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Changing Identities and Changing Laws: Possibilities for a Global Legal Culture

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Introduction

The 2002 World Cup provided a symbolic moment in the evolving relationship of identity and the nation-state. The source was the Polish squad, one of the teams hoping to create a stir in that summer of fine football. Still emerging from decades of Soviet control, the Polish people were full of pride for their team, especially for their star forward Emmanuel Olisadebe. Olisadebe, a 24-year-old born in Nigeria, was discovered in Lagos by a Polish scout and began playing for a cellar-dwelling Warsaw club team in 1997. In just three years he led the club to an unprecedented joint League and Cup championship, and Zbigniew Boniek, a former Polish star, led a campaign for Olisadebe to be granted citizenship. With the assistance of a presidential decree, Olisadebe, still barely able to speak Polish, became a Polish citizen just before the deadline for World Cup qualifying matches. He scored seven goals, led Poland to the final round of play in South Korea and Japan, and was quickly proclaimed a new Polish hero.¹

With a nudge and a wink, a Nigerian became one of the most recognizable Poles. The populace of one of Europe’s most homogeneous nations suddenly embraced an African-Pole. Its response revealed that, even in a society still discovering its own post-Cold War independence and identity, citizenship and nation may be just terms of convenience. They mean little more than a team to cheer for; even if some Polish children cheered for England or Germany in the World Cup, no one reprimanded them. The era during which the nation-state not only claimed to be unchallengeable but also was assumed to be sacrosanct has

come to an end. The nation—as a source of identity—may be reduced to the status of a sports uniform.2

The theory of globalization this Note builds upon is the model of denationalization.3 In this model, globalization is a radical rearrangement of communities that results in a need to relocate our sources of laws and legal norms. Most denationalization analysis focuses on the interplay between communities and societies on the regional or global scale and questions the possibility of denationalization. This Note takes a different tack, accepting for the sake of sparking further discussion that a fully or partially denationalized world is inevitable,4 and examining what effect the denationalization of identity may have on the relationship between the individual and the law. Examining current legal structures through new lenses can help us anticipate how they might change. From whence do the rules we feel compelled to follow come? What might individuals who do not recognize political borders consider binding law? I argue that a nation state-based legal system is ill suited to a world of multiple identities. Legal scholars need to consider new theories of the law and the legal institutions that result. This Note proposes a global legal culture as an alternative legal philosophy and structure, one that can help the legal profession envision how to alter existing legal institutions and build new ones. The changes considered are gradual, even generational, and are not meant to replace existing structures entirely.

2. Peter Spiro has commented on the new postnational reality of citizenship: “Where sovereign-subject relations were once analogized to the relationship of parent and child (a product of nature and hence indissoluble) and more recently to marriage (voluntary and terminable, but also singular), we may be moving towards a paradigm in which the more appropriate analogy is to membership in a club or civic association, in a class of affiliation that does not necessarily constrain other attachments.” Peter J. Spiro, Dual Nationality and the Meaning of Citizenship, 46 Emory L.J. 1411, 1416-17 (1997).

3. See, e.g., Saskia Sassen, The Need to Distinguish Denationalized and Postnational, 7 Ind. J. Global Leg. Stud. 575, 576-78 (2000); see also Alfred C. Aman, Jr., Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest, 6 Ind. J. Global Legal Stud. 397, 407-10 (1999). For an idea of how radical this concept is, see Louis Henkin’s writings on international law: “[O]rdinarily, nationhood is the unspoken assumption of political life. But the nation (‘state’) is not only a political conception; it is also a fundamental legal construct with important consequences. Statehood—who is and shall be a state—has been one of the major political issues of our day.” Louis Henkin, How Nations Behave: Law and Foreign Policy 15 (2d ed. 1979).

4. I presume a denationalized world for the sake of stimulating discussion, while acknowledging that some legal scholars find the notion of complete denationalization to be implausible. I do believe, however, that partial denationalization, at least in terms of individual and corporate identity, has already begun to occur.
But they have profound implications for nation-states, the legal profession, and, most importantly, the man on the street in Delhi or Kansas City.

Part I of this Note discusses changing concepts of citizenship and identity, focusing on their psychological implications. There has been an explosion of excellent literature exploring the implications of globalization for citizenship and identity in the last ten years. This Note supports that work by providing three examples of how psychological dimensions of individual identity are changing, and how that change is affecting our world. The deeper project, which begins in Part II, suggests that identity is becoming denationalized to such an extent that it will fundamentally change the role of law in global society. Part II aggregates the fragmented identities of globalization and suggests that existing laws and legal systems cannot adequately respond to the reality of a world where political borders no longer define community and identity. An alternative is the cultivation of a global legal culture. Part III then presents and responds to possible arguments against the idea of a denationalized world and a global legal culture. The conclusion briefly considers what sort of institutional changes may result from this shift in legal theory, with the intent of opening the door to further discussion.

I. Citizenship and Identity

A. Who Am I?

Each version of the postnational citizenship identity claim points to the fact that as ties increase across national borders, people are increasingly taking on commitments and identities that exceed the bounds of the national society and its members. Globalization, in this account, reconstitutes us in the deepest personal ways; it has important imaginative and emotional and moral effects on all of us.—Linda Bosniak

Citizenship has traditionally been defined as a state-based identity, as


“participation in and membership of the nation-state.”

Citizenship, however, may be considered more expansively to include participation in, and membership of, any community or communities, usually with associated obedience to some sort of legal code or culture. In this sense, citizenship is the active implementation of identity. While political citizenship plays a role in one’s identity, this Note suggests a future in which citizenship is determined by a chosen, conscious sense of identity. Ultimately, a free and wide-ranging discussion of new theories of identity and citizenship should accept that identity and citizenship may be defined in a number of ways.

Great emphasis is placed on national identity in both ethnically homogeneous and artificial nations (where borders are not drawn along historical cultural/racial divides). Nothing identifies a traveler as much as nationality; while even race and gender may lose their emphasis in a collective of travelers, nationality remains a major identifier. But we now live in a world where the nation-state is beginning to lose its primacy as a source of identity. This Note anticipates a future in which people in many parts of the world, particularly in cosmopolitan areas, envision themselves as having multiple identities or none at all. Communities will drift together and intermingle, more like liquids than solids. Many parts of the earth may resemble a sort of aggregated border town: a free-wheeling, lively mix of languages and cultures. In border towns there is a sense of lawlessness, or rather a sense that the law doesn’t apply. There is little certainty as to which country one is in at any one time: signs are bilingual and both currencies are accepted on either side of the border. If something is illegal in one country an individual can simply stroll across the border and sell it, make it, or do it on the other side. And this recognition of the geographical arbitrariness of the law’s application means that one is more likely to do the activity in question even on the side of the fence where it is illegal.

Linda Bosniak uses the term “postnational citizenship” to explain this declining primacy of state sovereignty and rising “transitional experience” of the

8. Other theories suggest that it need not even consider the law. For a short summary of various definitions, see Linda Bosniak, Multiple Nationality and the Postnational Transformation of Citizenship, 42 Va. J. Int’l L. 979, 1000 (2002).
9. Id. at 1001 (“Once we begin to think about citizenship as itself a plural concept . . . the idea of citizenship’s increasing postnationality can seem more plausible and more meaningful.”).
individual. Robert Holton has written that globalization has been extending its "hybridizing thrust" for centuries. "Just as the idea of biological race is a spurious basis for social and cultural distinction, so the idea of distinct cultures defined by purely endogenous characteristics is equally spurious from an analytical point of view." The vision of a world with increasingly stratified divisions has received considerable attention of late, highlighted by writers such as Samuel Huntington. But this vision of distinct and irreconcilable societies lacks depth and threatens to subordinate the complexity of the individual to an academic grouping of people. It tells a good story, but an incomplete one.

B. Examples of Denationalizing Identity

There are many phenomena commonly used to portray globalization as a force of increased mobility and interconnectivity, but few that pinpoint evidence of how individuals and nations have changed their concepts of identity. In contrast, the denationalized corporation, as a model of the global possibilities for chosen identity and chosen law, is much better documented. What follows are three examples of how the fragmentation of identity and citizenship is already taking place in various legal and social permutations.

10. Id. at 991–92.
13. Even though many small corporations are extremely diffuse with regards to where they pay taxes and maintain assets; they are actively exercising a form of chosen identity. Global corporations are often referred to as transnational corporations (TNCs) because these companies operate virtually without political borders. There has been an explosion in the use of risk-spreading and tax-avoiding global devices such as offshore banking, foreign subsidiaries, and tax shelters. In one of the most blatant renouncements of national identity, hundreds of American companies are incorporating in income tax-free Bermuda, choosing "profits over patriotism." David Cay Johnston, U.S. Corporations Are Using Bermuda to Slash Tax Bills, N.Y. TIMES, Feb. 18, 2002, at A1. The use of over 800 subsidiary tax shelters helped Enron avoid paying any income tax for four of the past five years. See Citizens for Tax Justice, Less Than Zero: Enron's Income Tax Payments, 1996–2000, (Jan. 17, 2002), http://www.ctj.org/html/enron.htm. Adam Weinberg, co-founder of the reform group Democracy Matters, has noted that U.S. law bars foreign corporations from giving money to U.S. political campaigns and asked whether a transnational corporation like Enron should be considered a foreign corporation under such laws. John Nichols, Enron's Global Crusade, THE NATION, Mar. 4, 2002, at 14. International businesses are already acting to minimize the significance of national legal systems. Litigation of international business disputes in national courts has decreased rapidly in the past two decades. Independent global and regional dispute resolution bodies have
1. The Growth in Multiple Citizenship

a. Changing Political Identities

No country remains unaffected by issues of migration and citizenship. Rich countries receive waves of legal and illegal migrants, chasing opportunity or fleeing danger or hunger. For a number of years Australia encouraged immigration, and the country now faces the tensions of a society with a large naturalized population. The United States no longer actively promotes naturalization of foreign residents, resulting in a society that perceives of itself as less of a 'melting pot' than it has historically claimed to be.\(^4\) Israel is a land of immigrants; its Law of Return lets all Jews return and take citizenship. Many of the migrants who flee to South Africa, looking for economic opportunity, are undocumented and unrecognized. Most significantly, multiple and dual citizenships are increasingly common.\(^5\)
During the Westphalian era, exclusive citizenship was regarded as a vital means of protecting the nation and national identity. U.S. law originally held that citizenship could be revoked on certain grounds, including naturalization in another nation-state or even marriage to foreigners by American women (but not men). These grounds were extended in 1940 to include, among others, voting in a foreign election. The Supreme Court recognized the danger of statelessness and subsequently restricted Congress' power to strip citizenship. “Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen.” The law of citizenship softened further in 1964 when the Supreme Court rejected the previously accepted assumption that a naturalized citizen could lose U.S. citizenship by residing in her country of origin for three years. This was soon followed by Afroyim v. Rusk, in which the Court held that citizenship could not be taken away because an individual voted in a foreign election. Over subsequent decades, the United States has chosen to take a highly hands-off position on citizenship. It technically still does not favor dual citizenship, but no recent action is known as a result of an individual taking or retaining foreign citizenship. The government does not attempt to remove citizenship, nor question the holding of foreign citizenship, unless there is a concern over national security or criminal activity. The United States does not attempt to track and record the number of dual citizens, but the total “may be quite large.”

16. This is true only of the past two centuries. Prior to that, self-governance was often encouraged and multiple loyalty was common. See Franck, supra note 5, at 377–78.


18. Id. at 136.


22. There are four ways in which one can technically claim dual citizenship: being born in the United States to a foreign parent; being born in a foreign country to parents of two different countries, including one American; renouncing foreign citizenship during the U.S. naturalization process, when the foreign country does not regard expatriation as a result of U.S. naturalization; or naturalizing in a foreign country, then resuming American citizenship. From Migrants to Citizens, supra note 17, at 138–39.

23. See Chander, supra note 5, at 1040 n.179. Whether this attitude changes in the post-September 11 overhaul of national security remains to be seen.

24. From Migrants to Citizens, supra note 17, at 139. For a more complete summary of the history of citizenship in the United States, see Franck, supra note 5, at 378–80.
rationale behind forcing an individual to declare sole allegiance to the single state has lost much of its value.\textsuperscript{25}

This is equally true for other nations. The lack of importance attached to determining citizens’ “loyalty” is evident from the increasing number of countries that allow citizenship to be retained even if an individual is naturalized elsewhere.\textsuperscript{26} Since 1977, Canada has allowed its citizens to hold multiple nationalities without any restrictions, and naturalized citizens need not renounce their prior citizenship.\textsuperscript{27} Most European countries allow for dual citizenship. Many sources of immigrants, especially emigrant countries such as Turkey, Colombia, Italy, and the Dominican Republic, also allow members of the “diaspora” to retain citizenship if naturalized in another country.\textsuperscript{28} Single national loyalty may become a quaint anachronism. Though this does not necessarily lessen the fervor of nationalism (some immigrants are among the most fervent patriots), it does allow individuals to exercise some choice of identity/affiliation. International and national law’s increasing acceptance of dual nationality—without any evident catastrophic consequences—weakens the validity of the statist claim to singular loyalties.

The increasing acceptance of dual and multiple citizenship shows that even nations themselves no longer emphasize citizenship as a primary definition of who we are. As we develop our own sense of belonging to multiple communities, the diaspora model becomes more appropriate. The possibility of exerting autonomy in our identity fulfills Stephen Dedalus’s declaration of independence from imposed identity.\textsuperscript{29} Thomas Franck has portrayed the new world of autonomous

\begin{enumerate}
\item[25.] Peter Spiro has argued that dual citizenship should be embraced by the United States, and that the oath renouncing foreign allegiances be eliminated entirely. Such a change, he argues, would be a significant recognition of the new nature of citizenship. Spiro, supra note 2, at 1479–84.
\item[26.] An incomplete list includes Canada, Argentina, Colombia, Costa Rica, the Dominican Republic, El Salvador, France, Ireland, Israel, Italy, Panama, Switzerland, and the United Kingdom. FROM MIGRANTS TO CITIZENS, supra note 17, at 140. These nations have found it more useful to retain individuals in their citizenship roles than punish them for their decision to legally recognize their habitation in another nation.
\item[27.] Donald Galloway, The Dilemmas of Canadian Citizenship Law, in FROM MIGRANTS TO CITIZENS, supra note 17, at 99.
\item[28.] Chander, supra note 5, at 1040–41; see also Cortese, supra note 15.
\item[29.] “I will not serve that in which I no longer believe, whether it call itself my home, my fatherland, or my church: and I will try to express myself in some mode of life or art as freely as I can and as wholly as I can, using for my defence the only arms I allow myself to use—silence, exile and cunning.” JAMES JOYCE, A PORTRAIT OF THE ARTIST AS A YOUNG MAN 268 (1916).
\end{enumerate}
identity as almost a fait accompli. He distinguishes it from the pre-Westphalian era, during which individuals often maintained multiple national identities, because the rulers and legal systems of that time were imposed, not chosen.

Now, in the twenty-first century, the realities of social interaction, conflict resolution, economic, scientific, and cultural development, and ecological and resource management have combined with various facets of the communications revolution to point us towards a global civil society. . . . In short, a community is emerging in which, for the first time, individuals are free to choose the components of their identities and to manifest a free choice of affinities. They are liberated to express associational preferences.

A further element of the citizenship debate is the existence of stateless peoples. Significant stateless populations include Bhutanese living in Nepal and India; Bidoons in Kuwait; Kurds in Syria and Iraq; and minority populations in Burma. After fifty years of stateless existence, the Palestinian people still face a lack of recognition. The United Nations and some states issue refugee documents and/or traveling documents or special citizenship, but these are all piecemeal, temporary solutions. For example, Israeli authorities control the issuance of passports to Palestinians in the occupied territories, yet the passports do not provide recognition equivalent to Israeli citizenship. This is also true in other Arab countries, where Palestinian residents are often issued traveling documents without the protection of full citizenship. In addition to causing obvious practical problems for millions of people, the dilemma of statelessness bolsters the case for a theory of identity that is not restricted to political borders, and makes the development of transnational legal regulations all the more necessary.

31. Id. at 45.
32. Id. at 64.
b. The Shady Side of Changing Citizenship

The Finor Organization provides offshore banking services from its headquarters in Panama. It also runs a healthy secondary business in what it calls “ID products.” These include secondary passports, titles of nobility, and—for the discount shopper—“camouflage passports,” documents made to resemble those of Rhodesia or other countries that no longer exist.

Although many of the services are global vanity plates, secondary passports are much more significant. Finor claims to be able to provide citizenship from any of fifteen different countries in sixty to ninety days. The process Finor undertakes is completely legal. It even has devised means by which to obtain citizenship under a different name, if one so desires. Most of the programs provide “economic citizenship,” which does not grant the holder permanent residency. Visa-free travel is possible, however, to many countries. Its Central American program is one of its most heavily promoted, and Finor advertises that it will allow for “naturalization in Spain within an abbreviated time of only two years’ residence in Spain.” Finor claims to be able to provide passports from a variety of locations (though the specific countries are not listed) including Central America, Caribbean Island, Eastern Europe, Central Europe, and even the European Union, for fees ranging from $15,000 to $150,000.

While such activities might technically be legal, there is an instinctive desire to classify them as illegitimate at best. Media sources in the United States and

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Europe are constantly reporting on the epidemic of illegal immigration from Africa, Asia, and South America. The emphasis is on the illegal nature of the migration, portrayed by speedboats on moonless nights and boxcars full of human cargo. Yet it is possible to buy the legal right to undertake exactly the same migration, but by first-class airline instead of a cargo ship. This is the absurdity of modern “exclusionary” citizenship.

Tonga has one of the world’s most flexible citizenship policies. Since the 1980s it has had a significant influx of foreign currency through a program in which individuals can purchase Tongan citizenship. Indeed, a visitor’s bureau’s website casually mentions, “For the visitor who wishes to eventually become permanent there are different courses of action I have heard. Of course, one option is to purchase a Tongan passport, although how long this option will be available is not known to me. This option has been taken up by many Asians and for them is [sic] seems to have been satisfactory.”40 Although a purchased Tongan passport gives the holder a different status from naturalized citizens, it is apparently a satisfactory tool for individuals insecure in their current status, and is sufficient to help them travel internationally and fade into the global collage.

2. The Return of Pirates to the High Seas

A variety of international groups are held to exemplify the de-emphasis of the nation-state, the most popular being benign groups, such as Amnesty International, that operate across national boundaries and from a self-proclaimed global position. But less publicly applauded transnational groups also exist, pirates being among the most serious and most denationalized. Pirates can be distinguished from other far-reaching criminal groups, such as the Italian or Russian mafia. The latter are national groups that operate internationally, much like corporations; pirates are unaffiliated groups of individuals operating on the

open seas, often forming and dissolving after only a short period of time. Both modern and historical pirates represent a diversity of ethnicities and identities.

Harboring where they can without being noticed and selling their loot to the highest bidder, pirates have recently reemerged as a sign of the growing lack of nation-state control. Piracy has been called "a troubling symptom of a new world order, one shaped by a fierce Darwinian struggle in the feral markets of modern international trade." This is only as true as the fact that street crime and financial fraud are symptoms of "fierce Darwinian struggle," a struggle that is accepted as a fundamental aspect of modern human society. Piracy, however,

41. The modern definition of piracy covers seizure of both ships and aircraft. This section of the Note can be extrapolated to cover such acts, which also have a clearly denationalized aspect. Piracy is defined as:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).


42. Compare DAVID CORDINGLY, UNDER THE BLACK FLAG: THE ROMANCE AND THE REALITY OF LIFE AMONG THE PIRATES 12-15 (1996) ("The pirates who operated in the West Indies [in the 17th century] were drawn from a number of seafaring nations and many were black slaves, so there was no sense of national identity to unite them.... The largest number, around 35 percent, were native Englishmen; next came men born in the American colonies, around 25 percent of the total; 20 percent came from the West Indian colonies, mostly Jamaica, Barbados and the Bahamas; 10 percent of the pirates were Scottish; 8 percent were Welsh; and there was a scattering of Swedish, Dutch, French, Spanish, and Portuguese.... [A] considerable number of the men on the pirate ships were black") with Jack Hitt, BANDITS IN THE GLOBAL SHIPPING LANES, N.Y. TIMES MAGAZINE, Aug. 20, 2000, at 36, 38-40 (describing the 1999 attack on a cargo ship: "there were 12 pirates on board—as multicultural as their 18th century avatars: 7 Indonesians, 3 Malaysians and 2 Thais.... [T]he pirate king.... spoke four or five languages, including grammatically perfect English.").

43. See Hitt, supra note 42, at 36.

44. Id. at 39.
is unique in that it is an example of activity undertaken with a denationalized mentality.\textsuperscript{45}

It is not a coincidence that the last time pirates ruled the seas, from the fifteenth to eighteenth century, was just before the rise of the Westphalian nation-state. Janice Thomson describes the pre-1900 period as one in which violence was “democratized, marketized, and internationalized. Nonstate violence dominated the international system. . . . The identity of suppliers or purchasers meant almost nothing.”\textsuperscript{46} At that time identity was still highly denationalized and the multi-racial pirate crew was representative of the time. Pirates developed sophisticated global networks, creating their own boundary-less cultures, languages and flags.\textsuperscript{47} We are de facto returning to that political time. Pirates are the new, but paradoxically the old, threat—affiliated individuals that do not retain national/patriotic identity. The definition of modern piracy specifically notes events that take place for “private ends” on the high seas or outside any State’s jurisdiction. It is a crime without borders, and thus highly difficult to combat successfully.

In 1994, Thomson put piracy at the center of an analysis of how the state achieved a “monopoly on violence.” She asked, “What explains the elimination of nonstate violence from global politics?”\textsuperscript{48} Yet in the eight years since then, non-state violence has exploded, most publicly in the form of terrorism and piracy. The Piracy Centre was created under the auspices of the International Chamber of Commerce (ICC) in October 1992 in response to this rising problem. Financed primarily by ship owners and insurance companies, it is based in Kuala Lumpur.

\textsuperscript{45} Those held responsible for the 9/11 tragedy are another criminal example of the growth of the diaspora and multi-dimensional identities. It is likely that many Al-Qaeda fighters would profess loyalty to a nation, or certainly a town or family, in addition to their Muslim belief. But they have chosen to lend their identities, and lives, to an ideological group that thinks globally. While Al-Qaeda is destructive and malevolent, it is structurally highly denationalized and progressive. Hence this battle, fought between a Westphalian nation-state and a diffuse, modern coalition, is asymmetrical and unlikely to be resolved in a traditional manner.

\textsuperscript{46} Janice E. Thomson, Mercenaries, Pirates, and Sovereigns: State-Building and Extra-Territorial Violence in Early Modern Europe 3 (1994). Even under the nation-state structure, violence has always been an internationalized phenomenon. For example, the eighteenth century French army was one-third foreigners, and thousands of mercenaries fought for the British in the American War of Independence. Id. at 10.

\textsuperscript{47} Id. at 48. Piracy was a form of active rejection of the nation-state, many pirates coming from persecuted or oppressed subclasses. See id. at 43–68.

\textsuperscript{48} Id. at 3.
because a large percentage of piracy takes place in that region.\textsuperscript{49} But it is increasingly prevalent beyond the seas of Southeast Asia. Pirates have boarded everything from vacation yachts off the coast of Corfu to massive oil tankers operating near Singapore.\textsuperscript{50} According to a 2000 Piracy and Armed Robbery Against Ships report, there were 469 piracy attacks in that year, representing a fifty-seven percent increase in pirate attacks over 1999, four and a half times the total for 1991.\textsuperscript{51} The report also claimed that piracy was probably significantly underreported.

Part of the problem is that the shipping industry, the main focus of attack for modern pirates, is itself a highly denationalized and deterritorialized business. These corporations use nations as necessary labels of convenience—nothing more than flags of identification. Most commercial ships are registered in ports of convenience that have minimal taxation and regulation, including Panama, Costa Rica, and Singapore. The crews are as diverse as the pirate crews; the high seas have always been free, deregulated and borderless.\textsuperscript{52} This new battleground of pre-Westphalian forces is among the first signs of our return to a denationalized world.

3. \textit{Activism Without Borders}

Mainstream media takes every possible opportunity to poke fun at global activists. One favorite report mocked a woman at the 2001 World Social Forum in Brazil when she loudly complained that an ATM in Rio de Janeiro would not accept her Dutch bankcard, the obvious point of ridicule being her reliance on the same global banking networks that she was protesting against.

Though this view ignores the real concerns of “anti-globalization” protestors (who are actually pro-local development, pro-environment, pro-labor, or one of a dozen other permutations), it does reflect a deeper point: anti-globalization protestors, more so than their critics, have already accepted the new state of the world and begun to envision the future societies that can/may be created. Global

\begin{itemize}
\item \textsuperscript{52} The crew of the ship attacked in Hitt’s article included crewmembers from Malaysia, Bangladesh, Scotland, Ghana, and Indonesia. See generally Hitt, supra note 42.
\end{itemize}
activists are in fact a highly cosmopolitan collective of individuals of diverse nationalities gathering in global cities to contest dominant capitalist ideologies. They are united far more by ideology than nationality. Furthermore, they utilize Internet communication and hold sophisticated simultaneous solidarity protests (for example, protests were held in many cities in France supporting the demonstrators at the 1999 WTO meeting in Seattle). Most importantly, antiglobalists are not demanding protection for any group—they see themselves as representing humanity:

Amnesty International and Greenpeace are emblematic of this transnational militancy with an identity...that can't really be tied very specifically to any one country or even any region... These networks of transnational activity, conceived both as a project and as a preliminary reality, are producing a new orientation toward political identity and community. Cumulatively, they can be described as rudimentary, generally unacknowledged forms of participation in a new phenomenon, global civil society.

"Anti-globalization" has become such a pejorative term that many activists now refer to themselves as global activists. By identifying them as activists for the entire globe, this term better reflects the cosmopolitan nature of their ideology. Aaron Pollack has described the recent history of international activism as "an increased cross-movement coordination as well as a greater focus on regional and 'global' organizing that is a response to global economic restructuring and both the regionalization and the globalization of the world economy that this entails." The examples he provides include the cooperation of NGOs,

built upon relationships made at U.N.-sponsored events. To a certain extent the global cooperation of modern activism is due simply to the perceived existence of common enemies. These “enemies,” including the IMF, WTO and multi-national corporations, are those entities that most successfully utilize and encourage the growth of global infrastructure.

A significant number of the most rabid protestors at global events identify themselves as “anarchists.” It is an untidy term, but one often used for self-identification of a person who does not recognize the authority of any government. Anarchists lack allegiance to any legal system; yet this definition of anarchism does not necessarily reflect a sense of lack of social responsibility. On the contrary, anarchists exhibit a heightened sense of duty to their self-defined communities, both local and global, by actively protesting against perceived injustices. For these activists, humanity as a whole is one level of community (a cosmopolitan model), and national laws are seen to restrict the freedom of some members of that society.

The so-called “anti-globalization activists” are in fact leaders in the revolt against the old school of the nation-state. They are at the forefront of true globalization, collaborating and gathering strength from communities of ideas, often gathering under the umbrella of NGOs or non-profit groups, and working to create global networks of activist identity. This lack of traditional loyalty to the nation-state has broad social and cultural parallels, in the transfer of loyalty to identities and communities such as philosophies, professions, geographies and languages.

57. Id.

58. A very incisive observation of this came not with regard to nationality, but to college football. When Tyrone Willingham left his position as head coach as Stanford in January 2002 to accept a position as Notre Dame, many critics considered it a lack of loyalty. In response, Donald Kennedy, president emeritus of Stanford, explained that all faculty members “are subject to a widening set of loyalties that run well beyond the institution. The biologist who moves from University A to B for better facilities in which to pursue innovative research is being loyal to her craft. . . . As for Tyrone Willingham, he will bring strong values and an African-American presence to a highly visible and influential program. He’s loyal to his craft, too.” Donald Kennedy, The New School Spirit, N.Y. Times, Jan. 5, 2002, at A11.

Loyalty and identity exist on many levels: school, nation, profession, or personal interest. To the question “What ever happened to loyalty?” Kennedy answered: “What happened to loyalty is that it has been broken up into a lot of pieces in a highly complex world.” Id. But Kennedy admits “I rather liked the old world in which loyalty was easier to keep track of.” Id. The one-dimensional world of Westphalian nation-states, like old school loyalty, was easier to grasp intellectually and emotionally, but this does not give it any better chance of surviving.
C. National Identity and Alternative Models of Citizenship

1. The End of the Nation-State?

These three examples of tangible denationalization should convince most readers that it is already a significant social phenomenon. But these merely hint at much larger structural changes that may occur in the near future. Globalization as denationalization suggests an alternative future to the global capitalist model of unrestrained market competition mediated by nation-states and heavily influenced by multinational corporations. Indeed, denationalization may be a crucial force in preventing adversarial global competition from propping up the nation-state as a unit of exclusion. Linda Bosniak has suggested that since citizenship is theoretically viable even without the nation-state, the nation-state may disappear completely. This seems a bit extreme, as citizenship, among other things, involves the exercise of legal rights and obligations. While international human rights treaties list some basic human rights, they mostly rely on nation-state implementation, and legal obligations are not yet very developed for individual entities on the superstatist or substatist levels.

A subtler, two-dimensional form of denationalization appears more likely to occur. First, nation-states will shrink in size and stature. The nation-state has maintained its dominance in part by adjusting to the shape of preexisting “borders” of identity. The size of states shrink as the national structure is used as a means of empowering preexisting identities of ethnicity, culture, or language.

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60. See Bosniak, supra note 5, at 491.


62. See Michael Hardt & Antonio Negri, Empire 106 (2000) (“Whereas the concept of nation promotes stasis and restoration in the hands of the dominant, it is a weapon for change and revolution in the hands of the subordinated...”). Eqbal Ahmad has noted that Islam, like other religions, has often been opposed to the concept of national identity. Eqbal Ahmad, Confronting Empire: Interviews with David Barsamian 5–6 (2000). “[T]he idea of Pakistan was very strongly
The number of independent nation-states has grown to 191 in 2001, with many other movements for autonomy as yet unrecognized. Second, individuals will recognize citizenship as simply a convenience, rather than an integral, inviolable identity. As movement of individuals become as fluid as that of capital, nation-states may adopt more libertarian legal theories, particularly with respect to consensual laws, just as they have with respect to controls of capital and trade. But at the same time, those laws that do remain may become more harmonized among nation-states. A global norm will become pervasive, as it already has for many fundamentals of business transactions, such as letters of credit and contract terms.

"The end of the nation-state" is a popular sound bite used by futurist political scientists (often with negative connotations). The importance attached to such a phrase is its influence on the psyche of the individual and the subsequent reaction of the individual to new political and social structures. Some theorists have argued that social cohesiveness and citizen-based governance are already myths, sustained in order to maintain social order. David Held claims that, "the idea of a political community of fate—of a self-determining collectivity—can no longer be meaningfully located within the boundaries of a single nation-state alone." Using Japan as an example, Jean-Marie Guéhenno observes, "One finds no more citizens in Tokyo than one does in Washington. Japan is not a society but the memory of a society; it mimics power relations."

It is important to clarify that this discussion does not envision the end of communal identification. On the contrary, as nationalism perishes, individuals opposed by the Islamic religious scholars of India. The reason for that was, among others, an argument on the part of the ulema, the religious scholars of Islam in India, that nationalism was an anti-Islamic ideology, because nationalism proceeds to create boundaries where Islam is a faith without boundaries." Id. at 5.


64. As individuals escape the monopoly of the nation-state in the same way global business has, laws that cannot be justified will be revoked or left unenforced.


66. Jean-Marie Guéhenno, The End of the Nation-State 31 (Victoria Elliot trans., 1995). She also considers the empowerment of the citizenry in a democratic nation-state to be illusory. "With the same party in power for decades, a charade of democracy is staged [in Japan], and the judicious choreography of these carefully limited confrontations is the Asian transposition of the media jousts of modern America." Id. at 31–32
will emphasize their remaining, more sustainable allegiances. Perhaps local government will regain its importance. Psychologically, individuals may come to see local and transnational governance, and thus local and transnational democracy, as the best forums in which to exercise their opinions. Andrew Linklater has criticized the fact that national citizenship “has long been 'too puffed up and too compressed.' . . . Higher and lower forms of citizenship . . . are evident within the elementary steps which have been taken to represent ethnic minorities and regions in international institutions and international law.”67 Large nation-states may even break up into smaller, more responsive and convenient districts of governance. As Michael Sandel has written, “In the age of NAFTA the politics of neighborhood matters more, not less. People will not pledge allegiance to vast and distant entities, whatever their importance, unless those institutions are somehow connected to political arrangements that reflect the identity of the participants.”68 Local government may take back supremacy from the nation-state, and new, non-geographically defined forms of governance may also develop.

These are not new or revolutionary ideas. In 1969 Karl Deutsch anticipated that the nation-state would face threats from the “citizens’ minds.”69 Deutsch predicted two main changes. The first was to move politics “one level down,” to small local groups.70 Deutsch described this as a desire for depoliticization, a term that is highly applicable to the rhetoric of citizens in liberal democracies today who express disillusionment with national politics and renewed interest in localism. The second alternative was to move politics “above the nation-state, up to the international level.”71 Though Deutsch saw no immediate alternative to the nation-state, he did not think that its dominance would last. “[T]he prospect before us is a world of nation-states for the next 20, 30, 50, or, perhaps, 80 years—that is, for the next two or three generations.”72 His estimate places us right in the midst of what he foresaw as an inevitable transformation, and he also prophesied the important contribution technology and communication would make towards the end of the

70. Id. at 167.
71. Id. at 169; see also LINKLATER, supra note 67, at 203 (“Post-Westphalian arrangements which break up the union of sovereignty, territoriality, citizenship and shared nationality can provide a more effective means of reconciling the claims of universality and difference.”).
72. DEUTSCH, supra note 69, at 171.
nation-state. Deutsch had the common Cold War obsession with nuclear war, emphasizing his vision of international peace simply as a means of basic self-survival. The nation-state, he believed, would inevitably lead to conflict. He was hopeful, however, that we would reach the point we are now approaching, a world of the shrinking nation-state, as a starting point for an interconnectivity that would finally release us from the specter of nuclear war.

2. Alternative Models

Citizenship is grounded in collective identification with a group, and evokes corresponding emotional responses. This element of subjectivity is often forgotten in conventional definitions of citizenship. Much has been written about the tension between globalization and national or subnational cultural and social norms. My concern, however, is not with national cultures, but with individuals and cultures, in the absence of borders that limit or define them. This Note assumes that the preeminent nation-state will decay, psychologically and probably

73. Id. at 190 ("[Technology] pushes beyond wars and beyond the economic fences of nation-states. It seems to push toward a pluralistic world of limited international law, limited, but growing, international cooperation, and regional pluralistic security communities. . . . [These developments] may preserve us, individuals and nations, for the next three or four decades, in which nuclear war is all too possible.").

74. Bosniak, supra note 5, at 494. See also Franck, supra note 5, at 382 (recognizing that for some people self-identification is achieved by loyalty to a nation and for many people identity is found in other social groups).


76. Joseph Carens's study of Canadian and Quebecois identity is an example of the limited institution-linked concept of identity. He assumes that a solution must include defining the identities involved, either by adjusting federalism, finding a means to strengthen both identities, or embracing diversity and a common identity. What he does not consider is the possibility of eschewing classified identities all together and recognizing that solutions can be created that do not require clear division of individuals' identities. Carens's "deep diversity" argument, borrowed from Charles Taylor, does affirm the possibility of multiple political identities in one society. But this is not the same as recognizing that there may be no need to define identity at all. Carens, supra note 75, at 161–76.
politically. As the dominance of the Westphalian system erodes, nationality will constitute a less significant part of each individual's identity. Among the alternative models of citizenship that address this insufficiency, two are most prominent: cosmopolitanism and the diaspora.77

The cosmopolitan model is a somewhat utopian vision of a human race conscious of its deterritorialized, united nature. Cosmopolitanism is based on "openness" to others and an acceptance of difference between cultures and people.79 Citizenship in the cosmopolis is based on the Enlightenment era belief in a common moral identity, a linking of humanity without regard to political definition.80 The common modern usage of "cosmopolitan" to describe young, affluent urban culture reflects the ability of individuals within that culture to interact across national, racial and ethnic boundaries. Global cities such as London, New York, and Tokyo epitomize cosmopolitanism.81

The diaspora vision is a broader concept, traditionally used to describe how displaced people maintain cultural, political, and social ties to their place of origin, usually across national borders. It may be exercised by voting in elections or sending financial support, but most often simply describes a sense of split identity.

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78. See generally Chander, supra note 5; Spiro, supra note 14, at 618–25 (assessing subnational communities and the new diasporas). "Diaspora" in this Note also covers the concept of "multiple identities." See Franck, supra note 5, at 376–77. A third, distinct model sometimes used is "hybridization." See Holton, supra note 11, at 148–51.

79. Urry, supra note 77. Urry lists cosmopolitan indicators as including extensive mobility, the capacity to consume places and environments, a curiosity and awareness of the world, a willingness to take risky by virtue of encountering the "other," an ability to "map" one's own society and its culture in terms of a historical and geographical knowledge, semiotic skill to be able to interpret images of various others, and an openness to other peoples and cultures. Id.

80. See Cosmopolitan Citizenship, supra note 77, at 11–19.

Thomas Franck describes the modern era's sense of identity as "a handful of birdseed to be distributed among several feeding stations." One may maintain loyalty to a country of birth, ancestry, or residence; one may even choose an identity unconnected to any of the above. Though little used in legal debate, the diaspora model most accurately reflects the complexity of postmodern human identity. In an important recent essay Anupam Chander presents the diaspora model as a basis for legal analysis, one that allows for individual choice in the definition of communities. "In place of the statist insistence on a singular state loyalty or the cosmopolitan call for global citizenship, the diaspora model would permit individuals to construct national and transnational communities of their own choosing."83

This Note draws upon the diaspora model of changing individual identity. The statist model responds awkwardly to issues of assimilation and multiple nationalities. The cosmopolitan model does not suffer these limitations, but it creates a false global identity that trivializes the deep cultural attachments to place, race, and community. The diaspora model is cognizant that the world is in reality inhabited by mixed, multi-dimensional identities, not homogeneity. "In a world that is increasingly diasporan, full of crisscrossing loyalties, transborder mobility, multinational political states, and transnational communities, neither the statist nor the cosmopolitan paradigm fits."84

The case of Olisadebe, the Polish soccer player, is most accurately seen as an example of the diaspora. When pressed, he has described himself as "a bit Polish, but more Nigerian."85 When asked if he had betrayed his "land of birth," he replied:

I refuse to feel this way. I know there will be a debate about it in Nigeria. While many would feel I did wrong, there will be others who will see things my way. Personally though, I don't think I betrayed anybody. I am not the first Nigerian to have acquired foreign citizenship. I have Nigerian blood flowing in my veins and nobody can take that away.86

82. Franck, supra note 5, at 377.
83. Chander, supra note 5, at 1007; see also Madhavi Sunder, Intellectual Property and Identity Politics: Playing With Fire, 4 J. GENDER RACE & JUST., 69, 90–98 (2000) (favoring the diasporic view of culture and viewing cultural appropriation as an interaction between cultures rather than a "taking from a culture that is not one's own.").
84. Chander, supra note 5, at 1048.
85. Olisadebe Interview, supra note 1.
86. Id.
Changing Identities and Changing Law

Olisadebe is representative of the diaspora bonds spider webbing across the world. He is of a generation comfortable with a transnational, transcontinental identity, a generation that refuses to be pinned down to one territory. And not just superior athletes and academics are crossing borders. Of much greater impact are the millions of Africans crossing into Europe to work, and the millions of Latinos into America. Moreover, the diaspora exists not only in the developed world, though that is where the trend is most examined. Peru’s last president was of Japanese heritage; the current president is of Peruvian Indian blood and Harvard-educated; and a majority of the country’s population is descended from Spanish settlers.

Understanding the complex, variable nature of identity presented by the diaspora model is a crucial element in imagining new legal theories and institutions. Each society’s diversity of identity and citizenship “is always a matter of degree, varying with the circumstances and over time. Vocabulary rarely allows for this fluidity and shading, and, by falsifying the past, vocabulary may actually block the future.” If we understand the interconnectivity and different levels of identity incompletely, our possibilities will be restricted by our own lack of vision.

II. The Absence of a “Legal Culture” and the Need to Build One

A vital concern of the contemporary lawyer should be the development of a legal system that can support “global society.” If individuals identify themselves as non-national and thus not responsible for complying with national laws, additional and alternative legal systems must be developed to avoid slipping into anarchic relations. But all the possibilities of identity reviewed above point towards a future in which coherent boundaries cannot be maintained within which exclusive legal structures can be built.

International institutions are growing and adapting to serve some of the functions of the nation-state. This Note suggests, however, that if the full possibility of

87. Interestingly, when forced to resign over corruption scandals, President Alberto Fujimori fled to Japan, of which his parents were citizens. The Japanese government recognized him as a full Japanese citizen and refused extradition even though he had never previously requested nor claimed citizenship and technically could not have served as Peruvian president as a foreign citizen. Fujimori Secures Japanese Haven, BBC News, Dec. 12, 2000, at http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1065000/1065667.stm.
88. Franck, supra note 5, at 368.
blended and chosen identities comes to fruition, existing legal theories and institutions will not necessarily be sufficient. A theory of a world legal culture, on the other hand, may encourage the growth of alternative institutions. It is necessary to reimagine law and legal culture in a way that mirrors the new borderless world. Part of this project is to propose new ways of looking at the law and to develop entirely new structures that support these new ideas of how the law and individuals can interact. Alternative institutions can be supported without proposing a total revolution in legal thinking: abolition of existing institutions is not required. The ideas below are meant simply to provide a base upon which to develop new legal structures that will work alongside, and perhaps someday replace, nation state-centered legal models.

The phrase “absence of a legal culture” has often been used to criticize emerging nations—sometimes as a convenient code for “uncivilized,” reflecting an assumption that there is only one correct form of legal culture. But the phrase may more accurately be applied to the global realm, as there really is an absence of a global legal culture, such that people and entities with denationalized identities feel increasingly free to act with impunity. Individuals recognize some sense of legality, but feel immune to it when visiting a different national jurisdiction, as if carrying a form of diplomatic immunity. Thus the need exists to develop a legal culture, a tradition of responsibility, with the intent of causing individuals to assume the existence of duty. The bare structure of a legal culture may rest in part on a theory of universal values or natural law, but these fundamental laws are contested and have few bright-line borders. The preamble of the Charter of the United Nations affirms a belief in “fundamental human rights, in the dignity and worth of the human person.” But the disagreement over “fundamental” rights and obligations is as unresolved today as it was fifty years ago.

As we move beyond national identity, there is less sense of obligation to bodies of government. Efforts are underway to counteract this, including the release by the InterAction Council (IAC) of a draft Universal Declaration of Human Responsibilities in 1997. While international law imposes various explicit

89. Even extreme examples, such as the murder of an innocent human being, may be contested. Might a killing be justified in certain instances? Who is an innocent human being?
90. U.N. CHARTER, pmbl., cl.2.
duties on nations, the notion of individuals and other entities having responsibilities is rarely discussed. The IAC anticipated this and has attempted to start a dialogue about individuals without nations. The breadth of the Declaration has been criticized for, among other things, addressing areas that are "the domain of the arbiters and teachers of everyday morality—the home, the church and the local school." This criticism implies that what behavior should be expected of an individual is more an element of culture than of formal codified law. The ethic of a global legal culture may be able to reconcile these views of morality and legal responsibility.

The cause of environmental protection has seen the most sustained effort, and the most success, in promoting a sense of global responsibility. Pollution ignores borders; environmental problems like global warming are challenges to human society, not to any one community. The Stockholm Declaration of the U.N. Conference on the Human Environment was a breakthrough, stating that a healthy earth is linked to a general "responsibility to protect and improve the environment for present and future generations." The trial of individuals for violations of human rights is a second area of progress in developing an assumption of global responsibility. The Pinochet case, though Pinochet was not brought to trial, declared authoritatively that English courts will use universal jurisdiction to try heads of state, even with claimed immunity, for committing the international crime of torture. The ongoing trial of Slobodan Milosevic is significant in part because his claim that the International Criminal Tribunal for the former Yugoslavia is illegitimate is summarily dismissed by the world legal community. At the same time, though with less publicity, the International Criminal Tribunal for Rwanda is continuing its work to bring a measure of jus-

92. Roland Rich, Universality, the Individual and International Law, Address at Australian National University (Nov. 20, 1998).
93. For another model of how this division has been treated by a society, see infra text accompanying notes 111–18, on Chinese legal history and the theories of li and fa.
tice to that region. The relevant element of these examples is that they all point to a growing sense of a global responsibility, a basis for a global legal culture.

Though these are exceptions to the dominance of the nation-state as ultimate arbiter, they nevertheless reflect the deepening sense of complex identities, and the need for creative institutional responses:

[H]uman institutions can [not] be so structured as to transcend contemporaneous values held by individuals and groups, values that fluctuate over time with the hopes and fears of those who harbor them. Human values exist in transient relations of mutual influence with the paths and choices that emerge as desirable and undesirable to populations and individuals reacting to evolving personal, social, political, cultural and economic circumstances at given moments.

This is a sophisticated model of identity, one with multiple dimensions, grey areas, and interchangeable communities, but the discussion is still focused on defining distinct levels of law. It is an inherently asymmetrical discussion, because the complexity, distinctiveness and variability of identity do not align with the formality and rigidity of law. Visions of a global legal structure do not necessarily imply a global government. Governance is “the framework of rules, institutions, and established practices that set limits and give incentives for the behaviour of individuals, organizations and firms.”

Forms of governance can change and evolve without the establishment of an overarching, omnipotent global government.

But legal systems are assumed to require rigid institutions of enforcement. Louis Henkin wrote that the common tendency to trivialize international law

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arises from the perception that there is no international society to enforce it. Is it possible then to conceive of “law” that is practical for a world without clearly delineated geographic jurisdictions? This is why this Note proposes the idea of a global legal culture. For while it may be virtually impossible to create a single appropriate legal system, a legal culture may be able to respond to these new globalized identities and communities. There is little reason to think that moving beyond our present structure of governance will lead to the collapse of society. Indeed, “modern reliance on government to make law and establish order is not the historical norm.” There is nothing exceptional about developing diverse, even contradictory, laws within the borders of a nation, so what is to prevent us from eschewing borders altogether? In countries without a stable government, order is still maintained. “In the absence of legal protection from the state in most developing nations, it is extralegal law that regulates the assets of most citizens.” As long as individual entities expect to have rights and responsibilities, even if the particular rights and responsibilities are unspecified, piecemeal creation of legal standards and dispute resolution mechanisms will be sufficient to fill the void created by denationalization. The result will be a deformalized, decentralized dispute resolution network based on a global legal culture as a sustainable form of “extralegal law.”

Most discussions of world law address primarily the feasibility of global courts. For example, functional bodies of “supranational adjudication” have

100. *Henkin,* supra note 3, at 24-25 (“The tendency to dismiss international law reflects impressions, sometimes summed up in the conclusion that it is not really law because society is not really a society: the world of nations is a collection of sovereign states, not an effective body politic which can support effective law.”). Is it not possible that if nations themselves lose their monopoly on identity, they will also cease to be identified as “effective body politic[s] which can support effective law”?


103. This “culture” means that the law applicable to any given situation will not necessarily be strictly limited by a global constitution or statute. Global networks will adapt to particular situations, maintaining fluid, informal constructions. If we trust humanity to create a culture of rights and responsibilities, much of the current stagnancy of nationalized law can be avoided. This vision does not require perfect individuals. We can certainly maintain our selfishness while acquiescing to denationalized concepts of justice.
been proposed by Laurence Helder and Anne-Marie Slaughter.\textsuperscript{104} Brian Havel has argued that supranational tribunals and courts may be permissible under the U.S. Constitution.\textsuperscript{105} But an increase in supranational institutions should not be mistaken for a world law. Rather, they are simply creating courts with universal jurisdiction to hear certain limited types of cases. Even then geography will always limit world law; distance limits the practicality of interconnectedness. As defined in the post-war period, transnational law “include[s] all law which regulates actions or events that transcend national frontiers,” including cross-border application of the laws of sovereign states.\textsuperscript{106} Similarly, a new global legal system will not necessarily exclude national laws; instead they will operate as one type of institution to regulate social interactions. Harold Berman has proposed a theory of an all-encompassing body of law—a world law—one that he compares to the evolution of world organizations, communications, technology, and travel.\textsuperscript{107} This encourages us to examine each field as a network of diverse elements and structures, not as one overarching institution. A world law “will once again combine inter-state law with the common law of humanity, on the one hand, and the customary law of various world communities, on the other.”\textsuperscript{108} Berman’s definition includes uniform global legal codes, such as the rules of air traffic control.\textsuperscript{109} But it also includes the customary law of various communities; similarly, a global legal culture imagines as many laws and institutions as there are communities, in the broad, non-geographical meaning of the word. Berman refers to customs of small communities of individuals, but also to customary world law “based on the contract practices of economic actors.”\textsuperscript{110} The benefit of looking at law as culture, instead of code, is that it becomes more malleable, extending beyond uncertain and unmarked lines.

\textsuperscript{105} Brian F. Havel, \textit{The Constitution in an Era of Supranational Adjudication}, 78 N.C. L. Rev. 257 (2000) (arguing that Article III of the U.S. Constitution was not necessarily meant to be the exclusive judicial power, and that even courts without review by U.S. federal courts may be constitutional).
\textsuperscript{106} Philip C. Jessup, \textit{Transnational Law} 2 (1956).
\textsuperscript{108} \textit{Id.} at 1622.
\textsuperscript{109} \textit{Id.} at 1621.
\textsuperscript{110} \textit{Id.} “When one speaks of world law, therefore, one must include within it not only world customary law, in the sense indicated above, but also international law in Bentham’s sense and transnational law in Jessup’s sense.” \textit{Id.}
Ultimately, the viability and/or constitutionality of supranational adjudication is not overly important, because it is doubtful that individuals in a globalized world can rely on such methods of dispute resolution. The construction of these institutions is fundamentally the same as the existing model of national courts. But we are under no obligation to conform to the Westphalian-style adjudication process. The more exciting possibility is of diffuse, amorphous interpersonal responses. Some elements of a denationalized global legal culture may be gathered from historical systems. Three brief and disparate models are provided below. The reader is cautioned that these are extremely simplified explanations of three rich legal histories; they are only meant to show those educated in the U.S. legal education system that many models of “law” exist. They offer alternative theories to consider how the theory of a global legal culture can include both existing legal frameworks and further development of new structures and thought.

A. The Chinese Duality of Li and Fa

Ancient Chinese legal philosophers were divided into two main schools: Legalism and Confucianism. The Legalists advocated governance by means of a strict Rule of Law imposed by a strong central state. Confucian philosophers argued that legal coercion was of limited efficacy and stressed that sustainable government was a matter of implementing education, persuasion, and moral example. The dichotomy is often characterized as the difference between fa (formal law) and li (moral and social conduct).¹¹¹

Confucianism can be considered both idealistic and utilitarian—if a society were truly to adhere to li, disputes could be resolved through friendly negotiation and compromise, “a system of explicit legal rules rendered unnecessary.”¹¹² Confucian scholars criticized the strict Legalist system for forcing people “to think only in terms of their self-interest and make them litigious, trying to manipulate the laws to suit their own interests.”¹¹³

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¹¹² Ch’en, supra note 111, at 9.
¹¹³ Id.
A second main concept in Confucianism is ren, the duty to act appropriately in relation to others. Ren is a combination of deference to others and the need to earn respect from others. Under Confucianism, society can be seen as an extended family. Respect for authority is a pillar, with a strong correlation between respect for parents and the government. Particularly under Mencius's elaboration of Confucian theory, authority figures also have parallel responsibilities to the people. Mencius would insist that modern figures of power, such as corporations with great economic influence, also accept their responsibility to the people.

Confucianism became the dominant state philosophy during the Han dynasty and remained so until the twentieth century. It was interpreted and manipulated, however, by the emperors in each dynasty, and the ideal of Confucianism was never seriously pursued. A form of legalism prevailed, as obedience to government commands was demanded of the Chinese citizens. Though the Chinese government never achieved the Confucian ideals, the society itself is still deeply influenced by the concepts of li and ren. Individuals have many more social expectations than in Western societies; moreover they assume much more informal but obligatory regulation of human relationships.

The most significant point for this Note in the vestiges of classical Confucianism is the retention of expectations that certain social rituals and norms exist, with a corresponding expectation that these rituals and norms may change and lack clarity. These are not only social norms, but present in legal philosophy itself. Global legal culture may provide the same structure of expectation, at the global, regional and local level, without specifying what these responsibilities and rights may be. They may be indigenized by each level of community as needed. Retaining rigid legal structures and adopting the concept of a modern, global li are not mutually exclusive. The ideal of a Confucian society still includes formalized, written law, but it is used only as a last resort when “virtue” has failed. “Only

114. Peerenboom, supra note 111, at 44. Some Americans find Confucianism hard to comprehend because there is no equivalent sense of overarching duty. “In the United States, much is made of rights, but duties, if discussed at all, are considered merely as corollaries to rights.... Chinese tradition turns Hohfeld on his head: rights are corollaries to duties.” Id. at 43.
115. Id. at 10.
116. Confucianism as a political philosophy spread across all of East Asia, and its basic premises are still evident today.
117. Corporate Codes of Conduct are the type of self-regulating law some see as vital to healthy globalization, and that is the type of li one may foresee. For a discussion of Corporate Codes of Conduct, see supra note 13.
when a person is an extreme recalcitrant or when the education system has broken down would it be necessary to use the severe sanctions of law."

B. Native American Tribal Peacemaking

Another historical example of the possibility of borderless law was found on the North American continent before European colonization. Native American tribes used law as simply another element of their "collective and communal culture," alongside language, religion, and worldview. Most Native American tribes were not bound by static statist boundaries of division, partly because some tribes were wholly or partly-nomadic. Because of an emphasis on the need to reintegrate offenders into society and not alienate injured parties (as well as a lack of jails), tribes attempted to use communication and accountability to resolve disputes. Thus formal courts were kept to a minimum, and elders would attempt to guide a favorable result by using what we now call alternative dispute resolution (ADR).

In its annual report, the Judicial Branch of the Navajo Nation has recounted that "the basic theme of Navajo thought, is harmony, to live in harmony . . . the intent of the Navajo dispute resolution system was to preserve the peace and to avoid disruption and fighting." It usually included compensation for the victim and an attempt to reconcile the guilty party with the community, and the procedure included allowing any party with interest in or knowledge of the case

118. Victor H. Li, Law Without Lawyers: A Comparative View of Law in China and the United States 13 (1978). Li points out a further benefit of the Chinese tradition, that law ought to be simple in order to serve the masses. "The underlying principle is that law should be, and indeed must be, broadly based rather than the special province of a group of elite professionals." Id. at 10. One hope of a global legal culture is that it may be organic and logical, thus easily understood by individuals. This philosophy also means that mediation has been heavily relied upon in China. See Cao Pei, The Origins of Mediation in Traditional China, 54 Disp. Res. J. 32 (1999). There were three steps of mediation in civil procedure at the local level: compelled "private settlement," having a village head conduct mediation, and a more official mediation process, where government officials themselves would mediate. Id. at 33.


120. Id. at 565.

to be heard. "This system developed over hundreds of years and exists today in
the form of our Peacemaker Courts. The outsiders know it as mediation." 122

This system was slowly suffocated by the dominant American political sys-
tem. A significant breaking point was the Major Crimes Act of 1885, limiting
tribal sovereignty by requiring federal prosecution of Indians that committed
certain felonies. 123 Despite a long period of almost total loss of legal sovereignty,
Indian tribes have recently begun to reassert traditional means of dispute resolu-
tion through modern ADR methods, also referred to as Tribal Peacemaking
( TPM), although the tribal court systems still operate primarily alongside the
formalized U.S. structure. 124

C. Thai Law and Postmodernism

Thai law could serve as a model for a multi-dimensional global legal cul-
ture. Thai law is roughly divided into two sources: a positive legal order and a
social order drawn from religion, culture and tradition. 125 Thai law maintains
elements of Buddhist law, but also includes purely Thai traditions and elements
of international commercial norms of Southeast and East Asia. 126 Static and vir-
tually unchanged for centuries, Buddhist law is a loose collection of principles,
but is considered law rather than simply a moral code because it involves direct
repercussions for violations, especially for violations by the religious order. 127

Thailand never fully accepted the Westphalian assumption that law is a
purely positivist, communitarian construct. As modern Thai law developed, cer-
tain substantive law, including family and property law, remained based on Bud-
dhist law. 128 But other areas of law, such as criminal procedure and administra-

122. Id.
124. Id. at 577–89. For example, in May 1994 the Tlingit tribe “secured a form of plea bargain
unique in American history.” Id. at 590–91; see also Experiment in Tribal Justice: 2 Youths Are Ban-
ished, N.Y. TIMES, Sept. 3, 1994, at A6. Although that particular situation revealed many problems
with TPM, it provided a creative attempt to resolve a dispute outside of the regular legal system.
125. Apirat Petchsiri, Eastern Importation of Western Criminal Law: Thailand as a Case
Study 150 (1987).
126. David M. Engel, Code and Custom in a Thai Provincial Court: The Interaction of For-
mal and Informal Systems of Justice 74 (Frank Reynolds ed., 1978); see also Petchsiri, supra
note 125, at 149–66 (discussing the diverse sources of formal Thai law).
127. See Sompong Sucharitkul, Thai Law and Buddhist Law, 46 AM. J. COMP. L. 69, 69–72, 78
(Supp. 1998).
128. Id. at 85.
law, developed independently. The twentieth century constitutional government has attempted to maintain indigenous law without sacrificing the benefits of more formalist models. Modern Thai law is one of the best examples of legal pluralism, a mixture of traditional and Western, formal and informal, legal controls and social norms. Globalization of law must recognize that legal pluralism is necessary to allow for diverse procedures and substantive laws while still recognizing general theories and frameworks.

Although Buddhism developed a strict set of laws, it has always contained an implicit element of valuing virtuous autonomy. Andrew Huxley explains it as “[w]eak antinomianism,” in which “the impulsive behavior of the truly virtuous is better than a calculating obedience to rules.”129 The consequence of this belief is to recognize that binding laws are only necessary in certain situations, creating a situationalist “virtue” subtext to the formal legal code. Ultimately, the justice of the situation is what controls the resolution of a dispute. “Rules merely give a first approximation to the truth.”130

“Once law is viewed as an emanation of the nation state . . . it cannot claim to be any more than local knowledge,” Huxley explained.131 International organization and law-making stand in contrast to this limited idea of law as “local”, but this does not mean that the U.N. Universal Declaration of Human Rights, for example, is necessarily a regression back to natural law. “Since the early nineteenth century, law, unlike other disciplines, has had to accept less ambitious truth claims for itself.”132 The UNDHR is an ideal, but few claim it to be of the stature of natural law. If the postmodernist claim that different legal traditions and cultures are incommensurable is correct, then “we can only compare different traditions by comparing degrees of incomparability.”133 Striving for a homogeneous global legal structure is then an exercise in futility. More realizable is the idea of the global legal culture assuming rights and responsibilities without de-

130. See id. The implications of this philosophy, especially on such legal theories as causation and mens rea, are complex and not predictable.
131. Id. at 1927.
132. Id.
133. Id. at 1928.
fining them in absolute terms, instead allowing informal, indigenous mixtures of traditions, cultures, and some (mostly procedural) global legal standards.

Natural law contains some concepts that are useful in examining the Buddhist aspects of Thai law. "Early natural law's general preference for situational ethics over explicit rules must surely connect with its preference for theories of causation that emphasize complexity and multiplicity."134 Buddhist theory, by stressing multiple causes to any act, denies the artifice of rules.135 The general need we can observe is to shift the legal focus from implementation of rules to observation of situations.

The Thai model of justice should not suggest that it is a society in which the individual is subsumed to strong communitarian and religious identity. On the contrary, individualism is a much more prominent element in Thailand than in many other Asian societies.136 As in the cosmopolitan and diaspora models of diffuse identity, this retention of a thread of individual autonomy results in social identities that are both flexible and transitory.137 Traditional groupings, such as kinship, are still an important part of many individuals' identities, but this is a choice by the individual to recognize kinship as part of his or her identity, not an imposed identity. "Individuals of all ages recurring move in and out of families; families splinter, in full or in part. . . . What is perhaps most distinctive of this flux is the sense of uncertainty that surrounds it—a state that is easily tolerated by the villagers."138 This allows for a broad concept of community and identity.139

As a result of this social structure, a hierarchy of dispute resolution methods exists; which method is applied depends on the nature of the dispute and the party’s positions in the social hierarchy.140 The existence of multiple levels of

134. Id. at 1945.
135. Huxley explains: "The Buddhist theory . . . offers a knock-down argument to the concept of rule: A rule is a schema that deals with situations by unscientifically distinguishing causal efficacy . . . To justify evading an inconvenient rule, the European tradition has to resort to devices like the maxims of equality or Dworkinian principles: these are needed, Buddhists would say, to patch over the holes in a leaky theory of causation." Id.
136. Engel, supra note 126, at 69.
137. Id.
139. See Engel, supra note 126, at 70–73.
140. See generally id. at 80–98 (describing the various levels of dispute resolution in Thailand, including non-official mediation, mediation by village chief and kamnan, district level mediation, police mediation, and mediation by private attorneys).
dispute resolution has resulted in a general desire to avoid litigation at all costs, and few private disputes reach the provincial courts. “Thailand was and remains a non-litigious society. Among most Thais there is still a strong preference for mediation rather than direct confrontation and the adjudication of private disputes. Courts of law are generally avoided, and a low value is placed upon the resort to litigation.”

III. Barriers to Denationalized Identity and Global Legal Culture

A. The Limits of Denationalization

Do these theories matter? The themes of this Note would be almost incomprehensible to the vast majority of citizens in any country from America to Zimbabwe. Nationality is still considered a defining part of identity. The ninety percent of Americans who do not have a passport are loath to lose any sense of identity, especially in the period after 9/11 when many perceive their national identity as being under attack. The United States is as diverse a society as exists in the world, yet nationalism and patriotism here are major elements of identity, and omnipresent in politics and the media.

In the European Union, the most integrated transnational region in the world, only 5.5 million of the 370 million inhabitants lived outside of their own member state in 1998. EU citizens do travel frequently, but permanent settlement is not common. EU residents of other countries have very low registration rates to vote in the host countries’ EU or local elections. In theory the ability of EU residents to vote in both local and EU elections in any EU country, traditionally a fundamental element of “citizenship,” is one of the most revolutionary, forward-looking aspects of the European Union. But in practice people either stay linked to their home country or do not vote at all.

141. Id. at 3. Engel recounts that Thai citizens sum up this desire by saying, “It is better to eat dog shit than go to court.” Id. at 98.


143. Id. at 369-70. Jean-Marie Guéhenno has speculated that democracy as recognized today may not be viable in the future. “We must ask today whether there can be a democracy without a nation . . . The nostalgic citizens of the declining Roman republic appealed, not without grandeur, to the virtue of ancient times. Our lamentations today will not stop the march toward a new empire, any more than did theirs.” Guéhenno, supra note 66, at xi-xii.
turnouts for Euro-elections have been low. “One of the clearest indicators of citizenship is the casting of one’s vote, and the turnout in an election is often reckoned an index of the strength of a nation’s sense of citizenship.” The European Union’s limited success in shifting attention from national elections shows how deeply imbedded national identity is.

Also, many postmodern citizenship studies ignore countries, such as Japan, that are tightly ethnically bound and extremely resistant to granting citizenship. Very little consideration is given to the dynamics of citizenship in such countries. Ethnically-bound nation-states and the limited mobility, education, and enrichment of most of the world’s population create strong barriers to the possibility of a denationalized world. As a form of self-defense against hunger and/or enemies, the nation-state is still perceived as protecting citizens. It is difficult to extricate the sense of national identity when one is still relying on the nation-state for fulfillment of the basic human needs of health care, shelter, and employment. Franck points out that although individuals are gaining more freedom of choice of identity, “[this freedom] does not yet engage the majority of the world’s people. It may never do so, leaving a world half-determinist and half-autonomous.” The potential for the autonomy of identity is restricted in much of the world by low levels of development and mobility, both social and physical.

Thus these visions are distant ones, and they presuppose a progressive developmental future for underdeveloped areas with rich cultural, ethnic, and linguistic mixtures and tenuous political boundaries, especially in South Asia and sub-Saharan Africa. Is a world “in which the dynamism of growing autonomy engulfs the lingering static forces of racial, cultural, national, linguistic and religious determinism” any more likely than a continuing unequal, divided, and violent world? To dissolve these “lingering static forces,” we are dependent upon the development of alternative forms of identity as a means of neutralizing national exclusivism.

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145. Even Japan is reconsidering its concept of the link between national identity and citizenship. In Tokyo, one in ten Japanese marriages involves a foreigner. Howard French, For More Japanese, Love is a Multiethnic Thing, N.Y. Times, July 31, 2002, at A3. Japan now relies quite heavily on foreign laborers from Thailand, Indonesia and the Philippines to serve as unskilled labor. Though the naturalization process is stringent enough that the citizenry remains almost entirely ethnically Japanese, the actual population is much more diverse.
146. Franck, supra note 30, at 64.
147. Id.
There are dangers in the breakdown of static citizenship and identity. The footnote above on transnational corporations and their increasing transience and lack of location foreshadows the possible future for individuals. Jean-Marie Guéhenno sees evidence of this in the fact that short-term interests now increasingly control social decision-making: “This is the ultimate logic of a world that is no longer defined by the human groupings (national or corporate) that it is composed of, but only by the problems with which it must deal. . . . [T]he stress [is] on the transaction rather than on the relationship with the client. . . .” The emphasis is being transferred from the relationship to the transaction because one cannot reliably expect to encounter the same entity in the future. Indeed, one can choose to avoid the partner of a past transaction and look to another entity anywhere on the globe.

B. A Viable Global Identity

The importance of identification with mankind is vital to the hope of developing a global legal culture. “The introduction of the concept of the common heritage points to the possibility of a legal order based on equity and cooperation.” One barrier to the dissolution of traditional forms of communal identification presented by many commentators is that people are not capable of identifying with humanity at large, “because the category is too big and too abstract to serve as the object of political love and identification.” This logic proceeds as follows: a small, cohesive, homogeneous social unit is obviously easy to identify with. People identify first with the family unit, then with a small group of friends, co-workers, or residents. Small-town folk are famously friendly in part because they can more easily identify themselves (and be identified) as having common goals and ideologies. But each further enlargement of the sphere of community requires an increased abstraction of identity and a reduced marginal return of the created unity. Commentators extend this logic and assume that an individual can identify with a nation of three million or 100 million citizens, but that the global society of six billion humans is too diverse and vast to have any sense of common identity.

148. See supra text accompanying note 13.
149. Guéhenno, supra note 66, at 26 (emphasis added).
151. Bosniak, supra note 5, at 496.
Upon closer look this logic is flawed. Identifying with the artificial nation-state of three or 100 million is a project of identifying common desires and needs that are different from those of citizens of other nation-states. American patriotism strains the idea of common identity, with individuals of every possible political, cultural, and ideological shade drawn together and wrapped in the same red, white and blue flag. The project of nationalism involves identifying ways in which certain groups of individuals are different. More accurate than the above misconception is the belief that "if cosmopolitanism were really too big, then the nation would be too big as well."\footnote{Cosmopolitics: Thinking and Feeling Beyond the Nation 6 (Pheng Cheah \\& Bruce Robbins eds., 1998).}

It may be easier to identify with six billion humans than with a diverse nation, because it is a matter of identifying how we are all the same (the classic cosmopolitan project). Martha Nussbaum has portrayed the concept of shared human desires and needs as the need of all humans to fulfill basic "capabilities."\footnote{See Martha C. Nussbaum, Capabilities and Human Rights, 66 Ford. L. Rev. 273 (1997).} She provides a broad list of cross-cultural empirical human needs, ranging from physical to emotional to social needs.\footnote{The full list includes life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; friendship; respect; other species; play; and control over one's environment. Id. at 287–88.} The primary contemporary examples are shared concerns about environmental destruction, nuclear fall-out, food shortages, global warming. Obviously more specific self-identification occurs on a smaller scale, but it is much easier to identify the harmony of humanity's physical, social and emotional needs than to identify the specific, shared desires and needs of any one nation-state. Self-identification by emphasizing difference within a community is logical, but imposing this identification along citizenship lines is arbitrary. It should be as easy to envision the common identity of "humanity" than it is "America" or "Brazil."\footnote{Perhaps this is the real reason why people responded so well around the world after 9/11 to comments that "we are all Americans." It appeals to the sentiment that, beyond the political movements mentioned above, we all share basic human emotions of love and fear, desire and regret. In a similar vein, we all sometimes feel sympathy for those below us and envy for those above us. We are all curious about the universe.} This does not obstruct our ability to create narrower definitions of identity, but merely directs us towards definitions that don't depend on nation-states.
John Rawls declared that we possess two types of duties: those naturally held as human beings and those voluntarily accepted as members of a community. The natural duties are minimal and abstract, including to avoid gratuitous cruelty and to do justice. But the majority of obligations are accepted, explicitly or implicitly, as part of a group. Especially over the past century, these accepted obligations have come to be defined by the nation-state, but there is no reason to expect that this will always be so. The deconstruction of this induced sense of communal identity leaves us with two options: to regroup in other social units, or to emphasize those rights and duties that Rawls defined. Doing both of these—emphasizing global customary norms and envisioning ourselves as members of many different communities, depending upon our actions and locations to determine what legal structure applies—provides a basis for a global legal culture.

In global civil society, writes Thomas Franck, we will find increasing “interactive transnational factions, passionate value-and-policy discourses and emerging public and private transactional networks.” These growing transactional networks and discourses will be the working grounds of the legal profession in the evolving global legal culture; this will require professional changes, even if legal culture and structures are never completely denationalized.

IV. Possible Institutional Changes in Response to a Global Legal Culture

What are the possible institutional changes that may come about in response to a global legal culture? While that could only be fully addressed in a separate Note, a rough sketch of ideas helps to make the idea more concrete. As emphasis shifts from sovereign national law to a global legal culture, established court systems will be relied upon less. A theory of a global legal culture does not necessarily require entirely new institutions, but may instead encourage a shift to existing alternative structures. One possible positive result of globalization would be a

157. Franck, supra note 30, at 64.
158. See generally Roger S. Haydock, Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future, 27 WM. MITCHELL L. REV. 745 (2000) (advocating ADR as providing fair, efficient resolution of interpersonal and business disputes). The Thai law reviewed above as a model for a global legal culture has led to minimal reliance on litigation. See supra text accompanying notes 125-41.
shift away from litigation and towards more narrowly designed, more efficient, less adversarial dispute resolution methods.\(^{159}\) True globalization will require a paradigm shift in the legal profession, and there are already signs of a lessening influence of and reliance upon national courts. "[F]ormal dispute settlement mechanisms based on legal principles are increasingly being used as methods of resolving international disputes."\(^{160}\) Law firms that find creative ways to anticipate these changes will prosper.\(^{161}\) Encouraging new forms of dispute resolution advances the development and adoption of some aspects of a global legal culture.

State-centered law is not effective in providing resolution for business entities that are attempting to minimize encounters with borders entirely.\(^{162}\) These global entities are also searching for methods of dispute resolution that can operate at the same pace as global communications and trade networks, something that national courts are unable to do.\(^{163}\) International business is leading the

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159. 150 years ago Abraham Lincoln advised his fellow lawyers: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time." Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), in The Collected Works of Abraham Lincoln 81 (Roy P. Basler & Christian O. Basler eds., 1990). Lincoln reassured lawyers concerned that use of ADR would make them redundant that "[t]here will still be business enough." Id.

160. Daniel S. Sullivan, Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy, 81 Geo. L.J. 2369 (1993). However, the implementation of international mechanisms does not necessarily mean that national identity and favoritism is absent in these forums. See Al J. Daniel, Jr., Agricultural Reform: The European Community, the Uruguay Round, and International Dispute Resolution, 46 Ark. L. Rev. 873, 918 (1994) ("A comparison of the dispute resolution mechanisms in the EC and in the GATT shows continuing examples of national favoritism and discrimination... ").

161. For example, law firms that focus on providing consistent and focused mediation and arbitration services, and enhance their ability to bridge cultural and linguistic divides, will be able to avoid the courts altogether in resolving the majority of their clients' disputes. Clients should be able to rely on case-specific services: procedure can be based on standard ADR models, but it can also be specially crafted to each case. Of course, as a consequence of providing more flexible, efficient systems, international law firms may see a reduction in the fees they reap from the complexity of traditional international litigation, which may be a major impetus to resist change. It takes tremendous effort to induce change in the legal profession; the necessary changes may come only from lawyers devoted to non-traditional globalized dispute resolution processes operating parallel to existing institutions.


163. See id. at 784. Civil procedure throughout the world is entangled in complicated disputes over standing and jurisdiction; domestic courts must spend a disproportionate amount of time dealing with transnational cases because of their inherent complexities.
transformation, with most disputes removed from national courts and resolved either by negotiation or before formal but non-national dispute resolution bodies. Institutions such as the Center for International Commercial Arbitration, the International Chamber of Commerce, and the London Court of International Arbitration all provide structures for international arbitration. Attempts to create processes more appropriate for a denationalized world have been applied in almost every specific trade industry. These bodies' procedures and regulations are arguably more important to the international business community than that of any one nation. Arbitration, especially, "has been a growth industry in the last twenty to thirty years." The use of arbitration, regional and specialized courts, and transnational use of domestic courts "amount to a revolution in international law." Further changes will affect not just international law, but all levels of legal process.

164. See, e.g., Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992), summarized in Volkmar Gessner, Globalization and Legal Certainty, in The Global Transformations Reader, supra note 65, at 172, 176. Because almost all dealers belonging to twenty worldwide trading clubs, an independent dispute resolution process has been set up. "The system remains completely apart from state penal code, contract law and bankruptcy law, and state courts are replaced by arbitration or on occasion by proceedings in Jewish rabbinical courts." Id. Gessner uses the banking industry as another example of a highly-efficient, closed resolution process. It relies almost purely on informal resolution, with little arbitration and virtually no litigation. He presents the reinsurance industry as a counterexample, where until recently many contracts were informal and based on trust, and disputes were resolved by arbitration. After a series of catastrophes, documentation was formalized and litigation increased. See id. at 176-77.


167. Carter, supra note 166, at 22.

168. Used not only transnationally, private ADR has also grown exponentially in the United States. "At the midpoint of the twentieth century ADR was used primarily in specialized settings, such as labor, but its use now extends to almost every sector of society." Stephen B. Goldberg et al., Dispute Resolution: Negotiation, Mediation, and Other Processes 421 (2nd ed. 1992); see also Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (announcing a policy of encouraging arbitration); Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983) (reading the
As in many fields, the high-tech industry and cyberindustry are leaders in creating non-national legal institutions. "A defining characteristic of digital technologies is their ability to transcend territorial boundaries, thereby challenging the unfettered jurisdiction of any single nation-state and complicating the application and enforcement of existing legal rules." An example of this transnational behavior is the Uniform Domain Name Dispute Resolution Policy (UDRP). In essence, the Internet community has formed its own worldwide community and designed a custom-made dispute resolution policy, forming a closed legal process. These processes will become more common in a global legal culture.

Can these examples be replicated in other fields? The supervisory body of the UDRP has control of the regulation of domain-names: perhaps this concentration of power is necessary for such a body to succeed. But UDRP has also been voluntarily adopted by New.net, a firm that registers second-level domain names. "Where a non-national dispute settlement system has advantages over traditional adjudication or arbitration, these advantages may in themselves persuade other public or private regulatory bodies to adopt the system." Perhaps in the future, private for-profit or non-profit organizations will operate as adjudicative competitors to national courts, inducing the market into more efficient and user-friendly dispute settlement options.


170. UDRP is promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN), a supervisory body for the Internet, to resolve disputes over domain names, including cybersquatting. See generally id. If its services are requested, a dispute resolution provider is selected under the UDRP and a three-person panel is appointed without input by the parties. Cases must be decided within 45 days of being filed, and detailed procedural rules are drafted along the lines of a model procedural code. Id. at 176–77. ICANN selected the World Intellectual Property Organization as the first dispute resolution provider, followed by the National Arbitration Forum and eResolution. Id. at 187.

171. Id. at 238.

172. Id. at 239–40.

173. Id. at 240.
We are approaching a crucial turning point in the balance between stable national sovereignty and interconnected but dispersed communities. Andrew Linklater has speculated that “[i]n the age of globalisation and fragmentation, a new stage in the development of citizenship rights is promised by efforts to strike the balance between concrete attachments to local or national communities and more abstract cosmopolitan affiliations.” Michael Sandel used a similar theoretical base to argue that “[s]elf-government today, however, requires a politics that plays itself out in a multiplicity of settings, from neighbourhoods to nations to the world as a whole. Such a politics requires citizens who can abide the ambiguity associated with divided sovereignty.” National governments will not undertake the necessary changes to allow open-ended and even ambiguous citizenship. Indeed, nation-states may resist them. The legal profession has changed very little in the past 200 years, but lawyers are precisely those who should be able to lead revolutions by imagining and buildings new structures of social and legal organization. Perhaps a bar association is correct when it writes:

If the law were just another company, or just another industry about to become obsolete, it would matter little in the overall order of things what, if anything, we do. But the law is not just another business or industry. It is the foundation upon which our entire society and our system of justice and enlightened self-government are founded. . . . Our greatest peril is that if we cannot survive as an “industry” and as a profession, then the underlying core principles and the Rule of Law are themselves at risk.

Anticipating and adapting to a denationalized future is the most important step in the project of protecting “the underlying core principles and the Rule of Law.” Even if the theory of a global legal culture is not fully developed, thinking in such ways allows the profession to prepare for future denationalization, thereby designing new legal theories and structures of dispute resolution.

174. Linklater, supra note 67, at 203.
175. Sandel, supra note 68, at 74.