Petty-Bourgeois Pickle Pickers?
A Case Study of the Transmogrification of Proletarians into Entrepreneurs

"You're a petty bourgeois"....
"Is that good or bad?"
"Pretty bad, but not incurable. We liquidate you, then we proletarianize you."¹

I. In the Beginning Was the Word—But Only the Word

Sharecropping as a system of commodity production arose on southern cotton plantations during the upheaval following the Civil War as a transitional phase between slavery and wage labor.² In order to restore control in another form over the emancipated slaves and their labor, plantation owners adopted the institution of

¹Elmer Rice, Imperial City 225 (1937).

sharecropping. Although bound to remain for the season, some freedmen regarded sharecropping as affording them a degree of independence that gang labor denied them.

Sharecropping, which assumed various forms, depending on whether the workers furnished only their labor or other inputs as well such as seed or draft animals, declined precipitously in the wake of the socioeconomic transformation associated with New Deal agricultural programs and the advance of mechanized cotton picking after World War II. Despite its statistical demise in the South,
the pickle industry has often sought to confer the classification on its migrant pickers. So-called sharecropping has, at various times, been imposed on migrants harvesting pickles in Ohio, Michigan, Wisconsin, Minnesota, Iowa, North Carolina, Texas, Colorado, and California as well as cherries in Michigan, onions in Ohio, and strawberries, cabbage, peppers, raspberries, blackberries, string beans, and snow peas in California. Although the practice antedates World War II, as early as the mid-1960s, pickle farmers and processors in Wisconsin "used the word 'sharecropper,' but they were doubtful whether they could defend the use of that term in a court. So, they preferred to say that the pickers were 'self-employed.'"

The coincidence that farmers had been paying pickle pickers about fifty percent of the price that they received from processors served as a convenient pretext for calling the employment


6The number of white croppers declined from 383,381 in 1930 to 47,650 in 1959; the corresponding figures for Blacks were 392,897 and 73,387 respectively. 1 BOC, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, series K 135 and K 141 at 465 (bicentennial ed. 1975). In 1959 the BOC stopped classifying croppers separately "[b]ecause of the decreasing importance of the cropper system in the South." Id. at 453.


relationship "sharecropping"; historical precedent from southern cotton farming would have supported other divisions of income as well. But such contingencies are superfluous. Cotton farmers in West Texas for years justified paying their cotton hoers a sub-minimum wage of $2.50 per hour merely by calling them independent contractors. Sugar-beet farmers in the Plains States have done the same with their piece-rate workers.

Pseudo-sharecropping is part and parcel of a widespread trend to reclassify employees as self-employed entrepreneurs in order to avoid employment taxes. Although it might be intellectually satisfying to demonstrate some inherent economic or socio-technological basis for the proliferation of sharecropping in pickles precisely in the 1970s and 1980s, no tenable explanation has been offered. Neither the economics of the industry nor any unique natural characteristics of the commodity can explain the custom. The argument that the "technoeconomic constraints" on mechanization are the common ground for sharecropping in strawberries and pickles fails when confronted with the fact that mechanization, which was used in the 1960s to frustrate unionization, has actually receded because of the superabundance of cheap labor—in part precisely because of sharecropping. Moreover, since the sharecropping that

10 See, e.g., Myrdal, AMERICAN DILEMMA at 237; Ransom & Sutch, ONE KIND OF FREEDOM, tab. 5.5 at 92; Ralph Shlomowitz, The Transition from Slave to Freedman: Labor Arrangements in Southern Agriculture, 1865-1870, at 40-55 (Diss., U. Chicago 1979).


13 Miriam Wells, Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture, 21 LAW & SOC. REV. 49, 53, 76 n.25
has been imposed on migrant farm workers is just a word, it is trivial whether employers use it or the more straightforward practice of simply classifying workers as independent contractors. Finally, while there is some evidence that sharecropping was introduced by strawberry farmers in California to stave off organizing efforts by the United Farm Workers (UFW), in the Midwest, some cucumber growers who treat their pickers as sharecroppers have recognized and collectively bargained with the latter's union.14

The spread of such employment practices has witnessed the creation of strange bedfellows as some Marxist sociologists have taken it seriously as part of an alleged recrudescence of the petty bourgeoisie.15 Whereas Marx identified as the sharecropper's distinguishing characteristic that his claim to part of the product rested not on his being a worker, but rather "his own capitalist," that is, an owner of part of the means of production,16 the epigones assert that "sharecropping is undergoing a revival in the vegetable fields of California as landowners and processors invite workers to assume more responsibility for the quality of production in the interest of 'flexibility.' There proletarians are being transformed into petty commodity producers."17 These same authors contend that farmers

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14See infra ¶ V; Carol Cain, Field of Dreams, Detroit News, July 24, 1989, at D4. VALDES, AL NORTE at 145, incorrectly assumes that in abolishing hourly wages, pickle processors "reinstituted a form of sharecropping, a modern corporate adaptation of a system long in disgrace."


17John Wilson, The Political Economy of Contract Farming, 18 REV. RADICAL POL. ECON. 47, 56 (1986). Wilson relies on the claims of Miriam Wells, who has repeated them ad infinitum in The Resurgence of Sharecropping: Historical Anomaly or Political
II. Even Real Sharecroppers May Be Employees

Of all the words which may be used to designate any sort of tenant, the word we heard used least frequently...by...all local human beings white or black, save only new dealers, communists, and various casts of liberal, was the word sharecropper.

In the north, however...sharecropper has...become the generic term...and...absorbed every corruptive odor of inverted snobbery, marxian, journalistic, Jewish, and liberal logomachia, emotional blackmail, negrophilia, belated transference, penis-envy, gynecological flurry and fairly good will which the several hundred thousand least habitable and scrupulous minds of this peculiarly psychotic quarter of the continent can supply to it: and it is one of the words a careful man will be watchful of, and by whose use...he may take clear measure of the nature...of the enemy.
under them. It was only when farmers became subject to social security tax obligations in the 1950s, and especially to FLSA in 1966, and later to state unemployment insurance and workers’ compensation programs and laws protecting migrants that farmers developed an economic incentive to devise schemes to avoid these costs of doing business. 21 Thus in places, such as parts of Michigan, where fifty-fifty arrangements may have antedated these financial impositions, it is possible that sharecropping had become such a trade custom that its continuation was the product of inertia and only later assumed a less innocent coloration. In other areas, however, where farmers did not introduce sharecropping until after they had felt the impact of their new statutory obligations, a presumption of unlawful original intent is more plausible.

When Congress amended FLSA in 1966 to cover some farm workers, it directly addressed the issue of sharecroppers:

> It is intended that the minimum provisions of the Act be extended to certain sharecroppers and tenant farmers. The test of coverage for these persons will be the same test that is applied to determine whether any other person is an employee or not. ... Coverage is intended in the case of certain so-called sharecroppers or tenants whose work activities are closely guided by the landowner or his agent. These individuals, called sharecroppers and tenants, are employees by another name. Their work is closely directed; discretion is nonexistent. True independent-contractor sharecroppers or tenant farmers will not be covered; they are not employees.

The U.S. Department of Labor (DOL) then adopted these directions almost verbatim in its interpretative bulletin. 22 That in fact many so-called sharecroppers would be entitled to the minimum wage emerged from the hearings held before the House Rules Committee. When asked about this issue by Representative Martin, Represen-

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tative Dent cited the above-quoted passage and the following colloquy ensued:

Mr. Dent. Where they do their own selection of work—they are truly in contractual agreement with an employer, and they are not employees of that farmer.

Mr. Martin. The owner of the farm has control as to when the crop is planted and harvested. It is traditional in this country that many of these people work on a percentage of the crop itself.

Mr. Dent. Where they work on a contract, I believe the law is now clear—and there have never been any problems on it to date.

Mr. Martin. Yes. But you haven’t gone into agricultural coverage under fair labor standards before. I think you are opening up a very serious problem. It is going to be difficult to determine.

Mr. Dent. Well, I am hoping it doesn’t create the trouble.24

The issue arose again on the floor of the House when Representative Watts of Kentucky, in the course of describing his own personal situation as a tobacco farmer vis-à-vis his three sharecroppers, inquired whether he would be responsible for paying the minimum wage if at the end of the year the tobacco burned up: “If so, it is an atrocious situation.”25 To allay his fears, Representative Powell of Harlem cited the committee report:

Testimony indicates that there are large numbers of so-called sharecroppers who are not allowed to make a single economic decision regarding the land upon which they live and work. For example, they do not decide what to plant, when to plant, when to harvest, where to purchase seed, or where to sell the product of their labor. For these people, the term “sharecropping” only denotes a means of compensation; it conveys no connotation of independence, individualism, or self-determination. On the other hand, there are true tenant farmers, who make basic economic decisions up[on] which rest the productivity of the farm and consequently the amount of their compensation. Generally these tenants operate farms owned by absentee landlords. They are unsupervised, make day-to-day decisions necessary to the running of the farm, and share in the profits related to the productivity, for which they are greatly responsible. Such persons are not intended

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Even this explanation did not satisfy Watts, who wondered about the consequences of a retired farmer’s telling his tenant which field to plow or which crop to grow on the basis of his greater knowledge of the land. Although he appeared relieved to hear Dent tell him that the controlling elements were "whether there is day-by-day supervision...and whether you would make the decision on the sales in conjunction with him or whether you would make the decision as to which fields to plant...," Watts insisted on an answer to his question about whether he was responsible if the crop was destroyed. This insistence appears to have flustered Dent, who replied irrelevantly:

Mr. Dent. That is absolutely not even within the realm of remote possibility. If you are working in an office with a contract for a year’s retainer and the office burns down, the owner does not have to pay you, does he? If a fellow does not open up again, he does not have to pay it, does he?

Mr. Watts. No. But under the bill there is a provision he shall receive the minimum wage for the time he put in.

Mr. Dent. He is then an independent contractor under those conditions.

Powell then intervened to praise Watts for having raised an "excellent" point, which was "exactly correct" and behind which the committee stood. Since Watts had merely asked questions, the only point to which Powell could sensibly have been referring was the absolute obligation to pay the minimum wage. This surmise is strengthened by the rest of the dialog in which Watts acknowledged that:

I can see that the purpose of covering the sharecropper was probably to keep somebody from ducking out from under the law and claiming so-and-so was a sharecropper. That may have been what was in the committee’s mind. But...I hope...it is not the intention of this Congress or of this committee that the

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26Id. (citing H. REP. NO. 1366 at 32).
27112 CONG. REC. at 11,623.
28Id. at 11,624. Dent prejudiced the issue by his claim that if the farmer "has seven sharecroppers, he would not be giving the kind of directions that would be considered to be daily supervision." Id. This is just as false when applied to a classical cotton plantation as it would be with regard to pickle pickers.
sharecropper could then say, "I am sorry it burned, old buddy, but I have put in so many hours, and you have to pay me."

To which Powell again ambiguously replied: "That position I subscribe to." 29

In the Senate, Cooper of Kentucky played foil to Yarborough of Texas. Horrified by the thought that a farmer might have to supplement the wages of a sharecropper (or a sharecropper's employee) if they fell below the minimum wage of $1.00 per hour, Cooper asked whether it would be necessary to determine the sharecropper's status on a case by case basis. The populist senator, who was the prime mover of the bill in the Senate, replied that a sharecropper would not be an employee under the kinds of arrangements that prevailed where he had grown up in Texas. But significantly the cotton sharecropping agreements Yarborough had in mind involved the tenant's furnishing tools, horses, mules, tractors, and food. 30

The year following enactment of the partial inclusion of farm workers under the minimum-wage provision of FLSA, the House Agriculture Committee devoted an entire hearing to the question of sharecropper coverage. In the course of questioning the Assistant Secretary of Labor and the Wage and Hour Administrator, the chair, Representative Poage of Texas, and Representative Abernethy of Mississippi repeatedly expressed their agreement that a sharecropper who provided only labor—who, for example, merely chopped cotton or harvested sugarcane—would be an employee. Indeed, Poage went so far as to state that:

I never heard of that. I will go farther than you did and say that nobody in my country ever rented a piece of land to somebody else and said that they would give him one-half or any part of it if he would just do the chopping and the harvesting. Who planted the land? How did the land get planted—who plowed it? Who cultivated it? Who paid for these items? I never heard of a contract like that which did not require more of a renter than that. Possibly such contracts exist, but surely they are exceptional. 31

When pressed, informants from the Department of Agricul-
ture admitted that such arrangements were not typical. After agreeing with the DOL officials once again that a labor-only sharecropper would be an employee, the chairman asked them whether "it [would] take the curse off if the landlord makes him pay one-half the cost of the insecticides." The Assistant Secretary replied that it would not necessarily so long as the tenant had no opportunity to exercise judgment and foresight or for profit and loss. When Poage insisted that a tenant could "come out the loser" or "make a profit without putting out any money," the Assistant Secretary sought to explain "[t]he whole basic philosophy...of the free enterprise system":

> When a man opens a shoeshine parlor, or a peanut stand, he takes the risk— he puts his money and his own initiative and imagination and courage which makes it either work or fail. If this tenant or this employee...does nothing more for the landowner than to go out and hire employees to come in and pick the cotton or the tobacco, whatever it may be, he is an employee, in our opinion. He is not an independent contractor.

Mr. Abernethy. Nobody disagrees with that statement.33

But when Poage began to hedge and pointedly asked whether the economic reality test factors controlled or whether the mere fact that a worker provided labor only was in itself dispositive, the Wage and Hour Administrator maintained that Congress had intended the latter.34

The history of sharecropping in the South belies the claims that labor-only sharecroppers were atypical.35 When a worker merely supplied his labor and was controlled by the landlord, he was a cropper, that is, an employee receiving a share of the crop as wages. Because a sharecropper was prohibited by law from disposing of the crop until it had been divided and the landlord had set aside a portion as wages, disputes arose as to whether the cropper was to receive wages in kind (by dividing the crop) or in money (if the proceeds were divided).36 Even where the share-

32 Id. at 10-11.
33 Id. at 11-12.
34 Id. at 13.
35 Sharecropping has been viewed as an inherently unstable arrangement propelled by increases in capital investment to give way to outright land rental or a wage system. Joseph Stiglitz, Incentives and Risk Sharing in Sharecropping, 41 Rev. Econ. Stud. 219, 251 (1974).
36 Oscar Zeichner, The Legal Status of the Agricultural Laborer in the South, 55 Pol.
cropper supplied all the labor and part or all of the seed and fertilizer, bore all or part of the cost of marketing, and received a share of the crop, often he still worked under close supervision. Moreover, especially after 1900, sharecropping became a form of piece-rate wage labor and ceased being true tenancy: "Cropplers, the most dependent of all tenants, are little more than wage hands." By the post-World War I period, most black sharecroppers had "practically no voice in deciding what crops to grow, or what methods to follow in cultivation." Thus it was "only by an ironic travesty" that Southern sharecroppers were classified as entrepreneurs. "In reality, the sharecropper was little more than a wage hand being paid in kind.... Essentially, it was a form of debt peonage." By the 1930s, nine-tenths of black plantation tenants "[w]ere just ordinary laborers" under supervision. Moreover, the sharecropper had most of disadvantages of being an independent entrepreneur without any of the rights. Thus, for example--like today's pickle picker--he had to take the landlord's word for the price obtained for the cotton. And more importantly, the sharecropper's "autonomy"--like the pickle picker's--consisted in large part in his ability to make full use of his family's labor. During World

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37C. BRANNEN, RELATION OF LAND TENURE TO PLANTATION ORGANIZATION 30 (1928); Robert Brooks, The Agrarian Revolution in Georgia, 1865-1912, 3 BULL. U. WIS. 393, 440 (1914) ("At the present time, an unsupervised 'cropper'...is almost never met with. The supervision of his operations is almost as close as the planter can make it...").


40MYRDAL, AN AMERICAN DILEMMA at 245 & n.b. Because of the similarity in status to wage laborers, attempts were made to include croppers, even though they were considered self-employed, in the social security bill in 1935. Lee Alston & Joseph Ferrie, Labor Costs, Paternalism, and Loyalty in Southern Agriculture: A Constraint on the Growth of the Welfare State, 45 J. ECON. HIST. 95, 109-15 (1985).

41MYRDAL, AMERICAN DILEMMA at 246; GAVIN WRIGHT, OLD SOUTH, NEW
War II, the Bureau of the Census observed that:

Most sharecroppers work under close supervision, and the land assigned each cropper by his landlord is often merely a part of a larger agricultural enterprise operated as a single working unit in respect to a central farm headquarters, to the control of labor, and to the managerial and supervisory functions.

Intimating the quasi-feudal character of the relationship, the Bureau added that "[i]n many instances, the croppers or tenants and their families are also wage hands on the 'home farm' of the plantation." The analogy to the serfs' duties on the medieval manorial demesne was difficult to overlook.

Throughout the postbellum period, sharecroppers were considered wage laborers in many jurisdictions. This classification created, to be sure, an ambiguous legal status; for while it entitled croppers to protection under the lien laws, it also subjected them to the oppressive enticement laws that the plantation oligarchy enacted in the wake of emancipation. Although Michigan pickle farmers are not the structural-functional homologues of nineteenth-century Mississippi planters, certain aspects of the master-servant relationship pertinent to modern labor-protective legislation are common to both; and if labor-only or closely supervised cotton picking sharecroppers were sufficiently dependent to qualify as employees, then a fortiori in-name-only sharefarming piece-rate pickle pickers must be too.

III. Midwestern Metempsychosis

Sugarbeet is stoop, but it isn’t as stooped as this pickle deal. ... It is the most difficult job in agriculture.
One successful farmer told us that his harvest workers, after reaching up all morning to pick cherries, were delighted to have the chance to spend the afternoon bending down to pick cucumbers.\footnote{Final Report of the Michigan Farm Labor Panel at J-18.}

The circumstances in which the souls of southern black sharecroppers were expedited to their Hispanic counterparts in the Great Lakes region shaped the initial litigation of the issue of sharecropping in the context of a modern protective statute. This dispute erupted in the wake of the transition from a labor force consisting of Mexican workers imported under the government-organized bracero program to a Texas-Mexican migrant labor force in midwestern cucumber harvesting. Until the mid-1950s, most pickle pickers in Michigan had been domestic migrant workers who also cultivated sugar beets before and after the cucumber harvest.\footnote{Michigan has been the largest producer of pickling cucumbers for decades. See USDA, \textit{Agricultural Statistics} 1949, tab. 313 at 258 (1949); \textit{idem}, \textit{Agricultural Statistics} 1972, tab. 251 at 208 (1972); \textit{idem}, \textit{Agricultural Statistics} 1988, tab. 216 at 158 (1988). The pickle industry was able to establish itself on a large scale in Michigan in the 1950s in part because "[t]he previous location of the sugar beet industry in Michigan provided a ready-made labor force." John Mason, \textit{The Aftermath of the Bracero: A Study of the Economic Impact of the Agricultural Hired Labor Market of Michigan from the Termination of Public Law 78} at 16 n.1 (Ph.D. diss., Mich. State U. 1969).}

But as advancing mechanization reduced the demand for labor in sugar beets, pickle processors began to import braceros. At the peak of the last summer of the bracero program in 1964, 12,800 foreign workers harvested pickles in Michigan as against 3,400 domestic workers.\footnote{Final Report of the Michigan Farm Labor Panel at J-1; S. Rep. No. 1549: \textit{The Migratory Farm Labor Problem in the United States,} 89th Cong., 2d Sess. 10 (1966).}

For years, pickle processors and farmers had warned Congress that terminating the bracero program would trigger the most dire consequences. The only local workers who showed up, they reported, were either hampered by "a wooden leg" so that the person "had to be carried into and out of the field," or so prissy that they insisted on walking on the vines "because otherwise they would get their feet dirty."\footnote{Extension of Mexican Farm Labor Program (House) at 178 (testimony of Paul Wolff, Glaser, Crandell Co., pickle processors).} Even migrants from Texas, who with their children had "worked wonderful" in the strawberry harvest, balked...
when it came to "that heavy work" in the pickle fields. The braceros, in contrast, were "[v]ery efficient, very efficient," even though a study done in cooperation with employers revealed that "[w]orkers picking fields which yield less than 200 bushels per acre generally ma[d]e unsatisfactory wages" at a time when the average yield in Michigan was only 147 bushels. Against the background of average bracero earnings of eighty-seven cents per hour, the National Pickle Growers Association informed Congress that "irrespective of what rates of pay, within reason at least, we offer to domestic workers," it would be unable to recruit enough "to carry any substantial amount of pickle harvest in Michigan.\textsuperscript{51}

Yet, at the height of the summer after the bracero program expired, 11,600 domestic (and no foreign) workers picked pickles in Michigan. By 1966 production had already exceeded the level attained in the last year of the bracero program. Contrary to the self-serving predictions of processors and farmers, the supply of labor proved to be elastic. The real problem with domestic laborers was that, by 1967, employers were required to pay the federal minimum wage of one dollar and social security taxes. Yet experience during the bracero program had shown that dividing the proceeds fifty-fifty between the farmer and workers had failed to generate even the seventy-five cent per hour prevailing rate fixed by the DOL.\textsuperscript{53}

\textsuperscript{50}Id. at 183 (testimony of Herbert Turner, Michigan pickle farmer); id. at 179 (testimony of Paul Wolff); Noel Stuckman, \textit{Michigan Pickling Cucumbers--The Grower, the Picker and the WYRF}, MICH. STATE U. AGRIC. EXPERIMENT STATION QUARTERLY BULL. NO. 42:1, at 2, 4 (1959).

\textsuperscript{51}Extension of Mexican Farm Labor Program at 179, 185 (testimony of Robert Ford, Nat'l Pickle Growers Ass'n).


Because employers' continuing attachment to sharecropping would therefore inevitably conflict with their statutory obligations, it was not coincidental that the first court case arose out of a dispute between a farmer and the IRS over payment of Federal Insurance Contributions Act (FICA) taxes. That the major midwestern sharecropping litigation involved farmers rather than processors had more to do with the federal government's narrow conception of who qualifies as an employer than with the realities of pickle production. As the author of a dissertation on the Michigan pickle growing industry observed, like the sugar-beet refiner, after which it modeled itself, "the processor, not the farmer, is the employer of harvest labor":"\[T\]he processor contracts in advance of the planting season with a grower for all the pickles produced on an agreed upon plot of land and at an agreed upon price per unit of output. Moreover, the processor normally provides the seed, and sometimes the fertilizer, the insecticides, and the fungicides. In a few instances, the processor provides the necessary farm machinery, and in still others he undertakes the tasks of planting and thinning. Finally, the processor recruits the harvest workers, distributes them among farms, often houses them, maintains the payroll records, and pays them. The activities of the processor relative to labor are performed in the name of a growers' association, made up of the growers under contract to a single processor and whose business is conducted by an employee of the processor.\n
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54Growers' associations copied the 50-50 arrangement from the sugar-beet industry, where processors and farmers shared the proceeds equally. Gallardo, An Evaluation of the United States Department of Labor Policy Regarding Wages Paid Mexican Nationals at 112-13 n.33. The president of the Michigan Pickling Cucumber Growers' Ass'n implausibly informed Congress that "[t]he main reason for this sort of contract is because the season is not long enough to divide the labor into crews of equal skill, so the fairest way to pay them is to give them one-half of the pickle crop which each individual harvests." Migratory Labor: Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess., pt. 1 at 202 (1960) (letter of Art Shoultes).


Mr. and Mrs. Sachs employed migrants to cultivate and harvest sugar beets, tomatoes, and pickling cucumbers on their 800-acre farm in northwestern Ohio in 1971. Mr. Sachs recruited them in Texas as he had in the past and paid for their travel expenses to Ohio. He paid them by the hour for cultivating sugar beets and tomatoes; by the piece for harvesting tomatoes; and half the receipts for the cucumbers. With the exception of hoes, Sachs furnished all the tools and materials and "informed them of the proper way to pick tomatoes and cucumbers." Whereas Sachs treated the payments for the tomato and sugar beet work as wages and paid FICA taxes on them, he treated the workers as "share farmers" with respect to the cucumber work and did not withhold FICA taxes. After protesting and paying the assessment of FICA taxes, a penalty, and interest, the Sachs's sued the IRS.

They alleged that the Internal Revenue Code (IRC) excepted from the definition of covered employment the relationship of a farm owner to a share farmer, who was responsible for self-employment taxes under the IRC. In order to prevail, the farmer had to show that the pickle picking was

service performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(A) such individual undertakes to produce agricultural commodities on such land,

(B) the agricultural commodities produced by such individuals, or the proceeds therefrom, are to be divided between

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Farm Enterprise, 2 WEST. ECON. J. 183, 191 n.11 (1964).

Although braceros were not used in Ohio, considerable concern developed over the possible insufficient supply of agricultural laborers after the termination of the bracero program in 1964." Alvar Carlson, Specialty Agriculture and Migrant Laborers in Northwestern Ohio, 75 J. GEOGRAPHY 292, 298 (1976).

Sachs, 422 F. Supp. at 1093.

Id. at 1094. Sachs also filed for a refund of the employment taxes paid for the tomato and sugar beet compensation on the ground that it had been paid to the family heads as self-employed crew leaders under 26 U.S.C. § 3121(o). The court ruled against the farmers on the ground that the fathers did not fit the statutory definition of a crew leader inasmuch as they did not "recruit" their own children and wives—rather Sachs performed that task. Sachs, 422 F. Supp. at 1098, aff'd, No. 77-3128, slip op. (6th Cir. Jan. 8, 1979); Farm Labor Contractor Registration Act, 7 U.S.C. § 2042(b).

§ 1402(c)(2)(B). Yet curiously, the parties agreed that the migrants were common-law employees. Sachs, 422 F. Supp. at 1095.
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such individual and such owner or tenant, and
(C) the amount of such individual's share depends on the
amount of the agricultural...commodities produced. 61

Because the IRS did not contest that criteria (B) and (C) had
been satisfied, 62 the case ultimately turned on the meaning of the
phrase "undertakes to produce," which the IRS interpreted as
meaning that the workers assumed the responsibility for performing
substantially all the physical labor from the inception to harvesting
of the crop. 63 Although the court acknowledged that the workers did
not meet this requirement, it found the statutory language suffi-
ciently ambiguous to warrant recourse to the legislative history,
which revealed that Congress added § (b)(16) in 1956 in order
to dispel doubt as to the intent of the Congress since persons who
operate farms under a share-farming arrangement with the owner
or tenant have some characteristics of employees and some
characteristics of self-employed persons. For example, in some
instances the landowner may direct the share farmer to nearly the
same extent, on an overall basis, as he does individuals who clearly
are employees. On the other hand, share farmers participate
directly in the risk of farming; their return from the undertaking is
dependent upon the amount of the crop...produced. The provisions
of the bill would remove any doubt as to whether the services
performed by the share farmer are rendered as an employee or as
a self-employed person by statutorily defining such services to be
self-employment. This definition is believed to be consistent with
the actual relationships existing under share-farming arrangements
in the majority of cases. 64

The court correctly identified the statutory intent "to place the
emphasis on the risk sharing element," but it completely missed the

61§ 3121(b)(16).

62The IRS's position is puzzling since (c) is manifestly intended as an indicium of
risk-taking: whereas an employer owes wages to an employee regardless of whether the
employer can sell the commodities produced by the employee, a share farmer is
presumed to share the immediate risks of non-sale. Yet there was no evidence that
these—or any other—pickle pickers ever assumed or were deemed by the farmer to have
assumed such a risk. WADE ANDREWS & SAAD NAGI, MIGRANT AGRICULTURAL
LABOR IN OHIO 15 (Ohio Agric. Experiment Station Research Bull. 780, Sept. 1956),
are misleading when they state that "[i]n harvesting pickles the workers receive a half
share of the crop instead of wages."

63Sachs, 422 F. Supp. at 1095.

64S. REP. NO. 2133, 84th Cong., 2d Sess. (1956), as reprinted in 1956 U.S. CODE
CONG. & ADMIN. NEWS 3877, 3883-84 (emphasis added).
point in ruling that Sachs's "exercise of a degree of control over the
direction of the migrants is not dispositive." For if the threshold
issue was whether the workers "operate" a farm, it was in-
appropriate to find that migrants who merely trained vines and
picked pickles were operating Sachs's farm.

Although the court was also correct in stating that Congress
intended to give statutory effect to the interpretation that the IRS
had issued before the amendment was enacted, the court failed to
see the crucial difference between the fact situation depicted in that
Revenue Ruling and that of the migrants. The Revenue Ruling
contemplated an entirely different socioeconomic situation in which
the farmer makes available a house as a residence at which "[e]ach
share-farmer is offered the use of a garden plot and is allowed to
keep livestock and poultry on his premises." With regard to the
costs and risk of production, the share-farmer "agrees to pay a
proportionate share of the costs of the fertilizer and insecticides"
and enters into an agreement with the owner as to the types and
locations of crops grown. Referring only to the similarities be-
tween the two--in particular to the element of control, which it had
just characterized as not dispositive--the court then distorted the
record by asserting that "[t]he remaining terms of the agreement
were substantially similar to the arrangement between Mr. Sachs and
the migrant workers...." On this basis the court then held the
cucumber harvesters to be share farmers.

In the aftermath of the decision, the Ohio Bureau of
Employment Services relied on Sachs to rule that service performed
by such sharecroppers was self-employment and thus not covered
employment for state unemployment compensation purposes.

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65Sachs, 422 F. Supp. at 1096.
67Sachs, 422 F. Supp. at 1096.
68Interoffice communication from A. Walter, Asst Unemp. Comp. Dir.,
Contributions, to D. Russell, Chief, Contribution Dep't, and J. Hardway, Chief,
Compliance Dep't (Mar. 20, 1978) (copy in author's possession). The IRS decided that
"[b]ecause the issue is widespread and of some administrative importance due to the
potential for large revenue loss, we believe the Service should continue to litigate this
issue. However, we are...doubtful as to the chance of prevailing on appeal. It appears
more prudent to develop another case...." Action on Decision CC-1977-87, Reference:
25 I.R.B. 9, in which it announced its disagreement with Sachs. Emphasizing that
operating a farm is the threshold issue, the IRS noted that:
Several years later, when given the opportunity to revisit the issue of pickle sharecropping under FLSA in a factual setting "very similar to" Sachs, the same judge would "not allow form to triumph over substance."69 In deciding that pickle pickers were employees in a child labor case, he ruled that Sachs was not precedent because the statutory purposes of the IRC differed from those underlying FLSA. Because the former served to collect taxes and the latter to eliminate low wages, a worker's status could vary from statute to statute.70

The court applied the economic reality test factors—control, opportunity for profit or loss, investment, permanence, and skill—making the following fact findings: The farmer owned or rented all the land and all the expensive mechanical equipment, including tractors, cultivator, plow sprayers and irrigation system; decided when to plow and when and where to plant and cultivate cucumber crops; paid for the seed, decided whether to use, applied, and paid for fertilizer, pesticide and insecticide. All of this activity preceded the migrants' arrival. They, on the other hand, were housed by the farmer at his expense, worked on other crops than pickles, provided no tools except hoes, and had no control over the price of the pickles or any say in the choice of a buyer. On this basis the court found "overwhelming control" by the farmer, who had significant investment, and no investment by the unskilled workers. Of potentially greatest significance were twin findings concerning profit and loss. Because the workers "exercise[d] no entrepreneurial discretion whatsoever," higher piece wages achieved through working faster or more could not be bootstrapped into "profit." By the same token, the migrants assumed no risk of loss because "they have not invested anything in which to lose": "If the pickle crop is bad, the loss incurred by the migrant would be a loss in terms of opportunities to

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70Since the court had found in Sachs that the migrants were employees under the common law but nevertheless sharecroppers for purposes of the IRC, it was illogical to have considered that case "irrelevant and inapposite." Id. at 160. Since the facts were the same and the FLSA economic realities test of employment the same as that developed in the cases cited by the Sachs court, Sachs was in fact stare decisis.
pick pickles. However, this loss translates into a loss of wages, and not a loss of profit.”

While this litigation was in progress, the DOL sued pickle farmers in Michigan for violations of the child labor and record-keeping provisions of FLSA. In two companion cases decided in 1983, a federal trial court there set the stage for renewed appellate review by ruling that because the pickle pickers were not employees, the farmers had not illegally employed children. The following year the Court of Appeals for the Sixth Circuit in the closely watched Brandel case furnished the first solid judicial support for sharecropping, which turned out to be the high-water mark in agricultural employers’ efforts to persuade the courts that unskilled and capital-less workers are not employees.

Crucial to understanding how the Sixth Circuit came to condone this practice is the fact that the evidentiary record was confused by the intervention of nine migrants whom the defendant-farmer had induced to proclaim their status as independent contractors. Relevant, too, is that Brandel was not presented as a minimum-wage case involving extreme and outrageous exploitation. The trial judge stated that “it might just as likely be said that Brandel is economically dependent upon the harvesters. There is no indication that these harvesters are in need of the protection of the Act. They work neither long hours nor earn low wages.” The Sixth Circuit not only accepted this finding, but asserted that the workers had earned “the equivalent of $6.00-$9.00 per hour.” The record-keeping violations committed by the defendant, however, made it unclear whether such hourly wages were not in reality earned by a

71Gillmor, 535 F. Supp. at 161, 152. The court omitted the factor of integration into the alleged employer's business. The Sixth Circuit dismissed the farmer's appeal on the grounds that it lacked jurisdiction to entertain an appeal of an issue that was not final. 708 F.2d 723 (6th Cir. 1982).


whole family. Moreover, the DOL committed a tactical error in failing to raise the issue of whether the children were Brandel's employees regardless of the relationship between their parents and Brandel. This approach made it easier for the Sixth Circuit to justify its decision by accepting the trial judge's characterization of the children's "progress gradually to an active role in the harvesting" as merely the achievement of the parents' primary purpose in "develop[ing] their basic skills and family unity."

In spite of the virtually identical fundamental structural relationships in both cases, just as the court in Gillmor found that every economic-reality-test factor pointed towards an employer-employee relationship, the Sixth Circuit found that no factor supported such a finding in Brandel. The essential facts as found by the lower court and adopted by the Sixth Circuit were as follows. Although the court mentioned in passing that Brandel's contracts "required that all harvesting be done by family members," it never reflected on the extraordinary character of such an invasive restriction of the putative independent contractors' entrepreneurial freedom. If employers are permitted to impose the biological limits of family size on the migrants' ability to exploit labor, they are in effect making it virtually impossible for migrants to accumulate sufficient capital to climb the "agricultural ladder...through tenancy to

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76 Petition for Rehearing and Suggestion for Rehearing en Banc on behalf of the Secretary of Labor, at 14 n.9, Donovan v. Brandel, 760 F.2d 126 (6th Cir. 1984). When the DOL belatedly raised the issue in its petition for rehearing, Brandel weakly responded that he had never "asserted that the children of the migrants are each, individually, independent contractors. ... Each child is, simply, solely, and realistically, a member of his or her family functioning within the family environment." Id. at 2 n.3; Appellee's Response to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, at 7. The court ruled, without prejudice, that the issue had been raised inappropriately. Donovan v. Brandel, 760 F.2d 126 (6th Cir. 1984).

77 Brandel, 736 F.2d at 1117. Another weakness in the conduct of the Brandel litigation was DOL's failure to argue that, because Congress intended FLSA to protect even some real southern sharecroppers, a fortiori sham sharecroppers were covered. The Brief of Amicus Curiae FLOC et al. on the petition for rehearing to the Sixth Circuit alluded to, but did not develop, this issue. Brief at 19. Because the amici concentrated their efforts on showing the vast historical differences between cotton sharecroppers and pickle pickers in order to divest the word "sharecropper" of any legal relevance to the migrants, they could no longer plausibly marshal the arguments that inferred the latter's employee status from the former's. Id. at 13-17.

78 Brandel, 736 F.2d at 1116 n.4. Sharecropping contracts run the gamut from the naive to the crude. One stated that the owners employed "el peon" and provided for withholding for social security. Even the more sophisticated versions include the prohibition on furnishing non-family labor. Copies in author's possession.
Petty-Bourgeois Pickle Pickers?

ownership." Such a constraint should in itself disqualify the arrangement as independent contracting. Moreover, in the real world of employment such a restriction is manifestly designed to create the prerequisites for the unbridled exploitation of the family's children. The farmer, by detaching himself from the employment nexus and assigning the family members to the father—who is legally privileged to engage in exploitation prohibited to strangers—appropriates additional labor time at an extraordinarily low cost. The incentive to the family lies in the additional piece-rate earnings it obtains through the children's labor.

The appellate court's finding that "[t]he price for pickles is set unilaterally by the processors in advance of the harvest season" did not prompt it to explore whether in economic reality the migrants might be employees of the processor—an important consideration since a few large firms such as Campbell (through its subsidiary, Vlasic Foods), General Foods (now part of Philip Morris), and Heinz control the industry. The parties themselves had stipulated that "each individual harvester's capital investment in their work with Brandel consisted of their pails and gloves," whereas "Brandel had a substantial capital investment in specialized equipment for his pickle farming operations" including tractors, irrigation equipment, trucks, and a grading station. Brandel also contractually agreed to prepare the land, plant, cultivate, hoe, and spray the crop, furnish the seed and fertilizer, "to pay any other costs incurred in growing of the crop," to furnish all receptacles used for harvesting, and to transport the pickles to the receiving station. The agreement did not even pretend that the pickers were involved in

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79 Memorandum to Paul Appleby, Office of the Sec'y of Labor, from A. Black, Chief, Bureau of Agric. Econ., June 4, 1937 (copy furnished by Wayne Rasmussen, Chief, Agric. Hist. Branch, USDA).

80 Z. Rowe & J. Kohlmeier, Migrant Farm Labor in Indiana 13 (Purdue U. Agric. Experiment Station Bull. 543, 1949), offer an intriguing distortion of this scenario: Because "Mexicans" and farmers differ as to the age at which children can work as productively as adults, piece rates are used to "lessen[] the difficulty of determining wage rates for the younger workers...."

81 Brandel, 736 F.2d at 1116.


83 Brandel, 736 F.2d at 1118 & n.8.
the decisions concerning the sale of the crop.\textsuperscript{84}

The court then recited this reason for employers' adoption of sharecropping:

This method of "subcontracting" was found to have been implemented because of the unique aspects of pickle marketing. Unlike most other crops, the market price of the pickles does not increase proportionately with their size, i.e., there are seven specific grades, and the smaller pickles bring a higher price per pound than larger pickles. Paying harvesters on a piecework basis had proved to be less profitable because of the extensive and ineffective supervision it required.\textsuperscript{85}

This description cannot withstand scrutiny. The hand-harvesting of many crops is a simple task that requires supervision only because the combination of low hourly wages and arduousness invites "shirking"; where, consequently, the quality or the standard of the output is as costly to monitor as the quantity of the labor input, it may become cheaper for employers to dispense with direct supervision altogether by introducing piece rates.\textsuperscript{86} The obvious advantage of the piece-rate system is that it forces the employee to internalize the price-discipline and concomitant self-monitoring that

\textsuperscript{84}"Share the Pickle Crop--Partnership Agreement" (1976) (copy in author's possession).

\textsuperscript{85}Brandel, 736 F.2d at 1116.

\textsuperscript{86}Employers will prefer a piece-rate to an hourly rate if checking output costs less than enforcing input. However with piece rates the worker is inclined to be "sloppy" and produce products of lower quality. Thus a piece-rate contract will be less preferable if the physical attributes of the products are such that it is relatively costly to police a specified standard.

Steven Cheung, The Theory of Share Tenancy 67 n. 12 (1969). Judge Posner used the same criteria to distinguish independent contractors from employees. Anderson v. Marathon Petroleum Co., 801 F.2d 936, 938-39 (7th Cir. 1986). In the real world of migrant farm work, employers are not quite so at the mercy of their alternately "shirking" and "sloppy" hand-harvesters. On the contrary, they often whipsaw their employees between hourly and piece rates, paying the minimum wage at the peak of the harvest when the picking is relatively easy and then, when the crop begins to thin out and productivity declines, putting workers on a piece rate, which frequently results in subminimum wages. Those who complain are commonly fired. On such "opportunistic" behavior, i.e., "self-disbelieved promises regarding future conduct," see Oliver Williamson, Michael Wachter, and Jeffrey Harris, Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange 6 Bell. J. Econ. 250, 258-59 (1975).
the market normally imposes on the firm. Some pickle farmers have achieved this result by establishing a piece rate differentiated according to the size of the pickle, which "meter[s] the effort and the results in a tangible way." The grading machine in effect replaces the field supervisor. What farmers have done, however, is merely to call the internalized piece-rate system "sharecropping" because the piece rate happens to approximate fifty percent of the crop price that they receive from the processor—provided they do not pay social security or unemployment insurance taxes or workers' compensation premiums. Pickle picking and sharecropping have no necessary relationship to each other: earlier, farmers paid pickers on a fifty-fifty basis while treating them as employees, and some still do. In sum, sharecropping contributes nothing to the elimination of the costs associated with supervision or to the creation of disincentives for picking large pickles that a graded piece rate does not achieve.

Ignoring these realities, the appellate court embarked upon its march through the economic-reality-test factors, beginning with the least coherent and intelligible one—the permanence of the relationship. Viewing the possible spectrum from temporary to permanent employment—with the former apparently contradicting

88Extension of Mexican Farm Labor Program: Hearings Before a Subcomm. of the Senate Comm. on Agriculture and Forestry at 122 (testimony of A. Hildebrand, Heinz Growers Employment Comm.).
89Brandel's own expert witness at trial admitted that it was merely a "sophisticated form of piece rate." Prof. Shapley, tr. 527, cited in Brief of Amicus Curiae at 17. Two authors of dissertations on the wages of pickle harvesters in Michigan referred to "the traditional piece rate of 50 per cent of the value of the crop" or to "the simple 50-50 pay system" without ever using the term sharecropping. Gallardo, Economics of the Demand for Harvest Labor at 189 n.7; Mason, The Aftermath of the Bracero at 208-209.
90Sharecropping Contract Lowers Workers' Wages, UNDER THE BURNING SUN (Berrien Springs, Mich), July 1976, at 1. In many areas pickle pickers are treated as employees and paid on a piece rate. E.g., Washington v. Miller, 721 F.2d 797 (11th Cir. 1983); Alzalde v. Ocanas, 580 F. Supp. 1394 (D. Col. 1984); telephone interview with Baldemar Velasquez, President, FLOC (May 22, 1989). Asparagus hand-harvesters must also be selective because they are docked for culls and yet have not been subjected to sharecropping, while strawberries are not graded but have been the object of sharecropping. A difference in quality may exist between strawberries for the fresh and frozen markets, but they are not grown in the same field at the same time. David Runsten, Competition in Strawberries, in MARKETING CALIFORNIA SPECIALTY CROPS at 47, 50-51; Donovan v. Brandel, FLOC, Amicus Brief at 18.
and the latter supporting a conclusion of employee status—the court accepted the trial judge’s finding of a temporary relationship. It also embraced his meaningless ruling—designed to undercut the DOL’s argument that annually repeated engagements constituted permanence—that such re-engagement “was a product of a mutually satisfactory arrangement rather than the permanent relationship between them.” Such a ruling underscores the need to jettison the factor of permanence because it obfuscates the meaning of dependence.92

In analyzing the central factor of skill, the Sixth Circuit misconceived the role that it plays in identifying economic dependence. Skill refers both to some absolute level required by the task and to the relative skill levels as between the worker and the entity for which he is working. A low level or absence of skill is synonymous with dependent employment because it implies that every entity has the knowledge to supervise the worker.93 The appellate court’s affirmance of the trial court’s finding that “an experienced harvester possesses a degree of skill in both the care of the pickle plants and judgment in the picking of the fruit itself.”94 designifies “skill” so that any worker who can become faster and more proficient at even the most unskilled tasks—for example, ditch-digging—would qualify as “skilled.” This possibility not only is irrelevant to a finding of economic independence but also overlooks the fundamental fact that work that seven-year-olds routinely perform competently—such as being able to tell the difference between big and small cucumbers—cannot be skilled.95

The court sought to downplay the enormous disparity between Brandel’s sizable investment in equipment and facilities and the migrants’ “investment in...their pails and gloves” by stating that it was not determinative because Brandel had little invested directly in the harvesting process.96 By the same crabbed logic the worker who uses a five-dollar broom to sweep the floor of a hundred million dollar factory would be an independent contractor because none of the hundred million dollars was invested in sweeping. Moreover, this view disregards the key function that investment fulfills with

91Brandel, 736 F.2d at 1117.
92See supra ch. 5.
93Id.
94Brandel, 736 F.2d at 1117.
95Appellant’s Brief at 30, Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984).
96Brandel, 736 F.2d at 1118.
regard to the opportunity for profit and the risk of loss.

In its only implied criticism of the lower court, the Sixth Circuit conceded that the record did not "support the finding that these workers are actually exposed to any risk of loss." Since Brandel had paid the harvesters for their pickles in 1980 even though he had been unable to sell them,97 this concession should have disposed of the whole case. Yet despite the fact that the risk of loss rather than the chance for profit essentially defines an independent enterprise, the court created unnecessary confusion by the unsupported assertion "that the opportunity for greater earnings based upon management of the fields...is not solely a function of a piecework method of compensation."98 The court sought to rest this conclusion on the claim that each family had its field under its own "dominion." But it failed to mention that some pickers remained for only five of the seven or more pickings.99 Yet the fact that when families regularly left the harvest early--either to enable their children to return to Texas to school or because the yields were decreasing--the farmers assigned other families to pick those fields, was crucial because it pointed to a run-of-the-mill employment relationship.

The appeals court also upheld the lower court's finding that Brandel lacked the right to control the details of the harvesting. It arrived at this conclusion by disregarding the pervasive control that the farmer exercised over the entire operation in which the pickers were but a cog. The court also neglected the venerable judicial insight that an employer cannot bootstrap his employee into independent contractor status by relying on the fact that the work is so simple that it requires no supervision.100 Both courts viewed the defendant's alleged "design to relinquish control of the harvesting to the migrant worker" as part of "the trend towards subcontracting major aspects of farming operations such as plowing, crop-dusting and grain harvesting."101 This conclusion, adopted verbatim from the trial court's opinion, omitted mention of the latter's major premise: "For at least 40 years, the only profitable method of harvesting

97Id. at 1119.
98Brandel, 736 F.2d at 1119.
100See, e.g., Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988).
101Brandel, 736 F.2d at 1119 & n.9.
pickles has been by subcontracting to "independent contractors." 102 Yet various methods of compensating pickle pickers, including hourly and graded and ungraded piece rates for direct employees, have coexisted for years in the Midwest. Moreover, no plausible inferences can be drawn from these custom machine operations because they all represent specialized, capital intensive, skilled, and independent operations that are not integrated into the farmer's business. The migrants, by contrast, "were not specialists called in to solve a special problem, but unskilled laborers who performed the essential everyday chores of [defendant's] operation." 103

Although the court was constrained to imply that the workers were an integral part of Brandel's operation, it quickly shifted ground to deny that the migrants were economically dependent on Brandel. The reasons it adduced were jejune. First, Brandel did not control the pickle prices to which their pay was directly related. By this logic virtually no farmer would be an employer. Second, the migrants could find similar work elsewhere. 104 Again, by this logic no worker except an immobile resident of a company town would qualify as an employee. As the ad absurdum arguments demonstrate, the issue is not whether a worker is economically dependent on a particular employer, but on "finding employment in the business of others" 105--rather than in his own independent business.

Brandel's triumphant manipulation of the economic-reality-test factors has had a significant real-world impact, strengthening pickle farmers' demands in Michigan (and Ohio) that workers submit to the loss of their rights to minimum wages and unemployment insurance benefits. 106 Resistance has, however, supervened in the form of worker self-help rather than legal skirmishes; now that the Farm Labor Organizing Committee (FLOC) has secured collective bargaining agreements covering half of Ohio's pickle growers, processors, and pickers, it has negotiated the elimination of share-cropping by 1993, which it considers "the root of our problems." 107

103 McLaughlin v. Seafood, Inc., 867 F.2d at 876-77.
104 Brandel, 736 F.2d at 1120.
105 Fahs v. Tree-Gold Coop Growers of Florida, 166 F.2d at 44.
106 In Texas, too, a federal judge mechanistically applied the findings of Brandel to relieve an agricultural employer of liability. Gonzalez v. Puente, 705 F. Supp. 331 (W.D. Tex. 1988).
107 FLOC, Share-Cropping Is the Root of Our Problem (n.d. [ca.] 1984); Keith
IV. Law and Economics to the Rescue of the Pickle Proletariat

Mr. Burton. In other words, by bringing you under the minimum wage bill we encouraged a whole proliferation of small free enterprise.

Mr. Knaus. Right.

Mr. Burton. We made independent entrepreneurs out of these men.

Mr. Knaus. Right.

Mr. Burton. And, therefore, we have broadened...the small business community base...108

Shortly after the Sixth Circuit handed down Brandel, the DOL filed suit against a pickle grower in Wisconsin, where sharecropping was enjoying an upsurge inspired by the farmers' judicial successes in Ohio and Michigan. Lauritzen Farms was represented by Brandel's counsel and its litigation expenses were in part borne by a pickle growers' association in those states. Although the original complaint alleged minimum-wage violations, these were eventually dropped, in large part because of evidentiary problems, leaving the child labor and recordkeeping violations intact. The work situation was essentially the same as in Brandel.109 The trial

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109One twist involved a regulation promulgated pursuant to the Wisconsin Migrant Law, which prescribes the signing of a Migrant Work Agreement and minimum guaranteed hours. Wis. Stat. Ann. § 103.90-103.97. Because the Wisconsin Attorney General had already interpreted the Act's provisions to be incompatible with sharecropping agreements, Lauritzen's work agreements stated the wage rate as "50% 335 P.H.," which the court interpreted to mean a guarantee of the minimum wage where the sharecropping arrangement did not meet the minimum wage. 71 Op. Atty. Gen. Wis. 92 (1982); Brock v. Lauritzen, 624 F. Supp. 966, 967 (E.D. Wis. 1986).
judge, finding that every factor pointed toward employee status, disagreed with Brandel because "it disregarded the economic reality of migrant cucumber pickers," who were "completely dependent upon Lauritzen...." After the court granted an injunction the next year, Lauritzen appealed to the Seventh Circuit, which issued a rather staid rehearsal of the facts as processed through the economic-reality-test factors, all of which suggested that the workers were employees. Although the Seventh Circuit directly engaged the Sixth Circuit's interpretation and found it wanting on every point, the only remarkable aspect of the opinion was the closing observation, which obliquely exposed sharecropping as a sham:

The basic arrangement between defendants and the pickle pickers which, according to the defendants, produces the highest economic return for both grower and picker, need not be altered. All that need change is the label which the defendants apply to the arrangement. The defendants need only think of the proceeds paid to the pickle pickers as wages....

Unprecedented, however, was Judge Frank Easterbrook's concurring opinion, in which this leading practitioner of Law & Economics subjected the economic reality test to its first judicial meta-critique. Written in the witty and pithy style that he and his colleague, Richard Posner, rejuvenating the tradition of Holmes and Learned Hand, have used to enliven judicial pronouncements, the concurrence dripped irony and sarcasm. Thus Easterbrook found it "comforting to know that 'economic reality' is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy." His engagement appears to have been prompted by his irritation that a half-century after enactment of FLSA, "no ascertainable legal rule determin[ing] a unique outcome" had yet emerged that would eliminate costly and risky litigation over the issue of employee status. The balancing test of economic realities he

This wrinkle does not appear to have played any part in the adjudications. Brock v. Lauritzen, Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, at 18-19.


Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1536-39 (7th Cir. 1987) (emphasis added).
viewed as symptomatic of this breakdown because it offered little
guidance and begged the crucial questions. In particular, Easter-
brook noted that enjoining courts to identify "those who as a matter
of economic reality are dependent upon the business to which they
render service"...does not help to isolate the elements of 'reality' that
matter." Shorn of their cute paradoxical tone, his remarks boil down
to this: the notion has been so drained of rigor that it has become
correlated with economic interdependence, a relationship that, be-
cause it defines virtually all economic agents, cannot distinguish
between employees and independent contractors.113

Easterbrook took aim at the individual test factors with
sniper shots, some of which were little more than glib debating
points while others were more telling. In response to the court's
ruling that the overriding consideration in determining control was
the farmer's "right to control...the entire pickle-farming operation,"
Easterbrook countered: "If this is so, Pittsburgh Plate Glass must be
an 'employee' of General Motors because GM controls 'the entire
automobile manufacturing process' in which windshields from PPG
are used. This method of analysis makes everyone an employee."114

For one as attuned to neoclassical economics as Easterbrook, his
disregard of the crucial fact that PPG and GM produce for different
final product markets seems disingenuous. After all, pickle-picking
is obviously an integrated part of pickle-farming in a way that glass-
making is not vis-à-vis automobile manufacture. Although GM could
(vertically) integrate glass-making into its operations--just as Ford
did for many years with steel manufacture--it has not chosen to do
so while PPG uses numerous technologies to manufacture many
different kinds of glass for various product markets. Thus in the
abstract the notion that glass makers could be GM employees is
hardly far-fetched; it all depends on the concrete relationships--and
in the pickle context the pickers' lack of skill together with their
complete integration into the farm's operations is dispositive of the
issue of control.

While implicitly agreeing with the court that the migrants
risked no loss, Easterbrook quibbled over whether they had an
opportunity for profit. He managed to do this only by analogizing
the family head to a manager deploying labor "in a hierarchical
organization." If the father parasitically lived on the income gen-

113Id. at 1539-40, 1542-43 quoting Bartels v. Birmingham, 332 U.S. at 130.
114Lauritzen, 835 F.2d at 1540.
erated by the exploitation of his wife and children, the analogy might have risen above the status of a joke, but as it stood, the comparison to a consultant without capital was shallow. Although Easterbrook readily agreed that the migrants possessed no physical capital, he objected again that the same was true of many real independent contractors who, however, have heavily invested in "human capital"--such as lawyers. Though surely not incorrect, the reference to human capital is but another way of referring to the next factor, skill, on which, Easterbrook agreed, migrants are short--especially since a ten-year-old learned how to pick in five minutes. The permanence or duration of the relationship he regarded as incoherent and irrelevant since no one-to-one relationship necessarily obtains between it and employment status.115

If until this point the tenor of Easterbrook's critique prompted bafflement at what remained for him to concur in, here the surprise began.116 His call for a new beginning, rooted in FLSA's policy "to correct and as rapidly as practical to eliminate" "the 'labor conditions detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers,'" was reminiscent of the nineteenth-century economic-reality-of-poverty test.117 He then quickly moved

115Easterbrook also chided the court for confusing the (meaningless) "integral part of the employer's business" with "part of integrated operation," but failed to see why such integration is relevant. Id. at 1540-41, 1533.

116Easterbrook also made the (factually unfounded) complaint that the court overlooked the "wrinkle" that "the migrants share the market risk with Lauritzen." Id. at 1542. Since the price is set at the beginning of the season and constitutes a guarantee from the grower to the picker, it is only the grower who bears the risk of price changes. By the end of the concurrence Easterbrook recanted:

The link of the migrants' compensation to the market price of pickles is not fundamentally different from piecework compensation. Just as the piecework rate may be adjusted in response to the market..., imposing the market risk on piecework laborers, so the migrants' percentage share may be adjusted in response to the market in order to relieve them of market risk. Through such adjustments Lauritzen may end up bearing the whole market risk, and in the long run must do so to attract workers.

Id. at 1545.

117Id. at 1543, citing 29 U.S.C. § 202. Even at this juncture Easterbrook halted again to interject his market-knows-best skepticism about whether such purposes might actually harm those they are intended to benefit "by foreclosing desirable packages of incentives." Since FLSA excludes agricultural employees from overtime, Easterbrook revealed a curious ignorance of the facts and the law in referring to the overtime provisions of FLSA as "the important ones here." 835 F.2d at 1543.
toward an unprecedented judicial denouement. Because FLSA "was designed to protect workers without substantial human capital, who therefore earn the lowest wages," it was also "designed to defeat rather than implement contractual arrangements" that undermine the paternalistic purpose of FLSA.

The migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. This does not belittle their skills. Willingness to work hard, dedication to a job, honesty, and good health, are valuable traits and all too scarce. ... But those to whom the FLSA applies must include workers who possess only dedication, honesty, and good health. ... There are hard cases under the approach I have limned, but this is not one of them. Migrant farm hands are "employees" under the FLSA—without regard to the crop and the contract in each case.118

That the only judge who, in a quarter-century of federal migrant labor law litigation, has been candid enough to state the obvious—namely, that if anyone remains a certified protected proletarian, migrant farm workers do—advocates repeal of such legislation,119 is a devastating commentary on how sanitized and devoid of passion (and compassion) liberal judicial opinions have become since the heyday of paternalistic-humanitarian interpretations in the 1940s.120

In part because of the unambiguous direction in which Lauritzen pointed, and in part because of the vigorous enforcement of state law,121 sharecropping appears to have been euthanized in

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118 Id. at 1542, 1543, 1545.
119 Taking his cue from Posner's unprecedented critique of FLSA in Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1176 (7th Cir. 1987), Easterbrook closed his opinion on this note: "Once they know how the FLSA works, employers, workers, and Congress have their options. The longer we keep these people in the dark, the more chancy both the interpretive and the amending process become." Lauritzen, 835 F.2d at 1545.
Wisconsin. In its wake, even farmers in Michigan have begun to reconsider the prudence of imposing the title on their workers.  

V. California: Straw Men and Strawberries

We on the land have always recognized that California labor requirements made impossible to those people ["the Chinaman...the Japanese...the Mexican...and the Filipino"] so employed the full efforts of American citizenship and the possibility of partaking of our normal standards of life.  

A. A Meta-Marxist Interlude

"When the sharefarmers get paid, they find that they are paid far less than minimum wage. In fact, sometimes, they owe the grower...."

To understand the peculiarities of sharecropping in California, it is necessary to distinguish among three distinct though related phenomena. First, some pickle and strawberry farmers have resorted to the same purely nominal arrangement that pickle growers in the Midwest adopted: merely calling their employees another name in order to reduce the costs of doing business. Second, California has also witnessed the rise of a variety of strawberry sharecropping in which family heads (together with their
employers) co-exploit not only members of their nuclear family but also relatives, friends, and, to some extent, others. Finally, tenant farming has emerged in the Santa Maria Valley where some strawberry farm owners have leased their land outright to persons who then, in turn, engage sharecroppers of the first category. While the last phenomenon is of very recent vintage and to some extent involves both tenants who had been small businessmen in Mexico and former sharecroppers, the former two have been dated back to the early 1970s, having been implemented because they "proved effective in frustrating attempts to organize field workers."  

A social scientist specializing in the study of California strawberry sharecroppers has misconceived the issue at stake by failing to distinguish between make-believe sharecroppers and potentially real ones. Although Miriam Wells correctly observes that strawberry farmers were motivated to convert their wage laborers into sharecroppers in order to avoid their obligations as employers, she has fallen victim to the illusion fostered by the farmers that they have actually reorganized production. The only piece of evidence that she has adduced in support of any change in organization refers to the fact that in reaction to a court decision, one farmer made a loan to some sharecroppers to buy a small tractor. In fact, farmers have not introduced sharecropping, but merely called their employees "sharecroppers." In seeking to bolster her thesis, Wells has also mischaracterized the political-economic and social-psychological forces leading to the workers' acquiescence in their paper conversion into sharecroppers. First, in some areas, such as the Santa Maria Valley, where seasonally sharecropping strawberries is the only way for farmworkers to make a living, economic coercion is the most plausible motivation. Second, in many instances workers are not sufficiently aware of the statutory protections afforded employees or of the tax obligations of the self-employed to


127Wells, Legal Conflict at 76.

128Information furnished by Jeannie Barrett, attorney, CRLA, Santa Maria (telephone conversation of May 26, 1989).
be in a position to make an informed decision as to the potential trade-offs between the two statuses.

Wells’s own theoretical ambivalence is reflected in the much more plausible position she has adopted distinguishing among share tenancy, sharecropping, and share labor. The first term refers to independent grain farm operators who rent farmland for a share of the crop in the Midwest; the second to "the most coercive, paternalistic systems" involving blacks in the South; and the last to pickle and strawberry pickers. Whereas the sharecroppers "were not free wage laborers," "strawberry sharecroppers...are more like wage laborers with a share feature to their labor contract. That is, their share constitutes wages paid by the landowner for the use of their labor." In fact, Wells’s own descriptions of the working conditions of the sharecroppers and share laborers reveal that the latter are subject to greater economic control by employers than were nineteenth-century black cotton sharecroppers.129

The vacillation reappears in the unwarranted significance that Wells imputes to a written contract in establishing whether a worker is a sharecropper and with respect to whether it explicitly characterizes the worker as a sharecropper: "Perhaps most importantly, the contract identifies sharecroppers explicitly as independent contractors, rather than employees...."130 Because covered workers cannot waive their rights under FLSA, for enforcement purposes the DOL does not even consider "an employer’s self-serving label of workers as independent contractors"131 and the Supreme Court provides the macroeconomic and social-psychological basis for that policy:

[T]he purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue...and would be likely to exert a general downward pressure on wages in competing businesses.132

129Wells, Sharecropping in the United States at 238-39, 226-27, 232-33. The "foreman exerts considerable control over strawberry cultivation and harvest, especially in operations requiring business judgment." Wells, What is a Worker? at 305.
130Id. at 304. See also Wells, Legal Conflict at 59, 66.
131Brock v. Superior Care, Inc., 840 F.2d at 1059.
And although Wells cites a French Marxist's cautionary statements as to the dangers of accepting juridical status as indicative of class boundaries, she neglects the one respect in which the contract is congruent with reality: the workers bear no risk of loss of capital.\footnote{Wells, *What is a Worker?* at 313.}

The gravamen of Wells's analysis is that these ambiguities in status are objective and account for the workers' subjective ambivalence: "This simultaneous holding of contradictory views of class status and interest reflects the interstitial nature of sharecroppers' structural niche." Thus sharecroppers define themselves as "small capitalists" in part because "[l]egally, they possess many of the juridical prerogatives of capital; economically they enjoy economic possession in that they have legal standing as the employers of labor power and are contractually empowered to direct the labor process." And even though their involvement in economic ownership is "very limited," so that they "cannot be considered unequivocally bourgeois," their "legal tax status...reinforces their bourgeois standing, since they have historically represented themselves as self-employed."\footnote{Id. at 310-12.}

On the other hand, because sharecroppers are "heavily supervised" and "charged with a limited range of tasks that are virtually identical to those performed by wage laborers in the industry," "they, like sharecroppers in other regions, can easily be viewed as piece-rate wage workers in a system in which the piece rate is variable." Moreover, "sharecroppers also think and act in ways that indicate an identification with the proletariat" such as supporting the UFW. If under these circumstances "they are a form of disguised wage labor,"\footnote{Id. at 312-13, 309. The last remark is circular since contesting their status with the IRS would be tantamount to challenging the non-employee status the owner has imposed on them—a battle that only few are in a position to take up.} who has not yet seen through the disguise?

The only evidence that Wells adduces in support of the claim that these workers function as capitalists is that "[d]uring the harvest all sharecroppers hire additional workers, usually illegal immigrants who are friends or relatives.... It is in their relations with these hired helpers that sharecroppers experience the autonomy they are otherwise denied." Yet this analysis fails to do justice to the background even as delineated by Wells--namely, that sharecroppers cite as a primary benefit the opportunity "to maximize the income..."
producing potential of wives and children...and to 'become [one's] own boss.'\textsuperscript{136} The opportunity to co-exploit and tyrannize others\textsuperscript{137} is manifestly not the autonomy they seek—which is freedom from the oppressive sort of subordination typical of backward, paternalistic capital-labor relations. This false equation of wanting to be one's own boss with wanting to boss others conforms to Wells's assertion that "[i]n terms of the political and ideological dimensions of the productive process, sharecroppers occupy the contradictory position of the petite bourgeoisie, dominating and exploiting labor in some situations but also being dominated by capital themselves."\textsuperscript{138} Yet many if not most petty bourgeois neither supervise nor are supervised. Moreover, in the United States, as the most highly developed capitalist society without a socialist labor movement, resistance to what is perceived as oppressive working conditions has, even among core industrial surplus-value-producing workers, often assumed the form of (fantasized) escapism into self-employment. If farm workers' putative conversion into non-employees rests on any informed, consensual agreement, they share it with marginalized workers elsewhere who, for lack of other sources of income, enter into sub-proletarian forms of self-employment.\textsuperscript{139}

By the same token, Wells inexplicably denies the kind of intrafamilial exploitation that is in fact the driving force behind workers' acquiescence in the loss of their protected status—the opportunity to press their own children unlawfully into service: because "little child labor is used in the industry...evasion of FLSA child labor laws is not a motivation for strawberry sharecropping."\textsuperscript{140} This claim, which is factually erroneous,\textsuperscript{141} contradicts Wells's explanation of the attraction of sharecropping to workers. To the

\textsuperscript{136}Wells, Resurgence of Sharecropping at 18.

\textsuperscript{137}By one account "most of the abuses are committed by sharecroppers against their own employees." Burns, State Court Shakes up Farm System at A14, col. 2.

\textsuperscript{138}Wells, What is a Worker? at 311.

\textsuperscript{139}See Eli ChinoY, Automobile Workers and the American Dream (1955); Marc Linder, Farewell to the Self-Employed: Deconstructing a Socioeconomic and Legal Solipsism (1992).

\textsuperscript{140}Wells, Resurgence of Sharecropping at 19.

\textsuperscript{141}Burns, State Court Shakes up Farm System; information furnished by Jeannie Echenique, former reporter with the Salinas Californian, who has reported on strawberry sharecropping and witnessed large numbers of children working (telephone conversation of May 24, 1989); information furnished by Jeannie Barrett, attorney, CRLA, Santa Maria (telephone conversation, May 26, 1989).
extent that the workers try to evade the state's ban on such activities by consenting adults, they are in effect seeking to slip back into a phase of original self-accumulation that the working class (and part of the employing class) succeeded in outlawing precisely because of its macrosocial Sisypheus-like character: while a few might manage to make a living or even to accumulate enough to rise into the hemi-demi-semi petty bourgeoisie, the standards of the lowest stratum of the working class would be degraded. Much like the southern black cotton sharecropper, today's share-farmer can boast of "autonomy" only to the extent that he can make full use of his family's labor.

On balance, then, the image that most clearly emerges from Wells's account of the family head is that of a crewleader who combines the functions of labor recruiter and working foreman on a piece rate. In this context it is of subsidiary importance whether the workers whom he co-exploits are relatives or strangers. That Wells's explanation of sharecropping in California suffers from overdetermination and underdetermination emerges from a comparison with its analogs in the Rio Grande Valley of Texas.

Although the proximity of a porous border and the absence of union organizing provide agricultural employers with unimpeded access to and control over huge numbers of impoverished and desperate workers, farmers in South Texas nevertheless engage in a whole range of identical or similar unlawful practices even in crops--such as onions--the machine-harvesting of which already competes with hand labor. That aggregate familial labor power is compensated at sub-minimum wages on a piece rate rather than through sharecropping is secondary. Moreover, in one prominent variant of pickle sharecropping, the packing shed, which organizes the harvest on behalf of the farmers under contract with it, makes it a condition of employment that the family head register as a farm labor contractor despite the fact that one who engages in farm labor

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142 Wells indirectly concedes this point; What is a Worker? at 308.

143 In the 1980s, Hidalgo County, Texas ranked first or second in terms of cucumber acreage. BOC, 1987 Census of Agriculture, 2 Subject Series, pt. 3: Ranking States and Counties, tab. 67 at 80 (1990).

144 Wells asserts that by adopting sharecropping the growers "altered the social and economic relations among social strata" in part because sharecroppers, unlike wage laborers, "work as families on a set plot of land...." Wells, Legal Conflict at 74. Yet, many families do this as piece-rate laborers in Texas. Wells offers no information on what the remaining wage laborers do and how their work differs from the sharecroppers'.
contracting activity exclusively vis-à-vis immediate family members is statutorily not a farm labor contractor. The purported reason for this condition is to protect the shed and the farmers against the claim of using an unregistered crewleader should the family head employ non-immediate-family workers, while the real reason is to buttress the contention that the family head is an independent contractor.145 Fantasy then gives birth to reality as some family heads, involuntarily armed with their crewleader cards, permit non-relatives—whom the shed refuses to hire directly—more as a personal favor than as a business transaction, to work with the family, thus extending the universe of workers available to the ultimate employer for exploitation at sub-minimum wages and without payment of employment taxes.

The crucial point for the family head—whether he is harvesting pickles in Texas or Michigan or strawberries in California or hoeing cotton in Texas or sugar beets in Wyoming—however, is that the family unit secure as much work, as many rows, as many acres as possible so that as many—especially children's—hands as possible contribute regardless of the depressive impact on the effective hourly rate of pay.146 Such workers with few or no alternative opportunities and hence low or no opportunity costs are accustomed to a reservation wage significantly below the lawful minimum; living on a margin informed by a short time-horizon, they set their sights on an existential household bottom line that does not consider hours worked let alone equivalent hourly wages.

In an artfully phrased understatement Wells concedes that unlawful self-exploitation is the key: "The element of anticipated self-direction is especially important to sharecroppers, because they do not always make more money than farm laborers. ... In general, long-term sharecroppers report that as a family they make more than they did as farm laborers, although their per person return is below the standard rate for wage labor in the area."147 Indeed, their income qualifies them as "among the poorest of Santa Maria's poor":


146In the mid-1980s, numerous migrant families from Texas declined to participate in litigation seeking to limit the scope of the lawful compensation of children sixteen and under at below the minimum wage for fear that, if the suit were successful, the employers would stop employing such children to work.

147Wells, Resurgence of Sharecropping at 18.
"There's very few sharecroppers that have gone to the middle class."\footnote{Burns, \textit{State Court Shakes up Farm System} at A14, cols. 1, 4-5.}

Wells sees the practice of sharecropping on several thousand acres in California at the end of the twentieth century as undermining the tenability of nineteenth-century economic doctrines that viewed sharecropping as incompatible with modern capitalist production.\footnote{Among the proponents of this thesis she includes not only "[t]raditional Marxist scholars," that is, Marx and Lenin, but also the "[c]lassical economists" Smith, Mill and Marshall, whom she also characterizes as "neoclassical economists." Wells, \textit{Resurgence of Sharecropping} at 5, 21; \textit{Sharecropping in the United States} at 213. Interestingly, by asserting that sharecropping would not necessarily be inefficient if the landlord regulated the labor, Marshall in effect conceded that it would have to constitute dependent employment. \textit{Alfred Marshall, Principles of Economics} 642-45 (8th ed. 1920). To be sure, evidence exists that sharecropping, especially in the Third World, has been adapted to developing the forces of production. \textit{E.g.}, Pranab Bardhan, \textit{Marxist Ideas in Development Economics: An Evaluation}, in \textit{Analytic Marxism} 64, 70-71 (John Roemer ed. 1986).}

Yet the sharecropping that nineteenth-century economists analyzed was not labor-only pseudo-sharecropping, but a transitional form of ground rent, in which the tenant's share in part represented compensation for having furnished part of the working capital, just as the landowner's share included interest on the capital he provided.\footnote{3:2 \textit{Marx, Das Kapital} at 337.}

Because, in contrast, strawberry harvesters are merely agricultural sweatshop laborers--"quasi wage laborers" "in a two-class production system"--it remains unclear in what sense "[s]harecropping is a new means of controlling and utilizing labor."\footnote{Wells, \textit{The Resurgence of Sharecropping} at 24.}

Ultimately Wells offers no "new" explanation as to why farmers retain sharecropping at all. For if it is true that: (1) growers considered braceros on hourly wages under close supervision the most efficient and inexpensive labor; (2) the productivity of wage laborers and sharecroppers is comparable; (3) growers still maintain fundamental control over all inputs and basic decisions and supervise sharecroppers closely; and (4) the decline of the UFW and the steady increase of readily available illegal and legalized workers\footnote{See, \textit{e.g.}, Seth Mydans, \textit{Strawberry Fields Bear A New Immigrant Crop}, \textit{N.Y. Times}, May 22, 1989, at 8 col. 1 (nat. ed.) (Mixtec Indians from southern Mexico as newest most exploitable migrant pickers in California).} have recreated a large pool of easily exploitable laborers: then in what sense can it be said that "the organizational principles of
sharecropping are used...to perform vital functions that cannot be accomplished at the same cost under the expected capitalist system of wage labor."—except that the label facilitates the unlawful reduction of wages and payroll taxes?

B. Strawberry Fields of Exploitation Forever

We pause here to note the remarkable fact that it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable rights to labor. This inestimable privilege is generally the object of the buyer's disinterested solicitude.

By the latter half of the 1970s sharecropping was already under attack in California. A much cited federal case that became the leading decision, Real v. Driscoll Strawberry Associates, Inc., was handed down by the Ninth Circuit in 1979. It is an object lesson in the divergence between judicial pronouncement and real implementation. Real came before that court as an appeal from a dismissal on summary judgment. The appellants had filed a class action against Driscoll Strawberry Associates and Donald Driscoll d/b/a Driscoll Berry Farms for failure to pay the minimum wage, which the district court dismissed on the grounds that they were not employees under FLSA. The original complaint, which the plaintiffs had brought expressly as independent contractors, alleged

153 Wells, Resurgence of Sharecropping at 13, 17, 22.

154 On early employment practices in strawberry harvesting, see O. Schleussner & J. Gilbert, Marketing and Distribution of Strawberries in 1915 (USDA Bull. No. 477, 1917).


156 In Hernandez v. Scaglione, SJ-8120 (Oct. 7, 1977), the Cal. Unemp. Ins. App. Bd. determined that the compensation of cucumber and strawberry pickers was not covered wages because "the grower is dependent upon the picker's interest, managerial ability, and skills..., experience, and cooperation" and "has little or no control over the manner in which the cucumbers are picked or the vines cared for." Two years later, the Appeals Bd. ruled that "[i]t]o find that the petitioner had relinquished its right to control would require this Board to close its eyes to the reality of the working conditions of the pickers." In the Matter of Patane, No. SJ-T-748 (Sept. 13, 1979).

157 603 F.2d 748 (9th Cir. 1979).

158 Although workers must affirmatively opt into collective or representative actions under FLSA, the reason for the confusion in the opinion, which never reached this issue because employment status was the only issue on appeal, may lie in the fact that the case was not originally brought as a FLSA action.
antitrust and contract violations by the defendants. An amended complaint, alleging that the agreements were a “sham,” stated that the plaintiffs were employees and owed back wages. Although the workers did not drop their commercial causes of action, they did not appeal their dismissal.

Driscoll Associates, which held patents on certain varieties of strawberries, contracted with Driscoll Farms to grow them. The adhesion contracts—“so one-sided it’s difficult to keep them on your desktop”—characterized the workers as patent sublicensees of Driscoll. Whereas the farmer undertook to plant the berries, the workers agreed to care for the plants during the growing season and to harvest, sort, grade, and pack the berries. Apart from hand hoes, shovels, clippers, and hand carts, the farmer contracted to furnish all the necessary tools and materials for these labor tasks. Despite the contractual recital, the farmer in fact paid the workers a piece rate to plant the plants according to directions. Although much of the description of control was couched in terms of "recommendations" from the patent holder and the farmer to the workers, the workers testified that the farm foreman even prescribed the precise hours of picking. The patent holder retained complete discretion to market the berries, which were packed in crates bearing the farmer’s name, and paid the workers a fixed percentage of the net proceeds weekly.

In its brisk promenade through the economic-reality-test factors, the Ninth Circuit found that Driscoll exercised control, while the workers had little or no opportunity for profit or loss, investment, or skill, and were an integral part of Driscoll operations "rather than an independently viable enterprise." Indeed, the court went so far as to state that it had not even been shown that the farmer was an independent contractor vis-à-vis the patent holder. The court remanded the case for trial, but before those proceedings were resumed, the case was settled in 1981. According to the eponymous sharecropper, Alonzo Real, each worker-plaintiff who

159 Real, 603 F.2d at 750.

160 Letter from Steven Belasco, attorney, CRLA, to Richard Pearl, CRLA (July 27, 1977, copy in author’s possession) (referring to similar contemporaneous strawberry sharecropper contracts).

161 Real, 603 F.2d at 750-52, 753 n.11. In addition, during the four to five months that elapsed between planting and picking, the workers did "not need to work in their fields daily" whereas farm employees inspected the fields daily. Id. at 752 n.7.

162 Id. at 755, 756.
remained in the suit received $1,600 after attorneys fees.163

The Real workers' behavior has been ethnographically analyzed as an expression of the "contradictory class consciousness" congruent with occupation of a "contradictory location" that "straddles the boundary between the bourgeoisie and the proletariat."164 Yet, a more plausible and coherent account suggests instead that the workers were torn between opting for their statutory rights as employees and for the increased total family income that they could generate by acquiescing in a level of exploitation and engaging in a kind of self-exploitation prohibited in an employer-employee relationship. Indeed, many of the workers--like many migrants--were insufficiently integrated into the civic culture of the United States to be aware of the rights (such as social security, unemployment insurance benefits, and workers' compensation) of which they were being deprived by virtue of their alleged self-employed status.165

In sharp contrast to Wells's unmediated description of the sharecroppers, who suddenly appear on the historical horizon without a prehistory,166 Alonzo Real reported that before working as a sharecropper for Driscoll, he and his wife had worked as hourly employees at another strawberry operation. They shifted to Driscoll for two reasons. First, they hoped to earn more money; and second, they had foreseen union-related turbulence, which they wanted to avoid: although they did not want to be "scabs," they did not wish to be blacklisted and to lose their livelihoods either. Very soon after starting work for Driscoll they realized that they were earning even less than they had as hourly workers, but remained because they saw no future at the other farms. Real noted that he performed exactly the same tasks at Driscoll that he had performed as an hourly employee with one unpleasant exception: he had to purchase a pesticide backpack for about $250, about which he had not known before signing up. He was not given proper training in how to use

163 Wells, Legal Conflict and Class Structure at 73; telephone interview with Alonzo Real of May 22, 1989.

164 Wells, Legal Conflict and Class Structure at 75; idem, What is a Worker? at 313.

165 A contemporaneous study in Michigan revealed that ninety per cent of covered migrants were unaware of their entitlement to compensation for injury or unemployment. Valdés, Al Norte at 206.

166 Wells, Legal Conflict at 64, does briefly allude to the fact that many of the Real plaintiffs "had previously been braceros, or wage laborers, on the same farm," but does not analyze this transition or seek to incorporate it into her account.
it, and workers on neighboring fields tended to spray one another and themselves since they were given no protective equipment.

Although only Real and his wife worked, most of the other families had children working--children too young to have worked lawfully had the parents retained their classification as employees; indeed, he confirmed that this opportunity to make use of children's labor was perhaps the primary attraction of sharecropping. The "independence" to which some workers also aspired meant for them not financial independence but freedom from a boss standing over them. But even this dream was destined to be shattered; since Driscoll did not consider the workers competent to operate the farm on their own, he supervised them closely. While it is true that the workers were dissatisfied with the discrepancy between the amount of money they were earning and the prices for which they saw the berries being sold, at no point did they wish to receive a share of the crop or to assume the risk of selling it on their own as entrepreneurs. They merely wanted more money, a fact that impressed itself on them when they realized that they were earning less than they had as hourly employees. The one or two workers whom Real did hire were relatives to whom he paid the minimum wage even though he himself was earning less than the minimum wage. Even at the time he realized that he was an employee--a status that he recognized as superior to being an independent contractor.167

C. Sharecropping: Old-Fashioned Familial Sweatshopping or A Law-Mediated, Dialectically New Class Relationship?

As sharecroppers, we were independent in name only.168

From Real Wells concludes that "legal structures and conflicts play a key role in the evolution of modern class structures" while law itself "has become one of the forces of production."169 She contends,
for example, that as a result of variations in coverage definitions among statutes, "employers' claims that their workers are exempt...tend to be accepted until challenged in the courts." This claim illustrates how Wells's impatience with approaches that treat the legal system as a means of maintaining "dominant economic interests" has blinded her to a conspicuous example of precisely such real-world instrumentalism. An employer's power to "make the initial determination as to whether a person performing services for him is an employee,"--and thus to shift to the worker the burden of overcoming this initial presumption--has nothing to do with semantics and everything to do with the fact that:

Typically, the worker as an individual has to accept the conditions which the employer offers. [T]he relation between an employer and

herself to the canons of scholarship. She asserts, for example, that Sachs was the controlling case (id. at 59-60), unaware that the IRS, not acquiescing in district court decisions, had issued a new revenue ruling on pickle pickers. She does not know that the legislative history on sharecroppers under FLSA has been codified in the DOL's regulations; id. at 60. She incorrectly asserts that the meaning of "employee" for the purposes of FLSA "has been established...through the application of certain common law tests." Id. The Supreme Court and the subordinate federal judiciary have in fact for more than four decades uniformly held that the common law is not relevant to FLSA. Without any authority or argument she asserts that among the common-law distinctions that have been modified "is the stipulation that the independent contractor status under the FLSA is more inclusive than the common law principles generally applied under the SSA, so that an individual deemed an employee under the FLSA may yet be found an independent contractor under the SSA." Id. at 61. Apart from the incorrect use of the term "stipulation," as a matter of logic her conclusion cannot follow: a more inclusive definition means a broader one. She cites a provision of the NLRA as containing a definition of independent contractor that it does not contain. Id. at 62. Wells cites a 1979 case as having established that sharecroppers cannot join unions because they have the power to hire and fire. Id. at 52 n.2 and 63. Yet the case was merely an unreported review of dismissal by the general counsel of the California ALRB; statutorily unappealable to the Board or to a court, it remains without any precedential value whatsoever. In fact, the ALRB has never resolved this issue. Information from Don Presley, assistant general counsel, ALRB (telephone conversations of May 23 and 26, 1989).

Wells, Legal Conflict at 63. As an instantiation of the "dialectical relationship between the law and class struggle" Wells cites the fact that Real "has already been used by public interest lawyers attempting to establish the employee status of cucumber sharecroppers in the Midwest." Id. at 74, 76. Ironically, this characterization of the manifestly class-neutral and politically indifferent use of precedent in briefs and decisions underscores the shallowness of Wells's own attempt to view the law instrumentally.

an isolated employee or worker is typically a relation between a
bearer of power and one who is not a bearer of power. In its
inception it is an act of submission, in its operation it is a condition
of subordination, however much the submission and the
subordination may be concealed by the indispensable figment of the
legal mind known as the "contract of employment." 172

It is, of course, open to a worker at the hiring stage to
contest his employer's classification of him as an independent
contractor, although experience suggests that this might not be the
way for a worker to put his best foot forward at a nonunion place of
employment. There is also no inherent reason why a labor-
protective statute could not create a rebuttable presumption that all
workers are employees, placing the burden on the employer to
contest and overcome that presumption. 173 Indeed, administrative
procedures are conceivable that would make it more difficult for
employers--at least outside the so-called informal economy--to use
self-help methods to circumvent the aforementioned presumption.174
Yet even where such a reversal has been legislatively imple-
mented--albeit in very modest form--in the real world of non-self-
enforcing law, the worker must still take the initiative to vindicate
his status. 175 Where unorganized and atomized workers are more

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172 KAHN-FREUND, LABOUR AND THE LAW at 6.
173 See Linder, Employees, Not-So-Independent Contractors, and the Case of Migrant
Farmworkers at 472 n.162.
174 An important link in such a mechanism would involve withdrawing from
employers the initial unilateral authority to issue IRS Form-1099. See Linder,
Involuntary Conversion of Employees into Self-Employed. Britain established such a
mechanism in the 1970s in order to curb analogous subterfuges regarding labor-only
subcontractors construction. Finance Act, 1971, ch. 68, §§ 29-30; Finance (No. 2) Act,
1975, ch. 45, §§ 39, 68-71, and Schedule 12; REPORT OF THE COMMITTEE OF INQUIRY
UNDER PHELPS BROWN at 107-58.
175 The unemployment compensation statutes in three-fourths of the states include
a provision to the effect that

any services performed by an individual for wages shall be deemed to be
employment subject to this Act unless and until it is shown to the
satisfaction of the Commission that such individual has been and will
continue to be free from control or direction over the performance of such
services both under his contract of service and in fact.

Tex. Stat. Ann. art. 5221b-17(g)(1)(Vernon 1987)(emphasis added). In spite of this
statutory presumption, if the employer issues Form-1099 to the worker classifying him
as an independent contractor and fails to pay Federal Unemployment Tax Act and
state unemployment insurance taxes, the worker's claim would initially be invalid until
fungible than their employers, who appropriate the work product and pay the workers, they have historically had to rely on the paternalistic intervention of the state to enforce their *already existing* rights on their behalf. Sharecropping litigation is but the latest instance of such defensive intercession designed to restore a protective (paper) status quo ante.

Similarly, the proposition that employee status determinations have "become a part of class resources" fails to reflect the fact that less competitive or profitable employers have for some time now been known to try to restrict the scope of the class of workers on whom the state has paternalistically conferred benefits such as the minimum wage that they could not achieve through their own collective action. Because the Driscoll workers were, by precedent, already entitled to the minimum wage, theirs was a purely defensive action designed merely to achieve the restoration of the status quo, which the farmers had unlawfully undone.

Wells portrays the real import of *Real* as pivoting on the "divergence between the contractual representation of the sharecroppers' independence and their experience of day-to-day dependence...." Under the rubric, "The Dialectics of Legal Struggle," Wells argues that this contractual "representation as independent," though initially to the advantage of the owners, "was appropriated in its meaning by workers, and ultimately spurred workers to challenge the economic and legal relationship." "[T]he actual process of litigation altered" their perceptions of their status, leaving them even years later "with what could be called a 'contradictory' class consciousness." In reality what occurred sequentially was that (1) the workers were economically coerced or deluded into accepting independent-contractor status; and (2) their lawyer, enlightening them as to the unlawfulness of their paper conversion, persuaded them to accept their original and only status as employees. One dialectic which Wells fails to elucidate is how workers can be "militant" and yet permit a piece of paper calling them sharecroppers to undermine their categorical proletarian consciousness.

If in arguing that law (such as the application of FLSA to farm workers in 1966) "has become one of the forces of production" and a "determinant of class relationships," Wells means that "the

the agency determines that an employer-employee relationship existed.

176 Wells, *Legal Conflict* at 78.
177 *Id.* at 74, 75, 77, 59.
potential benefits of utilizing nonemployee, independent contractors are considerable, it is undeniable that violating the law in order to lower costs at the expense of defenseless employees without an alternative has always had its allures. But no subtle sociological theorizing is required to understand that the enactment of laws imposing burdens on employers (or non-employing taxpayers for that matter) has always created incentives to stimulate every employer's trivial urge to violate those laws in order to avoid the additional costs. Alternatively, Wells's claim can also be more plausibly and less grandiosely restated to mean that state enforcement of a minimum wage can lead and has often led to a real reorganization in the form of labor-saving mechanization.

As further evidence "that the law bears a more complex relationship to class conflict" than "instrumental and determinist" Marxist approaches" can comprehend, Wells points to the emergence "in some periods" of lawyers "who are advocates for the lower classes." This focus on the privately retained lawyer as deus ex machina to the exclusion of the more than 100 specialized migrant legal services lawyers who, financed by ten million dollars from the federal government, file many suits like Real every year, distorts migrants' relationship and access to the law. Perhaps even more difficult to reconcile with Wells's analysis of the class content of law is that some of the most important employee-status cases have been prosecuted by the state itself. Not even during the Reagan administration did the DOL ever take the position that sharecropping was anything but a sham; indeed, DOL litigation has contributed to its suppression in certain areas.

Ultimately the most problematic aspect about Wells's analysis involves translating her conclusions into the rigidly binary world of social-welfare legislation, which must affirm or deny a worker's status as a covered employee. If the workers' alleged subjective ambivalence corresponds to their objectively ambiguous status, what guidance can Wells's approach--especially in light of her own tergiversations--furnish legislators, judges, and administrators, who are charged with drawing bright either-or lines? Yet Wells has adduced no evidence to support the claim that sharecroppers' working con-

178 Id. at 77, 59.
179 Id. at 51.
180 See, e.g., GAO, LEGAL SERVICES CORPORATION: GRANTEE ATTORNEYS' HANDLING OF MIGRANT FARMWORKER DISPUTES WITH GROWERS (HRD-90-144, 1990).
ditions or income warrant characterizing such workers as even "penny capitalists" or "lumpen-capitalists." That even well-meaning social scientists, imprisoned by academic constructs, can generate employer-friendly theses to the effect that "marginal producers hurled into existence by depression, underemployment or simple poverty" are petty bourgeois, underscores the need to move away from an employment-based, case-by-case statutory benefits system toward a guaranteed income.

D. The Growers Get into a Pickle

Although strawberry sharecropping apparently declined to some extent after Real, it survived in other crops in California virtually as if the case had never been decided. Why neither the DOL nor legal services organizations sought to enforce the rights that Real had inchoately vindicated for farm workers on the Pacific Coast is unclear. In large part the answer may lie in the sharecroppers' ignorance of their rights or their reluctance to jeopardize whatever meager employment and income they had. In other words, rather than false consciousness, the vulnerability associated with the lack of an alternative way of filling an empty stomach may have inhibited the workers. Farmers, on the other hand, while cynically passing off sub-minimum-wage earnings as "giv[ing] the farmworker a business opportunity...that's the American way," concede that they


183 See infra ch. 7.

184 Wells, Legal Conflict at 75. Driscoll asserted almost a decade later that: "We haven't changed any of our practices since then. We settled out of court with the farm workers for next to nothing. They probably lost their shirts in the case." Jeannie Echenique, Court's Decision Gives Farmer Backing to Use Contract Growing, Salinas Californian, Aug. 30, 1988, at 2A, col. 4. Several lawyers at CRLA have stated that Driscoll did in fact stop using sharecropping after Real. Jeannie Barrett, attorney, CRLA, Santa Maria, stated that for some years CRLA was persuaded by clients who sharecropped that it was better to reform than to destroy sharecropping. Telephone conversation (May 26, 1989).
"like the sharecropping because it saves them costs for keeping track of payroll requirements such as unemployment insurance, withholding taxes, disability contributions, Social Security contributions and deductions."\textsuperscript{185}

In the event, the next sharecropping battle came almost fortuitously. In 1985, the California Department of Industrial Relations (DIR) prohibited Borello & Sons, a pickle grower in Gilroy, from using employee labor until it secured workers' compensation coverage for its fifty cucumber harvesters. The Division of Labor Standards Enforcement affirmed the order based on the control that Borello exerted over the entire operation, the contractual prohibition on the workers' use of non-family members, and on the workers' lack of investment.\textsuperscript{186} When Borello filed a writ petition in superior court to overturn the administrative orders, the evidence presented to that court included the adhesion contract that Vlasic Foods, "the only commercial cucumber grower in the area," imposed on the farmer and his workers." The contractual recitals and the real working conditions were very similar to those prevailing in the Midwest. A significant wrinkle was that Vlasic maintained weekly picker summaries showing how many pounds each worker picked of each grade and the amount paid; on that basis Vlasic then issued checks directly to each worker. Borello's subordination to Vlasic was so pervasive that Borello may merely have been Vlasic's dependent contract farmer or farm labor contractor and foreman. Finding that the evidence supported the Division's order, the trial court denied the writ in January 1986.\textsuperscript{187}

In California, as in most states, the courts have interpreted the employer-employee relationship in the workers' compensation statute by reference not to the economic reality of dependence test developed under FLSA, but rather to the so-called control test.\textsuperscript{188}

\textsuperscript{185}O'Sullivan, \textit{Court Ruling Should Ease Sharecrop Woes}, Telegram-Tribune (San Luis Obispo County), Aug. 12, 1988, at C-6 (citing Richard Quandt, a lawyer in Santa Maria representing farmers); Jeannie Echenique, \textit{Family Farms the Hard Way}, Salinas Californian, Aug. 30, 1988, at 2A, col. 1 (family of eight earning $1,000 per week equaling $20 per person per day).


\textsuperscript{187}Borello, 242 Cal. Rptr. at 555; Brief of Petitioner-in-Intervention Cirilo Lopez, at 2 n.1, 4, 25, Borello & Sons v. State Dep't of Indus. Relations (Supreme Court of California, Aug. 10, 1988).

\textsuperscript{188}See LINDER, \textit{THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW} ch. 5.
The lower court had held that sufficient control was shown to meet the test; the appellate court unanimously disagreed and reversed although it stated that the facts were undisputed. Because facts enter into the articulation of law and law into the social construction and perception of facts, distinguishing between law and facts is, over a broad range of circumstances, a futile undertaking. This interpenetration protrudes sharply from the appeals court's opinion, making a mockery of its claim that it was merely resolving "a question of law": "The share farmers were free to utilize their own methods and set their own hours. Although...Vlasic's pricing schedule was an economic incentive to pick the cucumbers while they were small, the share farmers were free to pick them at any stage of maturity." This approach was subjected to scathing judicial parody long ago:

Under such circumstances although the employer's "relinquishment" of his right to control has no factual significance whatever, legally it may be regarded as decisive. Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their "services" but only contracted for the "result," an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other. The administration of an act designed to relieve human want should not be made to depend on our resolution of such verbal antics. ... The laborer with shovel in hand remains an employee even though the employer, under the spur of tax or other liability, solemnly recites to him a legal jingle: "I no longer control you. Shovel according to your own methods. I hold you responsible only for the ultimate result, a pile of coal. You render me no services, but you rather sell me a product: a pile of coal from an emptied car."

All five factors that the appeals court adduced to support its finding that the farmer did not control the workers have already been shown to be at best irrelevant: (1) Borello had no authority to terminate the workers at will (even if true, millions of non at-will employees are still employees); (2) the workers were required to furnish their own tools (so are millions of employees); (3) the work

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190Borello, 242 Cal. Rptr. at 557, 558.

was of limited duration; (4) the pay was based on results rather than
time worked (piece-rate workers are employees); and (5) the parties
believed they were creating an independent contractor relationship
(workers cannot waive their rights). In an effort to deny that the
workers were performing a detail task within a larger operation con­
trolled by Borello, the court meaninglessly asserted that it was
necessary to "distinguish between authoritative control and...nec­
essary co-operation where the work furnished is part of a larger
undertaking."192

Instead of granting the DIR’s request to decertify the
publication of the appeals court’s decision, the California Supreme
Court, on its own motion, "granted" review in March of 1988
although neither party wished to litigate the matter further.193 The
majority opinion is structured differently than earlier sharecropping
decisions. The first, very brief part provides a lay prolegomenon; the
second part discusses the control test; and the last can be regarded
as an extended dictum on the economic reality test. It stated the
outcome succinctly:

The grower controls the agricultural operations on its premises from
planting to sale of the crops. It simply chooses to accomplish one
integrated step in the production of one such crop by means of
worker incentives rather than direct supervision. It thereby retains
all necessary control over a job which can be done only one way. ...
In no practical sense are the "sharefarmers" entrepreneurs operating
independent businesses for their own accounts; they and their
families are obvious members of the broad class to which workers'
compensation protection is intended to apply.194

Although this skeletal reasoning in itself met the control test

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192Borello, 242 Cal. Rptr. at 558 (citations omitted).
193Pursuant to Rule 28(a)(1), California Rules of Court; 248 Cal. Rptr. 69, 755 P.2d
253 (1988). The court requested that the DIR brief "[t]he manner and extent to which
the decision of the Court of Appeal, and the criteria by which independent contractor
status is to be distinguished from an employer-employee relationship, may affect the
enforcement of remedial legislation other than the Workers' Compensation Law in the
what was probably unprecedented coverage of an employee-independent contractor
adjudication. E.g., Echenique, Children's Harvest, S.F. Chronicle, This World, Feb. 19,
1989, at 10; Leland, Where Landmarks Come From, CAL. LAWYER, Dec. 1988, at 34;
Siegel, Sharecropping: Local Challenge a Serious Threat, Santa Maria Times, Sept. 16,
1988, at 1.
194Borello & Sons v. Department of Indus. Relations, 48 Cal.3d 341, 345, 256 Cal.
standard, the majority noted that while the right to control was paramount, other secondary indicators were also relevant especially in conjunction with the need to interpret the employment relationship against the background of the purposes of the statute—the overriding purpose being "to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society." Here the majority exhibited ambivalence towards the control test.

It emphasized that whereas the common-law distinction between independent contractors and employees was developed in the context of vicarious liability in order to determine an employer's liability for injuries caused by his employee, the issue in workers' compensation is whether the employer is liable for injuries to his employee. Yet when the court came to spell out the difference between the two regimes, it disappeared. For just as the employer's power to supervise is deemed relevant to the former inquiry, the exclusion of independent contractors from workers' compensation has been justified by the self-employed's having "primary power over work safety." To be sure, the majority also added to the list of the criteria pertinent to workers' compensation the self-employed's being "best situated to distribute the risk and cost of injury as an expense of his own business," and having "independently chosen the burdens and benefits of self-employment." These additional factors, however, transcend the framework not only of the control test, but tendentially even that of the economic reality of dependence test. They suggest instead the applicability of the inchoate economic-reality-of-class-poverty test developed by nineteenth-century English

195 Id. at 345, 256 Cal. Rptr. at 548-49, 769 P.2d at 404-405.

196 This ambivalence is also reflected on the doctrinal level. On the one hand the majority adopted a realistic view in holding that: "A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible worker." Id. at 357, 256 Cal. Rptr. at 552, 769 P.2d at 408. On the other hand, it failed to perceive the asymmetric relationship between the requirements of a determination that a worker is an employee and those of one that he is an independent contractor. Since the burden was on Borello to prove that the workers were independent contractors, the court overlooked the crucial fact that—even in the common-law setting—whereas the presence of control dispositively identifies an employee, the converse is not valid: its mere absence does not necessarily identify an independent contractor. In other words, the latter determination is a much more complicated undertaking because it requires examination of all factors, no single factor being dispositive.

197 Id. at 352, 354, 350, Cal Rptr. at 549, 547, 550, 769 P.2d at 405, 403, 406.
courts in interpreting the Truck Acts.198

Such a test is more appropriate to workers' compensation than to any other modern labor-protective legislation. Since the workers to be protected are those who without coverage would bear the full economic burden of work-related accidents, the purpose of the statute can best be effectuated by interpreting "employee" to encompass all those unable to channel the costs either through an employer to the final consumer or directly to the latter.199 Thus a worker who cannot self-insure for medical and disability protection or pass the costs on, should be presumed to be a covered employee. These are only seemingly distinct issues. The financial ability to purchase insurance is a relatively simple quantitative determination; whether a worker can pass on the costs is a more complicated question, which would have to be resolved by reference to the extent of his integration into the alleged employer's business. But even if it were determined that the alleged employer were the consumer--in this case, that Borello purchased pickle-picking services--if the economic reality of that relationship is such that the picker cannot bargain for sufficient compensation to buy comparable insurance on his own, then the issue again reduces to financial ability.

Without expressly forging all the foregoing links, the majority appears to have taken this very radical step--albeit in dictum. It stated that the workers

have no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries. If Borello is not their employer, they themselves, and society at large, thus assume the entire financial burden when such injuries occur. Without doubt, they are a class of workers to whom the protection of the Act is intended to extend.200

To be sure, the court achieved this change in the law not through

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198 See supra ch. 5.


200 Borello, 48 Cal.3d at 358, 256 Cal. Rptr. at 553, 769 P.2d at 409. According to William Hoerger, who wrote an amicus brief on behalf of CRLA, the conservative members of the majority made it clear at oral argument that they did not want to see state welfare expenditures increase because private enterprise was failing to pay its own way. Telephone interview (May 22, 1989). The dissenters were so preoccupied fulminating against the majority's empirically "gratuitous assumptions that the sharefarmers do not obtain insurance coverage for themselves," that they failed to notice this more momentous legal innovation. Id. at 361 n.2, 256 Cal. Rptr. at 555 n.2, 769 P.2d at 411 n.2.
application of the control test, but by anonymous reference to the economic reality of dependence test. Its frank declaration that "by any applicable test, we must dismiss the growers' claims," 201 was valid for the decision as a whole, but not for the specific shortcut it used to reach the same conclusion. For that end required delineation of the aforementioned economic-reality-of-class-poverty orientation. 202

The dissent cast a bright light on the difference between self-reflective realistic Law & Economics as practiced by Easterbrook and mere ideological atavism to Lochner-era dogmatism. It lambasted the majority opinion as "a wholly unnecessary and inappropriate intermeddling in the affairs of and curtailment of the liberties of California's residents," which would "end up harming the very persons it is paternalistically intended to help" and who had found cucumber sharecropping "satisfactory." In faulting the majority's characterization of sharecropping as "a nefarious subterfuge" without an "iota of evidence," the dissent failed to provide an adequate epistemological framework for its implicit thesis that economic and cultural coercion create an appropriate basis for consensual activities that debase a worker's long-term life chances as well as those of the class of similar workers: "[T]here is no law establishing that a person's decision to enter into a transaction is involuntary unless he or she has been offered alternative arrangements." 203 In its unreconstructed Lochnerism, the dissent appeared oblivious to the fact that the entire edifice of modern protective legislation is rooted in that very "law"—namely, that certain kinds of exploitation are intolerable. 204 Instead, the dissent jettisoned the concept of exploitation altogether in a Fourth-of-Julyism that extinguished all of

201 Borello., 256 Cal. Rptr. at 551, 769 P.2d at 407.

202 The Fourth Circuit recently hinted at such an approach in deciding "whether an individual who does not fit within the traditional concept of employee should nevertheless be considered an employee in the context of ERISA [Employee Retirement Income Security Act]": "implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits." Darden v. Nationwide Mut. Ins. Co, 796 F.2d 701, 706-707 (4th Cir. 1986). The Supreme Court unanimously rejected this view; Nationwide Mut. Ins. Co v. Darden, 60 U.S.L.W. 4242 (U.S. Mar. 24, 1992).

203 Id. at 360, 361 n 2, 364, Cal. Rptr. at 554-55, 555 n 2, 558, 769 P.2d at 410-11, 411 n.2, 414. The only evidence offered for the assertion that sharecropping "is preferred by the sharefarmer families" was the self-serving testimony of the Borellos. Id. at 362, 256 Cal. Rptr. at 556, 769 P.2d at 412.

204 E.g., EMILE DURKHEIM, LECONS DE SOCIOLOGIE 235 (2d ed. 1969 [1950]).
economic science's elaborated distinction between labor and capital:

They invest the value of their labor. That may be insignificant to the majority but it is no doubt significant to the sharefarmers, as it is to me. The value of one's labor is ultimately the source of all capital. Many generations of American immigrants have become successful entrepreneurs doing just that—investing the only asset at their command, the value of their labor.  

Two days after Borello was handed down, farmers went to the fields to tell sharecroppers that they were hourly employees. Such swift renunciation of principle may have been dictated by the growers' strategy of seeking legislative reversal of Borello in keeping with their disingenuous position that the decision outlawed all independent contracting. Legal services attorneys promptly filed a class action on behalf of sharecroppers at a large strawberry farm, pleading both statutory minimum wage, workers' compensation, unemployment compensation, social security, and sanitary facilities claims and breach of employment and land-rental contracts, quantum meruit, leasehold, unfair competition, and fraud causes of action. The complaint is striking refutation of Wells's thesis that the alleged ambivalence of sharecropper-plaintiffs reflects the underlying ambiguity of their "contradictory class location." Instead, this dual-track litigation—alleging both that their designation as independent contractors was "fictitious" and that the farmer nevertheless breached the sharecrop contracts—symbolizes the consistently pragmatic behavior that the sharecroppers have always displayed. The same subjective maximizing behavior that induced many workers to try sharecropping in order to earn more than the minimum wage led them to file suit in order to recover the minimum wage. Perhaps

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205 Borello, 48 Cal.3d at 364, 256 Cal. Rptr. at 557, 769 P.2d at 413.

206 See, e.g., letter of Apr. 11, 1989, from Furukawa Farms, Inc. to its "growers" (copy in possession of author); Burns, Workers Won't Get Share of Harvest, Santa Barbara News-Press, Apr. 13, 1989, at A1, at A8 (Furukawa began paying workers $4.65/hour plus seventy cents per box); Duman, Court Case on Sharecropping Sows Confusion among Farmers, San Luis Obispo County Telegram-Tribune, Apr. 14, 1989, at C-7, col. 1; Keckler, Sharecropping Fallout: "Wait and See," Packer, Apr. 15, 1989, at 3A. The Grower-Shipper Vegetable Ass'n of Santa Barbara and San Luis Obispo Counties held a "legal briefing" at which one of the "[a]lternatives for responding to...Borello" was "[t]he 'find an alternative labor avoidance device' approach. The Future of Sharecropping Following the Borello Decision (agenda of Mar. 30, 1989 [copy in author's possession]). See also Duman, State Moves Ahead on Sharecrop Ruling, San Luis Obispo County Telegram-Tribune, Apr. 28, 1989, at C-6 (labor comm'r denies request by state legislators to delay implementation of Borello).
most significantly, these selfsame newly emancipated sharecroppers chose the UFW as their collective bargaining representative in an Agricultural Labor Relations Board election.\(^{207}\)

VI. Prolegomena to Any Future Sharecropping:
Individual Choice or Collective Coercion?

With more than nine-tenths of the labor force in formal employee status, Lincolnian notions of democratic social mobility can no longer underwrite—as they did in the mid-nineteenth century—the trope that wage labor normally functions as a stepping stone to self-employment. Consequently, the trend towards dependent employment has ceased to have the moral shock-value that it once did.\(^ {208}\) Conversely, despite an unprecedented public relations celebration of free enterprise orchestrated by the Reagan administration, neither the judicial branch of Law & Economics nor the majority of the appointees of a right-wing governor could take seriously the claim that pickle pickers are anything but employees par excellence.\(^ {209}\) Not even \textit{Brandel} resurrected a judicial ideology glorifying the entrepreneurial spirit of impoverished immigrants that a paternalistic state was unconstitutionally seeking to suppress.\(^ {210}\)

In the late-nineteenth and early twentieth century, the segmented-labor-market counterparts of today’s migrants—women, children, and men in certain extraordinarily dangerous or unhealthy trades—were often rebuffed by a pre-welfare state judiciary in their efforts to secure by state intervention what they could not through direct demands to employers. The problem confronting today’s sharecroppers, by contrast, is not atavistic judicial attitudes. It is

\(^{207}\) Gonzalez v. Furukawa Farms, Inc., No. SM62038, at 1 (Super. Ct. Santa Barbara filed May 10, 1989); Burns, \textit{State Court Shakes up Farm System} at A14, col. 6; information furnished by W. Hoerger, CRLA (telephone conversation, May 22, 1989).

\(^{208}\) See, \textit{e.g.}, \textit{Brandel}, \textit{Free Soil, Free Labor, Free Men} 18, 23 (1977 [1970]); \textit{In re Municipal Fuel Plants}, 182 Mass. 605, 66 N.E. 25 (1903). For a conceptual and empirical critique of the data on self-employment, see \textit{Linder}, \textit{Farewell to the Self-Employed}.


\(^{210}\) See, \textit{e.g.}, \textit{In re Jacobs}, 98 N.Y. 98 (1885).
Petty-Bourgeois Pickle Pickers?

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economic rather than legal.

Some truth attaches to claims that some strawberry sharecroppers have been able to earn and accumulate enough money to create a standard of living above that of the average migrant or even to become farmers in their own right.211 But there is nothing extraordinary about this scenario: the process of capital accumulation is continuously thrusting up from the ranks of wage laborers some individuals who manage to become entrepreneurs.212 By the same token, the fact that at the height of the Depression of the 1930s, more than a third of families cultivating sugar beets paid non-family members to do part of the work under their "contract" did not mislead contemporary observers to classify them as entrepreneurs.213 The mere fact that a minuscule percentage of workers can, through unlawful exploitation and self-exploitation, rise marginally above or out of their class, cannot justify sacrificing the rest of the class on the altar of uninhibited individual self-enrichment.214 On the contrary, until that class is sufficiently cohesive "to coerce others to choose collective interests over those of the individual," the state will have to intervene to prohibit pseudo-consenting adults from undermining their own life chances as well as those of their children and their class.215

This necessity of counterposing collective coercion to economic coercion will play an important part in ensuring that the Latin Americanization of the migrant labor force in the United States is not accompanied by the Latin Americanization of hand-harvest wages. Such an effort must include the prohibition and penalization of practices such as pseudo-sharecropping. But, as the

211 See Miriam Wells, Mexican Farm Workers Become Strawberry Farmers, 49 HUMAN ORGANIZATION 149 (1990).

212 See Cohen, The Structure of Proletarian Unfreedom. Even in mid-Victorian England, Marx noted that individual crew leaders, who sweated piece-rate harvesters, had climbed the agricultural ladder from farm laborer to tenant owning 500 acres. Marx, Das Kapital, in 23 Marx [=] Engels, Werke at 723 n.173.


concluding chapter will show, it must incorporate many other measures as well.