Migrant Workers and Minimum Wages

Regulating the Exploitation of Agricultural Labor in the United States

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A Second Reconstruction for Farm Workers

Labour...is a commodity which attaches in a peculiar manner to the person of man. Hence restrictions may need to be placed on the sale of this commodity which would be unnecessary in other cases, in order to prevent labour from being sold under conditions which make it impossible for the person selling it ever to become a free contributor to social good in any form.1

The brightest hope for the welfare of seasonal agricultural workers lies with the elimination of the jobs upon which they now depend...2

A key to understanding migrant farm workers' predicament is that whereas "most minimum wage jobs are for entry level positions...[that] are occupied for only a short time by workers who rapidly begin to climb the economic ladder of...more highly paying positions,"3 migrants are permanently immobilized in theirs. The


2FISHER, THE HARVEST LABOR MARKET IN CALIFORNIA at 148.


4Referring to "Corn Belt youngsters, chosen for their tolerance for field conditions and the monotony," the president of a hybrid seed corn firm characterized detasseling
creation of this lifelong agricultural proletariat has been based on the incorporation of a labor force "from a country with a living standard fundamentally lower than that of the United States." By continuously replenishing that supply and ensuring the formation of Third World enclaves in the United States, the state has perpetuated an atavistic form of domination. It is therefore unsurprising that state paternalism has reproduced the sector in which these workers are exploited as structurally impervious to the automatically corrosive effects that market forces are reputed to exert on pockets of local and historically contingent disequilibria.

That migrants' wages rank at the bottom of the scale of wage rates in the United States is not open to dispute. Even the reasons are uncontroversial. The fact that their labor-intensive work is

as "hard work, but it's a good first job for these kids." *Job Has Kids up to Their Ears in Corn*, Chicago Tribune, July 20, 1987, Bus. § at 7 (NEXIS). Were its implications for policy not so pernicious, the following claim could be dismissed as irony:

The harvest labor market has an earnings pattern similar to professional sports: high-wage years are typically followed by lower earnings. A rational wage-earner who realized that his or her earnings will decline with age would save from current high earnings or acquire other skills likely to enhance earnings in the next career.


6In this regard socioeconomic paternalism may be similar to the promotion of single-member electoral districts with cohesive, bloc-voting black or Hispanic majorities. See Voting Rights Act of 1965, 42 U.S.C. § 1973 (Supp. 1989); Thornburg v. Gingles, 478 U.S. 30 (1986); Abigail Thernstrom, Whose Votes Count? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987). Designed to overcome the effects of generations of racial discrimination, both presumably rest on the notion that they will become superfluous when substantive equality of opportunity is achieved. The suggestion that such intervention might be required in perpetuity would be tantamount to an admission that discrimination is not merely historical, but inherent in the political economy of the United States—or, alternatively, that the historical impact is ineradicable. Neither of these claims would be compatible with liberal theories of morally neutral, market-driven society. See, e.g., David Gauthier, MORALS BY AGREEMENT 83-112 (1987 [1986]).

7The largest employer of farm workers in the Rio Grande Valley, whose firm pays "the minimum" and has operated in Mexico since the 1940s, admits that the loss of agricultural jobs to Mexico is no "great loss because so much of agricultural work is seasonal...and minimum wage work that it does not provide an adequate standard of living...." COMM'N ON AGRICULTURAL WORKERS, HEARINGS 282, 281 (Weslaco, Tex., Jan. 17, 1991) (testimony of Othal Brand).
unskilled means that it can be and is performed by workers with no
education (including children). The lack of skill, undergirded by the
virtual absence of physical capital, translates, through the charac­
teristic mechanisms of the sweatshop, into a low and stagnant level
of productivity, which in turn narrows the scope for higher wages.
The unorganized state of the supply side of the labor market means
that the only power that unskilled workers have traditionally had at
their disposal to enforce higher wages is unavailable. The perma­
nent presence of a huge reserve army of the unemployed means that
labor market forces inexorably press down on the wage level,
"reflecting the low degree of compulsion they can bring to the
bargaining process, as compared to the compulsion brought to bear
by the employer." In a vicious circle, the low wages and physically
hard work attract only the most desperate and vulnerable workers,
who are least able to defend themselves.

In light of the failure of socioeconomic paternalism to attain
its self-liquidating ends, it is necessary to consider the alternative to
this self-perpetuating but feckless guardianship. The immediate
problem is that in the face of continuing hand-harvest labor market
imperfections leveraged to lopsidedness by overreaching employers,
the traditional approach has not been coercively paternalistic enough
to break up the structural barriers to the normalization of migrant
agricultural labor relations. Neither the state nor worker repre­
sentatives have, for different reasons, been willing to articulate the
distinctly antiliberal truth that regulation of this labor market will,
for the foreseeable future, require much more intrusive methods to
prevent employers from taking advantage of those unable to refuse
coercive wage offers or to extricate themselves from the web of

8Paul Miller, The Role of Farm Labor Market Institutions in the
Lower Rio Grande Valley of Texas tab. 2-2 at 48 (1971), found that more than
half of the farm worker household heads he surveyed had completed less than one year
of school.

9Robert Hale, Bargaining, Duress, and Economic Liberty, 43 COLUM. L. REV. 603,
627 (1943). In an alternative formulation: "The structural effect of constant labor
surpluses is not to depress the 'floor' of wages...but, instead, to depress the 'mean wage
level' by allowing employers who offer wages well below the 'standard' offer to
continue to attract workers, compensating for their high turnover by drawdowns on the
surplus of workers." 1 Ed Kissam & David Griffith, Final Report: The Farm

10For a good journalistic description, see Dianna Solis, On the Move: From Farm
to Farm, Migrant Workers Struggle to Survive: Texans and Illegal Hispanics Vie for Jobs
"desperation bidding."\textsuperscript{11} Breaking out of this Sisyphean circle would require administering a strong shock to the system. Direct action might achieve this result if, like unique and highly paid athletes, migrants could 'sit out the season.' If, for example, migrants concertedly remained in the Lower Rio Grande Valley one year, fruit and vegetable farmers and processors might be forced to reconsider their labor practices. They might try to recruit local workers, but to coax such workers into the fields they would have to offer significantly higher wages than migrants receive. Unless agricultural employers were willing to compete in urban labor markets for unskilled labor--as wheat farmers once were\textsuperscript{12}--it is unlikely that they would be able to secure a reliable labor force for the long term. If state action also blocked access to children and aliens, employers would have to invest more heavily in labor-saving mechanization and biotechnology. But it is precisely the implausibility of the mass sit-out scenario that makes state intervention necessary in the first place.

The proposed shock to be administered by the state would be a doubling of the minimum wage for migrants. Migrants' wages form such a small share of farmers' total receipts for most fruits and vegetables, which in turn constitute such a small share of retail prices that an increase in harvest labor wages, even if completely passed through, should not trigger significant retail price increases.\textsuperscript{13} If, however, wages in certain crops accounted for such a large share of consumer prices that farmers could not absorb the cost increases (without losing their livelihoods),\textsuperscript{14} the minimum wage shock would

\textsuperscript{11} Robert Goodin, Reasons for Welfare: The Political Theory of the Welfare State 133, 168, 367 and passim (1988); idem, Protecting the Vulnerable: A Re-Analysis of Our Social Responsibilities (1985). A recent monograph that challenges the belief that migrants have been the "helpless victims of unscrupulous employers" nevertheless also documents that helplessness unremittingly. Valdés, Al Norte at viii.

\textsuperscript{12} See supra ch. 1 § I.

\textsuperscript{13} S. Rep. No. 1487, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Admin. News 3002, 3022; National Comm'n on Food Processing, Cost Components of Farm-Retail Price Spreads for Foods tab. 2 at 4 (Technical Study No. 9, 1966); supra ch. 3 § V.

\textsuperscript{14} Fruit and vegetable producers are a heterogeneous group whose market power varies greatly depending not only on their size and whether they are members of cooperatives or are subject to marketing orders, but also on whether they are integrated grower-shippers. Processors' superior market power is so great that it is
be inconsistent with the basis of cheap food policy but only because
the latter's linchpin—unacceptably cheap labor—makes what should
be quasi-luxury commodities affordable to a mass market. If the
wage-price-profit matrix of this sector of the economy were such that
significantly increased wages brought in their wake higher consumer
prices and required consumers to devote a greater percentage of
their budgets to food consumption and a smaller share to other
items (reversing the secular trend of Engel's law), then economic
logic suggests that previously consumers must have been benefiting
from the exploitation of farm workers.15

Alternatively, consumers might decide that, once the subsidy
durnished by migrants, which they had taken for granted, was
withdrawn and they were forced to pay the full social costs of
producing that food, it was no longer 'worth' it to them; they might
then buy smaller quantities of fruits and vegetables for the same
total expenditure. If, on the other hand, instead of agribusiness's
importing Latin American farm workers, consumers bought Latin
American farm products (in part produced by United States agri-
capital reinvested in Latin America), the problem would merely be
externalized.16 \(^\text{16}\) The imposition of tariffs could eliminate the in-

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15See, e.g., James Holt, Impact of the Industrialization of the Hired Work Force upon
the Agricultural Economy, 52 Am. J. Agric. Econ. 780, 785 (1970). For an analysis of
"the farm problem" as linearly derived from Engel's law, see Hendrik Houthakker,
Economic Policy for the Farm Sector (1967).

16The program pursued by the Arizona Farmworkers Union of organizing Mexican
farm workers in cooperatives in Mexico that would compete with U.S. producers is one
centive that United States agribusiness might extend to consumers to share in the exploitation of even lower-paid Latin American workers.17

The ensuing revaluation of wage-price-profit relationships and redistribution of national income might entail that certain agricultural products would become luxury commodities. Public discussion of these consequences would present a rare opportunity for discussion between consumers and producers of the 'disutility' that the latter must undergo to satisfy the former's needs. From such debate might emerge a new structure of perceived needs.18 If lifelong assignment to the unnecessarily hard labor of hand-harvesting fruits and vegetables is inappropriate to an unprecedentedly wealthy "post-industrial" society, then mechanizing such jobs out of existence should be welcomed.19

The flanking measures necessary to sustain an increase in the agricultural minimum wage would amount to a comprehensive program of state intervention to restructure the labor market for, and to strengthen the bargaining power of, migrants in order to way to deal with these externalities. Philip Martin & Alan Olmstead, The Agricultural Mechanization Controversy, in SCIENCE, Feb. 8, 1985, at 601, 606, have proposed an integrated plan of systematic mechanization, imports of fruits and vegetables that cannot be mechanized, and a fund for displaced farm workers to be financed by a ten per cent payroll tax on farmers who employ foreign workers. For an example of U.S. agribusiness in Latin America, see ERNEST FEDER, STRAWBERRY IMPERIALISM: AN ENQUIRY INTO THE MECHANISMS OF DEPENDENCY IN MEXICAN AGRICULTURE (1977).

17Such tariffs would presumably have to be considerably higher than current rates of duty. See 19 U.S.C. § 1202, sched. 1, pt. 8-9 (1978). Alternatively, a plan could be applied to agriculture along the lines of the proposed Fair Trade Wages Act of 1985, which would have amended FLSA to levy an earnings parity fee on articles imported into the United States that had been produced outside the United States by U.S. firms "for the purpose of equalizing foreign direct labor earnings paid...to the foreign...workers...with the prevailing earnings paid...to United States...workers H.R. 3407, § 201, 99th Cong., 1st Sess. (1985).


19"The answer to the social problems incident to migrancy is to continue...the investment by farmers in the new machinery...necessary to reduce handwork employment in agriculture." REGISTRATION OF FARM LABOR CONTRACTORS: HEARINGS BEFORE THE GENERAL SUBCOMMITTEE ON LABOR OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, 88th Cong., 1st Sess. 8 (1963) (statement of Matt Triggs, asst. leg. dir., Am. Farm Bur. Fed.).
suppress the "forced sale" of their labor. The principal measures would be designed to reduce the supply of labor; eliminate labor contracting; extend the coverage of protective laws; eliminate atavistic forms of fraud; and facilitate or mandate self-organization. Some of the proposals that follow are unique and all of them taken together go far beyond previous sets of recommendations. That less radical proposals of earlier generations were stillborn does not augur well for prompt adoption of more radical ones.

1. Restructuring the Labor Market

Reducing the Supply of Labor. Because migrants' low annual income is as much a function of sporadic employment as of low wage rates, it may not be possible to raise the minimum wage sufficiently to induce parents, through purely market forces, to refrain from causing their children to work. Therefore an absolute prohibition

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20 Robert Hale, Minimum Wages and the Constitution, 36 Colum. L. Rev. 629, 630 (1936).

21 A half-century ago Sen. La Follette and Sen. Thomas offered what remains the most ambitious set of proposals. Among the measures that have still not been adopted are an agricultural wage board, incorporation of farm workers into the NLRA, and coverage under the minimum wage and overtime provisions of FLSA of all farmers with more than four employees at any time during the year. 88 Cong. Rec. 8320-38 (1942). An astonishingly timid and regressive set of recommendations was offered by Elizabeth Raushenbush, who, as the daughter of Louis Brandeis, had had a half-century of experience with minimum wage laws. Based on a study of families of pickle pickers, who worked fluctuating hours on a piece rate, she recommended, only three months before Congress finally brought farm workers within the straight hourly minimum wage provisions of FLSA irrespective of their mode of payment, that FLSA be amended to offer farm employers the option of paying workers $1.25 per hour, $8.00 per day "regardless of hours worked," or $20.00 per day for a family of three with $5.00 per day for each additional working member. She in effect warned Congress that "[t]o require the employer to make up the difference between piece-rate earnings and the legal minimum...is virtually an incentive [to workers] to take it easy." Elizabeth Raushenbush, A Study of Migratory Workers in Cucumber Harvesting: Waushara County, Wisconsin 1964, at 34 (June 1966).

22 Early proponents of the application of minimum wages to agriculture believed that such coverage in itself would eliminate the "dilemma" for parents. Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 2d Sess., The Migrant Farmworker in America: Background Data on the Migrant Worker Situation in the United States Today 56 (1960); Scott Nearing, The Solution of the Child Labor Problem 126-45 (1913 [1911]). When, at the time of the original FLSA hearings, a witness (who opposed the bill as a communist conspiracy) asserted that child labor would disappear in industry when
of child labor below the age of sixteen should be enacted. All statutory authorization to import foreign workers should also be repealed. The employment of illegal aliens should be discouraged by imposing additional penalties on their agricultural employers when they violate labor-protective legislation.

Faced with a smaller potential labor force, agricultural employers would presumably be forced to pay higher wages and to provide better working conditions. Improved terms for workers might in turn induce employers to increase their utilization of labor-saving machinery, which would be associated with a rise in the required level of skill. This enforced recalibration of supply and demand would mimic the effects of unionization which, by bringing about a smaller and structured supply of higher-waged labor, also

parents earned "a wage high enough that they will not feel that they need the labor of their children to contribute to the family budget," Rep. Schneider replied that he was "talking about a Utopia that is far off." FLSA Hearings at 985. Just how far off is suggested by a petition by strawberry sharecroppers calling on the governor of California to "overthrow" Borello: "Without this form of employment, there is no chance for our children to assist us after school and on days off." Finucane, Sharecroppers Learn Import of Court Pay Puling, Santa Barbara News-Press, Apr. 11, 1989, at B3.

Ironically, migrants are already replacing local white children—for example, in detasseling in the Midwest and harvesting potatoes in northern Maine in the fall. See Changes On Horizon In Fields of Potatoes, N.Y. Times, Dec. 21, 1989, at 19, col. 6 (nat. ed.).

The ban could be bolstered by adding such employment to the catalog of violations subject to civil penalties and injunctions under the so-called hot goods provision of FLSA. 29 U.S.C. § 215 (1965), § 216(e) (Supp. 1989), § 217 (1985). Wallace Huffman, International Trade in Labor versus Commodities: U.S.-Mexican Agriculture, 64 Am. J. Agric. Econ. 989, 996-97 (1982), proposes to "remove[] the labor market disequilibrium between the United States and Mexico" by permitting free entry on the one hand but subjecting guest workers to such draconian measures as higher income tax rates and sub-citizen rights and entitlements. But since even these steps would leave an enormous wage gap between the two countries, the result would be that only the most vulnerable workers would enter the United States (that is, those who would still find it "rewarding to arbitrage these international labor markets"), providing employers with even cheaper labor. One of the determinants of the powerlessness of migrants is that so few are integrated into the political and civic culture of the United States. The passivity of those without a long-run stake is also characteristic of permanent resident aliens who are in effect commuters. One way of combating this phenomenon would be to confer citizenship on those lacking it.

makes mechanization profitable.\footnote{On the impact of unionization in tomato and cucumber harvesting, see Wayne Rasmussen, \textit{Advances in American Agriculture: The Mechanical Tomato Harvester as a Case Study}, 9 TECHNOLOGY & CULTURE 531, 542 (1968); Mark Erenburg, \textit{Obreros Unidos in Wisconsin}, MONTHLY LAB. REV., June 1968, at 17; Philip Martin, \textit{Harvest Mechanization and Agricultural Trade Unionism: Obreros Unidos in Wisconsin}, 25 LAB. L.J. 166 (1977).} When the long-heralded spread of mechanization from processed to fresh-market fruits and vegetables does finally take place,\footnote{In the 1980s, fifty-three per cent of vegetable and sixty-six per cent of fruit production were processed, while sixty-three per cent of the former and eleven per cent of the latter were mechanically harvested. G. Brown, \textit{Fruit and Vegetable Mechanization}, in \textit{Migrant Labor in Agriculture} at 195, 197, tab. 1 at 207. On the state of the art and possible explanations of flagging mechanization, see G. Brown, \textit{Fruit Mechanization in the USA--Current and Future}, in \textit{FRUIT, NUT, AND VEGETABLE HARVESTING MECHANIZATION 1} (Proc. Am. Soc'y of Agric. Engineers, 1984); D. Lenker, \textit{Factors Limiting the Harvest Mechanization of Some Major Vegetable Crops in the U.S.A.}, in \textit{id.} at 29; C. Portas, \textit{Mechanical Harvesting of Vegetables for Processing: A World-Wide View}, in \textit{id.} at 39; Philip Martin, \textit{Labor-intensive Agriculture}, SCI. AM., Oct. 1983, at 54, 57-58. For earlier accounts and predictions, see Grover Sanders, \textit{Mechanization of Farm Operations in 1965}, \textit{FARM LABOR DEVELOPMENTS}, Oct. 1966, at 13; Robert Harper, \textit{Mechanization and the Seasonal Farmworker}, \textit{id.}, Apr. 1967, at 8; Velmar Davis, \textit{The Demand for Fruit and Vegetable Labor in 1975}, \textit{id.}, Apr.-May 1970, at 11, tab. 1 & 2 at 14-15.} the evidence from those crops that have been mechanized suggests that the outcome may be regularization of employment and increased income for a much smaller but more stable group of non-migratory workers in a more traditional industrial labor relations setting.\footnote{\cite{leftwich1975migratory} because wage rates for stoop labor in the [Rio Grande] Valley were $0.60 per hour, the overhang of supply enabled a grower-canner in Illinois to pay migrants who performed semi-mechanized planting for which few were qualified the same wages it paid hand-hoers. See \textit{Leftwich, The Migratory Harvest Labor Market} at 148, 99-101, 282.} Mechanization unaccompanied by a reduction in the supply of migrant labor, however, might not result in higher wage levels.\footnote{\cite{leftwich1975migratory}}

\textbf{Abolishing the Labor Contracting System.} The experience of a half-century of federal efforts--and even older state laws--to
regulate crew leaders and to suppress the abuses inherent in the private recruiting system demonstrates that making labor catchers the centerpiece of enforcement is inefficient. Precisely because labor contractors as "body-brokers" are typically intellectually, morally, and financially incapable of complying with the law, enforcement would be promoted by focusing on the real employers.

More than two decades elapsed between submission of the first bills in Congress to regulate crew leaders and passage of the Farm Labor Contractor Registration Act (FLCRA) in 1963. See To Regulate Private Employment Agencies Engaged in Interstate Commerce: Hearings before a Subcomm. of the House Comm. on Labor on H.R. 5510, 77th Cong., 1st Sess. (1941); Note, A Defense of the Farm Labor Contractor Registration Act, 59 Tex. L. Rev. 531 (1981). The historically proprietary purpose, function, and spirit of state farm contractor laws—particularly in the South—were spelled out by counsel for the Tex. Citrus & Vegetable Growers & Shippers in testimony before Congress. Referring to migrants as "our workers," he described the Texas labor contractor registration statute, which he had written in 1943, as requiring labor recruiters operating on behalf of out-of-state employers to be bonded and licensed so that if our workers were taken to other states with the promise of employment, and on arrival found that work was not available or that housing, wages and working conditions were not as promised, they would not be stranded far from home without means of getting back to their places of permanent residence.

Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 67 (1976) (statement of Scott Toothaker). But see SUZANNE VAUPEL & PHILIP MARTIN, ACTIVITY AND REGULATION OF FARM LABOR CONTRACTORS 17 (Giannini Infor. Ser. No. 86-3, 1986) (recommending reliance on crew leader sanctions). The Nebraska Farm Labor Contractors Act (FLCA) illustrates this tradition of labor catcher-oriented protective legislation. At first blush it appears to create a rigorous regime: by erecting relatively high financial thresholds in the form of a $750 annual licensing fee and a surety bond of at least $5,000 to satisfy wage claims, FLCA serves to screen out economically irresponsible contractors. NEB. REV. STAT. § 48-1710(5) and § 48-1705 (1987). Yet a contractor with a crew of 100 workers could be the conduit (for a seed corn company) for a weekly payroll in excess of $25,000 or $100,000 for a whole season. At these levels, a $5,000 bond would not satisfy wage claims. Nor would more careful legislative drafting avoid these problems; they are inherent in any system of regulation that is centered on crew leaders.

Administration of Laws Affecting Farmworkers: Hearing before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 3 (1980) (statement of Perry Elsworth, exec. dir., Nat'l Council Agric. Employers). See also Warren Flick, The Wood Dealer System in Mississippi, in J. FOREST Hist. 131, at 131, 135-36. Marx made a similar observation about mid-Victorian crew leaders. 1 MARX, DAS KAPITAL at 723-25. The president of the Vegetable Growers Ass'n of Am. perversely opposed enactment of FLCRA because the average crew leader was too uneducated to fill out the forms required by the Act. Migratory Labor Hearings Before the Select
These firms already operate according to routinized bureaucratic record-keeping and payroll procedures that can guarantee prompt, accurate, and full payment of wages. To force migrants to rely upon the vagaries of an intermediary's cash-flow (and moral integrity) for their meager wages when the real employer is hiding behind a civil outlaw is not only unjust but unnecessary.32

The abuses of the contracting system could be significantly reduced by amending federal and state statutes to preclude a labor contractor from ever being considered migrants' sole employer: a fixed-situs producer--seed company, forest owner, farmer, or processor--should always be liable for wage payments, written disclosures, contract compliance, recordkeeping, and other statutory obligations. If Congress amended FLSA and AWPA (as well as the social security, unemployment, and tax laws) to make such entities farm workers' employers even where they use labor catchers, they would have little incentive to interpose judgment-proof intermediaries between themselves and their workers.33

For their own reasons, some large agricultural employers have embraced this approach:

Let us assume...that an itinerant farm labor contractor were hired each year by an agricultural employer as a regular seasonal employee to perform [sic] the function of field foreman. ... He would be a direct employee of the employer. The workers he would supervise would be the direct employees of the employer. The corporate employer by making this individual a "full-time or regular employee" assumes full responsibility for his acts...and for any violations of the law the employee may commit. The corporate employer has a fixed situs. It is amenable to legal process and subject to law enforcement procedures.... The corporate employer also, be it a farmer, processor, packer, or whatever, presumably has assets and is financially responsible. [U]nder these circumstances the agricultural employee has far greater protection against abuses or exploitation than he would have if he were required to look to


32For an economically unrealistic account of the crew leader-farmer relationship, see William Friedland & Dorothy Nelkin, Migrant: Agricultural Workers in America's Northeast 71-75 (1971).

33See generally, Linder, The Joint Employment Doctrine. The Iowa Wage Payment Collection Law, for example, makes seed producers the employers of last resort of detasselers. Iowa Code § 91A.3.7 (1987). The DOL has disastrously undermined enforcement by its policy of focusing investigations initially on crew leaders rather than on real agricultural employers.
an itinerant farm labor contractor, whether that farm labor contractor were registered or not. ... The net result would be the elimination of the crew leader as such, and that is not all bad.\textsuperscript{34}

The Citrus Industrial Council agreed that "there should be incentives provided to encourage employers to cause all workers to become their own employees...and...to encourage them to pay each worker directly by check rather than paying off in cash to someone who would thereby have an opportunity to skim..."\textsuperscript{35}

An outright statutory ban on agricultural labor contracting would not only eliminate an elusive and evasive source of "petty graft and exploitation"\textsuperscript{36} by labor catchers, but, by focusing attention on the real agricultural employer, would make the system of exploitation more transparent to workers. Because legislators have repeatedly observed that the labor contracting system is incorrigible--"[t]here is something in the whole idea of contracting human labor...that is feudalistic and less than human, and...maybe we...don't need a lot of regulators but a law to abolish it"--prohibition may be politically feasible.\textsuperscript{37}

\textsuperscript{34}\textit{Administration of Laws Affecting Farmworkers} at 75 (letter from Perry Elsworth, exec. V.P., Nat'l Council of Agric. Employers, to Rep. Collins). Employers' proposals to take responsibility for crew leaders' acts were in part motivated by the desire to avoid registration under the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-2058, \textit{repealed by AWPA}, Pub. L. No. 97-470, 96 Stat. 2584 (1983). Although agricultural employers were ultimately exempted from the registration requirements of AWPA, 29 U.S.C. § 1802(7), Congress did not succeed in closing all the loopholes in prescribing status as joint employers. See Linder, \textit{The Doctrine of Joint Employment}.


\textsuperscript{36}\textit{Ross & Liss, The Labor Contractor System in Agriculture} at 1034.

\textsuperscript{37}\textit{Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor}, 93d Cong., 1st Sess. 88 (1973) (statement of Rep. Lehman). Edward Tuddenham, \textit{The False Promise of Legalized Immigration in Agriculture}, in \textit{8 In Defense of the Alien} 37, 40 (Lydio Tomasi ed. 1985), displays a puzzling attachment to keeping only the bathwater when he expresses dismay at the possibility that state-organized labor-import programs might disrupt the crew leader system. A recent study prepared for the DOL, which assumes that it is neither economically nor politically feasible to revamp agricultural labor relations, recommends intensifying and improving labor contracting: "Farm labor policy based on the romantic concept of the special relationship between the small family farmer and his or her 'hired hands' has served to reify the mythology that labor contractors and crewleaders are 'destined' or
Decasualizing the Labor Market. The same central authority that restricts the supply of labor to agriculture should also register and regulate the hiring process. A combination of public employment services, labor organizations, and agricultural employer associations should assume the functions currently performed by crew leaders.38 If large agricultural associations can recruit harvest workers from Mexico, Jamaica, and other countries through governmental agencies, recruitment could be similarly organized in the United States. To be effective, such recruitment would have to be coupled with the creation of a coordinated interstate employment and referral service imposing on the federal government joint liability for processing job offers the terms of which employers breached.39 Crucial to such a regime would be an array of substantive guarantees of wages and working and living conditions similar (but superior) to those currently mandated for temporary foreign workers, but shorn of the oppressive controls that intimidate the latter.40 Of especial significance would be the enforcement of a

inevitably committed to being exploitative manipulators of indentured workers." 1 KISSAM & GRIFFITH, FARM LABOR SUPPLY STUDY at 191. The study misconceives the alternative model as crew leaders "interfer[ing] in the direct relationship between workers and employers." Id. at 135. In fact, exploitation by employers and crewleaders complement each other. See supra ch. 1 § III.


39Under the Wagner-Peyser Act, 29 U.S.C. §§ 49-491 (Supp. 1989) & 20 C.F.R. § 653 (1991), the obligations of the Employment & Training Adm’n and of the U.S. Employment Serv. of DOL are very circumscribed; neither they nor the cooperating state agencies are "guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers." 20 C.F.R. § 653.501(a). As an example of government involvement: in the 1940s, officials of the Employment Service actually accompanied from California to Oregon 200 families whom it had recruited on behalf of farmers. MCWILLIAMS, ILL FARES THE LAND at 360-62.

guaranteed minimum number of hours in order to discipline agri­
cultural employers not to request workers before they are willing to
provide them paid employment.41

2. Raising Wages

Increasing the Minimum Wage for Migrants.42 So long as the
underlying labor supply and demand forces generate the desperation
and vulnerability that prevent workers from defending their own
working conditions—let alone from acting in concert with others—a
state-enforced wage increase would presuppose a continuation of the
old paternalistic regime. Until migrants are in a position to enforce
their paper rights themselves, such an approach would not differ
qualitatively from current practice. Thus the proposed doubling of
the agricultural minimum wage—which presumably would attract
additional labor market applicants—would have to be accompanied
by a reduction in the supply of labor until employers responded by
increasing the capital intensity of harvesting. Another necessary
flanking measure would be a significantly higher level of enforcement
of FLSA and AWPA by a Department of Labor staffed by com­
pliance officers subjectively committed to the eradication at the very
least of unlawful exploitation.43

Farmworkers (PEMD-89-3, 1988); Alec Wilkinson, Big Sugar (1989);
Farmworker Justice News, Spring 1990 (issue devoted to H-2A workers in the
Florida sugar cane industry).

41Employers who request temporary labor certification for temporary foreign
workers are required to "guarantee to offer the worker employment for at least three­
fourths of the workdays of the total periods during which the work contract" is in
effect. 20 C.F.R. § 655.102(b)(6)(i) (1991). For documentation that the DOL actually
conspires with sugar companies to evade this requirement, see Staff of House
Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of
Temporary Foreign Workers in the Florida Sugar Cane Industry 14-15 (Ser.
No. 102-J, 1991). The disclosure provision of AWPA, 29 U.S.C. § 1821(a), should also
be expanded to include certified payroll data for the employer’s previous three seasons
showing length of season, average hourly wages, and average weekly hours as well as
total acreage and number of hours of employment available for the current season
together with the maximum number of workers to be recruited. See 1 Kissam &
Griffith, Farm Labor Supply Study at 195.

42See Linder, Farm Workers and the Fair Labor Standards Act at 1335-36, 1381-82.

43"The best administrative machinery in the world will break down utterly if
intrusted to incompetent officials." Standing Comm. on Legal Aid Work, First Draft
Of a Model Statute for Facilitating Enforcement of Wage Claims, Commentary on § 6,
Establishing an Agricultural Wage Board. This specialized wage board for the farm sector would not supplant FLSA, but would create a differentiated scale of wages in excess of the statutory minimum. It could be patterned after the industry committees that Congress created in 1938 in order to phase in the minimum wage under FLSA. A still more appropriate model is Senator LaFollette’s proposal to create a board to "bring the essentials of collective bargaining on wages to an industry" in which "[t]he mere protection of labor's right to organize and bargain collectively" would not be able to prevail over entrenched employers "except after a considerable struggle." If local committees are composed of public members in addition to representatives of employees and employers, they would combine the functions of collective bargaining and arbitration. In recommending "fair and reasonable wages for the area and commodities" to the board, the committees would take into consideration: (1) the cost of living; (2) local economic conditions; (3) the value of services rendered; and (4) the wages for work of a comparable character established by collective bargaining or employers who voluntarily maintain fair wage standards.

Applying the Premium Overtime Provision of FLSA. Shortly after enactment of FLSA, which totally excluded agricultural employees, hired farm laborers worked an average of ten hours per day and fifty-seven hours per week. The chief difficulty, according to the DOL, in applying the maximum hours provision lay in "the highly seasonal character of many agricultural operations which must be performed within brief periods of time to avoid serious economic losses...." "On the other hand," the DOL conceded,

there can be no doubt but that many farm laborers work unreasonably long hours which are not justified by the normal demands for labor. The dependence of farm work upon natural conditions is generally limited to certain parts of the year.... The working hours of some farm workers probably reflect in part the


§§ 5 & 8, 52 Stat. at 1062, 1064.


For an extended argument that the exclusion of farm workers from the overtime provision of FLSA is unconstitutional because Congress intended to discriminate against nonwhite workers, see Linder, Farm Workers and the Fair Labor Standards Act.
Migrant Workers and Minimum Wages

same economic disadvantages and weaknesses in bargaining position as is sometimes the case with industrial workers.

It then asserted "that the hours requirements of the present Act could not be applied to agriculture. Different hours requirements would have to be devised for farm workers and...would have to be sufficiently flexible and provide adequate latitude in hours exemptions during seasonal operations." Why the DOL considered such an amended provision necessary is puzzling in light of the fact that the original FLSA then in effect already contained precisely such a provision. Even if such seasonality exemptions applied, the DOL argued that:

Since a very large proportion of the workers on large scale farms are employed only during seasonal operations, the benefits of hours limitations would not extend to them. It is quite probable that the benefits from reasonably flexible hours standards would accrue to a minority of farm workers and then only to a part of their employment period.

There is, however, nothing specific to agriculture about these claims. First, such considerations did not deter Congress from exempting other similarly situated seasonal employees. Second, such a restrictive application of the overtime provision would have been a financial boon rather than a burden to the affected farmers. And finally and most importantly, as one senator explained at the original hearings: "Of course, our purpose is to put on more help and absorb some of the unemployed by shortening the hours." In other words, even if agricultural employees had been neither completely nor partially (that is, seasonally) exempt, and even if those already employed had been deprived of all work in excess of forty-four hours per week because farmers preferred hiring additional employees in order to avoid paying statutory overtime compensation, they would still have been in no worse situation than covered industrial em-

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48§ 7(b)(3), 52 Stat. at 1063. See also § 7(c) (similar exemptions for cotton ginning, canning, etc.).

49National Farm Labor Problem at 1031.

50FLSA Hearings at 1104 (remarks of Sen. Lee).
ployees: "In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected [by Congress] to have an appreciable effect in [sic] the distribution of available work." And with more than 300,000 unemployed experienced farm laborers still seeking work as late as 1940, there would have been no shortage of labor forthcoming—at the minimum wage.

Opponents of the extension of the maximum hours provision of FLSA to farm workers continue to advance the argument that in agriculture "encouraging peak seasonal employment expansion through an overtime penalty wage may be detrimental to maximizing the seasonal earnings of already employed short-term workers" if employers hire additional workers to offset wage rate increases resulting from the premium overtime rate. The argument has not improved with age. The vast amount of unemployment and underemployment among migrants means that more than an additional 100,000 workers would be required to perform the work in excess of forty hours performed by workers subject to the minimum wage provision of FLSA. Consequently, overtime coverage of farm workers would promote the original purpose of the premium penalty—encouraging employers to hire additional workers—without burdening farmers financially. For all these reasons it is under-

51 Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).
531 REPORT OF THE MINIMUM WAGE STUDY COMM’N 107, 118, 127 (1981). See also 1 HARRY KANTOR, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS 202 (DOL 1959). The argument becomes even weaker when is coupled with a conflicting (as well as unsubstantiated and misleading) claim: "Since most of the hours worked in excess of 40 were worked by year round employees it is very likely that compensatory short workdays prevail during slack seasons." Conrad Fritsch, Exemptions from the Fair Labor Standards Act: Agriculture, Agricultural Services and Related Industries, 4 REPORT OF THE MINIMUM WAGE STUDY COMM’N 97, 121 (1981). See also 1 REPORT OF THE MINIMUM WAGE STUDY COMM’N at 127-28.
54 The 100,000 workers would have been the equivalent of an expansion by 15.8 per cent of the farm work force subject to the minimum wage provision of FLSA in July 1980. Holt, Elterich, & Burton, Coverage and Exemption of Agricultural Employment under the Fair Labor Standards Act at 456; and calculated according to data in id., tab. 8.6 at 459. Even if no additional workers had been hired and the overtime premium had been paid for all overtime hours, the total weekly farm payroll (during the week in July, 1980 when the Minimum Wage Study Comm’n study was conducted)
standable that even the Secretary of Labor in the Eisenhower administration supported some form of statutory overtime payment for farm workers.\textsuperscript{55}

One economic justification for penalty wages is that they bring employers' marginal private costs in line with the full marginal social costs of working overtime.\textsuperscript{56} This step toward greater market rationality nevertheless represents a codification of capitalist time management to the extent that workers accept the fundamental premise that money can compensate (for) all detriments. But just as monetarily internalizing externalities in the environment proves inadequate beyond the point of irreversible damage to nature, so too in the case of human beings. For this reason restoration of the outright prohibitions of overtime enacted by the states before the New Deal should be considered.\textsuperscript{57}

Finally, in a related area, the provision in the Portal-to-Portal Act that relieves employers of FLSA liability for travel to and from the place of employment should, at the very least, be amended to exempt farm workers who are transported by their employers. Although it is true that Congress enacted this provision in a broad and vindictive spirit to teach unions of highly paid workers a lesson, because farm workers were wholly excluded from FLSA at the time, the legislature never contemplated the hardship that the Portal-to-

\begin{itemize}
\item would have risen by a mere 4.7 per cent, while the weekly earnings of the ca. 320,000 farm workers actually working more than forty hours and subject to the minimum wage provision would have risen by 13.7 per cent. Id. at 464, tab. 8.6 at 459, tab. 8.10 at 463.
\item See generally, ELMAR ALTWATER, DIE ZUKUNFT DES MARKTES: EIN ESSAY ÜBER DIE REGULATION VON GELD UND NATUR NACH DEM SCHEITERN DES "REAL EXISTIERENDEN SOZIALISMUS" (1991). Such laws were restricted to women and children; where adult men were covered, the purpose was to protect not them but the public, which was harmed by the consequences of their fatigue. The major exception was a very radical statute in Alaska, which prohibited even self-employed from working more than eight hours per day; it was promptly held unconstitutional. 1917 Alaska Sess. Laws ch. 55; United States v. Northern Commercial Co., 6 Alaska 94 (1918).
\end{itemize}
Portal Act has come to license. It defies belief that even a significant minority of the electorate, if confronted with the fact, would approve of employers who "haul" subminimum-wage workers as many as six hours daily without any compensation because they refuse to provide housing at the remote locations at which they insist on growing crops. A precedent for the proposed reform is Representative Mikva's Day Laborer Protection Act of 1971, which would have included as compensable hours worked under FLSA all "travel time between the job site and the temporary help service...and one-half the time spent awaiting assignment at the temporary help service prior to being sent to a job site." Since farm workers are typically hired on a day-to-day basis through intermediaries, that bill's intended remedies would also fit their situation.

Eliminating the Exclusion of Employees of Small Farm Employers from FLSA. The economic situation of farm workers is well captured by the fact that, despite the manifest inadequacy of the minimum wage as a living wage, sixty-two per cent of nonsupervisory employees in agriculture are statutorily excluded from even this meager level of protection. This degree of exclusion is almost five times higher than that for the civilian labor force as a whole and even twice as high as that for private household employees.

In advising Congress as to an appropriate cut-off point for coverage in terms of farm size, the DOL took the position that it was unnecessary to impose the minimum wage on small farmers. Instead, it suggested that it would be "preferable to bring the wages paid by the smaller users of farm labor into closer relationship with wages paid by those subject to the law through market pressure on wage-offers." In the event, more than a quarter-century after this

58 29 U.S.C. § 254(a)(1); Linder, Class Struggle at the Door, supra ch. 1 § I.
61 See, e.g., DOL, HIRED FARM WORKERS: A STUDY TO EVALUATE THE FEASIBILITY OF EXTENDING THE MINIMUM WAGE UNDER THE FAIR LABOR STANDARDS ACT 35 (1966) (estimating that covering two per cent of farms—a total of 67,000—employing at least 300 man-days of labor in the peak quarter would afford the minimum wage to fifty-two percent of farm workers).
62 Kantor, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS at 116-17.
partial incorporation of agriculture, this hope has not been realized: the reserves of underemployed laborers are so enormous that many uncovered farms are under no pressure to pay the minimum wage in order to secure workers.

Most farm workers are excluded from FLSA by virtue of working for a family farm—that is, "an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor."63 The 500 person-day standard, however, is a poor surrogate definition of the family farm as one "operated by the farm family as a way of life, rather than primarily for profit."64 In an extreme case, an exempt farmer who employed exactly 500 person-days of labor during each quarter of the year and himself worked 300 days per year, would be performing only thirteen per cent of the total labor on the farm. A more relevant definition of a farm family—but still within the logic of agricultural exceptionalism—entitled to exploit its hired laborers as intensively as it does itself would require the family to perform at least one-half of all the labor performed on the farm.65 Such a

6329 U.S.C. § 213(a)(6)(A) (Supp. 1991). The Minimum Wage Study Comm'n recommended that the threshold be reduced to 300 man-days. 1 REPORT OF THE MINIMUM WAGE STUDY COMM'N at 126. This coverage was proposed as early as 1949. Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Comm. on Education and Labor, 81st Cong., 1st Sess. 9 (1949) (H.R. 2033). Although out of context this provision may seem to afford even the largest agricultural employer a start-up year free of FLSA liability, the legislative history shows that the only purpose of using the previous year's employment record was to enable the employer to "know before each quarter begins whether he will be required to pay the minimum wage." DOL, ANNUAL REPORT FISCAL YEAR 1948, at 145 (1949). Therefore as soon as a large employer in its first quarter of operation crosses the person-day threshold, its employees should be covered. Similarly lacking any justification are the exclusions of seasonal-commuter and child hand-harvest piece-rate workers. 29 U.S.C. § 213(a)(6)(C) and (D) (Supp. 1991). The Minimum Wage Study Comm'n supported elimination of both of these exclusions. 1 REPORT OF THE MINIMUM WAGE STUDY COMM'N at 126.

64DOL, ANNUAL REPORT FISCAL YEAR 1948 at 138. Fruit and vegetable farms can be quite large. In 1987, the last year for which census data are available, 2.5 per cent of all vegetable and 1.6 per cent of all fruit farms sold products valued at more $1,000,000 compared with only 0.5% of all types of farms. Calculated according to data in 1 BOC, 1987 CENSUS OF AGRICULTURE: GEOGRAPHIC AREA SERIES, pt. 51: UNITED STATES tab. 52 at 104 (1989). Forty-three vegetable farms and 51 fruit farms accounted for ten per cent of all sales of such farms in 1987. Calculated according to data in id., tab. 47 at 43.

65Luther Tweeten, Has the Family Farm Been Unjustly Treated? in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM? 212 (Gary Comstock ed. 1987), defines a family farm as one on which the operator and family provide more than half
standard would create a sliding scale: larger working farm families would be permitted to exploit correspondingly larger numbers of workers. To alleviate the economic pressures on family farm employers, the state could adopt measures to encourage collective action among farm families to place limits on self-exploitation.66

But even this rationalized version of exceptionalism can lay no claim to moral or economic justification. If a farm family is unable or unwilling to conduct its business through self-exploitation and chooses to hire others to perform the extraordinarily unpleasant work of weeding its cotton or harvesting its onions, asparagus, or apples, it has ceased to be a family farm and should be subject to the general societal limitations on the exploitation of others' labor.67

There is no legitimate reason for compelling the poorest stratum of workers in the United States to subsidize smaller farmers by working for subminimum wages. If the original justification for the exemption was grounded in the claim that many workers on small farms were themselves local farmers or future farmers who, "[t]o a certain extent...are protected from exploitation by community feeling," it is obviously irrelevant to migrants.68 If such farmers are unable to pay standard wages while retaining enough income to provide a livelihood for themselves, the basic principle of national wage regulation dictates that they be replaced by larger and more efficient producers who can afford such wages.69 Moreover, the fact that, for example, the Texas Minimum Wage Act, which until 1987 imposed an hourly wage of only $1.40 and was so ridden with exclusions and loopholes that it covered scarcely any farm workers, now includes virtually all migrant and seasonal farm workers at the federal

of the labor.


67"The idea of a family farm is jeopardized by supposing that the farm family might be simply the guardians...of crops...harvested by seasonal workers." Wendell Berry, A Defense of the Family Farm, in Is There a Moral Obligation to Save the Family Farm? at 347, 348. Sue Headlee, The Political Economy of the Family Farm: The Agrarian Roots of American Capitalism 46 (1991), fails to explain why a family farm hiring large numbers of harvesters does not become a "business farm."

68DOL, Annual Report Fiscal Year 1948 at 138.

69Without a minimum wage in agriculture, the continuing existence of a large labor surplus provides disincentives for utilizing farm workers at higher levels of productivity." I Kantor, Problems Involved in Applying a Federal Minimum Wage to Agricultural Workers at viii-ix.
minimum wage, suggests that universal coverage does not bring about the immediate demise of small farmers.  

3. Supressing Atavistic Lawlessness

Criminalizing Theft of Labor. Failure to pay migrants their wages at the time they are due should be recognized as the criminal act it is: theft of labor. To be sure, the Model Penal Code inaugurated a wave of enactments criminalizing such acts in the 1960s. Experience indicates, however, that local police and prosecutors take shoplifting considerably more seriously than laborlifting. Although FLMA provides for imprisonment (for not more than six months) of employers who have previously been convicted of violating the minimum wage, overtime, or child labor provision of the Act, these

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70 TEX. REV. CIV. STAT. ANN. art. 5159d § 6 (Vernon Supp. 1991). Precisely the same considerations apply to the partial and total exclusions of farm workers from unemployment compensation and workers' compensation systems. Migrants also receive few or no private benefits. Although L. Dunn, Nonpecuniary Job Preferences and Welfare Losses among Migrant Agricultural Workers, 67 AM. J. AGRIC. ECON. 257 (1985), has shown empirically that the monetary value that migrants attach to certain benefits—such as water and toilet facilities and an on-site nurse—exceeds the cost to employers of providing them, he does not resolve the question as to whether the existence of a rigid mandatory minimum wage prevents migrants from trading off monetary wages for such benefits. Dunn also fails to explain how a migrant earning merely the minimum wage could afford such trade-offs. Finally, Dunn does not reveal the basis of his calculation that providing "nonarbitrary and impartial work rules" would cost an employer only twenty-one cents per worker per season. Id. at 260, tab. 1 at 261.

71 M ODEL P ENAL C ODE § 223.7 (1980). The American Law Institute, in motivating this innovation in Anglo-American law, specifically mentioned only doctors, engineers, and (of course) lawyers as persons whose services consumers had previously been able to obtain without paying with impunity. M ODEL P ENAL C ODE § 206.7 comment at 91 (Tent. Draft No. 2, 1954). The wording of the provision, however, which stresses an intent to obtain services by deception, creates a possible loophole for employers who may brazenly assert that at the time of obtaining the services, they had every intention of paying, but later decided not to pay. E.g., TEX. REV. CIV. STAT. ANN. art. 5155 § 5A (Vernon Supp. 1992). Recourse to this gap may be foreclosed by M ODEL P ENAL C ODE § 223.7(1): "Where compensation for services is ordinarily paid immediately upon the rendering of such services, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay." As an example of state adoption, see IOWA CODE § 714.1(3) (1991). At one time the attorney general of New Jersey supported "more jail terms for those convicted of running sweatshops and exploiting migrant farm help." Pat Read, Attorney General Battles Obscurity, N.Y. Times, Aug. 2, 1981, § 11 at 1, col. 5 (NEXIS).
sanctions are "rarely used." Both the criminal sanctions of FLSA and state theft of labor statutes should be strengthened and vigorously enforced. If a social prejudice is created against this form of economic crime, the increased probability of being caught and the increased penalty incurred will force employers to rethink the calculus of noncompliance.

**Probationary Pre-Payment of Minimum Wages.** In the normal case, employees give their employers an interest-free "credit...before receiving pay for work done." This sequence of withholding payment until services or goods have been provided has traditionally been justified on the ground that the employer is a better credit risk than his employees. But the same high jurisprudential authority also offered a remarkable variant explanation:

> No doubt this custom arose because of the superior economic position of the employers—the "masters...[T]he risk of giving something for nothing...will usually be borne by the one whose needs are the greater. [I]t is superior economic position that makes wage-earning possible. Superior economic position is often resented by others. They may take steps to destroy it, either by violence or by votes. ... It is possible that the contrary system of payment, the system of paying wages before work done, would work, and that men could survive and prosper under it. [B]ut the wage-earner would probably be described as the "master". It seems reasonably clear...that there would then be no "employer" for the reason that his master would leave him nothing with which to pay. Attempts to bring about such a situation are merely attempts by servants to exchange position and become the masters.76

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74 Karl Marx, Questionnaire for Workers, in 1:25 Marx [&] Engels, Gesamtausgabe (MEGA) 202 (1985 [1880]).

75 See, e.g., 3A Arthur Corbin, Corbin on Contracts § 676 (1960). The other monumental contracts treatise adduced as further reasons "the normally greater responsibility of the employer and the fact that recalcitrant employee cannot be made to perform specifically..." 3 Samuel Williston, A Treatise on the Law of Contracts § 830 at 2323 (rev. ed. 1936 [1920]).

76 3A Corbin, Corbin on Contracts at 209-10.
The reversal of the conditionality and unconditionality of promises to pay and to perform advocated here does not aim at an inversion of labor and capital. Rather, it proposes to remedy the consequences of the dire necessity that undergirds the massive and incorrigible wage-theft committed by employers of migrants. FLSA and AWPA should, therefore, be amended to require any employer that has previously been found by the DOL or a court to have failed to pay wages in a timely fashion to migrants to pay its workers, for a period of one year, the minimum wage for forty hours in advance. After one year's compliance, the employer would be permitted to resume the normal procedure. Relevant precedent for such an approach comes from a recent enactment in California authorizing employees to seek a temporary restraining order to prevent an employer from doing business in the state who twice within the previous ten years has been convicted of violating the state wage payment law or failed to pay a wage claim judgment until the employer posts a bond of the greater of $25,000 or twenty-five per cent of the weekly gross payroll. If employers object to such intervention, a more streamlined procedure would authorize migrants, like hotels, before beginning performance, to make an imprint of their employer's credit card (a 'master' card) in case he decides to abscond. In the alternative, legislatures could confer upon migrants the same police, prosecutory, and judicial powers that they have bestowed upon store owners "to extract payments and fines from thieves they catch in the act."

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77 Even Marx, who nurtured a very expansive view of individual capitalists' cupidity, demonstrated the very real nature of the workers' advances to their employers by reference not to outright fraud but to the consequences of crises and bankruptcies. Karl Marx, *Das Kapital* (Ökonomisches Manuskript 1863-1865), in I:4 text pt. 1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 6-7 (1988).

78 This proposal tracks the proposed regulations published by the DOL to implement the 1989 amendments to FLSA mandating a civil penalty (not to exceed $1,000) for an employer "who repeatedly or willfully violates" the minimum wage or overtime provision of the Act. 29 U.S.C. § 216(e) (Supp. 1991); 56 Fed. Reg. 25,168 (1991) (to be codified at 29 C.F.R. § 578.3(b)(1)) (proposed May 23, 1991). FLSA should also be amended to authorize worker-plaintiffs (in addition to the Secretary of Labor) to seek injunctions enjoining the sale of goods produced in violation of the Act. 29 U.S.C. §§ 211(a), 215(a)(1), 217; Lorillard v. Pons, 434 U.S. 575, 581 (1978); Roberg v. Henry Phipps Estate, 156 F.2d 958 (2d Cir. 1946).


In response to the objection that, where an employee leaves before having performed, an employer would be without a real remedy since workers are judgment proof, Justice Holmes observed: "The objection that this remedy is practically worthless is...no less true, although for different reasons, if the workman’s wages should be detained unjustly." In other words, such workers’ poverty structurally preordains that regardless of whether the performer or the payor breaches, one party will be unable to recover—the employer because the worker is judgment proof or the employee because he cannot afford to litigate. Given the inevitable lack of a remedy for some party, as between the class with a documented history of breach and the class of perpetual hard-working victims, no justification is available for not shifting a merely speculative burden to the offending class.

Voiding Unconscionable Contracts: Judicial Restitution of Unjust Enrichment. For migrants not covered by a minimum wage law one possible avenue of redress would be to sue employers on the ground that their contracts are unconscionable. Virtually all states have enacted the Uniform Commercial Code, which authorizes judges to deny enforcement to a contract that they determine to have been "unconscionable at the time it was made." The provision is designed to enable courts "to police explicitly against" unconscionable contracts using as a touchstone "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses...are so one-sided as to be unconscionable...." In addition, the Restatement of Contracts, which is generally applicable to all contracts, has adopted the same provision.

The problem with this existing remedy is that courts have granted it almost exclusively to rescind contracts on behalf of buyers...
who wanted to relieve themselves of excessively onerous payments. What an underpaid migrant wants, however, is a judgment by a court substituting a more appropriate level of compensation for the actual wage, which is found to be "disproportionate" to the value of the performance received by the employer. In Germany, the law has conceptualized this problem of so-called hunger or starvation wages by invalidating such labor contracts as violations of public policy. The German Civil Code deems void any transaction by which one person "through exploitation" of the other's "distressed situation, inexperience, lack of judgmental ability, or gross weakness of will" receives an economic advantage "conspicuously disproportionate to the performance." Where both these subjective and objective elements are present, German courts have awarded higher wages based on prevailing wages—even where the contracts were already fully executed on both sides. Thus in one case the court increased the piece-rate wage to a seamstress on the grounds that the actual wage was so far below an "appropriate wage" that only the fear of not being able to obtain any work or her inability to recognize the disproportion between performance and compensation could have motivated her to agree to such a wage.

Several Anglo-American contract doctrines are also available to achieve such results. Although superior bargaining power alone

84E.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (welfare mother who bought various items on installment plan subject to very unfavorable cross-collateral conditions). But see Gianni Sport Ltd. v. Gantos, Inc., 151 Mich. App. 598, 391 N.W.2d 760 (1986) (manufacturer successfully sued retailer alleging unconscionable cancellation clause); Vockner v. Erickson, 712 P.2d 379 (Alaska 1986) (agreement under which seventy-three year-old seller of boarding house would not have received full payment for thirty years was unconscionable and reformed by court).

85See [Heinz] Potthoff, Programm eines Reichsarbeitsgesetzes, 13 Deutsche Juristen-Zeitung 1302, 1304 (1908) (de lege ferenda).

86BGB § 138(2). Until 1976 the three categories were "necessity, lightheadedness, and inexperience."

87See 2 Wolfgang Daubler, Das Arbeitsrecht 233-34 (1979); BGB §§ 612, 812, 826. For criticism of judicial reformation of hunger wages as a preemption of a legislated minimum wage, see Paul Oertmann, Hungerlöhne und Arbeitsvertrag, 18 Deutsche Juristen-Zeitung 254 (1913).

8816 Deutsche Juristen-Zeitung 768 (1911) (Gewerbegericht Berlin, Feb. 27, 1911). See also 25 Arbeitsrechtssammlung 185, RAG 75/35, No. 33, Oct. 23, 1935 (higher, appropriate, prevailing piece rate awarded to shirt-maker outworker—who was herself a sweatshop employer—subject to extreme exploitation by unjustly enriched employer).
may not constitute oppression, when coupled with an extraordinarily harsh wage term and ignorance and hardship on the part of the weaker party, unconscionability may result. The following considerations support, mutatis mutandis, such a conclusion for weak sellers of labor:

If there is a market, normally available, but unavailable to a buyer because of his ignorance, or because he lives in a ghetto and cannot normally be expected to reach it..., then if the seller extracts a higher-than-market price for his goods, the inequality of the exchange can be demonstrated.89

Courts should therefore adopt a presumption that where the going wage is at least the minimum wage, cognizable duress has coerced migrants who perform the same labor as others to work for less. Since the procedural and substantive aspects of unconscionability are present, the contract should be voided. In its place, courts should order the unjustly enriched employer to disgorge his unconscionably obtained gains to the employee in the form of the difference between the actual wage and the going wage.90

4. Amending the National Labor Relations Act to Include Farm Workers

The history of farm labor organizing in the United States strongly suggests that migrants cannot achieve organizational parity with their employers exclusively on economic terrain; larger political forces must be galvanized to force agricultural employers to recog-

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89 Dobbs, Law of Remedies at 711.

90 The procedural and substantive elements in American law correspond to the German subjective and objective aspects. As articulated by the leading labor law scholar in Weimar, Nazi, and postwar Germany, subminimum migrant wages would satisfy both. Alfred Hueck sees "necessity" as given where workers are compelled to sell their labor power in order to support their families under conditions of depression and high unemployment; by the same token, a "conspicuous disproportion" between wages and performance is present where the former does not constitute a living wage. 1 ALFRED HUECK & H. NIPPERDEY, LEHRBUCH DES ARBEITSRECHTS 129 (2d ed. 1928). For an overview of the American contract remedies doctrines, see JOHN CALAMARI & JOSEPH PERILLO, THE LAW OF CONTRACTS 337-38, 648-49 (3d ed. 1987). In the alternative, the contract "could be reformed to meet minimal standards of conscionability." DOBBS, LAW OF REMEDIES at 707. See also Uniform Rev. Sales Act, § 23 (proposed final draft no. 1, 1944).
nize unions and to negotiate with them.91 The fact, for example, that farm workers have to strike to enforce their already existing statutory right to receive the minimum wage underscores the unique lopsidedness of bargaining power.92 Farmers' opposition to unions and the exclusion of farm workers from the NLRA are particularly ironic in light of the fact that because Congress believed that few farmers as individuals "had sufficient economic power" to outwait processors and distributors, the Capper-Volstead Act has since 1922 exempted from the antitrust laws "comparatively helpless" farmers who join in cooperatives in order to avoid being "forced to bring [their] harvest to market at an unfavorable time."^93

In order to create support for unionization, leading public officials and politicians would have to enunciate a public bias in favor of farm worker organizing. A campaign orchestrated by the federal and state governments (and existing unions) to encourage unionization would have to be an integral part of such mobilization. The NLRA would also have to be amended to accommodate the need for quick elections, union access to employers' property, and secondary boycotts as has been done under the California Agricultural Labor Relations Act.94

In the alternative, states should enact their own Agricultural Labor Relations Act.95 A further possibility is a "self-executing" state

91See J. Jenkins & Charles Perrow, Insurgency of the Powerless: Farm Worker Movements (1946-1972), 42 AM. SOC. REV. 249 (1977); J. Jenkins, The Politics of Insurgency: The Farm Worker Movement in the 1960s (1985); W. Barger & Ernesto Reza, Processes in Applied Sociocultural Change and the Farmworker Movement in the Midwest, 44 HUMAN ORGANIZATION 268 (1985). Significantly, most organizing successes in agriculture have taken place in vertically integrated enterprises—especially those with already unionized off-farm operations. See Varden Fuller, A New Era for Farm Labor? 6 INDUS. REL. 285, 289 (1967). The most recent prominent example of both these trends is the collective bargaining agreement between pickle and tomato harvesters represented by FLOC and Heinz, Campbell, and the processors' farmers, which was made possible by a seven-year boycott. COMM'N ON AGRICULTURAL WORKERS, HEARINGS 332-35 (Grand Rapids, Mich., June 25, 1991) (testimony of Baldemar Velasquez).


95See Sue Hayes, The California Agricultural Labor Relations Act and National Agricultural Labor Relations Legislation, in SEASONAL AGRICULTURAL LABOR MARKETS IN THE UNITED STATES at 328.
constitutional provision, such as the one in New Jersey, guaranteeing "[p]ersons in private employment...the right to organize and bargain collectively." Within such a framework, state courts can, like the National Labor Relations Board, order recalcitrant agricultural employers to bargain collectively with unions and to reinstate and to make back pay awards to migrants who have been discriminatorily discharged for seeking to vindicate such constitutional rights.96 As a transitional measure, industry-wide wage advisory committees for hand-harvest agriculture could be reintroduced under FLSA, the representative character of which would "give[] both to employers and workers some experience and some realistic education in the technique of collective bargaining."97

5. Socio-Technological Transformation of Agricultural Production and Land Tenure

Large-scale, mechanized, chemical-dependent farming has brought about an ecological catastrophe for the stock of arable farm-land and injected intolerable levels of poisons into the nutritional base. Several purposes would be served by restructuring fruit and vegetable production along small-scale, labor and knowledge-intensive, organic lines. A family farm could operate more efficiently—in terms of output per input—on fifty acres of mixed crops than current specialized agribusinesses.98 Since such a regime would require approximately the same land base, many more farmers, and vastly fewer wage workers, the new pattern of rural land use would create the possibility of reinstating some proportion


97FLSA Hearings at 180 (testimony of Frances Perkins, Sec’y of Labor).

of farm workers as organic farmers. Even the much more modest proposal of crop diversification on the same farm or in the same location with staggered harvests would promote decasualization of farm labor by enabling a smaller group of resident workers to work for much longer periods of time.

6. What If They Gave a Harvest and No One Came? Towards a Guaranteed Income

The foregoing weak super-paternalistic proposals are designed to improve the conditions of exchange for migrants by remedying the defects of their labor market. The root cause on the supply side is migrants' extraordinary poverty, which compels them to acquiesce in wages and working conditions that no other segment of the working class in the United States would tolerate. This ever-present politically constructed reserve army, in turn, offers little incentive to agricultural firms to adopt less labor-intensive methods of production.

If the international division of labor precludes achieving the goal of full employment in a work-for-profit context, migrants may be the vanguard of a growing sector of would-be workers the market value of whose labor is insufficient to sustain a societally acknowledged minimal family standard of living. Without independent access either to the means of production or to the necessities of life, this group must be alimented in one way or another. Both the right and the left have suggested how purchasing power might be

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99 The experiments that the Farm Security Administration conducted in the 1930s and 1940s in creating large-scale cooperative farms for migrant families are one model. See U.S. Farm Security Admin., Casa Grande Farms (March 10, 1941); idem, History of the Farm Security Administration 6 (rev. ed. Oct. 21, 1941); McWilliams, Ill. Fares the Land at 370-71. For a pessimistic psychological explanation of the failure of the largest cooperative, see Edward Banfield, Government Project (1951).

100 See Harry Schwartz, Seasonal Farm Labor in the United States 150 (1945); Robert Glover, Unstructured Labor Markets and Alternative Labor Market Forms at 270-76. But see John Mamer & Varden Fuller, Labor and the Economic Factors in Fruit and Vegetable Mechanization, AGRIC. SCI. REV., 4th Q. 1965, at 1, 2 (such restructuring leads to "foregoing most of the advantages of specialization that are based on the unique soil and thermal characteristics").

101 A migrant is the archetypical "very poor labourer" whose lack of a "reservation of price" creates "a Hobson's choice in the fullest sense." William Thornton, On Labour 69, 71, 78 (1869).
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transferred to such contingent members of the working class—the one to buttress the remaining for-profit market system, the other to signal that system's demise and the emergence of a new principle of social organization. As the problems inherent in linking income to employment become increasingly intractable for migrants and similarly situated strata, a political decision may have to be made to transcend traditional paternalism.  

One way to break out of the self-reinforcing circle of migrant poverty is to create a higher floor of income security through a guaranteed basic annual income (fixed at the equivalent of a minimum wage higher than its current level), which would provide migrants with the economic wherewithal to resist working for sweatshop employers. Another is for the government to provide socially useful work at wages in excess of the minimum to all those willing to work. Such a program would make minimum wage laws superfluous (and eliminate their coverage and enforcement problems) by exerting labor market rather than legal pressure on agricultural employers to compete for workers by offering higher wages.

For migrants a unique transitional solution lies closer to hand. Just as other societies have created early-retirement pensions for workers, such as underground miners, who are deemed to have borne an undue share of the social costs of production, the United States should establish generous occupational pensions and free housing for all migrant farm workers after twenty years of work. The pensions could be financed through a special tax on producers

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103See Guy Standing, The "British Experiment": Structural Adjustment or Accelerated Decline? in THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES 279, 295-96 (Alejandro Portes, Manuel Castells, & Lauren Benton ed. 1989); ESPING-ANDERSEN, POLITICS AGAINST MARKETS at 31, 148; Hyman Minsky, THE ROLE OF EMPLOYMENT POLICY, in POVERTY IN AMERICA 175, 196 (Margaret Gordon ed. 1965); idem, STABILIZING AN UNSTABLE ECONOMY 308-10 (1986). Adapting the unemployment insurance system to the needs of migrants would be a second-best solution. See 1 KISSAM & GRIFFITH, FARM LABOR SUPPLY STUDY at 182-83.
and current consumers of the products harvested and cultivated by migrants as well as through general tax revenues. In this way society at large might at last acknowledge its debt to those whose unnecessarily hard lives have made possible thoughtlessly plentiful diets for others.\footnote{Covered workers could be defined as those having earned at least half of their income from seasonal agricultural labor during any twenty years. Provision would have to be made for alternative documentation for those workers whose employers failed to keep proper wage records. Russell Williams, a California farm representative and commissioner on the Commission on Agricultural Workers, has proposed for discussion a national retail food sales tax to support migrant assistance programs. \textit{COMM'N ON AGRICULTURAL WORKERS, HEARINGS} 330 (Grand Rapids, Mich., June 25, 1991).}