Theorizing Transnational Legal Ordering:
Three Categories of Approaches

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This is a working Draft
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Comments welcome on literature to cite; examples to add;
structure of piece; approaches missing; the argument

Abstract/Note to Reader: This is a working draft for the Annual Review of Law and Social Science on the topic “Theorizing Transnational Legal Ordering.” I welcome comments on (i) literature to cite; (ii) examples to add; (iii) the structure of the piece; (iv) approaches missing; (v) the arguments. The draft first distinguishes transnational from global approaches to legal ordering. It then categorizes three theoretical approaches to transnational legal ordering that respectively address private legal ordering, reconfigure the concept of law, and provide frameworks for empirical study of the recursive interaction of norm-making and practice at the transnational, national, and local levels. The first and narrowest approach is largely positivist and develops theory based on the nature of the actors (private actors) and the form of legal ordering (private legal ordering). These theorists assess lawmaking, adjudication, and enforcement through non-state institutions. The second approach is conceptual and critical, developing transnational legal theory to critique and reformulate the concept of law to include non-state processes that reflect the functional differentiation of society. The third and broadest approach is socio-legal in which theorists provide frameworks for orienting empirical study of the transnational processes through which legal norms are constructed, flow, and settle. This approach analyzes recursive transnational processes, which can be top-down, bottom-up, horizontal, and transversal, involving interaction among different bodies and networks at different levels of social organization, from the transnational to the local.
Transnational economic and cultural processes spur transnational legal ordering. They do so across almost all domains of social life, involving business, regulatory, and human rights law. They do so for different reasons — to address crises, externalities, respond to uncertainty, advance interests, or on account of processes of imitation and diffusion. They do so through different mechanisms, including coercion, bargaining, persuasion, policy learning, and socialization (Braithwaite & Drahos 2000). Public and private actors perceive and advance conceptions of problems that they believe require legal ordering that is transnational in scope. They have particular priorities they hope to advance. They take advantage of facilitating circumstances and precipitating conditions. These processes spur legal ordering that can take both public and private forms, and can shape international law, transnational law, national law, and local legal practice in what can be viewed as the creation of transnational legal orders (Halliday & Shaffer 2015a).

At times, such legal ordering may appear predominantly private-generated in light of constrained state capacities, the management of uncertainty, and state complicity. At times, public actors assume the leading role in proliferating transnational legal initiatives, but negotiate and work in coordination with private actors in public-private partnerships. Social scientists and legal scholars commonly refer to these processes as a turn to “governance,” as distinguished from government, a shift from the “regulatory state” to “regulatory governance” (Djelic and Sahlin Andersson 2006; Hale and Held 2011; Ladeur 2004).

These developments have triggered a range of theoretical approaches regarding transnational legal ordering, including regarding the very concept of law. This essay categorizes and evaluates three theoretical approaches to transnational legal ordering that respectively address private legal ordering, reconfigure the concept of law, and provide frameworks for studying the recursive interaction of norm-making and practice at the transnational, national, and local levels. The first and narrowest approach is largely positivist and develops theory based on the nature of the actors (private actors) and the form of legal ordering (private legal ordering). For these theorists, transnational legal ordering involves private actors
governing their relations through private contract and standards and resolving disputes and enforcing norms through non-state institutions, such as international arbitration, mediation, and mechanisms such as certification, shunning, and shaming, which give rise to non-state legal orders. A second set of approaches is conceptual and critical, developing transnational legal theory to critique and reformulate the concept of law to include non-state processes that reflect an increasing functional differentiation of society. The third and broadest set of approaches is socio-legal in which theorists provide frameworks for orienting empirical study of the transnational processes through which legal norms are constructed, flow, and settle. This approach analyzes recursive transnational processes, which can be top-down, bottom-up, horizontal, and transversal, involving interaction among different organizations and networks at different levels of social organization, from the transnational to the local.

These approaches differ in their emphases, epistemologies, and normativities. In particular, they differ in how much attention they pay to state law, ranging from none (those who characterize the transnational as autonomous private orders), to a great deal (those who conceive the transnational in terms of the construction and flow of legal norms) (Koh 1996, 2006; Shaffer 2013). Some theorize the decline of the nation-state and the autonomy of non-state transnational legal orders (Teubner 1996, 2013), some the mutual increase and layering of transnational functional and national territorial legal orders (Kjaer 2014), and others the mutual imbrication of state-based and transnational legal ordering (Michaels 2006; Sassen 2006; Calliess and Zumbansen 2010; Shaffer 2013; Halliday & Shaffer 2015).

Overall, the approaches overlap in calling for a reorientation of the socio-legal study of law in transnational terms. They expand conventional, positivist, state-based conceptions of law. They 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 counter methodological nationalism and are pluralist in incorporating the study of non-state actors in lawmaking and practice. They decenter territorially-differentiated national legal orders, and place them in
complex relations with other forms of legal ordering (Black 2001). 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.”

I. The Context for Theorizing: Transnational vs Global Legal Ordering

A. The context. Transnational legal ordering is ubiquitous across all areas of law. As Menkel-Meadow (2011) writes, pick up any newspaper any day and one will see examples of legal issues that are transnational in scope across legal domains, from contract to constitutional law. Numerous empirical projects show the expanse of transnational lawmaking, such as Braithwaite and Drahos’ Global Business Regulation (2000) with its case studies of sixteen areas of business regulation, and Halliday and Shaffer’s Transnational Legal Orders (2015) and its twelve case studies from business, regulatory, and human rights law. Scholarly interest in this phenomenon has grown exponentially. In 2015, fifty-four journals used the term “transnational law” or “transnational legal” in their title, and that number expands to an astounding one hundred and twenty-three journals when including the search terms “global legal” or “global law.” The development in the study of the transnational legal issues since 1990 is dramatically reflected in the number of articles that use term “transnational” in the title, rising from 61 articles in 1990 to 1,644 articles in 2015. Remarkably, only 400 articles even used the word “transnational” in the article’s text before 1990, while 20,000 articles did by the end of 2015.

B. Transnational vs Global. Theories of global legal ordering rival and complement those of transnational legal ordering. Clearly the approaches overlap, but they also differ. Economic and cultural globalization, broadly understood (Giddens 1990), drive significant legal change. Globalization processes are

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1 W.B. Yeats, The Second Coming, taken from and cited in Menkel-Meadow 2011.
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transnational in form when viewed discretely in terms of flows and relationships of exchange. These processes catalyze the development of public and private legal ordering to stabilize expectations, and, in turn, theorizing on global and transnational law and legal ordering.

There are differences in global and transnational theories’ geographic scope and their macro and meso orientations. Overall, the term “transnational” has a more modest feel than that of “global,” and its use reflects some discomfort with the homogenous and universal quality of the terms “globalization,” “global law,” and “global order.” Global law posits, by its name, that universal legal norms are being created and diffused globally, while transnational law suggests that the norms transcend nation-state boundaries but are not necessarily global in scope. Theorists of the global tend to build macro theories regarding the role of material structures and cultural scripts, while theorists of the transnational tend to develop meso and micro theories focusing on processes and practices. The term transnational reflects processes of both convergence and differentiation, so that even when convergence occurs, it tends to reflect the result of recursive, interactive processes over time that involve contestation, resistance, and hybridization.

World polity theory, for example, arguably the most prominent sociological theory regarding the diffusion of global norms, examines macro cultural trends. It focuses on the diffusion of global “scripts” to address the puzzle of why national laws do not vary as much as expected. World polity theorists contend that the degree of isomorphism of laws is explained by the power of global scripts that shape nation-state identities, as nation-states adopt global legal norms to bolster their legitimacy as “modern,” “advanced,” and “rational” (Meyer et al. 1997a; Boyle & Meyer 1998). They show these trends across legal domains, including environmental law and institutions (Frank, Hironaka & Schofer 2000), human rights law (Boyle 2002; Goodman & Jinks 2004), family law (Kim et al 2013), sex law (Frank et al 2010), and education law (Ramirez & Boli 1987). In international law theory, Goodman & Jinks (2013) build from world polity theory and contend that a mechanism of legal change that has been underappreciated in public international law is socialization, and, in particular, the socialization of nation-states.
Similarly, although world systems theory focuses on materialist structures, rather than cultural norms, it also takes a macro approach to global theorizing. It contends that structural power, exercised by dominant states and financial capital, divides the world between “a core” and “periphery” reflected in patterns of economic production (Wallerstein 2004; Chase-Dunn and Hall 1997). It finds continuation between colonialism and global capitalism in dividing the world into core-periphery spheres, supported by law.

Transnational theory also has its materialist and cultural variants, but it tends to focus less on global cultural norms and global structures and more on processes, flows of norms, and intermediaries between the local and the global (Merry 2006b; Carruthers and Halliday 2006; Shaffer 2013). It assesses both top-down and bottom-up processes, and recursive interaction between law formation and practice (Halliday and Carruthers 2007). Such processes tend to spur considerable contestation involving conflicting values, interests, priorities, and distributive implications, until some working equilibrium is formed.

Legal theorists of the global tend to focus on aspirations, while transnational theorists tend to focus on practice. The difference is exemplified in Neil Walker’s definition of “global law” in his book *Intimations of Global Law* (2015, 18), which he defines as an “endorsement of a commitment to the universal or otherwise global-in-general warrant of some laws or dimensions of laws.” He stresses the role of “vision” and “image” (2015, 56) in global law. Transnational legal theorists, in contrast, look to the processes through which national law and local private practices interact with international and transnational legal norm-making. What interests transnational legal theorists is “normative settlement” across levels of social organization to constitute a transnational legal order, and not simply aspiration (Halliday and Shaffer 2015). Overall, the focus of global theorists on scripts and aspirations tends to be more formalist and idealist, while transnational theorists’ focus on practices and effects has a more legal realist orientation.

For normative theorists interested in issues of problem solving and justice that transcend the nation-state, the choice of the terms transnational and global also should have different normative implications. A focus on global duties tends to see
the world as a single, cosmopolitan normative space (Pogge 1989; Singer 2015). In contrast, a focus on transnational processes leaves more room for pluralist contestation and variation in light of republican and communitarian concerns (Fraser 2014; Miller 2013; Krisch 2010). Global and transnational theorists range equally across the political spectrum. But since global law implies the universal, its very language lacks the pluralism reflected in transnational theory. Much of transnational theory, moreover, is problem-centered, and thus suggests that no one size fits all, and that no normative settlement will occur unless there is some fit and hybridization of the transnational legal norm in light of local contexts.

II. Transnational Legal Ordering as Private Legal Ordering

The narrowest orientation to theorizing transnational legal ordering is grounded in the nature of the actors (private actors, and in particular commercial actors) and the form of legal ordering (private contract and standard setting) in light of broader ideational and material economic developments. The choice to limit the transnational to private actors resonates across disciplines, in political science (Stone Sweet 2006; Mattli 2001), economics (Milgrom, North & Weingast 1990; Greif 2006), and law (Cooter 1996; Hadfield 2001; 2009). When legal theorist Neil Walker (2010) refers to the transnational, for example, he speaks of “transnational domain specific private ordering.” Similarly, in their study of the construction of the field of arbitration, Dezalay and Garth (1996) subtitle their book “a transnational legal order.”

Given the rise of global and transnational economic exchange, and normative shifts regarding individual autonomy, it is no surprise that private law scholars have been particularly prominent in developing transnational theory that focuses on the role of private actors, and in particular commercial actors. Much is to be gained from assessing their place in commercial lawmaking and enforcement today. Lloyds of London sets re-insurance law, credit card companies credit rules, accountants accounting rules, professional associations of architects construction contracts, the International Swaps and Derivatives Association master agreements for derivatives, and the International Chamber of Commerce (ICC) rules for letters of credit (Levit
Private actors develop standards across sectors through standard-setting organizations, whether independently or through government delegation (Buthe and Mattli 2011; Schepel 2005). They are central to the development of rules governing the internet, called lex informatica, and rules governing commerce, called lex mercatoria. Online companies create online consumer protection standards, methods of payment and security, certification mechanisms, and online dispute settlement (Calliess and Zumbansen 2010). Governments create commissions composed of private actors to create corporate governance codes that the state does not codify but backs by mandatory disclosure requirements (Calliess and Zumbansen 2010).

Such private legal ordering reflects the spread of global markets and responses to increasing complexity where governments lack capacity to adapt responsively to technological and organizational change. For some, it represents a neoliberal turn where national legislatures and courts acquiesce (Muir-Watt 2011). For others, it represents a new private form of lawmaking and enforcement calling for a reconceptualization of law (Calliess and Zumbansen 2010), and a new understanding of constitutionalism in societal terms (Teubner 2013).

1. Law and Economics and the New Lex Mercatoria. A group of theorists working in the law and economics tradition focus solely on commercial actors in the creation of transnational legal orders. They emphasize how modern forms of transnational legal ordering have long roots, reflected in the lex mercatoria (or law merchant) developed 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 arbitration (Cooter 1996).

The rise of commercial arbitration has been central to driving private law theory and empirical study (Schultz 2014). Today, it is estimated that over 90% of private contracts contain an arbitration clause, which can be deployed in over 200 arbitration centers around the globe (Stone Sweet 2006; Stone Sweet 2015). A new community of elite lawyers and arbitrators populate this field (Dezalay and Garth 1996). Although enforcement of arbitration awards formally depends on national
courts, national courts are rarely used — only about 1% of the time — so that privatized dispute settlement appears semi-autonomous in practice (Calliess and Zumbansen 2010, 122).

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; Dalhusien 2000; Hadfield 2001; 2009a), whether for innovation contracts (Gilson et al 2013), global supply chains (Gereffi...), just-in-time manufacturing, 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 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 law procedures). State law authorizes party autonomy to contract out of state-based systems, but the question becomes whether such state authorization is even needed (Glenn 2005). Public law, at best, provides Hayekian background rules to facilitate efficient private ordering, but Hadfield (2009a) contends that these background rules should be privatized as well. Private actors are codifying commercial norms through more conventional organizations such as the ICC, Unidroit, and the Hague
Conference on Private Law (Michaels 2007), but private legal service companies could, in theory, compete with and displace them.

Two related groups of legal theorists challenge this approach’s focus on commercial 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). One group theorizes private lawmaking that has an explicit regulatory purpose (Cafaggi 2011; Calliess and Zumbansen 2010; Wood et al 2015), including through engaging civil society groups (Keck and Sikkink 1998) and (potentially) a transnational public sphere (Fraser 2014). The other looks to traditional private international law governing transnational activities and stresses the regulatory nature of private international law that conventional theorists fail to capture (Wai 2005). Both of these groups, taking from the work of Karl Polanyi (Joerges and Falke 2011), contend that the economy must be embedded within society, and they theorize different ways that this embedding can occur, through non-state regulatory law and through traditional private international law.

2. Private Social Regulation. A first group of countervailing theorists is, in a sense, more radical than the law and economics scholars in that they address private lawmaking in both its efficiency and regulatory dimensions, which they contend cannot be separated, and thus apply the logic of private lawmaking beyond commercial law to all regulation (Black 2001, Cafaggi 2011, Calliess and Zumbansen 2010). Such regulation spans all areas of social protection developed by the welfare state during the 20th century, including labor law (Backer 2007), environmental law (Meidinger 2009), consumer law (Calliess and Zumbansen 2010), and financial law (Black and Rouch 2008). Business and civil-society networks drive such legal ordering. Much of food safety law, for example, depends on private regimes developed by retailers (Chalmers 2003; Meidinger 2009), while sustainable forestry regulation is driven by civil society developed regimes, such as the Forest Stewardship Council (Cashore et al 2004).

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4 muir-watt notes rating agencies, vulture funds and sovereign debt and development aid; child slavery; pollution; displaced persons
In these areas of social regulation, private actors serve as lawmakers, adjudicators, and enforcers, giving rise to what can be viewed as private legal order. These orders rely on private standards, certifiers to provide the functional equivalent of adjudication, and enforcement through market exclusion by retailers, at times out of fear of consumer boycotts. For example, in the U.S., the major tuna canning companies only market tuna that meets certain “dolphin-safe” standards, and they do so under the threat of organized consumer boycotts were they to change their policies (Parker 1999). Super market chains, like Walmart and Sainsbury similarly create their own private food safety standards and enforce them through private contract (Chalmers 2003; Backer 2007; Meidinger 2009). These processes have distributive effects, giving rise to analysis of their legitimacy and accountability (Black 2008; Cafaggi…).

Public international law can contribute to such out-sourcing both on account of its weaknesses and its strengths. For example, after the 1992 UN Conference on Environment and Development failed to adopt binding international rules, and after Austria was pressed under the General Agreement on Tariffs and Trade (GATT) to remove an import ban, Austria helped finance private certification systems, and the International Tropical Timber Organization (ITTO), formed by that same 1992 UN Conference, eventually endorsed them (Bartley 2007).

These theorists divide in their treatment of state law. Some theorize developments in terms of the marginalization of state law and the autonomy of private legal ordering in light of the transnational complexity of modern society and the decline of state capacities (Teubner 1992; 1996), while others assess the interaction of private regulation with state law (Wood et al 2015). 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 (NGOs) (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, including agenda-setting, norm formation, implementation, monitoring, enforcement, and review (Wood et al 2015). Private and state actors often negotiate with each other, so that private standard setting 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 private regulation.

3. Private International Law as Regulation. A separate group of countervailing theorists look to private international law and its choice of law techniques to govern transnational activities, which is a more traditional, but arguably under-appreciated view of transnational legal ordering involving the decentralized interaction of nation-state legal systems in relation to private ordering (Wai 2005; Michaels 2006; Muir-Watt. 2014; Whytock 2009). Private international law has long governed private transnational activity. It provides a second form of transnational legal ordering that can serve to counter the “liftoff” of business law as an autonomous field outside public regulatory control (Wai 2005). It 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 national legal systems and private ordering. In addressing this interface, questions arise regarding the policy behind different laws, the relevant interests at stake, and the convenience for affected parties.

A group of private international law scholars critique conventional private international law theory for ignoring its regulatory aspects. They develop countervailing theory and contend that the conflict-of-laws mindset and the techniques employed permit for both regulatory pluralism and cosmopolitanism in transnational legal ordering, recognizing both the legitimate concerns of the other while not abandoning domestic public policy (Berman 2014; Joerges 2011; Michaels 2014; Muir-Watt 2011; Wai 2005). As Wai (2005, 482-483) writes, “this conception of private law actions fits with views of the contemporary transnational order as a system of countervailing networks and systems,” and it provides “a venue for the contact and mutual influence of different systems.” Joerges (2011) advances such a pluralist approach through a conflict-of-laws framework used as a conceptual tool for understanding how normative legal systems collide, interact, and are mediated.
For these theorists, this form of transnational legal ordering counters claims of autonomy of private legal ordering, claims to hierarchy of international law, and the universalist pretensions of global law.

These theorists critique the first variant of transnational legal ordering as autonomous commercial law for its neoliberal legitimation of market-based orders that fail to account for broader social interests, and they point to the importance of the regulatory dimension of private international law as a countervailing governance mechanism. 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. Private law does so, for example, when it recognizes arbitration that includes public law claims, such as consumer, labor, antitrust, and securities law. These theorists view semi-autonomous lex mercatoria commercial regimes in a dialectical relationship with national regulatory law. For them, though there is “transnational liftoff” of business, there must also be “juridical touchdown” of national law to account for those affected by transnational business activities. Such national law, in turn, can take a cosmopolitan turn through national judges developing common private international law principles over time (Scott 2009). Michaels (2006) contends that law and economics theorists are thus empirically wrong in suggesting that the lex mercatoria is “anational.” He contends that empirics show that the state remains part of transnational legal ordering, whether as an accomplice, facilitator, or check. But it is only a part of such ordering, which involves “law beyond the state.”

As all approaches, there are tradeoffs with this cluster of theorizing. Those that stress transnational legal ordering as purely private are the most circumscribed in their theorizing. Among them, as always, law and economic scholars are the most parsimonious. But where these scholars theorize the autonomy of privatized regimes, they capture only part of the process of transnational legal ordering from a socio-legal perspective. Thus, much of this theorizing does not posit an anational

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5 see also Jacco Bomhoff, the reach of rights,” law and contemporary problems
III. Transnational Law as Conceptual Theory

Second, theorists use transnational legal theory as a means to critique and reorient the concept of law. Some develop a positive theory of private transnational legal ordering in terms of the provision of functional equivalents to state-based law. Others use the concept of transnational law as a critical tool to reconstruct legal theory in light of the limits of state-based law (Teubner 2013; Kjaer 2014; Calliess and Zumbansen 2010).

In his 1956 Storrs Lecture, Jessup (1956) was the first to give 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 reflects a functional concern that the combination of national and public and private international law is inadequate to regulate transnational activities. He thus included in his concept “other rules which do not wholly fit into such standard categories” as public and private international law. Yet those “other rules,” which involve relations between private persons and between corporations and states, form a residual category that Jessup did not develop or illustrate to a significant extent. It is that category which since has become more prominent.

Law-and-economics theorists have used the idea of a new lex mercatoria to develop positive legal theory that is sufficiently encompassing to include non-state norm-making and enforcement. 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.” They note that the steward can be a private body, and that enforcement can be decentralized, as through shunning and shaming.

Similarly, private regulatory theorists deploy a positive concept of law that encompasses non-state lawmaking and enforcement by civil society and other private actors from a functionalist perspective. These theorists note the role of
functional equivalents of lawmaking, adjudication, and enforcement in the private sphere (Cafaggi 2011, Meidinger…). 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, and include some sort of coordinating and sanctioning system.

More broadly, Glenn (2005) looked to transnational traditions of law that have modern analogues. “Persuasive authority,” for example, has long been a key part of the common law tradition, and now has its analogues in national court references to foreign and international law and judicial opinions (Jackson 2009). Transnational judicial dialogues, facilitated by communication technologies, support these developments (Slaughter 2004). Similarly, the *ius commune* in the civil law tradition (continental common law) is reemerging in the development of general principles in the commercial law field (Glenn 2005; Scott 2009). Religious law and indigenous law, representative of early non-state law traditions, similarly are transnational in scope. New transnational epistemic communities develop their own normative systems, working through “dialogic webs” (Braithwaite and Drahos 2000) facilitated by electronic forms of communication. This form of lawmaking is further reflected in transnational contracts regulating particular domains, complemented by state law support of or acquiescence to transnational contracting and dispute settlement.

A group composed mainly of German and German-trained theorists go further in developing a concept of transnational law viewed as a response to societal complexity and fragmentation in system-theoretic terms. The works of Teubner, Calliess, Zumbansen, and Kjaer 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 build from legal pluralism (going back to Ehrlich and his concept of societal legal orders), coupled with Luhman’s systems theory and its concepts of a “world society” in which functionally differentiated subsystems reflexively reproduce themselves.
Most of these legal theorists started as private law scholars, which helps to explain their focus on private legal orders.

Calliess and Zumbansen (2010, x) develop a sophisticated theory in which they posit “transnational law primarily as a methodological device rather than as a demarcated substantive field of law.” Advancing a post-modernist, process-based conception of law involving reflexive systems of communication, as opposed to a body of doctrine, they propose viewing transnational law under the metaphor of a “Rough Consensus and Running Code.” The metaphor, taken from internet governance, advances a perspective of “societal self-governance” that includes not only norm creation through consensus, but also practice giving rise to a code’s evolution, including through interpretation, adjudication, and enforcement.

Their analysis addresses the growing role of 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 contend, 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 (such as social sanctions), then it can constitute law. Transnational lawmaking is not necessarily autonomous from the state, as maintained by other theorists, but, in the private law field, private actors remain central as norm makers and enforcers.

Teubner, whose systems-theoretic approach has influenced Calliess and Zumbansen, differs in focusing on the autonomous character of transnational, functionally differentiated regimes. 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 non-state legal regimes (Teubner 1996; Fischer-Lescano and Teubner 2004). 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 and normatively closed. 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 nation-state as a problem-solver (Teubner 2004).

Teubner (2013), 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 “pouvoir constituant” of the constitution, which in turn creates collective identities and a sense of “constitutional consciousness.” These functionally differentiated, societal constitutions become critical as stabilization mechanisms today in light of the “totalizing tendencies” of the systems, such as the economy under neo-liberal norms.

Poul Kjaer (2014), a student of Teubner, develops, in parallel, a concept of transnational normative orders. 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.

With Teubner, Kjaer breaks with Luhmann who implicitly viewed constitutions in relation to nation-states. Yet Kjaer differs from Teubner in contending that transnational constitutionalism is grounded in organizations, such as the World Trade Organization, the International Organization for Standardization (ISO), and Fairtrade Labeling Organizations International, as opposed to functional systems as a whole, such as the economy, science, health, the media, and sports. 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, transparency, and an organization’s self-representation, such as through reason-giving. This political logic is more cognitive-based than normatively driven, resulting in new forms of technocratic managerialism.

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, the abstract jargon of systems theory can be unnecessarily distracting and hermetic, the theory is not sufficiently complemented by empirical study, and the theory’s turn to constitutionalism may be a step too far (Shaffer 2015b).

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

The third and broadest orientation toward theorizing transnational legal ordering is to place processes of international, transnational, national, and local public and private lawmaking and practice within a single analytic frame, providing a framework for assessing how they interact to create (potentially) transnational legal orders (Halliday and Shaffer 2015). These processes are top down, bottom up, horizontal, and diagonal. Actors import and export legal norms (Santos 2003; Dezalay and Garth 2002b; Koh 1998, 2006; Friedman 1996), and they use norms in one domain to contest and shape those in another (Joerges 2011; Shaffer and Pollack 2009). The processes are recursive and dynamic, as actors engage in diagnostic struggles, compromises are papered over with internal contradictions and indeterminacies, and there is “actor mismatch” between those who negotiate legal texts and those who implement and apply them, giving rise to new 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 for ordering issues. When the legal norms concord across levels of social organization, one can speak of a transnational legal order (Halliday and Shaffer 2015).
For such theorists, the term “transnational” does not suggest the withdrawal or disappearance of nation-states as major actors in transnational governance, nor that transnational processes are autonomous of nation-state law and institutions. Rather, they stress the following points: first, that much legal ordering transends nation-states so that one needs to assess law and institutional developments in transnational context; second, that nation–states and nation-state institutions are far from the only important actors in law-making beyond the nation-state (as conventionally reflected in public and private international law scholarship); and third, that to understand transnational legal ordering, one needs to assess the interaction of public and private lawmaking and practice at different levels of social organization, from the transnational to the local. Such an approach does not focus on transnational law as a body of law addressing transnational activities, but rather studies the transnational construction, flow, and settlement of legal norms, which includes the production of legal norms and institutional forms, their migration across borders, the role of intermediaries in these processes, and homologies and contestation among the transnational, national, and local levels (Dezalay and Garth 2002; Shaffer 2013).

This approach explicitly includes public lawmaking in its scope. As “public international law” opens to non-state complainants and parties, such as in the areas of human rights, crime, and trade, and as international courts exercise interpretive authority (Alter et al 2016), the traditional concept of “international” law weakens. As states delegate greater public powers to supranational organizations, they “become agencies of implementation of rules of extra-state origin” (Glenn 2005). These processes are particularly pronounced in the European Union, but also are developing regionally in Latin America, Africa, and Asia, as well as transnationally through webs of free trade and other hard and soft law agreements, giving rise to complex mappings of transnational legal orders that vary in their substantive and geographic scope (Halliday and Shaffer 2015). Transgovernmental networks are often central to these processes involving exchanges among networks of agencies from states whose sovereignty is “disaggregated” (Slaughter 2004).
The approach likewise includes private lawmaking, but it is particularly interested in the interaction of private lawmaking initiatives with public law as a form of governance. The resulting “public” governance often involves heterarchical networks, is pluralist, and is multi-polar, rather than hierarchical (Ladeur 2004). Combined, these processes can provide responsive, “experimentalist” architectures for governance transcending the nation-state (de Burca, Keohane and Sabel 2013).

This interaction is not solely at the transnational level, but also at the national and local levels. Empirical study exposes the layering and interaction of transnational private lawmaking with national law and local practice. Bartley (2011), for example, in a study of sustainable forestry standards and fair labor standards in Indonesia, captures the ongoing importance of Indonesian state law and customary norms to understand the implications of transnational private regulation on the ground. Such study 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).

This approach both builds from empirics, and provides concepts for empirics (Djelic and Sahlin Andersson 2006; Garavito and Santos 2004; Halliday and Shaffer 2015; Dezalay and Garth 2012). From empirical study, one can build theory and hypotheses regarding different stages and aspects of transnational legal ordering, including the framing, emergence, propagation, contestation, resistance, settlement, institutionalization, nesting, mapping, structuring, and decline of transnational legal orders (Halliday and Shaffer 2015b). Some theorists focus on particular stages, such as lawmaking at the international and transnational levels, or the diffusion of norms to nation-states (and in particular to developing countries), or institutional change within states in transnational context, but they can be theorized within a single
frame regarding the recursive interaction in transnational legal ordering of state and non-state actors at different levels of social organization.

Theories of transnational legal ordering implicitly or explicitly begin with the construction of a problem to be ordered. Behaviors can exist for a long time before they are considered a problem, so that the construction is not a natural one. The politics of framing can be understood through discourse analysis that unpacks the frame’s theoretical and ideological content, involving hidden contours of power. Contests among discourses and frames are frequent. Rajah (2015), for example, shows the importance of framing in rule of law conceptions, which shifted over time from a human rights orientation toward a neoliberal one. The content of a frame can affect the settling of legal norms and their institutionalization (Merry 2015). Lloyd and Simmons (2015) show that transnational consensus on the narrower issue of human trafficking was facilitated when it drew on the broader, established frame of transnational crime. 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.

Broader cultural norms operate as a form of pre-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 (Meyer 2006), and marketization (Djelic 2006). Policymakers increasingly frame problems and their solutions in economistic terms of efficiency and optimization, characterized as “neoliberalism,” affecting many areas of social life (Brown 2015).

Transnational legal ordering is not a linear, uncontroversial, or inexorable process. It is not simply top down involving the internalization of international norms. Rather, actors from particular national and local settings promote national and local legal norms globally, giving rise to globalized localisms (Santos 2003). Actors likewise do not simply apply these norms locally, but translate, adapt, and hybridize them, giving rise to localized globalisms (Santos 2003; Campbell 2004;
Merry 2006a). The United States, and U.S. private parties are often behind these processes, as is the European Union and European stakeholders (Braithwaite and Drahos 2000).

Transnational legal ordering involves the propagation of legal norms across national jurisdictions through mechanisms of coercion, reciprocal bargaining, persuasion, market discipline, modelling, learning, and socialization (Braithwaite and Drahos 2000; Halliday and Osinksy 2006). At times, actors use webs of agreements, such as tax treaties based on the OECD model code for the avoidance of double taxation (Genschel and Rixen 2015). Powerful states use this technique to spread intellectual property law (Helfer 2015) and investment law (Elkins, Guzman and Simmons 2008) in ways they cannot obtain through multilateral processes.

These mechanisms can be contingent, facilitating both the expansion and the contraction of transnational legal ordering. In the area of finance, for example, Helleiner (2015) shows how mechanisms of coercion, market discipline, and persuasion through epistemic networks gave rise to significant transnational legal ordering of finance, but changes in the international political economy weakened the ability of the United States and the International Monetary Fund (IMF) to use coercion, politicization following the 2007/2008 financial crisis curtailed the soft power of technical networks, and changed market conditions undermined market disciplines.

The role of intermediaries as conduits, carriers, and points of entry of transnational legal norms is often central (Resnik 2006). They include governmental representatives, 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. These intermediaries can form part of transnational epistemic communities (Djelic and Quack 2010) that mediate between the transnational, national, and local. Understanding their roles involves “mapping the middle” (Merry 2006b). They are critical in producing “the credibility and legitimacy” of transnational norms (Garth and Dezalay 2009). They 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).

Professions and civil society groups are central to propagation. Studies of corporate bankruptcy and secured transactions law, for example, show how bankruptcy and secured transactions lawyers help propagate transnational legal norms (Block-Lieb and Halliday 2015; Cohen 2007). Civil society groups similarly promote and obstruct transnational legal ordering when they propagate environmental and human rights norms (Keck and Sikkink 1998) or obstruct the propagation of intellectual property norms (Helfer 2015). They are “rooted cosmopolitans” in that they promote cosmopolitan norms, but their effectiveness depends on their rootedness in particular social contexts (Tarrow 2005).

Transnational legal processes can empower 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 these intermediaries have a professional stake, they become important allies in embedding the norms (Shaffer 2014).

Intermediaries are critical for translating and adapting transnational legal norms to local contexts. Merry (2006a, 222) shows how local actors “translate and remake transnational discourses into the vernacular,” such as regarding women’s rights. Transnational norms are adapted more easily if packaged in familiar terms and if they accommodate established hierarchies, but “they are more transformative if they challenge existing assumptions and power relationships” (Merry 2006). Dezalay and Garth’s work exemplifies the mistake of viewing nation-states as homogenous, rather than involving contests of power that intersect with transnational processes. Elites frequently invest in transnational discourses to gain or retain their positions. As a result, “particular exports of state expertises depend on the extent to which there are structural homologies in the respective fields of the importers and exporters” (Dezalay and Garth 2002b).

Transnational legal ordering commonly, but not always, involves considerable contestation and resistance among different legal domains at different
levels and sites of social organization. Efforts to establish transnational legal orders can conflict, such as legal ordering for pharmaceutical patent protection and for the protection of the economic and social right to health (Helfer 2015). 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 (Buthe 2015). Genschel and Rixen show that the very success 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,” which, in turn, is in friction with the existing transnational legal order for double taxation.

Even if legal norms settle at the transnational level, one cannot speak of a full-fledged transnational legal order if there remains considerable discordance with national law or local practice. Local and transnational norms often collide, involving an “interlegality” of “rival normative ideas, knowledges, power forms, symbolic universes and agencies” Santos (2003, 472). Local actors in weak positions in transnational normmaking can resist successfully at the level of implementation, and thus foil transnational powers (Halliday and Carruthers 2007). Resistance is more likely successful where the transnational norms are perceived to be instruments of coercion or imposition, which is a prevailing problem for the IMF and World Bank (Carruthers and Halliday 2009). Resistance can take the form of symbolic compliance. Payne (2015) shows how the implementation of accountability norms against political leaders is foiled through show trials, selective trials of former allies who are now opponents, and foot dragging where appeals overturn successful prosecutions. Resistance does not involve a single act, but is part of broader recursive processes that can catalyse new cycles of transnational lawmaking and implementation, leading to revised norms.

Proponents ultimate goal is a transnational legal order’s institutionalization. Such institutionalization depends on the settlement of legal norms concordantly at the transnational, national, and local levels, and the alignment of the legal norms with an issue. Some studies show that clear, precise texts, including if formally non-
binding, have a higher probability of adoption because states can drop the rules into national statutes with fewer costs, and because monitoring of compliance is simpler (Linos and Pegram 2016). Others suggest that initially vague transnational norms provide room for national adaptation and thus are more easily adopted in national law and local practice, including through processes of sequencing. In transitional justice, for example, initial amnesties may be later curtailed when political conditions change (Sikkink 2012; Payne 2015). Even where transnational legal orders are in tension, sometimes each can be applied in parallel to further constrain states. In the conflict over pharmaceutical patent protection and the right to health, states are pressed both to recognize patents and provide essential medicines at government expense (Helfer 2015).

Transnational legal ordering can involve nesting of discrete legal orders within broader ones. Following the 1997/1998 Asian Financial Crisis, promoters of a transnational financial legal order propagated functionally differentiated standards to regulate banking, securities, insurance, and accounting systems. They subsequently brought these “fragmented supervisory structures” into an integrated one under the umbrella of the Financial Stability Forum (Helleiner 2015). In the area of climate change, the failure to reach a global agreement was paralleled by normative development and settling in sub-parts of the issue, such as for greenhouse gas inventories, maritime transport emissions, and (to a lesser extent) carbon emissions trading (Bodansky 2015).

Transnational legal ordering often fails, and when it does succeed, it is often contingent. Where contradictory or conflicting discourses remain active, championed by powerful shapers of policy and public opinion, then settling and institutionalization become more difficult. Exogenous factors, such as shifts in power, technology, or ideas, can unsettle transnational legal orders. Endogenous factors can as well, as when transnational legal norms or institutions are rigid and unable to adapt, or are indeterminate or contain internal contradictions that manifest themselves when markets, technologies, or organizational structures change. Block-Lieb and Halliday (2015), for example, show how containerization in
maritime trade rendered the Hague and Hague-Visby conventions increasingly irrelevant to carriage of goods by sea.

While empirically oriented theories focus less on the concept of law in legal theory, they too can combat desiccated concepts of law (Halliday and Shaffer 2015; Shaffer 2015a). They show how law has a particular logic that can exercise normative power because it carries epistemological force. Transnational legal ordering can maintain and reconstruct “power relations in society by defining categories and systems of meaning” regarding appropriate behavior (Merry 1992, 360). Such theories of transnational legal ordering move beyond international law governing inter-state relations to norms that permeate national and local law and practice, such that the epistemology of these norms becomes of much greater salience. From the perspective of Bourdieusian field theory, law becomes a form of institutionalized power in setting the rules of the game (Dezalay and Madsen 2012; Djelic and Sahlin-Andersson 2006).

The theory of transnational legal orders maintains that the degree of institutionalization of transnational legal norms can have significant impacts. To start, where national law and local practices are structured and imbricated by transnational processes across domains 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 expertise and professions (creating incentives to invest in them), and accountability mechanisms subject to transnational normative frames (such as through peer review) (Shaffer 2013).

This approach to theorizing transnational legal ordering is the most capacious. It links with studies in sociology and political science regarding state transformations (Sassen 2006; Zurn et al 2005), as well as broader turns to transnational governance (Djelic and Sahlin-Andersson 2006; Newman and Farrell 2014). It is conducive for collective empirical projects across legal domains. Yet in being capacious, it is also much more demanding to apply in practice.
**Conclusion**

The point of theorizing is multi-fold, including to orient empirical projects, provide critical tools to evaluate concepts, and inform social action. The three approaches covered in this essay have all these aims. They have much in common, but they also vary in their emphases. Each 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. Each is both important and partial since there is no Archimedean “true” theoretical standpoint. Rather, such theoretical work helps orient empirical study, and such empirics recursively can lead to theory’s refinement. And so we go on, and in doing so, perhaps change the way things are.
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