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THE SCOPE OF CONTRACTOR-SUBCONTRACTOR LIABILITY IN THE MODERN ERA OF MULTINATIONAL COMPANIES

Niels Bybee*

I. INTRODUCTION

The modern multinational corporation is a powerful force, trampling on governments, citizens, and anyone willing to stand in the way of corporate profits and increasingly lower manufacturing costs. It was once common practice to absolve companies operating in the international arena from any liability for the acts of their subcontractors.¹ The proverbial “clean hands” doctrine traditionally applied when a subcontractor acted negligently or otherwise acted in a manner that should produce liability for the contracting company or, even worse, in a manner inconsistent with general societal morals.² The world was much larger without modern technology and efficient transportation systems, and executives and other higher-level management in multinational companies could not easily direct the international operations of their companies.³ Because of this, companies often found themselves with no liability, or at least limited liability, for the actions of their subcontractors.⁴ Citizens taking the brunt of the injuries, who were often underpaid and overworked, had no place to turn for legal relief.

Societal changes in recent decades have shrunked the world, providing for more-localized business practices, even for companies operating internationally.⁵ Companies can now direct the operations of their worldwide subcontractors with relative ease, relying on telephone, videoconference, and other remote communications. The needs to send a letter, hop on a plane to speak in person, and conduct face-to-face business are dying business practices.⁶ An increasing number of companies are now properly characterized as multinational corporations (or “multinationals”), which are companies that have operations in many countries as opposed to focusing their operations in one particular country.⁷

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¹ See EDWARD BURMAN, *THE TEMPLARS: KNIGHTS OF GOD* 40 (1990).

² See *id.*

³ See Kevin Kelly, *Essay: The World Without Technology*, NEXT NATURE (Oct. 12, 2009), <http://www.nextnature.net/2009/10/the-world-without-technology/>.

⁴ See, e.g., BURMAN, *supra* note 1.

⁵ See, e.g., SUSAN K. JONES, *BUSINESS TO BUSINESS INTERNET MARKETING* 122–23 (5th ed. 2009).

⁶ But see Joe Mullich, *The New Face of Face-to-Face Meetings: Efficiencies, Technology, and Better Metrics Bring Greater ROI*, WALL ST. J., <http://online.wsj.com/ad/article/globaltravel-face> (last visited Sept. 16, 2015) (noting that a company can still obtain a lot more work once the company and the client have “shared a handshake, some smiles and maybe a meal”).

⁷ *Multinational Corporation – MNC*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/multinationalcorporation.asp> (last visited Sept. 16, 2015).

Today's global economy is vast, and the foreign affiliates of multinational companies employed an estimated 69 million workers in 2011, which brought in a staggering \$28 trillion in sales.⁸ With the seemingly endless benefits of offshoring manufacturing operations, it is no wonder that citizen groups are becoming more and more critical of these companies, closely scrutinizing their operations, and campaigning when necessary.⁹ When violations are more serious, such as egregious human rights violations, citizen groups conduct consumer boycotts against multinational companies.¹⁰ If companies are still not held liable for these and other subcontractor violations, then "[p]erhaps boycotts should be understood as . . . a first step in global efforts" to hold companies liable.¹¹ Although boycotts do provide value in holding multinationals accountable, additional action by foreign courts and governments is needed to incentivize multinationals to change. Courts in the United States have long considered cases of subcontractor liability, but have been prone to rule in favor of multinationals. Citizen interest in the international operations of companies has not always been as intense as it is today, but still the power of multinational companies has been challenged in the past.

Should multinational corporations like Wal-Mart, Apple, and Nestlé continue to be shielded from liabilities arising from the operations of their subcontractors? Should the benefits of operating in a global market be accompanied by the costs of increased liability? To better protect society and injured factory workers against the aggressive international expansion of multinational companies, corporations like Wal-Mart, Apple, and Nestlé should be accountable for the actions of their subcontractors.

Part II of this Comment will provide historical grounds for the treatment of contractor-subcontractor liability, analyzing how early multinationals virtually trampled on the authority of governments. Part III will assess the impact that non-governmental organizations have on holding multinational corporations politically liable for the human rights violations of their foreign subcontractors. Part IV will analyze the contractor-subcontractor relationship with three modern multinational companies: Wal-Mart, Apple, and Nestlé. Examples of the limited recourse foreign workers have in the judiciary will show how these multinationals, like the early multinationals, again have a hold on the government. Part V will analyze the current treatment of multinationals in foreign courts to determine whether injured plaintiffs can seek redress in their home countries. Part VI will introduce the U.S. government's

⁸ See U.N. Conf. on Trade and Dev., *World Investment Report 2012: Towards a New Generation of Investment Policies*, 1, UNCTAD/WIR/2012 (2012), available at <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>.

⁹ See generally Gay Seidman, *Transnational Labour Campaigns: Can the Logic of the Market Be Turned Against Itself?*, 39 DEV. AND CHANGE 991 (2008).

¹⁰ *Boycott Companies Violating Human Rights Of The Palestinians, Says UN Expert*, COUNTERCURRENTS (Oct. 27, 2012), <http://www.countercurrents.org/cc271012A.htm>. Human rights violations sparked called for boycotts against "Caterpillar, Hewlett Packard, Motorola, Veolia Environment, G4S, Dexia, Volvo Group, Assa Abloy, Ahava, Elbit Systems, Mehadrin, Riwal Holding Group and Cemex." *Id.*

¹¹ Seidman, *supra* note 9, at 1001.

model of interacting with subcontractors and analyze its advantages and disadvantages. This model will be presented in part as a useful template for multinationals to implement in their interactions with foreign subcontractors. Part VII will provide recommendations for multinational treatment of foreign subcontractors based on the U.S. government's model of working through prime contractors. These recommendations will contain numerous proposals for how multinationals can maintain better oversight of the operations of foreign subcontractors. Finally, Part VIII will show how these recommendations will help eliminate human rights violations.

II. PROTECTIONS TRADITIONALLY OFFERED TO COMPANIES OPERATING INTERNATIONALLY

Two of the earliest multinational business organizations were the Knights Templar,¹² founded in 1120,¹³ and the British East India Company,¹⁴ founded in 1600.¹⁵ These multinationals were founded at a time when mankind was boldly expanding throughout the world and when company operations were not conducted through a network of subcontractors. Even absent foreign subcontractors, the Knights Templar was exempted by Pope Innocent II from obedience to local laws, meaning they could pass freely through borders, did not have to pay taxes, and were exempt from all but the Pope's authority.¹⁶ The organization could act contrary to societal interests without working through an intermediary and still not incur liability. Over time, the Knights Templar began working through local businesses to build an increased local presence,¹⁷ but continued to defy government until the organization's eventual dissolution.¹⁸

The British East India Company also obtained dominance in the international arena, accounting for a substantial portion of the world's trade in commodities including cotton, silk, salt, and tea.¹⁹ Officers of the

¹² The Knights Templar first founded the military orders, and are "marked in history (1) by their humble beginning, (2) by their marvelous growth, and (3) by their tragic end." *The Knights Templar*, NEW ADVENT, <http://www.newadvent.org/cathen/14493a.htm> (last visited Sept. 16, 2015). The military orders included "every kind of brotherhood of knights, secular as well as religious," and were formed for the purpose of crusading. *The Military Orders*, NEW ADVENT, <http://www.newadvent.org/cathen/10304d.htm> (last visited Sept. 16, 2015).

¹³ MICHAEL BENSON, *INSIDE SECRET SOCIETIES: WHAT THEY DON'T WANT YOU TO KNOW* 87-90 (2005).

¹⁴ The East India Company was a commercial venture originally founded by businessmen to import spices from South Asia. The Company took advantage of superior navigational technology and became a monopoly, but eventually became subjected to tough competition. George P. Landow, *The British East India Company – the Company that Owned a Nation (or Two)*, THE VICTORIAN WEB (Sept. 20, 2013), <http://www.victorianweb.org/history/empire/india/eic.html>.

¹⁵ See generally MEDARD GABEL & HENRY BRUNER, *GLOBALINC. AN ATLAS OF THE MULTINATIONAL CORPORATION* (2003).

¹⁶ BENSON, *supra* note 13, at 90.

¹⁷ MALCOLM BARBER, *SUPPLYING THE CRUSADER STATES: THE ROLE OF THE TEMPLARS* 314-26 (1992).

¹⁸ See *The Fall of the Knights Templar*, EXAMINER (Dec. 19, 2010), <http://www.examiner.com/article/the-fall-of-the-knights-templar>.

¹⁹ *China Trade and the East India Company*, BRITISH LIBRARY, <http://www.bl.uk/reshelp/findhelpregion/asia/china/guidesources/chinatrade/> (last visited Sept. 16, 2015).

company enjoyed prosperity that allowed them to build huge estates and businesses and influence within the political world.²⁰ Because of its status as a monopoly, the British East India Company became the single biggest player in the British global market.²¹ With its rise as a multinational, the Company became more reliant on subcontractors; it kept supply and production costs low by subcontracting its manufacturing, shipping, and retailing functions.²² Given the communication barriers of that day, information exchange between the Company and its subcontractors was weak.²³ This led to a balancing act between supply and demand from both sides of the planet, giving subcontractors more freedom in their operations.²⁴ Similar to the fate of the Knights Templar, the East India Company's dissolution following a rebellion in 1857 and passage of the East India Stock Dividend Redemption Act of 1873²⁵ provide another example of the danger of unchecked power coupled with limited liability.

The judicial system within the United States began considering cases of subcontractor liability early in our nation's history. One early case discussing contractor liability for a subcontractor's actions failed to hold the contractor liable, limiting the recovery of an injured third party.²⁶ The plaintiff sustained injuries on a highway for which a railroad had subcontracted the repairs.²⁷ The issue was whether the railroad could be held responsible for the negligence of the subcontractor's employees, who had left a stone that injured the plaintiff on the highway.²⁸ The court explained that some level of control must exist before a subcontractor's actions would produce liability for the contractor:

The general principle is, that a master is liable for the tortious acts of his servant, which were done in his service; and this responsibility of the master grows out of, and is measured by his control over his servants . . . Without the existence of this essential element of control and direction over the servant, it is difficult to discover any principle which can, in law, make the acts of the servant the acts of the master.²⁹

Control at the time of this decision was more difficult to obtain, as the world was much "larger" and company officers could not be as involved in the daily interactions of the railroad with its subcontractors. In a later

²⁰ *British East India Company*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/British_East_India_Company (last visited Sept. 16, 2015).

²¹ Landow, *supra* note 14.

²² Rob Wile, *BAILOUTS, BRIBES, AND INSIDE TRADING: Here's What The World's Leading Business Looked Like 300 Years Ago*, BUSINESS INSIDER (Feb. 21, 2012 12:26 PM), <http://www.businessinsider.com/history-of-british-east-india-company-2013-4?op=1>.

²³ *Id.*

²⁴ *Id.*

²⁵ JOHN TOLAN ET AL., *EUROPE AND THE ISLAMIC WORLD: A HISTORY* 275–76 (2012).

²⁶ *Pawlet v. Rutland & W. R.R.*, 28 Vt. 297 (1856).

²⁷ *Id.* at 299.

²⁸ *Id.* at 300.

²⁹ *Id.*

railroad case, a widow sought to obtain damages from a corporation who employed the driver that struck and killed her husband.³⁰ The accident happened at a railroad crossing, and the widow's husband was the engineer of the train that was struck.³¹ The court held that the concept of control over an agent was narrowly directed to the power to control the agent at the very instance of neglect; it did not matter whether the agent was in the service of the master, only that the principal could control the agent at the moment of neglect.³² Like the early multinationals, these railroads also received favorable treatment in the form of limited liability.

Consistent with the historical treatment of multinationals in United States courts, multinational companies continue to experience protection from liability for the acts of their subcontractors, and in recent decades have successfully contracted away liability.³³ Injured workers and human rights activists have no legal recourse within the judiciary because the multinationals with whom they are contracted do not have control at the instances of neglect by their subcontractors. For the benefit of society, some level of accountability is needed in order to encourage multinational companies to begin recognizing and internalizing the impact of their global operations.

III. POLITICAL ACCOUNTABILITY FOR OPERATIONS OF SUBCONTRACTORS

Our modern society is a society of consumption, whether it is food, electronics, clothing, entertainment, or any other item. We tend to take for granted the items we own, often without considering where the items we use were produced or who produced them. Because of its financial appeal, offshoring the manufacturing of goods sold in America is a growing practice among multinational and other companies.³⁴ Though we may recognize that our products are produced overseas, we do not recognize that overworked, underpaid citizens of other countries make some of these products. Concerned citizens have ways of discovering where products are made, such as reading product labels carefully, consulting the websites of companies making products in the United States, or contacting manufacturers directly. But how many Americans actually care enough to follow these steps to discover where their products are made? Most Americans say they are concerned about where

³⁰ See *Standard Oil Co. v. Parkinson*, 152 F. 681, 682 (8th Cir. 1907).

³¹ *Id.*

³² *Id.* at 682–85.

³³ See *Martin v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 76242, (E.D. Mich. June 1, 2012) (noting that Wal-Mart contracted away liability as it retained limited control over its subcontractors).

³⁴ *American-Made Products Rapidly Disappearing from Marketplace; Chief Reason Attributed to America's Leading Retailer*, WAL-MART'S EGONOMICS, <http://www.walmarts-egonomics.com/american-made-products-disappear/> (last visited Sept. 16, 2015) (noting that “today over 90 percent of the products Wal-Mart sells are manufactured in foreign facilities,” a business practice that companies are forced into “in order to compete in today’s market”).

products are made, but taking these steps is a laborious process.³⁵ Approximately ninety percent of Americans say they are more likely to buy from a company that treats its workers well, seventy-eight percent are more likely to buy from an American company, and seventy-five percent are more likely to buy from a company that has a manufacturing plant in their home state.³⁶ Regarding the use of child laborers, about sixty percent of Americans were concerned about the use of child workers or cheap labor overseas.³⁷ But, based on consumer shopping habits, Americans seem to care little about where the products we purchase were made.³⁸

Non-governmental organizations are making concerted efforts to let consumers and the world know exactly what goes into making an “American” product in foreign factories: substandard working conditions. The group Human Rights Activists displays the following on the main page of their website: “Human rights are ‘commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being.’”³⁹ In addition, Human Rights Activists has drafted a Universal Declaration of Human Rights. It is based on the United Nations Universal Declaration of Human Rights, which concludes its Preamble by stating:

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.⁴⁰

Do corporations share this same passion for protecting human rights? Wal-Mart, Apple, and Nestlé surely are not promoting respect for human rights and freedoms; their main function is simply profit-generation. The strategy of a corporation is often to drive costs as low as possible in order to increase profits and provide sustainability. Wal-Mart’s motto “Save

³⁵ *Made in America? How to know which flag-waving products are true red, white, and blue*, CONSUMERREPORTS (Feb. 2013), <http://consumerreports.org/cro/magazine/2013/02/made-in-america/index.htm>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See ApparelStats 2014 and ShoeStats 2014 Reports*, AM. APPAREL AND FOOTWEAR ASS’N (Jan. 9, 2015), <https://www.wewear.org/apparelstats-2014-and-shoestats-2014-reports/> (“97% of all clothes and 98% of all shoes sold in the United States today are still imported.”).

³⁹ HUMAN RIGHTS ACTIVISTS, <http://www.hractivists.org/>, quoting Wikipedia.com (last visited Nov. 25, 2014).

⁴⁰ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

Money. Live Better” applies to its customers, but not to its overseas employees. As will be illustrated, they are definitely not living “better” lives, but in order to live true to this motto, someone has to account for the low-cost strategy. Overseas factory employees seem an easy target because they have few alternatives and cannot voice enough concern to be heard by consumers or tribunals around the world. Non-governmental organizations are simply not having any measurable impact on these multinationals’ willingness to change.

A. Human Rights Violations

The human rights violations that overseas workers are subject to include extremely low wages, sometimes as low as a few cents per hour; child labor, with children as young as nine regularly being forced to work past midnight; forced labor, with some factories locking workers in for periods as long as six months; and physical abuse, such as limited bathroom breaks and regular beatings for not meeting production quotas.⁴¹

A brief description of Wal-Mart’s hidden operating practices sheds light on how this happy, yellow-smiled company can be so hated by human rights activists. Wal-Mart has 1,400 documented violations of child labor laws in Maine alone, and takes a repeat offender attitude towards its human rights violations.⁴² Despite its “We Buy American” campaign in the 1990s, Wal-Mart eventually gave in and moved its worldwide purchasing headquarters to China, earning a gold star for hypocrisy. Today, Wal-Mart is the largest importer of Chinese products in the world and “is actually lowering standards in China, slashing wages and benefits, imposing long mandatory-overtime shifts, while tolerating the arbitrary firing of workers who dare discuss factory conditions.”⁴³

Further, Wal-Mart hides behind a wall of secrecy, loudly proclaiming that it adheres to a code of conduct to treat workers well, while prohibiting its employees from disclosing where factories are located so as to prevent the “code of conduct” from being observed. In an act of direct defiance of governmental authority, Wal-Mart paid production workers thirteen cents an hour for their work, despite China’s prevailing minimum wage of thirty-one cents an hour.⁴⁴ Workers in this factory also complained that they have “constant headaches and nausea from paint-dust hanging in the air; the indoor temperature tops 100 degrees; protective clothing is a joke; repetitive stress disorders are rampant, and there’s not training on the health hazards of handling [various supplies].”⁴⁵

⁴¹ Monica Bauer, *Always Low Prices, Rarely Human Rights: Wal-Mart and Child Slave Labor*, IHSCSLNEWS.ORG (Nov. 2005), http://ihscslnews.org/view_article.php?id=68.

⁴² Jim Hightower, *Boycott Wal-Mart*, INDY WEEK (May 8, 2002), <http://www.indyweek.com/indyweek/boycott-wal-mart/Content?oid=1186460>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* In addition to these conditions, not a single employee had ever heard of Wal-Mart’s code of conduct. *Id.*

Workers in Wal-Mart's retail stores also receive poor treatment, without any corporate efforts to hide it. Some critics claim that employee pay is sufficiently low to require that workers obtain food stamps and other government assistance to survive.⁴⁶ This spurred a recent Black Friday boycott, with the continued hopes that Wal-Mart will pay workers a livable wage.⁴⁷ Despite all the public criticism and political accountability, Wal-Mart still escapes liability in the judiciary.

Similarly, recent discoveries reveal subpar working conditions in Apple's overseas factories. The allegations stem from the Foxconn factory⁴⁸ that has been a recurring topic among Apple critics. Human rights groups like Students & Scholars Against Corporate Misbehavior have alleged that Apple forces overtime, fails to provide safe working conditions, and causes worker suicides.⁴⁹ Yet, following a 2012 audit by the Fair Labor Association of Apple's Chinese factories, these practices continue although Apple is supposedly making progress.⁵⁰ With 178,000 workers at an average age of twenty-three, the Foxconn factory is able to get away with paying average monthly salaries of \$360 to \$455.⁵¹ Although no instances of child labor or forced labor were found in this factory, Foxconn was only recording violations that caused work stoppage.⁵²

B. Effect of Boycotts on Reduction of Human Rights Violations

Human rights activists recognize these violations and have been steadily fighting against multinationals, who continue to receive favorable treatment in American and foreign courts. However, these activists' boycotts are having little impact. A fiasco over infant formula at Nestlé provides a telling example of how persistent, although often ineffective, human rights activists can be in speaking out against multinationals. The longstanding boycott surrounding Nestlé's infant formula has spanned more than two decades, helping make it "a villain in the eyes of the international union movement."⁵³

During the mid-1970s, Nestlé was aggressively marketing infant formula in poor countries.⁵⁴ Mothers would buy formula for their children, but because of its high cost they would add extra water to dilute

⁴⁶ Peter Dreier, *Walmart Workers Will Make History on Friday as America Confronts Growing Inequality*, HUFFINGTON POST (Nov. 26, 2013, 12:01 PM), http://www.huffingtonpost.com/peter-dreier/walmart-workers-will-make_b_4339236.html.

⁴⁷ *Id.*

⁴⁸ Chi-Chi Zhang, *Apple manufacturing plant workers complain of long hours, militant culture*, CNNWorld (Feb. 6, 2012, 6:44 PM), <http://www.cnn.com/2012/02/06/world/asia/china-apple-foxconn-worker/>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Peter Svensson, *Foxconn Apple Factories Violated Chinese Labor Laws, According To Fair Labor Association*, HUFFINGTON POST (Mar. 29, 2012 4:33 PM), http://www.huffingtonpost.com/2012/03/29/foxconn-apple-factories-labor-violations_n_1389392.html.

⁵² *Id.*

⁵³ Philip Mattera, *Nestlé: Corporate Rap Sheet*, CORPORATE RESEARCH PROJECT (2013), available at <http://www.corp-research.org/Nestlé>.

⁵⁴ *Id.*

the drink to make it last longer.⁵⁵ In addition to the health problems arising from using unclean water with the formula, babies in these poor countries were often malnourished from receiving unclean water with a sprinkling of formula mixed in.⁵⁶ Despite knowing of the plight of these babies, Nestlé continued marketing its infant formulas at high prices.⁵⁷ Nestlé initially responded to the boycott of its products with a counter-campaign, which suspended the boycott until 1984.⁵⁸ But the protests continued in 1988 when human rights activists discovered that Nestlé was violating the World Health Organization's code by giving free infant formula samples to U.S. and international hospitals.⁵⁹ In 2007, thirty years after the apparently unsuccessful Nestlé boycott began, evidence surfaced that Nestlé was “still engaging in questionable infant-formula marketing practices.”⁶⁰ As recently as April 2012, Nestlé purchased Pfizer's infant formula business, fully entrenching itself in the infant formula market.⁶¹

Nestlé might claim that infant formula problems are a result of consumer decisions, but it seems as though Nestlé is either not learning from its mistakes or corporate greed is driving it to ignore human rights violations that it could easily change. So much for the Company's mission statement of being “the world's leading nutrition, health and wellness company.”⁶² Utter disregard for human rights violations, especially those of malnourished children, will continue to bring severe criticism of Nestlé from NGOs.

Like Nestlé, Apple is also in the hot seat with human rights activists, specifically the Chinese group China Labor Watch. This group recently performed an undercover investigation at one of Apple's subcontractor factories in Suqian, China, uncovering “dangerous working conditions and a myriad [of] labor rights violations.”⁶³ As can be expected, Apple was notified previously of these same violations, yet made no concerted effort to change the conditions at this factory.⁶⁴ The report on this factory cited violations of Chinese labor laws, violations of factory policies, and also violations of Apple's Supplier Code of Conduct.⁶⁵ In total, twenty-

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Edward Baer, *Babies Means Business*, NEW INTERNATIONALIST 110 (Apr. 1, 1982), <http://newint.org/features/1982/04/01/babies/>.

⁶⁰ *Mattera, supra* note 53.

⁶¹ *Id.*

⁶² *Our Mission Statement*, NESTLÉ, <http://www.nestle.co.za/aboutus/missionvision> (last visited Sept. 16, 2015). The Company's full mission statement is “Nestlé is the world's leading nutrition, health and wellness company. Our mission of ‘Good Food, Good Life’ is to provide consumers with the best tasting, most nutritious choices in a wide range of food and beverage categories and eating occasions, from morning to night.” *Id.* But it is debatable for whom the “Good Life” is intended. Surely this does not refer to the malnourished babies in poor countries who consume unclean water mixed with a little formula.

⁶³ *Call On Apple to Insure Workers Safety*, CHINA LABOR WATCH, (Sept. 11, 2014), <http://www.chinalaborwatch.org/newscast/358>.

⁶⁴ *Two Years of Broken Promises*, CHINA LABOR WATCH, (Sept. 4, 2014), <http://www.chinalaborwatch.org/report/99>.

⁶⁵ *Id.*

two labor violations were revealed in areas including hiring, working hours, and living conditions.⁶⁶

Even after being notified, Apple's violations grew worse both in volume and in degree.⁶⁷ China Labor Watch is now circulating a petition for concerned citizens to sign which calls on Apple to take immediate action.⁶⁸ However, if previous violations did not change the operating practices at this factory, it is unlikely that a concerned group of citizens and human rights activists with a long list of signatures will.⁶⁹ Like Wal-Mart and Nestlé, Apple still fails to change its production practices. Yet, when posed with the question of whether consumers should boycott Apple,⁷⁰ human rights activists continue to answer affirmatively, in large part due to the human suffering that occurs overseas and due to the relatively little impact the change would have on Apple.⁷¹ But can real progress, let alone complete elimination of human rights violations, really occur absent legal recourse in the courts? If Apple is merely violating international standards, but not breaking any law enforceable by courts, there is little incentive created to change its operating practices.

As is evidenced by these examples, Wal-Mart, Apple, and Nestlé are continuously criticized and boycotted with frequency. Human rights activists have no qualms with holding these companies politically liable, and would jump on the opportunity to hold them legally liable if courts would allow such. However, foreign countries offer little protection to factory workers, and without American courts stepping up and taking a stand against multinational corporations, human rights activists and those injured by the actions of multinationals will continue to be at a loss.

IV. MODERN MULTINATIONAL COMPANIES' INTERACTIONS WITH SUBCONTRACTORS

Since the political pressure of human rights groups has had limited impact on the human rights violations problem, there must be a legal solution to properly and effectively hold multinationals accountable. Legal solutions thus far have failed; however, there are still viable alternatives for legal liability. These companies should, at a minimum, be held to a stricter standard, which starts with American courts offering more protection to foreign citizens injured by American corporations.

⁶⁶ *Id.* All areas of violation are hiring; environment, health, and occupational safety; working hours; wages and benefits; management; student labor; worker representation and grievances; and living conditions.

⁶⁷ *See id.*

⁶⁸ *See Call On Apple to Insure Workers Safety, supra* note 63.

⁶⁹ *Id.*

⁷⁰ Paul Harris, *Apple hit by boycott call over worker abuses in China*, THE OBSERVER (Jan. 28, 2012, 7:07 PM), <http://www.theguardian.com/technology/2012/jan/29/apple-faces-boycott-worker-abuses>.

⁷¹ Damon Poeter, *NGOs Call for Boycott of Apple Products Over Worker Safety*, PC (Mar. 10, 2014, 9:08 PM), <http://www.pcmag.com/article2/0,2817,2454796,00.asp>. These groups seek to prove "the shockingly small amount of money per device it would take for Apple – one of the most profitable firms on the planet - to stop needlessly exposing workers in Chinese manufacturing facilities to toxic chemicals now causing severe illnesses." *Id.*

The following illustrations will highlight problems with the current system of multinational contractor-subcontractor liability.

A. Wal-Mart: Too Big to Fail?

Previous court decisions have absolved Wal-Mart from liability based on the concept of control. However, these decisions were not considered in light of modern technological advances but rather were considered in the ancient rubric of limited communication abilities. Wal-Mart has a massive worldwide presence, and, while started as a friendly American company, it has seen explosive international growth since its inception. Wal-Mart operates 4,588 stores within the United States and 6,293 stores outside of the United States.⁷² In addition, ninety percent of Americans live within fifteen minutes of a Wal-Mart and the company's total annual sales are \$405 billion with a per-minute profit of \$34,880.⁷³ Wal-Mart obviously receives a huge benefit from operating internationally, and it is financially capable to incur increased liability. To put Wal-Mart's international presence into perspective, eighty percent of its suppliers are located in China.⁷⁴ This strategy has afforded cheaper labor, which in turn yields higher returns and thus more lucrative executive compensation.⁷⁵ Its friendly, low-cost environment is supported by decades of human rights violations. With its low-cost, cutthroat business strategy, Wal-Mart continues to operate without liability for the actions of its subcontractors.

Citizen backlash is not foreign ground for Wal-Mart.⁷⁶ Like any large company, Wal-Mart has its fair share of critics and naysayers who keep tabs on its every move. Based on Wal-Mart's track record, there is no shortage of tabs to be kept. However, though the public has made Wal-Mart and other multinationals politically liable for the operations of their subcontractors, legal liability has been a tougher road. In *Sola v. Wal-Mart Stores East I*,⁷⁷ a man slipped in a subcontractor worksite on a floor that was covered in a floor stripping solution.⁷⁸ The court denied the injured man the ability to recover against Wal-Mart because Wal-Mart had neither actual nor constructive notice of the unsafe condition created by the subcontractor.⁷⁹ The jury in the trial court noted that the

⁷² *Our Locations*, WALMART, <http://corporate.walmart.com/our-story/our-business/locations/> (last visited Sept. 16, 2015).

⁷³ *Wal-Mart Company Statistics*, STATISTIC BRAIN (July 12, 2014), <http://www.statisticbrain.com/wal-mart-company-statistics/>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Jayne O'Donnell, *Survey: Most would boycott irresponsible company*, USA TODAY (May 21, 2013, 9:33 PM), <http://www.usatoday.com/story/money/business/2013/05/21/consumers-boycott-companies-bad-behavior-gap-protests/2343619/> (noting that "more than half of consumers in 10 countries say they have refused to buy a product in the past year because of what they saw as bad corporate behavior"). *But see* Betsy Schiffman, *Boycotting Wal-Mart? Good Luck With That*, DAILY FINANCE, (Mar. 19, 2010, 3:20 PM), <http://www.dailyfinance.com/2010/03/19/boycotting-wal-mart-good-luck-with-that/> ("But history shows that Walmart boycotts are mostly futile efforts.").

⁷⁷ 2013 Conn. Super. LEXIS 50 (2013).

⁷⁸ *See id.*

⁷⁹ *Id.*

subcontractor was not an agent because Wal-Mart had no control over the subcontractor's worksite, thereby eliminating any possibility for actual notice of the dangerous condition.⁸⁰ In a similar case, an injured party could not recover damages from Wal-Mart because "the duty to control and supervise the work of the subcontractors remained with [the subcontractor]."⁸¹

Although these cases represent Wal-Mart's liability protection in American courts for actions of its subcontractors, its protection overseas is no different. Some critics claim that retailers like Wal-Mart attempt to "abdicate responsibility for their supply chains by hiding behind [overseas] subcontractors."⁸² In its defense, Wal-Mart claims that third-party logistics companies are required to comply with labor laws and therefore adopts a "clean hands" stance.⁸³ Wal-Mart points fingers at others and rarely accepts responsibility for its actions.

Perhaps the biggest blow to employees of Wal-Mart subcontractors came in *Doe v. Wal-Mart Stores Inc.*⁸⁴ In that case, the plaintiffs were employees of foreign companies that sell items to Wal-Mart, based in countries such as China, Bangladesh, Indonesia, Swaziland, and Nicaragua.⁸⁵ The subcontractor employees claimed that Wal-Mart had a code of conduct for suppliers that it claimed it would enforce.⁸⁶ Any violators of the code would be "subject to immediate cancellation of any and all outstanding orders" and would have to "cease doing business with Wal-Mart."⁸⁷ While facially impressive, the court held that this promise did "not create a duty on the part of Wal-Mart to monitor the suppliers," and therefore the plaintiffs could not sue Wal-Mart for any monitoring failures.⁸⁸ The subcontractor employees next sought to prove that Wal-Mart was their joint employer, and that they could sue Wal-Mart directly for any breaches of the corporate code of conduct or labor laws.⁸⁹ However, the court also shut down this argument, claiming that Wal-Mart had no right to control the activities of the subcontractor and therefore had no "'day-to-day' authority over employment decisions."⁹⁰ Because Wal-Mart did not have sufficient control to "affirmatively contribute" to the employees' injuries, it did not owe the subcontractor employees any special duty to protect them from the alleged violations of the international suppliers, creating more problems for international liability.⁹¹

⁸⁰ *Id.*

⁸¹ Heughan v. Wal-Mart Stores, Inc., 1990 U.S. Dist. LEXIS 1738 (E.D. La. 1990).

⁸² Shelly Banjo, *Wal-Mart to Police U.S. Warehouses: Complaints Arise Over Subcontractors That Handle Storage, Shipping for Retail Giant*, WALL ST. J. (Dec. 27, 2012, 7:28 PM), <http://online.wsj.com/news/articles/SB10001424127887323300404578205781221252180>.

⁸³ *Id.* However, Wal-Mart is developing an auditing system within the United States that is similar to the one it uses in overseas factories in countries such as China and Bangladesh. *Id.* This system helps ensure that its supply chain is complying with safety and labor rules. *Id.*

⁸⁴ 572 F.3d 677 (9th Cir. 2009).

⁸⁵ *Id.* at 680.

⁸⁶ *Id.*

⁸⁷ *Id.* at 679–80.

⁸⁸ *Id.* at 681.

⁸⁹ *Id.* at 682.

⁹⁰ *Id.* at 682 (quoting *Vernon v. State*, 10 Cal. Rptr. 3d 121, 132 (Ct. App. 2004)).

⁹¹ *Id.* at 684 (quoting *Hooker v. Dep't of Transp.*, 38 P.3d 1081, 1083 (Cal. 2002)).

While these employees' injuries were the result of violations of basic societal moral standards, our courts simply cannot provide them (or others similarly situated) relief because Wal-Mart lacks "control" and thus cannot be held to its promises. But with the speed of modern technology and transportation, does Wal-Mart really lack "control" over the operations of foreign subcontractors? In today's technology driven society, Wal-Mart's ability to control and closely monitor its subcontractors both within the United States and internationally is increasing rapidly. Although it is a massive—and arguably the largest—company in the world, the training of factory supervisors and regional managers can be conducted remotely. This appears to contradict the reasoning American courts provide for limiting contractors' liability for subcontractors' actions; Wal-Mart can more easily direct the factory operations of its worldwide contractors. With control being so attainable, courts both within and outside the United States should gravitate towards holding Wal-Mart accountable for the actions of its subcontractors. This would eliminate both Wal-Mart's hands-off defense and its ability to spread liability through subcontracting. This will not only help impoverished employees of Wal-Mart's overseas subcontractors, but will also prevent Wal-Mart from sharing the fate of the early multinational companies.

B. Apple: An Unchecked, Growing International Presence

Apple Inc., like Wal-Mart, experiences limited liability for its actions in overseas factories. Though victims of Apple's corporate practices have a segment of the public fighting for them, general public pressure and the absence of legal recourse in the courts have led to very few changes in Apple's operating practices. Apple is a multinational corporation that designs, develops, and sells consumer electronics and other services to customers around the world. Although competition is getting fierce in this market, images of iPhones, iPads, and MacBook computers continue to be infused into society at a growing pace. Its ever-popular line of iPhones continues to dazzle consumers as seen by its commanding 41.4% market share in the smartphone market.⁹² Similar to Wal-Mart, Apple has aggressively expanded into the world of international commerce, increasing its number of stores from 116 in 2005 to 437 in 2013.⁹³ However, though Apple has experienced impressive growth and satisfied customers, it has also suffered criticism for its operating practices in foreign factories. In 2006, Apple was "stunned" to learn that workers at a Chinese factory "were being subjected to abusive living and

⁹² Chuck Jones, *Apple's U.S. iPhone Market Share Holding Steady*, FORBES (June 4, 2014 12:22 PM), <http://www.forbes.com/sites/chuckjones/2014/06/04/apples-u-s-iphone-market-share-holding-steady/>. Yet, with the growing popularity of the Android and other smartphones, we may soon see a shift in Apple's commanding presence in this market.

⁹³ *Number of Apple stores worldwide from 2005 to 2014*, STATISTA, <http://www.statista.com/statistics/273480/number-of-apple-stores-worldwide-since-2005/> (last visited Sept. 16, 2015).

working conditions.”⁹⁴ However, these despicable operating practices produced little liability for the company and Apple moved on with ease. Apple’s bottom line, like other companies’, remained unaffected⁹⁵ and it made no concerted effort to change its practices.

Though no legal liability resulted from Apple’s poor operating conditions in its overseas factories, the company did conduct an audit of its subcontractor factories. It found that most factories complied with moral standards; and it has been working with its suppliers to improve these areas.⁹⁶ Yet a pattern of inactivity persists; Apple is publicly criticized for questionable business practices, it conducts an investigation and publically resolves to rectify the issue, the public ceases its criticism, and Apple slowly returns to its old practice. Since this approach is simply a slap on the wrist, there remains no incentive for Apple to make permanent changes to its business practices. This is evidenced by a 2012 inquiry into Apple’s Foxconn factory in Chengdu, China.⁹⁷ One worker claimed that if she spoke about the factory to reporters, she would be subjected to criminal liability.⁹⁸ She described the pressure to work long hours in an environment in which women work as men, and men work as machines.⁹⁹ She believed this to be a strategy the factory uses to exploit cheap labor.¹⁰⁰ Though this practice yields affordable consumer electronics, it comes at the price of the employees of subcontractors who are essentially off the radar. If pressure from the public does not change Apple’s current business practice, what will? If increased legal liability were incurred, Apple would be more likely to seek permanent fixes to its overseas problems rather than ignoring them with the hope that the media will back away.

In 2011, the Foxconn factory had an explosion resulting from aluminum dust particles in the air.¹⁰¹ After an investigation, experts determined that ventilation would have prevented this accident.¹⁰² Yet, Apple executives defended their unsafe practices by stating that “the system works for us.”¹⁰³ However, “suppliers would change everything tomorrow if Apple told them they didn’t have another choice.”¹⁰⁴ Apple obviously has it within its control to make the change. However, without legal ramifications they have no incentive to change. This lack of accountability has allowed multinationals to “set standards that are

⁹⁴ Erika Morphy, *Apple, IT and the Specter of Sweatshop Labor*, TechNewsWorld (Jan. 31, 2008, 4:00 AM), <http://www.technewsworld.com/story/61454.html>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Zhang, *supra* note 48.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Charles Duhigg & David Barboza, *In China, Human Costs Are Built Into an iPad*, N.Y. TIMES, (Jan. 25, 2012), <http://www.nytimes.com/2012/01/26/business/economy-apples-ipad-and-the-human-costs-for-workers-in-china.html>.

¹⁰² *Id.*

¹⁰³ Bradley Girard, Note, *Corporate Transparency Through the SEC as an Antidote to Substandard Working Conditions in the Global Supply Chain*, 21 GEO. J. ON POVERTY L. & POL’Y 317, 325–26 (2014).

¹⁰⁴ *Id.*

purely aspirational and fashion their labor standards and other commitments guided by what looks best.”¹⁰⁵

C. Nestlé: Delicious Foods from Reprehensible Overseas Practices

Nestlé S.A. has knowingly violated human rights in international production facilities by utilizing reprehensible means to ensure cheap labor and increase profits. This allows them to escape liability because American courts will not review international violations. Victims and human rights activists have unsuccessfully brought joint cases to stop these violations, with the judiciary always deferring to the legislature to fix the problem. Either the legislature needs to take action, or the judiciary needs to hold multinationals liable.

Nestlé is a Swiss multinational food company that boasts the highest revenue of any food company in the world.¹⁰⁶ In addition to its perch atop the revenue pedestal, Nestlé has an impressive product line, ranging from baby food, bottled water, and breakfast cereals to ice cream, pet foods, and snacks.¹⁰⁷ It stands firm in its commitment to improve nutrition and make nutritious foods more accessible.¹⁰⁸ But that commitment takes a backseat to the endless drive to increase profits and shareholder returns. Given its breadth of food products and worldwide sales, factories in key locations around the world are an important aspect of Nestlé’s operations. Nestlé currently has 442 operating factories in 86 countries which help support its large and growing international presence.¹⁰⁹ But, as with Wal-Mart and Apple, Nestlé’s international presence subjects it to intense criticisms and the temptation to employ unethical practices in order to increase its profits. This practice has dubbed Nestlé one of the world’s most controversial corporations.¹¹⁰

Nestlé engaged in “aggressive marketing of infant formula in poor countries in the 1980s.”¹¹¹ Infant formula is less healthy and much more expensive than breast milk, creating significant problems for poor families that need formula.¹¹² Resulting boycotts, including “The Baby Killer” booklet and “Babies Mean Business” exposé,¹¹³ continue to impact Nestlé and place it among the most boycotted corporations in the world.¹¹⁴ To add to its impressive list of failures, Nestlé purchases a large

¹⁰⁵ *Id.* at 326.

¹⁰⁶ Lausanne & Vevey, *Nestlé: The unrepentant chocolatier*, THE ECONOMIST (Oct. 29, 2009), available at <http://www.economist.com/node/14744982>.

¹⁰⁷ See Brands, NESTLÉ, <http://www.nestle.com/brands> (last visited Sept. 16, 2015).

¹⁰⁸ See Nutrition, Health, & Wellness, NESTLÉ, <http://www.nestle.com/nutrition-health-wellness> (last visited Sept. 16, 2015).

¹⁰⁹ *How many factories do you have?*, NESTLÉ., <http://www.Nestlé.com/aboutus/ask-Nestlé/answers/how-many-factories-do-you-have> (last visited Sept. 16, 2015).

¹¹⁰ See Mattered, *supra* note 53.

¹¹¹ *The 14 Worst Corporate Evildoers*, INTERNATIONAL LABOR RIGHTS FORUM (Dec. 12, 2005), <http://www.laborrights.org/in-the-news/14-worst-corporate-evildoers>.

¹¹² Jill Krasny, *Every Parent Should Know The Scandalous History of Infant Formula*, BUSINESS INSIDER (June 25, 2012 2:48 PM), <http://www.businessinsider.com/Nestlés-infant-formula-scandal-2012-6?op=1>.

¹¹³ *Id.* These campaigns were aimed at “dragging the industry’s exploitative practices into the spotlight in the early 1970s.” *Id.*

¹¹⁴ *The 14 Worst Corporate Evildoers*, *supra* note 111.

portion of its cocoa from the Ivory Coast.¹¹⁵ The Ivory Coast is home to approximately 109,000 child laborers who work in hazardous conditions on cocoa farms.¹¹⁶ Though valiant in its promise, Nestlé's agreement to end abusive and forced child labor on cocoa farms by July 1, 2005, was a failed endeavor.¹¹⁷ This agreement, known as the Harkin-Engel Protocol, was "agreed to by the chocolate industry to ensure U.S. chocolate products aren't made using illegal child labor."¹¹⁸ Nestlé critics suggested that the failure of the agreement resulted from "the industry's unwillingness to support real solutions and exchange a small portion of its massive profits to ensure a sufficient return for farmers and workers."¹¹⁹ Though the child labor practices in Nestlé's overseas factories and its expensive infant formula have produced the most intense criticism, numerous violations of labor rights in many different companies also plague the country's image. At one point, Nestlé even replaced an entire factory staff with lower-wage workers without renewing the collective employment contract of the prior workers.¹²⁰ Nestlé simply shows no signs of remorse or respect for basic human rights.

As with Wal-Mart and Apple, American courts have been hesitant to hold Nestlé liable for its international violations of labor and other laws. In *Doe v. Nestlé, S.A.*, numerous allegations were made against Nestlé and other chocolate manufacturers for egregious violations such as slavery, forced labor, child labor, and even outright torture.¹²¹ In this case, Malians who were forced to labor on cocoa fields teamed up with the San Francisco-based human rights organization Global Exchange to stop these violations.¹²² Although most of the general public would agree that Nestlé should be liable for their actions, the court held that there is "no support in the relevant sources of international law for the proposition that corporations are legally responsible for international law violations."¹²³ In addition, Nestlé could not be liable for forcing children to work because it did not act with the appropriate mens rea of "the purpose of facilitating the commission of that crime."¹²⁴ The court noted that liability for actions of this type does not rest with corporations, but rather only with states or natural persons.¹²⁵ Thus, courts fail to hold Nestlé and other companies similarly situated liable because they are not states or individuals. Because of the difficult nature of these violations, the court also refers this issue to Congress to decide, as if deciding

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Harkin-Engel Protocol on Chocolate and Child Slavery Expires on July 1*, GLOBAL EXCHANGE (June 30, 2005), <http://www.globalexchange.org/news/harkin-engel-protocol-chocolate-and-child-slavery-expires-july-1>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

¹²² *Id.* at 1063–64.

¹²³ *Id.* at 1144.

¹²⁴ *Id.* at 1082 (citation omitted).

¹²⁵ *Id.* at 1140.

whether violating international law is something courts have jurisdiction to review.¹²⁶

Regardless of whether it is the legislative or judicial branch that is charged with establishing international law concerning these violations, someone needs to take responsibility and hold these multinational companies accountable. Without any legal recourse in the courts or a change in legislature, employees working in atrocious conditions in overseas factories will continue to face a grim future with no justice in sight because they are left to the mercy of corporate greed.

V. FOREIGN TREATMENT OF MULTINATIONAL CORPORATIONS

In addition to the American judicial system's failure to provide an answer to this problem, foreign courts have followed suit in providing little to no legal recourse. Although many egregious violations occur in foreign countries, these countries are hesitant to hold multinationals legally liable. Many countries, especially those with developing economies, welcome the foreign direct investment that multinationals provide and view multinationals as "valuable channels of technology transfer."¹²⁷ In addition to a much-needed influx of capital, multinationals also provide extensive job creation to foreign countries.¹²⁸ Some have characterized multinational corporations as a "necessary evil," or even more favorably as "partners."¹²⁹ These characterizations provide some evidence as to why countries are hesitant to look out for their own citizens when it comes to economic growth. Like the multinational corporations exhibiting corporate greed, foreign countries are willing to look past human rights violations as a "necessary evil" to expanding an economy. Sadly, it is difficult to protect lower-class citizens' rights and interests when there are millions of dollars of foreign direct investment on the line. Apparently, enough money can buy immunity from violating even the most basic human rights. Foreign countries tend to side with multinationals,¹³⁰ leaving their injured citizens without legal recourse either against the insolvent and uninsured subcontractors¹³¹ or against the court-favored multinational corporations.

Injured plaintiffs find no better luck in foreign courts than American courts. American courts often dismiss cases on grounds of forum non-

¹²⁶ *Id.* at 1144.

¹²⁷ Elisa Giuliani, *Multinational Corporations' Economic and Human Rights Impacts on Developing Countries: A Review and Research Agenda*, 2 (Discussion Papers del Dipartimento di Economia e Management – Università di Pisa, n. 158, 2013), available at http://www.academia.edu/3464613/Multinational_Corporations_Economic_And_Human_Rights_Impacts_On_Developing_Countries_A_Review_And_Research_Agenda.

¹²⁸ Mauro F. Guillen, *Organized Labor's Images of Multinational Enterprise: Divergent Foreign Investment Ideologies in Argentina, South Korea, and Spain*, 53 *INDUS. & LAB. REL. REV.* 419, 420 (2000) (discussing the importance of multinationals in foreign countries' economic growth).

¹²⁹ *Id.*

¹³⁰ Jennifer Levine, Note, *Alien Tort Claims Act Litigation: Adjudicating on "Foreign Territory,"* 30 *SUFFOLK TRANSNAT'L L. REV.* 116–17 (2006) (noting that immunity often arises as a barrier to international human rights violations lawsuits).

¹³¹ Richard Meeran, *Liability of Multinational Corporations: A Critical Stage* (1999), <http://www.labournet.net/images/cape/campanal.htm>.

conveniens.¹³² They hold that other jurisdictions, particularly those jurisdictions where subcontractors operate, are better-suited to hear these cases.¹³³ This is a death trap for injured plaintiffs, because “[f]ew cases dismissed in the U.S. on forum non-conveniens grounds ever reach trial abroad.”¹³⁴ In Nigeria, oil companies provide high enough revenues to local governments that the country looks past the negative effects on local residents.¹³⁵ Allowing a case against a multinational corporation to get to court is too risky a proposition, so Nigeria ignores the environmental degradation and military occupation of local residents’ lands in favor of the multinational corporations.¹³⁶ Because of Nigeria’s and other countries’ lax enforcement of human rights standards, some critics claim that “[t]he need for more effective regulation of [multinational corporations] through binding international and domestic norms as opposed to sole reliance on voluntary codes of conduct, and for greater accountability in cases of human rights abuses, is a central concern also for many human rights scholars”¹³⁷ These critics recognize that current enforcement is insufficient and does not adequately redress the negative human rights impacts of multinational corporations. Regulation has to come at the hand of the American legislature and judicial system, but as explained above, American courts do not provide relief.

A recent American case, *Daimler AG v. Bauman*,¹³⁸ restricted the role that American courts play in hearing cases involving overseas human rights violations of foreign companies. The holding of the Court rested on jurisdictional grounds, which thwarted these and future plaintiffs from receiving any relief in American courts. This decision allows multinationals to continue operating through overseas subcontractors and then claim that because the injury did not occur in the United States, those injured cannot seek relief in American courts. The phrase the Court uses is that the corporation is not “at home” in the forum state, meaning its contacts within the state are not sufficient to justify hearing the case as a general jurisdiction matter.¹³⁹ The Court denied the injured plaintiff’s relief even though it recognized that these plaintiffs would likely not find relief in any other country’s judicial system.¹⁴⁰ This decision further extended the protection that multinationals receive, again providing multinationals power similar to that which existed with the Knights Templar and the British East India Company.

¹³² Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1369 (1991).

¹³³ *Id.* at 1379.

¹³⁴ *Id.* at 1388.

¹³⁵ Giuliani, *supra* note 127, at 2–3.

¹³⁶ *Id.*

¹³⁷ *Id.* at 9.

¹³⁸ 134 S. Ct. 746 (U.S. 2014).

¹³⁹ *Id.* at 751.

¹⁴⁰ *Id.* at 773 (Sotomayor, J., concurring) (recognizing that “the majority’s approach would preclude the plaintiffs in these examples from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief”).

VI. FEDERAL GOVERNMENT'S INTERACTION WITH SUBCONTRACTORS:
A MODEL FOR MULTINATIONALS

The United States federal government provides a good example of how multinational companies should interact with their subcontractors. The federal government deals with subcontractors in many different departments, including the Defense Department, the State Department, and the U.S. Agency for International Development.¹⁴¹ These contracts include everything from manufacturing weapons to constructing buildings to designing computer software. Landing a contract with the federal government, though potentially very lucrative, can be quite a laborious process. The government first hires a prime contractor, usually a large American company that subsequently subcontracts some or all of its work to other companies, including foreign subcontractors.¹⁴² These subcontractors sometimes subcontract their work and so on until, in some cases, there are dozens of levels of subcontractors.¹⁴³ The value of work that the federal government subcontracts out can be billions, if not trillions, of dollars.¹⁴⁴ This seemingly endless line of subcontractors can be troublesome for the government, especially when it attempts to maintain some level of control over the end product. As is the case with multinationals, those injured by the wrongs of government foreign subcontractors often are without redress because "U.S. courts lack personal jurisdiction over these foreign defendants."¹⁴⁵ As is consistent with foreign courts' treatment of multinationals, the government's foreign subcontractors also get off the hook because "[f]oreign courts may be unavailable, unreliable, or otherwise unable to hear these claims."¹⁴⁶ But, although the government's model of subcontracting does have weaknesses, it can also provide valuable lessons to multinationals.

The federal government seeks to oversee the operating practices of foreign subcontractors through flow-down provisions.¹⁴⁷ These provisions are typically included in the contracts the government has with prime contractors.¹⁴⁸ Essentially, these provisions "impose on the subcontractor the same obligations and responsibilities that the prime contractor has to the Government."¹⁴⁹ Although prime contractors do not always strictly adhere to these provisions, and although these provisions can be similar to the failed corporate codes of conduct discussed previously, they do provide a model from which multinationals can learn. In the situation of construction contracts, prime contractors are

¹⁴¹ Carissa N. Tyler, Note, *Limitations Of The Contingency Contracting Framework: Finding Effective Ways To Police Foreign Subcontractors In Iraq And Afghanistan*, 41 PUB. CONT. L.J. 453, 455 (2012).

¹⁴² David Isenberg, *The Invisible Foreign Subcontractor*, HUFFINGTON POST (Aug. 16, 2012, 9:46 AM), http://www.huffingtonpost.com/david-isenberg/the-invisible-foreign-sub_b_1785420.html.

¹⁴³ *See id.*

¹⁴⁴ *See* Tyler, *supra* note 141.

¹⁴⁵ Isenberg, *supra* note 142.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

responsible to “ensure the cleanup of the site” and to take “other action necessary to leave a safe and healthful site.”¹⁵⁰ This fits into the overall need the government has for subcontracting oversight and responsible operations, which plays out in the government’s concern for how prime subcontractors manage further subcontractors. Reasons the government wants oversight of subcontractors include to “provide the customer with . . . [the] best value solution to [a] requirement,” to “maintain public trust in [the] government acquisition system,” to “implement public policy,” to “protect [the] government’s interests,” and to “ensure public funds are prudently spent.”¹⁵¹

Multinationals currently contract out their work but, besides being concerned about the quality and cost of the end product, they take no further interest in the operations of subcontractors. Imagine if multinational companies followed the model of the federal government to put more stringent requirements on “prime” contractors to closely monitor the operations of subcontractors.

Rather than adopting corporate codes of conduct that may provide us with warm feelings inside but otherwise do nothing to prevent human rights and other violations by foreign subcontractors, multinationals should impose on contractors the obligation to closely monitor the work of subcontractors. In our modern society of technological innovation and efficient communication, this can still be done at relatively low costs. Multinationals can require internal audits on subcontractors with reports distributed to the multinational, and can engage in other types of management reviews that let foreign subcontractors know their actions are more closely monitored. Also, multinationals should require “enhanced vetting procedures for foreign subcontractors to prevent the hiring of poor-performing or corrupt subcontractors,” as well as include a “mandatory flow-down provision that requires foreign subcontractors to consent to U.S. jurisdiction as a condition of accepting a contract award.”¹⁵² These suggestions were made by David Isenberg¹⁵³ in an attempt to improve the government’s subcontracting system, but would also improve the subcontracting of multinationals and would reduce human rights violations in foreign factories. Though not a perfect system,¹⁵⁴ the government’s model of imposing obligations on prime contractors can be implemented in a corporate setting to help multinationals gain more control over the operations of subcontractors in foreign factories.

¹⁵⁰ 48 C.F.R. § 49.105-4 (1983).

¹⁵¹ *Prime and Subcontractor Relationship*, WESSEL & COMPANY (2011), <http://www.wesselcpa.com/~wesselcp/images/Prime%20and%20Subcontracting%20-%20Showcase%206-7-2011.pdf>.

¹⁵² Isenberg, *supra* note 142.

¹⁵³ *Id.*

¹⁵⁴ *Id.* (noting that “prime contractors ‘have not consistently monitored subcontractor performance against the negotiated statements of work and have not actively engaged subcontractors in cost-control activities or initiatives’”).

VII. A PROPOSED FUTURE FOR MULTINATIONAL LIABILITY

The federal government's model of interaction with subcontractors could be applied by multinationals in their interactions with foreign subcontractors. This would provide more accountability and make foreign subcontractors aware that their operations are being monitored. Continuous neglect of basic human rights by multinational corporations is clearly a problem. Wal-Mart, Apple, and Nestlé are making limited efforts to oversee their foreign subcontractors, and absent any concrete incentives to change, these multinationals will continue to trample on human rights. Human rights boycotts and liability in foreign courts are insufficient to effect any meaningful change, thus liability of multinationals in American courts needs to be possible. The American legal system should impose a number of requirements on multinationals, some adopted from the government's model of subcontracting and some adopted by virtue of technological advances in society.

First, internal audits of subcontractors should be conducted, with the results of audits reported to company management, human rights groups, and government agencies. Second, to prevent negligent hiring of subcontractors, multinationals should be required to conduct enhanced vetting procedures wherein they verify the background of subcontractors to ensure no previous human rights violations have occurred. Finally, and perhaps most importantly, multinationals should require that foreign subcontractors submit to U.S. jurisdiction so injuries sustained by employees of foreign subcontractors can obtain relief in American courts.

A. Subcontractor Internal Audits and Management Reviews

Internal audits can be an effective method for preventing a breakdown in controls or operations. International labor standards make the sweatshop labor conditions of foreign factories illegal.¹⁵⁵ With the lax enforcement of these standards by foreign countries, some method of holding multinationals accountable is needed, and a mandatory internal audit would help deter violations. It should not be enough to merely require that multinationals conduct internal audits; rather, some method of governmental oversight should be involved. One proposed method is to require that multinational companies conduct internal audits of their foreign factories, and have reports from these audits distributed to company executives, NGOs such as Human Rights Activists, and government agencies. In the United Kingdom, the Thatcher Conservative government and the Blair Labour government promoted corporate social responsibility.¹⁵⁶ They did this through "'soft' regulation," wherein they

¹⁵⁵ Mary A. Skouras, *Social Auditing: How Multinational Corporations Can Join Forces with Civil Society to Improve Global Labor Conditions*, 1 PEPP. J. BUS. ENTREPR. & L. 1 (2008), available at <https://law.pepperdine.edu/jbel/content/online-publications/skouras.pdf>.

¹⁵⁶ Jeremy Moon, *Government as a Driver of Social Responsibility*, INTERNATIONAL CENTER FOR CORPORATE RESPONSIBILITY (2004), available at http://www.ecrc.org.eg/Uploads/documents/Articles_Government%20as%20a%20driver%20for%20CSR%286-3%29.pdf.

used tax expenditures, required reports on social behavior, and encouraged other environmental responsibilities.¹⁵⁷ This helped keep companies accountable for their actions because they knew regular reports were required which could subject them to governmental scrutiny. Even if United States multinationals sent audit reports to the government and the government did not immediately review them, the multinational should still be accountable in later judicial proceedings when human rights violations surface. If the company claims that it did not violate any laws, but the audit report suggests otherwise, then the judicial system should enforce international labor standards against the multinational based on the internal audit report.

When a completed internal audit report is sent to the multinational, the manager or executive in charge of corporate social responsibility should be tasked with reviewing the report and assessing any current violations of human rights laws. Any violations should be immediately reported so as to avoid future liability in foreign or American courts. The multiple levels of review by this manager, NGOs, and the government will ensure the company's compliance with international standards and will keep multinationals attentive to human rights violations in overseas factories. It will also incentivize foreign subcontractors to maintain more humane work environments because they will be aware that multiple sets of eyes are watching their operations.

B. Enhanced Vetting Procedures for Foreign Subcontractors

In business, the failure to conduct a thorough investigation of job applicants can produce liability for the offending company. If a police officer was previously convicted of using excessive force, and a subsequent police department hires him without conducting a thorough background check, if that officer again uses excessive force, the injured plaintiff may recover against the police department.¹⁵⁸ This doctrine of *respondeat superior* can also be applied to foreign subcontractors. Multinationals should be required to conduct thorough background checks on potential subcontractors, including searching for prior violations of human rights, prior inefficiencies in manufacturing, and any poor relationships with local governments. Discovering these actions and practices before contracting with a subcontractor can spare multinationals of subsequent embarrassments when it is discovered that a subcontractor has repeatedly violated human rights standards or is disfavored by a foreign government.

The Office of Personnel Management is the government agency charged with conducting background investigations for over 100 federal government agency applicants. On its website, the agency states that “[c]ooperation from local law enforcement entities, courts, educational institutions, and employers, is instrumental to the completion of

¹⁵⁷ *Id.* at 5, 14, 21.

¹⁵⁸ *See, e.g.,* *Graham v. Sauk Prairie Police Comm'n*, 915 F.2d 1085 (7th Cir. 1990).

background investigations.”¹⁵⁹ Clearly, conducting thorough background investigations of foreign subcontractors would also require a concerted effort of foreign governments, judicial systems, and the subcontractors themselves. The effort would be worth it, however, if a potential subcontractor were a blatant violator of basic human rights. An enhanced and widely supported system of conducting background checks would help sift through suitable foreign subcontractors for multinational companies.

C. Consent to U.S. Jurisdiction by Foreign Subcontractors

A final proposal for reducing human rights violations is to require foreign subcontractors to consent to U.S. jurisdiction as a condition of accepting a contract. *Daimler AG v. Bauman* proved that American courts would not hear human rights violation cases, despite the violations having been committed, of American companies operating abroad.¹⁶⁰ However, if subcontractors consented to be sued in American courts for violations abroad, there would be much more of an incentive to clean up their factories and provide more humane work environments. They would be faced with the difficult choice of either consenting to U.S. jurisdiction or not earning valued contracts from multinationals. This proposal would require stricter judicial enforcement of foreign subcontractor violations, multinational company compliance in drafting contracts with this U.S. jurisdiction clause, and a concerted effort by all multinational companies to hold subcontractors liable for human rights violations. Including this clause in contracts is effective only if it is properly enforced. If subcontractors have no choice but to accept U.S. jurisdiction, workers in foreign factories have a good chance of experiencing better working conditions and a better lifestyle. Having Wal-Mart, Apple, Nestlé, and other multinational giants on board with U.S. courts will put enough positive pressure on foreign subcontractors to change.

VIII. CONCLUSION

Multinational companies are not inherently evil enterprises. They provide valuable inflows of foreign direct investment, they create jobs in poorer countries and facilitate the influx of technology into disadvantaged economies, they improve the overall level of economic development of host countries, and they even occasionally engage in community outreach programs.¹⁶¹ In 2013 alone, Wal-Mart “gave \$1.3 billion in cash and in-kind contributions around the world, surpassing 2012’s total by more than \$244 million.”¹⁶² Of the \$1.3 billion given, \$1

¹⁵⁹ *Background Investigations*, OFFICE OF PERSONNEL MANAGEMENT, <http://www.opm.gov/investigations/background-investigations/> (last visited Sept. 16, 2015).

¹⁶⁰ See 134 S. Ct. 746 (2014).

¹⁶¹ Giuliani, *supra* note 127.

¹⁶² *Community Giving*, WALMART, <http://foundation.walmart.com/> (last visited Sept. 16, 2015).

billion was given to countries other than the United States.¹⁶³ However, despite these positive aspects of multinationals, there is much to improve. Human rights violations have been ignored long enough, and NGOs would welcome the support that multinationals, foreign governments, the U.S. government, and judicial systems could provide in regulating foreign subcontractors. Foreign factory workers who currently have no legal relief in any judicial system need not continue to suffer at the hands of corporate greed.

The call to action here is not a passive suggestion. Multinationals need to conduct regular internal audits of foreign subcontractors and have the reports generated from these audits distributed to the federal government, NGOs, and company executives. Appropriate follow up on the results of these audits is essential. Multinationals also need enhanced vetting procedures for foreign subcontractors, with thorough background checks to ensure that subcontractors do not have a pattern of human rights violations that would later surface to the company's "surprise." Finally, multinationals need to require foreign subcontractors to consent to U.S. jurisdiction as a prerequisite to obtaining contracts. With the looming threat of stricter enforcement by U.S. courts, this jurisdictional consent will appropriately incentivize foreign subcontractors to operate in a manner consistent with general societal standards.

Workers in foreign factories must realize that all hope is not lost. Although it is a tough road to strictly regulate foreign subcontractors, it can be done through appropriate supervision and teamwork. Without more effort to change, multinationals like Wal-Mart, Apple, and Nestlé will continue to be responsible for gross human rights violations no matter how much money they throw at the problem.

¹⁶³ *Id.*