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SYMPOSIUM ARTICLE

Transnational Environmental Law's Missing People[†]

Natasha Affolder*

Abstract

Legal scholars rely heavily on vocabularies of ‘actors’, ‘agents’, and ‘experts’ to account for the fact that law does not develop by itself. However, the identities, idiosyncrasies, and individual professional contributions of law’s *people* are rarely illuminated. This article suggests that the relative absence of people in transnational legal scholarship helps to explain some of its gaps. The task of bringing ‘human actors back on stage’ creates some new opportunities for transnational environmental law scholarship. It invites attention to both dominant and excluded voices. It offers a way of bridging the gap between the bureaucratic language of law and its lived reality. It also provides an understanding of why, despite ferocious attempts to roll back the advances of environmental law in some places, many scholars and practitioners find reason to be optimistic about the future of environmental law.

Keywords: Non-state actors, Agents, Experts, Transnational law scholarship, Life writing

† This contribution is part of a collection of articles growing out of the conference ‘Global Environmental Law’, held at the Strathclyde Centre for Environmental Law and Governance, University of Strathclyde, Glasgow (United Kingdom), 4–5 Sept. 2017.

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I am grateful to the participants in the Global Environmental Law workshop at Strathclyde Law School for their rich ideas and inspirations. I also thank Nicholas Russell and Nicholas Healey for their patient and invaluable research assistance. My early thoughts on why issues of invisibility matter for transnational legal method (Section 4 of this article) are explored in more detail in N. Affolder, ‘Transnational Law as Unseen Law’, in P. Zumbansen (ed.), *The Many Lives of Transnational Law: Critical Engagements with Jessup’s Bold Proposal* (Cambridge University Press, forthcoming).

1. INTRODUCTION

While accounts of environmental law's travels and transformations contain a dizzying array of 'actors',¹ 'agents',² and 'active players',³ these same accounts include few actual *people*. This puzzle inspires this article. Transnational law scholarship is widely credited with extending law's vision field beyond the state and state-based lawmaking; yet few of its 'people' have names and faces and identities attached. Instead, they are flattened into classes of 'actors': non-state actors, substate actors, corporations, local communities, indigenous peoples. At what cost?

This article emerges from a concern that, at times, the scholarly accounts we are producing of global or transnational environmental law developments are less rich, less nuanced, and less colourful than the processes that they describe. We may reduce environmental law and lawmaking processes to a bureaucratic language, to familiar norms and forms, and in the process write out the personalities that shape these developments. In neglecting the 'who', we risk producing partial accounts of the 'what', the 'how', and the 'why'. This, of course, is an over-reaching claim and there certainly are powerful exceptions.⁴ However, this claim admits out loud a troubling question: Why is environmental law 'on the books' sometimes much duller and less vibrant than its lived reality?

The call of this article to bring 'the human actors back on stage' is certainly not novel.⁵ It animates scholarship that is emerging in a number of fields.⁶ There are

¹ The terminology of 'actors' is omnipresent in transnational law scholarship, often tracing to the 'triad' of actors, norms and processes: see P. Zumbansen, 'Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back' (2016) 1(1) *UC Irvine Journal of International, Transnational, and Comparative Law*, pp. 161–94.

² An inspiration for the terminology of 'agents' is the work of Dezalay and Garth: Y. Dezalay & B. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press, 2002) (contemplating study of 'the actual agents of law, not simply as the operators of transnational law but also, and specifically, as the entrepreneurs building transnational legal fields': *ibid.*, p. 444).

³ N. Walker, *Intimations of Global Law* (Cambridge University Press, 2015), p. 31.

⁴ Of note is the recent attention to individual scholarly identities and experiences in shaping environmental law scholarship: see, e.g., Elizabeth Fisher's 'diversion into personal history' in E. Fisher, 'The Rise of Transnational Environmental Law and the Expertise of Environmental Lawyers' (2012) 1(1) *Transnational Environmental Law*, pp. 43–52, at 43; and, acknowledging the forces of socialization experienced by environmental law scholars working in the academy, M. Pieraccini, '(Un)Making the Boundaries of Environmental Law Scholarship: Interdisciplinarity Beyond the Social Sciences?', in O. Pederson (ed.), *Perspectives on Environmental Law Scholarship* (Cambridge University Press, 2018), pp. 60–78.

⁵ D. Kaiser, 'Bringing the Human Actors Back on Stage: The Personal Context of the Einstein-Bohr Debate' (1994) 27(2) *The British Journal for the History of Science*, pp. 129–52.

⁶ E.g., historians have identified a 'biographical turn' in historical research since around 1980, which has had powerful repercussions for historical theory and methodology, with ripples well outside historical research. This has included significant attention to, and the development of, life-writing, micro-history and biography: see, e.g., H. Render, B. de Haan & J. Harmsma, 'The Biographical Turn', in H. Render, B. de Haan and J. Harmsma (eds), *The Biographical Turn: Lives in History* (Routledge, 2017), pp. 3–12; P. France & W. St Clair (eds), *Mapping Lives: The Uses of Biography* (Oxford University Press, 2004). Post-colonial and critical race scholarship have also illuminated the complexity of individual roles and identities and the challenges of capturing them through categories such as class, gender, and race. This work has often emerged from the telling of individual stories: see, e.g., G. Ladson-Billings & J. Donnor, 'The Moral Activist Role of Critical Race Theory Scholarship', in

reasons why studying individual lives in order to understand both contemporary law and processes of social and historical change might, however, resonate particularly with scholars of transnational environmental law. Transnational law has in some ways served as a ‘holding pen’ for thinkers who feel trapped or restricted by existing vocabularies of international law, comparative law or domestic law, which inadequately accommodate the versions of law and its travels as they are being observed, lived, and practised. Transnational accounts of law often seek to better reflect law’s interactional and multilevel existence, its plurality of both actors and sources, its lived practice, and its complexity.⁷ By failing to fit people into transnational accounts of environmental law’s creation and movement, we may be limiting our ability to deliver on the suggested ambitions of transnational environmental law.

This is an early-stage, exploratory attempt to think about what might get lost in writing people out of accounts of transnational environmental law processes and what might be gained by including people in different ways in the next wave of scholarship. It begins with a bit of a fishing trip. This involves an analysis of how individuals have been discussed, if at all, in articles published in this journal, *Transnational Environmental Law*, over the past seven years (Section 2). From this peek-a-boo view of how individuals feature, or fail to feature, in recent transnational environmental law scholarship, Section 3 assesses the often unquestioned terminological and conceptual frames that have come to dominate transnational law’s writing about its human participants. These include, in particular, the clinical and conceptually flattening vocabularies of *actors, agents, and experts*. Section 4 identifies opportunities to add accounts of law’s people to transnational environmental law scholarship, highlighting literature that takes people seriously through different methods and approaches. Finally, the conclusion (Section 5) acknowledges the extent of the challenge involved in peopling transnational legal scholarship.

The deliberate focus of this article on ‘missing people’ situates this work within a larger project aimed at provoking thought regarding the visibility of people, processes, and histories within law and legal scholarship. In part, this is a project that reacts to, and resists, vocabularies of ‘global law’, claims of global reach, and unqualified universalist assumptions and applications.⁸ It seeks instead to particularize and to personalize. In

N.K. Denzin & Y.S. Lincoln (eds), *The Handbook of Critical and Indigenous Methodologies* (Sage, 2008), pp. 279–301.

⁷ Each of these elements emerges out of the set of essays, and particularly the inaugural editorial, contained in the first issue of this journal: see V. Heyvaert & T.F.M. Etty, ‘Introducing Transnational Environmental Law’ (2012) 1(1) *Transnational Environmental Law*, pp. 1–11.

⁸ This article emerges out of a workshop on ‘global’ environmental law. My discomfort with ‘global’ vocabularies is not particularly novel. Without turning this note into an article-length critique of such terminology, I note here a particular objection that the processes described as ‘global’ are rarely global, but often involve only select portions (people and peoples) of the globe. Thus, attempts to delineate whether law is ‘global’ based on whether it has ‘global justification’ (explained as a ‘commitment to the universal’ in the words of Walker, n. 3 above, p. 18) are suspect if one anticipates challenges in empirically tracing law’s justifications, or of embracing claims of ‘universality’ or global reach in such justifications. This critique of the selective scope of global law is particularly significant given the appeal being made here for accounts of transnational legal processes that emphasize specificity and particularity in the lives of law’s often invisible people. The term ‘global law’ problematically masks, or underplays, ‘non-global’ realities while the terminology of transnational law, in my opinion, makes more space for

so doing, this work shares sympathies with scholarship that challenges the claimed internationality of international law,⁹ and seeks to better elucidate how transnational law ‘works in practice’.¹⁰ Thinking about transnational environmental law’s missing people inevitably leads to a singular admission: it is highly challenging to produce the rich and full accounts of lawmaking that a ‘transnational’ lens might aspire to bring into view. These might include accounts of the movements of law that are alert to practices of marginalization, without succumbing to overused and underthought narratives of marginalization,¹¹ and that seek to illuminate interactions, without erasing the objects of those interactions. Admitting how hard this might be to do well is, no doubt, a useful first step.

2. A DEPEOPLED SCHOLARSHIP

Transnational environmental law is ever more richly described in terms of its doctrine, evolving case law, and principles, while much ink is spilled on its failings and implementation gaps¹² – but its ‘who’ rarely gets mentioned. In interrogating this claim, I have taken a short fishing trip into the literature, examining any references made to named people in articles published during the first seven years of this journal, *Transnational Environmental Law*.¹³ This journal was chosen for a number of reasons. The first is that the processes of legal movement in which the journal admits an interest – including processes of ‘uploading and downloading’, regulatory diffusion, and ‘trans-echelon borrowing’¹⁴ – require human activity. This suggests that law’s people might feature more prominently in this journal than perhaps in others. Secondly, this journal has a record of publishing scholarship that captures the ‘lived reality’ of environmental law. Its editors acknowledge a view of law where ‘the rules are important, but they are not the game’.¹⁵ As they explain, ‘trying to understand international environmental law

acknowledging the partial vision and partial ‘global’ coverage of legal processes that cross borders. Others have developed more thoughtful and extensive critiques of the vocabulary of the ‘global’ generally and ‘global law’ specifically: see generally W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009), p. 14; M. Loughlin, ‘The Misconceived Search for Global Law’ (2017) 8(3) *Transnational Legal Theory*, pp. 353–59.

⁹ A. Roberts, *Is International Law International?* (Oxford University Press, 2017).

¹⁰ See, e.g., G. de Búrca, ‘Human Rights Experimentalism’ (2017) 111(2) *American Journal of International Law*, pp. 277–316. This compulsion can also be traced through scholarship on global legal pluralism, global administrative law, transnational legal process, transnational legal orders, transgovernmental regulatory networks, international organizations as lawmakers, and new legal realism and international law.

¹¹ S. Amin, ‘Africa: Living on the Fringe’ (2002) 53(10) *Monthly Review*, pp. 41–50, at 42 (noting that the ‘marginalized’ are actually the super-exploited, and thus central to the world system, rather than operating at its margins).

¹² Indeed, a unifying concern of this literature emerges from the fact that ‘environmental law and policy may feature prominently on the political menu, but it does not necessarily follow that the political preoccupation is to support and further environmental law’: Heyvaert & Ety, n. 7 above, p. 1.

¹³ The search involved only full-length articles (not book reviews) from Apr. 2012 (vol. 1(1)) to July 2018 (vol. 7(2)).

¹⁴ All three of these processes are listed in the inaugural issue of *Transnational Environmental Law* as features of transnational environmental law that require further inquiry: see Fisher, n. 4 above, p. 46.

¹⁵ Heyvaert & Ety, n. 7 above, p. 5.

purely through a detailed study of, say, the Convention on Biological Diversity (CBD) and its supporting documents is a little like trying to understand football by poring over the FIFA rulebook'.¹⁶ The admitted orientation of the journal thus suggests that it might be one of the more receptive publishing venues for scholars looking to illuminate transnational environmental law through exploring the identities of the people who shape its processes and practices.

To undertake this investigation, we reviewed each published article to identify any mention of, or significant discussion of, individual named people.¹⁷ To meet our criteria for inclusion, a person had to be named as more than a source of a quotation, or as the author of a source, theory or finding (the type of attribution usually associated with a footnote reference). Here is a summary of our findings:

- There were *no* detailed substantive narratives of individual named people.
- There were frequent references in the text of articles to the influence of named scholars.¹⁸ In each case the reference addressed the intellectual influence of their scholarly work. There were no cases of what might be characterized as 'life writing'.
- There were several references to current or past political leaders. I mention these here to err on the side of inclusion, despite the fact that in each instance the reference is being made to a 'role' rather than a personality. This included two articles referring to United States (US) President Donald Trump,¹⁹ three mentioning former US President Barack Obama,²⁰ and one mention of the following: former US Secretary of State Hillary Clinton,²¹ the Prime Minister of Singapore,²² the Indonesian ASEAN representative,²³ the President of the Czech Republic,

¹⁶ Ibid.

¹⁷ Warm thanks are due here to an indefatigable research assistant, Nicholas Russell.

¹⁸ See, e.g., P.H. Sand, 'The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective' (2012) 1(1) *Transnational Environmental Law*, pp. 183–98, at 185 (mentioning Karl Neumeyer); D.A. Heyen, 'Influence of the EU Chemicals Regulation on the US Policy Reform Debate: Is a "California Effect" within REACH?' (2013) 2(1) *Transnational Environmental Law*, pp. 95–115, at 96, 102–3 (mentioning David Vogel and Veerle Heyvaert); E. Korkea-aho, 'Laws in Progress? Reconceptualizing Accountability Strategies in the Era of Framework Norms' (2013) 2(2) *Transnational Environmental Law*, pp. 363–85, at 377 (mentioning Charles Sabel and Jonathan Zeitlin); A. Kotsakis, 'Change and Subjectivity in International Environmental Law: The Micro-Politics of the Transformation of Biodiversity into Genetic Gold' (2014) 3(1) *Transnational Environmental Law*, pp. 127–47, at 128 (mentioning Michel Foucault).

¹⁹ H. Zhao & R. Percival, 'Comparative Environmental Federalism: Subsidiarity and Central Regulation in the United States and China' (2017) 6(3) *Transnational Environmental Law*, pp. 531–49, at 549; K. Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7(2) *Transnational Environmental Law*, pp. 229–50, at 232.

²⁰ J. Dafoe & D.A. Kysar, "'Go Ahead Without Us": Global Climate Change Policy in the Absence of Full Participation' (2014) 3(1) *Transnational Environmental Law*, pp. 7–15, at 8; M.B. Gerrard & S. Welton, 'US Federal Climate Change Law in Obama's Second Term' (2014) 3(1) *Transnational Environmental Law*, pp. 111–25, at 111–2, 115; Tienhaara, n. 19 above, p. 232.

²¹ J. Ayling, 'Harnessing Third Parties for Transnational Environmental Crime Prevention' (2013) 2(2) *Transnational Environmental Law*, pp. 339–62, at 343–4.

²² K. Kheng-Lian, 'Transboundary and Global Environmental Issues: The Role of ASEAN' (2012) 1(1) *Transnational Environmental Law*, pp. 67–82, at 77.

²³ Ibid.

Václav Klaus,²⁴ Mikhail Gorbachev,²⁵ California Governor Schwarzenegger,²⁶ British Prime Minister Tony Blair,²⁷ former US President Franklin Roosevelt,²⁸ Ecuador's President Rafael Correa,²⁹ and former French President Jacques Chirac.³⁰

- A handful of mentions of the names of specific judges or lawyers were made, without further discussion of their professional lives or judicial or off-the-bench work. These include Justice LeBel of Canada,³¹ New South Wales Justice Nicola Pain,³² Juliane Kokott, the German Advocate General at the Court of Justice of the European Union (CJEU),³³ and Fatma Ksentini, first Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.³⁴
- The only discussion of the relevance of the educational background of a lawyer appears in an article discussing Prakash Mani Sharma, one of the Pakistani lawyers representing the petitioners in the *Godavari Marble* case.³⁵
- In terms of non-lawyers of significance to environmental law, two murdered rubber tappers were named in an article describing the Brazilian state of Acre as one of the birthplaces of the contemporary Brazilian environmental movement.³⁶ Ashgar Leghari, the Pakistani 'agriculturalist' who brought a highly referenced public

²⁴ D.A. Kysar, 'Global Environmental Constitutionalism: Getting There from Here' (2012) 1(1) *Transnational Environmental Law*, pp. 83–94, at 93.

²⁵ B. Baker & B. Yeager, 'Coordinated Ocean Stewardship in the Arctic: Needs, Challenges and Possible Models for an Arctic Ocean Coordinating Agreement' (2015) 4(2) *Transnational Environmental Law*, pp. 359–94, at 368.

²⁶ T. Etty & V. Heyvaert, 'Transnational Dimensions of Climate Governance' (2012) 1(2) *Transnational Environmental Law*, pp. 235–43, at 236–7.

²⁷ *Ibid.*

²⁸ A. Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5(1) *Transnational Environmental Law*, pp. 25–53, at 34–5.

²⁹ L.J. Kotzé & P. Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) *Transnational Environmental Law*, pp. 401–33, at 415–16.

³⁰ R. O'Gorman, 'Environmental Constitutionalism: A Comparative Study' (2017) 6(3) *Transnational Environmental Law*, pp. 435–62, at 450.

³¹ C. Streck, 'Innovativeness and Paralysis in International Climate Policy' (2012) 1(1) *Transnational Environmental Law*, pp. 137–52, at 146.

³² J. Peel, L. Godden & R.J. Keenan, 'Climate Change Law in an Era of Multi-Level Governance' (2012) 1(2) *Transnational Environmental Law*, pp. 245–80, at 272.

³³ A. Hertogen, 'Sovereignty as Decisional Independence over Domestic Affairs: The Dispute over Aviation in the EU Emissions Trading System' (2012) 1(2) *Transnational Environmental Law*, pp. 281–301, at 288.

³⁴ S. Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environmental Law*, pp. 113–43, at 119.

³⁵ J.C. Gellers, 'Environmental Constitutionalism in South Asia: Analyzing the Experiences of Nepal and Sri Lanka' (2015) 4(2) *Transnational Environmental Law*, pp. 395–423, at 403 (Gellers notes the intellectual exposure that Sharma had during his time studying for his Masters of Law at Delhi to the writings of Indian environmental lawyer, M.C. Mehta. Gellers suggests that 'knowledge of relevant foreign jurisprudence, specifically India's series of cases brought by M.C. Mehta, influenced the types of argument made by legal counsel in *Godavari Marble*, which not only established a legal precedent for the constitutional protection of environmental rights, but also sensitized judges to the concept of environmental rights': *ibid.* p. 405).

³⁶ E. Roessing Neto, 'Linking Subnational Climate Change Policies: A Commentary on the California–Acre Process' (2015) 4(2) *Transnational Environmental Law*, pp. 425–37, at 429–30.

interest climate litigation case, was also named in an article on the rights turn in climate change litigation.³⁷

- In a loose category of corporate ‘celebrities’, Lord Browne of British Petroleum,³⁸ Sir Richard Branson of Virgin,³⁹ Mervin Kelly of Bell Labs,⁴⁰ and Tesla Motors founder Elon Musk⁴¹ were singled out for individual mention.
- In the category of ‘funders’, an article refers to the Uruguayan government’s acknowledgement that ‘it would not have been able to defend itself in ISDS [Investor-State Dispute Settlement] proceedings without the financial support of a foundation set up by Michael Bloomberg’.⁴²

The intention in undertaking this simple review was to describe and explore who receives mention, and in what depth, in this body of published work. The fact that no detailed narratives, or forms of ‘life writing’, or historical analysis of the lives of specific individuals was found may be unsurprising for a legal audience. Other readers may react differently, questioning the partial geographies of those mentioned, the racial and gender diversity among those attracting named reference at all, and the fact that there were only a handful of women among the numerous scholars cited in article texts. Even a very simple peek-a-boo view of our scholarship leads to new questions. This is the point. Naming people invites attention to issues of visibility and invisibility created by the selective gaze of legal scholarship.

Failing to name and discuss individual people is not the only way in which scholarship might be described as ‘depeopled’. Indeed, this label might seem perverse given the deliberate and significant contributions of transnational environmental law scholarship to making visible *non-state* actors and their role in transnational law. I argue below that part of the challenge of seeing, or even more boldly of centring, law’s people in transnational environmental law scholarship involves being aware of the risk that certain terminologies might obscure, rather than illuminate, human roles.

3. BEYOND ACTORS: HOW TO TALK ABOUT PEOPLE

Actors, agents and experts are three terminological frames that are frequently adopted in legal scholarship to acknowledge that law and legal ideas develop and travel as the result of human activities. The development of each of these vocabularies speaks to interdisciplinary borrowing, in particular the cross-fertilization between transnational

³⁷ J. Peel & H.M. Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7(1) *Transnational Environmental Law*, pp. 37–67, at 38.

³⁸ L. Benjamin, ‘The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?’ (2016) 5(2) *Transnational Environmental Law*, pp. 353–78, at 363.

³⁹ S. Hsu, ‘Capital Transitioning: An International Human Capital Strategy for Climate Innovation’ (2017) 6(1) *Transnational Environmental Law*, pp. 153–76, at 168.

⁴⁰ *Ibid.*, p. 171.

⁴¹ *Ibid.*, p. 169.

⁴² Tienhaara, n. 19 above, p. 237.

legal and social science scholarship.⁴³ This is not to suggest that it is just terminology that is moving here, or that terminology should be divorced from its distinct methodological origins within particular disciplinary methods. Rather, embracing such terminology while acknowledging its origins might create space for considering the varied methods that are used to illuminate actors, agents and experts, including historical analysis, ethnography, participant observation, interviews, and life writing. The section below thus explores these terms, taking inspiration from diverse scholarly methodologies to advance their understanding.

3.1. Actors

Attention to the role of *actors* other than states in lawmaking is often considered a key contribution of the transnational law lens.⁴⁴ Indeed, the vocabulary of ‘actors’ is fairly ubiquitous in transnational law scholarship. This prevalence of the terminology of ‘actors’ generally, and ‘non-state actors’ more specifically, has motivated scholars to challenge the *non-state* part of this term.⁴⁵ However, the usage of the term ‘actors’ remains curiously unproblematized. Acknowledging the presence or significance of non-state actors almost seems to provide an excuse for failing to name, or disaggregate, who they might be. Even detailed place-based accounts of global norm making tend to contemplate law’s globalization through ‘classes of actors’.⁴⁶ Perhaps the lack of attention to the terminology of ‘actors’ derives in part from the fact that the very act of identifying, centring and describing actors other than states has itself been a controversial political project for scholars of both law and international relations.⁴⁷ This might be easy to forget now that discussing non-state entities as ‘actors’ has become commonplace.

What follows is an attempt to parse out some potential concerns that the terminology of ‘actors’ implicates. The first is the problem of conceptual flattening. This emerges from the lumping together of diverse entities such as states, corporations, local communities, and indigenous peoples under the large tent that the term affords.

⁴³ For a thoughtful linking of the vocabulary of ‘actors’ to particular insights from sociological and international relations literature see L. Parks & E. Morgera, ‘The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit Sharing’ (2015) 24(3) *Review of European, Comparative and International Environmental Law*, pp. 353–67, at 359.

⁴⁴ Such attentiveness to non-state actors is not intended to be merely inclusionary, or descriptive, but disruptive in nature and function. ‘As non-state actors become ever more closely associated with the environmental legislative and regulatory enterprise, the conventional boundaries erode between the “legal” and the “illegal”, the “rule-bound” and the “free”’: Heyvaert & Etty, n. 7 above, p. 4.

⁴⁵ See, e.g., N. Affolder, ‘Non-State Actors’, in E. Morgera & J. Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar, 2017), pp. 387–98, at 387.

⁴⁶ The nuanced theory of recursivity of law, developed to explain the globalization of corporate insolvency regimes, funnels analysis through this vocabulary of ‘classes of actors’: T.C. Halliday & B.G. Carruthers, ‘The Recursivity of Law: Global Law Makers and National Lawmaking in the Globalization of Corporate Insolvency Regimes’ (2007) 112(4) *American Journal of Sociology*, pp. 1135–202, at 1148–9.

⁴⁷ This tension is observed in the critique offered by Alexander Wendt of the insistence of Thomas Waltz on centring the state as the central actor in the international order: A. Wendt, *Social Theory of International Politics* (Cambridge University Press, 1999), pp. 15–22; K.N. Waltz, *Theory of International Politics* (McGraw-Hill, 1979), p. 93.

The common distinction between state and non-state actors risks grouping non-state actors together in a way that might erase, or de-emphasize, their distinctions.⁴⁸ This not only does a disservice to non-state actors; it erases the significant and multiple personalities that comprise the state.⁴⁹

Some scholars argue that the ‘flattening’ associated with dividing the world into actors and mapping their interactions is not just valuable, but necessary.⁵⁰ Indeed, this is a key argument underlying actor-network theory which undertakes to make ‘the social world as flat as possible’ so that new links or interactions might be made visible.⁵¹ Where the object of study is the interaction of actors, rather than their individual identities and roles, such mapping of actors is of great value.⁵² It allows what Latour calls the ‘difficult social’ as well as the ‘easy social’ to be better identified:

Users of social science seem to consider that it’s rather straightforward to assemble, invoke, convoke, mobilize, and explain the social. Practitioners of social science know how painful, costly, arduous, and utterly puzzling it is. The ‘easy’ social is the one already bundled together, while the ‘difficult’ social is the new one that has yet to appear in stitching together elements that don’t pertain to the usual repertoire. Depending on which tracer we decide to follow we will embark on very different sorts of travels.⁵³

These words resonate for those attempting to trace who shapes environmental law as it crosses borders, and upon whom such law acts.

A second concern with the terminology of ‘actors’ traces to the inherent anthropomorphizing of non-human actors at work here. Some international relations scholars have felt the need to justify, or at least explain, their adoption of language that traditionally is descriptive of humans to refer to non-humans.⁵⁴ For legal scholars, the practice of attributing legal personality to non-humans is nothing new. Yet, it has the

⁴⁸ A good example of this is the frequent lumping together of local communities and indigenous peoples in international law instruments and discourses: see R. Niezen, ‘The Anthropology by Organizations: Legal Knowledge and the UN’s Ethnological Imagination’, in R. Niezen & M. Sapijnoli (eds), *Palaces of Hope: The Anthropology of Global Organizations* (Cambridge University Press, 2017), pp. 294–317, at 302.

⁴⁹ For a rare disaggregation of the many faces of the state, and state law, see G. Shaffer & T.C. Halliday, ‘With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering’, University of California Irvine School of Law Research Paper No. 2016-59, 8 Dec. 2016, pp. 1–25, available at: <https://ssrn.com/abstract=2882851>.

⁵⁰ B. Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford, 2005), p. 16.

⁵¹ Ibid.

⁵² Actor-network theory has thus been harnessed to advance an understanding of bioprospecting debates in a way that emphasizes ‘messiness rather than neat social categories, embeddedness rather than distinction, and entanglement rather than independent movements’: E. Cloatre, ‘Actor-Network Theory and the Empirical Critique of Environmental Law: Unpacking the Bioprospecting Debates’, in A. Philippopoulos-Mihalopoulos & V. Brooks (eds), *Research Methods in Environmental Law* (Edward Elgar, 2017), pp. 80–103, at 81.

⁵³ Latour, n. 50 above, p. 165.

⁵⁴ Wolfers states that ‘if state behavior is to be intelligible and to any degree predictable, states must be assumed to possess psychological traits of the kind known to the observer through introspection and through acquaintance with other human beings’: A. Wolfers, *Discord and Collaboration: Essays on International Politics* (Johns Hopkins Press, 1962), p. 10. For more recent debates on this issue see R. Oprisko & K. Kaliher, ‘The State as a Person? Anthropomorphic Personification vs. Concrete Durational Being’ (2014) 6(1) *Journal of International and Global Studies*, pp. 30–49; C. Wight, ‘State Agency: Social Action without Human Activity?’ (2004) 30(2) *Review of International Studies*, pp. 269–80, at 273.

consequence of obscuring the actors within institutions, cloaking the multiple personalities that comprise any state or non-state actor. The practice of attributing singular thoughts and motivations to non-human entities is evident in the way in which the ‘Global South’ is discussed as an actor able to ‘position itself’.⁵⁵ It emerges through descriptions of how ‘*the World Bank draws on the expertise of NGOs*’.⁵⁶ It frequently shapes discussions of corporate activities and motivations, including accounts of how ‘*TNCs developed a particular interest in the normative framework governing their economic activities*’.⁵⁷ As these examples reveal, one of the consequences of adopting an ‘actor’ vocabulary is the removal of human agency from the institutional actions of banks, companies, and NGOs. It is the institutions, rather than the humans who comprise these organizations, to whom thoughts, interests, and beliefs are attributed.

The value of disaggregating ‘actors’ can be seen in scholarship that explores how indicators operate as a tool of global governance. Tim Büthe’s work, for example, reveals that indicators, ranging from law school rankings to Freedom in the World ratings, problematically lump together ‘stakeholders’.⁵⁸ In so doing, these ranking tools obscure the distinctions between those who demand rules, effectively hiding the political nature of the tools in circulation. By separating out distinct users, demanders, and suppliers of indicators, a richer understanding of the subsets of ‘stakeholders’ emerges.⁵⁹ Thinking about indicators as the product of specific people, their expertise, their values, and their combined backgrounds highlights different dimensions of the knowledge problem that indicators produce and perpetuate. This comes into view particularly in Sally Engle Merry’s work, as she takes the time to trace the career paths and academic institutional affiliations of the creators of the Human Development Index in order to humanize the act of creating this tool.⁶⁰

It is particularly in the work of ethnographers and historians that the tensions involved in talking about people, as individuals and as groups, are illuminated. Merry’s scholarship is cited frequently by legal scholars eager to draw on ethnographic insights to illuminate transnational legal spaces and processes.⁶¹ Such anthropological

⁵⁵ G. Morgan, M.V.P. Gomez & P. Perez-Aleman, ‘Transnational Governance Regimes in the Global South: Multinationals, States and NGOs as Political Actors’ (2016) 56(4) *Revista de Administração de Empresas*, pp. 374–9, at 375.

⁵⁶ J. Tallberg & C. Jönsson, ‘Transnational Actor Participation in International Institutions: Where, Why, and With What Consequences’, in C. Jönsson & J. Tallberg (eds), *Transnational Actors in Global Governance: Patterns, Explanations and Implications* (Macmillan, 2010) pp. 1–21, at 1 (emphasis added).

⁵⁷ K. Nowrot, ‘Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?’ (2011) 18(2) *Indiana Journal of Global Legal Studies*, pp. 803–42, at 804 (emphasis added).

⁵⁸ T. Büthe, ‘Beyond Supply and Demand: A Political-Economic Conceptual Model’, in K.E. Davis et al. (eds), *Governance by Indicators* (Oxford University Press, 2012), pp. 29–51, at 31.

⁵⁹ *Ibid.*, pp. 46–7. A similar approach to illuminating the hierarchies of ‘staff’ in regulatory institutions marks the study by Büthe and Mattli of the internationalization and privatization of rulemaking: T. Büthe & W. Mattli, *The New Global Rulers* (Princeton University Press, 2011), p. 85.

⁶⁰ S. Engle Merry, ‘Expertise and Quantification in Global Institutions’, in Niezen & Sapignoli, n. 48 above, pp. 152–71, at 164.

⁶¹ E.g., her work on gender and violence informs scholarship on transnational private law theory: see, e.g., G.-P. Calliess & P. Zumbansen, *Rough Consensus and Running Code* (Hart, 2010), p. 4, citing

contributions on the transnationalism of law play a critical role ‘in bringing the tacit or implicit into consciousness – of making the invisible visible’.⁶² Galit Sarfaty identifies ethnographic approaches as particularly valuable to illuminate the internalization of globalized legal phenomena in local communities.⁶³ Environmental justice scholars such as Shannon Bell have also turned to ethnography as a means to privilege the experiences of persons such as those living in polluted environments.⁶⁴ Historians such as Lauren Benton offer quasi-ethnographic accounts of the lives of geographical features such as rivers, islands, and mountain ranges to illuminate how physical space and cultural imagination interact.⁶⁵

As a research paradigm tied to the empirical observation of everyday life, ethnographic research provides a particularly rich opportunity to people transnational law scholarship. Contemplating the use of ethnography to illuminate transnational law’s actors, both groups and individuals, directs conscious attention to the choice of *subject* in transnational environmental law scholarship – a choice frequently obscured.⁶⁶

3.2. Agents

As interest in law’s diffusion and dissemination mounts, it is not surprising that scholars are eager to map the *agents* of such spread. Writing abounds about the influence of agents of law’s dissemination, inspired by efforts to ‘study the actual agents of law, not simply as the operators of transnational law but also, and specifically, as the entrepreneurs building transnational legal fields’.⁶⁷ Neil Walker is attentive to the role of those agents of global law’s development and dissemination, acknowledging that academic and professional elites are ‘active players in the fashioning and shaping of global law’.⁶⁸ He also draws attention to the way in which legal scholars assume ‘real time’ responsibility for updating law’s doctrinal materials for front-line use by judicial and legislative authorities.⁶⁹ Walker presents an evocative image of global law’s ‘base camp’, populated by ‘a relatively small number of global law firms and

S. Engle Merry, ‘Human Rights and Gender Violence: Translating International Law into Local Justice’ (University of Chicago Press, 2006) (revealing a particular ‘paradox’ of processes of human rights’ vernacularization: rights must reflect universal principles to hold power and legitimacy, yet they must resonate with local understandings to be accepted by community members).

⁶² J.K. Cowan & J. Billaud, ‘The “Public” Character of the Universal Periodic Review: Contested Concept and Methodological Challenge’, in Niezen & Sapignoli, n. 48 above, pp. 106–26, at 123.

⁶³ G.A. Sarfaty, ‘An Anthropological Approach to International Economic Law’, in M. Hirsch & A. Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Elgar, 2018), pp. 296–318.

⁶⁴ S.E. Bell, ‘Bridging Activism and the Academy: Exposing Environmental Injustices through the Feminist Ethnographic Method of Photovoice’ (2015) 21(1) *Human Ecology Review*, pp. 27–58.

⁶⁵ L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press, 2009).

⁶⁶ J.D. Haskell, ‘The Choice of the Subject in Writing Histories of International Law’, in J. d’Aspremont et al. (eds), *International Law as a Profession* (Cambridge University Press, 2017), pp. 244–67, at 247 (exploring blind spots that emerge across scholarship as methodological choices about subject are obscured).

⁶⁷ Dezalay & Garth, n. 2 above, p. 444. For an example of the influence of this work, see G. Shaffer, ‘Transnational Legal Process and State Change’ (2012) 37(2) *Law & Social Inquiry*, pp. 229–64, at 246.

⁶⁸ Walker, n. 3 above, p. 31.

⁶⁹ *Ibid.*, pp. 48–9.

legal advocates, nationally ranked global law schools and academics, and globally networked judges'.⁷⁰ But who are these people? Peopling accounts of the 'agents' who attempt to disseminate and circulate particular 'global' visions and versions of law demands identifying and describing these 'base camp' inhabitants.

William Twining was an early adopter of the vocabulary of agents to describe those active in legal diffusion, specifically including, in addition to governments, 'commercial and other non-governmental organizations. Armies. Individuals and groups: e.g. colonists, merchants, missionaries, slaves, refugees, believers etc. who "bring their law with them". Writers, teachers, activists, lobbyists etc'.⁷¹

As this list suggests, Twining's gaze is far-reaching and his accounts of agents of legal diffusion extend far beyond the 'usual suspects'. Twining seems to suggest not only that individuals are 'agents' of diffusion – they may, in fact, be the most important agents of diffusion. Twining traces the agent vocabulary to communications scholar Everett Rogers' 1962 book *Diffusion of Innovations*, which attempts to model the movement of ideas through social systems.⁷² Rogers identifies 'change agents' as vital for the diffusion process, communicating with clients, or potential adopters, in a way designed to 'secure the adoption of new ideas'.⁷³

Curiously, despite the frequent use of the term 'agent' and its extension to include groups, individuals, and inanimate objects such as law⁷⁴ and ideas,⁷⁵ its unfocused, and at times confusing, usage in literature on the diffusion of law and policy has rarely been problematized. The distinctions between 'actors' and 'agents' can often only be inferred in texts. For example, Diane Stone uses the term 'agents' alongside 'actors'. She argues that 'the agents of lesson-drawing and policy transfer are a much broader category of individuals, networks and organizations', before stating that '[k]ey actors in the mechanics of policy transfer are international organizations and non-state actors such as interest groups and non-governmental organizations (NGOs), thinktanks, consultant firms, law firms and banks'.⁷⁶ The implication may be that 'agent' does not connote the same autonomy as 'actor', but such terminological clarity is lacking.

As with the terminology of 'actors', a certain conceptual flattening occurs in describing who law's 'agents' might be.⁷⁷ The terminology of 'agents' tends to be almost

⁷⁰ Ibid., p. 42.

⁷¹ Twining, n. 8 above, p. 279.

⁷² Twining refers to Rogers' text as a synthesis of the 'classic tradition in sociology': W. Twining, 'Social Science and Diffusion of Law' (2005) 32(2) *Journal of Law and Society*, pp. 203–40, at 218.

⁷³ E. Rogers, *Diffusion of Innovations*, 5th edn (Free Press, 2003), p. 312. Though the text itself refers to 'agents' in a way that suggests it means individuals, this definition could easily be extended to any entity capable of being employed for the purpose of promoting change.

⁷⁴ Parks & Morgera, n. 43 above, p. 360.

⁷⁵ G. Boushey, *Policy Diffusion Dynamics in America* (Cambridge University Press, 2010), p. 6. The book sets out to create a broad epidemiological model for the transmission of ideas across state boundaries in the US.

⁷⁶ D. Stone, 'Transfer Agents and Global Networks in the "Transnationalization" of Policy' (2004) 11(3) *Journal of European Public Policy*, pp. 545–66, at 550.

⁷⁷ This is an apparent risk with research that employs mathematical models in order to explain the influence of 'agents' on the movement of certain ideas and policies. In these contexts, 'agents' are highly abstract, reduced to nodes in a computer network: see, e.g., S. Cantono & G. Silverberg, 'A Percolation Model of

universally deployed without explicit definition, making its scope within a certain model or analysis unclear. Some inroads are undoubtedly being made towards understanding the agent concept by those scholars who choose to name names and locate individual people within institutional positions to illuminate particular ‘agents’ who advocate across and translate between local and transnational sites of lawmaking; but this work is still rare.⁷⁸

3.3. *Experts*

Frequently undefined, ‘experts’, like ‘actors’ or ‘agents’, is a slippery term, and legal professionals and scholars have trouble locating themselves inside or outside this terminology. One such ‘expert’ thus rebrands himself as a ‘casual expert’.⁷⁹ It is, of course, easier to treat expertise as something people ‘have or hold’ rather than ‘something people do’.⁸⁰ While ‘indicators’ such as formal education or a professional role often operate as proxies for ‘expertise’, expertise can also be seen as one’s capacity for intervention.⁸¹

Significant overlap undoubtedly exists between the humans who inhabit the positions of transnational law’s actors, its agents of dissemination, and those who attract the label of ‘experts’. Such blurring of distinctions can be deduced from the survey of ‘named mentions’ of transnational environmental law’s people in [Section 2](#) of this article. Much depends on who is deploying these labels, and who gets to define ‘expertise’. Twining thus identifies, as a core bias underlying Western academic legal culture, ‘that law is best understood through “top down” perspectives of rulers, officials, legislators, and elites with the point of view of users, consumers, victims and other subjects at best marginal’.⁸²

More widely, Twining’s scholarship foreshadows some of the challenges of naming ‘experts’, and conceptualizing ‘expertise’ in a context where Western jurisprudence has developed ‘with at most only tangential reference to, and in almost complete ignorance of, the religious and moral beliefs and traditions of the rest of humankind’.⁸³ Deliberate and conscious attempts are required to hear voices from other places that might challenge assumptions of universalism and regarding the nature of expertise.⁸⁴

Eco-Innovation Diffusion: The Relationship between Diffusion, Learning Economies, and Subsidies’ (2009) 76(4) *Technological Forecasting & Social Change*, pp. 487–96.

⁷⁸ See, e.g., S. Sell, ‘Intellectual Property and the Creation of Global Rules’, in H.J. Klug & S. Engle Merry (eds), *The New Legal Realism, Volume Two: Studying Law Globally* (Cambridge University Press, 2016), pp. 52–66, at 52–5.

⁷⁹ R.K. Hitchcock, ‘From Boardrooms to Field Programs: Humanitarianism and International Development in Southern Africa’, in Niezen & Sapignoli, n. 48 above, pp. 172–97, at 172.

⁸⁰ E. Summerson Carr, ‘Enactments of Expertise’ (2010) 39 *Annual Review of Anthropology*, pp. 17–32, at 18.

⁸¹ M. Sapignoli, ‘A Kaleidoscopic Institutional Form: Expertise and Transformation in the UN Permanent Forum on Indigenous Issues’, in Niezen & Sapignoli, n. 48 above, pp. 78–105, at 84.

⁸² Twining, n. 8 above, p. 6.

⁸³ *Ibid.*, p. 376.

⁸⁴ See Twining’s deliberate attempt to explore the work of four non-Western human rights jurists (Francis Deng, Abdullahi An-Na’im, Yash Ghai, and Upendra Baxi): *ibid.*, pp. 376–442.

Examples of such scholarship do exist. James Scott's work on international economic law explores the significance of Southern trade intellectuals in knowledge creation.⁸⁵ This work is notable both for listing named individuals⁸⁶ rather than lumping them into a category of 'experts', and for exploring the intellectual venues of their work, thus explicitly linking individual people to particular ideas and their transnational influence. Drawing on, and nuancing, theories of the influence of epistemic communities, Scott's work illustrates how the emergence of these intellectuals from specific 'rising powers' has changed the landscape of expertise and altered what knowledge is considered valid and valuable in trade policy formulation.⁸⁷

The more important point here is that expertise means different things to different scholars and enters transnational law discussions in distinct ways. 'Expertise' finds a place in environmental law scholarship on epistemic communities, which frequently is interpreted to mean scientific groups (even if this was not the original conception of the terminology put forward by Peter Haas).⁸⁸ Of particular interest to scholars interested in transnational environmental law are not just individual communities but also networks of communities of expertise. Emanuel Adler's theory of transnational communities of practice provides a valuable theoretical jumping-off point for thinking about transnational communities of practice who are active in spreading environmental law principles and understandings as a form of expertise.⁸⁹

Recent scholarship on expertise ironically also unveils the methodological challenges involved in problematizing the primacy of dominant notions of expertise and expert rule for scholars embedded in that very tradition. David Kennedy's scholarship has long been animated by deep suspicions about expert rule and its marginalization of opportunities for contestation.⁹⁰ Yet the anecdote-rich methodology of several of his recent books relies heavily on his own expert knowledge, position, and networks to reveal law in action, drawing on conversations and observations of professional practice,⁹¹ and his participation in human rights advocacy work.⁹² Nonetheless, his accounts of experts favouring 'usefulness' over analytical rigour and formal legal status, while advancing their conclusions as facts rather than contestable choices, resonate powerfully as a critique of the nature and status of 'expertise' within environmental

⁸⁵ J. Scott, 'Southern Trade Intellectuals in Expert Knowledge Creation', in E. Hannah, J. Scott & S. Trommer (eds), *Expert Knowledge in Global Trade* (Routledge, 2015), pp. 197–217.

⁸⁶ *Ibid.*, pp. 203–4.

⁸⁷ *Ibid.*, p. 205.

⁸⁸ P. Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46(1) *International Organization*, pp. 1–35; M.K. Davis Cross, 'Rethinking Epistemic Communities Twenty Years Later' (2012) 39(1) *Review of International Studies*, pp. 137–60.

⁸⁹ E. Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge, 2005), p. 13.

⁹⁰ D. Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 *European Human Rights Law Review*, pp. 463–97.

⁹¹ D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016), p. 2.

⁹² D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004), p. xvi.

law and highlight the absence of parallel ‘first person’ accounts of environmental lawmaking.

Views of expertise also emerge through writing in which the word ‘expert’ never appears. Such literature includes diverse forms of biographical, autobiographical, and historical writing that increasingly unite under the label of ‘life writing’.⁹³ Attention to ‘lives lived’ not only contributes to richer intellectual histories of the development of environmental law but also promotes an understanding of ‘who’ is responsible for the spread of transnational environmental law. The deliberate inclusion of biographical content has long served as a mechanism to challenge the invisibility of those with ‘hidden’ lives and for those excluded by singular and authoritative histories of the past and visions of the legal present. In this way, life writing can serve as a mechanism for challenging linear narratives of progress, and authorized ‘collective memory’.⁹⁴ Scholars engaged in this work are not only ‘filling gaps’ by recovering the ‘lost lives’ of law’s people, but also writing methodological accounts of how to approach this form of challenging legal research.⁹⁵

There are many reasons to personalize accounts of the spread of law by illuminating the individuals who inhabit the roles of actors, agents, and experts in transnational environmental law. Such accounts afford the opportunity to attribute moral agency to legal advisers,⁹⁶ to highlight the specificity of one’s experiences and perspectives, to illuminate those who play a defining role in legal developments, to challenge theses of inevitability, and to rewrite international legal history to incorporate neglected perspectives.⁹⁷ The argument here is not to suggest that prevalent vocabularies should be rejected or replaced by legal scholars; but there is a need to acknowledge the limitations of such terms and the restrictions on one’s visual field that emerge from their unquestioned use. The task of centring people in transnational environmental law involves more than writing ‘down to earth and perhaps unflattering documentary portrayals’.⁹⁸ It requires putting conscious effort into exploring vocabularies and methodologies through which people are given a conspicuous presence.

⁹³ ‘Whilst at first blush the shift from auto/biography to life writing appears little more than an exercise in its rebranding, life writing involves, and goes beyond, biography. It is a wide-ranging field, pluralistic in its approaches, agendas, and narratives and less constricted by convention than conventional biography and history writing’: D. Sugarman, ‘From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-Legal Scholarship’ (2015) 42(1) *Journal of Law and Society*, pp. 7–33, at 29.

⁹⁴ *Ibid.*, p. 27.

⁹⁵ See, e.g., R. Auchmuty, ‘Recovering Lost Lives: Researching Women in Legal History’ (2015) 42(1) *Journal of Law and Society*, pp. 34–52.

⁹⁶ This is a prevalent theme in Koskenniemi’s ‘life writing’ work: see A. Lang & S. Marks, ‘People with Projects: Writing the Lives of International Lawyers’ (2013) 27(2) *Temple International and Comparative Law Journal*, pp. 437–53, at 440.

⁹⁷ See J.T. Gathii, ‘A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias’ (2008) 21(2) *Leiden Journal of International Law*, pp. 317–49, at 319.

⁹⁸ J. Kustermans, ‘Parsing the Practice Turn: Practice, Practical Knowledge, Practices’ (2016) 44(2) *Millennium Journal of International Studies*, pp. 175–96, at 177.

4. PEOPLING TRANSNATIONAL ENVIRONMENTAL LAW

In this section, I situate the frequent absence of ‘people’ as part of a ‘knowledge problem’ in transnational environmental law.⁹⁹ I argue that issues of visibility are critical for a transnational legal method. This is a limited exploration of why invisibility matters, what value lies in centring certain groups of people and their individual members in legal scholarship, and what sources of inspiration exist for such work.

4.1. *Transnational Environmental Law as Revelation*

Transnational environmental law can be viewed not simply as a legal ‘field’ but as a methodological commitment to making certain inquiries to capture the globalization of law and understand the dynamic processes by which law crosses borders and has effects in multiple jurisdictions.¹⁰⁰ Ralf Michaels’ invocation of law ‘after the breakdown of methodological nationalism’¹⁰¹ aligns well with such a view. The objective here is to move the concept of the ‘transnational’ away from a ‘where’ inquiry – a narrowly geographical construct – to embrace a wider approach more alert to the ‘who’, ‘how’, and ‘why’ of transnational lawmaking.¹⁰²

Part of the challenge of embracing a wider (or merely different) vision field, and in contemplating accompanying methodological shifts, is that they import new blind spots. Responding to climate injustice demands first *seeing* climate injustice. Other legal blind spots in transnational legal scholarship trace to geography (how often in transnational or global scholarly writing are environmental law issues from the Middle East addressed?) and to issues incapable of metricization or quantification. These blind spots hint at the opportunity that transnational environmental law affords to advance a methodological commitment to *revelation*: uncovering hidden law and, through it, hidden people.¹⁰³

Part of the allure of Philip Jessup’s original description of transnational law lies in its promise of capturing ‘unseen law’ that lies beyond the *visible* bodies of public and

⁹⁹ Zumbansen usefully characterizes the transnational law ‘project’s’ work in scrutinizing law’s ‘knowledge’ problem: P. Zumbansen, ‘Law and Society and the Politics of Relevance: Fact and Field Boundaries in “Transnational Legal Theory” in Context’ (2014) *No Foundations* 11, pp. 1–37.

¹⁰⁰ Shaffer and Bodansky capture this sense of movement in their definition of transnational environmental law, which ‘includes national environmental regulation that has horizontal effects across jurisdictions – for example, by providing regulatory models to other countries or by applying to or affecting the behaviour of producers and consumers within them. It also includes the development of standards by private actors that have effects across borders, such as through product certification and labelling regimes’: G. Shaffer & D. Bodansky, ‘Transnationalism, Unilateralism and International Law’ (2012) 1(1) *Transnational Environmental Law*, pp. 31–41, at 32.

¹⁰¹ R. Michaels, ‘Globalization and Law: Law Beyond the State’, in R. Banakar & M. Travers (eds), *Law and Social Theory* (Hart, 2013), pp. 287–303, at 303.

¹⁰² Zumbansen thus describes transnational law as a ‘particular perspective on law as part of a society that itself cannot sufficiently be captured by reference to national or de-nationalized boundaries’: P. Zumbansen, ‘Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism’ (2012) 21(2) *Transnational Law & Contemporary Problems*, pp. 305–35, at 325.

¹⁰³ E.g., still largely unexplored in transnational environmental law scholarship is the critical role of private sector lawyers in shaping legal regimes and implementation practices, and moving legal norms between jurisdictions.

private international law and is thus neglected by the scholarship.¹⁰⁴ Recent scholarly attempts to capture, frame, and name this ‘unseen law’ have involved raising awareness of informal international lawmaking,¹⁰⁵ identifying the turn to ‘*stealthier* means of transnational legal ordering’,¹⁰⁶ revealing the ‘hidden world’ of World Trade Organization (WTO) governance,¹⁰⁷ disclosing the ‘hidden tools’ that populate international investment law,¹⁰⁸ and unveiling the obscured interactions of private international law and public international law.¹⁰⁹ Indeed, much of the conceptual work of defining transnational law now lies in recognizing the concept as more than a simple holding pen for less visible elements of known transnational legal ordering and various other misfits.¹¹⁰

Still, the need to investigate limitations on access to important sources is as urgent as ever. Important questions need to be asked about how accounts of transnational legal processes are shaped by the ‘data’ that we are able to access and that which remains off limits. In a similar vein, scholars must consider which ‘subjects’ of transnational law are left obscured by the impossibility of research access. As a survey of the literature makes clear, the absence of close attention to law’s people is part of a wider impulse to ignore what is not easily seen.

Feminist theory has done some heavy lifting around questions of visibility and invisibility, which helps to guide these critical reflections. Marginalized groups are shown as occupying positions of hyper-visibility,¹¹¹ while the experiences of dominant communities enjoy a claim to universality as the hegemonic norm that conceals their domination.¹¹² In other situations, feminists describe invisibility as a situation of

¹⁰⁴ P.C. Jessup, *Transnational Law* (Yale University Press, 1956), p. 15. Jessup’s conception of transnational law offered the alluring possibility of ‘a larger storehouse of rules to apply, and it would be unnecessary to worry whether public or private law applies in certain cases’. As these rules were left undefined, the concept of transnational law has developed into a powerful placeholder for ‘otherness’ and ‘misfits’ in legal thought and methodology.

¹⁰⁵ J. Pauwelyn, R.A. Wessel & J. Wouters, *Informal International Lawmaking* (Oxford University Press, 2012).

¹⁰⁶ G. Shaffer & C. Coye, ‘From International Law to Jessup’s Transnational Law, from Transnational Law to Transnational Legal Orders’, University of California Irvine School of Law Research Paper No. 2017-02, 6 Jan. 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2895159## (emphasis added).

¹⁰⁷ A. Lang & J. Scott, ‘The Hidden World of WTO Governance’ (2009) 20(3) *European Journal of International Law*, pp. 575–614.

¹⁰⁸ P. Fox & C. Rosenberg, ‘The Hidden Tool in a Foreign Investor’s Toolbox: The Trade Preference Program as a “Carrot and Stick” to Secure Compliance with International Law Obligations’ (2013) 34(1) *Northwestern Journal of International Law and Business*, pp. 53–80.

¹⁰⁹ A. Mills, ‘Rediscovering the Public Dimension of Private International Law’ (2011) 24 *Hague Yearbook of International Law*, pp. 11–23; A. Mills, ‘Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law’, in H. Muir Watt & D. Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press, 2014), pp. 245–61.

¹¹⁰ For a critique of treating transnational climate law as the Law of Misfits, see N. Affolder, ‘Melting the Boundaries of Law: Transnational Climate Law and Practice’, in P. Zumbansen (ed.), *Oxford Handbook of Transnational Law* (Oxford University Press, forthcoming).

¹¹¹ S. Arat-Koç, ‘Invisibilized, Individualized, and Culturalized: Paradoxical Invisibility and Hyper-Visibility of Gender in Policy Making and Policy Discourse in Neoliberal Canada’ (2012) 29(3) *Canadian Woman Studies*, pp. 6–18.

¹¹² R. Simpson & P. Lewis, ‘An Investigation of Silence and a Scrutiny of Transparency: Re-examining Gender in Organization Literature through the Concepts of Voice and Visibility’ (2005) 58(10) *Human Relations*, pp. 1253–75, at 1263–64.

marginalization in which women, and particularly women of colour, are deprived of political agency.¹¹³ In legal scholarship, feminist theory has sought to capture how laws are mutually constitutive with these gendered discourses of power, serving variously to create the conditions of silenced oppression and to perpetuate those conditions by masking their origin.¹¹⁴ A central occupation for many feminist authors is to make known what is hidden by legal processes.¹¹⁵

Feminist theory thus offers an ever-present reminder that facts, events, vocabularies, outcomes, processes, and people can all be erased by methodological choices and starting points. This can range from positioning actors from the ‘Global South’ as victims to conflating ‘environmentalism’ with the ‘environmentalisms of the rich’¹¹⁶ by emphasizing the importance of certain actors such as consumers. Environmental law’s fragmentation, and the resulting limits of ‘insider knowledge’, make it harder to know what scholars fail to see, and what sources, and people, are hidden from view.

The very exercise of looking for law’s people, keeping inventories of who gets mentioned by name in legal scholarship, helps to highlight patterns of visibility and invisibility. These patterns reveal that visibilizing involves far more than being included on a list, and that it can itself result in harm.¹¹⁷ For example, indigenous communities are increasingly mentioned in legal scholarship for their role as ‘actors’ in legal struggles and dramas involving environmental governance. While indigenous communities may themselves grapple with how to visibilize their identities,¹¹⁸ scholars are slowly realizing how concepts like ‘indigeneity’ and ‘indigenous environmental knowledge’ can themselves serve to erase indigenous peoples.¹¹⁹ Attention to ‘indigenous environmental knowledge’ tends to highlight some sites and situations of lawmaking and to overlook others. For example, indigenous experiences in the ‘global law’ of climate change are little discussed.¹²⁰ A number of texts flag indigenous experiences of climate

¹¹³ M. Yamada, ‘Invisibility is an Unnatural Disaster: Reflections of an Asian American Woman’, in C. Moraga & G. Anzaldúa (eds), *This Bridge Called My Back: Writings by Radical Women of Color* (Persephone Press, 1981), pp. 30–6, at 35.

¹¹⁴ R. Cook & S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2011), pp. 36–7.

¹¹⁵ See R. Ahlers & M. Zwartveen, ‘The Water Question in Feminism: Water Control and Gender Inequities in a Neo-Liberal Era’ (2009) 16(4) *Gender Place and Culture*, pp. 409–26, at 414–16 (exposing the practices of water resource management through which neoliberal discourse renders unseen the political nature of decision making); F. Johns, ‘The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory’ (1994) 19(4) *Melbourne University Law Review*, pp. 893–923, at 917–9 (employing feminist critiques of the public/private divide and jurisdictional doctrines to reveal how transnational corporations hide their damaging exploitation of women’s labour).

¹¹⁶ P. Dauvergne, *Environmentalism of the Rich* (The MIT Press, 2016).

¹¹⁷ Commonly adopted conceptual short cuts, like ‘ethnic groups’, can, e.g., force artificial identities upon indigenous peoples, and promote problematic lumping; see B. Nietschmann, ‘The Fourth World: Nations Versus States’, in G.J. Demko & W.B. Wood (eds), *Reordering the World: Geopolitical Perspectives on the 21st Century* (Westview Press, 1995), pp. 228–31.

¹¹⁸ M.T. Alfred & J. Corntassel, ‘Being Indigenous: Resurgences against Contemporary Colonialism’ (2005) 40(4) *Government and Opposition*, pp. 597–614.

¹¹⁹ M. Dove, ‘Indigenous People and Environmental Politics’ (2006) 35 *Annual Review of Anthropology*, pp. 191–208, at 191.

¹²⁰ But see R.S. Abate and E.A. Kronk (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar, 2013).

change as being a topic in the ‘future’ of law. This way of thinking about indigenous people as actors in environmental law’s future risks discounting them as actors in the present and deprives them of agency in current states of knowledge.

I turn now to explore three opportunities to bring into better view people whose practices matter for transnational law: (i) judges and the ‘project’ of environmental law; (ii) scholars and teachers; and (iii) funders. Such a limited list offers only a very partial view of some of the people who shape transnational environmental law. It may do little to illuminate those whose lives are shaped by such law; but even a limited list offers a window into some methodological possibilities for making people visible in transnational law scholarship.

4.2. *Judges and the ‘Project’ of Environmental Law*

Judges clearly occupy a privileged place in legal analysis, yet as research subjects only a narrow portion of their judicial ‘activities’ is considered. By contrast, a wide lens on transnational lawmaking might cover judicial practices beyond written court decisions, such as academic writing by judges, or conference activity, or transnational advocacy on behalf of specific issues. Such an approach challenges the tendency to trap discussions of judicial activity within discourses of judicial ‘independence’, framing ‘extra-judicial’ activities as transgressions.¹²¹

Studying the diverse non-judicial practices of judges moves beyond this formalism to capture the informal influences linked to speaking, writing, and advocacy work – some of which will be directly related to the judicial function (for example, advocating specialized tribunals and the form they should take), others not. Scholars are adopting diverse strategies to access the ‘black box’ of judicial lives outside their courtrooms. Douglas Kendall and Eric Sorkin traced financial disclosures to track the sponsors and funders of private judicial conferences which ‘represent a veiled attempt to lobby the judiciary under the guise of judicial education’.¹²² Another report on the feasibility and structure of a specialized environmental court for England and Wales revealed the involvement of a range of judges from diverse jurisdictions.¹²³ Environmental law offers particularly vivid exposure to the breadth of judicial influence. In particular, the ‘project’ of environmental protection has mobilized a select group of judges who have taken on public advocacy roles speaking in conferences, publishing scholarship as well as writing judicial opinions.¹²⁴

¹²¹ J.C. Blue, ‘A Well-Tuned Cymbal? Extrajudicial Political Activity’ (2004) 18 *Georgetown Journal of Legal Ethics*, pp. 1–63.

¹²² D.T. Kendall & E. Sorkin, ‘Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public’s Trust’ (2001) 25(2) *Harvard Environmental Law Review*, pp. 405–80, at 405.

¹²³ M. Grant, *Environmental Court Project: Final Report* (Department of the Environment, Transport and the Regions, 2000), pp. xviii–xix.

¹²⁴ See, e.g., the writings and lectures of Judge Brian Preston, Chief Judge of the Land and Environment Court of New South Wales, including B.J. Preston, ‘The Contribution of the Courts in Tackling Climate Change’ (2016) 28(1) *Journal of Environmental Law*, pp. 11–7; B.J. Preston, ‘Characteristics of Successful Courts and Tribunals’ (2014) 26(3) *Journal of Environmental Law*, pp. 365–93; and of

What lenses do we have for understanding the ‘lawmaking’ work that judges do outside their casework? Little has been systematically investigated regarding judges’ efforts to influence environmental law and policy as opinion leaders, network builders, publicists and law reform advocates – efforts referred to as ‘off-bench judicial mobilization’¹²⁵ – or about judicial practices of off-bench resistance.¹²⁶ Nonetheless, a strong sense of the common ‘project’ of environmental protection being advanced through the judiciary can be gleaned from articles like Lord Carnwath’s ‘world tour’ of exceptional environmental law judgments¹²⁷ and his celebration of the crucial role that ‘judges for the environment’ have to play, both individually and collectively.¹²⁸

Biographies and autobiographies offer rare glimpses of the ‘people’ who occupy the bench.¹²⁹ However, as earlier explorations of forms of ‘life writing’ suggest, book-length biographies and autobiographies are not the only ways in which the history of transnational environmental law becomes ‘peopled’. Anne Orford’s scholarship is a powerful model for historicizing international law through detailed excavation of law’s intellectual history. She traces this intellectual history to the ideas of *people*, rather than presenting ideas as abstractions devoid of human origins.¹³⁰ Her work hints at the rich opportunities to develop more historicized accounts of the intellectual development of environmental law ideas and their transnational movement.

4.3. *Scholars and Teachers*

Neil Walker’s earlier-described ‘agents’ of global law expressly include *academic* and professional elites who are ‘active players in the fashioning and shaping of global law’.¹³¹ This language suggests that scholars and teachers act as *entrepreneurs* of global law – actively building transnational legal fields.¹³² An increasingly rich and thoughtful

Brazilian High Court Judge, Justice Antônio Herman Benjamin, including A. Herman Benjamin, ‘We, The Judges, and the Environment’ (2012) 29(2) *Pace Environmental Law Review*, pp. 582–91.

¹²⁵ O. Bakiner, ‘Judges Discover Politics: Sources of Judges’ Off-Bench Mobilization in Turkey’ (2016) 4(1) *Journal of Law and Courts*, pp. 131–57.

¹²⁶ A. Trochev & R. Ellett, ‘Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance’ (2014) 2(1) *Journal of Law and Courts*, pp. 67–91.

¹²⁷ R. Carnwath, ‘Judges and the Common Laws of the Environment: At Home and Abroad’ (2014) 26(2) *Journal of Environmental Law*, pp. 177–87, at 182.

¹²⁸ R. Carnwath, ‘Judges for the Environment: We Have a Crucial Role to Play’, *The Guardian*, 22 June 2012, available at: <https://www.theguardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio>.

¹²⁹ A rare exception being Judge Weeramantry’s writings: C.G. Weeramantry, *Tread Lightly on the Earth: Religion, the Environment and the Human Future* (Stamford Lake, 2009).

¹³⁰ See A. Orford, ‘On International Legal Method’ (2013) 1(1) *London Review of International Law*, pp. 166–97 (explaining ‘juridical thinking’ as a methodology and the value of representing international authority through a choice of ‘main characters’ in her work, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011)).

¹³¹ Walker, n. 3 above, p. 31.

¹³² See Dezalay & Garth, n. 2 above, p. 444.

literature is evolving from scholars who are addressing their own complex, conflicting, and multiple roles. This work is significantly inspired by Martti Koskenniemi, a scholar who has consistently located himself in his scholarship and critique.¹³³

In a rare essay on ‘life writing’ and international legal scholarship, Andrew Lang and Susan Marks describe the ways in which Koskenniemi’s reflection on his own life has shaped his scholarship.¹³⁴ One effect of his self-references and personal anecdotes is to visibilize aspects of his experience in practice which fail to be captured in existing reflections on the field. These lived experiences shaped his theoretical accounts of international law’s indeterminacy. Speaking of writing *From Apology to Utopia*, Koskenniemi describes:

My starting point was an observation I had made in the course of having practiced international law with the Finnish Ministry for Foreign Affairs since 1977 that ... competent lawyers routinely drew contradictory conclusions from the same norms, or found contradictory norms embedded in one and the same text or behavior.¹³⁵

These observations, and the example set by Koskenniemi of a scholar willing to situate himself in his work, are particularly useful in thinking about how to visibilize dimensions of environmental law practice that are missed in textbook accounts and scholarly writings on how environmental law develops and moves. Such personalized reflections and willingness to situate oneself in one’s work elucidates the significance of what remains unpublished or secret. It also helps to identify the positionality of one’s own writing.¹³⁶

My conviction that much is to be gained from better capturing the ‘lived practices’ of those dedicated to building and spreading environmental law principles, regimes and institutions emerges in part from the fact that much of environmental law’s history has not been yet been written. Only occasionally have those active in the creation and spread of transnational environmental law written accounts of the processes in which they have participated, or shaped.¹³⁷ The value of such personalized accounts might be particularly pronounced for environmental law scholars, as many scholars have entered the academy with visionary commitments to ‘do something’ to advance environmental protection in the world. Such motivations often cause their scholarly, practitioner, activist, and teaching roles to blur.

¹³³ A powerful recent contribution to the literature emerges in the form of W. Werner, M. de Hoon & A. Galan (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, 2017). The introduction to that volume explains the resonance of Koskenniemi’s work with a wide international law audience, residing in the fact that ‘international lawyers recognize his world and their own. Koskenniemi’s work is about the things that international lawyers do, the grammar they use, the social worlds they inhabit, about the anxieties and hopes that drive the field’: *ibid.*, p. 3.

¹³⁴ Lang & Marks, n. 96 above.

¹³⁵ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), p. 562.

¹³⁶ Lang & Marks, n. 96 above, p. 442.

¹³⁷ Fiona McConnell, who led the British negotiating team for both the 1987 Montreal Protocol and the CBD in 1992 has produced one such account: F. McConnell, *The Biodiversity Convention: A Negotiating History* (Kluwer Law International, 1996).

Examples of such semi-autobiographical writings from scholars are emerging with increasing frequency in other fields of international law.¹³⁸ This reflects renewed interest in approaching legal work, including teaching and scholarship, as a set of professional practices worthy of study in itself.¹³⁹ It builds on research agendas in a variety of disciplines that seek to advance ‘practice theory’,¹⁴⁰ and now extends to include profoundly personal accounts of one’s own life stories or those of friends and family.¹⁴¹ Such a vision of law, and such examples of scholarship, necessarily implicate, and occasionally even centre, the study of law’s people.

International legal scholars are also revealing the ways in which international law both constitutes and is constituted by the community of international lawyers by using methods that extend beyond self-revealing disclosures and autobiographical accounts.¹⁴² Such literature draws on a variety of texts to illuminate how techniques of international law operate to socialize lawyers, how expertise is constructed by certain groups of lawyers,¹⁴³ and how common vocabularies and grammar create and justify the validity of legal rules.¹⁴⁴

A promising avenue for studying the transnational construction and movements of environmental law involves empirical interview-based studies of those tasked with disseminating or internalizing international or global law. For example, interview-based work such as Laura Dickinson’s on how military lawyers internalize and operationalize international law values,¹⁴⁵ as well as Elena Baylis’ study of the ‘internationals’ who inhabit staff posts in post-conflict justice,¹⁴⁶ have served to visibilize dimensions of ‘legal work’ and the function and dysfunction of networks and communities, which other forms of analysis might miss.

¹³⁸ See, e.g., S. Picciotto, ‘Critical Theory and Practice in International Economic Law and the New Global Governance’ (2016) *European Yearbook of International Economic Law*, pp. 3–22.

¹³⁹ D’Aspremont, et al., n. 66 above.

¹⁴⁰ Practice theory is not a singular framework but is evoked as a terminology referencing a wide variety of theoretical approaches that converge around ‘using practices as main units of analysis. The ways in which people typically do things is essential to understanding both macro-phenomena such as order, institutions, and norms, as well as micro-processes of rational calculations and meaning making’: V. Pouliot & J. Cornut, ‘Practice Theory and the Study of Diplomacy: A Research Agenda’ (2015) 50(3) *Cooperation and Conflict*, pp. 297–315, at 300.

¹⁴¹ Philippe Sands uses the form of a family memoir to powerfully centre individual people in the development of international human rights law: P. Sands, *East West Street* (Vintage Books, 2016).

¹⁴² J. d’Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation* (Edward Elgar, 2015), p. 1.

¹⁴³ See, e.g., M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70(1) *The Modern Law Review*, pp. 1–30.

¹⁴⁴ G. Hernández, ‘The Responsibility of the International Legal Academic: Situating the Grammarian within the “Invisible College”’, in d’Aspremont et al., n. 66 above, pp. 160–88, at 161.

¹⁴⁵ L.A. Dickinson, ‘Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance’ (2010) 104(1) *American Journal of International Law*, pp. 1–28.

¹⁴⁶ E. Baylis, ‘Function and Dysfunction in Post-Conflict Justice Networks and Communities’ (2014) 47(3) *Vanderbilt Journal of Transnational Law*, pp. 625–98.

4.4. *Funders as Environmental Law's Intermediaries*

One 'community of practice' relevant to environmental law's development and circulation that often escapes scrutiny is the funding community: those who provide the financial resources to make possible any project of law reform, legislative drafting, legal education, judicial education, institution building, conference hosting, or research.

A place to start thinking about funders as relevant to the transnational movements of environmental law lies in the history of Law and Development practice. Deliberate efforts to transport legislative schemes between countries, particularly in the 1970s, can be linked to the project of Law and Development. Law and Development claimed to seek to understand the relationship between legal systems and economic performance in developing nations.¹⁴⁷ Environmental law found its place in Law and Development theory and in many ways its practice was inseparable from the lives of its authors as practitioners. Many of these practitioners were US academics funded primarily by the Ford Foundation and the US Agency for International Development to undertake legal reform initiatives with the aim of 'modernizing' nations in Latin America and Africa.¹⁴⁸ Led by the World Bank, much of this work of sponsoring legal reforms was taken on by international financial institutions, particularly beginning in the 1980s, with investments in law reform as a development tool, which increased during the 1990s.¹⁴⁹

Following the fall of the Soviet Union, a new sense of legitimacy was lent to scholars engaged in transplanting American laws, in particular, by creating market legal structures for the transitioning economies of the newly independent states.¹⁵⁰ These projects were most commonly labelled as 'rule of law reform'¹⁵¹ and are highly relevant to understanding the spread of environmental law. For example, during this period environmental impact assessment was a key legal innovation, and funding streams in international institutions were devoted to promoting its spread.¹⁵² For example, Emmanuel Kasimbazi has described environmental legislation in many African countries as heavily influenced by institutional projects like the UN Environment Programme (UNEP) during this period.¹⁵³ While the paradigm shifted again in the 1990s to one of 'good

¹⁴⁷ D.M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82(1) *Yale Law Journal*, pp. 1–50, at 2.

¹⁴⁸ T. Krever, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model' (2011) 52(1) *Harvard International Law Journal*, pp. 288–319, at 294–5.

¹⁴⁹ D.M. Trubek, 'Law and Development: Forty Years after "Scholars in Self-Estrangement"' (2016) 66(3) *University of Toronto Law Journal*, pp. 301–29, at 312.

¹⁵⁰ An example of work originating from these developments is K. Pistor, M. Raiser & S. Gelfer, 'Law and Finance in Transition Economies' (2000) 8(2) *Economics of Transition*, pp. 325–68.

¹⁵¹ Trubek, n. 149 above, p. 312.

¹⁵² Craik credits the spread of environmental impact assessment to the work of institutional 'evangelizers': A.N. Craik, 'Environmental Assessment: A Comparative Analysis', in E. Lees & J. Viñuales (eds), *Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019), pp. 876–900, at 879.

¹⁵³ E. Kasimbazi, 'Application of International Standards in Drafting Environmental Legislation and Law Reform Projects: The African Experience' (2012) 1(1) *International Journal of Legislative Drafting and Legal Reform*, pp. 10–27, at 16–7.

governance' promotion, funding environmental law and institutional development remained a focus of this transnational project.

I coarsely recite this history (and risk losing important nuance) to make the point that there are a range of people whose involvement in the practice of spreading environmental law norms and deciding which environmental law developments are worth funding must be studied to better understand transnational environmental law's history and development. Partially as a result of methods, and of terminological issues discussed in [Section 3](#), existing histories of such developments have been decontextualized by reducing individuals and groups to 'experts', 'epistemic communities', 'NGOs', 'indigenous peoples', and 'the World Bank'. Some notable exceptions exist where particular professions or communities or institutions are deconstructed by fine-grained ethnographic study.¹⁵⁴ Such work illustrates what is possible.

Other funders also need to come into view to better understand how and why environmental law moves across borders. Making money visible helps in explaining 'implementation failures', a subject of significant interest in contemporary environmental law practice. As scholars grow increasingly aware of and anxious about 'disinformation campaigns' to challenge knowledge on climate change, attention to those funding such campaigns may develop as an area of environmental law scholarship.¹⁵⁵

The idea of investigating 'funding' and 'funders' as a way to elucidate law's people traces to the fact that legal ideas do not happen and are not spread without human involvement. These processes of development and spread are further facilitated by money flows. Rare cases where state or institutional decision making is directly explained by increased funding opportunities are insightful, such as the case of the Philippines 'rebranding disaster resilience programs as "adaptation objectives"' in order to maximize access to funds from the Green Climate Fund and UN Adaptation Fund.¹⁵⁶

This section has provided only a partial view of the 'people' of transnational environmental law and ways in which to study them. The point of exploring three possible candidates for future research (judges and the 'project' of environmental law; scholars and teachers; and funders) is to be suggestive both of possible candidates and ways of exploring their relevance. There are many others. The idea is to precipitate greater thinking about what a 'peopled' vision might implicate, and what needs to happen in order to see the people behind environmental law's ideas, concepts, and texts.

¹⁵⁴ Ethnographic studies of World Bank professionals and the clashes of world view between economists and lawyers such as Sarfaty's study help to contextualize and deconglomeratize 'the World Bank': G. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press, 2012).

¹⁵⁵ A.M. McCright & R.E. Dunlap, 'Challenging Global Warming as a Social Problem: An Analysis of the Conservative Movement's Counter-claims' (2000) 47(4) *Social Problems*, pp. 499–522; N. Oreskes, E.M. Conway & M. Shindell, 'From Chicken Little to Dr. Pangloss: William Nierenberg, Global Warming, and the Social Deconstruction of Scientific Knowledge' (2008) 38(1) *Historical Studies in the Natural Sciences*, pp. 109–52.

¹⁵⁶ I. Whitehead, 'Climate Change Law in Southeast Asia: Risk, Regulation and Regional Innovation' (2013) 16 *Asia Pacific Journal of Environmental Law*, pp. 141–94.

Consider the following dichotomies that sum up many unspoken defaults for legal study:

- constitutions, not constitution makers;
- judgments, not judges;
- legislation, not its drafters;
- cases, not litigants;
- scholarship, not its authors;
- concepts of legal personality, not live humans.

5. CONCLUDING ANXIETIES

‘Peopling’ accounts of transnational environmental law is likely to be fraught, messy and anxiety-provoking work, full of intellectual landmines. It requires large doses of humility to even contemplate. The dangers and stakes of inclusion and exclusion at the heart of a project to name and understand some individuals or groups and their influence on lawmaking, and law’s influence on them, necessitates a starting place of hesitation and caution. Re-narrating past events by writing people in similarly cannot be explained away as mere ‘gap filling’.

The anxieties that accompany such a project are profound. Can it be done? How can it be performed anything more than selectively, and haphazardly? Will gathering this information simply lead to the ‘artificial survival of trivia of appalling proportions’?¹⁵⁷ How can we ensure that we are not simply reproducing the sort of insularity that such work ultimately aspires to address?

Some comfort emerges from the fact that the ‘trailblazing’ work to be done might occur along a somewhat well-lit trail. Many of the challenges identified above are familiar to scholars working in other fields that engage with the question of ‘how to talk about people’. Postcolonial theory has grappled with how to address and unlearn ‘universalized’ accounts of history¹⁵⁸ as well as struggled to find effective methodologies for approaching non-Western law.¹⁵⁹ Historians are tackling head-on the methodological challenges implicit in writing about both self and society in ‘the global era’.¹⁶⁰ Peace studies, for example, have drawn on both the ‘transnational turn’ and the ‘biographical turn’ in historical research to illuminate the ‘side-glancing’ work of both individual activists and transnational networks of scholars.¹⁶¹ Socio-legal scholars are mounting empirical studies of a variety of ‘global lawmakers’, including those whose roles have

¹⁵⁷ B. Tuchman, ‘Distinguishing the Significant from the Insignificant’, in D.K. Dunaway & W.K. Baum (eds), *Oral History: An Interdisciplinary Anthology* (Altamira, 1996), pp. 94–8, at 96.

¹⁵⁸ D. Chakrabaty, ‘The Climate of History: Four Theses’ (2009) 35(2) *Critical Inquiry*, pp. 197–222.

¹⁵⁹ S. Vermeylen, ‘Comparative Environmental Law and Orientalism: Reading Beyond the “Text” of Traditional Knowledge Protection’ (2015) 24(3) *Review of European, Comparative and International Environmental Law*, pp. 304–17.

¹⁶⁰ L. Hunt, *Writing History in the Global Era* (Norton, 2014).

¹⁶¹ S.E. Rose, ‘The Changing Landscape of Peace Research: Geographic, Archival, and Digital Spaces’ (2017) 42(2) *Peace & Change*, pp. 277–90, at 278.

attracted little previous detailed analysis, such as delegates and delegations.¹⁶² There are rich sources of inspiration that both evoke and address the methodological complexity of making people matter in scholarship.

Moreover, weighing against the listed anxieties is a sense of a project worth the peril. Investigating social phenomena, like the emergence of professionals who call themselves ‘global climate lawyers’, is too important for legal scholarship to miss. The chance to discover the intellectual genesis of legal concepts such as sustainable development from the very architects of those concepts (many of whom are still alive) is exciting. Tracing funding patterns, perhaps with the assistance of investigative journalist colleagues, might yield surprising new insights. Pushing back against vocabularies that flatten people into a set of general characteristics and instead advancing terminology that celebrates the distinctness and originality of humans and their thoughts is an ambitious task. Yet, discovering the difference that individuals make is one vital way to maintain hope for environmental law’s progress at a time when the barricades to such advancement appear insurmountable. Peopling the past, present and future of transnational environmental law allows us to reintroduce into our accounts of law-making some of the colour, drama, and conflict that is already there in its practice.

¹⁶² S. Block-Lieb, T.C. Halliday & J. Pacewicz, ‘Delegates and Delegations’, in S. Block-Lieb & T. Halliday (eds), *Global Lawmakers* (Cambridge University Press, 2017) pp. 161–92.