

**Looking for Flexible Workplace Regulation
in Latin America and the United States**

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The dominant discourse in global economic policy remains today, as it has for the last thirty years, focused on the value of competitive markets, deregulation, and “flexibility”. Guided by competitive economic theory, neo-liberal philosophy, and the Washington consensus, policymakers, seemingly throughout the world, have come to believe that work rules and employment conditions should be released by government from legal restrictions in the expectation that they will then freely respond to the exigencies of the business environment and the competitive marketplace, thereby promoting economic efficiency, development and growth. History, and a long tradition of social thought, leads one to be skeptical of these claims. Indeed, there are signs that a counter-movement has already set in. The papers presented at last year’s conference at MIT reveal that several countries in Latin America had moved, even in the 1990’s, to strengthen labor inspection. The street demonstrations at the FTAA trade conference recently here in Argentina, to say nothing of the remarks of several of the more prominent national leaders, suggest that political and social pressures are building to exert even more governmental control over the labor market.

The question then is whether it is possible to develop a system of social control that is compatible with the needs of the economy for flexibility. Or are we doomed to what Karl Polanyi called in The Great Transformation a double movement (Polanyi, 1944), an oscillation between an uncontrolled competitive marketplace and the stifling restraints which society, in reaction, places on business practice.

The argument of this paper is that, in Latin America in particular, there is a potential to reduce this conflict, if not completely eliminate it. That potential is inherent in what I will call here the Latin model of labor inspection. But the potential has been limited – in labor market regulation but also in the development of the institutions of the emerging global order more broadly – by the hegemony of the U.S. institutional model. At the heart of this argument lies the

contrast between the U.S. and Latin models of labor market regulation, and it is here, therefore, that I begin.

In the United States, labor market regulations are administered by over a half dozen different administration agencies, each with its own system of inspection and with varying types of judicial review and sanctions. These include the Wages and Hours Division of the Department of Labor (minimum wages and hours restrictions), OSHA (occupational health and safety), ERISA (private pensions), Social Security (the public retirement system), Unemployment Insurance, EEOC (anti-discrimination regulations), the USCIS (Immigration), the NLRB (union organization and collective bargaining), and the Federal Mediation Service. Most of these administrative agencies have their counterparts at the state, and sometimes local, level; the relationship between these lower level regulations and the Federal system also varies from one agency to another. But in general, there is only limited cooperation and virtually no formal coordination among these different regulatory bodies. Because of the variety, generalizations are limited, but as a whole, each regulation is in itself relatively simple and straightforward; they are meant to be enforced, and penalties are assessed for violations.

The Latin system, by contrast, is a unified system of regulation. The whole of the labor code is meant to be enforced by a single agency, and that agency is formally responsible for insuring compliance with all of the statutes and, typically, with certain provisions of private collective bargaining agreements as well. In some Latin countries, jurisdiction is split between the federal and state governments in a manner that is in many ways comparable to that of the United States (Argentina and Mexico, for example), but the legislation is more uniform, and there is a formal and deliberate coordination among the various governmental levels (although in practice it does not always work smoothly). When the inspector enters the shop, he or she can cite the enterprise for violation of any provision of the code.

The unified system of work inspection operates in effect as what is termed a “street-level bureaucracy” (Lipsky, 1980). Street-level bureaucracies are organizations where the decision-

making power lodges in the line officers, whose actions are difficult to monitor and control through well-defined rules and standards promulgated by an administrative hierarchy. Because they cannot be controlled by administrative rules, the line officers exercise considerable discretion in when and how the law is enforced. Such discretion arises in organizations pursuing a broad set of goals that are not readily captured by simple rules and/or where there are multiple goals which interact with each other in complex, situation-dependent ways. Such organizations often do have rules that resemble those of classic bureaucracies, but the rules tend to be invoked as an excuse for action after the fact; they do not dictate or even necessarily guide action. The classic study of this type of organization is James Q. Wilson's Varieties of Police Behavior, a study of the management of police officers on the beat (Wilson, 1990). Wilson's police officers profess to be enforcing the law, but they actually operate to maintain social order, a concept which varies from one neighborhood to another (prostitutes are ignored in the red light district, but arrested if they venture into middle-class neighborhoods). The law becomes an instrument in the pursuit of order and is invoked situationally to gain leverage and control. Other typical street-level bureaucrats are classroom teachers and public welfare social workers. The discretion of line officers can also arise inadvertently when the organization is under-funded or overextended. Thus, the rules governing immigration to the U.S. are relatively straightforward, but there are very large numbers of undocumented aliens working in the country. U.S. Citizenship and Immigration Services is basically a street-level bureaucracy; the agents know virtually everything about the undocumented immigrant population, but they do not have the resources to enforce the immigration requirements. Immigration agents have thus acquired the power to decide who will actually be apprehended and deported.

What makes unified systems of work inspection a street-level bureaucracy is the nature of the labor codes they are responsible for administering, relative to the resources available for the task – indeed relative to the resources they could ever imagine being allocated to them under even the most aggressive administrative state. The labor codes are just too complex and extensive to

be applied literally in every case. Indeed, the codes are so extensive that no single person could possibly know all of its provisions. Hence, the inspector is often forced to make judgments about whether an enterprise is in compliance on the basis of other criteria and then, if questioned, to look in the code for justification. Often, the inspector's judgments vary depending on the financial condition of the enterprise or the state of the economy in which it is operating and the need to preserve jobs or the likelihood of social protest. Provisions may be enforced differently in family enterprises or large corporate concerns, although the code does not necessarily differentiate between them.

The tendency for labor market regulation to function as a street-level bureaucracy is reinforced by several other features which differentiate Latin American systems from narrower, more focused regulatory agencies. First, in contrast to the U.S. system, where obligations can generally be discharged by paying a penalty, the Latin system requires that the enterprise come into compliance. As a result, the inspector generally works out a plan of compliance and a schedule for meeting objectives. In this sense, the inspector tends to operate as much as an advisor or consultant as a law enforcement officer. Inspectors are in a good position to play this role because in their work they visit a wide variety of different enterprises and are in perhaps a better position than any other economic actor to compare business practices and disseminate best practice. But unified labor inspection agencies do not rely on the experience of the inspectors alone to develop compliance plans. They usually also have specialists on staff who can advise the line officers or to whom he or she can refer workers and management for advice. Fines and other penalties are invoked as pressures to develop and abide by a plan of compliance rather than as ends in themselves.

The fact that what is at stake in labor inspection is not a fine or a monetary penalty, but that actual compliance with the law reduces opportunities for corruption. But it by no means eliminates them. Compliance can sometimes lead to increases in business efficiency but it can also impose costs upon the enterprise. And where the inspectors not only monitor labor standards

but also payroll taxes, the money involved can be substantial. In many Latin American countries where corruption is pervasive, it becomes the central problem of administrative design. We return to this below.

A second feature distinguishing the Latin system from the U.S. system is that it seems to rely much more heavily on a systematic process of inspecting every enterprise than the U.S. system, which relies on complaints. The work inspectors in Latin America respond, of course, to complaints as well, but the attitude is captured by the terms used to characterize this aspect of their activities: “extraordinary” inspections. When the U.S. agencies do pick out a particular area for special treatment and operate in something akin to the Latin American model of tutelage, they do so on the basis of a statistical sampling of, for example, the complaints they have received or the record of industrial accidents. And the campaign is much more general; it is not aimed at the problems of a particular firm.

Viewed by the standards of an impartial and uniform judicial system, the ability – indeed the need – of the agency to adjust the code to individual circumstances is pernicious. It leads to unequal treatment of apparently similar enterprises and individuals and opens the door to corruption and more broadly to the arbitrary and abusive exercise of power. But at the same time, the ability to adjust the regulations to the peculiarities of individual enterprises and of the economic and social environments in which they operate gives the system a potential for flexibility that is very much like what is attributed in economic theory to the competitive market. This last characteristic is the central theme of this essay and I will return to it shortly. But before doing so, it is important to recognize the origins of the two systems of labor market regulations and the way in which they reflect key differences in the underlying social organization and conception of government in the United States and Latin America.

The U.S. political ethos is profoundly liberal. The individual is the basic unit out of which society is built; individual autonomy is the normative standard by which society is judged. Private property is viewed as an extension of the individual, at one and the same time an

expression of the person and a protection against encroachment upon individual autonomy. Society itself is basically an aggregation of inherently equal individuals who come together in the pursuit of goals which cannot be achieved on their own and to resolve problems arising from living in close physical proximity. The protection of private property is in many ways the preeminent such social problem. The formation of society in this way chiefly involves the imposition of constraints upon individual autonomy. The law embodies those constraints, which should be applied equally to all individuals. Labor standards are seen as part of these constraining laws. Since they limit the freedom of employers, moreover, they impose limits directly on property rights. The discretion which the inspectors have in the application of the law is thus fundamentally in conflict with the liberal ethos, and can often be understood as an essentially undesirable compromise with the reality of an overextended and under-funded regulatory apparatus.

The dispersion of labor regulations among multiple agencies and between the federal and state governments, as well as the lack of coordination among the different agencies, is a further product of the liberal ethos of American society, the distrust of government which it engenders, and the resultant attempt to check the capacity of the state to encroach upon the individual by creating a variety of checks and balances within the governmental apparatus itself.

In Latin America, by contrast, society tends to be viewed as organic, with a distinct identity, prior to those of its individual members and independent of them (Stepan, 1978). Indeed, the identity of the individuals within the society, and the meaning of their existence, derives from the identity of society as a whole and is dependent upon their place within it. The members of society are related to each other as parts of an organism, and like those parts are by their very nature different from each other and play different roles. The state is an expression of the larger social identity. The role of the state is to insure the smooth functioning of the society. Thus, it plays a tutelary role *vis a vis* the different functional components of the social organism, as the brain does for the body, a doctor for his or her patients or the father does for the classic,

biblical family. The tutelary relationship between the enterprise and the work inspectors, who are the agents of the state in the domain of employment relations, is thus a natural extension of this view. And any moral authority which they, or other agents of the state, exercise over the operation of the enterprise becomes a reflection of the identity of the state itself. The role of labor market regulation in general, and of labor inspection in particular, has historically been to restore a balance between workers and their employers within the larger society when that threatens the social equilibrium and the moral order.

Organic statism is particularly consistent with Catholic theology, and the importance of the Church historically and its continuing influence on social thought has thus enhanced its impact upon the way in people in Latin countries think about social organization. But the unified model of labor inspection actually originated in France and developed under aggressively secular governments. The model was then adopted by Spain and spread from there to Latin America.

The differences between the U.S. and Latin system can, of course, be exaggerated. The term “street-level” bureaucracy was coined in the United States in order to understand administrative behavior in a number of agencies and organizations, and that reflects the fact that discretion in governmental organizations is widespread. It arises deliberately and self-consciously in some cases (classroom teachers, child welfare agencies), but in others it simply reflects the fact that it has often proven to be difficult or impossible to mold the world to the liberal model. In the case of labor market regulation, a certain amount of discretion is present as well. But it is distinguished from that in Latin systems in two critical respects. First – and perhaps most important in the present context – the agency administers a very narrow range of regulations and hence is not in a position to trade off and balance the cost of one regulation against another or to assess the overall regulatory burden on the enterprise and the possibility that taken together, they will threaten the firm’s economic viability. Second, however, the source of discretion in the U.S. is ultimately very different. It grows out the fact that any penalties the inspector imposes can ultimately be appealed through the courts, a process which is costly to

government and inevitably involves long delays. To avoid such appeals, the inspector is often forced to bargain with the employer, and in the process reduce the range of violations which are actually cited and the penalties which are imposed (Bardach and Kagan, 1982).

II

Whether or not a unified system of labor market inspection is better able to manage and police labor standards in an effective and efficient manner than the multiple agencies of the U.S. system depends on the nature of the rules which limit managerial discretion and the pattern of violations of these rules which are likely to emerge. If the rules administered by the different agencies in the United States, and the patterns of violation, are essentially independent of each other, than the dispersion of authority should not make much difference. If the violations are, moreover, deliberate and willful – an attempt to exploit the labor force in whatever way the business can get away with – then the Latin system, with its trappings of specialists, and its tutelary approach, may be irrelevant. But a wide spectrum of research in different domains – specifically research on labor standards, interviews with labor inspectors in France, Spain and Mexico, studies of production systems and marketing strategies – suggests that this is not the case. In general, violations appear to cluster. They do so in two respects. First, the nature of the violations varies depending on the system of production, the marketing strategy which the firm adapts and the relationship between them. Thus, in low-priced, specialty segments of the garment industry, for example, violations tend to cluster around wages and hours, child labor, and safety violations related to overcrowded conditions. These are very different from the violations encountered in the mass-market segments of the industry producing blue jeans or t-shirts, and more different still from the violations one tends to find in construction, or steel, or retail trade. The Latin system encourages the inspectors to look for patterns of this kind to guide them in selecting what aspects of the enterprise to examine and which provisions of the labor code to enforce.

Second, while some violations are the product of a deliberate attempt to exploit the labor force and evade the law, an equally prevalent pattern is one in which management tends to slip into violations, inadvertently or at least without forethought, in an attempt to compensate for deficiencies in the production system and marketing strategies by lowering labor costs. Such violations are seldom enough to sustain the business over the long run. They can often be corrected – one can argue in fact that they can only be corrected – by improving the production system, adopting a more effective market strategy, or by a better adjustment between the two. When this is the case, a unified system of labor inspection is more likely to be able to identify the root causes of the problem and is, in fact, in a better position to address those causes. It is more likely to understand the root causes because it is looking for patterns of violation rather than simply for individual infractions. It is in a better position to address them both by the philosophy and the design of the system. The philosophy is one where it is the role of the state to guide industry, and the design of the system gives the inspectors access to experts whom they can call on to provide advice and assistance. In addition, as already noted, the inspectors, because they move so broadly across the economy and see so many different kinds of firms and practices, are often in a position to carry best practices from lead to laggard enterprises. The role of labor inspection in this regard could be strengthened by linking them directly to government programs designed to upgrade industrial enterprises through the provision of consulting services, adjustment assistance, and training. I have never encountered linkages of this kind myself, but Andrew Schrank reports that this has begun to happen in the Dominican Republic.

In addition to these two areas that bring into play the discretion and interpretative latitude of the inspector in the Latin system, these characteristics have an advantage in a third respect as well, i.e., in accessing and taking into account the total regulatory burden. The various provisions of the labor code are generally promulgated in a legislative and administrative process when they are viewed individually, in isolation from each other, often in the light of political crises generated by episodes of labor unrest or a major industrial accident. There is nowhere in the

process that the total regulatory burden of the code and its impact upon the ability of the firm to survive and compete, and upon others of society's goals, such as unemployment, economic development and the like, is assessed. The relative value of these different social goals, moreover, tends to vary with the course of the economic conjuncture and the level and process of economic development. The society is less concerned about the survival of a particular firm in a period of rapid expansion and low levels of unemployment, for example, than in a period of stagnation. The inspector in the Latin system, however, because he or she is administering the whole code and is encouraged to work out a plan of compliance over time, is in a position of make these judgments and adjust the regulatory process accordingly. It is this capacity in particular which seems to give the Latin system some of the flexibility of a competitive market.

Whether or not the capacities of the Latin system to adjust regulation to the specifics of individual firms and the broader economic environment in which they operate actually render the system flexible and efficient depends of course on how their discretion is exercised and managed. My own interviews with inspectors themselves suggest that they carry around in their head a series of rough typologies which guide their discretions: typologies of the industrial landscape and the violations associated with different types; typologies of the motivations of firms in violating the law; and typologies of the different business environments in which firms operate and the way in which those environments affect the regulatory burden and the trade-off with other social goals. These typologies guide their actions. They have emerged over time within the organizations: They are embedded in the folk-wisdom of the "profession", passed on from one generation of inspectors to another, and reinforced and given content and meaning for individual inspectors as they accumulated experience on the job. The typologies evolve with that experience and through discussions among the inspectors themselves. But that experience is more tacit than explicit and the discussions surrounding it are often inhibited by a reluctance to admit to the latitude which the inspectors on the line actually have and the power which derives from it. Framework of judgment could thus be improved substantially by making it explicit, by subjecting

it to systematic debate within the inspectorate itself, and by linking it to the wider body of research on production systems, business strategies, and labor standards. The scholarly literature, because it formalizes the issues and subjects them to systematic investigation should be an especially useful complement to the informal, tacit knowledge that has developed among the inspections themselves.

Most of that formal literature has been generated in schools of management and engineering (Gereffi and Korseniewicz, 1994). It has not been oriented toward issues associated with labor standards. But there are notable exceptions. The work in the Institute on Work and Employment at MIT has been oriented in this direction for some time (Piore, 1990; Kochan, Katz and McKersie, 1986; Piore and Sabel, 1984). My colleague, Richard Locke, has been working with several transnational firms in the shoe and garment industry to understand the relationship between labor standards in contractor plants and the way in which those firms manage the contracting relationship, place their orders, and monitor compliance not only with labor standards but with quality and delivery times (Locke, 2006).

The most promising developments for these purposes are, in my opinion, those emerging from the conventionalist school of economics in France. Two strands of thinking that have been developing there seem particularly promising. One of these is a typology of production systems developed by Robert Salais and Michael Storper (1993). The second is the work of Luc Boltanski and Laurent Thévenot linking production systems to systems of normative judgment (Boltanski, Darre, and Schiltz 1984; Boltanski and Thévenot, 1987; Boltanski and Chiapello, 1999). The starting point of their work on labor markets is the proposition that the workplace is governed by a limited number of normative systems of judgment and evaluation. These are systematically associated with different systems of production and shop management. One can argue that statutory regulations have evolved over time in a pragmatic attempt to reconcile these different normative systems with the exigencies of the economic environment and the technological constraints in which they are applied. Probably the longest standing regulations are

those in the garment industry, and one can certainly see how the law has been molded over the last hundred years by experiences such as the Triangle Shirtwaist Fire in the United States. This history, and the regulations associated with it, contrast sharply with the system of history and prevailing regulations in the construction industry or, to take a very different example, those emerging in high-tech industries such as electronics and biotech. In any case, the conventionalist school has developed a typology of such systems. A casual reading of my own interviews with inspectors suggests that the conventionalist typology is very close to that which the inspectors themselves have developed through experience. In any case, it could certainly be used as a starting point to catalyze discussion and debate among the inspectors themselves and amended in light of those discussions. The framework and the limits suggested by these debates could be used for organizing research designed to resolve the conflicts and expand the typology. That same research program could also be used to collect case material that might serve in teaching new inspectors and in standardizing judgments across the administration.

Charles Sabel (Sabel, Fong and O'Rourke, 2001) has argued that a general system for managing social regulation built around discussions of this kind has begun to emerge in many sectors modeled upon practices which have developed in manufacturing to meet competitive pressures over the last twenty years. At the core of these manufacturing practices is benchmarking: The identification of critical dimensions of performance and then the development of a measure for each dimension based on best practice in the industry. The benchmarks are used to identify deficiencies in performance. Discussion and debate are then focused on why these deficiencies exist and whether they result from legitimate differences among circumstances and, if not, how they might be corrected. This benchmarking process is, Sabel argues, being used in a wide variety of domains of regulation and government action. It would certainly provide a way of structuring the debates and hence directing the use of discretionary judgment within labor inspection.

Finally, let me say that I have completely neglected here a discussion of the major weakness of the discretion which the Latin model entails: The way it lends itself to seemingly arbitrary differences in the treatment of apparently equal cases and, in the extreme, outright corruption. This is obviously a topic in and of itself which cannot be adequately treated here. The most important barriers to corruption are undoubtedly the level of compensation, the monitoring and the professionalization of the service. But the development of the kind of benchmarking and case material which would emerge from a systematic attempt to think about and discuss the typologies which underlay the exercise of discretion would also provide a way of monitoring behavior and improving the consistency of treatment under the system.

Conclusions

The effort to understand and improve labor inspection is an important enterprise in and of itself for those of us concerned with social welfare and worker protection. But there is a general and much broader lesson here, which goes back to my starting point. Whatever one thinks about the relative merits of the market versus government policy as a way of regulating the labor market, the neo-liberal emphasis on flexibility and market reform over the last thirty years has had two unfortunate consequences. The first, inherent in the philosophy itself, is that in looking always to solve the problems posed by government regulation by eliminating it, it has led us to neglect the possibility of improving the regulatory process. The second derives from the fact that the political pressure for this approach has been generated, first and foremost, by the United States and as a result has drawn almost exclusively on U.S. institutional models. If, as appears to be the case, a reaction is setting in, and we are entering a period when it will no longer be possible to avoid government regulation of the economy, it is important that we move as quickly as possible to make up for these biases. And the attempt to recognize the particularities of the Latin model of labor market regulations, understand its strengths as well as its weaknesses, and build upon them seems to me a critical part of that endeavor.

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