

2011

## Protecting the Children: The Need for Modern Day Balancing Test to Regulate Child Labor in International Business

S. Denay Brown

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### Recommended Citation

Brown, S. Denay (2011) "Protecting the Children: The Need for Modern Day Balancing Test to Regulate Child Labor in International Business," *Florida State University Journal of Transnational Law & Policy*. Vol. 20: Iss. 1, Article 5.

Available at: <https://ir.law.fsu.edu/jtlp/vol20/iss1/5>

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**PROTECTING THE CHILDREN: THE NEED FOR A  
MODERN DAY BALANCING TEST TO REGULATE CHILD  
LABOR IN INTERNATIONAL BUSINESS**

S. DENAY BROWN\*

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INTRODUCTION

The use of child labor in international business, and specifically in the manufacturing context, has become a massive international problem which requires a realistic, enforceable solution. In coming to a realistic and workable solution, it is first important to understand the causes of child labor and realize that often, poverty and cultural trends dictate the use and acceptance of child labor. Next, it is necessary to understand the different players in the international world of child labor, address the importance and abilities of each, and understand the necessity of joint cooperation between all of the entities. Additionally, it is important to understand not only that complete bans on child labor are too restrictive, counterproductive, and an entirely infeasible solution to the prob-

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\* J.D. Candidate, Florida State University College of Law, December 2010; B.S., cum laude, Real Estate, Florida State University, 2005.

lem of child labor, but that the alternative, regulation of child labor, is the appropriate solution to the problem.

This Article addresses and analyzes each of these issues and proposes the utilization of a balancing test to establish nonuniform regulations for child labor within international business. The balancing test proposed herein is a seemingly innovative approach to addressing the weighty problem of the use of child labor in international business. Although child labor in general has received much attention in legal scholarship, most of that scholarship has addressed and largely supported the complete abolition of child labor. Unfortunately, however, even in light of the fact that attempts at the complete abolition of child labor are unsuccessful, legal scholarship is lacking in suggestions for alternative means of handling and regulating child labor. In fact, research revealed no other legal works suggesting the use of a nonuniform means of regulating child labor among countries. In contrast, while this Article may not entirely flesh out all of the elements and factors of the proposed balancing test, it serves as an initial attempt to introduce and examine this surprisingly untouched and unrepresented idea of allowing varying regulations and restrictions on child labor among countries.

As discussed in more detail below, in accepting the idea of allowing countries to have differing standards regarding the use of beneficial child labor, it is necessary to understand that having a universal prohibition against, or universal regulation of, child labor is ineffective and counterproductive. History has shown that attempts to regulate child labor with rigid, fixed standards that are applicable to all countries are unsuccessful and unenforced. As a result of cultural differences and poverty levels, some countries have no choice but to utilize child labor. In the face of strict, unbending child labor regulations, these countries will be forced to break standardized regulations and subsequently attempt to shelter and hide their use of child labor for fear of repercussion. The sheltering and hiding of child labor will do nothing but further the child labor problem by forcing child labor underground and out of the light where it can be monitored and regulated.

Because of the varying cultures, poverty levels, needs, and labor practices among differing countries, a balancing test which allows customized regulations for each country is ideal. Such a balancing test, which takes these factors into account and results in customized regulations, is the only appropriate and workable solution to the current child labor problem. These customized regulations, which will allow acceptable child labor, will reduce the necessity of forcing child labor underground and will remove much of

the stigma associated with child labor. As a result, these regulations are much more likely to be respected and enforced, and will open the door for both communication about, and monitoring of the use of, child labor. Ultimately, those that will benefit the most are those that need it the most: the children.

## I. THE FOUNDATIONS OF CHILD LABOR

In formulating a solution to the abuse of child labor in the international market, special attention must be paid to adequately addressing both the use of child labor as well as the causes. Thus, it is vital to understand both what child labor is and why it happens. This section explores and discusses the definition of child labor as well as many of the causes.

### A. *The Definition of Child Labor*

Due to different cultures and customs among countries, the definition of child labor can vary immensely.<sup>1</sup> As a result, one standard, universal definition of child labor is not applicable to all countries.<sup>2</sup> For the purposes of this Article, I define *child labor* as “any work done by a person under the age of 16.” Additionally, I will view child labor as one of two types: beneficial and exploitive. Discerning between beneficial and exploitive child labor can be a difficult task as there is no bright-line test to determine when labor crosses the line of acceptability.<sup>3</sup> However, it is possible to outline the broad parameters of what constitutes both beneficial and exploitive child labor.

*Beneficial child labor* or “child work” is defined by some authors as “benign and permissible.”<sup>4</sup> Although benign and permissible work falls within the definition of beneficial child labor, those terms, without more, are overly simplistic. In its largest sense, beneficial child labor is paid labor that in some form or manner benefits the child and is not exploitive, hazardous, or contrary to their best interests. One key, yet simple, distinction between necessary and exploitive child labor is that children are paid to do beneficial child labor, and exploitive child labor is that which children are compelled to do in situations that hinder their health and

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1. Christopher M. Kern, Note, *Child Labor: The International Law and Corporate Impact*, 27 SYRACUSE J. INT'L L. & COM. 177, 178 (2000).

2. *Id.*

3. *See id.* at 183-84 (arguing for the creation of universal standards defining unacceptable child labor).

4. Holly Cullen, *Child Labor Standards: From Treaties to Labels*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 87, 93 (Burns H. Weston ed., 2005).

development.<sup>5</sup> Some authors differentiate between child labor and child work, and define *child labor* as “work done by children that is harmful to them because it is abusive, exploitive, hazardous, or otherwise contrary to their best interests.”<sup>6</sup> They suggest that this can be differentiated from child work, which is a larger and more encompassing category that can include work that may be in the children’s best interest.<sup>7</sup> Beneficial child labor is generally synonymous with child work.

Exploitive child labor is defined by some authors as “harmful and impermissible.”<sup>8</sup> This form of child labor is harmful, “impinge[s] on the well-being of working children,”<sup>9</sup> and compelled. In general terms, *exploitative* is defined as “[t]he act of taking advantage of something; esp., the act of taking unjust advantage of another for one’s own benefit.”<sup>10</sup> In the realm of child labor, the most accurate and inclusive definition of exploitive child labor is perhaps the International Labor Organization’s definition for the “worst forms” of child labor which is:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.<sup>11</sup>

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5. Michael F. C. Bourdillon, *Translating Standards into Practice: Confronting Local Barriers*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 143, 144 (Burns H. Weston ed., 2005).

6. Burns H. Weston, *Introduction*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER xv, xv (Burns H. Weston ed., 2005).

7. *Id.*

8. Cullen, *supra* note 4, at 93.

9. *Id.* at 87.

10. BLACK’S LAW DICTIONARY 619 (8th ed. 2004).

11. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), art. 3, *adopted* June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000), *available at* <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm>; Cullen, *supra* note 4, at 94.

### B. Why Child Labor Happens

Child labor is an alarming and rampant problem.<sup>12</sup> As one author states, “[t]he truth is that child labor is a common practice in every country in the world, including the First World, but most especially in the developing world . . . .”<sup>13</sup> The prevalence of the use of child labor is best exemplified by the statistics assembled by the United Nations’ International Labour Organization (ILO). ILO publications released in 2006 indicate that as of 2004, there were 218 million children laborers worldwide between the ages of five and seventeen.<sup>14</sup> This figure showed a decrease from the reports for the year 2000, which indicated an estimate of 246 million child laborers worldwide within the same age group.<sup>15</sup> Additionally, in 2005, the ILO estimated that globally there were seventy-three million working children under the age of ten.<sup>16</sup> Although the 2006 figures released by the ILO showed a slight decrease in the number of child laborers, it is indisputable that with 218 million child laborers worldwide, the problem is still far from being cured.

In attempting to resolve the epidemic of child labor, it is necessary to examine the reasons why child labor occurs. Although the reasons child labor exists are numerous and varying, several causes are easy to identify. First and foremost, poverty is the leading cause of child labor.<sup>17</sup> Other key factors driving the supply of child labor include poor economies, vulnerability, lack of access to credit, poor educational services, lack of social security mechanisms, debt, and increasing population.<sup>18</sup> Additionally, “[c]hild labor flourishes under many conditions: cultural traditions; prejudice and discrimination based on gender, ethnic, religious, or racial issues; unavailability of educational and other alternatives for working children; and no or weak enforcement of compulsory education and

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12. See U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, BY THE SWEAT AND TOIL OF CHILDREN: THE USE OF CHILD LABOR IN AMERICAN IMPORTS, 1-2 (1994) [hereinafter LABOR REPORT], available at <http://www.dol.gov/ilab/media/reports/iclp/sweat/sweat.pdf>.

13. Llewellyn H. Rockwell, *Campaigns Against Child Labor are Protectionist and Imperialist*, in CHILD LABOR AND SWEATSHOPS 70, 73 (Mary E. Williams ed., 1999).

14. *Facts on Child Labour – 2006*, INT’L LABOUR ORG., [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_067558.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067558.pdf) (last visited Oct. 2, 2010).

15. *Id.*

16. *Facts on Child Labour*, INT’L LABOUR ORG., <http://www.ilocarib.org.tt/portal/images/stories/contenido/pdf/Fact%20Sheets/Fact%20Sheet%20Child%20Labour.pdf> (last visited Oct. 2, 2010).

17. Victor P. Karunan, *Working Children as Change Makers: Perspectives from the South*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 293, 307 (Burns H. Weston ed., 2005); Kern, *supra* note 1, at 182.

18. Karunan, *supra* note 17, at 307-08; Kern, *supra* note 1, at 179; see Dexter Samida, *Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization, and the WTO*, 33 DENV. J. INT’L L. & POL’Y 411, 411 (2005).

child labor laws.”<sup>19</sup> Further, globalization, international trade, and the internationalization of production play a major part in the continuing use of child labor.<sup>20</sup> Some experts argue that the child labor problem is fueled by the consolidation of the retail industry into a small number of huge conglomerates.<sup>21</sup> These conglomerates, including Wal-Mart, K Mart, and J.C. Penney, seek competitive advantages by “out-sourcing” to low-paying suppliers around the world.<sup>22</sup>

Together, these factors encourage child labor by creating a demand for cheap, unskilled labor, and by providing easy access to areas of cheap labor.<sup>23</sup> The demand for and access to cheap, unskilled labor enables and encourages companies to continue to use child labor by supplying an appealing ability “to keep labor costs down in a highly competitive global market.”<sup>24</sup> Overall, “the historical dependence upon child labor and the standard business objective to maximize financial gain[] are significant barriers in the elimination of exploitive child labor practices.”<sup>25</sup> The worldwide impact of these combined forces has been growing insecurity and decreasing labor standards.<sup>26</sup>

In the private sector, the potential advantages of child labor are often clear to employers. The majority of child labor abuses occur in private sector industries that produce everyday products and require nonskilled work, such as the manufacture of clothing, toys, sneakers, carpets, and sports equipment.<sup>27</sup> As one author explains, “[c]hild labor is cheap labor. Children are targeted for non-skilled, labor-intensive work. Because children are docile and easily controlled, employers have no fear of them demanding rights or organizing.”<sup>28</sup> One factory worker emphasizes that children, particularly those between the ages of ten and twelve, are the best because “[t]hey are easier to control, not interested in men, or movies, and obedient.”<sup>29</sup> As the above statistics and comments make evident, child workers’ popularity with factory owners makes them

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19. Linda F. Golodner, *The Apparel Industry Code of Conduct: A Consumer Perspective on Social Responsibility*, in GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME 241, 247 (Oliver F. Williams ed., 2000).

20. *Id.*; Karunan, *supra* note 17, at 308.

21. Charles S. Clark, *Child Labor and Sweatshops: An Overview*, in CHILD LABOR AND SWEATSHOPS 10, 12 (Mary E. Williams ed., 1999).

22. *Id.*

23. Golodner, *supra* note 19, at 247; Karunan, *supra* note 17, at 308.

24. Golodner, *supra* note 19, at 247.

25. Kern, *supra* note 1, at 191.

26. *Id.*

27. Clark, *supra* note 21, at 11.

28. Golodner, *supra* note 19, at 246.

29. Shahidul Alam, *Efforts to Ban Goods Made by Children Are Counterproductive*, in CHILD LABOR AND SWEATSHOPS 43, 46 (Mary E. Williams ed., 1999).

heavily utilized.<sup>30</sup>

## II. THE ENTITIES RESPONSIBLE FOR REGULATING CHILD LABOR

When addressing the regulation of child labor in the international scheme, it is necessary to do a two-part analysis. The first part of the analysis involves what entities should be responsible for developing, implementing, and enforcing the applicable standards. The second issue is what standards should be developed, implemented, and enforced. This section examines the first issue: the various players in the area of child labor. Additionally, it addresses the efforts made by each type of actor and discusses the strengths and weaknesses of each.

### A. Private Corporations

One level at which human rights issues must be addressed, enforced, and monitored is at the corporate level. The regulation of working conditions and human rights violations at this level is essential not only because modern corporations are powerhouses with the strength, financial means, and power to make changes, but also because these corporations are in the best position to monitor their working conditions. Specifically, these corporations have firsthand knowledge of, and access to, the workers and working conditions utilized by their company.

Historically, however, private corporations were not considered part of the solution to human rights problems. One possible explanation for this is that human rights issues were traditionally addressed in international law by nation states as the sole actors and not by private corporations.<sup>31</sup> Another possible explanation is that until recently, the economic significance of private corporations was not realized.<sup>32</sup>

The first shift toward viewing private corporations as actors in the international human rights scheme occurred after the First World War when “fundamental changes” occurred.<sup>33</sup> These changes “enlarg[ed] the possible group of actors in international law when ‘a new emphasis on the principle of self-determination brought to the forefront a new subject of international law, namely [peoples.]’”<sup>34</sup> “This metamorphosis of the state’s role, along with

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30. *See id.*

31. Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 538 (2002).

32. *Id.*

33. *Id.*

34. *Id.* (quoting Christina Baez, Michele Dearing, Margaret Delatour, & Chris-

an increased dependence on the market, encouraged corporations to *self-regulate* and to act ethically in their business transactions.”<sup>35</sup> As a result, both individuals and private corporations were added to the list of actors in the international scheme.<sup>36</sup>

The second shift in thinking occurred after the Second World War when global trade increased and resulted in the birth of a new private corporation, more particularly the transnational corporation (TNC) or the multinational enterprise (MNE).<sup>37</sup> Even as early as the 1990s, estimates of the number of TNCs or MNEs ranged from 35,000 to 37,000. However, their economic significance is what is truly remarkable.<sup>38</sup> These entities “ ‘control roughly one-fourth of the world’s assets[]’ and . . . account for ‘as much as one-fourth of the U.S. economy[.]’ ”<sup>39</sup> Additionally, of the 100 largest economies in the world, fifty-one are global corporations, while only forty-nine are countries.<sup>40</sup> Further, the world’s 200 largest corporations produce more than one quarter of the world’s economic activity, and some of the largest TNCs and MNEs have had annual gross sales larger than the gross domestic products of many nation states.<sup>41</sup>

As a result of their power and wealth, “[t]he obligation of these corporations to act ethically is critical considering their relative impact on both the economic and humanitarian structure of societies worldwide.”<sup>42</sup> Because these entities essentially control the economic markets, and because they are ultimately the parties most affected by the regulations, it is essential that they take part in the reform efforts. If these entities participate in the reform process and have a say in the rules and regulations that will affect them, the process will be more likely to produce rules and regulations with which the TNCs and MNEs agree and are willing to abide.

Additionally, these entities must play a part in the en-

tine Dixon, *Multinational Enterprises and Human Rights*, 8 YEARBOOK OF INT’L LAW 183, 211-13 (2000) [sic].

35. Maria Anne Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 385 (2007) (emphasis in original).

36. Wood & Scharffs, *supra* note 31, at 538.

37. *Id.*

38. *Id.* at 538.

39. *Id.* at 539 (quoting John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMP. L. 463, 467 (2000), citing Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT’L L. J. 1963, 1979 (1996)).

40. Pagnattaro & Peirce, *supra* note 35, at 385.

41. *Id.*; Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 57 (2002); See Wood & Scharffs, *supra* note 31, at 539.

42. Pagnattaro & Peirce, *supra* note 35, at 385.

forcement of the new rules and regulations. Not only because these entities have so much wealth and power, and thus the means to enforce the regulations, but also because they are the entities that have direct access to the factories and workers and are thus in the best position to monitor and regulate the labor conditions and practices. Former Secretary of Labor Robert Reich often stated that if sweatshops and child labor are to be policed, industry's active cooperation is essential.<sup>43</sup> Of course, not all TNCs and MNEs agree. Some argue the exact opposite, claiming that they have no control over their subcontractors and thus the abuses aren't their fault.<sup>44</sup> The subcontractors, they argue further, must operate within the local cultures, economies, and laws in which they are located, and these cultures and laws are not often in line with Americans'.<sup>45</sup> One possible explanation for such a position is explained by one author:

Profit-maximization, if not the *only* goal of all business activity, is certainly central to the endeavor. And the pursuit of profit is, by definition, an amoral goal—not necessarily immoral, but morally neutral. An individual or business will achieve the highest level of profit by weighing all decisions according to a self-serving economic scale . . . Multiple layers of control and ownership insulate individuals from a sense of responsibility for corporate actions. The enormous power of multinational corporations enables them to inflict greater harms, while their economic and political clout renders them difficult to regulate.<sup>46</sup>

Even outside of the conflicting opinions of the corporations themselves, there are many differing views and opinions among legal scholars about whether private corporations have duties in the realm of human rights and specifically what those duties are.<sup>47</sup> Several legal scholars have studied the duties of private corporations and although the scholars differ in their opinions about the specifics, they all agreed that not all private corporations have equal duties but rather that there are "gradations of duties."<sup>48</sup> The authors' positions are as follows:

"[A] continuum of legal and moral responsibility that can be

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43. Clark, *supra* note 21, at 16.

44. *Id.* at 12.

45. *Id.*

46. Stephens, *supra* note 41, at 46.

47. Wood & Scharffs, *supra* note 31, at 554.

48. *Id.*

divided into four broad levels." A private corporation "has the greatest duty to act when the company itself is compelled to participate in [a] human rights abuse; situations "imposing the least responsibility for action . . . include scenarios in which the company lacks involvement in the human rights violations as well as influence over the perpetrator of the violations."<sup>49</sup> Another author argues that "the [private corporation's responsibility] depends on how "close[] the [human rights] violations come to the company's operations" and how "serious [the human rights violations] are." This second author posits "five levels of responsibility[.]" ranging from most responsible to least responsible<sup>50</sup>[.] . . . The third author contends that "corporate duties are a function of four clusters of issues: the corporation's relationship with the government, its nexus to affected populations, the particular human right at issue, and the place of individuals violating human rights within the corporate structure."<sup>51</sup>

While it is true that some gradation of duty is inevitable as a company will have less control over the operations of a subcontractor versus the operations of their own company, such distance does not always make failure to act excusable. For instance, even companies which lack control over their subcontractors' operations have the ability to not use subcontractors which are in violation of labor regulations or are utilizing exploitive labor. Additionally, a corporation's lack of close nexus to the affected population does not permit a company to turn a blind eye to the harmful effects it is causing. Rather, companies should be responsible for the harmful effects they either knowingly cause or have knowledge of, regardless of their direct or indirect relationship to the harms.

In response to pressure and calls for action, many retailers and private corporations have adopted codes of conduct, increased monitoring, and employed strict enforcement of the rules.<sup>52</sup> Such corporate codes further federal and corporate goals, encourage ethical conduct, and improve self-governance.<sup>53</sup> These codes are in acknowledgment of, and a hedge against, corporate misconduct, and they serve many useful functions including communicating to

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49. *Id.* at 555 (quoting Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 181 (1997)).

50. *Id.* (quoting Cassel, *supra* note 39, at 1981-84).

51. *Id.* (quoting Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L. J. 443, 496-97 (2001)).

52. Clark, *supra* note 21, at 16.

53. Pagnattaro & Peirce, *supra* note 35, at 377.

“management, employees, and the public that the corporation intends to obey both national and international law” and “encourag[ing] those employees inclined to ‘do the right thing’ to intervene or report violations.”<sup>54</sup>

However, corporations’ efforts to employ codes of conduct have been met with criticism. Many legal scholars and human rights advocates are opposed to corporate codes. Some scholars state that such codes are “mere public relations gimmicks” while others deem them “glossy human rights package[s]”<sup>55</sup> and assert that they are used “as a vehicle for corporations to (1) distract and confuse conscience-laden consumers, who have demanded that the goods they buy not be made or handled by exploited workers, (2) distract and confuse workers regarding their fundamental rights, and (3) distract and confuse national policy makers.”<sup>56</sup> Similarly, others have stated that the codes are mere “window dressing” and are not actually followed.<sup>57</sup> These beliefs may be valid, as Nike’s Chief Executive Officer Philip Knight once said:

We are committed to improving working conditions for the 500,000 people who make our products. We are also a company of people rooted in our responsibility to be a good corporate citizen. I don’t necessarily expect you to believe that, but I will tell you this—it makes us feel better about ourselves.<sup>58</sup>

As Knight’s quote demonstrates, many MNEs and TNCs enact codes of conduct simply to appease the public and shift negative attention without ever intending to act upon such codes. These corporations should be held to their corporate codes of conduct and not allowed to make promises and turn a blind eye.

The current prowess, wealth, and power of TNCs and MNEs makes it undeniable that these entities must be involved in solving the child labor problem from this point forward. However, their involvement is essential not only because of their strength, financial means, and power to make changes, but also because these corporations are in the best position to monitor their working conditions and make a difference in how child labor is handled. As one author said:

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54. Wood & Scharffs, *supra* note 31, at 556.

55. *Id.* at 558.

56. *Id.* at 557 (quoting Owen E. Herrnstadt, *Voluntary Corporate Codes of Conduct: What’s Missing?*, 16 LAB. L. 349, 350 (2001)).

57. Pagnattaro & Peirce, *supra* note 35, at 393.

58. Kern, *supra* note 1, at 177.

MNEs directly and indirectly influence more lives in developed countries and in less developed countries than any other global institutions, except for a few intergovernmental organizations such as the United Nations, the World Bank, and the International Monetary Fund. A vital presence in many national economies, MNEs have accumulated significant economic and political power. This power puts MNEs in a position to influence government policies in many areas, and makes them key players in basic human rights issues.<sup>59</sup>

The foregoing emphasizes that it is imperative to secure the involvement of TNCs and MNEs in any future movements. Despite the criticism, "codes of conduct can build protective frameworks from the ground up."<sup>60</sup> Without the involvement of these entities, and without a good faith effort on their parts, the child labor problem will remain unresolved and unregulated and will continue to flourish.<sup>61</sup>

### B. National Governments

Nation states are another main player in the child labor and human rights areas. This view is apparently shared by many as a "June 1996 opinion poll released by the International Mass Retail Association showed that 46% of Americans think that the U.S. and foreign governments have the main responsibility to regulate exploitive labor practices abroad."<sup>62</sup> Only 29% of Americans said that manufacturers should be responsible for the regulation, and only 18% said that retailers should be responsible.<sup>63</sup> As a result, many people look to nation states to come up with the solution to human rights and child labor problems.

Nation states often develop legal regimes including numerous rules which apply to corporations and are enforceable through the nation's legal system.<sup>64</sup> However, regulations imposed by national governments are often unenforceable or impractical in the international context as nations have no power to regulate conditions in the other countries with which their corporations do business. Re-

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59. Cristina Baez, Michele Dearing, Margaret Delatour, & Christine Dixon, 8 U. MIAMI INT'L & COMP. L. REV. 183, 184 (2000).

60. Laurie S. Wiseberg, *Nongovernmental Organizations in the Struggle Against Child Labor*, in CHILD LABOR AND HUMAN RIGHTS: MAKING CHILDREN MATTER 343, 361 (Burns H. Weston ed., 2005).

61. Kern, *supra* note 1, at 191.

62. Clark, *supra* note 21, at 16.

63. *Id.*

64. Stephens, *supra* note 41, at 82.

sultantly, the legal system operates at a disadvantage when regulating multinational actors, especially those with the economic and political power of multinational corporations.<sup>65</sup> This is largely because corporations are multinational while legal systems are still largely national.<sup>66</sup> This distinction creates a disconnect between international corporate structures and the law.<sup>67</sup> Because these multinational corporations are much larger and more powerful than the legal structures that govern them, they have reached a level of transnationality and power that is beyond the reach of domestic law.<sup>68</sup> As a result, “the multilayered, multinational division of labor and responsibility of the modern corporation, its single-minded focus on economic gain, and its economic and political power all render multinational corporations a difficult regulatory target.”<sup>69</sup> As one author points out:

The very strengths of transnationals render them difficult regulatory targets. As corporate power becomes increasingly international and increasingly disassociated from the nation-state, regulation becomes more difficult. “The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world.”<sup>70</sup> Regulatory schemes are largely domestic, based upon national laws, administrative bodies and judicial systems, while transnationals operate across borders. . . . “[T]he present legal framework has no comfortable, tidy receptacle for such an institution,” producing a tension between the legal theory of independent corporate units, each “operating as a native within the country of its incorporation,” and the reality of the “economic interdependence” of the multinational corporation.<sup>71</sup>

Additionally, national legal systems typically exercise jurisdiction only over those corporations based in their nation and often refuse to exercise jurisdiction even for domestic corporations if the activi-

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65. *Id.* at 53.

66. *Id.* at 54.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Stephens, supra note 41*, at 58-59 (quoting Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 8 (1993)).

71. *Id.* (quoting Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 756 (1970)).

ties complained of occurred elsewhere.<sup>72</sup> As a further hindrance, any foreign attempts at regulation by the United States are often met with hostility since many believe that the United States intervenes only when it is in the best interest of the U.S. economy.<sup>73</sup> Overall, attempts to enforce such domestic regulations on other nations can lead to a multitude of inhibiting problems.<sup>74</sup>

Nonetheless, nation states do have the right and power to regulate corporate behavior.<sup>75</sup> To start, nation states can impose limits on corporate behavior and enact regulations forbidding corporate conduct that constitutes human rights abuses including physical harm, denial of basic labor rights, and harm to the environment.<sup>76</sup> Next, nation states can enforce these regulations within their jurisdiction and hold corporations liable for violations of these basic rights.<sup>77</sup> For means of enforcement, it is possible for the state to impose sanctions, including criminal, civil, and administrative penalties, domestically.<sup>78</sup> The fact that nation states have neglected to enact and enforce such regulations in the past does not prevent them from doing so in the future.

Such attempts at regulation and enforcement have the potential to be successful. For example, the United States has enacted the Occupational Safety and Health Act (OSHA) and the Fair Labor Standards Act (FLSA).<sup>79</sup> Both of these acts are aimed at regulating working conditions and employment practices and ensuring safe, fair, and low-hazard working conditions.<sup>80</sup> Additionally, both acts are largely successful at achieving their aims and regulating labor conditions in the United States.<sup>81</sup> Other nation states have the potential to do the same in their countries.

Despite the current obstacles and lax enforcement, it is imperative that nation states participate in the elimination of child labor. While some corporations may make attempts to self-regulate, it is undeniable that not all corporations will be proactive and act independently. Therefore, nation states must take responsibility to independently develop and enforce regulations in their home states. Without such outside regulation and enforcement, corporations will be free to disregard any efforts at reform. Thus, if the regulation of child labor is to be successful, the participation of nation

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72. *Id.* at 83.

73. *Id.*

74. See generally Pagnattaro & Peirce, *supra* note 35.

75. Stephans, *supra* note 41, at 60.

76. *Id.*

77. *Id.*

78. *Id.* at 64.

79. Wood & Scharffs, *supra* note 31, at 560-61.

80. *Id.*

81. *Id.*

states is vital.

### C. International Organizations

The involvement of international organizations in the regulations of child labor also is essential. Without an international standard, TNCs and MNEs are likely to move assets and production to avoid unfavorable regulation.<sup>82</sup> As one author said, the “[p]revention of corporate evasion of regulatory standards requires international consensus on the norms applicable to corporations.”<sup>83</sup> Specifically, the involvement of international organizations is essential because they “can apply well-developed human rights norms to hold the various corporate entities responsible for their involvement in human rights abuses, and can rely on accepted principles of international jurisdiction to locate the domestic legal systems empowered to impose liability.”<sup>84</sup>

One international organization that has attempted to make change in the areas of child labor and human rights is the International Labor Organization (ILO). The ILO is a United Nations-related organization that is made up of representatives from government, business, and labor.<sup>85</sup> The ILO consists of 159 member nations, addresses human rights issues, has consistently been one of the foremost organizations protecting human rights, and pursues consensus between business and labor.<sup>86</sup> After World War I, the ILO was formed with the intention of creating a forum where labor unions, private corporations, and states could develop solutions to employment issues.<sup>87</sup>

Many of the ILO conventions involving human rights cover the areas of minimum wages, work hours, workplace health and safety, and the elimination of forced labor, child labor, and discrimination.<sup>88</sup> Critics of the ILO charge that their guidelines are “limited and [break] little new ground, mostly reaffirming the long-standing rights of workers to organize unions, to bargain collectively, and to [have] nondiscriminatory employment.”<sup>89</sup> Additionally, one of the largest weaknesses of the ILO is their difficulty in

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82. Stephens, *supra* note 41, at 59.

83. *Id.*

84. *Id.* at 68.

85. David M. Schilling, *Making Codes of Conduct Credible*, in *GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME* 221, 222 (Oliver F. Williams ed., 2000).

86. Garth Meintjes, *An International Human Rights Perspective on Corporate Codes*, in *GLOBAL CODES OF CONDUCT: AN IDEA WHOSE TIME HAS COME* 83, 92 (Oliver F. Williams ed., 2000); see Kern, *supra* note 1, at 189.

87. Kern, *supra* note 1, at 189.

88. Meintjes, *supra* note 86, at 92.

89. *Id.* (quoting Cassel, *Supra* note 39, at 1979) (internal citation omitted).

enforcing judgments.<sup>90</sup> Particularly, the ILO does not have authority to provide remedies to injured parties which renders them "a rather hollow institution because they embrace the proper legislation to implement labor standards but have no practical means by which to mandate these standards."<sup>91</sup> If member states do not abide by their duty to follow the laws, the ILO is limited to airing the crimes in the court of public opinion.<sup>92</sup> Although the ILO does not have the power to sanction companies for the purposes of enforcement, it does have an established complaint procedure.<sup>93</sup> The complaint procedure involves a Standing Committee on Multinational Enterprises which is empowered "to investigate and make specific findings of code violations by individual companies."<sup>94</sup>

The ILO has made several attempts to regulate the use of child labor. Early instruments did not distinguish between harmful and beneficial child labor, but instead aimed to abolish all forms of child labor and were largely unsuccessful.<sup>95</sup> However, Convention 138, the Minimum Age Convention, was developed in 1973 and contained clauses which allowed for distinguishing between the two types of labor.<sup>96</sup> The Convention provides that the minimum age of working children "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years"<sup>97</sup> and "no one under that age shall be admitted to employment or work in any occupation."<sup>98</sup> The declaration provides for exceptions allowing the age to be reduced to thirteen years for light work in all countries and to fourteen years for all work in countries where the member's "economy and educational facilities are insufficiently developed."<sup>99</sup> Additionally, in those countries which qualify to have the minimum age lowered to fourteen for all work, they may reduce the minimum age to twelve years for light work.<sup>100</sup> Although it was a significant step in the right direction, Convention 138 was criticized for being "poorly drafted" and "failing to take into account the actual practice of child employment in developed and developing countries."<sup>101</sup> As a result, the Convention

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90. Kern, *supra* note 1, at 189.

91. *Id.* at 190.

92. *Id.*

93. Meintjes, *supra* note 86, at 92.

94. *Id.*; Cullen, *supra* note 4, at 89-92.

95. Cullen, *supra* note 4, at 89.

96. See generally Convention Concerning Minimum Age for Admission to Employment (ILO No. 138), adopted on June 26, 1973, 1015 U.N.T.S. 297 (entered into force June 19, 1976) available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

97. *Id.* at art. 2(3).

98. *Id.* at art. 2(1).

99. *Id.*

100. *Id.* at art. 7(4).

101. Cullen, *supra* note 4, at 91.

never received much support from nation states and the issue of child labor remained stagnant for the time.<sup>102</sup>

Although not directly aimed at child labor, the ILO also made an attempt to influence human rights in 1977 when it developed a code titled the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.<sup>103</sup> The declaration “created voluntary guidelines for corporations in the area of ‘employment, training, worker conditions, and industrial relations.’”<sup>104</sup> Additionally, it contained “mechanisms for reporting abuses and problems”<sup>105</sup> and, in lieu of operating directly on multinational corporations, it relied on governments to ratify and implement its provisions by implementing their own legislation to legally bind corporations.<sup>106</sup> The guidelines created by the declaration are largely not enforced as a result of their “voluntary and nonlegally binding status.”<sup>107</sup> Consequently, the Declaration did not make great changes in the areas of human rights and child labor.

The child labor movement again gained steam in 1999 with the adoption of ILO Convention No. 182 (C182) Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor.<sup>108</sup> C182 has been the most quickly and widely ratified convention in ILO history.<sup>109</sup> The Convention took an important step and distinguished between “child work (generally benign), ‘child labor’ (harmful), and ‘worst forms of child labor’ (abusive, inherently rights violating).”<sup>110</sup> But even C182 has its critics. Some argue that the Convention defines harm too narrowly, while others argue that the definition of the worst type was driven not by “an analysis of what types of work interfere with a child’s development” but rather “by the gravity of the harms involved and the need for political consensus.”<sup>111</sup> Regardless of the criticism, C182 has been the most widely accepted and modern thinking Convention.<sup>112</sup>

As exemplified by C182, the ILO and other international organizations have the means to significantly influence child labor regulations. Although their means of enforcement may be lacking, their ability to create regulations to which nation states can look and require compliance cannot be ignored.

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102. *Id.* at 87.

103. Pagnattaro & Peirce, *supra* note 35, at 389.

104. *Id.*

105. Schilling, *supra* note 85, at 222

106. Pagnattaro & Peirce, *supra* note 35, at 389.

107. Schilling, *supra* note 85, at 222.

108. Cullen, *supra* note 4, at 87.

109. *Id.* at 94.

110. *Id.* at 97.

111. *Id.* at 97-98.

112. *Id.* at 94, 98.

### III. WHAT STANDARDS SHOULD BE DEVELOPED AND IMPLEMENTED

As stated above, child labor should be addressed in a two-part analysis. The first part of that analysis was what entities should be responsible for developing, implementing, and enforcing the applicable standards. As addressed above, it will take the involvement of private corporations, nation states, and international organizations working in conjunction to make leeway on the child labor problem. Having established what entities should be responsible for establishing and enforcing child labor standards, it is now necessary to explore what standards these entities should develop and implement. Thus, what standards should be developed, implemented, and enforced is discussed in this section.

#### *A. Complete Bans on Child Labor*

In the context of child labor, advocates often argue for complete bans of child labor in one of two ways: either as a complete ban on imports from companies or countries who use child labor or as a complete ban on child labor itself. For the purposes of this Article, the term "complete ban" will include both of these types of bans, as the results are often the same.

As a means of dealing with the child labor problem, many human rights advocates petition for complete bans of child labor and suggest the suspension of tariff benefits for offending countries and the withdrawal of any funding from international lenders to these offending countries.<sup>113</sup> Tom Harkin, a Democratic senator from Iowa, is a proponent of a complete ban on imports of products made by children.<sup>114</sup> Harkin, who introduced the Child Labor Deterrence Act in Congress, which would ban imports of goods produced by children, argues that "[c]hildren in developing countries, for the sake of their future and that of their economies, should be in schools and not in factories working long hours for little or no pay under hazardous conditions."<sup>115</sup>

However, many efforts to impose a complete ban on products made by children are often challenged as attempts to meddle in the affairs of other sovereign nations as well as attempts to shield domestic industries against cheap imports.<sup>116</sup> As one author explains, "[t]here are only three groups pushing for more restrictions on imports: domestic producers who seek special immunity from

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113. Clark, *supra* note 21, at 14.

114. Tom Harkin, *The United States Should Ban Imports of Products Made by Children*, in CHILD LABOR AND SWEATSHOPS 38, 38 (Mary E. Williams ed., 1999).

115. *Id.* at 39.

116. Clark, *supra* note 21, at 15; see Alam, *supra* note 29, at 44.

competition, labor unions that want consumers to be taxed to prop up their inflated wages, and the federal government which seeks ever more power over economic life.”<sup>117</sup> Others allege that when attempting to make or implement such bans, “[t]he US is wielding power without responsibility. A nation with a history of genocide and slavery, and a reputation for being a bully in international politics, suddenly proclaims itself a champion of people’s rights, but refuses to make concessions over the rates it will pay.”<sup>118</sup> Some argue that countries which boycott products from countries utilizing child labor “strengthen their governments at the expense of the market.”<sup>119</sup> And still, others label campaigns against child labor as protectionist, imperialist, and left-wing demands.<sup>120</sup>

Although appealing, a complete ban is not an ideal or even practical solution to the problem of child labor.<sup>121</sup> Advocates of complete bans, including Harkin, tend to gloss over the benefits of child labor and downplay the strong ties of poverty and child labor, instead pointing to the unavailability or inadequacy of schools and the prevalence of military spending over education and health services.<sup>122</sup> However, such advocates, including Harkin, are misled, as complete bans on child labor are counterproductive and can backfire. These advocates ignore the fact that there are many benefits, both direct and indirect, to child labor. Most importantly, these advocates ignore that there are real dangers associated with complete bans as “[u]nrealistic rules on minimum age can have the effect of driving child work underground, where employers conceal the use of the underaged and the conditions under which they work.”<sup>123</sup> Forcing child labor underground and into concealment only further hinders any attempts at monitoring or regulating such labor.

An analysis of complete bans on child labor is incomplete without exploring the many ways in which such complete bans are counterproductive and can backfire. Complete bans on child labor or imports born of child labor, have led to instances in which companies, after a threat of action by importing governments or companies, have eliminated the use of all child labor.<sup>124</sup> These eliminations did nothing but force children to resort to more drastic measures for employment such as prostitution, begging, or new

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117. Rockwell, *supra* note 13, at 73-74.

118. Alam, *supra* note 29, at 47.

119. Rockwell, *supra* note 13, at 73.

120. *Id.* at 70.

121. Kern, *supra* note 1, at 179; *see generally* Samida, *supra* note 18.

122. *See* Harkin, *supra* note 114, at 40.

123. Cullen, *supra* note 4, at 90.

124. Clark, *supra* note 21, at 15.

employment in even worse working conditions.<sup>125</sup> Further, the implementation of stricter labor standards in one region or country simply leads the manufacturers to seek labor in other regions or countries and does nothing to help the underlying problem.<sup>126</sup>

In one example of the backfiring of complete bans, 50,000 Bangladeshi children garment workers lost their jobs in 1994 after news of Harkin's Child Labor Deterrence bill surfaced.<sup>127</sup> The bill was an attempt to "stop the economic exploitation of children and to get them out of the most dangerous jobs . . . by limiting the role of the U.S. in providing an open market for foreign goods made by underage kids," and it proposed a complete ban on the importation of products made by children overseas.<sup>128</sup> As a result of the firings, the ILO and UNICEF found that many of the children took on more dangerous work such as stone crushing or prostitution to make ends meet.<sup>129</sup> Stories such as this underscore the dangers of complete bans. Without the work, children are forced to choose between a life of increased poverty or more exploitative, often illegal, work.<sup>130</sup> As one senior ILO worker said:

What we have done here in Bangladesh is described as fantastic . . . I wonder how fantastic it really is. How much difference will these two or three years in school make to these children? In three years, the helper could have been an operator, with better pay and more savings . . . This is an experiment by the donors, and the Bangladeshi children have to pay.<sup>131</sup>

Many economists also persuade against complete bans, pointing out that there usually isn't a better option for these children.<sup>132</sup> Paul Krugman, an economist at the Massachusetts Institute of Technology, points to an example of destitute parents sometimes selling their children who are not allowed or able to work and says, "[i]f that is the alternative, it is not so easy to say that children should not be working in factories."<sup>133</sup>

An additional argument against complete bans on child labor is

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125. *Id.*

126. *Id.* at 13.

127. *Introduction*, in *CHILD LABOR AND SWEATSHOPS* 7, 8 (Mary E. Williams ed., 1999) [hereinafter *Sweatshops Intro*]; See Alam, *supra* note 29, at 44.

128. Harkin, *supra* note 114, at 41.

129. *Sweatshops Intro*, *supra* note 127, at 8; Alam, *supra* note 29, at 44.

130. *Sweatshops Intro*, *supra* note 127 at 9.

131. Alam, *supra* note 29, at 47.

132. Allen R. Myerson, *Sweatshops Often Benefit the Economies of Developing Nations*, in *CHILD LABOR AND SWEATSHOPS* 32, 32 (Mary E. Williams ed., 1999).

133. *Id.* at 34.

that child labor should not be eliminated entirely as it has benefits. For some countries, child labor is not a negative, but is instead a necessity, and it is not “per se” evil, unacceptable, or even wrong, but is instead a part of everyday life and is considered a societal norm.<sup>134</sup> In these countries, child labor is not used for the purposes of abuse, exploitation, or profit, but rather can be beneficial to both the children and to their countries.

Overall, even outside of these countries, most people would likely “agree that child labor, in limited amounts and in certain situations, can be beneficial.”<sup>135</sup> Alec Fyfe, a former education officer for UNICEF, has stated that “child work can be a positive experience and, in the best circumstances, children’s work can prepare them for a productive adult life.”<sup>136</sup> One author argues that hard work increases children’s sense of self-worth; it allows them to face difficult challenges and to take responsibility for their actions, and it provides for opportunity and discovery.<sup>137</sup> The author goes so far as to say that she “feel[s] sorry for youngsters nowadays who are being told by the adult world that they’re not supposed to do real work—the straining, grinding kind that tests your strength and helps pay the bills” and says that she would like children “to have a chance to discover the rewards of labor while they’re young, adventuresome, and impressionable.”<sup>138</sup> Additionally, working children allow “families undergoing extreme hardship to support themselves” and “contribute to family income and gain valuable experience and are seen as a net asset to families and society. But when children are not allowed to work, their economic value to families is reduced and they become net liabilities.”<sup>139</sup> Moreover, child labor and the garment industry in particular have increased the income of working-class families and have allowed children to choose to work in factories rather than as servants.<sup>140</sup> This choice allows children both greater economic stability and greater self-respect.<sup>141</sup>

However, child labor does not come without a cost. One way in which child labor can harm children is by depriving them of educational opportunities.<sup>142</sup> Because of the time requirements of working, child laborers often frequently miss school or drop out alto-

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134. Kern, *supra* note 1, at 178-79.

135. *Id.* at 183.

136. *Id.* (internal citations omitted).

137. Hannah Lapp, *Child Labor is Beneficial*, in CHILD LABOR AND SWEATSHOPS 36, 36 (Mary E. Williams ed., 1999).

138. *Id.* at 37.

139. Rockwell, *supra* note 13, at 72-73.

140. Alam, *supra* note 29, at 46-47.

141. *Id.* at 47.

142. Kern, *supra* note 1, at 180.

gether. Without an education, the children will have fewer career opportunities.<sup>143</sup> Other harms presented by child labor include mental and physical damage, and delayed mental and physical development.<sup>144</sup> As a result of children being less biologically mature and physically strong, they are more susceptible to chemical contaminants that may be found in the workplace and more susceptible to injury.<sup>145</sup> Additionally, some of the more severe harms include children being exploited for sex, used for military personnel, and being forced to work in highly dangerous work conditions involving disease and deadly chemicals.<sup>146</sup> However, it is important to note that because child labor that impinges on the well-being of working children is not allowed under the regulations proposed herein, the more egregious harms listed here would still be forbidden even under the new proposed regulations. Additionally, the argument that education opens doors for career opportunities assumes that there are posteducation career options available for these children, which is not often the case in developing countries.

Even in light of the harms that child labor can cause, many former proponents of complete child labor bans often change their minds about such viewpoints when exposed to the realities of the child labor situation and benefits that it can produce. One production manager at a garment factory who had formerly supported the movement for a complete ban stated, "I was happy that someone was fighting for children's rights. But now that I work in a factory and have to turn away these children who need jobs. [sic] I see things differently."<sup>147</sup>

In consideration of the foregoing risks and harms that complete bans on child labor cause, it is apparent that a complete ban on child labor is not the solution. As a result, further options, specifically the regulation of child labor, must be explored.

### *B. Regulating Child Labor*

In an effort to avoid the harsh consequences often accompanying complete bans, many organizations advocate for safe and humane working conditions along with an intense examination of the socioeconomic conditions that require young children to work.<sup>148</sup> In sum, such views often encourage a labor regulation approach in lieu of a complete ban. A labor regulation approach to child labor is

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143. *Id.*

144. *Id.* at 181.

145. Clark, *supra* note 21, at 11-12.

146. Kern, *supra* note 1, at 180-81; *see id.*

147. Alam, *supra* note 29, at 46.

148. Sweatshops Intro, *supra* note 127, at 9.

“treating child labor as an issue to be resolved via the setting of agreed legal rules concerning minimum ages for employment, similar to the regulation of such other aspects of the employment relationship as the health and safety of workers.”<sup>149</sup> The U.S. Department of Labor in its International Child Labor Study summarized the position of advocates favoring regulation in lieu of complete bans as follows:

Other advocates for children’s rights – probably a majority – believe that the immediate abolition of all child labor is unrealistic and, in many cases, contrary to the interests of the children themselves. They recommend first abolishing the most abusive forms of child labor, and, in order to avoid a situation in which a reduction of child labor in one sector of the economy will simply lead to an increase in another, government then should strictly regulate remaining forms of child labor to provide appropriate protections and benefits for those who must work to survive. They believe that the issue of child labor, especially in the more impoverished countries of the developing world, cannot be viewed in isolation but must be addressed in the broader context of social, economic, and educational development as a whole.<sup>150</sup>

The author believes this view is correct. In order to effectively protect children, exploitive child labor must be attacked, and thus, the abusive forms of child labor must be abolished. Additionally, because complete bans are counterproductive, a regulatory approach to the remaining, beneficial forms of child labor is the most likely type of constraint to be effective.

Additionally, regulation, not complete bans, appears to be what children workers prefer. In 1996, the first international conference of child laborers was held in Kundapur, India.<sup>151</sup> There, child delegates from thirty-three developing countries drafted a proposal that rejected boycotts and called for “work with dignity, with hours adapted so that we have time for education and leisure” along with “professional training, access to good health care, and more actions that would address ‘the root causes of our situation, primarily poverty.’”<sup>152</sup>

A system of regulation recognizes that it is beneficial, both to the children themselves and to the economies of which they are a

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149. Cullen, *supra* note 4, at 88.

150. LABOR REPORT, *supra* note 12, at 4.

151. Sweatshops Intro, *supra* note 127, at 9.

152. *Id.*

part, to allow some beneficial child labor. Additionally, allowing some forms of child labor persuades some countries and companies to avoid hiding child labor and forcing it underground, and instead allowing it to stay in view where it can be properly monitored and regulated. However, a system of regulation also recognizes that some forms of child labor, such as child prostitution, bonded labor, and hazardous working conditions, cannot be regulated and must be entirely abolished.<sup>153</sup> Such an approach takes into account the realities of the cultural and economic situations in many countries which make child labor necessary. Because it abolishes the harmful types of child labor, yet embraces beneficial child labor, a regulatory approach is the most likely to be effective and should be supported and enacted.

#### IV. RECOMMENDATIONS

##### *A. What Standards Should be Implemented and Developed*

The first step to establishing an effective system of controlling child labor is working towards a regulatory scheme in lieu of a complete ban. As discussed above, a complete ban on child labor is a closed-minded concept and is not an ideal or even feasible solution. The harms of complete bans far outweigh the benefits. Additionally, establishing an effective system will require disregarding the concept that a regulation be universal. Just as it is closed-minded to say that all child labor should be banned, it is equally closed-minded and unrealistic to say that a universal standard should apply to all countries. Such a position does not take into account the realities of different countries' cultures, environments, poverty levels, and other conditions. Abraham Katz, president of the United States Council for International Business, agrees that no across the board, one-solution-fits-all approach can deal constructively with and adequately solve this complex issue and has acknowledged a "need to respect local culture and customs."<sup>154</sup>

Attempts to regulate child labor thus far have failed to make this realization. Although the ILO has come a long way in recognizing the differences between child labor and child work, it still poses the same standard restrictions on all countries. The failure of the ILO convention's attempts to implement universal standards is evidence that such an approach is not feasible. To date, all of the conventions and declarations established by the ILO have attempted to apply one fixed standard to all countries and result-

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153. See LABOR REPORT, *supra* note 12, at 4.

154. Clark, *supra* note 21, at 15.

antly have been criticized and rejected by nations or, although accepted, have been largely unenforced or not followed.

Instead of focusing on the universal, strict requirements supplied by the ILO and advocated for by various interest groups, we should focus on attempting to establish an agreement that takes into account all of the different needs and cultures of varying nations, and, most importantly, the best interests of their children. "If we are to improve the lives of working children, international standards must be adapted to the children, their families, and their communities."<sup>155</sup> To do this, a system should be established which will be customizable to each country. In recognition of the fact that child labor happens regardless of complete bans, the system should allow and regulate beneficial child labor and eliminate exploitive child labor.

Accordingly, to determine whether child labor should be permitted in a particular country and, if allowed, to what extent it should be permitted, a balancing test should be established and employed. The balancing test should weigh the harms of child labor to children against the benefits resulting from the labor. As one author states, "[w]e need to balance the harm that can come from employment against the rights of children to the benefits that can come to them and their right to have a say in decisions affecting their lives."<sup>156</sup> Only when the balancing test determines that the benefits of child labor in a particular area or region outweigh the harms should the child labor be allowed. In whole, the ideal balancing test would consider numerous economic factors, cultural traditions and norms, as well as the relevant country's children's best interests and opinions.

Of the economic factors to be considered, the most influential factors would most likely be those which are indicative of the quality of life and economic position of a nation and its residing citizens. Quality of life and economic posterity of a nation and its citizens are vital considerations as these can strongly indicate the current welfare of a nation and its residents. Accordingly, they can reflect on the necessity (or lack of necessity) for the use of child labor as well as the benefits that child labor could bring if utilized. Relevant factors would include the poverty level, establishment and output of social welfare and/or social security programs, gross domestic product, per capita income, and other similar factors and indicators. Of these factors, strong consideration should be given to the level of economic development and the adequacy of social security and/or social welfare programs as these conditions have been

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155. Bourdillon, *supra* note 5, at 143.

156. *Id.* at 147.

shown to have a strong bearing on the quality of life within a nation.<sup>157</sup> Additionally, access to education, as well as the availability of post-education opportunities, should be assessed.

Above all, the balancing test should focus on and revolve around the child's best interests. As one author states, "[a]n overriding right in decisions concerning children is that the best interests of the child must be given primary consideration, and for this reason different rights can be in tension and need to be balanced against one another."<sup>158</sup> One major part of understanding what is in a child's best interest is understanding the unique situations in which individual children live.<sup>159</sup> As a result, an analysis of children's best interests would include different factors dependent on a child's culture and economy.

Additionally, considering the best interests of the children always includes taking into account their opinions. If we want to help working children, we need to find better options for them, not take away the ones they have chosen to survive; if we are to do this effectively, we must take their opinions seriously. If we listen to the children, we focus less on formal employment and more on how children are treated, even within the confines of private homes and families.<sup>160</sup> As discussed above, child labor can have many mental and psychological benefits for children. Without listening to children, it is impossible to know how they value their work, and thus impossible to determine what is in their best interests. Essentially, a child's opinion and preferences regarding his participation in child labor would act only to weigh more heavily on the side of beneficial or harmful, depending on whether he perceives his involvement in child labor to be an asset or a burden.

Regardless of the benefits, exploitive child labor should not be allowed in any form. As discussed in detail above, *exploitive child labor* is defined as "harmful and impermissible."<sup>161</sup> As one scholar rightfully said, "to address child labour without addressing exploitation is to treat the symptom, not the disease."<sup>162</sup> Additionally, if the balancing test determines that the labor is more harmful to the child than beneficial, it should not be allowed. As a result of the differing benefits of child labor in countries with different cultures and poverty levels, the balancing test will result in different standards for different countries.

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157. See John B. Williamson, *Social Security and Physical Quality of Life in Developing Nations: A Cross-National Analysis*, 19 SOC. INDICATORS RES. 205, 205 (1987).

158. Bourdillon, *supra* note 5, at 143.

159. *Id.*

160. *Id.* at 163.

161. Cullen, *supra* note 4, at 93.

162. Alam, *supra* note 29, at 47.

Some critics may argue that it will be more costly or expensive to establish and implement a balancing test. However, all child advocates, and surely most citizens, would agree that the costs are worth it. Having such a balancing test would allow beneficial child labor to continue in the areas that need it. In light of the reality that child labor will continue where needed, despite complete bans and strict regulations, having a balancing test that allows beneficial child labor to stay “above ground” where it can be monitored will allow for much safer conditions. As a result, any costs of such a test will be far outweighed by the benefits.

### *B. The Entities Responsible for Regulating Child Labor*

In light of the difficulties facing corporate self-governance, domestic laws, and international organizations when working individually, it is imperative that private corporations, nation states, and international organizations all work in conjunction to establish a foundation for the regulation of child labor. “It will absolutely take a united effort to adequately eliminate child labor abuses.”<sup>163</sup>

First, an international organization should be responsible for establishing the balancing test. An international organization would have access to, or the means to get, the information necessary to determine and quantify both the various relevant factors and how much weight they should be given.

After the establishment of the balancing test, nation states should be responsible for supplying the specifics necessary to apply the balancing test to their nations. As a result, nation states would indirectly, through the information supplied, establish what the applicable standard should be for their respective countries. The standards established by the nation states should be reviewed by an international organization that can assess the validity of their claims and determine if such standards are truly in the best interests of the children and other laborers in their countries. Additionally, nation states should be responsible for holding all corporations who are either organized in their jurisdiction (regardless of where the violation occurs) or operating in their jurisdiction to the applicable standard. Further, the standards established by nation states would be a floor, meaning that differing standards between corporations and nation states should not be a conflict, as corporations who wish to hold themselves to a higher standard than that

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163. Kern, *supra* note 1, at 198.

of a country with which they conduct business are free to do so.

Lastly, it is necessary to address the largely varying, unregulated, and often unenforced codes of conducts proposed by many TNCs or MNEs. Because of the power of TNCs and MNEs, it is important that they are involved in the movement to regulate child labor. TNCs and MNEs should be encouraged to establish codes of conduct. To make these corporate codes of conduct effective, an international organization and/or nation states should have the ability to hold the corporations responsible for violations of such codes.

### CONCLUSION

In lieu of having one universal regulation which applies to all countries, a balancing test should be established which allows countries to have differing standards regarding the use of beneficial child labor. Regardless of the benefits, exploitive child labor should never be utilized and should be eliminated. Additionally, it is essential that international organizations, nation states, and TNCs and MNEs each have a role and a responsibility in establishing and enforcing the regulations. Having all three entities working in conjunction to resolve the problems surrounding child labor will effectuate a reasonable, valid, and enforceable solution to the global problem of child labor.