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SYMPOSIUM: THE INFORMAL ECONOMY: The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation.

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SUMMARY:

... On October 26, 1993, California Governor Pete Wilson issued an Executive Order creating a Joint Enforcement Strike Force to target the underground economy. ... Hundreds of thousands of California workers, primarily immigrants, who toil in "sweatshops" in the garment and restaurant industries, have been cheated out of billions of dollars in wages owed to them under federal minimum wage and maximum hour laws. ... Whether it is local or international, subcontracting provides a whole series of advantages to the garment manufacturer, all of which are obtained by shifting various costs, risks and responsibilities onto the subcontractor, or, as is more likely, onto several subcontractors. ... A explains, because cutbacks in funding have gutted these labor law enforcement agencies, tens of thousands of sweatshop employers go unprosecuted. ... Any person who submits fraudulent payroll records to the enforcement agencies in any of its investigations or hearings or as evidence in a court action, which conceal the actual hours of labor worked by the person's employees or the violation of minimum wage, overtime compensation, child labor or any other provisions ensuring payment of wages as required by the Labor Code, shall be subject to a civil penalty of \$ 10,000 per act of fraud and \$ 15,000 per act of fraud for a second

offense of falsifying payroll records. ...

TEXT:

[*2179] I. INTRODUCTION

On October 26, 1993, California Governor Pete Wilson issued an Executive Order creating a Joint Enforcement Strike Force to target the underground economy. n1 State labor agencies had just concluded an eighteen- month survey of 13,000 California businesses suspected of engaging in underground economic activities, such as paying employees cash "under the table." The survey revealed that thirteen percent of the employers failed to report and pay employment taxes as required by law. The labor agencies issued more than 3200 citations and assessments, amounting to \$ 9.5 million, for labor code violations and failure to carry workers' compensation insurance. n2 As a result of these violations, the state was losing approximately three billion dollars each year in income taxes alone, n3 and millions more in unemployment and disability taxes.

California's new found interest in clamping down on the underground economy is not surprising. The state has been unable to balance its budget for four years running. This year's deficit stands at two billion dollars. n4 Meanwhile, the underground economy, which supplants an estimated sixty billion dollars in legal business transactions in California, is depriving the state [*2180] of much-needed tax revenues by evading sales taxes, payroll taxes, and fees. n5 Businesses in the underground economy, where transactions are conducted in cash, are largely outside the reach of state licensing and regulatory agencies. n6

In reality, underground economic activities consist of more than under-the-table cash transactions. Hundreds of thousands of California workers, primarily immigrants, who toil in "sweatshops" in the garment and restaurant industries, have been cheated out of billions of dollars in wages owed to them under federal minimum wage and maximum hour laws. n7 The state coffers lose much more than the estimated three billion dollars in uncollected income taxes, since lower wages also translate into less tax revenue. n8 Although these sweatshop businesses operate in the open, they violate labor laws with impunity. Accordingly, included in the definition of the underground economy must be those "sweatshops" that operate with the official sanction of state permits, licenses, and registrations, but that nevertheless chronically violate labor laws. n9

What "strike force" will go to bat for the workers who are trapped in these "sweatshops," the open sores of the underground economy? The Governor's Strike Force on the underground economy focuses only on assessing fines and retrieving revenues from employers for the state's coffers. The Strike Force has not concerned itself with assuring that minimum wages and overtime are paid to exploited workers. A concerted effort to recover minimum wages and overtime pay would require a different kind of commitment by the state. To carry out the commitment, there must be both: (1) a marked increase in staffing levels for enforcement agencies at a time when California has not pulled itself out of its current economic slump, and (2) the political will to pass

legislative reforms that will directly impact the profits of such key industries as garment-making, tourism, and agriculture. When the state fails to stem widespread labor law violations, illegal businesses compete with legitimate ones and drive down wages generally, leading to the further expansion of the underground economy. Thus, a vicious cycle is created.

This Essay argues that states should strengthen labor laws and stiffen penalties to eliminate the profitability of violating labor laws. More [*2181] importantly, this Essay argues that private plaintiffs should have a greater role in enforcing stricter labor laws. It is time for the state and federal labor agencies to concede that they are overwhelmed by the daunting task of controlling the underground economy. Without the assistance of private plaintiffs, such as the exploited employees themselves, labor unions, and other workers' advocates, governments will lose the battle against the underground economy. Part II begins by describing how sweatshops serve as a blatant example of the dangers of the informal economy, exploiting **vulnerable** immigrant workers right underneath the eyes of law enforcement agencies. Part III explores the need for tougher labor laws to clean up the sweatshops, and suggests model legislative reforms aimed at closing loopholes in the law, assessing stiffer penalties, and awarding larger damages. Part IV reviews the problem of dwindling inspection staffs of labor agencies, and argues for statutory provisions permitting private rights of action to augment governmental enforcement of labor laws.

II. SWEATSHOPS: THE OPEN SORES OF THE UNDERGROUND ECONOMY

The working definition of a "sweatshop" is a business that regularly violates both wage or child labor laws and safety or health regulations. n10 The terms "chronic labor law violators" or "multiple labor law violators" have been used synonymously with the term "sweatshops." n11 In 1988, after a nationwide survey by more than one hundred state and federal officials, the United States General Accounting Office (GAO) identified the garment, restaurant, and meat-processing industries as those most frequently considered "sweatshop" industries. n12 The surveyed officials believed that these three industries had the most widespread problems, committing multiple violations of labor laws and safety regulations. n13 The GAO officials also believed that in the past ten years, "the severity of violations in the restaurant, garment and meat-processing industries has either remained the same or become more severe." n14

[*2182] Among the factors believed to be responsible for the existence of sweatshops, the GAO report points to the following as major ones: the presence of a **vulnerable and exploitable immigrant workforce**, the labor intensiveness and low profit margins of these industries, and the rapid growth of subcontracting, particularly in garment-making and electronics. n15 Certain enforcement-related factors, such as insufficient inspection staff, inadequate penalties for violations, weak labor laws, and limited coordination among enforcement agencies were cited as reasons for the continuing existence of sweatshops. n16

In the six years following the GAO report, all of these conditions have persisted.

Furthermore, as will be discussed in detail below, several additional factors have caused the number and severity of labor law violations in the 1990's to increase.

A. *The Exploitable Labor Supply of Immigrants*

The wheels of the labor-intensive garment, electronics, agriculture, and restaurant industries turn because of the ready supply of immigrant workers concentrated in urban areas. These labor-intensive industries generally have low profit margins and thus offer generally low wages to their employees. Immigrants, both legal and illegal, constitute a significant percentage of the workforce in the nondurable manufacturing, retail trade, and personal services industries. n17 Because immigrants often have limited English-speaking abilities, language barriers and cultural obstacles limit their work options. Thus, they are more willing than others to work in low-skilled, low-paid entry level jobs. Moreover, employers in these industries typically prefer immigrant workers, because their vulnerability keeps them silent about the abuses they endure in sweatshops. Undocumented workers are especially **vulnerable** because of employers' express or implied threats to report them to the INS if they complain.

The vulnerability of undocumented workers became especially clear after the passage of the Immigration Reform and Control Act of 1986 (IRCA). n18 Since IRCA went into effect, a whole sub-class of workers ripe for exploitation has developed. IRCA prohibits the employment of undocumented workers and [*2183] imposes civil and criminal penalties for violations of its provisions. n19 According to the federal government's own studies, however, employer sanctions have not worked. The Commission on Agricultural Workers, a federal panel created by Congress to study the impact of immigration law, concluded that instead of the anticipated effect of stopping the flow of undocumented workers from Third World countries, IRCA has invited a booming market in false documentation to accommodate those workers. n20 Many employers readily hire immigrants with false documentation, knowing that these workers will not risk losing a paycheck to report abuses to labor agencies. Employers are shielded from legal penalties merely by claiming that they believed in good faith that the "green card" appeared authentic. n21 The immigrant worker has no protection. He or she is forced to accept slavery-like conditions under the constant threat of deportation.

In California, for example, private plaintiffs have brought hundreds of cases against restaurants, vineyards, poultry and cheese producers, farmers, and dairy ranchers for abusing an undocumented workforce. n22 In a four-month investigation, the *San Francisco Examiner* found that "immigrants in the Bay Area are beaten and abused because of their race and intimidated because of their often tenuous legal status in this country." n23 In Sonoma County, for example, the *Examiner* reported that a Mexican immigrant dairyman had charged in a lawsuit that he was living in unsanitary housing and working thirteen-and-a-half-hour shifts, with no overtime pay and few breaks. n24 In San Francisco, the *Examiner* discovered a Mayan immigrant from the Yucatan, who said he worked in a restaurant ten to twelve hours a day, seven days a week, with no overtime pay. n25 In Petuluma, twenty workers at a "free-range" chicken ranch charged

that they were required to be on call seven days a week, twenty-four hours a day. They claimed they were not allowed to leave the ranch to buy diapers or to attend church without the supervisor's permission, and that some workers were paid less than minimum wage and received no on-call pay as required by law. n26 In Marin country, Latino workers at a dairy ranch charged that they were paid two dollars and seventeen cents per hour and housed in unsanitary conditions. n27 Workers at a winery claimed they were [*2184] forced to live in storage sheds, physically threatened, and denied overtime pay. n28 The horror stories are endless. Because of the risks of deportation and the fact that employers do not fear the small sanctions imposed by the INS, n29 undocumented workers are forced even further underground. n30

While undocumented immigrants are the most **vulnerable** to threats and intimidation by their employers, conditions for legal immigrants and U.S. citizens with limited English-speaking skills also have worsened. As a result of economic hard times, legal workers toil for longer unpaid periods than ever before. In 1993, for example, eighty Chinese immigrant workers at the Mirawa Restaurant in San Francisco's Chinatown worked for nine months without pay, living only on tips, until the owner closed the restaurant and disappeared. n31 In 1992, more than one hundred Korean immigrant electronic workers at USM Technology in San Jose, California, lost their jobs and were owed hundred of thousands of dollars in unpaid wages when their company went into bankruptcy. n32 In 1991, the five hundred employees of Raymond and Yee Nor Kong were owed \$ 1.8 million in loans and unpaid wages when the Kongs fled for Hong Kong and closed their eight garment factories. n33 In each of these scenarios, the workers involved were legal immigrants or U.S. citizens who had worked for years without overtime pay and received no pay at all for weeks longer than any worker should have had to tolerate. In these tough economic times, unskilled workers with language barriers fear, quite realistically, that no other job will be waiting for them. In addition, when immigrants must depend on their insular ethnic communities for jobs, the threat of blacklisting prevents many from speaking out until it is too late and their employer has disappeared with their hard-earned wages.

[*2185] B. *The Rapid Growth of Subcontracting: The Garment Industry as a Case in Point*

Another factor historically linked to the existence of sweatshops is the subcontracting system. n34 The rapid growth of subcontracting and its debilitating effect on wages and working conditions can be seen most clearly in the garment industry. The thirty-eight-billion-dollar-a-year apparel industry relies heavily on sweatshop labor. n35 As many as half of all women's garments made in America are produced in sweatshops. n36

As one commentator noted, "the very structure of the garment industry renders abuses of labor laws virtually inevitable." n37 That structure is best described as a pyramid, with the brand-name manufacturers such as Liz Claiborne, Jessica McClintock, Guess, and Esprit at the top. These manufacturers contract production to intermediate subcontractors. Subcontractors, in turn, hire hundreds of thousands of immigrant garment workers, who form the foundation of the pyramid. Most apparel manufacturers

subcontract their production work, because this structure greatly increases their profits. Between 1977 and 1982, the number of subcontracting firms increased by seventy-two percent. n38 Today, there are an estimated 50,000 sewing subcontractors nationwide vying for work from manufacturers. n39 The advantages of subcontracting are summarized quite succinctly by another commentator:

[*2186] Whether it is local or international, subcontracting provides a whole series of advantages to the garment manufacturer, all of which are obtained by shifting various costs, risks and responsibilities onto the subcontractor, or, as is more likely, onto several subcontractors. Subcontracting puts the manufacturing firm in the position, first, to decrease its overhead by passing on the costs of securing factory space, sewing machines, and so on; second, to even out and otherwise regulate its production flows and therefore avoid the problems and expense of constantly hiring on and laying off workers; third, to discipline organized labor by bypassing unionized firms; fourth, to avoid certain risks of the marketplace (e.g., merchandise turned back by retailers) by placing the blame on the subcontracting firm; and fifth, to avoid state laws and regulations altogether by contracting production with firms in the underground economy. However, all these advantages add up to one big advantage that California's manufacturers have found hard to ignore, namely, significant savings in production costs. n40

The single greatest advantage of subcontracting is control over labor costs. Since garment production is labor-intensive, manufacturers must reduce labor costs in order to make their profits. Instead of hiring workers themselves and risking penalties for paying subminimum wages, brand-name manufacturers subcontract to firms in the underground economy. Whether subcontracting to shadowy, unlicensed firms or to licensed firms that routinely violate labor laws, manufacturers lower labor costs by manipulating the contract price paid to subcontractors. In so doing, manufacturers directly diminish the wages of workers. A contract price that is too low inevitably means that subcontractors will not generate enough revenues to pay minimum wages and overtime premiums.

Because of the increasing use of subcontractors, who over the years have become increasingly smaller, n41 there is fierce competition for subcontracting work. This competition drives contract prices down. In New York's Chinatown, with the recent influx of Asian immigrants, there are 400 subcontractors competing for New York manufacturers' business. n42 In San Francisco, 500 subcontractors vie for business from name-brand manufacturers, and in Los Angeles, 4000 subcontractors compete for work. n43 According to a Los Angeles subcontractor, she recently received \$ 1.80 to assemble a cotton shorts-and-top ensemble which, at retail, sold for \$ 32. n44 She states that "the [*2187] same company that used to pay \$ 2.00 for a blouse now pays only \$ 1.85 for the same blouse." n45 According to a New York contractor, "a few years ago, the contract price of a basic dress retailing for \$ 100 was \$ 8 . . . ; today it's \$ 6." n46 In order to obtain work from manufacturers, subcontractors regularly underbid each other, and frequently accept whatever prices are offered by the manufacturer. n47 If they do not accept the contract, another subcontractor down the street probably will.

As a result, subcontractors routinely must decide either to go out of business, or to accept from manufacturers low contract prices that will not cover the full costs of production at current expense levels. "Unable to make up the difference by any other means, in rent or the cost of machines, for example, it is to the area of labor costs that the subcontractors inevitably turn, pushing their workers to labor longer hours at lower and lower wages -- effectively 'sweating' out the difference." n48

Given the choice between violating labor laws to produce the garments or going out of business, subcontractors choose to break the law, largely because they have been able to do so with relative impunity. They hope that, with some luck, they can avoid the penalties that can be assessed for their multiple violations of labor laws. As explained below, their chances of operating undetected are actually quite good. In California, for instance, only one in four or five garment shops may be inspected each year by enforcement agencies in their random inspections. n49

Those violators who are caught and assessed penalties, and can afford to pay the fines, simply pay them as part of the cost of doing business. Since they are rarely reinspected to ensure continued compliance, they repeatedly violate the law. n50 Those who cannot afford to pay heavy fines go out of business. Given their small size and low profit margins, many of these firms are marginal and do not survive. "[T]he average life of a sewing shop is estimated at 13 months." n51 For even the larger, more profitable shops, filing for bankruptcy always remains an option to avoid a large wage judgment or civil penalties. As explained below, loopholes in the law allow these employers to open new businesses without ever having to pay the wages or fines they owed in their previous business. n52

After their subcontractors go out of business, manufacturers simply hire another subcontractor. Even though the brand-name manufacturers have profited from the labor of garment sweatshop workers, they have no responsibility to insure that the previous workers who produced their garments [*2188] are paid. As a result, manufacturers have been grossing record profits. In 1992, Guess' profits were estimated at \$ 108 million; The Limited earned \$ 455 million. n53 Jessica McClintock's annual profits have been \$ 145 million. n54

Despite widespread and highly publicized abuses, manufacturers feign ignorance of the deplorable conditions in garment sweatshops. But, with the extremely low contract prices manufacturers force subcontractors to accept, it should be obvious to any observer that subcontractors cannot afford to pay minimum wages. Manufacturers as well as government officials have always had the ability to conduct time-and-motion studies to estimate the time it takes to complete a garment. As early as 1914, California enforcement officials used time-studies to determine if the contract price would ensure that minimum wages were paid. n55 Thus, manufacturers not only conspire with their subcontractors in perpetuating sweatshops, they are primarily responsible for creating the problem.

It is clear that in such industries as apparel manufacturing, where the subcontracting

system perpetuates sweatshops, legislative changes must be aimed at both the manufacturers and their subcontractors. A discussion of proposed changes follows.

III. THE NEED FOR TOUGHER LABOR LAWS

A. Weak Labor Laws Do Not Deter Chronic Violators

Current labor laws are too weak to deter employers in the sweatshop industries from exploiting their employees. No civil penalty exists for an employer who falsifies payroll records to suggest compliance with wage laws. Under California law, the penalty for willful failure to maintain payroll records is a flat \$ 500 fine. n56 Additionally, the federal Fair Labor Standards Act (FLSA) n57 does not provide penalties for false recordkeeping. The FLSA offers no administrative means, other than filing a time-consuming and vigorously fought lawsuit in the federal courts, by which the Department of Labor can force an employer to pay back wages. Issuance of bounced checks may be a misdemeanor, punishable by a short term of imprisonment in a county jail, n58 but employers are almost never prosecuted for issuing paychecks that bounce. n59 In California, the only penalty for refusal to pay a valid wage judgment is "treble the amount of any damages accruing to the employee as [*2189] a direct and foreseeable consequence of such failure to pay," and then only if the employer fails to pay within ten days of receiving notice that wages are due. n60 Such damages, however, are hard to prove. As to employers who file for bankruptcy protection and are ultimately discharged from their debts to workers, no law prevents them from opening up another company, exploiting a new group of workers, and once again filing for bankruptcy -- leaving the second group of workers similarly empty-handed and wageless.

Employers faced with large wage judgments often play the "shell game" -- that is, they close down one corporation and start up another. The corporate shield of limited liability protects shareholders, directors, and officers from personal liability for the wages of their former employees. Former employees are unable to reach the assets of the new corporation or company because of the legal fiction that the predecessor and successor are separate legal entities. Unlike other federal labor laws, the FLSA incorporates no alter-ego or successor liability theory which would allow the former employees to reach the new corporation's assets. n61 Alternatively, an employer may transfer all of his assets to a family member, and continue to operate under the same management with a new company name.

A case in point is that of the one hundred Korean and Vietnamese immigrant electronics workers, mostly women, who worked for USM Technology, Inc., in San Jose, California. n62 USM was an assembly plant that produced electronic parts for large computer companies. It was incorporated by Korean entrepreneurs, Ted Choe, Ken Choe, and Chungsu Yun, as its shareholders, directors and officers. USM's employees regularly worked overtime, sometimes twelve hours a day, with no overtime pay. During July and August 1993, USM issued to its workers hundreds of paychecks that bounced. In order to entice the workers to continue working to finish orders, the

owners of the company wrote more paychecks, this time from closed or unauthorized accounts. After the Choes promised that wages would in fact be paid when new orders arrived, workers felt they had no choice but to continue working. But, on September 9, 1993, when the workers arrived at the USM plant, they found the entrance boarded up. USM filed for bankruptcy two days [*2190] later, owing one hundred workers a total of more than \$ 200,000 in back wages. n63

The USM bankruptcy estate collected \$ 400,000 in accounts receivable from USM's customers. The largest secured creditor, the Silicon Valley Bank, was owed \$ 1.5 million by USM. Under federal bankruptcy law, the bank, a secured lender, would be paid first, leaving nothing to workers who were unsecured creditors if there were no assets left to distribute. n64 Relying on a little-known case law exception to the priority scheme set up in the Bankruptcy Code, the USM workers brought a lawsuit n65 under section 215(a) of the FLSA -- the "hot goods" provision. n66

The "hot goods" provision prohibits "any person" from shipping or selling in interstate commerce goods produced by workers who were not paid minimum wages or overtime. n67 To remove the "hot goods" taint, the statutorily required wages must be paid. In *Citicorp Industrial Credit, Inc. v. Brock*, n68 the Supreme Court held that the definition of "any person" as used in section 215(a) includes not only employers, but also secured creditors who come into possession of "hot goods." The Court held that such secured creditors are also prohibited from shipping or selling "hot goods" until the workers' wages are paid. n69 In *In re Russell Transfer, Inc.*, n70 the bankruptcy court for the Western District of West Virginia, in interpreting differing mandates of the FLSA, the Bankruptcy Code and the *Citicorp* case, held that accounts receivable that were generated by the labor of workers who were not paid minimum wages were not a part of the bankruptcy estate. Therefore, workers must be paid before any other creditor. n71 In other words, the "hot goods" taint followed the accounts receivable and such funds could not be used to pay creditors in a bankruptcy settlement until workers received payment of wages. n72

In the USM Workers case, however, the bankruptcy court for the Northern District of California rejected the *Russell Transfer* holding. Instead, the court concluded: (1) under FLSA section 217, only the Department of Labor (DOL) had standing to bring an injunctive relief action to enforce the "hot goods" provision, so the USM workers possessed no implied private right of action; [*2191] (2) accounts receivable were not "goods" within the definition of the FLSA and thus could not be enjoined; and (3) in any event, since the goods (computer parts) had already been shipped, there was nothing to enjoin. n73 Had the DOL invoked the "hot goods" provision before the goods left the USM factory, the USM workers may have been able to recover their wages. However, the DOL lost the race to take possession of the goods before their shipment. The computer parts had disappeared into the stream of commerce, so the DOL declined to exert the effort required to trace the goods. On October 1, 1993, the court ordered payment of the \$ 200,000 in accounts receivable to the bank. n74 The workers have yet to recover their wages, and probably never will.

The USM bankruptcy was not the first filed by Ted Choe. Nine months earlier, he had filed bankruptcy for Neutronix, n75 another electronics assembly plant that he owned. Before shutting down Neutronix, paychecks had also bounced and workers were never paid their back wages from the Neutronix bankruptcy. n76 Ironically, a quarter of the USM workforce came from Neutronix. These workers followed Ted Choe to his new plant, hoping that they would eventually receive their back wages for work done at Neutronix. n77 They were duped twice.

Despite repeated requests to the district attorney, none of the USM owners have been prosecuted for issuing hundreds of bounced checks. The USM workers have not found an attorney willing to bring an action against Ted Choe to hold him personally liable for their back wages and to retrieve assets that workers believe may have been fraudulently transferred by Choe. Ted Choe is free to start yet another company and exploit yet another immigrant workforce. He may issue checks that will bounce and once again leave workers with weeks of back wages unpaid. He is legally entitled to file bankruptcy protection for his third company, to be discharged in bankruptcy, and to be freed of all debts to his workers. Ted Choe has and may well continue to do all of this with impunity.

As discussed in Part III, effective statutory changes can and must be adopted to provide real remedies to workers who are repeatedly cheated out of wages by their employers. Of course, enforcing the laws already in place would also help to eliminate sweatshops. For instance, the FLSA provides for liquidated damages in the amount of two times the unpaid minimum wages or overtime premiums. n78 Back wages and liquidated damages for overtime [*2192] violations could amount to \$ 200,000 to \$ 400,000 per year for an employer with fifty to one hundred workers who regularly work sixty-hour weeks. n79 In addition, in California, the state may assess substantial penalties -- \$ 250 per employee per violation and \$ 1000 per employee per subsequent violation -- for failure to provide itemized wage statements with each pay check. n80 Therefore, an employer with fifty employees who fails to itemize wage statements for fifty-two pay periods could face penalties amounting to more than \$ 600,000. n81

These potentially large damages awards, if assessed, would probably deter even the most recalcitrant of sweatshop owners. But no deterrence exists if no lawsuits are filed. Herein lies the problem. Only the federal DOL or a state labor agency has standing under the applicable statutes to bring a lawsuit to recover wages for an entire work force, with or without their consent, n82 and to collect the civil penalties. n83 As Part IV.A explains, because cutbacks in funding have gutted these labor law enforcement agencies, tens of thousands of sweatshop employers go unprosecuted. The sweatshops continue to operate in the underground economy, taunting law enforcement agencies and the public.

B. Proposed Legislative Changes To Deter Chronic Violators

1. Garment Manufacturers' Liability for Wages of Their Subcontractors' Employees

To stop the subcontracting system from perpetuating sweatshops, legislators must adopt a two-pronged strategy aiming at both the manufacturers and the subcontractors. n84 Manufacturers must be held jointly liable with the subcontractors for the unpaid wages of any garment worker who assembles their garments. A liability regime such as this would recognize the economic forces at work in the apparel industry. The abundant supply of competing subcontractors drives down contract prices. Small subcontractors do not have the bargaining strength to demand contract prices that will enable them to pay minimum wages and overtime, as well as make a profit.

[*2193] Holding manufacturers liable would force them to provide the contract price necessary to bring the hourly wage up to at least minimum wage. The manufacturer could not simply move from one contractor to another without remaining accountable for the violations of its subcontractors. This regime would compel manufacturers to select their subcontractors with care, avoiding those who are chronic violators of the law. Finally, the manufacturers, with their deep pockets and relative longevity, can afford to pay large wage judgments when their subcontractors close down shop and disappear.

Recent publicity about the plight of garment workers has prompted discussions in the apparel industry about how manufacturers can police their own subcontractors. In the past year, the DOL has invoked the "hot goods" provision of the FLSA n85 in an effort to hold manufacturers responsible for the abuses of their subcontractors. n86 By threatening to seize their goods, the DOL secured a \$ 573,000 settlement against Guess -- the company was paying workers less than one dollar an hour to make its sixty dollar jeans. n87 The DOL also began publicizing the names of designers and manufacturers whose subcontractors had been found violating labor laws. In 1993, for instance, after finding thirty-five out of seventy-one Bay Area sewing shops in violation of wage and hour laws, the San Francisco Regional Office of the DOL identified Esprit, Liz Claiborne, and Pearl Izumi as manufacturers who contract with sweatshops. n88

On October 26, 1992, the Lucky Garment workers who sewed Jessica McClintock's expensive romantic dresses launched a year-long campaign against her company, demanding that she pay their back wages after their employer went into bankruptcy. The campaign began with a full-page advertisement in the *New York Times* entitled "Let Them Eat Lace." n89 Coordinated nationwide picketing of McClintock boutiques ensued every weekend into the Christmas season in such cities as San Francisco, Los Angeles, New York City, and Chicago. n90 In November 1992, the state of California launched the Targeted Industries Project Program (TIPP), a coordinated effort by the State Labor Commissioner, the state DOL, State Franchise Tax Board, CalOSHA, and other labor-related agencies. [*2194] Accompanied by the mass media, TIPP has been conducting raids on garment subcontractors in the Los Angeles area and farm labor subcontractors in the Central Valley. n91

With workers' advocates pushing vigorously for manufacturers' liability, an alarmed apparel industry began looking for alternatives. On September 14, 1993, the industry announced that it had developed a "prototype contract" between manufacturers and

subcontractors that would ensure payment of minimum wages and overtime compensation. n92 However, the model contract itself merely recites the desires of the parties that labor laws be obeyed. Under this model contract, garment workers are not even third-party beneficiaries with enforceable rights. In fact, this model contract contains no mechanism whatsoever to ensure compliance with labor laws.

In an earlier draft, dated July 26, 1993, the model contract contained a provision that might have provided the necessary mechanism. That earlier version stated: "The Parties warrant that the estimated total minutes per unit listed on Schedule A (P2) represents their best estimate of the actual time required to complete the contracted work." n93 Additionally, Schedule A P3 of the early draft provided, "Agreed estimated total minutes per unit under this Schedule: ." n94 These provisions for estimated total minutes were eliminated from the final version of the model contract. n95 By not indicating the estimated assembly time, the model contract conceals the compensation per unit that would approximate minimum wage and overtime compensation. An estimated time would have kept the parties honest in their dealings with each other and given the subcontractors bargaining strength during the bidding process by demonstrating that the contract price offered by the manufacturer was too low to cover the costs of production. As it stands now, without time estimates, this model contract is useless in accomplishing its announced goals.

To add insult to injury, a final provision of the model contract provides:

As work proceeds under any Schedule A, if the Contractor finds that the Total Basic Payment Due provides insufficient margin above the Contractor's direct labor costs such that it will jeopardize the Contractor's ability to pay its employees on average at least the federal and California minimum wage, the Contractor shall advise the Company in writing requesting a price adjustment, and provide appropriate supporting information. The Company shall promptly and in good faith review this information and, *at its option*, may agree to make a price adjustment. n96

[*2195] Far from solving the problems in the industry, however, this model contract simply cemented the status quo within the four corners of a written document.

In essence, the self-policing scheme in the model contract is nothing more than the fox guarding the chicken coop. A system that relies on manufacturers to police their subcontractors will not work for one simple reason: There is no economic incentive for manufacturers to do so. Without legal liability for the nonpayment of garment workers' wages, manufacturers have no reason to clean up the sweatshops. When subcontractors can repeatedly violate the law without getting caught, they will continue to exploit their workers. For this reason, joint liability laws are necessary to keep both manufacturers and subcontractors honest. n97

In 1990 and 1992, manufacturers' liability bills were passed by both houses of the California legislature. n98 The 1992 bill, Assembly Bill 1542, sponsored by Terry Friedman, would have added Section 2673.5 to the Labor Code, providing:

Every person engaged in the business of garment manufacturing who contracts to have garment manufacturing operations performed by another person as a contractor shall be liable, with respect to these operations, to the same extent as the contractor for any violation . . . committed by the contractor, and shall be subject to the same penalties assessed against the contractor for violations of those provisions. n99

Unfortunately, both bills were vetoed by Governors Deukmejian and Wilson under the mistaken belief that current law already allowed lawsuits against manufacturers. n100 The need for such legislation remains compelling and is indeed the only workable solution yet devised.

[*2196] *2. Larger Damages Awards, Stiffer Penalties for Concealment of Violations, and the Elimination of Loopholes in the Law*

The second prong of legislative reform to eliminate sweatshops in the garment industry must aim at the subcontractors themselves. Tougher labor laws are needed to deter subcontractors, so that they think twice about paying subminimum wages in order to make a profit. The proposed reforms detailed below impose penalties for concealment of violations, eliminate loopholes in the law that allow employers to avoid wage judgments, and provide for larger damages awards that hit sweatshop owners in the pocketbook -- the only language they understand.

a. Liquidated Damages Provisions

Under the Fair Labor Standards Act, employers are liable for liquidated damages equal to the amount owed in unpaid minimum wages and overtime premiums. n101 This federal penalty, which amounts to double damages, can be quite substantial if an entire workforce is involved. Even when a single employee sues for recovery of wages, double damages are necessary to compensate that employee for the long period of delay before recovery. In addition, without double damages, private attorneys may not be attracted to these cases, since low recovery amounts generally mean lower attorney's fees. For these reasons, similar provisions should exist in state laws to enable the recovery of liquidated damages in the state fora -- the forum many practitioners prefer because it is less expensive to litigate in state than in federal courts. n102

b. Falsifying Payroll Records

As explained above, criminal prosecutions for falsifying payroll records rarely occur. n103 A more effective means of deterring fraud is required. There must be stiff civil penalties, recovered either by the government or by private plaintiffs suing on behalf of the government. Language for such a bill might read as follows:

[*2197] Any person who submits fraudulent payroll records to the enforcement agencies in any of its investigations or hearings or as evidence in a court action, which conceal the actual hours of labor worked by the person's employees or the violation of

minimum wage, overtime compensation, child labor or any other provisions ensuring payment of wages as required by the Labor Code, shall be subject to a civil penalty of \$ 10,000 per act of fraud and \$ 15,000 per act of fraud for a second offense of falsifying payroll records. n104

c. Recordkeeping Penalties

Under the FLSA, employers are required to keep and preserve "such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him . . . for such periods of time . . . as [the Administrator] shall prescribe by regulation." n105 No monetary penalty exists for recordkeeping violations; only injunctive relief is available. n106 Under the California Labor Code, the penalty for a recordkeeping violation is a flat \$ 500, no matter how egregious the violation. n107 As the GAO investigators found in their nationwide study of sweatshops, inadequate penalties for recordkeeping violations severely hamper enforcement efforts. Failure to keep records is "a major reason why investigations in [apparel and restaurant] industries are less productive than those in other industries." n108 Enforcement agencies must identify violations, calculate the wages that should have been paid, and persuade employers to pay the back wages voluntarily. Without accurate records, or any records for that matter, an employer may be getting away with paying a minuscule amount of the back wages actually owed. The following model language should be codified to provide effective remedies of sufficient size:

Any person employing labor who willfully fails to maintain the records required or to allow any member of an enforcement agency to inspect records shall be subject to a civil penalty of one hundred dollars (\$ 100) per employee for each pay period in which the records are not maintained, up to a period of three years. n109

California law does have stiff civil penalties for an employer's failure to provide itemized wage deductions statements. Under California Labor Code § 226(a), an employer is required to provide with each paycheck a written [*2198] itemized statement that shows, among other things, gross wages earned, total hours worked by each hourly employee, all deductions, net wages earned, and the inclusive dates of the period for which the employee is paid. Failure to provide this statement or to list the items required results in a civil penalty of \$ 250 per employee per violation in an initial citation by the Labor Commissioner, and \$ 1000 per employee per violation in a subsequent citation. n110 The same type of civil penalty is required in the FLSA to assist the DOL in its investigations and to enable employees to ascertain at the time they are paid whether or not they are receiving all of the wages they deserve.

d. Civil Penalties Under FLSA for Minimum Wage Violations

The FLSA also fails to provide civil penalties for violations of minimum wage and overtime laws. In California, the civil penalty for intentional failure to pay minimum wages and overtime premiums is fifty dollars per employee per pay period for first violations and one hundred dollars per employee per pay period for subsequent

violations, regardless of whether the initial violation is intentionally committed. n111
When the wages recovered by the federal DOL are small, additional civil penalties are needed so that damages will be large enough to deter effectively future violations. n112

e. Intimidating Workers into Returning Wages

When an enforcement agency has successfully exposed wage and hour violations and reaches a settlement with the employer to pay the wages owed to the worker, the employer often intimidates workers into returning the wages to him once the settlement checks are cashed. Model language to stem this practice could read as follows:

Any employer who compels an employee to return to its wages secured by an enforcement agency or wage judgment, or who accepts such wages from an employee, shall pay to the employee treble the amount of wages and be subject to a civil penalty of \$ 10,000 per employee. n113

Additional safeguards to prevent employer intimidation may be necessary. For instance, instead of permitting the employer to issue settlement checks to the [*2199] employee, states could require employers to pay the settlement amount to the enforcement agency, and the employees could collect their wages from the agency. Such a system would allow an individual worker to file her claim in confidence after six months to a year, or after she has left her employment with the employer; thus, an employer would not know which worker to intimidate and from which to demand the return of back wages. California, for example, has an Industrial Relations Unpaid Wages Fund under which monies recovered for wages are deposited until workers come forward to claim their wages. n114 Unclaimed monies in this Fund are not returned to the employer but stay in the state's General Fund. n115

f. Treble Damages for Failure To Pay Wage Judgment

When an employer refuses to pay a wage judgment, a worker must spend an inordinate amount of time and money attempting to collect on the judgment. First, an employee needs to hire a private investigator to locate the employer's assets, including bank accounts or accounts receivable. Second, the employee has to pay the sheriff to perform "till taps" n116 or to attach vehicles and equipment that must be stored before being auctioned. Often, the worker's only solution is to send his wage judgment to a collection agency, which can take a third or more of the judgment. To compel prompt payment of wage judgments, to entice private attorneys or collection agencies to collect on small judgments, and to ensure that there are enough wages remaining for the worker after a collection agency receives its share, treble damages must be assessed. The following model language, based on the California Labor Code n117 but strengthened to eliminate the requirement that the worker demonstrate actual damages suffered, is an example of such needed legislation:

If, after an investigation and hearing, the Labor Commissioner has determined the validity of any employee's claim for wages, or a court has issued a final judgment,

which has not been timely appealed, the wages are due within 10 days after receipt of notice by the employer that such wages are due or within 10 days after the time for filing an appeal has expired. Any employer having the ability to pay who willfully fails to pay such wages within 10 days shall, in addition to any other applicable penalty, pay treble the amount of wages owed.

[*2200] g. *The Shell Game Played by Sweatshop Owners*

Neither federal nor state laws have developed fast enough to address the "shell game" that sweatshop owners play to avoid paying wages to their workers. n118 Two legislative changes are needed to solve this problem. First, the definition of an "employer" under both state labor laws and the FLSA n119 must be expanded to include successor employers. Model language holding the successor liable for the predecessor's wage debts might read as follows:

A successor to any employer who owes wages to his or her former employee(s) is liable for payment of those wages as if he or she had retained the services of the employee(s). A successor employer is any person who:

- (1) uses substantially the same facilities or work force to produce substantially the same products for substantially the same type of customers as the predecessor employer; or
- (2) shares in the ownership, management, control of labor relations, or interrelations of business operations with the predecessor employer, n120 or
- (3) has in its employ in a managerial capacity any person who directly or indirectly controlled the wages, hours, or working conditions of the affected employee(s) of the predecessor employer, or
- (4) is an immediate family member of any owner, partner, officer, or director of the predecessor employer or of any person who had a financial interest in the predecessor employer.

Second, whether or not an individual or his company (corporation, partnership, or sole proprietorship) has been discharged in bankruptcy, that [*2201] individual should be prohibited from starting a new business that requires the employment of workers or the subcontracting of work until the wages of the former workers are paid. State law remedies should allow the government to refuse to issue the various licenses required to operate a business. In addition, the government should have the authority to issue "stop orders" or to obtain temporary restraining orders to close down a business that has failed to pay wages owed to former employees. n121

h. *Corporate Shareholder Liability*

Increasingly, employers are incorporating instead of operating as sole proprietors or

partnerships. As corporations go out of business, the sole shareholders or majority shareholders are protected from personal liability for the debts of the corporation, including wage debts, even though they profit from the unpaid labor of workers. n122 A number of states provide an exception to the limited liability doctrine in the case of unpaid wages. For example, in the state of New York, when a corporation becomes insolvent, the ten largest shareholders are liable for workers' unpaid wages. n123 In Pennsylvania, corporate officers, as well as their corporation, are included within the definition of "employer" and thus are personally liable for the wages owed to workers. n124

Similarly, in states where sweatshops proliferate, the doctrine of limited liability should be modified to exclude wage debts. Certainly, the policy reasons for limited liability of corporate shareholders do not outweigh the need for the payment of wages to workers who have toiled long hours to earn a living. Wages have been recognized as a special type of debt. For instance, while debtor's prisons have largely been abolished in the United States, some states imprison those who fail to pay wage debts. In California, for example, it is constitutional to incarcerate persons for refusing to pay wages to workers who labored for them. n125 Furthermore, as the California Supreme Court [*2202] explained in *Ex parte Trombley*, n126 "[i]t has long been recognized that wages are not ordinary debts . . . and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare" that he receive his pay when due. Labor Code provisions compelling prompt payment of wages were designed to "protect the employee and to promote the welfare of the community." n127 Model language such as the following is needed to refocus society's priorities:

The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed, of every corporation shall jointly and severally be personally liable for all debts, wages, or salaries due and owing to any of its laborers, servants or employees for services performed by them for that corporation.

i. *Statutory Wage Liens*

Faced with a large wage judgment that could render the company insolvent, sweatshop owners frequently petition for bankruptcy protection rather than negotiate payment of the wage judgment. In a bankruptcy settlement, workers who are owed pre-petition debts are lucky if they recover even ten cents on the dollar. Secured creditors such as banks are first in line for the assets. n128 The USM Technology workers got nothing from the bankruptcy estate, while Silicon Valley Bank, a secured creditor, recovered \$ 400,000. n129 The result would have been different if California had a statutory wage lien law giving workers superpriority over other creditors, such as banks.

The Supreme Court has recognized that states may statutorily create employee wage liens that are superior to other liens ordinarily recognized at common law. n130 The states of North Carolina, Tennessee, and Virginia, among others, have such wage lien

statutes. n131 Each of these state statutes, [*2203] either by express language or case precedent, dictates that statutory wage liens do not take priority over creditors who loan purchase money and hold the purchased property as collateral (i.e., secured creditor holding purchase money mortgages). n132 But in cases where a creditor has loaned operating capital rather than purchase money, and the loan is secured generally by a lien on assets of the business, statutory wage liens have been held to be superior. n133

If legislators enact such a reform, a hue and cry will be heard from financial institutions whose place in line will be taken by workers claiming their hard-earned wages. As explained above, however, wages have been recognized as special debts, the payment of which is "essential to the public welfare." Surely the interest of society in ensuring prompt payment of wages is as important as the interest of the banking institutions in recovering monies loaned. While workers are in no position to assess the financial solvency of their employers before accepting a job or while employed, banks regularly make such determinations before lending monies. Equity should require that the risk of an employer's defaulting on debts fall on those most able to anticipate and bear the loss, that is, banks and not workers. In addition, as the Supreme Court noted in *Citicorp Industrial Credit, Inc. v. Brock*, secured creditors "often monitor closely the operations of employer-borrowers" and "may be in a position to insist on compliance with FLSA's minimum wage and overtime requirements." n134 In justifying its holding that the "hot goods" prohibition applies to secured creditors, as well as employers, the Court quoted the following passage from an opinion from the Western District of Tennessee:

[I]f foreclosing creditors are free to ship and sell tainted goods across state lines, the temptation to overextend credit to marginal producers is strong, as is the likelihood that such producers will become unable to meet their payrolls. The reason for this is that finance companies and institutions stand to reap financial gain by keeping such producers in business. A holding by this Court that creditors may not ship and sell in interstate commerce goods produced in violation of the Act will not only protect complying manufacturers from the unfair competition of such tainted goods, but, we submit, it will also discourage the type of commercial financing which leads to minimum wage and overtime violations. n135

Marginal employers in the underground economy who violate minimum wage and overtime laws should not be kept afloat by lending institutions. Statutory wage lien laws would create the incentive for lending institutions to avoid [*2204] doing business with sweatshop owners in the underground economy. With their ability to monitor employer-borrowers and detect when subminimum wages are being paid, those institutions that choose to transact business with sweatshops should bear the risk that their loans will be repaid only after workers' wages are paid.

IV. PRIVATE RIGHTS OF ACTION TO ENFORCE LABOR LAWS IN THE PUBLIC INTEREST

A. *The Problems with Dwindling Field Enforcement*

If the DOL and state labor agencies are so understaffed that they cannot bring lawsuits to enforce these tougher labor laws and collect the stiffer penalties, chronic violators will not be deterred. Statistics make clear that understaffing in labor enforcement will continue for years to come. Under President Carter, the DOL had 1600 wage and hour inspectors to police ninety million workers. n136 Under President Reagan, the number was slashed to 700, and has increased only to 800 during President Clinton's tenure. n137 Thus, while the FLSA "hot goods" law potentially is one of the DOL's most effective weapons, particularly for compelling payment of minimum wages by garment manufacturers when their subcontractors disappear, it is rarely used. n138 The DOL simply does not have enough investigators.

The New York State Apparel Industry Task Force has only five inspectors to monitor 2000 garment shops. "Once they cite a factory for a violation, the task force rarely reinspects to ensure continued compliance." n139 Similarly, in California, general budget cuts have reduced the staffing of the state Division of Labor Standards Enforcement (DLSE) from a high of over 430 in 1982-1983 down to 342.9 in 1993-1994. n140 As a result, in 1988, the California State Labor Commissioner corrected 111,452 labor law violations, but by 1992 that number had dropped to 64,275. n141 Between 1980 and 1991, the number of garment workers increased by one-third, from 106,500 to 137,600, and the number of workers in sewing shops increased from 3708 to 6132. n142 Similarly, the number of hospitality workers increased from 113,100 to 189,100. n143 Because the DLSE has suffered cutbacks in staffing and has [*2205] shifted its focus from garment to other higher-wage industries, such as public works, inspections by the DLSE remained virtually constant, at just over 1200 a year, despite the increases in workers in these sweatshop industries. n144 At this rate, the Labor Commissioner will not be able to reinspect a shop to ensure continuing compliance until four years after the initial inspection. n145

Before the DOL, or state labor agencies can recover minimum wages, overtime compensation or civil penalties for an entire workforce, they need the necessary resources, including a staff of attorneys. The enforcement agencies' legal staff is as overwhelmed as the field inspectors and can bring only a handful of lawsuits. Thus, there is a dire need to pass legislation that will encourage private plaintiffs and the private bar to become active in the enforcement of labor laws.

B. The Expansion of the Private Attorney General Theory in Wage and Hour Enforcement

1. Private Plaintiffs Recovering Civil Penalties for the Government

Recognizing that the federal government cannot be in all places at all times to investigate and prosecute persons who have gained a monetary advantage by filing fraudulent claims, Congress amended the False Claims Act in 1986 to allow private persons to bring lawsuits, on behalf of the United States, to recover damages and penalties for the federal government. n146 The action is brought in the name of both the private person and the United States. n147 If the U.S. Attorney declines to

intervene and prosecute the case within sixty days, the private plaintiff may litigate the action on behalf of the United States. n148 Such actions are known as *qui tam* actions and the private plaintiffs as *qui tam* relators. At the end of a successful prosecution, *qui tam* relators recover for the United States between \$ 5000 and \$ 10,000 in civil penalties for each act of fraud, plus three times the amount of damages sustained by the government because of the fraudulent acts committed. The damages can be quite high. *Qui tam* relators are entitled to twenty-five percent of the total recovery by the United States, as well as attorneys' fees. Because private plaintiffs have recovered very substantial amounts in *qui tam* actions, the number of these actions have increased markedly. n149

[*2206] The amendment providing for private rights of action in *qui tam* plaintiffs has proven to be an effective means by which individuals, acting as private attorney generals, can "lengthen" the arm of the law in enforcing the federal False Claims Act. Similarly, by creating a private right of action to collect for the government civil penalties for labor law violations and rewarding the private plaintiff with a substantial percentage of the damages if successful, the long arm of the law can reach out to punish far more sweatshop owners than is currently possible.

Currently, in those states where civil penalties exist, the state agency simply assigns its cause of action to recover the penalties to private attorneys who sue on behalf of the state. Once an amendment to the FLSA passes that allows for the assessment of civil penalties for recordkeeping, minimum wage, and overtime violations, the same type of assignment could be made. Model language might look like this:

The labor agency shall inquire diligently for any violations, and, in cases which it deems proper, shall institute the actions for the civil penalties provided for in this article and shall enforce this article. The labor agency may assign its cause of action for the penalties to a private attorney, who shall institute the action in the name of the people of the State of . The civil penalties recovered therein shall be paid as follows: 30% to the private attorney, 30% to the Labor Commissioner for future enforcement of this article, and 40% into the State Treasury to the credit of the General Fund. The private attorney who prevails in recovering the civil penalties shall be entitled in addition to reasonable attorneys fees and costs.

Under section 16(c) of the FLSA, n150 and California Labor Code § 1193.6, n151 the DOL or state labor agency, with or without the consent of the employees, may bring an action to recover unpaid minimum wages or overtime for an entire workforce. An employee should be given similar standing to bring an action to recover wages on behalf of the entire workforce, with or without the consent of other employees. Moreover, under this scheme, the action would not be a "class action." There would be no need to certify the class or to have court-approved class representatives. The hybrid form of class action provided for under the FLSA would also be bypassed. Unlike class actions at common law, in any FLSA section 16(b) lawsuit brought on behalf of the named plaintiffs and all those similarly situated, the class members must "opt in" by filing a written consent with the court. n152 A model similar to the [*2207] False

Claims Act would allow plaintiffs to bypass all of these cumbersome devices. The model language might look like this:

(a) With or without the consent of employees affected, a private plaintiff may bring an action to recover unpaid minimum wages or unpaid overtime compensation, including interest thereon, for all affected employees of an employer if at least two employees of that employer are named plaintiffs. In such an action, plaintiffs may recover for the labor agency the civil penalties provided for in this article.

(b) In any lawsuit to recover wages as provided for in subdivision (a), plaintiffs may recover any applicable civil penalties provided for in this article for the state. Where civil penalties are sought, the employees shall institute the action in their own names and in the name of the people of the state. The complaint shall be filed *in camera* and shall not be served for 60 days upon order of the court. The labor agency shall be served with the complaint and a statement detailing the evidence upon which the complaint is based. If within 60 days of service of the state agency, the agency decides to prosecute the action, private plaintiffs shall be entitled to 20% of any civil penalties recovered, in addition to recovery of unpaid wages. If the labor agency declines to prosecute the action, private plaintiffs shall be entitled to serve the summons and complaint and prosecute the action. The penalties recovered under this section shall be paid as follows: 30% to the private plaintiffs, 30% to the labor agency for future enforcement of wage and hour laws, and 40% to the State Treasury to the credit of the General Fund. Money recovered for affected employees who are not named plaintiffs shall be paid into the Industrial Relations Unpaid Wage Fund in the State Treasury and shall be paid to any employee who files a proper claim within three years of judgment or after the employee's separation from employment with the defendant employer, whichever occurs earlier. The employee or employees who prevail in recovering penalties shall be entitled to reasonable attorneys' fees and costs in addition to their proportional share of unpaid wages.

Under this scheme, only named plaintiffs would be entitled to immediate recovery of back wages. This scheme would encourage more employees to join as plaintiffs. Payment of back wages for those who are not named plaintiffs would be delayed until after their separation from an employer. This delay should help to prevent intimidated employees from returning their back wages to their employer as a condition of continued employment.

The combination of large wage judgments and large civil penalties should be sufficient to entice private plaintiffs to assume the task of private enforcement of labor laws. Lawsuits against sweatshop owners should rise dramatically, filling the gap created by the dwindling staff for public enforcement.

[*2208] 2. *Private Right of Action to Enforce the "Hot Goods" Provision of FLSA*

Only the DOL has standing to bring an action for injunctive relief to enforce the "hot goods" provision of the FLSA. n153 As explained above, n154 although the "hot

goods" weapon is potentially highly effective, the DOL rarely uses it because the DOL is so drastically understaffed. Thus, Congress should create a private right of action allowing employees or their union representatives to seek injunctive relief to enjoin the shipment of goods in interstate commerce that were produced in violation of wage and hour laws.

In addition, the definition of "goods" under section 3(i) of the FLSA should be expanded to include the accounts receivable or proceeds from sale of the goods that were generated by the unpaid labor of workers. Private plaintiffs and the DOL cannot always move quickly enough to seize goods before they are shipped. Often, the only thing that remains of the "hot goods" are the accounts receivable or sale proceeds that are in the hands of the customer. With an expanded definition of "goods," the DOL or private plaintiffs should be able to obtain an injunction requiring the customer to withhold the proceeds from the employer until wages are paid. Moreover, the court should have the authority to order payment of wages from the accounts receivable before the balance is paid to the employer. Currently, neither the DOL nor the courts have the authority to compel payment of wages, even after the goods have been seized. n155 The customer, or whoever has possession of the goods, would have the choice of paying the wages to free the goods for interstate commerce or letting the goods rot in a warehouse. n156 An exception, however, should be made for accounts receivable and sale proceeds, because these amounts would have been paid by the customer to the employer in any event for his performance of the contract. Moreover, allowing customers to keep the accounts receivable instead of paying them to the employer who completed the contract or to the employees who performed the work would create a windfall for the customer and an anomaly in the law. n157

Including "accounts receivable" within the definition of "goods" and giving courts the authority to seize accounts receivable accomplishes two things. First, the risk that the employer will disappear with the accounts receivable, leaving workers with no source of recovery for their wages, is avoided. Second, since the court or trustee holds the accounts receivable, [*2209] workers can be paid quickly once a wage judgment is entered rather than endure the lengthy process of enforcing a wage judgment. Giving private individuals the right to seize "hot goods," including accounts receivable, would ensure that the "hot goods" weapon will be used -- and used often -- to deter chronic violators.

V. CONCLUSION

Increased enforcement of tougher labor laws by private plaintiffs and governmental agencies will have the desirable effect of cleaning up sweatshop industries. But what effect will such reforms have on employees of the marginal businesses who will most likely be forced out of business by large wage judgments and civil penalties? Wouldn't the closing of sweatshops make it more difficult for immigrants to find jobs? Should we not allow them to operate in the underground economy, with all its attendant evils, because these businesses provide new immigrants with entry-level jobs? Moreover, isn't society benefited by a long-suffering and silent workforce willing to work for

subminimum wages in back-breaking stoop agricultural labor, in the kitchens of restaurants, and on the assembly lines of garment, electronic, and meat-processing plants?

The underground economy does, of course, play a role in providing entry-level jobs in poor neighborhoods. Let us be clear, however, that for immigrants working in the garment, restaurant, electronics and agricultural industries, these so-called "entry-level" positions are not stepping stones to higher paying jobs. These are dead-end jobs, in which new immigrants can expect to work twenty or more years until retirement. There is no trade-off in job training, experience, improvement of English skills, or the possibility of future advancement, that might justify low wages or deplorable working conditions. Rather, sweatshops represent a life-long dehumanizing exploitation of people of color in the United States for the profit of brand-name manufacturers, restaurateurs, high-technology companies, and the meat and agricultural industries.

Certainly, closing sweatshops, particularly if the sweatshops are concentrated in particular ethnic communities or poor neighborhoods, will cause disruptions. But this disruption and temporary loss of jobs is just that -- only temporary. As it stands now, the average life of a garment sweatshop is thirteen months. n158 Garment workers move from one employer to another many times during their working lives. So long as garment manufacturers have work to subcontract, when one sweatshop closes down, whether because of its already tenuous marginal position, or because of a large wage judgment, another opens up to take its place. The same is true in the electronics industry, where subcontracting is on the rise. Similarly, in the [*2210] hospitality industry, eating establishments come and go because of the whims and tastes of an unpredictable public. Thus, while stringent enforcement of tougher labor laws might force marginal businesses to close, the ultimate impact on unemployment would be no more or less than when these businesses close for any of a myriad of other reasons.

Moreover, tougher laws should be enforced to drive out those marginal companies that are chronic violators. They should not be allowed to engage in business and to compete with legitimate businesses. Ending the proliferation of marginal shops, particularly where the subcontracting system predominates in an industry, would reduce the overabundance of subcontractors who drive contract prices down in the fierce bidding process. It also would encourage larger, more efficient, and more stable shops to open in their place. Indeed, unless sweatshops are forced to comply with the law, the legitimate shops that need to accumulate capital to modernize simply cannot do so. Only larger, more stable shops have the bargaining power to demand higher contract prices and thus can afford to pay minimum wages. n159 Furthermore, workers in small, marginal businesses are not easily unionized, and even if unionized, the unions cannot negotiate high wages and benefits for them. Thus, pushing out of business marginal sweatshops that are chronic law violators, far from being detrimental, is necessary to end sweatshop labor and to encourage the growth of larger, more modern shops in the garment industry and other industries that rely on subcontracting.

Contrary to the beliefs of other commentators to this Symposium, n160 by enforcing

minimum wage, child labor, and health and safety laws, states will not stamp out entire industries. In the garment industry, for example, the cost of labor is less than ten percent of the consumer's cost for a garment. Retailers charge a 100% markup over the price the manufacturer charges them -- thus retailers take the biggest bite of all. n161 The solution clearly is in the redistribution of the profits from the price paid by consumers. n162 Compelling [*2211] subcontractors to pay minimum wages and overtime therefore would not drive the local garment industry out of business.

Another often-heard explanation for subminimum wages in the garment industry is the need to reduce labor costs to compete with low-wage Third World economies. n163 According to this argument, increasing labor costs through law enforcement *presumably* would force garment manufacturers offshore to produce all their goods. But labor costs are not the sole determinant of where garments will be produced. Current retail strategy makes local production of garments necessary. Department stores and retailers no longer order large inventories. Instead, they order many different styles of smaller quantities, with greater variety and greater color selections. Unpopular styles are dropped and "hot" styles in shorter runs are reordered, necessitating quicker turnaround times that cannot be met by offshore producers. A local contractor can produce a small order in one week, whereas the turnaround time for garments assembled in Asia is twelve weeks. The compression of the production cycle because of reorders and smaller runs, produced by local contractors, is an integral part of current retail marketing strategies. n164 And, as stated above, it does not cost much to pay minimum wages and overtime and end sweatshop conditions in these local shops.

Finally, immigrants are not the only persons harmed by sweatshops -- society as a whole also suffers. In order to compete against businesses in the underground economy, legitimate companies close down or cut wages, causing deterioration in working conditions for an entire industry. n165 At a time when unemployment is high among all segments of the workforce, citizens and English-speaking legal resident workers refuse to accept jobs in the garment, agriculture, and restaurant industries, because the wages offered are low and the hours long. This simply does not have to be. Unionized garment workers in the San Francisco Bay area earn a minimum of [*2212] \$ 5.92 per hour. n166 On piece rate, they average from \$ 7.00 to \$ 8.00 per hour, and can make as much as \$ 16.00 per hour or more. Moreover, an employer pays an additional thirty-three percent in health and welfare, vacation, and pension benefits. n167 Unionized dishwashers in San Francisco restaurants can earn as much as \$ 10.50 per hour. n168 At these wages, there is no reason why citizen workers, as well as legal immigrants, would not take the jobs that currently attract primarily undocumented workers in the garment, restaurant, or electronics industries, much as white and black workers toil in the unionized coal mines of Tennessee, Virginia, and Kentucky, or as auto workers wait for jobs on the Big Three's assembly lines in Detroit.

The lawlessness that permeates the garment, restaurant, and other sweatshop industries and the government's losing battle against them does not go unnoticed by society at large. Underground economic activities begin to creep into other sectors of the economy. For example, construction contractors have started to operate in the

underground economy. n169 They bid for jobs against unionized contractors and other legitimate contractors. When successful, they force legitimate contractors to pay lower wages in order to bid competitively. If not checked, their debilitating effect will drive down wages and worsen working conditions for an entire sector. Our society cannot afford to sacrifice its immigrant workers to the underground economy because it cannot afford the risk that the underground economy may one day swallow the rest of the economy. This Essay calls for decisive action by state and federal governments to stem this trend by passing tougher labor laws and allowing private enforcement of these laws.

FOOTNOTES:

n1 Cal. Exec. Order No. W-66-93 (1993), *reprinted in* CAL. ECON. DEV. DEP'T, NEWS RELEASE NO. 93-66, NEW STRIKE FORCE TARGETS UNDERGROUND ECONOMY 3-4 (1993) [hereinafter EDD NEWS RELEASE] (on file with author).

n2 EDD NEWS RELEASE, *supra* note 1, at 1.

n3 Cal. Exec. Order No. W-66-93, *supra* note 1, at 2.

n4 Vlae Kershner, *California Remains Mired in Red Ink*, S.F. CHRON., Feb. 14, 1994, at A9.

n5 EDD NEWS RELEASE, *supra* note 1, at 2.

n6 *Id.*

n7 In 1991, California had 137,600 garment workers and 189,100 restaurant workers. *See* CAL. EMPLOYMENT DEV. DEP'T, GARMENT AND HOSPITALITY INDUSTRY SURVEY, Attachments I & II (1992) [hereinafter EDD INDUSTRY SURVEY] (on file with author). Many workers in the agricultural industry also suffer from low wages as a result of violations of minimum wage and overtime laws. *See infra* text accompanying notes 24, 26-28.

n8 The tax revenues lost are significant because these three industries are a major part of the state's economy. Tourism is the largest industry in California, followed by garment-making. Liz Lippincott, *San Francisco Makers Keep Steady Course*, WOMEN'S WEAR DAILY, June 1, 1992, at 1, 8, 10.

n9 Of the 6000 garment shops in California, an estimated 75% are registered with the State Labor Commissioner. *See Hearing on "Enforcement of State Labor Laws Relative to the Employment of Minorities" Before the Industrial Relations Comm. of the California Senate* 3 (Oct. 19, 1993) (testimony of Steven T. Nutter, Western States Regional Director, International Ladies Garment Workers' Union) (on file with author).

n10 U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-88-130BR, "SWEATSHOPS" IN THE U.S.: OPINIONS ON THEIR EXTENT AND POSSIBLE

ENFORCEMENT OPTIONS 16 (1988) [hereinafter GAO SWEATSHOPS REPORT].

n11 *Id.*

n12 *Id.* at 20.

n13 *Id.* In California, in addition to the garment and restaurant sectors, agriculture has also been targeted as a sweatshop industry. Special statutes have been passed regulating farm labor contractors and affording special protection to farm workers. *See* CAL. LAB. CODE §§ 1682-1699 (West 1989 & Supp. 1994). Various task forces have been created through the years to examine sweatshop industries. In 1988, the Concentrated Enforcement Program targeted garment, restaurants, agriculture and health care. In November 1992, because of the deteriorating situation of garment and farm workers, California launched its Targeted Industries Partnership Program in cooperation with the Federal Department of Labor to conduct area-wide raids on garment shops and farm-labor contractors. CAL. DEP'T OF INDUS. RELATIONS, NEWS RELEASE NO. 93-09, STATE, FEDERAL LABOR INVESTIGATORS SWEEP LOCAL GARMENT INDUSTRY SHOPS 1-2 (1993) (on file with author) [hereinafter DIR NEWS RELEASE].

n14 GAO SWEATSHOPS REPORT, *supra* note 10, at 20.

n15 *Id.* at 32-35. Note, however, that in *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2293 (1994), Saskia Sassen makes it clear that the expansion of the underground economy does not depend on the existence of an immigrant labor force, nor are immigrants the cause of the informal economy. Rather, businesses in the underground economy set up shop where large immigrant populations exist in order to exploit the available cheap labor.

n16 GAO SWEATSHOPS REPORT, *supra* note 10, at 36-44.

n17 *Id.* at 35. Asians, Hispanics, and Haitians are among the immigrant groups occupying these low-skilled entry level positions. *Id.*

n18 Pub. L. No. 99-603, 100 Stat. 3359 (1986).

n19 8 U.S.C. § 1324a(a)(1)(A), 1324a(e), 1324a(f) (1988 & Supp. IV 1992).

n20 Carla Marinucci, *Why Some Bosses Mistreat Immigrants*, S.F. EXAMINER, Jan. 13, 1993, § 4, at A1, A9.

n21 *See* U.S. DEP'T OF JUSTICE, HANDBOOK FOR EMPLOYERS: INSTRUCTIONS FOR COMPLETING FORM I-9, at 8 (1987).

n22 Carla Marinucci, *Immigrant Abuse: 'Slavery -- Pure and Simple,'* S.F. EXAMINER, Jan. 10, 1993, at A1, A11.

n23 *Id.*

n24 The dairy's owner declined to comment for the *Examiner's* story, but agreed to pay the worker and other employees more than \$ 105,000 in overtime and housing supplements. *Id.*

n25 An attorney for the restaurant denied that the worker was treated unfairly, but agreed to pay him \$ 45,000 if the California Labor Commissioner found otherwise. *Id.*

n26 The ranch denied all charges. *Id.*

n27 *Id.*

n28 *Id.*

n29 Civil penalties for knowingly hiring an undocumented worker are as follows: first violation, \$ 250 to \$ 2000 per employee; second violation, \$ 2000 to \$ 5000 per employee; subsequent violations, \$ 3000 to \$ 10,000 per employee. 8 U.S.C. § 1324a(e)(4) (1988); 8 C.F.R. § 274a(b)(1)(ii) (1992). The fine for recordkeeping violations, such as failure to have the required forms filled out by employees and on file with the employer, is \$ 100 to \$ 1000 per individual worker. 8 U.S.C. § 1324a(e)(5) (1988); 8 C.F.R. § 274a.10(b)(2) (1992). While these fines may appear formidable, the actual amounts imposed are so small that they do not really deter the hiring of undocumented workers. For example, from 1989 through 1993, the INS issued 3283 fine notices and collected \$ 959,000 in fines. The average fine amounted to a mere \$ 292. See Louis Freedberg, *INS To Crack Down on Employers*, S.F. CHRON., Feb. 18, 1994, at 2.

n30 Employer sanctions are not only ineffective, they also have caused widespread discrimination against Asians and Latinos. See U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 3, 6, 38 (1990).

n31 After the restaurant closed on February 2, 1993, the workers met with the author on February 4, 1993, at the Asian Law Caucus. Since the employer had disappeared, no lawsuit was ever filed.

n32 Mary Anne Ostrom & Michelle Levander, *Korean Employees Outraged by Betrayal at USM*, SAN JOSE MERCURY NEWS, Nov. 1, 1992, at 1E.

n33 Steven A. Chin, *Garment Firm's Owners Sought*, S.F. EXAMINER, July 22, 1991, at A1; Bill Wallace, *Union Outlines Steps To Help Garment Workers*, S.F. CHRON., July 30, 1991, at A13.

n34 GAO SWEATSHOPS REPORT, *supra* note 10, at 35.

n35 Susan Headden, *Made in the U.S.A.*, U.S. NEWS & WORLD REP., Nov. 22, 1993, at 48. Between July and October, 1993, *U.S. News* visited garment factories in the leading manufacturing centers of New York, Los Angeles, and Dallas, "interviewed dozens of contractors, garment workers and manufacturers' employees and reviewed 400 pages of documents obtained through [FOIA]." *Id.* at 50. The publication made these principal findings:

* Of the estimated 50,000 sewing contractors nationwide, fully a third are believed to operate with no licenses or permits; workers are paid in cash." *Id.*

* Most producers of low-end clothing appear to be breaking wage and hour laws. Of the 83 garment factories inspected by the California Department of Labor [in October, 1993], 77 were cited for violations of wage, hour and record-keeping laws." *Id.* at 52.

* Many garment factories routinely violate health and safety laws. . . . Problems documented time and again at illegal sewing factories [included] blocked fire exits, rodent infestation and unsanitary bathrooms and lunch areas." At Washmax, a garment-processing plant in South Central Los Angeles, workers were discovered using toxic chemicals without protective gear. "Federal safety inspectors say there are many more factories like Washmax, but they complain that they have neither the time nor the resources to inspect all of them." *Id.*

n36 *Id.* at 49. In recent years, the plight of garments workers has been highly publicized and readers can refer to a number of scholarly works on the subject. *See, e.g.*, 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 (1992); Leo L. Lam, *Designer Duty: Extending Liability to Manufacturers for Violations of Labor Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623 (1992).

n37 Hayashi, *supra* note 36, at 198.

n38 Beverley A. Pitman, *Enforcing Labor Laws in the California Garment Industry: The Role of Field Enforcement in the State of California's Policing of Minimum Wage and Overtime Pay Violations* 23, 25 (Aug. 1992) (unpublished manuscript, on file with author).

n39 Headden, *supra* note 35, at 50.

n40 Pitman, *supra* note 38, at 20-21.

n41 The increasing use of subcontracting by brand-name manufacturers has resulted in a growing number of smaller, specialized apparel subcontractors. GAO SWEATSHOPS REPORT, *supra* note 10, at 35. "Between 1977 and 1982, the number of contractors with between 1 and 19 employees (those likely to be subcontractors) increased by 51 percent in the women's and misses' outerwear sector -- the largest

component in the apparel industry." *Id.*

n42 Headden, *supra* note 35, at 53.

n43 EDD INDUSTRY SURVEY, *supra* note 7, at Attachment I.

n44 Headden, *supra* note 35, at 53.

n45 *Id.*

n46 *Id.*

n47 *Id.*

n48 Pitman, *supra* note 38, at 23.

n49 *See infra* notes 144-45 and accompanying text.

n50 Headden, *supra* note 35, at 55.

n51 *Id.* at 54.

n52 *See infra* text accompanying notes 61-77.

n53 Headden, *supra* note 35, at 54.

n54 Sarah Henry, *Labor & Lace: Can an Upstart Women's Group Press a New Wrinkle into the Rag Trade Wars?*, L.A. TIMES, Aug. 1, 1993, Magazine, at 20, 21.

n55 Pitman, *supra* note 38, at 34.

n56 CAL. LAB. CODE § 1174.5 (West 1989 & Supp. 1994).

n57 *See* 29 U.S.C. § 216 (1988 & Supp. IV 1992).

n58 CAL. LAB. CODE §§ 23, 215 (West 1989).

n59 *See* Headden, *supra* note 35, at 52.

n60 CAL. LAB. CODE § 206(b) (West 1989).

n61 The Ninth Circuit has interpreted the National Labor Relations Act, codified at 29 U.S.C. §§ 141-187 (1988 & Supp. IV 1992), to bind a successor employer to a collective bargaining agreement entered into by the predecessor employer, if a plaintiff can establish that the successor and predecessor shared a common ownership, common control of labor relations, common management, or interrelations of business

operations. *See* *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147, 1150 (9th Cir. 1989) (citing *J. M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033-37 (9th Cir. 1982)); *cf.* *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 516-19 (9th Cir. 1989); *U.A. Local No. 343 v. Nor-Cal Plumbing, Inc.*, 797 F. Supp. 767 (N.D. Cal. 1992) (considering alter-ego and piercing-the-corporate-veil doctrines under Labor Management Relations Act).

n62 *See* *Ostrom & Levander*, *supra* note 32, at 1E.

n63 *Id.*

n64 Workers have first priority over a number of unsecured creditors; they are entitled to be paid up to \$ 2000 in wages earned within 90 days of the filing of bankruptcy. 11 U.S.C. § 507(a)(3) (1988). This priority kicks in, however, only after secured creditors are paid their share. *See* 3 COLLIER ON BANKRUPTCY P507.02[3][a] (15th ed. 1993).

n65 *In re* *USM Technology Corp.*, 158 B.R. 821 (Bankr. N.D. Cal. 1993).

n66 29 U.S.C. § 215(a)(1) (1988).

n67 *Id.*

n68 483 U.S. 27 (1987).

n69 *Id.* at 32-38.

n70 *In re* *Russell Transfer, Inc.*, 107 B.R. 535 (Bankr. W.D. Va. 1989).

n71 *Id.* at 536.

n72 *Id.*

n73 *In re* *USM Technology Corp.*, 158 B.R. 821, 824-27 (Bankr. N.D. Cal. 1993).

n74 Order for Entry of Summary Judgment in Favor of Defendant Silicon Valley Bank and Against Plaintiff USM Workers' Committee, *In re* *USM Technology Corp.*, 158 B.R. 821 (Bankr. N.D. Cal. 1993) (No. 92-56411-JRG).

n75 *Ostrom & Levander*, *supra* note 32, at 8E.

n76 *Id.*

n77 *Id.*

n78 29 U.S.C. § 216(b) (Supp. IV 1992).

n79 For example, the overtime premium which must be paid for any hours over 40 in a week is one-and-a-half times the regular rate. 29 U.S.C. § 207(a)(1) (Supp. IV 1992). Overtime compensation based on the minimum wage of \$ 4.25 per hour, 29 U.S.C. § 206 (Supp. IV 1992), is an extra \$ 2.125 per hour. At 20 hours of overtime each week for 52 weeks, an employer would have to pay 50 employees \$ 221,000 in overtime premiums and an equal amount in liquidated damages.

n80 CAL. LAB. CODE § 226.3 (West 1989 & Supp. 1994) (enforceable only by Labor Commissioner).

n81 At \$ 250 per employee multiplied by 52 pay periods (one year), an employer would have to pay the state \$ 650,000 in fines for 50 employees.

n82 *See, e.g.*, CAL. LAB. CODE § 1193.6 (West 1989 & Supp. 1994).

n83 *See, e.g.*, CAL. LAB. CODE §§ 217, 226.3, 1197.1 (West 1989 & Supp. 1994).

n84 At least two other commentators have studied the need for manufacturers' liability. *See Hayashi, supra* note 36, at 198, 206-08; Lam, *supra* note 36, at 652-64.

n85 29 U.S.C. § 215(a) (1988).

n86 As discussed *supra* at text accompanying notes 67-72, the DOL may use the "hot goods" provision to prevent the shipment of goods that were produced in violation of minimum wage and overtime laws, until the statutorily required wages are paid.

n87 Headden, *supra* note 35, at 54.

n88 Bill Wallace, *Sewing Shop Owners Ante Up Back Pay*, S.F. CHRON., Jan. 4, 1994, at A18.

n89 N.Y. TIMES, Oct. 26, 1992, at A13.

n90 Henry, *supra* note 54, at 23. One week before Christmas 1993, in an effort to end the campaign against her, McClintock offered a "charitable contribution" in the amount of \$ 24,000 to the Lucky Garment workers. While five out of twelve of the workers accepted the "charity," seven have continued the boycott against McClintock. *See Steven A. Chin, Seamstresses Refuse "Charity," Demand Pay*, S.F. EXAMINER, Feb. 16, 1994, at A20; Bill Wallace, *S.F. Dress Firm Offers Gift to Seamstresses*, S.F. CHRON., Dec. 21, 1993, at A22.

n91 DIR NEWS RELEASE, *supra* note 13.

n92 U.S. DEP'T OF LABOR, NEWS, USDL-127 (Sept. 14, 1993) (on file with author).

n93 Master Apparel Industry Contractor Agreement 1 (July 26, 1993) (on file with author).

n94 *Id.* at 4.

n95 *See* Master Apparel Industry Contractor Agreement (Dec. 10, 1993) (on file with author).

n96 *Id.* at 3 (emphasis added).

n97 The proposal for joint liability of manufacturers and subcontractors, however, is equally applicable to other industries in which subcontracting perpetuates sweatshops. For example, the same market forces that keep contract prices low in the garment industry are at work when growers subcontract to farm contractors. In agriculture, however, the relationship of grower to farm labor contractor is more analogous to that of employer to foreman or supervisor than one where there is a true arm's-length relationship between two separate companies. Farm workers work on the land of the grower, tend and harvest the growers' crops, and are supervised merely by the so-called "independent contractor" who owns no equipment or tools and purchases no supplies. For a detailed discussion of the relationship between growers, contractors, and farm workers, see generally *S. G. Borello & Sons, Inc. v. Department of Indus. Relations*, 769 P.2d 399 (Cal. 1989) (holding sharefarmers not independent contractors under the California Worker's Compensation Act), and cases cited therein.

n98 A.B. 3930, Cal. 1989-90 Reg. Session, available in LEXIS, LEGIS Library, TRCK90 File; A.B. 1542, Cal. 1991-92 Reg. Session [hereinafter A.B. 1542], available in LEXIS, LEGIS Library, CATEXT File.

n99 A.B. 1542, *supra* note 98.

n100 Governor George Deukmejian's Veto Message to Assembly Bill 3930 (Aug. 24, 1990), 5 J. ASSEMBLY 9805 (Aug. 27, 1990); Governor Pete Wilson's Veto Message to Assembly Bill 1542 (Sept. 30, 1992), 24 J. ASSEMBLY 10,251 (Oct. 1, 1992).

n101 29 U.S.C. § 216(b) (1988).

n102 CAL. LAB. CODE § 1194.2 (West 1989 & Supp. 1994) provides for liquidated damages for minimum wage violations, but not for overtime violations. Since the debilitating effects of exceedingly long work hours is as damaging as the payment of subminimum wages to workers, this limitation should be eliminated.

n103 Criminal prosecution for recordkeeping violations is rare. In 1981, the General Accounting Office recommended to Congress the implementation of civil monetary penalties of sufficient size to deter recordkeeping violations. *See* U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/HRD-81-60, CHANGES NEEDED TO

DETER VIOLATIONS OF FAIR LABOR STANDARDS ACT 42 (1981). Despite the growing need, however, no congressional action has yet been taken on the recommendations.

n104 Similar language was introduced in the 1994 session of the California Legislature. *See* A.B. 3374, Cal. 1993-94 Reg. Session [hereinafter A.B. 3374], available in LEXIS, LEGIS Library, CATEXT File.

n105 29 U.S.C. § 211(c) (1988).

n106 29 U.S.C. § 217 (1988).

n107 CAL. LAB. CODE § 1174.5 (West Supp. 1994).

n108 GAO SWEATSHOPS REPORT, *supra* note 10, at 47.

n109 *See* A.B. 3374, *supra* note 104.

n110 *See supra* note 80 and accompanying text; CAL. LAB. CODE §§ 226(a), 226.3 (West 1989 & Supp. 1994).

n111 CAL. LAB. CODE § 1197.1 (West 1989).

n112 Although wages recovered may be small, this does not mean chronic violations do not exist. Rather, the DOL often has difficulty proving its case because immigrants who are still employed are reluctant to come forward to testify against their current employer, or because the employer has not kept adequate records or has falsified records.

n113 *See* A.B. 3374, *supra* note 104.

n114 CAL. LAB. CODE §§ 96.6, 96.7 (West 1989).

n115 CAL. LAB. CODE § 96.7(d) (West 1989).

n116 A "till tap" is a process by which a sheriff, armed with a writ of execution and notice of levy, is stationed at a retail establishment to collect the judgment amount directly from the cashier (the till) as customers pay for services or merchandise. *See* CAL. CIV. PROC. CODE § 700.070 (West 1987); *Debt Collection Practice in California*, 2 CALIFORNIA CONTINUING EDUCATION OF THE BAR § 7.23 (1987).

n117 CAL. LAB. CODE § 206(b) (West 1989).

n118 For a discussion of the "shell game" tactic, see *supra* text accompanying notes 61-63. Faced with a large wage judgment or civil penalties, a company simply closes

shop and resurfaces elsewhere under a new corporate name. Alternatively, the owner may sell all of his assets to an immediate relative, but continue managing the shop, with the profits remaining within the family. Finally, an employer may simply file for bankruptcy protection. Once discharged in bankruptcy, he is no longer liable for any wage debts to his employees. *See* 11 U.S.C. § 524 (1988) (describing effect of discharge). For exceptions to the general rule of dischargeability of debts, see 11 U.S.C. § 523 (1988 & Supp. 1992). Wages, however, are not included in these exceptions. Thus, the employer remains free to open yet another sweatshop. Under any of the above scenarios, the worker either has no defendant to sue because the bankruptcy company has disappeared, or, if a wage judgment is obtained, has no way of enforcing it against the new entity. Moreover, the legal fiction that the predecessor and successor companies are separate entities prevents the former workers from reaching the assets of the new company. *See* *Zaist v. Olson*, 227 A.2d 552 (Conn. 1967).

n119 29 U.S.C. § 203(d) (1988).

n120 The definition of an alter-ego or successor employer as set forth in subsection (2) was developed by the federal courts. *See* *Haley & Haley v. NLRB*, 880 F.2d 1147, 1150 (9th Cir. 1989) (interpreting National Labor Relations Act); *J. M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029 (9th Cir. 1982) (same); *U.A. Local No. 343 v. Nor-Cal Plumbing, Inc.*, 797 F. Supp. 767 (N.D. Cal. 1992) (interpreting Labor Management Relations Act). Under Title VII of the Civil Rights Act of 1964, courts have adopted NLRA case law in finding an employer liable as an alter-ego or successor employer for the discriminatory practices of its predecessor. *See* *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974).

n121 Under CAL. LAB. CODE § 240 (West 1989), the State Labor Commissioner may bring a court action to compel an employer to cease doing business if the employer does not pay a wage judgment. Under CAL. LAB. CODE § 243 (West Supp. 1994), a private plaintiff or her attorney may obtain a temporary restraining order if an employer, within a ten year period, fails to satisfy two separate judgments for nonpayment of wages. Under the California Workers' Compensation statute, the Labor Commissioner may issue a "stop order" requiring the employer to cease doing business unless and until it purchases workers' compensation insurance. CAL. LAB CODE § 3710.1 (West 1989).

n122 Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the debts of the corporation. *See* DEL. CODE ANN. tit. 8, § 102(b)(6) (1991).

n123 N.Y. BUS. CORP. LAW § 630 (McKinney 1963 & Supp. 1986); *see also* *Sasso v. Vachris*, 484 N.E.2d 1359 (N.Y. 1985).

n124 PA. STAT. ANN. tit. 43, §§ 260.1-11 (1992); *see also* *Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279 (3d Cir. 1983).

n125 CAL. LAB. CODE §§ 23, 216, 218, 226.6, 227 (West 1989); *see Ex parte* Sears, 30 P.2d 571 (Cal. Dist. Ct. App. 1934); *Sears v. Superior Court*, 24 P.2d 842 (Cal. 1993); *Ex parte* Oswald, 244 P. 940 (Cal. Dist. Ct. App. 1926).

n126 193 P.2d 734, 740 (Cal. 1949).

n127 *Barnhill v. Robert Saunders & Co.*, 177 Cal. Rptr. 803, 806 (1981).

n128 A secured creditor is entitled to be paid from the proceeds of its collateral, ahead of the unsecured creditors, even if these creditors are never paid. *See In re* Enserv Co., Inc., 64 B.R. 519, 521-22 (Bankr. 9th Cir. 1986).

n129 *See supra* text accompanying notes 62-64, 73-74.

n130 *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 38 n.9 (1987).

n131 North Carolina's statute provides that in the case of the insolvency of an employer, workers have a lien on assets for services rendered within two months preceding the institution of insolvency. N.C. GEN. STAT. § 44-5.1 (1993). Tennessee's statute provides that all employees shall have a lien on firm property of every character and that the lien extends to claims accrued within three months of the bringing of any action for the enforcement thereof. TENN. CODE ANN. §§ 66-13-101 to -102 (1993). Virginia's statute protects certain laborers, such as conductors, brakemen, engine drivers, firemen, and mechanics, up to \$ 25.00 per week, and gives these workers a prior lien on all the real and personal property of the employer. VA. CODE ANN. § 43-24 (Michie 1976).

n132 *See Roberts v. Bowen Mfg. Co.* 85 S.E. 45 (N.C. 1915); *Walker v. Linden Lumber Co.*, 87 S.E. 331 (N.C. 1915).

n133 *See Humphrey Bros. v. Buell-Crocker Lumber Co.*, 93 S.E. 971 (N.C. 1917).

n134 483 U.S. 27, 37 (1987)

n135 *Citicorp*, 483 U.S. at 38 (quoting *Ford v. Ely Group, Inc.*, 621 F. Supp. 22, 26 (W.D. Tenn. 1985)).

n136 Headden, *supra* note 35, at 54.

n137 *Id.* at 54-55.

n138 *Id.* at 54.

n139 *Id.* at 55.

n140 *Background Paper of California Senate Comm. on Industrial Relations: Hearing on Enforcement of State Labor Laws Relative to the Employment of Minorities* 6, 9 (Oct. 19, 1993) (Chart 3) (on file with author).

n141 *Id.* at 10 (Chart 4).

n142 EDD INDUSTRY SURVEY, *supra* note 7, at Attachment I.

n143 *Id.* at Attachment II.

n144 Pitman, *supra* note 38, at 51-52.

n145 With 6000 garment factories in California, *see supra* note 9, and 1200 inspections a year, only one in five can be inspected each year.

n146 False Claims Amendment Act of 1986, Pub. L. No. 99-562 §§ 2-4, 100 Stat. 3153, 3153-57 (codified as amended at 31 U.S.C. §§ 3729-3730 (1988)).

n147 31 U.S.C. § 3730(b) (1988).

n148 31 U.S.C. § 3730(b)(4) (1988).

n149 Since 1986, more than 600 *qui tam* cases have been filed, compared with 20 such cases in the decade prior to the amendment. The new *qui tam* cases have netted the U.S. government nearly \$ 440 million in fraud-based recoveries. In 1992, the amounts recovered in all *qui tam* cases exceeded those filed by the Department of Justice. Richard C. Reuben, *Ferretting Out Fraud*, CAL. LAW., Dec. 1993, at 39, 39.

n150 29 U.S.C. § 216(c) (1988).

n151 CAL. LAB. CODE § 1193.6 (West Supp. 1994).

n152 29 U.S.C. § 216(b) (1988).

n153 *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47, 51 (8th Cir. 1984).

n154 *See supra* Part IV.A; Headden, *supra* note 35, at 54.

n155 *See Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 38-39 (1987).

n156 *See id.*

n157 If the employer filed for bankruptcy protection, the accounts receivable would become the property of the debtor's estate. Without the statutory wage lien laws proposed above, the accounts receivable will be distributed according to the priority scheme under the bankruptcy code. With statutory wage lien laws, workers will have a

priority claim on accounts receivable. *See supra* Part IV.

n158 Headden, *supra* note 35, at 54.

n159 In 1990, the International Ladies Garment Workers Union (ILGWU) conducted a survey of 230 sewing shops in San Francisco. It found that of the smaller shops located in the Chinatown district (with 40 or fewer machines), at least 60% violated minimum wage laws and 80% violated overtime laws. Of the larger shops (41 to 200 machines), most paid minimum wage but 65% did not pay overtime. Memorandum, Summary of Information from Center's Survey (Nov. 26, 1990) (on file with author).

n160 *See, e.g.*, Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103 YALE L.J. 2157, 2173-75 (1994).

n161 *See* Kelly Gust & Carolyn Newberg, *Threadbare Dreams, Abuses Abound in Oakland Sweatshops*, OAKLAND TRIB., July 28, 1991, at A1, A9 (reporting that from a dress selling for \$ 120, \$ 10 or less than 10% went to labor, another \$ 10 went to subcontractor, \$ 15 to material, \$ 25 to the manufacturer, and \$ 60, or half, went to the retailer).

n162 An alternative approach would be to increase the retail price slightly and to use the extra dollars earned to pay workers. As the *U.S. News & World Report* investigators found in their three-month investigation of the garment industry, "[e]nding the sweatshop abuses on clothing Made in the U.S.A. probably wouldn't cost much: It's just a matter of increasing the margins a bit." Headden, *supra* note 35, at 55. And, as a U.S. Labor Department official opined: "For a buck more per garment, this whole problem could be solved." *Id.*

n163 *See, e.g.*, Sassen, *supra* note 15, at 2300. The U.S. garment industry is much more complicated than this and foreign competition cannot be the only explanation for sweatshop conditions. Massive foreign competition is more of a myth than a reality. Unlike the electronics and automobile industries, no foreign apparel designers compete with the U.S. apparel industry. Rather, U.S. apparel manufacturers overwhelmingly control the U.S. market. It is U.S. garment manufacturers who shut down plants in this country to produce their garments in low-wage Third World countries. Additionally, these very same manufacturers produce their goods locally. If there is any competition, it is with themselves.

n164 Interview with Steven T. Nutter, Western States Regional Director, ILGWU, in San Francisco, Cal. (Mar. 8, 1994).

n165 Between 1975 and 1978, the author was a member of the San Francisco Chapter of the ILGWU. At that time, African-American workers made up approximately 10% of the garment workers' union. Among the union leadership, including Business Agents and Organizers, Executive Board members and shop stewards, were a sizeable number of black garment workers. For over a decade, the Executive Director of the San

Francisco Region was an African-American woman. Wages were good compared to service industry jobs and black workers worked until retirement in the union shops. Today, the San Francisco garment work force is composed almost entirely of Asian immigrants working in sweatshops for half the wages black workers made two decades ago.

n166 Interview with Katie Quan, Manager, Pacific Northwest District Council of the ILGWU, in San Francisco, Cal. (Mar. 16, 1994).

n167 *Id.*

n168 Interview with Tho Thi Do, Organizer, Hotel and Restaurant Employees International Union, Local 2, in San Francisco, Cal. (Mar. 24, 1994).

n169 The Strike Force, created in California on October 26, 1993, *see supra* note 1, targets the garment, construction, and auto repair industries. *See* Memorandum from Senator Patrick Johnson Regarding Results of Industrial Relations' November 16th Hearing on the Underground Economy 2 (Feb. 22, 1994) (on file with author).