Recursivity of Global Normmaking: A Sociolegal Agenda

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Abstract

This review proposes that the recursivity of law offers a promising framework for sociolegal and interdisciplinary research on global normmaking. The recursivity approach is systematic, generates hypotheses and questions about global actors and mechanisms, takes seriously historical contingency, and is inherently comparative across issue areas and different levels of governance. In global lawmaking, recursivity proceeds principally through the intersection of three interacting cycles of global normmaking, national lawmaking, and the interaction between the two. With particular focus on genocide and war crimes, violence against women, trade law, and climate change, the review demonstrates how four mechanisms—actor mismatch, diagnostic struggles, contradictions, and indeterminacy—drive forward these cycles of reform until the inherent tensions within them are resolved and normmaking settles. A sociolegal approach to the recursivity of global normmaking emphasizes (*a*) the politics of the legal complex, (*b*) the constitutive power of legal concepts, (*c*) the structure and dynamics of global regulatory institutions, and (*d*) the formal properties of global law. The review concludes with generalizations about global normmaking and particularly promising topics for sociolegal scholarship.

A NEW FRONTIER

In the past decade, a new frontier for sociolegal inquiry has opened up. The 1997 Asian financial crisis proved a harbinger of the current global financial crisis—both failures in global regulation of financial markets. The arrest warrant issued by the chief prosecutor of the International Criminal Court (ICC) for the sitting president of Sudan signifies the expansive boldness of international courts. Face masks in Mexico City and compulsory quarantine in Hong Kong during the 2009 outbreak of swine flu linked continents so rapidly that airlines, global monitors, and regulators seemed perpetually outrun by the disease. And as North Polar ice melts and the Maldives government, perhaps seriously, looks for an alternative homeland more than a few feet above current sea levels, the extraordinary challenge of global governance over climate change ratchets up.

Here is the stuff of sociolegal scholarship, now on a global scale: courts and criminals, regulators and noncompliant corporations, regulatory holes and legislative lacunae, lawmakers and law-evaders. This new agenda consequently explores the paramount institutions of global normmaking: international courts, such as the ICC, tribunals for war crimes, the World Trade Organization's (WTO's) appellate panels for adjudication of trade disputes among nations, or the World Health Organization's (WHO's) guidelines on health care; international financial institutions (IFIs) whose Washington- or London- or Manila-based organizations forge regional and global financial architectures out of legal principles and rules; world governance bodies that range from the United Nations (UN) Security Council's deliberations on relations among states to the UN forums for monitoring abuses against women and children and UN entities that promulgate norms for health, climate change, labor and trade; clubs of nations, such as the G-7, G-20, and OECD, which propose frameworks of regulatory norms for economic behavior; international professional associations, whose programmatic aspirations reach to accounting, legal, and scientific standards; and networks of international nongovernmental organizations (INGOs) and business INGOs (BINGOs) whose agendas traverse the terrain of private and public interests. Added to these are globe-spanning corporations (multinational corporations, or MNCs) and states and blocs of states that dominate the structures of world society, politics, and markets. From all flows a variegated flood of normative products, technologies, and prescriptions.

This opening frontier stands at the borders of several scholarly fields that only recently are becoming aware of benefits to increased traffic across their intellectual boundaries: international law, jurisprudence, international organizations (IOs) and international relations (IR), comparative politics, law and development, economic development, international human rights, globalization of law, international political economy, institutional economics, political philosophy, world society and world systems theories, an anthropology of global institutions, and a social psychology of legitimacy. Because norms are a common ground for these fields, it is not surprising that tensions crosscut them and hinder comity, not least the rough divides between the descriptive and prescriptive, the empirical and moral, science and policy.

This turbulent scholarly terrain for sociolegal scholars invites the development of frameworks and theories that are open enough to encompass the extraordinary diversity of global norms and the institutions that produce them and yet limited enough to reduce the seeming intellectual chaos of arenas and institutions, scholarly fields and theories, to points of scholarly intersection where fruitful encounters can proceed with mutual respect. Such frameworks must accommodate two distinguishing elements of global normmaking: On the one hand, it occurs in an often unsettled institutional forest, far more in flux than normally will be observed in the institutional matrices of long-established sovereign states; on the other hand, it has a remarkable dynamism not only because normmaking occurs among competing transnational and suprastate bodies but also

because these bodies are constantly negotiating the formulation and implementation of global norms with the national and subnational actors on which depend their ultimate efficacy.

This review argues for the interpretive value of a developing framework—the recursivity of law—both to accommodate the best of widely diverse disciplinary fields and to integrate much of the best cumulative scholarship of law and society research into the arenas of global normmaking. It shows how this framework helps shift a central *problematique* of sociolegal research into the suprastate sphere of normmaking, where rich opportunities lie for new research and sociolegally informed theory. In short, the review aspires to show how sociolegal theory and methods apply distinctive perspectives to the problems of global normmaking and why sociolegal researchers must widen and deepen their incursions into law and society beyond the state.

A sociolegal approach to the recursivity of global normmaking has distinctive emphases too often missed in legal or social science treatments of this process:

1. A sociolegal approach pays close attention to the politics of the legal complex—those configurations of legal occupations that preside over the legalized space in global lawmaking (Halliday et al. 2007). If lawyers and judges are the mediating professions in the legalized end of the global normative continuum, then their interests and capacities become critical for an explanation of outcomes, as Weiler (2001) observes in his thesis that the transition in world trade regulation from GATT to WTO was also a transition from the ethos of diplomats to the rule of lawyers. Frequently, global normmaking is accompanied by conflict between legal and other epistemologies, as Barnett & Finnemore (2005) reveal in their discussion of policy shifts within the UN High Commission for Refugees (UNHCR).
2. Legal concepts have a constitutive power to order norms, normmaking, and norm implementation in distinctive ways. The invention of new legal concepts, or their creative reinterpretation, can narrow or expand the reach of IOs, as the UNHCR managed when it creatively reconstrued its founding document to expand its mandate significantly (Barnett & Finnemore 2005).
3. Sociolegal scholarship presumes that global issues of any sort will be constituted by legal institutions in some way or other. Hence, there is a focus on how and why institutions of global regulation develop. The dynamics and trajectories of change in these institutions must pervade social science accounts of the emergence, propagation, and stabilization of norms. This focus coincides with historical institutionalism in political science (Thelen 1999), the new institutional economics, and neoinstitutionalism in sociology (DiMaggio & Powell 1991).
4. A sociolegal orientation will be sensitive to the formal properties of law. Global norms come in enormous variety. That variety results from strategic choices of actors, legitimation politics, asymmetries of power among global normmakers, and the creativity of IO technocrats (Block-Lieb & Halliday 2006, Shaffer & Pollack 2008). These factors have significant effects for implementation in differing contexts, as the lively debate over principles versus bright-line rules exemplifies (Braithwaite 2002). Forms of norms directly affect the functions of international courts and IOs (Alter 2009b).

This review proceeds in four steps. First, it defines our understanding of globalization and the critical elements required for a social science theory of globalization in general and global normmaking in particular. Second, it introduces the framework of recursivity of law in global contexts and argues for its value for integrating diverse disciplines and theories into a more orderly and systematic research program on the seemingly anarchic world of actors and norms. Third, it explores how

mechanisms of recursive global normmaking drive forward processes of reform until the inherent tensions with them are resolved and normmaking settles. Fourth, the review concludes with broad generalizations about global normmaking and its recursive attributes together with particularly promising opportunities for sociolegal scholarship. Although the review draws on interdisciplinary scholarship of all sorts, to make it manageable it focuses on a limited number of issue areas where significant sociolegal scholarship has already emerged: genocide and war crimes, violence against women, trade law, and climate change.

GLOBALIZATION

The analysis of global normmaking occurs within an even more expansive literature on globalization and law. Globalization occurs along two dimensions: structural changes in flows of people, ideas, trade, capital, culture, and any other medium of exchange; and discursive changes in meanings and attributions of structural change (Fiss & Hirsch 2005).

> An arena may be said to be globalized when there is a coincidence of structural and discursive elements. Variation in the advance of globalization occurs in both structural and discursive elements, which may be arrayed along dimensions of extensity (i.e., breadth of inclusion of nation-states, policy domains within states), intensity (i.e., how deeply a global influence penetrates inside states, societies, and consciousnesses), velocity (i.e., how rapid the flow of a globalizing content), and impact (i.e., the degree of change effected directly or indirectly by a global encounter (Halliday & Osinsky 2006, p. 449).

Global norms are integral to both dimensions and every aspect of variation in the extensity, intensity, velocity, and impact of globalization.

Elements in a Theory of Globalization

A systematic social scientific treatment of globalization and global normmaking requires attention to the actors who create and implement norms, the forms of power they exercise, the structures and arenas that instantiate those norms, the mechanisms employed to effective normative change, and the outcomes that result.

Actors. Global arenas or issue areas encompass every variety of political actor in domestic politics but add others. States are the primary actors in global normmaking and are at the heart of classical IR theory (Waltz 1979). Their activities are expressed through international governmental organizations (IGOs) such as the UN; IFIs such as the International Monetary Fund (IMF), World Bank, and regional development banks; and international courts, such as the International Court of Justice or the ICC. However, many other voices are active in global politics—international professional associations (e.g., INGOs), epistemic communities, transnational advocacy networks (TANs) and social movements, transnational economic interest groups, and religious groups. Even certain charismatic individuals, such as Princess Diana on landmines or Al Gore on global warming, can influence global normmaking.

Power. Actors vary enormously in the degree and types of power they exercise. Many are unable to mobilize directly in their own right: infants who die of infectious diseases in Africa, women subject to violence in civil war in the Balkans, refugees caged in camps in remote regions of Bangladesh or the Congo. Others have limited repertoires of power—little capital, feeble infrastructural capacities, hesitant voices. Yet others can mobilize tremendous capacities of military, financial, and organizational influence. Not least, the power to identify and diagnose problems and to frame issues is a discursive capability of great significance in global normmaking (Silbey 1997). Asymmetries of power and prospects for their reequilibration are a fundamental issue for citizens and scholars alike. How law shapes power and power shapes law are critical problems for a sociolegal

treatment of global lawmaking (Conti 2008a, de Sousa Santos & Rodríguez-Garavito 2005).

Leverage. Actors exercise power through discernible forms of leverage. These may be quite manifest when they involve military (e.g., the United States in Iraq) or financial (e.g., conditionality demanded by the IMF) coercion, but they also appear through reciprocity of various sorts in diplomacy and trade, through modeling, capacity building, and types of persuasion (Babb & Carruthers 2008, Braithwaite & Drahos 2000, DiMaggio & Powell 1983).

Structures and arenas. Actors exercising power do so from within and through structures. Hence, an account of global normmaking must identify the structural features within and among states, epistemic communities, professions, and international civil society groups that will enhance capacities to influence and propagate global norms. Deeper structures—of ideas, of economic interdependency, of aid reliance—also shape globalization (Meyer et al. 1997, Wallerstein 1984). The distinction between global actors and arenas blurs. From one side, quasi legislatures, courts, and regulatory bodies appear on the global stage as macrocosms of national branches of government. From another side, it has become a lively point of debate in IO and IR theory when arenas for contests among states become emergent bodies and actors in their own right (Barnett 1997).

Outcomes. Most writing on globalization becomes frustratingly vague when it is held to rigorous behavioral standards for outcomes. Sociolegal scholars insist that local behavior, not national enactment or formal state compliance, constitutes the ultimate measure of impact for global norms (Halliday & Carruthers 2009, chapter 12). The extensity, intensity, velocity, and impact of structural and discursive influences, and the degree to which they produce settled change, cannot be judged without careful empirical scholarship on law in action and on practice and behavior, not only in national legislatures, but in cities, counties, towns, and villages remote from global centers. The probability of local outcomes that reflect global legal change, however, depends on processes of global normmaking.

Anarchies of States and Norms

A blunt rendering of the realist theory of IR postulates that nation-states exist in a state of international anarchy (Waltz 1979). Nations order their relationships with each other by the exercise of power. Those who can dominate do; those who cannot submit. But the ingenuous or uncritical supposition that power is the only dynamic of interstate ordering willfully neglects evidence not only that might is supplemented by right in the transnational order of nations but also that might frequently submits to right in the global arena (Barnett 1997, Hurd 2007a). Yet a shift from a realist to a constructivist politics of IO/IR (Ruggie 1998, Wendt 1991) merely pushes the problem of anarchy in a different direction—the seemingly anarchical proliferation of norms that purport to specify what is right.

Consider the growth and heterogeneity of the transnational, international, and supranational normative arenas. The stock taking of international law by the *American Journal of International Law* on its 100th anniversary pointed to the institutionalization of some 300 IOs (defined as interstate bodies) and nearly 40 international dispute settlement bodies (Alvarez 2006). Their state-to-state relations are intertwined with networks of officials, judges, and legislators who engage directly with each other beneath the heights of formal negotiations among states (Slaughter 2004). Alongside and engaged with these exist countless transnational civil society groups and TANs (Alkoby 2008). They in turn exist in a transnational space with MNCs or transnational corporations who develop norms for market behavior and countless business associations that aggregate interests for global normmaking (Backer 2006, Price 2003). All of these—public and private, state-based and

civil society–oriented, commercial and human rights—generate norms of every sort.

As a result, the prospect opens up for competition among global actors with very different resources and capacities to create and promulgate norms. Multiple actors in the global arena increase the diversity of inputs to global normmaking bodies and amplify the outputs of normative forms and substance. Wider constituencies drawn into international lawmaking make more acute the tensions between representativeness and efficiency that permeate the politics of authority and legitimacy in all IOs (Block-Lieb & Halliday 2006). As IOs compete with each other, and interested parties compete to obtain the stamp of IO authority on their particular norms, state and substate actors who are the subjects of normative production confront bewildering options that may confuse at best or confront them with the appearance of normative anarchy at worst.

Norms. For heuristic purposes, norms in this article refer to formalized codifications of behavioral prescriptions that are accepted by subjects as legitimate and authoritative (cf. Finnemore & Sikkink 1998, p. 891). Global norms are formalized in bewildering variety. These range from declarations (UN Declaration on Human Rights), treaties (Uruguay Round, WTO), conventions (Convention on the Elimination of All Forms of Discrimination against Women), and charters, to protocols (Montreal Protocol on ozone reduction), accords (Tokyo Accord on climate change), model laws [Model Law on International Credit Transfers, UN Commission on International Trade Law (UNCITRAL)], legislative guides (On International Commercial Conciliation, UNCITRAL), convictions in criminal cases (International Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda on war crimes), trade law cases (WTO Appellate Panel rulings), rules (1976 UNCITRAL Arbitration Rules), accounting and banking standards (Basel II), to medical prevention and treatment guidelines (WHO guidelines for the treatment of malaria, tuberculosis, and HIV/AIDS), best practices (INSOL Insolvency Workouts), resolutions (2001 Declaration of Commitment on HIV/AIDS, UNGA Resolution S-26), and environmental certification systems (Forestry Stewardship Council). For this review, I stipulate that norms explicitly or implicitly purporting to apply globally must be formalized or codified in some manner, thereby avoiding the vexing issues of noncodified norms and law (Tamanaha 2008).[1]

Norms may be stated explicitly, through prescriptive and declarative forms, or implicitly, through diagnostic instruments that assume norms as points of reference, such as the measuring tools used by IFIs to appraise national laws. They may exist in a normative hierarchy, where higher- and lower-level norms relate to each other in determinate ways (Shelton 2006), or coexist in a pluralist legal order, where indeterminacy results from intersecting, overlapping, and competing norms (Berman 2007, Tamanaha 2008). The forms of norms have a dynamic quality. They may begin as soft law, which sets standards, develops precedents, and institutionalizes principles without being binding, and, over iterations of normmaking, harden into hard law, which is binding (Abbott & Snidal 2000, Alvarez 2006, Merry 2003a). Or they may begin as hard law and soften as they confront exigencies of implementation (Shaffer & Pollack 2008). Hard and soft law sometimes complement and sometimes conflict with each other. In all their diverse manifestations, formal global norms are encapsulated by the classic sociolegal concept of law on the books.[2]

Global norms in all their forms are subject to negotiation not only in the supranational or transnational sphere, but also in politics of negotiation, contestation, and conflict over their reception by purported subjects (Carruthers &

[1]This is a more restrictive concept of norms than prevails in sociology, although see Braithwaite & Drahos (2000). Restrictive usage delimits the scope of explanatory focus.

[2]I do not attempt here to rehearse or arbitrate the extensive debate about what constitutes law, when norms are varieties of law, and when they are not.

Halliday 2006, Holton 2000). Normmaking, therefore, is an exercise of power, a struggle among competing actors in global arenas, a source of conflict between the global and local.

RECURSIVITY

Scholarship on normmaking is replete with the notion of cyclicality—that norm development goes through rounds, or cycles, or turns, or feedback effects, or episodes (Alter 2009b, Barnett & Finnemore 2005, Braithwaite & Drahos 2000). Rarely is cyclicality itself, its structure and dynamics across issue areas, treated systematically or methodically. The recursivity framework offers a way forward.[3] While allusions to recursivity are not new (Braithwaite & Drahos 2000), scholarship on rounds of reforms requires a theoretical architecture sufficiently open to embrace a variety of disciplines and middle-range theory but sufficiently precise to stimulate hypotheses that can be disciplined by data. The recursivity of law framework has been applied to global normmaking and national lawmaking in international trade law (Halliday & Carruthers 2007b, 2009) and national criminal law (Liu & Halliday 2009).

It offers several benefits to orderly development of the highly fragmented scholarship on global normmaking: (*a*) It is systematic, that is, it demands attention consistently to a set of issues, sets of processes, and discernible outcomes that recur widely in legal change; (*b*) it introduces hypotheses about the actors and mechanisms that drive global normmaking and eventual settling of global norms; (*c*) it looks for beginnings and endings in cycles of global normative change; (*d*) it is historical, that is, it takes seriously historical contingency, path dependency, inertia, but also enablement, adaptation, and institutional change (Campbell 2004, Thelen 1999); and (*e*) it is comparative, by permitting, indeed stimulating, comparisons across issue areas and different levels of normative and legal change in global, national, and subnational contexts.

Between Formal Norms and Practice

In the recursivity framework, national legal change occurs through cycles of activity that oscillate between the classic polarities of law and society scholarship: law on the books and law in action. On the one side, sets of problems stimulate actors to engage in lawmaking to remedy the problems. On the other side, actors translate law on the books into practice. For too long, sociolegal scholarship concentrated on the shift from law on the books to law in action, conceding lawmaking to political scientists. Obversely, political scientists were too often content to explain moves from practice to lawmaking without considering whether new statutes or court decisions actually produced changes in practice. The recursivity framework contends that neither side can avoid embracing the other if strong theories of legal change are to prevail: The conditions of lawmaking affect implementation, and the circumstances of practice influence what law gets placed on the books.

In a global world, national lawmaking is embedded in global processes. A supranational law on the books emerges in the variety of forms and from the heterogeneity of institutions noted above. In the conventional law and society move, the theoretical problem would be to explain the gap between global norms, national enactment, and local practice. In the conventional political science move, the theoretical problem becomes the explanation of how local practices and problems, and national interests and clashes, become embroiled with nonstate actors to produce new or revised global norms. Whether local-to-global or global-to-local, however, a polarity exists in global normmaking

[3] By recursivity, I emphasize the dynamic interplay of multiple reform cycles between law on the books and law in action within and between national and global lawmaking forums and sites of implementation. By framework, I specify an approach to domestic and global legal change that offers a way to conceptualize and generate questions about legal change. More than this, the framework incorporates a set of hypotheses about when settling occurs from efforts at legal change and how the long arc of episodes of legal change begin, proceed, and end.

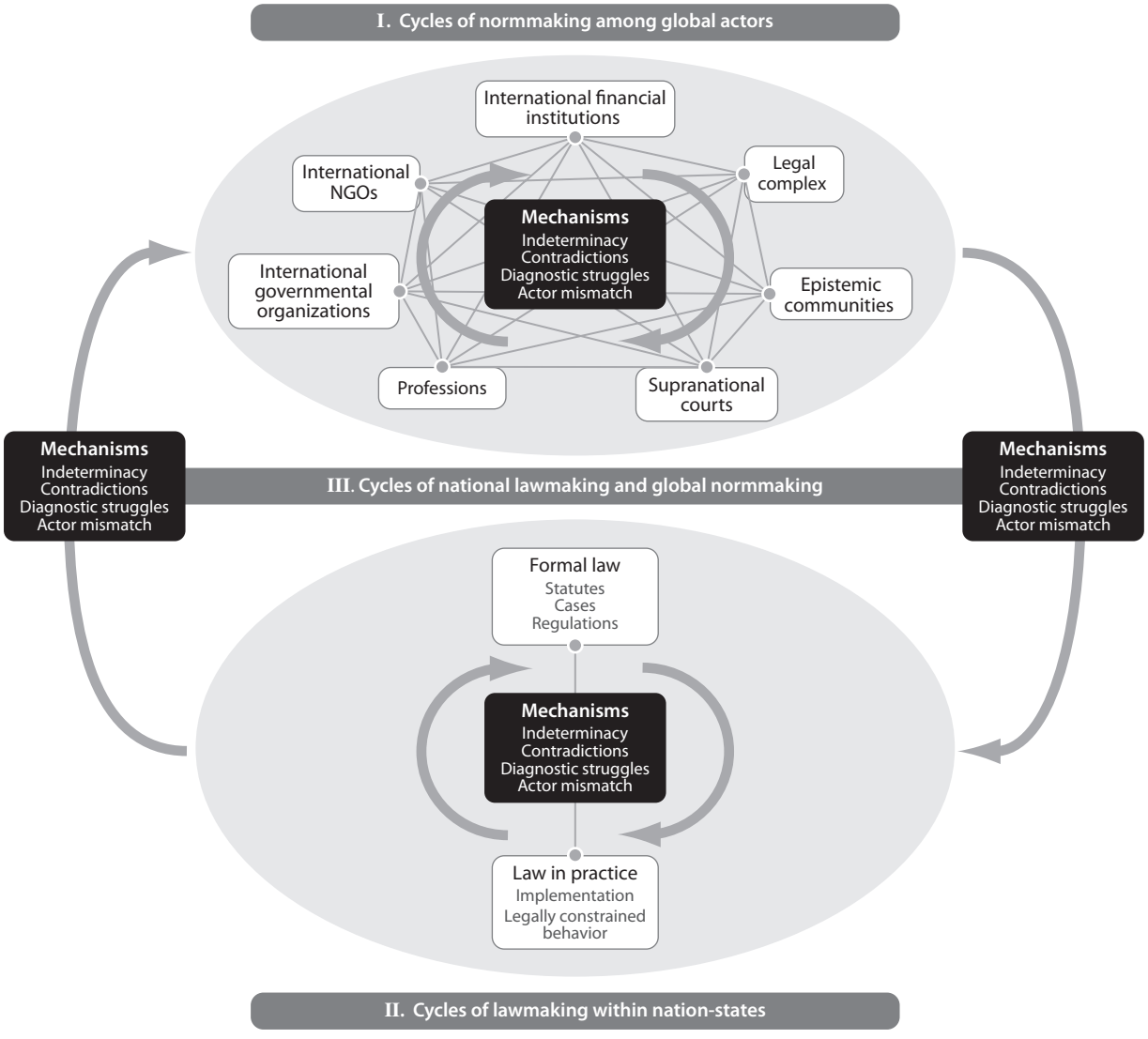

Figure 1

Recursive cycles of global normmaking and national lawmaking.

between global and national normmakers and normtakers, and national and local lawmakers and local subjects. It is a premise of the recursive framework that the exigencies of practice affect lawmaking just as the dynamics and structure of lawmaking constrain the shape of subsequent implementation. Hence, an account of national lawmaking or global normmaking must hold in tension both sides of the recursive cycle.

Cycles

In global lawmaking, recursivity proceeds principally through the intersection of three interacting cycles (see **Figure 1**).

Iterations of normmaking among global actors. There are cycles creating global norms that occur among actors on the global stage.

Reference to such cycles is common in accounts from international law, but social scientists often fail to describe a series of changes in formalized norms, as they move from or through one international forum to another, developing and propagating one after another set of norms.

The story of banning landmines contrasts the interstate diplomacy that led to the 1996 revision of Protocol II of the UN Convention on Conventional Weapons (CCW) with the multiactor negotiations that produced the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Mine Ban Treaty, MBT) (Cameron et al. 1998). Furthermore, the account of emergent global norms for corporate bankruptcy systems can be told as a move from products developed by professional associations (the Model International Insolvency Code, developed by the International Bar Association; the Guidelines for Out-of-Court Workouts drafted by the International Federation of Insolvency Practitioners) and IFIs (the IMF's *Insolvency Procedures*, the World Bank's *Principles*, the Asian Development Bank's standards) to UNCITRAL's 2004 *Legislative Guide on Insolvency Law* (Halliday & Carruthers 2009, Part I).

A recitation of a developing sequence of norms is a useful building block for theory, but it does not amount to an explanation. A principal limitation of this approach when taken alone is its tendency to imagine a kind of epiphenomenal politics, a globalization from above, as if globalization emanates from the center to the periphery, from the supranational to the national.

A sociolegal agenda therefore demands answers to key questions: (A1) How does the substance of global norms change—expand or contract, move from one doctrine to another—in an issue area? (A2) How do forms of global norms change character, for instance, from hard to soft law, or from higher-level principles to more precise bright-line rules? (A3) What drives the shifts in normmaking from one global arena to another in a particular issue area? (A4) What role is played by the legal complex in moving normmaking across forums and in formulating the substance and form of norms within them?

Cycles of lawmaking within nation-states. There are also cycles of lawmaking within nation-states. A decade or two ago these laws might have been entirely endogenous with little thought or heed of transnational contexts. When the United States undertook a far-reaching revision of its bankruptcy laws in 1978, lawmakers had no interest in developments anywhere else. When Britain revised its insolvency law in the 1970s and 1980s, it considered developments in Europe but then dismissed them as irrelevant and proceeded on its own course (Carruthers & Halliday 1998). When Milosevic instigated his campaign of ethnic cleansing in the late 1980s, he might reasonably have supposed he was protected by the mantle of national sovereignty; his troops could kill and rape at will.

Domestic politics in principle, therefore, and until very recently in practice can be understood as a series of cycles in which a problem (failing companies, ethnic impurity, air pollution) leads to formal law or policymaking, efforts to implement the new law in practice, and subsequent efforts to revise or modify statutes, provide judicial rulings, or provide regulatory guidelines—cycle after cycle that oscillates between formal law and practice until some sort of equilibrium is reached when cycles slow or stop.

The structure and practice of domestic politics has significant consequences for global normmaking. Countries contrast sharply between those that have institutionalized means for civil society to participate in legislative lawmaking (United States) and those that do less (France); between those that rest heavily on private professional expertise (United States, Canada, UK) and those that rely on the expertise of their civil service (New Zealand, France); between those that endow domestic courts with substantial lawmaking power (United States) and those that do not (China); between those where the center of political gravity is the

executive (France) and those where the judiciary is the most respected political institution (India); between those where statutes are drafted broadly (Continental Europe) and those where they are articulated in excruciating detail (United States); between those where judicial law accumulates from precedent and those where it does not. Styles of domestic lawmaking create mental imprints on their citizens and delegates who enter international forums with preconceptions about what is possible and by what means. For most nation-states, global politics in the first instance is a macrocosm of domestic politics. It frequently takes considerable socialization for state delegates to global normmaking endeavors to discover that global arenas may have their own *modus operandi* and that the pattern of domestic politics will more or less enable global influence.

Not only does the structure of the state and its politics make a difference. So, too, does state capacity. As one of their measures of legal capacity at the WTO, Busch et al. (2008) find that the resources available to government ministries affect surveillance and monitoring of global activities and, more importantly for domestic politics, also affect the expertise that is available locally, in the state and market, for policymaking. The vibrancy of civil society likewise affects which actors potentially participate in domestic lawmaking and which are neglected or excluded, a local political circumstance that has major implications for global normmaking (Keck & Sikkink 1998).

The areas of national lawmaking that can be sheltered from international or global influence appear to be increasingly contracting. Cycles of national lawmaking continue, but they do so in awareness of global influences, subject to constraints from a country's position in global structures, and responsive in varying degrees to global discursive frames. This is not to deny that a large divide exists between national enactment of laws responsive to global influences and their implementation in practice, as sociolegal scholars demonstrate clearly on women's rights (Boyle 2002, Boyle & Preves 2000, Merry 2005). Rather, it is to acknowledge that theories of national lawmaking and global normmaking require each other.

A sociolegal agenda will therefore productively ask (B1) how far does penetration of global norms into local contexts depend upon structural and institutional capacities of states? (B2) Is a principal imprint of national lawmaking on global normmaking arenas the reproduction of state policy practices in global settings? (B3) Does the decision-making structure of a global arena favor those countries whose domestic political processes have the closest affinity between the global and the local?

Cycles of national lawmaking and global normmaking. In a global context, both the first and second cycles engage each other. Not only do global norms influence national lawmaking, but national lawmaking has consequences for the global.

The global-local shift is the instinctive half-cycle for most scholarship on globalization. In this model, global institutions develop norms that are propagated via the forms of leverage identified above. This center-periphery logic is inherent in both the world society and world systems theories within sociology (Berkovitch 1999, Boli 1998, Frank 1997, Wallerstein 2002). It fits with the conventional law and society paradigm of a potential implementation gap.

Because our concern here is primarily with global normmaking, however, it is the local-global half-cycle that requires the greater sociolegal attention. This can take the form most closely consistent with an IR realist theory, namely, that hegemonic states impose their norms on the global. Hence, critical scholars maintain that globalization might be better construed as globalized localisms, i.e., any global norm, if carefully scrutinized, will more often than not be found to be a national norm or practice that is elevated from the nationalist particular to a global universal (de Sousa Santos 2002). Variants of this are the capture of global normmaking by market actors, or by regional blocs, or even by individual corporations, such as Wal-Mart's extraordinary impact through its standards for suppliers (Backer 2007).

More often than not, state regulatory standards arise from the private sector; "state regulation follows industry self-regulatory practice more than the reverse" (Braithwaite & Drahos 2000, p. 481). It is a classic move in domestic politics for business groups—and varieties of civil society groups—to seek to enroll or capture the state with norms that privilege sectional interests. States are as often agents of private interests as vice versa (Shaffer 2003). A similar logic can be observed in global arenas. The trade-environment politics of the WTO reflect the domestic struggles between NGOs and INGOs and business interests, the outcomes of which get translated into intergovernmental politics at the global level (Shaffer 2001). Domestic constituencies that are excluded from national politics or that cannot make headway frequently form alliances with transnational actors, such as TANs (Keck & Sikkink 1998), or even with IFIs, in the case of Indonesian law reformers' alliance with the IMF (Halliday & Carruthers 2009), to bring exogenous pressures on national elites unresponsive to their local constituencies. The "internationalization of palace wars" (Dezalay & Garth 2002) widens domestic politics in part by informing and then wielding international norms in local struggles.

Moreover, the resources and legal capacities of states substantially affect their ability to staff delegations or send experts to international forums where norms are being crafted. Research shows that the legal capacity of states influences litigation outcomes and behavior in the shadow of litigation at the WTO independently of the raw economic power of a state (Busch et al. 2008). One of the reasons that Brazil has enjoyed success in litigation before the WTO Appellate Panel, which is a kind of supreme court for world trade, results from its private and public investment in a legal expertise in Sao Paolo and Geneva, which translates into periodic victories in Geneva (Sanchez et al. 2008).

The impact of national lawmaking on global norms is not only direct but indirect. When nation-states resist and avoid, adapt and reject, the insertion of global norms in their domestic regimes (Boyle 2002, Halliday & Carruthers 2007a, Merry 2003b), they may compel global normmakers to alter the form or substance of the norms or the forms of influence by which they are propagated. In the case of insolvency reforms, for instance, the IMF Legal Department deliberately waived its claims to be the ultimate global standard-bearer by shifting its normmaking efforts to UNCITRAL because it knew there was a much higher probability that developing nations would accept norms produced by a global deliberative body than by the IMF's small panel of experts. In either case, national and local lawmaking and practice impinge on the global and thus are integral to explanations of global normmaking.

Arguably, the most important impact of national lawmaking on global normmaking occurs through formal adoptions and implementation of global norms. Even if adoptions do not get beyond symbolic decoupling, where nations enact global norms but with no intention or capacity to implement them, then a powerful reinforcement and, ultimately, diffusion effect can set in to reinforce the authority of the global mandates. Two patterns recur. In one, a large number of nations, powerful and not, rush to ratify or adopt a new set of global norms. At the conclusion of the negotiation process, 122 nations signed the MBT, and those nations included several regional blocs, strongly supported and prodded by powerful INGOs, such as the International Committee of the Red Cross and members of the International Campaign to Ban Landmines (Cameron et al. 1998, Maresca & Maslen 2000). This occurred despite the fact that the state with the world's most powerful military, the United States, did not ratify then, or now. In the second pattern, a set of new global norms remains on the books, neither enacted nor implemented locally, until one or more globally influential actors signal their intent to be bound by the norms. When UNCITRAL completed its Model Law on Cross-Border Insolvency in 1997, there was wide agreement among experts that it was critically important as a legal mechanism to handle increasing numbers of failures by MNCs. The Model Law eased the way for legal

jurisdictions, often with different substantive laws and procedures, to cooperate. Most of the advanced countries, and many developing countries, delayed incorporating the Model Law into their domestic bankruptcy law until the U.S. Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (enacted April 17, 2005, and effective October 17, 2005). The response was immediate, with a wave of national lawmaking across the world—in China and Korea, New Zealand and Australia, Great Britain and Colombia, among others.

A sociolegal agenda will therefore address (C1) Under what conditions are various forms of global leverage more effective on local compliance? (C2) What are the methods used by weaker states and substate actors in the world system to obtain degrees of freedom from global pressures to converge with global norms? (C3) To what degree is global politics the domestic politics of a major power writ large? (C4) What are the circumstances in which weak local actors—peripheral states, socially disadvantaged groups, even individuals—can make a constructive impact on global norms?

Normmaking Episodes

Recursive cycles of normmaking are neither constant nor continual. An ample literature documents that global norms do not spring into fully formed global regulatory regimes. Norms evolve dynamically, through iterations among transnational state and nonstate organizations, between global and national actors. They are initiated by norm entrepreneurs who mobilize organizations to institutionalize norms that cascade across states, IOs, and networks, eventually to be internalized and taken for granted (Braithwaite & Drahos 2000, Finnemore & Sikkink 1998, Meyer et al. 1997, Nadelmann 1990). In short, global normmaking has beginnings, at Time 1, when either there are too few or too many conflicting norms, and it has an ending, at Time 2, when the normative framework has a qualitatively different character, when behavior of individuals, groups, and nations is constrained in relatively routinized, orderly, and predictable ways by norms widely held to be legitimate and authoritative. These norms are embedded into and reinforced by institutions.

Cycles of normmaking have beginnings. As in domestic lawmaking, decades or centuries may pass without attention to a problem that would attract global normmaking. Following a garbage can theory of agenda setting (Kingdon 2002), global normmaking requires a coincidence of (*a*) the recognition that there is a problem to be addressed, (*b*) the availability of one or more policy solutions on the table, and (*c*) a policy environment in which policy decisions will be taken. Any one without the other leads nowhere. The beginning of a global normmaking episode generally requires a buildup of an underlying set of policy problems—the costs of high tariff barriers to economic development, systematic rape of women in war zones, the spread of HIV/AIDS, destruction of forests—followed by a precipitating event, such as a dramatic oil spill or the occurrence of a longstanding problem in closer proximity to vocal civil society groups (ethnic cleansing in the former Yugoslavia, on the European Union's doorstep), an act of genocide (Rwanda), or the election of a powerful politician committed to a cause (Milosevic's commitment to a greater Serbia; Bill Clinton's commitment to free trade embodied in the Uruguay Round, for example).

Political science and sociological theory (Alford 2008, Braithwaite & Drahos 2000, Finnemore & Sikkink 1998) frequently isolate the critical role of charismatic policy or norm entrepreneurs who activate influential publics and opinion leaders and enroll global celebrities [cf. Mostafa Tolba on ozone reduction (Canan & Reichman 2001); the Canadian Foreign Minister, Lloyd Axworthy, and Jody Williams, Princess Diana, and Queen Noor on landmines (Anderson 2000); Bono on HIV/AIDS; the chief prosecutor, Louise Arbour, at the International Tribunal for the Former Yugoslavia (Hagan 2003)].

Episodes also end. Norms may settle on a new consensus (see below). Actors are diverted

to other issues (e.g., terrorism). Resources dry up. Exhaustion wears down the central players. A stalemate locks up the most powerful actors. The arena for normmaking has crippling deficiencies. The form of norms—hard or soft law, conventions or principles—no longer seems feasible.

And between the beginning and the end of episodes, the long arc of efforts at global normmaking take on very different patterns and sequences. Recursivity among global actors can take the form of trial and error, of experimentation over first one way forward, then another, until finally a concatenation of problems, solutions, and policy circumstances coincides. Recursivity between global and national actors can follow quick or slow cycles; begin with a big bang and trickle away; or build up to a major achievement through a set of incremental steps. A lively debate in international law turns precisely on whether new international legal regimes are best accomplished by a series of small incremental steps or a major leap forward (Block-Lieb & Halliday 2007, Hathaway 2005), a progressive move toward legalization or a retreat from it, a progression from hard to soft law or vice versa (Shaffer & Pollack 2008).

Many accounts of long-term changes in global terms use concepts or equivalents of episodes without theorizing them very much. Between 1920 and 2000, for instance, Barnett & Finnemore's (2005) account of refugees cycles through three episodes. Episode I begins in the aftermath of the huge displacements of refugees from World War I, proceeds to the establishment of a High Commissioner for Refugees by the League of Nations in 1921, and then moves to a weak draft convention in 1933, when it languished and effectively died with only eight signatures. Episode II is also precipitated by war that led to the founding of the UN Relief and Rehabilitation Administration in 1943. This was succeeded by an International Refugee Organization in 1946 under U.S. pressure, and subsequently by the UNHCR in 1950, accompanied by a global set of norms, the Refugee Convention that took effect in 1951. Although the basic norms settled in the early 1950s with an emphasis on exiles, the reach of the UNHCR expanded from the 1950s to the 1970s through several cycles of national crises, including the Hungarian uprising (1956), the flood of refugees from China into Hong Kong (1949–1957), the Algerian uprising against France (1954–1959), followed by the widespread refugee movements precipitated by decolonization. As successive cycles of global-local engagements occurred over two decades, they gave rise to new norms and expanded powers for the UNHCR, formally inscribed in UN General Assembly Resolution 2039 (1969). But matters did not stop there. After a decade of relative quietude, a shift occurred that points to the opening of Episode III. From the late 1970s to the mid-1990s, the UNHCR has progressively moved from norms emphasizing exile and asylum to repatriation. As yet, this episode appears not to have produced a new set of formal norms, nor has it been the subject of explicit international deliberation. Rather, normative change has occurred through internal UNHCR shifts in interpretation of its mandate and in its formal and informal rules of practice.

The regulation of landmines, by contrast, cycled through one long episode that was punctuated by competing and successive normmaking activities (Matthew et al. 2004). The episode began in the 1950s when the International Red Cross tried to put the problem on the global agenda, but it was not until 1980, with the passage of Protocol II of the UN CCW, that some global norms were articulated to restrict use of landmines. Nevertheless, despite the EU's encouragement for its members to ratify, this norm did not settle. Pressure for much stronger norms against the production or use of antipersonnel mines mounted in the 1990s from a highly eclectic set of actors on behalf of victims, women, children, physicians, and veterans and from human rights organizations and TANs. UN groups and the Vatican joined the chorus for a total ban on antipersonnel mines, a movement that produced in an extraordinary 12 months, from late 1996 to late 1997, the MBT. Although this episode may not be

entirely over, given that the United States, China, Russia, India, and Pakistan have not signed, the moral authority of the treaty is extensive. Another round may reconcile the supporters of the two competing sets of norms (CCW versus MBT), but in the court of public opinion and a majority of the world's nations the high moral ground is held by the MBT.

Scholarship has yet to address satisfactorily problems salient to law and society scholars: (D1) What precipitates a new episode of normmaking? (D2) What determines the agenda-setting power of key actors at the outset of an episode? (D3) Can distinguishable sequences be identified within episodes in an issue area? (D4) How are shifts from one or another global forum and one or another legal form to be explained? (D5) What are the implications for impact of global norms of differing sequences (e.g., incrementalism versus big bang)?

Settling

The concepts of settling and settlements in sociolegal and sociological scholarship, respectively, provide a theoretically constructive way of appraising the state of play in Time 2 (Abbott 1988, 2005; Grattet & Jenness 2001a; Grattet et al. 1998). Two kinds of settling occur in global issue areas, one of structures, the other of meanings.

Settlements over structures occur when there is a stabilization of which actors in an issue area are defined as legitimate participants, a process akin to historical struggles among professions for control over terrains of work (Abbott 1988). In the WTO quasi-judicial process, where states bring disputes to the Appellate Panel, INGOs or industry groups were not permitted to submit amicus briefs. In the UN forums on women's rights, some nonstate actors get limited standing to participate and others do not (Merry 2005). There is nothing natural about this. It is a negotiated process in which actors with power are able to persuade others that a definition of the situation includes them but excludes others.

Empirical evidence from diverse sources reveals that mechanisms that produce structural settling include (*a*) negotiation among states, as in the Uruguay Round for the WTO and the Kyoto Accords on climate change; (*b*) competition among IOs that produces winners and losers, such as the United States, which wins in most areas of global business regulation, or the European Union, which wins in selected areas such as prescription drugs, food, or car safety (see Braithwaite & Drahos 2000, table 20.1, pp. 476–77); (*c*) forum shopping, where powerful actors select or move among IOs, shifting their resources to those that offer the most benefits (e.g., the United States from the World International Property Organization, where it was weak, to the WTO, where it was much stronger); (*d*) imposition of regimes, as in IMF/World Bank Reports on Observations of Standards and Codes (ROSCs); and (*e*) decisions in trade disputes (Conti 2008a,b) or in international criminal trials (Hagan & Levi 2005). Institutional settling also occurs as an institutional division of labor falls into place, as has occurred in relations between the European Commission and the European Court of Justice (Alter 2009a), or the WTO and its Appellate Panel (Conti 2008a). This settling involves many iterations, sometimes over decades, as the relative powers of each institution in the ecology stabilize.

Settling on meaning, over frameworks, norms, and underlying assumptions, infuses global lawmaking. It is a general sociolegal *problematique* to explain the conditions under which normative frameworks for the world settle on particular norms that purport to regulate the behavior of the subjects of the regulatory regime. Following Grattet's innovative work on settling of legal meanings within the United States (Grattet & Jenness 2001b), we can stipulate that global norms are settled when (*a*) competition or struggles among competing global normmakers are resolved in favor of one or more particular sets of norms, and (*b*) the normmakers and normtakers reach an equilibrium where the meanings of norms stabilize and

repeated cycles to revise them diminish or are routinized.

A sociolegal agenda must respond to the questions (E1) how is settling on global norms to be operationalized? (E2) Is settling possible without consensus on a single set of global norms? (E3) Is there a relationship between structural and discursive settling? (E4) How do varieties of forms of global norms enable or inhibit settling?

MECHANISMS

To get beyond a descriptive recitation of different norms formulated by a succession of transnational bodies to systematic theory requires careful scrutiny of mechanisms that explain why norms do or do not settle, why they move from one global normmaking body to another, why they vary in forms and substance, and why some are considered legitimate and others not. Four mechanisms function in domestic lawmaking and global normmaking alike: actor mismatch, diagnostic struggles, contradictions, and indeterminacy (Halliday & Carruthers 2007b, 2009). These encapsulate much law and society and interdisciplinary law and social science scholarship. Within each lies a tension. Failure to resolve the tension drives forward cycles of normmaking without resolution or settling.

Actor Mismatch

Legal change within domestic politics depends significantly on the extent to which the actors integral to implementation of a new law were also present at its formulation. When actors who are stakeholders in legal change, because it has significant impact on their everyday circumstances, are excluded from decisions over the shape of reforms, there is a higher probability that they will frustrate the intentions of lawmakers. They do this for several reasons: as a matter of principle, because their voices were not heard; as a matter of grievance, because their material or ideal interests were not satisfied; or as a matter of ignorance, because they were unaware of changes they are supposed to heed. Any of these can lead to lack of compliance: an implementation gap between global norms and national or local practice.

As discussed above, power in global normmaking is frequently exercised by excluding certain actors and stakeholders from normmaking. In trade law, labor and developing countries are disproportionately under- or unrepresented (Braithwaite & Drahos 2000; Conti 2008a,b). On the issue of female genital cutting, Muslim religious groups are principally absent from global forums (Boyle 2002). Yet the exclusion by intent or neglect ultimately becomes self-defeating because potential subjects of norms are far less likely to adopt the norms compliantly.

Actor mismatch speaks directly to fraught questions of global governance, most notably the authority of global normmaking bodies. And IO authority turns on legitimacy. The representative and procedural features of global normmaking are critical to legitimation of global norms and the authority of their institution precisely because the more severe the mismatch between those who make global norms and those who are expected to implement them, the longer they will take to settle on norms that evoke universal compliance and the less effective they will likely be (Barnett 1997; Hurd 1999, 2007a). Thus, there is vigorous debate in leading world forums over governance, legitimacy, and authority in the UN Security Council, the IMF, the World Bank, and even many INGOs that purport to be the voices of global civil society (Birdsall 2003, Bodansky 1999, Bradlow 2006, Franck 2006, Hurd 2007b, Kapur 2000). In every case the issue is identical: Which actors expected to adopt norms are absent from their negotiation?

Actor mismatch in global normmaking occurs for many reasons and through a variety of techniques, which need to be cataloged systematically and made contingent on when they are mobilized, when and how they work, and how mismatch is corrected. Sometimes mismatch is an expression of hegemonic power: The United States, advanced economies, and

the IMF may feel able to impose a set of norms on a global institution, and their ability to do so tempts them to exercise that power. Sometimes mismatch results from temporal pressures: In a financial emergency, such as the Asian financial crisis or a genocidal convulsion, a handful of actors exclude stakeholders because to consult them, it is said, would exacerbate the crisis. Sometimes mismatch is historically embedded in institutions in a path dependency, such as the balance of power inscribed in the founding documents of the UN Security Council and the Bretton Woods institutions (IMF and World Bank), both exceptionally difficult to change. Mismatch may be driven by financial interests, such as efforts by the United States and European Union in negotiations over the WTO Doha Round to compel an outcome less favorable to countries with large agricultural sectors, or by ideal interests, such as United States and European efforts to exclude nations like Libya and Zimbabwe from leadership in UN human rights' agencies. Collective action problems also bedevil smaller, weaker, underresourced actors, such as consumers, victims of systematic rape in war, refugees, or low-lying and island nations disproportionately affected by global warming.

A sociolegal agenda must therefore (F1) appraise critically the structure of governance in global normmaking institutions; (F2) identify which stakeholders and subjects of global norms are missing from global normmaking in an issue area; (F3) explain what accounts for their absence; and (F4) predict the consequences that result from their absence for local enactment and implementation.

Diagnostic Struggles

Global normmaking involves contests among actors over diagnoses of problems to be rectified. Actors who can define the meaning of a situation, fix the discursive framing of the problem that needs remedying, or establish why norms should be developed on an issue gain a great advantage in subsequent norm- and lawmaking (Abbott 1988, Keck & Sikkink 1998, Merry 2003b). A key form of power in global normmaking turns on an actor's ability to construct a global problem in a way that disproportionately benefits that actor or accords with the actor's orientation.

Diagnoses stem from a variety of sources, local and global. Some originate from ad hoc formal commissions created specifically to analyze a situation and offer recommendations, such as the UN's Intergovernmental Commission on Climate Change. Some are generated by INGOs, TANs, and international civil society, such as Human Rights Watch and Amnesty International national and global reports on torture. Some emerge from within standing global bodies that have their own capacities for research and analysis, such as the *Landmine Monitor Report*, or the ROSCs undertaken by the IMF and World Bank on member countries. The UN Commission on Elimination of Discrimination against Women requires national reports on women's rights. Sources of diagnoses and the forms in which they are presented differentially influence normmaking bodies and the audiences that hold their deliberations and norms as more or less legitimate.

Some IOs specialize in diagnosis, such as the OECD on economics and trade, whose teams of economists and others turn out regular reports on national economies and transnational appraisals of trends in issue areas. Other IOs have specialized diagnostic teams or functions, such as prosecutors in international criminal courts who use forensic scientists, or the IMF in its periodic Article IV appraisal of member economies.

Diagnoses rely on differing epistemologies championed by competing professions. On climate control and the environment more generally, a scientific basis underlies policy debates (Canan & Reichman 2001). Global responses to the crisis in Darfur in part turn on the scientific validity of estimates over the numbers killed (Hagan & Palloni 2006), just as policy prescriptions to combat HIV/AIDS rely on the underlying etiology and epidemiology of the disease. On the role of law in economic development, the underlying diagnosis relies on an amalgam

of flawed social science research (La Porta et al. 1997) and a commonsense theory without adequate research foundations (Carruthers & Halliday 2007). On governance of global institutions, current reform debates rely on a mixture of political theory on legitimacy and authority (Franck 2006) and on ad hoc observations about adverse consequences of current governance structures in IOs (Hurd 2005). Diagnoses therefore vary markedly in the degree to which the underlying problem can be commensurated (Espeland & Vannebo 2007), and its degree of reliance on scientific versus normative epistemologies (Halliday 1985). The affinity of a diagnostic method and its underlying epistemology with epistemologies persuasive to powerful global actors leverages the impact of some proponents versus their competitors. Moreover, diagnoses themselves differ substantially in their relative costs. Advanced science can be afforded more readily by rich nations than poor.

The impact of a diagnosis that emerges from the pack of competing diagnoses depends on its framing for a particular audience (Hagan & Rothenberg 2009, Keck & Sikkink 1998). As Campbell (2004) has demonstrated within countries, a diagnosis will be more persuasive the more readily it can be attached to a discursive frame, a system of meaning that is already accepted as legitimate and persuasive. Indeed, the same underlying problem, such as discrimination against women, may languish as an issue for global normmaking until it finds a frame that resonates widely, as scholars argue occurred in the shift of frames of violence against women from a feminist issue to a human rights issue (Keck & Sikkink 1998, Merry 2005).

A global problem with exactly the same objective characteristics—the same numbers of deaths, the same contours of harms—will either fail to become a topic of global normmaking, or those norms will be unpersuasive, if the interpretive frame does not resonate with critical audiences. The loss of life in Darfur can be construed as civil war, as ethnic cleansing, as a site for war crimes, as crimes against humanity, as genocide. The matching of a diagnosis (the wide scope of systematic rape), which is a scientific and forensic problem, with powerful frames (a war crime, a crime against humanity, an element of genocide) is a critical two-step move for international interventions now that rape has been established as a war crime (Hagan 2003).

However, as in domestic policy agenda setting, diagnostic struggles around normmaking do not proceed in one direction only. Progenitors of diagnoses may go in search of actors to adopt them or enroll them (Braithwaite & Drahos 2000), just as actors may search for diagnoses that suit them. Hence, it is an empirical question in each issue area whether diagnosis precedes an actor or the actor seeks or shapes a diagnosis that has an affinity with its policy preferences.

Moreover, the exercise of power in diagnostic struggles is not only a matter of actors prioritizing one diagnosis over another. Power inheres in the suppression of a diagnosis or its distortion. Actor mismatch ramifies into diagnostic struggles insofar as actors missing or excluded from global normmaking are thereby likely to be unable to put on the normmaking table their definition of situations, their construction of problems that global prescriptions are designed to alleviate.

A sociolegal research agenda will therefore (G1) demonstrate what sorts of diagnoses are most persuasive in a given issue area; (G2) reveal what epistemologies infuse diagnoses; (G3) show which global actors exercise what powers (*a*) to assure the ascendancy of a particular diagnosis and (*b*) to distort or suppress competing diagnoses; (G4) indicate which professions compete for diagnostic and epistemological ascendancy in an issue area; (G5) show degrees of competitive advantage of law and lawyers in diagnostic struggles; (G6) uncover which frames are tried and which frame(s) prevail(s); and (G7) pinpoint the salient audiences for global normmaking actors and institutions, concomitantly indicating which demands they place on the validity and reliability of diagnoses.

Contradictions

Settling on a new level of norms articulated by a stable IO or cluster of transnational institutions is frequently inhibited by contradictions built into those norms, contradictions that internalize tensions and instabilities into the normative framework that provoke further rounds of reform to resolve them. Two fundamental contradictions permeate global normmaking in every issue area: that between the primacy of international law versus the sanctity of sovereignty (Boyle 2002, Merry 2003a) and the related contradiction between the primacy of states and might versus the priority of IOs and right (Hurd 2007a). Because any issue area in the "the world polity is full of contradictions" (Barnett & Finnemore 2005, p. 38), it is useful analytically to distinguish between institutional and ideological contradictions.

Institutional contradictions occur when either competing logics (e.g., of markets, politics, religion) and/or competing institutions articulate norms in tension with each other. In an issue area, competing IOs, epistemic communities, or INGOs may compete for ascendancy as normmakers and propagators or enforcers. Global issue areas are replete with competing institutions that express contrary values: the World Economic Forum (Davos) versus the World Social Forum; the G-7 versus the G-77; the Climate Action Network versus the Global Climate Coalition (Alkoby 2008, p. 392); the United States versus the coalition supporting the ICC; even institutions of the greater UN family, such as the UN Development Program versus the World Bank. Sometimes these institutions fully express the range of stakeholder interests in implementation; sometimes actor mismatch pits one institutional actor against another while excluding yet others. As in national polities, these contradictions are expressed both in rivalries related to normmaking and in rivalries over enforcement and implementation.

A developing scholarship on IOs shows that institutional contradictions become internalized in the bureaucratic politics of IOs. These take two forms. In one, a might versus right struggle, which is reflected in realist and constructivist IR theory, respectively, pits the interests of actors entering global forums against the prospect of emergent interests in the IO itself, a set of tensions observed in the International Court for the Former Yugoslavia (Hagan 2003), the WTO (Conti 2008b, Weiler 2001), or the IMF (Barnett & Finnemore 2005). In another form, IOs themselves frequently internalize contradictions among the international civil servants that populate them, such as the friction between diplomats and lawyers in both the UNHCR and the WTO (Barnett & Finnemore 2005, Weiler 2001).

Ideological contradictions sometimes occur between global institutions and are often internalized within them. A liberal world polity, for instance, "has several defining principles, including human rights, markets, and democracy, that might conflict at any moment" (Barnett & Finnemore 2005, p. 38; Boyle 2002). Indeed, to reach consensus or agreement among strongly contending actors, a global institution or institutions in an entire global ecology may forge an agreement that appears to be a settlement but in fact merely places in juxtaposition quite divergent diagnoses and prescriptions for action. This allows implementing nations to follow quite divergent courses of action while each appeals to the same global norms. In human rights norms on discrimination against women, the supposed universal prescriptions against practices such as female genital cutting confront other norms that insist on respect for cultural integrity, a confrontation that requires the most careful drafting of international charters and conventions in order to produce the much-prized result of UN consensus (see Merry 2005, chapter 1). Both sides of this debate will use subsequent global normmaking efforts to strengthen their position by shifts in one or another direction. Similarly, global commercial norms confront differences in interests between capital (e.g., international banks) and labor (e.g., unions, workers' rights) that must be reconciled; global environmentalists confront advocates of economic development; state interests in security confront civil society

interests in the abolition of antipersonnel mines; avatars of property rights confront advocates for access to affordable treatment for diseases such as HIV/AIDS. A failure to produce a real political settlement leads to repeated cycles of normmaking, or forum shifting, or stalemate, as the episodes on refugees and landmines exemplify.

A sociolegal agenda must therefore (H1) discover, in each issue area, how the master contradictions of globalization perpetuate normative conflict and unsettled tensions; (H2) show in each issue area which institutional or ideological contradictions inhibit settling; (H3) isolate, in each issue area, which actors are proponents of competing ideologies and what power they have to compel settlements in their favor; (H4) describe, in each issue area, the degree to which ideological contradictions get expressed in rival institutions, thereby impeding a lasting political settlement; and (H5) consider what contradictions might occur between contiguous issue areas and how they might compound the difficulty of settling in either issue area.

Indeterminacy

A settlement among competing actors in an issue area and a settling of normative meanings by global normmakers are both abetted and impeded by the degree of determinacy in global norms. This is a particularly fraught problem on which many scholarly literatures coexist or occasionally engage each other without satisfactory resolution.

For instance, it is a premise of the dominant ideology of law and development that investors require certainty in markets and that certainty can be supplied by law (Carruthers & Halliday 2007). It is an assumption of global human rights organizations that compliance of warring armies and militia with global norms on war crimes requires both clarity about what constitutes a war crime or crime against humanity and the deterrence effect of a high probability, or some degree of certainty, that abuse of rights will result in arrest and trial. It has been an impetus of scientists on climate change to show with increasing precision that failure to adhere to certain global standards on noxious emissions will lead to predictable, catastrophic effects on climate. In each case, the underlying assumption is that increased determinacy of global norms helps solve global problems (Andersen et al. 2002).

The certainty, predictability, or determinacy of global norms depends significantly on whether there is an institutional settlement about which normmaking body prevails in which circumstances. The U.S. State Department pressed for a single set of norms on corporate bankruptcy because it argued that competing norms from IFIs simply confused national lawmakers and impeded normative convergence and the facilitation of trade that was assumed to follow (Halliday & Carruthers 2009). Here, indeterminacy was construed as a variation among nations and as uncertainty within them. In an issue area, such as human rights, trade, or the environment, a proliferation of competing norms espoused by competing IOs compounds difficulties for global normmakers and national normtakers. Divisions of labor in global arenas frequently emerge. In the field in international commercial law, norms on state procurement are the territory of UNIDROIT; on families and children, the Hague Conference; on sea transportation, UNCITRAL; and on trade tariffs, the WTO. Within an issue area, an institutional settlement can take the form of a separation of powers that may be conducive to determinacy: a quasi legislature proclaiming constitutional-like norms (e.g., UN General Assembly), a court presiding over cases and developing coherent doctrine (e.g., the ICC and other Hague Courts).

Yet indeterminacy remains problematic when a multiplicity of norms, executive agencies, and appellate bodies increase confusion about what norms will apply when. And even if a judicial-type body exists, the degree of its jurisdictional certainty affects the impact of norms. Hence, international lawyers seek to clarify whether normative hierarchies establish that some rules are of higher standing than others (Shelton 2006), while analyses of global

legal pluralism point to something approaching global normative anarchy as competing normative systems supposedly breed uncertainty (Berman 2007, Tamanaha 2008). Normmakers at UNCITRAL labor to clarify applicable law when business disputes break out across sovereign jurisdictions. And arbitration beckons as a solution to contracting parties who do not trust international disputes to any one national court system.

The determinacy problem has evoked an extensive literature on forms of norms. We have seen that these vary on two dimensions: whether they are binding and whether they are precise. Debates over precision of norms is well exemplified by advocates for principles versus rules. In scholarship on political economy and private legislatures, researchers argue that rules are better than principles because they reduce discretion by judges and thus enhance certainty; yet paradoxically bright-line rules result more often when private legislatures are captured by a dominant actor, such as the banking industry (Schwartz & Scott 1995, Scott 1994). Hence, certainty is bought at the price of undemocratic representativeness, or actor mismatch, in our terms. It is widely supposed that bright-line rules are to be preferred in order to produce certainty. However, this assumption for global regulation is contested by Braithwaite (2002), who argues that in certain circumstances—fast-changing arenas with powerful actors and great economic asymmetry—binding principles will yield more predictable outcomes than binding rules. Hence, every international normmaking body has a politics on the form of norms where the principles-versus-rules tension must be confronted.

In part, this tension can be resolved in a variety of products or legal technologies that contain norms. IOs have a choice of technologies: conventions, model laws, legislative guides, principles, and best practices, among others. These vary not only by the precision of their rules but by the extent to which they allow ruletakers to choose among options, a course of action that balances global norms with national sovereignty. Greater domestic choice is facilitated by global principles rather than global rules, by guides rather than model laws. Of course, the degree of indeterminacy that a global normative framework can tolerate may vary across issue areas. Although a few authorized alternatives might be considered normatively desirable to accommodate local circumstances in some trade areas, indeterminacy over war crimes or air transport might be much less so.

A sociolegal treatment of indeterminacy in global norms must yield research and theory on (I1) the sources of indeterminacy in global norms; (I2) the forms of norms and the circumstances that yield more or less determinacy in domestic and local implementation of global norms; (I3) the creativity of global actors and the legal complex in inventing varieties of normative technologies that seek to accommodate challenges of normative determinacy; (I4) the prospects and problems for determinacy of global legal pluralism.

In sum, the recursivity framework therefore proposes that episodes of global normmaking will not settle until the inherent tensions of actor mismatch, diagnostic struggles, contradictions, and indeterminacy are resolved. So long as key actors are absent, diagnoses are flawed, contradictions fuel instability, and indeterminacy sows regulatory confusion, then global norms will remain in flux, cycles of global-global and global-local/local reform efforts will continue, and normative convergence on an authentically negotiated universal standard(s) will falter.

KNOWNS AND UNKNOWNS

From the diverse cross-disciplinary scholarship on global normmaking, several general conclusions emerge on which there is substantial consensus.

1. The issue areas in which global normmaking occurs have proliferated, and within issue areas the volume of norms increases and threatens to press into zones previously thought immune from global influence.

2. Forms of global norms continue to diversify, from variants of hard and soft law, and varieties of prescriptive and diagnostic instruments, to geometrically variegated pyramids of abstract principles and precise rules with more or fewer levels from bottom to top.
3. The range and numbers of actors drawn into global normmaking, whether transnational or national, show no sign of abatement, a development that contextualizes state actors in social spaces heavily populated with nonstate actors.
4. Global normmaking institutions have emerged as international actors in their own right, neither reducible to the particular interests of any given state or nonstate actors nor incapable of placing their own imprint on the form and substance of global norms.
5. Much global normmaking is constituted by professionals who wield their technical authority through diagnoses, deliberative procedures, formal properties of norms themselves, and mechanisms for monitoring and effecting implementation. Of all professions, arguably the legal complex is the pivotal cluster of actors in global normmaking.
6. Evidence accumulates that legalization is the dominant trend for the process and procedures of normmaking and norm implementation.
7. Global normmaking is a highly competitive process in which asymmetries of power among actors may be moderated but are never equalized.

The pervasiveness of norms, of legalized procedures and technologies, of legal actors, of legal institutions, and of legal doctrines beckons sociolegal scholarship toward this burgeoning frontier for research. Significant pioneering studies already lead the way. But the claim of this article is stronger: that one of law and society's classic problems—the tension between law on the books and law in action—provides a special opportunity and a distinctive expertise for all scholarship and disciplines working on transnational issue areas. If sociolegal research and theory is to yield high dividends on global normmaking, then it must correct its own limitations. Chief among these is its imbalance of attention to the shift from formal law to practice rather than vice versa.

The recursivity framework seeks to redress this imbalance with a studied attention to the mutual tension that lies between the shift from formal law to practice and practice to formal law. Neither law in action nor law on the books can be understood without holding the two in balance. Indeed, the probability of a reduced implementation gap depends on the process that led to formal lawmaking in the first place.

A recursivity framework for global normmaking immediately opens up potential shifts in orientation, even for sociolegal scholars. The sociolegal tendency to prioritize a logic of action from formal law to its implementation gets reproduced in research on global normmaking and that in turn reinforces the tendency in international law to treat global normmaking as a global-centric process. The recursivity framework emphasizes that global norms flow up from nation-states and diverse constituencies as well as down from the heights of IOs. Settling on global norms is a matter not only of resolving disputes among transnational actors, but also of resolving the tensions between the global and the local. And in the latter case, settling of meanings of global principles or doctrines only becomes practically meaningful when it is accompanied by changes of behavior deep inside states and far away from national capitals or the apex of national power. In short, a recursivity framework insists that global normmaking must account for three sets of cycles: (*a*) iterations of normmaking among transnational actors; (*b*) cycles of lawmaking in nation-states; and (*c*) their mutual engagement.

An emphasis on a local-to-global as well as global-to-local directionality of normmaking activity again privileges a strength of sociolegal scholarship—its sophistication and depth of understanding about the actual behavior of law in its local manifestations. Law and society research has produced a vast stock of evidence and

theory about the actual workings of courts and police, legal consciousness and legal mobilization, legal professions and alternative dispute resolution, compliance with law and regulatory schemes. The recursivity framework invites such expertise to correct much scholarship that proceeds as if the heights of international and global negotiations proceed in an epiphenomenal space quite detached from local behavior the world over. Rather than an account of global norm evolution that flits from one international conference or convention to another, the recursivity framework insists that the impetus for each shift in global forum, each move in expansion or contraction of global norms, must be seen both as a site of global politics and as an engagement with national and local crises, compliance, rejection, and politicking. It still remains quite rare in any discipline for accounts of global normmaking in an issue area to give as much attention to national and local politics as the global politics with which it is in tension.

Notions of cyclicality pervade writings on global normmaking, usually without answering two fundamental questions: Why do episodes start and when do episodes end? We propose that the latter question requires the greater attention, and it can be found in the concepts of settling and settlement. Sociolegal scholars have made headway on this issue, but both require much more conceptual specification, empirical research, and theoretical development. Not least, settlements among actors and settling of meanings in global domains multiply the complexity of the problem. Are global norms settled when two contrasting but relatively stable sets of norms articulated by competing IOs remain in place? Can a global norm be considered settled if the actors in a global arena reach consensus but nation-states, organizations, and individuals within states do not concur? How is settling to be operationalized at the global, national, and local levels? Much research shows that, after years of fraught negotiations and frenetic activity, sets of norms get formalized at a moment in time and appear unchallenged and uncontroversial for years and decades. An equilibrium of some sort exists. How shall it be conceptually and empirically specified?

Between the onset and settling in an episode of normmaking lie many unsuccessful experiments, policy cul-de-sacs, partial solutions, frustrated intentions, incomplete implementations, false settlements. The recursivity framework proposes that these are not haphazard, limitless, incomparable, or dissociated from each other. Much of the heterogeneous research on global normmaking can be focused and made compatible for theory-building by subsuming it under the four mechanisms that drive successive efforts at settled global norms. Two of these—indeterminacy and contradictions—are integral to sociolegal scholarship. The other two—actor mismatch and diagnostic struggles—are characteristic foci of political science and sociology. All four together, however, bring into generative juxtaposition concepts and research across the heterogeneous disciplines and subdisciplines that converge on global normmaking. They offer a vocabulary for common understanding and mutual exchange.

The evidence of this article underwrites the claim at the outset that a sociolegal approach to global normmaking has particular added value in four respects.

First, a sociolegal approach pays close attention to the politics of the legal complex—those configurations of legal occupations that preside over the legalized space in global lawmaking. There is a singular role for legal professionals as a complex, not simply as lawyers or judges or prosecutors. The complex has its own politics, and almost always it is inserted, in various configurations, into the wider politics of global normmaking.

Second, legal concepts have a constitutive power to order norms, normmaking, and norm implementation in distinctive ways. Significantly, global normmaking involves creativity and invention of new concepts, doctrines, and applications. The social and political construction of new meanings builds a bridge between social scientists and international lawyers.

Third, sociolegal scholarship presumes that global issues of any sort will be constituted by legal institutions in some way or another. Law has its native institutions and indigenous folkways. These are familiar inside most advanced countries. Law now challenges diplomacy or transforms it through IOs. Two logics of action are therefore juxtaposed and potentially conflict in global arenas. The singularly legal aspect of global normmaking requires the application of concepts and testing of findings that arise from national studies of legal institutions, albeit with the ever-present recognition that transnational legal institutions are sui generis.

Fourth, a sociolegal orientation will be sensitive to the formal properties of law. Law comes in multiple forms—rules, principles, doctrines, decisions, regulations—and global norms are packaged eclectically. A sociolegal perspective seeks to understand (*a*) the political sociology that leads to selection of a formal legal technology to codify norms; (*b*) the politics that produce formal variants in amalgams of principles and rules, among others, within a given technology; and (*c*) the consequences for enactment and implementation of one legal technology versus another.

LEADING EDGES

I conclude with topical areas in which the sociolegal encounter with global normmaking is likely to prove especially rich.

The problem of legitimacy is of growing importance on the agendas of international law (Bodansky 1999, Franck 2006), IR (Barnett 1997; Barnett & Finnemore 2005; Hurd 1999, 2008), global public policy (Birdsall 2003), and a global sociology of law (Block-Lieb & Halliday 2006, Halliday & Carruthers 2009), among others. A politics of legitimacy permeates global normmaking, both influencing and resulting from degrees of actor mismatch, diagnostic struggles, contradictions, and indeterminacy. The interplay of legitimacy and authority determines significantly who obeys global norms. At the least, therefore, governance of IOs and the politics of normmaking legitimacy are critical issues for sociolegal scholars accustomed to explaining why subjects do or do not comply with law.

Although labeled by many other names, the autonomy of law is a central problem for IO/IR scholars, sociologists of law, and international lawyers, among others. If global normmaking is simply an extension of state power, a globalized localism of hegemonic states, then law becomes merely a tactical lever for a powerful few. Across one issue area after another, however, research points to institutional emergence, to bodies of norms, often legalized and presided over by lawyers and judges, that come to exert independent influence on global behavior of states, corporations, families, and individuals. How far IOs merely naturalize and disguise dominant powers or emerge as institutional constraints that are constitutive of power and shapers of interests and identities must be a central question for sociolegal research.

The recursivity framework insists on close attention to the global/local nexus, proceeding in both directions. It is a study of localized globalisms as much as globalized localisms (de Sousa Santos 2002). In so doing, it not only reinforces the contingency of normative efficacy on local response, but it also emphasizes the negotiative process and power of local actors in global arenas. Given that sociolegal scholarship has a proclivity toward the weak in society, it will do well not only to study how the weak can resist or adapt, reject or adopt, the norms propagated by global hegemons (Halliday & Carruthers 2007a, Merry 2005), but also to show how even putatively weak global actors have far greater capacities for global impact than raw counts of resources or ostensible powers may suggest (Braithwaite & Drahos 2000).

Between global and local actors occurs intermediation (Halliday & Carruthers 2009, Merry 2006). If globalization is a negotiated process, then the actors that stand between the global and local, or local and global, are key conduits for creation and implementation of norms. But if these actors stand astride the pathways between the global and local, it is most probable that they can extract a toll, that their

influence is substantial on the terms of engagement between global normmakers and national lawmakers. Very little research reveals who these actors are, what influence they exert, and how dependent the very process of globalization of law is on their mediation. On the move from the local to the global, the scholarship on delegations, for instance, of state actors or even nonstate actors to normmaking arenas is quite limited. On the move from the global to the local, a paucity of research shows who are the intermediaries and what price they exact in their mediation of norms that are globally authorized and locally enacted or implemented.

These four areas share a methodological deficit. Theoretical progress suffers from scarcity of a core methodology of law and society—participant observation or ethnography. The construction of legitimacy, governance behavior, evidence of legal autonomy, the practices of intermediation all require intimate face-to-face encounters with actors, most effectively on a continuing basis. Several of the best sociolegal studies include ethnography in global arenas as part of their research repertoire (Canan & Reichman 2001, Hagan 2003, Merry 2005). Their research shows that, while difficult, it can be done, not least because global norms, paradoxically, are frequently crafted by a very small number of core actors. Here again, law and society scholarship offers a long-refined sophistication to the study of global normmaking. It remains to deploy those skills in pursuit of the agenda put on the table in this review.

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