

## DEVELOPMENTS

### ***Book Review - Barry C. Lynn, End of the Line: The Rise and Coming Fall of The Global Corporation (2005)***

*By Fenner Kennedy-Stewart \**

[Barry C. Lynn, *End of the Line: The Rise and Coming Fall of The Global Corporation* (NEW YORK: DOUBLEDAY, 2005, ISBN: 0-385-51024-1). CAN\$ 21.00]

“Our corporations have built the most efficient system  
of production the world has even seen,  
perfectly calibrated to a world in which  
nothing bad ever happens”

- Barry Lynn, *End of the Line*

#### **A. Introduction**

Barry Lynn's *End of the Line*, published in 2005, stresses the dangers, which he associates with the emergence of the global production network as the preferred model for organizing manufacturing in the twenty-first century. Over eleven chapters, if one includes the introduction and conclusion, Lynn weaves together a collection of stories, which he gathered throughout his tenure as a business journalist, to provide an enlightened explanation of how and why corporate managers have taken advantage of technological innovations in logistics and transportation in order to devise, then execute, numerous strategies for outsourcing production. These strategies have led to the *ad hoc* construction of vast interconnected and overlapping transnational production systems, which have irrevocably modified how corporations are ordered. From one vantage point, this evolution can inspire a degree of optimism, for such global systems are evolving in spaces where companies and countries increasingly share their technology, their capital and their labor in order to receive the fruits of their cooperation. But as will

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be discussed, Lynn writes from a much different vantage point and does not share in such optimism.

Lynn's journalistic style pays dividends for his readers, as he stacks corporate tales from the successes and failures of companies like General Motors, Toyota, Walmart, Dell, Cisco, Boeing and Flextronics until his reader has a comprehensive account of the historical events, which inspired managers to re-focus corporate action away from physically manufacturing products and toward coordinating component-makers and component-assemblers throughout the world. Accordingly, management teams have restructured their corporations to model a new form - a form that on the one hand appears to be more cooperative, but on the other also appears to have a darker side. This new form generally has fewer assets, fewer employees and almost no reserve inventories, which may not be inherently so bad. However, it also has less direct control over its production systems than ever before, often relies too heavily upon too few inputs for supplies, and, worst of all, often has no idea where risk hides within its transnational production system(s), or for that matter, what the nature of this risk may be, considering such systems are exposed to a wide variety of potentially serious calamities from a plethora of different countries.

If this combination of factors is not enough to make the risk-adverse shudder, Lynn suggests that the situation appears to be deteriorating further. By shedding both the capital assets and the large labor forces necessary for in-house production, Lynn explains how firms have reduced their direct responsibility over production and thus increased their ability to achieve greater profitability by contracting with suppliers, who are vastly more efficient and flexible than traditional forms of in-house production. Generally, these suppliers create such efficiency and flexibility by not operating within regulatory-laden jurisdictions. Lynn explains how firms squeeze their buyer-dependent suppliers by insisting upon ever-greater efficiency to meet both the challenges of hyper-competition and the expectations of profit-minded investors. This quest to maximize efficiency becomes problematic when suppliers are already operating on a shoestring budget, yet find themselves under pressure to find new ways to generate even more products in even less time for even less money, or gamble being replaced by a supplier that will. As suppliers stretch the boundaries of intelligent and responsible business practice to meet the demands for faster and cheaper production, risk flourishes throughout global production networks.<sup>1</sup>

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<sup>1</sup> Mr. Zhang Shuhong's tragic story provides a glimpse into: a) the pressures that suppliers *might be* enduring from lead firms, and b) the risk lead firms assume by outsourcing production. Mr. Shuhong was a co-owner of the Lee Der Toy Company, which supplied toys for Fisher Price, a subsidiary of the American toy giant Mattel. On August 2, 2007, Fisher Price recalled almost one and a half million toys supplied by Mr. Shuhong's company, after learning that they were coated with non-approved paint

This book review has two purposes. The first is to provide an overview of Lynn's book. The following three sections provide a general overview of the book's argument, in part, explaining in greater detail Lynn's apprehensions over the dangers of global production networks, and then observing and evaluating his recommendations for improvement. The second purpose is to better understand Lynn's observations in the context of a discussion about corporate regulation. Lynn notes that his title, *End of the Line*, is inspired in part by his observation that the era of the vertically integrated assembly line has come to an end.<sup>2</sup> The next section describes this vertically integrated relic, as explained by Peter Drucker in 1946, in order to help visualize what sort of corporate structure did exist, so as to be able to properly draw a distinction between Drucker's model and Lynn's observations of today's corporation. Finally, the book review ends by suggesting how the new challenges created by global production systems might require a change in the manner in which legal thinkers consider how law can be used to influence these systems.

### **B. *End of the Line* – An Overview**

In his introductory chapter, Lynn explains that the rise of the global production system marks the death of the Ford-inspired vertically integrated assembly line and the birth of a new corporate order.<sup>3</sup> He proclaims that the debate regarding whether to globalize domestic economies has concluded with the ever-greater global integration of investment, labor, production and regulation.<sup>4</sup> However, having sites of production scattered throughout the world inspires new debate about the

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pigment that contained a dangerous level of lead. See: *Toys recalled over safety fears*, BBC News (2 August 2007), available at: <http://news.bbc.co.uk/2/hi/asia-pacific/6927156.stm>, last accessed 14 August 2007. On August 13<sup>th</sup>, it was reported that Mr. Shuhong hanged himself in his factory. See: *Chinese toy boss 'kills himself'*, BBC News (13 August 2007), available at: <http://news.bbc.co.uk/2/hi/asia-pacific/6943689.stm>, last accessed 14 August 2007. The following day, after a two-week review of the work of Mattel's Chinese subcontractor, Mattel reported that it would have to recall over 18 million toys. See: *Mattel recalls millions more toys*, BBC News (14 August 2007), available at: <http://news.bbc.co.uk/2/hi/business/6946425.stm>, last accessed 14 August 2007. As the story progressed, after even more recalls and the firing of several firms, Thomas Debrowski, Mattel's executive vice president for world operations, made a statement to the press stating: "The vast majority of these products that we recalled were the result of a flaw in Mattel's design" and not the fault of Chinese manufacturers. See: *Mattel sorry for 'design flaws'*, BBC News (21 September 2007), available at: <http://news.bbc.co.uk/2/hi/business/7006599.stm>, last accessed 28 September 2007.

<sup>2</sup> BARRY C. LYNN, *END OF THE LINE: THE RISE AND COMING FALL OF THE GLOBAL CORPORATION* (2005), 16.

<sup>3</sup> *Id.*, 16.

<sup>4</sup> *Id.*, 17.

emerging global interdependence, which creates novel challenges for those wishing to draw a distinction between domestic and international interests, as well as between one company and another.<sup>5</sup> In other words, Lynn suggests that the globalization of production networks changes traditional understanding of what the boundaries of the corporation are (when its production system is so fragmented and decentralized), and, one can only assume, what the nation-state's role in corporate governance is (when corporations appear to be operating more and more beyond any single domestic jurisdiction). One clear conclusion which can be drawn is that the competitive pressure that pushed managers toward the outsourced-offshore model of production serves as a notice that no single country or company can possess the *de jure* or *de facto* capacity to monitor and/or control all aspects of industrial production any longer. These global production systems are a "fait accompli", Lynn explains, and now the remaining challenge is for actors (like governments and corporations, but also other hybrid organizations with influence within the transnational realm) to ensure that their norm creation (generally considered having a spectrum from "public" regulation to "private" adoption of best practices) facilitates the continued growth of the system, while more importantly taking steps to ensure greater protection from risk.<sup>6</sup>

Chapter One, Two and Three tell the tales of corporate legends (like Henry Ford, Albert Sloan, Jr., Jack Welch, Lee Iacocca, Jose Ignacio Lopez de Arriortua, and Robert Galvin), tracing their ascensions to prominence in order to illuminate the development of American business practices today. For a broader perspective of this American corporate narrative, Lynn layers these stories with an explanation of how the American government, from Washington's Administration to the present one, influenced the evolution of these business practices. This political story progresses from Alexander Hamilton's strategy to achieve a rational economic self-dependence of America from Europe, which finally ended with Truman's post-war agenda of the liberal restructuring of the Japanese and European industrial systems to compliment and integrate with America's. This post-war phase was then replaced by a third phase, which Lynn's argues started during the Clinton Administration. Lynn points to the collapse of the Soviet Union as the trigger for events that convinced American policymakers that *The End of History*<sup>7</sup> was upon them. He argues that instead of allowing American political vision and strategy to continue to guide the creation of the emerging global industrial commons, American policymakers dismantled the existing international structures in hopes

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<sup>5</sup> *Id.*, 16-17.

<sup>6</sup> *Id.*, 17.

<sup>7</sup> FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

that “the market would take care of us all”.<sup>8</sup> Although these chapters are interesting, Lynn’s exclusive focus on the American historical narrative may cause more globally minded readers to lose confidence in the potential scope of his arguments, but be patient, for Lynn delivers in later chapters.

Chapters Four, Five, Six and Seven, which are the most rewarding chapters of the book, look at the history and consequences of outsourcing. In part, Lynn draws a distinction between traditional logistics and today’s logistics. Traditional logistics, he suggests, focus on the management of supplies flowing into a company, on one side, and the management of the flow of finished goods out of the firm, on the other.<sup>9</sup> Lynn declares that, with the rapid innovation of information technologies coupled with the innovation in transport services throughout the last quarter of the twentieth century,<sup>10</sup> logistics have now become the “nervous system” for modern production systems,<sup>11</sup> providing firms with the ability to transport, track and connect the components of any assembly process across a multitude of national boundaries with ease. This innovation has enabled companies to hire suppliers from all corners of the earth in the quest for ever-cheaper locations for production. The evolution has forged a radical interdependence between nations, which may be beyond what individual policymakers or industrialists can appreciate.

Chapter Six focuses on another piece of the corporate globalization puzzle - mergers and acquisitions. This phenomenon has resulted in greater consolidation of control within industries, not only for lead firms, like Cisco, but also for supply firms, like Flextronics.<sup>12</sup> Lynn points to various reasons for the great consolidation, which are all variations of Coase’s theorem,<sup>13</sup> including to “maintain leadership” in an environment where competitors within an industry are consolidating, to “innovate by buying dozens of smaller, tech-laden firms”, and/or to “rationalize the service and supply activities”.<sup>14</sup> When the phenomena of outsourcing and consolidation are combined, the result is ever-greater concentrated supply systems, which are stripped of their redundancy by lead firms, which depend on the

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<sup>8</sup> LYNN, *supra* note 2, at 72.

<sup>9</sup> *Id.*, 111-113.

<sup>10</sup> *Id.*, 136-137, and 139-141.

<sup>11</sup> *Id.*, 127.

<sup>12</sup> *Id.*, 177.

<sup>13</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1 (1960).

<sup>14</sup> LYNN, *supra* note 2, at 177.

systems, but have little responsibility for, control over, or understanding of the risk within these evermore single-sourced networks.<sup>15</sup> Lynn points to companies like Cisco, which have mastered strategic outsourcing and which have come to dominate their high-tech sectors. Such lead or hub firms are emerging as “the center” of global production networks, reducing competitors “to the status of satellites”.<sup>16</sup>

The results of this evolution, in Lynn’s mind, are threefold. First is “a huge but one-time leap in efficiency”.<sup>17</sup> Two is “a phenomenal shift of power – away from individual workers, and small firms, and slower-moving big firms, and the state – to the companies with the most nimble management teams and to the capital that backs them”.<sup>18</sup> Three is the “extinction of the traditional vertically integrated producer, and of that producer’s traditional focus on mitigating risk and planning for the future”.<sup>19</sup>

Chapters Eight and Nine discuss what Lynn observes to be the dangers of this evolution. This topic is taken up in detail in Section C. In his concluding chapter, Lynn offers some recommendations to help ensure the stability of global production systems and to ensure their ability to “keep growing”.<sup>20</sup> These recommendations are explained and evaluated in Section D.

### C. What Lurks in The Shadows?

Even though Lynn acknowledges that global production systems have vastly increased the efficient use of resources worldwide,<sup>21</sup> he laments over their dominance as a model for production, because of what he perceives to be lurking in their shadows. In chapter 8, Lynn questions whether the construction of these global production systems has been prudent, observing that it is more likely the haphazard result of “what happens when globalization and outsourcing are

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<sup>15</sup> *Id.*, 179-180.

<sup>16</sup> *Id.*, 141.

<sup>17</sup> *Id.*, 154.

<sup>18</sup> *Id.*, 154.

<sup>19</sup> *Id.*, 154.

<sup>20</sup> *Id.*, 17.

<sup>21</sup> *Id.*, 154.

combined with an entire lack of regulation by governments".<sup>22</sup> Fearing the fragility of these ever-more single sourced production systems, he emphasizes that any number of factors could lead to, as he puts it, "cascading economic breakdowns, from causes that are often all but impossible to conceive until the moment they hit".<sup>23</sup>

Still in chapter 8, Lynn draws a distinction between vertically integrated firms, which tended to take seriously their long-term survival and thus invested in their future, and what he calls the "arbitrage-oriented firm". The latter was named so because of its distinctive function of merely purchasing and selling products within the production network without engaging in the process of production itself – generating revenue without manufacturing product. He dislikes this shift in corporate ordering, explaining the havoc that he believes these firms to be causing in the following passage:

[T]oday's institutional structure serves to encourage companies to tear apart the very attributes we once celebrated in our traditional vertically integrated corporations, such as the ability to plan and protect, to invest and innovate, to provide stability and security. Opportunity lies in turning the more formal and carefully made structures of the past against the owners of these assets. The very goal of many upstarts is to break down these older, safer systems in order to free up and capture the wealth that has been built into what are, in essence, privately managed social infrastructures.<sup>24</sup>

Further along, he reiterates his concern by adding that the arbitrage-oriented firm has "no inherent interest in long-term planning", but rather its "method of operation is not to grow by introducing innovative new products, nor to focus on the safe operation of the system of production itself, but simply to ceaselessly exercise its power to destabilize both its suppliers and direct competitors".<sup>25</sup> He accuses such firms of being "blind to the needs of the system that feeds them, and

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<sup>22</sup> *Id.*, 224.

<sup>23</sup> *Id.*, 215.

<sup>24</sup> *Id.*, 220.

<sup>25</sup> *Id.*, 232.

blind to the effect of their own power on undermining the structure on which they themselves stand along with the rest of us".<sup>26</sup>

Lynn is suggesting that outsourcing and the reckless strategies of arbitrage-oriented firms continually deconstruct all of the safeguards that may have historically hampered what some might call *efficiency*. Lynn is also suggesting that such historic *inefficiencies* prudently fortified domestic economies from potential disruptions of production (like national strikes, natural disasters, global epidemics, terrorism, and wars) that today could occur in any number of countries, suspend global production and seriously damage any number of domestic economies. Most disturbing is that corporate leaders are aware of the potential for "cascading economic breakdowns", but do little to prevent them.<sup>27</sup>

Lynn provides many examples of minor global production system failures that caught the attention of the business community.<sup>28</sup> One such example, which he opened the book with, stands out.<sup>29</sup> In 1999, a shock wave from an earthquake damaged two Taiwanese manufacturing plants. This event made headline news in the business press, because of the unforeseen domino effect it caused among many economies throughout the world. Although the two plants were only shut down for one week, they were the main producers of a highly specialized semiconductor chip necessary in the production of many high-tech products manufactured worldwide. As a consequence of relying on this single source within the production system, the world output of electronics was 7% lower than predicted for the month of the earthquake and production levels could not fully recover to their pre-earthquake outputs for an additional two months. Thousands of workers were laid-off in the US, stock value in high-tech firms dropped and consumers paid higher prices.

Upon reflection, for any reader unfamiliar with the amount of risk lurking within today's industrial production complex, the natural reaction to Lynn's observations may be shock. If he is correct in his observations, then global production systems are stretched so thinly that they cannot weather, without serious cost, an incident like the closure of two important production plants for one week. One shudders to imagine the fallout from a real disaster, like others suggested by Lynn, such as a

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<sup>26</sup> *Id.*, 232.

<sup>27</sup> *Id.*, 213-216.

<sup>28</sup> *Id.*, 214-215.

<sup>29</sup> *Id.*, 1-3, 177, 215, 217, and 218.



war between India and Pakistan, which was narrowly averted in 2001, or a flu-like pandemic, which appears to be threatening every year.<sup>30</sup> Yet, what makes matter worse is that, even with this knowledge of the risks, these production systems are spread across so many domestic jurisdictions and are exploited by so many highly competitive private interests that no one is sure who will take responsibility, or for that matter who *can* take responsibility, to safeguard these systems from such disasters over the long term. One could conclude from Lynn's observations that until public and/or private authorities step forward and cooperatively sort out this state of affairs, all that can be done is to continue business as usual and hope for the best.

#### D. Lynn's Solutions

In his concluding chapter, Lynn offers some suggestions to his reader, which are designed to help avoid what Lynn perceives to be the self-destructive course of the global economy. He presents a list of recommendations, which he asserts would help fortify the global economy, including: (1) implementing more stringent anti-trust regulations, (2) requiring multiple inputs for key components of production, (3) strengthening the ability of suppliers to resist unreasonable demands from lead firms, (4) requiring greater disclosure of sourcing and supply-chain relationships to investors, (5) empowering workers, (6) reducing incentives for management to pursue share price maximization strategies, and (7) questioning the nationality of lead firms, even when their head offices are within the United States, so as to better shape domestic policies in areas of technology sharing, taxation, and public subsidization of the private sector.<sup>31</sup>

Lynn does not elaborate much upon his list of suggestions, nor does he address the potential opposition to them, but merely asks his reader to accept them *prima facie*. This is unfortunate for Lynn, because certain readers indubitably will regard one or more of his recommendations as problematic. Greater elaboration upon the potential drawbacks of his recommendations might have made them more difficult to immediately dismiss by those he may have wished to win over. For instance, the pros and cons of more stringent anti-trust regulations have been debated endlessly,<sup>32</sup> but for the purpose of this work, it will suffice to say that it is

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<sup>30</sup> *Id.*, 214-215.

<sup>31</sup> *Id.*, 256-257.

<sup>32</sup> ADAM SMITH, AN ENQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); Edward S. Mason, *Methods of Developing a Proper Control of Big Business*, 18:2 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 40 (1939); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1950);

contentious and debatable. As regards his second recommendation, requiring multiple inputs for key components appears to be the only sensible option, so the suggestion of this recommendation may not be controversial. That said, in highly competitive industries, implementing this recommendation might not be so easy and could generate controversy, if implementation undercut the competitive potential for business emanating from the jurisdiction attempting to reform unilaterally. As regards his third recommendation, if Lynn is correct in his assessment of the tremendous risk associated with the power imbalance between lead firms and buyer-dependent suppliers, then strengthening the bargaining position of suppliers seems like a non-contentious recommendation; for few would agree openly that suppliers should be forced to quietly undermine global production. However, this issue can also be recast in a different light. Why should one assume that empowering suppliers necessarily would improve risk management strategies? Regarding his fourth recommendation, greater disclosure of information makes the markets function better - one could dare to suggest - in all situations, so this recommendation might also seem non-contentious. That said, if implementation of this recommendation is not thoughtful, it could become overly onerous to business. One just has to recall Sarbanes-Oxley's (SOX) famous, expensive, and problematic section 404. This knee-jerk reaction to regulate highlights some of the problems with throwing together such disclosure requirements in a slapdash manner.<sup>33</sup> Next, empowering workers appears to be a socially responsible suggestion; however, such initiatives also need to be sensitive to the importance of labor market reforms in many jurisdictions, so finding the appropriate manner to empower labor is far more problematic than agreeing that in many countries labor empowerment is of critical importance.<sup>34</sup> As regards the

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Edward S. Mason, *Schumpeter on Monopoly and the Large Firm* 33 REV. OF ECONOMICS AND STATISTICS 139 (1951); Adolf A. Berle, *The Developing Law of Corporate Concentration*, 19 U. OF CHIC. L. REV. 639 (1952); RICHARD ORME WILBERFORCE, ALAN CAMPBELL, AND NEIL P. M. ELLES, *THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES* (1966); JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1st ed., 1976); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); Frank Easterbrook, *The Limits of Antitrust*, 63 U. TEX. L. REV. 1 (1984); ALFRED D. CHANDLER AND TAKASHI HIKINO, *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* (1990); JOHN E. KWOKA AND LAWRENCE J. WHITE, *THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY* (1999); MASSIMO MOTTA, *COMPETITION POLICY: THEORY AND PRACTICE* (2004); TONY PROSSER, *THE LIMITS OF COMPETITION LAW: MARKETS AND PUBLIC SERVICES* (2005); and Howard Shelanski and Michael Katz, *Merger Analysis and the Treatment of Uncertainty: Should we Expect Better?*, forthcoming, ANTITRUST L.J. (2007).

<sup>33</sup> *Smelly old SOX*, THE ECONOMIST 384:8539 (July 28 - August 3 2007).

<sup>34</sup> For the importance of reforming labor markets for securing economic stability and growth in the European context, see for instance: *Can Europe's recovery last?*, THE ECONOMIST 384:8537 (July 14<sup>th</sup>-20<sup>th</sup>, 2007). For the connections between gross domestic production, and social conditions and well-being of citizenry, see generally: Organisation for Economic Co-operation and Development, *ECONOMIC POLICY REFORMS: GOING FOR GROWTH* (2006).

problem of stock price maximization strategies, the arguments have been clearly presented,<sup>35</sup> however there is still debate as to whether these incentives are actually hurting the long-term interests of the firm.<sup>36</sup> Lynn's last recommendation appears unproblematic, if one accepts that corporations, which are deemed to be American, ought to have special advantages within the American marketplace. That said, not all free trade advocates, within and outside America, would agree with this position. So, upon reflection, although Lynn's recommendations may appear sound *prima facie*, more rigorous contemplation of them needs to be offered by Lynn in order to be able to assess their true merit.

One area where Lynn's recommendations are clearly lacking is in his understanding of how the global economic commons will have to be "regulated".<sup>37</sup> To be fair to Lynn, his expertise is in business, not law. That said, he does venture into the legal realm with his recommendations without an adequate sensitivity to how such regulation must come about in a transnational environment. Where Lynn first gets into trouble with his recommendations is when he explains that he selected all of his recommendations because the American government can implement each of them unilaterally.<sup>38</sup> This admission is surprising because he acknowledges that serious opposition may arise to "the merest spectre of American unilateralism" in this area.<sup>39</sup> And yet, he presses forward, rationalizing that there is room for "multinational actions",<sup>40</sup> but "when it comes to industry, it is far faster to

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<sup>35</sup> David Millon, *Why Is Corporate Management Obsessed with Quarterly Earnings and What Should Be Done About It?* 70 GEO. WASH. L. REV. 890 (2002), and also Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a more Rational System of Corporate Governance*, The Dorsey & Whitney Foundation Lecture, 10 March 2007, *forthcoming*, J. CORP. L. (2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=989624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=989624), last accessed 28 October 2007; for a comment on Strine's paper (and Stephen Bainbridge's reaction), see Peer Zumbansen, *Varieties of Capitalism and the Learning Firm: Corporate Governance and Labor in the Context of Contemporary Developments in European and German Company Law*, UNIVERSITY OF CAMBRIDGE, CENTRE FOR BUSINESS RESEARCH, WORKING PAPER No. 347/2007 & CLPE COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY RESEARCH PAPER 21/2007, *forthcoming*, EUR. BUS. ORG. L. REV. 2007, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=993910](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=993910), last accessed 28 October 2007.

<sup>36</sup> *Jam today: Worries about short-termism grip America's business elites - wrongly perhaps*, The Economist 384:8537 (July 14<sup>th</sup>-20<sup>th</sup>, 2007).

<sup>37</sup> LYNN, *supra* note 2, at 254-256.

<sup>38</sup> *Id.*, 256.

<sup>39</sup> *Id.*, 258.

<sup>40</sup> *Id.*, 259.

act at the national level".<sup>41</sup> He hopes, with complete lack of acknowledgment of his earlier concession, that if America takes the lead and implements his recommendations, then it "will make it far easier for other nations to follow our lead".<sup>42</sup> But what if there is a reaction? What if although it may be easy to follow America's lead, other nations are offended and refuse to follow? He does not address this possibility. Even worse, what if - with the rise of other world stock exchanges and the ability of global investment to ignore national borders - "American" firms and "American" investment choose to exit Delaware for less stringent, more investor-friendly jurisdictions?

One can easily conclude that Lynn may be a little too romantic about the ability of America, or any nation-state for that matter, to unilaterally change, as Lynn puts it, the "structural" nature of "our global commons".<sup>43</sup> But maybe Lynn merely sees domestic unilateralism as the better of two evils, the other being multinational action. In fact, Lynn says as much when he admits that he selected recommendations that can be enacted unilaterally, because of "the obvious and huge obstacles to forging any multinational agreement in the near term".<sup>44</sup> What is more obvious is that he does not address the literature that informs transnational legal theory.<sup>45</sup> This literature helps one to appreciate that there is a "highly

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<sup>41</sup> *Id.*, 259.

<sup>42</sup> *Id.*, 259.

<sup>43</sup> *Id.*, 254-255.

<sup>44</sup> *Id.*, 256.

<sup>45</sup>The capacity of the nation-state to control transnational corporations has been in decline throughout the twentieth century. For example, nation-states have faced erosion of the corporate tax system, resulting in a lesser ability to redistribute wealth within society. See John Braithwaite, *Markets in Vice, Markets in Virtue* (2006), 16-34. Enforcement issues aside (which are significant), Braithwaite observes the catch-22 of tax policy in the age of globalization between "attracting capital and securing growth on a small-government, low-taxation-of-capital, weak-safety-net trajectory, or having a bigger-government, lower-growth trajectory where the gulf between rich and poor is not allowed to widen". The challenge for smaller nations to maintain sovereignty against transnational corporate interests is grossly amplified. See Raymond J. Michalowski and Ronald C. Kramer, *The Space between Laws: The Problem of Corporate Crime in a Transnational Context*, 34 *SOC. PROB.* 34 (1987). In addition, other aspects of the decline of the nation-state in the age of the transnational corporation and globalization has been well documented, see amongst many others: Sally Engle Merry, *Anthropology, Law, and Transnational Processes*, 21 *ANNUAL REV. OF ANTHROPOLOGY* 357 (1992); Richard Falk, *Towards Obsolescence: Sovereignty in the Age of Globalization*, 17 *HARV. INT'L L. REV.* 34 (1995); Viven A. Schmidt, *The New World Order Incorporated: The Rise of Business and the Decline of the Nation State*, 124 *DEADALUS* 75 (1995); Gunther Teubner ed., *GLOBAL LAW WITHOUT A STATE: STUDIES IN MODERN LAW AND POLICY* (1997); Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM*, 3, (Christian Joerges, Inger-Johanne Sand, and Gunther Teubner, eds., 2004); JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); Oona A. Hathaway and

pluralistic mixture of legal regimes”, ranging from state-oriented systems to hybrid and private regimes, which influence normative development in transnational spaces.<sup>46</sup> Added to such legal regimes are other “norm entrepreneurs”, which may influence law, but also generate social norms, which may not achieve the status of law, but still make important contributions to the construction of such normative environments.<sup>47</sup> Lynn never gets past state-oriented legal regimes, but again to be fair to Lynn, he should not have to take ownership of devising the solution to one of the most complicated challenges presented to legal scholarship today. Nonetheless, to address the problem of risk within global production systems, which Lynn so impressively describes, this literature must be taken seriously.

### E. Observations of the Modern Corporation and Implications for Regulation

Contrasting Barry Lynn’s book to Peter Drucker’s *Concept of the Corporation*<sup>48</sup> (1946) draws one’s attention to the remarkable evolution of the modern corporation from the post-war period to today, and to the influence this observation can have on one’s understanding of corporate risk and regulation.

When the *Concept of the Corporation* was first published, Europe had endured almost a half-century of total war. Many, like Karl Polanyi, suspected this catastrophe could have been averted, if it had not been for the economic rationalities, which guided the nineteenth century liberal project.<sup>49</sup> This suspicion generated a general conviction in American society that governments must intervene in economic activities in order to stabilize national economies, and convinced policy-makers and

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Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006); Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in: THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, (David M Trubek and Alvaro Santos, eds., 2006); and Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

<sup>46</sup> Oren Perez, *Normative Creativity and Global Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003), at 25.

<sup>47</sup> GRALF-PETER CALLIENS AND PEER ZUMBANSEN, ROUGH CONSENSUS, RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW, TRANSTATE WORKING PAPER 2007, 8-9, available at [http://www.sfb597.uni-bremen.de/download/de/ueber/Preprint\\_zumbansen\\_2007.pdf](http://www.sfb597.uni-bremen.de/download/de/ueber/Preprint_zumbansen_2007.pdf), last accessed 28 October 2007.

<sup>48</sup> PETER F. DRUCKER, CONCEPT OF THE CORPORATION (1946).

<sup>49</sup> KARL POLANYI, THE GREAT TRANSFORMATION (1944), 3.

scholars that unregulated capitalism was a recipe for further disaster.<sup>50</sup> Needing an alternative economic rationality, John Maynard Keynes had been constructing a model,<sup>51</sup> in which governments could plan modern economies, in hopes of achieving greater equality, stability and thus peace within society than had been previously achieved since modern capitalism emerged in Europe during the early nineteenth century. The agreement reached at the United Nations Monetary and Financial Conference at Bretton Woods, in 1944,<sup>52</sup> cemented this economic theory in a new international economic order, which defended the policy autonomy of nation states, by providing a national economic space for the growth of Keynesian planning. This was a decisive shift from the classical liberal economic order of the nineteenth century.

It was in this context that Drucker envisioned the modern corporation as a powerful non-state entity, which assisted government efforts to achieve full employment and peace. His study offered an insider's view of the inner workings of General Motors Corporation (GM). GM, at the time, was not only one of the largest corporations in the world, but also one of the most innovative. GM's CEO, Albert P. Sloan Jr., implemented a dynamic strategy of decentralization, which reorganized command-and-control management structures, so that middle managers, who were better informed about particular aspects of this complex worldwide organization, could exercise their discretion within their area of knowledge, allowing for more effective and informed decision-making by GM as a system. This management structuring was called decentralization, because it created smaller systems of self-direction throughout all levels of management.<sup>53</sup> Drucker concluded that the decentralized, yet still vertically integrated, corporation would be the corporate model of the future, operating with the main objective of assisting governments' efforts to better order modern society for the benefit of the community.<sup>54</sup>

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<sup>50</sup> For the position of an American scholar, who was also a statesman and policymaker at the time, see: Adolf A. Berle, Jr., *Government Function in a Stabilized National Economy*, 33 AM. ECON. REV. 27 (1943), 1.

<sup>51</sup> JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1937).

<sup>52</sup> United Nations Monetary and Financial Conference at Bretton Woods (22 July 1944).

<sup>53</sup> DRUCKER, *supra* note 48, at 286-298.

<sup>54</sup> DRUCKER, *supra* note 48, at 284-290.

But even with the dramatic shift from the classical liberal economic order to the new doctrines of Keynes,<sup>55</sup> physical production still remained the same, relying on giant in-house assembly lines, much like Ford's Rouge River Production Complex of the pre-Keynesian world.<sup>56</sup> Management's core strategy for efficient production, being to exploit economies of scale and to ensure uninterrupted operation of assembly lines, remained steadfast. Production strategies still focused upon controlling as many aspects of the production process as possible. And for those few aspects of the production system that were most efficiently outsourced, the parent producer forged long-term commitments with allied suppliers, which fostered a high level of reliance and trust, and minimized the risks potentially associated with outsourcing.

Sloan's GM model, as presented by Drucker, is still the model that comes to mind, when many think of the corporation, with its multidivisional structure filled with a hierarchy of managers, who more or less autonomously supervise a number of different aspects of an in-house production system. GM is still regarded as an American company, because its cars are "made in America", which has some value to nationalistic consumers, although less in recent years.<sup>57</sup> This perception of the corporation is associated with nationality, hierarchical structure and permanence. A danger for corporate observers is in maintaining such underlying assumptions, for they can lead to erroneous presumptions when attempting to understand the twenty-first century corporation. Examples of such erroneous presumptions are that corporations have control over their production systems; or they are aware of the business practice involved in their production systems; or a national government, if it wished, has the power to impose responsible business practice upon *their* corporations.<sup>58</sup>

This potential for making erroneous presumptions adds credence to the suggestion that Lynn's book is an important foundation for those wishing to understand the corporation today. Lynn constructs an image of the corporation, which is much different from Drucker's. With corporate reliance upon global production systems, instead of one business producing a product from an in-house assembly system, which exists within one national jurisdiction, production systems can span across

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<sup>55</sup> For more detail, see: Jeffrey D. Sachs, *Twentieth-Century Political Economy: A Brief History of Global Capitalism*, 15 OXFORD REV. OF ECON. POL'Y 90 (1999), 93-95.

<sup>56</sup> THOMAS K. MCCRAW, *AMERICAN BUSINESS, 1920-2000: HOW IT WORKED* (2000), 18-27.

<sup>57</sup> *The road to recovery*, THE ECONOMIST 384:8541 (August 11<sup>th</sup>- August 17<sup>th</sup>, 2007).

<sup>58</sup> For an example of result of such fallacious assumptions, see: JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* (2004), 160-164.



many nations and many companies. This observation ought to have a profound influence in the way one ought to think about corporate responsibility. Lynn writes:

The result, when outsourcing has spread widely and deeply enough through any industrial system, is that many responsibilities are not so much shifted from one company to another as from one company to no company. ... Nobody looks for risk in the system, nobody analyzes risk in the system, nobody seeks to lessen risk in the system, nobody accepts any liability for risk in the system. If anything, the nature of competition results in a race among users to exploit the common system most effectively.<sup>59</sup>

Lynn's conclusion forces one, at least, to reconsider the traditional assumptions about responsibility within production systems. Possibly, this leads one to the conclusion that the implementation of responsible business practice does not involve the relationship between one governmental regulator and one producer, but the efforts of many legal regimes (state-based, private and hybrid) and other norm-producers to generate a less competitive, and more cooperation, normative environment, so that global production systems can be better managed by a collection of users.

Implicit in this conclusion is that not only an appreciation of the production system's evolution is necessary. It is also necessary to understand how the procedures and institutions, which create the normative environments of such systems, operate. At the time Drucker wrote *Concept of The Corporation*, Keynesian planning dominated regulatory theory, and although serious challenges to Keynes's theory were being espoused at the time,<sup>60</sup> it would not be until the late 1970s that his theory was debunked.<sup>61</sup> At this point, new perspectives on law and regulation were merging.<sup>62</sup> As economic globalization matured so did an

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<sup>59</sup> LYNN, *supra* note 2, at 11.

<sup>60</sup> FRIEDRICH A. VON HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* (1948), 77-91.

<sup>61</sup> DANIEL YERGIN AND JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* (1998, 2002) 96-138.

<sup>62</sup> In particular, see from a law and sociology perspective: Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC. REV. 139 (1983). And see from a law and economics perspective: RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).



understanding of global law.<sup>63</sup> Therefore, a historical narrative that describes the individuals and events, which helped - and are helping - to shape global law, would dovetail nicely with Lynn's narrative. Such a narrative may be required to provide a practical rationale for why certain developments in global law are necessary for the "regulation" of global production in a manner that can be easily appreciated by a non-law readership.

In conclusion, when Lynn makes recommendations as to how to regulate global production, he lacks the sensitivity to the regulatory and political landscapes in which these systems operate. Since Philip Jessup's seminal piece in 1956,<sup>64</sup> legal scholarship has been attempting to better understand the relationship between law, social norms, and decision-making within the transnational spaces that some systems operate within. What is unique about these spaces is that law appears to detach itself from the nation-state,<sup>65</sup> and yet still appears to function. This still-emerging understanding of a non-hierarchical acceptance of formal and informal "law" does not rest comfortably with a more traditional legal mindset, which is still loyal to the rationalization of the legitimization of norms into laws from a Westphalian explanation of legal order. The decentralization of norm/law-making has instigated a proliferation of sites of norm generation, and thus has vastly altered the process for *regulating*.<sup>66</sup> The conceptual trap of insisting upon the Westphalian explanation of legal order, like the one Lynn fell into, is of utmost concern for legal scholarship as the crisis of law beyond the state needs to be properly understood if legal systems are to have a constructive role in assisting in the creation of more socially beneficial normative spaces.

Lynn must be commended for his inspired explanation of a real-world situation that presents just such a test for legal systems, which may have to broaden their understanding of how norms can be legally legitimated, if they are going to embrace the proliferation of "norm entrepreneurs",<sup>67</sup> which transcend the historical

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<sup>63</sup> Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in: THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M Trubek and Alvaro Santos, eds., 2006); and also TEUBNER ED., GLOBAL LAW WITHOUT A STATE, *supra* note 45.

<sup>64</sup> PHILIP C. JESSUP, TRANSNATIONAL LAW. STORRS LECTURES ON JURISPRUDENCE (1956).

<sup>65</sup> CALLIESS AND ZUMBANSEN, *supra* note 47, at 284-290.

<sup>66</sup> POLANYI, *supra* note 49, at 3.

<sup>67</sup> Peer Zumbansen, *Transnational Law*, in: ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, 738 (Jan Smits, ed., 2006).

<sup>67</sup> CALLIESS AND ZUMBANSEN, *supra* note 47, at 8-9.

narratives of their native nation-state to join the membership of autonomous and pluralistic “legal” actors that possess the range of vantage points necessary to properly inform the normative environment. These norm entrepreneurs, when necessary, operate “before the law”,<sup>68</sup> facilitating the decision-making of complex and ever-changing social systems, like the production systems described by Lynn in his book. If the law cannot adjust to its environment, and norm entrepreneurs continue to be successful in filling the normative void, it is quite possible that the gatekeepers of the law will turn on their traditional masters, and instead of ever-keeping “man” “before the law”, they will ever-keep law before man.<sup>69</sup>

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<sup>68</sup> Calliess and Zumbansen comment on the role of law in shaping processes of “private” interaction by comparing the role/non-role of law within this interaction to the anti-parable of “before the law” presented to K., the protagonist of Kafka’s *The Trial*, by a priest. This passage can be found in the chapter entitled “In the Cathedral” within the book. See: CALLIESS AND ZUMBANSEN, *supra* note 47, at 7. Also see: FRANZ KAFKA, *THE TRIAL* (1957).

<sup>69</sup> For evidence of such a project, take seriously the significance of: Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 *THE WORLD BANK OBSERVER* 1 (1998).