourage the development of norms that cut across boundaries of sovereign territorial states.

Finally, there can be little doubt that transnational adjudicatory, quasi-governmental, or private regulatory bodies are also a source for the development of transnational common law norms. Although ICANN has been subject to criticism because of the composition of its governing body and the lack of transparency in its processes,[996] the idea of a regulatory body with authority based on activity rather than territory is an example of one way that alternative forms of jurisdiction can be exercised and transnational law developed. Similarly, non-governmental entities such as stock exchanges or bond and stock rating services may exercise significant regulatory authority within their substantive (non-territorial) realms. Although all such non-governmental regulation is subject to criticism from the perspec-

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[991] *See* Katherine A. Hermes, *Jurisdiction in the Colonial Northeast: Algonquian, English, and French Governance*, 43 AM. J. LEGAL HIST. 52, 64-65 (1999) (discussing the implementation of a mixed-jury system in colonial Pennsylvania, Rhode Island, and Massachusetts).

[992] *See* Ramirez, *supra* note 986, at 790 (noting that "[a]t various times between 1674 and 1911, Kentucky, Maryland, Massachusetts, Pennsylvania, New York, Virginia, and South Carolina each provided for mixed juries").

[993] *See* Wiseman, *supra* note 827, at 512-15 (describing Llewellyn's merchant-tribunal proposal).

[994] *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (forbidding prosecutors from challenging jurors solely on the basis of race); J.E.B. v. Alabama, 511 U.S. 127, 130-31 (1994) (extending *Batson* to peremptory challenges based on gender).

[995] For a discussion of such hybrid tribunals, see Laura Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT'L L. & POL'Y (forthcoming 2003).

[996] *See supra* note 147 and accompanying text (discussing criticisms of ICANN).

tive of democratic legitimacy,[997] the indeterminate nature of recognition and enforcement means that private regulation is always subject to challenge and debate.

Thus, the articulation of norms by judges, juries, and non-governmental entities is part of the process of creating international custom which, like lex mercatoria, can then become integrated within state sovereign law. In this way, globalization and online communication are processes that help to articulate customs across nation-state boundaries. The challenge posed by a cosmopolitan pluralist conception of jurisdiction is: Will law recognize these and other similar developments or will it continue to divide communities formally by territory?

CONCLUSION

At nearly the same historical moment that the Peace of Westphalia established the spatial jurisdictional orientation of the modern nation-state, Isaac Newton also established a new way of thinking about space.[998] In place of the medieval conception of the physical world as a living organism, Newton argued that space was "absolute, always similar and immovable."[999]

Both the Newtonian and the Westphalian understandings of space survived and thrived into the twentieth century. Newton's formulation of mathematical laws for physical space was developed and refined, and it became part of the accepted understanding of the universe. Similarly, the territorial boundaries that define legal jurisdiction, though often arbitrary, have continued to be absolutely compelling. "[A]n unwavering faith in the necessity and legitimacy of . . . [jurisdictional] boundaries would seem to be not only a foundation of our government, but a precondition of any government."[1000] As Richard Ford has observed, our reaction to the formality of jurisdictional arrangements is "something akin to the reverence and awe we reserve for natural phenomena beyond our control or comprehension."[1001]

In the past century, Albert Einstein and Stephen Hawking have challenged the Newtonian understanding of space and introduced conceptions of

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[997] *See supra* notes 386-89 and accompanying text (discussing concerns about the accountability of non-state regulatory bodies and the transparency of their processes); *see also supra* notes 344-53 and accompanying text (discussing similar concerns about quasi-governmental bodies such as the WTO and WIPO).

[998] This analogy is derived from CURTIN, *supra* note 5, at 1-2.

[999] *Id.* at 1. *See generally* EDWARD NEVILLE DA COSTA ANDRADE, SIR ISAAC NEWTON (1954) (exploring Newton's life and contribution to the development of scientific thought).

[1000] Ford, *supra* note 470, at 851.

[1001] *Id.*

fragmentation and indeterminacy into the Newtonian model.[1002] Could we stand to introduce those same elements into our understanding of jurisdiction? And if we did, what might the world look like? Would nation-states necessarily crumble? Would all that is solid melt into air?

I think not. To assert that geographical boundaries and nation-state sovereignty are no longer the only relevant way of defining space or community in the modern world is not to deny that they retain some salience as influences on personal identity. Indeed, even if we were all cosmopolitans in Nussbaum's sense, with concentric circles of allegiance, at least one of those circles would almost certainly include our geographical locale and another might include the nation-state in which we hold citizenship.

Nevertheless, although such identities remain important, they are not the only ways of conceptualizing space or identifying with a community. Allegiances to a physical location or a national identity are only two of the multiple conceptions of belonging and membership that people may experience. In our daily lives, we all have multiple, shifting, overlapping affiliations. We belong to many communities. Some may be local, some far away, and some may exist independently of spatial location.

Jurisdiction is the way that law traces the topography of these multiple affiliations. A jurisdictional assertion extends a community's dominion over the parties to a legal action. Thus, it is a statement that all those before the court are at least in some way members of the same community and that they can appropriately be bound together in the physical space of the courtroom to resolve the particular issue in dispute. An assertion of jurisdiction, therefore, is never simply a legal judgment, but a socially embedded, meaning-producing act. Conceptions of jurisdiction become internalized and help to shape the social construction of place and community. In turn, as social conceptions of place and community change, jurisdictional rules do as well. But if that is so, then what are we to make of the fact that our current jurisdictional system seems to correspond so poorly to contemporary social conceptions of space, distance, borders, and community?

The challenges posed by the rise of online communication and more generally by the forces of globalization have brought this question to the fore. Repeatedly over the past several years, legal conundrums have arisen around a range of issues that can broadly be defined as jurisdictional in nature. These challenges, some of which were surveyed in Part I, are not necessarily unanswerable, but at the very least they indicate that the reality of

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[1002] *See, e.g.*, STEPHEN HAWKING, A BRIEF HISTORY OF TIME 55-63, 188-90 (20th anniversary ed. 1998) (discussing the uncertainty principle, which acknowledges the impossibility of complete accuracy in quantum mechanics).

human interaction is chafing against the strictures our current conception of legal jurisdiction imposes. In such moments of transition, as legal forms adapt to a changing social environment, a window of opportunity opens. For a brief moment, we have the chance to rethink established verities and question whether a particular set of doctrines—even if they can be cobbled together to work one more time—makes sense anymore given the changing context of social life.

In this Article I have embraced the opportunity to interrogate the dominant assumptions underlying legal jurisdiction. Instead of focusing on doctrinal questions regarding how best to "solve" the specific jurisdictional dilemmas that have been raised to date, I have taken a step back and asked a series of foundational questions. What does it mean in social terms to assert jurisdiction? How are conceptions of jurisdiction related to the ways people experience physical space, territorial borders, distance, and community? Why should the nation-state be the only player on the field of legal jurisdiction? Are there other forms of community affiliations that the law might recognize?

In asking these questions, this Article has offered four central contributions. First, I have identified the social meaning of jurisdiction as an important field of discourse, which brings together the fields of cyberspace law, international law, civil procedure, and cultural analysis and provides a useful way of understanding the effect of globalization on legal systems. Such study affords us a better understanding of the world of experience on which the legal world of jurisdiction is mapped and allows us to develop a richer descriptive account of what it means for a juridical body to assert jurisdiction over a controversy.

Second, I have argued that existing jurisdictional models are not properly attuned to questions of social meaning. Instead, most jurisdictional systems (both in the United States and elsewhere) are moored to geographical territory and take for granted that territorially defined sovereign entities—nation-states (or individual states within federal systems)—are the only possibly relevant category of community affiliation. Both of these assumptions are problematic because, as we have seen, physical territory and geographical boundaries are not necessarily the only, or even the most appropriate, way of defining community, and an overly narrow focus on nation-states does not do justice to the multiple, overlapping, and often non-territorial conceptions of community that exist in the world. Thus, we can begin to conceive alternative approaches to jurisdictional questions that might better respond to the contested and constantly shifting processes by which people imagine communities and their membership in them.

Third, I have offered one such alternative approach here, which I call a

cosmopolitan pluralist conception of jurisdiction. This conception offers a more capacious view of what constitutes a relevant jurisdictional community—one that neither limits the jurisdictional assertion based on contact with a geographical locality nor limits the range of possible community affiliations that might be relevant. My jurisdictional framework is, of course, only one possible alternative, and there are surely others that await future elaboration. But I have argued that any such model must, at the very least, account for the social meaning of legal jurisdiction. Thus, it is less important that others embrace this particular conception of jurisdiction than that they begin to see the social meaning of legal jurisdiction as an important field of discourse and study. Indeed, even if one were to reject a more pluralist conception and retain current jurisdictional frameworks, this Article makes clear that simply assuming that territorial boundaries and nation-state communities are somehow the natural and inevitable bases for a system of jurisdictional rules is not an option. Rather, any jurisdictional system must be justified (both descriptively and normatively) as the appropriate way of organizing space and conceiving of community affiliation in the contemporary world.

Fourth, I have attempted to demonstrate that a focus on the social meaning of legal jurisdiction illuminates a wide variety of doctrinal areas and that future teaching and scholarship on jurisdiction might profitably be oriented not along doctrinal lines such as international law, law and anthropology, cyberlaw, or civil procedure. Rather, we must conceptualize these questions more thematically so that we can better come to grips with the convergence of these fields in an era of globalization.

In the end, I see jurisdiction and recognition of judgments as fruitful sites for thinking about the relationship between the "local," the "national," and the "global" and for mapping the evolving ways in which people construct identity by reference to places and/or communities. No one really knows whether the nation-state is dying or thriving, whether globalization is truly a new phenomenon or a lot of hype, whether the Internet defies territorial borders or whether geographical boundaries can be reinscribed into cyberspace, whether the world is fragmenting into subnational conflicts, or conversely, whether it is moving towards an era of global cooperation and international governance. Or perhaps a cosmopolitan future awaits us, when people will come to interpret themselves without using the nation-state as their principal frame of reference.

Whatever the answers to these imponderables, they will be reflected and constructed in the domain of legal jurisdiction. And if we pay attention to the social meanings embedded in jurisdictional debates, we might just possibly catch a glimpse of where we are headed.