

“Transnational Law” as Proto-Concept: Three Conceptions

By Craig Scott*

I shall use, instead of ‘international law’, the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.

PHILIP JESSUP, TRANSNATIONAL LAW
136 (1956)

A. The Nature of the Exercise

With this succinct and oft-quoted passage from his Storrs Lectures on Jurisprudence delivered just over a half-century ago at Yale Law School, Jessup posited “transnational law” as an expansive umbrella category for all “law” involved in regulation – what is called, with increasing frequency, the ‘governance’ – of *the transnational* (“actions or events that transcend national frontiers” whether involving state or non-state actors). While there need be nothing iconic about his formulation, there is a certain attractiveness in treating this very brief passage as a semantic jumping-off point for narrating several senses in which “transnational law” may be said to ‘exist’ (or not) in the contemporary world. No etymological pedigree for the term “transnational law” is hereby claimed, but whether Jessup coined the term or not is less important than the fact that his slim volume has been a common starting point for those seeking to get a handle on the use of this term.

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The purpose of this article is to identify three conceptions of transnational law, all of which have a certain integrity depending on one's premises about the nature and institutional operation of law. My method in discerning and then presenting these three conceptions is fluid, to say the least. Specifically, my discussion will blur the line between two usages, what we may call a practitioner's usage and a theoretician's usage.¹ On the one side, there are various uses of "transnational law" extant in normative discourses that invoke, however inchoately and impressionistically, "transnational" legal rules, legal principles, legal standards, and even legal systems as being 'applicable' or otherwise relevant in a given factual context. On the other side, we may discern something resembling a first-principles theorization of what, if any, uses of "transnational law" would be conceptually coherent, even if many legal practitioners and legal scholars may not currently speak of such law yet existing. To some extent, a search for what is immanent in contemporary legal discourse, both that of practitioners and that of scholars, straddles this blurred line.

What I do not wish to blur, however, is the distinction between the descriptive (what is or can count as transnational 'law') and the evaluative (is 'transnational law' (in a given conception) a form or species of law that is desirable (from any number of perspectives)?) That caveat aside, I will not hide from the reader that, in other work, I have found speaking in terms of "transnational law" and, more broadly in other contexts, of "transnational governance" to be not just possible but a useful way to approach aspects of law in the contemporary world;² the extent to which 'usefulness' counts as one measure of

¹ For a very small sampling of relevant articles, see for example: Harold Hongju Koh, *Transnational legal process*, 75 NEBRASKA LAW REVIEW 181-207 (1996); Zumbansen, Peer, *Transnational Law in* ENCYCLOPEDIA OF COMPARATIVE LAW 738-754 (Jan Smits ed., Edward Elgar 2006); Robert Wai, *Transnational private law and private ordering in a contested global society*, 46 HARV INTERNATIONAL LAW JOURNAL 471-486 (2005); Roy Goode, *Usage and its reception in transnational commercial law*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1-36 (1997); Charles Brower and Jeremy Sharpe, *The Creeping Codification of Transnational Law*, 45 VIRGINIA JOURNAL OF INTERNATIONAL LAW 200 (2004-05); L.M. Friedman, *Borders: on the emerging sociology of transnational law*, 32 STANFORD JOURNAL OF INTERNATIONAL LAW 65-90 (1996); E. Gaillard, *Transnational law: a legal system or a method of decision making?*, 17 ARBITRATION INTERNATIONAL 59-71 (2001); Eric Stein, *Lawyers, judges, and the making of a transnational Constitution*, 75 AMERICAN JOURNAL OF INTERNATIONAL LAW 1-27 (1981). Note also the forthcoming (2009 or 2010) book by MICHAEL GIUDICE AND KEITH CULVER, *LEGALITY'S BORDERS* (Oxford University Press).

² For pieces in which "transnational law" is more or less self-consciously referenced, see *The Alien Tort Claims Act Under Attack – Remarks ("Beyond the Sosa v Alvarez-Machain Terms of Debate: Conceptualizing International Human Rights Torts in Terms of 'Transnational Law'")*, 98 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 49, 58-61 (2004); *Introduction to Torture as Tort: From Sudan to Canada to Somalia*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 3-44 (C. Scott, ed.); *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in *TORTURE AS TORT* 45-63 (C. Scott, ed.). For pieces in which law, not necessarily itself styled as transnational, adjusts itself to transnational contexts and situates itself in terms of transnational governance, see *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 287-319 (C. Joerges, P Sand and G Teubner, eds., 2004) (co-authored with Robert Wai); *Multinational Enterprises and Emergent Jurisprudence on Violations of Economic, Social and Cultural Rights*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK*, 2ND EDITION 563-596 (A. Eide, C. Krause, and A. Rosas, eds., 2001); *Towards the Institutional Integration of the Core Human Rights Treaties*, in *REACHING BEYOND WORDS: GIVING MEANING TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 7-38, fn: 213-225 (Valerie

desirability is something I will set aside in this paper. However, it may well turn out that I will not succeed in expunging all elements of evaluative advocacy from the analysis to come: description almost always belies some fealty to underlying normative preferences. But I *am* genuinely open to being shown that, ultimately, “transnational law” is not a useful way and may even be a regressive way to think about law in the world of contemporary forms of transnational forces (many parading under various banners of globalization). It is for that reason that I seek to keep the present short paper at the level of a kind of explanatory analytical jurisprudence, albeit one that does contain elements of what could be thought of as an internal valuation of the discursive object of explication. An internal valuation arises from a form of performative commitment implicit in the exercise of making a given account of a concept the best it can be in light of the premises and more general assumptions the analyst attributes to the relevant field.

Many readers will recognize in the last sentence methodological overtones of Dworkin’s view that interpretive accounts (including accounts of the practice of interpretation itself) should achieve some plausible equipoise between “fit” with a practice’s core observable facts and “justification” of that practice from the perspective of relevant background morality.³ For present methodological purposes, there is some general similarity of approach. That said, I have long been more significantly influenced in my understandings of an unavoidable aspect of is/ought blurring by a method adopted by Joseph Raz in various law journal articles and later carried over to his *The Morality of Freedom*.⁴ One passage from this book has been particularly useful in my thinking on what it is to engage in conceptual analysis as both an insider to and critical observer of the social practice within which the concepts in question are invoked:

Accounts of ‘authority’ attempt a double task. They are part of an attempt to make explicit elements of our common traditions: a highly prized activity in a culture which values self-awareness. At the same time such accounts take a position in the traditional debate about the precise connections between that and other concepts. They are partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favour. The very activity is also an expression of faith in the tradition, of a willingness to understand oneself and the world in its terms and to carry on the argument, which in the area with which we are concerned is inescapably a normative argument, within the general framework defining the

Oosterveld and Isfahan Merali, eds., 2001); *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise*, 16 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 2 206-268 (co-authored with Philip Alston) (2000).

³ RONALD DWORKIN, *LAW’S EMPIRE* (1986).

⁴ JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

tradition. Faithfulness to the shape of common concepts is itself an act of normative significance.⁵

Having invoked Raz's framework, I do not see the above quotation as either a precise methodological template or as necessarily fully transferable to the context of "transnational law" as the object of conceptual inquiry.⁶ The extent to which the use of the expression "transnational law" amounts to a tradition, in the sense that may be intended by Raz, is of course open to question. The extent to which it does not would limit the applicability of Raz's methodological approach. On this score, it seems more likely that, with "transnational law", we are at most faced with a pluralistic landscape of "traditions" that vary in their referents and in the depth of their roots.⁷ Directly related to this observation about pluralism of the social or cultural (linguistic) field, we might observe that Raz's formulation may point in an alternative direction, namely, the emergence of (and more extensive recent use of the expression) "transnational law" as partly a case of *breaking faith* with state-centred ideas of law (which are certainly part of two highly relevant traditions within legal discourse, those of public international law and those of jurisprudence). In some measure, then, theorizing the nature of "transnational law" probably tends much more to embrace the parts of Raz's ideal-type situation that lean towards "producing new or newly recast arguments" that may assist practitioners, theorists, and citizens alike to better understand themselves and the social world in which they operate. Either way, Raz's methodological preference could be viewed as serving the useful function of drawing to our attention two quite useful ways to understand conceptual analysis of "transnational law" or, viewed another way, to a continuum of ways that lie somewhere between poles of keeping (total) faith with dominant discursive traditions and of (completely) breaking faith with those traditions.

By way of further addressing why the ideal-type equipose of Raz's methodology cannot be taken as a template for all cases of conceptual analysis, it is important to be aware when one has entered what is a more fractured than unified discursive field and also be aware that some concepts may not be analyzable outside their existing multivocality. Somewhere within this kind of awareness, the following may need to come into conscious play: recognition of the nature and extent of what I would call the power-beholderness of a social practice (or Razian "tradition") and, in that context, the relevance of recognizing more marginalized or less mainstream perspectives (which perspectives, upon reflection, may sometimes be more faithful to a practice or tradition's pillar principles or core ethos). Thus, conceptual analysis may sometimes – and maybe more often than we tend to accept

⁵ *Id.*, 63-64.

⁶ I owe what follows in this paragraph to observations offered by Michael Giudice.

⁷ This pluralism of "transnational law" discourses will be further addressed briefly in the section called "Transnational Socio-legal Pluralism" and also in the "Final Comments", *infra*.

– require forms of paradigm-shifting “partisan[ship]”, to use a term from the Raz extract, that exist in some kind of ironic interactive space between keeping faith and breaking faith. Often enough, this will involve digging into a mixture of inchoateness and inconsistencies in the practice or tradition and coming to grips with the epistemological pluralism of the field. This includes assessing the extent to which the practice or tradition embraces such epistemological pluralism as part of its own self-understanding versus whether the practice or tradition instead tends either not to see or even actively to obscure that pluralism. By way of what one then does with the foregoing assessments, it may be that we can benefit from thinking of conceptual analysis as involving the need sometimes first to excavate the possible or potential from the actual and then decide how to interpret the excavations in terms of the positions one takes on the best relationship, to return to Dworkin, between fit and justification.⁸

I conclude this methodological exploration of the nature of the exercise undertaken by this article by observing the similarities between the way in which Jessup thinks of “transnational law” as a linguistic concept in terms of its use-value and the way Raz approaches the task of explicating conceptual meaning as a kind of dialectic between the observed usage of the concept in practical discourse and reasoning and a kind of stipulative dimension that is involved in giving shape to a concept that is generally used more intuitively than self-consciously.⁹ Like Raz, Jessup avoided the language of definition, instead choosing to invoke “transnational law” in a manner that was both performative and narrative in nature. By beginning this famous passage with “I shall use...”, Jessup was setting up “transnational law” as an overarching premise for his lectures, and for the subsequent book, without developing as a prior step an argument for why this term should in fact be chosen. It would be in its very narrative use – implicit for the most part, although occasionally explicit – within the structure of the book’s exposition and argumentation that would, by the end of book, circle back and add depth to that premise.

With the foregoing methodological forays in mind, thus it is that the present paper does not seek to make an argument for the single best reading of the *concept* of “transnational law” but instead seeks to outline three candidate *conceptions* of that notion. Importantly, it is not assumed at this stage that these are necessarily *competing* conceptions. Rather, they may all be compatible to one extent or another. Such compatibility may arise either at a linguistic level (if one is content with the notion of polyvocality of concepts and associated multiple meanings) or at a substantive level (if one discerns aspects of mutual coherence amongst the proffered conceptions that could lead to a higher-order analytical account of “transnational law”).

⁸ A direct debt is owed to the explorations in ROBERTO UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

⁹ On this way of framing conceptual inquiry, see Joseph Raz, *On the Nature of Rights*, 93 *MIND* 19 (1984). See also *supra* note 4 at 165ff. The *The Nature of Rights* chapter in *THE MORALITY OF FREEDOM* is largely identical to the preceding article except for an added treatment of Ronald Dworkin’s notion of rights as trumps at 186-192.

In this sense, it might be said that “transnational law” operates in the present analysis not as an established concept but more as a kind of fuzzy or suggestive proto-concept, the viability of which will emerge ‘from below’ (as it were) through an exercise in comparing diverse conceptions that move back and forth across the above-mentioned blurred line that separates actual linguistic use and conceptually possible usage. While this approach may seem incoherent to some who assume that arriving at a given conception necessarily must refract off the notion of a prior concept that itself generates content and constraints for any given conception, the approach nonetheless seems to me to be appropriate to the subject-matter at hand. We are, I believe, still in search of transnational law, including the very concept of “transnational law,” and not yet at the stage of fattening it out (as concept) into a debate over competing conceptions of the best accounts of a consensus abstraction.

What will be presented in this article, then, are three contrasting – and, to reiterate, not necessarily conflicting – approaches to the relationship between the “the transnational” and “law.”¹⁰ Reflecting the origins of this brief paper, the implications for legal education will be used on occasion as one way of expressing the significance of the conception.¹¹

B. Six Linguistic Caveats with respect to the “Transnational” in “Transnational Law”

The phrase “the transnational” has already been used on at least two occasions so far in this paper. Before proceeding to the discussion of the three alternative conceptions of “transnational law”, a cluster of caveats are in order with respect to this notion of “transnational” as used by Jessup and in relation to how this term is used throughout the present paper.

First of all, the present paper tends to use the terms “phenomena” and “situations” interchangeably – as in transnational phenomena or transnational situations – to refer to the empirical contexts at play in theorizing about what “transnational law” does, could or should mean. In contrast, Jessup’s passage is arguably less inclusive in that “actions” and “events” are apt to suggest a) physical occurrences that b) have elements that are in more than one jurisdiction. What is not clearly covered in Jessup’s passage is the notion of transnational “issues”, which could include phenomena not involving physical acts or events across borders that are nonetheless understood by relevant participants and/or observers as “transnational” situations because of how the issue has come to be constructed by interacting normative (legal, policy, and moral) discourses as

¹⁰ Especially given my methodology emphasizing “transnational law” as a proto-concept, no claim is made here that there are only three conceptions. But, it is claimed (at least at present) that the three conceptions in this paper appear to the author to be sustainable, even if there are others.

¹¹ See *supra*, note 1.

"transcending" (to use Jessup's own term) frontiers. In particular, such constructions of transnational issues might piggyback on the contexts in which public international law has come to construct some situations and related issues as no longer falling within 'reserved domestic jurisdiction' of states, notably much of international human rights law. For example, consider a manufacturing context in which all production inputs, legal ownership structures, personnel and sales of product are local but in which production includes the forced labour of children in a way that engages the 1998 ILO Declaration on Fundamental Principles and Rights at Work.¹²

Secondly, quite apart from the normativized construction of 'empirical' contexts such as just noted, it is also important to note that Jessup's passage at the very least needs to be read (as he almost certainly intended it to be read) as including contexts in which there are one or more actors with connections outside the jurisdiction in which all physical acts or events are taking place. For example, consider a mining context in which all affirmative acts and events occur in a single jurisdiction but in which legal ownership and/or control of an involved corporation includes persons or entities beyond that acts-or-events jurisdiction. It is of course the case that it does not take much imagination to think of ways in which, by dint of the operation of forces of contemporary economic globalization including interconnected production and distribution networks and deterritorialized information flows, both of the just-given examples (in the preceding paragraph and in the preceding sentence) are very likely to involve connections outside the local jurisdiction that may not be immediately apparent. To the extent this is the case, the task of ideational construction of a situation as transnational is aided by globalization's facts on the ground that turn some situations into transnational situations even in the Jessupian "acts or events" sense.

Thirdly, "transnational" is being used synonymously (in this paper, at least) with "trans-state". In this respect, it is not claimed that the term "transnational" is an ideal term in the contemporary semantic universe in relation to the identity of the "national" within the "transnational." Treating "nation" and "state" as fungible here is parasitic on the semantic tradition inherited from public international law and its historical foundations in (mostly tendentious) political theory revolving around the concept of the "nation-state". Thus it is that "international law" semantically colonized the earlier terminology of the "law of nations" which arose in epochs when the modern state had not yet evolved into either the dominant form of polity in the world or the imperially preferred form of polity for participation of a society in inter-polity law. Without discussing the various nuances that arise, "international law" in the 20th Century quite clear referred to "interstate law" (just as United Nations refers semantically to United Member States), whatever other actors were accorded some measure of status by international law including as international legal

¹² Available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>, last accessed June 15, 2009.

persons with clusters of autonomous rights (most notably international organizations, as conceptualized by the International Court of Justice in the *Reparations Case*). A pure first-principles approach to theorizing “trans-state law” would probably opt for using “trans-state” in order to shed any association with the specious connection between “nation” and “state”, but the methodology employed in the present paper all but precludes such a clean break as the very point of the paper is to explore and to some extent leverage the very discourse of “transnational law.” It is not as if use of “trans-state” is not doable – witness how Jessup’s own usage a scarce fifty years ago has itself generated the very discourse that is referenced in this paper. At the same time, it is fairly safe to say that pretty well all users of “transnational law” discourse understand this in the sense of “trans-state” and, as such, from a theoretical perspective, it is arguable that nothing is lost to continue this convention.

If it has not been clear from the preceding paragraph, I should emphasize that alignment of “transnational” with “trans-state” does not entail that trans-state law must somehow itself be statist. “State” here is a reference to what is being transcended in one way or another (i.e. states and, more particularly, their legal systems including interstate law) and is most definitely not a reference to a constraining condition on the source of the law that can qualify as “trans-” in nature. Further, by drawing attention to the centrality of the state (as well as state law and interstate law) in relation to its simultaneous transcendence, I also do not wish to exclude coherent and useful employment of the idea of “transnational” in a context where a theorist might indeed wish to focus on “national” in a different term-of-art sense, as for example in relation to inter-nation norms that may be in play in such contexts as the relationship between groups sometimes called First Nations in Canada and other times Aboriginal Peoples.¹³

Fourthly, while dictionaries are arguably the last refuge of philosophical scoundrels, it is useful to note that pretty well any of dozens of dictionaries will define “trans-” (either on its own as its own prefix entry or as part of a range of words from transform to transcend to transubstantiate) in terms of any of “across”, “beyond” or “through.” It is either never or only marginally the practice of etymologists to also include “between”, which term is reserved for “inter-”. Thus it is that, while international law as interstate law is more or less the same as talking about law between or amongst states, transnational law can variously connote law across states, law beyond states, or law through states (i.e. states’ legal systems). As well, to the extent “trans-” has a serious polyvocality built into it, it opens rather fecund possibilities for the kinds of legal relationships or structures that count as being trans-national, even as, linguistically, it tends to frown on an understanding of transnational law as being just another way of talking about interstate law.

¹³ Just by way of two examples not unrelated to “nations” or “peoples” as law’s reference points, consider the choice of title and analytical focus in JOHN RAWLS, *THE LAW OF PEOPLES* (1999). Consider also the notion of “intersocietal rules” in Brian Slattery, *The Organic Constitution: Aboriginal Peoples and the Evolution of Canada*, 34 OSGOODE HALL LAW JOURNAL 101, 109 (1996).

That said, it must be acknowledged, fifthly, that on occasion there can be some looser employment of the term "transnational law" as simply a different (perhaps viewed as edgier) way of speaking about "international law." But, upon further examination, such usages tend to be compendious understandings of "international law" without the adjectives "public" and "private" or, put differently, understood as meaning "public and private international law." This usage may reach back historically to periods when it was more common to think of private international law (conflict of laws outside federal or interpersonal law contexts) as a branch of the law of nations and not a branch of each state's own legal system. It may also have a prescriptive dimension to the extent some employers of the term "transnational law" believe private international law should become more and more understood as fused at the hip with public international law in modern times. But, whatever the motivations for or influences on usage, the key point for present purposes is that such usage, by including private international law, is at minimum not synonymous with "public international law" on its own and, again by including private international law, makes non-state actors central to some relevant contexts. As such, this looser employment of the term still does not map onto the notion of "interstate law" in the sense of law between and amongst states.

Sixthly and finally, we are left with some ambiguity as to whether the increasingly commonly seen term of "transgovernmental" should be caught by the term "transnational."¹⁴ The usage of "transgovernmental" has tended to be in the context of discussions of what are called transgovernmental networks, governance and/or regulation in which persons within the executive arms of the state come together outside their own state's system to discuss problems, policies and regulatory solutions. These persons are usually bureaucrats closely integrated into the state, such as agriculture policy specialists, but sometimes they are public servants working for institutions with some degree of independence from (and certainly, 'within') the state, such as employees of central banks. The resulting regulatory solutions rarely include agreements that would be treated as interstate treaties by public international law; rather, they tend to include recommendations, guidelines, model laws, and so on, which each player in the process then must (or, simply, may) take back to his or her own state for some form of implementation within existing regulatory powers or by way of motivating law-makers in the state to legislate. There is clearly a sense in which so-called "transgovernmental" activity is apt to be understood as nothing but interstate activity in that states act through their governments and public international law assimilates the conduct of government to the conduct of states. However, the picture may not be so clear to the extent that most of these processes occur within functional or sectoral fields of regulation 'outside' of any

¹⁴ See for example, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW 1 (2002-2003). In the interests of the pluralism (and corollary semantic humility) gestured to earlier, it is also worth noting how others use the term "supra-" in preference to "trans-", as in Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?* 8 CHICAGO JOURNAL OF INTERNATIONAL LAW 513 (2008).

formal endorsement of ‘the state’ or even knowledge of this activity on the part of other state institutions; understood in a way similar to pluralistic understandings of ‘the state’ as involving multiple semi-autonomous players, it could be said that a significant range of “transgovernmental” processes are sufficiently decoupled from the state (and from formal interstate regulation) to be understood as activity that is more across, beyond or through states than it is between or amongst states. The picture becomes more palpably “transnational” for those processes that also involve non-state actors, such as corporations, as formal participants and also for those processes in which such non-state actors are significant informal interlocutors (whether as advisors, stakeholders, or active lobbyists) with the formal participants.

C. First Conception: Transnationalized Legal Traditionalism

As is the case for all three conceptions, the first of the three approaches begins with a focus on empirical context and environment – in other words, transnational phenomena attracting or indeed, in some cases, seeking to avoid regulation – and then, with some strong if implicit premise that such phenomena are heightening and broadening with every passing day. This approach then asks how/where “law”, *as we currently know and practice it*, fits into the picture. This approach might focus on the first sentence of Jessup’s seminal framing of a meaning for “transnational law” by saying it is “all law which regulates actions or events that transcend national frontiers.” In other words, it is “law” as we know it that must deal with various phenomena consisting of “actions or events that transcend national frontiers,” to which one might perhaps usefully add to “actions” and “events” something like “relationships amongst actors.”

However, here we may have recourse to Raz’s notion of keeping faith with traditions because the legal traditionalist, as I will call her, sees nothing about law responding to transnational phenomena that requires departure from a state-centred positivism.¹⁵ By this approach, it is completely open for a legal scholar, practitioner and/or educator to take the view that, at a normative level, both the existing law that one appeals to (applies, interprets, rhetorically invokes, etcetera) and the desirable or even necessary future law (that one advocates, campaigns for, takes part in negotiating, urges judges to forge, and so on) is made up of rules, principles, and/or standards and related decisions and other juridical acts ‘located’ in one of two kinds of legal systems: public international law or the

¹⁵ It is important to be clear that there are several distinct versions of what legal positivism entails, and state-centredness is not necessarily part of some conceptions. Also, legal positivism that emphasizes states as the ultimate source of all law invariably must have a prescriptive component (this is how law *should* be understood) and, in light of the extent and complexity of phenomena that seem to bracket the state in one way or another, cannot expect to persuade skeptics by claiming that state-centredness is purely and simply a description of observed social practice. That said, the thoughtful legal traditionalist will have answers as to why “fit” and “justification” do converge with retention of state-centred understandings of sources of law.

state (national/domestic/municipal) law of one of 195 or so states. Further, a person could divide the legal universe into public international law and national law in full knowledge that any given domestic-law system may itself embrace international law and that much domestic law may create, recognize, and delegate power to sub-systems like religious law, Aboriginal law, business custom, professional regulatory codes, and so on. The fact of regional law (e.g. European Union law) also does not disturb this basic division of the legal universe. On this account, there is not – and is no need for – something distinct called “transnational law” for such ‘law’ would invariably be given shape and be permitted to exist only as the combined functioning of public international law and domestic legal systems, and of their mutually regulated interaction.

All this said, for adherents to a state-centred traditionalist approach, the importance of the challenge that the non-legal transnational realm provides for law need not be under-emphasized: transnational phenomena will require the average lawyer to be educated in legal ideas, legal doctrine, and aspects of legal reasoning that can no longer avoid education/training in both public and private international law (an avoidance probably most common in North American common-law faculties of law).¹⁶ As well, the most

¹⁶ *Public international law* is traditionally understood as the system that deals with the legal regulation of interstate relations or the common consensual regulation by more than one state of a particular issue or problem (from human rights to the ozone layer). As traditionally studied and taught, it has been common to include interstate organizations (the UN being the most prominent) as both subjects of regulation and to some extent relatively autonomous law-generating agents within the public international law order. By way of nodding to points of overlap with “transnational” ways of viewing the world, it is important to note that any creation or recognition of rights and duties of non-state actors beyond international organizations (individuals, terrorist organizations, the Red Cross, pirates, multinational business entities, and near-endlessly so on) by two or more states acting collectively is viewed, from within mainstream contemporary public international law, as both conceptually part of public international law and empirically an ever-growing chunk of the corpus of public international law.

Private international law is the field of law that comes into play where persons have relationships, transactions or encounters in contexts of geographically-complex facts (involving more than one state’s jurisdiction), and questions of how to adjudicate so-called ‘private law’ rights and obligations arise. Classically, in the conceptualization and, more especially, the teaching of private international law (whether under this label or that of ‘conflict of laws’), the three core questions of the field relate to adjudicative jurisdiction, choice of (applicable) law, and recognition and enforcement of judgments. Note that the mainstream modern conception of private international law is that each jurisdiction has its own national rules on geographically-complex private law situations (jurisdiction, choice of law and recognition/enforcement), such that this area of law is actually a matter for each national legal system. That said, this area of law is “interstate” in the subject-matter sense that each system’s domestic rules exist to regulate the interaction of the domestic legal system and foreign states’ legal systems. Especially for the second and third conceptions of “transnational law” to be canvassed, it is deeply relevant that there was a time when what we now call private international law would have been more commonly categorized as a branch of an ‘international law’ that was tasked with regulating a multiplicity of actors and doing so by recourse to “law” that would not necessarily be (or be exclusively) the municipal law of states. The interstitial injection of public international law via treaties generated by the Hague Conference on Private International Law tends to be the clearest way contemporary public international law interacts with private international law, and then only as refracted through the rules of reception of public international treaty law by states’ domestic legal systems.

nimble and adaptive lawyers will be those who have enough grounding in comparative law as an academic discipline to be able to engage with lawyers and legally-relevant 'facts' in a way that grasps as early as possible the assumptions, baselines of analysis and fundamental concepts that may be animating an interlocutor from a different legal tradition.

The bottom-line is either that no good law school should allow students to graduate who have taken nothing but 'domestic law' courses (at least where such courses do not systematically build in public and private international law dimensions). *Transnationalized legal traditionalists* will at the very least wish to facilitate law students choosing a less parochial path by proactively encouraging a more cosmopolitan curricular constellation in law schools – such that any given student is responsible for any limitations in her own education and, in turn, limited training as a lawyer for our times.¹⁷

D. Second Conception: Transnationalized Legal Decisionism

A second approach to transnational law would concede that the legal traditionalist may be correct to say that the "law" dealing with transnational phenomena can always in some respects be analytically traced to one or more domestic legal systems and/or public international law. But, the second approach would then borrow a bit from various strands of legal theory and legal practice to argue that there is a kind of transnational law *in the result* when one observes the gradual build-up of decisions with respect to a variety of transnational contexts/problems – decisions that have been informed simultaneously and self-consciously by domestic and international law together providing the pool of potentially applicable (including potentially modifiable) standards for a given rule of decision or interlocking rules of decision.

Some will recognize doctrinal techniques from private international law embedded in the foregoing description, with it being fairly common across conflict of laws traditions to

¹⁷ Lest I be thought to be seeking to create a 'straw man' with my account of this approach, let me be clear that I see it as perfectly open for adherents to this approach also to be fierce advocates for a contextualized and interdisciplinary education of lawyers in addition to a more comprehensive traditional legal education. My only caveat here is that in my view it is particularly important to be conscious that the challenge of contextualization and interdisciplinarity is one of relating a more comprehensive legal education to *transnational phenomena* rather than assuming that the only phenomenon to be grappled with is "Globalization." In my view, the notion of transnational phenomena is more conducive to being understood as being more differentiated and as involving often less spatially extensive phenomena than the notion of globalization. It may be true that one can take the monolithic edge off the assumption that there is something going on called "globalization" by self-consciously thinking about "globalizations" – as I have done when teaching Osgoode's first-year course called *Globalization and the Law* – but, in my view, this still only takes us so far because globalizing forces are not co-extensive with transnational ones, at least as long as one is even a wee bit semantic in one's understanding of the meaning of "global." To take a by-now-trite example, it is not particularly easy to approach the legal dimensions of the European Union if hamstrung by "globalization" as the organizing reference point.

admit the possibility (with varying degrees of comfort and ease) of different rules from different domestic-law systems being brought to bear on different aspects of the same over-all legal case or interlocking series of legal problems being disputed. Some will also discern a certain overlapping of positivist and realist legal theory to the extent that versions of each kind of theory take cognizance of the law-constituting ‘power of decision’ of duly recognized or authorized actors – notably judges but also including administrators, executives-in-council, regulatory institutions with delegated powers like law societies, and so on. One way or another, this approach to ‘law’ understands law in disaggregation, not as whole legal orders or systems but rather as discrete norms or normative clusters that are capable of reasoned extraction from the whole and then of being brought to bear on constantly changing particulars. It might be further said that legal-systemic elements are mostly in the form of the methods (and associated facts) by which one determines whether a given actor has the power of decision on which this approach hinges.¹⁸

Such it is that this second approach simultaneously stays quite firmly rooted in the notion that states’ domestic legal systems (with private international law as one coordinating mechanism) and interstate-generated public international law jointly do two things. They create the pool of norms that may be thought of as rules of decision *in potentia* and they also bestow authority upon certain actors to exercise a power of decision that leads to some kind of resolution of a transnational issue, problem or dispute. In terms of the opening quotation by Jessup, this second approach would in some sense see transnational law as a result of “[b]oth public and private international law [being] included”, with, first of all, generalization of private international law *method* being the mechanism for a variety of potentially applicable substantive rules from domestic legal systems to be identified and applied and, secondly, the interaction of domestic and public international law being the means by which a public international law norm could itself be chosen as a rule of decision in a given context.

To be clear, this conception of of transnational law does not reduce the law to the method or the process in which method is embedded. Rather, for immediate purposes, transnational law is understood as the resulting (institutionally generated) interpretations or applications of domestic and international law to transnational situations. Analysis of ‘method’ probably will turn out to be inextricably connected to this idea, but, to the extent the point being made here is that interpretations and applications coalesce into bits of law (i.e. legal-normative content), something (substantive) beyond a method also emerges.

¹⁸ By way of contrast, statist legal traditionalism within legal theory tends to view (although I would not go so far as to say invariably views) law as always and everywhere systemic (with the corollary that all law either belongs to a state *legal system* or an international *legal system*.) This is a dominant presumption of state-centred theory, and one well worth questioning as part of generally reflecting on the adequacy of transnational legal traditionalism. I am grateful to Michael Giudice for the foregoing points.

This of course assumes that it makes sense to say that interpretations of legal norms are separable (if not separate) from the legal norms themselves; I can think of obvious ways in which this could be argued to be true or not true, but for present purposes there is no need to delve into the ontology of legal norms to sustain the foregoing points.¹⁹

In summary, this second approach involves the consideration of the relevance of the transnationalized empirical context, the juxtaposed and integrated consideration of one system's rule or principle here and another's there, the production of decisions thereby, and the gradual extrapolation from the body of decisions of principles and rules that can be argued before future decision-makers as being either governing or persuasive for similar transnational contexts in the future. Although I will not elaborate here, I would argue that such an approach to "transnational law" as the outcomes of legal decision-

¹⁹ Although this article's contribution is schematic in the extreme, I cannot avoid the temptation to comment a bit further on the relationship between process and decisional outcomes. I note (rather than defend) my view that one strand within what some would call the *transnational legal process* school is what I am calling here *transnationalized legal decisionism*. Much emphasis in the process approach is placed on the imbrication of comparative law analysis in a given domestic law context, for example, looking for edifying insights in relevant constitutional decisions in other jurisdictions before deciding one's own case: see for example, Anne-Marie Slaughter, *Judicial globalization*, VIRGINIA JOURNAL OF INTERNATIONAL LAW 1103 (2000). In such writings (and in speech-making by a growing number of judges), comparative constitutional analysis is often linked to a sociology of transnational interjudicial discussion that is sometimes literal (actual meetings amongst judges to exchange insights on parallel constitutional challenges) and more often metaphorical, as when we speak of an evolving *ethos* of transnational dialogue amongst courts in the world with respect to a common human rights enterprise that, in its more through-going (and, I would suggest, sophisticated) versions, links constitutions and international human rights treaties in a shared value system: see for example, Craig Scott and Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on 'Soobramoney's' Legacy and 'Grootboom's Promise'*, 16: 2 SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS 206 (2000); Reem Bahdi, *Globalization of judgment: transjudicialism and the five faces of international law in domestic courts*, 34 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 555 (2002); Yuval Shany, *How supreme is the supreme law of the land? Comparative analysis of the influence of international human rights treaties upon the interpretation of constitutional texts by domestic courts*, 31 BROOKLYN JOURNAL OF INTERNATIONAL LAW 342 (2006).

Transnational judicial conversation has of course always been part of common-law decision-making to the extent extra-jurisdictional common-law precedents have always played a persuasive role in 'domestic' common-law reasoning, and I am fairly certain that a parallel phenomenon exists in many civil-law jurisdictions (for example, cognizance of decisions in other civil-law countries or consulting both *la doctrine* and the reasoning of doctrinal theorists further afield than one's own jurisdiction). It also must not be forgotten that transnational judicial interaction includes a core mechanism of private international law, namely the not-infrequent necessity for judgments in one state to be given effect only once formally recognized by judges in another state as having been properly rendered – with propriety ranging from jurisdictional to procedural to, less commonly, substantive propriety. Analogues to all these examples can be given with respect to how judicial, arbitral, codifying, law-developing, legislating and similar decision-makers in the public international law system similarly engage in a comparativistic borrowing process with domestic legal systems, and how the domestic level can 'receive' norms from the international level that then become part of the transnational dialogue amongst national courts and other decision-makers – i.e. comparing the different and potentially similar interpretations that can be given to the 'same' international law norm. The upshot of these examples, however, is that we still need not necessarily go further than assuming some authorized decision within a given state or interstate jurisdiction, albeit in a way that usefully helps us see how a decision is invariably part of a broader decision-making process.

making faced with a transnational problem and/or in a transnationalized context is what competent, well-trained lawyers, judges, arbitrators, and others already do in a growing range of transnationalized contexts. Let us dub this second approach the school of *transnationalized legal decisionism*.

E. Third Conception: Transnational Socio-Legal Pluralism

A third approach is an approach that we can perhaps think of as homing in on the final tag in the Jessup quotation – “other rules which do not wholly fit into such standard categories.” This is an approach that in effect sees transnational law – or if one wishes to avoid conflating this tag with the whole category, at least the core of transnational law – as being in some meaningful sense autonomous from either international or domestic law, including private international law as a cross-stitching legal discipline. Rather than focusing on Jessup’s broad definition that sees transnational law as some kind of umbrella within which “other [non-standard] rules” fall alongside public and private international law, this approach sees these “other” rules as the true – or at least the quintessential – transnational rules.

This approach sees in “transnational law” something more than decisions plus extrapolations from decisional results in transnationalized contexts.²⁰ Rather, transnational law is imagined as in some respects occupying its own normative sphere. For example, a not-uncommon way of speaking about transnational law is as a kind of law of the interface or, as I have elsewhere described this strand of thinking, law that is *neither* national nor international nor public nor private at the same time as being *both* national and international, as well as public and private.²¹

A transnational-law theorist of the third sort may well assume that a separateness of “transnational law” in a systemic sense emerges from the gradual build-up of authorized decisions and extrapolated principles and rules that the transnationalized-legal-decision school sees as the end point of transnational(ized) law. The postulation of such systemic emergence tends to assume that “systemic” is flexible enough to encompass sub-systems that may be partially or totally isolated one from the other. But, whatever the scope or isolation of the system/s, here the key notion is that of “emerging from.” Just as the International Court of Justice reasoned 60 years ago that the United Nations, while constituted by states acting collectively, came to assume an “international legal

²⁰ Note, however, that the second conception’s focus on decisional outcomes can also be grafted onto the present (third) conception, once one has surmounted the hurdle of determining that non-state or other-than-only-state decision-making institutions have sufficiently recognized authority to generate decisions that are entitled to the label of “law.”

²¹ See, for example, the first three pieces cited in *supra*, note 2.

personality” independent of that interstate foundation and just as Westminster legal systems have been able to imagine an entrenchment of constitutional norms immune from the doctrine of the supremacy of Parliament, transnational law theorists of the third sort see “transnational law” as capable of being *at least* the organic outgrowth of cumulative decisions that are explicitly or implicitly authorized by domestic or international law that themselves may apply nothing but domestic law or international substantive norms. At minimum, on this view, transnational law can be treated as other than national or international in the sense of a body of law that gradually takes on a certain internal coherence in the form of a hybrid synthesis appropriate to a given normative subject-matter and surrounding context.²²

If this were ‘all’ that one might mean by transnational law in the strong sense, it would still be something significant, I believe. We would have something that is an extension of the second conception, with an added dimension of systematicity (even as we would have to acknowledge that the systems in question are often embryonic – and/or fragmented *inter se* as sub-systems so as to still allow us to approach them as systems). However, in my view, there is an added layer for those adhering to the third approach that shores up even further its foundations as separate from, while always related to, public international and domestic law: this layer is provided by the impact on legal analysis and legal imagination when we fasten onto the insights of what is often called “legal pluralist” thinking.²³

I have neither the time nor space to do more than observe that there is a fairly longstanding, vibrant and rapidly rejuvenating body of scholarship that draws on both legal history and existing ‘marginal’ realities to demonstrate that law need not be conceptualized as having to have either a direct or a derivative relationship to the state or to the interstate order. Law as both social practice and animating ideal may well be constructed and continue to exist independently of ‘official’ (in the sense of the modern state) law. Indigenous property law, the relations of Moroccan and Spanish fishers in the middle of the Straits of Gibraltar, church law, Gitano marriage ritual, the principles of lending in the Shar’ia, ‘internal’ corporate norms, commercial custom in all its varieties, the

²² Albeit an internal coherence that will always be relational in the sense of necessitating coherent interconnections with the other fields of law from which it grows.

²³ For a (very) small cross-section of a (very) wide range of approaches that I would categorize as “legal pluralist” with transnational dimensions, see: Andreas Fischer-Lescano and Gunther Teubner, *Regime-collisions: the vain search for legal unity in the fragmentation of global law*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 999-1046 (2003-2004); J.H.H. Weiler, *The geology of international law – governance, democracy and legitimacy* 64 ZAÖRV 547 (2004); Paul Berman, *Global Legal Pluralism*, 80 SOUTHERN CALIFORNIA LAW REVIEW 1155 (2007); Nico Krisch, *The Open Architecture of European Human Rights Law*, 71 MODERN LAW REVIEW 183 (2008); Sally Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 LAW & SOCIAL INQUIRY 975 (2006); Ruth Buchanan, *Legitimizing Global Trade Governance: Constitutional and Legal Pluralist Approaches*, 57 NORTHERN IRELAND LEGAL QUARTERLY 654 (2006).

complex normative nature of Internet regulation, the certification process of the Forest Stewardship Council, the guidelines produced by the International Union for Conservation of Nature, and so on.

These examples may suggest to some the marginality of law that is not directly rooted in state or interstate law, not least because the state and interstate order have for the last 150 or so years cast a commanding shadow over all other normative phenomena, constantly reminding other claimants to ‘law’ that they exist by dint of the space left for them by state and interstate law. However, what if one adds to legal pluralist challenges to the state-centredness of law the additional observation-cum-argument that much of what occurs under the auspices even of state or interstate law does not transpire at the formal level (of courts, etcetera) but in a complex informal world in which official law mutates and morphs as a function of delegated (even privatized) authority, social and economic power struggles, good faith mutual response to common needs, and interaction with unofficial normativities? So observed, a stronger case can be made that much of the transnationalizing world of law is “transnational law” in the sense of not being statist in any strong way as well as in the sense of involving multiple actors (who admittedly may owe their legal existence to state and interstate legal orders but who are nonetheless neither states nor interstate entities).

Although far from being an exegesis of Jessup’s definition, to some extent the foregoing discussion of the third approach takes seriously both that part of the passage that speaks of transnational situations (“actions or events that transcend national frontiers”) and that part which emphasizes the non-standard nature of some norms (“other rules which do not wholly fit into such standard categories”). For want of a better term at present, let us say this third approach involves a school of *transnational socio-legal pluralism*.

F. Final Comments

I end with two comments. The first relates to much wider questions of legal theory than have been addressed (or, at least, than have been disentangled) in this piece. Implicit in some of what I have said is that there are potentially multiple senses of “legal pluralism” relevant to thinking about the interaction of law in transnational contexts. There are at least two senses. One could be a legal pluralist about the sources of law (divine inspiration, state legislatures, courts, custom, extrapolated general principles, and so on) while still supposing there is one concept of law. Or, one could be a legal pluralist about both the sources and concept of law (i.e., there is no single concept of law). In this paper, I have avoided addressing these interacting senses of legal pluralism in a direct fashion, although it is also probably true to say that the general tenor of my narrative has been one of openness – at what I have called this “proto-concept” stage in the life of “transnational law” – to a double legal pluralism being a valid frame of reference. As my instincts tend towards ecumenical and interactive understandings of knowledge in the world, I lean

toward a provisional conclusion that reasonable disagreement over contending theories of the concept of law and over valid sources of law foretell a multivocal future for “transnational law” for many years to come.

The second concluding comment relates to the legal education context that generated the first version of this paper.²⁴ One purpose of all of the above has been to suggest that we (legal scholars, practitioners, educators) *may* be assisted by opening our minds to something extraordinarily fuzzy called “transnational law.” It may turn out that, for some or indeed many, “transnational law” remains, at best, not just elusive but also undisciplined as a construct and, at worst, obfuscatory and distracting. Transnational situations, yes; transnational law, no. To adopt again a legal education frame of reference, I might be reluctantly content if legal education around the globe even went this far (i.e. dealing with the theory and practice of state and interstate law faced with transnational situations) because it would count as a distinct cosmopolitanization in a world of still-too-often-parochial legal education. However, the implications of the foregoing brief discussion is, I believe, suggestive of some reasons why we may be well served by asking whether understandings of “transnational law” beyond transnationalized legal traditionalism need to be more vigorously (and rigorously) explored for transnational legal education to be worthy of its name. In the end and at the very least, I hope I have somewhat succeeded in suggesting why “transnational law” is an idea that pushes the boundaries of the legal imagination in such a way that, at the very least, legal theory and legal education based entirely on ‘domestic’ (state) and ‘international’ (interstate) constructs of law must be open to developing in ways that might take us all out of current conceptual comfort zones.

²⁴ See *supra*, note * about the author.