Production Liability

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Americans are periodically shocked to read about the horrific conditions under which a variety of retail goods are manufactured, especially our clothing. But we do not sustain our shock in sufficient numbers to alter those conditions through reduced consumer demand. Well-known corporations have taken a variety of steps to improve working conditions at their suppliers' factories but these have been mostly ineffectual.

Factory working conditions in industries like the garment industry are a well-known and long-standing problem. This paper focuses on the specific problem of safety violations at the sites of firms that supply goods to "lead firms", including both recognizable brands that retail their wares directly and manufacturers that distribute their goods through retail intermediaries. The discussion will center on the garment industry though the analysis and conclusions are intended to apply to other industries with similar market structures. The focus on safety violations largely sets aside the important problems of unpaid wages and low wages but should generate some insight into those related problems.

The discussion will frequently collapse the matter of working conditions in the factories of domestic and foreign subcontractors. Although their legal situations are importantly distinguishable, because domestic and overseas suppliers are to a large extent substitutes for one another, any reform that targets one without the other is unlikely to be effective.[1] One of the advantages of the course ultimately endorsed is that will not substantially skew lead firms' choice of suppliers.

Early on, I will conclude as others have that supplier-contractors are themselves largely ungovernable. It is an alarming conclusion but it shows the extent to which the problem we are addressing is not just a humanitarian problem but a challenge to the rule of law. Suppliers in the garment industry do not allow effective private recourse and they are too numerous and short-lived to be subject to effective government oversight. For this reason, commentators – including this one -- consistently arrive at the conclusion that some kind of liability for lead firms is necessary to improve working conditions at their suppliers. I call this liability for working conditions through the supply chain *production liability*. Notwithstanding the widespread view among scholars that some form of production liability is advisable, there has been no attempt to study systematically

[1] Production have shifted overseas but have also shifted back, suggesting that fluctuating transaction costs can overwhelm any fundamental different in factor prices. *See* Dennis Hyashi, *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) (the trend toward foreign production in the garment industry was reversed in early 90s due to "uncertain political conditions overseas, increased labor costs, poor workmanship, and problems associated with moving goods quickly").

the philosophical and economic basis for assigning liability to lead firms, and accordingly no satisfactory answer to the question of what form this liability should take. This paper takes on those open questions.

My discussion will proceed in several parts. First, I will provide some background on the problem of supplier working conditions. I will also offer an account of the inadequacy of the present legal regime that is intended to parallel earlier frustrations with the requirements of privity and fault in the context of product liability. As we know, those frustrations gave way to the products liability regime we now know. I will explore the fruits and limits of the analogy between products liability and production liability throughout the remainder of the paper.

In the second Part, I will argue that moral responsibility is properly borne by lead firms because they have control over supplier working conditions and can foresee those conditions as consequences of their own contractual terms with suppliers. Although their "outcome responsibility" is not exclusive, it is sufficient basis for the assignment of legal liability, which after all would not be exclusive on any proposed regime either.

In the third Part, I will argue that liability for lead firms is not only morally defensible but economically advisable. Such firms are best placed to bear the risk of poor working conditions; specifically, they are in the best position to deter violations, the best position to distribute the costs of ameliorating those risks, and they are the cheapest point of legal enforcement.

In the fourth Part, I will consider the choice between private and public enforcement. That is, I will address the question of whether it is better to create private rights of action against lead firms, or whether it is preferable to rest the authority to enforce lead firms' responsibility solely in the hands of administrative agencies. While fully cognizant of the many limitations of the regulatory approach, I will recommend government enforcement. There are several avenues, however, by which the prospect of government enforcement will give rise to complementary private enforcement, even absent private rights of actions by the employees of subcontractors.

Also in this Part, I will consider the appropriate standard of liability. The conceptual standard I propose is a hybrid of strict and fault-based liability. Lead firms should be responsible for working conditions that fail to meet government standards irrespective of whether any actual injuries have resulted and without inquiry into the details of their own conduct, including their contractual terms with suppliers and their performance of those contracts. The final Part concludes.

Production liability has been a timely topic for a long time. That is, though the policy concerns that it targets have long been on select political and scholarly agendas, scattershot litigation and legislative efforts have failed to make significant headway. There are of course substantial economic interests with political clout that stand to lose from the proposition of production liability, and this paper does not take full account of those headwinds. My primary aim is not to explore the political prospects for production liability but its regulatory logic.

Nevertheless, political constraints figure in the analysis here at two levels: First, like any meaningful discussion of potential reform, it is cognizant of institutional constraints. I take into account the costs and probably efficacy of different measures, assuming they were adopted. For example, I presume that any administrative agency charged with enforcement of a relevant rule will be underfunded.

Second, and more fundamentally, the prospects for production liability turn at least in part on the intelligibility of any proposed model, including its moral and economic underpinnings and its fit with existing legal concepts and institutions. This paper aims to offer an account of production liability that coheres with our prevailing normative commitments in that way.

I. Supply Chains and Working Conditions

What exactly is the problem? Sweatshops, in a word. These are actually small factories that produce goods (again, here, the focus is on garments) that are in turn sold to a manufacturer. The manufacturer either retails the goods directly or sells them through a distributor, such as a department store. The manufacturer has a recognizable brand name but there about twenty small suppliers for every manufacturer (in some cases, thousands more) and no one has heard of the suppliers.[2]

There is nothing inherently objectionable about such a market structure; the lead firms are not so few as to raise immediate concerns about their market power. However, suppliers are undercapitalized and on the tightest margins, in substantial part due to the fierce competition among them. They are essentially selling labor, and there is little room for ingenuity by which to improve productivity relative to competitors.[3] They are said to "sweat" out a profit from their workers, who are paid little and sometimes go unpaid. More than half of United States garment factors are in violation of labor laws.[4] They also tend to operate unsafe workplaces, from their production practices to the physical integrity of the buildings in which they operate. These facts hold with respect to both domestic contractors and overseas contractors. Neither workers nor agencies that sue domestic contractors consistently recover damages or fines because contractors are often judgment proof or declare bankruptcy. Workers are unable to collect from subsequent businesses that the contractor might open under a different name.[5]

Workers at overseas suppliers may be formally entitled to sue their employers too but their home legal systems are often dysfunctional for such cases. Importantly, working conditions at supplier factories may not be as distinct from other local workplaces as they are at contractors' factories in the United States. Given the importance of attracting foreign income, enforcing local

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[2] *See* Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOYOLA UNIV. CHIC. L. J. 291, 293, 302 (2003).
[3] Hyashi, supra note x, at 204.
[4] Lung, supra note x, at 293, 296 (describing scope of unpaid wages problem among contractors in the United States).
[5] See Lung, supra note x, at 305.

employment protections against suppliers is often not a priority. The sheer numerosity of suppliers, here and abroad, makes government enforcement a formidable task in any event.[6] The result is that overseas suppliers, like their American counterparts, operate in violation of local worker safety ordinances with impunity.

Workplace safety is traditionally the responsibility of employers. Why look to lead firms for responsibility where an employer comes up short? Before assessing the plausibility of legal arguments extending the 'employer' label to lead firms and other recent efforts to extend liability, it is worth clarifying the policy motivation for such quests. Lead firms have substantial bargaining power vis a vis suppliers.[7] They are in a position to demand alterations to the workplace. On the other hand, they are also in a position to exact contract terms that make it impossible for suppliers to comply with safety regulations while remaining profitable.

In specific cases, lead firms who were subject to intense bad publicity after a tragedy or investigation at a supplier location have taken measures to substantially improve working conditions at their suppliers. However, these measures have never been adopted on an industry-wide scale. The question of moral responsibility and efficient allocation of responsibility will be explored in greater detail in subsequent Parts but the push for production liability is mysterious without understanding the inadequacy of the present legal regime and the potential that lies in lead firms.

Labor rights activists and employment scholars have pursued four main avenues by which to hold lead firms accountable. First, they have argued that lead firms are "employers" and/or owe direct duties of care to contractors' employees. The Fair Labor Standards Act, which applies only to domestic employees, defines employment broadly in what legislative history suggests was a deliberate effort to encompass manufacturers.[8] But courts often use a definition that largely adopts common law control criteria. Lead firms' lack of direct physical control over suppliers' workers is usually enough to avoid liability under that standard. Other courts use an 'economic reality' test and ask whether work performed by the ostensible employee is part of an "integrated economic unit," and sometimes whether the intermediate contractor had opportunity to bargain with the proposed employer-manufacturer.[9] Some courts applying this standard also ask which party dominated decision-making over "essential determinants of profits in a business."[10] This approach

[6] Timonty Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMPLOYEE RIGHTS AND EMPLOYMENT J. 201, 204 (2011).
[7] Most contractors in garment industry have limited bargaining power because they lack business experience, education, language skills, and capital. See Hyashi, supra note x, at 200.

[8] *See* Bruce Goldstein et al, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L REV. 983 (1999).
[9] *Rutherford Food Corp. v. McComb*, 331 US 722 (1947).
[10] *See Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997) and *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748 (9th Cir. 1979).

standard is more hospitable to US workers who want to sue a lead firm[11], but "[c]ourts decide rather arbitrarily which factors to employ and, without articulated interpretive frameworks to guide their decisions, courts oscillate between different versions of the factors."[12] There has been no consistent shift in the direction of treating lead firms as joint employers of their suppliers' workers.

Workers overseas cannot sue under the FLSA. In one notable suit, workers overseas sued Walmart arguing instead that it had breached a duty of care to them by failing to adequately monitor its suppliers' working conditions.[13] The court said that the existence of any duty of care was a policy question declined to recognize any such duty running from lead firms to suppliers' workers. It dismissed the suit and the prospects for any subsequent claims by overseas workers against US lead firms appear dim.

There is an important grassroots movement to hold lead firms accountable, and it is the impetus for taking seriously the problem of sweatshop workers.[14] But the specific aim of holding lead firms *directly* responsible to supplier employees has made little legal progress. Even if liability were to gradually turn on apparent control, while some companies may improve performance throughout their supply chain, others will increase distance from their suppliers.[15]

A second strategy for worker advocates has been public regulations that specifically target lead firms. For example, the hot goods provision of the FLSA allows the government to seize any goods that were manufactured in violation of labor laws.[16] There have also been several local or regional efforts of this kind. Limited examples of strict liability regulation avoid the high costs that worker representatives face when attempting to establish lead firm control over particular supplier factories. However, because they are enforced sporadically and do not involve fines that reflect the low enforcement rate, these limited regulatory measures are not effective deterrents.

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[11] *See Lopez v. Silverman*, 14 F. Sup. 2d 405 (SDNY 1998) (considering range of factors to find garment workers economically dependent and to extend employer liability to manufacturer).

[12] *See* Lung, *supra* note x, at 325.

[13] *Jane Doe I v. Wal-Mart Stores, Inc*. (C.D. Cal. Dec. 11, 2006). *See also* Aaron Schindel & Jeremy Mittman, *Workers Abroad, Trouble at Home: Multinational Employers Face Growing Liability for Labor Violations of Overseas Suppliers*, 19 NYSBA INT'L L. PRACTICUM 40 (2006) (describing Walmart suit).

[14] Andrew Elmore, *State Joint Employer Liabilty Laws and Pro Se Back Wage Claims in the Garment Industry: A Federalist Approach to a National Crisis*, 49 UCLA L. REV. 395, 399 (2001) (describing various efforts to combat labor violations domestically, including ones that would impose liability on manufactuers and retailers); Scott Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Sweatshop Movement*, 30 BERKELEY J. OF EMPL. AND LABOR LAW 1 (2009) (describing several grassroots campaigns).

[15] Aaron Grieser, *Defining the Outer Limits of Global Compliance Programs: Emerging Legal & Reputational Liability in Corporate Supply Chains*, 10 OREGON REV. OF INT'L L. 285, 319 (2008).

[16] 29 USC Sec. 211 (a).

A third strategy has been to hold lead firms accountable to consumers. In *Nike, Inc. v. Kasky*[17], a consumer sued Nike on the grounds that it mislead buyers about the conditions under which its goods were produced. Nike claimed its representations were protected by the First Amendment. The case was settled before definitively resolved but the California Supreme Court did reverse the trial court's dismissal on the grounds that Nike was entitled only to the lesser protections granted commercial speech. Lawyers are sufficiently skeptical about consumers' legal arguments here that this strategy has not been pursued systematically.

Consumer movements have also sought to exert market pressure on lead firms, and these campaigns have been more successful in discrete cases. However, perhaps because labor abuses are so widespread, there has never been a consumer movement of a magnitude sufficient to trigger any substantial changes in industry ground-level practices. The problem is not really that consumers are unaware of dangerous working conditions so much as the sheer pervasiveness of those conditions raises the cost of deliberately avoiding such goods beyond the price consumers are willing to pay.[18]

The most important changes that consumer movements have won pertain to the formal commitments of lead firms. Consumer and worker advocacy groups have pushed lead firms to adopt codes of conduct for suppliers.[19] Some codes are quasi-contractual and are inspired by the "jobbers agreements" of the mid-twentieth century. Those contracts among workers, contractors and lead firms fixed labor prices in the domestic apparel supply chain.[20] The agreements were initially imposed by a "fair code" under the National Industrial Recovery Act but were sustained by collective action of the International Ladies Garment Workers Union after NIRA was struck down as unconstitutional. However, these agreements fell apart when contractors moved to nonunion states. Worker advocates today recommend the adoption of International or Global Framework Agreements (GFAs) between international union federations and multinational companies or global brands to achieve similar private regulation of the working conditions. But with a few exceptions, these have few substantive terms.[21]

Most codes are unilateral. A corporation simply undertakes to ensure that all of its suppliers abide by some standards. Although companies do expend substantial resources

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[17] 539 US 654 (2003).

[18] *Cf.* Robert Dorfman, *The Economics of Product Liability: A Reaction to McKean*, 38 UNIV. OF CHIC. L. REV. 92, 98 (1970) ("the problem of products liability arises because we live in a world in which it is costly to obtain full, or even adequate, information about the products we use"). Although it is difficult to obtain information about the conditions under which any particular good are made, the ubiquitous phenomenon of dangerous working conditions is not costly to learn.

[19] *See* Grieser, *supra* note x, at 291-2; Sarah Rackoff, *Room Enough for the Do-Gooders: Corporate Social Accountablity and the Sherman Act*, 80 SO. CAL. L. REV. 1037 (2007).

[20] Mark Anner, Jennifer Bair, Jeremy Blasi, *Toward Joint Liabilty in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontractig Networks*, 35 COMP. LABOR LAW & POL'Y J. 1 (2013).

[21] *Id*. at 25.

monitoring suppliers under these agreements, they have not effected any industry-wide change in practice either. After all, corporations gain little for each dollar they spend monitoring their suppliers; they only attenuate the risk of a public relations catastrophe in the event of a high profile, large-scale accident at a factory that makes their wares. But most of the injuries resulting at dangerous workplaces are small-scale and do not create a substantial threat to brand image.

The first and third strategies described above, creating direct liability for supplier working conditions to workers or consumers, have been almost entirely without success. The second and fourth strategies, involving narrow regulatory initiatives or corporate codes, have achieved modest results but are inevitably limited in how far they can go.

One might boil down the present legal hurdles to production liability as the absence of any direct relationship between contractor's employees and lead firms, and the difficulty in showing that any specific wrongful action by a lead firm resulted in worker injury. Suppliers sit between their employees and lead firms contractually. And any responsibility by lead firms has to rest on a theory about what they might have done rather than identification of particular actions they took which could not but result in injury, or even risk, to laborers.

These two obstacles to liability are familiar from the path to products liability. In that context, courts gradually relaxed the privity requirement between manufacturers and consumers and more abruptly abandoned the fault requirement to impose strict liability. As with production liability, the pressure on privity came first and followed market developments.[22] Consumers came to make purchasing decisions with almost exclusive attention to the reputation of the brand manufacturer, with little regard for the intermediate retailer. In the case of production liability, consumers' attention to brand manufacturers has left the original producer in the shadows. Where the retailer stood between consumer and manufacturer, supplier now stands between worker and manufacturer.

The proposed name for such liability is obviously intended to invoke the inverse of product liability. Just as product liability refers to the liability of a manufacturer to a consumer who may purchase from a third party intermediary (distributor/retailer), production liability makes brands liable to employees notwithstanding a third party intermediary (suppliers/employers).

II. Moral Responsibility

An argument for responsibility starts with the premise that there is a loss for which responsibility must be assigned. Where there is an actual accident, the loss is easy to identify. Dangerous working conditions are trickier to conceptualize in terms of loss, since they arguably represent only a risk of loss. Although the question of the appropriate standard for liability is

[22] The decline of privity in the product liability context followed an earlier market rupture whereby "the consumer's loyalty and reliance [moved] from his retailer and attached…to the producer. [T]he decline of the doctrine of privity is the legal recognition of this transformation." Dorfman, *supra* note x, at 100.

separately considered in Part V, I argue in this section that lead firms are morally responsible for unsafe working conditions at their suppliers even where suppliers are already legally responsible for those conditions under existing law.

Those who do not believe that moral responsibility is a necessary even if insufficient condition for legal liability will be unconcerned with the proposition I aim to defend in this Part. For the goal here is to show only that production liability is morally defensible. The aim is not to show either that legal liability of lead firms is morally compulsory or that lead firms are morally blameworthy. The concept of responsibility invoked here tracks the notion of "outcome responsibility" developed in tort theory over the last several decades. Scholars such as Thomas Nagel, Stephen Perry and John Gardner have persuasively argued that responsibility to other private individuals is not properly predicated on culpability but on a lesser form of responsibility. This responsibility extends beyond the intended effects of our actions to the foreseeable consequences of our actions or inaction – matters under our control. Importantly, this account of responsibility was not engineered to account for lead firm responsibility in production. It is a fundamental account of responsibility more generally, which means that to the extent it applies to lead firms, holding them responsible would be consistent with how we deploy the moral and legal concepts of responsibility more broadly.

We do not usually regard foreseeability and control as sufficient to generate blameworthiness. That is because individuals may not intend and may actually disavow certain effects of their actions. Negligent actions, for example, do not always rise to the level of culpability where the negligent person never contemplates -- even affirmatively tolerates -- the prospect of injury to a third person. Nevertheless, a negligent person is responsible for the injuries that flow out of her negligence. To hold otherwise would deny the scope of her agency; it would make her action and its consequences normatively indistinguishable from an event in the world without agency at its root. For example, it would equate hitting someone with the car you are driving too fast to hitting someone after your car has been hit by the car behind you. Failing to distinguish an event in which a person is merely involved from the actions she undertakes would undermine her very status as an agent capable of effecting change in the world.

The price of one's status as an agent capable of effecting such change is ownership of those effects. Because it is central to our identity that we are agents who can act upon the world, it is important that we credit each other with responsibility for the way we move things around us, even where those interactions with the world outside ourselves go wrong. If we do not accept responsibility for what we do, we constrict our agency. Instead of defining the boundary between ourselves and the rest of the world, agency would turn on some inaccessible and uncertain internal boundary between fully formed intentions and the broader haze through which much action takes place. A shared concept of outcome responsibility makes the all-important line the one between persons and objects outside ourselves. Our shared reliance on the concept helps construct us as agents.

However central outcome responsibility may be to individuals, the concept does not obviously extend to corporations. Certainly, we are not invested in constructing corporations as moral agents for the same reasons. But as with natural persons, whether we treat corporations is a matter of social construction and not a metaphysical inquiry.[23] It will turn on what we mean when we say that a corporation is *responsible* for a loss or state of affairs? The broader question of corporate moral responsibility is beyond the scope of this paper. But one reason we have for extending the basic framework does not depend on assigning corporations 'real' moral responsibility but on the value of applying a consistent framework of legal concepts to all legal persons. So long as corporations are treated as persons and subject to the same principles of private law, including its protections, the burden is on those who wish to apply a different standard of responsibility to corporations in a particular context. Note that to the extent one believes that corporations can be assigned legal responsibilities even absent the conditions of moral responsibility, the argument of this Part is not a problem, it is merely unnecessary.

Where foreseeability and control are present, a retailer may be morally responsible for the accidents, working conditions or employment terms on which its goods are produced. Neither foreseeability nor control is inevitable for brands, as they usually are for direct employers. But legal responsibility can reflect contingent facts about the global supply chain, the flow of information to retailers from sites of production, and permitted communication between brands. Together those facts make it both predictable to brands that certain payment structures and timelines worsen employment conditions at the level of production, and allow brands control over those terms. Notably, even supply terms that are economically consistent with acceptable conditions may give rise to responsibility for poor conditions in the absence of terms and monitoring systems that effectively ban such poor conditions, where the brand is aware that formally benign terms are associated with poor conditions.

Just as persons are not properly held responsible in law for the full range of affairs for which they are more generally responsible, policy considerations may justify withholding liability for corporations even where they are properly regarded as responsible. Indeed, political discourse follows this track. Corporations are regularly criticized for failing to promote a worthy social end, e.g. by failing to extend health insurance to same sex couples before same sex marriage was legally recognized, even where there is no suggestion that their policies could result in legal liability.

There may be a deeper account of responsibility in the context of production liability that buttresses the case for giving responsibility a legal form.[24] Although the account of bare

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[23] Rebecca DeWinter, *The Anti-Sweatshop movement: Constructing Corporate Moral Agency in the Global Apparel Industry*, 15 ETHICS & INT'L AFFAIRS 99 (2001) (describing the social construction of corporate moral agency).

[24] For other theories of corporate responsibility in this context, see Guy Davidov, *Indirect Employment: Should Lead Companies Be Liable?*, 37 COMP. LAB. L. & POL'Y J. 5, 16 (2015) (democratic deficits and dependency justify the application of labor law). Davidov canvasses a range of possible grounds for imposing responsibility, including the ideas that lead company cause contractor infringement, have the power to prevent infringement, can spread loss

responsibility above does not rely on a theory of deliberate wrongdoing or unjust enrichment, those elements may point to starker responsibility for lead firms – approaching actual culpability. Lead firms are alleged not only to be aware of dangers that they can prevent; they choose to pursue the contractor model precisely in order to avail themselves of the economic advantages to be gained from dangerous working conditions.[25] Knowing that they cannot themselves successfully evade enforcement of labor standards, lead firms may choose to externalize production at sites that are less susceptible to regulatory oversight. Lead firms thus obtain a regulatory discount without formally running afoul of any regulatory obligations. Layered on the minimal conditions of responsibility based on foresight and control, this narrative of deliberate regulatory avoidance suggests lead firms are potentially not only responsible but blameworthy.

It is not enough to justify production liability to show that corporations are morally responsible for poor working conditions at their suppliers, or even that they are culpable (if indeed, corporations are capable of culpability, as our criminal system presently allows). Given the material consequences of production liability, any affirmative argument for recognizing it has to consider its expected economic impact.

In the next Part, I argue not just that the moral predicate of legal responsibility is fulfilled, but that such liability is commendable on instrumental grounds. Once we overcome intuitions about boundaries of responsibility, as we did in the context of manufacturer responsibility for consumer injuries, we can adapt legal liability to effectively respond to contemporary production and distribution systems in much the way that products liability did.

III. Optimal Cost Assignment

The question of whether production liability is efficient is still more difficult than the same question posed about products liability. In the case of product defects that injure consumers, it is clear that consumers are within the set of subjects whose welfare the state aims to improve.[26] Moreover, consumer interests are to a substantial extent internalized by firms who wish to keep and win customers.[27] By contrast, at least some of the workers at suppliers to lead firms are located

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among many consumers, benefit from infringement, and have assumed responsibility through either representations or by virtue of citizenship to those working within its community. Id. at 18.

[25] *See* Leo Lam, *Designer Duty: Extending Liablity to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 UNIV. OF PENN. L. REV. 623, 631 (1992) ("avoiding responsibility for the conditions under which the garment worker labors is perhaps the foremost reason for the development of the contracting system"). *See also* Glynn, *supra* note x, at 209.

[26] In fact, the dominant norm in the contracts literature is consumer sovereignty, or that consumer preferences on risk allocation should prevail. Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L. J. 353, 355 (1988). There is no parallel norm of worker sovereignty in the context of production.

[27] *Cf.* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L REV. 1437, 1490 (2010) (there is a "crucial difference between situations in which strangers are harmed and those in which customers

overseas. Arguably, their welfare losses do not have the same standing in social welfare calculations that underlie US policy. That problem makes the questions around 'fair' compensation especially difficult. However, one of the motivations behind restricting the question considered here to workplace safety is that I will simply assume that there is some threshold level of workplace safety below which it is impermissible to allow work to take place – irrespective of the local labor market, other contract terms, knowing consent by workers, the developmental stage of the economy, and local law. This is a level of danger that no one would be prepared to accept under fair background conditions, or at least one at which no American national is permitted to conduct business, even outside the Unites States. Obviously, determining exactly what workplace standards should be in this context is difficult and mired in the details of specific industries. Even if international law supplies the norm that certain working conditions are intolerable, it does not supply the minimum standard that the *United States* should deploy in regulating the conditions under which goods sold here must be produced. We would have to look to politics to supply that minimum standard.

The challenge here is different. It is to identify the form of the liability regime that would best raise workplace safety to such a minimum bar, whatever it might be. Where dangerous working conditions are below the fixed threshold, not only the injuries that materialize but also the (moral and psychological) situation of working in such a hazardous environment can be regarded as an externality of the garment enterprise. The policy aim should be to absolutely deter such dangerous working conditions, though realistically some factories are likely to operate below the fixed bar at any given time. We might simultaneously and separately undertake to reduce the rate of workplace injury more generally -- in the way we would aim to reduce the rate of consumer injury -- but the problem of pricing those injuries across disparate markets is comparable to the problems associated with determining 'fair' wages.

There are several actors in a position to prevent dangerous working conditions at any given factory: the workers, the supplier-contractor, and lead firms with substantial bargaining power vis a vis supplier-contractors. In principle, the state could impose costs, including but limited to fines, on any of these actors when they are implicated in unsafe working conditions.

Outside of forced labor situations, workers have some control over the phenomenon of dangerous work. They could in principle decline to accept egregious working conditions. After all, what counts as egregious is usually set in large part by reference to what we think a worker would not accept. Unfortunately, the standard is not set by reference to what workers will actually accept but what we speculate that they would knowingly and freely accept under fair background conditions, and those qualifications are necessary precisely because the circumstances under which many workers choose to accept employment at dangerous workplaces do not meet those stipulations. In some cases, workers are unaware of the dangerous nature of their workplace

are harmed…if its customers are injured, it would expect to suffer…losses…[M]arket forces will not induce firms to increase safety if those at risk are strangers.").

because safety deficiencies are not apparent; for example, they may be unaware of structural or electrical problems in the building or the risks created by poorly maintained and outdated manufacturing equipment. In other cases, workers may become aware of the dangerous nature of their working conditions only upon commencing employment, after they have already fallen into a cycle of dependence on (or debt to) a particular employer that makes exit especially costly. Finally, many workers have such a poor choice set to begin with that working under dangerous conditions is not their worst option. In these cases, restricting their employment options will leave them worse off in the near term (from at least one conception of welfare), since they are prepared to accept terms that are no longer available to them.

Because this last set of cases probably describes many workers, we cannot properly characterize regulation of dangerous working conditions as the enforcement of free-standing individual entitlements. Rather, any individual entitlement to workplace safety is best regarded as derivative from a social interest in imposing general standards. The social interest might ultimately operate to the benefit of most workers but its pursuit will almost certainly come at the expense of some subgroup of workers. Whether by virtue of collective action problems or actual self-interest, then, we cannot expect workers to simply refrain from accepting working conditions that a national political community to which they may or may not belong might find unacceptable. In order to enforce a rule against dangerous working conditions by attempting to alter worker behavior, we would have to either directly fine workers or otherwise penalize them, e.g., by refusing to enforce compensation they are due or by rendering them ineligible for future work. Since workplace regulations are at least nominally intended to improve the situation of workers, it would be ironic in the least to penalize workers in any direct way. Moreover, most available (and in any event wholly unattractive) means require cooperation by the direct employer, the supplier. For the reasons to which I now turn, we cannot expect their cooperation.

The next and most obvious set of actors that could be targeted by a legal regime are the supplier-contractors themselves. Recall that many suppliers are overseas so, barring a violation of the laws of nations, they are outside the reach of US law, whether a private right of action or an agency directive.[28] Contractors in the United States are usually judgment proof and bankruptcy protects them from any prolonged debt burden. When they do pay out any fines, the additional cost pressures result in further reduction of employee compensation.[29] But contractors do not usually pay. They are highly mobile with limited capital and therefore easily evade enforcement authorities. The result is that neither domestic nor overseas suppliers are a viable point of enforcement because fines and private compensation cannot be collected. This is an unsurprising

[28] *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (limiting ATCA private rights of action to claims universally recognized as arising out of law of nations); Melissa Torres, *Labor Rights and the ATCA: Can the ILO's Fundamental Rigths be Supported through ATCA Litigation?*, 37 COL. J. LAW & SOC. PROB. 448 (2004) (noting that ATCA does not enable enforcement of all fundamental labor rights because those are not considered a part of customary international law).

[29] *See* Hyashi, *supra* note x, at 204-05.

conclusion; the fact that the present system of labor enforcement depends entirely on managing the behavior of suppliers is *the* reason that the present regime is wholly unsatisfactory to most observers.

Lead firms are an alternative, and indeed, they can efficiently prevent dangerous working conditions at suppliers. First, lead firms are in the best position to actually take steps that would improve workplace safety because they have an overview of industry practice and available technology. They bear relatively low information costs in coming up with specific steps that each supplier must take. Some of the relevant information will be local to specific factory sites. But because lead firms have the most resources of any actor in the supply chain, they may be in a better position to acquire even local information than the supplier. This advantage to assigning responsibility to lead firms somewhat mimics the argument in the context of products liability that manufacturers are in the best position to prevent injury because they are the ones in a position to identify measures that can be taken to improve design or reduce the error rate in manufacturing.[30]

Additional arguments for the assignment of costs to lead firms apply in the context of production liability. Many observers suggest that lead firms presently limit the possibility of decent working conditions by virtue of the low prices they pay suppliers.[31] Lead firms set the prices that they pay suppliers by calculating how long it will take to produce garments under ideal conditions; but those conditions do not approximate the conditions under which the goods are actually produced by their undercapitalized suppliers, who tend to employ low-skilled workers and use inferior machinery.[32] The result is that the prices that lead firms pay are barely enough to cover supplier costs, even where supplier costs are artificially depressed by noncompliance with labor codes. Were suppliers to provide safe workplaces, their contracts with lead firms would be losing contracts. Lead firms are thus at least in a position to make it possible to improve workplace safety by paying higher prices. Firms that do not wish to undertake reform of their suppliers can search out suppliers that already comply with minimum workplace safety standards.

Lead firms could also trade off a price increase for goods in exchange for increased control over suppliers' workplace, as well as increased monitoring rights. They could do so in a way that left unaltered the suppliers' expected gains from trade, entirely at their own expense. Of course, they are unlikely to simply absorb these costs, either the costs of actually improving workplace conditions or the regulatory fines imposed upon failure. In part, we can expect them to attempt to

[30] *See* Richard Wright, *The Principles of Product Liability*, 26 REV. OF LITIG. 1067, 1115 (2007) ("Manufacturers generally have much better information than plaintiffs about the 'state of the art' with respect to possible technology and product risks.").

[31] Lead firms set retail prices and supplier prices, and they keep approximately half of retail price. Elmore, *supra* note x, at 400. Garment employee compensation amounts to only 6 percent of retail prices. Id. at 401.

[32] Hyashi, *supra* note x, at 203 (manufacturers calculate contract prices on the basis of the time it takes a sample-maker to produce the garment under "accepted industry conditions" that depart significantly from the conditions under which garments are in fact produced).

recoup costs through indemnification clauses with suppliers[33] and possibly through the purchase of insurance. But we can also expect lead firm to pass on their increased costs to consumers.

The fact that lead firm are in a position to pass increase costs associated with improved working conditions on to consumers is actually one of the strongest arguments in favor of assigning costs to them.[34] As in the context of product liability[35], the aim of the regulatory regime should be to shift costs from unwitting workers/consumers to the parties best positioned to distribute costs widely. Perhaps even more clearly than in the context of products liability, lead firms are, by virtue of their market position, in the best position to reflect the price of workplace safety in the price of goods such that all users of the goods bear their true costs. [36]

Finally, lead firms are the cheapest point of legal enforcement. Reputational interests would reinforce the deterrent effect of any legal rule. Because lead firms are the fewest in number, have long corporate lives and substantial assets, the ordinary mechanisms for enforcing legal judgments will be effective. Perhaps equally important, lead firms interact with the legal system at many points and cannot afford to operate in its shadows. They can be expected to undertake compliance with any legal rule to which they are subject.

If the previous Part established that production liability is morally defensible, this Part was intended to establish that it is economically commendable. But, of course, whether production liability would have perverse effects on the incentives of retailers, suppliers, export countries or even foreign employees will depend on the particular legal form it takes, which leads to the questions of the next Parts, namely, the mechanism of enforcement and the standard of liability.

IV. Agency Enforcement

This Part considers several legal mechanisms by which production liability might be implemented. We could recognize a right of action in various stakeholders, either under existing common law doctrines or by way of a new statute. We could further promote transnational private regulation, or agreements among retailers to abide by voluntary standards (which would be

[33] Glynn, *supra* note x, at 205 (arguing for enterprise liability with respect to unpaid wages, and suggesting that companies will bargain for indemnification).

[34] I assume that higher labor costs will be passed on and that this will in fact achieve a distributive effect – because the aim is not distribution from buyers to sellers but from sellers (of labor) to buyers of products at various points along the supply chain, including but not limited to consumers. *Cf.* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

[35] Product liability history was driven in early part by ideas of internalization and risk distribution. George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEG. STUD. 461, 483 (1985).

[36] Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499, 505 (1961) ("resource-allocation theory requires that among the several parties engaged in an enterprise the lsos should be placed on the party which is most likely to cause the burden to be reflected in the price of whatever the enterprise sells.").

mandatory for their suppliers). Or we could impose new statutory duties for corporations. Although politically difficult to attain, I argue that on-point legislation paired with even a limited administrative remedy is the best and perhaps the necessary route to production liability. Although we can expect public underenforcement of any statutory provision, such a course could give rise to two additional indirect enforcement mechanisms. First, shareholders of corporations that knowingly violate statutory obligations can bring derivative suits. Second, suppliers can seek to avoid terms in supply agreements where those agreements effectuate a violation of the statute.

Before considering the advantages of an affirmative statutory, I address the deficiencies in each of the alternative methods of enacting production liability.

A. Private rights of action by employees

The most obvious way to recognize production liability, and the form most parallel to product liability, would be retailer liability to individual employees whose working conditions fail to meet a given standard. Although there is much to be said for direct liability to workers, there are good reasons not to go this route.

First, private recourse directly against lead firms will distort labor markets. Employees will prefer to work for factories producing goods for recognizable brands. Although lesser known lead firms will face the same costs, they will likely face higher costs as the labor costs of branded firms fall in response to higher worker demands for those workplaces, which will be perceived to provide more credible assurances.

Second, relying on private claims will distort the kinds of safety measures that lead firms invest in. Individuals are most likely to sue for immediate, substantial injury. But many of the most important workplace safety regulations are intended to promote worker safety in ways that do not decrease actionable claims. For example, general improvements in the hygiene or ventilation of a workplace may not prevent specific accidents but produce marginally superior health outcomes for all workers. Using safer chemicals may decrease cancer rates. But workers unlikely to successfully sue for general lack of hygiene, poor ventilation or the use of carcinogens because it is difficult to prove causation of specific injuries, and because many illnesses are too minor to justify litigation. The result is that companies will invest primarily against injuries that are likely to result in private suits but suboptimally protect against minor but pervasive health risks.

Finally, given existing legal frameworks, any direct right of action is likely to be far more accessible for domestic workers than overseas workers. The effect will be to exacerbate the price differential between domestic and overseas labor to the long term detriment of the domestic garment industry. The overall welfare of garment workers will not be improved. Of course, the weight to be assigned this consideration depends on the precise normative theory that underpins our commitment to safe workplaces.

B. Private rights of action by consumers

Brands might be made indirectly liable for supplier working conditions where consumers are entitled to sue for fraud or misrepresentation (as discussed *supra* Part I, to some extent, this may already be the case). This requires an initial representation by lead firms that their goods are produced under acceptable conditions. Many companies already feel pressure to issue such statements. If courts recognized those representations as material and consumers are presumed to rely on them, companies could face substantial liability to consumers as a class. A statutory regime might bolster common law claims either by requiring certification (forcing the representation) or creating a presumption of materiality and reliance.

There is something very peculiar, though, about improving overseas working conditions by creating a private right of action in domestic consumers. Although I conclude that direct responsibility to suppliers' workers is ill-conceived, such liability at least correctly identifies as potential plaintiffs that group whose welfare is at issue. Consumer practices suggests that most consumers do not in fact regard the conditions under which goods are produced as highly material to their individual consumption choices. There is no good way for courts to distinguish between those consumers who do care and those who do not.

Moreover, since even concerned consumers do not suffer material harm, they will normally be entitled only to rescission. Any further damages would be a windfall for the just that privileged group whose interest in low prices competes with workers' interest in decent working conditions.

C. Private regulation

Perhaps the easiest way to recognize production liability is by way of voluntary agreements among brands. Firms within an industry often agree to abide by set standards and assume responsibility for contracting with suppliers on terms that ensure compliance. Some company alliances work with non-governmental or international organizations to help enforce voluntary agreements. Others adopt no enforcement plan.

Were these agreements to be fostered and then enforced, it would be the most politically feasible means to establish liability. Because all signatories would have an interest in enforcement against other signatories, and because effect of improving supplier working condition on market share is minimal with coordinated action, lead firms actually have an interest in cooperating in the adoption of industry standards.

But voluntary agreement among lead firms is the wrong mechanism by which to set their obligations to third parties. Contract as an institution is designed to maximize the joint interests of parties to agreement. There is no obligation or incentive to give any weight to third parties. Firms may agree to abide by voluntary standards because they perceive the threat of regulation or otherwise see market constraints from the consumer side. But as the threat of regulation proves ineffective over time, and given mass consumer indifference, there is little reason to expect that

firms will give the interests of an economic weak group due weight.[37] The private regulations that firms come up with may be better than nothing, and can be encouraged as an intermediate step toward regulation. But serious self-enforcement is a costly proposition that companies will not embrace any more than necessary.[38] It does not represent a stable solution to an international regulatory problem in the absence of some new, distinct incentive for firms to take into account the interests of those outside their industry group.

D. Administrative enforcement

1. Substantive outcome requirement

A simple public regulatory requirement that imposes on companies an affirmative duty to use suppliers' with safe working conditions best embodies production liability. Responsibility for the conditions of production at a supplier is of a public nature: supply terms that motivate or perpetuate poor working conditions are a problem from a systemic point of view. They do not represent a wrong to any single class but they are part of a market dynamic that needs to be disrupted as a matter of public justice. Just as corporations are required to engage in or forebear from a variety of activities that are deemed against the public interest, they should be required to contract for goods on terms that are compatible with a just market for consumer goods.

Assuming only civil liability is at stake, some administrative branch or agency would have to be assigned the right to hold corporations accountable by way of fines for violation of the substantive conduct requirement. The fines should not be conceived as compensatory. Their level should take into account the rate of enforcement. Based on our experience with other labor-related enforcement, we can expect that limited resources will be allocated to enforcement of any new provision. Nevertheless, a substantive requirement would be useful both for the direct deterrence achieved by a substantial fine and because a statutory duty would allow supplementary means of

[37] *See* Debra Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 LEWIS & CLARK L. REV. 397, 403 (2010) (codes of conduct are intended to ward off more restrictive regulation). Enforcement of codes is limited. *Id.* at 409.

[38] For example, GAP spent $10,000 annually on inspections at a single plant in El Salvador and estimated it would cost 4.5% of its annual total profits of $877million in 2000 to replicate this model throughout its supply chain. Grieser, *supra* note x, at 312.

enforcement that do not require government action.[39] A complete solution will involve joint use of public regulation and private litigation.[40]

1. Derivative actions by shareholders

Shareholders can bring derivative suits on behalf of corporations against directors for failure to exercise oversight where they knew, or should have known, of violations of law.[41] Such derivative suits usually fail because they require that plaintiffs plead demand futility with some precision; that is, they require that plaintiffs show the board is conflicted out of the decision whether to sue. Plaintiffs generally try to show that directors were on notice of violations of law and chose not to take action.

Although plaintiffs rarely show demand futility, even in cases that likely would not have survived dismissal, corporations often pay out substantial settlements on their directors' behalf. As long as settlement value bears some relation to the probability of the suit succeeding on its merits, it helps offset lackluster public enforcement. In the case of production liability, we can expect demand futility claims to fare somewhat better than in typical derivative suits because NGOs may systematically bring attention to poor working conditions, and there may be a higher public relations cost to being publicly associated with poor working conditions than more abstract financial regulatory requirements. While most corporate misconduct may be secret (outside of the corporations' own employees), the working conditions at firms' suppliers is not. Because it will be easier to make directors aware, and to subsequently document their awareness, plaintiffs may have more success with derivative suits related to production liability than in other types of derivative suits.

The major drawback of this mechanism of enforcement is that it is largely under the control of a single state, Delaware. And there is little reason to expect that Delaware courts will be eager to play a role in enforcing production liability. Nevertheless, on the margin, the prospect of derivative suits will increase the cost of noncompliance with a regulatory rule.

2. Unenforceability of supply agreements/terms.

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[39] The proposal here is an inverse of what John Goldberg and Benjamin Zipursky describe in *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARVARD L. REV. 1919 (2010). They observe in the context of products liability that markets and regulatory forces would not work in the same way without a tort liability system 'feeding' them. Here, I propose a regulatory system that can feed an ancillary system of private enforcement.

[40]*See* Steven Shavell, *Liability for Harm versus Regulation for Safety*, 13 J. OF LEG. STUD. 357, 365 (1984).

[41] *See Walt Disney Co. Deriv.* Litig., 906 A.2d 27 (Del.2006) ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating conscious disregard for his duties."). See also Thomas A. Uebler, *Shareholder Police Power: Shareholders' Ability to Hold Directors Accountable for Intentional Violations of Law*, 33 DEL. J. CORP. L. 199 (2008).

A statutory obligation to contract with suppliers on terms that assure tolerable working conditions for suppliers' employees could also justify nonenforcement of noncompliant supply agreements, or at least those terms associated with poor working conditions (such as time schedules) on the grounds that such agreements are against public policy. Although it would be ironic for suppliers to benefit from a failure by brands to effectively reign in supplier practices, the doctrine that allows nonenforcement of agreements against public policy allows such inequity in the interest of vindicating the implicated legal rule. While we cannot expect suppliers to systematically invoke the right to void supply agreements on these grounds, the availability of this measure should help discipline lead firms on the margin.

E. Liability Standard

No duty-imposing statute can establish a detailed minimum standard of workplace safety. One possibility would be to incorporate the rules and regulations on workplace safety that are already in place. That might make sense for working conditions at domestic suppliers.

Arguably, however, the duty on lead firms can be less rigorous than that which applies directly to employers. That is, we might require employers to maintain safety standards at a higher level than we require lead firms to maintain at those same suppliers. One important advantage is that it might be feasible, then, for the statutory duty to apply a single standard across domestic and overseas suppliers. The requirements could not be literally the same but a single legislative standard would invite agency articulation of domestic and overseas standards that are roughly comparable.

A duty to contract with suppliers whose factories meet articulated standards is more strict liability than fault-based. Showing a violation of the duty would not require showing any negligence on the part of the lead firm whose liability is at issue, though it does imply negligence by the supplier.[42] Nor would liability turn on the occurrence of injury. Again, one of the advantages of agency enforcement is that it can avoid the distortion of standing and other evidentiary requirements of private adjudication, which could cause firms to attend disproportionately to easily detectable, substantial injuries.

Like enforcement activity, we can expect the standards that agencies adopt to be suboptimal.[43] But a strict liability standard – effectively, a duty to succeed in one's choice of appropriate suppliers – will reduce the costs of adjudicating individual cases, including the high

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[42] *Cf*. Cynthia Estlund, *Corporate Self-Regulation and the Future of Workplace Governance*, 84 CHICAGO-KENT L. REV. 617, 625 (2009) (suggesting that firm liability for wrongdoing be reduced where firms has maintained an adequate system of self-policing and reporting).

[43] *See* Michael Levine, *Regulatory Capture*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 267 (Peter Newman ed., 1998); Richard Posner, *Theories of Economic Regulation*, 5 BELL. J. ECON. & MGMT. SCO. 335 (1974).

error rate that follows from opaque and highly manipulable judgements about whether a given firm's efforts were reasonable.

V. Conclusion

The lesson of products liability is that privity and fault have to be relaxed as we update our systems of liability to meet the needs of new market structures. In the context of employment, as was earlier the case in consumer law, radical deference to contract should give way to a more liberal, tort-like (if not tort-based) system.

Of course, not everyone agrees that products liability was a success.[44] And we cannot be certain about how industry will respond to production liability. For example, production liability could result in disaggregation at the top of the supply chain due to the advantages conferred on smaller, less salient lead firms.[45] This seems unlikely, given how central brand recognition is to the garment and many industries, but it is not theoretically impossible. It is, though, practically impossible to persist with the present lawless regime. Production liability is the only viable way for the state to govern certain workplaces. We need to identify the model of production liability most likely to effectuate the moral standards to which we are already committed.

[44] *See, e.g.*, Polinsky & Shavell, *supra* note x; Richard Epstein, *Products Liability as an Insurance Market*, 14 J. LEG. STUD. 645 (1985) (viability of insurance depends on risk diversification, adverse selection and moral hazard and direct contract helps insurers manage those industry risks).

[45] *Cf.* Stephen Williams, *Second Best: The Soft Underbelly of Deterrenece Theory in Tort*, 106 HARV. L. REV. 932 (1993).