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How Business Shapes Law: A Socio-Legal Framework

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GREGORY C. SHAFFER

Much legal scholarship addresses law in terms of norms and incentives that affect business and individual behavior. This Article addresses the mechanisms through which business shapes law. There are two main ways in which business does so. First, business influences the public institutions that make and apply law. Second, business creates its own private legal systems, including private institutions to enforce privately-made law. These two sources of law, publicly-made and privately-made, are interpenetrated; they reciprocally and dynamically affect each other. This Article provides a socio-legal framework for analyzing business's interactional relationship with law. The Article argues that to assess the relation of business to law, we must look at three sets of institutional interactions: the interaction among public institutions (legislative, administrative, and judicial processes), in each of which business plays a critical role; the interaction of national and transnational institutional processes, with transnational processes having become more prominent; and the interaction among these public institutional processes and parallel private rule-making, administrative and dispute settlement mechanisms that business creates. The dynamic, reciprocal interaction of public and private legal systems constitutes the legal field in which economic activity takes place.

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How Business Shapes Law: A Socio-Legal Framework

GREGORY C. SHAFFER*

I. INTRODUCTION

As part of their professional pedigree, lawyers are taught to view their discipline as autonomous. Law has its specialized language—such as “consideration,” “tort,” “eminent domain,” and “*mens rea*.” Law has its specialized mode of reasoning, in which student-apprentices learn to distinguish factual contexts, judicial dicta, and legal holdings to construct and parse rhetorical arguments and defend different angles of a question. And law has its performativity, whether in opening or closing arguments in a courtroom, the deposition of an opponent in a law office, or the interviewing of a client in which the lawyer hones toward the crux of a legal issue, disregarding events and feelings that have no legal implications. Yet this view of law’s autonomy—the insider view—is narrow and naive to an outsider who views law’s performance from a sociological vantage. Social forces give rise to law’s construction and they mediate law’s application which, in turn, shapes law’s reconstruction. Law faces a dilemma regarding its legitimacy which gives rise to its Janus-faced nature, looking both inside and outside simultaneously. Law’s legitimacy depends both on a perception of legal autonomy (an internal view of the consistency and coherence of applied legal concepts) and a perception of legal responsiveness (an external view of the social context in which law operates). Without autonomy, law violates basic strictures of the “rule of law.” Without responsiveness, law alienates its subjects.

This Article puts business center stage as a means to understand law because business is a common feature of most areas of law,¹ and because, as a consequence, business is central to law’s construction and reception. Moreover, the proliferation of privatized legal systems and international

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¹ To name a few commonly taught subjects in law schools, these areas include contract law, tort law, commercial law, corporate law, antitrust law, labor and employment law, consumer law, environmental law, health law, insurance law, intellectual property law, administrative law, civil procedure, and constitutional law.

and transnational institutions challenge our very concept of law.² We need a socio-legal analytic framework to understand the relationship of business (driven by a quest for profit) and law (characterized by both reason and coercion) to understand how law operates.

There is a great deal of scholarship that addresses different aspects of the business-law relationship, from which this Article builds and to which it contributes. We lack, however, an overarching socio-legal analytic framework to assess the dynamic interaction of public and private business lawmaking in different institutions at the national and international levels. Lon Fuller earlier put forward a general interactional theory of law.³ In Fuller's words, law and society are linked in a mesh of "interactional expectancies."⁴ With respect to statutory law:

The interpretation of statutes is, then, not simply a process of drawing out of the statute what its maker put into it but is also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied.⁵

With regard to common law judging, as Gerald Postema writes in respect of Fuller's theory:

Through sensitivity to the underlying practices and understandings, and articulation of principled justifications for their decisions, courts sought to anticipate the ways in which ordinary citizens would take up their decisions, while the citizens were forced to understand the general import of the decisions in such a way as to anticipate how the courts would decide future cases as they may affect their lives.⁶

Fuller, however, did not focus on business's role, including its part in the creation of private legal systems.

This Article applies an institution-centered analytic framework to

² See Neil Walker, *Out of Place and Out of Time: Law's Fading Co-ordinates* 23–26 (U. Edinburgh Sch. L., Working Paper Series No. 2009/01, 2008), available at <http://ssrn.com/abstract=1367591>, at 33–34 ("State law, including the frame of state constitutional law, is increasingly rivaled by law otherwise spatially extended, including sub-state law, regional supranational law, transnational domain-specific private ordering, hybrid public-private ordering, and, increasingly, new forms of global legal regime that neither claim universality nor obviously emanate from nor respect the aggregate sovereign will.").

³ Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, *passim* (1969); see also Gerald Postema, *Implicit Law and Principles of Legality*, in LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY, PART ONE: THE COMMON LAW WORLD (forthcoming 2010) (citing LON L. FULLER, THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER (Kenneth I. Winston ed., rev. ed. 2001)).

⁴ Fuller, *Human Interaction*, *supra* note 3, at 14; see also LON L. FULLER, THE MORALITY OF LAW 221–23 (2d ed. 1969).

⁵ LON L. FULLER, ANATOMY OF THE LAW 59 (1968).

⁶ Postema, *supra* note 3.

address the reciprocal interaction of business and law, maintaining that one cannot be understood without the other. Law consists of systems of rules, standards, and procedures created and applied by social institutions which constitute business (by recognizing business charters) and which provide a framework in which business strategizes and operates.⁷ Business, in turn, uses law as a resource to advance and defend business aims, shaping law in various direct and indirect ways.⁸ While much legal scholarship addresses public and private legal ordering as distinct domains⁹ and assesses law in terms of norms and incentives that affect business and individual behavior,¹⁰ this Article reverses the telescope, providing a framework to assess the multiple mechanisms through which business reciprocally shapes law. It applies this framework to empirical examples from an array of legal domains.

To start with public institutions, business has advantages over other constituencies before them, be they legislatures, administrative bodies, or courts. Each of these institutions may be more or less propitious for business at different times and in different contexts, and these institutions, in turn, can constrain, catalyze, and otherwise affect each other. In addition, business creates its own private legal systems, including what is traditionally referred to as *lex mercatoria* (or private merchant law) and private institutions to enforce it (such as arbitral bodies).¹¹ These two

⁷ On the growing pervasiveness of law during the latter half of the twentieth century, as reflected in more regulation, litigation, number of lawyers and other legal actors, and greater diffusion of information and public awareness about law, see Marc Galanter, *Law Abounding: Legislation Around the North Atlantic*, 55 MOD. L. REV. 1, 1–2 (1992); LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 6–9 (2002).

⁸ By business, I refer to all institutional forms, including peak business trade associations, sectoral lobbying groups, large corporations, and small proprietorships. Although the Article makes clear that the interests of business with regard to law are rarely, if ever, monolithic, it will at times focus on business as a whole in this Article to simplify analysis. Corporate organization and state regulation have both grown dramatically in number and complexity over the last century, with each responding to the other. On the rise and global diffusion of the corporate form, see JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 144–45 (2000).

⁹ See, e.g., NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 256–57 (1995) (discussing the legal process school and its heritage in the United States, which stresses how the state may adopt a “hands-off” strategy, leaving issues to “the process of private ordering,” and further noting that “efficient administration suggests the desirability of maximizing these elements” (citing HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 870–72 (1958))).

¹⁰ Law and economics tends to focus on incentives and default rules, while legal philosophy tends to focus on law’s normative dimensions.

¹¹ By private legal systems and private law, I mean law made by and through private bodies, as opposed to traditional contract, property, and family law. Cf. Gillian K. Hadfield, *The Public and the Private in the Provision of Law for Global Transactions*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE: EMPIRICAL STUDIES AND THEORETICAL DEBATES ON INSTITUTIONAL SUPPORT FOR GLOBAL ECONOMIC EXCHANGES 239 (Volkmar Gessner ed., 2009) (focusing on the private production of law); Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 843–44 (2006) (providing conceptual clarifications of private law in light of processes of globalization and privatization); David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 375 (2003) (distinguishing “private law” from

sources of law, publicly-made and privately-made, interact dynamically. Publicly-made law is made in response to developments in the private sphere, sometimes addressing privately-made law's purported deficiencies, and sometimes codifying or otherwise taking into account private business law, business custom, and business institutional developments (such as alternative dispute resolution) into national statutes, regulations, and institutional practices. Privately-made law is adopted in response to the public legal system, whether to preempt public law's creation as unnecessary, to internalize public law through creating new organizational policies and procedures (affecting law's meaning), or to exit from the public legal system through the development of alternative dispute resolution bodies. The dynamic, reciprocal interaction of public and private legal systems at different levels of social organization constitutes the legal field in which economic activity takes place.

To assess the relation of business to law, one must thus examine how law is created and applied through public institutions, how it is created and applied through private entities, and how these systems interact, including between the national and the transnational levels. That is, one must look at three sets of institutional interactions: the interaction among public institutions (legislative, administrative, and judicial processes), in each of which business plays a critical role; the interaction of national and transnational institutional processes, with transnational processes having become more prominent in an economically globalized age; and the interaction among these public institutional processes and parallel private rule-making, administrative, and dispute settlement mechanisms that business creates, again at different levels of social organization. This analytic framework for assessing the relation of business and law applies across legal subject areas.

The remainder of this Article is in four parts. Part II examines business's role in shaping law through public institutions. Part III assesses business's creation of private legal rules and institutions. Part IV analyzes how public and private legal systems interact, and, in particular, how private business-made law and business practice affect publicly-made law over time. Part V addresses the interaction of business and law in the comparative and global context. It shows how, on the one hand, much of international business law has developed in response to business demands and practices, in the process affecting national law. On the other hand, it explains why national law and legal practice nonetheless retain significant variation in reflection of local interests, institutional structures, and business and legal cultures.

“privately made law”).

II. BUSINESS AND THE PUBLIC LEGAL SYSTEM

Business interests may be united or divided in relation to public institutions and the laws that these institutions create. Regulation provides some businesses with competitive advantages over others, dividing business and creating incentives for different public-private alliances.¹² Business is divided on account of economic competition, and public actors are divided on account of political, ideological and administrative competition.¹³ Different factions within business thus ally with different factions within government. Business interests, however, may also converge to oppose government measures, as when government sides with consumer or environmental groups at the national level, and business believes it will be disadvantaged against foreign competition. With the rise of transnational institutions, businesses can also look to public actors at different levels of social organization to promote their interests.

Business and law interact in mutually supportive and mutually constraining ways. On the one hand, law can significantly constrain business choice so that business attempts to constrain law's reach. On the other hand, law not only helps to stabilize expectations and thus create greater business certainty, but it also provides legitimacy for business and business operations, shielding them from fundamental challenges,¹⁴ and it can provide competitive advantages for some businesses over others.¹⁵ Business thus invests in law, both to shape law to support business interests and to legitimize business conduct, as well as to thwart law's potential constraints.

Business has a complex relationship with law, which, at a minimum, must appear autonomous from business or else law lacks legitimacy. Yet as Yves Dezalay and Bryant Garth write, "the autonomy of the law, which is necessary to its legitimacy, is not inconsistent with serving the needs of political and economic power."¹⁶ There often exists an "unspoken

¹² DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 1–3 (1995).

¹³ The division of public actors, of course, depends on a non-autocratic system. *See, e.g.*, ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 63, 78–81 (1956) (setting forth a pluralist theory of interest groups that distinguishes democracy, or polyarchy, from dictatorship).

¹⁴ This is true not only of property and contract law, which facilitate and legitimize business economic activity, but also of regulatory law more broadly in a capitalist economy. *See, e.g.*, JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, 60–61 (1970). As Hurst wrote concerning developments of law affecting business in the United States, "[b]efore the late nineteenth century questions of legitimacy relating to the business corporation concerned in the main the legitimacy of the ends and means of government's power as it affected corporations, rather than the legitimacy of corporations' use of the facilities the law provided for them." *Id.* at 59. While progressive regulation of corporations grew in the twentieth century, corporate law limits withdrew. From the 1890s to 1930s, "[t]he function of corporation law [in the United States became] to enable businessmen to act, not to police their action." *Id.* at 70.

¹⁵ VOGEL, *supra* note 12, at 1–3.

¹⁶ YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL*

deference of administrations, legislatures, and courts to the needs of business.”¹⁷ These processes of legitimation can go both ways. Business also legitimates law through passive compliance and active support. This phenomenon is particularly salient at the transnational level where public institutions are weak and may seek allies with business. For example, rather than enacting binding legal norms, the United Nations, through its Global Compact, attempts to find partners within business to help to align business conduct with “universally accepted principles in the areas of human rights, labour, environment, and anti-corruption.”¹⁸ The Global Compact will only have relevance if businesses voluntarily agree to join it.

A. *Business and Legislation*

Legislators may respond to business demands for many reasons, ranging from self-interest in campaign support, a desire not to harm business in light of business’s importance for the economy, and persuasion based on information that business provides.¹⁹ Organized businesses enjoy significant advantages in the legislative process over other constituencies because of their monetary and organizational resources, arguably facilitated in the United States by its traditionally pro-business ideological orientation.²⁰ They can fund political campaigns, hire well-connected lobbyists, create think tanks to circulate business-friendly ideas, access the media, and promote the exchange of their personnel into government positions. Because of these resources, organized businesses tend to have preferential access to the political process so that legislators take account of their views.²¹

Business interests have long held a preferential position in lawmaking for structural reasons. Their importance for investment and employment in capitalist economies provides them with a privileged position in dealings

ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 98 (1996).

¹⁷ CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD’S POLITICAL ECONOMIC SYSTEMS 179 (1977); see Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1399–1401 (2006) (discussing how “[i]n the past thirty years the business corporation has achieved an ascendancy over government entities . . .”).

¹⁸ United Nations, Overview of the UN Global Compact, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited June 2, 2009). I thank Fabrizio Cafaggi for our discussion on this point.

¹⁹ The extent to which they do so depends on “a large number of factors—among them the nature of the issue, the nature of the demand, the structure of political competition, and the distribution of resources” KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 317 (1986); see also DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 17–21 (1991) (discussing the complex and unpredictable relationship between interest groups and legislators).

²⁰ LINDBLOM, *supra* note 17, at 172, 174; Kevin Farnsworth & Chris Holden, *The Business-Social Policy Nexus: Corporate Power and Corporate Inputs into Social Policy*, 35 J. SOC. POL’Y 473, 475 (2006).

²¹ David Vogel, *The Power of Business in America: A Re-Appraisal*, 13 BRIT. J. POL. SCI. 19, 29 (1983); Farnsworth & Holden, *supra* note 20, at 475–76.

with government, since critical market functions such as jobs, prices, production, growth, standard of living, and economic security depend on business activity.²² Government thus has incentives to facilitate business performance by providing business with benefits, including tax breaks, subsidies, or business-favorable regulation.²³ The globalization of production arguably “enhances the structural power of corporate capital” because business can threaten to invest elsewhere if national regulation is unfavorable.²⁴ During financial crises, some businesses can be deemed too big and too important to fail.²⁵

Political representatives nonetheless respond to popular concerns regarding business power, the intensity of which varies over time. In the United States, the regulatory state grew significantly during the New Deal in the 1930s, in response to the public interest movement of the 1970s, and may well do so in light of the global financial crisis that exploded in 2008. Yet when faced with potentially constraining regulation, business lobbying can produce compromises that safeguard business interests, such as the inclusion of exceptions, loopholes, and open-ended language subject to subsequent interpretation. In some cases, “public interest” statutes may serve as a facade, providing a symbol of government concern while masking government inaction.²⁶

B. *Business and Administration*

Statutes often contain language that is sufficiently ambiguous so that their application depends on which parties mobilize the law to advance their ends before administrative agencies. There is a large literature, including that of public choice in law-and-economics, debating whether agencies are “captured” or “co-opted” by special interests, and, in particular, business interests.²⁷ While it is an overstatement to maintain

²² LINDBLOM, *supra* note 17, at 172.

²³ *Id.* at 174.

²⁴ DAVID HELD, ANTHONY MCGREW, DAVID GOLDBLATT & JONATHAN PERRATON, GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 270, 281 (1999); DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 44–45 (1997).

²⁵ See, e.g., GARY H. STERN & RON J. FELDMAN, TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS I (2004) (“These banks have assumed the title of ‘too big to fail’ (TBTF), a term describing the receipt of discretionary government support by a bank’s uninsured creditors”); David Reiss, *The Federal Government’s Implied Guarantee of Fannie Mae and Freddie Mac’s Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019, 1050 (2008) (“The term ‘Too Big to Fail’ refers to a policy where a government chooses to intervene in the market and bail out insolvent institutions instead of letting them unwind their affairs through normal channels, such as the bankruptcy courts.”); Edmund L. Andrews, *Battles over Reform Plan Lie Ahead*, N.Y. TIMES, Mar. 27, 2009, at B1 (referring to companies as “too big to fail”); Thomas L. Friedman, *The Price Is Not Right*, N.Y. TIMES, Apr. 1, 2009, at A31 (referring to companies as “too big to fail”).

²⁶ MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 150 (2d ed. 1985); MURRAY EDELMAN, POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE 36–38 (1971).

²⁷ Cf. ROGER G. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 15 (1971) (finding that agencies sometimes choose to pursue other objectives at the

that business simply captures agencies,²⁸ most agree that agencies are subject to significant business pressure and influence, and that business often occupies a privileged position. Explanations for business's influence range from sociological, with regulators learning to think like the regulated through constant interaction with them, to interest-based, where it is in the regulators' interest to accommodate business to avoid adverse consequences, such as contestation before legislative committees and the courts. Well-organized business groups can sometimes shape the application of regulation that is nominally designed to protect a public interest (e.g., clean air) to suit producer interests (e.g., the producers of "dirty coal").²⁹ Business groups can also press legislatures to thwart regulation that business does not favor, including through threats to limit agency funding for relevant programs.³⁰ Administrative law ultimately can be viewed as a negotiated legal order in which public officials and private actors must coordinate if public goals are to be realized.³¹

Representatives of organized interests are in constant contact with agency officials, and the two sides have opportunities to exercise influence over each other. Regulatory officials deploy "soft" persuasive mechanisms and threaten "hard" enforcement to affect business conduct.³² Reciprocally, even lower-level officials who see their specialized position as technocratic can have their views shaped over time through regular interaction with business representatives and the information that business provides.³³

A "revolving door" political culture also furthers business's access to administrative lawmaking and application. In the United States, business is often able to obtain the appointment of supportive political appointees to

expense of the public interest); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 335–36 (1974) (asserting that regulations respond to the demands of interest groups).

²⁸ JAMES Q. WILSON, *THE POLITICS OF REGULATION* 359 (1980).

²⁹ See, e.g., BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 79 (1981) (showing how a business coalition successfully lobbied for regulatory change at the expense of the public interest).

³⁰ See CINDY SKRZYCKI, THE REGULATORS: ANONYMOUS POWER BROKERS IN AMERICAN POLITICS 106–07 (2003) (stating that Congress withholds federal funding as a tactic to impede regulation); PAUL J. QUIRK, INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES 176 (1981) (discussing pro-business budgetary incentives).

³¹ Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547 (2000).

³² Keith Hawkins, *Bargain and Bluff: Compliance Strategy and Deterrence in the Enforcement of Regulation*, 5 LAW & POL'Y Q. 35, 40–41 (1983); Robert A. Kagan, Neil Gunningham & Dorothy Thornton, *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 LAW & SOC'Y REV. 51, 61–62 (2003); see IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 19 (1992).

³³ See Cary Coglianese, Richard Zeckhauser & Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 277–78 (2004) (stating that the best source of information for government regulators is from the very firms that they regulate).

lead governmental agencies.³⁴ More generally, lawyers and lobbyists in Washington, D.C. enhance their resumes by splashing a few years in public life to subsequently—and lucratively—serve private commercial clients. As former United States Trade Representative Robert Strauss observed, lawyers often go to work for the U.S. Government because “they know that [government work] enables them to move on out in a few years and become associated with a lobbying or law firm [where] their services are in tremendous demand.”³⁵ Whether or not regulators accommodate business to prop their own career prospects, a “revolving door” political culture forges understanding among public and private representatives so that each side better appreciates the other’s perspectives and needs.

C. *Business and the Courts*

By initiating and defending cases, litigants shape the law’s application, interpretation, and elaboration over time.³⁶ Even where a statute or administrative regulation does not favor business, business can attempt to mobilize litigation and dispute settlement resources to build favorable judicial precedent. Just as in political and administrative processes, well-resourced actors have advantages. To start, organized businesses benefit from economies of scale because of their experience with litigation. They also tend to have greater financial resources, which they use to attract the best lawyers to gather evidence and put forward legal arguments. Corporate in-house counsel can hire leading external law firms that employ scores of legal associates to scour statutes and jurisprudence and develop sophisticated factual and legal arguments. As John Heinz and Edward Laumann showed, legal “fields serving big business clients” are at the top in ranking of prestige, and “those serving individual clients . . . at the bottom.”³⁷ Corporate legal counsel can also deploy procedural

³⁴ See SKRZYCKI, *supra* note 30, at 84 (discussing the industry background of the top appointees of the Labor Department’s Occupational Safety and Health Administration during the Clinton and George W. Bush administrations).

³⁵ Jill Abramson, *The Business of Persuasion Thrives in Nation’s Capital*, N.Y. TIMES, Sept. 29, 1998, at A1 (quoting Strauss).

³⁶ Donald J. Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125, 147 (1973); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 4–5 (1974). Although this is clearly true in common law systems, it is also arguably the case in civil law systems where judges and legal scholars refer to judicial decisions as regarding the law’s meaning and give weight to them, which helps to preserve legal certainty and consistency. See, e.g., Mauro Cappelletti, *The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference—Or No Difference at All?*, in *FESTSCHRIFT FÜR KONRAD ZWEIGERT ZUM 70 GEBURTSTAG* 388, 392 (Herbert Bernstein, Ulrich Drobnig & Hein Kötz eds., 1981) (“[T]here is no sharp cleavage between the two major legal traditions, not even to the topic [stare decisis] discussed in this article.”).

³⁷ JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 127 (1982). Law firms have grown significantly in size, as have litigation expenses, favoring those with greater resources. MARC GALANTER & TOM PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 4–5 (1991).

mechanisms to draw out litigation and impose costs on less-resourced parties to induce favorable settlements. These advantages can be countered, in part, where mechanisms exist—such as attorney fee awards and class action lawsuits—which incentivize attorneys to bring lawsuits on behalf of consumers, investors, and other constituencies.³⁸ Yet corporations' resources and experience generally provide them with significant advantages over individuals.

Moreover, business can attempt to use soft law processes, such as through the American Law Institute which compiles “restatements” of the existing state of law, where business has been less successful before legislatures.³⁹ Similarly, business has funded research institutes, including some within law schools, which have challenged, directly or indirectly, the rationale for regulation. To give an example, Henry Manne's Law and Economics Center at George Mason University School of Law created a program for judges that was viewed by many as being pro-business and anti-regulation and which was dubbed by Arthur Leff as “Henry Manne's summer indoctrination session.”⁴⁰ A large percentage of the federal judiciary has attended it.⁴¹ In these ways, business aims to affect subsequent legal interpretation by courts over time.

Marc Galanter has theorized the limited prospects of social change through adjudication in his classic work, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*.⁴² As Galanter states, certain actors are more likely to be “repeat players” in litigation. These repeat players do not use the adjudicative process solely for the adjudication of single, unrelated cases; they also play for rules. As repeat players, they are well-positioned to settle unfavorable cases and litigate and appeal cases that are more likely to result in a favorable legal precedent. By selecting which cases to settle and thus extract them from

³⁸ These attorneys also have their own interests, complicating the assessment of the costs and benefits of these mechanisms. For an empirical assessment of the use of contingency fees, see Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. LAW Q. 739, 744–47 (2002).

³⁹ See Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist*, 26 LOY. L.A. L. REV. 743, 782, 784–85 (1993) (describing lobbying efforts by the ALI); see also Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 625 (1998) (noting the ALI's general contributions to the development of the law). David Snyder likewise notes how the National Conference of Commissioners on Uniform State Laws also acts as a de facto private legislator. Snyder, *supra* note 11, at 378–82.

⁴⁰ Arthur Allen Leff, Commentary, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452 (1974).

⁴¹ See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 360 (2001) (“[B]y 1983, over one-third of the federal judiciary had attended it at least once.”); see also Law and Economics Center, <http://www.lawecon.org/about> (last visited July 8, 2009) (noting attendance by “more than 5,000 judges”).

⁴² See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95 (1974) (maintaining that the legal system's structure inhibits change).

the adjudicative process, repeat players are better positioned to reduce the likelihood of adverse precedent affecting their future operations.⁴³ Even where subsequent legislation overturns a judicial precedent favorable to a repeat player, such new legislation triggers a new process of legal interpretation where well-resourced repeat players are favored.

Galanter defines a repeat player as a “larger unit . . . which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests.”⁴⁴ He defines a “one-shotter,” in contrast, as a smaller unit whose stakes in a given case are high relative to the actor’s total worth.⁴⁵ One-shotters, as a result, are more likely to focus on the particular result from settling a dispute rather than the creation of long-term precedent affecting future operations. Galanter finds that “organizations roughly correspond to [repeat players],” whether the organizations be a business or government actor.⁴⁶

Catherine Albiston has examined how businesses have strategically used litigation to shape the interpretation of aspects of employment law over time. Applying Galanter’s framework, she finds that “[e]mployers may settle strong cases likely to produce adverse decisions, ensuring that these cases never become the basis for a published judicial opinion[,]” while they “may dispose of weak cases . . . through motions to dismiss or motions for summary judgment, which often do become part of the judicial interpretation of the law.”⁴⁷ She finds that “published judicial determinations of rights . . . occur primarily when employers win[,]”⁴⁸ which affects understandings of law in subsequent employment disputes. Employees’ successful settlements come “at the price of silence in the historical record of the common law.”⁴⁹

In the United States, businesses have successfully used litigation to be recognized as “persons” benefiting from constitutional rights, such as involving search and seizure, free speech, and campaign finance, as opposed to mere instruments of natural persons. Carl Mayer characterized Supreme Court decisions recognizing constitutional rights protections for corporations against government action as symbolic of “the transformation of our constitutional system from one of individual freedoms to one of

⁴³ See *id.* at 103 (describing how repeat players utilize experience to reach favorable litigation results).

⁴⁴ *Id.* at 97–98.

⁴⁵ See Marc Galanter, Afterword, *Explaining Litigation*, 9 LAW & SOC’Y REV. 347, 347 (1975) (describing “one-shotters”).

⁴⁶ *Id.* at 348; see Galanter, *Why the “Haves” Come Out Ahead*, *supra* note 42, at 97, 113 (discussing businesses and bureaucracies as repeat players).

⁴⁷ Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC’Y REV. 869, 894 (1999).

⁴⁸ *Id.* at 902.

⁴⁹ *Id.* at 906.

organizational prerogatives.”⁵⁰ In contrast, although there have been stirrings of some change, corporations have remained relatively “immune from criminal punishment” because criminal laws are typically designed in contemplation of natural persons.⁵¹

D. *Negotiation in the Law’s Shadow*

Reading statutes, administrative regulations, and judicial decisions tells us little about the law’s operation. As socio-legal scholars have long shown, there is a difference between the law in the books (whether in statutes or published judicial decisions) and the law in practice, what they refer to as the “gap.”⁵² Only a few disputes are fully litigated. Most are settled through negotiation. As Galanter reminds us, “the career of most cases does not lead to full-blown trial and adjudication but consists of negotiation and maneuver in the strategic pursuit of settlement through mobilization of the court process.”⁵³ Galanter calls this process “*litigotiation*.”⁵⁴

Two primary aspects of the law exercise shadow effects on bargaining: the law’s substance and the law’s procedures. The substance of law, as set forth in statutes and administrative regulations and as interpreted in case law, can inform and constrain settlement negotiations conducted in the law’s shadow. As Robert Mnookin and Lewis Kornhauser observe in their famous study of divorce law, “the outcome that the law will impose if no agreement is reached gives each [party] certain bargaining chips—an endowment of sorts.”⁵⁵ Those more legally astute are more likely to be aware of the bargaining chips that they may deploy in order to use them strategically to their advantage. Repeat players in dispute settlement who can “play for rules” may also affect the very nature of the bargaining chips.

The judicial decision itself may be viewed in terms of its “shadow effect” on the resolution of a dispute. Negotiations may take place in the

⁵⁰ Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 578 (1990).

⁵¹ Marc Galanter, Comment, *Farther Along*, 33 LAW & SOC’Y REV. 1113, 1118 (1999).

⁵² See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 22 (1979) (demonstrating the gap between law “on the books” and its implementation in criminal justice system); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 56 (1963) (documenting differences between written contracts and actual practices followed by parties); Robin Stryker, *Mind the Gap: Law, Institutional Analysis and Socioeconomics*, 1 SOCIO-ECON. REV. 335, 358–59 (2003) (concluding with a discussion of institutions generally).

⁵³ Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 596 (2001).

⁵⁴ Marc Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEG. EDUC. 268, 268 (1984).

⁵⁵ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). But see Macaulay, *Non-Contractual Relations in Business*, *supra* note 52, at 63–64 (regarding the role of non-legal norms in the settlement of business disputes).

context of, and be informed by, a judicial decision. As Stewart Macaulay writes regarding contract law, “[w]hat appears to be a final judgment at the trial level may be only a step toward settlement. The judgment may affect the balance of power between the parties, but often it will not go into effect as written.”⁵⁶ Parties can settle the dispute in the shadow of a potential appeal, or they can settle it in light of their ongoing business relations with each other and third parties.

In addition, the law’s “shadow” effects include the costs of deploying the law procedurally. As Herbert Kritzer states, “the ability to impose costs on the [opponent] . . . and the . . . capacities for absorbing costs” affect how the law operates.⁵⁷ Where large businesses can absorb high litigation costs by dragging out a case, while imposing them on weaker complainants, they can seriously constrain a person’s incentives to initiate a claim, and correspondingly enhance a person’s incentives to settle a dispute unfavorably.⁵⁸ Law casts a weaker shadow for parties that lack the ability to hire and retain skilled lawyers, unless there are mechanisms, such as attorney fee awards and class actions, which create incentives for the plaintiff’s bar. When legal resources cannot be mobilized cost-effectively, then a party’s threat to invoke legal procedures against a business that wields greater legal resources has less credibility. A party may not even consider the threat of litigation, knowing the challenges that it faces. It has less of an incentive to become aware of the state of the law, affecting what is called in socio-legal studies its “legal consciousness.”⁵⁹ These aspects of the legal system most adversely affect individuals with fewer resources.

In sum, businesses have advantages in each of the public institutions discussed above and can look for allies in each of them when their interests are at stake. At times, businesses may find the legislature more favorable to their views, at others the executive, and at others courts. Businesses can thus search for allies in one public institution to counter or constrain another, as will any organized constituency. These institutional processes

⁵⁶ Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44, 71 (2003).

⁵⁷ HERBERT M. KRITZER, LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 73 (1991).

⁵⁸ See David M. Trubek, Austin Sarat, William L.R. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 76 (1983) (considering litigation from an investment standpoint).

⁵⁹ See, e.g., David M. Engel, *Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand*, 30 L. & SOC. INQUIRY 469, 471 n.2 (2005) (“Legal consciousness in this article refers to the practices and concepts invoked by ordinary people who have suffered injuries and who, in the course of their subsequent narrations, discuss questions of remedy, fate, causation, and justice.”); Elizabeth A. Hoffmann, *Legal Consciousness and Dispute Resolution: Different Disputing Behavior at Two Similar Taxicab Companies*, 28 LAW & SOC. INQUIRY 691, 692–93 (2003) (“Scholars have defined legal consciousness as how people make sense of law and legal institutions and how people give meaning to their law-related experiences and actions.”); see also Charles Cortese, *A Study in Knowledge and Attitudes Toward the Law: The Legal Knowledge Inventory*, 3 ROCKY MTN. SOC. SCI. J. 192, 192–93 (1966) (discussing inadequate experience with and ignorance of the law).

interact over time, giving rise to the national public law system. This public law system, however, is not autonomous, but is affected by developments in the private sphere.

III. THE PRIVATE LEGAL SPHERE

Law-in-action refers to how law is received, interpreted by and subsequently given meaning through practice—what Eugen Ehrlich called “the living law.”⁶⁰ Publicly-made law, whether formed through statute, administrative regulation or judicial judgment, not only must be put into action through practice; it also complements, competes and interacts with private ordering mechanisms, affecting public law’s meaning and application. To understand the relation of business and law, one must examine both how business responds to publicly-made law (which we explore in this section) and how that response can feed back into publicly-made law (which we examine in Part IV).

A. *Alternative Choices for Privately-Made Law*

We can view business’s response to publicly-made law in terms of three broad approaches. First, businesses can create their own private legal ordering regimes, which, if accepted as legitimate, can displace the demand for publicly-made law. This approach involves a privately-made alternative that is relatively *centralized*. Second, businesses can ignore existing public law, even that in their favor, because of other concerns such as long-term client relations and reputation. This market-oriented alternative, in which business focuses on partner and customer relations and social norms, is *decentralized*. Third, businesses can implement public law requirements through internal organizational policies and procedures in which they translate and potentially transform the meaning of publicly-made law. This *internal organizational* business alternative, in turn, may be diffused through customary business practice to entire business sectors and thus lies between the first two alternatives. Through these mechanisms, the corporate organization can act, “to varying extents, as a legislator, adjudicator, lawyer, and constable,” and thereby constitute a private legal system.⁶¹

⁶⁰ EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 501–02 (Walter L. Moll trans., 1936).

⁶¹ Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 961 (1999); Stewart Macaulay, *Private Government*, in LAW AND THE SOCIAL SCIENCES 445, 446–47 (Leon Lipson & Stanton Wheeler eds., 1986); Snyder, *supra* note 11. Edelman and Suchman contend that business organizations have internalized elements of the public legal system in at least four major ways which interact: “(1) the legalization of organizational governance [through internal policies and procedures]; (2) the expansion of private dispute resolution; (3) the rise of in-house counsel; and (4) the re-emergence of private policing.” LAUREN B. EDELMAN & MARK C. SUCHMAN, THE LEGAL LIVES OF

Business has long created its own private legal systems, in particular to govern commercial transactions under merchant law (or *lex mercatoria*).⁶² These private business law regimes can be national or transnational in scope. At the national level, businesses have created standardized contracts which effectively have become the law for sectors of industry, as has been the case with the standards set by the American Institute of Architects for the design and construction of buildings.⁶³ Similarly, stock exchanges began as relatively autonomous private organizations.⁶⁴ For the insurance sector, Lloyd's of London syndicates were effectively responsible for insurance law in the United Kingdom, and Lloyd's power extended internationally because London was the financial center for international trade.⁶⁵ Today, the credit card industry effectively sets credit card rules for consumers and businesses on many issues.⁶⁶ Business self-regulation plays a central role in international harmonization as well, as this Article explores further in Part IV. Through business's creation of new institutions, such as through chambers of commerce and trade associations, this alternative is the most centralized of the privately-made variants.

Second, a business can simply disregard law in light of long-term client relations and reputational concerns. As Macaulay found in his famous study of business contracts and the settlement of business disputes, “[t]here is a hesitancy to speak of legal rights or to threaten to sue in these negotiations.”⁶⁷ Ian Macneil elaborated these insights in developing “relational contract” theory which postulates that social norms underpin contractual relations so that individual contracts and contract disputes are best viewed as “part of a relational web.”⁶⁸ As Macaulay and Macneil show, a business may not even engage with law to determine what legal rights, claims, or defenses it may have. Non-legal sanctions, such as damaged reputation, are available if a business does not act in good faith. This alternative which relies on business relations and social norms is the

PRIVATE ORGANIZATIONS xxv (2007). On the latter point, businesses use private police forces to patrol their premises and oversee their workforce. It is estimated that private police outnumber public police by 3:1. Edelman & Suchman, *When the “Haves” Hold Court*, *supra*, at 958.

⁶² LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 1–3 (1983).

⁶³ Macaulay, *Private Government*, *supra* note 61, at 448; W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–30 (1971).

⁶⁴ Snyder, *supra* note 11, at 385–86 (describing the stock exchanges as private legislators).

⁶⁵ BRAITHWAITE & DRAHOS, *supra* note 8, at 113.

⁶⁶ Snyder, *supra* note 11, at 398–402.

⁶⁷ Macaulay, *Non-Contractual Relations in Business*, *supra* note 52, at 61. See Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) (“The diamond industry has systematically rejected state-created law. In its place, the sophisticated traders who dominate the industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members.”).

⁶⁸ IAN MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* 18 (2001).

most decentralized; law (in terms of formal rules, standards and procedures) plays the most limited role.

Third, business responds to publicly-made law by creating internal corporate organizational policies and procedures which parallel and overlap with public law. Like the external public legal system, organizations adopt increasingly detailed rules, policies, and programs, and create new departments and positions to oversee regulatory compliance. In some cases, these new programs and institutions can facilitate other parties' awareness and activation of the law. In other areas, they can lead to interpretations and applications of law that neutralize the law's normative ambitions. In short, business internalization processes can either expand or weaken the law's reach.

B. *The Impact of Corporate Internal Policies: Expanding and Curtailing Law's Reach*

1. *Expanding Law's Reach*

By internalizing public law norms and principles, business can further public law's reach. In some cases, businesses may instrumentally do so, marketing themselves as good citizens which protect the environment and labor rights.⁶⁹ Businesses may even require their suppliers to conform to these policies, extending their effects. In other cases, the process may be less consciously instrumental.

Corporate internalization policies provide a particular form of legalization. Phillip Selznick and Philippe Nonet went so far as to argue that such legalization transforms business organizations into polities that provide citizenship rights for their constituencies.⁷⁰ Public law, for example, spurs the creation of internal corporate rules and, in doing so, can expand the "rights consciousness" of particular constituencies, such as employees, reinforcing their expectations of social justice.⁷¹ Public law, in parallel, can spur the creation of new corporate compliance personnel

⁶⁹ See ASEEM PRAKASH, GREENING THE FIRM: THE POLITICS OF CORPORATE ENVIRONMENTALISM 147 (2000) (discussing the adoption of environmental policies by private firms); ASEEM PRAKASH & MATHEW POTOSKI, THE VOLUNTARY ENVIRONMENTALISTS: GREEN CLUBS, ISO 14001, AND VOLUNTARY REGULATIONS 2 (2006) (describing voluntary adoption of regulatory systems by businesses and industries).

⁷⁰ PHILIP SELZNICK, PHILIPPE NONET & HOWARD M. VOLLMER, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 229-33 (1969). For a more recent examination of how internal processes can expand law's reach, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 464-65 (2001) (examining "the set of intermediate actors, operating within and across the boundaries of the workplace, that have emerged as important players in the implementation of workplace innovations to address bias. These nongovernmental actors are simultaneously influencing judicial definitions of effective workplace problem solving and translating legal norms into organizational systems and standards.").

⁷¹ Lauren B. Edelman, *Legal Environments and Organization Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1410 (1990).

within corporations. Company employees in these positions attend conferences on the applicable law, write memoranda on the relevant issues which they distribute within firms, and generally increase firm awareness of the legal issues in question. In formulating and overseeing the implementation of company policies, they affect internal business organizational culture, fostering company compliance with existing legal requirements and norms even where state enforcement is weak.⁷²

Business lawyers who defend their clients against advocates' claims may aid advocates' ends in creating legal compliance procedures to avoid legal challenge. Even if the risk of restrictions is minute, in-house lawyers can benefit if their clients come to them for legal analysis and take that analysis into account. In-house counsel has an interest in being respected for its legal knowledge within the firm's hierarchy. When consulted by the firm's business personnel, in-house counsel, together with employees from the firm's human resources division, may (unintentionally) overstate the risks to an enterprise from non-compliance by focusing on a legal reading of the law (as opposed to the law-in-action), its substantive requirements and sanctions, including any draconian risks such as imprisonment of company executives. Outside law firms and other consultants likewise distribute to clients and prospective clients memoranda, manuals, and other private assessments of the law in order to encourage firms to come to them for legal advice. At symposia, they market contractual and other precautions, which can be drafted and implemented to reduce the risk of legal challenge. In doing so, however, they may catalyze change in corporate practices, shaping the law-in-action.

In the field of wrongful discharge law, for example, Edelman, Abraham, and Erlanger find:

Employer's in-house counsel may benefit from increased demands for their services within the firm and, like personnel professionals, may attain power by helping to curb the perceived threat of wrongful discharge lawsuits. . . . The threat of wrongful discharge, then, may [also] help practicing lawyers [of outside firms] in the field of employment law expand the market for their services.⁷³

They conclude that "the personnel profession, with some help from the legal profession, has constructed the law in a way that significantly overstates the threat it poses to employers."⁷⁴ Ironically, in providing legal counsel to their clients on the law's provisions and risks, in-house and

⁷² Frank Dobbin & John R. Sutton, *The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions*, 104 AM. J. SOC. 441, 443 (1998).

⁷³ Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 75 (1992).

⁷⁴ *Id.* at 53.

external business lawyers and internal human resource employees can become unconscious abettors of the aims of otherwise underfunded and disparate rights advocates.

Data privacy regulation provides another example of private law regimes that complement and parallel public ones.⁷⁵ In the United States, private privacy seal programs are funded by business to adopt private privacy codes. This is done in part to ward off public regulation by demonstrating that business self-regulation is sufficient. Yet these private regimes also interact with public law regimes. For example, if a business does not comply with the rules it advertizes, it is subject to challenge by the U.S. Federal Trade Commission for deceptive practices.⁷⁶ Moreover, through the threat of data transfer restrictions and foreign litigation under EU law (the data privacy directive), the European Union helps raise the bar of what a U.S. business is willing to sign. Existing public law, in this case domestic and foreign, stimulates business demand for privacy policies and independent certification of them, including reducing the prospect of new, and even more constraining, public law.

Legal and other professionals serve as carriers and filters of law and can facilitate a convergence in business practice over time. Business policies can become isomorphic in light of professionals' interactions, and business' desires to gain legitimacy through the adoption of what is perceived to be fair governance procedures.⁷⁷ In this way, business internal policies can affect entire organizational fields through parallel adoption of policies by individual firms. For example, internal U.S. business policies and procedures have been constructed parallel to civil rights laws⁷⁸ and health and safety laws.⁷⁹

2. *Curtailing Law's Reach*

The creation of internal business policies more than simply reflects and furthers law's reach. In creating organizational policies and procedures, business has an incentive to interpret public law requirements to suit business interests in ways designed to limit regulation's constraints. Law's textual ambiguities facilitate business's opportunity to do so. In internalizing public law, business translates and transforms it. Corporate

⁷⁵ Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 6 (2000).

⁷⁶ See *id.* at 22–25.

⁷⁷ See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147–48 (1983); John W. Meyer & Brian Rowan, *Institutional Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 348–49 (1977); see also Edelman & Suchman, *When the "Haves" Hold Court*, *supra* note 61, at 979; Sturm, *supra* note 70, at 462–64.

⁷⁸ Edelman, *supra* note 71, at 1401–02.

⁷⁹ SOCIAL REGULATION: STRATEGIES FOR REFORM 95 (Eugene Bardach & Robert A. Kagan eds., 1982).

internal policies and administrative procedures, for example, mimic central legal principles of due process, but do so by displacing the intervention of public legal authorities. Adopting internal rules allows the organization to “symbolize compliance” and borrow the legitimacy accorded to public law, while exercising greater control of its implementation and, in the process, its meaning.⁸⁰

Business can attempt to preempt public law by removing disputes from external controls, such as by including mandatory arbitration provisions in business contracts.⁸¹ Businesses have long created dispute settlement institutions to resolve conflicts between them. *Lex mercatoria*, for example, was enforced by specialized merchant courts at trade fairs in the Middle Ages.⁸² In contemporary international transactions, businesses still seek to avoid the biases and complexities of conflicts of law by avoiding adjudication before public courts. National legal systems recognize and enforce these private arbitration rulings.⁸³

These mechanisms are also increasingly deployed in entirely national settings. The U.S. Federal Arbitration Act, for example, curtails U.S. states’ ability to limit the use and enforceability of arbitration provisions in business contracts with consumers.⁸⁴ The rise of the alternative dispute resolution (“ADR”) movement in the United States and abroad generally facilitates businesses’ ability to resolve disputes outside the public domain.⁸⁵

The rise of in-house counsel can also contribute to the internalization of law by business in ways similar to how public law influences business strategies. Since the 1970s, the number and status of in-house counsel has grown dramatically.⁸⁶ The use of in-house counsel involves lawyers in

⁸⁰ Edelman & Suchman, *When the “Haves” Hold Court*, *supra* note 61, at 961.

⁸¹ *Id.* at 963.

⁸² See BRAITHWAITE & DRAHOS, *supra* note 8, at 46; see generally Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990).

⁸³ See Laure Leservoisier & Clifford Chance, *Enforcing Arbitration Awards and Important Conventions*, in THE ARBITRATION PROCESS: COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 255, 256 (Dennis Campbell & S. Meek eds., 2002) (“One of the main advantages of international arbitration over litigation in national courts is that, due to the existence of a number of international conventions on the recognition and enforcement of foreign arbitral awards, foreign arbitral awards are, in principle, readily enforceable in many countries.”).

⁸⁴ State attempts to protect consumers from mandatory arbitration “have been rendered substantially irrelevant by [a] series of Supreme Court decisions . . .” EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 158 (2006).

⁸⁵ See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMP. LEGAL STUD. 843, 911 (2004) (“Confronted with increasingly daunting litigation costs and perceived great risks, the great majority of major businesses were led to experiment with ADR. In recent years, mediation has become a more and more popular alternative.”).

⁸⁶ See Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1059 (1997) (“Between 1970

strategic planning at an earlier stage of transactions.⁸⁷ In-house counsel manage businesses' internalization of legal regimes as part of programmatic prevention policies.⁸⁸ In the process, in-house counsel can give law more of a business orientation since in-house counsel can blend both legal and business advice more than outside legal counsel, blurring the distinction between doing law and doing business.⁸⁹

By symbolically incorporating public requirements into internal corporate policies, by internalizing administrative control over its routine activities through complaint procedures, and by preempting external intervention through private alternative dispute resolution, business can create its own legal field which helps to legitimize business practices. While Galanter earlier explored the ability of repeat players to exploit the judicial process, internalizing the legislative and judicial processes circumvents the public law system. In a reflection piece twenty-five years after his article speculating "why the haves come out ahead," Galanter found that corporate internalization policies represent a "recoil against law" in response to reduced leeway afforded to business by the public law system.⁹⁰ Internalization policies remove issues from public rule making and adjudication. By usurping the role of external legal processes and supplanting them with internal rules, large organizations can enhance their ability to limit legal change.⁹¹ Under these internal systems, the "haves"

and 1980, there was a forty percent increase in the number of lawyers working in-house; and between 1980 and 1991, there was a thirty-three percent increase."); Steven L. Schwarcz, *To Make or To Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 498 (2008) ("Improvements in reputation and skill of in-house lawyers and the recent growth of in-house legal departments mark a watershed in legal demographics. Although a need remains for outside law firms, especially in litigation, the relative distribution of work has changed. There has been a substantial shift towards more in-house lawyer transactional work in the past decade, with one survey showing approximately 68% of transactions currently lawyered in-house.")

⁸⁷ See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 281 (1985) ("The very existence of a properly established inside counsel pushes back the involvement of lawyers to an earlier phase of a transaction and shifts the mode from reactive to proactive.")

⁸⁸ See *id.* ("Only in the last five years has it become systematic, structured, and formally articulated into milestones with formal documentation.")

⁸⁹ See Robert Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457, 464 (2000) ("Yet the counsel role implies a broader relationship with business actors that affords counsel an opportunity to make suggestions based on business, ethical, and situational concerns."); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 487 (1989) ("Inside counsel can use the information, organizational power, and trust they obtain from being part of the client organization to participate in corporate planning, anticipating legal problems and maintaining legal compliance.")

⁹⁰ Galanter, *Farther Along*, *supra* note 51, at 1116.

⁹¹ See Edelman & Suchman, *When the "Haves" Hold Court*, *supra* note 61, at 944 ("Although 'have not' groups may gain some short-run advantages from the introduction of legal norms into the workplace, we contend that the organizational annexation of law subtly skews the balance between democratic and bureaucratic tendencies in society as a whole, potentially adding to the power and control of dominant elites.")

are arguably even more advantaged.⁹²

IV. DYNAMIC INTERACTION: PUBLIC LAW IN THE SHADOW OF BUSINESS PRACTICE

Rather than being viewed as distinct, public law and business internal policies are interpenetrated, reciprocally and dynamically affecting each other. On the private side, private legal systems do not exist in a vacuum. Even in domains where publicly-made law does not exist and business creates its own private standards, business does so in the shadow of the public law system's potential intervention. First, the public legal system provides default rules that apply where private standards and contracts are incomplete.⁹³ Second, as behavioral economists note, default rules significantly affect behavior, whether because people consciously avoid the transactional costs of negotiating around them, blindly follow a path of least resistance, or are socialized to accept them as normal.⁹⁴ Third, public law can catalyze more transparent and principled decision-making within decentralized, private "new governance" processes that fall outside of traditional conceptions of law.⁹⁵ These new governance processes operate in the shadow of the public law system.

On the public side, public legal systems likewise can be viewed (reciprocally) as operating in the shadow of business practice. First, legislators can respond to private regimes by codifying them, and courts can do so by enforcing them as exemplars of business custom or

⁹² *Id.*

⁹³ See, e.g., Ian Ayres, *Default Rules for Incomplete Contracts*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., 1998); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) ("Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them."); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 822 (1992) ("Much of what is taught as the law of contract can be conceived as publicly provided 'background' rules or principles that fill the inevitable gaps in the private law made by contracting parties."); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489-90 (1989) ("These doctrines, which serve to define the exact scope of contractual obligations, are often referred to as 'background rules' or 'default rules,' although the term 'default rules' more commonly refers only to those rules which the parties are free to vary by appropriate language in their contract."); Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597, 599 (1990) (noting that default rules provide a gap filling function in contracts).

⁹⁴ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 83-87 (2008) (discussing how most people will choose whatever option requires the least amount of effort); see also Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1586 (1998) ("Parties are likely to favor default terms . . . because [such] terms are often correlated with inaction . . .").

⁹⁵ See Joanne Scott & Susan Sturm, *Courts as Catalysts: Rethinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 566 (2007) ("Courts' gate-keeping function places the judiciary in a position to shape the practice of legitimacy and accountability within new governance institutions."); Sturm, *supra* note 70, at 562 (noting how courts can create general norms and incentives which encourage employers to develop processes which comply with such norms).

responsible business practice. For example, after the New York Stock Exchange required corporations with listed securities to adopt Audit Board Committees, non-listed companies also adopted them out of concern that courts might now consider the practice to be a standard for responsible conduct when adjudicating lawsuits against corporate directors.⁹⁶ Second, when business responds to new public regulation through adopting internal policies and practices, business may reciprocally shape the understanding of existing law within public institutions, including courts.⁹⁷ Thus, while legal interpretation and enforcement affect economic behavior, organizational behavior, in turn, affects public law. The two, public and private legal ordering, dynamically interact.

To give an example, national courts have long enforced contracts based on customary business practices. As John Braithwaite and Peter Drahos write, “the common law absorbed and adapted the Law Merchant,”⁹⁸ such as private business regimes pertaining to bills of exchange, promissory notes, and letters of credit. “[S]pecialist commercial courts . . . in England bound themselves to the principle of recognizing the customary practices of merchants, which in turn helped to produce and reinforce the Law Merchant.”⁹⁹ In civil law countries, this customary private law was codified in the commercial codes of Western Europe.¹⁰⁰ In the United States, codification took place through the model Uniform Commercial Code which was subsequently adopted in all U.S. states but one.¹⁰¹ These codes and institutional practices then spread to other parts of the world through colonialization and a general modeling of Western commercial law.¹⁰² However, as discussed in Part V below, when these national public courts began to reach conflicting judgments in their applications of the new codes, business responded with new transnational

⁹⁶ BRAITHWAITE & DRAHOS, *supra* note 8, at 171.

⁹⁷ See *infra* notes 98–103. From the perspective of social theory, one can distinguish the concept of “recursivity” of public and private legal ordering used here, and the concepts of “reflexivity” and “autopoiesis” used in the work of Niklas Luhmann and Gunther Teubner. See NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* 122 (1982) (viewing the legal system as consisting of all social communication that contains some reference to law); see also GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 36–37 (1993) (viewing legal communication as circular and reflexive so that it is relatively autonomous from the social order). The socio-legal account used here does not view law as normatively closed to politics and social forces, but rather as interactive (and recursive), even while law retains some relative autonomy. For an assessment of autopoiesis theory in this vein, see Roger Cotterrell, *The Representation of Law’s Autonomy in Autopoiesis Theory*, in *LAW’S NEW BOUNDARIES: THE CONSEQUENCES OF LEGAL AUTOPOIESIS* 80 (Jiri Priban & David Nelken eds., 2001).

⁹⁸ BRAITHWAITE & DRAHOS, *supra* note 8, at 49.

⁹⁹ *Id.* at 65.

¹⁰⁰ Moreover, in France, the lowest-level court for commercial matters, the Tribunal de Commerce, is composed of lay members from the business community. Many German *Länder* have created special chambers for commercial matters that include lay judges. Jurgen Basedow, *The State’s Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 707–08 (2008).

¹⁰¹ BRAITHWAITE & DRAHOS, *supra* note 8, at 50.

¹⁰² *Id.* at 49–50.

private harmonization initiatives.¹⁰³ In other words, public and private ordering processes in commercial law have dynamically responded to each other over time.

Particularly important for our analysis, internal business policies and procedures can shape how public law is perceived, transforming its meaning. They can do so both in terms of social practice regarding the “law,” and in terms of formal legal interpretation by courts and administrative bodies. To start with social processes, business practices under internal organizational policies and procedures can affect what individuals perceive to be the law, shaping their “legal consciousness.” As seen in Part III, corporate compliance officers share their policies and procedures in symposia, workshops, electronic list-serves, trade journals, and other fora, leading to similar institutionalized practices in a field. Edelman, Fuller, and Mara-Drita show how managerial discretion in applying civil rights laws has transformed the way that the public views the scope and application of civil rights laws.¹⁰⁴ In their study of business “diversity” policies, they find that, “as legal ideas move into managerial and organizational arenas, law tends to become ‘managerialized,’ or progressively infused with managerial values.”¹⁰⁵ They find that managerial discretion in implementing civil rights laws within organizations reframe diversity issues to include not only gender and race, but also issues of personality and cultural lifestyle traits, transforming the legal ideals underlying civil rights law. These internal business laws and practices can colonize public law by “redefining what is seen as ‘normal,’ ‘reasonable,’ ‘rational,’ and ‘compliant’” in terms of internal business grievance procedures created in response to public law.¹⁰⁶

Turning to legal institutions, business internal policies and practices can affect courts’ interpretation and application of public law. In the civil rights field, internal business grievance procedures are not required by the laws themselves, yet they can shape courts’ understandings of these laws. Edelman, Uggen, and Erlanger find, in their study of internal business practices applying the civil rights laws, that professionals “promote a particular compliance strategy, organizations adopt this strategy to reduce costs and symbolize compliance, and courts adjust judicial constructions of fairness to include these emerging organizational practices.”¹⁰⁷ The study finds that “courts have become more likely to defer to organizations’ grievance procedures and to consider them relevant to determinations of

¹⁰³ See *infra* note 112 and accompanying text.

¹⁰⁴ Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589, 1591, 1601 (2001).

¹⁰⁵ *Id.* at 1599.

¹⁰⁶ Edelman & Suchman, *When the “Haves” Hold Court*, *supra* note 61, at 963.

¹⁰⁷ Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 408, 445–47 (1999).

liability.”¹⁰⁸ As Edelman and Suchman state, courts “often defer to the results of internal hearings” and “dismiss claims of any plaintiffs who have failed to exhaust their in-house remedies.”¹⁰⁹ Judges in overstretched and underfunded public law systems have incentives to do so.¹¹⁰ In sum, public law is often defined in the shadow of business practice, acquiring meaning and having effects through internal business policies and procedures.

V. BUSINESS AND LAW IN GLOBAL AND COMPARATIVE CONTEXT

Legal rules, norms, and institutions have diffused globally through processes of colonization, economic exchange, and the growth of international and transnational institutions. This transnational diffusion of law interacts dynamically with national and local legal cultures so that we cannot fully understand the relation of law and business within countries apart from transnational processes. Yet there continues to be significant variation in outcomes at the national level despite transnational processes of convergence.¹¹¹ This section integrates an evaluation of transnational lawmaking and its reception within countries into our analysis of the relation of business and law.

A. *The Making of Transnational Law*

Businesses play a critical role in international and transnational law, which has spread, directly or indirectly, to most regulatory areas.¹¹² Businesses do so through using centralized and decentralized mechanisms. They can enlist powerful states to create international public law that advances their interests. They can independently create transnational private legal orders. And they can export their internal standards globally through decentralized processes of diffusion. In their study of thirteen areas of global business regulation, Braithwaite and Drahos found that business actors play leading roles. They found, in particular, that “state regulation follows industry self-regulatory practice more than the reverse . . .”¹¹³ In some cases, international standards simply formalize and legitimize informal practices of large dominant businesses.¹¹⁴ Where

¹⁰⁸ *Id.* at 409.

¹⁰⁹ Edelman & Suchman, *When the “Haves” Hold Court*, *supra* note 61, at 965.

¹¹⁰ See NEIL KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 51–52 (2001) (describing courts’ reluctance to take complex cases because of competence and resource limitations).

¹¹¹ See, e.g., David Nelken, *Culture, Legal*, in 1 *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 369, 369–72 (David S. Clark ed., 2007).

¹¹² International law traditionally refers to the law between countries. Transnational law, in contrast, refers to the law applying across borders. Private legal orders are thus typically referred to as forms of transnational law.

¹¹³ BRAITHWAITE & DRAHOS, *supra* note 8, at 481.

¹¹⁴ *Id.* at 492.

harmonization occurs, it is easiest to base it on dominant business practices in a field.

Private transnational legal orders and national public law systems interact. Private parties have long engaged in private transnational rule-making to facilitate cross-border transactions. These transnational private norms are often codified by states into national law. When conflict-of-law issues arise between different national variants, business has responded by trying to re-harmonize the law at the international level through new private ordering initiatives, giving rise to a “new Law Merchant.”¹¹⁵

Among international business organizations, the International Chamber of Commerce (“ICC”) stands apart as the premier coordinating body on behalf of business interests to create transnational privately-made law.¹¹⁶ The field of international trade finance exemplifies the ICC’s lawmaking role. The ICC’s goal, as Janet Levit writes, is to codify “international banking practices, as well as to facilitate and standardize developing practices” for letters of credit used in international trade.¹¹⁷ The ICC has written a set of rules known as the Uniform Customs and Practice for Documentary Credit (“UCP”) to govern transnational letters of credit. The ICC clarifies the interpretation of these rules through issuing hundreds of “advisory ‘opinions.’”¹¹⁸ In this way, the ICC attempts to resolve ambiguities regarding the application of the UCP in different contexts. Most banks today will not issue letters-of-credit unless they are subject to UCP rules.¹¹⁹ When exporters and importers identify the UCP as their choice of law, national courts enforce them.¹²⁰ Levit finds that national courts do so “even in the face of a domestic statute designed for related issues,” demonstrating the UCP’s broader normative impact in national judicial practice.¹²¹ Similarly, the ICC periodically revises “Incoterms” which define and interpret sales terms used in the shipment of goods,¹²² and which guide national courts hearing contractual disputes.¹²³

¹¹⁵ TRAKMAN, *supra* note 62, at 3.

¹¹⁶ BRAITHWAITE & DRAHOS, *supra* note 8, at 488.

¹¹⁷ Janet Koven Levit, *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 EMORY L.J. 1147, 1171 (2008) (internal quotation marks omitted).

¹¹⁸ *Id.* at 1174–75.

¹¹⁹ *Id.* at 1177.

¹²⁰ Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 141 (2005).

¹²¹ *Id.* at 141.

¹²² See Incoterms: Understanding Incoterms, <http://www.iccwbo.org/incoterms/id3042/index.html> (last visited Sept. 4, 2009).

¹²³ See, e.g., Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT’L L. 157, 175 & n.47 (2004) (“In a variety of cases, courts have found that when commercial parties have used terms that are defined in INCOTERMS, have not otherwise defined the meaning of their terms in the contract, and are involved in an aspect of international trade in which INCOTERMS are traditionally used, INCOTERMS will be incorporated

International private lawmaking by business has particularly evolved in the area of technical standard setting.¹²⁴ Within the European Union, the *Comité Européen de Normalisation* (“CEN”) and *Comité Européen de Normalisation Electrotechnique* (“CENELEC”) are the two main bodies for the creation of “voluntary” European standards in which the private sector plays a central role. These standards are not internally binding on the European member states, but they have become *de facto* harmonized requirements for selling products within the European Union because of their importance in the marketplace.¹²⁵ At the international level, business works through the International Organization for Standardization (“ISO”), a Geneva-based non-governmental organization which is the world’s largest producer of international standards, and in which the private sector again plays a central role.¹²⁶ European business interests are sometimes favored within ISO because of their prior organization through CEN and CENELEC.¹²⁷ Market forces again press businesses to apply these

into the contract.”); Ch. Pamboukis, *The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods*, 25 J.L. & COM. 107, 127–28 (2005) (citing a ruling of a U.S. appeals court that “[e]ven if the usage of INCOTERMS is not global, the fact that they are well known in international trade means that they are incorporated through Art. 9(2)” of the Convention on Contracts for the International Sale of Goods); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT’L L. & BUS. 681, 689 (1996–97) (“In the field of international commerce, private legislatures have enjoyed substantial influence. . . . They also have developed detailed form contracts, such as the Uniform Customs and Practice for Documentary Credits and the Incoterms, that private parties widely adopt by reference and that domestic courts normally embrace as permissible expressions of contractual intent.”).

¹²⁴ See HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE: PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS 2* (2005) (noting trade agreements and technical standards required for the integration of markets).

¹²⁵ See Giandomenico Majone, *International Regulatory Cooperation: A Neo-Institutionalist Approach*, in *Regulatory Cooperation and Managed Mutual Recognition: Developing a Strategic Model*, in TRANSATLANTIC REGULATORY COOPERATION 596 (George Bermann, Matthias Herdegen & Peter L. Lindseth eds., 2000) (“[T]he voluntary standards produced by the European organizations become, *de facto*, binding.”). As stated in the Commission’s 1985 Bulletin:

[B]ut at the same time national authorities are obliged to recognize that products manufactured in conformity with harmonized standards (or, provisionally, with national standards) are presumed to conform to the “essential requirements” established by the directive. (This signifies that the producer has the choice of not manufacturing in conformity to the standards, but in this event, that he has an obligation to prove that his products conform to the essential requirements of the directive.)

COMM’N OF THE EUROPEAN COMMUNITIES, *TECHNICAL HARMONIZATION AND STANDARDS: A NEW APPROACH 7* (1985), available at http://aei.pitt.edu/3661/01/000307_1.pdf.

¹²⁶ ISO’s website provides the following statement:

ISO is a non-governmental organization that forms a bridge between the public and private sectors. On the one hand, many of its member institutes are part of the governmental structure of their countries, or are mandated by their government. On the other hand, other members have their roots uniquely in the private sector, having been set up by national partnerships of industry associations.

About ISO, <http://www.iso.org/iso/about.htm> (last visited Mar. 29, 2009).

¹²⁷ See Gregory Shaffer, *Reconciling Trade and Regulator Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor*

voluntary ISO standards. National courts can impose tort liability if they fail to do so and someone is harmed.¹²⁸

Business also can enroll state representatives to advance business goals in the creation of international law. They can do so in the negotiation of private international law treaties, like the United Nations Convention on Contracts for the International Sale of Goods and the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. They can also do so in the elaboration of “soft law” norms, such as the UNIDROIT Principles of International Commercial Contracts and the UNCITRAL Legislative Guide on Insolvency Law. A common form of regulatory export occurs where national industry associations shape the law in a dominant state, and this law becomes the model for other states, including through the enactment of international treaties and international soft law guidelines. While such influence varies by industry and country, Braithwaite and Drahos found that U.S. corporations exert more power in the world system than corporations of other states because they can enroll the support of the world’s most powerful state.¹²⁹

Private business also enlists states to advance its interests through public international law litigation. Corporations frequently lie behind the claims that state representatives bring in international trade litigation. They lobby state representatives, provide them with requisite background factual information, and hire outside lawyers to help write the legal briefs. As a result, most litigation before the dispute settlement system of the World Trade Organization (“WTO”) involves the formation of partnerships between state representatives, private business interests, and the lawyers that businesses hire.¹³⁰

Finally, business can bypass states and directly lobby international organizations. The ICC again plays a central role, as it lobbies the full spectrum of UN organizations. It looks “for key loci of decision-making in the globe and builds a poultice of influence around them” in order to influence international publicly-made law.¹³¹ The ICC has been central to international commercial law,¹³² tax law,¹³³ telecommunications and e-commerce law,¹³⁴ and the drafting of environmental treaties.¹³⁵

Agreements, 9 COLUM. J. EUR. L. 29, 36 (2002) (stating that this prior association gives European organizations more experience in negotiating and implementing agreements).

¹²⁸ See Basedow, *supra* note 100, at 710.

¹²⁹ BRAITHWAITE & DRAHOS, *supra* note 8, at 482.

¹³⁰ GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003); see also Gregory Shaffer, Michelle Rattton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies behind Brazil’s Success*, 41 CORNELL INT’L L.J. 383, 390, 392 (2008) (finding examples of such partnerships in Brazil).

¹³¹ BRAITHWAITE & DRAHOS, *supra* note 8, at 488.

¹³² *Id.* at 70.

¹³³ *Id.* at 120 (noting in particular the creation of model tax treaties to avoid double taxation of business).

¹³⁴ *Id.* at 344.

Public international law, of course, can also be used against businesses. Non-business actors can deploy public international law to challenge business conduct before national courts, exemplifying again how international and national institutions interact. Human rights activists have repeatedly brought suits under international law before U.S. courts to challenge business conduct in third countries, such as mining in Indonesia, oil exploration in Burma and Nigeria, and aiding and abetting the apartheid regime in South Africa.¹³⁶ The resulting national legal decisions, in turn, become evidence of customary international law.¹³⁷ These legal challenges, in turn, spur business efforts to curtail them through new transnational private legal ordering mechanisms¹³⁸ and lobbying for new national legislation.¹³⁹ But while there is a great deal of legal scholarship focusing on international human rights claims against corporations before U.S. courts, transnational business law is in fact much more commonly deployed before national courts, both in the United States and abroad.

In sum, public international law, transnational private legal ordering, national public law, and business practice dynamically and reciprocally interact over time. They increasingly do so as international and transnational public and private legal ordering processes proliferate, which in turn affect legal systems and the relation of business and law at the national level.

B. *The Reception of Transnational Law*

Transnational lawmaking does not uniformly affect national legal regimes. Legal change instead varies as a function of the configuration of domestic interests in a regulatory area, domestic institutional structures, the

¹³⁵ *Id.* at 273.

¹³⁶ JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS 172–73 (2008); BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 312–13 (2008).

¹³⁷ See Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez-Machain*, 74 U. CIN. L. REV. 105, 123 (2005) (“National courts and the international courts and tribunals referred to by McDougal, Lasswell, and Chen, as well as mechanisms like the ATCA, provide avenues through which individuals might have direct participation in the CIL formation process.”).

¹³⁸ See, e.g., Bennett Freeman, Maria B. Pica & Christopher N. Camponovo, *A New Approach to Corporate Responsibility: The Voluntary Principles on Security and Human Rights*, 24 HASTINGS INT’L & COMP. L. REV. 423, 425, 430 (2001) (describing agreements among oil and mining companies, U.K. and U.S. governments, and human rights organizations, under which companies will voluntarily comply with human rights standards); see also Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 314 (2007) (“Likewise, while international labor standards are difficult to establish at the governmental level, several private companies in the apparel industry, responding to calls for global responsibility and the setting of norms, have adopted codes of conduct and participated in the United Nations’ Global Compact.”).

¹³⁹ See Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC’Y REV. 635, 651 (2004) (“Relying on academics, trade and commercial associations, and various selected representatives, corporations have pursued a wide-range lobbying campaign against the very use of ATCA.”).

role of elites, traditions of business-government relations, and differences in legal and business culture. Legal culture refers to the attitudes and behavior that people have and exhibit toward law and legal institutions within a domestic system—or, as Lawrence Friedman writes, the patterns of “when, why and where people look for help to law or to other institutions, or just decide to ‘lump it.’”¹⁴⁰ Business culture refers to the patterns of norms and behavior of people and institutions in the business world, and in particular (for our purposes) their relation to law and state institutions.¹⁴¹ Although it would be myopic to reduce all behavior to expressions of interest, one must also be careful not to reify or essentialize culture, since both interests and cultural norms are channeled by institutional structures which reflect political choices.¹⁴² A full picture of how transnational lawmaking is mediated in national legal regimes must account for the interaction of these different factors.

Domestic systems receive international law differentially, in part as a function of domestic patterns of business-government relations. For example, Robert Kagan’s work depicts how business-government relations in the United States are characterized by “adversarial legalism,” which he defines as “policymaking, policy implementation, and dispute resolution by means of lawyer-dominated litigation.”¹⁴³ Kagan finds that both cultural and institutional factors give rise to adversarial legalism in the United States. He maintains that (culturally) U.S. attitudes that governmental power should be constrained and that persons (including corporations) should invoke the law to protect their rights and achieve their goals further an adversarial legal culture.¹⁴⁴ He likewise contends that (institutionally) “adversarial legalism arises from the relative *absence* of [U.S.] institutions that effectively channel contending parties and groups into less expensive and more efficient ways of resolving disputes, ensuring accountability, regulating business, and compensating victims of injury or economic misfortune.”¹⁴⁵ In such a context, business is more vigilant regarding the domestic application of international law, unless international law reflects U.S. law or business practice.

Within Europe, there continues to be considerable variation among

¹⁴⁰ Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 *RATIO JURIS* 117 (1994); Nelken, *supra* note 111, at 370.

¹⁴¹ See Paul DiMaggio, *Culture and Economy*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 27–28 (Neil J. Smelser & Richard Swedberg eds., 1994) (explaining that within organizational studies, “culture” refers to the “shared cognitions, values, norms, and expressive symbols” associated with a discrete group).

¹⁴² The literature on pluralist, centralized, and corporatist political systems provides institutional-oriented explanations for national approaches to the regulation of business. See WILSON, *supra* note 28.

¹⁴³ ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001).

¹⁴⁴ *Id.* at 15.

¹⁴⁵ *Id.* at 34.

legal systems, despite the harmonizing aims of the European Union.¹⁴⁶ In a famous article from the 1970s, Dietrich Rueschemeyer maintained that attitudes toward law in Germany are affected by more authoritarian traditions of rule “by an enlightened and supposedly neutral bureaucracy.”¹⁴⁷ He contended that lawyers within the German bar retained a greater “reserve toward the world of business.”¹⁴⁸ Regarding France, Kenneth Dyson found that “state-industry relations remain notably intertwined,” reflected in “the prevalence of members of the *élite grand corps* in the top management positions of the public and private sectors,” giving rise to “a web of patronage spanning the public-private sector divide.”¹⁴⁹ Laurent Cohen-Tanugi likewise contended that French society is “sensitive to the power relations underlying a given legal framework,”¹⁵⁰ which leads to a “quasi-exclusive attention to power, whether political or economic, rather than to law, which is seen as either mere window-dressing or simply the result of the power relations.”¹⁵¹ He argued that the French thus manifest “a fair amount of tolerance for failure to respect the rule of law.”¹⁵²

Some scholars contend that the U.S. model of adversarial legalism is being exported globally, and in particular to Europe.¹⁵³ The place of law is certainly changing in European countries in reflection of global competition, economic restructuring, the rise of the European Union, and citizen demands.¹⁵⁴ Yet, these changes, including a relative rise in the role

¹⁴⁶ See, e.g., Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MODERN L. REV. 11, 11–32 (1998) (discussing the effect of European Union policy directives in European social, legal, and philosophical contexts).

¹⁴⁷ Dietrich Rueschemeyer, *Lawyers and Their Society*, reprinted in EUROPEAN LEGAL CULTURES 83 (Volkmar Gessner, Armin Hoeland & Csaba Varga eds., 1996).

¹⁴⁸ *Id.* at 278.

¹⁴⁹ Kenneth Dyson, *Cultural Issues and the Single European Market: Barriers to Trade and Shifting Attitudes*, 64 POL. Q. 84, 93 (1993), reprinted in EUROPEAN LEGAL CULTURES 387, 395 (Volkmar Gessner, Armin Hoeland & Csaba Varga eds., 1996).

¹⁵⁰ Laurent Cohen-Tanugi, *The Law without the State*, reprinted in EUROPEAN LEGAL CULTURES 269, 270 (Volkmar Gessner, Armin Hoeland & Csaba Varga eds., 1996).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Cf. generally Robert A. Kagan, *Globalization and Legal Change: The “Americanization” of European Law?*, 1 REG. & GOVERNANCE 99 (2007) (discussing the ways in which American legal culture has influenced European nations, while also explaining important differences between them); R. Daniel Keleman, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101 (2006) (providing a conceptual framework for understanding the integration and consequences of “adversarial legalism” in the European Union); David Levi-Faur, *The Political Economy of Legal Globalization: Juridification, Adversarial Legalism, and Responsive Regulation*, 59 INT’L ORG. 451 (2005) (offering a critical analysis of theses exploring the globalization of the American legal culture and providing a model for interdisciplinary study of global legal and regulatory change).

¹⁵⁴ For excellent studies of developments in consumer law in Europe, see Fabrizio Cafaggi & Hans W-Michlitz, *Collective Enforcement of Consumer Law: A Framework for Comparative Assessment*, 16 EUR. REV. OF PRIVATE L. 391, 421 (2008) (“Clearly, the differences [between the U.S. and Europe] in the role of consumer protection associated with market structures, firm sizes, the role of the administrative state, and that of private organizations remain significant. However, the degree of

of courts and legal processes, take place in the context of institutional path dependencies and different legacies of government-business relations.¹⁵⁵

Turning to Asian nations, it is often stated that people are more reluctant to use formal legal processes than in Western nations, especially the United States, and thus there is less adversarial legalism. Japan, for example, has much lower litigation rates compared to the United States. This difference has sparked debate among those stressing Japanese cultural and institutional factors which affect the formal invocation of law.¹⁵⁶ More recently, the focus on cultural explanations, such as the importance of “social harmony” and “social consensus” in Asia, has sparked charges of Orientalism.¹⁵⁷ Scholars today often stress institutional factors in Asia, and how political choices determine the availability of institutions for dispute settlement, which can change in response to new political demands.¹⁵⁸ For example, Thomas Ginsburg and Glenn Hoetker show how litigation rates have risen in Japan in response to structural reforms and institutional changes, including relaxed controls over the licensing of lawyers.¹⁵⁹

Scholars also stress variation in Asian legal systems, including in light

consumer protection in European countries has clearly grown with European intervention.”); Fabrizio Cafaggi & Hans W-Michlitz, *Administrative and Judicial Enforcement in Consumer Protection: The Way Forward* 3–4 (EUI Working Papers LAW No. 2008/29, Nov. 1, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1317342 (“Changes are taking place [in both the U.S. and Europe]. In Europe, the more recent trend shows an increasing effort to create public regulators in charge of coordinating trans-border monitoring and enforcement issues with a volume of MS [member state] legislation introducing judicial collective enforcement Another important development in Europe is related to consumer protection for infringements of competition law. Here there is a strong push towards judicial private enforcement driven by European institutions.”).

¹⁵⁵ See Kagan, *supra* note 153, at 104 (“The American business community . . . historically has been less deferential to government than its counterparts in England and Western Europe and far more inclined to battle government regulation in the courts.”); see also Kelemen, *supra* note 153, at 120–22 (discussing the divergence in specific business-government relations between American and European legal cultures, specifically the securities industry); Levi-Faur, *supra* note 153, at 453 (critiquing Kelemen and Sebitt, but agreeing that the “adversarial legalism is spreading”).

¹⁵⁶ See Eric A. Feldman, *Law, Culture and Conflict: Dispute Resolution in Postwar Japan*, in *LAW IN JAPAN: A TURNING POINT* 50–72 (Daniel H. Foote ed., 2007) (assessing different approaches to the study of dispute resolution in Japan).

¹⁵⁷ Veronica L. Taylor & Michael Pryles, *The Cultures of Dispute Resolution in Asia*, in *DISPUTE RESOLUTION IN ASIA* 1–26 (Michael Pryles ed., 2d ed. 2003) (focusing on Asia generally).

¹⁵⁸ For assessments of dispute settlement within Japan, see J. MARK RAMSEYER, *RELUCTANT LITIGANT REVISITED: RATIONALITY AND DISPUTES IN JAPAN* (1988); FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987); John Owen Haley, *The Myth of the Reluctant Litigant*, 4 *J. JAPANESE STUD.* 359, 365–66 (1978); Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41, 50–52 (Arthur Taylor von Mehren ed., 1963). For assessments of dispute settlement within China, see generally MELISSA MACAULEY, *SOCIAL POWER AND LEGAL CULTURE: LITIGATION MASTERS IN LATE IMPERIAL CHINA* (1998); Randall Peerenboom & Xin He, *Dispute Resolution in China* (La Trobe Univ. Sch. L. Legal Studies Working Paper Series No. 2008/9, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265116. Finally, for assessments within Korea, see generally JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD: KOREA AND JAPAN (Dai-Kwon Choi & Kahei Rokumoto eds., 2007); Jeong-Oh Kim, *The Changing Landscape of Civil Litigation*, in *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* 321, 322–23 (Dae-Kyu Yoon ed., 2000).

¹⁵⁹ See generally Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 *J. LEG. STUD.* 31 (2006).

of contemporary pressures leading to changes in the role of law and courts. Rapid economic development, followed by the bursting of the Japanese economic bubble and the 1997 Asian financial crisis, has significantly affected the role of law for business. China has moved dynamically toward a market economy, and has developed “new structures and processes for resolving disputes,” and, in particular, commercial ones.¹⁶⁰ In India, where courts are plagued by a large backlog of cases, frequent adjournments and long delays, companies have increasingly sought to resolve legal disputes through alternative dispute resolution processes, including arbitration. Yet these processes also have given rise to delay, backlog, and frustration, spurring new reform efforts.¹⁶¹ In many less developed Asian countries, courts and formal law have not held as prominent a position, in part because these countries have other political and economic priorities, and in part because of the impact of corruption and authoritarian rule.¹⁶² Yet these systems also change in light of transnational pressures mediated through domestic institutional patterns of governance.

The diffusion of transnational corporate bankruptcy law exemplifies both how transnational law matters within domestic legal systems and how it is differentially received. Terence Halliday and Bruce Carruthers have done path-breaking field work at the international and national levels in this area.¹⁶³ From this work, they have developed the following theory:

[G]lobalization of law can be expressed through a complex set of three cycles: (1) at the national level through recursive cycles of *lawmaking* and law implementation, (2) at the

¹⁶⁰ See, e.g., PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* 26 (2001); see also Peerenboom & He, *supra* note 158, at 28–30 (explaining emerging trends and patterns of dispute resolution in China).

¹⁶¹ See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2219–32 (2007) (discussing problems of adjudication in India and analyzing attempts at reform).

¹⁶² See Randall Peerenboom, *Varieties of Rule of Law*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S* 1, 26 (Randall Peerenboom ed., 2004) (identifying problems common to Asian countries’ judicial systems, including impaired access to justice, inefficient and expensive courts, corruption and incompetence); see also Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 LAW & SOC. INQUIRY 521, 544 (2006) (noting “historic irrelevance of law and the courts as institutions of market regulation, and hence the ineptness of current courts and their vulnerability to corruption”); Keith E. Henderson, *Global Lessons and Best Practices: Corruption and Judicial Independence—A Framework for an Annual State of the Judiciary Report*, in *INDEPENDENCE, ACCOUNTABILITY AND THE JUDICIARY* 439, 451 (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2006) (finding judicial corruption in eighteen of twenty-three countries surveyed).

¹⁶³ See TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, *BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS* (2009); Bruce G. Carruthers & Terence C. Halliday, *The Recursivity of Law: Global Norm-Making and National Law-Making in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1137–38 (2007); Carruthers & Halliday, *Negotiating Globalization*, *supra* note 162, at 523.

global level through iterative cycles of *norm* making, and (3) at an intersection of the two where national experiences influence global norm making and global norms constrain national lawmaking, in an asymmetric but mutual fashion.¹⁶⁴

They show how bankruptcy law prescribed at the international level is resisted at the local level, in particular by corporate debtors, resulting in failed reforms. They find that strategies at the international level change in response to national implementation challenges. In the bankruptcy law context, the locus of international reform efforts has shifted among international institutions, from the International Monetary Fund (“IMF”), the World Bank, and the Organization for Economic Cooperation and Development, to the United Nations Commission on International Trade Law (“UNCITRAL”). Developing countries consider UNCITRAL to be more “legitimate” because it is part of the United Nations system and they are better represented within it. For this reason, Halliday and Carruthers find that UNCITRAL is potentially more effective. These institutions bring together not only representatives from states and international institutions, but also interested professionals, such as bankruptcy lawyers and accountants, diffusing the norms of a transnational epistemic community of practitioners.¹⁶⁵

Halliday and Carruthers examine the different types of mechanisms used to diffuse international bankruptcy norms within Asian states. Coercive measures (such as IMF loan conditionality) have been more effective in Indonesia than in Korea and China. International institutions also had greater leverage over Korea than China during the Asian financial crisis, but Korea was more likely to require persuasion to adopt legal change than was Indonesia. In contrast, change was most likely to occur in China through Chinese modeling of reforms based on others’ practices and experiences. In each case, national legal change occurred in light of transnational developments. Yet the impacts varied in light of the transnational mechanisms used, which in turn reflected the country’s position of relative power in relation to international institutions and other states.¹⁶⁶

Halliday and Carruthers also show how the reception of international harmonization efforts is affected by different interests and institutional legacies at the national level. They find that the reception of transnational bankruptcy law reform is affected by the fact that different actors (and, in

¹⁶⁴ Carruthers & Halliday, *The Recursivity of Law*, *supra* note 163, at 1138.

¹⁶⁵ For a discussion of the relationship between local law and global law in the context of the Asian Financial Crisis, see generally Carruthers & Halliday, *Negotiating Globalization*, *supra* note 162.

¹⁶⁶ For a description of reform efforts in Indonesia, Korea, and China, see Carruthers & Halliday, *The Recursivity of Law*, *supra* note 163, at 1156, 1162–67; Carruthers & Halliday, *Negotiating Globalization*, *supra* note 162, at 566.

particular, different business interests) participate in struggles over national implementation than in international lawmaking.¹⁶⁷ These domestic actors can block the effectiveness of bankruptcy reform efforts, including by taking advantage of the indeterminacy of international law and internal contradictions within it that reflect compromises made during its negotiation. In the case of Indonesia, even though Indonesia was in a weak position in relation to the IMF, the bankruptcy reform efforts that Indonesia enacted were often thwarted in practice because of the resistance of powerful Indonesian business interests.¹⁶⁸ Change in bankruptcy law in all three countries occurred dynamically in response to transnational processes, but the actual law-in-action continues to diverge in reflection of different articulations of business interests, national institutions, and legal traditions, as well as the relative susceptibility of the state to transnational pressures.

In an era of economic and cultural globalization, even when law is harmonized at the international level, the impact varies significantly. Transnational lawmaking acts as an “irritant” within domestic systems.¹⁶⁹ It provides new tools of leverage for domestic actors who desire reform, potentially unsettling traditional political, business, and legal practices. Yet different national institutional structures and cultural norms mediate international law’s reception, producing variations in each country. Although business can exercise considerable influence in international and transnational lawmaking, which can, in turn, feed back into national law, the results continue to vary at the national level in light of national legal and business cultures, institutional structures and configurations of domestic interests. National law is not static, and it responds to transnational lawmaking initiatives, but it continues to diverge in light of the interaction of transnational legal orders with disparate domestic legal systems.

VI. CONCLUSION

Business and law have a complex relationship. They operate, in part, autonomously from each other, and, in part, in response to one another. To understand the relation of business and law, one must assess business influence on the formation and application of publicly-made law through legislatures, administrative bodies and courts. One must also examine

¹⁶⁷ See Carruthers & Halliday, *Negotiating Globalization*, *supra* note 162, at 571–72 (stating that different actors take part in the enactment and implementation stages of reform).

¹⁶⁸ See Carruthers & Halliday, *The Recursivity of Law*, *supra* note 163, at 1157 (noting resistance by allies of the private sector in an effort to protect domestic corporations and creditors).

¹⁶⁹ For example, Gunther Teubner writes, “[l]egal irritants cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change.” Teubner, *supra* note 146, at 12.

business's creation and application of private legal systems, whether to preempt public law, exit from public law, or internalize and, in the process, translate and transform public law. One then needs to assess the dynamic and reciprocal interaction of these public and private legal systems in different national and transnational contexts. Although public and private lawmaking for most regulatory fields has spread to the international level, its domestic implementation varies considerably in light of ongoing differences in the relative power of business, government and law at the domestic level, as well as differences in local institutional structures and business and legal cultures.

Overall, the relationship of business and law is best viewed in terms of three sets of institutional interactions: the interaction among public institutions (legislative, administrative, and judicial), in each of which business plays a critical role; the interaction of national and transnational legal processes, with transnational processes having become more prominent in an economically and culturally interconnected age; and the interaction among these public lawmaking processes and parallel private rulemaking, administrative and dispute settlement institutions and mechanisms that business creates. It is these dynamic, reciprocal interactions that constitute the legal field in which business operates.