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## **An Agricultural Law Research Article**

# **The Joint Employment Doctrine: Clarifying Joint Legislative-Judicial Confusion**

by

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# THE JOINT EMPLOYMENT DOCTRINE: CLARIFYING JOINT LEGISLATIVE- JUDICIAL CONFUSION

Marc Linder †

## I. INTRODUCTION

In its report to the United States House of Representatives recommending approval of a Bill that would “provide for the protection of migrant and seasonal agricultural workers,”<sup>1</sup> the Committee on Education and Labor (“Committee”) stated that its

use of [the] term [“employ”] was deliberate and done with the clear intent of adopting the “joint employer” doctrine as a central foundation of this new statute; it is the indivisible hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for any breach of those duties.

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... [W]here an agricultural employer . . . asserts that the agricultural workers in question are the *sole* [sic] employees of an independent contractor/crew leader . . . , it is the intent of the Committee that the formulation as set forth in *Hodgson v. Griffin & Brand of McAllen, Inc.*<sup>2</sup> be controlling. This decision makes clear that even if a farm labor contractor is found to be a bona fide independent contractor, . . . this status does not as a matter of law negate the possibility that an agricultural employer may be a joint employer . . . of the harvest workers and jointly responsible for the contractor’s employees.

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The Committee’s adoption of the “joint employer” doctrine was deliberately made for it presented the best means by which to insure that the purposes of this Act would be fulfilled.<sup>3</sup>

As the report forcefully underscores, migrant farm workers are particularly vulnerable to efforts by employers to evade their responsibilities

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1. H.R. REP. NO. 885, 97th Cong., 2d Sess. 1 (1982).

2. 471 F.2d 235 (5th Cir.), *reh’g denied*, 472 F.2d 1405 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973).

3. H.R. REP. NO. 885, *supra* note 1, at 6-7.

under federal protective statutes by hiding behind judgment-proof middlemen.<sup>4</sup> In order to thwart such collusive contractual arrangements,<sup>5</sup> the Fair Labor Standards Act of 1938 (FLSA)<sup>6</sup> and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)<sup>7</sup> apply the doctrine of joint employment.

Yet, in spite of the Committee's very tough and clear language to the effect that no ruses or subterfuges will be permitted to stand in the way of placing liability where it belongs,<sup>8</sup> a review of the case law reveals that Congress, the Department of Labor and the courts, by failing to think through the underlying legal logic and socioeconomic implications, have created unnecessary confusion concerning the structure of joint employment. Mechanistic application of the law, as filtered through the Committee's injunctions, has nurtured a (well-intended) preconception that a "joint employer" is subject to the same test as an "employer" — namely, the "economic reality of dependence test."<sup>9</sup> However, because the structure of a joint employment relationship differs significantly from the structure of an employment relationship not utilizing a middleman, the dispositive analysis for determining whether joint employment is present should, in the typical case, be the control test<sup>10</sup> rather than the economic reality of dependence test.<sup>11</sup> Moreover, and paradoxically, by formulating a diluted version of the economic reality test in joint employment cases and collapsing the categories of "employer" and "joint employer," courts have

4. The problem of employers trying to evade their responsibilities is not confined to farm workers or to the United States. See Linder and Norton, *The Latest in Employer Scams*, *The Texas Observer*, Aug. 28, 1987, at 12; Hakim, *Employers' Use of Homework, Outwork and Freelances*, 92 *EMPLOYMENT GAZETTE* 144 (1984) (Great Britain); Dale, *Social Class and the Self-Employed*, 20 *SOCIOLOGY* 430 (1986) (Great Britain); Mills, *The Contract of Employment: Control Is Economic Reality*, 10 *AUSTL. BUS. L. REV.* 270, 277 (1982).

5. In one of the earliest cases dealing with an attempt at collusion, the Fifth Circuit stated in dictum that if one company colludes with another to interpose that entity as an apparent independent contractor in order to evade its responsibilities under the Fair Labor Standards Act (FLSA), the court would consider that entity an agent and the company an employer. *Bowman v. Pace*, 119 F.2d 858, 860 (5th Cir. 1941).

6. 29 U.S.C. §§ 201-219 (Supp. 1989).

7. 29 U.S.C. §§ 1801-1872 (Supp. 1989).

8. The Committee stated: "It is . . . the intent of the Committee that any attempt to evade the responsibilities imposed by this Act through spurious agreements among such parties be rendered meaningless; to make clear that it is the economic reality, not contractual labels, . . . which is to determine employment relationships under this Act." H.R. REP. No. 885, *supra* note 1, at 7. This principle was not a protective statutory innovation; it had long been used in common law tort decisions. See, e.g., *Gulf Ref. Co. v. Rogers*, 57 S.W.2d 183, 185 (Tex. Civ. App. 1933).

9. For a discussion of the "economic reality of dependence test" see *infra* section II.

10. For a discussion of the "control test" see *infra* section II.

11. Absent intermediaries, the presence — but not the absence — of control by a putative employer over a putative employee should be dispositive of the issue of the existence of an employment relationship. In other words, an employee can be identified much more readily than can an independent contractor.

unnecessarily confined the reach of the former to the latter's narrower scope.

Insofar as the economic reality of dependence test was intended to create, and has created, a broader universe of covered workers than the control test,<sup>12</sup> applying the latter could be expected to result in an abridgement of the rights of the affected workers. In point of fact, however, the scope of coverage of joint employment under the control test turns out to be more expansive than that measurable by the economic dependence test. The reason for this surprising outcome is that the crucial relationship being tested is not that between the alleged joint employer and the employees, but rather that between the smaller (admitted) employer and the deep-pocket (alleged) joint employer.

## II. THE CONTROL AND THE ECONOMIC REALITY OF DEPENDENCE TESTS

### A. *Differences Between the Two Tests*

What are the control and economic reality of dependence tests, and how do they differ? In the nineteenth century, control came to be defined in the master/servant context as follows: "A servant is a person subject to the command of his master as to the manner in which he shall do his work."<sup>13</sup> The economic reality of dependence test, by way of contrast, encompasses the following factors: skill, capital investment, opportunity for profit or risk of loss,<sup>14</sup> degree of control by the employer, performance of work as part of integrated unit of the employer's business, and permanency and exclusivity of the relationship.<sup>15</sup> In point of fact, however, even the

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12. See M. LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* 186-89 (1989).

13. *Yewens v. Noakes*, 6 Q.B.D. 530, 532-33 (Ex. D. 1880) (per Bramwell, B.). Earlier, Bramwell had remarked that a master had the right to say "how" the work was to be done. *R. v. Walker*, 27 L.J.M.C. 207, 208 (1858). For Bramwell, an early proponent of "law and economics," laissez-faire was "a dogma in which he fanatically believed." 15 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 500 (1965). Although "control" has been widely held to mean the employer's right to control the employee's physical conduct, that is, to mandate the details of how the work is to be performed, it also encompasses a broader set of criteria including skill, investment, and integration into the employer's business. *RESTATEMENT (SECOND) OF AGENCY* § 220 (1958).

14. For cogent arguments that the risk of loss, rather than the chance of gain, essentially defines an independent enterprise, see Flannigan, *Enterprise Control: The Servant-Independent Contractor Distinction*, 37 U. TORONTO L.J. 25, 46-47 (1987). Flannigan glosses over the significance of the real-world problems associated with distinguishing between employees and independent contractors where the workers in question have no capital and therefore have no loss to risk. See *id.* at 48-49.

15. *United States v. Silk*, 331 U.S. 704, 716 (1947). In its AWPAs report, the House Committee on Education and Labor stated as follows:

[I]t is the intent of the Committee that in making the determination as to whether the individual worker . . . was an employee of the defendant or an independent contractor . . . the prescriptions in *Rutherford Food Corp. v. McComb*, . . . *Real v. Driscoll*, . . . *Mednick v. Albert Enters.*, . . . [and] *Usery v. Pilgrim Equip. Co.* . . . be determinative. Each of these cases give [sic] a slightly different description of the five or six factors which

common law agency control test subsumes almost all of these criteria.<sup>16</sup>

While the purpose of both tests is to identify "the economist's distinction between one who sells his labour power to the enterprise of another and one who operates his own enterprise,"<sup>17</sup> the nub of the distinction between them is this: Whereas control focuses on personal work site subordination, the economic reality of dependence embraces those who are economically dependent on a firm even in the absence of control. Indeed, the whole point of the economic reality of dependence test has been to extend coverage and protection to uncontrolled employee-like persons.<sup>18</sup> A district court nicely captured the spirit of the test this way:

[W]here it is shown . . . that the maximum benefits that can be expected by the cook and her helpers from this sort of arrangement are less than would accrue to them from outright employment under the wage and hour restrictions of the Act; and when . . . the arrangement appears . . . to be intended for the benefit of the employer in limiting his outlay, rather than for the benefit of the cook-contractor (who is given little opportunity to make of the contract a profitable business venture) the surface appellation of "contractor" must be stripped off to uncover the real relation of the parties.<sup>19</sup>

### B. *Socio-Historical Origins of the Tests*

A review of the socio-historical dialectic between the two tests will illu-

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are to be considered in making this determination, but each eschews the traditional common law "right to control" test.

H.R. REP. No. 885, *supra* note 1, at 7 (citations omitted). Although first formulated in the context of social security act adjudications and subsequently overruled by Congress, the economic reality test has never been challenged by Congress as applied to FLSA. *McComb v. Homeworkers' Handicraft Coop.*, 176 F.2d 633, 639 (4th Cir.), *cert. denied*, 338 U.S. 900 (1949); *Donovan v. Agnew*, 712 F.2d 1509, 1513-14 (1st Cir. 1983). For a discussion of this congressional action see Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farm Workers: A Challenge to the 'Law and Economics' Agency Doctrine*, 15 N.Y.U. REV. L. & SOC. CHANGE 435, 449-51 (1987).

16. These include skill, investment, control, integration into the employer's business, and permanency. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

17. K. WEDDERBURN, *THE WORKER AND THE LAW* 113 (3d ed. 1986).

18. That the test does not automatically generate such expansive protective outcomes even in the hands of a very liberal judge is shown by *Brennan v. Longview Carpet & Specialty Co.*, 74 Lab. Cas. ¶ 33,073 (E.D. Tex. 1973) (holding carpet installers who earned \$100 weekly for fifty hours of work, worked almost exclusively for one employer where they showed up every day at 8:00 a.m., and did not hold themselves out to the world as contractors, to be independent contractors and thus not covered by FLSA).

19. *Tobin v. Cherry River Boom & Lumber Co.*, 102 F. Supp. 763, 768 (S.D.W. Va. 1952). Or, as an Australian commentator argued: "A decision . . . can be seen to be clearly wrong when it puts a worker in a position of being unable to claim the benefits of an employee although his real work and his bargaining power preclude him from availing himself of the advantages of the independent contractor." Merritt, "Control" v. "Economic Reality": *Defining the Contract of Employment*, 10 AUSTRAL. BUS. L. REV. 105, 119-20 (1982).

minate their current juridical-economic inter-relationship. Control as an indicator of the employment relationship originated in pre-capitalist forms of state-enforced compulsory labor in England. Embedded in a network of laws and institutions designed to enforce behavior in conformity with a legal status creating a liability to serve, such control was most influentially exemplified by the course of litigation under the poor laws, which secured a settlement in a parish for workers remaining "in the same service" for a whole year.<sup>20</sup> In order to contest settlements gained in this manner, thus triggering the right to remove potential poor law relief recipients, parishes successfully advanced the proposition that control was necessarily coextensive with service; where the worker could not be shown to have been continuously subject to his master's control for an entire year, the settlement failed and removal from the parish was ordered.<sup>21</sup> Although the master's abstract power and authority to dispose of his servant's time twenty-four hours a day, 365 days a year, may have been applicable to agricultural laborers, domestic servants, and others living in the master's house, even in the eighteenth century such a doctrine "ruled out most of the workmen who were employed by the capitalist manufacturer by the week or by the day."<sup>22</sup>

Therefore, with the rise of modern industry the early concept of control had to be adapted to accommodate the development of the core capital-labor relationship in which an employing entity supervises and directs in detail the activities of its employees within the factory, but is not entitled to use force, or to call upon the state to use force, to compel their appearance or to prevent their departure.<sup>23</sup> Thus, prior to the rise of large-scale mechanized industry, control of unskilled laborers was rooted in a type of personal-physical subordination common to slave, feudal and capitalist economies, while skilled craftsmen could be subject to control only by masters in whom "ownership of the means of production coincided with the possession of technical knowledge and skill."<sup>24</sup> Because this condition was not met in such key industries as metalworking, mining, and construction during much of the nineteenth and into the twentieth century, control

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20. An act for supplying some defects in the laws for the relief of the poor of this kingdom, 8 & 9 Will. 3, c. 30 § IV (1697).

21. See, e.g., *R. v. Wrigton*, Burr., Sett. Cas. 280 (1749); *R. v. Inhabitants of Macclesfield*, Burr., Sett. Cas. 458 (1758); *R. v. Inhabitants of Kingswinford*, 6 T.R. 219, 100 Eng. Rep. 983 (K.B. 1791).

22. 11 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 468 (1938).

23. This process also marked later litigation under the poor laws. Thus the Court of King's Bench, while sustaining the fiction that all masters theoretically retained the power to dispose of their servants' labor twenty-four hours a day throughout the duration of their service, held that where a worker worked fewer hours, he still gained a settlement so long as the hours corresponded to the custom of the trade. *R. v. Inhabitants of All Saints, Worcester*, 1 B. & Ald. 322, 106 Eng. Rep. 118 (1818).

24. Kahn-Freund, *Servants and Independent Contractors*, 14 MOD. L. REV. 504, 505-06 (1951).

there remained circumscribed.<sup>25</sup> Indeed, the struggle between owners seeking to introduce innovations designed to undermine the basis of craftsmen's autonomy and the resisting workers was the hallmark of capital-labor relations in these industries.<sup>26</sup> During this transition period the control test became inadequate to the sensitive task of identifying the spectrum of employment relations.

But with the impressive advances in centralized management, the division of labor ("Taylorism" and "scientific management") and automated mass production ("Fordism"),<sup>27</sup> corporate capital succeeded in de-skilling its employees by transforming them into appendages of its means of production<sup>28</sup> and achieving a previously unattainable level of control. It is, therefore, only in the twentieth century that the control test has come into its own as a standard appropriate for gauging the socio-technological domination of closely supervised, unskilled, and semi-skilled detail workers by firms that own, control, understand and coordinate the use of all the means of production.<sup>29</sup>

By the same token, however, large numbers of workers still remain outside the domain of such classical capitalist control. While some, such as migrant farm workers, continue to be subject to atavistic pre-capitalist forms of control, others may be uncontrolled yet still economically dependent on their employers. Yet identifying precisely what "economic dependence" entails is difficult for it could plausibly encompass the relationships of the entire economically active population except those able to live on their capital indefinitely.<sup>30</sup>

Both historically and categorically, the lack of ownership of the means that would enable workers to work for their own account constitutes the

25. See Linder, *supra* note 15, at 447 n.56.

26. See D. MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* (1987). Another commentator on the subject has stated:

Against the historical kaleidoscope of medieval serfdom, guild system, statutory regulation and industrial proletariat (providing a 'reserve army of labour'), control was legally significant because it was, either as an incident of status or of contract, a social reality. To the Victorians, commanding the productive forces liberated by the new machinery and the new forms of association, control was the secular corollary of the Pauline precept to servants that they should be submissive to their masters . . . .

Drake, *Wage-Slave or Entrepreneur?* 31 MOD. L. REV. 408, 413 (1968) (citations omitted).

27. See S. MEYER III, *THE FIVE DOLLAR DAY: LABOR MANAGEMENT AND SOCIAL CONTROL IN THE FORD MOTOR COMPANY 1908-1921*, at 9-65 (1981); D. HOUNSHELL, *FROM THE AMERICAN SYSTEM TO MASS PRODUCTION 1800-1932*, at 217-301 (1987).

28. See H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* (1974). For a conceptual discussion of the process of de-skilling, see M. LINDER, *EUROPEAN LABOR ARISTOCRACIES* 48-59 (1988).

29. In this sense, the frequently voiced criticism that the control test has become obsolete because "corporations . . . by their very nature could have no personal competence in any area of human activity at all" completely misses the point. Mills, *Defining the Contract of Employment*, 7 AUSTL. BUS. L. REV. 229, 232 (1979).

30. See *Taylor v. Local No. 7, Int'l Union of Journeymen Horseshoers*, 353 F.2d 593, 597 (4th Cir. 1965), *cert. denied*, 384 U.S. 969 (1966).

dependence and inequality that compelled them to subordinate themselves to those who did own those means. The latter (i.e., capital) assumes two forms: (1) (the money to buy) the means of subsistence on which to live until the results of the labor process are realized, and (2) the tools, machines, raw materials, etc., specifically required by that process in conformity with the standards enforced by competition.<sup>31</sup> The common law control test reflects both aspects: Those with no capital are subject to the authority of those who attach them to their capital and the lack of capital in turn prevents workers from accumulating the capital that would enable them to be independent, that is, to relate qua capital to other capitals as contradistinguished from relating qua labor to capital.

In other words, the control test identifies classical proletarians exposed to the full brunt of capitalist exploitation.<sup>32</sup> But the control test situated that relationship on the individual level of exchange (labor power for wages) between worker and capitalist, as well as on the level of the latter's authoritative disposition over the use of that labor. It obviously did not embed these individual phenomena in a compulsory class structure. Ironically, the nineteenth century economic reality of class poverty test did just that<sup>33</sup> by, in effect, inferring control from the (implicitly judicially noticed) categorical class differences in specific assets and income.

The modern economic reality of dependence test, on the other hand, by resisting the conceptualization of a binary class system, has diluted the robustness of both its predecessors. This refusal is so much the more unwarranted because labor-protective statutes are by their very nature collective-compulsory class institutions, which cannot be adequately conceptualized within the framework of individual exchange. To bar admission to these systems because of adventitious contingencies relating to the technical details of the forms of exchange and exploitation is self-contradictory. Making protected-employee status hinge on whether a worker is economically dependent on a particular business or employer,<sup>34</sup> rather

31. 1 K. MARX, *DAS KAPITAL*, Ch. 6 (1867).

32. In Marx's terms, the control of workers through their incorporation as appendages into mechanized capital production is adequate to the concept of capital because it constitutes the basis of relative surplus value production, that is, a potentially open-ended process of cheapening the elements entering into the value of labor power and thus making possible an increase in the segment of the working day devoted to producing surplus value. By way of contrast, the control associated with non-mechanized types of labor, such as hand-harvesting fruits and vegetables, is the basis of absolute surplus value production which is subject to much narrower limits because its outer dimensions are the finite length of the day and the finite intensity of unaided labor. See MARX, *supra* note 31, at chs. 7-18. In this crucial sense, control, rather than economic dependence, is the essence of the capital-labor relation.

33. In interpreting the (anti-company) store laws, Victorian judges identified protected workers by whether they earned "their bread by the sweat of their brow" or exploited others. *Riley v. Warden*, 2 Ex. 59, 68, 154 Eng. Rep. 405, 415 (1848); *Ingram v. Barnes*, 7 El. & Bl. 115, 135, 119 Eng. Rep. 1190, 1194 (1857).

34. Where a defendant-employer sought to turn the economic reality of dependence test against itself by claiming that its alleged employees could not be dependent upon it because



than on the employing class as a whole, is not only inappropriate to the context, but self-defeating. This is true for, ironically, by seeking to avoid association with a dogmatic approach, the modern economic reality test has made itself vulnerable to the charge that it does "not . . . encompass reasonable limits."<sup>35</sup> The economic reality of dependence test lays this trap for itself by virtue of its inability to conceptualize "dependence" rigorously.<sup>36</sup>

### III. THE COMMON LAW AGENCY ORIGINS OF JOINT EMPLOYMENT

In the nineteenth century in vicarious liability and fellow-servant rule accident cases, a rudimentary notion of joint employment emerged as courts began to accept the proposition that it was possible for one to be, simultaneously, the servant of a general master and, for a time or on a particular occasion, the servant of an "immediate employer."<sup>37</sup> These

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the income they received from it was a fraction of what they received in public assistance, the court, unable to distinguish between personal work site control and economic dependence, reverted to control in order to support a finding of dependence. *Marshall v. Michigan Power Co.*, 92 Lab. Cas. (CCH) ¶ 34,097 at 44,190-44,191 (W.D. Mich. 1981). Subsequently, the circuit courts also failed to confront this gap in the economic reality of dependence test. Instead, they have irrelevantly held that its proper meaning is whether the worker is dependent on the particular business for continued employment in that line of business. *Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1385 (3d Cir.), cert. denied, 474 U.S. 919 (1985); *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 267-68 (5th Cir.), modified on other grounds, 826 F.2d 2 (5th Cir. 1987). Because relatively few workers would be unemployable in one line of business if a particular employer did not employ them, this condition is so restrictive that it would disqualify most workers as employees under FLSA. Inconsistently, the Fifth Circuit also maintains the logically compelling position that the touchstone of the employment relationship is whether the workers are "dependent upon finding employment in the business of others." *McLaughlin v. Seafood, Inc.*, 861 F.2d 450, 453 (5th Cir. 1988), modified, 867 F.2d 875 (5th Cir. 1989) (citations omitted).

35. *Wheeler v. Hurdman*, 825 F.2d 257, 272 (10th Cir.), cert. denied, 484 U.S. 986 (1987) (adjudicating Title VII/Age Discrimination in Employment Act). For an overview of the various strands of precedent, see Note, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203 (1984).

36. On the lack of rigor and consequent vulnerability of the economic reality of dependence test, see Linder, *supra* note 15, at 473-75. The modern problem to which the courts are reacting is that, once the wage-form and the capital-labor relation come to encompass non-classically proletarian workers, it becomes difficult to justify the purpose of protective statutes without opening a breach in the scheme of categorical coverage. FLSA in part resolves this problem by excluding executive, administrative and professional employees. 29 U.S.C. § 213(a)(1) (Supp. 1989). See also P. DRUCKER, *THE CONCEPT OF THE CORPORATION* 59 (1964) (General Motors managerial employees' stock holdings have made them economically independent of their employment relationship with the company).

37. *Laugher v. Pointer*, 5 B. & C. 547, 569-70, 108 Eng. Rep. 204, 212 (K.B. 1826). See also *Johnson v. City of Boston*, 118 Mass. 114 (1875); *Rourke v. White Moss Colliery Co.*, 2 C.P.D. 205 (1877); *Jones v. Scullard*, 2 Q.B. 565, 569 (1898) (stating that "it is not at all impossible for a man to be in the practical relation of servant to two different employers" without reaching the issue). One aspect of contemporary joint employment under the FLSA regulations, namely, sharing or interchanging employees, 29 C.F.R. § 791.2(b)(1) (Supp. 1989), harks back to the category of the borrowed servant. See Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222 (1940). On the statutory regulation of a subset of such employment situations, see 29 U.S.C. § 207(p) (Supp. 1989); Wages-Hours 1981-

cases implicitly overruled an older line of English precedent that dogmatically asserted that it was logically impossible for one person to be employed simultaneously by two employers.<sup>38</sup> In *Bush v. Steinman*,<sup>39</sup> the court stated:

The Plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed. If the employer suffer by the acts of those with whom he has contracted he must seek his remedy against him.<sup>40</sup>

Later the King's Bench held:

[T]he law does not recognize a several liability in two principals who are unconnected. If they are jointly liable you may sue either, but you cannot have two separately liable; you must bring your action either against the principal, or the person who commits the injury . . . . If, indeed, several persons are concerned in a trespass, or other tortious act, they are liable jointly or severally, at the election of the party injured, but the several liability arises from the joint liability, and from the rule of law that a party injured need not sue all who are guilty of the wrongful act; but what I say is, that two persons cannot be made separately liable at the election of the party suing, unless in cases where they would be jointly liable: and there cannot be any ground for saying that the hirer of horses and the job-man would be jointly liable.<sup>41</sup>

#### IV. JOINT EMPLOYMENT AND THE FLSA OVERTIME PROVISIONS

Although the initial joint employment decisions under FLSA cite no authority, as if they were cases of first impression, an early FLSA case is redolent of this nineteenth century agency approach. Based on the rule that the agent of a disclosed principal can contractually bind either himself

1987 Transfer Binder, 87-69 Op. Att'y Gen. Kan., Lab. L. Rep. (CCH) ¶ 31,479 at 43,854 (Apr. 10, 1987). For a recent example, see Fisher, *Boeing, Short of Workers, Borrows Some at Lockheed*, N.Y. Times, Mar. 8, 1989, at 29, col. 1 (nat. ed.).

38. See, e.g., *Stone v. Cartwright*, 6 T.R. 411, 412, 101 Eng. Rep. 622, 623 (1795) (action for negligence could be brought against either actual hand committing it or owner for whom act was done). For latter-day approval, see *Bileau v. Paisley*, 21 P. 934 (Or. 1889).

39. 1 Bos. & Pul. 404, 126 Eng. Rep. 978 (C.P. 1799).

40. *Id.* at 410, 126 Eng. Rep. at 981 (per Rooke, J.).

41. *Laugher v. Pointer*, 5 B. & C. 547, 558-59, 108 Eng. Rep. 204, 208-09 (K.B. 1826). See also *Burgess v. Gray*, 1 C.B. 578, 135 Eng. Rep. 667 (1845):

According to the rule laid down in *Bush v. Steinman*, the remedy would be either against the defendant, the employer paramount, or against the immediate wrongdoer, the party employed paravaile . . . and not against the mesne agent.

There seems to be no objection to a joint action against the immediate wrongdoer and the ultimate principal, where . . . the act of the immediate wrongdoer appears to be such as would not subject him to an action of trespass.

*Id.* at 592 n.(a), 135 Eng. Rep. at 673 n.(a).

or his principal, but not both, the court dismissed an action that alleged that the defendant pulp-cutting contractor was both the employer of the plaintiff and the employee of the defendant-paper company: "He can't be both. . . . Employees of an independent contractor are not the employees of a contractee although the work done under the contract is for the ultimate benefit and use of the contractee."<sup>42</sup> Even the Restatement of Agency, while agreeing that "[i]n no case are the servants of a non-servant agent the servants of the principal," concedes that both the master and the servant may be masters of the subservant.<sup>43</sup>

The doctrine of joint employment came into its own statutorily in the administration of the overtime provisions of FLSA.<sup>44</sup> There, the point of joint employment is to guard against the possibility that joint employers would collude to undermine the aggregation of hours worked by claiming that each employed the worker separately for forty hours.<sup>45</sup> While that

42. *Maddox v. Jones*, 42 F. Supp. 35, 39-41 (N.D. Ala. 1941). *Accord* *Gross v. Grissom*, 2 Wage & Hour Cas. 497 (N.D. Miss. 1942); *Van Hee v. Breuer*, 5 Wage & Hour Cas. 675 (N.D. Ohio 1945). *But see* *Brennan v. Community Service Society of New York*, 181 Misc. 637, 45 N.Y.S.2d 825, 830 (N.Y. Cty. Ct. 1943) (agency rule not pertinent under FLSA). For a typical statement of the incompatibility of "independency" and "servancy" in a fellow-servant rule case, see *Knicely v. West Virginia Midland R.R.*, 64 W. Va. 278, 61 S.E. 811, 813 (1908). In a more recent case involving the Walsh-Healey Act, it was stated in dictum that the scope of the employment relationship under FLSA had "never been extended to embrace bona fide independent contractors and their employees." *United States v. New England Coal & Coke Co.*, 318 F.2d 138, 144 (1st Cir. 1963). It has also been held, albeit not in the joint employment context, that while an independent contractor may not be an employee, he can be "employed." *United States v. Capanegro*, 576 F.2d 973, 977, (2d Cir.), *cert. denied*, 439 U.S. 928 (1978). Because the purpose of the underlying statute was not to impose an obligation on an employer but to protect a union's treasury from embezzlers, the court held the distinction between employee and independent contractor to be irrelevant. *Id.* (holding that within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(c), an attorney retained by a union was "employed" by it and was guilty of embezzling its funds).

43. RESTATEMENT (SECOND) OF AGENCY § 5 comment (2)e (1958). But the reporter added that "[t]he conception of two masters to whom the servant must be obedient is perhaps even more difficult than that of an agent with two principals, one of whom at least is not his master." 3 RESTATEMENT (SECOND) OF AGENCY App., § 5 Reporter's Notes 38 (1958).

44. The Department of Labor originally formulated its position with regard to joint employment in its Interpretive Bulletin No. 13 which dealt with the "Determination of Hours for Which Employees are Entitled to Compensation." Under the rubric, "Employees Having More Than One Job," the Wage and Hour Administrator illustrated the diametrically opposite outcomes that joint employment triggers under the minimum wage and overtime provisions of FLSA: whereas each joint employer can take credit for the wages paid by the other toward the minimum wage, each joint employer is made liable for overtime where the aggregation of hours worked for each exceeds the statutory threshold. Interpretive Bulletin No. 13 at ¶¶ 16-17 (July 1939), *reprinted in* 1941 Wage & Hour Man. (BNA) at 144, 150. *See also* *Walling v. Friend*, 156 F.2d 429, 432 (8th Cir. 1946). On the distinction between several and joint employment, see *Fleming v. Knox*, 1 Wage & Hour Cas. 895 (S.D. Ga. 1941).

45. *Walling v. Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir.), *cert. denied*, 331 U.S. 851, *reh'g denied*, 332 U.S. 785 (1947). In *Morales v. Compania Azucarera del Toa*, 68 F. Supp. 346 (D.P.R. 1946), the court found joint employment for overtime purposes but did not explain the basis for its finding.

prophylactic approach may be beneficial to workers,<sup>46</sup> its scope is limited. Its limitations are those of the statute itself. For FLSA did not mandate premium pay for all employees working more than forty hours but only for those working for one employer for that period of time.<sup>47</sup> Hence the Department of Labor's admonition that:

[A]n employer should not be held responsible for an employee's action in seeking, independently, additional part-time employment. But where two or more employers stand in the position of "joint employers" and permit or require the employee to work more than the number of hours specified in section 7(a), both the letter and the spirit of the statute require payment of overtime.<sup>48</sup>

In other words, no matter how deep that employer's pocket and no matter how dependent that employee may be on it as a matter of economic reality, even if the employer pays him so wretchedly that he is, as a matter of economic reality, forced to work three other jobs, that employer is not liable for the overtime unless it is a joint employer.-

When it came to delineating the determinants of joint employment for the purposes of overtime, the Department of Labor logically emphasized (joint) control because it was no longer a matter of determining whether the worker was some employer's employee — that was generally already conceded by both employers with respect to the minimum wage — but whether the two employers jointly employed the worker.<sup>49</sup> Indeed, often

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46. The approach can also be detrimental. For example, there are situations in which joint employment figures as an employer's defense. In one extraordinary case, the plaintiff was an employee of the defendant-detective agency which placed him in a warehouse where he was treated and paid like the other employees there — except that he was hired to spy on his co-workers. He submitted his reports to the detective agency, which in turn forwarded them to the warehouse. The plaintiff worked at the warehouse for three years under a union contract, being paid \$10 to \$13 per hour by the warehouse, and \$1 per hour by the agency for the approximately thirty minutes a day he spent preparing his report. When the warehouse terminated his employment, he sued the detective agency for the minimum wage (\$3.35 per hour) and overtime. The detective agency defended on the grounds that as a joint employer it could, pursuant to 29 C.F.R. § 791.2(a), "take credit" for all the wages paid by the warehouse. The district court and the court of appeals sustained the defendant's position on the grounds that both employers were sharing an employee and control over him. *Karr v. Strong Detective Agency, Inc.*, 599 F. Supp. 901 (E.D. Wis. 1984), *aff'd*, 787 F.2d 1205 (7th Cir. 1986). In other words, if, instead of spying *for* the warehouse Karr had been paid by the agency to spy *on* the warehouse, there would have been no joint control or employment and the agency would have been liable under FLSA. This would have constituted the doubtless rare circumstance in which a worker is, in effect, employed two hours for every hour he works.

47. 29 U.S.C. § 207(a)(1).

48. 29 C.F.R. § 791.2 at n.5 (1988).

49. In defining "Joint Employment" the Department of Labor issued the following interpretation:

(a) [I]f the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and

neither employer denied its status as an employer. Therefore, the extended reach of the economic reality test, which is designed to gauge the relationship between the worker and the employer, is unnecessary in this overtime context. The only relevant relationship is that between the two employers and the only relevant issue is whether one controls the other or both share control over the employee.<sup>50</sup>

#### V. IS THE DOCTRINE OF JOINT EMPLOYMENT NECESSARY OR EVEN USEFUL UNDER AWPA?

By way of contrast, under AWPA (or the minimum wage provision of FLSA) no inherent statutory constraint compels recourse to the doctrine of joint employment.<sup>51</sup> That is to say, the mere presence of two (disassociated) employers would suffice to impute liability to each (and in particular to the deeper pocket). The recourse to joint employment appears to be dictated solely by the fact that the larger employer is assertedly shielded from the employees by the intervention of an intermediary whose relationship to them alone is visible. Joint employment here does not serve to determine whether the workers are employees or small entrepreneurs — the intermediary has already conceded that they are employees. Instead,

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jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint employment obligation, each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the joint employer or employers.

(b) Where the employee performs work which simultaneously benefits two or more employers . . . , a joint employment relationship generally will be considered to exist in situations such as:

.....

(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

29 C.F.R. § 791.2 (1988) (citations omitted).

50. In that context, the Fifth Circuit has found joint employment where the companies have a mutual purpose and the worker performs labor that is simultaneously beneficial to both. *Mitchell v. John R. Cowley & Bros.*, 292 F.2d 105, 112 (5th Cir. 1961). This potentially expansive guideline has never been extended from its original setting of contiguous, coordinate entities to the hierarchical crew leader-farmer context.

51. Developments under the National Labor Relations Act (NLRA) are omitted from discussion here because Congress expressly overruled the applicability of the economic reality of dependence test to it by *NLRB v. Hearst Publications, Inc.*, 332 U.S. 111 (1944). See H.R. REP. NO. 245, 80th Cong., 1st Sess. 18 (1947); *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 n.10 (1964). For an extended analysis, see, Linder *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. — (1989). Under the NLRA the key issue in joint employer cases is whether the alleged employers jointly control, share or co-determine "the essential terms and conditions of employment" and, hence, the labor relations with the affected workers. *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123 (3d Cir. 1982).

the circuitous function of joint employment is to establish a link with the deep pocket where it is only through the intermediary that the larger employer relates to the workers. That is to say, joint employment is structurally concerned with the relationship between the two alleged employers — not with their relationships to the workers. For this reason it is misleading for the AWPA committee report to state that “under the construction of the joint employer concept . . . [t]he focus of each inquiry . . . must be on each employment relationship . . . between the worker and the party asserted to be a joint employer.”<sup>52</sup>

At this juncture application of the economic reality of dependence test would either be infeasible or prove too much. If the test could be applied directly to the relationship between the farmer and the workers, the issue of joint employment would never have arisen — it is precisely the lack of a manifest relationship that compelled the detour to joint employment in the first place. If, by the same token, the test is applied to the relationship between the farmer and the intermediary, who is then determined to be the former’s employee, the workers would be deemed the farmer’s employees not so much by virtue of coordinate joint employment as through a hierarchical subservant relationship.<sup>53</sup>

As the aggressively worded AWPA committee report indicates, the most “expansive” test is reserved for suppressing the most expansive machinations — claims that the worker is an independent contractor and no entity’s employee: “This interpretation will be particularly acute when a defendant-employer . . . asserts that the worker in question was not an employee but an independent contractor or in the alternative that such worker was solely an employee of an independent contractor/crew leader.”<sup>54</sup> In the less “acute” cases, that is “[i]n the second instance,” where the farmer concedes that the workers are employees but not his employees, the committee was content to rely<sup>55</sup> on *Hodgson v. Griffin & Brand of McAllen, Inc.*,<sup>56</sup> a case that never reached the question of how to analyze the structure of employment relationships where the crew leader is a bona fide independent contractor. Moreover, that case, like its predecessors in the non-agricultural FLSA area, applies a hybrid<sup>57</sup> manipulable control/quasi-economic reality test<sup>58</sup> in determining whether the workers are the farmer’s employees. The AWPA regulations, tracking the cases cited by the

52. H.R. REP. NO. 885, *supra* note 1, at 7-8.

53. RESTATEMENT (SECOND) OF AGENCY § 5 comment (2)e (1958).

54. H.R. REP. NO. 885, *supra* note 1, at 6-7.

55. *Id.* at 7.

56. 471 F.2d 235 (5th Cir.), *reh'g denied*, 472 F.2d 1405 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973).

57. A hybrid control/economic reality test has been explicitly adopted in a number of circuits in Title VII cases. *See, e.g.*, *Mares v. Marsh*, 777 F.2d 1066, 1067-68 (5th Cir. 1985); *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1979), *aff'd*, 656 F.2d 900 (1981).

58. “Manipulable control” refers to the employer’s contractually waiving control without

committee report, prescribe the same test.<sup>59</sup>

In the typical farmer/crew leader/migrant farm worker relationship, applying the economic reality test to the relationship between the farmer and the workers, or to the relationship between the farmer and the crew leader, should suffice to reveal that the crew leader is an economic straw man and that the real relationship of substance runs between the farmer and the workers. In neither instance is a finding of joint employment strictly necessary.<sup>60</sup> Indeed, in such cases the search for indicia of joint employment itself betrays judicial insensitivity to the manifest subordination of the workers and of the crew leaders to the agricultural employer — that is, a failure by the courts to apply the economic reality of dependence or control tests properly.

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having to part with any real control. Perhaps the most scathing judicial critique of such a sham appeared in an unemployment compensation case:

Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their "services" but only contracted for the "result," an empty car. The means of unloading, he says, are their own, i.e. they can shovel right-handed or left-handed, start at one end of the car or the other.

.....

... The employer, under the spur of tax or other liability, ... solemnly recites to him a legal jingle: "I no longer control you. Shovel according to your methods. I hold you responsible only for the ultimate result, a pile of coal. You render me no services, but you rather sell me a product: a pile of coal from an emptied car."

*Powell v. Appeal Bd. of Mich. Emp. Sec. Comm'n*, 345 Mich. 455, 75 N.W.2d 874, 883, 886 (1956) (Smith, J., dissenting).

59. The AWPAs regulations provide as follows:

The definition of the term "employ" includes the "joint employment" principles applicable under the Fair Labor Standards Act. "Joint employment" under the Fair Labor Standards Act is "joint employment" under MSPA.

(i) The term "joint employment" means a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. . . . If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a "joint employment" situation does not exist.

(ii) Questions will often arise under the Act as to whether individuals employed by a farm labor contractor are also jointly employed by another person engaged in agriculture (including any person defined in the Act as an agricultural employer). Such joint employment relationships are common in agriculture and have often been addressed by the Federal courts. . . . The factors considered significant by the courts in these cases and to be used as guidance by the Secretary, include, but are not limited to, the following:

- (A) The nature and degree of control of the workers;
- (B) The degree of supervision, direct and indirect, of the work;
- (C) The power to determine the pay rates or the methods of payment of the workers;
- (D) The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;
- (E) Preparation of payroll and the payment of wages.

29 C.F.R. § 500.20(h)(4) (1988).

60. For acknowledgment that under the NLRA it may be irrelevant whether there is joint employment or the intermediary is merely an employee of the employer, see *Butler Bros. v. NLRB*, 134 F.2d 981 (7th Cir. 1943), *cert. denied*, 320 U.S. 789 (1943).

## VI. ANALYSIS OF THE JOINT EMPLOYMENT CASE LAW

The adjudicatory breakdown discussed above is not the problem with which the joint employment doctrine was meant to deal. Rather, in the non-overtime setting, the purpose of the joint employment doctrine is presumably to reach the employer with the deeper pocket where the intermediate employer, unlike the typical crew leader, is an employer in his own right. Yet examination of the case law discloses no case in which it was held both that a crew leader was an independent contractor and that the farmer was nevertheless an employer.<sup>61</sup> Although these cases, and in particular *Griffin & Brand*, are often cited for the proposition that joint employment is compatible with the crew leaders' being an independent contractor, that proposition has remained dictum because the courts have never reached the issue of whether the crew leader is an independent contractor.<sup>62</sup> Almost invariably the courts find the crew leader to be an employee of the farmer and, as a result, find the workers also to be employees of the farmer.<sup>63</sup> Alternatively, in the cases decided on an economically un-

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61. Indeed, no federal case has been located in which a court found joint employment involving any independent contractor. One non-agricultural case that perhaps comes closest to such a determination involved the triangular relationship among a hairdressing salon, its lessee hairdressers and the shampoo maids. The court held as follows: The lessee hairdressers were independent contractors; the shampoo maids were "entirely dependent on the hairdressers"; and, under FLSA, an employer includes "any person acting directly in the interest of an employer in relation to an employee." Nevertheless, the court self-contradictorily concluded that "even if . . . the hairdressers were joint employers with the defendant, [the court] would be compelled to also conclude that the shampoo maids are still employees of defendant." *Donovan v. John Jay Esthetic Salons, Inc.*, 99 Lab. Cas. (CCH) ¶ 34,478 at 45,955 (E.D. La. 1983) (citing *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir. 1973)). See also *Wirtz v. Schneider*, 47 Lab. Cas. ¶ 31,428 (D.P.R. 1963) (finding joint employment as between importer and local wholesaler based not on control of workers but of non-labor-related business aspects). In an early NLRB case, the National Labor Relations Board did find that the owner and contractor-operators of a mine were both employers of the miners. It based the owner's employer-status on his substantial control and supervision; the contractors were deemed to have risen above "ordinary supervisory employees" by virtue of their capital investment in ponies or mules, harnesses, blacksmith equipment, picks, mine cars, motor trucks and haulage equipment (the value of which the Board did not specify). Although the Board did not expressly find joint employment, it found in favor of the union, which had contended that the owner and contractors were joint employers. *S.A. Kendal, Jr.* 38 NLRB 1071, 1074-75 (1942).

62. See, e.g., *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755-56 (9th Cir. 1979).

63. See, e.g., *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985). In *Maldonado v. Lucca*, 629 F. Supp. 483 (D.N.J. 1986), the court found joint employment using the *Griffin & Brand* factors but never expressly found that the crew leaders were independent contractors, characterizing them as "intermediaries." *Id.* at 488. Accord *Donovan v. Harper*, 26 Wage & Hour Cas. 1089 (W.D. La. 1984). Tierce, *The Joint Employer Doctrine Under the Federal Migrant and Seasonal Agricultural Workers Protection Act*, 18 RUTGERS L.J. 863 (1987), overlooks this point in his lengthy comment on *Maldonado*. For non-agricultural employment settings in which courts have found the larger entity to be the employer of the intermediary and hence an employer of the intermediary's employees, see *Brown v. Minn. Co.*, 51 F. Supp. 363 (D. Minn. 1943); *Walling v. Woodbine Coal Co.* 64 F. Supp. 82, 84 (E.D. Ky. 1945) (holding mine contractors and the coal miners allegedly employed by them to be employees of coal



realistical basis, the courts find the crew leader to be an independent contractor and also find no joint employment.<sup>64</sup>

company despite fact that latter did not directly supervise miner's work, determine what they were paid or hire or fire them but "could control production" by regulating operations at the tippie); *Walling v. McKay*, 70 F. Supp. 160 (D. Neb. 1946) (holding employees not covered by FLSA because larger entity was exempt railroad); *Walling v. Southwestern Greyhound Lines*, 65 F. Supp. 52 (W.D. Mo. 1946); *Tobin v. Anthony-Williams Mfg. Co.*, 196 F.2d 547 (8th Cir. 1952) (woods workers are not employees of log haulers, but rather both are employees of timber company — without discussion of joint employment); *Tobin v. Cherry River Boom & Lumber Co.*, 102 F. Supp. 763 (S.D.W. Va. 1952) (holding some, but not all, logging contractors and their workers to be employees of the lumber company — without discussion of joint employment); *Marshall v. Truman Arnold Dist. Co.*, 640 F.2d 906, 909 (8th Cir. 1981); *Thomas v. Brock*, 617 F. Supp. 526 (W.D.N.C. 1985), *aff'd*, 810 F.2d 448, 449 (4th Cir. 1987) (holding employees of cookie distributor crew manager to be employees of cookie manufacturer on grounds that the crew manager was the manufacturer's employee — without reaching the issue of joint employment). For a personal injury case involving a similar structure, see *Texas Co. v. Mills*, 156 So. 866 (Miss. 1934) (employee of person in charge of petroleum company's bulk sales station is company's servant because agent is). See also *State ex rel Cooper v. Baumann*, 286 N.W. 76 (Wis. 1939) (engineer-janitor is school's employee and his helpers are sub-employees). In two interesting nineteenth century tort actions brought by employees of so-called inside contractors against the mills in which they worked, the courts found a master-servant relationship because they held the inside contractor to be the company's employee. *Rummell v. Dillworth, Porter & Co.*, 111 Pa. 343, 2 A. 355 (1886); *Indiana Iron Co. v. Cray*, 48 N.E. 803 (Ind. App. 1897).

64. See, e.g., *Donovan v. Horne & Walston Farms, Inc.*, Nos. 82-1546 and 82-1947, slip. op. (4th Cir. May 11, 1984) (Westlaw Genfed library, Dist. file); *Howard v. Malcolm*, 852 F.2d 101 (4th Cir. 1988); *Gonzalez v. Puente*, 705 F. Supp. 331 (W.D. Tex. 1988); *Lopez v. Bruegel*, 563 F. Supp. 316 (N.D. Tex. 1983) (decided under predecessor Farm Labor Contractor Registration Act). For older FLSA decisions with a similar structure involving non-agricultural employment, see *Schroepfer v. A.S. Abell Co.*, 48 F. Supp. 88 (D. Md. 1942) (holding distributors of newspaper, who were formerly payroll employees, to be independent contractors, and their helper, who was concededly a part-time employee of newspaper in a related capacity, not to be newspaper's employee — without discussing joint employment); *Durkin v. Pet Milk Co.*, 115 F. Supp. 628 (W.D. Ark. 1953) (milk route distributors were independent contractors and were employers of their drivers, who were not milk company employees — without express discussion of joint employment); *Wirtz v. San Francisco & Oakland Helicopter Airlines, Inc.*, 244 F. Supp. 680, 683-84 (N.D. Cal. 1965), *aff'd*, 370 F.2d 328 (9th Cir. 1966) (defendant not employer of janitorial service — without discussion of joint employment); *Wirtz v. Kneece*, 249 F. Supp. 564, 567-69 (D.S.C. 1966) (lessees of saw mill are independent contractors whose employees were not mill owner's — without discussion of joint employment). To be distinguished are a series of cases arising out of cost-plus-fixed-fee contracts performed during World War II in facilities owned by the United States Government. The companies contested the workers' claims for overtime on the grounds that the workers were employees of the Government and hence excluded from the Act. The Supreme Court ultimately held that they were the employees of the independent contractors. The structure of the decision is atypical because the majority was, aberrantly, able to expand coverage by finding the intermediary to be an independent contractor and the sole employer largely by reference to manipulable contractual provisions. *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950). Since the United States Government ultimately paid for the overtime, a certain logic cannot be denied Frankfurter's dissent that this was "not . . . a controversy between a capitalist employer and his employees" but rather between the Department of the Army and the Department of Labor. *Id.* at 523. Finally of significance is a nineteenth century tort action brought by the employee of an inside contractor against the rolling mill; the court held that the defendant was not the plaintiff's master because the intermediary was an independent contractor — again without discussion of joint employment. *New Albany Forge & Rolling-Mill v. Cooper*, 131 Ind. 363, 30 N.E. 294 (1892).

Thus, in *Griffin & Brand*, the Fifth Circuit created what it later characterized as a "hypothetical situation:"<sup>65</sup> "The independent contractor status of the crew leaders, if they are independent contractors, does not as a matter of law negate the possibility that Griffin & Brand may be a joint [e]mployer of the harvest workers."<sup>66</sup> The court, however, failed to make any findings at all about the status of the crew leaders or about the nature of their relationship to Griffin & Brand. Leaving the parties (and perhaps itself as well) in the dark as to whether it was deciding whether Griffin & Brand was an employer or a joint employer and whether the same standard applied to each, the Fifth Circuit stated that it was upholding the lower court's ruling that Griffin & Brand was a joint employer — in spite of the fact that that court's findings implied that the crew leaders were Griffin & Brand's employees.<sup>67</sup>

More significantly, the court in *Griffin & Brand* cited its earlier decision in *Wirtz v. Lone Star Steel Co.*<sup>68</sup> as a guide to "some important factors" to be used in determining whether an entity is "an employer or joint employer."<sup>69</sup> These factors included (1) whether the employment took place on the company's premises, (2) how much control the entity exerted over the employees, (3) whether the entity had the power to hire, fire or modify employment conditions, (4) whether the employees performed a specialty job within the production line, and (5) whether the employee "may refuse to work for the company or work for others."<sup>70</sup>

This approach is fraught with confusion insofar as the court lumped the definition of an "employer" together with that of a "joint employer" although the two categories are socio-economically, legally and logically distinct.<sup>71</sup> Moreover, in so doing, the court confined the definition of "employer" to the much narrower limits it established for a "joint employer."<sup>72</sup> As the statutory pole to an "employee," an "employer" must be

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65. *Castillo v. Givens*, 704 F.2d 181, 188 (5th Cir.), cert. denied, 464 U.S. 850 (1983).

66. *Griffin & Brand*, 471 F.2d at 237.

67. *Id.* The district court found "it unnecessary to decide whether the 'crew leaders' [were] 'independent contractors' or 'employees' of the Defendant, for in the situation here presented, the result will be the same under the Act." *Hodgson v. Griffin & Brand of McAllen, Inc.*, 68 Lab. Cas. (CCH) ¶ 32,682 at 45,343 (S.D. Tex. 1972). The court's view appears to have been dictated by the Department of Labor's request for an injunction under the so-called "hot goods" provision of FLSA (29 U.S.C. § 215(a)(1)): because Griffin & Brand knew or should have known that the workers were not receiving the minimum wage, it was irrelevant whose employees they were — so long as they were some employer's employees.

68. 405 F.2d 668 (5th Cir. 1968).

69. *Griffin & Brand*, 471 F.2d at 237.

70. *Id.* at 237-38.

71. It is puzzling why two commentators characterize the *Lone Star Steel* factors as having "refined" the economic reality test. See Scher & Catz, *Farm Worker Litigation Under the Fair Labor Standards Act: Establishing Joint Employer Liability and Related Problems*, 10 HARV. C.R.-C.L. L. REV. 575, 581 n.35 (1975).

72. Ironically, the same appeals courts that mechanically repeat the phrase that economic reality must determine the scope of employer status, ultimately define that status by reference

subject to the same expansive scope created by the economic reality of dependence test (i.e., the employer is the entity on which the employee is, as a matter of economic reality, dependent). Instead, the court forced the definition into the hybrid control/reality test reserved for "joint employer."<sup>73</sup>

The aforementioned *Lone Star Steel* factors by-and-large do not test for economic reality. The "premises" factor is virtually a throw-away since it almost always applies in agricultural cases.<sup>74</sup> The second and third factors are manipulable control factors of the kind that employers can cosmetically waive precisely in order to avoid liability. The fourth factor is presumably subsumable under the integration factor of the economic reality of dependence test. The final factor seems, at least since the advent of the Thirteenth Amendment, almost frivolously trite.<sup>75</sup>

A decade later, in *Castillo v. Givens*,<sup>76</sup> the Fifth Circuit, while repeating the talismanic words from *Griffin & Brand* concerning the "hypothetical situation" in which the crew leader was both an independent contractor and a joint employer together with the farmer, once again found it unnecessary to reach the question because it held that the crew leader was himself an employee.<sup>77</sup> To arrive at that conclusion the court appropriately used the economic reality test.<sup>78</sup> This approach has now become traditional. Thus

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to non-economic reality test criteria. See, e.g., *Hodgson v. Arnheim & Neely, Inc.*, 444 F.2d 609, 611-12 (3d Cir. 1971), *rev'd on other grounds*, 410 U.S. 512, *reh'g denied*, 411 U.S. 940 (1973); *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir. 1983); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983); *Donovan v. Agnew*, 712 F.2d 1508, 1510 (1st Cir. 1983); *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984). See also *Riojas v. Seal Produce, Inc.*, 82 F.R.D. 613, 618-19 (S.D. Tex. 1979) (discussing *Griffin & Brand* yet referring to control as the overriding consideration); *EEOC v. Blast Intermediate Unit 17*, 677 F. Supp. 790, 792-93 (M.D. Pa. 1987); *Schultz v. Jim Walker Corp.*, 314 F. Supp. 454, 457-58 (M.D. Ala. 1970) (holding carpenters to be independent contractors); *Foote v. Howard P. Foley Co.*, No. 83-C-2446 (N.D. Ill. Dec. 8, 1986) (Westlaw, Genfed library, Dist. file) (holding utility company not to be joint employer together with contractor of electricians).

73. The confusion is apparent in an unreported case, *Donovan v. Horne & Walston Farms, Inc.*, Nos. 82-1546 and 82-1947, slip op. at 16 (4th Cir. May 11, 1984) (Westlaw Genfed library, Dist. file), in which the court relied upon *Lone Star Steel* as authority for the proposition that the modified control test is properly applied to determining who is an employer. Even the dissenting judge, while concluding that the workers were the farmer's employees, was not able to distinguish between employment and joint employment and never clarified the status of the crew leader. *Id.* at 27-33.

74. Where the work is not performed on the alleged joint employer's land (e.g., large timber companies often conduct planting operations for small private land owners) that fact is irrelevant.

75. The Ninth Circuit has sanctioned a set of criteria even less oriented toward economic reality than the *Lone Star Steel* factors, namely whether the employer had the power to hire and fire the employee, supervise and control work schedules or conditions of employment, determine the rate and method of payment, and maintain employment records. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

76. 704 F.2d 181 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983).

77. *Id.* at 188-93.

78. *Id.*

in *Haywood v. Barnes*,<sup>79</sup> the district court, citing *Castillo* and *Hodgson v. Okada*<sup>80</sup> as authority, held that the farmer and the crew leaders were “at least joint employers,” thus obviating the need to decide “the closer question of whether the crew leaders were independent contractors.”<sup>81</sup> The *Haywood* court at least had the intellectual integrity to concede in a footnote “that this approach reverses the normal order of inquiry.”<sup>82</sup> But its reliance on the example set by other courts indicates that the approach has in fact become “normal” — albeit illogical.<sup>83</sup>

In *Okada*, another case singled out as a guide by the AWPAC committee report, the Tenth Circuit held that the farmers were employers of cucumber pickers “because they were acting directly or indirectly in the interest of an employer in relation to the employees,” but did “not reach the issue of whether . . . [the crew leader] was an independent contractor” because it was “irrelevant.”<sup>84</sup> What is puzzling about *Okada* is that the only employer in whose interest the farmers could have been acting was a pickle company owned by the farmer’s uncle; that company recruited the workers and (apparently) the crew leader, and assigned them to the farmer, but otherwise had little to do with the workers. Yet, in analogizing the case to its earlier decision in *Mitchell v. Hertzke*,<sup>85</sup> the court ruled that the pickle company in was “in the same position as” the processor in *Hertzke*, which the court found not to be an employer because “it had no control over the workers.”<sup>86</sup> In point of fact, when the *Hertzke* court tried to determine whether the processor was an employer along with the farmer, the court not only focused on control but it focused almost exclusively on the control exercised by the processor over the workers rather than — what would have been the proper test — the control it exercised over the alleged joint employer.<sup>87</sup>

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79. 109 F.R.D. 568 (E.D.N.C. 1986).

80. 472 F.2d 965 (10th Cir. 1973).

81. *Haywood*, 109 F.R.D. at 586 (emphasis added).

82. *Id.* at 586 n.12.

83. In *Mendez v. Brady*, 618 F. Supp. 579, 582-83 (W.D. Mich. 1985), the court concluded that the farmer was the employer of the blueberry harvesters but did not discuss the issue of joint employment. Although the court found that the farmer in part controlled the workers by virtue of controlling the crew leader, it did not reach the issue of whether the crew leader was an independent contractor.

84. *Okada*, 472 F.2d at 969.

85. 234 F.2d 183 (10th Cir. 1956).

86. *Okada*, 472 F.2d at 968.

87. This posture may have been dictated by the fact that the court did not expressly approach the issue as one of joint employment. But if the court’s focus was on the relationship between the processor and the workers, then the exclusive use of control was improper. On the other hand, a finding of “broad supervisory powers” over the grower should have sufficed to trigger a focus of joint employment. *Hertzke*, 234 F.2d at 190.

## VII. A PROPOSED APPROACH TO DETERMINING WHETHER JOINT EMPLOYMENT IS PRESENT

In light of the incoherence that has come to characterize joint employment jurisprudence, the following schematic steps are proposed as a more rational and realistic approach.

*STEP 1:* Using the economic reality of dependence test, the court should ask: Are the workers employees of the crew leader?<sup>88</sup> Since the answer to this question must be "yes,"<sup>89</sup> the court proceeds to the next step.

*STEP 2(a):* Next the court should ask: Is the crew leader an independent contractor or an employee of the farmer? If he is an employee, then the crew leader's employees are also employees of the farmer — either directly<sup>90</sup> or because the crew leader falls under the FLSA definition of "employer" insofar as he is a "person acting directly or indirectly in the interest of an employer in relation to an employee."<sup>91</sup> In the context of this inquiry the economic reality test goes to the relationship between the crew leader and the farmer, and has nothing to do with the farmer's relationship to the workers.

No reported case discloses any facts involving hand-harvest crew leaders that would justify proceeding past Step 2(a).<sup>92</sup> For the sake of com-

88. In the landmark FLSA case, *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 725 (1947), the Supreme Court did not even bother to deal with the status of the alleged intermediary; it assumed that he was an employee of the meat packing company together with the other alleged independent contractor-boners.

89. The answer to this question must be "yes" for the following reason:

The migrant workers are selling nothing but their labor. They have no physical and little human capital to vend. . . . [T]hose to whom the FLSA applies must include workers who possess only dedication, honesty, and good health. . . . Migrant farm hands are "employees" under the FLSA — without regard to the crop and the contract in each case.

Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 243, *reh'g denied*, 109 S. Ct. 544 (1988) (Easterbrook, J., concurring). For an extended legal and political-economic discussion of why there should be a per se rule that migrant farm workers are employees, see generally Linder, *supra* note 15. The major reported case holding migrant farm workers to be independent contractors involved so-called sharecropping where no crew leader intervened between the workers and the farmer. *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984), *reh'g denied*, 760 F.2d 126 (1985). Congress has made it clear that, for purposes of FLSA, workers merely providing their own labor are not "sharecroppers" but covered employees. *The Application of Minimum Wages in Agriculture: Hearing Before the House Committee on Agriculture*, 90th Cong., 1st Sess. 9-14 (1967).

90. See, e.g., *Monville v. Williams*, 107 Lab. Cas. (CCH) ¶ 34,979 (D. Md. 1987); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985).

91. 29 U.S.C. 12 § 203(d) (1982).

92. The class of crew leader that would most closely approximate independent contractor status is — together with its employees — expressly exempt from AWP. This group embraces persons specializing in and providing the equipment for performing custom combining, hay harvesting or sheep shearing operations. 29 U.S.C. § 1803(a)(3)(E) (1982); 29 U.S.C. § 500.30(g), (k) (1988). The FLSA regulations governing the 500-man-day exemption for agriculture, 29 U.S.C. § 213(a)(6), distinguish among three kinds of crew leaders: (1) One

pletteness, however, the scheme may be continued.

*STEP 2(b):* If, having used the economic reality test, the court determines that the crew leader is an independent contractor vis-a-vis the larger agricultural employing entity, then it continues on to the last step.

*STEP 3:* Here the court applies the control test. Even if the crew leader is an independent contractor with respect to non-work site related activities such as recruitment, transportation and housing,<sup>93</sup> the farmer should be considered a joint employer — insofar as he controls the crew leader *at the work site*.<sup>94</sup>

“who merely assembles a crew, brings [it] to the farm to be supervised and paid directly by the farmer” and receives the same pay as the workers is considered an employee. 29 C.F.R. § 780.331(a) (1988); (2) “Where the farmer only establishes the general manner for the work to be done . . . the labor contractor is the employer of the workers if he makes the day-to-day decisions regarding the work and has an opportunity for profit or loss through his supervision of the crew and its output.” 29 C.F.R. § 780.331(b) (1988); and (3) Those who perform “custom work such as crop dusting, grain harvesting or . . . sheepshearing” and who have “a substantial investment in equipment” are independent contractors. 29 C.F.R. § 780.331(c) (1988). In conformity with *Griffin & Brand*, the Department of Labor takes the position that the farmer may be a joint employer in all these scenarios where he “has the power to direct, control or supervise the work, or to determine the pay rates or methods of payment.” 29 C.F.R. § 780.331(d) (1988) (citations omitted). Whereas the first class of crew leader is unambiguously an employee of the farmer, the third may be an independent enterprise in its own right and thus trigger the possibility of joint employment — but is exempt from AWPA. It is the second scenario that forms the basis of the prevailing confusion in joint employment cases primarily because the Department of Labor has conflated superficially waived indicia of control with economic reality, thus creating a semblance of the crew leader’s status as someone other than the farmer’s foreman. The characterization, for example, of the possibilities open to the crew leader for sweating the workers (“his authority to determine the wage rates paid to his workers”) as the opportunity for profit or loss, is at best misleading; the fact that the farmer transmits his complaints through the crew leader is merely a manipulably waived control factor. 29 C.F.R. § 780.331(b) (1988). For an analysis of the employee status of non-agricultural crew chiefs, see *Wirtz v. National Wrecking Co.*, 17 Wage & Hour Cas. 449, 452-53 (N.D. Ill. 1966).

93. Joint employment under FLSA is joint employment under AWPA for establishing “responsibility for the maintenance of payroll records, payment of wages and the posting of notices under the law . . .” 29 C.F.R. § 500.70(b) (1988).

94. The following objection might be raised here: Since worksite control has been established in Step 3, why did the court not simply find that the crew leader was an employee in Step 2? One possible answer is that if the crew-leading entity is incorporated — and really is a corporate business — then it would presumably not qualify as “any individual” and thus would not be an “employee” under 29 U.S.C. § 203(3)(1). This suggestion is not meant to imply that a sham or collusive incorporation, formed merely to avoid being identified as an employee, could not be reached. This potential hurdle of the corporation-employee can be surmounted in two different situations: (1) Where the intermediary is a subsidiary, as in *Dolan v. Day & Zimmerman, Inc.*, 65 F. Supp. 923 (D. Mass. 1946), and (2) Where the court finds that the intermediary is an employer under FLSA by virtue of “acting directly or indirectly in the interest of an employer” under 29 U.S.C. § 203(d) (1988). *Schultz v. Chalk-Fitzgerald Constr. Co.*, 309 F. Supp. 1255, 1257 (D. Mass. 1970). In the latter situation the following is true:

Congress has in effect provided that for the purposes of the Act any person who acts directly or indirectly in the interest of an employer in relation to an employee shall be subject to the same liability as the employer. As to such person, liability is predicated not on the existence of an employer-employee relationship between him and the employee but on the acts he performs in the interest of the employer in relation

It is crucial to keep in mind that the control under discussion here is not the narrow, looking-over-the-shoulder, physical control test. Rather, it is that strand of nineteenth-century common-law vicarious liability jurisprudence that stressed the relative knowledge, skill and expertise of the worker and of the employer, and the resulting integration of the former into the latter.<sup>95</sup> In other words, the question it asks is: Whose business is this?<sup>96</sup> This analysis has entered into, and is now a part of, the economic reality test.<sup>97</sup> In the typical agricultural/silvicultural setting there should be no doubt that the farmer in this sense knows more than, and therefore controls, the crew leader. This is not necessarily actual control or even the right to control, but the ability to control.

An atypical example will suffice to illuminate this claim. During the past two decades, a number of tree planting companies evolved in the South as former "back-to-the-land hippie hoedads" accumulated funds through savings and through profits from small-scale employment of other workers on U.S. Forest Service and private contracts.<sup>98</sup> Little doubt can attach to the claim that these entities, unlike traditional crew leaders, are now enterprises in their own right. They have an independent business organization with numerous clerical and sales employees, simultaneous multistate operations under contracts with many large forestry companies, their own cash-flow through bank loans, and hundreds of employees with a multimillion dollar payroll.

During the same period, the large integrated forestry and paper companies, in an effort to reduce their wage and benefit costs, began to contract out most of their hand-planting of pine seedlings.<sup>99</sup> The planting businesses, however, cannot offer, and the timber companies could not ac-

to the employee. It makes no difference whether such person is a stockholder or officer of the corporate employer.

*Id.* See also *Hertz Drivursel Stations, Inc. v. United States*, 150 F.2d 923, 923 n.3 (8th Cir. 1945). The acting "in the interest of" basis of joint employment was also used in *Falk v. Brennan*, 414 U.S. 190, 195 (1973). Joint employment has also been found where common ownership suggests joint control. *Wirtz v. Hebert*, 368 F.2d 139 (5th Cir. 1966); *Martinez v. Deaf Smith County Grain Processors, Inc.*, 583 F. Supp. 1200, 1203 (N.D. Tex. 1984). See also *United States v. Klinghoffer Bros. Realty*, 285 F.2d 487, 491 (2d Cir. 1960) (affiliates as joint employers).

95. See *Linder*, *supra* note 15, at 443-44. This approach has been resurrected by Arthur Larson as the relative-nature-of-work test. A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 43.50 (1986). In English law it re-emerged as a criterion of integration in *Stevenson, Jordan & Harrison, Ltd. v. McDonald & Evans*, 1 T.L.R. 101, 111 (C.A. 1952) (per Denning, L.J.).

96. Jacobs, *Are "Independent Contractors" Really Independent?*, 3 DEPAUL L. REV. 23, 48 (1953).

97. In *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1327-28 (5th Cir. 1985), the court adopted this approach in the second step when it concluded that the crew leader was an employee.

98. Based on telephone and personal discussions with Mike Economopolous and Bruce Levine, and Dave Lower, officers of Superior Forestry and Qualitree, respectively, during the past four years.

99. *Id.*

cept, turnkey service contracts. Such arm's length dealing is not possible because the forestry and paper corporations have generated or acquired all known scientific technical knowledge about forestry practices,<sup>100</sup> whereas planting contractors are merely first-line supervisors of menial-manual workers<sup>101</sup> who have been incorporated into one small but vital "part of the integrated unit of production."<sup>102</sup> The companies must therefore contractually specify a great many details about inputs<sup>103</sup> for which compliance is monitored and rewarded.<sup>104</sup> Thus these entities specify and/or control all of the following aspects of the work: (1) Genetic engineering of many varieties of seedlings dedicated to various kinds of soil and terrain, which the contractor is unable to distinguish; (2) Designation of the tracts where each variety is to be planted; (3) Specification of how and where seedlings are to be stored, transported and handled; (4) Specification of spacing, configuration and directionality of seedlings; and (5) Specification of how seedlings are and are not to be planted in such detail that effectively no discretion is left to contractors or planters.<sup>105</sup> In forestry, then, even

100. See generally T. CLARK, *THE GREENING OF THE SOUTH* (1984).

101. Based on depositions taken by the author in connection with suits against forestry companies. Until very recently these businesses employed largely white, nomadic, rugged individualists. At the end of the 1980s they began to hire traditional Mexican and Mexican-American migrant farm workers who are expected to supplant the former labor supply within a short period at a lower wage level. See *supra* note 98.

102. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729, *reh'g denied*, 332 U.S. 785 (1947).

103. Even where the employer's expertise was much less pronounced, a state court saw this point clearly at the beginning of the century in an injury case in which the defendant alleged that the plaintiff was an independent contractor rather than an employee:

Is it conceivable that a railroad in hiring an unskilled man to perform one of the simplest tasks of hard manual labor requiring scarcely more than muscle in its performance, yet one that must be constantly performed in the yards to keep trains moving, would absolutely relinquish all right of control and direction? We hardly think so.

*Chicago, R.I. & P.R.R. v. Bennett*, 128 P. 705, 707 (Okla. 1912).

104. Here a question arises as to whether the companies, advised by lawyers to waive contractually as many indicia of control as possible, could afford to leave these input specifications to the planting contractors' discretion. The more plausible scenario is that the companies would delete such control language from their contracts and rely on oral directives, stating contractually merely that the company retains exclusive discretion to determine whether the contractor complied with the contract. While in no way diminishing the real level of control, such manipulation would create a significant evidentiary hurdle for plaintiffs to overcome.

105. See *supra* note 101. That the forestry firm would qualify as a joint employer even in the much stricter non-statutory vicarious liability setting receives strong support from a recent decision by Judge Posner. Using as his point of departure the traditional distinction between employees and independent contractors as rooted in whether the employer supervises the details of the work, he held that:

The independent contractor commits himself to providing a specified output, and the principal monitors the contractor's performance not by monitoring inputs — i.e., supervising the contractor — but by inspecting the contractually specified output to make sure it conforms to the specifications. This method of monitoring works fine if it is feasible for the principal to specify and monitor output, but sometimes it is not



more than on cucumber farms, it is the case that:

The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over . . . simple manual labor which can be performed in only one correct way. . . . It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary.<sup>106</sup>

The key to understanding why the planting company, despite its size, has not become the sole employer of the migrant planters is to be found in the fact that its growth has been purely quantitative-widening; that is to say, the labor performed by the company's increasing number of planters remains unchanged — namely, unskilled and without significant physical capital. Precisely because the planting entity has failed to transform the nature of the work process, for example, by creating or appropriating a new technology,<sup>107</sup> planting has not become a new specialty business in a new product market but has remained a core segment — and therefore under the control — of the forestry company. Consequently, no matter how large the planting firm may become, at the worksite it and its employees remain subject to control by the forestry company.<sup>108</sup> The mere fact that these ex-planters have recruited so many "helpers" that they themselves no longer need to plant and can live on the compensation they re-

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feasible. . . . In such a case it may be more efficient for the principal to monitor inputs rather than output — the producers rather than the product . . . .

Since an essential element of the employment relationship is thus the employer's monitoring of the employee's work, a principal who is not knowledgeable about the details of some task is likely to delegate it to an independent contractor.

*Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 938-39 (7th Cir. 1986).

106. *Borello & Sons v. Department of Indus. Relations*, 256 Cal. Rptr. 543, 544-45, 552, 769 P.2d 399, 400-01, 408 (1989).

107. To take a counter-example: A janitor who has been working in a number of buildings cleaning with a broom and brush hires others so that he can secure more work; with the funds he accumulates, however, he buys or develops mechanical cleaning equipment that enables him to create industrial cleaning crews. His former employers now become his customers because he has acquired specialized capital, technology and methods that their scale of business would not justify buying and that he understands better than do they. This example is not a perfect analogy inasmuch as cleaning was an ancillary rather than a core aspect of the businesses for which the janitor worked; consequently, the control to which he was subject was no greater than that exercised by a homeowner over a domestic employee. The obstacles a planting contractor would have to overcome on the way to creating a new product market would be much greater.

108. In other words, at the worksite little has changed vis-a-vis the time when the present owners of the planting entity themselves personally planted trees for the forestry companies. Whatever relationship obtained between them then is now replicated between the planting entity and the new generation of planters. "What better situation can his employee occupy? Is his position higher than that of his employer would have been, had he been standing in the shoes of the former . . . ? Can a stream rise higher than its source?" *Knically v. West Virginia Midland R.R.*, 64 W. Va. 278, 61 S.E. 811, 812 (1908).

ceive for furnishing and supervising labor does not fundamentally alter the relationship between the forestry companies and the laborers. The insertion of additional layers of supervisors and middlemen into the chain of command does not undermine the control ultimately exercised by the forestry companies over all those integrated into their business.<sup>109</sup>

By this logic, then, the world's largest integrated forest products firm would be a joint employer with a financially substantial planting contractor it hires to plant its trees. But, if the same entity planted trees at the headquarters of the world's largest computer manufacturer, the latter, knowing no more about forestry than a house owner about plumbing, would not control the contractor, without more, and would not be a joint employer. Since the crew leader would have to be a financially solid entity in order to qualify as an independent contractor under Step 2(b), it may be economically irrelevant whether the deep pocket is available to pay or not. The crew leader's absconding, on the other hand, should arguably create a presumption that he was not an independent contractor to begin with.<sup>110</sup>

In view of the economic realities of the agricultural and silvicultural employment of unskilled hand-laborers as well as of the untoward legacy of a confused state of the law of joint employment, the most efficient, realistic and just solution would be to adapt to joint employment issues the per se rule proposed by Judge Easterbrook<sup>111</sup> — namely, that farm labor contractors without significant human and/or physical (work site-related) capital are never the sole employers of migrant and seasonal farm workers.<sup>112</sup>

109. The need to exercise control in order to contain costs led one timber company to treat its loggers as "dependent contractors," i.e. as "piecework employees." Darwin, *Logging Cost Control with Dependent Logging Contractors*, in *COST CONTROL IN SOUTHERN FORESTRY* 125, 126-27, 130-31 (R. McDermid ed. 1964).

110. In such a case, workers might still be able to collect back wages from the land owner through liens on crops harvested or trees planted. See, e.g., TEX. PROP. CODE ANN. §§ 53, 58 (Vernon 1984).

111. In a concurrence, Judge Easterbrook proposed a per se rule that, for purposes of FLSA, all migrant farm workers are employees. Lauritzen, 835 F.2d at 1545.

112. *Howard v. Malcolm*, No. 85-123-CIV-3, slip op. at 33 (E.D.N.C. June 10, 1987), correctly held that AWPAs do not create a per se rule of joint employment. In *Marshall v. Presidio Valley Farms, Inc.*, 512 F. Supp. 1195, 1197 (W.D. Tex. 1981), the defendant-farmers unsuccessfully requested a ruling to the effect that persons working under a registered farm labor contractor were never the employees of the farmer on whose land they worked. The nineteenth-century English statute regulating farm labor contractors virtually created a per se rule of joint liability:

[A]ny gangmaster employing any child, young person, or woman in contravention of this section and any occupier of land on which such employment takes place, unless he proves that it took place without his knowledge, shall respectively be liable for a penalty not exceeding twenty shillings for each child, young person, or woman so employed.

The Agricultural Gangs Act, 30 & 31 Vict., ch. 13, § 4 (1867).