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Note

Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality

Andrew Herman

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and Reality

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The word “sweatshop” has long evoked the garment industry: poor young women bent over sewing machines in dimly lit, badly ventilated rooms, working long hours for pitiful wages. Sadly, that image is not outdated. . . . [C]lothing factories have also been central to transnational labor campaigns. . . . [A]buse[s] have made the global apparel industry a primary target for labor campaigns, the site where international trade, poor working conditions, corporate images, consumer boycotts, and independent monitoring schemes all come together.¹

[The] vision of “soft” regulation-by-monitoring first emerged in discussions of domestic regulation It is important to note, however, that most discussions of regulation-by-monitoring assume that voluntary self-regulation will be backed by state enforcement in domestic settings. . . . Yet when these schemes are proposed as a mechanism for international regulation, enforcement is left entirely to ethical consumers overseas.²

INTRODUCTION

The goal of supplier codes of conduct³ is to improve the labor standards for workers who are employed by suppliers for multinational

1. GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM 102 (2007).

2. *Id.* at 41.

3. Supplier codes of conduct “may be defined as voluntary commitments by companies, associations and others to specified principles of corporate behavior” including requiring suppliers to adhere to certain employment and labor practices. Bob Hepple, *The Importance of Law, Guidelines, and Codes of Conduct in Monitoring Corporate Behavior*, in MULTINATIONAL ENTERPRISE AND THE SOCIAL CHALLENGES OF THE XXIST CENTURY: THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES

corporations (MNCs) in developing countries around the globe. Labor activists believe supplier codes of conduct are a way to reach and improve the labor conditions at the bottom of the global supply chain. For MNCs, this voluntary self-regulatory scheme evolved in response to exposé campaigns that revealed the exploitative conditions of suppliers.⁴ Codes began as an effort to quell consumer outrage over sweatshops and have evolved into a means of meeting consumer demand for socially responsible products. Unfortunately, “voluntary compliance has its limits, and consumer pressure goes only so far.”⁵ And, attempts to monitor supplier compliance with codes of conduct have not been effective enough to sufficiently improve working conditions. Nonetheless, “[d]espite the plethora of evidence that codes have not resulted in widespread changes, there is also general agreement that codes hold the potential to be used as a *tool* for change.”⁶ Therefore, the question remains how supplier codes of conduct can be used to fulfill their promise to improve workers’ labor conditions.

In *Private Labor Rights Enforcement Through Corporate Codes of Conduct*, authors Lance A. Compa and Tashia Hinchliffe-Darricarrere sketch a trajectory for the evolution of supplier codes of conduct:

[T]he corporate codes of conduct that took shape recently are a first-generation effort. Making such codes the rule rather than the exception, and finding creative methods for making them effective, not just hortatory, are the next challenge . . . Perhaps after that, a third generation of corporate social responsibility will find respect for human rights the “matter of course, not altruism” that its pioneers envision.⁷

It is safe to say that codes have become the rule, at least in the brand-conscious apparel industry, where supplier codes of conduct proliferated in the 1990s.⁸ The second generation — monitoring — attempts to make codes more than hortatory proclamations by verifying and reporting on supplier code compliance. Although monitoring took off in the late

AT WORK — PUBLIC AND PRIVATE CORPORATE CODES OF CONDUCT 3, 6 (Roger Blanpain ed., 2000).

4. JILL ESBENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* 8 (2004).

5. SEIDMAN, *supra* note 1, at 102.

6. ESBENSHADE, *supra* note 4, at 163; *see also* SEIDMAN, *supra* note 1, at 44 (“Most proposals recognize the limits of voluntarism, but few see any viable alternative.”).

7. Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 *COLUM. J. TRANSNAT’L L.* 663, 689 (1995).

8. ESBENSHADE, *supra* note 4, at 122 (“Levi Strauss adopted the first broad code of conduct, which applied to all of its international contractors, in March 1992. . . . Following Levi Strauss’s move in 1992, many individual companies soon adopted their own codes of conduct.”).

1990s,⁹ “[i]t is too early to assess what practical consequences — if any — might flow from the[] second generation of corporate codes. However, a third generation may be just over the horizon.”¹⁰ It is unlikely that the third generation will reach as far as Compa and Hinchliffe-Darricarrere hoped, but it might be possible to begin seeing results that further the goal of supplier codes of conduct — the improvement of the labor conditions of supplier workers.

This Note examines the first generation (how codes became part of apparel industry business practice) and the second generation (the various forms of monitoring schemes) to highlight the current shortcomings of codes of conduct. One of the lingering problems from the first generation is that codes often take a weak or deferential approach to freedom of association and wages. The second generation, focused on ensuring compliance through monitoring, presents a range of problems, including conflicts of interest, limited resources, numerous codes and a lack of uniformity, and suppliers’ ability to game the system.

This Note also discusses the problems associated with the driving forces behind the rise of “voluntary” codes of conduct: exposé campaigns and consumer demand. Specifically, it discusses how and why those forces have led to codes that reflect Western choices and lack worker voices. As a result of these problems, as well as the limits of consumer demand for socially responsible products, codes of conduct sometimes result in adverse consequences for workers instead of actual improvements in working conditions.

The issues with the current state of codes of conduct guide this Note’s proposals for how the third generation can take a more practical approach to improving local workers’ labor conditions. This Note argues that taking a narrower approach and focusing on a single “linchpin” labor condition — a sufficient hourly wage — would better align supplier codes of conduct with the goal of improving the labor conditions of supplier workers.

Requiring suppliers to pay a sufficient hourly wage and prohibiting piece-rate pay would, theoretically, undermine the sweatshop business strategy and create the foundation for improving other labor conditions. Focusing on hourly wages would also help ameliorate some of the current issues with monitoring schemes. Most significantly, monitoring only hourly wages instead of a range of complex labor standards would enable local nongovernmental organizations (NGOs) and other local activists to become more involved in the monitoring process. A focus on a wages-as-

9. *Id.* at 138.

10. Harry Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law*, in *REGULATING LABOUR IN THE WAKE OF GLOBALISATION* 19, 23 (Brian Bercusson & Cynthia Estlund eds., 2008).

the-linchpin standard could make the third generation of supplier codes of conduct effective in improving the lives of supplier workers across the globe.

I. FIRST GENERATION: THE SPREAD OF SUPPLIER CODES OF CONDUCT

In 1992, Levi Strauss adopted what the company called its “Global Sourcing and Operating Guidelines.” This was the first supplier code of conduct created and established by a MNC in the apparel industry.¹¹ Levi Strauss’s code arose amidst outside scrutiny of its suppliers’ labor practices.¹² Along with several other companies, Levi Strauss had just been accused of using forced labor to make its products in China, and the exploitative conditions of its suppliers factories in Saipan had recently been the subject of an *NBC Nightly News* report.¹³ The company decided to gradually withdraw from China¹⁴ and quickly terminated contracts with the Saipan suppliers.¹⁵

A few years later, in 1995, a labor rights group issued a report on the sweatshop conditions of Kathie Lee Gifford-brand factories.¹⁶ After intense public scrutiny, Gifford apologized on national television.¹⁷ Then, in 1997, Gifford and industry executives met with U.S. Secretary of Labor Robert Reich for an apparel industry meeting, resulting in the formation of the Apparel Industry Partnership to End Sweatshop Practice (API),¹⁸ which later became the Fair Labor Association (FLA).¹⁹ The API produced a code of conduct for the apparel industry, including provisions

11. *Product Suppliers*, LEVI STRAUSS & CO., <http://tinyurl.com/3bsoqgj> (last visited Oct. 8, 2011); ESBENSHADE, *supra* note 4, at 122; GEORGE TSOOGAS, LABOR REGULATION IN A GLOBAL ECONOMY 62 (2001).

12. ESBENSHADE, *supra* note 4, at 122.

13. *Id.*; see Compa & Hincliffe-Darricarré, *supra* note 7, at 676–77 (citing *A Stitch in Time*, *ECONOMIST*, June 6, 1992, at 27).

14. *But see* ESBENSHADE, *supra* note 4, at 122 (“[I]n 1998 Levi Strauss reversed its five-year-old decision to gradually withdraw from China.”).

15. Compa & Hincliffe-Darricarré, *supra* note 7, at 678. When lawsuits were filed for the violations uncovered in the Saipan factories, which are subject to U.S. laws and courts because the island is a U.S. protectorate, Levi Strauss was “the only one that refused to settle the Saipan lawsuit. In defending this stance, the company has said that it has its own monitoring program, which was among the first in the world — although it apparently was not terribly effective.” ESBENSHADE, *supra* note 4, at 127.

16. Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 *J. SMALL & EMERGING BUS. L.* 93, 123 (1999).

17. *Id.*; ESBENSHADE, *supra* note 4, at 8.

18. Michael Posner & Justine Nolan, *Can Codes of Conduct Play a Role in Promoting Workers’ Rights?*, in *INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE AND PUBLIC POLICY* 207, 220 (Robert J. Flanagan & William B. Gould IV eds., 2003); Van Wezel Stone, *supra* note 16, at 123.

19. ESBENSHADE, *supra* note 4, at 8; Posner & Nolan, *supra* note 18, at 220.

for outside monitoring.²⁰ Throughout the 1990s, voluntary codes of conduct became common practice for apparel MNCs operating global supply chains.²¹

Codes of conduct may be voluntary in a legal sense, but, at least initially, MNCs adopted them in response to allegations or reports that their suppliers were exploiting or abusing workers.²² Exposé campaigns, like those against Levi Strauss and the Kathie Lee Gifford brand, became the tactic of choice for labor rights activists seeking to pressure MNCs into adopting supplier codes of conduct.²³ The strategy proved effective.²⁴ Not only did it force companies targeted by exposé campaigns to adopt codes, but MNCs also began adopting codes proactively.²⁵ Moreover, these exposé campaigns and the international labor rights movement fostered consumer demand for socially responsible products, making it a business necessity for many MNCs to at least pay lip service to social responsibility.²⁶ Today, codes of conduct are the norm for MNCs in the brand-conscious apparel industry.²⁷

Even though adopting supplier codes of conduct is becoming an accepted business practice, there is little uniformity in the content of the codes. The first generation of codes of conduct vary between companies and across industries.²⁸ Despite a wide array of content, most codes at least address core labor issues like child and forced labor, health and safety in the workplace, and discrimination and harassment.²⁹ However, many

20. Van Wezel Stone, *supra* note 16, at 123.

21. ESBENSHADE, *supra* note 4, at 122.

22. Arthurs, *supra* note 10, at 21; ESBENSHADE, *supra* note 4, at 122.

23. Van Wezel Stone, *supra* note 16, at 123.

24. ESBENSHADE, *supra* note 4, at 144.

25. Arthurs, *supra* note 10, at 21.

26. *Id.* (Some MNCs “may adopt a code entirely on their own initiative, in an effort to secure whatever market or moral rewards accrue to exemplars of corporate social responsibility”).

27. See Sarah H. Cleveland, *Why International Labor Standards?*, in INTERNATIONAL LABOR STANDARDS, *supra* note 18, at 129, 135 (“Most U.S. Fortune 500 companies, including Nike, Levi-Strauss, the Gap, and Toys-R-Us, have adopted codes of conduct or internal guidelines addressing labor standards.”) (citing OECD, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS 74 (2000)); ESBENSHADE, *supra* note 4, at 123 (The apparel industry’s “image-dependent nature made it particularly vulnerable to publicity attacks.”); Posner & Nolan, *supra* note 18, at 209.

28. Posner & Nolan, *supra* note 18, at 209 (“[T]he greatest differences are in standards on freedom of association and wages.”).

29. *Id.*; see also Kathryn Gordon & Maiko Miyake, *Deciphering Codes of Corporate Conduct: A Review of Their Contents* 14 (OECD, Working Papers on International Investment No. 1999/2 Nov. 1999) (The OECD study of 246 codes showed that “many of them concentrate on the ‘cluster’ of issues . . . – forced labour (38.5 per cent), child labour (43.2 per cent), working hours (31.8 per cent), compensation (45.3 per cent) and reasonable working environment (75.7 per cent).”); Int’l Labor Org. [ILO] Governing Body, *Overview of Global Development and Office Activities Concerning Codes of Conduct, Social Labeling and Other Private Sector Initiatives Addressing Labour Issues*, Working Party on the Social Dimensions of the Liberalization of International Trade GB.273/WP/SDL/1(Rev.1), 273rd Session ¶ 48 (Nov. 1998) [hereinafter the “ILO Study”] (the ILO study of 215 codes of conduct)

codes use vague language, and for certain rights, codes often do little more than ask for compliance with the supplier countries' domestic laws.³⁰ Most notably, codes of conduct often lack clear language on the freedom of association and wages, and frequently defer to domestic law.³¹

A. *The Absence of Code Provisions Regarding Freedom of Association*

Codes of conduct do not consistently address freedom of association.³² Many activists and scholars view this as one of the major shortcomings of codes of conduct as they currently exist.³³ There are several factors that explain the minimal treatment of freedom of association. First, “[t]he right to free association is almost as difficult to define and implement as it is to police.”³⁴ Second, corporations generally view freedom of association and the attendant formation of unions as a hindrance and burden to economic growth and profits.³⁵ Justified or not, corporate hostility towards unions

(“The labour issues included in codes of conduct often, but not necessarily, appear to reflect the nature of publicized labour problems in the various industry and service sectors. [Certain codes] tended to concentrate on child and forced labour. [T]hree-fourths of codes reviewed mentioned health and safety. . . . [T]wo-thirds . . . addressed the issue of employment discrimination. In contrast, relatively few codes addressed freedom of association and collective bargaining.”).

30. ESBENSHADE, *supra* note 4, at 133; Posner & Nolan, *supra* note 18, at 209–10.

31. Posner & Nolan, *supra* note 18, at 209–10 (For standards regarding freedom of associate and wages, “many companies prefer to adopt codes that simply require compliance with national laws and argue that applying human rights norms are not their business.”) (citing Compa and Hinchliffe-Darricarrere, *supra* note 7, at 663–86); *see also* Gordon & Miyake, *supra* note 29, at 14 (“Only 29.7 per cent of the [246] codes mention respecting freedom of association and collective bargaining.”); *id.* at 25 (For apparel companies, “[f]reedom of association is mentioned in just under half of the apparel codes.”).

32. BOB HEPPLER, LABOUR LAW AND GLOBAL TRADE 73 (2005) (“[O]nly 15 percent of codes in the ILO survey addressed freedom of association, and only some of these referred to collective bargaining. The same survey found examples of codes aimed at the elimination of trade unions, or expressing a preference for individualized non-union representation.”); ILO Director-General, *Freedom of Association in Practice: Lessons Learned* 38 (Global Report at the International Labour Conference, 97th Sess. Report I (B)) (2008), *available at* <http://tinyurl.com/3ohalg4>; ILO Study, *supra* note 29, at 5 (“[R]elatively few codes addressed freedom of association and collective bargaining.”).

33. Gordon & Miyake, *supra* note 29, at 25 (“Given the importance of freedom of association as a workplace right, it is perhaps surprising that the issue is not mentioned more often.”).

34. SEIDMAN, *supra* note 1, at 36. One MNC that does a particularly good job of recognizing freedom of association in its code is Levi Strauss. Its “Terms of Engagement Guidebook” states: “We respect workers’ rights to form and join organizations of their choice and to bargain collectively. We expect our suppliers to respect the right to free association and the right to organize and bargain collectively without unlawful interference. Business partners should ensure that workers who make such decisions or participate in such organizations are not the object of discrimination or punitive disciplinary actions and that the representatives of such organizations have access to their members under conditions established either by local laws or mutual agreement between the employer and the worker organizations.” LEVI STRAUSS & CO., TERMS OF ENGAGEMENT GUIDEBOOK 28 (2010), *available at* <http://tinyurl.com/3v5jt26>.

35. *See* ESBENSHADE, *supra* note 4, at 98 (“A representative of several manufacturers told me that monitoring is a way to avoid unionization because it eradicates the violations that lead workers to unionize. There is a fundamental contradiction between monitoring’s conceptualization as a process

makes it unlikely that many MNCs would promote freedom of association and the right to organize through codes of conduct.³⁶

Third, there is no incentive for MNCs to try to fit freedom of association provisions into their self-regulatory regimes. Unionization is declining across the globe.³⁷ Thus, MNCs do not feel compelled to address freedom of association concretely in codes because the right to organize is not part of most consumers' concept of what it means to be socially responsible. MNCs go to great lengths to ensure consumers do not think that they manufacture their products in sweatshop conditions.³⁸ However, that does not mean that products are being made in a "worker-friendly" environment.³⁹ As Mark Levinson explains, "[c]onsumer demand for worker-friendly products, in contrast to sweatshop-made products, is *elastic*: price increases generate sharp drops in demand. The loss of revenue from consumers unwilling to pay more for a garment produced under good conditions is not offset by those willing to pay more."⁴⁰

In addition to MNCs' lackluster position on freedom of association, some developing countries' policies and practices severely restrict freedom

to protect workers' rights and an avenue to avoid the exercise of such rights."). Some might see MNCs' attitude on this issue as a motivation to push harder for greater protection for freedom of association within the self-regulatory codes system. However, the bottom line is that codes are voluntary and have been shaped by pressure from NGOs leveraging consumer pressure. The fact is, there is a limit to what those tactics can make an MNC do in a self-regulatory regime, especially when freedom of association has not fit within an NGO's strategy for creating consumer pressure or the general consumer notion of socially responsible products. Those limitations are discussed later in this section and *infra* Part III.

36. ESBENSHADE, *supra* note 4, at 44 (Codes do "not bolster workers' key rights to freedom of association and collective bargaining. In fact, it can undermine those rights. Companies have used their monitoring schemes for public-relations purposes in the struggle for public sympathy during unionization campaigns. GUESS?, for example, took out a full-page newspaper advertisement slamming the union while proclaiming the relative advantages of monitoring.").

37. Cleveland, *supra* note 27, at 142–43 ("[C]hanges in the employment relationship have challenged traditional domestic regulation. States historically have regulated the workplace through collective bargaining agreements Collective bargaining models rely on strong unionization, and national labor laws traditionally assume the existence of relatively long-term employment with an individual firm in a traditional employer-employee relationship. But unionization is on the wane in many states, and 'flexible,' multitiered, and disparate employment relationships . . . are now proliferating through employment forms such as temporary and leased employees and so-called independent contractors."). For a discussion of the decline in unionization in the United States garment industry, see ESBENSHADE, *supra* note 4, at 29–31, 41–44.

38. Mark Levinson, *Wishful Thinking*, BOS. REV., Feb.–Mar. 2001, available at <http://bostonreview.net/BR26.1/levinson.html> ("Firms *do* have a lot to lose if they are seen as sweatshop producers. The demand for goods produced under sweatshop conditions is inelastic. Thus, firms will go to great lengths — join the Fair Labor Association (FLA) or Social Accountability International (SA8000), adopt codes of conduct, pay monitors to check their factories, increase their public relations efforts — to avoid being perceived as a sweatshop producer.").

39. *Id.* ("[F]irms will go to great lengths . . . to avoid being perceived as a sweatshop producer. What firms *will not do* is grant workers basic rights to organize . . .").

40. *Id.*

of association.⁴¹ The antiunionization stance of foreign governments may be the most significant reason that freedom of association is a difficult subject to address through codes of conduct.⁴² Even if corporations were more supportive of unions and unionization were not losing the battle to globalization, the restrictive laws and strong antiunion policies and practices of China and countries like it would still influence how MNCs treat freedom of association in their codes of conduct. Even in countries where independent unions are not against the law, “[i]n export-processing zones, which are often gated and secured by armed guards, unionization campaigns have almost universally led to firing and layoffs and often to physical abuse.”⁴³ Thus, even if MNCs wanted to foster freedom of association and unions, it is difficult to do so directly through codes of conduct without first addressing the policies and practices of foreign governments.

Addressing these policies and practices might best be left to the broader international community and government actors. Supplier codes should include freedom of association provisions as a normative principle to aid more institutionalized and human rights efforts to secure freedom of association and the right to organize. However, trying to create, monitor, and support freedom of association and the right to organize through supplier codes would require considerable time and resources. Advocates and scholars should be more focused on how to use codes of conduct to improve work conditions from a more practical standpoint.

Shifting codes of conduct away from freedom of association and the right to organize should not be mistaken for abandoning or even diminishing the importance of creating worker involvement in the implementation and enforcement of supplier codes. The need for a worker voices is apparent from the failure of codes of conduct to improve working conditions consistently.⁴⁴ For now, however, worker voices might

41. ESBENSHADE, *supra* note 4, at 128 (“[L]ocal governments sometimes participate in repressing workers’ rights to attract foreign investment. In a few countries, such as Bangladesh, Namibia, Pakistan, and Panama, union activity is prohibited or restricted in export-processing zones as a matter of law. In other countries, including China and Mexico, the only unions allowed in the export-processing zones are official unions that are traditionally allied with the government.”).

42. Posner & Nolan, *supra* note 18, at 209 (“Different standards on freedom of association are in part due to companies’ practical concerns for their ability to ensure compliance when producing in countries such as China and Vietnam, where the right of freedom of association and collective bargaining are severely restricted.”).

43. ESBENSHADE, *supra* note 4, at 43–44 (“In 1982, striking women in South Korea were beaten and arrested by police. The scene was repeated the same year in a free-trade zone in the Philippines when 10,000 workers protested conditions. The Philippine government responded by passing new anti-labor measures. There are other examples from Mexico to Sri Lanka.”) (internal citation omitted).

44. See *infra* Part III (discussing why the current approach, driven by exposés and consumer demand, does not always produce positive results for workers).

have to come in some form other than through freedom of association, the right to organize, and unionization.⁴⁵

B. *Difficulties Addressing Wages*

Wages are also a difficult issue, and codes tend to defer to local standards.⁴⁶ MNCs hesitate to include clear standards on wages because the low labor costs are a major reason why MNCs use suppliers in developing countries.⁴⁷ Also, there is no international standard for wages.⁴⁸ Therefore, codes frequently require suppliers only to comply with local laws regarding wages.⁴⁹ In practice, this means that suppliers are only required to meet local minimum wages that are rarely enforced⁵⁰ or do not meet workers' basic needs.⁵¹ Supplier codes of conduct should be used to

45. Determining the best way to incorporate worker voices is beyond the scope of this Note, but one of the auxiliary effects of this Note's main proposal is that it could enable local NGOs and activists to become more involved in monitoring codes of conduct. Increasing the role of local NGOs and activists would be an important part of effectively implementing this Note's main proposal, in part, because local NGOs and activists are best situated to serve as a proxy for worker voices.

46. ESBENSHADE, *supra* note 4, at 133 (An industry association code, "the WRAP code basically requires the manufacturer to comply only with local laws — for example, wages must comply with local legal minimum and hours with the local legal maximum."); *see, e.g.*, WALMART STANDARDS FOR SUPPLIERS, available at <http://walmartstores.com/download/2727.pdf> ("Suppliers must compensate all workers with wages, overtime premiums, and benefits that meet or exceed local legal standards, local industry standards, or collective agreements, whichever are higher. Suppliers are encouraged to provide wages and benefits that are sufficient to meet workers' basic needs and provide some discretionary income for workers and their families.").

47. TSOGAS, *supra* note 11, at 64.

48. Janelle Diller, *A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labeling and Investor Initiatives*, 138 INT'L LAB. REV. 99, 115 n.34 (1999) ("Of all the issues addressed, the most frequently referenced to national law was wage levels — an area where there is no international standard."). It would be particularly difficult to set an international standard for wages because they are so dependent on local factors and the local labor market. However, an international standard might call for wages to be set at the living wage for a given region. *See infra* Part IV.A.2 for further debate over living wage.

49. TSOGAS, *supra* note 11, at 64; Rajesh Chhabara, *Wages — Working for a Living*, ETHICAL CORP. (June 30, 2009), <http://tinyurl.com/62hf2ky>.

50. *See* THEODORE H. MORAN, BEYOND SWEATSHOPS: FOREIGN DIRECT INVESTMENT AND GLOBALIZATION IN DEVELOPING COUNTRIES 52 (2002); *see also* Arnab K. Basu, Nancy H. Chau & Ravi Kanbur, *Turning A Blind Eye: Costly Enforcement Credible Commitment and Minimum Wage Laws* 24 THE INSTITUTE FOR THE STUDY OF LABOR (IZA) IN BONN DISCUSSION PAPER NO. 2998 (Aug. 2007), <http://tinyurl.com/yfe3uau> ("There is now extensive evidence particularly from developing country [labor] markets that non-compliance with minimum wage legislations in covered sectors is pervasive.").

51. *See* Chhabara, *supra* note 49 ("In 2007, a wave of riots swept [Bangladesh] as textile factory workers protested against a legal minimum wage that had remained unchanged for 12 years. Workers argued that they could not earn enough to support themselves or their families. Fifteen years of corporate responsibility initiatives in global supply chains has made a significant improvement in working conditions in factories that make goods for multinational companies. But the lot of workers has barely improved according to living wage campaigners. Even after working long hours — at times up to 16 hours a day without a weekly day off — their wage is not enough for a decent

fill the void of enforcing minimum wage laws when states fail to do so, and may be the appropriate mechanism for supporting the push for a living wage.⁵²

The disparity between export suppliers, who are impacted by codes of conduct, and domestic industries, which have no relationship with MNCs, makes addressing wages through codes of conduct even more complex. Even if the wages of export supplier workers seem substandard or unacceptable from an outside perspective, workers for these companies are typically paid more than the national average.⁵³ In fact, there is evidence that, except in China, the export-oriented sectors that supply U.S. imports have relatively acceptable labor standards compared to nonexport sectors.⁵⁴ If export-oriented sectors already provide better labor conditions and higher wages than domestic industries, the issues with code wage provisions become trickier. If export-oriented labor standards are better than domestic conditions, and therefore preferred by workers, then workers' interests may be best served by focusing efforts on setting wages based on local conditions and basic needs, not on outside perspectives of what constitutes acceptable pay.

II. SECOND GENERATION: MONITORING SUPPLIERS TO VERIFY AND REPORT ON CODE COMPLIANCE

As supplier codes of conduct proliferated in the 1990s,⁵⁵ advocates shifted their focus away from code adoption and toward compliance verification.⁵⁶ This second generation was intended to make codes of conduct credible, even if it did not improve their effectiveness in actually

living.”).

52. *See supra* Part IV.B (Advocating for a living wage coincides with this Note’s main proposal of focusing codes on requiring suppliers to pay a sufficient hourly wage.).

53. TSOGAS, *supra* note 11, at 65 n.2.

54. SAMUEL ESTREICHER & MIRIAM CHERRY, GLOBAL ISSUES IN EMPLOYMENT LAW, CASES AND MATERIALS 8 (2008) (citing OECD, STUDY OF TRADE, EMPLOYMENT AND LABOUR STANDARDS (1996) (finding no relationship between measures of export performance and indicators of low labor standards); OECD, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS 13 (2000); *see also* SEIDMAN, *supra* note 1, at 88 (“Indian unionists have continued to insist that efforts to use trade treaties in response to labor grievances could block market access for products produced in the unionized, formal sector of the economy, punishing workers in export-oriented sectors for the sins of employers in rural areas — most of whose products are destined for domestic, not international, markets”).

55. ESBENSHADE, *supra* note 4, at 119–22.

56. *Id.* at 8 (“In 1995, the Gap became the first manufacturer to agree to ‘independent monitoring’ of a foreign contractor by human- and labor-rights organizations.”); TSOGAS, *supra* note 11, at 80 (“The issue of implementation, monitoring, and verification lie at the heart of efforts to raise employment standards and convince external concerned organizations (NGOs, trade unions, governments) and individuals that policies are taken seriously and being properly implemented.”).

improving labor conditions.⁵⁷ Monitoring became the primary means for holding MNCs accountable for supplier compliance.⁵⁸ Advocates began pushing for reports and demanding access to verify that suppliers were meeting the labor standards created by codes of conduct and were being held accountable for code violations. Today, if a MNC has a code, monitoring is a part of that company's supply-chain procedures.⁵⁹

Monitoring has taken various forms,⁶⁰ ranging from internal staffing to hiring an accounting firm. Some MNCs use their own internal compliance staff to monitor suppliers. This type of monitoring is most commonly seen in assessing new suppliers or giving an existing supplier a timeline to comply with the code of conduct.⁶¹ Although quality-control personnel are sometimes used, major companies like Nike and the Gap have specialized compliance departments.⁶²

For nearly a decade, accounting firms were heavily involved in social-accountability monitoring.⁶³ However, accountants were not suited for workplace monitoring, as they rarely specialize in labor issues or receive training in monitoring labor conditions.⁶⁴ Additionally, the accountants commonly came from outside the country, culture, and certainly the socio-economic circumstances of the factories and workers they were evaluating.⁶⁵ Consequently, by the early 2000s, major accounting firms "were no longer very active in monitoring."⁶⁶

Eventually, with considerable success, labor rights activists demanded third-party certification based on independent monitoring. There are two forms of certification: brand certification and factory certification.⁶⁷ Under

57. Arthurs, *supra* note 10, at 23.

58. SEIDMAN, *supra* note 1, at 47 ("Today business ethicists frequently identify the Sullivan Principles [which asked U.S. companies conducting business in apartheid South Africa to adopt an anti-discriminatory code of conduct] as the first 'successful' example of independent monitoring. . . . [T]he experience undoubtedly helped shape subsequent approaches to corporate codes of conduct and multinational monitoring, and it continues to resonate in contemporary discussion.")

59. For a thorough discussion of monitoring, see ESBENSHADE, *supra* note 4, at 119–64.

60. Posner & Nolan, *supra* note 18, at 211–12 ("Monitoring initiatives have chosen various avenues for meeting these challenges, with some focusing on systematically monitoring and certifying factories, other on monitoring entire supply chains and still others on conducting independent investigations and verification on a case-by-case basis.")

61. ESBENSHADE, *supra* note 4, at 138.

62. *Id.* at 138 ("The Gap has 115 compliance officers monitoring its nearly 4,000-factory supplier chain. Nike combines the work of its seventy in-house monitors with visits by outside auditing and consulting firms.") (internal citation omitted).

63. *Id.* at 139; SEIDMAN, *supra* note 1, at 60. For more on accounting firms' role in monitoring, see ESBENSHADE, *supra* note 4, at 138–40.

64. SEIDMAN, *supra* note 1, at 61.

65. *Id.* at 60 (discussing the accounting firm involved in monitoring the Sullivan Principles).

66. ESBENSHADE, *supra* note 4, at 139.

67. *Id.* at 131.

brand certification, a brand's products are certified as being produced under acceptable conditions.⁶⁸ Factory certification requires individual supplier factories to be certified. The supplier factories are responsible for retaining a monitor, while the brand-name MNC commits to using certified factories.⁶⁹ Two well-known examples of the two forms of certification are the FLA, which brand-certifies,⁷⁰ and Social Accountability 8000 (SA8000), which factory-certifies.⁷¹ Both forms of certification, as well as the specific groups, have critics.⁷²

The debate around monitoring has recently focused on “whether it should be conducted by ‘external’ commercial monitors, from the various business enterprises, or by local NGOs with a proven commitment to labor or human rights.”⁷³ NGOs are playing a larger role in the process,⁷⁴ gaining the most ground in monitoring labor standards in Central America.⁷⁵ However, MNCs have been slow to accept NGOs as monitors.

While the role of NGOs in monitoring continues to develop, monitoring as a whole still faces a number of problems. Regardless of the form, monitoring has yet to sufficiently improve labor conditions for any significant portion of supplier workers. There are many issues that hinder the effectiveness of monitoring, including monitors' conflict of interest, the limited resources available to monitor suppliers, the lack of uniformity in MNCs' codes of conduct, and suppliers' ability to game monitoring efforts.

68. *Id.* at 131–32.

69. *Id.* at 131.

70. *Id.*

71. *Id.*

72. Some argue that the factory-certification “scheme is more thorough because it will eventually cover 100 percent of factories used, whereas under the brand-name certification plan only a small percentage of the brand's factories have to be externally monitored each year to remain in good standing. Others point to grave conflicts of interest because the contractor directly hires the monitor for its own certification. [This notably . . . undermines the concept of manufacturer responsibility that monitoring was originally created to ensure.” *Id.* at 132. For a thorough discussion of both forms of certification, see *id.* at 131–38. “The FLA . . . has been criticized for a lack of independence in monitoring. Recently, however, the FLA adopted substantial changes in its monitoring system. Whereas previously the companies were able to select their inspectors from a list of FLA accredited monitors (which entail both international and local nonprofit groups), it is now established that the FLA, as an independent third party, will be responsible for selecting and paying the monitor.” Posner & Nolan, *supra* note 18, at 215. SA800, on the other hand, faced scrutiny after certifying factories in China that later were revealed to have many labor violations. See ESBENSHADE, *supra* note 4, at 135–36.

73. *Id.* at 140.

74. For a good discussion of the development of NGO monitoring, and some of its hurdles, see ESBENSHADE, *supra* note 4, at 140–43.

75. *Id.*

A. *Monitors' Conflict of Interest*

The independence of monitoring schemes, no matter who does the monitoring, is inherently compromised. MNCs, suppliers, monitors, and even workers have an interest in presenting an appearance of code compliance. There is an “inconsistent logic manifested in the conflict of interest embedded in the system.”⁷⁶

The conflict created by MNCs' internal monitoring is apparent. By seeking the lowest possible contract prices, the MNC contributes to and benefits from poor labor conditions, so monitoring by that same MNC to uncover poor labor conditions is a self-evident conflict of interest.⁷⁷ Even if an outside monitor is hired, the MNC commonly pays the bill, and the monitoring company wants repeat business, so its interests are best served by providing a favorable or clean compliance report.⁷⁸ MNCs are not likely to hire an auditing firm that consistently reveals the substandard labor practices of suppliers. Even the interests of some international NGOs engaged in monitoring may not always align with those of the supplier's workers. If an international NGO exposes code violations, it might want to publicize this discovery as a “success,” but this exposure may prompt the MNC to cancel the supplier's contracts and possibly result in workers losing their jobs.⁷⁹

B. *Limited Resources*

Second, monitoring supplier codes of conduct requires considerable resources. An examination of the U.S. Department of Labor's (DOL) enforcement efforts demonstrates the daunting task of monitoring suppliers across the globe. Compared to monitoring supplier codes of conduct, the DOL has it easy. Whereas monitoring suppliers involves monitoring loosely defined labor standards on a global scale, the DOL is charged with enforcing standards defined by laws and only has to monitor a limited territory. Despite these advantages, the DOL still faces a resource crunch. “In its report on sweatshops, the [Government Accountability Office] (1988) notes that staffing levels of both federal and state investigators are too low In 1998, the DOL had 950 investigators for 6.5 million work sites (120 million workers).”⁸⁰ The lack of resources

76. *Id.* at 97.

77. *See id.* at 98.

78. *See id.* at 98, 102 (“Although monitoring firms may want to maintain certain standards, they must please their clients to stay in business. . . . Without regulation, free-market monitoring to some degree creates made-to-order monitoring. For example, the director of one monitoring firm [said] . . . the company had a policy of doing only unannounced visits but was now doing some announced visits because the manufacturers insisted.”); Levinson, *supra* note 38.

79. *See infra* Part III.C.

80. *See* ESBENSHADE, *supra* note 4, at 40.

undermines the DOL's ability to monitor U.S. labor laws. "As a former DOL investigator conceded, the [U.S.] contractors' 'chances of being hit [with an investigation] are almost nil.'"⁸¹

The DOL's struggle to enforce U.S. labor laws is a strong indicator of how difficult it is to monitor supplier codes of conduct on a global scale. In fact, NGOs, the most independent form of monitors, struggle to monitor any significant number of suppliers. A quick empirical look at one of the more promising independent international NGOs,⁸² the Worker Rights Consortium (WRC), demonstrates the enormity of the task.⁸³

The WRC's program focuses on getting universities to license their logos only to manufacturers that contract with suppliers that will comply with the WRC code.⁸⁴ The WRC primarily monitors compliance by "launch[ing] factory assessments in direct response to worker complaints."⁸⁵ This reactive approach differs from the more common monitoring schemes of announced and unannounced monitoring visits used to check compliance and certify suppliers.⁸⁶

The WRC keeps a thorough database, including universities, licensees, and supplier factories, but it is not easy to get a complete list of all supplier factories.⁸⁷ A snapshot of a single school—the University of North Carolina—is sufficient to demonstrate the "sheer numbers" problem of monitoring. Nearly 4000 supplier factories are involved in manufacturing apparel bearing the school's logo.⁸⁸ However, according to the website,

81. *See id.* at 93.

82. Levinson, *supra* note 38, at n.1.

83. The idea to use the Worker Right Consortium as an empirical example comes from a course response paper written by David Lawrence, *Investigating the WRC: A Brief Empirical Study* (Mar. 30, 2009) (unpublished manuscript) (on file with the Virginia Journal of International Law Association).

84. *About Us: Mission*, WORKER RIGHTS CONSORTIUM (2007), <http://www.workersrights.org/about>; *see* JAMES ATLESON ET AL., *INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS' RIGHTS IN THE GLOBAL ECONOMY* 538 (2008). For a thorough discussion of the WRC's origins and practices, *see* ESBENSHADE, *supra* note 4, at 186–97.

85. *Factory Investigations: Overview*, WORKER RIGHTS CONSORTIUM (2007), <http://www.workersrights.org/Reports/overview.asp>; *see* ATLESON, *supra* note 84, at 536.

86. The WRC is currently trying to implement a new approach to monitoring. *See infra* note 137 and accompanying text.

87. The database only permits a user to search for factories by school, licensee, or country. Given that the WRC works with over 175 schools and includes factories in over seventy countries, it would be difficult to develop a complete list of factories. Additionally, the WRC disclaims that it "cannot guarantee the accuracy or completeness of the factory list and associated data, because of the complications inherent in gathering and reporting the information (including the tendency of licensees to change factories season-to-season and year-to-year)." *Factory Database: About the Factory Disclosure Database*, WORKER RIGHTS CONSORTIUM (2007), http://www.workersrights.org/search/about_fdd.asp.

88. *Factory Database: Results for UNC*, WORKER RIGHTS CONSORTIUM, <http://tinyurl.com/3q34uef> (last visited March 16, 2010) (click "UNC" under "search by school," then click "view data by factory, ordered by country"). The total number of factories for UNC is

WRC has only produced reports for fifty-one supplier factories.⁸⁹ If the University of North Carolina were the only school associated with WRC, the monitoring rate would only be 1.4% of supplier factories. There are, however, over 175 schools⁹⁰ and over 3000 brands⁹¹ affiliated with the WRC. Even if there were complete supplier factory overlap between all the schools and brands associated with WRC, the actual monitoring rate is discouragingly low. This means that, realistically, even the best monitoring schemes can only check compliance for a small fraction of suppliers. Even a system that includes “surprise” monitoring visits provides little deterrence value because the chances of a visit are so small.⁹² A more consistent monitoring presence is necessary to ensure code compliance.⁹³

C. *Too Much of a Good Thing: The Difficulty of Monitoring Multiple Codes*

It is not only the number of suppliers that make monitoring difficult; monitoring is further complicated by the fact that so many MNCs require suppliers to agree to their own particular code of conduct, and, as previously mentioned in Part I, codes vary from company to company.⁹⁴ The possible content of supplier codes is endless. This fact makes monitoring difficult for a few reasons. First, a supplier working with multiple MNCs on different products probably has a difficult time ensuring compliance with codes that vary on important labor standards, and might even conflict on some issues.⁹⁵ Second, monitors face a similar challenge, trying to assess compliance with numerous of codes with a variety of content and standards.⁹⁶ The monitors’ job is further complicated by the vagueness of codes, which are “often open to

based on the “displaying records” indicator at the bottom of the page.

89. *Factory Investigations: Factory Reports*, WORKER RIGHTS CONSORTIUM, <http://www.workersrights.org/Freports/index.asp>. It is unclear whether some factories were investigated more than once.

90. WORKER RIGHTS CONSORTIUM, *supra* note 84.

91. The Nike USA Inc. brand, for example, on April 27, 2010, had 258 supplier factories associated with WRC. *Factory Database: Results for Nike USA Inc.*, WORKER RIGHTS CONSORTIUM, <http://tinyurl.com/3t3oqaw> (last visited April 27, 2010) (click “Nike USA, Inc.” under “search by licensee company,” then click “view data by factory, ordered by country”). The total number of factories for Nike USA Inc. is based on the “displaying records” indicator at the bottom of the page.

92. This assumes that suppliers either have access to data on the number of monitoring visits and reports or are somehow aware that a monitoring visit is unlikely. If data are available, however, a simple cost-benefit analysis of whether it is worthwhile to incur expenses in order to comply with a code of conduct indicates that the risk of being caught for non-compliance is so small that even moderate expenditures for compliance would be too much.

93. Local NGOs and activists may be able to provide the type of frequent or constant presence that is required. *See infra* Part IV.C.

94. Posner & Nolan, *supra* note 18, at 209.

95. John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 490 (2000).

96. Posner & Nolan, *supra* note 18, at 212–13.

interpretation.”⁹⁷ As a result, it is difficult to assess the credibility of monitoring findings or compare the effectiveness of different MNC codes.⁹⁸ As one scholar puts it, “[i]f every company simply incorporates its own definition of appropriate working conditions into a code of conduct, the codes will be meaningless.”⁹⁹

D. *Suppliers Gaming the System*

The most troubling problem for monitoring is that suppliers are developing tricks for hiding code violations from monitors. There are two prevalent methods that particularly frustrate the effectiveness of monitoring. To hide actual hours and wages, suppliers will keep two sets of books, a doctored set for the monitors and a real set for business.¹⁰⁰ Also, to control information provided to monitoring firms, suppliers coach workers on what to say, even handing out scripts.¹⁰¹ Gaming the system has become so important to suppliers that there is software specifically designed to create fictitious employee work information.¹⁰²

Suppliers are not always acting alone. In fact, gaming the monitoring system may be creating its own industry, with consulting firms helping suppliers evade and trick the monitoring firms hired by MNCs. One former manager for a Chinese supplier for Walmart, fearful of a fourth strike that would result in his contract being cancelled, said that a consultant “provided advice on how to create fake but authentic-looking records and suggest that [they] hustle any workers with grievances out of the factory on the day of the audit, [the former manager] recounts. The consultant also coached [the company’s] managers on what questions they could expect from Walmart’s inspectors.”¹⁰³ With the help of the consultant, the supplier passed its inspections and continued operating without changing a thing.¹⁰⁴ Suppliers also share information with each other on how to pass monitoring inspections.¹⁰⁵

These institutional approaches to deception are one of the toughest problems for monitors to overcome. The inclusion of local organizations in monitoring efforts, however, may offer part of the solution to combat

97. *Id.* at 213.

98. *Id.*

99. Cleveland, *supra* note 27, at 147.

100. Thomas Fuller, *Sweatshop Snoops’ Take on China Factories*, N.Y. TIMES, Sept. 15, 2006, <http://tinyurl.com/3ebn624>.

101. *Id.*

102. *Id.*; see Guy Standing, *Decent Workplaces, Self-Regulation and CSR: From Puff to Stuff?*, in 62 U.N. DEPT. OF ECON. AND SOCIAL AFFAIRS WORKING PAPER 19–20 (Nov. 2007).

103. *Secrets, Lies, and Sweatshops*, BUSINESSWEEK, Nov. 27, 2006, available at <http://tinyurl.com/ypf7fd>.

104. *Id.*

105. Fuller, *supra* note 100.

suppliers gaming the system.¹⁰⁶ The bottom line is that unless monitors can combat suppliers tricks and reliably assess labor conditions, “the grades they give risk becoming a rubber stamp.”¹⁰⁷

III. THE FUNDAMENTAL PROBLEM WITH THE CURRENT STATE OF CODES OF CONDUCT: THE LIMITS OF RELYING ON EXPOSÉ CAMPAIGNS AND CONSUMER PRESSURE

Notwithstanding serious concerns about efficacy, the spread of voluntary codes of conduct can be viewed as a success of sorts in creating a self-regulatory framework where no regulatory regime or legal system previously existed. This success is a result of the pressure activists put on MNCs through exposé campaigns and by creating consumer demand for socially responsible products. However, those driving forces can push codes of conduct only so far.

The fact that consumer demand for sweat-free, socially responsible products does not necessarily lead to “worker-friendly” labor conditions has already been discussed.¹⁰⁸ Under pressure from exposé campaigns and consumer demand, MNCs have created codes with content and an implementation system that reflect Western choices and lack of worker voices. The content of codes and lack of local involvement in monitoring is a reflection of the international labor movement’s emphasis on “labor rights as human rights” and exposé campaigns’ presentation of workers as victims, not participants. As a result of these issues, as well as the limits of consumer demand for socially responsible products, codes of conduct sometimes result in adverse consequences for workers instead of improvements in working conditions.

A. *Whose Priorities Matter?*

1. *Western Choices and the Lack of Worker Voices*

MNCs try to attain the socially responsible label by adopting codes of conduct that apply to all of their suppliers across the globe. This is problematic because labor issues are shaped by local context.¹⁰⁹ In *Beyond*

106. The potential benefits of involving local NGOs is discussed in detail *infra* Part IV.C. For a discussion of the broader role civil societies might play in social auditing, see Mary A. Skouras, *Social Auditing: How Multinational Corporations Can Join Forces with Civil Society to Improve Global Labor Conditions*, 1 PEPP. J. BUS., ENTREPR. & L., Online Publications, <http://tinyurl.com/3s5ne3j> (last visited Oct. 27, 2011).

107. SEIDMAN, *supra* note 1, at 63.

108. See *supra* Part I.A.

109. SEIDMAN, *supra* note 1, at 63 (“[A] global code or global monitoring system designed to cover corporate activities [or suppliers] around the world may miss key local problems.”).

the Boycott, Gay Seidman examines the Sullivan Principles, which asked U.S. companies conducting business in apartheid South Africa to adopt an antidiscriminatory code of conduct.¹¹⁰ The Sullivan Principles demonstrates how severely Western-written codes can miss the practicalities of local issues. Despite its goal, the Sullivan Principles “blur[red] definitions of race in measuring the racial composition of the workforce or racial patterns in hiring.”¹¹¹

The fundamental disconnect between a global approach to inherently local problems makes it nearly impossible to simultaneously create concrete standards while accounting for the differences in local norms and customs for suppliers across the globe. This disconnect most commonly results in vague and malleable language that often merely requires compliance with the laws of the supplier’s country. The prime example of this result is how wages are addressed in codes of conduct.¹¹²

The disconnect between globally-applied codes of conduct and local labor standards is exacerbated by the fact that supplier workers are not included in the process of creating and monitoring codes of conduct.¹¹³ In the case of the Sullivan Principles, the accounting firm charged with monitoring “never solicited comments from anyone in South Africa who might have worked in or with corporate signatories — not unions, not employee committees, not even recipients of corporate grants for community services.”¹¹⁴ The lack of worker voices continues today, as codes tend to reflect consumer concerns rather than the labor issues raised by supplier workers.¹¹⁵ The fact that MNCs are only concerned with what

110. In *Beyond the Boycott*, author Gay Seidman studies three different codes of conduct cases — the Sullivan Principles in South Africa, RUGMARK in India, and the Commission for the Verification of Codes of Conduct in Guatemala — to uncover common patterns that push MNCs to agree to external monitoring and characterize “successful” monitoring programs. SEIDMAN, *supra* note 1, at 10. In an introductory summary of some common patterns, Seidman writes, “In terms of the actual monitoring process, key similarities emerge from the comparison in terms of funding, tensions between local and transnational goals, and . . . in the proliferation of alternative codes that undermine more effective monitoring” *Id.* at 7. Seidman’s comments on how he selected cases are telling about the efficacy of the monitoring: “I sought broad programs in which transnational campaigns had managed to insist that companies accede to nonstate regulatory monitoring schemes, where transnational activists had effectively mobilized threats of consumer boycotts to persuade employers to accept some form of independent workplace monitoring. I hoped to find common characteristics . . . that had produced widely acclaimed models of global workplace regulation. As I examined these ‘exemplary’ cases, however, I began to recognize that even this limited understanding of success might be problematic. . . . The closer I looked at cases I had initially viewed as success stories, the more I was forced to confront their limitations.” *Id.* at 10.

111. *Id.* at 63 (This fact “is a reminder of the pitfalls involved in designing codes that appeal to American and European consumers and investors, while trying to address local problems.”).

112. See *supra* Part I.B.

113. SEIDMAN, *supra* note 1, at 68.

114. *Id.* at 62.

115. *Id.* at 68.

consumers see as labor problems is a result of the reliance on exposé campaigns and consumer pressures.

Given the lack of local worker participation in developing approaches and solutions for labor problems, it is easy to understand the lack of appreciation for the differences in local culture, community, and norms, as well as the economic realities of the workers and their families. Instead of seeking to incorporate local voices, monitoring is geared toward demonstrating MNCs' efforts to be socially responsible, not to evaluate actual improvement in worker conditions.¹¹⁶ Supplier codes of conduct must incorporate local actors and be sensitive to local concerns to improve workers' conditions effectively.¹¹⁷

2. *"Labor Rights As Human Rights": Workers as Victims*

The failure to include local voices is not only the fault of MNCs and auditing firms charged with monitoring, but can also be partly attributed to the overall strategies of the international labor rights movement. The international labor rights movement was informed by the human rights movement's success in influencing national and international policies through global activism.¹¹⁸ The International Labor Organization's (ILO) creation of a set of core labor standards is a clear example of the attempt to paint a specific list of labor standards as human rights.¹¹⁹ The desire to piggyback on the successes of international human rights campaigns has resulted in a focus on "labor rights as human rights."¹²⁰ This approach

116. *Id.* at 62 (The accounting firm in charge of monitoring the Sullivan Principles, Arthur D. Little, "never devised any ways to evaluate the impact of corporate efforts. In fact, it could be argued that the ADL process only gave grades for effort, not outcome in ways that seem to undermine the entire point of monitoring. For example, despite the Sullivan code's expansion to include freedom of association, the ADL monitors never asked employees about any union experiences — surely an important source of information if you want to learn about labor practices."); *see also id.* at 98 ("Some companies, of course, will be honestly committed to improving their workplaces But others may be less conscientious. Voluntary programs may help persuade well-intentioned employers to comply with outside norms, but they clearly allow most cost-conscious, or less ethical, employers to 'play the gray' . . . complying only as much as is required by the regulatory framework.").

117. *Id.* at 63.

118. *Id.* at 33 ("[P]olicymakers began to talk about 'labor rights as human rights,' framing labor rights within a human rights paradigm.").

119. *Id.* at 22 ("[F]or most of its history [the ILO] viewed national states as central to the construction and enforcement of labor protections. . . . But in the 1990s, globalization seemed to undermine that strategy. Following the logic of transnationalism, the ILO shifted from its earlier emphasis on strengthening national-level labor law and labor enforcement to a new focus on promoting 'core' labor standards and universal labor rights."); *id.* at 35.

120. Cleveland, *supra* note 27, at 138 ("Given the widespread protection of certain fundamental labor rights in international human rights instruments, the ILO has identified its four 'core' labor standards as fundamental human rights. . . . These core standards are incorporated in the major human rights treaties as well as in the eight widely ratified core ILO conventions."). However, not all scholars have embraced this approach. *See generally* Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. INT'L L. 449, 452 (2010) (questioning the labor movement's turn to human rights and

tends to present workers as victims in order to gain sympathy from consumers and the international community and promote “naming and shaming” or boycott campaigns.¹²¹ As a result, workers are used as images or stories in such campaigns instead of being involved in negotiations for, or trying to create, actual improvements in labor conditions.¹²² At best, the emphasis on “labor rights as human rights” and a reliance on “naming and shaming” only serves to raise awareness of abuses and to push MNCs to avoid being caught working with abusive suppliers. In effect, however, the “labor rights as human rights” tactics do little to create practical avenues for workers to improve their labor conditions.

This focus has caused the traditionally local underpinnings of labor rights movements to be somewhat subsumed into the more universal or global rights paradigm of human rights,¹²³ which creates tension between international NGOs and local activists.¹²⁴ “Labor rights as human rights” is certainly one of the tools that should be used to improve labor conditions across the globe,¹²⁵ but the parallel to human rights should not completely overshadow the historically local roots of labor rights,¹²⁶ especially the need for worker participation.¹²⁷

discussing the potential long-term concerns of associating labor rights as human rights).

121. See SEIDMAN, *supra* note 1, at 32–34.

122. *Id.* at 35 (Seidman sums up this impact by stating: “To put it bluntly, in the effort to reach transnational consumers, these campaigns may be more likely to help workers ‘bear witness’ and gain international sympathy than to negotiate with managers on their own behalf.”); *id.* at 45.

123. *Id.* at 17–18 (“The dynamic of local struggles over citizenship [including rights in the workplace] and international campaigns around human rights differ in important dimensions. Historically, labor campaigns have sought to protect vulnerable members of a local community, often invoking local norms and citing the need to protect one’s neighbors By contrast, ‘human rights’ are advanced in more universal terms: human rights discourse tends to explicitly reject local variation and instead assert commonalities across contexts, setting an international standard for the treatment of all individuals regardless of their local cultures or traditions.”).

124. In an introductory summary of some common patterns among the three codes of conduct cases that he studied, Seidman writes, “In each case, relations between monitors and local activities were marked by visible and profound tensions — generally over who made strategic decisions and who represented workers to international activists — reflecting the kind of questions about accountability, representation, and access to global resources that arise in civil society everywhere.” *Id.* at 7.

125. See SEIDMAN, *supra* note 1, at 32–45 (discussing “labor rights as human rights”).

126. *Id.* at 32–34 (“Labor rights as human rights” and employing human rights tactics often involves emphasizing the victimization of workers and appealing to consumers and the international community by focusing on abuses to promote boycotts “rather than the construction of channels for negotiation or bargaining to improve actual labor conditions.”); *id.* at 45.

127. *Id.* at 35 (approaching “labor rights as human rights” by appealing for consumer and international sympathy not only fails to produce channels for improving labor conditions, but it marginalizes worker participation by “present[ing] workers as victims . . . dependent on outside support” undermining the historical labor approach of “emphasiz[ing] workers’ dignity and strength . . . and creat[ing] channels through which workers could articulate their own grievances.”); see also *id.* at 45 (“[T]ransnational labor campaigns may redirect attention away from labor’s traditional strategies and toward those core labor principles that look more like universal human rights; sometimes this approach emphasizes the protection of victims rather than the strengthening of

It is important to identify which aspects of the international labor rights movement are appropriate to address labor standards on the global stage and which tools are more effective in building labor rights locally. The “labor rights as human rights” paradigm may be limiting the potential of codes of conduct, and hindering the formation of a supportive network between international NGOs and local activists. Supplier codes of conduct may be more useful if efforts were focused on making them an effective tool for improving labor rights on a local basis and filling the voids of international standards and initiatives.¹²⁸

B. *What Is the Driving Force? The Danger of a Decline in Consumer Demand*

Although only time will tell, it is reasonable to believe that consumer awareness and demand for socially responsible products might have been a luxury of the prosperous economy during the 1990s and 2000s. The recession could cause that demand to collapse under consumer concerns about cost savings, giving way to a demand for cheaper products.¹²⁹ If exposé campaigns have little or no impact on consumer demand, the tactic’s ability to influence MNCs’ behavior is questionable. Exposé campaigns hinge on appealing to the conscience of middle-class consumers and creating “enough outrage and disgust to shame consumers out of their buying habit.”¹³⁰ This strategy is unlikely to succeed when consumer buying habits are primarily motivated by economic concerns.¹³¹

On the other hand, an argument can be made that apparel MNCs are extremely brand-conscious and they might be spurred into action by exposé campaigns,¹³² even without supporting consumer demand. MNCs are also concerned about the impact that bad publicity could have on the

workers’ voices.”)

128. *Id.* at 18 (arguing that there is no international standard for wages). *See also supra* Part I.B.

129. Virginia A. Leary, “Form Follows Function”: *Formulations of International Labor Standards — Treaties, Codes, Soft Law, Trade Agreements*, in INTERNATIONAL LABOR STANDARDS, *supra* note 18, at 179, 200–01. (“It is touching to have such faith in consumers but it seems more likely that they will prove to be as fickle in their ability to maintain boycotts and selectivity as they are in their purchasing preferences.”) (quoting Philip Alston and James Heenan, *The Role of International Labor Standards Within the Trade Debate: The Need to Return to Fundamentals* (prepared for publication in 2004 by the Project on Social Aspects of Trade Liberalization, Program for the Study of International Organizations, Graduate Institute of International Studies, Geneva, Director Virginia A. Leary; presented at the World Trade Forum 2001, World Trade Institute, Berne, Switzerland, Aug. 2001)).

130. Van Wezel Stone, *supra* note 16, at 124.

131. *See* SEIDMAN, *supra* note 1, at 129 (“In early 2005, a representative of Guatemala’s business federation pointed to broad variation in the way American corporations view labor rights, attributing this variation to companies’ views of their customers and to the threat that scandal might reduce their market share. Companies aimed at American students, like The Gap, may want to demonstrate good citizenship, but companies that aim at more price-conscious consumers — say, Wal-Mart — are less likely to care.”).

132. Compa & Hinchliff-Darricarrere, *supra* note 7, at 674–75; Van Wezel Stone, *supra* note 16, at 124–25.

brand's future value.¹³³ This is especially true in a world where information spreads and can be accessed on a 24/7 basis through Internet media and social networking sites.¹³⁴ However, when consumers are primarily cost-motivated, what MNCs believe is necessary in order to be seen as socially responsible by consumers is likely to move even further away from what local workers view as improved labor conditions.

C. *Who Bears the Costs? Adverse Impact on Workers*

The future viability of the exposé strategy and consumer pressure is important because, at its core, monitoring really is just another means of producing more information that can be used in an exposé.¹³⁵ While it was successful in creating pressure on MNCs to adopt codes, even if those tactics remained viable, it may not be the best approach for pushing a MNC toward implementing and enforcing its code. As long as monitoring continues to rely on consumers pressuring MNCs, it does little to empower workers to improve labor conditions.¹³⁶ In fact, once a MNC

133. This concern reflects a MNC's competing desires to increase market share by playing to current consumer demand for cheap products weighed against its desire to maintain a positive brand image in the long-term. Which motivation is more important will vary from company to company and industry to industry, but Walmart's initial response to the original consumer demand for "social responsibility" may be telling. Walmart was successful in employing a market-share-first strategy, despite heavy scrutiny from human rights groups. After establishing its dominance in the large-retail-discount market, Walmart has turned its attention to refurbishing its image. For a discussion of Walmart's changing approach to social responsibility, see CYNTHIA ESLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 96–100 (2010). However, Walmart may not be the best example because it has always served cost-conscious consumers. If consumer demand shifts during the recession, companies like The Gap, Banana Republic, and other retailers that cater to middle-class consumers might use a strategy that rebalances these competing desires.

134. Compa & Hinchliff-Darricarrere, *supra* note 7, at 675 ("As one analyst points out, 'In a global marketplace with almost instant communications, there are no hiding places for companies. International media will expose inconsistency and irresponsibility in corporate behavior, and vigilant consumers will respond.'") (quoting Martha Nichols, *Third-World Families at Work: Child Labor or Child Care?*, HARV. BUS. REV. 22 (Jan.–Feb. 1993)).

135. SEIDMAN, *supra* note 1, at 2–3 (Monitoring "alert[s] transnational networks to violations; those networks then mobilize consumer pressure against the corporate violator. . . . [M]onitoring factories around the world could assure ethical consumers that the goods they purchase were produced under broadly acceptable conditions"); *id.* at 43 ("[C]orporate monitoring capacities could be linked to the ILO's reporting capacities, but the only concrete enforcement mechanism they suggest involves 'taking corporate abuses to mass publics.'") (quoting John Braithwaite & Peter Drahos, *GLOBAL BUSINESS REGULATIONS* 255 (2000); SEIDMAN, *supra* note 1, at 44 ("At the heart of most activists' proposal lies active monitoring by civil society; independent NGOs, perhaps working in cooperation with corporate headquarters, would monitor conditions in corporate factories and facilities of their suppliers, providing information that would allow consumers and activities to 'name and shame' abusers and focusing on transnational campaigns as the most realistic sources of pressure on multinationals.")).

136. ESBENSHADE, *supra* note 4, at 39; see also ESBENSHADE, *supra* note 4, at 33 ("Monitoring arises from an economic configuration in which consumers have increasing leverage and workers have decreasing power. Private monitoring is a means of removing workers . . . from participation in the mechanism of rights enforcement. Private monitoring thereby reinforces rather than challenges

adopts a code, if monitoring reveals exploitative labor practices, it can produce adverse results for the workers who are supposed to benefit from the supplier codes. If negative information from monitoring reports is used in an exposé or published, instead of causing the supplier to take remedial action to actually improve labor conditions, the MNC may be pushed to cancel the contract, leading to the loss of jobs.

Faced with a monitoring report revealing a supplier's noncompliance, a MNC has essentially three options: discontinue its relationship with the supplier, require the supplier to take remedial action, or do nothing. From a business standpoint, discontinuing is the most attractive approach. The MNC can continue to claim it only contracts with socially responsible suppliers and enforces code compliance, while, with relatively minimal costs, replacing the offending supplier with a new one. This option, however, does not improve labor standards for the offending supplier and does nothing to hold the MNC accountable for its supplier practices. In fact, the only real consequence is that the supplier's workers might be out of jobs.¹³⁷

If improving labor standards is the goal of codes, requiring remedial action would be the ideal MNC response. However, this may require additional expenses, including continued monitoring, consulting, training, and aid to help the supplier improve its standards, or potentially increase costs to make improved standards economically viable for the supplier. Regardless of action taken, continuing the relationship might leave the MNC vulnerable to accusations of contracting with an inhumane or exploitative supplier.¹³⁸

Two examples demonstrate that workers often bear the consequences of exposé campaigns or reports of supplier noncompliance. In the first,

workers' vulnerability.”).

137. One possible solution to this dilemma is the recent push for MNCs to build stronger long-term relationships with a small, closed set of suppliers and to commit to helping them improve labor conditions. Nike, for example, publicly transitioned to this approach. See NIKE, INC., CORPORATE RESPONSIBILITY REPORT FY07 08 09, at 41–42, available at <http://tinyurl.com/5ucebab> (“At the end of FY09, Nike contracted with approximately 600 factories in 46 countries to manufacture Nike products. Our contracted manufacturing base is changing. NIKE, Inc. is executing a long-term sourcing consolidation strategy and streamlining its supply chain operations, which has, thus far, resulted in a 10-percent decrease in suppliers . . . from FY06 to FY09.”). Walmart is making similar overtures about shifting toward building stronger ties with fewer suppliers. See Stephanie Rosenbloom, *Wal-Mart to Toughen Standard*, N.Y. TIMES, Oct. 22, 2008, at B1. The WRC is also trying to get its affiliated universities and brands to make long-term commitments to suppliers through its “Designated Supplier Program.” See *The Designated Suppliers Program – Revised*, WORKER RIGHTS CONSORTIUM, <http://tinyurl.com/675kac3> (last visited Oct. 27, 2011). See <http://www.workersrights.org/dsp> for more information on the WRC's Designated Suppliers Program.

138. Compa & Hinchliff-Darricarrere, *supra* note 7, at 686 (arguing that companies that claim to set a higher standard by adopting codes to improve supplier labor practices get the perverse result of making themselves easier targets of criticism).

the Walt Disney Company left Haiti after being threatened that the poor working conditions there would be publicly exposed.¹³⁹ Pulling out of a low-labor standards country or cancelling a contract for a noncompliant supplier punishes “the very workers the policy is supposed to protect.”¹⁴⁰ In the second example, an *NBC Nightly News* report in 1992 on exploitative conditions in Saipan factories might have hurt workers by pushing a MNC to cancel a supplier contract instead of requiring remedial action.¹⁴¹ The report came less than a year after Levi Strauss adopted its code, which included a three-tiered response to supplier code violations that essentially included the three options discussed above: cancel the contract, remedial action, or no response.¹⁴² As a result of the exposé, Levi Strauss investigated the Saipan factories and “quickly canceled its contract with those suppliers.”¹⁴³

Although there is no definitive evidence that the *NBC Nightly News* report was the decisive factor in Levi Strauss’s decision to cancel the contracts, the publicity was probably a factor in the company’s decision to take definitive action instead of staying with the suppliers and trying to improve the labor conditions. Faced with negative publicity, a definitive response, such as terminating the relationship, is a simpler damage-control message than explaining that the company is continuing its relationship but is requiring the supplier to take remedial steps. The nuance of a remedial response could easily be lost in today’s quick news cycle.

Moreover, if a MNC does not respond to reports of supplier misconduct, it only suffers repercussions if its lack of action is brought to consumers’ attention, and even then, only if the bad publicity causes consumers to change their buying habits. This provides no more protection than exists without monitoring and, as discussed above in Part III.B, consumer pressure may prove to be an unreliable enforcement mechanism.

The available MNC responses demonstrate a fundamental problem with the tactic of exposé campaigns. Decisions are driven by consideration of Western consumers’ concerns, rather than those of the workers.¹⁴⁴ Workers suffer the consequences of those decisions, including potential factory closings and losing jobs.¹⁴⁵ Exposé campaigns were an effective means of pressuring MNCs to adopt supplier codes of conduct, but continuing to utilize them to force compliance based on information

139. Van Wezel Stone, *supra* note 16, at 126.

140. Compa & Hinchliff-Darricarrere, *supra* note 7, at 682.

141. *Id.* at 678 (citing *A Stitch in Time*, *ECONOMIST*, June 6, 1992, at 27).

142. *Id.*

143. *Id.*

144. SEIDMAN, *supra* note 1, at 31.

145. SEIDMAN, *supra* note 1, at 31 (internal citations omitted).

gained through monitoring is not the best means of improving actual workers' conditions. Importantly, exposés and consumer pressure continue to leave supplier workers out of the process of determining how to improve their own labor conditions.¹⁴⁶

IV. A PRACTICAL APPROACH TO THE THIRD GENERATION: ALIGNING CODES WITH THE GOAL OF IMPROVING LOCAL LABOR CONDITIONS

For a long time, corporate social responsibility meant “the company that seeks to pursue profit and do ‘good works’ at the same time is likely to do neither very well.”¹⁴⁷ Labor rights activists succeeded in changing that view through exposé campaigns, creating consumer demand for socially responsible products, and presenting “labor rights as human rights.” Now, supplier codes of conduct and monitoring are accepted business practices for MNCs.¹⁴⁸ However, the current state of codes of conduct presents labor standards as a list of moral obligations.¹⁴⁹ That paradigm misses the local nature of labor issues.¹⁵⁰ It also stretches resources as activists, monitors, and suppliers try to address labor standards on a range of issues, but struggle to improve actual working conditions on any single issue. Moreover, it focuses on exploitative labor practices that portray workers as victims,¹⁵¹ but fails to give workers a voice.

Despite these shortcomings, supplier codes of conduct are viewed as one of the most promising means of improving workers' labor conditions

146. *Id.* (internal citation omitted); ESBENSHADE, *supra* note 4, at 34 (“Emerging in the garment industry at the turn of the twenty-first century is a new social contract of sorts — what [Jill Esbenschade] call[s] the social-accountability contract. This arrangement, solidified through the monitoring regime, shifts the position of workers to one outside the contract itself.”). The role of workers, or lack of participation, in the social-accountability contract can be sharply contrasted with the social contract of the twentieth century, which revolved around workers' involvement in deciding on what terms business would be conducted.

147. Compa & Hinchliff-Darricarrere, *supra* note 7, at 665 n.1 (quoting B.J. McCabe, *Are Corporations Socially Responsible? Is Corporate Responsibility Desirable?*, 4 BOND L. REV. 1, 20 (1992)).

148. Posner & Nolan, *supra* note 18, at 215.

149. Stephen Herzenberg, *In from the Margins: Morality, Economics and International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 99, 100 (Lance A. Compa & Stephen F. Diamond eds., 1996) (internal citation omitted); *see also id.* at 104 (noting that a discussion of human rights dominated the U.S. coalition for international labor rights). After failing to influence U.S. foreign policy with a purely human rights agenda, the U.S. coalition for international labor rights had some success “conditioning unilateral U.S. benefits to developing countries on the state of basic labor rights in these countries.” *Id.* In doing so, the U.S. coalition for international labor rights was able to align its interest with the domestic labor movement, which was concerned with being able to compete with cheap foreign labor. *Id.* Despite tying U.S. trade to basic labor conditions, the strategy is still tantamount to calling for the adoption of a list of labor rights as a moral imperative.

150. *See supra* Part III.A.1.

151. *See supra* Part III.A.2.

around the globe.¹⁵² And although “[i]t is too early to assess what practical consequences — if any — might flow from the second generation of corporate codes[,] . . . a third generation may be just over the horizon.”¹⁵³ The issues with the current state of codes of conduct that have been highlighted above guide this Note’s proposal for how the third generation can take a more practical approach to improving local workers’ labor conditions.

To achieve real improvements for workers, the third generation of codes of conduct must involve a more nuanced understanding of (1) business strategies and the economic motivations of suppliers and MNCs, (2) what labor standards can effectively be improved through codes of conduct, and (3) the proper role for various organizations, such as local NGOs. A more refined approach will help define the proper role of supplier codes within the broader international labor movement and move beyond corporate social responsibility toward improving labor conditions at the local level.

Guided by those principles, this Note recommends that codes of conduct can be better aligned with the goal of improving labor conditions for local workers by taking a narrower approach and focusing on a single linchpin labor condition — a sufficient hourly wage. Requiring suppliers to pay a sufficient hourly wage and prohibiting piece-rate pay could, theoretically, undermine the sweatshop business strategy, creating the groundwork for improving other labor conditions. Moreover, focusing on a wages-as-the-linchpin standard could help ameliorate some of the current issues with monitoring schemes by simplifying the process and enabling local NGOs to take a more central role in monitoring efforts.

A. Understanding Business Strategy

The current approach to supplier codes fails to appreciate the importance of understanding the relationship between individual labor standards and business strategy. Recognition of that connection could result in a more focused effort from advocates and perhaps more importantly, might make enforcement of basic labor standards more palatable to MNCs by making them more practical to implement and enforce.

The significance of understanding the connection between an individual labor standard and a business strategy can be seen through an examination of sweatshop business strategies, the main target of supplier codes of

152. ESBENSHADE, *supra* note 4, at 163; SEIDMAN, *supra* note 1, at 5 (“Proponents persist in their view, painting voluntary regulatory schemes as the best available option in a world where multinationals seem more vulnerable to wealthy consumers than to weak legal sanctions.”).

153. Arthurs, *supra* note 10, at 23.

conduct in the apparel industry. The basic business structure of sweatshops consists of contracts being awarded to the supplier with the lowest bid. Those suppliers' profits are "'sweated' out of workers who toil under the pressure of a piece-rate system of pay."¹⁵⁴ The working conditions associated with the sweatshop business model tend to create a range of labor violations, including exploitation of child labor, long work hours, and piece-rate pay, which translates into low hourly wages and poor working conditions. Consideration of the economics of a sweatshop, however, reveals these poor standards to be a product of economically-driven business strategies, not simply a lack of morals.

Sweatshops require little capital investment, some sewing machines and rent for a facility.¹⁵⁵ Even these minimal capital costs can be eliminated through "homework," where the worker absorbs these costs by owning or renting the sewing machine and performing her work at home.¹⁵⁶ Because little or no capital is required to start a sweatshop, the employer focuses on minimizing the labor costs per garment sewn.

The pivotal aspect of the sweatshop business model is the piece-rate pay system, in which "workers are paid for each piece (seam, pants leg, or shirt) rather than by the hour."¹⁵⁷ By tying workers' pay directly to the number of garments sewn, the employer does not need to worry about ensuring that enough garments are being produced per hour to cover the cost of that worker's hourly rate.

These business strategies — reducing capital costs and utilizing piece-rate pay — help explain the consistent labor violations found in sweatshops. For example, piece-rate pay and the accompanying diminished concern for individual worker productivity permit sweatshop employers to exploit the cheapest, most unskilled workers, including child labor.¹⁵⁸ Additionally, the focus on lowering capital costs leads to crowding as many workers as possible into the workspace to reduce rent per worker. The potential health and safety problems created by overcrowding are of little concern to employers because the piece-rate pay system means individual worker productivity is relatively detached from profits. Just like the

154. ESBENSHADE, *supra* note 4, at 14.

155. Herzenberg, *supra* note 149, at 101.

156. *Id.* at 101 n.3; *see also* ESBENSHADE, *supra* note 4, at 126 ("Children are often involved in industrial homework, which has increased considerably with the globalization of the industry and intensified competition. Monitoring is almost impossible in situations involving homework.").

157. ESBENSHADE, *supra* note 4, at 14.

158. ESBENSHADE, *supra* note 4, at 125 ("The garment industry pushes down costs not only by locating in the lowest-cost countries but also by utilizing the workers in those countries with the least bargaining power: women, immigrants, children, and forced labor."); SEIDMAN, *supra* note 1, at 82 ("In a context [the Indian hand-woven carpet industry] where weavers' profits depended on reducing their labor costs, child workers were vulnerable to exploitation and abuse — especially when they worked, as they frequently did, far from their families and outside any official regulatory framework.").

incentive to overcrowd to reduce rent per worker, the desire to minimize capital investment reduces any concern for general health and safety issues.¹⁵⁹ Put simply, piece-rate pay eliminates concerns about workers' skill or well-being because the labor cost (*i.e.*, the employer's bottom line) is detached from an individual worker's productivity; therefore, suppliers use the cheapest labor available and try to minimize capital costs as much as possible.

Understanding this connection between business strategy and labor standards leads to the recognition that changing a single labor standard can have a ripple effect. Examining the sweatshop business model also reveals a "linchpin" labor standard "critical to eliminating the sweatshop, . . . 'a minimum hourly rate high enough to create an employer concern with productivity.'"¹⁶⁰ Replacing the piece-rate pay system with a sufficient hourly wage rate essentially reverses the economic incentives discussed above. Eliminating piece-rate pay removes the self-motivating drive for workers to be as productive. Also, requiring a sufficient hourly wage makes increasing productivity an imperative of profitability for suppliers. Now, the supplier must ensure that enough garments are being produced per hour to cover the cost of the workers' hourly rate.

The necessity for suppliers to increase productivity should have a ripple effect on other labor considerations. Suppliers have an incentive to employ skilled workers. Also, suppliers should create a system for oversight to ensure worker efficiency and productivity. Investing in an oversight system to ensure productivity means that complying with regulations or improving other labor conditions requires only a marginal investment.¹⁶¹ Additionally, suppliers might have further incentives to incur the marginal expense to comply with regulations or improve other labor standards if it increases productivity or enhances the supplier's ability to oversee worker productivity.¹⁶²

The important strategic advantage of focusing on a single linchpin labor standard versus a list of labor standards is apparent. First, MNCs will probably be more amenable to enforcing a single aspect of supplier codes than being held responsible for suppliers' violation of any labor standard.

159. ESBENSHADE, *supra* note 4, at 125 ("Employers generally save money [on capital investments] by failing to provide a safe and healthy workplace, including machine guards, potable water, ergonomic seating, clean bathrooms, and clear and functioning fire exits and extinguishers. Workers are also subjected to chemical exposure and unhealthy levels of particles in the air they breathe."); Herzenberg, *supra* note 149, at 101.

160. Herzenberg, *supra* note 149, at 101.

161. *Id.*

162. The shift from piece-rate pay to hourly wages may create other issues. Some potential problems are considered *infra* Part IV.D, but how wages-as-the-linchpin truly functions and the peripheral issues that arise will have to be dealt with through future study, hopefully based on empirical data.

Second, monitoring and discovering violations of one linchpin labor standard would be far easier and less expensive than monitoring a range of labor standards. Third, because a linchpin labor standard, such as a minimum wage, alters the business realities for sweatshops, only an initial heavy period of monitoring and enforcement may be required to gain long-term improvements. This initial period of heavy enforcement would force suppliers to change business strategies, eliminate labor violations and create systems to oversee and control worker productivity in order to remain profitable. Once the business paradigm shifts from reducing labor costs to increasing productivity, and the accompanying capital is invested to improve efficiency and establish systems of oversight and control, the employer has a long-term incentive to continue increasing productivity.

The actual ripple effect of requiring a sufficient hourly wage rate and prohibiting suppliers from using a piece-rate pay system has not been empirically tested. Like the developments before it, focusing on wages-as-the-linchpin must be tried and tested beyond the theoretical bounds of this Note. Generally, there is no much empirical evidence one way or the other concerning the efficacy or inefficacy of self-regulatory regimes, including supplier codes of conduct.¹⁶³ Wages-as-the-linchpin at least narrows the focus of potential empirical study of supplier codes of conduct. However, at least one study indicates that increasing wages and limiting hours improved productivity.¹⁶⁴ According to the study, this might be explained by the reduction in labor turnover.¹⁶⁵ And, the wage and hour compliance lead to improvements in the health and safety of the factory.¹⁶⁶ However, the study notes: “[I]n an industry with a quite low minimum wage, limitations in overtime working hours may *not* primarily be perceived as beneficial for a worker in need of an income that can support a family, i.e. ‘a living wage.’”¹⁶⁷

B. *The “Linchpin”: What Is a Sufficient Hourly Wage?*

The proposal to focus on wages-as-the-linchpin could align and reinforce efforts to get codes of conduct to require suppliers to pay workers a living wage. The debate over the content of codes regarding wages has focused on a minimum wage versus living wage debate.¹⁶⁸ The practical significance of wages-as-the-linchpin is primarily in prohibiting suppliers from using a piece-rate pay system and forcing them to shift to

163. Arthurs, *supra* note 10, at 30 n.37.

164. Ingrid Stigzelius & Cecilia Mark-Herbert, *Tailoring Corporate Responsibility to Suppliers: Managing SA8000 in Indian Garment Manufacturing*, 25 SCANDINAVIAN J. MGMT. 46, 53 (2009).

165. *Id.*

166. *Id.*

167. *Id.*

168. See MORAN, *supra* note 50, at 52–57.

an hourly rate, and thereby making profits reliant on hourly productivity to offset hourly labor costs.¹⁶⁹ However, to produce the desired ripple effect on other labor standards, the hourly wage has to be sufficiently high enough to give suppliers an incentive to make capital investments that help improve efficiency and productivity, such as ensuring that workers remain healthy by improving working conditions and avoiding injury through appropriate safety measures.

Only empirical and managerial studies can determine if a living wage is a sufficient wage necessary to produce the desired effect of focusing on the wages-as-the-linchpin standard. However, requiring an hourly wage that is a living wage at least provides workers with their basic needs and is determined by local conditions, not outside perspectives.¹⁷⁰ Currently, codes of conduct generally approach this issue by including a provision asking suppliers to provide a living wage, but requiring only that they comply with the local minimum wage.¹⁷¹ Activists, however, want more of a commitment that requires suppliers pay wages that are sufficient to provide for a worker's basic needs.¹⁷² According to one NGO, the Maquila Solidarity Network, some of the certification schemes, like SA8000, monitor for a living wage, but others, like the FLA, do not.¹⁷³ SA8000 calculates a living wage as "a wage sufficient to provide food and the remaining basic needs for the worker and half of the average number of dependents in a family in that region, with an additional 10% added on for discretionary income."¹⁷⁴ While there is considerable debate over how to

169. One potential problem is that suppliers might attempt to achieve productivity gains by pushing workers to work even faster and harder, leading to other abuses like limiting bathroom breaks or not permitting talking or lunch. This issue is considered in *infra* Part IV.D.

170. Chhabara, *supra* note 49 ("Brands, trade unions and NGOs differ in their definitions of how a living wage should be measured, what the size is of an average family, and what exactly constitutes a decent living. Dozens of definitions, approaches and methodologies have emerged over the decade. But none is broadly accepted. As a result, brands' supplier codes of conduct tend to stipulate that suppliers should pay workers the legal minimum wage, but not [necessarily] a living wage.").

171. *See, e.g.*, WALMART STANDARDS FOR SUPPLIERS, *supra* note 46 ("Suppliers must compensate all workers with wages, overtime premiums, and benefits that meet or exceed local legal standards, local industry standards, or collective agreements, whichever are higher. Suppliers are encouraged to provide wages and benefits that are sufficient to meet workers' basic needs and provide some discretionary income for workers and their families.").

172. *Living Wage Standards in Codes of Conduct*, MAQUILA SOLIDARITY NETWORK (Oct. 1, 2004), <http://en.maquilasolidarity.org/node/320>.

173. *Id.*

174. *Id.* (This living wage calculation is only part of how SA8000 monitors for a living wage. SA8000 use a combination of qualitative and quantitative analyses. "They recommend two quantitative methods: one, a comparison of wage levels against poverty line data for a given country, where it exists; and, two, a market basket survey. Basic needs are determined by calculating the cost of the basic food basket needs for an adequate diet, the percentage of an average household's budget that goes to food, and the average size of a householder in a given country. . . . Qualitative methods used . . . include comparing wages with those of a unionized company in the region (provid[ed] independent unions exist in the area), and worker interviews. Both qualitative and quantitative

determine a living wage, and concrete calculation can be complex,¹⁷⁵ a relatively simple starting point would be to survey workers, who at least have a general idea of what they need to earn to meet their basic needs.

Larger international NGOs, international institutions, interested governments, and MNCs would play a crucial role in helping determine living wages in different locations across the globe. These entities can provide the resources and support necessary to research, collect and retain data, and undertake economic analysis. Local NGOs and activists, on the other hand, should be primarily utilized to provide effective monitoring. This support and information supply chain may help alleviate some of the territorial tensions between international and local NGOs.¹⁷⁶

C. *Focusing and Simplifying Monitoring and the Significance of Local NGOs*

The shift towards NGOs to ensure independent monitoring has already begun, but international NGOs' strategies and approaches fail to fully appreciate the local nature of labor issues and incorporate local voices.¹⁷⁷ To be effective, local NGOs and activists must play a central role in monitoring because they can provide independent credibility and are attuned to local concerns.

Focusing on wages-as-the-linchpin should simplify monitoring and enable local NGOs to become more involved in the process. NGOs lack both the resources to effectively monitor compliance with entire codes of conduct and the expertise to tackle issues like health and safety conditions.¹⁷⁸ A wages-as-the-linchpin standard would diminish the demand for monitoring resources and eliminate the problems created by the wide variance between different codes of conduct. Instead of trying to monitor and seek compliance on health and safety standards, freedom of

methods are used in an audit to verify the results one against the other."); *see also* MORAN, *supra* note 50, at 54 ("Debates among the proponents of this idea show, however, that the task of determining a living wage is extremely complex, and must take into account a range of factors, including nutritional standards; housing types; expenditures on water, energy, clothing, transportation, health care, education, and savings; and provisions for contingencies.").

175. For a discussion of various approaches to calculating a living wage and some problems, see Mark Brenner, *Defining and Measuring a Global Living Wage: Theoretical and Conceptual Issues* (2002) (prepared for the conference *Global Labor Standards and Living Wages* at the University of Massachusetts–Amherst, April 19–20, 2002), available at <http://tinyurl.com/3ebwprf>. For more on the debate about living wages see Chhabara, *supra* note 49.

176. SEIDMAN, *supra* note 1, at 37.

177. *Id.* ("Although th[e] hostility [of local organizations toward international campaigns] may simply reflect local jealousies and turf battles, the recurrent pattern suggests that something more important is at stake: transnational campaigns may find it difficult to construct viable channels for workers' voices. Indeed workers' voices are frequently absent from monitoring schemes, and [international] nongovernmental groups rarely create processes through which transnational activists might become accountable to workers.").

178. ESBENSHADE, *supra* note 4, at 142.

association, and discrimination, resources would be deployed to address only one issue — whether the supplier was paying the appropriate hourly wage. Additionally, what constitutes a “sufficient hourly wage” would be consistent for all suppliers in a given location, and therefore would create uniformity between different MNCs’ codes based on location. While there will still be limited resources for monitoring, international NGOs and actors, even MNCs, might provide support to bolster local NGO monitoring capacities.

With monitoring limited to a “sufficient hourly wage,” local NGOs have unique skills that could be ideal for combating the other problems with monitoring. Local NGOs provide the kind of familiarity, intimacy, and consistent presence that may be necessary to overcome suppliers gaming the monitoring system. As Posner and Nolan state:

The ideal independent monitors may, in many situations, be local nonprofit groups who are familiar with local dynamics of the country or locale of the factory, who speak the language of workers and management, and who are able to monitor factories on a more consistent and regular basis . . . [and are] adept at interviewing and gaining the trust of workers.¹⁷⁹

Familiarity with local dynamics and the absence of a language barrier might make it easier to gain workers’ confidence.¹⁸⁰ Moreover, familiarity may facilitate worker discussion about wages outside the factory setting, which may produce more reliable interviews about supplier compliance. In addition, local NGOs’ positions in the community may enable them to gather independent information about a supplier’s practices from local sources other than workers.

A strong advantage for local NGOs is that their more frequent presence would make it more difficult for suppliers to hide violations and might allow the NGOs to compile their own data for independently verifying the accuracy of supplier books.¹⁸¹ As one monitor put it, “I can unequivocally

179. Posner & Nolan, *supra* note 18, at 214. Interviews are an important aspect of monitoring, but there are several roadblocks to their effectiveness. “Some argue that employee interviews are almost useless, because workers are subject to threats and intimidation. Others argue that employees have a vested interest in keeping information on off-the-book payments hidden. However, most monitors I spoke with view the employee interview as the key to any inspection, because the employees almost always know when they are being cheated. Although all agree that employees hold key information, they also agree that workers are afraid to talk and that contractors often tell them what to say.” ESBENSHADE, *supra* note 4, at 77.

180. Posner & Nolan, *supra* note 18, at 214; ESBENSHADE, *supra* note 4, at 142 (“[S]ome of the NGOs have the trust of the workers, expertise in investigating violations of human rights and freedom of association, and credibility with the larger society.”).

181. In the United States, some domestic monitoring firms engage in what is called “surveillance,” which involves practices such as watching a factory to confirm work hours are consistent with the hours indicated by time cards and the number of workers match payroll records. ESBENSHADE, *supra* note 4, at 74 (“One of the internal monitors told me that surveillance was the

state that the findings of an inspection are only as good as the day of the inspection. To ‘certify’ a factory as being in compliance for any period is nonsense.”¹⁸² While local NGOs cannot maintain a constant presence, they certainly can gather information more frequently than auditing firms and international NGOs. All of these characteristics might help combat supplier tactics such as keeping two sets of books, scripting or coaching worker interviews, and fixing violations in advance of monitoring inspections.

In *Beyond the Boycott*, Seidman also examines the monitoring efforts of the Commission for the Verification of Codes of Conduct (COVERCO),¹⁸³ a local NGO in Guatemala. The study of COVERCO and monitoring in Guatemala reinforces the efficacy of making local NGOs and activists a central feature of monitoring schemes. In fact, “Guatemalan activists were among the first to organize local efforts to monitor corporate codes of conduct in the apparel industry.”¹⁸⁴ Instead of monitoring being led by outside transnational activists or independent monitors hired by MNCs, some of the most active and visible NGOs are run by local activists,¹⁸⁵ such as COVERCO.¹⁸⁶

The primacy of local activists in Guatemala is a reflection of the long history of American involvement and activism in Central America, which predates the antisweatshop campaigns that began in the 1990s. That history “left a legacy of broad, dense contacts across borders, as well as bilingual activists and easy communication within the network.”¹⁸⁷ The result of all this, Seidman observed, was that:

[T]he transnational discussion around Central American monitoring reflected far more direct knowledge of and engagement in local issues. Once institutional pressures were mobilized, consumer campaigns were guided by activists who understood local issues far more clearly than was the case in either the Sullivan Principles or Rugmark case; this difference, [Seidman] suggest[s], was crucial in explaining the relative success of the transnational campaigns.¹⁸⁸

key to monitoring. . . . With thorough surveillance, he claimed, one can collect hard evidence of off-the-clock work, whereas employees will not always reveal such practices.”). Local NGOs are best situated to engage in practices like surveillance to augment regular monitoring techniques.

182. *Id.* at 136 (quoting Bill Bernstrom, Letter to the Editor, *BOBBIN*, Feb. 1999, at 6).

183. COVERCO is a local NGO monitor formed in 1997 by a group of professionals with experience in labor rights in Guatemala. *E.g.*, *ESBENSHADE*, *supra* note 4, at 141.

184. *SEIDMAN*, *supra* note 1, at 125.

185. While some of the activists involved in, or leading, these efforts are not native Guatemalans, they are local activists in the sense that they have long-standing ties to and intimate knowledge of Guatemalan affairs. *See id.*

186. *Id.*

187. *Id.* at 123.

188. *Id.* at 120.

COVERCO's local roots and presence allows it to employ tactics that might combat gaming by suppliers. For example, COVERCO demands frequent, unannounced monitoring visits and monitors interview workers off-site to reduce employer intimidation or retaliation.¹⁸⁹ Additionally, the primacy of local groups in Guatemala means international NGOs are "unusually responsive to local concerns" and has created a mutually supportive network between international NGOs and local activists.¹⁹⁰ Only local NGOs and activists can provide the familiarity with local workers' concerns and the community that is necessary for effective monitoring of the wages-as-the-linchpin standard and codes generally.

D. An Area for Concern and Future Study

The actual results created by focusing on wages-as-the-linchpin will only be revealed through testing in practice and further study. However, the underlying theory behind the potential ripple effect of a linchpin standard is not novel. The theoretical underpinnings are essentially the same as the argument for pushing developing countries to adopt and enforce higher labor standards generally. The theory is that labor standards inhibit "sweating" business strategies by increasing capital investments by, for example, requiring employers to meet health and safety standards, setting a minimum wage, or empowering workers to bargain for higher wages, thereby limiting employers' ability to reduce labor costs.¹⁹¹ This forces employers to change their business strategy from reducing labor cost to increasing productivity. Increasing productivity, in turn, requires investment in both human and physical capital.¹⁹² Ultimately, this fosters economic development and a more stable and skilled work force, which enjoys improved working conditions. If this theoretical application is effective on a broader scale, then a more focused application on a single labor standard that inhibits "sweating" business strategies should produce at least some ripple effect on other labor standards that also help increase productivity and worker efficiency.

189. *Id.* at 126.

190. *Id.* at 130.

191. Cleveland, *supra* note 27, at 168 n.74 (citing Michael Piore, *International Labor Standards and Business Strategies*, in *INTERNATIONAL LABOR STANDARDS AND GLOBAL INTEGRATION: PROCEEDINGS OF A SYMPOSIUM* 21, 23 (Gregory K. Schoepfle & Kenneth A. Swinerton eds., 1994).

192. *Id.* (citing OECD, *TRADE, EMPLOYMENT, AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE* 113 (1996)); *id.* (By "forcing companies to compete by increasing efficiency rather than by reducing labour standards . . . [companies] shifted resources to more efficient uses and allowed countries to protect and develop human resources.") (quoting Ray Marshall, *The Importance of International Labour Standards in a More Competitive Global Economy*, in *INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INTERDEPENDENCE* 65, 69 (Werner Sengenberger & Duncan Campbell eds., 1994)).

There is, however, one potential area for concern that can be anticipated. When suppliers are required to move to hourly wages, there is the potential that some suppliers may simply drive workers extremely hard to squeeze out more productivity. Put another way, suppliers could simply burn out workers and hire new ones.

There is a strong argument that this problem can be controlled. First, requiring an hourly wage does not necessarily mean that all compensation should be divorced from productivity. Suppliers may still want to provide positive incentives for workers to be productive, such as productivity bonuses. Another deterrent against abusively driving workers until they burn out is turnover. When productivity is important to the supplier, the supplier will want to reduce turnover because a worker's skill level correlates with that worker's productivity. Typically, new, inexperienced workers are not able to work as fast as more seasoned workers. Moreover, the concern about turnover has been expressed by suppliers under the current system. A study of seven SA8000 certified factories in India noted:

By nurturing the internal capabilities through ensuring a better working environment, some managers expect a lower [labor] turnover, less time with buyer audits and an increased productivity. [Labor] turnover is generally very high within the garment industry, around 15 percent, and there is a lack of skilled tailors. Two managers were therefore content to see a reduction of turnover with around 7 percent after implementing SA8000.¹⁹³

The recent push to get MNCs to commit to a small, closed set of suppliers and build strong, long-term relationships could also be used to promote supplier commitment to workers and increasing productivity through internal improvement.¹⁹⁴ While productivity bonuses, concern for turnover, and fostering long-term supplier relationships may ameliorate this problem, how to handle issues created by focusing on wages-as-the-linchpin standard properly will require future consideration when problems arise in practice.

CONCLUSION

Supplier codes of conduct have come a long way, and are now a business necessity for MNCs in the apparel industry. Monitoring suppliers for compliance continues to develop and will, hopefully, move toward greater incorporation of NGOs and the involvement of local organizations

193. Stigzelius & Mark-Herbert, *supra* note 164, at 52.

194. Walmart and Nike have indicated that they plan to shift their supply chain strategy toward this type of approach. Additionally, the WRC is trying to gain support from universities for its "Designated Supplier Program," which incorporates this strategy for improving code compliance. *See supra* note 137 and accompanying text.

and activists. But the pressures that have helped form this self-regulatory regime — exposé campaigns and consumer demand — have not produced the kinds of improvements in labor standards that activists and scholars envisioned.

The next step is to figure out how supplier codes can be utilized and how they should be implemented and enforced to move toward the goal of actually improving labor conditions for supplier workers around the globe. While there are plenty of problems to be addressed, there are many options for moving forward. This Note focused on two proposals to move supplier codes toward improving working conditions: (1) narrowing the focus of code implementation to a single linchpin standard, which, most obviously, is a sufficient hourly wage, although there may be others, and (2) giving local NGOs and activists a primary role in monitoring to combat suppliers' evasive tactics. These strategies are complementary. Limiting monitoring to hourly wages or another single labor standard simplifies monitoring and makes it possible for local NGOs, which may lack the technical skills and training to address complex labor issues, to take a primary role in monitoring efforts. Local NGOs' constant presence, through more frequent visits and familiarity with the community, is necessary to effectively monitor hourly wages and combat suppliers' efforts to trick and evade the code compliance system.

Some might view these proposals as a step backwards. In particular, limiting codes and monitoring to a single labor standard arguably sacrifices the progress that has been made in getting MNCs to adopt codes that incorporate a range of labor issues. While this is true on the surface, this Note has focused on what can be done, as a practical matter, to move toward real improvements, not just what appears on paper or in monitoring reports. Effective enforcement or actual improvements in a single area is a step forward and opens the door to further developments. Moreover, enabling local NGOs to take a more central role in monitoring moves closer to codes being implemented and enforced based on local concerns and interests and might lead to greater worker involvement in the process.

Finally, the recommendations of this Note are made as a potential guide for how to move codes of conduct toward actually improving working conditions. It should be noted, though, that the feasibility of some of these recommendations is unclear, and their actual impact might only be discovered after trial and error and empirical study. One of the goals of this Note, however, is to highlight the disconnect between the supposed goal of supplier codes of conduct and the current state of codes. The recommendations are meant to suggest that a more practical approach to codes should consider: the economic realities for MNCs, suppliers and workers; the proper role for codes of conduct within the broader

international labor movement; and the best way to incorporate and serve the different needs and interest of supplier workers around the globe. Whatever the third generation of codes of conduct turns out to be, it should focus on producing changes in labor conditions in a way that actually improves the lives of supplier workers.