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Production Liability

Aditi Bagchi
Fordham University School of Law

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PRODUCTION LIABILITY

*Aditi Bagchi**

It is well known that many consumer goods are produced under dangerous working conditions. Employers that directly supervise the production of these goods evade enforcement. Activists and scholars have argued that we must hold the manufacturers and retailers that purchase goods made in sweatshops accountable. However, there has been little movement toward such accountability.

Responsibility for the conditions under which goods are made—what I call "production liability"—entails assigning responsibility for workers to firms that do not directly employ them. Production liability, therefore, conflicts with deep intuitions about the boundaries of individual responsibility.

This Article offers a moral and economic defense of production liability that is responsive to that challenge. The Article identifies the particular moral responsibility that manufacturers bear as a public form of complicity. It further considers the economic logic of assigning legal liability to such firms and the optimal form that liability should take. This Article makes the case that production liability can update our legal regime for employment in the way that products liability did for consumer law.

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* Professor of Law, Fordham University School of Law. J.D., Yale Law School; M.Sc., Oxford University; A.B., Harvard College. I am grateful for the feedback received at presentations at the University of Michigan Law School, Fordham University School of Law, and Bar-Ilan University. I am particularly grateful for comments from James J. Brudney, Howard M. Erichson, Abner Greene, Jennifer Gordon, Rebecca Kysar, Thomas H. Lee, Ethan J. Leib, Kyle Logue, Russell Pearce, Veronica A. Santarosa, and Benjamin C. Zipursky. Many thanks to Bina Nayee for research assistance.

INTRODUCTION

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 steps to improve working conditions at their suppliers' factories, but these efforts have been mostly ineffectual.[1]

Factory working conditions in industries like the garment industry are a well-known and long-standing problem. Our limited progress can be explained in two obvious ways. First, improving working conditions for workers comes at someone's expense. Whether those potential payors are corporations or consumers, they have more political clout than the workers whose health and safety are at issue. Second, the enforcement of laws intended to improve working conditions is costly. The result is that workers' interests in health and safety compete not just with the interests of those with a stake in cheap production but with the many other worthy beneficiaries of government spending. Enforcing employment law rivals a myriad of other public spending priorities.

These constraints on any solution to the seemingly intractable problem of poor working conditions are daunting, but they may explain less than they appear to do. Many legal enforcement regimes advance the interests of one group at the expense of other, more politically powerful groups. And it is true of every government spending priority that it comes at the expense of other budget items. More must be said to explain our lack of progress on the specific problem of dangerous production.

One important obstacle is conceptual. We have thus far regulated employment conditions by regulating *employers*. But the employers of workers who manufacture many consumer goods, especially clothing, are almost outside the reach of the law.[2] The actors in the supply chain who are

1. *See generally* RICHARD M. LOCKE, THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY (2013) (describing the difficulties that Nike faces in attempting to improve supplier working conditions).
2. *See infra* Part I.

in the best position to improve working conditions *and* who are within the reach of the law are firms that purchase goods from suppliers,[3] with only suppliers directly employing the workers whose safety is at issue. We have failed to regulate lead firms not only due to a lack of political will, as many worker advocates have assumed, but also because there is genuine uncertainty about whether we are justified in assigning legal responsibility for working conditions to persons with no direct relationship with the workers. Absent a cogent theory of lead firm responsibility—or what I will call "production liability"—pinning legal liability on lead firms seems arbitrary, opportunistic, and perhaps inconsistent with basic principles of fairness and efficiency in our larger legal system.

This Article aims to provide the moral and economic logic that links lead firms with their suppliers' employees. The discussion centers 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 does not directly address the related challenges of unpaid wages and low wages, but it should generate some insight into those problems, too.

This Article encompasses 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.[4] One of the advantages of the legal course that this Article ultimately endorses is that it will not substantially skew lead firms' choice of suppliers.

Early on, this Article concludes, as other commentators have, that supplier-contractors are themselves largely ungovernable.[5] 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 frustrate the possibility of 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 in their suppliers' factories. Notwithstanding the widespread view among scholars that working conditions cannot be effectively regulated without regulating lead firms, there has been no attempt to systematically study the philosophical and economic bases for assigning liability to lead firms and, accordingly, no

3. This Article refers to the companies that buy goods from suppliers as "lead firms," which include both recognizable brands that retail their wares directly and manufacturers that distribute their goods through retail intermediaries.

4. Production has shifted overseas but at times it has also shifted back, suggesting that fluctuating transaction costs can overwhelm any fundamental difference in factory prices. *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) (explaining that the trend toward foreign production in the garment industry was reversed in the early 1990s due to "uncertain political conditions abroad, increased labor costs, poor workmanship, and problems associated with moving goods quickly").

5. *See infra* Part I.

satisfactory answer to the question of what form production liability should take. This Article takes on these open questions.

The concept of production liability is intended to invoke the apparently quite distinct doctrine of products liability.[6] Products liability concerns manufacturer liability to consumers for defects in products, even where those products are purchased from third parties.[7] The legal concept of privity initially barred manufacturer liability for product defects because manufacturers do not stand in any direct relationship with consumers; their relationship is mediated by distributors and retailers.[8] It took a revolution in tort law to establish that manufacturers owe a duty of care directly to consumers irrespective of the transactional chain that brings products into consumer hands.[9]

The shadow of privity—at least, the underlying legal impulse to require a direct "relationship" between wrongdoers and victims—has also substantially impaired the case for manufacturer liability for the working conditions under which goods are produced. Garment manufacturers do not usually stand in any direct contractual relationship with the workers who produce their goods. Most important, they do not employ those workers directly. Their relationship is mediated by suppliers who employ workers to produce goods and then sell those goods to manufacturers. Just as the legal system of accountability for defective products had to update to account for modern systems of mass production and distribution, so too must our system of accountability for working conditions. I do not expect that the rules and regulations by which we establish production liability will track products liability, nor will their histories run in parallel. Furthermore, I do not advocate judicial leadership or revision of fundamental common-law doctrines. Nevertheless, products liability and production liability each represent a new category of legal responsibility that is responsive to modern economic institutions and which historic common law and more modest regulatory tweaks have failed to recognize. Products liability ushered in a fundamental change in the principles of tort law; outdated intuitions about the boundaries of responsibility still rooted in an abandoned tort-law regime may be the greatest hurdle to establishing production liability today.

The discussion in this Article proceeds in several Parts. Part I provides some background on the problem of supplier working conditions. It also offers an account of the inadequacy of the present legal regime, which is intended to parallel earlier frustrations with the requirements of privity and

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6. *See infra* Parts I, IV.A.

7. *See Products Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 44, 44 (1955); *see also, e.g.*, Abercrombie v. Union Portland Cement Co., 205 P. 1118, 1119 (Idaho 1922) (denying recovery to plaintiff who had no "contractual relation" with the manufacturer it sued).

9. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. LAW INST. 1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect."); *id.* § 1 cmt. c ("The rule stated in this Section applies . . . to manufacturers and other commercial sellers and distributors . . . ."); *see also* DAN B. DOBBS, THE LAW OF TORTS § 352 (2000); DAVID G. OWEN, PRODUCTS LIABILITY LAW §§ 1.1–.2 (2005).

fault in the context of products liability. Those frustrations gave way to the products liability regime that exists today. I will explore the fruits and limits of the analogy between products liability and production liability throughout the remainder of the Article.

Part II argues 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 the suppliers. Although their "outcome responsibility" is not exclusive, it is a sufficient basis for the assignment of legal liability, which after all would not be exclusive under any proposed regime either.

It is not ultimately compelling to claim that the contracts that lead firms enter with suppliers are themselves direct wrongs against the suppliers' workers. However, because those contracts make worker abuse likely, lead firms are complicit in the moral wrong of hazardous working conditions that suppliers perpetrate directly. The wrongdoing of lead firms is better conceived as a public wrong that undermines just institutions rather than as a private wrong against their supplier's employees. This last point informs the legal form that production liability should take.

Part III argues that liability for lead firms is not only morally defensible, but it is also 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 and to distribute the costs of ameliorating those risks, and they are the cheapest point of legal enforcement.

Part IV considers the choice between private and public enforcement. That is, whether it is better to create private rights of action against lead firms, or whether it is preferable to place 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, this Article recommends 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 action by the employees of subcontractors. Part IV also considers the appropriate standard of liability. The conceptual standard this Article proposes 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.

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 would stand to lose from the implementation of production liability, and this Article does not take full account of those headwinds.

This Article's primary aim is not to explore the political prospects for production liability; rather, it will explain its regulatory logic. Nevertheless, political constraints figure into the analysis at two levels. First, like any meaningful discussion of potential reform, the foregoing discussion is cognizant of institutional constraints. This Article takes into account the costs and probable efficacy of different measures, were they to be adopted. For example, it presumes 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 Article 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. Sweatshops are small factories that produce goods (again, this Article focuses on garments) that are in turn sold to a lead firm.[10] The lead firm either retails the goods directly or sells them through a distributor, such as a department store.[11] The lead firm has a recognizable brand name, but there are about twenty small suppliers for every manufacturer (in some cases, thousands more), and no one has heard of the suppliers.[12]

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 operating on the tightest margins, in substantial part due to the fierce competition among them. They essentially sell labor, and there is little room to creatively improve productivity relative to competitors.[13] They are said to "sweat" out a profit from their workers, who are paid little and sometimes go unpaid.[14] Most of their employees are unskilled and are provided little training, so there are few costs associated with high turnover in an abundant labor pool. Many domestic garment workers are non-English speaking or undocumented;[15] their reluctance to seek clarification of instructions exacerbates workplace risks;[16] and their reluctance to report unsafe conditions to public authorities compromises enforcement that is already shoddy.[17] The result is that more

10. *See* Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 756–57 (2014) (describing the fragmentation of the supply chain); *see also* Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291, 302 (2003).

11. *See* Parella, *supra* note 10, at 756–57.

12. *See id.*; *see also* Lung, *supra* note 10, at 302.

13. Hayashi, *supra* note 4, at 204.

14. Andrew Herman, *Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality*, 52 VA. J. INT'L L. 445, 471 (2012).

15. Jayesh M. Rathod, *Danger and Dignity: Immigrant Day Laborers and Occupational Risk*, 46 SETON HALL L. REV. 813, 823–24 (2016).

16. *Id.*

17. *See id.* at 824.

than half of the garment factories in the United States violate labor laws.[18] These workplaces are shockingly unsafe, from their production practices to the physical integrity of the buildings in which they operate.[19] 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.[20] Workers are unable to collect from subsequent businesses that the contractor might open under a different name.[21]

Although the relative shares of domestic and foreign production shift over time, the domestic share of production has fallen considerably in the last two decades. Factory jobs in Los Angeles, where the domestic garment industry was centered, have decreased by nearly two-thirds in the last decade.[22] There also used to be as many as 30,000 garment workers in New York City in the 1980s and 1990s, but only a few thousand remain today.[23] Across the United States, the number of persons employed in the apparel-manufacturing industry has dropped by almost four-fifths since 1990.[24]

Over the last two decades, the Asia Pacific region has become the dominant source of garments, textiles, and footwear. In 2014, it exported almost 60 percent of such goods, mostly from China.[25] This shift was in part propelled by the lapse of the Multifiber Agreement, an international trade agreement that set quotas for the amount of textiles and garments that developing countries could deliver to developed countries.[26] China has also improved its trade position via the adopted 2001 World Trade Organization China accession agreement.[27] But most obviously, the vast wage differences between developed and developing countries explain the shift in production,

18. Lung, *supra* note 10, at 293, 296–98 (describing the scope of the unpaid-wages problem among contractors in the United States).

19. *Id.*

20. *Id.* at 305.

21. *Id.*

22. Joel Kotkin & Michael Shires, *The Cities Leading a U.S. Manufacturing Revival*, NEW GEOGRAPHY (July 24, 2015), http://www.newgeography.com/content/005003-the-cities-leading-a-us-manufacturing-revival [https://perma.cc/8PVV-SLEA].

23. Ke Xu, *Union Urges Garment Workers to Purchase 'Obamacare*,*'* VOICES N.Y. (Dec. 19, 2013), https://voicesofny.org/2013/12/union-urges-garment-workers-to-purchase-obamacare/ [https://perma.cc/7T4T-EJ4H].

24. *All Employees, Thousands, Apparel, Seasonally Adjusted*, BUREAU LAB. STAT., https://data.bls.gov/timeseries/CES3231500001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true [https://perma.cc/F4T6-W9PC] (last visited Apr. 10, 2019).

25. INT'L LABOUR ORG., WAGES AND PRODUCTIVITY IN THE GARMENT SECTOR IN ASIA AND THE PACIFIC AND THE ARAB STATES 1 (2016), https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_534289.pdf [https://perma.cc/wm9h-ha4z].

26. *See* Arrangement Regarding International Trade in Textiles: General Agreement on Tariffs and Trade, Dec. 20, 1973, 25 U.S.T. 1001.

27. World Trade Organization, Decision of 10 November 2001, Protocol on the Accession of the People's Republic of China, WTO Doc. WT/L/432 (2001); *see also* Jordan Weissmann, *Waking the Sleeping Dragon*, SLATE (Sept. 28, 2016, 12:00 PM), https://slate.com/business/2016/09/when-china-joined-the-wto-it-kick-started-the-chinese-economy-and-roused-a-giant.html [https://perma.cc/RX34-3TT3].

with labor costs in South and Southeast Asia sometimes equaling just 6 percent of labor costs in the United States.[28]

Workers at overseas suppliers may be formally entitled to sue their employers, too, but their home legal systems are often ill-equipped to handle such cases. Working conditions at supplier factories may not be very different from other local workplaces. Given the importance of attracting foreign income, enforcing local employment protections against suppliers is often not a priority. The sheer number of suppliers, here and abroad, makes government enforcement a formidable task in any event.[29] 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. Even if suppliers are difficult to regulate as employers, why look to lead firms, in particular, as an alternative? This Article analyzes the moral and economic basis for their liability in depth 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.

The appeal of lead firms as a point of enforcement is easily stated. Lead firms have substantial bargaining power vis-à-vis suppliers.[30] They are in a position to demand alterations to the workplace.[31] 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.[32] Indeed, labor abuses are more common during the peak seasons of the clothing industry because of the tight schedule to which suppliers are subject at those times.[33]

In specific cases, lead firms that were subjected to intense, negative publicity after a tragedy or investigation at a supplier location have taken measures to substantially improve working conditions at their suppliers.[34] However, these measures have never been adopted on an industry-wide scale.

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28. DAMIAN GRIMSHAW & RAFAEL MUÑOZ DE BUSTILLO, GLOBAL COMPARATIVE STUDY ON WAGE FIXING INSTITUTIONS AND THEIR IMPACTS IN MAJOR GARMENT PRODUCING COUNTRIES 54 (2016), https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_558636.pdf [https://perma.cc/G7DE-FZSG].

29. *See* Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 204 (2011).

30. Most contractors in the garment industry have limited bargaining power because they lack business experience, education, language skills, and capital. *See* Hayashi, *supra* note 4, at 200.

31. *See id.*

32. *See* Glynn, *supra* note 29, at 214 & n.59; *see also* Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1, 15–16, 43–44 (2009).

33. *See* Sean Cooney, *A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?*, 28 MELB. U. L. REV. 290, 296 n.22 (2004).

34. *See, e.g.*, Larry Cata Backer, *Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20 IND. J. GLOBAL LEGAL STUD. 805, 836–47 (2013) (describing the pressure on Apple and the subsequent monitoring efforts it has undertaken); Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT'L L.J. 1963, 1969 (1996) (describing the

Labor rights activists and employment scholars have pursued four main avenues to hold lead firms accountable: (1) direct claims by workers against lead firms, (2) regulations that outlaw goods produced under wrongful conditions, (3) consumer misrepresentation claims, and (4) voluntary corporate codes.

First, proponents of production liability have argued that lead firms are "employers," that they owe direct duties of care to contractors' employees, or both. The Fair Labor Standards Act (FLSA),[35] which applies only to domestic employees, defines "employment" broadly in what the Act's legislative history suggests may have been a deliberate effort to encompass manufacturers.[36] But courts have only rarely held lead firms accountable under the Act.

In *Rutherford Food Corp. v. McComb*,[37] the U.S. Supreme Court held that the determination of a person's status as an employee turns on "the circumstances of the whole activity," which seemed to invite varied criteria across jurisdictions.[38] Some courts use a definition heavily influenced by common-law control criteria.[39] Lead firms' lack of direct physical control over suppliers' workers is usually enough to avoid liability under that standard.[40] Other courts emphasize "economic reality" and ask whether work performed by the ostensible employee is part of an "integrated economic unit." Courts sometimes question whether the intermediate contractor had an opportunity to bargain with the proposed employer-manufacturer. Some courts applying this standard also ask which party dominated decision-making over essential determinants of profits in a business.[41] This approach is more hospitable to U.S. workers who want to sue a lead firm,[42] but "[c]ourts decide rather arbitrarily which factors to

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measures taken by Gap in response to negative publicity surrounding supplier working conditions in El Salvador); *see also* Harry Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law*, *in* REGULATING LABOUR IN THE WAKE OF GLOBALISATION 19, 20–24 (Brian Bercusson & Cynthia Estlund eds., 2008).

35. 29 U.S.C. § 203 (2012).

36. *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, 1003–05 (1999).

37. 331 U.S. 722 (1947).

38. *Id.* at 730.

39. *See, e.g.*, Wilde v. County of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994); Wheeler v. Hurdman, 825 F.2d 257, 268–75 (10th Cir. 1987).

40. *See, e.g.*, Xue Zhen Zhao v. Bebe Stores, Inc., 247 F. Supp. 2d 1154, 1155 (C.D. Cal. 2003). In *Xue Zhen Zhao*, a California district court found that a manufacturer was not a joint employer. The supplier in that case performed work for multiple manufacturers, owned the factory and equipment that workers used, employed its own supervisors, and controlled workers' pay and hours. *Id.* at 1155–56.

41. *See, e.g.*, Torres-Lopez v. May, 111 F.3d 633, 639–42 (9th Cir. 1997); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754–55 (9th Cir. 1979).

42. *See* Lopez v. Silverman, 14 F. Supp. 2d 405, 419–21 (S.D.N.Y. 1998) (considering a range of factors to find garment workers economically dependent and to extend employer liability to a manufacturer).

employ and, without articulated interpretive frameworks to guide their decisions, courts oscillate between different versions of the factors."[43]

There have been a few successes in the effort to hold lead firms accountable as employers under the FLSA. Most notably, in *Ling Nan Zheng v. Liberty Apparel Co.*,[44] the Second Circuit upheld a jury's finding that a New York garment manufacturer was the plaintiffs' joint employer.[45] The court considered several factors: (1) whether workers used the manufacturer's premises and equipment; (2) whether the contractor had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which workers performed a discrete line job that was integral to the manufacturer's process of production; (4) whether responsibility under the contracts could pass from one contractor to another without material changes; (5) who supervised the workers; and (6) whether workers worked exclusively or predominantly for the manufacturer.[46] *Ling Nan Zheng* demonstrates that production liability may be doctrinally attainable by way of the FLSA.[47] However, its test has proven to be a high hurdle for plaintiffs and there has been no shift in the direction of treating lead firms as joint employers of their suppliers' workers. While recent cases suggest that courts may be wary of corporations' efforts to classify workers as independent contractors to avoid employer responsibilities,[48] there is no indication that courts will designate workers as employees of a firm when those workers are already clearly employees of a different firm.

Even if it were possible to hold lead firms accountable for conditions of domestic production under the FLSA, overseas workers cannot sue under the Act.[49] Those workers also cannot rely on any amorphous common-law duty of care that the FLSA might be regarded as codifying with respect to some subset of workers. In one notable suit, overseas workers sued Wal-Mart, arguing that it had breached a duty of care owed to them by failing to adequately monitor its suppliers' working conditions.[50] The court said that the existence of any duty of care was a policy question and declined to

43. *See* Lung, *supra* note 10, at 325.

44. 389 F. App'x 63 (2d Cir. 2010). A district court in New York in an earlier case had found "genuine issues of material fact as to whether and to what degree [the defendant manufacturer] supervised [the contractor's employees'] work." Fen X. Chen v. St. Beat Sportswear, Inc., 364 F. Supp. 2d 269, 288 (E.D.N.Y. 2005).

45. *Ling Nan Zheng*, 389 F. App'x at 66.

46. *See generally id.*

47. *See generally id.*

48. *See generally* O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015); Dynamex Operations W., Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018).

49. Section 213(f) of the FLSA specifically states that it will "not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country." 29 U.S.C. § 213(f) (2012).

50. Aaron J. 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, 40 (2006). *See generally* Class Action Complaint for Injunctive Relief and Damages, Jane Doe I v. Wal-Mart Stores Inc., No. BC339737 (Cal. Super. Ct. filed Sept. 13, 2005).

recognize any such duty running from lead firms to suppliers' workers.[51] It dismissed the suit,[52] and the prospects for any subsequent claims by overseas workers against U.S. lead firms appear dim.

Overseas employees of suppliers are also unable to bring suit against lead firms under other statutes that do not depend on designating lead firms as employers or establishing a direct relationship between lead firms and employees. Overseas workers cannot bring suit under the Alien Tort Statute (ATS)[53] unless they allege a violation of a norm that was specific, universal, and obligatory as of 1789, when the law was enacted.[54] The Court expressed great reluctance to recognize any new private claims.[55] Most unsafe working conditions—let alone contracting with the direct operator of a facility with such conditions—probably would not amount to a violation of long-standing international law.[56] Nor is the Racketeer Influenced and Corrupt Organizations (RICO) Act[57] a promising avenue of recourse for overseas workers. Although one district court found that a contractual relationship between a retailer and supplier can provide sufficient facts to state a RICO claim, the court ultimately dismissed the RICO claim at hand, finding that the allegations did not establish that the defendant retail brands participated in the alleged enterprise.[58] In 2016, the Supreme Court resolved a circuit split and allowed some extraterritorial application of RICO, but only where the predicate conduct is itself a violation of a statute with extraterritorial application.[59]

Direct liability to workers has had little legal traction notwithstanding a significant grassroots movement to hold lead firms accountable. It is their work that is the impetus for taking seriously the problem of sweatshop workers.[60] Organizations like the Institute for Global Labour and Human

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51. Jane Doe I v. Wal-Mart Stores, Inc., No. CV 05-7307 AG (MANx), 2007 WL 5975664, at *5 (C.D. Cal. Mar. 30, 2007) (explaining that the "duty Plaintiffs seek to enforce would be a duty of a retailer to be reasonably careful when contracting with suppliers to prevent intentional labor violations by those suppliers" but rejecting this view because "Plaintiffs' negligence claims go well beyond the recognized limits of liability"), *aff'd*, 572 F.3d 685 (9th Cir. 2009).

52. *Id.* at *7–8.

53. 28 U.S.C. § 1350 (2012).

54. Sosa v. Alvarez-Machain, 542 U.S. 692, 724–33 (2004).

55. *Id.*

56. *See id.* at 712–13 (limiting ATS private rights of action to claims that are universally recognized as arising out of the law of nations); Melissa Torres, *Labor Rights and the ATCA: Can the ILO's Fundamental Rights Be Supported Through ATCA Litigation?*, 37 COLUM. J.L. & SOC. PROBS. 447, 464–67 (2004) (noting that the ATS does not enable enforcement of all fundamental labor rights because those right are not considered a part of customary international law).

57. 18 U.S.C. § 1961 (2012).

58. Doe I v. Gap, Inc., No. CV-01-0031, 2001 WL 1842389, at *8 (D. N. Mar. I. Nov. 26, 2001) ("As noted above, the allegations adequately show an *opportunity* for the retailer defendants to participate in the enterprise. However, for the reasons given below, the allegations purportedly showing that the retailer defendants actually did participate in the enterprise are insufficient to constitute . . . 'participation' [under the RICO Act].").

59. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2104 (2016).

60. Cummings, *supra* note 32, at 18–19, 43–44 (describing several grassroots campaigns); Andrew Elmore, Comment, *State Joint Employer Liability Laws and Pro Se Back Wage*

Rights and the Worker Rights Consortium monitor factories, conduct research, and attempt to garner public support to pressure brands to fix problems in specific factories.[61] Nevertheless, the specific aim of holding lead firms *directly* responsible to supplier employees has made little legal progress. Even if the case law were gradually to turn toward a finding of control by lead firms, companies are as likely to distance themselves from suppliers as they are to improve working conditions throughout their supply chain.[62]

A second strategy for worker advocates has been public regulation. The so-called "hot goods" provision of the FLSA allows the government to seize any goods that were manufactured in violation of labor laws.[63] The Obama administration used this provision more rigorously than previous administrations.[64] There also have been several local, regional, and sector-specific efforts to use the provision to enforce labor standards.[65] In principle, authority to seize hot goods would operate as a strict liability regulation in that it does not depend on establishing the present owner's fault for the conditions under which goods were produced. It thus avoids the high costs that worker representatives face when attempting to establish lead-firm control over particular supplier factories. However, the hot goods provision is more limited than it appears at first blush. It exempts both common carriers and "good faith purchasers" of goods who were unaware of the illegal conditions of production.[66] A 2014 fact sheet from the Department of Labor further clarified that goods on retailers' shelves or in consumer hands are not illegal because they are no longer in the flow of commerce.[67] No doubt, even within these legal parameters, there are many hot goods that could be seized but are not simply because enforcement officers are woefully underfunded

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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 manufacturers and retailers).

61. *See generally* Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1 (2013); Cummings, *supra* note 32.

62. Aaron Grieser, Comment, *Defining the Outer Limits of Global Compliance Programs: Emerging Legal & Reputational Liability in Corporate Supply Chains*, 10 OR. REV. INT'L L. 285, 319–20 (2008).

63. 29 U.S.C. § 211(a) (2012).

64. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 215–16, 227–28 (2014).

65. *See, e.g.*, Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2193 (1994); Stephanie A. Koltookian, Note, *Some (Don't) Like It Hot: The Use of the "Hot Goods" Injunction in Perishable Agriculture*, 100 IOWA L. REV. 1841, 1847–58 (2015); *see also* David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL'Y J. 125, 141–42 (2007) (advocating for more widespread use of the hot goods provision).

66. Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 30 (2010).

67. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #80: THE PROHIBITION AGAINST SHIPMENT OF "HOT GOODS" UNDER THE FAIR LABOR STANDARDS ACT (2014).

and have other priorities. The combined result is that public regulation has not been an effective substitute for private enforcement of worker rights.

A third strategy has been to hold lead firms accountable to consumers. In *Nike, Inc. v. Kasky*,[68] a consumer sued Nike on the grounds that it misled buyers about the conditions under which its goods were produced.[69] Nike claimed that its representations were protected by the First Amendment.[70] The case was settled before being adjudicated, but the California Supreme Court did reverse the trial court's dismissal on the grounds that Nike was only entitled to the lesser First Amendment protections granted commercial speech.[71] Lawyers are sufficiently skeptical about consumers' legal arguments that this strategy has not been pursued systematically.

Consumer movements also have 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 practices at the ground level. 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 many consumers are apparently willing to pay.[72]

The most important changes that consumer movements have won pertain to the formal commitments of lead firms. In the fourth and final strategy for lead firm accountability, consumer and worker advocacy groups have pushed lead firms to adopt codes of conduct for suppliers.[73] Some codes are quasi-contractual and are inspired by the "jobbers agreements" of the mid-twentieth century.[74] Those contracts among workers, contractors, and lead firms fixed labor prices in the domestic apparel supply chain.[75] The agreements were initially imposed by a "fair code" under the National Industrial Recovery Act (NIRA), but they were sustained by collective action of the International Ladies Garment Workers Union after the NIRA was struck down as

68. 539 U.S. 654 (2003) (per curiam).

69. *Id.* at 656.

70. *Id.*

71. *Id.* at 657.

72. *See* Allison M. Snyder, Note, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer?*, 2007 COLUM. BUS. L. REV. 565, 599–606 (observing limitations of voluntary disclosure of corporate practices); *cf.* Robert Dorfman, *The Economics of Products Liability: A Reaction to McKean*, 38 U. CHI. L. REV. 92, 98 (1970) ("[T]he 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 is made, the ubiquitous phenomenon of dangerous working conditions is not costly to learn.

73. *See* Grieser, *supra* note 62, at 291–92; Sarah Rackoff, Note, *Room Enough for the Do-Gooders: Corporate Social Accountability and the Sherman Act*, 80 S. CAL. L. REV. 1037, 1043–47 (2007).

74. *See generally* Anner, Bair & Blasi, *supra* note 61.

75. *Id.*

unconstitutional.[76] However, these agreements fell apart when contractors moved to nonunion states.[77] 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 working conditions.[78]

Over 100 GFAs have been signed.[79] The vast majority of GFAs are between a global union federation and a transnational corporation based in Western Europe.[80] The most dominant global union in the GFA context is the IndustriALL Global Union, followed by UNI Global Union.[81] While earlier GFAs did not even reference supply chains, now most include some reference to them, though enforcement language varies considerably.[82] In fact, with a few exceptions, GFAs typically have few substantive terms.[83] The agreements have been successful where competing unions came together to pressure a corporation; ongoing union pressure has been critical, rather than any roadmap for enforcement contained within the GFA itself.[84] Absent union monitoring, GFAs are poorly enforced.[85]

Most corporate codes are adopted unilaterally, albeit under some pressure from one or more nongovernmental organizations (NGOs). In these codes, the corporation undertakes to ensure that all of its suppliers abide by some standards without assuming any other directed obligation to do so.[86] Although companies do expend substantial resources monitoring suppliers under these agreements, they have not effected any industry-wide change in practice.[87] Organizations like the Maquila Solidarity Network, a Canadian

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76. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (striking down the NIRA).

77. *See* Anner, Bair & Blasi, *supra* note 61, at 20.

78. *See* Felix Hadwiger, *Global Framework Agreements: Achieving Decent Work in Global Supply Chains?*, 7 INT'L J. LAB. RES. 75, 77 (2015).

79. Michael Fichter & Jamie K. McCallum, *Implementing Global Framework Agreements: The Limits of Social Partnership*, 15 GLOBAL NETWORKS S65, S66 (2015).

80. Hadwiger, *supra* note 78, at 21.

81. *Id.* at 15.

82. *See* Jan M. Smits, *Enforcing Corporate Social Responsibility Codes Under Private Law: On the Disciplining Power of Legal Doctrine*, 24 IND. J. GLOBAL LEGAL STUD. 99, 111 (2017); Haley Revak, Note, *Corporate Codes of Conduct: Binding Contract or Ideal Publicity?*, 63 HASTINGS L.J. 1645, 1657 (2012).

83. Hadwiger, *supra* note 78, at 25.

84. *See* Fichter & McCallum, *supra* note 79, at S66.

85. *See id.*; *see also* Hadwiger, *supra* note 78, at 6. Note that code provisions that concern the employees of suppliers tend to be less committal, and therefore less binding, than statements about a company's own employment practices. *See generally* James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?*, 33 COMP. LAB. L. & POL'Y J. 555 (2012) (observing that codes of conduct are inadequately enforced at present, but offering some legal strategies for increasing compliance).

86. *See generally* Jaakko Salminen, *The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?*, 66 AM. J. COMP. L. 411 (2018).

87. *See* Renée-Claude Drouin, *Promoting Fundamental Labor Rights Through International Framework Agreements: Practice Outcomes and Present Challenges*, 31 COMP. LAB. L. & POL'Y J. 591, 592 (2010) (describing the limited success of voluntary labor codes).

anti-sweatshop network, urge brands to follow through on their stated policies, but their leverage depends on fickle public attention.[88] 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. Most of the injuries resulting at dangerous workplaces are small-scale and do not pose a substantial threat to brand image. Nevertheless, because litigation largely has failed as a method of ensuring accountability, most organizations now rely on brand protection as the impetus for socially responsible production.[89]

The first and third strategies described above, which attempt to create 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 a 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 must rest on a theory about what they might have done rather than the identification of affirmative actions that they took.

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.[90] As we now observe with production liability, the pressure on privity in the products liability context came first and followed consumer market developments.[91] 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, the supplier now stands between worker and manufacturer.

Production liability, the proposed name for such liability, is obviously intended to invoke the inverse of products liability. Just as products liability refers to the liability of a manufacturer to a consumer who may purchase from a third-party intermediary (distributor or retailer), production liability

88. *See* Anner, Bair & Blasi, *supra* note 61, at 35.

89. Activists in Los Angeles took the lead in pursuing litigation against lead firms, but by now they too have shifted to collaboration with manufacturers. *See* Cummings, *supra* note 32, at 68–70.

90. *See* Lung, *supra* note 10, at 339–40.

91. The decline of privity in the products 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 72, at 100.

makes brands liable to employees notwithstanding a third-party intermediary (suppliers and employers).

II. The Moral Basis of Production Liability

The central proposition of this Article, and of this Part, is that lead firms are *morally* responsible for unsafe working conditions at their suppliers, even though suppliers directly employ the workers. Those who do not believe that moral responsibility is a necessary, if insufficient, condition for legal liability will be unconcerned with the proposition this Article defends. That is, to the extent one believes that the question of moral responsibility for an injury only applies where one person is held directly legally accountable to another for injury—as in ordinary tort liability—production liability requires no moral justification. But though private rights of action that invoke the machinery of private adjudication may require a distinct species of justification, we do not normally hold persons—including companies—liable even in regulatory form for actions or circumstances for which they are not responsible in any familiar sense. For example, we do not assign liability for cleaning up environmental disasters based on liquidity or expertise—we ask who is responsible for the environmental damage in question. While a system that did not hinge legal liability on moral responsibility might not be illegitimate, our practice is for liability to track responsibility, and it is a good practice. It avoids arbitrariness that might arise were that practice to be abandoned. This Part considers whether production liability is consistent with this practice.

Assuming, then, that moral responsibility should be regarded a prerequisite for production liability, one might have two primary reservations concerning the conditions of moral responsibility. First, we normally think that we have to make a difference to an outcome to be responsible for it. Given the prevalence of poor working conditions in an industry or a foreign labor market, it is uncertain whether the conditions under which any given worker labors will be improved by the terms of a supply contract. Altering the terms of supply contracts could merely divert business to another lead firm or to another local industry. Thus, opponents of production liability will argue that lead firms make no difference to the conditions under which any particular person labors.

Second, we normally think that we are not responsible for the actions of others. Suppliers are moral agents that make their own choices, and it is those choices that translate the terms of their contracts with lead firms into poor working conditions for their employees. Thus, opponents of production liability can argue that the link that stands between lead firms and workers on the supply chain (i.e., suppliers) effectively insulates lead firms from moral responsibility.

This Article aims to overcome these intuitions and to show 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; rather, the goal is to establish that lead firms are morally responsible for the dangerous working conditions under which their goods are produced. This Part proceeds first by elaborating on the relevant notion of responsibility, distinguishing it from culpability. It then argues that contracting with suppliers generates a particular kind of responsibility for working conditions (i.e., complicity). Finally, this Part argues that the type of complicity at issue represents a public wrong rather than a direct, private wrong against the particular workers who manufacture a firms' goods under dangerous conditions. The economic analysis of optimal liability is largely reserved for Part III, while Part IV considers specific forms of legal liability.

A. *Outcome Responsibility*

The concept of responsibility invoked here tracks the notion of "outcome responsibility" developed in tort theory over the last several decades. Scholars such as Tony Honoré, 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.[92] This responsibility extends beyond the intended effects of our actions to the foreseeable consequences of our action 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 that it applies to lead firms, holding them responsible would be consistent with how we deploy the moral and legal concepts of responsibility more broadly.

Foreseeability and control are not usually regarded 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 rise to the level of culpability where the negligent person never contemplates that someone may be hurt by her actions.[93] Nevertheless, a negligent person is responsible for the injuries that flow from her negligence. To hold otherwise would deny the scope of her agency; it would make her action and its consequences normatively indistinguishable from an

92. *See* John Gardner, *Obligations and Outcomes in the Law of Torts*, *in* RELATING TO RESPONSIBILITY: ESSAYS FOR TONY HONORÉ ON HIS EIGHTIETH BIRTHDAY 111, 136 (Peter Cane & John Gardner eds., 2001) ("To deny that success can have independent rational significance is to leave us without *any* story of our lives as practical reasoners."); Tony Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530, 543 (1988) ("If actions and outcomes were not ascribed to us on the basis of our bodily movements and their mental accompaniments, we could have no continuing history or character."); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 505–07 (1992) [hereinafter Perry, *The Moral Foundations of Tort Law*] (arguing that agency is a "meaningful notion" because one can imagine an agent with knowledge of all relevant causal regularities who is capable of controlling natural processes, and observing outcome responsibility involves "retrospective evaluation of action" that turns on what would have been foreseeable to such an idealized agent); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, *in* PHILOSOPHY AND THE LAW OF TORTS 72, 83 (Gerald J. Postema ed., 2001) ("[O]utcome-responsibility in the achievement sense comprises a fundamental element in our understanding of our own agency.").

93. *See generally* Perry, *The Moral Foundations of Tort Law*, *supra* note 92.

event in the world without agency at its root.[94] 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.[95] Certainly, we are not invested in constructing corporations as moral agents for the same reasons. But, as with natural persons, how we treat corporations is a matter of social construction and not a metaphysical inquiry.[96] It will turn on what we mean when we say that a corporation is *responsible* for a loss or state of affairs. Our legal practice largely has assumed that corporations *can* be morally responsible because they perform actions that can be attributed only to the corporation, as opposed to its members, and they perform those actions with intentions that can similarly only be attributed to the corporation itself.[97] Christian List and Philip Pettit have argued that groups like corporations may

94. *See* THOMAS NAGEL, MORTAL QUESTIONS 37–38 (1979); *see also* Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES L. 97, 98 (2008).

95. To the extent one believes that corporations can be assigned legal responsibilities, even absent the conditions of moral responsibility, this Part's argument is not that this is a problem, but that such responsibility is merely unnecessary.

96. *See* Rebecca DeWinter, *The Anti-Sweatshop Movement: Constructing Corporate Moral Agency in the Global Apparel Industry*, 15 ETHICS & INT'L AFF. 99, 99–101, 108–14 (2001) (describing the social construction of corporate moral agency).

97. Some scholars have attempted to express and to defend these assumptions. *See generally, e.g.*, Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979). *But see* Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, *in* COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 111, 120 (Larry May & Stacey Hoffman eds., 1991) ("The underlying reason for corporate policies and procedures being unable to generate intentional action is that the concept of intentional action . . . is rooted in the concept of an agent with a certain mental and bodily unity that corporations do not have.").

qualify as moral agents because they "have representational states, motivational states, and a capacity to process them and act on that basis."[98]

Of course, the possibility of corporate moral responsibility remains in controversy, and the debate is beyond the scope of this Article.[99] Another pragmatic, but also principled, reason for extending the basic framework of responsibility to corporations does not depend on assigning corporations "real" moral responsibility; instead, it hinges 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 and protections of private law, the burden is on those who wish to apply a different standard of responsibility to corporations in a particular context. As it stands, the idea of corporate responsibility would not be unique to production liability. Corporations are held liable for their actions throughout our legal system and without controversy, at least outside criminal law. Indeed, it is hard to imagine a world in which they are not responsible and in which all fines are assigned instead to individuals within the firm. The effect would be to undo the corporation as an entity, since it is designed precisely to shield individuals from such liability.[100]

Applying the ordinary standard of responsibility—foreseeability and control—to lead firms, we can conclude that a retailer is responsible for the accidents, working conditions, or employment terms under which its goods are produced if those consequences of its supplier contracts are foreseeable and could be avoided by different contractual terms. 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 the permitted communication between brands. Together, these facts make it both predictable to brands that certain payment structures and production timelines worsen employment conditions at the level of production, and also allow lead firms 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 those conditions, where the brand is aware that formally benign terms are associated with poor conditions.

There may be still deeper grounds for responsibility in the context of production liability that buttress the case for giving responsibility a legal form.[101] Although the account of bare responsibility above does not rely on

98. *See* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 32 (2011).

99. *See, e.g.*, Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171, 177–92 (2007); Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531, 534–38 (2003).

100. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102 (2019) (providing that owners are not liable for debts of corporation).

101. 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), which asserts that democratic deficits and dependency justify the application of labor law. Davidov canvasses a range of possible grounds for imposing responsibility,

a theory of deliberate wrongdoing or unjust enrichment, those elements may point to starker responsibility for some lead firms—something approaching actual culpability. Lead firms are alleged not only to be aware of dangers that they can prevent but to choose the contractor model precisely in order to avail themselves of the economic advantages of dangerous working conditions.[102] 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 also blameworthy.

The above argument for culpability depends on establishing intentions that cannot be generalized across lead firms. At the same time, outcome responsibility standing alone is too generic to motivate a legal regime of accountability because it sweeps up so many actors without differentiating among them. Consumers often know that they are purchasing goods that likely have been produced under wrongful conditions.[103] If consumers did not purchase those goods, there would be marginally less demand for their production. Carriers know that the goods they transport were produced under wrongful conditions and that the incentive to produce them would cease should distribution costs dramatically escalate. Media outlets that advertise goods facilitate their sale—the outcome on which their production is predicated. No one is proposing that all these actors be held legally liable for unjust working conditions.

Indeed, it is apparent that we cannot be held legally responsible for every outcome for which we are responsible. There are too many people responsible for any given outcome, and we have liberty and relational interests in being able to harm each other in many ways. Public policy considerations similarly cut against attempting to hold corporations liable for all the harms for which they are responsible—at least when deploying a thin notion of responsibility, like outcome responsibility. Sometimes there is disagreement about the boundaries of their appropriate legal responsibility, as in the case of environmental and employment losses. For the most part,

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including the ideas that a lead company can cause contractor infringement, have the power to prevent infringement, can spread loss among many consumers, benefit from infringement, and assume responsibility through either representations or by virtue of citizenship to those working within its community. *Id.* at 18–32.

102. *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, 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 29, at 209.

103. *See generally* LYN K L TJON SOEI LEN, MINIMUM CONTRACT JUSTICE: A CAPABILITIES PERSPECTIVE ON SWEATSHOPS AND CONSUMER CONTRACTS (2017) (arguing that consumer contracts for the purchase of goods manufactured in overseas sweatshops may be unenforceable).

however, our political discourse demands more than bare outcome responsibility before imposing legal liability. For example, even when 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), there is no suggestion that their policies should result in legal liability. Production liability needs a further moral foothold. It needs to be able to distinguish among the myriad social actors responsible for dangerous supplier working conditions and explain why lead firms are more responsible than other participants in global economic institutions.

B. Complicity in the Wrongs of Suppliers

The particular form of responsibility that lead firms bear is complicity. Although they do not directly perpetrate any wrongs against the workers who manufacture their goods, their actions enable suppliers' wrongs in such a way as to render lead firms complicit. We may systematically fail to call out complicity because it falls in a blind spot in our moral reasoning, or what Christopher Kutz calls a "relational and causal solipsism."[104] We focus on direct individual responsibility, and it might be that our public discourse simply does not have the wherewithal to sustain appropriate levels of public censure for all types of wrongdoing.[105] But "[t]he most important and far-reaching harms and wrongs of contemporary life are the products of collective actions, mediated by social and institutional structures."[106] If we limit censure to individual production of harm, we will fail to hold anyone accountable for many pervasive wrongs.

Inducing and even consenting to the production of harm by others are among the recognized ways in which we can be complicit in wrongdoing.[107] Knowing contribution to another's wrongdoing is all that is required[108]—complicity does not require full-fledged partnership or identification with the wrongdoer. Thus, the charge of complicity against lead firms does not imply that lead firms are working with suppliers to subject workers to dangerous working conditions. It is enough that lead firms are on notice that their contracts with suppliers are the occasion for which these workers are subject to oppressive conditions.

Complicity amounts to a kind of infection of responsibility. In this case, suppliers commit the direct wrong of employing workers dangerously, and their wrongdoing infects lead firms by way of their contracts for the purchase of goods those workers produce. The conditions of contagion are those we

104. CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 5 (2000).

105. *Id.* at 5–6 (suggesting individual and collective responsibility may be substitutes for each other due to a crowding-out effect in blaming practices).

106. *Id.* at 113.

107. *See* Gregory Mellema, *Collective Responsibility and Qualifying Actions*, 30 MIDWEST STUD. PHIL. 168, 170–72 (2006) (identifying six varieties of complicity); *see also* KUTZ, *supra* note 104, at 122, 138.

108. CHIARA LEPORA & ROBERT E. GOODIN, ON COMPLICITY AND COMPROMISE 7, 80–83 (2013).

associate with shared, rather than joint, intention. Michael Bratman describes shared intentions as ones that separate persons have and act in accordance with. Their actions do not have to be identical but should be responsive to "meshing subplans."[109] Margaret Gilbert, by contrast, has a "plural subject account" in which members of a group are "jointly committed to intending as a body to do *A*."[110] Similarly, J. David Velleman argues that a unified moral subject is necessary to establish collective responsibility and that such a plural subject involves "two or more subjects who combine in such a way as to constitute one subject."[111] Bratman's thinner account of cooperation captures the moral relationship between suppliers and lead firms better than a plural-subject account. Lead firms do not join with suppliers in a common enterprise of production. They remain arm's-length actors, pursuing separate and, to some extent, rival economic interests. However, their separate plans intersect in their supply contracts, which reflect a common interest in inattention to workers' interests.

The most problematic supply contracts do not directly address working conditions at all. This might appear to foreclose application of Bratman's account of shared intentions, if the contracts' silence on working conditions is read as the absence of any objective intent with respect to working conditions. We might point to evidence that lead firms specifically intend working conditions to be so poor in order to enable the lowest consumer prices. But evidence of specific intention is uneven and, therefore, a poor basis for a general principle of liability, in the same way that we rejected ad hoc cases of culpability among lead firms as inadequate grounding for production liability.

We can look instead to Larry May's alternative account of group intentions, which provides a useful supplement to Bratman's model. May suggests that "pre-reflective" group intentions are ones that "are not yet reflected upon by each of the members of . . . [the] group."[112] They are not the product of individual consciousness, but "arise out of the relations and structures of the group."[113] In this context, we might say that lead firms and suppliers share a pre-reflective intent to subject workers to dangerous conditions even absent any specific intention to do so; their intent with respect to workers follows from the economic structure in which they jointly participate.

At least some of the discomfort with lead firms' conduct probably does lie not in their specific contracting policies, but in their role in an unjust global economic order or their participation in unjust local labor markets. These economic structures implicate others as well. But complicity is a matter of

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109. MICHAEL E. BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 121 (1999).

110. MARGARET GILBERT, SOCIALITY AND RESPONSIBILITY 22 (2000).

111. J. David Velleman, *How to Share an Intention*, 57 PHIL. & PHENOMENOLOGICAL RES. 29, 30 (1997).

112. LARRY MAY, THE MORALITY OF GROUPS 62 (1987).

113. *Id.* at 61–65.

degree.[114] Even if the supply chain were to be regarded as a group, members do not share equal fault because they contribute differently to the harm at issue.[115] In fact, we might attempt to set up a sliding scale of complicity from copartners to noncausal participation or unknowing contribution.[116] On such a scale, lead firms would rank well below suppliers but still well ahead of ordinary consumers.

Other participants in the supply chain, including consumers, may be morally tainted by wrongs of suppliers because moral taint may attach to membership in even a thinly constituted group that commits a wrong.[117] But even absent any affirmative intent with respect to suppliers' workers, lead firms take affirmative steps that are causally linked to the workers' harm. Most important, they set the timetable for production and the prices paid for the goods.[118] Consumers do not have direct influence over these driving factors. Consumers also have less knowledge of the conditions of production; in most cases, they do not know where production takes place or which supplier firm is involved. Their relative ignorance is accompanied by relative uncertainty as to whether their decision to buy will actually result in worse conditions for any worker or group of workers. Although all participants in the supply chain may share pre-reflexive intentions with respect to its functioning, and although the result may be that we are all thinly responsible for wrongful conditions of production, some agents of our collective economy are more obligated than others to alleviate harm as a result of their position in the causal chain.[119]

The phenomenology of agency gives priority to near, direct, and unmediated effects. When "an outcome is the joint result of the actions of a number of people, including ourselves, we tend to see our own agency as implicated to a much lesser extent than we do when we take an effect to have resulted solely from our own actions."[120] Complicity, like responsibility, is not exclusive to lead firms. But by identifying the particular kind of responsibility that lead firms bear, we can see how their responsibility is more severe than the responsibility of other actors that might also be infected with responsibility for suppliers' wrongdoing.

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114. *See* LEPORA & GOODIN, *supra* note 108, at 80–83.

115. *See* Joel Feinberg, *Collective Responsibility*, 65 J. PHIL. 674, 685 (1968).

116. LEPORA & GOODIN, *supra* note 108, at 8, 97–129.

117. *See* Juha Räikkä, *On Disassociating Oneself from Collective Responsibility*, 23 SOC. THEORY & PRAC. 93, 104 (1997).

118. Corporate demands on suppliers are probably "potentially essential"—not "definitely essential" or "inessential" according to the framework of Lepora and Goodin. *See* LEPORA & GOODIN, *supra* note 108, at 63.

119. Tracy Isaacs, *Collective Responsibility and Collective Obligation*, 38 MIDWEST STUD. PHIL. 40, 41 (2014).

120. Samuel Scheffler, *Individual Responsibility in a Global Age*, 12 SOC. PHIL. & POL'Y FOUND. 219 (1995), *reprinted in* BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT 32, 39 (2001).

C. Complicity as Public Wrongdoing

Thus far, I have argued that lead firms are "outcome responsible" for dangerous working conditions. More specifically, they are complicit in the wrongdoing of suppliers. Just as complicity is one among many variants of responsibility, complicity itself is of varied character. This Part argues that the complicity of lead firms amounts to public wrongdoing, and so their responsibility is of a public sort. The public character of their complicity has two main features: (1) it is a failure of social responsibility rather than direct responsibility to particular private persons, and (2) it is more forward-looking than backward-looking, in that it justifies a special role in rectifying unjust social conditions rather than in compensating losses that have already been incurred.

Absent specific circumstances that we cannot generalize across the industry—that is, direct control over production methods or compensation—lead firms are not directly responsible to the employees of suppliers. They are responsible for the conditions under which those employees work, in the sense of outcome responsibility, and they are complicit in the wrong to which those working conditions amount. Although there is a high degree of certainty that low prices and tight schedules will result in poor working conditions, there is also a high degree of uncertainty that any particular person will be wronged by working under those conditions. This is not just because the employees of suppliers are usually unknown to lead firms and turnover in the workforce is high; the very number of employees that a supplier hires depends on the existence and terms of the supply contract as well. More exacting terms in supply contracts that demand safe working conditions are likely to result in lower levels of employment and probably lower pay. It is quite likely that many individual workers, given their oppressive choice set, prefer unsafe working conditions to safe working conditions, where the latter are bundled with a higher risk of unemployment and lower pay. It is therefore not clear that a supply contract that creates an unsafe job is a wrong to the particular worker who occupies that position. The duty to produce goods under safe working conditions is not best conceived as a duty to particular workers, but as a duty to support just social institutions.[121] Even though individual workers may prefer unsafe working conditions, it is a collective aim to abolish dangerous working conditions because we think it will benefit the worst-off workers in the long run. The duty to further that aim effectively runs to society as a whole rather than to particular workers. Lead firms do not wrong individual workers, but their supply contracts render them complicit in the subversion of just employment practices.[122]

121. The natural duty to support just institutions is associated with the political theory of John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 114–16 (1971).

122. Remedial responsibilities can flow from "the interests we all share in sustaining the major social institutions." Derrick Darby & Nyla R. Branscombe, *Beyond the Sins of the Fathers: Responsibility for Inequality*, 38 MIDWEST STUD. PHIL. 121, 133 (2014).

The second respect in which we should regard the complicity of lead firms as a matter of public responsibility follows from the first. The duty to support just social institutions is a mostly forward-looking duty.[123] On particular facts, we can show that some actions violate such a duty even absent a related legal obligation. But most of the time we invoke the duty to support just social institutions as a *justification* for imposing more specific legal duties on private actors. Although private actors may already have responsibility for a set of outcomes (as lead firms bear responsibility for the conditions under which their goods are produced), they do not have a specific duty to avoid those outcomes until it is recognized publicly. We could say that, as yet, the duty of lead firms to contract with suppliers on terms that rule out dangerous work is subject only to an inchoate public duty to avoid creating dangerous working conditions. We are still waiting for clear public recognition of such a duty. Any conclusion that lead firms are complicit in wrongful employment practices, then, does not by itself generate a legal duty or legal entitlement. Rather, it justifies *the imposition* of such legal liability. And because the underlying responsibility is public, the appropriate form that liability should take is regulatory.[124] Although the merits of different forms of production liability will be considered at greater length in Part IV, the moral analysis here points toward public liability as the default form for recognizing complicity in the manner of a public wrong.

It is not enough to justify production liability to show that corporations are morally responsible for the poor working conditions of their suppliers or even that they are more complicit than other participants in surrounding economic institutions. Given the material consequences of production liability, any affirmative argument for recognizing it has to consider its expected economic impact.

In the next Part, this Article argues that not only is the moral predicate of legal responsibility fulfilled, such liability is also commendable on instrumental grounds. Once we overcome intuitions about the 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.

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123. Political responsibility is more forward-looking than a liability model of responsibility. *See* Iris Marion Young, *Responsibility and Global Labor Justice*, *in* RESPONSIBILITY IN CONTEXT: PERSPECTIVES 53, 65–66 (Gorana Ognjenovic ed., 2010). Young develops the idea of political responsibility that originates with Hannah Arendt. *See generally* Hannah Arendt, *Collective Responsibility*, *in* AMOR MUNDI: EXPLORATIONS IN THE FAITH AND THOUGHT OF HANNAH ARENDT 43 (James W. Bernauer ed., 1987). People are politically responsible for economic structures that are managed primarily through politics. *See generally id.* While action generates individual responsibility in the ordinary case, inaction generates typical political responsibility. *See generally id.*

124. *Cf.* KUTZ, *supra* note 104, at 138 (tying the appropriate form of accountability to an individual's particular relation to wrongdoing).

III. OPTIMAL COST ASSIGNMENT

The question of whether production liability is efficient may be still more difficult than its parallel in 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.[125] Moreover, consumer interests are, to a substantial extent, internalized by firms that wish to keep and win customers.[126] By contrast, most of the workers at lead firms' suppliers are located overseas. Arguably, their welfare losses do not have the same standing in social welfare calculations that underlie U.S. 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 we can presume that there is a minimum 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, 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 U.S. national is permitted to conduct business, even outside the United States. Obviously, determining exactly what the 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. The standard imposed by the United States with respect to overseas work sites should avoid violating the right of local communities to decide their own local standards. A sufficiently minimum standard would probably overlap substantially with local standards on the books (even if they are poorly enforced) and might be negotiated by way of trade agreements so that host governments can participate in setting the standard. But, ultimately, the standard in question is the standard below which we cannot abide our national corporations conducting business. Politics must supply that standard.

The challenge here is different. We must identify the form of the liability regime that would best raise workplace safety to such a minimum bar, whatever that 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

125. In fact, the dominant norm in the contracts literature is consumer sovereignty, or that consumer preferences on risk allocation should prevail. *See, e.g.*, 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.

126. *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 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.").

be to deter such dangerous working conditions absolutely, though realistically some factories are likely to operate below the minimum threshold at any given time. We might simultaneously and separately undertake to reduce the rate of workplace injury more generally in a similar way to how we aim to reduce the rate of consumer injury. The problem of pricing those injuries across disparate markets, however, 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-contractors, and the lead firms with substantial bargaining power vis-à-vis supplier-contractors. In principle, the state could impose costs, such as 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 set in large part by reference to what we think a worker would refuse. 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 because safety deficiencies are not apparent. For example, they may be unaware of structural or electrical problems in the building, or they may be ignorant to the risks created by poorly maintained and outdated manufacturing equipment. One of the most common workplace hazards is occupational asthma, a condition that may worsen over time as workers are exposed to invisible dust, vapors, gases, or fumes in their workplaces.[127]

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, we cannot expect workers

127. Ariela Migdal, Note, *RCRA in the Workplace: Using Environmental Law to Combat Dangerous Conditions in Sweatshops*, 75 N.Y.U. L. REV. 1843, 1847–48 (2000).

to simply refrain from accepting working conditions that a national political community, to which they may or may not belong, might find unacceptable. 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, for example, by refusing to enforce the payment of 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 wholly unattractive) means require cooperation by the direct employer: the supplier. For the reasons to be discussed, 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 U.S. law, whether via a private right of action or an agency directive.[128] Contractors in the United States are usually judgment-proof, and bankruptcy protects them from any prolonged debt burden.[129] When they do pay out fines, the additional cost pressures result in further reduction of employee compensation.[130] But contractors do not usually pay. They are highly mobile with limited capital and therefore easily evade enforcement authorities, for example, by closing and reopening under new names.[131] The result is that neither domestic nor overseas suppliers are a viable point of enforcement because fines and civil judgments cannot be collected. This conclusion is unsurprising: 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

128. *See supra* note 56 and accompanying text.

129. *See* Lung, *supra* note 10, at 305.

130. *See* Hayashi, *supra* note 4, at 204–05.

131. *See* Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT'L L. 255, 271 (2013).

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.[132]

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.[133] 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.[134] 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. Thus, lead firms are 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' practices 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' workplaces, as well as increased monitoring rights. They could do so in a way that leaves unaltered the suppliers' expected gains from trade, entirely at their own expense. Of course, they are unlikely to simply absorb either the costs of actually improving workplace conditions or paying off regulatory fines upon failure. In part, we can expect them to attempt to recoup costs through indemnification clauses with suppliers[135] and possibly through the purchase of insurance. But we can also expect lead firms to pass on their increased costs to consumers.

The fact that lead firms are in a position to pass increased costs associated with improved working conditions on to consumers is actually one of the strongest arguments in favor of assigning costs to them.[136] After all, there may be intermediaries between lead firms and suppliers who can also be

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132. *See* Richard W. Wright, *The Principles of Product Liability*, 26 REV. 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.").

133. Lead firms set retail prices and supplier prices, and they keep approximately half of the retail price. Elmore, *supra* note 60, at 400. Garment employee compensation amounts to only 6 percent of retail prices. *Id.* at 401.

134. Hayashi, *supra* note 4, at 203 (explaining that 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).

135. Glynn, *supra* note 29, at 205 (arguing for enterprise liability with respect to unpaid wages and suggesting that companies will bargain for indemnification).

136. This Article assumes 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. *See generally* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

described as complicit but who cannot raise retail prices. One aim of a regime of production liability should be to shift costs to the parties best positioned to distribute costs widely instead of allowing them to fall arbitrarily and in concentrated form on unwitting workers—just as products liability shifts costs from a handful of unwitting consumers to manufacturers.[137] 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.[138]

The other means by which states sometimes aim to impose costs on consumers are undesirable and unworkable. The state criminalizes the possession of some goods, but crimination would exaggerate the responsibility of consumers in this case and would involve heavy-handed state machinery that has proven costly and ineffective in smaller markets. The state could also subject a disfavored product to a special consumer tax but, by imposing costs on all goods irrespective of the conditions under which they were produced, such a tax would fail to capture (or track) responsibility altogether. It would be impracticable for the state to identify goods produced under noncompliant conditions and subject only those goods to a tax at the point of sale. The most feasible way to make consumers pay for humane working conditions is to impose liability on lead firms in the first instance.

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 and 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 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 issues addressed in the next Part, namely, the mechanism of enforcement and the standard of liability.

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

138. 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 loss 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.").

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 facilitate agreements among retailers to abide by voluntary standards (which would be mandatory for their suppliers). Or we could impose new statutory duties for corporations. Although politically difficult to attain, this Article argues that on-point legislation paired with even a limited administrative remedy is the best and, perhaps, the necessary route to production liability. While 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 approach, this Part addresses 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 products liability, would be to make retailers liable to individual employees whose working conditions fail to meet a given standard. One might attempt to achieve this by reforming or expanding existing doctrines such as joint employer liability, vicarious liability, or the doctrine of nondelegable duties; or courts could adopt a more sweeping new theory of private liability along the lines of products liability. 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 likely will 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 in which lead firms invest. Individuals are most likely to sue for immediate, substantial injuries. 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 such improvements produce marginally superior health outcomes for all workers. Using safer chemicals may decrease cancer rates. But workers are unlikely to successfully sue for general lack of hygiene, poor ventilation, or the use of carcinogens in a workplace because it is difficult to prove causation of specific injuries and because many illnesses are too minor to justify litigation. Such conditions may go unaddressed because companies will primarily invest in preventing injuries that are likely to result in private suits while neglecting to protect against minor but pervasive health risks.

Finally, given existing legal frameworks, any direct right of action is likely to be far more accessible to domestic workers than overseas workers. The effect will 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 to this consideration depends on the precise normative theory that underpins our commitment to safe workplaces.

B. Private Rights of Action by Consumers

Lead firms may become indirectly liable for supplier working conditions where consumers are entitled to sue for fraud or misrepresentation.[139] 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.[140] 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 for the representation or creating a presumption of materiality and reliance. A quite different tack could enable consumers to successfully claim against lead firms for supplier working conditions under a theory that extends public nuisance law; lead firms would be alleged to be responsible for creating impermissible conditions. Such a theory would require some legislative action to establish that the conditions created by lead firms are properly characterized as illegal.[141]

Separate from the practical obstacles, there is something peculiar, in principle, about improving overseas working conditions by creating a private right of action for domestic consumers. Although this Article concludes 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 suggest 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 normally will be entitled only to rescission. Any further damages would be a windfall for just that privileged group whose interest in low prices competes with workers' interest in decent working conditions.

139. As discussed in Part I, some observers argue that there is an existing basis for such liability. *See supra* Part I.

140. *See, e.g.*, Backer, *supra* note 34, at 836.

141. *See generally* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011) (rejecting the plaintiff states' attempt to hold corporations responsible for global warming).

C. Private Regulation

Perhaps the easiest way to recognize production liability is through voluntary agreements among brands. Firms within an industry sometimes agree to abide by set standards and assume responsibility for contracting with suppliers on terms that ensure compliance. Some company alliances work with nongovernmental 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 the effect that improving supplier working conditions would have 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 an 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. However, there is little reason to expect that firms will give the interests of an economically weak group due weight given the ineffectiveness of regulatory threats over time and mass consumer indifference.[142] Nor can we have confidence that the groups that would attempt to secure and negotiate private regulatory agreements would appropriately represent the range of interests at stake; most obviously, we can expect the interests of domestic and international workers to diverge. The private regulations that firms come up with unilaterally or agree to under pressure may be better than nothing and can be encouraged as an intermediate step toward regulation. Alongside public regulation, private contract can be the basis for the kind of monitoring, feedback, and advocacy that must feed into any administrative enforcement scheme. But serious self-enforcement *standing alone* is a costly proposition that companies will not embrace any more than necessary.[143] Indeed, self-enforcement to date is only occasionally effective and is, more often, plagued by incomplete or inaccurate reporting.[144] Companies have been prepared to "partner" with industry watch groups but have not taken obvious steps to

142. *See* Debra Cohen 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) (stating that codes of conduct are intended to ward off more restrictive regulation). The enforcement of codes is limited. *Id.* at 409.

143. For example, Gap spent $10,000 annually on inspections at a single plant in El Salvador and estimated it would cost 4.5 percent of its annual total profits of $877 million in 2000 to replicate this model throughout its supply chain. Grieser, *supra* note 62, at 312.

144. Auditors' connections to the firms they audit make observers skeptical of their reporting. *See* Paul David Harpur, *New Governance and the Role of Public and Private Monitoring of Labor Conditions: Sweatshops and China Social Compliance for Textile and Apparel Industry*, 38 RUTGERS L. REC. 49, 58 (2011).

redress poor working conditions, such as making specific conditions regarding worker compensation or altering the way they pay suppliers.[145]

In a few notable cases, worker groups backed by considerable external expertise and resources have managed to implement rigorous compliance programs that have radically improved working conditions in industries that were previously plagued with the worst abuses.[146] But we can have no reasonable expectation that the resources that these movements have required will materialize in every industry or supply chain in which regulation would be appropriate.

Besides the direct costs of subjecting itself to a strict enforcement regime—the costs of both monitoring and compliance—a company contemplating participation in an "industry-wide" effort faces the probability that at least some firms will choose not to participate. Among the most high-profile industry accords has been the Accord on Fire and Building Safety in Bangladesh, adopted in the aftermath of a factory collapse in Bangladesh that killed more than 1000 workers.[147] Although most worker deaths related to workplace safety are more difficult to trace causally and not en masse, the stark horror of the 2013 factory collapse prompted particular outrage. NGOs pushed for action and the resulting Accord's inspection standards drew from the Bangladesh National Building Code,[148] but they were modified based on multiparty discussions facilitated by the International Labour Organization (ILO). Nevertheless, even in this salient case, numerous brands linked to the factory, including J. C. Penney, Wal-Mart, H&M, and The Children's Place, did not sign the accord.[149] Only twelve U.S. companies have signed thus far.[150] The organization that monitored most North American firms, the Alliance for Bangladesh Workplace Safety, has completed its five-year term.[151]

145. *See* Dana Raigrodski, *Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains*, 8 WM. & MARY BUS. L. REV. 71, 128–30 (2016).

146. *See generally* James J. Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, *in* TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHALLENGES 351 (Joanna Howe & Rosemary Owens eds., 2016).

147. *See* ACCORD ON FIRE & BUILDING SAFETY BANGL., http://bangladeshaccord.org [https://perma.cc/TH8M-WUXX] (last visited Apr. 10, 2019).

148. Clare O'Connor, *These Retailers Involved in Bangladesh Factory Disaster Have Yet to Compensate Victims*, FORBES (Apr. 26, 2014, 5:29 PM), https://www.forbes.com/sites/clareoconnor/2014/04/26/these-retailers-involved-in-bangladesh-factory-disaster-have-yet-to-compensate-victims/ [https://perma.cc/6HV3-W9FE].

149. *Id.*; Rhonda Smith, *Bangladeshi Labor Leader Stresses Concerns on Safety at Wal-Mart Shareholders' Meeting*, 27 Lab. Relations Wk. (BNA) 24 (June 12, 2013).

150. *See Accord Signatories*, ACCORD ON FIRE & BUILDING SAFETY BANGL., https://bangladeshaccord.org/signatories [https://perma.cc/DHS7-4QVK] (last visited Apr. 10, 2019).

151. ALLIANCE FOR BANGL. WORKER SAFETY, http://www.bangladeshworkersafety.org/ [https://perma.cc/K4WQ-VGTJ] (last visited Apr. 10, 2019).

Self-regulation 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.[152]

D. Administrative Enforcement: Regulatory Strict Liability

A simple public regulatory requirement that imposes an affirmative duty on companies 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. Dangerous working conditions do not represent a wrong to any single class, but 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 forbear a variety of activities that are against the public interest, they should be required to contract for goods on terms that are compatible with a just market for consumer goods. A statute that codifies production liability would have familial precedent in the Foreign Corrupt Practices Act of 1977, which similarly held corporations liable for activities that are in substantial part overseas.[153]

Assuming only civil liability is at stake, some administrative branch or agency should be assigned the right to hold corporations accountable by imposing fines for violations of the substantive conduct requirements. 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 substantial fines and because a statutory duty would allow supplementary means of enforcement that do not require government action.[154] A complete solution will involve joint use of public regulation and private litigation.[155]

1. Derivative Actions by Shareholders

Shareholders can bring derivative suits on behalf of corporations against directors for failure to exercise oversight where the directors knew, or should

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152. *Cf.* Mark T. Kawakami, *Pitfalls of Over-Legalization: When the Law Crowds Out and Spills Over*, 24 IND. J. GLOBAL LEGAL STUD. 147, 151–56 (2017) (arguing that affording legal status to voluntary codes will undermine intrinsic corporate motivation to abide by social norms); Raigrodski, *supra* note 145, at 111 (arguing that it may be in the business interests of lead firms to eliminate at least some of suppliers' most egregious conduct).

153. 15 U.S.C. §§ 78dd-1 to 78dd-2 (2012).

154. The proposal here is an inverse of what John C. P. Goldberg and Benjamin C. Zipursky describe in *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. 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. This Article proposes a regulatory system that can feed an ancillary system of private enforcement.

155. *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 365 (1984).

have known, of violations of law.[156] Such derivative suits usually fail because they require that plaintiffs plead demand futility with some precision; that is, they require that plaintiffs show the company's board of directors is conflicted out of the decision whether to sue.[157] Plaintiffs often try to show that directors were on notice of violations of law and chose not to take action.[158]

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 values bear 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 are 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

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 it might render unenforceable 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 lead firm's failure to effectively reign in supplier practices, the doctrine that

156. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (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 a 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, 204–13 (2008).

157. Brehm v. Eisner, 746 A.2d 244, 254–55 (Del. 2000) (holding that a plaintiff must allege with particularity facts sufficient to establish demand futility).

158. These are so-called *Caremark* claims. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996).

allows nonenforcement of agreements against public policy allows such inequity in the interest of vindicating the implicated legal rule. While suppliers cannot be expected 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 worldwide minimum standard of workplace safety. One possibility would be to incorporate local 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 exactly 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 based more in strict liability than in fault. 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.[159] 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 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.[160] 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 error rate that follows from opaque and highly manipulable judgments about whether a given firm's efforts were reasonable. Well-resourced firms can always muster evidence in favor of weak, fault-based conduct standards, and they will largely control evidence of their own conduct. By contrast, administrative liability that turns on identification of a noncompliant factory requires far less factual inquiry. Moreover, the question of liability will turn entirely on facts outside the firm whose liability is at issue; those facts can be evidenced without

159. *Cf.* Cynthia Estlund, *Corporate Self-Regulation and the Future of Workplace Governance*, 84 CHI.-KENT L. REV. 617, 625 (2009) (suggesting that firms' liability for wrongdoing be reduced where they have maintained an adequate system of self-policing and reporting).

160. *See* Michael E. Levine, *Regulatory Capture*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 267 (Peter Newman ed., 1998). *But see* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 337–39 (1974).

documentation from the lead firm. Much like employment agencies in the United States are assisted by unions and other worker organizations that report workplace violations, an agency charged with enforcing production liability may be assisted by NGOs that report workplace violations by suppliers. The agency would only need to verify noncompliance and to identify the lead firms supplied by the noncompliant site before it issued fines to those firms.

The literal distance between wrongdoer and the site of wrongdoing raises the thorny question of responsibility to which this Article has been addressed, but it also makes it harder for a lead firm to evade liability were a regime of legal liability to be enacted.

CONCLUSION

The lesson of products liability is that privity and fault must 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 system—albeit not one based in the common law of tort.

Of course, not everyone agrees that products liability was a success.[161] And we cannot be certain about how industries 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.[162] This seems unlikely, given how central brand recognition is to the garment industry and many other 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.

161. *See generally, e.g.*, Richard Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985) (noting that the viability of insurance depends on risk diversification, adverse selection, and moral hazard and that direct contracts help insurers manage those industry risks); Polinsky & Shavell, *supra* note 126.

162. *See generally* Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932 (1993).