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### El Monte Is the Promised Land: Why Do Asian Immigrants Continue to Risk Their Lives to Work for Substandard Wages and Conditions

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# COMMENTS

## EL MONTE IS THE PROMISED LAND: WHY DO ASIAN IMMIGRANTS CONTINUE TO RISK THEIR LIVES TO WORK FOR SUBSTANDARD WAGES AND CONDITIONS?

### I. INTRODUCTION

Illegal immigrants, who are willing to work in less than human conditions, continue to inundate the United States. The recent raid in El Monte, California has exposed the typical abuses that illegal immigrant workers are willing to suffer in order to earn far less than the federal minimum wage standard.<sup>1</sup> It is hard to imagine that an immigrant would willingly want to face these conditions. Yet, ironically, the stories of the El Monte workers, which have traveled back to Thailand, have only encouraged more Thais to make the journey to the United States.<sup>2</sup>

The Thai government's response to the El Monte situation is dismaying. The "director of the Foreign Ministry's office in charge of safeguarding the interests of Thais overseas seemed unfazed by what allegedly happened in El Monte."<sup>3</sup> "The consulate, and the Thai government, have no interest in helping these people. All they care about is saving their face. The consulate is telling them 'You're costing the United States government money. It's embarrassing. You should go back'."<sup>4</sup>

As harsh as this attitude seems, the El Monte incident is routine in Thailand where the minimum daily wage is 145 baht, or \$6.07.<sup>5</sup> Moreover, despite Thailand's labor laws, many workers in Bangkok sweatshops are being paid as little as 80 baht, or \$3.35,

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1. See Bill Wallace, *70 Immigrants Found in Raid on Sweatshop: Thai Workers Tell Horror Stories of Captivity*, S.F. CHRON., Aug. 4, 1995, at A12.

2. See John-Thor Dahlburg, *Sweatshop Case Dismays Few in Thailand Southeast Asia*, L.A. TIMES, Aug. 27, 1995, at A4.

3. *Id.*

4. Karl Schoenberger & Shawn Hubler, *Asian Leaders Call for Release of Thai Workers*, L.A. TIMES, Aug. 10, 1995, at B1.

5. See *id.*

for a working day that can last 16 hours.<sup>6</sup> Thai citizens trying to escape these conditions are easily persuaded by recruiting groups promising workers higher wages in the United States.<sup>7</sup>

The recruiting groups themselves pose another problem in U.S. efforts to crack down on labor law violations in the garment district. In many cases, the recruiters are Asian-based crime groups.<sup>8</sup> These groups collaborate to recruit, smuggle, and imprison garment workers.<sup>9</sup> The totality of these factors makes it apparent that the United States faces a constant uphill battle in its struggle to deter unauthorized immigrant employment.

This Comment compares U.S. and Thai labor in an effort to determine why the wave of illegal immigrants from Thailand seems to be unending. Part II discusses U.S. sweatshops and the conditions facing Thai immigrants once they enter the United States. Part III examines specific Thai and U.S. labor law provisions to analyze how inhumane conditions can openly exist despite strong U.S. regulations and labor law provisions in Thailand's Constitution. Part IV examines current U.S. attempts to halt the flow of unauthorized immigrant employment. Parts V and VI examine negligence and strict liability as potential bases for manufacturer liability and possible methods of curbing inhumane working conditions. Part VII argues for imposing a strict liability standard on the manufacturer as a means to control the continuing influx of the illegal immigrant workforce. This theory is based on the idea that, if a sufficient nexus exists between the garment manufacturer and the contractor, the manufacturer owes an absolute duty of care to garment workers.

## II. SWEATSHOPS: THE UNDERGROUND INDUSTRIAL REVOLUTION

A "sweatshop" is a business that regularly violates both wage or child labor laws and safety or health regulations.<sup>10</sup> Unfortu-

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6. See Dahlburg, *supra* note 2.

7. See James Sterngold, *California Raids Link Organized Crime, Sweatshops*, AUSTIN AM.-STATESMAN, Aug. 25, 1995, at A2, available in 1995 WL 61024486.

8. See *id.*

9. See John Horn, *INS, El Monte Defend Failure to Discover Sweatshop: Senate Probes Why Surveillance, Tips, Inspections Fell Short*, S.F. EXAMINER, Aug. 26, 1995, at A7.

10. See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2181 (1994)

nately, sweatshops are an integral part of the garment industry. The garment industry in the United States is a very profitable one, with revenues in California alone reaching billions of dollars annually.<sup>11</sup> The largest apparel centers in the United States are located in New York City, Los Angeles, and San Francisco.<sup>12</sup> Across the United States, there are over one million garment workers in an industry dominated by small companies.<sup>13</sup>

The basic structure of the garment industry consists of: the retailer, usually a department store or boutique; the garment manufacturer, such as Guess? or Esprit; the contractor/shop owner; and the garment worker.<sup>14</sup> The profit margins are the largest at the top of the chain: the profit per garment to the retailer, which is usually greater than a 100% markup to the consumer, typically exceeds twice the profit to the garment manufacturer, which in turn exceeds twice the profit to the contractor.<sup>15</sup>

The El Monte incident illustrates the abuses that sweatshops promulgate. The California Labor Department's investigation concluded that these workers labored an average of 115 hours a week and were paid 69¢ an hour.<sup>16</sup> The El Monte factory was a seven-unit apartment complex, completely surrounded by razor wire fences to prevent escape.<sup>17</sup> The building had no air conditioning, windows were covered, and as many as sixteen workers shared

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(citing U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-88-130BR, "SWEATSHOPS" IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE ENFORCEMENT OPTIONS 16 (1988)).

11. San Francisco alone has a five-billion-dollar-a-year industry, which employs over 10,000 workers, most of whom are Chinese women. See Susan Sward & Bill Wallace, *Problems at S.F. Garment Shops*, S.F. CHRON., July 25, 1991, at A1; see also Bob Baker, *Union Targets Sweatshop Operators*, L.A. TIMES, Apr. 27, 1990, at B3 (reporting that there are over 90,000 garment workers in the garment district of downtown Los Angeles); Harry Bernstein, *Labor: Sweatshop a Complex Problem*, L.A. TIMES, July 10, 1990, at D3 (estimating garment industry revenues at six billion dollars a year in Orange and Los Angeles Counties).

12. See Sward & Wallace, *supra* note 11, at A1.

13. See *id.* at A15.

14. See Leo L. Lam, Comment, *Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623 (1992).

15. See Steven A. Chin, *Bay's Ugly Secret*, S.F. EXAMINER, Feb. 13, 1989, at A10 (showing the chain of operation in the garment industry).

16. See Patrick J. McDonnell & Paul Feldman, *Top Retailers May Have Sold Sweatshop Goods*, L.A. TIMES, Aug. 15, 1995, at A1.

17. See Wallace, *supra* note 1, at A12.

the same bedroom.<sup>18</sup>

Furthermore, the usual sweatshop situation is unsafe and unsanitary.<sup>19</sup> Inside a typical sweatshop, the workers sit in a crowded space, wear a surgical mask, if they are lucky enough to be provided with one, and "hunch over a sewing machine . . . pushing fabric past a speeding needle as quickly as [their] hands [can] manage."<sup>20</sup>

A sophisticated smuggling ring recruited the El Monte workers in Thailand.<sup>21</sup> Once the smuggling ring recruited the workers, it provided them with false documents that enabled them to enter the United States as tourists.<sup>22</sup> The smuggling ring also provided the workers with "show money" in case U.S. immigration officials questioned them about their planned tourist activities.<sup>23</sup> The smuggling ring charged each worker \$5,000 for the journey to the United States, which the workers repaid by working in the factory.<sup>24</sup>

Generally, once in the United States, the workers keep silent about the abuses they endure in sweatshops because of employers' express or implied threats to report them to the Immigration and Naturalization Service if they complain.<sup>25</sup> Another factor confining garment workers to their occupations is their lack of English

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18. *See id.*

19. *See Lam, supra* note 14, at 634 (citing Michael Freitag, *New York Is Fighting Spread of Sweatshops*, N.Y. TIMES, Nov. 16, 1987, at A1).

20. *Id.* at 633 n.60 (citing William Serrin, *After Years of Decline, Sweatshops Are Back*, N.Y. Times, Oct. 12, 1983, at A1, which gives the following description:

Often garment industry workers must walk three or four flights to their factories, up dark, dingy, littered hallways. Elevators, when they exist, are often old and small and overburdened; it would take too long to wait for them.

Cloth seems to fly through the machines as the seamstresses make blouses, skirts, dresses, trousers.

The factories hum with the noise of machines—electric cutting knives, sewing machines, pressing machines. Radios play loudly, and there is babble in foreign languages and the steam and smell of the food that workers often eat at their benches. Floors often are littered with cloth remnants and stacked with cut goods or rolled goods. The factories are hot or cold, depending on the season).

21. *See Karl Schoenberger et al., 21 Thais Found in Sweatshop Are Released*, L.A. TIMES, Aug. 12, 1995, at A1.

22. *See Patrick J. McDonnell & Paul Feldman, 9 Indicted in Alleged Operation of Thai Sweatshop*, L.A. TIMES, Aug. 18, 1995, at B1.

23. *See id.*

24. *See id.*

25. *See Foo, supra* note 10, at 2182.

skills.<sup>26</sup> Many of the workers are untrained for other types of work and believe that sewing is their sole means for survival in the United States.<sup>27</sup> Reporting abuses may also result in being black-listed from other local factories.<sup>28</sup> An additional threat to the El Monte workers was the fact that the factory contained armed guards.<sup>29</sup> Left with no options, the workers toll away.

A contractor calculates garment workers' wages in two main ways: the piecework wage system and the homework wage system. In the piecework wage system, the contractor pays the worker for each garment she assembles or produces instead of for the amount of time she works.<sup>30</sup> Wages vary with this system because the amount of pay depends on how fast the seamstress works; the faster she sews, the more income she earns.<sup>31</sup> The piecework wage system remains the mainstay of the industry and is the way most contractors pay garment workers.<sup>32</sup>

In the homework wage system, contractors send employees home with piecework to be completed for the next day in order to avoid paying legally mandated overtime wages.<sup>33</sup> Garment workers do not keep homework records because they fear it will cause contractors to have problems with labor officials. Also, because many of the workers are non-English speaking immigrants, they are unable to keep "painstaking records."<sup>34</sup>

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26. *See id.*

27. *See Lam, supra* note 14, at 639.

28. *See id.* at 640.

29. *See Paul Feldman & Carl Ingram, 8 Suspects in Sweatshop Ring Plead Not Guilty, L.A. TIMES*, Aug. 22, 1995, at B1.

30. *See Lam, supra* note 14, at 635. Wages run from one to nine dollars an hour at a rate of a few cents per item completed. This is based on a typical skirt, which involves sewing two darts, a waistband, and a zipper, and cutting a slit. *See id.* at 636 n.73 (citing Serrin, *supra* note 20, at B4).

31. *See id.* at 636.

32. *See id.* at 635.

33. *See id.* at 636 (citing JACK CHEN, *THE CHINESE OF AMERICA* 238 (1980)).

34. *See id.* at 636 n.79 (citing *Labor Department Hearing on Homework in the Women's Apparel Industry*, Daily Lab. Rep. (BNA) D1, D3 (Apr. 4, 1989) (statement of Jay Mazur, President, ILGWU)).

### III. COMPARING THE LABOR LAWS IN THE UNITED STATES AND THAILAND — THE IMPORTANCE OF ENFORCEMENT

#### A. Labor Law in Thailand

Overall, the inclusion of labor provisions in Asian constitutions is a rather recent occurrence.<sup>35</sup> A starting point may be the recognition of forced labor in the Thai Constitution. Although Thailand has a free market economy, forced labor is still an acceptable means of government control "when the country is in a state of armed conflict or war, or when a state of emergency or martial law is declared."<sup>36</sup>

Thailand's legal system is one of constant change. Since 1932, when absolute monarchy fell in Thailand, there have been ten successful coups, a number of failed coups, and fourteen constitutions.<sup>37</sup> A possible reason for all these alterations in the constitution may be Thailand's evolving economy.

Due to large Japanese and Western investment, Thailand has one of the largest economic growth rates in the world, averaging approximately 11% from 1987 through 1990, and slowing only to 7.5% in 1991.<sup>38</sup> Thailand has been unable to alter its infrastructure to keep pace with this growth. In turn, Japan has slowed its investment in Thailand because of the country's snarled phone lines, traffic jams, and shortage of skilled workers.<sup>39</sup> Even with this phenomenal growth, Thai citizens continue to flock to the United States. The reason lies in Thailand's Constitution and laws.

Thailand's Constitution lacks any provisions for special classes of laborers, such as women or children. Among the directives of the State under the Thai Constitution is the fair protection of labor and wages.<sup>40</sup> Unfortunately, these labor provisions are considered mere government pledges.<sup>41</sup> According to a Western expert, the

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35. See David Ziskind, *Labor Provisions in Asian Constitutions*, 6 COMP. LAB. L. 117, 118 (1984).

36. THAIL. CONST. (B.E. 2538, 1995) ch. III, § 35.

37. See George J. Church, *Growing Pains (Thailand)*, TIME, June 1, 1992, at 68.

38. See *id.*

39. See Stanley Reed et al., *Will Thailand's 'Tiananmen' Derail the Go-Go Economy?*, BUS. WK., June 1, 1992, at 51.

40. See THAIL. CONST. (B.E. 2538, 1995) ch. V, § 89.

41. See generally Ziskind, *supra* note 35.

Thai legal system operates under the belief that the constitution is “a goal, an ideal” to which laws are sometimes made to conform, but sometimes not.<sup>42</sup> While Thailand has no provisions that regulate the length of the work day, it does have a provision that provides for a minimum daily wage<sup>43</sup> and that promotes and maintains public health.<sup>44</sup>

### B. *U.S. Labor Law and its Enforcement*

In the United States, the Fair Labor Standards Act (FLSA)<sup>45</sup> regulates minimum wage,<sup>46</sup> maximum hours,<sup>47</sup> overtime pay,<sup>48</sup> and child labor.<sup>49</sup> The purpose of the FLSA was to correct, as rapidly as practicable, conditions harmful to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers.<sup>50</sup> The expansion in manufacturing during the early part of the twentieth century made the need for regulation clear. Immigrants in search of a better life flocked to the United States.<sup>51</sup> In sweatshops, men, women, and children often worked long hours for little pay.<sup>52</sup> The FLSA, for the first time in U.S. history, set a national wage standard and established a standard workweek of forty hours, with additional hours paid at time-and-a-half.<sup>53</sup>

The FLSA originally defined an employee as “any employee employed by an employer.”<sup>54</sup> Under this original definition, coverage was limited to individual employees who were engaged in commerce, or in the production of goods for commerce, or in any

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42. See Michael Vatikiotis, *Latest Model: Will New Constitution Foster More Democracy?*, FAR E. ECON. REV., Apr. 6, 1995, at 24, available in 1995 WL-FEER 2271529.

43. See THAIL. CONST. (B.E. 2538, 1995) ch. V, § 89.

44. See *id.*

45. 29 U.S.C. §§ 201-219 (1994).

46. See *id.* § 206.

47. See *id.* § 207.

48. See *id.*

49. See *id.* § 212.

50. See Lam, *supra* note 14, at 647 n.137 (citing S. REP. NO. 1487, at 1-3 (1966)).

51. See SAR A. LEVITAN ET AL., PROTECTING AMERICAN WORKERS: AN ASSESSMENT OF GOVERNMENT PROGRAMS INC. 79 (1986).

52. See *id.*

53. See *id.*

54. 29 U.S.C. § 203 (1994).



fringe employment related to production.<sup>55</sup> As such, application of this definition sometimes produced contrasting results; for example, the FLSA would protect an employee on the assembly line, but not a janitor in the same plant.<sup>56</sup> The 1961 amendment to FLSA changed the focus from the individual employee to the business of the employer.<sup>57</sup>

Determining if the employer is engaged in interstate commerce is another problem. The FLSA does not specify the percentage, volume, production of the goods, or amount of activity that constitutes engagement in interstate commerce.<sup>58</sup> The courts have stated that only minimal, recurring contact with interstate or foreign commerce will render the FLSA applicable.<sup>59</sup> As a result of this revision, the FLSA now covers eighty to ninety percent of all privately employed persons<sup>60</sup> and a significant portion of local government employees.<sup>61</sup>

Under the FLSA, a workweek is defined as any regularly recurring period of seven consecutive twenty-four hour periods that may begin at any hour of the day or week.<sup>62</sup> Each workweek stands alone and may not be averaged.<sup>63</sup> Based on this workweek, employees must be compensated at no less than one-and-a-half times the regular rate of pay for all hours in excess of forty hours per week.<sup>64</sup>

The FLSA is not effective by itself. Similar to any other protective provision, it will not be effective unless properly enforced. One of the main problems foreseen by legislators was that em-

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55. *See id.*

56. *See* LEVITAN ET AL., *supra* note 51, at 79 (citing 9 THEODORE W. KEEL, LABOR LAW (1995)).

57. *See* 29 C.F.R. § 779 (1996).

58. *See generally* 29 U.S.C. §§ 201-219 (1994).

59. *See* U.S. v. Darby Lumber Co., 312 U.S. 100, 123 (1941); Mabee v. White Plains Publ'g. Co., 327 U.S. 178, 181 (1946); Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1124 (5th Cir. 1979).

60. *See* MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 79 (1989).

61. The Supreme Court upheld the extension of minimum wage laws and overtime requirements to state and local governments in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

62. *See* 29 C.F.R. § 778.105 (1996).

63. *See id.* § 778.104.

64. *See* 29 U.S.C. § 207 (1994).

employees would keep silent about employer abuses from fear that they would be fired. According to the U.S. Supreme Court in *Mitchell v. DeMario Jewelry*,<sup>65</sup> section 15(a)(3) of the FLSA was designed to remove the risk of employer retaliation against employees who reported violations.<sup>66</sup>

The Secretary of Labor delegated the responsibility of administering the FLSA provisions to the Administrator of the Wage and Hour Division of the Department of Labor.<sup>67</sup> The Administrator investigates complaints and inspects records in order to determine if a statutory violation has occurred.<sup>68</sup> In furtherance of this end, the Administrator may issue subpoenas to obtain information reasonably related to the investigations.<sup>69</sup>

Upon receipt of a written request from an aggrieved employee, section 16(c) of the FLSA authorizes the Secretary to institute a civil action on behalf of the employee for unpaid minimum wages and overtime pay.<sup>70</sup> The FLSA also provides the employee with an action to recover unpaid minimum wages and overtime pay.<sup>71</sup> The U.S. Department of Justice may also get involved and institute criminal actions against "willful" violators of the FLSA.<sup>72</sup> The Supreme Court states that "willful" is synonymous with "voluntary," "deliberate," and "intentional."<sup>73</sup>

### C. *Thai Labor Law: The Problem With Promises*

Similar to U.S. labor law, enforcement is needed to ensure

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65. 361 U.S. 288 (1960).

66. *See id.* The Court stated that Congress did not intend to secure compliance with FLSA by continuing detailed federal supervision. Instead, Congress chose to rely on employee complaints, and compliance with FLSA could not be accomplished unless employees felt free to approach officials with their grievances. Thus, § 15(a)(3) proscribes retaliatory acts against employees, and § 17 provides for its enforcement by the Secretary of Labor. *See id.* at 296.

67. *See* 29 U.S.C. § 204(a) (1994).

68. *See id.* § 211(a).

69. *See* *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 360 (1942); *Walling v. Deweiller Bros.*, 157 F.2d 841 (9th Cir.), *cert. denied*, 330 U.S. 819 (1946).

70. *See* 29 U.S.C. § 216(c) (1994).

71. *See id.* § 216(b).

72. *See id.* § 216(a).

73. *See* *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). The Court stated that a violation is "willful" when an employer either "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." *See id.*

that the Thai government follows through with its pledges of fair labor.<sup>74</sup> Without enforcement, the promises will never fulfill their potential for curing substandard conditions. Currently, the Thai government has failed to bring its labor provisions in line with international safety, health, and labor standards.<sup>75</sup> Even with the current laws in existence, their enforcement is a major part of the problem.

For example, in May 1993, a toy factory fire in Thailand killed 200 people.<sup>76</sup> The toy factory had neither emergency fire exits nor emergency exit doors, despite the fact that in 1992, the Thai Government approved new labor laws, including fire security guidelines.<sup>77</sup> These new laws were not effective because there were only five fire inspectors for the 90,000 businesses in Thailand.<sup>78</sup>

Where Thailand's government has failed to improve labor conditions, unions are trying to compensate. The liberty to form a union is expressly stated among the "Rights and Liberties of the Thai People" in the Thai Constitution.<sup>79</sup> In fact, strikes and other forms of protests date back to the early 1880s.<sup>80</sup> Curiously though, unions have been permitted to legally exist only for short intermittent periods.<sup>81</sup>

Unfortunately, the union movement is weak and fragmented, with only five percent of the work force organized. Amazingly, however, the five percent constitutes over 700 unions.<sup>82</sup> In 1991, the Thai Government further hampered the movement towards organized labor in Thailand by approving amendments to existing labor laws that disbanded labor unions at state enterprises.<sup>83</sup> This

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74. See generally Ziskind, *supra* note 35.

75. See generally *id.*

76. See *Thailand: ICFTU Demands Investigation into Bangkok Fire*, Inter Press Service Global Information Network, May 14, 1993, available in 1993 WL 25409980.

77. See *id.*

78. See *id.*

79. See THAIL. CONST. (B.E. 2538, 1995) ch. III, § 43.

80. See Andrew Brown & Stephen Frenkel, *Union Unevenness and Insecurity in Thailand*, in ORGANIZED LABOR IN THE ASIA-PACIFIC REGION 82 (Stephen Frenkel ed., Cornell Int'l Indus. & Labor Relations Report No. 24, 1993).

81. See *id.* Unions have only legally existed for the following periods: 1932-1934, 1944-1947, 1955-1957, and 1972-1976.

82. See *id.*

83. See *Thailand Effectively Disbands Unions Opposing Power Plant Privatization*, INDEP. POWER REP., Apr. 26, 1991, at 13, available in 1991 WL 2417530.

disparity leads to the same conclusion: private-sector workers remain unprotected and exploited.

#### IV. ATTEMPTING TO STOP THE FLOW: WHY TEMPORARY CURES HAVE NOT SLOWED THE WAVE OF ILLEGAL IMMIGRANTS INTO THE UNITED STATES

The garment worker will rarely, if ever, attempt to cure his or her own situation. Garment workers thrown into the United States are usually unaware of their labor rights.<sup>84</sup> When a worker comes from a country that has few protective labor laws, such as Thailand, why would he or she expect them in the United States? More importantly, these immigrant workers feel lucky to have jobs and are desperate to keep them at any cost.<sup>85</sup> As such, the U.S. government must be responsible for enforcing labor law policy.

Until 1986, federal law prohibited any person from assisting in the willful or knowledgeable act of or attempt at concealing, harboring, shielding, or inducing entry of an illegal alien into or within the United States.<sup>86</sup> The loophole to this statute is that "harboring" does not include employment, including the usual and normal practices incident to employment.<sup>87</sup> This statute, while effective towards prosecuting the recruiters themselves, had no effect on the sweatshop owners.

Congress saw the need for reform and in 1986 it passed the Immigration Reform and Control Act of 1986 (IRCA).<sup>88</sup> IRCA expressly proscribes the hiring of illegal aliens<sup>89</sup> and imposes fines against employers who hire undocumented workers.<sup>90</sup> The main goal of IRCA was to reduce illegal immigration by driving illegal aliens out of the workforce.<sup>91</sup>

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84. See Lam, *supra* note 14, at 640.

85. See *id.*

86. See 8 U.S.C. § 1324 (1994).

87. See *U.S. v. Lopez*, 521 F.2d 437, 441-42 (2d Cir. 1975).

88. See Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994) (citing Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) (amending the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101-1525 (1982))).

89. See *id.*

90. See 8 U.S.C. § 1324a(e)(4) (1994).

91. See BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, EMPLOYER-SANCTIONS AND U.S. LABOR MARKETS: FIRST REPORT 3 (1991).

IRCA requires an employer to verify through documentation the identity and eligibility of all employees for employment.<sup>92</sup> The employee must first present proper documentation in one of the forms listed under IRCA.<sup>93</sup> Once the employee presents the document to the employer, the employer must examine the document, note its identification number and expiration date, and attest under penalty of perjury that the document appears genuine and relates to the individual.<sup>94</sup> This information is documented on an I-9 form, which must be made available for inspection by the Department of Labor, Special Counsel for Immigration-Related Unfair Employment Practices, or INS officers after receiving notice of an inspection.<sup>95</sup>

In *Patel v. Sumani Corp.*,<sup>96</sup> the court found that Congress intended the FLSA coverage to be consistent with IRCA policies.<sup>97</sup> The court determined that both employer sanctions and enforcement of wage and hour standards served IRCA's objective of eliminating employers' economic incentives to hire undocumented aliens.<sup>98</sup> The court further stated that the undocumented worker in the case was "entitled to the full range of available remedies under the FLSA without regard to his immigration status."<sup>99</sup> In theory, it would appear that the fines and relief available should outweigh the gain from exploiting an undocumented alien. Thus, any benefit of hiring illegal immigrants to work at substandard wages disappears.

The enforcement of IRCA falls upon the Department of La-

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92. See Espenosa, *supra* note 88, at 343 (citing INA § 274A(a)-(b)).

93. See The forms listed include, but are not limited to, the following: an expired or unexpired passport, a certificate of U.S. citizenship, a certificate of naturalization, an unexpired employment authorization document issued by the INS containing a photograph of the bearer, a state driver's license or identification card containing a photograph, a school identification card containing a photograph, and a social security card. *Id.* at 361 n.165 (citing INA § 274A(b)(1)(A)-(C); 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C) (1996)). This partial list demonstrates the wide variety of documents that satisfy the IRCA requirement.

94. See 8 C.F.R. § 274a.2(b)(1)(i).

95. See 8 C.F.R. § 274a.2(b)(2)(ii).

96. 660 F. Supp. 1528 (N.D. Ala. 1987), *rev'd sub nom.* *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988).

97. See 846 F.2d at 703.

98. See BUREAU OF INT'L LABOR AFFAIRS, *supra* note 91.

99. 846 F.2d at 706.

bor and the Immigration and Naturalization Service.<sup>100</sup> IRCA authorizes the appropriation of funds to the Department of Labor "to deter the employment of unauthorized aliens."<sup>101</sup> Even with this level of cooperative help, however, the Department of Labor and Immigration and Naturalization Service reach less than three percent of the nation's estimated seven million employers.<sup>102</sup>

Unfortunately, IRCA does not fulfill its promises. The effect of IRCA was to drive garment workers further underground, thereby increasing the number of workers employed in sweatshops.<sup>103</sup> With this prevailing situation, a closer look suggests that the government should not focus its attention on sweatshop owners or contractors, but on clothing manufacturers themselves.

## V. WHY NEGLIGENCE IS NOT A VIABLE SOLUTION

Negligence consists of five elements: duty, breach, cause in fact, proximate cause, and damages.<sup>104</sup> Breach of duty is a question of whether the defendant conducted himself as a reasonable person would have conducted himself in the same or similar circumstances.<sup>105</sup> Cause in fact consists of a question of whether the defendant's act was a substantial factor in bringing about the damages.<sup>106</sup> Proximate cause asks whether the damages were foreseeable by the defendant.<sup>107</sup>

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100. See Espenoza, *supra* note 88, at 378 (citing U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO-GGD-88-14, GAO IMMIGRATION REFORM: STATUS OF IMPLEMENTING EMPLOYER SANCTIONS AFTER ONE YEAR 29 (1987)).

101. Richard E. Blum, Note, *Labor Standards Enforcement and the Results of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. REV. 1367 (citing Supplemental Authorization of Appropriations for Wage and Hour Enforcement, Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381 (1986)).

102. See Espenoza, *supra* note 88, at 378.

103. See 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, 197 (1992) (citing EMPLOYMENT DEV. DEP'T, STATE OF CAL., GARMENT AND HOSPITALITY INDUSTRY SURVEY ATTACHMENT 1 (1991)).

104. See FRANK J. VANDALL, *STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS* 45 (1992) (citing W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 143, 144, 236-50 (4th ed. 1971)).

105. See *id.* at 44.

106. See *id.*

107. See *id.* at 236; see also FRANK J. VANDALL, *STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS* 45 (1992) (citing *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (Wagon Mound No. 1)*, 1961 App. Cas. 388 (P.C.) (appeal taken from

Although it appears from the five elements of negligence that duty is a main issue in determining if the defendant was negligent, courts often rest their decisions on the issue of proximate cause,<sup>108</sup> which is the most troubling issue in negligence theory.<sup>109</sup> Designating proximate cause as a factor of negligence enables courts to control the reach of jury deliberations.<sup>110</sup> In answering the reach of liability question, courts should look at the social policies of prevention, loss shifting, and availability of insurance.<sup>111</sup> Instead of using a policy-balancing approach, courts generally resolve the proximate cause issue by questioning whether the damages were foreseeable by the defendant, the injury was remote, the occurrence was natural, or whether the defendant's act was the sole proximate cause.<sup>112</sup> Thus, courts define negligence cases by primarily relying on "foreseeability."<sup>113</sup> The obvious result is that courts do not examine policy issues of prevention, loss shifting, and availability of insurance.<sup>114</sup>

Courts have decided negligence cases by "feelings" or "hunches" rather than by weighing policy issues.<sup>115</sup> In *Wagon Mound No. 1*,<sup>116</sup> the court found that the defendant shipowner was not liable for allowing oil to flow into the harbor because it was not "foreseeable" that oil floating in water would ignite. In *In re Arbitration Between Polemis & Furness, Withy & Co.*,<sup>117</sup> the court found in favor of the plaintiff because the damaging fire was a "direct" result of the plank's falling.<sup>118</sup> In neither of these cases

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N.S.W.)).

108. See Leon Green, *The Duty Problem in Negligence Cases* (pts. 1 & 2), 28 COLUM. L. REV. 1014 (1928), 29 COLUM. L. REV. 255 (1929).

109. See VANDALL, *supra* note 104, at 45.

110. See *id.* at 45 (citing PROSSER, *supra* note 104, at 244-45).

111. See generally Green, *supra* note 108.

112. See VANDALL, *supra* note 104, at 45 (citing PROSSER, *supra* note 104, at 244-89). For a case applying more than one of the proximate cause tests at the same time, see *Martin v. Southern Bell Tel. & Tel. Co.*, 192 S.E.2d 176 (Ga. Ct. App.), *rev'd*, 194 S.E.2d 910 (Ga. 1972).

113. See, e.g., *In re Kinsman Transit Co.*, 338 F.2d 708, 724 (2d Cir. 1964); *In re Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968).

114. See VANDALL, *supra* note 104, at 45.

115. See *Id.* at 45.

116. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co.*, 1961 App. Cas. 388 (P.C.) (appeal taken from N.S.W.).

117. [1921] 3 K.B. 560 (Eng. C.A.).

118. [1921] 3 K.B. at 575, 577. In this case, a plank slipped and caused a spark, which

did the court evaluate the costs and benefits involved.<sup>119</sup>

Under a negligence standard, a manufacturer may successfully argue sweatshop abuses are not foreseeable due to the contracts signed by the sweatshop owners. These contracts give the appearance that the sweatshops are performing an independent process in the completion of the garment.

From an economic perspective, negligence results in the product being underpriced and leads to overconsumption.<sup>120</sup> To achieve an efficient market, a product must reflect all costs associated with its production.<sup>121</sup> One of the costs that should be integrated into the product's price is damages.<sup>122</sup> Unlike negligence, strict liability coerces efficient behavior because "it forces the injurer . . . to take into account all of the adverse effects of his behavior on the victim."<sup>123</sup>

The manufacturer reaps incredible financial benefits by forcing the sweatshop worker to accept wages far below the FLSA minimum standards. As such, the manufacturer should be forced to bear the burden that accompanies these benefits by being held strictly liable for the wage violations. The manufacturer may pass on these costs directly to the consumer by increasing the price of garments.

## VI. STRICT LIABILITY: THE IMPORTANCE OF POLICY BALANCING WHEN DETERMINING LIABILITY

The fundamental question of strict liability is who should bear the loss.<sup>124</sup> In *Cities Service Co. v. State*,<sup>125</sup> the court stated that

led to a fire that consumed the entire ship. *See id.* at 563.

119. *See* VANDALL, *supra* note 104, at 46.

120. *See* A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 98 (1983).

121. *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 4 (1980).

122. *See* VANDALL, *supra* note 104, at 22.

123. POLINSKY, *supra* note 120, at 39. Frank Vandall includes the following example: "[I]f a ten-speed bicycle costs \$150.00, then a certain number of ten-speed bicycles will be purchased. However, if that price were to reflect all of the injuries caused by ten-speed bicycles, then the price would be higher, perhaps \$175.00 or \$200.00." VANDALL, *supra* note 104, at 122. "The theory is that if the bicycle[s] were priced to reflect the actual damages caused, the socially correct number of bicycles would be purchased and the market would function efficiently." POLINSKY, *supra* note 120, at 98.

124. *See* VANDALL, *supra* note 104, at 46 (citing *Spano v. Perini Corp.*, 250 N.E.2d 31



“the justification for strict liability . . . is that useful but dangerous activities must pay their own way.”<sup>126</sup> Although two authors have stated that strict liability is a form of negligence,<sup>127</sup> courts have held otherwise.<sup>128</sup>

Strict liability against products manufacturers consists of the idea that “one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer.”<sup>129</sup> Strict liability allows the court to weigh factors that negligence analysis does not consider, namely, the true amount of control that the garment manufacturer enjoyed over the sweatshop and its employees. Without the policy balancing of strict liability, a negligence standard allows the garment manufacturer to escape liability.

The policies behind a strict liability standard include “loss

(N.Y. 1969)).

125. 312 So. 2d 799 (Fla. Dist. Ct. App. 1975).

126. *Id.* at 803.

127. Dean Page Keeton wrote:

There are two main points to emphasize. First, when plaintiff seeks to recover for harm resulting from an alleged defective product on a theory of strict liability, rather than negligence, he is not relieved from the burden of showing a defect in the product which was likely present when the maker surrendered possession and control. Second, when negligence is the basis for recovery, proof of the same two requirements will normally serve as circumstantial evidence sufficient for a finding on the part of the jury that the defect was the result of the maker's negligence . . . . Therefore, while strict liability obviates the necessity for convincing the jury as to the existence of negligence, it does not alter in any substantial way the plaintiff's proof problems, and the satisfaction of plaintiff's proof requirements for strict liability will generally result also in a finding of negligence.

Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 563 (1969).

Professor John Wade indicated: “There is little difference here between the negligence action and the action for strict liability.” John W. Wade, *On The Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 841 (1973). In another article, Professor Wade wrote: “Thus, the test for imposing strict liability is whether the product was unreasonably dangerous, to use the words of the Restatement . . . . It may be argued that this is simply a test for negligence. Exactly.” John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 15 (1965).

128. *See, e.g., Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 418 (1978) (“[T]his test reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the product, not the manufacturer's conduct, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail.”).

129. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

shifting, safety, superior knowledge, and insurance.”<sup>130</sup> Loss shifting is the theory that the product manufacturer is in a better position to bear the damages by raising the price of the good to cover the damages.<sup>131</sup> Safety is based on the idea that the manufacturer will exercise a higher degree of care to prevent injuries and the resulting damage claims if held strictly liable.<sup>132</sup>

A key rationale for holding a product manufacturer strictly liable is that the product manufacturer should be treated as an expert.<sup>133</sup> Consumers often know very little about the safety of their purchases whereas the product manufacturer designs and builds the product.<sup>134</sup> Thus, the product manufacturer is deemed to possess a superior ability to understand the inherent dangers associated with a particular product.<sup>135</sup>

As a practical example, the California Supreme Court adopted strict liability in *Greenman v. Yuba Power Products*.<sup>136</sup> The court held that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”<sup>137</sup> The court emphasized that this “new” theory was not based on warranty law, but on the refusal “to permit the manufacturer to define the scope of its own responsibility for defective products.”<sup>138</sup>

The *Greenman* decision was based on Justice Traynor’s concurring opinion in *Escola v. Coca Cola Bottling Co.*<sup>139</sup> Justice Traynor explained that:

It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury

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130. VANDALL, *supra* note 104, at 20-22.

131. *See id.*

132. *See id.* at 21.

133. *See id.*

134. *See id.* at 22.

135. *See* Gary T. Walker, *The Expanding Applicability of Strict Liability Principles: How is a “Product” Defined?*, 22 TORT & INS. L.J. 1, 3 (1986).

136. 377 P.2d 897 (Cal. 1962) (en banc).

137. *Id.* at 900.

138. *Id.* at 901.

139. 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring).

they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.<sup>140</sup>

Furthermore, in *Henningsen v. Bloomfield Motors, Inc.*,<sup>141</sup> the court stated that the risk of loss resulting from injury to consumers is a "hazard of doing business."<sup>142</sup>

In 1965, the American Law Institute created section 402A of the Restatement (Second) of Torts, which specifically addressed strict liability of manufacturers.<sup>143</sup> A majority of states have now adopted section 402A or its equivalent as embodying the doctrine of strict tort liability for defective products.<sup>144</sup>

#### VII. IMPOSING STRICT LIABILITY ON THE MANUFACTURER: GOING RIGHT TO THE SOURCE

The major policy argument against manufacturer liability is that a buyer should not be held accountable for the seller's wrongdoing.<sup>145</sup> Manufacturers often insist that they are not responsible for or aware of the publicized abuse of workers that occur in sweatshops.<sup>146</sup> This argument is not realistic when the profits that manufacturers make per garment and the amount of control that the manufacturer exerts over the contractor are taken into account.

For example, a \$120 skirt yields a \$25 profit to the manufacturer and \$10 to the contractor, of which, only \$2.40 goes to the

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140. *Id.* at 441 (Traynor, J., concurring).

141. 161 A.2d 69 (N.J. 1960).

142. *Id.* at 96.

143. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonable dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and the user or consumer has not brought the product from or entered into any contractual relationship with the seller.

144. See Mark E. Roszkowski & Robert A. Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*, 33 ST. LOUIS U. L.J. 19 (1988).

145. See Lam, *supra* note 14, at 645.

146. See Bernstein, *supra* note 11.

worker.<sup>147</sup> In calculating the retail price, the manufacturer takes into account the labor costs, material costs, and desired profit margin.<sup>148</sup> Thus, the garment manufacturer not only has knowledge of the manufacturing process in sweatshops, like a product manufacturer, but is also in complete control of the entire production process by the regulation of price.

The work performed by the garment worker is an integral part of the manufacturer's normal business, and because the shop owners do not furnish an independent business or other services relative to the manufacturer, an employment relationship can be recognized.<sup>149</sup> The contractors provide all the labor except for product design and marketing.<sup>150</sup> This integrated relationship between the manufacturer and the contractor supports the proposition that the two are in fact a common enterprise.<sup>151</sup>

When evaluating the profits at each step,<sup>152</sup> it is difficult to understand why a contractor accepts such a low profit percentage. The reason is because the manufacturer knows that there is an overabundance of contract shops.<sup>153</sup> This overabundance results in underbidding competitions among contractors that compel them to cut either the workers' wages or their own profits.<sup>154</sup> This competition benefits the manufacturer, who pits contractors against each other and achieves the lowest price possible.<sup>155</sup> With this over-competitive system, the sweatshop can survive only by paying contracted workers sub-minimal wage rates.<sup>156</sup>

Although clothing manufacturers deny responsibility for the wage and hour violations that persist in the garment industry, they

147. See Lam, *supra* note 14, at 609 n.36 (citing *Chin*, *supra* note 15, at A10).

148. See *id.* at 629.

149. See *id.* at 659 (citing ARTHUR LAWSON, *THE LAW OF WORKMEN'S COMPENSATION* § 45.00, at 8-193).

150. See *Botany Indus., Inc. v. New York Joint Bd., Amalgamated Clothing Workers*, 375 F. Supp. 485, 494 (S.D.N.Y. 1974).

151. See, e.g., *Dole v. Snell*, 875 F.2d 802, 811-12 (10th Cir. 1989) (holding that the work of cake decorators is integral to the business of selling cakes); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (holding that nursing work is an integral part of defendant's health care service).

152. See Lam, *supra* note 14, at 629 (discussing the breakdown in the profit structure).

153. See *id.* at 630.

154. See *id.*

155. See *id.*

156. See *id.*

have complete knowledge and control over the entire garment manufacturing process, much like the product manufacturers in the traditional strict liability scenario. Many manufacturers sign contracts with the contractors, stating that all laws will be adhered to and there will be no violations of any state or federal laws.<sup>157</sup> These contracts and their terms make manufacturers perceive that liability lies elsewhere.<sup>158</sup> In reality, manufacturers are the cause of the problem.

The case of *Danielson v. Joint Board of Coat, Suit & Allied Garment Workers' Union I.L.G.W.U.*<sup>159</sup> explains the extent of the manufacturer's involvement with the garment workers. The manufacturer in this case, Hazantown, purchased the cloth to make the clothing from a supplier, delivered it to the contractors who manufactured the garments according to Hazantown's specifications, and upon redelivery sold the garments to retail establishments.<sup>160</sup> Contracting out this production part of the business enables manufacturers to minimize investment while providing insulation from instability and risk.<sup>161</sup>

In addition, manufacturers calculate contract prices that inaccurately reflect the actual production costs.<sup>162</sup> This price is calculated by a time-and-motion study that should be based on the performance of an average laborer working under average conditions.<sup>163</sup> Taking this into account, a fair and realistic contract price estimate must consider several factors, including: the quality of sewing specifications, supervision, tools, equipment, the skill of the garment workers, delays beyond the workers' control, the amount contractors have to pay pieceworkers who cannot sew enough pieces to earn the minimum wage, and the time workers need to learn a new style.<sup>164</sup>

A garment manufacturer's time-and-motion study is neither

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157. See McDonnell & Feldman, *supra* note 16.

158. See Hayashi, *supra* note 103, at 203 (citing Robert Collier, *Sewing for a Living: Unregulated Exploitation*, S.F. WKLY., July 24, 1991, at 1).

159. 494 F.2d 1230 (2d Cir. 1974).

160. See *id.* at 1231.

161. See Hayashi, *supra* note 103, at 199.

162. See *id.* at 203.

163. See *id.*

164. See *id.* (citing Merle Linda Wolin, *Sweatshop: Underneath in the Garment Industry*, L.A. HERALD EXAMINER, Jan. 25, 1981, at A12).

realistic nor fair. It is based on the time it takes sample-makers, who are working under far better conditions than sweatshop workers, to produce one item.<sup>165</sup> Thus, contract prices based on the manufacturer's study drastically underestimate the time necessary for a garment worker to sew a piece of garment using an old machine and under little or no supervision.<sup>166</sup>

Competition among various sweatshops force contractors to accept undervalued contracts, which means that in order to turn a profit, they cannot pay their workers minimum wage.<sup>167</sup> Once the garments are completed, some manufacturers refuse to pay the contract price because the apparel is purportedly either improperly sewn or not delivered on time.<sup>168</sup> The manufacturers' refusal to pay for the goods forces the contractor to reduce the workers' wages or go out of business, which means that the workers will not be paid at all.<sup>169</sup>

These factors fit neatly into the joint employer doctrine set forth in *Hodgson v. Griffin & Brand of McAllen, Inc.*<sup>170</sup> In holding that a crew leader and a grower were joint employers of a farm worker, the court stated that "independent contractor status does not necessarily imply the contractor is solely responsible for his employees under the FLSA. Another employer may be jointly responsible for the contractor's employees."<sup>171</sup>

The manufacturer, is not only the party most culpable for the violations of garment workers' labor rights but also the best risk allocator and the deepest pocket directly connected with the garment worker. In the garment industry, the cost of labor is less than ten percent of the consumer's cost for a garment.<sup>172</sup> This benefit

165. *See id.*

166. *See id.*

167. *See Foo, supra* note 10, at 2188.

168. *See Hayashi, supra* note 103, at 204.

169. *See id.*

170. 471 F.2d 235 (5th Cir. 1973); *see also* *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 756 (9th Cir. 1979) ("[I]ndependent contractor status . . . does not . . . negate the possibility that the contractee may . . . be a joint employer of those workers under the FLSA.") (citations omitted).

171. *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237 (5th Cir. 1973).

172. *See Kelly Gust & Carolyn Newbergh, Threadbare Dreams, Abuses Abound in Oakland Sweatshops*, OAKLAND TRIB., July 28, 1991, at A1 (explaining the costs associated with a dress that retails for \$120: \$10 or less than 10% for labor, \$10 for the subcontractor, \$15 for the dress material, \$25 for the manufacturer, and \$60 for the retailer).

of unfair, cheap labor should include the burden of it as well. The manufacturer may pass the costs of compliance with the FLSA on to the consumers, which means that the manufacturer is better able to bear the financial burden.<sup>173</sup>

Holding manufacturers liable reduces the overabundance of subcontractors who drive contract prices down by severe underbidding.<sup>174</sup> This in turn encourages more stable and efficient shops to open in their place.<sup>175</sup> The legitimate shops would be able to modernize and have the bargaining power to demand higher contract prices, which result in the ability to pay their workers minimum wages.<sup>176</sup> Currently, the average life of a garment sweatshop is thirteen months.<sup>177</sup> Further, without this stabilization, any chance of unionizing is a hopeless endeavor for a company whose expected lifetime is slightly over one year.

An explanation for the continuation of subminimum wages in the garment industry is that reduced labor costs are needed to compete with low-wage Third World economies,<sup>178</sup> such as Thailand. If garment worker wages are increased to comply with the FLSA, garment manufacturers may move their production to overseas facilities.<sup>179</sup> This argument, however, is not realistic:

Current retail strategy makes local production of garments necessary. Department stores and retailers no longer order large inventories. Instead, they order many different styles of smaller quantities, with greater variety and greater color selections. Unpopular styles are dropped and "hot" styles in shorter runs are re-ordered, necessitating quicker turnaround times that cannot be met by offshore producers. A local contractor can produce a small order in one week, whereas the turnaround time for garments assembled in Asia is twelve weeks.<sup>180</sup>

Currently, the FLSA relies heavily on government enforce-

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173. See Lam, *supra* note 14, at 663.

174. See Foo, *supra* note 10, at 2210.

175. See *id.*

176. See *id.*

177. See Susan Headden, *Made in the U.S.A.*, U.S. NEWS & WORLD REP., Nov. 22, 1993, at 48.

178. See Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994).

179. See Foo, *supra* note 10, at 2211.

180. See *id.*

ment mechanisms that require resources that the government is unwilling or unable to allocate.<sup>181</sup> Self-policing by manufacturers will not work because there is no legal incentive.<sup>182</sup> In 1990 and 1992, both houses of the California Legislature passed manufacturers' liability bills.<sup>183</sup> Both bills were vetoed by Governors Dukemejian and Wilson.<sup>184</sup> The failure of state action to remedy the situation means that the federal government must step in and implement sweeping and broad changes to the FLSA in order to correct sweatshop abuses.

#### VIII. BUEERONG V. UVWAS: AN UPDATE

On September 5, 1995, the El Monte Thai immigrant workers filed a civil complaint against the operators of the El Monte facility.<sup>185</sup> According to the complaint, the "operators" were the individuals or entities who allegedly operated the El Monte facility.<sup>186</sup> While this was normal procedure, the surprise came with the workers' first amended complaint. In it, the workers named the "manufacturers" of the products as defendants.<sup>187</sup>

The allegations connecting the manufacturers with the operators were based on the premise that each manufacturer "exercised meaningful control over the work plaintiffs performed."<sup>188</sup> The main allegation tying manufacturers as joint employers was:

[m]anufacturers engaged and continue to engage in a pattern and practice of contracting at unfairly low prices by utilizing garment contractors who are not registered and/or who are chronic violators of labor laws, thus condemning plaintiffs and

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181. See Hayashi, *supra* note 103, at 206 n.65 (citing H.R. 3125, 101st Cong. §§ 4-5 (1984)).

182. See Foo, *supra* note 10, at 2195.

183. See *id.* (citing A.B. 3930, Reg. Sess. (Cal. 1989-1990); A.B. 1542, Reg. Sess. (Cal. 1991-1992)).

184. See *id.* (citing Governor George Deukmejian Veto Message to Assembly Bill 3930, 5 J. ASSEMBLY 9805 (Aug. 27, 1990); Governor Pete Wilson's Veto Message to Assembly Bill 1542, 24 J. ASSEMBLY 10, 251 (Oct. 1, 1992)).

185. See *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1458 (C.D. Cal. 1996).

186. See *id.*

187. See *id.* at 1458-59. These manufacturers included Mervyn's; Tomato, Inc.; L.F. Sportswear; Ms. Tops of California, Inc.; Topson Downs of California, Inc.; F-40 California, Inc.; New Boys, Inc.; Bigin, Inc.; Italian Club; and B.U.M. International, Inc. See *id.*

188. *Id.* at 1460.



other garment workers to long hours of work without minimum wages and overtime pay as required by law, to the detriment of themselves, their families and to the public at large.<sup>189</sup>

The manufacturer defendants countered this allegation by asserting that they were not employers of plaintiffs within the meaning of the FLSA.<sup>190</sup> The court responded that the FLSA did not adequately define the term "employer" and that "[t]he Supreme Court ha[d] instructed . . . courts to interpret the term 'employ' in the FLSA expansively."<sup>191</sup> The court further stated that the Supreme Court's interpretation had forced the lower courts to consider the economic reality of the relationship between an alleged employer and employee.<sup>192</sup> This means the court must "consider the totality of the circumstances of the relationship."<sup>193</sup>

This "totality" is based on factors that the Ninth Circuit set forth in *Bonnette v. California Health & Welfare Agency*.<sup>194</sup> These factors include "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>195</sup>

In denying the manufacturer defendants' motion to dismiss, the *Bueerong* court stated that plaintiffs had sufficiently pled that the manufacturer defendants had "contracted with [the operators] to produce garments at prices too low to permit payment of employees' minimum wages and overtime. Manufacturers utilize[d] the business practice of contracting out garment manufacturing work in part to avoid compliance with labor laws and liability for violation of those laws."<sup>196</sup>

Although *Bueerong* is only one case in the lower federal court, it shows the realization that manufacturer and operator are indeed one unit. Whether or not this position will hold during trial

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189. *Id.* at 1460-61.

190. *See id.* at 1467.

191. *Id.*

192. *See id.*

193. *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993) (citing *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

194. 704 F.2d at 1465.

195. *Id.* at 1470.

196. 922 F. Supp. at 1468.

remains to be seen.

## IX. CONCLUSION

While *Bureerong* shows that some courts are willing to unveil the curtain manufacturers hide behind, it still requires each court to determine if the individual manufacturer is an employer by FLSA standards. Strict liability imposed on the manufacturer goes right to the source of the problem. Manufacturers realize that they dominate the entire situation. Contractors realize that they will only get the contract if they submit the lowest bid which equates to a price that makes minimum wage impossible.

This complete control by the manufacturer should equate to strict liability. Under strict liability, the manufacturer would be held liable for any violations of workers' rights. It would be forced to pay for the benefits it receives by having sweatshop workers toil endlessly for subminimal wages.

Critics argue that imposing federal legislation against manufacturers will prompt them to move overseas and, therefore, the United States must live with these deplorable violations to remain competitive.<sup>197</sup> This argument is nonsensical and hypocritical in the face of the FLSA and its policies to ensure fair wages for all. If the critics were right, all low paying jobs would be overseas.

By imposing strict liability, workers would actually be able to recover back wages. Currently, contractors found guilty of wage and hourly violations simply file for bankruptcy and open a new sweatshop in a different location.<sup>198</sup> By holding the manufacturer strictly liable, deep pockets are available to ensure payment of hourly and wage violations. The manufacturer may then pass the costs of compliance with the FLSA to consumers.<sup>199</sup>

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197. See Hayashi, *supra* note 103, at 209.

198. See Foo, *supra* note 10, at 2187.

199. See Lam, *supra* note 14, at 663.

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