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Legal Studies Research Paper Series No. 2016-06

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Law encounters, responds to, and shapes an immense amount of transnational economic and social exchange. As information processing and communication technologies revolutionize, transnational social interaction and interdependence deepen. Transnational knowledge practices and social risks spread. Time and space compress.

The response to these changes has been a dramatic increase in what can be viewed as transnational legal ordering. Much theorizing of transnational legal ordering revolves around three mismatches: those between global markets and national law; between public law capabilities and private demands; and between private lawmaking and public goals (Mattli 2015). The first spurs legal ordering that is transnational in its geographic scope. The second drives private lawmaking through private contract and private regulation. The third catalyzes hybrid forms of lawmaking, involving international hard and soft law, private legal ordering, and their interaction. These developments challenge the traditional concept of the national public sphere for the making of law (Fraser 2014).

Jessup's 1956 Storrs Lecture is widely cited as first giving prominent attention to the concept of "transnational law," which he defined as "all law which regulates actions or events that transcend national frontiers." Jessup's concept reflected a functional concern that the combination of national and international law is inadequate to regulate transnational activities. He thus included in his concept, in addition to public and private international law, "other rules which do not wholly fit into such standard categories." Yet he did not significantly develop that residual category of "other rules." Since then, scholarly interest in the phenomenon of transnational and global legal ordering has grown dramatically. In 2015, fifteen journals used the term "transnational law" or "transnational legal" in their title, and that number expands to forty journals when including the terms "global law" or "global legal."¹

¹ These figures are based on a search of the WorldCat database on January 15, 2016. The search created a much larger list of journals that we edited after reviewing it (on file with author).

Although scholarship increasingly refers to transnational law and legal ordering, it is often vague regarding what these terms encompass, so that the proliferating literature has become a jungle without a map. A theory of transnational legal ordering should define its terms so that it is amenable to theoretical scrutiny and empirical engagement. Halliday and Shaffer (2015), for example, define the terms “transnational,” “legal,” and “order” for purposes of engaging in multi-disciplinary, empirically grounded theory building and application. They contend that a transnational legal order seeks to produce *order* in an issue area that actors construe as a problem, uses *law* to address the problem, and is *transnational* in its geographic scope. They stipulate that a transnational order is *legal* insofar as it adopts legal form to address a problem, its norms are produced or conveyed in connection with a transnational legal body or network, and/or it directly or indirectly engages national legal bodies. By *order*, they refer, sociologically, to shared norms and institutions that orient social expectations, communication, and behavior. By *transnational*, they signify ordering that transcends and permeates nation-state boundaries. Yet, as we will see, there remains considerable variation in the use of these terms.

This review essay is cartographic in laying out the current state of transnational legal theorizing and application of such theories. Its aim is to provide a clearer understanding of this proliferating field. The essay categorizes and evaluates three theoretical approaches to transnational legal ordering that respectively (i) assess private legal ordering through private contract, private regulation, and private dispute settlement (covered in Part I); (ii) analyze the recursive interaction of public and private norm-making and practice at the transnational, national, and local levels that (potentially) give rise to transnational legal orders transcending, permeating, and transforming nation-states (examined in Part II); and (iii) critically reconfigure the concept of law (addressed in Part III).

Before we turn to these approaches in detail, let me make a reflexive caveat on this essay in light of transnational processes more generally. The scholarship reviewed was in English or is translated into English, and the majority of it by scholars from the Global North. In part, this reflects the subject of study since English has become the *lingua franca* of the commercial, financial, and economic world that drives much transnational legal ordering, and scholars from non-native-English-speaking countries increasingly publish in English, especially when writing on transnational topics. And yet, critically, this mapping exercise reflects a challenge for mapping exercises more generally. Since scholarship tends to reflect where one sits, there is a need to publish and include theorizing and empirical application of theory by scholars from different backgrounds, and in particular those from the Global South (Rodríguez-Garavito 2015; Santos 2014).

I. Transnational Legal Ordering as Private Legal Ordering

A first group of scholars focuses solely or predominantly on private legal ordering in theorizing the transnational. Most of them maintain that the state lacks the will, capacity, or efficiency to create, apply, and enforce law for the coordination and regulation of behavior. This theorizing is grounded in the nature of the actors (private actors) and the form of legal ordering (private contract, standard setting, assessment, and enforcement), giving rise to “a-national” law or “law beyond the state” (Carbonneau 1998; Michaels 2007). The theorists can be broken down into three sub-groups: (i) law and economics scholars who focus on privately-made commercial law, or *lex mercatoria*, as a more efficient and optimal form of lawmaking and dispute settlement; (ii) socio-legal scholars who evaluate private regulation by business and civil society groups; and (iii) private international law scholars who address private international law as a backdrop to private legal ordering which is either complicit or protective of public values.

Many private law scholars traditionally have viewed law as coming from society as opposed to from the state (Michaels and Jansen 2007), and they have been particularly prominent in developing transnational legal theory that focuses on the role of private actors. Much of this work has focused on the role of commercial actors in lawmaking and enforcement today. Private professionals develop standards across sectors through standard form contracts and standard-setting organizations, whether independently or through government delegation (Büthe and Mattli 2011; Schepel 2005). Lloyds of London sets re-insurance law, the International Accounting Standards Board (IASB) accounting rules, the International Swaps and Derivatives Association (ISDA) master agreements for derivatives, and the International Chamber of Commerce (ICC) rules for letters of credit (Levit 2005; Morgan 2006; Botzem and Quack 2006; Shaffer 2009). Private actors are central to the development of rules governing the internet, called *lex informatica*, sport, called *lex sportiva*, and commerce, called *lex mercatoria*. Online companies create online consumer protection standards, coupled with methods of payment, security, certification, and online dispute settlement (Calliess and Zumbansen 2010). Governments create commissions composed of private professionals to create corporate governance codes that the state does not codify but backs by mandatory disclosure requirements regarding them (Calliess and Zumbansen 2010). This turn to theorizing private transnational law reflects an analogous turn in the social sciences to the study of “governance” in contrast to “government” (Djelic and Sahlin Andersson 2006).

The rise of commercial arbitration as privatized dispute settlement has been central to driving this approach (Dezalay and Garth 1996; Gaillard 2010; Hale 2015). Today, a substantial proportion of private contracts contain an arbitration clause, which can be deployed in over 200 arbitration centers around the globe (Stone

Sweet 2006). A community of elite lawyers and arbitrators populate this field (Dezalay and Garth 1996; Karton 2013). The field's professional culture is one in which private arbitrators service transnational business as its agents, in contrast to judges appointed through public processes by a state or international organization (Karton 2013). States, which can be viewed as "competition states" in regulatory competition with each other (Cerny 1997; Genschel and Seelkopf 2015), further this process by competing to attract arbitration business through national laws and international treaties that limit state interference with arbitral rulings. Although enforcement of arbitration awards formally depends on national courts, national courts reputedly are used to enforce only a small percentage of them so that privatized dispute settlement appears semi-autonomous in practice (Callies and Zumbansen 2010, 122). We, however, lack reliable data given the confidential nature of most awards.

1. *Law and Economics of the New Lex Mercatoria*. A group of theorists working in the law and economics tradition focus solely on commercial actors in the bottom-up, spontaneous creation of transnational legal orders. They maintain (although against significant contention from historians)² that modern forms of transnational legal ordering have long roots, reflected in the *lex mercatoria* (or law merchant) developed as custom by private guilds and commercial traders during the Middle Ages before the ascent of nation-states (Milgrom, North & Weingast 2000). They contend that we are now witnessing the rise of a "new law merchant" grounded in private contract and commercial arbitration (Cooter 1996).

The law and economics approach to transnational legal ordering stresses the optimality of private ordering because of reduced transaction costs and the inadequacy of state-based law for the modern business community (Cooter 1994; Dalhuisien 2000; Hadfield 2001, 2009a), whether for innovation contracts (Gilson et al 2013), global supply chains (Gereffi and Lee 2012), just-in-time manufacturing, finance (Dalhuisen 2000), or otherwise. Cooter (1996, 1643) maintains that in a complex, rapidly changing economy, "efficiency requires decentralization [of lawmaking] to become more important," giving rise to a new law merchant involving "specialized business communities," in which law "arises outside of the state's apparatus." Hadfield (2001) goes further, contending that, in order to avoid the complexity and transaction costs of the public law system (including its choice of law rules), decentralized privatized regimes for commercial law should compete

² Historians contest the idea that *lex mercatoria* during the Middle Ages was based on uniform, universal merchant custom (Kadens 2012, 2015). Kadens (2012) insists that the historical evidence shows that it was based on private ordering through contract where *local* custom and regulation were used to address gaps.

against each other (including regarding their lawmaking, adjudication, and enforcement systems), so that companies may choose among them. She distinguishes law's economic function from its justice function, maintaining that its economic function is to provide structure "for the operation of efficient markets," and is paramount in commercial law governing commercial relations (2001, 40).

For these theorists, transnational private regimes exist when private parties are the source of the law's content (contract and background private rules), dispute settlement services are privately provided (such as arbitration), and the legitimacy of the legal order is based on the parties' consent (as opposed to public lawmaking's democratic status). The authors and subjects of law are thus the same — private parties. Public law, at best, provides Hayekian background rules to facilitate efficient private ordering, but Hadfield (2009a) contends that the background rules for commercial law should be privatized as well. Private actors are codifying commercial norms through long-standing organizations such as the ICC and Unidroit (Michaels 2007; Berger 2010), but private legal service companies could, in theory, compete with and displace them. *In this way, law would not only reflect and support global capitalism, but itself become a commodity.* Although state law authorizes party autonomy to contract out of state-based systems, the empirical, socio-legal question becomes whether such state authorization is needed for the creation of a transnational legal order (Glenn 2005).

2. Private Social Regulation. A second sub-group of private lawmaking theorists challenge the first sub-group's focus on efficiency because it elides questions of power, consent, externalities, and the mismatch of global markets and public interest regulation (Calliess and Zumbansen 2010; Cutler 2003; Muir Watt 2011, 2014). These theorists examine the role of private lawmaking that has an explicit regulatory purpose (Cafaggi 2011; Calliess and Zumbansen 2010; Wood et al 2015). They analyze *transnational private regulation of the social by the social.*

This second sub-group of theorists explicitly addresses private lawmaking in its broader regulatory dimensions, applying the logic of private lawmaking beyond commercial law to all areas of regulatory protection developed by the social welfare state during the 20th century. Such areas include labor law (Backer 2016), human rights law (Backer 2005, 2007), environmental law (Meidinger 2009; Perez 2011), consumer law (Calliess and Zumbansen 2010), and financial law (Black and Rouch 2008; Miller and Cafaggi 2013). Much of the resulting regulation is of a soft-law (voluntary) nature, exemplified by the United Nations Guiding Principles on Business and Human Rights (or "Ruggie Principles"). It thus contrasts with the hard law for commerce and investment grounded in binding contract enforced through arbitration, backed by courts (Cutler and Dietz 2016). Yet, such transnational soft law can be, and at times is, transformed into binding requirements through

transnational supply chain contracts, giving rise to new “transnational regulatory regimes” that affect power relations among private parties (Cafaggi 2013; Cafaggi and Pistor 2014).

Business and civil-society networks drive such legal ordering. Much of food safety depends on private regulatory regimes developed by retailers where super market chains, like Walmart and Sainsbury, create their own private food safety standards and enforce them through private contract (Chalmers 2003; Meidinger 2009). These standards are often developed through private standard setting networks, such as GLOBALG.A.P, which incorporate transnational soft law such as the Hazard Analysis and Critical Control Points (HACCP) guidelines published by the United Nations Food and Agricultural (FAO), and which are enforced through contract. Private standard-setting organizations themselves are often governed by transnational soft law standards, such as those set forth in the ISO/IEC Guide for certifications schemes published by the International Organization for Standardization. Sustainable forestry regulation, for example, is driven by transnational civil society developed regimes, such as the Forest Stewardship Council (FSC), which mandates that certification bodies comply with the ISO/IEC Guide. FSC’s substantive standards, in turn, are enforced by retailers, such as Home Depot, that require compliance with FSC’s certification system as a condition for purchasing lumber (Cashore et al 2004).

In these areas of social regulation, private actors serve as lawmakers, adjudicators, and enforcers, giving rise to what can be viewed as functionally differentiated transnational private regulatory legal orders. These transnational legal orders fill significant gaps in national legal systems that have limited resources to monitor global firms and supply chains (Cafaggi 2013). They rely on private standards and contracts, certifiers to provide the functional equivalent of adjudication, and enforcement through market exclusion, whether by industry concerned with the firm’s reliability, or by retailers out of fear of consumer boycotts amplified by the media (Backer 2007). Such private regulation creates a form of transnational harmonization whose jurisdictional scope is defined functionally (in terms of the subject area in question) rather than territorially. The result is a sectoral fragmentation of transnational law that contrasts with the hierarchical unity of nation-state territorial legal orders (Kjaer 2014; Karton 2016). Such transnational private legal ordering has regulatory and distributive effects implicating third parties, giving rise to analysis of their legitimacy, accountability, quality, and effectiveness (Black 2008; Cafaggi 2014).

These theorists divide in their treatment of non-state law. Some theorize developments in terms of the marginalization of state law and the autonomy of private legal ordering in light of the complexity of modern society and the decline of state capacities (Teubner 1992, 1997; Calliess 2004), while others assess the

interaction of private regulation with state law, including as a supplement or complement (Michaels 2007; Wood et al 2015; Cafaggi 2015), giving rise to the mutual increase of state-based and privately-made law (Kjaer 2014). Some of these latter theorists are covered as well in Part II regarding the interaction of public and private actors in the transnational construction and conveyance of legal norms across levels of social organization.

3. *Private International Law Conceived as a Regulatory Device.* A third sub-group of private law theorists has parallels with the second sub-group in that each builds on the work of Karl Polanyi to contend that the economy must be embedded within society (Joerges and Falke 2011). This third sub-group, however, theorizes a different way that this embedding can occur — that of private international law and its choice of law techniques to govern transnational activities. Private international law consists of national law addressing the questions of jurisdiction, applicable law, and recognition and enforcement of judgments, including arbitral awards. It thus governs the interface of different national legal systems and private ordering. This approach views transnational legal ordering in terms of *the decentralized interaction of nation-state legal systems in relation to private ordering* (Wai 2005; Michaels and Jansen 2006; Muir Watt 2014; Whytock 2009). Since this sub-group is linked to traditional state conceptions of legal ordering it could be included under the second approach addressed in Part II. It is included here because it comprises private law scholars who directly interact with decentralized theories of private transnational legal ordering, including regarding the state’s complicity in them.

This group of private international law scholars contends that private international law can counter the “liftoff” of transnational business law as an autonomous field outside public regulatory control (Wai 2002). They critique conventional private international law theorists who maintain that private international law is “apolitical” and “neutral” in advancing the aims of private party autonomy. As Muir Watt (2011, 2014) writes, private international law is complicit if it accords business rights to self-organize while shielding business from duties, thus granting it immunity and impunity. National courts do so when they apply private international law to recognize and enforce arbitral awards that include public law claims, such as consumer, labor, human rights, antitrust, and securities law claims. They do so when they permit vulture funds to seize the assets of poor, financially distressed countries in sovereign debt defaults, and even siphon off development aid. And they do so when they fail to provide jurisdiction against multinational companies for their human rights and environmental abuses abroad (Muir Watt 2011).

These theorists view semi-autonomous *lex mercatoria* commercial regimes in a dialectical relationship with national regulatory law. For them, although there is

“transnational liftoff” of business, there must also be “juridical touchdown” of national law to account for those affected by transnational business activities (Wai 2002), which they view as private international law’s regulatory dimension (Muir Watt 2011). Michaels (2007) thus contends that theorists are empirically wrong when suggesting that the *lex mercatoria* is “a-national,” at least from the perspective of the state. The state remains part of transnational legal ordering, whether as an accomplice, facilitator, enforcer, or check. But the state is only a part of such ordering, which, in transnational perspective, entails “law beyond the state” (Michaels 2007).

II. Transnational Legal Ordering as Transnational Construction, Flow and Settlement of Legal Norms

A second, broader approach toward theorizing transnational legal ordering incorporates both public law and privately made norms and institutions. It thus parallels Jessup’s conception of transnational law as comprising public and private international law and such “other rules which do not wholly fit into such standard categories.” Yet this approach parts from Jessup in focusing not on transnational law as a body of law, but rather on *the processes through which legal norms are constructed, flow, settle, and unsettle across levels of social organization, from the transnational to the local* (Halliday and Shaffer 2015).

The approach builds concepts for empirical study of the different stages of transnational legal ordering. In particular, it assesses the framing, emergence, propagation, contestation, resistance, settlement, institutionalization, nesting, decline, and fall of transnational legal orders (Halliday and Shaffer 2015b). These processes are top-down, bottom-up, horizontal, and transversal, as legal norms are uploaded and downloaded, imported, and exported (Santos 2002; Dezalay and Garth 2002; Koh 1996, 1998, 2006; Friedman 1996), and developed in one domain to contest and shape those in another (Joerges 2011; Shaffer and Pollack 2009). Actors engage in diagnostic struggles, conflicts are papered over with contradictions and indeterminacies, and “actor mismatch” arises between those who diagnose problems, negotiate legal texts, and implement and apply them, so that “problems” remain and can give rise to new, recursive cycles of lawmaking (Halliday and Carruthers 2007). Over time, these processes can lead to normative settlements comprising new working equilibria regarding the appropriate legal norms and institutions to order particular issues. One can point to a transnational legal order when the legal norms concord across levels of social organization (Halliday and Shaffer 2015a, 2015b; Block-Lieb and Halliday 2015). Figure 1 provides a simplified depiction of these processes.

[add figure 1 (from the end) here]

For these theorists, the term “transnational” does not suggest the withdrawal or disappearance of states as major actors in transnational governance, nor that transnational processes are autonomous of national law and institutions. Rather, they stress the following points: first, that much legal ordering transcends nation-states; second, that states and state institutions are far from the only important actors in law-making beyond the state; and third (and critically), that to understand transnational legal ordering, one should assess the interaction of lawmaking and practice across different levels of social organization, from the transnational to the local. Such an approach addresses the production of legal norms and institutional forms, their migration across borders, the role of intermediaries in these processes, and contestation and homologies among the transnational, national, and local levels (Dezalay and Garth 2002; Shaffer 2013).

This approach thus explicitly incorporates public lawmaking and public international law within its analytic scope (Jessup 1956; Halliday and Shaffer 2015; Shaffer 2015a). As public international law opens to non-state parties, such as in the areas of human rights, crime, trade, and investment, and as international courts expand in their jurisdiction and exercise increased interpretive authority (Alter et al 2016), international law contributes more directly to transnational legal ordering across domains of social life. Public international law harmonizes even parts of private international law, giving rise to transnational legal orders of particular geographic and substantive scope on choice of law and enforcement questions (Whytock 2016). As states delegate greater public powers and informal norm-making to supranational organizations and transgovernmental networks, states become agencies that implement rules of extra-state origin (Glenn 2005). These processes are particularly pronounced regionally in the European Union, but are also developing elsewhere. Transgovernmental networks are often central to these processes involving exchanges among networks of agencies from states whose sovereignty is “disaggregated” (Slaughter 2004). Such disaggregation reflects functional differentiation of lawmaking within the state itself (cf. Teubner and Korth 2012; Kjaer 2014).

This approach also encompasses private lawmaking and its interaction with public law within a single analytic frame, such that governance becomes pluralist, multi-polar, and heterarchical (Ladeur 2004). Abbott and Snidal (2008) develop the concept of a “governance triangle” in the production of environmental, labor, and human rights standards, where the triangle’s three points are states (at times operating through international organizations), firms (at times operating through trade associations), and non-governmental organizations (at times operating through NGO coalitions). Individual initiatives can be plotted within the triangle as a function of the actor or combination of actors engaged. These initiatives compete,

overlap, conflict, borrow, and coordinate with each other at different phases of the regulatory process, involving agenda-setting, norm formation, implementation, monitoring, enforcement, and review (Wood et al 2015).³

Public international law contributes to the development of transnational private regulation on account of international law's weaknesses as well as its constraints. For example, on the one hand, the 1992 UN Conference on Environment and Development failed to adopt binding international rules for sustainable forestry, creating a regulatory gap. On the other hand, while individual states could attempt to address this gap within their jurisdictions, they were constrained by other international rules, those of the General Agreement on Tariffs and Trade (GATT). After Austria was pressed to remove an import ban against unsustainably harvested lumber in order to avoid a GATT challenge, it helped finance a private certification system for sustainable lumber that became the Forest Stewardship Council. The International Tropical Timber Organization, formed by the same 1992 UN Conference that failed to create substantive standards, eventually endorsed such private standard and certification systems (Bartley 2007).

Private and public actors directly and indirectly negotiate with each other, so that transnational private regulation can be viewed in the shadow of public law, and (to turn the conventional metaphor on its head) public law can be viewed in the shadow of transnational private regulation. At times, states steer and "orchestrate" non-state governance initiatives (Abbott et al 2014), but one may question who at times does the orchestrating (Braithwaite and Drahos 2000). Public law often follows transnational private lawmaking, whether by incorporating and validating private standards, acquiescing to them, or complementing and supporting them, such as through disclosure requirements and fair trading laws. At times, state law implements private standards, as in the case of financial derivatives law incorporating ISDA standards, or securities law incorporating privately developed IASB accounting standards. In other cases, private associations turn non-binding international soft law into binding contractual obligations, such as when GlobalG.A.P. incorporates UN FAO food safety guidelines in its contracts. The public-private interaction is both horizontal (between transnational private associations and international and regional public organizations) and vertical (between transnational private associations and nation-states). These processes give rise to complex mappings of transnational legal orders that vary in their substantive and geographic scope (Halliday and Shaffer 2015).

³ At times, public and private processes provide new experimentalist architectures for governance transcending the nation-state (de Burca, Keohane and Sabel 2013).

This approach starts by viewing transnational legal ordering as beginning with the *framing and construction of a problem to be ordered* (Halliday and Shaffer 2015a; 2015b). Behaviors can exist for a long time before they are considered a problem, so that the construction is not a natural one. Broader cultural norms often operate as a form of framing that informs any conceptualization of a problem and thus any particular frame. The work of world polity theory is particularly important in this regard since it assesses the role of such cultural processes as individualization and rationalization (Frank et al 2010), scientification (Drori and Meyer 2006), and marketization (Djelic 2006). Critical and post-colonial scholars similarly reveal how norms of economization, individualization, and instrumental rationality increasingly induce policymakers to frame problems and their solutions in economic terms of optimization (Brown 2015; Escobar 2012).

Scholars unpack the politics of framing through discourse analysis to reveal the frame's theoretical and ideological content, involving hidden contours of power (Rajah 2015).⁴ Contests among discourses and frames are frequent. Rajah (2015), for example, shows the importance of framing in rule of law conceptions, which she contends shifted during the second half of the 20th century from a human rights orientation toward a neoliberal one. The frame's content can also affect the settling of legal norms and their institutionalization (Merry 2015). Lloyd and Simmons (2015) show how the established, broad frame of criminal law facilitated transnational consensus regarding human trafficking. They contend that if a discursive frame enhances state sovereignty and executive power within states, such as the criminal law frame eventually adopted, then national authorities are more likely to accept and propagate it.

Framing is critical for civil society organizations and developing country constituencies. Braithwaite and Drahos (2000) stress the need of civil society actors to focus on principles to frame global business regulation. Shaffer et al (2008, 2015) and Santos (2012) emphasize the importance for developing countries to build legal capacity if they are to participate in shaping the drafting, interpretation, and application of international rules. Networks from the Global South, including those that can be viewed as "counter-hegemonic" (Santos 2002), can play increased roles as economic and ideational power shifts, whether regarding human rights or economic development (Baxi 2012; Rodríguez-Garavito 2014; Rodríguez-Garavito and Santos 2004; Rajagopal 2003; Darian-Smith 2013; Trubek et al 2013). Socio-

⁴ Forms of power include material power (such as material resources), institutional power (to frame issues and shape agendas), and structural and productive power (that shape perceptions, understandings, and identities) (Barnett and Duvall 2005). Powerful states and regional groups such as the United States and European Union have traditionally played predominant roles, as have governmental agencies, businesses, professionals and civil society groups within them.

legal scholars, for example, assess the role of framing to advance economic, cultural, and social rights in Latin America (Rodríguez-Garavito 2015).

Transnational legal ordering involves *processes that are not simply top down and linear*. Rather, actors from particular national and local settings actively promote national and local legal norms globally, giving rise to globalized localisms (Santos 2002), such as U.S. antitrust, bankruptcy and other business norms (Braithwaite and Drahos 2000). Local actors likewise do not simply apply these norms, but resist, block, translate, adapt, and hybridize them, giving rise to localized globalisms (Santos 2002; Campbell 2004), such as for women's rights (Merry 2006a), money laundering (Rocha Machado 2013), intellectual property (Kapczynski 2009), and competition law (Klug 2013).

These processes layer on and interact with each other. Bartley (2011), for example, illustrates the ongoing importance of Indonesian state law and customary norms in relation to transnational private sustainable forestry standards and fair labor regimes. His work shows that, at the implementation stage, a private regime — that of the Forest Stewardship Council — “necessarily intertwines with domestic law and other types of rules.” He thus critiques the private standards literature for focusing on “governance gaps,” rather than the layering and interaction of transnational private regulatory regimes with territorial and customary forms of legal ordering. Empirical studies regarding *lex mercatoria* similarly point to the ongoing role of national law and institutions (Whytock 2010; Shaffer and Ginsburg 2012). In short, local and transnational norms can become enmeshed, involving the “interlegality” of rival transnational and local, modernist and traditional, norms, symbols, and knowledge (Santos 2002, 472).

These theorists study the *propagation* of legal norms across national jurisdictions through different mechanisms involving different legal forms. Transnational legal ordering through contracts or private standards differs from that through treaties, which differs from that through model codes or soft law principles, benchmarks, and peer review. The legal norms are propagated through different mechanisms, such as reciprocity, coercion, market discipline, modeling, persuasion, learning, and socialization (Braithwaite and Drahos 2000; Halliday and Osinsky 2006). The mechanisms are historically contingent in light of facilitating circumstances and precipitating conditions (Halliday and Shaffer 2015a) that induce the expansion or contraction of transnational legal ordering. Helleiner (2015) shows, for example, how mechanisms of coercion, market discipline, and persuasion through epistemic networks gave rise to transnational legal ordering of finance during the 1990s. Yet changes in the international political economy weakened the ability of the United States and the International Monetary Fund to use coercion, politicization following the 2007/2008 financial crisis curtailed the soft power of technical networks, and changed market conditions undermined market disciplines.

This approach evaluates the role of *intermediaries* as conduits, carriers, and “ports of entry” of transnational legal norms (Resnik 2006). The role of intermediaries has long been central in the transmission and structuring of legal norms and institutions, as stressed in the study of colonial legal regimes. As Benton (2002) writes, such intermediaries should not be viewed as mere collaborators or resisters since, by using law within particular local and transnational contests, they contribute to the production of legal frameworks through praxis. The intermediaries include governmental representatives, law firms, private professionals, academics, think tanks, and non-governmental organizations. The conduit can involve a small number of people, operating like taps over a pipeline, who facilitate or staunch the norms’ flow. Understanding their roles involves “mapping the middle” (Merry 2006b). Intermediaries vary in terms of their competencies (such as their legal expertise), power (in transnational and local contexts), and loyalty (to the transnational and local levels) (Carruthers and Halliday 2006). They are particularly prominent in the highly transnationalized fields of commerce and finance (Dalhuisen 2013; Dejelic and Quack 2010), but they play significant roles across areas of law. They are critical in producing “the credibility and legitimacy” of transnational norms (Garth and Dezalay 2010).

These intermediaries translate and adapt national and local legal norms to transnational contexts, and transnational legal norms to local ones, thus facilitating their propagation. Studies reveal that transnational norms are adapted more easily if packaged in familiar terms and if they accommodate established local hierarchies, but “they are more transformative if they challenge existing assumptions and power relationships” (Merry 2006a). Dezalay and Garth (2002b) exemplify the mistake of viewing nation-states as homogenous, rather than in terms of contests of power (or “palace wars”) that intersect with transnational processes. They show how elites invest in transnational discourses to advance their positions, whether in the area of human rights or the liberalization of the economy. Other local actors do as well to upend hierarchies, such as in the area of women’s rights, by remaking transnational discourses into the local vernacular (Merry 2006a). Transnational legal processes empower these intermediaries. National governments and associations depend on them to present national positions at the transnational level, while transnational organizations depend on them to convey them to national and local sites. When the intermediaries have a professional stake (as in such practices areas as intellectual property, competition, tax, and bankruptcy law), they become important allies in embedding the norms (Shaffer 2014).

These theorists scrutinize *contestation and resistance* within transnational legal ordering since, from a legal realist perspective, law and legal norms are not “things,” but are relational and develop and change through struggle, including through their interpretation (Shaffer 2015a). Studies reveal that transnational legal

ordering involves considerable contestation and resistance at different sites and levels of social organization. Contests can be triggered because of a transnational legal order's success, since its institutionalization can raise actor awareness that the stakes are higher than previously recognized, as in the area of food safety standards after Codex Alimentarius standards were referenced in the WTO Agreement on Sanitary and Phytosanitary Standards (Büthe 2015). The very success of one transnational legal order, such as regarding the patenting of medicines, can create new problems that spur efforts to create new transnational legal orders, such as regarding access to medicines (Helfer 2015). Genschel and Rixen (2015) show that the institutionalization of the transnational legal order on double taxation from the 1920s to 1960s created a new problem of tax competition and tax havens, which stimulated the drive for a new transnational legal order to combat "harmful tax competition" (Avi-Yonah 2016).

Local actors in weak positions in transnational normmaking often successfully resist implementation at the local level, and thus foil transnational powers (Halliday and Carruthers 2007; Rajagopal 2003). Resistance can take the form of symbolic compliance. Payne (2015), for example, shows how the implementation of accountability norms against political leaders for human rights violations is foiled through show trials, selective trials of former allies who are now opponents, and foot dragging where appeals overturn successful prosecutions. Resistance is more likely successful where the transnational norms are perceived to be instruments of coercion or imposition, and thus illegitimate (Halliday and Carruthers 2009; Merry 2006a).⁵ Yet even such resistance works within particular structures and involves interaction that recursively can contribute to the structuring of transnational legal ordering, as stressed by historians (Benton 2002) and sociologists of contemporary globalization processes (Halliday and Carruthers 2009).

This approach assesses the array of *impacts* of successful transnational legal ordering that can transform states (Leibfried and Zürn 2005; Sassen 2006; Shaffer 2013). Where national law and local practices are structured and imbricated by transnational processes across a domain of social life, they involve much more than changes in law. They affect the boundary of the market and the state (affecting what the state does), the allocation of institutional power within the state (such as between executives, legislatures, judiciaries, and administrative bodies), the role of

⁵ The importance of legitimacy in shaping outcomes catalyzes attempts to enhance legitimacy warrants, such as by incorporating broader stakeholder participation, enhancing transparency, developing and tapping into expertise, justifying decisions through reason giving, and measuring and reporting outcomes (Halliday and Carruthers 2009; Kjaer 2014). Halliday and Carruthers (2009), for example, show how this drove actors to shift norm-making for bankruptcy law from the International Monetary Fund and World Bank to UNCITRAL.

expertise and professions (creating incentives to invest in them), and accountability mechanisms subject to transnational normative frames (such as through peer review, monitoring, and reporting) (Shaffer 2013, 2014). They thereby affect relations of power among private actors (Cafaggi and Pistor 2014). Transnational legal orders do not inexorably have such effects. They do so conditionally in relation to particular factors such as the social legitimacy of transnational legal norms, the role and place of intermediaries, and homologies with local power configurations and contexts (Dezalay and Garth 2002; Shaffer 2013).

These scholars examine how law has a particular logic that can exercise normative power because it carries epistemological force, defining categories and systems of meaning (Merry 1992). Since theories of transnational legal ordering move beyond public international law governing inter-state relations to norms that permeate national and local law and practice, the epistemology of these norms becomes of much greater salience. From the perspective of Bourdieusian field theory, transnational legal ordering is a form of institutionalized power that sets the rules of the game (Dezalay and Madsen 2012; Djelic and Sahlin-Andersson 2006).

III. Transnational Legal Ordering and the Concept of Law

Building from such theorizing, a third approach develops *conceptual and critical theory to interrogate and reformulate the concept of law* in transnational terms. Overall, scholars working in this vein can be broken down into three groups. The first develops a positive theory of privately made transnational law in terms of the provision of functional equivalents to state-based law (Hadfield and Weingast 2013). A second group theorizes the transnationalization of state law (Glenn 2005, 2013; Halliday and Shaffer 2015). A third group, building from systems theory, adopts the concept of transnational law as a critical tool to reconstruct legal theory in transnational societal terms (Teubner 1997; Kjaer 2014), including to address the boundaries between law and non-law (Calliess and Zumbansen 2010; Perez 2015). These theorists show how transnational legal ordering, in contrast to state-based law, is de-localised (as opposed to territorial), has plural sources (beyond the state), blurs the traditional public/private law distinction, is polycentric (and not hierarchical), and often has a cognitive/technocratic logic (as opposed to a constitutive/declarative one) (Heyvaert 2016).

Conventionally, most analytic legal philosophy grounds its analysis in state-based legal systems, whether because state law represents an ideal type of legal system that combines primary and secondary rules of recognition, change, and adjudication (Hart 1961), because of the inner morality of such law in terms of formal criteria (Fuller 1964), or otherwise. It traditionally has given little attention to international law, much less to transnational law. The proliferation of transnational activity, the development of transnational communities, and the range

and variety of regulation operating beyond the nation-state have placed pressure on analytic theory to revise its concepts to be relevant in light of the importance of transnational legality in social practice (Cotterrell 2008; von Daniels 2010; Schultz 2015).

A first group of scholars have turned to the tradition of legal pluralism to incorporate non-state concepts of law (Tamanaha 2001, 2015; Twining 2009). The earlier aims of legal pluralists (who were often anthropologists) was to recognize indigenous groups' norms and systems as law as they struggled against colonial powers' claims of introducing the rule of law in the name of "civilization," as well as the claims of subordinate groups in relation to the state (Merry 1988). Today, legal pluralist arguments are used as well to justify and legitimize self-organization by powerful corporate actors, supported by elite lawyers, as autonomous of state regulation (Schultz 2015; Gaillard 2010).

Law and economics theorists have used the idea of a new *lex mercatoria* to develop positive legal theory that encompasses non-state norm making and enforcement as law. Hadfield and Weingast (2013), for example, define "the essence of law" as "a set of rules characterized by legal attributes, such as generality and universality, and an authoritative steward for removing ambiguities and adapting the rules to changing circumstances." That steward, they maintain, can be a private body, and the enforcement of the rules can be decentralized through shunning, shaming, and the denial of market opportunities. In stressing the role of a steward, they posit parallels with those who view law in terms of an institutionalized process (Roberts 2005), but they differ in viewing that process as a private one.

Private regulatory theorists similarly deploy a concept of law that encompasses non-state lawmaking and enforcement by business and civil society actors. These theorists note the role of institutionalized functional equivalents of lawmaking, adjudication, and enforcement in the private sphere (Cafaggi 2011, Wood et al 2015). They include customary norms, model laws, codes of conduct, standards, and benchmarks as "law" to the extent they establish normative expectations, create a sense of obligation, include some sort of coordinating and sanctioning system, and shape behavior.

Historically, Glenn (2005) looks to transnational traditions of law that have modern analogues to assess a transnational concept of law. Religious law and indigenous law, representative of early non-state law traditions, for example, have long been transnational in scope. Today, new transnational epistemic communities similarly develop normative systems working through "dialogic webs," which are facilitated by modern communication technologies (Braithwaite and Drahos 2000; Cotterrell 2008). These norms are reflected in transnational private standard setting and standard form contracts that regulate discrete functional domains, in which state law is either irrelevant or provides a slim backdrop at best.

A group of private international law theorists also advance pluralist, decentralized conceptions of transnational law. They maintain that conflict-of-laws techniques permit for both regulatory pluralism and cosmopolitanism in transnational legal ordering (Berman 2014; Michaels 2014; Muir Watt 2011; Wai 2005). Joerges (2011) advances this approach through a conflict-of-laws framework used as a conceptual tool for understanding how normative legal systems are mediated. Here, however, choice of law does not involve conflicts between two nation-state laws, but rather between the law of one functional regime and another. These theorists thus shift conflict-of-laws theory from the territorial logic of nation-states to the functional logic of differentiated regimes in transnational and world society (Fischer-Lescano and Teubner 2004). For these theorists, this decentralized form of law is superior to claims of hierarchy in public international law, avoids the universalist pretensions of global law, and helps check the claims of autonomy of private legal ordering.

Second, state law itself can be viewed in transnational terms. This approach includes legal positivists since the law is still, in part, often formally grounded in state enactment or backed by state enforcement. Yet the sources of law are transnational from a socio-legal perspective since the state in many cases becomes an agent in adopting rules of extra-state origin. The rules are frequently developed by public international organizations, disaggregated networks of administrative officials in particular functional domains, private parties, and professional associations (Glenn 2005; 2013; Halliday and Shaffer 2015).

Within state law, “persuasive authority” has long been a key part of the common law tradition, and now has its transnational analogues in national court engagement with and references to foreign and international law and judicial opinions (Jackson 2009), as well as to business custom. The *ius commune* in the civil law tradition (which was grounded in trans-European private law discourse) is similarly reemerging in the development of general principles of law for commerce and other fields (Glenn 2005). Transnational judicial dialogues, again facilitated by communication technologies, support these developments (Slaughter 2004). In the area of private international law, national law can take a transnational legal turn through national judges developing a legal Esperanto of common private international law principles (Scott 2009).

A third, group composed mainly of German and German-trained theorists develop a concept of transnational law in systems-theoretic terms. Systems theorists ground their theory of law in society, and not the state, viewing the state as a historically contingent and rather recent form of organization of politics. The works of Teubner, Kjaer, Calliess, and Zumbansen exemplify this approach, but vary in terms of whether they view transnational law as autonomous of and displacing nation-state law (Teubner 2013), as layered on nation-state law (Kjaer 2014), or as

constituting a “hybrid” public-private system (Calliess and Zumbansen 2010). These theorists also build from legal pluralism (going back to Ehrlich (1913) and his concept of societal legal orders), but coupled with the systems theory of Luhmann (2004) and its concept of a “world society.” Most of these theorists started as private law scholars, which explains their focus on private legal ordering grounded in the law of contract and business organization.

Teubner adapts systems theory’s concept of a “world society” to develop a theoretic approach to the emergence of “global law without a state” involving issue-specific, self-contained, sectorally differentiated, non-state legal regimes (Teubner 1997; Fischer-Lescano and Teubner 2004; Teubner and Korth 2012). These regimes incorporate information from the external environment (such as contestation or crises) and translates it into the regime’s own terms, such that, in systems-theoretic terms, they are cognitively open (to the environment) but normatively closed (in their own logic and discourse). Teubner highlights *lex mercatoria* to theorize how the practice of private lawmaking and conflict resolution, such as through arbitration, establishes the validity of private law, with legal validity being established reflexively (or “autopoietically”) through decisions using the binary code legal/illegal (Teubner 1997; Fischer-Lescano and Teubner 2004). In this way, private contract becomes not only a source of law, but “even the primary source of law” (Teubner 1997). These contracts are self-validated in that they refer to arbitration, which, in turn, confirms their validity.

This work is driven, in part, by a normative impulse to consider solutions to the challenges of societal complexity and the social crises it generates in light of the decline of the regulatory capacity of the state as a problem solver since the highpoint of the social welfare state (Teubner 2004). Teubner (2013) thus, in parallel, reconceptualizes constitutionalism in systems-theoretic terms involving autonomous, functionally differentiated, non-state institutions. He contends that each differentiated social system — such as the economy, science, technology, media, and the health system — performs constitutional functions of securing its own autonomy and self-limiting its reach. For Teubner, social communication within each system provides the constituent power of the constitution, which in turn creates collective identities and a sense of “constitutional consciousness” within the system. Teubner contends that these functionally differentiated, societal constitutions are critical as stabilization mechanisms today in light of the “totalizing tendencies” of systems, such as the economy under neoliberal norms.

Poul Kjaer (2014), a student of Teubner, develops, in parallel, a concept of functionally differentiated transnational normative orders within a broad historical perspective. Like Teubner, he theorizes developments in light of the need for stabilization mechanisms in a world characterized by increased societal complexity and fragmentation. Kjaer’s core claim is that there are three distinct organizational

logics that layer each other: that of the nation-state with its territorial logic; the transnational with its logic of “functional differentiation;” and the pre-modern with its traditional logic of stratificatory differentiation. He contends that in light of social complexity and fragmentation, the transnational logic of functional differentiation is deepening in relation to the nation-state’s territorial logic, so that new stabilization mechanisms are required. He historically contextualizes transnational legal ordering, and contends that, following the twentieth century’s two World Wars and the accompanying decline of Europe, transnational organizations increasingly emerged with distinct functional mandates that now play roles analogous to those of former colonial empires.

With Teubner, Kjaer breaks with Luhmann who implicitly viewed constitutions in relation to nation-states. Yet Kjaer also differs from Teubner in contending that transnational constitutionalism is grounded in organizations, exemplified by the World Trade Organization, the International Organization for Standardization (ISO), and Fairtrade Labeling Organizations International, as opposed to functional systems as a whole. These organizations lack a demos, public sphere, and democratic representation, so that new politics arise to legitimize them, a politics that relies on the concepts of stakeholders (in place of a demos), transparency (in place of the public sphere), and an organization’s self-representation, such as through reason-giving (in place of democratic representation). This transnational political logic is more cognitive-based than normatively driven (compared to nation-state constitutional orders), resulting in new forms of technocratic managerialism.

Calliess and Zumbansen (2010, x) develop a related theory in which they posit “transnational law primarily as a methodological device rather than as a demarcated substantive field of law.” They use this device to interrogate the contexts and assumptions of those distinguishing “law” from “non-law.” Their aim is to assess the role of law as a regulatory and legitimating device in the context of global markets, multinational corporations, societal interdependence, and society’s increasing functional differentiation. In doing so, they return to and build from pluralist and systems theory insights regarding the role, function, and status of law (Zumbansen 2012b).

Advancing a post-modernist, process-based conception of law as a form of communication, they propose viewing transnational law through the metaphor of a “Rough Consensus and Running Code,” a contemporary high-tech variant of the “living law” of Ehrlich (1913). The phrase, taken from internet governance, portrays transnational private law in terms of open-ended “societal self-governance” involving norm creation through deliberative processes that lead to “rough consensus” and practice that, in turn, gives rise to a code’s “running” evolution. Transnational law develops as a running code through interpretation, adjudication,

and enforcement within particular functional domains, as well as through collisions with other rule-making processes (Zumbansen 2011). The frequent result is the development of public-private hybrid forms of lawmaking and enforcement.

Their analysis addresses the growing role of transnationally developed model contracts, codes of conduct, recommended best practices, guidelines, general principles, and model laws, often but not necessarily interacting with state law. Conventionally, legal positivists view such soft law as non-law until the moment that a state official or institution implements, enforces, or otherwise recognizes it. In contrast, Calliess and Zumbansen suggest, from a legal pluralist perspective, that if a social community, such as law merchants, recognizes it as law, and there is a form of norm making, interpretation, dispute settlement, and enforcement (including through social sanctions), then it constitutes law. Such transnational lawmaking is not necessarily autonomous from the state, as maintained by some theorists, but private actors remain central as norm makers and enforcers (Zumbansen 2012a). Their work raises central socio-legal questions regarding the legitimation of privately made norms through the normalization of the claim that they constitute law (Perez 2011).

This form of conceptual theorizing is important for decentering the state so that the state is not reified as constituting society and law. It calls into question methodologically nationalist conceptual priors, and facilitates a critique of neoliberal, fetishistic views of the market. For some, however, systems theory's abstract jargon can be unnecessarily distracting and hermetic, insufficiently complemented by empirical study, and its turn to constitutionalism may be a step too far (Shaffer 2015b).

Conclusion

The point of theorizing is three-fold: to evaluate concepts, orient empirical projects, and inform social action. The three approaches covered in this essay have each of these aims. Each approach shows why law can no longer be viewed through a purely national lens. Each provides tools to assess legal developments through a transnational optic. Each provides a conceptual framework for seeing the world in particular ways and thus contributing to action in the world in light of that vantage.

The three approaches differ in how much attention they pay to nation-state law, ranging from none (those who characterize the transnational as autonomous private legal orders), to a great deal (those who conceive the transnational in terms of the construction and flow of legal norms involving public and private actors). But all of these approaches cast their theoretical lens on legal ordering that transcends state law and are not limited to traditional international law. Overall, the approaches break down the traditional divide between the national and the international, conventionally reflected in international relations theory (Clark 1999),

much of sociology (Chernilo 2007), and in legal theory (Glenn 2005; Twining 2009). They expand conventional, positivist, state-based conceptions of law. They decenter territorially-differentiated national legal orders, and place them in complex relations with other forms of normative ordering (Black 2001). They are pluralist in incorporating the study of non-state actors in lawmaking and practice and thus counter methodological nationalism and blur the public-private distinction (Darian Smith 2013; Zumbansen 2012a). What they have in common is their claim that if the traditional center of legal and socio-legal theory has been the nation-state and nation-state law, then, to take from W.B. Yeats, “the centre cannot hold” (Menkel-Meadow 2011).

In a socially interconnected world, transnational legal ordering is needed. It also raises concerns. Transnational legal ordering can help provide global public goods, such as a stable climate, and help protect individual rights and enforce state, individual, and corporate obligations, such as freedom of expression, access to health care, non-discrimination rights, and the accountability of political leaders for gross human rights violations. Transnational legal ordering also raises long-standing concerns of domination by powerful actors, whether they are states, such as the United States, private actors, such as large corporations and holders of capital, or the two together (Anghie 2007; Chimni 2004; Pahuja 2011). A richer understanding of transnational legal ordering facilitates both critique and reform. Otherwise scholars are blind to how law operates, and they replicate that blindness in their teaching, their scholarly work, and their normative prescriptions. Further theorizing of transnational legal ordering is critical for orienting empirical work and informing pragmatic social action. Such empirical work and social action, in turn, lead to theory’s refinement. And so we go on, and in doing so, perhaps change the way things are.

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Figure 1 Recursivity in Transnational Legal Orders (initially prepared for Halliday & Shaffer 2015)

