THE FOOD WE EAT AND THE PEOPLE WHO FEED US

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ABSTRACT

Food justice scholars and advocates have made a simple but important point: for all the attention we pay to the food we eat, we pay far too little attention to the people who feed us. But can law play a role in directing consumer attention to labor-related issues? Traditional food law paradigms provide at best incidental benefits to food workers because these types of laws typically rely on transparency and disclosure schemes that serve narrow consumer-centric interests. An increasing number of laws attempt to disseminate information about the working conditions of the people who pick, process, and produce our food so that consumers can also consider the ethical and moral consequences of their food choices. In assessing this attempt to rebrand labor enforcement in consumer protection terms, this Article does two things. First, this Article identifies the conditions under which such schemes are most likely to succeed. Regulators should target food markets characterized by relative consumer wealth, norm consensus regarding which outcomes are desirable, and an established intermediation infrastructure to give disclosure laws the best chances for improving labor conditions along the food chain. Even where these conditions exist, a second point this Article makes is that disclosure laws should supplement, not supplant, traditional labor enforcement strategies that rely on worker-initiated complaints. This is because certain values, like autonomy, equity, and community standing are best vindicated by the workers themselves instead of by others (like consumers) on their behalf. Crowding out workers from the enforcement process creates the risk of exacerbating the structural forms of inequality that define work across the food system.

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INTRODUCTION

The field of food law has begun to take shape. Over the last several years, academic conferences,[1] journal issues,[2] and even popular entertainment[3] have tackled the subject. Of course, the subject of food has long interested legal scholars, but previous efforts to scrutinize food's place in the law focused narrowly on issues specific to well-established fields such as agriculture or food safety.[4] By contrast, recent efforts have tried to place food within the context of a larger regulatory system of which agriculture and safety laws comprise only a part.[5] This new body of work aims to provide a clearer and more comprehensive picture of how our food system affects the lives of everyday consumers. Focused on organic food, locavorism,[6] and sustainable food practices, these scholars and advocates have tried to draw our attention to a wide range of moral issues implicated by our food choices.[7]

Meanwhile, another persistent group of scholars and advocates has

1. *See, e.g.*, *2nd Annual Harvard Law School-UCLA Food Law and Policy Conference: Drugs, Animals, and Food: Law & Policy of Antibiotics in the Food System*, UCLA L., https://law.ucla.edu/centers/social-policy/resnick-program-for-food-law-and-policy/events/2103/2015/10/23/2nd-Annual-Harvard-Law-School-UCLA-Food-Law-and-Policy-Conference-c--Drugs-Animals-and-Food-c--Law--a--Policy-of-Antibiotics-in-the-Food-System/ [https://perma.cc/569T-9PAQ] (last visited Nov. 27, 2016) (describing a conference at Harvard Law School on October 23, 2015); *4th Ann. Yale Food Systems Symposium*, http://yalefoodsymposium.org/ [https://perma.cc/ZBU9-EMXC] (last visited Nov. 27, 2016) (describing a conference at Yale University on September 30, 2016); *Establishing Equity in our Food System*, U. CAL., IRVINE SCH. L., http://www.law.uci.edu/events/food-equity/2016/ [https://perma.cc/59TA-LERL] (last visited Nov. 27, 2016) (describing a conference at UC Irvine on March 11–12, 2016). In addition, the University of California has rolled out a Global Food Initiative, which provides support for projects that develop solutions for "food security, health, and sustainability." *Global Food Initiative*, U. CAL.: OFF. OF THE PRESIDENT, http://www.ucop.edu/global-food-initiative/ [https://perma.cc/2VBH-Z8XQ] (last visited Nov. 27, 2016).

2. *See, e.g.*, Symposium, *Labor in the Food System, from Farm to Table*, 6 J. AGRIC., FOOD SYS., & COMMUNITY DEV. 1 (2015), http://www.agdevjournal.com/volume-6-issue-2.html.

3. *See Last Week Tonight with John Oliver: Food Waste* (HBO television broadcast July 19, 2015), http://www.hbo.com/last-week-tonight-with-john-oliver/episodes/02/45-july-19-2015/video/ep-45-clip-food-waste.html.

4. For an early contribution in the field of law and agriculture, see Harold W. Hannah, *Law and Agriculture*, 32 VA. L. REV. 781 (1946). For some early examinations of food safety issues, see C.C. Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROBS. 3 (1933) and Lauffer T. Hayes & Frank J. Ruff, *The Administration of the Federal Food and Drugs Act*, 1 LAW & CONTEMP. PROBS. 16 (1933).

5. *See* Stephanie Tai, *Food Systems Law from Farm to Fork and Beyond*, 45 SETON HALL L. REV. 109, 112 (2015).

6. *See* MARGARET GRAY, LABOR AND THE LOCAVORE: THE MAKING OF A COMPREHENSIVE FOOD ETHIC (2013).

7. *See* Laura T. Raynolds, *Re-embedding Global Agriculture: The International Organic and Fair Trade Movements*, 17 AGRIC. & HUM. VALUES 297 (2000); Dawn Thilmany, Craig A. Bond, & Jennifer K. Bond, *Going Local: Exploring Consumer Behavior and Motivations for Direct Food Purchases*, 90 AM. J. AGRIC. ECON. 1303 (2008).

articulated a simple and often overlooked point: for all the attention we pay to food, we pay far too little attention to the people who feed us.[8] With a focus on the conditions of food production, these commentators have sought to crystallize the moral consequences of supporting a food system in which workers must contend with daily exploitation. Account after account shows that wage theft, sexual harassment, and racial segregation pervade kitchens, farms, and meat processing plants all around the country.[9] The case for expanding notions of food justice to account for both the *content* of food and the *conditions* of food workers reminds us that concepts of "good food" are as much a matter of social construction as they are of nutritional science. Imploring the dining public to care about both the food it eats and the people who feed it evokes anthropologist Sidney Mintz's insight that "[g]ood food . . . must be good to think about before it becomes good to eat."[10]

Can law play a role in directing consumer attention to the labor consequences of their food choices? While not yet pervasive, an increasing number of laws disseminate information about the working conditions of the people who pick, process, and produce the food products consumers buy. Whereas conventional food law frameworks—such as those focused on consumer health and safety or those designed to deter anti-competitive behavior in the market—create only indirect and incidental benefits to food workers, these new laws squarely address and highlight the labor,

8. *See* Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008); Saru Jayaraman, *From Triangle Shirtwaist to Windows on the World: Restaurants as the New Sweatshops*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 625 (2011); Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2005); Mark Bittman, *The 20 Million*, N.Y. TIMES: OPINIONATOR (June 12, 2012, 9:00 PM), http://opinionator.blogs.nytimes.com/2012/06/12/the-20-million/; *Sustainability in the Workplace: A New Approach for Advancing Worker Safety and Health*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Dec. 2016), https://www.osha.gov/sustainability/docs/OSHA_sustainability_paper.pdf [hereinafter *Sustainability in the Workplace*].

9. For accounts of restaurant workers, see REST. OPPORTUNITIES CTR. OF N.Y. & N.Y.C. REST. INDUS. COAL., DINING OUT, DINING HEALTHY: THE LINK BETWEEN PUBLIC HEALTH AND WORKING CONDITIONS IN NEW YORK CITY'S RESTAURANT INDUSTRY (2006). For an account of the meat processing industry, see Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353 (2012) and William Kandel & Emilio A. Parrado, *Restructuring of the US Meat Processing Industry and New Hispanic Migrant Destinations*, 31 POPULATION & DEV. REV. 447 (2005). For an account of farm workers, see MARGARET GRAY, LABOR AND THE LOCAVORE: THE MAKING OF A COMPREHENSIVE FOOD ETHIC (2014); SETH M. HOLMES, FRESH FRUIT, BROKEN BODIES: MIGRANT FARMWORKERS IN THE UNITED STATES (2013); and Guadalupe T. Luna, *The Dominion of Agricultural Sustainability: Invisible Farm Laborers*, 2014 WIS. L. REV. 265 (2014). For a general overview, see FOOD CHAIN WORKERS ALLIANCE, THE HANDS THAT FEED US: CHALLENGES AND OPPORTUNITIES FOR WORKERS ALONG THE FOOD CHAIN (2012).

10. SIDNEY W. MINTZ, SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY 8 (1985).

employment, and human rights violations embedded within our food system and tied to the choices consumers make. In short, labor enforcement has been rebranded in consumer protection terms.

This Article hopes to do two things. First, it identifies conditions under which labor-oriented consumer laws are most likely to succeed. Consumers make food choices for a variety of reasons including cost, health, religious belief, and convenience. The limited empirical evidence to date suggests that food products and services highlighting labor conditions are most likely to positively impact consumer choices in food markets characterized by relative consumer wealth, norm consensus regarding which outcomes are desirable, and an established intermediation infrastructure. Even where transparency laws can help leverage consumer dollars to advance labor justice goals, a second point this Article makes is that these laws should supplement not supplant traditional labor enforcement strategies that rely on worker-initiated complaints. Certain values like autonomy, equity, and community standing are best vindicated by workers themselves instead of by others (like consumers) on their behalf. Crowding out workers from the enforcement process creates the risk of exacerbating structural forms of inequality that defines work across the food system.

Part I summarizes how traditional food law paradigms have addressed labor injustice and supply chain exploitation. Here, I observe that dominant food law paradigms often treat worker exploitation as an afterthought, choosing instead to focus on how a bad actor's conduct impacts its consumers or competitors. Food laws have been particularly focused on securing the health and safety of consumers. As a result, those approaches to food regulation have created limited, and sometimes awkward, opportunities to disrupt and deter workplace exploitation. Using these laws a foil, Part II explains that a relatively recent set of laws have tried to train the public's attention on harms related to worker exploitation. Drawing from public law enforcement models developed in the anti-trafficking and labor inspection contexts, these laws enlist the help of consumers to penalize food producers that engage in or benefit from exploitation.

Part III identifies the conditions that will give transparency schemes the best chance for success. Three conditions are particularly relevant. One is that there must be a sufficiently wealthy and interested consumer base that can afford premiums that are typically priced into these ethically produced goods. The limited empirical evidence suggests that markets for these types of goods exist but cater primarily to middle-class consumers and those with relative wealth. Many shoppers may be interested in purchasing ethically made goods (or avoiding ethically-compromised goods) but are simply priced out of the market. A second condition is a relative consensus on the

kind of relief to which workers are entitled. In other words, a preponderance of consumers must believe that what workers are experiencing does in fact amount to exploitation. As I explain, one complicating factor is when workplace exploitation implicates unauthorized immigrants, a topic over which the public remains sharply divided. A final condition for successful market-based governance is an established intermediation infrastructure. Information can be confusing and hard to access for consumers. Third-party intermediaries play an important role in collecting this information and in making it available in a usable form.

While enlisting the help of consumers to enforce labor laws offers some attractive benefits—especially its gap-filling function—Part IV makes the case that such laws should proliferate, but only as supplements rather than as substitutes for traditional worker-initiated labor enforcement schemes. In particular, I point to three values—autonomy, equity, and community standing—that are best realized when workers, and not consumers, initiate and guide the terms of enforcement.

I. FOOD WORK AS AN AFTERTHOUGHT

A core principle animating our nation's food laws is that consumers should be able to make food choices that are safe, healthful, and based on accurate information. On this consumer-centric approach, food law scholar Lisa Heinzerling observes, "when it comes to food, the American consumer must be the best-informed consumer (of any kind) in the world, perhaps in the history of the world."[11] As this Part shows, making consumers the central focus of our food law system has created only limited and indirect opportunities for addressing worker exploitation.

A. Consumer Safety and Health

Many food laws help ensure that consumers get what they expect. These laws regulate the type of information food producers may disseminate about their products. This regulatory approach explains why, for example, meat processors have to be careful about advertising their frankfurters as "all meat" when they are made just *mostly* of meat.[12] By targeting foods that are

11. *See* Lisa Heinzerling, *The Varieties and Limits of Transparency in U.S. Food Law*, 70 FOOD & DRUG L.J. 11, 14 (2015). At the same time, she argues that the administrative structure in which these laws operate often allows corporate food producers and the outsized influence they wield to distort protections, leaving a system that "fails to deliver the transparency it seems to promise." *Id.*

12. The Federal Food, Drug and Cosmetic Act, for example, renders a food label "misbranded" where, among other things, "its labeling is false or misleading in any particular." 21 U.S.C. § 343(a)

"misbranded," these laws express the view "that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality."[13]

This consumer protection approach reflects a norm of consumers as citizens,[14] economic actors who have the right to know exactly what they are buying. As President Kennedy declared in 1962: "The federal Government—by nature the highest spokesman for all the people—has a special obligation to be alert to the consumer's needs and to advance the consumer's interests" and "to make certain that our Nation's economy fairly and adequately serves consumers' interests."[15] Food laws, then, bolster consumer confidence by prohibiting food producers from peddling half-truths. In *United States v. Ninety-Five Barrels (More or Less) Alleged Apple Cider Vinegar*, for example, federal officials condemned barrels of apple cider made from dried or evaporated apples rather than from fresh apples.[16] Upholding the condemnation, the Court explained that the technical truth of the product's label did not change the fact that food manufacturers exploited their superior knowledge to detriment of the consumer public.

These early food laws also helped to allay economic security concerns. During the early part of the twentieth century, arguments against misbranding were often motivated by concerns with the rising price of food. Women, who at the time performed the bulk of food shopping and meal preparation duties in the early part of the twentieth-century, figured especially prominently into this consumer revolt.[17] At the legislative level,

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(2016). *See also* Federal Meat Inspection Act, 21 U.S.C. § 607(d) (prohibiting "false" and "misleading" labels in relation to meat products subject to the Federal Meat Inspection Act); Fed'n of Homemakers v. Butz, 466 F.2d 462 (D.C. Cir. 1972).

13. US v. Lexington Mill & Elevator Co., 232 U.S. 399, 409 (1914).

14. Lizabeth Cohen notes the following about America's mid-twentieth century economic expansion: "As a mass consumption-driven economy made possible a more adequate standard of living for more people than ever before in the decades after World War II, the consumer in the economic realm became increasingly identified with the citizen in the political realm." *See* Lizabeth Cohen, *The New Deal State and the Making of Citizen Consumers*, *in* GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY 111, 111 (Susan Strasser et al. eds., 1998).

15. *See* Special Message from President John F. Kennedy to the Cong., Protecting the Consumer Interest (Mar. 15, 1962), http://www.presidency.ucsb.edu/ws/index.php?pid=9108 [https://perma.cc/F3Z5-5XQ3]. Later on in the decade, President Nixon echoed these sentiments, noting that "[t]he buyer has the right to register his dissatisfaction, and have his complaint heard and weighed, when his interests are badly served." *See* Special Message from President Richard Nixon to the Cong., Consumer Protection (Oct. 30, 1969), http://www.presidency.ucsb.edu/ws/?pid=2299 [https://perma. cc/7BHW-YQT4].

16. 265 U.S. 438, 439 (1924).

17. *See* Monroe Friedman, *American Consumer Boycotts in Response to Rising Food Prices:*

Congress passed the McNary-Mapes Amendment—called the "Canner's Amendment"—which authorized the FDA to apply its "standard of quality" and "fill of container" requirements to canned food goods.[18] Getting one's money's worth was not only a matter of fairness and dignity. During uncertain economic times, like the Great Depression, it was a matter of keeping at bay hunger and a sense of pessimism. As one government-sponsored radio talk show declared in sharp, albeit outdated, terms: "We housewives need to be more discriminating than ever as label-readers if we want to get our money's worth in canned goods."[19][20]

Food laws also empower consumers to make more healthful food choices. The early strand of food laws, like the Pure Food and Drug Act, sought to protect consumers from themselves. As one court put it, these laws sought to protect even "the ignorant, the unthinking and the credulous.[21] Over the course of the twentieth century, food law has become less interventionist in this regard—that is, regulators are less willing to protect consumers against their own irrational decisions—but the law still fixates on the disclosure of information relevant to making these choices. In 2002, the FDA issued a guidance document explaining that it planned to pursue misbranding claims not under the highly protective "unthinking" consumer standard but rather with "reasonable" consumers in mind.[22] Such a view, the FDA explained, "more accurately reflects FDA's belief that consumers are active partners in their own health care who behave in health-promoting ways when they are given accurate health information."[23]

Other modern examples similarly reflect a policy of empowering consumers to make healthful food choices through disclosure requirements. Perhaps the most obvious example is the nutritional label affixed to nearly all food items available in grocery stores that reveals an item's nutrition-

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Housewives' Protests at the Grassroots Level, 18 Journal of Consumer Policy 55 (1995); William Frieburger, *War Prosperity and Hunger: The New York Food Riots of 1917*, 25 Labor History 217 (1984).

18. *Id.* However, it excluded meat and milk products. *Id.*

19. *Housekeepers' Chat* (U.S. Dep't of Agric. radio broadcast Oct. 4, 1937), transcript available at https://archive.org/stream/labelrequirement1937unit#page/n1/mode/2up.

20. *Id.* at 442–43.

21. The early strand of food laws like the PFDA sought to protect consumers from themselves. As one court put it, these laws sought to protect even "the ignorant, the unthinking and the credulous. *"See* United States v. An Article . . . Consisting of 216 Individually Cartoned Bottles, 409 F.2d 734, 740 (2d Cir. 1969) (quoting Florence Mfg. Co. v. J. C. Dowd & Co., 178 F. 73, 75 (2d Cir. 1910)).

22. *See* U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: QUALIFIED HEALTH CLAIMS IN THE LABELING OF CONVENTIONAL FOODS AND DIETARY SUPPLEMENTS (2002), http://www.fda.gov/ohrms/dockets/98fr/guidance[1].html.

23. *See id*.

related contents.[24] Without such labels, consumers would be unable to screen food products for ingredients connected to negative health outcomes such as sugars and saturated fats. More recently, the Patient Protection and Affordable Care Act includes a provision requiring chain restaurants to disclose the caloric content of the food products on their menus.[25] Giving consumers this data helps them make healthier food choices, thereby reducing the costs of healthcare in the long run.[26] And at the sub-federal level, many jurisdictions require restaurants to display health grades as a way to reduce the number of food-borne illnesses.[27]

All of these disclosure obligations are designed to help consumers do what is in their best interests and to enable them to independently monitor their own health.[28] This deeply pragmatic regulatory approach, which studiously weighs costs against benefits, tends to avoid the forced disclosure of information that could serve thornier or more potentially divisive policy goals designed to express moral judgment or outrage.[29] By and large, the

24. The Nutrition Labeling and Education Act requires the disclosure of information about content such as sugar, calories, and saturated fat to deter problems related to obesity, diabetes, and heart disease. *See* 21 U.S.C. § 343(q) (2012). *See also* David A. Kessler, *Toward More Comprehensive Food Labeling*, 371 NEW ENG. J. MED. 193 (2014). In 2004, Congress passed the Food Allergen Labeling and Consumer Protection Act, which requires food manufacturers to disclose whether a particular food product contains one of several known food allergens. *See* Pub. L. No. 108-282, § 203, 118 Stat. 905, 906–08 (codified at 21 U.S.C. § 343). *See also* Sarah Besnoff, Comment, *May Contain: Allergen Labeling Regulations*, 162 U. PA. L. REV. 1465 (2014).

25. *See* Patient Protection and Affordable Care Act, Pub. L. 111-148, § 4205, 124 Stat. 119, 573–76 (2010); Department of Health and Human Services, Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 71156 (Dec. 1, 2014). *See generally* Christine Cusick, *Menu-Labeling Laws: A Move from Local to National Regulation*, 51 SANTA CLARA L. REV. 989 (2011).

26. Christine Cusick, *Menu-Labeling Laws: A Move from Local to National Regulation*, 51 SANTA CLARA L. REV. 989, 990 (2011).

27. Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574 (2012); David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155 (2006).

28. As Lewis Grossman explains, it is often the case that, in the food regulation context, the consumer is assumed to be "an intelligent manager of his or her own health who does not need to be shielded from accurate information." Lewis A. Grossman, *FDA and the Rise of the Empowered Consumer*, 66 ADMIN. L. REV. 627, 644 (2014).

29. Laws like the Federal Food, Drug and Cosmetic Act and the Federal Meat Inspection Act that reside at the heart of our federal food laws aim to ensure the safety and quality of the food that is sold in grocery stores around our country. To the extent these laws do account for abuse, they do so in terms of how animals are transported and slaughtered, not in terms of the workers doing the transporting and slaughtering. *See* 21 U.S.C. § 603(b) (2012) (mandating that the Agriculture Secretary create an examination and inspection system "[f]or the purpose of preventing the inhumane slaughtering of livestock"); 9 C.F.R. § 313.2(b)–(c) (2016) (limiting the use of certain instruments like electric prods, pipes and "sharp or pointed objects" in driving animals); *id.* § 313.1(c) (requiring that slaughter facilities provide for "dying, diseased, and disabled livestock" with shelter against adverse weather conditions while they await slaughter). *See also* Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 973–74 (2012) (noting that the Federal Meat Inspection Act accounts for animal abuse).

goal of these laws is to foster and respect consumer autonomy,[30] not to proselytize or to strong-arm consumers into a particular lifestyle.[31]

This focus on consumer interests—on health, safety, and autonomy—has severely constrained the kinds of claims worker rights advocates and officials can advance. Many of these attempts to leverage consumer protection schemes for labor enforcement purposes can feel awkward, forced, or overly narrow. Consider some of the labor advocacy campaigns waged by the Restaurant Opportunities Center (ROC), which among other things tries to organize restaurant workers. In service of this goal, ROC issues a number of eating guides that focus on employers who refuse to provide sick days to their employees, with the obvious implication that forcing ill food workers to prepare and serve food raises the risk of consumers contracting a food-borne illness.[32] For example, a 2006 report compared restaurants that offered paid sick days with those that didn't and found that workers in restaurants without paid sick days were more likely to work while sick or injured, more likely to work while sneezing and coughing, more likely to spit on food, and less likely to seek medical care due to an on-the-job injury than workers in restaurants with paid sick leave.[33] And the report also found that workers that had not received proper health and safety training were more likely to have handled food improperly or served spoiled or leftover food to customers than workers who had received such training.[34] Both of these findings and others like it are intuitive, and more to the point, they are notable because they link the public's interest in safe food to labor's interest in safe working conditions. Thus, ROC has begun targeting workplaces with "employment conditions that compel workers to do things that might harm consumer health and safety, such as having to work while sick or not receiving proper health and

30. Or, as Mark McKenna has observed about consumers in the advertising context, defending consumer autonomy "does not depend on a descriptive claim that consumers will generally make good decisions. It depends instead on the judgment that due regard for consumer autonomy requires us to live with these decisions even if they are bad." Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 120 (2012).

31. *See* Lewis A. Grossman, *The Origins of American Health Libertarianism*, 13 YALE J. HEALTH POL'Y L. & ETHICS 76 (2013).

32. *See, e.g.*, REST. OPPORTUNITIES CTRS. UNITED, 2013 ROC NATIONAL DINERS' GUIDE TO ETHICAL EATING (2012), http://rocunited.org/wp-content/uploads/2011/11/ROC-DINERS-GUIDE-2013.pdf [hereinafter 2013 ROC DINERS' GUIDE]. A 2006 report pressed the point that a restaurant that is more likely to ignore basic workplace protections like the minimum wage or overtime pay is also likely to foster food preparation practices that pose a threat to public health. *See* REST. OPPORTUNITIES CTR. OF N.Y. & N.Y.C. REST. INDUS. COAL., *supra* note 9.

33. *Id.* at 11.

34. *See id.* at 5.

safety training."[35]

A diner who is concerned with her personal health may understandably avoid a restaurant where an employer has no sick day policy. Learning that a particular business engages in risky behavior simplifies the decisionmaking process for consumers choosing among otherwise comparable dining options. At the same time, that consumer might have no objection to dining at an establishment with a track record of other labor violations that do not directly impact one's health. Wage theft, for example, does not directly affect the safety of food. Neither does racial segregation or sexual harassment or even arguably the denial of meal and rest breaks. Moreover, paid sick leave is not required under federal law. And while penalizing restaurants for forcing workers to work through illness is consistent with the spirit of federal labor law's anti-exploitation mandate, this example illustrates the limits of linking labor enforcement arguments to consumer health rationales.

Farming practices offer another instance in which consumer health frames have only awkwardly bolstered worker protections. Take, for example, the organic certification process. This third-party certification system encourages farmers to adopt sustainable practices that minimize the environmental impact of agricultural food production as well as minimize the introduction of pesticides into consumer diets.[36] Such farming practices also generate benefits that redound to workers. For obvious reasons, banning the use of chemical pesticides also decreases workplace dangers.[37]

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35. *See* REST. OPPORTUNITIES CTRS. UNITED, SERVING WHILE SICK: HIGH RISKS & LOW BENEFITS FOR THE NATION'S RESTAURANT WORKFORCE, AND THEIR IMPACT ON THE CONSUMER 1 (2010), http://rocunited.org/wp-content/uploads/2013/04/reports_serving-while-sick_full.pdf. *See also* 2013 ROC DINERS' GUIDE, *supra* note 32 . This strategy of harnessing consumers as allies enjoys a long history. The National Consumers' League (NCL) was a powerful lobbying group that was organized by middle class consumers. The NCL played a central role in advancing the cause of many basic protections like child labor laws and the minimum wage. It also advanced an anti-sweatshop campaign during the 1890s. Importantly, the campaign sidelined the ethical implications of purchasing and consuming products from sweatshop factories and focused instead on the public health concerns. By highlighting the "disease-ridden tenements" producing garments, the NCL was able to tap into public anxiety over "import[ing] smallpox, diphtheria, or other diseases into their homes." Kathryn Kish Skylar, *The Consumers' White Label Campaign of the National Consumers' League, 1898–1918*, *in* GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY 17, 18–19 (Susan Strasser et al. eds., 1998). The NCL sought to empower women through consumption, which was vital given their exclusion from the franchise. *See* LAWRENCE GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 207 (2009). Importantly, this framework envisioned consumers as having responsibilities. *See id. See also* Frank Trentmann, *Beyond Consumerism: New Historical Perspectives on Consumption*, 39 J. CONTEMP. HIST. 373, 383 (2004).

36. *See* Patricia Allen & Martin Kovach, *The Capitalist Composition of Organic: The Potential of Markets in Fulfilling the Promise of Organic Agriculture*, 17 AGRIC. & HUM. VALUES 221 (2000).

37. *See* Daniel Jaffee & Philip H. Howard, *Corporate Cooptation of Organic and Fair Trade Standards*, 27 AGRIC. & HUM. VALUES 387 (2009).

But these worker benefits are rarely advanced as a core justification for farmers to embrace organic farming practices.[38] The organic farming lobby famously opposed a California bill that would have banned hand weeding farming practices.[39] Overlooking the debilitating back injuries linked to these farming practices, many small farm owners opposed the bill because such a law, they argued, would give large-scale, nonorganic farms a competitive advantage over smaller, organic farms.[40] Thus, even though concepts of sustainability are usually flexible enough to account for worker safety concerns,[41] the reality has been that organized and powerful interest groups have been able to coopt labels like "organic" to work against farmworker interests.

All of this means that because sustainable food systems generally offer no guarantees on worker safety,[42] consumers can never assume with full confidence that buying foods affixed with the "organic" label translates into support for the workers themselves. As food scholars Sandy Brown and Christy Getz observe, this model of enforcement fits within a "trickle down" notion of food justice in which "third party schemes seem to want to fix labor practices on behalf of workers without including them."[43] My point here is that in many cases, worker benefits emerge as an afterthought to other benefits that more directly benefit consumers.

B. Anti-Competition

Another common food law framework is grounded in principles of anti-competition. This too has offered protection to workers only indirectly. Such a framework is most closely associated with our nation's antitrust legal framework, which attempts to deter firms from gaining unfair competitive advantages in the civil and criminal settings. Recently, the anti-competitive framework made an appearance in a food labeling case. The FDA's regulation of pomegranate juice allows for companies to advertise

38. *See* Aimee Shreck, Christy Getz, & Gail Feenstra, *Social Sustainability, Farm Labor, and Organic Agriculture: Findings from an Exploratory Analysis*, 23 AGRIC. & HUM. VALUES 439, 440 (2006).

39. *See* Christy Getz, Sandy Brown, & Aimee Shreck, *Class Politics and Agricultural Exceptionalism in California's Organic Agriculture Movement*, 36 POL. & SOC'Y 478, 479 (2008).

40. *See id* at 492.

41. *See Sustainability in the Workplace: A New Approach for Advancing Worker Safety and Health*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Dec. 2016), https://www.osha.gov/sustainability/docs/OSHA_sustainability_paper.pdf.

42. *See* Joann Lo, *Social Justice for Food Workers in a Foodie World*, 3 J. OF CRITICAL THOUGHT & PRAXIS 1, 18 (2014).

43. *See id.* at 1190, 1192.

beverages as "pomegranate juice" even when the food product is more than 98% apple and grape juice, as was the case with Coca-Cola's "pomegranate blueberry" juice.[44] Pom Wonderful, which sells beverages that are 100% pomegranate juice, brought an antitrust suit against the Coca-Cola Company alleging economic harms in the form of lost business on account of Coca-Cola's allegedly deceptive practices.[45]

In *Pom Wonderful LLC v. Coca-Cola Co.*, the Court addressed whether engaging in a labeling practice that was explicitly sanctioned by the FDA under the Federal Food, Drug and Cosmetic Act (FDCA) would immunize that food producer from a civil suit by a competitor for a violation of the Lanham Act, the key federal antirust statute.[46] Put differently, Coca-Cola argued that because Congress intended for food and beverage labels to be governed by national uniform standards, the Lanham Act should yield to the FDCA. The Court rejected this argument. Explaining that the two statutes served complementary, but not identical, purposes, the Court concluded that complying with FDA regulations did not necessarily by extension satisfy the requirements of the Lanham Act.[47] The larger point, however, is that while the enforcement of these laws certainly benefits consumers by ensuring that they receive accurate information about the food products they buy, the interests that the Court ultimately vindicated belonged to Coca-Cola's competitors.[48] Protections enjoyed by the public are incidental to the protections offered to a bad actor's competitors.

The Tariff Act of 1930[49] illustrates how anti-competition principles could operate to provide incidental benefit to workers. In the early part of the twentieth century, the desire of American officials to partake in global commerce and trade raised uncomfortable questions about what to do about goods—including food items such as coffee and cocoa—imported from foreign markets where no prohibitions against slavery existed. President Franklin Roosevelt's New Deal protections famously excluded farm workers and domestic workers to appease Southern Democrats interested in maintaining a pliable, exploitable, and large African American workforce, but Americans could at least point to the Thirteenth Amendment's

44. POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2235 (2014).
45. POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228 (2014).
46. *Id*.
47. *Id.* at 2240.
48. *See id.* at 2234 (noting that the Lanham Act protects competitors who experience "an injury to a commercial interest in sales or business reputation proximately cause by [a] defendant's misrepresentations." (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1395 (2014))).
49. 19 U.S.C. § 1202 et seq. (2012).

abolishment of slavery as a sign of a legal culture dedicated to anti-exploitation norms.[50] At the same time, the country was reeling from the Great Depression, placing considerable pressure on elected officials to help restore the economy and stymie the impacts of joblessness and economic insecurity.

Elected officials resolved this tension with the Tariff Act of 1930, which prohibited the importation of any goods that were produced "by convict labor or/and forced labor or/and indentured labor under penal sanctions."[51] This law emanated at least in part from a broader set of moral commitments to dignity and anti-exploitation and other values expressed by a free and healthy workforce.[52] But a larger concern was with correcting the competitive disadvantage experienced by domestic firms, who were subject to the Thirteenth Amendment and other domestic labor protections.[53]

For decades, the protections offered by the Tariff Act to foreign food workers were not only incidental, but were often imaginary. This is because in trying to balance the interests of industry in earning profit against the interests of the public in obtaining cheap goods, Congress placed a thumb on the scale in favor of the consuming public. Slave-made goods were banned from importation *except* where such goods were not domestically produced in sufficient quantities to meet "consumptive demands."[54] Take the cocoa industry, for example. Even proof that cocoa beans were harvested by slaves—children in most cases—in West Africa was not enough to prevent consumers from getting their hands on imported food

50. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011); Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. IN AM. POL. DEV. 1 (2005); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 51–85 (1999).

51. 19 U.S.C. § 1307. The statute was eventually amended to add goods produced by "child labor" to the list of prohibited categories of goods. Trade and Development Act of 2000, Pub. L. No. 106-200 § 411(a), 114 Stat. 298 (2000).

52. As one commentator observed, Senator John Blaine, who championed the bill through Congress, "blended economic protectionism of domestic producers with moral indignation over the poverty, degeneration, and inhuman treatment suffered by natives in what would today be described as the Third World." Christopher S. Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. INT'L L. & POL. 19, 23 (1975).

53. *See* McKinney v. U.S. Dep't of the Treasury, 799 F.2d 1544, 1552 (Fed. Cir. 1986) ("Section 307 was enacted by Congress to *protect* domestic producers, production, and workers from the unfair competition which would result from the importation of foreign products produced by forced labor."). *See also* Mark K. Neville, Jr., *Child Labor—A Modest Proposal*, 20 J. INT'L TAX'N 18, 19 (2009).

54. 19 U.S.C. § 1307 ("[I]n no case shall [the forced labor provisions] be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.").

items.[55] Almost 21 million people are enslaved for profit worldwide, generating $150 billion in illicit revenue.[56] And while the overall point of the Tariff Act was to punish foreign companies selling slave-made foods at artificially low (and morally objectionable) prices, the "consumer demand" exemption rendered even these incidental protections ineffective.[57] If consumers wanted something badly enough, legislators made sure that they would get it.

The loophole was finally closed in 2015.[58] So the Tariff Act now presents a more effective deterrent to exploitation up the supply chain. But the law's anti-competitive origins remain. And to the extent workers up the supply chain experience some relief, it is not because they were able to directly affect the process. Even under this more fully realized version of the Tariff Act, workers remain an afterthought.

II. LABOR ENFORCEMENT AS CONSUMER PROTECTION

The process of making a food choice usually conjures a few images: a lonely consumer perusing grocery store aisles, popping in and out of dusty bodegas, or perhaps absentmindedly scrolling through Yelp restaurant reviews. But these images also create the false impression that food choices begin and end with the consumer. By focusing on the individual act of purchasing food—reviewing nutritional and menu labels, weighing the relative healthfulness and taste of a food product, and calculating how much of one's food budget to spend—these paradigms minimize and obfuscate

55. In 2001, chocolate manufacturing giants Nestle, Mars, and Hershey signed the Engels-Harkin protocol and, in doing so, pledged $2 million to investigate the use of child and slave labor up the supply chain. For 85 years, the US banned the importation of products made by slave labor except where domestic production couldn't meet consumer demand. Cocoa is being produced in the Ivory Coast in West Africa plantations. Those plantations use slave labor. The US could not produce enough cocoa to support America's demand for chocolate. At the time, the world consumed about 3 million tons of chocolate. *See* Joe Sandler Clarke, *Child Labour on Nestlé Farms: Chocolate Giant's Problems Continue*, THE GUARDIAN (Sept. 2, 2015), https://www.theguardian.com/global-development-professionals-network/2015/sep/02/child-labour-on-nestle-farms-chocolate-giants-problems-continue.

56. *See* Ben Leubsdord, *Modern Forms of Slavery Generate $150 Billion a Year in Profits for Exploiters*, Wall Street Journal, May 19, 2014. For some context, the population of the state of Florida is just under 20 million and the state's international trade industry generates about $150 billion.

57. *See supra* note 54 and accompanying text.

58. *See* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122 (2016). Even then, the death of the consumer demand exception drew little attention, at least from public officials. To take one example, President Obama's 616-word signing statement included a single, throwaway sentence on the subject of forced labor. "And, [the bill] eliminates a provision that previously allowed some imports into the United States made, in whole or in part, with forced labor, including child labor." Barack Obama, *Signing Statement for H.R. 644*, WHITE HOUSE (Feb. 24, 2016), https://www.whitehouse.gov/the-press-office/2016/02/25/signing-statement-hr-644 [https://perma.cc/87VR-AS4T].

information about a food product's origins.[59] They ignore who produced the food and whether the conditions of production proceeded on fair, just, and safe terms. In fact, consumption touches upon an intricate web of relationships. As sociologist Lisa Sun-Hee Park observes: "[C]onsumption is not a solitary act. Consumption is a social relationship."[60]

Over the last several years, a number of laws and regulations have tried to expose the social, political, and economic relationships implicated by consumer choices. Rather than empowering consumers to make food choices advancing their own economic or health goals, these laws try to educate consumers about the ethical and moral consequences of their choices. One version of these laws stems from a larger effort to combat trafficking. Twenty-one million people around the globe work as coerced or "forced" labor.[61] The sales from goods produced by these workers support a variety of industries including food markets, especially agriculture and seafood.[62] A number of labor and criminal laws protect victims of workplace exploitation within the United States, but for obvious reasons, such violations are more difficult to remedy and deter when they transpire in foreign settings. To compensate for this lack of reach, disclosure and transparency schemes in this context operate as supplements to enforcement efforts. These laws generate information about a business's reliance on exploitative labor practices with the hope that such disclosures will penalize them by shooing customers away.

The Department of Labor (DOL), for example, publishes and updates a list of goods that utilize forced and child labor. In 1999, President Clinton issued Executive Order 13,126, which both instructed the DOL to maintain a list of goods that were produced through forced or child labor and their countries of origin and required federal contractors to demonstrate a good faith effort to determine whether their goods were supplied from such countries.[63] In order to help disrupt the global trafficking industry, Congress has required the DOL to publish and update a list of goods that the DOL "has reason to believe are produced by forced labor or child labor in violation of international standards."[64] Much more than the DOL's domestic

59. Some of this stems from the libertarian streak that gnaws at even the most pro-regulation consumer. *See* Grossman, *supra* note 31.

60. *See* LISA SUN-HEE PARK, CONSUMING CITIZENSHIP: CHILDREN OF ASIAN IMMIGRANT ENTREPRENEURS 3 (2005).

61. *See* The California Transparency in Supply Chains Act: A Resource Guide (2015).

62. *See* List of Goods Produced by Child Labor or Forced Labor (Dec. 1, 2014).

63. *See* Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, Exec. Order No. 13,126, 64 Fed. Reg. 32383 (1999).

64. *See* Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164,

enforcement efforts, this program embraces a law enforcement rationale that identifies victims of trafficking.[65] These efforts target a diverse cross-section of industries of which food industries comprise only a part. Yet, the DOL's anti-trafficking efforts within industries like coffee, cocoa, and shrimp inevitably put pressure on the countries that host these food producers to respond or else risk losing the revenue streaming in on account of these exports.[66]

Another example is the California Transparency in Supply Chains Act (Transparency Act). California imposes disclosure requirements on large businesses based in the state.[67] In passing the Transparency Act, California has tried to capitalize on its outsized influence in the global market as a way of deterring such acts up the supply chain. As the California Attorney General's office states: "California, which boasts the world's seventh-largest economy and the country's largest consumer base, is unique in its ability to address this issue, and as a result, to help eradicate human trafficking and slavery worldwide."[68] Modeled after corporate social responsibility schemes, which are voluntary in nature,[69] the Transparency Act requires companies doing business in California making more than $100 million—an estimated 1700 businesses[70]—to display on their website efforts to eradicate trafficking in their supply chain.[71] This information must be "conspicuous and easily understood" by consumers.[72] And the law grants the California Attorney General (AG) the exclusive power to enforce the Act's provisions for injunctive relief.[73] While the California AG has taken

§ 105(b)(1), (b)(2)(C), 119 Stat. 3566–67 (2006); BUREAU OF INT'L LABOR AFFAIRS, DEP'T OF LABOR, LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR i, https://www.dol.gov/ ilab/reports/ pdf/tvpra_report2014.pdf [hereinafter DOL, LIST OF GOODS].

65. *See* DOL, LIST OF GOODS, *supra* note 64, at 12.

66. For example, in its 2014 report, the DOL highlighted the efforts undertaken by Nicaragua, Cote d'Ivoire, and Thailand to combat the exploitative work conditions in the coffee, cocoa, and shrimp industries respectively. *Id.* at 11–12, 14.

67. The Transparency Act states: "Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars ($100,000,000) shall disclose . . . its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale." Cal. Civ. Code § 1714.43(a)(1) (West Supp. 2013).

68. KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE i (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/ resource-guide.pdf.

69. *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005).

70. *See* KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE 3 (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/ sb657/resource-guide.pdf.

71. CAL. CIV. CODE § 1714.43(a)–(b).

72. *Id.* at § 1714.43(b).

73. *See id.* at § 1714.43(d).

a cautious approach to enforcing these laws,[74] it is important to point out that the AG still characterizes this law as a part of a larger anti-trafficking effort to draw the public's attention to the moral implications of their consumption choices.[75]

Beyond the anti-trafficking context, federal regulators have employed similar transparency-based schemes to advance domestic labor enforcement goals. Consider, for example, the Occupational Safety and Health Administration (OSHA), which oversees federal enforcement of the major workplace safety laws. In December 2016, OSHA issued a white paper calling for greater leveraging of the sustainability movement and regulatory infrastructure to achieve workplace safety goals.[76] According to OSHA, three pillars support the sustainability framework—environment, economy, and society—and of the three, society is the least well understood.[77] Building on the insights of a small number of organizations focused on how sustainability issues account for worker safety,[78] OSHA seems to be leveraging the momentum and market power commanded by sustainability actors to advance its goals of workplace safety.[79]

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74. To date, the AG's office has yet to initiate any prosecutions, opting instead for an educational approach to partnering with rather than punishing businesses affected by the disclosure requirements. *See* Rebecca Cross & J. Noah Hagey, *A New Class of Calif. Supply Chain Disclosure Suits*, LAW360 (Oct. 27, 2015) http://www.law360.com/articles/718673/a-new-class-of-calif-supply-chain-disclosure-suits (noting that the California AG had "reportedly sent warning letters to multiple retailers and manufacturers"). *See also* CAL. DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, BIENNIAL REPORT: MAJOR ACTIVITIES IN 2015-2016 45, https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/biennial-2015-2016.pdf (reporting that the AG's office "has issued extensive educational materials to aid companies in complying with the Transparency in Supply Chains Act"). The report further notes that the California AG sent letters to more than 1,000 companies in April 2015. *See id.* These letters appear to do no more than simply inform businesses of the reporting requirements imposed by the Supply Chains Act. *See id.* at 10 (reporting that the AG "sent letters to over 1000 companies informing them of the requirements of the [Transparency Act]").

75. For example, a recent report highlighted a human trafficking victory in which the AG, working as a part of a multi-agency taskforce, charged several defendants with pimping, pandering, bribery, and tax fraud. *See id.*; Press Release, Office of the Attorney General, Attorney General Kamala D. Harris Announces Arrest of Four Suspects Running Emeryville Sex Trafficking Ring (Dec. 12, 2014), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-arrest-four-suspects-running.

76. *See Sustainability in the Workplace: A New Approach for Advancing Worker Safety and Health*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Dec. 2016), https://www.osha.gov/sustainability/docs/OSHA_sustainability_paper.pdf.

77. *See Sustainability in the Workplace: A New Approach for Advancing Worker Safety and Health*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Dec. 2016), https://www.osha.gov/sustainability/docs/OSHA_sustainability_paper.pdf.

78. For example, The Sustainability Consortium has created a "product category portfolio, which allows consumers to learn about how worker safety and exploitation concerns fit into larger sustainability assessments of products like chicken, beef, or chocolate. *See Product Category Portfolio*, SUSTAINABILITY CONSORTIUM, https://www.sustainabilityconsortium.org/product-categories/.

79. *Sustainability in the Workplace*, *supra* note 8, at 6 ("Fully articulating and integrating OSH

The Department of Labor's wage and hour division, our nation's primary labor enforcement agency, has also been active in rebranding its labor enforcement strategies in consumer protection terms especially in its regulation of the restaurant industry. Although labor violations run rampant in many low-wage industries—such as caregiving, private security services, janitorial work, and landscaping—the restaurant industry stands apart in having the benefit of laws that favor transparency and informed decision-making.[80] To help address the exploitation of workers in low-wage industries like the restaurant and food service industries, the DOL, under the Obama administration, reformed its enforcement policies to maximize its limited resources.[81]

This reform was part of a larger shift in governance under President Obama that embraces principles of openness and transparency and fosters data-driven enforcement. Rather than simply presenting massive reams of information to the public, the Obama administration tried to disseminate information that was intelligible and digestible and that "nudged" them to do the right thing (at least as dictated by whatever policy was being implemented).[82] Harnessing the expertise of the private sector in making data more accessible, the Executive made existing regulatory data available

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within sustainability efforts can help expand the thinking of those already involved in sustainability and also provide a platform for OSHA and the community of safety and health professionals to move beyond traditional roles. Given the traction and the momentum of the sustainability movement, this type of engagement can be used as a transformative force to amplify the impact on the lives of workers, both inside and outside the workplace.").

80. For an overview of the various low-wage industries, see ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES (2009), http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf and WAGE & HOUR DIV., U.S. DEP'T OF LABOR, WAGE AND HOUR COLLECTS OVER $1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE FISCAL YEAR 2001 (2008), http://www.dol.gov/whd/statistics/2008FiscalYear.pdf.

81. *See, e.g.*, *Sustainability in the Workplace*, *supra* note 8, at 6.

82. *Id.* at 2. *See also* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008). In 2011, President Obama issued Executive Order 13,563, which reaffirmed the cost-benefit analysis of proposed regulations and championed the "provision of information to the public in a form that is clear and intelligible."[82] *See* Press Release, White House, President Obama Announces Another Key OMB Post, (Apr. 20, 2009), https://www.whitehouse.gov/the-press-office/president-obama-announces-another-key-omb-post. To help ensure that this shift in principle translated into reformation of policy, President Obama appointed Professor Cass Sunstein as the Administrator of the Office of Information and Regulatory Affairs. *See* Press Release, White House, President Obama Announces Another Key OMB Post (Apr. 20, 2009), *https://www.whitehouse.gov/the-press-office/president-obama-announces-another-key-omb-post*. An expert in behavioral economics, Sunstein encouraged all agencies to create policies and programs that simplified people's choices. Memorandum from Cass R. Sunstein, Adm'r, Office of Info. & Regulatory Affairs, to the Heads of Exec. Dep'ts & Agencies, (Sept. 8, 2011), https://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf.

in a machine-readable format to invite data experts to find ways to translate existing data into a digestible format for the public.[83] In 2011, the DOL Office of Public Affairs responded to the president's Open and Transparent Government Initiative by establishing a public-facing Developer Community website "to assist, support, and encourage public entities to develop user friendly software applications using DOL datasets."[84]

Importantly, the DOL under President Obama aggressively targeted wage theft. In 2011, the Wage and Hour Division collected $225 million in back wages, which was the largest amount the DOL had ever collected in a single year.[85] Unlike the DOL during the Bush administration, which evinced some indifference and incompetence regarding wage theft,[86] the DOL during the Obama administration prioritized the rational enforcement

83. *See* Exec. Order No. 13,642, 78 Fed. Reg. 28,111 (2013).

84. *See* U.S. DEP'T OF LABOR, DIGITAL GOVERNMENT STRATEGY, MILESTONE #1.2 – OPEN DATA POLICY IMPLEMENTATION 2 (2013), https://www.dol.gov/digital-strategy/DigitalGovernance1-2.pdf. *See also Developer Portal*, U.S. DEP'T OF LABOR (last visited Nov. 12, 2016), http://developer.dol.gov/ [https://perma.cc/7NWD-4GUK]. The competitions are funded through the Electronic Government Fund. *See* 44 U.S.C. § 3604(a)(3)(A) (2012) (making funding available for projects that, among other things, "make Federal Government information and services more readily available to members of the public"). Against this backdrop, the DOL became revitalized during the Obama administration. In terms of the President's data mandate, in 2010, the DOL announced a strategic plan for maintaining agency accountability. Rather than focusing on "output measures," which include data like the number of investigations that an agency conducts, the plan announced a "new approach" that would focus on "outcome measures," which look at the effectiveness of a particular strategy. *See* U.S. DEP'T OF LABOR, A NEW APPROACH TO MEASURING THE PERFORMANCE OF U.S. DEPARTMENT OF LABOR WORKER PROTECTION AGENCIES 5 (2010), https://www.dol.gov/ _sec/stratplan/newapproach.pdf [hereinafter, A NEW APPROACH]. *See also* Alison D. Morantz, *Putting Data to Work for Workers: The Role of Information Technology in U.S. Worker Protection Agencies*, 67 INDUS. & LAB. REL. REV. 675, 676 (2014). This is consistent with President Obama's broader commitment to transparency and openness in government. *See* Memorandum from Barack Obama, President, to the Heads of Exec. Dep'ts & Agencies (Jan. 21, 2009). Evaluating effectiveness would require looking beyond whether a particular entity had fallen into line post-inspection. The DOL would examine compliance levels within the larger universe of regulated entities—not just those where an inspection had occurred. *See* A NEW APPROACH, at 6. To do this, the DOL will utilize tools of statistical analysis such as random sampling, stratified random sampling, and other social science research methods to assess the impact of inspections on an industry-wide basis. *See id.*

85. *See Examining Regulatory and Enforcement Actions Under the Fair Labor Standards Act: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 8, 11 (2011) (testimony of Nancy J. Leppink, Deputy Administrator, Wage and Hour Division, United States Department of Labor).

86. *See* Steven Greenhouse, *Labor Agency Is Failing Workers, Report Says*, NY TIMES (Mar. 24, 2009), http://www.nytimes.com/2009/03/25/washington/25wage.html?_r=0. In 2009, the Government Accountability Office (GAO) issued a report documenting the incompetence of the DOL based on an audit the GAO conducted within the DOL. The audit period spanned July 2008 to March 2009, which caught the first two months of the Obama administration. *See* Gregory D. Kutz, Managing Dir., Forensic Audits & Special Investigations and Jonathan T. Meyer, Assistant Dir., Forensic Audits & Special Investigations, Testimony Before the H. Comm. on Educ. & Labor: Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft 4 (Mar. 25, 2009), http://www.gao.gov/assets/130/122107.pdf.

of labor laws affecting low wage earners.[87] And the DOL tried to change case law through the aggressive filing of amicus briefs in Fair Labor Standards Act (FLSA) cases. Through its first term, the Obama administration had filed nearly 100 amicus briefs in cases involving FLSA, ERISA, and other labor statutes.[88] Moreover, the DOL largely embraced a broad conception of labor rights, staking out positions that bolstered the protections of unauthorized immigrant workers both in the context of labor enforcement as well as in related contexts like immigration enforcement in the workplace.[89]

Increasing transparency in the administration of our nation's labor laws made particular sense in the restaurant industry. Not only are restaurants among the least compliant businesses operating in the domestic labor market,[90] they operate in an intensely consumer-oriented industry, which provides a hospitable environment for the kinds of market-based interventions enabled by increased transparency. Labor officials have long relied on a complaint-driven system of enforcement,[91] but the pool of potential complainants has been limited to workers. Quite sensibly, the DOL and other workplace protection agencies tailored their complaint system to

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87. All of this reflects the sentiment expressed in 2006 by then Economics Professor David Weil:

> Rather than focusing all energy and political capital on passing legislative initiatives, which could take years to implement, a new Congress or entering administration should bring to its regulatory agencies a clear and coherent plan for enforcing and implementing existing laws and regulations in order to achieve a focused set of public aims.

See David Weil, *Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters*, 28 COMP. LAB. L. & POL'Y J. 125, 125–26 (2006). Professor Weil has since been appointed the Wage and Hour Administrator within the DOL. *See* Katie Johnston, *BU Professor Takes on Task of Enforcing U.S. Wage Laws*, BOSTON GLOBE (June 8, 2014), https://www.bostonglobe.com/business/2014/06/07/professor-david-weil-brings-controversial-workplace-views-labor-department/N2k3YBB2S2pm2qLShA0PSP/story.html.

88. *See* Deborah Thompson Eisenberg, *Regulation by* Amicus: *The Department of Labor's Policy Making in the Courts*, 65 FLA. L. REV. 1223, 1267 (2013).

89. *See* Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants at 2, Rivera v. Peri & Sons Farms, Inc., 735 F.3d 892 (9th Cir. 2013) (No. 11-17365); Brief for the Secretary of Labor as Amicus Curiae Supporting Plaintiffs-Appellants at 1, Ojeda-Sanchez v. Bland Farms, LLC, 499 F. App'x 897 (11th Cir. 2012) (No. 11-13835); United States Department of Labor Josendis, Amicus Letter, Josendis v. Wall to Wall Residence Repairs, Inc., 662 F.3d 1292 (11th Cir. 2011) (No. 09-12266); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 6–8, Ramos-Barrientos v. Bland, 661 F.3d 587 (11th Cir. 2011) (No. 10-13412). For examples of the Obama administration's attempt to coordinate worksite immigration enforcement and labor enforcement, *see Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites* (May 5, 2016), https://www.dol.gov/sites/default/files/documents/MOU-Addendum.pdf.

90. *See* Working Below the Line: How Subminimum Wage for Tipped Restaurant Workers Violates International Human Rights Standards (Dec. 2015).

91. *See* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59 (2005).

workers who have the greatest access to information on whether a particular restaurant had run afoul of our nation's workplace protections and who have incentives to blow the whistle given the remedies they stand to receive.[92]

In 2011, the DOL held a competition for third parties to develop innovative tools to utilize DOL data for enforcement purposes. In October 2011, the DOL announced the winning app, entitled "Eat Shop Sleep."[93] This app integrated data from the popular consumer review site, Yelp, with DOL data allowing consumers to consider both customer reviews and labor data when making food choices.[94] In 2013, the DOL once again put out a call for submissions for an app or social media tool that could facilitate labor enforcement.[95] This time, the winner was the creator of a website, LaborSight.com, which utilized Google Maps data to create a map highlighting businesses with federal labor law violations.[96] This too fits within the larger regulatory efforts on the part of the Obama administration to harness data in protecting consumers.[97]

In utilizing app-based technology, the DOL explicitly describes these apps in consumer protection terms:

> More and more, consumers recognize that the choices they make can affect individuals and communities at any point along the supply chain, and socially responsible consumers want to make sure that the products they purchase don't cause any harm. Fair-trade products, sweatshop-free products, environmentally sound products—we see

92. *See* Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552 (2010); Weil & Pyles, *supra* note 91.

93. *See* News Release, U.S. Dep't of Labor, U.S. Department of Labor Announces Winners of Online and Mobile Development Contests (Oct. 27, 2011), http://www.dol.gov/opa/media/press/opa/opa20111568.htm [https://perma.cc/DR8N-ADPA]. The Eat Shop Sleep is also currently unavailable. In response to inquiries about the status of the app, representatives from both iTunes and Google Play indicated that the most likely explanation is that the developer—in this case, DOL—most likely removed the app. The DOL did not respond to my inquiry.

94. *See* Jeremy Blasi, *Using Compliance Transparency to Combat Wage Theft*, 20 GEO. J. ON POVERTY L. & POL'Y 95, 107–112 (2012).

95. *See* Laura Fortman, *Calling All Innovative Minds: Take the DOL Fair Labor Data Challenge*, U.S. DEP'T OF LAB. BLOG (July 9, 2013), https://perma.cc/BWR9-N4GP.

96. Unfortunately, the website laborsight.com is no longer active. The enforcement tool is powered by the Occupational Safety and Health Administration (OSHA). *See Fact Sheet: White House Safety Datapalooza*, OFFICE OF SCI. & TECH. POLICY (Jan. 10, 2014), *https://www.whitehouse.gov/sites/default/files/microsites/ostp/safety_datapalooza_factsheet_jan-2014.pdf*.

97. *See, e.g.*, Media Advisory, Office of Sci. & Tech. Policy, Exec. Office of the President, The White House, U.S. Department of Transportation, and U.S. Department of Agriculture to Host Safety Datapalooza (Jan. 10, 2013), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/safety_datapalooza_advisory.pdf (honoring Katherine Champagne, the creator of laborsight.com).

> them everywhere because these considerations have become an important part of a consumer's decision-making.[98]

Importantly, the "Eat Shop Sleep" app was a two-way street. Not only were consumers able to learn whether a particular restaurant was investigated or penalized for labor violations, it also included a "take action" button, which allowed anyone with a smartphone to communicate with the DOL. This effectively turned any customer into a potential whistleblower. The app allowed both workers and consumers to file a complaint against an employer, to contact a local Occupational Safety and Health Administration (OSHA) office, or to submit questions about one's rights in the workplace.

The DOL has other enforcement programs that similarly seek to harness the public's ability to vote with their dollars. The DOL makes public a list of willful violator employers under its temporary H visa program.[99] The violators are those employers who seek out noncitizen workers without adequately accounting for the adverse labor consequences for citizen and other authorized workers.[100] When an employer is a government contractor or subcontractor and willfully violates labor certification requirements, it is debarred for a period of three years during which time it is ineligible for government contracts.[101] This list is also publicly available.[102] A similar list exists for Farm Labor Contractors (FLCs), which are persons or entities engaging in the recruitment and employment of migrant farm workers under a federal temporary work visa program.[103] FLCs are responsible for transporting and housing workers and providing payroll information. The DOL oversees this process by forcing all FLCs to register with the agency, thereby ensuring that workers have access to basic protections on farms.[104] The DOL makes available to the public a list of registered FLCs[105] as well

98. *See DOL Challenge Leads to Consumer Protection App*, U.S. DEP'T OF LABOR BLOG (Mar. 9, 2012), http://blog.dol.gov/2012/03/09/dol-challenge-leads-to-consumer-protection-app/ [https://perma.cc/UM6U-26PN].

99. *See H-1B Willful Violator List of Employers*, U.S. DEP'T OF LABOR (last visited Nov. 12, 2016), https://www.dol.gov/whd/immigration/h1bwillfulviolator.htm [https://perma.cc/4UYX-CUAL].

100. *See Fact Sheet #62S: What Is a Willful Violator Employer?*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR (2008), http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62S.pdf. *See also* 20 C.F.R. § 655, subpts. H, I (2016).

101. *See* 29 C.F.R. § 5.12(a)(1) (2016).

102. *See H-1B Debarred/Disqualified List of Employers*, U.S. DEP'T OF LABOR (last visited Nov. 12, 2016), http://www.dol.gov/whd/immigration/H1BDebarment.htm [https://perma.cc/WX39-6J45].

103. *See* 29 U.S.C. § 1802(7) (2012) (defining a farm labor contractor). Temporary farm workers come in through the H-2A category. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012).

104. *See* Michael H. LeRoy, *Farm Labor Contractors and Agricultural Producers as Joint Employers under the Migrant and Seasonal Agricultural Worker Protection Act: An Empirical Public Policy Analysis*, 19 BERKELEY J. EMP. & LAB. L. 175 (1998).

105. *See Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Registered Farm Labor*

as those that are ineligible and have been debarred as contractors.[106] All of this information targets diners and eaters, who are increasingly attuned to a food item's journey from farm to fork.[107] And more to the point: all of this information concerns links in the supply chain critical to a food product's journey to a consumer's plate. Therefore, information about working conditions at other links of the food chain also provides leverage against bad-actor employers within the restaurant industry.[108]

III. CONSUMING FOR JUSTICE

Delegating some enforcement power to consumers offers an attractive solution to a larger problem tied to agency resource constraints. Labor officials and others working within workplace enforcement agencies have struggled against the enormity of the enforcement challenge: there are far too many food and drinking establishments for workplace enforcement agencies to inspect and punish. The food industry has consistently proven itself to be among the worst violators of federal and state labor laws[109] with cooks, dishwashers, and food preparers experiencing high rates of minimum wage violations, overtime violations, and off-the-clock violations.[110] That

Contractor Listing January 2017, U.S. DEP'T OF LABOR (last visited Nov. 12, 2016), http://www.dol.gov/whd/regs/statutes/FLCList.htm.

106. *See Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Ineligible Farm Labor Contractors – January 2017*, U.S. DEP'T LAB. (last visited Nov. 12, 2016), https://www.dol.gov/whd/regs/statutes/mspa_debar.htm.

107. *See* John Cranfield, Spencer Henson, & James Holliday, *The Motives, Benefits, and Problems of Conversion to Organic Production*, 27 Agric. Hum. Values 291, 291 (2010) (discussing the growing demand for organic foods in Canada); Katie M. Abrams, Courtney A. Meyers, and Tracy A. Irani, *Naturally Confused: Consumers' Perceptions of All-Natural and Organic Pork Products*, 27 Agric. Hum. Values 365, 365 (2010) (discussing growing consumer demand in the United States for natural and organic foods).

108. The DOL appears poised to increase its use of this regulatory tactic. In a 2010 audit of the DOL's foreign certification program, the Office of the Inspector General ("OIG") found that the DOL did not fully utilize its "debarment authority provided in the [Immigration and Nationality Act] and did not consider other regulatory suspension and debarment authority." OFFICE OF AUDIT, U.S. DEP'T OF LABOR, DEBARMENT AUTHORITY SHOULD BE USED MORE EXTENSIVELY IN FOREIGN LABOR CERTIFICATION PROGRAMS 3 (2010), http://www.oig.dol.gov/public/reports/oa/2010/05-10-002-03-321.pdf. For this reason, the OIG recommended that labor officials take greater steps to oversee employers seeking to sponsor temporary workers. *Id*.

109. *See* FOOD CHAIN WORKERS ALLIANCE, *supra* note 9, at 20.

110. DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 39 (2010). These high rates place the restaurant industry in the top fifteen low-wage industries identified for enforcement by the DOL. *Id*. In a high-density community like Los Angeles County, the numbers can be staggering. The DOL estimated that 72% of all restaurants in the county operated in violation of FLSA. *See* News Release, U.S. Dep't of Labor, US Labor Department's Wage and Hour Division Launches Enforcement and Education Initiative Focused on Los Angeles Area Restaurants (Apr. 18, 2012), http://www.dol.gov/opa/media/press/whd/WHD20120407.htm [https://perma.cc/E4RK-AH2C]. *See also* Ruth Milkman, Ana Luz González, & Peter Ikeler, *Wage and Hour Violations in Urban Labour*

unions have not traditionally had great success organizing these workforces places even greater pressure on public officials to expend their limited resources wisely and with maximum deterrent effect.[111] Consumers, then, offer a way to supplement and bolster enforcement efforts. But can consumption operate as a force for social change? Three conditions tend to increase the likelihood that transparency-based schemes can advance labor justice goals: consumer wealth, norm consensus, and an established intermediation infrastructure.

A. Consumer Wealth

To start with an obvious point, consumers can support exploited workers only to the extent their incomes allow them to do so. This has proven to be one of the most persistent obstacles to successfully utilizing ethical consumption platforms. Some shoppers are simply too poor to support markets for ethically produced goods.[112] Rather, the model of reform predicated on consumer-worker alliances rests on a binary in which consumers play the role of privileged and affluent allies to subordinated and economically insecure organizers. For example, unions used to affix labels on goods produced by unionized workplaces as a way of politicizing the consumer class.[113] But as food scholar Dana Frank explains:

> Historically, one problem in promoting the union label was that working-class shoppers could not afford to choose it. Middle-class shoppers, by contrast, have more discretionary income. If they choose, they are able to buy organic food at high-priced natural food stores, for example. They can select pricier Fair Trade Coffee. Working-class people, by contrast, are more likely to shop at Costco or Wal-Mart and buy their coffee in a name-brand can.[114]

Translating these historical examples into modern policy can also be challenging given the difficulty of measuring labor-related information's impact on shopping behavior. Consumers may indicate a willingness to pay a premium for ethically produced goods even if their actual shopping habits

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Markets: A Comparison of Los Angeles, New York and Chicago, 43 INDUS. REL. J. 378 (2012).

111. *See* Ashar, *supra* note 8, at 1881.

112. *See* Alison Hope Alkon et al., *Foodways of the Urban Poor*, 48 GEOFORUM 126 (2013).

113. *See* LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY (1997); Michael A. Gordon, *The Labor Boycott in New York City, 1880-1886*, 16 Labor History 184 (1975).

114. *See* Dana Frank, *Where are the Workers in Consumer-Worker Alliances? Class Dynamics and the History of Consumer-Labor Campaigns*, 31 POL. & SOC'Y 363, 374 (2003).

suggest otherwise.[115] Yet, despite the limitations of the existing empirical picture, a number of studies on garments do suggest that under certain conditions, consumers' shopping patterns have been positively impacted by information relating to the working conditions of goods they buy.

In a series of papers, Professor Michael Hiscox helped demonstrate that information on fair labor conditions can have a positive impact on consumer behavior. For example, Professor Hiscox and Jens Hainmueller conducted field experiments on the impact of "fair labor standards" labels on consumer shopping habits.[116] They found that at least some segments of the shopping public demonstrated support for goods produced through ethical working conditions. The study confirmed the intuitive point that a consumer's willingness to pay the "fair labor" price premium was in part a function of income. While such labels can have a positive impact on those who are in a position to purchase higher-priced goods, they are unlikely to have an impact on more cost-conscious shoppers.[117] In a separate study, Professor Hiscox found similar results for consumers using eBay to purchase shirts and fair trade coffee with fair working conditions labels.[118] Thus, there is some evidence that market-based mechanisms such as charging premiums for ethically sourced goods can work in the food context.

Another set of studies confirms that consumers are willing to pay a modest premium to avoid buying goods not made from sweatshop labor. Sociologists have found that when faced with a choice between two seemingly identical pair of socks—one displayed a label indicating that it was not made under sweatshop conditions while the other reflect no such label—customers were willing to pay a modest premium in order to avoid the possibility of buying something made under exploitative work

115. *See* Jens Hainmueller & Michael J. Hiscox, *The Socially Conscious Consumer? Field Experimental Tests of Consumer Support for Fair Labor Standards* 4 (MIT Political Sci. Dep't, Research Paper No. 2012-15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2062435 (summarizing survey data on consumer preferences for goods produced under decent working conditions but noting real possibility of divergent consumer preferences between real market settings and survey answers).

116. *Id.*

117. Hainmueller and Hiscox conducted field experiments in Banana Republic Factory Stores, which sell discounted clothing items. Their study found that labels with information about the fair labor conditions that produced a garment had a "substantial positive effect" on "women shoppers interested in a higher priced item." Their study also found that such labels had no "statistically significant impact" on those customers shopping for lower priced women's and men's garments. *See id.* at 2.

118. *See* Michael J. Hiscox, Michael Broukhim, & Claire S. Litwin, Consumer Demand for Fair Trade: New Evidence from a Field Experiment Using eBay Auctions of Fresh Roasted Coffee 3 (Mar. 16, 2011) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811783 (finding that a "fair trade" label positively impacted consumer bids for coffee); Michael J. Hiscox et al., Consumer Demand for Fair Labor Standards: Evidence from a Field Experiment on eBay (Apr. 12 2011) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1811788 (finding that fair working condition certification labels positively impacted consumer bids on polo shirts on eBay).

conditions.[119] This study is significant in that it targets consumers of more modest means suggesting that a market for ethically-produced goods may find support beyond the class of wealthy consumers. Thus, these studies show that consumers do consider the ethical consequences of their purchases and are willing to pay a modest premium in order to avoid generating those consequences, at least in certain circumstances.

In the context of food, Lucy Atkinson's studies of "socially conscious" food consumption lends some support to the notion that consumers might be willing to support ethically-produced goods.[120] Relying on interview data gathered from respondents in Texas, Atkinson found that many sought out food options from local sources or community gardens as a part of their "civic-minded" approach to food consumption.[121] These food choices not only advanced society's ethical goals, but the informants also often experienced a sense of personal empowerment.[122] They are concerned not just with the price of the product or maximizing benefit but also with the food product's "political, social, and environmental consequences."[123] But none of the study's participants directly addressed the issue of labor injustice limiting the reach of the findings.

Moreover, Atkinson drew from a tightly circumscribed pool of informants—"white, middle-class, college-educated consumers who self-identify as socially conscious"[124]—and even they acknowledged the significant costs and inconveniences associated with this food market.[125] Not only did shoppers have to pay price premiums for these ethically produced goods, they often had to visit multiple vendors to meet all of their shopping needs.[126] In this way, Atkinson's study mirrors the findings offered by Hiscox's studies: the goods positively impacted by fair labor

119. *See* Monica Prasad, Howard Kimeldorf, Rachel Meyer, & Ian Robinson, *Consumers of the World Unite: A Market-based Response to Sweatshops*, 29 LABOR STUDIES JOURNAL 57, 71 (2004); Howard Kimeldorf, Rachel Meyer, Monica Prasad, & Ian Robinson, *Consumers with a Conscience: Will They Pay More?*, 5 CONTEXTS 24 (2006).

120. Lucy Atkinson, *Buying In to Social Change: How Private Consumption Choices Engender Concern for the Collective*, 644 ANNALS AM. ACAD. POL. & SOC. SCI. 191, 191 (2012).

121. *Id.* at 196.

122. *Id*. at 199. Atkinson found that many of the informants viewed ethical consumption as a way to facilitate "an individual's growth and evolution into the person he or she hopes to become." *Id*. at 200.

123. *See* Veronika A. Andorfer & Ulf Liebe, *Consumer Behavior in Moral Markets. On the Relevance of Identity, Justice Beliefs, Social Norms, Status, and Trust in Ethical Consumption*, 29 EUR. SOC. REV. 1251, 1251 (2013).

124. *See* Atkinson, *supra* note 120, at 195.

125. *Id*. at 201–202.

126. *Id.* at 201.

standards labels in his studies were higher end goods.[127] And because price and geographic distances both operate to place these kinds of goods out of the reach of the food insecure,[128] consumer wealth operates as a key determinant for effectively implementing these types of schemes.[129]

B. Norm Consensus

Enlisting the help of diners and eaters to discipline restaurants amounts to a delegation of sorts. Agencies like the DOL have given the consumers the information they need to vote with their dollars. But these sorts of nudges work best when a particular regulatory goal tracks well-settled public norms and everyone agrees why disclosures related to that goal are relevant or important.[130] Restaurant health grading systems, for example, are widely (though not uniformly) understood as successful models of consumer-oriented disclosure schemes.[131] This is because the goal of the grades is to achieve a public policy outcome that invites little if any dissent: to reduce the spread of foodborne illnesses. By contrast, in the context of labor enforcement, consumers might have divergent views on whether working conditions for food and restaurant workers are so deplorable that they require consumer support. For this reason, even where a study points to positive impacts on consumer behavior, it is hard to generalize about a program's efficacy when implemented in different contexts.[132] Existing empirical data do not offer a broadly applicable or generalizable set of principles to guide industry-wide reform. Some studies focus on specific case studies that only partially translate to the food regulation context.[133]

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127. *See* Michael J. Hiscox & Nicholas F.B. Smyth, Is There Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Product Labeling 15 (2011) (unpublished manuscript), http://scholar.harvard.edu/files/hiscox/files/consumerdemandfairlaborstandardsevidence social.pdf (noting that towels and candles sold at the experiment site involved "a specific set of New Yorkers who could afford to buy high-quality furnishings").

128. *See* Alkon et al., *supra* note 112, at 133 (noting that for many low-income residents of Oakland and Chicago, "[t]he primary barrier to obtaining desired foods was lack of income, not proximity or lack of knowledge.").

129. Some suggest that these types of laws are better at drawing attention to the harms than actually altering the public's shopping choices. *See* Frank, *supra* note 114, at 371.

130. Behavioral economists explain that a data point's relevance often has to be immediately ascertainable to the consumer in order for disclosure schemes to work. *See* David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155, 161 (2006).

131. *See id*. at 169–70. For a more critical take, see Ho, *supra* note 27.

132. *See* David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155 (2006).

133. *See* Hainmueller & Hiscox, *supra* note 115 (testing consumer support for fair labor standards labels in the clothing context); Monica Prasad et al, *Consumers of the World Unite: A Market-based Response to Sweatshops*, 29 LAB. STUD. J. 57 (2004) (examining consumer demand for sweatshop-free

Others examine the impact of ethical considerations on food purchasing decisions but address issues that are only tangentially related to labor injustice.[134] Ultimately, utilizing disclosure schemes requires harnessing consumer empathy, something that psychologists have shown is hard for the non-poor to do in relation to the poor.[135]

Further complicating matters is the food system's pervasive dependence on immigrant labor—authorized and unauthorized—which invites a range of consumer responses.[136] The agricultural industry, for example, has historically depended on unauthorized workers, especially from Mexico.[137] By some estimates, over 70% of agricultural workers are unauthorized, with a significant portion of the remainder working as guest workers.[138] The meat-packing and -processing industry provides another example. As this industry has reorganized and established itself as a major employer in the Midwest and South, unauthorized migration has predictably grown in those regions.[139] One study estimated that 27% of all workers who butcher and process meat, poultry, and fish are unauthorized.[140] Another study suggested that between 1980 and 2000, the percentage of Latino workers in meat processing plants jumped from 8.5% to 28.5%.[141] Indeed, the growth of the meat packing industry parallels the growth of the Latino population in these

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socks).

134. *See* Atkinson, *supra* note 120; Thomas Macias, *Working Toward a Just, Equitable, and Local Food System: The Social Impact of Community-Based Agriculture*, 89 SOC. SCI. Q. 1086 (2008).

135. *See* Martin Gilens, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY (1999); Stéphane Côté, et al., *For Whom Do the Ends Justify the Means? Social Class and Utilitarian Moral Judgment*, 104 J. PERSONALITY & SOC. PSYCHOL. 490 (2013); Michael W. Kraus, et al., *Social Class, Contextualism, and Empathetic Accuracy*, 21 PSYCHOL. SCI. 1716 (2010); Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement, and Narcissism*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 34 (2014).

136. *See* Jennifer Merolla et al, *"Illegal," "Undocumented" or "Unauthorized": Equivalency Frames, Issue Frames, and Public Opinion on Immigration*, 11 Perspectives on Politics 789 (2013); Jens Hainmueller & Daniel J. Hopkins, *The Hidden Americans Immigration Consensus: Conjoint Analysis of Attitudes toward Immigrants*, 59 American Journal of Political Science 529 (2015).

137. Much of the history of unauthorized labor migration in the agricultural industry is tied into the history of guest worker programs. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (1992).

138. *See* GRAY, *supra* note 9, at 62.

139. *See* Paul Apostolidis, *Hegemony and Hamburger: Migration Narratives and Democratic Unionism among Mexican Meatpackers in the U.S. West*, 58 POL. RES. Q. 647 (2005); Georgeanne Artz, et al., *Is It a Jungle Out There? Meat Packing, Immigrants, and Rural Communities*, 35 J. AGRIC. & RESOURCE ECON. 299 (2010); Kandel & Parrado, *supra* note 9.

140. Jeffrey Passel, The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey 12, table 1, Pew Hispanic Center (March 7, 2006).

141. William Kandel & Emilio A. Parrado, *Restructuring of the US Meat Processing Industry and New Hispanic Migrant Destinations*, 31 POPULATION & DEV. REV. 447, 459 table 6 (2005).

regions,[142] providing important macroeconomic context to the spate of anti-immigrant ordinances that have sprouted in these areas.[143]

All of this points to the possibility that while consumers might feel inclined to support workers experiencing violations of wage theft, any inclination to do so might dissipate for unauthorized immigrant workers. A good example is the French Gourmet, a French restaurant and catering business in San Diego. The owner, Michel Malecot, has employed hundreds of workers.[144] As required by the Immigration and Nationality Act (INA), he examined employment verification forms submitted by his workers, and on this basis, he concluded they were authorized to work—that is, they were either citizens or noncitizens with work authorization (such as green card holders).[145] After putting several workers on the payroll, the Social Security Administration (SSA) sent Malecot a notice that the identities associated with submitted social security numbers did not match the identities offered by the workers. Despite these "no match" letters, Malecot allegedly continued to employ the affected employees in cash until they could produce different employment documents.[146] Shortly thereafter, Immigration Customs and Enforcement (ICE) arrested eighteen workers and indicted Malecot along with Richard Kauffmann, the manager, for violating various immigration laws.[147] Eventually, they pled guilty, and the district court ordered them to pay $400,000 in fines and placed them on probation for five and three years, respectively.[148]

142. One study found that counties with meat packing plants saw significant growth. In counties with less than 5% meat packing plant (MPP) employment share, the Latino ("Hispanic") population grew an added thirteen percentage points relative to counties without meat packing facilities. In counties with more than 20% MPP employment share, the Latino population rose almost two hundred percentage points. *See id.* at 305–06.

143. For example, in *Keller v. City of Fremont*, the Eighth Circuit upheld an anti-immigrant ordinance in Fremont, Nebraska, requiring renters to obtain occupancy licenses that verified immigration status. 719 F.3d 931, 945 (8th Cir. 2013). Two of the largest employers in Fremont are the Hormel Foods Corporation, which produces Spam, and Fremont Beef Company. *See* Ted Genoways, *This Land is Not Your Land: Deciding Who Belongs in America*, HARPER'S MAG., Feb. 2013, at 33–35.

144. *See* Richard Marosi & Anna Gorman, *Immigration Agency Targets Upscale San Diego Restaurant*, L.A. TIMES (May 25, 2010), http://articles.latimes.com/2010/may/25/local/la-me-imm-gourmet-20100525.

145. *See id.*

146. *See* Indictment, United States v. The French Gourmet, No. 3:10-cr-01417 (S.D. Cal. Apr. 15, 2010); Findings and Recommendation of the Magistrate Judge Upon a Plea of Guilty United States v. The French Gourmet, No. 3:10-cr-01417 (S.D. Cal. Oct. 13, 2011); Order Accepting Guilty Plea, United States v. The French Gourmet, No. 3:10-cr-01417 (S.D. Cal. Dec. 14, 2011).

147. *See* News Release, U.S. Immigration & Customs Enforcement, San Diego-area Bakery, Its Owner and Manager, Indicted on Federal Charges for Hiring Undocumented Workers (Apr. 21, 2010), http://www.fosterglobal.com/news/san_diego_bakery042110.pdf.

148. *See* News Release, U.S. Immigration & Customs Enforcement, San Diego-area Bakery Owner, Manager Sentenced for Employing Illegal Workers (Dec. 22, 2011), https://www.ice.gov/

Malecot's investigation and eventual conviction fit within the broader attempt to target high profile bad actors to draw the consuming public's attention to the issue of employing unauthorized workers.[149] And these cases have sparked an array of consumer responses. Some would punish these businesses for the act of hiring unauthorized workers irrespective of how the workers were treated.[150] Others reach the opposite conclusion: the only restaurants whose windows should be shuttered are those that violate labor laws without any regard for their incompliance with immigration laws.[151]

Malecot admitted that during a three-year period he hired ninety-one workers without authorization—but very little suggested that they created unsafe or hostile work conditions.[152] Indeed, in ordering probation, the district court judge noted that Malecot did not use workers' unauthorized status to exploit them and that Kauffmann did not profit from the illegal hirings.[153] In speaking to news media, Malecot's lawyer emphasized that these workers were treated fairly and paid above average wages.[154] While unauthorized workers are entitled to a wide range of basic labor and employment protections,[155] the public remains divided over whether they ought to benefit from such protections given their immigration status. In the case of the French Gourmet, the raid seemed to have a galvanizing effect, causing customers to support the restaurant, though again, for a variety of reasons ranging from concerns over the negative impact of over-enforcement on local economic growth to the simple reason that Malecot makes good food.[156] Thus, immigration status not only deters workers from filing complaints in the first place, it also might lead the public to penalize restaurants for reasons that have nothing to do with working conditions.

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news/releases/san-diego-area-bakery-owner-manager-sentenced-employing-illegal-workers [https://perma.cc/Q75U-XCLP] [hereinafter ICE Dec. News Release].

149. *See* Marosi & Gorman, *supra* note 144 (quoting ICE chief of enforcement, John Morton, as stating, "Even a small amount of concerted, uniform enforcement can get a lot of attention—and it has.").

150. *See* Sarah Kershaw, *Immigration Crackdown Steps Into the Kitchen*, N.Y. TIMES (Sept. 7, 2010), http://www.nytimes.com/2010/09/08/dining/08crackdown.html.

151. *See id.*

152. $10,000 of the $400,000 fine was for restitution for an injured employee. ICE Dec. News Release, *supra* note 148.

153. *See* Dana Littlefield, *Two Get Probation in French Gourmet Case*, SAN DIEGO UNION-TRIB. (Dec. 22, 2011), http://www.sandiegouniontribune.com/sdut-2-men-get-probation-illegal-hiring-case-2011dec22-story.html [https://perma.cc/Y2M2-5G5K].

154. Dana Littlefield, *Two Get Probation in French Gourmet Case*, SAN DIEGO UNION-TRIB. (Dec. 22, 2011), http://www.sandiegouniontribune.com/sdut-2-men-get-probation-illegal-hiring-case-2011dec22-story.html [https://perma.cc/Y2M2-5G5K].

155. *See* Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 257–258 (2009).

156. *See* Marosi & Gorman, *supra* note 144.

C. Intermediation Infrastructure

A restaurant owner who suffers a loss of business because of disclosed labor violations not only must cease her exploitative ways, she must also rehabilitate her reputation among the dining public. This rehabilitation can mean demonstrating that the restaurant not only meets but actually exceeds industry labor standards.[157] This fits within Professor David Vogel's argument that corporate social responsibility, as a regulatory regime, can create "markets for virtue" under some conditions.[158] During the 1990s, the shoe company giant, Nike, suffered significant public blowback when an internal report prepared by the accounting firm Ernst & Young showed that factory workers in Vietnam suffered from exposure to hazardous chemicals.[159] This widespread condemnation forced Nike to commit resources to monitoring exploitative conditions up the supply chain. To assuage public concern, Nike adopted a more transparent approach to doing business by, for example, disclosing the locations of plants in various Asian countries with whom it had manufacturing contracts. By pulling back the curtain a bit, Nike allowed for independent monitoring of labor standards.[160]

From a monitoring infrastructure perspective, the restaurant industry is in some ways well-positioned to adopt transparency-type schemes to eradicate exploitation.[161] As discussed earlier, consumers are already primed to consider information related to their food when making dining choices. At the same time, consumers can be fickle, which means markets for virtue can evaporate very quickly—perhaps for lack of interest or for lack of information on the ongoing compliance of once-bad-but-turned-good restaurants or for too much irrelevant information creating unhelpful and distracting noise for consumers. Given the limitations of consumers to act as monitors of restaurants, third party intermediaries and brokers will have to play a role in gathering and disseminating information in a usable

157. *See* VOGEL, *supra* note 69.

158. *Id.* at 3.

159. *See id.* at 79.

160. *See* David Teather, *Nike lists abuses at Asian Factories*, The Guardian, April 14, 2005, *at* https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money. Of course, not all companies have the kind of vast resources or attract as much consumer interest and attention as does Nike. For companies whose products are manufactured all over the world, even when leaders within those companies want to stamp out exploitative practices up the supply chain like the use of child labor or creating dangerous working conditions, it is hard for those companies to effectively monitor their business partners. *See id.* at 91–96.

161. In many ways, the labor recruitment model supporting food production industires mirror those of the garment and shoe industries. *See* Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 478–479 (2017).

form. The federal government in recent years has tried to do just that through the DOL, but the infrastructure for disseminating this type of information remains underdeveloped as evidenced by the short-lived nature of apps like "Eat Shop Sleep."[162] Thus, while government agencies undoubtedly play an important role in regulating the information market, given their limitations, private third-parties will inevitably figure into the process of developing an intermediation infrastructure.

Thus far, advocacy organizations have provided some notable examples of intermediation. Consumers increasingly want to know not just how food landed on their plate, but also how and from where the ingredients arrived in the kitchen, which gives advocates the opportunity to target distributors up the food supply chain. Take as another example the Coalition of Immokalee Workers (CIW), which has been waging a campaign for fair food in the Florida tomato industry. Embracing a motto of "Consumer Powered, Worker Certified," CIW's fair food program pressures larger, corporate food buyers to pledge to buy tomatoes only from growers who comply with standards set by the program.[163] These pledges, in turn, place downward pressure on growers to comply with the fair food standards or else miss out on doing business with major supermarket and fast food chains like Wal-Mart, Chipotle Mexican Grill, Trader Joe's, Subway, Burger King, McDonalds, and Whole Foods Market.[164] As a condition of certification, growers must agree to oversight by the Fair Food Standards Council, which has a 24-hour hotline to receive complaints from workers about alleged violations.[165] The CIW model of intermediation not only helps gather and disseminate information about a food producer's working conditions, it

162. Many scholars who have addressed disclosure policies have focused on the intermediation provided by private actors. *See* Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351, 377–78 (2011); Lior Jacob Strahilevitz, *"How's My Driving?" For Everyone (And Everything?)*, 81 N.Y.U. L. REV. 1699 (2006). To take two familiar examples from related contexts, Yelp, a consumer review website, and the National Association for Law Placement (NALP), an organization devoted to legal career counseling, exemplify the broader universe of third-parties who profit off intermediation of information about businesses and employers. Although I am interested in private actors, I focus on a broader array of intermediaries including government agencies like the DOL.

163. *See Fair Food Program Label Finds Its First Home at Whole Foods!*, COAL. OF IMMOKALEE WORKERS (Dec. 2, 2014), http://www.ciw-online.org/blog/2014/12/first-label/ [https://perma.cc/LJC4-Y6AV]. These standards include among other things raising wages for farm workers, complying with workplace protections like rest breaks, and prohibiting sexual harassment and verbal abuse. *See* Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. TIMES: BUSINESS DAY (Apr. 24, 2014), http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html [https://perma.cc/QCF6-G4TF].

164. *See Partners*, FAIR FOOD PROGRAM (last visited Nov. 28, 2016), http://www.fairfoodprogram.org/partners/ [https://perma.cc/E5AZ-VJ4N]. *See also* Greenhouse, *supra* note 86.

165. *See About*, FAIR FOOD STANDARDS COUNCIL (last visited Feb.14, 2017), http://fairfoodstandards.org/about/ [https://perma.cc/9ZN5-3JC9].

helps nurture and translate market interest into legal obligations through settlement[166] and contract negotiations between workers and employers.

In a similar fashion, the Restaurant Opportunities Center (ROC), a national collection of worker centers, published a series of eating guides with information on the degree to which restaurants comply with a variety of labor and employment protections.[167] This eating guide operates as a market-based certification system highlighting those restaurants taking the "high road" in the business and is analogous to the more formal certification governing the organic label.[168] The entry costs into the organic market can be steep, but once they obtain certification, farmers can begin charging a premium, which allows them to recoup losses and begin profiting from sustainable farming practices.[169] In the same vein, the "high road" restaurant model operates on the assumption that a customer will be willing to pay elevated prices if he or she knows that his or her money is going into the pockets of the workers and not the restaurant owner.[170]

Advocacy organizations can intermediate by serving a screening function—that is, by identifying potentially exploitative workplaces for labor officials. Although incompliance is widespread among restaurants in the Los Angeles area, violations were particularly egregious in Koreatown during the 1990s.[171] More than two-thirds Koreatown restaurants are owned by Koreans, many of whom are immigrants. Some have suggested that incompliance in these restaurants stems from a combination of lack of familiarity with U.S. and California laws and adherence to a different set of employer-worker norms.[172] During the 1990s, Korean Immigrant Workers Advocates (KIWA)[173] helped launch a campaign against the Koreatown

166. *See* James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1863 (2009); Ashar, *supra* note 8, at 1916.

167. *See, e.g.*, 2013 ROC DINERS' GUIDE, *supra* note 32.

168. *See* SARU JAYARAMAN, FORKED: A NEW STANDARD FOR AMERICAN DINING (Oxford Univ. Press ed., 2016); Restaurant Opportunities Center United, 2014's New High Road Restaurants (Jan. 6, 2014), *at* http://rocunited.org/2014/01/2014s-new-high-road-restaurants/.

169. *See* Patricia Allen & Martin Kovach, *The capitalist composition of organic: The Potential of markets in fulfilling the promise of organic agriculture*, 17 Agriculture and Human Values 221, 225 (2000).

170. *See* SARU JAYARAMAN, FORKED: A NEW STANDARD FOR AMERICAN DINING (Oxford Univ. Press ed., 2016).

171. *See* Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 483 (2005); Daisy Ha, *An Analysis and Critique of KIWA's Reform Efforts in the Los Angeles Korean American Restaurant Industry*, 8 ASIAN AM. L.J. 111, 122–25 (2001); K. Connie Kang, *41 Restaurants Violated Labor Laws*, LA Times, Aug. 22, 1998.

172. *See* Daisy Ha, *An Analysis and Critique of KIWA's Reform Efforts in the Los Angeles Korean American Restaurant Industry*, 8 ASIAN L.J. 111, 122–25 (2001).

173. The organization has since changed its name to the Koreatown Immigrant Workers Alliance. ASIAN AMERICANS: AN ENCYCLOPEDIA OF SOCIAL, CULTURAL, ECONOMIC, AND POLITICAL HISTORY

restaurant industry.[174] This campaign led to further investigations and sanctions by state and federal labor enforcement agencies.[175]

All of these examples—CIW, ROC, and KIWA—illustrate the complicated information economy in which intermediaries must broker transactions. They must engage employers, the dining public, and government officials across a variety of circumstances. But the through-line connecting all of these examples is that the intermediating decision begins with what the workers themselves want. These are not attempts to do anything "on behalf of" workers, but rather with and by them.[176]

IV. SUPPLEMENTS, NOT SUBSTITUTES

So ethical consumption schemes sometimes work. Certainly, reform-minded individuals should continue to find ways to leverage consumer interest to improve working conditions. But this shouldn't be all that they (and we) do. In this Part, I want to press the point that disclosure laws that educate consumers on food system exploitation should operate as supplements, not substitutes, for traditional worker-initiated programs. As I explain, there are some values that are best vindicated when workers take the lead in shaping the scope and purpose of disclosure schemes, namely autonomy, equity, and community standing. In explaining the importance of prioritizing these values, I focus on the challenges workers face in the restaurant industry. Although numerous links in the food chain could benefit from a more explicit recognition of these worker-centric values—farms and meatpacking plants are just two examples—the frequency with which Americans dine out means that most consumers have at least a sense of what restaurant workers do. Far fewer can say the same thing about farmworkers or meatpackers. For this reason, I focus on how disclosure schemes might worker given the peculiar contours of workplace protections in restaurants.

If the restaurant industry is not recession proof, then it is something close to it. In December 2007, the country entered one of the worst economic recessions in decades, and yet the restaurant industry as a whole has not

724 (Xiaojian Zhao & Edward J.W. Park eds., 2014).

174. *See* Jong Bum Kwan, *The Koreatown Immigrant Workers Alliance: Spatializing Justice in an Ethnic "Enclave", in* WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY (Ruth Milkman et. al. eds., 2013). *See also* Ha, *supra* note 172, at 122–25.

175. *See* K. Connie Kang, *41 Restaurants Violated Labor Laws*, L.A. TIMES (Aug. 22, 1998), http://articles.latimes.com/1998/aug/22/local/me-15443 (reporting that a DOL investigation of forty-three Koreatown-area restaurants found that two hundred workers were underpaid by $250,000).

176. *See* Dana Frank, *Where are the Workers in Consumer-Worker Alliances? Class Dynamics and the History of Consumer-Labor Campaigns*, 31 POL. & SOC'Y 363, 374 (2003).

only managed to survive but also has thrived.[177] Annual sales in food service firms have steadily increased over the last decade, as has the money that people are spending at restaurants.[178] Over the last half-century, Americans have allocated more and more of their food budgets for food prepared outside of the home.[179] Yet, despite the public's clamoring for restaurant food, restaurant workers routinely hover around the poverty line.[180]

Disclosure laws help consumers make more ethical dining choices by providing information that helps distinguish restaurants that comply with labors laws from those that do not. But economic harms experienced by restaurant workers are structural in nature. That is, workers often still struggle against poverty even where their employers comply with basic wage and hour and safety requirements. Cooks, dishwashers, waiters, bussers, and hosts all work at or near the minimum wage requirement.[181]

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177. In 2007, the year the Great Recession began, food services and drinking places registered $444 billion dollars in annual sales. In 2008, annual sales actually increased to $456 billion. This trend has largely continued. In 2014, that number reached $575 billion. *See* U.S. CENSUS BUREAU, ESTIMATED ANNUAL SALES OF U.S. ACCOMMODATION AND FOOD SERVICES FIRMS BY KIND OF BUSINESS: 1992 THROUGH 2012 (2015).

178. In 2007, Americans spent just under $420 billion at eating and drinking establishments, and that figure has risen to $521 billion in 2013. *See Food Expenditures: Table 3—Food Away from Home: Total Expenditures*, U.S. DEP'T AGRIC. ECON. RESEARCH SERV. (Nov. 12, 2016), https://www.ers.usda.gov/webdocs/DataFiles/Food_Expenditures__17981/FoodExpenditures_table3.xls?v=42395. In 1962, nearly 28% of one's food budget was spent on away-from-home foods. In 2002, that number jumped up to 46%. *See Food Expenditures: Table 10—Food Away from Home as a Share of Food Expenditures*, U.S. DEP'T AGRIC. ECON. RESEARCH SERV. (Nov. 12, 2016), https://www.ers.usda.gov/webdocs/DataFiles/Food_Expenditures__17981/FoodExpenditures_table10.xls?v=42395 [hereinafter *USDA Food Expenditures Table 10*]. The USDA estimates that in 1978, 18% of our daily caloric intake was from away-from-home food, whereas in 1996, it was 32%. *See* JAYACHANDRAN N. VARIYAM, NUTRITION LABELING IN THE FOOD-AWAY-FROM-HOME SECTOR: AN ECONOMIC ASSESSMENT2, fig. 2 (2005).

179. *USDA Food Expenditures Table 10*, *supra* note 178. In 1963, Americans devoted 71% of their food budgets to "food at home" and only 29% of their food budgets to "food away from home." The gap has steadily closed so that by 2010, Americans' food budgets were evenly split between the two categories of food. In 2010, Americans spent 51.4% of their food budgets on food at home leaving 48.6% for food outside the home. *Id.* The majority of food-away-from-home sales occur in restaurants. *See Food Service Industry: Market Segments*, U.S. DEP'T AGRIC. ECO. RESEARCH SERV. (last visited Nov. 12, 2016), https://www.ers.usda.gov/topics/food-markets-prices/food-service-industry/market-segments/ (noting that full service and fast food restaurants account for 77% of all food-away-from-home sales). The remaining purchases are made at hotels, motels, schools, colleges, stores, bars, vending machines, recreational places, and other establishments, including military outlets. *See id.* Today, one in twelve private sector workers in the United States is employed in the restaurant industry. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAY 2010 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES (2010).

180. *See* SYLVIA ALLEGRETTO ET AL., FAST FOOD, POVERTY WAGES: THE PUBLIC COST OF LOW-WAGE JOBS IN THE FAST-FOOD INDUSTRY (2013), http://laborcenter.berkeley.edu/fast-food-poverty-wages-the-public-cost-of-low-wage-jobs-in-the-fast-food-industry/.

181. *See id.* at 2. ("The median hourly wage for core nonmanagerial front-line fast-food workers, those working at least 27 weeks in a year and 10 hours a week, is $8.69 an hour."). For years, the federal minimum wage remained frozen at $5.15. *See* Small Business Job Protection Act of 1996, Pub. L. No.

And many restaurant workers receive tips during the course of their employment, which means that as "tipped employees," they are not covered by the minimum wage threshold.[182] Of course, states are free to set minimum wages for tipped employees above the minimum requirement. And, in recent years, a handful of localities have attracted national attention for their decision to increase the minimum wage requirement to $15 an hour for restaurants working within the fast food industry,[183] but these examples remain outliers.[184] All of this shows that relying on information about whether a restaurant has complied with workplace laws risks giving consumers a skewed perception of how restaurant workers actually fare on a daily basis. A fuller picture requires workers to weigh in themselves.

A. Autonomy

A common critique of consumer-oriented campaigns to alleviate exploitation up the supply chain is that such campaigns often disconnect workers from the larger process of holding bad actor employers accountable. In her critique of consumer-worker alliances, for example, Dana Frank explains:

> The risk is a model in which a man on a white horse rides into the

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104-188, § 2104(b), 110 Stat. 1755, 1928–29 (1997) (codified at 29 U.S.C. § 206(a)) (increasing the minimum wage to $5.15 an hour beginning September 1, 1997). In 2007, Congress amended the FLSA to raise the minimum wage to the current requirement of $7.25. *See* Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, § 8102(a), 121 Stat. 188 (2007) (codified at 29 U.S.C. § 206(a)(1)) (requiring that the minimum wage be gradually raised over a two year period to $7.25 effective in 2009).

182. *See* 29 U.S.C. § 203(m)(1)–(2) (2012). In those instances, employers can pay a direct wage as low as $2.13 provided certain conditions are met, most importantly that an employee's tips combined with the direct wages meet the federal $7.25 minimum wage benchmark. Other conditions include that the employee retains all of the tips and regularly receives more than $30 in tips per month. *See* Fact *Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR (July 2013), http://www.dol.gov/whd/regs/compliance/whdfs15.pdf.

183. The cities of Seattle, San Francisco, and Los Angeles have all passed laws instituting a gradual increase in the minimum wage to $15. *See* Victor Luckerson, *Here's Every City in America Getting a $15 Minimum Wage*, TIME MAG., July 23, 2015, http://time.com/3969977/minimum-wage/. Most recently, and perhaps most surprisingly, Governor Andrew Cuomo implemented a similar raise that will cover fast food restaurants within the entire state of New York. *See* Patrick McGeehan, *New York Plans $15-an-Hour Minimum Wage for Fast Food Workers*, N.Y. TIMES, (July 22, 2015), http://www.nytimes.com/2015/07/23/nyregion/new-york-minimum-wage-fast-food-workers.html.

184. To date, nineteen states and territories have adopted the $2.13 minimum wage and an additional five states have adopted a minimum wage under $3.00 an hour. The states and territories paying $2.13 are: Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, North Carolina, Nebraska, New Jersey, New Mexico, Puerto Rico, South Carolina, Tennessee, Texas, Utah, Virginia, Virgin Islands, and Wyoming. The following jurisdictions pay under $3 an hour: Arkansas ($2.63), Delaware ($2.23), District of Columbia ($2.77), Pennsylvania ($2.83), Wisconsin ($2.33), and West Virginia ($2.62). *See Minimum Wages for Tipped Employees*, U.S. DEP'T LAB. WAGE & HOUR DIV. (Aug. 1, 2016), http://www.dol.gov/whd/state/tipped.htm [https://perma.cc/6E8Q-4XAU].

> oppressed town, exposes exploitative conditions, points to helpless, passive workers, and then rides away. In this approach, strong, wise, U.S. middle-class people help a weak, ill-informed populace at the other end—which doesn't talk back or make demands on the nature of the solidarity relationship. At worst, this can lead to consumer activities that the workers themselves do not agree with or have power over.[185]

"The ultimate goal" of these campaigns, Frank insists, "is not middle-class people obtaining justice 'for' the working people at the other end but helping working people do so for themselves—in a long-term process of planned obsolescence."[186]

The very point of many workplace laws is to empower workers to help themselves. The prime example is the National Labor Relations Act (NLRA), which sets out an array of rights for workers to organize and engage in collective action.[187] Other models, such as worker centers and social movement-centered litigation advance similar goals. For these advocates and organizers, it is not enough for consumers to help workers achieve better working conditions. Rather, the primary goal is to help workers achieve those conditions *for themselves*.[188]

Of course, in the restaurant context, protection under the law is not so much the issue as it is the enforcement of those protections. Still, labor organizations remain an attractive institutional partner and service provider for these workers, many of whom are immigrants. In her ethnographic work on Mexican immigrant busboys in Chicago, Professor Gomberg-Munoz explains that these busboys—many unauthorized immigrants—relish in

185. *See* Frank, supra note 114, at 374.

186. *Id*. at 365.

187. *See* Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2694–2700 (2008).

188. A number of immigration scholars have utilized the solidarity-enhancing and solidary-rewarding elements of our workplace laws to develop theories supporting a robust set of immigrant rights providing a strong foundation for food justice scholars and advocates to build on. In my own work, I have defended the favorable exercise of prosecutorial discretion for unauthorized immigrant workers. Labor claims provide an acceptable sorting mechanism for identifying those immigrants most likely to strengthen rather than undermine the interests of other workers. *See* Stephen Lee, *Screening for Solidarity*, 80 U. CHI. L. REV. 225 (2013). Relatedly, Hiroshi Motomura has argued that labor protections allow citizen workers to function as "interest surrogates" or "citizen proxies" for their unauthorized immigrant co-workers, highlighting the degree to which citizen and noncitizen interests can be comingled and intertwined. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1751–54 (2010). And in one of the most robust assertions of labor-based membership, Jennifer Gordon has argued for "transnational labor citizenship," in which labor migration rules would be reformed to allow labor organizations to oversee the migration process. *See* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

their racialized identities as hard workers.[189] Yet these workers are also acutely aware that their unauthorized status puts pressure on them to work hard for fear of losing their jobs. Moreover, Gomberg-Munoz's ethnography reveals how several of these workers value "union job[s]" above all others because of the autonomy and professional boost such jobs provide.[190] Thus, Professor Gomberg-Munoz observes that these workers must negotiate the short-term advantages of racialized stereotypes as hard workers against the long-term implications of reinforcing stereotypes and perpetuating oppressive work conditions.[191]

Ths consumer protection approach to labor enforcement, in some ways, reproduces the same "savior" dynamic that can be found within anti-trafficking approaches to worker exploitation, another common alternative to the NLRA worker-initiated model. By design, the road to remedy in the anti-trafficking context travels through state power exercised by law enforcement officials, which means workers participate in the process only passively as victims whose interests are vindicated by the criminal justice process. Professor Hila Shamir helpfully observes that while most anti-trafficking efforts are organized around human rights principles, the realities of the trafficking industry suggest that regulators would be better off embracing a labor trafficking paradigm in which "[t]he workers are regarded as agents of change who, if given the tools to do so, can bargain for better working conditions and ultimately transform the employment practices and patterns in their work sector without any need to be rescued by either [nongovernmental organizations] or the authorities."[192] Within this paradigm, the workers themselves rather than government officials shape the contours of resistance against trafficking. Professor James Pope makes a similar point by advocating for a "free labor approach" to regulating trafficking.[193] Thus, while the traditional trafficking paradigm captures only

189. *See* Ruth Gomberg-Munoz, *Willing to Work: Agency and Vulnerability in an Undocumented Immigrant Network*, 112 AM. ANTHROPOLOGIST 295 (2010).

190. *See id.* at 302.

191. *See* RUTH GOMBERG-MUNOZ, LABOR AND LEGALITY: AN ETHNOGRAPHY OF A MEXICAN IMMIGRANT NETWORK 100 (2011) ("While being known as 'hard workers' has the benefit of making [unauthorized workers] indispensable at their jobs, it has the side effect of reproducing various exploitative aspects of their work, including intensification of their labor characterized by increasing workloads for the same pay."); Ruth Gomberg-Munoz, *Willing to Work: Agency and Vulnerability in an Undocumented Immigrant Network*, 112 AM. ANTHROPOLOGIST 295 (2010).

192. *See* Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 124 (2012).

193. The primary example Professor Pope offers is the Coalition of Immokalee Workers. Pope describes the CIW in these terms: "Instead of relying primarily on government enforcement, the CIW brings workers together, develops rights consciousness through education and action, and creates the space for workers to develop strategies for improving their conditions." *See* Pope, *supra* note 166, at 1863.

a narrow category of workplace harms, this paradigm could shift and expand with a broader conception of exploitation.

Maybe the point of any defensible labor enforcement scheme is to empower workers to help themselves. Articulated in these terms, the fixation on how to leverage public support for labor enforcement programs distracts from a different, and arguably more urgent, information deficit: empowering the workers themselves and treating them as *consumers* of work-related information.[194] Perhaps the problem isn't that fostering consumer-oriented information disempowers workers, but rather that we have been fostering the wrong kind of information for the wrong set of consumers. Rebranding labor enforcement on *these* consumer protection terms would mean meeting workers where they are, which is isolated at the margins of the economy.[195]

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194. As the DOL states: "We . . . understand that most workers are consumers (and vice versa), so our work sometimes yields benefits for the consumer public as well. . . . We want to let you know how the Labor Department can help you make safe and sound decisions as a consumer." *DOL Highlights National Consumer Protection Week*, DEP'T OF LABOR BLOG (Mar. 8, 2012), http://blog.dol.gov/2012/03/08/dol-highlights-national-consumer-protection-week/ [https://perma.cc/HWD8-89SW]. *See also* Phyllis Borzi, *National Consumer Protection Week: Securing Your Health and Retirement Benefits*, DEP'T OF LAB. BLOG (Mar. 8, 2012), http://blog.dol.gov/2012/03/08/national-consumer-protection-week-securing-your-health-and-retirement-benefits/ [https://perma.cc/JF39-XSHU]. The justification for protecting workers is that those protections also benefit consumers. When OSHA targeted hair salon owners for importing formaldehyde-laden hair smoothing products for the popular "Brazilian blowout," a key part of its messaging included the harms such products presented to consumers. *See* News Release, OSHA, DEP'T OF LABOR, U.S. Department of Labor Continues to Cite Beauty Salons and Manufacturers for Formaldehyde Exposure from Hair Smoothing Products (Dec. 8, 2011), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=21474 [https://perma.cc/JG4U-MH92] (noting that manufacturers and distributors of hair products were cited for "failing to protect their own workers from possible formaldehyde exposure as well as to communicate the hazards of formaldehyde exposure to salons, stylists and consumers."). The FDA also issued a warning letter to a company distributing hair smoothing products, alleging a potential misbranding violation. Warning Letter from Michael W. Roosevelt, Acting Dir., Ctr. for Food Safety & Applied Nutrition of the U.S. Food & Drug Admin, to Mike Brady, CEO, Brazilian Blowout (Aug. 22, 2011), http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm270809.htm [https://perma.cc/258K-NX59]. California's Department of Justice employed similar language when it announced a settlement agreement it reached with the manufacturer. *See* Press Release, Cal. Dep't of Justice, Attorney General Kamala D. Harris Announces Settlement Requiring Honest Advertising over Brazilian Blowout Products (Jan. 30. 2012), http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-settlement-requiring-honest [https://perma.cc/V3SH-EESU] ("California laws protect consumers and workers and give them fair notice about the health risks associated with the products they use . . . .").

195. Often times, as immigrants, these workers exist beyond the reach of legal service provider networks. In other instances, they simply do not know their rights. *See* Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1085–1089 (2014). Given their tenuous status, cooks are in no position to inquire about rest breaks. And workplace norms often discourage busboys from seeking out promotion. *See* RUTH GOMBERG-MUÑOZ, LABOR AND LEGALITY: AN ETHNOGRAPHY OF A MEXICAN IMMIGRANT NETWORK 92–94 (2011).

B. Equity

Another problem stems from the heterogeneity of statuses within workplaces like restaurants. While all restaurant workers might share an interest in working in an environment free of sexual harassment or committed to safe working conditions, workers often diverge on the issue of pay. This is because restaurants are subject to antiquated labor laws grounded in tipping practices, which benefits servers but not cooks, hosts but not dishwashers. Thus, disputes centering on wage-related issues such as tipping can invite different degrees of support depending on one's position on the restaurant staff.[196]

To start with, federal labor laws guarantee that workers are paid a certain amount per hour but they do not guarantee from where that payment will come. Under FLSA, the federal minimum wage is $7.25, which means that all employees will get paid (at least in theory) that much an hour.[197] FLSA separates out "tipped employees," which it defines as those employees who traditionally and customarily receive tips. For those employees, FLSA imposes a $2.13 minimum wage requirement and allows employers to take a "tip credit" for the difference between that wage and the $7.25 baseline.[198] Put simply, federal laws allow employers like a restaurant owner to decide *how* it plans to ensure that her workers get paid at least $7.25 an hour. At the very least, that employer can pay a server as little $2.13 an hour so long as the tips the server receives amounts to at least $5.12 an hour (thereby reaching the $7.25 an hour federal minimum wage).

This wage model allocates economic responsibility between two actors: employers and diners who support the restaurant. One consequence of this model is that it generates inequity within the restaurant staff, so that those who traditionally receive tips in the "front of the house" (such as servers, hosts, and bartenders) earn at a much higher rate than those who work in the "back of the house" (such as cooks, dishwashers, and busboys). In recent years, tipping policy has generated litigation[199] and caused the public to reconsider the entire tipping system.[200] This has been caused in part by

196. A similar dynamic operates in the organic and fair trade context, in which farmers tend to enjoy more privileged positions than farmworkers. Thus, forging ties with farmers allows employers to consolidate even more bargaining over their workers. *See* Daniel Jaffee et al., *Bringing the "Moral Charge" Home: Fair Trade within the North and within the South*, 69 RURAL SOC. 169, 171 (2004).

197. Wage theft remains a significant problem in many low-wage industries. *See* Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655 (2014).

198. *See supra* note 182 and accompanying text.

199. *See* Oregon Restaurant and Lodging Ass'n v. Perez, 816 F.3d 1080 (9th Cir. 2016); Trejo v. Ryman Hospitality Properties, Inc., 795 F.3d 442 (4th Cir. 2015).

200. *See* Jonathan Kauffman, *Tip pooling and the battle for equitable pay in restaurants*, SF CHRON.

restaurants attempting to impose tip pooling or sharing policies as a way of ameliorating the pay disparity between the front and back of the house.

Empowering consumers to monitor restaurants for labor and employment violations assumes to a certain extent that the employer-worker relationship is a contentious one or at least a relationship in which each side seeks to maximize monetary benefits. But it's important to note that tipping policies foist onto workers the responsibilities of serving as agents to two principals: customers, who subsidize worker incomes with tips, and the employer, who pays the difference between tips and the minimum wage requirement.[201] Within this world of having to serve two masters, tipping creates the possibility of collusion between consumers and workers.[202] For example, a restaurant server may refill a customer's drinks for free in the hopes of receiving a more generous tip. Effectuating an anti-exploitation agenda in this context reframe acts of collusion as acts of solidarity. From the consumer's perspective, a more generous tip would not represent an expression of gratitude for the server's willingness to cut the customer a deal on beverage service. Rather, it would be offered as help or support for the worker struggling to meet basic life needs within a low-wage industry.[203]

At the same time, sharing enforcement responsibilities with the dining public threatens to exacerbate power dynamics that already animate the customer-server dynamic. Within the restaurant industry, a worker's livelihood is already tied to consumers to the extent that the server relies on tips for income. This dependence already skews the consumer-worker relationship, and further empowering consumers in this sense might exacerbate the possibility of exploitation. In the parallel context of food safety inspection, which also increasingly relies on consumer input, Professor Daniel Ho noted that consumer-centric enforcement efforts invite problems of exacerbating discrimination within the inspection process. For example, food safety inspection programs are increasingly relying on consumer reviews through services like Yelp to help identify potentially incompliant restaurants. Such a strategy relies on choosing predictor terms that could point inspectors to the increased possibility of incompliance.

March 25, 2016.

201. Michael Lynn & Shuo Wang, *The Indirect Effects of Tipping Policies on Patronage Intentions Through Perceived Expensiveness, Fairness, and Quality*, 39 J. ECON. PSYCHOL. 62, 63 (2013).

202. *Id.*

203. *See* Michael Lynn, *Service Gratuities and Tipping: A Motivational Framework*, 46 J. ECON. PSYCHOL. 74, 79–80 (2015) (noting that one potential motivation to tip is to help servers). *See also* Hainmueller & Hiscox, *supra* note 108, at 6–7, (noting that one possible motivation of consumers supporting improved working conditions for those creating goods for purchase is "deriv[ing] a 'warm glow' satisfaction from supporting a program that is helping workers").

Such choices are not often obvious, and as Professor Daniel Ho argues, have the potential to exacerbate racial and national origin discrimination: "for instance, if reviewers were more likely to call Asian restaurants 'gross,' conditional on the same inspection score, this result may reflect (anti-Asian) bias from consumers or (pro-Asian) bias from inspectors."[204]

C. Community Standing

For many restaurant workers who are seen and not heard, the law creates the opportunity to assert and establish their belonging as members of their community. This vision of enforcement derives from the larger set of legal norms favoring integration of immigrants.[205] Thus, any attempt to enlist consumers for help should foster the ability of food workers to affirm their standing. Low wages not only prevent many restaurant workers from climbing out of poverty, the institutional setting creates a work environment in which these workers move invisibly in the presence of others.[206] Restaurants in the United States employ roughly 1.4 million foreign-born individuals, but this figure understates the influence that unauthorized workers have on the industry and worker identity-formation.[207] Indeed, many restaurateurs prefer unauthorized workers for their willingness to work long hours for little pay.[208] This "positive" view of immigrant workers comes with its own restrictions. While unauthorized immigrants have a particularly strong presence in the "back of the house" as cooks and dishwashers,[209] they stand very little chance of being promoted to the "front

204. *See* Daniel E. Ho, *Equity in Bureaucracy*, __ U.C. IRVINE L. REV. __ 1, 19 (forthcoming 2017).

205. *See, e.g.*, Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, U. CHI. LEGAL F. 1 (2007).

206. Of course, this is a part of what separates great from merely good servers at restaurants. Then again, the treatment of servers at fining dining establishments is not a priority in terms of worker exploitation.

207. A significant body of sociological and anthropological work has shown how the restaurant industry welcomes immigrants and those with criminal records so long as they are willing to work beyond the public's view. *See* RUTH GOMBERG-MUÑOZ, LABOR AND LEGALITY: AN ETHNOGRAPHY OF A MEXICAN IMMIGRANT NETWORK (2011); Jong Bum Kwon, *The Koreatown Immigrant Workers Alliance: Spatializing Justice in an Ethnic "Enclave"*, *in* WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY 23 (Milkman et al. eds., 2010); Alex Stepick et al., *The View from the Back of the House: Restaurants and Hotels in Miami*, *in* NEWCOMERS IN THE WORKPLACE: IMMIGRANTS AND THE RESTRUCTURING OF THE U.S. ECONOMY, 181, (Lamphere et al. eds., 1994); Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465 (2005).

208. *See* Kershaw, *supra* note 150. These employers sometimes use this preference to justify not hiring citizen workers, especially African Americans. *See* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008).

209. *See* Gomberg-Munoz, *supra* note 189; Shannon Gleeson, *Leveraging Health Capital at the Workplace: An Examination of Health Reporting Behavior Among Latino Immigrant Restaurant*

of the house" as waiters or hosts and hostesses,[210] highlighting subordinating elements of segregation: workers in the front can supplement their wages with tips while those in the back generally cannot.[211]

Labor justice in restaurants and other domestic workplaces poses exactly the types of questions consumers can avoid by supporting other similar programs benefiting in foreign settings. Overseas programs like fair trade goods allow consumers to participate in reform projects from a distance. As labor and consumer historian Lawrence Glickman observes, the tradition of ethical consumption rests on a principle of "long distance solidarity" in which consumers can, through their purchases, support workers they don't know or necessarily care about.[212] This is perhaps one of the dilemmas presented by domestic labor justice campaigns. As Professor Dana Frank helpfully observes:

> Mobilizing consumer power on behalf of domestic workers . . . brings to the fore the messy question of cooperation with the U.S. labor movement. . . . Building domestic consumer-labor alliances . . . forces middle-class activists to confront domestic class differences, both in organizing and in consumption patterns, which are more easily elided or romanticized in overseas relationships.[213]

Buying fair trade coffee to support indigenous Mayan farmers in Chiapas, Mexico[214] avoids the difficult question of what we as American consumers owe to Chiapans who migrate to the United States and become our neighbors, a question that certainly arose when a Chiapan man died in the basement of a Detroit restaurant for which he worked without authorization[215] and becomes relevant again when a Chiapan woman endures sexual harassment while picking fruit in Florida.[216] These domestic examples force consumers to confront the uncomfortable moral question

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Workers in the United States, 75 SOC. SCI. & MED. 2291 (2012).

210. Ashar, *supra* note 8, at 1881.

211. Although not common, restaurants can implement tip-pooling policies. *See* Cumbie v. Woody Woo, Inc., 596 F.3d 577 (9th Cir. 2010).

212. *See* GLICKMAN, *supra* note 35.

213. Frank, *supra* note 114, at 376.

214. *See Mexico "Chiapas" Coffee Roast*, GROUNDS FOR CHANGE, HTTP://WWW.GROUNDSFORCHANGE.COM/SHOP/PRODUCT.PHP?PID=62.

215. *See* Serena Maria Daniels, *Owners of Suburban Chinese Restaurant Charged After House Fire Killed 5 Immigrants*, DETROIT METRO TIMES (Feb. 12, 2016), http://www.metrotimes.com/table-and-bar/archives/2016/02/12/owners-of-suburban-chinese-restaurant-charged-after-house-fire-killed-5-immigrants.

216. *See* S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY 15-16 (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf.

underlying their attempts to engage in ethical behavior: do consumers owe a greater ethical obligation to those (like immigrants) who live and work in the same country and neighborhood or to workers toiling abroad (like fair trade farmworkers)? Legal philosopher Jeremy Waldron puts it this way:

> Much of our life is lived 'on the road,' or lived in circumstances where we are often and, in Kant's phrase, 'unavoidably side-by-side' with strangers, with people alien to what we fancy are our traditions or our community. It may well be that a moral outlook that begins with the sheer fact of the *proximity* of two human beings—irrespective of their affiliations—is a better bet for these circumstances than a moral outlook which takes as its starting point what we owe to those we know and to those with whom we already have a connection.[217]

CONCLUSION

In this article, I have attempted to identify places where existing food laws, regulatory structures, and norms can begin to address the pervasive problem of exploitation across the food system. Given food law's interest in consumer empowerment, it is tempting to frame a discussion about exploitation in terms of what consumers will decide to embrace—about whether consumers will affirm fair working conditions or disavow exploitative and cruel labor practices. But an important point that I have tried to make is that the food law community's reform agenda must allow for workers and their intermediaries to help set the terms of emerging markets for ethically-produced goods.

Moving forward, workplace law scholars also have some work to do. Much of the recent turn by workplace advocates and scholars to the food law frame has proceeded in largely instrumental terms. But is there a "there" there? Workplace disputes that are conventional by many standards suddenly feel fresh because arguments are deployed in food law terms. Frames like "food security" arm labor unions with metrics for economic insecurity that the public can easily understand.[218] While many middle-class

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217. *See* Jeremy Waldron, *Who is My Neighbor?:Humanity and Proximity*, 86 THE MONIST 333, 351 (2003).

218. For example, a recent study of University of California staff found that 70% of staff responded that they experienced "low" or "very low" food security. *See* Peter Drier et al, Food Insecurity Among University of California Employees, Urban & Environmental Policy Institute, 2016, *at* http://documents.latimes.com/UC-workers-food-insecurity/; Teresa Watanabe, *Many UC workers struggle to feed themselves and their families, study shows*, LA Times, Oct. 17, 2016. This "food security" framing formed a core part of its campaign. *See* CX Unit Strike, Teamsters 2010, *at*

citizens might struggle to envision what economic insecurity looks like, everyone can identify with being hungry. And labor enforcement agencies openly talk about the need to "leverage" the power of the sustainability framework to advance workplace safety goals.[219] It may be that the only principle connecting food law's ambitions to workplace law's aspirations is the intuitive sense that it simply isn't right that some people struggle to feed themselves while they dedicate their working hours to feeding others. But it seems a worthwhile endeavor to determine whether we can transform that intuition into something bigger and more enduring.

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http://teamsters2010.org/?zone=/unionactive/view_page.cfm&page=CX20Strike20.

219. *See Sustainability in the Workplace: A New Approach for Advancing Worker Safety and Health*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION AT 6 (Dec. 2016), https://www.osha.gov/sustainability/docs/OSHA_sustainability_paper.pdf.