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Transnational Climate Law

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TRANSNATIONAL CLIMATE LAW

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I. *Transnational Climate Law as a Visual Field*

Climate change leaves little on this planet untouched. The concept of transnational law is no exception. Transnational law has long functioned as a mechanism for illuminating particular legal subjects, processes, and spaces: the empty space left by existing doctrinal perspectives,¹ the relationships between, around and outside of national laws,² the importance for law of private actors and the power and powerlessness of those actors.³ It offers a way of opening our eyes to spheres of normativity other than the nation state and distinct ways of conceiving of the nation state itself. But climate change shatters the idea that jurisdictional borders and doctrinal debates about the scope of the ‘legal’ are the sole tensions with which a concept of transnational law must contend. Climate change exposes a further fault line underlying legal thought and practice – the problematic, but deep-rooted

¹ Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart, 2010), 11.

² Peer Zumbansen, “Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism,” *Transnational Law & Contemporary Problems* 21, no. 2 (June 2012): 307.

³ Transnational law scholarship continues to grapple with how to incorporate accounts of diverse actors and agents in ways that complement, rather than simply replicate, political science vocabularies. See Natasha Affolder, “Transnational Environmental Law’s Missing People,” *Transnational Environmental Law* (2019), DOI: 10.1017/S2047102519000190.

practice of separating ‘Human’ from ‘Nature.’ This separation, and its accompanying assumption that the natural environment is a limitless resource for human exploitation, is powerfully challenged by the reality of a dramatically changing planet, and the rise of Anthropocene literatures that bring planetary limits sharply into view.

Transnational law is far from a homogenous field, approach, discourse, theory, or methodology for approaching climate law. Nonetheless, core sympathies and methodological elements of a transnational approach to climate law do exist alongside tensions and disagreements. In this chapter, I resist cordoning off something called ‘transnational climate law’ as a distinct field of law.⁴ Instead, I approach transnational climate law as visual field with methodological implications. Transnational law offers an approach to understanding the globalization of law with a determined attentiveness to the dynamic processes by which law crosses borders and has effects in multiple jurisdictions.⁵ The challenges of studying law “after the breakdown of methodological nationalism”⁶ create fertile ground for extending the ‘transnational’ from merely a ‘where’ inquiry to a visual field capable of illuminating the ‘who’, the ‘how’, the ‘when’ and the ‘why’ of transnational lawmaking.

Transnational law is a work-in-progress, valuable even as it operates as a placeholder – a signifier that old vocabularies and ways of conceptualising legal actors, norms, and relations are inadequate to the task of fully capturing what we are witnessing around us. Climate law offers an illuminating point of entry for transnational law to assess misfits between theory and practice, between existing legal concepts and vocabularies and empirical realities. Words often fail to do justice to the dislocations and disruptions we are witnessing.⁷ Transnational law represents one attempt to find a vocabulary, and a space,

⁴ This approach resonates with the conclusion that there is not a unified transnational order relating to climate change, but rather both disorder and fragmentation. Daniel Bodansky, “Climate Change: Transnational Legal Order or Disorder?” in *Transnational Legal Orders*, ed. Terence C. Halliday and Gregory Shaffer (Cambridge: Cambridge University Press 2015), 287–308.

⁵ Shaffer and Bodansky capture this well in their definition of transnational environmental law, which “includes national environmental regulation that has horizontal effects across jurisdictions – for example, by providing regulatory models to other countries or by applying to or affecting the behavior of producers and consumers within them. It also includes the development of standards by private actors that have effects across borders, such as through product certification and labeling regimes.” Gregory Shaffer and Daniel Bodansky, “Transnationalism, Unilateralism and International Law,” *Transnational Environmental Law* 1, no. 1 (2012): 32.

⁶ Ralf Michaels, “Globalization and Law: Law Beyond the State,” in *Law and Social Theory*, ed. Reza Banakar and Mark Travers (Oxford: Hart, 2013), 287.

⁷ A point illustrated by the search for language to responsibly report on the climate crisis. See Damian Carrington, ‘Why the Guardian is Changing the Language it Uses About the Environment’ *The Guardian* (London, 17 May 2019), <https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment>.

for acknowledging the misalignment between the singularity of the nation state/interstate framework that underlies much legal theory and the messy reality of the people, places and forms of law that climate law-making brings into view. Moreover, climate law sharply challenges the view that the *only* non-state actors of interest to transnational law are globalized business interests.⁸

Even as climate law scholarship seems ever more unavoidably transnational,⁹ there is a tendency to reserve the transnational law label for only those legal developments happening outside the main tent of state and inter-state activity. This leads to a problematic relegation of the transnational to an alternative universe or separate script (Section II). It results in a superficial appreciation of transnational law, where what is noticed are the new actors, assemblages and arrangements of climate governance. What risks getting missed are the seismic legal transformations implicated by these new climate governance arrangements. Approaching transnational climate law as a visual field offers a way of challenging the separation of a transnational sphere from ‘the rest.’ Transnational climate law thus offers a way of bringing into view an integrated picture of climate law’s migrations (II.1), interactions (II.2) and revelations (II.3).

This chapter is not a marketing brochure for transnational law. As well as celebrating transnational law’s capacity to bring neglected visions of law’s actors and law-making processes into view, it is alert to what a transnational law lens might miss or obscure. The spaces and rhythms of transnationalism favour a visual fix on processes, flows, networks, and governance arrangements that may be only partially tethered to people.¹⁰ This leads to several tensions. Climate law scholarship already tends to privilege accounts of a handful of ‘innovative’ examples of legislation and lawsuits that bear the climate law label, leaving untouched vast areas of law that facilitate or advance climate change. Environmental law and clean energy law are the points of interest rather than the much larger subject areas of unenvironmental law and unclean energy law (III.1). Transnational law has a still uncertain relationship with legal ‘practice’ (III.2), and a tendency to work in terms of abstract

⁸ Acknowledging that transnational law is “most commonly seen in close relation to the demographics and institutional formations of globalized business interests” and thus, that the reimagining of transnational law as a ‘critlaw’ project is “anything but intuitive”, see Peer Zumbansen, “Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Methods” in *Research Handbook on Critical International Theory* (2019, forthcoming), ed. Emilios Christodoulidis.

⁹ Much of the climate law literature referenced in Ronald Mitchell’s analysis of climate law’s accomplishments speaks to transnational developments in the field even though transnational law is not an explicit focus of that analysis. Ronald B. Mitchell, “Climate Law: Accomplishments and Areas for Growth,” *Climate Law* 8, nos. 3–4 (2018): 135–50.

¹⁰ On some little-explored costs associated with the shift to the transnational in feminist legal theory, see Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (London: Routledge, 2015), 106.

processes rather than real ones populated by diverse actors (III.3). A transnational lens, applied to climate change law, may thus risk writing out particular people and understandings of nature from law's past, present and future.

The concept of the Anthropocene has effectively ripped to shreds many of the analytical categories that have served as frames for thinking about both the environment and law since the Enlightenment. While social theorists are dismantling the intellectual walls that separate human society from nonhuman nature, the geological from the generational, the local from the global, and the scientific from the political, an appreciation of these same cleavages is critical to understanding transnational law's history and epistemology.¹¹ Climate change is "legally disruptive"¹² in ways that are only beginning to be understood. Transnational climate law brings new boundaries into transnational law's visual field – planetary boundaries.

II. Transnational Climate Law: Out of the Margins

The term 'transnational climate law' is not widely used to denote a recognized 'field' of law.¹³ There may be good reasons for this. By framing transnational climate law *as a field*, it becomes simply a new box, a box for misfits – things that fall outside the well-established categories of international, national, regional and local climate change law. Conceptualising transnational climate law *as a field* risks merely setting up a new box and putting a new set of things within it, in the process obscuring the impact of the box's contents on everything left outside. The vital interactions between what is conceptualised as the transnational and what is more comfortably seen as recognizable law gets missed.¹⁴

Transnational climate law has many sources upon which to draw, including pioneering work from transnational environmental law and the ever-growing body of theoretical and conceptual work on transnational law that has developed since Philip Jessup's *Transnational Law* (1956).¹⁵ That volume, written more than sixty years ago, identifies some of the tensions and pressure points that are today manifest in approaching climate change as a transnational legal problem. Jessup conceived of the transnational not as a

¹¹ Perrin Selcer expresses this as the need to acknowledge "antiecological environmental history." Perrin Selcer, *The Postwar Origins of the Global Environment: How the United Nations Built Spaceship Earth* (New York: Columbia University Press, 2018), 11.

¹² Elizabeth Fisher, Eloise Scotford, and Emily Barritt, "The Legally Disruptive Nature of Climate Change," *Modern Law Review* 80, no. 2 (March 2017): 173–201.

¹³ For an uncommon example of the term's use, see Thijs Etty et al., "Editorial: Transnational Climate Law," *Transnational Environmental Law* 7, no. 2 (2018): 191–200.

¹⁴ Charles Roger, Thomas Hale, and Liliana Andonova, "The Comparative Politics of Transnational Climate Governance," *International Interactions* 43, no. 1 (2017): 2.

¹⁵ Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956).

distinct realm from either the domestic or the international, but rather as an array of tools and approaches to legal problems. Relevant sources of law extended far beyond public and private international law to encompass a holding pen of possible, but not defined, “other rules which do not wholly fit into such standard categories.”¹⁶

Jessup’s articulation of Transnational Law acknowledged the context of law-making in a “complex interrelated world community,”¹⁷ clarifying both that law’s problems transcend legal sub-disciplines and that they extend to the extra-legal or metajuridical.¹⁸ Jessup was thus attentive to the ways that rules emerge from sources distinct from positivist-inspired conceptions of state law, referencing “practices” as diverse as those of General Motors, secret societies, towns, cities, or states.¹⁹ From the vantage point of Jessup’s writing, climate law scholarship seems remarkably siloed. Invisible barriers separate studies of the legal (climate law) and the interstate (the international climate governance architecture) from the reality of a sub-state/supra-state/non-state (often described as transnational climate governance). These are barriers that a transnational law approach both brings into view and helps break down.

A formidable challenge in writing about climate law at any level is the sheer enormity of the subject. When the relevant literatures are this vast and the legal developments so fast-moving, any commentary is partial, possibly outdated, and ignorant of important new developments and literatures. As scholars devote much time and intellectual resources to understanding and explaining new developments in context, it is easy to bemoan the absence of a more critically-inspired scholarship.²⁰ In many ways, attempting the sort of border-crossing, practice-embracing, interdisciplinary-leaning transnational law approach inspired by Philip Jessup seems either futile or fool-hardy in the context of climate law.

International relations scholars and political scientists are responsible for much of the voluminous literature on transnational climate governance.²¹ This transnational work now includes both climate mitigation and climate adaptation, resisting an earlier tendency to focus on *global* efforts of climate mitigation and *local* examples of climate adaptation.²²

¹⁶ Ibid, 2.

¹⁷ Ibid, 1.

¹⁸ “One notes that the problem of extracting and refining oil in Iran may involve - as it has - Iranian law, English law, and public international law. Procedurally it may involve - as it has - diplomatic negotiations, proceedings in the International Court of Justice and in the Security Council, business negotiations with and among oil companies, and action in the Iranian Majlis.” Ibid, 6.

¹⁹ Ibid, 9.

²⁰ Benoit Mayer, “The Critical Functions of Scholarship in Climate Law,” *Climate Law* 8, nos. 3–4 (2018): 151–60.

²¹ See Roger, Hale, and Andonova, “The Comparative Politics of Transnational Climate Governance,” 2.

²² Åsa Persson and Adis Dzebo, “Special Issue: Exploring Global and Transnational Governance of Climate Change Adaptation,” *International Environmental Agreements* 19, no. 4 (2019): 357–58.

This work frequently locates transnational developments in a separate sphere from state law-making, analyzing it through questions of orchestration and effectiveness without fully integrating it into the reality of plural sources and venues of law-making. The result is the transnational realm tending to be seen as an add-on, and transnational governance as a “complement” to the UN Climate Regime and the *Paris Agreement* architecture.²³ Such a view endorses the message that interstate processes are the core of international climate change law. The transnational only exists as a sideshow, a realm that the core may choose to engage with as the *Paris Agreement* has done.²⁴

The *Paris Agreement* itself suggests, perhaps, another reality: an intense intermingling of the public/private, state/non-state, hard law/soft law developments that currently dominate climate regulation. The treaty replaces state ‘commitments’ with ‘contributions,’ and introduces a compliance mechanism aimed at ‘facilitating’ rather than ‘enforcing’ compliance. The ‘ratcheting mechanism’ at the heart of the treaty has been described as requiring support from cities, companies and other non-state actors to be effective. Indeed, the treaty has been praised for strengthening the role of networks of state and non-state actors in climate policy and technology.²⁵ It has given unprecedented visibility to the actions of non-state and sub-state actors. Indeed, the architecture put in place by the *Paris Agreement* might only be functional in the context of massive infusions of funding from private sources.²⁶ The *Paris Agreement* itself might suggest that the types of initiatives that a transnational law approach brings into view have already altered understandings of core versus peripheral actors in lawmaking, challenging fundamental expectations of what treaties can do, and of who is required for effective ‘implementation’. The form, nature, and function of law-making under the *Paris Agreement* all seem to push back against a view where the ‘transnational’ elements can be viewed separately from the ‘interstate,’ the stuff of real public international law.

And yet, the *Paris Agreement* is far from an anomaly in its integration of public, private and transnational lawmaking. Rather, it is representative in many ways of the structure of international lawmaking on climate change, where treaties have reached deeply into

²³ For a perspective that this transnational sphere of governance has “complemented” the interstate regime, see Laura Mai, “The Growing Recognition of Transnational Climate Governance Initiatives in the UN Climate Regime: Implications for Legal Scholarship,” *Climate Law* 8, nos. 3–4 (2018): 183.

²⁴ *Ibid.*, 184, 193.

²⁵ Stephen Minas, “The Paris Agreement to Strengthen Role of Networks in Climate Policy and Technology,” *Global Policy*, 23 December 2015, <http://www.globalpolicyjournal.com/blog/23/12/2015/paris-agreement-strengthen-role-networks-climate-policy-technology>.

²⁶ Cinnamon Carlarne, Kevin R. Gray, and Richard Tarasofsky, “International Climate Change Law: Mapping the Field,” in *The Oxford Handbook of International Climate Change Law*, ed. Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlarne (Oxford: Oxford University Press, 2016), 22.

nations and regions without limitation from traditional conceptions of treaty implementation and compliance. The emissions trading system and Clean Development Mechanism emerging from the *U.N. Framework Convention on Climate Change* and the 1997 *Kyoto Protocol* have engaged actors other than State Parties and influenced private actor conduct in both signatory and non-signatory states. In so doing, they have promoted regulatory convergence and conformity to the *Kyoto Protocol* requirements by non-signatories and non-state actors with regards to business and regulatory conduct.²⁷

A transnational law lens is valuable in revealing the inequalities and asymmetries that mark global or international approaches to climate change, in contemplating transnational legal spaces not simply as add-ons, but instead as counterpoints to interstate and national approaches. The “deep moral disagreements” and “deep divides” between climate justice and neoliberalism have created competing visions for climate law’s objectives.²⁸ Critiques of the *Paris Agreement* reveal this intellectual battleground, describing it as a largely neoliberal document²⁹ that allows individual liberties to “trump all other social and political ideals.”³⁰ The battleground emerges in the detailed studies of how legal responses to climate change deepen existing social inequalities.³¹ And in scholarship revealing the limitations of governance ‘by disclosure.’³²

The point of conceiving of transnational climate law in terms of its visual field is not about simply seeing and marveling at the infinite variety of forms and norms emerging in the technical regimes of climate governance. Transnational law produces ways of knowing, “particular understandings of the world and how it works.”³³ Below, I identify three particular dimensions of law-making that transnational climate law brings into closer view: migrations, interactions, and revelations.

²⁷ ‘Kyoto compliance’ was a claim frequently made by companies, even though these private businesses had no obligations under the treaty, and even when they were resident in non-signatory countries.

²⁸ Rosemary Lyster, “The Idea of (Climate) Justice, neoliberalism, and the Talanoa Dialogue,” *Journal of Human Rights and the Environment* 10, no. 1 (2019): 36. In these characterizations, she draws upon John S. Dryzek, “The Deliberative Democrat’s Idea of Justice,” *European Journal of Political Theory* 12, no. 4 (2013): 329–46.

²⁹ David Ciplet and J. Timmons Roberts, “Climate Change and the Transition to Neoliberal Environmental Governance,” *Global Environmental Change* 46 (2017): 148–56.

³⁰ Ibid, 149.

³¹ See e.g. Julia Dehm, “Authorizing Appropriations: Law in Contested Forest Spaces,” *European Journal of International Law* 28, no. 4 (2017):1379–96.

³² See e.g. Brett Christophers, “Climate Change and Financial Instability: Risk Disclosure and the Problematics of Neo-liberal Governance,” *Annals of the American Association of Geographers* 107, no. 5 (2017): 1109.

³³ Duncan Kennedy, “The Stakes of Law, or Hale and Foucault,” *Legal Studies Forum* 15, no. 4 (1991): 361.

1. Migrations

The concept of the transnational adopted in the early writings of international relations scholars was attentive to both the idea of movement and to the interaction of actors and norms. Joseph Nye and Robert Keohane defined transnational interactions as “*the movement* of tangible or intangible items across state boundaries when at least one actor is not an agent of a government or an intergovernmental organization.”³⁴ Today, when practices of transferring legal norms, models, arguments, and judicial reasoning across borders are a central feature of climate law, understanding how and why legal ideas move becomes more urgent. This is particularly the case when environmental principles provide a vital legal pivot point for illuminating rights and obligations in both legislation and litigation.³⁵ Accounts of the dynamics of climate law’s movements are needed to complement the valuable micro-studies and maps that have already produced rich and diverse understandings of the significance of *networks* of unconventional state and non-state actors such as cities,³⁶ government Ministers,³⁷ investor-driven governance networks,³⁸ and judges.³⁹ The movements in question extend beyond national borders and permeate supra-national and sub-national lawmaking processes, private environmental governance, sites of Indigenous lawmaking, legal cultures and traditions, judicial discourse and international organisational practice.

The most visible faces of climate law emerge through databases collecting examples of ‘global’ climate legislation⁴⁰ and climate litigation.⁴¹ For example, a 2018 Climate Legislation Study calculated that more than 1,500 laws to curb climate change have now

³⁴ Joseph S. Nye and Robert O. Keohane, “Transnational Relations and World Politics: An Introduction,” *International Organizations* 25, no. 3 (1971): 332 (emphasis mine).

³⁵ See Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Oxford: Hart, 2017).

³⁶ Jolene Lin, *Governing Climate Change: Global Cities and Transnational Lawmaking* (Cambridge: Cambridge University Press, 2018); Taedong Lee, “Global Cities and Transnational Climate Change Networks,” *Global Environmental Politics* 13, no. 1 (2013): 108–28.

³⁷ See e.g. Karin Bäckstrand’s discussion of the Carbon Sequestration Leadership Forum. Karin Bäckstrand, “Accountability of Networked Climate Governance: The Rise of Transnational Climate Partnerships,” *Global Environmental Politics* 8, no. 3 (2008): 74–102.

³⁸ Michael MacLeod and Jacob Park, “Financial Activism and Global Climate Change: The Rise of Investor-Driven Governance Networks,” *Global Environmental Politics* 11, no. 2 (2011): 54–74.

³⁹ Examples include the United Nations Environment Programme’s (“UNEP”) Environmental Rule of Law Programme and the Asian Judges Network on Environment. Stephen Minas, “The Rise of Transnational Networks in Climate Change Governance: A Study in Hybridity,” *TLI Think!* 5 (2015): 7–8.

⁴⁰ For example, since 2010 the Grantham Research Institute (“GRI”) and Global Legislators Organisation for a Balanced Environment (“GLOBE International”) have prepared studies of national law and policies directly related to climate change mitigation and adaptation.

⁴¹ The Sabin Center for Climate Change Law at NYU Law School maintains databases of both US and non-US litigation. Sabin Center for Climate Change, <http://columbiaclimatelaw.com/resources/>.

been passed, an increase from around 70 laws in place two decades ago.⁴² Econometric research drawing on earlier versions of this dataset of legislation indicates instances of international policy diffusion from this data, asserting that the climate action one country undertakes is likely to depend on prior climate legislation by other countries.⁴³

These datasets, and the studies that draw on them, reveal several of the methodological challenges plaguing climate law's intellectual development. These challenges include the problem of how to define climate legislation or litigation. Even more poignantly, they reveal the complexity and unevenness that results from any attempt to provide a comprehensive 'global' image of legislative activity or litigation, challenges that manifest through the English-language bias of much published work, the tendency to only count and compare federal legislation,⁴⁴ and a common instinct to see directionality rather than variation in how law moves from place to place.⁴⁵

The message of 'progress' emerging from the growth in numbers of so-called climate laws can be misleading. Given the significant pressure on states to be seen to be responding to climate change, the concern develops that even while the number of 'climate laws' is growing, actual reform is shallow and minimalist, focused on disclosing carbon emissions rather than profoundly reducing them.⁴⁶ The vast subject matter of what might be targeted by climate legislation indeed makes comparison complex and threatens the rigour of studies by comparing metaphorical "apples and oranges."⁴⁷ Climate laws target things as diverse as introducing systems of tax credits⁴⁸ and carbon pricing,⁴⁹ promoting renewable energy,⁵⁰ disaster response,⁵¹ the preservation of glaciers,⁵² or strengthening resilience to

⁴² Michal Nachmany and Joana Setzer, *Global Trends in Climate Change Legislation and Litigation: 2018 Snapshot* (London: Grantham Research Institute on Climate Change and the Environment, 2018), 2.

⁴³ Samuel Fankhauser, Caterina Gennaioli, and Murray Collins, "Do International Factors Influence the Passage of Climate Change Legislation?" *Climate Policy* 16, no. 3 (2016): 318–31.

⁴⁴ Terry Townshend et al., "Legislating Climate Change on a National Level," *Environment: Science and Policy for Sustainable Development* 53, no. 5 (2011): 7–9.

⁴⁵ Lawrence Rosen, "Beyond Compare," in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge: Cambridge University Press, 2003), 502–3.

⁴⁶ See Ciplet and Roberts, "Climate Change and the Transition to Neoliberal Environmental Governance."

⁴⁷ Johann Dupuis & Robbert Biesbroek, "Comparing Apples and Oranges: The Dependent Variable Problem in Comparing and Evaluating Climate Change Adaptation Policies," *Global Environmental Change* 23, no. 6 (2013): 1476–87.

⁴⁸ *Ley del Impuesto Especial Sobre Producción y Servicios*, Diario Oficial de la Federación ["DOF"] 30-12-1980, última reforma DOF 15-11-2016 (Mexico).

⁴⁹ *Australian National Registry of Emissions Units Act 2011* (Cth.) (Australia).

⁵⁰ *Ley de Transición Energética*, DOF 24-12-2015 (Mexico); *The Energy Conservation Act, 2001*, No. 52 of 2001, India Code.

⁵¹ *Wet van 1 december 2011*, Stb. 2011, 604 (The Netherlands).

⁵² Law No. 26639, 28 October 2010 (Argentina).

food insecurity.⁵³ And yet, the cross-sectoral orientation of climate change threats means that legislation labelled ‘climate legislation’ may not even be where the action is or needs to be.⁵⁴

The wildfire-like spread of climate strikes in 2019, ignited by the actions of Swedish teenage climate activist Greta Thunberg, has legal parallels in the explosive growth of climate change lawsuits. These lawsuits have attracted ‘uptake’ and led to widespread emulation even where the specific facts and relevant law makes replication unlikely,⁵⁵ and even when the cases have yet to successfully reach a trial court.⁵⁶ Analysis of the forms of climate litigation emerging in the Global South valuably extends an understanding of the diverse forms and manifestations of climate litigation, as well as “stealthy” forms of response in the face of judicial reluctance to engage directly with politically charged issues of climate law and policy.⁵⁷

This movement of legal forms, ideas, and models extends to financial and market instruments. The EU has sought a position of climate leadership, in part by deliberately developing models capable of transplantation elsewhere.⁵⁸ The EU’s Emission Trading Scheme has thus served as a model for many countries looking to introduce the legal infrastructure necessary for domestic carbon markets. But it is proving challenging to export.⁵⁹ Voluntary markets for trading in forest carbon have also given rise to models for the regulatory markets that have followed in their wake.⁶⁰ For example, the carbon

⁵³ Décret No. 2016-0102/P-RM, 26 February 2016, [2016] Journal Officiel de la République du Mali, 488.

⁵⁴ See Jaclyn Rolfe, “Combating Climate Change with Words: The Effect of Incorporating ‘Climate Change’ into Development-Regulating Laws,” *Queensland Environmental Practice Reporter* 15, no. 70 (2010): 164–79.

⁵⁵ The well-known Dutch *Urgenda* decision, for example, has inspired copycat litigation in Belgium, Switzerland and Ireland and also had a tangible influence on the environmental advocacy community in Australia, despite significant differences between Australian common law and Dutch civil law. *Urgenda Foundation v. The State of the Netherlands*, HA ZA 13-1396, C/09/456689 (The Hague Dist. Ct., 2015). See Jacqueline Peel, Hari Osofsky, and Anita Foerster, “Shaping the Next Generation of Climate Change Litigation in Australia,” *Melbourne University Law Review* 41, no. 2 (2017): 805.

⁵⁶ While the *Juliana* lawsuit initiated in the United States in 2015 by twenty-one youth plaintiffs against the United States and several of its officers has yet to advance to trial, it is widely cited as an inspiration and model for other climate change litigation. *Juliana v United States*, No. 6:15-CV-01517-TC, 2016 WL 6661146 (D. Or. 10 November 2016).

⁵⁷ See Jacqueline Peel and Jolene Lin, “Transnational Climate Litigation: The Contribution of the Global South,” *American Journal of International Law* (2019): 55, DOI: 10.1017/ajil.2019.48.

⁵⁸ Kati Kulovesi, “Climate Change in the EU External Relations: Please Follow my Example (or I Might Force You to),” in *The External Environmental Policy of the European Union: EU and International Law Perspectives*, ed. Elisa Morgera (Cambridge: Cambridge University Press, 2012), 115–48.

⁵⁹ Anatole Boute, “The Impossible Transplant of the EU Emissions Trading Scheme: The Challenge of Energy Market Regulation,” *Transnational Environmental Law* 6, no. 1 (2017): 59–85.

⁶⁰ Natasha Affolder, “Transnational Carbon Contracting: Why Law’s Invisibility Matters,” in *The Politics of Private Transnational Governance by Contract*, ed. A. Claire Cutler and Thomas Dietz (London: Routledge, 2017), 225.

disclosure movement informed regulatory developments of institutions such as the Securities and Exchange Commission and the Environmental Protection Agency in the United States as they formalized carbon accounting standards.⁶¹

Yet despite all of this activity, the challenge remains of developing the terminology and frameworks capable of describing law's migrations so that they reflect the novel polycentric forms of normativity visible in climate law practice. The model of the 'legal transplant' continues to exert a powerful influence on both the vocabularies and the methods of tracing the movement of legal norms even though it fails to capture the forms of "borrowing," 'mimicking,' 'impregnation' and other forms of 'travelling'" that shape climate law developments.⁶² A singular language of diffusion or transfer risks obscuring the fact that the movements of legal ideas in question are diverse and multi-directional – ranging from the *Kyoto Protocol*'s borrowing of legal concepts from national pollution control law⁶³ to the circulation of legal norms through value chain contracting.⁶⁴ Post-colonial scholarship can make significant contributions here by turning the lens towards the particularity and historicity of human experience and challenging universal histories of law's movements across time and space.⁶⁵

Climate law moves in diverse and unexpected ways, but that does not mean that practices of dissemination and circulation of legal models are random or surprising. Legal reformers and entrepreneurs (both public and private) have for decades pioneered and funded legal readiness projects to provide templates for regulatory and legislative schemes that are 'shovel ready' for wider use in climate governance. These work to both advance, and retard, progressive climate legislation. For example, the American Legislative Exchange Council (ALEC)'s practice of supplying templates of ready-made model legislation such as "Environmental Literacy Improvement Acts" for state implementation has been a key strategy for institutionalizing climate denialism and doubt in US schools. Climate law advocates have themselves sought to harness ALEC's strategy by producing their own

⁶¹ David L. Levy, "Private Actors and Strategies in Global Environmental Governance: The Role of Information Disclosure," in *Handbook of Global Politics*, 2nd ed., ed. Peter Dauvergne (Cheltenham: Edward Elgar, 2012), 315.

⁶² Peer Zumbansen, "Law & Society and the Politics of Relevance: Facts and Field Boundaries in 'Transnational Legal Theory in Context,'" *No Foundations* 11 (2014): 3.

⁶³ Jonathan B. Wiener, "Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law," *Ecology Law Quarterly* 27, no. 4 (2001): 1297, 1308.

⁶⁴ For a rare attempt to place law at the centre of the analysis of what have historically been addressed as "economic structures," see The IGEP Law and Global Production Working Group, "The Role of Law in Global Value Chains: A Research Manifesto," *London Review of International Law* 4, no. 1 (2016): 58.

⁶⁵ For an example of the contributions of such work to literatures of the environment, see Elizabeth M. DeLoughrey and George B. Handley, eds., *Postcolonial Ecologies: Literatures of the Environment* (Oxford: Oxford University Press, 2011).

versions of a “playbook” for progressive climate policies “ready to be distributed, ALEC style, to local state and federal lawmakers.”⁶⁶ The movement of these models and prototypes extends far beyond state and national borders. Indeed, the production and transnational dissemination of policies for climate adaptation are climate governance strategies of many intergovernmental organizations.⁶⁷ Given the significant role of experimentation in climate governance⁶⁸ and the diversity of institutions with climate mandates, the production and circulation of models and prototypes of carbon regulation for ‘scaling up’ is a critical, but easily obscured, site of transnational legal activity.

2. *Interactions*

The task of tracing *migrations* of legal norms might mistakenly suggest that such migrations are unilateral and unidirectional and only manifest through legislation and judicial decisions. The practices of climate lawmaking speak to another reality, one of the complex *interaction* of legal processes, actors and norms. Transnational legal theory provides many entry points for exploring the significance of both the scale of interaction and the interacting entities involved.⁶⁹ Climate law scholarship illuminates in particular the multiple and sometimes hidden layers of regulation, as well as the deformalisation of climate law processes.⁷⁰ A challenge for lawyers is that there are often no obvious answers or solutions to be found by simply applying legal doctrine when discussing questions of hierarchy and the conflict or simple co-existence of norms in the legal landscapes governing climate issues today.⁷¹

Project-level studies of climate law transactions illustrate this reality up close. Tracing the relevant legal frameworks applicable to a Clean Development Mechanism project leads to a lengthy list of ‘relevant law’ ranging from international law sources, to the domestic law of the host country and possibly the purchasing country, to the key contract itself (the

⁶⁶ Jeremy Deaton “These Lawyers are Creating an ALEC for Climate Change” (Nexus Media, 1 April 2019), <https://nexusmedianews.com/these-lawyers-are-creating-an-alec-for-climate-change-67cbd081e828>.

⁶⁷ United Nations Development Programme, *Adaptation Policy Frameworks for Climate Change: Developing Strategies, Policies, and Measures*, ed. Bo Lim and Erika Spanger-Siegfried (Cambridge: Cambridge University Press, 2005); UN Habitat, *Planning for Climate Change: A Strategic, Values-Based Approach for Urban Planners* (Nairobi: UN Habitat, 2014).

⁶⁸ See Paula Kivimaa et al., “Experiments in Climate Governance – A Systematic Review of Research on Energy and Built Environment Transitions,” *Journal of Cleaner Production* 169 (2017): 17–29.

⁶⁹ For an analysis of transnational legal theory’s incomplete attempts to account for transnational business interactions, see Stepan Wood et al., “The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory,” *Transnational Legal Theory* 6, no. 2 (2015): 333–69.

⁷⁰ Kati Kulovesi, “Exploring the Landscape of Climate Law and Scholarship: Two Emerging Trends,” in *Climate Change and the Law*, ed. Erkki J. Hollo, Kati Kulovesi, and Michael Mehling (Dordrecht: Springer 2013), 31–62.

⁷¹ Veerle Heyvaert, *Transnational Environmental Regulation and Governance: Purpose, Strategies and Principles* (Cambridge: Cambridge University Press, 2019), 41.

Emissions Reduction Purchase Agreement) invoking both contract law and private international law rules, and specifically referencing formal or informal best practice standards, all the while subject to tax and accounting rules.⁷²

There are stark implications for teaching climate law that emerge from the reality that carbon contracting work demands diverse competencies across public international law, private international law, and business, tax and contract law, as well as up-to-date knowledge of the best practices and standards.⁷³ The legal backdrop to these transactions is complicated by the fact that the architecture for climate finance has evolved in a fragmented manner with overlapping treaties, organisations, and mechanisms providing rules and practices at global, regional, and national levels.⁷⁴ The need for lawyers who are able to appreciate the legal and financial complexities of carbon contract transactions while knowledgeably navigating the human rights obligations and implications of those transactions comes to light in particular through the study of REDD+ transactions.⁷⁵ Scholarship continues to illuminate the fact that climate change solutions, and not just climate change, can be disastrous for human rights.⁷⁶

Furthermore, the oft-contested terrain of climate finance and clean energy projects reveals that interactions between legal regimes are not always positive or synergistic. Mark Pollack and Gregory Shaffer's study of the interaction of transnational legal orders speaks to both processes of "antagonistic interaction" and the result of those processes – "increasing confusion rather than progressive development of law."⁷⁷ These interactions tend to elicit commentary attentive to the surface-level tensions that plague climate law's smooth and effective development and spread. Simmering not far below the surface of climate law are far deeper ideological conflicts.

⁷² Kati Kulovesi, "Exploring the Landscape of Climate Law and Scholarship," 36.

⁷³ For examples of the breadth of the legal terrain invoked by carbon contracting, see Affolder, "Transnational Carbon Contracting"; Katerina Peterkova Mitkidis, "Using Private Contracts for Climate Change Mitigation," *Groningen Journal of International Law* 2, no. 1 (2014): 54–80.

⁷⁴ Alexander Thompson, "The Global Regime for Climate Finance: Political and Legal Challenges," in *The Oxford Handbook of Climate Change Law*, ed. Kevin R. Gray, Richard Tarasofsky, and Cinnamon Carlarne (Oxford: Oxford University Press, 2016), 148.

⁷⁵ Sébastien Jodoin, *Forest Preservation in a Changing Climate* (Cambridge: Cambridge University Press, 2017), 38–39.

⁷⁶ See Sébastien Duyck, Sébastien Jodoin, and Alyssa Johl, "Integrating Human Rights in Global Climate Governance: An Introduction," in *Routledge Handbook of Human Rights and Climate Governance*, ed. Sébastien Duyck, Sébastien Jodoin, and Alyssa Johl (London: Routledge, 2018), 3–15.

⁷⁷ Mark A. Pollack and Gregory C. Shaffer, "The Interaction of Formal and Informal International Lawmaking," in *Informal International Lawmaking*, ed. Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters (Oxford: Oxford University Press, 2012), 262.

3. Revelations

William Twining's call for an adaptation of Western intellectual traditions to engage with new realities of global law has caused powerful ripples. This is not only the case in terms of the substance of emerging scholarship on the globalization of law, but through Twining's methodological modelling of the practices of humility, self-reflection and self-criticism.⁷⁸ Twining engages in a masterful exercise of revelation, peeling away the trappings of legal doctrine and legal methodology to reveal core assumptions embedded in the Western legal tradition. His work presents a timely challenge for climate lawyers to adopt a global gaze capable of extending across time, disciplines, cultures and legal structures to unearth their underlying assumptions.

Given that climate law is an abstract term used to describe diffuse legal phenomena, it is perhaps unsurprising that a search for climate law's epistemology and core underlying assumptions often leads to conflict and contestation. Climate law self-presents through both fears and aspirations. It is seen hopefully as providing the mechanisms to harness markets, correct their failures, and redirect economic activity. And it is seen fearfully as capable of reduction to the tasks of carbon market-facilitating institutions (contract, property and corporate forms) and responding to market asymmetries and dysfunctions. Climate law is seen to emerge at the "clash of civilizations" between climate justice and neoliberalism.⁷⁹ This incongruity makes it perhaps unsurprising that little is written about the assumed purpose of climate law.⁸⁰

Yet by engaging with existential threats⁸¹ and inadequate legal responses,⁸² climate law brings new and distinct pressure points to bear on the transnational law concept. It reveals how little attention traditional legal theory has paid to the fact that Western legal traditions

⁷⁸ See e.g. William Twining, *Globalisation and Legal Scholarship* (Nijmegen: Wolf Legal Publishers, 2011).

⁷⁹ Rosemary Lyster, "The Idea of (Climate) Justice, Neoliberalism, and the Talanoa Dialogue," 36.

⁸⁰ Stephens extends this query to question why international environmental law exists at all in the Anthropocene, when already "many of Earth's environmental systems have passed a point of no return." Tim Stephens, "What is the Point of International Environmental Law Scholarship in the Anthropocene?" in *Perspectives on Environmental Law Scholarship*, ed. Ole W. Pedersen (Cambridge: Cambridge University Press, 2018), 124.

⁸¹ David Wallace-Wells begins his book with the words: "It is worse, much worse, than you think." David Wallace-Wells, *The Uninhabitable Earth: Life After Warming* (New York: Tim Duggan Books, 2019) 3.

⁸² The inadequacies of interstate legal processes are often the real reason behind so-called 'innovative' forms of regulation attracting attention as transnational climate governance initiatives.

The emergence of so-called 'innovative' forms of regulation attracting attention as transnational climate governance initiatives are frequently traced to the inadequacies of interstate legal processes. See e.g. Kenneth W. Abbott, "Strengthening the Transnational Regime Complex for Climate Change," *Transnational Environmental Law* 3, no. 1 (2014): 57–88.

are predicated on exploitative views of the planet. Transnational legal theory, while increasingly alert to the ‘North-South’ cleavage, as well as the problems endemic in crudely framing the world into the Global North and Global South,⁸³ has been less attentive to the ‘them and us’ mentality that marks law’s treatment of the natural world.

Dipesh Chakrabarty asks whether “the climate crisis – as symptomatic of humanity’s ecological overshoot – also signals the first glimpse we might have of a possible limit to our very human-centered thinking about justice, and thus to our political thought as well.”⁸⁴ While international law scholarship has taken important steps in tracing the historical significance of exploitative visions of the environment for its own development, this legacy extends to the contemporary contexts where the transnational legal gaze often focuses.⁸⁵ The foundational importance for law of conceiving of nature as a resource comes into view through recent histories of neoliberalism, which detail the institutionalisation of a worldview contemplating “the earth as a vast territory of varying natural endowments that needed to be exploited as thoroughly as possible through the mobility of capital, labor, and commerce.”⁸⁶ This vision has occupied an enduring role in international law’s concept of natural environment as something to be exploited for human use.⁸⁷ TWAIL-inspired scholars have linked this historic view of the environment through to the realities of a present-day environmental agenda established by and around the priorities and concerns of affluent countries.⁸⁸ It is a view that clashes with an alternative vision brought forward by the realities of climate change – one of an intensely interdependent human-nature relationship.

⁸³ Julian Eckl and Ralph Weber, “North-South? Pitfalls of Dividing the World by Words,” *Third World Quarterly* 28, no. 1 (2007): 3–23.

⁸⁴ Dipesh Chakrabarty, “Whose Anthropocene? A Response,” in “Whose Anthropocene? Revisiting Dipesh Chakrabarty’s ‘Four Theses,’” ed. Robert Emmett and Thomas Lekan, *RCC Perspectives: Transformations in Environment and Society* 2016, no. 2: 109.

⁸⁵ For example, Karin Mickelson analyses how the legal subject of territory traces to an understanding of nature as “existing for the benefit of humans.” Karin Mickelson, “The Maps of International Law: Perceptions of Nature in the Classification of Territory,” *Leiden Journal of International Law* 27 (2014): 621–639; quoting 637.

⁸⁶ Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018), 107.

⁸⁷ Kishan Khoday et al., “Locating Nature: Making and Unmaking International Law: Introduction,” *Leiden Journal of International Law* 27 (2014): 571–72. Stephen Humphreys and Yoriko Otomo, “Theorising International Environmental Law,” in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford: Oxford University Press, 2016), 797–819.

⁸⁸ See Sumudu Atapattu and Carmen G. Gonzalez, “The North–South Divide in International Environmental Law: Framing the Issues,” in *International Environmental Law and the Global South*, ed. Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, and Jona Razzaque (Cambridge: Cambridge University Press, 2015), 2.

III. Methodological Challenges Facing Transnational Climate Law

1. The Negative Spaces: Unenvironmental Law and Unclean Energy Law

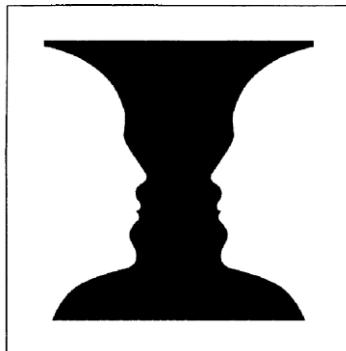


Figure 1: The two face, one vase illusion was developed around 1915 by the Danish psychologist Edgar Rubin. It illustrates the work of negative space, allowing the viewer a mental choice between two interpretations of an image. Ittelson, W. H. (1969). Visual Space Perception, Springer Publishing Company, LOCCCN 60-15818

This chapter has already noted the ways in which discussions of ‘climate law’ often default to focus on very recent legal initiatives manifesting through legislative change and judicial decisions, the constantly evolving international law and institutional architecture, and the climate governance initiatives emerging from networks and assemblages involving non-state actors that self-advertise their climate change focus. These defaults tend to capture explicit forms of rule-making responsive to historically recent climate change. Harder to conceptualise, but worthy of attention, are the vast arenas of law-related activity relevant to climate change that appear or work in the background free of any climate law packaging or self-advertisement.

The artistic concept of negative space has parallels in law that can assist with such an attempt to extend climate law’s content and scope. Negative space is the area between and around objects in an image or photograph. An awareness of negative space allows the core image to come more sharply into view, and reminds the viewer that perception involves choices of interpretation. In law, such an approach means looking outside and around the small amount of law conceived as ‘environmental law’ or ‘climate law’ to understand how other aspects of law-making consist of unenvironmental law or unclean energy law. This allows for a deeper inquiry into how legal systems perpetuate global warming and hamper

efforts to address it, such as through mechanisms of indirect or hidden support for fossil fuel activities.⁸⁹

Examples of unenvironmental or unclean energy law are not always evident. They often come to light gradually, as assumptions or defaults underlying common legal practices are identified and challenged. Environmental impact assessment law offers a fertile ground for studying these practices, as courts have affirmed the importance of analyzing the secondary climate impacts of approvals for projects such as coal mines.⁹⁰ Such decisions help to illuminate the ‘negative space’ of climate law, using environmental impact assessment law to acknowledge that the impact of a mine lies not only in its own carbon footprint, but includes the reality that the coal it produces will eventually be burned.

Transnational environmental law’s ongoing search for new methods lead to an expansion, and indeed a reimagining of what legal spaces are relevant to climate governance.⁹¹ Such spaces come to light through work identifying the obstacles to effective accountability for climate change-induced harms.⁹² They emerge through scholarship alert to how carbon market regulation risks overwhelming other aspects of ‘carbon law,’ constraining law’s role to the tasks of creating, supporting and occasionally disciplining ‘markets.’⁹³ They are revealed by approaching climate law as a social justice issue⁹⁴ and by challenging the tendency to premise legal responses to climate change “on forms of incremental managerialism and proceduralism” and “ticking boxes.”⁹⁵ It is this work of destabilizing received categories and concepts of law that reveals transnational law’s ability to bring into view alternative knowledges and the possibility of alternative futures.

⁸⁹ For an investigation of the economic forms of such subsidies, see Shelagh Whitley et al., *G7 Fossil Fuel Subsidy Scorecard: Tracking the Phase-Out of Fiscal Support and Public Finance for Oil, Gas and Coal*, (London: Overseas Development Institute, 2018), <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12222.pdf>.

⁹⁰ See *Gloucester Resources Ltd v. Minister for Planning*, [2019] NSWLEC 7; *Gray v. Minister for Planning*, [2006] NSWLEC 720, 152 LGERA 258.

⁹¹ See especially Elisa Morgera, Louisa Parks, and Mika Schröder, “Methodological Challenges of Transnational Environmental Law,” *BENELEX Working Paper No 21* (25 March 2019), DOI: 10.2139/ssrn.3359597.

⁹² Kim Bouwer, “The Unsexy Future of Climate Change Litigation,” *Journal of Environmental Law* 30, no. 3 (2018): 489–90.

⁹³ Climate finance is one example of this market-creation activity where law becomes relegated to the role of ‘regulator.’ Megan Bowman, *Banking on Climate Change: How Finance Actors and Transnational Regulatory Regimes are Responding* (Dordrecht: Kluwer, 2015).

⁹⁴ International Bar Association Task Force on Climate Change Justice and Human Rights, *Achieving Justice and Human Rights in an Era of Climate Disruption* (London: International Bar Association, 2014), 2.

⁹⁵ Philip Alston, *Climate Change and Poverty: Report of the Rapporteur on Extreme Poverty and Human Rights*, UNHRC, 41st Sess, A/HRC/41/39 (25 June 2019) at para 87.

To date, the study of transnational legal activity has focused predominantly on *space*, particularly by extending analysis beyond the nation-state, the “default container”⁹⁶ of legal study. Climate law scholarship has the power to challenge other forms of legal myopia, bringing into view boundaries and borders other than the territorial. Considering the complexity of climate change law and the vast workload to continually update the growing datasets mapping national and regional approaches to climate law,⁹⁷ it is easy to focus on legal regulation in a context of presentism and looming future threats.⁹⁸ Scholarship that seeks an understanding of climate crises from study of the very distant past illuminates how it may be a trait of only present-day environmental regulation to look to economists to define the universalizing models that will shape our future.⁹⁹ Longer-term historical narratives allow scholars to challenge the received wisdom on the history of climate change.¹⁰⁰ Such narratives teach contemporary climate activists “that their dissident views in fact represent a long tradition of contestation.”¹⁰¹

2. *The Place of Practice*

Transnational law offers the tantalizing potential of richly accounting for the lived realities of law through its practice. Philip Jessup addressed the need to better capture law’s practice in explaining the very need for transnational law. His invocation of the *practical* was multi-dimensional. It encompassed an approach of seeing law as a way of addressing the *problems* applicable to the “complex interrelated world community.”¹⁰² Appreciating these problems, and their potential solutions, required practitioner knowledge and the ability to transcend not only legal sub-disciplines but also to appreciate the relevance of extra-legal processes and sources of norms.¹⁰³ Jessup thus sought to align legal concepts with external

⁹⁶ Jo Guldi and David Armitage, *The History Manifesto* (Cambridge: Cambridge University Press, 2014), 15.

⁹⁷ See e.g. Daniel A. Farber and Marjan Peeters, eds., *Climate Change Law* (Cheltenham: Edward Elgar, 2016).

⁹⁸ For an exploration of law’s complicity in distancing people from nature’s biorhythms see Benjamin J. Richardson, *Time and Environmental Law: Telling Nature’s Time* (Cambridge: Cambridge University Press, 2017).

⁹⁹ Guldi and Armitage, *The History Manifesto*, 12.

¹⁰⁰ Dipesh Chakrabarty, “The Climate of History: Four Theses,” *Critical Inquiry* 35, no. 2 (2009): 197–222.

¹⁰¹ Guldi and Armitage, *The History Manifesto*, 35.

¹⁰² Jessup, *Transnational Law*, 1.

¹⁰³ “One notes that the problem of extracting and refining oil in Iran may involve - as it has - Iranian law, English law, and public international law. Procedurally it may involve - as it has - diplomatic negotiations, proceedings in the International Court of Justice and in the Security Council, business negotiations with and among oil companies, and action in the Iranian Majlis.” Ibid, 6.

“realities,”¹⁰⁴ suggesting that rules emanate from “practices” as diverse as those of General Motors, secret societies, towns, cities, or states.¹⁰⁵

In the sixty years since Jessup’s Storrs lecture, appeals to practice in legal scholarship have multiplied. The common vocabulary of *practice* and *practices* circulating through this scholarship may hide the fact that very different ideas are being invoked in appeals to practice. Indeed, as legal scholarship exhibits a growing comfort with sociolegal and ethnographic methodologies that seek to understand law through social practices, it remains difficult to elucidate whether the ‘practices’ being referred to are social practices, legal practices, or something else entirely. Unfortunately, the language of practice seems to be invoked somewhat more often than effort is put into articulating what is indicated by it.

Simply put, legal scholarship seems to have sidestepped the detailed methodological debates that have marked the “practice turns” in other disciplines such as international relations or history.¹⁰⁶ The consequence is that *legal* practice tends to be invoked as some non-contentious and non-political body of common knowledge without being subjected to the usual questions of legitimacy given to sources of law, and sources of knowledge about law. In this fashion, practice acquires an assumed rationality, rather than an up-for-debate one. The value of studying practices to reveal *unconscious* knowledges, which might be taken for granted or obscured, and *unseen* dynamics of socialization¹⁰⁷ remains no less relevant to current transnational law scholarship.¹⁰⁸

Climate law provides a poignant entry point into these debates. There is no debating the need for pragmatic and strategic legal interventions. Yet legal expertise in evolving fields such as climate engineering straddles challenging divides – calling for knowledge of technical processes, their long-term governance implications, and drawing on an

¹⁰⁴ Ibid, 7.

¹⁰⁵ Ibid, 9.

¹⁰⁶ Jorg Kustermans, “Parsing the Practice Turn: Practice, Practical Knowledge, Practices,” *Millennium: Journal of International Studies* 44, no. 2 (2016): 175–96.

¹⁰⁷ Theodore Schatzki, “Introduction: Practice Theory,” in *The Practice Turn in Contemporary Theory*, ed. Theodore Schatzki, Karin Knorr Cetina, and Eike von Savigny (London: Routledge, 2001), 13; Michael Polyakov, “Practice Theories: The Latest Turn in Historiography?” *Journal of the Philosophy of History* 6, no. 2 (2012): 219.

¹⁰⁸ For a rich collection of perspectives on the practice field of international law, see Wouter Werner, Marieke De Hoon, and Alexis Galán, eds., *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge: Cambridge University Press, 2017). This collection emerged from the insight that international law is partially “the product of the imagination of international lawyers.” Wouter Werner, Marieke de Hoon, and Alexis Galán, “Introduction: The Law of International Lawyers,” in *The Law of International Lawyers: Reading Martti Koskenniemi*, ed. Wouter Werner, Marieke de Hoon, and Alexis Galán (Cambridge: Cambridge University Press, 2017), 3.

understanding of ecological integrity and principles of social and environmental justice.¹⁰⁹ The particular knowledge, social practices, and contributions of climate lawyers are rarely the subject of legal texts,¹¹⁰ but the influence of these lawyers is indisputable.¹¹¹

Neil Walker's *Intimations of Global Law* (2015) represents a rare effort to see in legal practice "a reflection and expression of law's diverse content and resource set."¹¹² He explains:

Transnational lawyers are not merely the 'hired guns' of big business, though that is a significant part of the work of many and the defining function of some. They also possess a more versatile remit as a 'common carrier' of the wider range of client and broader constituency interests in regulation and litigation. The involvement of lawyers in transnational processes is not simply an expression of professional economic interest and power in globally expanded markets, therefore, but also speaks to their relationship to wider questions of public policy and social justice.¹¹³

Walker presents a kaleidoscopic account of the jurisgenerative activities through which transnational lawyers, including academic lawyers are "taking law to the world."¹¹⁴ This work challenges the myth of a faceless transnational realm. Instead, it populates that realm with the activities of globally inclined academics, judges and other legal experts who are "increasingly well placed to imagine new ways of framing, naming, patterning and projecting in global terms the unwieldy multiverse of transnational law to which they and their fellow legal specialists have done so much to contribute at the levels of practice, interpretation, drafting and design."¹¹⁵

¹⁰⁹ A. Neil Craik and William C. G. Burns, *Climate Engineering Under the Paris Agreement: A Legal and Policy Primer* (Waterloo: Centre for International Governance Innovation, 2016).

¹¹⁰ A possible source of inspiration for future work on this topic is Yves Dezelay and Bryant Garth's rich account of the role of United States law firms and lawyers in producing and exporting neoliberal economics, US-based conceptions of the state, and human rights law. Yves Dezelay and Bryant G. Garth, *The Internationalization of Palace Wars* (Chicago: University of Chicago Press, 2002).

¹¹¹ Highly visible contributions include Baker & McKenzie's creation of various climate law guides, including the influential online CDM Rulebook. "Baker & McKenzie launches online environment rule book," Lawyers Weekly, 3 April 2008, <https://www.lawyersweekly.com.au/news/616-baker-and-mckenzie-launches-online-environment-rul>.

¹¹² Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015), 33.

¹¹³ Ibid.

¹¹⁴ Ibid, 52.

¹¹⁵ Ibid, 53.

3. The Faceless Transnational

The spaces and rhythms of transnationalism favour a visual fix on processes, flows, networks, and governance arrangements that may be only partially tethered to people.¹¹⁶ This tendency towards abstraction manifests in many ways.¹¹⁷ It is evident in dominant vocabularies describing actors, ranging from non-state actors,¹¹⁸ to treatment of the Global South as a monolith,¹¹⁹ to the equally abstract concept of a climate migrant.¹²⁰ It is reflected in ways of identifying climate law's subjects as legal persons such as corporations, states, municipalities, or as abstract segments of society such as consumers or polluters or car drivers, rather than locating ourselves as critical subjects.¹²¹

While interdisciplinary inquiry is a critical aspect of climate law scholarship, such inquiry can be threatened by reductionist practices – practices involving reliance on truncated insights from ‘science’ or ‘economics,’ rather than acknowledging the complexity underlying scientific and economic thought and ways of knowing. The search for measurable outcomes of climate governance processes unsurprisingly privileges thinking of the world through measurable targets, goals, and units of greenhouse gas emissions. Carbon markets require the ability to attach a dollar amount to a unit of sequestered carbon, carbon kept out of the atmosphere for a specific period of time. The depoliticization of governance by indicators and other calculative practices is now well-explored in scholarship,¹²² but remains difficult to resist. The simplification and abstraction demanded by “measurementality” permeates law’s engagement with climate change as the science—

¹¹⁶ Valverde, *Chronotopes of Law*, 106.

¹¹⁷ For a deeper exploration of this theme, see Natasha Affolder, “Transnational Environmental Law’s Missing People.”

¹¹⁸ Philip Alston acknowledges the problems of lumping together non-state actors and defining them by what they are not. Philip Alston, “The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors,” in *Non-State Actors and Human Rights*, ed. Philip Alston (Oxford: Oxford University Press 2005), 3–36.

¹¹⁹ For a reminder that there is a ‘North’ in the ‘South’ and a ‘South’ in the ‘North,’ see Karin Mickelson, “Beyond a Politics of the Possible? South-North Relations and Climate Change,” *Melbourne Journal of International Law* 10, no. 2 (2009): 419.

¹²⁰ Dayna Nadine Scott and Adrian A. Smith, “The Abstract Subject of the Climate Migrant: Displaced by the Rising Tides of the Green Energy Economy,” *Journal of Human Rights and the Environment* 8, no. 1 (2017): 30–50.

¹²¹ Klaus Bosselmann, “Losing the Forest for the Trees: Environmental Reductionism in the Law,” *Sustainability* 2, no. 8 (2010): 2427.

¹²² See e.g. Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry, eds., *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford: Oxford University Press, 2012).

policy interface becomes tasked with generating user-friendly scientific knowledge that is considered politically and economically relevant.¹²³

Climate plans, climate strategies, and the creation of forms of greenhouse gas emission accounting require particular forms of scientific and economic knowledge created by expert groups. Lawyers occupy key roles in creating the blueprints of climate law governance, participating in global technical expert groups, chairing committees, and drafting and editing committee reports. These mechanisms of generating climate law norms, which incorporate public and private institutions, are encapsulated in practices of ‘law-making’ that, as Martti Koskenniemi argues, represent a shift from the task of ‘legislating’:

The most important ‘laws’ in Europe or the world are not those enacted in parliaments but those managed by economic or technical experts so as to avoid collapse but ultimately so as to produce optimal outcomes. In this optimistic understanding, laws are not about what we ‘want’ but what we ‘know’ about the world: they declare truths that scientists, economists and technical experts have uncovered or will do so in the nearest future.¹²⁴

The rhythms of carbon accounting that animate approaches to climate law-making contrast sharply with the rhythms of social and environmental interconnectedness and the realities of actual people and places, which human rights approaches seek to acknowledge.¹²⁵ The temporal dimensions of climate law governance, combining a fixation with mapping the polycentric reality of very recent and emerging governance arrangements and an ever-looming yet unknown future, further shifts our gaze towards the abstract.

The carbon atom has become the central organizing logic, the faceless abstract entity that has mobilized the transformation of law and governance canvassed in this chapter. And yet, transnational law theory continues to focus on disruptions caused by shifting conceptions of the state, with only occasional acknowledgement of the consequences for law of the disruptions caused by recent human interference with the Earth’s systems, geophysical processes and cycles. The intrusion of earthly life into debates about the

¹²³ Esther Turnhout, Katja Neves and Elisa de Lijster, “‘Measurementality’ in Biodiversity Governance: Knowledge, Transparency, and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES),” *Environment and Planning* 46, no. 3 (2014): 581–97.

¹²⁴ Martti Koskenniemi, “Declaratory Legislation: Towards a Genealogy of Neoliberal Legalism,” in *International Law-Making: Essays in Honour of Jan Klabbers*, ed. Rain Liivoja and Jarna Petman (London: Routledge, 2014), 19.

¹²⁵ See e.g. Joe Alizzi, “The Logic of Industrial Capitalism versus the Logic of Inuit Thinking – Denied Interconnectedness and How it Inhibits Broad-Based Action in the Human Rights and Environmental Spaces,” *Journal of Human Rights and the Environment* 8, no. 1 (2017): 139–67.

changing contours of political community represents “a far more radical challenge than the postulation of the supposedly ‘post-sovereign’ conditions of late modernity.”¹²⁶ But the types of lively debates the concept of ‘the Anthropocene’ has fostered in the natural and social sciences have yet to significantly influence the direction of transnational legal scholarship.¹²⁷ Even as legal thinking turns to draw on Earth systems governance¹²⁸ and new forms of planetary politics that acknowledge the Earth as “a new political actor,”¹²⁹ the reliance on abstractions does not go away, but simply shifts focus. The new boundaries brought into view are planetary ones, the epistemological binary under threat is the human–nature divide, and the carbon atom becomes a powerful new form around which life is both calculated and politicised.¹³⁰

Concluding Thoughts

The ecological overshoot of humanity requires us to both zoom into the details of intra-human injustice—otherwise we do not see the suffering of many humans—and to zoom out of that history, or else we do not see the suffering of other species and, in a manner of speaking, of the planet.¹³¹

Transnational climate law offers a particularly rich opportunity for such zooming in and zooming out. While the term transnational climate law may only be an abstract label bringing into view disparate processes of lawmaking, the term is broad enough to allow investigation of law’s border crossing travels, and its boundary-piercing nature. While climate law scholarship still privileges positivist accounts of law by counting new examples of federal legislation and providing extended commentary on climate lawsuits, the reality of climate law-making in other venues including carbon markets, consumer approaches, expert committees, carbon disclosures, and human rights indicators, is far from hidden. Transnational law scholarship has problematized the shifts propelled by these

¹²⁶ Daniel Matthews, “From Global to Anthropocenic Assemblages: Re-Thinking Territory, Authority and Rights in the New Climatic Regime,” *The Modern Law Review* 82, no. 4 (2019): 690.

¹²⁷ This scholarship has much to contribute to legal debates. See e.g. Scott Hamilton, “The Measure of All Things? The Anthropocene as a Global Biopolitics of Carbon,” *European Journal of International Relations* 24, no. 1 (2018): 33–57.

¹²⁸ See e.g. Frank Biermann, *Earth System Governance: World Politics in the Anthropocene* (Cambridge, MA: MIT Press, 2014); Oran R. Young, *Governing Complex Systems: Social Capital for the Anthropocene* (Cambridge, MA: MIT Press, 2017).

¹²⁹ Bruno Latour, *Down to Earth: Politics in the New Climatic Regime*, trans. Catherine Porter (Cambridge: Polity, 2017), 40.

¹³⁰ “Nature in the Anthropocene... privileges the human subject above all else by conceptualising and inserting carbon – the essence of all life, *and* the human – at every spatial and temporal scale.” Hamilton, “The Measure of All Things,” 35. Planetary boundaries define the operating space and core target corridors for human development, and thus serve as a critical element of earth system governance. See Biermann, *Earth System Governance*, 6–10.

¹³¹ Chakrabarty, “Whose Anthropocene? A Response,” 111.

realities, the related assumption of core governance functions by non-state actors, and the asymmetries of knowledge and power that underlie many carbon projects and transactions. While climate governance tends to focus on the present and near-future, scholars are beginning to explore law's complicity in entrenching the "carbon footprint" that "haunts every step of the history of industrial and colonial expansion of the last centuries."¹³²

Bruno Latour's *Down to Earth: Politics in the New Climatic Regime* (2012) draws attention to the last century's social movements' massive and profound failure to connect the dots between social and environmental conflicts.¹³³ This work challenges scholars to explain not only the complicated current terrain of transnational lawmaking, but the legal transformations that have not taken place. The non-occurrence of transformative climate law may indeed be one of the consequences of leaving unchallenged a particular and dominant vision of law, one whose solitudes continue to separate the environment from the social.

Writing about climate law is, and may well remain, a rather miserable endeavor. It may be useful to explore why this is the case. A subject as broad and disparate as climate lawmaking means writing in a context where the problems of massive incompleteness of knowledge, outdatedness, narrowness, and pointlessness are one's constant companions. Accusations of alarmism co-exist with the ever-present threat that one is recklessly underplaying what is at stake. Transnational climate law takes some steps towards addressing these challenges. It brings into view shifting territorial as well as conceptual spaces of law-making. Yet it leaves the boundary separating Humans from Nature largely intact, and the planetary boundaries that define law's operating space still largely unacknowledged.

¹³² Stephen Humphreys, "Climate Justice: The Claim of the Past," *Journal of Human Rights and the Environment* 5 (2014): 147.

¹³³ Latour, *Down to Earth*, 56–58.