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## Hostess and the Search for Workplace Dignity

Michael Selmi\*

### I. INTRODUCTION

Shortly before Thanksgiving 2012, another American icon expired and the clamoring began. Hostess Brands, maker of Twinkies, Ho Hos, Wonder Bread, and other baked goods, filed for a bankruptcy that marked the end of the company.<sup>1</sup> There was a sudden spike in the price of Twinkies, and many who had not bought a Twinkie in decades began to bemoan the loss of an iconic brand, seemingly unaware of the irony that if they had actually purchased the snacks, this round of bankruptcy would not have been necessary.<sup>2</sup>

To those who had been following the saga, the bankruptcy filing was hardly a surprise, as Hostess had cycled through owners, name changes, and a previous bankruptcy during the prior decade as demand for its products dwindled. But this time, the media entered the story, and it was not long before the workers were blamed for being greedy by refusing to accept wage cuts to keep Hostess afloat.<sup>3</sup> Hostess had a heavily-unionized workforce, and the members of its Bakers union refused to accept wage cuts while the Teamsters agreed to do so. When they were unable to reach an agreement, the Bakers union went on strike—a strike that preceded the company’s bankruptcy filing. Before long, the bakery union members were being called to task for having killed the Twinkie, much like their brethren had earlier been

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1. The bankruptcy and events leading up to Hostess’s shutdown are discussed in detail in Part II. The most detailed discussion can be found at David A. Kaplan, *Hostess Is Bankrupt . . . Again*, FORTUNE, Aug. 13, 2012, at 16.

2. Michael Liedtke, *With Hostess Shutting Down, A Gold Rush on Twinkies*, DETROIT FREE PRESS, Nov. 18, 2012, <http://www.freep.com/article/20121118/NEWS07/311180210/With-Hostess-shutting-down-a-gold-rush-on-Twinkies>.

3. The company specifically blamed the union that represented the bakers—the Bakery, Confectionary, Tobacco Workers and Grain Millers International Union—for its liquidation. See Alana Semuels et al., *Hostess Shuttering Doors, Ending Era of Iconic Brands*, CHI. TRIB., Nov. 17, 2012, [http://articles.chicagotribune.com/2012-11-17/business/chi-hostess-brands-seeks-court-permission-to-liquidate-20121116\\_1\\_hostess-brands-gregory-rayburn-madison-zingers](http://articles.chicagotribune.com/2012-11-17/business/chi-hostess-brands-seeks-court-permission-to-liquidate-20121116_1_hostess-brands-gregory-rayburn-madison-zingers) (“The company . . . has asked a bankruptcy judge for permission to go out of business and lay off 18,500 workers, blaming a labor strike by members of the Bakery [union].”). For a journalistic indictment of the unions, see Holman W. Jenkins, Jr., *Jenkins: Twinkies – A Defense*, WSJ.COM, Nov. 20, 2012, <http://online.wsj.com/article/SB10001424127887324352004578130912150512612.html>.

blamed for the demise of the domestic auto industry, the steel industry, and other relics from a previous era.

There was some truth to the story. It is true that the Bakers union refused to accept wage cuts prior to the most recent bankruptcy filing, but it is certainly not true that greed was the culprit—rather dignity was. The nearly six thousand bakery workers declared that they had had enough, that the job they were being offered was not worth having, and that the company could not assume that workers would do anything to keep their jobs. These workers took a stand, proclaiming in essence that some jobs are just not worth having.

But other jobs are worth having. Indeed, many employers—in various industries and with various agendas—treat their employees with respect and dignity, and these employers should be rewarded, particularly those who fulfill consumer demand so that consumers can choose to spend their money to aid the respectful treatment of workers. Yet, as matters currently stand, it is difficult to know which companies consumers should support. Many—likely most—of the “Best Companies to Work For” lists are rarely meaningful, and places on those lists are often purchased by companies seeking to improve their public image. Walmart was the most recent company to reveal the limited appeal of these rankings, as it routinely landed on Fortune’s list of best places to work despite having what appear to be rather egregious employment practices.<sup>4</sup>

This short Essay will use the recent Hostess bankruptcy filing and the principled stand of its workers to advocate for a consumer-driven movement that would support companies seeking to provide their workers with a humane workplace. Part II of this Essay discusses the recent stand by the Hostess workers, and then Part III discusses ways in which consumers have made a difference to the production and actions of many companies, including recent changes made by Apple in response to adverse publicity. Part IV of the Essay discusses the difficulty of communicating employer practices to consumers. Part V explores the recent emergence of Benefit Corporations that are designed to pursue goals that extend beyond profit maximization. Part V also calls for the development of a labeling system that would highlight humane employers by creating a label that proclaims that a product is “Humanely Produced.”

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4. Daniel Akst, *Welcome to Sherwood Forest, Er, Wal-Mart*, N.Y. TIMES, Mar. 6, 2005, at B6. Walmart’s employment practices have been the subject of numerous lawsuits—some of which are simply a function of its size—some of which have led to multi-million dollar settlements. For several analyses of the company’s practices, see Richard Thompson Ford, *Discounting Discrimination: Dukes v. Wal-Mart Proves that Yesterday’s Civil Rights Laws Can’t Keep Up With Today’s Economy*, 5 HARV. L. & POL’Y REV. 69 (2011); Gary Gereffi & Michelle M. Christian, *The Impact of Wal-Mart: The Rise and Consequences of the World’s Dominant Retailer*, 35 ANNUAL REV. OF SOC. 573 (2009); Lea S. VanderVelde, *Wal-Mart as a Phenomenon in the Legal World: Matters of Scale, Scale Matters*, Univ. of Iowa Legal Studies Research Paper No. 07-08 (Mar. 2007), <http://ssrn.com/abstract=971836>.

## II. THE UNREPORTED STORY: THE HOSTESS WORKERS' JUSTIFIED RESPONSE WHEN FACED WITH EGREGIOUS EMPLOYER PRACTICES

Over the last decade, workers have been beat down. Unemployment rose to levels that had not been seen for many years, and while productivity increased rather substantially, wages did not follow.<sup>5</sup> This was true across educational levels. The labor market typically prefers more education, and although it still does, the wage premium associated with higher levels of education declined during the last decade.<sup>6</sup>

Education and union membership have traditionally been the two primary means to middle-class wages and jobs, but with both faltering, workers have been left in a particularly vulnerable position. In certain sectors, unions have made inroads and improved the lives of many low-wage workers, particularly janitors in large cities around the country who have seen their wages increase substantially as a result of the successful Justice for Janitors campaign.<sup>7</sup> Hotel workers and nurses have also seen some victories, and there have been efforts aimed at the growing class of home health aides.<sup>8</sup> For the most part, however, meaningful victories have been elusive. Indeed, for every new union member, another one is removed from the rolls.<sup>9</sup> Some of this trend is the lingering result of our decades-long economic transition: The auto industry and what is left of the steel industry continue to shed union jobs, and the replacement industries have not lent themselves to broad union mobilization.

The Hostess workers can be seen as a product of that earlier era. The company, which had only recently adopted its most famous brand's name, Hostess, had been in existence for more than eighty years, and up until its end, approximately eighty percent of the workforce was unionized.<sup>10</sup> Like many of the older economy's industries, the company's snack products reached their peak popularity some thirty years ago. Although in recent years the company had adopted some new brands, its snack goods line failed to evolve, despite

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5. See, e.g., LAWRENCE MISCHEL ET AL., *THE STATE OF WORKING AMERICA*, 173–74 (12th ed. 2012).

6. *Id.* at 214–16.

7. The Justice for Janitors campaign has been enormously successful in raising the wages and working conditions of janitors around the country and is noteworthy for organizing immigrant workers and utilizing members of the community to spearhead the organization drives. See Christopher L. Erickson et al., *Justice for Janitors in Los Angeles and Beyond: A New Form of Unionism in the Twenty-First Century?*, in *THE CHANGING ROLE OF UNIONS: NEW FORMS OF REPRESENTATION* 22 (2004).

8. Michael Selmi, *Unions, Education and the Future of Low-Wage Workers*, 2009 U. CHI. LEGAL F. 147, 156–63 (2009).

9. The Department of Labor publishes annual statistics on union members. For the most recent statistics, see Bureau of Labor Statistics, *Union Members Summary*, U.S. DEP'T OF LABOR (Jan. 23, 2013), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

10. The company had twelve unions and approximately 12,000 union members between the Bakers and Teamsters unions. See Michael J. de la Merced & Steven Greenhouse, *A Push to Save the Twinkies: As Labor Talks Collapse, Hostess Turns out the Lights*, N.Y. TIMES, Nov. 17, 2012, at B1, B6; Ben Protess, *Hostess Brands, Twinkies Maker, Files for Bankruptcy*, N.Y. TIMES, Jan. 12, 2012, at B2 (noting that “[a]bout 80 percent of the company’s 19,000 employees belong to a dozen separate unions”).

changing consumer tastes.<sup>11</sup> The company's structure also failed to evolve, and because of the regional nature of the baking, Hostess had several hundred union contracts, though most of those contracts were with the Teamsters or the Bakers union.<sup>12</sup>

The company had previously filed for bankruptcy in 2004 and remained in that bankruptcy for five long years. It emerged with new owners, a private equity fund that had some connection to former Congressman Dick Gephardt, a long-time union advocate, and substantially greater debt.<sup>13</sup> In fact, the company's debt was \$200 million more after the bankruptcy than going in, a highly unusual move and no doubt a revealing sign.<sup>14</sup> During the 2004 bankruptcy proceeding, the workers made concessions that totaled more than \$100 million, and those concessions failed to turn the company around as it again filed for bankruptcy protection toward the end of 2011.<sup>15</sup>

It was at that point that the battle between the owners and the workers began. Once again, the company demanded wage concessions from the workers while seeking to increase the compensation for its managers.<sup>16</sup> Following protests by the unions, the company removed its Chief Executive but continued to demand wage concessions from the workers and contended that without the concessions the company would be forced to liquidate. The Teamsters reluctantly reached an agreement that included substantial wage and benefit cuts, as well as work rule changes, while the bakers union ultimately held out, refusing to make the concessions and voting to go on strike by a margin that exceeded ninety percent of its members.<sup>17</sup>

It has always struck me as odd to define workers as greedy; perhaps short-sighted, but greed seems to be the wrong description. After all, workers are not responsible for maintaining the health of their company and are really only concerned about preserving or enhancing their jobs, including their wages and benefits, and where there is a union in place, perhaps expanding union jobs. But to think that the workers at Hostess were greedy is to

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11. See Steven M. Davidoff, *Corporate Forces Endangered the Twinkie, But May Save It*, N.Y. TIMES, Feb. 5, 2013, <http://dealbook.nytimes.com/2013/02/05/corporate-forces-endangered-the-twinkie-but-may-save-it/>. The company's products had a surprisingly resilient following, particularly considering the Twinkie was its most popular item and the snack had not changed much since it was created in the 1930s. Up until the end, the company maintained sales of more than \$1 billion annually, but that was not nearly enough to overcome the debt it had accrued.

12. See *id.* (noting that the company had 394 different union contracts).

13. See Kaplan, *supra* note 1, at 16.

14. Michael Hiltzik, *Poor Management, Not Union Intransigence, Killed Hostess*, L.A. TIMES, Nov. 25, 2012, <http://articles.latimes.com/2012/nov/25/business/la-fi-hiltzik-20121125> (noting that the company went into the 2004 bankruptcy with \$575 million in debt and emerged with \$774 million in debt).

15. *Id.*

16. See de la Merced, *supra* note 10, at B6 (noting that the unions were "instrumental" in ousting the Chief Executive after his compensation was tripled).

17. See Jake Blumgart, *Venture Capitalism – Not Unions – Killed Twinkies*, SALON, Nov. 12, 2012, [http://www.salon.com/2012/11/20/vulture\\_capitalism\\_not\\_unions\\_killed\\_twinkies](http://www.salon.com/2012/11/20/vulture_capitalism_not_unions_killed_twinkies) (explaining that ninety-two percent of the Bakers union voted against the wage cuts). The Teamsters union narrowly approved the concessions.

misunderstand the situation, just as was true with the auto workers before them.<sup>18</sup> Workers should always try to obtain as much in wages and benefits as they can; it is the function of management to tailor the compensation in order to permit the company to remain competitive. Union workers are, in fact, the only workers who are routinely derided for trying to maximize their compensation. The one caveat might be when worker demands place the company on the brink of collapse. Many have defined the situation at Hostess in just this way—the refusal of the bakers union to make additional wage concessions forced the company into liquidation.

As is usually the case, there was more to the story. As noted previously, the workers had given up more than \$100 million in concessions during the company's first run at bankruptcy, and it did not appear that the concessions led to anything other than lower pay and lower benefits. The company was now embarking on yet another bankruptcy, and the question for the workers was what the likely outcome of another round of concessions would be. The complexity of the question was compounded by the pay increases the company afforded its managers; it was only after the unions objected that a new executive was put in place.

The press made much of the fact that the Teamsters union agreed to concessions as a way to keep their jobs while the Bakers union held out, thus imperiling all of the company's 18,000 jobs, not just the jobs of the bakers.<sup>19</sup> Some portrayed the stance of the Bakers union as a game of chicken or a gamble that failed to pay off, but there was a principled basis for their decision—one that distinguished their interests from those of the Teamsters.

Unions have traditionally obtained substantial pensions for their members, and that was true for the Hostess workers as well. But as is all too common when bankruptcy is on the horizon, the company had diverted pension contributions towards operating expenses.<sup>20</sup> The two unions had different pension provisions, and the Teamsters union was not affected by the diversion of funds. The bakers belonged to what is known as a multiemployer pension plan that was run by the Bakers union and included employers other

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18. The auto workers have frequently been blamed for the troubles the auto industry has encountered, particularly because the workers have traditionally received extremely generous health and pension benefits. Those costs can add to the cost of an American-made vehicle, but it would certainly be a gross exaggeration to lay the blame for the benefits at the feet of the union, assuming they do put American companies at a disadvantage compared to their foreign competitors. Surely, it was management's responsibility to negotiate wages and benefits that could be sustained, and it is likely that many of the managers who were negotiating such distant benefits were more concerned with short-term benefits than the long-term costs of those wage and benefit packages. For an excellent exploration of the auto industry, see PAUL INGRASSIA, *CRASH COURSE: THE AMERICAN AUTOMOBILE INDUSTRY'S ROAD FROM GLORY TO DISASTER* (2010).

19. See Lisa Brown, *Former Hostess Workers Scramble for Employment in Dickey Economy*, ST. LOUIS POST-DISPATCH, Jan. 14, 2013, at A3 (discussing conflict between Bakers and Teamsters); de la Merced, *supra* note 10, at B1 (detailing Teamsters deal and impasse with Bakers' union).

20. *The Wall Street Journal* broke the story with its coverage on Hostess. See Julie Jargon et al., *Hostess Maneuver Deprived Pension*, WALL ST. J., Dec. 10, 2012, <http://online.wsj.com/article/SB10001424127887323316804578165813739413332.html>.

than Hostess; the bakers had also traditionally chosen to shift a significant percentage of their income to pensions.<sup>21</sup> In the five months leading up to the 2012 bankruptcy filing, the company had missed \$22 million in pension fund payments, which included portions of employee wages that had been earmarked for the funds.<sup>22</sup> When it became clear that not only would the workers be expected to make substantial wage and benefits concessions for the company to emerge from the most recent bankruptcy, but also that their pensions would not be safe from further raids, the Bakers decided to cut their losses. Lower wages, depleted pensions, and an uncertain future did not seem like a worthwhile bet.

It was also critically important that the bakers took a stand on an issue as important as pension theft. In all too many cases, distressed employers have sought to raid pension funds in order to keep their businesses running, or they seek to discharge their pension liabilities during bankruptcy proceedings.<sup>23</sup> Pensions, however, are not perks, bonuses, or some bounty to be found at the end of one's career; rather, they are nothing more than deferred income. When employers offer a pension, they are effectively offering to pay most of one's wages today and to hold onto some of the wage for the future. Employers do so because workers (all individuals really) are typically poor savers and employers can dispassionately invest the sums collectively in a way individual employees may not be able to do. When employers raid pension funds, however, they are effectively stealing employee wages while violating the trust the employees placed in their employers. So, when the employees realized that Hostess had been spending the employees' rightfully-earned money and that the practice would continue, the employees declared that they had had enough.

Indeed, the real message sent by the Bakers union was they had had enough and that their employers could not assume that workers would make whatever sacrifices were necessary to keep their jobs. There is a breaking point, a point at which the job no longer becomes worth keeping. This is one of the issues percolating within the minimum wage job debate—raising the minimum wage might reduce employment levels, albeit modestly, but the question is whether the tradeoff is worth it to ensure that workers receive above poverty-level wages.<sup>24</sup> This same issue has bedeviled criticisms of the

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21. *See id.*

22. *Id.* The financial condition of multiemployer pensions, which are funded by a group of employers (typically in one industry), is precarious, and they are frequently underfunded. *See* Paul M. Secunda, *The Forgotten Employee Benefit Crisis: Multiemployer Benefit Plans on the Brink*, 21 CORNELL J. L. & PUB. POL'Y 77, 80 (2011).

23. Often times, these abuses of pension benefits are legal, and they can be quite common. For a recent discussion, see generally ELLEN E. SCHULTZ, *RETIREMENT HEIST: HOW COMPANIES PLUNDER AND PROFIT FROM THE NEST EGGS OF AMERICAN WORKERS* (2011).

24. Traditionally, economists have contended that minimum wage increases require a tradeoff between higher wages and job losses, although that traditional wisdom has been cast into doubt, initially by an influential study of fast food establishments. *See* David Card & Alan Krueger, *Minimum Wage and*

wage structures of developing countries. What workers need to understand is that it is not always the case that any job is better than no job, just as it is not always true that low-wage nations will ultimately become high-wage nations. The evidence for such transformations is surprisingly limited.

Indeed, the notion that workers must do whatever is necessary to preserve their job flies in the face of labor standards, including the minimum wage. Minimum labor standards define the bare minimum for humane work, and those standards mean that at some point the work may no longer be worth keeping. This sentiment was captured by a bakery worker for Hostess who stated that “[i]t will be hard to replace the job I had, but it will be easy to replace the job they were trying to give me.”<sup>25</sup>

### III. CONSUMERS HAVE A SUBSTANTIAL IMPACT ON EMPLOYER PRACTICES

Many employers endeavor to treat their employees with respect and dignity, and consumers should use their purchasing power to support those employers. Indeed, just in the last several years we have seen how consumer pressure, fueled by media stories, can lead to significant changes in workplace conditions. For example, Walmart, a notoriously difficult low-wage employer, altered its health care packages after damaging media stories broke, including the leak of an internal memorandum detailing ways in which the company could save health care costs.<sup>26</sup> Shortly after the media blitz, Walmart began offering an array of health benefit packages, including benefits to part-time workers.<sup>27</sup>

More recently, Apple has been the subject of media pressure regarding its production facilities in China. As *The New York Times* reported, two iPad factories exploded in 2011, injuring many workers and killing others.<sup>28</sup> In 2010, nearly 140 workers at another Apple supplier were injured after using poisonous chemicals in the course of their employment.<sup>29</sup> It was also

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*Employment: A Case Study of the Fast-Food Industry in New Jersey & Pennsylvania*, 84 AM. ECON. REV. 772 (1994). Since then a lively debate has broken out, which intensifies whenever there is consideration of increasing the minimum wage. Compare David Neumark et al., *Revisiting the Minimum Wage-Employment Debate: Throwing Out the Baby with the Bathwater?*, Institute for the Study of Labor Paper No. 7166 (Jan. 2013) (contending that there is a tradeoff between raising minimum wage and job losses), with John Schmitt & David Rosnick, *The Wage and Employment Impact of Minimum-Wage Laws in Three Cities*, CTR. FOR ECON. & POL’Y RESEARCH (2011), available at <http://www.cepr.net/index.php/publications/reports/wage-employment-impact-of-min-wage-three-cities> (concluding that wages can be raised without a discernible impact on employment for low-wage workers).

25. Blumgart, *supra* note 17 (quoting a fourteen-year Hostess bakery veteran).

26. See Steven Greenhouse & Michael Barbaro, *Wal-Mart Memo Suggests Ways to Cut Employee Benefit Costs*, N.Y. TIMES, Oct. 26, 2005, [http://www.nytimes.com/2005/10/26/business/26walmart.ready.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/10/26/business/26walmart.ready.html?pagewanted=all&_r=0) (discussing internal memorandum regarding health costs).

27. Michael Barbaro, *Wal-Mart’s Detractors Come in from the Cold*, N.Y. TIMES, June 5, 2008, <http://www.nytimes.com/2008/06/05/business/05walmart.html?pagewanted=all> (discussing changes Walmart had made in response to consumer pressure and bad publicity).

28. Charles Duhigg & David Barboza, *In China, the Human Costs that Are Built into an iPad*, N.Y. TIMES, Jan. 25, 2012, at A1.

29. *Id.*



reported that many of Apple's supply partners regularly required workers to work long hours in extremely poor conditions, and particular attention was focused on Apple's largest supplier, Foxconn, where several worker suicides occurred in 2010.<sup>30</sup> This publicity, as well as other negative attention directed toward Apple's employment practices, resulted in substantial changes.

In January 2012, Apple joined the Fair Labor Association ("FLA"), a nonprofit labor-monitoring group that now audits several of Apple's suppliers, including Foxconn.<sup>31</sup> Shortly thereafter, Foxconn agreed to alter its practices so that within a year workers would be restricted to forty-hour weeks with nine hours of additional overtime permitted, which was substantially more humane than the prior practices where some employees worked up to 100 hours per week.<sup>32</sup> Equally significant, wages for many workers were set to increase by as much as fifty percent.<sup>33</sup>

Apple has also sought to address child labor violations, particularly among its main suppliers.<sup>34</sup> For example, when an audit administered in January 2013 revealed that one of Apple's Chinese suppliers employed seventy-four underage workers, Apple promptly dropped the supplier.<sup>35</sup> Apple also established the Underage Labor Remediation Program, which requires suppliers to return underage workers to school, pay for their education, and continue to pay the children what they received while employed.<sup>36</sup> In addition, Apple publicly released the names of many of its suppliers for the first time and tripled the staff for its social responsibility office.<sup>37</sup>

Finally, at the end of December 2012, Apple announced its plan to invest \$100 million in 2013 to bring manufacturing of some Mac computers back to the United States, a move that would create approximately 200 jobs.<sup>38</sup> It is

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30. *Id.* at B10.

31. David Sarno, *Apple Joins Industry-Funded Labor Monitor for China Factory Audit*, L.A. TIMES, Feb. 13, 2012, <http://articles.latimes.com/2012/feb/13/business/la-fi-tin-apple-labor-20120213>.

32. See Keith Bradsher & Charles Duhigg, *Signs of Changes Taking Hold in Electronics Factories in China*, N.Y. TIMES, Dec. 26, 2012, <http://www.nytimes.com/2012/12/27/business/signs-of-changes-taking-hold-in-electronics-factories-in-china.html?pagewanted=1&r=1>; Sarno, *supra* note 31; *Fair Labor Association Finds Progress at Apple Supplier Foxconn*, FAIR LABOR ASS'N (Aug. 21, 2012), [http://www.fairlabor.org/press-release/foxconn\\_verification\\_report](http://www.fairlabor.org/press-release/foxconn_verification_report).

33. Bradsher, *supra* note 32.

34. Poornima Gupta & Noel Randewich, *Apple Discovers Underage Workers at iPhone Factories*, BUSINESS INSIDER, <http://www.businessinsider.com/apple-discovers-underage-workers-at-iphone-factories-2013-1#ixzz2IzjOm2WR> (last visited May 21, 2013).

35. Tim Culpan & Adam Satariano, *Apple Says China Agent Forged Papers for Underage Workers*, BLOOMBERG (Jan. 25, 2013), <http://www.bloomberg.com/news/2013-01-25/apple-expands-audits-says-china-labor-agent-forged-documents.html>.

36. APPLE INC., APPLE SUPPLIER RESPONSIBILITY – 2013 PROGRESS REPORT 31 (2013), [http://images.apple.com/supplierresponsibility/pdf/Apple\\_SR\\_2013\\_Progress\\_Report.pdf](http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2013_Progress_Report.pdf).

37. Bradsher & Duhigg, *supra* note 32.

38. Anne Kates Smith, *Foreign Factories Come Back Home*, KIPLINGER (2013), <http://www.kiplinger.com/article/investing/T019-C000-S002-more-manufacturing-in-the-us.html>; Joanna Stern, *Apple to Start Making Some Mac Computers in America in 2013*, ABC NEWS (Dec. 6, 2012), <http://abcnews.go.com/Technology/apple-start-making-mac-computers-america-2013/story?id=17894736#.UWYgcJNP4s>.

not entirely clear that this move was related to the bad publicity, but the timing certainly suggests a connection. It is also becoming increasingly clear that the combination of suppressed American wages and rising Chinese wages has narrowed the gap in overseas costs savings.<sup>39</sup> Furthermore, domestic manufacturing would allow Apple to monitor the quality of its products more carefully.<sup>40</sup> The jobs returning to the United States will not be traditional factory jobs but will require more specific skill sets geared toward automated production, with wages lower than the pre-outsourcing era.<sup>41</sup>

We also know that bad publicity and consumer pressure has had an important and significant effect on overseas manufacturing practices of other large American companies. High profile campaigns against Reebok, Walmart, and the Gap created pressure for companies to police the practices of their contractors, much like the pressure that was more recently imposed on Apple.<sup>42</sup> The issue of wages in developing countries is complicated, and many have argued that raising the wages or improving working conditions in one country will simply shift production to other low-wage countries, resulting in no net benefit but only a loss of jobs in the original manufacturing country.

The arguments on this front are undeniably complex, and there seems little room for persuasion. My own view is that we ought to be moving toward higher and stronger labor standards for all workers rather than the inevitable “race to the bottom.” And it seems to me that it is highly hypocritical of American consumers to approve of child labor or poverty-level wages abroad that we would never tolerate at home. Obviously, the conditions and circumstances differ, but relying on exploited labor, whether at home or abroad, is still morally problematic. Accordingly, working conditions are something consumers should be able to consider when they choose how to spend their money.

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39. See Bruce Bartlett, *Outsourcing, Insourcing and Automation*, N.Y. TIMES – ECONOMIX (Jan. 29, 2013, 6:00 AM), <http://economix.blogs.nytimes.com/2013/01/29/outsourcing-insourcing-and-automation/>; *Coming Home: A Growing Number of American Companies Are Moving Their Manufacturing Back to the United States*, THE ECONOMIST, Jan. 19, 2013, <http://www.economist.com/news/special-report/21569570-growing-number-american-companies-are-moving-their-manufacturing-back-united> (citing Boston Consulting Group data).

40. John McQuaid, *Why Apple Is Bringing Manufacturing Back to the United States*, FORBES (Dec. 6, 2012), <http://www.forbes.com/sites/johnmcquaid/2012/12/06/why-apple-is-bringing-manufacturing-back-to-the-united-states/>.

41. See Bartlett, *supra* note 39.

42. For two good discussions of the recent history of the anti-sweatshop movement, much of which arose on university campuses, see Peter Dreier, *The Campus Anti-Sweatshop Movement*, THE AM. PROSPECT, Dec., 19, 2001, <http://prospect.org/article/campus-anti-sweatshop-movement>; Michele Micheletti & Dietlind Stolle, *Mobilizing Consumers to Take Responsibility for Global Social Justice*, 611 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 157, 165 (2007).

#### IV. THE DIFFICULTY OF COMMUNICATING EMPLOYER PRACTICES TO CONSUMERS

There is little question that consumer pressure can make a difference to employers' practices, but the larger question is why consumers do not use their spending power more effectively. Part of the problem is likely a matter of knowledge or information regarding which employers are worthy of consumer support. In the United States, we have labels that will tell us whether our fish were sustainably caught, whether animals we eat were humanely raised, and whether farmers in developing countries received what is defined as a fair price for their goods. It is even possible to find labels that indicate the goods were not made with "sweat labor," though these products, few in number, are generally produced overseas in areas where sweatshops still abound. But there is no label that indicates whether domestic employers treat their employees with respect or pay them decent wages. The only label that comes close is the "Union Made" label, which is increasingly difficult to find, and while "union made" might be a good proxy for decent wages, it is too late in the day to expect such a label to make a comeback given the declining influence of unions.

It should also be possible to identify good employers who are not union shops, as it is a mistake to think that unions are the only means to a dignified workplace. Indeed, many employers pride themselves on the way they treat their employees, and some even use their employment practices as part of their marketing campaigns. Patagonia may be the best known of these companies. Privately held, the company, which makes expensive outdoor gear, has long been a haven for creative employees with a penchant for surfing.<sup>43</sup> Wegmans, a grocery store with a dedicated following, likewise seeks to put its "employees first," and, toward that end, it pays fair wages and engages in profit sharing with its employees.<sup>44</sup> Costco, a warehouse store that competes directly with Walmart's Sam's Club, is also known for paying decent wages and providing generous benefits.<sup>45</sup>

Often, however, it is difficult to know how to define employers who treat their employees with respect and dignity. Wegmans, for example, is a

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43. Patagonia has been the subject of considerable commentary regarding its employment practices. For one example, see Seth Stevenson, *Patagonia's Founder Is America's Most Unlikely Business Guru*, WALL ST. J. MAG., Apr. 26, 2012, <http://online.wsj.com/article/SB10001424052702303513404577352221465986612.html>.

44. Wegmans proclaims that it puts its employees first, and it is regularly finds itself listed among the best employers. See, e.g., Timothy R. Hinkin & J. Bruce Tracey, *What Makes It So Great? An Analysis of Human Resources Practices Among Fortune's Best Companies to Work For*, 51 CORNELL HOSPITALITY Q. 158, 160 (2010) (discussing Wegmans); see also David Rohde, *The Anti-Walmart*, REUTERS (Mar. 22, 2012), <http://blogs.reuters.com/david-rohde/2012/03/22/the-anti%E2%80%93walmart/> (discussing profit-sharing with employees).

45. See Wayne F. Cascio, *Decency Means More than "Always Low Prices": A Comparison of Costco to Wal-Mart's Sam's Club*, 20 ACAD. MGT. PERSPECTIVES 26, 28, 32 (2006); Steven Greenhouse, *How Costco Became the Anti-Wal-Mart*, N.Y. TIMES, July 17, 2005, at B1.

non-union employer in an industry that retains a substantial union presence.<sup>46</sup> Similarly, Whole Foods—often thought to be a highly desirable employer for the benefits and responsibility they provide their employees—has a co-founder who is zealously anti-union, and, true to form, Whole Foods remains union-free.<sup>47</sup> American Apparel might be considered another ambiguous employer. The company is well-known for its employment practices and its lobbying on behalf of undocumented workers, while its owner is equally well-known for his often bizarre interview tactics and widespread allegations of sexual harassment.<sup>48</sup> The verdict on American Apparel should be easy—doing some admirable things should not be sufficient to garner broad public support when tolerance for pervasive sexual harassment seems to be part of the company brand. The cases of Whole Foods and Wegmans are more complicated, even though those who support unions should avoid these stores as a practical matter because union alternatives are typically readily available, at least in large markets. Yet, if employee welfare is what is at issue, then both of these employers likely should be supported.

Not only is it difficult to know which companies are actually benevolent employers, it is also often difficult to know what should be the proper consumer reaction to corporate events. The Hostess case study provides a telling example. A consumer who is concerned about preserving employee jobs perhaps should have begun to gorge on Twinkies or Ding Dongs in an effort to save jobs. But that response plays into the notion that what is important is to preserve jobs at any cost, and it would also suggest that consumers should support any failing company. Respect for employee welfare, as demonstrated by the stance of the Bakers union, requires more than preserving jobs. That premise, however, raises a more difficult question—should consumers have boycotted Hostess after the company sought concessions from its workers? A boycott might pressure the company to work toward a settlement, knowing that it would need both its bakers and its customers to survive, while a threatened boycott might also serve the same purpose without inflicting harm on the company that could tip the balance

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46. On its website, the United Food Commercial Workers (“UFCW”) lists a large number of grocery store chains with a union presence, including Albertsons, Kroger, and Safeway; Wegmans is not listed. See UFCW, [www.ufcw.org/category/industries/retailfood/](http://www.ufcw.org/category/industries/retailfood/) (last visited May 21, 2013). For a discussion of unions in the grocery industry, see Richard W. Hurd, *Collective Bargaining in the Era of Grocery Industry Restructuring*, DIGITALCOMMONS@ILR (July 2, 2008), <http://digitalcommons.ilr.cornell.edu/articles/284>.

47. One of the founders of Whole Foods, John Mackey, is notoriously anti-union. See Steven Shapin, *Paradise Sold: What Are You Buying When You Buy Organic?*, THE NEW YORKER, May 15, 2006, at 85, 87 (noting that Mackey has labeled unions as “parasites”). As a large corporation with a flamboyant co-founder, Whole Foods has been the subject of considerable commentary and criticism. See Mark T. Harris, *Welcome to ‘Whole-Mart’: Rotten Apples in the Social Responsibility Industry*, 53 DISSENT 61 (2006) (criticizing Whole Foods); Josée Johnston, *The Citizen-Consumer Hybrid: Ideological Tensions and the Case of Whole Foods Market*, 37 THEORY & SOC’Y 229 (2008) (discussing the citizen-consumer approach of Whole Foods).

48. See Shan Li, *American Apparel Fights the “Made in America” Fight. For How Long?*, L.A. TIMES, June 3, 2012, <http://articles.latimes.com/2012/jun/03/business/la-fi-american-apparel-factory-20120603> (discussing the company’s practices, including the many lawsuits against its founder).

toward liquidation. What seems clear is that had the labor issues been resolved in a way the unions found acceptable, consumers should have then responded in kind by supporting the company's efforts to emerge from bankruptcy.

Some decisions are not complicated. I would place Walmart's myriad of employment abuses in this category, and anyone who can afford not to shop there should steer clear in order to send a message that we are not willing to save money at the expense of employee welfare. Walmart, however, is not the only culprit along these lines, and one might even conclude that it is our penchant for cheap goods and cheap food that has caused the race to the bottom. For some, this is a real economic decision, given their limited resources; while for others, it is little more than a preference for cheaper goods and food that drives many consumers to shop at a store like Walmart. This consumer choice is currently complicated by the lack of accurate information about employment practices. Confronted with two seemingly identical goods, most consumers will opt for the cheaper one, in part because it is difficult to know why the product is cheaper. But we also know that consumers are often willing to pay more for goods that are produced consistent with one's social objectives in mind. The main problem among consumers may not be greed but the lack of adequate knowledge, an issue I now turn to.

#### V. THE SOLUTION: "HUMANELY PRODUCED" LABELS

Currently, consumers have limited means of evaluating an employer's employment practices. The various labels geared toward social justice concerns are often ambiguous regarding labor practices. Take, for example, the "Fair Trade" label, which communicates that a farmer, or in some cases a producer, received a fair price for their commodity. However, this label does not necessarily mean that workers, if there are any, were likewise provided with a decent wage.<sup>49</sup> The "Made in the USA" label also offers no assurance regarding employment practices and has been subject to abuse in various ways, which have ranged from locating production in various U.S. territories, such as the Northern Mariana Islands where labor laws and their enforcement were lacking, to confusing claims regarding what counts as having been made in the United States.<sup>50</sup> One recent development, and one proposed

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49. See FAIR TRADE: THE CHALLENGES OF TRANSFORMING GLOBALIZATION (Laura T. Reynolds et al. eds., 2007); Geoff Moore, *The Fair Trade Movement: Parameters, Issues & Future Research*, 53 J. BUS. ETHICS 73 (2004) (providing overviews of the Fair Trade movement).

50. The Northern Mariana Islands, a territory of the United States, was long a notorious location for foreign companies to produce apparel under the "Made in the USA" label. Until 2007, the minimum wage laws of the United States did not apply and the territory's minimum wage was substantially lower. Several lawsuits were filed against the manufacturers and some of the retailers of the clothing. See Mark Magnier, *Sweatshop Case May Grow*, L.A. TIMES, Oct. 18, 2001, <http://articles.latimes.com/2001/oct/18/news/mn-58773>.

development, might provide some new means for consumers to determine which employers are, in fact, providing a humane workplace.

Over the last decade, a number of states have created a new category of corporation, what is known as a Benefit Corporation (“B Corp”), that incorporates social justice goals into a company’s charter.<sup>51</sup> Twelve states have now passed legislation that recognizes B Corps.<sup>52</sup> The statutes vary some in their focus, but they are generally geared toward corporations that provide benefits to individuals or corporations while taking into account the environment, employee welfare, and other non-profit generating interests. B Corps are distinct from non-profits in that while they are created with the intent to make profits and receive no tax benefits, the charters permit broader goals than profit maximization. Professor Lynn Stout has made the case that such corporations are not necessary because the notion that public corporations are duty-bound to maximize shareholder wealth is not embodied in any legal requirement but rather has become a perceived norm, particularly among scholars.<sup>53</sup> Yet, formal recognition likely provides some immunity from potential legal liability and also provides information necessary for investors who want to seek out corporations that include social justice goals within their corporate mandate.<sup>54</sup>

The statutes are relatively new, and most of the incorporated companies are still quite small, with a diverse array of interests. The hallmark of all of these B Corps, however, is that they seek to provide a public benefit while making a profit. The statutes also require the corporations to be accountable for pursuing their social mission and require annual reports assessing their social and environmental performance as measured against third-party yardsticks.

A related development, and one that spawned much of the recent legislation, is a certification process administered by the nonprofit group known as B Lab. The B Lab certification operates much like the Fair Trade certification, or something akin to the Certified Organic label administered by the U.S. Department of Agriculture in that companies apply for the certification and have to satisfy a stringent set of requirements in order to

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51. For a recent and comprehensive discussion of benefit corporations, see generally Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 592 (2011). Maryland was the first state to pass legislation authorizing the new form of corporation. Jamie Raskin, a law professor and state senator, was instrumental in its passage. For Raskin’s discussion of the new form of corporations, see Jamie Raskin, *The Rise of Benefit Corporations*, THE NATION, June 27, 2011, at 3.

52. Benefit Corporation, *State by State Legislative Status*, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited May 10, 2013) (tracking the recognition of benefit corporations).

53. See LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 23 (2012) (stating that “U.S. corporate law does not, and never has, required public corporations to ‘maximize shareholder value’”).

54. See Reiser, *supra* note 51, at 598–600; see generally Christopher Lacovara, Note, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 843–63 (discussing potential fiduciary duty complications involving benefit corporations).

achieve the certification.<sup>55</sup> To date, more than 600 companies have obtained certification; although many are small and not consumer-oriented, large consumer companies like Patagonia have obtained the B Lab certification.<sup>56</sup> Ben and Jerry's had recently joined the movement.<sup>57</sup> The process involves a written application and assessment of the company's practices, which requires an analysis of not just labor practices, but environmental and other sustainable goals. In order to obtain certification, the company must score 80 out of 200 points on the survey—what seems to be a relatively low standard—and a certain number of companies are subject to audits each year.

The B Corp certification is a movement in the right direction, but for consumers concerned about employee welfare, the certification provides only limited information. Like most of the various eco-labels that exist, B Corp seems more about the environment than about workers; without some significant digging, it is difficult to know what the certification means. For example, any consumer who searches to find information regarding the labor practices that are consistent with B Corp certification will likely turn up empty-handed without first registering themselves as a business and beginning the assessment process. There is little question that, on average, the employment practices of those certified by B Lab are likely to be better than their competitors, much like union employers, but it is difficult to say more than that.

A better approach would be to create a label, designed for consumer products, that designates the goods as "Humanely Produced." This would be akin to the Union Label that still adorns some goods or the "No Sweatshop" label that likewise adorns a limited range of goods, but a proclamation of humanely produced would be broader than either of those existing labels.

What standards such a label should support would be a complicated question that is beyond the scope of this short Essay, but the concept would be that the label would support humane workplace practices. This would certainly include the providing of benefits to workers, both pension and health care, and it should also include some minimum days of sick leave for all workers (perhaps seven per year). Certified companies should also be required to pay a living wage to all of their employees, and a cap should be imposed on wage inequity between management and lower-level workers. While a union presence would not be required, at least in my judgment, no company should be certified if it actively opposes a union-organizing campaign, effectively requiring such companies to agree to campaign

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55. BCORP, [www.bcorporation.net](http://www.bcorporation.net) (last visited May 21, 2013) (certification can be found on the B Lab website).

56. See Hilary Howard, *Socially Conscious Companies Have a New Yardstick*, N.Y. TIMES, Nov. 8, 2012, [http://www.nytimes.com/2012/11/09/giving/a-new-yardstick-for-socially-conscious-companies.html?\\_r=0](http://www.nytimes.com/2012/11/09/giving/a-new-yardstick-for-socially-conscious-companies.html?_r=0).

57. Howard, *supra* note 56.

neutrality and perhaps a card-check process for union recognition. Essentially, the label would ensure consumers that the product was produced by workers who were treated with a minimum of dignity.

It is hard to know how much of a difference such a label might make, but it would provide interested consumers with the information they need to make informed and deliberate decisions. I do not mean to suggest that the label would replace any of the existing labels or approaches—though some of the packaging can become a bit crowded with multiple and often overlapping messages—but I do want to say that there should be a way for concerned consumers to express their concern for workers just as they can for the environment. Traditionally, we have relied on union presence as a marker for progressive labor practices. Although a union presence might be an acceptable guidepost, it is simply irrelevant for the vast majority of private sector workers today, and there is no reason to believe that this will change any time soon. A label that is delineated “Humanely Produced” cannot tell us what the farmer was paid, whether unions were present, how much a corporation might have donated to nonprofits, or how many LED light bulbs were used. Instead, the label will tell us how the workers were treated and whether they were treated with a minimum amount of respect. The standard would truly be a minimum standard because the criteria to obtain a label can really only measure quantifiable aspects of a business, and it would be extremely difficult to incorporate the more intangible, but often equally important, parameters such as arbitrary dismissals and workplace bullying.<sup>58</sup>

There should also be a way to ensure companies that receive the certification are complying with the vast array of governing employment laws. This is actually a more complicated issue than one might expect. The apparent rampant rise of lawsuits, many of which are class actions involving blatant wage violations, requires some means of monitoring for legal compliance.<sup>59</sup> The problem is that it is a difficult issue to measure. Complaints, whether they are filed with administrative agencies or in court, are not a good indicator of actual legal violations, and if complaints were the measure of compliance, few if any companies might be eligible for certification. But, as is well known, most cases are ultimately settled, and it is again difficult to draw conclusions based on a settlement because almost every settlement will include a disclaimer indicating that the settlement is not an acknowledgement of discrimination. It would also be problematic to

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58. Professor David Yamada has done pioneering work on the phenomenon of workplace bullying in an effort to drum up support for a more humane workplace. See, e.g., David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523 (2009).

59. The last few years have seen a surge in wage violations, particularly among restaurants where overtime and tip violations seem to be frequent. See Renée Frojo, *Wage Violations “Systemic” in San Francisco Restaurants, Says Federal Report*, S.F. BUS. TIMES, Dec. 13, 2012, [www.bizjournals.com/sanfrancisco/blog/2012/12/culture-abuse-san-francisco-restaurants.html?page=all](http://www.bizjournals.com/sanfrancisco/blog/2012/12/culture-abuse-san-francisco-restaurants.html?page=all); Laurie Woolever, *High-End Food, Low-Wage Labor*, DISSENT, Spring 2012, at 26.



deprive or deny a company of its certification for settling a case; at the same time, however, there must be some means to include substantiated or repeated violations of the law. Again, the details will have to be left for another day, but surely a company's record of compliance with legal requirements must be a part of any humane workplace.

#### VI. CONCLUSION

When the end was near, cries to "Save the Twinkie" rang out and people rushed to stock up, but nowhere did we hear cries to, "Save the Workers." Instead, to the extent the workers were referenced at all, it was most commonly in the form of some exaggerated claim regarding how the Bakers union's demands had forced the company to liquidate. Anyone concerned with employee welfare should see the Baker union's stand as a claim for workplace dignity by a group of employees who would no longer tolerate the deterioration of their workplace while the executives failed to share their sacrifices. Workers should be celebrated for their stand, and consumers need to find a way to support workers and employers who seek to craft a humane workplace. I recommend the creation of a consumer-products label, the "Humanely Produced" label, designed to inform interested consumers that workers who were treated with a minimum amount of dignity produced a product.