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## Transnational Legal Process: An Evolving Theory and Methodology

Regina Jefferies

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# TRANSNATIONAL LEGAL PROCESS: AN EVOLVING THEORY AND METHODOLOGY

*Regina Jefferies\**

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## INTRODUCTION

Harold Hongju Koh's transnational legal process (TLP) theory sits within a much explored body of legal scholarship labelled "international legal compliance" theory, which has developed both in conversation across disciplines and in conversation with itself.<sup>1</sup> "International legal compliance" is identified as a subfield of international law that draws upon international relations theory and social science methodologies to address questions of whether, why, and how international law affects state behavior.<sup>2</sup> The discursive accretion of theoretical work on international legal compliance thus requires not only an exploration of TLP texts, but an exploration of TLP's intellectual precursors and critics, as well as TLP's continued refinements and contributions to the evolution of ideas within the compliance space. This work

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1. The extensive body of international law and international relations literature is difficult to synthesize due in part to the independent evolution of the two disciplines, the use of differing terminologies across ideas and topics, and the absence of general definitions of some key terms. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 191–94 (1996). Transnational Legal Process theory also overlaps with interdisciplinary debates within Transnational Law scholarship, which grapple with "the status and role of law in an increasingly inchoate, globe-spanning web of regulatory regimes, actors, norms and processes." Peer Zumbansen, *Transnational Law, Evolving*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 899, 900 (Jan M. Smits ed., 2nd ed. 2012). This article does not attempt to fully canvass the Transnational Law literature, but instead weaves insights from Transnational Law scholarship into the discussion through an exploration of works which critique and build upon Transnational Legal Process theory.

2. William C. Bradford, *International Legal Compliance: An Annotated Bibliography*, 30 N.C. J. INT'L L. COM. REG. 379, 379 (2004); William Bradford, *International Legal Compliance: Surveying the Field*, 36 GEO. J. INT'L L. 495, 495 (2005). The work within this defined subfield tends to differentiate human rights regimes from other types of international legal regimes. See Harold Koh, *Internalization Through Socialization*, 54 DUKE L. J. 975, 979 (2005) ("Human rights has traditionally been the toughest case study for interdisciplinary theory because compliance with international human rights rules cannot easily be explained as reciprocity or by reference to a larger cooperation or coordination game. Moreover, human rights is the subject matter area in international affairs where the largest enforcement deficit exists, inasmuch as the costs of enforcement appear high and the benefits seem low by traditional state interest calculations."). "The global promotion of human rights, however, is importantly different from both types of regimes." Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621, 628 (2004); see also JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 119–26 (2005).

fills a gap in the literature by synthesizing scholarship in disparate sub-fields of legal study that engage with three critical limitations of TLP, but that do not generally speak to one another. The piece further contributes to a more systematic approach to theory testing and development by identifying Pierre Bourdieu's concepts of "habitus" and bureaucratic field,<sup>3</sup> as well as the empirical method of social network analysis, as providing fertile ground for future empirical and interdisciplinary work.

This Article evaluates TLP theory, the intellectual traditions that have fed the theory, and the interdisciplinary legal compliance scholarship that has either critiqued or built upon TLP. Part I examines the origins of TLP within the literature on international legal theory, as well as in the debate between international law and international relations scholars. Part II turns to the detailed workings of TLP, including the principles and processes involved in its operation, before examining scholarship criticizing three main limitations of TLP theory. Within that scholarship, those limitations are broadly: (1) insufficient description of the actors and processes of norm internalization;<sup>4</sup>

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3. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 72 (2013).

4. Koh implicitly acknowledges these limitations in his article addressing Goodman and Jinks's "law-and sociology" approach to international legal compliance. Koh, *Internalization Through Socialization*, *supra* note 2, at 977-978. See, e.g., JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* 118-119 (2010); Asher Alkoby, *Theories of Compliance with International Law and the Challenge of Cultural Difference*, 4 *J. INT'L L. & INT'L REL.* 151, 187 (2008); Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 *VAND. L. REV.* 77, 81 (2007); Goodman & Jinks, *supra* note 2, at 626 n.8; Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 *COLUM. J. TRANSNAT'L L.* 281, 287 (1999); Fiona McGaughey, *From Gatekeepers to GONGOs: A Taxonomy of Non-Governmental Organisations Engaging with United Nations Human Rights Mechanisms*, 36 *NETH. Q. HUM. RTS.* 111, 118 (2018); Tamar Megiddo, *The Domestic Standing of International Law: A Non-State Account*, 57 *COLUM. J. TRANSNAT'L L.* 494, 502-03 (2019); Eric A. Posner, *Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations*, 12 *TULSA J. COMP. & INT'L L.* 23, 25 (2004); Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 *HARV. INT'L L. J.* 51, 75 (2010); Natasha Affolder, *Transnational Environmental Law's Missing People*, *TRANSNAT'L ENVTL. L.*, Aug. 2019, at 1, 2; see also ALEXANDER BETTS & PHIL ORCHARD, *Introduction: The Normative Institutionalization-Implementation Gap*, in *IMPLEMENTATION AND WORLD POLITICS: HOW INTERNATIONAL NORMS CHANGE PRACTICE* (Alexander Betts & Phil Orchard eds., 2014) (Observing that within international relations scholarship, "[t]he

(2) insufficient explanation of *why* States internalize certain international norms;<sup>5</sup> and (3) insufficient identification and description of norm-creation processes.<sup>6</sup> Part III then reviews empirical international law scholarship applying, testing, extending, or modifying aspects of TLP. The volume and variety of scholarship engaging with some aspect of TLP renders the task of exhaustively cataloguing the work impractical.<sup>7</sup> Therefore, rather than providing a comprehensive bibliography, this article traces the legal theoretical and methodological origins of TLP and uses those orienting points to draw TLP into present

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study of how new norms are implemented has been neglected within constructivist theorizing”).

5. See, e.g., BRUNNÉE & TOOPE, *supra* note 4, at 118; BRYAN PEELER, THE PERSISTENCE OF RECIPROCITY IN INTERNATIONAL HUMANITARIAN LAW 51 (2019); Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 721 (2007); Jutta Brunnée & Stephen J. Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, 13 FINNISH Y.B. INT'L L. 273, 291 (2002); Thalia Gonzalez, *From Global to Local: Domestic Human Rights Norms in Theory and Practice*, 59 HOWARD L. J. 373, 410–11 (2016); Goodman & Jinks, *supra* note 2, at 624 & n.5; Jeffrey T. Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324, 325 (1998); Koven Levitt, *supra* note 4, at 285–87; Caleb J. Stevens, *Hunting a Dictator as a Transnational Legal Process: The Internalization Problem and the Hissène Habré Case*, 24 PACE INT'L L. REV. 190, 193 (2012).

6. See, e.g., Ingo Venzke, *Contemporary Theories and International Lawmaking*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 1, 1, 14 (Catherine Brölmann & Yannick Radi eds., 2014); T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479, 479 (2008); Sébastien Jodoin, *Transnational Legal Process and Discourse in Environmental Governance: The Case of REDD+ in Tanzania*, 44 L. & SOC. INQUIRY 1019, 1020 (2019); Minzee Kim & Elizabeth Heger Boyle, *Neoliberalism, Transnational Education Norms, and Education Spending in the Developing World, 1983–2004*, 37 L. & SOC. INQUIRY 367, 368–69 (2012); Sharmila L. Murthy, *States and Cities as ‘Norm Sustainers’: A Role for Subnational Actors in the Paris Agreement on Climate Change*, in 37 VA. ENVTL. L. J. 1, 26 (2019); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a “They,” Not an “It,”* 96 MINN. L. REV. 194, 214 (2011); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 324 (2004); Melissa A. Waters, *Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 457 (2007).

7. See Maya Steinitz, *Transnational Legal Process Theories*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 339 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2013), for an overview of “transnational legal process theories” more generally.

debates on legal theory and methodology, while providing signposts in the form of contemporary scholarship. Part III explores Pierre Bourdieu's concepts of habitus and bureaucratic field, in addition to social network analysis, as potentially productive tools for future empirical, interdisciplinary scholarly work aimed at contributing to the evolution of TLP as both theory and methodology.<sup>8</sup> Part IV concludes with a reflection on the importance of continued engagement with TLP to advance a more complex understanding of the role of law and compliance in a transnational context.

## I. ORIGINS OF TRANSNATIONAL LEGAL PROCESS THEORY

The story of transnational legal process arises from both the evolution of international legal theory and from the post-World War II scholarly interplay between the fields of international law and international relations.<sup>9</sup> The general development of international legal compliance relevant to this piece involves conceptualizing international law as a constitutive process,<sup>10</sup> rather than as a static set of rules, and looking beyond the unitary State in international affairs not only to identify state interests but to

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8. "Method" is the tool used to answer a research question (interview, survey, textual analysis, etc.). See KERRY E. HOWELL, AN INTRODUCTION TO THE PHILOSOPHY OF METHODOLOGY 4 (2012) ("For example, considerations regarding the nature of reality and the role of theory in the pursuit of knowledge will have implications for the methodology and methods pursued in a research project. Methodology will impact on methods and have considerable influence on what knowledge is considered to be and the consequent outcomes of the investigation.") "A work's methodology is essentially its 'approach'. It addresses the question of how to find relevant information, how to organize it, and how to interpret the results." Fons Coomans, Fred Grünfeld & Menno T. Kamminga, *Methods of Human Rights Research: A Primer*, 32 HUM. RTS. Q. 179, 183-184 (2010); see also William Outhwaite & Stephen P. Turner, *General Introduction*, in THE SAGE HANDBOOK OF SOCIAL SCIENCE METHODOLOGY 1 (William Outhwaite & Stephen P. Turner eds., 2007) ("In the social sciences the term 'methodology' tends to indicate two increasingly differentiated areas of work—first, methodological issues arising from and related to theoretical perspectives, as in Marxist, functionalist or feminist methodology; and, second, issues of specific research techniques, concepts and methods.").

9. Koh, *supra* note 1, at 186.

10. The "transnational legal process school" relates to the "constructivist" school of international relations in the sense that both schools generally view state actors and interests as constructed by legal (and social) norms. Harold Hongju Koh, *Is there a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 570 (2007).

identify the diverse actors who play a role in the international legal process. Regarding legal theory, Koh traces the lineage of TLP from Roscoe Pound, Myres S. McDougal and other American (US) Legal Realists' revolt against formalism through legal process and international human rights scholarship.<sup>11</sup> As to the interaction between the fields of international law and international relations, Koh locates TLP within international law scholarship directly challenging the claim in international relations that international law does not matter.<sup>12</sup> Part I locates TLP within each perspective to provide a clear picture of where TLP has been, as well as to frame the remaining discussion of scholarship that has contributed to TLP's evolution and inform a path for future research.

#### A. *International Legal Theory*

International legal theory has undergone a wide-ranging shift in approaches: from legal formalism to US legal realism, to the codification movement and the legal process movement, to the Constitutional rights movement, to critical studies, "New Formalism," and "New Legal Realism," among others.<sup>13</sup> Though some of these approaches have been primarily associated with domestic legal theory, international legal theory shares a similar developmental history.<sup>14</sup> This section does not attempt to provide a comprehensive review of that history, which also implicates the broader development of the concept of "transnational law" as a "thought experiment in legal methodology and legal theory,"<sup>15</sup> and instead focuses on the developments in international legal theory which Koh acknowledges as precursors to the development of TLP.

The process-orientation of TLP derives from the international legal process movement,<sup>16</sup> which developed as a response to legal

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11. Koh, *supra* note 1, at 189–90.

12. *Id.* at 194.

13. Koh, *supra* note 1, at 187–88; Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt A New Legal Theory?*, 95 CORNELL L.R. 61 (2009). Though legal realism is closely associated with an American (US) approach to jurisprudence, "legal realism had important roots in European jurisprudence in terms of a social understanding of law . . .". Gregory Shaffer, *The New Legal Realist Approach to International Law*, in 28 LEIDEN J. INT'L L. 189, 191 (2015).

14. Shaffer, *supra* note 13, at 189; Koh, *supra* note 1, at 189.

15. Zumbansen, *supra* note 1, at 900.

16. Koh, *supra* note 1, at 187.

realism.<sup>17</sup> The New Haven School reflected the legal realist perspective of international law scholarship and took a decidedly normative and empirical approach to redefining and studying international law as part of a political and social process of authoritative decision making.<sup>18</sup> In contrast to the New Haven School's legal realism, however, the International Legal Process School opted for an approach which emphasized the "process and institutional place of legal decision making . . ." to demonstrate that international law and lawyers have an effect on political processes.<sup>19</sup>

Acknowledging this provenance, Koh also recounts the various theoretical responses to the legal process movement that emerged in the 1960s and 70s, including the international human rights movement, international poverty law, a version of the Law and Movement, as well as Law and Society.<sup>20</sup> The decades that followed witnessed the development of critical international legal theory (CILT), which encompasses a wide range of approaches with origins in Critical Legal Studies (CLS) and global critiques of liberalism.<sup>21</sup> Though seemingly unconnected, each of these movements draw upon legal realism while placing

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17. Legal realism rejected formalism by challenging claims that legal rules were sufficiently precise to constitute a science and arguing that legal analysis should give way to a functional analysis that embraced policy science and accounted for law in practice. Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 474–75 (1995). The codification movement represents the second main response to American (US) legal realism. Koh, *supra* note 1, at 187. The domestic legal process movement similarly developed as a response to American (US) legal realism, espousing neutrality, legal institutional integrity, and "reasoned elaboration" in deciding constitutional claims. See Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L. J. 1459, 1469 (2005); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

18. Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L. J. 2599, 2620 (1997); Koh, *supra* note 1, at 188–89.

19. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 213 (1993).

20. Koh, *supra* note 1, at 187–88.

21. Fleur Johns, *Critical International Legal Theory*, in, INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS 1, 2 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2020); see also Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*, 10 INT'L COMMUNITY L. REV. 37, 373–74 (2008); Luis Eslava & Sundhya Pahuja, *Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law*, 45 VERFASSUNG UND RECHT IN ÜBERSEE 195, 195 (2012).



particular focus on the normativity of international, and transnational, law. It is this normative turn that ties these movements back to TLP theory, which Koh explains differs from “international legal process” in its “focus on the transnational, normative, and constitutive character of global legal process.”<sup>22</sup>

### *B. Discourse Between International Law and International Relations*

Following the post-World War II establishment of international institutions like the United Nations, the growth of the human rights movement fueled the continued development of the field of international law and optimism for the prospect of a “new world order under law.”<sup>23</sup> At the same time, international relations theory challenged the idea that international law had any impact on state behavior, instead adhering to a conception of the world where power and politics rule.<sup>24</sup> Hans Morgenthau, a leading international relations scholar and an originator of Realism, championed the view that “the weakness of international law results from the fact that . . . enforcement of the law is dependent upon the power not of a central government, but of the individual participants in the legal dispute.”<sup>25</sup> The decades that followed saw international law and international relations theory develop independently, clashing primarily over the question of whether international law matters.<sup>26</sup>

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22. Koh, *supra* note 18, at 2626.

23. Koh, *supra* note 1, at 191.

24. See Slaughter Burley, *supra* note 19, at 206. Notwithstanding the logic and intellectual appeal of this vision, interdisciplinary efforts fell victim for most of the postwar era to the ‘Realist challenge’: the defiant skepticism of Political Realists such as George Kennan, Hans Morgenthau and, more recently, Kenneth Waltz that international law could ever play more than an epiphenomenal role in the ordering of international life. *Id.* Furthermore, though the focus in this piece is on the post-World War II era, international relations critiques of international law and its methods preceded that era. See Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT’L L. 260, 261 (1940) (“[T]he science of international law is now confronted with the alternative of maintaining the traditional pattern of assumptions, concepts and devices in spite of the teachings of history, or of revising this pattern and trying to reconcile the science of international law and its subject-matter, that is, the rules of international law as they are actually applied.”).

25. Hans J. Morgenthau, *International Law and International Politics: An Uneasy Partnership*, 68 A.S.I.L. PROC. 331, 333 (1974).

26. *Id.*

Indeed, as Anne-Marie Slaughter later observed, “[m]uch of the theoretical scholarship in both international law and international relations can be understood as either a response to or a refinement of [the Realist] challenge . . .” that international law does not matter in international relations.<sup>27</sup> The general response to the Realist critique was to essentially reconceptualize the relationship between international law and politics.<sup>28</sup> Legal scholars in this nascent Transnational Legal Process School related law more closely to politics and redefined law as process rather than rules, which allowed for reassessment of the primary functions of law.<sup>29</sup> Thus, in addressing Realist critiques, these scholars also moved away from traditional positivist theories of law as rules.<sup>30</sup>

One early process-oriented rejoinder to the Realist critique came from McDougal and Harold D. Lasswell, who introduced a policy science approach that regarded law as an “authoritative” and “effective” subset of value-driven political decisions.<sup>31</sup> This approach laid the foundation for The New Haven School, which

27. Slaughter Burley, *supra* note 19, at 206.

28. *Id.* at 209.

29. *Id.*

30. Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345, 348–49 (1998). The origins of legal process scholarship more generally involve both developments between the fields of international law and international relations, as well as developments within legal theory. See Koh, *supra* note 1, at 186. “Legal Realism” is distinct from “Realism” in international relations scholarship. “A legal realist approach to law . . . focuses on the question of how law obtains meaning, operates, and changes in terms of practice, whether that of courts, administrative bodies, or private parties in a broader social context.” Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT’L L. 189, 190 (2015). In international relations scholarship, “[c]lassical Realists see a world of states obsessed with their power vis-à-vis other states. International rules and institutions are mere window-dressing: their creation and decline, and the degree to which states respect them, depend solely on the current power realities.” Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335, 337–38 (1985).

31. Koh, *supra* note 1, at 189 & n.31; HAROLD D. LASWELL & MYERS S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992) 141–77, 187–93; *see generally* Myers S. McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953); Harold D. Lasswell & Myers S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

saw “law as a process of decision that is both authoritative and controlling,” not simply a collection of rules, and applied social science analytical methods “to develop tools to bring about changes in public and civic order that will make them more closely approximate the goals of human dignity which it postulates.”<sup>32</sup> The New Haven School thus “seeks . . . to map decision processes, assess the often contradictory trends and the factors conditioning them, predict the range of probable outcomes, and enhance the skills necessary for influencing the decision processes of concern so that preferred outcomes ensue.”<sup>33</sup>

Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld initiated a different challenge to realism in the form of the “international legal process model,” which argued that “legal issues mainly arise not before courts, but in the process of making policy decisions, with lawyers playing a more important role than judges, and consent playing a greater role than command.”<sup>34</sup> In essence, international legal process adapted the earlier US legal process method of Henry M. Hart, Jr. and Albert M. Sacks<sup>35</sup> to the study of international law. Chayes, Ehrlich, and Lowenfeld sought to study the role that law and lawyers play in international society, asking “[h]ow—and how far—do law, lawyers, and legal institutions operate to affect the course of international affairs?”<sup>36</sup> Rather than attempting to identify normative values in international law, Chayes, Ehrlich, and Lowenfeld described how international legal process works by focusing particularly on formal and informal institutional processes.<sup>37</sup>

New American (US) Legal Process (NLP) emerged in the 1980s to address the normative shortcomings of American (US) Legal

32. W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 575–76 (2007).

33. *Id.* at 577.

34. Koh, *supra* note 1, at 189; *see generally* ABRAHAM CHAYES, THOMAS EHRLICH & ANDREAS LOWENFELD, *INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* (1968).

35. Mary O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334, 334–35 (1999). Legal process was conceived as a “method for understanding, using and improving upon positivism,” understanding the relationship between law and society and how law works. *Id.*; *see generally* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994).

36. CHAYES, EHRLICH & LOWENFELD, *supra* note 34, at xi.

37. O'Connell, *supra* note 35, at 337.

Process exposed by the critical legal studies movement.<sup>38</sup> According to Koh, NLP scholars saw the legitimacy of law “as resting not just on process but also on its normative content . . .” and “viewed lawmaking as not merely the rubberstamping of a pluralistic political process, but as a process of value-creation in which courts, agencies, and the people engage in a process of democratic dialogue.”<sup>39</sup> Koh outlines how critical perspectives have similarly confronted the need to respond to “legislative and agency pathologies, and to value new substantive norms beyond liberal democratic principles . . .” within international legal process.<sup>40</sup>

By the mid-1990s, international law entered a “post-ontological era” and shifted focus from questions of whether international law mattered or whether international rules were even “law,” to questions about effectiveness and enforceability, among others.<sup>41</sup> In 1993, Slaughter proposed a joint research agenda bridging Institutionalism and Liberalism to examine domestic and transnational relationships within liberal states and how those relationships shape state-to-state interactions on the international level.<sup>42</sup> Kenneth Abbott and Robert Keohane typify

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38. *Id.* at 337–38.

39. Koh, *supra* note 1, at 188.

40. O’Connell, *supra* note 35, at 338; *see also* Koh, *supra* note 1, at 190.

41. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995); *see also* Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 *BUFF. L. REV.* 679, 680–81 (2003); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 *INT’L ORG.* 339, 339 (2002) (“[a]nalysis of international institutions and law is shifting from earlier concerns of whether institutions matter to questions of which aspects matter, how, and in what contexts.”) (footnote omitted); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 *VA. J. INT’L L.* 839, 840 (2002).

42. Slaughter Burley, *supra* note 19, at 207. The push for an interdisciplinary approach actually began earlier, though by the late 1970s and 1980s, scholars like Kenneth Abbott were making explicit calls for integration. *See* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335, 338 (1989); *see also* Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *AM. J. INT’L L.* 367, 367 (1998) (arguing that regime theory has “multiple uses for the study of international law” and calling for the “joint discipline” of international relations and international law).

the Institutionalist perspective,<sup>43</sup> which directly challenged the neo-realist emphasis on international “anarchy” and the centrality of State power.<sup>44</sup> Institutionalism provided a “sophisticated framework for analyzing the origins, functions, design, and effects of legal rules and institutions.”<sup>45</sup>

Andrew Moravcsik and Slaughter’s writings tend to be held as representative of the Liberal perspective,<sup>46</sup> which generally derives from Kantian thought and can be understood to define a broad range of international law and international relations scholarship that looks to a State’s domestic structure to identify state-interest.<sup>47</sup> Jose Alvarez identified Liberalism’s “central insight” as “investigating the complex consequences of the disaggregated state.”<sup>48</sup> From the Liberal perspective, though the domestic politics of a State determines its preferences, as opposed to the realist assumption of static self-interest, the State is still a unitary actor in international affairs “because separate government institutions have no formal standing in the international system or under international law.”<sup>49</sup>

By 1994, Koh began to outline TLP theory, a constructivist, process-oriented theory that built on Phillip Jessup’s concept of

43. See generally ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

44. Kenneth W. Abbott, *Commentaries on Kenneth W. Abbott, Modern International Relations Theory: A Prospectus for International Lawyers*, 25 *YALE J. INT'L L.* 273, 274 (2000).

45. *Id.* Institutionalism also gave rise to regime theory which, “emphasi[zed] the network of norms and institutions, formal and informal, within which states interact.” *Id.*

46. The liberal perspective looks to national institutions and “actors in charge” as the loci of legal implementation. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 166–67 (2004); see generally Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *INT'L ORG.* 513 (1997). Slaughter and Moravcsik’s approaches have also been labeled “neo-liberal” rather than “liberal”; see HAROLD HONGJU KOH & OONA A. HATHAWAY, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 110 (2005).

47. HAROLD HONGJU KOH & OONA A. HATHAWAY, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 78 (2005).

48. Anne-Marie Slaughter & Jose E. Alvarez, *A Liberal Theory of International Law*, 94 *A.S.I.L. PROC.* 240, 253 (2000). Neo-liberal theory has been highly criticised as “overly-simplistic” for essentially dividing international affairs into “liberal” and “non-liberal” states and arguing that “[d]emocracies do law better—especially with each other.” *Id.* at 250.

49. SLAUGHTER, *supra* note 46, at 152.

“transnational law”,<sup>50</sup> the concept of International Legal Process developed by Abram Chayes, Tom Ehrlich, and Andreas Lowenfeld in 1968,<sup>51</sup> and the concept of Transnational Legal Problems synthesized by Henry Steiner and Detlev Vagts in 1994.<sup>52</sup> TLP supports the idea that legal process “helps to reconstruct the national interests of the participating nations.”<sup>53</sup> TLP takes the theoretical analysis a step further, however, by looking to a vertical process “of interaction and interpretation” and moving beyond the state-to-state “horizontal focus of traditional process theories.”<sup>54</sup>

## II. THE PRINCIPLES OF TRANSNATIONAL LEGAL PROCESS AND THREE CRITICAL LIMITATIONS

In *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, Koh laid the groundwork for a norm-based theory “of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.”<sup>55</sup> While acknowledging that TLP draws upon a number of existing theories in international legal compliance, in the ensuing decades, Koh has refined TLP theory to describe the “complex process of interaction, interpretation, and norm-internalization by

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50. Koh, *supra* note 1, at 186. This article relies upon the concept of “transnational law” coined by Jessup in his 1956 monograph of the same name. PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956) (defining “transnational law” as “all law which regulates actions or events that transcend national frontiers” and includes “[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories.”). In this piece, the term “concept” is used in the general sense and not in the sociological sense of the word. See Roger Cotterrell, *The Sociological Concept of Law*, in *LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE* (Roger Cotterrell ed., 1995).

51. See CHAYES, EHRLICH & LOWENFELD, *supra* note 34.

52. Koh, *supra* note 1, at 186. Steiner and Vagts’ casebook stemmed from an earlier work by Milton Katz and Kingman Brewster. *Id.* See generally HENRY J. STEINER & DETLEV F. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* (1994); MILTON KATZ & KINGMAN BREWSTER, JR., *THE LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS: CASES AND MATERIALS* (1960).

53. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUSTON L. REV.* 623, 642 (1998).

54. *Id.* at 635–36.

55. Koh, *supra* note 1, at 183–84.

which transnational law is made in the twenty-first century.”<sup>56</sup> Koh has also labelled the transnational law that emerges from the process “transnational legal substance.”<sup>57</sup> He argues that the emergent transnational legal substance has proliferated into a body of “transnational public law,” which Koh views as “rooted in shared public norms that have a similar meaning in every national system around the world.”<sup>58</sup>

TLP comprises a number of different characteristics, as well as various categories that delineate the framework and function of the theory underlying the central insight that States “obey international law as a result of repeated interaction with other governmental and nongovernmental actors in the international system.”<sup>59</sup> This section outlines the features and characteristics of TLP, paying particular attention to Koh’s depiction of the process of internalization, before turning to three principle critiques of TLP. Since the early 1990s, Koh has continued to develop TLP through various writings and speeches, informed by experience as the Legal Adviser at the United States Department of State during the Obama Administration,<sup>60</sup> and most recently in the

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56. Harold Hongju Koh, *Keynote Address: Emerging Law of 21st Century War*, 66 EMORY L. J. 487, 487 (2016).

57. Koh, *supra* note 56, at 487. In this sense, Koh can be said to believe in transubstantiation. Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745, 746 (2006) (describing TLP as a “transubstantive process”) [hereinafter Koh, *Why Transnational Law Matters*]. See generally Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305 (2001).

58. Koh, *supra* note 56, at 487–88.

59. Koh, *supra* note 1, at 203.

60. The following works comprise a substantial portion, though not all, of Koh’s TLP corpus. See, e.g., HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (Oxford University Press, 143–44 (2019)); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347 (1991); Harold Hongju Koh, *Refugees, the Courts, and the New World Order*, 1994 UTAH L. REV. 999 (1994); Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L. J. 2391 (1994); Koh, *supra* note 1; Koh, *supra* note 18; Koh, *supra* note 53; Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Koh, *supra* note 2; Koh, *Why Transnational Law Matters*, *supra* note 57; Harold Hongju Koh, *Remarks: The State Department Legal Adviser’s Office: Eight Decades in Peace and War*, in 100 GEO. L. J. 1747 (2012); Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, in 101 GEO. L. J. 725 (2013); Koh, *supra* note 56; Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413 (2017). See generally DETLEV F. VAGTS, HAROLD KOH, WILLIAM S. DODGE, & HANNAH L. BUXBAUM, *TRANSNATIONAL BUSINESS*

book, *The Trump Administration and International Law* which proposes a counterstrategy to ensure the United States' long-term adherence to international law based upon TLP.<sup>61</sup> Thus, like the theory itself, Koh's exposition of its characteristics requires the evaluation of numerous sources over time.

#### A. Principles of Transnational Legal Process

TLP has four distinct features: it is (1) *non-traditional*, in that the theory rejects traditional international law dichotomies between domestic and international, public and private;<sup>62</sup> (2) *non-statist*, in that the theory accounts for both state and non-state actors;<sup>63</sup> (3) *dynamic*, in that “[t]ransnational law transforms, mutates, and percolates up and down . . . from the domestic to the international level and back down again . . .”;<sup>64</sup> and (4) *normative*, in that the process of transnational interaction produces new rules of law that plunge back into a cycle of interpretation, internalization, and enforcement.<sup>65</sup> Thus, in addition to expanding the range of actors and spaces understood to influence international law, Koh argues that international law actually shapes future interactions between those actors.<sup>66</sup>

TLP's rejection of traditional international law dichotomies reflects a continually changing and increasingly globalized world. There no longer exists a neat differentiation between “domestic” and “international” spheres.<sup>67</sup> Indeed, some areas of law—such as laws relating to asylum seekers or international business transactions—cannot be said to fit solely within either the

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PROBLEMS (5th ed. 2015) (this book traces its origins to earlier work (HENRY STEINER & DETLEV VAGTS, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* (1976)), while framing transnational legal problems as generative of, and influenced by, transnational legal process).

61. KOH, *supra* note 12, at 7.

62. Koh, *supra* note 1, at 184.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. As early as 1987, Koh argued that “substantial inroads into th[e] strictly dualist view of international law [had] been made . . . particularly in the area of international human rights.” Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 50 *TEX. INT'L L. J.* 661, 683 n.88 (2016); *see also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 *HARV. L. REV.* 853, 864 (1987).



domestic or international domain.<sup>68</sup> Similarly, there is increasing recognition of the role of private actors in the development and implementation of international law.<sup>69</sup> Each of these elements allow TLP to take a more nuanced, vertical look at the process not only of law creation, but of internalization and implementation.

Second, the non-statist nature of TLP reflects that: (1) the function and practice of international law encompasses the interests of actors other than States and (2) non-state actors play a role in shaping State preferences. Though international law has traditionally centered states vis-à-vis other states as the “primary subjects of international law[,]”<sup>70</sup> scholars have increasingly called for a recognition of “the central role of individuals in the everyday practice of international law: not only their impact on their state’s behavior, but also their engagement with international law and their potential influence outside and irrespective of their state.”<sup>71</sup> Furthermore, the idea that non-state actors play a role in shaping state preferences challenges the realist idea that state behavior can be explained based solely on the distribution of power.<sup>72</sup> Even “neo-conservative” or

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68. Koh, *Why Transnational Law Matters*, *supra* note 57, at 746.

69. As Koven Levit explains in her review of bottom-up practices of lawmaking using three obscure examples from the field of international trade and finance: Bottom-up lawmaking tales do not feature state policymakers but rather the very practitioners – both public and private – who must roll up their sleeves and grapple with the day-to-day technicalities of their trade. On the basis of their experiences on the ground, these practitioners create, interpret, and enforce their rules. Over time, these initially informal rules blossom into law that is just as real and just as effective, if not more effective, as the treaties that initiate the top-down processes.

Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 126 (2005).

70. Michael Wood, “Third Report on Identification of Customary International Law,” U.N. Doc. A/CN.4/682 (2015), para. 70. *See* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, 663-64, ¶¶ 65-66 (Nov. 30) (separate opinion by Cançado Trindade, J.); Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 179, ¶ 180 (Feb. 3) (dissenting opinion by Cançado Trindade, J.).

71. Tamar Megiddo, *The Missing Persons of International Law Scholarship: A Roadmap for Future Research*, in INTERNATIONAL LAW AS BEHAVIOR 231, 230 (Harlan G. Cohen & Timothy Meyer, eds., 2018); *see generally* Int'l Law Comm'n, Rep. on the Work of its Fifty-Eighth Session, Supp. No. 10, U.N. Doc. A/61/10 (2006).

72. Stephen D. Krasner, *Realist Views of International Law*, 96 A.S.I.L. PROC. 265, 265 (2002).

“nationalist” scholars who have picked up the realist thread, employing “rational choice theory” and arguing that States act on the basis of “consistent, complete and transitive” interests,<sup>73</sup> cannot account for the complexity of a disaggregated state that shapes, and is shaped by individuals.<sup>74</sup>

Third, conceiving of TLP as a dynamic process by which “states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law . . .”<sup>75</sup> permits a more robust compliance inquiry—one that moves beyond the question of simple behavior conformity. Koh opens the compliance inquiry to questions about *how*, *to what degree*, and *why* law influences state behavior.<sup>76</sup> TLP’s more nuanced approach to compliance reflects the reality of practice and opens the door to empirical work capable of isolating and testing variables.

Finally, Koh describes TLP as “norm-based” where “many actors make and remake transnational law . . . by generating *interactions* that lead to *interpretations* of international law that become *internalized* into, and thereby binding under, domestic . . . law.”<sup>77</sup> In other words, TLP encompasses the normativity of the process by focusing both on “how international interaction among transnational actors shapes law . . .” and “how law shapes and guides future interactions [among transnational actors].”<sup>78</sup> In explaining TLP’s character as norm-generative, Koh references the “prime example” of the international law norm of *non-refoulement* as embodied in the 1951 Refugee Convention and internalized in the 1981 US-Haiti Agreement and 8 U.S.C. § 243(h) (1995) (amended 1996)<sup>79</sup> of the Immigration and

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73. Janet Koven Levit, *Bottom-up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393, 396, n.16 (2007).

74. *See id.* at 398 (“The nationalists root their theory in a highly oversimplified and outmoded view of what international law is and how international law is made.”).

75. Koh, *Why Transnational Law Matters*, *supra* note 57, at 746.

76. *See* Koh, *supra* note 53, at 627 (discussing a scale of relationships between conduct and adherence to norms).

77. KOH, *supra* note 12, at 7.

78. Koh, *supra* note 1, at 184.

79. This is the prior withholding of removal statute. The current withholding of removal provision is at INA § 241(b)(3) and 8 U.S.C. § 1231(b)(3).

Nationality Act.<sup>80</sup> Through this example, Koh explains that states internalize international law by “incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms.”<sup>81</sup>

With these characteristics in mind, this Article turns to the inner workings of TLP. At the outset, TLP adds a layer of definitional complication to the question of “international legal compliance” by employing a four-part scale of “relationships between stated norms and observed conduct[:]” coincidence, conformity, compliance, and obedience.<sup>82</sup> Coincidence, conformity, compliance, and obedience present as a scale encompassing three shifts: (1) “a shift from the external to the internal”<sup>83</sup> (i.e. the degree of norm-internalization); (2) a shift “from the instrumental to the normative”<sup>84</sup> (i.e. an increase in normatively-driven conduct); and (3) a shift “from the coercive to the constitutive”<sup>85</sup> (i.e. effective regulation seeks to shape and transform personal identity).<sup>86</sup> The TLP focus on mechanisms of “vertical domestication”<sup>87</sup> allows scholars to investigate not only why observed conduct matches the legal rule, but the degree to which an international legal norm induces the observed conduct. “Obedience,” or “internalized compliance,”<sup>88</sup> therefore represents the ideal relationship between a stated norm and observed conduct.

Koh further argues that several factors drive compliance with international law along the scale of relationships between norms and observed conduct identified above: “coercion, self-interest, rule-legitimacy, communitarianism, and internalization of rules

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80. Koh, *supra* note 1, at 204 n.85. However, more recent legal developments call into question US adherence to the norm of *non-refoulement*. See, e.g., ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SCHRAG, THE END OF ASYLUM (2021); Dep’t of Homeland Security v. Thuraissigiam, 591 U.S. \_\_\_ (2020). Interestingly, Koh does not discuss *non-refoulement* in any depth in his most recent book, instead choosing to focus on the Trump Administration’s “Travel Ban” in the section on Immigration and Refugees. KOH, *supra* note 12, at 22.

81. KOH, *supra* note 12, at 204.

82. Koh, *supra* note 53, at 627.

83. *Id.* at 628.

84. *Id.*

85. *Id.*

86. *Id.* at 628–9.

87. Koh, *supra* note 1, at 183–84.

88. Koh, *supra* note 53, at 629.

through socialization, political action, and legal process.”<sup>89</sup> These factors work in concert towards “obedience” when a State repeatedly participates in the transnational legal process.<sup>90</sup> The idea of “internalization” is thus key to TLP and promoting “obedience” within transnational legal systems.

However, analyzing the forms and processes of internalization requires yet another layer of definitional unpacking and description. Koh distinguishes among three forms of internalization: social, political, and legal.<sup>91</sup> Social internalization “occurs when a norm acquires so much public legitimacy that there is widespread general adherence to it.”<sup>92</sup> Political internalization “occurs when the political elites accept an international norm and advocate its adoption as a matter of government policy.”<sup>93</sup> Legal internalization “occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation, or some combination of the three.”<sup>94</sup> No set sequence for these different forms of internalization exists and indeed Koh cites to instances which span sequences.<sup>95</sup> Koh also makes clear that one of his “core claims” is that law, policy, and politics are inherently intertwined and that “these three kinds of constraints invariably overlap and are often used in combination to check action destructive of legal stability.”<sup>96</sup>

Ultimately, compliance with international law is influenced by the degree to which a State internalizes certain legal norms.<sup>97</sup> Koh indicates that the internalization process “usually occurs in four phases: interaction, interpretation, internalization, and

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89. *Id.* at 633–34.

90. *Id.* at 635.

91. *Id.* at 642.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 643.

96. KOH, *supra* note 12, at 17–18.

97. Stevens, *supra* note 5, at 193. Ryan Goodman and Derek Jinks write in the constructivist, institutionalist tradition—though from a sociological perspective—in proposing “acculturation” as a mechanism beyond coercion and persuasion for promoting international legal compliance. Goodman & Jinks, *supra* note 2, at 626–27; see also Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L. J. 983, 985 (2005); RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013) [hereinafter, GOODMAN & JINKS, *SOCIALIZING STATES*].

obedience.”<sup>98</sup> Generally speaking, a transnational actor initiates an *interaction* with another in a law-declaring forum, which requires an *interpretation* of the global norm applicable to the situation meant to force the other party to *internalize* the new interpretation into its normative system, with the aim of conditioning the coerced party to treat the norm as an internal obligation, resulting in *obedience*.<sup>99</sup>

Finally, Koh describes six key “agents of internalization” who function within social, political, and legal internalization processes to bring about formal norm internalization.<sup>100</sup> These “agents” are represented as categories of actors identified as playing a particular role—and explicitly interacting with one another—within the various internalization processes. The first category consists of Transnational Norm Entrepreneurs, described as nongovernmental transnational organizations or individuals who: (1) “mobilize popular opinion and political support” domestically and abroad; (2) “stimulate and assist in the creation of like-minded organizations in other countries”; (3) “play a significant role in elevating their objective beyond its identification with the national interests of their government”; and (4) often attempt to persuade an international audience that a norm reflects a “universal moral sense.”<sup>101</sup> The second category consists of Governmental Norm Sponsors, defined as governmental officials who act within government structures and bureaucracies “as allies and sponsors for the norms that [nongovernmental actors] are promoting.”<sup>102</sup>

The third category arises through collaboration between transnational norm entrepreneurs and governmental norm sponsors, labelled Transnational Issue Networks. These networks consist “of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”<sup>103</sup> These networks “discuss and generate political solutions among concerned individuals on the same issues at the global and regional levels,”

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98. Koh, note 53, at 644.

99. *Id.*

100. *Id.* at 646.

101. *Id.* at 647; see also Ethan A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 482 (1990).

102. Koh, *supra* note 53, at 648.

103. *Id.* at 649.

among government and non-governmental actors.<sup>104</sup> The fourth category consists of Interpretive Communities and Law-Declaring Fora, which provide the space for transnational actors to interact.<sup>105</sup> Koh includes in this category “governmental and non-governmental fora competent to declare both general norms of international law (*e.g.*, treaties) and *specific interpretation* of those norms in particular circumstances . . . [.]” which may encompass the decisions of domestic, regional, and international courts, and the actions of national legislatures, executive entities, and nongovernmental organizations, among others.<sup>106</sup>

The fifth category consists of Bureaucratic Compliance Procedures, which are defined as the structures, standard operating procedures, and other internal mechanisms adopted by domestic governmental institutions to “help maintain their habitual compliance with internalized international norms.”<sup>107</sup> Koh argues that “domestic decision-making thereby becomes ‘enmeshed’ with international legal norms, because institutional arrangements for the making and maintenance of an international law norm become entrenched in domestic legal and political processes.”<sup>108</sup> Finally, Koh identifies Issue Linkages as the sixth category to promote internalization, whereby closely interconnected international legal obligations weigh against violation, as violation in one area may “lead noncompliant nations into vicious cycles of treaty violations.”<sup>109</sup>

In short, Koh covers a number of angles of inquiry in his description of TLP, including *whether* a state can be said to comply with international law, as well as *why*, *how*, and *to what degree* a state *obeys* international law. Koh sees TLP as the response to the question of why nations *obey*, rather than simply *comply* with, international law.<sup>110</sup> Yet, the process of internalization, which forms part of the multidimensional process so central to TLP theory, remains underdeveloped. The following sections look to three central critiques of TLP within international legal scholarship, as well as work that has built on TLP, to identify

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 652.

108. *Id.* at 653; Robert O. Keohane, *Compliance with International Commitments: Politics Within a Framework of Law*, 86 A.S.I.L. PROC. 176, 179 (1992).

109. Koh, *supra* note 53, at 654.

110. Koven Levitt, *supra* note 4, at 285.

the primary limitations in the current construction of TLP which relate to the central process of internalization and suggest potential avenues for future research.

### *B. Three Critical Limitations*

Though TLP provides a useful and convincing framework for analyzing State conduct and compliance with international law, three particular aspects of the theory merit closer examination and discussion. Critique of TLP's internalization thesis within international law scholarship generally touches upon one of three central problems: the insufficient (1) description of the actors and processes of internalization;<sup>111</sup> (2) explanation of *why* States internalize certain international norms;<sup>112</sup> or (3) identification and description of norm-creation processes.<sup>113</sup> Though the third critique does not appear to directly relate to the process of internalization, as will be described below, the question of how patterns of behavior between transnational actors generate norms that may then be internalized implicates broader debates about the types of action that can be termed norm-generating—or jurisgenerative<sup>114</sup>—and the types of action that diverge from norms—or formal law—and result in non-compliance.

First, despite TLP's acknowledgment of the multiplicity of actors involved in the domestic internalization of international legal norms and the impact of that internalization on compliance, the theory does not fully develop the role, or processes by which

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111. See, e.g., BRUNNÉE & TOOPE, *supra* note 4, at 118; Alkoby, *supra* note 4, at 187; Geisinger & Stein, *supra* note 4, at 81; Goodman & Jinks, *supra* note 2, at 626 n.8; Koven Levitt, *supra* note 4, at 287; McGaughey, *supra* note 4, at 118; Megiddo, *supra* note 4, at 502–03; Posner, *supra* note 4, at 25; Woods, *supra* note 4, at 75; Affolder, *supra* note 4, at 2.

112. See, e.g., BRUNNÉE & TOOPE, *supra* note 4, at 118; PEELER, *supra* note 5, at 51; Borgen, *supra* note 5, at 721; Brunnée & Toope, *supra* note 5, at 291; Gonzalez, *supra* note 5, at 410–11; Goodman & Jinks, *supra* note 2, at 624 n.5; Checkel, *supra* note 5, at 325.; Koven Levit, *supra* note 4, at 285–87; Stevens, *supra* note 5, at 193.

113. See, e.g., Venzke, *supra* note 6, at 1, 14; Aleinikoff, *supra* note 6, at 479; Jodoin, *supra* note 6, at 1020; Kim & Heger Boyle, *supra* note 6, at 368–69; Murthy, *supra* note 6, at 26; Rao, *supra* note 6, at 214; Slaughter, *supra* note 6, at 324; Waters, *supra* note 6, at 457.

114. See Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

actors promote the process of internalization.<sup>115</sup> For example, Koh identifies key agents involved in the TLP process of internalization to include “transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities.”<sup>116</sup> The category of “governmental norm sponsors” ostensibly encompasses both low- and high-level government officials, but the process of internalization described in this context assumes a decidedly top-down character.<sup>117</sup> Additionally, though Koh notes that the process of internalization may include social, political, and legal aspects, and provides descriptive examples,<sup>118</sup> he concedes in later work that “the mechanics of social influence have so far been grossly underspecified in the literature.”<sup>119</sup> In his most recent book, however, Koh points to a number of actions and interactions as descriptive evidence of processes of internalization, such as litigation and political backlash surrounding former President Trump’s Travel

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115. See Goodman & Jinks, *supra* note 2, at 626 n.8 (“Koh, however, has not identified what role, if any, global-level acculturation processes might play in his theoretical model. In Koh’s model, processes that most closely resemble acculturation occur at the final stage of norm implementation; they are governed primarily by bureaucratic and administrative impulses to follow already accepted legal rules.”); see also Koh, *supra* note 18, at 2655 (“institutional habits lead nations into default patterns of compliance.”).

116. Koh, *Why Transnational Law Matters*, *supra* note 57, at 746.

117. *Id.* at 746 n. 4.

118. Koh, *supra* note 18, at 2656–59; Koven Levit, *supra* note 4, at 287.

119. Koh, *supra* note 2, at 977.



Ban,<sup>120</sup> legal memos and various other strategies of bureaucratic resistance against the use of torture.<sup>121</sup>

In an article written a few years after Koh's *Transnational Legal Process*, Janet Koven-Levit appraises TLP as a "robust theory that emanates descriptive, prescriptive, and predictive energy," but points to Koh's "thin" treatment of internalization.<sup>122</sup> Koven-Levit notes that "for all of its energy and all of its dynamism, transnational legal process theory's treatment of its crucial and defining link—international law's penetration into domestic systems—is rather thin."<sup>123</sup> Koh acknowledges as much

120. See KOH, *supra* note 12, at 22–33. The "Travel Ban," also referred to as the "Muslim Ban," actually consisted of a series of Executive Orders issued by President Donald Trump beginning on January 27, 2017, restricting immigration and entrance into the United States from several Muslim-majority countries. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (restricting immigration and entrance into the US from several Muslim-majority countries for a 90-day period); Exec. Order No. 13,870, 82 Fed. Reg. 13,209 (Mar. 6, 2017) (rescinding and revising portions of Executive Order 13,769); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (adding countries to the restricted immigration and entry lists under Executive Orders 13,769 and 13,870). For a more in-depth discussion of the bans, see generally Shoba Sivaprasad Wadhia, *National Security, Immigration and the Muslim Bans*, 75 WASH. & LEE L. REV. 1475 (2018) (providing a detailed overview of the bans, the legal challenges brought in federal court against the bans, and the responses of non-state actors to the bans in advocacy outside the courtroom); Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L. J. 159 (2019) (providing background on the "origins, operation, and reception in the courts" of the third Executive Order).

121. See KOH, *supra* note 12, at 33–37.

122. Koven Levit, *supra* note 4, at 287.

123. *Id.* See also BRUNNÉE & TOOPE, *supra* note 4, at 118 ("We agree that a closer look at the social interactions through which the international norms migrate into states' domestic spheres and instantiate themselves in their social, bureaucratic and legal practices is important to understanding whether and to what extent they actually embrace the norms."); Alkoby, *supra* note 4, at 187; see generally ROUTLEDGE RESEARCH IN INTERNATIONAL LAW, BACKSTAGE PRACTICES OF TRANSNATIONAL LAW (Lianne J.M. Boer & Sofia Stolk eds., 2019). Neglect of how norms are implemented has also been an issue in international relations scholarship, according to Alexander Betts and Phil Orchard. See BETTS & ORCHARD, *supra* note 4, at 2 ("[I]f what we really care about is not just whether states sign onto or ratify particular international norms but rather how those states actually understand the norms, how they interpret and practice them, then there is an analytical step missing in existing IR scholarship . . . [T]here remains no coherent or consistent conceptualization of the 'normative institutionalization-implementation gap' within constructivist IR scholarship.").

in later works, yet this criticism of TLP seems to now represent less reproach than recognition of the need for additional empirical research.<sup>124</sup> Similarly, Asher Alkoby writes that “[t]he workings of social internalization are not fully developed in Koh’s model[;] each of his examples demonstrates interactions that were dominated by logic of consequences but then at the endpoint the norm somehow acquired its ‘stickiness’ and states complied with it because it had been internalized. How this leap takes place, again, is not clear.”<sup>125</sup> Andrew Woods faults TLP for failing to incorporate “literature on the micro-processes of norm promotion and adoption[,]” resulting in an overreliance on norm-internalization as a mechanism for domestic political and legal change when more recent norms literature suggests the possibility of “behavior change without any norm-internalization.”<sup>126</sup>

Recently, Natasha Affolder included TLP in a critique of transnational environmental law scholarship’s tendency to leave “people” out of scholarly accounts of global, or transnational, environmental law developments, resulting in descriptions “less rich, less nuanced, and less colourful than the processes that they describe.”<sup>127</sup> She argues that while transnational law scholarship has been credited with looking beyond the state and state-based lawmaking, accounts often lack specificity and particularity in accounting for the people who put law into practice.<sup>128</sup> Affolder’s critique centers the charge that transnational law scholarship, which includes TLP, underspecifies the actors involved in transnational law and contributes to a “conceptual flattening.”<sup>129</sup> Though primarily concerned with non-state

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124. Koven Levit, *supra* note 4, at 287; *see also* Koh, *supra* note 2, at 976-77; Goodman & Jinks, *supra* note 2, at 624; Stevens, *supra* note 5, at 193 n.9.

125. Alkoby, *supra* note 4, at 187; *see also* Roda Mushkat, *A New Turning Point in the Study of International Legal Compliance, in China and Elsewhere*, 45 H.K. L. J. 157, 177 (2015) (writing that “attempts to develop genuinely integrative theoretical schemes are a rare occurrence. The need for such schemes is selectively acknowledged, but no systematic follow-up materialises.”).

126. Woods, *supra* note 4, at 75. Woods noted that even as of 2010, few had taken up Koh’s call for additional international law and international relations research “that focuses on the micro-processes of social influence.” *Id.* at 71, 75.

127. Affolder, *supra* note 4, at 2.

128. *Id.* at 4; *see also* Nicole Ostrand & Paul Statham, ‘Street-level’ Agents Operating Beyond ‘Remote Control’: How Overseas Liaison Officers and Foreign State Officials Shape UK Extraterritorial Migration Management, 47 J. ETHNIC & MIGRATION STUD. 25 (2020).

129. Affolder, *supra* note 4, at 8.

actors, Affolder rightly notes that the common distinction between state and non-state actors not only “risks grouping non-state actors together in a way that might erase, or de-emphasize their distinctions . . . it erases the significant and multiple personalities that comprise the state.”<sup>130</sup>

Second, TLP has been criticized for its lack of adequate explanation of “*why* states internalize certain international legal norms . . .” and the “‘micro-processes of social influence’ that induce states to comply with international law.”<sup>131</sup> As outlined above, TLP moves beyond the fundamental question of *whether* a state’s behavior complies with an international legal norm and also asks *why* a state *obeys* international law.<sup>132</sup> Similar to the internalization critique outlined above, Goodman and Jinks explain that scholars widely recognize that constructivist theories of compliance, such as TLP,<sup>133</sup> generally fail to provide a detailed description of the microprocesses of internalization.<sup>134</sup> In proposing an approach to “human rights compliance and practices in the United States . . .” that asks how social influence mechanisms like acculturation “can explain micro- and macro-level human rights activities within the United States[,]”<sup>135</sup> Thalia Gonzalez sees TLP as an “internationalist approach[] that seek[s] to understand normative change from a ‘top down’ perspective . . .” and that it does not “fully explain the dynamic processes that

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130. *Id.* at 8–9.

131. Stevens, *supra* note 5, at 193–94 (emphasis added).

132. Koven Levit, *supra* note 4, at 285; *see also* PEELER, *supra* note 5, at 51.

133. Goodman & Jinks, *supra* note 2, at 626 n.8 (“we consider our project an extension of Koh’s and others’ work on transnational norm diffusion. We intend to supplement that larger constructivist agenda by isolating the microprocesses of social influence.”).

134. Goodman & Jinks, *supra* note 2, at 624 n.5 (“This is a widely recognized deficiency of constructivist scholarship in international relations.”). Interestingly, Goodman and Jinks have been criticized in the same way. *See* Checkel, *supra* note 5, at 342 (“[C]onstructivism, while good at the macrofoundations of behavior and identity (norms, social context), is very weak on the microlevel. It fails to explore systematically how norms connect with agents”); *see also* Alastair Iain Johnston, *Treating International Institutions as Social Environments*, in 45 INT’L STUD. Q. 487, 488 (2001) (noting that constructivists “have not been very successful in explaining the microprocesses about how precisely actors are exposed to, receive, process, and then act upon the normative arguments that predominate in particular social environments, such as international institutions.”).

135. Gonzalez, *supra* note 5, at 410–11.

occur at the local levels that influence domestic integration of international human rights norms.”<sup>136</sup>

In their work on legitimacy and legality in international law, Jutta Brunnée and Stephen J. Toope point out that “[a]lthough Koh is interested in the notion of ‘obedience’, he does not explore the role that the binding quality of international law plays in generating it.”<sup>137</sup> Brunnée and Toope argue that rather than taking the limited approach of examining the social processes “that help *make* international law matter,” scholars must “ask *how* international law matters”—a question that implicates *why* states internalize certain norms.<sup>138</sup> Caleb Stevens raises a similar critique, arguing “[t]ransnational legal process theory suffers from an internalization problem: it does not adequately explain why international legal norms are internalized.”<sup>139</sup> Pointing to Koh’s description of “vertical internalization,” Stevens contends that despite producing a number of case-centered examples to develop the concept, Koh has not provided a “sufficiently in-depth analys[is].”<sup>140</sup> Stevens’ critique builds from the idea that Koh describes internalization “as both a definition of compliance and its cause . . .”<sup>141</sup> and therefore Koh’s version of internalization describes only a “pathway to norm incorporation into domestic law.”<sup>142</sup>

Finally, the idea that that TLP describes a dialectical and dialogic process whereby the legal process of interaction, interpretation, and internalization “breeds hybrid international-domestic law rules[,]” producing “transnational legal substance”<sup>143</sup> requires a deeper look at where the transnational legal process shifts the normative direction of government policy towards obedience, or non-compliance, with international law norms. Koh often cites the example of the Haitian refugee litigation from the 1990s, in which advocates challenged the United States’ practice

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136. *Id.* at 397. Gonzalez calls for the “development of exacting descriptions of both localized case studies and the diverse expressions of dialogic and cooperative federalism arrangements to better understand how social influence mechanisms operate to effect and shape subnational compliance.” *Id.* at 411.

137. BRUNNÉE & TOOPE, *supra* note 4, at 118.

138. *Id.* at 118–19.

139. Stevens, *supra* note 5, at 190.

140. *Id.* at 193 n.9.

141. *Id.* at 203.

142. *Id.*

143. Harold Hongju Koh, *The Enduring Legacies of the Haitian Refugee Litigation*, 61 N.Y. L. SCH. L. REV. 31, 55 (2016).

of interdicting Haitian asylum-seekers on water and preventing access to a formal refugee status determination process, as an example of international legal process in action.<sup>144</sup> In that case, Koh argues, the public lawsuit challenged the United States' violation of international law and provoked judicial action that created "frictions and contradictions" that ultimately helped to shift normative government policy towards compliance.<sup>145</sup> However, long-term government policy in the United States has since shifted towards non-compliance—driven in part by the actions of administrative agencies—which raises questions about the role of the administrative state in transnational legal process and the production of "transnational legal substance."<sup>146</sup> Koh acknowledges the potential that "the very same channels of transnational legal process that foster compliance . . ." could provide a conduit for "a transnational transference of lawlessness."<sup>147</sup> Oddly, Koh does not spend time unpacking this issue, which directly implicates processes of internalization and norm-creation, and simply notes that "while these are real and serious concerns[,] he "hope[s] they are premature."<sup>148</sup> These questions regarding the jurisgenerative nature of TLP can be located within a broader discussion of the "pluralisation of regulative sources, processes, and norm-setting bodies at the macro, meso, and micro levels[,"<sup>149</sup> inviting "a fundamental reflection on what is to be considered *law*."<sup>150</sup>

Shaffer and Halliday have also explored and critiqued TLP<sup>151</sup> in the development of their own theory of Transnational Legal Orders which integrates bottom-up and top-down analyses of "how legal norms are developed, conveyed, and settled transnationally."<sup>152</sup> They define a "transnational legal order" as "a

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144. *Id.* at 55–56.

145. *Id.* at 55; Koh, *supra* note 1, at 207.

146. *See* Koh, *supra* note 143, at 155–56.

147. KOH, *supra* note 12, at 17.

148. *Id.*

149. LUCA SILIQUINI-CINELLI, *LEGAL POSITIVISM IN A GLOBAL AND TRANSNATIONAL AGE* 10 (2019).

150. Zumbansen, *supra* note 1, at 901; *see also* Venzke, *supra* note 6, at 14.

151. *See, e.g.*, Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229 (2012).

152. TERENCE C. HALLIDAY & GREGORY SHAFFER, *TRANSNATIONAL LEGAL ORDERS* 1 (2015). ("This book aims to build theory and empirical understanding of transnational legal orders. It does so by reframing the study of law and society in today's world from a predominantly national context – or one that

*collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.*<sup>153</sup> Like TLP, Shaffer and Halliday conceive of legal ordering as a “contingent, dynamic, and *interactive process . . .*” that is “transnational in scope, [and involves] the interaction of transnational, national, and local lawmaking, implementation and practice.”<sup>154</sup> Yet, they explain that transnational legal ordering diverges from both Koh’s TLP and Goodman and Jinks model of acculturation, which “fail to engage the dynamic process of transnational legal normmaking in which international, national, and local processes interact recursively to establish the meaning and ordering power of legal norms.”<sup>155</sup> Shaffer and Halliday’s theoretical approach aims to harness law and the social sciences to examine “lawmaking and practice at the transnational, national, and local levels . . .” and the “settlement and unsettlement of legal norms across national jurisdictions.”<sup>156</sup>

International law scholars have addressed—and attempted to redress—some of these criticisms of TLP in a variety of fora, yet much work remains to be done. Part III explores works that have added to the description of actors and processes of internalization, clarified definitions, and conducted empirical research into *why* States internalize certain international norms. Yet, despite the variety and import of scholarship, little progress has been made in international legal compliance scholarship regarding actors and processes of norm-internalization, as well as questions of norm-generation. The principal aim of this article is to synthesize the current scholarship on TLP in order to bring into sharper focus the principal theoretical limitations, while identifying two avenues for future empirical work and theory-building.

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dichotomizes the study of international law and national law, or international regimes and national politics – to a perspective that places processes of local, national, international, and transnational public and private lawmaking and practice in dynamic tension within a single analytic frame.”).

153. *Id.* at 7 (emphasis in original).

154. *Id.* at 12 (emphasis in original).

155. *Id.* at 54.

156. Gregory Shaffer, *Theorizing Transnational Legal Orders: Introduction and Context*, 110 A.S.I.L. PROC. 63, 63 (2016).

## III. BUILDING UPON TRANSNATIONAL LEGAL PROCESS

Koh's dedicated refinement of TLP theory through the years has contributed to a range of scholarship that engages with and expands upon different elements of the theory. Part III examines a variety of works within international law scholarship that explicitly grapple with Koh's articulation of TLP theory, including normative, case study-oriented applications of the theory, empirical work engaged in "midrange theorizing[.]"<sup>157</sup> and works that situate TLP in a specific sociolegal context or integrate interdisciplinary methodologies<sup>158</sup> to "facilitate understanding [of the] processes of legal knowledge production, circulation, and appropriation."<sup>159</sup> In addition to the literature on international legal compliance, relevant scholarship also appears in interdisciplinary literature on Transnational Law and global governance.<sup>160</sup> Rather than attempting to place each work within a specific category of literature, this section evaluates the work in relation to the thrust of its critique and relevance to the discussion of the development of TLP theory with the aim of providing signposts for scholars seeking to engage with, or test, TLP theory. This section concludes with proposals for research oriented towards the continued development of TLP theory, which draw upon Bourdesian concepts and socio-legal method to identify and describe complex, transnational legal frameworks belying a "simple, linear trajectory from the local to the global, from the domestic to the international"<sup>161</sup> and ground the theory in practical, empirical terms.

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157. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 1 (2012); see also Roda Mushkat, *Dissecting International Legal Compliance: An Unfinished Odyssey*, 38 DENV. J. INT'L L. & POL'Y 161, 161 (2009).

158. Shaffer & Ginsburg, *supra* note 157, at 64-65 (characterizing TLP theory as "unidirectional" in the sense that it does not provide a discursive and dynamic account of the development of legal norms and situating TLP outside of the interdisciplinary, law and social science approach of Transnational Legal Ordering.).

159. Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 L. & SOC. INQUIRY 975, 977 (2006).

160. See, e.g., Shaffer, *supra* note 151; UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 3 (Ryan Goodman, Derek Jinks, & Andrew K. Woods eds., 2013).

161. Peer Zumbansen, *Transnational Law as Socio-Legal Theory and Critique: Prospects for "Law and Society" in a Divided World*, 67 BUFF. L. REV. 909, 934 (2019).

*A. Engaging with Transnational Legal Process Theory*

Since its introduction in 1996, scholars have explored applications and limitations of TLP in a range of empirical scholarship<sup>162</sup> using a variety of different methods and methodologies. Gregory Shaffer and Tom Ginsburg have described an “empirical turn” in international legal scholarship that builds on earlier theoretical works—including TLP—and elaborates on “how international law works in different contexts.”<sup>163</sup> This new wave of scholarship not only crosses disciplines, it moves beyond traditional legal methodologies and uses empirical evidence to both test and build theory.<sup>164</sup> Some of the scholarship flies under the banner of “New Legal Realism” (NLR), which Shaffer describes as an empirical and problem-centered approach “that asks how actors use and apply law in order to advance our understanding of three interrelated questions—how law obtains meaning, is practiced (the law-in-action), and changes over time.”<sup>165</sup>

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162. See Mushkat, *supra* note 125, at 159. Mushkat discusses Louis Henkin’s influence on the theory and empirical foundation of international legal compliance studies and notes that: a distinction is commonly drawn between the ‘normative’ and ‘positive’ dimensions of international legal inquiry. Whereas the former is time-honoured, the latter does not yet qualify as such, but as indicated, it is expanding at a steady pace and may have reached both considerable scale and a degree of maturity. It is multifaceted, yet it primarily centres on whether and why States do or do not comply with international law. This question has been examined in detail, from several perspectives, by employing different methods, and in a variety of contexts. *Id.* at 159.

163. Shaffer & Ginsburg, *supra* note 157, at 1; see, e.g., Stepan Wood, Kenneth W. Abbott, Julia Black, Burkard Eberlein & Errol Meidinger, *The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory*, 6 *TRANSNAT’L LEGAL THEORY* 333, 334-35 (2015) (presenting a “more systematic, comprehensive analysis of the interactive dimension of transnational law” through an examination of actors and institutions in the context of “transnational business governance interactions”); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 *AM. J. INT’L L.* 1, 2-3 (2010) (undertaking an empirical study of international legal compliance in the context of military lawyers on the battlefield).

164. Shaffer & Ginsburg, *supra* note 157, at 1. “The tendency, until recently, for international legal scholarship to be aloof to empirical methods is reflected in the concept of ‘method’ used in the AJIL’s 1999 Symposium on Method in International Law. Not one contribution in the symposium addressed method in a social science sense, suggesting a significant gap between legal and social science scholarship.” *Id.* at 3; see also Zumbansen, *supra* note 1, at 900–01.

165. Shaffer, *supra* note 13, at 189.



According to Shaffer, NLR does not focus on traditional analytic jurisprudence or “moral theorizing of law[,]” but rather studies questions of law and law’s purposes “in light of our social experiences in the world.”<sup>166</sup> NLR’s two core interacting dimensions focus on “how law actually works in relation to social and political forces . . .” and “law as a method of pragmatic problem-solving . . . .”<sup>167</sup> Shaffer contrasts NLR with aspects of legal formalism in NLR’s treatment of legal doctrine as a “contextualized, empirical question, and not as an assumption[,]” as well as with critical legal approaches which he views as “reduc[ing] law to ideology and view[ing] law as structurally indeterminate in principle.”<sup>168</sup> This section examines a representative sample of empirical international law scholarship engaging with TLP theory both falling within and without the New Legal Realist umbrella.<sup>169</sup>

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166. *Id.* at 190–91; see also Brian Z. Tamanaha, *The Third Pillar of Jurisprudence: Social Legal Theory*, 56 WM. & MARY L. REV. 2235, 2236–38 (2015).

167. Shaffer, *supra* note 13, at 194. In 2006, Sally Engle Merry wrote of a “New Legal Realism” (NLR) — a scholarly approach with “the potential to incorporate new methodologies, a greater focus on international law, and attention to new domains of law, such as legal consciousness.” Engle Merry, *supra* note 159, at 975. Engle Merry’s conception of NLR would embrace several features, including: (1) the use of “transnational and multi-sited ethnographic research that tracks the flows of people, ideas, laws, and institutions across national boundaries”; (2) the “concept of legal pluralism” in the context of “international law, human rights law and transitional justice”; and (3) “an expansion of the dimensions of legality”, including legal consciousness. *Id.* at 976. Nourse and Shaffer have labelled this version of NLR, emphasizing empirical application of sociolegal ideas and methods, the “contextualist approach.” See Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 79–85 (2009).

168. Shaffer, *supra* note 13, at 195–96.

169. Bryant Garth and Elizabeth Mertz note the distinction between the American (US) and European traditions of legal realism and argue that the two interdisciplinary approaches can be complementary. Bryant Garth & Elizabeth Mertz, *New Legal Realism at Ten Years and Beyond*, 6 U. CAL. IRVINE L. REV. 121, 129 (2016). They note that American (US) legal realism synthesizes “self-reflective distance and the scepticism towards doctrinal dogmatism’ while at the same time refusing to ‘back away from formal law-identification....” *Id.* at 128. Whereas the European approach, “drawing especially on the sociological tradition of Pierre Bourdieu, is not normative in the sense that U.S. legal realism tends to be, as ‘the European legal realists strictly maintain that an empirically respectable legal science should remain external.” *Id.* at 129. Garth and Mertz posit that the seeming conflict between “those who want to get on with reform, typically from the law, and those who seem always to favor more research and deeper understanding...” “encompasses and permits

In the early 2000s, Ryan Goodman and Derek Jinks began an inter-disciplinary project “aimed at clarifying the mechanics of law’s influence . . .” and generating “empirically falsifiable propositions about the role of law in state preference formation and transformation.”<sup>170</sup> They introduced the concept of “acculturation” as a third mechanism—beyond coercion and persuasion—by which international law might engender state compliance with international law.<sup>171</sup> Goodman and Jinks viewed their work as “an extension of Koh’s and others’ work on transnational norm diffusion . . .”<sup>172</sup> and sought to clarify the “social mechanisms for influencing state practice.”<sup>173</sup> Goodman and Jinks observed that international legal compliance scholarship underemphasized and often conflated acculturation with other mechanisms such as persuasion.<sup>174</sup> Taking Koh as an example, they explained that while Koh’s description of “habitual obedience” as part of the internalization process resembled what they term “acculturation,” Koh had not identified what role acculturation processes play in TLP theory.<sup>175</sup>

Goodman and Jinks view the “identification and clear differentiation” of acculturation, coercion, and persuasion as a critical first step in developing more empirically-supported and effective human rights regimes.<sup>176</sup> They describe the hallmark of

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the opportunity for direct discussion of a tension that pervades much of the social science community.” *Id.*

170. Goodman & Jinks, *supra* note 2, at 624.

171. *Id.* at 626.

172. *Id.* at 626 n.8.

173. GOODMAN & JINKS, *SOCIALIZING STATES*, *supra* note 94, at 3.

174. Goodman & Jinks, *supra* note 2, at 627. Goodman and Jinks define “acculturation” as “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture.” *Id.* at 626. They argue that “acculturation” differs from “persuasion” in a number of important aspects: (1) “persuasion requires acceptance of the validity or legitimacy of a belief, practice, or norm”, while acculturation “requires only that an actor perceive that an important reference group harbors the belief, engages in the practice, or subscribes to the norm”; (2) “persuasion requires active assessment of the merits of a belief,” while acculturation operates tacitly; (3) persuasion “involves assessment of the content of the message,” while acculturation “involves assessment of the social relation . . . between the target audience and some group.” *Id.* at 642–43. Thus, acculturation “occurs not as a result of the content of the relevant rule or norm but rather as a function of social structure.” *Id.*

175. *Id.* at 626 n.8 (“Koh, however, has not identified what role, if any, global-level acculturation processes might play in his theoretical model.”).

176. *Id.* at 627–28.

acculturation as “varying degrees of identification with a reference group generat[ing] varying degrees of *cognitive* and *social pressures*—real or imagined—to conform.”<sup>177</sup> The critical insight relevant to TLP is thus that acculturation does not require acceptance of the validity or legitimacy of a norm and may often operate tacitly.<sup>178</sup> Yet, in arguing that acculturation influences states, Goodman and Jinks turn towards “world polity institutionalism[,]”<sup>179</sup> a more top-down, unitary State approach that leaves them open to criticism for not providing a sufficiently detailed description of the pathways and individual actors and institutions through which acculturation works from a top-down and bottom-up standpoint.<sup>180</sup>

In 2010, Andrew Woods examined both TLP and Goodman and Jinks’ work on acculturation to argue that international law scholars and practitioners have not sufficiently focused on ground level social contexts where human rights norms are given or deprived of meaning.<sup>181</sup> Woods notes that TLP’s failure to incorporate scholarship examining the microprocesses of norm adoption and promotion provides evidence that TLP—and international human rights scholarship and practice more generally—is “insufficiently attentive to empirical evidence about the social situations that influence . . . international regulation of state acts or state regulation of individual acts.”<sup>182</sup> He observes that “while human rights scholarship and practice have focused overwhelmingly on unitary actors’ compliance with rules, social scientists have produced an abundance of insights about the power of social conditions to influence behavior.”<sup>183</sup> Woods argues that while human rights scholarship and practice have not given sufficient attention to these social science insights, the designers of human rights regimes might use “the

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177. *Id.* at 639 (emphasis added).

178. *Id.* at 643.

179. *Id.* at 646.

180. See Roda Mushkat, *Incomplete Internalization and Compliance with Human Rights Law: A Reply to Ryan Goodman and Derek Jinks*, 20 EUR. J. INT’L L. 437, 439-40 (2009); Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law: A Rejoinder to Roda Mushkat*, 20 EUR. J. INT’L L. 443, 444-45 (2009).

181. Woods, *supra* note 4, at 56, 72-74.

182. *Id.* at 71.

183. *Id.* at 52.

latest research about social influence to enhance respect for human rights.”<sup>184</sup>

Heeding this criticism, Goodman and Jinks have continued to delve deep into interdisciplinary, empirical territory in subsequent work with Andrew Woods, acknowledging the persistence of the gap between the “international human rights regime’s aspirations and its achievements . . .” and arguing that the “gap cannot be closed with the tools of traditional legal policy and analysis alone.”<sup>185</sup> The trio’s edited volume, *Understanding Social Action, Promoting Human Rights*, uses interdisciplinary empirical research on the study of individual and organizational behavior to address the need for “reflective advocacy and institutional design” based on “robust empirical insights” in the human rights regime.<sup>186</sup> They observe that much of the empirical or interdisciplinary work that has appeared in human rights scholarship provides “macro-level, positive accounts of human rights regimes . . .” making visible “general patterns of state practice[,]” but that current scholarship “provide[s] little fine-grained understanding or assessment of prevailing actor- and organization-level tactics.”<sup>187</sup> Goodman, Jinks, and Woods aim to contribute to the literature by focusing particularly on nonlegal scholarship related to “norm creation, diffusion, and institutionalization . . .”<sup>188</sup> that: (1) provides “interdisciplinary, empirically-grounded insights into the behavioral and organizational foundations of the observed regime patterns”; and (2) brings general lessons from the empirical work “into a more concrete program of action for human rights policy makers and advocates.”<sup>189</sup>

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184. *Id.* at 53; see generally Richard C. Chen, *Suboptimal Human Rights Decision-Making*, 42 FLA. ST. U. L. REV. 645 (2015) (introducing the concept of “suboptimal decision-making” in the human rights context to problematize reliance on a “rational actor model” and examine how social science research might inform efforts to promote human rights compliance using case studies of Abu Ghraib and “Turkey’s Kurdish Problem”).

185. UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS, *supra* note 160, at 3.

186. *Id.*

187. *Id.* at 5; see also Dickinson, *supra* note 163, at 2.

188. UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS, *supra* note 160, at 4.

189. *Id.* at 5; see, e.g., Deborah A. Prentice, *The Psychology of Social Norms and the Promotion of Human Rights*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS (Ryan Goodman, Derek Jinks, & Andrew K. Woods eds., 2013). Prentice considers whether an understanding of the psychological function of social norms, which have been shown to be an “effective mechanism

Writing explicitly within the field of international legal compliance, Roda Mushkat acknowledges the utility of constructivist theories of compliance, such as TLP, while observing that the entire conceptual basis of international legal compliance scholarship<sup>190</sup> rests upon “distinctly narrow cultural/geographical foundations, both analytically and empirically, in that its construction has been an almost exclusively American/European affair.”<sup>191</sup> Mushkat notes, in particular, the absence of a substantial body of detailed case studies on international legal compliance in China.<sup>192</sup> She begins to fill that void by comparing the implementation of the Sino-British Joint Declaration to some of the legal process school’s conceptual underpinnings. Mushkat’s study leads her to conclude that a variety of TLP’s, and other’s, substantive and methodological assumptions require additional development when approached from a non-American or -European perspective.<sup>193</sup> Mushkat has continued to produce a variety of scholarly work critically examining methodology and methodological assumptions in international legal compliance scholarship.<sup>194</sup>

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for changing health-related and environmental behaviors”, might be helpful in promoting human rights through changing individual and institutional behavior. *Id.* at 23. She begins with a definition of “social norms”, differentiating them from legal norms, as well as providing an explanation of their mechanics. *Id.* at 23–24. Noting that “the power of social norms to constrain behavior resides in social psychological dynamics that occur within groups”, Prentice observes their connection to discussions of human rights as both a “source of problematic behavior” and “as a way to counter that behavior.” *Id.* at 25, 27. She provides illustrative examples of how social norms function within each of those capacities, before considering what that analysis might contribute to discussions around changing the behavior of actors that violates human rights. *Id.* at 27–41. Prentice looks at both strengthening norms that conform to a particular standard, while weakening norms that violate certain human rights standards and argues that a psychological approach to social norm analysis can clarify the role that norms play in “promoting and subverting human rights”, while suggesting effective ways to design and use norms-based interventions. *Id.* at 41–43.

190. At least until 2009, the time of the article’s publication. Mushkat, *supra* note 157, at 176.

191. *Id.*

192. *Id.* at 177.

193. *Id.* at 191.

194. See, e.g., Mushkat, *supra* note 125; Mushkat, *supra* note 157; Mushkat, *supra* note 180; Roda Mushkat, *Greater China Constitutes Fertile Ground for ‘Building’ and ‘Testing’ Positive International Legal Theory*, 20 UCLA J. INT’L L. FOREIGN AFF. 354 (2016); Roda Mushkat, *Counterfactual Reasoning: An*

In a piece based on extensive ethnographic field research at the World Bank, Galit Sarfaty adds to the literature on norm-internalization, arguing that an ethnographic analysis of the internal dynamics of International Organizations (IOs), “including their formal and informal norms, incentive systems, and decision-making processes[.]”<sup>195</sup> can aid in understanding “the conditions under which norms are internalized, including the degree to which they should be legalized.”<sup>196</sup> Sarfaty notes that although norm-based models, including TLP and literature on mechanisms of norm socialization, have treated IOs as an object for study, scholars have not “investigated the process of norm development within IOs.”<sup>197</sup> She then analyzes the “formal and informal processes of norm socialization and power dynamics between professional subcultures . . .” at the World Bank before analyzing “the risks of achieving norm internalization at the Bank” by “framing norms to adapt to organizational culture . . .”<sup>198</sup>

Darren Rosenblum undertakes a comparative case study of the internalization of Article 7 of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) in Brazil and France and draws links with literature on comparative legal perspectives and methodologies as a way to encourage the development of laws that encourage norm internalization.<sup>199</sup>

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*Effective Component of the International Law Methodological Armor*, 18 GERMAN L. J. 59 (2017); Roda Mushkat, *Constructivist Constructions of International Environmental Governance Regimes – The Southeast Asian Context*, 15 MELB. J. INT’L L. 252 (2014); Roda Mushkat, *The Anatomy of China’s Human Rights Regime: A Behaviourally Underpinned Analytical and Evaluative Account*, 8 VIENNA J. INT’L CONST. L. 131 (2014); Roda Mushkat, *Economics and International Law: Closer Alignment through Greater Analytical Diversity?*, 36 CHINESE (TAIWAN) YBK. INT’L L. & AFF. 1 (2018).

195. Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AM. J. INT’L L. 647, 647 (2009) [hereinafter Sarfaty, *Why Culture Matters*]; see also Galit A. Sarfaty, *International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation*, 48 HARV. INT’L L. J. 441 442 (2007).

196. Sarfaty, *Why Culture Matters*, *supra* note 195, at 651.

197. *Id.* at 655.

198. *Id.* at 652, 653.

199. Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT’L L. 759, 762-63 (2007). For an application of TLP in other contexts, see generally Omoleye Benson Olukayode, *Enforcement and Implementation Mechanisms of the African Human Rights Charter: A Critical Analysis*, 40 J. L., POL’Y &

Rosenblum examines TLP and parses the process of internalization proposed by Koh while identifying acculturation as “[o]ne element driving internalization.”<sup>200</sup> He then juxtaposes neorealist and constructivist approaches to internalization, identifying shortcomings of each, and points to three lessons that might be drawn from comparative methodologies and knowledge, including that: (1) “comparative work can foster interpretations of international law that avoid the model of vertically-imposed international solutions . . .”; (2) “‘soft’ law remedies can undermine enforcement when norms are internalized . . .”; and (3) reconfigured “universals . . . may foster the internalization of international law.”<sup>201</sup> More specifically for TLP, Rosenblum notes that the internalization process revealed in the Brazil and France case studies “may point to an internalization process less directly robust than that described by Koh . . .” in that international norms may fragment and lose universality in a domestic context.<sup>202</sup>

In two separate works, Arturo Carrillo and Catherine Powell address “actors of internalization . . .” in two very distinct contexts. In his piece, Carrillo relies upon TLP as a theoretical framework to examine whether they might function as a specific

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GLOBALIZATION 47 (2015) (discussing African Human Rights Charter); Matthew H. Charity, *Defying Gravity: The Development of Standards in the International Prosecution of International Atrocity Crimes*, 23 IND. INT'L & COMP. L. REV. 429 (2013) (discussing International Criminal Court); David M. Driesen, *Choosing Environmental Instruments in a Transnational Context*, 27 ECOLOGY L.Q. 1 (2000) (discussing international environmental law); Ernesto Hernández-López, *Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention*, 40 VAND. J. TRANSNAT'L L. 1345 (2007) (discussing immigration law); Hari M. Osofsky, *Is Climate Change “International”? – Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585 (2009) (discussing climate change regulation); Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 GEO. J. INT'L L. 303 (2011) (discussing military commissions).

200. Rosenblum, *supra* note 199, at 774. Rosenblum posits that Goodman and Jinks concept of “acculturation” does not “resolve all the challenges facing internalization, as diverse States may not necessarily adopt similar institutional mechanisms in order to comply.” *Id.* at 824. He argues that the case studies of Brazil and France demonstrate that “internalization looks different in different countries” and that transnational law benefits from an awareness of comparative law and methodology. *Id.* at 824, 826.

201. *Id.* at 809–810.

202. *Id.* at 820.

type of transnational actor within transnational legal process.<sup>203</sup> Drawing upon a case study of litigation in the Inter-American human rights system conducted by Columbia Law School's Human Rights Clinic, Carrillo argues that human rights clinics are "a distinct transnational non-governmental actor" that "possess a novel and under-appreciated potential to contribute to the progressive enforcement of international law."<sup>204</sup> Powell, on the other hand, draws insights from TLP to explore "how transnational norm entrepreneurs fit into the legal process and play a role in shaping the normative content of law."<sup>205</sup> Utilizing the case study of Guantanamo detainees in the "War on Terrorism," she demonstrates that nongovernmental organizations and "norm entrepreneurs" have relied upon a "dialogic approach" to human rights law enforcement where more traditional modes of enforcement were unavailable.<sup>206</sup> Her article uses the Guantanamo Bay case study in order to examine and theorize the role of transnational norm entrepreneurs in a dialogic approach to international legal compliance.<sup>207</sup>

Eugene Lim examines TLP and the concept of norm internalization in a case study of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS Agreement), which introduced formal "trade-based dispute settlement mechanisms and enforcement measures to the realm of intellectual property regulation."<sup>208</sup> Despite the introduction of measures with "teeth," Lim describes continued serious compliance problems with the TRIPS Agreement regime, which suggests that the type of State coercion enabled by dispute settlement and enforcement measures leaves other important issues to be resolved.<sup>209</sup> Lim looks to TLP theory to argue that "the absence of intellectual property norm internalization at a *social* level in both developed and developing countries . . ." helps to explain why widespread

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203. Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 535 (2004).

204. *Id.* at 530.

205. Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"*, 5 THEORETICAL INQUIRIES L. 47, 54 (2004).

206. *Id.* at 52.

207. *Id.* at 55–56.

208. Eugene C. Lim, *On the 'Compliance Pull' of Intellectual Property Norms: Finnis, Practical Reasonableness and the Challenge of Social Internalization*, 31 WINDSOR REV. L. & SOC. ISSUES 1, 1 (2011).

209. *Id.* at 1–2.



intellectual property infringement continues to impact States, regardless of developmental status.<sup>210</sup> Drawing upon John Finnis's theory of natural law and natural rights, Lim unpacks the internal characteristics of intellectual property norms and explores how norm-based compliance scholarship might inform Koh's internalization thesis by providing insight into the internal characteristics of norms that enable them to "exert a compliance pull . . ."<sup>211</sup> Lim then applies those insights to the case study of the TRIPS Agreement to demonstrate that a moral criterion of practical reasonableness can impact the strength of intellectual property law's compliance pull.<sup>212</sup>

Taking a more doctrinal approach, Frederic Gilles Sourgens applies TLP to a case study of the conflict between the United States federal government and states like California on climate change policy.<sup>213</sup> He argues that a reading of the Supreme Court's decision in *American Insurance Association v. Garamendi*, which suggests that "federal foreign policy can always overrule state law to the extent that there is 'clear conflict between the policies' in question," would essentially prevent states from participating in a transnational legal process.<sup>214</sup> Such a reading of *Garamendi*, he argues, would render state attempts to resist federal foreign policy as part of a transnational legal process per se unconstitutional.<sup>215</sup> Sourgens argues, however, that the problem of state resistance to a federal foreign policy, which detracts from an "existing global consensus[,] can be avoided by approaching the question of states' powers through a lens inspired by transnational legal process scholarship."<sup>216</sup> In Sourgens' view, the constitutional literature examining conflict between state law and foreign policy "misses constitutionally critical nuances . . ." about the myriad of state and sub-state

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210. *Id.* at 3.

211. *Id.* at 4.

212. *Id.*; see also Eugene C. Lim, *A Long 'TRIP' Home: Intellectual Property Rights, International Law and the Constructivist Challenge*, 4 J. INT'L L. & INT'L REL. 57, 60–61 (2008) (drawing upon Koh's TLP to argue that vertical norm internalization represents an overlooked aspect of the shortcomings of the TRIPS regime).

213. Frédéric Gilles Sourgens, *States of Resistance*, 14 DUKE J. CONST. L. & PUB. POL'Y 91, 92 (2019).

214. *Id.* at 94–95 (emphasis in original).

215. *Id.* at 95.

216. *Id.*

actors that inhabit TLP theory.<sup>217</sup> Sourgens then turns to the constitutional significance of state participation in TLP and global governance networks, positing that the Compact Clause provides the best framework for understanding state participation and resistance before mapping where resistance between actors occurs within that constitutional paradigm.<sup>218</sup>

Writing from a “new” New Haven School perspective in her case study of international trade finance, Janet Koven Levit looks to transnational legal process for a “skeletal roadmap” of her “bottom-up lawmaking” theory.<sup>219</sup> Koven Levit finds commonality with TLP’s process-orientation and internalization thesis, however, and points out that TLP scholars still take a decisively “top-down approach” in their analyses.<sup>220</sup> Her work draws attention to this “bottom-up” shortcoming, while providing empirical examples to develop TLP’s “transmission belt”<sup>221</sup>

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217. *Id.* at 95–96; see also Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT’L L. J. 263, 264–265 (2006) (examining the “profound transformation of localities into independent actors in the international arena” and the normative justifications for legitimating this transformation, including the democratic potential of localities as global actors).

218. Sourgens, *supra* note 213, at 97.

219. Koven Levit, *supra* note 69, at 181. Koven Levit’s “examples do not dwell on the official acts, imprimaturs, or statements of high-level diplomats or policymakers; instead, bottom-up lawmaking shows how the on-the-ground practices of a myriad of *transnational* actors (private individuals, corporations, and highly specialized government technocrats) are constitutive of law.” *Id.* at 178–79.

220. *Id.* at 181. Koven Levit explains that “transnational legal process stories typically begin with a treaty or some other legal instrument that triggers a trickle-down process whereby domestic legal systems absorb international law.” *Id.* at 130. *Cf.* Jodoin, *supra* note 6, at 1020 (using discourse analysis to understand “how discourses shape and become instantiated in the construction and circulation of legal norms and practices, while also recognizing how different legal institutions may, in turn, constrain and enable the emergence of discourses.”); Sébastien Jodoin & Sarah Mason-Case, *What Difference Does CBDR Make? A Socio-Legal Analysis of the Role of Differentiation in the Transnational Legal Process for REDD+*, 5 TRANSNAT’L ENVTL. L. 255, 271 (2016) (undertaking a socio-legal analysis of CBDR [common but differentiated responsibilities] “in the development, diffusion, and implementation” of climate change mitigation policies in the developing world.).

221. Koh, *supra* note 18, at 2651 (describing “transmission belt” as the process “whereby norms created by international society infiltrate into *domestic* society.”).

to include “externalizing practice-based norms as law.”<sup>222</sup> Koven Levit thus strikes at another ambiguity in TLP around the conditions under which new norms are created or modified.

In a piece approaching TLP from speech act and securitization theory, Caleb Stevens explores “why states internalize certain international legal norms . . .” in an empirical analysis of the Hissène Habré case.<sup>223</sup> Citing Kal Raustiala and Anne-Marie Slaughter’s charge that Koh describes “internalization” as both a dependent and independent variable, Stevens looks to speech act and securitization theories to uncover a “nano-process” beyond internalization’s “micro-processes of social influence.”<sup>224</sup> Stevens looked to state and non-state “agents of internalization” and relied upon interviews and reviews of media reports, in addition to doctrinal analysis, in conducting his research on internalization in the context of multiple judicial fora culminating in amendments to Senegal’s constitution and Penal Code.<sup>225</sup>

Finally, Shaffer and Halliday have played a key role in fueling empirical theory-testing and -building, drawing upon TLP<sup>226</sup> in their development of the concept Transnational Legal Orders, which aims to integrate bottom-up and top-down analyses of “how legal norms are developed, conveyed, and settled transnationally.”<sup>227</sup> Transnational Legal Ordering specifically seeks to incorporate socio-legal and interdisciplinary empirical work in its theorizing.<sup>228</sup> In this respect, TLO seeks to improve upon TLP by providing a clear framework for generating empirical inquiry, including longitudinal inquiry, which has largely escaped studies of transnational legal process.<sup>229</sup> The theory further reduces the fuzziness in TLP around actors of internalization and norm

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222. Koven Levit, *supra* note 69, at 182; *see also* Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L. J. 65, 132 (2004).

223. Stevens, *supra* note 5, at 193. Hissène Habré is the exiled, former dictator of Chad who was convicted on May 30, 2016 in the Extraordinary African Chambers in Senegal of crimes against humanity, war crimes, and torture. *See* REED BRODY, *BROT FÜR DIE WELT, VICTIMS BRING A DICTATOR TO JUSTICE: THE CASE OF HISSÈNE HABRÉ*, 6 (2017).

224. Stevens, *supra* note 5, at 194, 203.

225. *Id.* at 201, 218.

226. Shaffer, *supra* note 151, at 235.

227. HALLIDAY & SHAFFER, *supra* note 152, at 1.

228. Terrence C. Halliday, *The Theory of Transnational Legal Orders*, 110 A.S.I.L. PROC. 64, 67 (2016); *see generally* Mushkat, *supra* note 122.

229. Halliday, *supra* note 228, at 67.

creation, requiring “the careful identification of actors involved in [transnational legal ordering] politics and the careful articulation of their interests as they are expressed through law[,]” as well as a reliance on empirical inquiry to discover “how states or substate actors use the promise of an incipient TLO to legitimate an order propounded by transnational authorities.”<sup>230</sup> Shaffer and Halliday draw upon many of the ideas expressed by Koh in TLP, while addressing identified theoretical shortcomings and explicitly integrating socio-legal scholarship and methodology in the recognition that legal outcomes involve “changed normative orientations of those applying and practicing the law so as to affect behavior.”<sup>231</sup>

### *B. Areas of Potential Future Scholarship*

The idea that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time,”<sup>232</sup> belies the complexity of adherence to principles and obligations in a transnational and disaggregated world over an extended period of time. The most promising avenues for future scholarship are those which understand “transnational law as a critical methodology of law in a global context . . .”<sup>233</sup> and seriously engage with a tightening of legal methodology.<sup>234</sup> Situating TLP theory within this broader, interdisciplinary transnational legal project thus aligns with TLP’s origins in American (US) legal realism and its “focus on the transnational, normative, and constitutive character of global legal process[,]”<sup>235</sup> while providing the methodological tools to explore norm-development and compliance in context. Many of the questions raised in critiques of TLP already point in this direction, laying bare the limits of reliance upon formal legal rules and processes which often

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230. Halliday, *supra* note 228, at 267-68.

231. HALLIDAY & SHAFFER, *supra* note 152, at 8.

232. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed., 1979).

233. Zumbansen, *supra* note 161, at 936.

234. Mushkat, *supra* note 157, at 162 (“[T]he standards assumed to govern State action have seldom been juxtaposed with patterns of behavior witnessed in concrete international settings.”).

235. Koh, *supra* note 18, at 26.

render invisible critical inquiries into norm development and the practice of transnational law.<sup>236</sup>

In light of the three central critiques outlined and discussed above, this article suggests two areas for potential future scholarship aimed at testing and further developing TLP: (1) research that employs Pierre Bourdieu's concepts of "habitus" and "bureaucratic field"<sup>237</sup> to convert theory "into concrete research operations to forge [] empirical objects . . ." <sup>238</sup> and aid in TLP's continued development; and (2) research using social network analysis to examine the role of low-level State actors<sup>239</sup> and inform approaches to legal theory and methodology. These two avenues of future research extend the critiques of TLP identified in the sections above and align with an understanding of the transnational law project as a contextual, critical methodology of law.<sup>240</sup>

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236. See Zumbansen, *supra* note 161, at 937;; BETTS & ORCHARD, *supra* note 4, at 1–2. For a similar critique of "contemporary international law", see Eslava & Pahuja, *supra* note 21, at 198.

237. See Loïc Wacquant, *Four Transversal Principles for Putting Bourdieu to Work*, 18 ANTHROPOLOGICAL THEORY 1, 8 (2018) ("[I]t is not only possible but generally desirable to *decouple Bourdieu's concepts from one another*, to ensure that there is a real payoff to their individual usage before they are eventually recombined as needed to frame and resolve the empirical puzzle at hand.").

238. *Id.* at 7.

239. Michael Lipsky coined the term "street-level bureaucrat" in 1969 to describe "[p]ublic service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work." Lipsky, MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3 (Russell Sage rev. ed. 2010). Lipsky argued that the decisions of public service workers "actually constitute the services 'delivered' by government" and, in the aggregate, the decisions become agency policy. *Id.*

240. Zumbansen, *supra* note 161, at 932 ("Without a critical assessment of the conceptual framework which shapes the tools of empirical data collection, there is always the danger that the proverbial, anecdotal example (the infamously 'undeserving,' vacation travelling welfare recipient) is being elevated as proof of the validity of an entire world view. At question, then, is not only a continuation of detail-oriented and context-sensitive research into the actual operations of law (and, non-law) norms on the ground, but a sustained effort to question the way in which the 'bigger picture' is drawn up in relation to the micro-level of analysis. On which epistemological and normative foundations, in other words, rests the conceptual framework which is operationalized for the identification the engagement of 'the problem?").

### 1. Bourdieu's Concepts of "Habitus" and "Bureaucratic Field"

Despite TLP's acknowledgment of the multiplicity of actors involved in the domestic internalization of international legal norms and the impact of that internalization on compliance, the theory does not sufficiently develop the actors nor processes by which those actors promote norm internalization.<sup>241</sup> Even the identification of Bureaucratic Compliance Procedures does not explicitly acknowledge that, for example, legal processes of implementation of a normative framework involve a "variety of decisions made by individuals and groups involved in legal processes . . ." <sup>242</sup> who exercise discretion to interpret and give "purpose and form" to "legal rules and mandates."<sup>243</sup> These decisions fall outside of what Koh would term a Bureaucratic Compliance Procedure, but also represent more than simply useful social context in the examination of international legal compliance. These types of discretionary decisions—and sites of decision-making—form part of a process of meaning-making and contestation unaddressed by TLP theory.

The "specific question of whether and how a particular rule applies in a particular circumstance will inevitably be reserved for, or assumed within, the discretion of the legal actor concerned."<sup>244</sup> As Hawkins and other sociolegal scholars have observed in the context of criminal justice decision-making, focusing on individual cases as discrete entities "fails to describe the real character of [legal] decision-making, which has instead to be seen in an holistic or systemic perspective."<sup>245</sup> Decisions frequently emerge as the product of various officials acting at

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241. "Koh, however, has not identified what role, if any, global-level acculturation processes might play in his theoretical model. In Koh's model, processes that most closely resemble acculturation occur at the final stage of norm implementation; they are governed primarily by bureaucratic and administrative impulses to follow already accepted legal rules." Goodman & Jinks, *supra* note 2, at 626 n.8.

242. Keith Hawkins, *On Legal Decision-Making*, 43 WASH. & LEE L. REV. 1161, 1163 (1986).

243. *Id.* at 1164.

244. Keith Hawkins, *Order, Rationality and Silence: Some Reflections on Criminal Justice Decision-Making*, in EXERCISING DISCRETION: DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM AND BEYOND 207 (Lorraine Gelsthorpe & Nicola Padfield eds., 2003).

245. *Id.* at 194; *see also* EXERCISING DISCRETION: DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM AND BEYOND (Lorraine Gelsthorpe & Nicola Padfield eds., 2003).

different times and in the context of other decisions.<sup>246</sup> These types of decisions may oftentimes be hidden from traditional forms of legal review, because formal legal sources, such as treaties, legislation, or court and administrative decisions either do not reach them, do not constrain them, or neither. Yet, low-level government officials routinely make discretionary decisions based upon organizational, legal, practical and other considerations that factor into how—and whether—legal obligations are implemented.

Bourdieu's concepts of habitus and field help to make sense of the import and influence of "hidden" decisions on the interpretation, application, and ultimate development of formal sources of law.<sup>247</sup> Individuals and groups operating within a particular field "are endowed with a particular habitus or set of durable dispositions to act in particular ways."<sup>248</sup> These dispositions<sup>249</sup> are shaped by the actor's historical experience and "position vis-à-vis the structure of a particular field."<sup>250</sup> In the context of a bureaucratic field, or area of socially patterned practice that distributes and creates "socially guaranteed identities[,]"<sup>251</sup> habitus

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246. Hawkins, *supra* note 244, at 194; *see also* Hawkins, *supra* note 242, at 1164.

247. *See* Richard Terdiman, *Translator's Introduction* to Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805, 808 (1987). The related concept of "legal consciousness," though outside the scope of this piece, may also shed light on these practices. For example, Patricia Ewick and Susan Silbey's work supports a nuanced understanding of law that emerges just as readily from routine, discretionary encounters as from "groups of powerful law 'makers.'" PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* 19 (1998). Ewick and Silbey point to the formal enactment of treaties, statutes, court decisions, and regulations as recognizable manifestations of legality in law, but also point to more mundane transformations of legality into law by citing the example of routine, and often discretionary applications of law to specific cases and individuals. *Id.* at 17–18. For an overview of studies that consider legal consciousness in the context of government, *see generally* Sally Richards, *Unearthing Bureaucratic Legal Consciousness: Government Officials' Legal Identification and Moral Ideals*, 11 INT'L J. L. IN CONTEXT 299 (2015).

248. Moira Inghilleri, *Habitus, Field and Discourse: Interpreting as a Socially Situated Activity*, 15 TARGET 243, 245 (2003); BOURDIEU, *supra* note 3, at 73.

249. BOURDIEU, *supra* note 3, at 72.

250. Inghilleri, *supra* note 248, at 245.

251. Pierre Bourdieu, Loic J.D. Wacquant & Samar Farage, *Rethinking the State: Genesis and Structure of the Bureaucratic Field*, 12 SOC. THEORY 1, 12 (1994).

both generates the “perceptions of actors in the field . . .”<sup>252</sup> while also being “constituted in practice and always oriented to practical functions.”<sup>253</sup>

The notion of field presupposes that “social reality is conceived as fundamentally relational . . .” and “therefore the relationships among the elements, and not the elements themselves, [] must be at the heart of the analysis.”<sup>254</sup> Bourdieu conceives of field as “an area of structured, socially patterned activity or ‘practice’ . . . .”<sup>255</sup> Therefore understanding social activity within a field requires the identification of the “relations and structures of domination in that particular field[,]”<sup>256</sup> because social fields are sites of “struggle, of competition for control.” A “bureaucratic field” is representative of “a shift from a diffuse symbolic capital, resting solely on collective recognition, to an *objectified symbolic capital*, codified, delegated and guaranteed by the state.”<sup>257</sup> The “bureaucratic universe” is thus constituted by a mobilization of “symbolic capital accumulated in and through the whole network of relations of recognition . . . .”<sup>258</sup> Bourdieu points to “*official* acts or discourses . . .” which are “symbolically effective only because they are accomplished in a situation of authority by authorized characters . . .” and which “invoke the logic of official nomination to institute socially guaranteed identities.”<sup>259</sup> Thus, “[b]y stating with authority what a being (thing or person) is in truth (verdict) according to its socially legitimate definition, that is what he or she is authorized to be, what he has a right (and duty) to be, the social being that he may claim, the State wields a genuinely *creative*, quasi-divine, power.”<sup>260</sup> Though examples

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252. Matthew Philpotts, *The Role of the Periodical Editor: Literary Journals and Editorial Habitus*, 107 *THE MOD. LANGUAGE REV.* 39, 42 (2012).

253. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 52 (Richard Nice trans., 1990); see also Inghilleri, *supra* note 248, at 245.

254. Mathieu Hilgers & Eric Mangez, *Introduction to BOURDIEU’S THEORY OF SOCIAL FIELDS: CONCEPTS AND APPLICATIONS* 1, 2 (Mathieu Hilgers & Eric Mangez eds., 2015).

255. Terdiman, *supra* note 247, at 805.

256. Fran M. Collyer, Karen F. Willis & Sophie Lewis, *Gatekeepers in the Healthcare Sector: Knowledge and Bourdieu’s Concept of Field*, 186 *SOCIAL SCIENCE & MEDICINE* 96, 98 (2017).

257. Bourdieu, Wacquant & Farage, *Rethinking the State*, *supra* note 251, at 11 (emphasis in original).

258. *Id.* at 12.

259. *Id.* (emphasis in original).

260. *Id.* (emphasis in original).



of these “acts meant to carry legal effect . . .”<sup>261</sup> include judicial judgments and procedures of official registration, future research might explore how official actors, practices and discourses that construe activity as falling outside of legal frameworks created to evaluate and distribute socially guaranteed identities relates to TLP theory and implicates Koh’s conception of norm internalization.

Although socio-legal scholars have made significant contributions to the empirical examination of Bourdesian concepts, their work generally does not draw explicit connections to international legal theory.<sup>262</sup> As Engle Merry has observed, socio-legal studies largely miss international legal process.<sup>263</sup> Still, the idea of “law on the books” versus “law in action” has been well-explored in the literature and has often been paired with doctrinal analysis that leads to discussions of whether state practice comports with a positivist legal framework.<sup>264</sup> Perhaps more

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261. *Id.*

262. See Roger Cotterrell, *Socio-Legal Studies, Law Schools, and Legal and Social Theory*, 2 J. OXFORD CTR. SOCIO-LEGAL STUD. 19, 30 (2018) (“A renewal of jurisprudence as deeply receptive to social scientific insight and not confined by the disciplinary protocols and intellectual bounds of philosophy is needed. It offers a rediscovered means for normatively-oriented doctrinal legal analysis (the law school’s primary focus) to link theoretically with the rich resources of empirical socio-legal scholarship.”); see also ROGER COTTERRELL, *SOCIOLOGICAL JURISPRUDENCE: JURISTIC THOUGHT AND SOCIAL INQUIRY* 3 (2018) (observing that “[t]he idea of jurisprudence as the jurist’s theoretical understanding of the nature of law needs much clarification after a century of transformation of legal theory and of reassessment of the resources on which it can draw”); Tamanaha, *supra* note 166, at 2238 (2015) (arguing that recognition of social legal theory as a “third branch of jurisprudence will create a framework that facilitates the incorporation of insights currently at the margins of discussions of the nature of law”).

263. Sally Engle Merry, *International Law and Sociolegal Scholarship: Towards a Spatial Global Legal Pluralism*, in *NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM* 59, 60–61 (Michael A. Helfand ed., 2015).

264. See generally Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L.R. 295 (2007); Anna Pratt, *Between a Hunch and a Hard Place: Making Suspicion Reasonable at the Canadian Border*, 19 SOC. & LEGAL STUD. 461 (2010); Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999 (2017); Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L. J. 2134 (2014); Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT’L L. J. 243 (2013); Ben Bowling & James Sheptycki, *Global*

significantly, socio-legal scholarship has laid bare connections between law and the politically and historically contingent practices which give law meaning.<sup>265</sup> Yet, socio-legal studies has ground left to cover in taking “*its own stand* theoretically on the nature of law as ideas, practices and experiences . . .” in order to demonstrate “how juristic ideas find their meaning in relation to their time and place.”<sup>266</sup>

Rather than domestic and transnational actors locked in a dialogic process aimed at inducing norm-compliance by the “institutionalized organizational form”<sup>267</sup> of the State, the reality of “internalization” presents a much more complex picture.<sup>268</sup> From an institutional standpoint, the complexity relates to the vast array of legal and organizational structures within—and without—the social context of a State, which makes certain State behavior possible.<sup>269</sup> From an individual standpoint, the complexity relates to State behavior, which includes all of the components of the State down to the individual actor level, as well as the behavior of non-State actors.<sup>270</sup> One critical actor in this

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*Policing and Transnational Rule with Law*, 6 TRANSNAT'L LEGAL THEORY 141 (2015); Dave Cowan, Simon Halliday & Caroline Hunter, *Adjudicating the Implementation of Homelessness Law: The Promise of Socio-Legal Studies*, 21 HOUSING STUD. 381 (2006); Peter Dwyer, Stuart Hodgkinson, Hannah Lewis & Louise Waite, *Socio-legal Status and Experiences of Forced Labour Among Asylum Seekers and Refugees in the UK*, 32 J. INT'L & COMP. SOC. POL'Y 182 (2016).

265. Bronwen Morgan, *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship*, in THE INTERSECTION OF RIGHTS AND REGULATION: NEW DIRECTIONS IN SOCIOLEGAL SCHOLARSHIP 16 (Bronwen Morgan ed., 2007); see also Cotterrell, *supra* note 262.

266. Cotterrell, *supra* note 262, at 22 (emphasis in original); see also Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1045 (2013).

267. Koh, *Internalization through Socialization*, *supra* note 60, at 978.

268. See HALLIDAY & SHAFFER, *supra* note 152, at 45–46.

269. See Andrew Byrnes, *Whose International Law is it? Some Reflections on the Contributions of Non-State Actors to the Development and Implementation of International Human Rights Law*, 59 JAPANESE Y.B. INT'L L. 14, 49 (2016).

270. Janet Chan, *Using Pierre Bourdieu's Framework for Understanding Police Culture*, 56 DROIT ET SOCIÉTÉ 327, 329–30 (2004); see also Int'l Law Comm'n, Rep. on the Work of its Fifty-Sixth Session, at 40, Supp. No. 10, U.N. Doc. A/56/10 (2001) (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”); *Id.* at 39, ¶ 5 (“In principle,

process is the “street-level bureaucrat,”<sup>271</sup> introduced by Michael Lipsky in 1969 to describe “[p]ublic service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work.”<sup>272</sup> Lipsky argued that the decisions of public service workers “actually constitute the services ‘delivered’ by government . . .” and, in the aggregate, the decisions become agency policy.<sup>273</sup> Though TLP theory looks beyond the traditional realist conception of the State as a unitary actor to the myriad of actors who “interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law,”<sup>274</sup> TLP does not specifically examine the role of individual State actors in either the internalization process, or the dialogic process of norm creation and evolution.

While international law scholars have devoted extensive study to formal legal sources such as statutes, administrative and judicial adjudications, and high-level policymakers,<sup>275</sup> fewer scholars have examined the compliance implications of the discretionary decisions of low-level State actors, such as law enforcement officials or administrative agents.<sup>276</sup> Nevertheless, the decisions

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the State’s responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.”); *LaGrand (Ger. v. U.S.)*, Provisional Measures Order, 1999 I.C.J. 9, ¶ 28 (Mar. 3).

271. LIPSKY, *supra* note 239, at 3.

272. *Id.*

273. *Id.*

274. Koh, *supra* note 1, at 183–84.

275. Ramji-Nogales, Schoenholtz & Schrag, *supra* note 264, at 301–02; see generally REBECCA HAMLIN, *LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA* (2014); see also Woods, *supra* note 4, at 72–73 (critiquing Goodman and Jinks’ acculturation approach for paying “little or no attention to the ground level situations inhabited by the people human rights law is meant to address” and focusing on “treaty adoption and enforcement as a metric for international law.” This, Woods argues, means that the approach is fundamentally concerned with the state, rather than the “individual’s ground-level social situation” as the relevant actor, and is “legalistic in its fetishism of rule-ratification and rule-enforcement”).

276. See Ostrand & Statham, *supra* note 125, at 33–39. In a different context, Jose Alvarez discusses Professor Brian Simpson’s work, *Britain and the Genocide Convention*, which delves deeply into historical archives to examine the role of bureaucrats within multiple British government offices in influencing British treaty policy. José E. Alvarez, *Do States Socialize?*, 54 DUKE L. J. 961, 963 (2005) (discussing A.W. Brian Simpson, *Britain and the Genocide*

of “street-level bureaucrats” charged with interpreting, framing, and applying transnational legal regimes often directly implicate questions of norm internalization.<sup>277</sup> If participation in a transnational legal process induces State compliance with international legal norms over time, why do non-compliant legal practices persist when those practices should theoretically be corrected in jurisgenerative fora? And if compliant practices and discourses which flow between the domestic and international result in the production of new law, or “transnational legal substance,” how do non-compliant practices and discourses shape and inform the development of transnational law? These inquiries raise significant theoretical and methodological questions that might inform a jurisprudential approach which understands the gap between “law on the books” and “law in practice” as two sides of the same coin.<sup>278</sup>

## 2. Social Network Analysis

In terms of international legal compliance, the relevant question is not only whether a state has adopted legislation, regulations, and case law that appropriately reflect international legal norms, but how individual actors—whether they be executive agencies, courts, or front-line administrative decision-makers—exercise their discretion in interpreting and applying legal rules in the face of countless potential decisions and the degree to which those decisions reflect a good faith interpretation of

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*Convention*, 2002 BRIT. Y.B. INT'L L. 5). However, as Melissa Waters identifies in a critique of Robert Ahdieh's *Dialectical Regulation*, the transnational legal process literature has left unanswered important questions, including “[w]ho are the institutional actors engaging in this dialectical process” and that “[a] particularly fruitful endeavour in developing the dialectical regulation model—and addressing the crucial ‘who’ question—would be to explore the role of sub-national actors in influencing global regulatory norms.” Melissa A. Waters, *Dialectical Regulation: The Murky Middle Ground*, 38 CONN. L. REV. 961, 963 (2006) (critiquing Robert Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006)).

277. Garth & Mertz, *supra* note 169, at 129 (distinguishing the European tradition of legal realism from the US approach, in that the European approach draws upon Bourdieu, but is “not normative in the sense that U.S. legal realism tends to be”); *see also* BOURDIEU, *supra* note 253, at 52–65; Bourdieu, Wacquant & Farage, *supra* note 251, at 13.

278. *See generally* ROGER COTTERRELL, *SOCIOLOGICAL JURISPRUDENCE: JURISTIC THOUGHT AND SOCIAL INQUIRY* (2018).

international law norms.<sup>279</sup> Understanding networks as “structuring structures”<sup>280</sup> that both enable and encourage certain types of actor behavior, not all of which are envisioned by traditional positivist legal sources, encourages thinking about the sources of law, legitimacy, and the universe of potential actions that a particular legal regime makes possible to individual actors.<sup>281</sup> Accordingly, Bourdieu’s concepts of habitus and bureaucratic field also provide a vehicle for employing TLP as a methodology through which a variety of empirical methods might be put to use.

Social network analysis presents one such potentially fruitful method. Social network analysis is a form of network analysis that “studies structures of relationships linking individuals (or other social units, such as organizations) and interdependencies in behaviour or attitudes related to configurations of social relations.”<sup>282</sup> Actors in social networks “may be any meaningful

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279. See *Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add. 1. (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State”); Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. GAOR, 56th Sess., Supp. No. 10, at 39, U.N. Doc. A/56/10 (2001) (“In principle, the State’s responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.”); *LaGrand (Ger. v. U.S.)*, Provisional Measures Order, 1999 I.C.J. 9, ¶ 28 (Mar. 3) (“Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be . . .”).

280. BOURDIEU, *supra* note 253, at 53.

281. Bourdieu “construed theory not as the haughty master but as the humble servant of empirical enquiry, and he never advanced the one but through developing the other. The corrective to this common scholastic distortion . . . is to background the textual definition of concepts and to pay close attention to how Bourdieu converts them into concrete research operations to forge his empirical objects. There is less to be gained from parsing any dozen scholastic critiques or theoretical defenses of habitus, however clever they may be, than from tracking the variables Bourdieu digs up and interlinks to chart the making and *modus operandi* of a given set of agents or an innovative historical figure.” Wacquant, *supra* note 237, at 7–8.

282. A. James O’Malley & Peter V. Marsden, *The Analysis of Social Networks*, 8(4) HEALTH SERVS. & OUTCOMES RES. METHODOLOGY 222, 222 (2008); see generally MODELS AND METHODS IN SOCIAL NETWORK ANALYSIS (Stanley Wasserman, John Scott & Peter J. Carrington, eds., 2005); STANLEY

social unit, including individual or collective entities.”<sup>283</sup> Social networks are “usually modelled by graphs, where vertices [or nodes] represent the social entities and edges represent the ties established between them.”<sup>284</sup> The ties between the social entities can represent more than just personal or professional relationships and may include “the flow of information/goods/money, interactions, similarities[,]”<sup>285</sup> among other things. Recognizing that social context matters in legal service delivery, legal decision-making, and even doctrinal development, legal scholarship has begun to explore and apply social network analysis to examine and explain legal behaviour.<sup>286</sup> Thus, in order to understand how transnational legal norms are observed, one must examine the diverse institutions, actors, and instruments involved in operationalizing, implementing, and applying norms in specific contexts. By identifying and describing connections between actors, relative to the implementation of norms, social network analysis might provide a window into the actors of norm internalization and advance a pathway for testing TLP’s internalization thesis.<sup>287</sup>

To illustrate this point, Koh’s citation of the Haitian refugee litigation from the 1990s as an example of TLP theory in action

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WASSERMAN & KATHERINE FAUST, *SOCIAL NETWORK ANALYSIS: METHODS AND APPLICATIONS* (1994).

283. Katherine Faust, *Using Correspondence Analysis for Joint Displays of Affiliation Networks*, in *MODELS AND METHODS IN SOCIAL NETWORK ANALYSIS* 117, 119 (Stanley Wasserman, John Scott & Peter J. Carrington, eds., 2005).

284. Shazia Tabassum, Fabiola S. F. Pereira, Sofia Fernandes & João Gama, *Social Network Analysis: An Overview*, 8 *WIRES DATA MINING & KNOWLEDGE DISCOVERY* 1256, 1256 (2018).

285. *Id.* at 1259.

286. See generally Sergio Puig, *Network Analysis and the Sociology of International Law*, in *RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW* 319 (Moshe Hirsch & Andrew Lang, eds., 2018); Daniel M. Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 *OHIO ST. L. J.* 457 (2010); Shai Dothan, *Social Networks and the Enforcement of International Law*, in *RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW* 333 (Moshe Hirsch & Andrew Lang, eds., 2018); Patricia M. Sweeney, Elizabeth F. Bjerke, Hasan Guclu, Christopher R. Keane, Jared Galvan, Sherrienne M. Gleason & Margaret A. Potter, *Social Network Analysis: A Novel Approach to Legal Research on Emergency Public Health Systems*, 19(6) *J. PUB. HEALTH MGMT. & PRAC.* (2013).

287. Network modelling provides a methodological tool by which theory may be developed. See Puig, *supra* note 286 at 328 (“Some of the aforementioned network analysis tools could be useful for understanding the makings, interpretation, and enforcement of international law.”).

takes a relatively conceptually flat approach to searching for evidence of norm internalization, looking only to traditional jurisgenerative fora.<sup>288</sup> By contrast, understanding TLP as a constructivist, process-oriented methodology and employing the method of social network analysis begins within an understanding that, although the “Refugee Status Determination” process forms a critical, central, and much-studied part of the transnational refugee law framework, decisions which impact the legal claims of asylum seekers are dispersed throughout a network of interdependent actors with responsibility for implementing some aspect of a transnational normative framework. This, in turn, necessitates a move away from conceptualizing the State as a relatively stable and homogeneous institutionalized organizational form embedded within an international order. Implementation consists of countless discretionary legal decisions “made by individuals and groups involved in legal processes . . .”<sup>289</sup> that require legal interpretation, application, and often contestation. Relational sites within the network of individuals and institutions responsible for implementing a norm, such as *non-refoulement*,<sup>290</sup> present countless opportunities for contesting meaning and normative frames, which implicates both questions of compliance with international legal obligations and treaty interpretation. One might look to the actors involved in implementation to examine the degree to which competing norms, external and internal rule structures, and other factors inform a

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288. Koh, *supra* note 139, at 56 (describing a strategy of norm-internalization fixated on courts as mechanisms and fora for achieving legal compliance).

289. Hawkins, *supra* note 242, at 1163 (“It is the everyday discretionary behavior of police officials, lawyers, judges, and others that the legal system takes shape and gets things done. The abstract and often terse statements of the legislature are given form and purpose in the choices legal actors make about the reach and meaning of their conception of the law.”).

290. The norm of *non-refoulement* prohibits the return or removal of an individual to a place where they risk persecution or other serious harm. See Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954); Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

particular legal decision, which can, in turn, provide insight into norm internalization. In short, capturing the nuance of norm internalization requires a deeper look at networks of actors who play a key role in interpreting, contesting, implementing, and sometimes defying international law norms in a transnational legal framework.

Goodman, Jinks, and Woods propose that “the next generation of scholarship should study how general empirical insights apply in human rights contexts . . .” and “should also explore whether differences occur across sub-domains of rights.”<sup>291</sup> They cite work on networks analyzing the structure and effects of social ties among interconnected actors as one possible example of the type of research envisioned.<sup>292</sup> Yet, in addition to producing useful empirical research aimed at improving human rights compliance, future research using networks as a method of analyzing the role of actors,<sup>293</sup> in norm creation, diffusion, and

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291. UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS, *supra* note 160, at 20.

292. *Id.* at 7–8.

293. The uncertainty whether the actions of “street-level bureaucrats” can be applied to state-level behavior stems in part from the lack of a clear connection between empirical findings about individual actor behavior and legal theoretical questions around concepts of law, law-production, the role of discretion in legal interpretation and implementation, to name a few. *See id.* at 20 (noting one aspect of this disconnect, “the contention that a feature of human cognition or communication does not extend to the state—also needs a theoretical explanation and empirical foundation. One bright frontier for new research, then, involves examining these links systematically and determining the conditions under which micro-level motivations and changes in state practice are associated or dissociated with one another.”). For a sample of work examining law and discretion, *see, e.g.* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY (1969); TONY EVANS, PROFESSIONAL DISCRETION IN WELFARE SERVICES: BEYOND STREET-LEVEL BUREAUCRACY (2010); Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life*, in MAKING THINGS PUBLIC: ATMOSPHERES OF DEMOCRACY 556 (Bruno Latour & Peter Weibel eds., 1998); MICHAEL J. HILL & PETER L. HUPE, IMPLEMENTING PUBLIC POLICY: GOVERNANCE IN THEORY AND IN PRACTICE (2002); HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014); Denis Galligan & Deborah Sandler, *Implementing Human Rights*, in HUMAN RIGHTS BROUGHT HOME: SOCIO-LEGAL PERSPECTIVES ON HUMAN RIGHTS IN THE NATIONAL CONTEXT 23 (Simon Halliday & Patrick Schmidt eds., 2004); Dave Cowan, Simon Halliday & Caroline Hunter, *Adjudicating the Implementation of Homelessness Law: The Promise of Socio-Legal Studies*, 21 HOUSING STUD. 381 (2006); Anna C. Pratt, *Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian Immigration Act*, 8 SOC. & L. STUD. 199 (1999); Inés Valdez, Mat Coleman & Amna Akbar, *Missing in Action: Practice*,



internalization might also inform approaches to legal theory and methodology. Thus, Bourdieu's sociological concepts of "habitus" and "bureaucratic field," as well as social network analysis, might prove useful in advancing such a normative theoretical and methodological approach.<sup>294</sup>

#### CONCLUSION

Koh's introduction of TLP in 1996 represented a leap forward in the conceptualization of the dialectic and dialogic processes of norm development and internalization in the field of international legal compliance. Though many scholars have engaged with and improved upon the central limitations of TLP, including clarifying actors and processes of internalization, why actors internalize certain norms, and addressing norm-creation processes, TLP has ample room to grow both in terms of legal theory and as a legal methodology. For example, many of the "theoretical-empirical studies of international legal compliance have largely relied on deduction—with case studies, often commendably intensive and extensive in nature, being undertaken in support of theoretical propositions . . . ."<sup>295</sup> Though important, the prevalence of deductive case studies leave the field open to criticism of providing simply "thick description,"<sup>296</sup> rather than empirical findings with high validity and reliability.<sup>297</sup>

Using the legal theoretical and methodological origins of TLP as orienting points, this article charts a path through some of the contemporary scholarship that locates TLP in broader debates on legal theory and methodology and has contributed to TLP's evolution over the last 20 years. The piece further demonstrates that drawing upon Bourdieu's concepts of habitus and bureaucratic field might help to reveal the vast network of actors responsible for interpreting, implementing, and potentially

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*Paralegality, and the Nature of Immigration Enforcement*, 21 CITIZENSHIP STUD. 5 (2017).

294. BOURDIEU, *supra* note 253, at 52; *see also* Bourdieu, Wacquant & Farage, *supra* note 251.

295. Mushkat, *supra* note 122, at 168.

296. Koh, *supra* note 1, at 182 ("To the extent that international law professors write articles, domestic scholars consider them at worst, irrelevant, and at best, thick description. . . . In this lecture, I argue that this notion is wrong.").

297. *See, e.g.*, Mushkat, *supra* note 122, at 178; David Restrepo Amariles & Julian McLachlan, *Legal Indicators in Transnational Law Practice: A Methodological Assessment*, 58 JURIMETRICS J. 163 (2018).

contributing to the development of international legal norms within a transnational legal process. In addition, understanding transnational legal process as a vast network of relational interactions of meaning making and contestation makes clear TLP's potential as a methodology and opens TLP to the use of methods—like social network analysis—capable of documenting empirical aspects of the theory which have yet to be satisfactorily addressed. These recommendations for future empirical, interdisciplinary work outline one pathway to address the three identified limitations of TLP and contribute to TLP's evolution as both legal theory and methodology.