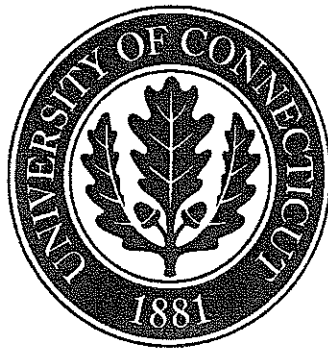


# CONNECTICUT LAW REVIEW



ECONOMIC GLOBALIZATION AND THE RISE OF EFFICIENT  
SYSTEMS OF GLOBAL PRIVATE LAWMAKING:  
WAL-MART AS GLOBAL LEGISLATOR

*Larry Catá Backer*

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## Article

### Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator

LARRY CATÁ BACKER

*This Article focuses on Wal-Mart's role in an important emerging phenomenon: the development of efficient systems of private law making by non-governmental organizations that sometimes supplement, and sometimes displace traditional legal systems. These emerging global systems of private law making are spearheaded by an important group of large multinational corporations like Wal-Mart. It arises in the shadow of, parallel with, and in response to the less successful attempts by national and international bodies to regulate economic behavior on a global scale. These systems are grounded in private law, contractual and business connections between the great multinational corporations and the many entities with which they have business relationships. This Article concentrates on one aspect of those connections—supplier or supply chain agreements involving multinational corporations. It examines the way Wal-Mart is able to use those contractual relationships to legislate behavior among its suppliers with respect to product quality, working conditions for the suppliers' employees, ethical conduct, and similar matters. The particulars of those behaviors reflect Wal-Mart's perception of the tastes and expectations of its consumers, investors and the financial community. Those tastes and expectations, in turn, are formed by elements of civil society and spread by elements of the media. Civil society elements serve not only to form consumer tastes, but also to develop Wal-Mart's specific set of behavior norms and then independently monitor compliance by Wal-Mart and its suppliers with their obligations. The media independently serves as the source of legitimacy and the conduit through which the results of civil society monitoring efforts, and the efforts of Wal-Mart to correct these breaches are transmitted. The media also serves as a forum through which consumer and investment tastes in behavior are developed. Together, multinationals, elements of civil society, the media, and the consumer-investor community constitute the elements of an autonomous system for the efficient regulation of economic behavior on a global scale that may contribute to the development of functionally differentiated and partial global systems of common law beyond the state.*

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# Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator

LARRY CATÁ BACKER\*

## I. INTRODUCTION

Wal-Mart<sup>1</sup> has been called many things.<sup>2</sup> It has been accused of a host

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\* Professor of Law, Pennsylvania State University. The author may be contacted at lcb911@gmail.com. On October 20–21, 2006, the University of Connecticut School of Law held a conference—*Wal-Mart Matters*—sponsored by the very able students of the *Connecticut Law Review* and the *Connecticut Journal of International Law*. My congratulations to the Interim Dean of the University of Connecticut Law School, Kurt A. Strasser, Sherrie Alice Armstrong (Editor-in-Chief, *Connecticut Law Review*), James C. Goodfellow, Jr. (Editor-in-Chief, *Connecticut Journal of International Law*), and the student symposium co-editors—Kent Michael Harper, Jennifer L. Paradee, Kirsten S.P. Rigney and Sally Welch, for putting together this well organized and important conference on Wal-Mart and the phenomenon of the giant economic enterprise in the world today. My gratitude to Professor and Dean Emeritus Philip Blumberg for his insights and comments; this work would not have been possible without his path breaking work. Special thanks to my research assistants Richard Snyder, and Robert Martin Ari Spitz, for their exceptional work on this project.

<sup>1</sup> It is always useful to start with some basic facts. Wal-Mart, Inc. is a Delaware corporation with its headquarters at 702 S.W. 8th Street, Bentonville, Arkansas 72716. Its common stock is publicly traded on the New York and Pacific Stock Exchanges (Sym: WMT). WAL-MART, 2006 ANNUAL REPORT: BUILDING SMILES 53 (2006), available at [http://media.corporate-ir.net/media\\_files/irol/11/112761/2006\\_annual\\_report.pdf](http://media.corporate-ir.net/media_files/irol/11/112761/2006_annual_report.pdf) [hereinafter 2006 ANNUAL REPORT]. As of March 20, 2006 there were 312,663 record holders of Wal-Mart stock. *Id.* Wal-Mart posts information for the investor community at <http://investor.walmartstores.com/>. According to that site, “As of November 30, 2006, the Company had 1,092 Wal-Mart discount stores, 2,195 Supercenters, 576 Sam’s Clubs and 110 Neighborhood Markets in the United States.” Wal-Mart Stores, Inc., Investors, <http://investor.walmartstores.com/phoenix.zhtml?c=112761&p=irol-> (last visited Feb. 7, 2007). “Internationally, the Company operated units in Argentina (13), Brazil (301), Canada (282), China (68), Costa Rica (136), Guatemala (127), Honduras (39), Japan (391), Mexico (874), Nicaragua (38), Puerto Rico (54), El Salvador (60) and the United Kingdom (335).” *Id.* Wal-Mart reported a net income of \$11,231,000,000 on net sales of \$312,427,000,000. 2006 ANNUAL REPORT, *supra*, at 13. It is managed by a fourteen person board of directors, the current members of which may be found at <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=502>, a majority of whom are independent. Wal-Mart, Notice of 2006 Annual Shareholders Meeting (2006), [http://media.corporate-ir.net/media\\_files/irol/11/112761/2006Proxy.PDF](http://media.corporate-ir.net/media_files/irol/11/112761/2006Proxy.PDF). For a current listing of Board members classified by independent status and board committee membership, see Wal-Mart, Board of Directors Information, <http://investor.walmartstores.com/phoenix.zhtml?c=112761&p=irol-govCommComp> (last visited Dec. 12, 2006). In addition, many of Wal-Mart’s public disclosure documents may be accessed at <http://www.sec.gov/cgi-bin/browse-edgar?company=&CIK=WMT&filenum=&State=&SIC=&owner=include&action=getcompany> (last visited Apr. 3, 2007).

<sup>2</sup> Compare CHARLES FISHMAN, THE WAL-MART EFFECT: HOW THE WORLD’S MOST POWERFUL COMPANY REALLY WORKS—AND HOW IT IS TRANSFORMING THE AMERICAN ECONOMY (2006) (detailing the environmental, economic and societal effects of Wal-Mart); DONALD SODERQUIST, THE WAL-MART WAY: THE INSIDE STORY OF THE SUCCESS OF THE WORLD’S LARGEST COMPANY (2005) (explaining the history of Wal-Mart from the perspective of the author who was Vice Chair and Chief Operations Officer of Wal-Mart from 1988–1999), and RICHARD VEDDER, THE WAL-MART REVOLUTION: HOW BIG BOX STORES BENEFIT CONSUMERS, WORKERS, AND THE ECONOMY (2007) (arguing that Wal-Mart has had a positive effect), with AL NORMAN, THE CASE AGAINST WAL-MART (2004) (calling for a national boycott of Wal-Mart); BOB ORTEGA, IN SAM WE TRUST: THE UNTOLD STORY OF SAM WALTON AND WAL-MART, THE WORLD’S MOST POWERFUL RETAILER (2000)

of evils including "poverty-level wages, skimpy benefits, scorched-earth antiunion policies, shuttered small-town Main Streets, suburban sprawl abetment and rampant outsourcing. Behind the facade of "corn-pone populism" fostered by folksy but steely founder Sam Walton, Dicker asserts, Wal-Mart has become a "global despot."<sup>3</sup> It has also been praised for revolutionizing the retail industry and bringing jobs and prosperity to many places, both in the United States and abroad.<sup>4</sup> But Wal-Mart has rarely been accused of having a hand in the creation of systems of self-contained autonomous systems of global law. This Article will suggest that Wal-Mart has become an important actor in the transformation of law making. That transformation challenges the regulatory monopoly of states<sup>5</sup> and may contribute to the construction of a global system of customary law as powerful as the English common law was in its day.

The production of legal regulation, like that of any other product, is subject to market forces.<sup>6</sup> Regulation is both a thing, and, as a system of constraints on human behavior, an institution, one with a life of its own.<sup>7</sup> The most successful producers of law are sensitive to their consumers, are efficient producers of reliable product that can be purchased, and can deliver stability, and production efficiencies, at a cost lower than their competitors. Traditionally, all markets for legal regulation were monopolies.<sup>8</sup> Since the 17th century, it has become common to embrace

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(recounting a critical investigation of Wal-Mart's business philosophy), and GREGG SPOTTS, *WAL-MART: THE HIGH COSTS OF LOW PRICE* (2005) (companion book to Robert Greenwald's documentary *WAL-MART: THE HIGH COST OF LOW PRICE* (Brave New Films 2005) (documenting people who are struggling against Wal-Mart)).

<sup>3</sup> Publisher's Weekly, *Book Review*, Apr. 25, 2005 (reviewing JOHN DICKER, *THE UNITED STATES OF WAL-MART* (2005)).

<sup>4</sup> SODERQUIST, *supra* note 2, at 1 ("[M]aybe the greatest example of the free-enterprise system at work.").

<sup>5</sup> That challenge has been the subject of much discussion, especially, in the corporate and institutional law sectors, for some time. See, e.g., Gunther Teubner, *The Many Headed Hydra: Networks as Higher Order Collective Actors*, in *CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION* 41 (Joseph MacCahery et al. eds., 1993).

<sup>6</sup> Legal academics have sometimes thought in these terms in the production of corporate regulation. See, e.g., Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985) (comparing the interwoven strategies for corporations with that of legislation).

<sup>7</sup> See generally DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 80-82 (1990) (discussing institutional path dependency).

<sup>8</sup> It is true that prior to the Protestant Reformation religious institutions (principally but not exclusively) also asserted strong claims to rule-making. And indeed, prior to the rise of the modern state system, rule-making power was more fluidly divided among institutional actors, and law itself, as a creature of custom, religion and state action, was more autonomous in character. See generally PAOLO GROSSI, *MITOLOGÍAS JURÍDICAS DA MODERNIDADE* (Fundação Boiteux ed., 2004). For my purposes, I will adopt the current usual normative assumptions about public power, based on the idea that states, representing the power of the governed to set rules for self governance, use law instrumentally for that purpose, and thus used, law becomes, at least within the territory of the self governing community, mandatory and enforceable. See Reifying Law: "Let Them be Lions," Law at

the idea that only one sort of enterprise—the state—has all legitimate power to produce binding behavioral rules (through legislation or other forms of rule-making).<sup>9</sup> These laws and rules could be monitored and enforced through a state's police power. In particular, political entities, states confined within a geographic territory, had a virtual monopoly over economic regulation, each in their own territory.

It follows that when thought turns to regulation generally, or specifically to the control of multinational corporations<sup>10</sup> like Wal-Mart, we usually think in public law terms.<sup>11</sup> One large area of public law traditionally concerned with the regulation of corporate behavior is national law. The traditional fields of such regulation are well known to lawyers and the political class. These include: (i) Company law (for the regulation of the relationships between statutory identified critical actors in the corporate enterprise, usually shareholders, directors and officers, but sometimes also lenders, labor and others); (ii) Competition law (for the regulation of conduct that produces unfair competitive advantage); (iii) Labor law (for the regulation of the relationship between the corporation and people who hire themselves out to the corporation, including the right to collective action on the part of labor and the terms of the employment of labor); (iv) Money laundering law (for the regulation of unfair practices with respect to capital); (v) Criminal law (for the regulation of bad behavior severe enough to require the imposition of public punishment by the state through penal statutes—that is, bad behavior affecting the political community beyond those primarily interested in the enterprise); (vi) Tort law (for the regulation of civil wrongs committed by the corporation through its agents); and (vii) Environmental law (for the regulation of wrongs with specific effects on the environment).

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the End of the Day, <http://lcbackerblog.blogspot.com/2006/10/reifying-law.html> (Oct. 22, 2006, 5:18 PM).

<sup>9</sup> For example, classical welfare economics and American political theory tends to view the state as the locus for regulation, especially regulations that cure market failures. WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY* 22 (1994) (“[D]emocratic governance is essentially benign and, although perhaps not efficient by economists’ standards, fundamentally fair. Although political scientists lament problems such as special interests’ excessive power, an “imperial presidency,” and voter apathy, by and large they tend to think that representative democracy results in overall justice and equity—or that it would if certain reforms were implemented.”).

<sup>10</sup> For my purposes in this Article, I find the definition used sometimes by John Dunning appropriate: multinational corporations include transnational enterprises, however legally organized, that “engage in FDI [foreign direct investment] and that own or control value adding activity outside their national boundaries.” John H. Dunning, *Towards a New Paradigm of Development: Implications for the Determinants of International Business Activity*, 15 *TRANSNAT’L CORPS.* 173 & n.1 (2006).

<sup>11</sup> Thus, for example, Robert Baldwin and Martin Cave, citing in part to some of their earlier work, ROBERT BALDWIN, C. SCOTT & C. HOOD, *A READER ON REGULATION* ch. 1 (1998), note that “Regulation is spoken of as an identifiable and discrete mode of governmental activity.” ROBERT BALDWIN & MARTIN CAVE, *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* (1999). They note that even the more expansive definitions tend to have a strong public component. *Id.* at 1–3.

But in response to the ability of economic enterprises to cross borders, that is, in response to modern economic globalization based on a freeing of the movement of capital, services (and perhaps eventually) labor, supranational or international public organization have increasingly sought to assert a power to regulate both the entities and actions that cross those borders.<sup>12</sup> Another increasingly important area of public law with an interest in the regulation of corporate (or more generally economic) behavior is international or transnational regulation. Significant work has been attempted in a number of well-known fields: (i) Migration: the movement of people across borders for any number of reasons, including the search for economic opportunity, the assertion of a right to return to ancestral lands, the need to leave overpopulated areas, and family reunification; (ii) Trans-border crime: the control of bad behavior whose effect crosses borders, including crimes whose commission require action in more than one state; (iii) Money laundering: the interdiction of a particular sort of criminal behavior focusing on the use of cash or cash equivalents to hide criminal activity; (iv) Labor: the minimum obligations with respect to the working conditions of labor, including the right to organize, pay, benefits, living and working conditions, and contract rights; (v) Security forces: the use of military, police or paramilitary forces by economic or other non-state enterprises; (vi) Human rights: the obligations of state and non-state actors to respect, to advance and protect the human dignity of individuals in particular ways, including economic, social, cultural, religious, and political rights.

And there have been significant changes in both national and international law with respect to the regulation of multinational corporations. These changes have sometimes been coordinated and sometimes they have been adversarial.<sup>13</sup> National law systems have seen a variety of changes meant to make it easier to control multinational corporations and the behavior of its agents. For example there have been efforts to create and impose a number of either new or substantially changed concepts and legal principles: (i) Enterprise liability: treating groups of commonly owned enterprises as a single business for purposes of liability under certain circumstances and with respect to certain types of liability; (ii) Veil piercing: making it easier under traditional equity based doctrines of determining that the shareholders of a corporation may be liable for corporate wrongdoing; this approach sometimes serves as a substitute for the broader concept of enterprise liability; (iii) Development

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<sup>12</sup> See generally PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 491-648 (1999).

<sup>13</sup> See Sol Picciotto, *The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks*, in *INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES* 89, 91-92 (William W. Bratton ed., 1996).

of a stakeholder model substitution of stakeholder welfare maximization for the traditional shareholder welfare maximization policy underlying corporate law; (iv) Jurisdictional changes: expansion of jurisdiction of courts to make it easier for litigants to bring actions in the courts of the multinational corporations' home countries for host country injuries; (v) Civil confiscations: expansion of power of the state to confiscate the goods of corporations alleged to have engaged in certain criminal activity; (vi) Criminal prosecutions: expansion of bases for prosecution of corporate agents (and the corporation itself) for criminal activity; and (vii) Transparency: broadening requirements for reporting by corporations and corporate groups.

At the international level, there have been increasing efforts to regulate corporations or corporate behavior, especially those behaviors with effects that cross borders and are difficult for any single state to control. Among other activities, these include the (i) development of international conventions for the regulation of transnational corporations; (ii) the vesting international organization with regulatory authority over issues of corporate governance; (iii) direct application of international conventions to multinational corporations; (iv) international regulation of jurisdictional issues to make it easier to bring actions against multinational corporations or related groups of enterprises; (v) use of multinational corporations to make customary international law through mandatory contract provisions; and (vi) development of aspirational norms for corporations and corporate behavior (voluntary codes including codes of corporate social responsibility).

But as economic activity increasingly crossed borders, old markets for regulation, the effectiveness of public law regulatory monopolies and their constraints changed dramatically. In particular, public law, as either substantive rules or as systems of governance, has proven increasingly unable to respond efficiently to the problems of the governance of economic relations. The current literature of the problems of governing multinational enterprises, for example, has refined the analytics of this regulatory market failure,<sup>14</sup> even as most of the scholarship continues to seek reform in public law terms.<sup>15</sup> The same forces affect markets for legal

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<sup>14</sup> See PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 123-72 (1999); Steven Lukes, *Five Fables About Human Rights*, in *ON HUMAN RIGHTS* (Stephen Shute & Susan Harley eds., 1993); Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 *FORDHAM INT'L L.J.* 1663, 1668-70 (2004); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443, 446 (2001); Grahame Thompson, *Multinational Corporations and Democratic Governance*, in *THE TRANSFORMATION OF DEMOCRACY? GLOBALIZATION AND TERRITORIAL DEMOCRACY* 149, 153-54 (Anthony G. McGrew ed., 1997); Tania Voon, *Multinational Enterprises and State Sovereignty Under International Law*, 21 *ADELAIDE L. REV.* 219, 232 (1999).

<sup>15</sup> See SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 128-43 (2004); Mitchell F. Crusto, *Green Business: Should We Revoke Corporate Charters for*



services as well, in which the dynamics are perhaps more clearly in evidence.<sup>16</sup>

At their core, these failures are structural. They are failures grounded in the jurisdictional limits of political entities, like states. These jurisdictional limitations may be understood as constituting territorial limitations and power limitations; a state may exercise its power to the limit only within the territory it controls.<sup>17</sup> And such control may be limited internally by whatever limitations a state may impose on its government.<sup>18</sup> Contests for legal harmonization reflect the limits of territorially based law, and its necessary commoditization, where the objects of regulation may freely enter and leave regulatory territories.<sup>19</sup>

But the failures are also substantive. The substantive failures have as their source either inadequate or inefficient regulation. The former can be understood as a failure to regulate or mis-targeted regulation.<sup>20</sup> The latter can be characterized by a failure to conform regulation to the current

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*Environmental Violations?*, 63 LA. L. REV. 175, 241 (2003); A.J. Natale, *Expansion of Parent Corporate Shareholder Liability Through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary*, 57 U. CIN. L. REV. 717, 734-36 (1988).

<sup>16</sup> Thus, for example, Yves Dezalay explains that with respect to the regulation of a simple industry—legal services—“[th]e market pressures of professional hierarchy put pressure on older forms of ‘collegiality’ and introduce a financial rationality born of the global market.” The consequences put pressure on traditional legal regulatory regimes as the realities of economic organization transcend the power of any one state to regulate. “Analysis reveals that this restructuring of professional hierarchies and corresponding discourses takes place across regional variants: the spread of the major (and multinational) U.S. firms leads to the importation of the model of the American Lawyer. Leading global centers (New York, the City of London) push these restructurings into continental Europe and elsewhere.” The result is the development of parallel systems of regulation, for example in the area of dispute resolution, in which “this process has even led to forms of ‘off-shore justice’ quite distinct from state judicial processes.” Yves Dezalay, *Regionalism, Globalization and Professional Society*, in REGIONALISM AND GLOBAL ECONOMIC INTEGRATION: EUROPE, ASIA, AND THE AMERICAS, 197, 198 (William D. Coleman & Geoffrey R. D. Underhill eds., 1998).

<sup>17</sup> And sometimes that territorial limit is smaller than the political boundaries of the state. Many states find it difficult to project power inwards, and impossible to project power abroad. See Jeremy E. Eizenstadt et al., *Rebuilding Weak States*, FOREIGN AFF., Jan.-Feb. 2005, at 134 (“[T]he gravest danger to the nation lies in the weakness of other countries—the kind of weakness that has allowed opium production to skyrocket in Afghanistan, the small arms trade to flourish throughout Central Asia, and al Qaeda to exploit Somalia and Pakistan as staging grounds for attacks.”); see also Stewart Patrick, *Failed States: Fact or Fiction?*, WASH. Q., Spring 2006, at 27, available at [http://www.twq.com/06spring/docs/06spring\\_patrick.pdf](http://www.twq.com/06spring/docs/06spring_patrick.pdf).

<sup>18</sup> All states limit, to some extent, the power of its government to act against individuals or others, usually in accordance with its constitution or the requirements of other systems of restraints, for example international human rights norms. For an old but very interesting reminder of the classic American formulation of this issue, see MARTIN J. HILLENBRAND, *POWER AND MORALS* 134-88 (1949).

<sup>19</sup> Philip Alcott put it nicely when he suggested, “[l]egal systems and legal services have become commodities in international trade, as legal experience is transferred from one country to another. It is now possible to get an economic advantage in international trade by ensuring that your trading partner’s legal system is more like your legal system than like that of your competitors.” PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 60 (2002).

<sup>20</sup> For a discussion from the legal literature, see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 3-19 (1992) (offering a compromise theory of partial public private regulation, though regulation still centered on state policy choices).

consensus of value maximizing activity among those subject to the regulation.<sup>21</sup> Others, less enamored of governmental intervention in markets, have characterized these failures as constituting "government failure."<sup>22</sup> There is a process element to this substantive failure as well. This sort of failure is focused on the inability of states to monitor and enforce compliance with whatever substantive normative framework has been enacted and is otherwise supposed to be binding within the territory of the enacting state. Since the beginning of the 21st century, this has come increasingly to be viewed through the lens of corruption.<sup>23</sup>

As a consequence, the production of regulation has become more fluid. By ushering in a regime founded on the free movement of capital across borders, the freer movement of services, and an enhanced (but by no means free) movement of labor,<sup>24</sup> globalization has opened a substantial number of holes in what had been (at least aspirationally) a more seamless and complete system of public regulation. On the one hand, economic entities have been able to exploit these openings. The ability to disperse ownership and operations across the globe has made it possible for the largest multinational corporations to become essentially self-regulating.<sup>25</sup> On the other hand, the absence of regulation might itself be inefficient, at least to the extent that it enhances unpredictability and arbitrary conduct, and in that manner, sub-optimizes collective activity.<sup>26</sup>

<sup>21</sup> For an example of the classical "progressive" approach, see Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUMBIA L. REV. 223-68 (1986).

<sup>22</sup> Thus, for example, an element of public choice theory suggests that "that the polity has a powerful propensity to adopt less efficient policies and to restrict personal liberty—all in the interest of special groups or equalization of wealth and income." WILLIAM C. MITCHELL & RANDY T. SIMMONS, *BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY*, at xviii (1994). *But see* LARS UDEHN, *THE LIMITS OF PUBLIC CHOICE: A SOCIOLOGICAL CRITIQUE OF THE ECONOMIC THEORY OF POLITICS* (1996).

<sup>23</sup> *See, e.g.*, Michaël Johnston, *The Definitions Debate: Old Conflicts in New Guises*, in *THE POLITICAL ECONOMY OF CORRUPTION* 11, 11-12 (Arvind K. Jain ed., 2001). Johnston notes the connection between corruption, wealth, power and accountability and points to the ways these issues, bound up in notions of corruption, "may also point to ways in which those ideas are about to undergo another major shift—one that reflects the changing role of the state, and important dilemmas of governance, in the emerging global system." *Id.* at 11.

<sup>24</sup> *See* Michael Mussa, Econ. Counselor & Dir. of Research, IMF, Speech presented at Symposium Sponsored by Federal Reserve Bank of Kansas City: Factors Driving Global Economic Integration (Aug. 25, 2000), available at <http://www.imf.org/external/np/speeches/2000/082500.htm>.

<sup>25</sup> *See* Larry Catá Backer, *The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, 41 TULSA L. J. 101, 104 (2006).

<sup>26</sup> Thus, a social relations school of regulation posits that "social relations are historically and logically prior and that economic exchanges are always embedded in social relations and structured by normative expectations. Hence, 'markets' consist of the competitive strategies and practices of social groups and actors, which may be dysfunctional or at best disruptive . . . ." INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 3 (William Bratton et al. eds., 1996). For a discussion from a traditional economics perspective, see, for example, JOE B. STEVENS, *THE ECONOMICS OF COLLECTIVE CHOICE* 75-94 (1993). For a perspective on Amartya Sen's approach to development economics, see

As economic actors become more global in operation, systemic inefficiencies in law making and enforcement become economic as well as political and social problems, but with greater global dimension.<sup>27</sup> Where regulation does not exist (in form or fact), or where markets in law break down or are inefficient, other competitors will enter the field. Where these competitors can deliver a better product—rules that optimize expectations, and perhaps that are even fair, consistent, predictable and stable in a larger sense—these competitors may well displace the territorial law making monopolies of nation states. I want to look at the contours, nature and characteristics of this rising system in the context of Wal-Mart's relationships with its suppliers. As a consequence, there may be emerging a private market for law making.

This Article provides a first look at what can emerge from within a global system in which old rule-making monopolies have been weakened and powerful non-state actors become free to order their relations, subject ultimately only to their stakeholders. It suggests that while the focus has been on the structures and contents of formal law making by political communities, another system of rule-making, from legislation to monitoring to enforcement has been rising. The characteristics of this emerging system are substantially different from the traditional public law based system based on the traditional model of a political community enacting laws that are enforced within its territory against all natural and juridical personalities found therein. This system of law is developing side-by-side with that of traditional public law sources in national and international law. It evidences a functional differentiation among law making bodies. It is based on a division of authority that no longer distinguishes categorically between public and private entities in terms of capacity or authority to make and enforce binding norms.

The system is based on private law making. It has arisen organically from out of the aggregated habits and behavior of the participants. It is both voluntary and self-aware; only the continued benefits of participation keep the actors from exiting. It is a closed system, internally complete; yet it also communicates, as a system, with the public national and supra-national legal systems through which it may sometimes find expression, and that may serve as sources of norms. There are four principle actors: (i) corporations and other enterprises; (ii) elements of civil society, primarily the great global economic and human rights non-governmental

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SABINA ALKIRE, VALUING FREEDOMS: SEN'S CAPABILITY APPROACH AND POVERTY REDUCTION (2002).

<sup>27</sup> One author suggested: "Various described as a new hypermobility of capital or as a scale dissonance between the organization of the political and the economic, there are new pressures being brought to bear upon agencies of the state and upon labor." Kevin R. Cox, *Introduction: Globalization and Its Politics in Question*, in SPACES OF GLOBALIZATION: REASSERTING THE POWER OF THE LOCAL 1, 2 (Kevin R. Cox ed., 1997).

organizations (NGOs); (iii) media; and (iv) consumers of the products of the corporations, civil society actors and the media, including consumers, customers, the investment community and financial markets. These actors have fundamentally adverse interests, are each dependent on the other, and derive authority from their respective interactions. Together, these actors produce a complete system of regulation, from legislation to enforcement that is focused and limited in scope, but dynamic and effective within its limits, and growing. Within this system, the role of the state and other public bodies becomes secondary rather than primary.<sup>28</sup> It becomes difficult to determine at the international level whether law is being sourced from consensus in private behavior or from legal norms developed through the deliberative political process.<sup>29</sup>

Wal-Mart and its global system of supplier agreements evidences how large multinational corporations, elements of civil society and the media increasingly perform powerful quasi governmental roles, roles encouraged by the human rights establishment in Geneva and loathed by most Western states—at least as official policy. Wal-Mart provides a face for an emerging efficient system of governance beyond the state and across state borders. It is a law making bounded by functional differentiation, that is, by law making limited to a particular and specifically bounded/defined field of conduct related to the purposes for which the law making community functions—applying to overlapping groups of people within multiple political, social, and ethnic communities. This system evidences a great characteristic of what Gunther Teubner describes as polycentric

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<sup>28</sup> It is important to recognize that

[s]ocial systems cannot exist in splendid isolation from their environment. This point is conceded even by ardent proponents of regime specialization .... Similarly, legal subsystems coexisting in isolation from the remaining bulk of international law are inconceivable. There will always be some degree of interaction, at least at the level of interpretation.

Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 492 (2006). Thus, the system suggests the notion of structural coupling from autopoiesis. See Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419, 1422, 1438–41 (1992); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies*, 61 MOD. L. REV. 11, 15–22 (1998) (examining the tight and loose coupling between law and its social context in the interactions between legal and social systems).

<sup>29</sup> This follows a general pattern in transnational law making among political and social networks engaged in fragmented and uncoordinated interactions at different levels. See Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197, 212 (2004).

globalization.<sup>30</sup> “Globalization, then, does not mean simply global capitalism, but the worldwide realization of functional differentiation.”<sup>31</sup>

Wal-Mart provides the template through which this system is fleshed out. The Article starts with an elaboration of the system and the role of each of the principal actors within it, by referencing its methodologies in the context of the regulation of the behaviors of the over 6000 factories producing goods for sale in Wal-Mart’s global retail operations. It then analyzes an application of that system to a concrete event—the disciplining of factory owners operating out of the Kingdom of Jordan for their abuse of their Bangladeshi (and other) workers. It then looks to the limits of this system, as it comes against public law systems, by examining recent German litigation that is challenging Wal-Mart’s attempts to impose a globally harmonized system of employee conduct. The Article ends with a preliminary examination of the limits and consequences of this rising system. The Article considers the characteristics of this system that make it different from the sort of private rule-making that have been a part of most legal systems in the modern period. It suggests parameters for the critical limiting notion of functional differentiation in global law.<sup>32</sup> It discusses the bases for judging the efficiency and equity of the system. And it explores the ways in which Wal-Mart’s experiences can be generalized. Clearly one company, even one very large and influential company, does not a system make. But Wal-Mart is pointing the way to the establishment of a new reality, a reality that is not waiting for theory for justification, or permission for implementation. Its development, importance, sustainability, and future are the stuff of much additional work. Still, Wal-Mart, along with the other participants in this social experiment, has effectively started to “shift the focus from the one political constitution of the nation-state to the many civil constitutions of world society . . . .”<sup>33</sup>

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<sup>30</sup> See Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 3, 13–15 (Christian Joerges et al. eds., 2004). Teubner describes a critical effect of the sort of globalization advanced by entities like Wal-Mart as “a polycentric process in which simultaneously differing areas of life break through their regional bounds and each constitute autonomous global sectors of themselves.” *Id.* at 13.

<sup>31</sup> *Id.* at 14.

<sup>32</sup> As an initial matter, there will be a consideration of parallels to the discussion in Andreas L. Paulus, *From Territoriality to Functionality? Towards a Legal Methodology of Globalization*, in *GOVERNANCE AND INTERNATIONAL LEGAL THEORY* 59–95 (I. F. Dekker & W. G. Werner eds., 2004). See also Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. INT’L L.* 999, 1004, 1017 (2004).

<sup>33</sup> Teubner, *supra* note 30, at 9.

## II. THE FRAMEWORK OF A PRIVATE REGULATORY SYSTEM.

What exactly are the characteristics of this emerging system separate from, but working alongside traditional systems of governance both within and between the traditional nation-state? What role does each of the principal actors play in making this system work, and in defining its character and boundaries? What is it about the system that suggests its autonomy and self-sufficiency? What does Wal-Mart have to do with this system of private regulation? Those are the questions explored in this section.

In exploring the construction of institutionalizing systems of regulation, there is always a great temptation to start from general principles, and from them to develop a series of hypotheses and working notions. I intend to start from the bottom up. I start from the specific characteristics of a series of relationships that can be observed among a number of actors. Wal-Mart and its supplier relations provide the source and template of the discussion that follows. By confining the discussion to the specific I hope to lay some groundwork for a more general discussion to follow. I recognize the importance of infusing meaning on things, conditions, and events as a means of constituting mechanisms for the control of individual behavior in particular, and of communal organization in general.<sup>34</sup> I will begin with the most specific of meaning by looking at a single manifestation of what, in the aggregate, likely constitutes a rising culture of regulation.

The system is composed of a number of actors. The principal actors in this law making system include: (i) multinational corporation as legislator and enforcer of norms, (ii) civil society organization (principally human rights NGOs) as system monitors and intermediaries, (iii) the media (as the vehicle through which monitoring efforts are legitimated and communicated to consumers, investors, the financial community and government), (iv) consumers, investors and the financial markets as the target audience for all this activity (acting as a proxy for a democratic publicity in a political community); and (v) national and international political communities providing baseline standards from which multinationals and civil society elements derive their more focused rules of conduct.

Private law making and private enforcement are possible because the system is built on a closed set of relationships among actors that, in the aggregate, produce norms, sustain viable systems of monitoring and communication among functionally distinct actors, and facilitate

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<sup>34</sup> See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1995). "[M]an is precisely the animal most desperately dependant upon such extragenetic, outside-the-skin control mechanisms, such cultural programs, for ordering behavior." CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 44 (1973).

enforcement with reference to the rules generated by the system itself. This is possible because of the basic characteristics of system function, which consist of: (i) an essential role of private law through contract; (ii) transparency, disclosure and its use by elements of civil society; (iii) a connection between civil society and media; (iv) a connection between media and public, consumers, public law enforcement institutions; and (v) a connection between public and internal corporate investigation and sanction apparatus.

In this section, the focus is on the actors in the system; that is the system reduced to its component elements. The two sections that follow examine the system in action, that is, the system as dynamic and autonomous operating in a world of multiple competing systems. The first concentrates on the system in a developing nation-state,<sup>35</sup> the second focuses on the system in a highly developed nation-state.<sup>36</sup>

#### A. *Multinational Corporations and Other Enterprises*

Institutional actors operate for the production of economic wealth and must operate efficiently to maximize the production of that wealth.<sup>37</sup> That requires attention both to internal operations, to reduce the costs of production of wealth, and attention to external operations to maximize the production of income and access to the capital markets. This involves operating complex multi-function systems that must either regulate the behavior, or conform to the behavioral expectations of others.<sup>38</sup> The systems tend to exert a strong harmonizing force throughout the system. While some flexibility is likely, efficiently run enterprises tend to either impose framework norms or more precise rules. The character of the impositions will depend on the multinational corporations sense of which leads to maximum advantage.

With respect to the management of suppliers, multinational corporations tend to focus regulatory efforts through contracts and agreements with individual suppliers that incorporate the multinational

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<sup>35</sup> See discussion *infra* Part III.

<sup>36</sup> See discussion *infra* Part IV.

<sup>37</sup> "[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994). But I take John Dunning's insights to heart, insights that have great significance for the rise of the system I elaborate here. "Corporations, too, though still fairly focused on the traditional objectives of their value adding activities, are increasingly aware of their wider social responsibilities." Dunning, *supra* note 10, at 189. These responsibilities "are requiring new and multi-stakeholder institutional structures." *Id.*

<sup>38</sup> See JOHN H. DUNNING, MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY 210-33 (1992) (arguing that multinational corporations are always required to balance the requirements of international integration of production within the corporation, with that of the need to respond to local conditions). While Dunning focuses on internal dynamics and the needs of global subsidiaries, the same holds true for external stakeholders and the financial markets.

corporation's framework for ethical standards. In some cases additional supplier standards are specified. These standards are stakeholder oriented. They focus primarily on the perceived tastes and expectations of consumers, investors, and the financial markets. They are developed in conjunction, or at least with some consideration of the agendas and projects of legitimate and influential elements of civil society (influential, that is, with consumers, investors or financial markets, or to some extent, the state). Sometimes multinationals will work directly with the civil society community through stakeholder engagement programs.<sup>39</sup> And of course, policy discussions and the regulatory approaches of governments play a key role in the formulation of standards. Multinational corporations can choose from a variety of approaches, both binding and voluntary from every level of political governance.<sup>40</sup>

Critical to the effective elaboration of modern systems of enterprise governance is the development and enforcement of the substantive relations between an enterprise and its factors of production, and the construction of systems of detecting conduct that triggers enforcement. Private governance systems increasingly focus a great deal of attention on enforcement of positive and negative obligations, usually focusing on quality and operations norms, rather than ground their relations with others on the post hoc "make whole" standards of traditional contract law. These systems are constructed to facilitate enforcement (in lieu of compensation) systems by the development of increasingly elaborate and intrusive methods of surveillance and monitoring. This is consonant with governmental policies, reflected in recent corporate law reform, in which the state has imposed increasingly comprehensive obligations on corporations to establish systems of surveillance and control for the enforcement of state imposed standards.<sup>41</sup> Multinational corporations have adopted this approach in the construction of their purely internal private governance systems. Enforcement and monitoring can include a variety of

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<sup>39</sup> "Today, many forward-thinking corporations increasingly appreciate the competitive benefits of proactive stakeholder engagement, a systematic process of managing and identifying risk and the subsequent maximization of fresh business opportunities." Erik Wohlgemuth, *By Invitation: Stakeholder Engagement: Lessons for Google*, ETHICAL CORP., May 9, 2006, <http://www.ethicalcorp.com/content.asp?ContentID=4246>. Stakeholder engagement, and programs produced from out of such programs are advanced as methods for avoiding "lawsuits, shareholder resolutions, direct action campaigns and in some cases, regulatory intervention." *Id.* This is possible because "stakeholders are bellwethers that help companies do the following: (1) anticipate and respond to problems before they reach crisis points that lead to loss of brand and shareholder value; and (2) identify opportunities for growth, particularly in developing markets." *Id.*

<sup>40</sup> For a discussion of the ways in which the largest multinationals deploy this process of choosing to effectively regulate themselves in a global system of free movement of capital, see Catá Backer, *supra* note 25.

<sup>41</sup> For a discussion of recent efforts in American securities laws, see Larry Catá Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327.



mechanisms, from certifications, to participation in multinational corporation training programs, to consent to audits (scheduled and unscheduled). Sanctions can include anything from agreements to make suggested changes, to financial penalties, to loss of the supplier arrangement with the multinational corporation. These sanctions can have a significant effect in a global economy in which most multinational corporations will be aware of difficulties each may have with their suppliers. In many cases, sanctions might also involve reporting the offending company to local or international authorities. Indeed, in many cases, the results of auditing could be made available to national authorities to the extent permitted by law.

These ideas are expressed by Wal-Mart through its Ethical Standards Program.<sup>42</sup>

Wal-Mart does not own, operate, or manage any factories. Instead, we purchase merchandise from suppliers located in more than 60 countries. Our Ethical Standards team is dedicated to verifying that these supplier factories are in compliance with our Standards for Suppliers and local law. These Standards cover compliance with local and national laws and regulations, compensation, hours of labor, forced/prison labor, underage labor, discrimination, freedom of association and collective bargaining, health and safety, environment, and the right of audit by Wal-Mart.<sup>43</sup>

The Standards for Suppliers is the heart of Wal-Mart's substantive norm enforcement based global governance system.<sup>44</sup> These Standards, along with the overarching ethics standards, are incorporated into all of the relationships between Wal-Mart and its suppliers. These Standards provide the framework for supplier performance for Wal-Mart specifically. The Standards for Suppliers is organized around thirteen categories of behavior.<sup>45</sup> The Standards are modeled on a number of ethical standards for multinational conduct that have been advanced by international institutions.<sup>46</sup> The Global Compact, in particular is interesting for its

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<sup>42</sup> See Wal-Mart Stores, Ethical Standards Program, <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=336> (last visited Apr. 3, 2007) [hereinafter Ethical Standards Program].

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> These categories include: (1) compliance with applicable laws and practices (2) compensation (3) hours of labor (4) forced/prison labor (5) child labor (6) discrimination/rights (7) freedom of association and collective bargaining (8) immigration law and compliance (9) workplace environment (10) security (11) concern for the environment (12) right of audit and (13) confidentiality. *Id.*

<sup>46</sup> Though beyond the scope of this preliminary study, it will be useful to compare the Standards for Suppliers with a number of the more authoritative voluntary ethical behavior codes put forward by international organizations and elements of civil society, including for example, the United Nations Global Compact. "In an address to the World Economic Forum on 31 January 1999, United Nations Secretary-General Kofi Annan challenged business leaders to join an international initiative—the

suggestion that multinational corporations have authority to “enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption.”<sup>47</sup> In a sense, this is precisely what Wal-Mart is doing through its Standards for Suppliers and its systems for enforcement of the behavioral norms imposed thereby. The Standards for Suppliers include an agreement to allow inspections, and Wal-Mart has instituted a global program of inspection, audit, and enforcement through sanction, leading ultimately to contract termination.<sup>48</sup>

The effect of these Standards for Suppliers, and the power vested in Wal-Mart to enforce its provisions through audit, education campaigns, and sanctions, is a strong harmonization tendency among supplier factories throughout the globe. This is not lost on Wal-Mart. There is a great recent example: in a speech to its suppliers, Wal-Mart’s CEO H. Lee Scott, spoke of the great many stakeholders to which Wal-Mart must answer, as a consequence of which Wal-Mart would take a greater interest in the behavior of its suppliers.

The CEO then took a strident tone towards its Pacific pipeline. “The factories in China are going to end up having to be held up to the same standards as the factories in the U.S.,” Scott said. “There will be a day of reckoning for the retailers. If somebody wakes up and finds out that children that are down the river from that factory where you save three cents a foot in the cost of garden hose are developing cancers at a significant rate—so that the American public can save three cents a foot—those things won’t be tolerated, and they shouldn’t be tolerated.”<sup>49</sup>

The Standards for Suppliers is the principle vehicle through which Wal-Mart deploys its contractually bounded relationships with its suppliers

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Global Compact—that would bring companies together with U.N. agencies, labour and civil society to support universal environmental and social principles.” United Nations Global Compact, What is the Global Compact?, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Jan. 22, 2006). The Global Compact is organized around ten principles of ethical conduct focused on respect for human rights, labor standards, environment and anti-corruption. See United Nations Global Compact, The Ten Principles, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Jan. 22, 2006) [hereinafter The Ten Principles].

<sup>47</sup> The Ten Principles, *supra* note 46.

<sup>48</sup> See Ethical Standards Program, *supra* note 42. The power of Wal-Mart’s sanctions should not be underestimated. In the United States there is a long history of such sanctions and all but the most independent suppliers have come to fear the power of sanction. “No one wants to end up in what is known among Wal-Mart vendors as the ‘penalty box’—punished, or even excluded from the store shelves, for saying something that makes Wal-Mart unhappy. (The penalty box is normally reserved for vendors who don’t meet performance benchmarks, not for those who talk to the press.)” Charles Fishman, *The Wal-Mart You Don’t Know*, FAST COMPANY.COM, Dec. 2003, <http://www.fastcompany.com/online/77/walmart.html>.

<sup>49</sup> Greg Levine, *Scott Warns China Wal-Mart Suppliers Re ‘Standards,’* FORBES, Oct. 20, 2005, available at [http://www.forbes.com/2005/10/20/wmt-environment-ceos-cx\\_gl\\_1020autofacescan08.html](http://www.forbes.com/2005/10/20/wmt-environment-ceos-cx_gl_1020autofacescan08.html).

to construct a deeper, and more intimate relationship between ostensibly independent actors, a relationship based on conformity to behavior norms in the conduct of supplier operations as well as the more traditional focus on the quality of the product to be delivered.

Wal-Mart is committed to working with its suppliers on steady improvement of workplace conditions. This requires better production planning and internal supply chain management, educating workers, and training factory managers. We also engage with stakeholders in the ethical sourcing community to identify additional ways to achieve and accelerate improvement.<sup>50</sup>

Each year, Wal-Mart produces a report on its management of its sourcing arrangements, including its ability to monitor, train and enforce the supplier behavior norms in the Standards for Suppliers.<sup>51</sup> One now begins to see the connection between customer preferences, multinational corporation behavior norms, and the private regulation of suppliers. But we are still missing a couple of critical elements. The other actors in the system of regulation, monitoring and enforcement supply these elements.

#### B. *Non-Governmental Organizations, Global Civil Society*

Non-governmental organizations play a key role in the construction of private systems of economic regulation. They constitute, individually, and as a community, a powerful set of actors in governance in both the public and private spheres of law making.

One of their most important functions, a function beyond the immediate control of multinationals (and even the state for that matter), is in developing, framing and advancing conduct standards—that is, expectations and understanding about what sorts of conduct are desirable and what sorts of conduct are not. Elements of civil society play a key role in helping shape community consensus on appropriate corporate behavior.<sup>52</sup> Multinational corporations compete with elements of civil society for authority and legitimacy to shape cultural behavior expectations. In a sense, the shaping of norms and social preferences in behavior is its own industry—for the production of culture. Control is impossible, but participation is important, especially if changes in such expectations have significant effects on economic organization. In this

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<sup>50</sup> Ethical Standards Program, *supra* note 42.

<sup>51</sup> For the current report, see *id.*

<sup>52</sup> On preference formation among consumers of goods and ideas, see, for example, CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 245–70 (1999).

respect, the relationship between multinational corporations and civil society actors within the private regulatory system is adversarial.<sup>53</sup>

Civil society elements traditionally seek to translate their norm forming activities into public law. Unlike states and public international organizations, civil society is much less fussy about technical distinctions between public law (statutes) and the "law" in contract. From the perspective of global civil society elements, both provide rules with substantial effects beyond the parties directly bound by them, and thus both ought to serve, in equal measure, as a binding conduct rules, enforceable in similar fashion. The usual methods are through persuasion, lobbying and litigation. Yet, civil society actors also play a key role in the implementation of those standards by multinational corporations. They serve as the conduit between conduct expectations, and their translation into specific rules of behavior to be imposed by multinational corporations through their global stakeholder bases. Multinational corporations, like Wal-Mart, increasingly rely on elements of civil society to act as translators of social norms that may have a positive effect on their consuming stakeholders (retail customers and investors). In Wal-Mart's case, those relationships have begun to be formalized, through the development of a stakeholder engagement program.<sup>54</sup> For that effort, Wal-Mart has turned to the civil society community, hiring a non-profit organization dedicated to facilitating such relationships, Business for Social Responsibility.<sup>55</sup> In this respect, and to some extent, the relationship between multinational corporations and civil society is cooperative. And indeed, there is a certain resonance between Wal-Mart's principles underlying its Standards for Suppliers and the principles driving the United Nations Global Compact.<sup>56</sup>

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<sup>53</sup> This inverts and expands the old criticism of industry and advertising, that industry uses advertising to create artificial tastes for its own purposes (in this case to generate a desire to purchase goods). See, e.g., JOHN K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 281 (1967).

<sup>54</sup> See WAL-MART, 2004 REPORT ON STANDARDS FOR SUPPLIERS 3 (May 31, 2005) ("Our goal is to partner with stakeholders with common goals to improve worker conditions and environmental impact.").

<sup>55</sup> Business for Social Responsibility describes itself as

[a] leading global resource for the business community and thought leaders around the world, BSR equips its member companies with the expertise to design and implement successful, socially responsible business policies, practices and processes. As a non-profit business association, BSR is uniquely positioned to promote cross-sector collaboration in ways that contribute to the advancement of corporate social responsibility and business success."

BSR.org, Business for Social Responsibility, About BSR, <http://www.bsr.org/Meta/About/index.cfm> (last visited Jan. 23, 2007).

<sup>56</sup> The Global Compact is keen, for example, to highlight its connection to former U.N. Secretary General Kofi Annan's idea "Let us choose to unite the power of the market with the authority of universal ideals." Isabelita Sy Palanca, Vice-Chair of the Women's Business Council and Chair-elect of the Confederation of Women's Business Councils, Keynote Address at the UNEP Seventh International High-Level Seminar on Cleaner Production: Reaching Out and Making it Work (Apr. 29, 2002) (quoting Kofi Annan).

The most visible role of civil society is to monitor compliance with both public law and the contractual obligations of multinational with its stakeholders. In the context of supplier agreements, this requires monitoring the factories with contractual relations with Wal-Mart. Monitoring is difficult and expensive. But there is irony here as well. Monitoring provides a valuable source of justification for and legitimacy of civil society activity. That is, civil society, in some sense, depends on a steady supply of violations of norms they help to develop and to internalize within the operations of multinational firms through private law systems, as a means of increasing their own business.

Civil society elements are also a critical source of supply of the most important factor in the production of content in the media industry—information. Civil society is not merely a vital source information; it also serves as an important gatekeeper for information dissemination. To some extent, its greatest power lies in its ability to authoritatively determine what ought to constitute news worth reporting, especially where it serves as a source of news to media (with respect to NGO activity and results of their monitoring and lobbying activities) and conveys consumer sentiments to multinational organization (act as a means of communication). Thus, for example, many participants in the monitoring of multinational compliance have dedicated press pages on their web sites.<sup>57</sup>

Civil society, like multinational corporations, ought not to be thought of in the singular. The community of civil society is as varied and complex as the communities of individuals from which they spring and whom they purport to serve. Civil society actors come in all shapes and sizes; they support all sorts of beliefs, and they spend a considerable amount of time fighting each other as they do interacting with other actors.

### C. *The Media*

The media is a complex bundle of institutions and processes with both public and private connections.<sup>58</sup> “The media’ is a catch-all term that includes transnational corporations, communication technologies, policy and regulatory frameworks, the practices of journalists, gossip columns, the nightly television news, blockbuster movies, advertisements, business

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<sup>57</sup> See, e.g., National Labor Committee, Contact Us, available at <http://www.nlcnet.org/live/contactus.php> (last visited Jan. 23, 2007). It “investigates and exposes human and labor rights abuses committed by U.S. companies producing goods in the developing world,” National Labor Committee, Mission Statement, available at <http://www.nitnet.org/live/> (last visited Jan. 23, 2007). To effectuate its mission, the NLC has created a section of its web site known as “The Newsroom,” which reports press and blog coverage. National Labor Committee, Newsroom, [http://www.nlcnet.org/live/news\\_room.php](http://www.nlcnet.org/live/news_room.php) (last visited Jan. 22, 2007).

<sup>58</sup> “The media are businesses and yet they are also ascribed a special function in the democratic health of a society; the media are the news media and function as journalism, but they are also the entertainment media and provide escape from the pressures of everyday life.” GEOFFREY CRAIG, *THE MEDIA, POLITICS AND PUBLIC LIFE* 3 (2004).

magazines, music radio, the local newspaper and the Internet.”<sup>59</sup> The media plays a critical role in the private law system. The media serves as a source of legitimacy for the expression of ideas it chooses to publish or otherwise disseminate. In that sense it serves as critical actor in the shaping of public tastes. The media serves as a critical factor in the effectiveness of private monitoring. And it serves as the most efficient means of communication among all of the actors within the private regulatory system. It is also a player in its own right, achieving substantive results through its power to choose among items of information for publication.

The media, like civil society actors, ought not be thought of in the singular. For every *New York Times* there is a *Washington Times*. For every form of media, there is another. Control of information, as totalitarian dictators have discovered in the late 20th century, has become virtually impossible. Like every other business, media actors compete—for information, for authority, for influence, for market share—across an industry whose boundaries and make up change quickly.

#### D. *Customers, the Investment Community, and Financial Markets*

The relationship between a private law system and its actors is similar to that between the individual members of a political community and its institutional actors. That parallelism is critical to an understanding of the roles of each of the private system actors in general, and of the customers of and investors in multinational corporations in particular. Satisfaction of customers and investors expectations is the core object of private norm making. Customers, investors and financial markets are the key factors in the ability of corporations to succeed on their own terms as economic entities with the primary objective of maximizing their own wealth and thus the aggregate wealth of their financial stakeholders (security holders) and less directly other stakeholders in the continuing operations of the businesses operated by the multinational corporation.

The private law behavior norms of Wal-Mart’s supplier agreements are targeted to satisfy these actors, and thus to maximize customer and investor satisfaction and market confidence. But, like the polity in political systems, customers/investors/markets are essentially passive (or rather reactive). They react to multinational corporate actions. That reaction serves as an approval of sorts. Customers who do not approve do not purchase the goods or services offered by a multinational; investors and markets that do not believe that the multinational corporation is acting

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<sup>59</sup> *Id.* (“The communicative power of the media is a fundamental idea that informs this book. The media are a specific institution in society, informed by particular interests, practices, norms and values; but to highlight the separateness of the media is not to appreciate fully how integral the media are to the meaning-making processes of a society.”).

appropriately will affect the ability of the multinational corporation to access the financial markets.

Because of the importance of these actors, and the reactive nature of their role in the system, the control of customer/investor/markets information is critical. This comes as no surprise—modern securities markets are based on the importance of markets for information. Information management becomes as important as development, implementation and enforcement of behavior norms through contract.

Wal-Mart has traditionally focused its cultivation of its customers and investors with instructional and advertising campaigns based on the entity's successful emphasis on low price (and good margins) and service. Over the course of the last decade or so, Wal-Mart has become substantially more sensitive to the perceived values of these stakeholders. It now projects a vision of itself as offering "[q]uality goods at low prices, responsible manufacturing, and opportunities for growth."<sup>60</sup> Wal-Mart offers this explanation of its culture: "From the three basic beliefs to the sundown rule, we respect our customers, Associates and suppliers and strive to treat them as we ourselves want to be treated. In building and nurturing these relationships, as well as serving the communities where we live, we've helped build a better business—one committed to excellence."<sup>61</sup> These ideas, Wal-Mart relates to its customers and investors, are applicable to the principles guiding its relations with its suppliers.<sup>62</sup> Wal-Mart tells its customers and investors, "[s]ourcing ethically through a socially responsible program is the focus of the Ethical Standards Program. We gather information and deliver a report each year on our Program."<sup>63</sup> And it provides substantial information about its global suppliers who meet its conduct standards in producing well-priced goods for Wal-Mart's global retail customers.<sup>64</sup>

#### E. *Government and the Political Communities on a Local, National and International Level*

How is this private system connected to the system of public law? Multinational corporations, civil society, the media, customers, investors and financial market actors do not operate in a vacuum. Each is also part

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<sup>60</sup> Wal-Mart Stores, Our Company, <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=1> (last visited Jan. 23, 2007).

<sup>61</sup> Wal-Mart Stores, People, The Wal-Mart Culture, <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=251> (last visited Jan. 22, 2007).

<sup>62</sup> "Efficiency, accountability and mutual advantage are key to our definition of excellence in our supplier partnerships. Strengthening these partnerships requires us to listen, learn and share solutions to our collective challenges." Wal-Mart Stores, Suppliers, <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=220> (last visited Jan. 23, 2007).

<sup>63</sup> Ethical Standards Program, *supra* note 42.

<sup>64</sup> See, e.g., Wal-Mart Stores, Our Suppliers, <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=367> (last visited Jan. 23, 2007).

of larger communities, or at least other communities. All are connected to political communities. Much of what becomes articulated at the private regulatory level reflects conversations that occur within national political communities as well as within the formally constituted international political community. In many respects, the relations among the actors in the private regulatory system I am framing here mimic those within modern political communities. Thus, political communities play both a formal and informal role in the operation of private systems.

The connection between systems is also both formal and informal. The formal connection focuses on the migration of standards grounded in law of states to the private regulatory system, and the migration of business behavior consensus to the state. Public law also serves as a source of aspirational norms in both the national and international levels. All public policy debates are fodder for private law systems. The closer these debates reflect the values of the customers, investors and others on whom the corporation relies for the maximization of its interests, the more likely its translation to private regulation. The migration of public policy to private norm is well understood and generally accepted; the migration from private actor to public policy (and law) is new, and at the international level, relatively revolutionary.<sup>65</sup> It is also old; custom as the basis of law, even the higher law of a constitution, is at least as old (in the modern era) as the old common law of England.

The informal connection between systems is also strong and necessary (for both). Private law is grounded in the forms of public process—the contract, the forms of dispute resolution, the police power of the state. Courts, especially serve as a point of contact between systems.<sup>66</sup> But legislatures may serve that purpose as well from time to time. In other ways, the multinational itself, global civil society, or the media can play that role, especially where the object is to transmit norms and harmonize behaviors on one or another model.

The critical consideration, from my perspective, however, is that, whatever the role or its importance, the role is that of an outsider. When public law systems encounter the private law system I am describing, it is

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<sup>65</sup> For a discussion in the context of the recent failed attempts to create an international framework for the direct regulation of multinational corporations, see Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

<sup>66</sup> Many times the efforts are formally unsuccessful. See *Wal-Mart Wins Ruling on Foreign Labor*, N.Y. TIMES, Dec. 19, 2006, at C7, available at LEXIS, News Library, NYT File (describing dismissal of a suit filed in Los Angeles by a civil society actor, the International Labor Rights Fund, seeking to represent thousands of overseas employees of suppliers under contract to Wal-Mart). For a discussion of the utility of litigation in the production of cultural movement and changes to social consensus of appropriate behavior, see Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM. & MARY BILL RTS. J. 117, 120–23, 172–78 (2003).



not encountering individual actors seeking to relate to the state, but instead is relating to a system with an autonomy of its own, an autonomy substantially developed enough to function independent of the state. The system mimics the forms of public law in remarkable ways. Private law making and private enforcement form the fundamental framework within which these systems are elaborated. But within it, that state assumes a role as a marginal player—passive and reactive at best, a tool of powerful local forces at worst.

### III. THE SYSTEM IN ACTION (I): WAL-MART AND ITS SUPPLIER LEGISLATION IN JORDAN.

The regulatory system framework outlined in the last section does not reveal the dynamism of the operation of the system of law making, enforcement and sanctions within a network of multinational corporation, the NGO community and the media. Within this system the corporation legislates uniform standards among its suppliers, these standards are developed with the cooperation (or at least with an eye to standards advanced by) elements of the NGO community, the NGO community monitors compliance with these (or its own parallel) standards and violations are reported to the media, which by publicizing breaches of standards to the corporation's consumer, investors and the financial community, places great pressure on the corporation to act to correct the deficiencies. In this way and within this focused area of relationships, these actors substitute for the state in virtually all respects.

To get a sense of how these components actually work together to produce an autonomous operation, it is necessary to observe the system in action. This section is meant to provide a start in that direction. Again, it focuses on the "small," on the peculiar dynamics of the system as implemented by Wal-Mart, its suppliers and the related system stakeholders.

One is able to sense the way the system components come together to produce expectation, regulation, monitoring, and enforcement in a continuous internally focused cycle from a series of recent events that took place in factories located in the Kingdom of Jordan, some of which produced merchandise to be sold through Wal-Mart retail outlets. The story itself evidences the elegance and simplicity of the new system, and the ease with which it can be effectively implemented.

The National Labor Committee is a human rights NGO based in New York.<sup>67</sup> The National Labor Committee "investigates and exposes human and labor rights abuses committed by U.S. companies producing goods in

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<sup>67</sup> National Labor Committee, Contact Us, <http://www.nlcnet.org/contractus.php> (last visited Dec. 15, 2006).

the developing world. We undertake public education, research and popular campaigns that empower U.S. citizens to support the efforts of workers to learn and defend their rights."<sup>68</sup> In the United States, it has worked recently to support federal anti-sweatshop legislation.<sup>69</sup> Outside the United States, the National Labor Committee monitors the compliance of multinational corporations and the economic entities with which they do business on compliance with a host of legal and other human rights standards. Their current focus is on Nicaragua, Honduras, El Salvador, Guatemala, China, Jordan, and Bangladesh.<sup>70</sup> It devotes considerable time to humanizing the stories of mistreatment of workers by highlighting individual stories, in the hopes of changing consumer behavior about the acceptability of buying goods made under these conditions.<sup>71</sup>

In March 2006, the National Labor Committee published a report that detailed a number of violations of Jordanian labor law and international human rights norms by a number of apparel factories in the Kingdom of Jordan.<sup>72</sup> The report was subtitled: "Tens of thousands of foreign guest workers stripped of their passports, trapped in involuntary servitude, sewing clothing for Wal-Mart, Gloria Vanderbilt, Target, Kohl's, Thalia Sodi for Kmart, Victoria's Secret, L.L.Bean and others."<sup>73</sup> The report reflected a year of fact gathering.<sup>74</sup> The National Labor Committee sought "an immediate freeze on entry of new guest workers into Jordan until the export factories are brought into full compliance with Jordan's laws and internationally recognized worker rights standards."<sup>75</sup>

The National Labor Committee's report was based on visits to Jordanian plants and interviews with current and former workers in Jordan and Bangladesh.<sup>76</sup> For this purpose, the National Labor Committee

<sup>68</sup> National Labor Committee, Mission Statement, <http://www.nlcnet.org/aboutus.php> (last visited Dec. 10, 2006).

<sup>69</sup> The National Labor Committee (NLC) worked with Senator Byron Dorgan (D-ND) and the United Steelworkers of America to draft legislation prohibiting the importation of goods made by sweatshop labor. "This summer [2006], the bill was introduced into the Senate by Senator Dorgan and into the House by Rep. Sherrod Brown of Ohio." National Labor Committee, Support Grows for Anti-Sweatshop Legislation, <http://www.nlcnet.org/article.php?id=120> (last visited Dec. 16, 2006).

<sup>70</sup> National Labor Committee, Where We Work?, <http://www.nlcnet.org/index.php> (last visited Dec. 14, 2006).

<sup>71</sup> See, e.g., National Labor Committee, Child Labor at the Harvest Rich Factory in Bangladesh, <http://www.nlcnet.org/live/article.php?id=189> (last visited Dec. 17, 2006) (featuring live interviews with child laborers); National Labor Committee, Shop With a Conscience this Holiday Season, <http://www.nlcnet.org/article.php?id=186> (last visited Dec. 4, 2006) (offering a poster of a young Bangladeshi woman at her sewing machine for a \$50 donation).

<sup>72</sup> CHARLES KERNAGHAN, NAT'L LABOR COMM., REPORT: U.S.-JORDAN FREE TRADE AGREEMENT DESCENDS INTO HUMAN TRAFFICKING AND INVOLUNTARY SERVITUDE (2006), <http://www.nlcnet.org/article.php?id=10> [hereinafter NLC 2006 REPORT].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.* at 25.

<sup>76</sup> In its methodological section, the NLC 2006 Report explained that "National Labor Committee staff members made two trips to Jordan, as well as traveling to Bangladesh to meet with workers who

worked in conjunction with civil society elements in Bangladesh.<sup>77</sup> Interviews with current and former workers of these factories, most of who were Bangladeshi, Indian or other foreign workers were difficult in Jordan and easier among returned workers.<sup>78</sup> The May 2006 Report detailed a number of findings: many foreign workers, most from South Asia, had spent over \$1000 for work permits in Jordan.<sup>79</sup> The workers alleged that many of them had their passports confiscated by the employer or by agents of the Kingdom at the behest of employers,<sup>80</sup> that they were made to work shifts far in excess of that permitted by law, that they were not paid either for the hours they actually worked or that they were not provided with the overtime compensation to which they ought to have been entitled.<sup>81</sup> When they protested, the employers sometimes relented but then began to illegally deduct from their salaries amounts for food and accommodations in excess of the additional moneys granted them as a consequence of the protests.<sup>82</sup> When some sought to protest, the employers had them arrested, beaten and deported.<sup>83</sup> In one instance, the workers reported that the Bangladeshi staff-person to Jordan told them to accept the conditions under which they worked without protest.<sup>84</sup> Ironically, these allegations might not have come to light so quickly but for the deportations. The Jordanian government played no role in the monitoring or enforcement of its laws.<sup>85</sup> Indeed, Jordanian police seemed to serve the interest of the factory owners in hustling complaining employees to jail and eventually deporting them back to their home countries.<sup>86</sup> The National Labor Committee specifically identified a number of factories that were Wal-Mart suppliers.<sup>87</sup>

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were exploited in Jordan and then forcibly deported when they asked for their legal rights, including their proper wages." *Id.* at 2.

<sup>77</sup> The NLC 2006 Report explained that:

[w]ith our partners in Bangladesh, the Bangladesh Center for Workers Solidarity (BCWS) and the National Garment Workers Federation (NGWF), we were able to establish a program visiting different workers' neighborhoods to locate former factory workers from Jordan and to interview them regarding their experiences. Some of these interviews were also filmed.

*Id.* at 2.

<sup>78</sup> The NLC 2006 Report noted that its team

held as many as four separate interviews with different workers from the same plant. In Jordan, it was difficult to find safe places for the interviews, but the workers were quite ingenious in setting this up. We cannot say any more than that. In Bangladesh, with our partners, it was easy to meet safely at their union offices.

*Id.*

<sup>79</sup> *Id.* at 94.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 93-94, 97.

<sup>82</sup> *Id.* at 93.

<sup>83</sup> *Id.* at 94.

<sup>84</sup> *Id.* at 93.

<sup>85</sup> *Id.* at 97.

<sup>86</sup> *Id.* at 94.

<sup>87</sup> *Id.* at 125-27.

Once published, the National Labor Committee sought the greatest exposure for its report. They were quite successful. The *New York Times* published a story about the report on May 3, 2006 detailing the findings of the advocacy group.<sup>88</sup> The same day, several members of the U.S. House of Representatives sent a letter to the U.S. Secretary of State and the U.S. Trade Representative to urge the “that the Administration urgently initiate an investigation of labor conditions in Jordan and . . . that the U.S. Government . . . offer its assistance to ensure the safety of the workers who courageously provided information to the National Labor Committee for its study, and to protect such workers from retaliation by their employers.”<sup>89</sup>

The publication of the National Labor Committee Report, the *New York Times* article and the distribution of the letter from the U.S. Congresspersons to the Secretary of State appeared to have little effect on the Jordanian factory owners or the Jordanian government. They did, however, appear to have an immediate effect on the multinationals for whom these factories served as supplier—particularly Wal-Mart. By the time of its publication, the authors of the *New York Times* story were able to report that, “[a]fter the New York Times asked about the accusation on Monday, Wal-Mart dispatched two inspectors to Jordan” to review.<sup>90</sup>

But the story does not end there. The National Labor Committee, in its role as monitor, decided to follow up on its report. In September 2006 the National Labor Committee reported some improvement in some factories, but continued violations in many.<sup>91</sup> Its findings were distributed in a report produced in September, 2006.<sup>92</sup> The National Labor Committee reported that “[a]ccording to workers on the ground, the majority of Jordan’s garment factories—perhaps as high as 80 percent—have shown substantial improvements. Conditions in these factories are far better now than they were in May of 2006.”<sup>93</sup> But it noted that four factories in particular—Atateks, Silver Planet, Horizon, and Jordan Silk—continued to engage in acts of human trafficking, illegal working conditions and forcible

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<sup>88</sup> Steven Greenhouse & Michael Barbaro, *An Ugly Side of Free Trade: Sweatshops in Jordan*, N.Y. TIMES, May 3, 2006, at C1, available at LEXIS, News Library, NYT File.

<sup>89</sup> Letter from Hon. Charles B. Rangel, Hon. Benjamin L. Cardin, Hon. Sander M. Levin, Hon. Xavier Becerra, members of the U.S. House of Representatives, to Hon. Condoleezza Rice, U.S. Secretary of State, and Hon. John Portman, U.S. Trade Representative (May 3, 2006), available at National Labor Committee, Letter From the Leading Members of the House Ways and Means Committee, <http://www.nlcnet.org/article.php?id=53> (last visited Jan. 21, 2007).

<sup>90</sup> Greenhouse & Barbaro, *supra* note 88, at C1.

<sup>91</sup> National Labor Committee, An Update on the Situation in Jordan—September 2006 (Sept. 27, 2006), <http://www.nlcnet.org/article.php?id=136> [hereinafter September 2006 Jordan Update].

<sup>92</sup> National Labor Committee, The State of Jordan’s Garment Factories (2006), available at [http://www.nlcnet.org/live/admin/media/document/ReportPDF/Jordan\\_Update\\_0609/Update\\_Final\\_2.pdf](http://www.nlcnet.org/live/admin/media/document/ReportPDF/Jordan_Update_0609/Update_Final_2.pdf).

<sup>93</sup> September 2006 Jordan Update, *supra* note 91.

deportations.<sup>94</sup> It also chronicled the continued use of Jordanian official power for the benefit of the factory owners.<sup>95</sup> In the case of Silver Planet, the Wal-Mart supplier, the National Labor Committee September 2006 report suggested that both the Jordanian government and the representatives of Bangladesh were complicit in the actions of the factory owner.<sup>96</sup>

Again, the National Labor Committee is successful in leveraging its finds through a national media outlet, a publication that adds substantial legitimacy to the National Labor Commission report as well. This time it is in the *Los Angeles Times*.<sup>97</sup> The *Los Angeles Times* story was distributed by the Business and Human Rights Resource Centre, another NGO.<sup>98</sup> When asked to comment, Rajan Kamalanathan, Wal-Mart's Vice President

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<sup>94</sup> *Id.* Silver Planet, a supplier for Wal-Mart, was described as owned either by a Palestinian or an "an investor from the United Arab Emirates." *Id.* It employed about 1000 guest workers, mostly from Sri Lanka and Bangladesh producing garments for Wal-Mart's George label. *Id.*

<sup>95</sup> *Id.* The NLC September 2006 Report, for example, described the use of the Jordanian police by the managers of the Atatek factory:

Ten of the workers who had led the efforts to win their rights were told they would have to travel to Amman to pick up their residency permits, that after lunch, at 1:00 p.m., a van would be ready to take them to their appointment. Instead the van took the 10 leaders to the Sahab police station. The workers used their cell phones to call their colleagues in the factory to inform them that they were being deported.

*Id.* The position of the Jordanian government, apparently, was to justify their actions on the grounds that these workers constituted security threats. *Id.*

<sup>96</sup> The NLC September 2006 Report stated that:

- Five hundred Bangladeshi and Indian workers struck on May 31 and marched to a local Ministry of Labor office demanding that the Silver Planet factory respect Jordan's labor laws.
- The Labor Ministry official, the Jordanian police and the Bangladeshi Embassy did not help the workers—instructing them instead that they must work 10 hours a day, rather than the regular, legal eight hours.
- On August 24, the factory owner arrived from Dubai and requested that seven of the workers leaders meet with him. When the workers approached his office, they were met by 15 to 20 police, who handcuffed the workers and took them to jail.
- The workers spent eight days in jail, most often sleeping on the floor and with access to water for just a half hour each day. On the first day, they were beaten and slapped.
- On September 2, 2006, the eight workers were forcibly deported—seven to Bangladesh and one to India.

*Id.* The NLC September 2006 Report also identified by name personnel from the Jordanian Ministry of Labor that failed to help the affected workers. *See id.* The Bangladeshi ambassador to Jordan, Ambassador Nazmul Hudda, was also named as complicit in the violations of the factory owner. *Id.*

<sup>97</sup> Evelyn Iritani, *Group Accuses Jordan of Failing to Enforce Labor Rights*, L.A. TIMES, Oct. 18, 2006, at C1, available at, LEXIS, News Library, LAT File.

<sup>98</sup> The Business and Human Rights Resource Centre "is an independent, international, non-profit organisation, in a collaborative partnership with Amnesty International sections and leading academic institutions." Bus. & Human Rights Res. Centre, A Brief Description, <http://www.business-humanrights.org/AboutUs/Briefdescription> (last visited Dec. 1, 2006). It was created in 2005 and "has become the world's leading independent resource on the subject . . . . The site covers over 3000 companies, and over 160 countries. It receives over 1.5 million hits per month. Topics include discrimination, environment, poverty & development, labour, access to medicines, health & safety, security, trade." *Id.*

of Ethical Standards quickly responded.<sup>99</sup> Kamalanathan focused on Wal-Mart's relationship with one factory identified in the National Labor Committee's September report, the Silver Planet Apparel Co. Ltd.<sup>100</sup> He explained that the factory at issue was audited immediately upon receiving the NGO report and that as a result significant improvements were made in working conditions.<sup>101</sup>

But Wal-Mart used this opportunity to do more. Wal-Mart must have been well aware that its response would be posted to the NGO website. The response was carefully crafted as a teaching and publicity vehicle for making a case for Wal-Mart's supplier based global regulatory system. Wal-Mart took the opportunity of the response to explain the way its supplier regulation system works, and its critical role in training and changing behaviors among indigenous employers.<sup>102</sup> It also used the response to demonstrate its willingness to work with elements of civil society to investigate and correct any breaches by its suppliers of its obligations under its contracts with Wal-Mart.<sup>103</sup> These events will then be reported to the investment community by Wal-Mart through its communications department and might serve as a basis for consumer education in advertising as well.<sup>104</sup>

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<sup>99</sup> Letter from Rajan Kamalanathan, Wal-Mart Vice President of Ethical Standards, to Chris Avery, Business and Human Rights Resource Centre (Oct. 17, 2006), available at <http://www.business-humanrights.org/Documents/Jordanfactories>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* ("In September 2006, Wal-Mart auditors conducted an on site audit of Silver Planet and as part of our audit process we identified violations and sought management's commitment to rectify the violations observed. In October 2006, we revisited the factory as part of our follow-up to the audit, and we have noted the following improvements: Working hours are properly recorded; Overtime is tracked and paid; Workers are compensated (paid) in accordance with Jordan's Labor Laws; Excessive working hours have been addressed; [and] Passports of guest workers have been released to those workers preferring to retain their own passports.").

<sup>102</sup> *Id.* (The language of the letter is worth quoting in full:

Wal-Mart expands great efforts in working with our suppliers and their factory management to remediate issues of concern that we have identified in our audits. We are often asked, "Why doesn't Wal-Mart immediately stop doing business with any factory where working conditions are substandard?" Our answer is that once we discontinue business with a particular factory, we lose our ability to influence improvement which then leads to meaningful and positive change for the workers involved. In addition, there is always a risk that if we discontinue production in a particular supplier factory, then the factory conditions may deteriorate. It is for that reason that Wal-Mart works with its suppliers and their factories to bring about positive change.

*Id.*

<sup>103</sup> *Id.* ("Wal-Mart is working collaboratively with other retailers and brand owners, the Government of Jordan, and the International Labor Organization to address issues of concern and to create sustainable improvements.").

<sup>104</sup> See WAL-MART, 2005 REPORT ON ETHICAL SOURCING (2005), available at [http://walmartstores.com/Files/05\\_ethical\\_source.pdf](http://walmartstores.com/Files/05_ethical_source.pdf) (the report provides information to both investors and the general public by outlining Wal-Mart's Ethical Standards Program and its system of auditing suppliers).

The story highlights the way in which new systems of law making—global, targeted, functionally differentiated, and private—are arising. The critical actors include economic entities (like Wal-Mart) and its network of relationships with suppliers, elements of civil society (principally human rights NGOs), the media (in this case especially the global print media), and the consumer and investment communities. Notice, too, what is significant by its absence in this story: the state and elements of the legislative, enforcement and judicial organs of the political community. This is not a story where governmental investigation uncovers violations of law through systems of reporting or enforcement and then vigorously investigates and enforces the law through the administrative and judicial process subject to well-established national law. It is not even a story of the way in which the state pursues investigation of allegations made by individuals or members of civil society. Neither the National Labor Committee nor the Business and Human Rights Resource Centre limited its actions to the state (if they interacted with state elements at all). Instead they went to the media and the multinational enterprises to publicize, investigate, and remedy allegations determined to have merit. To the extent that the state played a role at all in this drama, it was either as the tool of local employers seeking to violate the law (the local Jordanian police) or to collude with local authorities in the violation of law (the Bangladeshi Ambassador to Jordan).<sup>105</sup>

#### IV. THE SYSTEM IN ACTION (II): STRUCTURAL COUPLING AS THE PRIVATE AND PUBLIC LAW SYSTEMS MEET: WAL-MART IN GERMANY

After nearly a decade of substantial effort, in the summer of 2006, Wal-Mart abandoned its direct retail operations in Germany by selling its German retail business to a competitor.<sup>106</sup> Wal-Mart's decision to abandon its direct German operations was the consequence of a variety of factors, many of which were related to the clash between the internal policies and culture of the company with the legal, labor, and consumer attitudes Wal-Mart encountered in the German market.<sup>107</sup>

Wal-Mart entered the German market in 1997 with the purchase of the twenty-one store Wertkauf chain and the seventy-four store Spahr Handels AG chain, making Wal-Mart the fourth largest hypermarket retailer in Germany.<sup>108</sup> For Wal-Mart, adding the German operations would not

<sup>105</sup> See discussion *supra* Part III.

<sup>106</sup> See Louisa Schaefer, *World's Biggest Retailer Wal-Mart Closes Up Shop in Germany*, DEUTSCHE WELLE, July 28, 2006, <http://www.dw-world.de/dw/article/0,2144,2112746,00.html>.

<sup>107</sup> See Andreas Knorr & Andreas Arndt, *Why did Wal-Mart fail in Germany? (so far)?*, des Wissenschaftsschwerpunkts "Globalisierung der Weltwirtschaft" (Weiße Reihe) Materialien der Universität Bremen, Band 24, Bremen, June 2003, available at <http://www.hicbusiness.org/biz2003/proceedings/Andreas%20Knorr.pdf>.

<sup>108</sup> See *id.* at 8.

require changing Wal-Mart's corporate culture or operations approach; the German operations would merely add to the collection of retail outlets run substantially as a single operation out of Bentonville. Germany merely represented an extension of Wal-Mart's market, not a distinct way of operating its stores. But Wal-Mart was unable to take advantage of its harmonizing global strategies. Yet its regulatory harmonization strategies might have played only an incidental role in that result. The decision to enter the German market through acquisition might have played a more important role.<sup>109</sup> Labor relations gaffs, surprising for a company of its experience, also seemed to plague this acquisition. These included missteps in the recruitment and retention of administrative personnel,<sup>110</sup> and combative relations with rank and file employees.<sup>111</sup>

While important, these difficulties did not directly affect Wal-Mart's private regulatory system. As in every market in which it had operations, Wal-Mart sought to impose and enforce its supplier and labor standards. But in Germany, Wal-Mart found it difficult to enforce its supplier standards,<sup>112</sup> in part because Wal-Mart was unable to bring effective economic pressure on German suppliers.<sup>113</sup> Suppliers did not need Wal-

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<sup>109</sup> Knorr and Arndt, for example, suggest that bad business decisions, especially the decision to purchase Spahr placed Wal-Mart at a competitive disadvantage that it found costly to overcome. *Id.* at 19-20.

<sup>110</sup> Thus, for example, Knorr and Arndt recount Wal-Mart's decision to transfer managers from the United States, managers unwilling to learn German. These managers decided that rather than learn German, they would decree English the official language of business in the German operations. *Id.* at 22. After appointing first an American and then a U.K. national as CEO of its German operations, Wal-Mart appointed first one and then another German national to the post. At least one of these German CEOs was "supported by a group of native Germans" as they attempted to integrate the varied parts of Wal-Mart's German operations. *Id.* However, in the sophisticated German employment market, the damage was done, and a large percentage of Wal-Mart's local talent was reputed to be perennially on the job market. *Id.*

<sup>111</sup> In 2005 *Business Week* reported that "German companies are used to dealing with workers' councils, which are easy to organize under German law. Some even say the co-determination system improves communication with employees. That's likely to be a tough sell in Bentonville, though. Indeed, Wal-Mart clashes regularly with the *ver.di* union, which says it has organized every Supercenter in Germany." Jack Ewing, *Wal-Mart: Local Pipsqueak; The U.S. Giant is Struggling in Germany, where Discounters Already Dominate*, *BUS. WK.*, Apr. 11, 2005, at 54, available at LEXIS, News Library, BUSWK File. Wal-Mart's rigid insistence on set employment policies angered the *ver.di* union, which organized an employee walk-out of over thirty Wal-Mart stores, and filed a lawsuit against the company for failing to abide by German financial disclosure requirements. Knorr & Arndt, *supra* note 107, at 23.

<sup>112</sup> Knorr and Arndt relate that, as they had in virtually every other jurisdiction in which it engaged suppliers, Wal-Mart demanded the right to make announced and unannounced inspection visits to the factories of its suppliers. Most German suppliers refused to comply. Knorr & Arndt, *supra* note 107, at 23-24 (citing Jens Bergmann, *Wal-Mart in Deutschland: Augen zu und durch*, *BRAND EINS*, June 2000).

<sup>113</sup> Recall that Wal-Mart was only the fourth largest player in the German market and the big three were aggressive enterprises with well-developed local relationships. See *supra* note 100 and accompanying text. One of them, Aldi, is already making significant inroads in the American low end food retail industry. See Jack Ewing et al., *The Next Wal-Mart?*, *BUS. WK.* Apr. 26, 2004, at 22, available at LEXIS, News Library, BUSWK File ("Aldi is Europe's stealth Wal-Mart. Like the Arkansas-based giant, Aldi boasts awesome margins, huge market clout, and seemingly unstoppable



Mart's business enough to conform, and the suppliers could rely on well-established and still vigorously monopolistic public law systems, among the most sophisticated in the world. In this case, the state regulatory monopoly provided legal protections for local suppliers that might not have survived in the absence of legislation.<sup>114</sup> In Germany, then, the state remains an important player in mediating between the actors in private law system networks in the old fashioned way,<sup>115</sup> and also by erecting barriers to global trade for the benefit, as they see it, of their constituents.

But Germany's well-developed legal system provided another powerful source of resistance to Wal-Mart's global private regulatory system. The company failed to fully appreciate the response of its German employees to its internal codes and regulations, especially its ethics code.<sup>116</sup> The distribution of the German version of the Wal-Mart ethics manual "caused a furor. [German employees] read a caution against supervisor-employee relationships as a puritanical ban on interoffice romance, while a call to report improper behavior was taken as an invitation to rat on co-workers."<sup>117</sup> And indeed, Wal-Mart does devote a great deal of energy to a harmonized approach to its employee culture.<sup>118</sup> However, in 2005, the Local Labour Court of Wuppertal ruled that the company policy against fraternization<sup>119</sup> violated workers rights and enjoined its enforcement.<sup>120</sup>

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growth—including an estimated sales increase of 8% a year since 1998. It relentlessly focuses on efficiency, matching or even beating Wal-Mart Stores, Inc. (WMT) in its ability to strip out costs. Yet privately owned Aldi is also very old-school German, financing expansion with cash to avoid debt, shunning publicity, and moving quietly into new markets before the competition catches on."). Suppliers could afford to play Wal-Mart off against its competitors.

<sup>114</sup> This sort of protection has not been lost on developing states, which are also thinking about abandoning the free movement basis of globalization for at least some local protectionism. Mexican retailers and suppliers, fearful both of Wal-Mart's market power and the under pricing by competitors from China have sought to use the state to erect barriers to free movement of goods. See Ricardo Castillo Mireles, *Mexican CGP Companies Hope to Slow Wal-Mart With Legislation*, LOGISTICS TODAY, Apr. 2005, available at <http://www.logisticstoday.com/sNO/7121/iID/20909/LT/displayStory.asp> ("In Europe 50% of all purchases are devoted to local suppliers," claims Fernandez, "but Mexico's supermarket chains can refuse to use a similar scheme here if there is no legislation forcing them to do so. Today the percentage of Mexican products being sold is very low. Consumers prefer to buy Chinese articles, which represent 64% of what is being sold in the gift field.").

<sup>115</sup> Wal-Mart ran into additional legal complications when it violated German Anti-Trust regulations relating to the sale of goods substantially below market price without sufficient justification. See Knorr & Arndt, *supra* note 107, at 26. Wal-Mart was also cited in 2003 for failing to abide by German regulations requiring any seller of canned or bottled products to provide a reimbursement program. *Id.*

<sup>116</sup> See WAL-MART, STATEMENT OF ETHICS 2 (rev. ed. 2005), available at [http://media.corporate-ir.net/media\\_files/IROL/11/112761/corpgov/Ethics%20Current.pdf](http://media.corporate-ir.net/media_files/IROL/11/112761/corpgov/Ethics%20Current.pdf) ("This revised Statement of Ethics applies to all of our Associates worldwide as well as the members of our Board of Directors.").

<sup>117</sup> Ewing, *supra* note 111.

<sup>118</sup> See, e.g., Wal-Mart Stores, Wal-Mart Culture, <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=251> (last visited Dec. 1, 2006).

<sup>119</sup> See WAL-MART, STATEMENT OF ETHICS, *supra* note 116, at 16 ("Wal-Mart Associates are expected to conduct themselves in a manner that promotes respect, trust, safety, and efficiency in the workplace. You may not date or become romantically involved with another Associate if you can

In addition, the court enjoined the use of informant hotlines because it violated German labor law.<sup>121</sup> In February 2005, the German employees of Wal-Mart were given a thirty-three page code of conduct attached to their paychecks. The focus of this dispute pertains to the clause reading as follows: "You cannot go out or enter a love relationship with someone if this could influence the working conditions of the person involved." "Any kind of communication that could be interpreted as sexual" was prohibited, as were lustful looks and sexually offensive jokes.<sup>122</sup> Additionally, employees were encouraged to use an ethics-hotline to inform their employers if the rules were broken. Violation of the code was declared as a ground for dismissal.<sup>123</sup> The Germans were particularly upset because they felt Wal-Mart was effectively voiding rather than supplementing German labor laws, and because they felt that Wal-Mart was seeking to impose behavioral norms uncomfortably similar to those used by a recently discredited political regime, that of the Communist dictatorship of East Germany.<sup>124</sup>

The employee response was swift. In March 2005, the German works council filed a lawsuit against Wal-Mart Germany, the German subsidiary of Wal-Mart Stores, Inc., which is based in Wuppertal.<sup>125</sup> Ulrich Dalibor, head of German union ver.di's retail trade sector, charged Wal-Mart with a serious violation of German law by issuing its ethics code before consulting the worker-management councils. Under German law, employee-management councils must agree on a wide range of workplace policies.<sup>126</sup> The Local Labour Court of Wuppertal agreed. It determined

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influence that Associate's terms and conditions of employment or if that Associate can influence the terms and conditions of your employment.").

<sup>120</sup> Ingebjörg Darsow, *Implementation of Ethics Codes In Germany: The Wal-Mart Case*, IUSLABOR REVISTA ELECTRÓNICA, Mar. 2005, available at <http://www.upf.edu/iuslabor/032005/art11.htm> ("The clause to regulate the love life of the employees was judged to violate the personal rights of the employees, particularly the personal freedom guaranteed in Art. 1 para.1 (1) and Art. 2 para. 1 (2) of the Basic Law (Grundgesetz, [sic] the German Constitution)").

<sup>121</sup> *Id.* (Mr. Darsow explained: "Several parts of Wal-Mart's code of conduct breached the right of co-determination of the workers representative . . . . The requirement for staff to report code violations via a so-called ethics hotline was judged to violate the right of co-determination according to art. 87 para. 1 no. 1 and 6 (3). A clause that forces the staff to blow the whistle on colleagues who broke the code is a matter relating to the organization of work in the establishment (art. 87 para. 1 no. 1). The ethics-hotline is a technical device designed to monitor the behaviour of the employees (art. 87 para. 1 no. 6). In respect of these matters the works council has a genuine right of co-determination.").

<sup>122</sup> Darsow, *supra* note 120.

<sup>123</sup> *Id.*

<sup>124</sup> *Wal-Mart Violates German Labor Laws*, WORKERS INDEP. NEWS, Mar. 18, 2005, <http://208.185.252.177/laborradio/node/135>.

<sup>125</sup> Darsow, *supra* note 120.

<sup>126</sup> Press Release, Wake-Up Wal-Mart, *Wal-Mart Imposes KGB Style-Informant System on German Employees* (Mar. 18, 2005), available at <http://www.wakeupwalmart.com/press/20050318b-release.html>. In Germany, the employees working at a business with at least five employees have the right to elect a works council. Once a works council has been elected, it has so-called "co-determination rights" over a number of issues. Effectively, on substantive issues affecting the terms and conditions of employment and workplace conditions, works councils have a legal right to be

that several parts of Wal-Mart's code of conduct breached the right of co-determination of the workers' representative.<sup>127</sup> Examples for matters of co-determinations are the structuring, organization and design of jobs as well as operations and working environment. The requirement for staff to report code violations via a so-called ethics-hotline was judged to violate the right of co-determination.<sup>128</sup> A clause that forces the staff to blow the whistle on colleagues who break the code is a matter relating to the organization of work in the establishment.<sup>129</sup> The ethics-hotline is a technical device designed to monitor the behavior of the employees.<sup>130</sup> In respect of these matters the works council has a genuine right of co-determination. Before implementing a code of conduct concerning these issues, the court determined that Wal-Mart would have to negotiate with the works council.

Note the nature of the victory achieved by the employees in this case. It did not necessarily go to the invalidity of the whistle blowing provisions, but rather to the methods by which it had been imposed on German workers. Public law, in this case, did not seek to displace private global behavioral regulation, but to regulate the manner in which it was transposed into the local regulatory culture. Wal-Mart was not found to be regulating against local public law. Instead, the court determined that Wal-Mart failed to follow the appropriate procedures for imposing its private regulatory system, in this case by bargaining with workers representatives. In effect, Wal-Mart merely failed to speak the language of regulation (in its process aspects). Wal-Mart was free to try again by harmonizing its whistle blower provisions with German characteristics. On the other hand,

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consulted and to negotiate about those rights. "The German Courts confirmed that, as a matter of law, any provision that imposes an obligation on an employee to report a violation of an ethics code is a matter that falls firmly within the works council's co-determination authority." Greg Campbell et al., Faegre & Benson, LLP, *The Impact of SOX on US Multinational Companies' Operations in the United Kingdom and European Union*, [http://www.faegre.com/articles/article\\_print.aspx?id=1996](http://www.faegre.com/articles/article_print.aspx?id=1996) (last visited Feb. 21, 2007). "By contrast, employers are generally free to impose rules about work performance without prior consent by the works council." Anja Mengel & Henry Clinton-Davis, Wilmerhale, *Ramifications of German Court of Appeals Judgment on an Employer's Code of Ethics*, Jan. 30, 2006, <http://www.wilmer>

[hale.com/publications/whPubsDetail.aspx?publication=3053](http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3053).

<sup>127</sup> The provisions of the Works Constitution Act govern employee participation and co-determination at the level of the establishment. The duty of the works council is to safeguard the interests of the employees in dealing with the employer. The works council shall work together in a spirit of mutual trust and in co-operation with trade unions and employers' associations for the good of the employees and of the establishment. "German works councils have a far-reaching right of participation and co-determination in matters concerning the organization of work in the establishment." Darsow, *supra* note 120.

<sup>128</sup> Works Constitution Act as promulgated by the Act of September 25, 2001 ("Bundesgesetzblatt," Part I, p. 2518), last amended by the Art 81 Law of December 23, 2003 ("Bundesgesetzblatt," Part I, p. 2848) art. 87 ¶ 1 (German Fed. Ministry of Econ. & Tech. trans.), available at <http://www.bmwi.de/English/Redaktion/Pdf/Archiv/labour-law/act-on-european-works-councils,property=pdf,bereich=bmwi,sprach=en,rwb=true.pdf>.

<sup>129</sup> *Id.* art. 87 ¶ 1 no. 1.

<sup>130</sup> *Id.* art. 87 ¶ 1 no. 6.

the private regulation touching on fraternization was treated substantially more harshly. In that case Wal-Mart was effectively seeking to regulate directly against the higher law of the locality. From the German perspective, a multinational entity was seeking to supplant deeply held local consensus on behavior with its own global behavioral norms. This was not system communication; it was more like system conflict. And in Germany, the local and the public displaced the global and private. These lessons were not completely lost on Wal-Mart. "The company is now reassessing its practice of aggressively exporting its corporate culture to its stores abroad, and it no longer seems to think it can set up shop abroad without worrying about thinking hard about how it fits in in a particular country."<sup>131</sup>

Wal-Mart's failure in Germany, then, presents an interesting set of limiting principles to any network system of private law. It suggests, especially in developed states, that traditional law will continue to play an important role in economic regulation. It is likely that the substitution effect of network private law systems is worth exploring by empiricists. The proof of a strong substitution effect could serve to reinforce the sort of legal positivism, with its corollary allegiance to public law and public law institutions, which has been the foundation of Western jurisprudence and (to some extent) political theory since the French Revolution. On the other hand, the German experience might not suggest a substitution effect—that is confirmation of the notion that private law making is either always the "second best" solution to public regulation, or that it invariably works against public law regimes.

Instead, a more sophisticated analysis might be appropriate, one based on notions of congruence and conflict, rather than on substitution. Private rule systems that seek to impose rules that amplify, fill in gaps or are otherwise consistent with the basic normative legal structure of a community will be permitted, as long as procedural niceties are observed. On the other hand, rules that contradict or are inconsistent with the basic substantive values of a community (expressed through its laws) will much more likely be defeated through action by one of the institutions of the political community in which these contradictory or inconsistent rules are sought to be imposed. This result might strengthen the position of regulatory free marketers and deepen an understanding of the importance of the systems that Wal-Mart appears to be establishing. This result would reinforce postmodern ideas of the relation of law (and the state) to society,

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<sup>131</sup> Brian Montopoli, *Wal-Mart's German Flop: Retailer Bows Out of Germany Market After an Eight-Year Struggle*, CBS NEWS, Aug. 2, 2006, available at [http://www.cbsnews.com/stories/2006/08/02/business/main1860028\\_page2.shtml](http://www.cbsnews.com/stories/2006/08/02/business/main1860028_page2.shtml).

custom and politics.<sup>132</sup> It would certainly help confirm the separation of authority from government, at least in some contexts, and place it squarely in the contract relations among actors and interveners.<sup>133</sup> It is to a preliminary consideration of these issues that the Article turns to next.

## V. FIRST STEPS IN CONCEIVING SYSTEM LIMITS AND CONSEQUENCES

The consequences and implications of this new system are complicated. They do not all cut in the same direction. Moreover, there is a certain robustness in the process. I have been looking at something entirely new—new because technology and economic concentration, and the effects of globalization only now have made it possible for such systems to emerge. As such the system is dynamic, and it is fragile. It may evolve in ways we cannot predict, and evolve quickly. Effective threats to globalization may substantially stunt the system. On the other hand, the power of efficiency as a motivating force may broaden and deepen the system. I will sketch out here some of the macro and micro limitations and consequences of this emerging system.

### A. *The System in its Global Context*

The immediate consequences are apparent. There is a greater conflation of economic and political power. States lose their monopoly power to make and enforce behavioral rules—the trends toward state totalitarianism that began in the 17th century may be weakened. But the conflation of economic and political power is not complete. Other multinational groups will also step in to assert more overt rule-making authority over members of their community—the great religious institutions all over the world have already begun. But conflation does not necessarily reproduce monopoly. Multinational corporations may have authority and power as never before to legislate, but legislation is not made in a vacuum. Authority must be shared. Authority is shared with other emerging powers: the great institutions of civil society and the great institutions of information diffusion (i.e., those institutions that can acquire and maintain a certain legitimacy in their reportage).<sup>134</sup>

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<sup>132</sup> Regulation would thus be better as conceived the essence of the force relations of power between actors, "a network of power relations . . . forming a dense web that passes through apparatuses and institutions, without being exactly localized in them." 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY; AN INTRODUCTION* 96 (Robert Hurley trans., Random House, 1978) (1976).

<sup>133</sup> "Authority is designated by a contract, even if it is the final word in which the Law itself speaks" Jean-François Lyotard, *The Wall, the Gulf, the System*, in *POSTMODERN FABLES* 67, 77 (Georges Van Den Abbeele trans., Univ. of Minn. Press 1997) (1977).

<sup>134</sup> Thus, for example, it is no longer uncommon to think about public and private entities as asserting similar power and undertaking similar responsibilities within the limits of their functional frameworks. See, e.g., Caroline Neligan, *One World Trust, Increasing Accountability Through External Stakeholder Engagement* (2003), available at <http://www.oneworldtrust.org/documents/>

The reality of Wal-Mart's regulatory activities, and its participation in diffused networked and autonomous systems also suggest the need to rethink some important understandings common to the literature on multinational corporations. Important among those are theories of centralizing control in multinational corporations. For example, for almost two decades, John Dunning's ideas that centralized decisions are more likely as to matters "perceived to be culture free, in those which offer substantial economies of common governance . . . ."<sup>135</sup> But Wal-Mart's centralization strategy is focused precisely on those matters that traditionally have been deemed as needing sensitivity to local conditions. Globalization, and the role of multinational corporations within it may be changing the conventional wisdom about governance, at least within private regulatory networks.

Another area that will profit from additional study and analytical refinement is that of the growth of transnational network enterprises. Gunther Teubner's work in this area is foundational.<sup>136</sup> Current scholarship finds this a plausible, though messy, way to impose regimes of enterprise liability or at least to extend the veil piercing doctrine.<sup>137</sup> But Wal-Mart suggests that these networks have grown beyond their origins in the search for national bases of transnational liability for enterprise wrongdoing. Wal-Mart appears to be deploying networks in a way that begins to remind one of federal or confederal structuring. The study of networks as institutions, and the relationship between these institutional networks (both vertical and horizontal networks) and regulation (including regulatory networks), may prove to yield fresh perspectives.

The nature of the authority and legitimacy of multinational private regulation also impacts its relationship with its *demos*—the people and institutions on whom the corporate legislator is dependent for its continued life. These actors—consumers, investors and the financial markets—appear to play a role similar to that of the population of any state according

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framework%20final2.pdf ("Increasingly, organisations that work at the international level . . . are conscious of their 'ethical responsibility' to ensure that their activities are not undertaken to the detriment of society or the environment."). The One World Trust was established as the charitable arm of the All-Party Parliamentary Group for World Government (PGWG). The purpose of which was to focus the U.K. House of Commons on study and action on world government. One World Trust, History, <http://www.oneworldtrust.org/?display=history> (last visited Dec. 14, 2006). It is itself an NGO with special consultative status with the Economic and Social Council of the United Nations. One World Trust, About Us, <http://www.oneworldtrust.org/?display=about> (last visited Dec. 14, 2006).

<sup>135</sup> Dunning, *supra* note 10, at 226.

<sup>136</sup> See, e.g., Teubner, *supra* note 5, at 41–59; Gunther Teubner, *Beyond Contract and Organisation? The External Liability of Franchising Systems in German Law*, in *FRANCHISING AND THE LAW: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES* 105–32 (Christian Joerges ed., 1992).

<sup>137</sup> See, e.g., Muchlinski, *supra* note 12, at 326–27 (comparing this notion with the veil piercing of *Mehta v. Union of India*, A.I.R. 1987 SC 965, 1086, and enterprise liability concepts, and suggesting that it produces too much uncertainty).

to traditional democratic theory. There is a conflation in the way institutions approach the residuary holders of authority—whether they are the citizens of a state in constitutional law theory, the shareholders of a corporation in traditional firm theory, or the consumers, investors and financial markets in globalization or transnational law theory. The study of residuary relationships, a neglected stepchild of jurisprudence,<sup>138</sup> is potentially rich in insights for a new global economic ordering of power relationships.

Still, the development of new and functionally differentiated subsystems of global probate regulation will not reduce to oblivion either political communities, constituted as states, or an emerging international order (or orders). They remain a vital part of the equation, though no longer the whole of it, or even necessarily at its center. Above all else, one should not think of this emerging system as a substitute to the old law making systems of political communities. Wal-Mart is unconcerned with the acquisition of a monopoly power over legislation, monitoring or enforcement. Wal-Mart's actions suggest the power of functional differentiation—Wal-Mart is interested in the production of wealth, not regulation, and thus, regulatory systems are incidental. Political communities, on the other hand, in a world dominated by ideologies of legal positivism,<sup>139</sup> at their functional limits, are interested in the production of regulation and incidentally in the object of that regulation. But the porosity of these legislative systems, and the character of functional differentiation, for example its dynamic character, will also serve as a source of significant additional insight.

One of the great consequences of limited scope private governance systems is the institutional and organizational effect of fractured or divided power, especially where power was once believed to be undivided. Wal-Mart evidences the evolution of regulatory systems where the traditional monopolists—states—lose their monopoly power (in this case because the market for legislation has changed). In the absence of monopoly power, regulation becomes fragmented. That may be the most positive

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<sup>138</sup> For example, American jurisprudence studies ignores the Ninth Amendment. See, e.g., Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67 (1988). For a more miserly approach less attuned to an original understanding of English constitutional higher law, see Randy E. Barnett, *The Ninth Amendment Means What it Says*, 85 TEX. L. REV. 1 (2006). But philosophy might provide a clue:

The man engaged in commerce understands how to appraise everything without having made it, and to appraise it *according to the needs of the consumer*, not according to his own needs . . . . [H]e applies it to everything, and thus also to the production of the arts and sciences, of thinkers, scholars, artists, statesmen, peoples and parties, of the entire age . . . . This becomes the character of an entire culture.

FRIEDRICH NIETZSCHE, *DAYBREAK: THOUGHTS ON THE PREJUDICES OF MORALITY*, at bk. III, ¶ 175 (R.J. Hollingdale trans., Cambridge Univ. Press 1997) (1881).

<sup>139</sup> For a complaint about that state of affairs, see BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2005); for an analysis see Reifying Law, *supra* note 8.

contribution of the emerging world order to the ability of individuals to avoid subordination by singular systems with monopoly power over all aspects of life. In a functionally differentiated system in which alternative sources of law making compete; the individual may fare better, in the long run.

The system thus posits a host of dependant relationships. Adversaries are locked in positive relationships—the multinationals need the institutions of civil society, both of whom need the media, all of whom are dependent on consumers, investors and the financial markets, all of which in turn are dependent on the economic enterprises for their individual and institutional wealth maximization. Circles within and among circles. This also suggests an ironic result: where the power is asserted, it produces a movement toward harmonization. But where the system reaches its limits, fragmentation is exacerbated. The forms in which these limits are reached affect the way in which the cluster of dependant relationships will adjust. In a globalized system, the ultimate remedy is exit, rather than compromise. Private-law making systems need not compromise to reach consensus, they remain free to exit a territory.<sup>140</sup> Dependency, interconnection, communication through system boundaries, and strategic behavior across a global playing field mark the borders of the structural coupling among regulatory systems. It is only in that context that the role of global regulation becomes apparent.

Wal-Mart's experiences in Germany are telling in this respect.<sup>141</sup> Wal-Mart's German experience does not suggest that private law-making is impossible in Germany. On the contrary, it suggests that while the relationship of public and private legal systems is different in Germany than in Jordan, it is present in both. Public law proved to be an effective tool in Germany; it was ineffective in Jordan. In Germany, Wal-Mart's regulatory product was necessarily directed to a large spectrum of consumers—including German consumers, employees, and suppliers. To both its local and global detriment, Wal-Mart failed to satisfy their tastes for the consumption of regulation among its principal consumers in Germany (with respect to the investment community). In Jordan, the principal consumers of regulation were Wal-Mart product purchasers and the global investment community, few if any of whom lived in Jordan, and only incidentally suppliers and their employees. These later served less as objects of the regulation for their benefit, but more for the benefit of Wal-Mart in the maintenance of its relations with its global consumer and investor base.

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<sup>140</sup> "The presence of the exit alternative can therefore tend to *atrophy the development of the art of voice*." ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 43 (1970) (suggesting the synergies of combinations of loyalty and voice, but noting that exit tends to have lower short term transaction costs).

<sup>141</sup> See discussion *supra* Part III.



### B. *Is This a System?*

I have posited a set of relationships among the principal actors of the private regulatory system that I have described. It might be argued, for example, that the set of relationships I have described, and the private orderings I am characterizing, as constituting a closed and autonomous system, are little more than slightly more complicated examples of the sort of everyday private ordering that has characterized the usual relationships between the public and private sectors of national and global legal systems. There is a long history of private-public regulatory partnerships or associations in the West. These have ranged from private standard setting for products,<sup>142</sup> to the self-regulatory components of market regulation,<sup>143</sup> to the purely internal, private regulatory frameworks of the law of merchant transactions,<sup>144</sup> or banks.<sup>145</sup>

The system outlined above, however, is qualitatively different from traditional private ordering in a number of important respects. First, these traditional private rule-making efforts were, to a large extent, dependent on a specific relation to government. Thus, for example, both the European Union's reliance on private standard-setting bodies for some of its technical regulations harmonization, and the self-regulation built into the federal securities laws, are dependent on governmental grants or devolution of authority. Second, traditional private regulation tended to involve a single group of actors regulating relations among themselves. This is characteristic of the *lex mercatoria* (regulation among merchants)

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<sup>142</sup> In areas where public organizations lack knowledge, resources and legitimacy, private organizations are officially delegated public functions, or they voluntarily design and create arrangements of private authority. To a greater or lesser extent, these forms of global arrangements may co-exist with, or fully replace, public regulation. Either way, private organizations contribute to problem-solving and challenge prevailing state-centric views of global order.

Karsten Ronit, *The Good, the Bad or the Ugly?: Practices of Global Self-Regulation Among Dyestuffs Producers*, in *PRIVATE ORGANISATIONS IN GLOBAL POLITICS* 83 (Karsten Ronit & Volker Schneider eds., 2000). The European Union has, in its framework legislation regime since the 1980s increasingly relied on partnerships with non-governmental standard-setting organizations for its technical legislation. See, e.g., Council Directive 88/378/EEC, 1988 OJ (L187) 2 (EC) (on the safety of toys).

<sup>143</sup> See, e.g., JOHN O. MATTHEWS, *STRUGGLE AND SURVIVAL ON WALL STREET: THE ECONOMICS OF COMPETITION AMONG SECURITIES FIRMS* 45 (1994) (regulation of broker dealers).

<sup>144</sup> For a taste of the much discussed *lex mercatoria*, from a historical perspective, see, for example, Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427 (1999).

<sup>145</sup> For a discussion of the private development of global rules for letters of credit published by the International Chamber of Commerce as the Uniform Customs and Practice for Documentary Credits 500 (1994), see, for example, Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based on Business Practices?*, 38 WM. & MARY L. REV. 1465, 1487 n.102 (1997) ("Some might argue that the UCP 500 is not law—or even law merchant—but rather acts as a term of a contract, because it applies only when incorporated into the text of the letter of credit. However, because the vast majority of letters of credit do incorporate the UCP in one version or another, its characterization here as a type of law merchant approximating law is appropriate." (citations omitted)).

and letter of credit regimes (regulation among banks and their customers with respect to a specific form of transaction). Third, private regulation involved a regularization of vocabulary and production standards for goods that, while changing with changing technology, tended to be static, that is, the work of a single actor.

The system illustrated by Wal-Mart's supplier relations is related but foundationally different from these other private regulation efforts. In contrast to earlier or traditional private regulation, this system tends toward autonomy. It is composed of oppositional elements—actors who work with reference to each other in the construction, monitoring and enforcement of rules. In this sense it is self-contained. It is multi-institutional and closed; that is, it is self-referential. Traditional private rule-making exhibited none of these characteristics to this degree.

Moreover, it is likely that the relationships among the actors are more complex than I have posited in the simple model outlined above. That complexity, worthy of more concentrated exploration, also serves as evidence of the system characteristics of this set of relationships. For example, let us posit away the assumptions of the ideology of positivism that serve to support much public law theory today.<sup>146</sup> If we consider the emerging system illustrated by Wal-Mart's relationships with its global supplier base as a more traditionally customary system, then the relationship among the actors of the system becomes messier. It is possible that, in a system grounded in custom, the behavior of the stakeholders—customers and the investment community—is the source of norm-making rather than the contracts of Wal-Mart. Moreover, the consumers and investors might also serve as ultimate enforcers of the norms that they hold through their choices—to buy Wal-Mart products (including its financial products). Civil society and the media, then, serve as the critical transmitters of information through which the stakeholders act. Their actions may be individual, but the aggregate effects of individual conduct—especially as those aggregate behaviors are reported to Wal-Mart—may serve as a great meta disciplinary tool.

In a sense, Wal-Mart was anxious to enforce its standards to avoid sanctions by its customers and the financial markets. The same anxiety might have provided the incentive to effectively reduce customary expectations to writing in the form of enforceable supplier behavior standards. The standards themselves assume a certain autonomy. Neither Wal-Mart, nor civil society, nor the media, nor any individual controls

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<sup>146</sup> For my purposes here, I use positivism as a proxy for the idea that law, and regulation in general, are instrumental in character and acquire force and legitimacy only as the positive, conscious acts of bodies with authority to enact and enforce those regulations. Regulations proceeding from other sources, morals, habits, custom, and the like, are treated as less authoritative and less binding, at least with respect to the public enforcing power. See discussion *supra* Part IV and accompanying notes.

these standards. Each can control, interpret, and act in relation to the standards, and each can contribute to its ultimate shape and development, but none can, alone, use it instrumentally. The standards, whether marginalized as mere "consumer taste" or inflated as "law" stand apart from any *single* actor to control or to use them instrumentally.<sup>147</sup> The apartness of the standards is additional evidence of its autonomy.

But the system itself, like all systems, may reach its results in a roundabout way, one that may not accord with the highest moral values espoused by the system actors. Each of the actors in this system is motivated to maximize his or her own utility, as measured by each particular actor. Wal-Mart, and importantly, its suppliers, seek to maximize their wealth production; civil society elements seek to maximize their authority, legitimacy and acceptance of their own products—from belief systems, to judgments about the legitimacy of the actions of others, to adoption of whatever action plan or program they support. The media, like Wal-Mart, seek to maximize their wealth production (as commercial entities). The uniqueness of their product, information, merely yields a different place within systems of transactions among value-maximizing actors. Consumers, investors and the financial markets also seek to maximize the value of their transactions. The measure of that value, critical for the functioning of the system this Article outlines, is based on beliefs, including morals and ethics, control of which is at the heart of the values-competition between Wal-Mart, civil society and the media.<sup>148</sup> For Wal-Mart, and its suppliers in particular, maximization might be summarized as low price and high goodwill (understood in this case as the judgment of consumption markets that Wal-Mart is a place from which it is worth consuming).<sup>149</sup>

These value-maximizing vectors do not necessarily have a single and value-positive effect. Wal-Mart's desire to lower prices is widely understood as resulting in strong pressure on suppliers to reduce their

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<sup>147</sup> For its parallels to medieval conceptions of law, see GROSSI, *supra* note 8.

<sup>148</sup> And in a sense, that sort of competition creates a system that mimics the working of the political system beyond which it operates. See Ralph K. Winter, Jr., *Advertising and Legal Theory*, in ISSUES IN ADVERTISING: THE ECONOMICS OF PERSUASION 15, 18 (David G. Tuerck ed., 1978) ("As another example, political advertising employs techniques indistinguishable from those employed in commercial advertising. Name recognition is of critical importance, and sloganeering, hyperbole, and symbols are used pervasively. The point is that virtually every aspect of our lives is affected by attempts at persuasion and that the techniques of advertising are common to every form of persuasion . . . . If in fact consumers are endlessly manipulated by advertising, then the same consumers are no better able to avoid manipulation in their political judgments.").

<sup>149</sup> Wal-Mart, indeed, capitalizes on this well-known reduction, in its communications with consuming markets (markets for the consumption of Wal-Mart's goods and the investment and lending markets). See generally Wal-Mart Stores, Home, <http://www.walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=316> (last visited Feb. 24, 2007).

prices, or risk losing their relationships with Wal-Mart.<sup>150</sup> But price-lowering pressure may produce perverse results. Thus, one might argue that downward price pressure creates incentives for suppliers to "cheat" by finding extralegal or illegal methods for preserving margins while meeting Wal-Mart's demands for lower prices.<sup>151</sup> These methods of cost-cutting can include the hiring of undocumented labor from abroad, charging foreign labor for the privilege of working abroad, and engaging in forced labor practices from passport confiscation, to mandatory excessive hours for minimal to no pay, to the deployment of the local police power to intimidate complaining workers. Suppliers gamble that the risk of exposure is lower than the economic value of the practices. At the margin, Wal-Mart is likely to tie the level of its enforcement to the value of the effort, avoiding enforcement expenditure where it adds nothing to the value of the company (however measured).<sup>152</sup> As a consequence, Wal-Mart might enforce its system of behavior norms with a tolerance for cheating.<sup>153</sup> Wal-Mart's willingness to tolerate cheating may be greater than civil society believes ought to be tolerated (and who thus press Wal-Mart for more vigorous enforcement) aided by a media eager to report on the differences (as news) to consumers who decide between Wal-Mart and civil society's views in the patterns of their consumption and investment, and a political community that might be goaded to action by a wrong choice by multinationals.<sup>154</sup>

Perversely, all actors in the system are better off. Wal-Mart gets the best of both worlds—it purchases low cost supplies until the cost of the supplies includes a dip in economic goodwill, at which point Wal-Mart sanctions its supplier. This repairs the damage to Wal-Mart's economic goodwill after it has received the benefit of low-cost supplies. It has

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<sup>150</sup> In the United States, Wal-Mart's relationships with its suppliers are well known. Even the largest of them has had tremendous pressure exerted on them, sometimes producing great (and sometimes not great for the supplier) changes in operations and profitability. The same dynamic affects foreign suppliers. See, e.g., Fishman, *supra* note 48 (describing relationships with Huffy (Bicycles), Vlasic (pickles), Levi Strauss (apparel), Lovable Company (intimate apparel, and Master Lock (hardware)).

<sup>151</sup> See discussion *supra* Part II (discussing Wal-Mart's efforts to draw in customers and investors through its low prices and good margins).

<sup>152</sup> Valuation is tied to an assessment of consumer and investor tastes, the negative value of information about lapses in enforcement, and the estimate of the extent of decreases in sales or investor confidence given any level of enforcement. This is a difficult task at best.

<sup>153</sup> This certainly seems to be the case among multinational corporations in China. See *Secrets, Lies and Sweatshops*, BUS. WK., Nov. 27, 2006, at 50, available at LEXIS, News Library, BUSWK File ("Some American companies now concede that the cheating is far more pervasive than they had imagined. 'We've come to realize that, while monitoring is crucial to measuring the performance of our suppliers, it doesn't per se lead to sustainable improvements,' says Hannah Jones, Nike Inc.'s . . . vice-president for corporate responsibility. 'We still have the same core problems.'").

<sup>154</sup> "Guarantees by multinationals that offshore suppliers are meeting widely accepted codes of conduct have been important to maintaining political support in the U.S. for growing trade ties with China, especially in the wake of protests by unions and antiglobalization activists." *Id.*

externalized, to some extent, the costs of monitoring, by relying on the efforts of civil society. But civil society is better off as well. Wal-Mart is good for the business of civil society as long as Wal-Mart cannot perfectly manage its suppliers in accordance with its own standards. The media is better off as well. The dynamic relationship between supplier, multinational and civil society generates information that can be packaged as "news." Production of this sort of news is profitable for media entities and reinforces the media's role as information gatekeeper and authoritative source of "facts." Non-traditional media (internet and other sources) also profit. Their ability to transmit information about multinationals from elements of civil society reinforces their own legitimacy and strengthens network ties between them and civil society organizations. The suppliers are better off as well, gambling that the imperfect process of inspection and audit will protect them.<sup>155</sup> But ironically, even the workers are better off. The standards themselves, and the fear of enforcement, change the baseline for the treatment of workers across the board.<sup>156</sup> And again, the system suggests its own autonomy. But it suggests more than autonomy; it also suggests the dynamic nature of the relations that suggests a self-sustaining system operating on the basis of its own internal logic.

## VI. CONCLUSION

With a tremendous debt to Pierre Bourdieu,<sup>157</sup> Yves Delazay provides a useful insight for understanding "how—and by whom—the continual recomposition of the mosaic of legal and regulatory mechanisms is carried out."<sup>158</sup> For that purpose, it is impossible to avoid an analysis of the relation between capital, understood in all its forms, and the exercise of power.

In particular, we must assess the terms of trade between the different forms of capital—economic, academic, or cultural—which circulate there and which determine the hierarchy of techniques in the field of the state. For it is these objective positions which, in the last analysis, determine professional strategies, and hence the institutions or the forms

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<sup>155</sup> This provides an economic base to the old Chinese saying about the mountains being high and the Emperor far away.

<sup>156</sup> This has been the perceived result in places like China. See *Secrets, Lies and Sweatshops*, *supra* note 153 ("The situation in China is hard to keep in perspective. For all the shortcomings in factory conditions and oversight, even some critics say that workers' circumstances are improving overall. However compromised, pressure from multinationals has curbed some of the most egregious abuses by outside suppliers.").

<sup>157</sup> See, e.g., Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (Richard Terdiman trans., 1987).

<sup>158</sup> Delazay, *supra* note 16, at 197, 213.

of representation which circulate in the field of power.<sup>159</sup>

Wal-Mart provides us with a focus for understanding the way in which the social space is coming to be organized under the forms of action that drive modern economic globalization. I have shown how Wal-Mart, like many other multinational enterprises, is contributing to the creation of what is becoming an autonomous and self-contained regulatory system. I have suggested how this system of "[i]nternational economic restructuring . . . challenges the system of social pacification built around the welfare state . . . . It introduces a new power relationship into the field of the state . . . ."<sup>160</sup> But it does more than that; it introduces a new element of regulatory power beyond both the state, and the community of states organized in public international organizations, from quasi-states to semi-private affinity organizations.

Wal-Mart provides an excellent vehicle for understanding the reification of law beyond the state. It evidences the power of large economic units to revert to a more traditional form of developing frameworks, institutions, for governance, that effectively limit the jurisdiction of other normative systems. "An institution is any formal or informal constraint on human behavior. Law is one type of institution . . . . So defined, institutions serve as an excellent unit of analysis and cross-national comparison."<sup>161</sup> I have shown how one such system, built on private networks of relations among powerful actors—multinational corporations, elements of civil society, the media and the consumer/investor communities—have essentially begun to frame a new set of communal networks that have begun to resemble, in form and effect, the structure and habits of traditional public law-making bodies, principally among them the states. These networks extend far beyond the public law-infused functional differentiation that has tended to command the attention of public law internationalists of this generation.<sup>162</sup>

Wal-Mart is able to respond quickly because it has in place a system of supplier norms that it has imposed on its global supplier base. These uniform international standards specify certain basic conduct norms imposed on all suppliers. These norms are made part of the contractual relationship between Wal-Mart and its suppliers. Failure to comply with

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> CURTIS J. MILHAUPT & MARK D. WEST, *ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES* 1 (2004). But note the caution, "[b]ut law interacts with other, less formal institutions, such as markets, codes of best practice, social norms, and shared beliefs about how the world works." *Id.*

<sup>162</sup> For example, Anne-Marie Slaughter has written about globalization as producing a disaggregation of the state into "functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order." Anne-Marie Slaughter, *The Real New World Order*, *FOREIGN AFF.*, Sept.-Oct. 1997, at 183, 184.

the behavior norms could lead to contractually-imposed sanctions, from suspension of the contract to its termination. In addition, the contract permits Wal-Mart to require suppliers to undergo training in business conduct and ethics, and requires all suppliers to conduct their operations with a certain large degree of transparency—permitting Wal-Mart to audit and inspect the supplier.

This system provides another piece of evidence for Richard Falk's contention (itself quite contentious in the international relations community), that:

The state remains the preeminent political actor on the global stage; but the aggregation of states—what has been called “a states system”—is no longer consistently in control of the global policy process. Territorial sovereignty is being diminished on a spectrum of issues in such a serious manner as to subvert the capacity of states to govern the internal life of society, and non-state actors hold an increasing proportion of power and influence in the shaping of world order.<sup>163</sup>

Wal-Mart and its global supplier system, as an autonomous legal system, provide a clue to the shape of the emerging system of governing orders. The system that Wal-Mart appears to be helping create reinforces the idea of networks and law as “a network of communications joined by a common affiliation to the legal theme. The persistence of this communicative network does not depend or derive from its capacity to advance some predefined goal, but rather from its ability to regenerate itself by providing a responsive medium for legal-oriented communications.”<sup>164</sup> This is norm-making on a limited scale, tied precisely to the norm-making entities' limited scope of function. Wal-Mart's jurisdiction is as limited, in its own way, as that of the United States. But the character of the borders of Wal-Mart's power is vastly different from that of a political state, and the power is more bounded. Yet it is power all the same, asserted through an autonomous system of actors that operate beyond the political state.

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<sup>163</sup> RICHARD FALK, PREDATORY GLOBALIZATION: A CRITIQUE 35 (1999).

<sup>164</sup> Oren Perez, *Reflections on An Environmental Struggle: P&O, Dahanu, and the Regulation of Multinational Enterprises*, 15 GEO. INT'L ENVTL. L. REV. 1, 25 (2002).