

**UNMASKING THE CHARADE OF THE  
GLOBAL SUPPLY CONTRACT:  
A NOVEL THEORY OF CORPORATE  
LIABILITY IN HUMAN TRAFFICKING AND  
FORCED LABOR CASES**

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## I. INTRODUCTION

In February 2007, an investigative trip to China by members of Students and Scholars Against Corporation Misbehavior (SACOM) resulting in the plug being pulled on Mickey and his other Disney pals.<sup>1</sup> As a result of SACOM's 2006 report outlining the "working class hell" conditions suffered by the laborers who manufactured Disney's products, and subsequent media outcry, Disney discontinued its relation with the plant.<sup>2</sup> It is difficult to reconcile the image of Disney's delicate princess dolls, complete with dainty accessories, in the hands of exhausted, sick workers working and living in a dangerous substandard factory and dormitory.<sup>3</sup> Yet, the Disney factory is representative of the overseas factories that constitute

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1. Venkatesan Vembu, *Disney Sweats over Sweatshop Charges in China*, DAILY NEWS & ANALYSIS (Mumbai), Feb. 17, 2007, at 17, available at [http://www.dnaindia.com/world/report\\_disney-sweats-over-sweatshop-charges-in-china\\_108042](http://www.dnaindia.com/world/report_disney-sweats-over-sweatshop-charges-in-china_108042).

2. *Id.*

3. SACOM's initial report noted, "[t]he manufacturing facilities have no fans, even though they become oppressively hot in the summer . . . [W]orkers would faint from the exertion and heat of the workshops." STUDENTS & SCHOLARS AGAINST CORP. MISBEHAVIOR, *Looking for Mickey Mouse's Conscience—A Survey of the Working Conditions of Disney's Supplier Factories in China* 10 (Aug. 18, 2005), <http://sacom.hk/wp-content/uploads/2008/07/disney.pdf>. Some employees were subjected to choking on large amounts of dust and yet they were afforded no basic protection, not even facemasks. *Id.* at 29. Yet the factories severely limit the number of workers who are allowed to resign and quitting without permission results in the withholding of forty-five days' wages, an impossible sum for any but the most desperate. *Id.* at 16. Workers during peak seasons were found to be working ninety-hour weeks and senior management created fake wage reports for inspectors and bribed workers to lie about conditions. STUDENTS & SCHOLARS AGAINST CORP. MISBEHAVIOR, *A Second Attempt at Looking for Mickey Mouse's Conscience—A Survey of the Working Conditions of Disney's Supplier Factories in China* 5 (Dec. 2006), <http://sacom.hk/wp-content/uploads/2008/09/7-disney-research-2006.pdf>.

pivotal links in the global supply chain of many U.S. and foreign corporations.

Although the global economy has enabled average people access to a diverse and ready supply of inexpensive clothing and electronics, the dark reality is that this access comes at great human expense. The by-products of these cheap products are human trafficking and forced labor.<sup>4</sup> It is not just global criminal gangs that use electronic communications and various modes of transport to exploit vulnerable and desperate people living in poor countries. Although less visible, corporations using global production chains, containing multiple levels of subcontracting and outsourcing, breed human trafficking and forced labor.<sup>5</sup> Corporations driving this dynamic easily avoid accountability given the extraterritorial location of the suppliers, and the appearance of “arm’s length” contracts with their suppliers.<sup>6</sup> As Jorge Bustamante rightly points out, “[t]he practice of subcontracting . . . labour can also be a gateway for the impunity for abuse of and violations against migrant

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4. Although this Article uses the words “human trafficking” and “forced labor” together, the terms should not be confused. Forced labor is defined by the ILO as “all work or service which is exacted from any person under the menace of any penalty and for which said person has not offered himself voluntarily.” Int’l Labour Org. [ILO], *Forced Labour Convention*, art. 2, CO 29 (Jun. 28, 1930), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312174](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312174). Human trafficking involves the movement of a person, usually across international borders by means of threat, deception or abuse of vulnerability for the purpose of exploitation and can lead to forced labor. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, G.A. Res. 55/25, Annex II art. 3, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

5. Roger Plant, Head of Special Programme to Combat Forced Labour, ILO, *Eradicating Forced Labour: The International Business Challenge* (May 1, 2008), available at [http://www.ilo.org/sapfl/Informationresources/Speeches/WCMS\\_097000/lang--en/index.htm](http://www.ilo.org/sapfl/Informationresources/Speeches/WCMS_097000/lang--en/index.htm) (“The trend towards subcontracting, with often complex and unregulated chains, and towards the greater use of recruiting intermediaries, can be important factors behind abusive practices.”).

6. See Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKLEY J. INT’L L. 91, 134 (2002) (explaining how French oil company Total subcontracted to a group that used forced labor to complete construction of an oil pipeline); cf. H.R. 2759, 112th Cong. (2011) (requiring companies to disclose “any measures the company has taken during the year to identify and address conditions of forced labor . . . within the company’s supply chains”).

workers.”<sup>7</sup> The caginess of corporations in avoiding liability in the global contracting setting cannot be underestimated. Because corporations have circumvented the law, victims must find new theories of liability. This Article proposes a path of potential relief.

Courts should apply the economic realities test as a vehicle to determine the existence of joint employment between a corporation and their contractor.<sup>8</sup> Under the theory of joint employer liability, corporations would be equally responsible for their contractors’ acts in trafficking/forced labor cases pursuant to the Trafficking Victims’ Protection Reauthorization Act (TVPRA).<sup>9</sup> Despite attacks from defense counsel, the economic realities test is legally sustainable and legislatively sound. This test was born in response to the Fair Labor Standards Act (FLSA)<sup>10</sup> and other progressive federal labor statutes that embodied strong Congressional intent to improve working conditions, and decrease economic advantage to those violating fair labor standards.<sup>11</sup> Numerous United States Supreme Court and circuit rulings refined and expanded the definition of “joint employer” and shifted the focus of inquiry away from employer control to the dependency of the worker.<sup>12</sup> The TVPRA’s vivid

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7. Special Rapporteur on the Human Rights of Migrants, *Specific Groups and Individuals Migrant Workers*, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/73 (2005), at 2; ESCOR, 62d Sess. (Dec. 30, 2005) (by Jorge Bustamante).

8. *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (defining the economic realities test).

9. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875 (codified as amended in various sections of 18 U.S.C. & 22 U.S.C.); 18 U.S.C. §§ 1589, 1595 (2011) (imposing criminal and civil penalties for violations of the TVPRA); 29 C.F.R. § 791.2(a) (2011) (imposing responsibility on employers where one employee is jointly employed by two or more employers, both individually and jointly, for compliance of the Fair Labor Standards Act).

10. *Sec’y of Labor, U.S. Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987).

11. *See* National Labor Relations Act of 1935, Pub. L. No. 74–198, 49 Stat. 449 (codified as amended in scattered sections of 29 U.S.C. (2010)) (creating a National Labor Relations Board to “diminish the causes of labor disputes . . .”). *See also* Social Security Act, Pub. L. No. 74–271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397) (providing state financial assistance for the elderly).

12. *United States v. Silk*, 331 U.S. 704, 716–19 (1947) (holding that coal unloaders were independent contractors because of the “total situation, including the risk undertaken”); *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947) (holding that members of

legislative history shows congressional concern to decrease human trafficking, punish those who force labor, and address the problem of the foreign contractor.<sup>13</sup> There is a direct and compelling link between the legislative histories of the FLSA and the TVPRA. The economic realities test fits perfectly within the TVPRA's goals and objectives, and should be applied in all TVPRA cases.

Moreover, due to the conflicting and conflating theories regarding issues of agency theory, premise liability, notions of duty and control, and varying standards of intent under secondary liability theories, courts would welcome clarification. By assisting the courts to understand the history, evolution and rationale behind the economic realities test, and the legal and legislative basis upon which it can be applied to today's global contracting practices. Ultimately, courts would be able to pierce the fiction that corporations are innocent of the slavery connected to production of their products and they would be held responsible for their contractors' actions.<sup>14</sup> As one legal scholar writes, "manufacturers not only conspire with their subcontractors in perpetuating sweatshops, they are primarily responsible for creating the problem."<sup>15</sup> As such, the corporations should be held accountable for their actions and

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"name bands" were "employees of the band leader and not of the dance hall operators" for IRS purposes); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–31 (1947) (holding that meat boners were employees because it was not "an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor").

13. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5044.

14. For example, while negative attention has forced U.S. firms to exercise greater oversight in recent years, they continue to place the burden of compliance on the factories. Dexter Roberts, et al., *Secrets, Lies, and Sweatshops*, BUSINESSWEEK (Nov. 26, 2006), <http://www.businessweek.com/stories/2006-11-26/secrets-lies-and-sweatshops>. One general manager of a factory supplying major apparel retailers noted that "[a]ny improvement you make costs more money . . . . The price [Nike] pays never increases one penny." *Id.*

15. Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2188 (1994).

greed.

This Article does mean to condemn or expose the contemporary corporate global contracting system (although many renowned authors have written about it).<sup>16</sup> Rather, it hopes to guide the crafting of a legal theory of recovery from corporations involved in this system. The general judicial trend appears to be against finding the corporation responsible in the global supply context—both under primary and secondary theories of liability. In fact, courts, entrenched in antiquated notions of common law continue to dash hopes for financial recovery, further insulating those with the deepest pockets. Moreover, right before the publication of this Article, on April 17, 2013 the Supreme Court announced its decision in *Kiobel v. Royal Dutch Petroleum*,<sup>17</sup> which ruled that the Alien Tort Statute (ATS), which had been used by non-U.S. citizens to bring lawsuits in U.S. federal court to seek relief for certain violations of international law, including human trafficking had no extra-territorial application.<sup>18</sup> Therefore, it is even more imperative that other theories of liability are needed to hold corporations accountable.

Although there are many possible trafficking scenarios, this

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16. See U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-29, GARMENT INDUSTRY: EFFORTS TO ADDRESS THE PREVALENCE AND CONDITIONS OF SWEATSHOPS (Nov. 2, 1994) [hereinafter GAO 1994 Report], available at <http://www.gao.gov/archive/1995/he95029.pdf> (explaining the sweatshop problem has not improved over the last five years primarily because of legislative, resource and economic factors); Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 199 (1992) ("Garment manufacturers have preferred contracting for two reasons: they can control how much or how little contractors are paid, and they can take advantage of the prevailing presumption that they are not liable for wage violations in their contractors' sweatshops.").

17. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

18. It appears that the Court's recent decision in *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010), figured prominently, reflecting the Court's continuing skepticism regarding extraterritorial application of US law. See *Kiobel*, 133 S.Ct. at 1664. Justice Roberts found that nothing in the wording, logic or history of the ATS showed that Congress necessarily meant to sweep into US courts wholly non-US claims involving non-US parties. *Id.* at 1168-69. Therefore, in a case involving non-US plaintiffs, defendants and conduct surrounding the claims, the Chief Justice found that the "mere" US presence of defendants through a US office and US stock listing was not enough domestic content to support an ATS claim. *Id.*

Article focuses on the unknown nameless foreign worker who has been trafficked from his or her home country to a foreign country to produce goods for a U.S. corporation. It is not meant to minimize the plight of the vast numbers of domestic workers who toil in sweatshops throughout the United States—especially the undocumented, the immigrant, the under-aged, and the under-educated.<sup>19</sup> However, this Article chooses to put a face and name on the foreign worker since these victims have little or no access to information, resources, and assistance relative to their domestic counterparts in the United States, and therefore have fewer champions.

Section I of this Article introduces the general issue of corporate liability in the global supply scenario and briefly summarizes various problems trafficking and forced labor victims face when seeking restitution against corporations.

Section II sets forth a background of the concept of forced labor and human trafficking: its origins, evolution (including the concept of sweatshops), economic advantages to the corporation, and other related ramifications of the growing global contracting structure that is used to increase profits and deflect liability.

Section III introduces the corporate liability theory of joint employment, the origins of the economic realities test, its expansion and adoption into other federal statutory labor schemes, recent trends, and confusion faced by courts in enunciating and applying the test.

Section IV outlines and advocates for the application of the economic realities test as set forth in *Usery v. Pilgrim*<sup>20</sup> to be adopted by the TVPRA. This Article also discusses the specific importance of specific terms of the global supply contract and examination of the “independent” contractor’s situation as crucial factors in the “economic realities” analysis.

Section V sets forth legal arguments based on legislative

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19. A 1989 report indicated sixty-four percent of garment shops in New York, eighty percent in Miami and ninety percent in Los Angeles are sweatshops. See GAO 1994 Report, *supra* note 16, at 4. In 1999, the compliance rate had not improved. Press Release, U.S. Dep’t of Labor, Conditions in New York City’s Garment Industry Unchanged, but Tougher Enforcement Leads to Arrests (Oct. 15, 1999), available at [http://www.dol.gov/opa/media/press/opa/archive/opa99300.htm#UIszUG\\_A8Z0](http://www.dol.gov/opa/media/press/opa/archive/opa99300.htm#UIszUG_A8Z0).

20. 527 F.2d 1308, 1311 (5th Cir. 1976).

evidence that demonstrates how and why the economic realities test can be used to substantiate a valid theory of corporate liability in human trafficking and forced labor cases brought pursuant to the TVPRA. This section sets forth the primary legislative tenets that undergird the legal foundation that holds up the economic realities test.

Section VI concludes with suggestions and recommendations. The goal of this Article is to provide practitioners with the necessary tools to persuade courts to apply the economic realities test beyond its traditional applications under federal labor statutes, such as FLSA.<sup>21</sup>

## II. GENERAL BACKGROUND

### A. *Forced Labor Statistics and Background Information*

The International Labour Organization (ILO) estimates that “2.5 million people are in forced labor (including sexual exploitation) at any given time as a result of trafficking.”<sup>22</sup> Forced labor practices account for at least one-third of all trafficking cases.<sup>23</sup> Despite media outcry against sweatshops, this number does not appear to be decreasing.<sup>24</sup> “A firm’s goal is to maximize profit . . . [and because] labor is such a large part of business costs, a small increase in the cost of labor can significantly increase the cost of production and decrease profit.”<sup>25</sup> Therefore, “employers seek trafficked individuals as a

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21. 29 U.S.C. § 201 (2011).

22. United Nations Global Initiative to Fight Human Trafficking [UN.GIFT], Human Trafficking: The Facts, [http://www.unglobalcompact.org/docs/issues\\_doc/labour/Forced\\_labour/HUMAN\\_TRAFFICKING\\_-\\_THE\\_FACTS\\_-\\_final.pdf](http://www.unglobalcompact.org/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf) (last visited Mar. 3, 2013). Of these 2.5 million people, 1.4 million (fifty-six percent) are in Asia and the Pacific, 250,000 (ten percent) are in Latin America and the Caribbean, 230,000 (9.2%) are in the Middle East and Northern Africa, 130,000 (5.2%) are in sub-Saharan countries, 270,000 (10.8%) are in industrialized countries and 200,000 (eight percent) are in countries in transition. *Id.*

23. Int’l Labour Conf., *A Global Alliance Against Forced Labour: Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, at 46, ILO Doc. 93rd Session (2005) [hereinafter *ILO Global Report*], available at <http://www.ilo.org/public/English/standards/relm/ilc/ilc93/pdf/rep-i-b.pdf>.

24. See Roberts et al., *supra* note 14 (“[M]any factories have just gotten better at concealing abuses.”).

25. Elizabeth M. Wheaton, Edward J. V. Galli, *Economics of Human Trafficking*,

cheaper labour source,” which “constitute[s] a vast workforce supporting the global economy.”<sup>26</sup> This is nothing new. Throughout U.S. history, Africans were enslaved to work on plantations and European peasants were brought to America “in one of several forms of debt-bondage known collectively as “indentured servitude.”<sup>27</sup> Now, as was then, laborers save employers money not only through substandard wages, but also by enabling employers to circumvent the costs of providing health benefits and safe working conditions.<sup>28</sup> Given the globalization and intermingling of the world’s economies, the use of trafficked labor is easily hidden, making the worker effectively invisible.<sup>29</sup>

In its defense, the United States has made some good faith attempts to protect workers from oppressive work conditions, including low wages and long hours, and enacted various socially progressive federal labor statutes. Enacted in the 1930s and 1940s, these federal labor law statutes include the National Labor Relations Act (NLRA),<sup>30</sup> the Fair Labor Standards Act (FLSA)<sup>31</sup>, and the Social Security Act (SSA).<sup>32</sup> In 2000, Congress culminated these efforts in enacting the Victims of Trafficking and Violence Protection Act of 2000 (TVPA).<sup>33</sup> The TVPA was the first comprehensive act designed to combat the evils of forced labor and sex trafficking. The House approved the law by

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48 INT’L MIGRATION 114, 128 (2010).

26. *Id.* (quoting KEVIN BALES, *DISPOSABLE PEOPLE* 22 (University of California Press 1999)).

27. *Id.*

28. *See id.* (“Employers . . . do not have to be concerned about government-regulated human rights, constitutional rights, safety issues, or benefits for workers.”).

29. *See id.* at 129–30 (explaining the “coercive nature of human trafficking” and the multiple levels between the trafficked laborers and the international corporations).

30. National Labor Relations Act of 1935, Pub. L. No. 74–198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2010)).

31. Fair Labor Standards Act of 1938, Pub. L. No. 75–718, 52 Stat. 1060 (codified as amended in various sections of 29 U.S.C. §§ 201–219 (2010)).

32. Social Security Act, Pub. L. No. 74–271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397mm (2011)).

33. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (codified as amended in various sections of 22 U.S.C. (2010)).

a suspended rules vote of two-thirds<sup>34</sup> and the Senate unanimously approved it.<sup>35</sup> Furthermore, in 2003, the TVPA was specifically amended to include a civil remedy, creating a path to federal district court for trafficking victims.<sup>36</sup>

Armed with a brand new cause of action, human rights advocates, lawyers, law school students and professors have filed complaints against large corporations that committed human rights abuses related to the production of their products.<sup>37</sup> However, the rate of success has generally been dismally low.<sup>38</sup> Even though Congress created “a private right of action allowing trafficking victims to seek damages and attorneys’ fees, and allowing victims access to free legal representation in the pursuit of these claims, . . . workers will still encounter heavy barriers when seeking legal remedies under the TVPA.”<sup>39</sup> There are several possible reasons for this, including the newness of the statute, lack of awareness, fear of retaliation, and the shortage of attorneys willing to take cases where the likelihood of collecting money damages from traffickers is low, particularly given the limited financial resources of nonprofit legal service providers.<sup>40</sup>

Another reason why success against the deep-pocketed offenders has been so elusive is due to the virtual shield against corporate liability found in the current application and interpretation of the laws in this area.<sup>41</sup> The current TVPRA

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34. 146 Cong. Rec. H2687 (daily ed. May 9, 2000).

35. See U.S. Senate Roll Call Votes, H.R. 3244, 106th Cong., 2nd Sess., Vote 00269 (2000), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=106&session=2&vote=00269](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=2&vote=00269) (ninety-five “Yeas” and five “Not Voting”).

36. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108–193, 117 Stat. 2875 (codified as amended in various sections of 22 U.S.C. & 18 U.S.C.); 18 U.S.C. § 1595 (2011).

37. See Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1665–68 (2007) (explaining the benefits of the new private right of action).

38. See *id.* at 1668–71 (discussing the infrequent usage of the TVPRA and the failure to prevent further trafficking).

39. Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3003 (2006).

40. Nam, *supra* note 37, at 1688–90.

41. See Chacón, *supra* note 39, at 3034 (explaining that companies claim lack of awareness regarding use of such working conditions by subcontractors).

(and even ATCA before it was severely restricted in the *Kiobel* decision as discussed above in Section I) decisions have a chilling effect on those who represent trafficking victims against corporate offenders, given the narrow and regressive holdings against corporate liability in district and circuit courts across this nation.<sup>42</sup>

*B. History and Evolution of the Global Supply Contracting System*

*1. Evolution of the Sweatshop*

Before the turn of the last century, garments were manufactured primarily in “inside shops.”<sup>43</sup> Typically, the operator of such a shop would design the garments, hire production workers who would cut, assemble, and deliver them, and then the operator would market the completed line of apparel.<sup>44</sup>

However, manufacturers started retaining only a portion of garments in these so-called ‘inside shops,’ and “sent the balance away from their premises to be made by outside sub-manufacturers or contractors.”<sup>45</sup> The latter stage became known as the “outside system of production,’ . . . [and] ha[d] its genesis in a fiercely competitive struggle by manufacturers of garments . . . which caught the workers in the industry, . . . depress[ing] their wages and result[ing] in intolerable working conditions.”<sup>46</sup> In addition, during this era, as unions became organized and waged aggressive campaigns to better conditions, manufacturers found another good reason to contract all or a part of the work to outside contractors who were “generally were marginal operators without financial

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42. *See id.* at 3003 (“At the same time that the TVPA has done little to increase protection for exploited workers, immigration laws have exacerbated the problems of many vulnerable immigrant victims.”).

43. *Abeles v. Friedman*, 14 N.Y.S.2d 252, 255 (Sup. Ct. 1939).

44. *Id.*

45. *Greenstein v. Nat’l Skirt & Sportswear Ass’n*, 178 F. Supp. 687 (S.D.N.Y. 1959).

46. *Id.*

resources.”<sup>47</sup> Because the outside contractors were also keen to compete for business and accepted contracts with unfavorable terms, their garment workers suffered from low wages and poor working conditions.<sup>48</sup> As one court noted:

The contractor is an irresponsible go-between for the manufacturer, who is the original employer. He has no connection with the business interests of the manufacturer nor is his interest that of his help. His sphere is merely that of a middleman. He holds his own mainly because of this ability to get cheap labor, and is in reality merely the agent of the manufacturer for that purpose.<sup>49</sup>

Collectively, these conditions embody the conditions of employment that are known colloquially as the “sweatshop.”<sup>50</sup> The term is not defined in federal law or regulations.<sup>51</sup> The U.S. Government Accountability Office (GAO) describes “sweatshop,” as “an employer that violates more than one federal or state labor law governing minimum wage and overtime, child labor, industrial homework, occupational safety and health, workers’ compensation, or industry registration.”<sup>52</sup> Labor economist Michael Piore defines “sweatshop” as “a specific organization of

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47. *Id.*

48. *Id.* (“The contractors were in fierce competition with one another for the patronage of jobbers and inside manufacturers. The essential basis of this intense competition was reduced labor costs. The brunt of this economic rivalry was borne by the workers and reflected itself in depressed wages and substandard labor conditions.”). The importance of contractors in the early history of the garment industry is apparent from the reports of the immigrants who were recruited literally right off the boats. One such worker complained, “when these fugitives came to America seeking the promised land, they were taken off the boats by contractors . . . and set to work in subhuman surroundings, for a miserable wage, and under conditions which made protest utterly impossible.” Amanda Wilson, *Sweatshops: A Dirty History of Discrimination and Ignorance*, ATLANTIC INT’L STUD. ORG., <http://atlismta.org/online-journals/0506-journal-government-and-the-rights-of-individuals/sweatshops/> (last visited Sept. 1, 2012).

49. *In re Larry Jay, Inc.*, 3 A.D.2d 386, 388 (App. Div. 1957), *aff’d mem.*, 151 N.E.2d 93 (N.Y. 1958).

50. BLACK’S LAW DICTIONARY 1462 (7th ed. 1999).

51. *Sweatshops Not Thing of Past, Report Finds Three Industries Worst Offenders*, U.S. Says, L.A. TIMES (Sept. 5, 1988), [http://articles.latimes.com/1988-09-05/business/fi-1001\\_1\\_worst-offenders](http://articles.latimes.com/1988-09-05/business/fi-1001_1_worst-offenders).

52. GAO 1994 Report, *supra* note 16, at 1.

work” characterized by “very low fixed costs.”<sup>53</sup> Because the worker is often paid by the piece, the employer will try to minimize the cost of rent by cramming as many workers as possible into the space.<sup>54</sup> Fixed costs—rent, electricity, heat—are held to a minimum by operating substandard, congested, unhealthy factories, typically overseen by a “sweater” or subcontractor.<sup>55</sup> “The attempt to reduce the rent paid per worker is the chief cause of congestion in sweatshops affecting the way in which material inventories, supplies, equipment, and work-in-progress block aisles and exits. It is also the source of the unhealthy and dangerous conditions . . . for which the sweatshop is notorious.”<sup>56</sup>

Historian Leon Stein states, “[t]he sweatshop is a state of mind as well as a physical fact . . . [t]he sweatshop, whether in a modern factory building or a dark slum cellar, exists where the employer controls the working conditions and the worker cannot protest.”<sup>57</sup> Although the term “sweating” referred to a subcontracting system, by the 1890s it was associated with any workplace with oppressively low wages and harsh working conditions regardless of the presence of a labor intermediary.<sup>58</sup> The sweating concept “never lost its original association with the use of subcontractors, but the notion of a sweatshop developed a broader meaning.”<sup>59</sup> It is this very concept of subcontracting that has been duplicated with little tweaking by today’s multinational corporations, many with elaborate layers of overseas contractors.<sup>60</sup>

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53. Michael J. Piore, *The Economics of the Sweatshop*, in NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 136 (Andrew Ross ed., 1996).

54. *Id.* at 135.

55. *Id.* at 136.

56. *Id.* at 137.

57. Todd Pugatch, *Historical Development of the Sweatshop*, U.N.C. CHAPEL HILL (Apr. 30, 1998), <http://www.unc.edu/~andrewsr/ints092/sweat.html>.

58. Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1057 (1999).

59. *Id.*

60. See generally Hayashi, *supra* note 16, at 198–200 (explaining the contracting process presently utilized by many multinational corporations).

## 2. *Adoption by Corporations*

Modern corporations have eagerly adopted the global subcontracting system, both to offset liability onto contractors and increase their profits.<sup>61</sup> Many U.S. multinational corporations, notorious for off-shoring their direct labor, also maintain massive global supply chains.<sup>62</sup> The value chain of Cisco Systems, for example, has expanded to the point that it “is almost entirely outsourced with a network of more than 1000 suppliers providing services that include the manufacture, testing, shipping, return, reuse, and recycling” of Cisco products.<sup>63</sup> It is certainly no coincidence that after ten years of global supply chain expansion, Cisco greatly increased its net income by 740% (from July 2001 to July 2011).<sup>64</sup> Yet its operating expenses decreased from fifty-nine percent of total revenue to eighteen percent of total revenue and its cost of sales also decreased from fifty percent of total revenue to thirty-nine percent.<sup>65</sup> As a further example, Caterpillar, Inc. started formal efforts to “increase global sourcing” in “people” in 2003,

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61. A corporation is “[a]n entity (usu[ally] a business) having authority under law to act as a person distinct from the shareholders who own it . . . .” BLACK’S LAW DICTIONARY 151 (3d pocket ed. 2006). This Article uses the word “corporation” and “multinational corporation” interchangeably to encompass the contracting manufacturer or corporate entity that contracts with a contractor or sub-contractor in the overseas global contracting scenario. The entity could be a bank, a school district, a foreign government agency, or any other entity who outsources its work and labor to a third party contractor.

62. See David Wessel, *Big U.S. Firms Shift Hiring Abroad*, WALL ST. J. (Apr. 19, 2011), <http://online.wsj.com/article/SB10001424052748704821704576270783611823972.html> (exposing the practices by U.S. companies GE, Caterpillar, Oracle, Cisco, and Wal-Mart of hiring abroad while cutting domestic work forces).

63. CISCO SYSTEMS INC., VALUE CHAIN C2 (2011), available at [http://www.cisco.com/web/about/ac227/csr2011/docs/CSR2011\\_value\\_chain.pdf](http://www.cisco.com/web/about/ac227/csr2011/docs/CSR2011_value_chain.pdf).

64. Cisco Systems Inc., *Annual Report (Form 10-K)* 81 (Aug. 31, 2011), [http://www.sec.gov/Archives/edgar/data/858877/000119312511247394/d202951d10k.htm#tx202951\\_36](http://www.sec.gov/Archives/edgar/data/858877/000119312511247394/d202951d10k.htm#tx202951_36); *Cisco Systems, Inc. Annual Report (Form 10-K)*, SEC. & EXCH. COMM’N 12 (July 28, 2001), <http://www.sec.gov/Archives/edgar/data/858877/000109581101505065/f75710ex13.txt>.

65. Cisco Systems Inc., *Annual Report (Form 10-K)*, *supra* note 64, at 38; *Cisco Systems, Inc. Annual Report (Form 10-K)*, SEC. & EXCH. COMM’N, *supra* note 64, at 18–20.

projecting billions in cost savings.<sup>66</sup> It subsequently reported increased profits of 512% from 2001 to 2011 and decreased operating costs from ninety-four percent of total revenue to eighty-eight percent during the same period, indicating that cheaper overseas labor was a factor in the increase in profits.<sup>67</sup> These numbers, from some of America's most important companies, show a strong correlation between global sub-contracting and increased profits as a result of decreased costs.

Therefore, it is not difficult to see why corporations gravitated to this type of structure and how the "sweatshop" model has become the crux of the subcontracting system for larger manufacturers and corporations.<sup>68</sup> The ability to pass on the costs to third party contractors, while feigning ignorance about what really happens at the factory level, is just too good to pass up.<sup>69</sup> As succinctly stated by Dennis Hayashi:

Contracting out the production part of their business has enabled manufacturers to minimize their investment and insulate themselves from instability and risk. By characterizing their relationship with contractors as independent, they have avoided legal responsibility for workers' compensation, unemployment insurance and fringe benefits. In short, garment manufacturers have preferred contracting for two reasons: they can control how much or how little contractors are paid, and they can take advantage of

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66. Ron Kruse, *Caterpillar's Supply Chain Strategy and Results*, <http://www.ciltuk.org.uk/pages/downloadfile?d=8C94CD96-3EF3-43CF-BEF7-9C472FB8EBD5&a=stream> (last visited Oct. 26, 2012).

67. *Caterpillar, Inc. Annual Report (Form 10-K)*, SEC. & EXCH. COMM'N, at A-5 (Feb. 21, 2012), [http://www.sec.gov/Archives/edgar/data/18230/000110465912011331/a12-2184\\_110k.pdf](http://www.sec.gov/Archives/edgar/data/18230/000110465912011331/a12-2184_110k.pdf); *Caterpillar, Inc. Annual Report (Form 10-K)*, at A-4 (Jan. 23, 2002).

68. See Roberts et al., *supra* note 14 (admitting the difficulty in "achiev[ing] both the low prices and the humane working conditions U.S. consumers have been promised" and acknowledging the fact that "workers' circumstances are improving overall").

69. See, e.g., John M. Biers, *Billions in U.S. Contracts Go to Labor Law Violators; GAO Says \$23 Billion Went to 80 Companies*, BALTIMORE SUN (Feb. 15, 1996), [http://articles.baltimoresun.com/1996-02-15/business/1996046015\\_1\\_nlr-law-professor-labor-law](http://articles.baltimoresun.com/1996-02-15/business/1996046015_1_nlr-law-professor-labor-law) ("[C]ompanies can benefit from two wrinkles in the law: it is legal for government agencies to award contracts to labor-law violators. And agencies have no systematic way of knowing whether a company has broken labor law[.]").

the prevailing presumption that they are not liable for wage violations in their contractors' sweatshops.<sup>70</sup>

### 3. *Corporations taking it overseas*

As the protests over "sweatshops" in the United States became more vocal, leading to a deluge of public rallies and boycotts against the evil corporation,<sup>71</sup> big business saw the benefits of a foreign workforce and decided to transfer the problem overseas.<sup>72</sup> In a gradual move overseas, U.S. corporations found a convenient way to enhance their public image along with their bottom line.<sup>73</sup> Today, "instead of hiring workers themselves and risking penalties for paying subminimum wages, brand-name manufacturers subcontract to firms in the underground economy," and are able to diminish the wages of workers guilt-free.<sup>74</sup> In fact, in 2011, fifty-three percent of U.S. manufacturing companies used foreign contractors or agents or partners in the manufacturing of its products.<sup>75</sup>

Moreover, even if there is a discovery of sweatshop conditions overseas, such as the notorious Nike case of abused

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70. Hayashi, *supra* note 16, at 199.

71. See *Sweatfree in the News*, SWEATFREE COMMUNITIES, [http://www.sweatfree.org/media\\_coverage](http://www.sweatfree.org/media_coverage) (last visited Nov. 6, 2012) (linking to hundreds of press releases from the last decade related to anti-sweatshop rallies and campaigns). Even as far back as the late 19th and early 20th centuries, when sweatshops proliferated in this country, women exercised their economic power and shopped from "white lists" of "stores that treated their employees well. Kim Strosnider, *Sweatshops Have Long History, U.S. Garment Workers in the Late 19th Century Faced Similar Poor Conditions*, MAINE SUNDAY TELEGRAM, Oct. 13, 1996, at 16A, available at 1996 WLNR 4805527. In addition, the National Consumers League introduced a label in the early 1900s that certified garments "made under clean and healthful conditions." *Id.* The label was eventually dropped . . . because it thought the problem of sweatshops had disappeared." *Id.*

72. *Job Outsourcing Statistics*, STATISTIC BRAIN (July 20, 2012), <http://www.statisticbrain.com/outsourcing-statistics-by-country/>; David Wessel, *Big U.S. Firms Shift Hiring Abroad*, WALL ST. J., Apr. 19, 2011, available at <http://online.wsj.com/article/SB10001424052748704821704576270783611823972.html>.

73. *Cf.* Foo, *supra* note 15, at 2186 (including among advantages for manufacturers a reduction in overhead costs, labor expenses, and marketplace risks such as merchandise being turned back by retailers, as well as the avoidance of state laws and regulations).

74. Foo, *supra* note 15, at 2186.

75. *Job Outsourcing Statistics*, *supra* note 72.

Indonesian workers by South Korean subcontractors,<sup>76</sup> or the China-Disney case,<sup>77</sup> there is little follow-up or post-outcry investigation.<sup>78</sup> Furthermore, the mechanisms for redress for workers in foreign countries are even less developed and accessible than in the United States.<sup>79</sup> Plaintiffs are foreclosed from seeking relief in countries where they have been trafficked or exploited, since those countries usually have poor, corrupt judicial systems, frequently with complicit government officials.<sup>80</sup> For example, in Vietnam “workers do not have adequate legal recourse to file complaints in court against labor recruitment companies . . .” and “diplomats [have been] unresponsive in some cases to complaints of exploitation, abuse and trafficking. Furthermore, government regulations do not prohibit labor export companies from withholding workers’ passports and travel documents, a known contributor to trafficking.”<sup>81</sup> And, even if victims are able to obtain judgments, the victories are pyrrhic as the contractors are generally judgment proof or evade payment by changing names or dissolving and starting a new corporation, often with the same staff, office and assets the very next day, with no liability under local law.<sup>82</sup> Finally, assuming overseas trafficking victims are fortunate enough to make it to the United States and find a

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76. *Nike Faces New Worker Abuse Claims in Indonesia*, HUFFINGTON POST (Sept. 12, 2011), [http://www.huffingtonpost.com/2011/07/13/nike-faces-new-worker-abuse-indonesia\\_n\\_896816.html](http://www.huffingtonpost.com/2011/07/13/nike-faces-new-worker-abuse-indonesia_n_896816.html); *Nike Admits Abuse at Indonesian Plants*, BBC NEWS (Feb. 2, 2001), <http://news.bbc.co.uk/2/hi/asia-pacific/1184103.stm>.

77. Vembu, *supra* note 1.

78. *See id.*, (noting Disney ended all relationships with the violating facility after damning reports were published instead of following-up on the reported conditions with an investigation); Kate Hodal, *Nike Factory to Pay \$1m to Indonesian Workers for Overtime*, THE GUARDIAN, <http://www.guardian.co.uk/world/2012/jan/12/nike-1m-indonesian-workers-overtime> (last visited Nov. 15, 2012) (noting a factory employed by Nike is to pay a settlement, not Nike itself).

79. Denis G. Arnold & Norman E. Bowie, *Sweatshops and Respect for Persons*, 13 BUS. ETHICS Q. 221, 221 (2003), available at <http://webpages.marshall.edu/~davis194/MNC3.pdf>.

80. *See id.* (“[M]any of the labor practices in question . . . are tolerated by corrupt or repressive political regimes.”).

81. *Vietnam*, HUMANTRAFFICKING.ORG, <http://www.humantrafficking.org/countries/vietnam> (last visited Sept. 1, 2012).

82. Foo, *supra* note 15, at 2187–89 (1994).

lawyer willing to assist them in seeking justice in our courts—which in many cases is the only viable non-corrupt forum within which to seek relief—their ability to prevail is undermined by the layers of protection insulating the corporation from liability.<sup>83</sup>

#### 4. *Existing theories of liability*<sup>84</sup>

To date, various theories of liability that have been advanced by plaintiffs to fend off corporate counsels' motions to dismiss have been ineffective.<sup>85</sup> Corporations' arguments are designed to make the judiciary unreceptive to the concept of corporate liability in the international global supply contract.<sup>86</sup> Tactics include minimizing the corporation's alleged control over their far off contractors and exaggerating the potential financial and socioeconomic fallout of holding corporations accountable for their overseas violations.<sup>87</sup> In response, plaintiffs have had to resort to various secondary or vicarious liability theories in attempts to secure liability over the corporations through the actions of their contractors.<sup>88</sup> Generally, one who directly violates a duty imposed by a statute is the primary violator, while a secondary violator is one who assists or supports the primary violator's act or is liable for the act through a relationship with the violator.<sup>89</sup>

There are several popular theories of secondary liability in trafficking and human rights lawsuits. Until recently, plaintiffs frequently utilized the "aiding and abetting" concept under ATCA.<sup>90</sup> Under the ATCA, where plaintiffs are unable to show

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83. *Id.* at 2189–90; Arnold & Bowie, *supra* note 79.

84. This section is a short excerpt from Naomi J. Bang, *Finding a Theory of Corporate Liability Against Corporate Traffickers*, 43 U. MEM. L.J. (forthcoming Spring 2013).

85. Bang, *supra* note 84.

86. *Id.*

87. *Id.*

88. *Id.*

89. William H. Kuehnle, *Secondary Liability Under the Federal Securities Laws—Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and the Statutory Scheme*, 14 J. CORP. L. 313, 318–19 (1988).

90. *See, e.g., In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1340 (S.D. Fla. 2011) (listing Eleventh Circuit decisions holding aiding and abetting is a recognized

that a corporation was directly liable for the actions complained of, they would attempt to assert the theory of “aiding and abetting.”<sup>91</sup> After years of active litigation and much expected resistance by banks and corporations, courts did come to adopt the concept of “aiding and abetting.”<sup>92</sup> And, the “practical engine driving ATS litigation [was] corporate aiding and abetting, or ‘complicity,’ liability.”<sup>93</sup> However, the standard is high. Plaintiffs had to show and prove aiding and abetting. To do so, they had to show evidence of a corporation’s intent, or “purposefulness,” to engage in conduct that it knew would facilitate or cause serious human rights violations.<sup>94</sup> This is a tall order. The scope of aiding and abetting for tort liability in the civil context required the following:

- (1) the party whom the defendant aids must perform a wrongful act that causes an injury;
- (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance;
- (3) the defendant must knowingly and substantially assist the principal violation.<sup>95</sup>

Most of the relevant ATCA cases involve corporations that

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theory of indirect liability under the ATS).

91. *Id.*; *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 247–48 (S.D.N.Y. 2009) (stating that plaintiffs alleged various human rights violations under both direct and aiding and abetting theories of liability).

92. There appears to be a split in whether the aiding and abetting concept applies to the TVPA. *Compare Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 58 (D.C. Cir. 2011) (holding that Congress did not provide for aiding and abetting liability in the TVPA), *with Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (holding that the legislative history of the TVPA indicates that Congress intended for the statute to reach beyond primary violators to aiders and abettors), *and Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (“The law of this Circuit permits a plaintiff to plead a theory of aiding and abetting liability under the Alien Tort Statute and the Torture Act.”). *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1174 (C.D. Cal. 2005) (“[T]he legislative history of the TVPA rather unequivocally states that the statute encompasses aiding and abetting theories of liability.”).

93. 2 VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 9:16, at 9–94 (2d ed. 2012).

94. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 247 (2d Cir. 2009) (“[A] claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses.”).

95. *Doe*, 654 F.3d at 34 (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

have provided support or funding, or contracted with the tortfeasors in cases involving genocide, torture, military attacks and other serious violations of human rights.<sup>96</sup>

As discussed above in Section I, while the *Kiobel* case has had a severely limiting impact on human trafficking cases,<sup>97</sup> by focusing on the extraterritoriality issue, the Court's ruling did not altogether eliminate these types of claims. If the Court had ruled on that there was no corporate liability under international law, the ruling would have been more devastating<sup>98</sup>. Other pending ATCA cases will most likely be amended to demonstrate whether plaintiffs could allege enough relevant US conduct<sup>99</sup> to seat the claims here under the reasoning of *Morrison* and other decisions applying *Morrison* to other fact situations and federal laws.

In any case, as discussed above in Section I, application of the ATCA in situations involving extra-territorial acts as a legal mechanism to hold corporations liable for violations of the law of nations, plaintiffs must now look for other possible avenues of relief.

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96. *See, e.g.*, *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 679–81 (S.D. Tex. 2009) (discussing Daod's contracting of twelve men and how they were misled to believe they would work in a luxury hotel but forced to work on a military base in Iraq, unable to leave, and eventually killed); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1057–58 (C.D. Cal. 2010) (explaining that many Malian children who were forced to work on cocoa fields and suffer human rights violations brought suit against multinational corporations who purchased and assisted in the production and cultivation of cocoa beans); *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301, 1305–06 (S.D. Fla. 2011) (discussing the suit brought by families of deceased Colombian banana farm workers against Chiquita for torture, cruel, inhuman, or degrading treatment, and gross violations of human rights); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 259–61 (E.D.N.Y. 2007) (discussing suit brought against Arab Bank for supporting and providing funds to terrorists organizations involved in genocide and other crimes against humanity).

97. *See supra* notes 17–18 and accompanying text.

98. Although the *Kiobel* case was first argued February 28, 2012, the central issue was originally whether corporations, and not merely individuals, could be held liable in an ATS lawsuit. *Kiobel*, 133 S. Ct. at 1663.

99 Justice Breyer filed an opinion in *Kiobel*, joined by Justices Ginsburg, Sotomayor, and Kagan, concurring in the judgment, advocating an analysis "guided in part by principles and practices of foreign relations law" to determine whether an ATS plaintiffs allegations involved "sufficient ties" to the United States to trigger jurisdiction. *Kiobel*, 133 S. Ct. at 1671.

Another theory of secondary liability used by plaintiffs in trafficking cases is that of principal-agent.<sup>100</sup> The goal of this Article is to provide practitioners with the necessary tools to persuade courts to apply the economic realities test beyond its traditional applications under federal labor statutes, such as FLSA.<sup>101</sup>, “[w]here one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same is an agent, and the principal is liable for acts of its agent within the scope of the agent’s authority.”<sup>102</sup> Applying this to the global contracting context, plaintiffs assert that the larger entity (the corporation) is liable for the torts or bad acts of another entity (the contractors), resulting from the privity created between the workers and the corporation.

Satisfying this central requirement of “control” of the corporation over its contractors is particularly challenging in overseas trafficking cases, in which the corporation and contractors are likely separated by an ocean, with most of the trafficking committed directly by a far-off contractor. As a result, Plaintiffs struggle to find concrete evidence of “control” and “authority” over the worker to comply with restrictive common law principles of control.<sup>103</sup> Corporations will simply emphasize the absence of any meaningful connection between the parties, painting it as a typical supplier arrangement.<sup>104</sup> Although this concept has been used in seeking corporate or governmental liability for the actions of subcontractors who committed various human rights violations, including trafficking, the future utility of this theory is still uncertain given the paucity of successful cases.<sup>105</sup>

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100. *Adhikari*, 697 F. Supp. 2d at 694.

101. 29 U.S.C. § 201 (2011).

102. *Pacific Can Co. v. Hewes*, 95 F.2d 42, 46 (9th Cir. 1938).

103. *See, e.g., In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 275–76 (S.D.N.Y. 2009) (holding that plaintiffs failed to provide specific allegations to support principal-agent relationship between defendants).

104. *See, e.g., id.* at 270 (explaining that defendant corporations attempted to avoid liability by arguing that illegal acts were attributed to their “subsidiaries, indirect-subsidiaries, or affiliates”).

105. *Adhikari*, 697 F. Supp. 2d at 679–81.

Finally, some plaintiffs have attempted to use the civil Racketeer Influenced and Corrupt Organizations (RICO) statute to obtain liability over the corporation.<sup>106</sup> On its surface, the RICO statute offers some glitzy benefits: treble damages, compensatory damages, attorneys' fees, and the ability to bring such claims as a Rule 23 class action.<sup>107</sup> However, the use of RICO to prove corporate liability is difficult, time consuming and expensive. The pleading requirements are extensive.<sup>108</sup> Plaintiffs have had their RICO claims dismissed for failure to meet the complicated requirements of proving an ongoing pattern of racketeering activity, that the racketeering predicates are related *and* that they amount to or pose a threat of continued criminal activity, and at least two predicate acts of racketeering committed within a ten-year period.<sup>109</sup> In the *Adhikari* case, even though plaintiffs were able to defend motions to dismiss on the RICO charges,<sup>110</sup> the parties are currently in the midst of summary judgment motions, after enduring an extensive and costly discovery process.<sup>111</sup> Moreover, some defendants may attempt to argue that RICO claims cannot be used to address overseas violations,<sup>112</sup> although there is case

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106. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2006); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 302–03 (D.N.J. 2005).

107. 18 U.S.C. § 1964 (2006); *see also, e.g.*, *Robinson v. Fountainhead Title Grp. Corp.*, 257 F.R.D. 92, 94–95 (D. Md. 2009) (citing courts who “have certified RICO claims for class action treatment”).

108. *See* Michael Goldsmith, *Resurrecting RICO: Removing Immunity for White-Collar Crime*, 41 HARV. J. ON LEGIS. 281, 289 (2004) (“Many courts required RICO plaintiffs to meet heightened specificity requirements in their pleadings.”).

109. *See* *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (requiring related racketeering predicates that amount to a threat of criminal activity); *see* *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 302–03 (D.N.J. 2005) (RICO claims dismissed in human trafficking case because elements missing from each underlying predicate act).

110. *Adhikari*, 697 F. Supp. 2d at 694.

111. *See* Interview with Agnieszka Fryszman and Molly McOwen (Aug. 29, 2012, April 20, 2013) (stating that plaintiffs had responded to over 464 requests for documents, 1,662 interrogatories, and 5,561 requests for admission by the fall of 2012).

112. *Cf. Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (holding that unless Congress clearly expresses an intention to give a statute extraterritorial effect, courts must presume that it only applies domestically).

law to the contrary.<sup>113</sup>

In light of the legal obstacles associated with most of the available theories of liability, plaintiffs have been forced to cast a wide net.<sup>114</sup> Moreover, defense counsel and courts are often confused by the interplay of secondary liability theories and frequently conflate agency theory with unrelated concepts, such as premise liability.<sup>115</sup> Thus, plaintiffs must educate courts and correct defense counsel when inapt analogies are drawn between these unrelated theories. They must convince the courts, the legislature, the public, the corporations, and even their own clients to look rather at the true economic reality of the worker's economic dependence on the corporation.

Because existing law is ineffective and unclear, victims need a new theory of corporate liability that is legally sustainable, legislatively faithful, accurate, and fair. With these goals in mind, we now turn to the liability theory of joint employment and the economic realities test.

### III. ECONOMIC REALITIES TEST

Corporations have been able to deflect most of the liability theories that have been thrown at them, by simply pointing a finger at the direct, physical, day-to-day control of their contractors over the workers in a distant land.<sup>116</sup> With most of the courts steeped in the traditional common law concepts of physical control, it is no wonder that the contractor is considered the only employer.<sup>117</sup> Defendants also continue to torpedo other

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113. *Adhikari*, 697 F. Supp. 2d at 690.

114. Nicholas C. Thompson, *Putting the Cart Back Behind the Horse: The Future of Corporate Liability Under the Alien Tort Statute After Kiobel*, 9 DEPAUL BUS. & COM. L.J. 293, 293 (2011); see, e.g., *Saleh v. Titan Corp.*, 580 F.3d 1, 3 (D.C. Cir. 2009) ("Plaintiffs brought a panoply of claims under the [ATS], [RICO], government contracting laws, various international laws and agreements, and common law tort.").

115. See generally Naomi J. Bang, *Navigating the Complexities of Corporate Liability in Human Trafficking and Forced Labor Cases*, 75 TEXAS BAR JOURNAL 766, 768 (2012) (concluding that "conflated agency and unrelated premise liability theories" are presented by corporations to courts and practitioners).

116. *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1241 (N.D. Cal. 2004).

117. See *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) (holding that "in determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and

plausible theories of liability, such as aiding and abetting, that require proof of purposeful intent.<sup>118</sup> Other theories based on contract or tort have proven equally futile.<sup>119</sup> More frustrating is that these unsophisticated victims often blame their deplorable work conditions on those who were physically present at the work site—oblivious of the corporations who control and direct the contractors.<sup>120</sup> Unless there is blatant direct evidence of active wrongdoing, corporations continue to escape accountability.<sup>121</sup> The global supply contracting structure is alive and well, replicated and tweaked with impunity by corporations. While these vicious cycles of cheap and forced labor and corporate profits abound in developing countries overseas, the U.S. has lost about 400,000 service jobs since 2000 and two million manufacturing jobs since 1983.<sup>122</sup>

The economic realities test is a powerful and legally viable test that allows the courts to conduct an examination of dependency factors from the worker's perspective to determine whether the corporation could be liable as a joint employer.<sup>123</sup> As opposed to the traditional common law interpretation of joint employment that focuses only on limited indicia of employer control, this revolutionary test enables courts to look at true economic reality factors that reflect the actual situation.<sup>124</sup>

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means by which the product is accomplished”).

118. See, e.g., *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 32 (D.C. Cir. 2011).

119. See generally *Saleh v. Titan Corp.*, 580 F.3d 1, 2–3, 9 (D.C. Cir. 2009) (holding that Plaintiff's common law tort claims were federally preempted).

120. As discussed at the conclusion of this section, it is imperative to engage in some immediate pre-trial jurisdictional discovery to determine who the employers of the plaintiffs/workers truly are. Cf. DANIEL WERNER & KATHLEEN KIM, *CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING* 24 (3d ed. 2008) (encouraging immediate discovery to determine the name of employers of trafficked plaintiffs).

121. See generally *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260–61 (2d Cir. 2009) (affirming the district court's findings of no evidence for corporate liabilities).

122. Sharon Otterman, *Trade: Outsourcing Jobs*, COUNCIL ON FOREIGN RELATIONS (Feb. 20, 2004), <http://www.cfr.org/pakistan/trade-outsourcing-jobs/p7749#p4>.

123. See *Dole v. Snell*, 875 F.2d 802, 804–05 (10th Cir. 1989) (citations omitted) (describing the economic realities test and several factors for liability).

124. *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994).

### A. Basic Theory of Joint Employment

If a corporation can be characterized as a joint employer with the contractors it hires to manufacture its products, the corporation is equally liable to the trafficked workers, thereby relieving plaintiffs from the more difficult burden of having to prove the more attenuated theories of secondary liability.<sup>125</sup> Essentially, the logic is that if the contractor is found to be an employee of a corporation, then its workers are also the corporation's employees.<sup>126</sup> Therefore, even if the contractor claims to be an independent contractor, the court could also find that the contractor was a joint employer with the corporation, making the workers employees of the corporation.<sup>127</sup> Since one theory of liability does not preclude another, plaintiffs can aggressively plead the joint employer theory with all other relevant theories of liability.<sup>128</sup> For example, the fact that a contractor employed the workers does not preclude allegations that the corporation also jointly employed the workers.<sup>129</sup> The issue of joint employment is a question of fact.<sup>130</sup>

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125. *Cf.* *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 195–96 (S.D.N.Y. 2003) (finding that under the economic realities test, a corporation was a joint employer with contractors and liable to workers in claims under the FLSA and New York Minimum Wage Act).

126. *Cf.* *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir. 1983) (applying economic realities test and holding defendant liable for FLSA violations even though employees technically were employee of independent contractor).

127. *Id.* (citing *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973)).

128. *Cf.* *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1007 (C.D. Cal. 2009), *aff'd*, 671 F.3d 736 (9th Cir. 2011) (pleadings included thirteen different theories of liability).

129. *See* 29 C.F.R. § 791.2 (describing various “joint” employment situations); *Castillo v. Givens*, 704 F.2d at 188 (holding that defendant was joint employer with independent contractor); *Campbell v. Miller*, 836 F. Supp. 827, 831 (M.D. Fla. 1993) (describing factors to consider regarding joint employment).

130. *Hodgson v. Griffin & Brand of McAllen Inc.*, 471 F.2d at 237 (citing *Wirtz v. Lone Star Steel Co.*, 405 F.2d 668, 669 (5th Cir. 1968)). Practice pointer: It is crucial that plaintiffs allege as many relevant facts as possible in the complaint and supporting attachments to prove the plausibility of their theory of liability in order to avoid an early dismissal. With the heightened standards of pleading pursuant to Federal Rule of Civil Procedure 8, plaintiffs' counsel should be vigilant to plead as many relevant facts as possible to substantiate their theories. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545–46 (2007) (citing *FED. R. CIV. P.* 8(a)(2)).

The joint employment doctrine is of utmost importance and relevance to the scenario when a corporation hides behind an independent contractor, particularly in sectors that are prone to human trafficking and forced labor.<sup>131</sup> For example, in the agricultural industry, as seen in the *Castillo v. Case Farms of Ohio* case, the court utilized the joint employment doctrine to prevent the employer from escaping liability.<sup>132</sup> It recognized that “[b]y hiring (and thereby shifting liability to) intermediary ‘independent contractors’ to recruit and/or oversee workers, agricultural owners have, at times, sought to create a buffer between themselves and their workers . . . . In the interests of justice, however, courts have frequently ‘pierced’ this independent contractor ‘veil’ with the invocation of the ‘joint employer doctrine.’”<sup>133</sup> Courts developed the joint employer doctrine specifically to ensure that the ultimate employer does not escape liability.<sup>134</sup> Similarly, courts have found growers and their labor brokers who provide migrant farm workers to the growers to be joint employers,<sup>135</sup> and liable for such failures of their co-employers for using pesticide without proper training,<sup>136</sup> of obtaining insurance for the automobile transporting the worker,<sup>137</sup> and to pay wages.<sup>138</sup>

As with the analysis for determining the existence of agency,

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131. OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, COMPENSATION FOR TRAFFICKED AND EXPLOITED PERSONS IN THE OSCE REGION 143 (2008), available at [http://www.childtrafficking.com/Docs/osce\\_08\\_com\\_region\\_0708.pdf](http://www.childtrafficking.com/Docs/osce_08_com_region_0708.pdf) (explaining that “joint employers are individually responsible, and therefore potentially liable, for violations”).

132. *Castillo v. Case Farms of Ohio*, 96 F. Supp. 2d 578, 596 (W.D. Tex. 1999).

133. *Id.* at 589.

134. *Id.* at 588. Plaintiffs were recruited in Texas to work in Ohio, and upon arriving “discovered that the actual terms and conditions of their employment, transportation, and housing in Ohio did not coincide with the promises made to them in Texas[.]” *Id.* The defendant argued it could not be held liable for the conduct of its labor recruiter. *Id.*

135. See, e.g., *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985).

136. *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, [slip op at 7–8] (7th Cir. 2007) (Easterbrook, J.) (citing *Rutherford Food*, 333 U.S. 722).

137. *Charles v. Burton*, 169 F.3d 1322 (11th Cir. 1999)

138. *Griffin & Brand*, 471 F.2d at 238; *Hodgson v. Okada*, 472 F.2d 965 (11th Cir. 1973).

the question of joint employment is decided under state law.<sup>139</sup> Since there are various state theories, first, this article addresses the joint employment principles, primarily using Texas law. Texas law is used for the following reasons: first, Texas has a well-developed progressive body of case law on the issue of joint employment.<sup>140</sup> Second, the Fifth Circuit's decision in *Pilgrim*, clearly explicates the economic realities test, has been cited throughout the country and referred to as one of the clearest explications of the economic realities test.<sup>141</sup> Third, Texas federal district courts have made several groundbreaking and frequently cited federal trafficking cases that have experimented with various theories of corporate liability.<sup>142</sup> Fourth, Texas has been one of the primary venues where trafficking victims have sought relief.<sup>143</sup>

Under Texas law, two separate entities can be considered joint employers, regardless of the existence of any partnership relationship between the two of them.<sup>144</sup> An employee may even be found to serve two masters even if they are not "joint" or "co-employers," and "most Texas courts, while not resorting to the theory" of joint-employment, "have acknowledged its

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139. *Torres-Lopez v. May*, 111 F.3d 633, 644 (9th Cir. 1997); *Lopez v. Silverman*, 14 F. Supp. 2d 405, 411, 411 n.4 (S.D.N.Y. 1998).

140. *See, e.g., Hoffman v. Trinity Indus., Inc.*, 979 S.W.2d 88 (Tex. App. 1998) (discussing the joint employer theory under Texas law).

141. *See Shirley Lung, Exploiting the Joint Employer Doctrine: Providing A Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L. J. 291, 317 (2003) (citing *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308 (5th Cir. 1976)) ("The Fifth Circuit Court of Appeals, perhaps, provides the clearest explication of this relationship in *Usery v. Pilgrim Equipment Co.*").

142. *See, e.g., Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009).

143. *See OFFICE OF THE ATT'Y GEN., THE TEXAS RESPONSE TO HUMAN TRAFFICKING, REPORT TO THE 81ST LEGISLATURE 1, 20 (2008)* (recognizing that an estimated 14,500 to 17,500 foreign nationals are trafficked into the United States every year and that Texas is a "destination point" and major route for transportation of human trafficking victims). Of these, one in five are in Texas. *Id.* at 10. The Justice Department has listed both Houston and El Paso among "the most intense trafficking jurisdictions in the country." *Id.*

144. *See Texas & N.O.R. Co. v. Gross*, 128 S.W. 1173, 1177 (Tex. Civ. App. 1910) (holding that two separate railroad companies had such closely joined operations that they were "practically partners"), *aff'd*, 221 U.S. 417, 417 (1911).

viability.”<sup>145</sup> Similarly, under the joint employment theory, if an employee receives an injury while working on a project jointly undertaken by two companies, the employee may sue both companies for the injury.<sup>146</sup>

Although there may be variations on existing tests to determine joint employment, they can be lumped into two categories: the traditional “common law” test that focuses on control and authority of the employer over the employee,<sup>147</sup> and the “economic realities” test that focuses on the true economic reality of the situation and dependency of the worker on the corporation.<sup>148</sup> And, over the years, both the common law theory and the economic realities theory test have produced variations on the basic theme.<sup>149</sup> The question then becomes which test to utilize in order to determine whether someone is a joint employer or not. We turn to those two tests now.

### *B. Common Law Test*

Surprisingly, the traditional common law test for determining joint employment is not nearly as well defined as would be presumed given its age and the proliferation of writing on the subject by courts and authors.<sup>150</sup> Although the common

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145. *Brown v. Aztec Rig Equip., Inc.*, 921 S.W.2d 835, 843–44 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (listing numerous cases that acknowledge the co-employer concept); *see also* *Texas Indus. Contractors, Inc. v. Ammean*, 18 S.W.3d 828, 831–32 (Tex. App.—Beaumont 2000, pet. dismissed by agr.) (holding jury had sufficient evidence to find employer relationship even though petitioner was hired as an independent contractor); *Hoffman v. Trinity Indus., Inc.*, 979 S.W.2d 88, 90 (Tex. App.—Beaumont 1998, pet. denied) (recognizing the existence and viability of joint-employer doctrine but distinguishing “borrowed servant doctrine”).

146. *Dallas Electric Co. v. Mitchell*, 76 S.W. 935, 940 (Tex. Civ. App. 1903).

147. *See* RESTATEMENT (FIRST) OF AGENCY § 220(1) (1933); *see also* *N.L.R.B. v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 128 n.27 (1944) (“Control of ‘physical conduct in the performance of the service’ is the traditional test of the ‘employee relationship’ at common law.”), *overruled in part on other grounds by* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

148. *See Hearst*, 322 U.S. at 129 (holding that employer relationships should be determined by “underlying economic facts rather than technically and exclusively by previously established legal classifications”).

149. *Lung*, *supra* note 141, at 315–18 (discussing the history of the joint employer doctrine and several lines of cases).

150. *See id.* at 319–26.

law test has been around for over a century, judges still wrestle to “secure precise and ready applications.”<sup>151</sup> This was evident in the “difficulties encountered in borderland cases by its reformulation in the Restatement of the Law of Agency § 220.”<sup>152</sup> In fact, even after years of litigation, there is no “simple, uniform and easily applicable test that the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other.”<sup>153</sup> Most can agree that the common law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”<sup>154</sup> Indeed, even the Supreme Court recognized that because “courts tended to look to local precedents to determine the common-law standards” this produced “different results for similar factual situations in various parts of the country.”<sup>155</sup>

The common law requirements are strict and non-forgiving. The Restatement’s definition of the word “servant” (employee) embodies this emphasis: “one who performs continuous service for another and who, as to his *physical movements*, is *subject to the control or to the right to control of the other* as to the manner of performing the service.”<sup>156</sup> The relationship is defined by “one giving and the one receiving the service, rather than the nature of the service or the importance of the one giving it,” and “[t]he rules for determining the liability of the employer for the conduct of both superior servants and the humblest employees are the same.”<sup>157</sup> Not surprisingly, the “common law” test is also known as the “control test,” since the core analysis focuses on the indicia of control that the employer has over the employee.<sup>158</sup> That issue alone has been the most frustrating

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151. *Hearst*, 322 U.S. at 120 n.19.

152. *Id.*

153. *Id.* at 120.

154. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

155. *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 184 (1970).

156. RESTATEMENT (FIRST) OF AGENCY § 220(1) cmt. a (1933) (emphasis added).

157. *Id.*

158. *See Darden*, 503 U.S. at 323–24 (quoting Cmty. for Creative Non-Violence v.

roadblock for victims of human trafficking.<sup>159</sup> How do overseas worker substantiate enough physical day to day “control” to demonstrate that the corporation—who sits thousands of miles away in a distant land—is also their employer? It is precisely this rigid test focusing on control that has been espoused and promoted by the corporations.<sup>160</sup>

In the context of this traditional common law test of joint employment, the United States Supreme Court courageously pushed the legal frontier to replace it with a more legitimate and workable test, beyond the one-faceted “control” test.<sup>161</sup>

### *C. Introducing the Economic Realities Test*

#### *1. Powerful but Short-Lived Beginnings: The Hearst Case*

For a revolutionary new concept that swept away centuries of established law, the economic realities test has not been used as extensively as it could be in the trafficking and forced labor contexts.<sup>162</sup> This innovative test initially arose in the context of interpreting several federal labor statutes—most notably the NLRA and the FLSA.<sup>163</sup> Although the economic realities test is primarily referred to today as a FLSA test, it actually first grew out of *Hearst*, a NLRA case.<sup>164</sup> Though years later legislation

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Reid, 490 U.S. 730, 751 (1989) (“[W]e consider the hiring party’s right to control the manner and means by which the product is accomplished.”).

159. See generally DANIEL WERNER, CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING 25 (3d ed. 2008) (discussing the potential defendants in a trafficking case and detailing the requirements of “control”).

160. See, e.g., *N.L.R.B. v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 120 (1944) (newspaper company arguing that the extent of their control and direction of the newsboys’ working activities simply created an “independent contractor” relationship so common law standards should determine the “employee” relationship under the Act), *overruled in part* by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

161. See *id.* at 134 (rejecting the inflexible common law rules as the “test of an appropriate unit” because of the need for flexibility due to “wide variations in the forms of employee self-organization and the complexities of modern industrial organization”).

162. For full discussion of the history and evolution of the “economic realities test,” see Lung, *supra* note 141, at 336–39.

163. See, e.g., *Hearst*, 322 U.S. at 113 (NLRA context) (overruled in part, specifically as to its broader-than-common-law interpretation of “employee”); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003) (FLSA context).

164. *Hearst*, 322 U.S. at 113, 127–29.

removed the economic realities test under the NLRA,<sup>165</sup> the court's reasoning is still persuasive, instructive, and controlling.<sup>166</sup> Numerous courts later adopted the *Hearst* rationale to propitiate the economic realities test to determine joint employment under other federal labor statutes, including the FLSA.<sup>167</sup> The economic realities test still stands strong under the FLSA, many state workmen's compensation acts, the Family and Medical Leave Act, the Worker Adjustment and Retraining Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.<sup>168</sup>

In *N.L.R.B. v. Hearst Publications*, the US Supreme Court flatly rejected the common law test as the mechanism for determining joint employment, instead applying an economic realities test to determine whether newsboys were employees of the newspaper publisher.<sup>169</sup> The corporation argued that the newsboys were independent contractors and not entitled to

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165. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 326, 324–25 (1992) (noting that Congress amended the NLRA in response to *Hearst* to demonstrate “that the usual common-law principles were the keys to meaning”).

166. See *N.L.R.B. v. United Ins. Co. of Am.*, 390 U.S. 254, 256–58 (1968) (noting that “Congress passed an amendment specifically excluding ‘any individual having the status of an independent contractor’ from the definition of ‘employee’” while still considering the total factual context in light of the common-law agency principles), *overruling in part Hearst*, 322 U.S. 111 (1944).

167. *E.g.*, *United States v. Silk*, 331 U.S. 704, 716 (1947).

168. See, *e.g.*, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003) (FLSA); *Penton v. Crown Zellerbach Corp.*, 699 F.2d 737, 740–41 (5th Cir. 1983) (workmen's compensation); see also Susan N. Houseman, *9.1 Who Is an Employee? Determining Independent Contractor Status*, U.S. DEPT. OF LABOR (Aug. 1999), [http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1\\_contractors.htm#19](http://www.dol.gov/oasam/programs/history/herman/reports/futurework/conference/staffing/9.1_contractors.htm#19) (“The economic realities test is used to determine employee status under the Family and Medical Leave Act . . . the Fair Labor Standards Act . . . and the Worker Adjustment and Retraining Act . . . . Additionally, it is often applied by courts in determining independent contractor status in civil rights cases under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.”).

169. See *Hearst*, 322 U.S. at 128–29 (stating that the nature of economic relationships and the broad language of the Act's definitions leave “no doubt that its applicability is to be determined . . . by underlying economic facts” rather than by the technical and exclusive legal classifications of the common law).

bargaining rights.<sup>170</sup> The Court conducted an economic realities test, focusing on factors that reflected the “dependency” of the newsboys on the newspaper company.<sup>171</sup> The Court examined and gave great weight to facts such as the newsboys “rely[ing] upon their earnings for the support of themselves and their families, and having their total wages influenced in large measure by the publishers who dictate[d] their buying and selling prices, fix[ed] their markets and control[led] their supply of papers.”<sup>172</sup> The Court also noted that the newsboys’ “hours of work and their efforts on the job” were “supervised and to some extent proscribed by the publishers or their agents.”<sup>173</sup>

Moreover, it is significant that even though the Court noted the existence of a district manager who admittedly “serve[d] as the nexus between the publishers and the newsboys,” it still found the newspaper publisher as the employer.<sup>174</sup> Even though the district manager unilaterally determined the number of papers distributed—effectively fixing the compensation—and assigned spots or corners to which the newsboys’ selling jobs were confined, the Court believed they were still the newsboys’ employer.<sup>175</sup> Unbridled by common law constraints, the Court was able to focus on the more humane side of the story: that the newsboys were “responsible workers, continuously and regularly employed as vendors and dependent upon their sales for their livelihood.”<sup>176</sup> The real life factors served as the rightful crux of the inquiry.

In order to justify this innovative holding and new test, the Court adhered to the “terms and the purposes of the statute, as well as the legislative history.”<sup>177</sup> The Court relied on the law’s stated goals that addressing the inequality between employers and workers, encouraging collective bargaining, and seeking to remedy the individual worker’s inequality of bargaining

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170. *Id.* at 119–20.

171. *Id.* at 131–32.

172. *Id.*

173. *Id.* at 131.

174. *Id.* at 118–19.

175. *Id.* at 117–18.

176. *Id.* at 132–33.

177. *Id.* at 123.

power.<sup>178</sup> Finding the economic realities test a much more suitable vehicle to address the legislative concerns, the Court was empowered to break from the path of least resistance, and pushed aside the common law test as the sole determinant of who was an employee.<sup>179</sup> In sifting through the statute's legislative history, the Court took notice of Senate Reports on that disclosed "clearly the understanding that 'employers and employees not in proximate relationship may be drawn into common controversies by economic forces.'"<sup>180</sup> The *Hearst* court's desire to follow legislative intent is seen in this piercing examination into the statute's history as well as a concern in context, reflecting a method that took "color from its surroundings."<sup>181</sup> The Court created the test with "the mischief to be corrected and the end to be attained" in mind.<sup>182</sup> This perspective enabled the Court to expand the scope of analysis to incorporate national goals and ramifications of the law as declared by the legislators.<sup>183</sup> The Court justified employing the economic realities test since it directly reflected "the policy of the United States to eliminate the causes of obstruction to the free flow of commerce" as stated in the findings and declaration of policy in the Act.<sup>184</sup> Cleverly armed with unequivocal congressional intent, the Court make short shrift of the common law test, denigrating it into "a technical legal classification . . . unrelated to the statute's objectives," in favor of the "economic facts of the relation" as a far more effective tool.<sup>185</sup>

It is no surprise that common law conception was swept

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178. *Id.* at 126.

179. *See id.* at 129 (stating that there "is no good reason" to invoke the common law technical concepts to restrict the scope of the term employee because "the term 'employee' must be understood with reference to the purpose of the Act and the facts involved in the economic relationship").

180. *Id.* at 128–29, n.28 (citing S. REP. NO. 74–573, at 7 (1935)).

181. *Id.* at 124 (quoting *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 545 (1940)).

182. *See Id.* at 124 (quoting *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)).

183. *Id.* at 124–25.

184. *See id.* at 126 (quoting 29 U.S.C. § 151 (2006)).

185. *Id.* at 127–28.

aside. The continued application of the old doctrine would obviously have limited “the scope of the statute’s effectiveness,” and not only been inconsistent with “the statute’s broad terms and purposes,” and could have “ultimately defeat[ed], in part at least, the achievement of the statute’s objectives.”<sup>186</sup>

Broadening the scope of inquiry permitted the Court to examine the “underlying economic facts rather than technically and exclusively by previously established legal classifications.”<sup>187</sup> This interpretation lead to a new edict freeing plaintiffs from the shackles of the “narrow technical legal relation of ‘master and servant,’ that centuries of courts had reflexively “import[ed] wholesale . . . as exclusively controlling limitations upon the scope of the statute’s effectiveness.”<sup>188</sup>

## 2. *Expansion under other federal statutes*

After *Hearst*, other courts followed suit and expanded the economic realities test to other cases under other labor-related statutes, re-directing their examination of the existence of an employer-employee relationship in the context of the true economic realities of a work relationship, rather than narrow and technical classifications of employee and employer under common law.<sup>189</sup>

Courts adjudicating the issue of joint employment or the question who is an “employee” under the Fair Labor Standards Act of 1938, enacted on June 25, 1938, and the Social Security Act of August 14, 1935, found the *Hearst* analysis and methodology persuasive in defining the coverage of the employer-employee relationship under other similar statutes.<sup>190</sup>

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186. *Id.* at 124–26.

187. *Id.* at 129.

188. *Id.* at 124–25.

189. *See, e.g.,* *Holland v. Altmeyer*, 60 F. Supp. 954, 959 (D. Minn. 1945) (discussing how legislation “deals with . . . every phase of the relationship of wage earner and employer [and] strict technical interpretation of the factual situation . . . is not mandatory”); *Tapager v. Birmingham*, 75 F. Supp. 375, 384 (N.D. Iowa 1948) (holding that the “[practical] policies to be applied in determining employment under Social Security Act are those stated . . . in [*Hearst*]”).

190. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723–24 (1947) (citing *Hearst*, 322 U.S. 111 (1944); *United States v. Silk*, 331 U.S. 704 (1947)).

The legislative history of the FLSA as set forth in Section 2(a) of the Act minces no words in tying the welfare of the worker to the burden on interstate commerce, succinctly stating that:

The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.<sup>191</sup>

Following the *Hearst* example of utilizing clear and decisive legislative intent to direct their legal analysis, other courts confidently expanded the economic realities test to fulfill correspondingly similar legislative mandates.<sup>192</sup> Naturally, a statute with the clearly stated purpose of denying a competitive advantage to employers who use substandard labor conditions meant a huge blow to the corporations.<sup>193</sup> The new examination through the dependency lens of the worker—instead of the control indicia of the employer—meant that the corporate world could no longer manipulate the physical manifestations of control.<sup>194</sup> And dirty secrets, like the subcontracting game, could be exposed in the courts for what they truly were.<sup>195</sup>

In the *Rutherford* case, one of the first and most well-known FLSA cases to adopt the “economic realities” test, the Supreme

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191. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 509 n.11 (1950).

192. *See Rutherford*, 331 U.S. at 723 (citing *Hearst*, 322 U.S. 111 (1944)).

193. *See Goldstein et al., supra* note 58, at 984 (“The [Fair Labor Standards Act’s] broad definition of ‘employ’ was intended to deny a competitive advantage to employers who maintained substandard labor conditions through such devices as abusive subcontractors.”).

194. *Id.* at 1028–29.

195. *See id.* at 984, 1055–57 (discussing how a broad definition of “employ” will quell devices such as abusive subcontractors).

Court staunchly justified its holding by relying upon the legislative goals of the FLSA.<sup>196</sup> The Court first acknowledged the legislative goals of FLSA to reduce the distribution in commerce of goods produced under subnormal labor conditions (i.e. conditions that were detrimental to the health and well-being of workers) by eliminating low wages and long hours detrimental to the health and wellbeing of workers.<sup>197</sup> Armed with this strong legislative arsenal, the Court justified and applied the economic realities test to the case of meat “boners.”<sup>198</sup> The manufacturer unsuccessfully attempted to push the blame and responsibility onto a third party contractor, claiming that the contractor was the immediate supervisor, but the court found the corporation, Kaiser, was the boners’ employer.<sup>199</sup>

The *Rutherford* court appeared to tweak and expand the economic realities test by evaluating the existence of a joint employment relationship “upon the circumstances of the whole activity.”<sup>200</sup> Without using the words “dependency” or “dependent” in its opinion, the *Rutherford* court conducted a dependency analysis. The court examined the following factors and found them significant: the fact that the workers performed a specialty job on a production line, that the premises and equipment belonged to the corporation, their pay was more like piecework and not dependent on any initiative on the part of the workers.<sup>201</sup> Rejecting a knee-jerk application of the common law indicia of control, the *Rutherford* court looked at the specifics of the work, examining and evaluating the task of the boners as one “performed in its natural order as a contribution to the accomplishment of a common objective,” and found them to be dependent on the meat packing corporation, not just the contractors.<sup>202</sup>

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196. See *Rutherford*, 331 U.S. at 727–28, 730 (discussing how the court relies on Congressional purpose for passing the Fair Labor Standards Act).

197. *Id.* at 727.

198. *Id.* at 730.

199. *Id.* at 729.

200. *Id.* at 730.

201. *Id.*

202. *Id.* at 726, 730 (quoting *Walling v. Rutherford Food Corp.*, 156 F.2d 513, 516

The Supreme Court extended and honed the economic realities test in defining who qualified as an employee for purposes of the Social Security Act of 1935 (SSA), another federally enacted example of social legislation during the same era as the FLSA and the NLRA.<sup>203</sup> The SSA was enacted to protect workers from poverty by requiring employers to pay taxes earmarked for future compensation to workers during periods of unemployment.<sup>204</sup> In particular, “[t]he [SSA] was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment . . . [and] was enacted in an effort to coordinate the forces of government and industry for solving the problems.”<sup>205</sup>

In a much-cited economic realities test case, *United States v. Silk*, a railway company refused to pay unemployment taxes for men who unloaded its railway cars, claiming they were not employees, but independent contractors.<sup>206</sup> Here, the Court rejected the traditional common law test, reviewed the case through the legislative lens of the SSA, and applied dependency test to determine the true economic reality of the worker.<sup>207</sup> First, it noted that the relevant law’s aimed to eradicate “the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment.”<sup>208</sup> Deciding that protection of the railway car un-loaders was consistent with the Act’s intent, the Court found them to be employees of the railway.<sup>209</sup> The *Silk* court applied a dependency test using five factors: “degrees of control,

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(10th Cir. 1946)0.

203. 42 U.S.C. § 406(a) (1999).

204. *United States v. Silk*, 331 U.S. 704, 710 (1947).

205. *Id.* The Court continued: “[t]he principal method adopted by Congress to advance its purposes was to provide for periodic payments in the nature of annuities to the elderly and compensation to workers during periods of unemployment. Employment taxes, such as we are here considering, are necessary to produce the revenue for federal participation in the program of alleviation.” *Id.*

206. *Id.* at 706–08, 713–14.

207. *Id.* at 713–14.

208. *Id.* at 710.

209. *Id.* at 716–18.

opportunities for profit or loss, investment in facilities, permanency of relation, and skill required in the claimed independent operation,” as the basis for analysis.<sup>210</sup> The Court quickly concluded the un-loaders were employees, noting that these workers “provided only picks and shovels,” and “had no opportunity to gain or lose except from the work of their hands and these simple tools.”<sup>211</sup>

Although one could ostensibly argue that the first factor—degree of control—appears to harken a regression back to the days of the traditional master-servant common law analysis, the court interpreted the word “control” broadly, including both indirect and direct means of control, and did not confine itself to the traditional physical control test.<sup>212</sup> Moreover, the issue of control was only one of several factors for analysis. Furthermore, the *Silk* court appeared to examine the prongs with the perspective of worker dependency in mind.<sup>213</sup> It is also significant that the Court critically examined the employment contract with an eye to protecting the worker, rebuking the corporation for trying to shift tax liability to the contractors by contract, “however ‘skillfully devised.’”<sup>214</sup>

### 3. *Problematic issues with the economic realities test*

Despite the strong origins of the economic realities test,<sup>215</sup> different viewpoints, conflicting applications, and even different tests arose among the courts and circuits.<sup>216</sup> Some courts watered down the pure strand of economic realities test by

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210. *Id.* at 716.

211. *Id.* at 716–18.

212. *See id.*

213. *See id.* at 716 (applying “degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation” as factors in determining worker dependency).

214. *Id.* at 715 n.10.

215. *N.L.R.B. v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 129 (1944); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 724 (1947); *Silk*, 331 U.S. at 713–14 (1947).

216. *See Rutherford*, 331 U.S. at 730 (expanding the economic realities test to a totality of circumstances); *Bartels v. Birmingham*, 332 U.S. 126, 130, 132 (1947) (following *Silk*'s five-prong test, ending up with disparate results); *Velez v. Sanchez*, 754 F. Supp. 2d 488, 499 (E.D.N.Y. 2010) (using different test to determine economic reality), *aff'd in part, vacated in part*, 693 F.3d 308 (2d Cir. 2012).

expanding the analysis to a “totality of circumstances” test.<sup>217</sup> Many followed *Silk*’s five-pronged test, yet ended up with disparate results under similar facts.<sup>218</sup> Others invented and applied tests that were completely different.<sup>219</sup> These varying applications created tension.

First, in some cases, there is tension between the common law test and the economic realities test.<sup>220</sup> This ambivalence is seen in the undertones of various court opinions that spout out “dependency of worker” sound bites, voicing a willingness to throw out the common law test as outdated and ineffective, but are unable to let go of the common law test.<sup>221</sup> Naturally, this ambivalence results in decisions that contravene the purpose of the relevant statute and add to the confusion.<sup>222</sup> For example, in *Bartels*, the court appeared to give lip service to the economic realities test and ultimately ruled in favor of the employer.<sup>223</sup> Here, the issue was whether band members were employed by the dance hall where they performed or their bandleader, who contracted with the dance hall.<sup>224</sup> In rejecting the dance hall as an employer or a joint employer with the band leader, the Court emphasized typical physical “control” facts such as the band leader’s having organized, trained, and selected the band members, and other more immediate indicia of control such as who bore maintenance costs as well as the loss or gains after payment of wages and expenses.<sup>225</sup> Although the court stated that it would not focus on the “idea of control of the employer over details of the service rendered to his business,” and intended to apply “social legislation [viewing] employees [as]

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217. See, e.g., *Rutherford*, 331 U.S. at 730.

218. See, e.g., *Bartels*, 332 U.S. at 132.

219. See, e.g., *Velez*, 754 F. Supp. 2d at 499.

220. See *Bartels*, 332 U.S. at 130, 132 (discussing the economic realities test but ruling in favor of the employer).

221. See *Goldberg v. Whitaker House Co-Op., Inc.*, 366 U.S. 28, 31–32 (1961) (conducting both a “dependency of worker” economic reality analysis and a common law control test).

222. See *id.* (mentioning the statute and the economic realities test, but ultimately siding with the common law test).

223. *Bartels*, 332 U.S. at 130, 132 (reiterating the *Silk* factors).

224. *Id.* at 127.

225. *Id.* at 132.

those who as a matter of economic reality are dependent upon the business to which they render service,” the court ended up according more weight to common law factors of control.<sup>226</sup> In one sense, the court conducted a hybrid common law analysis.<sup>227</sup> The conflict in the analysis and holding in *Bartels* was visibly exemplified by the dissenting opinion of three members of the Court, who pointed out that alternatively, the dance hall owner could also be considered the employer because “he has all of the conventional earmarks of the entrepreneur—ownership, profit, loss, and control,” and that “the requirements of the Social Security Acts [were] satisfied,” since “hold[ing] the dance hall proprietor liable for the tax is not to contract the coverage contemplated by the statutory scheme.”<sup>228</sup>

In *Goldberg*, the court appeared to split the baby and conducted both an economic reality analysis and a common law control test even though it ultimately concluded that home-based workers who sewed, knitted and embroidered products for a co-op were employees of the co-op.<sup>229</sup> On one hand, it focused on dependency factors and found significant the fact that workers were “regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.”<sup>230</sup>

However, it also balanced classic common law factors of managerial control such as the fact that “[t]he management fixe[d] the piece rates at which they work” and could “expel [the worker] for substandard work or for failure to obey the regulations,” essentially, the power to “hire or fire

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226. *Id.* at 130, 132.

227. *See id.* at 130 (“[O]bviously control is characteristically associated with the employer-employee relationship, but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”).

228. *Id.* at 133 (Douglas, J., dissenting); *see also* *Fahs v. Tree-Gold Co-op Growers of Fla.*, 166 F.2d 40, 44–45 (5th Cir. 1948) (finding fruit grower was employer of contractors due to economic dependency, even where there was very little physical control by fruit growers over contractors who assembled, labeled, filled, and loaded fruit boxes for compensation according to amount of work completed).

229. *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 31–32 (1961).

230. *Id.* at 32.

the . . . workers.”<sup>231</sup> The Court also made a passing reference to the “suffer to work” language of the FLSA statute, another test for which scholars have advocated in lieu of the “economic realities test.”<sup>232</sup>

Even within the economic realities test, there is disagreement as to which factors should be used, leading to some unpredictability.<sup>233</sup> Some courts have expanded the number of factors to include such things as:

- (1)the degree of the alleged employer’s right to control the manner in which the work is to be performed;
- (2)the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- (3)the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers;
- (4)whether the service rendered requires a special skill;
- (5)the degree of permanence of the working relationship;
- (6)and whether the service rendered is an integral part of the alleged employer’s business.<sup>234</sup>

While these factors all seem to reflect a concern with the dependency test, as found in *Silk*, the uncertainty of which test to use, or the ability to invent a new test, adds to an already unpredictable playing field.<sup>235</sup>

Many courts have adopted the *Silk* and *Bartel* Courts’

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231. *Id.* at 32–33 (citing *United States v. Silk*, 331 U.S. 704, 713, (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947)).

232. *Goldberg*, 366 U.S. at 31–32; *see also* Goldstein, et al., *supra* note 58, at 984 (advocating for a test based on the interpretation of the statutory wording “suffer or permit to work”).

233. *See* 2 WILLIAM L. DECKELMAN, JR. ET AL., *SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL* § 24:35 (2012) (explaining the different factors used by the different circuits).

234. *See, e.g.*, *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) (showing that in the FLSA case, the court used real dependency analysis to find operators and employees and not “agents”).

235. *See, e.g.*, *Donovan*, 656 F.2d at 1370 (discussing dependency).

five-prong approach using dependency factors.<sup>236</sup> Other courts, however, appear unable to let go of common law roots, applying more restrictive factors and centering their inquiry on employer control factors such as whether the alleged employer: “(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”<sup>237</sup> Since these factors mirror the traditional physical control test, the results inevitably favor an outcome against joint employment.<sup>238</sup> Other times, courts have allowed more restrictive common law factors, such as who hired, supervised or paid the workers, to creep into the analysis and have determined coverage under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).<sup>239</sup>

As Professor Lung has observed, “[c]ourts decide rather arbitrarily which factors to employ and, without articulated interpretative frameworks to guide their decisions, courts oscillate between different versions of the factors, resulting in inconsistencies within circuits.”<sup>240</sup> This leads to an added layer of unpredictability as courts appear to pick and choose the factors that they want to apply, giving them unexplainable weight in some decision and none in others.<sup>241</sup>

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236. *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947); *United States v. Silk*, 331 U.S. 704, 716 (1947).

237. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (ruling that the existence of an employer-employee relationship depends on the “circumstances of the whole activity”), *holding modified by Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003).

238. Lung, *supra* note 141, at 317–18 n.195 (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). For an example of a court erroneously applying common law control factors in the guise of the economic realities test, see *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996).

239. Goldstein, et al., *supra* note 58, at 984.

240. Lung, *supra* note 141, at 325.

241. Compare *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (utilizing rigid common law control factors in ostensible application of economic realities test, such as employer power to hire and fire, degree of supervision, determination of rate and method of payment), with *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058–60 (2d Cir. 1988) (stating “mechanical application of [the economic realities test] must be avoided” and considering nurses’ opportunities for profit or loss, investment in business,

*a. Fighting common law*

To show how entrenched common law notions are in the courts, we turn to a case that demonstrates how fiercely corporations (and courts) cling to the old common law analysis to defeat corporate liability in even the most egregious forced labor situations. The Ninth Circuit's holding in *Doe v. Wal-Mart* demonstrates these difficulties in a classic overseas global supply contract scenario that serves as context for this Article.<sup>242</sup> In *Wal-Mart*, workers from Wal-Mart's factories in various foreign countries filed a class action complaint in California regarding sub-standard work conditions in which they were forced to produce Wal-Mart products.<sup>243</sup> The plaintiffs attempted to hold Wal-Mart liable as a joint employer with their foreign suppliers from countries like China, Bangladesh, Indonesia, Swaziland and Nicaragua.<sup>244</sup> The federal court (to which the case was removed) rejected the joint employer argument, steadfastly applying the common law test of control, and holding that "[t]he key factor to consider in analyzing whether an entity is an employer is 'the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.'"<sup>245</sup> The court equated the concept of "control" to physical proximity as well as frequency of contact, holding that "[a] finding of the right to control employment requires . . . a comprehensive and immediate level of 'day-to-day' authority over employment decisions."<sup>246</sup>

Although there was no discussion of an economic reality argument or issue in the opinion, what is telling is the court's ease in summarily dismissing significant factors such as supplier contractual terms of "deadlines, quality of products, materials used, [and] prices."<sup>247</sup> The court rejected these factors,

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and whether service was integral to hospital operation).

242. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

243. *Id.* at 680.

244. *Id.*

245. *Id.* at 682 (citing *Serv. Employees Int'l Union v. Cnty. of Los Angeles*, 275 Cal. Rptr. 508, 513 (Ct. App. 1990)).

246. *Id.* (quoting *Vernon v. State*, 10 Cal. Rptr. 3d 121, 132 (Ct. App. 2004)).

247. *Id.* at 683.

characterizing them as insufficient to find that Wal-Mart exercised an “immediate level of ‘day-to-day’ control” between a purchaser and a supplier’s employees.<sup>248</sup> Ironically, these very contract terms concerning price and deadlines are the factors forming the crux of the economic realities test. Consideration of these terms would have yielded the opposite finding of dependence by the workers and a conclusion that Wal-Mart was clearly a joint employer with its contractors.<sup>249</sup> By ignoring Plaintiffs’ attempts to apply the FLSA definition of “joint employer,” the court ceded to Wal-Mart’s argument to adhere to a “strict application of traditional agency law principles.”<sup>250</sup>

*b. Watering down and confusion*

Under the guise of broadening the analysis, other courts have advanced a “totality of the circumstances” test, effectively diluting the true economic realities test.<sup>251</sup> Some courts reject the exclusive various factored tests and significantly open the field of analysis, stating “that courts are permitted to consider any other factors they deem relevant to the economic realities calculus.”<sup>252</sup> Not only does this muddy the test parameters, it creates an unspoken catchall to slip in traditional common law factors, depending on the court’s leanings. While commending the economic realities test’s factors as “certainly relevant,” courts still hedge their bets by stating that “it would be foolhardy to suggest that these are the only relevant factors, or even the most important.”<sup>253</sup> While some courts are able to work

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248. *Id.*

249. *See supra* Part IV. Indeed, even at the appellate level, Wal-Mart continued to insist on the common law test, reinforcing that plaintiffs failed to show that “Wal-Mart exercised ‘a comprehensive and immediate level of ‘day-to-day’ authority over employment decisions’ in the suppliers’ factories . . .” *Id.* at 682 (quoting *Vernon*, 10 Cal. Rptr. 3d at 132).

250. Appellee’s Answering Brief at IV(C)(2), *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) 2008 WL 5550529.

251. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999).

252. *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 71–72 (2d Cir. 2003); *Saavedra v. Lowe’s Home Ctrs., Inc.*, 748 F. Supp. 2d 1273, 1293 (D.N.M. 2010).

253. *Saavedra v. Lowe’s Home Ctrs., Inc.*, 748 F. Supp. 2d 1273, 1287 (D.N.M. 2010) (citing *Moldenhauer v. Tazewell-Pekin Consol. Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008)).

within a more amorphous test requiring an inquiry and mindset focusing on the general dependency of the worker,<sup>254</sup> there is a real danger that other courts may find an escape hatch to revert back to the common law test.<sup>255</sup>

Finally, other courts come up with their strands of their own “economic realities” test even though they may have nothing in common with models enunciated in *Hearst* or *Silk*.<sup>256</sup> *Velez v. Sanchez* provides one such alternative model.<sup>257</sup> Here, in the only known case where a human trafficking plaintiff argued the economic realities test, the court applied a two prong “economic realities” test—one that bore no resemblance whatsoever to the *Silk* or *Pilgrim* test and appears to focus solely on the benefits to the employer.<sup>258</sup> Here, the two factors revolved around: 1) “whether there was an expectation or contemplation of compensation” and (2) “whether the employer received an immediate advantage from any work done by the individuals.”<sup>259</sup> The economic realities test in this case was used to determine whether the plaintiff’s sister was her employer under the FLSA.<sup>260</sup>

In sum, there are various reasons why some authors and professors advocate disregarding the economic realities as being ineffective in favor of other more statutory based interpretations.<sup>261</sup> However, the focal point of a court’s analysis should be on the worker’s dependence. Therefore, as advocated by the legislature in the relevant statutes,<sup>262</sup> a proper analysis requires a meaningful and undiluted application of the economic realities test, one with clear-cut parameters. We now turn to a

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254. See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727–29 (1947) (determining “employee” status based on workers’ independence).

255. See *Howard v. Malcolm*, 852 F.2d 101, 105 (4th Cir. 1998) (AWPA case stating dependency words but performing no real dependency analysis).

256. See *Velez v. Sanchez*, 754 F. Supp. 2d 488 (E.D.N.Y. 2010), *aff’d in part, vacated in part*, 693 F.3d. 308 (2012).

257. *Id.*

258. *Velez v. Sanchez*, 693 F.3d. 308 (2012).

259. *Id.*

260. *Id.*

261. See, e.g., Goldstein, et al., *supra* note 58, at 984 (advocating for a test based on the interpretation of the statutory wording “suffer or permit to work”)

262. *Id.*

viable model.

#### IV. *PILGRIM* ECONOMIC REALITIES APPROACH

In light of the contradicting and confusing applications and variations of the economic realities test, courts should universally apply the economic realities test as originated with the *Silk* and *Bartel* courts and implemented and refined by the Fifth Circuit's *Pilgrim* court.<sup>263</sup> The two specific factors that are unique to the global supply- contracting scenario must also be included for accurate analysis. Those factors include an in-depth examination of 1) the terms of the global supply contract; and 2) the dependency of the so-called "independent" contractor who contracts with the corporation.

The practicality and perspective of the *Pilgrim* analysis is an excellent model for courts to determine joint employment in trafficking and forced labor cases under the TVPRA, and in particular, those involving the corporate global supply contracting scenario. The *Pilgrim* model should be followed since its application yields accurate and just results reflecting true economic reality. Moreover, its philosophy and underpinnings are squarely rooted in solid legislative purpose and perspective of its controlling statute, the FLSA.<sup>264</sup> Second, the method of, rationale behind, and the guidance given in, the application of the (five) factors by the *Pilgrim* court provides solid guideposts for uniform application. Third, the *Pilgrim* test allows for and encourages inclusion of crucial evidence, such as terms of the global supply contract as well as the dependency of the contractor, that is highly indicative of worker dependency.

In *Usery v. Pilgrim*, sixty female operators of laundry pickup stations claimed that they were employees.<sup>265</sup> The company argued they were independent contractors.<sup>266</sup> In ruling that the operators were employees, the *Pilgrim* court confirmed and

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263. *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1311–12 (5th Cir. 1976).

264. *See infra* section V. In Section V, this Article demonstrates the similarity between the legislative history of the FLSA and TVPRA. They embody the same goals and therefore the same rationale for applying the economic realities test should be applied in TVPRA cases as in FLSA cases. *Id.*

265. *Id.* at 1314–15.

266. *Id.* at 1312.

applied the *Silk* five factors of degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required.<sup>267</sup> Equally important was Pilgrim's method of evaluation framework—that the factors were to be used as “aids-tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected,” and that each factor “must be applied with that ultimate notion in mind.”<sup>268</sup>

Examining the first factor of “degree of control” exerted by the employer, the *Pilgrim* court dove headfirst into a genuine analysis of the worker's dependency, slicing the façade from the truth.<sup>269</sup> Unlike past common law analysis, it rejected the veneer of titles and labels and recognized that “[t]he controlling economic realities are reflected by the way one actually acts.”<sup>270</sup> The court examined certain facts such as the operators having no viable economic status that could be traded to other laundry companies.<sup>271</sup> It also stripped away the corporation's superficial argument that the workers' handling minor regular tasks without corporate supervision, only constituted “an appearance of real independence.”<sup>272</sup>

In analyzing the second factor—opportunities for profit and loss—the court looked beyond superficial indicia of control such as the operators being able to set their own hours, provide extra service, and offer customer service.<sup>273</sup> Instead, the court gave greater weight to the fact that the operators' wage was based on a percentage income generated pursuant to a contract, a contract that did *not show [that it] was ever subject to negotiation*, highlighting another factor that many other courts may overlook—the disparity in negotiating power by the worker.<sup>274</sup>

The court evaluated the third factor of amount of

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267. *Id.* at 1311–12.

268. *Id.* at 1311.

269. *Id.* at 1312.

270. *Id.*

271. *Id.* at 1312–13.

272. *Id.*

273. *Id.*

274. *Id.* at 1313.

investment, “from the point of view of each operator” and noted that “[b]ut for Pilgrim’s provision of all costly necessities, these operators could not operate.”<sup>275</sup> Similarly, with respect to the fourth factor, the court found that “[n]ot a single operator [was] shown to be capable of terminating relations with Pilgrim and taking her organization to another laundry . . . [and] the operators have nothing to transfer *but their own labor*.”<sup>276</sup> After all, if a contractor has nothing else to invest but his time, and he sells that time to one customer, he is therefore, dependent on that customer for that work.<sup>277</sup> The *Pilgrim* court correctly recognized that unskilled work meant it was more fungible, did not require initiative, and thus contributed to the workers’ dependency.<sup>278</sup>

Finally, in a non-patronizing move showing a steadfast faithfulness to the controlling statute’s legislative goals, combined with a compassionate understanding of the true economic realities position of a low skilled fungible worker, the court discounted the subjective intent of what the workers believe as not important or controlling, stating that “[n]either contractual recitations nor subjective intent can mandate the outcome in these cases, and that broader economic realities are determinative.”<sup>279</sup> Other courts in the Fifth Circuit have agreed with the *Pilgrim* analysis, espousing the same ideals that statutory coverage is “not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service.”<sup>280</sup>

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275. *Id.* at 1313–14.

276. *Id.* at 1314 (emphasis added).

277. *See id.* (stating that “every one of them is dependent upon Pilgrim’s continued employment”).

278. *Id.*

279. *Id.* at 1315.

280. *Fahs v. Tree-Gold Co-op Growers of Fla.*, 166 F.2d 40, 44 (5th Cir. 1948) (referring to NRLA and FLSA in stating that “[u]nder these decisions, the act is intended to protect those whose livelihood is dependent upon finding employment in the business of others. It is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings”); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1043 (5th Cir. 1987) (the multifactor

*A. The Global Supply Contract and Dependent Contractors*

When applying the economic realities test to the corporate global supply-contracting scenario, two factors are essential to obtain an accurate picture of the true economic reality. To properly evaluate “dependency” of the worker in this specific context, courts should examine two specific factors with a critical eye—the terms of the supply contract and the dependency of the contractor.

First, the supply contract is known under various names—supply contract, global supply contract, specification contract, purchase order, purchasing contract—but as used in this Article, it primarily refers to the contract or agreement containing terms and specifics of production that a corporation imposes on its contractors to produce their goods.<sup>281</sup> The supply contract is the lynchpin in the overseas supplier context because the terms regarding price and timelines directly trickle down to the worker, defining their work conditions.<sup>282</sup> The contract contains an instant snapshot of the true work conditions.<sup>283</sup> It is disturbing that the global supply contract is frequently overlooked by courts as one of the key indicators in determining “control” in both the agency test and the traditional joint employer test. Corporate counsel downplay the importance of the supply contract and deflect the courts’ attention away from what they mischaracterize as an insignificant invoices or “boilerplates.”<sup>284</sup> However, these contractual terms yield a

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economic realities test must be directed at “an assessment of the ‘economic dependence’ of the putative employees . . .”).

281. See, e.g., Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 547 (2008) (referring to international labor supply contracts as “global supply contracts”).

282. See, e.g., *Usery v. Pilgrim Equipment Co.*, 527 F.2d 1308, 1312 (5th Cir. 1976) (describing how the contract between Pilgrim and the operators controlled the work conditions of the operators, therefore making the operators the employees of Pilgrim).

283. See *id.* (explaining that the contract controlled the use of signage at the work place, it prevented any improvement to the premises, it governed the rights to set employees’ hours, and it governed the overall control the operators could exert).

284. Cf. Alford, *supra* note 281, at 531 (citing Guy Morgan & Melina Cataife, *Responsible Supply Chain Management*, IN FOCUS, June 2005 at 1) (explaining the difficulties multi-national corporations are facing to determine “what extent their responsible business practices can be enforced in third-tier supplier organizations”).

virtual goldmine of incriminating information, revealing the stark realities of who is in control and the detrimental effect these superficially benign terms have on true working conditions.<sup>285</sup> Price ceilings directly affect the wage that the worker will receive.<sup>286</sup> Production deadlines directly affect the hours that the worker has to work and increase the likelihood that egregious practices such as no breaks, insufficient nutrition, beatings and locked factories will be in place.<sup>287</sup> Low wages, long hours and inhumane conditions are hallmarks of forced labor and trafficking.<sup>288</sup>

Big name corporations have the ability to conduct time-and-motion studies to estimate the time it takes to complete a garment in order to determine that minimum wage was paid.<sup>289</sup> With today's high level of technology and ability to order product tests yielding instant gauges and measures of how long it takes to produce items according to specification, corporations cannot pretend they do not realize the direct impact these terms have on hours worked to produce their items.<sup>290</sup> With information pertaining to prices of any raw material in the world available at one's fingertips, corporations cannot feign ignorance, with a straight face, of the margins left to pay the

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285. Cf. ETHICAL TRADE INITIATIVE, *ETHICAL TRADE*, 1–3, 285 (2d ed. 2003) (explaining the importance of implementing strategies in a company's supply chain, including supplier contracts, to improve working conditions and provides language companies can use to improve their supplier contracts to meet the ILO standards).

286. Dwight R. Lee, *Price Floors, Surpluses and the Minimum Wage*, THE FREEMAN, [http://www.fee.org/the\\_freeman/detail/price-floors-surpluses-and-the-minimum-wage](http://www.fee.org/the_freeman/detail/price-floors-surpluses-and-the-minimum-wage) (last visited Nov. 25, 2012) (explaining how price ceilings and floors can affect wages, including the minimum wage).

287. See Megha Gupta, *Corporate Responsibility In The Global Apparel Industry: An Exploration of Indian Manufacturers' Perceptions* (2012) (unpublished Ph.D. dissertation, The University of North Carolina at Greensboro), available at [http://libres.uncg.edu/ir/uncg/f/Gupta\\_uncg\\_0154D\\_11000.pdf](http://libres.uncg.edu/ir/uncg/f/Gupta_uncg_0154D_11000.pdf) (explaining the tight production deadlines in the apparel industry and how companies relying on this informal workforce do not adhere to socially responsible business practices).

288. *Id.* at 10.

289. FREDRICK W. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* 5–29 (New York: Harper Bros, 1911), available at <http://www.fordham.edu/halsall/mod/1911taylor.html> (explaining how Fredrick Taylor invented scientific management which involves firms conducting time-and-motion studies to find inefficient motions in order to increase output based on total time).

290. See *supra* notes 269–77 and accompanying text.

soft costs of labor, benefits, safety measures and other unexpected costs. Many already have global auditing companies on expensive monthly retainers advising on aspects of global compliance and working to prevent human trafficking and forced labor in their supply chain.<sup>291</sup>

Yet, corporations refuse to acknowledge the logical correlation that a low contract price means that subcontractors will have more difficulty paying minimum wages and overtime premiums.<sup>292</sup> These factors must form the crux of any meaningful inquiry into the evaluation of corporate liability. As Professor Su states about a domestic garment sweatshop, “[t]he turnaround time the manufacturers demanded was much too fast for the downtown locations to have been furnishing all of the work. Such large quantities of high quality garments could not have been filled by workers making the requisite minimum wage and overtime.”<sup>293</sup>

It is heartening to observe that some plaintiffs have started to argue, and some courts to accept, the correlation between the contract prices and the resulting impact on wages.<sup>294</sup> In the

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291. See, e.g., *Meeting the Demand for Social Responsibility*, BUREAU VERITAS GROUP, [http://www.bureauveritas.com/wps/wcm/connect/bv\\_com/group/home/about-us/our-business/our-business-consumer-products/our+services/services/social+audits](http://www.bureauveritas.com/wps/wcm/connect/bv_com/group/home/about-us/our-business/our-business-consumer-products/our+services/services/social+audits) (last visited Sept. 4, 2012). The Bureau Veritas Group’s guidelines state:

As companies expand their manufacturing and sourcing capabilities around the world, supply chain workplace conditions are increasingly scrutinized, particularly in developing countries. The conditions under which products are manufactured have become a dimension of quality and an important part of the business value proposition. The lack of a process for managing risks related to supply chain social compliance can have a direct impact on a company’s financial results, especially for those organizations in consumer markets where image and brand names are critical assets.

292. *Levis Strauss & Company Corporate Profile and Case Material*, CLEAN CLOTHES CAMPAIGN, <http://www.cleanclothes.org/betterbargain/4?task=blogcategory&start=164>, (last visited Nov. 25, 2012) (explaining Levi’s low-price contract with subcontractor “Tans” forced employees to work seven days a week for less than minimum wage and the company provided no overtime pay).

293. Julie A. Su, *Making the Invisible Visible: The Garment Industry’s Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 409–10 (1998).

294. See, e.g., *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1468 (C.D. Cal. 1996) (stating that manufacturers have “contracted with [the operators] to produce garments at prices too low to permit payment of employees’ minimum wages and overtime”); *Doe v.*

*Bureerong* case, plaintiffs pursued a theory of liability that the manufacturers and operators were joint employers and the court described the corporations as “manufacturer” defendants, those entities who contracted with “operators” to produce garments at prices too low to permit payment of minimum wages and overtime.<sup>295</sup> Similarly, in *Nestle*, the plaintiff also alleged that “[the] exclusive contractual arrangements allow[ed] [d]efendants to dictate the terms by which such farms produce and supply cocoa to them, including specifically the labor conditions under which the beans are produced.”<sup>296</sup> It is ironic that the contractor’s strict compliance with the terms of the supply contract in meeting price and timelines is tantamount to being controlled by that corporation. Under these circumstances, the common law test can be said to have been satisfied. Other plaintiffs have set forth this theory claiming that manufacture of products “at prices too low to permit payment of employees’ minimum wages and overtime.”<sup>297</sup>

Following the *Pilgrim* model, courts should look beyond the four corners of the supply contract when conducting an analysis of worker dependency.<sup>298</sup> Courts are aware that contracts can be manipulated to shift liabilities, sometimes unknowingly to the other party.<sup>299</sup> The *Silk* Court long ago recognized “*adroit schemes by some employers and employees to avoid the*

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*Nestle, S.A.*, 748 F. Supp.2d 1057, 1064 (C.D. Cal. 2010) (stating that contractual arrangements give the operators the ability to dictate the terms under which farmers grow cocoa).

295. *Bureerong*, 922 F. Supp. at 1469. Plaintiffs have sufficiently alleged an employment relationship between the Plaintiffs and the ‘manufacturer’ Defendants within the meaning of the FLSA. Essentially, “Plaintiffs have successfully pled that the ‘manufacturers’ and the ‘operators’ were the ‘joint’ employers of the Plaintiffs.” *Id.*

296. *Doe*, 748 F. Supp. at 1064.

297. *Bureerong*, 922 F. Supp. at 1468 (citing FAC ¶ 26) (“[M]anufacturers utilize the business practice of contracting out garment manufacturing work in part to avoid compliance with labor laws and liability for violation of those laws,” and “at prices too low to permit payment of employees’ minimum wages and overtime,” resulting in “unfairly low prices [that] basically condemn plaintiffs “to long hours of work without minimum wages and overtime pay.”).

298. *Usery v. Pilgrim Equipment Co., Inc.*, 527 F.2d 1308, 1315 (5th Cir. 1976).

299. *See Russ v. Woodside Homes, Inc.*, 905 P.3d 901, 904 (Utah Ct. App. 1995) (explaining that parties may generally bargain against liability for harm, and that these indemnity agreements must be unambiguous to prevent deceit).

immediate burdens at the expense of the benefits sought by the legislation.”<sup>300</sup> Courts should resist glossing over the superficial allegations of “control,” and focus on the specifics of turnaround time and pricing. “Contracts however skillfully devised” should not be permitted to shift liability as definitely fixed by the statutes.<sup>301</sup>

Second, courts should also examine the contractor’s lack of meaningful ability to negotiate with the engaging firm as probative of whether the engaging firm is a joint employer of a contractor’s employees. This occurs where the contractor is so subordinate to the engaging corporation during negotiations, if any, that result in a standardized contract.<sup>302</sup> “In distinguishing between employees and independent contractors, the unilateral imposition of contractual terms by the principal has been a factor in revealing who ‘exercises control over the meaningful aspects’ of a business.”<sup>303</sup> The relevant inquiries<sup>304</sup>, therefore, should rather focus on the disparity in bargaining power, and courts as impartial decision makers should delve beyond the surface of the contract and ask: How much power do these independent contractors truly have to refuse the price ceilings and deadlines fixed by the multinational corporations? How do those terms define the working hours and conditions of their workers given the true turn-around time required to produce those items in that specific time frame? How do those terms directly affect the wages paid to workers, given the remaining

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300. *United States v. Silk*, 331 U.S. 704, 712 (1947) (emphasis added).

301. *Lucas v. Earl*, 281 U.S. 111, 115 (1930).

302. *Pilgrim*, 527 F.2d 1308, 1312, 1315.

303. *Lung*, *supra* note 141, at 334.

304. Procedurally, plaintiffs’ attorneys must proactively investigate the true nature of the third party independent contractor relationship with the corporation. The global supply contract is key evidence and needs to be requested up front by plaintiffs. In order to survive motions to dismiss, it is crucial that the plaintiff obtain enough information about and from the corporations to prove its theory of joint employment. Therefore, it is of utmost importance to send out pre-trial jurisdictional discovery at the earliest possible moment so that enough facts to support the joint employment argument can survive any motions to dismiss. In particular, it is imperative to argue for and obtain copies of the vendor supply contracts to examine the telling terms of price, processing times, and any other information relating to the work conditions at the foreign factory. Inquiries must be made to determine the dependence of the third party contractor by investigating whether the contractor has other streams of income.

margin for labor costs? What is the competition among these contractors? How dependent is this contractor on this company? How much flexibility is there for deviations from the contract?

The judiciary must open the courtroom doors to the world market and take judicial notice of such global realities as the “contractor’s option” which effectively gives overseas contractors the choice of violating labor laws in order to keep their corporate client happy, or going out of business.<sup>305</sup> Even when forced to close due to violations, overseas contractors can take advantage of less developed judicial and political systems and simply reappear the next day under alternate names.<sup>306</sup> With virtually no chance of enforcement and ability to simply go bankrupt, the choices are many for the contractor. None of these are good for the worker.

#### V. THE TVPRA AND ECONOMIC REALITIES TEST

In overseas trafficking cases brought under the TVPRA, where contractors often disappear, reorganize, or are judgment-proof, the economic realities test is a desperately needed tool to establish a legally sound nexus between the contractor to the corporation.

Fortunately, the task of expanding the economic realities test to the trafficking and forced labor context is not as difficult as one would imagine. In contrast to the violent legal upheavals, controversial changes in the law, drastic shift in mores and practices in the courts (and society) that led to the passage of the Civil Rights Act in the 1960s, this is a far easier battle.<sup>307</sup> Most of the necessary framework is already in place to extend the “economic realities” test to the TVPRA.<sup>308</sup> The legal methodology has already been created, articulated, and refined in past U.S. Supreme Court cases.<sup>309</sup> The TVPRA’s congressional record and legislative history is custom-made for

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305. See Foo, *supra* note 15, at 2186–88 (explaining the fierce competition in subcontracting work that drives down prices to the point that the only option is to lower worker wages and increase hours).

306. *Id.*

307. Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (1964).

308. See discussion *supra* Part IV.

309. *Id.*

the immediate and universal adoption of the economic realities test.<sup>310</sup> It is simply a matter of connecting the dots.

The beauty of using the already existing models is that no drastic change in the laws is required—only an open mind to extend existing legal concepts, already at our disposal, to related situations. Hopefully, the legislature will heed the call, clarify ambiguities, address and fix the corporate loopholes, and increase remedies and avenues for victims. Until then, victims should continue simultaneously to shape the law to expand avenues of relief in court.

This Article incorporates the birth, history and various applications of the economic realities test under the FLSA and various other federal labor statutes. Admittedly, however, those statutes did not specifically focus on the plight of the overseas trafficked or forced labor victim.<sup>311</sup> Nonetheless, the judicial methodology that gave rise to the creation of the economic realities test in connection to those federal labor statutes is extremely relevant—precisely because the underlying national concerns that gave rise to the FLSA are equally, if not more compellingly, embodied in TVPRA.<sup>312</sup> The stage is already set to apply the economic realities test to TVPRA cases.

The Supreme Court has already developed and refined the economic realities test that focuses on worker dependency, a feat tantamount to turning around the heavy common law freighter mid-stream.<sup>313</sup> Second, the legitimacy of the economic realities test is backed by a crystal clear legislative history, reflecting an unequivocal intent to implement a new social agenda based on

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310. The Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1464 (codified at 22 U.S.C. §§ 7101–7112).

311. For discussion regarding the flaws of The Fair Labor Standards Act in excluding agricultural and domestic labor, the National Labor Relations Act applying mostly to those in unionized workplaces, and The Migrant and Seasonal Agricultural Worker Protection Act in being limited to certain workers, see Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 3000–01 (2006).

312. Compare Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §102(b), 114 Stat. 1464, (codified at 22 U.S.C. § 7101–7112), with The Fair Labor Standards Act of 1938, 29 U.S.C. 201, §2(a).

313. See *supra* note 8 and accompanying text.

dependency of the worker.<sup>314</sup> Third, the TVPRA's legislative history reflects even more serious concerns about the labor conditions of workers than those found under the FLSA and other domestic labor statutes.<sup>315</sup> As shown below, these statutes' basic goals mirror each other in that they relate to the plight of the dependent (trafficked) workers and the evils to be corrected as starkly seen in their respective legislative histories.<sup>316</sup> The legislative intent behind the FLSA encourages the economic realities test, *not* the common law test.<sup>317</sup> The same goes for the TVPRA,<sup>318</sup> whose history also provides a legitimate basis to import the economic realities test into the trafficking context to hold corporations liable.

*A. TVPRA—Relevant Causes of Action (Global Contracting “Forced Labor” context)*

First, in a typical global supply contract case with forced labor or trafficking claims, plaintiffs would plead Section 1595 of the TVPRA to allege the right to a civil action against a corporation, contractor, individual or trafficker, and allege Section 1589 which encompasses the “forced labor” component under the TVPRA, and plead the forced labor provision as follows.

Section 1595(a) of the TVPRA provides the private right of action and states in relevant part:

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314. *See generally* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, (codified at 22 U.S.C. § 7101-7112) (explaining the purposes of this division are to combat human trafficking and protect the victims).

315. *Id.*

316. *Compare* The Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1464, (codified at 22 U.S.C. § 7101-7112), *with* The Fair Labor Standards Act, 29 U.S.C. 201.

317. *See, e.g.*, *United States v. Silk*, 331 U.S. 704, 716-18 (1947) (emphasis added) (creating the common law test).

318. The Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1464, (codified at 22 U.S.C. § 7101-7112); Pub. L. No. 108-193, § 4(a)(4), 117 Stat. at 2877 (creating the civil cause of action through TVPRA); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 221, 122 Stat. 5044, 5067 (2008) (enacted in Dec. of 2003 and amended in Dec. of 2008 and codified at 18 U.S.C. § 1595) (amending the civil cause of action to remove references to specific crimes and therefore expanding its scope to include forced labor).

An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.<sup>319</sup>

Section 1589 of the TVPRA addresses the forced labor cause of action and states in relevant part:

Whoever knowingly provides or obtains the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both. . . .<sup>320</sup>

Under these causes of action, courts would not find it difficult it to pin the blame the contractor as the direct perpetrator of the acts of forced labor and trafficking. However, if the corporation is considered a joint employer (as can be proven under the economic realities test based on an analysis of the trafficked worker's dependency) with that contractor, then the corporation would be considered equally liable under this statute for injuries suffered by it overseas factory workers.<sup>321</sup> Similarly, if the contractor were also found to be the corporation's employee, the corporation would also be liable since the contractor's workers would be considered the corporations' employees.<sup>322</sup> Either way, primary liability is established over the corporation who can no longer deny that it

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319. 18 U.S.C. § 1595(a) (2006).

320. 18 U.S.C. § 1589 (2006).

321. 29 C.F.R. § 791.2(a) (2000).

322. *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir. 1983), *disapproved of by* *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (citing *Hodgson v. Griffin & Brand, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973)).

is liable under this statute as the perpetrator.

*B. TVPRA Legislative History—Clear Intent to Abolish Slavery*

With the 2003 passage of Section 1595 of the Trafficking Victims Protection Reauthorization Act (TVPRA), Congress provided for a private right of action for victims of trafficking against their traffickers.<sup>323</sup> Many had hoped that the TVPRA, which had been seen mostly as a criminal statute, would provide a simplified one-step approach to civil litigation (as opposed to pursuing contract, tort, and myriad of other federal labor statutes) along with the psychological benefit to victims by classifying trafficking as a human rights violation.<sup>324</sup> Unfortunately, there has been relatively little success and few attempts to bring lawsuits against corporations in the global supply-contracting context.<sup>325</sup> Nevertheless, the TVPRA's *legislative history* now provides us with a strong supporting rationale to apply the same economic realities test that had been previously developed pursuant to the FLSA to trafficking cases.<sup>326</sup>

First, the concerns that were formed the basis for the FLSA are echoed in the legislative roots that gave life to the TVPRA, which was enacted to redress forced labor and the exploited worker.<sup>327</sup> The TVPRA states its goal succinctly in one sentence:

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323. Subsection (a)(4) provides trafficking victims a civil right of action in federal courts for violations of 18 U.S.C. §§ 1589 (forced labor), 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), or 1591 (sex trafficking of children or by force, fraud, or coercion). Pub. L. No. 108-193 § 4(a)(4), 117 Stat. 2875, 2878 (2003), *reprinted in* 22 U.S.C. § 7101 (2003).

324. Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 34-36 (2004).

325. See Andrew Martin, *Turning Point for Suits Over Chinese Drywall*, N.Y. TIMES (Oct. 12, 2012), <http://www.nytimes.com/2012/10/13/business/chinese-drywall-lawsuits-at-a-turning-point.html?pagewanted=all> (discussing the difficulties of bringing a suit, as well as collecting a judgment, in the global supply chain context).

326. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193 §§ 2(3)-(4), 6(g), 117 Stat. 2875, 2875, 2884 (2003), *reprinted in* 22 U.S.C. § 7101 (2003).

327. See H.R. Rep. No. 101-430, at 33, (stating that the purpose of the TVPRA 2007 amendment is to "establish new requirements and programs regarding trafficking into . . . forced labor[;]" that "[i]ndividuals are forced to work in agriculture, domestic

“to combat trafficking in persons, a contemporary manifestation of slavery . . . to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>328</sup> Two of the TVPRA’s numerous stated premises and findings<sup>329</sup> expound on the tremendous negative impact of trafficking on interstate commerce and the level of national dedication devoted to addressing the problem of forced labor and trafficking:

(12) Trafficking in persons substantially affects interstate and foreign commerce. Trafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market. Within the context of slavery, servitude, and labor or services which are obtained or maintained through coercive conduct that amounts to a condition of servitude, victims are subjected to a range of violations. (emphasis added)

(24) Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.<sup>330</sup>

The legislature’s strong intent to abolish and eradicate the

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servitude, sweatshops and restaurants and hotels, often for no pay or in debt bondage that eliminates any hope of freedom;” and that the amendment “would require DOL to establish an electronic process [requiring] the department to investigate and dispose of complaints related to foreign labor contractor’s failure to comply with the act”).

328. 22 U.S.C. § 7101(a) (2006).

329. 22 U.S.C. § 7101(b)(12), (24) (2006).

330. *Id.*

country of involuntary servitude and other forms of forced labor could not be clearer.<sup>331</sup> Moreover, Congress' drawing the nexus between forced labor and its direct impact on interstate commerce, such as the "nationwide employment network" and "labor market" bears a strikingly resemblance to the legislative language found in the FLSA's goals.<sup>332</sup> Furthermore, Congress' urgency in addressing the scope of human trafficking and forced labor is clearly reflected in the language urging both national and international cooperation to eradicate this serious offense.<sup>333</sup> Like the FLSA, the undeniable focus rests on the protection and welfare of the exploited worker and victim.<sup>334</sup>

Second, further support of the seriousness with which Congress views forced labor is amply demonstrated in the high criminal penalties associated with the criminal counterpart of forced labor trafficking:

§ 1590. Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor "Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both."<sup>335</sup>

Third, astoundingly on point with this Article, the House Report on the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2007 reveals that there was a real concern with and attempts to rectify the problem of U.S. corporations using overseas contractors, including their initiative to create a system of monitoring through the

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331. *Id.*

332. *See infra* section V(C).

333. 22 U.S.C. § 7101(b)(24).

334. *See supra* notes 125,–26 (showing examples of the FLSA protecting exploited workers and victims).

335. 18 U.S.C. § 1590 (2006) (emphasis added).

Department of Labor:

[The bill] also would impose private-sector mandates, as defined in UMRA, *on foreign labor contractors and employers who use such contractors*. The bill would require [any person who is a foreign] labor contractor to obtain a certificate of registration from DOL before engaging in contracting activities. [As defined in the bill, such activities include recruiting, soliciting, hiring, employing, or furnishing an individual who lives outside of the United States to be employed in the United States. *Foreign labor contractors also would be required*] *to disclose certain information in writing about employment opportunities [to each worker who is recruited for employment*. In addition, the bill would require employers who use foreign labor contractors to use only those that have registered with the DOL.<sup>336</sup>

This provision unequivocally shows the legislators' awareness of the antics of foreign contractors and expressed a desire to monitor corporations' use of such contractors.<sup>337</sup> Moreover, this specific discussion to require businesses to provide specific proof such as means of activity and disclosure of information as a prerequisite to hiring foreign contractors reinforces the statute's purpose to combat forced labor.<sup>338</sup> These specific reporting and monitoring requirements concretely reflect the legislature's initiative to assure that legitimate businesses are not employing foreigner contractors who manufacturer corporate products through illegitimate means.<sup>339</sup>

Finally, one cannot ignore the over-riding congressional intent in the TVPRA embodying the strongest of desires to abolish the evil institution of slavery as follows:

One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right

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336. H.R. Rep. No. 101-430, at 35 (emphasis added). This provision is in the 2007 bill that passed the house by a vote of 405 to 2. It did not pass the Senate. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

to be free from slavery and involuntary servitude is among those inalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.<sup>340</sup>

This declaration without a question supports the economic realities test since that test—and certainly not the common law test—would produce a result that would be far more in line with Congress’ goal to rid the society of the evils against which this statute was created—slavery and involuntary servitude.<sup>341</sup> The words are crystal clear. The intent could not be made clearer.

Therefore, as seen above in the legislative history, the “economic realities” test to hold corporations liable if they profit while using unmonitored, unscrupulous foreign contractors is completely consistent with the statutes’ motives.<sup>342</sup> Moreover, the fact that Congress wanted to place the monitoring of foreign suppliers under a federal government agency, such as the Department of Labor (DOL), further demonstrates the gravity of their concern with this issue and realization that strong and consistent check over corporations and their contractors was desirable.<sup>343</sup>

### C. *Legislative History of the FLSA*

The legislative intent of the FLSA similarly encapsulates the same national concerns and social economic agenda regarding workers’ situations.<sup>344</sup> The FLSA and TVPRA basically mirror each other.<sup>345</sup>

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340. 22 U.S.C. § 7101(b)(22) (2006).

341. *See id.* (explaining that applying the economics reality test would help better determine how dependent one is on their work and whether or not one is being enslaved, an issue Congress sought to resolve in passing the statute).

342. *See supra* note 336 and accompanying text.

343. 22 U.S.C. § 7103(a)–(c) (2006).

344. 29 U.S.C. § 202 (2006).

345. In contrast, the FLSA “shall *not apply* with respect to any employee whose services during the workweek are performed in a workplace within a foreign country . . . .” 29 U.S.C. § 213(f) (2006) (emphasis added); *Cruz v. Chesapeake Shipping*,

The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.<sup>346</sup>

Even back in the 1940s, when workers were mistreated and the products that were produced under such conditions were released into the flow of commerce, the negative impact was unquestionable.<sup>347</sup> Congress strongly recognized that and enacted socially progressive federal labor statutes such as the FLSA.<sup>348</sup> In comparison, the TVPRA was enacted to combat working conditions that are even more abhorrent.<sup>349</sup> The fact that the roots of the TVPRA coincide with the roots of the FLSA, as demonstrated through their legislative histories and congressional records, is very telling about Congress' intent, and a powerful tool to use against corporations whose only response will be to argue for a limited application of the economic realities doctrine to FLSA or Worker Compensation cases.<sup>350</sup>

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Inc., 738 F. Supp. 809, 820–21 (D. Del. 1990) (rejecting application of FLSA for workers on American ships in the Persian Gulf).

346. 29 U.S.C. § 202.

347. See Aron Cramer, *Bad Labor Conditions Aren't Just a Problem for Apple—We All Have a Stake*, FAST COMPANY (Feb. 24, 2012), <http://www.fastcompany.com/1819261/bad-labor-conditions-arent-just-problem-apple-we-all-have-stake> (discussing the general principal that poor labor law enforcement will lead to overworked employees and poorer production and products).

348. 29 U.S.C. § 202 (2006).

349. 22 U.S.C. § 7101(a) (2006).

350. *Id.*; 29 U.S.C. § 202(a) (2006).

Using the economic realities test to hold accountable corporations using trafficked or forced labor through foreign contractors fits perfectly within legislative intent of abolishing human trafficking and holding those liable for such acts, both criminally and under private civil actions. The economic realities test is a judicially sound solution that reflects the undeniable reality of globalization. Reality dictates that the court can no longer live in a vacuum and ignore the glaring abuses stemming from a structural framework, capitalizing on the dependency of workers. Courts must realize that overseas workers are even more highly dependent upon the businesses to which they render service than in most of the cases we see here in the United States.<sup>351</sup> The stark economic reality also shows that workers today, who are trafficked to remote parts of the world and forced to work by third party contractors are actually at the mercy of their corporate employers, not only for their economic livelihoods, but for their lives.<sup>352</sup> The application of the economic realities test, therefore, to the plight of the domestic and overseas trafficked victim is the next logical and equitable step, and reflects our nation's goals.

## VI. CONCLUSION

Victims of human trafficking and forced labor have made significant progress in persuading the courts to define, expand, and push the parameters of existing theories primary and secondary liability against their corporate offenders.<sup>353</sup> Others have innovatively used the criminal forfeiture restitution

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351. See, e.g., *Howard v. Malcolm*, 852 F.2d 101, 106 (4th Cir. 1998) (discussing the added measures of protection for United States workers implemented by the Department of Labor); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) (identifying the factors that should be considered in determining employee status, including, the degree of control an employer may have over a worker, which is limited by law in the United States as opposed to other countries); *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979) (identifying the factors that should be considered in determining employee status, which are more highly protected in the United States as opposed to other countries).

352. 22 U.S.C. § 7101(b)(6), (7) (2006).

353. See *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1225 (S.D. Fla. 2011) (holding that the TVPRA does not preclude workers' human trafficking and forced labor claims under the ATS).

provisions against individuals and corporations.<sup>354</sup> Going forward, victims can expect the same vigorous fight in advocating for the economic realities test to be accepted as a test of joint employment under the TVPRA.<sup>355</sup> Like past efforts to enact, implement and enforce civil rights laws and social legislation, plaintiffs must realize that their cases are not just lawsuits for money, but an opportunity to change the existing legal perspectives pertaining to corporate liability in the global contracting context. Moreover, committing to the litigation in civil trafficking cases against well-heeled corporate counsel and their private law firms requires a tremendous commitment of resources, time, legal fees, and anxiety, with financial victory elusive, even if a judgment is finally obtained.<sup>356</sup> Nevertheless, the past has demonstrated that small and large victories are painstakingly birthed from the efforts of those courageous and persistent enough to overcome seemingly unconquerable odds.

This is not for those without passion and a willingness to push the envelope. There are numerous barriers. First, the common law approach is so deeply engrained that courts do not realize how subconsciously they may be tied to antiquated notions relating back to last century's emphasis on physical immediate control when evaluating concepts such as agency and joint employment.<sup>357</sup> Second, the economic realities test itself has been contorted into so many different hybrids with varying factors that courts (and plaintiffs) may have some confusion

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354. See Kim & Hreshchyshyn, *supra* note 324, at 16 (explaining that restitution awards are largely dependent on the aggressiveness of prosecutors, and the victims may have to be creative and fend for themselves if prosecution is lacking).

355. Cynthia Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMP L. 503, 519 (2005).

356. See generally *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009) (case was filed on Apr. 24, 2009 and more than three years later, as of the writing of this Article, the parties still appear to be engaged in discovery disputes). *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1148 (C.D. Cal. 2011) (case filed on Aug. 5, 2010, and case continues with discovery and motion for summary judgment issues); *Magnifico v. Villanueva*, 783 F. Supp.2d 1217, 1229–30 (S.D. Fla. 2011) (case was filed on June 30, 2010 and settlement order was signed and granted on June 25, 2012).

357. Nancy Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 79 (1984).

understanding and applying it.<sup>358</sup> Third, because an initial perception of this test may be viewed as “pro-worker,” it is natural that some courts may fear dampening business and harbor secret fears about opening floodgates to workers from around the world, seeking redress against our own corporations.<sup>359</sup> In fact, even some plaintiff-friendly critics of the economic realities test claim that it is simply not workable because it would encompass everyone.<sup>360</sup> As one court which refused to apply the broad definition to a Social Security case, stated, “[w]ho, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person?”<sup>361</sup>

Legal perspectives are highly influenced by the public and media and any legal approach must be done within an overall context of consumer activism. The impact of the consumer on corporate behavior also cannot be under-estimated. As the Polaris Project notes, “[h]uman trafficking victims make an alarmingly high number of consumer goods and food products that are both imported to the United States and produced domestically. More often than we realize, somewhere in the supply chain of the products we buy, elements of exploitative child labor or forced labor may be present.”<sup>362</sup> Consumers can change purchasing choices, ask questions about how products were made, and ultimately have the power to reduce these types of demand to stop human trafficking.<sup>363</sup> According to research

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358. *Id.* at 80–83.

359. Lauren A. Heischmidt, *Do Verbal Complaints Constitute Protected Activity Under the Fair Labor Standards Act? An Examination of Kasten v. Saint-Gobain Performance Plastics Corp.*, 570 F.3d 834 (7th Cir. 2009), 35 S. ILL. U. L.J. 187, 187, 195 (2010).

360. See, e.g., Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C.L. REV. 239, 248–49 (1997) (discussing the possibility for someone to be both economically dependent upon the principal and in business for himself).

361. *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 185–88 (1970) (citing 12 Fed. Reg. 7966 (1947) (striking down proposal to Social Security Administration law to redefine employee under economic reality theory)).

362. *Why Trafficking Exists*, POLARIS PROJECT (Nov. 18, 2012), <http://www.polarisproject.org/human-trafficking/overview/why-trafficking-exists>.

363. *Take Action*, POLARIS PROJECT, <http://www.polarisproject.org/take-action> (last

conducted by BBMG, a brand marketing and research group in New York, eighty-seven percent of consumers said they are more likely to buy from a company that supports fair labor and trade practices than one that does not.<sup>364</sup>

In sum, those defending the rights of trafficked victims must see their battle as an integral part of an ongoing civil rights cause, evolving tools and concepts to change and seeking to delicately reform the court's historical attachment and deference to antiquated common law tenets that are no longer suitable against the backdrop of a globalized economy. This Article has endeavored to provide one small but viable tool to expand the boundaries of corporate accountability against those who have indifferently skirted liability in the global supply-contracting context.

Applying the economic realities test to fact scenarios under the TVPRA, is therefore, the next sensible step. The TVPRA undeniably embodies the very same values in its legislative history as contained in the socially progressive federal labor standards enacted in the 1940s from which the test was derived.<sup>365</sup> It comes to reason, then, that the economic realities is even more applicable to the TVPRA—a statute that addresses the most egregious unfair labor practices on trafficked workers who are just as dependent, if not more so than the domestic or immigrant worker in the United States for which the FLSA was designed.<sup>366</sup>

The economic realities test application in TVPRA cases is a

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visited Sept. 7, 2012); *What You Can Do*, INTERNATIONAL LABOR RIGHTS FORUM, <http://www.laborrights.org/what-you-can-do/2028> (last visited Sept. 7, 2012).

364. Society for Human Resources Management, *Human Trafficking: Who's Inspecting the Inspectors?* (May 14, 2012), <http://www.shrm.org/Publications/HRNews/Pages/TraffickingInspectors.aspx>.

365. See 22 U.S.C. § 7101(a) (2006) (observing that the purpose of the statute is to combat human trafficking, which is “a contemporary manifestation of slavery”); 29 U.S.C. § 202 (2006) (noting that the purpose of the statute is to eliminate labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency, and general well-being of workers).

366. See 22 U.S.C. § 7101(a) (2006) (explaining that the purpose of this statute is to eliminate human trafficking “whose victims are predominately women and children”); 29 U.S.C. § 202 (2006) (noting that the purpose of this statute is to help the entire working class in the United States).

sustainable legal solution that will improve corporate image and be good for business, improve working conditions and treatment of the workers by corporations, and allow for the release of goods into our stream of commerce that do not offend our ideals of fair labor. If all American offshore businesses must follow the same minimum standards or understand that there is serious risk of liability, then the international and national playing fields will be made equal, with incentives rather than disincentives to monitor production and take care of the vulnerable worker. The economic realities test, which has been around since the 1940s, embodies America's deepest values of fair labor, bargaining practices, and preventing unfair competition from products resulting from wrongful labor practices. It is time that we started using it.