The Legal Ambiguity of Fissured Work in the United States

Matthew W. Finkin[*]
The University of Illinois

I. Introduction

For more than a generation students of the American economy have drawn attention to the growing segmentation of the work force, to the resulting deterioration in labor standards and to the lag in the law's response.[1] The situation has been dealt with comprehensively by David Weil, who captured the process in what he termed "fissurization."

> During much of the twentieth century, the critical employment relationship was between large businesses and workers. Large businesses with national and international reputations operating at the top of their industries.…[**"Lead businesses**"] continue to focus on delivering value to their customers and investors. However, most no longer directly employ legions of workers to make products or deliver services. Employment has been actively shed by these market leaders and transferred to a complicated network of smaller business units….
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> This creates downward pressure on wages and benefits, *murkiness about who bears responsibility for work conditions*, and increased likelihood that basic labor standards will be violated. In many cases, fissuring leads simultaneously to a rise in profitability for the lead companies who operate at the top of industries and increasingly precarious working conditions for workers at lower levels.[2]

Two features of the scene Weil describes bear emphasis at the outset. First, fissurization takes diverse forms: contracting with individual workers on terms designed to have them regarded as independent contractors, not employees, and so ineligible for the protections accorded employees under labor law; contracting with businesses in systems of

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[*] Professor of Law, the University of Illinois. The author would like to thank Sanford Jacoby and Wilma Liebman for comment on a previous draft. Thanks are also due to the comments of the participants in the Tokyo Seminar and to Fellows of the Institute of Advanced Studies, Nantes, France, for their comments on the revised paper presented to them for discussion on May 9, 2016.

[1] The body of literature is substantial. Attention to the former was drawn early on by David Gordon, Richard Edwards, & Michael Reich, SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES (1982). Attention to the latter was drawn most insightfully in the U.K. by Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 Oxford J. Legal Studies 353 (1990) and in the U.S. by Craig Becker, *Labor Law Outside the Employment Relationship*, 74 Tex. L. Rev. 1527 (1996).

[2] David Weil, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 8 (2014) (italics added).

franchising, and sub-franchising, that require these companies to adhere to intense oversight by the franchisor to maintain the attributes of its brand identification even as the franchisees retain managerial discretion over employment; contracting for goods and services down chains of supply, sometimes quite long, that competitively pit these smaller business entities against one another resulting in a race to the bottom on labor standards and the creation of strong incentives for wage theft and unlawful union avoidance.

The resort to individual independent contractors, currently subject to increasing litigation and state "misclassification" law, has a well-developed set of tests to distinguish one from another.[3] That aspect of fissurization will not be addressed here; not directly, that is. The latter two contracting models engage the theme of business structure; they will be addressed. Here, the law's approach in the United States probes whether the relationship of the lead company, as it will be called, to the contracting company below is such as to make them joint employers of the affected employees. Even so, the law of joint employment often echoes the law of individual classification and, to that extent, will be reflected in the discussion.

Second, the relevant body of law in the United States was enacted on the tacit and sometimes, not so tacit assumption that it was concerned with workers employed in large, vertically integrated companies; that is, with American business structure at a certain moment of historical development. That structure was not characteristic of American businesses in the run-up to integration and is disintegrating today. Whence the legally vexing nature of fissurization, the law's time boundedness, its historical disconnect with what is presented today.

What follows explores the "murkiness about who bears [legal] responsibility" for wages, hours, and working conditions in this fissured world. The state of affairs will be examined through the three sets of the protective law most implicated: wage and hour law, collective bargaining law, and employment discrimination law, with a sidelong glance at social security and unemployment compensation.[4] However, the focus throughout is only

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[3] Most states apply a multi-pronged test of economic reality under their wage and hour laws that echo the federal Fair Labor Standards Act. *See e.g.*, Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033 (9th Cir. 2014) (applying Oregon law); Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014) (applying California law); 863 To Go, Inc. v. Dept. of Labor, 99 A.3d 629 (Vt. 2014). New Jersey has adopted a three part "ABC" test which presumes the worker is an employee unless all of three conditions are met:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and
(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

Hargrove v. Sleepy's, LLC, 106 A.3d 449 (N.J. 2015). Kansas, in contrast, has adopted a twenty part test that mixes elements of both "right to control" and "economic reality." Craig v. FedEx Ground Package Sup., Inc., 355 P.3d 66 (Kan. 2014). The National Labor Relations Act adopts a "right of control" test under which, however, the National Labor Relations Board, in disagreement with a federal court of appeals, held FedEx drivers to be employees. The court assigned the individual's opportunity to engage in entrepreneurial activity heightened weight. The Board has disagreed. FedEx Home Delivery, 361 NLRB No. 55 (2014). The matter awaits judicial resolution.

[4] This essay will not take up responsibility under workplace safety and health law as it is too complex for summary treatment. The law is a mixture of federal law, which has an exacting set of detailed rules governing multi-employer workplaces, and state law, both legislative and judge-made. Federal law deals

partly on legal tests and outcomes. The primary focus is on the fact that these laws were fashioned at a moment in time that is not characteristic of antecedent business structures and well before what is happening now. Consequently, the thrust of this paper is to summon attention anew to the legal protections working people need in a world of fissured work.

II. The Arc of Business Size and Structure

Most manufacture in antebellum America was done in small workshops, even in the home, as it had long been in Western Europe. There were exceptions where production demanded high energy consumption and substantial capital outlays for technology – iron manufacture, for example.[5] But even in textile manufacture, one of the earliest to assemble large numbers of machine operators under a single roof, work was often "put out," as it had been in Europe from the sixteenth century. The European merchant-capitalists of that time

> coordinated great numbers of cottage workers at different stages in the production process, such as combers, spinners, weavers, bleachers, and dyers, and they frequently used middlemen to conclude and enforce contracts with individual workers (*Verlagssystem*, or putting-out system). The activities of merchant-manufacturers or master-manufacturers thus came fairly close to what Alchian and Demsetz have defined as the entrepreneur in a modern firm. They monitored the use of inputs in the team production of a complex good; they measured output performance; they acted as a central party at least for contracts relating to individual stages of production; they were able to alter the structure of their workforce at short notice; and they were residual claimants, that is, they earned a profit from their efforts at co-ordinating and supervising production processes.[6]

These contracts could be made with individuals; but, more often, they were made with the heads of workshops employing journeymen and apprentices, *i.e.* with contracting firms. The putting out of work in antebellum America was simpler, usually involving only individual home workers; but it continued as a business model well into the twentieth century and continues afresh today where cognitive work is bid on and performed electronically by individuals working away from a common work site.[7]

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extensively with the obligations of contractors to their sub-contractors' workers who work on the lead company's premises. OSHA Instruction CPL 02-00-124 (Dec. 10, 1999). State law is more variegated. *Compare* Halterman v. Radisson Hotel Corp., 523 S.E.2d 823 (Va. 2000) (hotel not negligent under state law in failing to inform dispatched workman of exposure to hazardous chemicals, nor would liability be imposed under federal "multi-employer workplace" rule as this required only that the receiving employer inform the dispatching employer, not the dispatched employee, of the hazard) *with* Afoa v. Port of Seattle, 296 P.3d 800 (Wash. 2013) (airport authority would be liable for workplace injury to employee of its contractor's contractor despite lack of privity of contract between the airport and the subcontractor, depending on the degree of control the airport exercised over the manner and instrumentalities of the subcontractor's employee's work).

[5] Anne Knowles, MASTERING IRON: THE STRUGGLE TO MODERNIZE AN AMERICAN INDUSTRY, 1800-1868 (2013).

[6] Ulrich Pfister, *Craft Guilds, the Theory of the Firm, and Early Modern Proto-Industry* in GUILDS, INNOVATION AND THE EUROPEAN ECONOMY, 1400-1800, 25, 31-32 (S.R. Epstein & Maarten Prak eds. 2009) (reference omitted).

[7] This is discussed by Matthew Finkin, *Beclouded Work in Historical Perspective*, 37 Comp. Lab. L. & Pol'y J. — (2016) (in press).

The putting out system had advantages over centralized production: the merchant-capitalist, or "lead business," did not have to invest in real estate and technology; the work did not require close supervision by the lead business; the lead company had considerable flexibility in responding to market demand; and, as it contracted at a piece rate, the problem of labor cost and control was the contractor's. In addition, by dispersing the work the contractor reduced the prospect of collective action by the workers.

However, this business model was ill-suited to the needs of mass production toward which America moved from the last third of the nineteenth century into the first third of the twentieth and at breakneck speed.[8] Mass production required the use of large amounts of energy at a single location; heavy investment in real estate and technology; and the close coordination and supervision of a complex of interrelated tasks by an on-site workforce. A number of companies, especially those producing products composed of interchangeable parts – firearms, sewing machines, farm implements, machine tools – used "inside contractors" for the production of work requiring a high degree of technical knowledge and skill.[9] The system had been used in the Venetian arsenal for the production ships in the sixteenth century[10] and in some early American textile factories.[11] It entailed a contract between the company and a master craftsman. The

> factory owner agreed to provide a fixed piece rate to the contractor in exchange for completed product components. Components collected from the contractors were usually assembled by owner-employed workers under the supervision of owner-employed foremen. Three key elements, when combined, made this arrangement different from ordinary contracts: (1) the contractor hired, fired, and set the wages for his own helpers (employees); (2) the owner provided the contractor with machinery (although the contractor could make changes in the production

[8] Daniel Rodgers, THE WORK ETHIC IN INDUSTRIAL AMERICA 1850-1920, 22-25 (1978):

> By 1916 the McCormick plant had grown to 15,000 workers; and in that year the payroll at the Ford Motor Company works at Highland Park reached 33,000. Workshops of the size that had characterized the antebellum economy, employing a handful or a score of workers, persisted amid these immense establishments. But they employed a smaller and smaller fraction of the workers. By 1919, in the Northern states between the Mississippi River and the Atlantic Ocean, three-fourths of all wage earners in manufacturing worked in factories of more than 100 employees, and 30 percent of the giants of more than 1,000.

[9] John Buttrick, *The Inside Contract System*, 12 J. Econ. Hist. 205 (1952).

[10] Robert Davis, SHIP BUILDERS OF THE VENETIAN ARSENAL 54-55 (1991). *See also* Frederick Lane, VENETIAN SHIPS AND SHIPBUILDERS OF THE RENAISSANCE 200-201 (1934); Frederic Lane, VENICE: A MARITIME REPUBLIC 364 (1973) ("For occasions when galleys were needed in a hurry and a large labor force had to be made to work more efficiently, the Lords of the Arsenal devised a system of 'inside contracts,' much like that employed by American gun manufacturers in the nineteenth century. Using materials and equipment supplied by the management, shipwrights bid for contracts to make specified numbers of hulls. The lowest bidder received the contract and hired other shipwrights to work for him under his supervision. The Senate felt that work done by inside contracting was not of top quality. It forbade caulking to be done in that way, and permitted it for construction of hulls only in emergencies.").

[11] For example, in Samuel Riddle's mill in Rockdale, Pennsylvania, in the 1830s where the "mule spinner" was treated as a subcontractor (and in census returns, even as late as 1850, might be referred to as a "cotton manufacturer"), paying his creel attender and piecer out of his own wages. As Samuel Riddle said, "The mule spinners are paid by the quantity they do, and they employ their own help." Although the spinners did not own their own mules….

Anthony F.C. Wallace, ROCKDALE 177 (1980) (reference omitted).

> techniques), raw materials, and working capital; and (3) production took place inside the owner's factory rather than in the contractor's workshop.[12]

The system was popular with companies because it kept costs low. The system also stimulated innovation and careful management by the contractors who often pocketed the fruits of both. A consequence, as with contemporary fissurization, was that the men who worked for the contractor "often bore the brunt of the downward 'alignment' of the contractor's price when the manufacturer decided that his [the contractor's] profits were too high."[13]

The inside contract system was eventually abandoned, the inside contractor replaced by company foremen. Various reasons have been given for the change: management's perceived need for greater control over cost and production; its concomitant desire to acquire the cost information as well as the technical knowledge hoarded by its contractors; even as a response to the challenge the system posed to managerial hierarchy.[14] Whatever the reason, or reasons, the abandonment of inside contracting coincided with a period of intense business integration – forward into distribution and marketing, backward into the supply of parts and raw materials. "Although nonexistent at the end of the 1870s, these integrated enterprises came to dominate many of the nation's most vital industries within less than three decades."[15]

The drive toward vertical integration responded to the imperatives of continuous mass production: to be assured of the consistency of the supply, cost, and quality of materials entering the plant; to schedule and coordinate the flow of materials in production; to get products efficiently into distribution. "[M]eat packing, brewing, cotton, oil, and sugar companies, owned their own ships, fleets of railing cars, and transportation equipment."[16] American Chicle owned three million acres in Mexico to grow its raw materials.[17] As late as the 1990s, a subsidiary of Monsanto, a chemical company, owned one of California's largest strawberry producers.[18]

Archetypical instances of integration are found in the production of steel and electricity and in railroad transportation, all of which depended on a reliable supply of coal at a predictable cost. Many of these companies acquired what came to be called "captive mines." As a result, these coal consumers placed themselves in the position of mining employers subject to unionization, upward pressure on wages, and work stoppages.[19]

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[12] Ernest Englander, *The Inside Contract System of Production and Organization: A Neglected Aspect of the History of the Firm*, 28 Labor Hist. 429, 436 (1987).

[13] Daniel Nelson, MANAGERS AND WORKERS: ORIGINS OF THE NEW FACTORY SYSTEM IN THE UNITED STATES 1880-1920, 37 (1975).

[14] Dan Clawson, BUREAUCRACY AND THE LABOR PROCESS: THE TRANSFORMATION OF U.S. INDUSTRY, 1860-1920 Ch. 3 (1980) (from a Marxist perspective). Inside contractors sometimes earned more than their superiors. A cartoon of the period depicts an inside contractor "as a cunning, wealthy, well-dressed mechanic who put his own interests before his company's." David Hounshell, FROM THE AMERICAN SYSTEM TO MASS PRODUCTION Fig. 2.26 at p. 111 (1984).

[15] Alfred Chandler, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 285 (1977).

[16] *Id.* at 352.

[17] *Id.* at 341.

[18] Nano Riley, FLORIDA'S FARM WORKERS IN THE TWENTY-FIRST CENTURY 64 (2002).

[19] The owners of captive mines were also less able to resist union demands for higher wages in times of high demand. Their agreement to better wages put pressure on commercial mining operators. As a student of the industry explains:

> Several times since World War II the union has succeeded in splitting the captives away from the rest of the bituminous industry, has achieved much of its demands, and has then imposed the settlement on

Some companies, aware of those consequences, strove to find alternative means of securing reliable supplies of specified quality at predictable prices without actually owning and operating the supplying companies. Perhaps the most prominent example, foreshadowing contemporary fissurization, is Campbell Soup. It was a forwardly integrating company – it replaced the purchase of tin cans by making them – and one of the most innovative. It manufactured demand for its product, condensed soup, a product that had not been a feature of the American diet, by the aggressive and creative use of advertising.[20] But it needed a reliable supply of fresh vegetables especially suitable for its condensing process at a low and predictable cost.

Unlike American Chicle, Campbell Soup did not decide to grow its own raw materials. Instead, it contracted with about two thousand farmers in trucking distance of its major plant in Camden, New Jersey, and, later, with farmers in northern Ohio for its plant there. These standardized contracts dictated the specific breed of vegetables to be grown – in fact, Campbell developed and supplied the seeds of a tomato that met its needs – and allowed Campbell to oversee production: "Company inspectors visited contractors' farms throughout the growing season to ensure that farmers were supplying the proper amounts of fertilizer."[21] These contract specified the condition of the product on delivery and the price; they also set tonnage limits per acre of production. They even forbade the growers from selling the product to anyone other than Campbell without Campbell's permission, but allowed Campbell to refuse to accept purchase, a practice so sharp that it was eventually held unenforceable.[22]

In the wake of efforts by farm workers to unionize, the company required its growers to harvest tomatoes mechanically.[23] Mechanical harvesting could incur a loss of production as well as a reduction in quality, but a student of the company concludes that mechanization was imposed on the growers to eliminate the "uncertainties and expense of employing human labor to harvest tomatoes and other crops."[24] However, when those farm workers sought collectively to bargain with Campbell, Campbell rebuffed them on the ground that it was not their employer.[25] Campbell's approach thus adumbrates the modern fissurized world, and strongly; but, at the time, it stood apart from the general integrative trend.

> the commercial operators. That this procedure has stirred the helpless wrath of the latter is well indicated by the angry statement that "the steel industry or someone else is going to write the contract."

Morton Baratz, THE UNION AND THE COAL INDUSTRY 38 (1955) (reference omitted).

[20] Douglas Collins, AMERICA'S FAVORITE FOOD: THE STORY OF CAMPBELL SOUP COMPANY (1994).

[21] Daniel Sidorick, CONDENSED CAPITALISM: CAMPBELL SOUP AND THE PURSUIT OF CHEAP PRODUCTION 36 (2009).

[22] The "sum total" of these provisions were held to drive "too hard a bargain for a court of conscience to assist." Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3rd Cir. 1948) (refusing to enforce that part of the contract as "unconscionable." The combination of a provision that allowed Campbell to reject the produce while prohibiting its resale was said to be " 'carrying a good joke too far'," *id.* at 83).

[23] Sidorick, *supra* n. 21 at 160.

[24] *Id.*

[25] W.K. Barger & Ernesto Reza, THE FARM LABOR MOVEMENT IN THE MIDWEST 65 (1994) (italics in original):

> The company [Campbell] had claimed that it had no direct relations with farmworkers in its operations. It had also said that it could not intervene in the internal operations of its growers. Yet, the mandate to mechanize…made clear that the large food-processing corporations *were* directly involved in determining farmworkers' conditions and could mandate how the growers ran their operations.

As the National Labor Relations Act excludes agricultural workers, whatever control Campbell exercised over its growers employees was irrelevant as federal law could not compel Campbell to bargain with them.

III. The Conundrum of Vicarious Liability

The drive toward mass production fueled an intense, decades-long debate on "the labor question": how a country rooted in the small farm and workshop, whose employment law reflected those roots, would deal with the social problems thrust upon it by the concentration of wealth and power in the hands of industrialists and the emergence of an industrial working class, often restive and subject to exploitation. It was a period of enormous legal as well as social flux.

The inadequacy of the law of tort to deal with mutilation and death on an industrial scale was an early subject of public concern and legislative address.[26] So, too, were other questions of responsibility and liability that had not emerged theretofore, not, at least, on the scale of modern mass production. Most of the response was and would be legislative.[27] Some states, for example, made railroads liable for the wages of construction workers engaged by the railroads' contractors which, in one case, was held to render the railroad liable for the wages owed an employee of the subcontractor of a subcontractor of a subcontractor of the railroad's contractor:

> It is common knowledge that contracts for building railroads are nearly always taken in the first instance by construction companies or syndicates, who then let out the entire work in various divisions to subcontractors, without themselves directly employing any laborers. The most if not all the work of building the railroad is thus done by laborers directly employed by subcontractors. If these should be excluded from the statute by interpretation, its evident purpose would be defeated.[28]

As an aside, that approach has been taken anew in California; it imposes joint liability on a lead company that uses workers supplied by a contractor for those workers' wages and worker compensation coverage.[29]

Part of the response was judge-made, notably in attending to an employer's liability to third parties for the negligence of its employees, an issue exacerbated by the expansion of mass industrial employment. It was taken up by the American Law Institute (ALI) in an effort to simplify and modernize the law. The ALI's *Restatement of Agency* appeared in 1933. It distinguished employees, for whose negligence their employer would be liable when they acted within the scope of their employment, from independent contractors, for

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[26] John Fabian Witt, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004); Donald Rogers, MAKING CAPITALISM SAFE: WORK, SAFETY, AND HEALTH REGULATION IN AMERICA, 1880-1940 (2009).

[27] At about the century's turn a number of states enacted "wage payment" laws, modeled on the British "Truck Act" of 1831, requiring that workers be paid in U.S. currency and on a regular periodic basis. The field of contestation over these laws was constitutional; of whether these laws wrongfully abridged "freedom of contract," not their coverage, of who is a worker. *See generally*, Robert Patterson, WAGE PAYMENT LEGISLATION IN THE UNITED STATES (1918). That question had arisen under the British law, however. The Truck Act, 1 & 2 Will. 4, c. 37 (1831), applied to "artificers," understood to be workers. It was held that a worker had to perform the work personally in order to be protected; he could not be only a contractor. But, if he employed others to work with him he was a worker entitled to statutory protection even as he was also a contractor. The texture of British law is laid out in 5 C.B. Labatt, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 1973b at pp. 6136-6137 (1913).

[28] George v. Washington County Rr. Co., 44 Atl. 377, 377-378 (Me. 1899) (citing authority to the same effect from Massachusetts and New York).

[29] Cal. Labor Code § 2810.3 (2014).

whose employees' negligence the lead company would not be liable. It did so by crafting criteria to determine who is an employee (a "servant" in the anachronistic usage at the time) as distinct from an independent contractor.[30] The manner in which the distinction was drawn was to influence analysis under federal labor protective law legislated later in the decade, albeit for different purposes.[31] In other words, the determination of those who could secure the coverage of labor protective law was made to turn on whether their negligence could be attributed to a third party that had utilized their service.

It is important to note that the ALI's engagement proceeded against a background of intense engagement with the issue at the turn of the century; that is, during the period of the most socially unsettling drive toward industrialization and integration. American courts had looked to British precedent, but that drew on the law of a domestic relationship, of "master and servant," the assumptions and contours of which did not map easily on to an amorphous, anonymous industrial work force.[32] And even the British had not had an easy time of it in deciding who should be liable to whom for what.[33] In fact, British law had been subjected to withering fire at the time.[34]

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[30] Restatement of Agency § 220 (1933):

(1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right of control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer; and

(i) whether or not the parties believe they are creating the relationship of master and servant.

[31] Fleming James, a noted torts scholar, called this "cross-pollinization." Fleming James, *Vicarious Liability*, 28 Tulane L. Rev. 161, n. 176 at 202 (1954); *see also* Gerald Stevens, *The Test of the Employment Relation*, 38 Mich. L. Rev 188 (1939), focusing on the effect of the distinction on labor legislation.

[32] Compare the majority and dissenting opinions in Payne v. Western & Atl. Ry, 81 Tenn. 507 (1884), wherein the orders of a railroad superintendent to its entire workforce, forbidding them to shop at a certain store, was likened to the order a father could give a child, a master could give a maid; the dissenters argued that an industrial employer was not a father.

American courts came to distinguish industrial workers from children, apprentices, and household servants in applying the common law rule allowing a master to use corporal punishment on a servant. 1 C.B. Labatt, *supra* n. 29, § 242b at pp. 740-41. The Louisiana Code of 1838 allowed a master to "correct his indentured servant or apprentice for negligence or other misbehavior, provided he does it with moderation, and provided he does not make use of the whip." La. Civil Code § 167. In 1888, the section was amended to provide, "but he can not exercise such rights with those who only let their services."

[33] A 1799 case, repudiated fifty years later, but which found some sympathy in American courts, held a property owner liable for injury to a traveler under these facts: The defendant property owner's house lay along a road. He hired a contractor to repair the house. The contractor subcontracted the work. The subcontractor contracted with a supplier of materials whose employee left materials on the road causing the traveler's carriage to overturn. Bush v. Steinman, 1B & P 404 (1799) *overruled* Reedie v. London & North Wales Ry., 4 Ex. 256 (1849). The sense of it was that as the sub-sub contractor was set upon the property owner's work, the property owner should be liable for the consequences. *Bush* v. *Steinman* was cited as

The contemporary context for the controversy was noted by no less a figure than Oliver Wendell Holmes, Jr., who attacked the very idea of vicarious liability: the doctrine was, he said, "the resultant of a conflict between logic and good sense" the "most flagrant" rules of which "now-a-days often present…[themselves] as a seemingly wholesome check on the indifference and negligence of great corporations…."[35] On the distinction between an independent contractor and a "servant," Holmes prefaced his analysis thusly:

> [I]t may be urged that when you have admitted that an agency may exist outside the family relations, the question arises where you are to stop, and why, if a man who is working for another in one case is called his servant, he should not be called so in all. And it might be said that the only limit is found, not in theory, but in common-sense, which steps in and declares that *if the employment is well recognized as very distinct*, and all the circumstances are such as to show that it would be mere folly to pretend that the employer could exercise control in any practical sense, then the fiction is at an end.[36]

Contemporary fissurization places that common sense assumption at issue: when is the relationship one so "very distinct" that liability will not be imputed when the work done by the contractor's workers becomes woven into, as an intrinsic part of the lead company's process or product?

The issue was taken up afresh by Harold Laski in 1916.[37] Three grounds had been offered for an employer's liability for the wrongful act of its employee: (1) as a moral consequence of a person's failing to do his own work; (2) as a logical consequence of setting in motion the chain of events that resulted in the loss; (3) as the practical consequence of the need to have employers select employees with care and to exercise care in their supervision. Only the latter speaks to the employee-independent contractor distinction; but, on close examination, none of it held up.

The assumption of the first – which Laski attributed to "the unctuous Bacon"[38] – is obviously untenable in an industrial society. The second moves along rather strained causal grounds, that he whose work results in an injury must be responsible for it; but, there actually was precedent for something akin to it.[39] The third ignores the fact that a duty of care in the selection and control of employees can and has been imposed, but that an employer's vicarious liability obtains no matter how careful the employer has been in employee selection and supervision. Moreover, categories of "non-delegable duties" and of contracting for "inherently dangerous" undertakings were later added that do render lead

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authority in Inhabitants of Lowell v. The Boston & Lowell Rr. Corp., 40 Mass. 24 (1839) and Stone v. Cheshire Rr. Corp., 19 N.H. 427 (1849).

[34] T. Baty, VICARIOUS LIABILITY (1916).

[35] Oliver Wendell Holmes, Jr., *Agency II*, 5 Harv. L. Rev. 1, 14 (1891).

[36] *Id.* at 15 (italics added).

[37] Harrold Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105 (1916). Laski, who rose to international prominence in the 1930s, has faded from view today. *See generally*, Jeffrey O'Connell & Thomas O'Connell, *Book Review: The Rise and Fall (and Rise Again?) of Harold Laski*, 55 Md. L. Rev. 1384 (1996). As the issue of the vicarious liability of fissured lead companies has come to the fore, Laski's thoughts under circumstances obtaining a century ago against which fissurization resonates repays attention.

[38] Bacon's belief in the individual's duty to work as a religious obligation is discussed by Keith Thomas, *Work and Leisure in Pre-Industrial Society*, 29 Past & Present 50, 59 (1964).

[39] *Bush* v. *Steinman*, discussed *supra* n. 33.

companies liable for the acts of the employees of their contractors.[40] The distinction rests on rather shaky grounds.

Laski took all this in and concluded that, at bottom, the question is one of public policy, the resolution of which had to draw from the realities of mass industrial employment and the need to give meaningful effect to labor legislation:

> It is only by enforcing vicarious liability that we can hope to make effective those labor laws intended to promote the welfare of the workers; for it is too frequently the corporation that evades the statute or attempts to discredit it.[41]

To sum up so far, when the laws about to be addressed – wage and hour law, collective bargaining law, social security and unemployment compensation law and even anti-discrimination law – were enacted, the legislature confronted what it saw to be the situation of a helpless industrial working class in the hands of large mass production enterprises.[42] It was not concerned with such a company's relationship to a contractor's employees. By then the inside contractor system had become a thing of the past. And by then the word "employee" had taken on a gloss of meaning that distinguished that person from an independent contractor, albeit for the purpose of vicarious liability for negligence. Even then, however, the distinction refused to defer automatically to contractual determination; that is, it disallowed the superior party the power to declare the relationship to be such as to avoid responsibility.[43] Consequently, the matter of labor protective coverage in today's fissurized world to moves across legal terrain on which the sign posts are, for the most part, absent, ambiguous, or unresponsive.

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[40] Today, the issue would be more likely addressed in economic terms, as resting on the determination of who the superior risk-bearer is. Alan Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231 (1984).

[41] Harold Laski, *The Basis of Vicarious Liability*, *supra* n. 37 at 124 (references omitted).

> [I]f we admit that the state has the right, on grounds of public policy, to condition the industrial process, it becomes apparent that the basis of the vicarious liability is not tortious at all; nor, since it is withdrawn from the area of agreement, is it contractual. It is simply a statutory protection the state chooses to offer its workers.

Id. at 130.

[42] The "public policy" of the United States was declared in the Norris-LaGuardia Act of 1932.

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment….

29 U.S.C. § 102. The National Labor Relations Act echoed "inequality of bargaining power" as a basis for the law. 29 U.S.C. § 151. The Fair Labor Standards Act rested upon a legislative finding of "labor conditions detrimental to the minimum standards of living" necessary for worker health and well-being in industry. 29 U.S.C. § 202. The later extension of civil rights in the employment setting, especially in laws prohibiting discrimination, was limited to employers exceeding a certain number of employees.

[43] Note that the RESTATEMENT OF AGENCY, *supra* n. 30, does not list an express contractual term between the parties as a factor to be considered let alone to be given dispositive effect. It lists instead what the parties "believe" the relationship to be and that only as one among eight other factors. The blackletter rule today is the parties' agreement is to be considered, but it is not dispositive. So well entrenched is this principle that even where a contract between a lead company and a contractor designated them as joint employers a court undertook the further examination of the relationship to see if that was actually so. Childress v. Ozark Delivery of Mo. LLC, 95 F.Supp.3d 1130, 1140 (W.D. Mo. 2015).

IV. The Legislative Terrain

The Fair Labor Standards Act (FLSA), requiring payment of a minimum wage and time and a half for overtime, defined an employee, circularly, as a person employed, and defined employment as being "suffered or permitted" work.[44] The National Labor Relations Act (NLRA) was equally circular, defining an "employee" as "any employee."[45] Title VII of the Civil Rights Act and cognate federal and state antidiscrimination law – the Americans with Disabilities Act (ADA) or Californian fair employment law – similarly apply to "employees" without further elaboration.[46] The Social Security Act (which also authorized state participation in the unemployment compensation system) only said that the term " 'employee' includes an officer of a corporation."[47] These would seem to give the agencies administering these laws and the courts construing them ample room to craft the scope of coverage to deal with business structures or practices that would otherwise defeat the statutory ends. As, indeed, they did; but, there's more to the story.

In 1944, the United States Supreme Court held in *Hearst Publications* that newspaper distributors, euphemistically called "newsboys," were employees entitled to bargain collectively with the newspaper under the NLRA even though they would be considered independent contractors at common law: "Congress had in mind a wider field than the narrow technical legal relation of 'master and servant,' as the common law had worked this out in all its variations…."[48] The determination would be driven by whether those seeking the law's protection were "as a matter of economic fact"[49] within the compass of what the law sought to effect. In 1947, the Court took the same approach with respect to the FLSA: the test is " 'economic reality' " rather than " 'technical concepts'."[50] And it did so as well with the Social Security Act, echoing *Hearst*, that the word employee must be "construed 'in light of the mischief to be corrected and the end attained'."[51]

In that year, however, a conservative Congress clipped two of these laws' wings. Over President Truman's veto, it legislated against *Hearst*, amending the NLRA to exclude independent contractors, importing the common law test that the Court had rejected as too technical and as having scant bearing on the problem the law addressed.[52] Also in that year, the Treasury Department proposed a regulation to redefine an "employee" under the Social Security Act as: "an individual in a service relationship who is dependent as a matter of economic reality upon the business to which he renders service and not upon his own

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[44] 29 U.S.C. § 203(g) (1938).

[45] 29 U.S.C. § 152(3) (1935). An earlier draft of the law defined an "employee" as an individual working under a contract of hire "including any contract entered into by any helper or assistant of any individual, whether paid by him or his employer" – that is, to define employees of inside contractors as employees of the lead employer. Matthew Finkin, *Legal Craftsmanship? The Drafting of the Wagner Act* in Proceedings of the Forty-Eighth Annual Meeting of the Industrial Relations Research Association 381, 383 (Paula Voos ed., 1996). This requirement was omitted as "employee" was defined to extend beyond a proximate employer relationship.15

[46] Title VII provides that an "employee" is an "individual employed by an employer." 42 U.S.C. § 2000e(f); as does the ADA, 42 U.S.C. § 1211(4); *see also* Cal. Gov. Code § 12926(c).

[47] Internal Revenue Code § 110(a)(6) (1935).

[48] National Labor Relations Board v. Hearst Pub., 322 U.S. 111, 124 (1944).

[49] *Id.* at 127.

[50] Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947), *reiterated in* Goldberg v. Whitaker House Cooperative, Inc., 336 U.S. 28, 33 (1961).

[51] United States v. Silk, 331 U.S. 704, 713 (1947) (reference omitted).

[52] 29 U.S.C. § 152(3).

business as an independent contractor." Though this seems to remove only authentic contractors, those who run their own businesses, the proposal provoked an uproar in the Republican-controlled Congress resulting in a resolution legislating against it. This, too, was enacted over President Truman's veto.[53] The Social Security Act as amended now defines employees as individuals who are employees "under the usual common law rules."[54]

The Supreme Court took heed of these legislative reversals in the *Darden* decision in 1992 when confronted with the scope of coverage, of who is an "employee" under federal pension protection law, and engaged in a strategic withdrawal.[55] The Court made clear that it had abandoned the principle that it would construe the statute " 'in light of the mischief to be corrected and the end to be attained'."[56] As a critic pointed out, the Court thus enshrined purposelessness as a guiding principle of statutory construction.[57] This assessment is unassailable. Nevertheless, at the same time the Court reiterated its long-standing approach to the FLSA: that law, it opined, "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles."[58] Following *Darden*, the scope of control or, sometimes, a hybrid test conjoining control with the idea of economic dependence, has been applied to the reach of anti-discrimination law generally.[59]

In sum, the statutory tools to deal with fissurization have become fissured. Under the three statutory systems about to be taken up a notion of joint employment has been developed that extends to a lead company vis-à-vis its contractors employees; but, the contours differ significantly, the doctrine's reach is in a state of flux.

A. Wage and Hour Law

The test of whether the lead contractor would be liable for a subcontractor's wage and hour obligations, as a joint employer with the contractor, is governed by the "economic reality" of the relationship. But, in applying it the courts have uniformly looked to the power the lead company exercises, not over the contractor's business, but over the contractor's employees. Commonly, a four-part test or some variation of it is applied, as, for example, in the case of the franchisor of a pizzeria:

> Under the economic reality test, we evaluate "whether the alleged employer: (1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."…"The dominant theme in the case law is that those who have operating control *over employees* within companies may be individually liable for FLSA violations committed by the companies."[60]

[53] 62 Stat. 438 (1948). The legislative history is set out in 2 U.S. Code & Cong. News 1752 (1948).
[54] 42 U.S.C. § 401(j)(2).
[55] Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) (references omitted).
[56] *Id.* at 325.
[57] Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law; An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 Comp. Lab. L. & Pol'y J. 187 (1999).
[58] Nationwide Mut. Ins. Co. v. Darden, *supra* n. 55 at 326.
[59] See the text accompanying notes 76-80, *infra*.
[60] Orozco v. Plackis, 757 F.3d 445, 448 (5th Cir. 2014) (reference omitted) (italics added).

This approach has been widely followed. To mention only some recent cases, it has been applied to the franchisor of a janitorial service (and to the lead company that retained the franchisor) with respect to an employee of its franchisee,[61] to a hotel with respect to employees of a temporary staffing agency,[62] and by a trial court a case involving a jobber in the garment industry.[63] However, in that case, *Zheng* v. *Liberty Apparel Co. Inc*,[64] the court of appeals considered the test applied by the lower court – which it termed one of "formal control" – to be a sufficient condition to find joint employer status, but not a necessary one. If relied on exclusively, the test might fail to capture the essence of the relationship. The appeals court adopted a six part test, of "functional control," as conducing toward a better grasp of the "totality of circumstances":

1. whether the lead company's premises and equipment were used by the workers,
2. whether the sub-contractor had a business that could or did shift the workers as a unit to work from one lead contractor to another,
3. the extent to which the work was a discrete job (a "line job") integral to the lead company's process of production,
4. whether responsibility to fill the contract could shift under the contract from one contractor to another,
5. the degree to which the lead company supervised the workers, and
6. whether the workers worked exclusively or predominantly for the lead company.[65]

Only one of these, supervision of the contractor's workers by the lead company, goes to the relationship between the lead company and the contractor's employees. The others concern the relationship of the lead company to the work done by the contractor's workers for the lead company. One of the nine factors the *Restatement of Agency* put into the mix was whether the work the person did was a part of the company's "regular business." The functional control test converts that factor into the almost singular focus of attention – not only that the contractor's work is part of the regular business but how deeply integrated the contractor's work is with the lead company – and it infuses that focus into five of the elements of analysis. When these "indicate that an entity has functional control over workers even in the absence of the formal control measured by the [four part test]" it will be jointly responsible.[66]

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[61] Becerra v. Expert Janitorial, LLC, 332 P.3d 415 (Wash. 2014).
[62] Tolentino v. Starwood Hotels & Resorts Worldwide, Inc., 437 S.W.2d 754 (Mo. 2014) (en banc).
[63] Ling Nan Zheng v. Liberty Apparel Co., 2002 U.S. Dist. LEXIS 4226 (S.D. N.Y. May 12, 2002).
[64] 355 F.3d 61 (2d. Cir. 2003) *jury verdict aff'd* 617 F.3d 183 (2d Cir. 2010), *followed and explained* Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 145 (2d Cir. 2008).
[65] *Zheng*, *supra* n. 64 at 72.
[66] *Id.* Olivera v. Bareburger Group, LLC, 73 F.Supp.3d 201 (SDNY 2014), concerned a franchisor's liability for its franchisees' wage and hour violations. The complaint alleged that the franchisor

> (1) guided franchisees on "how to hire and train employees"; (2) set and enforced requirements for the operation of franchises; (3) monitored employee performance; (4) specified the methods and procedures used by those employees to prepare customer orders; (5) exercised control, directly or indirectly, over the work of employees; (6) required franchises to "employ recordkeeping" of operations, including "systems for tracking hours and wages and for retaining payroll records"; and (7) exercised control over their franchises' timekeeping and payroll practices. The [complaint] also alleges that the franchisor defendants had the right to inspect the facilities and operations of franchises, to audit any franchise's financial

The difference between formal and functional control could have important consequences in a fissured relationship. Take the archetypical instance anticipating modern fissurization – Campbell Soup. Under a test that attends only to formal control, Campbell Soup could not be a joint employer of its growers' workers and would bear no responsibility to assure compliance with the wage and hour provisions of the FLSA governing them. But, under a test of functional control it is at least arguable that Campbell would bear joint responsibility: although the farm workers do not work in the Campbell plant, the growing field is their workplace, and are not directly supervised by Campbell's supervisors, though their work is subject to Campbell's inspection in the field, they cannot be shifted by their growers to non-Campbell work; their work is integral to Campbell's production; their growers' contracts cannot be shifted to another (though Campbell can refuse the product, the growers could even dispose of it elsewhere without Campbell's approval); and their work is not only predominantly but exclusively done for Campbell, the lead company. In other words, by deploying exclusive supply contracts dictating quantity, quality, and price, deploying inspectors to monitor production, and dictating the manner of production – leaving the contractor's room for profit to be grounded significantly, perhaps predominantly, in keeping its labor costs low[67] – the lead company might not be able to avoid responsibility for its contractors' wage and hour violations.[68]

It remains to be seen whether "functional control" test is only a straw in the wind.[69] But, it holds open the possibility of the application of wage and hour law to lead companies operating in exactingly fissurized frameworks.

B. Collective Bargaining Law

The National Labor Relations Board has long held, with judicial approval, that two or more enterprises can be joint employers of the same employees for the purposes of

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records, and to terminate the franchise agreement and the operations of any restaurant that violated the FLSA.…

Id. at 207. Note that the controls the franchisor reserved were largely over the franchisee's practices, not over the franchisee's workers save for monitoring (3) and a general assertion of "indirect" control. Nevertheless, these allegations raised enough questions of material fact to preclude a grant of summary judgment for the franchisor.

[67] *See* the discussion of agriculture by David Weil, THE FISSURED WORKPLACE, *supra* n. 2 at 259-260.

[68] In *Depianti v. Jan-Pro Franchising, Int'l, Inc.,* 990 N.E.2d 1054 (Mass. 2013), the Massachusetts Supreme Court addresses two questions certified to it by a federal court under the following business model. Jan-Pro was a national franchisor of janitorial services. It contracted with Bradley Mtg. Enterprises, Inc., to be Jan-Pro's regional master franchisee. Booking and billing for janitorial services were made by Bradley. Bradley takes its fees, remits Jan-Pro its fee (or royalty) and pays Depianti. Bradley treats Depianti as an independent contractor thereby avoiding state wage law and other employment benefits. Depianti sued Jan-Pro as being vicariously liable for Bradley's misclassification of him and as being directly liable under the state's independent contractor misclassification law. The federal court posed two questions of state law to the state's highest court: (1) could Jan-Pro be vicariously liable? The court held it could not unless it had the right to control the specific policy or practice resulting in the injury. (2) Could it be liable for Bradley's misclassification when it, Jan-Pro, had no contract with Depianti? It held it could. Such would be a direct violation of the statute, not a matter of vicarious liability. One Justice dissented in the latter on the ground that the lack of privity of contract between Jan-Pro and Depianti was dispositive.

[69] The Third Circuit, for example, applied the "formal control" test to the parent company of a car rental system noting *Zheng's* endorsement of it without mention of that court's additional embrace of functional control actually operative in the decision. In Re Enterprise Rent-A-Car Wage and Hour Employment Practices Litigation, 683 F.3d 462 (3d Cir. 2013).

collective bargaining; but, the test of joint employment has echoed the requirements of "formal control" taken under the FLSA.[70] For example, the United States Court of Appeals for the Second Circuit, the same court that was later to decide the *Zheng* case, affirmed the NLRB's conclusion that the purchaser of a building was not a joint employer of the janitors who worked for a janitorial company with which the owners had contracted for janitorial services:

> "[A]n essential element" of any joint employer determination is "sufficient evidence of *immediate* control over the employees,"…namely, "whether the alleged joint employer (1) did the hiring and firing; (2) *directly* administered any disciplinary procedures; (3) maintained records of hours, handled the payroll, or provided insurance; (4) *directly* supervised the employees; or (5) participated in the collective bargaining process"….[71]

However, in 2015, the NLRB, by vote of three to two (along political lines) opined that that standard was "increasingly out of step with…recent dramatic growth in contingent employment relationships."[72] In that case, the lead company, Browning-Ferris (BFI), owned and operated a recycling plant. It contracted with Leadpoint Business Services (Leadpoint) who provided sorters, screen cleaners and housekeepers. Leadpoint workers were hired by Leadpoint, subject to BFI's standards including drug and background testing. Leadpoint had sole contractual authority to discipline these workers, but BFI had the authority to discontinue any of Leadpoint's workers by denying them access to the plant. The contract specified the amount BFI would pay Leadpoint for each worker's wage. Although it reserved to Leadpoint the sole determination of pay rates, BFI's approval was required for any payment in excess of the usual rate for the job. Leadpoint's workers were entitled only to Leadpoint's benefits. BFI set the shift schedules including overtime, but that was calculated by Leadpoint's on-site supervisor. BFI determined the number of Leadpoint workers assigned to each material stream, but Leadpoint assigned the specific workers to them. BFI solely set production standards, including the speed of the material streams and any adjustments to them. Any employee problems identified by BFI are referred to Leadpoint. The contract requires Leadpoint's workers to comply with BFI's safety policies, which BFI reserved the right to enforce; however, most, but not all safety training was done by Leadpoint.

The Board's Regional Director found BFI not to be a joint employer under extant law for the want of the sort of immediate and direct control of these workers by BFI that the Board had required. The Board disagreed, modifying its approach. The Board majority opined that prior to the 1980s, the Board's focus was on the right to control the employees'

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[70] NLRB v. Browning-Ferris Indus. of Pennsylvania, 691 F.3d 1117 (3d Cir. 1982).

[71] Service Employees Int'l Union, Local 32BJ v. NLRB, 647 F.3d 435, 442-443 (2d Cir. 2011) (italics added) (references omitted). A joint employer can be required to bargain collectively with the other joint employer with a union designated or selected by their joint employees all of which is subject to rather complicated rules involving multi-employer bargaining structures. *See generally*, Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY § 6.7 (2013). However, a joint employer is liable for only those acts of anti-union discrimination which it either knew or should have known and acquiesced in by failing to protest or to have exercised the right of control it possessed. Capitol EMI Music, Inc., 311 NLRB 997 (1993) *enf'd* 23 F.3d 399 (4th Cir. 1994).

[72] Browning-Ferris Indus., 362 NLRB No. 186 (2015) (slip opinion at 1). It noted that in 2014, 2.87 million workers, about 2% of the workforce, were contingent employees supplied by temporary help agencies. *Id.* at p. 11.

work and conditions, not with the actual exercise of that power. "The Board had never looked to the common law to justify the requirements that a putative joint employer's control be exercised and that the exercise be direct and immediate, not 'limited and routine'."[73] Accordingly, it recalibrated the standard. First, the putative joint employer's relationship to the worker must be that of a common law employment relationship – so much is a statutory requirement. Second, the Board retained the requirement that the putative joint employer "share or co-determine" those matters governing "essential terms and conditions of employment"; but, it pointed to what those essentials might be matter other than hiring, firing, discipline, and supervision – that is, wages and hours, "the number of workers to be supplied;…scheduling, seniority, and overtime, and assigning work and determining the manner and method of work performance."[74] (By footnote the Board also observed that authority need not be reserved over all of them, but could well be apportioned between the joint employers.[75]) Third, it abandoned the requirement that actual exercise beyond the possession of power to act will be required.[76]

The Board's newly announced standard is a variation on a test of "formal control." Even as it broadens the areas of shared or co-determined subjects – the number of workers, the scheduling of their work, and the manner in which it is to be performed – and relaxes any requirement of "direct and immediate" control over them, it is not a test of "functional control." The focus remains on the lead company's relationship to the contractor's employees, not to its business. Nevertheless, the decision, if judicially sustained, could open the door a bit wider for employees of contractors to compel the lead company to bargain with them.

C. Antidiscrimination Law

Laws prohibiting discrimination in employment on a variety of invidious grounds – race, sex, disability, and the like – and forbidding the creation of workplaces hostile to employees on such grounds create, in essence, statutory torts.[77] Employers are liable for

[73] *Id.* at 13.

[74] *Id.* at p. 15. The dissenters contested the degree of control the lead company possessed at every point. On control of the hours and monitoring of production, they argued that a contractor does not become an employer of its subcontractor's employees because the subcontractor is required to fit its work around the lead company's schedule: if one hires a roofing company to repair one's roof, the property owner does not become the employer of the roofer's workers by requiring the work to be done while he is at home. The analogy is inapt. BFI set the speed by which the sorting would be done by Leadpoint's workers. The speed of work is a mandatory bargaining subject; the "speed up" has long been a bone of labor contention, so contentious that some collective bargaining agreements reserved a right to strike over it. R. Herding, JOB CONTROL AND UNION STRUCTURE 29 (1972). If Leadpoint's workers can bargain only with Leadpoint, how can their demands over a speed up be bargained about?

[75] *Id.* n. 80 at p. 15.

[76] The new, or, in the Board majority's view, resurrected standard will most likely be tested in the courts *i.e.* Browning-Ferris Indus., 363 NLRB No. 95 (2016), the actual order to bargain, can be subject to judicial review. Even if affirmed, its reach remains to be seen. A pending complaint brought by the Board's General Counsel against a national franchisor, McDonald's USA, for alleged unfair labor practices jointly with several of its franchisees might provide more definitive guidance. Meanwhile, the decision provoked a response on the right to legislate against it. Lawrence Dubé, *Senate Panel Reviews Joint Employer Bill Intended to 'Pull Back' Labor Board Ruling*, 193 DLR (Oct. 6, 2015) at A-1.

[77] Staub v. Proctor Hosp., 131 S.Ct. 1186, 1187 (2010) (terming Title VII of the Civil Rights Act a "federal tort"). The goodness of fit has been much debated. *See generally*, The Symposium: *Torts and Civil Rights Law: Migration and Conflict*, 75 Ohio St. L. Rev. 1021-1412 (2014) (and the sources cited therein).

the wrongful actions of their managers and supervisors and liable as well for those other actions, for example, by coworkers, which they know about and could have remedied.

Accordingly, whether by a test of "economic reality"[78] or "hybrid economic realities/common law right of control,"[79] or the *Darden* test of " 'common-law agency,' "[80] or the Equal Employment Opportunity Commission's recommended fifteen question test of formal control,[81] the courts attend closely to the degree of control the lead contractor exercises in the matter or could have exercised consistent with the contractual apportionment of responsibilities between the lead company and contractor. Inasmuch as a multi-factor balancing test is involved, much turns on what those who do the balancing see – as an undue extension of liability[82] or a better realization of the statutory end even when the action challenged was taken by the lead company vis-à-vis a contractor's worker.[83]

The issue was taken up under California law by that state's supreme court addressing a fast food franchisor's liability under state law for an alleged pattern of sexual harassment by its franchisee.[84] The court closely parsed the details of the franchise agreement and, by vote of four to three, upheld the grant of summary judgment for the franchisor. The court noted the "profound" economic effects a contrary result would have on the "business format" model of franchising, a model that did not begin to take root until the 1950s.[85]

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[78] Love v. JP Cullen & Sons, Inc. 779 F.3d 697 (7th Cir. 2015).

[79] Burton v. Freescale Semiconductor, Inc., 798 F.3d 222 (5th Cir. 2015).

[80] Fusch v. Tuesday Morning, Inc., 808 F.3d 208 (3d Cir. 2015).

[81] Casey v. Dept. of Health and Human Servs., 807 F.3d 395 (1st Cir. 2015).

[82] The Seventh Circuit opined, in the context of a lead construction contractor's relationship to the employees of sub-sub-contractor, that a five part test applied by the lower court was not inconsistent with – merely gave more concrete expression to – the test of "economic reality". *Viz*.

> (1) the extent of the employer's control and supervision over the employee; (2) the kind of occupation and nature of skill required, including whether skills were acquired on the job; (3) the employer's responsibility for the costs of operation; (4) the method and form of payment and benefits; and (5) the length of the job commitment.

Love v. *JP Cullen & Sons*, Inc., *supra* n. 78 at 702. However, even though the contractor had reserved the right to control the presence of any worker on the job site and had allegedly ordered the worker off the job site for racial reasons, it was held incapable of being responsible because it did not control the subcontractor's dismissal of the worker; his dismissal was due to the fact that the subcontractor had no other work for the worker to do after the lead contractor ordered him off the site. ACCORD Knitter v. Corvais Military Living, LLC, 758 F.3d 1214 (10th Cir. 2014). *But see Burton* v. *Freescale Semiconductor, Inc*., *supra* n. 79, where the contractor's exercise of its right to demand a labor contractor's removal of a worker from assignment to it, allegedly on grounds of violation of the Americans with Disabilities Act, was held to be capable of rendering it liable under that law.

[83] *Fausch* v. *Tuesday Morning, Inc*., *supra* n. 80, concerned the subjection of a supplied worker to an atmosphere of racial hostility and eventual removal from work at the lead company by its request. The lead company supervised the workers and had ultimate control on whether the supplied workers would be permitted to work at the location. Though other factors were to the contrary, the court took the "broad remedial policies" supporting anti-discrimination law to allow the case to proceed to trial.

[84] Patterson v. Domino's Pizza, LLC, 333 P.3d 723 (Cal. 2014).

[85] *Id*. at 733. The court explains the "business format" thusly. The franchisor's business plan

> requires the franchisee to follow a system of standards and procedures. A long list of marketing, production, operational, and administrative areas is typically involved….The franchisor's system can take the form of printed manuals, training programs, advertising services, and managerial support, among other things….The business format arrangement allows the franchisor to raise capital and grow its business, while shifting the burden of running local stores to the franchisee…The systemwide standards and controls provide a means of protecting the trademarked brand at great distances….The goal—which benefits both parties to the contract—is to build and keep customer trust by ensuring

> [T]here are sound and legitimate reasons for business format contracts like the present one to allocate local personnel issues almost exclusively to the franchisee. As we have explained, franchisees are owner-operators who hold a personal and financial stake in the business. A major incentive is the franchisee's right to hire the people who work for him, and to oversee their performance each day. A franchisor enters this arena, and becomes potentially liable for actions of the franchisee's employees, only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees. Any other guiding principle would disrupt the franchise relationship.[86]

In other words, in deciding the scope of responsibility, the court was persuaded that casting too broad a net would result in lead companies' exertion of greater direct control over its franchisees which, in turn, would deter future investment by those who choose to be entrepreneurs, not corporate managers. Thus extending responsibility to the lead company would be contrary to the entrepreneurial interests of franchisees. The next question, of how those interests should weigh against the effective realization of their employees' rights, was begged.

The dissenters criticized the majority for placing too much weight on the terms of the franchise agreement and too little on how the franchisor actually behaved which, to them, presented triable issues of fact. They addressed the policy issue as well. The judicial function, they opined,

> Is not to give effect to private contracts intended to shift or avoid liability, nor is it to promote the use of franchising as a business model or to avoid "disrupt [ing] the franchise relationship."…Instead, our duty is to vindicate the Legislature's "fundamental *public* interest in a workplace free from the pernicious influence of sexism."[87]

The legal obstacle for the dissent, and so for the employees of fissured employers, is the tort-focus of anti-discrimination law. Analysis focuses on corrective justice for acts of individual fault, not on enterprise compliance with regulatory norms.[88] The approach to discrimination, and especially sexual harassment, as a matter of formal control, stands in contrast to that at least potentially available to secure compliance with wage and hour law. In that setting, the business format model of franchising can generate incentives to cheat: franchisees are far more likely to violate wage and hour law than are company owned outlets, even adjusting for other factors that might explain these differences,[89] and the differences are dramatic.[90] It remains to be seen if there is an analogous pattern of practice by franchisees violative of antidiscrimination law.

> consistency and uniformity in the quality of goods and services, the dress of franchise employees, and the design of the stores themselves.

Id. (references omitted). An example is echoed in the complaint in *Olivera* v. *Bareburger Group, LLC*, *supra* n. 66 which was held sufficient to deny the franchisor's motion for summary judgment under the FLSA.

[86] *Id*. at 739.

[87] Patterson v. Domino's Pizza, LLC, *supra* n. 84 at 745 (Werdegar, J. dissenting) (italics in original).

[88] *See generally*, Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 Ohio St. L. Rev. 1315 (2014). *See also* William Corbett, *What Is Troubling About the Tortification of Employment Discrimination Law*, 75 Ohio St. L. Rev. 1027, 1049 (2014).

[89] David Weil, THE FISSURED WORKPLACE, *supra* n. 2 at 124-131.

[90] *Id*. at 131 (footnote omitted):

D. A Sidelong Glance at Social Security and Unemployment Compensation

The Social Security Act of 1935 established a public system of old age pensions and created a state-participative system of unemployment compensation. The law embraces a test of common law agency.[91] Consequently, as Judge Learned Hand put it: "the servant of a servant may be the master's servant, but the servant of an 'independent contractor' is not."[92]

Questions of coverage have tended most frequently to arise when a payer asserted that the persons for whom the Internal Revenue Service had had taxes withheld was not an employee, but an independent contractor, and sought the return of those sums. Consequently, there is scant texture to the law's reach to what, under the FLSA or NLRA, would be a relationship of joint employment: either the taxpayer was the employer or not. But another early case hints at another possibility, if ever so slightly.

This much appears from the opinion. Mr. Concello was the head of a family troupe, of trapeze performers, "the Flying Concellos." He signed a contract with the Ringling Brothers-Barnum and Bailey Combined Shows, "the circus," for the performances of his troupe. The contract was for a season, of seven months. It could be renewed and had been for many years. The circus paid Mr. Concello a fixed sum per week; he, in turn, paid the members of his company. From what appears, what he paid them was for him to decide. The troupe supplied their own costumes and equipment; they controlled their safety. The circus covered transportation costs, meals, and the like. The contract required them to perform wherever the circus did. The lower court held the troupe to be employees of the circus. The court of appeals agreed, albeit over a strong dissent.[93]

At the threshold, the court dealt with the "right of control" test which extends not only to the result of the work, but to the means of achieving it. The court had little difficulty with that, given the nature of the work: The circus "would hardly be expected to direct the manner and means by which a human cannon ball should be shot from a gun."[94]

The more difficult problem arose from the fact that the court had earlier confronted the status of individual vaudevillians and held that they were independent contractors, the degree of control being exercised by the putative employer, the Radio City Music Hall, amounting to little more than the sort of scheduling at a contracting party's convenience that one might for any independent contractor.[95] Thus, the question was whether there was a difference between the two. The majority thought there was, endorsing the trial court's reasoning:

The probability of noncompliance is about 24% higher among franchisee-owned outlets than among otherwise similar company-owned outlets. Total back wages owed workers who were paid in violation were on average 50% higher for franchisees, and overall back wages found per investigation were close to 60% higher.

[91] The Treasury Regulation of the time was set out in Texas Co. v. Higgins, *supra* n. 76 at 637. It has been refined into a twenty question test echoing the basic thrust of the "right of control" test. Avram Sacks, 2006 SOCIAL SECURITY EXPLAINED 138-139 (2006).

[92] Texas Co. v. Higgins, 118 F.2d 636, 638 (2d Cir. 1941).

[93] Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins, 189 F.2d 865 (2d Cir. 1951).

[94] *Id.* at 870.

[95] Radio City Music Hall Corp. v. U.S., 135 F.2d 715 (2d Cir. 1943). This decision was relied on by the dissenting NLRB members in Browning-Ferris, *supra* n. 72.

> "The performers were an integral part of plaintiff's business of offering entertainment to the public. They were molded into one integrated show, 'the circus.' It was not a loose collection of individual acts like a vaudeville show. The individuality of the performers was subordinated to the primary purpose of enhancing the reputation of the plaintiff and of producing one integrated show that would entertain the public."[96]

The court took it that the circus had contracted individually with each of the performers; they were its employees, not independent contractors, and that was enough. But, the relationship could be looked at differently – as a contract made with a contractor, Mr. Concello, who, in turn, hired and paid those whom he supplied to perform under his direction. This relationship would be akin to that with an "inside contractor" in the previous century, save for the inconsequential difference that the work was performed for the lead company on the premises of third parties. By that reasoning, the performers could still be the lead company's employees because of their complete integration into its work despite the lead company's privity of contract only with Mr. Concello and its lack of any direct control over his workers. In that sense, the case foreshadows the "functional control" approach taken under the FLSA: it looks to the extent of integration of the contractor's workers into the lead company's business.

V. The Challenge of Fissurization

A half century ago, Fleming James observed that businesses

> commonly farm out many tasks which may well be regarded as normal incidents to their enterprises….Where the entrepreneur uses familiar existing patterns, questions seldom arise….Questions arise mainly where an enterprise makes regular use of…units that would *ordinarily* be regarded as subordinate to it…in order to get something done which would *ordinarily* be regarded as a part of its enterprise.[97]

Fissurization has shifted the bounds of the ordinary. What makes that possible is the "glue," as David Weil has termed it, that often solves the problems of informational transparency and coordination that bedeviled inside contracting; the availability of sophisticated information technology. Companies abandoned inside contracting because it was a "*disintegrated* system."[98] Companies sought to get control of the process and product, the knowledge secreted by the contractor and his employees, and the only way they could do that is by having the work done by their own employees supervised by their own supervisors.

In contrast, Campbell Soup, anticipating contemporary fissurization, was able to achieve the benefits of vertical integration by imposing a system of business accountability

[96] Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Higgins, *supra* n. 93 at 870.
[97] Fleming James, *Vicarious Viability*, 37 Tulane L. Rev. 161, 200 (1954) (emphasis added). Even as the court fashioned the "functional control" test of a lead company's responsibility under the FLSA, the Second Circuit was cognizant of the role of "buy" instead of "make" decisions in business: "manufacturers of relatively sophisticated products that require multiple components, may choose to outsource the production of some of those components in order to increase efficiency" without the law making them responsible for their contractors' observance of labor protective law. *Zheng* v. *Liberty Apparel Co. Inc*., *supra* n. 64 at 73.
[98] David Hounshell, *The* System: *Theory and Practice in* YANKEE ENTERPRISE: THE RISE OF THE AMERICAN SYSTEM OF MANUFACTURES, 127, 147 (Otto Mayr & Robert C. Post eds. 1981) (italics in original).

so oppressive of its suppliers as to be held unconscionable[99] even as it structured the relationship to avoid any responsibility to the farm workers so critically affected by it.

Today, a lead company can require its contractors and franchisees to be subject to continuous and intense business mentoring and monitoring even as it abjures any role in the contractor's management of its workforce. Outside contractors can be brought "in," virtually; but, unlike the inside contractors of a century ago, the lead company has no resulting problem of informational asymmetry or loss of product or cost control. The technology allows the lead company to treat its contractors much as Campbell Soup treated its growers, but with greater immediacy, constancy, and efficiency, all the while avoiding any responsibility for foreseeable, perhaps inevitable negative consequences for the subcontractor's workers.

The contemporary legal conundrum derives from the fact that the laws obviated by these means were not drafted with this business structure in prospect. They were fashioned when business was driving toward ever more extensive integration, well before the business format model of franchising and well before the development of sophisticated information technology. Consequently, these laws do not focus on what power the lead company *could have* reserved, but rather on the power it did. As Judge Learned Hand opined, in a case concerning whether an oil company was liable for the social security taxes of its distributor's employees, of a gas station, "The character of the relation was determined by the rights and obligations assumed, and it is no answer that the plaintiff [the lead company] could force a change in these by threatening to terminate the agency."[100]

Campbell Soup, for example, could have bargained with its growers' employees. In fact, eventually Campbell did bargain with them in the wake of a national campaign mounted against it.[101] But, insofar as its contracts kept Campbell at arms-length from the farm workers' wages, and hours – from their hiring, firing, and working conditions – collective bargaining was the result not of its business model (putting aside the lack of agricultural worker coverage under the Labor Act), but of social and economic pressure to change it.

The distinction is less obvious than first appears, however. The common law justified vicarious liability instrumentally, *i.e.* as a means of encouraging employers to exercise control over their employees. That would make sense if employers were otherwise disinclined to impose controls, as employees might balk to the point of terminating the relationship if they thought the control imposed to be excessive. Truck drivers, for example, might refuse to accept continuous electronic sensory monitoring of their driving[102] and employers might be loathe to assert such control or might even assure employees expressly of a degree of autonomy as part of the contract of employment. The law, not parties' agreement, implies an employer's authority to require employees to submit to control on

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[99] *Campbell Soup Co.,* v. *Wentz*, *supra* n. 22

[100] Texas Co. v. Higgins, 118 F.2d 636, 638 (2d Cir. 1941). The "gas station" cases posed a recurring problem under *respondeat superior* akin to franchisor liability today. Annot., 116 ALR 457 (1938) and 83 ALR 2d 1282 (1962).

[101] Daniel Sidorick, CONDENSED CAPITALISM *supra* n. 23 at 222-224. The struggle, which took almost a decade, is described by Barger and Reza, THE FARM LABOR MOVEMENT IN THE MIDWEST, *supra* n. 25 at 60-84. There are more recent examples, *e.g.* by the Coalition of Immokalee Workers. *See* Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. Times, April 24, 2014. *See generally*, Nano Riley, FLORIDA'S FARMWORKERS, *supra* n. 20 at 60. This is discussed as well by David Weil, THE FISSURED WORKPLACE, *supra* n. 1 at 260-262.

[102] Matthew Finkin, PRIVACY IN EMPLOYMENT LAW 450 (4th ed. 2013) (on just such systems).

pain of terminating that agency relationship and places limits as well on the scope of that control.[103] Reliance on the contract thus begs the question of whether the law should imply an analogous power on the part of the lead company in the governance of this agency relationship irrespective of contractual terms.

Moreover, the contract focus of the joint employer doctrine – exacting under a test of "formal control," slightly less exacting under a test of "economic reality," and more cognizant still of the reality of the circumstances under a test of "functional control" – tends to shy away from engaging with the role that might or could be played by the principle that public policy cannot be contracted away or around; or, less strongly, that efforts to do so should be viewed skeptically.[104] The principle was raised by the dissenting judges of the California Supreme Court in *Patterson* v. *Dominos Pizza LLC*[105]; but, the majority, singularly concerned not to disturb the business format of franchising, declined to engage with it.[106]

VI. Cloven Work, Cloven Workers

There is a rather awkward technical term in linguistics – a mouthful: enantiosemia.[107] It designates a category of words that simultaneously bear opposite meanings. The verb "to cleave" is an example. It means "to join together," perhaps quite intricately, even intimately, as in marriage. But it also means "to separate," sharply, even violently, as by an axe. Fissurization gives rise to cloven employers with cloven workforces. Employers down the contractual chain cleave to the lead company through webs of contractual obligation, instruction, and technological oversight. They are cogs engineered by the lead company into its working machinery. But, the employees of these companies, who actually do the work, are cloven from the lead employer by the same design.

The question for law, unlike language, is whether lead companies can have it both ways; can they reap the benefits of fissurization without bearing responsibility for the consequences. The doctrine of employer vicarious liability took full form in the wake of industrialization. It imposed liability for negligence on companies as a matter of social policy, but only for its employees, not its contractors – and certainly not for its contractor's employees. Where the lines were drawn a century ago – even then understood to be grounded in pragmatism, not principle –live with us today, despite radical change in business models and practices. Consequently, the question put at the time by Harold Laski echoes anew: without some form of vicarious liability can labor protective legislation be effective?[108]

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[103] *See supra* n. 32.
[104] *See Fausch* v. *Tuesday Morning, Inc.*, *supra* n. 80.
[105] *Supra* n. 83.
[106] One might expect that there would be *some* empirical evidence or even experience to draw on that would address both these concerns.
[107] *See* Jordan Finkin, *Enantiodrama: Enantosemia in Arabic and Beyond*, 68 Bull. School of Oriental & African Studies 369 (2005), to whom I am indebted for educating me.
[108] Harold Laski, *The Basis of Vicarious Liability*, *supra* n. 37 at 130.