Chinatown Sweatshops: Wage Law Violations In The Garment Industry

"Forget it Jake, it's Chinatown."[1]

I. INTRODUCTION

Chinatown is one of San Francisco's major tourist attractions. Chinatown is also an alien ghetto[2] where Chinese immigrants — separated from American society by language, education, and culture — must live and find work.

This article focuses on the problem of wage law violations in the San Francisco Chinatown garment shops.[3] A discussion of the economic and social facts operative in the garment industry in San Francisco Chinatown will precede an analysis of the present law and its ineffectiveness. The final section will propose specific reform of the present wage law.

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[1]An expression of the futility felt by law enforcement officials working in Chinatown. Joe Mantell to Jack Nicholson in the movie, Chinatown.

[2]Population density in 1970 in the Chinatown core area was 228.1 persons per net acre which was 7.2 times the San Francisco average. SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CHINATOWN 1970 CENSUS: POPULATION AND HOUSING ANALYSIS 22 (1972) [hereinafter cited as CHINATOWN CENSUS]. In 1970, over 13 percent of the housing in Chinatown was considered overcrowded, which was approximately 16.5 percent of the city's entire overcrowded housing. *Id.* at 42. In 1970, the percentage of families in the core area below the 1969 poverty threshold of $3,743 was 21.0 percent, more than twice that of the city as a whole. *Id.* at 58.

[3]The problem is not restricted to Chinatown. A large percentage of the garment shops in central and southern California use Mexican immigrant labor, and recent investigation in the Los Angeles area indicates that severe violations of the wage law are also the rule in these shops. In the summer of 1973, the California Division of Industrial Welfare conducted 70 investigations and found 536 violations, an average of 7.7 per establishment. No establishment was innocent of violations and in some establishments investigators found as many as ten violations. California Division of Industrial Welfare, Press Release, Aug. 9, 1973 [hereinafter cited as Press Release—Aug. 9, 1973]. In New York, garment workers in Chinatown work "as many as 50 hours a week for as little as 65 to 75 cents an hour." *New York Times*, May 10, 1972, at 49, col. 1.

II. THE APPAREL INDUSTRY CONTRACTING SYSTEM

The apparel industry is a major source of employment both nationally and in California.[4] The industry utilizes a contracting system in which the manufacturer, after cutting the garments, farms out the work of assembly to small sewing shops. Opening a sewing shop requires little managerial experience since the owner is not required to buy materials, sell garments, make designs, or cut cloth.[5] Because frequent style changes preclude automation,[6] the only capital required to start a shop is that necessary to rent sewing machines, to lease premises, and to purchase a business permit.[7] Thus, ambitious workers are encouraged to become contractors which results in a perpetual oversupply of garment shops.[8]

The contracting system is advantageous to manufacturers for several reasons. First, because of the oversupply of contractors, the manufacturer can play one contractor off against another to minimize his production costs.[9] Contractors compete for jobs by lowering their bids to the manufacturer. In turn, the contractors lower their costs by lowering wages.[10] Second, the contracting system

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[4]The value added in 1970 by apparel manufacturers in the United States (that portion of garment market value attributable completely to the productive activity of the manufacturer) was estimated at $10.9 billion. California alone was estimated to have added $561 million. UNITED CALIFORNIA BANK, THE APPAREL INDUSTRY IN CALIFORNIA 5 (Aug., 1971). The two major clothing manufacturing centers in California are Los Angeles and San Francisco-Oakland. Los Angeles's value added in 1967 was estimated at $413.7 million (73.7 percent of California's total) while the San Francisco-Oakland value added was estimated at $88.8 million (15.8%). BANK OF AMERICA, SMALL BUSINESS REPORTER: APPAREL MANUFACTURING 2 (1971) [hereinafter cited as SMALL BUSINESS REPORTER]. Approximately 92,500 Californians were employed in the garment industry in 1974. CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, HEALTH AND WELFARE AGENCY, CALIFORNIA LABOR MARKET BULLETIN: STATISTICAL SUPPLEMENT 3 (May, 1974). 11,600 were employed in the San Francisco-Oakland area. *Id.* at 11. Chinatown garment shops produce about one-half of the volume of the apparel manufactured in San Francisco-Oakland, while employing only 3,500 workers. REPORT OF THE SAN FRANCISCO CHINESE COMMUNITY CITIZENS' SURVEY AND FACT FINDING COMMITTEE 66 (1969) [hereinafter cited as CITIZENS' REPORT].

[5]K. BRAUN, UNION-MANAGEMENT CO-OPERATION: EXPERIENCE IN THE CLOTHING INDUSTRY 77 (1947) [hereinafter cited as BRAUN].

[6]*Id.*

[7]Interview with Evelyn E. Whitlow, Chief of the California Division of Industrial Welfare, San Francisco, Sept. 12, 1974 [hereinafter cited as Whitlow interview].

[8]W. HAMILTON, PRICE AND PRICE POLICIES 343 (1938) [hereinafter cited as HAMILTON].

[9]*Id.* at 347.

[10]*Id.*:

> The contractor's overhead costs are fairly standardized and the area in which efficiency of management has any real scope is not large. He cannot economize by the strategic buying of goods nor institute a better organization of selling. His labor costs are approximately 75 percent of the price he gets and the difference of a penny a garment

allows the manufacturer to constrict and expand production, free of the burden of overhead for maintaining production equipment.[11] Third, use of contractors allows the manufacturer to avoid concern with production details and labor problems and to concentrate on design, purchase of materials, and development of markets.[12] Finally, by reducing the amount of his capital commitment,[13] the manufacturer retains the option of moving his factory to other areas having concentrations of inexpensive unskilled labor. This ability to threaten re-location gives the manufacturer enormous leverage in wage bargaining.[14]

III. CHINATOWN GARMENT SHOPS

San Francisco's Chinatown has been a major force in the apparel industry since at least the 1860's.[15] The Chinese entered the clothing industry as the California gold rush expanded the demand for clothing and undergarments in San Francisco.[16] With the growth of Chinese involvement in the industry, Chinatown garment workers organized craft guilds to provide job security and training and to assure payment of adequate wages.[17] These guilds regulated work hours and established a uniform wage rate for each type of work.[18] They deteriorated in the 1900's as women operators, who were barred from the guilds and who worked for lower wages, steadily replaced male operators in the industry.[19] By the 1930's, female operators dominated garment work in Chinatown, and the guilds were powerless to control industry wage rates.[20]

Today the Chinatown garment workers are generally immigrant

> on a large order may spell success or failure. Low costs for contractors mean, therefore, low labor costs, and over the years the contractor who could sweat his labor most effectively has been the survivor. However much he may have desired to deal fairly and squarely with labor, the competitive stress has driven him inexorably to a hard bargain.

[11] *Id.* at 345.
[12] *Id.* at 344.
[13] The Bank of America indicates that it is possible to start a manufacturing plant with as little as $20,000-$25,000. SMALL BUSINESS REPORTER, *supra* note 4, at 7.
[14] Garment manufacturers in New York did, in fact, re-locate when the International Ladies Garment Workers Union attempted to unionize the industry. 8 RAMPARTS 52 (Oct., 1969).
[15] T. CHINN, A HISTORY OF THE CHINESE IN CALIFORNIA 53 (1969) [hereinafter cited as CHINN].
[16] *Id.*
[17] *Id.* at 54.
[18] *Id.*
[19] *Id.*
[20] *Id.*

women living in Chinatown,[21] who have little formal education[22] and limited English proficiency.[23] The women work fewer hours[24] and do less sewing at home[25] now than in the past, but wages are still extremely low[26] and fringe benefits are few.[27] Typically, the decision to work in the garment industry is one of expediency and not of choice.[28] Yet, despite all these factors, the workers do not want to work outside Chinatown.[29]

Approximately 150 garment shops operate in San Francisco Chinatown.[30] The garment shops at one time existed in violation of the General Zoning Ordinance of the San Francisco Municipal Planning Code.[31] In 1960 the City Planning Commission amended the General Zoning Ordinance to establish a Garment Shop Special Use District in Chinatown, an exception to the general regulation barring

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[21] 80 percent lived in the Chinatown vicinity in 1971. HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, ANALYSIS OF CHINATOWN GARMENT WORKERS SURVEY QUESTIONNAIRE 1 (June 10, 1971) [hereinafter cited as SURVEY-1971].

[22] 52.2 percent had less than six years Chinese education in 1971. SURVEY-1971, *supra* note 21, at 2.

[23] 70 percent had very limited English proficiency in 1971. SURVEY-1971, *supra* note 21, at 2.

[24] All workers indicated that they worked an 8-hour day in 1971. (In 1969, prior to a union proposal to eliminate the garment shops, 40 percent reported working from 9 a.m. to 7 p.m. with a lunch break, while an additional 18 percent reported working from 9 a.m. to 10 p.m. with a lunch and dinner break.) SURVEY-1971, *supra* note 21, at 4; HUMAN RIGHTS COMMISSION OF SAN FRANCISCO, ANALYSIS OF CHINATOWN GARMENT WORKERS SURVEY QUESTIONNAIRE 1 (Oct. 23, 1969) [hereinafter cited as SURVEY-1969]. In 1971, only 46 percent used time cards to record their work. SURVEY-1971, *supra* note 21, at 4. In 1969, the time cards used were not the card-punch type but the write-in type, and 50 percent of the workers indicated that the employer filled out the cards. SURVEY-1969, *supra* at 5.

[25] 9 percent took garments home to sew in 1971 (48 percent in 1969). SURVEY-1971, *supra* note 21, at 5; SURVEY-1969, *supra* note 24, at 6.

[26] 82 percent of the full time workers surveyed received less than $3,900 in 1970. SURVEY-1971, *supra* note 21, at 7.

[27] In 1971, 68 percent had no annual vacation, 57 percent were not given sick leave with pay, and 56 percent were not paid any bonus. In 1969, 100 percent did not receive overtime pay even though a substantial number were entitled to such pay. SURVEY-1971, *supra* note 21, at 8; SURVEY-1969, *supra* note 24, at 9.

[28] In 1971, 52 percent indicated that their strongest reason for becoming a garment worker was that it was the only type of work they could find and do. SURVEY-1971, *supra* note 21, at 8.

[29] In 1971, 62 percent indicated they would not like to work outside of Chinatown (24 percent in 1969). SURVEY-1971, *supra* note 21, at 9; SURVEY-1969, *supra* note 24, at 10.

[30] CITIZENS' REPORT, *supra* note 4, at 66. The exact number of shops is difficult to determine because a number of shops are located in basements, alleys, and apartment buildings. Mr. M.K. Hedberg, former Regional Director of Wage and Hours for the U.S. Department of Labor, Human Rights Commission of San Francisco, minutes of the meeting 4 (Oct. 9, 1969) [hereinafter cited as HRC-Oct. 9, 1969].

[31] DEPARTMENT OF CITY PLANNING, CITY AND COUNTY OF SAN FRANCISCO, REPORT ON THE CHINATOWN GARMENT FACTORIES 1-3 (Oct. 23, 1958).

industry from residential areas.[32] Presently, the garment shops are a major source of employment and income for Chinatown.[33] The shops, as well as being economic units, are social and cultural institutions where Chinese alien women go to converse in their native tongue and be with people of similar cultural background. The women work irregular hours, leaving when necessary to shop, to prepare meals for the family, or to care for children.[34] Mothers even bring their children to the shops and care for them while working.[35]

IV. WAGE AND HOUR LAW APPLICABLE IN CALIFORNIA

In California, the Industrial Welfare Commission[36] sets minimum wage standards[37] and overtime rates[38] and establishes standard working conditions[39] for each industry in the state. The Fair Labor Standards Act of 1938[40] sets federal minimum wage standards[41] and

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[32] SAN FRANCISCO, CAL., MUNICIPAL CODE ch. 2, art. 2, § 236 (1960).

[33] Of the 749 businesses and factories listed in a 1969 inventory, 162 were markets, 136 were dry goods and art shops, and 120 were sewing factories. CITIZENS' REPORT, *supra* note 4, at 59.

[34] *Id.* at 67.

[35] The Human Rights Commission survey submitted to the employment committee in 1969 indicated that 7 percent of the women brought their children to work. The follow-up survey submitted in 1971 indicated a figure of 4 percent. SURVEY-1969, *supra* note 24, at 7; SURVEY-1971, *supra* note 21, at 6.

[36] The Industrial Welfare Commission acts pursuant to CAL. LABOR CODE §§ 1176-398 (West 1971). The Attorney General recently interpreted the minimum wage and related investigation and enforcement provisions of CAL. LABOR CODE §§ 1171-398 (West 1971) to include men within its scope. 56 OP. CAL. ATTY. GEN. 297 (1973).

[37] INDUSTRIAL WELFARE COMMISSION WAGE ORDER NO. 1-74 provides for a minimum wage of $2.00 per hour for the garment industry.

[38] CAL. LABOR CODE § 1350 (West 1971) which prohibited employment of women in manufacturing for more than 8 hours a day or 48 hours a week was declared void as in conflict with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970). CAL. LABOR CODE § 1350.5 (West 1971) which specifies 1½ times regular pay for work beyond the specified maximum hour was also declared void. Homemakers, Inc., Los Angeles v. Division of Industrial Welfare, 509 F.2d 20 (9th Cir. 1974). INDUSTRIAL WELFARE COMMISSION ORDER M-74 required overtime payments to employees who had worked more than 10 hours per day or 40 hours per week, but the order was stayed in an action instituted by the AFL-CIO. John F. Henning v. Industrial Welfare Commission of the State of California, Civil No. 674671 (Super. Ct., San Francisco, Cal., Feb. 14, 1975).

[39] The Board's discretion is limited by the Federal Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-78 (1970) and CAL. LABOR CODE §§ 2350-54, 2440-41 (West 1971) and in San Francisco by SAN FRANCISCO CAL., MUNICIPAL CODE part II, ch. V, art. 5, 11 (1960). In the future the California Department of Industrial Safety will administer the OSHA provisions. Interview with Emlyn L. Cox, Safety Engineer with the Division of Industrial Safety, San Francisco, Sept. 20, 1974.

[40] 29 U.S.C. §§ 201-19 (1970).

[41] Pursuant to 29 U.S.C.A. § 206(a)(1) (Supp. Pocket Part, 1975), wages must be: "not less than $2.10 an hour during the year beginning January 1, 1975, and

overtime rates,[42] but does not regulate working conditions.

The federal statute applies to any "employees who in any work week are engaged . . . in the production of goods for commerce . . . "[43] The garment worker is involved in production "for commerce" if her employer reasonably knows or intends that the goods will be shipped interstate.[44] Since the Chinatown contractor deals with relatively well-known, national manufacturers,[45] it seems reasonable to assume his knowledge of interstate shipment. The federal act preempts local standards only if they are lower than federal standards.[46] Where state law or municipal ordinance establishes a higher minimum wage or lower maximum hours than the federal provision, the state or municipal standard governs.[47]

V. THE INEFFECTIVENESS OF PRESENT WAGE AND HOUR LAW

Government officials acknowledge that violations by garment shop contractors of the minimum wage and overtime pay provisions of California and federal law are wide-spread.[48] In the summer of 1973, the California Division of Industrial Welfare investigated employment practices in the garment shops in San Francisco-Oakland and found 601 violations of the wage and hour law.[49] Of the 92 shops investigated only one was free of violations.[50]

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not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section."

[42] 29 U.S.C. § 207(a)(1) (1970) specifies that no employee shall work more than 40 hours a week unless paid 1½ times regular pay for hours in excess of 40.

[43] 29 U.S.C. § § 206(a), 207 (a)(1) (1970).

[44] Wirtz v. Ray Smith Transport Co., 409 F.2d 954 (5th Cir. 1969), *cert. denied* 396 U.S. 986 (1969). That the contractor does not ship the goods interstate himself is immaterial; the contractor's knowledge of the manufacturer's subsequent shipment is sufficient. White v. Wirtz, 402 F.2d 145 (10th Cir. 1968).

[45] Whitlow interview, *supra* note 7.

[46] 29 U.S.C. § 218 (1970).

[47] *Id.*

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> [w]ages may range down to 40 cents, 50 cents or 70 cents an hour . . . a true record of [employees'] hours is not being kept . . . [employees] are not being paid for all hours worked.

HRC-Oct. 9, 1969, *supra* note 30, at 6. *See also* California Industrial Welfare Commission, transcript of the California Industrial Welfare Commission Meeting 345-46 (July 13, 1967). A garment worker, under the alias of Sharon Chew, testified:

> Every week we work over 70 hours but are paid for 35 . . . We work every day, get 50 cents per hour, sometimes 35¢ . . . the average pay is 75¢ per hour.

Ms. Chew's average pay was 55¢ an hour.

[49] California Division of Industrial Welfare, Press Release, Sept. 26, 1973 [hereinafter cited as Press Release—Sept. 26, 1973].

[50] *Id.*

A. PROOF PROBLEMS

1. LACK OF EMPLOYEE CO-OPERATION

Employee initiated wage actions are extremely rare in the Chinatown garment industry.[51] The worker who does bring suit finds co-workers afraid to join the suit or to testify in her behalf.[52] Many workers are afraid of being deported if they testify or otherwise bring attention to themselves.[53] This fear is justified since a high proportion of the workers in the industry are illegal aliens subject to deportation.[54] Workers also fear that the pressure which wage suits create may force the manufacturer from Chinatown.[55] This fear, which contractors share,[56] can drive workers to overstate their wages to protect the industry and their jobs. Another factor which discourages employee initiated wage actions is a generalized distrust of white agencies.[57] Historically the Chinese were forced into Chinatown by harassment and discrimination.[58] Today the Chinese suspect that at best white society is uninterested in Chinese problems.[59] Finally, the garment worker fears reprisal firing and blacklisting for

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[51] Interview with Richard Cheung, Compliance Officer with the San Francisco Regional Office of the U.S. Department of Labor, San Francisco, Sept. 12, 1974 [hereinafter cited as Cheung interview]; Whitlow interview, *supra* note 7. The only successful civil action by an employee for back wages due as a result of wage law violations was against a garment contractor in Wong v. Lew, Civil No. 51352 (N.D. Cal., July 20, 1971). The suit was originally filed against both the manufacturer and the contractor (Lew), but the manufacturer settled before trial. The other major case in this area is Cheong v. Lai, Civil No. 51213 (N.D. Cal., Oct. 6, 1970) which was dismissed with prejudice to all parties.

[52] In Wong v. Lew, Civil No. 51352 (N.D. Cal., July 20, 1971), the plaintiff had to rely on her own testimony and that of her children because fellow employees refused to testify. B. DE NEE AND V. DE NEE, LONGTIME CALIFORN': A DOCUMENTARY STUDY OF AN AMERICAN CHINATOWN 295 (1972) [hereinafter cited as DE NEE]. The extent of fear is illustrated by a case reported in the *New York Times*, May 14, 1967, § 1, at 78, col. 1 [hereinafter cited as *New York Times*-May 14, 1967]:

> Once we took this guy to court and got a judgment and he had to distribute checks for the wages he'd cheated the women out of. . . .A wage and hour inspector was there with me. We watched him hand out the checks and the women wanted to give them back to him. He couldn't take them in front of us, but we both knew they took and cashed them and gave him the money.

[53] Press Release—Aug. 9, 1973, *supra* note 3.

[54] Danny Perez, chief organizer for the International Ladies Garment Workers Union, stated that 90 percent of the workers in Los Angeles garment shops are illegal aliens. *Los Angeles Times*, Jan. 30, 1975, part II, at 1, col. 5. The problem is probably not as severe in Chinatown since Chinese entry into the United States is more difficult.

[55] CITIZENS' REPORT, *supra* note 4, at 68.

[56] *New York Times*—May 14, 1967, *supra* note 52.

[57] Whitlow interview, *supra* note 7.

[58] S. LYMAN, THE ASIAN IN THE WEST 20-23 (1970).

[59] Whitlow interview, *supra* note 7.

involvement in any legal action.[60] Jobs are scarce in Chinatown and workers are understandably reluctant to risk expulsion from an industry which may provide their only means of support. In one case discovered by the Human Rights Commission, employees had worked without pay for as long as eight months without official complaint.[61] They finally came forward with a demand for back wages only after the shop owner went bankrupt.[62]

Under both California and federal law, an employer is guilty of a misdemeanor if he retaliates against an employee enforcing her wage rights by firing her.[63] Retaliation is not presumed, however, even when discharge occurs soon after the employee has testified or filed an action against the employer.[64] Moreover, remedies for a retaliatory firing are inadequate. The California statute imposes only criminal sanctions and does not allow the employee damages or government or employee initiated injunctive relief.[65] The federal statute does not allow damages[66] or employee initiated injunctive relief.[67]

2. *THE LACK OF ADEQUATE ALTERNATIVE METHODS OF PROOF*

The ineffectiveness of alternative methods of proof aggravates the evidentiary problem created by the general unwillingness of employees to testify. Wage enforcement agents have employed three alternative methods of proof. All have notable deficiencies.

One method used is surveillance of the garment shops.[68] Agents

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[60] Mr. M.K. Hedberg, HRC-Oct. 9, 1969, *supra* note 30, at 2, commented:

> . . . the employees will not be candid with us to the point where they will give us a statement which we can use. Off the record, they will tell us what conditions are, but they will not give us statements as evidence that we can use in court. I think these employees are willing to work for whatever wages they can get rather than no wages at all. I think, too, that they, unlike employees generally, have nowhere else to go. If they tell us about the conditions of the shop they work in, they are likely not to have a job in Chinatown in the industry. And, as you know, it's rather difficult for them to move out of Chinatown.

In Wong v. Lew, Civil No. 51352 (N.D. Cal., July 20, 1971), the plaintiff after winning her suit sought work outside Chinatown. DE NEE, *supra* note 52, at 295.

[61] This case involved the Hoi Ming factory. Human Rights Commission of San Francisco, minutes of the meeting 1 (Dec. 11, 1969).

[62] *Id.*

[63] 29 U.S.C. § 215(a)(3) (1970); CAL. LABOR CODE § 1196 (West 1971).

[64] *Id.*

[65] CAL. LABOR CODE § 1199(c) (West 1971).

[66] Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959), *cert. denied* 360 U.S. 930 (1959). *Contra*, Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969). *But see* Martinez v. Behring's Service, Inc., 363 F. Supp. 428 (M.D. La. 1973) criticizing *Fagot*.

[67] Bowe v. Judson C. Burns, Inc., 137 F.2d 37 (3rd Cir. 1943).

[68] Cheung interview, *supra* note 51.

watch and record the entrance and exit of employees from the shops and then compare their observations with the hours recorded on employees' time cards. A discrepancy is evidence of the falsification of records, a criminal offense.[69] The obvious difficulty with this method of proof is that the agents cannot see inside the shops. Discrepancies between hours observed and hours recorded can be explained by saying, for example, that the employee quit early but stayed inside to socialize.[70] Even if machines can be heard inside the shops, the contractor may simply say that the employees were working on their own garments.[71] Moreover, observed shop time does not take into account any hours worked at home. "Homework" — piece goods sewn in the employee's home rather than the garment shop — is illegal in the garment industry,[72] but in Chinatown it is an established practice.[73]

The second alternative method of proof is the use of time studies. Time studies are of two types. In one, wage enforcement officials go into a garment shop and actually record the number of items finished by employees in a given time.[74] The number of items is then multiplied by the piece rate the contractor pays to see if employees' pay is equal to the minimum wage rate. The method is not effective because the employer, when he knows a study is to be conducted, can send the slow workers home and keep only workers capable of meeting the minimum wage rate.[75] In addition, employees may simply leave the shop and refuse to participate in the study.[76] The second type of time study involves calculating the expected wage rate by multiplying the number of garments an average worker could be expected to produce in an hour by the piece rate the manufacturer pays to the contractor.[77] Agents determine whether the contract piece rate paid by the manufacturer is sufficient to allow payment of the minimum wage to employees.[78] This method lessens the need

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[69] 29 U.S.C. § §211(c), 215(a)(5) (1970); CAL. LABOR CODE § § 1174, 1353 (West 1971).
[70] Cheung interview, *supra* note 51.
[71] *Id.*
[72] 29 C.F.R. § § 530.1(d), 530.2 (1974), promulgated under 29 U.S.C. § 211(d) (1970); DIVISION OF INDUSTRIAL WELFARE, PROHIBITORY ORDER NO. 1 IN THE GARMENT MANUFACTURING INDUSTRY, promulgated under CAL. LABOR CODE § 2654 (West 1971).
[73] Whitlow interview, *supra* note 7.
[74] *Id.*
[75] Wage law enforcement agencies generally notify contractors before conducting a time study. *Id.*
[76] HRC—Oct. 9, 1969, *supra* note 32, at 2-3.
[77] Interview with Ed Tchakalian, compliance agent with the California Division of Industrial Welfare, San Francisco, Sept. 12, 1974 [hereinafter cited as Tchakalian interview].
[78] The problem of policing contractors still exists even if it is determined that the manufacturer contract price is sufficient.

for employee cooperation, but the manufacturer can refuse to give the contract price to enforcement officials.[79] Even where contract prices seem sufficient to ensure minimum wage payments, the contractor may make kickback payments to the manufacturer.[80]

The third alternative method of proof is the inspection of contractor payroll records. The present law requires employers to make and keep wage and hour records,[81] and it is a criminal offense either to fail to keep adequate records or to knowingly falsify them.[82] Enforcement agents may enter business premises to inspect wage records and may question employees regarding the accuracy of the records.[83] Inadequate or falsified records not only provide the grounds for criminal or injunctive actions,[84] but may also be used to shift the burden of proof in actions to recover back wages and damages.[85]

The availability of records reduces the proof problems enforcement officials face in garment shop actions, but it does not eliminate these problems. Whereas the inadequacy of records could be established without employee testimony, such testimony would generally still be required to prove falsification.[86] Homework creates a particular falsification problem since the contractor's records, though accurately reflecting shop time, neglect the additional hours worked at home. A homework violation may be proven separately from a wage violation.[87] In the federal system, substantial criminal penalties exist for homework violations.[88] In California, however, criminal

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[79] At present, manufacturers are giving the information to enforcement officials. Whitlow interview, *supra* note 7.

[80] Enforcement officials have met with the Chinese accountants to warn them that falsification of records could result in the suspension of their licenses. Whitlow interview, *supra* note 7.

[81] 29 U.S.C. § 211(c) (1970); CAL. LABOR CODE § § 1174(d), 1353 (West 1971).

[82] 29 U.S.C. § 215(a)(5) (1970); CAL. LABOR CODE § 1175(d) (West 1971).

[83] 29 U.S.C. § 211(a), (b) (1970); CAL. LABOR CODE § 1174(b) (West 1971).

[84] 29 U.S.C. § 217 (1970); CAL. LABOR CODE § 1194.5 (West 1971).

[85] If an employer has kept adequate records, the employee must prove by a preponderance of the evidence that she was not adequately compensated. Wirtz v. McGhee, 244 F. Supp. 412 (E.D.S.C. 1965). Lewis v. Ferrari, 34 Cal. App. 2d Supp. 767, 90 P.2d 384 (1939). But if an employer's records are inadequate, the employee, or the administrative agency acting in the employee's stead, need only prove by "just and reasonable inference" that the employee was not adequately compensated. Smith v. Superior Casing Crews, 299 F. Supp. 725 (E.D. La. 1969). The burden then shifts to the employer to negate the inference. If the employer fails to meet this burden, the employee is entitled to recovery. *Id.*

[86] The employer's tax records might be used to establish falsification of wage records. If the employer in computing his taxes deducted actual wages paid, the discrepancy between his wage records and his tax return would establish falsification. However, if the employer deducted the inflated wage stated in the wage records, the problem of proving falsification would still exist.

[87] 29 C.F.R. § 530.2 (1974); CAL. LABOR CODE § § 2650-67 (West 1971).

[88] 29 U.S.C. § 216(a) (1970).

penalties for violation of the homework statute are insubstantial[89] and the legal owner of any confiscated homework has the right to its return within thirty days of seizure.[90] Moreover, neither the California[91] nor the comparable federal statute[92] include the garment manufacturer within their scope.

Finally, a major problem common to all these methods is the manpower limitation of the enforcement agencies. They simply do not have the manpower to cover Chinatown for the time that would be required.[93]

B. DEFICIENCIES IN THE AVAILABLE REMEDIES

Both California and federal labor law provide four basic remedies for employer violations of minimum wage and maximum hour laws: (1) civil action by the employee for back wages and damages;[94] (2) civil action by the state or federal agency for back wages;[95] (3) injunctive action by the state or federal agency;[96] and (4) criminal action by the state or federal agency.[97] These remedies are deficient in several respects. Since employees are limited to the recovery of back wages and damages,[98] rarely will their pecuniary interest in the outcome of a suit be sufficient for them to risk losing their jobs by

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[89] The first offense is a misdemeanor, punishable by a fine of not less than $100 or by imprisonment for not less than 10 days or by both. The second and any subsequent conviction is a misdemeanor, punishable by a fine of not less than $250 or by imprisonment for not less than 30 days or by both. CAL. LABOR CODE § 2658.5 (West 1971).

[90] CAL. LABOR CODE § 2664 (West 1971).

[91] The manufacturer is not considered the employer of the garment worker, does not control the materials once he gives them to the contractor, and would not be accepting the homework. CAL. LABOR CODE § 2658.5 (West 1971).

[92] 29 C.F.R. § 530.1(c) (1974).

[93] The Division of Industrial Welfare has 40 agents for the entire state of California; the Wage and Hour Compliance Division of the U.S. Department of Labor has four compliance agents and one trainee for the San Francisco area. Whitlow interview, *supra* note 7; Cheung interview, *supra* note 51.

[94] 29 U.S.C. § 216(b) (1970); CAL. LABOR CODE § 1194 (West 1971).

[95] 29 U.S.C. § 216(c) (1970); CAL. LABOR CODE § 1193.6 (West 1971).

[96] 29 U.S.C. § § 211(a), 217 (1970); CAL. LABOR CODE § 1194.5 (West 1971).

[97] Both California and federal law provide for criminal prosecution upon violation of the wage standard (29 U.S.C. § 215(a)(2) (1970); CAL. LABOR CODE § 1197 (West 1971), overtime provisions (29 U.S.C. § 215(a)(2) (1970); CAL. LABOR CODE § § 1198, 1350.5 (West 1971)), record keeping requirements (29 U.S.C. § 215(a)(2) (1970); CAL. LABOR CODE § § 1174, 1175(d), 1353, 1354 (West 1971)), and the discriminatory firing law (29 U.S.C. § 215(a)(3) (1970); CAL. LABOR CODE § 1196 (West 1971)). Both also specify penalties for the misdemeanor offenses. The federal misdemeanor penalty provision is 29 U.S.C. § 216(a) (1970). The California misdemeanor penalties for violation of minimum wages, maximum hours, records, and retaliatory firing provisions are: CAL. LABOR CODE § 1199(b) (West 1971), CAL. LABOR CODE § § 1199(a), 1354 (West 1971), CAL. LABOR CODE § § 1199(c), 1354 (West 1971), and CAL. LABOR CODE § 1199(c) (West 1971) respectively.

[98] 29 U.S.C. § 216(b) (1970); CAL. LABOR CODE § 1194 (West 1971).

bringing an action. Moreover, criminal and injunctive actions[99] are not directly available to the employees but can be brought only through the wage enforcement agency.[100] Criminal and injunctive actions are subject not only to wage agency approval but must also be approved and ultimately prosecuted by the California Attorney General's Office or the U.S. Solicitor General's Office.[101] This prosecutorial discretion further limits the number of complaints which result in wage suits.[102]

Even in cases where government action is appropriate, both California[103] and federal law[104] permit administrative resolution of the dispute. The agencies direct repayment of back wages and secure the contractor's promise to comply with the wage law in the future. While this recovers the employee's back wages, it does not guarantee future compliance because the penalty imposed upon non-compliance with the agreement is uncertain.

Administrative resolution of a criminal complaint is particularly adverse to employee interests because California law in part and federal law without exception permits imprisonment of a wage law violator only after a second conviction.[105] The administrative finding, however adverse to the employer, does not constitute a criminal conviction.

C. MANUFACTURER LIABILITY

The oversupply of garment contractors forces individual contractors to accept contract prices too low to allow payment of the minimum wage.[106] Competitive pressures also discourage individual manufacturers from paying contract prices sufficient to afford workers the minimum wage. Any manufacturer who pays the increased labor cost must either absorb the additional costs or increase the

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[99] 29 U.S.C. § § 211(a), 217 (1970); CAL. LABOR CODE § 1194.5 (West 1971). *See* Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959), *cert. denied* 360 U.S. 930 (1959).

[100] 29 U.S.C. § § 211(a), 217 (1970); CAL. LABOR CODE § 1194.5 (West 1971)

[101] Cheung interview, *supra* note 51; Whitlow interview, *supra* note 7.

[102] For example, the California Division of Industrial Welfare initially had difficulty convincing the District Attorney in San Francisco to file criminal suits. The District Attorney's reluctance was attributed to the lack of proof, the attitude that Chinatown handles its own problems, and frustration because of the complexity of the problem and the language difficulties. Whitlow interview, *supra* note 7.

[103] CAL. LABOR CODE § 1193.5 (West 1971).

[104] 29 U.S.C. § 216(c) (1970).

[105] 29 U.S.C. § 216(a) (1970); CAL. LABOR CODE § 1354 (West 1971).

[106] Mr. M.K. Hedberg, HRC—Oct. 9, 1969, *supra* note 30, at 10, commented:

> In this industry, I think the shipper or the manufacturer has a large role. I think we have to acknowledge the economics of the situation, too. If one garment shop wants to comply fully, he's not going to have much business.

price of his garments relative to other manufacturers. Collectively, manufacturers could ensure minimum wage payments if each paid contract prices sufficient to generate the minimum wage and monitored the payment of wages to the workers.[107] Existing law, however, is primarily directed at contractors rather than manufacturers. In the single provision that is directed at manufacturers, remedies are too weak to force collective compliance.

1. LIABILITY LIMITED TO EMPLOYER

Liability of the garment manufacturer for wage violations, under both California and federal law, depends on the legal relationship existing between the manufacturer and the garment shop owner. If the garment shop owner is an agent of the manufacturer, then the manufacturer is considered the employer of the workers and is liable for the contractor's wage violations.[108] If, however, the shop owner is an independent contractor, then the manufacturer is not considered the legal employer of the workers, and is not liable for the contractor's wage violations.[109]

In both the federal system and in California, the determination of the contractor-manufacturer relationship is essentially factual, turning on the particular circumstances of the case at hand. In California, the primary factor used to adduce the nature of the relationship is the manufacturer's right to control the manner of accomplishing the result.[110] If the manufacturer controls only the result of the work, and not the manner of its accomplishment, the garment shop owner is deemed an independent contractor.[111] The California courts will, however, weigh such secondary factors as whether the method of payment is by time or by job and whether the manufacturer supplies the place of work in determining the nature of the relationship.[112]

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[107] Whitlow interview, *supra* note 7; Mr. M.K. Hedberg, Human Rights Commission of San Francisco, minutes of the meeting 3 (Sept. 24, 1970).

[108] Maddox v. Jones, 42 F. Supp. 35 (N.D. Ala. 1941); 1 WITKIN, SUMMARY OF CALIFORNIA LAW 649-650 (8th ed. 1973).

[109] *Id.*

[110] *See* Burlingham v. Gray, 22 Cal. 2d 87, 99, 137 P.2d 9, 13 (1943); Gerrard Co. v. Ind. Acc. Comm., 17 Cal. 2d 411, 414, 110 P.2d 377, 378 (1941).

[111] *See* Tieberg v. Unemp. Ins. App. Bd., 2 Cal. 3d 943, 946-47, 88 Cal. Rptr. 175, 177, 471 P.2d 975, 977 (1970); Green v. Soule, 145 Cal. 96, 99, 78 P. 337, 339 (1904).

[112] The secondary factors considered in California are: (a) whether or not the contractor engages in a distinct occupation or business, (b) whether, in the locality, such work is usually done under the direction of the manufacturer or by a specialist without supervision, (c) the skill required in the particular contractor occupation, (d) whether the manufacturer or the contractor supplied the tools and the place of work, (e) the length of time for which the services are to be performed, (f) the manufacturer's method of payment, whether by time or by the job, (g) whether or not the contractor's work is part of the regular business of the manufacturer, and (h) whether or not the manufacturer and contractor believe they are creating an employer-employee relationship. Tieberg

The federal judiciary, in contrast, has evolved a multifactor test for determining the garment manufacturer's status.[113] No single factor is considered primary; rather factors such as whether the manufacturer may hire and fire the garment workers and whether contractor initiative is required for success are considered equally.[114]

Normally, the apparel manufacturer need not directly control the manner of manufacture to gain the benefits he seeks. Changes in the types of garments a particular shop handles are infrequent, and the need to retool equipment never arises.[115] A set of assembling instructions and a finished sample of the garment to be sewn represent the manufacturer's total production involvement under most contracts.[116] Thus, the manufacturer controls only the result of production and not the means and would probably not be considered an employer under either California's right to control test[117] or the federal definition.[118]

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v. Unemp. Ins. App. Bd., 2 Cal. 3d at 949, 88 Cal. Rptr. at 179, 471 P.2d at 979 (1970); Empire Star Mines Co. v. Cal. Emp. Com., 28 Cal. 2d 33, 43-44, 168 P.2d 686, 692 (1946). RESTATEMENT OF AGENCY 2d § 220 (1958) adds two other elements to the above list — the extent of control which, by agreement, the master may exercise over details of the work and whether the principal is or is not in business.

[113] United States v. Silk, 331 U.S. 704, 716 (1947). The federal principle is to look at the whole activity, the economic reality of the situation. Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961); Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947); Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235, 237 (5th Cir. 1973), *reh. denied* 472 F.2d 1405 (1973).

[114] While holding no list complete or controlling in determining whether employer status exists, the federal courts have recognized such factors as: (a) whether or not employment takes place on the premises of the manufacturer, (b) how much control does the manufacturer exert over employees, (c) does the manufacturer have the power to fire, hire, or modify the employment condition of the employees, (d) do employees perform a specialty job within the manufacturer's production line, (e) may employees refuse to work for the manufacturer, (f) amount of manufacturer investment in facilities and equipment, (g) the contractor's opportunities for profit, (h) the amount of contractor initiative required for the success of the claimed independent enterprise, and (i) the permanence and duration of the relationship. United States v. Silk, 331 U.S. at 716; Wirtz v. Lone Star Steel Co., 405 F.2d 668, 669-70 (5th Cir. 1968); Goldberg v. Warren Bros. Roads Co., 207 F. Supp. 99, 102 (D. Me. 1962).

[115] Tchakalian interview, *supra* note 77.

[116] *Id.*

[117] In addition, most of the secondary factors important in California indicate no employment relationship exists: (a) only a small degree of control would be set by any agreement, (c) the work would be done by a specialist without any supervision, (d) the contractor is a skilled manager, (e) the contractor provides his own supplies, machines, and lease, (f) employment is for a fixed time period which is set by the job, (g) pay is by the job, and (i) the contractor would think of himself as an independent contractor. *See supra* note 112.

[118] An analysis of the pertinent factors reveals: (a) employment does not take place on premises owned or leased by the manufacturer, (b) the manufacturer exercises no control over employees, (c) the manufacturer has no power to hire, fire, or modify employment, at least not by agreement, though it is possible that "suggestions" would be heeded, (f) the contractor invests in his own facilities and equipment, (g) the contractor has significant opportunities for profit and

2. "HOT CARGO" PROVISION

The federal "hot cargo" provision,[119] is an exception to the manufacturer's general insulation from liability. The hot cargo provision provides:

> It shall be unlawful for any person . . . to deliver or sell in commerce . . . with knowledge that shipment or delivery, in commerce is intended, any goods in production of which any employee was employed in violation of the minimum wage provision or the maximum hour provision of this title . . .[120]

Since the provision includes "any person", garment manufacturers are within its ambit, even if they are not considered employers.[121] Moreover, a manufacturer is under an affirmative duty to see that the contractor is in fact complying with the wage laws and may not rely merely on the contractor's assurance.[122]

The major problem with the hot cargo provision is that persons other than employers are subject only to the criminal penalties[123] and a government initiated injunction.[124] Title 29 of the United States Code, Section 216, specifically limits civil actions, whether brought by an employee[125] or the government,[126] to actions against the employer. The statutes thus deny the garment shop employee an opportunity to initiate an injunctive action or any civil action against the manufacturer.

VI. RECOMMENDATIONS

A. UNIONIZATION

Garment workers have the right to form or join labor unions[127]

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loss, and (h) the contracting business appears to require a fair amount of initiative for success. *See supra* note 114. *See also* Walling v. Twyeffort, Inc., 158 F.2d 944 (2nd Cir. 1947), *cert. denied* 331 U.S. 851 (1947), *reh. denied* 332 U.S. 785 (1947).

[119] 29 U.S.C. § 215(a)(1) (1970). California has no comparable provision.

[120] 29 U.S.C. § 215(a)(1) (1970). The knowledge requirement is one of imputed knowledge. *See* Wirtz v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968).

[121] Meek v. United States, 136 F.2d 679 (6th Cir. 1943).

[122] Wirtz v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968).

[123] 29 U.S.C. § 216(a) (1970).

[124] 29 U.S.C. § 211(a) (1970) provides:

> except as provided in section 212 [child labor provisions] of this title, the Secretary of Labor shall bring all actions under section 217 of this title to restrain violations of this chapter [Chap. 8—Fair Labor Standards].

[125] 29 U.S.C. § 216(b) (1970). The argument that authorization for an employee initiated civil action outside 29 U.S.C. § 216(b) (1970) could be implied from the purpose of the Fair Labor Standards Act was rejected in Britton v. Grace Line Inc., 214 F. Supp. 295 (S.D. N.Y. 1962).

[126] 29 U.S.C. § 216(c) (1970) authorizes the government to file civil actions for violations of 29 U.S.C. § § 206-07 (1970). Only the employer, however, is liable under 29 U.S.C. § § 206-07 (1970).

[127] 29 U.S.C. § 157 (1970).

free from employer interference, restraint, coercion,[128] or discrimination because of membership.[129] As members of a labor union, garment workers would have the right to good faith collective bargaining[130] with respect to wages, hours, and other terms of employment,[131] subject to arbitration by the National Labor Relations Board.[132]

The International Ladies Garment Workers Union (ILGWU) has attempted to organize the Chinatown garment workers,[133] but has been successful in only one third of the shops.[134] In large part, the ILGWU's failure is the result of its strained relationship with the Chinese community[135] and its ineffectiveness in policing those contracts it has negotiated.[136] Though unionization may provide a future solution to the wage problem in the Chinatown garment industry, it will not be actualized until Chinese confidence in the union and its benefits increases.

B. LEGISLATIVE REFORM

Wage law reform in the garment industry must solve the basic evidentiary problem that arises when employees are unable or unwilling to testify. Reform must also ensure that appropriate remedies are available for violations. Finally, reform must extend liability for contractor wage violations to the manufacturer.

1. *THE ANONYMOUS EMPLOYEE: A PROPOSED RECORD KEEPING SYSTEM*[137]

A fundamental change in the record keeping system would solve

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[128] 29 U.S.C. § 158(a)(1) (1970).
[129] 29 U.S.C. § 158(a)(3) (1970).
[130] 29 U.S.C. § 158(a)(5) (1970).
[131] 29 U.S.C. § 158(d) (1970).
[132] 29 U.S.C. § 160 (1970).
[133] EAST WEST, May 1, 1974, at 6, col. 1 [hereinafter cited as EAST WEST].
[134] Interview with Matty Jackson, Business Manager of the San Francisco Joint Board of the International Ladies Garment Workers Union, San Francisco, Sept. 6, 1974.
[135] The ILGWU's last major effort to organize the industry was in 1967. Substantially frustrated in that attempt, the union asked the San Francisco City Planning Commission to eliminate the Special Use District. The union defended the proposal as the only way to effect unionization and thereby guarantee adequate garment workers' wages. *See* letter from Cornelius Wall, former head of the San Francisco Joint Board of the ILGWU, to William Becker, Director of the San Francisco Human Rights Commission, Sept. 12, 1969, on file at the San Francisco Human Rights Commission Office. The Planning Commission rejected the proposal after strong protests from the Chinatown community and the Human Rights Commission's refusal to support the proposal. EAST WEST, *supra* note 133. In the end, the proposal only created severe employee distrust of the union.
[136] Mr. Cornelius Wall admitted that the union was only 10 percent effective in policing its contracts. *New York Times*—May 14, 1967, *supra* note 52.
[137] This system is modeled after the Occupational Safety and Health Act, 29 U.S.C. § § 651-78 (1970).

the evidentiary problem that exists when employees will not testify. Under the proposed record keeping system manufacturers would be required to file with the wage office[138] all garment contracts, together with estimates of the average time required to complete garments of the type contracted for. Contractors would have to file a listing of wages paid under each of these contracts with both the wage agency and the manufacturer.[139] This information would be held for a statutorily prescribed length of time, subject to challenge that the minimum wage was not or could not have been paid.

A wage agency investigation would be initiated upon complaint either by an aggrieved employee, who could remain anonymous,[140] or by the wage agency itself. Substantive violations could be prosecuted for failure to file wage summaries or any contract or for the wilful filing of inadequate or false information. Homework would automatically establish falsification of the wage summary.

The filed documents would also provide the evidentiary basis for wage violation actions against the contractor and manufacturer. A wage summary indicating a violation would establish contractor liability; if no violation was shown on the face of the summary but the contract price was insufficient to allow payment of minimum wages, the contractor would be presumed to have violated the wage laws.[141] The filed documents would also establish two presumptions of manufacturer knowledge, which would be used to establish manufacturer liability. First, the contracts would establish a presumption of manufacturer knowledge of a contractor wage violation where the contract price was insufficient to reasonably ensure minimum wage payments.[142] Second, contractor wage payment records filed with

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[138] It is contemplated that this would be a federal wage office or a state office to which federal authority has been delegated. The system must operate at the federal level in order to prevent manufacturers from moving to states where less stringent wage laws are in effect.

[139] This requirement, the heart of the proposed system, is the most significant departure from OSHA. *Cf.* OSHA, 29 U.S.C. § 657(c) (1970) which merely requires that each employer "shall make, keep and preserve, and make available" his records.

[140] *Cf.* OSHA, 29 U.S.C. § 657(f) (1970).

[141] To withstand due process challenge, such a presumption must provide "substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is based." United States v. Leary, 395 U.S. 6 (1969). *But cf.* Barnes v. United States, 412 U.S. 837 n. 11 (1973) and Bewley, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341 (1970), which suggest that in criminal cases the Court may be moving toward a test which would require the proved fact to establish the presumed fact beyond a reasonable doubt.

[142] A court may judge the validity of the presumption as a matter of common sense or experience. In Turner v. United States, 396 U.S. 398, 417 (1970), where possession of heroin was used to presume knowledge that the heroin was smuggled, the Court said:

> common sense tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, *unless they*

the manufacturer would establish a presumption of manufacturer knowledge of contractor wage violations where the wage summaries on their face suggested a violation.[143]

Investigation and prosecution of violations would be conducted administratively. The wage agency would determine whether the records established wage violations. If they did, the agency would assess penalties against both the contractor and the manufacturer.[144] If homework were involved in the violation, the agency would have the power to dispose of the garments.[145] Either party would have the right to challenge the wage agency's fact finding before a statutorily established board.[146] In addition, the contractor would have the opportunity to rebut the presumption of violation, and the manufacturer to rebut the presumption of knowledge. If the board sustained the finding of the agency, the parties would have the right to go to court to contest the finding.[147]

Any penalty ultimately paid by the contractor and manufacturer would be divided pro rata among the affected employees.[148] Such a disposition of the penalty would encourage employees to report violations, since they would be free from exposure and would have a pecuniary interest in making the report.

This proposed system would have several distinct advantages over the present record keeping system. It would provide an evidentiary basis for establishing wage violations independent of employee testimony, effective administrative resolution of violations, manufacturer liability, and compensation for wage violations to employees even when they were unwilling to testify or to file suit.

Though the system would increase the volume of documents handled by a wage office, it would not require added bureaucratic structure. The documents would be filed in the office and would be

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practice a studied ignorance to which they are not entitled (emphasis added).

In the garment industry it would be a matter of common sense to presume manufacturer knowledge of a wage violation where the contract price is too low to guarantee the minimum wage, since the manufacturer is a party to the contract.

[143] This distinction is necessary to cover cases where the contract is sufficient to guarantee minimum wages but the contractor is not paying minimum wages. This presumption would be reasonable since the contractor will have filed his wage payment summaries with the manufacturer. The effect of the presumption would be to force the manufacturer to police his contractor's wage payments.

[144] *Cf.* OSHA, 29 U.S.C. § 659 (1970).

[145] *Cf.* A.B. 353, Cal. Legislature (1975-76), introduced by Assemblymen Montoya, Alatorre, and Egeland, which would require homework to be confiscated and destroyed.

[146] *Cf.* OSHA, 29 U.S.C. § 659(c) (1970).

[147] *Cf.* OSHA, 29 U.S.C. § 660(a) (1970).

[148] *Cf.* the Refuse Act of 1899, 33 U.S.C. § 411 (1970), where a citizen who reports a violation which results in a criminal conviction may be entitled to one-half the fine.

examined pursuant only to a complaint or a departmental investigation. The system would also increase federal regulation of the garment industry. Federal involvement is justified where, as here, the states are ineffective in enforcing laws regarding goods in interstate commerce.[149]

2. *THE LITIGATING EMPLOYEE: REFORM OF THE PRESENT WAGE LAW*

Whereas the new record keeping system is designed to benefit the employee who wishes to remain anonymous, reforms of the present wage law are necessary for the benefit of the employee who chooses to bring an action to recover personal wage claims and damages.[150] The employee could use records available under the proposed record system to help her establish the violation and the amount of back wages and damages.

While the proposed record keeping system and the willingness of the employee to testify in her own behalf largely resolve the evidentiary problems,[151] several problems remain: a weak retaliation statute, limited remedies, and lack of manufacturer liability under the hot cargo provision.

a. The Retaliation Statute[152]

A strengthened retaliatory firing statute is necessary to protect the employee who chooses to bring an action. A presumption that a firing is retaliatory when it closely follows employee involvement in legal action against the employer would accomplish this purpose. An employer should not be allowed to fire an employee who has brought a complaint or testified unless he can show that the firing is in good faith.[153]

b. Remedy Reform[154]

To effect compliance with the wage laws, the pressure put on potential violators must be more than the remote threat of a weak

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[149] *See* Perez v. United States, 402 U.S. 146 (1971).

[150] Under 29 U.S.C. § 216(c) (1970) and CAL. LABOR CODE § 1193.5(b) (West 1971), the wage agency may direct payment of unpaid minimum wages or unpaid overtime compensation owing to an employee. If the employee accepts these payments, he waives his right to any private cause of action including any action for damages.

[151] *See supra* notes 51-93 and accompanying text.

[152] *See supra* notes 63-67 and accompanying text.

[153] *Cf.* California's retaliatory eviction statute, CAL. CIV. CODE § 1942.5 (West Supp. 1974), which provides that the landlord may not evict the tenant for 60 days after a documented complaint unless he can show that the eviction is in good faith.

[154] *See supra* notes 94-105 and accompanying text.

sanction. Pressure could be increased in four ways. First, employee initiated civil actions should permit some form of punitive damages in order to increase the employee's incentive to bring the action. Second, employees should be able to initiate injunctive action. Although recovery in an injunctive action is limited to restitution,[155] the employee might want to bring the action for its prospective effect — the threat of a criminal contempt penalty for any future manufacturer violation. Third, where the contractor or manufacturer offers to pay back wages to the employee and to comply with wage laws in the future,[156] and the employee decides to accept the offer rather than prosecute the action in court, the wage agency should be given the power to supervise the agreement and levy fines for violations of the agreement. Fourth, the two conviction prerequisite to imprisonment for criminal violation should be removed.[157] An employer's mistaken or even negligent underpayment, though still grounds for a civil action, would not be grounds for a criminal action because of the wilful violation requirement.[158] Where wilful violation is an element of the crime, little justification exists for giving the employer a second chance, particularly given the difficulty of obtaining a first conviction.

c. Manufacturer Liability Under the Hot Cargo Provision[159]

The two basic problems in seeking manufacturer liability under the present hot cargo provision are the difficulty of showing manufacturer knowledge[160] of a wage violation and the limitation on the actions available against the manufacturer under the provision. The presumptions of manufacturer knowledge available under the new record keeping system[161] would help solve the problem of proving manufacturer knowledge. The problem of limited actions could be solved by simply expanding the remedies available under the hot goods provision to include employee initiated civil suits.[162] This

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[155] *Cf.* the employee initiated civil action under 29 U.S.C. § 216(b) (1970) and CAL. LABOR CODE § 1194 (West 1971) where the employee may recover damages as well as back wages.

[156] *See supra* note 150 and accompanying text.

[157] *See supra* note 105 and accompanying text.

[158] 29 U.S.C. § 216(a) (1970).

[159] *See supra* notes 119-26 and accompanying text.

[160] *See* the manufacturer-defendant's answers to interrogatories in Cheong v. Lai, Civil No. 51213 (N.D. Cal., Oct. 6, 1970). The manufacturer displays a studied ignorance of his contractor's wage payment practices.

[161] *See supra* notes 137-49 and accompanying text.

[162] One alternative approach to the problem is the expansion of the definition of "employer" to include the garment manufacturer. *See* S.B. 939, Cal. Legislature (1970) introduced by Senator Moscone of San Francisco and killed in the Committee on Industrial Relations. Such an expansion would be too broad. While the manufacturer should be liable for most wage violations since these are within his control, the manufacturer should not be liable for contractor torts and other matters outside his control.

would allow the employee to join the manufacturer and the contractor as defendants for wage violations.

VII. CONCLUSION

Chinatown garment shop employees do not receive the minimum wage under the present wage statutes. They are afraid to enforce their rights. Year after year, more of them are trapped in the poverty of Chinatown:

> They come over, they don't speak English, the man gets a job in a restaurant and the woman in a garment factory down here. In a few years, they think they'll learn English, save some money, and move out. Everyone talks about that. But . . . they've lived in Chinatown all ten or twenty years. They earn just enough to keep going, they've hardly saved at all. They don't get exposed to English at work, they're too tired to study at night. The job they got to tide over ends up as life-time occupation. It's like a vicious cycle. If they didn't have the garment industry, or those restaurant jobs, a lot of people in Chinatown wouldn't make it. But as long as they have those jobs, they'll never get out of here.[163]

Until legislation is passed that is equal to the problems and peculiarities of the Chinatown garment industry, industry abuse of the wage laws will continue unabated.

Harold Paul Dygert III
David Shibata

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[163] DE NEE, *supra* note 52, at 317.