

The Globalization of Jurisdiction:
Cyberspace, Nation-States, and Community
Definition

By Paul Schiff Berman*

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“Supposing however that the Act [at issue] had said in terms, that though a person sued in the island [of Tobago] had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the Court door; how could that be obligatory upon the subjects of other

countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?”¹

“[This] is a plea to grant all collective behavior entailing systematic understandings of our commitments to future worlds equal claim to the word ‘law.’ The upshot of such a claim, of course, is to deny the nation-state any special status for the collective behavior of its officials or for their systematic understandings of some special set of ‘governing’ norms. The status of such ‘official’ behavior and ‘official’ norms is not denied the dignity of ‘law.’ But it must share the dignity with thousands of other social understandings. In each case the question of what is law and for whom is a question of fact about what certain communities believe and with what commitments to those beliefs.”²

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

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

1. *Buchanan v. Rucker*, 103 Eng. Rep. 546 (K.B. 1808).

2. Robert Cover, *The Folktales of Justice*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 173, 176 (Martha Minow et al. eds., 1993) (footnote omitted).

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

differently, and we need to encourage people to imagine them differently...”⁴

Introduction

In the past decade, the terms “cyberspace” and “globalization” have become buzzwords of a new generation. And it is probably not surprising that the two have entered the lexicon simultaneously. The Internet from its beginning heralded a new world order of interconnection and decentralization,⁵ while the word globalization conjured for many the specter both of increasing trans-national and supra-national governance and increasing mobility of persons and capital across geographical boundaries.⁶ Thus, both terms have reflected a perception that national borders might no longer be as significant as they once were.⁷

On the other hand, national governments have been quick to reassert themselves. For example, there was a heady moment circa 1995 when it seemed as if the rise of cyberspace might cause us to rethink the

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

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

6. See, e.g., ANTHONY GIDDENS, *RUNAWAY WORLD: HOW GLOBALIZATION IS RESHAPING OUR LIVES* 24-37 (2000); Arjun Appadurai, *Disjuncture and Difference in the Global Cultural Economy*, in *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* 27, 27-29 (1996) (“Today’s world involves interactions of a new order and intensity.... With the advent of the steamship, the automobile, the airplane, the camera, the computer and the telephone, we have entered into an altogether new condition of neighborliness, even with those most distant from ourselves.”); MICHAEL EDWARDS, *FUTURE POSITIVE: INTERNATIONAL CO-OPERATION IN THE 21ST CENTURY* 5-6 (1999) (“Globalisation challenges the authority of nation states and international institutions to influence events, while the scale of private flows of capital, technology, information and ideas makes official transfers look increasingly marginal.”); MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE*, at xi (arguing that the increasing flow of money, technology, people, and goods across national boundaries means that “the nation-state has less and less power to regulate these flows and impose its power over the economy” and suggesting that, as a result, “[e]ven the most dominant nation-states should no longer be thought of as supreme and sovereign authorities, either outside or even within their own borders”).

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

relevance of national boundaries. Most famously, David Johnson and David Post argued that cyberspace could not legitimately be governed by territorially-based sovereigns and that the online world should create its own legal jurisdiction (or multiple jurisdictions).⁸ Predictably, nation-states pushed in the opposite direction, passing a slew of laws purporting to regulate almost any conceivable online activity from gambling⁹ to chat rooms¹⁰ to auction sites,¹¹ and seeking to enforce territorially-based rules regarding contractual relations,¹² privacy norms,¹³ “indecent” content,¹⁴ and

8. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996) [hereinafter Johnson & Post, *Law and Borders*]; see also, e.g., David Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155 (1996).

9. E.g., *Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (1999) (enforcing state and federal laws to ban foreign corporation, its Antiguan subsidiary, and their principals, officers, and directors from operating or offering gambling over the Internet); *Humphrey v. Granite Gates Resorts, Inc.*, 568 N.W. 2d 715 (1997) (asserting personal jurisdiction over non-resident corporation and its principal for deceptive trade practices, false advertising, and consumer fraud in connection with an Internet gambling site); Interactive Gambling Act, 2001, (Austl.) available at <http://www.noie.gov.au/projects/consumer/gambling/banact.pdf> (prohibiting online gambling services to customers in Australia and other, designated countries).

10. E.g., Nev. Rev. Stat. Ann. § 176A. 413 (2001) (restricting ownership and use of online chatrooms by people previously convicted of cyber-stalking); 47 U.S.C. § 254 (l)(1)(A)(ii) (2001) (requiring schools and libraries to adopt and implement policies to insure the safety and security of minors when using chat rooms).

11. E.g., Ind. Code Ann. § 26-2-8-102 (2001) (applying consumer regulations to online auction sites); N. C. Gen. Stat. § 66-312 (2000) (same); TGI Paris, Ordonnance de référé du 20 nov. 2000, available at <http://www.juriscom.net/txt/jurisfr/cti/tgiparis200001120.htm> (enjoining Yahoo!.com from permitting French users access to Nazi memorabilia via Yahoo!’s auction sites). For further discussion of this case, see text accompanying notes 61-86, *infra*.

12. E.g., Uniform Computer Information Transactions Act §209 (1999), available at <http://www.law.upenn.edu/bll/ulc/ucita/cita10st.doc> (proposed uniform state law to govern online contracts); Electronic Transactions Act, 1999 (Austl.) available at <http://www.law.gov.au/publications/ecommerce/> (creating a regulatory regime intended to support and encourage business and consumer confidence in the use of electronic commerce).

13. E.g., Electronic Communications Privacy Act, 18 U.S.C. § 2701 (Supp. III 1998) (prohibiting unauthorized access to a “facility through which an electronic communication service is provided”); Data Protection Act, 1998, c. 29 (Eng.) available at <http://www.hms.gov.uk/acts/acts1998/19980029.htm> (requiring technical and organizational measures against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data).

14. See e.g., *Reno v. ACLU*, 117 S.Ct. 2329 (1997) (striking down, on First Amendment grounds, provisions of the Communications Decency Act, 47 U.S.C. § 223 (1994, Supp. II), that criminalized certain content sent via online communication); *ACLU v. Reno*, 217 F.3d 162 (3d Cir., 2000) (striking down, on First Amendment grounds, the Child Online Protection Act, 47 U.S.C. § 231 (1998 Supp. III), which also criminalized certain content sent via online communication), cert. granted sub nom. *Ashcroft v. American Civil Liberties Union*, 121 S.Ct. 1997 (2001); Sexual Exploitation and other Abuse of Children Act, 18 U.S.C. § 2252(A) (1998 Supp. III) (prohibiting the receipt or distribution of sexually explicit photos of minors by any means including computer); *Regina v. Pecciarich*, [1995] O.R.3d 748 (holding that the distribution of child pornography by uploading photos to an electronic bulletin board was in violation of criminal statutes).

crime,¹⁵ among others.

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

In the meantime, on the globalization front, annual meetings of the world’s industrialized countries have become sites for the expression of uncertainty and resentment about the effect of international trade and monetary policy on local labor forces, the environment, and national sovereignty.¹⁶ Similar debates recur in the context of international human rights, where, increasingly, countries are asserting extraterritorial jurisdiction to try those accused of genocide and crimes against humanity in international or foreign domestic courts.¹⁷

All of these issues, questions, and conundrums, though they arise in a variety of doctrinal areas and may involve a wide range of different legal and policy concerns, nevertheless have at least one common element: they all touch on the idea of legal jurisdiction, the circumstances under which a

15. *E.g.* Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1998 Supp. III) (applying federal law to newly discovered forms of computer abuse and providing civil remedies for certain types of computer crimes); Regulation of Investigatory Powers Act, 2000, c. 23 (Eng.) (defining criminal penalties for interception of traffic on all postal and telecommunications networks and any action that may cause the content of a message to become known to people other than the sender or intended recipient); *see also* *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp.2d 444 (E.D. Va. 1998) (holding that defendants who harvested email addresses of AOL members using an extractor program and then used those addresses to send unauthorized bulk email advertising their pornographic web sites were in violation of the Act).

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

17. *See infra* text accompanying notes 137-170.

juridical body can assert authority to adjudicate or apply its legal norms to a dispute.¹⁸ And, in each of these cases, the question is complicated by the fact that jurisdiction may be asserted in one physical location over activities or parties located in a different physical location. Thus, the issue of jurisdiction is deeply enmeshed with precisely the fixed conception of territorial boundaries that contemporary events are challenging.

The problem, of course, is that local communities are now far more likely to be affected by activities and entities with no local presence. Cross-border interaction obviously is not a new phenomenon, but in an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all. Thus, although it is not surprising that local communities might feel the need to assert their norms over extraterritorial activities based simply on the local harms such activities cause, assertions of jurisdiction on this basis will almost inevitably tend towards a system of universal or transnational jurisdiction because so many activities will have effects far beyond their immediate geographical boundaries. Such a system, for better or worse, would jettison any idea that the application of legal norms over a party depends in some way on the party having consented to be governed by those norms.

Even more important, while courts, policy-makers, and scholars are scrambling simply to adapt existing jurisdictional models to the new social context in order to “solve” these tensions in particular situations, they are doing so without giving sufficient consideration to the theoretical *basis* for the exercise of legal jurisdiction in an increasingly interconnected world. Thus, I aim to take a different approach. I believe the time is ripe for us to take a step back and reflect on the jurisdictional principles we are seeking to adapt. By doing so, I attempt to lay the groundwork for a theoretical model that will allow us better to understand and evaluate the increasing globalization of legal jurisdiction.

In order to construct such a model, we first need to remind ourselves that conceptions about legal jurisdiction (by which I mean to include both the jurisdiction to decide a dispute and the determination that a jurisdiction’s law will apply) are more than simply ideas about the most efficient ways of regulating our world. Rather, jurisdiction is the locus for debates about community definition, sovereignty, and legitimacy. In

18. In the United States, this inquiry often focuses on the issue of personal jurisdiction (at least in the civil context) and is distinguished from subject matter jurisdiction, which is concerned not with location, but with which *type* of court in a given location is permitted to hear a case. Internationally, the issue is often framed as a question of choice of law rather than authority to adjudicate. And indeed, some of the policy concerns underlying the two inquiries might be different. For example, the question of jurisdiction implicates issues of convenience to the parties in deciding a case in a given location, whereas choice-of-law addresses the actual norms to be applied. Nevertheless, both involve the symbolic assertion of a community’s dominion over a dispute and therefore many of the same concerns about territorial borders, community definition, and the nation-state apply to debates about choice of law.

addition, the idea of legal jurisdiction both reflects and reinforces social conceptions of space, distance, and identity. Nearly all of the current frameworks for thinking about jurisdictional authority, however, take as their starting point the assumption that nation-states defined by fixed territorial borders remain the relevant jurisdictional entities, without any sustained discussion of how people actually experience allegiance to community or understand their relationship to geographical distance and territorial borders. Moreover, by side-stepping these questions of community definition, borders, and the experience of place, legal thinkers (in typically parochial fashion) are ignoring a voluminous literature in anthropology, cultural studies, and political philosophy concerning such issues.¹⁹

Indeed, even a cursory examination reveals that our current territorially-based rules for jurisdiction (and conflict of laws) were developed in an era when physical geography was more meaningful than it is today and during a brief historical moment when the ideas of nation and state were being joined by a hyphen to create an historically contingent Westphalian order.²⁰ Yet, if the ideas of geographical territory and the nation-state are no longer treated as givens for defining community,²¹ an entirely new set of questions can be asked. How are communities appropriately defined in today's world? In what ways might we say that the nation-state is an *imagined* community, and what other imaginings are possible? How do people actually experience the idea of membership in multiple, over-lapping communities? Should citizenship be theorized as one of the many subject positions occupied by people as members of diverse, sometimes non-territorial, collectivities? In what ways is our sense of place and community membership constructed through social forces? And if ideas such as "place", "community", "member", "nation", "citizen", "boundary", and "stranger"²² are not natural and inevitable, but are instead

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

20. The Peace of Westphalia ended the Thirty Years War, see *Treaties of Peace Between Sweden, France and the Holy Roman Empire* (October 14, 1648), I.C.T.S. 119-356 [hereinafter *Treaties*]; Leo Gross, *The Peace of Westphalia 1648-1948*, 42 AM. J. INT'L L. 20 (1948), and is generally thought to have ushered in the international legal order based on individual state sovereignty. See *infra* note 531. The historically contingent nature of the nation-state is discussed further at Part IVB, *infra*.

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

22. See, e.g., George Simmel, *The Stranger*, in *THE SOCIOLOGY OF GEORGE SIMMEL* 402, 402 (Kurt Wolff ed., 1950 (1908)) ("The stranger] is fixed within a particular spatial group, or within a group whose boundaries are similar to spatial boundaries. But his position in this group is determined, essentially, by the fact that he has not belonged to it from the beginning, that he imports qualities into it, which do not and cannot stem from the group itself.").

constructed, imagined, and (sometimes) imposed, what does that say about the presumed “naturalness” of our geographically-based jurisdiction and choice of law rules?

This article will ask these questions, drawing on humanities and social science literature that complicates many of the premises most lawmakers and legal scholars take for granted concerning jurisdiction. This literature insists that we recognize the constructed nature of our ideas about boundaries and community definition as well as the historical contingency of the nation-state. Moreover, by analyzing the social meaning of our affiliations across space, we can think about alternative conceptions of community that are subnational, transnational, supranational, or cosmopolitan. Such an analysis provides a better understanding of the world of experience on which the legal world is mapped and is therefore essential in order to develop a richer descriptive account of what it means for a juridical body to assert jurisdiction over a controversy.²³

In addition, moving from the descriptive to the normative, I set about the task of theorizing the idea of jurisdiction in a way that might take account of the contested and constantly shifting process by which people imagine communities and their membership in them. Drawing on the insights of legal theorist Robert Cover, I offer what I will call a cosmopolitan pluralist conception of jurisdiction.

A cosmopolitan pluralist approach would allow us to think of community not as a geographically determined territory circumscribed by fixed boundaries, but as “articulated moments in networks of social relations and understandings.”²⁴ This dynamic understanding of the relationship between the “local” community and other forms of community affiliation (regional, national, transnational, international, cosmopolitan) would permit us to conceptualize legal jurisdiction in terms of social interactions that are fluid processes, not motionless demarcations, frozen in time and space. A court in one country might therefore appropriately assert community dominion over a legal dispute even if its territorially-based contacts with the dispute are minimal.²⁵ Or conversely, a country that might have certain

23. Cf. PAUL KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 91 (1999) (encouraging those studying law as a cultural system to move “away from normative inquiries into particular reforms and toward thick description of the world of meaning that is the rule of law”); Susan Silbey & Austin Sarat, *The Pull of the Policy Audience*, 10 *L. & POLICY* 97 (1988) (arguing that sociolegal scholars would benefit from resisting the demand for normative proposals). *But see* Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law* (reviewing AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION*), ___ *COLUM. L. REV.* ___, ___ (2002, forthcoming) (arguing that “the cultural analysis of law is both a vital field of academic knowledge in its own right and a way of shedding new light on practical questions concerning legal rules and institutions”).

24. DOREEN MASSEY, *SPACE, PLACE, AND GENDER* 154 (1994).

25. Of course, even if a court asserted jurisdiction over a dispute, other doctrines, such as standing or causation, might still cause those courts to limit the scope of the relief available.

“contacts” with a dispute might nevertheless not be able to establish a tie between a local community and a distant defendant sufficient to justify asserting its dominion.

A more thorough interrogation of conceptions of community, therefore, might reign in some assertions of jurisdiction over distant acts while permitting other extraterritorial assertions of jurisdiction that are currently unrecognized. In any event, the jurisdictional inquiry would no longer be based on a reified counting of contacts with, effects on, or interests of, a territorially-bounded population. Rather, courts would take seriously the multiple definitions of community that might be available, the symbolic significance of asserting jurisdiction over an actor, and the normative desirability of conceptualizing the parties before the court as members of the same legal jurisdiction.²⁶

In addition, if the nation-state is an imagined, historically contingent community defined by hopelessly arbitrary geographical boundaries, and if those nation-states—because of transnational flows of information, capital, and people—no longer define a unified community (if they ever did), then there is no conceptual justification for conceiving of nation-states as possessing a monopoly on the assertion of jurisdiction. Instead, any comprehensive theory of jurisdiction must acknowledge that *non-state* communities also assert various claims to jurisdictional authority and articulate alternative norms that are often incorporated into more “official” legal regimes. This pluralist²⁷ understanding of jurisdiction helps us to see that law is not merely the coercive command of a sovereign power, but a language for imagining alternative future worlds. Moreover, various norm-generating communities (not just the sovereign) are always contesting the shape of such worlds.

Of course, not all assertions of jurisdiction ultimately possess the coercive force we often associate with law. One of the obvious reasons that nation-states have been the primary jurisdictional entities of the past several hundred years is that those states have wielded the power to enforce their judgments. In contrast, many jurisdictional assertions may

26. This broader conception of jurisdiction would necessarily affect choice of law as well, but a more detailed exploration of how the ideas explored here apply to choice of law must await further elaboration in a future project.

27. Political pluralism includes “theories that seek to organize and conceptualize political phenomena on the basis of the plurality of groups to which individuals belong and by which individuals seek to advance and, more importantly, to develop, their interests.” AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM 2 (1995). Thus, I use the term to refer to situations where “two or more legal systems coexist in the same social field,” Sally Engel Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. 869, 870 (1988) (citations omitted), even if one or both of those legal systems is not an “official,” state-based system. For further discussions of legal pluralism, see generally *id.*, John Griffiths, *What is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM 1 (1986); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 28 (1981); David Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. BAR. FOUND. RES. J. 425 (1980).

never have such coercive force behind them. But that merely means that communities asserting jurisdiction must convince those with greater coercive power to enforce their judgments. For example, when a Spanish judge chose to assert jurisdiction over former Chilean dictator Augusto Pinochet,²⁸ that seizure of jurisdiction had no literal power unless the judge could rhetorically persuade other countries to recognize the judgment.²⁹ Although ultimately the Spanish prosecution did not proceed,³⁰ the rhetorical force of the assertion of jurisdiction has changed the environment for future international human rights prosecutions.³¹ In a very real sense then, the assertion of jurisdiction shaped the future world.

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

My discussion proceeds in five parts. First, I describe some of the challenges that the rise of cyberspace and globalization pose to a legal system based on territorially based jurisdiction and fixed borders. The challenges indicate that, in a wide variety of legal settings, the rise of online interaction (and global inter-connectedness more broadly) has raised

28. Spanish magistrate Baltasar Garzon issued an arrest order stating that Pinochet was “the leader of an international organization created...to conceive, develop, and execute the systematic planning of illegal detentions, kidnappings, torture, forced relocations, assassinations and/or disappearances of numerous persons, including Argentines, Spaniards, Britons, Americans, Chileans, and other nationalities.” Anne Swardson, *Pinochet Case Tries Spanish Legal Establishment; Pinochet Case Tries Legal System*, WASH. POST, Oct. 22, 1998, at A27. On October 30, 1998 the Spanish National Court ruled unanimously that Spanish courts had jurisdiction over the matter based both on the principle of universal jurisdiction (that crimes against humanity can be tried anywhere at any time) and the passive personality principle of jurisdiction (that allows courts to try cases if their nationals are victims of crime, regardless of where the crime was committed). See Order of the Criminal Chamber of the Spanish *Audiencia Nacional* Affirming Spain’s Jurisdiction (Nov. 5, 1998), in *THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN* 95, 107 (Reed Brody & Michael Ratner, eds. 2000) [hereinafter *PINOCHET PAPERS*]. Garzon had alleged that Spaniards living in Chile were among those killed under Pinochet’s rule. See *id.*; see also *infra*, notes 147-148.

29. In this instance, Pinochet was physically in Great Britain. The British House of Lords ultimately ruled that Pinochet was not entitled to head of state immunity for acts of torture and could be extradited to Spain. See *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, 37 I.L.M. 1302 (1998) (Eng.).

30. The British government refused to extradite, citing Pinochet’s failing health, see Statement of Secretary of State Jack Straw in the House of Commons (Mar. 2, 2000), in *PINOCHET PAPERS*, *supra* note 28, at 481, 482-83, and Pinochet was returned to Chile where, after domestic proceedings, Pinochet was deemed mentally unfit to stand trial. See *Pinochet Unfit for Trial, Chilean Court Rules*, N.Y. TIMES (Jul. 10, 2001), at A2.

31. See Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. INT’L L. & POL. 527, 536 (2001) (“In a way that was not necessarily predictable, a national court...[has] made a connection between international law and a broader set of values than those to which states have given express approval”).

difficult questions about the extraterritorial assertion of legal norms or adjudicatory authority. Second, I summarize several leading theories regarding how to adapt (if necessary) existing legal doctrine to address these challenges. The responses include schemes that seek large changes in contemporary legal regimes, as well as arguments that cyberspace and globalization present no true practical problem at all, and a number of positions in between. Although both the challenges and the responses have been major topics in the legal literature over the past few years, I believe that simply surveying conceptual difficulties that cut across a variety of doctrinal areas affords us a more comprehensive view of the way in which territorially based understandings of legal rules have become problematic. Third, I argue that these various theories are unsatisfying because they fail to pay sufficient attention to the social meaning of legal jurisdiction and community definition. Fourth, I survey some of the literature from other disciplines that complicates our understanding of the nation-state, community definition, territorial borders, and belonging. This literature reveals that, far from having fixed geographical boundaries, community alliances are multiple, overlapping, often contested, and frequently operate at a sub-, supra-, or trans-national level. Moreover, the definition of community emerges as a politically-charged (and sometimes hegemonic) social construction. Fifth, drawing on this literature and starting from Cover, I begin to construct a cosmopolitan pluralist model for understanding the globalization of jurisdiction. In this model, jurisdictional assertions and contests about judgment recognition are placed at the center of debates about community definition and norm development. Finally, I suggest how such a conception might operate (and in some cases already is operating) in practice.

One must always be wary of claims that the environment we are living in today is radically different from anything that has come before. And, undoubtedly, some of the breathless quality of globalization and cyberspace literature is unwarranted. Indeed, by some measures, the world was more “global” and interconnected at the end of the 19th century,³² and we have been communicating over wires across national borders for over a hundred years. In addition, although nation-states are historically contingent, they are, of course, significantly embedded in historical, social, and political contexts that inevitably continue to shape social and political action. Thus, the idea of nation-state sovereignty is not likely to end anytime soon (though the nature of that sovereignty certainly is shifting).

32. See, e.g., Nicholas D. Kristof, *At This Rate, We'll Be Global in Another Hundred Years*, N.Y. TIMES (May 23, 1999) at sec. 4, p. 5 (suggesting that labor, goods, and capital moved across borders at least as much in the period from 1860-1900 as in the 1990s).

It is not my intention, however, to prove conclusively that the twin engines of globalization³³ and online interaction are necessarily creating an entirely new *crisis* that must be “solved” by revisiting the concept of legal jurisdiction (though I don’t rule out the possibility either). Nevertheless, although it is dubious to assume that everything has changed in the past decade it is also dubious to assume that nothing has. And, while people in almost any given geographical location have undoubtedly always been affected by extraterritorial activities to some degree, in the past those effects were far more likely to be at least somewhat related to geographical proximity than they are now.³⁴ Even a cursory glance at a major newspaper on most days indicates at the very least that territorially-based sovereigns are facing *challenges* regulating in this new environment.³⁵

Such periods of challenge and adaptation are also moments of opportunity. Just as the increasing use of legal fictions in an area of law often indicates that the area is in flux, so too the widespread acknowledgment that new social developments challenge traditional legal rules indicates that those rules may benefit from re-examination. Thus, my aim in this Article is a more limited one: to lay out some of the conceptual challenges nation-states currently face in attempting to maintain distinctive territorially-based regulatory regimes, to enrich our descriptive understanding of what it means in social as well as legal terms to assert jurisdiction over an individual and activity, to consider whether territorially-based legal regimes fit people’s experience of place, borders and community affiliation, and to begin constructing a model that might allow the jurisdictional inquiry to match more accurately this lived experience. At the very least, we may emerge with a more nuanced appreciation of the social meaning of jurisdiction. And those who argue that we need not rethink

33. I am using the term “globalization” to mean both the worldwide process of liberalizing state controls on the international movement of goods, services and capital and the social, economic and political consequences of liberalization. See generally SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* (1999). In addition, when I speak of globalization, I also mean the attitude about the world that tends to come into being as a result of frequent use of the term globalization. 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.

34. See David G. Post, *Against “Against Cyberanarchy,”* unpublished manuscript at 17-18 (on file with author) (“A plot of the location of all events and transactions taking place in *cyberspace* that have an effect on persons or property in [any particular location] will have virtually no geographic structure at all.”).

35. See, e.g., Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMM. 197, 201-02 (2000) (noting that “there is no reason to assume that the nation-state form will be around forever” and identifying “serious challenges to nation-state sovereignty from three directions”: supra-national norms and structures (international human rights and trade law, subnational groups “demanding (and receiving) increasing degrees of autonomy,” and “transnationalism”—the presence within state borders of communities of non-nationals with significant ties across borders”).

jurisdiction at all will be forced to articulate a coherent understanding of community definition from which their theory arises and then test that theory against the experience of people who supposedly belong to such communities. Thus, if scholars wish to defend the nation-state as the only relevant jurisdictional entity or adopt a particular test for evaluating various assertions of jurisdiction, they must justify their normative choices; they cannot simply assume the jurisdictional world they assert is natural or inevitable.

I. Ten Challenges

This Part surveys some of the conceptual challenges that have arisen in the past few years concerning the extraterritorial assertion of legal norms or adjudicatory authority to activity that, in one way or another, creates effects across borders. While the list of challenges is by no means exhaustive, my goal is to suggest that, in a wide array of doctrinal areas, the rise of online communication and global inter-connectedness has forced courts and policy-makers to wrestle with the difficulty of mapping a jurisdictional system based on fixed borders onto a world that resists—in a myriad of different ways—such neat divisions.³⁶ Moreover, many of the examples also challenge territorially-based assumptions about nation-state sovereignty. Indeed, the traditional understanding of national boundaries as inviolate has been called into question by the increase of cross-border interaction and the rise of transnational and international administrative and judicial bodies. Thus, the precise contours of extraterritorial adjudication and nation-state sovereignty are both in flux.

For those who follow the legal literature on Internet-related developments, none of these scenarios (except possibly the challenge of international human rights) is new. Indeed, many of these issues have been hashed out by various scholars during the past several years, and many “solutions” to the challenges have been proposed. Nevertheless, although some (or perhaps all) of these challenges might be resolved without rethinking the concept of jurisdiction, I believe the existence of these challenges creates the space for such rethinking to occur. To take one example, discussed in more detail below, it certainly is the case that U.S. courts are capable of adapting the *International Shoe* minimum contacts test³⁷ to the online environment. And perhaps this approach is the best one

36. Such a jurisdictional system includes both the assertion of adjudicatory authority and the decision about what substantive norms to apply to the dispute. In this Article, I refer to both inquiries as issues of jurisdiction writ large.

37. See *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (establishing 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 contact with the relevant state “such that jurisdiction is consistent with traditional notions of

to take. But it seems to me that, before the new adaptations become too entrenched, we might take this moment of transition to ask the fundamental questions that a narrow focus on adaptation never permits one to ask. Moreover, as I will discuss later in the article, there is at least some evidence that courts and policymakers are already embracing more flexible understandings of jurisdiction and national boundaries, and not simply adapting settled jurisdictional and choice of law rules. Thus, the time for reexamination is now. The challenges discussed below may give some sense of why.

A. The Challenge of “Minimum Contacts” in Cyberspace

The U.S. Supreme Court’s *International Shoe* test for determining whether an assertion of personal jurisdiction comports with the Due Process Clause of the U.S. Constitution asks whether the defendant has sufficient contact with the relevant state “such that jurisdiction is consistent with traditional notions of fair play and substantial justice.”³⁸ This “minimum contacts” test is satisfied as long as the “quality and nature of the activity” of the defendant within the state is sufficient “in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.”³⁹ Although this test is obviously a matter of United States constitutional law and is therefore not binding on courts elsewhere, it provides a useful starting point because the problems of extraterritorial activity will affect all territorially-based jurisdictional systems, even those that define the scope of jurisdiction (or choice of law) somewhat differently.

Since 1945, the minimum contacts test has provided the framework for determining the outer limits of personal jurisdiction under the United States Constitution.⁴⁰ Nevertheless, although the test’s flexibility is its greatest strength, such flexibility has meant that the minimum contacts analysis does not provide a clearly defined rule, relying instead on a highly particularized, fact-specific inquiry. Accordingly, it is difficult to be certain in advance how many and what sort of contacts will be enough for a state to exercise jurisdiction under the federal Constitution. The Supreme Court has variously looked to whether defendants have “purposely availed”

fair play and substantial justice”).

38. *Id.* at 316 (internal quotation omitted).

39. *Id.* at 319.

40. The minimum contacts test, of course, establishes only the outer limit for the exercise of personal jurisdiction. Although no state can assert jurisdiction *beyond* that which the federal Constitution allows, they may choose to exercise *less* than the full authority granted by the Constitution. Some states have crafted their own statutes that voluntarily restrict their jurisdiction over out-of-state defendants further than the federal Constitution requires. In those states, courts may exercise personal jurisdiction only if the case falls within the limits of the state statute *and* jurisdiction is permitted under the federal Constitution.

themselves of the state,⁴¹ whether they could “reasonably anticipate”⁴² that they would be sued there, or whether the interests of the state in adjudicating a dispute outweighed the defendant’s concerns about increased cost, inconvenience, or potential bias.⁴³ In addition, some members of the Court have indicated that a state may assert personal jurisdiction even when the only link to the forum state is that a corporation “delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”⁴⁴

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

B. The Challenge of E-Commerce

If a consumer purchases goods online, what law should apply to the transaction, and which jurisdiction will adjudicate any subsequent dispute? After all, in many cases, the consumer will not know whether the website she has just accessed is “located” on a server just down the street or on a different continent (and indeed a single site may have elements that reside on multiple servers in multiple locations). If a French consumer accesses a “Swedish” website, has she somehow “entered” Sweden for purposes of jurisdiction and choice of law?

Moreover, the possibility that the site itself might require the consumer to agree to contractual terms that include choice of law and forum selection clauses may not fully resolve the dilemma. Some countries

41. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

42. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

43. See *Burger King v. Rudzewicz*, 471 U.S. 462, 476-77 (1985).

44. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 119 (1987) (Brennan, J., concurring in part and concurring in the judgment). In *Asahi*, four justices indicated that simply placing a product in the stream of commerce, without more, would *not* be sufficient to establish jurisdiction wherever that product happened to end up. Instead, these justices would require some sort of “additional conduct” by the defendant that would demonstrate that the defendant had the specific “intent or purpose” to serve the market in the state exercising jurisdiction. *Id.* at 112 (Opinion of O’Connor, J.). Four other justices (including Justice Brennan) disagreed, however, arguing that simply placing a product in the stream of commerce was sufficient. See *id.* at 117 (Opinion of Brennan, J.). The ninth, Justice Stevens, found that, based on the facts of the case, jurisdiction was proper under either test and therefore declined to choose between them. See *id.* at 122 (Opinion of Stevens, J.). As a result, neither rationale achieved a majority, and the Supreme Court has not since spoken directly to the stream-of-commerce question.

may determine that such “click stream” agreements are enforceable⁴⁵ while others might view them as not being true bargains because the bargaining power among the participants might be unequal.⁴⁶ Or countries might determine that consumer protection issues implicate public values that cannot simply be contracted away by parties to a transaction.⁴⁷ If so, which jurisdiction’s consumer protection law should apply?⁴⁸

The European Union, in an attempt to address these challenges, adopted a directive in early summer 2000, enshrining the “country of origin” principle for such sales. Under the directive, the law of the country of the merchant or service provider applies in the event of a dispute.⁴⁹ Several months later, however, the European Commission indicated that it might adopt the so-called Rome II Regulation, which would reverse the directive and make the laws of the consumer’s country apply in cross-border e-commerce disputes, absent contractual provisions to the contrary.⁵⁰ Since then, under heavy pressure from business interests, the EU has now backed off the idea of enacting Rome II.⁵¹ These flip-flops demonstrate how contentious the question of jurisdiction over e-commerce activities has become.

45. See, e.g., *Rudder v. Microsoft Corp.*, 2 C.P.R. (4th) 474 (Ont. S.C.J. 1999) (holding that to find the forum selection clause unenforceable would undermine the integrity of any agreement entered into through the Web); *Kilgallen v. Network Solutions*, 99 F. Supp. 2d 125 (D. Mass. 2000) (holding that forum selection clauses are enforceable unless proven unreasonable under the circumstances).

46. See, e.g., Thomas A. Lipinski, *The Developing Legal Infrastructure and the Globalization of Information: Constructing a Framework for Critical Choices in the New Millennium Internet—Character, Content and Confusion*, 6 RICH. J.L. & TECH 19, ¶ 25 (Winter 1999-2000), available at <http://www.richmond.edu/jolt/v6i4/article2.html> (criticizing courts for disregarding the fact that such agreements are subject to an imbalance in bargaining power at the time of contract formation); Susan D. Rector, *E-Commerce Update: Clickwrap Agreements: Are They Enforceable?*, 13 CORP. COUNS. 1 (Mar. 1999) (noting that the complete terms of click stream contracts often are not known until after the consumer makes the purchase).

47. See, e.g., *Williams v. America Online, Inc.*, 2001 WL 135825 (Mass. Super. 2001) (refusing to enforce forum selection clause contained in America Online’s Terms of Service agreement in part because “public policy suggests that Massachusetts consumers who individually have damages of only a few hundred dollars should not have to pursue AOL in Virginia.”).

48. Cf., *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, ___ (2d Cir. 1955) (Frank, J., dissenting) (arguing that a choice-of-law provision in a contract of adhesion should not be honored); see also, generally, Alfred Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

49. See Council Directive 2000/31, 2000 O.J. (L 178).

50. See Communication from the Commission on the law of non-contractual obligations, COM (2001) 66 final (Feb. 7, 2001).

51. See John Duckers, *Regulation Tide Begins to Recede*, BIRMINGHAM POST & MAIL, 2002 WL 13710809 (Feb. 15, 2002) (reporting that the European Commission has “shelved” its Rome II negotiations, indicating that “business is making its voice heard in Europe’s corridors of power”); Paul Meller, *Europe Panel is Rethinking How it Views E-Commerce*, N.Y. TIMES (June 27, 2001), at W1; European Commission Changes Tack on E-Commerce Law, N.Y. TIMES (June 26, 2001), at ___.

C. The Challenge of International Taxation

Historically, taxation regimes have been based on geography and have depended on the traditional nation-state structure.⁵² Thus, the question of who gets to collect a tax generally boils down to questions such as: Where did the transaction take place? Where did the income stream arise? Where is the company located? Needless to say, these questions can be quite difficult to resolve in the context of digital transactions. Indeed, one commentator has stated bluntly: “The basic assumption underlying economic governance in the modern era is that, regardless of how international the world economy, any transaction can be located precisely in two dimensional geographic space.... [But] [g]eography does not map on cyberspace.”⁵³

For example, imagine a company that provides on-line data services or that transmits wireless messages via satellite. Should the profits from these services be taxed in any country where the business has customers? The overwhelming majority of bi-lateral income tax agreements allow taxation if a business maintains a “permanent establishment” (PE) in a particular jurisdiction, but otherwise does not allow taxation of “business profits” derived from that jurisdiction.⁵⁴ In an e-commerce world, the need to have such a permanent establishment is radically altered. A company may maintain no particular physical presence in the country at issue. Or the only presence may be a server located in the country, but normally that server is owned or operated by someone else. Are the electrons passing through the server sufficient to create a presence or “permanent establishment” so as to justify taxation?

The Committee on Fiscal affairs of the Organization for Economic Cooperation and Development (OECD), which administers the model income tax convention that forms the basis of most bi-lateral agreements, recently has attempted to “clarify” the definition of what constitutes a

52. Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 278; see also TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 69 (1983). In fact, most modern countries have based their tax policies on traditional notions of a nation’s sovereign authority over its subjects. Stephen G. Utz, *Tax Harmonization And Coordination In Europe And America*, 9 CONN. J. INT’L L. 767, 767 (1994). Early tax policy analysts assumed that the geographically-fixed nation-state possessed inherent taxing authority, reflecting the view that “nations were natural units and that within their boundaries national governments were sovereign for all purposes.” STEPHEN G. UTZ, TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPAL DEBATES 56 (1993). Under this vision, nation-states continue to “claim full taxing authority over people, property, and transactions ‘within’ their territory.” *Id.* at 195.

53. Stephen J. Kobrin, *Taxing Internet Transactions*, 21 U. PA. J. INT’L ECON. L. 666, 671 (2000).

54. See Model Tax Convention on Income and On Capital §R(6) (OECD Committee on Fiscal Affairs 1961).

“permanent establishment”:

The clarification states that a web site cannot, in itself, constitute a PE; that a web site hosting arrangement typically does not result in a PE for the enterprise that carries on business through that web site; that an Internet service provider normally will not constitute a dependent agent of another enterprise so as to constitute a PE for that enterprise and that while a place where computer equipment, such as a server, is located may in certain circumstances constitute a permanent establishment, this requires that the functions performed at that place be significant as well as an essential or core part of the business activity of the enterprise.⁵⁵

While this clarification may sound reasonable, it poses a major problem for developing countries that rely on tax revenue from foreign investment because corporations can now more easily avoid local taxation by maintaining only an “e-presence” in a given country.⁵⁶

Stephen J. Kobrin, Director of the Wharton School’s Institute of Management and International Studies, recently offered a similar sort of example.⁵⁷ Assume a software programmer in India is working in real time to upgrade a bank’s computer system in New York, using the bank’s servers, which are in New Jersey, so that the bank’s accounting office, located in Ireland, can function more efficiently. Certainly an economically valuable service is being rendered, but where does the taxable transaction take place?

Kobrin argues that in discussions of Internet taxation issues such as this one, four assumptions are generally at work. First, taxation should be economically neutral—that is, it should not influence the location or form of

55. *OECD Progresses towards Achieving an International Consensus on the Tax Treatment of E-commerce*, OECD News Release (Feb. 12, 2001); see also *Clarification on the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on the Model Tax Convention on Article V*, OECD Report 3 (Dec. 22, 2000), available at http://www.oecd.org/daf/fa/e_com/ec_1_PE_Eng.pdf. Similarly, language on taxation in the Restatement (Third) of Foreign Relations Law requires that corporations have a “physical nexus” with a jurisdiction before taxation is permitted. See *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* §412 (1987).

56. Even within the United States, the issue of physical nexus is controversial. For example, California’s State Board of Equalization recently issued an opinion asserting that purchases made through Borders.com can be charged state sales tax despite the fact that Borders.com has no property or employees in California. See *In the Matter of the Pet’n for Redetermination under the Sales and Use Tax Law of Borders Online, Inc.*, California State Board of Equalization (Mem. Op. SC OHA 97-638364-56270) (Sep. 26, 2001). The state based its opinion on the fact that Borders Books stores (a separate corporation that does have a physical presence in California) accepts returns of books purchased online at Borders.com, thus establishing the requisite “nexus” between the two. See *id.* While it is beyond the scope of this article to debate whether this particular determination is justified, the tenuous nature of the nexus inquiry is clear.

57. Kobrin, *supra* note 53, at 670.

economic activity. Second, a transactions that are either doubly or triply taxed, or not taxed at all, should be avoided. Third, there should be an equitable distribution of tax revenue. Fourth, fiscal sovereignty based on geographically defined nation-states should be maintained.⁵⁸

As the question of permanent establishment indicates, satisfying all four of these principles simultaneously poses a formidable challenge. Indeed, given the non-geographic nature of digital transactions, “it may be impossible to resolve ‘jurisdictional’ issues, distribute revenue, or even collect sufficient revenues to sustain governmental activities while maintaining the practice or principle of mutually exclusive jurisdiction—political and economic control exercised through control over geography.”⁵⁹ According to Kobrin, an efficient and just tax system may ultimately require a far greater degree of international cooperation and redistribution than we have seen in global tax policy thus far.⁶⁰

D. The Challenge of Extraterritorial Regulation of Speech

Cyberspace creates the possibility (and perhaps even the likelihood) that content posted on-line by a person in one physical location will violate the law in some other physical location. In such circumstances there is an inevitable problem of extraterritoriality. Will the person who posts the content be required to conform her activities to the norms of the most restrictive community of readers? Or, alternatively, will the community of readers, which has adopted a norm regarding Internet content, be subjected to the proscribed material regardless of its wishes? The answers to these questions depends in part on whether the community of readers asserts the jurisdictional authority to impose its norms on the foreign content provider.

Recently, a French court addressed this jurisdictional issue and claimed the power to regulate the content of an American website accessible in France. On May 22, 2000, the Tribunal de Grande Instance de Paris issued a preliminary injunction against Yahoo.com, ordering the site to take all possible measures to dissuade and prevent the access in France of Yahoo! auction sites that sell Nazi memorabilia or other items that are sympathetic to Nazism or constitute holocaust denial.⁶¹ Undisputedly, selling such merchandise in France would violate French law,⁶² and

58. *See id.* at 672.

59. *Id.*

60. *See id.*; *see also* Stephen G. Utz, *Tax Harmonization And Coordination In Europe And America*, 9 CONN. J. INT’L L. 767, 767-68 (1994).

61. *See* TGI Paris, Ordonnance de référé du 22 mai 2000, <http://www.juriscom.net/tzt/jurisfr/cti/tgiparis20000522.htm>. An example of the type of auction page at issue can be found at http://www.legalis.net/jnet/illustration/yahoo_auctions.htm.

62. *See* Article R. 645-1 du Code Pénal.

Yahoo.fr, Yahoo!'s French subsidiary, complied with requests that access to such sites be blocked.⁶³ What made this action noteworthy was the fact that the suit was brought not only against Yahoo.fr, but against Yahoo.com, an American corporation, and the fact that the court sought to enjoin access to non-French websites stored on Yahoo!'s U.S.-based servers.

Of course, one can easily see why the court and the complainants in this action would have taken this additional step. Shutting down access to web pages on Yahoo.fr does no good at all if French citizens can, with the click of a mouse, simply go to Yahoo.com and access those same pages. On the other hand, Yahoo! argued that the French assertion of jurisdiction was impermissibly extraterritorial in scope. According to Yahoo, in order to comply with the injunction it would need to remove the pages from its servers altogether (not just for French people) thereby denying such material to non-French citizens, many of whom have the right to access the materials under the laws of their nations. Most importantly, Yahoo! argued that such extraterritorial censoring of American web content would run afoul of the First Amendment of the U.S. Constitution. Thus, Yahoo! and others⁶⁴ contended that the French assertion of jurisdiction was an impermissible attempt by France to impose global rules for Internet expression.⁶⁵

Interestingly, an Australian case decided the previous year had adopted this same logic in refusing to enjoin material posted on the Internet by a person in the United States that was defamatory under Australian law.⁶⁶ According to the court, “[o]nce published on the Internet material can be received anywhere, and it does not lie within the competence of the publisher to restrict the reach of publication.”⁶⁷ The court went on to explain:

The difficulties are obvious. An injunction to restrain defamation in NSW [New South Wales] is designed to ensure compliance with the laws of NSW, and to protect the rights of plaintiffs, as those rights are defined by the law of NSW. Such an injunction is not designed to superimpose the law of NSW relating to defamation on every other state, territory and country of the world. Yet

63. See TGI Paris, Ordonnance de référé du 20 nov. 2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis200001120.htm>.

64. See, e.g., Carl S. Kaplan, *Experts See Online Speech Case as Bellwether*, N.Y. TIMES (Jan. 5, 2001) (quoting Barry Steinhardt, associate director of the American Civil Liberties Union, warning that if “litigants and governments in other countries...go after American service provider...we could easily wind up with a lowest common denominator standard for protected speech on the Net.”).

65. As Greg Wrenn, associate general counsel for Yahoo!'s international division put it, “We are not going to acquiesce in the notion that foreign countries have unlimited jurisdiction to regulate the content of U.S.-based sites.” See *id.*

66. See *Mcquarie Bank Ltd. v. Berg*, [1999] NSWSC 625 (New South Wales Supreme Ct., June 2, 1999).

67. *Id.* at ¶ 12.

that would be the effect of an order restraining publication on the Internet. It is not to be assumed that the law of defamation in other countries is coextensive with that of NSW, and indeed, one knows that it is not. It may very well be that, according to the law of the Bahamas, Tashakistan, or Mongolia, the defendant has an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of this court.⁶⁸

Thus, the court adopted precisely the type of argument Yahoo! made before the French investigating judge and declined to make a ruling that it saw as unavoidably extraterritorial in its scope.⁶⁹

The French judge took a different tack, however, and decided to investigate the empirical basis for Yahoo!'s position. Thus, the court engaged a panel of three technical experts to determine whether Yahoo! could, under existing technology, identify and filter out French users from the auction sites in question, while maintaining access to those sites for other users.⁷⁰ The panel, though partially divided,⁷¹ ultimately concluded that, for approximately 70 percent of the French users of Yahoo.com, identifying the location of the user would be feasible.⁷² Armed with that

68. *Id.* at ¶ 14.

69. *But see Gutnick v. Dow Jones & Co., Inc.* [2001] VSC 305 (Supreme Ct. of Victoria, Aug. 28, 2001) (asserting jurisdiction of American publisher for publishing on its website an article allegedly defaming an Australian citizen).

70. *See* Tribunal de Grande Instance de Paris, Ordonnance de référé (Aug. 11, 2000), http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord_tgi-paris_110800.htm.

71. One of the three members, Vint Cerf, objected to the part of the experts' report recommending that Yahoo! be forced to ask users their location upon accessing the site. *See* TGI Paris, Ordonnance de référé du 20 nov. 2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis200001120.htm>. According to Cerf, such a requirement would be both ineffectual (because users could lie and because Yahoo! could not force sites accessed through Yahoo! to ask about location), and an invasion of privacy. *See id.* In addition, Cerf argued that any order should not extend to French citizens who are not in French territory at the time of their access to the Internet because the court's jurisdiction as to those individuals is unclear. *See id.*

Although a second member of the expert panel, Ben Laurie, did not dissent from the recommendation, he subsequently posted to the Web an open letter, titled "An Expert's Apology." *See* Ben Laurie, *An Expert's Apology* (Nov. 21, 2000), available at <http://www.apache-ssl.org/apology.html> of apology. In the letter, Laurie explained that, though the panel had attempted to answer the narrow question posed by the court (to what extent was it technically possible for Yahoo! to comply with the court's order), the expert report did not necessarily reflect his policy opinion on the question. Laurie also argued that any geographical filtering would be "inaccurate, ineffective, and trivially avoidable" and would impose a tremendous burden on services such as Yahoo!, which would be required "to maintain a huge matrix of pages versus jurisdictions to see who can and can't see what." *Id.*

72. *See* Tribunal de Grande Instance de Paris, Document de travail sur le rapport d'expertise (Nov. 6, 2000), *UEJF et Licra c/ Yahoo! Inc. et Yahoo! France*, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001106-rp.htm>.

information, the court then re-issued its injunction.⁷³ Meanwhile, a group of Auschwitz survivors initiated a separate action in France against Yahoo! CEO Timothy Koogle because of the availability of Nazi-related goods on the site.⁷⁴

Rather than filter out French users, Yahoo! decided to remove the auction sites from its servers altogether. Although Yahoo! claimed that its decision was “voluntary” and unrelated to the French court ruling,⁷⁵ civil libertarians viewed Yahoo!’s capitulation as evidence that the French court had successfully engaged in extraterritorial censorship.⁷⁶ Indeed, on its face, the French ruling looked like the classic 1870 case in which Lord Ellenborough ruled that a default judgment against a British citizen issued in Tobago could not stand and asked rhetorically, “Can the island of Tobago pass a law to bind the rights of the whole world?”⁷⁷

Although in conflict with the Australian defamation case, the French judgment is not anomalous. Shortly after the French court ruling, Italy’s highest court, in an appeal of an online defamation case, ruled (in contrast to the Australian decision) that Italian courts can assert jurisdiction over foreign-based websites and shut them down if they do not abide by Italian law.⁷⁸ The court determined, as in the *Yahoo!* case, that Italian courts have jurisdiction both when an act or omission has actually been committed on Italian territory *and* when simply the *effects* or consequences of an act are felt in Italy.⁷⁹ Likewise, Germany’s second-highest court ruled that an Australian website owner—whose website questioning the

73. See TGI Paris, Ordonnance de référé du 20 nov. 2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis200001120.htm>.

74. See, e.g., *French Auschwitz Group Sues Yahoo*, REUTERS (Jan. 22, 2001), available at <http://www.zdnet.com/zdnn/stories/news/0,4586,2677090,00.html?chkpt=zdnstop>.

75. See *Yahoo! Enhances Commerce Sites for Higher Quality Online Experience*, Yahoo! press release (Jan. 2, 2001); see also Troy Wolverton & Jeff Pelling, *Yahoo! to Charge Auction Fees, Ban Hate Materials*, CNET NEWS.COM (Jan. 2, 2001), available at <http://news.cnet.com/news/0-1007-200-4352889.html>.

76. See, e.g., Center for Democracy and Technology Policy Post, Vol. 6, No. 20, Nov. 21, 2000) (discussing the dangerous precedent set for countries seeking to restrict free expression outside their borders); *Borderless Net, RIP?*, THE INDUSTRY STANDARD, (Nov. 21, 2000), available at <http://thestandard.com/article/display/0,1151,20331,00.html> (criticizing the French court’s ruling on the ground that it imposed international censorship on the World Wide Web).

77. *Buchanan v. Rucker*, 103 Eng. Rep. 546, 547 (K.B. 1808).

78. *In re Moshe D.* (Court of Cassation, Italy, Jan. 10, 2001), English translation available at <http://www.cdt.org/speech/international/001227italiandecision.pdf>. The case was brought by a Jewish man who said he was defamed by a number of Web sites that claimed he had kidnaped his two daughters, was holding them in the city of Genoa and was raising them in defiance of Jewish law. In fact, the man had been granted custody of the girls after his wife left him, went to Israel, and married an ultra-orthodox rabbi. She had taken the girls herself and was raising them as fundamentalists. See *id.*; see also *Italy: Foreign 'Net Sites Can Be Closed*, UPI, (Jan. 10, 2001) (reporting decision and noting that “[i]t was not immediately clear how [an order to shut down a foreign web site] could be implemented or enforced”).

79. *In re Moshe D.* (Court of Cassation, Italy, Jan. 10, 2001), English translation available at <http://www.cdt.org/speech/international/001227italiandecision.pdf>.

Holocaust is illegal in Germany but not in Australia—could be jailed for violating German speech laws.⁸⁰ Germany’s interior minister subsequently announced that he was examining “the possibilities of using [German] civil laws to sue the creators of right-wing Web sites based in the USA that have an effect in Germany.”⁸¹ And, even in Australia, a recent ruling has been issued that contradicts the earlier one.⁸²

Most recently, the Canadian Human Rights Commission ordered Ernst Zündel, a former Canadian resident now living in the United States, to remove anti-Semitic hate speech from his California-based Internet site.⁸³ The Commission’s order recognized that it might have difficulty enforcing its order in part because Zündel was not in Canada, but determined that there would be “a significant symbolic value in the public denunciation” of Zündel’s actions and a “potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles” enunciated in its decision.⁸⁴

For its part, Yahoo! continued its legal battle and recently won a judgment in U.S. District Court in California declaring that the French court ruling cannot be recognized or enforced in the United States both because the French court lacked jurisdiction in the first place and because the judgment was impermissible under the First Amendment.⁸⁵ An appeal of that judgment is still pending.⁸⁶ But however the American case is ultimately resolved, the French court’s willingness to assert its norms over cyberspace content originating elsewhere demonstrates some of the difficulties that arise because of the ease with which online content crosses territorial borders.

80. See Australian Faces Trial for Holocaust Denial, Reuters (Dec. 14, 2000), available at <http://www.zdnet.com.au/news/dailynews/story/0,2000020833,20107617,00.htm>: In a judgement with possible implications for regulation of the global computer network, the Federal Supreme Court in Germany ruled that the former school teacher could be charged with inciting racial hatred under German law because the offending material, which denied the deaths of millions of Jews during the Nazi era, could be accessed by German Internet users.

81. Ned Stafford, *German Official Seeks Help to Shut U.S.-Based Hate Sites*, NEWSBYTES (Aug. 6, 2001), at <http://www.newsbytes.com/cgi-bin/u...lient.id=newsbytes&story.id=168726>, visited Aug. 7, 2001.

82. See *Gutnick v. Dow Jones*, *supra* note 69.

83. See *Citron v. Zündel*, Canadian Hum. Rts. Comm (Jan. 18, 2002), available at <http://www.chrt-tcdp.gc.ca/decisions/docs/citron-e.htm>; see also Peter Cameron, *Hate Web Sites Have “No Place in Canadian Society”: Commission*, LONDON FREE PRESS, Jan. 19, 2002, at B5 (noting that Zündel is “a former Toronto resident now believed to be living in Tennessee”).

84. *Citron*, *supra* note 83, at 57; see also Cameron, *supra* note 83 (quoting a Commission spokesperson acknowledging that “[w]e have no experience with enforcing compliance in cases involving the Internet”).

85. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F.Supp. 2d 1181 (N.D. Ca. 2001).

86. Similar issues of regulatory “spillover” from one jurisdiction to another have been raised in the United States in the context of the so-called “dormant” Commerce Clause. See *infra*, text accompanying notes 87-101.

E. The Challenge of the Dormant Commerce Clause

In the United States, courts have begun to invoke many of the same extraterritoriality concerns raised by the Yahoo! case to strike down state regulation of Internet activity under the so-called “dormant” Commerce Clause.⁸⁷ Generally speaking, the dormant Commerce Clause uses a jurisdiction-like reliance on the fixed geographical boundaries among states to limit state regulations based on their extraterritorial effects.⁸⁸ In the cyberspace context, such an emphasis on territorial boundaries threatens the validity of many state efforts to regulate Internet activity. For example, in one of the first cases to apply the dormant Commerce Clause to cyberspace, a federal district court enjoined enforcement of a New York statute that prohibited the intentional use of the Internet “to initiate or engage” in certain pornographic communications deemed to be “harmful to minors.”⁸⁹ The court reasoned that, because materials posted to the Web anywhere are accessible in New York, application of the statute might chill the activities of non-New York content providers and force them to conform their behavior to New York’s standard. Moreover, according to the court, because states regulate pornographic communications differently, “a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed.”⁹⁰ Thus, the court determined that the New York statute impermissibly regulated interstate commerce.

Other courts have struck down state Internet regulations concerning pornographic content on similar grounds. For example, courts

87. The Commerce Clause grants Congress the “power ... [t]o regulate commerce with foreign nations, and among the several states.” U.S. CONST. ART. I, §§ 8, cl. 3. Implicit in this affirmative grant is the negative or “dormant” Commerce Clause—the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce. See, e.g., *Gibbons v. Ogden*, 22 U.S. (Wheat.) 1, 227 (1824) (Johnson, J., concurring) (“And since the power to [regulate commerce] necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.”).

88. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); see also *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Courts use the dormant commerce clause to assert Congress’ authority in two scenarios: (1) when, although Congress has not acted on the particular issue, the state nevertheless has usurped Congress’ commerce power; and (2) when Congress has acted on the issue and the state’s regulation directly conflicts with the action. See *id.* The Supreme Court’s dormant commerce clause test asks three questions: (1) is the regulation protectionist through either its means or its ends; (2) is it an even-handed law—does it have a legitimate local purpose; and even if so, does the law nevertheless affect interstate commerce; and (3) are the costs of the law worth the benefits? See *id.*

89. N.Y. Penal Law §§ 235.20(6), .21(3) (McKinney, WESTLAW through 2000 legislation).

90. *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997).

have used the dormant Commerce Clause to invalidate a New Mexico statute criminalizing dissemination by computer of materials harmful to minors,⁹¹ a Virginia law regulating pornographic communications,⁹² and a Michigan statute criminalizing the use of computers to distribute sexually explicit materials to minors.⁹³

But the reach of the dormant Commerce Clause has extended far more broadly than that. Indeed, as commentators have pointed out, under the logic of the New York case, “nearly every state regulation of Internet communications will have the extraterritorial consequences the court bemoaned,” including state antigambling laws, computer crime laws, consumer protection laws, libel laws, licensing laws, and many more.⁹⁴ A court in California, for example, invalidated, under the dormant Commerce Clause, a state law regulating “junk” e-mail.⁹⁵ Likewise, the First Circuit ruled that a Massachusetts cigar advertising law, if applied to Internet advertising, would violate the dormant Commerce Clause,⁹⁶ and a federal district court in Illinois similarly enjoined enforcement of a state statute prohibiting advertising of certain controlled substances in part because the pharmaceutical company challenging the ban would not be able to comply with the statute unless it canceled all Internet advertising.⁹⁷

Scholars have divided on whether the emerging dormant Commerce Clause jurisprudence in cyberspace is justified,⁹⁸ but it is clear that the same concerns about cross-border regulation of the Internet that appear in the international context raise challenges within a federal system as well. The most recent wrinkle on this question is the “Jurisdictional Certainty Over

91. See *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999).

92. See *PSINet, Inc. v. Chapman*, 108 F. Supp. 2d 611 (W.D. Va. 2000).

93. See *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 2d 737 (E.D. Mich. 1999).

94. Goldsmith & Sykes, *supra* note ?, at 787 (2001).

95. See *Ferguson v. Friendfinder, Inc.*, No. 307309, at 2 (Cal. Super. Ct. June 2, 2000) (order sustaining demurrer). *But see State v. Heckel*, No. 24 P.3d 404 (Wash 2001) (upholding Washington state law in face of dormant Commerce Clause challenge); see also Evan Hansen, *Court Kills Key Parts of Bulk Email Law*, CNET NEWS, June 9, 2000; Carl S. Kaplan, *In Spam Case, Another Defeat for State Internet Laws*, N.Y. TIMES, March 24, 2000.

96. See *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000), *aff'd in pt., rev'd in pt. on other grounds, Lorillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404 (2001); see also Carl S. Kaplan, *Ruling Favors Tobacco Companies*, N.Y. TIMES, Nov. 17, 2000; cf. *Sante Fe Natural Tobacco Co., Inc. v. Spitzer*, 00 Civ. 7274 (LAP) (S.D.N.Y. June , 2001) (permanently enjoining, on dormant Commerce Clause grounds, state law that effectively prohibits Internet and mail order sales of cigarettes).

97. See *Knoll Pharmaceutical Co. v. Sherman*, 57 F.Supp.2d 615, 623 (N.D. Ill. 1999).

98. Compare, e.g., Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1123-34 (1996); Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1593-96 (1999); David Post, *Gambling on Internet Laws*, AM. LAW., Sept. 1998, at 97; Glenn Harlan Reynolds, *Virtual Reality and "Virtual Welters": A Note on the Commerce Clause Implications of Regulating Cyberporn*, 82 VA. L. REV. 535, 537-42 (1996), with Goldsmith & Sykes, *supra* note ?.

Digital Commerce Act,”⁹⁹ which was recently introduced in Congress. The bill would reserve to Congress exclusively the right to regulate “commercial transactions of digital goods and services conducted through the Internet,”¹⁰⁰ thus seemingly pre-empting all state regulation of online activity.¹⁰¹

F. The Challenge of International Copyright

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

Although such a network of national codes may have sufficed in an era when the distribution or performance of works occurred within easily identifiable discrete geographic boundaries, “[i]nstant and simultaneous worldwide access to copyrighted works over digital networks...fundamentally challenges territorial notions in copyright”¹⁰² and complicates traditional choice of law doctrine because it is often difficult to determine where particular acts have occurred. Thus, as one commentator has asked, “if authors and their works are no longer territorially tethered, can changes in the fundamental legal conceptions of existing regimes for the protection of authors be far behind?”¹⁰³ These changes, though not literally concerned with the scope of adjudicatory jurisdiction, are arguably necessary precisely because copyright law, like laws concerning jurisdiction, rely upon geographical boundaries among nation-states that may not be maintainable in the new online context.

99. Jurisdictional Certainty over Digital Commerce Act, H.R. 2421, 107th Cong. (2001).

100. *Id.*

101. For a discussion of the bill, see Margaret Kane, *Digital Commerce Sparks Tax Tango*, CNET NEWS.COM (July 20, 2001), <http://news.cnet.com/news/0-1007-200-6614719.html?tag=prntfr>, visited July 24, 2001.

102. Andreas P. Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT’L L. 799, 800-01 (1998).

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

For example,¹⁰⁴ let us assume that a publisher produces a web page, residing on a server in Holland. The web page includes photos taken by both American and French authors. Some of the photos are taken from magazines that the publisher has scanned and uploaded without permission and other photos are simply copied from other websites, again without permission. Assume further that the photographers now claim that the publisher has violated U.S. copyright law on a similar theory to the one used by the French court in the Yahoo! case: that the photos are available to be accessed by U.S. users via the website.

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

G. The Challenge of Domain Names as Trademarks

Historically, the boundaries of trademark law have been delineated in part by reference to physical geography. Thus, if I own a famous restaurant in New York City called “Berman’s,” I cannot prevent a person in Australia from opening a restaurant that is also called “Berman’s,” even if I have previously established a trademark in my name. The idea is that customers would not be likely to confuse the two restaurants because they are in markets that are spatially distinct.¹⁰⁵ In the online world such clear spatial boundaries are collapsed because, as a technological matter, there can be only one bermans.com domain name, and it can only point to one of the two restaurants.

In the early to mid 1990s, as corporations and entrepreneurs began to understand the potential value of a recognizable domain name, pressure increased to create trademark rights in domain names. For example, one

104. This example is drawn from Ginsburg, *supra*, at 349-50, and is based on a controversy in France involving the unauthorized scanning and uploading to a cybercafé’s website of *Le Grand Secret*, a banned biography of the late French President Francois Mitterand. *See id.* at 349 n 3.

105. *See United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 101 (1918) (“But where two parties independently are employing the same mark upon goods of the same class, but in separate markets wholly remote from the other, the question of prior appropriation is legally insignificant...[except in cases of bad faith].” (quoting *Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 415 (1915)).

early Internet domain name dispute involved the Panavision Corporation, which holds a trademark in the name “Panavision.” In 1995, Panavision attempted to establish a website with the domain name panavision.com, but found that the name had already been registered to Dennis Toeppen. When contacted by Panavision, Toeppen offered to relinquish the name in exchange for \$13,000. Panavision sued, arguing that Toeppen’s registration violated trademark law despite the fact that Toeppen’s Panavision site (which included photographs of the City of Pana, Indiana) could hardly be confused with the Panavision Corporation. The Ninth Circuit agreed with the trial court that Panavision’s inability to use the panavision.com website diminished the “capacity of the Panavision marks to identify and distinguish Panavision’s goods and services on the Internet.”¹⁰⁶ In so doing, the court was, in effect, expanding the geographical reach of trademark law, at least with regard to domain names. While I still could not sue Berman’s Restaurant in Australia for violating my trademark, I would now have a cause of action concerning the bermans.com domain name if the Australian Restaurant registered the name ahead of me.

The U.S. Congress subsequently enacted legislation confirming this expansion of trademark law. Under pressure from trademark holders, Congress first passed the Federal Trademark Dilution Act¹⁰⁷ and then the Anticybersquatting Consumer Protection Act (ACPA),¹⁰⁸ which provides an explicit Federal remedy to combat so-called “Cybersquatting.” According to the Congressional Reports, the Act is meant to address cases like *Panavision*, where non-trademark holders register well-known trademarks as domain names and then try to “ransom” the names back to the trademark owners.¹⁰⁹

Nevertheless, even if one believes that reigning in “cybersquatters” is a laudable goal (and even that goal has been debated),¹¹⁰ there can be

106. *Panavision Int’l v. Toeppen*, 141 F.3d 1316, 1326 (9th Cir. 1998) (quoting *Panavision Int’l v. Toeppen*, 945 F.Supp. 1296, 1304 (C.D. Cal. 1996)).

107. Pub.L. No. 104-98, 109 Stat. 985 (codified at 15 U.S.C. §§ 1125, 1127 (Supp.1996)).

108. Pub.L. No. 106-113 (1999); see H.R.Rep. No. 106-479 (Nov. 18, 1999).

109. See H.R.Rep. No. 106-412, at 5-7; S.Rep. No. 106-140, at 4-7 (1999).

110. For example, Yochai Benkler has argued that the strong protection of trademarks in domain names “has maintain[ed] the value of brand names at the expense of the efficiency of electronic commerce.” Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1256 (2000) According to Benkler, the current approach first assumes that consumers will, for the foreseeable future, seek out websites primarily by typing into their browser a uniform resource locator (“URL”) such as <http://www.brandname.com>, rather than by using search engines or product review sites and then asserts that the brand-name in the URL therefore must be controlled by the owner of the trademark in that brand-name. See *id.* at 1256. This is, however, not just to assume a static model for the digital environment where customer habits, browser configurations, and search engines will continue as they are, but to enforce such a static model backed by the power of law. See *id.* at 1257. As Benkler points out,

The private stakes for those corporations who have invested in building brand recognition and plan to recoup their investments by exercising some

little doubt that the application of trademark law to domain names has meant that trademark law has become unmoored to physical geography and is now more likely operate extraterritorially. Potentially, even those who are legitimately using a website that happens to bear the name of a famous mark held by an entity across the globe could be forced to relinquish the name.

Moreover, each of the parties claiming ownership in a trademark could sue in a different country and, because of differences in substantive law, each party could win.¹¹¹ Thus, with the increasing scope of trademark law in cyberspace, the next question becomes: how shall any domain name decision be enforced? The ACPA attempts to address this problem by providing *in rem* jurisdiction over the domain name itself wherever that name is registered.¹¹² Thus, for example, if people register domain names online via a website owned by Network Solutions, a domain name registrar¹¹³ corporation located in Virginia, they potentially can be forced, under the ACPA, to defend a trademark action in Virginia whether or not they have ever set foot in Virginia or knew Network Solutions was a Virginia corporation. This *in rem* provision has proven to be controversial,¹¹⁴ however, and it remains to be seen whether courts will find

price discipline using the value of their brand name as a search-cost saving device for consumers are obvious. The public benefits of protecting these costs by encouraging consumers not to take advantage of the reduced search costs in the electronic commerce environment are more questionable.

Id. Thus, he suggests that we might instead “accept the declining importance of trademarks in the digital environment, limit legal protection to situations where competitors try to use a mark to confuse consumers, and abandon the notion of dilution as protection of goodwill, which developed to protect the famous marks most useful in the old environment.” *Id.* at 1249; *cf.*, *e.g.*, *Manchester Airport PLC v. Club Club Ltd.*, Case No. D2000-0638, WIPO Arbitration and Mediation Administrative Panel Decision (Aug. 22, 2000), *available at* <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0638.html> (“It is not contested that the Respondent has attempted to sell the Domain Name to the Complainant for an amount well in excess of the registration fees. But selling a domain name is not *per se* prohibited by the ICANN Policy (nor is it illegal or even, in a capitalist system, ethically reprehensible.”).

111. *See, e.g.*, *Mecklermedia Corp. v. DC Congress GmbH*, 1 All E.R. 148, 160 (Ch. 1998) (reaching a different conclusion on ownership of a mark from the one reached in other countries).

112. *See* 15 U.S.C. § 1125(d).

113. A registrar is one of several entities, for a given top-level domain (such as .com, .edu, .gov, .uk, etc.) that is authorized by the Internet Corporation for Assigned Names and Numbers to grant registration of domain names. *See* DAVID BENDER, *COMPUTER LAW* § 3D.03[3] at 3D-56 (updated to 2000).

114. *Compare, e.g., Fleetboston Financial Corp. v. Fleetbostonfinancial.com*, 138 F.Supp.2d 121, (D.Mass. Mar 27, 2001 (finding that *in rem* provisions of ACPA violate due process when domain name registration paper is subsequently transferred to a district other than the district where registrar is located); *Heathmount A.E. Corp. v. Technodome.Com*, 106 F.Supp.2d 860, 865-66 (E.D.Va.2000) (finding that the registration of a domain name, without more, cannot be sufficient minimum contacts for the purposes of *in personam* jurisdiction); *America Online, Inc. v. Chih-Hsien Huang*, 106 F.Supp.2d 848, 855-60 (E.D.Va.2000) (finding that filing an online domain name registration agreement with Network Solutions is not sufficient contact with Virginia to justify *in personam* jurisdiction) *with Caesars World, Inc. v.*

that such assertions of jurisdiction comport with Constitutional Due Process guarantees.¹¹⁵

In the meantime, domain name trademark disputes are increasingly resolved through online arbitration under the auspices of the Internet Corporation for Assigned Names and Numbers, a not-for-profit corporation that administers the domain name system,¹¹⁶ and the World Intellectual Property Organization, a United Nations administrative body. While the ability of these organizations to govern domain names is not hemmed in by geographical borders, they face their own legitimacy problems because they are quasi-governmental entities exercising *de facto* governing power over the Internet without structures of democratic accountability or transparency that some think necessary.¹¹⁷ Thus, even this alternative to the problem of

Caesars- Palace.Com, 112 F.Supp.2d 502, 504 (E.D.Va. 2000). (finding sufficient contacts for purposes of *in rem* jurisdiction); *Lucent Technologies, Inc. v. LucentSucks.com*, 95 F.Supp.2d 528, 535 n. 5 (E.D.Va.2000) (Brinkema, J.) (finding that registration is sufficient minimum contact for *in personam* jurisdiction).

115. The resolution of this question probably rests ultimately on whether courts interpret the U.S. Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), to have extended the constitutional requirements of *International Shoe* to all *in rem* actions (or at least those that do not involve real property). Some courts read *Shaffer* narrowly, see, e.g., *Caesars World, Inc. v. Caesars-Palace.Com*, 112 F.Supp.2d 502, 504 (E.D.Va. 2000) ("under *Shaffer*, there must be minimum contacts to support personal jurisdiction only in those *in rem* proceedings where the underlying cause of action is unrelated to the property which is located in the forum state"), and even some members of the U.S. Supreme Court have taken that approach, see *Burnham v. Superior Court of California*, cite, (Plurality Opinion of Scalia, J.). On the other hand, dicta in *Shaffer* suggests that the Supreme Court intended its holding to extend the minimum contacts test of *International Shoe* to all *in rem* jurisdiction, not solely to the subcategory of *in rem* cases specifically at issue. See, e.g., *Shaffer*, 433 U.S. at 212 (stating that, henceforth, "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."); *id.* ("The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification.") Thus, *Shaffer* may be taken to stand for the proposition that Congress cannot avoid the Constitutional requirements of fair play and substantial justice simply by calling an action *in rem*, and by limiting recovery to the *res* itself.

116. For a description of ICANN and its history, see generally *Developments in the Law—The Law of Cyberspace V: The Domain Name System: A Case Study of the Significance of Norms to Internet Governance*, 112 HARV. L. REV. 1657 (1999).

117. For example, a recent study of ICANN's and WIPO's Uniform Dispute Resolution Policy suggests that the arbitration system is fundamentally biased in favor of trademark holders. See Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, available at <http://aix1.uottawa.ca/~geist/g.PDF>; Steven Bonisteel, Law Expert Charges Bias in Domain-Dispute Arbitrations, NEWSBYTES (Aug. 20, 2001), available at <http://www.newsbytes.com/news/01/169180.html>; see also Michael Geist, *Fundamentally Fair.Com? An Update on Bias Allegations and the ICANN UDRP*, available at <http://www.lawbytes.ca> (updating study and responding to methodological criticisms). For criticisms of ICANN from the perspective of democratic legitimacy and administrative transparency, see, e.g., A. Michael Froomkin, *Wrong Turn in Cyberspace, Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000); David Post, *Governing Cyberspace, or Where is James Madison When We Need Him?*, available at <http://www.temple.edu/lawschool/dpost/icann/comment1.html>; see generally www.ICANNWatch.org. For similar criticisms of WIPO, see, e.g., A. Michael Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617, 618 (1999) ("As an

territorially-based Internet governance faces substantial challenges.

H. The Challenge of International Computer Crime¹¹⁸

In the past few years, the increasing problem of computer crime has captured public attention. In the year 2000 alone, several incidents illuminated the scope of the challenge. In February, the websites of at least eight major U.S.- based Internet companies were crippled by so-called “denial of service” attacks unleashed by a computer hacker.¹¹⁹ A few months later, the “I Love You” virus infected 45 million computers worldwide.¹²⁰ And in November FBI investigators conducted a controversial sting operation in which they lured two Russians suspected of participating in a hacking ring to the United States, captured their passwords, and then used the passwords to connect to a Russian computer network and download incriminating data from the hackers’ Russian servers, all before obtaining a search warrant.¹²¹

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

118. This subsection is largely derived from Patricia L. Bellia, *Chasing Bits Across Borders*, 2001 U. CHI. L. FORUM 35 (2001).

119. The targeted sites included Amazon.com, Buy.com, CNN.com, eBay, E*Trade, MSN.com, Yahoo!, and ZDNet. See Charles Cooper, *New Cybersport: Taking Out Web Sites*, Z D N E T N E W S (F e b . 1 0 , 2 0 0 0) , <http://www.zdnet.com/zdnn/stories/news/0,4586,2435899,00.html> (listing targeted sites). For a description of the incidents, see *Internet Denial of Service Attacks and the Federal Response, Hearing Before the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on Criminal Justice Oversight of the Senate Committee on the Judiciary*, 106th Cong., 2d Sess. 35-37 (2000) (statement of Michael A. Vatis, Director, National Infrastructure Protection Center, Federal Bureau of Investigation) (describing attacks); *Cybercrime, Hearing Before the Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies of the Senate Committee on Appropriations*, 106th Cong., 2d Sess. 25-26 (2000) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation) (same).

120. See Paul Festa and Joe Wilcox, *Experts Estimate Damages in the Billions for Bug*, CNET NEWS.COM (May 5, 2000), <http://news.cnet.com/news/0-1003-200-1814907.html>; *Electronic Communications Privacy Act of 2000, Digital Privacy Act of 2000 and Notice of Electronic Monitoring Act, Hearings on HR 5018, HR 4987, and HR 4908 before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 106th Cong., 2d Sess. (2000) (statement of Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

121. See Mike Carter, *E-sting Nets 2 Russian Hackers; FBI Alleges Pair Stole Credit Info*, Seattle Times A1 (Apr 23, 2001); Robert Lemos, *FBI Nabs Russian Hackers*, ZDNet News (A p r 2 3 , 2 0 0 1) , a v a i l a b l e o n l i n e a t <<http://www.zdnet.com/zdnn/stories/news/0,4586,508199,00.html>> (visited May 4, 2001); Robert Lemos, *FBI "Hack" Raises Global Security Concerns*, CNET News.com (May 1, 2001), available online at <<http://news.cnet.com/news/0-1003-202-5785729.html>> (visited May 12, 2001). In May 2001, a district court denied a motion to suppress the evidence downloaded from the Russian servers. *United States v Gorshkov*, No CR00-500C (W D Wash May 23, 2001) (order denying motion to suppress evidence).

Moreover, criminal conduct involving computers extends far beyond simply crimes perpetrated *against* computer networks, such as hacking. For example, computer networks can be used to facilitate online forms of traditional crimes, such as gambling,¹²² child pornography,¹²³ fraud,¹²⁴ and software piracy.¹²⁵ In addition, a computer may simply contain evidence relevant to a criminal investigation.¹²⁶ Certainly, with the heightened interest of governments worldwide in combating terrorism, tracking crime through electronic means is increasingly a priority.

In these circumstances national borders may be inconsequential both to the commission of the crime or the location of the relevant evidence. The denial of service attacks on U.S. websites originated in Canada.¹²⁷

122. See generally National Gambling Impact Study Commission, *Final Report* chapter 5 (June 1999), available online at <<http://www.ngisc.gov/reports/fullrpt.html>> (visited Jan 29, 2001) (describing the emergence, rapid growth, and various forms of Internet gambling and recommending methods of federal regulation).

123. See Report of the President's Working Group on Unlawful Conduct on the Internet, *The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet* app C (March 2000), available online at <<http://www.cybercrime.gov/unlawful.pdf>> (visited Sept 14, 2000) (hereinafter "Unlawful Conduct Report") (addressing online child pornography, child luring, and related offenses and discussing federal laws and initiatives to protect children).

124. See Robin Fields, *Emulex Stock Hoax Was Triggered by E-Mail Release*, L.A. TIMES C1 (Aug 31, 2000) (describing how email and the Internet were used to distribute a false press release); John F.X. Peloso and Ben A. Indek, *Overview of SEC's Response to the Internet in Securities Markets*, N.Y. L. J. 3 (Oct 19, 2000) (explaining various SEC actions taken in response to the rise in cases of Internet securities fraud).

125. Unlawful Conduct Report, *supra* note 123, at app I (discussing software piracy and intellectual property theft and describing federal laws and initiatives to prevent such crimes). The question of extraterritoriality in combating such piracy has arisen in the prosecution of Russian computer programmer Dmitry Sklyarov for violations of the Digital Millennium Copyright Act, codified at 17 U.S.C. §§ 1201 (Supp. V 1999). Sklyarov was accused of violating the Act based on his activities in Russia, where they were legal. See *Russian Police Say Programmer Arrested in U.S. Broke No Russian Laws*, SILICON VALLEY.COM (July 27, 2001). For more on the Sklyarov controversy, see, e.g., Lawrence Lessig, *Jail Time in the Digital Age*, N.Y. TIMES (Jul. 30, 2001), at A17.

126. Commentators frequently distinguish among these three types of criminal conduct: computer as target; computer as tool; and computer as incidental storage of material related to the crime. See, e.g., Bellia, *supra* note 118, at 37-38; Michael A. Sussmann, *The Critical Challenges from International High-Tech and Computer-Related Crime at the Millennium*, 9 DUKE J COMP & INT'L L. 451, 455 (1999); Marc D. Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J. L. & TECH. 465, 468-69 (1997); Scott Charney & Kent Alexander, *Computer Crime*, 45 EMORY L. J. 931, 934 (1996); Unlawful Conduct Report, *supra* note 123, at 7-9.

127. See *Canada Broadens Its Case Against Suspected Hacker*, N.Y. TIMES (Aug 4, 2000), at C5.

The “I Love You” virus originated in the Philippines.¹²⁸ Gambling¹²⁹ or child pornography¹³⁰ or “spam”¹³¹ operations targeting users in one jurisdiction will often locate their servers elsewhere. And, as online activities become ubiquitous, even cases that do not otherwise have a computer component, will increasingly require electronic evidence that may or may not be located within the jurisdiction. Indeed, “[t]he physical location of electronic evidence...often depends upon the fortuity of network architecture: an American subsidiary of a French corporation may house all of its data on a server that is physically located in France; two Japanese citizens might subscribe to America Online and have their electronic mail stored on AOL’s Virginia servers.”¹³² Or, a criminal might deliberately store computer files in a jurisdiction that affords greater privacy protection.¹³³

Moreover, as the FBI sting operation involving the Russian hackers demonstrates, the jurisdictional challenges of international computer crime include not simply how to *enforce* criminal laws across borders but also how to *investigate* such cases. As one commentator has observed:

A state conducting a cross-border search and the target state are likely to have different perspectives on the issue. The searching state may view its actions as merely advancing a claimed power to regulate extraterritorial conduct causing harmful effects within its own borders. The target state, however, may view a remote cross-border search itself as extraterritorial conduct with harmful local effects.¹³⁴

128. See *ISP Tracks “Love” Bug Through Caller ID*, CNET NEWS.COM (May 15, 2000), available online at <<http://news.cnet.com/news/0-1003-200-1877238.html>> (visited Sept 14, 2000) (stating that virus apparently originated in Manila); *“Love” Bug Release May Have Been Accidental*, CNET NEWS.COM (May 11, 2000), available online at <<http://news.cnet.com/news/0-1003-200-1855997.html>> (visited Sept 14, 2000) (noting effect on government and corporate systems in more than 20 countries).

129. See, e.g., *People v World Interactive Gaming Corp.*, 714 NYS 2d 844, 851-53 (N.Y. Sup. Ct. 1999) (holding that Antigua-based corporation violated New York and federal gambling laws by offering gambling to Internet users in the United States).

130. See, e.g., *Crackdown on Net Child Porn*, CNET NEWS.COM (Sept 2, 1998), available online at <<http://news.cnet.com/news/0-1005-200-332841.html>> (visited Sept 14, 2000) (reporting over 100 people arrested in 12 countries and over 100,000 images seized in crackdown).

131. See, e.g., Declan McCullagh, *Spam Oozes Past Border Patrol*, WIRED.COM (Feb. 23, 2001), available at <http://www.wired.com/news/print/0,1294,41860,00.html>, visited Aug. 9, 2001 (reporting that an increasing amount of unsolicited commercial e-mail is originating from overseas sites and flowing through non-U.S. servers).

132. Bellia, *supra* note 118, at 56.

133. See Jonathan I. Edelman, Note, *Anonymity and International Law Enforcement in Cyberspace*, 7 FORDHAM INTEL. PROP., MEDIA & ENTER. L. J. 231, 265-67 (1996) (discussing the possibility of countries using anonymous remailers and computer secrecy laws to create data havens for criminals).

134. Bellia, *supra* note 118, at 42.

Indeed, the target state might well decide that it needs to protect its citizens from the extraterritorial investigations of other countries either by imposing privacy or property protections that limit the scope of investigations or by attempting to bar the investigations altogether.¹³⁵ Thus, as computers are increasingly involved in international criminal activities, we can expect continued debate about whether, and under what circumstances, cross-border searches, international investigations, and extraterritorial enforcement actions are permissible or legitimate.¹³⁶

I. The Challenge of International and Transnational Human Rights Enforcement

International law has traditionally been viewed as a set of rules agreed upon by countries and meant to govern the relations between them. Indeed, until the 20th century, the state was the primary entity in international law, and the need to protect its sovereignty was paramount. As one commentator has observed, “there were relatively few rules of international law—and certainly no rules protecting fundamental human rights or the environment which could be invoked to override immunity or to claim an interest beyond a state’s territory.”¹³⁷ For example, in 1876, when an American citizen asked a New York state court to assert jurisdiction over Buenaventura Baez, the former President of the Dominican Republic, for injuries caused by Baez when he was President, the court refused to hear the case despite the fact that Baez was physically present in New York at the time.¹³⁸ According to the court, Baez was immune from jurisdiction because such immunity was “essential to preserve the peace and harmony of nations.”¹³⁹

The world of international law looks very different today. Indeed, “[w]e appear to be in the midst of a sweeping away of foundations that had been in place if not for a millennium than at least for several centuries.”¹⁴⁰ Increasingly, international law is no longer simply the preserve of nation-states, effective over a narrow range of issues. Rather, we have seen the creation of regional and global institutions, treaties and other international

135. *See id.* at 42-43.

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

137. Sands, *supra* note 31, at 529.

138. *Hatch v. Baez*, 7 Hun 596 (N.Y. 1876).

139. *Id.* at 600.

140. Spiro, *supra* note 19, at 567.

obligations that have established limits on sovereign autonomy.¹⁴¹ Moreover, non-state actors are playing a larger role, including non-governmental organizations, multi-national corporations, worldwide religious movements, subnational governmental and administrative bodies, and regional and international institutions.¹⁴² What arises from these changes is “the development of a new consciousness of international public law governing legal relations beyond the nation-state, available to influence public and administrative law at the national level, and accessible to an emergent international civil society.”¹⁴³

The most striking example of this development is the increasing willingness of states to apply principles of universal jurisdiction. As Mary Robinson, United Nations High Commissioner on Human Rights, recently explained, “universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim.”¹⁴⁴ While the principle of universal jurisdiction has long existed, it is rapidly becoming a significant challenge to the assumed prerogatives of national

141. See, e.g., Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT’L L. 415, 441 (2000) (arguing that “the development of international human rights and the more recent growth of an ‘international civil society’ reflect an international system that is slowly but surely embracing the rule of law” and “challeng[ing] the prerogatives of state sovereignty (along with its cynical politics and reliance on military and economic power), with moral authority and the slow but sure evolution of binding rules and effective judicial processes.”). Philippe Sands has made a similar observation:

[In the twentieth century,] [r]egional and global institutions were created. Treaties and other international obligations were adopted across a broad range of subject areas, establishing limits on sovereign freedoms. New standards were adopted seeking to protect and promote fundamental human rights and, more recently, conserve the environment. Gradually, new actors emerged with an international voice, of which corporations and NGOs were to become the most active. Inherent in these developments—but not explicitly conceived—were the seeds for change: the development of a new consciousness of international public law governing legal relations beyond the nation state, available to influence public and administrative law at the national level, and accessible to an emergent international civil society.

Sands, *supra* note 31, at 530.

142. See Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305, 305 (2001) (“[T]he most striking change in the law since I graduated from law school more than two decades ago is the rise of a body of law that is genuinely transnational—neither fish nor fowl, in the sense that it is neither traditionally domestic nor traditionally international.”); see also Boutros Boutros-Ghali, *An Agenda for Democratization*, 51st Sess., at 973, U.N. Doc. A/51/761 (1996) (observing that international relations “are increasingly shaped not only by the States themselves but also by an expanding array of non-State actors on the ‘international’ scene”).

143. Sands, *supra* note 31, at 530.

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

sovereignty.¹⁴⁵

Similarly, we are seeing an erosion of long-standing sovereignty principles that gave heads of state immunity from prosecution before foreign or international tribunals.¹⁴⁶ For example, on October 16, 1998, a magistrate in London issued a provisional warrant for the arrest of Senator Augusto Pinochet Ugarte, pursuant to an extradition request arising from a prosecution initiated by Spanish judge Juan Garzon, who asserted universal jurisdiction over acts of genocide, hostage-taking, and torture while Pinochet was Chile's head of state.¹⁴⁷ Although Pinochet claimed immunity, the British House of Lords ruled, in contrast to the New York court ruling in the *Baez* case a century before, that Pinochet had no entitlement to claim immunity for the crimes of which he was accused.¹⁴⁸

Pinochet appears not to be an isolated case. In February 2000, a Senegalese court indicted Chad's exiled former dictator, Hissène Habré, on torture charges and placed him under virtual house arrest, marking the first time an African country had brought human rights charges against another nation's head of state.¹⁴⁹ Likewise, Slobodan Milosovic, the former Serbian

145. See generally Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347 (1991); see also PRINCETON PRINCIPLES, *supra* note 144, at 25 (2001) (offering a set of "principles to guide, as well as to give greater coherence and legitimacy to, the exercise of universal jurisdiction.").

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

147. See Provisional Arrest Warrant by Nicholas Evans, Metropolitan Magistrate, Bow Street Magistrates' Court, London, England for Augusto Pinochet Ugarte (Oct. 16, 1998). Although the House of Lords, in its final decision, ultimately determined that the International Convention Against Torture provided its source of jurisdiction (rather than general principles of universal jurisdiction), *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, 37 I.L.M. 1302 (1998) (Eng.), the convention itself can be seen as codifying the principles of universal jurisdiction.

148. *Id.* For the various Spanish and English court documents in the Pinochet case, see generally PINOCHET PAPERS, *supra* note 28. For further discussion of the case, see generally THE PINOCHET CASE: A LEGAL AND CONSTITUTIONAL ANALYSIS (Diana Woodhouse ed., 2000); Byers, *supra* note 141; J. Craig Barker, *The Future of Former Head of State Immunity after ex parte Pinochet*, 48 INT'L & COMP. L. Q. 937 (1999); Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237 (1999); Michael Byers, *Decisions of British Courts During 1999 Involving Questions of Public International Law*, 70 BRITISH YEARBOOK OF INT'L L. 277, 277-95 (1999); Christine Chinkin, *In Re Pinochet*, 93 AM. J. INT'L L. 703 (1999); Hazel Fox, *The Pinochet Case No. 3*, 48 INT'L & COMP. L. Q. 687 (1999); Colin Warbrick, *Extradition Law Aspects of Pinochet 3*, 48 INT'L & COMP. L. Q. 958 (1999).

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

leader, has now been extradited to appear before an international tribunal.¹⁵⁰

In addition, over the past two decades, aliens have begun to bring human rights suits in the United States against foreign and U.S. governments and officials under the Alien Tort Claims Act (ATCA).¹⁵¹ Although the jurisdictional reach of this act is governed by the same due process/minimum contacts limitations as all other suits, the act does grant federal courts original subject matter jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁵² Enacted as part of the Judiciary Act of 1789, this statute, according to a 1980 ruling by the Second Circuit, permits federal courts to hear suits by aliens alleging torture committed by officials of foreign governments.¹⁵³ Later decisions have upheld suits for genocide, war crimes, summary execution, disappearance, prolonged arbitrary detention and cruel, inhuman or degrading treatment.¹⁵⁴ In 1992, Congress also passed the Torture Victim Protection Act,¹⁵⁵ which reinforces and expands the ATCA by defining specific causes of action alleging torture and summary execution and by permitting U.S. citizens as well as aliens to bring suit.¹⁵⁶ In recent years, successful suits have been brought under these statutes against various members of the Guatemalan military,¹⁵⁷ the Estate of former Philippine leader Ferdinand Marcos,¹⁵⁸ and Serbian General Radovan Karadzic.¹⁵⁹ Although these are civil cases, and many of the monetary judgments issued may never actually be paid, the suits have strong symbolic and emotional value for the victims, they may deter potential defendants from entering U.S. territory, and they reinforce the

150. See, e.g., R. Jeffrey Smith, *Serb Leaders Hand Over Milosevic For Trial by War Crimes Tribunal; Extradition Sparks Crisis in Belgrade*, WASH. POST (Jun. 29, 2001), at A1, available at <http://washingtonpost.com/wp-dyn/world/issues/balkans/A59234-2001Jun28.html>; see also Peter Finn, *International Justice Proves its Reach*, WASH. POST (Jun. 29, 2001), at A1, available at <http://washingtonpost.com/wp-dyn/world/issues/balkans/A59332-2001Jun28.html> (“When the war crimes tribunal for the former Yugoslavia was created by the United Nations in 1993, its underlying promise was that no one—whether president or lowly private—was beyond the reach of international justice. Today, in the most dramatic moment in its history, the tribunal made good on that pledge.”).

151. 28 U.S.C. § 1350.

152. *Id.*

153. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

154. See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 343-48 (1996) (summarizing ACTA cases); see also William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES (date), at A1.

155. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

156. *See id.*

157. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

158. *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

159. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *reh'g den.*, 74 F.3d 377 (2d Cir. 1996).

principle of universal (or at least transnational) jurisdiction.¹⁶⁰

International human rights suits against former and current governmental officials have been brought in courts outside the United States as well. For example, in addition to the Pinochet and Habré cases, lawyers representing survivors of the 1982 Israeli invasion of Lebanon have asked a Belgium court to indict Israeli Prime Minister Ariel Sharon, who was then the Defense Minister, for war crimes.¹⁶¹ Indeed, the Israeli government takes the threat of foreign assertions of jurisdiction over human rights claims so seriously that it recently issued an advisory to all government, security, and army officials, warning them that foreign travel could subject them to law suits.¹⁶² Although the International Court of Justice recently halted a Belgium prosecution of the former Foreign Affairs Minister of the Democratic Republic of Congo, citing the need for governmental immunity in some circumstances,¹⁶³ the sharp criticism this decision inspired¹⁶⁴ demonstrates that the overall landscape for international human rights suits has changed.

Finally, plans for a permanent International Criminal Court,¹⁶⁵ which had languished during the Cold War era because of concerns about incursions on national sovereignty,¹⁶⁶ are nearing fruition.¹⁶⁷ The Court's

160. See STEPHENS & RATNER, *supra* note 154, at 234-38 (discussing nonmonetary impact of ACTA and TVPA claims).

161. See The Complaint Against Ariel Sharon for his involvement in the massacres at Shabra and Shatila, filed in Brussels, Belgium, June 18, 2001, available at <http://www.mallat.com/articles/complaintenglish.htm>, visited Aug. 10, 2001. For press coverage of the case, see, e.g., Nicholas Blanford, *Sharon Begins to Take War-Crimes Lawsuit Seriously*, CHRISTIAN SCIENCE MONITOR (July 30, 2001); Clyde Haberman, *Israel is Wary of Long Reach in Rights Cases*, N.Y. TIMES (July 28, 2001), at A1, A6; Constant Brand, *Court Asked to Indict Sharon over Palestinian Massacre*, INDEPENDENT (June 18, 2001).

162. See Blanford, *supra* note 161.

163. See *Democratic Republic of the Congo v. Belgium (re Arrest Warrant of 11 April 2000)*, Intl' Court of Justice (Feb. 14, 2002), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>, visited March 20, 2002.

164. See *id.*, dissenting opinions, available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>; see also, e.g., International Court of Justice's Ruling on Belgian Arrest Warrant Undermines International Law, Press Release of International Commission of Jurists (Feb. 15, 2002), available at <http://www.icj.org/press/press02/English/congob.htm>, visited Feb. 16, 2002 ("International humanitarian law and international human rights law have accorded national States jurisdiction over persons committing international crimes in order to combat impunity. Yesterday's decision is one that might have been expected sixty years ago, but not in the light of present-day law.").

165. See G.A. Res. 207, U.N. GAOR, 51st Sess., Supp. No. 49, vol. I, 88th mtg. at 343, U.N. Doc. A/51/49 (1996) (issuing a mandate to the preparation committee responsible for drafting the statute).

166. See Robert Rosenstock, *Symposium, Should There Be an International Tribunal for Crimes Against Humanity*, 6 PACE INT'L L. REV. 84 (1994); Benjamin B. Ferencz, *An International Criminal Code and Court: Where They Stand and Where They're Going*, 30 COLUM. J. TRANS. L. 383-384 (1992). Indeed, A United Nations Committee on International Criminal Jurisdiction first submitted a draft statute for an international criminal court as early as 1953. See Revised Draft Statute for an International Criminal Court (Annex to the Report of the Committee on International Criminal Jurisdiction), 7 U.N. GAOR, Supp. No. 12, at 23,

jurisdiction would be limited only to the most serious crimes, such as war crimes and crimes against humanity.¹⁶⁸ Further, the Court is intended to function only in cases where there is little or no prospect of offenders being duly tried in national courts.¹⁶⁹ Nevertheless, the ICC clearly represents another step along the path away from the national sovereignty paradigm that has traditionally dominated international relations.¹⁷⁰

J. The Challenge of International Trade

We can see similar incursions to traditional ideas of nation-state sovereignty in the area of international commercial relations. Indeed, although this field is often called “private international law,” international trade issues are increasingly seen to implicate important societal values such as environmental protection and labor standards. Therefore, it may be that the traditional distinction between “public” and “private” international law should be revisited.¹⁷¹

U.N. Doc. A/2645 (1954).

167. For updated information on the status of the ICC, see Rome Statute of the International Criminal Court, at <http://www.un.org/icc> (last updated on Nov. 5, 2001).

168. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 5, U.N. Doc. A/CONF.183/9 (1998), at <http://www.un.org/icc>, preamble and Article 20.

169. *Id.*

170. Indeed, the United States continues to object to the ICC on the ground that it will unduly interfere with its sovereignty. *See, e.g.,* Norman Kempster, *U.S. May Back Creation of Special Atrocity Tribunal War Crimes: New Envoy Says Administration Remains Opposed to Plan for a Worldwide Court*, LA TIMES, Aug. 2, 2001, at A4, available at 2001 WL 2507570; Editorial, *Why America Says No*, OMAHA WORLD-HERALD, July 22, 2001, at 18A, available at 2001 WL 9581188; Brett D. Schaefer, *Overturning Clinton's Midnight Action on the International Criminal Court* (Jan. 9, 2001) available at <http://www.heritage.org/library/execmemo/em708.html>; *Bush Administration Ponders Position Towards International Criminal Court*, 17 Int'l Enforcement L. Rep. (Int'l Enforcement Law Reporter) § XIV (June 2001), <http://www.globalpolicy.org/intljustice/icc/2001/05icc.htm> (describing the Bush administration's resistance to the ICC); Press Release, Office of U.S. Representative Ron Paul, Paul Introduces Resolution Opposing International Criminal Court (February 7, 2001), at <http://www.house.gov/paul/press/press2001/pr020701.htm> (introducing HCR 23, a resolution calling for Congress and the President to oppose ICC); Jim Lobe, *Rights-US: Republicans Urge Clinton to Oppose ICC*, Inter Press Service, at http://www.oneworld.org/ips2/jul98/22_32_097.html (July 23, 1998).

171. According to Black's Law Dictionary, public law consists generally “of constitutional, administrative, criminal, and international law, concerned with the organization of the state, the relations between the state and the people who compose it, the responsibilities of public officers to the state, to each other, and to private persons, and the relations of states to one another.” BLACK'S LAW DICTIONARY 1230 (6th ed. 1990). Private law, in contrast, is defined as “[t]hat portion of the law which defines, regulates, enforces, and administers relationships among individuals, associations, and corporations.” *Id.* at 1196. As Robert Post has pointed out, however, this distinction is difficult to maintain in light of the American legal realist critique challenging the so-called public/private distinction. *See* Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, 2 THEORETICAL INQUIRIES L. 323, 324 (2001) (noting that “legal realists relentlessly demonstrated that rules of ‘private’

Traditionally, international law did not recognize the legitimacy of public-law-type claims in international commercial disputes. For example, in 1893, when the U.S. government tried to prevent British fur traders from trapping seals, arguing that the seals were in danger of extinction, an international arbitral tribunal overwhelmingly rejected the claim because there was no basis in international law for the U.S. to apply its standards of conservation to measures taking place outside its territory.¹⁷² Likewise, in the 19th century there were no international organizations and no permanent international courts, and if one state refused to submit a trade claim to arbitration, the possibilities for enforcement were minimal.¹⁷³

Yet, here too the assumption that national sovereignty trumps other claims is under attack. Indeed, the same week that Pinochet was arrested in London, the Appellate Body of the World Trade Organization handed down a decision that, for the first time, recognized that one country can have a legitimate legal interest in activities carried out in another country, at least when those activities are harmful to migratory endangered species.¹⁷⁴ This case arose from a U.S. government decision to ban the import of shrimp harvested in the waters of India, Malaysia, the Philippines, and Thailand because the shrimp were being caught in such a way that sea turtles were being incidentally killed. The four Asian countries objected to the U.S. ban, arguing that it violated W.T.O. free trade rules. Contrary to the decision in the seal case, the W.T.O. Appellate Body ruled that the U.S. measures were “provisionally justified” because the U.S. had a legal

property actually structured social relations and thus were subject to evaluation in terms of the social structures they created”). From this perspective, government is always in the background, regulating social life to establish and maintain the type of “private” relationships deemed appropriate or desirable. Moreover, such regulation is always directed toward the achievement of public goals. “All private law therefore ultimately involves ‘the relations between the state and the people who compose it.’” *Id.* (quoting BLACK’S LAW DICTIONARY 1230 (6th ed. 1990)).

172. See *Pacific Fur Seal Arbitration (United States v. Great Britain)*, reprinted in 1 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATION HISTORY 755-961 (Washington, Government Printing Office 1898); see also Sands, *supra* note 31, at 529 (summarizing case). Until the Shrimp/Turtle case, tribunals had generally followed these same principles. Indeed, as recently as the early 1990s, the territorial sovereignty doctrine in international trade disputes seemed alive and well. See General Agreement on Tariffs and Trade Dispute Settlement Panel Report on U.S. Restrictions on Import of Tuna, 30 I.L.M. 1594, 1616 (Aug. 16, 1991); GATT Dispute Settlement Panel Report on U.S. Restrictions on Import of Tuna, 33 I.L.M. 839, 890 (June 1994); see also Benedict Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT’L ENVTL. L. 1 (1994); Torsten H. Strom, *Another Kick at the Can: Tuna/Dolphin II*, 33 CANADIAN Y.B. INT’L L. 149 (1995); Friedl Weiss, *The Second Tuna GATT Panel Report*, 8 LEIDEN J. INT’L L. 135 (1995); Stephen Fleischer, *The Mexico-U.S. Tuna/Dolphin Dispute in GATT: Exploring the Use of Trade Restrictions to Enforce Environmental Standards*, 3 TRANSNAT’L L. & CONTEMP. PROBS. 515 (1993).

173. See *id.* at 530.

174. United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), available at http://www.wto.org/english/trato_e/dispu_edistab_e.htm (last visited Feb. 8, 2001).

interest in the protection of the sea turtles.¹⁷⁵ In other words, as in the human rights cases, there is increasing recognition that “what one state does or permits to be done within its territory can be of legitimate interest in another state, however distant.”¹⁷⁶

Not only does this decision represent a change in the way we conceive of state sovereignty, it is also significant that this case (and most of the human rights cases discussed previously) originated not with actions taken by the executive branch of a sovereign state, but with non-state actors. Thus, in the “Shrimp/Turtle” case, the U.S. export restrictions at issue¹⁷⁷ were the result of legal proceedings initiated in federal courts by the Earth Island Institute, a non-governmental organization.¹⁷⁸ In the Pinochet case, the extradition request was the result of investigation and charges initiated by a judge based on a complaint brought by non-state actors.¹⁷⁹

We can see similar efforts of non-state actors in other contexts as well. For example, the Apparel Industry Partnership, a joint undertaking of non-governmental organizations (NGOs), international clothing manufacturers, and American universities, has established its own quasi-governmental (but non-state) regulatory regime to help safeguard public values concerning international labor standards. The Partnership has adopted a code of conduct on such issues as child labor, hours of work, and health and safety conditions, along with a detailed structure for monitoring compliance (including a third-party complaint procedure).¹⁸⁰ In the Internet context, the “TRUSTe” coalition of service providers, software companies, privacy advocates, and other actors has developed (and monitors) widely adopted privacy standards for websites.¹⁸¹ Similarly, the Global Business Dialogue on Electronic Commerce has formed a series of working groups to develop uniform policies and standards regarding a variety of e-

175. United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, P 187, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998), available at http://www.wto.org/english/trato_e/dispu_edistab_e.htm (last visited Feb. 8, 2001).

176. Sands, *supra* note 31, at v535.

177. See Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24244 (June 29, 1987) (to be codified at 50 C.F.R. pt. 222).

178. See *Earth Island Institute v. Christopher*, 913 F. Supp. 559 (Ct. Int'l Trade 1995); *Earth Island Inst. v. Christopher*, 922 F. Supp. 616 (Ct. Int'l Trade 1996); *Earth Island Inst. v. Christopher*, 942 F. Supp. 597 (Ct. Int'l Trade 1996); *Earth Island Inst. v. Christopher*, 948 F. Supp. 1062 (Ct. Int'l Trade 1996).

179. For a description of the process in Spain and links to Spanish official documents related to the Pinochet case, see <http://www.diplomatiejudiciaire.com/Chili/Pinochet.htm> & <http://www.derechos.org/nizkor/chile/juicio/eng.html>. See also generally PINOCHET PAPERS, *supra* note 28.

180. See generally Report of Apparel Industry Partnership Workplace Code of Conduct, *available at* <http://www.dol.gov/dol/esa/public/nosweat/partnership/report.htm#WORKPLACE> (last visited Sept. 23, 2001).

181. See generally TRUSTe, *at* http://www.truste.org/consumers/users_how.html (last visited Feb. 4, 2002).

commerce issues.¹⁸² And, of course, the Internet Corporation for Assigned Names and Numbers, discussed previously, is a non-state governmental body administering the domain name system.

I do not mean to suggest that any of the challenges surveyed in this section are unsolvable. Nor do I argue that these challenges, even taken together, mean that nation-states are on an inevitable path toward irrelevance or dissolution.¹⁸³ Indeed, in the next section, I will provide an overview of various approaches that have been advanced to meet these challenges.

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

II. Ten Responses

For those scholars, judges, and policymakers who have confronted cyberspace legal issues during the past decade, the ten challenges discussed in the previous section are not new. To the contrary, numerous articles, judicial decisions, and domestic and international legislative and administrative bodies have wrestled with these challenges, and the debate about appropriate responses has been robust. In this Part, I identify ten responses that appear to have received the most attention, summarize each of the arguments, and briefly describe some of the criticisms most often raised about each response. Significantly, however, though both the responses and the criticisms are widely varied, they are primarily grounded either in political philosophy and its abstract conceptions of sovereignty and democratic models of governance, or legal policy analysis, which focuses on the development of effective and efficient rules. None attempts to explore in detail either the social meaning of jurisdiction or the multiple conceptions of space, borders, and community allegiance that people

182. See <http://www.gbde.org>.

183. See, e.g., Michael Mann, *Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying*, *DÆDALUS* 115, Vol. 122, No. 3 (Summer 1993).

experience on the ground and that might complicate the governance models being discussed.¹⁸⁴ Thus, although many arguments for and against the various strategies are outlined here, the debates are being waged within an overly limited field of analysis. Neither the responses nor the critiques they have engendered go far enough in articulating a rich descriptive account of jurisdiction in a global era.

A. E Pluribus Cyberspace

David Johnson and David Post were among the first legal scholars to think seriously about the issues of jurisdiction and sovereignty in cyberspace. Since 1996 they have staked out a simple but radical position. They argue (both in co-authored articles and in articles written by Post alone)¹⁸⁵ that cyberspace should be deemed a distinct “place” for purposes of lawmaking sovereignty, and that the law applicable to interactions and transactions in cyberspace “will not, could not, and should not be the same law as that applicable to physical, geographically-defined territories.”¹⁸⁶

184. Even David Johnson and David Post, who come the closest, focus mostly on jurisdiction as an issue primarily concerning the legitimate scope of sovereignty as a matter of political philosophy and efficient organization. See *infra*, text accompanying notes 185-201.

185. See Johnson & Post, *Law and Borders*, *supra* note 8 (arguing that cyberspace is a unique “space” and cannot be governed by laws that rely on traditional territorial borders, instead requiring creation of a distinct and separate doctrine to be applied to cyberspace); see also David G. Post and David R. Johnson, “Chaos Prevailing on Every Continent”: *Towards A New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHL-KENT L. REV. 1055 (1998) (using a problem-solving dilemma to argue in favor of decentralized decision-making over the Internet); David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155 (1996) (arguing that the nature of Internet destroys the significance of physical location, eliminating the possibility of a single, uniform legal standard); David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L., at 3 (examining the various groups and organizations that can impose substantive rules on the Internet and arguing that the lack of physical borders in cyberspace prevents effective rule-making by centralized governments); David G. Post, *Of Black Holes and Decentralized Law-Making in Cyberspace*, 2 VAND. J. ENT. L. & PRAC. 70 (2000) [hereinafter Post, *Black Holes*] (applying theory of decentralized law-making to the regulation of junk e-mail); David G. Post, *The “Unsettled Paradox”: The Internet, the State, and the Consent of the Governed*, 5 ND. J. OF GLOBAL LEGAL STUD. 521 (1998) (using the dilemma of Internet governance to question legitimacy of a centralized state).

186. Johnson & Post, *Law and Borders*, *supra* note 8, at 1402. Others have expressed similar skepticism about the ability of territorial sovereigns to regulate cyberspace, at least in traditional forms. See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CINC. L. REV. 177 (1997) (recognizing the difficulties states have in regulating the global network, but arguing that certain private filtering and control mechanisms will ultimately facilitate far greater state regulation); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L. J. 911 (1996) (arguing that the transnational nature of the Internet requires governance by a collection of state, business, technical, and citizen forces); John T. Delacourt, Note, *The International Impact of Internet Regulation*, 38 HARV. INT’L L. J. 207 (1997) (contending that national regulation of the Internet is inappropriate and that a consensual regime of user self-regulation should be adopted).

Thus, they contend that cyberspace should be its own jurisdictional entity. Given the onslaught of territorially-based regulation in cyberspace, this idea seems almost quaint a mere six years after it was written. Nevertheless, the set of concerns Johnson and Post articulate still haunt the cyberspace regulatory landscape.

Post's article, *Governing Cyberspace*¹⁸⁷ summarizes what I am calling the "e pluribus cyberspace" view quite nicely. Post starts with the question: When is it legitimate for a court, or a territorial sovereign to exercise jurisdiction over someone? His answer is that law-making sovereignty is defined by control over physical territory.¹⁸⁸

Starting from this premise, Post then argues that cyberspace destroys the significance of physical location in three ways. First, he notes, events in cyberspace do not merely cross geographical boundaries the way pollution does; they "ignore the existence of boundaries altogether."¹⁸⁹ For example, "the cost and speed of message transmission from one point on the net to any other is entirely independent of physical location: messages can be transmitted between physical locations without any distance- or location-based degradation, decay, or delay." Second, even if in some cases there are physical connections to a geographical locality, such as a server, many cyberspace transactions "consist of continuously changing collections of messages that are routed from one network to another across the global net, with no centralized location at all."¹⁹⁰ Third, Post argues that it is incoherent to discuss physical location with respect to cyberspace because "the net enables simultaneous transactions between large numbers of people who do not and *cannot* know the physical location of the other party."¹⁹¹ Moreover, according to Post, even if one tried to premise

187. *Supra* note 185.

188. *Id.* at 158. For this proposition, Post cites the Restatement (Third) of Foreign Relations Law of the United States § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government") and MALCOLM N. SHAW, *INTERNATIONAL LAW* 277-314 (3d ed. 1991) ("International law is based on the concept of the state [which] in its turn lies upon the foundation of sovereignty [which itself] is founded upon the fact of territory. Without territory, a legal person cannot be a state."). See Post, *Governing Cyberspace*, *supra* note 185, at 158, n.10. Nevertheless, this vision of sovereignty may be overly simplistic. See, e.g., Henry Perritt, *The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance*, 5 *IND. J. GLOBAL LEGAL STUD.* 423 (1998) (arguing that the "Internet as a threat to sovereignty" thesis only threatens a "Realist" theory of international relations, not the "liberal tradition of international relations" that already accounts for the interaction of non-state actors across borders; see also, e.g., Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 *AM. U. J. INT'L L. & POL'Y* 717 (1995) (distinguishing the liberal theory of international relations from realism, which assumes "that the primary actors are states, and define states as monolithic units identifiable only by the functional characteristics that constitute them as states"). The question of how we might complicate the concept of sovereignty will be taken up later in this article.

189. Post, *Governing Cyberspace*, *supra* note 185, at 159.

190. *Id.* at 160.

191. *Id.* at 161.

jurisdiction on whether an act had a substantial effect within a particular state's territory (as Italy's highest court has attempted),¹⁹² the formulation is incoherent because "[t]he effects of cyberspace transactions are felt *everywhere*, simultaneously and equally in all corners of the global network."¹⁹³

The problem, Johnson and Post contend, is that "[t]raditional legal doctrine treats the Net as a mere transmission medium that facilitates the exchange of messages sent from one legally significant geographical location to another, each of which has its own applicable laws."¹⁹⁴ Instead, "[m]any of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of cyberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the 'real world.'"¹⁹⁵ Thus, they argue for the creation of an indigenous law of cyberspace. According to Johnson and Post, such a law not only would sidestep most of the territorial dilemmas we encountered in the previous section; it would also allow for new law to develop that would take into account many of the distinctive features of online interaction.¹⁹⁶

Finally, Johnson and Post summon a radically decentralized vision of law formation and enforcement wherein cyberspace will be its own self-regulating jurisdiction.¹⁹⁷ In his subsequent article, *Anarchy, State, and the Internet*,¹⁹⁸ for example, Post argues that communities in cyberspace will be governed by "rule-sets." These rule-sets are the underlying restrictions on behavior that are either promulgated in a contractual document (such as America Online's Terms of Service Agreement) or embedded in the architecture of the website (such as a screen that prevents the user from accessing information unless personal information or a credit card number is provided). Post envisions a kind of free market in law,¹⁹⁹ whereby users will "vote" with their browsers and only frequent those parts of cyberspace with rule-sets to their liking. Thus, one could easily opt out of the "law" of eBay and go somewhere else. Similarly, if AOL's terms of service are distasteful, other ISPs are available. In Post's view, this will mean that "[t]he 'law of the Internet'...emerges, not from the decision of some higher

192. See *supra* text accompanying note 79. American courts elaborating a test for minimum contacts in cyberspace have also attempted to construct an effects test. See *infra*, text accompanying notes 368-376.

193. *Id.* at 162.

194. Johnson & Post, *Law and Borders*, *supra* note 8, at 1378.

195. *Id.*

196. See *id.* at 1380-87 (applying theory to various substantive areas of cyberspace regulation).

197. See *id.* at 1396-1400 (arguing for the development of distinct rule-sets in cyberspace).

198. Post, *Anarchy, State, and the Internet*, *supra* note 185.

199. See Post, *Governing Cyberspace*, *supra* note 185, at 169; see also Post, *Black Holes*, *supra* note 185, at 70-73 (applying his approach to the problem of junk e-mail).

authority, but as the aggregate of the choices made by individual system operators about what rules to impose, and by individual users about which online communities to join.”²⁰⁰ And, to the extent necessary, territorial sovereigns would enforce cyberspace law as a matter of comity.²⁰¹

The e pluribus Cyberspace view is provocative, and we all owe a great debt to Johnson and Post for forcing us to grapple with the dilemmas they identify. Nevertheless, their approach is problematic in several respects.

First, they appear to have severely underestimated the ability of territorially-based sovereigns to regulate cyberspace. Indeed, their implicit vision of the state and how it exercises power seems unduly limited. As James Boyle has pointed out,²⁰² their cyber-libertarian approach only makes sense if one has an “Austinian”²⁰³ positivist vision of the lumbering state asserting sovereign prerogatives only by enacting laws and arresting people who disobey them. From that perspective, perhaps, states may face difficulties regulating cyberspace (though given the recent success of authorities in China and elsewhere to censor online content,²⁰⁴ states may have maintained even this type of regulatory power). But that is not the only (or even the most effective) way in which states regulate. Boyle (and Lawrence Lessig) posit a more subtle “Foucauldian”²⁰⁵ view, whereby government regulates by changing the architecture of the space itself.²⁰⁶ Thus, by affecting how the “code” of cyberspace is constructed, governments might well be able to control online behavior even more effectively than they control behavior in the “real world.”

Second, even as a matter of political theory, the Johnson and Post conception of sovereignty as necessarily tied to physical power and territorial boundaries may be overly simplistic. As we will see later in this

200. Post, *Governing Cyberspace*, *supra* note 185, at 167.

201. See Johnson & Post, *Law and Borders*, *supra* note 8, at 1391-95.

202. See Boyle, *supra* note 186.

203. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Isaiah Berlin et. al. eds., 1954).

204. See, e.g., Shanthi Kalathil & Taylor C. Boas, *The Internet and State Control in Authoritarian Regimes: China, Cuba, and the Counterrevolution*, CARNEGIE ENDOWMENT FOR INT’L PEACE WORKING PAPER (July 2001); *Freedom of Expression and the Internet in China*, HUM. RTS. WATCH BACKGROUNDER (Summer, 2001); Chen May Yee, *Internet Companies Increasingly Practice Self-Censorship as They Open Offices in Asia*, ASIAN WALL ST. J. (June 22, 2001) at N1.

205. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (exploring how the eighteenth-century development of the panopticon prison architecture, with its centralized and omniscient gaze, pervaded the mass psyche by conditioning individuals to internalize discipline and behave as if the authoritative, punitive gaze were always watching them).

206. See generally LESSIG, *supra* note 230; Boyle, *supra* note 186; see also Alan Hunt, *Foucault’s Expulsion of Law: Toward a Retrieval*, 17 L. & SOC. INQ. 1, 8 (describing Foucault’s belief that law—understood as centralized juridical state power—had lost its importance in modernity and had been eclipsed by power that is specific, local, fragmentary, and dispersed).

Article, other theories challenge this conception.²⁰⁷

Third, their vision of competing rule-sets makes sense if, and only if, alternative rule-sets are always available. For example, it is all well and good to say that a user who does not like AOL's Terms of Service can go elsewhere. But if there are no other Internet service providers or (more realistically) if all other providers with similar capabilities to AOL also have the same terms of service, the rule-set competition is meaningless.²⁰⁸ Johnson and Post seem to assume that, in cyberspace, the cost to start a competing service or website will always be low enough that options will continue to be available. This assumption may or may not be true, particularly as the online market becomes dominated by large multinational content providers that may effectively monopolize a given market. Johnson and Post might argue that antitrust laws would prevent such accretion of market power, but then the state (or perhaps multiple states) must be involved in the regulation of anti-competitive activities in cyberspace, which Johnson and Post wish to avoid.

Finally, the need for antitrust enforcement illustrates a larger problem underlying Johnson and Post's libertarian approach. They appear to assume that some state will be there to enforce underlying background rules, most particularly rules of contract and property. Both the legal realists, in their attacks on laissez-faire in the 1920s and 1930s,²⁰⁹ and members of the Critical Legal Studies movement, in their efforts to challenge the public-private distinction,²¹⁰ however, have repeatedly argued that this sort of assumption undermines the whole idea of "private ordering" because it presupposes a "public" regime of enforcement and policing as well as a baseline of background rights. If so, then the Johnson and Post scheme will run into the very jurisdictional problems they seek to avoid because territorial sovereigns will inevitably be called upon to establish and

207. See Part IV, *infra*.

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

209. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); see also generally BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

210. See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 242-68 (1987); Kenneth M. Casebeer, *Toward a Critical Jurisprudence—A First Step By Way of the Public-Private Distinction in Constitutional Law*, 37 U. MIAMI L. REV. 379 (1983); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010-13 (1985); Duncan Kennedy, *Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349-50 (1982); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835 (1985). Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1219-59 (1985).

enforce those background rights. Although a detailed discussion of this long-standing public-private debate is far beyond the scope of this Article, it is worth recognizing that the issue resurfaces in the context of cyberspace.²¹¹

B. Coase in Cyberspace

The Johnson and Post approach assumes that contract law increasingly will become the primary law of cyberspace. Although not embracing all of Johnson and Post's vision, a number of other scholars have similarly argued that the best response to the conundrums of cyberspace governance is to rely on the fact that cyberspace can reduce both transaction costs and barriers to entry and exit, thereby enabling a more perfect Coasean world. Such a world, premised on contractual relations, seems to offer a way around jurisdictional puzzles by allowing parties to construct their own legal relations, opt for a particular set of legal rules, and designate the forum of their choice for dispute resolution.

Nevertheless, this vision has been controversial because it does not provide sufficient space for public, non-contractual values. The battle has been particularly fierce in the field of intellectual property.²¹² Increasingly, the creators of intellectual products are relying less on traditional intellectual property regimes to enable them to limit access to their material, and more on a combination of contractual rights and technological protections.

For example, if I purchase a book from a bookstore, American copyright law grants me various entitlements. Under the so-called "first sale" doctrine, I can sell it to a used bookstore or give it to a friend to

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

212. See, e.g., Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93 (1997); William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203 (1998); Michael J. Meurer, *Price Discrimination, Personal Use, and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845 (1997); Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998); Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998); David Friedman, *In Defense of Private Orderings: Comments on Julie Cohen's "Copyright and the Jurisprudence of Self-Help"*, 13 BERKELEY TECH. L.J. 1151 (1998); Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53 (1997); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000) (hereinafter Cohen, *Perfect Curve*); James Boyle, *Cruel, Mean, or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007, 2025 (2000).

read.²¹³ Likewise, under the fair use doctrine, I can create my own parody of the book, or excerpt passages for critical or educational use.²¹⁴ And there are various other copyright doctrines that aim to strike a balance between granting incentives to copyright holders and allowing the broadest possible dissemination of information.²¹⁵

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

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

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

213. See 17 U.S.C. §109(a) (1994). For a discussion of the history of the first sale doctrine and concerns that the doctrine may be overly restricted in the digital environment, see generally JESSICA LITMAN, *DIGITAL COPYRIGHT* 81-83 (2001).

214. Fair use, which began life as a judge-made defense to copyright infringement, is now statutorily recognized under U.S. law. See 17 U.S.C. §107 (1994).

215. For example, the U.S. Supreme Court made clear that, in order to serve both First Amendment goals and the Copyright Clause’s stated objective of “promot[ing] the progress of science and the useful arts,” U.S. CONST., ART. I §8, CL. 8, copyright doctrine “assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991). This conception underlies the traditional copyright distinction between ideas, which are not copyrightable and the expressions of those ideas, which are copyrightable, see *Baker v. Selden*, 101 U.S. 99 (1879), as well as the doctrine that expression must have a “modicum” of originality in order to be protected. *Feist, supra*, at 345 (“Originality remains the *sine qua non* of copyright.”). Whether these doctrines sufficiently protect First Amendment values is debatable. See, e.g., Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (arguing that copyright doctrines must be subjected to independent First Amendment scrutiny).

Programs might be tied to unique identifier numbers embedded in software or hardware. Content providers will declare that content is not being “sold,” merely licensed subject to numerous restrictions. Self-help sub-routines might be used to encrypt user-files in the event of contractual violation, with the key only being provided on payment of a fee and a return to proper behavior. Digital fingerprints and watermarks will help identify texts. Encryption will be used to protect programs against decompilation, or to scramble source code so that it cannot be parsed.²¹⁶

Moreover, although theoretically I could develop a tool to circumvent the protection, the controversial Digital Millennium Copyright Act makes such circumvention (even for fair use purposes) a crime.²¹⁷

There are, of course, certain advantages to a contractarian system such as this. Most significantly, scholars have pointed out that content providers, armed with technological protection, could engage in finely-grained price discrimination, which might permit more people to access material at a price closer to what they are able to afford.²¹⁸ The analysis

216. Boyle, *supra* note 186, at 2025 (2000).

217. See 17 U.S.C. §1201 (Supp. V, 1999). Critics have argued that the Digital Millennium Copyright Act has overly enhanced the ability of copyright owners to wield electronic protective measures to control new kinds of exploitation of their works. See, e.g., LITMAN, *supra* note 213, at 81-86 (describing overexpansion of copyright through examples of the repeal of first sale doctrine, contraction of privilege of fair use, and expansion of notion of “piracy” with advent of Internet technology); Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTELL. PROP. REV. 236, 237-38 (1999) (arguing that the Act will likely improperly narrow the fair use doctrine); Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1683-86 (1999) (expressing concern about recent expansion of private rights in copyright law); Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. COPYRIGHT SOC’Y USA 193, 204-07 (2000) (arguing that balance between incentive for copyright holders and public access has shifted towards “a free market in property rights rooted in the natural entitlement of creators”); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC’Y USA 365, 387-89 (2000) (arguing that Congress inappropriately granted a “natural law monopoly” in the Act “comprised of rights for the creator to the exclusion of any duties”); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 566 (1999) (arguing that certain provisions of the Act are overbroad and warning of its “potential for substantial unintended detrimental consequences”); Yochai Benkler, *The Battle Over the Institutional Ecosystem in the Digital Environment*, COMM. OF THE ACM, Feb. 2001, at 84, 86 (arguing that “the expansion of exclusive private rights in information tilts the institutional ecosystem within which information is produced against peer production and in favor of industrial production”). *But see*, e.g., Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1616-17 (2001) (arguing that proper “resolution of tensions between the exercise of control under copyright on the one hand and the availability of new technology on the other... notwithstanding current critiques, supports a continued role for control in a new technological environment” and suggesting that the logic underlying the act “is consistent with earlier approaches to copyright/technology conflicts”).

218. See, e.g., Fisher, *supra* note 212

proceeds like this. Assume there is a book that person A values at \$10, person B values at \$20, and person C values at \$30. If the book is priced at \$20, B and C will buy it, but A will not. The producer has lost \$20 that might have been reaped from the sale: the \$10 A would have spent, as well as the additional \$10 C would have been willing to pay. In addition, A will not be able to buy the book, which we might see as a social loss. If, however, the producer were able to identify these individual valuations and could charge different prices to different customers, both the producer's loss and the social loss would disappear. Now, C would be charged the full \$30, and A could get the book for \$10.

Of course, this hypothetical scenario assumes that a producer would be able to determine various buyers' actual valuations. Historically, one way of doing so has been by creating a variety of different versions of a product with different price points. Some versions may have stripped down features. Some versions simply may be available sooner. The methods can also be combined: hardcover books are generally distributed first at a higher cost, and lower-cost paperbacks are distributed some time later.

Obviously, these mechanisms result in only rough approximations. Even more significantly, there is nothing to prevent a secondary used book market from developing, which can skew the price discrimination altogether. Thus "effective price discrimination requires restrictions on transfer of the work to other users; price discrimination will not work if high-value arbitrageurs can obtain low-cost access from redistributors."²¹⁹ Accordingly, advocates of such a contractarian approach argue that copyright owners need to be able to contract around some of the ground rules of copyright law. Indeed, they argue that there will be greater access to information and more incentive to create if contract is allowed free reign.

There are at least three problems with this approach, however. First, the contractual price discrimination model may well favor certain types of new creation over others. For example, fair use of copyrighted expression would no longer be permitted, and new creation that uses existing uncopyrightable material would suddenly be subject to licensing schemes. Second, such a model assumes that access to information is a purely private matter implicating concerns only about efficiency and agreement among parties. However, "licensing decisions designed to maximize individual or private welfare may not maximize society's."²²⁰ Thus, the public as a whole may benefit from access to information that no one individual would value sufficiently to purchase. Or, even if an individual purchases the information, it might not be disseminated to others who might not be able to afford it. Third, online licensing contracts are often not true

219. Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1804 (2000).

220. *Id.* at 1809.

bargains, but simply click-stream agreements that are entered into by parties of different bargaining power and sophistication. Indeed, the recent battle over proposed Article 2B of the Uniform Commercial Code and the subsequent UCITA has been waged in part over the issue of whether such contracts should be binding in all circumstances.²²¹ Finally, as discussed previously, these contractual “solutions” do not actually remove the need for state intervention because some government must always be in the background to enforce any contractual agreement.

C. A World of Online Passports

In response to the French lawsuit concerning access to Nazi memorabilia, Yahoo! argued that it could not feasibly block French users from accessing the offensive websites without censoring those sites altogether.²²² According to Yahoo, “no existing technology could effectively keep all French users from seeing” the sites at issue.²²³ Ultimately, the French court appointed a panel of three experts to test Yahoo!’s technical argument.²²⁴

The panel estimated that, for approximately 70 percent of those accessing the Web from France, the Internet Protocol (IP) address of the user is associated with a French Internet service provider and can be filtered accordingly.²²⁵ The IP addresses for French users of America

221. The proposed Uniform Computer Information Transactions Act (“UCITA”) was formerly draft Article 2B of the U.C.C., until the American Law Institute withdrew its support. UCITA would enforce these so-called “clickwrap” licenses in the mass-market context where the licensee manifests assent either before or during the initial use. See Uniform Computer Information Transactions Act §209 (1999), available at <http://www.law.upenn.edu/bll/ulc/ucita/cita10st.doc>. One of the principal points of contention about both Article 2B and UCITA is that they would make most of their default rules subject to change by “agreement of the parties,” including provisions on choice of law, choice of forum, the remedies to be awarded, and the implied warranties of noninfringement, merchantability, and program content. Thus, as Mark Lemley has argued, “a software vendor with a good lawyer can quite easily enforce virtually whatever terms it likes simply by putting them ‘conspicuously’ in a multi-page document that the user cannot even see (much less agree to) until after buying, installing, and beginning to run the software.” Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 122 (1999). And, although there is the possibility of such a contract being deemed unconscionable, that possibility is relatively remote given courts’ reluctance to void contracts as unconscionable.

222. See Angela Doland, *French Oppose Yahoo! on Nazi Items*, AP, July 24, 2000 (“[A]n expert witness called by Yahoo! testified [at today’s hearing]...that it would be technically impossible to keep French cybernauts off the disputed Web sites.”).

223. *Id.*

224. See Tribunal de Grande Instance de Paris, Ordonnance de référé (Aug. 11, 2000), available at http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord_tgi-paris_110800.htm.

225. See Tribunal de Grande Instance de Paris, Document de travail sur le rapport d’expertise (Nov. 6, 2000), *UEJF et Licra c/ Yahoo! Inc. et Yahoo! France*, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001106-rp.htm>.

Online, however, would appear to originate in Virginia, where the headquarters of AOL's network is located.²²⁶ Similarly, IP addresses on the private networks of large corporations might indicate the location of the server rather than the user.²²⁷ Finally, the panel noted that users could actively conceal their location by using anonymization sites that replace the user's IP address with a different one from another location.²²⁸ Thus, the panel concluded that 100 percent geographical identification was infeasible.²²⁹

Nevertheless, the French court, in imposing its order, appeared to embrace the position that, even if Yahoo! could not block all French users from sites displaying Nazi memorabilia, enough users could be identified so as to make the judgment effective. Thus, although for years cyber-libertarians have argued that cyberspace is unregulatable by geographically-based sovereigns, the Yahoo! decision reflects the idea that even if perfect regulation is impossible, such regulation can still be effective enough. After all, the fact that locks can be picked does not render locks useless as regulatory devices.²³⁰

Moreover, the technology to zone cyberspace based on physical geography is rapidly improving. In the past several years, companies such as DoubleClick, Akamai, NetGeo, Digital Island, Quova, and Digital Envoy have been racing to compile databases that match up the 4.3 billion possible Internet locations with actual locations.²³¹ Significantly, although commentators initially warned that governments might try to impose a digital identification requirement on cyberspace,²³² it appears to be not government but private industry that is leading the charge. For businesses, geographical tracking permits marketing campaigns tailored to customers in specific locations²³³ and the ability to sell more targeted advertising.²³⁴ Nevertheless, once the technology exists, government regulators may insist

226. *See id.*

227. *See id.*

228. *See id.*

229. *See id.*

230. This example is drawn from LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 57 (1999).

231. *See* Michael Geist, *E-borders Loom, for Better or Worse*, *TORONTO GLOBE & MAIL*, (June 28, 2001), available at <http://www.globetechn...neutral&slug=TWGEISY&date=20010628>; *We Know Where You Live*, *FORBES.COM* (Nov. 13, 2000), available at www.forbes.com/global/2000/1113/0323130a_print.html; Stephanie Olsen, *Geographic Tracking Raises Opportunities, Fears*, *CNET NEWS.COM* (Nov. 8, 2000), available at <http://news.cnet.com/news/0-1005-200-3424168.html>.

232. *See, e.g.*, LESSIG, *supra* note 230, at 49-53.

233. *See* Olsen, *supra* note 231 (“[A] traditional retailer such as Banana Republic could hawk swimming suits to Web visitors from Los Angeles as it pushes parkas to online shoppers in New York.”).

234. *See* Geist, *supra* note 231 (“[N]ational and global Web sites may now use geographic identification technology to guarantee advertisers that their ads will only be displayed to a local audience.”).

(just as the French judge in the Yahoo! case did) that sites employ this technology to enforce local laws.

If geographical tracking technology becomes both more accurate and more widely used, then it is not hard to envision a cyberworld of digital passports, where users entering a website are immediately identified by country (or state, or city, or town, or zip code) and then offered content that has been zoned for members of that geographical community. In order to see how this would work, consider a recent legal battle concerning iCraveTV.com, a Canadian corporation. In 1999, the company began offering a streaming version of 17 Canadian and American broadcast television stations online uncut and uninterrupted,²³⁵ arguing that such retransmission was permitted under Canadian copyright law,²³⁶ and that the site was intended for Canadian viewers only.²³⁷ Nevertheless, the steps taken by the site to block access to Americans were trivially easy to circumvent. First, a potential user was required to enter his or her local area code. If the area code entered were not a Canadian area code, the user was denied access to the service.²³⁸ Users who negotiated the first step were then confronted with two icons: “I’m in Canada” and “Not in Canada” and were asked to click one.²³⁹ Ultimately, a federal judge in Pittsburgh ruled that “acts of [United States copyright] infringement are committed within the United States when United States citizens received and viewed defendants’ streaming of the copyrighted materials.”²⁴⁰ The judge issued a temporary restraining order against the Internet company,²⁴¹ which subsequently settled the case²⁴² and later went out of business.²⁴³ Since that time, however, a new corporation called JumpTV.com has announced its intention to launch a similar service in Canada, claiming that it will use geographic identification technology to insure that only Canadians

235. See *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d 1831 (W.D.Pa. 2000); see also John Borland, *Broadcasters Win Battle Against iCraveTV.com*, CNET NEWS.COM (Jan. 28, 2000), available at <http://news.cnet.com/news/0-1004-200-1535528.html>.

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

237. See *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d 1831, 1834 (W.D.Pa. 2000).

238. See *id.* at 225-26 (noting that “this approach was viewed, with some justification, as rather gimmicky since iCraveTV’s own Toronto area code was posted on the site”).

239. See *id.* at 226.

240. *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d 1831, 1834-35 (W.D.Pa. 2000).

241. *Id.* at 1833.

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

243. See *Symposium, Panel II: Digital Video*, 11 FORDHAM INT’L PROP., MEDIA & ENT. L. J. 317, 338 (2001) (remarks of Jeffrey Cunard).

will be able to access the site.²⁴⁴ In a world of digital passports, a company like JumpTV could go one step farther and automatically “read” the digital identification of each user attempting to access the site, even more effectively blocking access to those without Canadian “identification.”

Geographical tracing and digital identification technology therefore appear to “solve” the problem raised in cases such as Yahoo! and *iCraveTV.com*. Using the technology, website operators or Internet service providers can simply allow access to some users while denying access to others, based on the geographical location of the user.

Nevertheless, at least three difficulties remain. First, website operators arguably would be required to monitor continuously the laws of every jurisdiction in order to determine which users to admit.²⁴⁵ Second, net users (and regulators) worried about online privacy may balk at technology that would pierce geographical anonymity and link physical location to other data, such as the sites that the user visits. Such links might lead to increased invasion of privacy by marketers,²⁴⁶ but even more ominous is the possibility that loss of geographical anonymity might make people more reluctant to visit certain sites, for fear that they may be identified.²⁴⁷ Finally, if, as in the Yahoo! case, a website operator in the United States refuses to block French citizens accessing the site, how will France enforce its wishes? Thus, the jurisdictional puzzle may not be completely solved.

D. You Enforce My Laws, I’ll Enforce Yours

Lawrence Lessig in his book, *Code and Other Laws of Cyberspace*²⁴⁸ offers a theory of international regulation of cyberspace activity that attempts to solve the question that the technological response in the previous suggestion leaves open: even if a website operator could easily identify the territorial location of each user, what is it that would compel a website operator to enforce the laws enacted in other

244. See generally Ed Hore, *JumpTV Wants to Put TV Signals on the Internet*, THE LAWYERS WEEKLY, Jan. 12, 2001; Geist, *supra* note 231.

245. See Laurie, *supra* note 71 (arguing that geographical filtering would impose a tremendous burden on services such as Yahoo!, which would be required “to maintain a huge matrix of pages versus jurisdictions to see who can and can’t see what”).

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

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

248. See *supra* note 230.

jurisdictions? One answer, of course, is that, at least for commercial site operators, the desire to operate internationally will exert a strong persuasive force, as Yahoo!'s "voluntary" capitulation to the French order demonstrates. Nevertheless, Lessig's approach goes farther than that by involving governments in a series of reciprocal enforcement arrangements.

Lessig starts by outlining the standard cyber-libertarian argument that the Net is unregulatable.²⁴⁹ This argument, reminiscent of the Johnson-Post approach discussed previously, proceeds along the following lines. Suppose the legislature of New York passes a statute banning online gambling. In the wake of the legislation, New York's Attorney General moves to shut down all gambling sites located on servers in New York. The sites can simply move their servers to Connecticut, and New York citizens can still access online gambling activities as easily as before. If the New York Attorney General is persistent, he or she may decide to seek prosecution in Connecticut as well and may be able to persuade the Connecticut Attorney General to shut down the servers, even if Connecticut does not have the same anti-gambling policy as New York. But then the website operators simply move their servers off-shore, to the Grand Caymans or the Bahamas, or somewhere else where they will not be prosecuted. It is still no more difficult for American citizens to gain access to the gambling sites, and territorial regulation appears to have failed.

Lessig's answer to this dilemma is reciprocal enforcement. According to Lessig "[e]ach state [or nation] would promise to enforce on servers within its jurisdiction the regulation of other states for citizens from those other states, in exchange for having its own regulations enforced in other jurisdictions."²⁵⁰ Lessig argues that, although states do not necessarily have the same regulatory goals, they all at least have some goals they wish to be enforced extraterritorially. Thus, New York may have an interest in preventing its citizens from accessing gambling sites, while Florida may have an interest in restricting access to pornography. In Lessig's scheme, Florida would simply require servers within Florida to block the access of New Yorkers to gambling sites, in exchange for New York keeping Florida citizens away from New York servers offering content deemed impermissible in Florida. According to Lessig, "[w]ith a simple way to verify citizenship, a simple way to verify that servers are discriminating on the basis of citizenship, and a federal commitment to support such local discrimination, we could easily imagine an architecture that enables local regulation of Internet behavior."²⁵¹ Indeed, such architecture would be similar to the online passports discussed in the previous section. Moreover, Lessig sees this system of reciprocal enforcement operating internationally as well. Indeed he states, without explanation, that there would be an even

249. *See id.* at 54-55.

250. *Id.* at 55.

251. *Id.* at 55-56.

greater interest in enforcing another jurisdiction's local law internationally than within one nation.²⁵²

Such a system would, as Lessig observes, "dramatically increase the power of local governments to impose requirements on their citizens."²⁵³ Websites would condition access on the presentation of digital certificates, and rules imposed by local jurisdictions would be enforced by sites worldwide.

The effect, in short, would be to *zone* cyberspace based on the qualifications carried by individual users. It would enable a degree of control of cyberspace that few have ever imagined. Cyberspace would go from being an unregulable space to, depending on the depth of the certificates in the space, the most regulable space imaginable.²⁵⁴

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

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

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

252. *See id.* at 56.

253. *Id.* at 56-57.

254. *Id.* at 57.

non-profit organizations.²⁵⁵

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

Finally, as the discussion of the Yahoo! case indicates, there is very little global consensus about what constitutes appropriate Web material. France and Germany want to block Nazi sites; states within the U.S. try to prosecute gambling sites;²⁵⁶ governments in China, Saudi Arabia, Singapore and elsewhere try to block access to sites for political or religious reasons.²⁵⁷ While countries may be able to regulate such sites within their borders, they may well find it difficult to convince other countries to enforce those restrictions, even in the reciprocal scheme Lessig envisions. Moreover, such efforts might run counter to the current trend of increasing international norm-creation in the human rights area.²⁵⁸ Thus, many would argue that other nations' "sensitivities should not serve as an excuse to block sites that promote the protection of human rights."²⁵⁹

Lessig recognizes both that the "architecture" he describes may never be universally enforced and that some individuals—if they desire it enough—will probably always be able to avoid technologies of identity. Nevertheless, he argues that even partial control would have powerful effects. According to Lessig, "it is as likely that the majority of people would resist these small but efficient regulators of the Net as it is that cows would resist wire fences."²⁶⁰

Perhaps then an even more fundamental objection to this approach, which Lessig himself seems to share,²⁶¹ is a normative one. A cyberspace

255. Brief for Chamber of Commerce of the United States, et al. at 6-7, *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, No. 00-21275 (N.D. Ca., filed 12/21/00).

256. See, e.g., *Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (1999) (prosecution of non-resident corporation and subsidiaries for offering Internet gambling to residents of New York); *Humphrey v. Granite Gates Resorts, Inc.*, 568 N.W. 2d 715 (1997) (prosecution of non-resident corporation and its principal for deceptive trade practices, false advertising, and consumer fraud in connection with an Internet gambling site).

257. See, e.g., Mary Kwang, *Internet dreams: China's New Generation*, THE STRAITS TIMES (SINGAPORE) (July 16, 2001) (quoting a Washington-based official of Human Rights Watch complaining that "China's attempts to control access to the Internet through politically-motivated regulations and detentions blatantly violate users' rights to free expression."); *Tougher Regulations on Internet cafes planned*, MIDDLE EAST NEWSFILE (SAUDI ARABIA) (Sep. 9, 2001) (describing regulations on Internet cafes that would bar access to websites deemed offensive to Islam and the political system); Tan Tarn How, *Foreign Websites that Refuse to Register "Can be Blocked"*, THE STRAITS TIMES (SINGAPORE) (Sep. 1, 2001), (reporting that Singapore government will block access to foreign websites that do not register in Singapore as political websites and abide by new laws that limit political campaigning by websites during an election.).

258. See *supra* text accompanying notes 137-170.

259. Glater, *supra* note 247 (quoting William F. Schulz, Executive Director of U.S. operations for Amnesty International).

260. LESSIG, *supra* note 230, at 57.

261. Lessig even addresses the reader directly to make this point:

Stop. Don't turn away. I know at least some of the thousands of reasons

where individuals could only access content that was approved by their government is a very different cyberspace from the one most people have experienced until now. Indeed, many of the most highly touted features of the Internet are a function of its relatively open architecture. Thus, observers have lauded the Internet's power (or at least potential) to democratize where people get their news,²⁶² to make more accessible all forms of political²⁶³ and artistic expression,²⁶⁴ to alert the international community about environmental²⁶⁵ and human rights abuses²⁶⁶ occurring anywhere in the world, and to facilitate political organizing.²⁶⁷ Without these benefits, we may lose some of the attributes that have made the Internet both so popular and so significant.

you have for rejecting the structure I've just described. Some of those reasons are normative—you hate the world I am describing. Or you hate the idea that cyberspace would become like this world. I do too. I am not promoting an idea, I am arguing that this is the world we are moving to.

Id. at 56.

262. See, e.g., ANDREW SHAPIRO, *THE CONTROL REVOLUTION* (1999) 34-37 (describing the way in which the Internet facilitated resistance to a 1995 Time Magazine article about the availability of pornography online); see also *id.* at 40-43 (citing Matt Drudge's online reporting of the Clinton-Lewinsky affair as an example of shifting power away from exclusive reliance on mainstream news sources).

263. See, e.g., Glater, *supra* note 247 (“[T]he Web allowed Amnesty International to get information into China about the Universal Declaration of Human Rights and about Chinese human rights violations, despite the government's efforts to block them.”).

264. See, e.g., John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net, available at* http://www.eff.org/Publications/John_Perry_Barlow/HTML/idea_economy_article.html (visited Feb. 4, 2002) (“[A]ll the goods of the Information Age—all of the expressions once contained in books or film strips or records or newsletters—will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions which one might behold in effect, as glowing pixels or transmitted sounds, but never touch or claim to ‘own’ in the old sense of the word.”).

265. Anthropology article about Environmental movement in Amazon rain forest.

266. As William F. Schulz, Executive Director of Amnesty International's United States operations, puts it:

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

Glater, *supra* note 247.

267. See Henry H. Perritt, Jr., *The Internet is Changing the Public International Legal System*, 88 KY. L.J. 885 (1999-2000) (“The Internet's low economic barriers to entry provide a voice to political actors who otherwise would be denied effective access to the public arena. Because the Internet gives them access, and is inherently global, these actors can find like-minded people in other states, thus enabling them to build political movements across national lines.”).

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

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

The classical model of international harmonization is through bilateral and multilateral treaties. Two examples of such a treaty-based approach will suffice to indicate the limitations of the classical model. First, I will examine an older treaty, the Berne Convention for The Protection of Literary and Artistic Works,²⁶⁸ which was designed to harmonize the various national copyright regimes. Second, I will outline the debates concerning the still-ongoing Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which is being developed under the auspices of the Hague Conference on Private International Law.²⁶⁹

During the first meetings in 1883 to form the Berne Convention, an attempt was made to institute a uniform international copyright system.²⁷⁰ By the time the Convention concluded three years later, however, that ambition had been rebuffed, and the Berne Convention stops far short of true harmonization.²⁷¹ Instead, the participating countries agreed to a

268. BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, July 24, 1971, 1161, U.N.T.S. 3 [hereinafter Berne Convention]. The first version of the Berne Convention was concluded in 1886. See generally SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 (1987) (tracing the development of the Berne Convention).

269. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Oct. 30, 1999), available at <http://www.hcch.net/e/workprog/jdgm.html> [hereinafter HAGUE CONVENTION DRAFT].

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

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

system of “national treatment,” whereby member states agreed to give authors from other signatory states the same rights as those states apply to domestic authors.²⁷² Moreover, the Convention established a set of minimum requirements for copyright protection to which all signatory states must adhere.²⁷³ While this idea of minimum standards could in theory result in a strong set of international norms, the actual minimum requirements set by the Convention were extremely weak and relatively easy to meet.²⁷⁴

Thus, the Convention allowed great latitude for signatory states to develop their own copyright regimes and create their own norms regarding, for example, how to define the “author” for purposes of copyright protection²⁷⁵ and how to carve out exceptions to copyright to respond to free speech concerns²⁷⁶ or effectuate other social policies.²⁷⁷ Throughout the 20th century “the process of public international copyright lawmaking tended to be slow and unwieldy because it operated by way of consensus among...countries with a diverse range of social and economic perspectives.”²⁷⁸ As a result, changes to the Berne Convention have generally represented mere codifications of commonly accepted policies that, in many cases, had already been implemented in the national laws of most member states before being incorporated into the Convention.²⁷⁹ Moreover, such changes have always been developed through the laborious

272. See Berne Convention, *supra* note 268, art. 5(1), 1161 U.N.T.S. at 31 (“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals”).

273. See Dinwoodie, *supra* note 271, at 490.

274. See RICKETSON, *supra* note 268, at 53, 73-74.

275. See STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 4.46 (2d ed. 1989). For example, U.S. copyright law, taking a market-oriented approach, recognizes employers as authors of works prepared by employees within the scope of their employment, *see* 17 U.S.C. § 201(b) (1994) (providing that the employer or commissioning party is the author of a work made for hire); 17 U.S.C. § 101 (1994) (defining “work made for hire” to include a work prepared by an employee within the scope of his employment), whereas French law, focusing on the moral rights of the creator, treats the employee as the author regardless of the employment relationship, *see* Law No. 92-597 of July 1, 1992 on the Intellectual Property Code, art. L-113 (amended Mar. 27, 1997) (Fr.) (providing for copyright ownership by employers only with respect to software).

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

277. See Dinwoodie, *supra* note 271, at 492 (“Although these different [national] approaches inevitably privilege many similar acts—such as core educational or research uses, or uses implicating free speech concerns—many also reflect the exigencies of national cultural policy (or political demands)”; *see also* Sam Ricketson, *The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties*, 1999 INTELL. PROP. Q. 56, 93 (1999). For a discussion of the different exceptions found in national laws, *see* Jaap H. Spoor, *General Aspects of Exceptions and Limitations to Copyright: General Report*, in THE BOUNDARIES OF COPYRIGHT 27 (Libby Baulch et al. eds., 1999).

278. Dinwoodie, *supra* note 271, at 492-93.

279. *See id.* at 493.

process of treaty revision.²⁸⁰

The Hague Convention has been beset by similar difficulties. The treaty got its start in 1992, when the United States approached the other countries that belong to the Hague Conference on Private International Law and suggested the conference attempt to harmonize international rules for enforcement of judgments across borders.²⁸¹ Almost ten years later, that goal continues to elude delegates to the convention, largely because of a lack of consensus about adjudicatory jurisdiction generally, and jurisdiction over online commercial transactions particularly.²⁸² Indeed, the disagreements are now so entrenched that, in 2002 when the delegates next meet, they will not discuss any of the draft convention's substantive provisions, but instead will consider scaling back the scope of the convention altogether.²⁸³

Both of these attempts at international harmonization reveal the principal drawbacks of attempting to establish international norms through multilateral treaties. Almost by definition, these treaties will demand prior consensus among many countries with different social policies and economic interests. Thus, the treaties will tend merely to codify painstakingly developed conventional wisdom about recognized problems.²⁸⁴ As a result, such treaties are rarely the best mechanism for developing new solutions to emerging issues on which there are widely divergent traditions and interests. Yet, "technological pressures demand a rapidity of lawmaking, a dynamic disposition, and a forward-looking perspective."²⁸⁵ Accordingly, the classical model of public international lawmaking may not be the appropriate mechanism for achieving international harmonization in a fast-changing world.

280. *See id.*

281. *See Proposed Hague Convention Would Help IP Owners*, NAT'L L.J. at C20 (Jul. 23, 2001) (describing U.S. government request that the Hague Conference on Private International Law, of which US is a member state, negotiate and draft a convention on jurisdiction and the enforcement of judgments in foreign countries).

282. *See Paul Hofheinz, Birth Pangs for Web Treaty Seem Endless*, WALL ST. J. (Aug. 16, 2001), at A11 ("Should a German shopper be able to sue a U.S. Internet retailer in a Munich court if he is unhappy with something he bought online? Delegations from 53 countries have worked on an answer for more than two years, and it continues to elude them.").

283. *See Hofheinz, supra* note 282, at A11 ("When they meet here for their 10th session in January, it won't be to discuss the treaty's provisions but to talk about whether its scope should be reduced.").

284. *See, e.g., J.H. Reichman, The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions*, 17 HASTINGS COMM. & ENT. L.J. 763, 765 (1995) (arguing that "both the strengths and weaknesses of the TRIPS Agreement stem from its essentially backwards-looking character").

285. Dinwoodie, *supra* note 271, at 494.

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

Given the cumbersome nature of public international lawmaking, international harmonization efforts, not surprisingly, have shifted in recent years to a somewhat more dynamic model, particularly in fields of rapid technological development. For example, since the 1994 Uruguay Round Revision Uruguay Round revision of the General Agreement on Tariffs and Trade,²⁸⁶ commercial trade issues that were formerly hashed out through diplomatic channels are now addressed by W.T.O. dispute resolution panels in a more adjudicatory fashion.²⁸⁷ Likewise, the Arbitration and Mediation Center of the World Intellectual Property Organization adjudicates 58 percent of the trademark disputes filed under the Internet Corporation for Assigned Names and Numbers' Uniform Dispute Resolution Policy.²⁸⁸ International tax policy has been developed in OECD meetings and guidelines.

The advantages of the more dynamic model are obvious. International institutions can react far more quickly to new developments without the need for diplomatic conferences or complete consensus.²⁸⁹ And, if the amount of activity is a sign of success, then it appears that the more dynamic model is catching on. In the first three years of the W.T.O. dispute settlement system, as many cases were filed as in the entire 47-year period preceding the Uruguay Round.²⁹⁰

Nevertheless, there are several reasons to resist this dynamic model. First, the Dispute Settlement Understanding of the W.T.O. makes clear that its rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."²⁹¹ Although the panels may, over time, expand their ability to "interpret" (and thereby define or change)

286. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, Legal Instruments--Results of the Uruguay Round vol. 31, 33 I.L.M. 112 (1994) [hereinafter DSU] (establishing the rules and procedures to be used in WTO dispute settlement proceedings).

287. See Dinwoodie, *supra* note 271, at 502 ("The diplomatic model of the GATT gave way to the judicial model of the WTO, reflecting an attempt to shift from a power-based to a rule-based procedure."); see also Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT'L L. 171 (1998) (describing the shift to a rule-based model of dispute settlement within the WTO); Kim Van der Borgh, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L L. REV. 1223, 1224 (1999) (describing the ways in which the Uruguay Round changed the nature of the dispute settlement process from a power-based to a rule-based procedure).

288. See Geist, *supra* note 117.

289. See Dinwoodie, *supra* note 271, at 494-95.

290. See Chua, *supra* note 287, at 172 (reporting in 1998 that "GATT dispute settlement panels resolved more than 100 cases between 1947 and 1994, [while s]ince the implementation of the DSU in 1995, the WTO has received over 100 trade disputes with 28 cases proceeding to a dispute settlement panel" (citations omitted)).

291. See DSU, *supra* note 286, at art. 3(2).

international law, the governing documents seem designed to constrain any truly creative administrative/judicial role.

Second, as the violent protests at international gatherings over the last few years²⁹² indicates, bodies such as the W.T.O. and the WIPO face serious objections from the perspective of procedural transparency and democratic legitimacy.²⁹³ Perhaps because they were developed in the context of international diplomacy, these bodies assume a model of mediation, negotiation, conciliation, and secrecy that might makes us pause before endowing them with power to create international norms.²⁹⁴ For example, many observers have urged that the procedures of these bodies be made more transparent, through open hearings, greater access to the submissions of parties, and the ability of non-state parties to participate.²⁹⁵

Even beyond procedural issues, however, W.T.O. panels face the further objection that they are not accountable to any electorate. Although all unelected adjudicatory bodies are insulated from democratic pressures to some extent, accountability is usually built into the system at some stage in the process, through, for example, appointment, confirmation, or removal of decisionmakers. In contrast, W.T.O. panel members are selected through an obscure process,²⁹⁶ and no democratically accountable official

292. *See supra* note 16.

293. As David Post has recently argued:

I think the problem of scale in governmental institutions is one we have to think about again, because I don't see any good solutions, right now at least, to how we build global institutions that have the trust of the people who are subjected to their rules and regulations. I think this is related to what we might call the Seattle phenomenon (or the WTO protests), if you will. I think there is a very real phenomenon that is going to play itself out on the Net as people ask themselves: Who or what are these international institutions who have the authority to make the rules for this global environment? It's an essential problem and a very difficult one.

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

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

295. *See* Van Der Borgh, *supra* note 287, at 241-42 (describing WTO procedures and suggested reforms); *see also* Sands, *supra* note 31, at 543-46 (praising recent decisions of the WTO Appellate Body that have begun to permit non-state actors to play a role in WTO proceedings).

296. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round vol. 33, no. 1, 33 *I.L.M.* 112 (1994) [hereinafter DSU]. Article 8 of the DSU provides the rules for the composition of panels. The WTO Secretariat proposes nominations to the panel, which can be disputed only for compelling reasons. DSU art. 8(6). The Secretariat maintains a list of qualified governmental and non-governmental individuals. DSU art. 8(4). The qualifications are general. The panelists must be: well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of an MTO Member or of a contracting party to the GATT 1947 or as a representative to a council or committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

is involved.²⁹⁷ Thus, we see a “democratic deficit”²⁹⁸ because lawmakers lack electoral responsibility to the “people whose ‘sovereignty’” they exercise.²⁹⁹ As one commentator has argued, “the GATT is not the world constitution, and the W.T.O. is not the World Supreme Court. They both fail to adhere to some of the essential standards required of institutions that would claim to exercise prescriptive authority over individuals throughout the world.”³⁰⁰

Third, the structure of the W.T.O. process, in which complaints are brought by countries rather than by individual parties, may tend to produce norms skewed toward a limited range of interests because the concerns of a national government may not reflect a variety of interests present within the population at large. For example, in the copyright context, the United States Trade Representative may well take the position in disputes before the W.T.O. or the WIPO that greater copyright protection is beneficial to U.S. industry as a whole, thereby ignoring those who might advocate a lesser level of protection, in order to create greater distributional equity between countries or to protect non-trade interests, such as privacy or free speech. In addition, the lack of procedural transparency or democratic accountability may make such international administrative/adjudicative

DSU art. 8(1). Further, the panel members should be “selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.” DSU art. 8(2). The panelists generally cannot be from the disputant country, DSU art. 8(3), and must “serve in their individual capacities and not as government representatives, nor as representatives of any organization,” DSU art. 8(10).

297. See Dinwoodie, *supra*, note 271, at 506 (pointing out the poor representational legitimacy of the WTO panels because they are “insulated from democratic pressures”); David M. Driesen, *What is Free Trade?: the Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT’L L. 279, 316-17 (2001) (explaining that the WTO lacks democratic legitimacy because the officials are not selected by citizens or legislative bodies, but generally by the GATT Secretariat); Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STANFORD J. INT’L L. 191, 213-14 (2000) (observing that the denial of citizen participation in the WTO has raised the concern that “some type of democratic process is needed to counter growing popular opposition to many of its initiatives.”).

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

299. See Lindseth, *supra* note 298, at 633 (arguing that supranational institutions raise questions of democratic legitimacy due to the “transfer of power to agents that are not electorally responsible” to the people they represent).

300. Dinwoodie, *supra* note 271, at 505.

bodies more subject to industry capture. For example, a recent study of domain name trademark decisions reached by WIPO's Arbitration and Mediation Center found that WIPO arbitrators ruled in favor of the trademark holders 82.2 percent of the time.³⁰¹

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

different countries with varying educational practices and literacy rates may permit or prohibit quite different copying practices. The manner in which authors are compensated may differ from country to country depending upon established labor and employment practices. The ways in which works are exploited, and thus need to be protected, may hinge upon social customs unique to particular countries. The extent of reasonable copying privileges may reflect the level of access to public libraries. Commitments to free expression, and hence use of a work in that cause without the need for permission, may vary in intensity depending upon the political development of the society in question. Unqualified respect for the integrity of artistic works might be affected by different notions of property. And market mechanisms necessary to support schemes for compensating authors might be more feasible in certain cultures than in others.³⁰²

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

Finally, some critics have suggested that the goal of harmonization may do more harm than good. For example, Paul Stephan has pointed out two common outcomes of the harmonization process, neither of which are normatively desirable.³⁰³ First, Stephan contends that international harmonization efforts are often simply the product of rent-seeking by various industry groups. He suggests that many harmonization efforts in

301. See Geist, *supra* note 117. Geist also found that, in cases where the parties opt for a single arbitrator rather than a panel of three (90 percent of the total), the complainant wins 84.4 percent of the time. See *id.*

302. Dinwoodie, *supra* note 271, at 513-14 (footnote omitted).

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

commercial law are initiated by particular industries seeking particular legal rules. The resulting international norms are usually drafted by industry experts and, not surprisingly, benefit the industry seeking the change. Second, he observes a tendency among the various parties to an international harmonization effort to adopt relatively vague standards in order to smooth over major policy disagreements. These standards, because they are couched in such general language, then become a license for domestic decisionmakers to exercise broad discretion in interpreting the international norm. As a result, the law may well become even less certain than it was before, thus foiling the harmonization effort altogether. Accordingly, Stephan argues that “[t]he political economy of [the harmonization] process results too often either in rules written for the benefit of particular industries and other interest groups, or in the suppression of conflict that in turn increases legal risk.”³⁰⁴ Instead, he envisions a system that would allow parties virtually unlimited power to choose among national rules through private contractual agreements.³⁰⁵ Whether or not one embraces Stephan’s alternative, his criticism of international harmonization should at least raise doubts regarding the efficacy of the enterprise.

G. A Return to *Lex Mercatoria*

Given the problems inherent in both treaty-based and agency-based efforts to harmonize legal regimes, one possible alternative is to consider the role national courts might play in developing international norms. In several recent articles, Graeme Dinwoodie has advocated this approach, particularly with regard to copyright law.³⁰⁶ Essentially, Dinwoodie asks courts to develop an international common law, resurrecting the “*lex mercatoria*”³⁰⁷

304. *Id.* at 744.

305. *Id.* at 789.

306. See generally Dinwoodie, *supra* note 271; see also Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001).

307. *Lex mercatoria* has been defined as “a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.” Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT’L L. 427, 473 n.167 (2001) quoting Berthold Goldman, *The Applicable Law: General Principles of Law—the Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 116 (Julian D. M. Lew ed., 1987)). *Lex mercatoria* is not a monolithic body of law, and is neither purely national nor purely international. See Abul F.M. Maniruzzaman, *The Lex Mercatoria And International Contracts: A Challenge For International Commercial Arbitration?*, 14 AM. U. INT’L L. REV. 657, 674 (1999). It appears to have developed during the middle ages, when transnational merchants resolved their disputes in specialized merchant courts that applied customary transnational commerce norms and trade practices rather than any particular national positive law. See Lawrence M. Friedman, *Commentary: Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT’L L. 347, 356 (2001); Philip J. McConaughay, *The Scope Of*

that for centuries governed international trade.³⁰⁸

Dinwoodie starts from the observation that all current approaches to choice of law force courts to localize international disputes and therefore resolve them under the law of one country or another.³⁰⁹ This process forecloses courts from considering international norms that might exist “separate and apart from domestic policy objectives.”³¹⁰ As Dinwoodie points out, however, international disputes often implicate interests beyond those at stake in purely domestic disputes.³¹¹ Thus, he recommends that national courts develop a substantive common law for addressing multistate cases.

Many decades ago, conflict-of-laws theorist David Cavers wrote that, in a conflicts analysis, “[t]he court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?”³¹² Building on this observation, Dinwoodie argues that the judicial role often involves choices among many different substantive solutions, and courts should be free to generate legal standards in multistate cases the same way they do in purely domestic cases.³¹³ Moreover, “statutory rules enacted by a national legislature are rarely enacted with an eye to international disputes or conduct.”³¹⁴ As a result, these legislative choices inevitably reflect domestic priorities, and there is no particular reason to apply them reflexively in international conflicts. Finally, Dinwoodie argues that, when a dispute is multinational, it will always implicate interests in at least two different nations. Thus, when courts arbitrarily (or even not so arbitrarily) choose to apply one nation’s laws over the other, they are responding only to one nation’s interests.³¹⁵ Instead, in Dinwoodie’s view, courts should develop an appropriate rule “from an amalgam of national and international

Autonomy In International Contracts And Its Relation To Economic Regulation And Development, 39 COLUM. J. TRANSNAT’L L. 595, 610 fn.31 (2001). This hybrid practice governed exporters and importers, shippers, banks, and marine insurance companies. See Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 157 n.47 (1994). The principal advantage of *lex mercatoria* is that it eliminates uncertainties regarding which jurisdiction’s law will apply to a given dispute, see Maniruzzaman, *supra*, at 680 (1999), although as with all common law doctrines, uncertainties may remain with regard to the substantive norms to be applied.

308. See Dinwoodie, *supra* note 271, at 522; see also B. Santos, *Law, A Map of Misreading: Toward a Postmodern Conception of Law*, 14 J. OF L. & SOC’Y 279, 287 (1987) (describing the re-emergence of *lex mercatoria* as an example of one way in which “transnational capital has...created a transnational legal space, a supra-state legality.”).

309. See Dinwoodie, *supra* note 271, at 475.

310. *Id.*

311. See *id.* at 476.

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

313. See Dinwoodie, *supra* note 271, at 548.

314. *Id.* at 548-49.

315. See *id.* at 552.

norms.”³¹⁶ This hybrid form of lawmaking would respond to “the reality of modern life” by reflecting “the complex and interwoven forces that govern citizens’ conduct in a global society.”³¹⁷

Significantly, Dinwoodie reaches back to conflict-of-laws approaches that pre-date the rise of the Westphalian order of independent sovereign states. Indeed, he observes that the idea of a substantive body of international common-law norms “declined in significance with the rise of nation-states and with positivistic demands for a clear connection between law and the sovereign.”³¹⁸ Dinwoodie argues, however, that these approaches may once again be worth considering given “the relative decline of the nation-state.”³¹⁹ Thus, like the arguments I make in this article, Dinwoodie’s call for the re-development of a *lex mercatoria* is a response to changing conceptions of national sovereignty.

H. The Triumph of NGOs

Because the various questions about extraterritorial law-making and jurisdictional limitations arise primarily with regard to *public* governmental institutions exercising *sovereign* powers, some commentators have looked to *private*, non-governmental organizations wielding *quasi-governmental* power. As Henry Perritt has recently argued, “jurisdictional uncertainties associated with transnational commerce on the Internet can be reduced when rules are made and enforced by private rather than public institutions.”³²⁰

Perritt advocates public-private hybrid governance structures. In his model, public law sets minimum general standards and provides enforcement power, while multiple “private regulatory regimes can work out detailed rules, first-level dispute resolution, and rule enforcement machinery.”³²¹ And, like the contractarian model discussed previously, Perritt believes that this sort of hybrid governance system could exercise jurisdiction through contractual agreement, thereby side-stepping legitimacy concerns.³²²

Perritt offers three examples of his hybrid model. First, he points to the Internet Corporation for Assigned Names and Numbers (ICANN), the not-for-profit corporation that, as we have seen, administers the Internet domain name system and provides an online dispute resolution forum for

316. *Id.* at 550.

317. *Id.*

318. *Id.* at 544.

319. *Id.*

320. Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 U. PA. J. OF INT’L ECON. L. 563, 574 (2000).

321. *Id.* at 575; see also generally Perritt, *supra* note 267.

322. See Perritt, *supra* note 320, at 574.

adjudicating domain name conflicts.³²³ Second, he notes that the recent agreement between the European Commission and the United States concerning privacy protection envisions several private regulatory regimes.³²⁴ Third, he argues that credit card companies will provide dispute resolution mechanisms for virtually all credit card based Internet commerce.³²⁵

Each of these regulatory regimes is a form of government, with private intermediaries performing roles traditionally filled by governmental entities. For example, ICANN promulgates rules for issuance and retention of domain names,³²⁶ administrative panels of the World Intellectual Property Organization adjudicate these controversies using ICANN regulations,³²⁷ and domain name registrars revoke or transfer domain names in accordance with panel decisions.³²⁸ Likewise, current privacy regulatory regimes depend upon private third parties who will certify that a site complies, thereby immunizing members from public regulatory action.³²⁹ With credit card purchases, the credit card issuers themselves function as intermediaries, refusing to pay merchants who fail to deliver merchandise or revoking credit from consumers who fail to pay.³³⁰

Nevertheless, such private regulatory bodies raise serious concerns about accountability and transparency. For example, in the United States, under the Supreme Court's traditional interpretation of the so-called "state

323. See Perritt, *supra* note 267, at 940-44 (discussing the scope of ICANN's regulatory responsibilities).

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

325. See Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 675, 691-92 (2000).

326. See ICANN, Uniform Domain-Name Dispute Resolution Policy, at <http://www.icann.org/udrp/udrp.htm> (last updated June 17, 2000) ("Under the policy, most types of trademark-based domain name disputes must be resolved by agreement, court action or arbitration before a registrar will cancel, suspend or transfer a domain name.").

327. See WIPO, Supplemental Rules for Uniform Domain Name Dispute Resolution Policy (in effect as of Dec. 1, 1999) ("These supplemental rules are to be read and used in connection with the Rules for Uniform Domain Name Dispute-Resolution Policy approved by [ICANN] on Oct. 24, 1999."), at <http://arbitrator.wipo.int/domains/rules/supplemental.html>.

328. See ICANN, Registrar Accreditation Agreement §§ II(k), at <http://www.icann.org/nsi/icann-raa-04nov99.htm> (approved Nov. 4, 1999) (last modified Nov. 9, 1999) ("During the term of this Agreement, Registrar shall have in place a policy and procedure for resolution of disputes concerning [Second-Level domain] names. In the event that ICANN adopts a policy or procedure for resolution of disputes concerning SLD names that by its terms applies to Registrar, Registrar shall adhere to the policy or procedure.").

329. See, e.g., BBBOnline, at <http://www.bbbonline.org> (last visited Sept. 30, 2000) (offering a process by which to file a complaint against an offending website for use of personally identifiable information); TRUSTe, at <http://www.truste.org> (last visited Sept. 30, 2000) (certifying a subject website with a visible logo and inclusion of privacy statement that adheres to privately established privacy policies).

330. See Perritt, *supra* note 320, at 577; see also Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63, 99-102, 101 n.137 (1987) (describing the rights of card issuers to cancel cardholder's account under certain circumstances).

action doctrine,”³³¹ these private entities need not comply with constitutional norms.³³² Similarly, one wonders how well minority rights will be protected in these private regimes and by what mechanisms such entities will ensure impartial decisionmaking and fair procedure.³³³ While these same concerns arise in the public arena,³³⁴ there are likely to be far fewer democratic checks on private entities.

I. Challenge? What Challenge?

Over the past several years, Jack Goldsmith has consistently attempted to refute the Johnson and Post view that the rise of cyberspace requires us to rethink issues of sovereignty and territoriality. Indeed, according to Goldsmith, the Internet and globalization produce no true conceptual challenges at all. Rather, he argues that “territorial regulation of the Internet is no less feasible and no less legitimate than territorial regulation of non-Internet transactions.”³³⁵

331. Having its genesis in an 1883 Supreme Court decision overturning Reconstruction-era civil rights legislation, see *The Civil Rights Cases*, 109 U.S. 3 (1883), the state action doctrine, in its least nuanced form, rests on the observation that most constitutional commandments proscribe only the conduct of governmental actors. For example, the Fourteenth Amendment provides that “No state shall. . . .” U.S. CONST. AMEND. XIV (emphasis added). As a result, the Supreme Court has often refused to apply these constitutional provisions to so-called “private action.” Thus—and again to express the doctrine in its least subtle form—the state cannot constitutionally exclude African-Americans from a government housing facility, but the Constitution is silent with regard to an individual’s choice to exclude African-Americans from his or her home. Similarly in cyberspace, so the doctrine might go, the activities of private corporations, such as America Online or ICANN or the other bodies that Perritt describes, are not subject to the Constitution because they are not state actors.

332. For a discussion of such concerns, see generally Berman, *supra* note 211.

333. See Perritt, *supra* note 320, at 578-79. ICANN, for example, has faced particularly searching questions on these issues. See, e.g., Geist, *supra* note 117; Froomkin, *supra* note 117; see also ICANN, Preliminary Report: Meeting of the ICANN Board in Yokohama (July 16, 2000) (reporting on changes in ICANN bylaws to resolve disagreements about at-large members and selection of board members by them), <http://www.icann.org/minutes/prelim-report-16jul00.htm>; ICANN, Public Comment Forum, At-Large Elections: Proposed Rules for Self-Nomination (Comments through July 7, 2000) (discussing, in a participatory forum, at-large membership selection and representation), at <http://www.icann.org/mbx/selfnomination>.

334. See, e.g., CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, at 69-74 (1966) (describing how Constitutional Convention delegates settled on a method for electing members of Congress); Lindseth, *supra* note 298 (discussing European Community’s “democratic deficit”).

335. Jack Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. OF GLOBAL LEGAL STUD. 475, 475 (1998) [hereinafter Goldsmith, *Territorial Sovereignty*]; see also, Jack Goldsmith, *Against Cyberanarchy*; Jack Goldsmith, *The Internet, Conflicts of Regulation, and International Harmonization*, in GOVERNANCE OF GLOBAL NETWORKS IN THE LIGHT OF DIFFERING LOCAL VALUES 197 (Christoph Engel & Kenneth H. Keller eds.) (2000) [hereinafter Goldsmith, *Conflicts of Regulation*]. Others share Goldsmith’s view. See, e.g., Josef Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145

Goldsmith takes on two related contentions: first, that territorial regulation is infeasible because individuals can easily avoid the sovereign's regulatory reach; and second, that territorial regulation means that a website will be subject to the laws of all jurisdictions simultaneously. Both claims, he argues, are exaggerated because they fail to distinguish between a state's *prescriptive* jurisdiction and its *enforcement* jurisdiction. Prescriptive jurisdiction is a nation's power to apply its laws to particular transactions. But the question of whether or not that regulation will actually be enforced depends upon the nation's ability to induce or compel compliance with the law through its enforcement jurisdiction.³³⁶

Thus, he argues that, just because individuals may try to evade a nation's enforcement jurisdiction by, say, relocating off-shore, does not render the idea of regulating the harms caused by those individuals illegitimate. Goldsmith acknowledges that the regulation of a local act might not be efficacious if the individual subject to the regulation is not present within the jurisdiction. But he argues that the sovereign will still be able to enforce its regulation "to the extent that the agents of the acts have a local presence or local property against which local laws can be enforced."³³⁷

Moreover, even if the content provider has no local presence or property, the sovereign will be able to regulate harms indirectly by moving against end users within their enforcement power or intermediaries that operate within their territory, such as Internet service providers or manufacturers of hardware or software. These actions may either encourage local intermediaries to enforce the local laws against foreign parties or may induce local parties to include devices to block objectionable content.³³⁸ In either scenario, the local jurisdiction turns out to have more extraterritorial power than originally envisioned.³³⁹

Likewise, Goldsmith argues that there is nothing inherently illegitimate about a local regulation that happens to affect behavior extraterritorially. As he says, "[i]t is uncontroversial that pollution emitted in State A that wafts into State B can be regulated in State B."³⁴⁰ And, though one might think notice is a more severe problem in the Internet context—where the material that "wafts" from jurisdiction to jurisdiction may do so all over the globe simultaneously and unknowingly—Goldsmith argues that geographical filtering technology will allow content providers to ensure that material deemed objectionable in a jurisdiction never reaches

(2000).

336. See Goldsmith, *Conflicts of Regulation*, *supra*, at 197.

337. Goldsmith, *Territorial Sovereignty*, *supra* note 335, at 479.

338. For example, a recent lawsuit filed in France seeks an order requiring French ISPs to block access to an American portal that allegedly hosts "hate websites." See Ned Stafford, *French ISPs Fight to Avoid Blocking Nazi, Racist Content*, NEWSBYTES, (Sep. 4, 2001), available at <http://www.newsbytes.com/cgi-bin/u...lient.id=newsbytes&story.id=169727>.

339. See *id.* at 481-82; Goldsmith, *Conflicts of Regulation*, *supra* note 335, at 199.

340. Goldsmith, *Territorial Sovereignty*, *supra* note 335, at 484.

that jurisdiction.³⁴¹ Moreover, according to Goldsmith, as long as the content provider never sets foot in the jurisdiction, enforcement power will be lacking.³⁴²

Goldsmith's analysis, however, raises several normative questions about the nature of Internet communication. First, Goldsmith's conclusion that the Internet poses no new jurisdictional issues is premised on the idea that extraterritorial regulation has existed for a long time, which is, of course, true. But it is reasonable to think that international disputes heretofore generally involved relatively large and sophisticated parties. Such parties were likely to have some presence in the enforcing jurisdiction, and possess the resources to arrange their affairs to avoid "entering" a jurisdiction with unfavorable laws. Neither of these assumptions is necessarily true with regard to the Internet. For example, it may be prohibitively expensive for a small business or individual to filter out only users from selected jurisdictions. One might not want the threat of extraterritorial regulation to curtail such actors from posting content.

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

Goldsmith also assumes that a jurisdiction can pursue claims against intermediaries as a way of enforcing regulations against distant parties, but such regulation has very real costs. For example, service providers might find that the threat of liability makes them filter online activity more aggressively or cause them to spend a tremendous amount of money trying to intercept the flow of messages in order to investigate them. Indeed, this is precisely why American Internet service providers have lobbied for and received immunity for defamatory e-mail and websites carried on their services.³⁴³

Goldsmith seems to recognize this problem. He acknowledges that the need to filter information to conform with the law of multiple jurisdictions "places enormous burden on content providers that might

341. *See id.*; Goldsmith, *Conflicts of Regulation*, *supra* note 335, at 201-02.

342. Goldsmith, *Territorial Sovereignty*, *supra* note 335, at 485 ("The vast majority of individuals who transact on the Internet have no presence or assets in the jurisdictions that wish to regulate their information flows.")

343. *See* 47 U.S.C. §230(c)(1) (Supp. 1999) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); *see also Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997) (concluding that Congress enacted this provision because of "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium").

significantly curtail Internet activity.’³⁴⁴ But, he cheerfully responds, “there is nothing sacrosanct about Internet speed, or about a foreign content provider’s right to send information everywhere in the world with impunity.’³⁴⁵ Thus, Goldsmith’s analysis embeds the normative assumption that the distinctive benefits of the Internet should be jettisoned so that the existing jurisdictional framework can be preserved. Many will not share that normative viewpoint, however, and Goldsmith’s analysis offers little consolation to those people.

Finally, despite Goldsmith’s claims that these extraterritorial enforcement problems are exaggerated and mostly hypothetical, many of the challenges discussed in this article belie that assertion. Indeed, Yahoo.com appears to have capitulated to the French court order regarding Nazi memorabilia despite having no presence in France,³⁴⁶ and the very real tax dilemmas discussed previously indicate that the jurisdictional problems raised by online activity are not at all hypothetical. In addition, the problems of extraterritorial regulatory evasion will likely persist as well. For example, in a recent case involving the Digital Millennium Copyright Act, an American defendant was enjoined from posting information that allowed circumvention of the encrypted code on Digital Video Disks.³⁴⁷ Such an order, however, will necessarily have only limited power over non-U.S. sites, and the defendant immediately posted links to those sites.³⁴⁸ Goldsmith’s assurance that this is not a problem may not satisfy those seeking to regulate online activity, whether governments or private parties.

J. Common-law Evolution

One reason we need not radically rethink conceptions of jurisdiction, Goldsmith might argue, is that courts are perfectly capable of adapting established legal doctrine to new contexts. Thus, we can simply leave it to the common-law process (even in civil law countries, where judges must often engage in “gap-filling” and interpretation)³⁴⁹ to develop

344. Goldsmith, *Territorial Sovereignty*, *supra* note 335, at 485.

345. *Id.*

346. While Yahoo! had a French subsidiary, the existence of the subsidiary would not usually be considered sufficient to bring suit against the parent corporation. See Phillip I. Blumberg, *Does Company Law Adequately Address the Problems Presented by Multinational Corporations?*, ___ AM. J. COMP. L. ___ (forthcoming, 2002).

347. See *Universal City Studios Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

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

349. See Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 236 (1999) (suggesting that civil law judging is less alien to the common law tradition than is usually supposed because codes can be notoriously vague and are often sufficiently general

the guidelines necessary for addressing the challenges of globalization and the Internet.

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

In the area of personal jurisdiction,³⁵⁰ U.S. courts have, since 1945, attempted to apply the Supreme Court's flexible due process standard first articulated in *International Shoe Co. v. Washington*.³⁵¹ Thus, courts ask whether the defendant had sufficient contact with the relevant state "such that jurisdiction is consistent with traditional notions of fair play and substantial justice."³⁵² As transportation and interstate commerce have continued to grow in the decades since 1945, the Supreme Court has many times been called upon to determine how far to expand the reach of personal jurisdiction.³⁵³

By 1995, questions about personal jurisdiction based on Internet contacts were beginning to arise in district courts around the country. At first, it appeared that at least some courts would find that the exercise of personal jurisdiction was proper even over defendants whose only contact with the relevant state was an online advertisement available to anyone with Internet access. For example, in *Inset Systems, Inc. v. Instruction Set, Inc.*,³⁵⁴ a federal district court in Connecticut ruled that it had proper jurisdiction over the defendant, a Massachusetts-based provider of

(because they must handle a variety of unforeseen circumstances) that they require extensive judicial elaboration).

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

351. 326 U.S. 310 (1945).

352. *International Shoe*, 326 U.S. at 316 (internal quotation omitted).

353. Indeed, the Supreme Court issued at least twelve major personal jurisdiction decisions between 1976 and 1990 alone. See *Burnham v. Superior Court*, 495 U.S. 604 (1990); *Omni Capital Intl., Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales De Colombia, S. A. v. Hall*, 466 U.S. 408 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Insurance Corp. Of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694 (1982); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

354. 937 F. Supp. 161, 165 (D. Conn. 1996).

computer technology, even though Instruction Set maintained no offices in Connecticut and did not conduct regular business there. The court ruled that the defendant's promotional website, because it was *accessible* in Connecticut, supported the exercise of jurisdiction in the state. According to the court, the website advertisements were directed to all states within the United States. Therefore, Instruction Set had "purposefully availed itself of the privilege of doing business within Connecticut."³⁵⁵ Similarly, other courts have at times indicated that the posting of a website accessible within a state, without more, might be sufficient to justify jurisdiction.³⁵⁶

Although the United States Supreme Court has yet to address the issue of personal jurisdiction based on Internet contacts, most lower courts, perhaps concerned over the broad implications of cases like *Inset*, have attempted to craft a more moderate rule. The most influential case thus far has been *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*³⁵⁷ There, the district court applied a "sliding scale" to Internet contacts in order to determine the "nature and quality of commercial activity that an entity conducts over the Internet."³⁵⁸ On one end of the court's spectrum was a "passive" website, where a defendant has simply posted information on the Internet "available to those who are interested."³⁵⁹ According to the court, such a site, absent additional contact with the forum state or its citizens, would not be enough to support jurisdiction.³⁶⁰ At the other end of the spectrum, the court placed "active" websites where the defendant "enters into contracts with residents of a foreign jurisdiction that involve the

355. *Id.* at 165 (D. Conn. 1996).

356. For example, in *Maritz Inc. v. CyberGold, Inc.*, 947 F. Supp. 1328 (E.D. Mo. 1996), the court found jurisdiction in Missouri over a California corporation. Although defendant's web server was located in California, the court noted that the disputed website was "continually accessible to every Internet-connected computer in Missouri." *Id.* at 1330. According to the court, "CyberGold has consciously decided to transmit advertising information to all Internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant." *Id.* at 1333. Similarly, in *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. 1997), the Minnesota Supreme Court ruled that the state Attorney General's office could sue an on-line gambling service in Minnesota even though the service was based outside of the state. Relying on *Inset* and *Maritz*, the court determined that the defendants had "purposefully availed themselves of the privilege of doing business in Minnesota," *id.* at 721, based on a finding that "computers located throughout the United States, including Minnesota, accessed appellants' websites," *id.* at 718. See also, e.g., *Telco Communications v. An Apple a Day*, 977 F. Supp. 404, 407 (E.D. Va. 1997) (a website available twenty-four hours a day in the forum state constituted "a persistent course of conduct" in the state); *Heroes, Inc. v. Heroes Found.*, 958 F. Supp. 1, 5 (D.D.C. 1996) (suggesting that the existence of a website might be deemed a sustained contact with the forum because "it has been possible for a . . . resident [of the forum] to gain access to it at any time since it was first posted").

357. 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

358. *Id.* at 1124.

359. *Id.*

360. See *id.*

knowing and repeated transmission of computer files over the Internet.”³⁶¹ The existence of an active site would be sufficient to establish jurisdiction anywhere the site is accessed.³⁶² In between, the court identified a middle ground “occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.”³⁶³

Although other courts quickly latched onto the *Zippo* framework,³⁶⁴

361. *Id.*

362. *See id.*

363. *Id.*

364. *See, e.g., Soma Medical Intern. v. Standard Chartered Bank*, 196 F.3d 1292 (10th Cir., 1999); *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000); *Ambersson Holdings LLC v. Westside Story Newspaper*, 110 F.Supp.2d 332 (D. N.J., 2000); *Hasbro, Inc. v. Clue Computing, Inc.*, 66 F.Supp.2d 117 (D. Ma., 1999); *Search Force Inc. v. DataForce Intern., Inc.*, 112 F.Supp.2d 771 (S.D. Ind., 2000); *American Eyewear, Inc. v. Peeper’s Sunglasses and Accessories, Inc.*, 106 F.Supp.2d 895 (N.D. Tex., 2000); *Patriot Systems, Inc. v. C-Cubed Corp.*, 21 F.Supp.2d 1318 (D. Utah, 1998); *Roche v. Worldwide Media, Inc.*, 90 F.Supp.2d 714 (E.D. Va., 2000); *Coastal Video Communications, Corp. v. Staywell Corp.*, 59 F.Supp.2d 562, (E.D. Va., 1999); *Butler v. Beer Across America*, 83 F.Supp.2d 1261 (N.D. Ala., 2000); *Colt Studio, Inc. v. Badpuppy Enterprise*, 75 F.Supp.2d 1104 (C.D. Cal., 1999); *CIVIX-DDI LLC v. Microsoft Corp.*, 1999 WL 1020248 (D. Colo., 1999); *Blumenthal v. Drudge*, 992 F.Supp 44 (D.D.C., 1998); *J.B. Oxford Holdings, Inc. v. Net Trade, Inc.*, 76 F.Supp.2d 1363 (S.D. Fla., 1999); *Berthold Types Ltd. v. European Mikrograf Corp.*, 102 F.Supp.2d 928 (N.D. Ill., 2000); *International Star Registry of Illinois v. Bowman-Haight Ventures, Inc.*, 1999 WL 300285 (N.D. Ill., 1999); *Vitullo v. Velocity Powerboat, Inc.*, 1998 WL 246152 (N.D. Ill., 1998); *F. McConnell and Sons, Inc. v. Target Data Systems, Inc.*, 84 F.Supp.2d 961 (N.D. Ind., 1999); *Resuscitation Technologies, Inc. v. Continental Health Care Corp.*, 1997 WL 148567 (S.D. Ind., 1997); *Alantech Distribution, Inc. v. Credit General Ins. Co.*, 30 F.Supp.2d 534 (D. Md., 1998); *McRae’s, Inc. v. Hussain*, 105 F.Supp.2d 594 (S.D. Miss., 2000); *Lofton v. Turbine Design, Inc.*, 100 F.Supp.2d 404 (N.D. Miss., 2000); *Citigroup v. City Holding Co.*, 97 F.Supp.2d 549 (S.D.N.Y., 2000); *K.C.P.L., Inc. v. Nash*, 1998 WL 82367 (S.D.N.Y., 1998); *Tech Heads, Inc. v. Desktop Service Center, Inc.*, 105 F.Supp.2d 1142 (D. Or., 2000); *Standard Knitting, Ltd. v. Outside Design, Inc.*, 2000 WL 804434 (E.D. Pa., 2000); *Westcode, Inc. v. RBE Electronics, Inc.*, 2000 WL 124566 (E.D. Pa., 2000); *Harbuck v. Aramco, Inc.*, 1999 WL 999431 (E.D. Pa., 1999); *Renick v. Manfredy*, 52 F.Supp.2d 462 (E.D. Pa., 1999); *Barrett v. Catacombs Press*, 44 F.Supp.2d 717 (E.D. Pa., 1999); *Blackburn v. Walker Oriental Rug Galleries, Inc.*, 999 F.Supp 636 (E.D. Pa., 1998); *Brown v. Geha-Werke GmbH*, 69 F.Supp.2d 770 (D.S.C., 1999); *ESAB Group, Inc. v. Centricut, LLC*, 34 F.Supp.2d 323 (D.S.C., 1999); *Mieckowski v. Masco Corp.*, 997 F.Supp. 782 (E.D. Tex., 1998); *Agar Corp. Inc. v. Multi-Fluid Inc.*, 1997 WL 829340 (S.D. Tex., 1997); *Jewish Defence Organization, Inc. v. Superior Court*, 85 Cal. Rptr. 2d 611 (Cal.App. 2 Dist., 1999); *Nida Corp. v. Nida*, 2000 WL 1610635 (M.D. Fla., 2000); *Smith v. Hobby Loby Stores, Inc.*, 968 F.Supp. 1356 (W.D. Ark., 1997); *Online Partners. Com, Inc. v. Atanticet Media Corp.*, 2000 WL 101242 (N.D. Cal., 2000); *Quokka Sports, Inc., v. Cup Intern. Ltd.*, 99 F.Supp.2d 1105 (N.D. Cal., 1999); *Mallinkrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.*, 989 F.Supp 265 (D.D.C., 1998); *Ameritech Services, Inc. v. SCA Promotions, Inc.*, 2000 WL 283098 (N.D. Ill., 2000); *LFG, LLC v. Zapata Corp.*, 78 F. Supp.2d 731 (N.D. Ill., 1999); *Biometrics, LLC v. New Womyn, Inc.*, 112 F.Supp.2d 869 (E.D. Mo., 2000); *Decker v. Circus Circus Hotel*, 49 F.Supp.2d 748 (D.N.J., 1999); *Hurley v. Cancun Playa Oasis Intern. Hotels*, 1999 WL 718556 (E.D. Pa., 1999); *Grutowski v. Steamboat Lake Guides & Outfitters, Inc.*, 1998 WL 962042 (E.D. Pa., 1998); *Fix My PC, L.L.C. v. N.F.N. Associates, Inc.*, 48 F.Supp.2d 640 (N.D. Tex, 1999); *Origin Instruments Corp. v. Adaptive Computer Systems, Inc.*, 1999 WL 76794 (N.D. Tex., 1999);

ultimately, this sliding-scale analysis has proven to be unstable and difficult to apply. First, drawing the distinction between an active and passive site is often problematic. For example, if my website includes only a list of articles I have written, that site appears to be passive under the *Zippo* decision. If I then include a sentence at the bottom of the site inviting readers to e-mail their comments about my articles, or providing links to other sites where the full text of the articles can be found, is the addition of that extra material enough to transform my passive site into an active one? And while the active/passive distinction was difficult to draw in 1997, when *Zippo* was decided, the line between active and passive sites is even more blurry now and is likely to become increasingly so in the future, as websites grow ever more complex and sophisticated.³⁶⁵ Ultimately, most sites probably will fall into the middle ground, and “examining the level of interactivity and commercial nature of the exchange of information” is unlikely to yield predictable or consistent results. Moreover, some sites that seem passive may sell advertising based on the number of “hits” the sites receives or collect and market data about the user,³⁶⁶ both of which may seem to render the site more active.

Perhaps most importantly, few large organizations or corporations will spend the money necessary³⁶⁷ to create a sophisticated website without including some mechanism to earn money back from the site. But if all such sites are deemed interactive under the *Zippo* framework, then they will all subject the site owner to universal jurisdiction, returning us to a solution like the one reached in *Inset*.

Perhaps because of these difficulties, courts already appear to be shifting away from the *Zippo* approach towards a test based on the effect of the activity within the jurisdiction.³⁶⁸ This test derives from the U.S.

Telephone Audio Productions, Inc. v. Smith, 1998 WL 159932 (N.D. Tex., 1998); *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex., 1998); *America Online, Inc. v. Huang*, 106 F.Supp.2d 848 (E.D. Va., 2000).

365. See Geist *supra* note 350, at 1379-80:

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

366. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1226-29 (1998).

367. See David Legard, *Average Cost to Build E-commerce Site: \$1 Million*, THE STANDARD (May 31, 1999), available at <http://www.thestandard.com/article/article_print/0,1153,4731,00.html>, visited Mar. 31, 2001.

368. See, e.g., *Panavision Intern., L.P. v. Toepen*, 141 F.3d 1316 (9th Cir., 1998); *Nissan Motor Co. Ltd. v. Nissan Computer Corp.*, 89 F. Supp.2d 1154 (C.D. Cal., 2000); *Euromark Designs, Inc. v. Crate & Barrel, Ltd.*, 96 F. Supp.2d 824 (N.D. Ill., 2000); *Neogen Corp. v. Neo Gen Screening, Inc.*, 109 F.Supp.2d 724 (W.D. Mich., 2000); *People Solutions, Inc. v. People Solutions, Inc.*, 2000 WL 1030619 (N.D. Tex., 2000); *Uncle Sam's Safari Outfitters, Inc. v. Uncle Sam's Navy Outfitters—Manhattan, Inc.*, 96 F.Supp.2d 919 (E.D. Mo.,

Supreme Court's 1984 decision in *Calder v. Jones*,³⁶⁹ a suit in which a Florida publisher allegedly defamed a California entertainer. In that case, the Court reasoned that, because the plaintiff lived and worked in California and would suffer emotional and perhaps professional harm there, the publisher had deliberately caused harmful effects in California and, accordingly, California could assert jurisdiction over the case. Thus, under *Calder*'s "effects test," personal jurisdiction may be based on "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered--and which the defendant knows is likely to be suffered—in the forum state."³⁷⁰

Courts have applied the effects test not only to Internet libel cases,³⁷¹ but to a broad-range of other Internet-related cases as well. For example, in a trademark suit brought against a California corporation, the plaintiff argued that jurisdiction was appropriate in Texas because the defendant owned an undisputedly interactive website that was accessible in Texas.³⁷² Although the court acknowledged the interactivity of the site, it refused to assert jurisdiction absent evidence that residents of Texas had actually purchased from the site.³⁷³

Likewise, in a case alleging copyright infringement in the design of craft patterns, a Michigan plaintiff sued a Texas defendant in Michigan.³⁷⁴ According to the plaintiff, the Michigan court could properly exercise jurisdiction because the defendant both maintained an interactive website accessible to Michigan residents and had sold patterns to Michigan residents on two occasions. Nevertheless, the court ruled that jurisdiction was not proper in Michigan. Applying the effects doctrine, the court refused to accept the idea "that the mere act of maintaining a Web site that includes interactive features ipso facto establishes personal jurisdiction over the sponsor of that website anywhere in the United States."³⁷⁵ Further, the court deemed the two Michigan sales an insufficient basis for jurisdiction because they were sold in an eBay auction and therefore the defendant had

2000); *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp.2d 746 (E.D. Mich., 2000); *Search Force v. DataForce Intern.*, 112 F.Supp.2d 771 (S.D. Ind., 2000); *Neato v. Great Gizmos*, 2000 WL 305949 (D. Conn., 2000); *Rothschild Berry Farm v. Serendipity Group LLC*, 84 F.Supp.2d 904 (S.D. Ohio, 1999); *Millenium Enterprises, Inc. v. Millenium Music, L.P.*, 33 F. Supp. 2d 907 (D. Or., 1999); *Bochan v. La Fontaine*, 68 F.Supp.2d 701 (E.D. Va., 1999); *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38 (N.J. 2000).

369. 465 U.S. 783 (1984).

370. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1486 (9th Cir.1993) (applying *Calder*).

371. See, e.g., *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38 (N.J. 2000) (using effects test to determine that jurisdiction existed over non-resident defendants who allegedly posted defamatory messages on electronic bulletin board of their New Jersey-based employer).

372. See *People Solutions, Inc. v. People Solutions, Inc.*, 2000 WL 1030619 (N.D. Tex., 2000).

373. See *id.*

374. See *Winfield Collection, Ltd. v. McCauley*, 105 F. Supp.2d 746 (E.D. Mich., 2000).

375. *Id.* at 751.

no say in where the products would be sold.³⁷⁶

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

Unlike the *Zippo* approach, a targeting analysis would seek to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction. Targeting would also lessen the reliance on effects-based analysis, the source of considerable uncertainty since Internet-based activity can ordinarily be said to create some effects in most jurisdictions.³⁷⁷

At least one Court of Appeals has embraced a targeting analysis, ruling that jurisdiction is proper “when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.”³⁷⁸ Likewise, OECD Consumer Protection Guidelines,³⁷⁹ Securities and Exchange Commission regulations on Internet-based offerings,³⁸⁰ the American Bar Association Internet Jurisdiction

376. *See id.*

377. Geist, *supra* note 350, at 1345-46; *see also* Perritt, *supra* note 320, at 573 (“The concept of targeting is the best solution to the theoretical challenge presented by difficulties in localizing conduct in Internet markets.”).

378. *Bancroft & Masters Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000); *see also, e.g., American Information Corp. v. American Infometrics, Inc.*, 139 F.Supp.2d 696 D.Md., 2001 (ruling that “[a] company’s sales activities focusing generally on customers located throughout the United States and Canada without focusing on and targeting the forum state do not yield personal jurisdiction.”) (internal quotation omitted).

379. *See* OECD, *Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce* (Paris, 9 December 1999), available at OECD <http://www.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines_final.pdf>, visited Mar. 31, 2001 (“[B]usiness should take into account the global nature of electronic commerce and, wherever possible, should consider various regulatory characteristics of the markets they target.”).

380. Securities and Exchange Commission, *Interpretation; Statement of the Commission Regarding Use of Internet Websites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore* (Mar. 23, 1998), <http://www.sec.gov/rules/concept/33-7516.htm> :

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

See also Securities and Exchange Commission, *Interpretation; Use of Electronic Media* (Apr. 28, 2000), <http://www.sec.gov/rules/concept/34-42728.htm> (providing guidance in applying federal securities law to electronic media).

Project, and the Hague Conference on Private International Law's Draft Convention on Jurisdiction and Foreign Judgments³⁸¹ all include references to targeting as a basis for the exercise of jurisdiction.

Nevertheless, targeting too ultimately may prove to be an unstable test because even if courts embrace this approach they will need to identify criteria to be used in assessing whether a website has actually targeted a particular jurisdiction. This will not be an easy task. For example, the American Bar Association Internet Jurisdiction Project, a global study on Internet jurisdiction released in 2000, referred to the language of the site as a potentially significant way of determining whether a site operator has targeted a particular jurisdiction.³⁸² With the development of new language translation capabilities, however, website owners may soon be able to create their site in any language they wish, knowing that users will automatically be able to view the site in the user's chosen language.³⁸³ As one commentator notes, "[w]ithout universally applicable standards for assessment of targeting in the online environment, a targeting test is likely to leave further uncertainty in its wake."³⁸⁴ Thus, although the adaptation process continues, it is unclear whether the results will be satisfying either conceptually or practically.

In the area of choice of law, we can see a similar process at work. For example, with regard to international copyright cases, Article 5 of the Berne Convention,³⁸⁵ and the broader principle of national treatment, have long established a relatively stable set of choice of law rules based upon territoriality.³⁸⁶ Under this regime, courts were asked to apply the law of

381. HAGUE CONVENTION DRAFT, *supra* note 269, at Art. 7, Version 0.4a ("[A]ctivity by the business shall not be regarded as being directed to a State if the business demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in that State.").

382. American Bar Association, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created By the Internet* (2000).

383. See Geist, *supra* note 350, at 1384, n.224 (describing a new automatic translation service offered by the search engine Google); see also <http://www.google.com/machine_translation.html> (date accessed: 3 April 2001).

384. Geist, *supra* note 350, at 1384.

385. See *supra* note 268.

386. See Berne Convention, *supra* note 268, at art. 5(1), 1161 U.N.T.S. at 35: Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."); see also Berne Convention, *supra* note 268, at art. 5(2), 1161 U.N.T.S. at 35 ("the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.") It is commonly understood that this regime "implicates a rule of territoriality." *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc). Of course, one could read Article 5(2) to create a rule of *lex fori* because the forum can be seen as "the country where protection is claimed." Nevertheless, the accepted reading of the

the place where the copying or other allegedly infringing act occurred. In a world of digital technology and global commerce, however, the assumption that we can necessarily fix a place of origin or a place of infringement has been undermined.³⁸⁷

In response, courts have been forced to adapt. For example, in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*,³⁸⁸ several Russian language newspapers located in Russia sued a U.S. corporation that was taking articles from those newspapers, rearranging them, and creating a Russian language newspaper for U.S. distribution.³⁸⁹ The Second Circuit declined to apply exclusively the territorial place of infringement rule derived from Article 5(2) of the Berne Convention.³⁹⁰ Rather, the court developed a choice of law rule as a matter of federal common law. Looking to the Restatement (Second) of Conflicts of Law—under which courts use the law of the place with the most significant relationship to the parties and the transaction³⁹¹—the Second Circuit applied Russian copyright law to the question of who holds the copyright,³⁹² but applied American law to the infringement question.³⁹³

Nevertheless, even the more flexible analysis of the Second Restatement may ultimately be unsatisfying in more complex cases. Indeed, commentators have often criticized this approach because it tends to devolve into an unguided list of governmental interests with a conclusory decision appended.³⁹⁴ Moreover, such a list will almost always include the

provision is that it refers to the country where the infringement is alleged to have occurred. See, e.g., Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 3 (1999) at 24-25 (discussing accepted interpretations of Article 5(2)); see also Dinwoodie, *supra* note 271, at 533 n.196 (citing Austin).

387. See e.g., Dinwoodie, *supra* note 271, at 535 (“The place where an act of alleged infringement ‘occurs’ has become difficult to determine in the digital environment; concepts such as ‘place’ of publication or ‘country of origin’ lose meaning in a global and digital world, where geography holds less significance.”).

388. 153 F.3d 82 (2d Cir. 2000).

389. See *id.*

390. *Id.* at 89-90.

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

392. See *Itar-Tass*, 153 F.3d at 90-91 (following “law of the state with ‘the most significant relationship’ to the property and the parties” (citation omitted)).

393. It is unclear whether the court reached this second conclusion by applying a fixed rule of *lex loci delicti* or by using a broader interest analysis akin to the Second Restatement approach. See *id.* at 91.

394. Even in the U.S. domestic context, scholars have criticized the Second Restatement approach. See, e.g., William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1388-89 (1997) (summarizing scholarly criticisms of the Second Restatement); Jeffrey M. Shaman, *The Vicissitudes of Choice of Law: The Restatement (First, Second) and Interest Analysis*, 45 BUFF. L. REV. 329, 359-60 (1997) (commenting that

forum jurisdiction, particularly in the digital world where publication may occur simultaneously in a number of countries.³⁹⁵ Thus, given that courts tend to prefer applying their own laws,³⁹⁶ we may find that this flexible approach begins to look simply like the old *lex fori*, where the law of the forum jurisdiction always applied. Such a rule may encourage uncertainty because one will not know in advance which jurisdiction's copyright law may be applied to a given online posting or transaction.³⁹⁷ To combat this uncertainty, some scholars have proposed that courts use the law of the place where a website server is located.³⁹⁸ (Interestingly, this proposal contrasts with the recent OECD tax recommendations, which take the position that a server is not sufficient to constitute presence in a jurisdiction for tax purposes.³⁹⁹) Because websites may contain elements stored on multiple servers, however, locating a website may be difficult. Moreover, because servers can easily be located anywhere, such a scheme may result in a regulatory race to the bottom.⁴⁰⁰ Thus, as with adjudicatory jurisdiction,

contacts are often "counted up...at most with conclusory and arbitrary pronouncements concerning their relative value"); see also James A. Meschewski, *Choice of Law in Alaska: A Survival Guide for Using the Second Restatement*, 16 ALASKA L. REV. 1, 19 (1999) (complaining that lack of guidance prevents any effective restraint on judicial decisionmaking and results in conclusory statement of the most relevant contacts).

395. See, e.g., *Allarcom Pay Television Ltd. v. General Instrument Corp.*, 69 F.3d 381 (9th Cir. 1995) (ruling that a public performance occurs at the place or receipt of satellite transmissions); *National Football League v. TVRadioNow Corp.*, 53 U.S.P.Q.2d (BNA) 1831, 1834-35 (W.D. Pa. 2000) (holding that where defendants originated the streaming of copyrighted programming over the Internet from a website in Canada, public performances occurred in the United States because users in the United States could access the website and receive and view the defendants' streaming of the copyrighted material).

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

397. See DAVID CAVERS, *THE CHOICE OF LAW PROCESS* 22-23 (1965) (arguing that a forum law solution makes it impossible to know what law will apply until after one acts); see also Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987) (arguing that a *lex fori* approach is inconsistent with the rule of law because it repudiates the idea that laws reflect norms that exist apart from their enforcement); Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1587-1602 (1985) (describing move away from *lex fori* approaches among both commentators and courts). But see Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593, 595 (1983) (arguing that application of forum law produces the most "functionally sound and fair results"); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 599 (1983-84) (arguing that forum preference vindicates widely shared policy concerns because the interests of the plaintiff and the forum are aligned).

398. See, e.g., Jane C. Ginsburg, *Copyright Without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153, 173 (1997) ("[T]he court should either apply the law of the place of the server or of the defendant's domicile").

399. See *supra*, text accompanying note 55.

400. Scholars seeking to localize an international copyright dispute at a particular point, such as the place of the server, have incorporated in their proposed tests a range of caveats to prevent such "races" from occurring. See, e.g., Ginsburg, *supra* note 398, at 45 (providing alternative tests to be used if a country's copyright laws are not adequate). But, as Graeme Dinwoodie has pointed out, "these (necessary) caveats inevitably detract from the gains

the evolution of choice of law rules in this new environment are still a work-in-progress.

III. The Need to Consider the Social Meaning of Legal Jurisdiction

The ten responses discussed in Part II undoubtedly do not exhaust the number of approaches that judges, government regulators, legislators and academics have devised or might devise to address the challenges of cyberspace and increasing trans-border interaction.⁴⁰¹ More important, the purpose of this survey is neither to embrace nor reject *any* of the responses as a normative policy matter. Indeed, although I have noted some of the pros and cons of the various suggestions, I do not intend, in the remainder of this article, to offer an alternative policy formulation that will “solve” their purported shortcomings, and I will therefore not be returning to most of these specific policy issues.

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

in certainty provided by the localizing rule. If certainty and predictability are the reasons for adopting an arbitrary and inflexible rule, this approach becomes less attractive when the principal advantages are imperiled.” Dinwoodie, *supra* note 271, at 540 (footnote omitted).

401. For example, I have not detailed the various proposals about how best to apportion taxes for Internet transactions. For a discussion of these proposals, see generally Christopher J. Schafer *V. Business Law A, Electronic Commerce 2, Taxation a) Federal Legislation: Federal Legislation Regarding Taxation Of Internet Sales Transactions*, 16 BERKELEY TECH. L.J. 415 (2001) (considering various issues and proposed standards regarding Internet taxation); William V. Vetter, *Preying on the Web: Tax Collection in the Virtual World*, 28 FLA. ST. U.L. REV. 649 (2001) (surveying how state tax rules apply to Internet transactions and suggesting options to solve Internet taxation problems); Arthur J. Cockfield, *Transforming The Internet Into A Taxable Forum: A Case Study In E-Commerce Taxation*, 85 MNN. L. REV. 1171 (2001) (outlining the various regulatory efforts to tax Internet transactions); Charles E. McClure, Jr., *Taxation of Electronic Commerce: Economic Objectives, Technological Constraints, and Tax Laws*, 52 TAX L. REV. 269 (1997) (surveying the development of Internet taxation principles, and offering proposals for reforming e-commerce taxation); see generally RICHARD D. POMP AND OLIVER OLDMAN, *STATE AND LOCAL TAXATION* pp. 13-1 to 13-97 (4th ed. 2001).

and Post) or the creation of transnational norms (Dinwoodie and Perritt) do so based largely on literature from political philosophy and law.

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

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

A. Jurisdiction and the Social Construction of Space

It has become commonplace for cultural critics and others to identify the ways in which social structures shape and constrain conduct; yet, the link between social structure and physical space has received less attention.⁴⁰² Nevertheless, “[t]he production of space and place is both the medium and the outcome of human agency and social relations . . .”⁴⁰³ This

402. For two notable exceptions within legal scholarship, see generally Terry S. Kogan, *Geography and Due Process: The Social Meaning of Adjudicative Jurisdiction*, 22 RUTGERS L.J. 627 (1991) (using insights drawn from critical human geography to understand changes in America's jurisdictional rules); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999) (describing socially constructed nature of jurisdiction in the context of voting districts). Kogan's work, although it pre-dated the rise of cyberspace, specifically addressed the social significance of adjudicative jurisdiction and so is particularly relevant here. My discussion in this section is heavily indebted to Kogan's argument.

403. ALLAN PRED, MAKING HISTORIES AND CONSTRUCTING HUMAN GEOGRAPHIES 10 (1990).

cultural construction of space includes the boundaries drawn between “public” and “private” spaces, the decisions a community makes about land-use and zoning, the appropriation and transformation of “nature” as both a concept and as a physical description, the local autonomy of governmental units, the use of specialized locations for the conduct of economic, cultural, and social practices, the creation of patterns of movement within a community, and “the formation of symbolically laden, meaning-filled, ideology-projecting sites and areas”⁴⁰⁴

In addition, *topological* space, which consists of the formal boundary lines we have chosen, is distinctively different from *social* space, which includes the meanings given to space (both local and non-local), to the distances between delineated spaces, and to the time necessary to traverse those distances.⁴⁰⁵ For example, a 100-mile automobile trip may seem like a greater journey to residents of the northeast United States, who are accustomed to relatively short distances between destinations, than to residents of the west, where cities and towns are more dispersed. Similarly, a 1,000-mile trip carries a very different social meaning today, in the age of relatively inexpensive air travel, than it did a hundred years ago, even if the topological space remains the same.⁴⁰⁶ And of course America’s well-documented post-war demographic shift from city to suburb is not merely a change of topology, but a politically and symbolically significant cultural transformation.⁴⁰⁷

Moreover, the construction of legal spaces and the delineation of boundaries is always embedded in broader social and political processes.⁴⁰⁸ “Legal categories are used to construct and differentiate material spaces which, in turn, acquire a legal potency that has a direct bearing on those using and traversing such spaces.”⁴⁰⁹ For example, in the history of European conquest of Australia, the naming of particular spaces—rivers,

404. *Id.*

405. Kogan, *supra* note 402, at 634.

406. See JOHN TOMLINSON, *GLOBALIZATION AND CULTURE* 4 (1999) (“In a globalized world, people in Spain really do continue to be 5,500 miles away from people in Mexico, separated, just as the Spanish conquistadors were in the sixteenth century, by a huge, inhospitable and perilous tract of ocean. What connectivity means is that we now experience this distance in different ways. We think of such distant places as routinely accessible, either representationally through communications technology or the mass media, or physically, through the expenditure of a relatively small amount of time (and, of course, money) on a transatlantic flight. So Mexico City is no longer meaningfully 5,500 miles from Madrid: it is eleven hours’ flying time away.”).

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

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

409. *Id.* at 54.

mountains, capes, bays, etc.—became a central point of political contest.⁴¹⁰ The Europeans believed that the aboriginals did not classify or name the landscape and transformed that “spatial deficiency” into a “legal deficiency”: if the aboriginals did not name their places, their hold on it must be tenuous and so it would not be a crime to take possession of it.⁴¹¹ Similarly, Jeremy Waldron has observed that increasing restrictions on the use of public spaces for activities such as sleeping or washing means that homeless people cannot perform those acts at all because they are denied a place either public or private.⁴¹²

The social meaning of geographical space also includes the way in which an individual or community perceives those who are *outside* the community’s topological or social boundaries. While people tend to develop attitudes of familiarity toward the spaces in which they reside and conduct their daily activities, they may come to view unfamiliar people and locations as alien, forbidding, or foreign. Or, alternatively, the outside “other” can be seen as inviting, friendly, and hospitable, or as mysterious, exotic, and romantic.⁴¹³ These are just a few examples of the infinite variety of possible attitudes one may hold towards unfamiliar social spaces. “These attitudes will be influenced by a host of factors, including the political governance of that ‘other’ location, the socio-economic involvement that the individual has on a daily basis with that other location, and the extent of contact that a person has . . . with that other location.”⁴¹⁴

Thus, jurisdictional rules have never simply emerged from a utilitarian calculus about the most efficient forum for adjudicating a dispute. Rather, the exercise of jurisdiction has also been part of the way in which societies demarcate space, delineate communities, and draw both physical and symbolic boundaries. Such boundaries do not exist as an intrinsic part of the physical world; they are a social construction. As a result, the choice of jurisdictional rules reflects the attitudes and perceptions members of a

410. See PAUL CARTER, *THE ROAD TO BOTANY BAY: AN EXPLORATION OF LANDSCAPE AND HISTORY* (1988).

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

412. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 *UCLA L. REV.* 295, 315 (1991) (“Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions [such as sleeping] may be performed by the homeless person. And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them.”).

413. See, e.g., Stuart Hall, *The Local and the Global: Globalization and Ethnicity*, in *CULTURE, GLOBALIZATION AND THE WORLD-SYSTEM* (Anthony D. King ed., 1997) (“To be English is to know yourself in relation to the French, and the hot-blooded Mediterraneans, and the passionate, traumatized Russian soul. You go round the entire globe: when you know what everybody else is, then you are what they are not. Identity is always, in that sense, a structured representation which only achieves its positive through the narrow eye of the negative.”).

414. Kogan, *supra* note 402, at 637.

community hold towards their geography, the physical spaces in which they live, and the way in which they define the idea of community itself.

In order to convey this basic idea, it might be useful to tell an admittedly over-simplified functionalist account of the change in American jurisdictional rules over time. In this account, the territorially-based jurisdictional principle articulated in the nineteenth century by the Supreme Court in *Pennoyer v. Neff*⁴¹⁵—states have complete authority within their territorial boundaries but no authority outside those boundaries⁴¹⁶—derives in part from a particular understanding of social space in the United States at the time. Historian Robert Wiebe has observed that

America during the nineteenth century was a society of island communities. Weak communication severely restricted the interaction among these islands and dispersed the power to form opinion and enact public policy The heart of American democracy was local autonomy. A century after France had developed a reasonably efficient, centralized public administration, Americans could not even conceive of a managerial government. Almost all of a community's affairs were still arranged informally.⁴¹⁷

According to Wiebe, geographical loyalties tended to inhibit connections with a whole society. “Partisanship . . . grew out of lives narrowly circumscribed by a community or neighborhood. For those who considered the next town or the next city block alien territory, such refined, deeply felt loyalties served both as a defense against outsiders and as a means of identification within.”⁴¹⁸

As the nineteenth century progressed, so this story goes, massive socio-economic changes brought an onslaught of seemingly “alien” presences into these island communities. Immigrants were the most obvious group of outsiders, but perhaps just as frightening was the emergence of powerful distant forces such as insurance companies, major manufacturers, railroads, and the national government itself. Significantly, these threats appear to have been conceived largely in spatial terms. According to Wiebe, Americans responded by reaffirming community self-determination and preserving old ways and values from “outside” invasion.⁴¹⁹

415. 95 U.S. 714 (1877).

416. *See id.* at 722 (“[E]very State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also the regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred... [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.”).

417. ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877-1920*, at *xiii* (1967).

418. *Id.* at 27.

419. *Id.* at 52-58.

Given such a social context, it is not surprising that the jurisdictional rules of the period emphasized state territorial boundaries. Indeed, it is likely that the burdens of litigating in another state far exceeded simply the time and expense of travel, substantial as those burdens were. Just as important was the *psychic* burden of being forced to defend oneself in a foreign state, which may have felt little different from the idea of defending oneself in a foreign country. An 1874 Pennsylvania state court decision issued shortly before *Pennoyer* illustrates the extent of this psychic burden. In the case, a resident of New York had contested jurisdiction in Pennsylvania. The court acknowledged that the Pennsylvania courthouse was only “a few hours travel by railroad” from New York, but nevertheless ruled that the defendant could not be sued personally, in part because “nothing can be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear”⁴²⁰ The court disregarded the relatively slight literal burden in the case at hand, and instead focused on the specter of being “dragged” to a “distant state” located “thousands of miles” away. The decision even equated other states with foreign countries, referring to a “defendant living in a remote state or foreign country . . . [who] becomes subject to the jurisdiction of this, to him, foreign tribunal”⁴²¹ These passages indicate that the psychic significance of defending oneself in another state was at least as important as the literal difficulties of travel.

Both the literal and psychic burdens associated with out-of-state litigation changed as a result of the urban industrial revolution at the turn of the twentieth century, a revolution that profoundly altered American social space. Increasingly, most economic and governmental activities were administered from afar by impersonal managers at centralized locations. In such a world, another state was likely to be viewed less as a foreign country and more as yet another distant power center, just one of many “anonymous, bureaucratic, regulatory bodies in an increasingly complex society.”⁴²²

In addition, advances in transportation and communications helped to weaken territoriality as the central category in which Americans understood their space. “As long as daily lives were focused to a large extent on the local, a state boundary symbolized the edge of the world, and everything outside that boundary was alien and foreign.”⁴²³ With increased mobility, however, Americans regularly crossed state boundaries by train, by car, and in the air, which inevitably diminished the sense that other places were alien. The rise of radio and television meant that events in other states could become a regular part of one’s daily consciousness. “Physical distance as a social barrier began to be bypassed through the shortening of

420. *Coleman’s Appeal*, 75 Pa. 441, 457 (1874).

421. *Id.*

422. Kogan, *supra* note 402, at 651.

423. *Id.* at 652.

communication ‘distance.’”⁴²⁴ And the functional interdependence that has characterized the United States in this century has meant that almost all of us are regularly affected by people, institutions, and events located far away.

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

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

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

All of these changes radically reshape the relationship of people to their geography.⁴²⁵ As Joshua Meyrowitz observed over fifteen years ago,

424. JOSHUA MEYROWITZ, *NO SENSE OF PLACE* 116 (1985).

425. Some have conceptualized this shift as a change in the way we experience and represent space and time. See, e.g., TOMLINSON, *supra* note 406, at 4-5 (describing the way airline journeys transform “spatial experience into temporal experience”); ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990) (describing the problem of “time-space distanciation”). In that regard, it is interesting to link this change to shifts in the arts. For example, in visual arts, we have witnessed the fall of the linear perspective of early Renaissance

electronic media create “a nearly total dissociation of physical place and social ‘place.’ When we communicate through telephone, radio, television, or computer, where we are physically no longer determines where and who we are socially.”⁴²⁶ Meyrowitz pointed out that, historically, communication and travel were synonymous, and it was not until the invention of the telegraph that for the first time text messages could move more quickly than a messenger could carry them.⁴²⁷ Thus, “informational differences between different places began to erode.”⁴²⁸ Moreover, many of the boundaries that define social settings by including and excluding participants—including walls, doors, barbed wire, and other physical and legal barriers—are less significant in a world where “the once consonant relationship between access to information and access to places has been greatly weakened....”⁴²⁹

Given such changes, it is possible that the psychic burden of foreign jurisdiction is less significant today because of our increased contact with foreign places. On the other hand, we may feel the need to cling even more tenaciously to localism in the face of the encroaching global economic system.⁴³⁰ Moreover, the “we” in this story is problematic. After all, different social groups, and different individuals, have very different degrees of exposure to and control over global flows of information, capital, and human migration.⁴³¹ Nevertheless, the important point is that if jurisdictional

painting, which not coincidentally rose along with the rediscovery of Euclidean geometry and the emergence of spatial representation, such as maps. See Denis Cosgrove, *Prospect, Perspective, and the Evolution of the Landscape Idea*, 10 TRANSCRIPTS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 45-62 (1985). Beginning in the late nineteenth century, impressionists “fragmented light (and thus time).” Roger Friedland & Deirdre Boden, *NowHere: An Introduction to Space, Time and Modernity*, in NOWHERE: SPACE, TIME AND MODERNITY 1, 2 (Roger Friedland & Deirdre Boden eds., 1994). Then, postimpressionists such as Cezanne built “a new language, abandoning linear and aerial perspective and making spatial dispositions arise from the modulations of color.” Charles Taylor, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 468 (1989). The cubists went still further, “providing simultaneous images of the same moment from different points in space and multiple views of a single scene at various points in time.” Friedland & Boden, *supra*, at 2; see also Stephen Kern, *Cubism, Camouflage, Silence, and Democracy: A Phenomenological Approach*, in NOWHERE: SPACE, TIME AND MODERNITY, *supra*, at 163. Likewise the development of the modern novel, with books such as *Remembrance of Things Past*, *Finnegan’s Wake*, and *Mrs. Dalloway*, also mined changes in the equation between space and time.

426. MEYROWITZ, *supra* note 424, at 115.

427. *See id.* at 116.

428. *Id.*

429. *Id.* at 117.

430. *Cf.* GIDDENS, *supra* note 425, at 65 (“The development of globalised social relations probably serves to diminish some aspects of nationalist feeling linked to nation-states (or some states) but may be causally involved with the intensifying of more localised nationalist sentiments.”)

431. Doreen Massey refers to this as the “power geometry of time-space compression.” See MASSEY, *supra* note 24, at 149 (1994). She contrasts those who are “in charge” of time-space compression—“the jet-setters, the ones sending and receiving the faxes and the e-mail, holding international conference calls...distributing the films, controlling the news, organizing the investments”—with those who do a lot of physical moving, but are not “in

rules both reflect and construct social space, further investigation is needed in order to better comprehend the relationship between community affiliation, physical location, and personal identity in a world where the importance of territorial borders and geographical distance are being challenged.

B. Jurisdiction and the Assertion of Community Dominion

When a transgressor behaves in some way contrary to society's moral code, the community can come to view the transgressor in one of two ways. First, the community can close ranks by defining itself in opposition to the transgressor and by treating the transgression purely as an *external* threat. Or, second, the community can claim dominion over the transgression by conceptualizing the transgressor as a member of the community who has committed what might be considered an *internal* offense. We may liken these two strategies to the difference in the responses of the United States to the 1993 bombing of the World Trade Center in New York City and to the subsequent attack on the same building in September 2001. The recent attack was seen as an offense perpetrated by an outsider to be fought in a "war" on terrorism. With the 1993 bombing, however, although at least some of the attackers were foreign nationals, their criminal prosecution reflected a conception of the perpetrators as community members to be punished internally.

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

I have written previously about the surprisingly widespread and elaborate practice in medieval Europe and ancient Greece of putting on trial animals and inanimate objects that caused harm to human beings.⁴³² Although such trials may seem far removed from any discussion of contemporary jurisdictional rules, I believe they illuminate the symbolic content of such rules. In deciding how to respond to acts of violence or

charge" of the process in the same way. *Id.* These people include those such as undocumented migrant workers crossing borders illegally or those who lose their jobs to less expensive labor abroad, or those whose livelihood is affected by global currency fluctuations. Thus, social conceptions of space, distance, and community definition are, of course, themselves varied and contested.

432. See Paul Schiff Berman, *An Observation and a Strange But True "Tale": What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 HASTINGS L.J. 123 (2000); Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Criminal Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288 (1994).

depredation caused by animals, communities were faced with a choice of whether to view the acts as internal or external threats. Random acts of violence caused by insensate agents undoubtedly brought a deep feeling of lawlessness: not so much the fear of laws being broken, but the far worse fear that the world might not be a lawful place at all.⁴³³ To combat such a fear, it may have been essential to view the animals not as uncontrollable natural forces belonging to the outside world, but as members of the community who could actually break the community's laws. By asserting dominion over the animals, members of communities could assure themselves that, even if the social order had been violated, at least there was *some* order, and not simply undifferentiated chaos.

The scrupulous concern for according due process to animal transgressors can be seen as a necessary part of restoring this sense of social order. After all, simply lashing out to destroy the animal would continue to imply that the animal was an uncontrollable "other," a part of the "natural" world that could not be reasoned with or domesticated. Such "unlawful" punishment might even mean that the community had symbolically succumbed to the disorder of the natural world and that it was now propelled into an ongoing war with forces of darkness it could not control. Just as retaliatory acts of a lynch mob might not restore a true sense of order to a community, so too punishment of animals without legal procedures could well have increased a sense of impending chaos.⁴³⁴

Instead, the trials implicitly adopted a narrative asserting that animals, along with human beings, were *part of* a community and *subject to* universal norms of justice. Paradoxically, even though the trials often resulted in the execution of the individual animal, the proceedings, by their very nature, first insured that the animal was conceptualized as a member of the community.

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

433. Nicholas Humphrey, *Introduction*, in E.P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* at xxv. (Paperback ed. 1987; 1907).

434. Indeed, in at least one instance, when a hangman, without legal authority, killed a pig at the gallows after it had bitten the ear off a child, the community viewed the hangman's act as being to "the disgrace and detriment of the city" and forced the hangman to flee the town. EVANS, *supra* note 433, at 146-47. Apparently, an execution without a formal judicial ritual was intolerable.

of destruction that obey only their own law. By bringing the corporation within local jurisdiction, the individual and the community may feel they have regained some control over their world.

Finally, the need to assert community dominion may also be a significant part of the desire to use legal and quasi-legal proceedings to respond to atrocities such as war crimes or crimes against humanity. For example, the trial of accused Nazi war criminal Klaus Barbie, held in France several years ago, arguably was concerned less with punishing the individual (who, after all, was extremely old and in failing health at the time of the trial), than about asserting France's authority and sense of control after a horrific and chaotic human tragedy.⁴³⁵

The rise of online communication may create increased pressure to assert community dominion over the activities of outsiders. A foreign website can easily breach community boundaries and threaten community order. For example, material that a community might wish to ban nevertheless may be readily accessible from websites outside the bounds of that community. Likewise, a community that adopts strict consumer protection laws to regulate corporate activity may feel threatened when outside businesses can ignore the local laws through Internet sales.⁴³⁶ These "external" threats appear to flout local norms.

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

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

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

436. Such e-commerce issues have caused the European Union to change course several times in recent years regarding jurisdiction over Internet sales. See *supra* text accompanying notes 49-51.

C. Jurisdiction and the Extension of Community Membership

The previous section discussed how the exercise of jurisdiction functions in part as a symbolic assertion of community *dominion*. A corollary to this observation is that the exercise of jurisdiction also symbolically extends a form of community *membership*. As discussed above, a true outsider is either fought as an external threat or ignored entirely. By exercising jurisdiction, a community constructs a narrative whereby the outsider is not truly an outsider, but is in some way a member of that community and subject to its norms.

A rather extreme example of this phenomenon is the death sentence issued in the Islamic world against author Salman Rushdie. Chances are that if I had written the same novel as Rushdie, I would not have been treated in the same way. Instead, it is likely that I would have been dismissed as a total outsider or targeted in an *ad hoc* fashion as a purely external threat. The death sentence therefore reflects the fact that Rushdie was considered a *member* of the Islamic community. Even this violent exercise of jurisdiction acted in part to extend community membership.

Similarly, by prosecuting war criminals we are insisting that the defendants are members of the world community. The assertion of jurisdiction therefore can be seen as an educative tool and not simply an exercise of coercive power. The community, in effect, tells the defendants that they share a membership bond with the rest of the world and therefore cannot simply impose their will with impunity. Meanwhile, the assertion of jurisdiction also implicitly delivers a message to the public at large that the defendants are neither sub-human nor the product of chaotic fate, but are instead members of the world community to be considered in their full humanity and punished according to human law.

This idea of jurisdiction as the assertion of community membership may also have relevance in evaluating the usefulness of alternative legal procedures aimed at restorative justice, such as the growing use of truth commissions as a mechanism for societal reconciliation.⁴³⁷ For example,

437. For example, truth commissions have been established in countries including Argentina, Bolivia, Chile El Salvador, Guatemala, Haiti, the Phillipines, Rwanda, Somalia South Africa, Uganda, Uruguay. See PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 291-97 (2001) (listing 20 truth commissions established since 1982); Michael P. Scharf, *The Case For A Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 379 (1997); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 53-54 (1998);. Indeed, "truth commissions have proliferated, and now every nation emerging from dictatorship or war wants one. This year Nigeria, Ghana, Sierra Leone, Peru, Panama, East Timor, Yugoslavia, Bosnia and South Korea all began commissions or have them under way." Tina Rosenberg, *Designer Truth Commissions*, N.Y. TIMES, Dec. 9, 2001 (late edition), available at LEXIS. In addition, "there is pressure for commissions in Mexico, Bosnia, Serbia, Ghana and Burundi. Canada is concerned about the way it has treated native peoples and may use a committee to air the subject." *It's Time For A Good National Confession; Truth*

the Truth and Reconciliation Commission (TRC) proceedings in South Africa have attempted to restore psychic membership in the South African community to both victims and perpetrators. The TRC required that those perpetrators seeking amnesty first acknowledge the community's jurisdiction by appearing before the Commission, and then describe their misdeeds to the entire country. Likewise, victims who for years were not recognized as full-fledged members of the South African community were given a forum to speak about their pain and enter into the community's legal system instead of remaining outside of it. The TRC proceedings, therefore, implicitly expressed the hope that victims, perpetrators, and spectators could all be integrated into the new South African community.

Even in more commonplace legal proceedings, the idea of jurisdiction as a way of asserting community membership may be important. For example, while a community may need to assert its dominion over the products of a distant corporation in order to feel some control over seemingly random misfortune, it may also be that, because of the potential exercise of local jurisdiction, a multi-national corporation comes to conceive of itself as a corporate citizen of many different localities. Accordingly, the exercise of jurisdiction may encourage corporations to rethink their sense of responsibility to communities far beyond the boundaries of their corporate headquarters.

In addition, the ability to assert the jurisdiction of a court may give people some sense of *their own* membership in the community. A prison inmate bringing a civil rights action against an abusive guard, for example, may feel vindicated simply by the fact that he or she is able to invoke the jurisdiction of a court. Regardless of outcome, the fact that the inmate's grievance is aired and considered, however briefly, may give a marginal member of society more of a sense of community affiliation.⁴³⁸ As a result, the assertion of community dominion may be beneficial both for the community, which can assert its control over otherwise uncontrollable behavior, and for the individual, who achieves a form of community membership through the legal process. Even a criminal defendant is implicitly deemed to be a member of the community who has gone astray (and therefore retains certain rights), rather than a purely external pariah (who has none).⁴³⁹

Commissions To Heal War Atrocities, NATIONAL CATHOLIC REPORTER, June 15, 2001, available at LEXIS; see also Hayner, *supra*, at 5 (describing the possibility of truth commissions in Indonesia, Colombia, and Bosnia).

438. See Roland Acevedo, *Thoughts of an Ex-Jailhouse Lawyer*, N.Y. L. J. (Aug. 5 1998) at 2 (describing the psychological importance for prison inmates of being able to bring a lawsuit in court even if ultimately unsuccessful); .

439. *But see* David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 3 (2001) (charting the retreat since the early 1970s in the United States and Britain from a concern for criminal rehabilitation to an "official policy of punitive sentiments and expressive gestures that appear oddly archaic and downright anti-modern").

The assertion of community membership is relevant to discussions of Internet jurisdiction as well. As discussed previously, the growth of electronic communications is closely linked to our increasing global economic and psychological interdependence. Online interaction contributes to our awareness of outsiders and our sense of connection with them. People develop friendships and business relationships regardless of physical proximity; they may even fall in love online. Many of the psychic bonds that in a previous era were shared only within the confines of one's local community now stretch far beyond any single geographical location. Given this change in economic and psychological interdependence, it would not be surprising to see the definition of community membership change as well. And, if jurisdiction is one of the ways we express our intuitions about community membership, then jurisdictional rules, in turn, must evolve. Otherwise, we will risk being trapped in a legal doctrine that no longer represents the reality of modern life, just as the U.S. was during the first half of the twentieth century, when courts struggled to expand the strict territorial rule of *Pennoyer*.

Having identified three ways in which the assertion of jurisdiction both constructs and reflects social meaning, it remains to investigate more fully to what extent accepted notions of legal jurisdiction actually accord with the social meanings at play in the contemporary world. Territorially-fixed boundaries remain the primary way of differentiating jurisdictional space, and nation-states remain the primary jurisdictional community. How well does this legal conception actually map onto social space? The answer to such a question cannot be left in the legal arena, where the discussion is often limited to debates about historical precedent, political philosophy, or economic efficiency. Instead, the relationship between jurisdiction and social understandings of space, borders and community is a topic that should engage theorists from a variety of disciplines, who might help forge a more complex account of the world onto which jurisdictional rules are imposed, and who might point the way to alternative conceptions of jurisdiction that allow for a more pluralist understanding of the variety of community affiliations people experience in their lives. This Article now turns to consider some of this scholarship in order to challenge the authority of physical location, territorial boundaries, and nation-state sovereignty that is usually assumed in contemporary jurisdictional schemes.

IV. The Nation-State and the Social/Historical Construction of Space, Community, and Borders

This Part considers the vast literature in anthropology, sociology, political science, and cultural studies concerning conceptions of borders, territoriality, nation-state sovereignty, and the cultural construction of place and belonging. First, I will address the assumption that there is somehow a “natural” tie between a culturally or ethnically unified community and a physical location, and suggest that social and political processes tend to construct ideas of physical location rather than vice-versa. Therefore, no jurisdictional scheme is necessarily more “natural” than any other. Second, I will survey the historical rise of the modern conception of the nation-state, revealing that the idea of sovereign nation-states operating within fixed territorial boundaries is a relatively recent development and a result of specific historical and political processes. Third, I will explore in more detail the idea of community itself, as well as the ways in which we might think of the nation-state as an imagined community built on a set of narrative constructions. Fourth, I consider several forms of community affiliation that offer alternatives to the nation-state.

Taken together, this literature challenges any idea that national boundaries are somehow a natural or inevitable jurisdictional construct. Instead, these authors interrogate assumptions about identity, territoriality, community, and sovereignty, and reveal that the straight-forward tie between geographical boundaries, community, personal identity, and nation-state sovereignty is inevitably problematic, contingent, socially-constructed, and contested. The analyses suggest that the conception of territorially-based jurisdiction is not an inevitable fixture of political organization. As a result, even this necessarily brief overview opens space for creatively imagining more pluralistic conceptions of jurisdiction that will attend to the wide variety of ways in which people construct community affiliation and identity.

A. The Unmooring of Cultures, Peoples, and Places

Legal discussions of jurisdiction are often predicated on a seemingly unproblematic division of space, and particularly on the idea that societies, nations, and cultures occupy “naturally” discontinuous spaces. This assumption ignores the possibility that territorial jurisdiction often *produces* political and social identities rather than reflecting them.⁴⁴⁰ As Lefebvre has observed:

Space is not a scientific object removed from ideology or politics; it has always been political and strategic. If space

440. See generally Ford, *supra* note 402.

has an air of neutrality and indifference with regard to its contents and thus seems to be “purely” formal, the epitome of rational abstraction, it is precisely because it has already been occupied and used, and has already been the focus of past practices.... Space has been shaped and moulded from historical and natural elements, but this has been a political process. Space is political and ideological. It is a product literally filled with ideologies.⁴⁴¹

Indeed, the idea of territoriality itself—which we can think of as a geographic strategy to control people and things by controlling area⁴⁴²—is not biologically motivated, but is instead socially rooted.⁴⁴³ Thus, conceptions of territoriality depend on how people use land, how they organize themselves in space, and how they give meaning to place.⁴⁴⁴ Absent a rigorous attempt to develop a social understanding of how space is actually constructed, the power of topography tends to conceal the topography of power.⁴⁴⁵

In recent years, anthropologists and others have increasingly challenged the assumed correlation between a people, a culture, and a physical place. In doing so, they reject two related “naturalisms.” First, they argue that we cannot necessarily assume that a culturally unitary group (a “tribe” or “people”) is naturally tied to “its” territory. Second, they reject the national habit of taking the association of citizens of states and “their” territories as natural.⁴⁴⁶

441. H. Lefebvre, *Reflections on the Politics of Space*, ANTIPODE (Vol. 8, No. 2), 30, 36 (1979).

442. SACK, *supra* note 411, at 5.

443. It is the socially constructed nature of territoriality that permits theorists to discuss “deterritorialization” with respect to globalizing processes. *See generally* Appadurai, *supra* note 6; NESTOR G. CANCLINI, ET AL., *HYBRID CULTURES: STRATEGIES FOR ENTERING AND LEAVING MODERNITY* (1995); Z. MILNAR, *GLOBALIZATION AND TERRITORIAL IDENTITIES* (1992); JAMES LULL, *MEDIA, COMMUNICATION, CULTURE: A GLOBAL APPROACH* (1995); MIKE FEATHERSTONE, *UNDOING CULTURE* (1995); ARMAND MATTELART, ET AL., *MAPPING WORLD COMMUNICATION* (1994); DAVID MORLEY & KEVIN ROBBINS, *SPACES OF IDENTITY: GLOBAL MEDIA, ELECTRONIC LANDSCAPES, AND CULTURAL BOUNDARIES* (1995); SERGE LATOUCHE, *THE WESTERNIZATION OF THE WORLD* (Rosemary Morris trans., 1996).

444. *Id.* at 2.

445. *See* Akhil Gupta & James Ferguson, *Beyond “Culture”: Space, Identity, and the Politics of Difference*, in *CULTURE, POWER, PLACE*, *supra* note 3, at 33, 35 [hereinafter Gupta & Ferguson, *Beyond “Culture”*]; *see also* LISA H. MALKKI, *PURITY AND EXILE: VIOLENCE, MEMORY, AND NATIONAL COSMOLOGY AMONG HUTU REFUGEES IN TANZANIA* 5 (1995) (referring to “ways in which the contemporary system of nation-states composes a hegemonic topography”); Ford, *supra* note 402, at 859 (“The ideological foundation of nation-states is primarily that of organicism; nations are thought to represent “a people” who are both distinctive and relatively homogeneous. The French are united not only by language but by something called “culture”: a set of practices, significant artifacts, beliefs, styles, a certain *je ne sais quoi*.”).

446. *See* Gupta & Ferguson, *Beyond “Culture,” supra* note 445, at 40.

Both of these “naturalisms” are difficult to shake because they are so subtly ingrained in the modern consciousness. For example, simply the fact that contemporary maps refer to a collection of “countries” presents a picture of fragmented space, where different colors represent different national societies, and each society seems “rooted” in its proper place.⁴⁴⁷ Looking at such maps, “schoolchildren are taught such deceptively simple-sounding beliefs as that French is where the French live, America is where Americans live, and so on.”⁴⁴⁸ And yet, we all know that not only Americans live in America, and, of course, the very question of what constitutes a “real American” is contested and variable. Nevertheless, we assume a natural association of a culture (“American culture”), a people (“Americans”), and a place (“the United States of America”). Thus, we “present associations of people and places as solid, commonsensical, and agreed on, when they are in fact contested, uncertain, and in flux.”⁴⁴⁹ This naturalization of jurisdiction means that space itself comes to be seen as a kind of “neutral grid on which cultural difference, historical memory, and societal organization is inscribed.”⁴⁵⁰ As a result, although the social and political *construction* of space is a central organizing principle in law, the constructed nature of the enterprise tends to disappear from analytical purview. As Richard Ford has observed, “jurisdictional space may serve to obscure social relations and the distribution of resources.”⁴⁵¹

Geographers, though they too historically tended to assume a “natural” bond between a people, the land, and a set of legal institutions,⁴⁵² are increasingly recognizing the power and politics of the construction of space in society⁴⁵³ as well as the symbolic significance of maps.⁴⁵⁴ Indeed,

447. See *id.* at 34. See also Ford, *supra* note 402, at 866-67 (linking the emergence of jurisdiction to the development of the science of cartography).

448. Gupta & Ferguson, *Beyond “Culture,” supra* note 445, at 40.

449. *Id.*

450. *Id.* at 34.

451. Ford, *supra* note 402, at 854.

452. See, e.g., Ellen C. Semple, *The Influences of Geographic Environment on Law, State, and Society*, in FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 215 (A. Kocourek & J.H. Wigmore eds., 1918) (“People develop their customs, traditions, political organizations, and laws based on their geographic location. For example, civilizations that develop in an isolated locale will develop much differently than civilizations that develop in areas which are more suitable for commerce.”).

453. See BLOMLEY, *supra* note 408, at 42 (“Recent geographic scholarship...has adopted what might be regarded as a relational view of space. Drawing on those such as Lefebvre, some theorists regard space as both socially produced and as socially constitutive, and as deeply implicated in power relations.”). For examples of such critical geography, see Doreen Massey, *Politics of Space/Time*, NEW LEFT REVIEW, No. 196, 65-84 (1992); ALLAN PRED, *supra* note 403; Alan Pred, *Place as Historically Contingent Process: Structuration and the Time-Geography of Becoming Places*, ANNALS OF THE ASS'N OF AM. GEOGRAPHERS Vol. 74, No. 2, 279 (1984); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989); J. AGNEW, PLACE AND POLITICS: THE GEOGRAPHICAL MEDIATION OF STATE AND SOCIETY (1987); N. Thrift, *On the Determination of Social Action*, in SPACE AND TIME, ENVIRONMENT AND PLANNING, D: SOCIETY AND SPACE 1, 23-57 (1983); ALLAN PRED & MICHAEL JOHN WATTS, REWORKING

maps are often persuasive precisely because, though they are always an attempt to portray the world in a specific way, that interest tends to be masked.⁴⁵⁵ In the thrall of such “cartohypnosis,” people “accept unconsciously and uncritically the ideas that are suggested to them by maps.”⁴⁵⁶

Maps often function as “almost the perfect representation of the state.”⁴⁵⁷ Most maps both evenly cover the territory of a country and hierarchically organize it with the most significant places symbolically at the center and “states on the periphery marked down, through the use of symbols, as inferior orders of government.”⁴⁵⁸ In addition, many social and cultural realities, such as ethnic or religious clusters, may not be recognized on state-sponsored maps at all.⁴⁵⁹ After all, jurisdictional lines define an abstract area that is conceived of “independently of any specific attribute of that space.”⁴⁶⁰ These cartographic “silences”⁴⁶¹ may be the result of “deliberate exclusion, willful ignorance, or even actual repression.”⁴⁶² For example, the removal or alteration of the place names of conquered peoples or minority groups establishes a silence of subordination.⁴⁶³ Similarly, “the state projection of geometric designs throughout a country in the form of straight-line jurisdictional boundaries, transnational highways, and preserves of one kind or another—thus establishing ‘order upon the land’—can also produce what might be termed geographic silences, or the structural subordination of the natural landforms that shape human communities.”⁴⁶⁴ In short, cartography has always been “a teleological discourse, reifying

MODERNITY: CAPITALISMS AND SYMBOLIC DISCONTENT (1992); THONGCHAI WINICHAKUL, *SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION* (1994); CULTURAL ENCOUNTERS WITH THE ENVIRONMENT: ENDURING AND EVOLVING GEOGRAPHIC THEMES (Alexander B. Murphy & Douglas L. Johnson eds. 2000).

454. See, e.g., Alan Henrikson, *The Power and Politics of Maps, in REORDERING THE WORLD*, *supra* note 7, at 49; WINICHAKUL, *supra* note 453, at 129-30 (“[Mapping] became a lethal instrument to concretize the projected desire on the earth’s surface. . . . Communication theory and common sense alike persuade us that a map is a scientific abstraction of reality. A map merely represents something which already exists objectively. [But at times] this relationship was reversed. A map anticipated a spatial reality, not vice versa. In other words, a map was a model for, rather than a model of, what it purported to represent.”).

455. Diane M. Bolz, “*Follow me...I am the earth in the palm of your hand*,” *SMITHSONIAN* 112 (Feb. 1993) (quoting Denis Wood); see also generally Denis Wood, *THE POWER OF MAPS* (1992).

456. S.W. Boggs, *Cartohypnosis*, 15 DEP’T OF STATE BULL. 1119-1125 (Dec. 22, 1946); see Ford, *supra* note 402, at 856 (“[J]urisdiction is a function of its graphical and verbal descriptions; it is a set of practices that are performed by individuals and groups who learn to ‘dance the jurisdiction’ by reading descriptions of jurisdictions and by looking at maps.”).

457. Henrikson, *supra* note 454, at 59.

458. *Id.*

459. See *id.*

460. Ford, *supra* note 402, at 853.

461. See J.B. Harley, *Silences and Secrecy: The Hidden Agenda of Cartography in Early Modern Europe*, 40 *IMAGO MUNDI* 65 (1988).

462. Henrikson, *supra* note 454, at 59.

463. See Harley, *supra* note 461, at 66.

464. Henrikson, *supra* note 454, at 59.

power, reinforcing the status quo, and freezing social interaction within charted lines.”⁴⁶⁵ As contemporary debates about the distortions caused by various “projections” of the world make clear,⁴⁶⁶ our cartographic representations are socially constructed and politically fraught.⁴⁶⁷

Anthropologists, no less than cartographers, have challenged the supposedly natural correspondences between space and people. Historically, anthropologists focused on the idea of “cultures.” Nevertheless, as in assumptions about legal jurisdiction or in the structure of map-making, the anthropological interest in culture sprang from the idea that a world of human differences can be conceptualized as a diversity of separate societies each with its own culture. In anthropology, this central assumption made it possible, beginning in the early years of the twentieth century, to speak not only of “culture,” but of “*a* culture.” The assumption was that there were separate, individuated worldviews that could be associated with particular “peoples,” “tribes,” or “nations.”⁴⁶⁸

This individuated conception of community, still so powerful in legal discussions, no longer fits the understanding of anthropologists, or the practice of ethnography. “In place of such a world of separate, integrated cultural systems...political economy turned the anthropological gaze in the direction of social and economic processes that connected even the most isolated of local settings with a wider world.”⁴⁶⁹ As many commentators have observed, cultural difference no longer can be based on territory because of the mass migrations and transnational culture flows of late capitalism.⁴⁷⁰ Thus, the task is to understand “the way that questions of

465. J.B. Harley, MAPS, KNOWLEDGE, AND POWER 302-03.

466. See, e.g., ARNO PETERS, THE EUROPE-CENTERED CHARACTER OF OUR GEOGRAPHICAL VIEW OF THE WORLD AND ITS CORRECTION; Arthur H. Robinson, *Arno Peters and His New Cartography*, THE AMERICAN CARTOGRAPHER 104 (October 1985); see also Henrikson, *supra* note 454, at 63-64 (describing controversy).

467. See J.M. ROBERTS, THE TRIUMPH OF THE WEST 127 (1985) (“Maps...are always more than mere factual statements. They are translations of reality into forms we can master; they are fictions and acts of imagination communicating more than scientific data. So they reflect changes in our pictures of reality.”).

468. See Akhil Gupta & James Ferguson, *Culture, Power, Place: Ethnography at the End of an Era*, in CULTURE, POWER, PLACE, *supra* note 3, at 1, 1 [hereinafter Gupta & Ferguson, *Ethnography*]; see also ULF HANNERZ, TRANSNATIONAL CONNECTIONS: CULTURE, PEOPLE, PLACES 20 (1996) (“The idea of an organic relationship between a population, a territory, a form as well as a unit of political organization, and one of those organized packages of meaning and meaningful forms which we refer to as cultures has for a long time been an enormously successful one, spreading throughout the world even to fairly unlikely places, at least as a guiding principle.”); GEORGE W. STOCKING, JR., RACE, CULTURE, AND EVOLUTION: ESSAYS IN THE HISTORY OF ANTHROPOLOGY 202-03 (1982).

469. Gupta & Ferguson, *Ethnography*, *supra* note 468, at 2.

470. See, e.g., ULF HANNERZ, TRANSNATIONAL CONNECTIONS: CULTURE, PEOPLE, PLACES 8 (1996) (“As people move with their meanings, and as meanings find ways of traveling even when people stay put, territories cannot really contain cultures.”); Appadurai, *supra* note 6, at 33 (proposing a set of non-territorial “scapes” to replace “landscapes” as fields of inquiry); see also TOMLINSON, *supra* note 406, at 106-49 (discussing the mundane ways in which deterritorialization is experienced in everyday life).

identity and cultural difference are spatialized in new ways.⁴⁷¹

Accordingly, anthropologists have argued that we live increasingly in the “global cultural ecumene”⁴⁷² of a “world in creolization.”⁴⁷³ Similarly, sociologists have attempted to replace their traditional emphasis on bounded “societies” with “a starting point that concentrates upon analysing how social life is ordered across time and space....”⁴⁷⁴ In both disciplines, therefore, we see increasing calls to explore the “intertwined processes of place making and people making in the complex cultural politics of the nation-state.”⁴⁷⁵

This perspective permits us to understand that cultures (or communities) are no longer fixed in place (if indeed they ever were). Rather, “all associations of place, people, and culture are social and historical creations to be explained [or justified], not given natural facts.”⁴⁷⁶ Thus, we should not speak of natural territorial boundaries but the “territorialization” of identities.⁴⁷⁷ This territorialization “must be understood as the complex and contingent results of ongoing historical and political processes.”⁴⁷⁸ Accordingly, such political processes, rather than pre-given cultural-territorial entities, must inform our thinking about jurisdiction.⁴⁷⁹

Indeed, the assumption of a fixed nation-state with spatially-based identities creates significant problems on the ground. “Although the color map of the political world displays a neat and ordered pattern of interlocking units (with only a few lines of discord), it is not surprising that the real world of national identities is one of blotches, blends, and blurs.”⁴⁸⁰ First, many people inhabit border areas, where “the fiction of cultures as discrete,

471. Gupta & Ferguson, *Ethnography*, *supra* note 468, at 3; *see also* Austin Sarat & Thomas R. Kearns, *The Unsettled Status of Human Rights: An Introduction*, in HUMAN RIGHTS: CONCEPTS, CONTESTS, CONTINGENCIES (Austin Sarat & Thomas R. Kearns eds. 2001) 13 (describing “a new understanding of culture in which awareness of internal plurality, fragmentation, and contestation has replaced former tendencies to speak of cultures as unified wholes”).

472. Ulf Hannerz, *Notes on the Global Ecumene*, PUBLIC CULTURE, vol. 1, No. 2, at 66 (1989); Arjun Appadurai & Carol Breckenridge, *Editors' Comments*, PUBLIC CULTURE, vol. 1, No. 1, at 1 (1988); Appadurai, *supra* note 6; Robert Foster, *Making National Cultures in the Global Ecumene*, 20 ANN. REV. OF ANTHROPOLOGY 235 (1991).

473. Ulf Hannerz, *The World in Creolisation*, AFRICA, vol. 57, no. 4, at 546 (1987).

474. GIDDENS, *supra* note 425, at 64 (1990).

475. Gupta & Ferguson, *Ethnography*, *supra* note 468, at 4.

476. *Id.*

477. *See* Friedland & Boden, *supra* note 425, at 42 (“The circulation of populations and symbols is progressively undercutting the essential relation between territory and culture, the link between place and identity.”).

478. *Id.*

479. *See* Ford, *supra* note 402, at 854 (noting that “jurisdiction tends to present social and political relationships as impersonal” because authority is not defined by “status relationships such as caste, race, religion or title”).

480. David H. Kaplan, *Territorial Identities and Geographic Scale*, in NESTED IDENTITIES 31, 35.

objectlike phenomena occupying discrete spaces becomes implausible.⁴⁸¹ Such people may identify with the state controlling the area, the nation with which most inhabitants identify, or the borderland itself.⁴⁸² Second, many others live a life of border crossings—migrant workers, nomads, and members of the transnational business and professional elite. For these people, it may be impossible to find a unified cultural identity. “What is ‘the culture’ of farm workers who spend half a year in Mexico and half in the United States?”⁴⁸³ Finally, there are those who cross borders more or less permanently—immigrants, refugees, exiles, and expatriates.⁴⁸⁴ In their case, the disjuncture of place and culture is especially clear. Immigrants invariably transport their own culture with them to the new location and, almost as invariably, shed certain aspects of that culture when they come in contact with their new communities. Diasporas therefore are both “transnational” in the sense of being dispersed among several countries, but also extremely national in that they tend to share a cultural and political loyalty to a homeland.⁴⁸⁵ Indeed, such clashes of former culture and present community have led to questions about the so-called “cultural

481. Gupta & Ferguson, *Beyond “Culture,” supra* note 445, at 34; Chicana writer and poet Gloria Anzaldua has captured one experience of a “borderland” existence:

I am a border woman.... I have been straddling that tejas-Mexican border, and others, all my life. It’s not a comfortable territory to live in, this place of contradictions. Hatred, anger, and exploitation are the prominent features of this landscape. However, there have been compensations for this mestiza, and certain joys. Living on borders and in margins, keeping intact one’s shifting and multiple identity and integrity, is like trying to swim in a new element.... There is an exhilaration in being a participant in the further evolution of mankind....

GLORIA ANZALDUA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (Preface, no pg. number) (1987).

482. See ANSSI PAASI, *TERRITORIES, BOUNDARIES, AND CONSCIOUSNESS: THE CHANGING GEOGRAPHIES OF THE FINNISH-RUSSIAN BORDER* (1996); Oren Yiftachel, *Regionalism Among Palestinian-Arabs in Israel*, in *NESTED IDENTITIES* 237; Jena Gaines, *The Politics of National Identity in Alsace*, 21 *CANADIAN REV. OF STUDS. IN NATIONALISM* 1 (1986). Borderland regions, because they are often so removed physically from the state center, are often psychologically, as well as physically, isolated, see STEIN RACCOON & DEREK ERWIN, *ECONOMY, TERRITORY, IDENTITY: POLITICS OF WEST EUROPEAN PERIPHERIES* (1983), and therefore provide fertile ground for the introduction of disparate cultural influences. Not surprisingly, states often put extra effort into securing border communities both culturally and ideologically. For example, the Dominican Republic forcibly expelled Haitians from border communities and then attempted to reeducate the remaining population to make the region more “Dominican.” See John Augelli, *Nationalization of Dominican Borderlands*, 70 *GEOGRAPHICAL REV.* 19 (1980); see also George W. White, *Transylvania: Hungarian, Romanian, or Neither?*, in *NESTED IDENTITIES* 267 (discussing efforts by the Romanian state to eradicate Hungarian influences in the borderland of Transylvania).

483. *Id.*

484. *See id.*

485. Kaplan, *supra* note 480, at 38; see also generally MODERN DIASPORAS IN INTERNATIONAL POLITICS (Gabriel Sheffer ed., 1986).

defense” to certain crimes.⁴⁸⁶ And the divided loyalty of diaspora communities can cause host countries to view members of these communities as a potential threat.⁴⁸⁷ By creating communities of interest rather than place, diasporas (the number of which is increasing due largely to labor immigration)⁴⁸⁸ pose an implicit threat to territorially based nation-states.⁴⁸⁹ In sum, we see that “[p]rocesses of migration, displacement and deterritorialization are increasingly sundering the fixed association between identity, culture, and place.”⁴⁹⁰

In addition, the presumed tie between a territory and a culture fails to account for the obvious cultural differences that exist *within* a locality. “‘Multiculturalism’ is both a feeble recognition of the fact that cultures have lost their moorings in definite places and an attempt to subsume this plurality of cultures within the framework of a national identity.”⁴⁹¹ Even the idea that these are “subcultures” within a society tends to preserve the idea of distinct “cultures” within the same geographical and territorial space. Thus, many accounts of ethnicity, even when used to describe cultural differences in settings where people from different regions live side by side, rely on an unproblematic link between identity and place. While such conceptions aim to stretch the naturalized association of culture with place, they leave the tie between culture and place largely intact.⁴⁹²

486. So-called “cultural defenses” use evidence about a defendant’s cultural background to negate or to mitigate criminal liability (with a concomitant sentence reduction). For example, in one early use of a cultural defense that was recognized within the United States, a court in Fresno, California, took into account a husband’s tribal custom of marriage by capture (which involves the kidnap and rape of an intended wife) in permitting a guilty plea to misdemeanor false imprisonment, rather than rape and kidnaping. See Rorie Sherman, “Cultural” Defenses Draw Fire, NAT’L L.J., Apr. 17, 1989, at 3. To its supporters, the “cultural defense is an argument for tolerance of foreign cultures due to a lack of moral basis for punishment.” Andrew M. Kanter, *The Yenaldlooshi in Court and the Killing of a Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411, 413 (1995). But see, e.g., Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a “Cultural Defense”?*, 99 DICK. L. REV. 141, 144 (FALL 1994) (“Permitting the [cultural] defense promotes an unfair policy towards the majority to whom the defense violates principles of legality... [O]pponents assert that a recognition of the cultural defense would, in essence, condone and even encourage, the violence toward women that is practiced throughout the world.”); *id.* at 155 (“The cultural defense, if formally adopted, would operate as an excuse for an otherwise criminal act. Under the present justice system, the act would be considered wrongful; however, the actor would be excused because he lacked the requisite mental culpability.”); see also Neal A. Gordon, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809, 1831 (2001) “The cultural defense is...condescending toward other cultures—it excuses action based on foreign cultures by likening it to insanity.... [T]he defense isolates cultural groups with a patronizing wink. This isolation may lead in turn to a balkanized law and reinforce the idea that minorities should be treated differently.”).

487. Kaplan, *supra* note 480, at 38.

488. *Id.*

489. Robin Cohen, *Diasporas and the Nation-State: From Victims to Challengers*, 72 INT’L AFFAIRS 507, 517 (1996).

490. Gupta, *supra* note 3, at 179, 196.

491. Gupta & Ferguson, *Beyond “Culture,” supra* note 445, at 35.

492. See Gupta & Ferguson, “*Beyond Culture,*” *supra* note 445, at 35.

Even people who remain in seemingly familiar and ancestral places are likely to find that their relation to place continues to change over time, and the illusion of a natural and essential connection between the place and the culture will therefore be challenged consistently. “‘Englishness,’ for instance, in contemporary, internationalized England is just as complicated and nearly as deterritorialized a notion as Palestinian-ness or Armenian-ness, for “England” (the real “England”) refers less to a bounded place than to an imagined state of being or a moral location.”⁴⁹³

We can see the everyday effects of deterritorialization in all areas of the world and all sectors of the economy. For example, the “local” shopping mall is not truly experienced as local at all, because nearly everyone who shops there is aware both that most of the shops are chain stores identical to stores elsewhere and that the mall itself closely resembles innumerable other malls around the globe.⁴⁹⁴ Thus, we experience a “local” place, while recognizing the absent forces that structure our experience, including the steadily declining local ownership of public spaces that is linked directly to the globalization of capital.⁴⁹⁵ Similarly, we may feel the growing significance of “remote” forces on our lives, whether those forces are multinational corporations, world capital markets, or distant bureaucracies like the European Union. As John Tomlinson has observed:

People probably come to include distant events and processes more routinely in their perceptions of what is significant for their own personal lives. This is one aspect of what deterritorialization may involve: the ever-broadening horizon of relevance in people’s routine experience, removing not only general “cultural awareness” but, crucially, the processes of individual “life planning” from a self-contained context centered on physical locality or politically defined territory.⁴⁹⁶

The increased access to media also affects deterritorialization because one is no longer limited to the perspectives offered from within one’s “home culture.”⁴⁹⁷ Thus, the “typical” life of a suburban family in the United States may become as familiar to world citizens inundated by American film and television as their own “home” life.⁴⁹⁸ And, of course, those with even

493. *Id.* at 38; see also RAYMOND WILLIAMS, *TOWARDS 2000*, at 177 (1983) (describing the cosmopolitan existence of a typical English person experiencing everyday life); TOMLINSON, *supra* note 406, at 113-16 (updating Williams’ story from the early 1980s to the late 1990s).

494. See GIDDENS, *supra* note 425, at 141.

495. See TOMLINSON, *supra* note 406, at 107-08.

496. *Id.* at 115.

497. See *id.* at 116.

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

less power to influence the processes of globalization—those forced to cross borders for work, those bankrupted through global competition, those affected by environmental degradation, and many others—experience this deterritorialization in even more insidious ways.

Accordingly, we must think more carefully about the social conception of place. As David Harvey has pointed out, “place” is “one of the most multi-layered and multi-purpose words in our language.”⁴⁹⁹ Indeed, we have many ways to refer to the generic qualities of place (milieu, locality, location, locale, neighborhood, region, territory), to particular kinds of places (city, village, town, state), and to connote place without designating a particular location (home, hearth, turf, community, nation). We also talk metaphorically about the “place” of art in social life, the “place” of women in society, and our “place” in the cosmos, we assert norms by putting things “in their place,” and we seek to subvert norms by finding a “place” for alternative narratives.⁵⁰⁰ Thus, many conceptions of “place” are completely unmoored to specific spatial locations.⁵⁰¹

Moreover, Harvey argues, social changes, such as the advance of industrial capitalism, alter our conceptions of place. For example, the growth of turnpikes, canals, railways, automobiles, air transport, and telecommunications alter the character of places, creating “new territorial divisions of labour and concentrations of people and labour power, new resource extraction activities, and [new] markets....”⁵⁰² Because capital is mobile, however, landscapes shaped in relation to a certain phase of industrial development must be reshaped around new forms of transportation, communication, and production. “The cathedral city becomes a heritage centre; the mining community becomes a ghost town; the old industrial centre is deindustrialized; speculative boom towns or gentrified neighborhoods arise on the frontiers of capitalist development or out of the ashes of deindustrialized communities.”

Harvey argues that it is a mistake to assume that either one of these categorizations of place are more “authentic.” They are merely different social meanings inscribed on physical locations at different times or by different people. Another example illustrates this process of “place-making.” Although a new entertainment district was built in New York City in the late-nineteenth century, it was not called Times Square until the early 1900s. *The New York Times*, which had just relocated to the square, pushed for the name in order to compete with the *New York Herald*, which

499. David Harvey, *From Space to Place and Back Again*, in *MAPPING THE FUTURES: LOCAL CULTURES, GLOBAL CHANGE* 3, 4 (Jon Bird et al. eds., 1993).

500. *See id.*

501. *See id.* (“While the collapse of spatial barriers has undermined older material and territorial definitions of place, the very fact of that collapse...has put renewed emphasis upon the interrogation of metaphorical and psychological meanings which, in turn, give new material definitions of place by means of exclusionary territorial behavior.”).

502. *Id.* at 6.

was located in Herald Square, a few blocks away. The Times organized the New Year's Eve fireworks display and later the ball-dropping as a promotional gimmick. According to Harvey, people were drawn to the square not only at New Year's, but throughout the year to sample the entertainments, eat out, survey the latest fashions, and pick up gossip on everything from real estate transactions to celebrity activities. "Times Square was, in short, created as a representation of everything that could be commercial, gaudy, promotional and speculative in the political economy of place construction." This was, seemingly, a "pseudo-place" constructed by capitalism to masquerade as a town square. Yet, as Harvey reports, Times Square "soon became the symbolic heart of New York City...the place where everyone congregated to celebrate, mourn or express their collective anger, joy or fear." Although created as one kind of place, it was appropriated for another and became "an authentic place of representation with a distinctive hold on the imagination." Thus, places and their social content are always in flux, always contested.

Similarly, in the global context the ideas of homeland or place-ness do not necessarily cohere with a physical location: there is no necessary correspondence between geography and social meaning. "In a world of diaspora, transnational culture flows, and mass movements of populations, old-fashioned attempts to map the globe as a set of culture regions or homelands are bewildered by a dazzling array of postcolonial simulacra, doublings and redoublings, as India and Pakistan seem to reappear in postcolonial simulation in London, prerevolution Teherean rises from the ashes in Los Angeles, and a thousand similar cultural dramas are played out in urban and rural settings all across the globe."⁵⁰³ The very idea of a "nation" or a "culture"—understood as a common ethnic or political society with a shared sense of identity existing within but not without a fixed set of borders—is irretrievably compromised.

Ironically, as actual places and localities become ever more blurred and indeterminate, *ideas* of culturally and ethnically distinct places become perhaps even more important.⁵⁰⁴ Imagined communities attach themselves to imagined places, displaced peoples cluster around remembered or idealized homelands in a world that seems increasingly to deny such firm territorialized anchors in their actuality. Indeed, one of the primary illusions of nationalism is the presumption that one's nation has existed from time immemorial. In case after case, however, it turns out that most national traditions are inventions of the past two hundred years, and the principle of nationality itself, "despite its trappings of misty antiquity, is a defining feature of modernity."⁵⁰⁵ Thus, in the next two sections I first explore the particular

503. See Gupta & Ferguson, *Beyond "Culture,"* *supra* note 445, at 37-38

504. *Id.* at 39.

505. Jonathan R  e, *Cosmopolitanism and the Experience of Nationality*, in *COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION* 77, 81 (Pheng Cheah & Bruce Robbins eds., 1998). Indeed, as R  e points out, the two national groups in Europe with

social and historical context surrounding the rise of the nation-state, and then survey the many ways that nations imagine themselves as natural and inevitable communities rather than as historically contingent and ideologically contested ones.

B. The Historical Contingency of the Nation-State

As discussed in the preceding section, we tend to assume a correspondence between territory, governance, and people. Yet, by looking at the historical rise of the nation-state, we can see that these ties are both relatively recent⁵⁰⁶ and the result of a particular sequence of events. Thus, instead of simply asserting the inevitability of nation-state sovereignty, we must attempt “to understand why certain forms of organizing space—specific boundaries, particular places—attain the singular significance they do in a given historical context.”⁵⁰⁷ This section briefly surveys this context. Only by “stepping ‘outside’ the nation (and the problematic of nationalism) [can we] see how nations are created and reproduced as a consequence of the global interstate system.”⁵⁰⁸

The words “nation” and “state” are frequently used as synonyms, despite the significant difference between them. For example, the United “Nations” actually represents the *states* of the world, not national groups. Similarly, *international* relations really refers to *interstate* relations. Whereas a state is an explicitly political entity based on physical dominion over a place,⁵⁰⁹ a nation implies a “natural” ethnic or cultural unity.⁵¹⁰ Yet, as the last section suggested, there is no necessary tie between culture and geographical territory. Accordingly, “neither nations nor states exist at all

the greatest claims to many centuries of continuous existence ironically have no securely held collective territory: the Romanies and the Jews. *See id.* at 89, n.10.

506. *See* Immanuel Wallerstein, *The National and the Universal: Can There Be Such a Thing as World Culture?*, in CULTURE, GLOBALIZATION AND THE WORLD-SYSTEM, *supra* note 413, at 91, 92 (“A world consisting of...nation-states came into existence even partially only in the sixteenth century. Such a world was theorized and became a matter of widespread consciousness even later, only in the nineteenth century. It became an inescapably universal phenomenon later still, in fact only after 1945.”).

507. Gupta, *supra* note 3, at 195.

508. *Id.*

509. Weber defined the state as that agency within society which possesses the monopoly of legitimate violence. ERNEST GELLNER, NATIONS AND NATIONALISM 3 (1983). Ernest Gellner, modifying Weber’s definition slightly, argues that “the ‘state’ is that institution or set of institutions specifically concerned with the enforcement of order (whatever else they may also be concerned with).” *Id.* at 4. Regardless of which definition one adopts, for our purposes the salient point is that the state is a political (not a natural) entity.

510. *See id.* at 7 (“Two men are of the same nation if and only if they share the same culture, where culture in turn means a system of ideas and signs and associations and ways of behaving and communicating.... [In addition,] two men are of the same nation if and only if they *recognize* each other as belonging to the same nation.”).

times and in all circumstances.”⁵¹¹

Moreover, state and nation need not evolve together. In some countries, the state emerged long before a nation was imagined to inhabit that state, and in others a sense of nationhood may precede the emergence of a state structure.⁵¹² As a result, “a state territory may contain several groups who define themselves as separate from the majority nation, or a nation may extend far beyond the boundaries of the existing state.”⁵¹³ For example, the main unifying element of the United States is not an ethnic identity, but simply the fact of being born within the borders of the state. Not surprisingly, U.S. citizenship, which is based on birth, is distinctly different from, say, German or Italian citizenship, which is based on blood relation (a rough proxy for ethnic similarity).

The history of the nation-state in the west is relatively familiar, and I will only sketch its broad outline here.⁵¹⁴ Pre-modern states were not based principally on territorial sovereignty. Indeed, medieval Europe was in some ways an archetype for non-exclusive territorial rule; its “patchwork of overlapping and incomplete rights of government” were “inextricably superimposed and tangled.”⁵¹⁵ In spite of this fragmentation, however, “[m]edieval actors viewed themselves as the local embodiments of a universal community,”⁵¹⁶ a *Respublica Christiana* “in which each individual found his definition, identity and purpose, where all lived in common under the same law and morals and where none was severed or independent in his authority or beliefs.”⁵¹⁷ Moreover, political power arose not from the sacrosanct notion of borders, but from personal allegiances between

511. *Id.* at 6.

512. See David H. Kaplan & Guntram H. Herb, *Introduction: A Question of Identity*, in *NESTED IDENTITIES: NATIONALISM, TERRITORY, AND SCALE* 1, 3 (Guntram H. Herb & David H. Kaplan eds., 1999).

513. *Id.*

514. This history is also a bit distorted because it focuses on Western European history. Nevertheless, the European experience is the basis for most scholarship on nationalism and sovereignty, and, by most accounts, was the foundation for the law of nations as we conceive it today. See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 9 (1979) (“Despite its claims to universality, the early law of nations had its origins in the European State-system.”); see also JAMES MAYALL, *NATIONALISM AND INTERNATIONAL SOCIETY* 1 (1990) (“[T]he global system of world politics is historically derived from the European states-system as it developed between the seventeenth and twentieth centuries.”). For an account of how the European model of statehood spread to other continents and cultures, see ROBERT H. JACKSON, *QUASI-STATES* 59-81 (1990).

515. J. Ruggie, *Territoriality and Beyond: Problematising Modernity in International Relations*, 47 *INT’L ORGANISATION* 139, 149 (1993); see also J.R. STRAYER & D.C. MUNRO, *THE MIDDLE AGES* 115 (1959).

516. CURTIN, *supra* note 5, at 8.

517. Daniel Philpott, *Sovereignty: An Introduction and Brief History*, 48 *J. Int’l Aff.* 353, 357, 360 (1995); see also Ronald A. Brand, *External Sovereignty and International Law*, 18 *Fordham Int’l L.J.* 1685, 1687 (1995) (discussing medieval concept of *Respublica Christiana*).

subjects and a wide variety of authorities,⁵¹⁸ including the Pope, the Holy Roman Emperor, and various nobles, kings, and clerics.⁵¹⁹ Anthony Giddens describes this as the “absolutist state,” in which a political order is “dominated by a sovereign ruler, monarch or prince, in whose person are vested ultimate political authority and sanctions, including control of the means of violence.”⁵²⁰ Yet, this was a different conception from that of sovereign *states* fixed in place.⁵²¹ In this world, the social construction of space was “organized concentrically around many centres depending upon current political affiliation, rather than a singular centre with established territorial boundaries.”⁵²²

Commentators trace the origin of modern western territorial states to the emergence of European mercantile capitalism in the fourteenth and fifteenth centuries.⁵²³ Increasing wealth in Europe resulted in larger and more complex economies, which in turn required greater central control and administration.⁵²⁴ In addition, the declining influence of the church, and the development of more sophisticated military technology allowed rulers to begin to assert more exclusive control over geographical territory.⁵²⁵ Overseas discoveries also spurred on the development of territorially-based sovereignty because demarcating territory allowed for exclusive and unambiguous claims to possessions in the new world.⁵²⁶ For example, Spain and Portugal divided their colonial spheres using a line of longitude in the Treaty of Tordesillas in 1494.⁵²⁷ Scholars such as Francisco de Vitoria in Spain, and Hugo Grotius in Holland emerged in the sixteenth century to articulate a theory of territorial sovereignty. They argued that any political

518. Guntram H. Herb, *National Identity and Territory*, in NESTED IDENTITIES, *supra* note 512, at 9, 10.

519. See J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT’L ORG. 107, 111 (1994).

520. ANTHONY GIDDENS, *SOCIAL THEORY AND MODERN SOCIOLOGY* 170-71 (1987).

521. See W. ULLMANN, *PRINCIPLES OF GOVERNMENT AND POLITICS IN THE MIDDLE AGES* 137 (1975) (arguing that the idea of an omnipotent state was remote from the medieval mind). Indeed, the word “state” did not exist in political parlance until the 1500s. See Curtin, *supra* note 5, at 9, n.27. *But see* H. MITTEIS, *THE STATE IN THE MIDDLE AGES: A COMPARATIVE CONSTITUTIONAL HISTORY OF FEUDAL EUROPE* (1975) (arguing that the reality of the state pre-existed by several centuries the conscious formulation of the idea of the state).

522. CURTIN, *supra* note 5, at 9.

523. See, e.g., *id.*, at 171 (describing close connection between “the ascendancy to power of the bourgeoisie” and “the gradual transformation of the absolutist state into the nation-state”); Herb, *supra* note 518, at 10; Alexander B. Murphy, *International Law and the Sovereign State: Challenges to the Status Quo*, in REORDERING THE WORLD, *supra* note 7.

524. Jouni Häkli, *Territoriality and the Rise of the Modern State*, 172 FENNIA 1, 43-45 (1994).

525. JEAN GOTTMAN, *THE SIGNIFICANCE OF TERRITORY* (1973).

526. See Herb, *supra* note 518, at 11.

527. See ROBERT D. SACK, *HUMAN TERRITORIALITY: ITS THEORY AND HISTORY* 131-32 (1986).

authority exercising control over territory was entitled to govern that territory free from outside intervention.⁵²⁸

Ultimately, the Protestant Reformation weakened the central authority of the Pope,⁵²⁹ bringing on the Thirty Years' War, which culminated in the Treaty of Westphalia, signed in 1648.⁵³⁰ Under the treaty, each country agreed to honor each others' territorial boundaries and to refrain from interfering in internal affairs of another state, thereby codifying the territorial power of individual sovereign states⁵³¹ and limiting the prerogatives of the Pope and Emperor.⁵³² The treaty gave states both the authority to form alliances without imperial or papal approval⁵³³ and the power to determine the religion that would be practiced within their territories.⁵³⁴ Moreover, "as it came to be practiced," Westphalia "removed all legitimate restrictions on a state's activities within its territory."⁵³⁵ Thus, the sovereign state became the primary political unit, and the control of territory became the primary criterion for assessing the existence of such a state.⁵³⁶ Subsequently, public international law has developed to

528. See Murphy, *supra* note 523, at 210.

529. See Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1084 (1996) ("By most accounts, the idea of the sovereign state, an entity exercising 'supreme legitimate authority within a [[defined] territory,' grew out of the Protestant Reformation.") (quoting Philpott, *supra* note 517, at 357); see also JACKSON, *supra* note 514, at 50 ("Sovereign states first came into view when medieval Christendom fractured under the combined impact of the Renaissance and the Reformation.").

530. Treaties, *supra* note 20. Westphalia has been called the "majestic portal" leading from the medieval world to modernity. See Gross, *supra* note 20, at 28. Others, however, have observed that Westphalia did not simply create a system of sovereign states *ex nihilo*, but rather that it consolidated 300 years of evolution towards such a system. See, e.g., Philpott, *supra* note 517. For an argument that Westphalia did not even constitute a decisive break with the medieval order, see generally S. Krasner, *Westphalia and All That*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE 235 (J. Goldstein & R. Keohane eds., 1993). For further discussion of Westphalia, see generally HANS KOHN, THE IDEA OF NATIONALISM 188 (1944); Alfred-Maurice de Zayas, *Peace of Westphalia (1648)*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 536-39 (1984). On the Thirty Years War, see generally C.V. WEDGWOOD, THE THIRTY YEARS WAR (1938); GEOFFREY PARKER, EUROPE IN CRISIS, 1598-1648 (1979).

531. See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 113 (1990) ("The notion of the sovereign equality of states may be said to have made its debut, in modern Western civilization, with the Peace of Westphalia."); Brand, *supra* note 517, at 1688 (explaining that Peace of Westphalia formalized "[a] new era of equal sovereigns"); Eric Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269, 270 (1978) (noting "Westphalian emphasis on territorial sovereignty and sovereign equality").

532. See CURTIN, *supra* note 5, at 11 ("This post-medieval epoch was characterised by the coexistence of a multiplicity of states each sovereign within its territory, equal to one another and free from any external earthly authority.").

533. Movsesian, *supra* note 529, at 1085.

534. Although this principle of *cuius regio, eius religio* (whose the region, his the religion) had been recognized in the Peace of Augsburg a hundred years earlier, it was not put into practice until Westphalia. See Philpott, *supra* note 517, at 363.

535. *Id.* at 364.

536. See CURTIN, *supra* note 5, at 11.

harmonize and prevent conflicts among these new actors in human history.⁵³⁷

Although Westphalia established a system of state territorial sovereignty, it was not until the Enlightenment that a separate conception of nation emerged. Whereas the right to control territory had previously been viewed as the right of a *monarch*, the contractarian philosophy of Locke, Montesquieu, and Rousseau grounded political power in the consent of the *people* of a given territory.⁵³⁸ Thus, in order to be legitimate, modern states needed the loyalty of this territorially-bounded group of people.⁵³⁹ Such groups came to be conceived as culturally cohesive communities with common interests and bonds known as nations, and the political institutions they formed were called nation-states.⁵⁴⁰ “The Enlightenment ushered in an era in Europe during which sovereign nation-states were assumed to be the political geographic ideal.... The notion of territorial sovereignty thus acquired a new kind of legitimacy, one premised on the ideological bedrock of ‘national’ rights.”⁵⁴¹

As discussed in more detail in the next section, these new states, in turn, used their administrative power to encourage social cohesion and identification with the state, through the enforcement of uniform languages, the establishment of compulsory education, and the institution of rhetorical and symbolic efforts to erase local differences and imagine a coherent community.⁵⁴² These efforts formed the roots of nationalism, which can be

537. See *id.* (“The new multistate system rested on international law and the balance of power, a law operating *between* rather than above states and a power operating *between* rather than above states.”).

538. See MALCOLM ANDERSON, *FRONTIERS: TERRITORY AND STATE FORMATION IN THE MODERN WORLD* 19, 37-38 (1996).

539. See CURTIN, *supra* note 5, at 13-14 (“Sovereignty shifted from the person of the monarch, identified with a ‘divine cosmos’ to the territory of the state and state institutions (a more impersonal structure of power with supreme jurisdiction over a territory) and the loyalty of citizens became something that had to be won by modern states (legitimacy).”).

540. See Herb, *supra* note 518, at 11; Murphy, *supra* note 523, at 210; CURTIN, *supra* note 5, at 15 (“The governing people became a transformed political subject, namely a people of *citizens* which came to be identified with the *Nation*.”). HORSMAN & MARSHALL, *supra* note 7, at 5-6 (1994) (“The French Revolution of 1789 marked a watershed: in its aftermath, the nation was not just the king, his territory, and his subjects.... [T]he *patrie*...was not strictly the country but its people—all its people. The nation was a pact between the sovereign people and the state....”). *But see* ANTHONY D. SMITH, *NATIONALISM AND MODERNISM: A CRITICAL SURVEY OF RECENT THEORIES OF NATIONS AND NATIONALISM* 38 (1998) (arguing that the growth of nationalism can be traced back as far back as the fourteenth and fifteenth centuries in many European regions).

541. Murphy, *supra* note 523, at 210.

542. See Herb, *supra* note 518, at 11; see also John Borneman, *State, Territory, and National Identity Formation in the Two Berlins, 1945-1995*, in *CULTURE, POWER, PLACE*, *supra* note 3, at 93, 97 (“Contemporary state narratives about a national identity are constructed in a long conversation between states and their residents.... In its laws and policy statements, the state proposes for its citizens a model life course using tools including educational institutions, housing regulations, fiscal and monetary policy, and marital laws. The citizen reflects on and responds to this model life course in everyday experiences and ritual encounters.”). *But see* SMITH, *supra* note 540, at 40 (cautioning against using a neo-Marxist

defined as a political movement seeking to unite people to a sovereign state, based on common ancestry or culture.⁵⁴³ Nationalism “reordered the psychological allegiances of Europe and gave to the state an emotional appeal it had previously lacked.”⁵⁴⁴ By fostering a sense of “belonging,⁵⁴⁵ of shared participation in a unique, sometimes mythical, heritage,⁵⁴⁶ eighteenth- and nineteenth-century nationalism provided the basis for powerful new political identities to replace the medieval unity of the *Respublica Christiana*.⁵⁴⁷ Indeed, as one commentator has argued, the idea that nationality equals identity became “a social fact or social construction that is taken for granted, a cognitive frame in which to threaten nationality is to threaten identity.”⁵⁴⁸ Thus, political identity came to be linked powerfully with territory.⁵⁴⁹

Nevertheless, although the American and French Revolutions provided a context for conceiving of a territorially-based “people” as a unified “nation,” problems arose in applying similar conceptions elsewhere. The nation-state system did not follow the ethnic identity of its human subjects as its controlling criteria. Therefore, the map of the post-Westphalian Europe showed a mosaic of sovereign powers controlling

“top-down” framework whereby elites simply transmit nationalist sentiment to the “masses”); *see also* note 625, *infra*.

543. *See* JOHN BREUILLY, *NATIONALISM AND THE STATE 2* (2d ed. 1994) (“The term ‘nationalism’ is used to refer to political movements seeking or exercising state power and justifying such action with nationalist arguments.”); GELLNER, *supra* note 509, at 1 (“Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent.”); WILLIAM PFAFF, *THE WRATH OF NATIONS* 197 (1993) (“Nationalism is the political ... expression of a form of group identity attached to an existing state, or to a community which is not yet a recognized nation-state but which believes that it should become one.”). For other discussions of nationalism, *see generally* KOHN, *supra* note 530; MICHAEL BILLIG, *BANAL NATIONALISM* (1995); BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (rev. ed. 1991); GIDON GOTTLIEB, *NATION AGAINST STATE* (1993); Liah Greenfeld, *Nationalism* (1992); ERIC J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780* (1990); MICHAEL IGNATIEFF, *BLOOD AND BELONGING* (1993); ANTHONY D. SMITH, *THE ETHNIC ORIGINS OF NATIONS* (1986); YAEL TAMIR, *LIBERAL NATIONALISM* (1993); Lea Brilmayer, *The Moral Significance of Nationalism*, 71 *NOTRE DAME L. REV.* 7 (1995); Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 *AM. J. INT’L L.* 359 (1996). For an essay summarizing some of the recent scholarship, *see* Tony Judt, *The New Old Nationalism*, *N.Y. REV. BOOKS*, May 26, 1994, at 44.

544. Movsesian, *supra* note 529, at 1086; *see also* HAROLD J. LASKI, *THE FOUNDATIONS OF SOVEREIGNTY AND OTHER ESSAYS* 15 (1921); KOHN, *supra* note 530, at 4 (asserting that nationalism “changed” the state “by animating it with a new feeling of life and with a new religious fervor”).

545. *See* Alan Branthwaite, *The Psychological Basis of Independent Statehood*, in *STATES IN A CHANGING WORLD* 46, 51 (Robert H. Jackson & Alan James eds., 1993).

546. *See infra*, text accompanying notes 626-639.

547. Indeed, some argue that state sovereignty continues to be a social construction: *See generally, e.g.*, STATE SOVEREIGNTY AS SOCIAL CONSTRUCT (Thomas J. Biersteker & Cynthia Weber eds., 1996).

548. CURTIN, *supra* note 5, at 15; *see also* HORSMAN & MARSHALL, *supra* note 7, at 10 (noting the contemporary view that the nation-state is “natural and eternal”).

549. *See id.* (“[T]he identification of citizenship with residence in a particular territorial space became the central fact of *political identity*.”).

multiethnic societies. This arrangement has continued to create tension and conflict. In Central and Eastern Europe, for example, two different identities formed: one based on ethnic affiliation, and one based on territorial boundaries. Unfortunately, though these two identities are quite distinct, they were conflated in the territorial settlements that followed World War I, which attempted to create new nation-states, such as Czechoslovakia and Yugoslavia. In addition, the UN was established to ensure the territorial integrity of the existing system of states and therefore until very recently tended to recognize only those self-determination movements brought forth by a people as a whole operating within existing colonial boundaries (such as Nigeria), rather than ethnic minorities operating within those states.⁵⁵⁰

Even this cursory survey reveals first that the idea of nation-states operating within fixed territorial boundaries is a relatively recent phenomenon, and second, that the link between nation and state is contingent and often tenuous. Thus, although it is admittedly difficult to imagine an international geopolitical order that is not based on a network of nation-states operating in bounded spaces, history suggests that the nation-state system is neither immutable nor inevitable. Moreover, to the extent that nations and states do not coincide, alternative conceptions of identity and community that are *not* based on state boundaries will continue to challenge the hegemony of this system.

C. The Nation-State as an Imagined Community

If legal jurisdiction is both a symbolic assertion of community dominion and a way of demarcating the boundaries of community, then it is essential that we consider more carefully what it means to say that a coherent community exists and how such a community might be defined. This consideration reveals the act of imagination necessary to equate community with state as well as the ongoing tug-of-war between nostalgic and transformative visions of community in mediating the relationship between Self and World.

The concept of “community” is one of the most widely used in the social sciences. However, a precise definition has been predictably elusive. Even as far back as 1955, one study compiled 94 social-scientific attempts at definition and found that the only substantive overlap among them was that all the definitions dealt with human beings!⁵⁵¹

550. For an argument that a right to personal self-determination similar to the right of nation-states, see Francis A. Gabor, *Quo Vadis Domine: Reflections on Individual and Ethnic Self-Determination Under an Emerging International Legal Regime*, 33 INT'L LAW. 809, 811-14 (1999).

551. G. Hillery, *Definitions of Community: Areas of Agreement*, 20 RURAL SOCIOLOGY 116, ___ (1955).

To many, the word “community” conjures up Norman Rockwell-like images of a small, face-to-face congregation of people sharing common values, backgrounds, and worldviews. Such a vision seems at odds with much broader appropriations of the word, such as “the American community” or “the world community.” Thus, it is not surprising that in much sociological and anthropological literature, community and state are often juxtaposed. For example, Ferdinand Tönnies, writing in the 1880s, described ways in which “*gemeinschaft*”—the community of intimacy, close personal knowledge, and stability—was being superceded by “*gesellschaft*”, the political society dominated by social relations that were artificial, contractual, ego-focused, short-term, and impersonal.⁵⁵² Tönnies viewed the small, rural community of the past as a site of solidarity and unity, while portraying contemporary society as incapable of creating such bonds.⁵⁵³ His conception of *gemeinschaft* was firmly grounded in physical proximity, where community derives from shared territory, blood ties, and constant interaction among its members, rather than shared values or interests.⁵⁵⁴ In contrast, according to Tönnies, the modern period of *gesellschaft* offered no face-to-face community, but only a set of associations invented for the rational achievement of mutual goals (for example, corporations, political parties, and trade unions).⁵⁵⁵

Other social scientists of the late nineteenth and early twentieth century echoed this same juxtaposition. Henry Maine’s work, though not specifically focused on the nature of community, also contrasted a society founded on personal relationships and blood-based hierarchies with a more “modern” social form based on individual freedom to enter into legal agreements.⁵⁵⁶ Maine saw this transformation from “status” to “contract” as a shift from defining social relations through kinship networks to defining them based on individual will.⁵⁵⁷ Similarly, Emile Durkheim argued that “earlier” communities were characterized by “mechanical solidarity”, in which society was founded upon likeness and unable to tolerate dissimilarity.⁵⁵⁸ In contrast, “modern” society was based on “organic solidarity”, the integration of difference into a collaborative, harmonious whole.⁵⁵⁹ This vision, however, remained a dream for the future. Durkheim viewed the contemporary world as without “a whole system of

552. See FERDINAND TOENNIES, *GEMEINSCHAFT UND GESELLSCHAFT* 43-44 (Charles Loomis trans., 1887; 1957).

553. See *id.* at ____.

554. See *id.* at ____.

555. See *id.* at ____.

556. See HENRY SUMNER MAINE, *ANCIENT LAW* 165 (Univ. of Ariz. Press 1986) (1864) (“[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.”).

557. See *id.*

558. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 88-92 (W.D. Halls trans., 1984).

559. See *id.* at 129-32.

organs necessary to social life (*la vie commune*).”⁵⁶⁰ In later work, Durkheim retreated from his optimistic view of modern society, calling instead for new communal relationships to counteract the tendency towards debilitating anomie.⁵⁶¹

For many twentieth-century scholars, community remained a term reserved only for pre-industrial forms of affiliation. For example, Raymond Williams considered the rise of modernity and its challenge to earlier conceptions of community: “The growth of towns and especially of cities and a metropolis; the increasing division and complexity of labour; the altered and critical relations between and within social classes: in changes like these any assumption of a knowable community—a whole community wholly knowable—became harder and harder to sustain.”⁵⁶² Similarly, Robert Redfield attempted to define community as necessarily small in scale, homogenous in both activities and states of mind, self-sufficient, and conscious of its distinctiveness.⁵⁶³ Redfield almost seemed to find a kind of nobility and purity in these small (generally agrarian) communities. In contrast, he viewed urban societies far more negatively. To Redfield, cities are based in “impersonal institutions and what has been called atomization of the external world.”⁵⁶⁴

Other anthropologists, while perhaps not quite as nostalgic as Redfield, have similarly viewed communities as inherently local. Ronald Frankenberg suggested that members of a community must have common interests in achievable things (economic, religious, or whatever).⁵⁶⁵ Such communities, in his view, require people to live face-to-face, in a small group of people, sharing many-stranded relations with one another and maintaining a sentimental attachment towards a physical locality and the group itself.⁵⁶⁶ David Minar & Scott Greer also emphasized geographical proximity.⁵⁶⁷ They argued that the realities of living in a locale will give rise to common problems, which lead to the development of organizations for joint action and activities, which in turn produces common attachments, feelings of interdependence, common commitment, and increasing homogeneity.⁵⁶⁸ Even recent work by “communitarian” theorists such as Amitai Etzioni demonstrates a similar view of community. Attempting to

560. *Id.* at *lv*.

561. See EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* 361-92 (John A. Spaulding & George Simpson trans., 1951).

562. RAYMOND WILLIAMS, *THE COUNTRY AND THE CITY* 165 (1973).

563. See ROBERT REDFIELD, *THE LITTLE COMMUNITY AND PEASANT SOCIETY AND CULTURE* 4 (1960).

564. *Id.* at 5.

565. See RONALD FRANKENBERG, *COMMUNITIES IN BRITAIN* 238 (1966).

566. See *id.* at 237-54; see also NIGEL RAPPORT & JOANNA OVERING, *SOCIAL AND CULTURAL ANTHROPOLOGY: THE KEY CONCEPTS* (2000) 61 (discussing the work of Frankenberg and other theorists).

567. See DAVID MINAR & SCOTT GREER, *THE CONCEPT OF COMMUNITY* 47 (1969).

568. See *id.*

stem what he sees as the multicultural drift away from the common values of a liberal democracy, Etzioni clings to the notion of shared beliefs in communities of the past and asks contemporary members of society to recommit to those values.⁵⁶⁹

These ideas of community do not fit comfortably with the sprawling nature of the modern industrialized state. And yet, the transformation of *states* into *nation*-states requires that members of a sovereign entity come to think of themselves not simply as subjects of a governmental power but as somehow bound to the other subjects within one community. Benedict Anderson therefore refers to nation-states as *imagined* communities, “imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”⁵⁷⁰

This formulation does not imply that such imagined communities are somehow “false” or “fabricated” in a negative sense.⁵⁷¹ Anderson makes clear that *all* communities larger than “primordial villages” (and perhaps even those) are imagined.⁵⁷² Thus, nation-states are not illegitimate just because they imagine and construct psychological bonds of affiliation. Nevertheless, it means that those bonds are not natural and inevitable; they are merely one particular way of imagining community among many.

This is a very different vision of community. Rather than a reified, natural structure in the relations among people, Anderson, and other theorists, focus on the ways conceptions of “community” are constructed within social life, on how membership in a community is marked and attributed, and on how notions of community are given meaning.⁵⁷³ In a similar vein, Gregory Bateson argued that “community” is not a thing in itself, but rather an epiphenomenon of social relations.⁵⁷⁴ Likewise, Barth observed that social groups are not naturally joined as communities; they achieve an identity by defining themselves as different from such groups and by erecting boundaries between them.⁵⁷⁵ Anthony Cohen extended Barth’s critique, arguing that community must be seen as a symbolic

569. See, e.g., AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* (1993).

570. ANDERSON, *supra* note 543, at 6 (rev. ed. 1991). Ernest Gellner has made a similar argument. See, e.g., ERNEST GELLNER, *THOUGHT AND CHANGE* 169 (date) (“Nationalism is not the awakening of nations to self-consciousness: it *invents* nations where they do not exist.”) (emphasis added).

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

572. ANDERSON, *supra* note 543, at 6.

573. See RAPPORT & OVERING, *supra* note 566, at 62.

574. See GREGORY BATESON, *COMMUNICATION* 153 (1951).

575. See F. BARTH, *ETHNIC GROUPS AND BOUNDARIES* (1969).

construct, not a natural one.⁵⁷⁶ As such, community derives (in Cohen's vision) not from the type of external characteristics Redfield and others had posited, but from internal perceptions of a boundary that separates one social group from another. Thus, communities and their boundaries exist not as geography but as "repositories of meaning" in the minds of their members, and these socially constructed repositories of meaning come to be expressed as a community's distinctive social discourse.⁵⁷⁷

This sort of symbolic understanding of community is echoed in social psychological research on group identities. Henri Tajfel, who first articulated what has come to be known as the Social Identity Theory,⁵⁷⁸ argued that groups do not exist because of external factors; rather, they exist only if members identify themselves with the group.⁵⁷⁹ Subsequent scholars have articulated three stages in the process of group identification. First, individuals categorize themselves as part of an ingroup, assigning themselves a social identity and distinguishing themselves from the relevant outgroup. Second, they learn the norms associated with such an identity. Third, they assign these norms to themselves, and "thus their behavior becomes more normative as their category membership becomes salient."⁵⁸⁰ Again, community-formation is viewed as a psychological process, not as a naturally occurring phenomenon based on external realities.

Thus, "community" is never simply a matter of recognizing some kind of pre-existing cultural similarity or social contiguity. Rather, "community" is "a categorical identity that is premised on various forms of exclusions and constructions of otherness."⁵⁸¹ Indeed, it is only through such processes of exclusion or otherness that group identities can be formed. Even in a geographically "local" setting, what is important is "not simply that one is located in a certain place but that the particular place is set apart from and opposed to other places."⁵⁸² Accordingly, even locality is a social constructed conception.

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

576. See ANTHONY P. COHEN, *THE SYMBOLIC CONSTRUCTION OF COMMUNITY* ___ (1985).

577. *Id.* at 98.

578. See J.R. EISER, *SOCIAL PSYCHOLOGY* 316 (1986) (describing Social Identity Theory as "one of the most ambitious undertakings in research on group processes"). For early work on the theory, see generally Henri Tajfel, *Social Identity and Intergroup Behavior*, 13 *SOC. SCI. INFORMATION* 65 (1974); HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES* (1981); *SOCIAL IDENTITY AND INTERGROUP RELATIONS* (Henri Tajfel ed., 1982); M. Brewer, *Ingroup Bias in the Minimal Intergroup Situation: a Cognitive-Motivational Analysis*, 86 *PSYCHOLOGICAL BULLETIN* 307 (1979); R. BROWN, *GROUP PROCESSES* (1988).

579. See HENRI TAJFEL, *HUMAN GROUPS AND SOCIAL CATEGORIES* 229 (1981).

580. M.A. HOGG & D. ABRAMS, *SOCIAL IDENTIFICATIONS* 172 (1988).

581. Gupta & Ferguson, *Ethnography*, *supra* note 468, at 1, 13.

582. *Id.*

the same time, if communities are based not on fixed attributes like geographical proximity, shared history, or face-to-face interaction, but instead on symbolic identification and social psychology, *then there is no intrinsic reason to privilege national communities over other possible community identifications that people might share.* These other identifications will be explored in the next section, but for now it is important to recognize that the very same conception of community upon which the nation-state relies also provides the basis for critiquing the hegemony of the nation-state as the only relevant community under discussion.

According to Anderson, the nation-state historically has had three distinct imagined features. First, the nation is imagined as limited, with finite boundaries. He argues that “[n]o nation imagines itself coterminous with mankind. The most messianic nationalists do not dream of a day when all members of the human race will join their nation....”⁵⁸³ Second, the nation is imagined as sovereign in order to replace the divinely-ordained dynasties that began to give way to modern states in the period of the Enlightenment and afterwards.⁵⁸⁴ Third, the nation is imagined as a community. “Regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately, it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings.”⁵⁸⁵

Unlike Tönnies, Anderson views the modern state not in *opposition* to community, but as a *replacement* for, and *appropriation* of the idea of community. According to Anderson, it is no coincidence that the eighteenth century, with its rationalist secularism and its challenge to divine rule, is also the century when nationalism arises. While stopping just short of drawing a causal link between the decline of religious belief and the rise of nationalism,⁵⁸⁶ Anderson does argue that the “disintegration of paradise” required “a secular transformation of fatality into continuity, contingency into meaning.... Few things were (are) better suited to this end than an idea of nation.”⁵⁸⁷

Significantly for the study of jurisdiction, Anderson also links this transformation to changing conceptions of borders. Monarchy, he argues “organizes everything around a high centre. Its legitimacy derives from divinity, not from populations, who, after all, are subjects, not citizens.”⁵⁸⁸ Thus, since states were defined by their centers, “borders were porous and

583. ANDERSON, *supra* note 543, at 7.

584. *See id.*

585. *Id.*

586. *See id.* at 12 (“Needless to say, I am not claiming that the appearance of nationalism towards the end of the eighteenth century was ‘produced’ by the erosion of religious certainties, or that this erosion does not itself require a complex explanation.”).

587. *Id.* at 11.

588. *Id.* at 19.

indistinct, and sovereignties faded imperceptibly into one another.”⁵⁸⁹ According to Anderson, this loose sense of territoriality helps to explain how pre-modern empires and kingdoms were able to sustain their rule over widely diverse (and sometimes not even contiguous) populations for long periods of time.⁵⁹⁰ In contrast, modern state sovereignty aims to be “fully, flatly, and evenly operative over every square centimetre of a legally demarcated territory.”⁵⁹¹ Similarly, Giddens argues that, whereas the boundaries of empires and absolutist states were diffuse, the nation-state “is a set of institutional forms of governance maintaining an administrative monopoly over a territory with demarcated boundaries....”⁵⁹²

Returning to the idea explored earlier that cartography both reflects and creates political consciousness,⁵⁹³ we can see the difference Anderson and Giddens describe played out in a comparison of medieval and modern maps. European medieval maps differ in a number of ways from contemporary maps. The older maps tend to depict Jerusalem at the center,⁵⁹⁴ they typically indicate an incompleteness to the world, with distant lands only sketched in and then fading off without clear endpoints, and they not only are imprecise as to boundaries; they seem to treat boundaries as relatively insignificant.⁵⁹⁵ Kingdoms and empires are depicted in general areas, and little effort is made to pinpoint the precise point where one begins and the other ends.⁵⁹⁶ In contrast, the modern map, like the modern conception of sovereignty, is firmly territorial, with precisely drawn boundaries.⁵⁹⁷

Moreover, the evidence seems to indicate that the lack of clear territorial boundaries was not only part of medieval map-making but medieval consciousness as well. As one commentator points out, medieval Europe consisted of a series of small overlapping power structures with no single authority controlling a clear-cut territory or the people within it.⁵⁹⁸ In addition, medieval monarchs tended to divide their estates among their heirs, meaning that territories would often change shape with each new generation.⁵⁹⁹ The feudal structure rested on loyalties to local lords, not to

589. *Id.*

590. *See id.*

591. *Id.*

592. GIDDENS, *supra* note 520, at 171-72. Indeed, according to Giddens, although all states seem to have been associated with territoriality, “[w]hat is specifically late European is the fixing of very precise boundaries that actually *do* effectively mark the realm of the administration of the state.” *Id.* at 172.

593. *See supra* text accompanying notes 448-466.

594. *See* ROBERTS, *supra* note 467, at 128.

595. *See* BILLIG, *supra* note 543, at 20.

596. *See* ROBERTS, *supra* note 467, at ____.

597. *See* BILLIG, *supra* note 543, at 20.

598. Michael Mann, *European Development: Approaching a Historical Explanation*, in *EUROPE AND THE RISE OF CAPITALISM* (Jean Baechler *et al.* eds., 1988).

599. *See* BILLIG, *supra* note 543, at 20.

distant monarchs.⁶⁰⁰ If kings raised armies, they did so through the local lords.⁶⁰¹ And wars were the principal means of conducting politics; they were constant, seldom announced officially, and were rarely brought to formal conclusion.⁶⁰² Not surprisingly, the mass of inhabitants in what is now France or England did not think of themselves as English or French and had little conception of a territorial nation to which they owed allegiance.⁶⁰³

The social psychological and sociological literature is filled with similar examples of non-national conceptions of identity. In one study, a group of peasants in Western Galicia at the turn of the twentieth century were asked whether they were Poles. “We are quiet folk,” they replied. When asked whether, instead, they were Germans, they responded, “We are decent folk.” Joshua Fishman, in describing this story, concludes that the identity of these people was bound up in *this* village or *this* valley, rather than an abstract idea like a nation.⁶⁰⁴ Others have noted that rural Slovaks, in emigrating to the U.S. at about the same time, were often unable to articulate a national identity, reporting only the village from which they had come.⁶⁰⁵ Similarly, in Central Arabia, nationalism was not a central category for self-description until the twentieth century.⁶⁰⁶ Previously, identities had been based on tribal identification or “sphere of trade.”⁶⁰⁷

Anderson’s conception of nation-state as imagined community allows us to see that, although we often reserve the term “nationalist” for extremist groups seeking recognition from a modern state,⁶⁰⁸ the state itself often operates as a nationalist enterprise, encouraging identification in a community that matches the state’s geographical borders. This nation-state nationalism is often overlooked because we assume that such nationalism is “natural.” Thus, “the separatists, the fascists and the guerrillas are the problem of nationalism. The ideological habits, by which ‘our’ nations are reproduced as nations, are unnamed and, thereby, unnoticed.”⁶⁰⁹

The rise of the nation-state, therefore, is a theory of community, not a natural or historically grounded set of cultural realities. Moreover, “[t]he assertion of belonging to a “people”, if made in a political context in which ‘peoples’ are assumed to deserve nation-states, is not an assertion of inner

600. *See id.*

601. *See id.*

602. *See id.*

603. *See, e.g.,* FERNAND BRAUDEL, *THE IDENTITY OF FRANCE: VOL. 1. HISTORY AND ENVIRONMENT* (1988); HUGH SETON-WATSON, *NATIONS AND STATES* (1977).

604. *See* JOSHUA A. FISHMAN, *LANGUAGE AND NATIONALISM* 6 (1972).

605. *See* PAUL R. BRASS, *ETHNICITY AND NATIONALISM* 39 (1991).

606. *See* CHRISTINE M. HELMS, *THE COHESION OF SAUDI ARABIA* (1981).

607. *Id.*

608. *See* BILLIG, *supra* note 543, at 5 (“In both popular and academic writing, nationalism is associated with those who struggle to create new states or with extreme right-wing politics. According to customary usage [the American president] is not a nationalist; but separatists in Quebec and Brittany are; so are the extreme right-wing parties such as the Front National in France.”).

609. *Id.* at 6.

psychological identity. A movement of national independence will not only claim that ‘we are a nation’, but in so doing it will be demanding the political entitlements which are presumed to follow from being a nation.”⁶¹⁰ Thus, the feelings of national identification are politically and culturally constructed.⁶¹¹

The idea that the composition of a nation is a political, not a natural, process is true not only in the western European nation-states discussed by Anderson, but even in so-called homogenous states, like Japan. Although many commentators have assumed that countries such as China, Korea, and Japan are ethnically homogenous,⁶¹² recent scholarship has challenged this claim. For example, one study argues that Japanese identity and much of Japanese officialdom has evolved through interaction with both internal others (minorities) and external others (foreigners), who were just as important for Japanese self-identification as were internal “cultural” constructions.⁶¹³ Similarly, movements in the 1970s and 1980s to define

610. *Id.* at 63.

611. *See id.* at 60-61 (observing that feeling patriotic about one’s nation requires pre-existing social representations of what a nation is and what patriotism means). Ernest Gellner and Anthony Giddens likewise emphasize that nation-states are not founded on “objective” criteria. Rather, identification with a national community is a phenomenon of social psychology. Indeed, on the very first page of *Nations and Nationalism*, Gellner asserts that “nationalism is primarily a political principle, which holds that the political and the national unit should be congruent.” GELLNER, *supra* note 509, at 1. According to Gellner, nationalism cannot exist as a concept without a taken-for-granted belief that the state is the legitimate political entity. *See id.* at 4. Accordingly, the national state becomes linked with a national culture and thereby becomes seen as the “natural political unit.” *See id.* at 409. Gellner not only links national consciousness to the existence of the state but also highlights the political reasons it becomes necessary to make the bridge between nation and state appear natural.

Giddens has focused on the new forms of governance that arose concurrent to the rise of the nation-state. *See* ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* (1985). He defines the nation-state as “a set of institutional forms of governance maintaining an administrative monopoly over a territory with demarcated boundaries, its rule being sanctioned by law and direct control of the means of internal and external violence.” *Id.* at 120. In Giddens’ view, the nation-state is a “bounded power-container”: fixed boundaries and ability to wreak official violence are its key attributes. *Id.* He argues, moreover, that nation-states cannot exist in isolation, but only as part of a worldview that sees an entire complex of nation-states knitted together in a world system. *See* GIDDENS, *supra* note 520, at 171. Accordingly, we have a system of nations who go to war against each other. “In this new world of nations-at-war, there was little room for a Duke of Burgundy or an Earl of Warwick to march into the fray at the head of a private retinue.” BLLIG, *supra* note 543, at 21. Rather, local warlords appear in places where state authority has disappeared. Finally, the geographical boundedness of nations and the nation-state’s monopolization of violence is constantly reflected in rhetoric, symbolic imagery, and habits of thinking until they appear to be not only the primary means of organizing political community, but the most natural way of doing so.

612. *See, e.g.*, HOBBSAWM, *supra* note 543, at 66 (1992) (“China, Korea and Japan...are indeed among the extremely rare examples of historic states that are composed of a population that is ethnically almost or entirely homogenous.”).

613. *See* Emiko Ohnuki-Tierney, *A Conceptual Model for the Historical Relationship Between the Self and the Internal and External Others: The Agrarian Japanese, the Ainu, and the Special-Status People*, in *MAKING MAJORITIES: CONSTITUTING THE NATION IN JAPAN, KOREA, CHINA, MALAYSIA, FIJI, TURKEY, AND THE UNITED STATES* 31-51 (Dru C. Gladney

distinctive features of Japanese culture and identity were launched in opposition to western influence because the business and administrative elite were concerned about too *little* Japanese homogeneity.⁶¹⁴

So, how is national community formed? Anderson traces the ascendancy of the nation-state to the development of what he calls “print capitalism.”⁶¹⁵ He argues that the old orders of religiously unified communities, divinely determined monarchs, and static cosmologies were slowly challenged by the impact of economic change, social and scientific discoveries, and the development of increasingly rapid communications.⁶¹⁶ According to Anderson the new order of print capitalism “made it possible for rapidly growing numbers of people to think about themselves, and to relate to others, in profoundly new ways.”⁶¹⁷

Anderson argues that the development of the printing press and the relative ease with which literary works came to be disseminated laid the basis for national consciousness in three distinct ways. First, the spread of print languages meant that there were “unified fields of exchange” operating “below” Latin, but “above” the huge variety of locally-distinct spoken vernaculars.⁶¹⁸ Thus, “[s]peakers of the huge variety of Frenches, Englishes, or Spanishes, who might find it difficult or even impossible to understand one another in conversation, became capable of comprehending one another via print and paper.”⁶¹⁹ In the process, Anderson argued, these readers became aware of a broader community of readers to which they belonged that was beyond the local, but not as large as the world. Newspapers enabled the nation to be represented by the juxtaposition of stories from different “parts” which were then assimilated within one polity. The newspaper also allowed the nation to differentiate itself from others by the presentation of “international” and “foreign” news as something separate from “domestic” or “national” news.⁶²⁰ Second, according to Anderson, the rise of print-capitalism allowed languages to become more fixed, therefore further cementing identity based on shared linguistic tradition.⁶²¹ Third, and relatedly, Anderson argues that those vernaculars that were closest to the print languages rose in status and began to form something beginning to approach an “official” language that would be understood by a broader group.⁶²²

ed., 1998).

614. See Kosaku Yoshino, *Culturalism, Racialism, and Internationalism in the Discourse on Japanese Identity*, in *MAKING MAJORITIES*, *supra* note 613, at 13-30.

615. ANDERSON, *supra* note 543, at 36.

616. *See id.*

617. *Id.*

618. *Id.* at 44.

619. *Id.*

620. *See id.* at 16.

621. *See id.* at 44-45.

622. *See id.* at 45.

Other theorists have explored the myriad ways in which national identification, once introduced, is continually reinforced in the modern era. For example, Michael Billig has studied what he calls “banal nationalism”: the everyday habits of life that serve subconsciously to remind citizens of their affiliation with a particular nation-state in a world of nation-states.⁶²³ Billig writes:

In so many little ways, the citizenry are daily reminded of their national place in a world of nations. However, this reminding is so familiar, so continual, that it is not consciously registered as reminding. The metonymic image of banal nationalism is not a flag which is being consciously waved with fervent passion; it is the flag hanging unnoticed on the public building.⁶²⁴

Thus, although we usually think of nationalist movements as possibly suspicious or artificial efforts by sub-groups to claim historical pedigree and moral and political authority, Billig makes clear that nationalism is continually reinscribed even in seemingly established nation-states.⁶²⁵

In response to the inherently imagined nature of their existence, nations make calls upon something called national “identity.” And, true to the social psychological theories, national identity is formed through self-categorization: articulating attributes that make “we” of one group different from “them” in another group. One such attribute is the telling of a unified national “history.” Indeed, it is no coincidence that the rise of nation-states was accompanied by the creation of national historical tales⁶²⁶ and the rise of the professional historian.⁶²⁷ These state-funded historians were a

623. See generally BILLIG, *supra* note 543.

624. *Id.* at 8; see also Gupta, *supra* note 3, at 185 (“In addition to practices oriented externally - that is, toward other states - some of the most important features that enable the nation to be realized are flags, anthems, constitutions and courts, a system of political representation, a state bureaucracy, schools, public works, a military and police force, newspapers, and television and other mass media.”).

625. Anthony D. Smith has argued that the social science literature on nationalism relies too much on a “top down” method whereby elites manipulate “the masses” into feelings of nationalist identification. See SMITH, *supra* note 540, at 40. To Smith, this neo-Marxist outlook “debars us from grasping the popular power of nationalism, its capacity for mass mobilization, and the vital energizing role played by culture and symbolism.” *Id.* While I believe this objection to be valid, my argument here (and Billig’s as well, I think) is not that the masses are manipulated by some devious elites to believe in nationalism, but rather that nationalism is a socially constructed, constitutive, and self-perpetuating phenomenon, and all members of society are simultaneously agents and recipients of nationalist sentiment. Thus, Smith’s objections to a neo-Marxist view of nationalism seem to have less weight with regard to Billig’s more Foucauldian approach.

626. See, e.g., Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION 1* (Eric Hobsbawm & Terence Ranger eds., 1983); LINDA COLLEY, *BRITONS: FORGING THE NATION, 1707-1837* (1992) (describing the “invention” of a British national identity in the eighteenth and early nineteenth centuries).

627. See Friedland & Boden, *supra* note 425, at 10 (“[T]he professional historian emerged in the nineteenth century at the same time that states were struggling to create a unified nation in the territories over which they claimed sovereignty.”).

mechanism by which states bolstered their power and integrated linguistically and ethnically diverse populations.⁶²⁸ Thus, as Edward Said observed, nation-states are “interpretive communities” as well as imagined ones.⁶²⁹ Similarly, Akhil Gupta argues that nationalism is “a distinctively modern cultural form [that] attempts to create a new kind of spatial and mythopoetic metanarrative.”⁶³⁰

Moreover, Gupta contends, nationalism itself transforms pre-existing narratives of community. “[N]ationalism does not so much erase existing narratives as *recast* their difference. The recognition that different ethnic groups, different locales, and different communities and religions have each their own role to play in the national project underlines their differences at the same time that it homogenizes and incorporates them.”⁶³¹ Such national histories “tell of a people passing through time—‘our’ people, with ‘our’ ways of life, and ‘our’ culture.”⁶³²

For example, when Scots get together to celebrate their national identity, they appear to be steeped in tradition, with men wearing kilts, each clan having its own tartan, and bagpipes wailing full blast. By means of these symbols, they show their loyalty to seemingly ancient rituals—rituals whose origins go far back into antiquity. Yet, as Hugh Trevor-Roper has argued, these symbols of Scottishness were actually a creation of the industrial revolution.⁶³³ Indeed, the short kilt was invented by an English industrialist to allow Highlanders to work in the factory. Moreover, Anthony Giddens observes that even the notion of a tradition is the product of modernity. In medieval times, by contrast, there was no conception of tradition “precisely because tradition and custom were everywhere.”⁶³⁴ Thus, the idea of a traditional national culture is an imagined narrative, passed on like an inheritance through generations.⁶³⁵ Through such an

628. *See id.*

629. EDWARD W. SAID, *THE WORLD, THE TEXT, AND THE CRITIC* (1983).

630. Gupta, *supra* note 3, at 191; see also Friedland & Boden, *supra* note 425, at 10 (“[T]erritorial historicity is the core of the nation-states legitimacy and an element in the narrative of modernity.”).

631. *Id.*

632. Billig, *supra* note 543, at 71; see also generally M. WETHERELL & J. POTTER, *MAPPING THE LANGUAGE OF RACISM* (1992). Indeed, pop cultural forms may also tell nationalist histories. See generally, e.g., Purnima Mankekar, *Making Modernities: The Ramayan and the Creation of Community and Nation*, in *SCREENING CULTURE, VIEWING POLITICS: AN ETHNOGRAPHY OF TELEVISION, WOMANHOOD, AND NATION* 165 (1999) (discussing the relationship between a nationally broadcast television dramatization of an important Hindu epic tale and the consolidation of Hindu nationalism in subsequent years).

633. Hugh Trevor-Roper, *The Invention of Tradition: The Highland Tradition of Scotland*, in *THE INVENTION OF TRADITION*, *supra* note 626, at 15.

634. GIDDENS, *supra* note 6, at 57 (1999).

635. See Eugene Balibar, *Is There a Neo-Racism*, in EUGENE BALIBAR & IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS* 17, 24-25 (1991) (discussing the way in which conceptions of national culture inscribe racist assumptions). For a further discussion of the “racialization” of the idea of national culture, see generally M. BARKER, *THE NEW RACISM* (1981); T.A. VAN DIJK, *ELITE DISCOURSE AND RACISM* (1993).

invention of tradition, the nation becomes conceptualized in kinship terms: the nation is a “family” passing down identity over time, living in the “motherland” or “fatherland.”⁶³⁶

This reference to land brings forth another attribute in the imagining of a national community: the idea of a homeland. Indeed, this tie between group identity and land is essential to the modern idea of the nation-state. After all, many peoples have nurtured a sense of their own communal distinctiveness “in the specific history of the group, and, above all, in the myths of group origins and group liberation.”⁶³⁷ Nationhood, however, requires the added element of place. Nationalism is never “beyond geography.” Moreover, this geography is more than a physical setting. After all, as previously discussed, pre-modern communities had a strong sense of attachment to their particular physical surroundings.⁶³⁸ Thus, what makes a nation-state distinctive is the imagining of an overall “country” in which lived-in localities are united within a wider homeland. The inhabitants of that homeland will generally be personally familiar with only a small part of the land, but the nation is conceived as a totality. Thus, it must of necessity be *imagined* as a totality, rather than directly apprehended. Yet, again and again, these “images of virgin territories, self-evident boundaries, and datable original occupation turn out to be mere mirages: territorial claims become more obscure, not clearer, the further you dig in the past.”⁶³⁹

Finally, as the Social Identity Theory suggests, there can be no “us” without a “them.” Accordingly, the national community can only be imagined by also imagining foreigners. “The structures of feeling that enable meaningful relationships with particular locales, constituted and experienced in a particular manner, necessarily include the marking of ‘self’ and ‘other’ through identification with larger collectivities. To be part of a community is to be positioned as a particular kind of subject, similar to others within the community in some crucial respects and different from those who are excluded from it....”⁶⁴⁰ For some nations, the claim to antiquity will often involve the affirmation of a continuous chain of racial inheritance going back to a biologically pure past.⁶⁴¹ For others, it will be founded in stories about exceptionalism: that which makes our nation superior to all others on the planet. But in either case, the imagined community of the nation-state is very different from the localism of the fishing village discussed earlier. Whereas that group might also view itself

636. See G.R. Johnson, *In the Name of the Fatherland: an Analysis of Kin Term Usage in Patriotic Speech and Literature*, 8 INT’L POL. SCI. REV. 165 (1987); NIRA YUVAL-DAVIS, GENDER & NATION 15 (1993) (arguing that in a “naturalized image of the nation...nations not only are eternal and universal but also constitute a natural extension of family and kinship relations”).

637. BILLIG, *supra* note 543, at 74.

638. See text accompanying notes 604-607, *supra*.

639. Rée, *supra* note 505, at 81.

640. Gupta & Ferguson, *Ethnography*, *supra* note 468, at 17-18.

641. See Rée, *supra* note 505, at 81

in contradistinction to those beyond the village, it can often simply ignore the terrain beyond. Nationalism, in contrast, is always professed in an international context. “Even the most extreme...nationalists do not shut out the outside world from consciousness, but often show an obsessive concern with the lives and outlooks of foreigners.”⁶⁴²

Thus, we see again the nation-state is a particular type of imagined community, one that could not have existed prior to modernity and the increasing awareness of an international system. The nation-state, socially constructed and historically contingent, is only one way of parsing the modern world. In the next section, I will consider several alternative visions.

D. Conceptions of Subnational, Supranational, Transnational, and Cosmopolitan Identities

Although nation-states have become the dominant form of organizing space in the contemporary world, there are other ways of imagining community and constructing identity. As we have seen, not only are processes of placemaking always contested and unstable but also relations between places are continuously shifting as a result of the political and economic reorganization of space in the world system. Moreover, “[j]ust as the formation of nation-states was one of the defining characteristics of an earlier era, their rapid and often radical transformation is one of the defining characteristics of ours.”⁶⁴³ Thus, we need to look at nation-state sovereignty against the backdrop of alternative transnational, international, or subnational identities, or perhaps even against forms of imagining community that are not territorially based.⁶⁴⁴ “The structures of feeling that constitute nationalism need to be set in the context of other forms of imagining community, other means of endowing significance to space in the production of location and ‘home.’”⁶⁴⁵

1. Subnational Communities

Subnational communities can include political identifications that are more local than the nation-state—such as provinces, states, towns, and voting districts—or affiliations that form around specific functions or activities—such as water regions, geographical areas, block associations,

642. See Billig, *supra* note 543, at 80.

643. Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 3, 3 (Austin Sarat & Stuart Scheingold eds. 2001) (hereinafter *CAUSE LAWYERING*).

644. See Gupta & Ferguson, *Ethnography*, *supra* note 468, at 17; see also Gupta, *supra* note 3, at 181 (“We need to pay attention to the structures of feeling that bind people to geographical units larger or smaller than nations or that crosscut national boundaries.”).

645. *Id.* at 193.

bowling leagues, religious institutions, and schools—or commonalities that derive from a purported ethnic identification that is not coterminous with the nation-state, such as Basques in Spain, Sikhs in India, Tamils in Sri Lanka, or even white supremacist militias in the United States. All of these communities are often spatially localized and therefore may play a more tangible role in everyday life than broader community allegiances.

It is unclear whether all subnational community identification is on the rise. Certainly, commentators have noted an increase in subnational political identifications in the wake of the Soviet Union's collapse and the internationalization of economic activity.⁶⁴⁶ Most often this rise in "tribalism" is viewed as a response to globalization: the argument is that people "seek a level of comfort in their communities to withstand the complexity and atomization that modern capitalism has wrought on their lives and to free themselves from domination by 'alien' elites."⁶⁴⁷ Thus, Richard Falk argues that one response to economic globalization is a "backlash politics that looks either to some pre-modern traditional framework as viable and virtuous...or to ultra-territorialists that seek to keep capital at home and exclude foreigners to the extent possible."⁶⁴⁸ These responses tend to emphasize a "sacred religious or nationalist community of the saved that is at war with an evil 'other,' either secularist or outsider."⁶⁴⁹ Such subnational communities are therefore viewed as oppositional and reactive. Alternatively such communities may grow more salient not in opposition to global events, but simply to fill a power vacuum in moments when the nation-state loses authority. Thus, for example, the dissolution of Yugoslavia quickly degenerated into tribalism and a battle waged among people allied to various imagined ethnic and historical communities.⁶⁵⁰ If every nation-state is multi-ethnic at least to some degree, then constructed communities along those ethnic cleavages will always be available.

Subnational communities can also be viewed, however, in a less negative light, as the building blocks of civil society. My seemingly fanciful inclusion of bowling leagues as an example of subnational affiliation was not accidental. Recently, Robert Putnam has argued that the decline in the United States of bowling leagues and other localized civic group activities is a serious problem that has done and will continue to do harm to the American polity.⁶⁵¹ According to Putnam, such groups foster the development of "social networks and the norms of reciprocity and

646. See, e.g., HORSMAN & MARSHALL, *supra* note 7, at 185.

647. *Id.*

648. RICHARD FALK, PREDATORY GLOBALIZATION 142 (1999).

649. *Id.* at 142. The Islamic fundamentalist regimes in Iran, Algeria, and Afghanistan in recent years would be examples of the backlash Falk describes.

650. See Horsman & Marshall, *supra* note 7, at 188.

651. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 27-28 (2000) ("[O]ur schools and neighborhoods don't work so well when community bonds slacken, [and] our economy, our democracy, and even our health and happiness depend on adequate stocks of social capital.).

trustworthiness that arise from them.’⁶⁵² Without these social networks, Putnam argues, core societal institutions suffer.⁶⁵³

Those looking to promote *global* civil society initiatives also tend to focus on subnational affiliations. For example, Michael Edwards, Director of the Ford Foundation’s Governance and Civil Society Unit, stresses three ways for communities to respond to global problems such as income inequality or environmental degradation. First, in the realm of formal politics, he points to the possibility that civic groups, governments, businesses, and donor agencies can come together to develop regional initiatives for economic development or natural resources management.⁶⁵⁴ Second, in the economic realm, subnational coalitions can help markets work to the benefit of smaller communities by reducing the benefits siphoned off by intermediaries. Thus, peasant foresters in Mexico have begun to negotiate higher prices directly with timber companies, and rubber tappers in Brazil have been able to retain a higher price for their produce, solely by organizing themselves into coordinated groups.⁶⁵⁵ According to Edwards, collective community action of this sort “stimulates both equity and efficiency, and builds a sense of solidarity among people who are sharing risks as well as benefits.”⁶⁵⁶ Finally, he argues that local pressure groups, membership associations, and specialized authorities are essential to “build the preconditions of democracy by injecting a wider range of views and voices into the political arena.”⁶⁵⁷

Similarly, Richard Falk advocates “globalization-from-below” as the best response to “globalization-from-above.”⁶⁵⁸ He notes, for example, that green parties in Europe in the 1980s were able to expose the drawbacks of global capitalism, particularly in the environmental arena.⁶⁵⁹ Other local affiliations have formed around specific encroachments, such as the siting of a nuclear power plant or dam, which have mobilized residents or areas facing displacement or loss of livelihood.⁶⁶⁰ Nevertheless, though these subnational affiliations also have had some success,⁶⁶¹ Falk ultimately

652. *Id.* at 19.

653. *See id.* at 288-89 (arguing that social capital “allows citizens to resolve collective problems more easily,” provides the trust required for economic transactions, and serves as a conduit for the free flow of information necessary to a functioning democracy).

654. *See* EDWARDS, *supra* note 6, at 136.

655. *See id.* at 151; *see also* MEDIATING SUSTAINABILITY: GROWING POLICY FROM THE GRASSROOTS (Jutta Blauert & Simon Zadek eds., 1998) (exploring ways that rural communities have sought to influence policies affecting their livelihoods and quality of their natural environment through collaboration and mediation involving producer organizations, non-governmental organizations, and advisers); C. MENDES, FIGHT FOR THE FOREST (1989).

656. *See* EDWARDS, *supra* note 6, at 151.

657. *Id.* at 178.

658. *See* FALK, *supra* note 648, at 127-36.

659. *See id.* at 143.

660. *See id.*

661. *See, e.g.,* Vandana Shiva, *People’s Ecology: The Chipko Movement*, in TOWARDS A JUST WORLD PEACE: PERSPECTIVES FROM SOCIAL MOVEMENTS 253 (R.B.J. Walker & Saul H. Mendlovitz eds., 1987); BRUCE RICH, MORTGAGING THE EARTH: THE

concludes that *transnational* civil society efforts are likely to be even more effective.⁶⁶²

2. *Transnational Communities*

Turning to such transnational affiliations, we can differentiate them from those that are international because transnational communities do not necessarily envision common world membership or global governmental institutions. Rather, transnational communities are communities of interest that cut across nation-state boundaries. Perhaps the most important transnational force in recent years has been the transnational corporation itself. “The global capitalist system increasingly operates on bases other than national, and effective means of asserting political control over the transnational economy and of requiring [trans-national corporations] to be accountable to political institutions have yet to be developed.”⁶⁶³ Once cities were used as trading centers to connect firms. “Market geographies were so powerful that what was produced was determined by where it was produced.”⁶⁶⁴ Now, it is *corporate* geography, rather than *territorial* geography, that determines what is produced and where. “Because of their newfound capacity to instantaneously coordinate production and distribution around the globe, to downsize and subcontract, factories and firms have lost their dependence on particular cities or regions.”⁶⁶⁵

Examples of such transnational corporate activity abound. Indeed, production by transnational corporations outside their “home base” now exceeds the volume of all world trade, indicating that trade within firms, rather than among them, is a growing proportion of world commerce.⁶⁶⁶ Sales figures for many transnationals rank higher than the gross domestic product of many countries.⁶⁶⁷ And, of course, because money can so easily be transferred through global capital markets around the world⁶⁶⁸ central banks are severely limited in their ability to affect national monetary policy.⁶⁶⁹

WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT 283-93 (1994) (describing ways in which “local populations long marginalized from the grand narrative of modern history are mobilizing to defend ecological balance and fight against the destruction of resources upon which their survival depends”).

662. See FALK, *supra* note 648, at 143-44.

663. HORSMAN & MARSHALL, *supra* note 7, at 172.

664. Friedland & Boden, *supra* note 425, at 12.

665. *Id.* at 13; see also Donald Palmer & Roger Friedland, *Corporation, Class and the City System*, in STRUCTURAL ANALYSIS OF BUSINESS (Mark S. Mizruchi & Michael Schwartz eds. 1987).

666. See HORSMAN & MARSHALL, *supra* note 7, at 201.

667. See Conference Board of New York, *Report* (1992).

668. See, e.g., Ted C. Fishman, *The Joys of Global Investment*, HARPERS (Feb. 1997).

669. See e.g., David G. Oedel, *Puzzling Banking Law: Its Effects And Purposes*, 67 U. COLO. L. REV. 477, 537 (1996) (observing that the “general significance of centralized supervision of the money supply is rapidly declining in the modern global economy”); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION xi-xii (1995)

Regional trading blocs and free-trade zones create another form of transnational economic space that is both related to geography and yet beyond the bounds of nation-states. These zones have proliferated in recent years.⁶⁷⁰ Although NAFTA is perhaps the most familiar to Americans, trade groups now exist in South America⁶⁷¹ and Southeast Asia⁶⁷² (not to mention the European Union itself), and others cut across even regional identification.⁶⁷³

All of this commercial activity inevitably affects cultural identification. “In the transnational public sphere, peoples’ identities as citizens of a nation are multiply refracted by their inventive appropriation of goods, images, and ideas distributed by multinational corporations.”⁶⁷⁴ Arjun Appadurai highlights international fashion as one area where the global impact goes far beyond “cross-national-style cannibalism” to the “systematic transnational assemblage[] of production, taste transfer, pricing, and exhibition.”⁶⁷⁵ Elsewhere, we see concerns about the impact of American food, clothing, or mass entertainment, amid concerns about post-colonial imposition of homogenized taste that was so memorably captured by Benjamin Barber in the title of his 1995 book *Jihad vs. McWorld*.⁶⁷⁶

(noting that “[s]tate sovereignty, nation-based citizenship, the institutional apparatus in charge of regulating the economy, such as central banks and monetary policies—all of these institutions are being destabilized and even transformed as a result of globalization and the new technologies”); see also Dani Rodrik, *Governance of Economic Globalization*, in GOVERNANCE IN A GLOBALIZING WORLD 347, 351 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000). (“A familiar result of open economy macroeconomics is that countries cannot simultaneously maintain independent monetary policies, fixed exchange rates, and an open capital account.”).

670. See William H. Lash, III, *The Decline of the Nation State in International Trade and Investment*, 18 CARDOZO L. REV. 1011, 1012 (1996) (citing statistics regarding growth of trade within regional free-trade associations).

671. The ANDEAN Group includes: Bolivia, Colombia, Ecuador, Peru, and Venezuela.

672. The ASEAN Group includes: Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Vietnam.

673. For example, the APEC Group includes: Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Mexico, Malaysia, New Zealand, Papua New Guinea, the Philippines, Singapore, Taiwan, Thailand, the United States, and Vietnam.

674. Gupta, *supra* note 3, at 193-94.

675. APPADURAI, *supra* note 6, at 167.

676. BENJAMIN BARBER, *JIHAD V. MCWORLD* (1995) Others argue that globalization has not led to cultural homogenization. See, e.g., AIHWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 10 (1999) (“The dispersal of Coke, McDonald’s Restaurants, and American TV soap operas to villages in West Africa or to Cairo, Beijing, or Sydney is not bringing about a global cultural uniformity; rather, these products have had the effect of greatly increasing cultural diversity because of the ways in which they are interpreted and the way they acquire new meanings in local reception or because the proliferation of cultural difference is superbly consonant with marketing designs for profit making.”). For further discussion of this “cultural imperialism” question, see generally Hannerz, *supra* note 472; ANG IEN, LIVING ROOM WARS: RETHINKING MEDIA AUDIENCES FOR A POSTMODERN WORLD (1996); Stuart Hall, *Cultural Identity and Diaspora*, in IDENTITY: COMMUNITY, CULTURE, DIFFERENCE 222 (J. Rutherford ed., 1990).

Nevertheless, in many areas it is increasingly difficult to define corporate activity with a particular national moniker. Even leaving aside transnational mergers such as Daimler-Chrysler, is an automobile sold by an “American” corporation really a U.S. product, when most of its component parts are manufactured and assembled abroad? Are jobs created by Japanese plants in the Mississippi Valley a measure of the health of the American economy or the Japanese economy?⁶⁷⁷ Is it American mass culture when the Sony corporation (nominally Japanese) releases a film?

Moreover, the modern corporation, the international monetary fund, the free trade region, and the global commodities market form only one area in which transnational affiliation has become significant. The impact of transnationalism is far broader. Indeed, if we look more closely, we can see a wide variety of “complex, postnational social formations.”⁶⁷⁸ As Appadurai has argued, “[t]hese formations are now organized around principles of finance, recruitment, coordination, communication, and reproduction that are fundamentally postnational and not just multinational or international.”⁶⁷⁹ Simply listing examples gives a sense of the scope. Transnational philanthropic movements such as Habitat for Humanity send volunteers around the globe to build new environments.⁶⁸⁰ The emergence of a diffuse overarching European identity, while not replacing national identification, has begun to create “a shift towards multiple loyalties, with the single focus on the nation supplanted by European and regional affiliations above and below.”⁶⁸¹ Global public policy networks, ranging in focus from crime to fisheries to public health, have emerged in the past decade, bringing together loose alliances of government agencies, international organizations, corporations, and elements of civil society, such as nongovernmental organizations, professional associations, and religious groups.⁶⁸²

In addition, such global public policy networks are only one part of a “nascent international civil society”⁶⁸³ that includes NGOs such as

677. This example is taken from Kenichi Ohmae, *The End of the Nation State*, in *THE GLOBALIZATION READER* 207, 208 (Frank J. Lechner & John Boli eds., 2000).

678. Arjun Appadurai, *Patriotism and Its Futures*, in *MODERNITY AT LARGE*, *supra* note 6, at 158, 167.

679. *Id.*

680. *See id.*

681. *See* HORSMAN & MARSHALL, *supra* note 7, at 179; *see also* Lindseth, *supra* note 298, at 682 (“The notion of multiple membership in overlapping demoi may in fact be an accurate reflection of the undoubted fragmentation of power and sovereignty in the modern state, of which the [European Community] is both an agent and a consequence.”) (footnote omitted).

682. *See* Wolfgang H. Reinicke, *The Other World Wide Web*, *FOREIGN POLICY* (1999/2000).

683. EDWARDS, *supra* note 6, at 179; *see also* FALK, *supra* note 648, at 138 (describing “global civil society”); Richard Falk, *An Inquiry Into the Political Economy of World Order*, 1 *NEW POLITICAL ECONOMY* 13 (1996); M. SHAW, *GLOBAL SOCIETY AND*

Amnesty International, Oxfam, and Greenpeace, as well as business and trade union networks and cooperative efforts of government actors including banking regulators, law-enforcement officials, intelligence agencies, judiciaries, and other local authorities.⁶⁸⁴ Such civil society initiatives function sometimes as *an aspect of globalization* by challenging nation-state sovereignty, particularly with regard to human rights norms, and other times as *an organized resistance to globalization*, particularly with regard to economic, trade, environmental, and labor policy. While some NGOs, like Amnesty International, monitor the activities of the nation-state, others “work to contain the excesses of nation-states...by assisting refugees, monitoring peace-keeping arrangements, organizing relief in famines, and doing the unglamorous work associated with oceans and tariffs, international health and labor.”⁶⁸⁵ Transnational networks of lawyers also work to challenge many of the perceived injustices of globalization.⁶⁸⁶

Such transnational policy efforts have been deployed with increasing frequency. The international anti-apartheid movement was perhaps the first successful global civil society effort to combine shareholder, consumer, and governmental action, persuading many corporations, universities, and pension funds to divest themselves of South African investments long before official national sanctions were in place.⁶⁸⁷ Similar boycott efforts have resulted in changes to tuna fishing so as to protect dolphins,⁶⁸⁸ a decision by the French government to suspend its nuclear testing program,⁶⁸⁹ and alteration in Shell Oil’s decommissioning of

INTERNATIONAL RELATIONS (1995); P. Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POLITICS 311 (1995); M. DE OLIVEIRA & R. TANDON, *CITIZENS STRENGTHENING GLOBAL CIVIL SOCIETY* (1994); T. PRINCEN & M. FINGER, *ENVIRONMENTAL NGOs IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL* (1994).

684. See EDWARDS, *supra* note 6, at 179; see also JOHN VOGLER, *THE GLOBAL COMMONS: ENVIRONMENTAL AND TECHNOLOGICAL GOVERNANCE* 20-41 (2d ed., 2000) (using “regime analysis” to discuss such complex international cooperative efforts).

685. Appadurai, *supra* note 6, at 168.

686. See generally CAUSE LAWYERING, *supra* note 643.

687. See Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 CARDOZO L. REV. 957, 959 (1996).

688. See WESTERN MORNING NEWS, 2002 WL 5839498 (Feb. 7, 2002) (Reporting that, whereas a decade ago dolphins were regularly threatened by tuna fishing with “wall of death” nets, now, as a result of successful public awareness campaigns, tuna fishing techniques have changed, and tuna manufacturers routinely label their tuna containers as “dolphin safe”); National Oceanic and Atmospheric Administration, SEA POWER 223232, 2002 WL 13922711 (Jan. 1, 2002) (Reporting a “notable success” in forging “international cooperation that allows ‘dolphin-safe’ tuna to be harvested, while ensuring the health of dolphin stocks).

689. See *Car Crash Claims Life of Greenpeace International Founder*, ENV’T NEWS SERV., 2001 WL 8662796 (Mar. 23, 2001), (crediting Greenpeace with having created pressure that helped push the French government to end its nuclear testing program).

a rig in the North Atlantic.⁶⁹⁰

In addition, NGOs are increasingly formulating global standards of behavior. These “codes of conduct” have appeared most prominently with regard to human rights, environmental protection, and fair labor standards. As *The Economist* recently observed “a multinational’s failure to look like a good global citizen is increasingly expensive in a world where consumers and pressure groups can be quickly mobilised behind a cause.”⁶⁹¹ In response, prominent corporate leaders, including AT&T, Federal Express, Honeywell, and AOL Time-Warner have established Business for Social Responsibility “to enhance the quality of life for current and future generations.”⁶⁹² And, especially in the wake of the global movement against sweatshops,⁶⁹³ NGOs have been able to persuade many corporations to accept independent monitoring of adopted standards.⁶⁹⁴

Finally, in the area of human rights, NGOs have been active in pursuing transnational public law litigation of the sort discussed earlier in this Article⁶⁹⁵ as well as lobbying on behalf of humanitarian intervention around the globe. Indeed, in the last decade we have seen that various events, such as the Chernobyl nuclear disaster, the mistreatment of Kurds in Iraq, the starvation and lawlessness in Somalia in 1992-93, and the brutal human rights abuses in Kosovo have all brought international intervention in defiance of the old idea that national borders and sovereignty were sacrosanct.⁶⁹⁶ Two recent Secretaries General of the United Nations have gone so far as to question whether “the time of absolute and exclusive sovereignty...has passed.”⁶⁹⁷

In contrast to the development of global civil society, the development of transnational terrorist organizations such as Al Qaeda are a much darker example of transnational affiliation. Such organizations can

690. See Allan Pulsipher & William Daniel IV, *Onshore-only Platform Disposition Needs Exceptions*, OIL & GAS J. 64, 2001 WL 9151649 (Jan. 15, 2001) (Reporting that Shell’s decision to cancel its plan for an “at-sea disposition” of an oil rig followed an unexpectedly fierce campaign and public boycott)..

691. *Multinationals and their Morals*, ECONOMIST, Dec. 2, 1995, at 18 (editorial).

692. See Business for Social Responsibility Mission Statement, <<http://www.bsr.org/Meta/about/Mission.cfm>>. Similarly, the mission statement of World Business Council for Sustainable Development evinces a “shared commitment to sustainable development via the three pillars of economic growth, ecological balance and social progress.” <<http://www.wbcsd.ch/aboutus/index.htm>>.

693. See Ethan B. Kapstein, *The Corporate Ethics Crusade*, FOREIGN AFFAIRS 105, 2001 WL 2974607 (Sep. 1, 2001) (“Many prominent companies...began to experience the full force of NGO and media rage, with a barrage of stories and Internet-based campaigns aimed against their products. Students lobbied their universities to sever business ties with companies that employed sweatshop labor. As a result, several firms changed their behavior, raising standards abroad and inviting independent monitors to assess their progress.”).

694. See Spiro, *supra* note 687, at 962.

695. See *supra* text accompanying notes 137-170.

696. See Demko & Wood, *supra* note 7, at 10.

697. UN Press Releases, no. 5/24111, *An Agenda for Peace* (June 17, 1992), at 5; UN Press Release, no. SG/4560 (April 24, 1991).

mobilize personnel and deploy money around the world,⁶⁹⁸ functioning as quasi-state entities. Indeed, it is significant that the United States has been willing to treat Al Qaeda almost as if it were a sovereign state to be fought in a “war.” NATO invoked Article V of the North Atlantic Treaty (which pledges each signatory country to defend the others in the event of an armed attack),⁶⁹⁹ thereby treating the attack more as a military action than a criminal one.⁷⁰⁰ And the Bush administration has asserted the authority to try Al Qaeda operatives before military commissions, apparently based in part on the belief that the attacks on the World Trade Center and Pentagon were not simply crimes, but violations of the laws of war, which have customarily been reserved for state entities.⁷⁰¹

3. *Supranational Communities*

Whereas transnationalism binds people to communities of interest *across* territorial borders, supranationalism asserts the primacy of governing norms that exist *above* the nation-state. Perhaps the most obvious example of such affiliation is the United Nations, which insistently evokes an overarching narrative of world community.⁷⁰² Another that has drawn considerable attention in recent years is the effort to construct a European

698. See Benjamin Weiser and Tim Golden, *Al Qaeda: Sprawling, Hard-to-Spot Web of Terrorists-in-Waiting*, N.Y. TIMES, (Sep. 30, 2001), at B4; Susan Sachs, *An Investigation in Egypt Illustrates Al Qaeda's Web*, N.Y. TIMES (Nov. 20, 2001), at A1; Sam Dillon, *Indictment by Spanish Judge Portrays a Secret Terror Cell*, N.Y. TIMES, (Nov. 20, 2001) at A1; Tony Blair, *Responsibility for the Terrorist Atrocities in the United States, 11 September 2001, an Updated Account* (Nov. 14, 2001), available at <http://www.pm.gov.uk/news.asp?newsID=3025>. Other terrorist (or revolutionary) movements have similarly global links. See e.g. Vladimir Kucherenko, *Cause and Effect Nature of Globalization and Terror Argued*, Sept. 13, 2001, WORLD NEWS CONNECTION, available at Westlaw (citing “the Tamil movement fighting in Sri Lanka and southern India...[t]he guerrilla armies of Latin America which work closely with the drugs barons; the Kosovo terrorists in cahoots with the Albanian mafia in Europe; certain Arab groups; and the Chechen bandit[s]” as examples of quasi-state entities which utilize global technology to facilitate the flow of money and general coordination).

699. The North Atlantic Treaty, Art. V. (Apr. 4, 1949), available at <http://www.nato.int/docu/basic/txt/treaty.htm> (“The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them...will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.”).

700. See *Nato to Support U.S. Retaliation*, CNN.COM, (Sep. 12, 2001), available at <http://www.cnn.com/2001/WORLD/europe/09/12/nato.us> (reporting that NATO had invoked Article V in response to the attacks, the first time NATO had invoked the provision in 52 years).

701. See, e.g., Testimony of Pierre-Richard Prosper, Ambassador at Large for War Crimes, Before U.S. Senate Judiciary Committee Hearings on Military Tribunals, 2001 WL 1591408, at *17 (Dec. 4, 2001) (“As the President’s order [establishing military commissions] recognizes, we must call these attacks by the rightful name, ‘war crime.’”).

702. Nevertheless, as Gupta points out this supranational ideal is still premised on the idea of the world as a body of equal but different nation-states. See Gupta, *supra* note 3, at 185. Thus, the U.N. does not fully challenge nation-state sovereignty.

identity that operates beyond the individual nation-states on the continent.

In the post-Maastricht European Union, the line between a “national” and a European unit has become increasingly blurred.⁷⁰³ We now see a common currency, the ability to travel without visas, the development of a European parliament, along with a European administrative and judicial bureaucracy, the relaxation of trade barriers, tariffs, and taxation, and the free movement of labor.⁷⁰⁴ Such practices certainly resemble the activities and concerns of traditional nation-states so much that it could be argued that we are indeed seeing the dissolution of old national boundaries and the creation of a new, united nation of Europe.⁷⁰⁵ Though it may be unlikely that the nations constituting Europe will disappear,⁷⁰⁶ the shift is nevertheless a real and important one. Indeed, we may even be seeing a hybrid form of governance that is neither a unified federation nor a single European state, but is perhaps some combination of the two. “This tension between a federation and a confederation, between *integration* and *interdependence*, has been implicit in the notion of “Europe” since the beginning.”⁷⁰⁷

In order to understand whether the European Union is really inculcating notions of supranational community, one might look to the schools that have been established for the fifteen thousand children of the employees of the European Community.⁷⁰⁸ The explicit aim of these schools is to “create a whole new layer of identity in these kids.”⁷⁰⁹ According to reports, “[g]raduates emerge [from these schools] superbly educated, usually trilingual, with their *nationalism muted—and very, very European*”⁷¹⁰ This seems to be the intent. Indeed, the schools strive to educate students “not as products of a motherland or fatherland but as

703. See ALLAN M. WILLIAMS, *THE EUROPEAN COMMUNITY: THE CONTRADICTIONS OF INTEGRATION* (2d ed., 1994).

704. See Paul Teague, *Between Convergence and Divergence: Possibilities for a European Community System of Labour Market Regulation*, 132 INT’L LABOR REV. 391 (1993).

705. See, e.g., ALAN S. MILWARD ET AL., *THE FRONTIER OF NATIONAL SOVEREIGNTY: HISTORY AND THEORY, 1945-1992* (1993).

706. See Lindseth, *supra* note 298, at 680-83 (describing the “continued pull of the nation-state” in Europe); Alec Stone, *Ratifying Maastricht: France Debates European Union*, 11 FRENCH POLITICS & SOC’Y 70 (1993).

707. Gupta, *supra* note 3, at 186. Alan Milward et al. argue that the European Union is integrationist only in its plans for monetary union. In contrast, on topics such as immigration, defense, and foreign policy, the goal of coordinated policies is an attempt at interdependence. See Milward et al., *supra* note 705, at 20-30; see also Etienne Balibar, *Racism and Politics in Europe Today*, 186 NEW LEFT REV. 5, 16 (1991) (“The state today in Europe is *neither national nor supranational*, and this ambiguity does not slacken but only grows deeper over time.”).

708. See Gupta, *supra* note 3, at 186-87.

709. See Glynn Mapes, *Polyglot Students are Weaned Early off Mother Tongue*, WALL ST. J. (Mar. 6, 1990), at A1.

710. *Id.* (emphasis added).

Europeans”⁷¹¹

This effort has not been without contentiousness, particularly in the realm of history, where textbooks from a particular country tend to portray events in the past from that country’s point-of-view.⁷¹² Nevertheless, the European Community schools are attempting to create a new relationship between peoples and spaces, and a different type of identity in their students.⁷¹³ It will be interesting to see whether these schools ultimately adopt a broader cosmopolitan perspective or whether they simply reconstruct Europe as a “homeland” that, while not national, is nevertheless viewed as a territorial fortress to be protected from “outsiders.”⁷¹⁴ Sadly, the evidence thus far indicates that a coordination of immigration policies is leading to precisely this kind of “fortress” mentality, where “Europe” must be defended against immigrants.⁷¹⁵ Thus, though the European Community schools are engaged in the reconstruction of an identity not based on old nation-state boundaries, new territorial boundaries may be substituted.

4. *Cosmopolitan Communities*

Another way of constructing supranational identity is to view the relevant community as truly global and plural, a cosmopolitan community.⁷¹⁶ We can think of cosmopolitanism as an extension of Anderson’s idea of the nation-state as an imagined community. Anderson argued that the rise of print capitalism allowed people to feel as though they were part of the same community with others whom they would never meet, thus providing the basis for imagining the nation-state. Cosmopolitanism takes the argument a step further. “If people can get as emotional as Anderson says they do about relations with fellow nationals they never see face-to-face, then now that print capitalism has become electronic- and digital-capitalism, and now that this system is so clearly transnational, it would be strange if people did not get emotional in much the same way, if not necessarily to the same degree, about others who are not fellow nationals, people bound to them by

711. *Id.*

712. *See id.* at A16.

713. *See Gupta, supra* note 3, at 186-87.

714. *See* Carlos Closa, *The Concept of Citizenship in the Treaty on European Union*, 29 COMMON MARKET L. REV. 1137 (1992); MIGRATION AND EUROPEAN INTEGRATION: THE DYNAMICS OF INCLUSION AND EXCLUSION (Robert Miles & Dietrich Thränhardt eds., 1995); *cf.* Bidy Martin & Chandra T. Mohanty, *Feminist Politics: What’s Home Got to Do with It?*, in FEMINIST STUDIES/CRITICAL STUDIES 191 (Teresa de Lauretis ed., 1986).

715. *See Gupta, supra* note 3, at 187.

716. For a sampling of this literature, see generally BRUCE ROBBINS, *FEELING GLOBAL: INTERNATIONALISM IN DISTRESS* (1999); HANNERZ, *supra* note 470; COSMOPOLITICS, *supra* note 505; MARTHA C. NUSSBAUM ET AL., *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (Joshua Cohen ed., 1996); GLOBALIZATION (Arjun Appadurai ed., 2001); JESSICA BERMAN, *MODERNIST FICTION, COSMOPOLITANISM, AND THE POLITICS OF COMMUNITY* 1-27 (2001).

some transnational sort of fellowship.”⁷¹⁷

Indeed, a cosmopolitan perspective may cause us to feel connected to others in a way that breeds empathy and, perhaps, political engagement. Cosmopolitans recognize that “[w]e are connected to all sorts of places, causally if not always consciously, including many that we have never traveled to, that we have perhaps only seen on television—including the place where the television itself was manufactured.”⁷¹⁸ If we truly feel that connection, we may be more likely to concern ourselves with the plight of those who manufactured the product.

Cosmopolitanism can be traced at least as far back as the Stoics, who argued that each of us dwells in two communities: the local community of our birth, and the community of human argument and aspiration that “is truly great and truly common, in which we look neither to this corner nor to that, but measure the boundaries of our nation by the sun.”⁷¹⁹ Recognizing the dangers of factionalism that come from allegiance to the political life of a group, the stoics contended that only by placing primary allegiance in the world community can mutual problems be addressed.

Martha Nussbaum has recently elaborated on the stoic ideal in an essay touting the cosmopolitan perspective. According to Nussbaum, cosmopolitanism does not require one to give up local identifications, which, she acknowledges, “can be a source of great richness in life.”⁷²⁰ Rather, following the stoics, she suggests that we think of ourselves as surrounded by a series of concentric circles. “The first one encircles the self, the next takes in the immediate family, then follows the extended family, then, in order, neighbors or local groups, fellow city-dwellers, and fellow countrymen—and we can easily add to this list groupings based on ethnic, linguistic, historical, professional, gender, or sexual identities. Outside all these circles is the largest one, humanity as a whole.”⁷²¹ The task then, is to draw the circles together. Therefore, we need not relinquish special affiliations and identifications with the various groups. “We need not think of them as superficial, and we may think of our identity as constituted partly by them.”⁷²² But, Nussbaum argues, “we should all work to make all human beings part of our community of dialogue and concern, base our political deliberations on that interlocking commonality, and give the circle that defines our humanity special attention and respect.”⁷²³

717. Bruce Robbins, *Introduction Part I: Actually Existing Cosmopolitanism*, in *COSMOPOLITICS*, *supra* note 505, at 1, 7.

718. *Id.* at 3.

719. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *NUSSBAUM ET AL.*, *supra* note 716, at 3, 7 (quoting Seneca).

720. *Id.* at 9.

721. *Id.*

722. *Id.*

723. *Id.*

In this vision, people could be “cosmopolitan patriots”⁷²⁴ (to use Kwame Anthony Appiah’s phrase), accepting their responsibility to nurture the culture and politics of their home community, while at the same time recognizing that such cultural practices are always shifting, as people move from place to place. “The result would be a world in which each local form of human life was the result of long term and persistent processes of cultural hybridization: a world, in that respect, much like the world we live in now.”⁷²⁵

Iris M. Young has used the ideal of the “unoppressive city” as a model for a similarly multi-faceted understanding of community.⁷²⁶ She argues that “community” is always a politically problematic term “because those motivated by it will tend to suppress differences among themselves or implicitly to exclude from their political groups persons with whom they do not identify.”⁷²⁷ Thus “[t]he desire for community relies on the same desire for social wholeness and identification that underlies racism and ethnic chauvinism on the one hand and political sectarianism on the other.”⁷²⁸ Instead, she posits ideal city life as the “‘being-together’ of strangers.”⁷²⁹ These strangers may remain strangers and continue to “experience the other as other.”⁷³⁰ Indeed, they do not necessarily seek an overall group identification and loyalty. Yet, they are open to “unassimilated otherness.”⁷³¹ They belong to various distinct groups or cultures, and they are constantly interacting with other groups. But they do so without seeking either to assimilate or to reject those others. Such interactions instantiate an alternative kind of community,⁷³² one that is never a hegemonic imposition of sameness but that nevertheless prevents different groups from ever being completely outside one another either.⁷³³ In a city’s public spaces, Young argues, we see glimpses of this ideal: “the city consists in a great diversity of peoples and groups, with a multitude of subcultures and differentiated activities and functions, whose lives and movements mingle and overlap....”⁷³⁴ In this vision, there can be community without sameness, shifting affiliations without ostracism.

724. Kwame Anthony Appiah, *Cosmopolitan Patriots*, in *COSMOPOLITICS*, *supra* note 505, at 91, 91.

725. *Id.* at 23.

726. See Iris M. Young, *The Ideal of Community and the Politics of Difference*, in *FEMINISM/POSTMODERNISM* 300, 317 (Linda J. Nicholson ed., 1990).

727. *Id.* at 300.

728. *Id.* at 302.

729. *Id.* at 318.

730. *Id.*

731. *Id.* at 319.

732. Young resists using the word “community” because of the “urge to unity” the term conveys, but acknowledges that “[i]n the end it may be a matter of stipulation” whether one chooses to call her vision “community.” *Id.* at 320.

733. See *id.* at 319.

734. *Id.*

Although Young does not refer to her vision as cosmopolitan, it fits comfortably within the alternative understanding of community I am sketching here. Cosmopolitanism is emphatically not a model of international citizenship in the sense of international harmonization and standardization, but instead is a recognition of multiple refracted differences where (as in Young's ideal city) people acknowledge links with the "other" without demanding assimilation or ostracism. Cosmopolitanism seeks "flexible citizenship,"⁷³⁵ in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances. These allegiances could also include non-territorial communities, like those found in Internet chatrooms. The cosmopolitan worldview shifts back and forth from the rooted particularity of personal identity to the global possibility of multiple overlapping communities. "Instead of an ideal of detachment, actually existing cosmopolitanism is a reality of (re)attachment, multiple attachment, or attachment at a distance."⁷³⁶

Thus, cosmopolitanism forms perhaps the strongest alternative vision to the territorially bounded sovereignty of the nation-state. But what would a system of legal jurisdiction look like in a world based on cosmopolitan pluralism? The next part takes up this question.

V. Robert Cover and a Cosmopolitan Pluralist Conception of Jurisdiction

As we have seen, the story of jurisdiction is a story of social space and community definition. But the very idea of a community is itself always a narrative construction and always contested. Before we can even begin to adjudicate rights and responsibilities, or articulate supposedly shared public values, we inevitably "move into a realm of being-in-common that rests upon the border between 'I' and 'we,' a border that may not necessarily coincide with the political boundaries that surround us."⁷³⁷ Thus, the story of community is necessarily a story of liminality, a way to negotiate conceptions of identity, commonality, and self-perception.

Moreover, the problem with assuming that national identities are the relevant matrix for understanding community is that such a conception "serves to foreclose a richer understanding of location and identity that would account for the relationships of subjects to multiple collectivities."⁷³⁸ Rather, we must understand that the ability of people to confound the established spatial orders, either through physical movement or through their own conceptual and political acts of reimagination or jurisdiction-making, means that space and place can never be "given" and that the process of

735. See ONG, *supra* note 676.

736. ROBBINS, *supra* note 505, at 3.

737. BERMAN, *supra* note 716, at 3-4.

738. Gupta, *supra* note 3, at 196.

their sociopolitical construction must always be considered. A jurisdictional system whose objects are no longer conceived as automatically and naturally anchored in space can therefore pay particular attention to the way spaces and places are made, imagined, contested, and enforced.⁷³⁹

In order to understand how such a cosmopolitan pluralist jurisdictional system might be conceived, this article now turns to a consideration of the work of Robert Cover. Cover is particularly useful in this context, I believe, because to Cover, the terrain of law is never limited to the coercive commands of a sovereign power. Rather, law is constantly constructed through the contest of various norm-generating communities. He argues that law functions as a “bridge in normative space,” a way of connecting the “world-that-is” with various imaginings of “worlds-that-might-be.”⁷⁴⁰ In this view, law is a language that allows us to discuss, imagine, and ultimately even perhaps generate alternative worlds spun from present reality. Thus, Cover envisioned law as that which connects “reality” to “alterity.”⁷⁴¹

Cover specifically refused to permit the state to have a monopoly on the use of “law.” He argued instead that we should “grant *all* collective behavior entailing systematic understandings of our commitments to future worlds equal claim to the word ‘law.’”⁷⁴² By doing so, we will “deny to the nation state any special status for the collective behavior of its officials or for their systematic understandings of some special set of ‘governing’ norms.”⁷⁴³ According to Cover, such “official” norms may count as law, but they must share that title with “thousands of other social understandings.”⁷⁴⁴ In each case, the question for Cover is what various “communities believe and with what commitments to those beliefs.”⁷⁴⁵

If the state loses a monopoly on the articulation and exercise of legal norms, then law becomes a terrain of engagement, where various communities debate different visions of alternative futures. The idea of jurisdiction thus becomes a locus for this debate because it is in the assertion of jurisdiction itself that these norm-generating communities seize the language of law and purport to articulate visions of future worlds. Such assertions of jurisdiction, in Cover’s view, are now no longer moored to the state. Indeed, to Cover, jurisdiction is not even a power conferred by a sovereign. Rather, jurisdiction is, literally, simply the ability to speak as a community. Thus, he posits a “natural law of jurisdiction,”⁷⁴⁶ where

739. See Gupta & Ferguson, *supra* note 445, at 47.

740. Cover, *supra* note 2, at 176; see also Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

741. Cover, *supra* note 2, at 176 (quoting GEORGE STEINER, *AFTER BABEL* 222 (1975)).

742. *Id.*

743. *Id.*

744. *Id.*

745. *Id.*

746. Cover, *Nomos and Narrative*, *supra* note 740, at 58.

communities claim the authority to use the language of the law based on a right or entitlement that precedes the arbitrary sovereignties of the present moment.

Cover's vision opens the space for a cosmopolitan pluralist conception of jurisdiction because he is willing to permit the language and forms of law to be deployed by individuals and communities outside the fixed territorial bounds of the state system. Moreover, his generic focus on "norm-generating communities"⁷⁴⁷ as the relevant jurisdictional entities permits us to imagine that such communities will be based on the entire panoply of multiple overlapping affiliations and attachments people actually experience in their lives, from the local to the global (including some affiliations not based on territory at all). This Part begins by outlining Cover's analysis of two different jurisdictional scenarios. First, he considers those moments when a judge must courageously "defend his own authority to sit in judgment over those who exercise extralegal violence in the name of the state."⁷⁴⁸ By daring to judge the "King," the assertion of jurisdiction becomes a revolutionary act. Second, Cover examines instances when a non-state community asserts a form of legal jurisdiction in order to pursue a particular normative agenda. In such cases, the community norms being expressed must somehow persuade more established powers of its authority. The Part then concludes by using both scenarios to articulate a cosmopolitan pluralist conception of legal jurisdiction.

A. Jurisdiction as Resistance to Kings

Cover begins by analyzing the idea that jurisdiction could function as resistance to "Kings," using examples drawn from both ancient Roman and English history. In the Roman story, set in 47 B.C.E., Herod, governor of Galilee and King Hyrcanus' right-hand man, executed a leader of a group of rebels without judicial trial in violation of Jewish law.⁷⁴⁹ Summoned to appear before the court, Herod arrived with a bodyguard of troops. According to a Jewish historian, this show of force "overawed them all, and no one of those who had denounced him before his arrival dared to accuse him thereafter; instead there was silence and doubt about what was to be done."⁷⁵⁰ Nevertheless, Samais, a member of the court rose and addressed the body, warning of the difficulties that arise if raw power were able to overcome legal jurisdiction:

747. See, e.g., *id.* at 43.

748. Cover, *supra* note 2, at 177-78 (quoting Cover, *supra* note 740, at 59).

749. See Cover, *supra* note 2, at 180. For an historical account, see generally JOSEPHUS, *JEWISH ANTIQUITIES*, Book XIV 143-84 (R. Marcus trans., Loeb Classical Library ed., 1976).

750. JOSEPHUS, *supra* note 749, at 171.

Fellow councillors and King, I do not myself know of, nor do I suppose that you can name, anyone who when summoned before you for trial has ever presented such an appearance.... But this fine fellow Herod, who is accused of murder...stands here clothed in purple, with the hair of his head carefully arranged and with his soldiers around him, in order to kill us if we condemn him as the law prescribes, and to save himself by outraging justice. But it is not Herod whom I should blame for this...but you and the King for giving him such great license. Be assured, however, that God is great, and this man, whom you now wish to release for Hyrcanus' sake, will one day punish you and the King as well.⁷⁵¹

Despite this plea, the court permitted Herod to escape, and he subsequently assumed royal power, killing Hyrcanus in the process.⁷⁵² Significantly, though Herod had all the members of the court executed as well, he spared Samais,⁷⁵³ perhaps recognizing the power of a person willing to assert legal jurisdiction even against the King.

Cover then recounts seventeenth-century English disputes over the use of the writ of prohibition by common law courts to restrain the Court of High Commission from hearing certain kinds of cases.⁷⁵⁴ In one celebrated case, the common law courts issued a writ denying the High Commission the power to punish a barrister, Nicholas Fuller, for contempt.⁷⁵⁵ Archbishop Bancroft argued that the question of which court had proper jurisdiction to hear the case could only be resolved by the King because the authority of all judges derived from him.⁷⁵⁶ Lord Coke, in his *Prohibitions del Roy*, describes himself as having replied:

[T]rue it was that God had endowed his Majesty with excellent science and great endowments of nature. But his Majesty was not learned in the Laws of his Realm of England;... With which the King was greatly offended, and said that then he should be under the Law, which was treason to affirm (as he said). To which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et Lege—that the King should not be under man,

751. *Id.* at 172-76.

752. *See id.*

753. *See id.*

754. *See* Cover, *supra* note 2, at 183. According to Cover some of these writs concerned the power of the High Commission to punish puritans for breaches of ecclesiastical discipline. *See id.*

755. *See Nicholas Fuller's Case*, 12 EDWARD COKE, PROHIBITIONS DEL ROY 41; *see also* C. BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 293-301 (1959).

756. *See* 12 COKE at 63; BOWEN, *supra* note 755, at 303-04.

but under God and the Law.⁷⁵⁷

Thus, as in the Roman example, Coke refuses to place the King beyond or above the domain of law.

Cover points out that, in both stories, a “courageous judge challenges the King, affirms the value of an impersonal law or source of law over the King and places the authority of the Court to speak the law—its jurisdiction—upon that impersonal foundation.”⁷⁵⁸ At this moment of triumph, however, the judge is also the most naked.⁷⁵⁹ By calling the judge to account, the judge is stripped of the very institutional power that usually stands behind the Court and enforces its orders. Who is to enforce legal jurisdiction when the King stands in opposition?

These stories make clear both that courts can exercise power separate from (and perhaps contrary to) the governing power of the state, and that the exercise of such power is risky and always contingent on broader acceptance by communities (and coercive authorities) over time. After all, though Coke’s version of the story may not be factually accurate (there is some evidence that he actually capitulated to the King’s authority),⁷⁶⁰ his rhetorical assertion of jurisdiction, memorialized in his treatise, was undoubtedly part of the Enlightenment movement to limit the power of Kings and assert a higher rule of law. Indeed, one can see a direct line from Coke to Thomas Paine, who declared that, in the new United States of America, law would be King.⁷⁶¹

It is, of course, a commonplace to say that courts lack their own enforcement power, making them dependent on the willingness of states and peoples to follow judicial orders. This observation is often used as an argument for the irrelevance of international law itself. Because such “law” is subject to the realpolitik demands of pure power, so the argument goes, it is not really law at all.⁷⁶² But in essence this is no different from domestic law, where courts can only exercise authority to the extent that

757. 12 COKE at 65.

758. Cover, *supra* note 2, at 185.

759. *See id.* at 186.

760. Some historians have rejected Coke’s account, relying on other seventeenth century evidence indicating that Coke actually threw himself on the mercy of the King. *See* BOWEN, *supra* note 755, at 305-06.

761. Thomas Paine, *Common Sense*, reprinted in THE COMPLETE WRITINGS OF THOMAS PAINE 1, 29 (Philip S. Foner ed., 1969) (1945).

762. This position is most often associated with so-called “international relations realists.” *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 206 (1993) (describing the “Realist challenge” embodied in “the defiant skepticism...that international law could ever play more than an epiphenomenal role in the ordering of international life”). From the realist perspective, states in the international realm always act only in their own national interest. Thus, law is irrelevant. The only relevant laws are the “laws of politics,” and politics is “a struggle for power.” HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 4-5, 25-26 (4th ed. 1967).

someone with coercive power chooses to carry out the legal commands.⁷⁶³

Thus, as Cover makes clear, the essence of law is that it makes aspirational judgments about the future that depend for their power on whether those judgments accurately reflect evolving norms of the communities that must choose to obey them. If this is so, then we might see extraterritorial law-making as no less legitimate than law-making within territorial bounds. To take the French prosecution of Yahoo! as an example, it is true that the court's command is only enforceable if an American authority will agree to enforce it, but the same court's decision against Yahoo!'s French subsidiary is similarly dependent on the enforcement power of a sovereign. After all, if the executive branch of the French government refused to enforce the order against the subsidiary, that order would have no more force than the order against the American parent.

If the assertion of jurisdiction is always an assertion of community dominion, then all judicial decisions are reliant on both that community's acquiescence and the willingness of other communities to recognize and enforce the jurisdictional assertion. Thus, for a court to dismiss a case because the original court did not have formally "proper" jurisdiction provides no answer to Cover's "natural law of jurisdiction."⁷⁶⁴ Rather, courts would need to consider whether the prior judgment properly spoke for a relevant community and whether the substantive norms articulated in the judgment are attractive, in order to determine if the jurisdictional assertion and the substantive norms will be recognized.

B. Jurisdiction as the Articulation of Alternative Norms

Cover also considers the bold (or utopian) impulse of a non-state actor to assert jurisdiction:

Imagine yourself a tribunal. Pretend you have an audience—a community of some sort that will recognize you as a tribunal. Now, go all the way. What grandeur of transformation of the normative universe would you perform? Will you simply issue a general writ of peace? A warrant for justice notwithstanding facts and law? Will you order everyone to be good? Perhaps, perhaps you will judge the dead? Or even bring God as a defendant? The possibilities are endless and the question arises whether or why one should or should not try something outlandish,

763. This insight derives from a recent work applying Cover's theories to the realm of international law. See Laura Dickinson, *Law as Justice, Law as Violence: Responses to September 11th* (forthcoming).

764. Cover, *Nomos and Narrative*, *supra* note 740, at 58.

impossible, or just plain daring.⁷⁶⁵

The idea of imagining oneself a tribunal sounds fanciful. After all, we might think, people cannot simply construct their own legal jurisdiction. But that is true only if we accept a reified conception of jurisdiction based on state sovereign actors acting within an unchanging set of legal boundaries. Such a conception, however, has been challenged throughout this article both because it is normatively unjustifiable as a way of capturing actual community identifications and social understandings of space, and because it fails to describe adequately the increasingly extraterritorial and non-state nature of actual legal practice. Moreover, by imagining the creation of jurisdiction we can see the transformative way in which alternative assertions of legal jurisdiction can be linked to the articulation and development of alternative norms and community definitions.

Cover offers several examples of such jurisdiction creation. In 1538 a group of Jews in Safed, a small city in the Galilee, attempted to constitute a Jewish court, reviving an old tradition of ordination of judges that supposedly went back to Moses.⁷⁶⁶ The problem was that this tradition, known as Semikah, relied on there being an unbroken line of succession of ordained judges from Moses to the present, and everyone agreed that the line had been broken.⁷⁶⁷ Thus the creation of a court (and recreation of a tradition) was a daring and controversial one. Could the Semikah be re-established simply by following a set of ritual processes? And who should decide the legitimacy of this new Semikah? Could the leaders of the town of Safed unilaterally assert their own jurisdiction?

Significantly, the leaders of Safed apparently determined that they could not assert jurisdiction on their own. Thus, they proclaimed their act in a message sent to Jerusalem seeking recognition.⁷⁶⁸ Cover suggests that such approval was necessary not only as a matter of religious doctrine, but also because, without assent from Jerusalem, it was hardly likely that the rest of Judaism would take the experiment seriously.⁷⁶⁹

This story resembles the process of judgment recognition familiar to those who study conflict of laws. A tribunal asserts jurisdiction over a dispute, and then other jurisdictions must decide whether to confer legitimacy on that tribunal by recognizing and enforcing its judgment. The religious leaders of Safed, even at the moment that they daringly invented their own legal jurisdiction, were forced to acknowledge that their invention was limited by the willingness of others to accept it as normatively legitimate. As Cover points out, though law is a bridge *to* an alternative set of norms, the bridge *begins* not in alterity but in reality. Therefore there

765. Cover, *supra* note 2, at 187.

766. *See id.* at 192.

767. *See id.* at 190.

768. *See id.* at 192.

769. *See id.* at 193.

are real constraints on the engineering of that bridge.⁷⁷⁰ A community seeking to assert jurisdiction must always convince other norm-generating communities of the acceptability of the normative universe the new jurisdictional assertion suggests.

Nevertheless, sometimes the norms asserted by new juridical bodies do take hold. Cover turns next to the decision to invent a court to try war criminals after World War II. As Cover recounts, although almost nobody seriously argued that perpetrators should go unpunished,⁷⁷¹ there was considerable disagreement about whether it was appropriate to create a legal proceeding.⁷⁷² For example, Charles Wyzanski contended that punishing those captured in war was not a legal but a political act.⁷⁷³ It was, he argued, an example of victors' justice,⁷⁷⁴ or, to use Cover's typology, a case of Kings using judges to achieve a desired result.⁷⁷⁵

But Cover argues that the great accomplishment of Nuremberg (and the proceedings in the Far East that followed) was "the capacity of the event to project a new legal meaning into the future."⁷⁷⁶ As Wyzanski himself later acknowledged, "the outstanding accomplishment of the trial, *which could never have been achieved by any more summary executive action*, is that it crystalized the concept that there already is inherent in the international community a machinery both of the expression of international criminal law and for its enforcement."⁷⁷⁷ Significantly, Wyzanski's statement reveals that he came to believe not only that the tribunals were legitimate, but also that they served a norm-creating function that went

770. *See id.* at 187 ("If law...is a bridge from reality to a new world there must be some constraints on its engineering. Judges must dare, but what happens when they lose that reality?").

771. *But see* MONTGOMERY BELGION, VICTORS' JUSTICE 42-131 (1949) (arguing that the alleged crimes were acts of war in which both sides were engaged and therefore did not warrant criminal punishment).

772. *See id.* at 195; *see also* TUSA & TUSA, THE NUREMBERG TRIAL, ch. 1-5 (1983).

773. *See* Charles Wyzanski, Jr., *Nuremberg—A Fair Trial? Dangerous Precedent*, ATLANTIC MONTHLY, April 1946, *reprinted in* Charles Wyzanski, Jr., THE NEW MEANING OF JUSTICE 125, 135 (1966).

774. *See id.*

775. *See* Cover, *supra* note 2, at 197.

776. *Id.* at 196. Robert Jackson, chief prosecutor at Nuremberg, made a similar argument at the time:

We have also incorporated [the trial's] principles into a judicial precedent. "The power of the precedent," Mr. Justice Cardozo said, "is the power of the beaten path." One of the Chief obstacles to this trial was the lack of a beaten path. A judgement such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law—and law with a sanction.

U.S. Dep't of State, Report of Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, 437 (1945).

777. Charles Wyzanski, Jr., *Nuremberg in Retrospect*, in THE NEW MEANING OF JUSTICE, *supra* note 773, at 137, 144 (emphasis added).

beyond the realm of political or military power and that could not have been achieved through the use of such power. Thus, the assertion of legal jurisdiction, more than the assertion of military or political muscle, may help inculcate norms for the future.⁷⁷⁸

Moreover, these norms, once created and developed into a functioning body of human rights law are not so easily circumscribed. Therefore, although Nuremberg might have been judges *in the service of Kings*, the norms created ultimately have contributed to the ability of judges *to challenge Kings*.⁷⁷⁹ We have already discussed the case of Augusto Pinochet, where a Spanish judge asserted jurisdiction over the former Chilean dictator and almost succeeded in convincing the world to accede to his request. Other transnational legal actions, both criminal and civil, have been attempted or are pending around the world. This normative universe of human rights enforcement through legal apparatus is a direct result of the jurisdiction-creation at Nuremberg.

Formal state-sanctioned trials such as Nuremberg are not the only ways in which legal jurisdiction can be created and exercised, however. As discussed above, Cover recognized that non-state communities also assert law-making power in various ways. Indeed, prior to the rise of the state system, much lawmaking took place in autonomous institutions and groups, such as cities and guilds, and large geographic areas were left largely unregulated.⁷⁸⁰ Even in modern nation-states, we see a whole range of non-state lawmaking in tribal or ethnic enclaves,⁷⁸¹ religious organizations,⁷⁸² corporation by-laws, social customs,⁷⁸³ private regulatory bodies, and a wide

778. For a recent work using Cover to support the idea that international trials help create and develop norms, see generally Dickinson, *supra* note 763.

779. See Cover, *supra* note 2, at 197.

780. See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 14-38 (Walter L. Moll trans., 1936); see also OTTO GIERKE, *ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES* (George Heiman ed. & trans., 1977); OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY 1500 TO 1800* (Ernest Barker trans., 1957).

781. See, e.g., Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 *YALE L.J.* 323 (1993) (delineating the subtle interactions between the legal system of the Romani people and the norms of their host countries).

782. See, e.g., CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* (1980) (examining the contractual underpinnings of four religious utopian communities: the Shaker, Harmony, Oneida, and Zoar). As Marc Galanter has observed, the field of church and state is the "*locus classicus* of thinking about the multiplicity of normative orders." Galanter, *supra* note 27, at 28; see also Carol Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 *U. LOUISVILLE J. FAMILY L.* 741 (1988) (analyzing church-state relations in the United States from a pluralist perspective).

783. See, e.g., LON L. FULLER, *ANATOMY OF LAW* 43-49 (1968) (describing "implicit law," which includes everything from rules governing a camping trip among friends to the customs of merchants).

variety of groups, associations, and non-state institutions.⁷⁸⁴ For example, in England, bodies such as the church, the stock exchange, the legal profession, the insurance market, and even the Jockey Club opted for forms of self-regulation that included machinery for arbitrating disputes among their own members.⁷⁸⁵ Even more informally, day-to-day human encounters such as interacting with strangers on a public street, waiting in lines, and communicating with subordinates or superiors are all governed by what Michael Riesman has called “microlegal systems.”⁷⁸⁶ Thus, law is found not only in the formal decisions of judges, legislators, and administrators, but also

any place and any time that a group gathers together to pursue an objective. The rules, open or covert, by which they govern themselves, and the methods and techniques by which these rules are enforced is the law of the group. Judged by this broad standard, most law-making is too ephemeral to be even noticed. But when conflict within the group ensues, and it is forced to decide between conflicting claims, law arises in an overt and relatively conspicuous fashion. The challenge forces decision, and decisions make law.⁷⁸⁷

In some circumstances, official legal actors may delegate law-making authority to non-state entities or recognize the efficacy of non-state norms. For example, commercial litigation, particularly in the international arena, increasingly is taking place before non-state arbitral panels.⁷⁸⁸ Likewise, non-governmental standard-setting bodies, from Underwriters Laboratories (which tests electrical and other equipment) to the Motion Picture Association of America (which rates the content of films) to the Internet Corporation for Assigned Names and Numbers (which administers the Internet domain name system) construct detailed normative systems

784. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 *LAW & SOC'Y REV.* 185 (1987); Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963); Stewart Macaulay, *Popular Legal Culture: An Introduction*, 98 *YALE L.J.* 1545 (1989).

785. See F.W. Maitland, *Trust and Corporation*, in *SELECTED ESSAYS* 141, 189-95 (H.D. Hazeltine et. al. eds., 1936) (1905).

786. See Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 *U. CIN. L. REV.* 417 (1985); Michael Reisman, *Looking, Staring and Glaring: Microlegal Systems and Public Order*, 12 *DENV. J. INT'L L. & POL'Y* 165 (1983); Michael Reisman, *Rapping and Talking to the Boss: The Microlegal System of Two People Talking*, in *CONFLICT AND INTEGRATION: COMPARATIVE LAW IN THE WORLD TODAY* 61 (Institute of Comparative Law in Japan ed., 1988).

787. Weyrauch & Bell, *supra* note 781, at 328 (quoting Thomas A. Cowan & Donald A. Strickland, *The Legal Structure of a Confined Microsociety*, at i (Space Sciences Laboratory, University of California, Berkeley, Internal Working Paper No. 34, 1965)).

788. See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

with the effect of law. Regulation of much financial market activity is left to private authorities such as stock markets or trade associations like the National Association of Securities Dealers. And, to take even a rather mundane example, law-making authority over sports events is generally left to non-state entities (such as referees) whose decisions are not usually reviewable except within the system established by the sports authority or league.⁷⁸⁹

Significantly, the jurisdiction of all of these non-state actors may be formally limited to their particular bounded communities, but the norms they articulate often seep into the decisions of state legal institutions. The most obvious example of state law recognizing non-state law-making is in the common law's ongoing incorporation of social custom and practice. As scholars have recognized, "[d]ecisionmakers work under a continuing pressure to incorporate customary rules into their decisions."⁷⁹⁰ Sometimes such incorporation is explicit, as when a statute is interpreted (or even supplanted) by reference to industry custom,⁷⁹¹ or in Karl Llewellyn's efforts to codify a law of sales that would accord with merchant reality.⁷⁹² Even when the impact of non-state norms is unacknowledged, however, state-sponsored law may only be deemed legitimate to the extent its official pronouncements reflect the common understandings of private law and customs.⁷⁹³ Indeed, the invention of legal fictions often indicates that official norms are being adjusted to better reflect the dictates of non-state norms and practices.

In addition, non-state assertions of jurisdiction may sometimes take the guise of a more formal legal proceeding. For example, from December 8 to 12, 2000, a "peoples' tribunal" called the "Women's International War Crimes Tribunal 2000" sat in Tokyo to hear evidence concerning the criminal liability for crimes against humanity of both Japan and its high-ranking military and political officials for rape and sexual slavery arising out of Japanese military activity in the Asia Pacific region in the 1930s and

789. See, e.g., *Georgia High School Athletic Association v. Waddell*, 289 S.E.2d 247 (Ga. 1982) (finding non-justiciable a dispute over a referee's decision affecting the outcome of a high school football game). But see *PGA Tour, Inc. v. Martin*, 121 S. Ct. 1879 (2001) (ruling that golf association had violated the Americans with Disabilities Act by preventing partially disabled golfer from using a golf cart to compete).

790. Weyrauch & Bell, *supra* note 781, at 330.

791. See, e.g., JAMES W. HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915*, at 290 (1964) (describing the ways in which local norms in the Wisconsin lumber industry played a significant role in the way contract law was applied); FULLER, *supra* note 783, at 57-59 (arguing that the act of interpretation permits courts to adjust official legal norms to match custom or usage).

792. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 503-19 (1987) (describing Llewellyn's initial drafts of what became Article 2 of the Uniform Commercial Code).

793. See Weyrauch & Bell, *supra* note 781, at 329.

1940s.⁷⁹⁴ Frustrated by official denials of Japanese government officials⁷⁹⁵ and failure in lawsuits before state-sanctioned courts,⁷⁹⁶ survivors of these alleged offenses turned to international non-governmental organizations.⁷⁹⁷ Preparatory conferences were held in Tokyo in December 1998 and in Seoul in February 1999, where an International Organizing Committee for the tribunal was formed.⁷⁹⁸

Indictments were presented by prosecution teams from ten countries, including North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands.⁷⁹⁹ Indeed, “the shared experience of Japanese colonization brought North and South Korean prosecutors together with a joint indictment—an expression of common purpose that continues to be unthinkable at the governmental level.”⁸⁰⁰ For three days the tribunal heard prosecution statements supported by oral and documentary evidence.⁸⁰¹ Over seventy-five survivors were present, and many gave evidence.⁸⁰² The prosecution also submitted videos of interviews with many other survivors and affidavits in evidence to the court.⁸⁰³ The panel of judges “represented a broad geographical distribution, expertise in diverse and relevant areas of domestic and international law, a mix of practitioner, judicial, and academic expertise, and...an equitable gender balance.”⁸⁰⁴

After the closing of evidence and argument, the judges deliberated for a day and, assisted by a team of legal advisers, prepared a preliminary judgment.⁸⁰⁵ The judgment, which was presented on the closing day before a packed hall of over a thousand people,⁸⁰⁶ found Emperor Hirohito guilty of the charges on the basis of his command responsibility.⁸⁰⁷ In addition, the panel ruled that Japan was responsible under international law applicable at the time of the events for violation of its treaty obligations and principles of customary international law relating to slavery, trafficking, forced labor, and

794. For a description of the tribunal, see generally Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335 (2001).

795. *See id.* at 335 (describing Japan's official denials of legal responsibility).

796. *See, e.g., Japan Overturns Sex Slave Ruling*, BBC NEWS (Mar. 29, 2001) (Hiroshima High Court overturning only successful claim for compensation in Japanese courts), available at http://news.bbc.co.uk/1/hi/english/world/asia-pacific/newsid_1249000/1249236.stm.

797. *See Chinkin, supra* note 794, at 336 (noting that the primary NGO was a group called Violence Against Women in War Network, Japan, which was founded in 1998 after the International Conference on Violence Against Women in War and Armed Conflict Situations was held in Tokyo in 1997).

798. *See id.*

799. *See id.*

800. *Id.*

801. *See id.* at 337.

802. *See id.*

803. *See id.*

804. *Id.*

805. *See id.* at 338.

806. *See id.*

807. *See id.*

rape, amounting to crimes against humanity.⁸⁰⁸ Finally, the judges recommended a range of reparations and made other recommendations.⁸⁰⁹

Other non-state tribunals have similarly sought to inculcate the norms embodied in international or international human rights law. For example, Cover himself describes the 1967 “International War Crimes Tribunal” convened by Bertrand Russell and Jean Paul Sartre purporting to adjudicate whether the United States had violated international law in prosecuting the Vietnam War.⁸¹⁰ Likewise, a “Permanent Peoples’ Tribunal” was established in Italy in the 1970s by “private citizens of high moral authority” from several countries.⁸¹¹ This tribunal continued in existence for a number of years and examined a series of alleged violations of international law to which there had been inadequate official response, including the Soviet military intervention in Afghanistan, that of Indonesia in East Timor, and the alleged genocide of Armenians by the Turks in the period from 1915-1919.⁸¹² In 1984, another Peoples’ Tribunal was convened to gather evidence concerning the Armenian genocide.⁸¹³

In some ways, of course, such assertions of jurisdiction are purely symbolic acts. On the other hand, by claiming authority to articulate norms, these tribunals insisted that “‘law is an instrument of civil society’ that does not belong to governments, whether acting alone or in institutional arenas.”⁸¹⁴ Moreover, the reports issued by such tribunals provide a valuable alternative source of evidence and jurisprudence pertaining to contested applications of international law. And, even these “quasi-legal” fora can constitute a form of public acknowledgment to the survivors that serious crimes were committed against them.

Thus, calling the tribunal “extra-legal” or “symbolic” does nothing to lessen its claim to produce norms or affect people. After all, even state entities pursue trials that are largely symbolic, like the French trial against Klaus Barbie,⁸¹⁵ and the proposed Spanish trial of Pinochet himself. In the

808. *See id.*

809. *See id.*

810. *See* Cover, *supra* note 2, at 198-201. For the report of this tribunal, see *AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL* (J. Duffett ed. 1968).

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

812. *See id.* at 28-29.

813. *See generally* *A CRIME OF SILENCE: THE ARMENIAN GENOCIDE, REPORT OF THE PERMANENT PEOPLE’S TRIBUNAL* (1985).

814. Chinkin, *supra* note 794, at 338 (quoting Falk, *supra* note 811, at 29).

815. Indeed Guyora Binder has argued that many of those most interested in the trial viewed its role as pedagogical or symbolic. *See* Binder, *supra* note 435, at 1322 (1989). Binder quotes French government officials referring to the proceedings as “a pedagogic trial,” Israeli governmental officials describing the trial as “justice that has educational significance,” a *New York Times* editorial expressing hope that the trial would “educate a new generation,” a statement from a representative of French Resistance veterans that he hoped the trial would “deepen our understanding,” and a comment from Nazi hunter Simon Wiesenthal that the trial would be “a proper history lesson,” and that its true significance was “symbolic.” *See id.* (citing

past two decades, we have also seen the rise of Truth and Reconciliation proceedings, whose primary aim is story-telling in order to create a record of past abuses.⁸¹⁶ Lawsuits in the United States seeking reparations for slavery⁸¹⁷ are another example of people using juridical mechanisms to affect collective memory. Finally, one might see the overwhelming consensus concerning the creation of an International Criminal Court⁸¹⁸ (a new form of international jurisdiction-assertion) as evidence that the norms these non-state tribunals sought to inculcate have indeed taken hold.

C. A Cosmopolitan Pluralist Conception of Legal Jurisdiction

Cover's decentralized vision of legal jurisdiction provides a framework for thinking about jurisdictional rules that is cosmopolitan in orientation. As previously discussed, a cosmopolitan conception of community recognizes the inter-relatedness of peoples and cultures around the world while nevertheless attending to local variations and the wide variety of ways that individuals come to understand their identification with groups. This view imagines overlapping webs of relation, some woven out of local affiliation, and some unbounded by geography. Cosmopolitan communities are rooted in the local "as a structure of feeling, a property of social life, and an ideology of situated community," while still remaining unbordered.⁸¹⁹ Instead of an ideal of detachment, cosmopolitanism recognizes multiple attachments across time and space.

Cover likewise understands that there are always multiple norm-generating communities and therefore conceives of the assertion of jurisdiction as the act that sets these normative views in conflict. Cover would allow all the multiple attachments we might call community an opportunity to establish both their claim to community status and their particular normative commitments on the legal stage of jurisdiction. Jurisdiction thus becomes the terrain of engagement for debates about the appropriate definition of community and the articulation of norms.

In practice, this means that territorially-based limitations on the assertion of jurisdiction are inappropriate because they reify arbitrary

sources).

816. *See generally, e.g.*, HAYNER, *supra* note 437; MINOW, *supra* note 437.

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

818. Despite U.S. resistance to the ICC, *supra* note 170, an overwhelming percentage of the world's countries signed the ICC treaty, and the number of ratifying countries is approaching 60, at which point the Court will come into existence. For updated information on the status of the ICC, see Rome Statute of the International Criminal Court, at <http://www.un.org/icc> (last updated on Nov. 5, 2001).

819. APPADURAI, *supra* note 6, at 189.

boundaries and eliminate debate about either community definition or the evolution of substantive norms. In a cosmopolitan pluralist conception of jurisdiction, courts could not simply dismiss assertions of jurisdiction based on a mechanical counting of contacts with a geographically-based sovereign entity. This is just as well because, as we have seen, such jurisdictional tests are routinely acknowledged as problematic in a contemporary world of interconnection and cross-border interaction. Instead, jurisdiction must be based on whether the parties before the court are appropriately conceptualized as members of the same community however that community is defined.⁸²⁰ And a court subsequently being asked to enforce a judgment would need to address in a more nuanced way both the question of whether the assertion of jurisdiction that led to the judgment was legitimate and whether the substantive norms announced by the prior court should be deemed enforceable.

Such an analysis would not necessarily result in broader assertions of jurisdiction than under current jurisdictional schemes in all cases. Rather, a cosmopolitan pluralist approach to jurisdiction merely requires that courts make explicit an inquiry that current jurisdictional rules obscure. If jurisdiction is in part about the assertion of community dominion over a distant actor, then courts should consider the nature of the community that has allegedly been harmed, the relationship of the dispute to that community, and the social meaning of asserting dominion over the actor in question. Accordingly, the jurisdictional inquiry becomes a site for discussion both about the nature of community affiliation and the changing role of territorial borders. The precise contours of the jurisdictional norms that would develop from this process are impossible to predict and would undoubtedly evolve over time. Most important, however, is that these discussions would not be truncated by a formulaic test that bears scant relationship to the core questions underlying the social meaning of jurisdiction.

Conceiving of jurisdiction in terms of community membership and dominion would not only lead to more explicit discourse regarding jurisdictions, but might change the outcome of some cases as well. For example, in a recent case brought in California, plaintiffs alleged that they were subject to forced labor in the construction of an oil pipeline in Myanmar and so they sued the company allegedly responsible for the pipeline. The Ninth Circuit dismissed the case for lack of jurisdiction because the defendant was a French corporation, despite the fact that the corporation was directly involved in the operations and decisionmaking of a California-based subsidiary.⁸²¹ Had the court focused on community

820. Such an inquiry is not so different from those undertaken in cases that hinge on the legitimacy of tribal identification. For a discussion of the issues involved in those cases, see, e.g., James Clifford, *Identity in Mashpee*, in *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE AND ART* (1988).

821. See *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001). For a critique of the decision focusing on the law of corporate groups, see Blumberg, *supra* note 346, at ____.

membership in a more holistic way, it might have recognized the importance of bringing the nominally French corporation within the dominion of California, particularly in a case where the French corporation was conducting major business activities in California and where the underlying substantive issues implicated international humanitarian norms.

Similarly, a focus on community membership might lead us to rethink the scores of cases in which American courts have dismissed, on *forum non conveniens* grounds, human rights claims brought by foreign nationals against American corporations.⁸²² In these cases, courts have applied the so-called public and private interest factors that were laid out by the U.S. Supreme Court in 1947 in the case of *Gulf Oil Corp. v. Gilbert*.⁸²³ The difficulty with these *Gilbert* factors, however, as Phillip Blumberg has recently observed, is that they leave “little, if any, room for argument that the American society and American courts have a social responsibility to provide an American hearing for alleged misconduct of American based multinationals...”⁸²⁴ In contrast, a conception of jurisdiction based on community membership and responsibility would offer more space to consider such an argument.

Moreover, a pluralist conception of jurisdiction also permits more opportunity for debate about the *substantive* norms in these cases. Rather than simply refusing to hear a claim for lack of personal jurisdiction or on *forum non conveniens* grounds, courts would be permitted (or required) to hear cases and therefore articulate norms of decision. Such norms might serve a democratizing function. For example, the Internet for many years

822. See Blumberg, *supra* note 346, at ___ n.16 (collecting cases). For a discussion of the responsibility of corporations to obey human rights norms, see generally Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

823. 330 U.S. 501, 509 (1947). *Gilbert*'s private interest factors are: the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

Id. at 843. In delineating the public interest factors, the court noted the following:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id.

824. Blumberg, *supra* note 346, at ___.

was largely an American creation, and its architecture (both technical and legal) tended to embed American values such as free speech. The Yahoo! case raises the possibility that other countries might begin to challenge America's legal dominance by advancing alternative normative visions about the shape of online regulation.⁸²⁵ If multiple communities are affected by online activity (and almost inevitably multiple communities *will* be affected), then giving the court systems of those communities greater latitude to weigh in on the best regulatory approach may be desirable.

For this same reason, a cosmopolitan pluralist conception of jurisdiction might prompt rethinking about how best to handle so-called "lis pendens" issues in the international context. Generally, if two parties to a suit each file complaints in different jurisdictions, the suit filed second in time is suspended until the first suit has reached a judgment, at which time the second case is dismissed altogether.⁸²⁶ In a more pluralist understanding of jurisdiction, however, the prospect of multiple communities reaching varying decisions in the same dispute is not a problem; indeed, it might even foster greater norm development because other jurisdictions would need to determine which of the judgments to recognize.

A more pluralist approach to jurisdiction might encourage forum-shopping, of course, if plaintiffs have more available jurisdictions to hear their claims. There is no guarantee, however, that under the approach I suggest assertions of jurisdiction will necessarily be more broad than under current jurisdictional rules, particularly given recent trends toward an expansive, effects-based jurisdictional scheme. Indeed, a court focusing on the definition of community might *refuse* jurisdiction in situations where an inquiry analyzing solely the contacts with, effects on, or interests of, a geographical territory would counsel in favor of asserting jurisdiction. Moreover, the idea that forum-shopping is necessarily such an evil that it provides a sufficient reason, in and of itself, to choose one jurisdictional scheme over another deserves closer scrutiny. As Larry Kramer has pointed out, "[t]he assumption that it is unfair to allow plaintiffs to [forum-shop] presupposes a 'correct' or 'fair baseline defining how often the plaintiff's choice ought to prevail.'"⁸²⁷ After all, if it is permissible to have different jurisdictional entities and to have these entities develop different laws, why should the law *not* vary depending on where a suit is brought, and why is it necessarily unfair to give plaintiffs this choice? Brainerd

825. See Joel R. Reidenberg, *The Yahoo Case and the International Democratization of the Internet* (Fordham Law & Econ. Working Paper No. 11, 2001) (arguing that the Yahoo case signals that the Internet regulatory framework must recognize values adopted by different states and will not be dictated by technical elites), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=267148 (last visited Feb. 15, 2002).

826. See HAGUE CONVENTION DRAFT, *supra* note 269, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference (Jun. 6-22, 2001), at Art. 21.

827. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 313 n.117 (1990).

Currie, arguably the most influential American choice-of-law theorist, downplayed the importance of forum-shopping, particularly if preventing it required sacrificing substantive policies.⁸²⁸ Finally, even if one believes forum-shopping is a problem, it is difficult to evaluate this concern without empirical data. For example, other factors beyond choices about substantive norms may well have a strong impact on forum choice. If most plaintiffs consult a local attorney, how many attorneys are willing or able to file suit and litigate in a foreign jurisdiction? How might the existence (or not) of regular referral arrangements affect this choice? Thus, on both normative and empirical grounds there is at least some cause to question the reflexive concern about excessive forum-shopping without further exploration of the extent of the problem.⁸²⁹

Perhaps most important, a cosmopolitan pluralist conception of jurisdiction reflects developments already occurring in the international arena. Universal and transnational jurisdiction, though controversial, are increasingly being invoked in the area of human rights law. In addition, many individual nations have shown their willingness to relinquish aspects of their sovereign adjudicatory authority to transnational or international bodies, whether they be an international court, such as the European Court of Justice, or an administrative body, such as the W.T.O. Although territoriality and nation-state sovereignty are not likely to disappear for the foreseeable future, it may be that the traditional image of the state is changing. Agencies of the state are now likely to be linked in networks to private actors as well as international or transnational agencies. Mixed coalitions of governments, non-governmental agencies, and (sometimes) transnational corporations will help redefine the role of government. In short, global networks will become more complex. “Governance will

828. See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 128, 169 (1963) (suggesting that, at least in some circumstances, forum-shopping is “positively commendable” and arguing that “we need to take a harder and closer look at the ideal of uniformity and the condemnation of forum-shopping”). Currie has, of course, been criticized for emphasizing the policies underlying substantive laws to the exclusion of more general choice-of-law policies, like minimizing forum shopping and enhancing uniformity and predictability. See, e.g., Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960); Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975).

829. See Kramer, *supra* note 827, at 313 n.117 (“[T]he argument that plaintiff’s power to shop for a forum is unfair to defendants rests on an unarticulated—and unexplained—assumption about what each party is entitled to expect in a “fair” system. [Although] I share the intuition that it is ‘unfair’ if plaintiffs can always choose among the potentially applicable laws...I am loath to rely on an intuition that I cannot satisfactorily defend simply because it is widely shared.”).

Of course, to the extent forum-shopping creates uncertainty, parties may attempt to contract around the problem through forum-selection and choice-of-law clauses (at least in contractually-based cases) or may contractually choose non-litigation alternatives. These “solutions” depend in part, however, on the law applied to the contractual provisions. See *supra* notes 45-48 and accompanying text.

require extensive networked cooperation, and hierarchical rules are likely to become less effective.⁸³⁰ In such a world, a cosmopolitan conception of jurisdiction is likely to become the norm.

Finally, the mere assertion of jurisdiction will not lead to a nightmare world of multiple liability around the globe because enforcement will remain a contested issue. As the story of the creation of the ordained Jewish court in Safed indicates, just because a tribunal asserts jurisdiction does not mean that its judgment will be recognized and enforced elsewhere. Rather, the judgment will be analyzed both for its assertion of community dominion and for its substantive norms. Only if the decision can persuade other communities elsewhere will it be entitled to recognition. To use the Yahoo! example again, the French court must persuade the American court both that the norms embodied in the First Amendment must yield to the need to protect French citizens from accessing Holocaust memorabilia and (more generally) that the needs of French citizens justify the assertion of French community dominion over Yahoo! in this instance. What neither court could do in a cosmopolitan pluralist understanding, however, is simply throw the case out for lack of jurisdiction. Eschewing the formalistic application of mechanical jurisdictional rules ensures that substantive discussion of both community definition and evolving substantive norms will always take place.⁸³¹

The recent Canadian Human Rights Commission decision ordering American resident Ernst Zündel to remove anti-Semitic hate speech from his California-based website provides an example of the way even possibly unenforceable decisions may nevertheless be important.⁸³² Indeed, the Commission's order explicitly acknowledged the difficulty of enforcement, but nevertheless insisted that there was "a significant symbolic value in the public denunciation" of Zündel's actions and a "potential educative and ultimately larger preventative benefit that can be achieved by open discussion of the principles" enunciated in its decision.⁸³³ By refusing to dismiss the case on jurisdictional grounds, the Commission was able to articulate norms that might have persuasive value both in Canada and elsewhere over time. And, if a United States court subsequently were to refuse to enforce the order on First Amendment grounds (as in the Yahoo! case), such a decision would likewise provide an opportunity for debate about both the most appropriate community to exercise dominion over Zündel and the most attractive normative stance with regard to Internet freedom of expression.

830. Joseph O. Keohane & Joseph S. Nye, Jr., *Introduction*, in *GOVERNANCE IN A GLOBALIZING WORLD*, *supra* note 669, at 1, 19.

831. Of course, other constitutional, statutory, or prudential constraints, such as standing doctrine, might still cause a court to reject a claim.

832. *See Citron v. Zündel*, *supra* note 83.

833. *Id.*

A corollary question to jurisdiction is what law to apply to these transnational (or cosmopolitan) assertions of jurisdiction. While a full elaboration of this issue is beyond the scope of this Article, Graeme Dinwoodie's application of the substantive law method, discussed previously,⁸³⁴ provides the appropriate starting point. Dinwoodie argues for a revival of the old *lex mercatoria*,⁸³⁵ suggesting that the judicial role in multistate cases should permit common law development just as in domestic cases.⁸³⁶ By definition, a dispute involving multiple communities means that there will be multiple norms available to apply. Instead of using mechanical choice of law rules to choose one set of norms or the other, Dinwoodie argues that courts should be free to develop an appropriate rule from an amalgam of these norms.

In Dinwoodie's vision, national courts would apply international norms, which in turn would shape and develop both the international norms themselves and even the domestic norms over time, much as Cover observed human rights norms evolving since Nuremberg. This approach suggests that a true international common law might arise. Even if this seems too utopian, multinational actors would need not fear outlier jurisdictions because, again, those jurisdictions would always be obligated to persuade courts elsewhere to enforce their judgments. Thus, the enforcement arena would provide a powerful incentive to courts not to move too far away from a developing international consensus.

In addition to the development of a transnational common law, another way of accommodating multiple community affiliations also has deep historical roots. From 1190 until 1870, English law used the so-called "mixed jury," or jury *de medietate linguae*, with members of two different communities sitting side-by-side to settle disputes when people from the two communities came into conflict.⁸³⁷ Coke attributed this practice to the Saxons, for whom "twelve men versed in the law, six English and an equal number Welsh, dispense justice to the English and Welsh."⁸³⁸ Regional differences, however, were not the only type of community variation recognized in the mixed jury custom. Mixed juries were also used in disputes between Jews and Christians,⁸³⁹ city and country dwellers,⁸⁴⁰ merchants and non-merchants,⁸⁴¹ and members of different social

834. See *supra* text accompanying notes 306-319.

835. See *supra* note 307.

836. See Dinwoodie, *supra* note 271, at 548.

837. See Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and Proposal for Change*, 74 B.U. L. REV. 777, 781 (1994); see also MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND KNOWLEDGE* 8 (1994).

838. *Id.* at 17 & n.82 (quoting Coke and citing other sources).

839. See *id.* at 18-21; Ramirez, *supra* note 837, at 783-84.

840. See *id.* at 17.

841. See *id.* at 23-25; Ramirez, *supra* note 837, at 784-86. Indeed, mixed juries for merchants apparently helped spawn the *lex mercatoria* on which Dinwoodie's conception builds. See CONSTABLE, *supra* note 837, at 23-25.

classes.⁸⁴² In the United States, the custom of mixed juries was imported from England and used in disputes between settlers and native tribespeople⁸⁴³ and in other inter-jurisdictional disputes at least through the beginning of the twentieth century.⁸⁴⁴ Karl Llewellyn's proposal that merchant experts sit as a tribunal to hear commercial disputes relies on a similar idea that specialized communities may possess relevant knowledge or background that should be called upon in rendering just verdicts.⁸⁴⁵ And the principles underlying mixed juries still find expression today in the line of U.S. Supreme Court decisions aimed at ensuring that jury panels reflect both racial and gender diversity⁸⁴⁶ and in the practice of having judges from multiple countries preside at international tribunals. The custom of the mixed jury could be revived and expanded, however, to encourage the development of norms that cut across boundaries of individual territorial states.

A truly pluralist conception of jurisdiction also allows us to make sense of *non-state* assertions of jurisdiction. In order for the legal norms of a non-state community to be enforced beyond its boundaries, those norms must be adopted by those with coercive power. In a sense, this is how even state-sanctioned courts operate because they lack their own enforcement power. Courts always issue decisions at the sufferance of their "King," and if they choose to defy the entity that enforces their judgments, they will need to appeal to a broad base of popular support or risk being treated as a political irrelevance. Likewise, non-state jurisdictional assertions, such as the decision to apply the norms of merchants or the pronouncements of the permanent people's tribunals, must make a strong case to the governments of the world and other political actors that their assertion of community dominion is appropriate and that the substantive norms they express are worth adopting. By extending the term jurisdiction to these non-state norm-producing acts, multiple communities can attempt to claim the mantle of law, making it more likely that we will notice these visions of the bridge from reality to alterity.

One might think that current jurisdictional rules are already a proxy for the determination that a community legitimately can assert dominion over a controversy. Indeed, this Article has already argued that

842. *See id.* at 17.

843. *See* Katherine A. Hermes, *Jurisdiction in the Colonial Northeast: Algonquin, English, and French Governance*, 43 AM. J. LEGAL HIST. 52, 64-65 (1999).

844. *See* Ramirez, *supra* note 837, at 790 & n.85 (noting that, "[a]t various times between 1674 and 1911, Kentucky, Maryland, Massachusetts, Pennsylvania, New York, Virginia, and South Carolina each provided for mixed juries").

845. *See* Wiseman, *supra* note 792, at 512-15 (describing Llewellyn's merchant tribunal proposal).

846. *See* *Batson v. Kentucky*, 476 U.S. 79 (1986) (forbidding prosecutors from challenging jurors solely on the basis of race); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (extending *Batson* to peremptory challenges based on gender).

jurisdictional rules play precisely that role.⁸⁴⁷ There are, however, two significant limitations regarding the particular mapping of jurisdiction and choice of law that we have now. First, most jurisdictional systems (both in the United States and elsewhere) are moored to geographical territory. Even the more flexible *International Shoe* “minimum contacts” test is based on contacts with or effects on a physical location. This is problematic because, as we have seen, physical territory and geographical boundaries are not necessarily the only, or even the most appropriate way of defining community. Second, current jurisdictional schemes tend to assume that territorially defined sovereign entities—nation-states (or individual states within federal systems)—are the only possibly relevant category of community affiliation. Yet, again as we have seen, this is an overly narrow view that does not do sufficient justice to the multiple, overlapping, and often nonterritorial conceptions of community that exist in the world. Thus, we need a more capacious view of what constitutes a relevant jurisdictional community, one that neither limits the jurisdictional assertion based on contact with a geographical locality nor limits the range of possible community affiliations that might be relevant.

In a cosmopolitan pluralist conception of jurisdiction, courts could not simply dismiss assertions of jurisdiction based on a mechanical counting of contacts with a geographically-based sovereign entity. This is just as well because, as we have seen, such jurisdictional tests are routinely acknowledged as problematic in a contemporary world of interconnection and cross-border interaction. Rather, the court being asked to enforce a judgment would need to address in a more nuanced way both the question of whether the assertion of jurisdiction that led to the judgment was legitimate and whether the substantive norms announced by the prior court are enforceable.

A detailed description of precisely how this pluralist jurisdictional system would operate in practice is beyond the scope of this Article, and so I will not here return to the various challenges and responses surveyed in Parts One and Two in order to apply this approach. Indeed, given that such a model relies on the common law development of jurisdictional norms, a programmatic mapping of the contours of the analysis is inappropriate. Instead, the important point is merely to open up the opportunity to consider how our understanding of jurisdiction might respond to changing conceptions of physical space, territorial boundaries, and community definition. Moreover, even if one were to reject a more pluralist conception and retain current jurisdictional frameworks, the discussion in this Article makes clear that simply assuming that territorial boundaries and nation-state communities are somehow the natural and inevitable basis for a system of jurisdictional rules is not an option. Rather, any jurisdictional system needs to be justified (both descriptively and normatively) as the appropriate way of organizing

847. *See supra*, Section IIIB.

space and conceiving of community affiliation in the contemporary world.

Conclusion

At nearly the same historical moment that the Peace of Westphalia established the spatial jurisdictional orientation of the modern nation-state, Isaac Newton also established a new way of thinking about space.⁸⁴⁸ In place of the medieval conception of the physical world as a living organism, Newton argued that space was absolute, always similar, and immovable.⁸⁴⁹

Both the Newtonian and the Westphalian understanding of space survived and thrived into the 20th century. Newton's formulation of mathematical laws for physical space was developed and refined, and it became part of the accepted understanding of the universe. Similarly, the territorial boundaries that define legal jurisdiction, though hopelessly arbitrary, have continued to be absolutely compelling. An unwavering faith in the necessity and legitimacy of jurisdictional boundaries seems to us to be not only a foundation of our government, but a precondition of any government.⁸⁵⁰ As Richard Ford has observed, our reaction to the formality of jurisdictional arrangements is "something akin to the reverence and awe we reserve for natural phenomena beyond our control or comprehension."⁸⁵¹

In the past century, Albert Einstein and Stephen Hawking have challenged the Newtonian understanding of space and introduced conceptions of fragmentation and indeterminacy into the Newtonian model.⁸⁵² Could we stand to introduce those same elements into our understanding of jurisdiction? And if we did, what might the world look like? Would nation-states necessarily crumble? Would all that is solid melt into air?

I think not. To assert that geographical boundaries and nation-state sovereignty are no longer the only relevant way of defining space or community in the modern world is not to deny that they retain some salience as influences on personal identity. Indeed, even if we were all cosmopolitans in Nussbaum's sense, with concentric circles of allegiance, at least one of those circles might include our geographical locale and

848. This analogy is derived from CURTIN, *supra* note 5, at 1-2.

849. See EDWARD N. ANDRADE, SIR ISAAC NEWTON (1954).

850. Ford, *supra* note 402, at 851.

851. *Id.*

852. See, e.g., STEPHEN HAWKING, A BRIEF HISTORY OF TIME: UPDATED AND EXPANDED TENTH ANNIVERSARY EDITION 55-63; 188-90 (1998) (discussing the uncertainty principle).

another might include the nation-state in which we hold citizenship.

Nevertheless, although such identities remain important, they are not the only ways of conceptualizing space or identifying with a community. Allegiance to a physical location or a national identity are only two of the multiple conceptions of belonging and membership that people may experience. In our daily lives, we all have multiple, shifting, overlapping affiliations. We belong to many communities. Some may be local, some far away, and some may exist independently of spatial location.

Jurisdiction is the way that law traces the topography of these multiple affiliations. A jurisdictional assertion extends a community's dominion over the parties to a legal action. Thus, it is a statement that all those before the court are at least in some way members of the same community and that they can appropriately be bound together in the physical space of the courtroom to resolve the particular issue in dispute. A n assertion of jurisdiction, therefore, is never simply a legal judgment, but a socially embedded, meaning-producing act. Conceptions of jurisdiction become internalized and help to shape the social construction of place and community. And, in turn, as social conceptions of place and community change, jurisdictional rules do as well. But if that is so, then what are we to make of the fact that our current jurisdictional system seems to correspond so poorly to contemporary social conceptions of space, distance, borders, and community?

The challenges posed both by the rise of online communication and more generally by the forces of globalization have brought this question to the fore. Repeatedly over the past several years legal conundrums have arisen around a range of issues that can broadly be defined as jurisdictional in nature. These challenges, some of which were surveyed in Part One, are not necessarily unanswerable, but at the very least they indicate that the reality of human interaction is chafing against the strictures our current conception of legal jurisdiction imposes. In such moments of transition, as legal forms adapt to a changing social environment, a window of opportunity opens. For a brief moment, we have the chance to rethink established verities and question whether a particular set of doctrines—even if it can be cobbled together to work one more time—makes sense anymore given the changing context of social life.

In this article I have embraced the opportunity to interrogate the dominant assumptions underlying legal jurisdiction. Instead of focusing on doctrinal questions regarding how best to “solve” the specific jurisdictional dilemmas that have been raised to date, I have instead taken a step back and asked a series of foundational questions. What does it mean in social terms to assert jurisdiction? How are conceptions of jurisdiction related to the way people experience physical space, territorial borders, distance, and community? Why should the nation-state continue to be the dominant player on the field of legal jurisdiction? Are there other forms of community affiliations that the law might recognize?

There are two principal reasons for asking such questions. First, we gain a better understanding of the world of experience on which the legal world of jurisdiction is mapped, and we therefore can develop a richer descriptive account of what it means for a juridical body to assert jurisdiction over a controversy. Second, we can begin to conceive alternative approaches to jurisdictional questions that might better respond to the contested and constantly shifting processes by which people imagine communities and their membership in them.

Although I have sketched one such alternative approach here, it is less important that others embrace this particular conception of jurisdiction than that they begin to see the social meaning of legal jurisdiction as an important field of discourse and study. After all, there is nothing natural or inevitable about using ideas of fixed geographical boundaries and nation-state sovereignty as the basis for a jurisdictional system. It is simply one approach among many and it therefore must be justified both as an accurate reflection of people's lived reality and as a normatively attractive jurisdictional system in its own right. Accordingly, there is much work to be done.

In the end, I see jurisdiction and recognition of judgments as fruitful sites for thinking about the relationship between the "local," the "national," and the "global" and for mapping the evolving ways in which people construct identity by reference to places and/or communities. No one really knows whether the nation-state is dying or thriving, whether globalization is truly a new phenomenon or a lot of hype, whether the Internet defies territorial borders or whether geographical boundaries can be reinscribed into cyberspace, whether the world is fragmenting into subnational conflicts, or conversely, whether it is moving towards an era of global cooperation and international governance. Or, perhaps, there's a cosmopolitan future awaiting us, when people will come to interpret themselves without using the nation-state as a frame of reference.

Whatever the answers to these imponderables, they will be reflected and constructed in the domain of legal jurisdiction. And, if we pay attention to the social meanings embedded in jurisdictional debates, we might just possibly catch a glimpse of where we're headed.