THREE MISUNDERSTANDINGS ABOUT CONSUMOCRATIC LABOR LAW

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I. INTRODUCTION

When the Webbs published Industrial Democracy in 1897, and prefiguratively announced the rise of labor power in Occidental societies, they had good reasons for envisaging a key role for unionized workers in the equitable development of liberal democracies. Collective agreements were reached well before Beatrice Webb first described the process of collective bargaining in 1891 and British unions indeed were progressively gaining economic and political influence in the second half of the 19th Century.1 There are rather solid grounds, one may argue today, for suggesting that consumers are now called upon to play as critical a role in the coming decades, with the support of a distinct regulatory apparatus. The efficient development of transnational codes of conduct enforced through demand-side, market-based mechanisms may in effect provide regulatory bulwarks against corporate hegemonic interests or, at any rate, open promising avenues for countering them along the routes of globalized production.

Protective codes of conduct whose enforcement is to be signaled to world consumer markets are designed precisely to follow these routes transnationally—a result, it is now widely acknowledged, that protective states can hardly achieve.2 If one cannot assume that states will or may adjust their protective labor legislation to the vicissitudes of a still globalized economy, it is understandable that transnational modes of labor regulation have received and still receive much attention from the academia.3 Among them, codes of conduct and labeling schemes, these

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combined instruments of consumocratic regulation, happen to suffer from a number of misunderstandings in the literature. This article is intended to describe some original features of consumocratic law and, on the basis of an in-depth case study of Rugmark (now GoodWeave)—a consumocratic initiative designed to combat child labor in Southern Asia⁴—to correct three such misunderstandings. They arise from the incorrect assumptions that: (1) consumocratic law is inherently deficient and will remain so unless it is mandated by the state; (2) when codes of conduct operating behind labeling schemes comply with generally accepted (ILO) labor standards, it is their effectiveness that is problematical; and (3) wherever power is exercised, be it under consumer influence or not, there should be transparency.

II. FEATURES OF CONSUMOCRATIC LAW

Consumocratic law should be first conceived of as a liberating response to the oppressive, institutional isolation of two important spheres of human activity: production and consumption. We owe to Karl Marx the idea that the rupture between production and consumption may turn into a source of oppression.⁵ It is not devoid of sense. Let us consider the

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⁴. Among the most advanced forms of consumocratic initiatives are the dolphin-safe, see Mario F. Teisl, Brian Roe & Robert L. Hicks, Can Eco-labels Tune a Market? Evidence from Dolphin-Safe Labeling, 43 J. ENVTL. ECON. & MGMT. 339 (2002), child labor free, see IV U.S. DEP’T OF LAB., BY THE SWEAT & TOIL OF CHILDREN: CONSUMER LABELS AND CHILD LABOR (1997) [hereinafter BY THE SWEAT & TOIL OF CHILDREN], and Janet Hilowitz, Labeling Child Labour Products (IPEC paper, 1998), fair-trade, see JOHN E. STIGLITZ & ANDREW CHARLTON, FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT (2005), and forestry (eco-)labeling initiatives, see BENJAMIN CASHORE, GRAEME AULD & DEANNA NEWSOM, GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY (2004).

⁵. The theory developed by Marx identifies the isolation of the spheres of production and consumption as a necessary condition for the exploitation of labor by capital. The alienation of labor first rests on the estrangement of labor on modern production sites in that salaried workers work independently from each other, following the “objectification of labor.” Salaried workers neither see consumer goods in their final form, nor do they consume them directly; they are here estranged from the fruits of their labor. This alienation would reveal itself in the corresponding estrangement of a worker’s product, i.e., in the “loss of the object” to which the worker would otherwise relate more authentically. According to Marx, this process does not take place at the individual level only; it is immediately extended to the wider social sphere within which the alienated worker relates to other people:

An immediate consequence of man’s estrangement from the product of his labor, his life activity, his species-being, is the estrangement of man from man. When man confronts himself, he also confronts other men. What is true of man’s relationship to his labor, to the product of his labor and to himself, is also true of his relationship to other men, and to the labor and the object of the labor of other men.

KARL MARX, THE ECONOMIC AND POLITICAL MANUSCRIPTS. EARLY WRITINGS 330 (1975). Also, unlike neoclassical attempts to assess the value of a commodity, Marxist ones are mainly based on the idea that, if one had perfect knowledge of the relations and activities which govern the production of commodities, one would then be in a position to provide an accurate, materially informed elucidation of the valuation process:

The determination of the magnitude of value by labor-time is therefore a secret hidden under the apparent movements in the relative values of commodities. Its discovery destroys the semblance of the merely accidental determination of the magnitude of the
situation of fundamental labor rights. By the standards of the International Labor Organization, there are certain things that one should not do to people in their place of work. In this sense, workers are the holders of core labor rights. We count among these rights the right to physical integrity, and the rights to freedom of mobility and expression. In the labor context, they consist of the right of children to a task and a work environment that does not pose serious risks to their integrity; the right of under-age children not to perform work; the right not to be subject to forced labor; the right not to be subject to discrimination; and the right to associate with the goal of agreeing upon suitable working conditions. These rights attach to individuals in their workplace. In no way do they commingle with the rights in those things manufactured by a person at work. Besides, the conditions under which a thing is produced do not legally qualify the traditional status of that same thing. It follows that “real rights” attach to the thing—from a civilist perspective, more particularly—but are alien to the conditions under which the item was made. Under both the common and civil law regimes, the sale of a stolen carpet might be stained with illegality, whereas the sale of a carpet manufactured under illegal working conditions would not normally be stained with such illegality, whether or not the buyer is aware of the manufacturing conditions. Within this institutionalized rupture between the spheres of production and consumption, goods produced under conditions that violate the workers’ “fundamental rights” can therefore be offered and sold legally on end markets. Non-state, market-based governance systems or, for reasons of conciseness and etymological usefulness, consumocratic law may link value of the products of labor, but by no means abolishes that determination’s material form.

6. These are, more precisely, the rights envisioned in the Freedom of Association and Protection of the Right to Organize Convention, 1948 (87), the Right to Organize and Collective Bargaining Convention, 1949 (98), the Forced Labour Convention, 1930 (29), the Abolition of Forced Labour Convention, 1957 (105), the Equal Remuneration Convention, 1951 (100), the Discrimination (Employment and Occupation) Convention, 1958 (111), the Minimum Age Convention, 1973 (138), and the Worst Forms of Child Labour Convention, 1999 (182), which are brought out by the ILO Declaration on the Fundamental Principles and Rights at Work (1998), http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dttx.htm.
7. The sale of a good implicating the private law of contract, and property law pertaining to the private right in goods, this rule is firmly rooted in both legal traditions: in the common law, one may refer for instance to the decisions rendered in Lipkin Gorman v. Karpnale Ltd., [1991] 2 A.C. 548; R. v. Green (1841) 7 M & W 623; Rex v. Hutton (1911) 19 W.L.R. 907 (the simple theft of water might be—or have been—an exception); or, in the civil law, to the French CODE CIVIL [C. CIV.] arts. 1599 & 2279 (Fr.), the Spanish CÓDIGO CIVIL arts. 433, 447, 464 (1950) (Spain), the Quebec CODE CIVIL arts. 1713 & 1714, the German BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, arts. 861, 935 & 1006 (Ger.) as well as the ancient Roman Law I [CORPUS JURIS CIVILIS, DIGEST 47,16]; DE RECEPIATORIBUS.
8. From consummare (Lat.), to consume, and kratos (Gr.), authority. One may be indecisive about whether to refer to consumocratic “law” or “regulation.” But as rightly pointed out, “there is no settled definition of ‘law’ within legal pluralism, just as there is none of regulation. Legal pluralists are
production and consumption processes in ways that rehabilitate morality in the operation of markets.9

From a consumocratic perspective, informational barriers between the loci of production and consumption are thus partially removed, providing consumers with the choice of combining, in their purchasing decisions, both the final attributes of goods (e.g., their price or manufacturing quality) with their peripheral attributes (e.g., the social and environmental conditions under which they are produced). By the means of societal marketing, the spheres of production and consumption may connect through a third, informational sphere—a societal window, as it were—between the first two. This bridging device may turn a potentially oppressive state of affairs into an object of regulation by consumocrats, that is, by consumers who pay attention to societal information. It then makes it possible to appreciate the value of commodities from a wider perspective, a societal angle, and to redefine one’s perception of what is a desirable product or service. In other words, the societal window serves a potentially emancipatory function, insofar as widespread socio-environmental conditions of production are deemed unacceptable by significant segments of the population. The extent to which the societal value of the commodity is taken into account in the appraisal of its exchange value then becomes a matter of fact, a process agreed that ‘law’ does not solely emanate from the state; just what it is and how it is distinguished from other forms of norm-based social ordering is still contested.” See Julia Black, Critical Reflections on Regulation (CARR paper 1-27, 2002). In a pluralist perspective, it is acknowledged that other types of non-state law such as soft law and reflexive law (or else, at another level, global administrative law) may lack some of the attributes conventionally attached to state law (according to a certain orthodoxy), while exercising significant influence over corporate affairs and state regulation itself. See H. VAN SCHOOOTEN & J. M. VERSCHUUREN, INTERNATIONAL GOVERNANCE AND LAW: STATE REGULATION AND NON-LAW-STATE (2008)—whether or not through some form of coercion. See KINGSBURY infra note 9.

9. Few jurists have detailed the regulatory features of market-driven governance systems. See Benjamin Cashore, Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority, 15 GOVERNANCE 502 (2002). Among the pioneers, Cashore examined legitimacy-granting mechanisms operational within the production chain of consumer goods. Using a constructive adaptation of Suchman’s strategic and institutional approach, he showed how various types of legitimacy (pragmatic, moral, and cognitive) may interact with conforming, manipulating, and informing strategies in the emergence of “non-state market-driven governance systems” and their rule-making authority. See Mark C. Suchman, Managing Legitimacy: Strategic and Institutional Approaches, 20 ACAD. MGMT. REV. 571 (1995). In effect, there exist different angles from which to envisage issues of consumocratic legitimacy, be they connected to the normative source or content of consumocratic rules. Moreover, a consideration for the gap between the supply of, and demand for, societal values in global markets brings other issues worthy of examination, such as the degree of “publicness” of consumocratic law, in comparison with that of global administrative law. See Benedict Kingsbury, The Concept of “Law” in Global Administrative Law (IIJL Working Paper 09-29, 2009). Such early observations raise further questions regarding the reach of consumocratic law, on the polemical terrains of authority and obligation, liberty, and tolerance. They are examined in more detail in my further works. See also P. Martin Dumas, The Malaise of Modernity under Consumocratic Order, 5 ECON. & SOC. 75 (2012) for a socio-economic examination of consumocratic law.
made plausible. But in the absence of consumocratic devices and of such reconsiderations, the exploration of such new areas of regulation within the economic socket of the modern order itself would remain, at best, a utopian project. In this sense, the theorization of the physical isolation of labor and consumption as a source of alienation is nonconsumocratic or, more deterministically, preconsumocratic.

Second, consumocratic labor law requires the use of relatively simple signals such as labels to communicate to consumers the expected achievements of relatively complex codes designed to improve the fate of workers. This transmission is central in the development and qualification of private transnational (labor) law for in its absence the corporate codes involved would remain essentially “reflexive”—that is, characteristic of autonomous processes of ‘self-regulation’ within firms, and detached from the imposition of particular distributive outcomes by external forces. Reliable codes mediated by means of societal marketing do not fit well within the “reflexive law” regime said to underpin corporate voluntary initiatives. They may more appropriately be described as “second generation codes,” in contrast with first generation, voluntary codes.

10. Financial constraints undeniably act as a deterrent if consumers must pay a substantial premium in the aim of supporting those corporations engaged in integrating pre-targeted rights into their practices. Because the ratio of a product’s price to the total income of a consumer is likely to favor the elasticity of demand as this ratio increases, societal marketing is clearly doomed to failure if consumocratic premiums are out of the consumers’ reach.

11. The expression may qualify as a pleonasm if one is to consider the traditional meaning of the term “regulation” in the field of cybernetics. See Norbert Wiener, God and Golem (1964) as well as Supiot’s critique of the subject. Alain Supiot, Critique du Droit du Travail [Critique of Labor Law] (2007) (Fr.).


13. One may define societal marketing as the marketing of goods or services whereby societal information is signaled to consumers through various means. Societal information in turn pertains to certain conditions or effects observed or to be observed at the stage of production, distribution, or usage of goods, in accordance with the terms of a corporate code. See Philip Kotler & Sidney J. Levy, Broadening the Concept of Marketing, 33 J. Marketing 10–15 (1969). For an earlier vision of this marketing form, see Andrew Crane & John Desmond, Societal Marketing and Morality, 36 EUR. J. Marketing 548 (2002).

14. Arthurs describes the former as follows: This second generation is characterized by several innovations, designed to give greater credibility to codes, if not actually to enhance their effectiveness. First, transnational advocacy organizations—unions and social movements—are claiming a greater role in the formulation and administration of codes. Second, the monitoring or auditing of code compliance has become a discrete and increasingly professionalized function, often contracted out to specialist commercial or non-profit agencies which operate at arm’s length from the corporation itself. Third, in a few cases, senior management and boards of directors are becoming more heavily invested in the exercise, responsibilities are fixed on a compliance officer and the code itself becomes a standing item on the directors’ agenda. Fourth, proactive steps are being taken to ensure that suppliers and other elements in the production chain do not embarrass the company by violating code standards. Fifth, less frequently, the language of the code is re-written to provide more explicit guarantees of a broader range of employment standards, occasionally even including a “living wage” or a
Their regulatory frame does have a character all of its own. It hardly suits, for descriptive purposes, the modern model of separation of powers—among legislative, executive, and judicial branches. Associations of consumers are not required to participate in the formulation of codes of conduct whose enforcement is to be signaled to the private market. Consumers are rather called to play a role ex post, to pronounce themselves on the desirability of certain goods, in comparison to others, following a number of non-traditional criteria already embodied in these codes. If anything, their role is more akin to that of judges—who sanction, positively or negatively, a series of corporate deeds. But in contradistinction with this institutional rapprochement, one must note that, in the regulation of informed markets, the power to sanction ultimately rests with the masses; and the power to legislate, with the expert few. In the absence of democratic legislative voting, it is therefore from highly dispersed sanctions, expressed along transnational production chains, that such regulation instruments may derive their quantitative legitimacy.

Thirdly, the “demand-side” character of consumer regulatory power is equally worth stressing, in a context in which state protection measures, typically addressing the supply side of the economy, are often overruled by lobbying. This point is relevant to the extent that appropriate state intervention on the supply side of markets is lacking, that is, at the locus of production or along transnational distribution chains. The “demand-side” character of consumer regulatory power, by contrast, brings hope for the targeted populations. Consumocratic law in fact provides for direct incentives for producers to improve their products and practices along value-chains and, in consequence, cannot in principle be overruled by

“fair wage.” And finally, sanctions are built into some code regime in the form of compliance marks or labels whose presence or absence will trigger positive or negative consumer reactions.


15. This sanctioning assembly is inevitably larger and more cosmopolitan than national voting assemblies; it includes people of all ages, including children, who happen to purchase specially marketed goods.

16. This does not prevent consumer associations from intervening in the drafting of market-sanctioned codes of conduct, but such intervention need not constitute a sine qua non condition for legitimacy.

17. This type of legitimacy may be contrasted with Habermas’ vision of legal legitimacy (and state political force): “informal public opinion-formation generates “influence”; influence is transformed into “communicative power” through the channels of political elections; and communicative power is again transformed into “administrative power” through legislation. This influence, carried forward by communicative power, gives law its legitimacy, and thereby provides the political power of the state its binding force.” See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTION TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 28 (1996).


19. See Arthurs, supra note 3.
suppliers or lobbyists. It is called to supplement protective state law when the latter is inappropriately enforced, but also when inappropriately designed, whether the state is incapable or simply unwilling to protect these populations more efficiently. Under a traditional approach to corporate governance, corporations are indeed free to engage in any kind of profitable activity, provided that they do so in accordance with applicable state laws—even if such activity is known to be socially or environmentally harmful by large segments of the citizenry. To an appreciable extent, the resulting detrimental effects are justified by the inaction of more or less representative states. Consumer regulatory power can be seen in this regard as a serious challenge to a deficient though enduring ideology, one under which it is assumed that the failure by the state to correct common market failures leads to undesirable results deemed (wrongly) to be inevitable.20

III. THE RUGMARK INITIATIVE

A few preliminary words on Rugmark may be useful before discussing, in the light of case study results, important misunderstandings regarding the nature and development of consumocratic law.

Rugmark International’s mission is officially to eliminate illegal child labor in the carpet industry in India (Rugmark Foundation, India), Nepal (Nepal Rugmark Foundation), and Pakistan (Rugmark Society, Pakistan), and offer educational opportunities to children removed from the looms. In its attempt to progressively eliminate child labor, the organization: (1) certifies to consumers that carpets bearing the Rugmark label are child-labor free; (2) rehabilitates former child weavers found by its inspectors; and (3) manages free schools—with the Indian carpet belt principally. While manufacturers and exporters of certified carpets are asked by inspectors to reveal the conditions under which weavers are working or to ensure free access to the work sites, it is through Rugmark that such information is transmitted to consumers, under the apparent control of the organization. It is estimated by Sharma that between 130,000 and 350,000 children are involved in the making of carpets in India, the majority working in the region of Uttar Pradesh.21 Before Rugmark launched its operations in 1994, attempts to eradicate child labor in the South Asian carpet industry failed since no mechanism was in place to create disincentive to employ children; those removed from the looms would shortly be replaced by others. As a

20. This ideology is perpetuated notably by the traditional examination of “economic externalities” in the study or use of the fundamental theorems of welfare economics, since Bator. See Francis M. Bator, The Anatomy of Market Failures, 72 Q. J. ECON. 351 (1958).
result of the combined efforts of Indian and European organizations, including companies exporting carpets from India, the Indo-German Export Promotion Council and UNICEF-India, Rugmark International and Rugmark Foundation (India) were established in September 1994 in order to regulate the consumer labeling process of the new “Rugmark,” thus reducing the risk of foreign boycotts of Indian rugs. In 1995 and 1999, Rugmark extended its activities to the Nepalese and Pakistani carpet manufacturing activities. Rugmark is officially a network of private, voluntary, non-profit entities with Rugmark offices in carpet buying countries (e.g., RugMark USA, Rugmark UK, Rugmark Germany), the activities of which are coordinated by Rugmark International.

Rugmark’s operation mode involves the participation of a number of actors—namely, manufacturers, exporters, importers, inspectors, retailers, educators, social welfare agents, and informed consumers.

Carpet exporters and manufacturers in India are asked to become Rugmark Licensees by signing a licensing agreement under which they agree: (1) to submit a list of all their loom manufacturing units and have them registered with Rugmark; (2) to pay minimum official wages to weavers; (3) to ensure that children below fourteen years of age are not employed in the making of the carpets; (4) to allow access to looms and manufacturing units for unannounced inspections by Rugmark officials; (5) to remove children found working on looms or disengage the loom in case the loom owner does not comply with inspectors’ orders; and (6) to pay Rugmark a 0.25% royalty on the net export value of the carpets in order to cover the costs entailed in the inspection and labeling system. In India, 316 carpet exporters are licensed by Rugmark, representing approximately 15% of all registered carpet looms.

Carpet importers are legally permitted to sell carpets carrying the Rugmark label only if they sign a license agreement with Rugmark under which they undertake to pay Rugmark at least a 1% royalty (e.g., 1.75% in the United States) on the net import value of carpet shipments in order to finance social programs for children removed from the looms.

Carpet retailers may support this initiative by agreeing to purchase Rugmark-certified rugs from licensed importers. They then receive increased publicity with the support of Rugmark’s marketing program and can more effectively promote their commitment to social responsibility.

Loom inspectors, employed and trained by Rugmark, conduct regular, unannounced, and random inspections on all working sites. Inspectors ignore the locations they will be visiting until the morning of the inspection day. They also work in pairs that are periodically changed in order to

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prevent corruption. If a child is found working on a loom\(^{23}\), the carpet manufacturer’s license can be withdrawn by Rugmark “immediately.”\(^{24}\)

Independent of the carpet industry, Rugmark’s teachers and social welfare agents help educate and rehabilitate children removed from rug weaving by providing them with appropriate healthcare, educational opportunities, and vocational training. In India, Rugmark runs six schools and one rehabilitation center with a total strength of 2085 students in 2007. It is reported that over 9,000 children have received “schooling and/or rehabilitation” from Rugmark as of 2008. Students attending Rugmark schools each year are based in India (over 2,000), Pakistan (around 700), and Nepal (around 50).

Carpet buyers may support the gradual elimination of carpet child labor in India, Nepal, and Pakistan by purchasing Rugmark-labeled rugs. Using the certification number on the label attached to the rug, consumers may allegedly trace the precise origin of their carpet back to the loom number. More than six million Rugmark-labeled carpets have been sold in Europe and North America since 1995. The Rugmark trademark is registered in fourteen countries and consumer countries actively promoting the Rugmark label include Canada, England, Germany, Luxembourg, the Netherlands, and the United States. The major part of the business is between India and Northern Europe, more than half of Rugmark-certified carpets being sold in that region.

In the Summer of 2009, a new brand name was created ("GoodWeave"), indicating that Rugmark intended to phase out its label and logo.\(^{25}\)

Four reasons have mainly justified the choice of Rugmark, among NGOs involved in consumocratic activities, in an attempt to generate as well as infirm or confirm "theories." First, the organization is trying to help a population of child weavers which, among the most common targets of societal labeling (such as forests, animals, waters, and the lower atmosphere) is arguably the most sensitive. The rightness of the arguments invoked in favor or in opposition to the Rugmark initiative is, on that

\(^{23}\) Other activities such as washing, clipping, or dyeing are also forbidden.

\(^{24}\) In case of noncompliance on the part of the manufacturer, the carpet exporter may alternatively be asked to order the removal of the child from the loom and send him/her to school.

\(^{25}\) The Rugmark Foundation, India, resists the change, as appears from its website. See RUGMARK, http://www.rugmarkindia.org (last visited Sept. 20, 2013). In fact, the Rugmark organization has gradually split into two disconnected networks: Rugmark India and the GoodWeave, which encompasses the entire spectrum of the former network of organizations, with the exception of the local Rugmark team. See GOODWEAVE, http://goodweave.org/home.php (last visited Sept. 20, 2013). Mathew John Smith, a manager once dismissed by Rugmark India, currently oversees the operation of GoodWeave India in the carpet belt. Because most of the facts on which this Article is based have been collected during or immediately before these changes, they are considered as attached to the operations of Rugmark, even though our conclusions also hold for the new GoodWeave.
account, rendered all the more crucial. Second, Rugmark is the most experienced and diversified consumer-led organization involved in the Indian carpet belt, having paved the way for competitors such as Step and Care & Fair.26 Being the only one in charge of inspectorship, education, and rehabilitation work, it is more exposed than any other NGOs to the multiple facets of the child labor problem. Third, the message of hope transmitted by Rugmark to consumers (and to those willing to consider the fate of distant child laborers, more especially) takes its roots in one of the poorest regions of India. The gap between this message—a vision of freed children studying in good schools—and the difficult life of the carpet belt weavers is relatively large indeed. In this context, the Rugmark initiative represents a potential “critical case” in the sense and to the extent that it reflects a clear tension between the expectations raised by its official discourse and the harsh reality of some economic developments in rural India. If the distance problem of regulatory transparency can be solved under these conditions, it is arguably more likely to be solved with respect to other projects based on ethical purchasing.27 Fourth, no in-depth research on Rugmark (or any of its main competitors) has been conducted thus far. Studies on these initiatives have mostly consisted in describing the Rugmark scheme (along the lines of the portrait presented by the organization itself), within a general framework and a period of only few days.28 Concerned with the lack of effectiveness and transparency in the


27. This may be referred to as a “least likely” type of critical case in the sense that this gap (further enlarged by language and cultural differences, geographical obstacles, and the notable facility with which societal information may still remain hidden in Uttar Pradesh) is least likely bridgeable, under such unpropitious conditions. My research does not yet provide an answer to the question of whether such a gap is in fact bridgeable; it more specifically addresses the conditions under which gap bridging is possible in the circumstances, without dwelling into purely normative issues. A well-known illustration of a least likely critical case is offered by the classical study of oligarchic organizations by ROBERT MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE Oligarchical Tendencies of Modern Democracy (1962) (suggesting that most organizations are oligarchical since even examples of the most horizontal and democratic ones show evidence of oligarchic influence).

28. See GAY W. SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSCATIONAL ACTIVISM (2007); BY THE SWEAT & TOIL OF CHILDREN, supra note 4; Diller supra note 26; Hilowitz, supra note 4. A more comprehensive study realized by the Institute for Human Development (New Delhi) on the impact of social labeling on child labor in India did raise a pertinent issue here, although in a rather suggestive and limited way: “Shamshad Khan, (former) member of Rugmark’s board of directors . . . was of the firm opinion that it was unjust to make consumers believe that a carpet could be ‘child labour free.’” SHARMA ET AL., supra note 21, at 80. My own fieldwork was accomplished between September 2006 and March 2007 (with some update work in 2012), with the financial support of a generous fellowship plan. Children, weavers of all ages (from eleven to seventy years old), inspectors, teachers, managers, business people, lawyers, activists, and villagers were interviewed or observed, or both, in the course of regular visits (on motorcycle, rickshaw, or auto-
operation of the Rugmark scheme, one author has underlined the shortcomings of the existing literature in this respect.29

IV. THREE MISUNDERSTANDINGS REGARDING CONSUMOCRATIC (LABOR) LAW

Important misunderstandings regarding the nature or development of consumocratic law arise from the assumptions that: (1) consumocratic law is inherently deficient and will remain so unless it is mandated by the state; (2) when codes of conduct operating behind labeling schemes comply with generally accepted (ILO) standards, it is their effectiveness that is problematical; and (3) wherever power is exercised, be it under consumer influence or not, there should be transparency. They are corrected below, through the lenses of a pragmatic approach.

V. CORRECTING A FIRST MISUNDERSTANDING

Consumer regulatory power is typically regarded as deficient because relatively few consumers actually pay attention to societal information when shopping.30 It is first assumed that markets for certified products or services will never grow to a point where they could defy the influence of traditional markets. The “fair trade” market does not appear to lose its growing popularity, however, even if it involves paying premiums in return for a shared expression of social responsibility. Its certified sales increased by 47% worldwide in 2007 and, in spite of the world economic crisis, by 22% in 2008. The number of types of fair trade certified products also

increased by 58% from 2009 to 2010 in the United States, while the country was still struggling economically. But a pragmatic reaction to this first misunderstanding should primarily translate in an attempt to better qualify the authority of consumocrats as well as the perception of that authority along production chains. The exercise of consumocratic authority is communicational at first, in that it necessarily implies the transmission, between diffusers and recipients, of a message through a messenger. On certain markets, corporations in effect send to consumers, via a label affixed to a product or other means of societal marketing, a signal according to which a code of conduct is being enforced by them or along a given chain of production. The marketing signal can vary in clarity from one chain to another, but it invariably conveys information destined to meet the expectations of consumers who pay heed to peripheral attributes of consumer goods, and sanction corporate practices directly. Such directness may prove highly compelling for a significant number of competing firms. No comparative study appears to have been conducted recently on the relative dependence of firms on the preservation of market shares likely to be boosted or curtailed by consumocrats. But it has been suggested in 1979 that a minimum relative market share is needed for the long term sustainability of a business and that such "critical share is (often) of the order of ¼ of the leader’s share." It is implied for instance that a corporation should keep a minimal share of approximately 4% when the leading corporation controls 16% of a given market. In the United Kingdom, Asda (Wal-Mart’s former supermarket chain) is still doing well economically, with 17.5% of the market share (in 2009) while the leader in that region, Tesco, has a 30.4% share of the grocery market. By comparison, Wal-Mart stores in Germany captured only 2% of the grocery market following their entry on the territory in 1997 and remained a marginal player there, far behind Aldi, the leading competitor with a 19% share. Wal-Mart pulled out of Germany in 2006 with a financial loss of about one billion dollars (Newsweek 2005).

31. In 2008, Fair Trade sales grew by at least 50% in seven countries, including Australia and New Zealand (72%), Canada (67%), Finland (57%), Germany (50%), Norway (73%), and Sweden (75%). The largest markets for Fair Trade products continued to experience strong growth, as sales of Fair Trade certified products increased by 43% in the United Kingdom and 10% in the United States. Fair Trade products also gained popularity in a number of new markets, including in Eastern Europe, Eastern Asia, and South Africa. More than 9,500 Fair Trade certified products were available in 60,000 U.S. retail locations (in 2010), both up from around 6,000 fair trade certified products and 50,000 locations (in 2009). FAIR TRADE RESOURCE NETWORK, www.fairtraderesource.org (last visited Sept. 20, 2013).  
33. CHRIS LONGBOTTOM, ANOTHER RECORD SHARE FOR ASDA (TNS Worldpanel Report, 2009).
is therefore suggested that, under certain conditions, competing firms often have to consider (potential) variations in their market share very seriously, even if a relatively small portion of the market is at stake.

Data culled from our study confirms that consumocratic law is not only enforced at the very end of the value-chain, by consumocrats, but also within it, by importers speculating on the expected valuations of critical masses of individual buyers. Rugmark exporters and weavers, reportedly, did not join the Rugmark network on a voluntary basis. Carpet importers (mostly from Europe and North America) literally imposed their conditions on carpet exporters. Contrary to the common belief, local exporters may therefore feel forced to register with Rugmark or a similar organization. The Rugmark initiative was indeed perceived by key actors in the carpet industry as involuntary and ultimately dictated by the preferences of carpet buyers. This perception was firmly grounded, since threats of boycott forced the implementation of Rugmark in the first place, in a region where protective state law had failed.

From a more abstract and comparative point of view, one also observes that consumocrats and voters face similar utilitarian challenges, in spite of the fact that the latter still participate (in democratic elections) in larger proportions than the former (in ethical buying practices). Voters typically refer to culmination results when it comes to justifying their going to vote. Culmination outcomes envisaged by voters (e.g., supporting a certain political program or ideology) are used to justify their vote. Voters wish to “win” their election, or “object” to a political project, but it is difficult for them to explain how, in effect, their individual vote will “make a difference” and significantly contribute to the ultimate outcome. The internalization of the civil duty to vote, and the valuation of this democratic necessity, is often strong enough to induce voters to speak of culmination


35. RUGMARK, http://www.rugmarkindia.org/Rugmark/rugmark_india.html (last visited Oct. 1, 2013) (“Intensive campaigns against the use of child labour led to a proposal to totally boycott the import of carpets from India. To avoid the negative consequences of such a step on workers, exporters and carpet manufacturing regions positive solutions were needed. Consequently, RUGMARK, the initiative against the use of illegal child labour in the carpet industry, was initiated in 1994 by Indian carpet manufacturers and exporters along with many leading non-governmental organisations (NGOs).”).

36. Child labor was prevalent in the carpet belt, before the establishment of Rugmark in 1995. In comparing the ability of consumers to force corporations to review their policies or practices with that of the state, Max Weber interestingly concluded that “[t]he case of conventional guarantee of an order which most closely approaches the legal, is the application of a formally threatened and organized boycott. For terminological purposes, this is best considered a form of legal compulsion.” MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 128 (1964).
outcomes as their principal motivational force. Consumocrats may adopt a similar logic in this regard. Because there is a societal value attached to a product subject to societal marketing, a “child labor free” carpet for sale is not simply a carpet for sale. It is also an idea of, and a commitment to, fairness; societal marketing thus opens a door to the terrain of civil action. In this context, consumocrats may justify their ethical buying by referring to some socially desirable outcome (e.g., the elimination of child labor). Nonetheless, rational consumocrats must be aware of the inevitable dilution of the instrumental effect of their purchasing decisions in the sea of sales. An ethical appeal, more or less internalized under the form of a social duty, ought to drive such proactive consumers. For they must value the process of ethical buying as much as the desired culmination outcome – e.g., the making of carpets by fairly paid adults, not by young bonded laborers.

Utilitarian voters and consumocrats accordingly value the process of voting and of buying responsibly as much as the civil projects that lie behind such processes. This is why one may plausibly anticipate participation levels in consumocratic activity to approach or mirror those of traditional democratic activity.

It is finally worth recalling that consumocratic law is not and should not be intended to substitute state law. A substitution would not prove possible nor guarantee a higher level of achievement of societal objectives. In fact, it is in principle through private markets that the societal value of a product is ascertained and that consumocratic law may operate (the exception being found in public procurements).

Also, as will be shown in the following section, consumocratic law alone may prove ineffective if not inefficient in cases concerning the general fight against child labor. This is to suggest that consumocratic law may spur government action or serve

37. The act of voting is arguably the most powerful symbol of living democracies and, were it to fade away, it would most likely be rehabilitated, paradoxically, by an obligation to vote imposed by the state. Australia and Belgium, among other states, have made voting a legal duty. See, e.g., the classical study of William H. Riker & Peter C. Ordeshook, A Theory of the Calculus of Voting, 62 AM. POL. SCI. REV. (1968). Utilitarian voters and consumocrats may value the very process of voting and of “buying responsibly” as much as the civil projects that lie behind such processes. It is otherwise more difficult to explain why (1) voters would apparently wait in line to simply add one vote into a national election machinery and why (2) consumers would spend “extra time” or “extra money” when shopping individually. See also Amartya Sen, Maximization and the Act of Choice, 65 ECONOMETRICA 745 (1997) (on the role of the choice act in maximizing behavior).

38. One may here refer to the rich literature on the (ir)rationality of voters. See, e.g., On this point, see also Geeta Chowdhry & Mark Beeman, Challenging Child Labor: Transnational Activism and India’s Carpet Industry, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 158 (2001); Aparna Ravi, Combating Child Labour with Labels: Case of Rugmark, 36 ECON. & POL. Wkly. 1141 (2001); Gay Seidman, “Stateless” Regulation and Consumer Pressure: Historical Experiences of Transnational Corporate Monitoring, 11 RES. RURAL SOC. & DEV. 175 (2005).
as a useful supplement to state law and, even if it could affect only a portion of the industrial sector (typically the export sector), that it could also bring about positive results when national and foreign businesses ignore protective state laws with impunity.\footnote{See Rina Agarwala, Transnational Movements Among Informal Workers: The Case of the Self-Employed Women’s Association, 54 J. INDUS. REL. 443, 449 (2012).}

In sum, unlike sanctions known under state and private customary law, consumocratic sanctions operate directly through private markets, linking a critical mass of consumers (the sanctioners) to more or less distant corporations (the sanctioned). This is done with a degree of directness the state could hardly approach.\footnote{In the works of regulatory cost-benefit analysis proponents, consumer choices in fact do not lay themselves wide open to bureaucratic inefficiencies, agency capture, and paternalism—at least not as openly as political action through voting does. See Daphna Lewinsohn-Zamir, Consumer Preferences, Citizen Preferences, and the Provision of Public Goods, 108 YALE L.J. 377 (1998).} Such directness invites us, though, to pay close attention to the classical problem of the unanticipated consequences of purposive action.

\section*{VI. CORRECTING A SECOND MISUNDERSTANDING}

The efficiency of rules (i.e., whether they serve their intended purpose) must never be confused with their effectiveness (i.e., whether they are actually observed). If confused, one may fear the manifestation of an old problem, lying in the belief that regulators’ ultimate goals are served by the practical goals upheld. This may appear obvious at first sight, but what of the seductive link between working children’s well-being (ultimately) and the elimination of child labor (practically)? Prejudging of the substantive adequacy of protection rules is not uncommon.\footnote{For a telling illustration of this problem in relation to the extension of social security in the developing countries, see R. Filali Meknassi, Extending Social Security in the Developing Countries: Between Universal Entitlement and the Selectiveness of International Standards, 27 COMP. LAB. L. & POL’Y J. 202 (2006).} About the effectiveness of a consumocratic initiative designed to rehabilitate child laborers, it is characteristically asked: “What is the precise implementation of the Rugmark scheme . . . and how do we ensure that the companies involved are adhering to the principles of the scheme? It is thus imperative that more research is conducted in this area to investigate several basic questions that arise.”\footnote{See McDonagh, supra note 29, at 659–60.}

Child-labor related problems of unanticipated consequences of action raise sharp polemics. On the one hand, it is feared that well-intentioned consumers and independent monitors may ultimately cause, directly or indirectly, more harm than good to the populations targeted by societal marketing. It is suggested that consumers should ignore the social and the
environmental contexts in which goods are produced since taking them into account would perpetuate, for instance, the impoverishment of first-line producers. Consumers would then contribute to the worsening of production conditions. In relation to the work of children, the World Bank maintains that: “Children work for a variety of reasons, the most important being poverty and the induced pressure upon them to escape from this plight. Though children are not well paid, they still serve as major contributors to family income in developing countries . . . . There must be an economic change in the condition of a struggling family to free a child from the responsibility of working.”

Some authors affirm that extreme poverty, in contrast with parents’ callousness, is the root cause of child labor, adding that “[w]hile consumers are, in some sense, better off if they are consuming goods produced only by adult labor, no claims can be made concerning the overall welfare of the children involved.” In consequence, “child labor free” labeling initiatives may not be worth pursuing. Dessy and Pallage would go as far as not imposing a single ban on the “worst forms of child labor.”

Attempts to force children to leave their work positions may well lead, it is here often argued, to the worsening of their working and living conditions. Under this instrumentalist perspective, it is implied that consumers should not be given access to societal information to the extent that they do not understand the local, socio-economic

47. See Brown, supra note 46, at 3.
50. Article 3 of the ILO Convention on the worst forms of child labor (1999) determines that these forms include: (a) all forms of slavery or analogous practices, such as the sale of or trade in children, debt servitude and bondage, as well as forced or mandatory labor, including forced or mandatory recruitment of children for use in armed conflicts; (b) using, recruiting or offering a child for purposes of prostitution, the production of pornographic materials or pornographic entertainment; (c) using, recruiting or offering a child for illegal activities, particularly for the production and trafficking of drugs as defined by the relevant international treaties; (d) work that, by its nature or the conditions under which it is performed is likely to adversely affect the health, safety or the morality of children.
51. I.e., the making of bricks by former carpet child weavers, the resort to uncontrolled prostitution among city workers, or sheer starvation and death. See JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004). See also a report of the International Research on Working Children to the effect that “children who had worked out of economic necessity were laid off by their employers in order to comply with legislation, and finally ended up faring worse in the informal and unregulated sector.” IREWOC, WORKING CHILDREN’S ORGANISATIONS IN INDIA 13 (IRWC Report, 2007).
dynamics at work in developing countries. They would otherwise encourage what is regarded as a form of cultural imperialism, by imposing a moral vision that is specific to the rich and insensitive of the context of the poor.

One of the most disconcerting specialized debates underlying the regulation of consumer choice, indeed, relates to the child labor problem. Specialists also condemn child labor vehemently, insisting that it is a way of keeping children out of school, contributing to the escalation of illiteracy and poverty. They argue that the establishment of compulsory education is a necessary condition for the reduction and abolition of child labor; more especially so as it is easier to monitor school attendance than to monitor the work of children. Admitting that child labor is partly a response to the financial conditions of deprived families, they also draw attention to the existence of a demand for child labor and challenge the arguments traditionally invoked in its support. One reason is that children would benefit from special skills (e.g., the nimble fingers of young carpet weavers) which help them perform certain tasks better than adults. Another is that certain skills develop over long periods so that early training leads to better skills and improved incomes and job mobility. The two arguments have been questioned. It has been argued that no industry is child-specific, in the sense that there is no work process in which the labor power of children cannot be replaced by that of adults. Evidence also supports the conclusion that children trained at an early age do not enjoy better economic benefits than children trained after the age of 14. Governments, it is further advanced, can bring an end to child labor; what is lacking is the political will to achieve this goal.

Fieldwork results call for a nuanced and pragmatic approach to the problem of child labor. This is revealed in a number of ways. The continuous presence of Rugmark inspectors in the carpet-belt region has coincided with a growing awareness of the illegality of child labor, but also with novel attempts to dissimulate the work of children. The work of (Rugmark and state) inspectors is therefore made more complicated by the reaction of some communities. Before the foundation of Rugmark, the work of child weavers was visible and generally not clandestine, as the

52. See Nera Burra, Born to Work (1998).
56. See Weiner, supra note 53.
57. Interview with R. Mishra, Coordinator at Care and Fair, UTTAR Pradesh, Site 45H at 137 (Jan. 22, 2007) (on file with author).
work of sari weavers and young vendors currently still is visible and not clandestine.\(^{58}\) It is worth noting in this regard that child labor is regarded as a normal phenomenon by large segments of the Indian population, including influential journalists. Public elections “have come to a boon” to many children, it is suggested, as political parties engage them in election campaigns.\(^{59}\) And the phenomenon may also convey a positive connotation in the mind of educated people.\(^{60}\) Because the employment of child weavers was previously overtly accepted by the local population, it was relatively easy to discover its worst forms. The progressive recognition of the illegality of child labor in the region was paralleled with efforts to hide it, to inspectors’ discontent. One major unintentional consequence of Rugmark’s action, then, consisted in the development of interloper practices. Contrary to inspectors who are now aware of this issue, “child labor free” carpet buyers are not in a position to discover this phenomenon in light of the information provided by Rugmark.

Deprived families and their children have also taken advantage of secretly accommodating and paradoxical applications of the Rugmark code and Indian law. This may occur, for instance, when “illegal” child labor is tolerated by Rugmark inspectors under certain circumstances. Such circumstances abound. One of their common denominators is almost inevitably found in the exceptionally high value attached to a child worker’s remuneration in destitute or hapless families. In contravention with its own code, Rugmark covertly allows the children of these families to work under conditions determined ad hoc. This permissiveness is put into effect through various processes: (1) the maintenance of a certain degree of complaisance in the regulation of carpet labeling\(^{61}\); (2) the friendly age evaluation of some children caught working behind carpet looms\(^{62}\); (3) the


\(^{60}\) When informed of my intention to examine the ways in which foreign consumers can help improve the well-being of Indian children through societal labeling, a university professor of Allahabad candidly advanced that those would involve the purchase of products exclusively made by deprived children. Interview at Professor’s Home, Site 18 at 35 (Nov. 10, 2006) (on file with author).

\(^{61}\) The series number which appears on a Rugmark label cannot generally correspond to the registration number of the loom on which the carpet was produced. The label may only signal the existence of a loom—in or out of use—that is occasionally inspected by Rugmark. Interview with R. Ahmad, Partner at Izhar International, Nature’s Loom and Asif Woolens, Uttar Pradesh, Site 45C, at 126 (Jan. 22, 2007) (on file with author); Interview with M. Srivastava, Director of STEP, Varanasi, Site 49 at 158 (Feb. 2, 2007) (on file with author); Interview with Dr. Kebshull Rugmark India’s Permanent Advisor, New Delhi, Site 59 at 189 (Mar. 7, 2007) (on file with author).

\(^{62}\) In a context where few children are given a birth certificate, in rural regions in particular, it is easier for an employer and his young employee to deceive the inspector. Inspectors rely on answers provided by children, together with a general appreciation of combined physiological traits. Interview with H. Kahn, Rugmark Inspector, Varanasi, Site 51 at 168–69 (Feb. 10, 2007) (on file with author).
consideration of nonlegal arguments in the decision not to rescue a child worker\(^\text{63}\); (4) a generous interpretation of the “family business” notion\(^\text{64}\); (5) the preference given to obtaining the consent of parents and employers, over the organization of “raids” (to better prevent the dangers of clandestininess)\(^\text{65}\).

At times, they refrain secretively from rescuing a child laborer. Some former and current agents at the employ of Rugmark do not tolerate any child labor. Inspectors’ decisions thus remain largely subjective, being ultimately guided by a personal appreciation of what children should be doing. The right of children to leisure and education, on the one hand, and the right to life and bodily health, on the other hand, are not guaranteed the same type of arbitrage when they do conflict.

Faced with this contextual diversity, inspectors now declare using their judgment to determine whether or not they should crack down on child labor. They will generally refrain from rescuing a child laborer if they judge that the health of the child would be compromised as a result. In so doing, it is clear that the rights envisioned in the Minimum Age Convention (1973) and the (ILO) Worst Forms of Child Labour Convention (1999) are not given equal weight. The principle that all human rights are interlinked

63. A trained child who would nonetheless attend school on a regular basis could “deprive” his family of approximately 600 to 1,200 rupees per month, that is, 25% to 50% of an adult’s revenue. Although modest, this sum suffices to substantially enrich the diet of a destitute family. One may compare the daily remuneration of a relatively poor weaver with the cost of a satisfactory family meal composed of rice, potatoes, lentils, tomatoes, milk, and onions (fruit remaining a luxury for many). Whereas the salary of an adult weaver may amount to only 50 rupees per day, the price of such a meal for a family of five in 2007 was up to 100–120 rupees a day in the rural area surrounding the city of Varanasi. And food prices were affected by a growing inflation rate of 7% in the same year. See Inflation Continues to Right . . . Touches 6.73%, THE PIONEER, Lucknow ed., Feb. 16, 2007, at 9.

64. The Rugmark code authorizes the work of children who accompany their parents or their uncles—“family business” being excluded from the work interdictions posed under the code. An additional specification, not provided for under Indian law, and not necessarily followed by inspectors, reads as follows: “In the case of traditional family enterprises, children under 14 years of age helping their parents must attend school regularly.” RUGMARK, supra note 25. Under Indian state law, the prohibition of child labor is in principle not applicable to any workshop wherein the occupier carries on any process with the aid of his family, or to any school established by or receiving assistance or recognition from the government. Child Labor (Prohibition & Regulation) Act, proviso to § 3, 1986 (India). But the employment of children for domestic work was prohibited in October 2006, under the CLPRA through a Notification by the Ministry of Labour. It is not clear then whether Indian children can be legally employed by their parents if the workshop happens to be located within the family house. It may take a decade before the question is answered by one of the overcrowded courts of Uttar Pradesh. One finds only 13 judges per 10 lakhs (1,000,000) people in Uttar Pradesh—instead of 30 per 10 lakhs under the law. Shortage of Judges Most Acute in Uttar Pradesh, HINDUSTAN TIMES, Dec. 6, 2006, at 5.

65. Rugmark deplores that in matters of rehabilitation, the organization cannot do much without parental consent, while admitting that it has not approached state institutions such as the Juvenile Welfare Board, in charge of enforcing legal procedures for neglected children and authorized to use force.
and of equal importance, if applied strictly it is suggested, may not serve children well, whether under state or consumocratic law. The right to survival and the right to education do not logically conflict, but one can seriously question the absolute nature of their equivalence under conditions found to be relatively common in some parts of the world. A distinction between short-term and long-term perspectives does not suffice to clarify the problem. The direction of causality is reported to remain ambiguous, for instance, in the correlation between schooling and health outcomes, as if one should regard hunger (while at school) and child work (while delaying school entry) as functionally equivalent sacrifices on the road to improved living conditions. The question of whether a problem relating namely to the safety, health, or diet of a family could legitimize the (temporary or part-time) work of a school-aged child can hardly escape the controversy exposed earlier. Notwithstanding this controversy, the reality of inspection work demands that problems be effectively addressed on a daily basis. Social and environmental inspections mandated under a consumocratic regime often take place within faulty state institutions and inspectors must therefore attempt to compose with the latter in a pragmatic fashion, paying as much attention to the efficiency as to the effectiveness of protection rules.

On the procedural level, one notes that Rugmark’s inspection system is based on an inquisitorial mode. It is in effect Rugmark that takes the initiative of the monitoring, auditing, and certification process in the handmade carpet industry by directly undertaking the information gathering required by its mission. Since its inception, this inquisitorial scheme has been deemed sufficient in responding to the informational demand of societal marketing. Yet the success of the Rugmark mission necessitates the adoption of a supplementary, more accusatorial mode of information collection—a more independent, complaint-based system, in other words.

The main reasons supporting this contention are as follows.

First, the vast and hostile territory covered by Rugmark and state inspectors poses a serious obstacle to access to the production sites.


67. Admittedly, this is not to appease the fears of a hierarchized ordering of labor rights; for a rather aggressive formulation of the “anticore rights” point of view, in which all “noncore rights” are perilously relegated to a second-class status, see Philip Alston, Core Labour Standards and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457 (2004).


69. The substantive portion of a consumocracy-based regulatory platform could include, for instance, some structural elements of procedural regulation, such as online diffusion of decisions rendered through arbitration-like processes.
Inspecting all carpet looms within a reasonable period is impossible under these conditions. Other hurdles include the difficulties attached to the identification of looms within villages as well as their inspection before and after regular office hours. A flagrant violation of the Rugmark code may thus persist without any inspector having even the chance of intervening. In these circumstances, surprise inspections based on sampling procedures appear to answer a need for equality before the Rugmark code more than a need for efficiency.

Second, institutional flaws of the current regime drive potential sources of infractions away from the scope of the Rugmark inspectorship. One flaw concerns the child labor displacement effect following a selective registration of carpet looms with Rugmark. It has been shown that a community of weavers could very well register one (or several) loom(s) with Rugmark while maintaining one (or several) unregistered loom(s) outside the purview of the Rugmark code. The ensuing displacement of young workers toward such unregistered looms has created privileged and non-representative zones of direct Rugmark influence outside of which child labor problems may be unintentionally moved. Another flaw of importance relates to the reputational risks incurred as a result of the non-correspondence between the series number displayed on a Rugmark label and the registration number of the loom on which the carpet was produced, contrary to Rugmark’s official claims. In this context, a mention to the effect that the label signals the intervention of Rugmark within a broader sphere of regulatory influence—as opposed to a collection of hardly traceable carpet orders—would be more susceptible of reassuring informed consumers. And the use of external “antennas,” more autonomous and decentralized, would prove necessary in this respect. Flagrant violations of the Rugmark code could then be uncovered outside the more privileged zones created by the organization. In both cases, the exclusively inquisitorial scheme retained by Rugmark appears as a major determinant of the problem.

In sum, institutional failures, spatio-temporal limitations, and the centralism of the regulatory apparatus all point to the failures of Rugmark’s inquisitorial system. The precise form that a suppletive, accusatorial system could take will not be discussed in detail here. One may envision an arbitration tribunal or a (Scandinavian-type) private ombudsman scheme, among known models. What matters the most at the preliminary stages of an institutional and efficient reform is arguably the recognition of a need for “decentralizing” the information gathering process at Rugmark’s—e.g., encouraging the development of initiatives intended to collect and treat a broader range of potentially controversial facts and opinions. On the procedural level, the setting-up of such a system would require tackling
issues relating to the nomination and destitution of arbitrators or ombudsmen and to the determination of their powers, to general rules of amendment and evidence, and to the posting of claims and decisions on websites accessible to consumers.70

VII. CORRECTING A THIRD MISUNDERSTANDING

In discourses on the challenges of regulation, an aura of rightness almost invariably accompanies the notion of transparency. Accuracy, openness, disclosure, and their positive association with opportunities to correctly inform choices form, as a general rule, a highly recommended set of tools in governance studies. Illustrative of this accord is the fact that transparency remains an essential ingredient in conflicting approaches to the study of various objects of regulation. In the field of fair trade, by way of example, academics and other professionals do not agree on the level of convergence to reach in the determination of standards to be shared with the population. In spite of this clash, both proponents of “heterogeneity” and “convergence” come out as strong advocates of increased transparency. Under the first approach, that of “ratcheting labor standards,”

[I]t is possible to build on the core dynamics of nongovernmental regulatory systems by first expanding the transparency of monitoring methods and results and then creating mechanisms to compare and benchmark the performance of manufacturing facilities and monitors. Increased transparency and comparison would allow stakeholders to evaluate individual factories—comparing an FLA factory to a WRAP factory to an SAI factory—and then to compare monitors and monitoring methods to evaluate the effectiveness and credibility of monitoring protocols.71

Under the second approach, that of “convergence,” it is believed that the multiplicity of standards and benchmarking initiatives, while supportive of innovative schemes, may on the contrary hamper the evaluation of

70. One may fairly point to the problem of juridification likely to emerge following the adoption of such procedural rules. In order to avoid excessive focus on meeting detailed regulation, one could propose that rulers be in a position to proceed with the inquiry into the grievance in accordance with such procedure and mode of proof as they deem appropriate, subject to review mechanisms.

71. See Dara O’Rourke, Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring, 31 POL’Y STUD. J. 23 (2003) (emphasis added). The ratcheting of labor standards regards the array of existing standards as differentiated levers through which competitive pressures could drive corporations to improve their social performance. Under this mode, the multiplicity of available (substantive and procedural) standards may be instrumental in permitting a positive differentiation of productive activities more or less in accord with the “best practices” developed by the leaders of corporate social responsibility management. See also ARCHON FUNG, DARA O’ROURKE & CHARLES SABEL, CAN WE PUT AN END TO SWEATSHOPS? A NEW DEMOCRACY FORUM ON RAISING GLOBAL LABOR STANDARDS (2001), Charles Sabel, Archon Fung & Dara O’Rourke, Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace (KSG Working Papers, No. 00-010, 2000), available at http://ssrn.com/abstract=262178.
results achieved in the area of corporate social responsibility. The transparency prerequisite, remarkably, is here again unquestioned:

“The interest in benchmarks has resulted in an increase of guidelines, principles and codes during the last decade. Not all of these tools are comparable in scope, intent, implementation or applicability to particular businesses, sectors or industries. They do not answer to the need for effective transparency about business social and environmental performance. As expectations for CSR become more defined, there is a need for a certain convergence of concepts, instruments, practices, which would increase transparency without stifling innovation, and would offer benefits to all parties”.

A further confirmation of a certain unity of thought regarding the role of transparency is revealed in the fact that problems associated with transparency are also depicted as a lack thereof—in contrast with any serious difficulty deriving from its genuine use. Typical in this respect are the reasons for which, according to a group of analysts,
targeted transparency policies can also do more harm than good. Such policies are always the products of political compromise. When the information from the tug and pull among many interests is incomplete, inaccurate, obsolete, confusing, or distorted, it can contribute to needless injuries or deaths or to large economic losses.

In other words, it is typically suggested that the objectives motivating disclosure would be better served should one use transparency more genuinely—i.e., should the information provided be more complete, accurate, timely, clear, and not distorted.

Also, given the significant potential for growth in the (national and transnational) market share of labeled products and the regulatory autonomy of this sector, the demand for transparency in the regulation of private-sponsored schemes somehow reflects a major requirement imposed on government-sponsored scheme—i.e., that labels must be informative and credible. A power struggle feeds in parallel the search for more transparency, outside corporations and NGOs. A tenor of corporate social responsibility sums up this point of view shared by the advocates of the general stakeholder theory: “[W]herever power is exercised, there should be transparency.” This general and well-accepted conclusion is challenged here on various grounds.

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75. ADRIAN HENRIQUES, CORPORATE TRUTH. THE LIMITS TO TRANSPARENCY (2007).
It does not distinguish between recommendations made in relation to transparency measures aiming at the satisfaction of information recipients’ needs and those aiming at the satisfaction of people usually unknown to information recipients. By failing to consider information recipients and the ultimate beneficiaries of a transparency measure as potentially separate groups, it overlooks the self-regarding versus other-regarding problem of calculation in social life. One must recall in this regard that product information often differs from societal information in that the latter creates more opportunities for other-regarding action. Whereas habitual expert advice on transparency issues may well serve the condition of information recipients in search for ways of improving their own well-being, it is unclear whether it would serve people whose condition is judged by distant information recipients. In more practical terms, the self-other distinction suggests that increased transparency may help consumers make better, safer choices for themselves, but that it may not generate only positive results on people consumocrats endeavor to support from a distance. It is unclear in effect whether the diffusion of more transparent information on the treatment of distant working children under current consumocratic initiatives would necessarily improve their fate.76

Behind the veil of ideal statements hailed by Rugmark, one is led to acknowledge that under existing conditions increased transparency in the regulation of its societal information would be problematic. Ceteris paribus, more transparency could prove as harmful as beneficial to carpet belt children. One should distinguish in this regard between two types of comforting opacity, i.e. between the villain type (with potentially harmful consequences) and the Machiavellian one (with potentially beneficial consequences).77 These do not lend themselves to similar rationales with respect to the problem of regulatory transparency.

The revelation of villain practices to the public (e.g., those tainted with corruption or abuse), could be followed by a commitment not to repeat them, under good auspices. The target audience of societal marketing would not ask for less, in return for its confidence. Weavers would be better off, to the extent that abusive practices often serve the personal interests of some Rugmark employees, and generally not those of weavers. Increased transparency, in this context, would be more likely to trigger a

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76. It is assumed here that a proper enforcement mechanism is in place and duly managed to effectuate anti-child labor policies. The same rationale applies to other people or ecosystems consumocrats may attempt to protect when encouraging specialized labeling initiatives.
77. Cicero suggested that, in the political arena, “honesty is the best policy,” an advice which had shaped the official Christian discourse of Renaissance times. Machiavelli, by contrast, insisted on the incompatibility of Christian-valued unwavering truthfulness and what he conceived of as another moral objective, that is, the stability of an enviable City. See ISAIAH BERLIN, AGAINST THE CURRENT: ESSAYS IN THE HISTORY OF IDEAS (Henry Hardy ed., 1981).
desirable adjustment within the organization, in agreement with consumers’
expectations.\footnote{78}

By contrast, the revelation of Machiavellian practices (i.e.,
misleadingly comforting, although secretly beneficial to weavers), could
not be followed by such a commitment of non-repetition without risk for
the weavers. Increased transparency would consist in communicating some
troubling information likely to trigger boycotts (or threats of boycotts) in a
context where a commitment not to repeat these practices could very well
prove more detrimental then helpful to weavers. Hence the most manifest
illustration of the regulatory transparency problem. First, consumers do not
have access to the contextual elements required for a full understanding of
the likely benefits of practices they may strongly oppose. Second, if they
were given access to such contextual elements, polemics would
undoubtedly be brought to life, in the absence of any conciliatory
mechanism. The expert scene is no exception. Controversies characterize
the discourse of specialists on the question of child labor and, thus far, the
expert literature seems incapable to play such a mediating role. In sum, the
quality of the societal information transmitted to consumers should not
eclipse issues concerning the quality of the debates this (more transparent)
information is likely to engender.

It is thus the obligation of contextualizing societal information, within
a more transparent framework, which would command the development of
a constitutional platform for consumocratic law.\footnote{79} In the absence of such
background rules, higher levels of transparency would most likely trouble
local regulators and consumers alike, putting the mission of consumocratic
organizations such as Rugmark at risk. From a pragmatic and
consequentialist point of view, maintaining a certain degree of opacity,
while fighting power abuses insofar as possible, would be advisable before
such developments take place. A successful and transparent regime would
thereafter represent an important step toward the creation of a veritable
deliberation space between producers and consumers and, plausibly, toward
a more globally democratic alignment of the policies which model
transnational markets.\footnote{80}

\footnotesize

\textit{\footnote{78. This could be reflected in the introduction of a mismanagement clause, within a model
costitutional charter to be developed, to the effect that the mismanagement of a consumocratic
organization is, for certain purposes, an infringement of the rights guaranteed by it.}}

\textit{\footnote{79. One may be well advised to provide for a “Machiavellian clause” within the constitutional
platform envisioned above, in order to suspend the release of societal information when it is established,
for instance, that conflicting expectations held by consumocrats and local producers would, following
such release, most likely hamper the protection of vulnerable populations.}}

\textit{\footnote{80. SIMON DEAKIN & ALAIN SUPIOT, CAPACITAS: CONTRACT LAW AND THE
INSTITUTIONAL
PRECONDITIONS OF A MARKET ECONOMY (2009); Ulrich Mückenberger, Civilising Globalism:
Transnational Norm-Building Networks—A Research Programme (GIGA Series Paper, No. 90, 2008).}}