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A Review of Private Regulation: Codes and Monitoring in the Apparel Industry

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Abstract

This article reviews the last decade of scholarship on a leading corporate social responsibility initiative: the use of codes of conduct and monitoring in the global garment industry. The review focuses on three debates in the field: the evaluation of code and monitoring effectiveness, the problematic of various relationships in transnational anti-sweatshop campaigns, and the meaning of private regulation vis-a-vis state enforcement. The article concludes that codes and monitoring do not constitute a solution to the sweatshop problem and certainly cannot substitute for state enforcement or worker organizing. If private regulation is to contribute to a solution in a meaningful way, it must move from a model that presumes compliance and, therefore, focuses on ferreting out violators, to one that assumes non-compliance, and so concentrates on altering the structure of the industry.

In December 2010, 29 workers met their death as a Bangladeshi garment factory burst into flames. Just shy of the 100th anniversary of the fire at New York City's Triangle Shirtwaist factory (an emblem of industrial abuse in a an earlier era of unbridled industrial growth), workers are still stitching away behind closed (and sometimes locked) doors in abysmal conditions for extremely low pay. While the fire garnered media attention, the fact is most clothing is made in sweatshops, where pay is low and hours long, where workers are driven by quotas and powerless to complain. This situation continues despite many years of corporate and multi-stakeholder codes of conduct and monitoring, private regulation meant to tighten the belt on the (under)belly of globalized production.

In the 1990s and early 2000s, this code and monitoring movement – sometimes referred to as private regulation – was the cutting edge of a wave of Corporate social responsibility (CSR), which encompasses such disparate company initiatives as self-regulation, community development projects, philanthropy and disaster relief. As far back as the late 1970s, the Organization for Economic Cooperation and Development (OECD) and the International Labor Organization (ILO) issued principles for the ethical operation of multinational enterprises, including the protection of workers' rights. Companies signed on, and by the 1990s many apparel companies were developing their own codes. Several anti-sweatshop activist and multi-stakeholder initiatives adopted codes in the late 1990s, including Europe's Clean Clothes Campaign and US-based Apparel Industry Partnership (AIP)/Fair Labor Association (FLA) and Social Accountability International. While private monitoring emerged in Los Angeles in 1992, university students and activists founded the most stringent independent labor rights monitoring program in the US, the Workers' Rights Consortium (WRC), in 2000. Originally monitoring had the support of not only many non-governmental organizations (NGOs) and companies, but also the US government. After the term of US President Bill Clinton, and more specifically his Secretary of Labor Robert Reich, government support for even private regulation, much less

enforcement, largely fell away. But the expansion of codes and monitoring has continued, and become an accepted way of doing business. In the apparel industry, tens of thousands of factories have been operating under this regime for a decade or more. Consumers have become more aware and brands have acknowledged some level of responsibility for conditions in contracting factories.

However, change on the ground has been minimal. Codes and monitoring have led to some improvements in the payment of required wages and benefits, the reduction of child labor and improvement in health and safety protections. In a few individual factories workers have even achieved higher levels of wages and/or collective representation, gains not previously known in most of the global garment sector. In a very few cases, brands have agreed to pay over a million dollars in back wages or severance. In one factory, Alta Gracia in the Dominican Republic, workers are actually receiving a living wage. Nevertheless, even after so many years of widespread company participation, we continue to see breathtaking levels of exploitation: hundreds of millions of dollars stolen from workers in unpaid wages and severance each year, a growing trend of workers on temporary contracts without protections, regular firings of union activists, and even deaths by fire and by violence. The fact is that *non-compliance* with basic rights, under national laws, international accords, and with codes remains the norm in the industry.

This article reviews the last decade of literature on the field of codes and monitoring, particularly in the apparel sector. Academic literature on codes and monitoring in the garment industry began around 2000. As both commercial and independent monitoring expanded, more academics turned their attention to this new form of private regulation. This literature addresses both the empirical investigation of the effectiveness of codes/monitoring regulation and the theoretical question of the meaning of such regulation for worker empowerment and for governance in a globalizing economy. It should be noted that this review focuses primarily on the private regulation movement in the US, although there are certainly groups who have been active in both Canada and Europe on this issue, and does not analyze the semi-private models under the OECD Guidelines for Multinational Enterprises code or the United Nations Global Compact. Following a general background on codes/monitoring, this article will first cover the question of effectiveness on the ground and then explore the major debates in the literature.

Variety of monitoring

The garment industry is one of the most globalized in the world. Don Wells (2007) reports that there are 200,000–300,000 factories in the export apparel sector, and including small workshops could bring the total closer to a million (63). These are spread across almost every continent, with the biggest concentrations in Asia, particularly China and India, but also many factories in Southeast Asia, Central America and a much smaller number in Africa, South America, the US and Europe. With very few exceptions, brand name companies contract out all of their production to a far-flung network of factories (Bonacich and Appelbaum 2000). Contract terms are short and brands rarely account for the majority of production in any given factory. Therefore, factory owners are catering to a variety of clients at once, with little to no assurance that any improvements they make within the factory will lead to a long-term commitment by the brand. Brands also often set unreasonable prices and schedules, forcing contractors into non-compliance with local laws and codes as the pressure to produce low cost goods with quick turn-around plays out in low wages and sporadic hours and employment. Codes and monitoring have

not changed the pricing or sourcing structure of the industry because, while they were adopted in this context, they were not designed to alter these arrangements.

The commercial monitoring model emerged in Los Angeles as a part of a US Department of Labor (DOL) program of sanctions against brands who used violating contractors. The program was further developed as an incentive for any brand to be listed as a ''Good Guy'' of fashion on the DOL website. Shortly after, the commercial model of brands hiring monitors, be it internal compliance officers or external monitoring firms (often a new service of an accounting firm), went global. This expansion happened as a result of several forces: students forcing their university administrations to adopt codes and force monitoring as a condition of receiving a license to produce logoed apparel; anti-sweatshop campaigns forcing companies into new CSR initiatives (through negative publicity, picketing and lawsuits); the US government calling together brand name companies and NGOs into an internationally-focused AIP; and newly created compliance firms selling their risk-management product of monitoring. At the same time, US activists and local NGOs and unions in Central America were forming independent monitoring organizations. These organizations generally had labor, rather than business, oriented staff and more access to workers in terms of being able to conduct interviews outside the work place free from employer pressure.

Both models continued to expand, with more commercial firms and independent monitors emerging and applying for accreditation through various monitoring oversight bodies. These multi-stakeholder initiatives (MSIs), which joined NGO, company and, sometimes, union participation, included the AIP's successor the FLA, Social Accountability International, and the European-based Ethical Trading Initiative. United Students Against Sweatshop (USAS) and its allies also created a US-based independent monitor, the WRC in an attempt to offer universities wanting to monitor their licensees an alternative, free of company influence, to the FLA. At the same time the industry came up with its own monitoring program, the Worldwide Responsible Apparel Production program (WRAP). A few years later, in 2003, states and cities formed Sweatfree Communities to promote ethical procurement policies and to work toward a monitoring system for the production of goods that member public agencies purchase (such as police and firefighter uniforms).

While all of the monitoring models, from internal compliance officers to the WRC, can be referred to as private regulation, there are important distinctions. According to Ana Wetterberg (2010), approximately 25 percent of apparel companies now have their own codes of conduct, a list of rights and conditions that their contractors must provide to workers. A subset of these brands monitor their contracting factories. And a much smaller subset of those who monitor belong to one of the various MSIs. The MSIs have their own codes and require some level of external monitoring, often by one of a group of accredited agencies (private firms and NGOs). They also include some scheme of checks by which the monitoring body itself can send an investigative team or hire a monitor, and policies on remediation.

Tim Bartley (2007) argues that codes/monitoring is not an inevitable response to lack of enforcement under globalization, and neither are these MSIs simply company efforts to protect their reputation or market share. The private regulation regime and the MSIs are a result of negotiations between various actors. As violations were uncovered, activists pushed for codes and monitoring, and there was a struggle between activists and corporations to shape these regulatory regimes. Anti-sweatshop activists saw both an opportunity for true reform and the danger of codes/monitoring being used simply as a public relations ploy. Corporations were responding to stockholders as well as consumers and activists.

The result of these struggles has been a variety of monitoring regimes, with widely varying elements and/or requirements. According to Gay Seidman (Anner et al. 2008), independent monitoring is really considered the ''gold standard'' of CSR (366). Wells (2007) agrees that it is the most significant element of the CSR movement, which has on a broader scale included the United Nations Global Compact, trade agreement clauses and the adoptions of industry-wide guidelines. For Peter Utting (2008), the distinction between private (commercial) monitoring and MSI or independent monitoring adds up to the difference between CSR and Corporate Accountability. CSR is an effort by companies themselves to behave in a more ethical manner, whether they are responding to threats to their reputation or vying for socially conscious consumers or investors. Since 2000, activists, workers and consumers have pushed for Corporate Accountability, forcing companies to accept public disclosure of both factory locations and monitoring reports, third party monitoring (not hired by the company), and redress of grievances (reinstatement of fired unionists, payment of back wages, responsibility for severance).

Several sociologists have broken down the various codes/monitoring programs by criteria that allow for useful comparison. Henry Frundt (2004), for example, lays out such facets as: code content, independence of monitors, transparency of reporting, strength of enforcement and existence of viable complaint mechanism as measures to distinguish more stringent systems from ones that are more likely to serve simply as corporate cover. O'Rourke (2006), also pinpointed transparency in his comparison of MSIs but added participation of local stakeholders and mechanisms for connecting results to markets as two crucial elements of effectiveness. More recently, Ana Wetterberg (2010) has identified these standards as components of three major determinants usually associated with actual laws: precision (of codes and monitoring), obligation (of companies to comply with the monitoring process and with remediation), and delegation (of enforcement and adjudication to an outside party). Borrowing these terms from Abbot and Snidal's discussion of international law, Wetterberg applies them to codes/monitoring to make the claim that certain monitoring programs actually rise above others as viable forms of regulation.

Taking a different tack, Esbenshade (2008) breaks down efforts by how they address major facets of globalization. She argues that codes are response to *horizontal webs of production* where liability is absent. Codes allow brands to set standards for employment situations to which they are not actually a party. *Buyer-driven chains of production* have meant that the consumer or buyer or licensor has more leverage than the producer and, therefore, universities and cities can demand that brands and factories accept their codes. *Deregulation* has created a void in labor rights enforcement, which independent monitoring attempts to fill. However, the key to real change comes with whether a monitoring regime addresses: first, the *undermining of unions* (by prioritizing rights to freedom of association and collective bargaining, rather than attention to conditions) and second, the lack of leverage held by workers as a result of *corporate mobility* (by requiring brands to concentrate production and give factories long-term contracts).

Evaluating codes/monitoring

Prior to the development of a body of literature in academia there was a burgeoning policy discussion on the content and effectiveness of codes and monitoring. Starting in the late 1990s, the discussion found publication in articles in trade journals and such popular magazines as *Business Weekly* as well as policy reports and working papers (US DOL (Department of Labor) 1996; O'Rourke 1997; Sajhau 1997; Varley 1998; ICCR (Interfaith Center for Corporate Responsibility) 1998; Esbenshade 1999; Kwan 2000; Jenkins

2002). Many NGO's were contracted to perform studies on code and monitoring effectiveness by universities and individual companies (Oxfam et al. 1998; IHS (Insan Hitawasana Sejahtera) 1999; Verité 2000; BSR (Business for Social Responsibility), Investor Respsonibslity Research Center and O'Rourke 2000; CSDS (Center for Social Development Studies) 2001). These early reports generally found a great variation in code content. The ''enabling rights'' of freedom of association and collective bargaining, which enable workers to organize to improve their own lot, were far less represented than such ''protective rights'' as minimum standards on wages, age, and overtime – where a limit is set to protect workers from unacceptable levels of exploitation. Not surprisingly, effectiveness of monitoring also varied, with more progress made on payment of minimally required compensation and child labor, than on enabling rights. Grave deficiencies were noted in the realm of commercial monitoring, by far the most common form, and even independent monitoring was found to have serious limitations in capacity and an inability to address the crux of the problem: the structure of the industry.

The scholarly evaluation of the effectiveness of codes/monitoring has not been systematic and study results vary, partly by discipline. Researchers in the fields of business and management have commonly found progress and promoted codes/monitoring, and CSR more broadly, as an antidote to sweatshops. For example, business ethics professor Laura Hartman (Hartman et al. 2003) compiled an edited volume of what she hoped would be exemplary cases to help companies in their effort in *Rising Above Sweatshops*. Arnold and Hartman (2006) argue that companies not only have an ethical obligation to adopt codes and monitor, but that it is a strategic move which provides risk-management, a clear company value system and improved relations with stakeholders. Kolk and Van tulder (2002) find that codes have been an effective mechanism for their six researched apparel firms to reduce child labor, while acknowledging that there must be broader endeavors to address underlying causes. David Weil (2005) shows that where private monitoring is part of a government oversight program, as in Los Angeles, it can raise compliance. Thomas Hemphill (2004) supports the monitoring model but warns that strong accountability and transparency mechanisms are needed to insure effectiveness.

There are certainly also exceptions to the generally optimistic view of codes/monitoring from management scholars. Richard Locke et al. (2007), analyze 800 Nike audits from 51 countries and find that monitoring alone has little effect. In fact, factory-level compliance is most tied to whether factories operate in a context of: (1) a country with a stronger rule of law and (2) a relationship with brands that allowed for negotiation over scheduling and support for higher productivity. These researchers find that it is visits *not* by brand CSR staff that correlates with code compliance but by brand quality control and production staff, indicating that it is the business relationship – not the human rights efforts – that creates space for labor conditions improvement.

Sociologists, and other social scientists, have been far less sanguine about the effects of codes/monitoring. Very early on Jill Esbenshade and Bonacich (1999) and Dara O'Rourke (2000) revealed the weaknesses of the private monitoring system through ethnographic research, which included observing monitors at work. This research shows grave procedural problems as well as irreconcilable structural conflicts of interest involved in a system where companies hire their own monitors (either as direct employees or contracting with outside firms). Later research also finds minimal or no change in conditions for most workers. In a case study of Malaysia, Vicki Crinis (2010) shows that violations continue largely unchecked, particularly for foreign workers whose issues of indentured servitude, confiscated passports and overcrowded and unsanitary dormitories are not even covered by many codes, much less uncovered by monitoring. Patricia Barrientos and Sally

(2007) find that even in MSIs improvement is restricted to certain code provisions. In their study of 23 work sites (not all garment) in four countries producing for Ethical Trading Initiative (ETI) members, they find improvement in some ''outcome standards'' (health and safety, payment of required wages, reduction in hours) but not in others (living wage, permanent employment, harsh treatment) and no progress in ''process rights'' (freedom of association, collective bargaining, discrimination). They also point to the fact that migrant and temporary labor are extremely common, and undermine even basic protections.

Researchers have generally had more praise for independent monitors than privately contracted ones. Both Mark Anner (Anner et al. 2008) and Esbenshade (2004a,b) contrast commercial monitors who are paid by the brands to independent monitors who are not. They find that the latter not only have fewer conflicts of interest but more access to workers and a much better chance of uncovering violations of the key issue: workers' rights to organize.

Others have specified the conditions necessary for effective independent monitoring. Wetterberg (2010) differentiates between the buyer-regulated markets and socially-regulated markets. The latter is effective in (1) an area where market access is limited (licenses for college logoed goods or procurement for public employee uniforms); (2) there are ''interested intermediaries'' who can provide market access in exchange for higher levels of compliance (universities or local governments); (3) these intermediaries have engaged some independent monitoring entity (the WRC or FLA); and (4) there is continued activism (by students, workers or citizens) to ensure that the intermediary continues to require compliance. However, Gay Seidman (2007) warns that independent monitoring also has its flaws: it depends on the brands for access to factories, it requires the trust of workers, and the nature of individual consumer and activist action is somewhat mercurial. Wells (2007) agrees that the episodic nature of consumer and activist attention presents a grave challenge. In his analysis of NGO monitoring, he also points to larger problems: the lack of capacity of independent monitoring to cover the hundreds of thousands of factories, and limits imposed by the reality of global production (mobility, volatility, price structure).

Researchers have been most enthusiastic about aspirational forms of codes/monitoring that appear to hold the potential to overcome some of the shortcomings of actual programs. An early proposal that is often referred to in the literature is ''Ratcheting Labor Standards,'' created by Fung et al. (2001). This model would have required companies not only to adopt codes and hire monitors but also to participate in a system of publicly disclosed ranking or grading of results with an ''umpire'' organization overseeing the verification of information. The model has been criticized for de-emphasizing the role of workers and unions (Broad 2001; Moberg 2001; Rodriguez-garavito 2005) and for being unrealistic (Levinson 2001; Standing 2001). O'Rourke (2003, 2006) later proposed that current systems become more transparent and ''interoperable'' in order to achieve some of the benefits of Ratcheting Labor Standards, without adoption of the entire model.

A second aspirational model, the Designated Suppliers Program (DSP), emerged from the student anti-sweatshop movement (USAS) and was adopted by the Workers Rights Consortium. The DSP, which has been stalled due to legal barriers, but is still to be implemented, would require university licensees to source progressively increasing percentages of apparel from WRC ''verified'' factories, which would be unionized and pay a living wage. Esbenshade (2008) emphasizes that the DSP has the potential to address industry practices that continue to undermine monitoring, by requiring brands to stabilize their supplier base with fewer and more long-term contracts and by requiring fair pricing.

Ian Robinson (Anner et al. 2008) claims that the reason consumer-based strategies have not been effective is not because consumers are unreliable, as Seidman (2007) and Wells (2007) argue, but because consumers do not have a reliable system to evaluate no-sweat claims, which the DSP would provide. Both authors argue that the DSP would foster what many have argued is the key to an effective monitoring system, workers protected by a union contract that allows them to raise issues and to be a continuously vigilant presence in their own factories.

At the time of the writing of this article, the federal government has just approved the DSP plan in theory as not violating anti-monopoly laws and regulations, an approval that took over 5 years to secure. The DSP, which had such promising momentum with almost 50 universities signed on, is now heading for revival. In the meantime, USAS and the WRC have launched the bookstore initiative, an interim measure under which individual bookstores (often controlled by a large entity like Barnes and Nobles) purchase directly from a model factory. The factory, Alta Gracia, actually pays a living wage (over three times the minimum) and has signed a collective bargaining agreement.

Major debates: ethical consumerism, empowerment and governance

In addition to the question of whether codes/monitoring effectively raises standards for workers on the ground, there are several important debates about how the (im)balance of power between actors is created or embedded in codes/monitoring regulation and the anti-sweatshop movement more generally. Relationships discussed include consumers and workers, activists in the global North and South, NGOs and unions, and workers and employers. Most significantly, there is also lack of consensus about how codes/monitoring regimes fit into the larger question of the nation-state as a viable entity for regulating rights, given the nature of power relations in the global economy.

Role of the consumers, activists and workers

In their classic work *Can Labor Standards Improve under Globalization?*, Elliott and Freeman (2003) respond with a resounding yes. They posit that those who want to raise labor standards in less developed countries (LDCs), are often accused of being protectionists opposed to globalization. Instead, they argue that globalization can actually promote a rise in standards, bringing workers out of the fields and informal employment, and into the factory where labor standards can more easily be monitored and enforced. However, they believe the onus is ultimately on consumers in developed countries to demand products made under decent conditions, as consumers demand price or quality. The authors pinpoint the market incentive as the strongest tool for achieving corporate reform. Although they acknowledge that the voice of LDC workers is crucial to the process of protection, Elliot and Freeman see workers' weak position under globalization as an irremediable impediment to their meaningful participation in demanding their own rights.

The global economy's foundation of buyer-driven chains of production as laid out by Gary Gereffi (1994) and brand name loyalty as described by Naomi Klein (1999), shifts power from workers to consumers in terms of the ability to negotiate terms with companies (Esbenshade 2004a). However, most scholars see this foundation not as an opportunity for improved conditions, as Elliot and Freeman lay out, but as an obstacle. Scholars generally have little faith in consumers as the driving force behind change, portraying them as fickle at best and ultimate bargain hunters at worst (Armbruster-sandoval 2005; Seidman 2007). While Robinson (Anner et al. 2008) claims consumers are committed to

the anti-sweatshop issue and will pay more, Wells (2007) dismisses the surveys on which this assessment is based as nothing more than spoken intentions without proven behavioral change. Bartley (2007) explains consumer flux as, at least partly, a result of the lack of reliable certification labels. The resources of the individual consumer may also impinge upon ethical buying, as the efforts toward ethical production are happening not in Wal-Mart but in the pricier realm of the American Apparels and $40 university logoed sweatshirts. Kim Voss (Anner et al. 2008), on the other hand, emphasizes that well-orchestrated grassroots boycotts, like the grape boycott of the United Farm Workers, can collectivize individual decision-making into a powerful force.

However, there has been a strong emphasis in the literature on the advantage of institutional as opposed to individual buyers. Wetterberg (2010) and Seidman (2007) both claim that a regulation scheme must rely on the more stable behavior of institutional buyers (universities, cities or states for example), if it is to have any real leverage. The purchases by or licenses with these entities can be a stable influence that is controlled by longer-term policy decisions, rather than immediate shopping choices. Sweatfree Communities takes advantage of the fact that the government as purchaser (of uniforms for example) can be much more easily influenced to do (and pay for) the ''right thing'' than individual buyers. Similarly, while the DSP was on hold, the bookstore initiative leveraged the power of college bookstores to purchase from Alta Gracia. While the bookstores in turn relied on consumer choice to trigger new orders, bookstores have a lot of influence over that choice by how they display and market the product.

Another important power disparity within the configuration of the globalized anti-sweatshop movement is that between activists in consuming countries, acting as intermediaries for consumers, and those in producing countries, acting as representatives of workers. While noting the importance of a ''transnational advocacy network'' (TAN), a concept developed by Keck and Sikkink (1998), Ralph Armbruster-sandoval (2005) sees the imbalance of power within the TANs as a major weakness of the anti-sweatshop movement, and even of the TAN theory itself. Anner (2003) describes how activists in the North not only have more clout with Northern-based companies, but more resources in terms of initiating and ultimately controlling campaigns, sometimes to the detriment of local actors. Because the anti-sweatshop movement has focused primarily on the improvement of conditions, it has failed to ensure enabling rights that would more effectively improve conditions than monitoring and codes have done (Rodriguez-garavito 2005). César Rodríguez-Garavito argues that what workers need is ''empowered participatory regulation,'' that would focus on guaranteeing enabling rights, education, training and direct worker complaint mechanisms in the monitoring process, as well as addressing the power asymmetry between North and South in terms of TAN decision-making, partly through devoting resources to building capacity of Southern partners.

Rodríguez's vision attempts to fuse what to others are contradictory tendencies between Northern NGOs and Southern unions. Braun and Gearhart (2004) claim that Northern NGOs are developing a regulatory model, whereas unions are trying to build a participatory model. Braun and Gearhart (2004) and Lance Compa (2001, 2004) warn that monitoring is based on a ''wary alliance'' between idealist NGOs, who are not accountable to members and are run by middle-class staff, and interest-driven, member-based, working-class unions. Sakhela Buhlungu (Anner et al. 2008) points out that the power disparity between activists in the North and South results in a situation where garments workers are dependent on Northern NGOs rather than empowered by their own unions, a situation he characterizes as one of philanthropy rather than solidarity.

A related theme in the literature is the way in which the media and the anti-sweatshop movement have portrayed garment workers as victims, thus reinforcing the imbalance of power. Anner (2000) presents a review of Nexis/Lexis during 1996 – the 'Year of the Sweatshop' – which determined that 314 articles appeared in major US newspapers mentioning the word sweatshop in conjunction with child labor and only eight linking sweatshop to the right to organize. Ethel Brooks (2002) analyzes the complicated interplay between the movement utilizing the symbol of the gendered and racialized sweatshop victim and simultaneously contesting this image. However, the ''victim'' problematic extends beyond such frames, to the basic tenets of the monitoring paradigm. Seidman (2007) argues, that the paradigm itself is based on helping victims of violations of universally-accepted human rights through pressure on multinationals, rather than on defending citizens' rights to protection by their own government against violations of their nationally determined labor laws. It is this issue, of the centrality of government in regulation, which has brought about the most interesting debates in this field.

Private regulation and the ''governance'' dilemma

Scholars have generally discussed three mechanisms of corporate regulation: state enforcement, market advantage and private (often self) regulation. Codes/monitoring is clearly a form of the third, but also relies on the second\the sanction for not complying with private regulation is, at the most, limited access to the market or, at the least, the threat of the loss of individual consumers. Sociologists writing on codes and monitoring generally agree that the first, government enforcement, should be an important component of the protection of labor rights. They also agree that private regulation has arisen to fill the vacuum left by impotent governments, which have neither the capacity nor often the political will to enforce labor laws in a globalized economy that makes them dependent on foreign investment. Robert Ross (2006) argues that public policy is the third ''pillar of decency,'' along with active unions and alliances with reformers, necessary to fight sweatshops. While public policy includes enforcement of strong labor laws on the national level, because of the structure of the global economy he argues that we must also include trade sanctions to ''level the playing field'' for countries that protect their workers. There is, however, a debate over the degree to which private regulation is a distraction from the task of shoring up national labor law enforcement. Some argue that private regulation is the *only* realistic regulation, given the current context of the decline of the nation-state.

The first position, that national enforcement is key to compliance, has been taken by several in-depth studies of monitoring. In her book, *Beyond the Boycott* (2007), Seidman argues that the major flaw in monitoring regimes is that they are based on human rights discourse rather than principles of citizens' rights. Monitoring is an attempt to protect vulnerable workers from the excesses of greedy corporations, not to claim legally guaranteed rights for citizens from their own governments. She argues that anti-sweatshop activists must, in fact, switch their energies to the task of rebuilding the strength and effectiveness of national laws and systems of enforcement. ''Citizens at work'' can only really be protected by state inspectors, who are accountable to these same citizens, have access to factories, and are empowered to sanction violators. In her book, *Monitoring Sweatshops* (2004), Esbenshade delineates the decline of the traditional social contract in which workers had an active role in a system where the government did protect its citizens. In the traditional social contract of the middle part of the 20th century (at least in the US), workers were part of an agreement with employers, and mediated by the

government, to share (at least to some degree) power and profits (Bluestone and Harrison 1982). However, she argues this triangle of power has been replaced by a ''social accountability contract'' among corporations, contractors and the government. The social accountability contract, and the monitoring regime through which it operates, excludes workers from an active role in the protection of their rights, since they are not generally party to monitoring agreements nor do they play an active role in the monitoring process. Instead this regulatory model makes corporations (which are ultimately responsible for exploiting workers) accountable for their protection.

Others have also offered important critiques of private regulation as a weak substitute for state enforcement. Rodríguez-Garavito points out that the governance paradigm, which touts private regulation rather than regulation by the state or the market, is tone deaf to the importance of power differentials. The state's role has long been to mediate on behalf of its more vulnerable members (e.g., setting child labor and minimum wage laws). Bulunga (Anner et al. 2008) argues that, while national governments have ''thinned,'' they are still the proper focus for movements seeking labor rights enforcements. He also asserts that such movements must be led by, not just potentially benefit, local actors (e.g., local unions). Codes/monitoring are at the weakest in a continuum of possible labor rights protections according to Robert Ross (2004), at the opposite end from unions and government enforcement, with international law and trade sanctions in between. They are no substitute for a well funded and active system of national enforcement of laws; unfortunately, as he also details, there is a lack of political will to support such a system. However, the state failure is not an inevitable outcome of globalization; it is a result of purposeful defunding of enforcement agencies. Under neoliberalism, the state's role as protector of the vulnerable citizen is relinquished; instead the state assumes the role of supporter (not regulator) of the corporation, which in turn will prosper providing economic prosperity and jobs to the citizens.

A more common argument is that the two systems – private regulation and state enforcement – are complementary, either logistically working together or because the more layers of regulation the more likely there will be compliance. Based on his research in Los Angeles, which used a hybrid system, Weil (2005) argues that it is the ability of the government to enforce penalties on the upper levels of the industry that makes private monitoring on the factory level more effective. Gereffi et al. (2001) contend that, while monitoring should not be seen as substitutive, monitoring and certification are an opportunity to highlight disparities in state enforcement, and push enforcement beyond national borders. Voss (Anner et al. 2008) and Robinson (Anner et al. 2008), in response to Seidman, both argue that you need a combination of ''stateless'' and state regulation. Voss (Anner et al. 2008) makes a case that the most effective strategies not only target both, but also do so in a way that encourages each to put pressure on the other. For example, in the case of the UFW campaigns, not only was the union asking the government to enforce labor laws against Gallo Winery, but also Gallo ended up lobbying the government to legally extend the right to unionize to farmworkers in order to level the playing field.

There are claims in the literature that independent monitoring *has* led to some instances of pressure on local governments. By focusing on his own involvement with an independent monitoring group in El Salvador, Mark Anner (Anner et al. 2008) gives an instance of how this has been done. Similarly, Seidman (2007) analyzes a Guatemalan case, Knight and Wells (2007) deconstruct the Kukdong/Mexmode campaign in Mexico, and O'Rourke (2006) gives this example along with one in Indonesia where some

measure of pressuring the state to enforce laws occurred in the context of independent monitoring. However, reviewing the WRC reports (which was responsible for the Mexican and Indonesian cases) it is clear that these are fairly isolated incidents and not indicative of any general trend in independent monitoring, much less private monitoring. It seems that pressuring for government reform is a more likely outcome of a *local* independent monitor (e.g., in Coverco in Guatemala and GMIES in El Salvador), who is constantly engaged in the civil society movements within the country and for whom government engagement is part of its long-term work.

Even these authors, though, offer warnings about the possibility that monitoring might replace enforcement. In Los Angeles, where commercial monitoring first flourished, once George W. Bush replaced Bill Clinton in the White House, the DOL withdrew any oversight of monitoring, preferring instead a tack of ''compliance assistance'' rather than enforcement. And monitoring, which had started as an effort to broaden the reach of government enforcement, became the only dedicated form of investigation. However, as King and Pearce (2010) point out, the threat of state regulation strengthens the potential of private regulation, since companies prefer self-regulation to submitting to the state. This is born out by the experience in Los Angeles and also Locke's finding that Nike monitoring was most effective in countries with strong labor inspectorates. Of course, it could also be that the monitoring was not more effective in these cases but that factories had higher levels of compliance because they expected they might be inspected by the state.

Wetterberg challenges the sharp distinction researchers have made between private regulation and the traditional government regulation. Wells (2007) in his critique of codes called them a form of ''soft law,'' as opposed to the ''hard law'' of legal statutes. Wetterberg claims that, in fact, there are ''harder soft law'' regimes. She argues that private regulation should neither be lumped into one category nor dismissed. Moreover, she asserts that if the regulation is in a socially-regulated market that is controlled by an interested intermediary, and where there is independent monitoring and continued activism (as previously described), this form of regulation is not only viable but has shown success. However, in two of her three examples the government actually plays a crucial role. In the example of local governments as the interested intermediary, the city or state actually passes a law or adopts an ordinance to require monitoring and impose sanctions on violators. In the example of Cambodia, the US government provided market access (trade preference) in exchange for the Cambodian government cooperation.

Even government-sanctioned monitoring is open to debate, as described in the Los Angeles example, as well as in the Cambodian case. The monitoring in Cambodia conducted by the ILO and supported by the garment manufacturer's association, was mostly funded by the US government. The agreement also provided half a million dollars in capacity building for the Cambodian labor ministry so the idea was to strengthen both government enforcement and institute non-governmental inspection. However, there has been a lot of criticism in the anti-sweatshop movement about the program, which gave trade privileges with the US to Cambodian garment manufacturers at the same time that the manufacturers shifted most of their workforce to temporary contracts, greatly undermining workers' rights (Allard 2011). The philosophy of the program is that monitoring and cooperation in raising productivity will bring an end to labor strife and make the industry more competitive. Critics believe that monitoring has not solved regular violations and that competitive advantage continues to be based on paying low wages and fighting unionization through the repression of strikes, and even assassination of union

leaders (Ballinger 2009). However, Shea et al. (2010) claim that the model developed under the bilateral trade agreement known as Better Factories Cambodia was largely successful in improving working conditions, although the authors do admonish that future monitoring ventures should include off-site worker interviews and unannounced visits, practices that if missing, as the recommendations indicate, would bring into question the program's integrity.

The model is now proliferating with Better Work projects in Jordan, Vietnam, Haiti, and Lesotho being touted by the ILO and the funding agency – the World Bank – as a market competition strategy (for countries and brands). In her analysis of the program in Lesotho, Seidman (2009) warns that Lesotho is a cautionary tale against basing development plans on the ethical consumer niche; she predicts that orders will soon decline and the industry will move on. She also points to the fact that workers are silenced by a fear of ruining the reputation, and therefore market share, of their employer and country. Esbenshade (2001, 2004a) pointed to a similar flaw in the government-backed monitoring in Los Angeles a decade ago.

Conclusion

The debates in the literature on codes of conduct and monitoring have moved beyond whether these regulatory mechanisms are simply an effective ploy that gives corporations cover, or a solution to global sweatshops. They are clearly neither. Companies try to use these programs to boost their reputation but are still vulnerable to media attacks, as the mechanisms do not stop the emergence of serious violations. On the other hand, companies have been pushed to take steps that change to some degree the landscape under which their factories operate: there is now acceptance of public disclosure of factory names and locations – once held to be an unbreachable trade secret; recently there have been incidents of brands taking responsibility for unpaid back wages and severance, still isolated but previously unknown in the global supply chains constructed in part to avoid such liability; and there are indications that brands may consolidate their far-flung production, which is unmanageable in the age of disclosure and monitoring. Despite these changes, with few exceptions workers are not paid living wages and are not able to organize, and they are not uncommonly cheated out of mandatory pay, benefits or severance. This does not mean that codes and monitoring are misguided, rather, that they are limited; they are a salve, not a cure.

The private regulatory model rarely empowers workers. As Esbenshade (2004a) finds, workers have no formal role in private regulation (socially regulated or not) – they are informants, and informants who fear that production at their plant may be cut off and their jobs lost. There are instances where organized workers fighting for collective bargaining agreements through their union, have actually chosen to take this risk. While this happens infrequently, it can be powerful as in the recent Russell case in Honduras. This well-organized transnational campaign calling on universities to cut their licensing contracts was based on a guarantee of a long-term commitment to the workers by established organizations (the USASs and the Workers Rights Consortium), who had built up relationships with Honduran labor leaders over years. Although the Russell case was a great success – in that workers were rehired and won a collective bargaining agreement and a guarantee of broader rights to freedom of association than previously experienced in the industry, not only for themselves but also for all Honduran workers at other Russell factories – this is not a model that is replicable on a large scale. The victory required enormous resources for all parties involved, resources that could not be

committed to thousands or even dozens of factories. Moreover, as discussed above, few TANs have strong, long-standing bonds of cooperation and trust, and even those that do are still fraught with unequal power relations. Lastly, the ability for activists to pressure universities to cut contracts may turn out to be more effective than their leverage to force reinstatement of Russell orders (thus securing jobs for the workers). The case does, however, provide a precedent that raises the bar of what can be demanded from companies.

In fact, it is unproductive to declare that either workers or nation-states are so weakened by globalization as to be irrelevant. However, to broaden such wins in a systematic way, workers' rights cannot rely on a negotiation between ethical consumers and corporations, but must also involve a movement of citizens to demand protections from the governments they elect to do so (Seidman 2007). National security should not be just about protecting citizens from invading armies, or terrorists, but also from exploitative labor arrangements.

Governing cannot be abandoned to private forms of ''governance.'' Jill Murray (2003) argues that primary responsibility for regulation lies with the state. The enforcement of labor law actually fulfills two major tasks of the government: providing companies with a ''level playing field'' and balancing the power of companies and workers. Lipschutz and Rowe (2005) agree that it is in the government's interest to make sure that everyone abides by the same rules, both within their countries and between countries. Voluntary private regulation cannot play this role since it is not uniform, nor enforced, nor enforceable given the global and mobile nature of supply chains. While some companies may sincerely want to regulate their contractors, they cannot count on others to do the same. Thus monitoring, rather than giving a company or even a country a market advantage, may actually put them at a competitive disadvantage. Locke et al. (2007) show us that it is, in fact, the context of strong national enforcement and a supportive business relationship between the brand and the contractor that have far more effect on compliance than monitoring.

Regulation must move from a model that presumes compliance and, therefore, focuses on ferreting out violators, to one that assumes non-compliance, and so concentrates on altering the structure of the industry. It remains a question whether the MSIs can demand changes that go far beyond the current criteria set by codes and enforced by monitoring. Can MSIs, the anti-sweatshop movement, and/or workers in producing countries force the adoption of standards that actually change the pricing and sourcing structures of the industry, creating fair long-term contracts where workers have leverage and where their organizing does not threaten their continued employment? This is the real question for scholars and activists.

Short Biography

Jill Esbenshade is an Associate Professor of Sociology at San Diego State University. Her research is located at the intersection of labor, immigration and race studies. She focuses on the effect of laws, regulation and government and employer policies on workers, particularly immigrant workers. She is the author of *Monitoring Sweatshops: Workers, Consumers and the Global Apparel Industry* and various articles on codes of conduct and monitoring. She is also author of numerous articles and policy reports on such issues as: local anti-immigrant ordinances, refugee policy, and employer policies reorganizing work for hotel housekeepers and for welfare workers. She holds a BA from Brown University and a PhD from the University of California at Berkeley.

Note

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