WHO MOPS THE FLOORS AT THE FORTUNE 500? CORPORATE SELF-REGULATION AND THE LOW-WAGE WORKPLACE

by
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Rising inequality in the U.S. is reflected and largely created in the labor market, and in the huge and growing disparity in wages and working conditions between the top and the bottom. In particular, the meager and often illegal wages and working conditions in the low-wage labor market pose a threat not only to the well-being of the working poor but to the health of our democratic society. So what is to be done? Both labor law reform that enables workers to form unions and stronger public enforcement of labor standards are essential, but are unlikely to fill the enforcement gap. This Essay finds a partial solution to the problem of underenforcement in the fact that many low-wage workers supply labor—sometimes directly but often through one or more layers of contract—to large firms with prodigious internal regulatory resources and a large stake in their reputations as responsible corporate citizens. The law has already moved, and could productively be pushed further, in the direction of encouraging, shaping, and relying upon compliance structures within regulated entities themselves. Both law and society have also taken steps toward holding large firms responsible for the illegal conditions that prevail at the bottom of their supply chains. But more can and should be done to encourage the large and rich firms that are reaping the greatest profits from globalization to take responsibility for securing decent minimum wages and working conditions for the workers who supply them with essential labor inputs.

With all eyes on this year's gripping presidential campaign, it seems irresistible to look for a hook for this lecture in the election landscape. My best hook left the campaign months ago. John Edwards had made economic inequality the centerpiece of his campaign. Four years ago he called it "Two Americas," a phrase that led many to accuse him of sowing class conflict.[1] However, there is no real question that economic

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[1] See, e.g., ROBERT RECTOR & REA HEDERMAN, JR., TWO AMERICAS: ONE RICH, ONE POOR? UNDERSTANDING INCOME INEQUALITY IN THE UNITED STATES (Heritage Foundation August 24, 2004), available at http://www.heritage.org/Research/Taxes/bg1791.cfm.

inequality is growing in the United States. Between 1979–2000, the family income of the poorest 20% of Americans rose less than 1% in real dollars, while that of the richest 20% increased by 49%; for the top 1%, family income increased by 111%.[2] The rich have gotten much richer, while the poor and near poor are working harder to stay in the same place.

Economic inequality is reflected, and largely created, in the labor market, and in the huge disparity in wages and working conditions between the top and the bottom. For example, from 1979–2005, the real hourly wage declined by 2.3% for workers in the bottom 10% of the labor market, while for workers in the top 5%, the real hourly wage increased by 33%.[3] Gains have been particularly dramatic at the very top of the income distribution—the top 1%, or even the top 0.1%.[4] In part, these income disparities reflect differences between the top and the bottom of the wage scale within companies. During that same period of 1979 to 2005, the ratio between CEO pay and the pay of the average employee in the same company grew from 24 to 1 to 262 to 1.[5] That dramatic and growing disparity is especially striking once we consider, as we shortly will, the extent to which firms during this same period have contracted out much of their lowest-wage work to outside firms—and often to smaller firms with little reputation or capital that exist essentially to fill the labor needs of larger companies. The disparity between CEO pay and average employee pay has skyrocketed even though much of the bottom of the wage scale within large companies has effectively been lopped off the payrolls.

That fact reminds us that growing wage disparities between the poorest and the richest wage earners reflect not only disparities within companies but also disparities between big, rich companies and smaller, less profitable companies. At the top—within many Fortune 500 companies—core employees enjoy generous pay and benefits, sophisticated human relations policies and grievance procedures, family-friendly policies, and amenities far beyond what law demands or ever could demand.[6] Top firms compete to be "employers of choice" for workers with scarce skills. We need only think of the Google-plex, where apparently champagne flows from the drinking fountains.[7]

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[2] LAWRENCE MISHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, THE STATE OF WORKING AMERICA 2006/2007, 64 fig.10 (2007).

[3] *Id.* at 121 tbl.3.4.

[4] *Id.* at 202.

[5] *Id.* at 203 fig.3Z.

[6] See, for example, FORTUNE Magazine's listing of the "100 Best Companies to Work For," complete with descriptions of each company's virtues and perks. http://money.cnn.com/magazines/fortune/bestcompanies/2008/.

[7] Figuratively speaking, that is. *See* Steve Lohr, *At Google, Cube Culture Has New Rules*, N.Y. TIMES, Dec. 5, 2005, at C8, *available at* http://www.nytimes.com /2005/12/05/technology/05google.html?_r=1&oref=slogin.

At the bottom of the labor market—at the bottom of large company hierarchies and at the bottom of the hierarchy among companies—are the working poor and near-poor: Janitors and housekeepers, hotel and restaurant workers, garment manufacturing workers, food processing workers, retail sales clerks, call center operators, and hospital orderlies. Pay scales are too low—even when they are lawful—to lift these workers' families out of poverty. But in many of these low-wage jobs, labor standards laws are broken daily.[8] Wage and overtime violations, and in many sectors, health and safety violations, are rampant. Some low-wage work is virtually unregulated—paid in cash, often below the minimum wage, without the required premium for overtime, and without state-mandated employment taxes.[9] But even among employers that are above-board, one finds a variety of illegal cost-cutting practices, like demanding unpaid off-the-clock work, shaving time off time sheets, and misclassifying employees as independent contractors to avoid employment laws.[10] Among advanced economies of the world, the United States has an unusually large low-wage sector, and within that, an unusually large informal economy in which labor standards are essentially unregulated.[11]

Just note for now a fact to which I will return: Many of those low-wage workers supply labor to big rich Fortune 500-type firms. Some do so directly, like the sales associates at Wal-Mart, Target, and Home Depot, or chicken processors at Tyson Foods (all Fortune 500 firms). Others do so through contractors, like the burger flippers at a McDonald's franchise or the folks who mop the floors and take out the trash at Fortune 500 offices.[12] Some of these contractors are themselves rather large companies. For example, Aramark, a Fortune 500 company, supplies food services to many large firms; Aramark's low-wage food service workers staff the cafeteria at Goldman Sachs, for example.[13] One way or another, though, the chain of contracts often bottoms out with small

[8] David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 60 (2005) ("[L]ow-wage workers in particular [are] the group most vulnerable to violations of core labor standards . . . .").

[9] *See* ANNETTE BERNHARDT, SIOBHÁN MCGRATH & JAMES DEFILIPPIS, BRENNAN CENTER FOR JUSTICE, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN THE GLOBAL CITY 59–60 (2007), *available at* http://brennan.3cdn.net/d6a52a30063ab2d639_9tm6bgaq4.pdf [hereinafter UNREGULATED WORK].

[10] STEVEN GREENHOUSE, THE BIG SQUEEZE: TOUGH TIMES FOR THE AMERICAN WORKER, 10–12 (2008) (describing such employer practices as forcing off the clock work, manipulating time sheets, classifying service employees as independent contractors, and refusing breaks and lunches).

[11] *See* Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 258–59 (1995).

[12] *See infra* pp. 686–87.

[13] Sewell Chan, *Food-Service Workers Rally to Press Demands With Operator of Cafeterias*, N.Y. TIMES, Mar. 6, 2008, at B4, *available at* http://www.nytimes.com /2008/03/06/nyregion/06union.html?_r=1&pagewanted=print&oref=slogin.

contractors with no reputational or other capital at stake.[14] So the tale of "Two Americas" ends up looking a bit like *Upstairs, Downstairs*, the British television drama from the 1970s that depicted the lives of servants and their upstairs masters in a large townhouse in early twentieth century London.[15] We will return to the interesting fact that many among the working poor are working for the rich who are getting richer.

First, however, let us take up a different kind of question: What is at stake for the rest of us—those of us who sit comfortably several rungs up the economic ladder—in the low pay and poor labor conditions that prevail in these low-wage workplaces? I believe that the prevalence of low-wage work creates a serious problem not only for low-wage workers themselves but for all of us, and not only for the health of the economy but for the health of our polity as well. What happens in the workplace is as important to the vitality of democratic society as what happens in the voting booth.

The workplace is not only where people support themselves and their families economically. It is also where they participate in cooperative social activity and interact with others outside their families and friends.[16] They learn the civic skills of cooperation, compromise, and persuasion that carry over to the political realm. They talk about politics and public issues more with co-workers than with anyone else other than their spouses.[17] At work, people form social capital—human connections and connectedness that enable people and societies to get things done together. Bonds among co-workers help promote empathy and tolerance—the feeling of "being in this together"—that shape political preferences, facilitate compromise, and enrich public discourse. The importance of workplace bonds is magnified by the fact that, of all places where adults interact with each other, the workplace is likely to be most demographically diverse.[18] So lots of good things happen at work. But of course, there can be too much of a good thing. Decent work is also about having time and energy outside of work for civic and domestic life.

If it is true that the health of our democracy depends partly on how people make their living and on the social and economic conditions that prevail at work, then we should be troubled about the large segment of

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[14] UNREGULATED WORK, *supra* note 9, at 34 (discussing how complex contracting chains derail enforcement efforts because "the big fish, the ones really improving their profit margins by hiring these workers, are untouchable because they are not hiring directly.").

[15] *Upstairs, Downstairs* (London Weekly Television 1971–1975).

[16] *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY, 7 (2003) [hereinafter WORKING TOGETHER].

[17] *See* Robert Huckfeldt, Paul A. Beck, Russell J. Dalton & Jeffrey Levine, *Political Environments, Cohesive Social Groups, and the Communication of Public Opinion*, 39 AM. J. POL. SCI. 1025, 1031–32 (1995); Bruce C. Straits, *Bringing Strong Ties Back In: Interpersonal Gateways to Political Information and Influence*, 55 PUB. OP. Q. 432, 446–47 (1991).

[18] WORKING TOGETHER, *supra* note 16, at 9–10.

society that works in low-wage jobs, often under conditions that fall below societally-established minimum standards of decent work. And we should be troubled, not only for the sake of sheer human decency, but for the sake of democracy. First, low wages necessitate long hours or second jobs to make ends meet, leaving little time for domestic or civic life. One might guess, for example, that those individuals who have to work two jobs to make ends meet are not well-represented at the big political rallies and caucuses that we have seen during this campaign season. Second, the intense supervision and relentless pace, often without breaks, that is characteristic of much low-wage work, leave workers little time and space for the informal interaction among co-workers that most of us take for granted. Third, low-wage employees typically have no individual voice or bargaining power in shaping working conditions, and find that any whisper of collective protest is harshly suppressed. Finally, low-wage workplaces are often among the least integrated workplaces. Discrimination and segregation flourish among workers who do not have the wherewithal to bring a lawsuit. All in all, low-wage jobs, apart from failing to afford workers a decent livelihood, are more likely to corrode than to cultivate civic skills and social capital, and more likely to foster a sense of alienation and betrayal than a sense of being in this together.

In arguing that the vitality of democratic self-governance rests on economic foundations—on how and under what conditions people make a living—I am tapping into an old and deeply rooted theme in American history. A very condensed recounting of some of that history will help both to reveal the deep roots of concerns about the relationship between democracy and work (and especially work at the bottom of the economic ladder), as well as the roots of our existing legal approach to the regulation of work and of low-wage work in particular.

For the "civic republicans" of the founding generation, sound self-governance required citizens who were politically independent and committed to the common good. And political independence and civic virtue rested on a foundation of economic independence.[19] The "yeoman farmer" was thus the ideal citizen for the Jeffersonian republicans. Those republican beliefs helped to justify limiting the franchise in the nation's early years to property owners—specifically, land-owning male heads-of-household—who were not dependent on others for their livelihood.[20] By the 1830s, however, all of the states had eliminated property qualifications for voting in favor of "universal" white male suffrage.[21] In the meantime, as both skilled artisans and household servants began to be pulled into the emerging factory system, the ranks of property-less

[19] *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 767 (1985) (on the republican idea of "free labor," its schizophrenic evolution during the nineteenth century, and its legal significance).

[20] *See* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 338 (1989).

[21] *Id.* at 337.

wage earners were growing. As the fate of the young republic increasingly rested in the hands of citizens who were dependent on others for their livelihood, a new answer was urgently needed to the question of what defined the economic foundation of citizenship and self-governance.

By the mid-nineteenth century, many Americans had found an answer in the concept of "free labor."[22] At a minimum, that meant self-ownership and freedom of contract. This conception of free labor, with its simple moral clarity, was both a rallying cry against slavery and a defense of the wage labor system of the North. But for beleaguered artisans and skilled workers who were being sucked into the factory system, "free labor" required more than freedom from chattel slavery. If all you own is yourself and your labor, they said, you have no choice but to sell your labor. Without ownership of the material means of your own livelihood—land to farm, or a shop and tools, for example—you are a "wage slave," beholden to the boss and hardly fit for citizenship.[23] Some, including Lincoln, put their faith in the classic American solution of economic or geographic mobility: Those who were today dependent servants, armed with self-ownership and freedom of contract, could save up and become independent masters with their own shop and tools and servants of their own.[24] Or if not, they could head west and stake a claim to their own land and independent livelihood on the frontier.[25] This hope was able to sustain the coalition of Northern industrialists and workers and abolitionists of the Republicans in their battle against the slave labor system of the South. But after the Civil War, with slavery vanquished and the factory system ascendant, it became increasingly clear that many citizens were destined to remain dependent and property-less employees, subject to the control or whim of the factory bosses, for their entire productive lives. How could they fulfill the obligations of citizenship from this state of dependency and, too often, economic deprivation?

Skilled workers did not quickly give up their fight for economic autonomy and control over their work.[26] But by the late nineteenth century, as the wage labor system became increasingly entrenched, workers and their organizations were pursuing a two-pronged strategy to secure a decent life and a kind of freedom within the wage relationship. First, by the formation of trade unions, skilled workers sought to aggregate their bargaining strength, to exercise some collective power

[22] The "free labor" idea was embraced—but given different meanings—by groups ranging from Antebellum Northerners, politicians and businessmen to labor leaders. *See* Forbath, *supra* note 19, at 773–79.

[23] *Id.* at 805–06.

[24] *Id.* at 776 ("Lincoln insisted, 'the man who labored for another last year, this year labors for himself, and next year he will have others to labor for him.'").

[25] *Id.* at 776 n.17 (noting the concern that if slaveholders were permitted in the western territories, they "would undermine the Northern workingman's opportunities to go West and rise out of the wage-earning class by owning a small shop or farm").

[26] *Id.* at 803–07, 812.

within the employment relationship, and to negotiate for better terms and conditions.[27] Second, with their growing electoral power, they sought legislation regulating employment contracts, and putting a legal floor below which the market could not press wages and other terms and conditions of employment. Hence the proliferation of maximum hour laws and other minimum labor standards.[28] Both of these strategies were expressly promoted not only in economic terms but also in terms of prerequisites for full citizenship. How could a worker fulfill the obligations of citizenship (much less have a decent domestic life) if forced by sheer necessity to work twelve-hour days and six-day weeks? How could a worker be fit for democratic citizenship if reduced during these long hours to a mere machine performing repetitive tasks under the watchful eye of the foreman?

As the new century turned, workers in many trades turned increasingly to labor unions and to collective economic pressure, while many state legislatures and even Congress began to embrace parts of labor's basic program, and enacted a stream of protective labor standards and union-friendly labor relations laws. But these laws and labor organizations confronted a judiciary, and especially a federal judiciary, that saw both government regulation and labor's collective pressure tactics as affronts to the individual liberty of contract of both employers and employees.[29] During this period, courts enjoined hundreds of labor strikes, pickets, and boycotts, and struck down hundreds of state and federal statutes setting maximum hours or other terms of labor contracts.[30] They did so partly, and ironically, in the name of employees' own liberty of contract.[31] Thus did the formalistic residue of the ideal of "free labor" that had animated the fight against slavery become an ideological and constitutional battering ram against the efforts of workers and organized labor to realize their own vision of labor freedom.[32]

Finally, in the New Deal, the Supreme Court led a judicial retreat, and Congress enacted a version of labor's two-prong strategy: industrial democracy through unionization and collective bargaining, and a few minimum labor standards. In 1935, the National Labor Relations Act gave workers the freedom to speak up, make common cause, and form organizations to bargain collectively with employers.[33] In 1938, the Fair Labor Standards Act established a nationwide floor on wages, an overtime premium for excess work hours, and a ban on most child

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[27] *Id.* at 812.

[28] *Id.* at 809.

[29] *See* Forbath, *supra* note 19, at 795–800.

[30] *See, e.g.*, William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1237–53 (1989).

[31] Lochner v. New York, 198 U.S. 45, 64 (1905).

[32] Forbath, *supra* note 19, at 794–800.

[33] *E.g.*, WORKING TOGETHER, *supra* note 16, at 135–36.

labor.[34] Those twin commitments to industrial democracy through collective bargaining and to decent wages and working conditions set the template for modern labor and employment laws. They became the nation's new answer to the recurring question of what is the economic foundation for democratic self-governance.

Since then, the fates of the two branches of the New Deal settlement of "the labor question" have diverged. Labor law's system of industrial democracy has faltered badly.[35] Union membership has been in decline since the 1950s, and currently stands at less than 8% of the private sector.[36] Labor law reform is needed for unionization to be a real option, especially for workers at the bottom of the labor market. But that is another topic altogether. For now, we cannot say that workplace democracy through collective bargaining establishes an economic foundation for democratic self-governance, as its proponents meant it to do. In the meantime, however, employment mandates have proliferated. Minimum standards now reach a much greater share of the labor force, and a much wider range of terms and conditions of employment. We have laws regulating wages and hours, health and safety, pensions and benefits, family and medical leave, etc., and we have laws protecting employee rights against discrimination and scattered rights of expression and privacy.[37]

Perhaps that collection of legal mandates is our generation's answer to the question of how our economic and work lives support our lives as citizens. It is a far cry from the economic independence of the yeoman farmers and artisans of the early Republic; and it affords barely a token role for democracy within the workplace itself. But what these laws do amount to is a societal guarantee of decent work: decent wages and working conditions and a collection of employee rights against some forms of employer abuse.

Are the rights and labor standards that make up employment law an adequate economic foundation for political democracy? I think they are not. First, our minimum labor standards are too low; they do not ensure that a full time worker can secure a decent living even for herself, much less her dependents. Some states and cities (including Portland, Ore.) have a higher "living wage" that aspires to that standard.[38] But on the

[34] 29 U.S.C. §§ 201–209 (2000).

[35] For my own spin on that tale, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

[36] 7.5% of the private sector workforce is represented by a union. Press Release, U.S. Bureau of Labor Statistics, Union Members in 2007, USDL 08-0092 (Jan. 25, 2008), *available at* http://www.bls.gov/news.release/pdf/union2.pdf.

[37] On the rise of regulatory statutes and individual rights in the workplace, see Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 327–333 (2005).

[38] Living wage ordinances have been enacted in St. Louis, Boston, Los Angeles, Tucson, San Jose, Portland, Oregon, Detroit, New York, and Oakland, among other

current federal minimum wage of $5.85 per hour, a single person working year-round for 40 hours per week will make just $12,000. That is a bit more than the federal poverty level for a single person.[39] But it is unclear how anyone could actually house, clothe, and feed herself, much less support any dependents, on that amount.

The other problem is that, even if minimum labor standards were adequate in principle, they are widely underenforced, even ignored, at the bottom of the labor market. In large part that is because employees in our society are largely responsible for enforcing their own legal rights at work, either by suing or by bringing complaints to public enforcement agencies. Without either collective representation or individual bargaining power of the sort that some skilled workers have, many employees are unable to do that.

That brings us to the next question: What is to be done? To even begin to address that question, we must look more closely at the source of the problem. Downward pressure on wages and labor standards is partly due to increasingly competitive product and capital markets (and partly due, as we will see, to the choices managers make in response to market forces). Deregulation is a big factor in some sectors, like transportation, telecommunications, and utilities.[40] Globalization has contributed in a variety of ways to downward pressure on wages for unskilled and semi-skilled work. Transnational mobility of goods and some services means that many domestic producers face more competition from low-wage regions. Transnational mobility of capital allows investors to seek profits globally, which pressures firms to keep profit margins high. A publicly-traded corporation that accepts lower profits and pays relatively generous wages and benefits may become a prime takeover target.[41] Transnational mobility of labor is also a part of the picture. Growing migration of poor workers to richer countries—a worldwide phenomenon—expands the supply of the least skilled workers in those richer countries like the United States, and puts pressure on wages and labor conditions at the bottom.[42] Together, these economic

cities. Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, n.168 (2006).

[39] The 2007 Federal Poverty Guideline for a single family household is $10,210. Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 15, 3147–48 (Jan. 24, 2007).

[40] *See* Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 618–20 (2007).

[41] *See* Annette Bernhardt, Laura Dresser & Erin Hatton, *The Coffee Pot Wars: Unions and Firm Restructuring in the Hotel Industry, in* LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE 33, 38–40 (Eileen Appelbaum, Annette Bernhardt & Richard J. Murnane eds., 2003) (noting the increased external pressure for short-term performance that results from going public, and that those performance pressures encourage firms to engage in cost cutting and labor restructuring to remain competitive).

[42] Eileen Appelbaum, Annette Bernhardt & Richard J. Murnane, *Low Wage America: An Overview, in* LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING

dynamics create both incentives and opportunities to reduce labor costs and violate labor standards; they push employers to compete by reducing wages, and they make it easier for employers to do so by giving them greater access to cheaper labor both domestically and abroad.

In the United States, the forces pushing back in the other direction are simply too weak to resist the downward pressure on wages and labor standards. Unions historically have been one such countervailing force. But the same economic dynamics that push down labor standards have contributed to the decline of unions and to employers' determination to resist new union organizing.[43] Many economists, including Federal Reserve Chairman Ben Bernanke, agree that the decline of unions has contributed to growing inequality and the inability of workers to secure a bigger share of recent productivity gains.[44] That leaves government regulation. But the regulatory response to downward pressure on labor standards has fallen far short of what's required to keep the legal floor intact. For employers at the bottom of the labor market, enforcement action is very unlikely, and its consequences are either manageable or escapable. Many employers, especially small employers, may rationally decide to ignore or skirt legal constraints.[45] That puts further competitive pressure on law-abiding employers to follow suit. The result is a widespread ethos of lawbreaking under the perceived pressure of "economic necessity" at the bottom of the labor market.

One obvious answer to the question of what is to be done is renewed commitment to public enforcement of labor standards and employee rights. Given the economic dynamics mentioned earlier, that is likely to have some consequences we would prefer to avoid. Firms will eliminate some jobs or send them overseas in search of lower labor costs and higher profits. Prices for some goods and services that are produced here will presumably go up. But those consequences may be overstated—or in any case, bearable. Many manufacturing jobs have left already, and some of those that remain are likely to follow. But some manufacturing is best done in proximity to customers. And many service sector jobs are not readily movable, including many jobs in hotels and restaurants, hospitals and health care, building maintenance, transportation, and construction.

OPPORTUNITY IN THE WORKPLACE 1, 13 (Eileen Appelbaum, Annette Bernhardt & Richard J. Murnane eds., 2003); AFL-CIO, IMMIGRANT WORKERS AT RISK: THE URGENT NEED FOR IMPROVED WORKPLACE SAFETY AND HEALTH POLICIES AND PROGRAMS 8 (2005), *available at* http://www.aflcio.org/aboutus/laborday/upload/immigrant_risk.pdf (noting the likelihood of immigrant workers to work in the unregulated informal economy).

[43] Wachter, *supra* note 40, at 585–88.

[44] Ben S. Bernanke, Chairman, Fed. Reserve Bd., Speech Before the Greater Omaha Chamber of Commerce: The Level and Distribution of Economic Well-Being (Feb. 6, 2007) *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20070206a.htm.

[45] *See* David Weil, *Regulating Noncompliance to Labor Standards: New Tools for an Old Problem*, 45 CHALLENGE 47, 58 (2002).

As for increased prices, consumer prices ought to reflect the full, lawful cost of the labor, and better-paid workers will be better able to afford those prices.

But we should bear in mind that cutting jobs and raising prices are not the only possible employer responses to enforcement of decent minimum wages and working conditions. Employers' labor practices reflect managerial choices, not just inexorable market forces of supply and demand and competition. Some employers, even in low-wage sectors, compete successfully by improving productivity instead of minimizing labor costs. They reduce their cost-per-unit, or improve quality of goods or services, by cultivating employees' skills, experience, loyalty, and cooperation, and by reducing costly turnover.[46] They may make those choices more readily when tight labor markets or labor agreements constrain their ability to reduce wages or increase the pace of work. But real enforcement of decent labor standards should similarly induce more employers to take that path.

A serious commitment to enforcement of decent labor standards may still entail some tradeoffs for society—some lost jobs, some higher prices. But the place to consider those tradeoffs is in setting the minimum standards themselves. Our society needs to determine what are the just and decent rewards of hard work, given the world we live in. Once having established those decent minimum standards, it is self-defeating and corrosive to fail to enforce them and to let lawbreakers undercut law-abiding employers.

So more public enforcement is necessary. But the fact is that there are never going to be enough inspectors for the government to do it alone. Private rights of action by employees themselves, with the help of lawyers and advocacy organizations, could and do help narrow the enforcement gap to some degree.[47] But litigation, especially in the form of class actions and other collective actions, is bound to be rare; in the case of small, marginal, "fly-by-night" employers, litigation is even less of a threat than is government enforcement. The challenge for policymakers and advocates in this area is to figure out how to leverage limited regulatory resources, public and private, into a viable system for improving compliance with labor standards and employee rights in the workplaces and jobs in which they are most degraded and threatened. That challenge turns out to be emblematic of challenges faced by modern regulation generally.

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[46] George A. Erickcek, Susan N. Houseman & Arne L. Kalleberg, *The Effects of Temporary Services and Contracting Out on Low-Skilled Workers: Evidence from Auto Suppliers, Hospitals, and Public Schools*, *in* LOW-WAGE AMERICA: HOW EMPLOYERS ARE RESHAPING OPPORTUNITY IN THE WORKPLACE 368, 375 (Eileen Appelbaum, Annette Bernhardt & Richard J. Murnane eds., 2003) (describing a 'high-road' employer who has historically paid above-market compensation, believing it can then attract the best workers, increase quality, and reduce turnovers).

[47] Estlund, *supra* note 37, at 347.

The problem of securing corporate compliance with public norms through traditional forms of regulation is not limited to the low-wage workplace or to employment law, and it is not limited to the United States. There is a widespread conviction that traditional command-and-control regulation is losing its grip in our technologically supercharged global economy, and cannot keep up with the increasingly fragmented, fluid, and footloose organizations and networks through which goods and services are produced and distributed.[48] Yet there is also a recognition that those organizations and networks themselves have prodigious internal regulatory resources—in the aggregate, far more than governments have.[49] Many scholars and policymakers have concluded that law can effectively regulate complex organizations in modern society only by shaping those organizations' own processes of self-regulation and inducing organizations to internalize public values. Hence the turn to what is sometimes called the regulation of self-regulation.[50]

In general, law promotes self-regulation not so much by mandating it as by rewarding it or proposing a *quid pro quo* to firms: If the firm maintains what the law deems to be effective self-regulatory systems, the legal system will reward it with a less adversarial or less punitive regime. Consider three quick examples.[51] First, under the federal criminal law that governs corporations, organizations with effective compliance programs can get both a reduced sentence and some leniency at the charging phase if criminal wrongdoing nonetheless occurs inside the organization. Second, under federal antidiscrimination law, if an employer maintains and implements policies and complaint processes that are reasonably calculated to prevent and remedy discrimination and harassment, the employer can avoid punitive damages for some discrimination that nonetheless occurs, and can avoid liability for some harassment claims altogether. Third, under the Occupational Safety and Health Act (OSHA),[52] a quintessential command-and-control statute, firms can qualify for a less adversarial enforcement track, and for public

[48] *See* STEPHEN G. BREYER, REGULATION AND ITS REFORM 131–55 (1982); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 278–79 (1998).

[49] *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 54–57 (1992).

[50] The regulation of self-regulation is related to a larger theory of "reflexive law," which works by supporting self-regulation and self-governance within institutions. For an overview of the literature on reflexive law and the shift from regulation and adjudication to governance, with a particular focus on the law of the workplace, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

[51] These examples are briefly reviewed in Estlund, *supra* note 37, at 342, 336–38, 383–85.

[52] 29 U.S.C. §§ 651–678 (2000).

recognition as a leader in the field, by maintaining internal health and safety programs that meet legally prescribed standards.

In each case, firms are induced by the prospect of official carrots and sticks, some of them tangible and others quite intangible, to take on-board the project of ensuring their own compliance with societal norms. This quasi-contractual approach has encouraged firms to adopt internal compliance structures with the formal elements the law demands. The extent of corporate resources that go into compliance programs at major companies is impressive, and it is a major part of how law can effectively regulate complex organizations in modern society.

The skeptical reader has already perceived one big problem: A system that encourages self-regulation, and rewards it with lower penalties and less scrutiny, is vulnerable to cheating. It risks putting thinly disguised foxes in charge of the chicken coops—or maybe in charge of the chicken processing plants. Consider Tyson Foods, Inc., which touts its Team Member Bill of Rights, including the right to a safe workplace,[53] but whose employees suffer high rates of injury on its speedy poultry processing lines.[54] Or consider Wal-Mart, Inc., whose proclaimed commitment to become "a corporate leader in employment practices"[55] might be viewed skeptically in light of the scores of legal actions charging Wal-Mart with demands for off-the-clock work and overtime violations, use of child labor and undocumented workers, illegal anti-union activity, and discrimination against women and older and disabled workers.[56] If public agencies rely heavily on corporate self-regulation to secure compliance, how do they avoid being hoodwinked by cosmetic compliance?

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[53] Tyson Foods, Inc. Team Members' Bill of Rights (March, 2005), *available at* http://www.tyson.com/Corporate/AboutTyson/CompanyInformation/TeamMemberBillofRights0305.pdf.

[54] *E.g.*, Jeffrey Klamut, *The Invisible Fence: De Facto Exclusion of Undocumented Workers from State Workers' Compensation Systems*, 16 KAN. J.L. & PUB. POL'Y 174, 203 ("The meat and poultry industry is also notorious for dangerous working conditions brought about by line speed, close quarters cutting, heavy lifting, sullied working conditions, long hours, and inadequate training and equipment."); United Food and Commercial Workers Fact Sheets and Backgrounder, Injury and Injustice—America's Poultry Industry, http://www.ufcw.org/press_room/fact_sheets_and_backgrounder/poultryindustry_.cfm.

[55] Press Release, Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices (June 4, 2004), http://walmartstores.com/FactsNews/NewsRoom/4645.aspx.

[56] On wage and hour litigation against Wal-Mart, see Steven Greenhouse, *In-House Audit Says Wal-Mart Violated Labor Laws*, N.Y. TIMES, Jan. 13, 2004, at A16; on discrimination litigation, see Steven Greenhouse, *Court Approves Class Action Suit Against Wal-Mart*, N.Y. TIMES, Feb. 7, 2007, at C1. *See generally* HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART'S VIOLATION OF US WORKERS' RIGHT TO FREEDOM OF ASSOCIATION (2007), *available at* http://hrw.org/reports/2007/us0507/; Wal-Mart Litigation Project, http://www.wal-martlitigation.com (last visited May 21, 2008).

My effort to work this out in the context of labor and employment law is the topic of a book-in-progress, but I will summarize the argument briefly here.[57] An effective system of regulated self-regulation depends on building safeguards against cosmetic compliance into self-regulatory systems—that is, into the corporate compliance regimes themselves. The single most important safeguard is effective participation by stakeholders, those for whose benefit the relevant laws or social norms were chiefly enacted. In the case of labor and employment laws, that obviously means employee participation. So when the law holds out regulatory concessions—a less adversarial enforcement track, leniency in charging, immunity from punitive damages, or the like—to firms that maintain effective internal compliance systems, one of the elements of efficacy they should demand is effective employee participation.

But what is effective employee participation? It is not enough to create an employee "hotline" or to encourage employees in a company handbook to report violations. Employees face at least two major hurdles to their effective participation in monitoring compliance with labor standards—at least when compliance entails costs. First, given the "public goods" nature of most forms of compliance, employees face familiar "collective action" and "free rider" problems. Second, given the at-will status of most employees and their dependence in many cases on the supervisors and managers who are engaging in misconduct, employees face a threat or fear of reprisals. For employees to participate effectively in self-regulatory systems, and to overcome both the collective action problem and the fear of reprisals, they need some form of independent collective representation. A union can supply representation that is both collective and independent of the employer. Absent a union, however, employees may need one institution to supply collective representation and to pool the knowledge and pro-compliance impulses of employees, and another to secure independence from the employer and protection against reprisals. One possibility, putting aside some complications created by labor laws, is to establish internal employee committees and to link them up with outside monitors who are scrupulously independent of the employer. The use of outside monitors or auditors is a familiar component of self-regulatory systems across a range of areas.[58]

Stakeholder representation is not the only prerequisite for effective self-regulation. A growing body of research also supports the importance of maintaining a significant background threat of external enforcement

[57] This argument was first sketched in Estlund, *supra* note 37.

[58] Environmental audits sanctioned by the EPA are one example of corporate regulated self-regulation that frequently includes the use of consultants or auditors from outside the corporation. For a detailed discussion on environmental audits as self-regulation see Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q. 663 (1996).

to deter and punish those who defect from the self-regulatory regime.[59] But stakeholder representation and independent monitoring are the biggest missing internal components of most existing systems of corporate compliance. With these and other safeguards against cosmetic compliance, a system of well-regulated self-regulation in which employees have an independent voice can better advance public goals and values than traditional command and control regulation. Bearing in mind the quasi-contractual structure of existing ventures in regulated self-regulation, my basic proposal is that, in the context of employment law, any regulatory or remedial concessions that are held out to responsible self-regulating employers should be conditioned on a self-regulatory system with the necessary built-in safeguards, including employee representation. That is part of how we can get large, brand-conscious firms like Wal-Mart and Tyson Foods to live up to their public commitments to employee welfare and social responsibility, even for their lowest-paid workers.

But what about the small marginal firms at the bottom of the labor market, with no reputational capital, or little capital of any kind, where employee rights and labor standards are most abused? Far from investing in corporate compliance or self-regulation, many of those firms operate as virtual outlaws, beyond the sight and reach of regulators. Is this idea of regulated self-regulation destined to leave behind that large segment of the low-wage workforce?

At worst, even if self-regulation does not reach these small and marginal employers at the bottom of the labor market, one might suppose that a system of effective self-regulation in larger firms would free up existing public regulatory resources to target those smaller firms. But much more is possible to the extent that large and competent firms can be made accountable for the labor practices of contractors that supply their essential labor needs. Indeed, it may be necessary to extend accountability down the ladder in that way, lest the law's demand for more effective internal compliance structures, and especially for employee participation, become an additional impetus for firms to offload their responsibilities and contract out even more of their lower-wage employees. Of course, any system that actually enforces minimum wages and labor standards domestically risks driving some jobs to lower-wage or less regulated jurisdictions, if the work can be done there, but that often-overstated risk is one that must be taken, as already discussed,

[59] *E.g.*, Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 458 (2007) ("[T]he background threat of legal sanctions has been identified as a central element of the successful self-regulatory schemes. Similarly, legal sanctions tend to strengthen the hand of those inside the corporation who promote compliance and to reinforce compliance norms in the web as a whole. Background legal threats, therefore, can supplement and reinforce the regulatory web.").

in the interest of maintaining the rule of law and the viability and morale of law-abiding competitors.

Recall the observation above that many low-wage workers supply labor, through one or more layers of contract, to large, visible, organizationally-complex firms. Those firms hold themselves out as responsible corporate citizens and have elaborate corporate compliance systems. We may call them "super-employers," while postponing for now the question of whether existing law deems them to be the employers of their contractors' employees. Take, for example, building maintenance services, once mostly done in-house by firms' own employees, but now mostly contracted out, often to smaller and less visible contractors, and sometimes to large maintenance firms that subcontract to smaller contractors. Either way, some of these contractors operate as virtual outlaws, demanding long hours at sub-minimum wages and no overtime compensation, and often ignoring or underpaying employment taxes (which costs governments millions of dollars and leaves employees unprotected by worker's compensation, unemployment compensation, and social security). As result, these contractors' labor costs are up to 40% less than those of legitimate contractors, whom they can easily outbid.[60] If they are caught or sued, they may simply disappear and pop up under another name. A similar story can be told in garment manufacturing and other low-wage sectors.

Let us step back and briefly examine the phenomenon of "contracting out" work to see how it contributes to the erosion of labor standards. The basic theory of the firm has it that a firm's boundaries are defined by a series of decisions about whether to "make or buy"—to produce needed goods or services in-house through the firm's own employees or rather to purchase those goods or services from another firm or entity.[61] Firms in recent decades have turned increasingly from "making" to "buying," and have made greater use of outside contractors to supply needed goods and especially services.[62] The trend toward contracting out is particularly pronounced for discrete activities that are labor intensive and that require little capital or specialized skill. Building cleaning and maintenance is the quintessential example of such an activity.[63]

There are many reasons why firms might choose to contract out certain functions; economies of scale or specialized expertise might enable outside contractors to perform services better or more cheaply. The primary reason firms cite for contracting out labor-intensive services

[60] *See* Steven Greenhouse, *Illegally in the U.S., and Never a Day Off at Wal-Mart*, N.Y. TIMES, Nov. 5, 2003, at A1.

[61] R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388, 393–94 (1937).

[62] *E.g.*, KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67 (2004).

[63] UNREGULATED WORK, *supra* note 9, at 29 ("the entire workings of an industry have been restructured . . . .").

or processes such as maintenance, however, is the cost savings that result.[64] Those cost savings come in large part from cutting workers off from the higher wages and benefits that typically prevail within the user employer's own workforce, even at the bottom of the wage scale. But why would one firm in the same geographic labor market be obliged to pay higher wages to its own employees than an outside contractor can get away with paying?

The answer to this puzzle lies largely in differences between external and internal labor markets. The user firm may maintain relatively generous wages and employee benefits for its own valued employees, and may be unable or unwilling to pay as little to its own least skilled employees as the external labor market would bear. The informal dynamics of internal labor markets tend to compress wage differentials to some degree, and to push up wages at the bottom of the internal market above what workers with the relevant skills may command on the external labor market.[65] Those dynamics may be formalized by a collective bargaining agreement in the case of unionized firms; unionization tends to have the greatest impact on the lowest wages in a bargaining unit.[66] The federal law governing employee benefits reinforces these tendencies, for its tax provisions strongly discourage firms from discriminating against its own lower-paid employees in benefits such as health insurance and pensions.[67] But all of these constraints can be avoided by contracting out low-skilled work to a legally separate entity that does not face these internal labor market pressures. Escaping a union wage scale, for example, is a major impetus for unionized firms to contract out work.[68] In essence, contracting out low-skilled work allows a firm to fill its labor needs at the lower wages that the external market will bear.

These kinds of cost savings help explain how the trend toward contracting out low-skilled, labor intensive work tends to press down

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[64] *Id.* at 34.

[65] *See, e.g.*, Sharon Rabin-Margolioth, *Cross-Employee Redistribution Effects of Mandated Employee Benefits*, 20 HOFSTRA L.J. 311, 313 (2003) ("individuals holding internal labor market jobs tend to earn more and receive more favorable benefit packages than their secondary market counterparts.").

[66] RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 78–93 (1984); Bernhardt et al., *supra* note 41, at 57. A recent study confirmed that unions tend to reduce wage inequality, and that declining union membership had contributed to greater inequality. David Card, Thomas Lemieux & W. Craig Riddell, *Unions and Wage Inequality*, *in* WHAT DO UNIONS DO? A TWENTY-YEAR PERSPECTIVE 114, 152–53 (James T. Bennett & Bruce E. Kaurman eds., Transaction Publishers 2007) (2004).

[67] Retirement plan tax benefits under the I.R.C. require that "contributions or benefits . . . do not discriminate in favor of highly compensated employees." I.R.C. § 401(a)(4) (2000).

[68] Service contracting in particular is effectively used to avoid union wages—most service contractors are not unionized, so outsourcing services effectively evades collective bargaining rights and, in turn, union wage and benefit premiums. *See* Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 515–16 (1997).

wages for that work (and to contribute to declining union membership). But they do not yet explain why contracting out may tend to erode the law's minimum labor standards. Three additional aspects of contracting out help to explain that tendency. First, contracting out allows user firms to put contractors into competition with each other for the low bid. Competition among low-wage contractors is often intense; there are few barriers to entry or other barriers to competition. Given that labor costs make up the lion's share of the contractor's costs, contractors almost inevitably compete by pressing down wages to whatever the market (and the regulatory framework) will allow.[69] Second, these contractors pose a chronic challenge to the regulatory framework because they are typically much smaller and less visible, and have little capital or reputation invested in their business.[70] They may be able to fly below the regulatory radar, and may be judgment-proof or prone to disappear in the event of enforcement. Third, and relatedly, these low-visibility, low-wage contractors often rely heavily on immigrant, and especially undocumented immigrant, workers (partly because immigration enforcement, like labor standards enforcement, poses a fairly remote threat to these low-visibility businesses). Undocumented immigrant workers who face threats not only of discharge but of deportation (threats that some employers make explicit and follow through on) are particularly unlikely to complain about substandard wages or working conditions; that is part of their appeal to unscrupulous employers.[71]

The upshot is that many of the less skilled jobs that used to be performed within larger and more integrated firms, and that may have fed into those firms' internal labor markets, are now often performed within a more thoroughly low-wage environment for contractors who are in a race to the bottom of the wage scale and who are beyond the gaze of the public and regulators. The practice of contracting out work under these circumstances puts downward pressure on wages and labor standards that is predictable and profitable, if not intentional.[72] That is basic logic of holding those at top accountable for the illegalities that flourish at the bottom of the labor market.

In fact, the single most important law in the low-wage landscape, the Fair Labor Standards Act, aimed to do just that.[73] The practice of

[69] UNREGULATED WORK, *supra* note 9, at 28–29.

[70] *Id.* at 34.

[71] *Id.* at 2.

[72] *Id.* at 34 (noting the prevalence of and trend towards employer use of subcontracting and similar strategies as a legal distancing tool and concluding that the current "status or wholesale exclusion of subcontracted workers, independent contractors, temporary workers, and day laborers is one of the central factors opening the door to conditions of work that fall below the standards established by law.").

[73] The aim of the FLSA and its definition of "employ" and expansion of joint employer liability is exhaustively explored in Bruce Goldstein, Marc Linder, Laurence E. Norton, II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern*

contracting out labor-intensive parts of a business to small, minimally-capitalized contractors to cut labor costs was well-known to New Deal reformers. In the early twentieth century, this was known as the "sweating system": middlemen sweated out their profits from workers under oppressive and illegal conditions, away from the public eye.[74] The system was especially familiar in garment manufacturing; hence, the term "sweatshops." It was precisely to reach through those contracting arrangements that the drafters of the FLSA in 1938 defined employer liability very broadly. Following a pattern set by federal and state child labor laws, the FLSA defined the term "employ" to include "suffer or permit to work."[75]

The express purpose of this very broad formulation was to hold employers liable for substandard working conditions of their contractors' employees even when the common law would not have done so.[76] Under the common law, an "employment" relationship is established by indices of control over the work of the individual worker, as well as by formalities of the relationship such as who pays the worker. As a result, by delegating direct control of certain components of the business to a contractor, the larger company might escape legal responsibility for the employees' substandard wages and working conditions.[77] Under the "suffer or permit to work" standard, however, the user employer would be liable for wage and overtime violations, provided that the work was an integral part of the user employer's business (especially if it was performed on the user employer's premises), and if the employer had the means to learn that the work was being done and the economic power to prevent it. The goal behind this very broad standard of employer liability was to eliminate substandard wages and working conditions. It was also to eliminate the competitive advantage of employers who used abusive contracting arrangements to lower labor costs, and to protect responsible employers from that unfair competition.[78]

The original meaning of the phrase "suffer or permit to work," and the history and legislative intent behind Congress' use of the phrase, has been exhaustively documented by legal scholars.[79] But from early in the history of judicial construction of the FLSA, the courts have tended to ignore or misconstrue this broad phrase, and have often gravitated back toward the common law "control" test. The Supreme Court, for its part, has recognized that the meaning of "employ" is broader under the FLSA than under the common law, and broader than under other federal labor

American Sweatshop: Rediscovering the Statutory Definition of Employment, 46 UCLA L. REV. 983, 1106 (1999).

[74] *Id.* at 984.

[75] *Id.* at 1089–1100.

[76] *Id.*

[77] *Id.* at 1055–61.

[78] *Id.* at 1161.

[79] *Id.* at 987.

and employment statutes.[80] The Court has helpfully directed inquiry away from issues of direct physical control and the formalities of the employment contract—both of which are themselves largely under the control of the contracting parties—and toward the "economic realit[ies]" of the employees' situation.[81] But the Court has failed to explain which "economic realities" are important and why, and it has failed to grapple with the legislative intent behind the "suffer or permit to work" standard. The Court's decisions have left the door open to lower courts' use of absurdly indeterminate multifactor tests that often veer back toward the common law and that sometimes allow employers to avoid liability by delegating day-to-day control over work, and the direct payment of wages, to contractors.[82]

Many lower courts seem convinced that Congress could not have meant to deprive employers of the ability to structure their contracting arrangements however they wish to compete effectively.[83] That assumption is half-right and half-wrong. Congress did not prohibit any contracting-out arrangements. But it did seek to eliminate employers' ability to use them in a way that fostered substandard labor conditions and undercut responsible employers. It would be an uphill battle to excavate Congress' intent back in 1938 and restore the original meaning of "employ" under the FLSA on the basis of legislative history that much of the current Court categorically refuses to consider. But if ever a future President and congressional majority seek to improve enforcement of labor standards in low-wage labor markets, restoring the broad intended scope of employer liability under FLSA, and even extending it to other employment laws, would be a good start.

Employers will undoubtedly complain that it is unfair or impracticable to hold them accountable for their contractors' illicit labor practices. But on that score, developments on the ground since 1938 have actually strengthened the case for holding them accountable. In recent decades, employers at the top of these contracting ladders have developed extraordinary internal regulatory resources. Not only have they developed the sophisticated internal corporate compliance systems discussed above, additionally, for purely operational reasons, firms have had to develop systems for monitoring the quality of the goods or services their contractors provide. Often that requires monitoring not just outputs but processes of production, and the technology for doing so has vastly improved in recent decades.[84] To be sure, these two systems of control may currently be lodged in different parts of the corporate hierarchy. In order to monitor contractors' compliance with labor

[80] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

[81] *E.g.*, Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961).

[82] Goldstein, et. al., *supra* note 73, at 1010–15.

[83] *See, e.g.*, Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 73–76 (2d Cir. 2003).

[84] For a description of these systems within garment manufacturing, see Weil, *supra* note 45, at 34–36.

standards laws, the two systems will have to be merged or linked to some degree. So to the extent user firms are held liable for contractors' labor and employment violations, they should be expected to extend oversight of contractors to monitor not only the quality of goods and services but also the conditions under which they are produced, and they should extend their corporate compliance programs to include their contractors' compliance.[85]

Something like this is already happening for some brand-conscious firms even without a threat of legal liability. Some big multinational firms have learned they may be scarred by scandalously poor labor conditions in overseas factories where their goods are produced. They are being held socially liable to those overseas workers even absent any mechanism for holding them legally liable. Some have taken serious steps to avoid those scandals. Corporate websites of many Fortune 500 firms—especially those that sell to individual consumers—will quickly direct you to corporate social responsibility programs and often to programs for supply chain management and even monitoring of overseas factories. One of the best examples is actually Portland's neighbor, Nike. From Nike's corporate website, a few mouse clicks will take you to a remarkably candid report on a very impressive program of factory monitoring throughout its global supply chain.[86] Over the last fifteen years, Nike has developed increasingly sophisticated methods of monitoring and improving labor standards for eight hundred thousand workers in its global supply chains. The results are far from perfect, as Nike's own reports acknowledge. But conditions have certainly improved from the days before monitoring began.[87]

There is a major lesson here for our purposes: If a firm such as Nike can monitor and take responsibility for working conditions among its almost 700 suppliers in 52 countries, then it should be possible for other companies to monitor and take responsibility for their contractors that perform work within the U.S. that is integral to the company's business, especially those that perform work within the company's business premises.

Someone might suggest a different lesson: Advocates have sometimes found ways to pressure super-employers to accept a degree of responsibility for working conditions within their supply chains even

[85] For a thoughtful account of how such developments can be nudged along in the context of global supply chains in garment manufacturing, see ARCHON FUNG, DARA O'ROURKE & CHARLES SABEL, CAN WE PUT AN END TO SWEATSHOPS?: A NEW DEMOCRACY FORUM ON RAISING GLOBAL LABOR STANDARDS (2001).

[86] Nike Responsibility, http://www.nikeresponsibility.com.

[87] Michele Micheletti & Dietlind Stolle, *Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 172 (2007) ("[A]fter years of sustained antisweatshop criticism [Nike] improved its code of conduct, issued its first Corporate Responsibility Report, opened up to independent monitoring, disclosed its outsourced factory locations, increased minimum wage requirements, and improved health and safety conditions.").

without any basis in external law for holding them legally responsible. If this is already happening without legal mandates, why undertake the additional cost and burden of legal intervention? Why not let private ordering take its course?

Unfortunately, without the pressure of legal liability, these monitoring programs are both too weak and too limited in scope. First, many supply chain monitoring programs are designed more to fend off public criticism than to improve labor standards, and are quite ineffective. Everything said above about internal corporate compliance—the pitfalls of cosmetic compliance and the need for effective employee voice and independent monitoring—applies to supply chain monitoring too. Second, these programs are concentrated in a few sectors, especially apparel, footwear, and toys. That is not because those are the sectors in which it is *feasible* for corporations to monitor contractors and suppliers; it is because those are the sectors that are sensitive to consumer outrage and have been successfully targeted for scrutiny by worker advocates. In the global supply chain context, for now, there is not much leverage beyond organized consumer outrage and public pressure. But in the domestic context, the law can supply more concrete incentives for firms to monitor suppliers and contractors.

To the extent that the law looks through contracting arrangements and makes companies directly responsible as employers or joint employers of the workers whose labor they depend on, the law encourages self-regulatory activity. Just as a matter of liability avoidance, firms that are sensitive to this expanded liability threat may have to extend their "corporate compliance" machinery beyond their own corporate boundaries. Some firms may respond by recalibrating their contracting relationships to avoid being defined as an employer—by further reducing their monitoring of suppliers' production, for example, or by outsourcing their contracts to lower-wage, less regulated countries. An expanded definition of "employer" is likely to produce some of that kind of counterproductive liability avoidance. But it is likely also to produce some of the right kind of liability avoidance—improved self-policing and monitoring of contractors, greater investment in improving contractors' productivity rather than minimizing wage costs, or even taking the work itself back onboard, performing the services or producing the goods in-house. There are operational limits on responses that increase the geographic distance between firms and their contractors or decrease firms' control of contractors or both. It is not always possible to outsource labor needs to other jurisdictions—maintenance is a prime example—and it is often economically desirable to supervise and control contractors' production of goods and services. So firms will often choose, rather than give up that operational control over quality and quantity of production, to extend that control to include labor standards for which they may be held legally answerable.

Of course it is not costless to expand liability and monitoring in this way. But the cost of a firm monitoring its own contractors' labor practices

is likely to be much less than the cost of effective public enforcement, given the contractual ties and familiarity between the parties. And the more a firm is already monitoring its contractors' operations in the interest of quality, speed, and reliability of production, the less it will cost to extend that monitoring to include wages and working conditions. The main cost to user firms will be the increased labor costs associated with bringing wages, hours, and working conditions into compliance with minimum legal standards. And that, of course, must be counted not as a social cost but as a benefit. The cost of monitoring itself, though hardly trivial, may be justified if it helps to strengthen the legal floor that is supposed to underlie and support both individual and collective efforts by workers at the bottom of the labor market to bargain for better wages and working conditions.

There is every reason to believe economic inequality will continue to grow in our society—that those who are best positioned to take advantage of the limitless opportunities for profit offered by a globalized economy will continue to take the lion's share of the social product. Notwithstanding some quibbling around the edges about repealing tax cuts for the wealthy, there is really no politically or practically viable program on the horizon for seriously curbing the ability of the rich to get richer. What we can do, and what we must do if we want to live in a reasonably humane and cohesive democratic society, is improve the conditions that prevail at the bottom layers of the economy and ensure, in particular, that full-time work secures full membership in society and the material foundations of a decent life.[88] One constructive step in that direction is to ensure that the firms at the top of the heap—those that are reaping the greatest profits from globalization—take responsibility for securing decent minimum wages and working conditions for the workers who supply them with essential labor inputs.

[88] For a compelling appeal to make a decent life "affordable" for those who work hard, see JEFFREY D. JONES, THE UNAFFORDABLE NATION: SEARCHING FOR A DECENT LIFE IN AMERICA (2007).