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Escaping the Allure of Joint Employment: Using Fault-Based Principles to Impose Liability for the Denial of Employee Statutory Rights

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Using joint employment alone to impose liability requires an extension of the strict imputed liability theory embodied in respondeat superior. *Employers, including incorporated businesses, under the common law are strictly liable for harms to their employees, as they are for harm to third parties, because of actions of their agents or other employees taken within the scope of their employment. The liability is strict because it does not depend on a finding that the employer, the principle, was negligent or otherwise at fault. Expanding liability through joint employment, even if based on a demonstration of joint control of statutorily protected employees, extends this strict imputed liability by imposing responsibility on one of the businesses for the acts of managers or others who may not be under its control.*

There are both a practical political problem and a related legal doctrinal problem with using joint employment to draw the boundaries of assigned liability for the denial of employee statutory rights. The legal doctrinal problem is that the common law definition of employment is too constricted to reach all actions of agents of independent businesses that sometimes cause the denial of statutory employee rights. Before treating a business as an employer on whom strict respondeat superior *liability can be imposed, the common law has required that a business have sufficient control over workers to ensure that their work is aligned with its interests. Yet employers may intentionally or negligently cause the denial of employee rights without having such control. Franchisors, for instance, that do not meet the common law definition of employer for their franchisees' employees, typically do have enough influence over their franchisees to cause violations of federal or state wage and hour laws or the National Labor Relations Act.*

The practical political problem is that expanding joint employment liability from its common law dimensions to reach businesses that may have not caused the denial of employee statutory rights seems unfair to business owners and managers, in part because it is disruptive of efficient business relationships. The imposition of strict liability on one employer for a second employer's denial of

rights to its employees may compel the first employer to assert full control over the second employer's employment relations. Whether or not this benefits the employees, it may also disrupt efficient relationships that have been set contractually between two solvent businesses for reasons other than the evasion of liability through insolvency. Not surprisingly, not only the business community, but also the judiciary has resisted imposing liability on employers whose agents have not been the cause of statutory harm.

An alternative fault-based approach to extending liability for the deprivation of statutory rights can reach more culpable businesses, whether or not joint employers, without the disruption of efficient business relationships. Many statutes, including Title VII of the 1964 Civil Rights Act and the National Labor Relations Act, have been reasonably read to embody this fault-based approach, and those that cannot, including the Fair Labor Standards Act, can be read to permit non-preempted supplementary common law actions based on implied duties not to interfere actively with another employer's grant of statutory benefits. This fault-based approach would allow businesses to determine the efficient level of control they exert over the employment policies of subordinate independent businesses, but require them to take reasonable steps to ensure that whatever control they do exert does not result in the deprivation of the rights of the employees of the subordinate businesses.

I. INTRODUCTION

Over the past decade the debate over which businesses should be assigned liability for the denial of employee statutory rights has focused almost exclusively on the doctrine of joint employment. Progressive government[1] and academic lawyers[2] have advocated the use of joint employment doctrine to expand the number of employees whose employment rights economically dominant franchisors and users of supplied or subcontracted labor are responsible for

[1] *See, e.g.*, U.S. Dep't of Labor Wage & Hour Div., Administrator's Interpretation No. 2016-1, *Joint Employment Under the Fair Labor Standards Act and Migrant and Season Agricultural Worker Protection Act* 5, 13 (2016); Browning-Ferris Industries of California, 362 N.L.R.B. No. 186 (2015) (defining joint employment under the National Labor Relations Act).

[2] *See, e.g.*, Andrew Elmore & Kati Griffith, *Franchisor Employer as Employment Control*,109 Calif. L. Rev. xxx (2021) (forthcoming); Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. REL. 727, 739 (2004).

protecting. This essay contends that this focus on joint employment as the primary doctrinal tool for expanding employer responsibility for the denial of employee rights has been misguided. Rather than relying primarily on joint employment doctrine and the associated strict imputed liability theory of *respondeat superior*, progressive lawyers should press for a more robust application of fault-based principles drawn from the common law of torts.[3] This shift of focus need not weaken the case for an expansion of collective bargaining responsibilities. In order to enable collective bargaining to more fully serve its redistributive goals, progressives should seek a legislative amendment that assigns bargaining responsibility to the providers of capital, rather than only to joint employers who would have imputed *respondeat superior* liability for torts against third parties.[4]

Joint employment doctrine may seem to offer the most promising route to making economically dominant businesses responsible for the denial of employee rights. If a franchisor or economically dominant contractor is a joint employer of employees of workers formally employed by another employer, the franchisor or contractor theoretically can be assigned liability for any denial of the rights of employees, even when that denial is the fault of only the primary formal employer. Such strict liability seems to follow, at least for rights secured under statutes whose definition of employment is to derive from the common law,[5] because the common law derived the definition of the employment relationship to set the boundaries of strict imputed, *respondeat superior* employer liability.[6] Though the definition of employment was used primarily in the common law to set the bounds of strict imputed employer liability to third parties for employee

[3] *See infra* TAN 55-70; 81-88.

[4] *See infra* TAN 162-170.

[5] The Supreme Court has made clear that the common law provides a default definition for the employment relationship for the many federal statutes -- including the anti-discrimination statutes and the National Labor Relations Act -- that do not provide a meaningful alternative definition. *See, e.g.*, Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992); Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). The Court acknowledges, however, that by defining "employ" to mean "suffer or permit to work," the Fair Labor Standards Act does provide an alternative and more inclusive definition based on older child labor statutes. *See* Darden, supra, at xxx.

[6] *See* MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW, A HISTORICAL PERSPECTIVE 133-150 (1989); Michael C. Harper, *Using the Anglo-American Respondeat Superior Principle to Assign Responsibility for Worker Statutory Benefits and Protections*, Wash. Univ. Global Stud. L, Rev. 161, 177-78 (2019); Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY. J. OF EMP. & LAB. L. 295, xxx (2001).

torts committed in the scope of employment, the same arguments for employer internalization of the costs of doing business can be used to support strict employer liability for the denials of employee rights during the course of business.[7]

Yet the common law definition of employment is too constricted to reach all businesses that sometimes cause the denial of statutory employee rights. Before treating a business as an employer on whom strict *respondeat liability* can be imposed, the common law has required that a business have sufficient control over workers to ensure their work is aligned with its interests.[8] Economically dominant franchisors or contractor employers may intentionally or negligently cause the denial of franchisee-employee rights without having such control. A food franchisor, for instance, that cedes control over the hiring, discipline, work direction, and compensation of a franchisee's workers, may not meet the common law definition of employer for these workers. Indeed, by taking its royalties as a share only of revenues rather than of net profits,[9] a typical fast food franchisor provides its franchisees with an incentive to not fully align personnel policies with the interests of their franchisor.[10] Nonetheless, franchisors that control franchisees' right to continue and expand their branded operations typically will have enough influence over their franchisees to cause particular violations of federal or state wage and hour laws or the National Labor Relations Act.[11]

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[7] *See* Harper, *supra* note 6, at 178-184.

[8] *See id.* at 179-181. Following the Restatement (Second) of Agency, § 220(2), published in 1958, contemporary articulations of what is summarized as a right to control test invoke multiple factors, including those offered by the Court in *Reid* and then quoted in *Darden*, that are relevant to the existence *vel non* of an employment relationship. *See, e.g., Darden,* 503 U.S. at 323, *quoting Reid,* 490 U.S. at 750-51. As stated in the Restatement of Employment Law (2015) (hereinafter REL) § 1.01, the multifactor tests determine whether a worker renders service in alignment with the putative employer's interest or rather somewhat in his or her own or another independent business's interest. *See also* REL § 1.04.

[9] *See* ROGER D. BLAIR & FRANCINE LAFONTAINE, THE ECONOMICS OF FRANCHISING (2005); G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Tying Contracts*, 28 J. OF LAW AND ECON. 503 (1985); Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 933 (1990)

[10] The franchisee of course has a greater incentive to reduce labor costs, even if somewhat at the risk of reduced sales, while the franchisor is relatively more interested in expanding sales, even if somewhat at the expense of the franchisee's profits.

[11] *See, e.g.*, Ochoa v. McDonald's Corp., 133 F. Supp.3d 1228, 1236 (N.D. Cal. 2015) (testimony of John A. Gordon, restaurant advisor and consultant: "'McDonald's is able to exercise a greater degree of control over its franchisees' restaurants' … through control over growth and rewrite, and the ability to terminate franchise agreements for

Addressing this under inclusion by expanding joint employment from its common law dimensions to impose strict liability without fault on any business with sufficient economic power to control the personnel delinquencies of other businesses, however, may seem unfair and disruptive of efficient business relationships. It may seem unfair to many to impose strict liability on a business that has not affirmatively caused another independent business's denial of employee statutory rights. The imposition of strict liability also may cause an economically independent business without direct culpability to attempt to assert full control over any economically culpable business's employment relations. Whether or not this forced vertical integration of business operations benefits the employees, it may also disrupt efficient relationships that have been set contractually between independent solvent businesses[12] for reasons other than the evasion of liability through insolvency.[13] More conservative policy makers,[14]

deviation from its standards."). See also the compelling case for franchisor influence over franchisees presented in Elmore & Griffith, *supra* note 2.

[12] Reductions of labor costs set by internal labor markets seem to be one reason for divisions of operations between firms, through subcontracting, franchising, and other forms of vertical disintegration. *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 49-52 (Harvard Univ. Press 2014); Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD J. OF LEG. STUD. 353, 354 (1990). However, firms also derive efficiencies by assigning tasks to more specialized firms with "core competencies." *See* Weil, at 85-88; Collins, at 360; Davidov, *supra* note 2, at 730-31.

[13] Ensuring compensation to employees who have been denied statutory rights of course provides the strongest policy arguments for extending liability to firms other than the employers primarily responsible for the denial of the rights. These arguments apply where there is risk that the primarily responsible employers are unable to provide compensation because of insolvency. In most other cases the extension of liability to other businesses with some contractual relationship with the responsible business will have no effect on ensuring compensation or on the firm that pays. Contracts between two rationally operated businesses will almost invariably include indemnity clauses. *See* Kati L. Griffith, *An Empirical Study of Fast-food Franchising Contracts: Towards A New Intermediary Theory of Joint Employment*, 94 Wash. L. Rev. 172, xxx (2019) (finding indemnity clauses to be common in franchise agreements).

Assigning responsibility for purposes of defining collective bargaining obligations, however, might matter significantly even where each business is fully solvent. *See infra* TAN 162-170.

[14] *See* Save Local Business Act H.R. 3441, 115th Cong., 1st Sess. (Aug., 2017) (legislation to amend National Labor Relations Act and Fair Labor Standards Act to tighten definition of joint employment); Protecting Local Business Opportunity Act H.R. 3459 (Sept. 2015) (legislation to amend National Labor Relations Act to tighten definition of joint employment); Joint Employer Status under the National Labor Relations Act, 85 Fed. Reg. 11184 (2020) (President Trump-appointed Labor Board Rule tightening President Obama-appoint Labor Board definition of joint employment); Joint Employer Status under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (2020) (Department of Labor tightening of joint employer definition).

the business community,[15] and courts applying liability rules[16] thus predictably have resisted the expansion of joint employment and its associated strict liability.

Furthermore, no realistic expansion of joint employment doctrine can reach all businesses that are responsible for the denial of rights that employment statutes are intended to secure. Even in the absence of any continuing relationship on which a claim of joint employment could be based, a business may impair the statutory rights of the employees of other businesses through the exertion of economic leverage.[17] This seems particularly likely for businesses with market-based leverage over other independent businesses.

In light of these difficulties with the use of joint employment doctrine, this essay demonstrates how fault-based principles borrowed from tort law can be better used to define the employers responsible for the denial of employee rights. By analyzing cases and hypotheticals under three types of statutory regimes, the essay contends that these principles should supplement the strict liability, joint employment doctrine. The fault-based principles explain how and when employers can and should be liable for some denials of statutory rights to workers over whom they may not exercise the kind of authority that would justify the imposition of joint employer status and its associated strict liability.[18] The essay also contends that the case for expanding the scope of liability through the application of fault-based principles has more appeal than does expanding the scope of liability by enlarging the concept of joint employment from its roots in the law of *respondeat superior*.[19]

The essay first considers how fault-based principles can impose liability on non-joint employers for the discrimination and retaliation prohibited by Title VII of the 1964 Civil Rights Act,[20] and other anti-discrimination statutes like the Age

[15] *See, e.g.,* Testimony of Tamra Kennedy, Testifying on Behalf of International Franchise Association, in favor of H.R. 3441, supra note 14; Testimony of G. Roger King, Senior Labor and Employment Counsel, H.R. Policy Association, for the House Education and Workforce Committee Hearing on Joint Employer Policy and Legal Issues, July 12, 2017; Testimony of Kevin R. Cole, on Behalf of Independent Electrical Contractors in favor of H.R. 3459, *supra* note 14, Sept. 29, 2015; Letter from National Federation of Independent Business, in favor of H.R. 3459, *supra* note 14, Sept. 10, 2015

[16] *See, e.g., infra* TAN and note 71; *infra* TAN and note 151.

[17] *See, e.g., infra* TAN and notes 39-52; *infra* TAN and notes 134-142.

[18] *See, e.g., id.*

[19] *See, e.g., infra* TAN 67-72; *infra* TAN 107-120; *infra* TAN 143-150.

[20] Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e(f) (2017).

Discrimination in Employment Act (ADEA)[21] and the Americans with Disabilities Act (ADA).[22] The common law provides an alternative model to that of joint employment for the imposition of this liability. This alternative is the tort of intentional wrongful interference with a present or potential employment relationship between two other parties.[23] As some judicial decisions have recognized,[24] the language of the anti-discrimination statutes allow this model to be applied as a statutory cause of action against employers that obstruct with prohibited intent other employers from hiring particular employees. Furthermore, the statutes should permit the interference tort to be used against employers who intentionally cause other employers to discriminate or retaliate in violation of one of these statutes.[25] The essay also explains how fault-based principles can be adapted to impose non-economic liability outside joint employment for discriminatory harassment.[26]

The essay next considers the expansion of responsibility for the denial of the minimum wage and overtime payment obligations imposed by the Fair Labor Standards Act (FLSA),[27] as well as many state statutes.[28] The tort of intentional wrongful interference with employment or prospective employment would be of limited use in expanding liability beyond the single or joint employers assigned such obligations; few employers have the intention of preventing other employers from meeting their FLSA responsibilities. However, negligence law does provide a fault-based model for expanding FLSA liability.[29] Employers whose continuing control of other employers and their employees is insufficient to be treated as joint employers nonetheless may cause the denial of FLSA rights through particular affirmative acts of negligent interactions with other employers. When causation can be demonstrated, affirmative negligent acts, if not also

[21] Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (2017).
[22] Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2017).
[23] *See infra* TAN 55-67.
[24] *See infra* TAN 39-55.
[25] *See infra* TAN 56-72.
[26] *See infra* TAN 73-88.
[27] 29 U.S.C. § 201 et seq.
[28] The FLSA does not preempt state minimum wage or wage payment laws. All but five states impose their own minimum wage, a majority at a level above that set in the FLSA. *See* https://www.dol.gov/agencies/whd/mw-consolidated.
[29] *See infra* TAN 91-94.

passive acquiescence to known wage and hour violations, make a compelling case for liability, regardless of joint employment status.[30]

The essay acknowledges that using a negligence model to expand FLSA liability would require legislative action. Unlike the tort of intentional wrongful interference for the anti-discrimination laws, a negligence tort cannot be easily spliced on to the language of the FLSA. Furthermore, common law courts have not required employers to exercise reasonable care when affecting employees of other employers.[31]

The essay finally considers the administrative law regime of the National Labor Relations Act (NLRA).[32] The NLRA renders illegal an employer's interference with or restraint or coercion of employees' concerted activity for their mutual aid,[33] as well as an employer's discrimination to encourage or discourage union membership or activity.[34] The National Labor Relations Board (NLRB), the agency delegated exclusive power to enforce the NLRA, has interpreted these prohibitions to apply against employers for actions that directly and intentionally affect the employees of other employers.[35]

The essay considers that the NLRA also requires employers to bargain with unions that demonstrate support from a majority of employees in a unit appropriate for bargaining,[36] and it allows that fault-based liability rules do not help define the employers that may be subject to such bargaining obligations.[37] However, the essay concludes that expanding the meaning of joint employment also is not the best way to define the economic relationship most appropriate for collective bargaining. [38]

[30] *See infra* TAN 121-126.
[31] *See infra* TAN 103.
[32] 29 U.S.C. §§ 141-188.
[33] 29 U.SC. § 148(a)(1).
[34] 29 U.S.C. § 148(a)(3).
[35] *See infra* TAN 134-142.
[36] 29 U.S.C. §§ 148(a)(5); 149(a).
[37] *See infra* TAN 155-163.
[38] *See infra* TAN 164-169.

II. Intentional Interference with Non-Discriminatory Employment

Within the first decade after passage of the 1964 Civil Rights Act, without any reference to joint employment, a panel of the District of Columbia Circuit Court of Appeals explained in *Sibley v. Memorial Hospital*[39] how Title VII's prohibition of intentional discrimination[40] applied against employers that had intentionally caused prohibited discrimination against employees of other employers. Sibley was a private duty nurse who claimed that supervisors at a private hospital had refused because of his male gender to refer him for employment with two female patients in rooms at the hospital. The parties did not contest that the hospital had sufficient employees to fit Title VII's definition of employer,[41] nor did they dispute that Sibley was not one of those employees. Furthermore, Sibley did not, and could not persuasively, contend that the hospital met Title VII's definition of an employment agency also subject to anti-discrimination prohibitions.[42] The issue before the panel was only whether Title VII's prohibition of intentional discrimination reached an employer's obstruction of an individual's potential employment relationships with third parties such as the two female patients.[43] Judge McGowan, writing for a unanimous panel, stressed that the prohibition of intentional employment discrimination covers an employer's discrimination against "any individual with respect to . . . privileges of employment" rather than only against present or former employees or applicants for employment.[44] He also emphasized that Title VII's objective of achieving

[39] 488 F.2d 1338 (1973).
[40] 42 U.S.C. § 2000e-2(a)(1).
[41] Title VII offers as its definition of employer only: "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year … " 42 U.S.C. § 2000e(b).
[42] Sibley in any case would not have been able to include the hospital within this definition, which "means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer." 42 U.S.C. § 2000e(c).
[43] The parties also did not contest the Court of Appeals' assumption that Sibley, if referred by the hospital, could have been in employment relationships with the patients. Later Courts of Appeals have declined to apply *Sibley* under similar facts because they have found plaintiffs failed to establish that obstructed patient relationships were ones of employment and thus within the scope of Title VII. *See, e.g.,* Salamon v. Our Lady of Victory Hosp., 514 F.3d 217 (2d Cir. 2008); Bender v. Suburban Hosp., Inc., 159 F.3d 186 (4th Cir. 1998); Diggs v. Harris Hosp.-Methodist, Inc., 847 F.2d 270 (5th Cir. 1988).
[44] 488 F.2d at 1341.

"equality of employment opportunities"[45] could be circumvented if the statute did not constrain discrimination by businesses, like the defendant hospital, that were in control of the employment opportunities of individuals other than their employees. "To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited."[46]

Although the *Sibley* court's liberal interpretation of the relevant statutory language has not been accepted in all other Courts of Appeals,[47] no court has contested the policy argument for expanding Title VII's coverage of intentional employment discrimination by influential third party employers like the hospital.[48] Most adherents to non-discrimination principles would agree that the hospital's discrimination, if proven, at least *should* be illegal and that this illegality should not turn on whether the hospital also employed Sibley. If the hospital is an employer covered by the Act,[49] if it intentionally discriminated with what would be employment relationships between Sibley and the patients, the hospital should be held responsible.[50] The same coverage of third party interference should apply for the age discrimination in employment prohibited by similar language in the ADEA, for the disability discrimination in employment prohibited

[45] *Id.* 1340-41 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429 (1969).

[46] *Id.* at 1341. Title VII defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

[47] *See, e.g.,* Lopez v. Massachusetts, 588 F.3d 69 (1st Cir. 2009) (rejecting "interference theory" and using only common law of agency in disparate impact challenge to state test used by local police departments); Gulino v. New York State Educ. Dept., 460 F.3d 361 (2d Cir. 2006) (refusing to apply *Sibley* in disparate impact challenge to a state test given to local school department employees).

[48] For other decisions applying the *Sibley* interference theory, *see, e.g.,* Ass'n of Mexican-American Educators v. California, 231 F.3d 572 (9th Cir. 2000) (disparate impact case against state for teacher credentialing test); Christopher v. Stouder Mem'l Hosp., 936 F.2d 870 (6th Cir. 1991) (hospital's retaliation against scrub nurse by limiting private duty and thus employment opportunities). *See generally* Andrew O. Schiff, The Liability of Third Parties under Title VII, 18 U. Mich. J.L. Ref. (1984).

[49] *See supra* note 46.

[50] Other courts have found *Sibley* inapplicable to cases where the relationships were not ones of employment. *See, e.g.,* Bender v. Suburban Hosp., Inc. 159 F.3d 186 (4th Cir. 1998) (doctor's obstructed relationship with patients not one of employment); Diggs v. Harris Hospital-Methodist, Inc., 847 F.2d 270 (5th Cir. 1988) (same); Darks v. Cincinnati, 745 F.2d 1040 (6th Cir. 1984) (city that does not license dance hall is not interfering with employment relationship).

by the more capacious language in Title I of the ADA,[51] and for the retaliation prohibited by provisions in all these statutes.[52] It should apply under § 1981[53] for any obstruction of contractual opportunities, whether or not employment related,[54] and it should apply under state anti-discrimination laws that have sufficiently broad language. The political case for such application, whether by judicial interpretation or by legislative amendment, is much easier to advance than is any case for imposing strict liability on the hospital as a joint employer for any discriminatory acts of another employer of which its agents did not even have knowledge.

The common law tort of intentional wrongful interference with contractual or prospective economic relations[55] provides not only a model for the coverage of third party interference under the anti-discrimination statutes, but also an alternative to joint employment as a way to enforce statutory anti-discrimination and anti-retaliation policies against third party interference. Title VII and the other federal anti-discrimination statutes do not have a strong preemptive force.[56] The federal laws anticipate the involvement of state law in the eradication of discrimination and allow state laws to strengthen federal law as long as they do not prohibit what federal law requires.[57] Because federal anti-discrimination law has not been framed to occupy the field of discrimination regulation, it would be fully appropriate for state courts to apply and develop the wrongful interference tort as a fault-based tool against employment discrimination.

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[51] *See* Satterfield v. Tennessee, 295 F.3d 611 (6th Cir. 2002) (*Sibley* could apply to disability discrimination case if interference with employment relationship); Carpart Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, Inc., 37 F.3d 12 (1st Cir. 1994) (*Sibley* analysis the same under ADA and Title VII).

[52] *See* Christopher v. Stouder Mem'l Hosp, *supra* note 48.

[53] "All persons … shall have the same right … to make and enforce contracts … as is enjoyed by white citizens." 42 U.S.C. § 1981.

[54] *See* Zaklama v. Mt. Sinai Med. Ctr., 842 F.2d 291 (11th Cir. 1988) ("*Sibley* is equally applicable to a claim under § 1981" against a hospital for discriminatory recommendation causing discharge from residency program of another hospital).

[55] Most jurisdictions, as well as the Restatements Second and Third of Torts, separate the interference tort into two torts, one covering interference with contract and the other covering interference with prospective contractual relations or economic expectations. *See* Restatement Second Torts §§ 766 and 766B; Restatement Third Torts: Liability for Economic Harm §§ 17 and 18. The Restatement of Employment Law (REL) § 603, however, follows the many jurisdictions that treat intentional interference as one tort.

[56] *See* California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272, 282-83 (1987) ("narrow scope of preemption … reflects the importance Congress attached to state anti-discrimination laws in achieving Title VII's goal of equal employment opportunity").

[57] *See id.*

The tort fits well third party intentional discrimination that causes a contractual employment relationship to be terminated or to not be formed. The elements of the tort include: (1) a contractual or prospective economic relationship between the plaintiff and a third party; (2) the defendant's awareness of the relationship; (3) the defendant's action with an intent to interfere with the relationship; (4) the defendant's action causing the interference; (5) the interference resulting in foreseeable economic damages to the plaintiff; and (6) the defendant's action being "improper."[58] These elements can be satisfied in a case like *Sibley* where a business with discriminatory intent interferes with the employment or employment prospects of a worker with another employer or prospective employer.

The most problematic element of the interference tort for application to cases like *Sibley* may be the requirement that the action be "improper." However, actions taken with a discriminatory intent condemned by federal anti-discrimination law should fit this requirement regardless of whether it is interpreted in accord with the Restatements Second or Third of Torts or the Restatement of Employment Law. Each of these Restatements take somewhat different approaches to defining what is "improper." The Restatement Second of Torts articulated a seven-factor balancing test that considered the nature of the defendant's conduct, the defendant's motive, the interests of the plaintiff, the interests of the defendant, societal interests, the proximity of the conduct to the interference, and the relations between the defendant and the plaintiff.[59] It seems improbable that any such balancing would not condemn a discriminatory interference like that in *Sibley*.

Satisfying the approach of the Restatement of Employment Law also should be possible. This Restatement found that most employment cases, rather than follow the multifactor approach, instead focused on whether the interference was privileged or justified by a legitimate business interest and was accomplished without using some means "defined by common or statutory law as wrongful."[60] Whether or not federal anti-discrimination laws provide a cause of action against employers that interfere with a discriminatory intent in the employment or

[58] *See* REL § 6.03, cmt. b.
[59] *See* Restatement (Second) of Torts, § 767.
[60] *See* REL § 6.03, cmt. b.

prospective employment relationships of other employers, these statues do unequivocally define certain discriminatory intent as improper against public policy.

The Restatement Third of Torts, also rejecting the multifactor balancing test offered by the Restatement Second, conditions the interference tort on the defendant committing "an independent and intentional legal wrong."[61] The Restatement Third comments that "independent" means that the conduct "was wrongful apart from its effect on the plaintiff's contract"[62] or "in some way recognized elsewhere by the law."[63] The Restatement Third does not, however, require that the wrongful conduct could support a separate cause of action independent of the interference tort. It is not a significant reach to cover as independently wrongful discriminatory intent condemned by federal statutes. If most jurisdictions can recognize a common law cause of action for discharge in violation of a public policy expressed in federal and state statutes,[64] so should they be able to recognize an interference tort based on a public policy against wrongful discrimination based in such statutes. Furthermore, the Restatement Third's expressed reasons for requiring independence, the protection of competitive business practices[65] and the difficulty in determining the existence of malice,[66] do not apply to the protection of discriminatory intent.

Even if the fault-based interference tort requires further judicial or legislative development, it provides a more effective model for expanding liability for employment discrimination than does the modification of joint employment doctrine. To illustrate the comparative potential of the two doctrines, consider a typical scenario where one business, contracting with a second business to provide some service such as cleaning, then refuses to accept the second

[61] *See* §§ 17(2)(b) and 18(b). For the separate interference with contract tort, the Restatement Third also defines conduct as "wrongful" when it is to appropriate the benefits of the plaintiff's contract or where the defendant engaged in the conduct for the sole purpose of causing harm to the plaintiff. *See* § 17(2). Neither of these additional categories of wrongfulness fit the interference with discriminatory intent application, however.
[62] *See* § 17, cmt. e.
[63] *See* id., § 18, cmt. b.
[64] *See, e.g.,* Gardner v. Loomis Armored, Inc., 913 P.2d 377, 383 (Wash. 1996) (finding a public policy in favor of preserving life "evidenced by countless states and judicial decisions"); Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (state constitution, state statutes, and judicial decisions "clearly indicate" importance of jury duty). *See also* REL § 5.03.
[65] *See* Restatement (Third) § 18, cmt. b.
[66] *See id.*, cmt. c.

business's use of an employee because of her membership in some class protected from discrimination. Since the first "user" or client employer is at fault, it can be held responsible through intentional interference doctrine for the prohibited discrimination regardless of whether it had enough general control of the second servicing business's employees to be deemed their joint employer. By contrast even liberal joint employment doctrine could not cover a user or client employer that exercised no control, beyond this discriminatory action, over the hiring, compensation, supervision, or working conditions of the second employer's workers.

Consider, for instance, *Greene v. Harris Corporation*,[67] a decision upholding dismissal of a complaint alleging that the agent of a business receiving services from a cleaning company had caused the cleaning company's dismissal of an employee assigned to his office and that the agent had done so in violation of state anti-discrimination law because of the employee's sexual orientation.[68] The Court of Appeals accepted these allegations, but nonetheless held that the plaintiff could not invoke the anti-discrimination law against Harris Corporation, the company receiving the cleaning services, because she did not allege adequate facts to establish that the company was her joint employer.[69] The dismissal seems wrong, regardless of whether the court correctly applied joint employer doctrine; the allegation of Harris's agent's discriminatory intent in causing the plaintiff's termination of employment should be sufficient to establish liability, whether under an interpretation of the state law or an application of the intentional interference tort.[70]

By contrast, despite its promise of strict liability without fault, courts resist using joint employer doctrine to impose dual liability under the anti-discrimination statutes without the involvement of both employers in the discriminatory action. Where discrimination is the fault of the agents of only one

[67] 653 Fed. Appx. 160 (4th Cir. 2016).
[68] *Id.* at 161.
[69] *Id.* at 164.
[70] The Court of Appeals in *Greene*, however, upheld the lower court's dismissal of Greene's claim of tortious interference with a business relationship without considering whether proof of the discriminatory intent condemned by Maryland law should be treated as proof of improper conduct. Id. at 165.

For another revealing example of a user firm being insulated from alleged illegal discrimination because of a finding that it was not a joint employer, see Scott v. Sarasota Doctors Hospital, Inc., 688 F. App'x 878 (11th Cir. 2017).

of two joint employers, where the agents of one of the employers do not even know of the discrimination, courts do not hold the other employer responsible.[71] For instance, in the *Greene* case the serviced company, even if a joint employer, would not have been held liable for the cleaning company's discriminatory dismissal of an employee working at the serviced company if the agents of the serviced company had no part in or even knowledge of the dismissal or the discriminatory motivation.

Of course, even if joint employment doctrine does no work in the typical contracting employer case that cannot be done alone by fault-based interference doctrine, anti-discrimination law could be legislatively modified for it to do so. The law could impose the strict liability promised by the joint employer doctrine on each joint employer for discriminatory actions taken or policies set by the agents of the other. But this use of strict liability seems politically unappealing for any case in which the culpable agents are not acting within the scope of their authority for both employers. Expanding joint employment to impose liability on principles for the acts or omissions of the agents of other principals would be foreign to the principles of agency law.[72]

Because economic harm is an element of the tort of intentional interference,[73] the tort may seem less applicable to discriminatory harassment of an employee of one employer by the employees of another. Such harassment may be sufficiently severe or pervasive to create an actionable hostile work environment under the discrimination laws,[74] but if the hostility is not sufficiently

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[71] As stated by a panel of the Ninth Circuit Court of Appeals in E.E.O.C. v. Global Horizons, Inc., 915 F.3d 631, 641 (9th Cir. 2019) (quoting EEOC, Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, 1997 WL 33159161, at *11 (Dec. 3, 1997):

> "As our sister circuits have explained, even if a joint-employer relationship exists, one joint employer is not automatically liable for the actions of the other. … Liability may be imposed for a co-employer's discriminatory conduct only if the defendant employer knew or should have known about the other employer's conduct and "failed to undertake prompt corrective measures within its control."

Accord Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 228-29 (5th Cir. 2015); Whitaker v. Milwaukee County, 772 F.3d 802, 811-12 (7th Cir. 2014); Anderson v. Pacific Maritime Ass'n, 336 F.3d 924, 928-30 (9th Cir. 2003) (dicta); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244-45 (11th Cir. 1988); Torres-Negron v. Merck & Co., 488 F.3d 34, 41 n.6 (2007) ("joint-employer liability does not by itself implicate vicarious liability").

[72] *See* Restatement (Third) of Agency § 7.03 (2006) (stating ways a principal can be liable for its own agent's conduct).

[73] *See supra* TAN and note 53.

[74] The standard for actionable discriminatory harassment under Title VII has been consistently articulated by the Court: "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive

severe to constitute a constructive discharge warranting the victim's resignation, there would be no economic harm.[75] Nevertheless, as explained below, development of fault-based tort principles also offers a more promising path to expanded employer liability for discriminatory harassment than does the joint employer doctrine alone.

The courts have used two doctrines to impose liability on employers for discriminatory harassment that does not include official employer actions resulting in tangible economic harm.[76] First, for cases where the harassment has been inflicted by supervisors with some degree of control over personnel actions that could result in tangible economic harm, the Court, in its *Faragher*[77] and *Ellerth*[78] decisions, modified imputed liability under the common law of agency to hold liable any business for whom the inflicting supervisor is an agent, even where the harassment is inflicted outside the agent's scope of employment or authority.[79] The Court's common law modification, however, also allows employers to avoid liability for a supervisory agent's discriminatory harassment by proving that it acted reasonably to prevent and correct the harassment and the victimized employee failed to act reasonably to report and mitigate it.[80] Second, the Court also has approved lower court decisions using doctrine modeled on the tort of negligent supervision to impose direct, rather than imputed, liability on the employer where it knew or should have known of and did not take prompt and appropriate remedial action against discriminatory harassment inflicted by non-supervisory co-employees.[81]

While an application of joint employment beyond a case of integrated operations with joint supervisory agents would not expand employer liability

working environment." *See* Oncale v. Sundowner Services, Inc., 523 U.S. 75, 81 1998); Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993); Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986).

[75] The Court's recognition of hostile work environment harassment as actionable under Title VII turned on its acceptance of Title VII prohibition of discrimination that did not have direct tangible economic consequences, except presumably in cases where the harassment was sufficiently severe to justify resignation as a constructive discharge. *See Vinson*, *supra*, at 64.

[76] After the amendment of Title VII in 1991, such liability can include general compensatory damages. *See* 42 U.S.C. §1981A(b).

[77] Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

[78] Burlington Industries v. Ellerth, 524 U.S. 742 (1998).

[79] Ellerth, 742 U.S. at 765; Faragher, 742 U.S. at 807.

[80] *Id.*

[81] *See Faragher,* 524 U.S. at 799-800; *Ellerth*, 524 U.S. at 759.

through either of these doctrines, each could be further developed to impose liability on employers with responsibility for harassment. First, the modified *Faragher-Ellerth* agency doctrine has not been, and would not be, applied where the harassing agent is not an agent of both employers, regardless of whether each had sufficient potential control over the harassed employees to be treated as their employers.[82] It would be more sensible to modify agency law doctrine further to impose liability on the principal of an harassing agent who used his or her authority to harass an employee of another employer, regardless of whether the harassing agent's principal was a joint employer of the victims. Agents of associated businesses -- especially associated dominant businesses like franchisors or users of servicing contractors -- may have significant influence on the continuing employment prospects of victims, even when their principals are not joint employers. In such a case, the principal, like the harassing agent, could be made liable for interfering with the victim's employment relationship.[83]

For instance, in a case similar to *Greene*, if an economically dominant user employer's agent uses his delegated authority to discriminatorily harass a cleaner of his office who is employed, directed, and compensated by a cleaning company, the agent's employer should be subject to the *Faragher-Ellerth* modified agency rule, regardless of whether the harassed cleaner is jointly employed by the harassing agent's employer. The most cogent deterrent rationale for the *Faragher-Ellerth* modification of agency doctrine applies equally, whether or not the victim is employed by the principle.[84]

The negligent supervision model also cannot be applied against any employer, single or joint, that did not, or at least should not, have known of the harassment. On the other hand, the tort can readily be used to impose liability on

[82] *See, e.g.,* Takacs v. Fiore, 473 F.Supp.2d 647, 656-57 (D. Md. 2007) (even if human resources contractor was a joint employer, the alleged harassment could not be imputed to it because the harasser was not a supervisor within the contractor's "hierarchy"). *Cf.* cases cited in note 71.

[83] Many lower courts have refashioned agency doctrine to impose strict liability on principals for their agents' abuse of delegated authority, outside the scope of their employment, in the commission of intentional torts, such as sexual assaults, against victims subject to such abuse. In his opinion for the Court in *Faragher,* 524 U.S. 775, 795-96 (1998), Justice Souter cited several of these cases involving police officers and therapists. For citations and discussion, see Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes,* 100 Cornell L. Rev. 1281, 1322-23 (2015).

[84] For elaboration of this rationale, see Michael C. Harper, *Employer Liability for Harassment under Title VII: A Functional Rationale for* Faragher *and* Ellerth, 36 San Diego L. Rev. 41 (1999). *See also* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law,* 81 Va. L. Rev. 273, Part IV (1995).

employers who knew of, but failed to take feasible effective action against the discriminatory harassing conduct of their own employees, even where the victims of that conduct were not also their employees.

The negligent supervision tort has been used, through the common law as well as through state antidiscrimination law, to impose liability on employers that negligently allow their employees to harass.[85] Furthermore, the employer's duty to supervise runs not only to its own employees, but also to third parties such as employees of other employers. As stated in § 7.05(1) of the Restatement Third of Agency, "a principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent."[86] Section 41 of the Restatement Third of Torts categorizes the employer's duty expressed in the negligent supervision tort as an example of a duty based on a special relationship with persons "posing risk" and states that the duty runs to third parties "when the employment facilitates the employee's causing harm to third parties."[87]

The last condition of facilitation applies to most harassment cases with related employers. In the typical discriminatory harassment case where joint employment is alleged to expand employer liability, an employee of a temporary agency or a servicing company like the cleaner in the *Greene* case[88] is subjected to harassment from employees of the serviced company. Whether or not the harassers are supervisors warranting *Faragher-Ellerth* treatment, this harassment is "facilitated" by the service company's employment at its work site of the harassers. This is true regardless of whether the victimized worker is also the employee of the harassers' employer. A duty should be imposed on the user or serviced company to reasonably supervise its own employees to avoid the discriminatory harassment of any workers at its facilities, whether or not those workers are the user company's employees.

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[85] *See, e.g.,* Patterson v. August Wiring Systems, Inc., 944 F. Supp. 1509 (M.D. Ala. 1996) (common law claim); Baker v. Weyerhaeuser Co., 903 F.2d 1342, 1348 (10th Cir. 1990) (common law claim).

[86] Restatement (Third) of Agency § 7.05(1). *See also* Restatement (Second) of Agency § 213: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: …. (c) in the supervision of the activity . . ."

[87] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41(b)(3).

[88] *See supra* note 67.

To be sure, expanding the boundaries of joint employment would expand the number of employees that an economically dominant business, like a franchisor, had a duty to supervise, and thus would augment the impact of the negligent supervision tort. But liability would still be based on the dominant business's fault. Finding economically dominant businesses to be joint employers of harassment victims is sufficient only to impose a duty not to negligently allow discriminatory harassment by jointly employed co-employees. Liability would still be dependent upon proof of some failure to discharge this duty.

III. Fault-Based Liability for Causing Another Employer's FLSA Violation

Fault-based torts requiring some level of intent or negligence might seem to have no potential use for the expansion of employer liability under the Fair Labor Standards Act. Employer fault is not an element of a violation of the FLSA; unlike the anti-discrimination laws, the FLSA imposes strict liability on an employer whenever covered employees do not receive a minimum wage[89] or an appropriate bonus for overtime hours of work.[90] If a business is an employer, single or joint, of employees denied adequate wages, it is liable for the deficit. If it is not such an employer, the FLSA cannot be interpreted to impose such liability, regardless of the business's role in causing the deficit.

Nevertheless, a strong argument can be made for the legislative or common law development of a cause of action against businesses that intentionally or negligently take actions that cause another business to deny its employees the wages guaranteed by the FLSA or similar state wage and hour laws.[91] The imposition of a new duty on businesses not to cause wage and violations by related businesses could provide another example of the special relationships covered by § 41 of the Restatement Third of Torts noted above.[92] Section 41(a) states that "[a]n actor in a special relationship with another owes a duty of reasonable care to third parties with regard to risks posed by the other that arise within the scope of the relationship."[93] Expanding the list of such special relationships to include business relationships between a dominant employer and

[89] 29 U.S.C. § 206.
[90] 29 U.S.C. § 207.
[91] *See supra* note 28.
[92] *See supra* TAN 87.
[93] Restatement (Third) of Torts § 401(a).

a dependent, generally subordinate employer would be preferable on policy and more realistic on political grounds than would expanding the definition of joint employment to encompass both employers in such a relationship. The latter would make the dominant employer, regardless of its culpability, liable for any of the dependent subordinate employer's violations of the FLSA, while the former would make the dominant employer liable only for the violations that it intentionally or negligently caused by particular interactions with the subordinate business.

Consider the troublesome case of *Salazar v. McDonald's Corp.*[94] as an illustration. In this case a panel of the Ninth Circuit Court of Appeals upheld a grant of summary judgment in favor of the prominent fast food franchisor in a class action brought by employees of one of its franchisees, Haynes Family LP. The class action alleged that McDonald's through the provision of scheduling, timekeeping, and payment software, had caused Haynes to deny "overtime premiums, meal and rest breaks, and other benefits in violation of the California" wage-and-hour regulations.[95] The panel accepted the plaintiffs' proof that the settings in the software caused many night shift-employees who worked more than eight hours in a twenty-four hour period to not be credited with overtime in violation of California law.[96] The panel also accepted the allegation that by being "set to daily and weekly overtime thresholds of 8:59 hours (instead of 8:00 hours) and 50:00 hours (instead of 40:00) hours," McDonald's software caused many workers to miss out on additional overtime pay.[97] Finally, the panel did not contest the plaintiffs' allegation that because the software's settings for meal periods and rest periods were not compliant with California law, Haynes employees also were denied further overtime pay.[98]

The panel nonetheless granted summary judgment for McDonald's by rejecting both the plaintiffs' claim that McDonald's was a joint employer of the employees at the eight restaurants operated by Haynes[99] and also plaintiff's claim that McDonald's had breached its duty to supervise Haynes reasonably to avoid

[94] 944 F.3d 1024 (9th Cir. 2019).
[95] *Id.* at 1027. The employees brought their claim under California Wage Order No. 5-2001.
[96] *Id.* at 1028.
[97] *Id.*
[98] *Id.*
[99] *See id.* at 1029-32.

harm to these employees.[100] The panel rejected the joint employment claim in part because it concluded that the plaintiffs could not prove that McDonald's had the "right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior" of Haynes's employees."[101] The panel rejected the common law fault-based claim by holding both that McDonald's had no relevant duty of care toward the employees of Haynes and also that any common law action based on harm defined by the California wage statutes would be precluded by the remedies those statutes provided.[102]

The rejection of neither claim should have been surprising. The rejection of the fault-based claim was consistent with precedent; businesses have not been held to have a general common law duty of care toward employees of other businesses.[103] And the court's finding that plaintiffs could not prove McDonald's was a joint employer was in accord with the common law not finding a business strictly liable under *respondeat superior* to third parties for the torts of employees whose work the business could not fully align with its interests.[104] Thus, absent induced reliance[105] or operations with peculiar risks,[106] franchisors have not been held liable to third parties injured by the torts of the employees of independent franchisees with economic interests in tension with those of the franchisors.[107]

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[100] *See id.* at 1033.

[101] *Id.* at 1032 (quoting Patterson v. Domino's Pizza, 333 P.3d 723, 739 (2014). The court relied on a California Supreme Court decision, Martinez v. Combs, 231 P. 3d 259, 277-79 (2010) that provided three alternative definitions for what to "employ" means under this definition. One of them was through "creating a common law relationship" and another was "to exercise control over the wages, hours, or working conditions," which the *Salazar* court interpreted *Patterson*, *supra*, to combine, at least for franchisor cases. *See* 944 F.3d at 1032. Relying on *Martinez*, the *Salazar* court found that the third alternative, "suffer or permit to work," was not met because Haynes had no "power" to determine whether the Haynes employees were permitted work. *See* 944 F.3d at 1031. *See also infra* note 117.

[102] *Id.* at 1033. The court also held that plaintiffs' common law "ostensible agency" claim could not be advanced under California law. *Id.*

[103] *See, e.g.,* Goonewardene v. ADP, LLC, 434 P. 3d 124, 139-40 (Ca. 2019) (declining to impose on payroll company duty of care toward employees of company serviced by payroll company).

[104] *See, e.g.*, Smith v. Cities Service Oil Co., 346 F.2d 349 (7th Cir. 1965); Pack v. Mayor of City of N.Y., 8 N.Y. 222 (C.A. 1853); Reedie v. The London & North Western Railway Co., [1849] 4 Ex. 244, 154 E. R. 1201.

[105] *See, e.g.,* Hofherr v. Dart Industries, Inc., 853 F.2d 259 (4th Cir. 1988) (franchisor not liable because no evidence of actual control over franchisee or that plaintiffs relied on franchisee being authorized to act for franchisor).

[106] *See, e.g.,* Wilson v. Good Humor Corp., 757 F.2d 1293 (D.C. Cir. 1985) (ice cream truck on busy road) (Wald, J.).

[107] *See, e.g.,* Lopez v. Motor Plan, 42 F.3d 1384 (1st Cir. 1994) (Boudin, J.).

But absolving McDonald's of responsibility for wage deprivations that it caused seems so obviously wrong that it begs the question of whether some of this precedent requires modification, and if so, which precedent. The most compelling response to these questions would be a legislative or judicial provision imposing a duty on dominant businesses like franchisors to not intentionally or negligently cause harm – including harm defined by statutory guarantees -- to the employees of subordinate, dependent businesses like franchisees. This duty would not impose the strict liability that any employer, single or joint, has for any denial of statutory guarantees. It only would require dominant businesses not to be at fault in their affirmative exercise of any level of control they choose to exercise in their business interests.

The *Salazar* case demonstrates the superiority of fault-based principles rather than the strict liability principles embodied in joint employment through *respondeat superior*. A fault-based approach would provide a beneficial incentive for a dominant franchisor like McDonald's to be careful before inducing a franchisee to compensate employees in accord with faulty software that could lead to legal harm. Finding McDonald's business relationship with Haynes sufficient to render McDonald's an employer of Haynes's employees, however, would mean that McDonald's could be liable for any minimum wage or overtime deprivations suffered by these employees regardless of its involvement, through software or more directly, or even the knowledge of McDonald's managers. This exposure to liability, even if insulated by indemnity clauses, could cause McDonald's and other franchisors to rethink a business model that has been efficient for reasons other than the lowering of labor costs.[108] These reasons, franchise experts suggest, include rapid expansion through dispersed investment[109] and the profit incentives offered to franchisees,[110] economic benefits that could be compromised if strict liability led franchisors to take full

[108] *See supra* TAN and note 12.

[109] *See* JEFFREY L. BRADACH, FRANCHISE ORGANIZATIONS 75 (1998); JOHN F. LOVE, MCDONALD'S: BEHIND THE ARCHES 202 (1986).

[110] *See* James A. Brickley & Frederick H. Dark, *The Choice of Organizational Form: The Case of Franchising*, 18 J. OF FINANCIAL ECON. 401- (1987); G. Frank Mathewson & Ralph A. Winter, *The Economics of Franchise Tying Contracts*, 28 J. OF LAW AND ECON. 503 (1985).

control of their franchisees' operations. Not surprisingly, franchisors have forcefully exerted political power against such strict liability.[111]

The attractiveness of a fault-based rather than strict liability approach to dominant employer liability is demonstrated by Chief Judge Thomas's concurring and dissenting opinion in *Salazar*.[112] Although Judge Thomas did not dispute the majority opinion's rejection of a common law negligence action and accepted its conclusion that McDonald's was not a common law employer of the Haynes employees, he argued that the plaintiffs had submitted sufficient evidence to prove to a jury that McDonald's satisfied one of the California Supreme Court's alternative definitions of "to employ" under the applicable wage and hour regulation: "to suffer or permit to work."[113] The "suffer or permit" definition was imported from Congress's inclusion of this phrase in the definition of "Employ" in the FLSA.[114] This inclusion was intended to ensure a dominant employer's responsibility for child labor within its control through encompassing a broader scope of relationships than does the common law test of employment.[115] In the decades since the passage of the FLSA, federal courts have responded with somewhat variant multifactor tests for both single and joint employment, which may or not be broader than the multifactor tests used to define the common law.[116] In *Salazar*, however, Judge Thomas's rejection of a finding of summary judgment based on the "suffer and permit" definition does not rely on any multifactor test that would make McDonald's strictly liable as a joint employer of the Haynes employees.[117] Rather, he stresses that the plaintiffs presented evidence that McDonald's "computer system … was a direct cause of their lost

[111] See *supra* notes 14-15.
[112] *See* 344 F.3d at 1034.
[113] *See id.* at 1034-35.
[114] 29 U.S.C. § 203(g). *See supra* note 5.
[115] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).
[116] *See* REL § 1.01, cmts. d-e and cases cited therein. For examples of FLSA multifactor tests for joint employment, *see, e.g.,* Zheng v. Liberty Apparel Company Inc., 355 F.3d 6 (2d. Cir. 2005); Torres-Lopez v. May, 111F.3d 633, 640 (9th Cir. 1997).
[117] Nor does he rely on the interpretation of the California law's "suffer or permit to work" definition of employ given by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018) . This interpretation, now codified through CA AB5(19R), conditions a hiring entity's treatment of a worker as an independent contractor on the entity proving the worker: (a) is free from the control and direction of the hiring entity; (b) performs work outside the usual course of hiring entity's business; and (c) is customarily engaged in an independently established trade, occupation, or business. *Id.* at 964. The *Salazar* court found the *Dynamex* test only to concern whether workers are employees, not define what businesses are employers. *See* 944 F.3d at 1032. There was no dispute in *Salazar* that the hiring party was Haynes, not McDonald's.

wages,"[118] and that McDonald's "was aware that work was occurring under unlawful conditions."[119] Judge Thomas thus concludes "that McDonald's had the ability to prevent wage-and-hour violations caused by its … system settings yet failed to do so."[120] For Judge Thomas, McDonald's liability could and should turn on its culpability for suffering and permitting the violations; he did not and presumably could not cite evidence that McDonald's had any control over the hiring of the Haynes workers or otherwise suffered and permitted their employment as would a joint employer subject to strict liability without culpability.

The potential of fault-based analysis for the expansion of liability under wage and hour laws does not mean that economically dominant businesses, including franchisors, never have sufficient control over economically dependent, subordinate businesses to qualify as joint employers even under the common law standard for strict vicarious liability. As I have noted in other writing,[121] some franchises are sham arrangements that hide single employment relationships with franchisee-employees.[122] Furthermore, even where franchise agreements, like those prevalent in the fast food industry, divide franchisee interests from those of their franchisors by requiring payments as a percentage of revenues rather than profits,[123] a dominant franchisor might assert sufficient control, including through mandatory software, to ensure that the franchisee employees work fully in the franchisor's interest.[124] But the case for expanding the liability of dominant businesses like franchisors is stronger under doctrine that requires proof of some level of fault rather than one that imposes strict liability because of the subordinate business's economic dependence or the dominate business's potential economic leverage.

Fault and culpability admittedly are relative concepts that require some presumed level of responsibility or duty to be meaningfully applied. Any cause of

[118] 944 F.3d at 1035.
[119] *Id.*
[120] *Id.*
[121] *See* Michael C. Harper, *Using the Anglo-American Respondeat Superior Principle to Assign Responsibility for Worker Statutory Benefits and Protections*, Wash. Univ. Global Stud. L, Rev. 161, 205 (2019).
[122] *See, e.g.*, Awuah v. Coverall North America, Inc., 707 F. Supp. 2d 80 (D. Mass. 2010) (cleaning company denominated its cleaning workers as franchisees; misclassification under Massachusetts law).
[123] *See supra* TAN and note 10.
[124] *See* Harper, *supra* note 121, at 206-207.

action against a dominant but non-employer business based on the business's fault, including one based on § 41 of the Restatement Third of Torts, thus must define the level of care that a business with economic leverage must exercise to protect the statutory rights of the employees of other businesses. If the law imposes a duty on economically dominant businesses to monitor and avoid any and all risks that a subordinate business might abridge statutory wage guarantees of its employees, the effects on independently efficient business relationships could be close to those of the strict liability imposed by joint employer obligations. Imposing on dominant businesses a duty of care over the labor policies of dependent, subordinate businesses could require a restructuring of their business relationships.

The fault-based cause of action thus could instead impose a responsibility to take reasonable care only in taking affirmative actions -- such as McDonald's provision of flawed software -- that could result in harm defined by wage and hour statutes. Such affirmative actions, for instance, could include using economic leverage to impose cost-plus contracts on associated businesses that provide for wages that do not comply with the associated businesses statutory obligations to their employees. Such contracts presumably would both directly cause such non-compliance and communicate its inevitability to agents of the dominant businesses. These kinds of cost-plus contracts also are distinguishable from business relationships resulting in thin profit margins for the subordinate business. Since any subordinate business presumably wants to structure labor costs to maximize its profits, a causal connection between an unfavorable business relationship and wage and hour violations cannot be assumed.

A perhaps more inclusive line also might be drawn by imposing a responsibility based on a dominant business's chosen level of monitoring of subordinate businesses. This would impose responsibility for business practices of which the dominant was actually aware[125] without also requiring additional monitoring and possible inefficient business integration because of a judgment that a dominant business could and thus should have been aware of wage and hour violations of a subordinate business. For instance, if a fast food franchisor used monitoring software that provided it with proof that a franchisee was

[125] These were the allegations against the Domino's Pizza franchisor deemed sufficient to survive judgment on the pleadings in Cano v. DPNY, Inc., 287 F.R.D. 251, 260 (S.D.N.Y. 2012).

committing violations, the franchisor could be held responsible, without also imposing comparable monitoring responsibilities on other franchisors only because they had the economic leverage to insist upon such monitoring.[126]

IV. Fault-Based Expansion of Liability Under the NLRA

Unlike the FLSA, the National Labor Relations Act does not make employers strictly liable for their employees not receiving some guaranteed benefit or protection. Instead, like the anti-discrimination laws, the NLRA prohibits as unfair labor practices only employer actions taken with culpable intent or at least without adequate business justification to outweigh particular effects.[127] Section 8(a) of the NLRA in particular defines as prohibited employer unfair labor practices: "(1) to interfere with, restrain, or coerce employees in the exercise of the rights"[128] to engage or refrain from engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection"[129] and "(3) by discrimination in regard to tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[130]

The NLRA, however, does not mirror the common law by providing a private right of action against culpable employer action, even --- like the anti-discrimination laws -- after the exhaustion of administrative remedies; employees only can file against employers charges that may or may not result in complaints pressed through Labor Board processes by the General Counsel and his or her

[126] Brishen Rogers, arguing for a fault-based expansion to dominant firms of liability for wage and hour violations in supply chains, would define the duty of such firms more broadly. He would impose a duty of reasonable care on such firms to take affirmative steps to prevent foreseeable violations by domestic low wage firms in supply chains, whether or not the dominant firms are even in direct contractual privity with the firms that are at risk for violations. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 Berkeley J. Emp. & Lab. L. 1, 33, 46-47 (2011). If politically feasible, the imposition of such a broad duty could be an effective way to ensure a compensatory remedy for wage and hour violations by low capitalized, potentially insolvent businesses in particular supply chains. But if applied broadly in all industries, including to franchising operations where the risk of insolvency is slight, it could also result in forcing inefficient vertical reintegration.

[127] *See, e.g.,* NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) (both holding that employer can be found guilty of unfair labor practices in some cases even without proof of improper motive).

[128] 29 U.S.C. § 158(a)(1)

[129] 29 U.S.C. § 157.

[130] 29 U.S.C. § 158(a)(3).

staff.[131] Furthermore, the NLRA has been interpreted to carry a strong preemptive force against any common law action that would provide additional remedies against that which is prohibited by the Act[132] or that would upset the balance in labor relations set by the Act.[133] Thus, absent some significant legislative reordering of American labor law, any imposition of responsibility on a business for unfair labor practices taken against employees of another employer would have to be based upon the interpretation of the current law.

Significantly, in a revealing set of older cases, the Labor Board has made such an interpretation. The decisions extend back to 1952 when the Board held that a general contractor on a construction site, Austin, violated § 8(a)(3) by insisting, in response to union pressure, that a security guard subcontractor remove three of its employees from the site because they belonged to the wrong union local.[134] The Board acknowledged that the contractor was not an employer of the removed guards, as there was no "evidence that Austin exercised any control over the guards, who were assigned, directed, and paid entirely by Pinkerton,"[135] the security guard subcontractor. But the Board held that an employment relationship between the general contractor and the aggrieved employees was not necessary for the general contractor's coverage.[136] As the Board explained, "[i]t is evident, as the Trial Examiner found, and as the General Counsel concedes, that these guards were not employees of Austin. However, Austin's defense, grounded on this fact alone, finds no statutory support. Rather, the statute, read literally, precludes any employer from discriminating with respect to any employee, for Section 8 (a) (3) does not limit its prohibitions to acts of an employer *vis-à-vis* his own employees. Significantly, other sections of the Act do limit their coverage to employees of a particular employer. Thus, Section 8 (a) (5) makes it an unfair labor practice for an employer ""to refuse to bargain collectively with the representative of *his* employees …" and Section 8 (b) (4) (B) prohibits a labor organization from striking to force or require any other employer

[131] *See* 29 U.S.C. § 160(b).
[132] *See, e.g.,* Wisconsin Dep't of Industry v. Gould, Inc., 475 U.S. 282 (1986) (state cannot add penalties for unfair labor practices to those set by Congress in NLRA).
[133] See, e.g., Chamber of Commerce v. Brown, 354 U.S. 60 (2008); Lodge 76, IAM v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976).
[134] Austin Co., 101 N.L.R.B. 1257 (1952).
[135] *Id.* at 1258.
[136] *Id.*

to recognize the labor organization "as the representative of *his* employees …" [emphasis supplied]. Thus, the omission of qualifying language in Section 8 (a) (3) cannot be called accidental. Moreover, Section 2 (3), in defining the term "employee," provides that the term "… shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise …" The statutory language therefore clearly manifests a congressional intent not to delimit the scope of Section 8 (a) (3) in the manner urged here by Respondent Austin." [137]

The Board applied the same analysis in later cases, finding violations of both §§ 8(a)(1) and 8(a)(3) in the absence of an employment relationship between the culpable employer and the aggrieved employees.[138] In some of these cases the Board found liable an economically dominant contractor that forced an independent, but subordinate subcontractor to not employ workers due to their union-related activity.[139] In other cases the Board found liable businesses with dominance over a subsidiary[140] or over a staffing agency.[141] In each case the dominant business was held liable because it intentionally caused the denial of the statutory rights of the subordinate business's employees, not because it was found to be a joint employer that could have been liable for any statutory violation committed by the subordinate.[142]

The doctrine set in those decisions, rather than joint employer doctrine,[143] is the doctrine that progressive lawyers should seek to develop to impose liability

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[137] *Id.* at 1258-59.

[138] As stated by the Republican-majority Board in International Shipping Ass'n, 297 N.L.R.B. 1059, 1059 (1990): "Respondent Lederle contends that because it is not the employer of the discriminatees it cannot be found to have violated Section 8(a). This contention is without merit. The Board consistently has held that an employer under Section 2(3) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship. See, e.g., *Jimmy Kilgore Trucking*, 254 NLRB 935, 946-947 (1981); *Lucky Stores*, 243 NLRB 642, 643 (1979); *Dews Construction*, 231 NLRB 182 fn. 4 (1977), enfd. 578 F.2d 1374 (3d Cir. 1978); and *Fabric Services*, 190 NLRB 540 (1971). See also *Neo-Life Co. of America*, 273 NLRB 72, 77 (1984); and *Georgia Pacific Corp*., 221 NLRB 982, 986 (1975)."

[139] *See* Dews Constr. Corp., 231 N.L.R.B. 182 (1977); Georgia-Pacific Corp., 221 N.L.R.B. 982 (1975).

[140] *See* Esmark, Inc. 315 N.L.R.B. 763 (1994).

[141] *See International Shipping Ass'n, supra* note 138.

[142] For an excellent treatment of these cases, *see* Caroline B. Galiatsos, *Beyond Joint Employer Status: A New Analysis for Employers' Unfair Labor Practice Liability Under the NLRA*, 95 B. U. L. Rev. 2083, 2106-2108 (2015).

[143] The Board's recognition that an employer, absent joint employment status, may commit unfair labor practices against employees of other employers also is reflected in its formulation of doctrine governing the access of employees of subcontractors or tenants to solicit on an employer's property. *See* Bexar County Performing Arts

on dominant businesses that cause employees of subordinate, dependent businesses to suffer unfair labor practices. That development, for instance, could abrogate the Board's current curious interpretation of §8(a)(3) not to prohibit an employer's "ceasing to do business with another employer because of the union or nonunion activity of the latter's employees."[144] A Democratic-majority Board first pronounced this interpretation in a questionable 1968 decision in which a union pressured a contractor through reserve gate picketing not treated as secondary and illegal.[145] But the interpretation has been affirmed without any persuasive justification in cases where dominant businesses terminate contracts with subordinate employers because of union activity among the subordinate's employees.[146] By allowing dominant businesses intentionally to eliminate union subordinates, the interpretation does more to weaken the force of §§ 8(a)(3) and (a)(1) in the current fissured economy than does any strict interpretation of joint employment. As highlighted by the *Austin* line of cases discussed above, it cannot be reconciled with the statute's language and purpose, and should be overturned.[147]

The doctrine set in the *Austin* line of cases also would have been a more effective and promising tool than was joint employment for the General Counsel to have used in the complaints brought against McDonald's in December, 2014.[148] Those complaints charged McDonald's with liability for unfair labor practices suffered by employees of some of its franchisees because of work actions taken by the employees in support of a campaign to raise wages.[149] The General Counsel

Center Foundation, 368 N.L.R.B. No. 46 (2019) (non-joint employer property owners may not exclude off-duty employees of an on-site contractor if: (1) the employees work regularly and exclusively on the property; and (2) the property owner fails to show that they have one or more reasonable alternatives to communicate their message); New York New York Hotel & Casino, 356 N.L.R.B. 907 (2011), enf'd, 676 F.3d 193 (D.C. Cir. 2012) (doctrine modified in *Bexar*).

[144] Malbaff, 172 N.L.R.B. 128, 129 (1968).

[145] *See id.*

[146] *See* Comput. Assocs. Int'l, Inc., 324 N.L.R.B. 285 (1997). In this decision, the unanimous Board panel, including Chairman Gould and Members Fox and Higgins, expressly rejected the Administrative Law Judge's use of the *Austin* line of cases, apparently blithely accepting the weapon against unions and the nondiscriminatory principles of the Act they were affording employers. Such acceptance was not necessary even without overruling *Malbaff*, which involved common situs secondary picketing more particularly regulated through § 8(b)(4) doctrine. At least one former Board Member recognized in an opinion that *Malbaff* should and could be over turned. *See* Airborne Express, 33 N.L.R.B. 597, 598 n.1 (2002) (Member Liebman, concurring). *See also* Becker, *infra* note 147.

[147] *See* Craig Becker, *Labor Law Outside the Employment Relation*, 74 Tex. L. Rev. 1527, 1550-51 (1996); Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B.C. L. Rev. 329, 346 (1998).

[148] *See* McDonald's USA, LLC, 368 N.L.R.B. No. 134 (2019).

[149] *Id.*, slip op. at 1.

proceeded in the McDonald's case by introducing evidence to demonstrate that McDonald's was a joint employer of the franchisees' employees and therefore strictly liable for any unfair labor practices committed by the franchisees against their employees. This evidence consisted not only of McDonald's nationwide business policies, and practices, but also of McDonald's direction of a nationwide effort to coordinate the response of the franchisees to protected concerted and union activities in support of the wage campaign.[150] Had the General Counsel used the *Austin* line of cases instead of joint employment to establish McDonald's liability for any unfair labor practices committed against franchisee employees during the campaign, the latter evidence could have been sufficient. The General Counsel could have proven McDonald's culpability for any franchisee unfair labor practices without sustaining the much more difficult proof of McDonald's being a joint employer.

Proving that a dominant business, such as a franchisor like McDonald's, is a joint employer inevitably will be more difficult than proving its culpability for causing particular unfair labor practices. Regardless of how broadly joint employment is defined, proof of joint employment status will require a demonstration not of causation of particular employment decisions, but rather of the dominant employer's general control over the employees of the economically subordinate employer. It is this case of general control that the General Counsel in the McDonald's litigation struggled to make, whether or not successfully.

Furthermore, expansion of joint employment beyond the perimeters set by its origins in *respondeat superior* is likely to make less tenable the assumption of strict liability for joint employers that have no involvement in unfair labor practices committed by the other employer. Indeed, the Board in a 1993 decision, *Capital EMI Music*, *Inc.*, [151] held that a temporary employment agency, though a joint employer of the workers it supplied to a record distributor, was not liable for the distributor's discharge of one of the supplied workers because of the worker's union activity. The Board held the employment agency was not liable because it demonstrated that it did not know nor had any reason to know of the distributor's antiunion reason for the discharge. Although the Board has not applied *Capital EMI* to shield nonculpable joint employers other than staffing

[150] *Id.*, slip op at 13 (Member McFerran, dissenting)
[151] 311 N.L.R.B. 997 (1993), *enf'd*, 23 F.3d 399 (4th Cir. 1994).

agencies, strong arguments would be made to do so were economically dominant businesses with no direct control of a subordinate business's managerial agents treated as joint employers of subordinate businesses' employees. It seems doubtful, for instance, that most courts would find it acceptable to impose liability on a franchisor for one of its franchisee's discharge of an employee when the franchisee's discriminatory motive was not known and the franchisor would not be liable under traditional *respondeat superior* analysis for torts against third parties. If accepted, such expanded strict liability, like an expansion of strict liability under the anti-discrimination laws or the FLSA, would provide incentives for otherwise inefficient vertical integration.[152]

The *Capital EMI* decision also suggests how the fault-based doctrine in the *Austin* line of cases might be developed somewhat further to impose liability without regard to joint employment status on economically dominant employers for unfair labor practices committed by subordinate employers. In dicta the *Capital EMI* Board stated that a joint employer who knew of the other employer's unfair labor practice still could escape liability by demonstrating that "it took all measures within its power to resist the action."[153] This suggests how the Board might go beyond the *Austin* line of cases to impose liability on any dominant employer, whether or not a joint employer, when it knew of a subordinate's unfair labor practices, but took no reasonable steps to prevent them. The Board, in other words, stopping short of the strict liability imposed by *respondeat superior*, could impose a duty on employers to not acquiesce in the commission of unfair labor practices over other employers that it controlled.[154] Rather than encouraging a departure from an otherwise efficient level of vertical integration, such a duty still would accept the level of vertical integration between businesses that had been determined to be otherwise efficient.

To be sure, the NLRA does more than prohibit employers, and labor organizations,[155] from discriminating against or coercing or restraining employees in the exercise of their rights to engage in or refrain from union-related or other concerted activities for mutual aid or protection.[156] The Act also requires any

[152] *See supra* TAN 108.
[153] *Id.* at 1000.
[154] For a well framed proposal for the formulation of such doctrine, see Galiatsos , supra note 142, at 2108-2115.
[155] 29 U.S.C. §§ 148(b)(1)(a); (b)(2).
[156] 29 U.S.C. § 147.

covered employer to bargain collectively with a union representative selected by a majority of "his" employees[157] in a unit appropriate for bargaining.[158] One might infer that that the General Counsel in 2014 pressed the sixty-one § 8(a)(1) interference and § 8(a)(3) discrimination complaints against McDonald's under a joint employer theory, rather than an easier to substantiate culpable non-employer theory, because the General Counsel's ultimate goal was to establish McDonald's duty to bargain with any union that achieved the support of a majority of employees at any franchisee location.[159] Bargaining an agreement with McDonald's at a few locations presumably would have facilitated achieving employee support at all other franchisee locations. It is revealing that Member McFerran's dissent from the Trump-appointed General Counsel's settlement of the McDonald's complaints expressed her concern that the General Counsel did not adequately account for the "important collateral consequences for McDonald's, in both unfair labor practice proceedings involving its franchisees *and in possible representation cases, if workers employed at McDonald's franchisees sought to organize."*[160] It is also revealing that the *Browning Ferris* case[161] in which the Obama-appointed Board formulated doctrine governing joint employment was prompted by a union petition to represent employees in bargaining with both an economically dominant business and a subordinate labor supplier as joint employers of workers hired and supplied by the subordinate.

That collective bargaining advocates would want to impose on businesses collective bargaining obligations toward workers for whose torts they would not be strictly liable as an employer through *respondeat superior* is understandable.[162] It makes little sense to use the *respondeat superior* analysis that defines employer liability for wrongs of subordinates to define the businesses that should be required to bargain over benefits and working conditions with workers. As I have

[157] 29 U.S.C. § 148(a)(5).
[158] 29 U.S.C. § 149(a).
[159] The general organization of workers at McDonald's outlets must have been the ultimate goal of the Service Employees International Union's campaign to raise wages at these outlets, including the associated work actions that prompted the responses that were the subject of the General Counsel's complaint.
[160] McDonald's USA, LCC, 368 N.L.R.B. No. 134 (2019), slip op. at 13 (emphasis supplied).
[161] 362 N.L.R.B. No. 186 (2015), *remanded* 911 F.3d 1195 (D.C. Cir. 2018).
[162] Whether it was appropriate for the General Counsel to use §§ 8(a)(1) and (a)(3) complaints to establish join employment for purposes of collective bargaining and union organization is a different question beyond the scope of this article.

argued elsewhere,[163] whether a non-culpable business should be strictly liable for discrimination of or the denial of benefits to workers can be sensibly answered by asking whether it should be strictly liable for torts committed by those workers against third parties. But given the redistributive goals of the NLRA,[164] different considerations should determine whether a business's management, as a representative of the suppliers of capital, should have to submit to good faith bargaining with a union representative of the laborers who help make that capital productive. As I also have argued elsewhere,[165] those different considerations should include identification of the suppliers of the capital – including perhaps the intellectual property of brands –that the workers make productive. For collective bargaining to provide any leverage to workers to extract a greater share of the profits that their labor helped engender, they must be able to bargain with firms that have garnered most of those profits. As the vertical disintegration of production, distribution, and servicing has proceeded in our advanced capitalist economy, it has become more and more likely that those firms are those with some degree of oligopolistic power or brand differentiation in their market.[166] These firms, the ones with above market profits or "rents" that could be shared with labor, are not necessarily those with any formal or immediate control over the wages and terms and conditions of employment that are subject to mandatory bargaining with labor.[167]

For instance, requiring McDonald's to bargain with a union representative over the wages and working conditions of its franchisees' employees would enable the employees to have a better opportunity to capture more of the returns from the sale of what a combination of their labor with McDonald's

[163] *See* Harper, *supra* note 121, at 177-184.
[164] *See* 29 U.S.C. § 151 (concern with "inequality of bargaining power . . . depressing wage rates and the purchasing power of wage earners").
[165] *See* Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B. C. L. Rev. 329, 344-356 (1998).
[166] For empirical support, *see, e.g.*, Richard A. Benton & Ki-Jung Kim, *The Dependency Structure of Bad Jobs: How Market Constraints Undermine Job Quality*, ILR Review (July 5, 2020); Anna Stansbury & Lawrence Summers, *Declining Worker Power and American Economic Performance*, Brookings Papers on Economic Activity (March 29, 2020). The latter paper provides a compelling statistical case for using the decline in worker bargaining power, rather than increases in product market monopolies and labor market monopsonies, to explain the rising share of above competitive market profits ("rents") being captured as profits for shareholders rather than shared with workers. *Id.* The decline in worker bargaining power of course reflects the decline in union density over the past half century. *Id.*
[167] 29 U.S.C. § 148(d).

capital, including its brand, can garner. Such a bargaining obligation between the employees of franchisees who use a brand and the franchisor company that profits from the brand's product differentiation should exist regardless of the franchisor's level of control over the identity or work of the franchisees' employees.[168] Furthermore, unlike making McDonald's liable for the derelictions of its franchisees' agents and employees, requiring McDonald's to bargain about the division of the returns from the sales of its branded products with the employees of the franchisees that contribute to these sales would not impel McDonald's to reconsider otherwise efficient divisions of authority with the franchisees. Any franchising that exists only to avoid collective bargaining and a shift in the divisions of returns between capital and labor cannot be defended on the grounds of efficiency.

But the battle over defining the economic relationship appropriate for collective bargaining needs to be fought on a different field as part of the reform of the NLRA, rather than indirectly through the development of joint employer doctrine that would be inadequate for both defining collective bargaining and for governing secondary responsibility for discrimination or the denial of minimum benefits. That field has to be one of legislation that can address the incompatibility of the common law definition of the employment relationship with the purposes of the NLRA.[169] The Taft-Hartley Congress' clearly expressed intent to use the common law to define the employment relationship[170] and hence any bargaining obligation between an employer and "his" employees prevents a broadening of bargaining obligations under the current statute.

[168] This is not to argue that the employees of McDonald's franchisees, any more than McDonald's own employees, should be able to insist on bargaining about McDonald's branding decisions and control. The NLRA sensibly does not require bargaining over how a business extracts profits from its product market; it simply requires bargaining over how those profits are divided between the providers of the capital and the providers of the labor that are combined to create that product. *See* Michael C. Harper, *Leveling the Road from* Borg-Warner *to* First National Maintenance*: The Scope of Mandatory Bargaining*, 68 Va. L. Rev. 1447 (1982). For similar reasons, McDonald's should be able to protect its brand without becoming a joint employer that is liable for all its franchisees' common law and statutory torts. Defining McDonald's responsibilities to bargain over the distribution of the rents garnered from its brand presents a totally different question, however.

[169] I suggested what might be the outlines of such legislation in Harper, *supra* note 147, at 44-56. I intend to explore more fully in a future essay how labor law reform legislation should define bargaining responsibilities.

[170] *See* H.R. Rep. No. 245, 80th Cong., 1st Sess., on H.R. 3020, at 18 (1947).

V. Conclusion

As explained above, the definition of joint employment is the wrong terrain on which to advance employment and labor law reform. The focus on joint employment diverts attention from the use and development of existing doctrine that can better ensure the liability of solvent businesses for deprivations of employment rights that they cause. The concept of joint employment also provides the wrong goal for redefining bargaining responsibilities in the comprehensive labor law reform necessary for the rejuvenation of the American labor movement. Progressive lawyers need to think more deeply and creatively about defining both the bounds of employer liability and the obligations to bargain with union-represented employees.