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## Productions Chains and Workplace Law Violations: The Case of Apple and Foxconn

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# PRODUCTION CHAINS AND WORKPLACE LAW VIOLATIONS: THE CASE OF APPLE AND FOXCONN

BY HILARY K. JOSEPHS<sup>†</sup>

## ABSTRACT

*For decades U.S. based multinational companies have outsourced production of goods to developing countries with low labor costs and weak implementation of protective legislation. The consumer electronics giant Apple is a prime example: it outsources virtually all of its manufacturing to companies such as Foxconn, a Taiwanese original equipment manufacturer, which employs over a million assembly line workers in China. In the last several years Foxconn's operations have been under scrutiny for violation of Chinese domestic employment law. This paper focuses on the problem of compulsory overtime, a violation of both Chinese law and international labor standards, and various measures brought to bear on the problem. The analysis concludes that no single instrumentality is likely to eliminate compulsory overtime, but that a combination of pressures—better enforcement of domestic law, reports by non-governmental organizations, oversight provided by corporate social responsibility programs, and consumer reaction—may ultimately prove effective. Ameliorating the working conditions for workers abroad may also inure to the benefit of American workers through the process of reverse diffusion of labor norms.*

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## I. INTRODUCTION

For the last three decades, the dominant voice in U.S. legal academic writing, and in the sphere of U.S. law-making itself, has lauded the superiority of free market capitalism, unfettered by government regulation. As evidence of this phenomenon, one might point to the frequency with which Ronald Coase’s “The Problem of Social

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Cost” has been cited in law review articles, the most cited article, with over 5,000 citations, according to one study.<sup>1</sup> Regardless of how Coase’s article *should* be interpreted,<sup>2</sup> it is utilized to lend credence to a human propensity for wealth accumulation over other values and efficiency concerns as the best principle for ordering society.<sup>3</sup> Even with respect to public goods, government has proved itself so incompetent, corrupt, and wasteful that the responsibility for them should be devolved onto private entities.<sup>4</sup>

During the same time period, the role of non-government organizations (NGOs) has gained importance both domestically and internationally. The term NGO originated with the UN Charter but since the 1940s has come to be variously defined.<sup>5</sup> Nonetheless, NGOs tend to have certain characteristics in common: the are not formed by nation-states but rather at the initiative of private parties (individuals or groups), are independent of any particular government,<sup>6</sup> and are dedicated to public concerns (poverty alleviation, environmental protection, human rights).<sup>7</sup> Since

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<sup>1</sup> Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1489 (2012). A search of the law review literature on Lexis yields only 288 hits for Karl/Marx/Capital and 384 for Adam Smith’s *Theory of Moral Sentiments*. Smith’s *Wealth of Nations* does better, at over 1800, but still not close to Coase.

<sup>2</sup> Coase himself complained about being misunderstood and his ideas used for purposes he did not intend. R.H. COASE, *THE FIRM THE MARKET AND THE LAW* 159 (1988) (“It is my view that the objections raised to the Coase Theorem...are invalid, unimportant, or irrelevant”). See also *id.* at 26-27. (“The concept of ‘externality’ has come to play a central role in welfare economics, with results which have been wholly unfortunate”).

<sup>3</sup> Markus Kitzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LITERATURE 51, 58 (2012)(quoting Milton Friedman’s assertion that “the only responsibility of business is to maximize profits”). The pendulum of public opinion, as expressed in the most recent political elections, in the United States may be swinging back in the other direction in the wake of various financial scandals and the 2008 global economic crisis, in other words, the reckless unchecked pursuit of individual profit damages aggregate welfare in the long run. Once avid supporters of the unregulated free market have repented. See, e.g., *The Big Banker’s Change of Heart*, N.Y. TIMES, July 27, 2012, at A22 (Sanford Weill). For a scholarly perspective on the drawbacks of reliance on private law solutions and the importance of public regulation, see Nicholas C. Howson, *When “Good” Corporate Governance Makes “Bad” (Financial) Firms: The Global Crisis and the Limits of Private Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 44 (2009).

<sup>4</sup> Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 137 (2005).

<sup>5</sup> Christine Bakker & Luisa Vierruci, *Introduction: a normative or pragmatic definition of NGOs?*, in *NGOs in International Law: Efficiency in Flexibility?* 16-17 (Pierre-Marie Dupuy & Lisa Vierucci, eds., 2008) (“In practice, a wide range of organizations has evolved, their diversity stemming from the very absence of prior regulation”).

<sup>6</sup> Servile NGOs—or GONGOs—are beyond the scope of this paper. See Olivier de Frouville, *Domesticating Civil Society at the United Nations*, in Dupuy & Vierruci, *supra* note 5, at 71.

<sup>7</sup> SERGEY RIPINSKY & PETER VAN DEN BOSSCHE, *NGO INVOLVEMENT IN INTERNATIONAL ORGANIZATIONS: A LEGAL ANALYSIS* 4-7 (2007).

World War II, the number of international NGOs has risen dramatically, as high as 44,000 by one count in 1999.<sup>8</sup>

Another approach which has emerged to fill the gap left by governmental failure is the concept of corporate social responsibility (CSR), whereby private companies invest in public goods provision and reduce the negative externalities of their operations below levels required by law.<sup>9</sup> Obviously, CSR involves a departure from the neoclassical model, whereby the firm's sole *raison d'être* is the generation of profits. The debate as to whether CSR *should* exist has shifted to *why* it exists and *what effects* it produces.<sup>10</sup>

The puzzle examined here is why, despite investigations by NGOs and oversight supplied by CSR, the problem of compulsory overtime at Foxconn,<sup>11</sup> a contract handset maker for Apple,<sup>12</sup> persists.<sup>13</sup> The issue is ripe for analysis because there are well-defined domestic legal standards for what constitutes "compulsory overtime," respectable authority that "compulsory overtime" violates international law,<sup>14</sup> and much information in the public domain which corroborates the existence of "compulsory overtime."<sup>15</sup>

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<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 51. In this paper, I will use the term CSR to include compliance with legally mandated minimum requirements, not just "above the floor" commitments, which is the usual sense of the term.

<sup>10</sup> *Id.* See also CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 11-13, 97-103 (2010) (describing various CSR commitments).

<sup>11</sup> Foxconn, also known as Hon Hai Precision Industry Company Ltd., is a Taiwanese company. See *Hon Hai Precision Ind. Co. Ltd.*, FOXCONN INTERNATIONAL HOLDINGS, <http://www.fih-foxconn.com/about/HONHAIprofile.aspx> (last visited Feb. 11, 2013).

<sup>12</sup> For a time the world's most valuable company by stock valuation. See E.S. Browning et al, *Apple Now Biggest-Ever Company*, WALL ST. J. (Aug.21, 2012), <http://online.wsj.com/article/SB10000872396390443855804577601773524745182.html>. Although Apple is incorporated in and has its headquarters in the United States, virtually all Apple products are manufactured in Asia. See note 58, *infra*, and accompanying text.

<sup>13</sup> For detailed discussion, see note 58, *infra*, and accompanying text.

<sup>14</sup> INTERNATIONAL LABOUR CONFERENCE, *ERADICATION OF FORCED LABOR*, REPORT III (PART 1B) 12 (2007) (forced labor conventions most ratified of all ILO conventions); see also *id.* at 72 (compulsory overtime constitutes forced labor). In other situations, human rights advocates had to gain acceptance of a new international norm while proving that particular conduct violated it. See ANN MARIE CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* 19 (2001).

<sup>15</sup> On the advantages of limited focus, see ROGER BLANPAIN ET AL, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS* 71 (2d ed. 2012) (discussing the four fundamental human rights articulated in the 1998 Declaration on Fundamental Principles and Rights at Work); Andrew Herman, *Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality*, 52 VA. J. INT'L L. 445, 471-81 (2012) (recommending focus on "living wage").

It may be that in an authoritarian system such as China's, which bans independent unions and constricts civil society,<sup>16</sup> there is no effective substitute for government enforcement. And remedial government action will be more likely in response to "self-help" protests by affected workers.<sup>17</sup> As for pressure from abroad, some consumer products may be impervious to adverse publicity and consumer boycotts, even among those consumers who consider themselves "socially conscious."<sup>18</sup>

No one instrumentality is likely to solve the problem, but a combination may produce—what will in hindsight be—significant change. On the other hand, where a number of modalities exist to rectify violations of worker rights, does their combination create a whole greater than the sum of its parts, or do they result in a dispersion of energy and resources which should be concentrated on one or a few modalities?<sup>19</sup>

This article concludes that while NGO reports and CSR investigations are duplicative of one another, and in that sense redundant and "inefficient," there is no viable alternative to publicizing workplace violations and garnering public support, inside China and abroad, for their remediation. A multi-pronged, multi-stakeholder approach is especially necessary in a society where channels of information are heavily monitored and censored by the government. The discussion which follows will examine the various instrumentalities of reform and assess their respective strengths and weaknesses.

## II. PRC WORKPLACE LAW

Since Foxconn's manufacturing operations are located in China, it is the law of the forum to which we must turn first. The worker's right to rest is a basic right set forth in art. 43 of the PRC Constitution. Under PRC law constitutional rights are not directly justiciable, but the right to rest is expressed in positive law, namely the 1994 Labor Law. As described by a noted academic commentary, "the goal of the Labor Law is to protect workers' health by prescribing hours of rest. After a day of exhausting work, a worker is spent both physically and mentally. Only through rest can s/he recover strength, maintain a healthy body, and replenish energy, so that s/he can further engage in production, achieve advances in professional education,

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<sup>16</sup> See generally Jillian S. Ashley & Pengyu He, *Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots" NGOs in China Today*, 26 B.U. INT'L L. J. 29 (2008).

<sup>17</sup> See generally Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China*, 44 LAW & SOC'Y REV. 157 (2010) (discussing proactive, extrajudicial dispute resolution by government agencies and the courts).

<sup>18</sup> Because the focus of this article is workplace violations, specifically those dealing with overtime demands, it will not address in depth consumer boycotts responding to other situations of corporate misconduct, such as environmental degradation.

<sup>19</sup> In an article about threats by "green" organizations to boycott "brown" producers, the diffusion problem is articulated as follows: "[T]here may be competing public interest organisations that represent 'non-environmentalist' consumers and counter the [green organisation]'s efforts. There may be different [green organisations]—with different objective functions—competing to represent consumers." Robert Innes, *A Theory of Consumer Boycotts Under Symmetric Information and Imperfect Competition*, 116 ECON. J. 355, 376 (2006).

participate in social activities and household chores, and arrange his/her personal life.”<sup>20</sup>

The Labor Law, as amended by a 1995 State Council regulation, provides in pertinent part for a standard 40 hour work week with a minimum of one rest day per calendar week.<sup>21</sup> Under standard arrangements, the employer must obtain the employee’s consent to any additional working hours,<sup>22</sup> which must then be compensated at overtime rates.<sup>23</sup> However, overtime is limited to three hours per day or thirty six hours in a single month.<sup>24</sup> Failure to properly compensate overtime subjects the employer to fines.<sup>25</sup>

However, the Labor Law does legitimate alternative arrangements which are not subject to overtime requirements.<sup>26</sup> The alternative arrangement theoretically applicable to factory workers, the Comprehensive Working Hours System, authorizes a longer work day during peak periods so long as total hours worked during a particular cycle do not exceed the limit on total hours during that period.<sup>27</sup> Such a system requires permission from the local labor authorities and consultation with the enterprise trade union and the workforce.<sup>28</sup> The spirit of the exception is to make a reasonable accommodation for industries which are genuinely seasonal, such as food processing, but the very existence of an exception tempts employer abuse.

Forced labor is not only an issue of employment law but also of the criminal law. Violations are punishable by a fixed term of imprisonment and a fine, up to ten years if the violation is particularly serious.<sup>29</sup> This provision of the criminal law broadly applies to forced labor generally, and not just forced overtime.

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<sup>20</sup> A COMPLETE COMMENTARY ON THE EMPLOYMENT CONTRACT LAW 106-107 (Li Jianfei ed. 2008).

<sup>21</sup> Labor Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., July 5, 1994, effective May 1, 1995) at art. 36, 38 [hereinafter Labor Law]. For adoption of the 40-hour work week, see *China – Working time – 2011*, available at [http://www.ilo.org/dyn/travail/travmain.sectionReport1?p\\_lang=en&p\\_structure=2&p\\_year=2011&p\\_start=1&p\\_increment=10&p\\_sc\\_id=1001&p\\_countries=NE&p\\_countries=CN&p\\_print=Y](http://www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_structure=2&p_year=2011&p_start=1&p_increment=10&p_sc_id=1001&p_countries=NE&p_countries=CN&p_print=Y)

<sup>22</sup> Labor Law at art. 41. Workers may not be compelled to work overtime. Labor Contract Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008) at art. 31 [hereinafter Employment Contract Law].

<sup>23</sup> Labor Law, *supra* note 21, at art. 44.

<sup>24</sup> *Id.* at art. 41.

<sup>25</sup> Employment Contract Law, *supra* note 22, at art. 85.

<sup>26</sup> Labor Law, *supra* note 21, at art. 39.

<sup>27</sup> ANDREAS LAUFFS, EMPLOYMENT LAW & PRACTICE IN CHINA 106 (2008).

<sup>28</sup> *Id.*

<sup>29</sup> Criminal Law of the People’s Republic of China (promulgated by the Nat’l People’s Cong., July 6, 1979, effective Jan. 1, 1980, as amended) at art. 244 [hereinafter Criminal Law].

## III. INTERNATIONAL LAW ON “FORCED LABOR”

The ILO’s 1998 Declaration on Fundamental Principles and Rights at Work, which binds all members of the ILO, targets four areas of concern, including the elimination of all forms of forced or compulsory labor. This objective is undergirded by two ILO Conventions, Convention No. 29 (Forced Labour, 1930) and Convention No. 105 (Abolition of Forced Labour, 1957).<sup>30</sup> Convention No. 29 provides in pertinent part that “the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” Convention 105 provides in pertinent part that forced or compulsory labor cannot be used as a method of mobilising and using labour for purposes of economic development.<sup>31</sup>

The concept of forced labor is interpreted to comprise three elements: (1) work or service provided by an individual to a third party; (2) work performed under threat of penalty, which can be physical, psychological, financial, or other form of intimidation; (3) involuntariness, including situations where, although the work may initially have been undertaken voluntarily, the worker cannot leave (a) with a reasonable period of notice or (b) without forgoing payment or other entitlement.<sup>32</sup> The ILO considers obligations to work overtime to earn the legally mandated minimum wage or to avoid dismissal “threat of penalty.”<sup>33</sup> Coercion may be applied in overt ways, such as the use of guards or locking the premises to prevent workers from leaving, or more indirectly, such as taking possession of identity papers.<sup>34</sup>

## IV. REPORTS OF COMPULSORY OVERTIME AT FOXCONN

As part of a new approach to economic development and foreign investment, China established Special Economic Zones (SEZs) in 1979.<sup>35</sup> The problem of

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<sup>30</sup> China is not party to either Convention No. 29 or Convention No. 105, but as a member of the ILO, it is bound by the Declaration, which requires non-ratifying states to submit reports on their progress towards achieving core labor standards. BLANPAIN, *supra* note 15, at 76. China has complied with this requirement. INTERNATIONAL LABOUR CONFERENCE, *supra* note 14, at 14. The U.S. is party to Convention 105 but not Convention 29. *Id.*

<sup>31</sup> BLANPAIN, *supra* note 15, at 103-09 (report of ILO commission of inquiry into forced labor in Myanmar).

<sup>32</sup> INTERNATIONAL LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 19 (2012), available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_182004.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_182004.pdf). Cf. E. ALLAN FARNSWORTH, CONTRACTS § 4.17 (4th ed. 2004) (discussing economic duress).

<sup>33</sup> See INTERNATIONAL LABOUR CONFERENCE, *supra* note 14, at 72.

<sup>34</sup> *Id.* See Employment Contract Law, *supra* note 22, at art. 84 (penalty for retaining worker’s ID card); Supreme People’s Procuratorate and the Ministry of Public Security, Regulations on Standards for Prosecuting Cases under the Criminal Law (No. 1) [Zuigao renmin jianchayuan, gong’an bu guanyu gong’an jiguan guanxia de xingshi anjian li’an zhuisu biao zhun de guiding (yi)], at art. 31 (2) (defining compulsion to include withholding wages and retaining IDs). Because of China’s system of restrictions on internal migration, possession of the ID is an effective deterrent to quits. See Hilary K. Josephs, *Residence and Nationality as Determinants of Status in Modern China*, 46 TEXAS INT’L L.J. 295 (2011).

<sup>35</sup> For discussion of the policy spurring establishment of SEZs, see BLANPAIN, *supra* note 15, at 764-65. Three out of four of the early SEZs at this time were located in Guangdong Province; the fourth was located in adjoining Fujian Province.

compulsory overtime was anticipated from the beginning. Regulation of standard working hours and overtime was addressed in Guangdong Province's Interim Provisions for Labor and Wage Management art. 10, which provided for six work days per week, eight hours per day.<sup>36</sup> However, enforcement lagged seriously behind the written law, and systematic violation has been reported continuously for the last three decades.<sup>37</sup>

In 2006 China Business News (Di Yi Caijing Ribao) and Britain's Sunday Mail published exposés of working conditions, including compulsory overtime, at the Foxconn facility in the Shenzhen SEZ.<sup>38</sup> Additional domestic and international publicity accompanied a number of employee suicides in 2010.<sup>39</sup> In 2011-12 several NGOs published reports substantiating complaints about compulsory overtime.<sup>40</sup> The Apple Supplier Responsibility 2012 Progress

Report,<sup>41</sup> though not identifying Foxconn specifically in this connection, stated that its audits of suppliers showed a compliance rate of only 38 percent for working

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<sup>36</sup> Interim Provisions for Labor and Wage Management in Enterprises in the Special Economic Zones in Guangdong Province (promulgated by the 13th Session of the Standing Committee of the Fifth People's Cong. of Guangdong Province, Dec. 24, 1981, effective Jan. 1, 1982) at art. 10, available at [http://www.novexc.com/lab\\_wage\\_man\\_gundong.html](http://www.novexc.com/lab_wage_man_gundong.html) (last visited Aug. 9, 2012).

<sup>37</sup> At an interview conducted at the Shekou Industrial District Labor Service Company in June 1986, officials reported that excessive overtime was a major problem at the San'yo Electronics plant. Workers regularly put in 12-hour days (Shekou was a separately administered area within the Shenzhen SEZ). See HILARY K. JOSEPHS, LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY 89 (1990).

<sup>38</sup> Raymond Li, *iPod Maker Sues Over Labour Story*, S. CHINA MORNING POST, (July 19, 2012), <http://www.scmp.com/article/561980/ipod-maker-sues-over-labour-story>; *The Stark Reality of iPod's Chinese Factories*, MAIL ON SUNDAY, <http://www.dailymail.co.uk/news/article-401234/The-stark-reality-iPods-Chinese-factories.html> (last updated Aug. 18, 2006) (quoting one worker as saying "[w]e have to work overtime if we are told to and can only go back to the dormitories when our boss gives us permission").

<sup>39</sup> Kathleen E. McLaughlin, *China Suicides: Is Apple Headed for a Consumer Backlash?*, GLOBALPOST (May 28, 2010), <http://www.globalpost.com/dispatch/Apple-iPad-suicides-china-suppliers>.

<sup>40</sup> See, e.g., *Foxconn and Apple Fail to Fulfill Promises: Predicaments of Workers after the Suicides*, STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOUR (SACOM) (May 7, 2011), <http://sacom.hk/archives/837>; CHINA LABOR WATCH, TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONIC SWEATSHOPS (2012), available at <http://chinalaborwatch.org/pdf/20110712.pdf> [hereinafter CLW Report]; VERITÉ, FOR WORKERS' BENEFIT: SOLVING OVERTIME PROBLEMS IN CHINESE FACTORIES (2012), available at <http://digitalcommons.ilr.cornell.edu/globaldocs/1593/>. The CLW Report concludes that "the failings of Foxconn exist in the majority of electronics factories, and are representative of the policies and behavioral norms found throughout the electronics industry." CLW Report at 12. None of 16 mobile phone companies rated very well in the area of workers' rights. Motorola ranked highest at 23 out of 100; Apple was second at 21. *Free Buyers' Guide to Mobile Handsets*, ETHICAL CONSUMER, <http://www.ethicalconsumer.org/buyersguides/phonebroadband/mobilephones.aspx> (last visited March 7, 2013).

<sup>41</sup> APPLE, APPLE SUPPLIER RESPONSIBILITY 2012 PROGRESS REPORT 7 (2012), available at [http://images.apple.com/supplierresponsibility/pdf/Apple\\_SR\\_2012\\_Progress\\_Report.pdf](http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf).

hours.<sup>42</sup> Of the seven criteria applied in the area of labor and human rights, this measure was by far the lowest; the next lowest was wages and benefits at 69 percent.<sup>43</sup>

#### V. THE ROLE OF NGOS: INFORMATION AND ACTION?

NGOs may play a variety of roles in the enforcement of international human rights, creating and mobilizing networks of committed persons, gathering information at the grass roots, and proposing action strategies for national governments and international organizations.<sup>44</sup> Arguably the most important contribution of NGOs is fact-finding.<sup>45</sup> Generally NGOs have developed a track record of accuracy, independence, and impartiality.<sup>46</sup> In their information-gathering capacity, NGOs can deploy “undercover” methods of investigation, foreclosed to agents of national governments, international missions, and social compliance monitors formally dispatched by MNCs.<sup>47</sup> However, with the proliferation of NGOs, the question of “effectiveness” in a world of perpetually limited resources comes into play. As with CSR programs discussed below, an NGO may be well-managed internally without necessarily producing desired outcomes.<sup>48</sup>

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<sup>42</sup> This percentage represented a *decline* in compliance from the preceding year. Paul Harris, *Apple Hit by Boycott Call Over Worker Abuses in China*, THE OBSERVER, (Jan. 28, 2012), available at <http://www.guardian.co.uk/technology/2012/jan/29/apple-faces-boycott-worker-abuses>. Apple’s Code sets a maximum of 60 work hours per week and requires at least one day of rest per seven days of work, absent “unusual” or “exceptional” circumstances. Under Chinese law, the standard maximum should be 49 hours (40 plus 9). A Fair Labor Association (FLA) report, *Independent Investigation of Apple Supplier, Foxconn*, identified violations of overtime limits per FLA’s Workplace Code of Conduct and Chinese law but did not find any problem of “forced labor.” FAIR LABOR ASSOCIATION, *INDEPENDENT INVESTIGATION OF APPLE SUPPLIER, FOXCONN 8* (2012), available at [http://www.fairlabor.org/sites/default/files/documents/reports/foxconn\\_investigation\\_report\\_0.pdf](http://www.fairlabor.org/sites/default/files/documents/reports/foxconn_investigation_report_0.pdf) [hereinafter FLA Report].

<sup>43</sup> *Id.* at 7.

<sup>44</sup> RIPINSKY & VAN DEN BOSSCHE, *supra* note 7, at 9.

<sup>45</sup> See CLARK, *supra* note 14, at 16, 32-33, 104, 129-30.

<sup>46</sup> See *id.*

<sup>47</sup> Thomas Fuller, *‘Sweatshop Snoops’ Take on China Factories*, N.Y. TIMES (Sept. 15, 2006), [http://www.nytimes.com/2006/09/15/world/asia/15iht-inspect.2827852.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/09/15/world/asia/15iht-inspect.2827852.html?pagewanted=all&_r=0); CLW Report, *supra* note 40, at 7 (CLW staff gained entry to a plant by being hired as workers); cf. Dexter Roberts & Pete Engardio, *Secrets, Lies, and Sweatshops*, BUSINESSWEEK (Nov. 27, 2006), <http://www.businessweek.com/stories/2006-11-26/secrets-lies-and-sweatshops> (factories keep two sets of books and coach workers on how to answer questions from compliance monitors).

<sup>48</sup> See generally Jesse D. Leczy et al., *Non-Governmental and Not-for-Profit Organizational Effectiveness: A Structured Literature Review*, 23 INT’L J. VOLUNTARY & NONPROFIT ORG. 434 (2012) (empirical studies of “effectiveness” rare and no consensus as to how “effectiveness” should be measured). George Edwards judges NGO effectiveness by results, but results are broadly defined to include human rights education. George Edwards, *Ten Attributes of Highly Successful Human Rights Non-Governmental Organizations*, 18 MICH. ST. J. INT’L L. 165, 211 (2010). For an attempt at NGO self-governance, see NGO CODE

In cases such as labor abuses in China's SEZs, many separate NGOs have been reporting to the same effect for a number of years. The relative trustworthiness of any particular NGO and its publications may be judged according to various criteria: (1) the nationality, education, and work experience of the NGO's principals;<sup>49</sup> (2) the background and qualifications of its investigative staff; (3) the duration of the investigations which provide factual support for its publications; (4) the sample size; (5) the extent to which a report is annotated or its conclusions supported by numerical data; (6) sources of funding for its activities, as a possible indicator of bias;<sup>50</sup> (7) accreditation with an international organization, such as the ILO;<sup>51</sup> (8) whether, and to what extent, a report is cited in government publications, media and the scholarly literature;<sup>52</sup> (9) whether the NGO maintains a bilingual website apprising affected workers of their rights and efforts made to effectuate them.<sup>53</sup> While no single NGO meets each and every one of the above criteria, CLW certainly satisfies some, most importantly, executive leadership by a native Chinese, production of extended, detailed reports on factory conditions based on first-hand observation, and media coverage in newspapers of international reputation such as *The New York Times* and the *Financial Times* (London).

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OF CONDUCT FOR HEALTH SYSTEMS STRENGTHENING, <http://ngocodeofconduct.org> (last visited Mar. 8, 2013).

<sup>49</sup> Li Qiang, a Chinese, is the principal of CLW, which is based in New York. *Our People*, CHINA LABOR WATCH, <http://www.chinalaborwatch.org/OurPeople.html> (last visited Mar. 8, 2013).

<sup>50</sup> CLW has received financing from the National Endowment for Democracy (NED), a private, nonprofit foundation, which in turn is funded largely by the U.S. Congress. In addition to CLW, NED has provided grants to other organizations tasked with promoting labor rights enforcement in China, such as the American Center for International Labor Solidarity and Human Rights in China. See *About NED*, NATIONAL ENDOWMENT FOR DEMOCRACY, <http://www.ned.org/about> (last visited July 11, 2012); *Where We Work*, NATIONAL ENDOWMENT FOR DEMOCRACY, <http://www.ned.org/where-we-work> (last visited July 11, 2012).

<sup>51</sup> RIPINSKY & VAN DEN BOSSCHE, *supra* note 7, at 72-73. If an NGO receives an invitation from the ILO, it may attend and participate in meetings in the same manner as those international and regional organizations which have permanent consultative status (the "Special List"). As of August 2012, SACOM, CLW, and Verité were not on the Special List. See *ILO Special List of NGOs*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/pardev/civil-society/ngos/ilo-special-list-of-ngos/lang--en/index.htm> (last visited Aug. 11, 2012). Neither CLW nor Verité were evaluated by [charitynavigator.com](http://www.charitynavigator.com), which rates the financial health and accountability and transparency of §503(c)(3) organizations based in the United States. See generally CHARITY NAVIGATOR, <http://www.charitynavigator.org> (last visited Mar. 8, 2013).

<sup>52</sup> The 2011 report of the U.S. Congressional-Executive Committee on China (CECC), cites to China Labour Bulletin, China Labor News Translations, the International Trade Union Confederation, the Shenzhen Dagongzhe Migrant Worker Centre, the Institute for the Study of Labor (IZA), Human Rights Watch, and the ILO Report of the Committee of Experts on the Application and Recommendations, Worst Forms of Child Labour Convention. See generally CHARITY NAVIGATOR, <http://www.charitynavigator.org> (last visited Mar. 8, 2013).

<sup>53</sup> China Labour Bulletin and Human Rights in China are among those with bilingual websites. See generally CHINA LABOUR BULLETIN, <http://www.clb.org.hk/en/> (last visited Mar. 8, 2013); HUMAN RIGHTS IN CHINA, <http://www.hrichina.org> (last visited Mar. 8, 2013).

It is not uncommon for a report to contain a list of recommendations for action. The CLW Report made the following recommendations, among others: (1) creation by the UN and the ILO of a special set of labor standards for the electronics industry;<sup>54</sup> (2) pressure on the Chinese government to realize genuine worker representation;<sup>55</sup> (3) encouragement of ethical purchasing;<sup>56</sup> (4) fair trade labeling, so as to identify supplier factories;<sup>57</sup> (5) worker hotlines for making complaints internally;<sup>58</sup> (6) training programs for managers of supplier factories.<sup>59</sup>

CLW does not recommend a boycott, but rather a “boycott” through ethical purchasing; fair trade labeling in turn enables ethical consumer decision-making.<sup>60</sup> The recommendations reflect a perspective that various actors have a role to play and their combined efforts are necessary to produce a positive outcome.<sup>61</sup> However, implementation of these recommendations lies outside the power of the NGO itself.

#### VI. THE “EFFECTIVENESS” OF CSR

When the nation-state is unable or unwilling to enforce its own written law, CSR has been proposed as one of a number of next-best alternatives.<sup>62</sup> With the rise of outsourcing by “virtual” corporations in developed countries,<sup>63</sup> the development of

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<sup>54</sup> CLW Report, *supra* note 40, at 9. The ILO has issued a number of conventions protective of certain occupations such as seafarers, miners, and agricultural workers. *See Subjects Covered by International Labour Standards*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/lang--en/index.htm> (last visited Mar. 8, 2013).

<sup>55</sup> Doubtful where there is only a single official trade union with a dismal record of protecting worker rights. BLANPAIN, *supra* note 15, at 749-52.

<sup>56</sup> CLW Report, *supra* note 40, at 9.

<sup>57</sup> *Id.*

<sup>58</sup> CLW Report, *supra* note 40, at 10.

<sup>59</sup> *Id.*

<sup>60</sup> *See* MONROE FRIEDMAN, CONSUMER BOYCOTTS: EFFECTING CHANGE THROUGH THE MARKETPLACE AND THE MEDIA 201 (1999).

<sup>61</sup> *See* INTERNATIONAL LABOUR CONFERENCE, *supra* note 14, at 1. (discussing the “multistakeholder global alliance” approach).

<sup>62</sup> *See* BLANPAIN, *supra* note 15, at 847-48 (discussing, inter alia, complaints brought under the auspices of the ILO, regional trade agreements such as NAALC, and the OECD). Efforts to enforce foreign workplace law in U.S. courts has been largely unsuccessful. *Id.* The president rejected a petition under § 301 to sanction China for labor rights violations. *See* MARK BARENBERG, SUSTAINING WORKERS’ BARGAINING POWER IN AN AGE OF GLOBALIZATION 12, 53 (2009), available at <http://www.epi.org/publication/bp246>.

<sup>63</sup> Substantially all of Apple’s products are *manufactured* in Asia by “outsourcing partners,” mainly Foxconn and Quanta. APPLE, FORM 10-K ANNUAL REPORT 8 (2010) available at <http://investor.apple.com/sec.cfm>. Apple’s nearly exclusive relationship with these companies make it less willing to exert pressure on them to improve working conditions. *See* Charles Duhigg & David Barboza, *In China, the Human Costs That are Built Into an iPad*, N.Y. TIMES, Jan. 26, 2012, at A1 (quoting former Apple executives as saying that terminating Foxconn and finding alternative suppliers would be time-consuming and costly). The obvious counterargument is that dependence runs in both directions and furthermore, it is easier to monitor and exert pressure on a few suppliers with large workforces than many small

production chains through subcontracting arrangements, and the globalization of the production process, pressure may be more effectively applied to the multinational enterprises which market final products rather than to the governments where subcontracting occurs. While under no legal obligation for the actions and omissions of foreign subcontractors,<sup>64</sup> multinational enterprises do have a stake in their reputations and brand equity.<sup>65</sup>

However, there is little empirical evidence that CSR has been a more effective enforcement tool than the domestic legal system of the country where production takes place.<sup>66</sup> When an MNC delegates the responsibility for monitoring to a third party auditor, so as to avoid the appearance of bias, the auditor's own credibility may be called into question if it in turn subcontracts its duties to other parties. The auditor's final report is only as reliable as those of its subcontractors. The FLA's "independent" investigation of Foxconn was implemented by three "FLA-accredited" monitors:<sup>67</sup> Openview,<sup>68</sup> Social Compliances Services Asia (SCSA),<sup>69</sup> and INFAC.<sup>70</sup> No matter how capable and experienced their staff may be, no matter

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players. See Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accounting for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL'Y J. 201, 210 (2011).

<sup>64</sup> Companies in the United States which subcontract *domestically* have been held liable for the conduct of their subcontractors. Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 639-41 (2012). If Apple's products were manufactured in the United States, it could be liable for wage and hour violations of its subcontractors under the Fair Labor Standards Act. See Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 9-11 (2010). Apple is intimately informed about the operations of its subcontractors and has been conducting audits of their operations since 2007. Moreover, Apple's unreasonable delivery lead times is a direct cause of overtime demands. Duhigg & Barboza, *supra* note 63.. Cf. ESTLUND, *supra* note 10, at 99 (discussing *Doe v. Wal-Mart Stores*, 572 F.3d 677 (9th Cir. 2007); no duty under either contract or tort law towards workers of foreign suppliers).

<sup>65</sup> BLANPAIN, *supra* note 15, at 848.

<sup>66</sup> Cynthia Estlund, *Enforcement of Private Transnational Labor Regulation: A New Frontier in the Anti-Sweatshop Movement?*, in ENFORCEMENT OF TRANSNATIONAL REGULATION: ENSURING COMPLIANCE IN A GLOBAL WORLD 237, 244-45 (Fabrizio Cafaggi ed., 2012). Estlund defines enforcement as "[a]t a minimum...some process of identifying violations (of a labor code) that can, failing correction, leads to sanctions against the violator." *Id.* at 248. This definition includes both judicial (litigation culminating in an award of damages) and non-judicial enforcement (termination of a contractual relationship). *Id.* In one respect judicial enforcement is preferable because the results are made public, while termination of a supplier for workplace violations is confidential information.

<sup>67</sup> FLA Report, *supra* note 42, at 4-6.

<sup>68</sup> OPENVIEW SERVICE LIMITED, <http://www.Openview.hk> (last visited Mar. 10, 2013).

<sup>69</sup> SOCIAL COMPLIANCE SERVICE ASIA LIMITED, <http://www.scsagroup.com> (last visited Mar. 10, 2013).

<sup>70</sup> INFAC SOCIAL PERFORMANCE SOLUTIONS, <http://infactory-solutions.com> (last visited Mar. 10, 2013).

how solid their empirical analysis by industry standards,<sup>71</sup> they are servants to their ultimate employer and their reports are not available in the public domain.

Furthermore, there is always a risk that private CSR will adversely affect local regulatory capacity. Already, developing countries may be even less inclined to dedicate public resources to regulation<sup>72</sup> or “pass off” the responsibility for socio-economic problems to NGOs. This is a “slippery slope” dilemma in the case of “failed states” where responsibility for education, health, and crisis management have devolved more or less permanently onto NGOs.<sup>73</sup> While China in no way approaches the definition of a “failed” state, it is possible that the Communist Party sees civil society organizations as an easily controlled channel for the direction of energy which would otherwise go towards the introduction of multi-party democracy.<sup>74</sup>

#### VII. CONSUMER WILLINGNESS TO BOYCOTT GOODS PRODUCED IN VIOLATION OF INTERNATIONAL HUMAN RIGHTS

After a spate of news articles about Foxconn’s operations appeared in the English language press, calls for a consumer boycott<sup>75</sup> of Apple products emerged, and then, as often happens, petered out.<sup>76</sup> There are instances where consumer boycotts have succeeded in changing corporate behavior, because reputation is part and parcel of a firm’s value and consumers’ willingness to purchase its goods and services.<sup>77</sup> The next section explores why some consumer boycotts have a meaningful effect on

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<sup>71</sup> See discussion of measuring NGO effectiveness, *supra* note 48, and accompanying text.

<sup>72</sup> Estlund, *supra* note 66, at 249.

<sup>73</sup> MADELEINE KRISTOFF & LIZ PANARELLI, HAITI: A REPUBLIC OF NGOS? (2010), available at <http://www.usip.org/publications/haiti-republic-ngos>; Dickinson, *supra* note 4, at 138, and accompanying text; cf. ESTLUND, *supra* note 10, at 101 (CSR programs may “crowd out” worker organizations and local regulators); NGO CODE OF CONDUCT FOR HEALTH SYSTEMS STRENGTHENING, *supra* note 48 (“NGOs, if not careful and vigilant, can undermine the public sector and even the health system as a whole”).

<sup>74</sup> See generally Ashley & He, *supra* note 16.

<sup>75</sup> To specialists boycotts are not all of a piece. An *instrumental* boycott has a defined practical goal, while an *expressive* boycott is an outlet for frustration and anger, a self-affirming opportunity to do something rather than sit by passively. FRIEDMAN, *supra* note 60, at 12-13, 133. However, one type of boycott may evolve into another.

<sup>76</sup> See Harris, *supra* note 42); Brishen Rogers, *How and Why to Boycott Apple*, CONCURRING OPINIONS (Feb. 9, 2012), <http://www.concurringopinions.com/archives/2012/02/how-and-why-to-boycott-apple.html>; Aaron Kwittken, *Have Apple and Walmart Proven That Brands Can Be Invincible?*, FORBES (June 1, 2012), <http://www.forbes.com/sites/onmarketing/2012/05/02/have-apple-and-walmart-proven-that-brands-can-be-invincible/> (“major corporations seem increasingly immune to damaging news, quickly bouncing back from corporate debacles with shockingly little long-term damage to their brand and the bottom line”).

<sup>77</sup> Mark Hunter et al, *Beyond Control: Crisis Strategies and Stakeholder Media in the Danone Boycott of 2001* (Insead Working Paper Series, Paper No. 5, 2008), [i](#); Karen Braunsberger & Brian Buckler, *Consumers on a Mission to Force a Change in Public Policy: A Qualitative Study of the Ongoing Canadian Seafood Boycott*, 114 BUS. & SOC. R. 457 (2009); Rogers, Third-Party Liability, *supra* note 64, at 62, and sources cited therein.

corporate practices, not mere “window-dressing,” and why others do not even gain traction with the consuming public.

Apple products occupy an intermediate position between necessities and luxury goods.<sup>78</sup> While it does not enjoy a world monopoly with respect to any of its products, the Apple brand enjoys special cachet, for example, with respect to iPhones.<sup>79</sup> Each succeeding generation of iPhone is designed for planned obsolescence and builds on the consumer loyalty developed with regard to earlier generations.<sup>80</sup> A thorough-going, extended boycott of Apple products demands that a large number of people refrain from purchasing or using possessions they have already acquired, a considerable degree of sacrifice.<sup>81</sup> Consumer boycotts are more likely to succeed when the product has a high degree of substitutability, making demand fairly elastic.<sup>82</sup>

Furthermore, consumers tend to participate in a boycott when they believe their actions will have an impact on corporate behavior. The smartphone potentially enhances this sense of participation because world-wide boycotts can be organized electronically.<sup>83</sup> At the same time, joining a boycott electronically and anonymously is so easy that serious and sustained commitment to the purpose of the boycott may be lacking. An electronic boycott also runs the risk of bystander effect: As the number of participants increases, the sense of individual responsibility decreases.<sup>84</sup>

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<sup>78</sup> Rogers, *supra* note 76 (terming Apple products luxury goods). Some uses of a product verge on necessity, as when a person is completely dependent on an iPhone for connectivity. Other uses may be classified as discretionary, such as using an iPhone to play video games (no offense to anyone intended.)

<sup>79</sup> FRIEDMAN, *supra* note 60, at 219 (difficulty in mounting boycott when products have acquired strong consumer loyalty). See *Apple in China: iPhone Make Chinese Eyes Light Up*, THE ECONOMIST (July 28, 2012), <http://www.economist.com/node/21559624> (greater China, including Hong Kong and Taiwan, second largest market for Apple products). If Chinese consumers are themselves indifferent to the plight of workers, it is harder to make the case for the ethical responsibility of foreign consumers.

<sup>80</sup> Charles Duhigg & Keith Bradsher, *How U.S. Lost Out on iPhone Work*, N.Y. TIMES, (Jan. 22, 2012), [http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html?pagewanted=all&_r=0) (Apple released five iPhones in four years); Al Fasoldt, *Google, Apple Take Very Different Approaches*, POST-STANDARD, Sept. 9, 2012, at D2 (“[Apple’s] iOS is a buttoned-up operating system. You work with your iPhone or iPad the way Apple intended you to, and that’s that”).

<sup>81</sup> Braunsberger & Buckler, *supra* note 72, at 469.

<sup>82</sup> *Id.* at 471.

<sup>83</sup> Rogers, *supra* note 76.

<sup>84</sup> John M. Darley & Bibb Latané, *Bystander Intervention in Emergencies: Diffusion of Responsibility*, 8 J. PERSONALITY & SOC. PSYCHOL. 377 (1968); BARENBERG, *supra* note 62, at 52. California’s “brother’s keeper” law, CAL. LAB. CODE § 2810 (2013), was enacted during a series of campaigns by affected workers *in that state*. See Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y. L. SCH. L. REV. 465, 505-07 (2005). The reluctance of U.S. courts to extend jurisdiction overseas, whether applying common law principles or statutes which are silent on extraterritoriality, makes good intuitive sense in line with individual behavior. It is only “natural” to care more about those “close” to us. Legal principle is aligned with human nature. To paraphrase Justice Cardozo, a sense of obligation is a function of physical proximity. See *Palsgraf v. Long Island*

Since the entire electronics industry has a reputation for worker abuse, consumers may not feel that switching to another product will make much of a difference on the factory floor.<sup>85</sup> When a Chinese version of a New York Times article on Foxconn was posted to websites in China, one person commented: “If not to buy Apple, what’s the substitute—Samsung? Don’t you know that Samsung’s products are from its OEM factory in Tianjin? Samsung workers’ income and benefits are even worse than those at Foxconn.”<sup>86</sup>

Labor used in the assembly process accounts for an insignificant portion of production costs.<sup>87</sup> On the one hand, this fact may enhance consumer willingness to pay more for the product.<sup>88</sup> On the other hand, it is difficult to ensure that an incremental increase in retail price will be passed along to the worker. OEM manufacturers such as Foxconn operate on very thin profit margins, which drives the tendency to exploit their workforces.<sup>89</sup> The surplus created by an increase in the retail price may readily be appropriated by the manufacturer, if not by the retailer.

The downturn in the economies of developed countries decreases empathy for others, even fellow citizens,<sup>90</sup> much less foreign workers.<sup>91</sup> Those who are

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*R. Co.*, 248 N.Y. 339, 343, 162 N.E. 99, 100 (1928) (“the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty”).

<sup>85</sup> David Barboza, *Questions for Li Qiang of China Labor Watch*, N.Y. TIMES BLOGS, THE LEDE, (Jan. 26, 2012), <http://thelede.blogs.nytimes.com/2012/01/26/q-and-a-with-li-qiang-of-china-labor-watch/>.

<sup>86</sup> *Chinese Readers on the ‘iEconomy,’* N.Y. TIMES BLOGS, THE LEDE, (Jan. 25, 2012). Samsung offers competing products at much lower prices. Tim Bradshaw, *Apple Hits Sour Note in Emerging Markets*, FIN. TIMES, July 30, 2012, at 18. CLW found the same kinds of workplace violations, including excessive overtime, at factories owned and managed by Samsung or which supply Samsung. CHINA LABOR WATCH, AN INVESTIGATION OF EIGHT SAMSUNG FACTORIES IN CHINA: IS SAMSUNG INFRINGING UPON APPLE’S PATENT TO BULLY WORKERS? (2012), [available at http://www.chinalaborwatch.org/pdf/Samsung%20Report%200904-v.3.pdf](http://www.chinalaborwatch.org/pdf/Samsung%20Report%200904-v.3.pdf).

<sup>87</sup> Duhigg & Bradsher, *supra* note 80; (total cost of producing phone \$196, of which assembly labor accounts for \$8). This report does not break down the labor costs of producing the various components of the iPhone or delve into working conditions at components suppliers.

<sup>88</sup> *Id.* (paying U.S. wages would add up to \$65 to each iPhone’s expense). If a purchaser receives an iPhone as part of a “bundled” package for connectivity services, he is likely to pay a heavily discounted price for the phone itself. Arik Hesseldahl, *New iPhone 4S Cracked Open*, WALL ST. J., Oct. 20, 2011, at B5 (carriers cover part of sales price of phone if buyers sign up for two year service plan); Miriam Gottfreid, *Bruised Mobile Carriers Fight Back at Apple*, WALL ST. J., Aug. 6, 2012, at C8 (Apple charges about \$620 for each iPhone; mobile carriers have to offer subsidy of about \$420). It would be necessary to parse the cost of the “bundle” for purposes of determining how much more the consumer would be willing to pay for the phone. “Bundling” locks consumers into a long-term relationship with the service provider, further discouraging ethical decision-making.

<sup>89</sup> Duhigg & Barboza, *supra* note 63.

<sup>90</sup> See comments posted for David Segal, *Apple’s Retail Army, Long on Loyalty but Short on Pay*, N.Y. TIMES, June 24, 2012, at A1.

<sup>91</sup> The popular image of China as a cruel despotic country with a passive, automaton-like population makes identification with the plight of exploited foreign workers even more

unemployed or underemployed resent, rightfully or wrongfully, workers in developing countries who are perceived to have “stolen” their jobs.<sup>92</sup> Those who are employed but expected to be available for work around the clock via smartphone do not see much difference between their plight and that of workers abroad.<sup>93</sup>

#### VIII. SOCIAL AND TECHNOLOGICAL CHANGE

The rise of China as the world’s manufacturing floor is so recent a phenomenon that it can only be expected that the combined forces of written law, NGO activity, and CSR programs would take time to produce a positive effect on working conditions. Meanwhile, changes in demographics and technology are likely to alter the situation for the better, at least as far as workers in SEZ plants are concerned.<sup>94</sup> Because of the one-child policy, the population of rural youth is in decline; fewer people are willing to undertake assembly line work far from home even if it is comparatively well paid.

Hence, Foxconn is moving its operations inland closer to its supplies of labor, locations where the cost of living and hence wages are lower as compared with the SEZs.<sup>95</sup> However, moving inland does not insulate Foxconn’s operations from scrutiny, and incidents of worker unrest are being reported at its factories in Zhengzhou, Taiyuan, Chengdu and Wuhan.<sup>96</sup>

No matter how well-paid, the tedium of assembly line work is basically intolerable for a younger generation, better educated than its predecessors and seeking upward mobility.<sup>97</sup> In recognition of this reality, Foxconn is planning

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elusive. The average developed country consumer is not likely to be well-informed about worker protests or litigation against labor law violations. For examples of worker resistance, through wildcat strikes and litigation, see BLANPAIN, *supra* note 15, at Chapter Eleven.

<sup>92</sup> James Politi, *US Voters Want Tougher China Trade Stance*, FIN. TIMES, July 16, 2012, at 3 (94% of Americans surveyed worried that jobs were being shipped overseas).

<sup>93</sup> Alina Tugend, *The Workplace Benefits of Being Out of Touch*, N.Y. TIMES, July 14, 2012, at B5; Marjorie Connelly, *More Americans Sense a Downside to an Always Plugged-In Existence*, N.Y. TIMES, June 7, 2010, at A12; Elizabeth Holmes, *No Vacation from Tweeting*, WALL ST. J., Aug. 1, 2012, at D1.

<sup>94</sup> It is beyond the scope of this paper to assess the impact of patent litigation which Apple has brought, in the United States and elsewhere, against Samsung, its main competitor in the smartphone market. See Evan Ramstad, *Samsung Will Fight Efforts To Bar Sales of Smartphones*, WALL ST. J., Aug. 29, 2012, at B7. In an industry where OEM predominates, redistribution of market share among companies is not likely to impact working conditions on the factory floor.

<sup>95</sup> *Welcome Home*, THE ECONOMIST, Feb. 25, 2012, at 53.

<sup>96</sup> Kathrin Hille & Rahul Jacob, *Beyond the Conveyor Belt*, FIN. TIMES, Oct. 15, 2012, at 9

<sup>97</sup> Bai Limin, *Graduate Unemployment: Dilemmas and Challenges in China’s Move to Mass Higher Education*, 185 CHINA Q. 128 (2006).

eventually to replace workers with robots.<sup>98</sup> It is also pursuing a corporate strategy of diversification out of OEM manufacturing into higher value-added activity.<sup>99</sup>

#### IX. CONCLUSION

Despite the uncertainties of proving cause and effect,<sup>100</sup> a long-term view of history teaches that the more things change, the more they stay the same. The ways that employers extract surplus value today have not changed from the era which inspired New Deal reforms in the United States: subcontracting, time-shaving, off-the-clock work, among others.<sup>101</sup> That the mechanisms of exploitation do not change should make identifying and taking action against them easier. It is a source of guarded optimism that the concept of forced labor has moved beyond "traditional" forms of chattel slavery and debt bondage, which, though not completely eradicated, are greatly diminished.

Improving the lot of foreign workers may indirectly inure to the benefit of U.S. workers, the so-called reverse diffusion of labor norms.<sup>102</sup> As a case in point, subsequent to all of the negative publicity about its manufacturing activities and contemporaneous with an exposé of working conditions in its retail stores,<sup>103</sup> Apple recently raised the wages of its sales associates in the United States.<sup>104</sup> Thus, the same extractive approach to labor management which characterizes Apple's foreign OEM manufacturing is manifest in Apple's domestic sales operations. However, wage increases by themselves do not mitigate the effects of overwork, and may in fact exacerbate them. An increase in work demands, or "stretch-out," erases the benefit of additional wages.<sup>105</sup>

A study of one Chinese NGO Yirenping provides clues as to how an organization can survive and flourish in an environment otherwise hostile to civil society.<sup>106</sup>

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<sup>98</sup> Kathrin Hille, *Foxconn Looks to a Robotic Future*, FIN. TIMES, Aug. 2, 2011, at 1; Klaus Zimmermann, *Robots Can Solve China's Labour Problem*, FIN. TIMES, April 17, 2012, at 8.

<sup>99</sup> Daisuke Wakabayashi, *Japanese LCD Alliance Frays*, WALL ST. J., Mar. 29, 2012, at B4 (Foxconn/Hon Hai investment in Sharp). Local governments in the SEZs now prefer the elimination of sweatshops in favor of high-tech industry. See Virginia E. Harper Ho, *From Contracts to Compliance? An Early Look at Implementation Under China's New Labor Legislation*, 23 COLUM. J. ASIAN L. 36, 88-89 (2009).

<sup>100</sup> FRIEDMAN, *supra* note 60, at 222-23 (hard to demonstrate effectiveness of boycott empirically).

<sup>101</sup> ESTLUND, *supra* note 10, at 60-64, 110-11, 200-201.

<sup>102</sup> BLANPAIN, *supra* note 15, at 860, n. 20.

<sup>103</sup> Segal, *supra* note 90 (low wages, working through shifts without rest breaks, no career path).

<sup>104</sup> Ian Sherr, *Raises in Store at Apple*, WALL ST. J., June 21, 2012, at B3 (biggest staff complaint is low wages).

<sup>105</sup> Intensification of work following a wage increase was a contributing factor to strikes at U.S. textile mills in 1929. See HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 386 (20th anniversary edition, 1999).

<sup>106</sup> Fu Hualing, *Embedded Socio-Legal Activism in China: The Case of Yirenping*, (Univ. of Hong Kong Faculty of Law Research, Working Paper No. 2012/029), available at <http://ssrn.com/abstract=2096998>.

Yirenping advocates on behalf of approximately 130 million people in China infected with Hepatitis B. Sufferers of the disease experience discrimination in employment, which included, at one time, officially sanctioned barriers.

Yirenping has pursued a diversified approach to its mission, combining online networking with offline activism. It brings anti-discrimination cases in court, communicates with the public through street theater, and liaises with the media. However, to avoid antagonizing the government, its online forum practices self-censorship to keep the tone of discussion at a moderate level.<sup>107</sup>

An important difference between Yirenping and worker rights groups is that the former stepped into that rarity, a vacant regulatory space, while the latter present a challenge to the single official trade union, the All China Federation of Trade Unions (ACFTU). The ACFTU actively discourages grassroots movements. Consequently, grassroots movements self-organize, bypass the ACFTU, and take radical collective action in the form of work stoppages and street demonstrations.<sup>108</sup>

By contrast, Yirenping is careful to avoid the impression of any extremist or violent potential.<sup>109</sup> The distinctions which Prof. Fu draws between Yirenping and grassroots labor movements support the kind of multipronged, multistakeholder approach recommended by the CLW Report and this paper. While slow-moving, tentative, and uncertain, such an approach seeks to avoid harassment and criminal prosecution of individual activist leaders as well as repression of groups which are perceived as a threat to governmental authority.

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<sup>107</sup> *Id.* at 6.

<sup>108</sup> *Id.* at 18-19; BLANPAIN, *supra* note 15, at 752-63. Despite Foxconn's ballyhooed commitment to allow "genuinely representative" union elections in all of its factories, under FLA supervision, the ACFTU will continue to have a monopoly of worker representation. See Kathrin Hille & Rahul Jacob, *China Wary Amid Push for Workers' Union Poll*, FIN. TIMES, Feb. 4, 2013, at 3.

<sup>109</sup> Fu, *supra* note 106, at 18.