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Frank J. Garcia

*Boston College Law School*, [garciafr@bc.edu](mailto:garciafr@bc.edu)

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## Globalization's Law: Transnational, Global or Both?

Frank J. Garcia\*  
Boston College Law School

*"Globalization has changed the face of the earth; changes in the paradigms of modernity have outpaced intellectuals and jurists' capacity for reflection. The law cannot remain immune to these new facts."*

Rafael Domingo, *The New Global Law*

### I Introduction

Globalization as a subject can be bewildering in its complexity, nowhere more so than in its jurisprudential dimension. What counts as law in this global space? Transnational processes are governed by diverse areas of national and international law, often in novel combinations, in tandem with less formal non-statist norms such as *lex mercatoria* and regulatory compacts such as the Basel Accords. Legal, social and political thinkers have come up with a rich array of approaches as they struggle to theorize such developments, and legal education is beginning to rethink its basic enterprise as it struggles to prepare lawyers for practice in the 21<sup>st</sup> century rather than the 19<sup>th</sup>. To not attempt to do so, writes Arjona, is to "neglect juridical experience."<sup>1</sup>

As legal theorists grapple with the diversity of sources and types of norms regulating behavior in this global space, many argue that we see new forms of law emerging such as "transnational" or "global" law. In this short essay, I hope to make a modest contribution towards clarity in the discussion surrounding these concepts, and how they stand in relation to what has been understood as "national" and

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<sup>1</sup> Cesar Arjona, *Transnational Law as an Excuse: How Teaching Law Without the State Makes Legal Education Better*, 38 (ESADE, Working Paper No. 219, 2011) (citing de Sousa Santos, *SOCIOLOGICA JURIDICA CRITICA*).

“international” law. This entails, first, a brief inquiry into globalization and the relevant social and institutional changes it is generating that influence the nature of law as it is evolving. Second, I explore “transnational law” and “global law” as conceptual responses to such changes, employing a characterization of law as process, output and architecture that I analogize to light’s paradoxical nature as simultaneously wave and particle. I conclude with some reflections on the significance of this inquiry for law and for we who depend upon it.

## II Globalization and Law

It is well understood that law has a two-way relationship to social organization and social relations. The nature of a society, its culture, its forms of organization, hierarchy and distribution, all directly impact the nature and substance of the law such a society produces as a tool for facilitation and control, as much as the law in turn influences the development and structure of that society.<sup>2</sup> Globalization’s effects on law, and vice versa, are consistent with this account: law is responding to changes in the way people behave and organize themselves, changes in the ways states and other actors interact, and changes in the ways states and other actors regulate in this new global space, and law in turn is shaping, organizing and defining that space and its evolution.<sup>3</sup>

Globalization has almost as many definitions as it has scholars working in the field, as befits such a complex, transformative phenomenon.<sup>4</sup> Perhaps what best captures the essence of contemporary globalization is the compression of space.<sup>5</sup>

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<sup>2</sup> This has long been a cornerstone of both Legal Realism and the Law & Society movement. See Christine Sypnowich, *Law and Ideology*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), available at <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=law-ideology> (“[L]egal realism ... took up the idea that social forces outside the law are central in determining what the law is.”); Susan S. Sibley, *Law and Society Movement*, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 860, 860 (Herbert M. Kritzer ed., 2002) (“[T]he law and society approach makes a simple but ambitious claim: law, legal practice, and legal institutions can be understood only by seeing and explaining them within social contexts”).

<sup>3</sup> See, e.g., Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 LAW & SOC INQUIRY 975 (2006) (documenting how transnational legal developments follow the tenets of classical legal realism and inform a “new legal realism”).

<sup>4</sup> For a thoughtful recent survey of this rich literature, see generally GLOBALIZATION: CAUSES AND EFFECTS (David Deese ed., 2012). The classic remains THE GLOBAL TRANSFORMATIONS READERS (David Held et al. eds., 2<sup>nd</sup> ed. 2003).

<sup>5</sup> Jan Scholte, GLOBALIZATION: A CRITICAL INTRODUCTION (Palgrave Macmillan, 2<sup>nd</sup> ed. 2005); Jay R. Mandle & Louis Ferleger, *Dimensions of Globalization, Preface*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 8 (2000); see generally David Harvey, THE CONDITION

Geographic constraints on commercial, social, political, legal and cultural arrangements recede, and people become increasingly aware they are receding. In real terms, boundaries become more porous – we know more about what happens beyond our boundaries, we project our desires, anxieties and fears more easily beyond our boundaries, our actions affect others beyond our boundaries in more pronounced ways, and we are increasingly aware of these effects. Globalization intensifies our awareness of the world as a whole.

This spatial transformation underlies the transformative impact of globalization on both global social relations and the nature of law. Such compression and the resulting porosity of borders do more than simply facilitate international commerce, social networking and information sharing: they change the way space enters into social relationships, with consequent changes at all levels of human experience including law. In particular, they destabilize the fundamental bases for modern social order, namely the state and its law. The existence of the state is predicated on its ability to control defined borders, and regulate conduct within these borders, and our traditional notion of law is closely tied to jurisdiction, and jurisdiction to territory.<sup>6</sup>

By transforming borders and de-territorializing behavior, globalization thus raises a host of questions and concerns fundamental to law. These questions include the powers and capacities of legal actors such as states, individuals and international organizations; the continued viability of distinctive national approaches to law, social welfare and political authority; the formation and ideology of global social policy; the global economy and its effects on inequality and on national social contracts and regulatory cultures; the legitimacy of global institutions and the effectiveness of national ones; the possibility and necessity of global justice; and the changing nature of legal education and legal practice, among others.

Such questions are the subject of a rich and growing literature well beyond the scope of this small essay, a literature that Arjona writes “symbolizes the uncertainties of law in the post-modern age.”<sup>7</sup> Here I want to focus on a “narrower” question: how is globalization challenging our current conceptualizations of law?

## **A Undermining the National/International Dichotomy**

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OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (Blackwell 1990) (arguing that changes in technology have changed capital flow, politics and culture).

<sup>6</sup> For a fascinating exploration of the notion of territory and its relation to statehood, and the “unbundling” effects of globalization, see SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (Princeton Univ. Press rev. ed. 2008).

<sup>7</sup> Cesar Arjona, *Anthropology and Transnational Legal Education: Some Ambitious Reflections Based on a Humble*, in *THE TRIALS AND TRIUMPHS OF TEACHING LEGAL ANTHROPOLOGY* (M.C. Foblets, G. Woodman and A. Bradney eds., forthcoming, 2016).

Many commentators across the spectrum argue that international law and national law are no longer adequate as categories embracing the totality of “law,” i.e., processes of authoritative norm-creation, thereby requiring us to reexamine law as it is emerging in this global space through notions of transnational law, global law, legal pluralism, and so forth.<sup>8</sup> Essentially, they are responding to globalization’s impact on how norms are created and the kinds of norms that are emerging.

Through globalization, we see in addition to the usual abundance of “national” (think “statute”) and “international” (think “treaty”) law-making, an increase in the number of bodies producing “softer” norms, often through transnational processes, that influence or guide state or private actor behavior or facilitate coordinated regulation by states.<sup>9</sup> We can see such transnational norm creation in a number of areas spanning the waterfront of global social policy, from crime to tax to food safety and beyond.<sup>10</sup>

Such fields of activity and regulation have various characteristics in common. Transnational law scholar Peer Zumbansen describes them as spaces of individual, organizational and regulatory activity that evolve following functional imperatives, with little regard for jurisdictional boundaries, and are constituted through a complex overlapping of different national, international, public and private norm-creation processes.<sup>11</sup> In response to this, “traditional ‘national’ legal responses that draw on architectures of normative hierarchy, separation of powers and unity of law are likely to fall short of grasping the nature of the evolving transnational normative order.”<sup>12</sup>

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<sup>8</sup> See, e.g., Sally Engle Merry, *supra* note 3 at 976-7 (extending legal realism’s interest in everyday practices transnationally means wrestling with legal pluralism and new forms of legality). It also requires us to investigate the nature of the global social space law is helping shape (global governance, global society, global justice, etc.), but that is for another day. See, e.g., Frank J. Garcia, *Between Cosmopolis and Community: Globalization and the Emerging Basis for Global Justice*, 46 N.Y.U. J. Int’l L. & Pol. 1 (2013).

<sup>9</sup> The Basel Accords and the Basel Committee process are a good example, as is the OECD’s BEPS Project, both in collaboration with the G-20. The Basel Accords; Base Erosion and Profit Shifting (BEPS), July 2013, OECD. On the soft law phenomenon, see Shaffer and Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 Minn. L. Rev. 706 (2010).

<sup>10</sup> See generally Dirk Messner, *World Society: Structures and Trends*, in GLOBAL TRENDS AND GLOBAL GOVERNANCE 34-40 (Paul Kennedy et al. eds., 2002); Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 305, 312-13 (2012) (cataloguing global social challenges calling for transnational approaches).

<sup>11</sup> Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNAT’L LEGAL THEORY 141 (2010).

<sup>12</sup> *Id.*, at 153.

Moreover, even where we think we may see “national” norm creation, the nature of the “national” itself is being undermined by globalization. Saskia Sassen argues that globalization is changing law even within what we are accustomed to thinking of as “national” legal spaces, in ways that defy traditional national versus “global” categories. Contemporary accounts of globalization focus almost always on the obviously global (such as the Bretton Woods Institutions), but neglect the national. However, the transformation we call globalization is taking place within the national and reorganizing it, far more than our categorizations reveal.<sup>13</sup> Nevertheless, it is a global transformation, in that these changes are oriented towards global agendas and systems even though located within the national.<sup>14</sup> Globalization is thus “denationalizing the national” but in obscure ways that are better understood, she argues, if we free our analyses from the binary of global versus national.<sup>15</sup>

Whatever we make of these significant long-term trends, it seems clear that because of globalization and the resulting diversity and interpenetration of norm creating processes, we cannot simply distinguish types of law according to their purported geographical source or effect—national or international—nor can we readily divide law’s universe into two systems, the national and the international.

## **B Transnational and Global Law: Emerging Concepts**

Insofar as the accuracy and utility of “national law” and “international law” as categories (at least as we have traditionally understood them) are being challenged by globalization, what terms should we be using instead, or in addition? Here we enter the morass. Attempts to characterize some aspect of what law consists of and how it works in a globalizing space are legion, and include transnational law,<sup>16</sup> global law,<sup>17</sup> transnational legal process,<sup>18</sup> transnational commercial law,<sup>19</sup> world

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<sup>13</sup> Sassen cites as examples NGOs working locally on global agendas, domestic institutions developing national monetary and fiscal policy but according to global norms, national courts using international human rights instruments. Through such mechanisms, both the national and the evidently global are destabilizing settled meanings and systems. *See* Sassen, *supra* note 6, at 1-3.

<sup>14</sup> Sassen 3.

<sup>15</sup> Sassen recommends instead that we examine both the national and the global through the perspective of trans-historical socio-legal categories and processes present in all societies from medieval times to the present and which coalesce into various “assemblages,” and offers three: territory, authority and rights. *See* Sassen, *supra* note 6, especially 401-423.

<sup>16</sup> PHILIP C. JESSUP, *TRANSNATIONAL LAW* (Yale Univ. Press, 1956).

<sup>17</sup> *See, e.g.*, RAFAEL DOMINGO, *THE NEW GLOBAL LAW* (Cambridge Univ. Press, 2010); Giuliana Ziccardi Capaldo, *THE PILLARS OF GLOBAL LAW* (Ashgate 2008)

<sup>18</sup> Harold Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996).

<sup>19</sup> *See, e.g.*, Ross Cranston, *Theorizing Transnational Commercial Law*, 42 *TEX. INT’L L.J.* 597 (2007).

law,<sup>20</sup> global legal pluralism,<sup>21</sup> soft law,<sup>22</sup> non-legal social norms,<sup>23</sup> and transnational legal pluralism<sup>24</sup>—doubtless I am forgetting others as well.

Collectively, these terms offer more than competing definitions of law—they also offer sophisticated and varied accounts of legal process in a global space, tied to an account of what makes such processes—and outputs—both distinctively legal and distinctively global; and grander architectural visions as well of what kind of legal system may be emerging from globalization dynamics. How can we begin to sort through this theoretical ferment?

## 1 Law as Process, Output and Architecture

One way to understand the law and globalization literature is to look at the kinds of insights into law’s globalization that each literature offers—I see three distinct patterns. First, there is the literature aimed at clarifying new and transnational processes of norm creation.<sup>25</sup> This is closely related to a second literature aimed at characterizing and organizing the varying kinds of norms—call them legal outputs—produced through these transnational processes.<sup>26</sup> Third, there is a literature aimed at more abstract and systemic characterizations of kinds of legal orders and structures emerging from the cumulation of global social and legal processes.<sup>27</sup> For the purposes of this essay, I will characterize these three approaches to law as process, output and architecture.<sup>28</sup>

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<sup>20</sup> See, e.g., DAVID BEDERMAN, *GLOBALIZATION AND INTERNATIONAL LAW* (Palgrave, 2008).

<sup>21</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge, 2014).

<sup>22</sup> See, e.g., Abbott and Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000).

<sup>23</sup> See, e.g., ERIC POSNER, *LAW AND SOCIAL NORMS* (Harvard Univ. Press 2000).

<sup>24</sup> Zumbansen, *supra* note 11.

<sup>25</sup> See, e.g., *Id.*; Koh, *supra* note 18, at 183-4 (defining transnational legal process as “how public and private actors...interact in a variety of public and private, domestic and international for a to make, interpret, enforce, and ultimately internalize, rules of transnational law”).

<sup>26</sup> See, e.g., Shaffer and Pollack, *supra* note 9; Craig Scott, *Transnational Law as a Proto-Concept*, 10 GERMAN L.J. 877 (2009) (“transnational law *in the result*.”). I am combining this conception, which Scott calls “Transnationalized Legal Decisionism” with his first conception, “Transnationalized Legal Traditionalism,” which looks at those elements in existing national and international law that regulate transnational phenomenon, together into my “law as output” category.

<sup>27</sup> See, e.g., Domingo or Ziccardi Capaldo, *supra* note 17.

<sup>28</sup> One might count a fourth literature aimed at understanding the underlying social and epistemic changes to which law necessarily responds. See, e.g., SASSEN, *supra* note 6; JENS BARTELSON, *VISIONS OF WORLD COMMUNITY* (Cambridge Univ. Press, 2009); ANDREW HURRELL, *ON GLOBAL ORDER* (Oxford Univ. Press, 2007); Garcia, *supra* note 8. I

We are already accustomed to speaking in these three modes. For example, when discussing EU jurisprudence we distinguish legal outputs—regulations, directives and decisions—from each other and from national law analogues (national statutes and administrative decisions), which are similar yet different in important ways; and from the distinctive legal process that creates them—co-decision and cooperation, for example—and *their* national legal analogues (parliamentary legislation, for example), also similar yet different. Finally, we speak “architecturally” of the “New Legal Order” which EU legal processes and outputs constitute together with “national” law and key constitutional/federalist principles.

For the purposes of understanding globalization’s law, these three approaches resolve analytically into two: law as process and output, which I am associating with the dimension of law’s globality studied by transnationalists; and law as architecture, which I am associating with the work of the global law theorists. Operationalizing this framework into our contending conceptions of law in a global space, the first step is to sort the universe of accounts into two batches, “transnational law” and “global law.” I recognize that this risks doing violence to the distinctions between these contending conceptions. Nevertheless, in my view, conceptions relying on some notion of transnationality and conceptions relying on notions of globality are distinctive enough as groups, and share enough key features in common, such that clarity may be better served by grouping them than by further maintaining their distinctiveness.<sup>29</sup>

From a pragmatic perspective, this typology makes sense. Given that globalization is clearly having effects on how and where law is created, with a corresponding diversity in resulting norms, it is important to develop a methodology aimed at capturing globalization’s effects on norm creation, and the types and sources of legal outputs that result. Similarly, since globalization is also understood to be complicating our established notions of national and international legal structures and orders, it is important to attempt to sketch the architectural contours of the “global” [or at least, “post-national” and “post-international”] landscape of legal norms, institutions, structures and processes that may be emerging. All three—process, output and architecture—are clearly interrelated and impact one other, but distinguishing them can help avoid the confusion that arises when we attempt to discuss all three interchangeably.

Understanding law’s totality means accepting that it may have multiple and seemingly inconsistent dimensions, in much the way we have come to understand

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will set that aside for the moment as closer to the globalization literature and therefore “secondarily” legal, but nevertheless essential.

<sup>29</sup> In so doing, I seek to both respect the spirit of methodological agnosticism that Scott so eloquently employs, and gesture towards “aspects of mutual coherence amongst the proffered conceptions that could lead to a higher-order analytical account.” *Supra* note 26, at 863.



light as simultaneously wave and particle.<sup>30</sup> This analogy helps us understand why it is the case that if we want to understand globalization's law fully, we have to understand it comprehensively as both "transnational" and "global," in the way that light must be understood comprehensively, if paradoxically.<sup>31</sup>

## **2 Transnational and Global Law as Process, Output and Architecture**

I therefore propose to examine contemporary accounts of law's globalization through the dyad of law as process/output on the one hand, and law as architecture on the other.

### **a Transnational Law: Process and Output**

The clear starting point is Philip Jessup's conception of transnational law, published in a prescient 1956 book by that title. Jessup was the first to seek to transcend categories such as private international law, public international law and domestic law, which he felt by 1956 had ossified beyond usefulness. Jessup recognize earlier than anyone else that the received categories were breaking down, and they were breaking down precisely because of the transnationality of legally significant social processes. In response, he proposed a new category, transnational law, to describe "all law which regulates actions and events that transcend national frontiers." In so doing, he initiated the paradigm shift that concerns us today, and for this Jessup can rightly be called the father of the transnational law investigation.<sup>32</sup>

Jessup did not have the benefit of the vast and growing interdisciplinary literature on globalization and its effects on politics, law and society. More recent theorists such as Berman, Zumbansen and Arjona have a rich literature from sociology, anthropology, political science, international relations, media studies and other fields through which to understand even more deeply how globalization is changing norm-creating processes and their underlying social relations. In particular, the transnational law inquiry has linked to the older literature on legal

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<sup>30</sup> On the paradoxical aspects of light as wave, particle and energy, *see, e.g.*, <http://micro.magnet.fsu.edu/primer/lightandcolor/particleorwave.html>.

<sup>31</sup> As Einstein wrote about wave-particle duality, "It seems as though we must use sometimes the one theory and sometimes the other, while at times we may use either. We are faced with a new kind of difficulty. We have two contradictory pictures of reality; separately neither of them fully explains the phenomena of light, but together they do." ALBERT EINSTEIN & LEOPOLD INFELD, *THE EVOLUTION OF PHYSICS* 262-63 (Touchstone 1967) (1938).

<sup>32</sup> Harold Koh significantly refined and elaborated this approach in his work on transnational legal process (*supra* note 18), which has been described by Paul Schiff Berman as a blend of the New Haven School and Robert Cover's work on pluralism, extended towards international law. *A Pluralist Approach to International Law*, 32 *YALE J. INT'L L.* 301 (2007).

pluralism, first developed in colonial and postcolonial legal studies to explore relationships between the colonial and indigenous norms, and now deployed for the exploration of the wide array of norms and processes associated with law's globalization.<sup>33</sup>

This strand of pluralism is what for Arjona is most distinctive about the transnational law debate.<sup>34</sup> For Arjona, insofar as the term has any usefulness—and he counsels a decidedly pragmatic approach to the debate—it lies in whether conceiving law as transnationally pluralist rather than state-centered and positivist (the traditional view) makes for better teaching or research.<sup>35</sup> Thus he argues that transnational law is “a good tool in order to perceive reality in its complexity. It is useful, and it can be profitably used for research purposes and for legal education.”<sup>36</sup> Arjona thus simultaneously seeks to engage us in an inquiry into the nature of knowledge, the virtues of philosophical pragmatism, globalizations's social transformations and their jurisprudential impact, and our need to respect law's utility, or put another way, to respect our need for law.

Such methodological, jurisprudential and normative concerns are hallmarks of the inquiry into law's globality. But what *is* this “transnational law,” and how exactly does it capture something essential about law in a globalizing age? A particularly intriguing and representative contribution to this methodological and jurisprudential discussion is Peer Zumbansen's notion of “transnational legal pluralism.”<sup>37</sup>

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<sup>33</sup> Berman, *supra* note 31, at 310-311; Arjona, *supra* note 7; Scott, *supra* note 26. It has also been aligned, symbolically if not always substantively, with critical legal theory, and the larger domain of efforts to theorize law's response to post-modernity. *See, e.g.*, DUNCAN KENNEDY, “THREE GLOBALIZATIONS OF LAW AND LEGAL THOUGHT: 1850-2000,” IN *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek et al. eds., 2006). Global law theorists, as will be discussed below, may be said to be more modernist in their approach to globalization's law. I am indebted to Cesar Arjona for this insight.

<sup>34</sup> *Supra* note 1, at 13. It is also characteristic of George Berman's distinctive contribution, global legal pluralism, which I include as a transnational approach despite the use of the word “global,” as I will explain below. In fact, Scott notes wryly that there is a “pluralism” of transnational law discourses. *Supra* note 26, at 862.

<sup>35</sup> In this Arjona rightly considers his thought on the subject to be in the tradition of Jessup's himself. *Supra* note 1, at 13 n. 16.

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Supra* note 11; *see also* Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 *Transnat'l L. & Contemp. Prob.* 305 (2012); Zumbansen, *Why Global Law is Transnational*, 4 *TRANSNAT'L LEGAL THEORY* 463, 464-5 (2013) (offering Transnational Legal Pluralism as the response to globalization's effects on law, as analyzed in the work of William Twining and others).

For Zumbansen, transnational legal pluralism is more than what Jessup first recognized for us as “transnational law.” Zumbansen seeks to combine insights from legal sociology, legal theory, global justice theory and the literature on regulatory governance, into a theory that is as much a methodological approach through which to make sense of the conditions shaping the evolution of law in the global space, as it is a characterization of a kind of law governing that space.<sup>38</sup> Characteristics of transnational legal pluralism include interdisciplinarity, pluralism, and a regulatory pastiche of hard and soft, direct and indirect norms.<sup>39</sup> Zumbansen finds examples of that space and its characteristic features in areas such as financial markets, e-commerce, labor law and multinationals.<sup>40</sup>

At the heart of Zumbansen’s approach is a key methodological problem: in his view, we are today unable to satisfactorily distinguish between legal and non-legal forms of regulation.<sup>41</sup> This is particularly problematic for globalization’s law since formal identification (as a stop gap) of law with the state fails to clearly illuminate law in spaces where the state is not the only or even the dominant

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<sup>38</sup> Zumbansen is thus the quintessential representative of Scott’s third conception of transnational law, “Transnational Socio-Legal Pluralism.” *Supra* note 26 at, 873-5. Although Scott speaks at times of “system” in reference to this third conception, a careful reading suggests that what he intends is closer to transnational law as a distinctive legal process than what is meant by the “global” systemic thinkers discussed below. *See, e.g., supra* note 26, at 875 (“much of what occurs under the auspices even of state or interstate law does not transpire at the formal level (of courts, etcetera) but in a complex informal world in which official law mutates and morphs as a function of delegated (even privatized) authority, social and economic power struggles, good faith mutual response to common needs, and interaction with unofficial normativities”).

<sup>39</sup> *Supra* note 11, at 175-78. These are also characteristic of Berman’s global legal pluralist approach. *Supra* note 20, at 5-9, 141-51.

<sup>40</sup> Zumbansen, *supra* note 11, at 148 (these contexts “are characterised by a complex amalgamation of ‘hard’ and ‘soft’, direct and indirect norms that no longer fit under the semantic umbrella of existing disciplinary fields such as labour law or corporate law. As a result, not only have the scope and content of such fields come under pressure; more importantly, the intersection of different forms of ‘regulatory governance’ with regard to such contexts must now be assessed through a methodological lens”).

<sup>41</sup> *See id.* (“The central point of the transnational perspective embraced here is that, despite an emerging consensus regarding the co-existence of legal and ‘other’ forms of regulation... we are still at a loss as to how to distinguish between a legal and a non-legal form of regulation.”). In this sense, transnational legal theorists are quite comfortable with post-modern approaches to law, which also find this boundary blurred, if not disintegrating. *See also supra* note 37, at 463, 464-5 (2013) (discussing how the “definitional” problem of law/non-law is also at the center of William Twining’s work on law and globalization).

regulatory actor. This means two methodological premises are central to transnational legal pluralism: first, an inquiry into the elements that inform the distinction between law and non-law in any given regulatory context. Second, a notion of “transnational” as not defining a territorial space across boundaries, but as a conceptual space between national and international characterizations of law. It is meant to mark the process of transition in legal theory from a state-based definition of law to a concept of legal norm-creation based in functional specialization: “an attempt to bridge the experience of legal pluralism in the nation state with that of a functionally differentiated world society.”<sup>42</sup>

Returning to my tri-partite characterization of law, Zumbansen’s work is characteristic of how transnational approaches to law’s globalization focus both on process—the transnational creation of norms through a range of interacting state and non-state processes, grounded in changing socio-legal relationships—and output—transnational law as a “regulatory pastiche” of hard, soft, direct, indirect, state-based, commercial or networked norms.

## **b Global Law: Law’s Architecture**

In contrast to this nuanced socio-legal approach to norms and norm creation, global law theorists approach globalization’s law from a different perspective, what I am calling a more architectural or structural sensibility.

Many commentators are skeptical of the notion of global law. Legal practitioners who must work in the world of actual claims, counterclaims and clients ask whether “we are concerned here about a trendy theory for researchers attracted by a new source of inspiration and legal exploration, or are there really concrete and factual elements allowing submission of irrefutable evidence of a movement toward the creation of a standalone international legal system?”<sup>43</sup> Transnational law theorists conclude more grimly that “any aspirations to a normative unity of global law are...doomed from the outset.”<sup>44</sup>

A good example of this colloquy is an interesting article from 2006, in which Pierrick Le Goff captures an evolutionary moment in the development of the concept of global law, tied to a key academic conference on the subject that year at Indiana

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<sup>42</sup> Zumbansen, *supra* note 11, at 150-52.

<sup>43</sup> Pierrick Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 *IND. INT’L & COMP. L. REV.* 119, 120 (2007).

<sup>44</sup> Arjona, *supra* note 1, at 40 (citing Teubner and Fischer-Lescano). Zumbansen does write, however, of the “procedural and substantive architectures of fast-emerging global regulatory regimes.” However, his interest lies more in demonstrating the fragmented, plural nature of these structures and their residual, almost reflexive associations with demarcations such as state versus private ordering, than in tracing their emerging contours—in fact, I suspect he would prefer deconstructing such attempts. Zumbansen, *supra* note 10, at 23-25.

University.<sup>45</sup> Le Goff begins by inquiring whether there is in fact anything substantive to the notion of global law, asking the key questions any practicing lawyer would:

“Where does one access the information on the rules and regulations forming global law? Who determines the contents of global law? Where are the courts sanctioning violations of global law? On what fundamental basis is global law supposed to represent a binding set of international rules? What makes global law an independent legal system?”<sup>46</sup>

He proceeds, however, to conclude that there is indeed something called global law, locating it in the complex blend of national and international rules and processes governing the global economic space. He prefigures his conclusion by turning these apparently skeptical questions on their heads: “should these interrogations not be viewed as the best demonstration of the factual existence of global law? After all, one can hardly criticize something that does not exist.”

He concludes that global law does exist “as a multicultural, multinational, and multidisciplinary legal phenomenon, finding its roots in international and comparative law and emerging through the international legal practice that was prompted by the globalization of the world economy.” Thus far his characterization of global law would seem entirely consistent transnational law theory as Zumbansen articulates it. However, in his view global law does trend towards a structured legal system, though it has not yet reached such “maturity and formality.”<sup>47</sup> Instead, he finds global law in a transitional phase, in which we see areas or “hubs” of global law emerging, but no generalized autonomous body of global norms. Le Goff’s characterization of global law can itself be seen as a sort of transitional concept, capturing something of transnational law’s pluralist and process-oriented flavor, yet inserting a teleological element towards system and structure that transnationalists would eschew.

Le Goff remains optimistic, however, about the possibilities for global law, since as can be seen in “the evolution in international criminal law or international trade law, ... the process of global law formation starts with sub-categories. Once the efforts toward shaping these sub-categories reach a more advanced stage, an overarching vision of the concept and contents of global law will emerge more clearly.”

If we look at the work of leading contemporary global law theorists such as Domingo and Ziccardi Capaldo, we see powerful arguments that globalization’s law

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<sup>45</sup> Globalization of the Legal Profession Symposium at the Indiana University School of Law (Apr. 6, 2006).

<sup>46</sup> *Supra* note 41, at 120-21.

<sup>47</sup> *Supra* note 41, at 126.

is moving towards that point of “overarching vision.” It is in articulating this vision that global law theorists excel.

To begin with, theorists of “global” law acknowledge the process points made by transnational law theorists. Domingo, for example, begins defining global law as a distinctive product of national, transnational and international legal processes made possible and necessary by global social and territorial relationships and dynamics.<sup>48</sup> Global law as the “product” or “output” which transnational legal processes create can sound a lot like transnational law theorists talking about law as output. However, while global law theorists like Domingo seek to incorporate the insights of transnational law, this should not be confused with the more careful and nuanced accounts of processes and norms which a true transnational approach would offer, such as one finds in the work of Zumbansen. Global law theorists are after a further and different point, and their work is best understood with this different aim in mind.

The “tell” is in what Domingo goes on to say next, namely, that global law is “a world legal order that governs the ambit of justice as it affects humanity as a whole.<sup>49</sup>” *Now we are in global law country.* Domingo defines global law as a “system of systems, compatible with national and international legal orders.”<sup>50</sup> Global law is thus nothing short of the new legal order, a sort of global legal federalism, emerging from, indeed necessitated by, the effects of globalization on law, politics and society.<sup>51</sup> Through systemic principles such as “universality, solidarity, subsidiarity and horizontality,” global law brings order to social relations (including among systems of national law) in the global space.<sup>52</sup>

Domingo does not entirely reject the socio-legal perspective, and keeps an eye on the legal significance of globalization’s effects on social relationships, but it is the 30,000 feet view. He sees globalization as “creat[ing] a global community and a global space, which need a global law to order social relations within it.”<sup>53</sup> This may sound in terms of social relations and processes, but it is clearly not Zumbansen’s

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<sup>48</sup> Domingo, *supra* note 17 at xiii-xix, 98-100.

<sup>49</sup> *Id.* at xvii.

<sup>50</sup> *Id.*

<sup>51</sup> Compare this with Sassen’s notion of global assemblages, which also suggests a kind of “architecture,” or at least “structure,” emerging from global legal processes. However, Sassen is more of a transnationalist, as is clear in her sense of how long-term components such as territory, authority and rights continue to be reassembled through globalization into “novel global configurations,” yielding a more fluid and evolutionary picture as “their mutual international and interdependencies are altered, as are their institutional encasements.” *See Sassen, supra* note 6.

<sup>52</sup> Domingo, *supra* note 17, at 157-85.

<sup>53</sup> *Id.* at 98 et seq. Garcia, *supra* note 8.

socio-legal process language, for example.<sup>54</sup> Global law flows from the need to order human relations, but on a global scale.<sup>55</sup> Notions of global society are painted in broad strokes, in the service of a larger architectural and normative ideal.

And global law is very much an ideal term, in a necessary and important sense. Domingo and others see the need to articulate not simply an account of transnational legal process and output (where we “are” in law’s globalization and how it “works”), but where we may be *going*. For Domingo, global law is as much aspiration and lodestar for the evolution of law’s response to globalization, as it is an account of legal process and output.

Another global law theorist, Gabrielle Ziccardi Capaldo begins her inquiry with the skeptic’s question (and Le Goff’s): has globalization produced a corpus of rules autonomous enough from inter-state law to be called “global law?”<sup>56</sup> The answer for her (as for Le Goff) is yes, though she concedes it is in “an embryonic phase.”<sup>57</sup> She begins her inquiry by first setting forth the goals as she sees them for any investigation of global law: to offer “a uniform set of legal rules and procedures designed to manage global interests and goods, established for the purpose of institutionalizing governance mechanisms and procedures, defining and allocating powers to the global level, and creating authorities or bodies exercising functions of a public nature.”<sup>58</sup> By so defining the goals, Ziccardi Capaldo is clearly signaling her intellectual background in public international law and constitutional law, attributes of many global law theorists and which doubtless influence their more structural and architectural aims.<sup>59</sup>

She goes on to define Global Law as “an autonomous legal system” consisting of four “pillars,” namely “**verticality** of decision making processes; **legality** and the safeguarding of common values and goods; **integration** between legal systems and

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<sup>54</sup> Compare to Zumbansen, *supra* note 10, at 8: “A transnational perspective deconstructs the various law-state associations by understanding the evolution of law in relation and response to the development of ‘world society,’ a society understood as non-territorially confined, functionally differentiated and constituted by the co-evolution of conflicting societal rationalities.”

<sup>55</sup> Domingo, *supra* note 17, at 98 et seq.

<sup>56</sup> Capaldo, *supra* note 17, at 3. Simply by posing this question, Ziccardi Capaldo and Le Goff can be said to be identifying themselves as legal modernists operating with an assumption of law’s autonomy, which more post-modern transnationalists would seek to question from the outset. I am indebted to Cesar Arjona for pointing this out.

<sup>57</sup> Capaldo, *supra* note 17, at 305.

<sup>58</sup> Domingo, *supra* note 17, at xiii.

<sup>59</sup> It can perhaps be said that global law theorists approach globalization’s law from a public law perspective, while transnational law theorists approach it from a law and society perspective. See Zumbansen, *supra* note 42, at 475 (calling for a renewed sociological jurisprudence in response to law and globalization).

procedures;” and “development of forms of **collective guarantees.**”<sup>60</sup> Global law consists of mechanisms through which governance is exercised at levels “above” and in tandem with the state, through the UN system and in parallel to it, towards a kind of co-management of global issues under core human rights principles and the rule of law (verticality and legality).<sup>61</sup> This co-management includes principles and mechanisms promoting coherence and deference to international norms throughout the patchwork of international, regional and national legal systems and actors in the global space (integration);<sup>62</sup> and systems for the collective enforcement of global values through sanctions, specialized tribunals (such as the Extraordinary Chamber in Cambodia), and specialized regimes (such as for the environment or trade) (collective guarantees).<sup>63</sup> It is through these four pillars that global law attains its status, in her view, as a functioning autonomous legal system.<sup>64</sup>

Given the use of terms such as “uniform” “institutionalizing” and “allocating,” and her “pillars” metaphor, the systemic, architectural nature of her approach could not be clearer.<sup>65</sup> Moreover, as with Domingo, the aspirational dimension to her theory is not simply a concession to global law’s embryonic nature. Ziccardi Capaldo’s statement of the goals for global law (“achievement of a harmonic legal system for a universal society, capable of safeguarding humanity and each and every human being”<sup>66</sup>) is just as much an element in her definition of global law as are the

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<sup>60</sup> Domingo, *supra* note 17, at xv.

<sup>61</sup> She cites, for example, increased activism by the UN GA and SC in not simply monitoring and enforcing international peaceful order and the use of force but in protecting international public values in the absence of an organized structure to do so. Capaldo, *supra* note 17, at 61-68.

<sup>62</sup> She cites as examples recent decisions by the ECHR, the WTO AB and the ECJ recognizing the special status of IL within their respective juridical systems. Capaldo, *supra* note 17, at 13-14.

<sup>63</sup> See especially Capaldo, *supra* note 17, at 173-213.

<sup>64</sup> This approach echoes Berman’s in *Global Legal Pluralism*, where he focuses on “procedural mechanisms, institutions and practices” that help manage legal pluralism and its normative conflicts through a “cosmopolitan pluralist” framework. *Supra* note 21, at 10-17, 152-89. However, he is more transnationalist than globalist, in that his framework is more minimalist than Ziccardi Capaldo’s, and lacks the strong teleological dimension characteristic of the globalists, as discussed below.

<sup>65</sup> Ziccardi Capaldo makes clear that “this investigation is directed at the ‘structural’ aspects of emerging global law, rather than to substantive ones,” believing the latter to be comparatively better understood than the former. Capaldo, *supra* note 17, at xiii-xiv.

<sup>66</sup> Capaldo, *supra* note 17, at 305. Here the difference between Berman’s approach and that of the globalists becomes clearest, and so too the reason for my locating him within the transnationalist family. Far from embracing such a universalist vision, he explicitly rejects universalism and orthodox accounts of cosmopolitanism, preferring instead a “cosmopolitan pluralism” and a set of practices for mediating



four pillars, because her understanding of global law is essentially constitutional in nature, hence both aspirational and substantive. Global law is nothing short of the “public law” of an emerging global community.<sup>67</sup> She analogizes “international law” as traditionally understood, to private law as it functions in a domestic legal system: ordering private relationships between the actors. In her vision of law’s globality, international law orders the relationships between states taken individually, whereas global law “carries out the functions of constitutional law in the domestic system,” and consists of “the founding principles of the global community, the procedures and institutions that regulate public functions.”<sup>68</sup>

As does Domingo, Ziccardi Capaldo grounds her theoretical enterprise in a gesture towards the social basis for legal norms, grounding global law in the social transformations of globalization. In her view, globalization as a set of social processes is not only generative of global law, but transformative of how global law interacts with other legal systems: inter-state, regional and domestic. As is characteristic of other global law theorists, however, she is less interested in a close analysis of these developments as socio-legal processes, and instead more interested in a “constitutional” understanding of how the four pillars function as systemic legal principles.

### 3 Pulling the Strands Together

Whatever can be said about the terminological debate, I think we can agree, with Arjona, that it is “not just a matter of style.”<sup>69</sup> Something is going on in globalization’s law, even as we struggle to capture its nature. We may be blind scholars attempting to describe an elephant by touch, but there is most definitely something large and alive in the room. To reject the entire inquiry would be to engage in what has been called “indolent legal thinking,” and those advocating such conservatism should ask themselves, with Arjona, “how would the result work as a better description of the world we actually live in?”<sup>70</sup>

So, what *is* going on? My reading of the literature suggests that globalization’s law is both transnational *and* global, in significant ways that follow the process, output, and architecture model, and that presume a continuing role for concepts such as national law and international law, properly understood.

When we seek to inquire into the processes of norm creation evolving in distinctive ways in response to globalization, and their underlying social bases, we

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pluralism which remain decidedly agnostic on normative matters. *Supra* note 21, at 11-12, 141-142, 152-153.

<sup>67</sup> Here she is in full agreement with Domingo. *See* Domingo, *supra* note 53.

<sup>68</sup> Capaldo, *supra* note 17, at 8.

<sup>69</sup> Arjona, *supra* note 1 at, 12.

<sup>70</sup> Arjona, *supra* note 1 at, 40, following de Sousa Santos. Live in and, I would add, practice in.

are best served by the literature and perspective of Transnational Law scholars such as Zumbansen, Berman, Arjona and others. This helps us understand globalization's law as process. Similarly, if we seek to understand the various legal outputs that are emerging in this new global regulatory space—new types of norms intended to influence behavior in the global space—this is best approached through the “output” strand of transnational law literature.

When we seek instead to glimpse the contours of the system of institutions, values, norms and processes which may be emerging as a result of the disparate sites and sources of legal activity, and how the many pieces fit together, we can turn to the Global Law literature for its insights into law as architecture. “Global” law thus captures both something of the nature of this emerging global legal order in a descriptive sense, and something of its teleology as well, a vision of what law may be evolving towards in the global space, and perhaps what we need or hope it will evolve towards as well.

Concepts of “national” and “international” law retain vitality and utility, particularly if deployed with an understanding of the transnational perspective on norm-creation processes. National law (loosely understood as law promulgated and enforced by state-centric processes within their territories) and international law (understood in the traditional sense as custom and treaty developed out of state practice and ordering state relations) continue to operate and play key regulatory roles. However, it is a national law that is being transformed from within by global agendas and goals, as Sassen reminds us,<sup>71</sup> and which regulates the national space in tandem with a range of other norms of various kinds and strengths formed through transnational processes, as Zumbansen reminds us.<sup>72</sup> It is an international law that continues to function through treaty and custom, but is increasingly drafted to mediate on a “constitutional” level between “national” problems (problems felt within national and local polities) and “transnational” norms which increasingly interpenetrate national law, much as European “national” law both defers to and validates EU norms.<sup>73</sup> Hence our understanding of the “national” and the “international” are transformed by the “global.”

Can we say anything definitive about the nature of transnational law? The notion is by nature loose and disaggregated, but here I would point towards Zumbansen's definition: “Transnational law is another name for transnational legal pluralism, for an—inherently interdisciplinary—inquiry into the nature of legal regulation of problems, which have long been extending beyond the confines of jurisdiction – both ‘inside’ and ‘outside’ of the nation state.”<sup>74</sup> I would add that transnational law consists not only of this perspective and inquiry, and the transnational norm-creating processes that it reveals and foregrounds, but also the

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<sup>71</sup> *Supra* note 6, at 401.

<sup>72</sup> *Supra* note 40 and associated text.

<sup>73</sup> *See* Arjona, *supra* note 1, at 40.

<sup>74</sup> Zumbansen, *supra* note 10, at 55.

“outputs” of this process, the range of hard and soft norms that together regulate behavior in this global space.<sup>75</sup> Perhaps the clearest statement is Arjona’s: “transnational law [i]s normativity that is not strictly dependent on the state.”<sup>76</sup>

What can we say about the nature of Global Law? It may well be too soon to know with any precision, as the globalists themselves would concede,<sup>77</sup> but that is not a criticism. Insofar as “global law” as a concept charts the contours of an emerging architecture, it will by nature be an evolutionary term, and an aspirational one as well, as is clear in the work of both Domingo and Ziccardi Capaldo. Our attempts to understand and characterize global law will in turn help shape its development. A good place to begin is to think of global law, as Ziccardi Capaldo urges, as a kind of “globalized” international law, transformed by globalization into a pluralist legal order of multiple overlapping sets of norms, integrated and rendered cohesive by a variety of tools, principles and values which characterize the “pillars” of the global legal order and their underlying social foundation. But I suspect the heart of global law, and its most audacious claim, is in its aspiration to be the human rights-based public law of an emerging global community.

Both transnational and global approaches to law share an assumption that law in a global age will be pluralist in nature. Such pluralism is both a challenge to, and a strength of, legal processes and outputs within the global space taken as a whole. This is not a static pluralism or simple diversity of types of law, but a dynamic pluralism involving the interaction of different types and sources of law, with manifold effects on different actors and in different spaces, and subject to contending ideologies.<sup>78</sup> Moreover, this pluralism points to a second assumption these two approaches share, namely, that understanding and creating effective regulation of globalized phenomenon (like the Internet or global financial flows) requires understanding and deploying transnational legal processes. In both assumptions, transnational and global law theorists seek to be eminently pragmatic.

How do we account for the difference in these two approaches? Part of the difference may be conceptual modesty, in that transnational law theorists tend as a group to be cautious about asserting larger systemic claims about the nature of the emerging legal landscape, as could be expected of a process-oriented approach foregrounding instability and change. Process scholars may be temperamentally

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<sup>75</sup> Or, as Zumbansen characterizes it, “attempts towards the development of an appropriately designed framework of legal analysis and regulation in light of a radically disembedded regulatory landscape.” Zumbansen, *supra* note 10, at 51.

<sup>76</sup> Arjona, *supra* note 1, at 41.

<sup>77</sup> See, e.g., Le Goff, *supra* note 41; Simon Roberts, *After Government? On Representing Law Without the State*, 68 MODERN L. REV. 1 (2005).

<sup>78</sup> See Berman, *supra*, note 21; Zumbansen, *supra*, note 11. See generally Frank J. Garcia, GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: THREE TAKES (Cambridge 2013) (discussing role of pluralism in global justice theory).

suspicious of grander claims and architectural schemes, preferring to remain analytically closer to legal processes and their socio-legal groundings, which in part accounts for their popularity with practicing lawyers and with socio-legal theorists of law.

This is not to say that global law theorists are by comparison immodest or reckless—far from it. For one thing, transnational theorists may be equally ambitious, even grandiose, in their deconstruction of legal structures and in their breezy insistence on law’s instability and porosity. In my view, the deeper reason for the difference lies partly in their aims, and partly in their temperament (temperament understood as a predisposition towards different pieces of a larger puzzle containing *all* pieces). Global law theorists are responding to a different imperative, a different musical sensibility, if you will, than transnationalists—towards classical instead of jazz, or legal modernism instead of post-modernism. This enables global law theorists to play a key role in offering us vistas and visions of where law’s globalization may be taking us. Without this dimension, we cannot assemble a comprehensive view of law’s globalization and its valence—we risk operating with text and context, but no teleology.

### III Conclusion

In conclusion, I want to return to my analogy to light as wave and particle, for what else it might tell us about the nature of law in this global space, and what we might expect of it. I have already mined the analogy for one sort of insight: that law can simultaneously be process, output *and* architecture, in the way light is simultaneously wave and particle. Now, I want to draw out a second parallel, involving law’s penetration of national and global spaces, and law’s continuing urgency.

Sassen and others highlight global law’s deep penetration into what we continue to call the national. We can understand this penetrative aspect of law by reference to light’s ability as a wave to penetrate deeply through many layers of structure.<sup>79</sup> Simply put, we find law almost everywhere.<sup>80</sup> Moreover, it is an active presence, not a passive one. Global law’s ability to affect even the tiniest of “national” or “private” transactions (think of the way everyday domestic contract law accommodates transnational e-signature norms, for example, or the impact of global privacy norms on Internet commerce) can be analogized to light’s property as

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<sup>79</sup> We hear echoes of this in Arjona’s musing that the prefix “trans” in “transnational” suggests “through.” Arjona, *supra* note 1 at .

<sup>80</sup> And where we don’t, we use metaphors of darkness, i.e., “dark pools” in finance. See, e.g., Ross Buckley, *Reconceptualizing the Regulation of Global Finance*, -- Oxford J. Leg. Stud. -- (2016)(forthcoming)(decrying the effects of dark pools on finance and financial regulation).

a particle to register as an impact at the most granular level.<sup>81</sup> Finally, this energetic capacity of law to both permeate virtually any space and to effect change at the tiniest of levels can be analogized to light's fundamental nature as energy. Light's energy makes life itself possible on our planet, as law makes social life possible.

Considering light (and law) as energy reminds us, however, that other bands on the energy spectrum (think harmful radioactivity) are less benign, even toxic. Put another way, radiant energy can power many kinds of changes, both photosynthesis and carcinogenic mutations. It matters what kind of energy globalization's law is to become, light or toxic radioactivity. For this reason it is important that law in the global space, and our understanding of global justice and its relationship to law, evolve apace. Properly understanding law's globality, writes Arjona, creates a more natural space within legal education and law itself for considerations of justice than does a traditional state-centric jurisprudence in which positivism seemingly displaces normativity.<sup>82</sup> Global justice helps keep transformative what could shift into toxicity.

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<sup>81</sup> I am indebted to Fiona Smith for suggesting these examples and for her insights in helping extend the metaphor.

<sup>82</sup> Arjona, *supra* note 1, at 42 (a state-centric view of law reinforces the contractarian approach to justice, confining it within the domain of a (state-based) social contract and ignoring or minimizing the transnational impact of just and unjust practices). *See also* Garcia, *supra* note 78.