

2008

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## Recommended Citation

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Cite as: 17 MINN. J. INT'L L. 7 (2008)

## A Baby-Step to Global Labor Reform: Corporate Codes of Conduct and the Child

Frederick B. Jonassen\*

### INTRODUCTION

I have been assured by a very knowing American of my acquaintance in London, that a young healthy child . . . is at a year old a most delicious, nourishing, and wholesome food, whether stewed, roasted, baked, or boiled, and I make no doubt that it will equally serve in a fricassee or a ragout.

Jonathan Swift, *A Modest Proposal*<sup>1</sup>

Observing the poverty of Irish children in the early eighteenth century and reflecting upon the contemptuous and callous attitude of the English elite toward them, Jonathan Swift envisioned the parodic solution of serving these children as a culinary delicacy with which to garnish English dinner tables. This would both supplement the English diet and reduce the number of unwanted children. As to critics of his plan, Swift suggested they

first ask the parents of these mortals whether they would not at this day think it a great happiness to have been sold for food at a year old in the manner I prescribe, and thereby have avoided such a perpetual

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1. In 1 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 2181, 2182 (M.H. Abrams, ed., 1993).

scene of misfortunes as they have since gone through . . .<sup>2</sup>

More than two centuries later, the globalization of economic activity makes far more efficient use of children, putting them to work to manufacture products or cultivate crops as cheaply as possible. Just as surely as anything Swift imagined, this arrangement consumes poor children for the economic, if not the dietary, benefit of the world's wealthy, to whom, as it happens, a reasonably-priced shirt or a pair of shoes is preferable to a roasted child.

It is an irony that might well have intrigued Swift that one of the major causes of exploitative child labor, the multinational corporation (MNC), may well provide a partial solution to the problem. Under circumstances in which conventional processes and institutions of international law have failed and seem likely to continue failing to control child labor, corporate codes of conduct—that is, statements of rules regulating labor that MNCs voluntarily and unilaterally adopt, announce, publicize, and, with varying degrees of effectiveness, implement in order to avoid bad publicity for their products—not only hold promise for reducing exploitative child labor, but have already proven useful in achieving that goal.

This paper proceeds as follows. Part I details the problem of exploitative child labor. Part II reviews the international and national efforts to regulate child labor and will show how these efforts have largely failed. Part III examines the political and cultural difficulties that have impeded attempts to control child labor. Part IV reviews extra-legal codes of conduct from the past. Finally, Part V assesses the apparent and potential success of the strategy.

## I. THE MAGNITUDE OF EXPLOITATIVE CHILD LABOR

There is, of course, work that children perform that is not abusive or harmful to them and that provides skills and work habits that are useful later in life.<sup>3</sup> This type of work may be properly characterized as educational and beneficial. The concern in this paper, however, is with exploitative child labor in which school-age children work for excessively long hours under conditions that are dangerous or harmful to their physical

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2. *Id.* at 2186.

3. See ALEC FYFE, CHILD LABOUR 3 (1989); Robert Weissman, *Stolen Youth: Brutalized Children, Globalization and the Campaign to End Child Labor*, 18 MULTINATIONAL MONITOR 1, 9 (1997), available at <http://www.allbusiness.com/specialty-businesses/610710-1.html>.

or mental health.<sup>4</sup> There are no authoritative estimates of how many children labor in exploitative situations.<sup>5</sup> Examples of exploitation on a gigantic scale, however, are readily visible and well-publicized. There are boys who work in Colombian coal mines where, like the chimney sweeps of old, they crawl through narrow tunnels to chip at exposed coal amidst high levels of dust.<sup>6</sup> In Cambodia, children work in brick-making factories, suffering cuts and injuries to their bare hands and bare feet.<sup>7</sup> Children cut Brazilian sugar cane with razor-sharp machetes, and are exposed to pesticides.<sup>8</sup> In Latin America and parts of Africa, children who serve as domestics are forced to work long hours while being subject to physical and sexual abuse.<sup>9</sup> In many countries homeless children earn a living as street vendors or rag pickers who search garbage heaps for things to sell. All the dangers and corruptions of the streets threaten these children.<sup>10</sup>

The International Labor Organization (ILO) is a Geneva-based United Nations agency that issues "conventions" setting international labor standards that governments, companies, and labor delegates approve at annual conferences.<sup>11</sup> The organization estimated that from 1979 to 1996 the number of children working in the world's labor force increased from fifty-six million to nearly a quarter of a billion.<sup>12</sup> According to the

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4. FYFE, *supra* note 3, at 18–19 (providing eight criteria proposed by UNICEF to determine the extent to which a particular form of child labor is exploitative).

5. See U.S. DEPT OF LABOR BUREAU OF INT'L LABOR AFFAIRS, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM? 3–4 (1996) [hereinafter APPAREL INDUSTRY], available at <http://www.dol.gov/ILAB/media/reports/iclp/apparel/apparel.pdf>; UNICEF, REPORT 1997: THE STATE OF THE WORLD'S CHILDREN, *How Many Children Work?* 1, 2 (1997), available at <http://www.unicef.org/sowc97/report/many.htm>.

6. Weissman, *supra* note 3, at 2.

7. *Id.*

8. *Id.* at 3.

9. See FYFE, *supra* note 3, at 114–16; ROGER SAWYER, CHILDREN ENSLAVED 140–42 (1988).

10. See FYFE, *supra* note 3, at 97–114; A BEQUELE & W. MYERS, FIRST THINGS FIRST IN CHILD LABOUR 146–47, 152–53 (1995).

11. See <http://www.ilo.org/global/lang-en/index.htm> (English-language website of the ILO).

12. See Timothy A. Glut, Note, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1206–07 (1995); David Holley, *WTO's Small Step Forward on Workers' Rights*, L.A. TIMES, Dec. 14, 1996, at D1; CHILD LABOUR TODAY: FACTS AND FIGURES (1996) (pointing out that in 1996, the ILO estimated that the number of economically active children between 10 and 14 years of age was seventy-three million, or 13.2% of all children in that age group). Assefa Bequele of the ILO stated that

[n]o reliable figures on workers under 10 are available though their

ILO, more than ninety-five percent of child laborers live in the developing countries of Asia, Africa, and Latin America.<sup>13</sup> From 1983 to 1992, the annual number of births in these countries rose by only 15%.<sup>14</sup> This increase in child laborers, therefore, cannot be attributed to the greater number of children in the world.<sup>15</sup>

Instead, the rise of the MNC most likely accounts for the increase in child labor in the third world. Typically, an MNC is based in an industrialized country that has long enforced laws against child labor.<sup>16</sup> For such companies, poor, underdeveloped, third-world countries provide a competitive advantage in the form of cheap labor.<sup>17</sup> Child labor is among the cheapest. The MNC, through its contractors, will pay children far less than it would have to pay workers in its home country, and pockets the differential. The arrangement is also beneficial to the underdeveloped country, for MNCs bring investment, jobs, markets, and other services that develop economic infrastructure. Hence, the economic circumstances of child labor result in a globalized "race to the bottom" in which wages are reduced as much as possible.<sup>18</sup>

Asia has the highest absolute number of child laborers.<sup>19</sup> In terms of population, however, Africa has the greatest percentage of children who work.<sup>20</sup> Many countries can illustrate the extent that children suffer from work exploitation. India, however, exemplifies the problem on a particularly large scale.

Article 24 of the Indian Constitution states, "No child below

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numbers . . . are significant. The same is true for children between 14 and 15 . . . . If all of these could be counted and if proper account were taken of the domestic work performed full-time by girls, the total number of child workers around the world today might well be in the hundreds of millions.

CHILD LABOUR TODAY: FACTS AND FIGURES (1996).

13. U.S. DEPT OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, 1 BY THE SWEAT AND TOIL OF CHILDREN [VOLUME 1: THE USE OF CHILD LABOR IN U.S. MANUFACTURED AND MINED IMPORTS] 1-2 (1994) [hereinafter SWEAT AND TOIL].

14. Glut, *supra* note 12, at 1207 n.19.

15. *See id.* at 1208.

16. *See* Natasha Rossell Jaffe & Jordan D. Weiss, Note, *The Self-Regulating Corporation: How Corporate Codes Can Save Our Children*, 11 FORDHAM J. CORP. & FIN. L. 893, 899 (2006).

17. *See id.* at 900.

18. *See id.*; *see also* Stephen Chapman, *How Americans Can Stop Child Labor Abroad*, CHI. TRIB., Dec. 4, 1994, at C3.

19. ILO, BITTER HARVEST (1997), [http://www.ilo.org/public/english/dialogue/actrav/genact/child/part2\\_a/agric.htm](http://www.ilo.org/public/english/dialogue/actrav/genact/child/part2_a/agric.htm).

20. *See id.*; Jens Andvig, Sudharshan Canagarajah & Anne Kielland, *Child Labor in Africa: Issues and Challenges*, FINDINGS 194 (November 2001) (describing ILO data that indicates that 40% of Africa's children work), available at <http://www.worldbank.org/afr/findings/english/find194.pdf>.

the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."<sup>21</sup> The Indian Parliament abolished bonded labor in 1976, and in 1986 enacted a statute prohibiting children under fourteen from working in a number of occupations, including carpet weaving.<sup>22</sup> The Indian Supreme Court has ruled that bonded labor is a violation of fundamental constitutional rights and an affront to human dignity.<sup>23</sup> In spite of this, bonded labor continues to exist in India in two main forms. Under inherited bondage, children work off debt incurred by preceding generations.<sup>24</sup> Under bondage by debt, family members who have accumulated debts sell their children into bondage in exchange for loans.<sup>25</sup> Typically, these parents sell their children into bondage to agents or traffickers who scour India's poorest areas, such as Bihar or Uttar Pradesh, for such cheap labor and bring children to the carpet-weaving regions of Mirzapur or the Vale of Kashmir.<sup>26</sup> Some children are kidnapped, some are allegedly adopted and then sent to work, and some are tricked into running away.<sup>27</sup> These include children less than ten years of age.<sup>28</sup>

In 2003, Human Rights Watch issued a report on bonded child labor and India's silk industry. The summary of the report stated:

[m]illions of children in India toil as virtual slaves, unable to escape the work that will leave them impoverished, illiterate, and often crippled by the time they reach adulthood. These are India's bonded child laborers. A majority of them are Dalits, so-called untouchables. Bound to their employers in exchange for a loan, they are unable to leave while in debt and earn so little that they may never be free of it. The Indian government knows about these children and has the

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21. INDIA CONST. art 24. See Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 371 n.70 (1995).

22. See Ehrenberg, *supra* note 21, at 371 n.70.

23. See *id.* at 371 n.71.

24. See ANTI-SLAVERY INTERNATIONAL, CHILDREN IN BONDAGE – SLAVES OF THE SUBCONTINENT 24 (1991) [hereinafter CHILDREN IN BONDAGE]; Ehrenberg, *supra* note 21, at 372; ROGER SAWYER, SLAVERY IN THE TWENTIETH CENTURY 128 (1986).

25. CHILDREN IN BONDAGE, *supra* note 24, at 25.

26. See *id.* at 9–10, 25–26; PETER LEE-WRIGHT, CHILD SLAVES 52 (1990); Ehrenberg, *supra* note 21, at 372 n.82 (citing Ben Tierney & Dave Todd, *Swept Under the Carpet: About 10 Million Children in India Work in Slavery—Many of Them, as Carpet Boys in the Rug Trade*, MONTREAL GAZETTE, Sept. 29, 1991, at A4).

27. See CHILDREN IN BONDAGE, *supra* note 24, at 25; ANTI-SLAVERY INTERNATIONAL, A PATTERN OF SLAVERY – INDIA'S CARPET BOYS 5 (1988) [hereinafter INDIA'S CARPET BOYS].

28. See Tierney & Todd, *supra* note 26, at A4.

mandate to free them. Instead, for reasons of apathy, caste bias, and corruption, many government officials deny that they exist at all.<sup>29</sup>

Many of India's bonded child laborers work in the carpet weaving industry. Typically they work twelve hours a day and subsist on a diet of "rotis and watery lentils."<sup>30</sup> Because they are far from home, they sleep on the dirt floors of the huts where they work.<sup>31</sup> Many are beaten, tortured, and sexually abused. They receive no medical attention.<sup>32</sup>

Besides the carpet industry, thousands of children work in the Indian glass industry. These children work with or near molten glass and crude open furnaces in factories littered with broken glass and filled with air polluted by chemicals, soot, and coal dust.<sup>33</sup> They are susceptible to asthma, bronchitis, eye problems, burns, and chronic anemia.<sup>34</sup> Seventy-six percent of them have tuberculosis.<sup>35</sup>

Numbers and scale, of course, have a certain significance and impact, but the description of this tragedy is incomplete without a consideration of the sufferings individual children endure. Thirteen-year-old Praiwan in Bangkok makes leather handbags from eight o'clock in the morning until eleven o'clock at night, and after waiting in line for a shower, goes to bed at one o'clock in the morning. He gets only two days off each month and earns a total of twenty-four dollars per month for his labor.<sup>36</sup> Twelve-year-old Luis works from dawn to 10:00 p.m. in carnation fields near Bogota. He mixes pesticides, some of which have been banned in the United States and Europe, without gloves, mask, or any protection. "When they spray the pesticides, I get sick, but my family needs the money."<sup>37</sup> Eleven-

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29. See HUMAN RIGHTS WATCH, SMALL CHANGE: BONDED CHILD LABOR IN INDIA'S SILK INDUSTRY, in I. Summary (2004), <http://www.hrw.org/reports/2003/india/index.htm>. [hereinafter SMALL CHANGE].

30. INDIA'S CARPET BOYS, *supra* note 27, at 5; see also Tierney & Todd, *supra* note 26, at A4; LEE-WRIGHT, *supra* note 26, at 52.

31. See INDIA'S CARPET BOYS, *supra* note 27, at 22; Tierney & Todd, *supra* note 26, at A4.

32. See CHILDREN IN BONDAGE, *supra* note 24, at 40; INDIA'S CARPET BOYS, *supra* note 27, at 5, 14, 19, 26, 29-30; Christopher Thomas, *Singh Links Drive to Assist Lowly Castes with Plight of Child Slaves*, THE TIMES [London], Sept. 20, 1990; Tierney & Todd, *supra* note 26, at A4.

33. See LEE-WRIGHT, *supra* note 26, at 47; Ehrenberg, *supra* note 21, at 374 n.98 (citing Joseph Albright & Marcia Kunstel, *Stolen Childhood*, CHI. TRIB., Oct. 5, 1987, at C1).

34. See LEE-WRIGHT, *supra* note 26, at 44-45.

35. CHILDREN IN BONDAGE, *supra* note 24, at 12.

36. See Lynn Kamm, *How Our Greed Keeps Kids Trapped in Foreign Sweatshops*, WASH. POST, Mar. 28, 1993, at C5.

37. See Jocasta Shakespeare, *Gardens of Shame*, WORLD PRESS REVIEW, Oct. 1,

year-old Yeramma, bonded in the Indian silk industry since she was seven, gets up at 4:00 a.m. to wind silk, works twelve hours a day, sleeps in the factory in spaces between the machines, and is beaten if she makes any mistakes.<sup>38</sup> Thirteen-year-old Lesly in Honduras works up to eighty hours per week making sweaters for thirty-eight cents per hour. She endures beatings, locked bathrooms, unreachable quotas, and managers who “like to touch the girls.”<sup>39</sup> There are millions of these stories.

In the midst of these tragedies, however, there is some good news. In its 2006 Report of the General Director, “The End of Child Labour: Within Reach,”<sup>40</sup> the ILO found that from 2000 to 2004, there has been a modest decrease in children involved in child labor, from 246 million to 218 million worldwide.<sup>41</sup> Noting that there is a great deal yet to be done, the report reviewed many causes for this improvement, among them, the “cooperation of employers,” which “is crucial in the fight against child labour because they can help to ensure that their enterprises are free of child labour . . . [and] play a powerful role in influencing those who hire children . . . .”<sup>42</sup>

## II. PAST EFFORTS TO REGULATE EXPLOITATIVE CHILD LABOR

Past efforts at regulating child labor in the global marketplace through international law and domestic law have largely failed. Timothy Glut reviews a variety of these attempts to limit child labor internationally.<sup>43</sup>

### A. ILO CONVENTIONS AND TRIPARTITE DECLARATION

Over many years, the ILO has issued conventions discussing the subject of child labor.<sup>44</sup> In 1921, the ILO produced Convention No. 5, “Fixing the Minimum Age for Admission of Children to Industrial Employment,” and in 1941,

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1995, at 42.

38. See SMALL CHANGE, *supra* note 29.

39. Glut, *supra* note 12, at 1205 (referencing Michael Zuckoff, *Free-Trade, Human Rights Clash Over GATT*, BOSTON GLOBE, Oct. 30, 1994, at 77).

40. International Labour Office, *Report of the Director-General: The End of Child Labour: Within Reach*, 95 ILO INT'L LABOUR CONF. REP. I(B) (2006) [hereinafter *The End of Child Labour*], available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-b.pdf>.

41. See *id.* at 6 tbl.1.1.

42. *Id.* at 18.

43. See Glut, *supra* note 12.

44. See *id.* at 1226 (listing various ILO Conventions).



ILO Convention No. 59, which had the same title.<sup>45</sup> ILO Convention No. 138, "Concerning the Minimum Age for Admission to Employment," introduced in 1973, incorporated provisions from its predecessors.<sup>46</sup> It requires that each party set a minimum age for employment not less than the age of completion of compulsory education, with an absolute minimum of fifteen years old.<sup>47</sup> The Convention, however, permits developing countries to limit the initial scope of the Convention and to lower the minimum working age to fourteen years if a need is shown.<sup>48</sup> It also permits children as young as thirteen years old to perform light work. In developing countries that may limit the scope of the Convention, children twelve to fourteen years old may perform such work.<sup>49</sup>

In 1999, the ILO issued Convention 182, "Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour."<sup>50</sup> This Convention prohibits child labor for which there is no economic justification due to the illegal and harmful nature of the labor. The Convention defines a child as a person under eighteen years of age.<sup>51</sup> "[T]he worst forms of child labour" that Convention 182 bans include slavery, bondage, compulsory recruitment of children in armed conflict, prostitution, pornography, the use of children in drug trafficking, and "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."<sup>52</sup> Article 5 requires state signatories to "establish or designate appropriate mechanisms to monitor" its implementation.<sup>53</sup> Article 6 requires signatories to "design and implement programmes of action to eliminate as a priority the worst forms of child labour."<sup>54</sup> In its attempt to eliminate child labor that injures the child, Convention 182 focuses on an area

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45. *See id.*

46. *See id.*

47. *See* ILO CONVENTION 138, art. 1.3, *reprinted in* APPAREL INDUSTRY, *supra* note 5, at 235–42.

48. *See* ILO CONVENTION 138, *supra* note 47 at art. 1.4, & art. 5.

49. *See id.* at art. 6.1–6.4.

50. *See* ILO CONVENTION 182, *available at* <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>.

51. *See id.* at art. 2.

52. *Id.* at art. 3.

53. *Id.* at art. 5.

54. *Id.* at art. 6. *See generally* ILO, *Declaration on Fundamental Principles and Rights at Work*, 86 INT'L LABOUR CONF. (identifying four core labor rights, including the elimination of child labor), *available at* [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATI ONTEXT](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATI ONTEXT).

of near universal consensus.

The effect of ILO conventions is limited in several respects. Some countries where child labor is widespread have not signed Convention 138.<sup>55</sup> Further, ILO conventions do not have much in the way of “teeth.”<sup>56</sup> Only once, in 2000, did the ILO invoke its enforcement mechanism, in that case against Burma for its continuous use of forced labor.<sup>57</sup> The ILO requested all multilateral agencies of the U.N. to refrain from providing further assistance to Burma, in effect promoting a world-wide boycott of the country.<sup>58</sup> The ultimate sanction that the ILO could take, that of expelling a country, is of little use because it would “negate any influence the ILO had over that country in the future.”<sup>59</sup>

The ILO has a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>60</sup> This code goes into great detail about workers’ rights, extending to issues such as job creation and investment in the local economy.<sup>61</sup> It also provides a more specific complaint procedure before a Standing Committee on Multinational Enterprises that can investigate and make specific findings.<sup>62</sup> It too, however, has no enforcement mechanism.<sup>63</sup> The bottom line is that the ILO has procedures to investigate situations of child labor, provide hearings, and make reports and recommendations, but it can do little more than discreetly advise or publicly embarrass a signatory. As Daniel Ehrenberg puts it, “[t]he ILO relies on moral persuasion, publicity, shame, diplomacy, and dialogue to ensure compliance by member states.”<sup>64</sup>

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55. See ILOLEX: DATABASE OF INTERNATIONAL LABOUR STANDARDS, available at <http://www.ilo.org/ilolex/english/newratframeE.htm>; Glut, *supra* note 12, at 1226 n.170.

56. Sarosh C. Kuruvilla & Anil Verma, *International Labor Standards, Soft Regulation, and National Government Roles*, CORNELL UNIVERSITY, ILR COLLECTION, ARTICLES AND CHAPTERS, 8 (2006), available at <http://digitalcommons.ilr.cornell.edu/articles/37>.

57. *Id.* at 9.

58. *Id.*

59. *Id.* at 8.

60. ILO, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (1977), in DUNCAN C. CAMPBELL & RICHARD L. ROWAN, MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES 254 (1983), cited by Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 671 (1995).

61. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 671.

62. *Id.*

63. *Id.*

64. Ehrenberg, *supra* note 21, at 388–89.

## B. THE CONVENTION ON THE RIGHTS OF THE CHILD

In 1989, the U.N. General Assembly unanimously adopted the Convention on the Rights of the Child.<sup>65</sup> Sections 32(2)(a), (b), and (c) of that document requires states to establish a minimum age for admission to employment, regulate the hours and conditions of employment, and provide penalties to enforce these provisions.<sup>66</sup> But like the ILO Conventions, the Convention on the Rights of the Child, while it provides for the monitoring and collection of information regarding the rights of children, lacks an enforcement mechanism. Of the 174 nations that have ratified the Convention, one-third have lodged reservations allowing them exemptions.<sup>67</sup> Some of these reservations, such as those of various Islamic countries indicating that the Convention will be interpreted in accordance with Islamic law and values, may be so basic as to undermine the object and purposes of the Convention.<sup>68</sup> Further, the Convention's use of the term "appropriate" to describe the regulations of hours and conditions of employment, its penalties for violations, and its failure to set standards for minimum age of employment are defects that render the document vague and unenforceable.<sup>69</sup> The United States did not sign the Convention

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65. Glut, *supra* note 12, at 1224; Susan O'Rourke von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 589 (1995). G.A. RES. 44/25, U.N. GAOR, 44th Sess. Supp. No. 49, U.S. Doc. A/44/49 (1989) [hereinafter Convention].

66. Convention, art. 32, *supra* note 65, states:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

Provide for a minimum age or minimum ages for admission to employment;

Provide for appropriate regulation of the hours and conditions of employment;

Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

67. O'Rourke von Struensee, *supra* note 65, at 590 n.3.

68. See Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 93-94 (1993) (citing *Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child*, Committee on the Rights of the Child, U.N. Doc. CRC/C/2/Rev.1 (1992), at 17).

69. See Maureen Moran, *Ending Exploitative Child Labor Practices*, 5 PACE

until 1993 and has never ratified it. For these reasons, the Convention does not appear to be a vital force for the diminishment of child labor.

### C. THE U.N. AND THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

In the early 1970s, the U.N. developed and promoted, but never adopted, a Code of Conduct for Transnational Corporations.<sup>70</sup> It was promoted by developing countries opposed to corporate interference in their national political affairs, such as ITT's involvement in the overthrow of Chilean President Salvador Allende.<sup>71</sup> The Code refers to human rights and workers' rights in a very general way.<sup>72</sup> Its influence waned as the liberalized global economy strengthened with the result that developing countries came to prize multinationals instead of regarding them with suspicion.<sup>73</sup>

In 1976, the Organization for Economic Cooperation and Development established Guidelines for Multinational Enterprises.<sup>74</sup> This Code recognizes the right of labor to organize and bargain collectively, and bans discrimination in employment.<sup>75</sup> It also provides a complaint procedure against companies.<sup>76</sup> Though there is no enforcement mechanism, labor and management have occasionally resolved their differences through the OECD.<sup>77</sup>

Lacking the ability to impose sanctions, the U.N. and OECD Codes do not add much to the ILO Conventions and the Convention on the Rights of the Child.<sup>78</sup> They do, however, present a conceptual difference from the ILO and U.N. Conventions that is notable in the light of globalization: these

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INT'L L. REV. 287, 291 (1993).

70. Development and International Economic Co-operation: Transnational Corporations, U.S. Economic and Social Commission, 2d Sess., Agenda Item 7(d), at U.N. Doc. E/1990/94 (1990), *cited in* Compa & Hinchliffe-Darricarrere, *supra* note 60, at 669.

71. Compa & Hinchliffe-Darricarrere, *supra* note 60, at 669–70.

72. *Id.* at 670.

73. *Id.*

74. OECD, DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (originally written in 1976, revised in 1979), in CAMPBELL & ROWAN, *supra* note 60, at 254, *cited in* Compa & Hinchliffe-Darricarrere, *supra* note 60, at 670.

75. CAMPBELL & ROWAN, *supra* note 60, at 258–65.

76. Compa & Hinchliffe-Darricarrere, *supra* note 60, at 671.

77. *Id.* See generally JOHN ROBINSON, MULTINATIONALS AND POLITICAL CONTROL (St. Martin's Press 1983).

78. See Compa & Hinchliffe-Darricarrere, *supra* note 60, at 669–71.

codes do not presume to create law for the states, but rather only attempt to provide guidance and regulation for MNCs.

#### D. THE WORLD TRADE ORGANIZATION

The General Agreement on Tariffs and Trade (GATT) became effective on January 1, 1948.<sup>79</sup> On January 1, 1995, as a result of the Uruguay Round of the Multilateral Trade Negotiations, GATT was succeeded by the World Trade Organization (WTO).<sup>80</sup> The purpose of GATT/WTO is to "liberalize international trade and place it on a secure basis, thereby contributing to the economic growth, development, and welfare of the world's people."<sup>81</sup> As of January 2007, one hundred and fifty governments were members of GATT/WTO.<sup>82</sup> Accounting for the overwhelming majority of world trade, members are obliged to negotiate the reduction of tariffs, eliminate non-tariff barriers, and refrain from discriminatory treatment.<sup>83</sup> Unfortunately, human rights groups have not been able to make recognition of workers' rights, such as prohibiting child labor, a condition for trade under the GATT/WTO agreement.<sup>84</sup> Developing countries have opposed such restrictions, arguing that the measures are protectionist and would hinder developing countries from competing with developed countries in the global market.<sup>85</sup> These countries also maintain that such measures would only punish children who are an important source of income for their families.<sup>86</sup> The treaty would, however, allow a country that did not wish to accept imports produced by child labor to make side treaties

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79. Ehrenberg, *supra* note 21, at 390 (citing generally THE GENERAL AGREEMENT ON TARIFFS AND TRADE, *opened for signature*, Oct. 30, 1947, 61 Stat. Pt. 5, at A3 U.N.T.S. 194).

80. Ehrenberg, *supra* note 21, at 390 (citing generally FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, AGREEMENT ESTABLISHING THE MULTILATERAL [WORLD] TRADE ORGANIZATION, GATT Doc. MTN/FA (Dec. 15, 1993), *reprinted in* 33 I.L.M. 13 [hereinafter FINAL ACT]).

81. Ehrenberg, *supra* note 21, at 391 (citing FINAL ACT).

82. World Trade Organization, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Sept. 21, 2007).

83. Ehrenberg, *supra* note 21, at 391.

84. Glut, *supra* note 12, at 1230.

85. Zuckoff, *supra* note 39, at 78.

86. From the perspective of many developing countries, the ILO, rather than the WTO, is the appropriate agency to pursue the implementation of labor standards. See Farkhanda Mansoor, *The WTO versus the ILO and the Case of Child Labor*, WEB JOURNAL OF CURRENT LEGAL ISSUES (2004), <http://webjcli.ncl.ac.uk/2004/dload2.html>; see also Anna Quindlen, *Public & Private; Out of the Hands of Babes*, N.Y. TIMES, Nov. 23, 1994, at A23.

concerning such imports.<sup>87</sup>

#### E. THE NORTH AMERICAN FREE TRADE AGREEMENT

The situation is similar to the North American Free Trade Agreement (NAFTA).<sup>88</sup> The purpose of this treaty is to eliminate trade barriers between Canada, Mexico, and the United States. Those who wanted to protect workers were unable to include recognition of workers' rights in the NAFTA agreement itself.<sup>89</sup> After the passage of NAFTA, however, the Clinton Administration negotiated side agreements guaranteeing that Mexico would adhere to these rights, including a limitation on child labor.<sup>90</sup> The side agreement with Mexico and Canada under NAFTA, the North American Agreement on Labor Cooperation (NAALC), provided a helpful precedent for the United States in seeking similar arrangements with foreign countries under GATT/WTO. But rather than impose uniform labor conditions among the members of NAFTA, NAALC only encourages members to enforce their own labor laws.<sup>91</sup> Opponents have criticized NAALC for its unwieldy complaint procedures and for its ineffective measures meant to improve the lot of Mexican workers.<sup>92</sup>

The United States has completed a number of other free trade agreements that include labor rights components, such as agreements with Chile, Singapore, Jordan, and Cambodia, but these have been criticized for weak enforcement provisions.<sup>93</sup> In any event, it remains difficult to persuade developing countries to enter into side agreements that establish the very same labor standards that they opposed in negotiating GATT/WTO.

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87. Glut, *supra* note 12, at 1230–31.

88. *Id.* at 1230 (citing the NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT, Pub. L. No. 103–182, 107 Stat. 2057 (1993) (codified in scattered sections of 19 U.S.C.)).

89. John Dillon, *Campaign Over NAFTA Comes Down to the Wire*, CHRISTIAN SCI. MONITOR, Nov. 16, 1993, at 1–2.

90. RONALD G. EHRENBERG, LABOR MARKETS AND INTEGRATING NATIONAL ECONOMICS 94 (1994).

91. Kuruvilla & Verma, *supra* note 56, at 12.

92. See Joshua Briones, *Paying the Price for NAFTA: NAFTA's Effect on Women and Children Laborers in Mexico*, 9 UCLA WOMEN'S L.J. 301, 321–22 (1999); see also Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 85–87 (1994).

93. See Don Wells, *"Best Practice" in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement*, 27 COMP. LAB. L. & POL'Y J. 357, 358–59 (2006).

## F. THE GENERALIZED SYSTEM OF PREFERENCES AND CHILD LABOR DETERRENCE ACT

The United States has a variety of generalized trade laws that condition trade with foreign countries upon some degree of regulation in child labor. These include the Generalized System of Preferences,<sup>94</sup> the Caribbean Basin Economic Recovery Act,<sup>95</sup> the Africa Growth and Opportunity Act,<sup>96</sup> and the Andean Trade Preferences Act.<sup>97</sup> The Overseas Private Investment Guarantee Agency<sup>98</sup> and the Multilateral Investment Guarantee Agency<sup>99</sup> promote investment and economic aid in countries, if they adopt policies that include the recognition of workers' rights, such as a minimum-age requirement for employment. The Trade Act of 1974 provides for retaliation against violations.<sup>100</sup> The U.S. Congress adopted ILO Convention 182 regarding the worst forms of child labor,<sup>101</sup> so a state that "has not implemented its commitments to eliminate the worst forms of child labor" is not eligible for trade benefits under the Generalized System of Preferences.<sup>102</sup>

From 1989 to 1995, U.S. Senator Tom Harkin introduced versions of a bill known as the Child Labor Deterrence Act.<sup>103</sup> The 1993 version would have required the Secretary of Labor to consult with organizations such as the ILO to determine which foreign countries make use of the labor of children under fifteen in their industries.<sup>104</sup> The Secretary was then to place the names of the violating countries and industries in the Federal Register<sup>105</sup> and impose a prohibition on the importation of any product from that foreign industry.<sup>106</sup> The difficulty with this bill and other unilateral measures that would prohibit imports produced by child labor is that they are likely to violate the

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94. 19 U.S.C. §§ 2461–2467 (2000).

95. 19 U.S.C. §§ 2701–2706 (2000).

96. 19 U.S.C. §§ 3701–3706 (2000).

97. 19 U.S.C. §§ 3201–3206 (2000).

98. 19 U.S.C. §§ 2192–2200 (2000).

99. 22 U.S.C. § 290k (2000).

100. 19 U.S.C. §§ 2101–2467 (2000).

101. 19 U.S.C. § 2467(6) (2000).

102. Junlin Ho, *The International Labour Organization's Role in Nationalizing the International Movement to Abolish Child Labor* 7 CHI. J. INT'L L. 337, 345–46 (2006) (construing 19 U.S.C. § 2462(b)(2)(H) (2000)).

103. Glut, *supra* note 12, at 1219. The 1993 version is found in 139 CONG. REC. S3179 (daily ed. Mar. 18, 1993). The 1995 version is in 141 CONG. REC. S5404 (daily ed. Apr. 6, 1995).

104. Child Labor Deterrence Act of 1993, S. 613, 103d Cong. § 4(a) (1993).

105. *Id.* § 4(e)(1).

106. *Id.* § 5(a)(1).

GATT Treaty, which provides that "no prohibitions or restrictions . . . whether made effective through quotas, import or export licenses, or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party. . . ." <sup>107</sup> Though the United States may adopt and enforce this legislation anyway, such unilateral measures would also invite trade retaliation from foreign countries. <sup>108</sup>

In regard to trade sanctions against foreign countries in which child labor is abused, the new GATT may present more difficulties than its predecessor. If a country violated the old GATT by such sanctions as a ban on imports produced by children, imposing a penalty on the violator required the unanimous consent of all parties. <sup>109</sup> The latest GATT, however, requires the unanimous consent of all parties not to impose such a penalty. <sup>110</sup> Under the old framework, the United States could avoid a penalty by objecting to it. <sup>111</sup> Under the Understanding on Rules and Procedures Governing the Settlement of Disputes of the new GATT, a dispute that resists negotiation would be submitted to a panel whose decision, if not appealed, is adopted unless the members decide by consensus not to adopt it. <sup>112</sup> This system virtually guarantees the adoption of panel decisions and renders the United States unable to block the adoption of a decision that would impose a penalty. <sup>113</sup>

In prohibiting the import of products manufactured in countries that tolerate exploitative child labor, the United States might well avail itself of several defenses. It could claim that the prohibition on child labor is *erga omnes* so that the prohibition takes precedence over GATT rules. <sup>114</sup> The United

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107. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187, art. XI, *quoted by* Glut, *supra* note 12, at 1219–20. *See id.* at 1231–33 for a more detailed discussion on how measures such as the Child Labor Deterrence Act are inconsistent with the General Agreement on Tariffs and Trade.

108. Glut, *supra* note 12, at 1218, 1220.

109. *Id.* at 1231.

110. *Id.*

111. *Id.* at 1232.

112. Dec. 15, 1993, 33 I.L.M. 112 (1994), Part II, Annex 2, ¶ 16.4 [hereinafter USD]; Glut, *supra* note 12, at 1232.

113. *Results of the Uruguay Round of Trade Negotiations: Hearings Before the Senate Comm. on Finance*, 103d Cong., 199 (1994) (statement of John H. Jackson, Professor of Law, University of Michigan Law School), *cited in* Glut, *supra* note 12, at 1232.

114. Glut, *supra* note 12, at 1233. *Erga omnes* rights are those which apply to all states. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)* 1970 I.C.J. 3, 32 (Feb. 5).



States may argue that the sanction against nations that permit child labor is a threat to human health and therefore qualifies as an exception under GATT, Art. 20.<sup>115</sup> But a country attempting to claim such an exception must deal with GATT panels that interpret this article as permitting only the least GATT-inconsistent measures possible.<sup>116</sup> Further, the Agreement on Technical Barriers to Trade counsels a country such as the United States to "take into account the special development, financial and trade needs of developing country Members" and ensure that its regulations "do not create unnecessary obstacles to exports from developing countries."<sup>117</sup> Finally, the United States, which has not ratified the Convention on the Rights of the Child, will appear hypocritical in maintaining that its only interest in imposing trade sanctions is to protect children.<sup>118</sup> This situation exposes the United States to the accusation that its real motives are protectionist.

#### G. THE EHRENBURG PROPOSAL

Daniel Ehrenberg suggests that the offices of the ILO and GATT/WTO be melded into an enforcement regime that would address the problem of child labor.<sup>119</sup> He argues that the use of child labor in violation of ILO standards "should be viewed as a state subsidy or 'social dumping' that give[s] states an unfair competitive advantage."<sup>120</sup> The exploitation of child labor, then, would be an unfair trade practice. To address complaints of labor violations such as exploitative child labor, Ehrenberg proposes a bifurcated process consisting of a determinative phase and a remedial phase. The determinative phase would begin with a detailed complaint filed by a member state of the ILO or GATT/WTO or a bona fide employer or worker organization from such a state. The complaint would then go to

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115. Glut, *supra* note 12, at 1233; see also Madeleine Grey Bullard, *Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 Hous. J. INT'L L. 139, 147-158 (2001) (examining the extent, causes, and effects of child labor).

116. Report of the Panel, *Thailand - Restrictions on Importation of and International Taxes on Cigarettes*, ¶ 74, DS10/R (Nov. 7, 1990), GATT B.I.S.D. (37th Supp.) at 223 (1991). See also Agreement on Technical Barriers to Trade, Dec. 13, 1993, art. 2, para. 2.2, cited in Glut, *supra* note 12, at 1234.

117. Glut, *supra* note 12, at 1234; Agreement on Technical Barriers to Trade, art. 12, ¶¶ 12.2-3.

118. Glut, *supra* note 12, at 1236.

119. Ehrenberg, *supra* note 21, at 404-08.

120. *Id.* at 379.

an Admissibility Panel, and then a Dispute Panel, which would issue a panel report that is then circulated to the parties. If adopted by an ILO-GATT/WTO panel charged with enforcement, the losing party could appeal to the International Court of Justice. The remedial phase is equally complex.<sup>121</sup> The procedure is limited to ILO or WTO member states whose workers would somehow have access to the means of making such complaints.<sup>122</sup>

The WTO conference, which was held during December 1996, in Singapore, rendered the implementation of such a scheme unlikely. Though the conference participants issued a final declaration that referred to the "observance of internationally recognized core labor standards," the declaration pointedly identified the ILO as the "competent body to set and deal with these standards."<sup>123</sup> The Doha Conference of 2001, responding to the objection of developing countries, similarly reaffirmed the declaration made at Singapore.<sup>124</sup> The enforcement mechanisms of the WTO, then, would not be placed in the service of forging a link between free trade and labor standards. Instead, the Declaration explicitly endorsed the rationale under which developing countries oppose this linkage. "We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."<sup>125</sup>

#### H. CHILD LABOR AS *JUS COGENS*

In the presence of international conventions and widespread domestic laws that prohibit child labor, the distinctly supine posture of the world community in regard to this issue is somewhat surprising. Article 38 of the Statute of the International Court of Justice recognizes three primary sources of international law: international conventions, international custom, and the principles of civilized nations.<sup>126</sup>

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121. *Id.* at 408–14.

122. Ryan P. Toftoy, Note, *Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?* 15 ARIZ. J. INT'L & COMP. L. 905, 927 (1998).

123. Holley, *supra* note 12, at D1. The quotation is taken from the Singapore Ministerial Declaration of 18 December 1996, World Trade Organization, WT/MIN(96)/DEC, 36 I.L.M. 218, ¶ 4 (1997) [hereinafter Singapore Declaration], available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm).

124. Mansoor, *supra* note 86, at 3.

125. Singapore Declaration, *supra* note 123, ¶ 4.

126. Statute of the International Court of Justice, art. 38(1)(a)–(c), reprinted in ANTHONY D'AMATO, INTERNATIONAL LAW COURSEBOOK 307 (Anderson Publishing

In regard to principles of civilized nations, virtually all countries in the world have domestic laws that place limits on child labor.<sup>127</sup> Though these domestic prohibitions are often unenforced,<sup>128</sup> they nonetheless provide evidence for the existence of a general principle of law among nations. In regard to conventions, more than one hundred and ninety-three states have ratified the Convention on the Rights of the Child, which, among other things, requires that signatories adopt and enforce regulations limiting child labor.<sup>129</sup> Finally, to establish the existence of a rule of customary international law, it is necessary to show general and consistent state practice and state belief, or *opinio juris*, that compliance with the rule is a legal obligation.<sup>130</sup> General practice is evident from the limitations on child labor that virtually all nations have in their domestic law. And *opinio juris* might be argued from the agreement of parties to the Child's Rights Convention to comply with its informational and monitoring requirements, an indication that these states consider the limitations of the treaty a matter of international as well as domestic law.<sup>131</sup> All of this evidence, once assembled, should be sufficient to support an argument that the rule against exploitative child labor is *jus cogens*, or is approaching such status.<sup>132</sup> At this time, however, no international court has held that child labor is a matter of international law.<sup>133</sup>

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Co. 1994).

127. See Convention, *supra* note 65, for a list of countries that have ratified the Convention.

128. Glut, *supra* note 12, at 1215, 1222–23.

129. See Convention, *supra* note 65; for a list of countries that have ratified the Convention, see Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child, Status of Ratification [hereinafter Status of Ratification], <http://ohchr.org/english/bodies/ratification/11.htm> (last visited Oct. 27, 2007).

130. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7–11 (Oxford Univ. Press 4th ed. 1990). See Glut, *supra* note 12, at 1214–17, for a discussion on *opinio juris*.

131. Article 43 of the Convention establishes a Committee on the Rights of the Child. Under Article 44, parties must periodically report to the Committee: "States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights." See Cohen, *supra* note 68, at 35–38, for a case study of the reporting and monitoring procedures of the Convention on the Rights of the Child.

132. Cohen, *supra* note 68, at 93 ("Even though one might be tempted to assert that, because of its near universal acceptance as a legal norm, the right of the child to respect for his or her human dignity is now approaching a status of *jus cogens*, the theory of the rights of the child continues to be in a state of evolution.").

133. Glut, *supra* note 12, at 1215.

### III. OBSTACLES TO INTERNATIONAL REGULATION

#### A. POVERTY AND THE CHILD

A variety of factors conspires to make the formulation and application of international standards in child labor difficult. Perhaps the most significant of these is the degree of poverty that generates child labor. Poverty provides a potent argument against the application of uniform standards for all situations. There are times when children work in order to eat.<sup>134</sup> Sometimes, children work in order to afford their attendance at school.<sup>135</sup> In some cases, schooling may not be available, or the available education is so substandard that it is useless as a preparation for adult occupation.<sup>136</sup> Under these circumstances, parents and their children often make a calculated decision that the children are better off working.<sup>137</sup> The sweatshop job may in fact be highly desirable in comparison to the alternatives.<sup>138</sup>

In this situation, implementing standards that will throw children out of work is counterproductive and resented. For example, in 1993 an estimated 55,000 children in Bangladesh lost their jobs because the Bangladesh Garment Manufacturers

134. Nicole J. Krug, Note, *Exploiting Child Labor: Corporate Responsibility and the Role of Corporate Codes of Conduct*, 14 N.Y.L. SCH. J. HUM. RTS. 651, 654 (1998) (citing Nomi Morris & Suzanne Goldenberg, *Kids at Work: Child Labor is on the Rise as Countries Rush into the Global Economy*, MACLEAN'S, Dec. 11, 1995, at 29).

135. Ben White, *Globalization and the Child Labor Problem*, 8 J. INT'L DEV. 829, 832 (1996).

136. *Id.*

137. PATRICK MACKLEM & MICHAEL TREBILCOCK, FED. LAB. STANDARDS REV., NEW LABOUR STANDARDS COMPLIANCE STRATEGIES: CORPORATE CODES OF CONDUCT AND SOCIAL LABELING PROGRAMS, 27-28 (2006) ("[A] blanket ban on the use of child labour in certain developing economies, without accompanying offsetting measures, might reduce the livelihood of the most vulnerable families who depend on their child's income."); Jaffe & Weiss, *supra* note 16, at 895 ("[p]utting children to work should be construed as a rational household decision given the available alternatives and should therefore be excluded from the realm of normative or ethical judgments." (quoting Robert Crawford, *Soccer Balls Made for Children by Children? Child Labor in Pakistan*, INSEAD 5, available at [www.hec.unil.ch/ocadot/CASES/soccer\\_case.doc](http://www.hec.unil.ch/ocadot/CASES/soccer_case.doc))).

138. White, *supra* note 135, at 832:

Although we read in the media mainly about children working under conditions approaching slavery in workshops and factories producing for export markets, the most common form of children's work, worldwide, is not in the 'commercial' sector at all, but the unpaid labour of children working for their parents, whether in housework, the family farm or some other family enterprise. This form of child labour is scarcely touched by international or national child labour regulations, but it is often to *escape* this form of unpaid work that children enter the labour 'market'.

and Exporters Association feared an international boycott of their products, if its membership did not conform to Bangladeshi law prohibiting the employment of children under fifteen.<sup>139</sup> An ILO-UNICEF follow-up study showed that few of these children went back to school. Some of them turned to even less remunerative and harder work in the domestic sector.<sup>140</sup> Others never found work.<sup>141</sup> The terminations elicited a petition from one hundred of the very children they were meant to protect, asking their employers not to dismiss them, but "to allow us to continue our light work for 5-6 hours a day and give us an opportunity to attend school for two to three hours a day."<sup>142</sup>

## B. CHEAP LABOR AND PROTECTIONISM

As the WTO controversy above indicates, developing countries argue that they cannot compete against the developed countries on the world market unless they take advantage of cheap labor. Since the developing countries are in the best position to assess their economic circumstances, the argument goes, it should be up to them, and not to their wealthier competitors, to decide what standards to apply.<sup>143</sup>

These economic considerations shade into the political differences between developed and developing countries. Among developing countries, it is common to regard the solicitude of developed countries for children as a form of hypocrisy that masks self-interested protectionism.<sup>144</sup> The imposition of labor

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139. *Id.* at 833; APPAREL INDUSTRY, *supra* note 5, at 7.

140. White, *supra* note 135, at 833.

141. *Id.*

142. *Id.*

143. Holley, *supra* note 12, at D1 ("Developing countries fear that rich countries' expressions of concern for the welfare of oppressed workers in the poorer nations are actually no such thing, but rather are disguised attempts at throwing up trade barriers against products from such nations.").

144. Mansoor, *supra* note 86, at 506, argues that protectionist motives for banning child labor are ill-conceived, that it is hypocritical for countries such as the United States to sanction developing countries for child labor when the United States itself has not completely eradicated child labor, and that such sanctions are often arbitrarily imposed. See Gwynne Dyer, Editorial, SEATTLE POST-INTELLIGENCER, Dec. 12, 1996, at A11:

Any attempt by the WTO to overstep the legitimate boundaries of trade and invade the domestic production system is bound to create serious problems,' said India's commerce minister, B.B. Ramaiah, denouncing core labor standards as merely the mask for a plan to undermine the competitive advantages that developing countries enjoy because their labor is cheaper.

standards in developing countries would raise the price of their exports, diminish their competitiveness, and thereby subsidize the high wages of the developed nations.<sup>145</sup> Whereas the industrial nations historically made ample use of child labor in building up their economies to the point where they could afford restrictions on child labor, the imposition of such laws on countries that have not yet reached that stage of development would condemn them to forever remain economically disadvantaged.<sup>146</sup>

### C. CULTURAL DIFFERENCES: PARENTAL RIGHTS

Social and cultural differences also divide countries in their attitudes towards child labor. What is a child? "[N]o universal definition of a child exists; in some nations, childhood ends at age thirteen, while in others it continues through the age of fifteen."<sup>147</sup> In many societies, the child is thought of as a resource who owes a duty of obedience to his or her parents and has an obligation to help the family financially.<sup>148</sup> In virtually

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145. MACKLEM & TREBILCOCK, *supra* note 137, at 10 ("Business leaders who voice commitments to good corporate citizenship rarely demand the removal of domestic barriers to competition in their own industries."); Devinder Sharma, *Labour Standards or Double Standards*, BUSINESS LINE (THE HINDU), March 17, 1997, at 16, is typical, "[C]ommerce rather than altruism seems to be behind the international concern for the plight of unorganised labour."

146. Glut, *supra* note 12, at 1208:

[p]roponents of this view [that child labor is necessary for a developing country to survive in the global market] argue that developed countries such as the United States have, at some time in the past, made use of child labor. Because developing countries cannot keep pace with more developed countries in areas such as technology, employing cheap labor—including that performed by children—is the only way those countries can remain competitive.

See also Mansoor, *supra* note 86, at 6. A similar point might be made about international regulations on the environment. See ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA 135 (Cornell Univ. Press 1992):

[w]ealthy countries have long had the luxury of affluence by engaging in activities that now appear to be the main causes of environmental damage. They were able to achieve relatively high standards of living without having to internalize the costs of environmental harm in any way. Today's poorer countries bent on moving into the mainstream of the global economy can often ill afford the costs that regulation would add to their attempts to industrialize.

147. Glut, *supra* note 12, at 1216.

148. *Id.* at 1209:

many societies view child labor as a way of life. Such societies believe that a child will develop a skill by working at a young age, and that this skill will lead to learning a trade that will support the child throughout life. In Africa, people look upon child labor as a form of education that initiates the

all societies, there is likely to be some degree of resistance to the intrusion of the state, let alone the international community, in matters affecting the family.

The idea of creating universal rights for children also presents the possibility of a conflict with parental rights. As it happens, parental rights are not as much of a preoccupation with developing countries as they are with the United States. When Hillary Rodham Clinton announced that the United States would sign the United Nations Convention on the Rights of the Child, social conservatives argued that enforcement of the Convention would intrude upon the parent-child relationship and weaken the authority of parents.<sup>149</sup> The American objection maintains its force under the Bush administration to this day. As a result, the United States is the only country in the world, aside from Somalia, yet to have ratified the Convention.<sup>150</sup>

Perhaps it would not be an exaggeration to say that there is an element of sovereignty within the family concerning the upbringing and treatment of children, and states are limited in their ability to intrude on this sovereignty because of almost universally recognized parental rights concerning the upbringing of children. To the extent that international law seeks to protect the rights of children, international law must not only contend with an intrusion upon state sovereignty, but with an intrusion upon the parental sovereignty, which many states have preferred to leave intact. Though states have

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child into a path of communal life and work, a path that African society values highly. Many Asian societies believe that 'children should work to develop a sense of responsibility and develop a career, rather than become street urchins and beggars . . . . ' Likewise, Pakistani parents push their children into work at a young age to avoid vagrancy. Throughout India, children's participation in work is entirely consistent with the indigenous cultural tradition, because work has always been an important socializing device. Regardless of whether or not these beliefs are sound, they remain prevalent among certain societies.

See also FYFE, *supra* note 3, at 2-6, 16 ("At the first UN Seminar on Child Labour, delegates from developing countries stressed that this type of work expressed family solidarity and therefore was not subject to exploitative relationships.").

149. See John F. Harris, *U.S. to Sign U.N. Pact on Child Rights*, WASH. POST, Feb. 11, 1995, at A3 (stating that the decision to sign the Convention will provoke "a possible ratification battle in the Senate with conservatives") *cited in* Martha Minnow, *What Ever Happened to Children's Rights?* 80 MINN. L. REV. 267, 267 n.2 (1995).

150. See Status of Ratification, *supra* note 129; see also Mary Jo Anderson, *Bush Team Signals New U.N. Direction: Decries 'Erosion of Parental Authority' in Internationalization of Family Policy*, WORLDNETDAILY, Feb. 2, 2001, available at [http://wnd.com/news/article.asp?ARTICLE\\_ID=21590](http://wnd.com/news/article.asp?ARTICLE_ID=21590); see also Jaya Dayal, *U.S. Children, U.N. Convention Gets U.S. Support*, INT'L PRESS SERV., Feb. 16, 1995, *cited in* Minnow, *supra* note 149, at 267 n.2.

allowed international law to intrude upon their sovereignty in the area of human rights,<sup>151</sup> it is not at all clear that states will allow international law to influence parental prerogatives as well.

#### D. THE RIGHTS OF THE CHILD

These cultural differences aside, the very concept of "children's rights" is fraught with difficulty. Children, as opposed to adults, may be entitled to "developmental" rights, such as the right to education, play, and leisure in order to develop to their full potential.<sup>152</sup> To implement these rights, one may speak of the right of children to be free from abusive labor exploitation. But this is not a classical political right, like freedom of speech, of the press, or of worship. Nor is it exactly an economic right, like the right to work, or the right to a decent wage. The right of children to be free from exploitation is actually the right to be prohibited from working even if the child wants to work, and the right to be required to go to school even if the child does not want to go to school.

"Developmental rights" are peculiar in that possessing such rights implies limitations rather than freedom. Such rights have the effect of subordinating children to adults in a way that no adult is subordinated, except for the slave. The comparison between the legal and social situation of slaves and exploited children is provocative. Like slaves, children usually have little choice about working. Just as slaves are under the legal protection and control of their slave master, children are under the legal protection and control of their parents, families, or guardians. Children generally have a reduced bundle of civil rights. In *New Jersey v. T.L.O.*, for instance, the Supreme Court found that schools did not need probable cause, but only a reasonable suspicion, in order to search students.<sup>153</sup> In *Bethel School District v. Fraser*, the Court found that schools may censor the speech of students in order to maintain school decorum.<sup>154</sup> In the context of educating the child, such a

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151. Rudolf Bernhardt, *Domestic Jurisdiction of States and International Human Rights Organs*, 7 HUM. RTS. L.J. 205 (1986-87) traces the expansion of international law to include human rights in spite of state sovereignty. *Id.* at 206. ("The protection of human rights is no longer exclusively within the domestic jurisdiction of States."). See also Felix Ermacora, *Human Rights and Domestic Jurisdiction (Article 2, § 7, of the Charter)*, 124 RECUEIL DES COURS 371, 431 (1968).

152. Minnow, *supra* note 149, at 296.

153. 469 U.S. 325 (1985).

154. 478 U.S. 675 (1986).



diminution in a child's rights may be in the best interests of the child. But in a context that exploits child labor, a reduction in rights only makes it easier to treat the child as a slave.

Children are generally considered incompetent to advocate for their own rights. In this regard, children must be distinguished from racial or ethnic minorities, and from women, the disabled, homosexuals, and any other group of competent adults whose rights have been subject to abuse. All of these groups consist of adults who, as mature human beings, can advocate for their respective rights. The past century has witnessed a strong awareness of the injustice of racial discrimination.<sup>155</sup> That has led to greater civil rights for racial and ethnic minorities in many countries on the domestic level and decolonization on the international level. The black African nations and minorities were in a position to focus and galvanize worldwide opposition to the persistent racial discrimination of South Africa by advocating the application of boycotts, embargoes, and protests. Even minorities who do not have their own nations, like the Palestinians and the Kurds, can still provide advocates that will plead their causes in various national and international fora.

Women, of course, do not have a separate nation, but their growing participation in the political, economic, and social activities of various nations has led to progress in recognizing the rights of women and their particular social, economic, and health concerns. Though women's rights may to some extent overlap with the rights of the children they care for, the two are not equivalent. Mothers can exploit children as well as fathers.<sup>156</sup> An increasing ability to participate and advocate is available for the disabled, homosexuals, and other groups of competent adults.<sup>157</sup>

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155. Ermacora, *supra* note 151, at 427, points out, "It must not be overlooked that the [U.N.] Charter contains at least one specific provision concerning the protection of human rights, apart from the provisions concerning self-determination. This provision is the prohibition of discrimination." Ermacora goes on to demonstrate how this one area of human rights trumped the claims of state sovereignty advanced by South Africa. *Id.* at 434.

156. Consider Minnow's discussion, *supra* note 149, at 284–86, on the failure of the feminist movement to fight sufficiently hard enough for children's rights.

157. The gay rights movement became international in scope during the second half of the twentieth century with the establishment of organizations such as the International Lesbian and Gay Association. See <http://www.ilga.org/>. There has been a similar international establishment of organizations for disabled persons such as International Disability Alliance. See <http://www.internationaldisabilityalliance.org/>. On March 30, 2007, the United Nations opened the Convention on the Rights of Persons with Disabilities for signature. See <http://www.un.org/disabilities/>.

The very notion of a child advocating for the rights of children will strike many in positions of power as risible simply due to the immaturity and lack of experience of children. In 1996, the television program 60 Minutes broadcasted a feature about a twelve-year-old Canadian boy, Craig Kielburger, who founded a group known as Free the Children and traveled to several countries to investigate child labor.<sup>158</sup> Having collected thousands of signatures calling for an import ban on products made with child labor, Kielburger held several news conferences in which he requested a meeting to discuss the subject with the Canadian Prime Minister, Jean Chretien.<sup>159</sup> The Prime Minister ignored Kielburger until newspapers picked up the story.<sup>160</sup>

Disregard is one way in which a child activist may be treated. But there are other ways. Kielburger started his activism after hearing the tragic story of Iqbal Masih, another twelve-year-old crusader against child labor in Pakistan, who was shot to death as he rode his bicycle.<sup>161</sup>

Children, then, are largely dependent on adults to advocate for their rights. In this respect, their situation is potentially little better than that of slaves whose treatment and well-being depend on the humanitarian character of their masters. It is unsurprising that in the absence of enforceable standards upholding the dignity of the child, predators exploit children for sex,<sup>162</sup> and homeless children die in the streets like stray dogs

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There are also many organizations that advocate for children such as UNICEF. See <http://www.unicef.org/>. But, children must depend on adults to administer these organizations and to advocate and develop policy. Although organizations for gay and disabled persons may be open to anyone, gay and disabled persons are not subject to a similar dependency. There are, however, some developments in empowering children in the labor context. See *The End of Child Labor*, *supra* note 40, at 35, 41, & 73.

158. Clint O'Connor, *Teen Activist Makes World Heed His Cause*, CLEVELAND PLAIN DEALER, NOV. 15, 1997, available at 1997 WLNR 6375811; Mike McDaniel, '60 Minutes' to Focus on Young Crusader from Canada, HOUSTON CHRON., Apr. 20, 1996, at 3.

159. *Teen Activist*, *supra* note 158; Michele Landsberg, *Boy, 12, Takes OFL by Storm with Child Labor Plea*, TORONTO STAR, Nov. 26, 1995, at A1.

160. *Teen Activist*, *supra* note 158.

161. *Death of a Young Crusader; Boy Who Fought Exploiters of Child Labor in Pakistan Is Slain*, DALLAS MORNING NEWS, Apr., 19, 1995, at 1A. Members of the carpet industry had made many threats against Masih for his activities which had led to the closure of dozens of carpet-weaving factories. *Id.* The murderers were never found. See *id.* Ehsan Ullah Khan, the chairman of the Bonded Labor Liberation Front, believes that Masih's death was a conspiracy of the carpet manufacturers. *Id.* But no evidence has ever been found to support these claims. See *id.*

162. U.N. Child. Fund [UNICEF], *The Progress of Nations: The Nations of the World Ranked According to Their Achievements in Child Health, Nutrition,*

and cats.<sup>163</sup> These phenomena are interrelated. In the presence of the lesser abuse of exploitation, the others are likely to become more common. The powerlessness of children to advocate for themselves forms the greatest obstacle to achieving progress in children's rights.

#### IV. HISTORICAL BACKGROUND TO CORPORATE CODES OF CONDUCT

##### A. THE AMERICAN NORTH VS. SOUTH

It is, of course, a treacherous enterprise to seek a solution to modern problems through historical analogies. It may be equally treacherous, however, to ignore history altogether. Consider the following quotation: "We cannot possibly gravitate from a condition of agriculturalism to a condition of industrialism without the employment of minors."<sup>164</sup> This statement was not made in recent times by an official from a developing country. It is taken instead from the testimony of Lewis Parker, a South Carolina cotton mill owner, before the House of Representatives Committee on Labor in 1914, on legislation that would outlaw the use of child labor in the United States.<sup>165</sup>

Even today, stories surface in the United States about child labor among migrant workers, in the garment industry, retail, and construction.<sup>166</sup> At the turn of the twentieth century, the

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Education, Family Planning, and Progress for Women, 1994, 36-39, (1994) (Peter Adamson, ed.) (providing data on child sexual exploitation in various countries); O'Rourke von Struensee, *supra* note 65, at 613 n.168 (citing an interview with Marcus Halevi, a UNICEF photojournalist). Describing the child sex business in Thailand, Halevi relates how recruiters sell children to hundreds of brothels in Thailand. The girls work from 9:00 AM to 1:00 AM and serve as many as fifteen customers during that time. Chiang Rai is a northern city that serves as a central dispatch point for girls from the surrounding villages. In the railroad yard recruiters buy, trade, and barter children. Sex tours are arranged out of Munich. There is also a Japanese owned and operated sex tour hotel in Bangkok.

163. O'Rourke von Struensee, *supra* note 65, at 617 n.190 (citing Anthony Swift, UNICEF INT'L CHILD DEV. CTR., BRAZIL: THE FIGHT FOR CHILDHOOD IN THE CITY (1991)); *The Murder of Street Children in Rio De Janeiro*, 9 INT'L CHILDREN'S RTS. MONITOR (1993) (recounting the death of 306 street children by authorities).

164. Quoted in Weissman, *supra* note 3, at 1.

165. *Child Labor Bill: Hearing on H.R. 12292 Before the H. Comm. on Labor*, 63d Cong. 95 (1914) (statement of Lewis W. Parker, cotton manufacturer, Greenville, South Carolina).

166. FYFE, *supra* note 3, at 62-67; MILTON MELTZER, CHEAP RAW MATERIAL 85-119 (Viking 1994); Glut, *supra* note 12, at 1205.

exploitation of child labor in parts of the United States was comparable in its extremity to situations that exist in parts of the developing world today.<sup>167</sup> Congress attempted to control child labor by passing the Child Labor Act in 1916.<sup>168</sup> The act would have banned interstate commerce of products from mines and quarries in which children under the age of sixteen worked, or products from other factories in which children under fourteen worked, or in which children between fourteen and sixteen worked for more than eight hours a day.<sup>169</sup> In 1918, however, the United States Supreme Court held, in *Hammer v. Dagenhart*, that Congress had no power under the Constitution to regulate child labor.<sup>170</sup>

Congress thought the issue so important that in 1924 it passed a constitutional amendment, the Child Labor Amendment, which provided, "The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age."<sup>171</sup> The Amendment never received the endorsement of three-quarters of the states.<sup>172</sup> In 1938, however, the U.S. Congress successfully legislated against child labor by passing the Fair Labor Standards Act,<sup>173</sup> which the Supreme Court upheld under the power of the interstate commerce clause in *United States v. Darby*, in effect overturning *Hammer*.<sup>174</sup>

The difficulty of passing a federal child labor law in the United States anticipated to some extent the difficulties of establishing and enforcing such a regulation at the international level. Following Reconstruction, the states of the American South were far less industrialized than those of the North. Recovering from a slave-dependent economy, the sudden abolition of that economy, and the effects of the Civil War, the South desperately needed to industrialize in order to compete with the North. Child labor provided a cheap means to that

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167. EDWIN MARKHAM ET AL., CHILDREN IN BONDAGE (1914) (containing numerous such accounts of child labor abuses in the United States in the early twentieth century), cited in Glut, *supra* note 12, at 1205; FYFE, *supra* note 3, at 28–33, 57–62.

168. Child Labor Act of 1916, Pub. L. No. 249, 39 Stat. 675 (1916).

169. *Hammer v. Dagenhart*, 247 U.S. 251, 268 n.1 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941) (quoting the relevant passage of the statute).

170. *Id.*

171. V. Nathaniel Ang, *Teenage Employment Emancipation and the Law*, 9 U. PA. J. LAB. & EMP. L. 389, 402 (2007).

172. *Id.*

173. 29 U.S.C. § 212 (2000).

174. *Darby*, 312 U.S. 100.

end. Whereas the wealthier states in the North could afford to prohibit child labor, the poorer states of the South claimed they could not.<sup>175</sup> On the other hand, if child labor could continue in some states, and not others, then those states that tolerated child labor would have an economic advantage over those that did not, a situation that would inhibit child labor reform in the wealthy as well as the poor states, resulting eventually in the economic race to the bottom.<sup>176</sup>

The frustration of changing this status quo is evident from the attempts Congress made to pass a statute and then an amendment on child labor. It was during this period, when regulatory law that could provide a national solution to the child labor problem was not forthcoming, that precursors to the modern corporate codes of conduct appeared.<sup>177</sup> As Macklem and Trebilcock point out, such codes are not new.<sup>178</sup> In 1899, "various apparel companies in the United States agreed to

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175. For an account of the economic conditions in the American South that contributed to the exploitation of child labor, see STEPHEN B. WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW* 6-10 (Univ. of Chicago Press 1968).

The Civil War, which had accelerated northern industrial expansion, left the south virtually in ruins, and the region sought to restore its prosperity[—]its very life[—]by establishing a viable system of agriculture that 'integrated' white labor and colored freedman, and by turning[—]where its capital resources were sufficient or northern financing was available[—]to manufacturing.

176. *Id.* at 25:

[n]ot only was there great variation in legislation, but some states[—]especially those of the southern piedmont area[—]lagged far behind the general level of regulation. The economic and competitive advantages supposedly (and often actually) enjoyed by backward states tended to retard reform efforts in almost every state in which manufacturing was of any importance.

177. U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, *BY THE SWEAT AND TOIL OF CHILDREN*, VOL. IV: CONSUMER LABELS AND CHILD LABOR 4-9 (1997), available at <http://www.dol.gov/ILAB/media/reports/iclp/sweat4/welcome.html>, (providing a brief history of labeling programs which originated in the U.S. during the late nineteenth century, long before national legislation prohibiting child labor took effect). In a labeling program, a labor advocacy organization persuades a manufacturer to agree to maintain labor standards in return for the right to attach the organization's label to the manufacturer's products. See MACKLEM & TREBILCOCK, *supra* note 137 at 4-5, 20-21. The label is a guarantee to the consumer that the products were ethically manufactured. In effect, the manufacturer voluntarily adopts the standards or code of the labeling program. In 1898, the National Consumers League persuaded seventeen clothing manufacturers to adopt its labor standards to qualify for the "White Label." 4 SWEAT AND TOIL, *supra* note 177 at 7-8. Among other things, these standards prohibited the employment of children under fourteen years of age. *Id.*

178. MACKLEM & TREBILCOCK, *supra* note 137, at 13.

comply with safe labour conditions and be inspected by the National Consumers League (NCL), entitling them to advertise the NCL's 'White Label' on their garments."<sup>179</sup> Even before the NCL, the New York City League developed a "white list" that informed consumers about conditions in retail stores.<sup>180</sup> In the absence of federal law to regulate child labor, these efforts relied upon consumer activism to pressure manufacturers not to exploit child labor. These measures were also likely to generate debate and eventually build a consensus on the need to reform until such time as the government found a way to address child labor. This national process to regulate child labor may hold lessons as codes of conduct emerge as a means of reducing child labor today at the international level.<sup>181</sup>

## B. PAST MODEL CODES

There have been several modern attempts to regulate labor through codes of conduct. These include the following.

### 1. *The Sullivan Principles for South Africa*

In 1971, the Reverend Leon Sullivan, a Philadelphia clergyman and member of the board of General Motors, developed a set of principles as a guide for corporations that did business under the apartheid regime in South Africa.<sup>182</sup> Sullivan had consulted with religious and labor leaders in South Africa who believed that constructive engagement with foreign investors was preferable to disinvestment.<sup>183</sup> Constructive engagement, Sullivan thought, would raise the quality of life for black South Africans, help them to obtain education, and

179. *Id.* at 13 n.28 (citing 4 SWEAT AND TOIL, *supra* note 177).

180. *Id.*

181. For an example of this type of analysis, see Michele D'Avolio, *Child Labor and Cultural Relativism: From 19th Century America to 21st Century Nepal*, 16 PACE INT'L L. REV. 109 (2004).

182. Compá & Hinchliffe-Derricarrere, *supra* note 60, at 666–67; Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?* 19 FORDHAM INT'L L.J. 1963, 1970–71 (1996); Jorge F. Perez-Lopez, *Promoting International Respect for Worker Rights Through Business Codes of Conduct*, 17 FORDHAM INT'L L.J. 1, 5–9 (1993) (citing Reverend Leon H. Sullivan, *Sullivan Principles for U.S. Corporations Operating in South Africa*, reprinted in 24 I.L.M. 1496 (1985)).

183. Perez-Lopez, *supra* note 182, at 6 (citing Reverend Leon Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 LAW & POL'Y INT'L BUS. 427, 427–28 (1983)); Leon H. Sullivan, *The Sullivan Principles and Change in South Africa*, AFRICA REPORT 48 (May–June 1984); Leon H. Sullivan, *The Sullivan Principles and Change in South Africa*, in BUSINESS IN THE CONTEMPORARY WORLD 175 (Herbert L. Sawyer ed., 1988).

eventually overcome the barriers of apartheid, while disinvestment would only put South Africans, especially non-white South Africans, out of work. Twelve U.S. firms, including General Motors, immediately adopted the Sullivan Principles, and by 1986, approximately 200 of the 260 U.S. corporations doing business in South Africa had adopted them.<sup>184</sup> The Sullivan Principles included commitments to racially non-discriminatory employment, wages, access to management programs, supportive services, affirmative action, and the use of corporate influence to end apartheid.<sup>185</sup> Each Sullivan firm's performance was to be monitored by an independent accounting firm, Arthur D. Little.<sup>186</sup> By 1987, however, the Reverend Sullivan himself declared his Principles a failure, largely due to the intransigence of the South African government on the question of apartheid.<sup>187</sup> Apartheid eventually fell not because of the Sullivan Principles, but rather because of corporate disinvestment and international sanctions against South Africa.

In spite of Sullivan's ultimate rejection of his Principles, there is evidence that they did some good. The Sullivan Principles resulted in the desegregation of hundreds of enterprises, education, and job training for approximately 50,000 workers a year, and significant investment in the infrastructure of black and desegregated education in South Africa.<sup>188</sup> The Principles increased the number of non-white managers, placed them in positions supervising whites, inspired other countries to establish similar codes for their corporations operating in South Africa, and promoted the growth of black trade unions.<sup>189</sup> A study also showed that the Sullivan companies as a group out-performed the Dow Jones Industrial Average in average return on equity from 1977 to 1983.<sup>190</sup>

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184. Cassel, *supra* note 182, at 1970 (citing Patricia Arnold and Theresa Hammond, *The Role of Accounting in Ideological Conflict: Lessons from the South African Divestment Movement*, 19 ACCT., ORGS., AND SOC. 111, 116 (1994)).

185. Perez-Lopez, *supra* note 182, at 6–9.

186. Arnold & Hammond, *supra* note 184, at 114.

187. *Id.* at 118.

188. Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: the Limits and Possibilities of Promoting International Labor Rights through Private Initiatives*, 30 LAW & POLY INT'L BUS. 111, 123 (1998) (quoting Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 175 (1997)).

189. Liubicic, *supra* note 188, at 123–24 (citing Perez-Lopez, *supra* note 182, at 43).

190. JILL MURRAY, INTERNATIONAL LABOR ORGANIZATION, BUREAU FOR WORKERS' ACTIVITIES, CORPORATE CODES OF CONDUCT AND LABOUR STANDARDS 26 (1998), <http://www.ilo.it/actrav/actrav-english/telearn/global/ilo/guide/jill.htm>.

Hence, investing in the ethically sound Sullivan companies was also financially sound. Perhaps the most important effect of the Sullivan Principles was the demonstration that such ethical schemes were possible and worthwhile.<sup>191</sup>

## 2. *The MacBride Principles in Northern Ireland*

During the troubles of Northern Ireland in the mid-1980's, the Irish statesman Sean MacBride developed the MacBride Principles to ensure that U.S. companies would provide equal treatment to Catholic workers in Protestant-dominated Northern Ireland. Here there was no interest in disinvestment.<sup>192</sup> These principles included commitments of non-discrimination, affirmative action, and protection of the workers both at the workplace and while traveling to and from work.<sup>193</sup> Though opponents claimed the Principles' restrictions and vague standards discouraged investment, in 1998, the U.S. Congress amended the Anglo-Irish Support Act of 1986, introducing the "Principles of Economic Justice" as a requirement for the disbursement of U.S. funds to the International Fund for Ireland.<sup>194</sup> These Principles are virtually identical to the MacBride Principles.<sup>195</sup> Several states and cities have also adopted them.<sup>196</sup> These institutions can leverage their huge pension funds and thereby place effective pressure on corporations to follow these Principles.<sup>197</sup>

## 3. *The Slepak and Miller Codes*

The Slepak Principles, named in honor of a Soviet dissident

191. *Id.*

192. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 671–72; Cassel, *supra* note 182, at 1971; Perez-Lopez, *supra* note 182, at 9–12 (citing SEAN MACBRIDE, *THE MACBRIDE PRINCIPLES* (Irish National Caucus, Wash. D.C., 1984)). For biographical information, see William G. Blair, *Sean MacBride of Ireland is Dead at 83*, N.Y. TIMES, Jan. 16, 1988, at 10.

193. Perez-Lopez, *supra* note 182, at 10–12.

194. Kathleen P. Lundy, *Lasting Peace in Northern Ireland: An Economic Resolution to a Political and Religious Conflict*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 699, 729–31 n.148 (2001) (citing Pub. L. Nos. 105–277, 112 Stat. 2681–2851 (adopted Oct. 21, 1998) (§ 2811 amending the Anglo-Irish Agreement Support Act of 1986, Pub. L. No. 99-415)).

195. *Id.* at 730 n.149 (providing the text of the Principles of Economic Justice).

196. Cassel, *supra* note 182, at 1972.

197. Father Sean McManus, *The MacBride Principles: The Essence* (2001), <http://www.irishnationalcaucus.org/pages/MacBride/MacBride%20Principles%20The%20Essence.htm> (making this point about pension funds and lists cities, states, and prominent politicians who have supported the MacBride Principles).



and promulgated in 1988 by a private foundation, were designed to provide a code of conduct for multinational companies doing business in the Soviet Union.<sup>198</sup> The Miller Principles, contained in a 1991 bill introduced by a U.S. Congressman, John Miller, sought to do the same for China.<sup>199</sup> In view of the dissolution of the Soviet Union and corporate interest in investment in China, however, neither has attracted much attention.<sup>200</sup>

#### 4. *The Maquiladora Code*

The AFL-CIO and a coalition of religious and environmental groups issued the Maquiladora Standards of Conduct, which appeal to U.S. companies to maintain a healthy environment, safe workplace, and adequate standard of living for workers, especially in the factory zone along the border with Mexico.<sup>201</sup> The Maquiladora Code requires disclosure to workers and communities about the risks of chemicals and hazardous materials, calls for workplace health and safety committees, the right to organize, a minimum wage, limits on work hours, improvements in housing, health care, sanitary services for workers, and prohibits discrimination.<sup>202</sup> As of mid-1994, only one company, Asarco, had signed on to this Code.<sup>203</sup>

#### 5. *Rugmark*

To combat the widespread problem of child labor in the carpet industry of south Asia, an Indian child labor activist, Kailash Satyarthi, founded the Rugmark Foundation with the help of the South Asian Coalition on Child Servitude, the Indo-German Promotion Council, UNICEF, and other concerned

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198. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 672; Perez-Lopez, *supra* note 182, at 12–16. See S. 1018, 101st Cong., 1st Sess. (1989), and H.R. 2366, 101st Cong., 1st Sess. (1989).

199. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 672; Perez-Lopez, *supra* note 182, at 16–19 (citing H.R. 1571, 102d Cong. 1st Sess. (1991)).

200. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 672.

201. *Id.* at 672–73; Perez-Lopez, *supra* note 182, at 19–23 (citing COALITION FOR JUSTICE IN THE MAQUILADORAS, INTRODUCTION TO MAQUILADORA STANDARDS OF CONDUCT, § 1 (1991)). Perez-Lopez explains, “Maquiladoras are factories located in Mexico along the U.S.-Mexico border that specialize in assembling U.S.-made parts and components into finished products that are then sold in the United States.” *Id.* at 20 n.66.

202. Perez-Lopez, *supra* note 182, at 20–23.

203. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 673 (citing *Activists Reached a Variety of Agreements in Withdrawing All 10 Maquiladora Resolutions*, NEWS FOR INVESTORS (Investor Responsibility Research Center) May 1992, at 15).

industry and nongovernment groups.<sup>204</sup> Rugmark is a labeling program. Carpet retailers and manufacturers agree to abide by the Rugmark code of conduct that provides for the replacement of child labor with adult labor and for the education of the children. Signatories pay a licensing fee and are subject to inspection by Rugmark monitors. Those who pass the inspection may attach the Rugmark label to their products, which signifies that the carpet was not produced with child labor.<sup>205</sup> In Germany, which is an import center for carpets from Asia, carpet wholesalers and retailers who agree to buy only Rugmark-certified products are permitted to publicize the fact and use the label.<sup>206</sup> In 1994, the U.S.-based Child Labor Coalition established the Rugmark Foundation to promote the U.S. Consumer Education Campaign for Rugmark.<sup>207</sup> Rugmark also rescues children from exploitative labor situations and places them in schools.<sup>208</sup> The movement has been successful in Germany and is gaining popularity in the United States.<sup>209</sup>

## 6. FIFA

Child labor is a serious problem in the manufacture of soccer balls.<sup>210</sup> In 1996, the Fédération Internationale de

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204. See the Rugmark Foundation website, <http://www.rugmark.org>; *How to Become Licensed by Rugmark* (including information about the licensing process, fees, and a License Agreement Overview), <http://www.rugmark.org/index.php?cid=62>; *Rugmark License Agreement Request*, [http://www.rugmark.org/license\\_agreement.php?cid=91](http://www.rugmark.org/license_agreement.php?cid=91); and *Rugmark's Annual Reports 2002–2006* (listing licensed importers and explaining how Rugmark operates), <http://www.rugmark.org/index.php?cid=16>. See also Liubicic, *supra* note 188, at 129–30 (citing 4 SWEAT AND TOIL, *supra* note 177, at 24); and State Department Press Release, News from the Washington File, Governments, Private Groups Work to End Child Slavery, 2007 WLNR 8975343 (May 11, 2007).

205. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 673; Liubicic, *supra* note 188, at 130.

206. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 673 n.40 (citing Interview with Pharis Harvey, Executive Director, International Labor Rights Education and Research Fund and Co-Chair, RUGMARK CAMPAIGN (Jan. 13, 1995)).

207. *Id.* at 673 n.38 (citing *CLC Launches RUGMARK Consumer Campaign*, 4 CHILD LABOR MONITOR 1–2 (Sept. 1994) (National Consumers League Publication)); see also Child Workers in Asia, *The Rugmark Campaign*, 11 CHILD WORKERS IN ASIA NEWSLETTER (Apr.–Sept. 1995), [http://www.cwa.tnet.co.th/Publications/Newsletters/vol11\\_2-3/v11\\_2\\_rugmark.html](http://www.cwa.tnet.co.th/Publications/Newsletters/vol11_2-3/v11_2_rugmark.html).

208. Rugmark Foundation, Schools and Opportunities, <http://www.rugmark.org/index.php?cid=14>.

209. Liubicic, *supra* note 188, at 130; see *Rugmark in the News*, [http://www.rugmark.org/in\\_the\\_news.php?cid=14](http://www.rugmark.org/in_the_news.php?cid=14), for news articles about the Rugmark Foundation.

210. Sydney H. Schanberg and Jimmie Briggs, *Six Cents an Hour*, LIFE, June,

Football Association (FIFA), a Swiss organization that oversees the sport of soccer, reached an agreement with international unions to incorporate child labor standards into FIFA's regulatory system.<sup>211</sup> In order to attach the FIFA label to soccer balls, a manufacturer now not only had to meet FIFA's regulations as to the size, weight, and durability of the soccer ball, but also had to certify that the manufacturer was in compliance with ILO conventions, which include a ban on child labor.<sup>212</sup> In 2002, however, nongovernmental organization (NGOs) reported that manufacturers using the FIFA logo were violating the FIFA code on a massive scale, including violations of child labor.<sup>213</sup> FIFA itself acknowledges the difficulty of addressing the problem of child labor.<sup>214</sup> In 2003, FIFA joined the ILO in a renewed effort to combat child labor in the manufacture of sports equipment called "The Red Card to Child Labor."<sup>215</sup>

### 7. Social Accountability 8000

In 1997, The Council on Economic Priorities and Accreditation Association (CEPAA)<sup>216</sup> created Social Accountability 8000 (SA 8000).<sup>217</sup> This is a certification program that provides a code of standards to measure the performance of MNCs in several areas, including child labor. The SA 8000 code is based on international workplace norms such as ILO Conventions, the Universal Declaration of Human Rights, and

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1996, at 38.

211. Liubicic, *supra* note 188, at 130–31 (citing 4 SWEAT AND TOIL, *supra* note 177, at 118).

212. *Id.*

213. Berne Declaration, Fair-Play Campaign 2002, *FIFA Tolerates Massive Violations of Labor Rights: Statement of the Clean Clothes Campaign and the Global March Against Child Labor*, May 28, 2002, <http://www.evb.ch/en/p25001374.html>.

214. FIFA, *Child Labor*, "Child labour is a complex socio-political phenomenon and as such, it is extremely difficult to combat. As a sporting organisation, FIFA has neither the experience nor the means to eradicate this wide-reaching problem on its own." <http://www.fifa.com/aboutfifa/worldwideprograms/footballforhope/campaigns/childlabour.html>.

215. *FIFA and ILO Join Forces to Fight Child Labor*, THE SPORTS NETWORK, February 13, 2003. Human Rights Education Association, *FIFA and ILO Team Up on Worldwide Campaign to Fight Child Labour*, <http://www.hrea.org/lists/child-rights/markup/msg00168.html>. The red card in soccer indicates that a player must leave the game.

216. CEPAA is an American public interest organization that attempts to improve corporate social responsibility, <http://www.cepaa.org>.

217. Liubicic, *supra* note 188, at 126; see Document Library, Social Accountability: International Standard, <http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=136>.

the U.N. Convention on the Rights of the Child.<sup>218</sup> The CEPAA accredits firms to certify and monitor signatories on the basis of briefs provided by local unions and human rights organizations regarding signatory work sites.<sup>219</sup> Currently SA 8000 certifies more than 1,300 companies in sixty-three countries and seventy industries.<sup>220</sup>

#### 8. *Model Business Principles and the Apparel Industry Partnership Code of Conduct*

In 1995, the Clinton administration published a model code to provide guidance to U.S. MNCs in their overseas operations. It is called the Model Business Principles, and it contains provisions regarding child labor.<sup>221</sup> However, there were no recommendations regarding monitoring or sanctions.<sup>222</sup> The Department of Commerce administered the Principles and, in cooperation with various nonprofit organizations, created a clearinghouse to collect and provide information on the codes adopted by U.S. MNCs.<sup>223</sup>

The U.S. Secretary of Labor in the Clinton administration, Robert Reich, encouraged the formation of the Apparel Industry Partnership (AIP).<sup>224</sup> This is a coalition of labor, industry, consumer, and human rights groups formed in 1996 to eliminate or reduce sweatshop conditions in the globalized apparel industry.<sup>225</sup> In 1997, the AIP created a Workplace Code of Conduct and urged U.S. clothing manufacturers to adopt it.<sup>226</sup> The Code includes Principles of Monitoring that provide for monitoring by Code signatories and independent external

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218. Social Accountability International, Overview of SA8000, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=473>.

219. Liubicic, *supra* note 188, at 127 n.92 (citing Deborah Leipziger, *Social Accountability 8000: CEP Accreditation Agency Launches Standard on Workplace Issues*, COUNCIL ON ECON. PRIORITIES RES. REP. 2, 5 (1998)).

220. The Social Accountability International Website, SAI Corporate Programs, <http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=527&grandparentID=475&parentID=747>.

221. Cassel, *supra* note 182, at 1974.

222. *Id.*

223. Frey, *supra* note 188, at 173 n.113; Liubicic, *supra* note 188, at 125 (citing *Administration Releases Details on Voluntary Business Principles*, DAILY LAB. REP. (BNA), May 31, 1995, at A-4).

224. Adelle Blackett, *Global Governance, Legal Pluralism and the DeCentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 413 n.38 (2001).

225. Liubicic, *supra* note 188, at 125.

226. *Id.*

monitors.<sup>227</sup> A signatory may choose independent monitors from a list of organizations that the AIP has approved.<sup>228</sup> Unfortunately, signatory agreement, rather than proof of compliance, results in permission to attach the "No Sweat" label to the signatory's products.<sup>229</sup> In 1999, the AIP created the Fair Labor Association (FLA) to administer this program.<sup>230</sup> Aside from reviewing and monitoring participants, the FLA issues an Annual Public Report with detailed information from monitored factories and remediation action plans.<sup>231</sup> The FLA also has a third-party complaint procedure and other special projects.<sup>232</sup>

## V. THE EMERGENCE OF CORPORATE CODES

### A. OF CORPORATIONS, CELEBRITIES, THE MEDIA, AND THE PUBLIC

During the late 1990s, corporations and celebrities who sponsored corporate products found that the public had certain expectations of them. The idea that corporations, whether they had committed to a corporate code or not, should abide by certain standards of conduct came to have a certain enforcement power of its own. It was the media and the public response to exploitative child labor that produced this result.

#### 1. *The Gap*

In early 1995, for instance, labor and religious groups mounted a campaign to protest sweatshop conditions prevalent in El Salvador among the contractors of the trendy clothing retailer, the Gap.<sup>233</sup> A columnist at the New York Times related how young teenage girls were paid fifty-six cents an hour, forced to work eighteen hours a day, had to get tickets from supervisors to go to the bathroom, and were subject to firing if

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227. *Id.* at 126.

228. *Id.*

229. Heidi S. Bloomfield, "*Sweating*" the International Garment Industry: A Critique of the Presidential Task Force's Workplace Codes of Conduct and Monitoring System, 22 HASTINGS INT'L & COMP. L. REV. 567, 585 (1999).

230. Fair Labor Association Website, Defending Worker's Rights Worldwide, <http://www.fairlabor.org/about/history>.

231. Fair Labor Association, 2006 Annual Public Report, <http://www.fairlabor.org/all/2006PublicReport>.

232. *Id.* at 21-22.

233. Bob Herbert, *In America: A Sweatshop Victory*, N.Y. TIMES, Dec. 22, 1995, at A39, cited in Cassel, *supra* note 182, at 1968 n.28.

they formed a union.<sup>234</sup> The Gap responded by suspending the contractor's orders and sending investigators. Eventually, the Gap halted all business with the contractor until it met a set of newly adopted guidelines. Further, the Gap refused to deal with any other contractors until the government of El Salvador capably investigated such abuses and resolved the labor disputes fairly.<sup>235</sup>

In March 1996, the Gap established an independent monitoring system for human rights violations by its contractors.<sup>236</sup> In an attempt to resolve the conflict, the clothing retailer agreed with its Salvadoran contractor and local religious, human rights, and labor organizations to monitor compliance under its revised and more specific code of conduct.<sup>237</sup>

## 2. *Levi Strauss*

In September of 1991, Levi Strauss established a Sourcing Guidelines Working Group to develop standards for overseas suppliers not only for ethical reasons, but also to protect the company's brand image.<sup>238</sup> The group reviewed the UN's Universal Declaration of Human Rights and other international human rights instruments.<sup>239</sup> In March 1992, the company adopted the task force's guidelines after embarrassing media exposure of labor abuse at a company source factory in Saipan.<sup>240</sup>

The Levi-Strauss code of conduct has two parts.<sup>241</sup> The first,

234. Bob Herbert, *In America: Children of the Dark Ages*, N.Y. TIMES, July 21, 1995, at A25; Bob Herbert, *In America: In Deep Denial*, N.Y. TIMES, Oct. 13, 1995, at A33, cited in Cassel, *supra* note 182, at 1968 nn.29–31; Bob Herbert, *In America: Not a Living Wage*, N.Y. TIMES, Oct. 9, 1995, at A17; Bob Herbert, *In America: Sweatshop Beneficiaries*, N.Y. TIMES, July 24, 1995, at A13.

235. Cassel, *supra* note 182, at 1968–69.

236. Bob Herbert, *Righting a Wrong*, SACRAMENTO BEE, Dec. 23, 1995, at B6; Stuart Silverstein, *Labor Dept. Adds GAP Inc. to "Good Guy" Retailer List*, L.A. TIMES, Dec. 22, 1995, at D2; Journal of Commerce, *GAP Pressures Suppliers to Improve Conditions*, BUFFALO NEWS, Dec. 25, 1995, at B9, cited in Cassel, *supra* note 182, at 1969 n.33.

237. REVISED RESOLUTION DECLARATION, March 22, 1996, signed by representatives of Mandarin International, the Archdiocese of San Salvador, the Human Rights Institute of the University of Central America, Centra (a labor organization), and the Mandarin Workers' Union (on file with the FORDHAM INT'L. L.J.), cited in Cassel, *supra* note 182, at 1969 n.34.

238. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 676.

239. *Id.*

240. *A Stitch in Time*, ECONOMIST, June 6, 1992, at 27, cited in Compa & Hinchliffe-Derricarrere, *supra* note 60, at 677 n.54.

241. LEVI STRAUSS & CO., BUSINESS PARTNER TERMS OF ENGAGEMENT AND COUNTRY ASSESSMENT GUIDELINES (1992), in APPAREL INDUSTRY, *supra* note 5, at

Business Partner Terms of Engagement, addresses "workplace issues that are substantially controllable by [the company's] individual business partners, such as environmental requirements, ethical, health and safety standards, legal regulations and employment practice."<sup>242</sup> The second part, Country Assessment Guidelines, entails issues that are probably beyond the ability of the business partner to control, but that nevertheless "could subject [the company's] corporate reputation and therefore [its] business success, to potential harm."<sup>243</sup> These include health and safety, human rights, legal requirements, and political or social stability.

The employment practice section includes six specific issues of employment: wages and benefits, working hours, child labor, prison/forced labor, discrimination, and disciplinary practices such as corporal punishment or other forms of coercion.<sup>244</sup> It omits the right to form a union.<sup>245</sup> The company has established an internal monitoring and enforcement system that begins with a questionnaire on employment practices in foreign plants, provides for audits, surprise site visits, review by company personnel, and possible termination of violators' contracts.<sup>246</sup> The company rates business suppliers according to a three-tiered system: contractors who are indifferent or unwilling to improve unacceptable working conditions are terminated; contractors who can possibly improve can negotiate a plan and time-table to resolve the problems; and contractors who could do more are encouraged to improve.<sup>247</sup>

At its Saipan contractor, Levi Strauss found virtually slave labor conditions. Immigrant workers were housed in padlocked barracks, their passports confiscated during the contract period. They worked for eleven hours a day, seven days a week, for \$1.65 an hour.<sup>248</sup> As a result of its investigation under its "Terms of Engagement," Levi Strauss canceled its contract with the Saipan factory owner and with thirty other contractors in the Philippines, Honduras, and Uruguay while improving employment practices with one hundred others overseas.<sup>249</sup> In

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155-57.

242. *Id.* at 155-56.

243. *Id.* at 157.

244. Compa & Hinchliffe-Derricarrere, *supra* note 60, at 677.

245. *Id.*

246. *Id.* at 677-78.

247. *Id.* at 678.

248. *A Stitch in Time*, *supra* note 240, at 27.

249. John McCormick & Marc Levinson, *The Supply Police*, NEWSWEEK, Feb. 15, 1993, at 48-49, *cited in* Compa & Hinchliffe-Derricarrere, *supra* note 60, at 678-79.

Bangladesh, Levi Strauss established an innovative program in two plants where it discovered children under fourteen were working. In an agreement with local officials, the children returned to school but continued drawing pay from the contractor while Levi Strauss paid for their tuition, books, and uniforms and agreed to offer the children jobs at the plants when they became fourteen.<sup>250</sup>

In regard to its "Country Assessment Guidelines," Levi Strauss checked whether any of its facilities in China and Burma were reported to use prison labor and conducted surprise visits and inquiries. As a result, the company entirely withdrew from both countries.<sup>251</sup>

### 3. Kathie Lee Gifford

In May of 1996, talk show host Kathie Lee Gifford felt vilified after Charles Kernaghan, the executive director of the National Labor Committee, alleged that exploited child laborers in Honduras produced her Wal-Mart fashion line.<sup>252</sup> Her first response was defensive. She declared herself a victim of a smear campaign and threatened to sue the organization that accused her of taking advantage of child labor.<sup>253</sup> Eventually,

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In 1999, several labor groups, including the Asian Law Caucus, Global Exchange, Sweatshop Watch of Oakland, and the Union of Needletrades, Industrial and Textile Employees, filed a class action lawsuit on behalf of workers in Saipan against twenty-seven garment manufacturers and retailers including Levi Strauss. All but Levi-Strauss settled, paying \$6.4 million to the workers. Levi Strauss consistently claimed it had acted appropriately, and in 2004 the plaintiffs voluntarily dropped their suit against Levi Strauss. Jenny Strasburg, *Levi's Lawsuit Tossed, Saipan Workers' Case Dismissed in Victory for Clothier*, S.F. CHRON., Jan. 8, 2004, at B1.

250. Martha Nichols, *Third-World Families at Work: Child Labor or Child Care?*, HARV. BUS. REV. 22 (Jan.-Feb. 1993), cited in Compa & Hinchliffe-Derricarrere, *supra* note 60, at 679; McCormick & Levinson, *supra* note 249.

251. Amy Borrus and Joyce Barnathan, *Stanching the Flow of China's Gulag Exports*, BUS. WK., Apr. 13, 1992, at 51-52; G. Pascal Zachary, *U.S. Companies Back Out of Burma, Citing Human-Rights Concerns*, WALL ST. J., Apr. 13, 1995, at A10, cited in Compa & Hinchliffe-Derricarrere, *supra* note 60, at 679 n.62. The implementation of Levi Strauss's Code not only provides benefits for the company's brand name, but also helps its foreign business partners. Those who qualify to work for Levi Strauss can work for anyone in the industry. Richard Rapaport, *Import Jeans, Export Values: What Happens if a Company's Global Reach Exceeds its Ethical Grasp?*, FAST COMPANY, Oct. 1993, cited in Compa & Hinchliffe-Derricarrere, at 679 n.64.

252. Charles S. Clark, *Child Labor and Sweatshops* (Outlook section), 6 CQ RESEARCHER 721 (Aug. 16, 1996), available at <http://library.cqpress.com/cqresearcher/document.php?id=cqresre1996081600>.

253. Mike Leonard, *Stopping Sweatshops Helps Both U.S., Foreign Workers*, BLOOMINGTON HERALD-TIMES (IND.), Nov. 17, 1996, at C1.



however, she spoke with one of the children who worked in the sweatshop that produced the line of clothing bearing her name. To her credit, Mrs. Gifford began to work with other garment-endorsing celebrities to organize a July 16 industry summit in Washington, promoting the Labor Department's "No Sweat" campaign.<sup>254</sup>

## B. THE EFFECTIVENESS OF CORPORATE CODES OF CONDUCT

### 1. *The Department of Labor Apparel Industry Study*

In 1996, the U.S. Department of Labor published a report that broadened the scope of these case studies. It bears the hopeful title, *The Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem?*<sup>255</sup> The report drew on wide-ranging sources, including interviews with labor ministry officials, manufacturers, plant managers, buyers, trade associations, unions, workers, community activists, human rights groups, and NGOs in the Dominican Republic, El Salvador, Guatemala, Honduras, India, and the Philippines, and a survey of codes of conduct from forty-eight American corporations with interests overseas.<sup>256</sup> Though the study admits that no reliable statistics on the rate of child employment in any particular economic activity exists, on the basis of its information, the study concluded that "in some of the countries examined, fewer children may currently be working on garment exports for the U.S. market than two years ago."<sup>257</sup> The report noted the recent emergence of corporate codes of conduct, the first appearing in 1991, and most others in the previous two or three years.<sup>258</sup> It also noted the variety of forms these codes take. Aside from special documents providing guidelines, there are letters stating company policies that are sent to overseas contractors, compliance questionnaires and certificates required of suppliers, and clauses in formal documents such as purchase orders.<sup>259</sup> These documents may refer to a minimum age for workers who make the products, to the national laws of the host country, and to international standards like ILO Convention

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254. *Call Her 'Gandhi Lee,'* ARIZ. REPUBLIC, July 16, 1996, at A3.

255. APPAREL INDUSTRY, *supra* note 5.

256. *Id.* at iii.

257. *Id.* at i.

258. *Id.* at ii.

259. *Id.* at 31.

138.<sup>260</sup>

The Department of Labor study noted a variety of limitations to which corporate codes of conduct are subject. For one thing, a corporation's code is likely to have effect only to the extent that the corporation can exercise influence on the overseas factory. If the factory is not owned by the corporation, or if it can find other customers, it is less likely to adhere to the corporation's rules.<sup>261</sup> Sometimes it is difficult to ascertain the ages of children because records such as birth certificates are poorly kept or unavailable in the host country.<sup>262</sup>

Monitoring takes a number of forms, some more likely to have an effect than others. Some corporations do no more than include a clause on child labor in their contracts and expect parties to honor it.<sup>263</sup> Those corporations that monitor compliance might get information from local organizations, such as labor unions, if there are any, religious groups, and NGOs.<sup>264</sup> Others might use accounting firms,<sup>265</sup> their own staff,<sup>266</sup> or rely on their buying agent.<sup>267</sup> Enforcement may take the form of screening out some suppliers or terminating contracts, but also less drastic measures, such as demands for improvement or the cancellation of certain orders.<sup>268</sup> Often the concern about labor conditions affecting children is secondary to concerns about the quality of the merchandise.<sup>269</sup> In spite of all this, the main point

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260. *Id.* at 32–39.

261. *Id.* at 101:

[g]enerally, the closer the relationship between a U.S. company importing garments and the actual producer of the items, the greater the ability of the U.S. company to influence labor standards, including prohibitions on child labor . . . . Conversely, the longer the chain of procurement/production . . . and the more levels of buying agents, contractors, and subcontractors, the more complex and challenging is the implementation of the labor standards policies and the less the ability of the U.S. importers to influence them.

262. *Id.* at 82 ("In some countries, birth registries are not common and therefore there is no demonstrable method to determine age. In other countries, youths below the legal minimum age procure fraudulent identification cards or fake government permits required to prove that they have permission to work.").

263. *Id.* at 61 ("Some companies, particularly retailers, may have general language in their purchase order or vendor contracts requiring vendors to comply with applicable laws but have no mechanisms for monitoring compliance.").

264. *Id.* at 59–60.

265. *Id.* at 58–59.

266. *Id.* at 54–57.

267. *Id.* at 57–58.

268. *Id.* at 108–11.

269. *Id.* at 48 ("Monitoring is usually part of a larger process that includes issues such as quality control and delivery coordination. For this reason, it is not always clear to what extent site visits focus on the code implementation."); *id.* at 101

of the Department of Labor study was that this rather amorphous form of regulation had some effect in reducing child labor in the apparel industry and warranted further study, perhaps even industry-wide standardization in order to increase its effectiveness.<sup>270</sup>

President Clinton's announcement in April of 1997 of the Apparel Industry Partnership's accord among apparel industry, consumer, and human rights groups provided some of this standardization. The agreement includes guidelines that prohibit corporations from employing children under fifteen in most nations. Additionally, the agreement contains a declaration of other workers' rights, such as the right to collective bargaining, a minimum wage, and a sixty-hour workweek. Corporations that sign this agreement may mark their products with the words, "No Sweat," to indicate that they comply with the standards of the accord.<sup>271</sup>

## 2. Corporate Social Responsibility and Self-Interest

Perhaps the most basic criticism of the idea that corporate codes can ameliorate exploitative child labor is that such social altruism is antithetical to the function and nature of a corporation. Corporations are in the business of making profits, not establishing social programs. As Adam Smith stated, "[b]y pursuing his own interest [the individual] frequently promotes that of the society more effectually than when he really intends to promote it."<sup>272</sup> In Milton Friedman's view, doing public good is the responsibility of government, not business. "[T]here is . . . only one social responsibility of business— . . . to increase its profits so long as it stays within the rules of the game . . ."<sup>273</sup>

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("While monitoring for product quality, and even for health and safety conditions, is customary in the garment industry, . . . monitoring for compliance with provisions of the codes of conduct of U.S. garment importers dealing with other labor standards[—]and child labor in particular[—]is not.")

270. *Id.* at 113–14, 118–19.

271. William Branigin, *Clinton, Garment Makers Hail Accord on Sweatshops; Critics Say Pact Falls Short on Key Work Issues*, WASH. POST, Apr. 15, 1997, at A10; Steven Greenhouse, *Accord to Combat Sweatshop Labor Faces Obstacles*, N.Y. TIMES, Apr. 13, 1997, § 1, at 1.

272. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, Book IV, Ch. 2, 181 (R. H. CAMPBELL & A. S. SKINNER eds., Liberty Fund, Inc. 1976) (1776).

273. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine) at 32, 126; see also William Safire, Op-Ed., *The New Socialism*, N.Y. TIMES, Feb. 26, 1996, at A13 ("What are the primary 'social' responsibilities of a corporation? To serve its owners by returning a profit and its community by paying taxes; to earn the allegiance of customers by

This particular criticism of corporate codes, however, may be wide off the mark because the corporate implementation of the codes does not depend entirely on altruism as its exclusive motivation. Codes of conduct make economic sense if corporate management believes that consumers are willing to pay a premium for products that are made without exploitative child labor, so that the corporation will enhance its profits by enhancing its image.<sup>274</sup> There is evidence to support consumer willingness to pay such a premium. According to a survey of consumers taken in 1995, "78 percent of respondents said that they would prefer to shop at retail stores that had committed themselves to ending garment-worker abuse; 84 percent said they would pay \$1 extra on a \$20 item to ensure that the garment had been made in a worker friendly environment."<sup>275</sup> As Tim Smith, director of the Interfaith Center on Corporate Responsibility, put it, corporations have taken an interest in social responsibility because a small group of individuals constituting only five percent of consumers are influenced by political and social concerns. "They're fighting very hard for every percent of the market so they do pay attention and they do care very much."<sup>276</sup>

### 3. Reputation and Unpredictability

Consumers, however, may exaggerate their altruism, or even lie about their willingness to pay a premium to avoid using products manufactured by poor children. Even if these surveys are accurate in assessing consumer conduct, consumers may either lose interest in the issue or not be well-informed about the products that are or are not made with exploitative child

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delivering value; and to provide a secure future for employees who help it succeed in the marketplace.").

274. MACKLEM & TREBILCOCK, *supra* note 137, at 22–23.

275. Debora I. Spar, *Creating Corporate Social Responsibility*, BLUEPRINT MAGAZINE (June 1, 2001), available at [http://www.ppionline.org/ppi\\_ci.cfm?knlgAreaID=115&subsecID=900026&contentID=964](http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=115&subsecID=900026&contentID=964). A survey conducted a year after Spar's survey found similar results. Vivian Marino, *Sweatshops Becoming a Retail Issue; Stores Finding Themselves Being Held Accountable For Human Rights Abuses*, SUN-SENTINEL (FLA.), June 23, 1996, at 1, in Jaffe & Weiss, *supra* note 16, at 908 n.83. Jaffe and Weiss caution that these surveys may overstate consumer willingness to pay a premium because the economy during the 1990s was good, and also because the consumers may have exaggerated their altruism. Jaffe & Weiss, *supra* note 16, at 908 n.83.

276. Leslie Lindeman, *Good Intentions: Letting Your Conscience Be a Shopping Guide*, CHI. TRIB., Sept. 12, 1996, § 6, at 1.

labor.<sup>277</sup> The capacity of consumers for consistent and organized choice is limited. The television series *Seinfeld* has an episode that humorously illustrates this point. In the episode, Jerry Seinfeld's eccentric friend Kramer has a job as a department store Santa Claus. As Santa Claus, he recommends toys that are ethically manufactured. He tries to discourage one little boy from asking for a racing car set which, Kramer claims, was made by exploited children in Taiwan. This particular boy, however, insists on the racing car set he originally asked for, and calls Kramer a "commie," after which Kramer's career as a department store Santa comes to an abrupt end.<sup>278</sup>

Though public reaction may at times be disappointing, at other times, public reaction may be surprisingly strong and effective, as the cases of the Gap, Levi Strauss, and Kathy Lee Gifford illustrate. This uncertainty of the public's response to publicity concerning exploitative child labor may actually contribute to the effectiveness of corporate codes. A high-profile corporation that either tolerates exploitative child labor in the manufacture of its products or is negligent about maintaining standards regarding child labor risks injuring its reputation and hurting its sales. It is unpredictable whether the media will expose a particular situation of exploitative child labor or whether the story will have legs: the public reaction might be anything from indifference to boycotts. To avoid this risk, it is prudent to temper the corporate interest in cheap labor with some solicitude for maintaining labor standards. This would be particularly true of standards regarding the use of child labor, since the abusive exploitation of children can potentially provoke the greatest sympathy and hence the most unforeseeable and unmanageable public response. The exercise of discovering whether losses generated by a bad corporate image will outweigh the gain of exploiting child labor is probably not worth the risk, since the corporate reputation and sales contingent upon it, once lost, may prove unrecoverable.

The concern with reputation not only justifies efforts on the part of the corporations to impose codes of conduct, but also efforts to enforce them. If a corporation creates a code of conduct because it does not wish the media to portray it as an exploitative employer, the corporation is also likely to have some interest in enforcement of the code, since the bad press will be worse if the media portrays the corporation as hypocritical in

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277. MACKLEM & TREBILCOCK, *supra* note 137, at 23, 42–43.

278. *Seinfeld: The Race* (NBC Television broadcast Dec. 15, 1994), transcript available at <http://www.seinfeldscripts.com/TheRace.html>.

publicizing a code that has no real effect.

#### 4. *The Flexibility of Corporate Codes*

Macklem and Trebilcock point out that corporate codes of conduct differ profoundly from conventional forms of labor regulation:

[l]abour market regulation, traditionally understood, is a blend of specific rules negotiated by parties—either individually or collectively—to an employment relationship and general legislative imperatives that establish baseline entitlements to workers regardless of their bargaining power. In contrast, codes of conduct and social labeling programs rely “primarily on the participation and resources of nongovernmental actors in the construction, operation, and implementation of a governance agreement.”<sup>279</sup>

The implementation of codes of conduct does not depend “on an employment contract, a collective agreement, legislation, or the common law” to govern relations between employers and employees.<sup>280</sup> Corporate codes depend upon internal or external monitoring chosen by the corporation itself, and not the state or government, to insure compliance with any regulations contained in the code.<sup>281</sup> Corporate codes rely on the economic power of the consumer rather than the policing power of the state to enforce compliance.<sup>282</sup> Indeed, much about corporate codes of conduct “runs counter to the basic tenets of domestic labour law,” which assume that labor agreements are the product of negotiations between or among the relevant parties under the rules set by the state.<sup>283</sup> This situation subjects the corporate code regimen to many inadequacies because the corporation is able to bypass its workers, therefore ignoring their interests.<sup>284</sup> Because the corporation sets out its own code and means of monitoring it, the corporation can be arbitrary and inconsistent in its formulation and enforcement of its own code.<sup>285</sup> Further, reliance on consumer power for enforcement means the corporation will often manipulate the codes for purposes of public relations.<sup>286</sup>

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279. *Id.* at 12 (citation omitted).

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 24.

284. *Id.*

285. *Id.* at 37–39.

286. See Charles Sabel, Dara O'Rourke & Archon Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* 3–4 (Columbia Law Sch. Pub. Law & Theory Working Paper Group, Paper Nov. 21,

There may not be any completely satisfactory solutions to these disadvantages. Commentators recommend, however, that corporations cooperate and consult with local organizations such as nongovernmental agencies, religious groups, and the workers themselves in developing and implementing corporate codes.<sup>287</sup> Further, the corporate codes should reference international agreements such as ILO Convention 182, Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, or the U.N. Convention on the Rights of the Child.<sup>288</sup> Additionally, commentators suggest that corporations use outside monitors to help give the implementation of their codes credibility and transparency.<sup>289</sup>

But even though they find it desirable to develop greater uniformity among the corporate codes, Macklem and Trebilcock also recognize that the variation of standards found in the codes is a source of their strength as well as their weakness.<sup>290</sup> The authors note, "[b]y locating the source of regulation in the transnational corporation [or MNC] itself, a corporate code of conduct also can identify with much more precision how general standards are to govern specific workplaces."<sup>291</sup> In contrast to domestic or international standards, "codes can be tailored to account for the complexity and fluidity of flexible forms of transnational production . . . ."<sup>292</sup> Unlike domestic laws, codes "can . . . adapt relatively quickly to structural changes in a firm, sector or economy . . . ."<sup>293</sup>

Ultimately, the unpredictable danger of media investigation and public scrutiny should motivate corporations to comply with their self-imposed codes. While this self-imposed compliance may not be the most efficient manner of eliminating exploitative child labor, it provides an opportunity to foster global consensus

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2000), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=253833](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253833).

287. The Gap successfully negotiated an agreement with representatives of a trade union, the Mandarin Workers Union, the Archdiocese of San Salvador, and the Human Rights Institute of the University of San Salvador. REVISED RESOLUTION DECLARATION, March 22, 1996, *supra* note 237; *The End of Child Labour*, *supra* note 40, at 77 (recommending the empowerment of children to organize in youth groups and trade unions); see also Liubicic, *supra* note 188, at 153–54.

288. See Jill Murray, *Corporate Social Responsibilities: An Overview of Principles and Practices* 19 (Int'l Labor Org., Working Paper No. 34, 2004) (recommending incorporation of ILO standards into corporate codes), available at <http://digitalcommons.ilr.cornell.edu/codes/5/>.

289. Jaffe & Weiss, *supra* note 16, at 919–20; Liubicic, *supra* note 188, at 138.

290. MACKLEM & TREBILCOCK, *supra* note 137, at 44.

291. *Id.* at 21.

292. *Id.*

293. *Id.*

and cooperation among developed and developing countries until an international labor regimen is forthcoming.

### 5. *The Influence of Corporate Codes*

The idea that corporate codes of conduct can significantly reduce child labor has attracted the criticism that such codes can only affect a fraction of the children who work.<sup>294</sup> The majority of children who work do so in agriculture, in family settings at home, the domestic manufacturing sector, or service-oriented positions in homes and restaurants, not in a factory.<sup>295</sup> In fact, a manufacturing job in the export sector is likely to be a better job than most of the other employment available to poor children in developing countries.<sup>296</sup> As a result, only local or national governments can effectively regulate the majority of exploitative child labor situations through enforcement of their child labor laws. Corporate codes might even be counterproductive by, in effect, distracting attention from the duties that governments must perform.<sup>297</sup>

The recent ILO Report announcing reductions in the number of children who labor around the world indicates that in the teeth of increased global competition for cheap labor, the child labor situation is improving. The ILO found:

[t]he number of child laborers in both age groups 5–14 and 5–17 fell by 11 per cent over the four years from 2000 to 2004. However, the decline was much greater for those engaged in hazardous work: by 26 per cent for the 5–17 age group, and 33 per cent for 5 to 14 year-olds . . . *Child work is declining, and the more harmful the work and the more vulnerable the children involved, the faster the decline.*<sup>298</sup>

The improvement is not attributable to corporate codes alone, though the ILO Report makes it clear that corporate codes have played a crucial role in this improvement.<sup>299</sup> But the

294. Liubicic, *supra* note 188, at 140 (noting that workplaces which are unrelated to U.S. markets and MNCs whose products do not derive value from corporate reputation are not protected by code and labeling efforts).

295. *Id.* at 140–41; see also White, *supra* note 135, at 832:

[i]n recent years, powerful lobbying organizations have been promoting various forms of trade sanctions. . . . These efforts focus exclusively on child labour in the export sector, which represents a very small percentage of child employment in most countries, and . . . is not the sector in which the worst working conditions and abuse of children . . . [is] found.

296. Consider the results when children in Bangladesh lost their jobs and had to turn to less desirable employment. See *supra* notes 139–140.

297. See Liubicic, *supra* note 188, at 149.

298. *The End of Child Labour*, *supra* note 40, at 7 (emphasis in original).

299. The ILO report describes the contributions of employers as critical in



ILO report also speaks of a "growing global consensus" among the governments of developing countries on the need to set standards on child labor,<sup>300</sup> and illustrates this consensus with examples of programs from various developing countries that reduce child labor.<sup>301</sup>

Developing countries are realizing that poverty cannot be eliminated without the elimination of child labor, because "[child labor] is both the result of poverty and a way of perpetuating it."<sup>302</sup> The toleration of child labor makes no economic sense. The ILO Report cites a study that found that the elimination of child labor and its replacement by universal education yields benefits that exceed costs at a ratio of 6.7 to 1.<sup>303</sup> Children who spend their youth working grow up to become adults whose health is poorer,<sup>304</sup> and whose labor, if they can work at all, will be worth much less than it would had they gone to school.<sup>305</sup> The child labor standards of corporate codes, therefore, provide an impetus that nudges developing governments toward reforms, which, these governments are beginning to realize, serves their own best interests as well.

Hence, although corporations rather than governments developed corporate codes to improve business, governments can and do take advantage of the existence of these codes by extending the standards to other, non-corporate areas of employment in order to achieve goals that have thus far defied national and international authorities, such as the elimination of exploitative child labor and the cycle of poverty it implies. Also, because the codes and their implementation are ideally an outcome of negotiations between local labor interests and

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several places of the Report, *Id.* at 69 *passim* (noting that "[e]mployers' organizations played a key role in the development of sectoral alliances in the last four years . . .").

300. *Id.* at 23.

301. *Id.* at 10–15 *passim*. Reports independent of the ILO suggest that in recent years corporations are taking their social responsibilities more seriously:

after a decade of denying any wrongdoing, companies such as Nike and Gap are now admitting that their workers have been exploited and abused, and have pledged to improve the conditions of the millions of people who are paid a few pence a day to make their top-selling goods.

Maxine Frith, *The Ethical Revolution Sweeping Through the World's Sweatshops*, INDEPENDENT (U.K.), April 16, 2005 (News Section).

302. Geof Wood, *Staying Secure, Staying Poor: The "Faustian Bargain"*, 31 WORLD DEV. 455, 468 (2003).

303. *The End of Child Labour*, *supra* note 40, at 33.

304. *Id.* at 32; see also F.C. Rosati & R. Straub, *Does Work During Childhood Affect the Health of Guatemalan Adults?*, 5 REV. ECON. HOUSEHOLD 83 (2007) (reporting results of study on adverse long-term health effects of child labor).

305. *The End of Child Labour*, *supra* note 40, at 33.

corporations, they reflect greater flexibility toward local economic circumstances and therefore are more acceptable to a developing country than uniform and coercive standards of a national or international agreement would be.

Because corporate codes are neither generated by government action nor motivated by government interests, their implementation sidesteps the political confrontation between developed and developing countries over core labor standards. For one thing, these codes often require that the child labor laws of the host country be respected.<sup>306</sup> The host country cannot very well complain that the corporation is imposing some foreign regime, or ignoring the law of the host country, when the corporation is in fact insisting that the host country's domestic law be respected.

Corporate codes of conduct mute the objections of developing countries in another respect. The extent to which corporations seek to impose and enforce codes of conduct undercuts the argument that the global adoption of core labor standards is merely a ploy to rob developing countries of their cheap labor advantage. Unlike the governments of developed countries, the corporations that are implementing codes of conduct cannot be accused of having protectionist motivations. The main reason these corporations are in developing countries at all is to take advantage of the cheap labor markets there. Corporations have invested a great deal in cultivating these markets and cannot want to destroy them in order to return to the more expensive labor of developed countries.

In implementing corporate codes, MNCs are pursuing interests that are congruent, not adverse, to the interests of the host developing country. Developing countries must eventually face the fact that corporate implementation of codes of conduct protects their economic interests as well as those of the corporations. If a country develops a reputation for exploiting the labor of its impoverished children, that country, like any corporation, may itself become the target of consumer boycotts, which may lead not only to a loss of business, but also to a corporate exodus as well. "A potential loss of revenue from the lucrative U.S. market arguably far outweighs any potential gain to be made by hiring lower-cost child labor."<sup>307</sup>

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306. See MACKLEM & TREBILCOCK, *supra* note 137, at 30-31 (noting codes referencing national laws).

307. APPAREL INDUSTRY, *supra* note 5, at 118.

## CONCLUSION

It is uncertain whether corporate codes of conduct will continue to have an impact on problems such as child labor. Some may point to the failure of such codes in the past, such as the Sullivan Principles, which, despite some improvements in the labor situation of black South Africans, were nevertheless so ineffective in undermining the system of apartheid in South Africa that the creator of these Principles, the Reverend Leon Sullivan, abandoned them.<sup>308</sup> The lesson to be learned here, however, might not be that such codes can never have an effect, but rather that they are of limited value against a government that is ideologically intransigent on the issue of human rights. The experience of Levi-Strauss, with its two-part code discussed above, has pertinence here. According to its Guidelines, Levi-Strauss will contract in states where there is a chance for improvement in the rights of workers. But when the conditions tolerated or fostered by a state make it impossible for a corporation to monitor even those rights that should be under its control, then that corporation will have no choice but to leave. In the absence of any respect for human rights, disinvestment may be the answer.<sup>309</sup>

The codes of conduct under discussion are not the result of international organizations or the product of treaties. These corporate codes result from the far-flung sourcing contracts of multinational corporations, in countries where these corporations cannot rely on government enforcement of child labor laws. The situation that creates these codes is the manufacture and export of items such as footwear or soccer balls that go from the hands of impoverished children working in developing countries to the hands of wealthy children playing in developed countries half the world away.

Though the result is humanitarian, the driving force behind these codes is the avoidance of corporate embarrassment, which can mean the loss of sales. Corporations are now under the constant threat of embarrassment because investigative reporters can readily travel anywhere in the world with their

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308. Compa & Hinchliffe-Darricarrere, *supra* note 60, at 666-67; Cassel, *supra* note 182, at 1970-71; Sullivan, *supra* note 182, at 1496 (explaining new and "more stringent" principles introduced in 1985).

309. Consider comments regarding the Clinton labor accord in Greenhouse, *supra* note 271, at 20 ("Labor union officials say they expect a struggle with companies over the steps their Chinese factories should take to allow freedom of association. 'China represents a special kind of problem,' Mr. Mazur said. 'China has to be dealt with once this thing gets off the ground.'").

video cameras collecting footage of laboring children that may be shown on CNN, the major networks, or the internet, or be splashed across the front pages of the major tabloids. The embarrassment is particularly intense when a figure of popular culture who endorses the products at issue, such as Kathie Lee Gifford, is dragged into the moral drama, for the exploitation of children provides what is perhaps the most provocative example of abusive labor practices. If humanitarian instinct should fail, concern for the possible loss of popular good will and consequent financial losses will motivate these figures and their corporate sponsors to sever their ties with exploitative child labor. But the embarrassment also reaches each individual whose purchase of a recognizable brand of clothing may elicit from friends and acquaintances the comment, "Did you know that children made that?" Influential journalists expose exploitation and tar corporations, celebrities, and even individuals who have any association with the products of child labor.<sup>310</sup>

The process by which corporations produce these codes largely bypasses the traditional players in international relations and human rights—that is, the states. This process begins with reporters and journalists reaching across the globe to expose violations of human rights. Responding to these revelations, consumers enforce their understanding of human rights standards by refusing to purchase from known violators. To remedy and prevent the appearance of facilitating human rights violations, corporations benefiting from labor in developing countries respond by promulgating codes of conduct that define their workers' rights. Traditionally, codes containing rights were the product of nations and took the form of a treaty, a convention, or a Bill of Rights. But while the traditional instruments of international and national law have largely failed to regulate this contested area, corporate codes of conduct have introduced some progress. Hence, corporate codes have helped where governments and international law have thus far failed: the enforcement of workers' rights, especially those of the child.

Whatever their eventual impact may be on child labor, corporate codes of conduct are the product of globalization. In distinguishing globalization from internationalization, Professor Jost Delbrück wrote, "globalization . . . may be defined as a means to enable nation-states to satisfy the national interest in

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310. PETER DICKEN, *GLOBAL SHIFT: THE INTERNATIONALIZATION OF ECONOMIC ACTIVITY* 105 (1992) (noting that developments in communications technology are harbingers of globalization).

areas where they are incapable of doing so on their own.”<sup>311</sup> Confronted with the failure of nations and international bodies to resolve the dilemma of exploitative child labor, actors who are not themselves nations or representatives of nations have developed a possible solution.<sup>312</sup>

There is a term for the business practices or customs that are used to adjudicate contractual differences among international business parties without recourse to domestic or international courts of law. This term, “*lex mercatoria*,” or law merchant, consists of “contract practices, understandings, regulations, and decisions [that] constitute a body of customary law which is the foundation on which national and international commercial legislation has been and continues to be built.”<sup>313</sup> The development of corporate codes of conduct may signal a similar development among corporations in the area of labor, child labor in particular. Perhaps this is a *lex humanitariana*?

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311. Jost Delbrück, *Globalization of Law, Politics, and Markets – Implications for Domestic Law – A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9, 11 (1993) (emphasis in original omitted).

312. Some commentators refer to corporate codes as a species of soft law because they do not have the enforcement capacity usually associated with law. Kuruvilla & Verma, *supra* note 56, at 4. However, another term that may more accurately describe such codes in view of the role globalization has played in generating them is one that was first coined by Gunther Teubner. Teubner's term “global law” designates “a new body of law from various globalization processes in multiple sectors of civil society.” Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 4 (G. Teubner, ed. 1997).

313. Harold J. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RESOL. 235, 237 (1988).