

**RECONSTITUTING THE LAW OF THE WORKPLACE
IN AN ERA OF SELF-REGULATION**

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9/1/04

As the reach of collective bargaining has shrunk in recent decades, the domain of employment law – of judicially-enforceable individual rights and administratively-enforced regulatory standards – has expanded. Both branches of employment law have seen the rise of employer “self-regulation” – internal systems for enforcement of rights and regulatory standards – and of legal inducements to self-regulation in the form of reduced public oversight or sanctions. In the shift from “self-governance” to “self-regulation,” employees have lost their institutional voices and are losing the protective oversight of courts and public agencies. In this article Professor Estlund looks for ways not to combat the movement toward self-regulation – which she finds both inexorable and potentially promising – but to channel that movement so as both to fortify employee rights and labor standards, and to give employees a stronger voice in their own work lives and workplaces. Drawing on a range of regulatory theory and experience, Estlund casts outside monitors – independent of employers, accountable to employees and the public – in a central role in a system of “monitored self regulation.” Employees play essential supporting roles as whistleblowers, informants, and watchdogs; and targeted public enforcement and private litigation supply much of the impetus for effective self-regulation. The article aims to bridge the divide between labor law and employment law – to find leverage within the dynamic law of workplace rights and regulations for the rejuvenation of employee voice, and to use new forms of employee voice to help realize workplace rights and improve labor standards.

- I. Introduction
- II. The Rise of Employment Law: Rights and Regulations without Representation
 - A. *The Proliferation of Labor Standards Laws*
 - B. *The Civil Rights Act of 1964 and the Employee Rights Revolution*
- III. The Emergence of Employer “Self-Regulation” in the Enforcement of Rights and Regulatory Norms
 - A. *The Privatization of Rights Enforcement: Diversity Programs, Internal Dispute Resolution, and Mandatory Arbitration*
 - 1. From Litigation Avoidance to Liability Shield: The Legalization of Corporate Antidiscrimination Policy
 - 2. Mandatory Arbitration and the Privatization of Public Law Enforcement
 - B. *From Demands for “Deregulation” to “Self-Regulation” of Labor Standards*
 - 1. Illustrations from Occupational Safety and Health Regulation
 - 2. Illustrations from Wage and Hour Regulation
- IV. Building a Framework for Effective Self-Regulation in the Workplace
 - A. *“Responsive Regulation” and Tripartism*
 - B. *Responsive Regulatory Theory Meets US Regulatory Reality: The Enforcement Gap and the Representation Gap*
 - 1. Underenforcement
 - 2. Non-Union Workplaces and Anti-Union Employers
 - C. *“Ratcheting Labor Standards” and the Role of Monitoring*
 - 1. Ratcheting Labor Standards: Regulating Without States or Unions
 - 2. Responsive Regulation and RLS: Points of Convergence and Divergence
 - 3. The Multiple Uses of Monitoring
 - D. *Refining Monitored Self-Regulation: A Sarbanes-Oxley for the Workplace?*
 - E. *A Hybrid Model of Monitored Self-Regulation*
- V. Monitored Self-Regulation of Labor Standards: Assessing Existing Experiments and Future Possibilities
 - A. *A Critical Look at Self-Regulatory Experiments Within the US*
 - B. *The Next Step: The “Representation Remedy”*
 - C. *Other Forms of Worker Representation within a System of Monitored Self-Regulation*
 - D. *A Role for Private Litigation*
- VI. Monitored Self-Regulation in the Enforcement of Individual Rights
 - A. *Recasting the Tripartite Regime*
 - B. *The Functions and Limits of Collective Representation in Individual Rights Enforcement*
 - C. *Other Potential Monitors in Rights Enforcement*

Conclusion

Reconstituting the Law of the Workplace in an Era of Self-Regulation

I. Introduction

Wal-Mart, Inc., stymied by labor and community opposition to its expansion plans¹ and battered by legal challenges under state and federal wage and hours laws,² immigration laws, labor laws, and most recently by the certification of an unprecedented 1.6 million member class of sex discrimination plaintiffs, recently announced the creation of a “Corporate Compliance Team.”³ The world’s largest private employer and reigning nemesis of organized labor and other employee advocates has vowed to use its legendary organizational capabilities, along with new technology and compensation policies, to become “a corporate leader in employment practices.” According to the company, new software will insure that workers are taking required breaks and not working “off the clock”; a new job classification and pay structure will insure pay equity; managers’ compensation will reflect in part their achievement of “diversity goals.”

What are we to make of Wal-Mart, Inc., vowing to reorganize itself into a model corporate citizen in its labor practices? Do these measures represent a cynical and superficial public relations gesture? A genuine and public-spirited embrace of corporate responsibility? Or perhaps simply a rational set of precautions against future “accidents” and attendant liability? Are these measures diversionary tactics that should be exposed and discounted, or do they show the law working just as it should by inducing compliance? Or do they represent something new and important in the evolution of the law of the workplace?

What is new lies not so much in Wal-Mart’s organizational response to the external legal environment – the corporate compliance bandwagon has been on the road for some time – but in the the response of external law to internal compliance programs like Wal-Mart’s. Such programs are no longer simple litigation avoidance schemes instituted

¹ See Stephen Kinzer, *Wal-Mart's Big-City Plans Stall Again*, *New York Times*, May 6, 2004, at A-27

² See Steve Greenhouse, *In-House Audit Says Wal-Mart Violated Labor Laws*, *New York Times*, Jan. 13, 2004, at A-16.

³ *Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices*, News release, June 4, 2004 (available at <http://www.walmartstores.com/wmstore/wmstores/Mainnews.jsp>).

under the “shadow of the law.”⁴ Rather, they seek to meet explicit demands of external law and to earn distinct legal benefits. The coordination of internal or “self-regulatory” compliance structures with the external law of the workplace has the potential to create something genuinely new under the sun: a new mechanism for the enforcement of employee rights and labor standards, one that engages employees and revives the prospects for employee voice in the wake of declining unionization. But it also has the potential to divert crucial public resources from the task of securing compliance with public norms, and to enfeeble the few fearsome legal weapons that worker advocates have in their efforts to enforce basic employee rights and labor standards. It all depends.

To understand on what it depends, and to shape the divergent possibilities that are presented by the movement toward “self-regulation” in the workplace, it will be helpful to look back from whence it came. For “self-regulation” resonates with very old ideas in workplace governance. The New Deal model of industrial relations itself, with its reliance on self-organization of workers and voluntary collective bargaining over most terms and conditions of employment, is itself a system of “self-regulation” or self-governance.⁵ As the New Deal model of industrial self-governance in the United States has grown old and ossified, however, the problems to which collective bargaining was to be the answer have not disappeared.⁶ Nor has the law ceased to grapple with them. On the contrary, the role of law – of courts, of legislation, and of regulatory bodies – has burgeoned as the ambit of unions and collective bargaining has contracted. In short, the external law governing the workplace has grown as the New Deal system of internalized lawmaking and dispute resolution has shrunk.

⁴ The term is usually coupled with “bargaining” to describe the law’s influence beyond its institutional reach. See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979). But it works as well to capture how managers “manage under the shadow of law,” in light of how their actions might be assessed in case of litigation.

⁵ The idea of the collective bargaining model as a system of self-governance has been elucidated by leading doctrinal scholars, see Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 *Mich. L. Rev.* 1, -- (1958); by theorists, see Phillip Selznick, *Law, Society, and Industrial Justice* (196-); and by the Supreme Court, see *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960).

⁶ By “ossified,” I mean entrenched against reform by a variety of mechanisms. See Cynthia Estlund, *The Ossification of American Labor Law*, 102 *Colum. L. Rev.* 1527 (2002) [hereinafter Estlund, *Ossification*].

Since the 1960s, the New Deal collective bargaining system has been supplemented, and largely supplanted, by other models of workplace governance: a “regulatory model” of minimum standards enforceable by administrative agencies, exemplified by the wage and hour laws and OSHA; and a “rights model” of judicially enforceable individual rights, exemplified by the civil rights laws and the employee rights underlying the law of wrongful discharge. These two bodies of law, which make up much of what we call “employment law,” each mobilized institutions and resources that were not central to the collective bargaining model constituted by “labor law.” The regulatory model harnessed the coercive power and comprehensive reach of the government, while the rights model made courts central to the articulation and enforcement of employee rights, and tapped into the self-interest and indignation of aggrieved individuals and the professional and entrepreneurial energies of their attorneys.

Much as they fought against the constraints of collective bargaining, employers have fought back against the burdens of regulatory compliance and of litigation. But challenges to the efficacy of regulation and litigation of workplace rights and standards have come not only from employers but from scholars and employee advocates as well. Observers from a range of perspectives have argued that the postwar regime of “command-and-control” regulation is losing its grip in the face of rapidly changing markets, technology, and firm structures;⁷ that civil litigation is a costly, slow, and often inaccessible mechanism for securing workplace rights.⁸

These complaints and critiques have begun to make their mark on the external law of the workplace. They have produced not deregulation in any simple sense but a trend toward “self-regulation” – toward the internalization or privatization of public law

⁷ See S. BREYER, *REGULATION AND ITS REFORM* 131-55 (1982); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998).

⁸ Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 *Tul. L. Rev.* 1401 (2004) Wayne N. Outten, *Negotiations, ADR, and Severance/Settlement Agreements: An Employee's Lawyer's Perspective*, 604 *PLI/Lit* 235, 249-50 (1999); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements*, 16 *Ohio St. J. on Disp. Resol.* 559 (2001). A particularly influential critique came from the Clinton Administration's blue ribbon panel on labor and employment policy, which found employment litigation to be unsatisfactory for employees and employers and called for expanded use of arbitration and other forms of alternative dispute resolution. See The Dunlop Commission on the Future of Worker-Management Relations, *Final Report* 59-60 (1995)

enforcement.⁹ Agencies responsible for enforcing labor standards have experimented with cooperative programs designed to bring about “self-regulation” and “voluntary compliance.” Courts responsible for enforcing employee rights have begun to formalize the role of internal compliance procedures and to defer to private dispute resolution schemes (including arbitration), according employers a partial shield against litigation and liability based on those schemes. These developments bring the locus of enforcement of both rights and regulations inside the firm or under the firm’s control. The internal compliance regimes of Wal-Mart and many other employers must be seen in that light: as efforts not simply to comply with the law but to secure the legal advantages of self-regulation and a partial shield against regulatory and judicial intervention.

Detractors see in these moves toward self-regulation a disguised form of deregulation. Proponents see the evolution of more efficient and effective systems for enforcing legal norms.¹⁰ Much turns on how self-regulation works – what standards of procedural fairness courts impose on arbitration agreements; what standards of efficacy and what institutional safeguards regulators require of “self-regulating” firms.

Indeed, regulatory theory and experience suggests that the term “self-regulation” obscures much that is important to the success of the enterprise. Leading scholarly accounts of effective self-regulation teach, first, that “self-regulation” must itself be regulated.¹¹ It must be subject to some form of oversight and accountability to the public, and backed by the potential for serious sanctions. But that oversight need not come – indeed should not come – exclusively from the state. There is much theory and experience behind the proposition that effective self-regulation in the workplace is “tripartite” in structure: It requires the participation of the government, the regulated firm, *and* representatives of the workers for whose benefit the relevant legal norms

⁹ For an overview of some experiments in self-regulation across a range of fields, see Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 *Admin. L. Rev.* 813, 831-35 (2000).

¹⁰ Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 101 (1992); Eugene Bardach & Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* 105-06 (1982). For an argument in favor of self-regulation in regard to the problem of workplace harassment, see Anita Bernstein, *Law, Culture, and Harassment*, 142 *U. Pa. L. Rev.* 1227, 1293-95 (1994).

¹¹ See Part III below (relying especially on Ayres & Braithwaite, *supra* note --).

exist.¹² Self-regulatory processes in which workers participate can introduce flexibility and responsiveness into the regulatory regime, and can reduce the costs and contentiousness associated with litigation, while promoting the internalization of public law norms into the workplace itself.

Tripartism in the context of workplace regulation normally implies union or union-like representation. The problem, of course, is that the move toward self-regulation has coincided with a drastic decline in unionization, and thus in the only legally-sanctioned vehicle in the US for employee representation within the firm.¹³ Even apart from the trend toward self-regulation, both employee rights and workplace regulations are often underenforced in the absence of union representation, especially where employers are committed to competing through the minimization of labor costs.¹⁴ The movement toward self-regulation, and the attendant retreat of public agencies and of courts from the front lines of enforcement, exacerbates this vulnerability. Yet the prospects for reviving and dramatically extending the New Deal collective bargaining model seem bleak.¹⁵

The story so far – like many labor law stories these days – threatens to become a lamentation: The same relentless forces of capital and competition that have eroded unionization have led employers to push for the internalization and domestication of both

¹² See Part IV *infra*. The concept of tripartism in labor relations and labor regulation is not new. John Commons was a proponent nearly a century ago. See John Commons, *Labor and Administration* 382-94 (1913), cited in Bruce E. Kaufman, *John R. Commons and the Wisconsin School of Industrial Relations Strategy and Policy*, 57 *Indus. & Lab. Rel. Rev.* 3, 10 (2003).

¹³ One critic sees the rise of self-regulation as contributing to the decline of employee voice: “By diverting attention to management monitoring systems, and away from classic voice mechanisms . . . , self-regulatory initiatives run the risk of supplanting rather than buttressing democratic participation in the workplace.” Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *Ind. J. Global Legal Stud.* 401 (2001).

¹⁴ On the role of unions in enforcing employment rights and labor standards, see generally Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 *U.S.F. L. Rev.* 169 (1991); Charles B. Craver, *Why Labor Unions Must (and Can) Survive*, 1 *U. Penn. J. Lab. & Emp. L.* 15 (1998). Catherine Fisk extends this literature by contending for the role of union lawyers in helping to enforce labor statutes in non-union workplaces. Catherine Fisk, *Union Lawyers and Employment Law*, 23 *Berkeley J. Emp. & Lab. L.* 57 (2002).

¹⁵ In part that is because the right to form a union is perhaps the most trampled and underenforced of employees’ legal rights. See Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 *Indus. & Lab. Rel. Rev.* 351, 351-54 (1990); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 *Harv. L. Rev.* 1769, 1771-1803 (1983). See also Richard W. Hurd & Joseph B. Uehlein, *Patterned Responses to Organizing: Case Studies of the Union-Busting Convention*, *in* *Restoring the Promise of American Labor Law* 61 (Sheldon Friedman et al. eds., 1994).

rights and regulatory enforcement. That process of internalization exacerbates the vulnerability of employees who lack a collective voice within firms, and threatens to collapse into deregulation. That is the fatalistic version of the story.

I aim instead to retell the story as one of opportunity. I argue that the models of workplace governance that have emerged in the wake of the decline of the collective bargaining model can be both improved by *and turned to the cause of* promoting democratic self-governance within the workplace. As this formulation suggests, I have in mind two interconnected objectives. The first is to make rights more real and regulatory standards more effective, in part by giving employees an institutionalized role in the enforcement process. The second is to find footholds within “employment law” for the realization of the core normative commitment of New Deal “labor law”: the commitment to workplace democracy and effective worker participation in self-governance. For the commitment to democracy, which is utterly absent from the avalanche of litigation and legislation that makes up employment law, turns out to be one key to the efficacy of employment law, especially in an era of self-regulation.

The movement of employment law and its enforcement inside firms creates not only the need but also the opportunity for reviving employees’ voice inside firms. That is because the law can and does impose conditions on firms’ ability to secure the legal advantages of self-regulation – conditions that aim to ensure the efficacy of self-regulation. In keeping with the precepts of tripartism, one of those conditions should be the organized participation of the employees whose rights and working conditions are at stake. The challenge is to reconfigure tripartism for the overwhelmingly non-union environment that exists, and is likely to persist, in the US. Drawing from recent efforts to gain regulatory traction over third-world sweatshops and over American corporate executives, as well as from existing American experiments with self-regulation in the workplace, I cobble together a constellation of actors and mechanisms that together can make up, or make up for, the third leg of the tripartite scheme.

At the center of that constellation are independent monitors or auditors, who oversee the self-regulatory system and safeguard its integrity. Provided they are independent from employers and accountable in some manner to workers and the public, monitors can

both leverage limited public enforcement resources and serve some of the watchdog functions that employees in the non-union setting cannot. Moreover, independent monitoring of workplaces can help give voice to individual workers by serving both as a conduit for what they know and as protection against employer reprisals. The periodic presence of independent monitors inside the workplace represents a small but visible breach of employer sovereignty over the workplace, and may help dispel the fear that inhibits both employees' participation in law enforcement and their impulses toward self-organization. Alongside independent monitors and individual employee "whistleblowers," employees and their private attorneys also play important roles, both in bolstering the efforts of public agencies and in insuring against their capture. The existence of private rights of action is thus a key component of the hybrid model that I call "monitored self-regulation."

The aim of this article is to chart a strategy for reforming the law of the workplace that straddles the conventional divide between "labor law" and "employment law." The key to that strategy is a recognition that democracy within the workplace is not only of intrinsic value in a democratic society – that proposition has been much mooted and will not be further elaborated here – but of instrumental value in realizing the rights and the regulatory norms governing the workplace. That is especially true in an era of self-regulation, in which the locus of enforcement is moving inside the workplace and away from direct public oversight. As firms gain increasing responsibility for the enforcement of public norms that are supposed to protect workers, it is ever more important to find ways to make workers' voices heard both in internal enforcement processes and in the public oversight of those processes.

I begin by briefly charting, in Part II, the rise of employment law – both the rights model and the regulatory model – and, in Part III, the rise within both models of legally sanctioned forms of "self-regulation." Part IV turns to some theoretical frameworks for effective self-regulation. I find a thoroughly convincing theoretical case for full-fledged tripartism, as well as some entrenched obstacles to tripartism within US context. In the face of those obstacles, I develop a hybrid model of "monitored self-regulation" within which independent third-party monitors help to hold up the third leg of tripartism in an overwhelmingly non-union environment. Part V examines some existing experiments in

the self-regulation of labor standards, and offers proposals for reform based the precepts of “monitored self-regulation.” Part VI does the same within the rights arena.

II. The Rise of Employment Law: Rights and Regulations without Representation

Among the centerpieces of the New Deal, the National Labor Relations Act of 1935 (NLRA) established a “constitution” of the private sector workplace – a framework for self-governance supported by a set of individual and group rights and an administrative enforcement scheme.¹⁶ That framework sought to permit workers, acting through unions, and management to enact “legislation” in the form of a collective bargaining agreement and to set up a system of adjudication and interpretation through grievance arbitration. The New Deal labor scheme was supposed to take most labor disputes and struggles for improved working conditions out of the courts and legislatures and into a reconstructed domain of contractually-based self-governance, in which workers were citizens, with rights of association and freedom of expression, and the workplace was a site of self-determination.¹⁷

By comparison to the federal Constitution, the New Deal constitution of the workplace was missing some important provisions. It did not “guaranty ... a republican form of government,” leaving to majority rule and the precarious process of union organizing the question of whether workers were to be represented at all. It lacked an “equal protection clause” banning discrimination on the basis of race or other ascriptive traits. Missing, too, was a requirement of “due process,” as it left non-union employees terminable at will without notice of the reasons or an opportunity to contest them.¹⁸ The

¹⁶ I draw the following description of the New Deal “constitution of the workplace” and its subsequent amendment from Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (2003).

¹⁷ See MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965* (Urbana: U. Ill. Press 1970); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *HARV. L. REV.* 1379, 1412-30 (1993).

¹⁸ Due process rights could be gained through collective bargaining; but the lack of a baseline just cause requirement made union organizing riskier by making it easier for an employer to get rid of a union supporter. For while it is illegal to fire an employee for supporting a union, it may be difficult or impossible to prove the illegal motive, and it can take many years to get any relief even if the NLRB decides to pursue the claim; there is no private right of action. See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 *TEX. L. REV.* 1655, 1674-78 (1996); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1795-1803 (1983) (chronicling the long delays in NLRB proceedings from 1960 to 1980)..

very partiality of the New Deal constitution of the workplace, and especially the opportunity it afforded for employer resistance to unionization, helps to explain the subsequent decline of unions and collective bargaining. Still, the New Deal constitution designated the workplace as an appropriate domain of civil rights and liberties, and it established the legislatures' power to intervene into the internal workings of private firms and to limit employer property rights in order to further employees' freedom and self-determination.¹⁹

The legislatures have made frequent use of that power, for the much chronicled decline of unions and collective bargaining since the 1950s has coincided with an upsurge in both judicially enforceable individual rights and administratively enforced labor standards. The rights and regulatory models of workplace governance aim to supply for workers some of what the NLRA had sought to enable workers to secure for themselves – dignity, fair treatment, decent working conditions – and some of what was missing from the New Deal scheme – especially “equal protection” rights. But the burgeoning body of “employment law” does nothing to restore or refurbish the New Deal commitment to workplace democracy.

A. The Proliferation of Labor Standards Laws

The New Deal, in which the template for the modern regulatory state was forged, was founded on the conviction that market mechanisms for the organization of the economy, albeit superior to the alternatives, were intrinsically flawed and prone to failure. Regulatory agencies were established to protect the public interest against market malfunctions through the enactment and centralized enforcement of uniform rules and standards, later denominated “command-and-control.” Alongside the NLRA’s reconstitution of the framework for private bargaining, “command-and-control” gained a foothold in the New Deal workplace with the Fair Labor Standards Act of 1938.²⁰ The FLSA provided for a nationwide minimum wage and an overtime premium – time-and-a-half beyond forty hours – for much of the private sector labor market. Enforcement was

¹⁹ See generally Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689.

²⁰ 29 U.S.C. § 201 et seq. (2000).

chiefly by the Department of Labor, though employees could also sue on their own behalf.

So substantive regulation of labor standards was no more foreign to the New Deal scheme than was the recognition of employee rights. Still, the FLSA was seen as secondary to and largely supportive of collective bargaining.²¹ The expected upsurge in unionization and collective bargaining was to be the primary vehicle for improving wages and working conditions in the leading economic sectors. Similarly, the Social Security Act established a minimal system of retirement security, leaving individuals and unions to bargain with employers for more generous retirement benefits.²² Taken together, the New Deal legislation established a floor on some basic economic terms of employment but left most terms and conditions to the newly established regime of collective bargaining or, outside the union sector, to individual contract.

By the late 1960s, the problem of workplace disease and injury – left untouched by the New Deal and in the hands of the states²³ – again loomed large on the national agenda. Even in those industries and firms in which they were well established, unions had often proven unable or unwilling to bargain effectively over health and safety issues. The Occupational Safety and Health Act of 1970 (OSHA) sought to take workplace safety out of competition by establishing minimum standards through regulation.²⁴ Also in the 1970s, Congress confronted the chronic failings of the private pension system, and put in place a set of detailed regulations for the administration and funding of employee pension and benefit plans, along with an insurance-based scheme for the partial rescue of

²¹ See Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 *Neb. L. Rev.* 7, 9 (1988).

²² 42 U.S.C. § 301 et seq. (2000).

²³ The problem of compensation for industrial injuries – a recurring source of legal and political turmoil over the previous half-century – had recently been channeled out of tort law and into state workers' compensation systems. John F. Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows and the Remaking of American Law* (2004). But prevention remained the province of a patchwork of state laws. See Alfred W. Blumrosen et al., *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 *Cal. L. Rev.* 702, 722-23 (1976);

²⁴ S. Rep. No. 1282, 91st Cong., 2d Sess. 2-5 (1970); H.R. Rep. No. 1291, 91st Cong., 2d Sess. 14-16 (1970).

failed pension plans.²⁵ Later came the WARN Act of 1988, which required employers to give employees advance notice of plant closings and mass layoffs,²⁶ and the Family and Medical Leave Act of 1993, which regulated parental and medical leave policies.²⁷

All of these enactments were major victories for organized labor, the leading proponent of workplace legislation – especially minimum standards legislation – that benefits employees, union and non-union alike. In hindsight, however, these regulatory statutes foreshadowed the eclipse of the collective bargaining model. The statutes give unions barely a nod of recognition and a token role in enforcement.²⁸ For employees without a union, the statutes afford no avenue for participation in enforcement, except for the right to file a complaint or to contact regulators. The cumulative message of this rash of legislation was that it was through legislation, not through collective bargaining, that the most politically salient workplace issues were being addressed for most workers.²⁹ The collective bargaining model was inadequate to deal with these problems, not only outside of its shrinking ambit but even within the organized workplace.

B. The Civil Rights Act of 1964 and the Employee Rights Revolution

The idea of the workplace as a domain of civil rights and liberties, planted in the New Deal, was extended dramatically in 1964, when Congress enacted an “equal protection clause” for the workplace.³⁰ The equal opportunity mandate of the Civil Rights Act, which initially proscribed discrimination based on race, sex, religion, color, and national origin, has proven to be both formidable and adaptable. It was extended in stages to reach discrimination based on age, pregnancy, and disability.³¹ All of these

²⁵ Employee Retirement Income Security Act of 1974, ---

²⁶ Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101 et seq.

²⁷ 29 U.S.C. § 2601 (2003).

²⁸ See James J. Brudney, Reflections on Group Action and the Law of the Workplace, 74 Tex. L. Rev. 1563 (1996).

²⁹ As James Brudney has shown, the congressional shift away from “group action” toward regulations (as well as individual rights) may have taken a toll even on the judicial interpretation of the labor laws. Brudney, *supra* note --, at 1569-72.

³⁰ Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2 (2000)).

³¹ See Age Discrimination in Employment Act of 1967, Pub.L. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. 621 et seq. (2000)); Pregnancy Discrimination Act, Pub. L. 95-555 (codified at 42

statutory equality rights were made enforceable both by public agencies and by private individuals, but in either case in court. Critically, individuals could sue on their own behalf and recover attorneys fees if successful.³² Many plaintiffs could seek a jury trial and could recover compensatory and exemplary damages, not just backpay.³³

Employees had gained some basic rights in the New Deal, but their vindication had been channeled away from courts and lawyers. The Civil Rights Act appointed courts and lawyers as the leading agents of civil rights enforcement, and brought them into the process of defining employee rights. Creative lawyers translated the experiences of aggrieved individuals into new legal theories of discrimination, and courts sometimes responded by striking down employer policies with a statistically “disparate impact” on protected groups,³⁴ the imposition of sexual demands on employees,³⁵ and the creation of a discriminatory “hostile environment.”³⁶

Employment discrimination law gave momentum to the idea of the workplace as a domain of legally cognizable rights and liberties, and helped inspire a new wave of legal demands for protection of privacy and dignity on and off the job, and for freedoms of belief, association, and expression at work. Of course, those claims were up against the venerable doctrine of employment at will, and employers’ presumptive power to terminate employment at any time for good reason, bad reason, or no reason at all. But the civil rights laws had dealt a mortal blow to the legitimacy of employers’ claimed right to fire employees for “bad reasons” and opened the door to judicial recognition of other unacceptably bad reasons for discharge and other employee rights on the job.³⁷

U.S.C. § 2000e (2000)); Americans with Disabilities Act of 1990, Pub. L. 101-336 (codified at 42 U.S.C. § 12101 (2000)).

³² Compare NLRA, 29 U.S.C. § 151-169 (2000) with Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2000).

³³ Before the Civil Rights Act of 1991, race discrimination plaintiffs could seek damages, and a jury trial, by using 42 U.S.C. § 1981(a) (2000), alongside Title VII. After the 1991 amendments, a jury trial and damages (subject to caps) were available under Title VII itself.

³⁴ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

³⁵ See *Barnes v. Costle*, 561 F.2d 983, 990 (1977).

³⁶ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

³⁷ See, e.g., *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989) (random drug testing); *Nees v. Hocks*, 536 P.2d 512 (Ore. 1975) (serving jury duty); *Petermann v. Int’l Brotherhood of*

Most of the law of wrongful discharge and of individual employee rights outside of the antidiscrimination statutes is state law, and much of it judge-made common law; employee rights thus vary dramatically from state to state and often unpredictably from case to case.³⁸ Even when they are recognized, these employee rights are circumscribed by deference to managerial prerogatives. Given the cost of litigation and the difficulty of proving the requisite unlawful motive, many employees are still unable or unwilling – given the costs and burdens of litigation – to mount a legal challenge to a discharge or other adverse action they believe to be illegal. Still, employees face a vastly more congenial legal regime than they did before 1964. The malleable vehicle of tort law, fueled by the interests of aggrieved individuals and their entrepreneurial attorneys, has generated a dynamic body of “wrongful discharge” law, and, along with it, a rudimentary body of employee rights against employers.

It is also clear that wrongful discharge liability, whether it flows from tort law or from the tort-like vehicle of antidiscrimination law, has had some of the deterrent impact that tort liability is supposed to have: It has induced employers to take precautions against liability. Some of those precautions aim simply to minimize liability by avoiding, concealing, or even destroying evidence of a discriminatory motive.³⁹ But some employer precautions aim to minimize “accidents” – that is, decisions that might appear discriminatory – by creating internal procedures for the review and appeal of disciplinary and discharge decisions.⁴⁰ There is little doubt that personnel practices and workplace demographics have been dramatically transformed in response to the threat of employment litigation and liability.

At least in principle, the legal rights of employees and the corresponding limitations on employer power that have developed since 1964 provide rudimentary analogues to the constitutional rights of citizens as against the government. One is

Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959) (refusing to give perjured testimony).

³⁸ Compare, e.g., *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (employee fired for filing a worker’s compensation claim stated wrongful discharge claim), with *Shick v. Shirey*, 691 A.2d 511 (Pa. Super. Ct. 1997) (no claim stated).

³⁹ Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 Fla. St. U. L. Rev. 959, 967-71 (1999).

⁴⁰ Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 Am. J. Soc. 1401, 1422-35 (1990).

tempted as well to see in these doctrines a revival of the New Deal conception of employees as “citizens” of the workplace. But these were citizens without representation, for none of these innovations in “employment law” incorporated any role for employees to participate in workplace decisionmaking.

So the law of the workplace, once dominated by New Deal “labor law” and the collective bargaining model it established, is now dominated by regulatory statutes administered by government agencies and by individual rights enforceable through private litigation. This shift has fundamentally altered the law’s conception of employees and their role: The rights-litigation model of wrongful discharge law casts employees as rights-bearers, but also, and perhaps more visibly, as victims seeking redress for past wrongs. The regulatory model renders employees the passive beneficiaries of the government’s protection. Neither conceives of employees, as the NLRA does, as citizens sharing in the governance of the workplace. Especially in the wake of union decline, modern employment law suffers from a serious “democratic deficit.” That democratic deficit has become particularly disquieting as the enforcement of rights and regulations has been pulled increasingly into the firm itself, through parallel trends toward “self-regulation” and internalization in the enforcement of both labor standards and employee rights.

III. The Emergence of Employer “Self-Regulation” in the Enforcement of Rights and Regulatory Norms

The proliferation of rights and regulations has come at some cost to employers: the costs of liability and litigation, the costs of compliance or of non-compliance, and the cost of having employer discretion constrained and second-guessed by judges and regulators. Not surprisingly, employers have looked for ways to reduce the reach and impact of these legal regimes. At the same time, the regimes of regulation and litigation have had their critics among scholars and friends of employees as well. Much of the commentary has converged upon the concepts of “voluntary compliance” and self-regulation, forms of which have emerged in both the regulatory and the rights arenas.⁴¹

⁴¹ For a skeptical view of these developments, and particularly the lack of empirical support for their effectiveness in improving compliance, see Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of*

A. The Privatization of Rights Enforcement: Diversity Programs, Internal Dispute Resolution, and Mandatory Arbitration

There is no doubt that the threat of large damage awards and bad publicity in employment litigation has captured the attention of employers. They have responded to the growth of employment litigation with complaints about escalating costs, burdens, and threats to American competitiveness, and with appeals for legislative relief.⁴² But the substance of employee rights, and especially rights against various forms of discrimination, has been surprisingly resistant to those appeals. Indeed, the formal reach of federal antidiscrimination legislation has only expanded in the last forty years to reach new groups, new forms of discrimination, and additional remedies. In the legislative arena, the antidiscrimination principle has proven to be nearly a one-way ratchet.

As a consequence, employers' efforts to tame the litigation "explosion" has taken different forms. In particular it has induced them to engage in self-regulatory modes of litigation avoidance and management. Recall again Wal-Mart's announcement of sweeping new compliance and diversity programs in the aftermath of the certification of a massive class action in pending sex discrimination litigation. It is hard to know how big a role litigation avoidance has played in the growth of "workforce diversity" programs. But clearly those programs can help to avoid the kind of statistical disparities that got Wal-Mart into trouble and that are the single most damning body of evidence in the case. No major company wants to be the next Wal-Mart, the next Coca-Cola, or the next Texaco on that score. So fear of litigation has helped to change patterns of hiring and promotions, at least in major firms.

Litigation has also made a big mark on how firms deal with discipline, discharge, and other disputes with employees. In particular, employers, at the urging of human relations professionals and employment lawyers, have crafted "alternative dispute resolution" mechanisms inside organizations to stem the tide of legal claims and to reduce their cost. The proliferation of internal grievance procedures and

Negotiated Governance, 81 Wash. U. L.Q. 487 (2003). Most of the programs studied lacked many crucial safeguards discussed below.

⁴² Complaints about the "litigation crisis" were found to be pervasive in the human relations literature, though largely overstated. See generally Lauren B. Edelman et al., Professional Construction of Law: The Inflated Threat of Wrongful Discharge, 26 Law & Soc'y Rev. 47 (1992).

antidiscrimination policies and the rise of mandatory arbitration of employees' legal claims both reflect to some degree the efforts of organizations to tame the threat of litigation. They both seek to ameliorate the tension between outside legal norms and internal organizational needs, partly by bringing the organization into closer conformance with the outside norms, and partly by domesticating those outside norms and the means of their enforcement. They both represent nascent forms of "self-regulation" in the enforcement of employee rights.⁴³

1. From Litigation Avoidance to Liability Shield: The Legalization of Corporate Antidiscrimination Policy

"Corporate due process" systems – non-union grievance and dispute resolution procedures – have proliferated in the past several decades, especially in large firms. The procedures vary in their complexity, from simple "open-door" policies to multi-step grievance procedures involving peer review, mediation, and arbitration. They typically invite a broad range of grievances or disputes, regardless of whether they have a legal basis; and they cover broad swaths of the workforce. They generally culminate in a decision by a somewhat-disinterested company official and only rarely before a genuinely neutral third party (though I will turn shortly to the important phenomenon of mandatory arbitration).

These systems have many benefits. Employees feel more fairly treated; these good feelings are thought to enhance employee morale, longevity, and performance, and to quell interest in unionization. Moreover, these systems allow management to rationalize discipline, monitor supervisors, and avoid mistakes. That being said, it is clear that the threat of litigation – especially over discharge and harassment claims under the antidiscrimination laws – helped to spur the dramatic growth of these systems in medium- and large-sized firms.⁴⁴ It has become near-gospel among human relations professionals that corporate due process systems help to avoid litigation by resolving

⁴³ For a leading account of how employment discrimination law is leading firms to find new ways to maintain and manage diverse workforces, see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458 (2001).

⁴⁴ Lauren Edelman, Christopher Uggen, & Howard Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures As Rational Myth*, 105 *Am. J. Soc.* 406, 408 (1999); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *Law & Soc'y Rev.* 47, 74-79 (1992).

disputes within the firm and by flagging and permitting the correction of actions that may be found or plausibly claimed to be discriminatory.⁴⁵

The growth of corporate due process illustrates one important way in which wrongful discharge law, and especially antidiscrimination law, has penetrated the workplace and transformed at least the outward manifestations of workplace decisionmaking: Antiharassment policies prohibit a wide range of speech and conduct that some workers might find offensive on the basis of race, sex, age, or other suspect criteria. Managers and supervisors are trained to avoid referring to these same traits in connection with employment decisions. In other workplaces, ambitious workforce diversity programs reach deeper into the reform of workplace culture. In a variety of ways, modern human relations policies adopted in the wake of the employment rights revolution have brought those external legal rights inside the workplace.

Indeed, they have done more than that, for, under many corporate due process regimes, not only legally actionable disputes but other complaints of unfair treatment may receive “some kind of hearing,” usually before a relatively dispassionate company official. At a minimum these procedures afford a sober second look and some protection against the personal tyranny of low-level supervisors; at best they administer a dose of procedural regularity and soften the sharp edges of employment at will. In effect, the “equal protection clause” of the workplace has helped to generate a modicum of “due process” for non-union employees in many large and medium-sized organizations.

Internal grievance procedures and diversity programs alike have been criticized for their failure to fully realize employee rights. At the same time, those policies have operated to “domesticate” legal rights. Internal grievance processes, for example, tend to assimilate complaints of discrimination to other complaints of unfair treatment, and indeed to the ordinary run of personnel conflicts.⁴⁶ They tend to tame external law,

⁴⁵ In fact it is unclear whether an internal dispute resolution system reduces the incidence of litigation or outside complaints (e.g., with the EEOC). See Edelman, Uggan, & Erlanger, *supra* note --, at 431-32. Some advisors also claimed that the existence of these mechanisms could serve as a partial shield against liability by convincing adjudicators of the fairness of the employer’s decisionmaking. Until recently, there was little doctrinal basis for that proposition. *Id.* at 444-45. However, the law has recently come to partially vindicate the HR advice. *Id.* at 435-36. See *infra* pp. --.

⁴⁶ See Lauren B. Edelman et al., Diversity Rhetoric and the Managerialization of Law, 106 Am J. Soc.

bending it to fit organizational needs. So long as internal grievance procedures played no direct role in the adjudication of formal legal complaints, their tendency to domesticate, and perhaps distort, external law to suit the needs of the organization was of limited significance to the enforcement of legal rights. These internal systems might avoid some discrimination, or correct it; or they might dissuade individuals from pursuing legal complaints by assuaging their sense of grievance or by reconstructing their understanding of what happened. But they afforded no immunity from liability. If a complaint was nonetheless filed, it would follow the course charted by the relevant statute and public enforcement agencies, and proceed to some kind of resolution (or not), without regard to its fate within the corporate hierarchy.

That changed with the Supreme Court's 1998 decisions in *Burlington Industries v. Ellerth*⁴⁷ and *Faragher v. City of Boca Raton*,⁴⁸ in which the Supreme Court established standards by which employers could be held liable for sexual harassment committed by supervisors.⁴⁹ The Court reaffirmed the proposition that employers were generally liable for unlawful discrimination – including discriminatory harassment – within the organization regardless of whether high-level company officials knew or approved of the unlawful conduct. However, with respect to one important category of discrimination – the creation of a discriminatory hostile environment without any tangible adverse employment action – the Court recognized an affirmative defense against employer liability. The employer can escape liability by showing that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁵⁰ While the Court did not explicitly require employers to adopt internal antiharassment policies and procedures, its decisions certified those policies as the surest path to the partial immunity offered by the

1589 (2001); Lauren B. Edelman, Christopher Uggen, & Howard Erlanger, Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace, 27 Law & Soc'y Rev. 497 (1993).

⁴⁷ 524 U.S. 742 (1998).

⁴⁸ 524 U.S. 775 (1998).

⁴⁹ The *Faragher* and *Ellerth* decisions were foreshadowed by *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), which indicated that the existence of an adequate grievance procedure might under some circumstances insulate an employer from liability for some harassment by supervisors.

⁵⁰ *Faragher*, 524 U.S. at 807

affirmative defense.

The *Faragher* and *Ellerth* decisions seemed to discourage any near-term extension of the affirmative “self-regulation” defense to discrimination claims involving tangible adverse action such as discharge, denial of promotion or demotion, pay disparities, or the like. But the Supreme Court took the next step down that road just one year later. In *Kolstad v. American Dental Association*,⁵¹ the Court held that “good faith efforts to comply with Title VII,”⁵² in the form of antidiscrimination policies and procedures, would bar *punitive damages* against the employer for intentional discrimination by managers in promotions and presumably discharges. Insofar as much of employers’ litigation anxiety focuses on the (very small) risk of very large jury verdicts, this holding greatly magnified the significance of internal antidiscrimination policies.

Both *Faragher*’s affirmative defense and *Kolstad*’s defense against punitive damages come into play only when there has already been proof of intentionally discriminatory conduct by supervisory or managerial officials. They allow the employer’s internal, self-regulatory efforts to avoid discrimination to bar or substantially reduce liability for discrimination that has demonstrably occurred, sometimes at high levels within the organization. With these few decisions, the Supreme Court rapidly transformed employers’ internal compliance and grievance procedures into front line mechanisms for enforcing antidiscrimination law. This is not wholesale self-regulation, for the doctrine affords at least the potential for oversight of these procedures by the public institutions – the courts – to which enforcement had been delegated by the legislatures. Under *Faragher* the employer’s antiharassment policies and practices must be “reasonable” to bar liability (and the employer bears the burden of proof on that point), and under *Kolstad*, the employer’s internal antidiscrimination practices must demonstrate “good faith” to bar punitive damages. In principle the courts are enjoined to distinguish sham processes from effective ones.

If these internal procedures work – if they do reduce the incidence of discrimination and harassment and deliver a quicker and more cost-effective form of recourse to

⁵¹ 526 U.S. 527 (1999).

⁵² *Id.* at 544.

aggrieved employees – then they will represent a significant step forward in the enforcement of anti-harassment and antidiscrimination norms. On the other hand, if judicial oversight is inadequate and litigation ends up being barred by a mere pretense of internal process, then employers may be able to insulate themselves from the litigation threat that has driven much internal workplace reform. The result may be a disguised form of deregulation under the guise of self-regulation. That is a serious risk with a doctrine that rewards employers not for successfully preventing discrimination and harassment from occurring – after all, the procedures only matter when actionable misconduct did in fact take place within the organization – but for convincing a court that they tried to prevent it, or would have tried if the complainant had come forward. Unfortunately, there is a distressing paucity of evidence about how well these internal enforcement systems actually perform, and whether they succeed in protecting employee rights.⁵³ But the chorus of judicial complaints about the growing burden of employment litigation (and, more privately, about the marginal quality of the discrimination claims that reach them) gives reason to fear that judges may be predisposed to sign off on these internal procedures without close scrutiny.⁵⁴

2. Mandatory Arbitration and the Privatization of Public Law Enforcement

The rise of mandatory arbitration represents a further step toward privatizing and domesticating the enforcement of employees' legal rights. In a pair of decisions a decade apart – *Gilmer v. Interstate/Johnson Lane Corp.*⁵⁵ and *Circuit City Stores, Inc. v. Adams*⁵⁶ – the Supreme Court upheld the enforceability of employees' agreements to submit any future legal claims against the employer, including statutory discrimination claims, to an arbitrator rather than to a court. Most courts have read these decisions as affirming employers' ability to demand such agreements as a condition of employment.⁵⁷ In the

⁵³ See Kimberly Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash U. L.Q. 487, 511-15.

⁵⁴ Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 Am. J. Soc., 406, 412 (1999).

⁵⁵ 500 U.S. 20 (1991).

⁵⁶ 532 U.S. 105 (2001).

⁵⁷ See, by contrast, California law, under which an agreement secured on a take-it-or-leave-it basis as a condition of employment is held to be "procedurally unconscionable," and invalid if it also contains

past decade, employers, and especially larger employers, have turned increasingly to pre-dispute mandatory arbitration agreements as a way to take employment disputes out of the public courts and into the more private and party-controlled arbitral forum.

One might quibble with my characterization of arbitration as a form of self-regulation.⁵⁸ In principle, these agreements merely substitute one neutral outside forum for another; to be valid, they must preserve statutory rights and remedies.⁵⁹ But employers write the arbitration agreements; they determine in the first instance how the process works and how arbitrators will be chosen. They do so subject to the power of courts to reject or to redact unfair or legally invalid provisions. But judicial supervision is episodic, and it often takes a form that does little to discourage employers from overreaching. A court faced with an invalid clause – say, one that bars the award of attorneys’ fees to prevailing discrimination plaintiffs – might simply strike the clause (or “blue-pencil” the agreement) while enforcing the rest of the agreement, in which case employers who include such invalid clauses risk nothing and may gain by deterring some litigation. Or a court might enforce the agreement to arbitrate, leaving the contested issue to arbitration and post-arbitration judicial review, at which point traditional judicial deference to arbitration awards may trump the supervisory impulse.⁶⁰ In the meantime, prospective plaintiffs and their attorneys bear the burden of uncertainty and may be deterred from proceeding. The upshot is that employers gain considerable control over the adjudicatory process by securing arbitration agreements. Their control and their

provisions that are “substantively unconscionable,” that is, “unduly harsh or oppressive.” See *Armendariz v. Found. Health Psychcare Svcs., Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669, 690 (2000); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2001).

⁵⁸ Paul Carrington went one step further, calling the wholesale move toward mandatory pre-dispute arbitration, especially of consumer claims, a form of “self-deregulation.” See Paul D. Carrington *Self-deregulation, the “National Policy” of the Supreme Court*, 3 Nev. L.J. 259 (2003). But he portrayed employment arbitration as comparatively even-handed as a result of judicial oversight and arbitral self-regulation in the form of the Due Process Protocol discussed below.

⁵⁹ See *Gilmer; Spinetti v. Service Corp. Intern.*, 324 F.3d 212 (3rd Cir, 2003) (invalidating fee provisions contrary to Title VII); *Morrison v. Circuit City Stores, Inc.* 317 F.3d 646 (invalidating cost-splitting and limitation-of-remedies provisions contrary to Title VII).

⁶⁰ See *George Watts & Son In. v. Tiffany & Co.*, 248 F. 3d 577 (7th Cir. 2001), a non-Title VII case, in which the court held that an arbitrator’s refusal to award attorneys’ fees to the prevailing plaintiff, as authorized by the statute under which plaintiff’s claim was brought, cannot be vacated on the ground that it was in “manifest disregard of law.” In essence the court held that legal error is grounds for vacating an arbitrator’s award only if the award itself violates the law. Citing *Eastern Ass’d Coal.*

incentive to exercise it effectively is enhanced by their posture as likely “repeat players” who foresee repeated resort to the arbitration process in a range of legal disputes. So it is fair to describe arbitration as a form of employer self-regulation – not wholesale self-regulation but more or less regulated self-regulation.

It is precisely the self-regulatory aspect of arbitration that troubles many scholars and employee advocates. Even apart from employers’ ability to skew particular terms in their favor, arbitration subjects public law rights to interpretation and adjudication by private decisionmakers.⁶¹ Arbitration proceedings are generally private, and awards are not necessarily explained or published. Those are among its attractions to publicity-averse employers.

Much of the heat in the debate over mandatory arbitration, however, is generated by the belief that arbitration reduces expected recoveries for plaintiffs (and employers’ incentive to respect employee rights). Studies do indicate that awards to plaintiffs are lower in arbitration; but there is also evidence that plaintiffs win more often in arbitration than in court,⁶² and that more employees bring claims under an arbitration regime.⁶³ That leads some observers to question the conventional wisdom that arbitration favors employers. They contend that arbitration is less costly and more accessible than litigation – a claim for which the evidence is also decidedly mixed⁶⁴ – and may put a fair hearing within the reach of many claimants who could not file a lawsuit, much less get a judicial

⁶¹ See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 *Denver U. L. Rev.* 1017 (1996); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 *U. Pa. J. Lab. & Emp. L.* 685 (2004).

⁶² See Maltby, *supra*, at 46. Most litigated employment disputes are resolved on dispositive motions, not at trial; and the overwhelming majority of those motions are won by employers. Arbitration traditionally has no dispositive motions but resolves cases “on the merits.” See Maltby at 47.

⁶³ Largely for this reason, some commentators strongly dispute the claim that arbitration is advantageous for employers. See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 *Rutgers L.J.* 399 (2000).

⁶⁴ For a review of evidence that arbitration is cheaper and faster, see Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements*, 16 *Ohio St. J. on Dispute Resolution* 559, 564-65 (2001); Lewis L. Maltby, *Private Justice, Employment Arbitration and Civil Rights*, 30 *Colum. Hum. Rts L. Rev.* 29, 45-51 (1998). For studies indicating that arbitration is often as costly or more costly, see Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts’ Use of Antisuit Injunction Against Courts*, 147 *U. Pa. L. Rev.* 91, 126 (1998); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 *N.C. L. Rev.* 931, 959 & n.161 (1999). Part of the concern is with arbitrators’ fees that often reach five figures.

hearing. If the process were indeed cheaper and faster, and if plaintiffs made up for lower awards with higher claim rates and win rates, then arbitration could expand employees' access to "some kind of a hearing" before a neutral decisionmaker without reducing the overall impact of employees' legal rights.⁶⁵

Much will turn on how these arbitration procedures work and how effectively the courts supervise them. But we have already observed that the prevailing modes of judicial supervision fail to deter even some blatant forms of employer overreaching. More subtle concerns, such as the impartiality of arbitrators and the adequacy of awards, may effectively be screened off from effective supervision, especially if the courts adopt the deferential standard of review that is traditional for arbitration awards. The difficulty of outside judicial monitoring of the fairness of arbitration suggests the importance of what happens inside – within the firm-led process of formulating the ground rules of arbitration. In the context of *labor* arbitration under collective bargaining agreements, the fairness of the process is safeguarded not by judicial review, which is very limited, but by the role of unions in establishing procedures and selecting arbitrators. Under individual arbitration agreements, by contrast, employees have no collective representation or experience, and no role in the establishment of arbitration procedures. In theory, individual employees choose whether to accept the arbitration agreements drafted by employers; in fact, nobody believes that employees who can lawfully be put to a choice between signing the agreement and losing or foregoing employment have any real choice in the matter.⁶⁶

For the moment, the initiative is in the hands of employers, who typically adopt these agreements unilaterally and impose them on employees with little or no pretense of negotiation or even real consent.⁶⁷ The courts are reduced to a largely reactive role of

⁶⁵ See, e.g., Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 7-8 (1998); Estreicher, *supra* note 57, at 564-65.

⁶⁶ See, e.g. Stone, *supra* note 56, at 1037-38.

⁶⁷ For example, the Texas Supreme Court has held that the imposition of mandatory arbitration – that is, the waiver of the statutory right to a judicial forum for discrimination claims – was like any other modification to an at-will employment contract: “[W]hen an employer notifies an employee of changes to the at-will employment contract and the employee ‘continues working with knowledge of the changes, he has accepted the changes as a matter of law.’” *In re Halliburton*, 80 S.W.3d 566 (Tex. 2002).

approving or disapproving the provisions that employers devise. Employers are effectively engaged in a process of “self-regulation” in the matter of rights enforcement under the supervision – more or less vigilant – of the courts.

B. From Demands for “Deregulation” to “Self-Regulation” of Labor Standards

The viability of “command-and-control” regulatory schemes has, since the 1970s, come under challenge from many directions. One critique, particularly salient in the labor standards context, portrays the main problem as one of underenforcement: not enough inspectors, not enough penalties, not enough deterrence or compliance.⁶⁸ But the opposite critique has been at least as voluble, as business interests pleaded for “deregulation” in the interest of competitiveness and flexibility.⁶⁹ They did not get much deregulation, even during the Reagan administration, though they did get lengthy processes of administrative and judicial review, procedural constraints on inspections and enforcement, and reduced funding, all of which impaired the efficacy of agencies such as OSHA.⁷⁰

Business interests gained an increasingly respectful hearing as they changed their tune in the 1990s from the tendentious call for “deregulation” to the kinder and gentler pursuit of “self-regulation” and “voluntary compliance.” Those concepts resonated with growing confidence in markets and private ordering, which had rebounded rather robustly from its post-Depression nadir. Changes in the economy – away from mass production, toward increasingly agile forms of production, porous product markets, and transnational corporate structures – helped to produce an economic justification and a political demand for “flexibility.” From the pro-regulatory side as well, however, uniform and centrally-administered standards and the lengthy process for developing and enforcing those standards appeared increasingly out of step with the fluid and fast-moving character of production. Together these developments have converged to yield a growing conviction

⁶⁸ See Thomas McGarity & Sydney Shapiro, *Workers At Risk: The Failed Promise of the Occupational Health and Safety Administration* (1993).

⁶⁹ See Eugene Bardach & Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (1982)

⁷⁰ See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

that traditional “command-and-control” regulatory approaches are anachronistic – ineffectual at best, counterproductive at worst.⁷¹ Growing doubts about the viability of command-and-control have not made major inroads on the basic federal labor standards statutes themselves.⁷² Still, regulatory agencies have cautiously experimented with forms of “voluntary compliance” and self-regulation within the confines of command-and-control statutes.⁷³ A few examples, to which I will return throughout this paper, will help ground the discussion.

1. Illustrations from Occupational Safety and Health Regulation

OSHA, a political lightning rod since its birth in 1970, has undertaken cautious yet controversial experimentation with “cooperative” approaches to securing compliance.⁷⁴ The most ambitious program of self-regulation is OSHA’s Voluntary Protection Program (VPP), first established in 1982. Under the VPP, employers who demonstrate their commitment and internal organizational capacity to comply with health and safety standards and to improve their safety records can get taken off the ordinary inspection schedule and effectively put onto a more conciliatory enforcement track. Employers must also demonstrate that employees are “involved” in the safety program, though in the non-union context employees participate largely as individual volunteers. I will return to the employee involvement feature of the VPP below.

The VPP, started during the Reagan administration at the height of deregulatory fervor, is a modest program squeezed into the interstices of a command-and-control

⁷¹ Daniel Yergin & Joseph Stanislaw, *The Commanding Heights: The Battle for the World Economy* (2002); Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998).

⁷² In some cases, the fear of employee advocates that regulatory reform is a disguise for deregulation, and of employer allies that it is a stalking horse for union organizing, seems to have activated the latent risk of legislative deadlock that chronically plagues the politics of labor legislation. See *infra* TAN ---

⁷³ For two early and encouraging studies of self-regulation and cooperative regulation of workplace health and safety outside of OSHA, see John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (1985) (arguing that cooperative approach promotes coal mine safety); Joseph V. Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational Safety* (1988) (finding improved safety under “mandated self-regulation” in California).

⁷⁴ For an overview of cooperative initiatives within OSHA enforcement, see Sydney Shapiro & Randy Rabinowitz, *Punishment Versus Cooperation in Regulatory Enforcement: A Case Study of OSHA*, 49 *Admin. L. Rev.* 713 (1997). For a more theoretical assessment of the conditions necessary for effective “cooperative” compliance, see Sydney Shapiro & Randy Rabinowitz, *Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA*, 52 *Admin. L. Rev.* 97 (2000).

statute. But the program proved to be both effective and politically popular.⁷⁵ It became a building block of a more comprehensive reform effort in the Clinton administration as part of its “Reinventing Government” initiative. The administration announced in 1995 that “OSHA will change its fundamental operating paradigm from one of command and control to one that provides employers a real choice between a partnership and a traditional enforcement relationship.”⁷⁶ The program offered partnership, cooperation, and compliance assistance to employers who maintained a good safety record and an effective safety program, while aiming to preserve and even strengthen traditional adversarial enforcement mechanisms for employers who put workers at risk.

The effort to tap into regulatory resources within the firm had been at the center of proposed OSHA reform legislation in the early 1990s. Among other things, the law would have mandated the creation of workplace health and safety committees at most sizable workplaces.⁷⁷ Such committees might have played a crucial role in extending the reach of an overextended enforcement apparatus by activating regulatory resources and impulses within firms.⁷⁸ But the legislation became entangled in the chronic gridlock of “labor law reform”: the idea of employee safety committees triggered both employer fears of union organizing and union fears of employer domination and manipulation.⁷⁹

Gridlock at the federal level has not entirely squelched innovation at the state level.

⁷⁵ <http://www.vpppa.org/GovAffairs/Appropriations.cfm>

⁷⁶ President Clinton & Vice President Gore, *The New OSHA - Reinventing Safety and Health*, issued May 16, 1995; available at <http://govinfo.library.unt.edu/npr/initiati/common/reinvent-.htm>

⁷⁷ See H.R. 1280, 103d Cong. (1993); H.R. 3160, 102nd Cong. (1991).

⁷⁸ Studies have recognized the effectiveness of employee safety committees in improving safety. See Gregory R. Watchman, *Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA*, 4 *Cornell J.L. & Pub. Pol’y* 65, 82–89 (1994); Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 *Cornell Int’l L.J.* 373, 431 (2000). See generally Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 *Wm. & Mary L. Rev.* 411, 497–98 (2000) (recognizing success of employee safety committees in reducing accident rates at California construction sites, but concluding that effectiveness of these committees in other contexts “remains an open question”).

⁷⁹ See Rabinowitz & Hager, *supra* note --, at 431 (stating that legislation requiring employee safety committees was “strongly opposed by the business community”); Kenneth A. Kovach, et al., *OSHA and the Politics of Reform: An Analysis of OSHA Reform Initiatives Before the 104th Congress*, 34 *Harv. J. on Legis.* 169, 175 (1997) (reporting union fears that employer controlled safety committees might become anti-union devices); Seidenfeld, *supra* note --, at 500 (reporting union fears of employer domination and employer fears of independent employee representation).

OSHA preempts some state regulation of workplace health and safety, but it expressly authorizes states to operate their own approved safety and health plans pursuant to OSHA, and leaves states with considerable authority and room for innovation in this area. Some states have used that authority to promote self-regulatory activity by employers. Nearly a dozen states have mandated the creation of workplace health and safety committees along the lines of what federal OSHA reform proposals would have required.⁸⁰ Those mandatory committees are more likely to be instituted, and appear to do more to improve enforcement, in union workplaces than in non-union workplaces; still, they do appear to ratchet up agency enforcement activity.⁸¹ Though the data do not go so far, one may reasonably infer that such committees also stimulate greater internal compliance, and create safer workplaces, by abating hazards without agency involvement.

Other states have made further steps in the direction of employer self-regulation. The most ambitious and innovative of state workplace health and safety programs is in California, which has instituted a form of mandatory self-regulation.⁸² Since 1991, all covered employers have been required to put in place a Workplace Injury and Illness Prevention Program.⁸³ An employer who maintains a program that tracks the recommended “model program” will avoid civil penalties for a first violation.⁸⁴ The program must include regular self-inspections, identification and abatement of hazards, training of and regular communication with employees, and establishment of a system for confidential employee reporting of hazards. A similar set of requirements is imposed in New York for employers with worse-than-average injury rates.⁸⁵ These programs

⁸⁰ See Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees*, 5 U. Pa. J. Lab. & Emp. L. 75, 95-100 (2002).

⁸¹ See David Weil, *Are Mandated Health and Safety Committees Substitutes for or Supplements to Labor Unions?*, 52 *Indus. & Lab. Rel. Rev.* 339 (1999).

⁸² The program is described in Rees, *supra* note ---.

⁸³ See Cal. Labor Code 6401.7. A guide to setting up the program can be found on-line at http://www.dir.ca.gov/dosh/dosh_publications/iipp.html.

⁸⁴ Cal. Labor Code 6401.7(J)(1).

⁸⁵ Specifically, employers with annual revenues over \$800,000 and a workers' compensation “experience rating” above 1.2 (i.e., 1.2 times average in the industry). McKinney's Workers'

represent a decidedly regulated version of self-regulation; yet they do recognize and reward the regulatory potential within firms – the particularized expertise and awareness of hazards and the potential for customized forms of hazard abatement.

So the move to push regulatory activity into the regulated firm itself has been pursued in different forms by regulators, employer advocates, and employee advocates. The recent controversy over OSHA's ergonomic standards may illustrate how far the regulatory paradigm has moved in recent decades.⁸⁶ Among the last acts of the Clinton Administration's Department of Labor was the adoption of a long-awaited and exhaustively-vetted standard for the reduction of ergonomic hazards in the workplace. And among the first acts of the Bush Administration and the new Republican Congress that accompanied it into power was the rescission of the ergonomics standard in favor of a system based largely on "voluntary compliance" and agency guidance.⁸⁷ But this was no showdown between the proponents of "command and control" and the apostles of self-regulation. For the rescinded regulation itself administered a heavy dose of self-regulation by requiring employers themselves to put in place mechanisms for recognizing and redressing potential ergonomic hazards. The proposed regulation prescribed the establishment of certain internal procedures and institutional structures, while the substance of ergonomic practices was to be shaped almost entirely within firms themselves – drawing on public and private experience and guidance – in response to the very particular needs of the workplace and its workers.

The second Bush Administration's retreat from mandatory ergonomic regulation to "voluntary compliance" with ergonomic guidelines is emblematic of its widely-advertised shift in emphasis within OSHA from enforcement to guidance and "compliance assistance." One might properly view with skepticism calls for "self-

Compensation Law § 134; NY ADC T. 12, Ch. I, Subch. A, Pt. 59.

⁸⁶ Steven Greenhouse, Senate Votes to Repeal Rules Clinton Set on Work Injuries, *N.Y. TIMES*, Mar. 7, 2001, at A1 (describing President Bush's unveiling of a new workplace safety policy that relies on "voluntary actions" by companies to reduce repetitive motion injuries in the workplace); Steven Greenhouse, Bush Plan to Avert Work Injuries Seeks Voluntary Steps by Industry, *N.Y. TIMES*, Apr. 6, 2002, at A1 (discussing the repeal of repetitive motion workplace rules issued by OSHA five months earlier).

⁸⁷ The guidance was to be backed by limited case-by-case prosecution of obvious and serious ergonomic hazards under the "general duty clause" of OSHA.

regulation” by those who once touted the virtues of deregulation. But it is important to recognize that the shifting of regulatory activity to the firm itself is not merely a partisan move that is likely to be reversed under a future Democratic administration. That shift was embraced under the Clinton administration, and was a central feature of its effort to “reinvent government.”

2. Illustrations from Wage and Hour Regulation

Wage and hour regulation has been chronically plagued by underenforcement. Whenever there are workers willing to work for less than the law provides, producers have a dauntingly predictable incentive to pay them less. Traditional enforcement mechanisms have often failed to raise the cost of non-compliance high enough to outweigh the immediate gains from non-compliance.⁸⁸ That is especially true for marginal producers at the bottom of the production chain, who have little fixed capital or stake in their reputation, and who tend to operate under the regulatory radar.

On the other hand, the possibilities for experimentation within the enforcement of wage and hour laws are amplified by some features that distinguish those laws from workplace health and safety laws: First, the FLSA contains at least one novel and potent remedy, the “hot goods” embargo, which permits the DOL to stop commerce in goods produced in violation of the Act. That gives the agency significant leverage to induce participation in novel forms of wage and hour enforcement. There is nothing comparable, or comparably onerous, under OSHA. Second, the FLSA only sets a floor on wage and hour regulation; states are otherwise free to regulate, and to devise new regulatory approaches. OSHA, by contrast, preempts some state workplace safety regulation (that which addresses hazards regulated by OSHA), and puts some constraints on state experimentation. Third, the availability of private rights of action, including aggregate forms of action, under the wage and hour laws has created an opening for “private attorneys general” to supplement government enforcement efforts. These features of wage and hour regulation – potent public sanctions, parallel state regulation,

⁸⁸ David Weil, *Compliance With The Minimum Wage, Can Government Make A Difference?*, Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=368340.

and private litigation – open up room for experimentation. In the case of private litigation, that room remains largely unexplored, but I will return to it in Part V.

“Hot Goods” and Monitoring in Textiles: The apparel industry is a low-wage sector with notoriously high rates of non-compliance with minimum wage and overtime pay requirements.⁸⁹ In an effort to improve compliance among the low-wage, low-visibility workplaces at the bottom layers of the apparel sector, the Department of Labor (DOL) launched a program founded on the aggressive use of the longstanding but much-neglected “hot-goods” provision of the FLSA, which allows the Secretary of Labor to petition to embargo goods produced in violation of the Act. The interdiction of goods has two big advantages over traditional sanctions: First, it hurts the large manufacturers (who supply finished apparel to retailers) a lot, especially in a retail market like fashion apparel that puts a high premium on speed of delivery. Second, by targeting the goods themselves, the remedy cuts through contracting arrangements that may insulate manufacturers from liability for the substandard wages of workers at the bottom of the production chain.⁹⁰ The embargo sanction and its threat give manufacturers an incentive to discover and fix compliance problems among their contractors at lower levels of the production chain. The manufacturers’ *capacity* to discover and fix such problems was an outgrowth of developments in production itself, which bound manufacturers and contractors or “jobbers” closer together to the end of producing high quality goods in very short and fast production runs.⁹¹

Capitalizing on these features of the apparel industry, DOL deployed the threat of a “hot goods” embargo to induce manufacturers to agree to monitor the wage and hour practices of their own contractors. The manufacturers entered into further agreements with their own contractors to abide by wage and hours laws, keep records, and submit to

⁸⁹ Weil, *supra* note 79, at 7

⁹⁰ The statutory definition of “employer” in the FLSA is the broadest in American law. Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 *UCLA L. Rev.* 983, 996-1003 (1999). However, partly because of overly restrictive judicial interpretations, it still does not reach through many of the contractor arrangements that are typical in apparel and other manufacturing sectors, and that separate workers from financial responsible employers. *Id.*

⁹¹ For a description of these arrangements in apparel, see Weil, *supra* note --. For an account of how similar dynamics have come to characterize much of global manufacturing, see Sabel, *supra* note --, at --.

inspections by representatives of the manufacturers or by outside monitors. This program sought to leverage public enforcement powers to generate a system of private enforcement that was much more vigilant than a public agency could possibly be. It is a form of “self-regulation” if one expands the regulated “self” to include the entire chain of interconnected albeit nominally independent entities on the production line. Studies of the program’s effects have found improved (though hardly complete) compliance among participating contractors.⁹²

The Green Grocer Code of Conduct: Federalism is often touted as a cauldron of innovation. A striking example of creative state enforcement of wage and hour laws – one that suggests the potentialities of both federalism and self-regulation – can be found in New York City’s “green grocer” markets – the small retail produce markets that sprang up in the city in the 1980s.⁹³ The story began with a coalition of worker advocates seeking to improve working conditions of the greengrocery workers. They found a lot of wage and hour violations, and started bringing cases to the Attorney General’s Labor Bureau. State investigations showed a nearly identical pattern of violations: The workers were paid two to three hundred dollars a week for a 72 hour week. Cases were nearly open-and-shut, and produced backpay liability that was often ruinous for these small businesses. But case-by case investigations proved unsatisfactory, given the AG’s limited resources and the large number of greengrocers in the city. So once having gained the attention of employers, the AG brought representatives of employers and of labor to the bargaining table.⁹⁴ Together they devised a “Green Grocer Code of Conduct” (GGCC).⁹⁵

A merchant’s submission to and compliance with the GGCC secures a kind of

⁹² Weil, *supra* Note 79, at 22

⁹³ See Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 Hofstra L. & Empl. L. J. – (2004). For a first-hand account of the negotiation of the agreement, see Matthew T. Bodie, *The Story Behind the New York City Greengrocer Code of Conduct: A Conversation with Patricia Smith*, 6 Regional Lab. Rev. 19 (2004) (hereinafter “Smith Interview”).

⁹⁴ The negotiations were made feasible in part by the fact that the green groceries were operated mostly by Koreans and Korean Americans, and were effectively represented by the Korean Produce Association. Employees, for their part, were mostly Mexican immigrants. They were represented at the bargaining table by Casa Mexico, “a worker advocacy group ... that deals with primarily Mexican workers.” See Smith Interview, *supra* note --, at 22-23.

⁹⁵ The text of the GGCC is available at <http://www.oag.state.ny.us/labor/> (visited 7/7/04).

provisional amnesty with respect to past violations of wage and hours laws. The Code binds signatory employers to comply with wage and hours laws (as well as with other employment and labor laws), to keep records, to undergo training and to allow their employees to do so, to post notices advising employees of their rights, and, crucially, to submit to regular inspections by independent labor standards monitors appointed by the AG. Monitors make unannounced visits to the workplaces, inspect employers' payroll records, speak privately with employees about these issues, assist employers in compliance, and report on violations to the AG's office and to a Code of Conduct Committee. The Committee, which oversees the Code, deals with disputes, and certifies new signatories, consists of three members representing workers, employers, and the AG.

Notably, the GGCC does provide for some forms of employee representation within the enforcement scheme. Representatives of the state AFL-CIO, as well as Casa Mexico, an advocacy group for Mexican-American workers, who make up most of the affected labor force, participated in the creation of the Code. One of the three members of the Code of Conduct Committee is appointed by Casa Mexico.⁹⁶ And for shops with more than ten employees, the Code provides for appointment of an employee spokesperson by the monitor, after consultation with employees. Unfortunately, the latter innovation appears to be largely symbolic; few green grocers employ as many as ten workers.⁹⁷ Yet this was the best that the agency could do with respect to direct employee representation, for employers fought vehemently against any such provision even while submitting to outside third-party monitoring of their wage and hour practices.

According to Deputy AG Patricia Smith, who spearheads the program for the state, monitors have found significantly improved rates of compliance with wage and hour regulations. Nearly every business inspected thus far has been found in substantial compliance. Some technical and recordkeeping violations remain common in these small businesses, and monitors are educating employers as well as monitoring compliance. But the improvement is dramatic.⁹⁸

⁹⁶ See Bodie, Smith Interview, *supra* note --, at --.

⁹⁷ Communication with Patricia Smith, ---, on file with author.

⁹⁸ That is, they had paid workers at least the minimum wage plus one-and-a-half times the minimum

These experiments still occupy only a very small part of the larger scheme of labor standards regulation in the US. Yet the decline of “command-and-control” and the rise of employer self-regulation – more or less well monitored and enforced – seems inexorable. It converges with the development and legal encouragement of “corporate compliance” programs across a range of regulatory arenas, as best exemplified by the the U.S. Sentencing Guidelines’ promise of mitigation of criminal sentencing for firms with effective internal preventive programs.⁹⁹ The rise of self-regulation is also in keeping with regulatory trends, both in theory and in practice, across many areas of regulation and many countries across the globe.¹⁰⁰ And it parallels emerging efforts to gain regulatory traction over manufacturing workplaces outside the developed world, where a growing share of the world’s goods are produced.¹⁰¹

In all of these settings, there is much skepticism from organized labor and worker advocates about the efficacy of corporate codes of conduct, private monitoring, and other forms of self-regulation.¹⁰² And there is too little research that rigorously evaluates the

wage for hours beyond 40. Because of how the overtime laws compute hourly wages and overtime premium, this leaves many employers in technical violation of the laws. But the substantial compliance achieved thus far is a vast improvement over the rampant violations discovered initially. *Id.*

⁹⁹ Under the federal Sentencing Guidelines, a firm is eligible for mitigation of sanctions if an offense occurred despite “an effective program to prevent and detect violations of the law,” provided the firm promptly reported violations once they occurred. U.S. Sentencing Guidelines Manual, ch. 8, 393-433, § 8C2.5(f) (1993). These federal guidelines spurred the growth of corporate compliance programs. For a generally favorable assessment of this approach to controlling corporate crime, see Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 *N.Y.U. L. Rev.* 687, 745-52 (1997). For a skeptical assessment based on the lack of empirical evidence of the efficacy of these regimes, see Krawiec, *supra* note --.

¹⁰⁰ See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 28 (Cambridge U. Press 2000): “The last two decades of the twentieth century saw the rise of a ‘new regulatory state,’ where states do not so much run things as regulate them or monitor self-regulation. Self-regulatory organizations frequently become more important than states in the epistemic communities where debates over regulatory design are framed.” See also Robert Kagan & Lee Axelrad, *Regulatory Encounters: Multinational Corporations and American Adversarial Legalism* (2000).

¹⁰¹ See Mark Barenberg, *Law and Labor in the New Global Economy: Through The Lens of United States Federalism*, 33 *Colum. J. Transnat’l L.* 445 (1995). For a critical assessment of the “code of conduct” approach to global labor regulation, see Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *Ind. J. Global Legal Stud.* 401 (2001).

¹⁰² See, e.g., Harry W. Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, in Joanne Conaghan et al, *Labour Law in an Era of Globalisation* (forthcoming Oxford University Press, 2001); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *Ind. J. Global Legal Stud.* 401 (2001). Blackett, in particular, criticizes the “code of conduct”

efficacy of the internal compliance regimes that are gaining legal recognition.¹⁰³ But a preference by many employee advocates for stronger adversarial enforcement is tempered by a growing realization that workplaces are too numerous and too varied, and production is too mobile and too global, to hope for traditional regulatory methods to do the whole job. There will simply never be enough inspectors. The question is no longer whether to invest in self-regulatory mechanisms but how to make those mechanisms effective in improving labor standards.

IV. Building a Framework for Effective Self-Regulation in the Workplace

So we find that employment law – both the rights side and the regulatory side – is moving in the direction of allowing employers to “self-regulate,” and to partially substitute internal enforcement procedures for public enforcement. Superficially these developments may appear to be a slow-motion and low-visibility replication of the New Deal embrace of self-governance over public regulation as the primary mode of protecting workers and improving their wages and working conditions. We are once again moving toward internal “lawmaking” and “law enforcement” – albeit within a public law framework – and away from direct public regulation or judicial resolution of workplace disputes. One obvious difference is that, this time around, workers have been largely cut out of the internal governance scheme.

So it is at least ironic and ultimately troubling that the trend toward self-regulation is taking hold at the same time that the system of self-governance through collective representation and bargaining is so diminished, and still diminishing, in scope. The “self” that is increasingly claiming the prerogative to regulate itself is less likely than ever to encompass employees other than as individuals, who face familiar and daunting impediments to effective bargaining or intervention on their own behalf. To see why this is problematic and to lay the groundwork for an effective response, let us reexamine these recent developments toward self-regulation through a more theoretical lens.

approach for often lacking both an external regulatory dimension and an independent monitoring system, two features that I also insist are crucial. *Id.* at 411-12.

¹⁰³ See Krawiec, *supra* note --.

A. *“Responsive Regulation” and Tripartism*

Among the analytical frameworks that have been put forward to illuminate and shape the megatrend toward self-regulation, that of “Responsive Regulation,” elucidated by Professors Ayres and Braithwaite, is particularly well suited to the problem of labor regulation.¹⁰⁴ A basic problem for regulators is the range and complexity of human motivations among regulated actors. In short, there are both “good guys” and “bad guys” among the regulated, and there are many who could go either way depending partly on the workings of the regulatory scheme. This is true within industries – some firms aim to be model corporate citizens while others are self-interested maximizers who will defect whenever it profits them– as well as within firms – some individuals are more committed to doing the right thing than others. It is true even within individuals, whose consciences may speak to them in more than one voice. In other words, “preferences” or dispositions toward compliance with regulatory norms are both heterogeneous and endogenous; they are varied, and they can change in response to the regulatory environment.

This heterogeneity poses a challenge for regulators, particularly in a world of scarce enforcement resources. A system of regulation that assumes that all regulated actors are self-interested opportunists who will respond only to carrots and sticks will waste enforcement resources on those who seek to do the right thing and squander the good will and the vast regulatory resources within those actors. Yet a system that assumes instead that regulated actors are well-intentioned and seek to abide by the law – such as a system of wholesale self-regulation – invites the more opportunistic actors to cheat. That puts competitive pressure on the would-be law-abiders, erodes trust and norms of good citizenship, and breeds resentment.

The regulatory solution proposed by Ayres and Braithwaite is the establishment of a pyramid of enforcement mechanisms, from the least interventionist form of self-regulation and self-reporting at the bottom of the pyramid to the most punitive sanctions – what they call “the benign big gun” – at the top.¹⁰⁵ The choice of enforcement

¹⁰⁴ Ayres & Braithwaite, *supra* note --.

¹⁰⁵ The pyramid needs to escalate to very punitive sanctions, for the more onerous the highest penalty, the more pressure there is on regulatees to cooperate. The pyramid should also contain many incremental steps, for a system with just a few regulatory approaches – e.g., one cooperative and one punitive – lacks

mechanism is based on the compliance record of the regulated entity, and is subject to change based on new experience: Compliance is rewarded with more cooperative, less adversarial, and more firm-based enforcement strategies. Non-compliance is met with the escalation of regulatory scrutiny and sanctions, coupled with a willingness either to escalate further to harshly coercive sanctions in response to chronic non-compliance or to return to cooperative strategies in response to improved compliance.¹⁰⁶ At some risk of oversimplification, the scheme might be understood as comprising two tracks (each with its own gradations): a cooperative and largely self-regulatory track and an adversarial enforcement track.¹⁰⁷

A system that relies heavily on self-regulation and that encourages cooperation between regulators and regulated actors seeks to tap into a wealth of knowledge, experience, creativity, good will, and organizational efficacy within the firm. If those resources can be brought to bear on the enforcement of legal norms, then scarce public regulatory resources can be targeted at “bad actors” and leveraged into more thorough accomplishment of the public’s regulatory aims. But a system that encourages cooperation and self-regulation is also vulnerable both to cheating by reputedly-compliant actors and to “capture” of the regulators, who may indulge a preference for cooperation when it is not warranted.

Responsive Regulation seeks to guard against both cheating and capture by empowering third-party watchdogs that are independent of both regulators and the regulated and that represent the interests that the particular regulatory scheme seeks to advance. It is a “tripartite” model of regulation. In some regulatory regimes – for example, environmental regulation – this role must be played by a public interest group. In many cases, however, the public interest can be represented by the beneficiaries

flexibility. It risks locking actors into adversarial patterns, or allowing them to coast on an outdated record of cooperation, because a switch in regulatory modes appears too drastic. See Ayres & Braithwaite, *supra* note --, at --.

¹⁰⁶ Ayres and Braithwaite describe the appropriate regulatory strategy as a version of the “tit-for-tat” strategy that game theorists have found to produce a cooperative equilibrium among repeat players in “prisoners’ dilemma”-type games. *Id.* at --.

¹⁰⁷ See Neil A. Gunningham, *Towards Effective and Efficient Enforcement of Occupational Health and Safety Regulation: Two Paths to Enlightenment*, 19 *Comp. Lab. L. & Pol’y J.* 547, 552 (1998) (proposing a two-track – cooperative and adversarial – approach to regulation of workplace health and safety).

themselves. So, they suggest, “[t]he simplest arena to understand how tripartite regulation would work is with occupational health and safety,” in which a union and its “elected union health and safety representatives” would participate in inspections, receive information, and initiate enforcement.¹⁰⁸ They suggest that “one could usefully grant the same rights to a nonunion safety representative elected at a nonunionized workplace,” provided that one could insure access to technical and legal assistance. “Where there is no power base and no information base for the weaker party, tripartism will not work.”¹⁰⁹ These are problems to which we will return.

Employee representatives can also participate directly within the self-regulatory process itself, helping to devise rules and standards, implement them, monitor compliance, take complaints, train employees, and the like. Almost uniquely in the context of workplace regulation, the primary beneficiaries of the law are fully competent adults who operate inside of the regulated entity, and are potentially capable of speaking for themselves and playing a part in the internal regulatory regime.¹¹⁰ Workers are on the scene, well-informed about workplace conditions, and motivated to represent their own interests within the firm. Within the internal self-regulatory regime, a union or other representative of employees functions not just as an independent third party but as an integral constituent of the “self” that is charged with self-regulation. The employee organization can serve not only as a watchdog over the regulated entity and the regulatory agency, but as an integral participant in the internal processes by which regulatory standards are set and met or improved upon.

The presence of employees inside the “self-regulating” firm might suggest that the problems to which tripartism responds do not exist in the case of workplace regulations. But that would be a mistake for two reasons. First, while the interests advanced by labor standards laws are generally “local public goods” within the workforce, and are subject to familiar collective action problems. That is most obviously true with regard to the

¹⁰⁸ Ayres & Braithwaite, at 59.

¹⁰⁹ Id. at --.

¹¹⁰ Ayres and Braithwaite speak of public interest groups (PIGs) being represented in independent internal inspection and compliance groups, and give as an example union representation on the workplace health and safety group. A&B, p. 106. See also p. 126.

mitigation of health and safety hazards, but it is also true of wage and hour practices, leave policies, and equal employment policies. As those phrases imply, such matters are typically dealt with by policies, not by individualized decisionmaking (much less negotiations); any one worker's effort to bargain for better is encumbered by the expectation that any improvements may have to be extended to others as well.¹¹¹ Second, individuals may face not only inadequate incentives to seek improved labor standards but also powerful disincentives in the form of feared reprisals.¹¹² Collective representation can supplant the need for individual workers to step forward with complaints and can protect workers against unwarranted discipline or discharge.

Unions fit the tripartite bill well, for they are designed to meet the challenges posed by both the "public goods" nature of workplace conditions and the problem of worker dependency and fear. They have, through their members, information about working conditions on the ground, and they can represent members' aggregate interest in improving them. They almost invariably bring job security – protection against arbitrary discipline and discharge, and thus against reprisals – as part of their package of contractual benefits. Whether an employee committee can serve these functions in the non-union setting remains an open question to which we will return.

Self-regulation as it is conceived in Responsive Regulation is not a substitute for public regulation. It bears little resemblance to the bland invocations of "voluntary compliance" of some employer advocates and allies. Rather, it embeds "self-regulation" in a system of external and internal accountability – external accountability to public regulators with the power to impose coercive sanctions and internal accountability to the workers whose interests are at issue. And it situates self-regulation in a broader scheme in which traditional inspections, enforcement, and punitive sanctions continue to operate for the low-road or less-capable actors at the bottom of the labor market. The next question is whether it is a viable model for workplace regulation in the US.

¹¹¹ On the public goods problem in labor standards enforcement, see generally Louise Sadowsky Brock, *Overcoming Collective Action Problems: Enforcement of Worker Rights*, 30 U. Mich. J.L. Reform 781, 789-92 (1997).

¹¹² Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. Pa. L. Rev. 457, 491-96, 504-10 (1992).

B. Responsive Regulatory Theory Meets US Regulatory Reality: The Enforcement Gap and the Representation Gap

One encouraging point of divergence between the theory of Responsive Regulation and emerging regulatory reality is the moderately successful use of self-regulatory mechanisms not for the most cooperative and compliant regulated actors but for chronic “defectors.” Within Responsive Regulation, regulatory “big guns” are aimed at chronic defectors, who are on a decidedly adversarial enforcement track; that threat indirectly helps to support effective self-regulation by well-intentioned and capable high-road actors who are on the cooperative self-regulatory track. But the NY Attorney General’s Green Grocer Code and the DOL’s use of the “hot-goods” provision in the textile industry are two examples of what might be called the remedial use of self-regulatory mechanisms. Both involved the direct deployment of legal coercion as leverage in securing submission to a decidedly regulated version of self-regulation; both have been reasonably successful. That would suggest a possible expansion of what Responsive Regulation envisions as the domain of self-regulation.

In other respects, however, the application of Responsive Regulation to US labor regulation faces several hurdles: Can Responsive Regulation work in an environment of chronic underinvestment in the enforcement of labor standards? Can tripartism work in the overwhelmingly non-union American workplace, and in the face of the vehement anti-unionism of most American employers? Or would an effort to apply Responsive Regulation to US reality founder on the shoals of underenforcement, union decline, and anti-union animus?

1. Underenforcement

While Responsive Regulation aims to make more efficient use of scarce enforcement resources, it still demands greater regulatory oversight and resources than are – or are perhaps ever likely to be – available to a regulatory agency like OSHA.¹¹³ Successful examples of “responsive” occupational health and safety regulation are found in Australia and in the US Mine Health and Safety Administration, both of which maintain a much

¹¹³ On the chronic shortage of inspectors and resources, see McGarity & Shapiro, *supra* note --; Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 *Hous.L.Rev.* 99 (1994).

higher density of inspections than does OSHA for the workplaces under its jurisdiction. One study calculated that, on average, OSHA officers inspect a workplace once every 107 years.¹¹⁴ Similarly, public enforcement of wage and hour laws suffers from a chronic deficit that helps produce compliance rates of less than 50 percent in some low-wage industries.¹¹⁵

Moreover, both OSHA and the DOL's Wage and Hour Division gravitate toward modest penalties that do not remotely offset the low probability of detection. In the case of OSHA, criminal prosecution is rare and fines, civil and criminal, are modest.¹¹⁶ The agency has sometimes been frustrated in its episodic efforts to impose mega-fines that might serve as a real deterrent.¹¹⁷ In the latter case, the hot-goods embargo provision qualifies as a "big gun," and has proven a potent inducement to cooperation. But its potential is confined to goods-production, and mainly to time-sensitive products such as fashion apparel and perishable goods (though in a just-in-time world, most products may be time-sensitive enough for these purposes). More importantly, the embargo can be triggered only by the DOL, with its limited enforcement resources. For many employers who are tempted to violate the law, the risk and cost of detection by public enforcement agencies is still too low to induce compliance when market conditions encourage defection.

The low rate of enforcement defies one of the key prescriptions of Responsive Regulation: The cost of non-cooperation or "defection," primarily in the form of enforcement and sanctions, must be great enough to deter the most willful defectors and to protect cooperators against demoralizing and economically injurious competition from defectors. That would require a massive infusion of regulatory resources into these programs (perhaps coupled with an upsurge of targeted private litigation, a distinctly

¹¹⁴ OSHA Inspection Cycle Equals 107 Years, Because of Low Resources, AFL-CIO Reports, 81 Daily Lab. Rep. (BNA) A-7 (2000).

¹¹⁵ Weil at 12-13.

¹¹⁶ See Stacy Cooper, et al., Employment-Related Crimes, 40 Am. Crim. L. Rev. 367, 378-79 (2003).

¹¹⁷ The maximum fine for a "willful" violation is \$70,000. Multiple violations produce multiple fines, and in some cases quite large fines. However, OSHA's efforts to address egregious cases by multiplying the fine by the number of employees affected were curbed by *Reich v. Arcadian Corp.*, 110 F.3d 1192 (5th Cir. 1997).

American “wild card” that regulatory theory, including Responsive Regulation, tends to neglect). Absent a serious escalation in the commitment to enforcing and improving labor standards generally, an effort to apply Responsive Regulation might end up masking what amounts to a process of deregulation.

Part of the solution must lie in the “targeting” of enforcement resources – in the redeployment of existing enforcement resources and scrutiny toward sectors and employers whose noncompliance is most chronic or serious.¹¹⁸ But how are regulators to identify targets without doing inspections? Moreover, unless regulators’ sights are to remain permanently fixed on the targeted sectors, they need to come up with strategies to secure compliance that do not depend on intensive continuing oversight – something to leave behind as they move on to a different set of targets. Those structures will need to draw on non-governmental regulatory resources, both from within and from outside the regulated firms. Targeted enforcement must be used as leverage to induce firms to accept otherwise unacceptable conditions that aim to insure future compliance. Targeting of the textile industry and the green grocer sector, for example, gave regulators the leverage to secure “voluntary” submission to self-regulation and monitoring.

2. Non-Union Workplaces and Anti-Union Employers

So one puzzle is how to drive and manage a system of effective self-regulation in a context of chronic underenforcement. Another puzzle is how to adapt tripartism to predominantly non-union American workplaces. In workplaces in which unions exist, their participation in self-regulatory schemes should be required (as indeed it is in the case of OSHA’s VPP). Unfortunately, unions exist inside too few firms in the US to serve as the only vehicle of employee representation. Ayres and Braithwaite suggest that non-union employee committees – the equivalent of limited-purpose works councils – can step into the same role. But that answer is problematic, especially in the American context, for several reasons.

¹¹⁸ In principle, that is what OSHA promises. See ---. In practice, the opposite has traditionally been true: inspections and enforcement actions are more likely in the larger and more visible establishments that tend to have better compliance than smaller and more marginal establishments. See ---

First, it is unclear whether non-union, workplace-based institutions of employee representation are able to perform their part in a tripartite scheme for workplace standards enforcement. Employee committees that exist only inside firms – that have no outside power base or organizational structure – may be too vulnerable to capture or intimidation to serve as the chief guardians against both cheating by employers and capture of agencies. In particular, where participating employees are terminable at will, as most non-union employees are, they may be too vulnerable to reprisals to play their assigned role even within a collective framework. That is especially likely among immigrant workers – often undocumented immigrants – who occupy many of the worst workplaces, and who may fear not only discharge but deportation.¹¹⁹ That is not to say that these committees accomplish nothing. There is some evidence that non-union health and safety committees improve compliance (though less than unions do).¹²⁰ Such committees may help overcome some of the “public goods” problems of labor standards enforcement by aggregating the information, the energies, and the incentives of individual employees to engage in enforcement activity. However, such committees lack independence from the employer and the expertise and power that an outside organizational base can supply.¹²¹

Part of what makes unions effective as watchdogs is an organizational existence beyond the particular workplace. That gives them greater independence from the employer, insulation from reprisals, and expertise than any group of employees alone could have. Unions exist both inside and outside the firm: they supply regulatory eyes and impulses from the workers directly affected, as well as an independent perspective, expertise, and power base. Of course, the existence of a union does not necessarily banish the fear of reprisals and of job loss that might dampen the pursuit of regulatory

¹¹⁹ Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 *Harv. C.R.-C.L. L. Rev.* 345, 348 (2001); Marianne Staniunas, *All Employees Are Equal, But Some Employees Are More Equal Than Others*, 6 *U. Pa. J. Lab. & Emp. L.* 393, 399-400 (2004).

¹²⁰ See *supra* note --.

¹²¹ Indeed, unions might help supply such independence and expertise to employee committees, such as the health and safety committees that are mandatory in some states, even in workplaces in which they do not represent the majority of employees. See Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees*, 5 *U. Pa. J. Lab. & Emp. L.* 75 (2002).

objectives, even those that seek to benefit workers. Still, an organizational existence outside as well as inside the workplace may be essential for an employee representative to serve as the third leg of a tripartite system of regulated self-regulation.

Another problem with securing collective employee representation in non-union workplaces lies in the peculiar provisions of US labor law. The NLRA defines any employee committee that deals with an employer on work-related matters as a “labor organization” – in effect, a union – and goes on to prohibit employers from dominating, interfering with, or supporting such organizations.¹²² Many forms of interaction between employee committees and employers that may seem innocuous to the uninitiated would violate that prohibition. In effect, the NLRA rules out a range of intermediate options between purely individual bargaining and full-fledged union-like representation. In one sense, the NLRA reflects the same concerns expressed above – that employees in a non-union setting are too vulnerable to cooptation and intimidation.¹²³ But it puts the force of federal law behind those concerns, and limits the range of potential experimentation with alternative forms of employee representation within a tripartite scheme for labor standards regulation.¹²⁴ It demands employee representation that is scrupulously independent of the employer or else absent altogether.

A third impediment to non-union forms of employee representation lies in the deep-seated employer opposition to unions and, by extension, to any kind of real collective employee representation.¹²⁵ Even if legal hurdles were surmounted and concerns about

¹²² See NLRA, 29 U.S.C. § 102(5) (defining “labor organization”); § 158(a)(2) (prohibiting employer assistance, interference in or domination of labor organizations). For a small sampling of scholarly criticism, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 *Colum. L. Rev.* 753, 879–983 (1994); Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 *N.Y.U. L. Rev.* 125, 149–55 (1994); Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, 16 *J. Lab. Res.* 387, 389–91 (1995); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 *S. Cal. L. Rev.* 1651, 1706–09 (1999); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 *Chi.-Kent L. Rev.* 129, 141–48 (1993).

¹²³ See Barenberg, *supra* note --.

¹²⁴ On how this provision has stymied experimentation in labor relations more generally, see Estlund, *Ossification*, *supra* note --, at --.

¹²⁵ See Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 *Indus. & Lab. Rel. Rev.* 351, 351 (1990); Julius G. Getman, *Explaining the Fall of the Labor*

efficacy addressed, any proposal to mandate “works councils” or the like would be vehemently opposed by employers, who would see such an entity as a proto-union, the risks of which outweigh the benefits of a more cooperative and less adversarial enforcement regime. (Ironically, some union adherents would see those same employee bodies as proto-*company* unions, and as posing risks of capture and cooptation that negate or outweigh the potential benefits of organized employee participation.) Similarly, if participation in a system of self-regulation were conditioned on the existence of a structured, elected, and independent “employee council” or committee, the system would have few takers among employers in non-union workplaces.

The problem of deep-seated employer aversion to independent employee representation interacts with the problem of chronic underenforcement to frustrate the implementation of a genuinely tripartite scheme of labor regulation. In that framework, a cooperative, firm-centered self-regulatory approach is to be both a reward for and an inducement to good behavior. But the conditions for entry into the self-regulatory arena can be only as demanding as the rewards, tangible and intangible, of self-regulation; and the rewards of self-regulation depend partly on the weight of scrutiny and oversight under the traditional default regime. For most US employers most of the time, the expected cost of adversarial enforcement is too low to justify taking the risk (of unionization) associated with formal employee representation. Without a greater coercive threat, it will be difficult to induce most employers to take meaningful steps toward effective self-regulation, and perhaps least of all steps toward employee representation.

There is one further reason to seek alternatives to workplace-based union-like representation of employees: This form of collective employee representation assumes a bounded workplace, a stable workforce, and a single employer. Trends toward increasing use of temporary, contingent, and contract labor, toward electronic communications and transmission of work product, and toward shorter job tenure and thinner internal labor

Movement, 41 St. Louis U. L.J. 575, 578–84 (1997); Michael H. Gottesman, In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers, 69 Chi.-Kent L. Rev. 59, 61–62 (1993); Paul Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1769–70 (1983).

markets, defy those assumptions.¹²⁶ The increasing contingency, volatility, and even virtuality of workplace relationships casts a shadow not only over traditional forms of union representation and collective bargaining but over proposals for “works councils” or other forms of collective self-governance within a workplace community. Collective representation may be possible in a workplace shared by regular employees (many of short tenure), temporary employees, telecommuters, and the employees of independent contractors, suppliers, and customers; but it might look very different from a traditional union, which engages in exclusive collective bargaining within a fixed bargaining unit. I will return to these possibilities in Parts V and VI.

The proponents of Responsive Regulation make a very strong case that, where it is possible, full-blown tripartism – in which strong and independent labor organizations represent employees vis-à-vis both regulatory agencies and their employers – is the right aspiration for an effective system of self-regulation. But it is a sufficiently elusive aspiration in the current political and labor relations climate in the US that we need to consider alternative mechanisms for making self-regulation work – alternatives that leave open the road, or even take a few steps down the road, toward true tripartism without depending on it.

C. “Ratcheting Labor Standards” and the Role of Monitoring

In light of the problems of underenforcement and “underrepresentation,” it may be useful to consider models of regulation that rely less on intensive state engagement with regulated actors and less on independent union-like employee representation. Therein lies much of the appeal of alternative frameworks such as what Charles Sabel and his collaborators call “Ratcheting Labor Standards” (RLS). Like Responsive Regulation, RLS relies on the internal regulatory capacity of firms themselves and on third-party non-governmental organizations (NGOs). But RLS is a kind of post-regulatory regime that does not depend at all on the state to monitor, inspect, or sanction employers. It was conceived as a way to improve labor standards and enforce international labor rights in

¹²⁶ See Katherine Van Wezel Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L.Rev. 519, 540-548.

developing countries with little or no effective state regulatory capacity.¹²⁷ RLS may also suggest ways to improve enforcement, even in the low-wage non-union workplace, in the face of chronically inadequate regulatory oversight.

1. Ratcheting Labor Standards: Regulating Without States or Unions

The basic idea behind RLS is that the large transnational enterprises at the top of the manufacturing pyramid have enormous untapped enforcement capabilities with regard to their chain of suppliers, including those at the bottom-most rungs of the global production hierarchy; and that those capabilities can be tapped by creating mechanisms of transparency and exploiting these enterprises' vulnerability to public and consumer pressure. As with Responsive Regulation, the focal point of "regulatory" activity is within the firm itself, and specifically within transnational corporations themselves. Those corporations have, by necessity, developed effective ways to monitor and coordinate the activities of far-flung contractors and subcontractors. They have done so in pursuit of the optimal tradeoff between quality and cost. It is of course the cost side of that equation that tends to produce a "race-to-the-bottom" in labor standards. But to the extent that improved labor standards go hand in hand with higher quality, greater agility, and ultimately productivity, the same competitive imperatives can help generate a "race-to-the-top."

A crucial part of the equation, however, is consumer solidarity with workers and repugnance toward exploitative practices. The transnational corporations have enormous investments in their brands, and are highly sensitive to consumer pressure and negative publicity, which can follow the exposure of exploitive labor practices among the corporations' suppliers. These pressures can induce the corporations to enter into "codes of conduct" that commit them to both (1) compliance with international and domestic labor rights and to additional improvements in labor standards beyond what either body of law mandates; and (2) submission to a system of outside monitoring. A central element of RLS is transparency – that is, transmitting reliable information about labor practices and conditions from the bottom layers of the supply chain, located mostly in

¹²⁷ See Blackett, *supra* note --; Bob Hepple, A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct, 20 Comp. Lab. L. & Pol'y J. 347 (1999).

remote, poor, developing nations with no effective regulatory apparatus, to the public and the customers of the multinational corporation in the developed world.

So the crucial actors in RLS, apart from the multinational firms themselves, are non-governmental monitoring organizations (which inspect and certify labor conditions, necessarily with the cooperation of firms), non-governmental advocacy groups (which publicize good and bad labor practices), and consumers (a critical mass of whom can be counted on to prefer brands associated with fair labor practices). Together these actors can drive a “race to the top” – a competition in improved labor standards – among brand-conscious multinational corporations. The prodigious internal resources of the multinationals, together with the power of publicity and consumer pressure, largely supplant governmental oversight and compulsion in an economy that moves faster and reaches further than any government can.

RLS explicitly engages the complexities of modern global manufacturing supply chains. It seeks to harness the resources of the largest, most visible, and most competent (if not always civically virtuous) corporate actors not so much to regulate themselves as to regulate the less competent and less visible entities that supply them with most of the labor that goes into their products. And it seeks to do so in the virtual absence of governmental power in the jurisdiction in which that labor is employed. It is a scheme of “self-regulation” in which the “self” encompasses the entire network of firms that make up the supply chain in much of the manufacturing sector. That redefinition allows for the expansion of self-regulation from the “good corporate citizens” (who qualify for self-regulation under Responsive Regulation) to the near-outlaw firms at the bottom of the labor market. The vulnerability of the scheme lies in the lack of coercive state authority – a “big gun” in RR terms – to reliably discipline the outlaws and opportunists, and in its dependence on the potentially fickle sympathies of comparatively rich consumers, many of whom may prefer to remain ignorant of the conditions under which their sneakers are produced.

The proponents of RLS put forth their scheme as an intelligent consolidation and extension of trends already in evidence among some highly visible multinationals. But the scheme is not fully in place, and the verdict is not yet in as to how well and under

what conditions this scheme works. Some monitoring arrangements that might wish to claim the imprimatur of RLS have been heavily criticized for succumbing to capture by the multinational firms themselves.¹²⁸ Monitors may adopt inspection protocols that allow cheating to go undetected, and may indulge firms' taste for secrecy, thus blocking the crucial flow of information to advocates and consumers.

Of course, where there is no viable regulatory alternative – no state apparatus with effective enforcement capacity – RLS-like systems may not have to work very well to be worth supporting.¹²⁹ But where there is a reasonably competent regulatory regime – as is the case within the US – it may not make sense to sidestep it altogether in favor of a private monitoring regime. Agencies like OSHA and the Labor Department's Wage and Hour Division are usually capable, when they set their sights on an employer, of undertaking investigations, imposing sanctions, and enforcing judgments. The problem within the US is one of underenforcement – inadequate density of enforcement activity and sometimes inadequate remedial or punitive tools. (Of course, another problem within the US is that production doesn't necessarily take place, or stay, within the US. Something like RLS at a global level may be necessary for the support of US labor standards even if we had a fully-resourced and "responsive" domestic regime.) The question becomes whether RLS can teach lessons in how to improve labor standards in the US context of underenforcement and "underrepresentation."

2. Responsive Regulation and RLS: Points of Convergence and Divergence

There are many points of convergence between Responsive Regulation and RLS. Both recognize and seek to mobilize the vast regulatory resources that lie within the modern firm. Both diverge from the "command" feature of "command-and-control," adopting instead a quasi-contractual approach to regulation: Firms agree, under certain constraints, to submit to self-regulatory protocols. Both represent efforts to make "self-regulation" effective, in part by designating non-governmental actors to play crucial roles safeguarding the interests of workers and the public. Both also seek to economize on the

¹²⁸ See Blackett, *supra* note --.

¹²⁹ On the other hand, RLS might be strengthened by a commitment to working with and strengthening local enforcement capacity, see Barenberg, ---, and a commitment to enforcing workers' rights of self-organization and to incorporating workers' voices into the scheme. See *id.* at ---; Blackett, *supra* note --.

traditional resort to governmental oversight and coercion by bringing other actors into the equation.

The two models diverge on other points. Most importantly, government coercion – rarely used but always on call – plays a pivotal role in Responsive Regulation, while it is absent altogether from RLS.¹³⁰ Pragmatists on both sides would recognize that governmental powers and institutions, where they exist, can be brought into the RLS equation in helpful ways, while NGOs might help to fill the partial regulatory vacuum that frustrates the full implementation of Responsive Regulation in the US. We might therefore adopt a hybrid approach in which the role of outside, non-governmental actors expands to the extent that the role and efficacy of government diminishes.

Another point of divergence between the two models is with respect to the identity and role of the non-governmental actors. Responsive Regulation is a full-fledged tripartite regime; it insists on empowering representatives of the primary regulatory beneficiaries, particularly when those beneficiaries are situated within the regulated organization. Responsive Regulation seeks to tap into both the self-interest of those beneficiaries and their intimate knowledge of conditions inside the organization. It would rely on outside entities, with their more diffuse constituencies and altruistic motivations, only when the beneficiaries of regulation cannot speak and act for themselves (as in the case of environmental regulations). The proponents of RLS are rather more hazy and less insistent about the role of the workers themselves and their organizations.¹³¹ Trade unions figure among possible advocates of RLS, monitors and proponents of improvement, and beneficiaries of its regime of transparency. But the workers whose working conditions are at stake play no real role in the scheme.¹³²

¹³⁰ The private, non-state-centered approach to international rights enforcement is both a strength and a weakness. See Paul Redmond, *Transnational Enterprise and Human Rights: Options for Standard Setting and Compliance*, 37 *Int'l Law*. 69 (2003).

¹³¹ See Sabel, et al., *supra* note –, at --.

¹³² Adelle Blackett is critical of many corporate codes of conduct in the global manufacturing context for their neglect of worker representation; she seeks to inject a broadened conception of “tripartism-plus” to include representation by NGOs. See Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *Ind. J. Global Legal Stud.* 401, 436-40 (2001).

The absence of worker involvement is a weakness of RLS, but it may be simply realistic in the context of developing countries with little or no governmental enforcement capacity and no real protection for workers' ability to organize and speak for themselves. The freedom of association among workers is in fact one of the international labor rights that is most systematically and harshly suppressed in parts of the world in which the most labor-intensive phases of manufacturing are increasingly performed. The vulnerability and dependence of the workers themselves may justify the turn in RLS to outside NGOs, which have the considerable advantages of both independence and the ear of wealthy consumers. Of course, outside groups are at a disadvantage, relative to the workers themselves, with respect to knowledge about working conditions. So RLS relies on both advocacy organizations (who can supply independence and economic leverage) and monitoring organizations (who inspect workplaces and supply information to advocacy groups and consumers) to perform the functions that Responsive Regulation assigns to employees' own organizations.

The US presents an intermediate case between the comprehensive but misdirected regulatory environment that Responsive Regulation seeks to reconfigure and the regulatory wilderness that RLS seeks to tame. A usable hybrid model for the US should take into account both the reasonably competent but undersized public agencies at issue *and* the formally-established but underenforced freedom of workers to join together and act in support of shared interests.

3. The Multiple Uses of Monitoring

The deployment of independent outside monitors in particular is a vital innovation that may help to supply some of the independence and expertise that unions supply within Responsive Regulation's tripartism but that are missing from the non-union and anti-union workplaces that predominate within the US. While collective employee representation is essential to a full-fledged tripartite system of monitored self-regulation, monitoring itself, even without direct collective employee representation, can help liberate employee voice, individual and collective. It "triangulates" tripartism, advancing not directly along the path toward collective representation, but perhaps diagonally in the right direction by helping to liberate individual employee voice and to give voice to

outside worker advocates. Monitoring may thus enhance the prospects for employee representation and tripartism for in the future.

Take, for example, the Green Grocer Code, which largely lacks mechanisms for direct employee representation but which may nonetheless take a step toward employee empowerment. Employers under the GGCC submit to unannounced inspections by monitors who are themselves overseen by and accountable to employee advocacy organizations, as well as the AG. These independent monitors multiply regulatory eyes within the workplace and help to give voice to individual employees. Private meetings between monitors and employees, with formal assurances of non-retaliation and a open channel of communication between employees and monitors, may go some distance toward quelling the employee fear that corrodes any system of workplace rights. Workers are afforded, though not a collective voice, at least a chance of exercising their individual voices. And at least insofar as the monitors themselves can judge, workers interviewed pursuant to the GGCC do appear to feel free to speak to them about employer practices.¹³³

Monitoring works in some rather diffuse ways to advance workers' freedom of association and expression. For the presence of outside monitors cracks open the doors of the workplace to a degree of public or quasi-public scrutiny beyond what rare and tightly regulated public inspections could do; they demonstrate tangibly to employees that their rights matter and that someone is watching out for them. An employer's agreement to submit to monitoring represents the negotiated surrender of part of the sovereignty that employers still claim over the workplace. As it did before the New Deal, employer sovereignty over the physical workplace presents no small challenge not only to the regulation of working conditions but to competing principles of democracy and freedom of association within the workplace.¹³⁴ Breaching employer sovereignty by the introduction of third parties – parties accountable to the public interest and independent of the employer – can advance those competing principles at least indirectly.

¹³³ Communication w/ Patricia Smith, Associate Attorney General of New York, Labor Division (7/13/04).

¹³⁴ The contest between property rights and labor rights has been a persistent theme under the NLRA, most recently and overtly in the battle over union organizer access to employer property. See Cynthia Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 *Stan. L. Rev.* 305 (1994).

Monitoring also works in more concrete ways, in part by formalizing and protecting employee “whistleblowing.” Effective outside monitoring both depends on and helps to promote employees’ ability to speak up for themselves without fear of reprisals. If a system of outside monitoring contains effective assurances of non-retaliation for individual employees who speak up – and it must do so to work at all – then it may help to lay the groundwork for employees to speak to each other as well and to associate for other shared workplace goals. If outside monitoring helps to alleviate the corrosive problem of employee fear, it may represent a step toward the liberation of employee voice more generally.

D. Refining Monitored Self-Regulation: A Sarbanes-Oxley for the Workplace?

The importance of employee “whistleblowers” and of monitor independence and accountability in a monitoring regime suggest yet a third source of insights: theories and institutions that seek to insure corporate integrity and accountability. The twentieth century model for avoiding corporate misconduct and fraud couples a mandatory regime of disclosure with what we can fairly call a system of monitored self-regulation.¹³⁵ Recent corporate scandals dealt a blow to the proponents of self-regulation, but the most tangible legal response to those scandals, the Sarbanes-Oxley Act, relies less on new forms of regulatory oversight than on new ways of shoring up self-regulation: the law seeks to insure the independence and public accountability of the outside monitors or auditors, and to formalize and protect employee “whistleblowing.”¹³⁶

The problems that have come to light in recent corporate scandals are analogous to the problem of widespread disregard of labor standards: The pressure to maximize profits (or apparent returns) generates a tremendous temptation on the part of managers to cut corners and to disregard the constraints of external law. Knowledge of legal

¹³⁵ For one criticism of the reliance on self-regulation, see William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 *Tul. L. Rev.* 1275 (2002). William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 *N.C. L. Rev.* 1861, 1892-98 (1995). For a more favorable view, see Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes Of Conduct*, 78 *Geo. L.J.* 1559, 1647 (1990) (exploring history and advocating expanded use of corporate codes and self-governance mechanisms

¹³⁶ On the centrality of these outside monitors or “gatekeepers” in guarding against corporate misconduct, see John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 *B.U. L. Rev.* 301 (2004).

transgressions is mostly confined to insiders within complex organizations and is hidden from public view and public enforcement. And the individual employees who do have that knowledge – who might be moved to expose the illegal conduct – are often economically dependent on the transgressors at the top of the organization and vulnerable to reprisals. Of course, at that level of generality, the problem is simply that of organizational compliance with law generally – the very problem with which the theory of Responsive Regulation grapples. But the traditional system of safeguards against corporate self-dealing, and recent legislative efforts to strengthen that system, highlight some essential elements and lend them a here-and-now political resonance that both Responsive Regulation and Ratcheting Labor Standards may lack.

In the corporate governance context, the traditional solution to the problem of hidden corporate self-dealing has been thought to lie chiefly in the mandated deployment of independent, publicly licensed auditors – themselves subject to a system of professional self-regulation – who must certify the firm's compliance with relevant standards of accounting and disclosure. Sarbanes-Oxley sought to fortify that system of outside auditing (or monitoring) and to combat the capture of auditors by imposing measures designed to insure the professional independence of the auditors from the regulated firms, by strengthening the self-regulatory oversight of auditors, and by imposing new liabilities on those auditors.¹³⁷ At the same time, legislators sought to tap into the enormous regulatory potential that resided within corporations themselves by encouraging employees to disclose wrongdoing. To that end, the law prohibited reprisals against employee whistleblowers, and backed that prohibition with both criminal sanctions and a

¹³⁷ So Sarbanes-Oxley (1) prohibited auditors from engaging in certain other lucrative forms of business with corporate clients; (2) created a new "Public Company Accounting Oversight Board" to oversee public accountants; and (3) imposed new liabilities on auditors. For a summary of major provisions, see John C. Coffee, Jr., A Brief Tour of the Major Reforms in the Sarbanes-Oxley Act, ALI-ABA Continuing Legal Education, December 5, 2002. Whether these new measures will restore the crucial regulatory role of these "gatekeepers" is questionable in light of hurdles to private enforcement of the securities laws that in the past may have supplied the primary deterrence to gatekeeper misconduct or negligence. See Coffee, *supra* note --, at --.

private right of action with the full panoply of tort and equitable remedies: compensatory damages, backpay, reinstatement, attorneys' fees, and litigation costs.¹³⁸

Sarbanes-Oxley thus fortifies an existing system of monitored (and regulated) self-regulation by combating the capture of monitors and by protecting and institutionalizing employee whistleblowing – that is, by ensuring the independence and accountability of the outsiders looking in and by encouraging insiders to speak out. With the backdrop of billions of dollars lost by shareholders and pocketed by insiders, Congress backed up these measures with beefed up criminal and civil penalties – “big guns,” indeed – administered by the SEC. But much as in the labor standards context, the mismatch between agency resources and the number and complexity of the regulated actors insures that the SEC and public prosecutors can play only the most episodic role in enforcement. While even an occasional criminal prosecution of a top executive can pack a surprising deterrent punch, “enforcement” is assumed to come primarily from private securities litigation.¹³⁹

These lessons are directly relevant to the development of an effective system of monitored self-regulation of workplace rights and standards. I have emphasized the importance of outside independent monitoring; but Sarbanes-Oxley counsels the adoption of specific safeguards against the capture of monitors by the monitored firm – such as certification and selection by a tripartite oversight group, use of approved inspection protocols, and conflict-of-interest prohibitions. I have also underscored the importance of employee voice – ideally the independent collective representation required by full-fledged tripartism, but at least the vigorous encouragement and protection of individual employees who speak up about rights and regulatory infractions. That translates into both confidential communications between monitors and employees and the vigorous protection of whistleblower. Sarbanes-Oxley represents the gold standard in protection

¹³⁸ The criminal prohibition is codified at 18 U.S.C. § 1514 A; civil enforcement provisions appear in Section 806(b) of the Act.

¹³⁹ Hence one potent criticism of the resulting scheme: Hurdles to private enforcement of securities laws that were imposed by the Private Securities Litigation Reform Act of 1995 (“PSLRA”) and Supreme Court decisions (and not dismantled by Sarbanes-Oxley) weaken the most important “stick” that deterred both corporate insiders and gatekeepers from engaging in or tolerating abuse. See Coffee, *supra* note --, at -

of employee whistleblowers, with both criminal sanctions and fully compensatory private civil remedies against reprisals. Given the limited resources of public agencies, at least in the labor context, the Sarbanes-Oxley model of private rights of action for whistleblowers is especially worthy of emulation. Therein also lies the third lesson to be taken from the model of securities regulation and Sarbanes-Oxley: Private litigation can supply some of the enforcement energy and motivation that is supposed to emanate from the state in Responsive Regulation and that is seemingly missing from RLS.

E. A Hybrid Model of Monitored Self-Regulation

Drawing on the theory and practice reviewed above, and considering the constraints of limited public enforcement and limited collective representation of employees, I propose a hybrid model of effective self-regulation in the workplace. The Responsive Regulatory model supplies the fundamental notion of encouraging self-regulation, and tapping into the pro-compliance capabilities and impulses within the firm, largely through a combination of inducements and threats, while conditioning the privilege of self-regulation on the presence of safeguards against cheating by firms and capture of regulators. Also drawn from Responsive Regulation are the utility of state scrutiny and coercive sanctions, episodic though they may be; the concept of multiple regulatory tracks; and the aspiration to tripartism – to giving an institutionalized voice to the workers whose interests are most immediately at stake.

RLS teaches the crucial lesson that regulation is possible without state regulators (and therefore with only episodic interventions by state regulators). For our hybrid model, RLS supplies the basic framework of “codes of conduct” – quasi-contractual commitments that include but frequently go beyond the requirements of public law; the crucial innovation of independent monitoring as a partial substitute for state enforcement; the recruitment, at least in the non-union setting, of other external actors such as independent worker advocacy organizations to supply rewards and sanctions and to transmit information; the leveraging of regulatory resources within larger and more advanced firms to reach the smaller, less visible, and less competent firms that supply them with goods and labor; and the ambition of reaching the worst performing workplaces with this innovative constellation of actors.

Finally, from the recent response to corporate scandals, and scholarly and legislative assessments of the strengths and vulnerabilities of a system of monitored self-regulation, I draw three elements: the need for close attention to the prerequisites for vigorous and independent monitoring (or auditing); the strong and privately-enforceable protection of employee whistleblowers against reprisals; and the value of private litigation on behalf of victims of misconduct as a supplemental form of enforcement and deterrence where public regulators are unable (or unwilling) to enforce the law.

The net result is a hybrid model that uses targeted public enforcement and private litigation to back up, and to induce entry into, a system of monitored, quasi-tripartite self-regulation. That requires the following elements:

- (1) A voluntary system of monitored self-regulation in which employers agree (or, where circumstances permit, agree to require their contractors or suppliers¹⁴⁰):
 - a. to comply with a code of conduct that incorporates (but potentially supplements) legal rights and standards, and
 - b. to submit to monitoring of code compliance by entities that
 - i. are independent of the employer and accountable to workers and the public, and
 - ii. follow inspection protocols and standards of good practice that include confidential communication with employees as well as monitoring of employer records;
- (2) Targeted public enforcement, with the threat of potent sanctions, against the worst lawbreakers, along with the willingness to hold sanctions in abeyance for those who submit to a system of self-regulation under (1);
- (3) Private rights of action on behalf of employees whose rights are violated, including whistleblowers, subject to a partial defense (especially against supercompensatory remedies) based on participation in self-regulation under (1);

¹⁴⁰ Under existing FLSA law, for example, that would be where either (1) the target employer could be held liable as a joint employer of the contractor's employees, see *supra* note --; or (2) the contractors produce goods in violation of the FLSA (e.g., by paying sub-minimum wages) that can be subjected to the "hot goods" embargo to the detriment of the target employer.

Monitoring arrangements might be adopted voluntarily by firms seeking a prospective partial shield against targeted prosecution, criminal liability, excess fines, or punitive damages; or they might be negotiated between public or private enforcers and targeted violators as the condition for escaping potent and potentially ruinous sanctions. Monitors would have to distinguish cheating by self-regulators from good faith violations, and would have to help public agencies and judges make the same distinction; for the former but not the latter would be grounds for losing the partial shield against public or private enforcement.

A good moniker for this hybrid is essential, and “monitored quasi-tripartite self-regulation” is not it. Let us call this model “monitored self-regulation,” in light of the pivotal role of monitoring and the enlarged “self” that is implied by the incorporation of employees’ own voices.

V. Monitored Self-Regulation of Labor Standards: Assessing Existing Experiments and Future Possibilities

Among the experiments with self-regulation in the US that we have discussed, none fully meets the prescriptions of “monitored self-regulation” (or of Responsive Regulation or RLS). But a quick look back at three of these programs may help to give further definition to both the vulnerabilities and the possibilities of self-regulation within the US context. I will follow this with a glance into the future and the prospects for a fuller realization of the promise of monitored self-regulation.

A. A Critical Look at Self-Regulatory Experiments Within the US

OSHA’s Voluntary Protection Program: The VPP tracks the basic outlines of Responsive Regulation in some respects. It is a cooperative program designed to induce high performers to undertake much of the regulatory work; the inducement takes the form of foregoing some traditional adversarial processes – for example, unannounced inspections – in exchange for employers’ documented commitment to improved workplace safety.

The VPP is also nominally “tripartite” in explicitly requiring employee involvement. Employers who wish to participate in the VPP must show that employees support participation, and that employees are “involved” in the enforcement process. Where a

union is in place, it must support the employer's application, and must participate in the VPP application process and in the self-regulatory program itself. But in the non-union workplace, the requirements of employee support and involvement can be met through individual employee participation. The regulations specify that "[e]mployees must be involved" in the employer's safety and health program "in at least three meaningful, constructive ways in addition to their right to report a hazard." This requirement can be met through individuals' participation, for example, in "audits, accident/incident investigations, self-inspections, suggestion programs, planning, training, [or] job hazard analysis."¹⁴¹ These forms of employee involvement do not address the public goods problem associated with workers' interest in safety, and provide no on-site collective support, power, or expertise to back up individual workers where they may be at odds with management. In short, the VPP's conception of "employee involvement" falls short of the "employee representation" called for by a genuine tripartism.

To be sure, one optional avenue for "meaningful, constructive" employee involvement in the non-union workplace is through "*appropriate* safety and health committees and teams." The VPP's very tentative embrace of safety and health committees reflects in part the hurdles that current labor law poses to non-union forms of employee representation. But that is not the whole story, for the VPP could have mandated the kind of scrupulously independent employee committees that the NLRA permits. That it does not do so may have more to do with employer opposition to independent employee representation than with the legal gauntlet created by the NLRA. Closer to the mark were the health and safety committees that would have been mandated by Clinton-era OSHA reform legislation. But employer opposition to the prospect of independent employee representation (as well as union skepticism about the possibility of independent employee representation in a non-union setting) contributed to the demise of that reform proposal.

Still, the hybrid "monitored self-regulation" approach suggests that the impasse might be unsettled if not broken, and the VPP could be improved, by the introduction of

¹⁴¹ As for employee support, an employer's claim of "employee support" in a non-union workplace is to be verified mainly by consultation with individual employees during the on-site evaluation of the program.

outside monitoring, at least in the non-union workplace.¹⁴² An outside monitoring body with health and safety expertise that is independent of the company and accountable in part to organizations that represent workers (that is, unions, state or local labor federations, or other bona fide worker advocacy organizations) would inject aspects of tripartism that are otherwise missing from the program as it operates in the non-union workplace. Even in state programs that do mandate health and safety committees, there is enough doubt about the independence and capabilities of employees in the non-union setting to militate for the reinforcement that could be provided by independent monitoring organizations.¹⁴³

Such a program – as long as it is voluntary– may be unlikely to attract employer participation absent some stepping up of enforcement pressure and of sanctions. That problem points to the basic weaknesses of OSHA: The low background threat of public enforcement, together with the lack of private enforcement mechanisms, even on behalf of whistleblowers. Absent serious reforms to federal OSHA, the prospects for successful experiments in monitored self-regulation of occupational health and safety may be confined to those states that have their own more ambitious programs.

The “Hot Goods” Textile Program: The Department of Labor’s textile program contains some elements of a hybrid “monitored self-regulation” approach. The program relies on the government’s wielding a “big gun” to motivate larger and more visible firms to take the lead in monitoring the smaller and less visible firms that supply them, and that are especially likely to be flouting labor standards. Missing from the textile program, however, is any form of employee participation, either within the monitored firms themselves or within the monitoring organizations. Nor do there appear to be any clear requirements governing the independence, expertise, public accountability, or inspection protocols of outside monitors. In short, there appear to be few safeguards against the capture or cooptation of monitors by employers.

¹⁴² For another proposal to incorporate third-party monitoring into a system of self-regulation of health and safety, see Neil A. Gunningham, *Towards Effective and Efficient Enforcement of Occupational Health and Safety Regulation: Two Paths to Enlightenment*, 19 *Comp. Lab. L. & Pol’y J* 547 (1998).

¹⁴³ Doubt about the legality of such committees under the NLRA have been at least provisionally resolved. See NLRA General Counsel’s Advice Memorandum on legality of state-mandated safety committees.

The program's modest success even without these safeguards should count as evidence in support of the potential of monitored self-regulation. However, our foray into regulatory theory gives reason to believe that the program could be improved by the involvement of worker representatives in monitoring compliance, and by stricter regulation of outside monitors to insure their independence and accountability to the public. Such independence and accountability, and a modicum of labor involvement, might be secured through a tripartite oversight mechanism: The monitors themselves might be overseen by organizations that include employee or union representation. That would keep alive the aspiration toward tripartism, and secure some of its regulatory benefits, in a non-union and notoriously low-wage sector.

The Green Grocer Code of Conduct: Some of these additional elements are found in the Green Grocer program, which comes closest to the model hybrid approach. The scheme gains most of its motivating force from the threat of state enforcement. The threat of costly prosecution of past violations got the scheme off the ground, and the threat of enforcement on a going-forward basis appears to be a driving force behind compliance. The Code also makes important use of outside monitoring, and seeks to recruit consumers into the regulatory scheme by publicly certifying participation.

The Green Grocer Code also tips its hat to tripartism by recognizing the importance of employee representation. Employee representatives from outside the green grocer sector – specifically, advocacy organizations representing workers' interests – do play a role in Code enforcement. This role is a direct growth of the instrumental role that these organizations played in the initial investigations and campaign for enforcement. Individual employees have a role as well, for they are guaranteed the opportunity to meet privately with monitors during unannounced inspections, and are offered assurances against retaliation. Recall, however, that collective employee representation within the regulated businesses is recognized only symbolically. Because of the adamant opposition of employers to the notion of employee representation, it is only in the few green groceries with more than ten employees that the GGCC calls for the appointment of employee spokespersons in connection with monitoring of pay practices. Even while agreeing to allow independent third party monitors to enter their businesses, inspect records, and meet privately with individual employees, these employers balked at the

most rudimentary form of collective representation of and by their own employees.

The dual problems of underenforcement and employer resistance to employee representation clearly impede efforts to develop effective self-regulatory measures. Still, the Green Grocer Code may point in a fruitful direction. Its apparent success in improving compliance suggests that monitored self-regulation can be a useful regulatory strategy for dealing with employers who reside at the grim end of the spectrum from consummate compliance to chronic defection. It also suggests that, given the practical and legal difficulties of securing genuinely independent employee representation in the non-union context, and especially in low-wage, low-visibility workplaces, a tripartite structure for this sector may look quite different from its initial theoretical depiction. The third leg of tripartism may need to be cobbled together out of a combination of individual employees and other non-governmental actors – such as the advocacy and monitoring organizations that populate the RLS landscape and that play a role in the Green Grocer Code. The latter can supply some of the independence and expertise that employees themselves lack in these workplaces. The resulting constellation of internal and external actors may together be able to serve most of the functions that unions ideally serve within a fully tripartite regime.

The modest successes of the DOL's program for wage and hour enforcement in the textile industry and the Green Grocer Code suggest, as Responsive Regulation would predict, that "big guns" are crucial to effective enforcement of labor standards in the low-wage sector. In the former case, the threatened use of the regulatory "big gun" of the goods embargo induces manufacturers to deploy the economic "big gun" of withholding business from non-compliant contractors. Directly or indirectly, both schemes illustrate how regulators, when they do aim their "big guns" at noncompliant employers, can induce them to opt for cooperation over defection, and for regulated self-regulation over traditional coercive sanctions, even if that requires acceptance of conditions (such as monitoring) that they might otherwise seek to avoid. One of those conditions should be employee involvement and empowerment.

B. The Next Step: The “Representation Remedy”

Both the “hot goods”-textile program and Green Grocer programs show the way toward incorporating both monitoring and employee representation into prospective *remedies* for violation of labor standards. Once chronic defectors have been identified and brought within the grip of regulators, they might be induced to accept a “representation remedy” as the price of continued operation. Enforcement agencies could supervise election of representatives, and place the representatives under the protection of the agency and of outside monitors.

The primary logic of the “representation remedy” would be prophylactic: Employee representatives, with a protected line of communication with both outside monitors and regulators, would multiply regulatory eyes within the workplaces most in need of scrutiny. The “representation remedy” would help focus regulatory attention on the workplaces that are most evidently in need of it and, in particular, most in need of the benefits that collective employee voice can bring. The remedial context would both legitimate and facilitate a level of active regulatory oversight – of the election process, of the provision of information, of meetings, and of enforcement activity – that would be necessary for a representation scheme to function in a hostile environment, but that would be infeasible across the board.

But there is another side to the logic of a “representation remedy”: The typical low-wage employer might find such a prospect alarming enough to be worth avoiding; it might help to deter misconduct. There is ample evidence that union avoidance – indeed, aggressive and, if necessary, illegal union suppression – is a central tenet of the low-wage model of production.¹⁴⁴ It is part of cluster of illegalities, along with health and safety, wage and hour, and immigration violations, that characterizes much of this layer of the labor market. Apparently low-wage employers perceive independent employee representation as a danger assiduously to be avoided. That would make the “representation remedy” a significant deterrent – a novel “big gun.” Government-imposed employee representation is not the equivalent of shutting a business down, or of

¹⁴⁴ See Harry C. Katz & Owen Darbshire, *Converging Divergences: Worldwide Changes in Employment Systems* 21-22 (2000).

crippling fines. And it should not supplant other remedies and penalties for non-compliance. But as part of the regulatory response to a pattern of illegality, it may be quite a fearsome prospect and a useful addition to the standard remedial arsenal.

Of course, the atmosphere of threats and fear by which employers often suppress union activity in these low-wage workplaces makes it hard to imagine how a government-imposed employee representation scheme could function effectively. There is a significant risk that these bodies would become a sham or, worse, an anti-union device. Clearly a “representation remedy” would require oversight, support, and protection – by the public agency or an independent monitor with a direct line to the agency – to insure the independence of the employee representatives and their protection from reprisals. But if that could be done, the employee representatives would provide a very useful channel of information from inside these worst workplaces to external public and private enforcement authorities.

The low wage sector presents many challenges to this or any enforcement strategy. Some low-wage employers have such a tenuous investment in capital and reputation that going out of business may be a low-cost response to enforcement. But where those low-wage employers supply labor or products to more rooted and visible employers, and where the latter can be brought within the regulatory net – either by their potential liability as joint employers of the low-wage workers or by the “hot goods” embargo – there are economic carrots as well as regulatory sticks to deploy. The “representation remedy,” like the monitoring arrangements in the DOL’s apparel program, might become part of what the latter, larger employers can be induced to exact from their contractors as a cost of doing business.

The full implementation of this or any scheme of employee representation in the US may be a long time coming. The politics are unpromising, given the likelihood of both employer opposition and union skepticism. In the meantime, however, existing experiments in self-regulation show the way to better mechanisms for securing labor standards compliance, even among marginal low-wage segments of the labor market. Effective enforcement of minimum standards in the workplace depends on liberating employee voice from the shackles of fear and insecurity, and on aggregating that

employee voice to overcome the collective action problems that depress efforts to secure what are typically “public” workplace goods. The two parts of this strategy are intertwined, and must both be part of any effective regulatory strategy for the low-wage workplace.

C. Other Forms of Worker Representation within a System of Monitored Self-Regulation

The pace and extent of change in the organization of work, while it is sometimes exaggerated, does pose a serious challenge to conventional conceptions of employee self-governance. Looking forward, it will be necessary to devise forms of employee representation for workers who do not belong to a stable and cohesive community of workers within a single physical work site, or who are unable to traverse the long and perilous path to exclusive majority employee representation within a particular workplace.

One possibility is for unions to expand their horizons and their activities to encompass non-exclusive, non-majority forms of representation. Some workers may be organizable or even organized along craft or occupational lines; others may be organized by region or industry.¹⁴⁵ Others have explored the possibilities for non-exclusive union representation and the role that such organizations might play in the enforcement of employment law.¹⁴⁶ One such model is “Open-Source Unionism,” put forward by Professors Richard Freeman and Joel Rogers.¹⁴⁷ They propose that unions affiliate with workers as individuals or as less-than-majority groups of workers, and offer services –

¹⁴⁵ For proposals for alternative configurations for worker representation, see, e.g., Alan Hyde, Katherine Stone,

¹⁴⁶ For scholarly exploration of non-majority unionism, see Charles Heckscher, *The New Unionism: Employee Involvement in the Changing Corporation* 8, 177, 189-90 (1988); Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481 (1992); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 655; Alan Hyde, Frank Sheed, & Mary Deery Uva, *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 Rutgers L. Rev. 637 (1993); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 916-17, 921 (1991); Clyde Summers, *Unions Without Majority--A Black Hole?*, 66 Chi.-Kent L. Rev. 531, 548 (1992).

¹⁴⁷ See Richard Freeman & Joel Rogers, *Open-Source Unionism: Beyond Exclusive Collective Bargaining*, 6 Working USA 2 (2002). All of these activities may or may not lead to a traditional union organizing campaign for exclusive bargaining rights.

including information, expertise, and even representation in the enforcement of workplace rights – outside the exclusive collective bargaining setting. Freeman and Rogers put much emphasis on the ability to offer many of these services, and to create a network of union-friendly workers, at very low cost over the Internet.

Unions operating on such a model may assist workers in identifying violations; they may provide legal representation to employees seeking to vindicate their rights; they may alert public agencies to the existence of violations and pressure them to prosecute them; they may publicize violations and generate public and consumer pressure on violators.¹⁴⁸ Many of these activities would strengthen a system of monitored self-regulation indirectly by increasing the prospects for adversarial public or private enforcement. To the extent unions' role extends to the prosecution of private rights of actions, I will return to it in the next section. But non-majority unions could also participate more directly in a system of monitored self-regulation. For example, they could, as they do in the Green Grocer Code of Conduct, compose part of the oversight body for code monitors.¹⁴⁹ They could provide a check against cheating on the part of self-regulators by providing a back-channel from employees to monitors or regulators. And they could assist and even represent employee whistleblowers who suffered reprisals for reporting violations inside or outside the firm.

Of course once unions step outside the scope of exclusive collective bargaining, they may be in competition with other organizations that advocate the interests of workers or particular groups of workers.¹⁵⁰ Workers' centers and advocacy groups, many of which respond to the interests of immigrant workers from particular ethnic groups, can do many of the things that unions can do (and have sometimes proven willing to do them when unions have not).¹⁵¹ One such a group, Casa Mexico, provided that kind of

¹⁴⁸ Indeed, unions did nearly all these things in connection with the Green Grocer Code. See Smith Interview, *supra* note --, at --.

¹⁴⁹ See Smith Interview, *supra* note --, at --.

¹⁵⁰ On the desirability of expanding the kinds of associations that can serve as a collective employee voice in the context of global labor regulation, see Blackett, *supra* note --, at --.

¹⁵¹ For an excellent account of one such worker center, its role in enforcing workers' statutory rights, and its relation to trade unions, see Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 *Harv. C.R.-C.L. L. Rev.* 407 (1995).

representation in securing, and then in overseeing enforcement of, the GGCC on behalf of the predominantly Mexican green grocer workforce. Unions that have evolved in the collective bargaining context begin with the advantages of expertise, a large organizational base, and the resources that go with it. But if unions are not both willing and able to assist workers whom they do not represent in an exclusive collective bargaining context (and who they are not currently seeking to organize on that basis), then other groups can and should step into that role.¹⁵²

D. A Role for Private Litigation

I began by dividing the growing field of employment law into employee rights enforceable through litigation and workplace standards enforced by regulatory agencies. But that division turns out to be somewhat artificial, for employee rights, some of them backed with private rights of action, are embedded within many of the labor standards regimes, and offer potential leverage to private sector worker advocates. Private lawsuits can potentially help to fill the enforcement gap left by the undercommitment of public resources; indeed, they can sometimes supply a “big gun” where public enforcement has none to wield. They can also provide a check on public agencies’ failure to enforce the laws.¹⁵³ Private rights of action can function as “destabilization rights.”¹⁵⁴ They can help mobilize or simply bypass public regulators that become captured, hamstrung, sclerotic, or ideologically resistant to enforcing statutory labor standards.

Of course they can do that only where the law affords private rights of action. There are essentially none to be had within the arena of occupational health and safety. Unlike the FLSA, OSHA affords no private right of action to employees who are subjected to

¹⁵² I do not mean to imply it is only a matter of will. Representation of non-members will cost something, and unless it generates some new revenues, it will draw away from the representation of members and from the value of collective bargaining representation. That is why Freeman and Rogers emphasize the low-cost use of the internet to offer services.

¹⁵³ See Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1015 (2004). Sabel and Simon borrow the term from Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* 530-35 (1987).

¹⁵⁴ Sabel and Simon define destabilization rights as “claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.” *Id.* at 1020. They address mainly public service providers – schools, prisons, public housing agencies, and the like – and the institutional reform litigation that has become a near-permanent feature of the public law landscape. But a variation of the concept applies equally well to

safety hazards or injured as a result of noncompliance. Nor can workers turn to state tort law to promote health and safety reforms indirectly. Tort law would normally make firms internalize the cost of injuries caused by workplace hazards, and would stimulate precautions against accidents.¹⁵⁵ But state worker compensation laws channel nearly all workplace injury claims out of the tort system and into a low-profile, sub-compensatory administrative system.¹⁵⁶ Whatever creative energies might have been unleashed by the threat of megabucks tort liability for workplace accidents remain well caged.

Even private rights of action for employee whistleblowers who are fired for reporting safety concerns are rare and endangered. OSHA's whistleblower protection provision – an administrative remedy that affords no private right of action and no compensatory or exemplary damages – is notoriously ineffectual.¹⁵⁷ Several state courts have held that the discharge of job safety whistleblowers violates public policy and is a tort.¹⁵⁸ But some state courts foreclose such common law actions based on the existence of a remedy under OSHA.¹⁵⁹ A major goal for the improvement of health and safety regulation, and an important condition for the development of an effective system of monitored self-

¹⁵⁵ See Guido Calabresi, *The Cost of Accidents* (1970).

¹⁵⁶ For critiques and proposals for the reform of the undercompensatory and underdeterrent features of workers compensation, see, e.g., William J. Maakestad & Charles Helm, *Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives that Influence Employer Decisions to Control Occupational Hazards*, 17 *N. Ken. L. Rev.* 9 (1989).

¹⁵⁷ Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 *Hous.L.Rev.* 99, 115-17 (1994)

¹⁵⁸ See *Kulch v. Structural Fibers, Inc.* 677 N.E.2d 308 (Ohio 1997); *Motarie v. Northern Montana Joint Refuse Disposal Dist.* 907 P.2d 154 (Mont. 1995); *Cerrachio v. Alden Leeds, Inc.* 538 A. 2d 1292 (N.J.Super.A.D. 1988); *Reed v. Municipality of Anchorage* 782 P. 2d 1155 (Alaska 1989); *Cloutier v. Great Atlantic & Pacific Tea Co., Inc.* 436 A.2d 1140 (N.H. 1981); *D'Angelo v. Gardner* 819 P.2d 206 (Nev. 1991).

¹⁵⁹ Although OSHA does not expressly preempt state wrongful discharge actions, a few courts have held that OSHA implicitly preempts such action, see *Hines v. Elf Atochem N. Am., Inc.*, 813 F.Supp. 550, 552 (W.D. Ky. 1993); *Braun v. Kelsey-Hayes Co.*, 635 F.Supp. 75, 80 (E.D. Pa. 1986). Most courts have found no preemption. See *Schweiss v. Chrysler Motors Corp.*, 922 F.2d 473,475 (8th Cir. 1990); *McElroy v. SOS Int'l Inc.*, 730 F.Supp. 803 (N.D. Ill. 1989); *Hentzel v. Singer Co.* 188 Cal.Rptr. 159 (Cal.App. 1982). But several courts have held that, even absent federal preemption, state common law precludes a tort action where a federal or state statute provides an "adequate" remedy for the discharged employee, and that OSHA provides such a remedy. See *Miles v. Martin Marietta* 861 F.Supp. 73 (D.Colo 1994); *King v. Fox Groceries* 642 F. Supp. 288 (W.D. Pa. 1986); *Grant v. Butler* 590 So.2d 254 (Ala. 1991); *Burnham v. Karl & Gelb, P.C.* 1997 WL 133399 (Conn.Super.Ct. 1997); *Walsh v. Consolidated Frieghtways* 563 P.2d 1205 (Or. 1977). Other courts have held that OSHA does not provide an adequate remedy. *Flenker v. Willamette Industries, Inc.* 967 P. 2d 295, 300 (Kan. 1998); *Shawcross v. Pyro Products, Inc.* 916 S.W. 2d 342 (Mo.App. E.D. 1995); *Antlitz v. CMJ Management Co.*, 1997 WL 42396 (Mass.Super. 1997).

regulation, must be the preservation and expansion of private rights of action in this arena.¹⁶⁰

But where there are private rights of action, litigation has proven to be a potent stimulus to workplace reform. We in the US do not do regulation especially well, but we do litigation better than any society in the world. Litigation has effectively become our primary mode of workplace regulation in some areas, especially under the civil rights laws. Consider the impact of discrimination and harassment lawsuits on employer practices and workplace culture. Patterns of conduct that were endemic to many workplaces began to produce costly judgments in a relative handful of cases; employers responded eventually with an arsenal of antidiscrimination and antiharassment policies and procedures – and with what now goes under the name of “diversity initiatives” – that have genuinely transformed the employment landscape and the working environment for many women and minorities. Antidiscrimination doctrine has lately come around to formally recognizing and rewarding those initiatives, giving further impetus to their growth. Private litigation has effectively brought about the existing regime of “regulated self-regulation” in the workplace.

Private litigation under the wage and hours laws has much the same potential. Until recently, private wage and hour litigation was a rather negligible phenomenon largely confined to small claims courts and bankruptcy proceedings. But the private bar has recently discovered that aggregate wage and hours claims – including those on behalf of low-wage workers – can be very lucrative: Both the violations and the resulting liabilities are often substantial and provable.¹⁶¹ Employers have begun to take notice of the resulting surge of lawsuits alleging the violation of state and federal wage and hours

¹⁶⁰ That might be done through an expansion of tort liability, through reform of workers compensation, or a combination. See William J. Maakestad & Charles Helm, Promoting Workplace Safety and Health in the Post-Regulatory Era: A Primer on Non-OSHA Legal Incentives that Influence Employer Decisions to Control Occupational Hazards, 17 N. Ken. L. Rev. 9 (1989).

¹⁶¹ The FLSA itself allows for “collective actions,” a form of opt-in group action. See 29 U.S.C. §216(b). Parallel state statutes may permit “class actions” under Rule 23 of the Federal Rules of Civil Procedure or the equivalent, which permit opt-out actions. See e.g., *Ansoumana v. Gristede’s Operating Corp.*, No. 00 Civ. 253(AKH), 201 F.R.D. 81 (S.D.N.Y., 2001). The latter allows for the pursuit of hundreds or even thousands of workers’ claims without first recruiting individual plaintiffs. But the former is simpler to prosecute. See Mark J. Neuberger, *Punching the Clock Is Not So Simple: An Old Statute Holds New Perils for Employers, as Workers Increasingly Sue, Alleging Wage and Hour Violations*, 26 Nat’l L. J. – (Jan. 13, 2003).

laws. Given the number of employees and hours at issue in many of these lawsuits, and once taking into account the prospect of attorneys' fees and the likely prospect of liquidated damages, these suits may spell disaster for the affected firms.

Undoubtedly employers operating under the "shadow of the law" are reexamining their wage and hour practices and in many instances reforming them to avoid becoming the next defendant. Even venerable Wal-Mart, Inc., has proven vulnerable to the threat of large scale litigation and liability, and has responded by instituting "a new Corporate Compliance team ... to oversee Wal-Mart's compliance in a number of areas, including the company's obligations to associates in terms of pay, working hours and time for breaks."¹⁶² The firm has vowed to use its much-touted information technology systems to ensure that workers do not work more than the law permits or get paid for less than they work.¹⁶³

One may hope that this new internal compliance machinery actually improves labor practices; one may be sure that it will feature in future litigation against the firm. Future lawsuits against the company are likely to be met with the argument that, as under *Kolstad*, their maintenance of preventive procedures should afford them at least a partial defense – say, against liquidated damages otherwise available for "willful" violation of the FLSA. Those arguments would then bring into play all of the same concerns about the adequacy of internal procedures and of judicial oversight that were rehearsed in the context of the rights model into the heart of this quintessentially regulatory scheme. Moreover, employers increasingly seek to preclude wage and hour litigation by including such claims within mandatory arbitration clauses, and courts have mostly upheld the arbitrability of such claims.¹⁶⁴ While such clauses have heretofore been rare among the low-wage workers who feature in much FLSA litigation, that may be changing as the threat of litigation on behalf of these workers grows.

¹⁶² *Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices*, Press Release, June 04, 2004 (available at <http://www.walmartstores.com/wmstore/wmstores/Mainnews.jsp>).

¹⁶³ An in-house audit from several years ago shows Wal-Mart's ability to monitor itself (though not necessarily its commitment to compliance. See Greenhouse, *supra* note --.

¹⁶⁴ *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004); *Poteat v. Rich Products Corp.* 91 Fed.Appx. 832 (4th Cir. 2004); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir.1996); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir.2002);

So wage and hour litigation, much like antidiscrimination litigation, has already begun to promote self-regulation. Depending on whether internal preventive procedures and mandatory arbitration can be made fair and effective means of avoiding or resolving employees' legal claims – a question raised above and yet to be answered – these procedures could either enhance or largely diffuse the potential of wage and hour litigation to effectively reform internal practices. As in the case of antidiscrimination law, it remains to be seen whether those mechanisms of self-regulation can be made effective, or whether they will operate instead mainly as defensive tactics, stifling the litigation threat that has been the main engine of organizational reform. In other words, it is already too late to ask *whether* wage and hour litigation will lead to self-regulation; the question is whether it will lead to *effective* self-regulation or to something more like self-deregulation.

Can private litigation help bring into being a regime of “monitored self-regulation” of labor standards?¹⁶⁵ Consider, for example, the widespread “off-the-clock” practices that have been the target of extensive litigation at Wal-Mart,¹⁶⁶ or the recently-publicized and surprisingly common employer practice of “shaving time” – of doctoring hourly employees' time sheets to reduce their pay.¹⁶⁷ Whether these acts are the isolated and unauthorized acts of rogue supervisors, as employers claim, or the pervasive and tacitly encouraged cost-cutting strategies that the lawsuits allege, they occur under the radar and risk being continued even after being proven, declared unlawful, and retrospectively remedied. Wal-Mart, for its part, has promised an internal fix through its “corporate compliance” program, and if workers and their advocates trust Wal-Mart to regulate itself, that might be a satisfactory prospective resolution of the problem. But if workers

¹⁶⁵ Monitoring is not the obvious response to unlawful practices such as the treatment of a category of employees as “independent contractors” that are relatively visible and can be corrected in a single stroke. Note, however, that in one leading recent case, *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001), FLSA litigation on behalf of a group of delivery workers (who had been illegally treated by the stores who employed them as “independent contractors”) was eventually settled on the basis, in part, of an agreement to incorporate the workers into the stores' existing collective bargaining units. As a result, the workers gained access to the New Deal version of self-governance, with an in-house monitor of wages and working conditions in the form of a union.

¹⁶⁶ Steven Greenhouse, *US Jury Cites Unpaid Work at Wal-Mart*, New York Times, Dec. 20, 2002.

¹⁶⁷ Steven Greenhouse, *Altering of Workers' Time Cards Spurs Growing Number of Suits*, New York Times, April 4, 2004 at A1.

and their advocates are inclined instead to live by the Reaganesque aphorism, “Trust, but verify,” it would be a short and sensible step to incorporate independent monitoring of Wal-Mart’s compliance into a prospective remedy or settlement of these claims. For the pendency of litigation and the threat of megabucks liability may give employee advocates much the same leverage over employers that government regulators used to secure monitoring in the apparel industry and the green grocers. While compensation is undoubtedly a major goal of these lawsuits – particularly where they are prosecuted by private attorneys on a contingency basis – some of the potential liability for past misconduct might be provisionally traded off in exchange for the firms’ submission to a system of monitoring that promised to prevent continuing violations. The absence of a state agency from the constellation of actors in most of these cases is not obviously fatal to the prospects of a viable system of monitored self-regulation.

Once again, the proposed strategy has been pioneered in private antidiscrimination litigation. We have already observed that the defenses that Title VII affords to “self-regulating” firms provides a potential precedent for employers seeking partial relief from wage and hour liability on the basis of internal compliance machinery. *Faragher* and *Kolstad* represent what we might call a “wholesale” approach to the promotion of self-regulatory practices: they create a self-regulatory template on which liability averse employers can model their conduct to reduce legal exposure. But antidiscrimination law also has been deployed to induce self-regulatory behavior at the “retail” level: under the gun of actual litigation, employers may agree or be required to accept more intrusive forms of internal reform, including outside monitoring. Professor Susan Sturm has explored the institution of internal organizational reforms, which may include ongoing consultation with independent experts – as part of the remedy for large-scale employment discrimination litigation.¹⁶⁸ She has argued that these “structural” remedies – some of which resemble privately monitored self-regulation – effectively extend the reach of law and of antidiscrimination norms to uncover and alter subtly discriminatory practices that traditional remedies do not.

¹⁶⁸ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* --- (2001)

Large-scale private wage and hour cases could similarly be resolved in part on the basis of the employer's adoption of internal compliance measures – for example, technological safeguards against off-the-clock work, and use of discipline and incentives to insure supervisory cooperation – coupled with outside monitoring. Whether employers adopt such measures as a shield against future litigation or under the gun of threatened liabilities for past misconduct, there is a risk that these private monitoring arrangements, which are often shielded from public scrutiny by strong confidentiality agreements, might be susceptible to cheating and capture – that they might give (or even sell) a valuable stamp of legitimacy to employers while failing to insure compliance. Some form of employee representation in the oversight of private monitoring arrangements might help to avoid that risk. Clearly these private settlements present pitfalls that the involvement of public agencies can help to avoid. But creative and committed employee advocates – lawyers and non-profit organizations – together with the emergence of experienced and publicly-vetted monitoring organizations – also have an important role to play at least in the current environment of public underenforcement of labor standards.

Apart from direct enforcement of labor standards through private litigation, private rights of action on behalf of whistleblowers – employees who have suffered reprisals for publicizing illegal conduct, either within the firm or to public officials – can help to enable employees themselves to serve an internal monitoring function. OSHA-like administrative remedies appear too ineffectual to draw either public attention or employer apprehension. Employees who blow the whistle on workplace hazards need their own Sarbanes-Oxley-like remedy against reprisals. Law reform that protects and expands whistleblower protections where they do not already exist, and a concerted commitment by employee advocates to pursue whistleblower claims for workers who expose illegal employment practices would bolster both the enforcement of labor standards and the role of employees in such enforcement.

VI. Monitored Self-Regulation in the Enforcement of Individual Rights

There has been comparatively little effort to apply theories of effective self-regulation within the decentralized system of individual rights enforcement that makes up

so much of the American law of the workplace.¹⁶⁹ In some ways the theories may seem an awkward fit with the decentralized and mostly judicial regime of individual rights enforcement. But the emergence of privately monitored self-regulation in conjunction with antidiscrimination litigation shows that employment practice may be running ahead of the theory in this regard.

Indeed, in one way the rights arena may be a more promising site for the application of theories of effective self-regulation than, for example, workplace health and safety regulation. The latter is plagued by chronic underregulation. The former is not. In the rights arena, the regulatory resources are not so much lacking as they are misallocated, yielding wildly inconsistent results and levels of procedural fairness – a gold-plated enforcement process for some and no hearing at all for most potential claimants. Still, the decentralized process of initiating enforcement – the ability of private complainants and their lawyers to file lawsuits, trigger discovery, and command at least some level of judicial process – creates many regulatory eyes and makes the threat of outside scrutiny much more present in the rights arena than in the regulatory arena. The question is whether those rights-enforcement resources might be more effectively deployed, and whether the ongoing move toward self-regulation within rights-enforcement might be better channeled, by some form of monitored self-regulation.

Antidiscrimination law has been the most prolific source of employment litigation, and the most powerful impetus toward self-regulation in the enforcement of rights. It also has the virtue, as compared with the patchwork of state wrongful discharge and privacy law, of doctrinal coherence. It will therefore be my focus here.

A. Recasting the Tripartite Regime

It may be useful to begin by recasting the characters that populate the “tripartite” system to fit the rights arena. The objects of regulatory scrutiny – the regulated firms – are the same, as are the challenges of heterogeneity and endogeneity: Firms, and individuals within firms, may be more or less committed to respecting the worker rights recognized by external law. Some may voluntarily establish standards of fair treatment

¹⁶⁹ A notable exception is my colleague Susan Sturm, especially in her article *Second Generation*, *supra* note ---.

and equal opportunity that exceed what the law could require; others may do only what is necessary to fend off costly lawsuits (and may be expected to “cheat” – for example, to hide evidence of rights violations – if they can get away with it). On that score, the value of multiple enforcement tracks and of efforts to tap into regulatory resources within firms is apparent, as is the need for oversight.

The main public regulators in the enforcement of individual rights are not administrative agencies but courts. The Equal Employment Opportunity Commission (EEOC) and coordinate state agencies play a role in enforcing antidiscrimination law, one to which I will return.¹⁷⁰ But courts still adjudicate claims and assess the fairness of internal antidiscrimination procedures and the enforceability of arbitration agreements; they are the primary public agencies for enforcing most employee rights and overseeing the emerging regime of self-regulation. Antidiscrimination law directs courts, in effect, to judge whether the firm is a “cooperator” or a “defector” in deciding whether to take a more cooperative approach to the firm – for example, to enforce arbitration agreements, give deferential review to arbitration awards, or grant a defense to liability based on the existence of internal antidiscrimination procedures – or a more “adversarial” approach – for example, by refusing to enforce an arbitration agreement or by allowing a punitive damages claim to go to the jury.

That brings us to the third leg of the tripartite scheme, which is supposed to guard against excessive cooperation by judges (for example, unwarranted deference to internal and arbitral proceedings) and against “cheating” by firms (for example, the institution of biased internal or arbitral procedures). It may seem tendentious to call excessive judicial deference to arbitration awards a form of “capture,” but it is much the sort of underregulation or over-cooperation that the tripartism is designed to guard against. More generally, there is a need for actors to watch out for those individuals who are not inside the self-regulating firms but whose rights are potentially at stake – most importantly, the job candidates who are passed over for discriminatory reasons (but who

¹⁷⁰ The EEOC issues rulings interpreting the law, for example, with respect to the enforceability of arbitration agreements; but those rulings are not always granted deference by the courts. The EEOC and parallel state agencies can resolve disputes without litigation (and have been particularly aggressive and quite successful in the use of mediation to that end); and they act as institutional representatives in litigating claims with special public import.

rarely sue). Those individuals are particularly in need of some third party – neither the regulated employers nor the courts that stand in judgment over the employment decisions that are challenged – to uphold the public interest in equal opportunity. What is needed is some actor or set of actors with enough independence, expertise, and accountability to employee interests to perform those functions.

B. The Functions and Limits of Collective Representation in Individual Rights Enforcement

One possible actor within the scheme is a union or union-like organization. But the role of a union is less obvious in the rights context than it was in the labor standards context. There is at least a potential tension between the individual and minority group rights at stake in most statutory employment disputes and the collective and presumably majoritarian nature of a union or elected employee council. Rights claims often concern the allocation of workplace goods such as promotions and layoffs among employees. Those goods themselves are not “public goods” in the same sense as, for example, a healthy physical environment. Claims of discrimination, in particular, may highlight fault lines within the workforce such as race and gender, and may pit one group of employee against another – as with claims of co-worker harassment. In these cases, a collective representative is in a difficult position if it must directly represent any or all of the employees, and its representation may be skewed in favor of majority sentiment.¹⁷¹

Such concerns, and the blemished history of American unions’ treatment of women and racial minority groups and their claims of discrimination, surely played a part in the decades-old series of Supreme Court decisions rejecting the applicability of collectively bargained arbitration provisions to individual statutory claims and affirming individual sovereignty over those claims.¹⁷² The implication of *Gilmer* is that individual employees are, after all, best situated to represent their *own* interests in the realm of rights, and in the

¹⁷¹ When such a conflict arises under a collective bargaining agreement, the union can stand behind widely accepted principles of seniority or “just cause” that may mediate the conflict. They do not have the same recourse in the case of statutory claims.

¹⁷² *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981); *McDonald v. West Branch*, 466 U.S. 284 (1984).

waiver of rights, without the intervention of a collective representative.¹⁷³ Is collective representation simply out of place in this regime of individual rights and remedies?

What *Gilmer*, on this reading, forgets is that the quality of dispute resolution procedures is a local public good within the workplace. Even though employees assert individual claims and seek individual redress, the emergence of firm-based enforcement mechanisms as a partial substitute for litigation creates collective action problems for employees. Firms cannot customize their internal grievance or arbitration procedures for individual employees or seek employees' individual agreement to those procedures. They could perhaps customize the terms or applicability of arbitration agreements, but they rarely do so. Whether because of the administrative advantages of a single system or just because they can, employers typically present an arbitration agreement as "take it or leave it" proposition. That means that individual employees, even if they had a realistic chance to object to features of the arbitration or grievance system, would effectively do so on behalf of the entire group of employees who are covered, and would effectively share any improvements with her co-workers.

The flipside of the "public goods" problem that employees face is the advantage that employers have by virtue of being "repeat players" in their chosen dispute resolution forum. One aspect of the problem – hotly contested by scholars and arbitrators – is the risk that the arbitrator's judgment may be skewed in favor of the employer, who may be in a position to choose the arbitrator in the future, and against the employee, who is typically a "one-shot" player.¹⁷⁴ Whether or not that is a real problem, however, the employer's status as a "repeat player" certainly increases its incentive to invest in shaping the dispute resolution and arbitration processes in its own interest. An employee

¹⁷³ In subsequently upholding the individual contractual waiver of the judicial forum in *Gilmer*, the Court distinguished those cases, in part, based on "the potential disparity in interests between a union and an employee." *Gilmer*.

¹⁷⁴ As with everything else about employment arbitration, the empirical evidence on the existence of a repeat player effect is mixed. For studies finding evidence of a repeat player bias, see Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 *Employee Rts. & Emp. Pol'y J.* 189, 191 (1997); Lisa S. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 *McGeorge L. Rev.* 223 (1998). For studies purporting to refute such bias, see Michael Delikat, Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, 58 *Disp. Resol. J.* 56 (2004); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 *Disp. Resol. J.* 9 (2003).

representative with a role in the design of the process and the selection of arbitrators could serve as a “repeat player” on the side of employees.

An employee representative could also help to mitigate employees’ fear of reprisals for objective to employer policies. In the case of arbitration agreements, reprisals are not merely feared but effectively legitimized by the law, for in most jurisdictions employers can and do demand an agreement to arbitrate future disputes as a condition of employment or of continued employment; in other words, employees, at least if they are at-will, can be fired for refusing to agree to mandatory arbitration.¹⁷⁵ Given that the agreement only applies in case of a dispute that has not yet arisen and hopefully never will, employees will rarely find it worthwhile even to utter an objection to the agreement; the potential cost – loss of a job – is simply too high.¹⁷⁶ An institutional representative of the employees, because it has no job to give up, may avoid this problem as well as the public goods problem and the repeat player problem.¹⁷⁷

Still, the potential conflicts of interest between a majoritarian institution and employees asserting individual statutory rights should constrain the former’s role in the policing of rights-enforcement within the firm. A union should not be able to waive an

¹⁷⁵ Under California law, which appears to be the most demanding with regard to the “voluntariness” of the agreement, an agreement that is offered on a take-it-or-leave-it basis as a condition of employment is deemed “procedurally unconscionable.” But that conclusion simply triggers a closer scrutiny of the fairness of the terms of the agreement itself. An agreement is invalid only if it is both “procedurally” and “substantively unconscionable.” *Armendariz, Circuit City, etc.*

¹⁷⁶ There are additional cognitive and informational impediments to individual bargaining over what procedures will apply to future disputes: Employees lack information about the employer’s discharge and layoff practices; they are systematically misinformed about the law that applies to discharges; they may underestimate the chances that they will end up in a legal dispute over such issues; they may fear that raising questions about these issues will label them as a troublemaker or a slacker who expects to encounter difficulties. All of these objections have been levied against the contractual default of employment at will and the assumption that employees who want job security can bargain or shop around for it. e.g., Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 *Tex. L. Rev.* 1783 (1996); Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 *U. Pa. L. Rev.* 1953 (1996); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 *Cornell L. Rev.* 105 (1997); Cass R. Sunstein, *Switching the Default Rule*, 77 *N.Y.U. L. Rev.* 106 (2002). These concerns are even more acute as to the subtler question of what the procedure and forum will be in the event of a future dispute.

¹⁷⁷ Unions perform all of these functions within “labor arbitration” – adjustment and arbitration of grievances under collective bargaining agreements. Labor arbitration is widely viewed as a model system of dispute resolution, in which both labor and management generally support a deferential standard of judicial review because both shape the process and choose the arbitrators.

individual's right to judicial process for statutory claims, and should not act as gatekeeper to the arbitral process where it provides an individual's only recourse for a statutory claim.¹⁷⁸

What employees do share in these cases is an interest in the fairness of dispute resolution processes. Both arbitration and internal dispute resolution mechanisms typically cover a very broad range of disputes. Nearly all employees face some prospect of using these mechanisms in a future a dispute. A collective representative of employees can help to secure the basic elements of "due process." It can also become the repository of employees' collective experience over time, with the capacity to advise employees on choice of arbitrators, to represent employees who cannot or do not choose to get an attorney, and in general to counterbalance the employer's aggregate experience and its long-term incentive to make the process work to its advantage.

C. Other Potential Monitors in Rights Enforcement

So there is a perfectly sound theoretical case for conditioning legal deference to self-regulatory processes on collective employee participation in the formulation and administration of these processes. But as in the case of labor standards regulation, reality demurs. Such a proposal has no chance of implementation in the current political and labor relations climate. As in the case of labor standards enforcement, we are faced with the need to convene a constellation of actors that together can supply the independence, expertise, and accountability to workers' shared interests that individual employees lack.

It turns out, however, that a lot of "monitoring" is already going on. Several sets of actors already play distinct "monitoring" functions within the existing system of self-regulation of rights enforcement: First, advocacy groups, including unions acting as non-exclusive representatives, civil rights groups and identity-based organizations; second, plaintiffs' attorneys and their professional organizations such as the National

¹⁷⁸ Whether unions have the power to consent to the mandatory arbitration of individual statutory claims is currently an open and contested question. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Supreme Court held that, at a minimum, a collectively-bargained waiver of the judicial forum for individual statutory claims would have to be "clear and unmistakable." But it declined to consider whether such a waiver would be enforceable. Some courts have held, following *Wright*, that it would, and that unions do have the power to waive individual employees' right to litigate statutory claims. See, e.g., *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001).

Employment Lawyers Association (NELA); third, arbitrators and their own professional organizations such as the American Arbitration Association; and, fourth, the EEOC and its state analogues. Based on a better understanding of what each of these actors do and are equipped to do, I offer some proposals for improving the quality and efficacy of their monitoring roles.

Advocacy organizations: There are many employee advocacy groups that can help to monitor employers' enforcement of employee rights. Unions, as discussed above, can play such a role on a non-exclusive basis outside of collective bargaining. In addition, many civil rights organizations and identity-based organizations promote the interests of racial, ethnic, religious, or gender-based groups within the workforce. They may be organized around particular racial or ethnic groups as in the case of the Urban League or La Raza; they may represent a range of racial and ethnic groups as in Jesse Jackson's Rainbow Coalition; they may even represent particular groups within particular occupations or industries, as in the Society of Women Engineers.

Those groups play a key role in publicizing (and thereby punishing) perceived employment discrimination against the groups they represent. They may become involved at the behest of individuals in connection with very particular events, or they may monitor broader statistical patterns of employment, identifying firms that lag behind industry norms and seem potentially to be discriminating. They may encourage or sponsor litigation, or they may even represent individuals or classes in arbitration or in litigation, at which point their role begins to blend into the role of plaintiffs' attorneys, which I will discuss next.¹⁷⁹ Through a wide range of advocacy efforts, such groups can play a very important watchdog role over firms when they are not under the spotlight of litigation, especially with respect to individuals who are not within those firms because they were not hired there.

I want to be precise, however, about how these groups can be seen as helping to "monitor" a regime of self-regulation in the enforcement of rights: Employers predictably reform their employment practices and their patterns of hiring, promotions,

¹⁷⁹ For a proposal for union representation of individuals and groups of employees in mandatory arbitration, see Matthew W. Finkin, *Employee Representation Outside the Labor Act: Thoughts on Arbitral Representation, Group Arbitration, and Workplace Committees*, 5 U. Pa. J. Lab. & Emp. L. 75 (2002).

and discharges, to reduce their exposure to discrimination litigation. We may call that “self-regulation,” but it is simply the familiar “shadow of the law” variety of self-regulation. When the law begins to take account of those internal reforms in assessing the firm’s liability, it becomes of interest here. That happens most obviously in litigation, as where *Kostad* and *Faragher* invite firms to put forward aspects of their “diversity programs” as a basis for avoiding punitive damages in a hiring discrimination case, or for escaping liability for co-worker or supervisor harassment. It happens more subtly in efforts to avoid becoming a target of litigation: Firms may advertise themselves as leaders in workforce diversity in part to avoid the scrutiny, publicity, and disruption of a lawsuit. But the reality may not be as advertised. Advocacy groups with have a birds-eye view of the labor market and a constituency that turns to them with experiences of frustration in the job market may be in an especially good position to see through sham programs and undeserved corporate reputations. Groups that informally monitor the workforce demographics of major corporations may also simply spur firms to stay at the head of the pack, or at least to avoid falling behind, in workforce diversity efforts lest they become the target of a damaging publicity campaign (with or without a lawsuit). This is not exactly rights enforcement; it goes well beyond rooting out illegal practices. But it may be the best way of addressing subtle and hidden barriers to equal opportunity with which traditional legal tools have such difficulty. Advocacy groups effectively extend the shadow of the law and increase the weight of public norms within firms’ internal operations.

Even better would be systematic comparisons of firms’ practices and demographics based on detailed inside information from managers and employees. That is in fact already being done privately by a publication, Diversity, Inc., that has made itself the leading publicist for corporate diversity efforts. Its annual ranking of “Top Companies for Diversity,” and the various subrankings and subindices that it compiles and publicizes, may not have quite the impact of the US News educational rankings, but it has the same aspiration and is headed in the same direction: It aims to bring greater precision and accuracy to firms’ reputations in this area, and to spur firms to improve their performance and their ranking. (So, too, its success is sure to breed questionable reporting practices and questions about the reliability of the indices.)

At the same time, Diversity, Inc., undertakes in every issue to publicize programs that work, for example, to retain and advance women during child-rearing years, to increase the numbers and qualifications of Latino applicants through cooperation with local educators, or to reduce subtle barriers for disabled workers. The magazine is in the business of identifying and publicizing “best practices” among firms. It is an example of how outside monitoring by private groups, with the cooperation of the monitored firms themselves, is evolving spontaneously around the edges of the law and dealing with problems that have proven obdurate.

Plaintiffs’ attorneys: Plaintiffs’ attorneys represent employees literally, and pursuant to professional obligations of loyalty and zeal. Moreover, most are “repeat players” on the employees’ side. Sometimes, as in the remedial phase of a large-scale lawsuit, plaintiffs’ attorneys may become directly involved in the restructuring and oversight of employers’ internal antidiscrimination machinery. Professor Sturm has described several such cases and contended for the valuable role that attorneys and other intermediaries – expert witnesses, consultants, and insurers, for example – can play inside organizations that have come directly under the bright light of litigation.¹⁸⁰ The systematic reforms devised in that exceptional context might also become a template for firms that aim to avoid litigation. In both the remedial and the prophylactic context, the precepts of monitored self-regulation call for close scrutiny of the independence of monitors from employers, and their accountability in some manner to employees and the public. So, for example, employers’ own consultants and insurers may be more attuned to reducing the risk of litigation than they are to redressing rights violations. Those may sometimes conflict, for example, where the issue is how to gather or disseminate information about racial and gender disparities in promotions.

Outside of those large scale cases, attorneys’ capacity to act as monitors for employees is limited by the fact that they usually enter the picture only after a claim arises, and often after internal review of the claim. So in the case of internal grievance procedures, plaintiffs’ attorneys cannot participate directly in shaping those processes. Still, they can play a post-hoc monitoring role when these internal procedures are raised

¹⁸⁰ See Sturm, *supra* note --.

as a partial or complete defense to liability, at which point the attorneys will be highly motivated and professionally obliged to point out flaws in employers' internal procedures. In that context they may be able to guard against some kinds of employer "cheating" and some kinds of judicial "capture," and to make law to which employers respond prospectively, but in an indirect, attenuated, and episodic form of participation. In the arbitral process, plaintiffs' attorneys play a larger role. On behalf of the employees they represent, they can challenge the fairness and adequacy of arbitration procedures both in individual cases and more systemically. Still, their ability to shape arbitration agreements and processes is largely indirect and dependent on their ability to secure judicial disapproval of unfair provisions. We have already observed some of the limitations of these judicial oversight mechanisms.

Plaintiffs' attorneys collectively – for example, through organizations such as NELA – can play a broader role as advocates for employees in shaping both the law of arbitration and the practices of arbitrators (on which more below). But even in that broader role, plaintiffs' attorneys can arguably be counted on only to represent the interests of those whom they are likely to represent in the future. Traditionally, that has been more highly-paid employees who can either afford their fees or whose claims promise a high payoff. Paradoxically, that might lead plaintiffs' attorneys to lobby for *too much* process – for trial-like procedures that make arbitration a closer substitute for litigation, but that may also make it too expensive for lower-income employees with smaller claims who cannot get an attorney. Those employees might be able to get an arbitral hearing if that process is significantly cheaper than litigation. A collective employee representative would be expected to consider the benefits of arbitration (especially for employees whose claims would not otherwise be viable in court) as well as its limitations, and to lobby for a process that is broadly accessible as well as thorough.

On the other hand, concerns about the role of plaintiffs' attorneys in arbitration may be misdirected. They may represent, directly and indirectly, a broader range of employees if the law develops so as to ensure the ability to bring aggregate claims or

class actions within arbitration.¹⁸¹ Even in individual litigation, many plaintiffs' attorneys are doing valuable work for all employees in contesting arbitration agreements and provisions that are grossly skewed in favor of employers: limitations on remedies, short limitations periods, biased tribunals, high and often prohibitive arbitrators' fees, and the like. They are in effect monitoring this important form of self-regulation on behalf of employees generally. For plaintiffs' attorneys to serve this monitoring role, it is essential that arbitration procedures make it financially feasible for attorneys to both participate in arbitration and to contest arbitrability (for example, by insisting that arbitration agreements explicitly provide for the award of attorneys fees to prevailing plaintiffs).¹⁸²

One further innovation would enhance the ability of plaintiffs' attorneys to play a broader monitoring role on behalf of employees: Public disclosure of arbitration agreements. If employers were required or induced to publicly disclose the basic terms of any mandatory arbitration agreements to which they and their employees were party – on the internet, for example – monitoring would be improved on several fronts. Lawyers and other advocates could identify and challenge questionable provisions outside the context of arbitration; employers could better be held accountable in the job market for unfairly skewed procedures; “best practices” in the form of model arbitration procedures could better emerge.

Arbitrators and their organizations: Viewed through the lens of tripartism, arbitrators might be seen variously as regulators exercising powers delegated by the public judiciary or as agents of the parties – both employers and employees. But they are not well suited to serving as independent advocates of employees. To begin with, they are at least as much an agent of the employer, and often more so if we attribute any significance to the employer's status as a repeat player or to the fact that the employer

¹⁸¹ The availability of class action mechanisms under mandatory arbitration remains an open issue. The Supreme Court in *Green Tree Financial Corp. v. Bazzle*, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003), allowed a class action arbitration under the FAA (in a non-employment case) where the particular agreement at issue did not preclude class treatment. That leaves open the question whether an agreement that does explicitly preclude class action adjudication would be valid or not, particularly under the employment discrimination laws. For a discussion of the issues remaining after *Bazzle*, see Samuel Estreicher & Michael J. Puma, *Arbitration and Class Actions After Bazzle*, 58 *Disp. Resol. J.* 13 (2003)

¹⁸² On the other hand, some systems that allow attorney representation (and compensation) but that invite complainants to proceed without attorneys – for example, in exchange for the employers' foregoing attorney representation – appear to work reasonably well.

often pays the whole arbitrator's fee. In particular, arbitrators cannot serve as employee representatives within the self-regulatory process of formulating the terms of arbitration agreements because they are called into service by those very agreements, are by and large bound by their terms.

On the other hand, arbitrators and their professional associations do play a crucial role in monitoring the arbitral process. For example, both the Judicial Arbitration and Mediation Service (JAMS) and the American Arbitration Association (AAA), which maintain large rosters of arbitrators for employment disputes, establish qualifications and professional standards of impartiality for arbitrators. These organizations were also leading participants, along with representatives of employers, employees, unions, and government agencies, in the adoption of the "Due Process Protocol" for statutory employment disputes.¹⁸³ The Due Process Protocol is not law. Arbitrators themselves are the primary enforcers of these standards; they may decline to participate in arbitration proceedings that do not meet prevailing standards of fairness, and may implement the standards within arbitrations they do conduct. Arbitrators are effectively engaged in their own process of self-regulation through these professional associations, and that process has markedly improved the quality of employment arbitration.

The standards of fairness established by the Protocol and followed by members of the AAA address several of the issues of procedural fairness and compliance with external law that concern us here.¹⁸⁴ Being a product of consensus, the Protocol leaves some issues unresolved. In particular, the Protocol punts on the still-contested question of whether pre-dispute arbitration agreements, especially those demanded as a condition

¹⁸³ On the origins of the Due Process Protocol, see Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 *Ohio St. J. on Disp. Resol.* 369 (2004).

¹⁸⁴ The Protocol calls for adequate representation and, where provided by statute, attorneys fees. It calls for the availability of "[a]dequate but limited pre-trial discovery" and information about the arbitrator's recent decisions. It provides that arbitrators should be knowledgeable about employment law as well as about "the employment environment"; "diverse by gender, ethnicity, background, experience, etc."; "independent of bias toward either party" and free from conflicts of interest. It provides for even-handed methods of selecting arbitrators and arbitrator panels. And it provides that arbitrators "should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency [e.g., the AAA]"; "should be empowered to award whatever relief would be available in court under the law"; and should issue written decisions explaining, in particular, "the disposition of any statutory claim(s)." Following traditional standards of judicial review for arbitration, the Protocol states that the "arbitrator's award should be final and binding and the scope of review should be limited."

of employment, are ever fair.¹⁸⁵ It addresses other critical but contentious issues at a high level of generality. For example, it provides for “adequate but limited pre-trial discovery,” for awards that describe “the disposition of any statutory claim(s),” and for “limited” judicial review of awards, with no real elaboration of what those terms mean. Much is left to interpretation and even more to arbitrators’ discretion.¹⁸⁶ Still, the Due Process Protocol is a major contribution to the fairness of arbitration, due in part to the involvement of employee advocates in its formulation.

One other initiative of the AAA bears mention. The AAA has recently begun to publish, in searchable form, employment arbitration decisions issued from 1999 going forward. The prospect of publication may put pressure on arbitrators to explain their awards more fully and to demonstrate their evenhandedness and impartiality. More importantly, this move toward transparency will help enable others, including employee advocates, to monitor the fairness of arbitrators and of arbitration awards. That is a crucially important development in the evolving system of employment arbitration.

Organizations such as the AAA and self-regulatory initiatives such as the Due Process Protocol are playing a very productive role in upgrading the fairness and the transparency of the arbitral process – in both conducting a form of monitoring and in enabling monitoring by others. Unfortunately, there is no legal requirement that employment arbitration be conducted by arbitrators who have been certified by a reputable organization such as the AAA, or who follow the rules of the AAA or the Protocol.¹⁸⁷ A straightforward way to improve upon the system of employer self-regulation of which arbitration is an important part would be to incorporate the self-regulatory initiatives of arbitrators into the law of employment arbitration. Courts reviewing arbitration agreements and awards should require adherence to the Due Process Protocol or its future refinements, as well as the use of an established arbitrator-

¹⁸⁵ Many employee advocates and some arbitrators question the ethical propriety of arbitrating disputes that have not been voluntarily submitted to them. Those who make a living through employment arbitration are hard pressed to maintain this position.

¹⁸⁶ For a balanced critique of this approach to regulation of arbitration in several areas including employment, see Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 *Ohio St. J. on Disp. Resol.* 369 (2004).

¹⁸⁷ *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999)

provider organization such as the AAA or JAMS that provides reasonable assurance of the impartiality and qualifications of arbitrators.

The EEOC: It is admittedly tendentious to characterize the EEOC as one of the potential monitors rather than one of the public regulators in the system of rights enforcement. By doing so, I mean simply to highlight a few aspects of the EEOC's role. First, it has very limited enforcement powers. The EEOC has the power to conduct investigations of employers, but then private plaintiffs can compel discovery through judicial process. The EEOC "enforces" discrimination law mainly by suing on behalf of selected complainants, either at the behest of an individual or on its own initiative. But those functions hardly distinguish the EEOC from a private advocacy organization such as the Legal Defense Fund. Like LDF, the EEOC should presumably be choosing cases for their public impact – cases that are otherwise unlikely to be litigated, such as large-scale hiring cases. It should, for example, identify large firms that hire relatively few minorities or that fail to promote women, and target them for investigation (say, by sending "testers," pairs of black and white "applicants" who present equivalent qualifications) and litigation. But that is what one would expect of a sophisticated legal advocacy fund such as LDF.

The EEOC obviously has some distinctive features as a public agency. It is especially significant that the EEOC may sue in court on behalf of individuals who are otherwise bound by arbitration agreements.¹⁸⁸ The EEOC's ability to bypass mandatory arbitration provides a check against a firm's ability to completely privatize oversight of its performance under the law. Moreover, the more common mandatory arbitration becomes, the more important is the ability of the EEOC to take cases of public or legal significance to court, and to maintain the public nature of discrimination law itself by preserving the ability of courts to interpret and clarify the law. Mandatory arbitration is likely to become even more common, and the EEOC's ability to litigate in court in spite of a mandatory arbitration agreement even more important, if the courts eventually allow the enforcement of arbitration provisions that bar class actions or other aggregation

¹⁸⁸ EEOC. v. Waffle House, Inc., 534 U.S. 279, 291-92 (2002).

mechanisms.¹⁸⁹ That result would leave the EEOC standing virtually alone (and obviously inadequate) in its ability to pursue some large-scale discrimination cases. Whether we conceive the EEOC as a weak regulator or as a strong monitor, it could play an important role in a system of enforcement that is otherwise highly decentralized and increasingly privatized.

Among the candidates who do or could serve as “monitors” within a system of monitored self-regulation in the enforcement of employee rights, none is ideally suited to overcome the public goods, informational, and other barriers to effective individual participation in the formation of fair internal and arbitral procedures. On the other hand, each has some performs a useful role by monitoring employers’ personnel practices and employment policies, including internal and arbitral procedures for resolving rights disputes, beyond what courts can do. The system of partial self-regulation that is evolving within the regime of individual rights could be greatly improved by recognizing and formalizing the roles that advocacy organizations, plaintiffs’ attorneys, and arbitrators play in the regime. That would require some guarantee – secured through legislative or doctrinal reform – that attorneys can feasibly represent employees in their rights claims and in scrutinizing the adequacy of the internal and arbitral processes to which those claims are subject; and, second, that arbitrators are affiliated with and subject to reputable self-regulating bodies that oversee their professional qualifications and conduct, guarantee due process, and maintain the public transparency and accountability of arbitral law.

Conclusion

The National Labor Relations Act of 1935 recognized both the intrinsic and the instrumental value of “industrial democracy” when it sought to secure workers’ ability to participate in the workplace decisions that vitally affect them. But the very term “industrial democracy” sounds anachronist, while “workplace democracy” has never gained much currency. That is both cause and symptom of the fact that our elected representatives have never seriously revisited the issue since the New Deal. In the meantime, the Wagner Act system has become distorted and dysfunctional if not

irrelevant for most employees, while employment law has mushroomed into a fearsome hydrahead of liability for employers and a font of rights and entitlements, real or illusory, for employees.

Employment law, both its regulatory and its rights dimensions, is in many ways a poor substitute for the system of self-governance envisioned by the labor laws. Indeed, it is not really a substitute at all, for the rights and regulations that make up employment law will be inevitably incomplete and underenforced without a complementary system of collective representation to back them up. But the solution to the representation gap may lie partly within employment law rather than solely within the traditional realm of “labor law.” For employment law has a broader political constituency, and more points of entry for reform efforts, than does labor law. Employment law also encompasses diverse institutional energies and sources of leverage that might be turned to the cause of workplace democracy. Employment law – especially in the form of costly and embarrassing litigation – packs a punch. It can and has led to some dramatic reforms in how workplaces are organized, on the part of both employers who have experienced litigation and those who have observed its traumatic effect on others. And employment law itself has circled back, as if inevitably, to the realization that “employers” are organizations with a vast potential for self-governance and self-regulation.

The rise of self-regulatory mechanisms for the enforcement of labor standards and employee rights presents a kaleidoscope of possibilities. On the one hand, there are undoubtedly vast regulatory resources – knowledge, expertise, and even some good will – within firms; a regulatory framework that activates and leverages those resources promises to be far more effective than one that relies solely on traditional mechanisms of adversarial inspections and enforcement. There will simply never be enough government inspectors to do the job alone. On the other hand, the movement threatens to justify regulatory disengagement and to disguise a process of deregulation. A system of privatized enforcement that is detached from public oversight and the prospect of serious coercive sanctions for noncompliance may simply obscure the unleashing of market forces and of a “race to the bottom” to compete with domestic and foreign low-wage competition.

The movement toward self-regulation also casts a prismatic light on the “representation gap” in the workplace. On the one hand, it magnifies the dangers of still-declining levels of unionization. If responsibility for insuring compliance with rights and labor standards is increasingly to be pushed inside the regulated firm itself, then it is deeply troubling that the employees whose rights and interests are at stake are increasingly unlikely to have an organized voice within the firm. At the very least, the movement toward self-regulation has the makings of a new argument for labor law reform that makes unionization possible. But even if a worker-friendly constellation of political forces managed to produce real labor law reform for the first time in a half century, it is unlikely to produce anything like widespread collective worker representation, at least for decades. So the problem of the non-union workplace in an era of self-regulation must be reckoned with.

Fortunately the movement toward self-regulation provides not only a justification for promoting employee representation but potential leverage in securing new forms of employee representation and participation. If the movement toward self-regulation is, as it should be, part of a regulatory scheme in which serious sanctions also play a role, then both good corporate citizens and bad actors may be induced to accept conditions – including some form of employee representation within a scheme of outside monitoring – either as a prerequisite of responsible self-regulation or as part of a remedy for chronic noncompliance. Unfortunately, full-fledged tripartism is not imaginable within the existing landscape of labor relations and politics – the unyielding opposition of American employers to unionization and other forms of independent representation of employees, and the resulting political deadlock over anything that smacks of “labor law reform.” Those stubborn realities have steered my own thinking from a forthright embrace of tripartism toward a more pragmatic proposal that seeks footholds for employee representation within a system of independently monitored self-regulation.

I initially set out to advance not only regulatory efficacy and rights enforcement but also democracy in the workplace. Yet my proposed scheme takes only small and indirect steps toward democracy. It seeks to keep alive the aspiration to tripartism, and to independent employee representation, while giving up for the near future on its full-fledged realization.

Rejuvenating the idea of workplace democracy, and of the worker as a citizen of the workplace, will contribute to the making of better workplaces and a better democracy. But the path to workplace democracy in the US is at best a long one, and its direction is uncertain and likely to change in coming decades as transformations in the economy and the organization of work continue to race ahead. The path of democratization does not inevitably lead to organizations that would be recognizable as unions. For pragmatic proponents of workplace democracy, the best hope in these circumstances is to take a step in the right direction, a step that advances important instrumental goals to which the public is more clearly committed while opening a bit of space for workers to decide for themselves what forms of self-organization and participation might best serve their particular needs within the workplace and the labor market. That is what the model of monitored self-regulation represents.