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Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad

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EXTRATERRITORIALITY BY OTHER MEANS: HOW LABOR LAW SNEAKS ACROSS BORDERS, CONQUERS MINDS, AND CONTROLS WORKPLACES ABROAD

Harry Arthurs*

INTRODUCTION

Labor lawyers generally believe that each country's labor law, for better or worse, expresses its fundamental values and reflects its historic experience; that states can neither import nor export labor law because of the unique characteristics of each country's legal and industrial relations systems;¹ and that the doctrine of extraterritoriality² shields each state's labor law from the intrusion of others, thus ensuring that each can pursue its social and economic development in the manner it thinks best. While labor lawyers who hold these views are genuinely respectful of national sovereignty, some also chafe under its restrictions. They believe that the extraterritoriality doctrine unduly limits the capacity of a state to protect the labor rights of its own citizens while they are employed abroad. They are also concerned that a state cannot punish the businesses it has incorporated for engaging in exploitative labor practices when operating in foreign countries, thereby harming workers in those countries as well as undercutting labor standards at home.³

This Article challenges this state-centered description of labor law and

* University Professor Emeritus and President Emeritus, York University. I am grateful for the insightful comments on an early draft provided by Peer Zumbansen, Katherine Stone, and Susan Bisom-Rapp, the able research assistance of Caroline Markiewicz, and the helpful advice of the two senior editors of the *Stanford Law and Policy Review* assigned to work on my manuscript.

1. The issue is canvassed extensively in *RETHINKING COMPARATIVE LABOR LAW: BRIDGING THE PAST AND THE FUTURE* (Benjamin Aaron & Katherine Van Wezel Stone eds., 2007).

2. *See infra* Part I.A.

3. *See, e.g.*, BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 151 (2005); Lance Compa, *Pursuing International Labour Rights in U.S. Courts: New Uses for Old Tools*, 57 *INDUS. REL.* 48 (2002); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 *MICH. J. INT'L L.* 987 (1995).

impoverished view of extraterritoriality. It suggests that transnational flows of technology and capital, goods and services, and ideas and information have brought in their wake changes in political economy and social relations that have transformed regimes of public and workplace governance in all countries. It proposes that the extraterritoriality doctrine operates, if at all, only in the formal sense of not allowing one state to overtly project its law into the territory of another. But extraterritoriality does little to prevent the rules governing employment relations in one country from taking root elsewhere, from shaping foreign labor market norms, institutions, and practices, and from being reproduced, in their original or mutant forms, in foreign systems of labor law. The result is the extraterritorial projection “by other means” of labor law and policy—a form of extraterritoriality that has the potential to enhance as well as undermine labor standards in global enterprises.

This challenge, in turn, rests on two premises.

The first is that all workplaces tend to generate their own law.⁴ The “law of the workplace” thus comprises not only state labor law but also (and more importantly) formal contractual understandings; workplace customs explicitly acted on and implicitly accepted as binding by workers and managers; and low-visibility behavioral norms embedded in operating manuals, daily routines, and workplace cultures. The law of the workplace has long been understood by industrial relations practitioners and socio-legal scholars to exist apart from—and sometimes in contravention of—state law. Indeed, given the unwillingness or incapacity of states to regulate the labor practices of transnational corporations, such corporations are relatively free to develop their own normative regimes. The law of the workplace is therefore not unduly influenced by national legal systems, though for their own reasons corporations may choose whether and to what extent they will comply with the local law of the countries in which they operate. Consequently, to describe labor law as operating extraterritorially is only to identify one more way (amongst many) in which it departs from the formal state-centered paradigm of law to which most jurists subscribe.

The second premise is that “labor” is not a discrete domain of law and policy.⁵ While a central preoccupation of labor law is indeed to regulate the

4. See generally H.W. Arthurs, *Labour Law Without the State?*, 46 U. TORONTO L.J. 1 (1996); Harry Arthurs, *Landscape and Memory: Labour Law, Legal Pluralism and Globalization*, in *ADVANCING THEORY IN LABOUR LAW AND INDUSTRIAL RELATIONS IN A GLOBAL CONTEXT* 21 (Ton Wilthagen ed., 1998) [hereinafter Arthurs, *Landscape and Memory*]; Harry Arthurs, *Reinventing Labor Law for the Global Economy*, 22 BERKELEY J. EMP. & LAB. L. 271 (2001); Harry W. Arthurs, *Understanding Labour Law: The Debate over “Industrial Pluralism,”* 38 CURRENT LEGAL PROBS. 83 (1985) [hereinafter Arthurs, *Understanding Labour Law*].

5. See Harry W. Arthurs, *What Immortal Hand or Eye?—Who Will Redraw the Boundaries of Labour Law?*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK* 373 (Guy Davidov & Brian Langille eds., 2006).

balance of power between workers and employers, many of the factors that actually determine that balance are not conventionally perceived to be “labor” related. Trade and taxation, homeland security and health insurance, and insolvency and immigration laws and policies (to name but a few) have profound effects on labor markets in general, and therefore on particular economic sectors, enterprises, and workplaces. The result is that in many advanced economies—especially those where global corporations originate and dominate—labor law and policy become an incidental by-product, an externality, of other political preoccupations. The bargaining power of unions, the enforcement of labor standards legislation, and the provision of employment opportunities for excluded minorities are often determined in a practical sense by public policies whose primary purpose is to encourage or discourage consumption, pacify or punish particular political constituencies, or realign relations with foreign trading partners. Nor, given the declining political influence and bargaining strength of unions in most advanced economies, can workers count on recouping at the workplace level losses sustained in debates at the political level. And, of course, the situation of workers in most developing economies is even worse: they are not citizens of the metropolitan countries where important decisions are made that affect their jobs, are often denied a voice even in the political system of their own country, and seldom wield much power at the workplace level.

Thus, the “extraterritoriality” debate is not merely over the extent to which states have the right to project their labor laws beyond their territorial borders or, for that matter, to exempt foreign corporations from their labor laws. It is more fundamentally a debate over the multiple sources and meanings of “law,” the permeable boundaries of “labor” as a policy domain, and the effects of globalization on these two difficult issues.

In the next Part, I introduce this debate by briefly examining the legal doctrine of extraterritoriality, by providing historical examples of states that have actively sought to project their labor laws into foreign territories, and by showing that labor laws do operate extraterritorially (with varying degrees of success), legal-doctrinal objections to the contrary notwithstanding. Then, in successive Parts, I address what I have referred to as the “fundamentals” of the debate, by describing how labor laws in fact “sneak across borders” relatively unconstrained by the extraterritoriality doctrine; how they “conquer the minds” of foreign legislators and policy makers, workers and managers, and their advocates and allies; and how they come to “control workplaces abroad.” These are the “other means” by which extraterritoriality is accomplished. In a concluding Part, I revisit the issue of globalization, and suggest that since extraterritoriality “by other means” is probably inevitable, we had better understand its modalities and consequences.

I. THE MULTIPLE MANIFESTATIONS OF EXTRATERRITORIALITY

A. Extraterritoriality as Legal Doctrine

The legal doctrine of extraterritoriality has three distinct aspects. First, it prima facie prevents states from applying their laws to anyone not physically present within their own territorial boundaries.⁶ Not surprisingly, then, states may not enact laws that purport to govern employment relations in another country. To do so would clearly infringe the sovereignty of that country. Second, by way of exception, states may regulate the conduct and protect the rights of their individual and corporate citizens while abroad so long as they do not require them to violate the law of the country where they live, work, or carry on business.⁷ Consequently, if a state does wish to subject its expatriate workers and employers to the extraterritorial reach of its labor laws it may do so by making this explicit in domestic legislation or by demonstrating that their conduct abroad has significant effects at home.⁸ And third, the extraterritoriality doctrine may be qualified by treaty or international law so as to confer on the expatriate citizens of one state full or partial immunity from the law of another state in which they work or live. This type of extraterritoriality is relatively rare in the labor context, but certainly not unknown.⁹ Obviously,

6. For a canonical statement of the doctrine, see Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages*, in PRIVATE INTERNATIONAL LAW IN COMMON LAW CANADA: CASES, TEXT, AND MATERIALS 14, 14-15 (Nicholas Rafferty et al. eds., 2003) (“No State or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein . . .”).

7. See, e.g., DAVID P. CURRIE, HERMAN HILL KAY & LARRY KRAMER, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 733 (6th ed. 2001) (“The ‘effects doctrine’ . . . is generally treated as an aspect of territoriality, and a state may regulate activity occurring outside the state if that activity has or is intended to have effects within it.”).

8. See, e.g., Van Wezel Stone, *supra* note 3, at 987; cf. LaToya S. Brown, *The Title VII Tug-of-War: Application of U.S. Employment Discrimination Law Extraterritorially*, 40 VAND. J. TRANSNAT’L L. 833 (2007); Todd Keithley, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 COLUM. L. REV. 2135 (2005); Stephen B. Moldof, *The Application of U.S. Labor Laws to Activities and Employees Outside the United States*, 17 LAB. LAW. 417 (2002).

9. The most notorious example involved the establishment of “foreign concessions” in Shanghai, Tienjin, and other Chinese cities under the notorious “unequal treaties” imposed by the United States, Japan, and various European powers from the mid-nineteenth century onwards. These “concessions” were enclaves in which Chinese law was displaced by the law of the foreign power operating extraterritorially. Since they were major commercial, manufacturing, and shipping centers, the same cities were often the site of labor organization and nationalist agitation. See generally S.A. SMITH, *LIKE CATTLE AND HORSES: NATIONALISM AND LABOUR IN SHANGHAI 1895-1927* (2002). Contemporary examples of extraterritoriality usually involve bilateral arrangements whereby states agree to exempt each other’s citizens from complying with their law in narrowly specified circumstances. Examples include the following: conventions against double taxation, see, e.g., Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, U.S.-Can.,

full or partial immunities for foreign corporations may be established unilaterally by the domestic legislation of the host country, as they are in export processing zones (EPZs).¹⁰

B. Extraterritoriality in Historical Context

The great trading companies that undertook the first wave of globalization, from the seventeenth century onwards, did not hesitate to impose their own “law” on their employees, whether dispatched from the mother country or employed locally.¹¹ Nor did colonial courts and administrations shrink from *holus bolus* importation of labor laws from their home countries, however ill-suited to local conditions. Nor did colonial legislators hesitate to replicate in local form legislation clearly borrowed from the motherland—the U.K. Master and Servant Acts being a particularly well-documented case in point.¹² Nor did newly independent nations always shrug off colonial labor laws when the flag of the metropolitan power was lowered.¹³ Even post-apartheid South Africa redesigned its collective labor laws through extensive “borrowings and bendings” from other national systems, in the hope of both enabling its labor market institutions to operate in the context of a global economy, and ensuring its workers freedoms and protections comparable to those enjoyed by workers in other democracies.¹⁴ In fact, attempts to import labor market policies,

Sept. 26, 1980, T.I.A.S. No. 11087; agreements providing credit for old age pensions earned abroad, *see, e.g.*, Agreement Between the Government of the United States of America and the Government of Canada with Respect to Social Security, U.S.-Can., May 22, 1981, 35 U.S.T. 3403; and treaties providing for mutual recognition of professional credentials, *see, e.g.*, North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended in scattered sections of 19 U.S.C.).

10. *See infra* Part III.

11. *See, e.g.*, EDITH BURLEY, *SERVANTS OF THE HONOURABLE COMPANY: WORK, DISCIPLINE, AND CONFLICT IN THE HUDSON’S BAY COMPANY, 1770-1879*, at 19-63 (1997); Russell Smandych & Rick Linden, *Administering Justice Without the State: A Study of the Private Justice System of the Hudson’s Bay Company to 1800*, 11 CAN. J.L. & SOC’Y 21 (1996).

12. *See generally* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955 (Douglas Hay & Paul Craven eds., 2004).

13. *See, e.g.*, ANTHONY CLAYTON & DONALD C. SAVAGE, *GOVERNMENT AND LABOUR IN KENYA 1895-1963* (1975); N.S.K. TUMBO ET AL., *LABOUR IN TANZANIA* (1977); Christopher Candland, *The Cost of Incorporation: Labor Institutions, Industrial Restructuring, and the New Trade Union Strategies in India and Pakistan*, in *THE POLITICS OF LABOR IN A GLOBAL AGE* 69 (C. Candland, R. Sil & M. Murillo eds., 2001); N. Adeti Bastine, *The Relevance of Freedom of Association for Ghanaian Labour Law* (2000) (unpublished L.L.M. thesis, Osgoode Hall Law School) (on file with author).

14. *See* Clive Thompson, *Borrowing and Bending: The Development of South Africa’s Unfair Labour Practice Jurisprudence*, in *THE CHANGING FACE OF LABOUR LAW AND INDUSTRIAL RELATIONS: LIBER AMICORUM FOR CLYDE W. SUMMERS* 109 (Roger Blanpain & Manfred Weiss eds., 1993); *see also* Bob Hepple, *Can Collective Labour Law Transplant Work? The South African Example*, 20 INDUS L.J. 1 (1999).

institutions, and laws from one state to another have been so frequent that debate over the feasibility of “transplantation” has become a dominant theme of comparative labor law scholarship.¹⁵

Moreover, the transplantation of labor law and policy has featured prominently in international politics. Thus, in 1944, American labor law significantly influenced the ILO’s Declaration of Philadelphia¹⁶ and subsequently other labor-related international regimes¹⁷ (though apparently not the U.S. Congress itself, which declined either to ratify this text or reform U.S. labor legislation in accordance with its terms).¹⁸ During the immediate postwar period, the United States sought to export its distinctive New Deal vision of industrial democracy to other countries. It had greater success in this project as a liberating power in the Philippines¹⁹ than as an occupying power in Japan.²⁰ But it had virtually no success at all during the Cold War in Latin America or Europe, despite the active support of the American labor movement.²¹ Nor,

15. See RETHINKING COMPARATIVE LABOR LAW: BRIDGING THE PAST AND THE FUTURE, *supra* note 1.

16. The Preamble to the Declaration of Philadelphia declares that “labor is not a commodity”—language taken from the Clayton Act of 1914 § 6, Pub. L. No. 63-212, 38 Stat. 730 (codified as amended at 15 U.S.C. § 17 (2000)). It characterizes labor rights as “freedom of association” and “freedom of expression,” paralleling a contemporaneous, if short-lived, movement in American jurisprudence, and it reproduces FDR’s famous phrase, “the war against want.” Declaration Concerning the Aims and Purpose of the International Labour Organization (Declaration of Philadelphia) Part I, Oct. 9, 1946, 15 U.N.T.S. 35.

17. For example, the 1947 Havana Charter of the proposed International Trade Organization (ITO) committed member states to “achieve full and productive employment,” to “take fully into account the rights of workers,” and to “take whatever measures may be appropriate and feasible to eliminate [unfair] labor conditions”—all objectives consistent with the “post-war compromise” then emerging in the United States and other western democracies. Havana Charter for an International Trade Organization, arts. 3 & 7, Mar. 24, 1948, U.N. Doc. E/Conf.2/78. And trace influences of then-prevailing American labor policy can be found in the Universal Declaration of Human Rights, G.A. Res. 217A, arts. 20 & 23, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) and in the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), at 50 arts. 6-9, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 19, 1966).

18. The United States has not ratified key ILO conventions dealing with freedom of association and protection of the right to organize (Convention 87) and the right to organize and to engage in collective bargaining (Convention 98). See Steve Charnovitz, *The ILO Convention on Freedom of Association and Its Future in the United States*, 102 AM. J. INT’L L. 90 (2008). Indeed, Congressional opposition led to rejection of the Havana Charter and to a virtual U.S. boycott of the ILO for an extended period. See Robert W. Cox, *Labor and Hegemony*, 31 INT’L ORG. 385, 394-400 (1977); Robert W. Cox, *Labor and Transnational Relations*, 25 INT’L ORG. 554 (1971); Stephen Schlossberg, *United States’ Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48 (1989).

19. See generally LABOR CODE, bk. V, Pres. Dec. No. 442, as amended.

20. See generally WILLIAM B. GOULD IV, JAPAN’S RESHAPING OF AMERICAN LABOR LAW ch. 2 (1984).

21. See John Windmuller, *The Foreign Policy Conflict in American Labor*, 82 POL. SCI. Q. 205 (1967); see also Cliff Welch, *Labor Internationalism: U.S. Involvement in Brazilian Unions 1945-1965*, 30 LATIN AM. RES. REV. 61 (1995).

during the 1970s, did America's unique labor law system survive an attempted transplant into the body politic of its close legal relative, leading ally, and significant trading partner, the United Kingdom.²² At least for a time America's Cold War rival, the Soviet Union, had greater success in extending the extraterritorial influence of its labor policies, not because it slavishly replicated them in the laws of the countries it first liberated and then dominated, but because it was able to enforce conformity with the ideology that underpinned them.²³ As we now know, however, the Soviet experiment with "extraterritoriality by other means" contained the seeds of its own destruction.

Nonetheless, America—for good or ill—continues to project its own labor policies abroad by embedding them (often in conflicting versions) in foreign policy pronouncements,²⁴ in trade legislation and treaties,²⁵ and in the normative architecture of the so-called "Washington Consensus" and the analytical repertoires of international agencies such as the World Bank.²⁶

Still, despite this history of mostly unsuccessful attempts at extraterritoriality, labor law has sometimes played—and can play—an important role in achieving economic integration across jurisdictional boundaries. As Mark Barenberg reminds us, the adoption by the United States of national labor legislation during the New Deal helped to construct the huge domestic market for goods and services that contributed so much to America's

22. See William B. Gould IV, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 YALE L.J. 1421 (1972); Hamish R. Sandison, *A Rejected Transplant: The British Industrial Relations Act (1971-1974)*, 3 INDUS. REL. L.J. 247 (1979).

23. See generally Michal Sewerynski, *Prospects for the Development of Labor Law and Social Security Law in Central and Eastern Europe in the Twenty-First Century*, 18 COMP. LAB. L.J. 182 (1996).

24. See, e.g., Windmuller, *supra* note 21.

25. See, e.g., HENRY J. FRUNDT, TRADE CONDITIONS AND LABOR RIGHTS: U.S. INITIATIVES, DOMINICAN AND CENTRAL AMERICAN RESPONSES 56-75 (1998); Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165 (1993); Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253 (1988).

26. A very recent example: In 2009, the Democratic-controlled U.S. Congress enacted legislation requiring the U.S.-nominated directors of several World Bank agencies to "use [their] voice and vote" to persuade those agencies to cease using an "Employing Workers Indicator" —introduced in 2003 during the Republican ascendancy—that gave the highest credit-worthiness ratings to countries with the lowest levels of worker protection, and thus forced many developing countries to deregulate their labor markets. The new indices proposed by Congress would "fairly represent the value of internationally recognized workers' rights, including core labor standards, in creating a stable and favorable environment for attracting private investment . . ." International Financial Institutions Act 22 U.S.C. § 262p-9(a) (2006). However, President Obama, in a subsequent "signing statement," rejected this incursion by Congress into the presidential prerogative to conduct foreign affairs. See *Lawmakers Warn Obama Not to Overuse Signing Statements*, GOVERNMENTEXECUTIVE.COM, July 21, 2009, <http://www.govexec.com/dailyfed/0709/072109cdpm2.htm>.

postwar growth and prosperity.²⁷ Countries in today's global economy, he notes, bear something of the same relationship to each other that American states did prior to the adoption of an expansive interpretation of the Commerce Clause of the U.S. Constitution: the absence of a common pattern of labor regulation produced pressures for a "race to the bottom," as jurisdictions with low labor standards sought to attract investment and jobs from those with high standards. Conversely—as Barenberg and others argue—the development of common normative structures across jurisdictional boundaries may promote international worker solidarity and cooperation, facilitate worker mobility, and encourage the dissemination of best employment practices by corporations that operate extraterritorially.²⁸

Canada's experience with the extraterritorialization of American labor law is particularly instructive. The economies of the two countries are closely integrated, to the point where each is among the other's leading trading partners and sources of investment capital. Indeed, many enterprises and industries have operated seamlessly across the Canada-U.S. border for much of the past century.²⁹ It is hardly surprising, then, that one of the most important initiatives to organize Canadian blue-collar workers in the 1930s should have originated with the United Auto Workers, an American-based "international" union active on both sides of the border.³⁰ Other international unions—in mining, steel, transportation and other sectors—also sought to extend their reach, often in tandem with or in pursuit of American companies whose operations extended into Canada. As patterns of corporate ownership, union organization, and labor conflict developed in parallel in the two countries, it is not surprising that Canadian workers increasingly demanded protections similar to those provided to American unionists by the National Labor Relations Act (NLRA) from 1935 onwards. These protections were extended hesitantly at first, but by 1944 Canada had adopted its own version of the NLRA.³¹

Surely there are few more compelling examples of "extraterritoriality by

27. See Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 445 (1995).

28. Cf. HEPPLE, *supra* note 3; Mark Barenberg, *Labor Federalism in the United States: Lessons for International Labor Rights*, 3 J. INT'L ECON. L. 303 (2000).

29. The auto industry was an early and prominent example. Cross-border industry integration explains the Auto Pact of 1965, which—until struck down by the WTO in 1999—permitted autos and auto parts to move smoothly from one country to another, in accordance with the logic of manufacturing and marketing developed by each of the "big three" North American auto makers. Agreement Concerning Automotive Products, U.S.-Can., Jan. 16, 1965, 17 U.S.T. 1372; see also Dimitry Anastakis, *Requiem for a Trade Agreement: The Auto Pact at the WTO, 1999-2000*, 34 CAN. BUS. L.J. 313 (2001) (analyzing causes of the discontinuation of the treaty).

30. See JUDY FUDGE & ERIC TUCKER, *LABOUR BEFORE THE LAW: THE REGULATION OF WORKERS' COLLECTIVE ACTION IN CANADA, 1900-1948*, at 208-09 (2004); SAM GINDIN, *THE CANADIAN AUTO WORKERS: THE BIRTH AND TRANSFORMATION OF A UNION* 56-71 (1995).

31. Wartime Labour Relations Regulations, P.C./1944-1003 (Can.); see also FUDGE & TUCKER, *supra* note 30, at 263-80.

other means” than this: for much of the postwar period, American-based corporations employing Canadian workers, and American-based unions representing them, were regulated by a labor law regime imported from the United States and adapted to the Canadian context by government and academic experts, many of whom were trained in American graduate schools and/or influenced by American scholarly literature and professional practice.³² But the Canadian case is also fraught with irony. The Canadian progeny of the NLRA have proved (so far) to be more robust than their progenitor, as have Canadian unions; consequently, some American scholars, legislators and unionists have been considering Canadian adaptations of the Wagner Act as they attempt to resuscitate the original.³³

C. Extraterritoriality in the Context of International Economic Integration

The Canadian case suggests that de facto integration of national economies may lead to de facto extraterritoriality, as one state’s labor laws provide the template for strategies of labor market regulation adopted by the other. However, the experience of the European Union suggests the contrary. Member states of the European Union—while in principle committed to deep economic integration—have neither attempted nor achieved the same degree of harmonization in their labor laws that has evolved between the much less formally integrated Canadian and American economies.³⁴ Indeed, the original Treaty of Rome has relatively little to say about labor law;³⁵ community-wide labor law directives have been limited in scope and number;³⁶ and decisions of

32. See Harry Arthurs, *National Traditions in Labor Law Scholarship: The Canadian Case*, 23 COMP. LAB. L. & POL’Y J. 645, 648-49, 653-54 (2002).

33. The Employee Free Choice Act, presently being debated by the U.S. Congress, proposes three main reforms based on or related to Canadian legislation: card checks rather than elections to establish a union’s majority status, first-contract arbitration, and enhanced remedies against employer unfair labor practices. However, bitter opposition to the first of these has apparently led to its abandonment by senior labor leaders. See Steven Greenhouse, *Union Head Would Back Bill Without Card Check*, N.Y. TIMES, Sept. 5, 2009, at B3.

34. See generally PHIL SYRPIS, EU INTERVENTION IN DOMESTIC LABOUR LAW (2007) (discussing EU efforts to standardize member states’ labor laws); Silvana Sciarra, *The Evolution of Collective Bargaining: Observations on a Comparison in the Countries of the European Union*, 29 COMP. LAB. L. & POL’Y J. 1 (2007) (reviewing the diversity of national collective bargaining systems in the EU member states, and their relationship to other aspects of labor law and policy).

35. See Treaty Establishing the European Economic Community arts. 48-51, Mar. 25, 1957, 298 U.N.T.S. 11 (protecting primarily the free movement of workers).

36. EU directives, inter alia, guarantee the free movement of labor among member states, prohibit workplace harassment and discrimination, regulate working time, establish rights of consultation and participation, ensure workers’ privacy rights, and provide an approach to mass redundancies. In some cases, states retain the right to opt out even of this modest list. For access to individual enactments see European Commission, Employment, Social Affairs and Equal Opportunities, <http://ec.europa.eu/social/main.jsp?catId=82&langId=en> (last visited Apr. 7, 2010).

the European Court, while growing in importance, have so far had limited impact on the interaction of community and national labor laws.³⁷ On the other hand, the EU's "open method of coordination"—systematizing the community's long-standing reliance on both "soft" and "hard" law—mandates structured and transparent exchanges concerning labor market issues amongst national experts, social partners, and policy-makers within broad community-level policy guidelines.³⁸ This has contributed, or may contribute, to several developments with quasi-extraterritorial implications: some approximation of national adherence to broad community policy (which in turn is significantly influenced by the leading states);³⁹ the conscious imitation by some states of successful policy experiments originating in others ("flexicurity" is a case in point⁴⁰); and the explicit borrowing of labor law institutions or doctrines (especially by new member states that adopted—with modifications—those of older members).⁴¹

Given that the deeply integrated EU tacitly accepts the coexistence of different national labor law systems, it is hardly surprising that NAFTA—much less deeply integrated—explicitly embraces national diversity in the labor laws and policies of its member states. The NAFTA "side agreement" on labor—the North American Agreement on Labor Cooperation (NAALC)—imposes on

37. See generally Claire Kilpatrick, *The ECJ and Labour Law: A 2008 Retrospective*, 38 INDUS. L.J. 180 (2009).

38. See MILENA BÜCHS, NEW GOVERNANCE IN EUROPEAN SOCIAL POLICY: THE OPEN METHOD OF COORDINATION 28-33, 101-03 (2007); Susana Borrás & Kerstin Jacobsson, *The Open Method of Co-ordination and New Governance Patterns in the EU*, 11 J. EUR. PUB. POL'Y 185, 195-97 (2004).

39. See Kerstin Jacobsson, *Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy*, 14 J. EUR. SOC. POL'Y 355 (2004); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L.J. 343 (2005); cf. Andrew Watt, *Reform of the European Employment Strategy After Five Years: A Change of Course or Merely of Presentation?*, 10 EUR. J. INDUS. REL. 117, 120 (2004) (providing a rather more skeptical view).

40. Ton Wilthagen, Frank Tros & Harm van Lieshout, *Towards "Flexicurity"?: Balancing Flexibility and Security in EU Member States* (September 2003) (unpublished working paper, available at <http://ssrn.com/abstract=1133940>). But see Lothar Funk, *European Flexicurity Policies: A Critical Assessment*, 24 INT'L J. COMP. LAB. L. & INDUS. REL. 349 (2008).

41. For a timely warning concerning the dangers of such borrowing, see Manfred Weiss, *The Transformation of Labour Law and Industrial Relations in South-East Europe*, 3 S.-E. EUR. REV. FOR LAB. & SOC. AFF. 25 (1998). Nonetheless, it is clear that borrowing did occur. See, e.g., Larry S. Bush, *Romanian Regulation of Trade Unions and Collective Bargaining*, 32 CORNELL INT'L L.J. 319, 359 (1999) (influence of French labor law in Romania); Csilla Kollonay Lehoczky, *European Enlargement: A Comparative View of Hungarian Labour Law*, in LAW AND GOVERNANCE IN AN ENLARGED EUROPE 209, 233-34 (George Bermann & Katharina Pistor eds., 2004) (influence of West European labor movements on Hungarian labor law). See generally LABOR AND EMPLOYMENT LAW IN THE NEW EU MEMBER AND CANDIDATE STATES (Anders Etgen Reitz ed., 2007) (summary guide to EU labor law).

each member state only the obligation to conform to its own laws.⁴² And as matters have turned out, asymmetries of power and interests, as well as flaws in institutional design, have undermined the achievement even of this modest objective.⁴³ That said, even the disappointing experience under the NAALC presents two potentially significant innovations for extraterritoriality: states that fail to apply their labor laws to their own workers run the risk of censure by their trading partners, and workers whose national labor laws have failed them may—with the help of foreign proxies and allies—call their own government to account in an international forum.⁴⁴ Extraterritoriality turned inside out, one might say.

D. Extraterritoriality as Social Fact

However, as noted in my Introduction, my focus is neither on extraterritoriality as legal doctrine nor on state-sponsored initiatives to export or import labor law nor on the harmonization of national labor laws in the context of international economic integration. It is, rather, on the metaphorical achievement of extraterritoriality “by other means.”

Why “other means”? The phrase is intended to challenge the proposition that labor law systems create, reproduce, and sustain themselves, that they are no more or less than a compendium of treaties and interstate agreements, statutes, and leading cases. To the contrary: in my view, labor law comprises all normative influences, of whatever provenance, that—for better or worse—shape labor markets, distribute power amongst labor market actors, and affect their perception of what they can achieve and how best to achieve it. These influences may originate in a country’s political economy, in its demography or culture, in its social structures or relations, or in its constitutional system or legal culture. But in the current context, it is important to note that they may also originate in the global political economy, in the institutions governing economic, human, and labor rights within that economy, or in relations amongst the transnational civil society actors that populate and animate it.

Moreover, the normative sources of labor law may be found at the micro-level of the workplace rather than at the macro-level of the national or global political economy, although the two are obviously related. They may be

42. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., art. 2, Sept. 14, 1993, 32 I.L.M. 1499.

43. See, e.g., Mario F. Bognanno & Jianfeng Lu, *NAFTA’s Labor Side Agreement: Withering as an Effective Labor Law Enforcement and MNC Compliance Strategy?*, in *MULTINATIONAL COMPANIES AND GLOBAL HUMAN RESOURCE STRATEGIES* 18 (William N. Cooke ed., 2003); Rainer Dombois, Erhard Hornberger & Jens Winter, *Transnational Labor Regulation in the NAFTA—a Problem of Institutional Design? The Case of the North American Agreement on Labor Cooperation Between the USA, Mexico and Canada*, 19 INT’L J. COMP. LAB. L. & INDUS. REL. 421 (2003).

44. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., arts. 21-22, Sept. 14, 1993, 32 I.L.M. 1499.

secreted in the interstices of corporate organization, encoded in systems of production and distribution, embedded in shop-floor customs and usages, or imbricated in patterns of quotidian relations between and amongst workers and managers.

If, therefore, labor law is not so much a body of doctrine as it is a social fact, the same must be said of extraterritoriality. Consequently, the extraterritorial application of labor law is achieved “by other means” whenever influences emanating from outside a country shape labor law within it.

II. CONQUERING MINDS: LABOR LAW AS A HEGEMONIC (AND COUNTER-HEGEMONIC) PROJECT

Thus defined, “extraterritoriality” is indeed a process of altering law, broadly defined, by conquering minds. As the short history cited in Part I suggests, extraterritoriality is therefore often associated with the hegemonic project of extending the ideologies of dominant nations into the political space and consciousness of others. But, as I will argue, the same phenomenon can also be understood as a counter-hegemonic project, designed to challenge unequal power relations in the workplace and the orthodoxies that legitimate them.

In a process I have referred to as “globalization of the mind,” ideas about what constitutes “good” public policy percolate through transnational discursive communities of academics, policy makers, civil servants, business executives, consultants, and professionals.⁴⁵ These individuals often attend the same universities, read the same literature, belong to the same organizations and networks, participate in the same conferences, and consciously refer to each other’s ideas and experiences, often reaching across national borders to do so. Not surprisingly, their consensus about “good” public policy often produces broadly similar labor policies in different countries, albeit not necessarily identical labor laws. Thus, over the past three decades or so, the extraterritorial migration of neoliberal ideas, propagated largely in British and American intellectual circles,⁴⁶ has persuaded other countries to adopt policies that have led to widespread deregulation of labor markets, reduction of worker entitlements, flexibilization of the workforce, disempowerment of unions, growth in income inequality, contraction of social safety nets, and the emergence of a new “precariat.”⁴⁷

However, these policies have been challenged and their consequences

45. See H.W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CAN. J.L. & SOC’Y 219 (1997).

46. See, e.g., Robert Flanagan, *Economic Forces, Law and World Labor Conditions*, 21 STAN. L. & POL’Y REV. ____ (2010).

47. Mika LaVaque-Manty, *American Exceptionalism, Part 42: The Case of the Missing Precariat* (Aug. 30, 2007) (unpublished manuscript, available at http://www.allacademic.com/meta/p208723_index.html).

condemned by other transnational discursive communities whose members are drawn from universities and the “chattering classes,” from unions and NGOs, and from social democratic or social market policy institutes and political movements. Their counter-hegemonic critique has mobilized coalitions of workers, consumers, and other civil society groups to oppose the exploitation of migrants in the global north, and of women and children in the global south; significantly improved protections for women, gays, disabled people, and members of racial minority groups in the advanced economies; and sparked interest in the creation of a new labor movement based on “social unionism” in both the third world and the first.⁴⁸

Indeed, the International Labor Organization (ILO) itself may be viewed as an archetypal transnational discursive community. For ninety years it has been attempting to improve the lot of workers by promoting discussion within its tripartite assembly of governmental, labor, and employer representatives. It publishes carefully researched reports on current labor issues, proposes conventions for adoption by its members, provides expert advice and training to assist developing countries, investigates complaints against governments that transgress particular conventions or “core labor rights,” and campaigns for “Decent Work” as the conceptual fundament of labor standards in the global economy.⁴⁹ Thus, the ILO might be described as an agent of counter-hegemonic extraterritoriality: it develops, disseminates, legitimates, and (to an extent) enforces normative approaches to labor issues⁵⁰ and projects them into the discursive and juridical space of member states that have long been committed to abstaining from most forms of labor market regulation (and, in some cases, to ruthless suppression of labor rights). Whether the ILO and other counter-hegemonic communities have actually achieved the world-wide repudiation of neoliberal labor policies and laws is another matter—one that is not likely to be resolved overnight. As Daniel Rogers reminds us, the transformation of American labor law under the New Deal was the culmination of fifty years of trans-Atlantic dialogue amongst progressive thinkers concerned with “the social question.”⁵¹ But if labor-backed parties in the advanced economies are ultimately resuscitated in some form or other, if labor

48. See KIM MOODY, *WORKERS IN A LEAN WORLD: UNIONS IN THE INTERNATIONAL ECONOMY* 52 (1997); Stephanie Ross, *Varieties of Social Unionism: Towards a Framework for Comparison*, 11 *JUST LAB.* 16 (2007); Michael Schiavone, *Moody's Account of Social Movement Unionism: An Analysis*, 33 *CRITICAL SOC.* 279 (2007).

49. See International Labour Organization, *Decent Work for All*, http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork (last visited Apr. 5, 2010).

50. For a comprehensive account of such proceedings, see ILO, *FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO* (5th rev. ed. 2006). See also Jean-Michel Servais, *The ILO Law and the Freedom to Strike*, *CAN. EMP. & LAB. L.J.* (forthcoming 2010).

51. DANIEL T. ROGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998).

policies are transformed and labor laws reinvigorated, future historians may similarly acknowledge the contribution of interlinked global networks of progressive thinkers—a prime example of extraterritoriality “by other means.”

III. SNEAKING ACROSS BORDERS

Labor law, in all the senses in which I use the term, often crosses borders by stealth and takes root in countries that do not import it as a matter of conscious policy.

Transnational corporations are often the vehicle of covert and/or unintended importation. To cite the most obvious example, a corporation may enter into employment contracts with employees who work abroad to the effect that the law of the corporation’s home country, or some other country, will apply to those contracts, rather than the law of the country in which they are working. If the parties do not agree to this explicitly, a court may find that they have done so implicitly, or that applying local law would be inconvenient or inappropriate in the circumstances.⁵² Nor, apparently, is the host country under such circumstances entitled to insist on compliance with its own labor standards, rather than on those of the country where the enterprise originated.⁵³ In these situations, national law moves under the carapace of employment contracts to govern workplace relations abroad.

To cite a less obvious (but more common) example, national law may be exported *sub rosa* because its values, assumptions, or requirements become embedded in the HR policies and workplace practices of transnational corporations.⁵⁴ For example, corporations may develop internal procedures for dealing with complaints of workplace discrimination or harassment as required by the domestic law of their home state. These procedures are then applied when they, or their subsidiaries, operate abroad, whether or not required by local law to do so.⁵⁵ Another example: HR practices developed by corporations in home countries with strong traditions of paternalism or workplace democracy may persist when these corporations initiate operations abroad in less solidaristic environments.⁵⁶ And a third, less benign example: corporations

52. See, e.g., RUTH HAYWARD, *CONFLICT OF LAWS* 110 (4th ed. 2006); JANET WALKER, *CONFLICT OF LAWS* 598-624 (1st ed. 2006); RUSSELL WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 475-541 (5th ed. 2006).

53. See, e.g., Herwig Verschueren, *Cross-Border Workers in the European Internal Market: Trojan Horses for Member States’ Labour and Social Security Law?*, 24 *INT’L J. COMP. LAB. L. & INDUS. REL.* 167 (2008).

54. See, e.g., Laura Beth Nielson, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 *LAW & POL’Y* 247 (1999).

55. E.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

56. See, e.g., THOMAS BATA & SONJA SINCLAIR, *BATA: SHOEMAKER TO THE WORLD* (1990); Schon Beechler & John Zhuang Yang, *The Transfer of Japanese-Style Management to American Subsidiaries: Contingencies, Constraints and Competencies*, 25 *J. INT’L BUS.*

whose home jurisdictions provide them with the legal or practical means to resist unionization may develop HR practices that ensure that they remain “union-free” even when they operate in more union-friendly jurisdictions.⁵⁷

Of course, transnational corporations seek advice from lawyers and other consultants in countries where they carry on business. However, while these consultants almost invariably advise compliance with local labor law, they often find ways to achieve the “extraterritorial” outcomes sought by their clients by exploiting weaknesses or creating ambiguities in local law. In doing so, as some of them acknowledge, they necessarily become agents of legal change, introducing elements of foreign labor law and policy into the local system by the way they construct transactions, interpret existing laws, or lobby for legislative amendments.⁵⁸ However, in general their contribution to extraterritoriality is relatively modest compared to the proselytizing efforts of the offshore offices of U.S.-based consultants who actively attempt to persuade their foreign clients to adopt American-style legal concepts and strategies, including aggressive antiunion measures.⁵⁹

In short, corporate officials, lawyers, consultants, and workers whose work takes them literally or figuratively across national boundaries sometimes smuggle their national law across those boundaries in their operating manuals, briefcases, or lunch buckets. On occasion, however, “smuggling” is actively encouraged or passively acquiesced to by host states. In the case of export processing zones (EPZs) for example, foreign firms are formally granted full or partial immunity from local labor law as a quid pro quo for the investment, jobs, and know-how they bring with them.⁶⁰ In the best of circumstances,

STUD. 467 (1994).

57. E.g., Roy J. Adams, *Organizing Wal-Mart: The Canadian Campaign*, 6 JUST LAB. 1 (2005); Tony Dundon, *Employer Opposition and Union Avoidance in the UK*, 33 INDUS. REL. J. 234 (2002); Tony Royle, *Just Vote No! Union-Busting in the European Fast-Food Industry: The Case of McDonald's*, 33 INDUS. REL. J. 262 (2002). But see Susan Christopherson, *Challenges Facing Wal-Mart in the German Market*, in WAL-MART WORLD: THE WORLD'S BIGGEST CORPORATION IN THE GLOBAL ECONOMY 261 (Stanley D. Brunn ed., 2006); Kevin Kolben, *Wal-Mart Is Coming, but It's Not All Bad: Wal-Mart and Labor Rights in Its International Subsidiaries*, 12 UCLA J. INT'L L. & FOREIGN AFF. 275 (2007); Chris Tilly, *Wal-Mart Goes South: Sizing Up the Chain's Mexican Success Story*, in WAL-MART WORLD, *supra*, at 357.

58. See Harry Arthurs, *The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 273 (Richard P. Appelbaum, William F. Felstiner & Volkmar Gessner eds., 2001).

59. See Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL'Y J. 257 (2004); John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651 (2006).

60. See, e.g., Int'l Labour Org. [ILO], *Employment and Social Policy in Respect of Export Processing Zones (EPZs)*, ILO Doc. GB.286/ESP/3 (March 2003), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb286/pdf/esp-3.pdf>; Joshua M. Kagan, *Workers' Rights in the Mexican Maquiladora Sector: Collective Bargaining*,

though unencumbered by local law, these firms may adopt decent HR practices approximating or mimicking those they apply to workers in their countries of origin.⁶¹ In the worst, however, EPZs may constitute a normative vacuum in whose workplaces “anything goes” and in which foreign enterprises may behave with ruthless disregard for the rights and well-being of their workers.⁶²

Sometimes, too, “smuggling” results from a tacit state policy of not enforcing labor laws against foreign firms. In such circumstances, workers are even more likely to experience severe coercion and exploitation. Indeed, even countries that usually take labor standards seriously have been known to treat foreign firms with unusual solicitude. To cite Canada as an example, in at least two documented cases, decisions of provincial labor boards that adversely affected transnational companies have been retroactively overturned by legislation,⁶³ and suspicions have been voiced from time to time that labor laws have been enacted, interpreted, or enforced with a view to attracting or retaining foreign investors rather than protecting the rights of workers.⁶⁴ This may be a far cry from extraterritoriality in its technical legal sense, but it may produce similar effects.

Finally, the nonapplication of local labor law to foreign businesses may result not from a deliberate or tacit decision by the host government but from a joint decision of labor and management to apply some other legal regime. Two examples involving Canada and the United States illustrate the point. In 1967, the operations of Chrysler Corporation on both sides of the border were closely integrated, and its employees were all represented by locals of the United Auto Workers. A transnational collective agreement was negotiated under U.S. law that purported to cover both American and Canadian workers despite the fact

Women's Rights, and General Human Rights: Law, Norms, and Practice, 15 J. TRANSNAT'L L. & POL'Y 153 (2005).

61. See Ana Teresa Romero, *Labour Standards and Export Processing Zones: Situation and Pressures for Change*, 13 DEV. POL'Y REV. 247 (2008); Dorsati Madani, *A Review of the Role and Impact of Export Processing Zones* (World Bank Policy Research, Working Paper No. 2238, 1999).

62. For a particularly egregious case, see ROBERT J.S. ROSS, *SLAVES TO FASHION: POVERTY AND ABUSE IN THE NEW SWEATSHOPS* 139-44 (2004) (concerning fashion sweatshops).

63. Brian Langille, *The Michelin Amendment in Context*, 6 DALHOUSIE L.J. 523 (1981); Eric Tucker, *Wal-Mart and the Remaking of Ontario Labour Law*, 12 INT'L UNION RTS. 10 (2005).

64. See Harry Arthurs, *Who's Afraid of Globalization? Reflections on the Future of Labor Law*, in *GLOBALIZATION AND THE FUTURE OF LABOUR LAW* 51 (John D.R. Craig & S. Michael Lynk eds., 2006); see also MAUDE BARLOW, *THE FREE TRADE AREA OF THE AMERICAS AND THE THREAT TO SOCIAL PROGRAMS, ENVIRONMENTAL SUSTAINABILITY AND SOCIAL JUSTICE IN CANADA AND THE AMERICAS* (2001), available at <http://www.canadians.org/trade/documents/campaigns-ftaa-threat-barlow.pdf>; Eric Tucker, “Great Expectations” Defeated?: *The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA*, 26 COMP. LAB. L. & POL'Y J. 97 (2004); *North American Labor Federations Blast NAFTA*, WORLD WAR 4 REPORT, Aug. 26, 2009, <http://www.ww4report.com/node/7719>.

that each group was in principle covered by the law of the jurisdiction in which it worked.⁶⁵ A second example: professional sports leagues operating in cities in both the United States and Canada negotiate standard minimum salaries and working conditions with players' unions that purportedly bind all clubs in the two countries. These negotiations are also conducted within a framework of American labor legislation, despite the fact that the NLRB has excluded Canadian teams from the league bargaining unit,⁶⁶ while its Ontario counterpart has indicated that it will apply Canadian law to clubs located within its jurisdiction.⁶⁷

IV. CONTROLLING GLOBAL WORKPLACES: THE ROLE OF TRANSNATIONAL ACTORS

Who actually controls global workplaces? As these examples demonstrate, actors other than states may play a decisive role in deciding the form and content of workplace governance. The most powerful of those actors—transnational corporations and their local executives, managers, and advisors—operate within but also across national borders, straddling the familiar regulatory domains of state and international law. They comprise a governance regime in themselves: they make their own law and, of course, do so primarily in their own interest. But corporations are not the only effective actors. Foreign unions and social movements, often working with their local counterparts as well as informal workplace-level and community organizations, may reinforce, implement, subvert, or replace local state law as well as the law generated by transnational corporations. The attempts by foreign unions and corporations to create, control, influence, defer to, reinforce, override, or destabilize local actors may lead both groups of transnational actors to be seen as imposing extraterritorial governance arrangements. And to the extent that they incite, welcome, co-opt, or resist the law generated by transnational actors, local actors are by choice or necessity implicated in the extraterritorialization of workplace governance.

And where do workplace norms actually come from? To some extent, of course, global workplaces are regulated by labor laws enacted by home and host states; but to a considerable extent, workplace actors are the primary

65. See David H. Blake, *Multi-National Corporation, International Union and International Collective Bargaining: A Case Study of the Political, Social and Economic Implications of the 1967 U.A.W.-Chrysler Agreement*, in *TRANSNATIONAL INDUSTRIAL RELATIONS* 137 (Hans Günter ed., 1972).

66. See, e.g., *N. Am. Soccer League*, 236 N.L.R.B. 1317 (1978), *aff'd*, 613 F.2d 1379 (5th Cir. 1980); ROBERT C. BERRY, WILLIAM B. GOULD & PAUL D. STAUDOHAR, *LABOR RELATIONS IN PROFESSIONAL SPORTS* 31-34 (1986); RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* 395-401 (5th ed. 2003).

67. *Nat'l Basketball Referees Ass'n v. Nat'l Basketball Ass'n*, [Nov. 1995] O.L.R.B. Rep. 1389; *Ass'n of Major League Umpires v. Am. League & Nat'l League of Prof'l Baseball*, [Nov. 1995] O.L.R.B. Rep. 540.

authors of the visible and invisible rules that govern employment relations on a daily basis. Moreover, these rules may not only differ from state law in terms of subject matter; they sometimes operate in direct contravention of the explicit requirements of state law.⁶⁸ Often this results in workers being treated less well than one might anticipate in light of the “rights” they supposedly enjoy under state law, but sometimes the opposite is true: workers are able to limit employer power by collective resistance organized by a union or by a more amorphous collectivity.⁶⁹

This phenomenon of workplace normativity has been much studied in the literature of industrial relations and well-theorized in the literature of legal pluralism. However, it has received less attention than it deserves in the special context of globalization.⁷⁰ I therefore turn next to a somewhat more detailed account of normativity in global workplaces, focusing particularly on the principal actors.

A. Transnational Corporations

A significant body of literature suggests that power and responsibility in leading transnational corporations have been redistributed from global headquarters to national and regional managers,⁷¹ that the directors and senior managers of the parent company are no longer drawn exclusively or primarily from the corporation’s country of origin, and that corporate cultures have become “cosmopolitan” or “truly global” in character.⁷² On the other hand, there is considerable evidence to the contrary, much of which has been deployed in the lively debate over “the hollowing out of Corporate Canada”—the increasingly direct control exercised by American-based transnational companies over key functions within their Canadian subsidiaries.⁷³

68. See Arthurs, *Landscape and Memory*, *supra* note 4; Arthurs, *Understanding Labour Law*, *supra* note 4.

69. See, e.g., NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000).

70. See Arthurs, *Landscape and Memory*, *supra* note 4.

71. See, e.g., G. Hedlund & B. Kogut, *Managing the MNC: The End of the Missionary Era*, in ORGANIZATION OF TRANSNATIONAL CORPORATIONS 343 (Gunnar Hedlund & John H. Dunning eds., 1993); Richard C. Hoffman, *Generic Strategies for Subsidiaries of Multinational Corporations*, 6 J. MANAGERIAL ISSUES 69 (1994); Sharon Watson O’Donnell, *Managing Foreign Subsidiaries: Agents of Headquarters, or Interdependent Network?*, 21 STRATEGIC MGMT. J. 525 (2000); Stephen Young & Ana Teresa Tavares, *Centralization and Autonomy: Back to the Future*, 13 INT’L BUS. REV. 215 (2004).

72. See, e.g., P. MOURDOUKOUTAS, THE GLOBAL CORPORATION: THE DECOLONIZATION OF INTERNATIONAL BUSINESS (1999); KENICHI OHMAE, THE BORDERLESS WORLD 82-100 (1990); W.K. Carroll & Meindert Fennema, *Is There a Transnational Business Community?*, 17 INT’L SOC. 393 (2002); Andrew Jones, *Truly Global Corporations? Theorizing “Organizational Globalization” in Advanced Business-Services*, 5 J. ECON. GEOGRAPHY 177 (2005).

73. See H.W. Arthurs, *The Hollowing Out of Corporate Canada?*, in GLOBALIZING

While both accounts of transnational corporate governance imply that foreign subsidiaries and suppliers may be subject to direction emanating from abroad, neither specifically addresses the means by which workplace normativity at the local level may be influenced by such controls. However, some recent studies carry forward this debate by exploring the actual modalities of control and assessing their implications for workplace normativity. One study, for example, assesses the extent to which local managers of transnational corporations are able to introduce new technologies and HR practices.⁷⁴ Another recounts how senior corporate executives actually secure adherence to higher labor standards by local managers far down the extended corporate value chain.⁷⁵ More empirical work of a similar nature⁷⁶ is clearly needed if we are to understand how workplace norms are constructed and enforced within such corporations. Nonetheless, it would be reasonable to predict that studies will show that patterns of normativity and enforcement differ from one country, economic sector, time period, or corporation to another.⁷⁷

Even when transnational corporations do not smuggle labor laws across borders, they may nonetheless provoke “extraterritorial” consequences in the sense of preventing or subverting the application of local labor laws in countries where they do business. Corporations that are listed on global stock exchanges or that sell standard products in global markets must maintain tight financial discipline, dependability of supply, and consistent quality standards across their entire global operations, whether those operations are conducted by the corporation itself, by its subsidiaries, or by “arm’s-length” suppliers. If costs rise, if inventories falter, or if quality fails in any one part of its

INSTITUTIONS: CASE STUDIES IN SOCIAL REGULATION AND INNOVATION 29 (J. Jenson & B. Santos eds., 2001); H.W. Arthurs, *The Hollowing Out of Corporate Canada: Implications for Transnational Labor Law, Policy and Practice*, 57 BUFF. L. REV. 781 (2009).

74. JACQUES BÉLANGER ET AL., EMPLOYMENT PRACTICES IN MULTINATIONAL COMPANIES IN CANADA: BUILDING ORGANIZATIONAL CAPABILITIES AND INSTITUTIONS FOR INNOVATION (2006), available at http://www.crimt.org/PDFs/CRIMT_Report_on_MNCs_in_Canada_September_2006.pdf.

75. David Doorey, *Transnational Domestic Labour Regulation: Using Domestic Regulation to Influence Foreign Labour Practices* (Apr. 2009) (unpublished Ph.D. dissertation, York University) (on file with author).

76. See, e.g., Anthony Ferner, Javier Quintanilla & Matthias Z. Varul, *Country-of-Origin Effects, and the Management of HR in Multinationals: German Companies in Britain and Spain*, 36 J. WORLD BUS. 107 (2001); Matthias Schmitt & Dieter Sadowski, *A Cost-Minimization Approach to the International Transfer of the HRM/IR Practices: Anglo-Saxon Multinationals in the Federal Republic of Germany*, 14 INT’L J. HUM. RESOURCE MGMT. 409 (2003).

77. Kolben, *supra* note 57, at 298-312, suggests that even Wal-Mart, despite its aggressive antiunion policies, accepts unions in countries with corporatist labor laws where unions tend to be state controlled. And for a more general and nuanced account, see Jacques Bélanger & Paul Edwards, *Towards a Political Economy Framework: TNCs as National and Global Players*, in MULTINATIONALS, INSTITUTIONS AND THE CONSTRUCTION OF TRANSNATIONAL PRACTICES: CONVERGENCE AND DIVERSITY IN THE GLOBAL ECONOMY 24 (Anthony Ferner, Javier Quintanilla & Carlos Sanchez-Runde eds., 2006).

operations, the reputation and profitability of the entire global corporation may be put at risk.

To forestall such outcomes, global corporations seek to tightly control unit costs of production, establish output quotas, and specify quality standards. And they enforce these prescriptions by firing delinquent local managers and getting rid of defaulting suppliers. Local managers and suppliers may thus find themselves between the rock of local labor standards and the hard place of corporate power. In such a context, many are likely to cling to the latter rather than the former.⁷⁸ The result in fact, if not in law, is a kind of extraterritoriality.

B. Transnational Unions and Union Alliances

Workplace normativity is unlikely to be established unilaterally by employers; it is almost bound to be somewhat influenced by workers acting to defend their interests through informal shop-floor networks of resistance or through more formal means.⁷⁹

Informal shop-floor networks are, by definition, almost always local in character, but unions may well be organized transnationally. The most obvious examples of “international” unions are U.S.-based organizations that have established a Canadian region and/or Canadian locals. Significantly, while these unions represented 77% of all Canadian organized workers in 1943,⁸⁰ and 70% in 1965,⁸¹ as of 2007 they represent only 28%;⁸² a further decline is likely.⁸³ In their heyday, as noted above, international unions often confronted the same employer on both sides of the border. Although bargaining was typically conducted on a workplace-by-workplace rather than on a company-

78. See, e.g., Ngai-Ling Sum & Pun Ngai, *Globalization and Paradoxes of Ethical Transnational Production: Code of Conduct in a Chinese Workplace*, 9 COMPETITION & CHANGE 181 (2005).

79. See, e.g., MICHAEL BURAWOY, *MANUFACTURING CONSENT* (1979); MICHAEL BURAWOY, *THE POLITICS OF PRODUCTION* (1985); PHILLIP SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* (1969); Arthurs, *Understanding Labour Law*, *supra* note 4; Stuart Henry, *Factory Law: The Changing Disciplinary Technology of Industrial Social Control*, 10 INT'L J. SOC. L. 365 (1982).

80. H.A. LOGAN, *TRADE UNIONS IN CANADA: THEIR DEVELOPMENT AND FUNCTIONING* 84 (1948).

81. JOHN CRISPO, *INTERNATIONAL UNIONISM: A STUDY IN CANADIAN-AMERICAN RELATIONS* 4 (1967).

82. STRATEGIC POLICY, ANALYSIS, & WORKPLACE INFO. DIRECTORATE, LABOUR PROGRAM, HUMAN RES. & SOC. DEV. CAN., *UNION MEMBERSHIP IN CANADA—2009*, at 7 tbl.6 (2010), available at http://www.hrsdc.gc.ca/eng/labour/labour_relations/info_analysis/union_membership/union_membership2009.pdf.

83. Union density has remained most resilient in the public sector, which is dominated by Canadian unions, and has declined most significantly in manufacturing and transportation in which international unions continue to play a significant role. See Andrew Jackson & Sylvain Schetagne, *Solidarity Forever? An Analysis of Changes in Union Density*, 4 JUST LAB. 53 (2004); Susan Johnson, *Canadian Union Density 1980 to 1998 and Prospects for the Future: An Empirical Investigation*, 28 CAN. PUB. POL'Y 333 (2002).

wide or sectoral basis, agreements negotiated within a given time frame across a given firm or industry often provided for comparable wages and contained similar contract language.⁸⁴ This is hardly surprising since both union and employer negotiators would have been aware that positions won or lost in one set of negotiations might have a precedential effect on others. Moreover, unions and employers on both sides of the border would have deployed negotiators whose philosophies, training, information base, and mandates were to some extent defined by their parent organizations.

Nonetheless, as noted, North American “international” unionism has declined, even as continental economic integration has proceeded apace. Why? As tariff and other barriers between Canada and the United States were removed, workers in the two countries increasingly competed against each other for available work, and solidarity between them became more and more difficult to sustain. As American union membership and power shriveled, the ability of U.S. unions to support and control their Canadian locals diminished. As workers’ prospects receded in a “new economy” shaped by globalization, technological change, and neoliberalism, the Canadian labor movement responded by consolidating its membership into larger unions, by maintaining its support for a social democratic agenda, and by forging links with other social movements; the American union movement took fewer comparable initiatives. For all these reasons, the direct influence of “international” unions over Canadian workers declined—nowhere more dramatically than in the auto industry, the most completely integrated industry of all, in which the Canadian wing seceded from the “international.”⁸⁵

While the North American case may be unique, it helps to explain the limited role played by transnational unions and union alliances in shaping workplace normativity elsewhere. Differences of economic interest, political orientation, technical resources, and regulatory frameworks make union cross-border cooperation very difficult indeed. This is not to say that such cooperation is unknown or necessarily ineffectual. Unions have formed international alliances with a view to promoting concerted action by all workers employed by a single employer or in a single sector.⁸⁶ In Europe, at least, these

84. See, e.g., John Holmes, *Re-scaling Collective Bargaining: Union Responses to Restructuring in the North American Auto Industry*, 35 *GEOFORUM* 9 (2004).

85. See SAM GINDIN, *THE CANADIAN AUTO WORKERS: THE BIRTH AND TRANSFORMATION OF A UNION* 199-219 (1995).

86. See, e.g., MICHAEL E. GORDON & LOWELL TURNER, *TRANSNATIONAL COOPERATION AMONG LABOR UNIONS* 16-23 (2000); Frank Borgers, *Global Unionism—Beyond the Rhetoric: The CWA North Atlantic Alliance*, 24 *LAB. STUD. J.* 107 (1999); Douglas Meyer, *Building Union Power in the Global Economy: A Case Study of the Coordinated Bargaining Committee of General Electric Unions (CBC)*, 26 *LAB. STUD. J.* 60 (2001); Stephen B. Moldof, *Union Responses to the Challenges of an Increasingly Globalized Economy*, 5 *RICH. J. GLOBAL L. & BUS.* 119 (2005); John Russo, *Strategic Campaigns and International Collective Bargaining: The Case of the IBT, FIET, and Royal Ahold NV*, 24 *LAB. STUD. J.* 23 (1999).

alliances have sometimes managed to organize coordinated strategies.⁸⁷ Individual unions have also established ties with their counterparts in developing countries and provided them with technical, financial, and political support,⁸⁸ and, on occasion, sympathetic action.⁸⁹ But these efforts have been at best episodic. International unions (except in Canada)⁹⁰ have not won an explicit place within established regulatory or negotiating structures in national industrial relations systems, and they have sometimes been accused of “interference” and “self-interest” by hostile states, employers, and, on occasion, even those who purport to speak on behalf of workers.⁹¹ Unions, in other words, have not been particularly successful as agents of extraterritoriality.

C. Transnational Social Movements

Something similar might be said of transnational social movements based in the global north, with which unions often cooperate, albeit sometimes tentatively.⁹² These movements have had some success in organizing consumer boycotts, lawsuits, and governmental sanctions to force abusive local employers to abide by international labor norms and human rights standards; to ensure that workers are paid a living wage even when local law permits extreme exploitation; to guarantee gender equality and safe working conditions in the workplace when local laws to this effect are nonexistent or unenforced; and to protect the right of workers to bargain collectively when local managers suppress all locally based attempts at unionization.⁹³

87. See, e.g., Brian Burgoon & Wade Jacoby, *Patch-Work Solidarity: Describing and Explaining US and European Labour Internationalism*, 11 REV. INT'L POL. ECON. 849 (2004); Ian Greer & Marco Hauptmeier, *Political Entrepreneurs and Co-managers: Labour Transnationalism at Four Multinational Auto Companies*, 46 BRIT. J. INDUS. REL. 76 (2008).

88. See Jeffrey M. Hirsch, *Employee Collective Action in a Global Economy*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 606, 616 (Kenneth G. Dau-Schmidt et al. eds., 2008); Mark Anner, *Forging New Labor Activism in Global Commodity Chains in Latin America*, 72 INT'L LAB. & WORKING-CLASS HIST. 18, 25 (2007); Henry J. Frundt, *Trade and Cross-Border Labor Strategies in the Americas*, 17 ECON. & INDUS. DEMOCRACY 387, 405 (1996); Steven Hecker, *US Unions, Trade and International Solidarity: Emerging Issues and Tactics*, 14 ECON. & INDUS. DEMOCRACY 355, 362 (1993).

89. James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85, 124 (2004).

90. See, e.g., Ontario Labor Relations Act, 1995 S.O., ch. 1 (Can.) (defining a trade union as including “a provincial, national, or international trade union” while no similar language appears in the U.S. National Labor Relations Act).

91. See, e.g., Anil Verma, *Global Labor Standards: Can we get from here to there?*, 56 INT'L COMP. J. OF LAB. L. & INDUS. REL. 515 (2003).

92. See Lance Compa, *Trade Unions, NGOs, and Corporate Codes of Conduct*, 14 DEV. PRAC. 210, 211 (2004).

93. See, e.g., Dae-Oup Chang & Monina Wong, *After the Consumer Movement: Toward a New International Labour Activism in the Global Garment Industry*, 38 LAB. CAP. & SOC'Y 128 (2005); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889 (1991);

To the extent that these campaigns succeed in transforming local working conditions, it can be said that transnational social movements promote “extraterritoriality by other means.” The question remains, however, whether they can sustain their influence over the long term and at the local level. Their best hope for doing so appears to lie in persuading transnational corporations to adopt, implement, and monitor codes of conduct that will effectively control the behavior of local managers and contractors. There is good reason to be skeptical about why corporations might choose to adopt these codes and whether they will abide by them.⁹⁴ But there is also some recent empirical evidence to suggest that well-designed codes drafted with input from workers, unions, and social movements, internalized as a fundamental aspect of a corporation’s culture and implemented by it as transparently and robustly as other indicators of corporate performance, may indeed alter conditions in its workplaces around the world.⁹⁵ So far, this evidence covers a limited set of transnational corporations in a few industries over a relatively short period of time. But, if a scattering of single instances grows into a widespread and sustained trend, transnational social movements will indeed have exercised extraterritorial influences over workplace normativity all down the value chain of transnational corporations.

D. Transnational Monitoring Agencies

It is often contended, and with reason, that effective monitoring at the workplace level is indispensable to achieving respect for labor standards. But effective monitoring is a challenge even within well-designed and well-funded state systems of regulation. Workplaces are geographically dispersed and functionally diverse; workforces are constantly turning over; technologies, management systems, and working conditions are constantly reinvented. It is clearly impossible for any system of labor inspectors to be present everywhere, all the time, and with adequate resources to identify every unlawful workplace practice. Consequently, labor standards regimes tend to depend on educating workers and employers about their rights and duties, on occasional inspections

Debora L. Spar & Lane T. LaMure, *The Power of Activism: Assessing the Impact of NGOs on Global Business*, 45 CAL. MGMT. REV. 78 (2003).

94. See Harry Arthurs, *Corporate Codes of Conduct: Profit, Power and Law in the Global Economy*, in ETHICS CODES, CORPORATIONS AND THE CHALLENGES OF GLOBALIZATION 51, 55-57 (Wesley Cragg ed., 2005); Harry Arthurs, *Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 471, 473 (Joanne Conaghan, Karl Klare & Richard Michael Fischl eds., 2001).

95. See, e.g., Jonathan P. Doh & Terrence R. Guay, *Globalization and Corporate Social Responsibility: How Non-Governmental Organizations Influence Labor and Environmental Codes of Conduct*, 44 MGMT. INT’L REV. 7 (2004); Debora L. Spar & Lane T. LaMure, *The Power of Activism: Assessing the Impact of NGOs on Global Business*, 45 CAL. MGMT. REV. 78 (2003); Doorey, *supra* note 75.

and compliance audits, and on the prosecution of delinquent employers in response to complaints by aggrieved employees (who will almost always be ex-employees by the time they complain).⁹⁶

In light of these problems, it will surely be even more difficult to achieve effective monitoring at the workplace level in global enterprises where labor standards are likely to be extraterritorial in their origin: no public inspectorate or auditors, no courts or formal legal sanctions, no governing statute, and no authoritative interpretations of broadly framed rights to receive a living wage, bargain collectively, or be protected from unsafe working conditions.⁹⁷ Indeed, in the context of extended global value chains comprising multiple layers of subsidiaries, contractors, and subcontractors, it is often difficult even to identify the workplaces where extraterritorially generated labor standards are meant to apply.⁹⁸

Nonetheless, through the efforts of transnational unions, employers, and social movements, as well as national governments and international organizations, some progress is being made towards the development of effective workplace-level compliance strategies. Some leading apparel companies provide a list of all their contractors and subcontractors online, and legislation has been proposed that would make disclosure of such information mandatory for all.⁹⁹ Some companies have established their own arm's-length monitoring systems, often in cooperation with unions and social movements,¹⁰⁰ and a whole industry of compliance auditors has grown up to ensure the integrity and efficacy of these monitoring systems.¹⁰¹ Country-specific

96. See generally HARRY ARTHURS, *FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY* ch. 9 (2006).

97. However, there are exceptions. See, e.g., ILO, *supra* note 60 (noting that the ILO has monitored global workplaces for over twenty years); Keith Ewing & John Henty, *The Dramatic Implications of Demir and Baykara*, 39 *INDUS. L.J.* 2 (2010) (noting that the European Court of Human Rights has embraced collective bargaining as an essential right).

98. David J. Doorey, *Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation*, 43 *OSGOODE HALL L.J.* 353, 384 (2005).

99. Doorey, *supra* note 75.

100. See Michael Posner & Justine Nolan, *Can Codes of Conduct Play a Role in Promoting Workers' Rights?*, in *INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY* 207 (Robert J. Flanagan & William B. Gould IV eds., 2003); see also William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Abroad Stay Abroad?*, 21 *STAN. L. & POL'Y REV.* [redacted] (2010).

101. See, e.g., Mick Blowfield, *ETI: A Multi-Stakeholder Approach*, in *CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY* 184 (Rhys Jenkins, Ruth Pearson & Gill Seyfang eds., 2002) (describing the Ethical Trading Initiative); Fair Labor Association, www.fairlabor.org (last visited Feb. 5, 2010); Global Reporting Initiative, *About GRI*, <http://globalreporting.org/AboutGRI/> (last visited Feb. 10, 2010); GoodWeave, <http://www.goodweave.org/home.php> (last visited Apr. 5, 2010); Social Accountability International, <http://www.sa-intl.org> (last visited Feb. 10, 2010). In addition, some private sector auditing firms provide social or labor audits for their clients, with less than satisfactory results. See, e.g., DARA O'ROURKE, *MONITORING THE MONITORS: A CRITIQUE OF PRICEWATERHOUSECOOPERS (PWC) LABOR MONITORING* (2000), available at

initiatives undertaken by the ILO in cooperation with governments and other transnational actors—notably in Cambodia—have mobilized local teams of inspectors that visit significant numbers of workplaces.¹⁰² And at least one American court has mandated regular on-site inspections as part of a comprehensive remedy for workers unlawfully exploited in an offshore U.S.-administered territory.¹⁰³

CONCLUSION: COPING WITH THE INEVITABLE

Extraterritoriality may be inevitable, but in the various extended senses in which I have used the term, it is neither intrinsically disadvantageous to workers, nor necessarily an infringement of the sovereignty and policy prerogatives of host states. Transnational corporations sometimes offer their offshore workers better working conditions than local employers; powerful states sometimes force or persuade their trading partners to adhere to higher labor standards than they might otherwise do.¹⁰⁴ And of course there is evidence that globalization has had equal and opposite effects. But whether globalization triggers a “race to the top,” as its proponents argue, or a “race to the bottom,” as is widely believed by its critics, no one will deny that ensuring workplace-level compliance with decent labor standards presents a formidable challenge for even the most principled global employers, the most militant international unions, the most persevering transnational social movements, and, for that matter, the most labor-friendly governments and international agencies.

One reason for this difficulty is extraterritoriality—the unwillingness or inability of states to extend the reach of their traditional national-level command-and-control models of labor regulation into the broader global economy. Another is that the models themselves are seen to lack efficacy—and, therefore, credibility—even in the domestic context.¹⁰⁵ “Command,” after all, is difficult to imagine when the state is indifferent, indisposed, or absent

<http://nature.berkeley.edu/orourke/PDF/pwc.pdf>.

102. See, e.g., Michael Hecker, *A Lesson from the East: International Labor Rights and the U.S.-Cambodia Trade Agreement of 1999*, 26 *BUFF. PUB. INT. L.J.* 39 (2007); Kevin Kolben, *Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia's Garment Factories*, 7 *YALE HUM. RTS. & DEV. L.J.* 79 (2004); Sandra Polaski, *Combining Local & Global Forces: The Case of Labor Rights in Cambodia*, 34 *WORLD DEV.* 919 (2006); Don Wells, “Best Practice” in the Regulation of International Labor Standards: *Lessons of the U.S.-Cambodia Textile Agreement*, 27 *COMP. LAB. L. & POL'Y. J.* 357 (2006).

103. See, e.g., Lance Compa, *Pursuing International Labour Rights in U.S. Courts*, 57 *INDUS. REL.* 48 (2002); Farrah-Marisa Chua Short, *An Experiment in Protecting Workers' Rights: The Garment Industry of the U.S. Commonwealth of the Northern Mariana Islands*, 7 *U. PA. J. LAB. & EMP. L.* 971 (2005); Erin Geiger Smith, *Case Study: Can a Sweatshop Suit Settlement Save Saipan?*, 23 *REV. LITIG.* 737 (2004).

104. See, e.g., Carolyn Penfold, *Offshoring and Decent Work: Worlds Apart?*, 24 *INT'L J. COMP. LAB. L. & INDUS. REL.* 573 (2008).

105. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 498 (2004).

altogether; and “control” is difficult to assert if it has no coercive forces to deploy or when its writ does not run beyond the nearest international border.

However, regulation theorists have begun to explore new models of regulation with novel approaches to both “command” and “control.” To cite one example, “reflexive law” posits the need for states to use their limited legal resources circumspectly, primarily to ensure the organizational and procedural integrity of other regimes of social ordering, such as the economy, which must be left largely to regulate themselves so long as they comply with broadly acceptable “constitutional” norms.¹⁰⁶ To cite another, “new governance theory” argues that states—and state proxies such as international agencies—should be more pragmatic, that they can and must employ an array of hard and soft law measures, of sanctions and incentives, of direct and indirect measures, to achieve their objectives.¹⁰⁷ And to cite a third, proponents of “ratcheting labor standards” hope to harness market incentives and a regime of transparency to prompt employers to embark on a virtuous cycle of self-improvement.¹⁰⁸ In the absence of state or international agencies with regulatory capacity at the global, national, or workplace levels, such approaches may indeed be the last, best hope for decent labor standards in the global economy. However, they all assume that, ultimately, powerful corporate actors can be induced to “do the right thing”—whether to forestall state action, to win recognition and market share as socially responsible employers, to secure access to state subsidies and contracts, or simply to avoid adverse publicity and consumer boycotts.

In my view, this assumption is overly optimistic.¹⁰⁹ In deciding how to treat their workers, corporations adopt a rational calculus: will adhering to decent and more costly labor standards yield a net advantage over the opposite strategy? That calculus is radically altered if substandard labor conditions cannot be detected by state inspectors or suppressed by state law; if unions,

106. For early works on the reflexive approach, see, for example, REFLEXIVE LABOUR LAW (Ralf Rogowski & Ton Wilthagen eds., 1995); Brian Bercusson, *Globalizing Labor Law: Transnational Private Regulation and Countervailing Actors in European Labour Law*, in GLOBAL LAW WITHOUT A STATE 133 (Gunther Teubner ed., 1997); Gunther Teubner, *Regulatory Law: Chronicle of a Death Foretold*, 1 SOC. & LEGAL STUD. 451 (1992). And for a general perspective on the relevance of reflexive law in the context of globalization, see William Scheuerman, *Global Law in Our High-Speed Economy*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS, *supra* note 58, at 103.

107. For a particularly ambitious overview of the “new governance” approach, see Lobel, *supra* note 105.

108. See Archon Fung, Dara O’Rourke & Charles Sabel, *Ratcheting Labor Standards*, BOSTON REV., Feb.-Mar. 2001, available at <http://bostonreview.net/BR26.1/fung.html>.

109. See Harry Arthurs, *The Administrative State Goes to Market (And Cries ‘Wee, Wee, Wee’ All the Way Home)*, 55 U. TORONTO L.J. 797 (2005); Harry Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law*, in REGULATING LABOUR IN THE WAKE OF GLOBALISATION 19 (Brian Bercusson & Cynthia Estlund eds., 2007). But for a somewhat more pragmatic and optimistic view, see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, in REGULATING LABOUR IN THE WAKE OF GLOBALISATION, *supra*, at 89.

social movements, and aroused consumers, unable to sustain lengthy international boycotts, cannot ultimately shift the burdens of securing compliance to states or state proxies; or if “good” domestic employers cannot persuade states to shelter them from unfair competition by “bad” firms that exploit their workers at home or abroad.

Extraterritoriality is an inevitable aspect of any corporate calculus, I would argue, and consequently of the calculus of all labor market actors, including states themselves. By identifying the “other means” by which extraterritoriality occurs—means implicit in the extended definitions of “law” and “labor” proffered at the beginning of this essay—I have attempted to liberate debates over regulation of the global workplace from limits imposed by the conventional discourses of public and private international law. But this is just a first step. If we aspire to improve the conditions of workers in these workplaces, we must understand better than we do now the transnational migration of state laws and policies, of normativity generated within corporate, social, and discursive networks, and of workplace-level strategies of exploitation, resistance, and regulation. We must understand as well the dynamic relationship amongst these and their relationship to developments in nonlabor policy domains and in the global political economy more generally. The next step is therefore to develop a conceptual and analytical framework, and especially a body of empirical evidence, that will enable us to think more rigorously, to see more clearly, and especially to look to the future more constructively than I have been able to do in this preliminary exploration of extraterritoriality.