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What Is Transnational Law?

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VON DANIELS, DETLEF. 2010. *The Concept of Law from a Transnational Perspective*. Burlington, VT/Farnham, UK: Ashgate Publishing. Pp. x + 225. $119.95 cloth.

CALLIESS, GRALF-PETER, and PEER ZUMBANSEN. 2010. *Rough Consensus and Running Code: A Theory of Transnational Private Law*. Portland, OR/Oxford: Hart Publishing. Pp. xvi + 366. $75.00 cloth.

Is it important to conceptualize transnational law and "map" it as a new legal field? This article suggests that to do so might help both juristic practice and sociolegal scholarship in organizing, linking, and comparing disparate but increasingly significant types of regulation. To explore the idea of transnational law is to raise basic questions about the nature of both "law" and "society" (taken as the realm law regulates). This involves radically rethinking relationships between the public and the private, between law and state, and between different sources of law and legal authority. Taking as its focus Von Daniels's The Concept of Law from a Transnational Perspective and Calliess and Zumbansen's Rough Consensus and Running Code (both 2010), the article considers what approaches may be most productive, and what key issues need to be addressed, to make sense of broad trends in law's extension beyond the boundaries of nation-states.

THE SCOPE OF TRANSNATIONAL REGULATION

The idea that law has "spilled out" beyond the borders of the nation-state is now commonplace. Merchant communities that operate across national borders make regulation that effectively binds them as law in their dealings with each other. Europeans are now used to the idea that much of their law comes not from their own nation-state sources but from Europe-wide institutions. International criminal justice increasingly claims to reach out to catch gross violators of human rights irrespective of the state they happen to be in or the place of their alleged crimes. Judges in different nations draw on each other's ideas in what are beginning to appear as transnational judicial communities. Conventions authorized by international law create rights and duties for people in cross-border relationships. Human rights instruments and agencies carry legal ideas around the world, creating new expectations of rights and protections not limited by national borders.

For many scholars, a new term has seemed necessary to indicate new legal relations, influences, controls, regimes, doctrines, and systems that are not those of

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nation-state (municipal) law but, equally, are not fully grasped by extended definitions of the scope of international law. The new term is "transnational law," widely invoked but rarely defined with much precision.

Often, the term refers to extensions of jurisdiction across nation-state boundaries, so that people, corporations, public or private agencies, and organizations are addressed or directly affected by regulation originating outside the territorial jurisdiction of the nation-state in which they are situated, or interpreted or validated by authorities external to it. Sometimes, it refers to regulation guaranteed neither by nation-state agencies, nor by international legal institutions or instruments such as treaties or conventions. Sometimes, it signals a space for regulation not yet (fully) existing but for which a need is felt in cross-border interactions.

The international lawyer Philip Jessup wrote that transnational law includes "all law which regulates actions or events that transcend national frontiers" (Jessup 2006, 45). In his view, national and international law would be part of it insofar as they have these effects, and it could address both public (state and governmental) and private (nongovernmental, civil society) actors (Tietje and Nowrot 2006). However, other writers treat transnational law as conceptually distinct from national and international law because its primary sources and addressees are neither nation-state agencies nor international institutions founded on treaties or conventions, but private (individual, corporate, or collective) actors involved in transnational relations (for discussion, see Zumbansen 2002; Calliess 2007, 476).

Another controversy is as to whether substance or procedure should be emphasized. Is transnational law primarily made up of rules applying directly across national borders, or is it mainly coordinating regulation harmonizing or linking substantive rules that may differ between states? The latter suggests a pluralistic approach (Berman 2007) recognizing and preserving legal difference but smoothing interactions between legal regimes—a kind of transnational conflict of laws system. Its main focus might be procedural. The substantive approach, by contrast, could envisage convergence in regulation, a potentially monistic approach, a "universalist harmonization" (Berman 2007, 1164, 1189–91) in which transnational law aims at a gradual spread of legal uniformity across national boundaries, and moves toward a "world law" (cf. Berman 1995). Perhaps more realistically, it might emphasize the way regulatory regimes seek uniformity across limited (usually functionally defined) transnational operational spheres.

Thus, basic questions about transnational law remain. First, does this law still rely fundamentally on nation-state law and international law (the latter supported by and recognizing the sovereignty of states), or does it entail a new relationship between law and state—in which some sources of law now exist entirely outside the ambit of state authority? Second, if transnational law regulates transnational relations, are these specifically the relations of individuals, corporations, and associations in civil society or, as Jessup thought, can it also embrace relations involving state and governmental agencies? In other words, is it centrally transnational *private* law, or is that too narrow a conception? Third, is transnational law building a new regime (or regimes) of substantive law existing alongside state law; or is it mainly a procedural, coordinating law, linking state and other legal regimes to serve transnational networks? Does it point toward a gradual transnational unification of regulation, or must

it remain a vast array of intersecting, often conflicting, regulatory regimes (see, e.g., Snyder 1999)?

These questions defy conclusive answers. However, areas of established or embryonic regulation often associated with transnational law can easily be listed. Individually, many items on the list might be assigned to traditional legal categories (municipal law, international law, nonlegal regulation) but, taken together, perhaps they imply a change in the legal landscape, if only because of the vast regulatory scope they cover. The list could include international human rights law, international criminal law, international trade law, international financial law, international environmental law, Internet regulation, international commercial arbitration practice and the transnational regulation of merchant communities (*lex mercatoria*), EU law, the law of the World Trade Organization, private self-regulation in transnational industries, and transnational corporate governance codes or principles.

Equally available for consideration is a mass of regulation (guidelines, standards, norms, principles, and codes, together with procedures for norm creation, adjudication, and enforcement) established by associations, nongovernmental organizations, and administrative agencies, in addition to the "internal" collective regulation of transnational corporations and corporate groups. Finally, also in the mix of transnational legal phenomena could be the extraterritorial application and effects of national laws, as well as extradition practices, by which the practical reach of national jurisdiction is extended into foreign states.

THE VALUE OF MODELS AND MAPS

The range of all this is surely disconcerting. Is transnational law a category at all? And is it all "law"? Lawyers often quickly make judgments as to what is and is not law in such a motley regulatory mix. They judge on the basis of common understandings about the concept of law, probably most centrally the idea that all law is, in one way or another, the *law of the nation-state*. If international law is significant as law, a matter that even now is not universally assumed (Goldsmith and Posner 2005; cf. Berman 2006), this is often on the basis that it is a projection of the sovereignty of nation-states (which authorize the making of treaties and international conventions and the recognition—explicitly or through their practice—of international customary norms). From this viewpoint, transnational law, when properly called law, is an extension of national sovereign jurisdictions, or the creation (through recognized mechanisms of international law) of law by international agencies or through international instruments ultimately validated by the express or tacit authority of sovereign states. Viewed in such a perspective, a category of transnational law apart from municipal or international law might seem redundant.

However, the range and variety of regulation operating beyond nation-state boundaries may now have become so considerable and its impact so substantial that a different view is needed. To invoke an idea of transnational law is to suggest that law has new sources, locations, and bases of authority. Adding "transnational" to "law" is like adding a question mark: querying modern Western jurisprudence's state-centered understanding of law. It is also to query whether ideas and methods in international law

need revising (see, e.g., Koh 1996; Berman 2005), to accelerate the ongoing development of this field away from its traditional focus on the relations of states, toward a broad concern with the regulatory problems of international society.

Is it enough to look merely at *specific* fields of regulation—for example, international criminal justice or *lex mercatoria*—and ignore any *general* category of transnational law? In this article, with two sharply contrasting books as reference points, the problems of analyzing transnational law as a general idea are the focus of attention. My interests are in both law and society studies and legal theory, and for someone with such a background an attempt to conceptualize this new field (if that is what it is) can hold attractions. Perhaps it might help to solve some basic problems of legal theory—allowing a better understanding of the changing nature of law as an idea, as well as some of its seemingly enduring features.

From a law and society standpoint, a general inquiry about the nature of transnational law might offer a *framework* for comparing empirical sociolegal studies in different cross-border contexts. If a useful *model* of transnational law could be devised—a working notion of what might link together social phenomena under this conceptual label—perhaps the possibilities of relating together studies of transnational legal developments in seemingly disparate areas could be enhanced. Theoretical interpretations of historical sociolegal developments in diverse fields—viewed through a "transnational" lens—might show commonalities or interesting parallels and divergences otherwise missed. For the law and society scholar, the use of a concept of transnational law could help guide the selection of problems for empirical study and the formulation of hypotheses. It could help in mapping a field of phenomena and organizing ideas (to be tested in research) about their nature.

But *juristic* interests in a concept of transnational law are likely to be very different. For the jurist and practical lawyer, crucial issues may be about conflicts of laws and of legal authorities. Is it becoming harder to identify valid law in a transnational context? Juristically, what is to be made of "soft law"[1] (often linked to legal authorities but ambivalent in its legal significance)? Is it an irrelevance or a confusion in strictly legal terms, or something whose half-hearted designation as law (but not "hard" or enforceable law) suggests that *some* account has to be taken of it, if only as doctrine (rules, principles, guidelines, etc.) perhaps *on the way to becoming law* and acquiring some legal authority. Perhaps the potential proliferation of kinds of legal authority (and the dilemma of navigating within them) is what really suggests to some jurists a need for conceptual mapping in this area.

Closely related may be concerns about the "de-formalization" and "fragmentation" of established legal regimes (and so of their authority), noted especially by scholars and practitioners of contemporary international law (Higgins 2006; Michaels 2009, 249; Calliess and Zumbansen 2010, 271). But fragmentation seems a growing feature of law in general, so that the concept of legal pluralism, its use once largely confined to sociolegal scholars and especially legal anthropologists, is now part of the everyday discourse of well-informed jurists (Berman 2009; Michaels 2009). In a situation in

1. Usefully defined as "regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions" (Di Robilant 2006, 499).

which old ideas of unity and system in law are insecure (Graver 1990), the need to find new ways to interpret and manage legal complexity juristically is easily felt.

Practicing lawyers, as a professional group, and the community of law and society scholars both have an interest in getting a sense of the whole range of law so as to be able to order and develop their activities in this realm of "the legal." As researchers on law (even if with contrasting purposes), they need a way to orient themselves to the changing character of sociolegal phenomena. To adopt John Austin's metaphor in defending his idea of a general jurisprudence, they need *a map of law*—a chart to give perspective on its range and structure (Austin 1885, 1082) and the lines of its past, present, and likely future development.

So the idea of conceptualizing transnational law to provide a map of law's changing scope and features makes sense in both juristic and sociolegal contexts. Admittedly, Austin saw law mapping as important for newcomer law students, but perhaps he was just flattering his legally knowledgeable audiences by not claiming that they had the same needs. Indeed, since probably most nonspecialist lawyers and law and society scholars are relative newcomers in confronting current transnational regulation as a whole, the idea of the map to provide basic bearings seems very relevant.

TRANSNATIONAL LAW IN LEGAL PHILOSOPHY

For a legal philosopher, the aim in trying to conceptualize transnational law could be very different from that of the lawyer or sociolegal scholar. For Detlef Von Daniels (2010, 4), for example, the development of "a concept of law from a transnational perspective" is "a way to save jurisprudence as a philosophical discipline." The stakes are that high. Since conceptual study of law has been so central to legal philosophy (insofar as it has aimed to develop philosophical theories of the nature of law), the issue is whether legal philosophy's explanations of law can cope with the new (or newly prominent) phenomena of transnational law, or whether its ignoring of these phenomena (one of Von Daniels's key complaints) undermines the whole legal theoretical house of cards that the philosophers have built.

Can legal philosophy's existing resources encompass transnational law? More precisely, can the concept of law, endlessly refined and disputed in legal philosophy, be made to embrace legal transnationalism; that is, law no longer understood in its "central case" as being state law? As Von Daniels (2010) notes, legal philosophers today almost always think in terms of nation-state law (138). Whatever their internal disagreements, their scope of argument typically stays inside this intellectual box.

Even international law receives scant attention in the current literature of legal philosophy. More fundamentally, the kinds of phenomena that writers on transnational law attach much attention to—"private" legal regimes (existing apart from the public authority of the state and international law), transnational agencies, institutions, obligations and jurisdictions, and the influence of nonstate actors on the creation and guaranteeing of regulation—do not even figure on the horizon of interest of most legal philosophers (see Von Daniels 2010, 1). In this respect, much Anglo-American legal philosophy is out of step not only with social science, which addresses, for example, the growth of cosmopolitan regulation (see, e.g., Held 2010),

but also with broader approaches in moral and social philosophy (see, e.g., Gould 2007).

A few scholars, rather than merely giving up on legal philosophy's myopic character, have tried to do something about it, for example by considering challenges for legal philosophy posed by legal pluralism (Melissaris 2009; Culver and Giudice 2010), or by the legal structures of the European Union (e.g., MacCormick 1993; Barber 2006). Most interestingly, however, Von Daniels's book *The Concept of Law from a Transnational Perspective* (2010) undertakes a "systematic reconstruction" (87) of H. L. A. Hart's legal theory to extend its reach beyond state law. In this way it tries to adapt one of the most central strands of existing Anglo-American legal philosophy to embrace transnational law.

I suggest that more enlightenment for law and society researchers is to be expected from social-scientifically-oriented juristic inquiry (exemplified by the second book on which this article will focus) than from legal philosophy. Nevertheless, Von Daniels's discussion indirectly suggests ideas that need to be considered in modeling transnational law as a focus of sociolegal research. Law and society studies and juristic inquiries should not become embroiled in debates about what law in some timeless sense "really" is. But a provisional model of transnational law, developed solely to aid empirical research and help to orient regulatory practice—that is, to map a field that still needs exploring—might draw lessons from the conceptual travails of legal philosophy. This is what Von Daniels's book offers here.

The first half of his text focuses not on Hart but on Jürgen Habermas, whom Von Daniels sees as important for having tried to conceptualize law in a broad sociohistorical context. The discussion covers much ground, but Von Daniels's key argument is that, for all the richness of Habermas's contextualization of legal development in Western history, he does not provide a sufficiently nuanced and inclusive concept of law. Habermas fails to recognize the sheer variety of legal regimes (including merchant law and canon law existing in ambiguous relations with the state), and no unambiguous view of law arises from his writings as a whole.[2]

Overall, Von Daniels's discussion of Habermas looks like a ground-clearing exercise—historical inquiry is revealed as no substitute for conceptual study in philosophy. He subjects Hart's concept of law to equally serious (if very different) criticisms. But whereas, in time-honored legal philosophical fashion, the criticism of Habermas clears the way for an entirely "fresh start" (cf. Hart 1994, 79) taking little from what has been critiqued, the criticism of Hart justifies a sympathetic "systematic reconstruction" of Hart's concept of law, which provides the main focus of Von Daniels's book.

The key stages in the argument can be briefly sketched. Hart's concept of law is widely understood as "the union of primary and secondary rules" (Hart 1994, 79). However, Von Daniels thinks a regime of primary (obligation-imposing) rules alone could amount to "law," and Hart's theory would allow law in embryonic form to be

2. Why this elaborate study of Habermas is included is ultimately not very clear. The main point seems to be that a sociohistorical account of law (1) is flawed if it fails to recognize the great diversity of state and nonstate forms of law revealed by legal and political history, and (2) cannot avoid the need for a serious conceptual inquiry about the nature of law. The absence of such an inquiry in Habermas's work leads to shifting, inconsistent sociopolitical images of law.

thought of in these terms, although Hart himself did not develop this possibility. Von Daniels argues, however, that certain conditions, which Hart did not identify, are necessary for primary rules to be identified as law. The rules would have to be (1) always multilateral (referring to judgments of proper behavior relating to a *group*, not just expressing an individual's personal moral convictions), (2) decisive (unlike moral rules that can be surrounded by ambiguity), and (3) "justice apt"—that is, concerned with "the right and proper thing to do," "the done thing," or what is "fair" (2010, 101). These conditions would identify "the legal" in some basic way.

What then of Hart's secondary rules, which supplement and procedurally support the primary rules? Their function, for Von Daniels, is to *institutionalize practices*, including the practice of primary rules. But, importantly, he notes that the use of secondary rules is not confined to law, and so secondary rules cannot serve the role Hart assigns to them of identifying a central and distinctive component of law. They are a feature of institutionalization in many organizations (Von Daniels 2010, 113–16).[3] The union of primary and secondary rules is needed to institutionalize and develop law with elaborate agencies and practices (and not just in the nation-state, but also in subnational and transnational contexts), but it is not essential for the *existence* of law. Primary rules (subject to the three conditions indicated) identify law; secondary rules do not (though they are practically necessary for any developed legal regime).

However, because there can be a variety of legal systems or regimes interacting in the transnational environment, it is important, in Von Daniels's view, to envisage a third category of rules, which he calls linkage rules. These are hinted at by Hart (but not developed) in discussing relations between international regimes. They (1) allow the (purported) validation, by one system, of rules in another; (2) allow the completion, by one system, of rules established in another; and (3) allow the recognition of rules of one system by another or the delegation of rule-creating powers between systems.[4]

LAW AS INSTITUTIONALIZED DOCTRINE

For Von Daniels, this conceptual structure allows wide recognition of many kinds of transnational regulation as law, and of processes for ordering their relations. He also makes brief, relatively undeveloped remarks about the kinds of sanctions that can be used in different kinds of legal regimes, and about different kinds of moral judgments that could bear on the comparison of regulatory regimes.

Here, just two possible areas of criticism of his thesis will be outlined, one in relation to his use of Hart, the other in relation to his own view of law. As regards the former, he claims that the idea that primary rules alone could be an embryonic form of law "is not contrary to Hart's writings" (87) but merely undeveloped in them. Later, Von Daniels's claim is firmer: Hart's interpretation is "that a simple regime of primary law

3. The point has been made before (see Colvin 1978, 201).

4. Von Daniels claims that, unlike primary and secondary rules, linkage rules are not accessible to members of a legal system from a Hartian "internal" point of view but only as a matter of "external" description because, by definition, they operate *between* legal systems. "Only a descriptive legal theory can demonstrate that all legal systems are interwoven into a net of legal systems . . . of which the official legal discourse [of a single system] captures only a part" (Von Daniels 2010, 163).

can be identified as a legal one" (143). But this is surely simply wrong. Hart (1994, 94–95) is explicit: the introduction of secondary rules marks the transition from a *prelegal* to a legal regime. A regime of social rules *needs this union* if it is to be clearly recognizable as law. Although Von Daniels (2010, 143) thinks that international law (which, in Hart's view, is basically just a set of primary rules) is law for Hart, in fact Hart carefully avoids any such claim and treats ordinary usage of the term "international *law*" as based only on an "analogy" with law understood in the conceptually adequate sense (Hart 1994, 237; Payandeh 2010).

Von Daniels is right to say that the union of primary and secondary rules is not, in itself, an idea that adequately distinguishes law from other institutions or regimes, but this fundamental problem should not lead to rewriting Hart to make it appear that primary rules alone can be the basic idea of law for him. Hart does not set out to offer a definition of law, but he does want to suggest that the union of primary and secondary rules is at the *center* of law as an idea, and that it provides a key insight for legal theory (Hart 1994, 98–99). If the union of primary and secondary rules is displaced from the center of the concept of law, there is nothing else to take its place in Hart's thought. If Hart's insight presents difficulties, what is needed (if the aim is to build on his work) is to consider whether the insight can be adapted to be more useful, not to claim that an entirely different founding idea (law as primary rules) *which is not Hart's* can be a legitimate basis for reconstructing his theory.

As noted earlier, Von Daniels's own view of law in embryo form is as primary rules that are "multilateral," "decisive," and "justice apt." But each of these three claimed marks of the legal is problematic. As regards the last, "reference to justice" is "a primary indication of something being a legal rule" but instead of "justice," one "could use the word 'fair', [or] call a behaviour 'the right and proper thing to do', or even just 'the done thing,' signalling that the rules belong to the 'legal realm'" (101). He uses this criterion to distinguish legal rules from mere etiquette rules, but the reference to the "proper thing" or "done thing" could easily embrace rules of etiquette. And, while "fairness" is unfortunately *not* an essential attribute of legal rules, it can be a basis for moral judgments. So the "justice apt" criterion remains mysterious. Nevertheless, Von Daniels's other two criteria of the legal are more significant in the context of this article because their problems point to more constructive analyses.

First, what does multilateral mean? The idea is that legal rules depend on commitment to them by the *group* to which they relate, whereas moral rules could be adopted by an individual without reference to other people as a purely personal conviction (Von Daniels 2010, 103). However, it is not clear that this difference in attitudes to legal and morals always necessarily applies. One could feel obligated to a legal rule as a matter of personal conviction, even if others did not. Is the point, rather, that legal rules have been collectively affirmed *by the group*, whereas moral rules may not have been? Surely the issue is not "unilateral versus multilateral," but that for *law* the group (not each individual member) sets in place or affirms the rules. But that requires the recognition of some agency to establish, guarantee, or interpret rules (even if this is an organization of the group as a whole). This is a matter that, in Hartian terms, entails the use of secondary rules.

Second, Von Daniels claims that what ultimately distinguishes legal from moral rules is that legal rules are decisive (105). But again, for this to be true, in a way that is

different from the decisiveness of settled group morality, there will be a need for "official" practices that make law decisive. Legal rules can be decisive in the face of disagreement or challenge only when agencies of some kind are available to formulate these rules, adjudicate and interpret them, or take steps to enforce them. Hart saw the need for secondary rules in precisely this context.

What this points to is the centrality of *institutionalization* of rules through established practices of managing them. Von Daniels sees nothing specifically "legal" about institutionalization. To link it specifically to law, it would be necessary to focus on the existence of agencies specifically tasked with creating, interpreting, or enforcing primary rules. But for Von Daniels (113–14), the problem would remain: how to link these institutional practices conceptually. In Hart's terms the problem would be how to explain what makes secondary rules a conceptually coherent category. The matter is surely unanswerable as a philosophical problem; that is, a problem of identifying the essence of law without reference to law's variability in its sociohistorical contexts. But what if Hart's concept of law is contextualized: that is, adapted to make it a model for use in sociohistorical inquiry about kinds of regulation that could be associated with law? Then various questions would arise.

First, why limit regulation to rules? As noted earlier, what is discussed in the context of transnational law often includes much more than rules (guidelines, principles, concepts, etc.). Why not think in terms of "doctrine," a wider concept than rules and one implying many kinds of normative ideas? Second, why not abandon the dilemma of conceptualizing secondary rules as a category and, instead, merely look (via empirical sociohistorical inquiries) for the existence of some agencies specifically concerned with creating, interpreting, and enforcing doctrine? Why not abandon the philosophical search for the essential legal attributes of primary rules (Von Daniels) or of a union of primary and secondary rules (Hart)? Instead, why not treat the idea of *institutionalized doctrine* as a sufficient model of "the legal" for the purposes of research (Cotterrell 1995, 23–40), recognizing that this doctrine may take various forms and be institutionalized to varying degrees? Finally, why not recognize that agencies for making, interpreting, or enforcing law do not necessarily depend on rules? As Max Weber (1978, 215–16, 226–54) famously showed, the authoritative practice of such agencies can be based instead, in some circumstances, on tradition or charisma.

One might not find agencies in existence fulfilling *all* the institutional tasks of identifying, creating, interpreting, and enforcing doctrine, but only some of these tasks. A useful model of law might then properly suggest that the legal character of transnational regulation can be a *matter of degree*, that some regulation may be more or less recognizable as law; more or less comparable as legal; more or less likely to attract authority and legitimacy as law. The issue would be how far doctrine exists and has been institutionalized in the senses discussed above.[5]

5. It has been suggested to me that the word "doctrine" in this context might seem to have too formal a connotation. However, I think that it usefully encompasses normative ideas that, even if they may be very unlike formal rules of state law, can be similarly expounded, organized, or interpreted.

PRIVATE AND PUBLIC IN TRANSNATIONAL REGULATION

Gralf-Peter Calliess and Peer Zumbansen's book *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010) provides much material for applying this sketchy idea of law as institutionalized doctrine, though they do not explicitly adopt this idea. It might be asked immediately: Why "private" law? The answer is not at first sight obvious. One of their main themes is that public and private cannot realistically be separated, yet the designations public and private can still be of use. In their view, anything that can be recognized as law, even if developed essentially by "private" actors such as traders in transnational commercial networks (as *lex mercatoria*) or corporations and corporate groups (as transnationally operating norms of corporate social responsibility), will have important public aspects.

The point seems to be that "public" here draws in governmental or governance aspects that go beyond a mere compromising of private interests in transnationally operating groups or networks. The "private" in transnational law suggests that the dynamo of norm production, development, interpretation, and enforcement is primarily located with civil society actors, rather than public authorities of the state or public international law. And the kinds of matters regulated are those that (if legally relevant at all) would be the concern of municipal private law if they were limited within the jurisdiction of the nation-state.

The examples on which Calliess and Zumbansen focus are the regulation of corporations and their relations with civil society, regulation governing the practice of transnational merchant groups, governance frameworks for e-commerce between business and consumers, and transnational technical standard setting. More significant than legislation by state authorities or international agencies is often the working out of regulatory practices in social (especially economic) interaction within networks of individuals, corporations, organizations, and associations. Yet, echoing many other writers in this field, Calliess and Zumbansen emphasize that state authority is still important in many contexts.

Corporate governance codes may gain official authorization and support from state legislation (as in Germany, discussed in some detail in the book) even if these remain voluntary in the sense of lacking official enforcement. Organizations, corporations, or associations set up to manage regimes of transnational private regulation may also be created, recognized, or guaranteed by public authority. Soft law mechanisms may be attached to hard law, or introduced as a prelude to the "hardening" of guidelines into state or international law. When the focus of attention ceases to be the settled jurisdictional reach of the nation-state, the public-private line becomes blurred. Common lawyers often tend to confront the undermining of the public-private dichotomy with pragmatic adjustments to their reasoning, but for continental European civil law scholars, used to a firmer conceptual association of law and state, perhaps the issue is more fundamental: "without the nation-state as an Archimedean point of reference, the public or private status of regulators becomes fundamentally ambiguous" (Calliess and Renner 2009, 265). Then issues of regulatory legitimacy may arise.

Whatever these conceptual problems, a focus on transnational *private* law (TPL) is a way of making some provisional demarcations in an impossibly huge and diverse field of transnational regulation. As with almost all concepts in this area, the pragmatic

nature of a concept of TPL should be stressed. The question is merely whether it helps in mapping and modeling; whether it aids analysis in an area that for the moment has few reliable signposts and landmarks. The private emphasis makes it possible to separate off an area of transnational regulation from the familiar public or governmental regulation of municipal and international law. So TPL might be considered (temporarily) as in a different regulatory category from, for example, the international economic law created by the separate or collective acts of nation-states via municipal law or public international law. TPL could be thought of (again provisionally and pragmatically) as "bottom-up" law (developed in social interaction) rather than "top-down" (legislated) law (Calliess and Zumbansen 2010, 125).

As soon as these terms, suggesting different ways of law making, are introduced, their problems are apparent. All law is *voluntas* (the expression of coercive authority) as well as *ratio* (negotiated, elaborated reason or principle). Most law is imposed by the regulators through force or pressure of some kind, as well as consented to or at least acquiesced in by those it regulates. Calliess and Zumbansen are well aware of all this but, in focusing on the "private" even if they do not really believe in it as a category, they are choosing to start analysis somewhere, rather than be paralyzed by conceptual indecision. For the moment, it seems, many questions about the specific contribution of municipal and international law to transnational regulation are to be left aside. In a rich and complex discussion that, among much else, provides very extensive reference to what is now a vast literature on transnational law, they illustrate ways in which transnational economic regulation emerges directly from social interaction (in merchant practice, corporate contexts, e-commerce, etc.), but always in a dialectic of regulatory power located in a variety of sources, official and unofficial.

Different kinds of theoretical resources structure different parts of their account. The idea of a regulatory dialectic in which established regulatory structures frame and encourage relatively spontaneous processes of norm development implies the significance of theories of reflexive law that emphasize, for example, "how political governance and corporate self-regulation can be mutually reinforcing and optimising" (224). Economic theories of social norms are also noted for their helpful emphasis on nonstate mechanisms of regulation, but are heavily criticized for their general failure to link up with the extensive, long-established, wider sociolegal literature on norms. They are attacked also for simplistic, overgeneralized claims about the greater efficiency (according to what criteria?) of informal norms over formally institutionalized law (71–72), and about the widespread regulatory "incompetence" and inadequacy of courts, and (in the view of some critics) of contemporary state regulation as a whole (253–54). Soft law theory is seen as broadly allied with the authors' approach, but insufficiently precise and rigorous (255–60).

LAW IN THE TOOLBOX OF GOVERNANCE MECHANISMS

More significant here is a detailed discussion of Oliver Williamson's "economics of governance." Williamson distinguishes contrasting kinds of "good order and workable arrangements" to regulate different conditions presented, for example, by "spot markets" (involving isolated transactions), long-term contracts (hybrids) providing for ongoing

interaction, and "vertical" hierarchies of control and coordination appropriate to firms and their subsidiaries. Important variables are the relative frequency of transactions and the degree of standardization or specificity of assets involved in them. The risks and costs that vary with types of transactions and interactive relationships indicate the attractiveness and possibilities of different kinds of regulatory methods (Calliess and Zumbansen 2010, 113–18).

Building on Williamson and other scholars, Calliess and Zumbansen identify twelve possible "generic governance mechanisms," ranging from state law, courts, and legal sanctions through tripartite arbitration and bilateral negotiation to reliance on social, relational (especially contractual), or corporate norms, and hierarchical corporate control (118). What will be optimal or possible depends on the nature of transactions and relations between those engaged in them. But "this map of governance mechanisms is . . . a toolbox from which tailor-made solutions for the governance of cross-border commerce are formed" (113). Much of this will not fall within the scope of law if, as proposed earlier in this article, law is thought of as institutionalized doctrine. Again, public and private will be mixed in various combinations. Private ordering mechanisms "take place in the shadow of national law" (117, 118) but often state law is not what shapes and guarantees these mechanisms in practice, nor does it necessarily produce or even recognize the regulatory forms seen as binding by those subject to them. What appears is a very complex regulatory picture—a kaleidoscope of governance methods in which the nature of "the legal" remains to be clarified in transnational contexts.

The contrast between Calliess and Zumbansen's approach to this problem of clarification and the legal philosophical approach illustrated in Von Daniels's reconstruction of Hart is striking. While the latter aims at something timeless and definitional, the former waver between treating it as a nonissue—"Whether transnational law . . . should be regarded as 'law' in the traditional sense can remain outside the present analysis" (20)—and recognizing its multifaceted importance as a practical matter (see also Michaels 2009, 250). A sociological approach could easily identify a range of phenomena to label as transnational law, but the issue of the *normative significance* of these phenomena has to be addressed. Several questions are interconnected. What, if anything, does law do that can be considered distinctive? Does it have a specific function? Does it have a specific kind of authority (claim to bind those it addresses) and legitimacy (claim to recognition as an established order or system)?

Calliess and Zumbansen deal only unsystematically, somewhat inconclusively, and at times opaquely with these questions, approaching them from a number of viewpoints. Following Niklas Luhmann's systems theory, they see law as reconstructing conflicts, alienating them from the social contexts in which they arise, and redefining them in terms of the binary legal/illegal code (44–45, 51), a process that in no way depends on state institutions and can be applied "into the last corners of societal organization" (77). But surely this admitted circularity (law is communication about what is legal) in no way solves the problem of what the term "law" should be taken to embrace or exclude,[6] though

6. This is not a call for a definition of law but for a means (1) of recognizing (for juristic purposes) degrees of normative significance in various kinds of regulation (such as Calliess and Zumbansen's generic governance mechanisms), and (2) of provisionally marking out (for sociological purposes) a research field of transnational law. The idea of institutionalized doctrine takes normative doctrine *of some kind* (rules,

it indicates a degree of dis-embedding of the legal from the social, a process by which law separates from social relations and seeks a special kind of functional legitimacy.

Elsewhere, Calliess and Moritz Renner (2009, 267) have been more explicit. In Luhmann's thinking, they note, the sole function of law is "the stabilization of normative expectations," the selection and upholding of such expectations even in the face of disappointment (i.e., failure to realize the expectations in practice). Transnational governance regimes that take on this function can develop into legal systems. The function involves more than providing useful regulation (which nonlegal social norms may do in many contexts) because it relates to "society as a whole" (266). This description might be taken to mean that law has to be significant for (stabilizing normative expectations in) social organization in general, not just for regulating specific social tasks or functions.

Whether this systems theory approach is a useful or even coherent way to identify law in transnational regulation is debatable. Calliess and Zumbansen (2010) now write in ways that suggest something like the idea of law as institutionalized doctrine I advocated earlier. A "private legal system" would be one that could "bundle private governance mechanisms which fulfil *legislative*, *adjudicative*, and *enforcement* functions into an effective and operational regime" (120, emphasis added). However, in "the context of the institutional organisation of modern cross-border commerce . . . purely private legal systems in praxis are rare" and state law "often suppresses any potential competition to its traditional claim to be the supreme ruler of society" (120, 121). Thus, effective enforcement would be crucial for an autonomous private legal system, but Calliess and Zumbansen note that such enforcement devices as diminishing deviant members' reputations, threatened exclusion from the regulated community, or direct coercion will often be controlled or even prohibited by state law. So it seems that—as suggested earlier—the institutionalization of regulation as law will often be a matter of degree. Calliess and Renner (2009, 268–69, 274–75) have suggested that indicators of steps toward this institutionalization might be the "verbalisation of conflicts" in adjudicatory hearings of some kind and the "stabilising of normative expectations" by publicizing past regulatory decisions as precedents.

ROUGH CONSENSUS AND RUNNING CODE: BOTTOM-UP REGULATION

Whatever the complexities, these ideas point to a need to think about law in radically new ways: emphasizing the creation of norms and their authority in "bottom-up" processes of negotiation and consensus formation. At the heart of Calliess and Zumbansen's book (and the justification for its title) is a model that they use to "bracket off" for (presumably temporary) purposes of analysis almost all concern with "top-down" law making or law validating by state institutions, or with the element of coercive authority (*voluntas*) in law.

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guidelines, standards, principles, etc.) together with institutionalization *to some degree* (agencies to create, interpret, apply, or enforce that doctrine) as a basis for modeling the extent and kinds of "the legal" in transnational regulation.

The concept of "rough consensus and running code" (RCRC) refers to a process of global technical standard setting and rule making for the Internet, embodied in the long-established "request for comments procedure" in which technical experts, network designers, system operators, researchers, and Internet enthusiasts with varying degrees of technical experience engage in collective deliberation and experimentation aimed at producing agreed technical standards for the operation of the Internet.

As Calliess and Zumbansen describe RCRC, its most important characteristic is its informal and largely antihierarchical orientation. Debate is neither restricted nor ended by the acts of any established authority, or by majority votes. Nor do membership rules decide participation in the working groups that deliberate on standards; anyone can be involved. Discussion is guided only by occasional provisional declarations by an ad hoc chairperson that a "rough consensus" has been reached on an intermediate issue or a final conclusion. A proposed standard may then be published for further consideration. A recommended draft standard might eventually follow. In the "recognition phase," the deliberating community decides whether to adopt the standard in practice. Finally, if it gains broad acceptance, it may become a "full standard" in the "binding phase," analogous to "running code"—that is, to "a program that functions in practice and is widespread in terms of its installed basis" (136).

One might wonder whether this has anything to do with transnational law. After all, RCRC concerns merely *technical* standards. The Internet Engineering Task Force, which oversees this governance mechanism, writes on its Web site: "We try to avoid policy and business questions as much as possible." However, as discussions of implicit politics in accounting practices have shown, technical norms can have a wider resonance (Calliess and Zumbansen 2010, 256–57) and "potentially significant values and policy choices can be embedded into the Internet's technical architecture" (Berman 2007, 1222–23; see also Froomkin 2003, 809–10).

More problematic is the fact that the Internet as a social network is very different from, for example, transnational economic networks. Its underlying value (the value animating those actively promoting it for its own sake) might be seen as one of openness, inclusiveness, and comprehensiveness. The wider its reach and the more uniform its technology, the more successful its operation. But this is not the case necessarily for other transnational networks. A business network may prioritize cooperation and consensus within its members but its orientation will be to its members' profit, and it has no need to aim at openness and inclusiveness. Indeed, probably the opposite: it is likely to protect its collective interest against the interests of outsiders. The issue of power within such a network, and in relation to those outside it, becomes very important. What may drive the Internet community is the shared ultimate value of promoting communication (Froomkin 2003, 810–12), but what primarily drives commercial networks is usually cooperation for individual profit.

This element of power is absent from Calliess and Zumbansen's discussion of RCRC.[7] Indeed, this standard-creating process has appeared to some as a close approximation of Habermas's communicative rationality in operation—oriented to the

7. It is intriguing, however, to contrast the remarkable formal detail of published regulations, for example, as to how, and by whom, deliberative processes are to be overseen (Network Working Group 2004), with the extreme nonlegalistic informality that the regulations are apparently intended to ensure.

production of mutual understanding (Froomkin 2003). Calliess and Zumbansen make much of it as a regulatory model: it is "'a mixed, public-private, dynamic norm-creation process" and "a particular form of societal self-governance" (10) that complements municipal and international regulation. It links substance and procedure, regulation and coordination, and shows a way to legitimize regulation through its multistage facilitation of deliberation (134, 143–44). Whether or not it is really an island of pure communicative rationality in a sea of competing interests, it does at least suggest, as an idealized model of "bottom-up" rule making, something radically different from familiar models of municipal and international law.

LAW AND TRANSNATIONAL NETWORKS OF COMMUNITY

Where does this leave the mapping of transnational law? The main mapping tools that have been mentioned here have been dichotomies: private and public, bottom up and top down, substance and procedure, primary and secondary rules, *ratio* (principle and reason) and *voluntas* (coercive authority),[8] and doctrine and its institutionalization. All these dichotomies are problematic if taken too seriously. They are useful for provisionally orienting initial inquiry; allowing a start to be made somewhere in systematic analysis; creating—to adapt Karl Llewellyn's (2008, 55) words—"a temporary divorce [in this case, of different aspects of law] . . . for purposes of study."

The significance of the dichotomies depends on context. As long as the idea of institutionalized doctrine, for example, remains context free it offers a conceptualization of law only at the most basic and abstract level. To progress further it is necessary to link this skeletal idea of "the legal" to an adequate concept of "the social"—the social realm to which law relates. The nature of the social may, for example, determine what kind of agencies for institutionalizing doctrine as law can be envisaged. Sociolegal scholars are used to thinking of the social mainly as (national) "society"—"law in society." However, if transnational law relates to social relations extending *across* the borders of national societies, it may be better to see the social in a way that avoids these national connotations.

The social can be thought of as made up of networks of interpersonal relations, but to be subject to any kind of stable regulation, these networks themselves must have some minimum degree of stability. They might therefore be thought of as networks of *community*. Some scholars have linked transnational law and global legal pluralism to an idea of "multiple normative communities" (Berman 2007, 1157, citing Robert Cover's work; Berman 2002, 472–90; 2009), seeing these as the source and locus of transnational regulation (Djelic and Quack 2010). David Held (2010) has written of "overlapping communities of fate" to emphasize a restructuring of politics beyond and in the state. However, it is important to be cautious in invoking the typical, warm, fuzzy, somewhat nostalgic idea of community that, for many, is wholly out of touch with a contemporary Western world of individualistic, transient social relations. As Calliess and Zumbansen (2010, 55) put the matter, with the "ongoing privatisation of public spaces, the oft-praised notion of 'communities' . . . turns into a farce."

8. See further, on the significance of the *voluntas/ratio* distinction, Cotterrell (1995, 165–66, 317–20).

I think that the concept of community is useful, indeed essential, to make sense of transnational law in sociolegal theory. However, it is very rare for a *rigorous* concept of community to be put forward in this context. "Community" has to be drained of any residual romanticism and its different types identified insofar as they have a bearing on regulatory issues. Relations of community need to be seen as much more varied, flexible, fluid, and changeable than what is envisaged in most appeals to "community."

For example, contractual relations (like all stable *instrumental*, especially economic, relations focused on common or convergent projects) can be treated as social relations of community, but so can social relations based on shared *ultimate values or beliefs* (perhaps, but not necessarily, religious beliefs). Community can also refer to social relations based purely on *affect* (emotional attraction or repulsion), or on a shared environment (e.g., of locality, language, history, custom)—what might be called common *tradition*. It is likely that the different kinds of social bonds that these types of community suggest imply different regulatory needs and problems, and as social bonds they can be relatively enduring or transient, strong or weak. Most importantly, communal relations are not mutually exclusive. So any given person can participate simultaneously in a range of them.

It makes sense, therefore, to think of communal networks that combine different types of social relations of community—instrumental, belief based, affective, or traditional—but may be dominated by one or more of these types. It is easy to think of local, religious, financial, commercial, professional, scientific, kinship, friendship, or ethnic networks of community in this way. These ideas about types of community and their regulation have been elaborated fully elsewhere (Cotterrell 2006, especially 65–78; 2008a, 17–28, 363–72), but two aspects are especially important here: first, thinking in this way suggests that all relations of community are based on a degree of *mutual interpersonal trust* among their members (which gives them some stability); second, all have *regulatory needs* (for "justice" and "order") (Cotterrell 1995, 154–57, 316–17) that may or may not give rise to law in the form of institutionalized doctrine of some kind.

One might think of transnational networks of community as the ultimate source of their own legal regulation but, equally, as being subject to legal regulation created in other such networks that impinge on them. The socioeconomic networks in which Calliess and Zumbansen's examples of transnational private law develop (e.g., transnational merchant law, corporate governance regimes, e-commerce arrangements, standard-setting organizations or associations) can easily be thought of in this way. So it is possible to envisage a kind of paradigm shift in legal inquiry provoked in part by the development of transnational law: a shift away from a limited nation-state focus and toward a new emphasis on the law-creating potential of complex, interpenetrating networks of social relationships of community (Cotterrell 2008b).

Calliess and Zumbansen see the idea of analyzing transnational private law in terms of community as "promising" (39) but ultimately do not pursue it far. Two aspects, in particular, would certainly need examination. First, relations of community are almost always unequal, structured by power, and the regulation created in them will reflect this. Municipal law reflects the power structures present in the networks of community that make up the national society; international law reflects the power relations of the "international community." Similarly, transnational law will reflect the

distribution of power in transnational communal networks. Second, as most writers on transnational law regimes emphasize, a major issue for these regimes is their legitimacy (their recognition and acceptance as established) and authority (their capacity to bind those subject to them). So it is important to ask where their authority and legitimacy can come from if they cannot appeal to the democratic foundations on which municipal law is usually assumed to rely. From a law-and-community perspective the answer would have to be found in the structure of networks of community themselves.

The nature of relations of community is not Calliess and Zumbansen's concern, but their book does contain discussions that indirectly bear on this. For example, they consider in some detail the operation of "trustmark" systems in e-commerce, designed to build the confidence of economic actors, especially consumers, in the reliability of others with whom they plan to trade. In Internet transactions, where the usual resources of municipal law and the possibilities of dealing securely "in its shadow" may not be available, the need to build confidence in the general reliability of potential trading partners becomes especially important, though clearly it is relevant in any environment where few opportunities exist to assess such matters personally. Trustmarks, like credit rating mechanisms, consumer satisfaction ratings, professional accreditations, and transaction insurance systems, are examples of devices for supporting mutual interpersonal trust in primarily economic networks of community. Thus they help (insofar as they are effective) to stabilize context-specific (Schultz 2011) expectations of justice and order.

In fact, the most interesting aspect of transnational trustmark and related systems, as described by Calliess and Zumbansen, is their *fragility*: the vulnerability of trusting relations, especially where interacting members of networks of community are (as in many Internet dealings) (1) physically remote from and entirely unknown to each other, (2) single-shot transactors (as individual purchasers or sellers) rather than repeat players, and (3) unable to judge probity on the basis of any personal, face-to-face interaction. Mutual interpersonal trust is fundamental to all social relations of community. Supporting it in the case of transnational networks is one of the most vital tasks of transnational regulation. Hence the development of "trustmarks of trustmarks" (secondary trustmarks) and reliance on municipal law or, in the European context, Europe-wide regulation to support mutual interpersonal trust through its enforcement mechanisms wherever this is feasible (Calliess and Zumbansen 2010, 169–78).

ELABORATING TRANSNATIONAL LEGAL DOCTRINE

Where can transnational law find its legal authority and legitimacy or, more broadly, its practical guarantees of effectiveness? Most writers find these guarantees in an unstable mix of (1) the politically established authority of municipal law and international institutions, (2) social sanctions having varying degrees of authority rooted in the nature and organization of the regulated population, and (3) considerations of mainly economic necessity and self-interest among the regulated. But some further progress might be made in considering how transnational regulation in general is developing and seeking effectiveness by emphasizing its locus in networks of social relations of community. Here, analysis of transnational law parallels that of municipal law because the

authority and legitimacy of the latter are usually traced to the assumed structure of the national community and democratic theories, elite theories, and social contract theories are the main tools employed in explanation.

In the national context the coercive authority (*voluntas*) of law is mainly associated with state power. The reason and principle of law (its *ratio*) is associated mainly with the expert elaboration of doctrine (primarily by judges in the common law world, but also through legislative drafting, code making, jurists' conceptualizations, and lawyers' practical problem-solving creativity). Both *voluntas* and *ratio* as essential elements of law can be seen as components of its overall authority: the former as law's political authority, the latter as what might be called its moral authority—its resonance with shared cultural understandings. As suggested earlier with regard to all such dichotomies, their separation is a matter of analytical convenience, a provisional contrasting of ultimately interdependent aspects of law.

How might the *voluntas* and *ratio* of transnational law be identified? In some respects it is easier to see how the transnational development of regulation creates new forms of *ratio* than how it builds *voluntas*. It may be that the nature of the sources of *ratio* of international law is not radically changed by the increasing application of this law to nonstate actors, even if the range of locations in which the *ratio* of international law is being developed is extending—a matter of the fragmentation of international law noted earlier. Equally, the processes of producing *ratio* in municipal law may not be changing in a fundamental way specifically as a result of transnationalism.

However, in the relatively "bottom-up" creation of transnational private law considerable change is surely occurring. Alongside familiar kinds of law-creating or law-interpreting agencies (courts, legislatures, administrative agencies, and international organizations), other agencies increasingly take part in shaping transnational regulatory doctrine. A space has been created, outside the normative reach of municipal authorities and international agencies established by treaties or conventions, for new agencies to elaborate the emerging *ratio* of transnational law. Examples are commissions of private law experts drafting new "model laws" available for adoption in national law, European law, or through the choice of transacting parties. Notable products of this kind of enterprise are the Principles of International Commercial Contracts created by the International Institute for the Unification of Private Law (UNIDROIT), and the Principles of European Contract Law drafted by the independent Commission on European Contract Law headed by the Danish lawyer Ole Lando. Insofar as these are "private" (nongovernmental) productions of legal doctrine, they are elaborations of *ratio* without *voluntas*. They depend on voluntary adoption by those they are intended to regulate, or on "public" political incorporation into law.

Here, as elsewhere, however, the line between public and private is hard to draw. The Lando principles, for example, have contributed to broader private law unification initiatives pursued "in the shadow" of the ongoing development of EU law and political integration. The independently operating UNIDROIT is an intergovernmental organization supported by sixty-three states as members. International public organizations or conventions often authorize the production of model law codes. The Convention on Contracts for the International Sale of Goods 1980, prepared by the UN Commission on International Trade Law (UNCITRAL), applies in general to contracts between parties based in states that have ratified the convention (currently seventy-six), or

where contracting parties have chosen this law to regulate their agreement. The UNCITRAL Model Law on International Commercial Arbitration has been used by many countries as the standard for reform of their national arbitration laws. The International Bar Association and the International Federation of Insolvency Practitioners were actively involved in UNCITRAL's drafting of a model law to regulate major corporate bankruptcies across national borders (Halliday and Carruthers 2007, 1183–84). In general, jurists, whether independent or serving, directly or indirectly, state or international bodies, have acquired many new opportunities to serve as expert elaborators of *ratio*, as the possibilities for transnational law expand (Quack 2007).

EXPERTS AND NONEXPERTS AS LAW CREATORS

It might be appropriate to introduce here yet another pragmatic (and ultimately problematic) dichotomy; one between "experts" and "nonexperts" as elaborators of *ratio*. In municipal law, legal doctrine is created mainly by legal experts (judges, legislative drafters, jurists, lawyers) but sometimes by others (nonlawyer legislators, administrative officials). Controversially, the idea has been mooted that "lay" citizens can be seen as elaborators of legal doctrine when they interpret law in principled opposition to state authorities as a justification for their civil disobedience (Dworkin 1978, 206–22). In a transnational context, however, the scope for both expert[9] and nonexpert elaboration of legal ideas seems greatly expanded. Much transnational regulation and policy formation now develops through the work of innumerable associations, organizations, or corporate bodies engaged in setting and developing standards.

Familiar examples of private transnational standard-setting organizations include the Forest Stewardship Council, "an independent, non-governmental, not-for-profit organization established to promote the responsible management of the world's forests," the European Advertising Standards Alliance, claiming to promote "high ethical standards in commercial communications by means of effective self-regulation," and the food standards regulator GlobalG.A.P., which sets "voluntary standards for the certification of production processes of agricultural (including aquaculture) products around the globe."[10]

Alongside such bodies, others established, authorized, or sheltered by municipal or international law exist to elaborate transnational standards. How far these should be seen as public or private is often unclear (confirming the insecurity of the public-private dichotomy). Also often unclear is what counts as "expert" in standard setting. Yet the authoritativeness of standard setting or rule declaring by bodies that lack access to some kind of coercive (*voluntas*) authority and rely on voluntary compliance may depend on how far these bodies enjoy respect for their (not necessarily legal) expertise or on the basis that they adequately represent the participants in the networks of community they purport to regulate.

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9. For claims about the increased significance of professional experts in building trust in transnational economic relations, see Dingwall (1999).

10. Quotations in the text are from the Web sites of the organizations mentioned. See further Scott, Cafaggi, and Senden (2011, 6–11).

Possibilities of *democratizing* (beyond domination by experts) the elaboration of regulatory *ratio* are surely greatly expanded in transnational settings. The power of state legal authorities in national contexts to destroy any competing nonstate sources of law—what Robert Cover described as their "jurispathic" role (Cover 1992, 139)—is typically great. In transnational contexts, however, where the writ of municipal law does not necessarily run, or run smoothly, these jurispathic possibilities are much less. Numerous sources from which competing kinds of *ratio* could be created may exist. What could give them authority? What could make their doctrinal *ratio* persuasive? One important factor might be democratic mandate, or the overwhelming authority of mass popular support.

Calliess and Zumbansen's invocation of RCRC as a regulatory model provides food for thought here. Recall, first, that the members of the working groups whose deliberations produce binding Internet standards are not necessarily "experts" and no one, it seems, inquires into the levels of expertise of those participating. What determines whether the ideas formed in the process of deliberation prevail is simply the evolution of "rough consensus." Second, recall that there are no membership rules for working groups—anyone can join. So there are no fixed boundaries of the communal network of these Internet standard makers. Yet through a process of collective deliberation and consensus formation they build standards.

Can wider lessons be learned from this? First, the development of transnational law might imply a revision of the whole idea of "legal" expertise. Regulation intended to be meaningful, authoritative, and capable of attracting support in networks of community could be produced not necessarily by people with juristic expertise, but by standard setters knowledgeable in the specific kinds of regulatory problems that exist in those networks; that is, experts in functionally specific areas rather than juristic generalists. Taking the point one step further: Is the whole idea that the expert's view should be privileged put in contention? In municipal law contexts, the authority of lawyers, judges, and legislators is supported by their position in the structures of "official" power in the nation-state. If these power structures no longer operate in the transnational realm, or at least are contested and unclear, the authority of expertise may dissolve away into the issue of how acceptable is the *ratio*—the reason and principle of regulatory doctrine—which people claiming expertise actually produce.

Second, the RCRC example is a reminder that, in thinking about the production of *ratio*, boundaries around networks of community are not needed. Membership can be open, and in constant flux. Ralf Michaels (2009, 253) criticizes appeals to "community" in analyzing transnational law partly on the ground that there would be a need for "some kind of boundaries, a distinction of inside and outside" and it may be hard to identify such boundaries, but this problem does not arise if communities are seen as types of social relations combining and recombining, and not as "fixed" social objects.

The open communities of RCRC might be seen as not unconnected with the open organization of mass opinion through the Internet by transnational organizations such as Avaaz, which is said to have "more than eight million members in 193 countries and . . . to be the largest online activist community in the world" (Pilkington 2011, 16; see also Bentley 2011). Internet "referenda," coordinated by such campaigning bodies, mobilize the sheer power of numbers—mass transnational plebiscitary voting from the computer keyboard—to influence legislators and governments by means that entirely

bypass any appeal to expertise or any membership rules for participation in opinion formation.

COERCION AND EFFECTIVENESS IN TRANSNATIONAL LAW

Where can transnational law find its coercive authority (*voluntas*)? And to what extent is some kind of *voluntas* necessary to guarantee its effectiveness? As Calliess and Zumbansen's book makes clear, and most discussions of transnational law confirm, this law relies in many ways on the established coercive authority of municipal law, and of international law underpinned by the support of nation-states. Thus, contemporary *lex mercatoria*, developed through private arbitration practice and sometimes described as an autonomous nonstate transnational commercial law, in fact involves "a continuous competition and interplay between state and non-state institutions" (Michaels 2007, 465), and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been called a "historic milestone" in linking "the private law" created by international commercial arbitration to the enforcement guarantees of municipal law (Rödl 2008, 746–47). Prospects for further harnessing the coercive authority of municipal law may also lie in the development of conflict of laws rules to allow a wider recognition, in state law, of regimes of regulation chosen by transnational transacting parties (see, e.g., Rödl 2008; Wai 2008, 123–25).

Ultimately, the coercive authority of *municipal* law reflects the power structures of networks of community that make up the nation-state, and the mechanisms of consent formation that exist within them—matters that political theorists have usually analyzed in terms of democratic theory, elite theory, and social contract theory. Can parallels exist in transnational networks of community? Processes of mass opinion formation through organizations such as Avaaz were referred to earlier. Mainly because of the communication possibilities opened up by the Internet, opportunities for democratic will formation can be extended transnationally, theoretically without limit. Transnational referenda and plebiscites, as well as the organization of lobbying and campaigning unconstrained by national borders, now become entirely feasible as a matter of technical organization, with issues of representativeness obscured to some extent by the availability of huge numbers of participants. Although such devices seem limited as a means of producing any adequately elaborated *ratio* of regulation (often being restricted to yes/no answers to referendum questions), they may indicate ways of giving a kind of democratic foundation for coercive authority (*voluntas*) to be exerted by transnational agencies. The idea of a global public opinion—however crude the means of measuring it may be for the foreseeable future—is not fantasy.

To suggest that possibilities for *voluntas* depend on the structure of transnational networks of community is not inconsistent with the claim made earlier that "community" should be thought of not in terms of bounded entities, but of often flexible and fluid social relations (nevertheless with a degree of stability based on mutual interpersonal trust). It can be assumed that participation in communal relations—even if temporary and limited in scope—is often valuable to members of networks of community. Hence, as legal sociologists have long emphasized, social sanctions of expulsion from or ostracism in those networks can be powerfully coercive—indeed, often far more

so than the sanctions of municipal law in practice (see, e.g., Bernstein 2001, 1737–39). Studies of transnationally organized business networks often identify strong pressures for conformity in them to their dominant norms of self-regulation (Djelic and Quack 2010, 389–90). Among specific sanctions are reduction in reputation among peers and business partners; loss of opportunities for productive dealing with other members of the communal network; denial of access to knowledge available to other members; blacklisting; less favorable terms and conditions of trade; less availability of cooperation from other members; and, ultimately, exclusion from the communal network.

To understand how these sanctions work it would be necessary not only to differentiate between different types of social relations of community and the different ways they combine in networks, but also to examine the structure of power relations in communal networks. So, just as law and society research has examined the power structures that surround the operation of municipal law, the sociology of transnational law requires further empirical study of corresponding power structures in transnational networks and their bearing on regulation.

For most networks of community, the coercive authority supporting their regulation will be seen to come partly, as suggested above, from the internal structure of the network concerned. Clearly, this is an image of *self*-regulation, consistent with the experience of participants in many such networks and also with many current assumptions about the limited utility of "external" (e.g., state) regulation. A focus on transnational private law tends to direct attention to internally generated regulation in communal networks, but it is vital to note that networks of community do not exist in isolation. Their members are usually members of other networks, and networks of community may exist within (or in the field of influence of) larger or more powerful networks, or in complex articulation with other networks. So the regulatory authority that operates will usually be a mix of internally and externally generated regulation.

Again there is no need to think in terms of rigidly bounded communities confronting each other. The appropriate image is rather of intersecting (but fluid and frequently changing) networks of social relations of community. So sources of coercive authority in any given network may be varied. Transnational networks will often be subject to the regulatory authority of states, of international networks of states, and of other nonstate networks of community.

CONCLUSION

In this article, the problem of conceptualizing transnational law has been addressed partly in terms of the traditions of legal philosophy and partly in terms of recent sociolegal literature on transnational private law. Only a few themes in a vast subject have been brought to light. Nevertheless, taken together they suggest a necessary displacement in thinking about the nature of law and society.

It is likely that jurists, at least, will find it hard to accept a reconceptualization of the idea of "law" to make possible an analysis of the whole range of types of doctrine (guidelines, principles, concepts, codes, norms, standards, etc.) that are now being associated with transnational law. There may, similarly, be resistance to a reconceptualization of the social, to see it no longer as (national) "society" but as networks of

community that may be subnational, national, or transnational in extent. Yet, calls to discard a focus on "society" and to view the social in more flexible terms to take account of the development of transnational social relations are now familiar in sociological literature (see, e.g., Urry 2000; Beck and Sznaider 2006). As regards transnational regulation itself, lawyers and sociolegal scholars are busy analyzing its many aspects and its diverse social contexts.

Indeed, large forces are at work encouraging new thinking about the nature of law and about the nature of the social. Debates about the efficiency or "competence" of state regulation were mentioned earlier in this article. The capacity of the state to regulate is often an ideologically charged issue, but whatever the nature of the debate, it feeds into queries about the general regulatory capacity and limits of state law, and so of the significance (or insignificance) of "law" as it is most commonly understood by governments and lawyers. Interest in soft law, in self-regulation, in informal regulation, "voluntary" standards, and social norms is spurred in part by neoliberal political and other campaigning movements that are interested in reducing as much as possible the use of law, in its usual "hard" sense as municipal law, and are often also suspicious of orthodox international law. At the same time, doubts are frequently expressed about the current general significance of traditional ideas of state sovereignty that assume nation-states have full control or direct supervision of all socioeconomic regulation inside their territory. In the face of these accumulating doubts, the idea of analyzing regulatory needs and problems by reference to a social realm not defined by nation-state boundaries becomes theoretically attractive and seemingly increasingly realistic.

It is possible, at least, to be sure that the terrain of sociolegal research is shifting. Transnational law remains an imprecise notion. As has been seen, the characteristics attributed to it are debated and disputed in many fundamental respects and the concepts available for its analysis are often no more than fragile dichotomies applicable only provisionally and pragmatically. Nevertheless, it can be confidently predicted that the transnational extension and transformation of law will become ever more clearly one of the most urgent and practically important foci for systematic inquiry by sociolegal researchers, as well as for the ingenuity of lawyers, legal scholars, governance experts, and regulators.

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