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The Progressive Critique of the Current Socio-legal Landscape: Corporations and Economic Justice*

Julie A. Su[1]

The very definition of a corporation as an entity that is created to permit maximum income and designed to insulate the individuals who will profit from liability for the acts of that entity, seems to promote and perpetuate economic injustice.

Today, employees who are making less than living wages, working without health care, being forced to endure long hours, and lacking job security have become the norm. From restaurants to retail, from farm workers in the fields to taxi drivers on the streets, and from day laborers fighting for their right to seek work to grocery store workers and nurses trying desperately to hang on to benefits at work, there is an ever-growing low wage sector in the United States.[2]

At the same time, Chief Executive Officer (CEO) compensation at seventy of the largest 100 United States companies averaged $14.1 million last year.[3] It would take the average U.S. production worker 525 years at an average salary of $26,902, to make what many CEOs make in one year.[4]

But executive salaries are only a small part of the problem. The real problem, and the larger challenge, is the growing ability of corporations to use, abuse, and exploit poor people anywhere in the world, and do this through subcontracting for labor. Let me illustrate.

Suchadal is a garment worker who grew up in northern Thailand. On the day that she was supposed to begin second grade, she put on her secondhand school uniform and waited at the door. That day, her mom told her to take off her school uniform because she would not be going to school anymore. Her parents needed her to take care of household chores and to watch her two younger brothers while her mother and father worked in the

fields. Suchadal was devastated and refused to take off her school uniform. For days she cried and continued to put on her school clothes, hoping that her mom would change her mind. That never happened.

Years later when Suchadal was twenty-eight, she was brought to the United States where she faced a very different kind of heartache. She and seventy-one other Thai immigrants were forced to work behind barbed wire and under armed guard in an apartment complex in a suburb of Los Angeles called El Monte. She sewed garments eighteen hours a day, sometimes more, seven days a week. She worked downstairs and slept upstairs, sharing a bedroom and sleeping on the floor with other workers who were also held against their will. She was paid less than one dollar an hour. The garments she made ended up on the racks at Robinsons-May, Mervyns, and other U.S. retailers across the country.[5]

Suchadal's experience, while heinous, is just one end of a spectrum of abuse that is commonplace in the garment industry.[6] Like most industries, the garment industry is ruled by corporations—department stores, retailers and manufacturers—who collectively sell over $24 billion worth of California-made clothes alone each year.[7] Some of these retailers design their own clothes and sell them in their own stores, while others contract with manufacturers who design the clothes.[8] However, none of these corporations directly hire the tens of thousands of workers who actually make the clothes. They go through a layer of contractors who run the factories that we commonly call "sweatshops."[9]

Contractors are at the mercy of manufacturers and retailers, who dictate the quantity, quality, type of work, turnaround times, and even the prices they will pay to have their work done. Contractors supervise the workers and ensure that garments are completed on time and to specification. This way, manufacturers and retailers are shielded from direct contact with the workers and, they hope, from direct liability and responsibility for wages and working conditions. The subcontracting scheme is replicated in the production of other consumer goods and has been commonplace in the

agriculture industry for decades, where farm workers endure conditions often referred to as "sweatshops in the fields."[10] The result is the creation of a category of millions of temporary or contract workers that fall outside of traditional labor and employment law protections.

Globalization has exasperated these economic injustices. While corporations operate unhindered by borders, individuals, and poor people in particular, face ever-greater restrictions on their mobility. The United States is devoting more and more resources to building walls, both literal and figurative, to solidify borders that prevent people from crossing over to seek a better life. This double standard is further reinforced by laws that label certain workers as "illegal" and a conservative judiciary that will strip such workers of any protections in the workplace.

In 2002, the U.S. Supreme Court held in *Hoffman Plastic Compounds v. NLRB* that an undocumented worker is not entitled to back pay, even if he or she is fired illegally for engaging in protected union activities.[11] The decision spawned efforts across the country by employers to intimidate workers who had dared to go to court to challenge low wages, unfair termination, and retaliation—hundreds of discovery requests were made for the immigration status of plaintiffs in pending cases.[12] Although many courts refused to extend the *Hoffman* decision, the damage had been done. For many immigrant workers in the United States, the decision proved what their employers had been telling them all along: The United States government will not protect you, so do not bother to report violations of your rights.

The government's role in exasperating economic injustice should not be underestimated, and the role that John[13] talked about is clearly at play here. Hostility to new legislation that would protect workers and the failure or refusal to enforce existing laws means that one of the traditional means for regulating corporate conduct, that is government regulation, is essentially gone.

Conservatives like to argue that government should get out of the way and that the market will decide. But just as the idea of "race neutral" is not really neutral when you have a society built on white privilege and systemic racial subordination, government inaction really means government sanction and support for unfettered corporate greed.

The racial component of economic injustice cannot be ignored either. To build on Cheryl Harris's comments,[14] race relations in the garment industry mirror race relations in our society. People of color at the bottom share common struggles and common working conditions, but they often are made to view one another with suspicion and hostility. This is true in thousands of sweatshops throughout Southern California where Asian and Latino workers labor side by side.

On the rung of the industry ladder immediately above workers are the factory owners, who are largely Asian immigrants. They play the classic middleman role.[15] While these middlemen are beholden to the manufacturers and retailers, they become the scapegoats. As the director of the California Fashion Association once said to me, "If your people would just stop exploiting their own, we would be rid of sweatshops."

Asian contractors and the white-owned corporations who control them routinely rely on the racial and ethnic commonality between Asian contractors and Asian workers to diffuse worker dissatisfaction. The view of Asians as oppressors for Latino workers solidifies the Asian-Latino distrust, which further hinders worker solidarity.

What do we do in the face of a corporation's seemingly limitless freedom to scour the globe for exploitable poor people, laws that defend that conduct, a government that turns a blind eye, and a judiciary mostly skeptical of attempts to extend corporate accountability? Luckily, I am on a panel designed to identify and frame the problems rather than solve them, but I would like to describe some of the efforts that we have made.

Working closely with the non-profit Thai Community Development Center, the Korean Immigrant Workers Advocates, the Coalition for

Humane Immigrant Rights of Los Angeles, and the garment worker union the Union of Needletrades, Industrial and Textile Employees (UNITE),[16] the Asian Pacific American Legal Center (APALC)[17] represented Suchadal and the other Thai workers, along with a group of Latino workers who also sewed for the same companies, in a lawsuit that struck at the heart of the garment industry structure.[18] It was the first federal lawsuit of its kind.

In prior years, contracting was assumed to insulate corporations from liability because corporations were no longer the workers' employers. Using the doctrine of joint employer, we sued the dozen manufacturers and retailers whose labels and garments were sewn by the workers. The theory of "joint employment" under the Fair Labor Standards Act provides that any company which exercises sufficient control over the means of production, even if such control is indirect, can be deemed to be the employer of workers. This doctrine had not been tested in the garment industry before, though case law from other industries set out a multi-factored test for determining when a joint employer relationship existed.[19]

After four years of litigation, we won over $4 million in settlements for the Thai and Latino workers and two published opinions that gave workers the green light to proceed not only against sweatshop owners, but also against manufacturers and retailers who effectively created such sweatshop conditions. The struggles and testimony of these courageous workers further inspired the strongest anti-sweatshop legislation in the country.[20] It took slave-like conditions in the United States to move the California legislature, and the governor, to actually pass legislation.

From the time the media began reporting on the workers' plight, it was assumed that they would be deported. APALC took the lead in advocating against deportation and for legalization of their status. At first, it appeared that there were no established avenues for this effort. After all the possibilities seemed to have been exhausted, including the passage of a private immigration bill, we discovered the existence of the S-visa. The S-visa, part of the Crime Bill of 1994, provided that material witnesses who

provided critical testimony in the criminal prosecution of another, and who would face danger in their home countries, could be granted a special visa.[21] We were told, however, that S-visas were only applicable in drug cases. After studying the statute and combing the legislative history, we learned that there was nothing in the statute that so limited the use of the S-visas. Thus, we engaged in a coordinated advocacy effort that began with the local INS office in Los Angeles and went all the way to the Assistant Attorney General for Civil Rights in Washington, D.C., to then-Attorney General Janet Reno herself. After endless twists and turns and multiple roadblocks, we ultimately prevailed, and the workers were granted S-visas. Today, the workers are legal permanent residents, and Congress has created two new visa categories, T- and U-visas, which protect survivors of trafficking and domestic violence by granting them legal status in the United States after testifying against their captors and abusers.[22]

What began as a long shot ended up resulting in several precedent-setting victories. Yet the most radical changes that resulted from our efforts with and for the Thai workers held against their will, and the Latino workers in the related sweatshop, were not measured in dollars or other clearly defined indicators of success. The most profound changes were personal. In a world where low-wage women of color are expected to keep their heads down and "know their place" and where race and poverty are usually tremendous barriers to true, meaningful participation in the political process—workers standing up and speaking out and uniting to demand an end to sweatshops was a radical change.

Since then, we have brought other cases on behalf of garment workers against well-known retailers, including Bebe, BCBG, XOXO, and Forever 21.[23] However, the limitations of using joint employer has become more clear as companies respond to our lawsuits by hiding concrete evidence of control.

The companies do everything orally so there is no written paper trail to prove the detailed instructions and requirements they give. They divide

their production work among dozens, even hundreds, of factories; thus, at least superficially, this diminishes their influence over each one.[24] They externalize their control by hiring third-party monitors who directly tell sweatshop owners how to calculate wages and how to maintain payroll records. While it is obvious to us that these monitors prove the retailers' control over the factories, judges have said that this is a sign that corporations are trying to do the right thing by monitoring, and judges refuse to punish them or hold them responsible as employers.[25] This has forced us to be more strategic and selective about the cases we bring.

I want to close with four general points about what we need to do about the economic and other injustices created by corporate conduct.

First, although legal victories are few and far between, and it seems that we are increasingly more at risk of making bad law than good these days, the use of private litigation combined with on-the-ground public campaigns to rein in corporate conduct creates positive results. Even if we obtain only limited relief for individuals or groups of workers, or we fail in our goal to develop good law through the courts, such suits, or more precisely the desire to avoid such suits, gives companies an incentive to self-regulate. Companies have adopted codes of conduct, refined their standards for monitoring factories to determine the conditions in which their clothes are made, and spent millions of dollars on databases and information to try and track working conditions. This is a far cry from the see-no-evil, hear-no-evil approach of a decade ago, but it is still not enough.

Second, lawsuits can provide a concrete vehicle for marginalized people to participate in demanding change. For progressive lawyers, in addition to our work in the courts and in front of legislators, we must also commit to organizing and building the capacity of community-based partners to organize. We must engage in corporate accountability campaigns, public speaking, and media strategies to encourage and facilitate those most affected to tell their stories. As I have said to the workers I am privileged to know, the facts of any case come from their voices and their lived

experiences; litigation, if nothing else, is an opportunity to articulate, document, and ultimately share that story.

In my work, I have seen that the most profound systemic changes occur because of community-based work that informs the broader institutional changes. Litigation that encourages and even demands our clients' full participation and serves as a vehicle for educating them, not only about their case, but about power and protest, is one of the most effective ways of creating concrete change. It gives individuals a sense of control over the circumstances of their lives, and it turns the legal system from a source of marginalization in our communities into a tool for empowerment.

Third, activists and academics can form key alliances. When it comes to corporate conduct, one positive response to the problems discussed today is that progressive academics publish articles that challenge the prevailing scholarship and its overvaluation of efficiency. Documentation on the external cost of corporate conduct, the societal harm of gross wealth disparities, the incongruity of applying national borders to individuals and ignoring them for corporations, and the connections between workers in different parts of the world, are invaluable types of scholarship.

And fourth, I will share a few brief thoughts on the limitations and promise of existing legal theories. As I have said earlier, the ability to hold corporations responsible for labor law compliance when corporations subcontract is critical to addressing the reality of economic injustice. We need something more than the joint employer test that currently exists. We need a test that reflects the reality of a global marketplace for cheap labor and, more specifically, that understands how control over labor will not be proven by a multi-factored test about the relationship between one company and its subcontractors. Rather, a new test should be developed that requires an analysis of the industry dynamics and economics as a whole. Just as it is often too narrow to evaluate desegregation cases without the context and history of "separate but equal," or discrimination cases without attention to systemic racial and gender inequality, an examination of one retailer's

relationship with its subcontractors devoid of an understanding of how the industry as a whole is designed to exert downward pressure on prices and working conditions misses some of the most profound ways in which corporations are responsible for sweatshops.

In addition, we need to reexamine the notion of damages or harm in the context of corporations whose conduct affects not just workers, but entire communities. Companies routinely play the consumer card by saying: "I'm just trying to give consumers what they want." Or more pointedly: "If I pay workers more, I'm just going to have to pass those costs on in terms of higher prices."

Wal-Mart's CEO, Lee Scott, has put it this way: "Workers' rights advocates just don't want people to get cheap goods." Mr. Scott said that Wal-Mart saved the average family $600 a year in cheap products, giving them what he calls "a raise" every time they shop with Wal-Mart.[26] This is from a man who should know about raises, since he made $28.7 million in compensation in fiscal year 2003.[27] Clearly, that $600 a year can come from somewhere other than consumer pockets or worker wages. So, we need to reexamine this issue of harm to consumers.

Current legal doctrine is extremely simplistic. Consumers are not harmed if they get goods cheaper than they otherwise would have. But in following the campaigns to stop Wal-Mart stores from entering certain communities, primarily communities of color in South Los Angeles and the San Gabriel Valley, there is another reality. Residents feel harmed by a company that lives and operates in their midst that systematically exploits workers, employs sweatshops, pushes small businesses out, and disregards environmental consequences. The harm to these residents is something (to my knowledge) that has never been recognized by a court, and existing case law suggests that courts are unlikely to recognize it.

To the contrary, this situation is analyzed in the law as these individuals got a store that will save them money when they shop, and so what is the damage? We should move toward recognition of collective community

harm, perhaps akin to the doctrine of public nuisance, for corporations that enter communities and have a detrimental effect on the overall health of the community.

Progressive people recognize, as Dr. Martin Luther King, Jr. preached, that an injustice to one is an injustice to all. Getting courts to acknowledge a cognizable harm in this regard would empower individuals and bring the legal system in line with the way people experience the world.

I do not know if economic injustice is the natural byproduct or even an intended result of the very existence of corporations. But I do think that it is critical for progressive people to address the landscape we have—a world in which corporations are not going to go away—and figure out how we can fashion a more just world by working with, through, and against them.

How can we use the law to help people like Suchadal so that corporate profits do not prevent second graders in poor families from going to school or force garment workers to give up their freedom and humanity to make a living? This is one of the important and difficult questions facing this conference.

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[*] This text is a transcript from panel discussion at University of California at Los Angeles School of Law on April 9, 2005 as part of the conference, New Strategies for Justice: Linking Corporate Law with Progressive Social Movements, cosponsored by UCLA Law School and the Center on Corporations, Law & Society at Seattle University School of Law. Transcripts from the other panelists, John C. Bonifaz and Cheryl I. Harris, are also featured in this volume.

[1] Litigation Director of the Asian Pacific American Legal Center of Southern California, working with and representing garment workers to call for corporate accountability and an end to sweatshop conditions.

[2] *See, e.g.*, Lynn Duggan, *Retail on the "Dole": Parasitic Employers and Women Workers*, 13 NAT'L WOMEN'S STUD. ASS'N J. 95 (2001), *available at* http://muse.jhu.edu/journals/nwsa_journal/v013/13.3duggan.html. All across the United States, heroic battles are being waged by workers and their allies, from well-publicized efforts like the Service Employees International Union grocery strike in California to restaurant workers allied with the Korean Immigrant Workers Advocates (KIWA) in Korea Town, and taxi workers from New York to Los Angeles organizing to demand change and corporate and governmental accountability.

[3] Mark Jaffe, *Time Warner, Gillette, Citigroup CEO Pay Outpaces Stock Gains*, BLOOMBERG NEWS FEATURE, Apr. 19, 2004,

available at http://quote.bloomberg.com/apps/news?pid=nifea&&sid=aVqt7aTR27ow (last visited Nov. 1, 2005).

[4] *Id. See also* Kathy M. Kristof, *Gulf Between Top, Bottom Gets Wider*, L.A. TIMES, May 31, 2005, at C1 (stating that "CEOs at California's largest 100 public companies took home a collective $1.1 billion in 2004, up almost 20% from 2003. That compares with the 2.9% raise that the average California workers saw last year," and describing this as reflective of a national trend).

[5] *See* Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 406 (1998). *See also* Karl Schoenberger et al., *21 Thais Found in Sweatshop Are Released*, L.A. TIMES, Aug. 12, 1995, at D1; George White, *Garment 'Slaves' Tell of Hardship*, L.A. TIMES, Aug. 4, 1995, at D1.

[6] *See* EDNA BONACICH & RICHARD P. APPELBAUM, BEHIND THE LABEL: INEQUALITY IN THE LOS ANGELES APPAREL INDUSTRY (2000).

[7] SWEATSHOP WATCH & GARMENT WORKER CENTER, CRISIS OR OPPORTUNITY? THE FUTURE OF LOS ANGELES' GARMENT WORKERS,
THE APPAREL INDUSTRY AND THE LOCAL ECONOMY (2004), *available at* http://www.sweatshopwatch.org/media/pdf/garment_report_2004.pdf (last visited Nov. 3, 2005).

[8] The labels given to different entities in the garment industry are often misleading. "Retailers" sell clothes to the public but often also engage in various steps in the garment production process, including design, fabric selection and quality control over garment workers. A large majority of "manufacturers" today do not actually manufacture (sew) garments, but instead design clothes, make patterns, select fabric, and otherwise perform all operations except for sewing, for which they contract with garment factories. Either way, these companies try and use labels such as "retailer" to suggest that they have little or nothing to do with the garment production process and therefore should have no responsibility for the conditions in which their clothes are made.

[9] *See* Ku-Sup Chin, *Contractors*, *in* BEHIND THE LABEL, *supra* note 6, at 135; SWEATSHOP WATCH & GARMENT WORKER CENTER, *supra* note 7, at 3.

[10] *See, e.g.,* PROGRESSIVE JEWISH ALLIANCE, NO SHVITZ: YOUR ONE-STOP GUIDE TO FIGHTING SWEATSHOPS (2d ed. 2004).

[11] Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 137 (2002).

[12] *See, e.g.,* Zhao v. Bebe Stores, 247 F.Supp.2d 1154, No. 2:01CV10950 (C.D. Cal. 2003); Topo v. Dhir, 210 F.R.D. 76, 76-77 (S.D.N.Y. 2002), *available at* 2002 WL 31050855; Flores v. Albertsons, 2002 WL 1163623, *5 (C.D. Cal. 2002); Liu v. Donna Karan Int'l, 207 F.Supp.2d 191, 193 (S.D.N.Y. 2002); de la Rosa v. Northern Harvest Furniture, 210 F.R.D. 237 (C.D. Ill. 2002).

[13] John C. Bonifaz, *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Political Injustice*, 4 SEATTLE J. FOR SOC. JUST. 251 (2005).

[14] Cheryl I. Harris, *The Progressive Critique of the Current Socio-legal Landscape: Corporations and Racial Justice*, 4 SEATTLE J. FOR SOC. JUST. 263 (2005).

[15] BONACICH, *supra* note 6.

[16] The Thai Community Development Center, KIWA and the Coalition for Humane Immigrant Rights of Los Angeles are all nonprofit 501(c)(3) organizations based in Los Angeles that advocate for the Thai community, low-wage workers in Korea Town

(primarily Latino and Korean), and immigrants, respectively. Together with the Asian Pacific American Legal Center, the groups worked under the umbrella "Sweatshop Watch" to free Thai workers and to provide a range of services and education.

[17] The Asian Pacific American Legal Center (APALC) is a nonprofit 501(c)(3) organization founded in 1983 whose mission is to advocate for civil rights, provide legal services and education, and build coalitions to positively influence and impact Asian Pacific Americans and to create a more equitable and harmonious society. It is the largest provider of multilingual, culturally sensitive legal cervices, education and civil rights support to one of the nation's fastest growing populations. The author is an attorney at APALC.

[18] Bureerong v. Uvawas, 959 F. Supp. 1231 (C.D. Cal. 1997); Bureerong v. Uvawas*,* 922 F. Supp. 1450 (C.D. Cal. 1996). APALC was honored to have co-counseled the case with Della Bahan, now part of the Law Offices of Della Bahan; the ACLU of Southern California; the Asian Law Caucus; the ACLU Immigrants Rights Project; Hadsell & Stormer; and the firm of Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg. I am indebted to the phenomenal attorneys with whom I worked on this case, who taught and continue to teach me so much through their tireless advocacy for justice.

[19] *See, e.g.,* Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997).

[20] CAL.LAB.CODE § 2671 *et seq.* (West 2005) (commonly known as "AB 633"); ASIAN PACIFIC AMERICAN LEGAL CENTER & SWEATSHOP WATCH, REINFORCING THE SEAMS: GUARANTEEING THE PROMISE OF CALIFORNIA'S LANDMARK ANTI-SWEATSHOP LAW, AN EVALUATION OF ASSEMBLY BILL 633 SIX YEARS LATER (2005).

[21] Beneva Weintraub, *New "S" Visa Program for Foreign Witnesses*, U.S. ATT'YS BULL., Apr. 1996, at 44.

[22] 8 U.S.C.A. § 1101(a)(15)(T) (defining "T visas"); 8 U.S.C.A. § 1101(a)(15)(U) (defining "U visas").

[23] *See, e.g.*, Zhao, 247 F.Supp.2d 1154; A.Z.3 v. Tampa Westshore Assocs., 869 So.2d 42 (Fla. Dist. Ct. App. 2004); Lola v. Novelty Textile Mills, No. 1:96CV04205, 1996 WL 734900 (S.D.N.Y. 1996).

[24] ASIAN PACIFIC AMERICAN LEGAL CENTER & SWEATSHOP WATCH, *supra* note 22, at 11.

[25] Zhao, 247 F.Supp.2d at 1161.

[26] Lee Scott, President & CEO, Wal-Mart Stores, Inc., Wal-Mart and California: A Key Moment in Time for American Capitalism,
Address at Town Hall Los Angeles (Feb. 23, 2005) (transcript available at http://www.walmartfacts.com/docs/981_leescottspeechattownhall2-23-05_1492524199.pdf).

[27] Jaffe, *supra* note 3.