

# Federalism and International Law Through the Lens of Legal Pluralism

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## I. INTRODUCTION

Federalism in the United States is often discussed in terms of sovereignty. Thus, we are told that the colonies were originally completely separate sovereign entities and that though they ceded some authority to the federal government, they retained their sovereign prerogatives. Accordingly, so the story goes, we live in a system of 51 sovereignties, and discussions of federalism are about how best to negotiate the relative power of these different sovereign entities.<sup>1</sup>

This, however, is not the only way of thinking about federalism. Indeed, there is a different story we could tell, perhaps best captured in the oft-quoted idea of the states as “laboratories” of democracy.<sup>2</sup> Here the federal system is important not so much because such a system maintains the autonomy of different sovereign entities, but because it provides the opportunity for multiple decision-makers to try out different solutions to similar problems. Moreover, the dialogue among the multiple decisionmakers may cause better solutions to spread through the system or may cause decisionmakers to recognize that varying solutions may be appropriate given varying local conditions. From this perspective, the overlapping jurisdiction of federal and state

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1. See *New York v. United States*, 505 U.S. 144 (1992), for an example of this conceptual framework.

2. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); see also, e.g., *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (“There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires . . . even though the experiments may seem futile or even noxious to me . . .”). This narrative about federalism has been less prominent since the New Deal. See, e.g., Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011 (2005) (discussing decline of localism following the New Deal).

entities is seen as opening the possibility for creative innovation. This is what might be called a pluralist justification for federalism.

As with federalism, the relationship between international law and nation-state law similarly is often viewed through the lens of sovereignty. And again, as with federalism, the sovereigntist approach focuses on states as autonomous power centers. Thus, according to the conventional narrative, states use international law when it is in their interests, but ignore it when it is not. In this vision, international law is merely an epiphenomenon of state sovereignty, not any limitation upon it.<sup>3</sup>

But, again as with federalism, we can view international law through a pluralist lens. Thus, we may focus on international and transnational legal pronouncements as providing alternative sources of authority that can change legal consciousness over time, affect local debates, empower different local actors, and provide an alternative set of fora in which individuals and coalitions can make their voices heard.<sup>4</sup> On this view, rational choice understandings of how international law works or pure theory debates about sovereignty are limited because they focus too heavily on coercive power, thereby giving insufficient attention to the role of rhetorical persuasion, informal articulations of legal norms, and networks of affiliation that may not possess literal enforcement power. All of these are emphasized in a pluralist frame.

Recently, a group of scholars, many influenced by the seminal work of Robert Cover,<sup>5</sup> have embraced a more pluralist approach to both American federalism and international law.<sup>6</sup> They have touted the important virtues of jurisdictional redundancy and inter-systemic governance models in which

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3. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). For one (among many) published critiques of this approach to international law, see Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (book review).

4. See Berman, *supra* note 3, at 1295-96.

5. See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

6. See, e.g., Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006) [hereinafter Ahdieh, *Dialectical Regulation*]; Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996); Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008); Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 473 (1996) [hereinafter Resnik, *Afterword*]; Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) [hereinafter Resnik, *Foreign as Domestic Affairs*]; Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) [hereinafter Resnik, *Law's Migration*]; Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

multiple legal and regulatory authorities weigh in regarding the same acts and actors. And, like Cover, they argue that such jurisdictional redundancies are not just a necessary accommodation to the reality of a world of multiple authority; they may actually be *beneficial*. In short, we can view legal pluralism (to use the parlance of computer science) as a feature and not a bug.

This is a controversial move. After all, it is one thing to recognize the inevitability of legal pluralism as a description of reality and quite another to treat it as normatively desirable. Indeed, legal pluralists have historically focused primarily on the descriptive, tracing the overlaps and tensions that occur when two or more legal or quasi-legal systems operate in the same social field.<sup>7</sup> Thus, anthropologists have charted the relationships between colonial and indigenous legal systems,<sup>8</sup> theorists of religious pluralism have documented the interactions between state law and religious communities,<sup>9</sup>

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7. See, e.g., Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources*, in LAW AND THE SOCIAL SCIENCES 11, 15 (Leon Lipson & Stanton Wheeler eds., 1986) (“[N]ot all the phenomena related to law and not all that are lawlike have their source in government.”). For further discussions of legal pluralism, see BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE (2d ed. 2002); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997); KEEBET VON BENDA-BECKMANN, TRANSNATIONAL DIMENSIONS OF LEGAL PLURALISM (2001); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Berman, *supra* note 6; Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301 (2007); David M. Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RES. J. 425; Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 28-34 (1981); John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Sally Engle Merry, *International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism*, 41 STUD. L. POL. & SOC’Y 149 (2008) [hereinafter Merry, *Spatial Global Legal Pluralism*]; Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 870 (1988) [hereinafter Merry, *Legal Pluralism*]; Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC’Y REV. 719 (1973) [hereinafter Moore, *The Semi-Autonomous Social Field*]; Balakrishnan Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT’L L. 345 (2005); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC’Y 296 (2000); Franz von Benda-Beckmann, *Who’s Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002).

8. For a review of the literature, see Merry, *Legal Pluralism*, *supra* note 7.

9. 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

and so on. These scholars have persuasively argued that all legal systems are inevitably plural. And while such an argument depends in part on how broad one's definition of law is,<sup>10</sup> there can be little dispute that legal pluralism is often an accurate description of the world we live in.

But what about the next step: that legal pluralism is actually a desirable aspect of a legal system, one with distinct benefits? After all, Cover's article, *The Uses of Jurisdictional Redundancy*, aimed not simply to describe American federalism, but to justify it.<sup>11</sup> Indeed, Cover celebrated the benefits that accrue from having multiple overlapping jurisdictional assertions (by both state and non-state entities).<sup>12</sup> Such benefits include a greater possibility for error correction, a more robust field for norm articulation, and a larger space for creative innovation.<sup>13</sup> Moreover, we might think that when decisionmakers are forced to consider the existence of other possible decisionmakers they will tend to adopt, over time, a more restrained view of their own "jurispathic" power.<sup>14</sup> Instead, they may come to see themselves as part of a larger tapestry of decisionmaking in which they are not the only potentially relevant voice. Finally, though Cover acknowledged that it might seem perverse "to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict," he nevertheless argued that we should "embrace" a system "that permits . . . tensions and conflicts of the social order" to be played out in the jurisdictional structure of the system.<sup>15</sup> Thus, Cover's pluralism, though focused on U.S. federalism, can be expanded to include the creative possibilities inherent in multiple overlapping jurisdictions asserted by both state and non-state entities in whatever context they arise. More recently, Judith Resnik has touted the "multiple ports of entry" that a federalist system creates<sup>16</sup> and has argued that what constitutes the appropriate spheres for "local," "national," and "international" regulation and adjudication changes over time and should not be essentialized.<sup>17</sup> A pluralist approach resolutely refuses such sovereigntist essentialization.

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the multiplicity of normative orders." Galanter, *supra* note 7, at 28; see also Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741 (1987-88) (analyzing church-state relations in the United States from a pluralist perspective).

10. Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J.L. & SOC'Y 192, 193 (1993).

11. Cover, *supra* note 5, at 641-43.

12. *Id.* at 682.

13. Cover, *supra* note 5.

14. See *id.* at 664-68 (describing the idea that judges are inevitably jurispathic because in making a decision they "kill" competing legal visions).

15. *Id.* at 682.

16. See Resnik, *Law's Migration*, *supra* note 6.

17. See Resnik, *Afterword*, *supra* note 6, at 473-74 ("My point is not only that particular subject matter may go back and forth between state and federal governance but also that the tradition of allocation itself is one constantly being reworked; periodically, events prompt the revisiting of state or federal authority, and the lines move.").

In this brief Essay, then, I wish to engage in a thought experiment by looking at both federalism and international law through a pluralist rather than a sovereigntist lens. First, I summarize the pluralist literature and some of its core insights and suggest that scholars interested in international law (and its relationship with domestic law) would do well to consider this literature. Second, I provide a few examples of jurisdictional redundancy operating in the transnational, international, and federalist realm and show how the existence of multiple fora can both empower voices that might otherwise be silenced and effect changes of legal consciousness over time. Finally, I turn to a recent controversy concerning the relationship between federalism and international law, *Medellin v. Texas*,<sup>18</sup> in which the United States Supreme Court intervened in a dispute among the International Court of Justice, the Bush administration, and the State of Texas regarding the appropriate role of the Vienna Convention on Consular Relations<sup>19</sup> in a state capital murder case. Although the Supreme Court majority emphasized the need to delineate clear, non-overlapping spheres of international, national, and state authority, I draw on the insights of legal pluralism to proffer a more flexible approach to the interaction of multiple sources of law implicated by the case.

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18. 128 S. Ct. 1346 (2008).

19. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention on Consular Relations].

## II. LEGAL PLURALISM AND THE GLOBAL LEGAL ORDER

As I have argued elsewhere,<sup>20</sup> scholars seeking to understand the multifaceted role of law in an era of globalization<sup>21</sup> must take seriously the insights

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20. See Berman, *supra* note 6; Berman, *supra* note 7.

21. Of course, the idea of an “era of globalization” is contested. Indeed, the vast debates concerning globalization’s meaning, its importance, and even its existence could fill many volumes. For purposes of this Essay, I do not attempt to articulate a single definition because part of the premise of law and globalization is that multiple definitions and meanings for globalization will be salient for different populations. See, e.g., SANTOS, *supra* note 7, at 178 (“There is strictly no single entity called globalization. There are, rather, globalizations, and we should always use the term only in the plural.”). Thus, I use the term to refer generally to the intensification of global interconnectedness, in which capital, people, commodities, images, and ideologies move across distance and physical boundaries with increasing speed and frequency. See, e.g., ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES* 24-37 (2000) (pointing to the increased level of trade, finance, and capital flows, and describing the effects of the weakening hold of older nation-states). Indeed, I am content to acknowledge that the existence of many different visions of globalization is a fundamental part of globalization itself.

Even some who acknowledge globalization nevertheless question whether globalization is really a new phenomenon at all. Certainly, interrelations among multiple populations across territorial boundaries have existed for centuries. For example, some argue that the pre-1914 era was in fact the high-water mark for economic interdependence, although there is also evidence that the post-1989 era surpasses that period. See Miles Kahler & David A. Lake, *Globalization and Governance*, in *GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION* 1, 10-14 (Miles Kahler & David A. Lake eds., 2003). Again I do not think such arguments need detain us. First, it seems clear that *something* is going on, given the pervasiveness of the ideology of market capitalism, the speed of commodity, capital, and personal movement, the ubiquity of global media, and so on. Whether such developments are truly new (or greater than ever before) seems less important than understanding the consequences of the phenomena. Second, I see the term “globalization” as also signifying the *attitude* about the world that tends to come into being as a result of frequent use of the term itself. Indeed, in a certain sense it does not really matter whether, as an empirical matter, the world is more or less “globalized” than it used to be. More important is the fact that people – whether governmental actors, corporations, scholars, or general citizens – think and act *as if* the world is more interconnected and treat globalization as a real phenomenon. In addition, there is at least some evidence that global “scripts” are exerting a broad impact, at least in the officially sanctioned discourse of governmental bureaucrats. See, e.g., John W. Meyer et al., *World Society and the Nation-State*, 103 *AM. J. SOC.* 144, 145 (1997) (“Worldwide models define and legitimate agendas for local action, shaping the structures and policies of nation-states and other national and local actors in virtually all of the domains of rationalized social life . . .”). For further discussion of “the problematics of globalization,” see Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *COLUM. J. TRANSNAT’L L.* 485, 551-55 (2005).

of legal pluralism. In general, theorists of pluralism start from the premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups.<sup>22</sup> Such groups can, of course, include familiar political affiliations, such as nation-states, states within a federation, counties, towns, and so on. But many community affiliations, such as those held by transnational or subnational ethnic groups, religious institutions, trade organizations, unions, internet chat groups, and a myriad of other “norm-generating communities”<sup>23</sup> may at various times exert tremendous power over our actions even though they are not part of an “official” state-based system. Indeed, as scholars of legal pluralism have long noted, “not all the phenomena related to law and not all that are lawlike have their source in government.”<sup>24</sup>

Just as importantly, legal pluralists have studied those situations in which two or more state and non-state normative systems occupy the same social field and must negotiate the resulting hybrid legal space. Historically, anthropologically-oriented legal pluralists focused on the overlapping normative systems created during the process of colonization.<sup>25</sup> For example, early Twentieth-Century studies of indigenous law among tribes and villages in colonized societies noted the simultaneous existence of both local law and European law.<sup>26</sup> Indeed, British colonial law actually incorporated Hindu, Muslim, and Christian personal law into its administrative framework.<sup>27</sup> This early pluralist scholarship focused on the hierarchical coexistence of what were imagined to be quite separate legal systems, layered one on top of the other. Despite the somewhat reductionist model, these pioneering studies established the key insights of legal pluralism: a recognition that multiple normative orders exist, a focus on the dialectical interaction between and among these normative orders, and an identification of the ways in which

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22. See, e.g., AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 2 (1995) (“[Pluralist theories] seek to organize and conceptualize political phenomena on the basis of the plurality of groups to which individuals belong and by which individuals seek to advance and, more importantly, to develop, their interests.”).

23. Robert M. Cover, Foreword, *Nomos and Narrative*, 97 HARV. L. REV. 4, 43 (1983).

24. Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources*, in LAW AND THE SOCIAL SCIENCES, *supra* note 7, at 12, 15; see also Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1443 (1992) (“[L]egal pluralism is at the same time both: social norms *and* legal rules, law *and* society, formal *and* informal, rule-oriented *and* spontaneous.”). *But see* Tamanaha, *supra* note 10, at 193 (arguing that such a broad view of “law” causes law to lose any distinctive meaning).

25. See Merry, *Legal Pluralism*, *supra* note 7, at 869-72 (summarizing the literature).

26. See, e.g., BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926).

27. Merry, *Spatial Global Legal Pluralism*, *supra* note 7, at 156.

actors strategically use the existence of multiple fora to pursue their agendas.<sup>28</sup>

In the 1970s and 1980s, anthropological scholars of pluralism complicated the picture in two significant ways. First, they questioned the hierarchical model of one legal system simply dominating the other and instead argued that plural systems are often only semi-autonomous, operating within the framework of other legal fields, but not entirely governed by them.<sup>29</sup> As Sally Engle Merry recounts, this was an extraordinarily powerful conceptual move because it placed “at the center of investigation the relationship between the official legal system and other forms of ordering that connect with but are in some ways separate from and dependent on it.”<sup>30</sup> Second, scholars began to conceptualize the interaction between legal systems as bi-directional, with each influencing (and helping to constitute) the other.<sup>31</sup> And though these studies continued to focus on less official forms of legal and quasi-legal regulation, this recognition of jurisdictional overlaps among multiple normative systems and the inevitable strategic interaction among them provides a useful template for studying both international law and federalism.

Those who study international public and private law have not, historically, paid much attention to legal pluralism, likely because the emphasis traditionally has been on state-to-state relations. However, the rise of a conception of international human rights in the post-World War II era transformed individuals into international law stakeholders, possessing their own entitlements against the state.<sup>32</sup> But even apart from individual empowerment, scholars have more recently come to recognize the myriad ways in which the prerogatives of nation-states are cabined by transnational and international actors. Whereas F.A. Mann could confidently state in 1984 that “laws extend so far as, but no further than the sovereignty of the State which

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28. See Merry, *Legal Pluralism*, *supra* note 7, at 873.

29. See, e.g., Robert L. Kidder, *Toward an Integrated Theory of Imposed Law*, in *THE IMPOSITION OF LAW* 289 (Sandra B. Burman & Barbara E. Harrell-Bond eds., 1979); Moore, *The Semi-Autonomous Social Field*, *supra* note 7.

30. Merry, *Legal Pluralism*, *supra* note 7, at 873.

31. See, e.g., Peter Fitzpatrick, *Law and Societies*, 22 *OSGOODE HALL L.J.* 115 (1984).

32. See, e.g., W. Michael Reisman, *Introduction to JURISDICTION IN INTERNATIONAL LAW*, at xi, xii (W. Michael Reisman ed., 1999) (noting that “since the Second World War, an increasing number of international norms of both customary and conventional provenance . . . now restrict or displace specific law-making and applying competences of states”); Louis Henkin, *Human Rights and State “Sovereignty,”* Sibley Lecture (Mar. 1994), in 25 *GA. J. INT’L & COMP. L.* 31, 33 (1996) (“At mid-century, the international system began a slow, hesitant move from state values towards human values.”). *But see* MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 5-6 (4th ed. 2003); 1 *GEORG SCHWARZENBERGER, INTERNATIONAL LAW* 34-36 (3d ed. 1957) (both noting that even after Nuremberg, international law derived primarily from state practice).

puts them into force,"<sup>33</sup> many international law scholars have, at least since the end of the Cold War, argued that such a narrow view of how law operates transnationally is inadequate. Thus, the past fifteen years have seen increasing attention to the important – though sometimes inchoate – processes of international norm development.<sup>34</sup> Such processes inevitably lead scholars to consider overlapping transnational jurisdictional assertions by nation-states, as well as norms articulated by international bodies, non-governmental organizations (NGOs), multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on.

Yet, while international law scholars are increasingly emphasizing the importance of these overlapping legal and quasi-legal communities, there has been surprisingly little attention paid to the pluralism literature.<sup>35</sup> This is a shame because this literature could help international law find a more comprehensive framework for conceptualizing the clash of normative communities in the modern world. Consider, for example, Sally Falk Moore's idea of the "semiautonomous social field," which she describes as one that

can generate rules and customs and symbols internally, but that . . . is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.<sup>36</sup>

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

In addition, pluralism offers possibilities for thinking about spaces of resistance to state law. Indeed, by recognizing at least the semi-autonomy of conflicting legal orders, pluralism necessarily examines limits to the ideological power of state legal pronouncements. Pluralists do not deny the significance of state law and coercive power, of course, but they do try to identify

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33. F. A. Mann, *The Doctrine of International Jurisdiction Revisited After Twenty Years*, 186 RECUEIL DES COURS 9, 20 (1984).

34. See Berman, *supra* note 21, at 488-89 (summarizing some of this literature).

35. There are some exceptions. See, e.g., William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004); Benedict Kingsbury, Editorial Comments, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT'L L. 713 (1998).

36. Moore, *The Semi-Autonomous Social Field*, *supra* note 7, at 720.

places where state law does not penetrate or penetrates only partially, and where alternative forms of ordering persist to provide opportunities for resistance, contestation, and alternative vision. Such an approach encourages international law scholars to treat the multiple sites of normative authority in the global legal system as a set of inevitable interactions to be managed, not as a “problem” to be “solved.” And again, though pluralists historically looked only at non-state alternatives to state power, the international law context adds state-to-state relations and their overlapping jurisdictional assertions to the mix, providing yet another set of possible alternative normative communities to the web of pluralist interactions.

Finally, pluralism frees scholars from needing an essentialist definition of “law.” For example, with legal pluralism as our analytical frame, we can get beyond the endless debates both about whether international law is law at all and whether it has any real effect. Indeed, the whole debate about law versus non-law is largely irrelevant in a pluralism context because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status. Thus, we can resist positivist reductionism and set nation-state law within a broader context.<sup>37</sup> Moreover, an emphasis on social norms allows us to more readily see how it is that non-state legal norms can have significant impact on the world. After all, if a statement of norms is ultimately internalized by a population, that statement will have important binding force, often even more so than a formal law backed by state sanction.<sup>38</sup> Accordingly, by taking pluralism seriously we will more easily see the way in which the contest over norms creates legitimacy over time, and we can put to rest the idea that norms not associated with nation-states necessarily lack significance.<sup>39</sup> Indeed, legal pluralists refuse to focus solely on who has the formal authority to articulate norms or the coercive power to enforce them. Instead, they aim to study empirically which statements of authority tend to be *treated* as binding in actual practice and by whom.

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37. For those who are inclined to reify state law as law and to deny all other forms of social ordering the use of the word law, Santos argues that law is like medicine. Thus, he observes that

side by side with the official, professionalized, pharminochemical, allopathic medicine, other forms of medicine circulate in society: traditional, herbal, community-based, magical, non-Western medicines. Why should the designation of medicine be restricted to the first type of medicine, the only one recognized as such by the national health system? Clearly, a politics of definition is at work here, and its working should be fully unveiled and dealt with in its own terms.

SANTOS, *supra* note 7, at 91.

38. For a discussion of the importance of legal consciousness scholarship to international law thinking, see Berman, *supra* note 3, at 1280-95.

39. *See id.* (critiquing a positivist rational choice approach to international law on this ground).

In any event, the important point is that scholars studying the global legal scene need not rehash long and ultimately fruitless debates (both in philosophy<sup>40</sup> and anthropology<sup>41</sup>) about what constitutes law and can instead take a non-essentialist position: treating as law that which people view as law.<sup>42</sup> This formulation turns the what-is-law question into a descriptive inquiry concerning which social norms are recognized as authoritative sources of obligation and by whom.<sup>43</sup> Indeed, the question of what constitutes law is itself revealed as a terrain of contestation among multiple actors.<sup>44</sup> And, by broadening the scope of what counts as law, we can turn our attention to a more comprehensive investigation of how best to mediate the hybrid spaces where normative systems and communities overlap and clash.

### III. JURISDICTIONAL REDUNDANCY: TRANSNATIONAL, INTERNATIONAL, FEDERAL

As noted above, legal pluralists often look to interactions of state and non-state law-making. But even if we limit our gaze to “official” regulatory pronouncements – by international, nation-state, or state authorities – we still see a pluralist world of jurisdictional overlaps. And it is not at all clear that sovereigntist line-drawing is the most useful way to respond to such jurisdictional redundancy. After all, even if it is asserted that certain legal pronouncements are “binding” and others are not, or that certain authorities are “legitimate” while others are not, the really important question is what the impact of legal pronouncements are on the ground over time.

For example, with regard to transnational jurisdictional redundancy, consider Spanish efforts to assert jurisdiction over members of the Argentine military. In August 2003, Judge Baltasar Garzón sought extradition from Argentina of dozens of Argentines for human rights abuses committed under

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40. Compare, e.g., H. L. A. HART, *THE CONCEPT OF LAW* (1961), with LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1964), and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

41. Compare, e.g., MALINOWSKI, *supra* note 26, with E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* (1954).

42. For a statement of this approach, see Tamanaha, *supra* note 7.

43. Such an approach echoes Paul Bohannan’s focus on “double institutionalization,” the process whereby secondary institutional arrangements are developed to assess which primary norms are deemed authoritative. See Paul Bohannan, *Law and Legal Institutions*, in 9 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 73, 75 (David L. Sills ed., 1968); see also PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 13 (1978) (adopting a similar formulation).

44. This is one of the reasons anthropologists turned away from the essentialist debate. See LAURA NADER, *THE LIFE OF THE LAW* 31 (2002).

the Argentine military government in the 1970s.<sup>45</sup> In addition, Garzón successfully sought extradition from Mexico of one former Argentine Navy lieutenant who was accused of murdering hundreds of people.<sup>46</sup> In the wake of Garzón's actions, realist observers complained that such transnational prosecutions were improper because Argentina had previously conferred amnesty on those who had been involved in the period of military rule and therefore any prosecution would infringe on Argentina's sovereign "choice" to grant amnesty.<sup>47</sup> Thus, the sovereigntist view labels the Spanish assertion "illegitimate" and denies its importance.

But the amnesty decision was not simply a unitary choice made by some unified "state" of Argentina; it was a politically contested act that remained controversial within the country.<sup>48</sup> And the Spanish extradition request itself gave President Nestor Kirchner more leverage in his tug-of-war with the legal establishment over the amnesty laws. Just a month after Garzón's request, both houses of the Argentine Congress voted by large majorities to annul the laws.<sup>49</sup> Meanwhile the Spanish government decided that it would not make the formal extradition request to Argentina that Garzón sought, but it did so based primarily on the fact that Argentina had begun to scrap its amnesty laws and the accused would therefore be subject to domestic human rights prosecution.<sup>50</sup> President Kirchner therefore could use Spain's announcement to increase pressure on the Argentine Supreme Court to officially overturn the

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45. See Larry Rohter, *Argentine Congress Likely to Void 'Dirty War' Amnesties*, N.Y. TIMES, Aug. 21, 2003, at A3 (recounting Garzón's extradition request).

46. Emma Daly, *Spanish Judge Sends Argentine to Prison on Genocide Charge*, N.Y. TIMES, June 30, 2003, at A3 ("In an unusual act of international judicial cooperation, and a victory for the Spanish judge Baltasar Garzón, Mexico's Supreme Court ruled this month that the former officer, Ricardo Miguel Cavallo, could be extradited to Spain for crimes reportedly committed in a third country, Argentina.").

47. See David B. Rivkin Jr. & Lee A. Casey, *Crimes Outside the World's Jurisdiction*, N.Y. TIMES, July 22, 2003, at A19 (noting that Argentina had granted amnesty to Cavallo and arguing that "Judge Garzón is essentially ignoring Argentina's own history and desires").

48. The Argentine army, for example, made known its desire for amnesty for human rights abuses through several revolts in the late 1980s. The Argentine Congress granted amnesty after one such uprising in 1987. See Joseph B. Treaster, *Argentine President Orders Troops to End Revolt*, N.Y. TIMES, Dec. 4, 1988, § 1, at 13 (describing an army revolt in Buenos Aires).

49. Editorial, *Argentina's Day of Reckoning*, CHI. TRIB., Apr. 24, 2004, at C26.

50. Elizabeth Nash, *Garzón Blocked over "Dirty War" Extraditions*, INDEPENDENT, Aug. 30, 2003, at 14; see also Al Goodman, *Spain Blocks Trials of Argentines*, CNN, Aug. 29, 2003, <http://www.cnn.com/2003/WORLD/europe/08/29/spanish.argentina/index.html> (quoting the Spanish attorney for the victims saying that the Spanish government's decision "sends a 'powerful message' to Argentina's Supreme Court" to overturn the amnesty laws).

amnesty laws.<sup>51</sup> Finally, on June 14, 2005, the Argentine Supreme Court did in fact strike down the amnesty laws, thus clearing the way for domestic human rights prosecutions.<sup>52</sup> In the wake of that decision, 772 people, nearly all from the military or secret police, face criminal charges and investigations in Argentina.<sup>53</sup> So, in the end, the “sovereign” state of Argentina made political and legal choices to repeal the amnesty laws just as it had previously made choices to create them. But in this change of heart we can see the degree to which jurisdictional redundancy may significantly alter the domestic political terrain.

Likewise, Judge Garzón’s earlier efforts to assert jurisdiction over former Chilean leader Augusto Pinochet,<sup>54</sup> though not literally “successful” be-

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51. See Héctor Tobar, *Judge Orders Officers Freed: The Argentine Military Men Accused of Rights Abuses in the '70s and '80s May Still Face Trials*, L.A. TIMES, Sept. 2, 2003, at A3 (“President Nestor Kirchner used Spain’s announcement to increase pressure on the Argentine Supreme Court to overturn the amnesty laws that prohibit trying the men here.”).

52. Corte Suprema de Justicia [CSJN], 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad,” causa No. 17.768, S.1767.XXXVIII (Arg.); see also Press Release, Human Rights Watch, Argentina: Amnesty Laws Struck Down (June 14, 2005), available at <http://hrw.org/english/docs/2005/06/14/argent11119.htm>. Interestingly, the Argentine Court cited as legal precedent a 2001 decision of the Inter-American Court of Human Rights striking down a similar amnesty provision in Peru as incompatible with the American Convention on Human Rights and hence without legal effect. Corte Suprema de Justicia [CSJN], 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad,” causa No. 17.768, S.1767.XXXVIII (Arg.); see also Press Release, Human Rights Watch, *supra*. Thus, the Inter-American Court pronouncement played an important norm-generating role, even though it was not backed by coercive force.

53. *Slaking a Thirst for Justice*, ECONOMIST, Apr. 14, 2007, at 39, 40.

54. Judge Garzón issued an arrest order based on allegations of kidnappings, torture, and planned disappearances of Chilean citizens and citizens of other countries. Spanish Request to Arrest General Pinochet (Oct. 16, 1998), reprinted in *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 57-59 (Reed Brody & Michael Ratner eds., 2000) [hereinafter *THE PINOCHET PAPERS*]; see also Anne Swardson, *Pinochet Case Tries Spanish Legal Establishment*, WASH. POST, Oct. 22, 1998, at A27 (“As Chilean president from 1973 to 1990, Garzón’s arrest order said, 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.’” (alteration and omission in original)). 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). S Audiencia Nacional, Nov. 5, 1998 (No. 173/98), reprinted in *THE PINOCHET PAPERS*, *supra*, at 95, 95-107. For an English

cause Pinochet was never extradited to Spain,<sup>55</sup> strengthened the hands of human rights advocates within Chile itself and provided the impetus for a movement that led to a Chilean Supreme Court decision stripping Pinochet of his lifetime immunity.<sup>56</sup> In 2006 the Chilean court further ruled that Chile was subject to the Geneva Conventions during the period of Pinochet's rule and that neither statutes of limitations nor amnesties could be invoked to block prosecutions for serious violations of the Conventions, such as war crimes or crimes against humanity.<sup>57</sup> To date, 148 people, including nearly 50 military officers, have been convicted for human rights violations committed during this era, and over 400 more suspects, mostly from the armed forces, have been indicted or are under investigation.<sup>58</sup> One might even consider Italy's assertion of jurisdiction over U.S. CIA agents for allegedly abducting a terrorist suspect to be a source of alternative norms concerning the appropriate role for civil liberties in the conduct of antiterrorism operations.<sup>59</sup> Such norms may have broader influence over time.

Turning to international assertions of jurisdiction, we can see again that even the potential jurisdictional assertion of an alternative norm-generating community can put pressure on local politics. For example, although international courts do not generally have the power to force states to surrender suspects, the International Criminal Tribunal for the former Yugoslavia instituted so-called Rule 11 *bis* proceedings, whereby public hearings were held at the

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translation of the opinion, see *id.* The Office of the Special Prosecutor alleged that Spaniards living in Chile were among those killed under Pinochet's rule. *Id.* at 106.

55. 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. *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 148-49 (H.L. 1999) (appeal taken from Q.B.) (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 former heads of state). Nevertheless, the British government refused to extradite, citing Pinochet's failing health. See Jack Straw, Sec'y of State Statement in the House of Commons (Mar. 2, 2000), in *THE PINOCHET PAPERS*, *supra* note 54, 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."). Pinochet was eventually returned to Chile.

56. See *Chile's Top Court Strips Pinochet of Immunity*, N.Y. TIMES, Aug. 27, 2004, at A3 ("Chile's Supreme Court stripped the former dictator Augusto Pinochet of immunity from prosecution in a notorious human rights case on Thursday, raising hopes of victims that he may finally face trial for abuses during his 17-year rule.").

57. *Slaking a Thirst for Justice*, *supra* note 53, at 39.

58. *Id.* at 39-40.

59. See, e.g., Tracy Wilkinson & Maria De Cristofaro, *Italy Indicts 33 in Abduction Case; 26 Americans Charged in Alleged CIA Rendition*, CHI. TRIB., Feb. 17, 2007, at C11, available at 2007 WLNR 3186956.

indictment phase.<sup>60</sup> Such hearings publicized the various cases and the atrocities alleged, thereby helping pressure states to turn over suspects. And, of course, the prosecution of Slobodan Milosevic may well have played at least some role in weakening his hold on power in Serbia, perhaps ultimately contributing to his ouster from government.

Even without formal court proceedings, the United Nations can influence local political realities by asserting forms of jurisdiction. For example, when the UN creates international commissions of inquiry concerning alleged atrocities or threatens prosecutions in international courts, such acts can empower reformers within local bureaucracies, who can then argue for institutional changes as a way of staving off international interference. Thus, in the aftermath of the violence in East Timor that followed its vote for independence, there were grave concerns that the Indonesian government would not pursue human rights investigations of the military personnel allegedly responsible for the violence.<sup>61</sup> Accordingly, an International Commission of Inquiry was established, and U.N. officials warned that an international court might be necessary.<sup>62</sup> As with Argentina, such actions strengthened the hand of reformers within Indonesia, such as then-Attorney General Marzuki Darusman. With the specter of international action hanging over Indonesia, Darusman made several statements arguing that, for nationalist reasons, a hard-hitting Indonesian investigation was necessary in order to forestall an international takeover of the process.<sup>63</sup> Not surprisingly, when this international pressure dissipated after the terrorist attacks of September 11, 2001, so did the momentum to provide real accountability in Indonesia for the atrocities committed.<sup>64</sup>

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60. ICTY Rule 11 *bis* concerns, *inter alia*, the procedure by which the Trial Chamber issues arrest warrants. See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules for Procedure and Evidence, Rule 11 *bis*, May 30, 2006, IT/32/Rev. 38, available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>.

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

62. *Id.* at 358-59.

63. See *id.* at 360 (documenting the response of the Indonesian government, which appointed an investigative team, identified priority cases, named suspects, and collected evidence).

64. See *id.* at 364-66 (discussing the shifting priorities of the Bush administration following the 9/11 attacks and tracing the impact of outside pressure in efforts to hold individuals accountable for the violence in East Timor).

Complementarity regimes are a more formalized way of harnessing the potential power of jurisdictional redundancy. Here the idea is that when two legal communities claim jurisdiction over an actor, one community agrees not to assert jurisdiction, but only so long as the other community takes action. Thus, while one community does not hierarchically impose a solution on the other, it does assert influence on the other's domestic process through its mere presence as a potential jurisdictional actor in the future.

The best known complementarity regime in the world today is the one enshrined in the statute of the International Criminal Court. Pursuant to Article 17, the ICC cannot prosecute someone unless the suspect's home country is unwilling or unable to investigate.<sup>65</sup> Interestingly, the complementarity regime has been criticized by both sides in the nation-state sovereignty/international human rights debate. Thus, sovereigntist voices in the United States condemn the ICC as an encroachment on state prerogatives,<sup>66</sup> despite the fact that ICC jurisdiction over U.S. citizens is easily staved off so long as our domestic or military authorities simply conduct the type of investigations that a democratic citizenry would normally expect in response to allegations of serious human rights abuses. On the other hand, international human rights advocates fear the complementarity regime will permit too many potential suspects to skirt international justice.<sup>67</sup> This concern, however, discounts the catalytic impact that even the *potential* of international prosecutions can have.

The important catalytic function of complementarity has not been lost on the ICC prosecutor, Luis Moreno Ocampo. In one of his first speeches upon assuming office, Ocampo noted that “[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure [of] its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”<sup>68</sup> Ocampo therefore announced that he would take a “positive approach to complementarity,” by encouraging (and perhaps even aiding)

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65. See Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90.

66. See, e.g., Miles A. Pomper, *Helms Gives Blunt Message to U.N. Security Council: Don't Tread on U.S.*, 58 CQ WKLY. 144 (2000) (reporting that Senator Jesse Helms “criticized the proposed International Criminal Court as an intrusion on sovereignty and stated that the U.S. should be free to pursue unilateral military action overseas”).

67. See, e.g., Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583, 613 (Antonio Cassese et al. eds., 2002) (referring to the rejection of universal jurisdiction as a “painful weakness” of the ICC regime).

68. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court 2 (June 16, 2003), [http://www.icc-cpi.int/library/organs/otp/030616\\_moreno\\_ocampo\\_english\\_final.pdf](http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf).

national governments to undertake their own investigations and prosecutions.<sup>69</sup>

According to William Burke-White, this idea of proactive complementarity, if it is truly pursued, would create a hybrid system of judicial enforcement for the prosecution of the most serious international crimes, under which the ICC and national governments share the ability and the duty to act and would therefore necessarily be engaged in a broad series of interactions directed towards accountability. Indeed, the ICC could become a contributor to the effective functioning of national judiciaries and investigative bodies. Such a policy, Burke-White argues, “could produce a virtuous circle in which the Court stimulates the exercise of domestic jurisdiction through the threat of international intervention.”<sup>70</sup> Meanwhile, Elena Baylis has documented the on-the-ground impact of the ICC even on local prosecutions conducted in domestic courts under domestic law.<sup>71</sup>

Of course, we should not assume that international jurisdictional assertions always work as a force for increased human rights protections. As Kim Lane Scheppele has documented, recent Security Council resolutions, backed by threat of sanctions, require countries to enact antiterrorism legislation and adjust antiterrorism policies regardless of domestic, constitutionally-based, civil liberties concerns.<sup>72</sup> Nevertheless, the important point is to see jurisdictional overlap in the state and supranational spheres as a plural legal space where alternative norms are proposed and contested.

Sometimes, instead of one jurisdiction ultimately adopting the other’s norms, we may see the existence of jurisdictional redundancy open up space for the creation of hybrid substantive norms. For example, Graeme Dinwoodie has argued that national courts should decide international copyright cases

69. Luis Moreno-Ocampo, Prosecutor of the Int’l Criminal Court, Statement of the Prosecutor to the Diplomatic Corps 1 (Feb. 12, 2004), [http://www.icc-cpi.int/library/organs/otp/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf).

70. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 57 (2008); see also Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, a View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201 (2000) (discussing ways in which the International Criminal Court’s complementarity regime, supplemented with other forms of aid, can support local prosecutions).

71. See Elena A. Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks* (Univ. of Pittsburgh Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2008-06, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1105244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105244) (describing the use by national courts of the ICC’s statute even in domestic trials for war crimes and crimes against humanity).

72. See Kim Lane Scheppele, *The International State of Emergency: Challenges to Constitutionalism After September 11*, at 3-4 (Sept. 21, 2006) (unpublished manuscript), available at [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1048&context=schmooze\\_papers](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1048&context=schmooze_papers).

not by choosing an applicable *law*, but by devising an applicable *solution*, reflecting the values of all interested systems, national and international, that may have a prescriptive claim on the outcome.<sup>73</sup> Similarly, where courts once simply adjudicated bankruptcies independently, based on the presence of assets in their territorial jurisdiction, global insolvencies are now often dealt with by courts working cooperatively.<sup>74</sup>

In the domestic federalism context, we likewise see jurisdictional redundancy open space for competing views of regulatory issues. As such, it is clear that the existence of overlapping authority provides opportunity for contestation. For example, with regard to climate change, states and localities have been pursuing initiatives (sometimes in direct dialogue with international treaty regimes) that contrast with those preferred by federal authorities.<sup>75</sup> Such activities have even involved states suing the federal government regarding regulatory enforcement.<sup>76</sup> Similarly, localities have, in recent years, sought to create alternative immigration regimes,<sup>77</sup> gay marriage procedures,<sup>78</sup> securities regulation,<sup>79</sup> and foreign policy strategies.<sup>80</sup> To be sure, some of these initiatives have been beaten back by federal action, either judicial or otherwise. Yet, as with international legal pronouncements, state action has often resulted in changes in popular opinion that have altered the regulatory landscape and played a key role in pushing federal authorities to act differently than they otherwise would have.

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

74. See generally Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991). See also Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 214 (2003); Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037 (1997).

75. See Esty, *supra* note 6; Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 214-16 (2002); Osofsky & Levit, *supra* note 6. The dual system of bank regulation in the United States is another example. See Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977).

76. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

77. See, e.g., Federation for American Immigration Reform, Non-Cooperation Policies: "Sanctuary" for Illegal Immigration, [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters0173](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters0173).

78. See, e.g., Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

79. For example, as Robert Ahdieh has recounted, then-New York Attorney General Eliot Spitzer's broad assertions of authority to regulate the New York financial industry "repeatedly forced the SEC to follow his lead, or at least to join in his regulatory endeavors." Ahdieh, *Dialectical Regulation*, *supra* note 6, at 865-66.

80. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

Of course, all of these jurisdictional redundancies might be seen as perhaps necessary but regrettable concessions to the realities of a world of normative disagreement. Such a view would focus on encroachments upon sovereignty, concerns about forum shopping, uncertainty about applicable rules, litigation costs, and so forth. In order to minimize such difficulties, we might seek international harmonization or stricter territorialist rules to cut off some of the overlap. But such efforts are unlikely ever to be fully practical. Thus, jurisdictional overlap is likely to continue to be a reality. Moreover, the pluralist framework allows us to see ways in which jurisdictional redundancy might be a necessary (and perhaps sometimes a generative) feature of a hybrid legal world and not simply a problem to be eliminated.

#### IV. *MEDELLÍN* THROUGH A PLURALIST LENS

So far, the focus of this Essay has been largely descriptive, seeking to highlight the myriad ways in which a pure sovereigntist vision consisting of lines of demarcated legal authority fails to accurately describe the much more complex reality on the ground. Not surprisingly, some look to re-assertions of hierarchical legal authority to clean up this messiness. Thus, even when jurisdictional overlap or regulatory interdependence is undeniable, we see what Robert Ahdieh has termed “the standard dualist response.”<sup>81</sup> Law seeks to more effectively delimit each entity's jurisdiction and authority and thereby eliminate such overlaps. This paradigm of jurisdictional line-drawing has been prevalent both in the international/transnational realm<sup>82</sup> and in

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81. Ahdieh, *Dialectical Regulation*, *supra* note 6, at 867.

82. For example, debates in the United States about judicial citation of foreign authority have often centered around delineating when it is permissible and when impermissible to reference foreign or international law. *See, e.g.*, Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 *COLUM. L. REV.* 628 (2007). Similarly, theories of jurisdiction and choice-of-law have long sought to provide a single answer to the question of which law should apply to a cross-border dispute. *Compare* *Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that states have complete authority within their territorial boundaries but no authority outside those boundaries), *with* *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (establishing a test for determining whether an assertion of personal jurisdiction comports with the Due Process Clause of the U.S. Constitution based on whether the defendant had sufficient contacts with the relevant state “such that maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’” (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))); *compare* *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* § 378 (1934) (“The law of the place of wrong determines whether a person has sustained a legal injury.”), *with* *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 cmt. c (1971) (providing a more flexible inquiry aimed at determining the place with the “most significant relationship” to the dispute in question).

discussions of federalism,<sup>83</sup> as courts and scholars try to demarcate distinct spheres for state and federal authority.<sup>84</sup>

Yet, this single-minded focus on certainty and clarity not only fails to describe a globalized world of inevitable cross-border jurisdictional overlap; it also ignores the crucial question of whether leaving open space for such overlapping regulatory authority might actually be beneficial. In this final section of the Essay, therefore, I wish to engage in a thought-experiment. What if, instead of approaching problems of jurisdictional overlap by insisting on separate sovereign spheres among state, federal, and international authority, we sought to maximize pluralist interaction among various communities, both state and non-state? What impact might such a change of lens have on the way we approach questions of jurisdictional overlap?

My vehicle for confronting this question is the ongoing dispute over the role of the Vienna Convention on Consular Relations<sup>85</sup> in state capital cases. This dispute has arisen in several different guises so far; the U.S. Supreme Court has addressed the issue on four different occasions,<sup>86</sup> and the questions involved have generated a large scholarly debate. The most recent iteration, *Medellin v. Texas*,<sup>87</sup> focused particularly on the interaction of state, federal, and international jurisdiction and regulatory authority and therefore provides an excellent opportunity for thinking about how a pluralist lens yields a significantly different analytical framework from a sovereigntist one.

#### A. The Medellín Dispute

Because the underlying issues have been much rehearsed in the literature, I will not rehash all the procedural complexities and doctrinal nuances of the *Medellin* case here. Essentially, this contentious line of cases arose because for years various state authorities around the United States, in processing suspects in their respective criminal justice systems, ignored (or were unaware of) their obligations under the Vienna Convention on Consular Relations, which the federal government signed in 1963.<sup>88</sup> The Convention, among other things, requires that foreign nationals arrested in a signatory country be able to contact their consulate in order to coordinate their defense or otherwise help in negotiating a foreign legal system.<sup>89</sup> In each of the cases

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83. Schapiro, *supra* note 6, at 249.

84. As Ahdieh notes, “Such reactions are hardly surprising. At heart, they reflect some visceral sense of law’s project as one of categorization, clear definition, and line-drawing.” Ahdieh, *Dialectical Regulation*, *supra* note 6, at 867.

85. Vienna Convention on Consular Relations, *supra* note 19.

86. *Medellin v. Texas*, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Fed. Republic of Germany v. United States*, 526 U.S. 111 (1999); *Breard v. Greene*, 523 U.S. 371 (1998).

87. *Medellin* 128 S. Ct. 1346.

88. Vienna Convention on Consular Relations, *supra* note 19.

89. *Id.* art. 36.

so far, a foreign national was arrested in the United States, the relevant consulate was not notified, and the suspect was subsequently found guilty at trial and sentenced to death.

Under the terms of the Vienna Convention, the International Court of Justice (ICJ) is the legal entity given jurisdiction to adjudicate claims concerning alleged violations of the Convention.<sup>90</sup> In early 2003 Mexico initiated proceedings against the United States in the ICJ, claiming that among those sentenced to death in violation of their Vienna Convention rights were 52 Mexican nationals.<sup>91</sup> The United States participated in the proceedings before the ICJ, which ultimately ruled, in the *Avena* case, that the United States had breached Article 36(1)(b) of the Vienna Convention in the cases of 51 of the Mexican nationals by failing “to inform detained Mexican nationals of their rights under that paragraph” and “to notify the Mexican consular post of the[ir] detention.”<sup>92</sup> The ICJ held further that in 49 of the cases, the United States had also violated its obligations under Article 36(1)(a) “to enable Mexican consular officers to communicate with and have access to their nationals, as well as its obligation under paragraph 1(c) of that Article regarding the right of consular officers to visit their detained nationals.”<sup>93</sup> Finally, the ICJ held that in 34 cases, the United States had also violated its obligation under Article 36(1)(c) “to enable Mexican consular officers to arrange for legal representation of their nationals.”<sup>94</sup>

Significantly, however, the ICJ denied Mexico’s request for annulment of the convictions and sentences.<sup>95</sup> Instead, the ICJ required only that United States courts provide review and reconsideration of the convictions and sentences of the 51 Mexican nationals to determine whether the violations of the Vienna Convention prejudiced the various defendants’ ability to obtain a fair trial.<sup>96</sup> All that was necessary, according to the ICJ, was that this review be conducted as part of a “judicial process” and could not be barred by any procedural default doctrines that might otherwise thwart such review.<sup>97</sup>

At the time the ICJ decision was issued, Jose Ernesto Medellín’s application for a certificate of appealability from the denial of federal habeas relief was pending before the Fifth Circuit. Medellín, having been convicted in Texas state court, was one of the Mexican nationals whose case was addressed in the ICJ’s judgment. Nevertheless, the Fifth Circuit, following its own precedent, ruled that Article 36 of the Vienna Convention was not judi-

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90. Optional Protocol Concerning the Compulsory Settlement of Disputes, Vienna Convention on Consular Relations, *supra* note 19.

91. Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 17, 23 (Mar. 31).

92. *Id.* at 53-54, 71-72.

93. *Id.* at 54, 71-72.

94. *Id.* at 54-55, 71, 72.

95. *Id.* at 60-61.

96. *Id.* at 72.

97. *Id.* at 65-66.

cially enforceable.<sup>98</sup> Medellín petitioned for certiorari, which the U.S. Supreme Court granted.<sup>99</sup>

While the appeal in the U.S. Supreme Court was pending, President Bush issued a signed, written determination that state courts must provide the required review and reconsideration to the 51 Mexican nationals named in the ICJ judgment, including Mr. Medellín, notwithstanding any state procedural rules that might otherwise bar review of their claims.<sup>100</sup> The President declared:

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States . . . , that the United States will discharge its international obligation[s] under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.<sup>101</sup>

That same day, the United States filed an amicus brief in Medellín's case stating that the United States had a "paramount interest . . . in prompt compliance" with the ICJ judgment.<sup>102</sup> Specifically, the President had determined that compliance would "serve[] to protect the interests of United States citizens abroad, promote[] the effective conduct of foreign relations, and underscore[] the United States' commitment in the international community to the rule of law."<sup>103</sup> The United States stressed that "[c]onsular assistance is a vital safeguard for Americans abroad, and the government has determined that, unless the United States fulfills its international obligation to achieve compliance with the ICJ *Avena* decision, its ability to secure such assistance could be adversely affected."<sup>104</sup>

Moreover, the U.S. brief stated that pursuant to the President's determination, an individual Mexican national named in the judgment "may file a petition in state court seeking [the] review and reconsideration [ordered by the ICJ], and the state courts are to recognize" the ICJ decision.<sup>105</sup> In such a case, "a state court would not be free to reexamine whether the ICJ correctly

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98. Medellín v. Dretke, 371 F.3d 270, 280 (5th Cir. 2004).

99. Medellín v. Dretke, 543 U.S. 1032 (2004).

100. Memorandum from George W. Bush to the Attorney General (Feb. 28, 2005), app. 2 to Brief for the United States as Amicus Curiae Supporting Respondent, Medellín v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490.

101. *Id.*

102. Brief for United States as Amicus Curiae Supporting Respondent, *supra* note 100, at 41.

103. *Id.*

104. *Id.*

105. *Id.* at 42.

determined the facts or correctly interpreted the Vienna Convention.”<sup>106</sup> Finally, state procedural rules that might otherwise prevent a state court from giving effect to the ICJ judgment “must give way.”<sup>107</sup>

The U.S. Supreme Court dismissed certiorari as improvidently granted, “[i]n light of the possibility that the Texas courts [would] provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President’s memorandum.”<sup>108</sup> The Court did, however, note that it could once again review the case if further proceedings did not provide Medellín with the relief he sought.<sup>109</sup>

Back before the Texas Court of Criminal Appeals, the issue became whether Medellín’s habeas petition was barred by Texas Criminal Procedure law regulating applications by petitioners who have previously sought post-conviction relief. Medellín argued that the ICJ judgment and the President’s determination to comply with it constituted binding federal law that, by virtue of the Supremacy Clause of the United States Constitution, preempted any inconsistent provisions of Texas law.<sup>110</sup> Meanwhile, the United States, as *amicus curiae*, urged the Texas court to grant Medellín the review and reconsideration he sought, on the ground that the President’s determination constituted preemptive federal law.<sup>111</sup>

Nevertheless, on November 15, 2006, the Texas court dismissed Medellín’s application, holding that Texas law barred the petition and that neither the ICJ decision nor the President’s determination pre-empted or superceded local law.<sup>112</sup> The U.S. Supreme Court ultimately agreed.<sup>113</sup> The six-member majority sought to draw clear lines between the spheres of authority at issue in the case. In this vein, the Court first held that while an international treaty may create an international commitment of sorts, it is not binding domestic law unless the treaty is explicitly implemented through domestic regulation or ratified by Congress as a “self-executing” treaty.<sup>114</sup> Second, with regard to the Presidential Order, the Court similarly sought to define clear lines of authority, ruling that neither the President’s power under the Treaty itself, nor his power to conduct foreign affairs, nor his power to “take care” that laws are faithfully executed authorized the President to turn a non-self-executing treaty into a self-executing treaty, absent congressional

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106. *Id.* at 46.

107. *Id.* at 43.

108. Medellín v. Dretke, 544 U.S. 660, 666 (2005) (per curiam).

109. *Id.* at 664 n.1.

110. He also argued that, in any case, he satisfied the requirements of the Texas law. *Ex parte* Medellín, 223 S.W.3d 315, 324 (Tex. Crim. App. 2006).

111. Brief for United States as Amicus Curiae at 49-50, *Ex parte Medellín*, 223 S.W.3d 315 (No. AP-75,207), 2005 WL 3142648.

112. *Ex parte Medellín*, 223 S.W.3d at 351-52.

113. See Medellín v. Texas, 128 S. Ct. 1346, 1349-50 (2008).

114. *Id.* at 1356-67.

action.<sup>115</sup> Thus, given the lack of international or presidential authority in the matter, the Court held that Texas was free to ignore both the ICJ ruling and the presidential directive.<sup>116</sup> The Court's approach envisions no interaction among multiple sources of law, no interplay among multiple pronouncers of law, and no accommodation to the multiple interests at stake.

### *B. Principles of Pluralism*

As noted previously, a great deal has already been written about the issues raised by the *Medellin* case. But most of it involves the sorts of sovereigntist line-drawing discussed above. Thus, the questions revolve around the degree to which the obligations of the Vienna Convention, or the ICJ decision, or the presidential statement can reach into Texas and encroach on Texas's sovereign prerogative to follow its procedural default rules. The U.S. Supreme Court's decision follows these broad lines of debate and explicitly seeks to draw clear lines of demarcation between the multiple sources of law at issue in the case.

Instead of that debate, however, I'd like us to imagine a different set of inquiries. What if we were to try to conceptualize a more interactive system of relationships among these three governmental entities (as well as other possibly relevant non-governmental communities), keeping in mind the potential benefits of legal pluralism, jurisdictional redundancy, and inter-systemic governance? What would such an interaction look like?

In order to facilitate such an inquiry, we first need to consider the general principles that might guide our understanding of pluralist interactions. As I have discussed elsewhere,<sup>117</sup> a pluralist approach generally eschews solutions that are either universalist on the one hand, or territorialist on the other. Thus, we look neither to one overarching law that trumps all others, nor to a territorially delimited set of hermetically-sealed spheres of law. Instead, a pluralist approach deploys the following five ideas:

First, a pluralist approach to managing jurisdictional overlap should not attempt to erase the reality of that overlap. Indeed, arguably the desire to "solve" such problems is precisely what has made conflict of laws such a conceptually dissatisfying field for so long. Each generation seeks a new way (or often the revival of an old way) to divine an answer to what is at its root an unanswerable question: which territorially-based state community's norms should govern a dispute that, by definition is not easily situated territorially and necessarily involves affiliations with multiple communities?

Second, and relatedly, a pluralist framework recognizes that normative conflict is unavoidable and therefore instead of trying to erase conflict, it seeks to manage it through procedural mechanisms, institutions, and practices

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115. *Id.* at 1367-71.

116. *Id.* at 1372.

117. *See* Berman, *supra* note 6.

that might at least draw the participants to the conflict into a shared social space. This approach draws on Ludwig Wittgenstein's idea that agreements are reached principally through participation in common forms of life, rather than agreement on substance.<sup>118</sup> Or, as political theorist Chantal Mouffe has put it, we need to transform "enemies" – who have no common symbolic space – into "adversaries."<sup>119</sup> Adversaries, according to Mouffe, are "friendly enemies": friends because they "share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way."<sup>120</sup> Ideally, law – and particularly legal mechanisms for managing hybridity – can function as the sort of common symbolic space that Mouffe envisions and can therefore play a constructive role in transforming enemies into adversaries.

Third, in order to help create this sort of shared social space, procedural mechanisms, institutions, and practices for managing overlap should encourage decisionmakers to wrestle explicitly with questions of multiple community affiliation and the effects of activities across territorial borders, rather than shunting aside normative difference. As a result, a pluralist framework invites questions that otherwise might not be asked: How are communities appropriately defined in today's world? To what degree do people act based on affiliations with non-state or supranational communities? How should the various norm-generating communities in the global system interact so as to provide opportunities for contestation and expression of difference? Such questions must be considered carefully in order to develop mechanisms that will take seriously the multifaceted interplay among such communities.

Fourth, thinking in more pluralist terms forces consideration of so-called "conflicts values," particularly the independent benefit that may accrue when domestic judicial and regulatory decisions take into account a broader interest in a smoothly functioning overlapping international legal order, reflecting what Justice Blackmun called "the systemic value of reciprocal tolerance and goodwill."<sup>121</sup> For example, under the Full Faith and Credit Clause of the U.S. Constitution,<sup>122</sup> a valid judgment issued by one state must be enforced by every other state even if the judgment being enforced would be *illegal* if it had been issued by the enforcing state in the first instance.<sup>123</sup> Thus, the con-

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118. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 241 (G. E. M. Anscombe trans., 3d ed. 1953).

119. CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 13 (2000).

120. *Id.*

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

122. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.")

123. *See, e.g., Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (making clear that there is no public policy exception to the full faith and credit due judg-

flicts value of respecting an interlocking national system outweighs individual parochial interests. And though the domestic example is made easier by the existence of a constitutional command, such considerations should always be part of any mechanism for addressing the overlap of plural legal systems. Moreover, taking account of these sorts of systemic values should be seen as a necessary part of how communities pursue their interests in the world, not as a restraint on pursuing such interests. After all, if it is true that communities cannot exist in isolation from each other, then there is a long-term parochial benefit from not insisting on narrow parochial interest and instead establishing mechanisms for trying to defer to others' norms where possible.

Fifth, even a system that respects conflicts values will, of course, sometimes find a foreign law so anathema that the law will not be enforced. Thus, embracing pluralism in no way requires a full embrace of every external legal pronouncement. But when such "public policy" exceptions are invoked within a pluralist framework, they should be treated as unusual occasions requiring strong normative statements regarding the contours of the public policy. This means that, as Robert Cover envisioned, a jurispthic act that "kills off" another community's normative commitment is always at least accompanied by an equally strong normative commitment. The key point is to make decisionmakers self-conscious about their necessary jurispthic actions. Only such an approach has any chance of keeping adversaries from turning into enemies.

Finally, as noted above, a pluralist framework must always be understood as a middle ground between strict territorialism on the one hand and universalism on the other. The key, therefore, is to try to articulate and maintain a balance between those two poles. As such, successful mechanisms or institutions will be those that simultaneously celebrate both local variation *and* international order, while recognizing the importance of preserving both multiple sites for contestation *and* an interlocking system of reciprocity and exchange. Of course, actually doing that in difficult cases is a Herculean and perhaps impossible task. Certainly, mutual agreement about contested normative issues is unlikely and, as discussed previously, possibly even undesirable. Thus, the best we can do is develop ways to seek as much mutual accommodation as possible, while keeping some "play" in the joints so that diversity is respected. Such play in the joints also allows for the jurisgenera-

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ments); *see also, e.g.*, *Estin v. Estin*, 334 U.S. 541, 546 (1948) ("[The Full Faith and Credit Clause] ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it."); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935) ("In numerous cases this court has held that credit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded . . ."); *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (holding that the judgment of a Missouri court is entitled to full faith and credit in Mississippi even if the Missouri judgment rested on a misapprehension of Mississippi law).

tive possibilities inherent in having multiple law-making communities and multiple norms.

Taken together, these principles provide a set of criteria for evaluating the ways in which legal systems interact. As noted above, jurisdictional overlaps may sometimes be problematic, and there might be some occasions that would justify the imposition of either a universal norm or a local rule. But such impositions would need to be justified through a strong normative argument. More usually, we would instead seek intersystemic compromises – institutional interactions that allow space for dialogue, multiple voices, and creative innovation.

For example, consider the oft-discussed “margin of appreciation” doctrine of the European Court of Human Rights (ECHR).<sup>124</sup> The idea here is to strike a balance between deference to national courts and legislators on the one hand, and maintaining “European supervision” that “empower[s] the ECHR] to give the final ruling” on whether a challenged practice is compatible with the Convention, on the other.<sup>125</sup> The margin of appreciation allows domestic polities some room to maneuver in implementing ECHR decisions in order to accommodate local variation. How big that margin is depends on a number of factors including, for example, the degree of consensus among the member states. Thus, in a case involving parental rights of transsexuals, the ECHR noted that because there was at that time no common European standard and “the law appear[ed] to be in a transitional stage,” the respondent State was “afforded a wide margin of appreciation.”<sup>126</sup>

Affording this sort of variable margin of appreciation usefully accommodates a limited range of pluralism. It does not permit domestic courts to fully ignore the supranational pronouncement (though domestic courts have sometimes asserted greater independence<sup>127</sup>). Nevertheless, it does allow space for local variation, particularly when the law is in transition or when no consensus exists among member states on a given issue. Moreover, by framing the inquiry as one of local consensus, the margin of appreciation doctrine disciplines the ECHR and forces it to move incrementally, pushing towards consensus without running too far ahead of it. Finally, the margin of appreci-

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124. A particularly useful, succinct summary of the “margin of appreciation” doctrine can be found in Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 316-17 (1997). My discussion here largely tracks theirs.

125. *Sunday Times v. United Kingdom*, No. 30, 2 *Eur. H.R. Rep.* 245, 276 (1979).

126. *X v. United Kingdom*, No. 21830/93, 24 *Eur. H.R. Rep.* 143, 144 (1997); *see also Otto-Preminger Inst. v. Austria*, No. 295-A, 19 *Eur. H.R. Rep.* 34, (1994) (finding that the lack of a uniform European conception of rights to freedom of expression “directed against the religious feelings of others” dictates a wider margin of appreciation).

127. *See Berman*, *supra* note 6, at 1198-99 (discussing resistance of the German Constitutional Court to the ECHR).

ation functions as a signaling mechanism, through which “the ECHR is able to identify potentially problematic practices for the contracting states before they actually become violations, thereby permitting the states to anticipate that their laws may one day be called into question.”<sup>128</sup> And, of course, there is reverse signaling as well, because domestic states, by their societal evolution away from consensus, effectively maintain space for local variation.

### C. *Medellín Through a Pluralist Lens*

Turning to *Medellín*, a pluralist approach would, first of all, seek to preserve spaces for interaction among the various communities involved. Thus, a pluralist approach would eschew the positions put forth by hardline international law triumphalists, who argue that the violations of the Vienna Conventions necessarily invalidate all the various convictions, regardless of Texas law on the matter. But, a pluralist would also reject the hardline sovereigntist idea that Texas should focus only on its own law and pay no attention to the Vienna Convention or the pronouncements of the ICJ. And finally, the Bush administration’s efforts simply to take the issue away from the state by ordering adherence to the ICJ decision also would be rejected.

So, what are we left with? Let us start with the ICJ. In a pluralist account, the ICJ does not necessarily trump all other decisionmakers simply because it is an international body enforcing universalist treaty-based norms. Instead, the Court should take seriously the prerogatives and interests of other relevant communities and only squelch those other communities if it justifies why it needs to act jurisprudentially by attempting to kill off competing views.

To get some sense of what I mean, we may return to Robert Cover for a moment. In his article *Nomos and Narrative*,<sup>129</sup> Cover criticized the U.S. Supreme Court’s decision in *Bob Jones University v. United States*<sup>130</sup> In that case, the Internal Revenue Service had interpreted Section 501(c)(3) of the Internal Revenue Code, which gives tax-exempt status to qualifying charitable institutions, to apply to schools only if such schools have a “racially non-discriminatory policy as to students.” Accordingly, the Service denied tax

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128. Helfer & Slaughter, *supra* note 124, at 317; *see also* Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, 141 (1993). For an example of this type of signaling, *see* J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 81 (2d ed. 1993) (interpreting the ECHR’s statement in *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 19 (1986), that “[t]he need for appropriate legal measures [to protect transsexuals] should therefore be kept under review having regard particularly to scientific and societal developments” as a “strong hint that while British practice currently satisfied [the Convention], the Court’s duty to interpret the Convention as a living instrument may lead it to a different conclusion in the future”).

129. Cover, *supra* note 23.

130. 461 U.S. 574 (1983).

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

Cover criticized the reasoning of the *Bob Jones* decision, even while agreeing with the Court's result. According to Cover, the Court assumed "a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional."<sup>131</sup> In particular, Cover argued that by grounding its decision on an interpretation of the Internal Revenue Code, the Court had side-stepped the crucial constitutional question of whether Congress could grant tax exemptions to schools that discriminated on the basis of race. This was a problem for Cover because he believed that if a state legal authority were going to "kill off" the competing normative commitment of an alternative community, it should do so based on a profound normative commitment of its own.<sup>132</sup> By avoiding the constitutional question, Cover complained, the Court had disrespected both the religious community – whose normative commitments would be placed at the mercy of mere public policy judgments – and racial minorities – who "deserved a constitutional commitment to avoiding public subsidization of racism."<sup>133</sup>

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

Unlike the U.S. Supreme Court in the *Bob Jones* case, the ICJ in *Medellin* did indeed attempt explicitly to justify its universalist position, discussing at great length the need for an interlocking and reciprocal system of consular rights. In addition, the Tribunal took seriously the competing claims to a limited sphere of local autonomy. Thus, as with the ECHR's margin of

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131. Cover, *supra* note 23, at 66.

132. *See id.* at 52-60.

133. *Id.* at 67.

appreciation doctrine, the ICJ attempted to be restrained in imposing its international norm, thereby trying to leave as much space as possible for local variation. Accordingly, the ICJ denied Mexico's request to invalidate the convictions altogether. Instead, the ICJ decision asks only for a serious judicial consideration of possible prejudice. Finally, using a pluralist analysis, the ICJ decision is more justifiable if it is giving voice to the norms of communities that are not necessarily represented adequately in other fora, either because they are not parties to the suit or have no centralized voice. Here, for example, the communities who might care about reciprocal consular rights (U.S. citizens who travel abroad, potential immigrants who may be more reluctant to enter the country for fear of becoming trapped in the criminal justice system, and so on) are dispersed and have no real ability to advance their interests. Similarly, there were significant voices within Texas itself who may have wanted these consular rights to be protected. For example, Texas Attorney General Greg Abbott implemented a comprehensive set of reforms at the local level to try to make sure Vienna Convention rights are protected in the future.<sup>134</sup> The ICJ decision can, therefore, be seen as giving voice to these alternative epistemic communities.

Turning to Texas, from a pluralist point of view, a decision of the ICJ is not necessarily binding absent a local decision to be bound. In some sense this is no different from what happens in run-of-the-mill domestic cases. Enforcement of any legal decision depends on whether those who assert jurisdiction can rhetorically persuade those who possess coercive power (the police force, the military) to enforce the judgment issued. 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.<sup>135</sup> And, because courts can only exercise authority to the extent that someone with coercive power chooses to carry out the legal judgments issued, judges need, in a sense, to rhetorically persuade others within the government that what they have to say should have force.

Of course, just because the ICJ decision is not hierarchically binding on Texas does not mean it should be ignored altogether. Rather, the Texas Court of Criminal Appeals should treat the ICJ decision similarly to the way it might think about recognition of judgments in the choice of law context. The judgment recognition inquiry considers under what circumstances a commu-

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134. See GREG ABBOTT, ATTORNEY GEN. OF TEX., MAGISTRATE'S GUIDE TO CONSULAR NOTIFICATION UNDER THE VIENNA CONVENTION (2006), available at [http://www.oag.state.tx.us/AG\\_Publications/pdfs/vienna\\_guidebook.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/vienna_guidebook.pdf). For further discussion of local governmental and nongovernmental initiatives to increase compliance with the Vienna Convention, see Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass is Half Full*, 11 LEWIS & CLARK L. REV. 29, 40-46 (2007).

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

nity should recognize and enforce a prior ruling of another community. A pure sovereigntist might answer, “Never.” After all, what if the prior judgment was based on an entirely different set of governing norms? Why should such a ruling be enforced? And yet, as discussed previously, often foreign judgments *are* recognized and enforced.<sup>136</sup>

Moreover, while the decision to enforce a judgment surely will be less automatic when the judgment at issue was rendered by a court whose governing norms are less familiar, the important point is that the decision to enforce a foreign judgment is fundamentally different from the decision to issue an original judgment, and it should not be treated as equivalent. This is because judgment recognition implicates an entirely distinct set of concerns about the role of courts in a plural order. Thus, courts might consider the independent value of participating in an interlocking legal system, where deference to other community judgments is likely to have long-term reciprocal benefits. As Judge Cardozo has observed: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”<sup>137</sup>

This is not to say, of course, that foreign judgments should always be enforced. Indeed, even employing a more pluralist approach, one would expect that judges might sometimes interpose local public policies where they would not in the domestic state-to-state setting. But if we acknowledge the importance of the values effectuated by strong judgment recognition, we will necessarily reject the idea that Texas is simply *unable* to enforce the ICJ judgment just because the local procedural default rule would have barred the Texas court from hearing the appeal had it come directly to the court. Thus, there will always need to be engagement with the foreign statement of norms; one could not simply reject the foreign as alien and therefore place it automatically beyond consideration.

In order to see an example of how this sort of engagement might work, consider the 2004 decision of the Oklahoma Court of Criminal Appeals in a

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136. In most areas of law, United States courts have generally enforced foreign judgments as a matter of comity. See Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 176 (2004) (noting that, since the nineteenth century, “the United States has been at the vanguard of enforcing foreign judgments”). Indeed, as far back as 1895, in *Hilton v. Guyot*, the U.S. Supreme Court made clear that comity “is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” 159 U.S. 113, 164 (1895). The Second Restatement codifies this idea, noting that a “judgment rendered in a foreign nation . . . will, if valid, usually be given the same effect as a sister State judgment.” RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 117, cmt. c (1971). Moreover, validity is based only on whether the court that rendered judgment had proper personal jurisdiction over the parties and utilized procedures that were not inherently unfair. *Id.* § 92.

137. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918).

similar Vienna Convention case, *Torres v. Oklahoma*.<sup>138</sup> Responding to an identical ICJ order, the Court stayed a pending execution and remanded the case for an evidentiary hearing to determine, in part, whether Torres was “prejudiced by the State’s violation of his Vienna Convention rights.”<sup>139</sup> The Governor commuted Torres’ sentence to life in prison without parole later that day.

Although a hardline sovereigntist might see the Oklahoma court’s deference to the ICJ decision as inappropriate and an abdication of the autonomy of the Oklahoma courts, looking at the decision from a pluralist perspective helps to clarify the issues at stake. After all, as noted above, United States courts routinely enforce judgments issued by foreign tribunals. As far back as 1895, in *Hilton v. Guyot*, the U.S. Supreme Court made clear that comity “is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”<sup>140</sup> The *Restatement (Second) of Conflict of Laws* codified this idea, noting that a “judgment rendered in a foreign nation . . . will, if valid, usually be given the same effect as a sister State judgment.”<sup>141</sup> Moreover, validity is based only on whether the court that rendered judgment had proper personal jurisdiction over the parties and utilized procedures that were not inherently unfair.<sup>142</sup>

To be sure, courts enforcing foreign judgments (as opposed to domestic ones) have applied a public policy exception to avoid enforcing particularly egregious rulings, but the exception has been construed very narrowly. Accordingly, courts only refuse to enforce “where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”<sup>143</sup> Likewise, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Uniform Foreign Money-Judgments Recognition Act require that a U.S. court enforce a judgment or arbitral award unless there is fraud or if doing so would be repugnant to the public policy of the enforcing forum. Thus, in most recognition of judgments cases, “[c]ourts consistently have enforced foreign judgments even if they would have refused to entertain suit on the original claim on grounds of public policy.”<sup>144</sup>

Thinking of *Medellin* and *Torres* using a judgment recognition frame encourages courts to consider the normative community that the ICJ decision represents. This normative community, significantly, includes the United

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138. *Torres v. State (Torres II)*, No. PCD-04-442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004).

139. *Id.* at \*1.

140. 159 U.S. 113, 164 (1895).

141. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 117, cmt. c (1971).

142. *Id.* § 92.

143. *Id.* § 117.

144. Rosen, *supra* note 136, at 178-79.

States. Indeed, the Optional Protocol to the Vienna Convention, which makes the ICJ the venue to consider all “[d]isputes arising out of the interpretation or application” of the Convention,<sup>145</sup> was not only ratified but also drafted (and championed) by the United States in the first place.

Thus, as Judge Chapel wrote in a special, unpublished concurrence to the Oklahoma Court of Criminal Appeals’ decision,<sup>146</sup> the United States freely and consensually signed and ratified the Vienna Convention, including the Optional Protocol, creating binding, contract-like legal obligations between the United States and other State Parties. The Court of Criminal Appeals was therefore “bound by the Vienna Convention and Optional Protocol” and was obligated “to give effect” to both.<sup>147</sup> And the ICJ decision, because it was a “product of the process set forth in the Optional Protocol” deserved, according to Judge Chapel, the Court of Criminal Appeals’ “full faith and credit.”<sup>148</sup> By conceiving of the ICJ decision’s force in pluralist terms, Judge Chapel was able to stave off concerns about encroachments on local state sovereignty.

Further, the concept of sovereignty is unhelpful to resolve the Texas (or Oklahoma) case because there is no monolithic set of “state interests” to be effectuated; there are myriad voices within Texas. Texas must interact with the world, its citizens go abroad and might well want their consular notification rights honored, the Texas Attorney General has actively attempted to educate local law enforcement concerning Vienna Convention rights, and so on. In addition, the procedural default rule at issue here was most likely not enacted specifically with foreign defendants in mind. As Graeme Dinwoodie has argued in a different context, “statutory rules enacted by a national legislature are rarely enacted with an eye to international disputes or conduct.”<sup>149</sup> And even when legislators actually consider activities abroad, they do so to pursue domestic policy priorities, with little consideration for multistate implications.<sup>150</sup> Thus, a choice-of-law regime that only offers two options (the home state or the foreign one) improperly insists on judging citizens according to a single state norm in a world where those citizens affiliate with multiple states or nations. Indeed, the mere fact that a dispute is multinational necessarily means that it implicates interests that are different from a purely domestic dispute. Accordingly, judges should consider these added factors and craft rules based on a variety of national and international legal norms. Here, there are obviously lots of additional interests at play to distinguish the case from a purely domestic one, including concerns about diplo-

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145. Optional Protocol Concerning the Compulsory Settlement of Disputes, Vienna Convention on Consular Relations, *supra* note 19.

146. *See Torres v. State (Torres II)*, No. PCD-04-442, 2004 WL 3711623, at \*2 (Okla. Crim. App. May 13, 2004) (Chapel, J., concurring).

147. *Id.*

148. *Id.* at \*3.

149. Dinwoodie, *supra* note 73, at 548-49.

150. *Id.* at 549.

macy, foreign relations, citizens abroad, the federal government's stated interest in compliance with the ICJ order, and so on.

Finally, as noted above, the ICJ did satisfy the two requirements for the sort of intersystemic jurisdictional assertions that should command deference. First, it provided a detailed justification for its decision to intervene in an otherwise seemingly "local" criminal case. Second, it issued a very limited order, not attempting to overturn the convictions involved in toto, but instead simply asking for a further evidentiary hearing. Thus, the ICJ attempted a nuanced balance of international and local interests, and the decision therefore deserves a similar kind of deference and accommodation from the Texas court. Indeed, once the distorting filter of Texas' purported sovereign power is put aside, this seems like a relatively easy call.

And what about the federal government? From a pluralist perspective, the Bush Administration was wrong on both parts of its argument. First, contrary to the Solicitor General's contention before the U.S. Supreme Court, the ICJ decision *should* be deemed applicable to the states (at least in the judgment recognition sense described above), regardless of the position of the executive branch. Second, to the extent that the administration relied on a preemption or supremacy rationale to justify trumping the Texas procedural bar, such a rationale would not be sufficient from a pluralist perspective, unless it were accompanied by a strong normative statement as to why the federal interest must trump. Such a justification was not a part of the executive statement at issue in *Medellin*. In addition, a pluralist would not allow any automatic supremacy argument to win the day. This is in contrast to a strand of U.S. Supreme Court doctrine that has interpreted the U.S. Constitution to contain an implicit foreign affairs preemption doctrine that cuts off the interplay of federal and local authority.<sup>151</sup> In these cases, the Court has refused to allow localities to take actions that were deemed to trench on the exclusive national prerogative to conduct foreign affairs. Yet, as Judith Resnik has argued, lost in this approach is the idea that "[n]on-uniformity is a predicate of federalist systems, which can impose a national norm but which ought to be dedicated to local divergence whenever tolerable."<sup>152</sup> At the very least, courts should carefully interrogate the claimed justification for preemption to ensure that the local action at issue poses a real, rather than conjectural, threat

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151. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (striking down California law requiring insurance companies doing business in California to disclose any business activities in Europe during the Nazi Holocaust); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (prohibiting Massachusetts from banning state expenditures on imports made with forced labor); *Zschernig v. Miller*, 389 U.S. 429 (1968) (striking down Oregon statute that had the effect of preventing a resident of East Germany from inheriting property probated in the state). For a discussion of these cases, see Resnik, *Foreign as Domestic Affairs*, *supra* note 6.

152. Resnik, *Foreign as Domestic Affairs*, *supra* note 6, at 86.

to the federal government's conduct.<sup>153</sup> After all, given that pluralism is built into the structure of federalism, a bare assertion of foreign affairs preemption should not win the day, absent further justification.

## V. CONCLUSION

Both our international law and our federalism discourse are too often trapped in a language of sovereignty that fails to capture the reality of life in an era of cross-border interaction. 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 . . . is one of blotches, blends, and blurs.”<sup>154</sup> Thus, regardless of the positions one might adopt as a matter of political theory, the most important point to remember is that a total rejection of foreign, international, or non-state influence and authority is unlikely to be fully successful in a world of global interaction and cross-border activity. Indeed, seen from the point of view of U.S. historical practice, “sovereignists have a dismal track record, in that American law is constantly being made and remade through exchanges, some frank and some implicit, with normative views from abroad. Laws, like people, migrate. Legal borders, like physical ones, are permeable, and seepage is everywhere.”<sup>155</sup>

Accordingly, instead of bemoaning either the “fragmentation” of law<sup>156</sup> or the messiness of jurisdictional overlaps, we should accept them as a necessary consequence of the fact that communities cannot be hermetically sealed off from each other. Moreover, we can go further and consider the possibility that this jurisdictional messiness might, in the end, provide important systemic benefits by fostering dialogue among multiple constituencies, authorities, levels of government, and non-state communities. In addition, jurisdictional redundancy allows alternative ports of entry for strategic actors who might otherwise be silenced.

The *Medellin* case itself demonstrates the value of having multiple overlapping fora. These 52 Mexican nationals, with no recourse in state courts, were first able, because of our federalist system, to try pursuing their claims

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153. *See id.* at 87 (“[J]udges ought to adopt a posture of non-encroachment by insisting on exacting evidence of particular and specific imminent harms before invalidating actions by localities or by states as those entities determine their own expenditures of funds and rules.”).

154. 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).

155. Resnik, *Foreign as Domestic Affairs*, *supra* note 6, at 63-64.

156. *See, e.g.*, U.N. Int'l Law Comm'n, Study Group on Fragmentation of Int'l Law, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (2006) (*finalized by Martti Koskenniemi*).

in federal courts. And when that did not work, they were finally able to have their story told before the ICJ. Thus, jurisdictional pluralism is empowering, providing opportunities for accessing the levers of law.

On the other hand, a pluralist perspective does not necessarily privilege the international as somehow hierarchically superior and therefore able to dictate compliance. Instead, it recognizes the role of all legal pronouncements as fundamentally rhetorical, and it views the question of legitimacy not based on formalisms such as sovereignty but on what statements come to be accepted as true over time. Thus, legitimacy becomes a sociological question about changes of legal consciousness, and a pluralist legal system seeks to keep those multiple voices in dialogue with each other to the extent possible.

The *Medellin* case has now been “decided” by the U.S. Supreme Court, and although positivists view such a decision as the “final” word on this dispute, pluralists know that no statement of law, no matter how seemingly authoritative, is ever really final. Thus, the conversation will go on. Moreover, the Vienna Convention and the ICJ decision will continue to have an impact, regardless of the Supreme Court, because local law enforcement authorities around the country are now cognizant of their obligations in a way that they were not ten years ago.<sup>157</sup> Indeed, the U.S. State Department maintains a Consular Notification and Outreach Division specifically to help educate local prosecutors and police officers of their obligations under the Vienna Convention.<sup>158</sup> Thus, pluralism recognizes the tangible, day-to-day ways in which international law is “brought home,”<sup>159</sup> sometimes regardless of official legal pronouncements.

Most fundamentally, all of this interaction is elided or ignored if we continue to think and speak in the language of sovereignty, with its purportedly clear lines of demarcation, its assumed allocation of authority, and its formalistic conceptions of legitimacy. Such a language cannot hope to guide us in a world of interdependence, inevitably permeable borders, multiple communities, and overlapping jurisdictions. In the face of this messy world, we can retreat and insist on a set of pure theoretical models hopelessly divorced from reality, or we can accept (and perhaps even celebrate) the potentially jurisgenerative and creative role law might play in a plural world order.

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157. Levit, *supra* note 1344, at 41-46.

158. *See id.* at 42-43 (describing the work of the division).

159. *See, e.g.*, Harold Hongju Koh, Address, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 641-42 (1998).