

LAW, LEGAL INSTITUTIONS, AND THE LEGAL PROFESSION IN THE NEW ECONOMY[©]

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The diverse, dynamic, and inchoate developments we call the new economy are a catalyst for responsive and reflexive changes in the production of law, legal institutions, and the legal profession in Canada and elsewhere. This article examines these changes alongside ongoing themes of the privatization of legal production, hybridization, and juridification. The resulting transformation of legal production has reshaped the role of law experts and aggravated existing tendencies of stratification, concentration, diversification, and marginalization within the legal profession itself.

Les développements divers, dynamiques et rudimentaires que nous appelons la nouvelle économie sont un catalyseur pour des changements en réponse et des changements réflexifs dans la production de loi, les institutions légales, et la profession légale au Canada et ailleurs. Cet article examine ces changements à côté des thèmes continuants de la privatisation de la production légale, la hybridation et la juridification. La transformation de la production légale qui résulte a reconstruit le rôle des experts en droit et aggravé les tendances existantes de la stratification, la concentration, la diversification, et la marginalisation à l'intérieur de la profession légale elle-même.

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I. INTRODUCTION

The new economy seems to be a “brooding omnipresence” in contemporary discussions of democracy, social relations and, of course, the distribution of wealth, opportunity, and distress. It is no less brooding, no less omnipresent, in discussions about law, one of the primary means available to nation-states to address—benignly or repressively—those very issues.

Any discussion of how the new economy affects and is affected by law must begin with a definition of the object in view. Conventionally defined—conventionally, that is, by lawyers—“law” may be said to comprise a body of rules promulgated by duly authorized organs of the state, and enforced by the exercise of its coercive powers. However, other definitions are common, if not conventional, in the discourse of social science. Law is often used to encompass not only the rules of the state legal system, but also the institutions and processes by which the state promulgates and enforces law.¹ This is a significant expansion of the first definition: it reminds us of the social, political, and cultural

¹ See H.M. Hart, Jr. & A.M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge, Mass.: Unpublished tentative ed., 1958); and W.N. Eskridge, Jr. & P.P. Frickey, “Commentary: The Making of the Legal Process” (1994) 107 Harv. L. Rev. 2031.

context within which legal rules are made and applied and also, therefore, of the source of law's contingency and variability.

Further, law is sometimes described as a "field," constituted by a body of professional knowledge and professional praxis. The legal field is shaped by an internal dynamic, generated both by professionals and other important actors whose knowledge constitutes the field, as well as by interaction with other fields.² This important extension of the notion of law points to the need to seek its existence not only in the environs of the state, its rules and institutions, but also in spheres populated by professional actors located in non-state institutions such as law firms and consultancies.

Finally, a growing body of scholarship speaks of legal pluralism, of the significant normative dimension of all social relations, of law deeply imbricated within social relations, rather than imposed by the state or other external forces.³ This view of law acknowledges the importance of the state and of professional actors, but does not privilege state or professional contributions to law over those of other participants in social institutions such as the family, the community, the marketplace, and the workplace, which generate these ubiquitous normative regimes.

Our examination of law in the context of the new economy necessarily draws upon more complex and dynamic definitions of the subject, rather than upon the narrow and static view of law as merely an autonomous and self-contained body of legal rules promulgated by the state. In the same spirit, we use the term "legal institution" to include not just formally constituted organs of state law, but rather all ongoing, repeated, or organized social interactions, state and non-state, formal and informal, explicit and implicit.⁴ Thus defined, legal institutions

² P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 *Hastings L. Rev.* 805; Y. Dezalay, "Negotiated Justice Within the Field of Law: The French Example" in K. Plett & C.S. Meschivitz, eds., *Beyond Disputing: Exploring Legal Culture in Five European Countries* (Baden-Baden: Nomos Verlagsgesellschaft, 1991) 117; and Y. Dezalay & B. Garth, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes" (1995) 29 *Law & Soc'y Rev.* 27.

³ See, for example, M. Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law" (1981) 19 *J. Legal Plur.* 1; S.E. Merry, "Legal Pluralism" (1988) 22 *Law & Soc'y Rev.* 869; and J. Griffiths, "What is Legal Pluralism?" (1986) 24 *J. Legal Plur.* 1.

⁴ R.O. Keohane, "International Institutions: Two Approaches" (1988) *Int'l Stud. Q.* 32; J.G. Ruggie, "Multilateralism: the Anatomy of an Institution" in J.G. Ruggie, ed., *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Columbia University Press, 1993) 3; P. Cooke, "Institutional Reflexivity and the Rise of the Region State" in G. Benko & U. Strohmayer, eds., *Space and Social Theory: Geographic Interpretations of Postmodernity* (London: Blackwell, forthcoming); and G. Teubner, "Evolution of Autopoietic Law" in G. Teubner, ed., *Autopoietic Law: A New Approach to Law and Society* (Berlin: Walter de Gruyter, 1988) 217.

include all sites of normativity, all contexts within which norms are generated, promulgated, and enforced with a view to shaping conduct by human agents.

While these definitions of “law” and “legal institutions” are grounded in current theorizing, they also happen to be particularly apposite for a discussion of the concatenation of political, economic, and technological developments which we refer to as the “new economy,” a term which also deserves definition, and will receive it shortly, in Part II, below. At the threshold of our analysis, however, we want to suggest that it is no coincidence that the state and its travails have become a problem for contemporary scholarship about law, just as it is in debates over socio-economic and political developments. For a very long time, in both traditions of discourse, we have focused upon, perhaps been mesmerized by, the state—as a vehicle of aspiration and an agency of repression, as contested terrain and an impartial, unifying symbol, as the embodiment of power and the epitome of impotence, as the *alter ego* of community and as its nemesis. But when we attempt to resolve these contradictions—to try to imagine law without the state and economy without the state—we are beset with conceptual dilemmas and practical difficulties. Nonetheless, we must persevere. If we persist in thinking of state, law, and economy as having a specified and invariable relationship, rather than one which is contestable and changing, we will limit our own ability to perceive large events and comprehend small ones.

This paper is indeed an attempt to comprehend certain rather small events. How is law made, we want to ask, when the state is under siege as a concept and as a palpable presence? By whom? And especially, with what consequences for the legal profession? At the same time, our paper is about the relationship between those small events and larger ones which are transforming economies, societies, and politics everywhere.

We begin with a tour of the new economy—around the world in half a dozen pages—and end in the upholstered precincts of law offices. Need we say it? The paper is necessarily impressionistic.

II. THE “NEW ECONOMY”

The “new economy” is obviously not a term of precision, nor are its boundaries strictly limited to the economic realm. Its novelty largely resides in the fact that certain simultaneous, and arguably interrelated, developments are occurring at the level of world order, of the state and of production. The result, as we will suggest below, is an unusually

powerful challenge to established institutions and understandings. Speaking specifically to law and legal institutions, this challenge does not, of course, imply that the old is immediately and universally replaced with the new. On the contrary, although we will focus upon the new economy, we will also try to keep in view the reactions—indeed, the resistance—of law and legal institutions associated with the old economy or, rather, the old economies which persist everywhere and predominate in most parts of the world. The persistence of these older expressions of law ensures that the new shape of law and legal institutions will only gradually become clearer as the old and new become visible side-by-side, or as old and new are subsumed into complex hybrids which contain part of both.⁵

Keeping in mind all of these disclaimers, however, we do propose to identify, in a summary way, the implications and complexities of the phenomenon known in the vernacular as the “new economy.” As suggested, the new economy is both defined by and defines (a) a “new world order,” (b) “new patterns of state-civil society relations,”⁶ and (c) a “new techno-economic paradigm.” These replace or reshape their respective predecessors (a) the old post-war *Pax Americana* world order and related Bretton Woods institutions, (b) the interventionist, Keynesian welfare state, and (c) the traditional, Fordist paradigm of mass manufacturing and its familiar labour market institutions.⁷ Following a brief explanation of each of these elements, we will consider their implications for law, legal institutions, and the legal profession.

⁵ B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995) c. 4.

⁶ R. Grinspun & R. Krekewich, “Consolidating Neoliberal Reforms: ‘Free Trade’ as a Conditioning Framework” (1994) 43 *Stud. Pol. Econ.* 33.

⁷ Fordism is generally characterized as standardized mass production using assembly-line techniques, single-purpose machinery, and semi-skilled and unskilled labour. Large inventories of parts are used as buffer stocks to ensure continuous high-volume production runs. Industrial relations in traditional Fordist industries generally comprised (in the North American case) Wagner-style social contracts between labour and management in which labour concedes to management much shop-floor autonomy, overall production strategy, and the right to strike over the course of a collective agreement in return for tolerance of unionization, perhaps even industry-wide or pattern bargaining in core industries (e.g., automobile), and labour’s guaranteed shares in productivity gains. In the European context, the state has undertaken a more overt role as a mediator between labour and management in more broadly based, tripartite, or corporatist institutional arrangements. See generally R.W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (New York: Columbia University Press, 1987); and R. Boyer, ed., *The Search for Labour Market Flexibility: The European Economies in Transition* (Oxford: Clarendon, 1988).

A. *A New World Order*

A new world order has been evolving since the early 1970s. Contributing to its dynamic have been challenges to the post-war role of the United States as world military, economic, and political leader,⁸ the deterioration of the old General Agreement on Tariffs and Trade (GATT) regime⁹ and trade multilateralism,¹⁰ the end of the gold standard and financial regulation,¹¹ the restructuring of Bretton Woods institutions, notably GATT-WTO, the International Monetary Fund (IMF) and World Bank,¹² and increasing recourse to new strategies of non-tariff protectionism.¹³ To be sure, the new world order of the 1990s is not entirely orderly; potential for instability resides in the sudden collapse of

⁸ The United States' share of world capital experienced a noticeable decline from 41.9 per cent to 33.6 per cent over the period 1963-1980. Statistics cited from M.K. Hawes, "The Steel Industry: Change and Challenge" (1986-87) 42 *Int'l J.* 25 at 32. See also Cox, *supra* note 7; and R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, N.J.: Princeton University Press, 1984).

⁹ GATT's decline can be measured by the increasing percentage of world trade taking place outside GATT jurisdiction, under some rubric of a "managed-trade" agreement, or subject to a plethora of subtle non-tariff barrier protection. In manufactured commodities, which account for roughly 40 percent of total world trade, the ratio of managed trade to total trade rose from 13 per cent in 1974 to 30 per cent in 1982. See Hawes, *supra* note 8 at 35.

¹⁰ GATT is only viable to the extent the major, post-war economic powers, of which the United States was the most predominant, were prepared to play by its rules or overlook the bending of GATT rules by other countries in times of crises. The United States had this capacity during the initial decades of post-war reconstruction. GATT's influence progressively deteriorated during the economically turbulent decade of the 1970s, as the United States, in particular, shifted its emphasis from GATT and multilateralism to a more aggressive bilateralism and unilateralism in trade. We see this evidenced first by President Nixon's surcharge of 10 per cent placed on all American imports in 1971. This induced a similar shift in trade policies amongst most GATT member-countries. This is not to suggest that GATT is no longer relevant; indeed, it may achieve even greater prominence with the conclusion of the Uruguay Round and its reformulation into an even more powerful World Trade Organization (WTO).

¹¹ M. Bienefeld, "Financial Deregulation: Disarming the Nation-State" (1992) 37 *Stud. Pol. Econ.* 31.

¹² Canada added its voice in calling for reforms to the IMF to prevent currency speculation during the August, 1995 G-7 summit in Halifax, Nova Scotia, which Prime Minister Chretien hosted.

¹³ Studies estimate that by 1983 nearly one-half of all international trade was under "quantitative controls and that proportion is burgeoning." See F. Clairmonte & J.H. Cavanagh, "Transnational Corporations and the Struggle for the Global Market" (1983) 13 *J. Contemp. Asia* 446 at 472. G. Hufbauer, "Beyond GATT" (1989-90) 77 *Foreign Pol'y* 64 at 68, contends that by 1987, non-tariff barriers probably diminished world commerce by about U.S. \$330 billion and that their restrictive effect is now likely three to four times greater than existing tariff barriers.

the Soviet empire,¹⁴ and the fitful experiments in reconstruction being conducted in Russia and Eastern Europe. Unlike the bipolar post-war world, the new order is multipolar,¹⁵ with three powerful regional economic spaces, each dominated by a regional power. Most advanced, in formal terms, are the European Community (EC) and the North American Free Trade Agreement (NAFTA), dominated by Germany and the United States, respectively. While these two regional blocs have each been considering expansion—the EC into post-communist Central and Eastern Europe, and NAFTA into South America, possibly beginning with Chile¹⁶—domestic and international political considerations have, for the moment, slowed momentum. Less advanced in terms of formal integration, but arguably experiencing greater momentum, is the “Yen bloc” of Southeast Asia, led by Japan.¹⁷ Whether regional economic integration will lead to global liberalization or to regional neo-mercantilism—“Fortress Europe” and “Fortress North America”—is not yet clear.

One important effect of these developments is to secure the “deep integration” of the state within global and regional economic

¹⁴ The breakdown of the Soviet Union itself has spawned numerous ethnic/nationalist conflicts. This same strife has consumed the former nation of Yugoslavia.

¹⁵ This is also partly due to the growing competitiveness of many newly industrializing countries (NICs) in Latin America and Southeast Asia. As a consequence, Latin American and South-East Asian NICs almost doubled their share of world capital over the period 1963-1980 from 6.2 per cent to 10.1 per cent, as has Japan (7.1 per cent to 15.5 per cent). See Hawes, *supra* note 8 at 32. The statistics include Argentina, Brazil, Mexico, India, Hong Kong, and South Korea within the group of Latin American and East Asian NICs.

¹⁶ Canada’s Prime Minister, Jean Chretien, announced that agreement had been reached between the governments of Canada, the United States, and Mexico to negotiate Chile’s entry into NAFTA by 1 January 1996. The announcement was made at the Summit of the Americas conference in Miami, Florida in December 1994, where the thirty-four participant countries also agreed to work toward a western hemispheric free trade area and complete such work by 2005. Chile’s entry into NAFTA has been sidelined by the 1996 American presidential campaign. In the interim, Canada and Chile have entered into a bilateral trade accord, signed 18 November 1996.

¹⁷ Intra-Southeast Asian trade and investment has grown rapidly since the early 1970s. In 1970, the aggregate value of Japan’s trade with Hong Kong, South Korea, Singapore, Taiwan, Malaysia, Thailand, Indonesia, and the Philippines was half of its trade with North America. By 1989, Japan’s trade in Asia surpassed that in North America. As a ratio of investment to GNP, Japanese investment in the above Asian countries was 8.3 times its investment in the EC and four times its investment in North America. See E. Terry, “New empire created as Tokyo moves south” *The [Toronto] Globe & Mail* (26 February 1990) B1 and B13. See also “A Survey of the Yen Block: Together under the Sun” *The Economist* (15 July 1989) 1.

regimes,¹⁸ which act as a “conditioning device”¹⁹ effectively to foreclose as viable public policy options any interventionist initiatives which might violate the fundamental quasi-constitutional norm of liberalized trade.

B. New Patterns of Relations Between the State and Civil Society

Thus, virtually all advanced industrialized states, willingly or under duress, are committed to policies designed to privatize, deregulate, and liberalize their economies. Global trade regimes, regional economic integration, and domestic neo-liberalism have been mutually reinforcing, if not consciously orchestrated. Their combined effect has been to transform the relations between the state and civil society. In practical terms, government now has at best a weakened capacity to pursue social policies through public initiatives or institutions, or to conduct, stimulate, channel, or regulate economic activity. There is no longer much that the state can do by way of economic policy, beyond maintaining macroeconomic stability and enforcing “the rules of the microeconomic game.”²⁰ Specifically, states are no longer able to use Keynesian strategies to manage their domestic economies or to insulate them from the vicissitudes of international markets, as they did for much of the post-war period.

It must be said that the erosion of the Keynesian welfare state, and the ensuing transformation of state-civil society relations, is attributable neither to globalization and regional economic integration alone nor to the liberalization of national economies which these entail. Separate from—but supportive of—these developments has been the growth of neo-conservatism and of the atavistic populisms with which it is allied. These movements, now ascendant in the United States, contest the very notion that governments have a right and a duty to act as they have been doing at least since the time of the New Deal—purposefully and proactively, through innovative legislation, to achieve the greatest

¹⁸ D. Trubek, “Social Justice ‘After’ Globalization: Transnational Agency, International Regimes and the Deep Integration of Economies” (Paper presented at the University of Toronto Law School and the Canadian Institute for Advanced Research, November 1995) [unpublished].

¹⁹ Grinspun & Krekewich, *supra* note 6. This is not to imply that the nation-state is inevitably passé. For a defence of the nation-state’s efficacy and continuing relevance, see R. Boyer & D. Drache, eds., *States Against Markets: The Limits of Globalization* (London: Routledge, 1996).

²⁰ Boyer & Drache, eds., *supra* note 19 at 34-35.

good for the greatest number.²¹ Political elites, experts, bureaucracies, and interventionist strategies are all in bad odour these days.²² All of this has obvious implications for law and legal institutions, especially those closely identified with the activist state.

Further, contemporaneous with the liberalization of domestic and international trade, states have been liberalizing in a juridical sense. Their capacity to use their coercive and regulatory powers has also been “hollowed out” by the adoption or reinvigoration of self-denying ordinances such as charters of rights, which constitutionally constrained their right to implement certain kinds of regulatory regimes.²³ Finally, centripetal and centrifugal forces have combined to further disempower the legal institutions of the state. On the one side, supranational entities such as the GATT, the European Union (EU), and NAFTA constrain the capacity of member states to act unilaterally and in response to what they define as their own best interests. On the other side, regional and ethno-cultural entities are aggressively asserting the right to make their own social and economic policies within their own space and in their own interest, without interference from the containing state.

To summarize, more and more activities—especially those related to economic activity—are being moved beyond the reach of state intervention, with a corresponding expansion of the scope of individual—especially entrepreneurial—action. Within the residual area of state competence, various constraints—internal and external, legal and political—are further disabling the state and to that extent expanding the scope of civil society.²⁴

²¹ We do not mean to deflect the critique of the New Deal and other interventionist legislation, to the effect that it had the effect of de-radicalizing social movements and incorporating them more effectively within the assumptions and structures of capitalism. In the labour sector, see especially K. Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941” (1978) 62 *Minn. L. Rev.* 265; and J.B. Atleson, “Law and Union Power: Thoughts on the United States and Canada” (1994) 42 *Buffalo L. Rev.* 463.

²² See H.W. Arthurs, “‘Mechanical Arts and Merchandise’: Canadian Public Administration in the New Economy” (1996) *McGill L.J.* [forthcoming].

²³ M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational, 1994); H.J. Glasbeek & M. Mandel, “The Legalization of Politics in Advanced Capitalism: The Canadian *Charter* of Rights and Freedoms” (1984) 2 *Socialist Stud.* 84; H.J. Glasbeek, “Some Strategies for an Unlikely Task: The Progressive Use of Law” (1989) 21 *Ottawa L. Rev.* 387; and L. Panitch & D. Swartz, *The Assault on Trade Union Freedoms: From Consent to Coercion Revisited*, rev. ed. (Toronto: Garamond, 1988) c. 4.

²⁴ As we will indicate in Part III, below, there are also fields in which state power is expanding, rather than contracting.

C. *A New Techno-Economic Paradigm*

The new economy also encompasses an emerging “techno-economic paradigm,” the summation of widespread changes from Fordist to flexible modes of production.²⁵ The Fordist paradigm of standardized, mass manufacturing has broken down because of its limited capacity to respond to greater differentiation and volatility of market demand, which requires shorter production runs, quicker retooling, and economies of scope and specialization, as well as scale. These new production requirements are being facilitated by computerization and other developments in information and telecommunication technologies, which promote efficiency and make batch production more feasible.²⁶ Furthermore, a rapidly changing international division of labour from the mid-1970s onward has made many core Fordist manufacturing operations in Western countries uncompetitive, resulting in the transfer of many routinized processes to the newly industrializing countries of Latin America and Southeast Asia. Finally, dramatic change has not been confined to the manufacturing sector. Analogous developments have occurred in the service sector, which has assumed increasing predominance in all advanced economies.

Changes in the processes of production have obviously affected the social organization of work, and especially industrial relations. The resulting stresses have been exacerbated by the inability of unions to penetrate the rapidly growing service sector and by the state’s abandonment of its regulatory and social welfare functions. The net result is that Fordist-style industrial relations have been largely confined to their traditional—but shrinking—strongholds in the primary and secondary manufacturing sectors, and to the public sector, itself under considerable stress for reasons noted.²⁷

All over the world, over the past twenty years, the erosion of standardized, mass manufacturing has triggered intense and extensive

²⁵ For a definition of Fordism, see Boyer, *supra* note 7.

²⁶ M.J. Piore & C.F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984). We are not implying that the “new economy” emerged simply because it was technically possible. Technological innovations emerge within a broader social and political context. In this case, to facilitate production strategies for a limited set of large corporations, their sponsors, allies, and clienteles. These corporate strategies, in turn, required “liberalization” of long-standing arrangements for the orderly adjustment of international fiscal, monetary, and trade relations.

²⁷ H.W. Arthurs, “Labour Law Without the State?” (1996) 46 U.T.L.J. 1 [hereinafter “Labour Law”].

restructuring, rationalization, and internationalization. These processes may be global, but they have not resulted in universal outcomes. Restructuring has, more often than not, fallen short of a full-fledged transition to what is commonly referred to as “flexible production.”²⁸ The more typical outcomes are varieties of “neo-Fordism,”²⁹ that is, complex hybrids of Fordism and flexible production, often organized across sectoral, regional, and national spaces. This heterodoxy appears to be rooted in history and culture,³⁰ the institutional-political context of

²⁸ Flexible manufacturing is ideally defined by a number of interrelated elements, many pioneered by the Japanese. First is a heavy reliance on technical innovations, such as information technology, computer-aided design and manufacturing technology, and numerically controlled machine tools and robots. These facilitate quick reprogramming of assembly line equipment and smaller batch production without sacrificing efficiency. Second, assembler-supplier relations become close, collaborative networks, instead of arm’s-length, competitive links. This requires greater trust, essential for just-in-time (JIT) delivery of parts and supplies to manufacturers. Third, industrial relations are qualitatively restructured. Multi-purpose machinery requires more multi-skilled, highly trained workers, usually organized in work teams. Workers progressively acquire responsibility for total quality control and practice a highly sophisticated learning-by-doing on the job. See R. Boyer, “Capital-Labor Relations in OECD Countries: From the Fordist ‘Golden Age’ to Contrasted National Trajectories” (Paper presented at the WIDER Project on Capital-Labor Relations, Harvard University, 1989) [hereinafter “Capital-Labour Relations; unpublished]; and Piore & Sabel, *supra* note 26.

²⁹ Neo-Fordism, at least in the North American case, generally encapsulates the uneven, problematic nature of the transitions to flexible manufacturing. More progress has generally been made in the introduction of new technologies, the reorganization of manufacturer-supplier networks, JIT inventory control and delayering of middle management. On the other hand, industrial relations in North America remain adversarial, perhaps even more in the aftermath of NAFTA; Fordist-style collective bargaining in most core industries remains the norm, albeit one on the defensive; and most unions and management distrust work teams (unions for fear of a weakening of labour’s power on the shop floor and increased managerial control; management for the opposite reason). See Boyer, *supra* note 7; S. Wood, “The Transformation of Work?” in S. Wood, ed., *The Transformation of Work? Skill, Flexibility and the Labour Process* (London: Unwin Hyman, 1989) 1; D. Drache & R. Boyer, “Introduction” in Drache & Boyer, eds., *supra* note 19, 1 at 16-17; R. Kreklewich, “North American Integration and Industrial Relations: Neoconservatism and Neo-Fordism?” in R. Grinspun & M.A. Cameron, eds., *The Political Economy of North American Free Trade* (New York: St. Martin’s, 1993) 261; D. Drache, “Lean Production in Japanese Auto Transplants in Canada” (1994) *Can. Bus. Econ.* 45; and D. Drache, “New Work and Employment Relations: Lean Production in Japanese Auto Transplants in Canada” in Drache & Boyer, eds., *supra* note 19, 227.

³⁰ The specific nature of the post-Fordist compromise across countries in Europe and North America very much built upon the varying manner in which capital, labour, and the state coalesced during the previous decades of the Keynesian compromise. See Boyer, *supra* note 7; “Capital-Labor Relations,” *supra* note 28; and E.H. Lorenz, “Trust and the Flexible Firm: International Comparisons” (1992) 31 *Indus. Rel.* 455. For a historical examination of the Canadian post-war compromise, see J. Jenson, “Representations in Crisis: the Roots of Canada’s Permeable Fordism” (1990) 23 *Can. J. Pol. Sci.* 653.

restructuring,³¹ the varying strengths of key actors,³² the changing role of the state,³³ and a region's or country's location within the structure of the global economy.³⁴ However, in specific circumstances, despite the centrifugal forces which have spun manufacturing out to the peripheral economies of the third world, a centripetal force also seems to be at play. There is a logical affinity between the newly emerging regional economic spaces and neo-Fordist production,³⁵ which depends on tightly

³¹ One need only contrast the European mode of integration with that of North America. The latter mode of integration, via NAFTA, is promoting a restructuring process that is indelibly neo-liberal. See Grinspun & Krekewich, *supra* note 6. Restructuring in the European context remains more attentive to preserving the identity of social markets. See H.G. Mosley, "The Social Dimension of European Integration" (1990) 129 Int'l Lab. Rev. 147; M. Rhodes, "The Social Dimension after Maastricht: Setting a New Agenda for the Labour Market" (1993) 9 Int'l J. Comp. Lab. L. & Indus. Rel. 297; B. Bercusson, "Social Policy at the Crossroads: European Labour Law after Maastricht" in R. Dehousse, ed., *Europe After Maastricht: An Ever Closer Union* (München: Law Books in Europe, 1994) 149; and W. Hutton, *The State We're In* (London: Jonathan Cape, 1995) c. 4.

³² Particularly important is the balance of power between capital and labour and the extent to which either is integrated in a tripartite corporatist fashion institutionally with the state. In general, the less the prevalence of tripartite corporatist structures, the more likely integration will proceed on a neo-liberal basis. The United States is perhaps the prime example.

³³ Global economic recession by the early 1980s exacerbated the indebtedness of most Western countries. This, along with the liberalization of global trade and finance which rendered interventionist policies and state institutions innocuous, led to the erosion of the Keynesian welfare state. This process is referred to, possibly hyperbolically, as the "hollowing out" of the state. See B. Jessop, "Towards a Schumpeterian Workfare State? Preliminary Remarks on Post-Fordist Political Economy" (1993) 40 Stud. Pol. Econ. 7; and D. Held "Democracy, the Nation-State and the Global System" (1991) 20 Econ. & Soc'y 138. The central point here, though, is that this inoculation of the state has been an uneven one. The erosion of the Keynesian welfare state is much more apparent in North America than in Germany or Japan. In the United States, the state has become a powerful force in promoting a realignment of social forces and enforcing a series of policies compatible with broader neo-liberal projects of restructuring and internationalizing production, largely through privatization and deregulation. This has influenced the policy direction in Canada and Mexico.

³⁴ For example, NAFTA represents more of a conditioning framework for Mexico and Canada than it does for the United States, given the respective asymmetries of power in North America. The United States can, if it wishes, withstand trade friction and holds the larger trump cards in the form of (a) investment capital and (b) access to its larger market over its smaller neighbours. Canada and Mexico remain "price-takers" not "price-makers" with respect to the nature of restructuring implied by NAFTA.

³⁵ C. Sabel, "Flexible Specialization and the Re-emergence of Regional Economies" in P. Hirst & J. Zeitlin, eds., *Reversing Industrial Decline? Industrial Structure and Policy in Britain and her Competitors* (Oxford: Berg, 1989) 17; M. Storper & A.J. Scott, "The Geographical Foundations and Social Regulation of Flexible Production Complexes" in J. Wolch & M. Dear, eds., *Territory and Social Reproduction* (London: Allen & Unwin, 1988); M. Storper & A.J. Scott, eds., *Production, Work, Territory: The Geographical Anatomy of Industrial Capitalism* (Boston: Allen & Unwin, 1986); D. Wolfe, "The Wealth of Regions: Rethinking Industrial Policy" (Working Paper No. 10) (Toronto: Canadian Institute for Advanced Research, May 1994); and R. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton, N.J.: Princeton University Press,

knit webs of manufacturer-suppliers and just-in-time (JIT) inventory control. These devices generate incentives for more intense regional concentration of production without altering the need for global distribution networks for final products or services.³⁶

However, whether the forces are centripetal or centrifugal, we are clearly witnessing an erosion of the post-war transnational corporation with its branch plant subsidiaries, standardized product lines, and relatively static production processes. This erosion coincides with the decline of the Keynesian welfare state,³⁷ and, to an extent, the two are connected. Because the old Fordist companies were the dominant mode of industrial production, they also exercised a paradigmatic influence on the social organization of work and on public policies related to work. They were, moreover, a primary source of jobs, tax revenues, and civic largesse and leadership. Not least, they were both the subject and object of fiscal and monetary policies. And, as all of these state and private institutions and strategies are changing, so too are the legal structures which were meant to give them effect.

What, then, is the new techno-economic paradigm? The heterogenous nature of neo-Fordism and other hybrid forms makes it difficult to discern unidirectional labour market changes. However, at least two broad tendencies seem to be emerging.

First, stratification both within and amongst firms is becoming more pronounced. Within larger firms, the relatively privileged and hitherto quite stable “core” of employees (those protected by long-term tenure, large unions, and strong collective agreements) is shrinking in size relative to an expanding “periphery” of less securely tenured, less well-paid, more narrowly trained, and lower skilled employees. The latter group bears the brunt of downsizing, cost-cutting, and rationalization initiatives, though like the “core” itself, even the new technostructure and middle management are by no means immune. As amongst firms, not all enterprises have fared equally well in the new economy. Some—generally large, diversified companies—have been

1993). The phrase “regional economic spaces” refers to both subnational and supranational regions. Within regional free trade areas, the presence of a national border is no longer an obstacle to the formation of neo-Fordist networks of production.

³⁶ These tendencies are apparent in the North American automotive industry. See J.M. Rubenstein, “Changing Distribution of the American Automobile Industry” (1986) 76 *Geographical Rev.* 288; A. Mair, R. Florida & M. Kenney, “The New Geography of Automobile Production: Japanese Transplants in North America” (1988) 64 *Econ. Geography* 352; and A.K. Glasmeier & R.E. McCluskey, “U.S. Auto Parts Production: An Analysis of the Organization and Location of a Changing Industry” (1987) 63 *Econ. Geography* 142.

³⁷ M. Storper, “Industrialization and the Regional Question in the Third World: Lessons of Postimperialism; Prospects of Post-Fordism” (1990) 14 *Int'l J. Urban & Reg. Res.* 423.

able to withstand competitive pressures and restructure quite dramatically; they have aggressively maintained or consolidated their market shares. Others—including many small to medium businesses—must retreat into specialized niches and slash costs and profit margins in order to survive. This explains the prominence of small business as a major source of new jobs—however ephemeral—and the proliferation of self-employed consultants and service providers.

The result is more diverse and segmented labour markets. “Core” and “periphery” no longer connote easily defined spatial locations; now they signify favoured and disfavoured segments of the economy, groups of firms within given sectors, and elements within firms.

Second, the workplace itself is becoming more fragmented spatially and functionally, particularly in the service sector. The liberalization of trade rules governing many service industries under NAFTA and the Uruguay Round of GATT has facilitated the spatial dimension of fragmentation; new technologies have made possible the functional dimension. As a result, service corporations are able to decentralize production regionally or globally, often by subcontracting out particular components of work.³⁸ This shifts the political risks and social costs of adjustment more broadly across geographical areas with the added benefit (for management) of not losing central strategic control over the entire work process.³⁹ Personal computers, faxes, and modems have made it possible for a significant fraction of the service sector workforce to work either full-time or part-time at home, instead of commuting to the office. And finally, neo-Fordist restructuring is neither gender—nor racially—neutral. Fragmentation of the labour market also takes place along demographic fault lines with disfavoured

³⁸ The insurance industry in Canada and the United States, for example, is well-known for subcontracting out low value-added data-processing work to low-wage southern American states or Mexico. Within Canada, New Brunswick—an area of chronic unemployment, with relatively low labour standards—has upgraded its phone system to enable it to become a continental centre for telemarketing and other phone-based business procedures. Subcontracting in the North American automotive industry has contributed to a disparity between productivity and real wages. See S. Head, “The New Ruthless Economy” *New York Review of Books* (29 February 1996).

³⁹ Governments themselves have contributed to this fragmentation process. It is now technologically possible to locate departments or functionally specific units of ministries in any region of the country or province. For example, consider the location of the GST-processing unit at Summerside, Prince Edward Island.

groups—including immigrants and young people—often relegated to non-standard, occasionally illegal, conditions of employment.⁴⁰

In the long term, stratification and fragmentation might represent either a potential rallying point or a formidable barrier for labour unions and other social movements, in their efforts to influence the shape of the new techno-economic paradigm. To date, it has been very much the latter. The results have become part of our everyday experience: static or diminishing wage rates; high levels of unemployment reaching across all categories of employment; downsizing, closures, and relocations leading to disruption of family and community life; and, predictably, social and political tensions.

Whether, in the long run, a prosperous new economy will emerge from the travails of the old remains to be seen. Whatever its other consequences, however, it is already clear that the new paradigm of production and the social relations of work more-or-less captures the new environment, the new formative influences, which are changing important aspects of law and the legal system.

D. Implications

These diverse, dynamic, and inchoate developments we call the new economy will obviously be a catalyst for changes in law, legal institutions, and the legal profession. As a preface to the next section of this essay, we suggest that a crude taxonomy of those changes might characterize them as either responsive or reflexive. Responsive changes, in our taxonomy, are those which are driven by the need to address the juridical and institutional implications of economic, political, social, and other trends associated with the new economy. Reflexive changes are those which seem to be occurring within law, legal institutions, and the legal profession as they themselves experience, learn from, and adapt to changes which parallel those occurring in the larger society.

Amongst the responsive changes are the need to develop and administer new structures and techniques of governance, embracing state, supra-state, sub-state, non-state, corporate, community, and hybrid institutions. New forms of property which are characteristic of the new economy, especially new forms of intangible property, must be created, disseminated, and regulated. New social relations, often shaped by the

⁴⁰ J.A. Fudge, "Fragmentation and Feminization: The Challenge of Equity for Labour Relations Policy" in J. Brodie, ed., *Women and Public Policy in Canada* (Toronto: Harcourt Brace, 1996) 57.

harsh consequences of a stratified and fragmented economy, must be mediated by new processes of dispute resolution, and new juridical concepts.

Reflexive changes are obviously in part directly traceable to responsive changes. A new techno-economic paradigm which implicates the creation of new property regimes also implicates, as it were, the creation of a new category of juridical technicians. Some reflexive changes are, however, less directly related to external stimuli. New computer technology, for example, changes the legal needs of global corporations, but also makes possible changes in the production of law, in the way in which law firms and other law experts do their work, in the structure and operation of internal labour markets in law firms and other sites of legal activity, in their capital structure, and in their ability to serve increasingly dispersed, fragmented, and volatile client markets. As a consequence, globalization, stratification, and fragmentation are all becoming increasingly prominent features of the law "industry."

The following sections of this paper trace these responsive and reflexive changes first by considering the production of law, then by looking at the social relations of production, and finally by focusing more intensively on one specific site of those relations, the legal profession itself.

III. THE PRODUCTION OF LAW

Law has long been regarded as the state's conventional strategy for social control and regulation, the former term being understood to refer to disciplining the poor and powerless,⁴¹ the latter to constraining the market behaviour of the rich and powerful. Rather recently, law has also come to be viewed as an important strategy for social transformation and structural change because of its close association with the coercive power of the state, and apart from that power, because of its importance as a powerful symbol and cultural force.⁴² However, the advent of the new economy forces us to reconsider each of these manifestations of law.

⁴¹ For a recent contribution to the cultural history of the idea of law as oppression and lawyers as its agents, see Y. Castan, F. Lebrun & R. Chartier, "Figures of Modernity" in R. Chartier, ed., *A History of Private Life: Passions of the Renaissance*, vol. 3 (Cambridge, Mass.: Belknap Press of Harvard University Press, 1989) at 122-23.

⁴² For a brilliant exposition of the uses and expectations of law, see R.A. MacDonald, *Study Paper on Prospects for Civil Justice* Ontario Law Reform Commission (Toronto: Queen's Printer, 1995).

Globalization—a defining characteristic of the new economy—complicates social control. Domestic social control is easy enough to prescribe, if not to achieve. Indeed, governments are apparently infatuated with the possibilities these days, as they adopt draconian strategies to suppress crime, enforce “family values,” exclude unwanted immigrants, and punish welfare recipients. However, an effective attack on globalized crime—on money laundering, arms smuggling, or sex tourism—would require not only resuscitation and extension of state law but unprecedented supra-state initiatives in law making and law enforcement. The retrenchment of the state’s regulatory power—another feature of the new economy—creates a conundrum. Those with faith in the global marketplace may rejoice in the notion that businesses can escape the reach of regulation by shifting operations and assets abroad. But even its most ardent devotees surely cannot wish or imagine that in a global marketplace, there will be no norms, no means of creating them, no means of securing compliance. It is one thing to gloat over the inability of governments to collect taxes or control currency flows, and quite another to tell exporters that they cannot collect for goods shipped, patentees that they cannot protect their inventions, unpaid bond houses that they cannot bring to book twenty-eight-year-old rogue traders, and investors that they cannot safeguard their money against state confiscation. And so with technology and its capacity to trump state regulation: true, in the new economy, governments cannot shield their citizens from satellite transmissions which rain down foreign politics, commerce, smut, or culture; but by the same token they cannot protect them from foreign overfishing, acid rain, or nuclear accidents.

In short, there are many positive reasons why even enthusiasts for the new economy might wish to populate it with serviceable legal regimes of regulation and social control. And despite globalization, despite the weakening of state regulation, despite new technologies, it is quite possible to imagine how this demand for law might be satisfied. It is not simply a matter of the wish being father to the thought or necessity the mother of invention. Several strands of socio-legal scholarship already attest to versions of the proposition that law never was produced exclusively, or even primarily, by the state.⁴³ Using insights derived from

⁴³ Bourdieu, *supra* note 2; and Teubner, *supra* note 4. For a disaggregation of the variety of state-society relations at a meso or sectoral level, see W.D. Coleman & G. Skogstad, “Policy Communities and Policy Networks: A Structural Approach” in W.D. Coleman & G. Skogstad, eds., *Policy Communities and Public Policy in Canada: A Structural Approach* (Mississauga, Ont.: Copp Clark Pitman, 1990) 14. See also, generally, *supra* note 3.

this scholarship, we will examine how law is being produced in the new economy, both within the state and elsewhere.

In effect, we will examine how the new economy reshapes an industry with an unusually high proportion of knowledge workers, whose product is the norms of social behaviour. In the current vernacular, the production of law can be described as increasingly “lean” and “flexible,” high value-added and intensely competitive, and functionally and spatially diffuse. Law production is characterized by technical innovations, or more accurately, by changes in the mix and relative importance of several pre-existing modes of production. These innovations or changes include: the emergence of multiple sources of law within the state, increased transnational production of legal norms, greater competition between state and non-state producers of law, the privatization of state legal functions, hybridization, and juridification—the penetration of law and legalism into domains previously governed by other forms of social ordering. Each of these phenomena will be reviewed briefly.

A. *The Production of Law by Competing Agencies of the State*

As is now well understood—everywhere except in fundamentalist legal circles—state law is produced not only by the legislature but by the executive and judicial branches of government. Not surprisingly, given their differing mandates and make-ups, various agencies and organs of government are frequently at odds over whose law will prevail, and whose will authoritatively define social values, express public policies, and regulate personal behaviours. Debates about the “rule of law,” the proper scope of judicial review and judicial independence, the strict and liberal approaches to statutory interpretation, the presumptively limited character and scope of delegated legislative and judicial functions, proportionality or overreach when government action is reviewed under the *Charter*, cabinet’s domination of or accountability to Parliament, and the contestability of administrative discretion and policy guidelines are all, in fact, debates amongst the many legal institutions of the state over whose law will prevail in what circumstances. They are, in essence, debates about who may use state law as an instrument of social control and regulation, and on what terms.

Of course, law has not always been used instrumentally to advance the purposes of the state. On the contrary, in the Anglo-American tradition, law also portrays itself as a shield against oppression by the state. And not just as a shield: from the very beginnings of

regulation in Victorian England, judges have used law as a sword to hack away at effective state intervention in the market place.⁴⁴ These contradictions in the use of state law—to regulate and to defeat regulation—have persisted in the United Kingdom,⁴⁵ Canada,⁴⁶ and the United States—notoriously so during the New Deal⁴⁷—and more recently in the European Community.⁴⁸ Indeed, they became embedded in the regulatory apparatus of the Fordist state and were one cause of its limited effectiveness. However, the contradictions have recently intensified.

This has come about in a rather unexpected way. Litigation under the American *Bill of Rights*⁴⁹ often undertaken defensively up to the 1930s to forestall regulation, began to be used creatively—and with apparent success—during the post-war period, and especially during the 1960s and 1970s, to expand civil rights and to promote various progressive projects of social transformation. Understandably, marginalized groups in other countries began to demand access to comparable legal technologies with which to empower themselves. These demands were responded to with some genuine liberal idealism—and perhaps also a degree of cynicism. The result was a

⁴⁴ H.W. Arthurs, *“Without the Law”: Administrative Justice & Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985).

⁴⁵ A.V. Dicey, *The Law of the Constitution* 10th ed. by E.C.S. Wade (London: Macmillan, 1959); and G.B. Hewart, *The New Despotism* rev. ed. (London: Ernest Benn, 1945). Modern critiques include W.G. Friedmann, *The State and the Rule of Law in a Mixed Economy* (London: Stevens, 1971); R.F. Heuston, *Essays in Constitutional Law* 2d ed. (London: Stevens, 1964); and J. Willis, “Three Approaches to Administrative Law: The Judicial, the Conceptual and the Functional” (1935) 1 U.T.L.J. 53.

⁴⁶ Ontario, *First Report of the Royal Commission Inquiry into Civil Rights* (Toronto: Queen’s Printer, 1968) [hereinafter *McRuer Report*]. For a critique of the *McRuer Report*, see H.W. Arthurs, “Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law” (1980) 30 U.T.L.J. 225 at 237-39 [hereinafter “Jonah and the Whale”].

⁴⁷ New Deal legislation, particularly that which would expand the state’s administrative functions, was weakly embraced, at best, and often opposed by most segments of the American legal community: solo practitioners and small firm lawyers, on grounds of overcrowding and fears of competition from lay practitioners; and corporate lawyers, on grounds that administrative agencies would erode the “centrality of federal courts in the resolution of disputes.” See R. Shamir, “Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933-1937” (1993) 27 *Law & Soc’y Rev.* 361 at 377. Protagonists were federal government lawyers, examined in great detail in P.H. Irons, *The New Deal Lawyers* (Princeton, N.J.: Princeton University Press, 1982). For a superb examination of the tensions and ambiguities in Wagner’s progressive cooperative vision, see M. Barenberg, “The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation” (1993) 106 *Harv. L. Rev.* 1379 at 1489-96.

⁴⁸ “Labour Law,” *supra* note 27 at 7, note 18.

⁴⁹ U.S. Const. amends. I-X.

proliferation of constitutional documents such as the *European Convention of Human Rights*⁵⁰ and the *Canadian Charter of Rights and Freedoms*⁵¹

During the debates over adoption of Canada's *Charter*, an attempt was made to lay to rest concerns that it might be used—as its American progenitor had earlier been used—to inhibit market regulation.⁵² Nonetheless, on several occasions since its adoption in 1982, it has been used precisely for that purpose,⁵³ although the direct juridical consequences have been rather limited. More important than these juridical consequences, however, have been the indirect effects of the *Charter* on our political culture. By subordinating the decisions of elected parliaments to judicial review, the *Charter* has helped to weaken confidence in electoral politics. By reinforcing the notion of society as an aggregation of autonomous, rights-bearing individuals, it has helped to delegitimize collectivist or communitarian ideologies. By making all legislation and administrative action subject to open-ended judicial review, it has provided a tactical weapon for anti-state and anti-interventionist litigants. And by raising the litigation stakes, thereby lowering the efficiency of regulation, the *Charter* has created disincentives for even the most interventionist-minded governments to pursue their strategies through state law and legal processes.

The *Charter* obviously did not initiate the use of law to attack regulation, nor did its architects necessarily envisage that its adoption would hasten Canada's incorporation into the new global economy. Indeed, the *Charter* was arguably an effect, not a cause, of public disenchantment with parliamentary politics, state intervention, and big government. But whatever its provenance, the *Charter* has in fact helped to transform state-civil society relations, and to create a friendlier environment for all those private interests which the state might formerly have sought to regulate and constrain.⁵⁴

⁵⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 (entered into force 21 September 1970).

⁵¹ Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁵² For example, the original draft of the *Charter* did include a provision for property rights; in the aftermath of hearings over the *Charter* this provision was omitted in later drafts and in the final text, despite the objections of the business community. See Mandel, *supra* note 23 at 308.

⁵³ *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145; and *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311.

⁵⁴ Mandel, *supra* note 23; Glasbeek, *supra* note 23; and Panitch & Swartz, *supra* note 23.

B. States and the Transnational Production of Legal Norms

As noted, the new economy has been characterized by the emergence of strong regional trade blocs and the globalization of production and financial markets. To a degree, these developments represent an extrapolation of previous practices, and they are still more visible in some sectors than others. However, the trajectory is so extreme, and the potential implications so profound, that it is necessary to consider whether, and if so how, states can produce legal norms with transnational efficacy.⁵⁵

A state's law usually stops at its borders. When the parties to a transaction are in different countries, they may agree to be bound by the state law of either country or of a third (not necessarily their own), or by norms agreed between the parties or established by a trade association or other private institution.⁵⁶ States can, in principle, extend the reach of their legislation at least to regulate locally based corporations doing business in foreign countries, but they are limited by the extra-territoriality principle and by practical difficulties of detection and enforcement abroad. Even more important, the plausible threat by a major corporation to shift its activities to another country is enough to persuade all but the most determined or powerful states to abandon or modify their regulatory exertions.

Obviously, states can collaborate to organize transnational regulatory action through simple bilateral treaties, juridically complex and fecund multilateral regimes such as the EU and GATT (now the WTO), or specific international conventions such as those on child labour, trademarks, or maritime safety. But these treaties, regimes, and conventions are seldom universal, and often lack effective agencies of enforcement. Consequently, compliance depends largely upon the willingness and ability of individual states to enforce them. Enforcement, in many cases, is neither assiduous nor effective.⁵⁷

Indeed, governments may sometimes collude in immunizing corporations from the reach of both their own laws and the laws of other

⁵⁵ For an interesting typology of attempts to extend the reach of state law beyond national boundaries, see K. Stone, "Labor and the Global Economy: Four Approaches to Transnational Labor Regulation" (1995) 16 *Michigan J. Int'l L.* 987.

⁵⁶ Dezalay & Garth, *supra* note 2.

⁵⁷ By way of example to the contrary, a German court recently ordered CompuServe, one of the commercial gatekeepers of the Internet, to terminate the access privileges of users who purveyed pornography. CompuServe, an American company, complied, presumably at least in part because its German operations were within the reach of the Court's enforcement procedures.

states. Examples include ships which fly “flags of convenience,” small countries whose incorporation and banking laws shelter offshore investors from their tax liabilities, and the *de jure* and *de facto* immunities from labour standards, environmental legislation, and local taxation which some jurisdictions use as bait to lure potential investors. In fact, the ability of states to produce domestic legal regimes is sometimes the basis of competition between them to attract investment by creating unusually favourable conditions for particular markets, as in the case of the “big bang” which deregulated the London financial markets in 1986, or particular types of manufacturing operations, such as the Mexican *maquiladora* plants. The point is not that any of these represent radical departures from past practice: all have long-standing precedents. Rather, it is that states now pursue these strategies within a framework of belief and practice which stresses the virtues of both globalization and deregulation. The consequence is that powerful supranational corporations are relatively free to produce their own law, their own normative systems, and to impose them on customers, suppliers, and workers⁵⁸—even on governments.

On the other hand, the relative legal autonomy of global corporations can also be overestimated. In the new economy, they may ignore the law of their home country; with the connivance of host governments, they may use foreign law in their own interest; indeed, they may even become a law unto themselves. But there is also historical evidence that relatively powerless communities—E.P. Thompson’s commoners and plebeian crowds,⁵⁹ for example, or local merchants in rural Quebec,⁶⁰ or the peasants of Chiapas—may retain some vestigial capacity to generate their own norms, some limited capacity to modify, deflect, even occasionally defeat, the law of the state or of powerful corporate interests.

To generalize from this point, the question of which law—of whose law—will prevail in any contestation between rival systems is, we contend, an empirical question; it cannot be answered *a priori* by reference to general principles of national or international law. In consequence, debates over which strategies ought to be adopted to regulate the activities of global corporations beyond the boundaries of

⁵⁸ P.B. Meyer, “General Motors’ Saturn Plant: A Quantum Leap in Technology and Its Implications for Labour and Community Organizing” (1986) 30 *Capital & Class* 73.

⁵⁹ See *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1991).

⁶⁰ J.-G. Belley, “Contrat et citoyenneté. La politique d’achat régional d’une entreprise multinationale” (1993) 34 *C. de D.* 1063.

their home state is also an empirical question. Regulatory strategies will be favoured or disfavoured depending on estimates of their likely practical outcome. State lawmaking is no longer an obvious—let alone automatic—choice; on the basis of their limited efficacy to date, supra-state regimes must be regarded with some scepticism, and non-state regulation may be the only recourse in given circumstances.

C. Competition Between State and Non-State Producers of Law

What of non-state regimes? As studies in legal pluralism empirically demonstrate,⁶¹ the state does not enjoy a monopoly over the production of law. It never did. To the contrary: as we have argued, all institutions—broadly defined to include both state and non-state institutions—are, by definition, sites of the production of law. Consequently, within given institutions, various actors will contend for control over the local process of legal production. In a government agency—a police force, for example—front line employees may resist—may subvert—detailed instructions legally promulgated by senior officials; in a business organization, middle managers may develop standard practices for dealing with consumers, suppliers, or employees which are designed to maintain cordial relations or personal advantage, rather than those which would maximize the firm's profitability or minimize its legal liabilities. Furthermore, institutions may be at odds with each other over whose law will prevail. Thus, norms produced on the factory floor and the trading floor clash with the norms of state regulatory regimes; indigenous norms of aboriginal and immigrant communities clash with the norms of the dominant society, encapsulated in criminal codes and family law statutes; norms of universities, professional sports leagues, and churches clash with each other and with those of the state as well.

It is impossible, in any given situation, to predict the outcome of normative clashes within and amongst institutions. However, while the state, in principle, can assert both might and right, non-state systems, in

⁶¹ S.F. Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1973) 7 *Law & Soc'y Rev.* 719; Belley, *supra* note 60; M. Galanter & D. Luban, "Poetic Justice: Punitive Damages & Legal Pluralism" (1993) 42 *Am. U.L. Rev.* 1393; S. Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (Boston: Routledge & Kegan Paul, 1983); D. Sugarman, ed., *Legality, Ideology and the State* (London: Academic Press, 1983); B. Yngvesson, "Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town" (1988) 22 *Law & Soc'y Rev.* 409; and R.C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass.: Harvard University Press, 1991).

fact, often prevail over state law, precisely because they are imbricated within, even constitutive of, the daily life of particular institutions or communities. Contracts and commercial law offer particularly apposite examples of how state and non-state laws and institutions relate to each other.

Characteristically, business transactions are governed by contracts and, in principle, contracts are subject to state law. However, state law may be trumped by private arrangement, of which the standard form contract is the most ubiquitous example. Indeed, while the state continues to assert its primacy over business custom and practice,⁶² and even over the express desire of the parties to be governed by some other normative system,⁶³ the bark of state law is worse than its bite. Given the symbolic and practical importance of freedom of contract in market economies, the state tends to be diffident about intervening in private transactions, so that parties are usually given considerable latitude to “contract out” of state law or, what amounts to the same thing, to draft around it.⁶⁴ True, some recent decisions suggest that courts may prevent the enforcement of oppressive contracts, especially where one of the parties has diminished competence⁶⁵ or where the transaction involves important public policies or moral principles.⁶⁶ But those very circumstances often permit the stronger party to have its way with the weaker regardless of what the contract says: “sue me” is an invitation few people can afford to accept when it is issued by a major corporation.

Moreover, many important, long-term business relationships are governed by “relational” contracts or simply by tacit understandings

⁶² For example, *Employment Standards Act* R.S.O. 1990, c. E-14.

⁶³ *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478 (C.A.).

⁶⁴ D. McBarnet, “Legal Creativity: Law, Capital and Legal Avoidance” in M. Cain & C.B. Harrington, eds., *Lawyers in a Postmodern World: Translation and Transgression* (New York: New York University Press, 1994) 73; and L. Bernstein, “The New Law Merchant: Private Commercial Law in the United States” *Law & Economics Workshop Series WS 1994-95* (No. 9) (Toronto: Faculty of Law, University of Toronto, 1995) at 18.

⁶⁵ Particularly, if the party seeking enforcement knew of the other’s mental incompetence or ought to have known of it. See, for example, *Hart v. O’Connor*, [1985] A.C. 1000 (P.C.); *Hill Estate v. Chevron Standard Ltd.* (1992), 74 Man. R. (2d) 162 (Q.B.); and *Cameron v. Dorcic* (1988), 80 N.S.R. (2d) 152 (S.C.T.D.).

⁶⁶ On these grounds, many restrictive covenants preventing business competition have been struck down. See, for example, *W.R. Grace & Co. of Canada Ltd. v. Sare* (1980), 28 O.R. (2d) 612 (H.C.); *Alec Loeb (Garages) Ltd. v. Total Oil Great Britain Ltd.*, [1983] 1 W.L.R. 87 (Ch.); and *Bassman v. Deloitte, Haskins & Sells of Canada* (1984), 44 O.R. (2d) 329 (H.C.).

evolved over a prolonged course of dealing.⁶⁷ Relational contracts are in effect framework agreements, the details of which are filled in pragmatically, as the parties work through their relationship and develop mutual dependencies and expectations. Even in the absence of a contractual framework, and even where the parties possess vastly disparate power, there is evidence that their relationship is likely to be conducted not arbitrarily, but rather in accordance with legal norms.⁶⁸ Some of these norms may be formally laid down, in internal company policies, in ephemeral bulletins, in shipping documents; some can be inferred only by observing patterns of conduct. But there is no necessary correlation between such norms and the requirements of state law. Indeed, some may explicitly contravene the requirements of state law.⁶⁹

D. Privatization of Legal Production

It was once regarded as axiomatic that state agencies should—and did—enjoy a monopoly over the production, administration, and enforcement of state law. However, whatever the previous descriptive or prescriptive validity of this assumption, in the new economy the situation is clearly changing. As part of a general demand to reduce and “reinvent” government,⁷⁰ a number of initiatives have begun to impinge upon even its hitherto sacrosanct core legal functions.

Private and partially private institutions are becoming active in the production of law, particularly in the enterprises of social control and regulation. There has been an overt effort to shift the centre of gravity of the justice system from state courts to systems of alternative

⁶⁷ I.R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven, Conn.: Yale University Press, 1980) at 72-118. For a more sociological treatment, see E. Schanze, “Symbiotic Contracts: Exploring Long-Term Agency Structures Between Contract and Corporation” in C. Joerges, ed., *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Baden-Baden: Nomos Verlagsgesellschaft, 1991) 66. For a legal pluralist treatment, see J.G. Belley, “Contract, Legal Pluralism, Global Economy and Human Development” (Paper prepared for the Canadian Institute for Advanced Research Workshop, Toronto, 28-29 October 1994) [unpublished].

⁶⁸ S. Macauley, *Law and the Balance of Power: The Automobile Manufacturers and Their Dealers* (New York: Russell Sage Foundation, 1966); and J.-G. Belley, “Les transformations d’un ordre juridique privé. Les contrats d’approvisionnement à l’ère de la cybernétique et de la gestion stratégique” (1992) 33 C. de D. 21.

⁶⁹ Moore, *supra* note 61.

⁷⁰ M.J. Trebilcock, *The Prospects for Reinventing Government* (Toronto: C.D. Howe Institute, 1994).

dispute resolution (ADR), especially private systems of mediation and arbitration.⁷¹ In part, this effort stems from a desire to make the system more responsive, less formal, and less costly for the litigants. However, it is also driven by the imperative of reducing public expenditures in the justice sector by reducing the activity level of the courts.⁷² As it turns out, ADR may also lead to privatization, and transformation, of disputes with an important public policy dimension⁷³—a by-product of ADR which validates the expectations of both opponents and advocates of the new economy. The state also seems to be yielding its monopoly over the use of force to armed citizens,⁷⁴ private security firms,⁷⁵ and the franchised administrators of newly privatized prisons.⁷⁶ And in certain regulatory realms of great social and economic significance—technical standards,⁷⁷ intellectual and industrial property,⁷⁸ and credit arrangements,⁷⁹ for

⁷¹ For a convenient summary of developments, see G.W. Adams & N.L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995) 17 *Advocates Q.* 133. A more legal pluralist perspective is found in G.R. Woodman, "The Alternative Law of Alternative Dispute Resolution" (1991) 32 *C. de D.* 3.

⁷² The Honourable Mr. Justice T.C. Zuber, *Report of the Ontario Courts Inquiry* (Toronto: Ontario Ministry of the Attorney General, 1987) at 51-53.

⁷³ B. Garth, "Privatization and the New Market for Disputes" (1992) 12 *Stud. L. Pol. & Soc'y* 367.

⁷⁴ While there is no constitutional or inherent legal right to bear arms in Canada, the debate generated by modest government proposals to license firearms revealed the existence of a sizeable body of opinion in this country apparently prepared to countenance the use of guns not just for sport or commercial hunting, but for personal security.

⁷⁵ P. O'Malley, "Legal Networks and Domestic Security" (1991) 11 *Stud. in Law, Pol. & Soc.* 171; and C. Shearing & P. Stenning, "Private Security: Implications for Social Control" (1983) 30 *Soc. Prob.* 493.

⁷⁶ See J.G. Dipiano, "Private Prisons: Can they Work? Panopticon in the Twenty-First Century" (1995) 21 *New Eng. J. Crim. & Civ. Confinement* 171; and N.B. Casarez, "Furthering the Accountability Principle in Privatized Federal Corrections" (1995) 28 *U. Mich. J.L.* 249. On their historical emergence in the U.K. and the United States, see D.N. Wecht, "Break the Code of Indifference: Judicial Review of Private Prisons" (1987) 96 *Yale L.J.* 815.

⁷⁷ L. Salter, *Mandated Science: Science and Scientists in the Making of Standards* (Boston: Kluwer Academic, 1988).

⁷⁸ S. Jasanoff, *Risk Management and Political Culture: A Comparative Study of Science in the Policy Context* (New York: Russell Sage Foundation, 1986); S. Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge, Mass.: Harvard University Press, 1995); and R. Mansell & R. Silverstone *Communication by Design: The Politics of Communication Technologies* (New York: Oxford University Press, 1996).

⁷⁹ See generally Y. Dezalay & D. Sugarman, eds., *Professional Competition and Professional Power: Lawyers, Accountants and the Social Construction of Markets* (London: Routledge, 1995). See also J. Flood & E. Skordaki, "Normative Bricolage: Informal Rule-Making by Accountants and Lawyers in Mega-Insolvencies" in G. Teubner, ed., *Global Law Without the State* [forthcoming].

example—those being regulated are, in effect, more and more frequently writing the rules of regulation.

Overall, the state's production of legal norms in many areas is being consciously curtailed to facilitate production in the private sector. What does this imply, in terms of the future content and consequences of law? Generally speaking, as privatized law-making is removed further and further from democratic institutions and the practice of democratic politics, we can expect that the content of legal rules will more and more closely correlate with the interests of the stronger party to any dispute or transaction.⁸⁰ This would hardly be surprising, since state intervention often occurred after a political struggle, with at least the ostensible aim⁸¹ of curbing private power.

There is some evidence for the view that the withdrawal of state law does not lead inevitably to the introduction of privately generated norms which are arbitrary and abusive. But enthusiasts for the new economy do not stoop to conquer; instead, they advance theoretical or principled arguments against state law production and in favour of privatization. First, they argue, government by periodic elections and brokerage politics, as practised in most Western states, is undemocratic in fact if not in form; to disempower the state and to dismantle the powerful and privileged *apparatus* which controls its regimes of legal production are necessary preconditions to the achievement of a genuinely democratic society. Second, they urge, of all democratic institutions, none is more perfect than the market; citizens are the most effective guardians of their own rights and interests when they are allowed to function as sovereign consumers, empowered by information, given voice by technology, and protected by constitutional safeguards and financial "realities" from any temptation to nestle into the bosom of the state. From these propositions, it is an easy step to imagine that the privatization of law production is an early stage on the journey to the new New Jerusalem.

Quite apart from any concern for the advancement of democratic values, however, clearly serious competition is developing in both process and product between the state and private producers of law who have inherited some part of its dominant role in production.

⁸⁰ Garth, *supra* note 73 at 368.

⁸¹ Official justice is often arbitrary and decontextualized in its own right and intolerant of less formal, normative legal fields: see R.A. Macdonald, "Theses on Access to Justice" (1992) 7 *Can. J.L. & Soc'y* 23 at 27.

E. Hybridization

It has been argued that we are in the midst of a process of hybridization, in which law and legal institutions can no longer be described accurately as belonging strictly either to the private or the state sector, as national or as international in origin, as formal or informal in character.⁸²

The changes in the processes of legal production which we have described—conflicts within the state legal order, transnational production of legal norms, competition between state and non-state regimes, and privatization—result from, or have been accelerated by, the advent of the new economy. However, just as the new economy is superimposed upon, and coexists with, a large remnant of the old, so too do the characteristic legal forms of each coexist. But hybridization suggests more than coexistence. It implies that a dynamic interaction, a melding, of old and new legal institutions and norms is producing something which is not quite the same as either.

Such, indeed, is the nature of many of the developments hinted at above. Technical product standards are defined through multinational negotiations which are effectively conducted and controlled by the leading firms and their experts, but these standards are validated by government decree and enforced both by industry convention and government inspection. Privatized prisons continue to house inmates who have been convicted in state courts and are being punished in accordance with norms decreed by the state; however, the logistics of prison administration are contracted out to private firms mandated to use the state's coercive powers. Charter schools, supported by state funds and held to performance standards set by the state, are administered by private boards which usually comprise parent and teacher representatives.

But the novelty and positive features of hybridization should not be overstated. In a sense, hybridization has proceeded along lines which have been visible for some time. Private interests so egregiously influence state regulatory regimes that the phenomenon of "regulatory capture" had become a virtual cliché of public administration scholarship. Informal normative regimes—negotiated justice and paramilitary traditions, for example—were long ago observed to function "in the shadow" of state criminal law, even inside state-run courts, police forces, and prisons. Strong parent groups, teachers'

⁸² de Sousa Santos, *supra* note 5.

unions, and principals were able to influence academic standards and administrative practices in state schools, long before legislation and charters formally gave them responsibility for school governance. Essentially then, under pressure of the new economy, low-visibility practices have been translated into high principle, and the state, discovering itself to be financially and politically impoverished, has placed itself at the disposal of its creditors. To put matters at their highest, the “new reality”—the menacing face of the new economy—has frightened the state into experimenting with new hybrid legal institutions which it hopes will enable it to maintain some semblance of its former capacity to produce and administer law.

This is at least a partial explanation of the phenomenon of juridification, described next.

F. *Juridification*

It is regarded as axiomatic in a democratic society that governments should adhere to “the rule of law”—an ill-defined concept⁸³ which is nonetheless regarded as the mother-lode of democratic legitimacy. In countries where the rule of law is enshrined as a constitutional principle, it operates juridically to trump all forms of state action. But even in countries such as Canada, where the rule of law constitutes only the subtext of a body of discrete technical legal rules, its impact is considerable.

It defines our political and legal sensibilities by shaping the deep structures of normative discourse concerning not only state, but also non-state, institutions. It leads us to expect that all agencies of the state—not just courts—will act legally, in accordance with predetermined and duly promulgated norms, and fairly, more or less in accordance with curial procedures, which we take to be exemplary. These same expectations are percolating into the private sphere, into corporations, community movements, the arts and popular culture, even family life. Here the cultural power, the tutelary impact, of the rule of law has had consequences which far outstrip its technical, juridical force. This process of extrapolating expectations of lawfulness and fairness

⁸³ H.W. Arthurs, “Rethinking Administrative Law: A Slightly Dicey Business” (1979) 17 *Osgoode Hall L.J.* 1; and G. Teubner, “Juridification: Concepts, Aspects, Limits, Solutions” in G. Teubner, ed., *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (Berlin: Walter de Gruyter, 1988) 3.

from state courts to other public agencies, and from the state sphere to private institutions, we will refer to as juridification.

Two dramatic examples from the public sector illustrate the power of the rule of law. In 1963, the Conservative government of Ontario introduced what became known as the “notorious Police Bill,”⁸⁴ a relatively innocuous statute designed to enhance the power of the Ontario Police Commission to attack organized crime. The Bill was attacked so vigorously by the opposition Liberal party, and by civil libertarians, editorial writers, and legal organizations, that an abashed government appointed a Royal Commission on Civil Rights (the McRuer Commission) to identify and to extirpate all violations of the rule of law to be found in the Ontario statutes. The McRuer Commission reported in 1968.⁸⁵ Its consequences were various: the amendment of literally hundreds of statutes; no discernible change in the freedom experienced by Ontario citizens; exponential growth in delay, cost, and inefficiency within the provincial administrative apparatus; and, to the extent that that apparatus became inoperable, the enhanced immunity of business from state regulation.⁸⁶

Three decades later, in 1994, legislation was introduced by a new federal Liberal government which reversed the recent privatization, in dubious circumstances by an expiring Conservative government, of the Toronto airport. The legislation also deprived the new private owners of what they regarded as their legitimate expectation of profits. This statute—which, after all, sought to restore the previous boundary between state and civil society—was denounced as a violation of the rule of law almost universally, not just by conservatives, journalists, and the business community, but by lawyers of all stripes, including academics and government supporters and advisors. The government, having already agreed to amendments designed to deflect the criticism, now seems likely to retreat even further in the face of a court challenge⁸⁷ and an investigation by the Conservative-dominated Senate. The result is likely to be delay in the regeneration of an important public facility with attendant inconvenience and business losses for users, windfall profits

⁸⁴ Bill 157, *An Act to amend the Police Act* 4th sess., 26th Leg., Ontario, 1962-63 (1st reading 22 April 1963).

⁸⁵ *Supra* note 46.

⁸⁶ J. Willis, “The McRuer Report: Lawyers’ Values and Civil Servants’ Values” (1968) 18 U.T.L.J. 351; “Jonah and the Whale,” *supra* note 46; and R.W. Macaulay, *Directions: Review of Ontario’s Regulatory Agencies* (Toronto: Queen’s Printer, 1989).

⁸⁷ *TIT2 Ltd. Partnership v. Canada* (1995), 23 O.R. (3d) 81 (Gen. Div.). An appeal to the Ontario Court of Appeal was dismissed on 23 May 1995: see (1995), 24 O.R. (3d) 546.

for private entrepreneurs providentially relieved of the risks of investment and management in a volatile industry, and—most seriously—a generation of Canadian governments reluctant to use their legal powers and risk their scant resources to protect the long-term public interest. (However, no such reluctance seems likely to inhibit governments defending other versions of the public interest against the vested claims of trade unions or poor people.)⁸⁸

These examples of the juridification of public administration and politics show how the production of law is a cause of the new economy as well as an effect. Juridification does not merely plant clearer boundary markers between the state and civil society; it makes it more difficult to shift those markers into the private domain, or even to maintain or restore the previous domain of the state. Moreover, the clarity of the markers laid down by the rule of law facilitates and encourages challenges to state “encroachments” at the same time as sensitivity to those encroachments is being heightened by the prevalence of anti-state rhetoric.

Ironically, however, juridification has operated to inhibit entrepreneurial freedom within the new economy, as well as to facilitate it. The literature of private sector management is replete with stories of juridification, albeit seldom as far-reaching or profound as those cited above. For example, individual and collective employment rights,⁸⁹ and the handling of complaints about racial or sexual harassment⁹⁰ are now

⁸⁸ Thus, public sector unions have been notoriously unable to generate comparable support for their claims that legislative repudiation of their collective agreements, and deprivation of their expectation interests in future employment opportunities and higher wages, is a violation of the rule of law or of any other fundamental legal norm. See *Reference Re Anti-Inflation Act (Canada)* [1976] 2 S.C.R. 373; *BCGEU v. British Columbia (A.G.)* [1988] 2 S.C.R. 214; *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313; *PSAC v. Canada (A.G.)*, [1987] 1 S.C.R. 424; and *OPSEU v. Ontario (Management Board)* (1993), 106 D.L.R. (4th) 321 (Gen. Div.). Welfare claimants are encountering similar difficulties in protecting their entitlements and expectations against a 20 per cent reduction by executive order during the first months of Ontario’s Conservative “common sense” revolution: *Masse v. Ontario (Ministry of Community & Social Services)* (1996), 134 D.L.R. (4th) 20 (Div. Ct.).

⁸⁹ B. Adell, “Juridification Under Wagnerism: The Need for a Change in Direction” in A. Giles, A.E. Smith & K. Wetzel, eds., *Proceedings of the XXXIst Conference, Canadian Industrial Relations Association, 1994* (Quebec City: CIRA, 1995) 123. Compare J. Browne, *The Juridification of the Employment Relationship* (Aldershot: Avebury, 1994) at 201-02, who contends that unfair dismissal legislation in Ireland has spurred many companies to devise company handbooks, precisely because personnel managers have discovered that formalization of the employment relationship “gives the employer greater control ... as the employee has no input to the terms of the contract.”

⁹⁰ For example, A.P. Aggarwal, *Sex Discrimination: Employment Law & Practice* (Toronto: Butterworths, 1994) c. 9, provides a “Guide for Non-Discriminatory Hiring Policies and Practices.”

juridified in many companies well past the point required by state law. The juridification of individual employment law has developed as an explicit, and possibly contrived, riposte to the high level of executive *angst* engendered by the uncertainties of the new economy.⁹¹ Businesses faced with consumer claims and newspapers confronted with accusations of journalistic malpractice have established voluntary ombudsman procedures but these procedures—however innovative and well-publicized—seldom generate much traffic; consumers and complainants tend to be scornful of anything less than due process and independent adjudication. And the juridification of personal relationships is the stuff of scholarly comment, popular humour, and bitter experience for spouses, lovers, and parents.

Thus, juridification underlines a paradox of the new economy. On the one hand, state law and administration designed to regulate corporate, institutional, and individual conduct is being reined in by juridification—the imposition of a legalist ideology and a legalist procedural template which is often disabling and sometimes fatal to regulation. Furthermore, some of the state’s legal functions of social control, of norm creation and dispute resolution, are being privatized. These developments obviously have the effect of expanding the power of corporations and private institutions by insulating them from the state. On the other hand, civil society and the institutions which populate it are by no means devoid of law. On the contrary, they too have become juridified, even though the traditional source of law—the state—is being held at arm’s length.

How to explain this paradox? The juridification of civil society, of corporate and institutional life, is not, we argue, simply the flotsam and jetsam left behind by a receding tide of state regulation. We offer several alternative hypotheses.

State law is not just a form of social control. It is a cultural artefact, a “great code”⁹² which shapes the way we express ourselves, and imprints on our mind an image of social relations which is not easily dislodged, even when neither the state nor its law is present. A second hypothesis: bureaucratic rationality, which we associate with state law, and especially with regulatory institutions, is not peculiar to them. As Max Weber reminds us, it is a mode of organizing social relations which is common to corporate bureaucracies as well. It is a function of size,

⁹¹ L.B. Edelman, S.E. Abraham & H.S. Erlanger, “Professional Construction of Law: The Inflated Threat of Wrongful Discharge” (1992) 26 *Law & Soc’y Rev.* 47.

⁹² N. Frye, *The Great Code: The Bible and Literature* (New York: Harcourt Brace Jovanovich, 1982).

complexity, specialization of functions, hierarchy, and impersonality, which are to be found on both sides of the divide between the state and civil society.⁹³ Or, to put the same idea in non-Weberian language, it may simply be that all social relationships abhor a normative vacuum. A third hypothesis: juridification is not a spontaneously occurring phenomenon; it is a project advanced by specific groups of lawyers to increase the value of their social and intellectual capital to the prejudice of competing law experts and other lawyers.⁹⁴

And a final hypothesis: the juridification of civil society, and especially of corporate life, is part of a conscious effort to demonstrate that the state is unnecessary, that the privatization of its functions need result in no impairment of the values which state action is intended to advance. Privatized prisons are still meant to be secure and punitive—arguably more so than the state institutions they replaced; the rights of female employees to be treated fairly are still to be protected—arguably more cheaply and efficiently through corporate edicts than they would have been by employment equity legislation administered with notorious government clumsiness.

Whatever the explanation, juridification is clearly not confined to the state sector, and legalist ideology, that is, legalist procedural templates, may prove to be as potentially disabling in non-state settings as they are in government. Given that corporations and institutions have, to a large extent, voluntarily juridified themselves, it is at least possible that the new economy will not be as different from the old regulated state as its proponents hope or its critics fear. Finally, this brief look at juridification reminds us that the production of law generates effluents and emissions—some benign, some not—which seep into all corners of social life. Those who produce law may therefore be the agents of consequences beyond their own intention or comprehension. We turn next to an examination of producers of law.

IV. PRODUCERS OF LAW

We have proposed that law can be seen as an industry with a high proportion of knowledge workers. It is now time to examine those workers more closely.

⁹³ G.F. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 Harv. L. Rev. 1276.

⁹⁴ See, for example, Dezalay & Garth, *supra* note 2 at 49-62.

A. *Law Experts*

If virtually all institutions, all significant social or economic relations, generate law, virtually everyone is to some extent a producer of law. However, we propose to focus on one particular set of producers—essentially elite producers—whom we will refer to as “law experts.”⁹⁵ We use this term as a convenient and compendious way of referring to those skilled, specialized, and strategically located knowledge workers who contribute consciously and significantly to the construction of the “legal field”—“the ensemble of institutions and practices through which law is produced, interpreted and incorporated into social decisionmaking.”⁹⁶ Our category of law experts therefore encompasses not only formally qualified legal practitioners and judges, but also academics and commentators, accountants and management consultants, non-lawyer advisors and advocates, lobbyists and policy makers, drafters and adjudicators, and a host of other individuals doing “law jobs”⁹⁷ both in the state sector and in institutions such as stock exchanges, corporations, unions, universities, sports leagues, and community groups.

Law experts tell us how to understand and work with law. Obviously, they do not possess an autonomous power of enactment in either the state or the private sphere, but they do tend to constitute and control important sectors of the legal field, and to influence the making of policy choices by their characterization of issues, by their validation of techniques of intervention, and by their conventions of discourse.⁹⁸ This is not to say that with their very different mandates, skills, tasks, ideologies, and clienteles, they represent a single unified influence

⁹⁵ The focus on the pre-eminent role of law experts in the new economy has two potential limitations. First, it may underestimate the actual and potential contribution to the production of law of non-elite producers. Second, it might be construed as privileging elite control over law, and as failing therefore to address concerns about democratic process and values. We accept fully the need to keep all contributions and contributors clearly in view, and to remain aware always of the contestations between different groups of producers involved in legal production. However, without being tautologous, it is important to recall that elite producers—law experts—are identifiable precisely because they occupy strategic roles in law production in the new economy.

⁹⁶ D.M. Trubek *et al.*, “Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas” (1994) 44 Case W. Res. L. Rev. 407 at 411.

⁹⁷ For the origin of this term, see K. Llewellyn, “The Normative, the Legal and the Law-Jobs” (1940) 49 Yale L.J. 1355.

⁹⁸ P. Bourdieu & L.J.D. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992).

within the legal field, or even that they define their roles within the processes of law production in a similar manner. On the contrary, as has been noted, “the forces and logics that can be observed in the economy, the state and the international legal order are at work within the legal field as well,”⁹⁹ as contending groups struggle internally for control of the field and interact with other fields to produce legal “outcomes.”¹⁰⁰ Those struggles are evident in various domains of the new economy.

B. *The Role of Law Experts in the State and Private Sectors*

Although it is now generally accepted that the state sector is not the sole source of law, law experts within that sector still make an important contribution to the production of law. They are responsible for providing advice to government, shaping policies, drafting legislation, and designing and implementing regimes of enforcement. As advocates and administrators, they constantly interpret state law, translate law into practice and practice into law, and seek to validate particular meanings of state law in the courts or within the executive arm of government. In effect, the law experts of the state are the agents who translate general political debates about social values into conceptual vocabularies, which in turn are used to construct normative systems within public bureaucracies.¹⁰¹

But not only do law experts construct: they deconstruct. They sit on courts and regulatory agencies, provide advisory opinions, and write learned commentaries and criticisms, and, through processes of interpretation and subordinate legislation, give crucial specificity to vague enactments. And sometimes law experts obstruct: they advise or warn of the possible negative legal, financial, or political consequences of action, and thereby deter their clients—governmental or non-governmental—from enacting, applying, or violating legal norms. In this way, they not only produce law, but sometimes effectively inhibit or even veto its production.

⁹⁹ See Trubek *et al.*, *supra* note 96 at 410.

¹⁰⁰ *Ibid.* at 417-18. See also Y. Dezalay, “From Mediation to Pure Law: Practice and Scholarly Representation Within the Legal Sphere” (1986) 14 *Int’l J. Soc. L.* 89 [hereinafter “Mediation to Pure Law”].

¹⁰¹ H.W. Arthurs, “Law as an Instrument of State Intervention: A Framework for Enquiry” in I. Bernier & A. Lajoie, eds., *Law, Society and the Economy* (Toronto: University of Toronto Press, 1986) 77.

Nor is the work of construction, deconstruction, and obstruction confined to law experts in the public sphere. In contractual and other private normative regimes, law experts help to shape transactions, corporate structures, and commercial strategies. Here they play a role similar to that which they play in the state sector: identifying issues, proposing solutions, and translating those solutions into formal legal arrangements—in effect, private legislation—and exercising a *de facto* veto over arrangements which seem imprudent or irregular. Conversely, they sometimes validate arrangements by pronouncing them prudent or regular, as an accommodation for clients who wish to deflect subsequent complaints or allegations by saying that they acted on the advice of their lawyer or accountant. As in the state legal sector, they tend to dominate the process of dispute resolution, by acting as negotiators, advocates, and negotiators on a “repeat” basis, as distinct from the occasional appearances of non-experts.

Moreover, in case the point is not obvious, in neither the public nor the private sphere do law experts always define their task as bringing their clients into strict conformity with the spirit and letter of the law, much less as reinforcing the rule of law. What they are trying to do is to show their clients how to do what they wish to do without getting into serious legal or practical difficulties with the state or with other private actors.¹⁰²

However, changes in the production of law, catalogued in Part III, above, are reshaping and refocusing the role of law experts. As the boundaries between state and civil society shift, as the state’s regulatory role is diminished, as law is being privatized, and as legal institutions are increasingly hybridized, many of the functions previously performed by them in the state sector are being abandoned. As legal conflicts proliferate amongst state policies and agencies—some reflecting frictions between the policies of the new economy and those of the old—and as social and economic relations more generally are becoming juridified, other functions acquire new importance. Since the legal field is the site of frequent interactions between key political and economic actors, law experts in government are being called upon as go-betweens, mediating between private interests and public legislators, regulators and regulatees, and the various and divergent domestic and international agencies of the state. The results of this mediation of state and private

¹⁰² McBarnet, *supra* note 64; J. McCahery & S. Picciotto, “Creative Lawyering and the Dynamics of Business Regulation” in Dezalay & Sugarman, eds., *supra* note 79 at 238; and B. Garth, “Transnational Legal Practice and Professional Ideology” (1985) 8 Mich. Y.B. Int’l Legal Stud. 3 at 16-17.

interests have to be captured in legal formulae and institutional structures which are often adaptations of existing arrangements to novel circumstances, sometimes wholly original, but increasingly hybridized or privatized structures.

In the current dispensation, government law experts are therefore likely to become more and more involved in managing the regulatory retreat and financial realignment of the state articulating, for example, new “principles” to induce adherence to national standards for social programs in lieu of the previous “standards,” which a retrenching federal government can no longer enforce. Similarly, to the extent that government itself, as an institution, is experiencing juridification of its relations with its own employees, with clients and claimants, and with citizens generally, its law experts are likely to become more and more preoccupied with ensuring that these particular relations are conducted in accordance with the substantive and procedural requirements of the rule of law. The juridification of welfare, refugee admissions, and prison administration, for example, have all resulted in an expansion of the cadre of law experts employed by the state or by advocacy groups attempting to influence the state’s production of law in the form of announced policies and practical outcomes. Or, to take a third example, the urgent claims for greater autonomy and better social and economic conditions for Canada’s First Nations have led to a proliferation of law experts who are striving to reconfigure the role of the federal government in this area, and to construct alternative regimes of Aboriginal self-government.

In all of these quite conventional respects, government law experts are instrumental in the production and administration of law in the state sector. As already noted, they occupy the state sector of the legal field along with other groups of experts with whom they may collaborate, contend, or compete. The important point, however, is that the relationships amongst all of these expert groups, the outcomes they achieve, even the arguments they use and their technical solutions to problems are shaped not only by their shared expertise in law, but by their divergent mandates, ideologies, and professional interests. As the examples suggest, those mandates, ideologies, and interests, in turn, are very much implicated in the changing role of the state in the new economy.

C. *Law Experts in the Transnational Legal Field*

Globalization relocates important corporate actors and activities beyond the reach of state law. In that sense, it might be thought, globalization potentially diminishes the influence of law experts—or at least of those whose expertise happens to be grounded in state law. However, transnational actors and activities may not benefit from the complete absence of whatever predictability and coherence state law formerly provided, nor are they loath to invoke state law—or even reproduce it—when it suits their purposes to do so. Whatever else is implied by this paradox, it does point to the proliferation of non-state regulatory regimes whose architects and artisans, we argue, are law experts, often from the private sector.

Non-state regulatory regimes take many forms. Some are buried in the interstices of business transactions and the fine print of financial instruments—a phenomenon of domestic as well as global business relations. Others emerge from what is assumed to be common practice in transnational transactions, in the form of a new *lex mercatoria* articulated by arbitrators and acquiesced in by the business community.¹⁰³ Still others come about through the promulgation by multinational corporations—acting alone or under the umbrella of sectoral agreements—of codes of behaviour in sensitive areas such as corrupt practices, worker rights, and pollution,¹⁰⁴ or technical standards for products and processes.¹⁰⁵ Law experts are central to the production of these non-state regimes.

Moreover, the new economy is dominated by three regional trading blocs—Europe, NAFTA, and the Asia-Pacific bloc—whose legal

¹⁰³ Dezalay & Garth, *supra* note 2 at 42-43; J. Flood & A. Caiger, “Lawyers and Arbitration: The Juridification of Construction Disputes” (1993) 56 *Modern L. Rev.* 412; and T. Wilhelmsson, “Legal Integration as Disintegration of National Law” in H. Petersen & H. Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995) 127.

¹⁰⁴ L. Compa & T. Hinchcliffe-Darricarrere, “Enforcing Labour Rights through Corporate Codes of Conduct” (1993) 33 *Colum. J. Transnat’l L.* 663, also refer to codes governing investment, environmental, social, and ethical practices. For other examples, see D. Pink, “The Valdez Principles: Is What’s Good for America Good for General Motors?” (1990) 8 *Yale L. & Pol’y Rev.* 180; UNCTAD, *World Investment Report 1994: Transnational Corporations, Employment and the Workplace* (New York: United Nations, 1994) at 313-40. See also the activities of Transparency International (The Coalition against Corruption in International Business Transactions), which has adopted *Standards of Conduct* in order to influence business behaviour through investigation and publicity of corrupt practices: Pamphlet, “Introducing TI” [in possession of authors].

¹⁰⁵ L. Salter, “Have We Reached the Information Age Yet?” (1993) 23 *Int’l. J. Pol. Econ.* 3; and L. Salter, “The Housework of Capitalism: Standardization in the Communications and Information Technology Sectors” (1993) 23 *Int’l. J. Pol. Econ.* 105.

institutions were formally created by international treaties and implemented by state laws. Clearly, state law experts helped to formulate the fundamental legal texts, such as that of NAFTA, but they did not act alone. They were assisted by experts seconded from private sector employment to serve on government negotiating and drafting teams. More importantly, private-sector law experts were also active and influential in their own right, as representatives of important sectoral interests, and as advisors and interlocutors to the main negotiators. As a trade bloc such as the EU or NAFTA develops, moreover, it may—as any complex institution might—develop its own cadre of experts, who will perform routine tasks of administration, resolve disputes over the meaning and application of basic texts, and support the periodic renegotiation of their terms. Indeed, those recruited to serve in the institutions of the bloc itself are regarded as highly—if not excessively—influential, as witnessed by the resentment and black humour which attend the manic regulatory initiatives of the Brussels “Euro-crats.”

Private sector experts also help to define the trade bloc as a legal field in various ways. As indicated, they were influential in the original conception of NAFTA. Since then, they have developed a significant “law industry” providing advice to public and private sector clients on the treaty and the two side agreements, offering training and information programs on NAFTA for specialized audiences, promoting intra-bloc contacts amongst various groups of professionals—including law experts—and providing academic and journalistic writing on the legal regime of NAFTA. Euro-law experts in the private sector exercise an even more formidable influence on the direction, content, and effectiveness of the regime—in part because the EU has a more explicit and ambitious regulatory bite. They are consulted extensively on the formation of policies, the drafting of regulations, and the resolution of conflicts; when subsidiary national legislation is to be enacted or interpreted, they make representations, and they help to habituate their clients to the requirements of European law and to reshape their clients’ conduct to conform (or appear to conform) with the regulatory regime.

Finally, the new economy involves increasingly complex corporate arrangements designed to minimize domestic regulation and taxation, to facilitate penetration of trade blocs or national spaces by multinational corporations, or to forge alliances, networks, and other corporate liaisons. Thus, the creation of holding companies and subsidiaries, the negotiation of product mandates and procurement policies, the sharing of trade secrets and technologies, and the host of other linkages that bind the disparate elements of a global corporation

and its satellites all must be devised, negotiated, reviewed, and implemented. This is productive work for law experts.

D. Law Experts and Technology

Since the new economy is built around new forms of technology and new flows of information, there is a particular need for these to be protected and reinforced by new property rights and new contractual arrangements. Moreover, in light of the trend towards globalization of production, financial markets, and corporate structures, there is a particular requirement that these new rights should operate regardless of national borders. This has led to the adoption of several complementary strategies.

International conventions and regional agreements require the standardization or harmonization of national legislation governing many of these matters. While harmonization is arguably a necessary precondition to the international dissemination of technology, in fact it tends to reinforce the dominance of the legal regimes of leading countries, such as the United States, whose state law becomes a benchmark or standard for other countries.¹⁰⁶ Moreover, the market dominance of global corporations—again, many of them American—which hold forms of property protected under the new harmonized regime is also enhanced.¹⁰⁷ On the other hand, however, negotiation of international or regional conventions is a slow process: their translation into “harmonized” national legislation is subject to the usual political vicissitudes; and even when fully operational, state regulatory regimes are not always equal to the task of protecting rapidly changing technological innovation.

Consequently, instead of relying on supra-state conventions or state law, proprietors of technical innovations and industrial know-how may try to protect them through the construction of private contractual legal regimes. These private regimes may turn out to somewhat resemble state law—indeed to resemble American law—even though it is not invoked directly. In effect, state law is used by law experts as an

¹⁰⁶ To be fair, this phenomenon is restricted neither to American law nor to international conventions which reinforce the new economy.

¹⁰⁷ An example: the Canadian generic drug industry grew up under the now-abandoned provisions of the *Patent Act* R.S.C. 1985, c. P-4, permitting them to secure compulsory licences from international drug firms, at regulated prices. As a result, they were able to produce and market these drugs in Canada, to supply them at a favourable price to Canadian consumers, and to moderate the burden of drug costs for Canada’s health care system.

intellectual template with which to reconfigure private arrangements. Over time, as these legal regimes come to incorporate, codify, and project what can plausibly be described as “normal” business practice, pressures mount for national laws to be brought into conformity with what international business expects. This can sometimes be accomplished by modifications in the administration of existing national laws, sometimes by their amendment, and sometimes by their supersession by international conventions or treaties. Sometimes, too, private legal regimes, like state regimes, may appear to be too cumbersome or risky. Owners of new forms of industrial property may decide instead to rely on secrecy, to disseminate their industrial processes, software, and confidential information nationally and transnationally only through internal company channels, within which it can hopefully be protected against industrial espionage.¹⁰⁸ Thus, law experts play a role at every turn: in the initial formulation of international standards, in the rewriting of national law, in its application to specific issues, and in the formation and execution of alternative strategies.

E. Competition Amongst Law Experts in the New Economy

It could hardly be argued that the role of law experts within the sectors of the legal field most affected by the new economy represents a radical departure. Obviously not; law experts have performed analogous roles producing law in previous times and under different circumstances. However, their role in the new economy does take on certain distinctive qualities which require some discussion.

First, the production of law at a distance from the state, even from supra-state institutions, gives law experts in the private sector an unusual degree of influence. Whereas law experts representing clients in encounters with state law were constrained, even chastened, by the possible consequences of their clients acting illegally—or being caught in illegality themselves—fewer constraints operate in the new economy where so much happens outside the reach of the state, and where the state itself is acting with diminishing vigour and vigilance. Consequently, the law expert is put in the paradoxical position of being able to maximize the client’s freedom of action, while also having to accept

¹⁰⁸ The detection and prevention of industrial espionage have become, in the United States, part of the mandate of both public agencies (including the Central Intelligence Agency) and private firms, such as the “Big Six” consulting firms, some of which now offer security management services.

greater personal responsibility as the inspiration and instrument of any new system of self-regulation.

Second, the privatization of law production makes possible the proliferation of legal forms and fora and places a premium on legal creativity. Here too there is a paradox. It is not enough to invent, say, new legal rules for international licensing or loan agreements: these rules must be satisfactory to customers, bankers, suppliers, and creditors. The result is that privatized arrangements often reflect those familiar to the law expert, either because they are common in a particular trade sector, or because they resemble state law, typically the state law of the United States or other dominant economies. Creativity is thus constrained by the need for intelligibility and acceptability.

Third, accepting that state law is often disproportionately influenced by powerful business interests, the legislative process in most democratic countries nonetheless provides an opportunity for public input, debate, and the accommodation of competing viewpoints. Not so the law produced by law experts. Much of the law of the new economy suffers from a democratic deficit both in terms of process and in terms of content.¹⁰⁹

And finally, to return to an issue raised above, at the outset of this section, law experts contend with each other for control of the international legal field. Public- and private-sector law experts have different clients and different mandates, and consequently will often have different ideological perspectives. However, whereas the state might once have been thought to hold the trump hand, the new economy relegates the state to a junior partnership with business. The state is no longer meant to regulate, except to the extent that regulation produces national peace and productivity and facilitates global trade, while the global corporation is no longer meant to be the target of regulation so much as a prime contributor to national and global prosperity. In this context, the struggle for control between state and private-sector law experts is likely to be muted,¹¹⁰ and likely to take the form of

¹⁰⁹ See generally de Sousa Santos, *supra* note 5; and Garth, *supra* note 73. The EU's "democratic deficit" is a persistent theme in discourse surrounding European integration. The extent to which the *Treaty on European Union* (popularly known as the *Maastricht Treaty*), signed on 7 February 1992 and entering into force on 1 November 1993, may restore legitimacy to EU institutions is addressed in S. Laitinen-Rawana, "Creating a Unified Europe: Maastricht and Beyond" (1994) 28 *Int'l Law*. 973.

¹¹⁰ The point is illustrated in various ways: close consultation between state and private sector experts in the shaping of government policy; the hiring of private sector experts to represent state interests in policy-sensitive issues, such as trade disputes, and the secondment of private sector experts to government service for limited periods of time. Each of these strategies—whatever its

compromise, if not mutual cooptation—another manifestation of the democratic deficit that is a defining characteristic of the new economy.

Within the private sector, competition amongst law experts is clearly discernible. Local lawyers compete with national law firms.¹¹¹ National law firms compete with international law firms which compete with accounting and consulting firms.¹¹² Contestation between rival groups of international arbitrators, and arbitration counsel, with divergent styles and claims to authority, have been well documented.¹¹³ Accountants, life insurance and trust companies, and investment counsellors all compete with lawyers in the market for the provision of tax planning for wealthy clients. Immigration consultants, tax preparers, workers' compensation advocates, and auto insurance claims experts compete with lawyers and accountants for a mass clientele.

While by no means all of these providers and consumers of law expertise are directly implicated in the new economy, its pervasive effects ensure that the production of law, and the competition amongst legal producers, is directly affected by developments within it. For example, changes in the relationship between the state and civil society are eviscerating the publicly funded legal aid systems which we have built up over the past thirty years. One result will be the intensification of competition among law experts who provide advice in matrimonial and immigration matters. Globalization which has stimulated changes in the corporate structure of Canadian business, with more and more decision making being centralized in the home office of global enterprises based in the United States, may well lead to the proliferation of American law firms in Canada. Changes in information technology which support legal research and record-keeping will affect different kinds of law experts in different ways. For example, routine services, such as divorces and house purchases may be deskilled,¹¹⁴ while law experts who provide sophisticated services, such as tax advice, may become capital-intensive as rulings and regulations effectively become accessible only with the aid of a computer.

With this brief mention of examples of the possible effects of the new economy on competition in the market for legal expertise, we turn

advantages—has the effect of eroding the differences between state and private sector experts.

¹¹¹ *Black v. Law Society of Alberta*[1989] 1 S.C.R. 591.

¹¹² Dezalay & Sugarman, eds., *supra* note 79.

¹¹³ Dezalay & Garth, *supra* note 2.

¹¹⁴ J. Van Hoy, "Selling and Processing Law: Legal Work at Franchise Law Firms" (1995) 29 *Law & Soc'y Rev.* 703.

to a closer analysis of the legal profession, one of the primary sources of that expertise.

V. THE LEGAL PROFESSION IN THE NEW ECONOMY

The new economy has transformed the legal profession or, at the least, aggravated tendencies within the profession which have been emerging for some time. We take note of four such tendencies, each of which is related to the other. First, the profession has become more and more functionally diverse, and at the same time, and for that very reason, more stratified. Stratification of the profession reflects, and is causally related to, social stratification, which the new economy has intensified. It has helped to create a multidimensional crisis of professional governance. Second, as a consequence of social and professional stratification, middling and marginalized clienteles within the community are being less, and less well, served by the legal system. Third, law firms in the upper stratum of the profession are most closely identified with the dominant forces of the new economy in a functional sense. As is the case with corporations in many sectors of the new economy, the development of these law firms in the past twenty or thirty years has been characterized by two phenomena—a concentration of wealth and power, and a geographic dispersal of activity from the local to the national to the global level. Fourth, as a result especially of this concentration, law firms within the upper strata—sometimes referred to as Cravathist firms—have experienced and reacted to internal stresses similar to those that have transformed their industrial counterpart, the Fordist manufacturing enterprise.

A. *Diversification and Stratification*

The legal profession in the United States and Canada, had been quite stratified well before the advent of the new economy.¹¹⁵ Scholars

¹¹⁵ In the American context, see J.E. Carlin, *Lawyers on their Own: A Study of Individual Practitioners in Chicago* (New Brunswick, N.J.: Rutgers University Press, 1962); J.P. Heinz & E.O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation, 1982); and R.L. Abel, *American Lawyers* (New York: Oxford University Press, 1989). For Canada, see generally H.W. Arthurs, R. Weisman & F.H. Zemans, "The Canadian Legal Profession" (1986) *Am. B. Found. Res. J.* 447; D. Stager with H.W. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990); J. Hagan, M. Huxter & P. Parker, "Class Structure and Legal Practice: Inequality and Mobility among Toronto Lawyers" (1988) 22 *Law & Soc'y Rev.* 9; F.M. Kay, *Women in the Legal Profession: A Report submitted to the Law Society of Upper Canada* (Toronto: LSUC,

have long pointed to the existence of “two hemispheres” within the legal profession:¹¹⁶ a functional division within the profession based on specialities of legal practice and the type of client served; and a hierarchical division, based on the prestige and rewards attached to these differing practice situations, which were populated differentially by lawyers with particular personal and sociological characteristics. One hemisphere comprises “high status lawyers educated in elite law schools, who represent corporations and work in high-prestige areas of law,” the other “predominantly ... lawyers from the lower classes and ethnic and religious minorities, educated in local and night law schools, who represent individual clients and work in low-prestige areas of law.”¹¹⁷

While the new economy did not initiate stratification, it certainly exacerbated it. The proliferation of legal forms and fora, privatization, the transnationalized production of legal norms, and greater competition between and within state and non-state producers of law, echo and replicate developments in other sectors of the new economy which have experienced analogous processes of deregulation, privatization, globalization, and heightened competition within and amongst private and public service providers. The cumulative effect of these developments in law and in the economy more generally has been a tremendous expansion of demand for high value-added services (particularly legal services). This demand, in the United States¹¹⁸ as elsewhere, has disproportionately benefited lawyers serving large corporate clients who are implicated in the new economy. As Nelson and Trubek point out:

The corporate sector is attracting a growing share of the total expenditures on legal services. This has resulted in a dramatic expansion in the size of law firms and the overall earnings of large-firm lawyers. The personal client hemisphere, in contrast, has been flooded with cohorts of young law graduates, and average earnings have declined substantially.¹¹⁹

1989); and J. Hagan & F. Kay, *Gender in Practice: A Study of Lawyers' Lives* (New York: Oxford University Press, 1995).

¹¹⁶ Heinz & Laumann, *supra* note 115.

¹¹⁷ R.L. Nelson & D.M. Trubek, “New Problems and New Paradigms in Studies of the Legal Profession” in R.L. Nelson, D.M. Trubek & R.L. Solomon, eds., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press, 1992) 1 at 8.

¹¹⁸ Over the period 1970 to 1987, the legal services industry in the United States doubled its share of national income. See *ibid.* at 8.

¹¹⁹ *Ibid.* at 9. The authors go on to note that in the United States, the average solo practitioner's income was 43 per cent as much as a law firm partner in 1961; that share fell on average to only 28 per cent as much by 1985.

By contrast, elements of the profession at the periphery of the new economy are in decline or at risk. The position of solo practitioners and small firms, particularly in the metropolitan areas, seems to be the most vulnerable. These firms typically serve working-class and middle-class clients, and small businesses. Over the past twenty or thirty years, there had been an expansion of the need for legal services for members of these groups in tax and regulatory matters affecting small businesses, in real estate and family law, and in criminal law. For some time, in Canada at least, positive economic conditions enabled many of those who required legal services to pay for them. Those who could not afford to pay were supported by the rapidly expanding legal aid system and a modest growth in legal clinics and group-sponsored legal service plans. However, this clientele has experienced economic difficulties in recent years—measured, for example, by declining blue-collar wages, falling house prices, and increasing personal and business bankruptcies; they have less discretionary income, and are less able to afford legal services. But although the need is increasing, legal aid expenditures are being dramatically reduced, clinics and group plans are in danger, and lawyers willing and able to provide needed services are less likely to be publicly subsidized to do so.

Lawyers in the lower strata of the profession thus confront a declining market. Furthermore, they also confront rising overheads due to rapidly escalating professional licence fees and insurance costs, capital investment in information technology, and, likely, mandatory continuing education and other costs of maintaining their own professional competence. Finally, their core business of performing standard services for individual clients at modest fees is highly vulnerable to competition from a new species of multi-location, franchised legal service providers, relying heavily on secretaries, computers, and mass-production techniques.¹²⁰ Thus, serious hardship lies ahead for many lawyers in the lower strata—the “working class”—of the profession. However, they seldom escape into the other “hemisphere” of the profession: the same personal and sociological characteristics which consigned them to their initial professional roles ensure that they will remain there.

The middle ranks of the legal profession have been populated by firms which serve a more affluent individual and corporate clientele, although seldom the largest institutional clients. Recruitment into these firms is varied, but many of them developed around a core group of able lawyers who by choice or by reason of their background did not find their way into the elite firms. Until fairly recently, these firms have

¹²⁰ Van Hoy, *supra* note 114.

prospered. However, they now confront a declining market, in part due to the new economy which features transnational corporations, high technology, consolidation of core enterprises, and the marginalization of small companies and individual service providers. Essentially, mid-sized law firms are losing clients to the elite firms which have a national and international presence, a complete range of specialized services, and access to an extensive network of valuable contacts. To compete, mid-sized firms must therefore become larger, either by expanding and diversifying or by merging with other firms. If they cannot make this transition, they will likely either be required to reinvent themselves as “boutique” firms within special niche areas of practice or to suffer decline, dissolution, bankruptcy, or piecemeal absorption by their competitors.¹²¹

This account of stratification does not speak to the miscellany of practitioners who work in other practice settings: in small and mid-sized communities, in the law departments of corporations, governments, and other institutions, or in private or public clinics. While their patterns of recruitment, reward, and practise differ considerably, these practitioners have one thing in common: unlike lawyers in the prestige firms, they are heavily or totally dependent upon a single “client” or community of clients, and have little or no opportunity either to diversify or retool. They therefore flourish or suffer as the fortunes of their clients wax and wane. As both governments and locally based industries are doing more waning than waxing in the new economy, most of these lawyers will do likewise.

The picture, then, is one of increasing stratification within the profession. The largest firms are growing in size, power, and (relatively, at least) affluence; solo practitioners and small firms are facing a radical decline in their prospects; and middle-sized firms are being absorbed, dissolved, or, perforce, reinvented. And to reiterate: the various strata of the profession are not randomly populated with men and women, members of various religious and ethno-cultural groups, or graduates of particular law schools. Even recent data show that recruitment in the elite firms, while more and more meritocratic, still favours males from preferred socio-economic backgrounds and law schools.¹²²

¹²¹ J. Fitzpatrick, “Legal Future Shock: The Role of Large Law Firms by the End of the Century” (1989) 64 *Ind. L.J.* 461 at 464.

¹²² Hagan, Huxter & Parker, *supra* note 115; Hagan & Kay, *supra* note 115; and M. Cain, “The Symbol Traders” in Cain & Harrington, eds., *supra* note 64, 15 at 26-27.

B. *The Professional and Societal Consequences of Stratification*

Thus, lawyers engaged in heterogeneous conditions of work exhibit different class, ethnic, and gender characteristics, and occupy different positions within both the profession and the national political economy. Not surprisingly, their visions of themselves, of their work, and of their profession vary considerably. As Nelson and Trubek suggest:

[L]awyer professionalism is not a fixed, unitary set of values, but instead consists of multiple visions of what constitutes proper behaviour by lawyers. Conceptions of lawyer professionalism reflect 'the arenas' in which they are produced, that is, the particular institutional settings in which groups construct, explicitly or implicitly, models of the law and of lawyering.¹²³

These divergent conceptions of professionalism generate conflicts over such issues as specialization, competence, legal aid, fee levels, competitive practices, and control of entry to the profession. Such conflicts can no longer be resolved through the assertion of hierarchical authority by the profession's traditional elites; their authority has been eroded both by increasing stratification and by the increasing democratization of professional governing structures. Rather, conflicts take the form of hotly contested elections for governing bodies, widespread resistance to professional policy initiatives and fee levies, and even litigation challenging the authority of governing bodies. Indeed, the profession is experiencing growing internal political dissension at the very moment when it also confronts the profound and permanent external challenges of the new economy. Given such dissension, it is difficult to imagine how long the bar can survive as a unified profession, with a single licensing structure, a single ethical code, and a single, omnicompetent governing body.

Stratification of the legal profession has also influenced legal education and what might be called legal science.¹²⁴ Since careers in large law firms are known to be the most highly paid, and perceived to be the most professionally challenging, law school curricula have to some extent focused on preparing students for such careers. Likewise, legal scholars have devoted considerable attention to the problems encountered by those who practise in such firms. The result has been,

¹²³ R.L. Nelson & D.M. Trubek, "Arenas of Professionalism: The Professional Ideologies of Lawyers in Context" in Nelson, Trubek & Solomon, eds., *supra* note 117, 177 at 179 [hereinafter "Arenas of Professionalism"].

¹²⁴ "Mediation to Pure Law," *supra* note 100 at 89.

some claim,¹²⁵ a considerable ideological skew in legal education and research.

The dominance of the prestige firms and their characteristic version of law has not been absolute. The firms themselves, in what has been portrayed as a strategy of legitimation, perform a significant amount of *pro bono* or public service work.¹²⁶ More importantly, law schools have often functioned as what one scholar has called “counter-hegemonic enclaves,”¹²⁷ and launched important counter-trends in legal education and scholarship.¹²⁸ And publicly funded legal clinics and advocacy groups have created competing models of service delivery and competing visions of law and its social mission.¹²⁹

However, the new economy places all these counter-tendencies at risk. Cuts in public expenditure have diminished the law schools’ margin for innovation in teaching and research. Insecurity about future job prospects has dampened student enthusiasm for critical perspectives. Cutbacks in public funding for legal clinics and advocacy groups have reduced their share of the production of law and legal services.¹³⁰ Concerns about the “bottom line” have led even affluent law firms to reduce their involvement in *pro bono* work. It would not be too much to say that the new economy has indeed operated as a disciplining framework for the law industry.

At the same time, the growing stratification of the profession does not affect the profession alone. It affects society as a whole. In

¹²⁵ C.B. Harrington, “Outlining a Theory of Legal Practice” in Cain & Harrington, eds., *supra* note 61, 49. See, more generally, A. Hutchinson & P. Monahan, “Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought” (1984) 36 *Stan. L. Rev.* 199.

¹²⁶ Much of this began in the late 1960s as large firms responded to “criticism that their work was unfulfilling and inimical to the public interest.” See M. Galanter & T. Palay, “The Transformation of the Big Law Firm” in Nelson, Trubek & Solomon, eds., *supra* note 117, 31 at 52.

¹²⁷ D. Kennedy, “Legal Education and the Reproduction of Hierarchy” (1982) 32 *J. Legal Educ.* 591 at 614-15.

¹²⁸ D. Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Cambridge, Mass.: Afar, 1983); Sugarman, ed., *supra* note 61; A. Chase, “The Birth of the Modern Law School” (1979) 23 *Am. J. Legal Hist.* 329; P. Gabel & P. Harris, “Building Power and Breaking Images: Critical Legal Theory and the Practice of Law” (1982-83) *N.Y.U. Rev. L. & Soc. Change* 369; D. Kaiyrs, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982); K. Klare, “The Law School Curriculum in the 1980s: What’s Left?” (1982) 32 *J. Legal Educ.* 336; and E. Dvorkin, J. Himmelstein & H. Lesnick, *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* (St. Paul, Minn.: West, 1981).

¹²⁹ For a recent account of legal aid in Canada, see National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Ministry of Supply and Services Canada, 1995).

¹³⁰ F.H. Zemans & L.T. Smith, “Can Ontario Sustain Cadillac Legal Services?” (1994) 5 *Md. J. Contemp. Legal Issues* 271.

effect, large commercial enterprises are acquiring even more comprehensive access to skilled, specialized, and well-connected legal advisors, at the same time as governments, community institutions, mid-sized businesses, and ordinary citizens are all experiencing a downgrading and an increasing scarcity of legal services. To the extent that the economics and technology of contemporary legal practice favour firms with large staffs, libraries, and computers, important advantages accrue to the clients of these favoured firms. To the extent that litigation is becoming more and more expensive, access to litigation is more and more restricted, and more and more dominated by those who act for wealthy clients; non-affluent clients and their lawyers are under pressure to settle rather than sue. To the extent that large multinational corporations have access to international commercial arbitration, or to conventional litigation in the forum of their choice, public accountability for this high-stakes litigation is diminished. And to the extent that other regimes of public regulation are being relaxed or repealed, and replaced by non-state or supra-state systems, lawyers who dominate these new fora are becoming more and more influential in shaping legal norms; as their influence rises, it predictably tilts outcomes in the direction of their clients.

All of these developments suggest that, as a result of increased professional stratification in the new economy, we are likely to see further deterioration in the legal power of most people and businesses, as they confront powerful corporations and their legal experts. Ironically, this development coincides with the end of a period of experimentation with publicly funded litigation as a means of redressing unequal economic power. In the new economy, there will be less funding to support citizens engaged in consumer and environmental litigation, or defending state regulation against corporate challenges based on the *Charter* or NAFTA or the GATT. Quite apart from political attacks on regulation *per se*, this will exacerbate the inequalities attributable to professional stratification.

C. Internationalization and Concentration of Legal Practice

Over the past ten or fifteen years, there has been a considerable concentration of legal practice in the largest law firms of the United States and the United Kingdom, of Canada and of some European countries, especially in areas of law most pertinent to the new economy. Large law firms across North America and Europe have increased in size (employing greater numbers of lawyers and support staff), geographical

dispersal (with branch offices or affiliates across the country and abroad), control of legal production (as outlined above), and influence in society generally (through their connections with corporate, financial, and government elites).¹³¹

During this same period, the effects of globalization have been felt by law firms, despite their long tradition of sheltering from foreign competition behind protective barriers such as professional monopolies, practice requirements based on knowledge of local law, and the close affinity between state sovereignty, legislation, and adjudication. These barriers have become much more permeable in the new economy, in light of the privatization of much law making and dispute resolution, of regional economic integration and the creation of regional and supra-national juridical institutions, and of the determination of law firms to reach beyond their traditional local markets in order to retain or recapture the international business of their transnational corporate clients.

American law firms have led this process of concentration and internationalization across North America and into Europe. The largest firm on Wall Street, New York in the early 1960s was Shearman & Sterling & Wright with 125 lawyers (thirty-five partners, ninety associates). Only three other Wall Street firms had over 100 lawyers.¹³² Moreover, the largest firms generally were located in and identified with a single city.¹³³ In contrast, by 1988 there were 115 law firms in the United States each employing more than 200 lawyers.¹³⁴ The largest American law firm at present, Baker & McKenzie, is a full service, multinational conglomerate with branch offices across the United States, Europe, Japan, and Southeast Asia. It employs 1,300 lawyers. Most large American firms have rapidly internationalized: forty-four of the largest 100 law firms in the United States had a total of 136 overseas offices by 1988.¹³⁵

Leading Canadian law firms have generally followed suit, although their growth and internationalization has been much more

¹³¹ In Canada, related legal institutions include the Canadian Bar Association and provincial law societies.

¹³² M. Galanter & T. Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (Chicago: University of Chicago Press, 1991) at 22 [hereinafter *Tournament of Lawyer*].

¹³³ *Ibid.* at 23.

¹³⁴ *Ibid.* at 46. The fifty largest firms doubled in size from 1975-1985, from an average of 124 to an average of 252: Galanter & Palay, *supra* note 126 at 45-46.

¹³⁵ Galanter & Palay, *supra* note 126 at 47.

recent, rapid, and selective than that of their American counterparts.¹³⁶ In 1962, none of the forty-eight largest firms had more than 100 lawyers. By 1980, only one Canadian firm had more than 100 lawyers. By 1990, nineteen law firms in Canada had more than 100 lawyers¹³⁷—the very largest, such as McCarthy Tétrault, employing 200 or more lawyers.¹³⁸ Canadian law firms have also expanded their geographic scope, moving from local to national status on an unprecedented scale, by means of expansion, mergers, affiliations, and alliances.¹³⁹ Fourteen Canadian firms opened eighteen foreign offices between 1985 and 1990, more than triple the number opened in the twenty years prior to 1985.¹⁴⁰ Whether these firms will survive the challenges of globalization and regional economic integration, and their effects on the Canadian economy, must be regarded as an open question.¹⁴¹

Law firms in European countries have also internationalized rapidly since the early 1980s.¹⁴² This process was spurred by the prospect of new markets for transnational legal services, due to the penetration of Europe by American multinational corporations, the

¹³⁶ C. Wilton, "Introduction" in C. Wilton, ed., *Canadian Law Firms in Historical Perspective* (Toronto: University of Toronto Press for the Osgoode Society, 1996) 1 at 71, notes that "whereas the Americans produced giant firms by the 1950s, their Canadian counterparts appeared only shortly before the mega-firms of the 1980s."

¹³⁷ R. Daniels, "Growing Pains: The Why and How of Law Firm Expansion" (1993) 43 U.T.L.J. 147 at 155-56.

¹³⁸ F.M. Kay & J. Hagan, "Changing Opportunities for Partnership for Men and Women Lawyers During the Transformation of the Modern Law Firm," (1994) 32 Osgoode Hall L.J. 413 at 416. This concentration and centralization of Canadian legal production has been propelled by federal deregulation of the Canadian financial industry—which eroded barriers between banks, trusts companies, investment houses, and insurance companies, the continentalizing of trade and investment via the Canada-U.S. Free Trade Agreement and later, the North American Free Trade Agreement, and continued corporate concentration in Canada through mergers and acquisitions—notably in the late 1980s. For further elaboration, see Wilton, *supra* note 136 at 57-64.

¹³⁹ There were thirty-seven regional and national mergers and affiliations across Canada between 1981 and October 1990. See Daniels, *supra* note 137 at 187-88; and Wilton, *supra* note 136 at 65.

¹⁴⁰ Daniels, *supra* note 137 at 157-159.

¹⁴¹ See H.W. Arthurs, "Lawyering in Canada in the 21st Century" (1996) Windsor Y.B. Access Just. [forthcoming].

¹⁴² Trubek *et al.*, *supra* note 96 at 435-448. Y. Dezalay, "The *Big Bang* and the Law: The Internationalization and Restructuration of the Legal Field" (1990) 7 Theory, Culture & Soc'y 279 at 281 [hereinafter "*Big Bang*"], also argues that the largest European firms have been modelled on the Wall Street firm.

deregulation of European—especially British—financial markets,¹⁴³ and concerted efforts to harmonize regulatory standards and liberalize national markets across Europe.¹⁴⁴ The newly emerging European transnational law firms, particularly in the United Kingdom and, to a lesser extent, in the Netherlands and Germany,¹⁴⁵ found themselves in competition with American law firms (already a significant presence in Europe by the late 1970s), the so-called “Big Six” accounting firms which had transformed themselves into multinational, multidisciplinary consulting conglomerates, and in-house counsel of European corporations. Between 1985 and 1990, however, the total professional complement of the twenty largest U.K. law firms doubled. The largest U.K. firm, Clifford Chance, is now the second largest law firm in the world (after Baker & McKenzie) with 1,100 lawyers. Many U.K. firms have opened offices throughout Europe to match the ubiquitous European presence of the large American firms and the Big Six.¹⁴⁶

In certain respects, the new economy seems to have been a catalyst for new or reconstituted legal regimes which have in turn become important to lawyers as new sources of income and influence. In this respect, American law firms have exerted a powerful influence, in part because of their linkages with American-based corporations. They recruit local lawyers and through graduate training and apprenticeship, educate them in American-style practice and the conceptual structures of American law. In association with a new generation of legal academics, also trained in or influenced by American law, they have helped to create transnational legal regimes. These transnational regimes are the result not of state or supranational enactments, but of private arrangements. Using these arrangements, international law

¹⁴³ For more elaboration on the recent rise of mega-law firms in the U.K. and Thatcherite deregulation—notably of London financial markets, see J. Flood “Megalaw in the U.K.: Professionalism or Corporatism? A Preliminary Report” (1989) 64 *Ind. L.J.* 569. This financial deregulation demolished barriers between trading, stockbroking, and advising in the London market. See “*Big Bang*,” *supra* note 142 at 290, note 4.

¹⁴⁴ The leading role taken by U.K. law firms in establishing a presence in Brussels preparatory to 1992 European unification has been empirically documented: see N. Tutt, “Bar sans frontières in Brussels” (30 September 1988) 138 *New L.J.* 707. One should be cautious not to assume that these measures have brought about a common European legal culture. Significant national legal-cultural differences remain in Europe. See, for example, V. Gessner, “Global Legal Interaction and Legal Cultures” (1994) 7 *Ratio Juris* 132.

¹⁴⁵ Many European multinational law firms evolved from aggressive mergers and acquisitions. Trubek *et al.*, *supra* note 96 at 435, cite their growth as “[p]erhaps the most dramatic development on the European scene.”

¹⁴⁶ *Ibid.* at 435-36.

firms have managed, for example, to accomplish mergers, acquisitions, and reorganizations of global corporations in Europe, essentially in accordance with American law.¹⁴⁷

There is a certain business logic to this. The shareholders, debt-holders, assets, workers, suppliers, and customers of a corporation with headquarters in the United States may be located almost anywhere in the world. If the corporation's affairs are to be reorganized, or its debts restructured in some consistent or coherent fashion, this must be done according to a process which embraces all interested parties, regardless of their location. Whether reorganization or restructuring is contemplated, even permitted, by local law is beside the point from the point of view of whoever is the moving party in the process. Global corporations do not regard themselves as being at the disposal of idiosyncratic—and often inconsistent and inconvenient—national legal regimes. Here is the justification for the creation of transnational legal regimes, and an illustration of the power, influence, and technical skill of international law firms. They know American law; they know local law; they are able to work out how to achieve the essential requirements of the former without overtly contravening the latter. But here too is the source of potential injustice and justifiable concern. International law firms obviously work for a particular clientele, typically banks and businesses, not workers or unions. Their objective is to maximize the financial interests of their clients, rather than, say, to protect jobs or the solvency of local suppliers or customers. In any given instance, if they are able to ensure that a privately constructed transnational regime triumphs over local state law, their large corporate clients may benefit and workers and small businesses may lose out.

Another example makes a similar point. Privatization and globalization have created a “market” for normative regimes and dispute resolution procedures which are not aligned with a particular national legal system. A dramatic increase in international arbitration of major disputes between transnational corporations has ensued. Because the size and importance of such disputes makes arbitration practice especially valuable, intense competition has ensued for control of the arbitration market. Lawyers and their clients now engage in extensive forum shopping amongst arbitral regimes, arbitrators, and venues, in order to secure arrangements which appear optimal in terms of cost, speed, privacy, selection of decisionmakers, and confidence in predictable outcomes. The result is what one scholar refers to as “justice

¹⁴⁷ Dezalay & Garth, *supra* note 2 at 49-58.

à la carte.”¹⁴⁸ Seen from a public policy perspective, the predictable outcome of this market competition between regimes is that business gravitates towards those which “favour maximum recognition of freedom of contract and freedom from national laws and regulations.”¹⁴⁹

Transnational legal regimes, then, like other legal fields, must thus be seen as sites of contestation amongst competing forms of property, social and economic interests, ideologies, intellectual perspectives, and modes of production. These contestations resemble, are related to, and derived from those which occur elsewhere in the new economy. Large law firms have come to play a key role in the construction of these new regimes—both domestically and internationally—and consequently in the resulting global and national distribution of wealth and power. As the next section of this paper suggests, however, they have not emerged unscathed from this dramatic enhancement of their own affluence and influence.

D. “Cravathism” and the New Economy

The large, corporate American law firm—sometimes referred to as “Cravathist” after the Wall Street firm of Cravath, Swaine, Moore, an early and still leading exemplar¹⁵⁰—is such a powerful unit of legal production that it is often referred to as a “law factory.” Whether used sardonically or admiringly, the metaphor invites extended consideration.

Like the Fordist industrial plant, the Cravathist law firm was organized around specialization and the division of labour. Like the Fordist industrial plant, it experienced a series of innovations and successes and, latterly, problems: exponential growth in size¹⁵¹ and

¹⁴⁸ “Big Bang,” *supra* note 142 at 288.

¹⁴⁹ Garth, *supra* note 73 at 377.

¹⁵⁰ The “Cravathist” model was pioneered by the Wall Street firm of Cravath, Swaine, Moore in the 1960s. The prototypical large firm of that era operated within the boundaries of a large metropolitan area (e.g., New York, Chicago, Los Angeles). Firm loyalty was paramount; most associates entered the firm with aspirations of partnership, and were routinely placed on partnership tracks. Lateral hiring was the exception, most promotions came from within the firm on the “up or out” model. The 1960s Cravathist firm is seen by most scholars to represent the “golden age” of lawyering in the United States—an era where specialization, bureaucratization, and rationalization of law firm practice had begun, but where these tendencies had not yet caused concerns with respect to the loss of professional autonomy by a large-firm lawyer.

¹⁵¹ Such growth rates are prevalent both in the United States and Canada before and after 1970; Toronto law firms, in particular, grew more than 8 per cent annually over the decade 1980-1990. See Daniels, *supra* note 137 at 157.

influence,¹⁵² the evolution of strategies to deal with the recruitment, training, and remuneration of personnel,¹⁵³ substitution of capital for labour, a technological revolution,¹⁵⁴ volatile markets for professional services,¹⁵⁵ escalating costs and declining profitability, and, belatedly, innovations in firm structure and management technique.¹⁵⁶

We do not wish to overtax the metaphor, particularly in relation to the status of lawyers working in the “law factory.” These Cravathist “workers” experienced challenges, rewards, and a degree of dignity and autonomy unknown to industrial workers; they had no need of or interest in collective bargaining or other statutory regimes of workplace regulation. They were, obviously, not workers at all, but entrepreneurs with a share, or prospective share, in a highly sophisticated business. Unlike the typical assembly-line worker or clerk, even the lowliest associate lawyers aspired to “make partner” within a reasonable period of time, to become a part-owner and manager of the firm following an initial period as a well-paid probationer. However, while acknowledging the limits of the metaphor, it is striking that Cravathism and Fordism are being transformed by the new economy in rather similar ways.

In the industrial sector, under the intense pressure of global competition, Fordism is being transformed by a range of innovations collectively known as “flexible production,” described above.¹⁵⁷ Cravathism is also being reshaped by competitive pressures driven by changes in both the modes of production and the market for services, thus, the restructuring of Cravathist firms tracks the evolving logic of corporate organization in the new economy.¹⁵⁸ Among its principal features are: heightened attention to competitiveness as corporate

¹⁵² M.J. Green, *The Other Government: The Unseen Power of Washington Lawyers* (New York: Grossman, 1975); L.M. Friedman, *Total Justice* (New York: Russell Sage, 1985); and R.A. Ferguson, *Law and Letters in American Culture* (Cambridge, Mass.: Harvard University Press, 1984). For a critique of the general perception that lawyers exercise considerable influence over national policy-making in the American context, see R.L. Nelson & J.P. Heinz with E.O. Laumann & R.H. Salisbury, “Lawyers and the Structure of Influence in Washington” (1988) 22 *Law & Soc’y Rev.* 237.

¹⁵³ *Tournament of Lawyers*, *supra* note 132 at 55-58.

¹⁵⁴ *Ibid.* at 42; and Stager with Arthurs, *supra* note 115 at 181-82.

¹⁵⁵ Fitzpatrick, *supra* note 121 at 464; and Daniels, *supra* note 137 at 169 underscore the growing use of in-house counsel. Many large firms have responded to this volatility in the demand for legal services by hiring their own marketing directors and engaging in aggressive marketing campaigns. See Galanter & Palay, *supra* note 126 at 49.

¹⁵⁶ One such innovation is greater diversification: see Fitzpatrick, *supra* note 121 at 466-67.

¹⁵⁷ See Part II(C), above, for a discussion of this issue.

¹⁵⁸ Daniels, *supra* note 137.

clients try to hold down their costs by putting legal services out to tender, attending to them in-house or, where possible, dispensing with them altogether;¹⁵⁹ geographic expansion by law firms beyond their traditional local markets so as to serve transnational clients through branch offices or affiliates located across the country and abroad;¹⁶⁰ “product” diversification in the form of a more comprehensive range of specialized professional services, and consequent proliferation of semi-autonomous departments, practice groups, or teams within the firm; and enhanced attention to profitability as evidenced by greater emphasis on aggressive marketing, productivity, and cost controls.¹⁶¹

These developments have caused, and are causing, significant changes in the structure, management, and culture of Cravathist firms, and especially in the security, status, and working conditions of the lawyers who work in them. Increased competitiveness, size, specialization, and geographic dispersal require a restructuring and rationalization of the Cravathist firm. Specifically, they generate pressures to subordinate individual practice preferences, skills, aspirations, and lifestyles to overall firm strategy. To devise and implement firm strategy, however, changes are required in the decision-making processes of the partnership. These changes seem to presage greater bureaucratization. Collegial self-management by the lawyer-partners seems in disfavour and some firms are experimenting with professional management by non-lawyer “chief executives” and their consultants.¹⁶² More ambitious and detailed business plans, along with more single-minded focus on billable hours and the “bottom line,”¹⁶³

¹⁵⁹ It has been observed that legal shopping has become increasingly sophisticated. In international commercial disputes it resembles “justice à la carte”—that is, extends to the *forum* for conflict resolution. Transnational clients are increasingly bypassing formal public judicial processes in favour of private alternatives (e.g., arbitration, mini-trials, and rent-a-judge schemes). See “*Big Bang*,” *supra* note 142 at 288-89.

¹⁶⁰ Many observers forecast that these tendencies towards concentration and centralization of legal production within the mega-firm will continue. A senior partner in Clifford Chance (the United Kingdom’s largest law firm) predicts that “[i]n a few years’ time, there will only be room for about a half a dozen big international law firms”: cited in Flood, *supra* note 143 at 578.

¹⁶¹ A 1 per cent shift in the economy translates into a 2 per cent shift in demand for legal services. See Stager with Arthurs, *supra* note 115 at 319.

¹⁶² *Tournament of Lawyers* *supra* note 132 at 52.

¹⁶³ The average annual target for billable hours in most major firms in the United States and Canada in 1990 was 1,600, up from 1,500 the previous year. Annual targets for billable hours have generally increased over the past decade in large law firms, such that targets of 2,000 hours (or more) in major Toronto firms are not uncommon. See K. Monteith, “1989 National Associate Survey” *Canadian Lawyer* (December 1989/January 1990) 22. See also Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* Report of the Task Force on Gender

blur the traditional professional ethos of the Cravathist firm. Specifically, they dilute one of its traditional strengths, namely, the ability to renew the firm by attracting, recruiting, socializing, training, and promoting very able and energetic young lawyers. In the new economy, however, while a privileged cadre of such recruits remains, and pursues more-or-less traditional career paths, more and more firms are introducing more heterogenous employment conditions, and entering into more flexible and non-traditional arrangements with lawyers who will always function at its periphery.¹⁶⁴ Simply put, within the very elite of the legal profession—the Cravathist firm—there are good jobs and not-so-good jobs, and the latter are expanding faster than the former.¹⁶⁵ In sum, the new mode of Cravathism is one of greater intra-firm stratification and fragmentation at the core.

These tendencies are reflected in lower percentages of associates being promoted to partner,¹⁶⁶ after longer probationary periods,¹⁶⁷ slower and fewer promotions within the large firm and more lateral hiring,¹⁶⁸ and eroding security of tenure for partners.¹⁶⁹ The

Equality in the Legal Profession (Ottawa: CBA, 1993) at 84 [hereinafter Task Force Report]. In the United States, billable hours targets have recently increased by almost 100 a year—with targets reaching as high as 2,300 in a major Los Angeles firm: see C. Menkel-Meadow, “Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers” in R.L. Abel & P.S.C. Lewis, eds., *Lawyers in Society*, vol. 3 (Berkeley: University of California Press, 1989) 221.

¹⁶⁴ Tempting as it might be, we are not suggesting these tendencies translate to an overall proletarianization of the legal profession. The proletarianization thesis has been put by E. Spangler, *Lawyers for Hire: Salaried Professionals at Work* (New Haven, Conn.: Yale University Press, 1986). For a cogent critique of this thesis see, “Arenas of Professionalism,” *supra* note 123 at 202-07.

¹⁶⁵ Hagan, Huxter & Parker, *supra* note 115 at 9.

¹⁶⁶ As Kay & Hagan, *supra* note 138 at 447, put it, “opportunities for promotion for women and men have not kept pace with the growth of the profession.” Ontario lawyers called to the bar in 1975 have a 34 per cent probability of invitation to partnerships. Those chances have declined steadily on average for all Ontario lawyers called to the bar in 1982 (27 per cent) and in 1985 (20 per cent). See Kay & Hagan at 448-49.

¹⁶⁷ In the United States, some firms have increased the number of years before admission to partnership from six or seven years to eight or nine years: see *ibid.* at 418.

¹⁶⁸ *Tournament of Lawyers* *supra* note 132 at 54, observe that lateral hiring has become much more common since the 1970s and has now “widened out from individual lawyers to whole departments and groups within firms and to whole firms.” In 1988, over 100 large American law firms hired more than half their associates and partners laterally, rather than from promotions within the firm. The growth in lateral hiring and commercial orientation of the large law firm is echoed in Fitzpatrick, *supra* note 121.

¹⁶⁹ Mergers and acquisitions of firms have contributed to this tendency. Many merger arrangements are conditional upon a rationalization (*i.e.*, downsizing) of the new firm’s partners or greater differentiation in partnership status (senior vs. junior vs. non-equity). A greater emphasis on “rainmaking”—the bringing in of new business—and profitability has also led many firms simply

restructuring of the Cravathist firm in both the United States and Canada has led to increasing ratios of associates to partners,¹⁷⁰ and consequently to “a higher proportion of new lawyers who are starting their careers as employees and retaining that status for longer periods.”¹⁷¹ Salaried lawyers—in Cravathist firms and elsewhere—have been described as a “professional proletariat”¹⁷² amounting in 1985 to more than one-third of Toronto lawyers.¹⁷³ In the prestigious field of corporate commercial law—essentially the field dominated by the Cravathist firms—about a fifth of salaried lawyers remained as “untenured” employee-associates after completing six years of service, a figure once considered unusually high.¹⁷⁴ We hypothesize that recessionary conditions since the early 1990s have only exacerbated these conditions, especially in light of the continued high level of admissions to the bar.¹⁷⁵

As in the Fordist manufacturing enterprise, flexible or non-standard work arrangements are also emerging in the new Cravathist firm, although their meaning and effect must be assessed in context. No longer does partnership participation lie within the reasonable expectation of all recruits. New occupational categories of lawyers have emerged, such as permanent associates, staff lawyers, special counsel, senior lawyers, and salaried partners.¹⁷⁶ Large law firms have also begun experiments with flexible work arrangements, such as sabbaticals, job

to eliminate non-producing partners. See *Tournament of Lawyers* *supra* note 132 at 53.

¹⁷⁰ The number of associates within the American legal profession increased fivefold between 1951 and 1980. During the same period, the number of partners increased less than threefold. See Kay & Hagan, *supra* note 138 at 416.

¹⁷¹ *Ibid.* at 417.

¹⁷² Hagan, Huxter & Parker, *supra* note 115 at 14-18, formally define the “professional proletariat” as associate lawyers who have only clerical persons below them, but some autonomy to design important aspects of their work or who can only design a few or no important aspects of their work.

¹⁷³ *Ibid.* at 22. As the authors put it, “that suggests the legal profession is surprisingly proletarianized, albeit with a proletariat that is much better paid and has much better class prospects than proletariats normally considered.”

Note that this research was done in 1985. Continued high levels of admittance of lawyers to the bar, combined with the recessionary 1990s, would tend to suggest that this size of working-class lawyers, both absolutely and proportionately, is even larger today than ten years ago. Moreover, such lawyers face much lower prospects for mobility than did their counterparts in 1985.

¹⁷⁴ *Ibid.* at 27.

¹⁷⁵ Whether these material conditions will give rise to demands for reforms to the institutional structure of the large law firm, which are more transformative than that contemplated in the Task Force Report, *supra* note 163, remains to be seen.

¹⁷⁶ For more elaboration on these new positions, see Kay & Hagan, *supra* note 138 at 418.

sharing, part-time positions,¹⁷⁷ and contracting out files to temporary legal service providers.¹⁷⁸ Temporary lawyers work on a hourly basis (for “sweat hours,” not billable hours), receive no benefits, and can be hired or dismissed with as little as two days’ notice.¹⁷⁹ And, of course, paraprofessionals are being used in ever-greater numbers to perform work once done by lawyers. In short, “flexible” work arrangements are emerging in the Cravathist firm, as in many sectors of the North American economy, because of management’s desire to cut costs through personnel policies that increasingly recategorize employees as variable rather than fixed costs for the firm.

We must neither romanticize the Cravathist firm in its “golden age,” nor forget that it is today—as it always was—primarily a profit-making venture. As such, it remains almost uniquely successful as a form of organization within the legal profession. However, functional, financial, structural, managerial, and cultural changes, driven by intense competitive pressures, seem to be transforming the Cravathist firm at the very moment of its greatest success. Contemporaneously, and arguably as a consequence, Cravathism seems to be experiencing a crisis of morale and stability, an increase in individual self-seeking, intra-firm disputes, defections and schisms, bankruptcies and dissolutions, ethical lapses, and even defalcations. This crisis raises long-term questions not only about the prosperity of individual firms, but about the very survival of Cravathism in the new economy.

¹⁷⁷ See “The New Lawyer Temp” (April 1994) 3 *National* 16.

¹⁷⁸ One of the largest such agencies in Canada is Advocate Placement Ltd., which has 400 lawyers registered with it. Eighty-three per cent of its lawyers who were placed in temporary jobs in 1993 had been recently called to the Bar (*i.e.*, between 1983 and 1988).

¹⁷⁹ See M. Conrod, “Pleasures and pitfalls of flexible work arrangements for lawyers” 12 *The Lawyers Weekly* (2 April 1993) 1 and 23.