
Migrant Workers and Minimum Wages

Regulating the Exploitation
of Agricultural Labor
in the United States

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1

The Pillars of an Inexhaustible Supply of Cheap Labor

The modern model of the employment contract, as a voluntary consensual relationship sanctioned by the civil law, is suffused with an individualism that ignores the economic reality behind the bargain. ... The question arises whether an employment contract on "sweated" terms dictated to a destitute worker by a take-it-or-leave-it employer would ever be seen as one induced by "economic duress."¹

I. Poverty-induced Mobility

The phrase "mobility of labour" is but a euphemism for the activity aroused by prospective starvation.²

Migrant farm workers in the United States have established an unsurpassed standard of mobility, availability, and fungibility.³ In

¹K. WEDDERBURN, *THE WORKER AND THE LAW* 143 (3d ed. 1986 [1965]).

²DEPT OF AGRICULTURE & TECHNICAL INSTRUCTION FOR IRELAND, *AGRICULTURAL STATISTICS, IRELAND, 1900: MIGRATORY AGRICULTURAL LABOURERS* 12 (Cd. 341, 1900) (discussing Irish migrant harvesters). See also Tamara Henry, *Farmworkers Have Poor Health, Group Says*, UPI, Apr. 6, 1989 (NEXIS) (discussing extent of hunger among migrants).

³An instructive comparison shows that migrancy per se is not the problem. The scarce skills of New Zealand sheep shearers, who fly around the world following the seasons to the United States, England, Scotland, Norway, and Australia, account for their high piece-rate wages (resulting in daily income of more than \$200). See Thomas Knudson, *New Zealanders Thrive on U.S. Sheep Shearing*, N.Y. Times, Apr. 26, 1987, at 24, col. 2.

the Rio Grande Valley of Texas--"the supply point for a majority of all seasonal migrant workers in the United States"⁴--the members of this unique national and international labor force are, literally on a moment's notice,⁵ just as ready, willing, and able to be transported on a bus a few miles to harvest melons, broccoli, cabbage, citrus, onions, or lettuce as they are to go off with complete strangers who recruit them to harvest broccoli in northern Maine, asparagus in Washington and Missouri, citrus in Florida, pickling cucumbers in Ohio, Christmas trees in Michigan, strawberries in Oregon, watermelon in Arkansas, onions in Colorado, apples in Kansas,

⁴John Thomas & H. Goodwin, Jr., *Employment Compensation among Farm Workers in the Lower Rio Grande Valley*, 68 SOC. SCI. Q. 620, 623 (1987). See also GOOD NEIGHBOR COMM'N OF TEXAS, TEXAS MIGRANT LABOR: A SPECIAL REPORT 17, fig. 1 at 19 (1977) (showing that Hidalgo and Cameron counties in the Lower Rio Grande Valley [LRGV] are the principal residential bases of migrants). See also COMM'N ON AGRICULTURAL WORKERS, HEARINGS 299 (West Palm Beach, Fl., Feb. 15, 1991) (testimony of Robert Williams, attorney, Flor. Rural Legal Serv.) ("the Texas Employment Service said that they could fill every farm work job in the country out of people from the Rio Grande Valley"). A recent study cautions against using the LRGV as a model of the migrant labor force. 1 ED KISSAM & DAVID GRIFFITH, FINAL REPORT: THE FARM LABOR SUPPLY STUDY: 1989-1990--FINDINGS AND RECOMMENDATIONS 5, 172 (1991). Although local labor markets surely differ from one another, this study is fundamentally flawed by the fact that it interviewed only workers resident in the LRGV, wholly ignoring the vast group of workers living on the Mexican side of the border (in and around Reynosa) who form a very significant proportion of the migrant labor market and whose socioeconomic and demographic characteristics approximate those of the workers studied in California and Florida. See 2 FINAL REPORT: THE FARM LABOR SUPPLY STUDY: 1989-1990--CASE STUDIES (Ed Kissam & David Griffith ed. 1991). The optimistic picture of migrant workers depicted in ELIZABETH BRIODY, HOUSEHOLD LABOR PATTERNS AMONG MEXICAN AMERICANS IN SOUTH TEXAS: BUSCANDO TRABAJO SEGURO (1989), results from the author's use of an unscientifically created and unrepresentative sample of workers affiliated with the United Farm Workers.

⁵Given this hypermobility, it is curious for a government official to justify importation of workers from Mexico on the grounds that "[s]hortages in California for the tomato harvest lasts [sic] 3 or 4 months, maybe a little more. It would not be profitable for us to move an unemployed farmer from Georgia or Mississippi for this short period of work. You also have the problem of separation of families and this type of thing." HOUSE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS: ADMINISTRATIVE PRESENTATIONS (III): ADMISSION OF ALIENS INTO THE UNITED STATES FOR TEMPORARY EMPLOYMENT AND "COMMUTER WORKERS" 7 (Comm. Print, Spec. Ser. No. 11, 1963) (testimony of Jack Donnachie, Dep'y Dir., Off. Farm Labor Serv., DOL). When asked whether it would not be cheaper to move unemployed workers than foreign workers, the official indirectly confirmed that employers prefer the most vulnerable workers they can get: "we are limited in what we can require the growers to do voluntarily in order to attract the domestic workers." *Id.* at 20.

mushrooms in Pennsylvania, tobacco in Virginia, tomatoes in Indiana, lettuce in New Mexico and Arizona, bell peppers in California, and--believe it or not--pineapples in Hawaii; to detassel corn in Iowa; to hoe sugar beets in Wyoming and North Dakota; to work on sod farms in New York; to irrigate fields in Montana and Idaho; to weed soy beans in Nebraska; to plant pine trees in Louisiana and Alabama; to hoe cotton in West Texas; to inseminate turkeys and mow highway median strips in North Carolina; to process poultry in Minnesota; to work in canneries in Wisconsin and Illinois, cotton gins in Mississippi and South Carolina, fruit and vegetable packing sheds in Georgia, meat packing plants in Iowa and Nebraska, and plant nurseries in Maryland; to work on construction sites in Atlanta; and even to wield jackhammers to dismantle oil refineries for Marathon Oil/USX in Detroit.

The economic plight of migrant farm workers is largely a function of the incomplete and uneven process of industrialization of the agricultural operations in which they work. Whereas the mechanization of pre-harvest activities made possible the cultivation of huge tracts of land by family farmers, lagging mechanization of fruit and vegetable harvesting in tandem with a strong trend toward local geographic specialization and concentration of production created a situation in which the peak needs for seasonal harvesters exceeded the supply of the rural localities--at least at the wages farmers were offering.⁶ This gap created a need for migrancy, which

⁶See Glenn Zepp, Roger Conway, and Frederic Hoff, *Trade Patterns in Fruits and Vegetables*, in *MIGRANT LABOR IN AGRICULTURE: AN INTERNATIONAL COMPARISON* 211, 212-14 (Philip Martin ed. n.d. [1984]). The same analysis applies, mutatis mutandis, to cotton, soy bean, and sugar beet hoeing, where harvesting has been fully mechanized but cultivating has not. For explicit recognition of mechanization of cultivation as having created the need for migrant cotton pickers and the spread of mechanical pickers as having made such workers superfluous in West Texas, see Richard Mason, *The Cotton Kingdom and the City of Lubbock: South Plains Agriculture in the Postwar Era*, in *LUBBOCK: FROM TOWN TO CITY 1* (Lawrence Graves ed. 1986). No other advanced capitalist country relies so heavily on migrant agricultural labor as the United States. Small farm-size and compact and dense population make it unnecessary in most of Western Europe. To some extent French agriculture uses seasonal migrants from Spain and North Africa. See *MIGRANT LABOR IN AGRICULTURE*; Philip Martin, *Migrant Labor in Agriculture: An International Comparison*, 19 *INT'L MIGRATION REV.* 135 (1985). The use of migrant harvesters in Europe was greater in the nineteenth century, when large numbers of Irish worked in Britain, Belgians in France, Poles in Germany, and Italians in a number of countries. See *DEPT OF AGRIC. & TECHNICAL INSTRUCTION FOR IRELAND, AGRICULTURAL STATISTICS, IRELAND, 1900* at 12; *DAVID MORGAN, HARVESTERS AND HARVESTING 1840-1900: A STUDY OF THE RURAL PROLETARIAT* 76-83 (1982).

the neediness of unskilled and severely underemployed farm laborers converted into a reality.⁷

Migrants' lack of bargaining power in the labor market is poignantly on display at the physical labor markets along the United States-Mexican border--the only place on earth where the First and Third Worlds confront each other directly. At the end of the twentieth century, when no other workers in the United States would even contemplate sacrificing fifteen to twenty hours of leisure for as little as ten dollars, this singular exploitation of "abject poverty" begins at a counterpart to the shape-up as it used to be conducted among longshore workers.⁸ There they are recruited by agricultural employers and their intermediaries and emissaries indiscriminately for all manner of local and long-distance migratory employment. Regardless of caveats that may be appropriate elsewhere,⁹ "the labor

⁷MCWILLIAMS, *ILL FARES THE LAND*, conducted his wide-ranging study of depression-era migrants within this analytical framework.

⁸Vega v. Gasper, 118 Lab. Cas. (CCH) ¶ 35,474 at 47,330 (W.D. Tex. 1991). For a description of the major international middle-of-the-night shape-up serving the Imperial Valley in California, see COMM'N ON AGRICULTURAL WORKERS, HEARINGS 203 (Coachella Valley, Cal., Dec. 6, 1990) (testimony of Eileen McCarthy, attorney, Cal. Rural Legal Assistance). On the shape-up as a fixture of the migrant and seasonal agricultural labor market, see *Farm Labor Contractor Registration Act Amendments, 1974: Hearings Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 35 35 (1974) (statement of Barbara Rhine, attorney, UFW); L. Winokur & Chip Hughes, *Workers of the Harvest*, SOUTHERN EXPOSURE, Nov.-Dec. 1983, at 55. On the "human labor market" at another international border crossing--from the occupied West Bank to Israel--see Thomas Friedman, *Israel's Arab Army Of Migrant Workers*, N.Y. Times, Dec. 6, 1987, § 3, at 1, col. 2, at 16, col. 3. On the demise of the shape-up and its replacement by a computerized telephone system among longshore workers, see Anthony DePalma, *Longshore Hiring Shape Ends in New York Harbor*, N.Y. Times, June 6, 1989, at 14, col. 1 (nat. ed.). On the recent rise of an internal Mexican migrant agricultural labor force, see STEVEN SANDERSON, *THE TRANSFORMATION OF MEXICAN AGRICULTURE: INTERNATIONAL STRUCTURE AND THE POLITICS OF RURAL CHANGE* 64-118 (1986); Enrique Astorga Lira & Simon Commander, *Agricultural Commercialisation and the Growth of a Migrant Labour Market in Mexico*, 128 INT'L LAB. REV. 769 (1989).

⁹ROBERT THOMAS, *CITIZENSHIP, GENDER, AND WORK: SOCIAL ORGANIZATION OF INDUSTRIAL AGRICULTURE* (1985), argues that the model of unskilled casual employment inadequately describes lettuce harvesting for large integrated agribusinesses in California and Arizona. To the extent that this thesis is accurate, it depends on the structural limitations imposed on sweating by significant capital investment in the operations in which harvesters are engaged. To the extent that sectors of agriculture in California have become heavily capitalized and industrialized and employment relations have passed beyond the sweating phase, workers employed

market" does exist here as a supply of and demand for homogeneous and undifferentiated labor.¹⁰

All these characteristics should, in theory, contribute powerfully to the creation of "a perfectly competitive labor market, in which workers would move about so freely among employers that all firms would be forced to pay the same wage rate for the same job. ... An employer who reduced his wages below the going rate would be deserted by his employees."¹¹ If the mere propensity to move is theoretically sufficient to create a perfect labor market, in which other employers' bidding for a worker's services is at least as effective as unions in deterring the current employer from overreaching, why does the migrants' actual permanent mobility fail to achieve that beneficial result? It cannot be that they lack the freedom to quit, which is said to be "the only meaning which 'bargaining power' can have for the worker under nonunion conditions."¹² For despite sporadic recurrences of physical and debt peonage, migrants can and do change employers frequently during

there have become more assimilated to the prevailing patterns of industrial capital-labor relations. See, e.g., Margaret FitzSimmons, *The New Industrial Agriculture: The Regional Integration of Specialty Crop Production*, 62 *ECON. GEOGRAPHY* 334 (1986); COMM'N ON AGRICULTURAL WORKERS, HEARINGS 113-29 (Visalia, Cal., Aug. 24, 1990) (testimony of managers of agribusiness). By the same token, to characterize as "highly skilled" workers who can acquire those skills in "a day or two" suggests a Pickwickian usage. THOMAS, *CITIZENSHIP, GENDER, AND WORK* at 102, 95-96. The same objection applies to the claim that lettuce harvesters who "burn out"...have accumulated sufficient capital to move into another area of economic activity." WILLIAM FRIEDLAND, AMY BARTON, & ROBERT THOMAS, *MANUFACTURING GREEN GOLD: CAPITAL, LABOR, AND TECHNOLOGY IN THE LETTUCE INDUSTRY* 117 (1981).

¹⁰Clark Kerr, *The Balkanization of Labor Markets*, in *idem*, *LABOR MARKETS AND WAGE DETERMINATION* 21, 22-23 (1977 [1954]). S. Torok & Wallace Huffman, *U.S.-Mexican Trade in Winter Vegetables and Illegal Immigration*, 68 *AM. J. AGRIC. ECON.* 246, 248 (1986), model migrant agricultural labor as a "relatively homogenous [sic] low-skilled type." In order to persuade Congress to admit Third-World agricultural laborers, farmers from time to time have insisted that such workers are "skilled": "Any man can learn to be...a carpenter...or build buildings, but it is not every one who can learn to work beets." *Seasonal Agricultural Laborers from Mexico: Hearing Before the House Comm. on Immigration and Naturalization*, 69th Cong., 1st Sess. 93 (1926) (statement of I. O'Donnell, Montana sugar-beet farmer). Such advocates never explain why this supposedly scarce factor of production is so poorly compensated.

¹¹LLOYD REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 344 (1949).

¹²*Id.* at 345; PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 18, 162-63 (1990).

the season.¹³

Why have the ethnic and racial minorities who hand-harvest fruits and vegetables been unable to take advantage of employers' vulnerability to delays in harvesting time-sensitive crops as, for example, the quarter-million migrant wheat harvesters regularly did in the latter part of the nineteenth and early twentieth centuries to secure higher wages? This comparison is all the more instructive because the spread of wheat combines at the end of the 1920s and the beginning of the 1930s, which put an end to mass migration to the wheat fields, suggests the prospects of today's migrants.¹⁴

The New Mexico chile industry will illustrate current labor market powerlessness. It is the most recent example of a phenomenon that has characterized agriculture in the United States since the nineteenth century: in expanding the area of cultivation and the volume of production, farmers have taken care "to plan to have a processor available to take the chile, and a market for it," but have not needed to give similar thought to the source of a seasonal work force because state intervention enables them to "get continued access to workers in a way that does not raise their costs and choke off the expansion."¹⁵ What distinguishes New Mexico chile farming from earlier efforts to initiate mass production of crops in remote areas without a sufficient population base to meet peak seasonal needs for hand-harvesters is this: whereas farmers elsewhere forged a system of transcontinental migrancy, New Mexico chile farmers have chosen to exploit a source of labor located close enough to

¹³See, e.g., Peter Kilborn, *Drugs and Debt: Shackles of Migrant Worker*, N.Y. Times, Oct. 31, 1989, at 1, col. 2, at 9, col. 6; *Immigration Reform and Control Act of 1983: Hearing Before the House Comm. on Agriculture*, 98th Cong., 1st Sess. 60 (1983) (statement of Henry Voss, Pres., Cal. Farm Bureau Fed'n).

¹⁴On the earlier development of labor-saving technology in wheat harvesting, see LEO ROGIN, *THE INTRODUCTION OF FARM MACHINERY IN ITS RELATION TO THE PRODUCTIVITY OF LABOR IN THE AGRICULTURE OF THE UNITED STATES DURING THE NINETEENTH CENTURY* 125-53 (1931). THOMAS, *CITIZENSHIP, GENDER, AND WORK* at 51-56, appears to suggest that the family farm, whose members were all "trained in the totality of production skills," was a viable alternative to the "strategy," developed by larger entities, of employing low-wage unskilled seasonal labor. The crucial event, however, was uneven mechanization; by enabling farm families to cultivate much larger areas of fruits and vegetables than they alone could harvest, it inexorably created a demand for such labor. Had fruit and vegetable harvesting been mechanized as quickly as was wheat, the migrant system would not exist today.

¹⁵COMM'N ON AGRICULTURAL WORKERS, HEARINGS 5 (Las Cruces, N. M., Oct. 23, 1991) (statement of Comm'r Philip Martin); Memorandum from Comm'r Philip Martin to Comm'rs at 3 (Oct. 28, 1991).

make it just barely physically possible for employers "to haul these people back and forth from the border" every night,¹⁶ even though it is not humanly possible for the harvesters to sustain the accompanying physical stress and strain.

Caught up in an employment system that has been called "the most barbaric and inhumane in the country," workers who live in Ciudad Juarez have to leave their homes before 10 p.m. in order to catch the last buses across the border to reach the shape-up in El Paso by midnight. If they succeed in fighting their way to a seat on an employer's bus, they leave for the fields, which are 2 to 3 hours away, at 2 a.m. By the time work begins at 6 a.m. the workers have already been on the move for as long as normal workers work. They then pick until 2 p.m. The employers' primitive payroll system forces the workers to wait another two hours every day to be paid. The crew leaders then deposit them in El Paso by 7 p.m. Because it would be senseless to go home to Juarez literally for a few minutes before beginning the cycle all over, hundreds of workers--who are otherwise not homeless--must spend the few hours that are even nominally theirs on the sidewalks of El Paso trying to preserve enough strength to prevail over their competitors at the next middle-of-the-night shape-up to gain a seat on the bus and thus employment for the next day.¹⁷

The Chile harvesters, who "live like zombies traveling most of the night and sleeping on a rickety school bus,"¹⁸ have the worst of all worlds: the cattle-like treatment of day-haul workers; the separation from home typical of migrant workers; and the street existence of the homeless. Eighteen-hour days with three hours sleep on the street make workers so enfeebled that they are disabled

¹⁶COMM'N ON AGRIC. WORKERS, HEARINGS at 6 (statement of Don Hackey, Chairman, N.M. Chile Comm'n)

¹⁷Suzanne Gamboa, *Chili Pickers Want a Better Life*, El Paso Herald-Post, Dec. 21, 1990, at B5. Until they were expelled in 1991, hundreds of these workers had been "sleeping under the interstate highway bridges...in...New Mexico." Louise Palmer, *Border Union*, TEX. OBSERVER, Feb. 8, 1991, at 4. The employers have thus given an unanticipated meaning to the characterization that Sen. Javits once gave of the purpose of protecting migrants under FLSA: "farm workers...are entitled to some very basic concrete floor under them..." 112 CONG. REC. 20,623 (1966).

¹⁸Lee Gemoets, *Housing Troubling Migrant Workers*, Sun-News (Las Cruces), Sept. 5, 1990, at 1A, at 2A col. 3 (quoting Rosa Garcia, exec. dir., Tierra Del Sol Housing Corp.).

from working every day.¹⁹ This grueling regime--fit for a chronicler with the stature of a Charles Dickens or an Upton Sinclair--has been successful because, while it exhausts the individual worker, it always has at its disposal an inexhaustible supply of impoverished laborers.

The principal reason that chile pickers have to spend as many as thirteen hours a day waiting and travelling and most of their free time sleeping on the sidewalks is that the chile industry refuses to provide housing despite the fact that amortization of the capital investment in typical migrant housing amounts to only 25 to 40 cents per worker-hour.²⁰ The employers' argument--if the workers "are willing to accept a job in New Mexico, they ought to be willing to accept the wages they get and not demand payment for travel"²¹--overlooks the fact that, unlike other employees, the chile pickers cannot move closer to their work. Not only are the farmers unwilling to finance housing, but even if the workers could pay for their own housing--which their subminimum wages preclude--growers refuse to pay higher taxes to finance the additional infrastructure (especially schools) that a resident permanent or even seasonal labor force would represent.²²

A near-monopoly in the national chile pepper market has made processors and growers prosper: year after year the New Mexico Agricultural Experiment Station reports that chile is "one of

¹⁹Palmer, *Border Union* at 4; Alfredo Corchado, *They're Shadows in Unfriendly Night*, *El Paso Herald-Post*, Sept. 22, 1990, at B-5.

²⁰CHILE: DOMESTIC AGRICULTURAL IN-SEASON WAGE SURVEY REPORT 1990 (n.d.); COMM'N ON AGRIC. WORKERS, HEARINGS at 17 (statement of Robert Porter, acting V.P., N.M. Farm Bureau); 2 FINAL REPORT: THE FARM LABOR SUPPLY STUDY at 71-72. Although chile farmers complain that it is not practical to provide housing for harvesters of a crop with such a short season, the July through December harvest period is considerably longer than most seasons in the North where free housing is the norm for an obvious reason: minimum wage-migrants cannot afford to pay rent in addition to maintaining a permanent residence. 1 KISSAM & GRIFFITH, FINAL REPORT: THE FARM LABOR SUPPLY STUDY at 54, 104, 117 n.8 (1991); 2 *id.* at 32.

²¹Amy Boardman, *The New Mexico Chile Field Wars*, *TEX. LAWYER*, June 3, 1991, at 1, 25, col. 5 (quoting Dan Byfield, *Tex. Farm Bureau*, farm labor coordinator).

²²TIERRA DEL SOL HOUSING CORP., DONA ANA COUNTY FARM LABOR HOUSING MARKET STUDY, App. C (1988) (farmer surveys); Memorandum from Comm'r Philip Martin at 3. Although workers view even a trailer near the fields as a marked improvement, on an annual income of \$6,000 "even the most basic accommodations" are out of the question. Barbara Ferry, *Chili Pepper Pickers Protest Poverty Pay*, *Guardian*, May 1, 1991, at 5, col. 1-2.

the big winners" and "profitable."²³ With the net operating profit and acreage of chile farms rising strongly "New Mexico is churning out chiles as fast as the ground will yield them."²⁴ The chief reason for the prosperity of the industry is that demand is increasing so rapidly that the market will bear price increases.²⁵ In spite of this extraordinarily favorable market position, growers, who "rely on a ready supply of inexpensive Mexican farm labor," are not satisfied with the already existing massive oversupply of labor; they have therefore petitioned for permission to import workers from the interior of Mexico under federal auspices.²⁶

Because chile is the most labor-intensive crop in New Mexico, the industry has taken special measures to maintain its "supply of cheap labor."²⁷ Just how "cheap" farmers have succeeded in making their labor can be seen from the fact that the average

²³N.M. AGRIC. EXPERIMENT STATION, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1985, at 23 (Research Rep. 612, 1987); *idem*, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1986, at 7 (Research Rep. 633, 1989); *idem*, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1987 (no pagination) (Research Rep. 648, 1990). "New Mexico...provides more than two-thirds of total chile production." Harvest Labor Shortage: Report by the Agricultural Labor Committee to Senator Pete Domenici at 1 (1990).

²⁴Jim Robbins, *Care for a Little Hellish Relish? Or Try a Hotsicle*, SMITHSONIAN, Jan. 1992, at 42, 48; USDA, N.M. AGRIC. STATISTICS SERV., NEW MEXICO AGRICULTURAL STATISTICS 1990, at 70. N.M. AGRIC. EXPERIMENT STATION, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1984, table A4 at 26 (Research Rep. 611, 1987); *idem*, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1989, tables A4 & A5 (no pagination) (1992).

²⁵Palmer, *Border Union* at 5; Ruth Hamel & Tim Schreiner, *Chile Pepper Market*, AM. DEMOGRAPHICS, Aug. 1988, at 54; Jocelyn Lieu, *New Mexico Thriving on Chile's Variety*, PACKER, Jan. 27, 1990, at 47B, col. 1; Del Jones, *High-Tech Harvest*, El Paso Times, May 26, 1991, at 1A, 4A. In 1991 salsa displaced ketchup as the best-selling condiment in the United States. Molly O'Neill, *New Mainstream: Apple Pie and Salsa*, N.Y. Times, Mar. 11, 1992, at B1, col. 1 (nat. ed.).

²⁶Robbins, *Care for a Little Hellish Relish?* at 48-50. They sought special dispensation from the statutory requirements imposed on all agricultural importers of so-called H-2A workers to pay workers' compensation, provide housing, or guarantee workers employment for at least three-fourths of the workdays in the work contract. Harvest Labor Shortage at 6.

²⁷COMM'N ON AGRIC. WORKERS, HEARINGS at 22 (statement of Comm'r Martin). Labor accounts for 27% of total operating costs. *Id.* at 3 (statement of Russell Matthews, N.M. Dep't Agric); W. Harper, T. Clevenger, & S. Pereira, *The Sensitivity of New Mexico's Irrigated Agriculture to Changes in the Farm Wage Rate* (N.M. Agric. Experiment Station Research Rep. 655, n.d. [ca. 1989]).

annual income of farm workers in Dona Ana County, the leading agricultural county in the state, is only \$4,712.²⁸ A potential problem for profitability, however, is competition from exports from Mexico with its "vast labor supplies at low wages" and a longer growing season. Although employers see mechanization--estimated to be five to ten years away--as the ultimate defense against imports, the process of displacing cheap hand-harvesters is a contradictory one.²⁹ Thus the same major New Mexico chile producer who put chile harvesters on notice that only increased productivity could justify paying wages in excess of the five dollars a day prevailing in Honduras, also conceded that: "Back in the early '80s, harvest belts were used extensively in this area. And because of cheap labor since then, we stopped using them."³⁰ As an interim strategy, employers have adopted a variety of unlawful employment practices designed to maintain profitability by keeping overall labor costs as low as possible.³¹

Although farmers complain of a shortage of labor, unlike other commodities in short supply, this allegedly scarce good never seems to rise in price. Piece rates, which have scarcely risen in a decade and systematically generate subminimum wages, are so low that chile pickers find themselves forced to take children as young as ten to work "even though they earn only \$10 a day": "It's really hard to make the children go, especially when it's so cold. But when they help, at least there's enough money for clothes." The employers' response captures the spirit of the whole system: "Why they feel they need a raise, I don't know. We aren't out there with machine

²⁸TIERRA DEL SOL HOUSING CORP., DONA ANA COUNTY FARM LABOR HOUSING MARKET STUDY at 4; NEW MEXICO AGRICULTURAL STATISTICS 1990 at 19.

²⁹Statement of the N.M. Farm & Livestock Bureau before Comm'n on Agric. Workers, Oct. 23, 1991, Las Cruces, N.M. See also Robbins, *Care for a Little Hellish Relish?* at 50; Harper, Clevenger, & Pereira, *The Sensitivity of New Mexico's Irrigated Agriculture to Changes in the Farm Wage Rate* at 14; Del Jones, *High-Tech Harvest*, El Paso Times, May 26, 1991, at 1A, 4A; Keith Whelpley, *Progress Shakes Chile Fields*, Las Cruces Sun-News, Oct. 6, 1991, at 1A; *idem*, *Progress Threatens Migrants*, *ib.*, Oct. 7, 1991, at 1A.

³⁰COMM'N ON AGRIC. WORKERS, HEARINGS at 19, 21 (statement of Dino Cervantes).

³¹A recent investigation by the U.S. Department of Labor (DOL) found that 90% of them were violating federal labor laws. Suzanne Gamboa, *Investigators Crack Down On Chili-Industry Violations*, El Paso Herald Post, Nov. 3, 1990.

guns, making them work. They're not indentured."³²

There is a purpose to this orneriness. The general practice has been for crew leaders to hire workers between midnight and 2:00 a.m. in El Paso and to drive them to Deming, N.M., where the drivers make phone calls to determine the location of the fields to be harvested that day. In the only instance of a collective labor agreement in the industry, the contract specified that the workers would not report to the meeting place in El Paso until 5:00 a.m. and "were guaranteed a job for the duration of the contract."³³ Thus where a farmer knows in advance who his workers are and where they will be harvesting, he does not require a mobile crew and does not need a crew leader to provide one. Farmers who operate through crew leaders, in contrast, wish to heighten workers' anxiety of not being rehired each day because the fear of dismissal will cause workers to work even harder; they also wish to keep the workers mobile in order to retain the flexibility of sending them at the latest possible moment to the fields that the farmers want harvested. These farmers have structured their operations in such a way as to receive the benefits of mobility, fungibility, and availability without having to compensate their workers for them.

The migrant wheat harvesters' labor market, in sharp contrast, is distinguished by several crucial characteristics. First, the fact that this army of single white males was largely unencumbered by families to support may well have raised their reservation wage even before some joined the International Workers of the World about the time of World War I.³⁴ The following contemporaneous

³²Palmer, *Border Union* at 4, 5 (quoting working parent and Don Hackey); Vega v. Gasper.

³³Boardman, *The New Mexico Chile Field Wars* at 25, col. 6.

³⁴"The migratory's lack of a family to tie him to one location and the constant presence of free railroad transportation made him difficult to control." Allen Applen, *Migratory Harvest Labor in the Midwestern Wheat Belt, 1870-1940*, at 110 (Ph.D. diss. Kansas State U. 1974). According to Applen, the "heavy labor and rapid movement through the fields" made the work inappropriate for children and hence for women. *Id.* at 82. See generally, Paul Taylor, *Origins of Migratory Labor in the Wheat Belts of the Middle West and California: Second Half of the Nineteenth Century*, in *Migrant and Seasonal Farmworker Powerlessness: Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess., pt. 8-C, at 6258 (1970); McWILLIAMS, *ILL FARES THE LAND* at 91-108; STUART JAMIESON, *LABOR UNIONISM IN AMERICAN AGRICULTURE* 396-405 (BLS Bull. No. 836, 1945); Philip Taft, *The I.W.W. in the Grain Belt*, 1 LAB. HIST. 53 (1960); THOMAS ISERN, *BULL THRESHERS AND BINDLESTIFFS: HARVESTING AND THRESHING ON THE NORTH AMERICAN PLAINS* (1990) (most detailed account). Philip Eastman, *This Year's Big*

observations by a labor economist and an official of the U.S. Employment Service on a group of 500 wheat harvesters passing through Hutchinson, Kansas in the 1920s capture the image well:

"They're not hoboes, either, Harry. Look at their stride."
 "No, those are the boys from Missouri, Arkansas and Oklahoma. They come through here every year...." And fine boys they were, straight, strong and bronzed; with a spring in their stride and a laugh on their lips. Clad in clean overalls, some carrying bundles or suitcases, but hundreds with only their working clothes on their backs, the boys of the Southwest were coming to the harvest.³⁵

Credulity is snapped by the effort to imagine an analogous appreciation of Mexican-American, black, or Guatemalan migrants on their way to cultivate the sugar beets or to harvest the apples, onions, or cucumbers of a grateful midwestern farm community.

Second, migrant wheat harvesters did not rely exclusively on this or any other crop. Many had other seasonal employment (such as forestry, railroad, mining, and factory work) while others temporarily abandoned jobs as skilled building mechanics to harvest wheat. Railroads at the turn of the century, for example, had to raise their daily wages to section crews to discourage them from abandoning their work for the wheat harvest.³⁶ A third crucial factor was the extensive use of capital equipment; the pace of work set by

Wheat Harvest in Kansas, REVIEW OF REVIEWS, July 1903, at 193, speaks of the 28,000 harvesters in Kansas as "a force half as large as the standing army of the United States." For an impressive narrative of the logistics of the labor process replete with military rhetoric, see C. Coffin, *Dakota Wheat Fields*, 60 HARPER'S NEW MONTHLY MAG. 529, 534 (1880). In 1920-21, ninety per cent of wheat harvesters were native-born Americans and only eighteen per cent had families; even some of the latter, however, did not support their families. DON LESCOHIER, SOURCES OF SUPPLY AND CONDITIONS OF EMPLOYMENT OF HARVEST LABOR IN THE WHEAT BELT 3, tab. 5 at 8 (USDA Bull. No. 1211, 1923). Economically irrational racism may have underlain the exclusion of nonwhites; a handbill advertising for wheat harvesters in Kansas in the early 1920s specified: "Cannot use colored." Don Lescohier, *Hands and Tools of the Wheat Harvest*, SURVEY, July 1, 1923, at 376, 378. Although many "unaccompanied males" currently work as migrants, they are largely Latin Americans who are supporting families and are among the most vulnerable farm workers. See 1 KISSAM & GRIFFITH, FINAL REPORT: THE FARM LABOR SUPPLY STUDY at 47, 57, 100-101, 197.

³⁵Lescohier, *Hands and Tools of the Wheat Harvest* at 376.

³⁶Applen, *Migratory Harvest Labor* at 82-83; Don Lescohier, *Harvesters and Hoboes in the Wheat Fields*, SURVEY, Aug. 1, 1923, at 482, 486-87; *idem*, *Hands and Tools of the Wheat Harvest* at 381-82, 412; *idem*, SOURCES OF SUPPLY at 3-5 (five per cent were farmers).

the machines created a customary capital-labor ratio that, in conjunction with the use of daily wage rates--piece rates would have been difficult to calculate--disciplined individual farmers not to overhire.³⁷ Unlike hand-harvest fruit and vegetable workers, wheat harvesters "were looked upon as a necessary adjunct to the machines used in harvesting."³⁸ Unlike other migrant agricultural employment, which was and remains disarticulated from other labor markets, wheat farming

[wa]s dependent upon the industrial labor supply for so large a portion of its seasonal labor that the state of employment in cities, and the wages, hours, and conditions of employment in urban occupations largely determine[d] the amount of labor available for farm work...and the price which the farmer must pay for it.³⁹

Thus despite a chaotic labor market characterized by excess supply, "[t]he lure of the harvest fields at times resulted in labor shortages in cities located near the Wheat Belt."⁴⁰ Consequently, wheat harvesters normally received hourly wages in excess not only of those of contemporary urban unskilled labor but also of those that migrant fruit and vegetable harvesters or sugar-beet workers would receive for decades.⁴¹

³⁷See William Draper, *Solving the Labor Problem of the Wheat Belts*, in 26 REV. OF REVIEWS 70 (1902); HIRAM DRACHE, *THE DAY OF THE BONANZA: A HISTORY OF BONANZA FARMING IN THE RED RIVER VALLEY OF THE NORTH* 115-16 (1964).

³⁸Allen Applen, *Labor Casualization in Great Plains Wheat Production: 1865-1902*, J. OF THE WEST, Jan. 1977, at 5, 6. See also William White, *The Business of a Wheat Farm*, 22 SCRIBNER'S MAG. 531, 539 (1897) (picture of workers feeding wheat thresher).

³⁹LESCOCHIER, SOURCES OF SUPPLY at 3.

⁴⁰Applen, *Migratory Harvest Labor* at 81.

⁴¹See DON LESCOCHIER, HARVEST LABOR PROBLEMS IN THE WHEAT BELT 30-35 (USDA Bull. No. 1020, 1922); *idem*, CONDITIONS AFFECTING THE DEMAND FOR HARVEST LABOR IN THE WHEAT BELT 32-37 (USDA Bull. No. 1230, 1924) (hourly wages ranged from twenty to ninety cents including the depression year of 1921); Draper, *Solving the Labor Problem of the Wheat Belts* at 70 (harvesters in Kansas at turn-of-century paid \$1.50 to \$4.00 daily); GEORGE HOLMES, WAGES OF FARM LABOR tab. 17 at 36-37 (USDA Bureau of Statistics Bull. 99, 1912) (by 1906 daily wage rate for harvest labor without board exceeded three dollars in North Dakota). As early as 1873 Wisconsin farmers paid wheat harvesters two to three dollars per day. MERLE CURTI, *THE MAKING OF AN AMERICAN COMMUNITY: A CASE STUDY OF DEMOCRACY IN A FRONTIER COUNTY* 168 (1969 [1959]). Toward the end of the nineteenth century, even sack fillers on steam combines received considerably higher wage rates than hand-harvesters of vegetables. 2 U.S. COMM'R OF LABOR, THIRTEENTH ANNUAL REPORT,

In fruit and vegetable harvesting, in contrast, "there has been a perfectly elastic supply of low-wage Spanish-speaking foreign agricultural labor available in the United States"⁴² whose un-First-World-like permanent poverty compels them to operate virtually without a reservation wage.

Where would growers find domestic workers willing to migrate from harvest to harvest at substandard wages, working, and living conditions if there were not poverty and unemployment in the home areas of our migratory farm work force? ... If this pool of underprivileged workers were not available, American growers would have to compete on the open market for their labor. They, like industrial employers, would have to plan their production schedules in accordance with the labor market situation. [T]hey would be forced to raise employment standards in agriculture.⁴³

The disarticulation of the hand-harvest labor market from urban labor markets is strikingly illustrated by comparing the responses of migrant farm workers and local non-agricultural unemployed workers to offers of harvest jobs. The divergence in the extreme case leads to "the formation of a transnational labor market, almost completely disengaged from the local labor market."⁴⁴ When the so-called bracero program, under which the federal government organized the importation of agricultural laborers from Mexico for two decades beginning with World War II,⁴⁵ came under attack in the early 1960s, pickle processors and farmers from Michigan testified before Congress that they were unable to interest any of the thousands of unemployed General Motors and Ford workers in this

1898: HAND AND MACHINE LABOR 449-51, 468-69, 472-73 (1899). As late as 1950 the going rate for "stoop labor" in the Rio Grande Valley was twenty cents per hour. 3 & 4 PRESIDENT'S COMMISSION ON MIGRATORY LABOR, STENOGRAPHIC REPORT OF PROCEEDINGS HELD AT BROWNSVILLE, TEXAS 31 (July 31, 1950) (testimony of Mr. McElrath, grower, Cameron County).

⁴²Wallace Huffman, *Costs and Returns: A Perspective on Estimating Costs of Human Capital Services and More*, in AM. AGRIC. ECON. ASS'N-U.S. DEP'T OF AGRIC.-ECON. RESEARCH SERVICE CONFERENCE ON ECONOMIC ACCOUNTING FOR COMMODITY COSTS AND RETURNS 17 (1991).

⁴³107 CONG. REC. 7711 (1961) (Rep. Santangelo).

⁴⁴Robert Smith, *The Mushroom Industry in Chester County, Pennsylvania*, in 2 IMMIGRATION REFORM AND PERISHABLE CROP AGRICULTURE: CASE STUDIES 48, 58 (Monica Heppel & Sandra Amendola ed. 1991).

⁴⁵The postwar program was created by Pub. L. No. 82-78, 65 Stat. 119 (1951). For further discussion, see *infra* § IV.

"hard, hot, dirty, backbreaking job" "irrespective of what rates of pay, within reason, at least, we offer...."⁴⁶ The limit within reason turned out to be eighty-seven cents per hour.⁴⁷ At a time when even janitors and other unskilled workers at GM and Ford were earning four times that amount, and the national statutory minimum wage was \$1.15, the pickle employers wondered out loud how they could possibly compete with unemployment insurance.⁴⁸ The answer, however, was clear: "[U]nless they are faced with the alternative of out-and-out starvation, I do not think we will ever be able to get a substantial number of domestics...."⁴⁹ It was employers' good fortune that the exclusion of farm workers from unemployment insurance systems kept alive the "alternative of out-and out starvation" for migrants.⁵⁰

A more recent example involves the New York City area. The shortage of accessible labor for retail, service, and clerical employment in the surrounding counties led to "bringing in employees from as far away as" thirty-five miles; consequently, "the minimum wage of \$3.35 an hour is meaningless; no one works for

⁴⁶*Extension of Mexican Farm Labor Program: Hearings Before the Subcomm. on Equipment, Supplies, and Manpower of the House Comm. on Agriculture*, 87th Cong., 1st Sess. 185, 182 (1961) (testimony of Herbert Turner, farmer). The representative of the National Pickle Growers Ass'n allowed that not even for \$2 per hour was it possible to recruit "Detroit style Americans" to pick pickles. *Extension of Mexican Farm Labor Program: Hearings Before A Subcomm. of the Senate Comm. on Agriculture and Forestry*, 87th Cong., 1st Sess. 126-27 (1961) (*Extension of Mexican Farm Labor Program* (Senate)) (testimony of Robert Ford). In fact, non-bracero workers were easily found after the program was terminated. See *infra* ch. 6; Donald Wise, *The Effect of the Bracero on Agricultural Production in California*, 12 ECON. INQUIRY 547 (1974).

⁴⁷*Extension of Mexican Farm Labor Program* at 179 (testimony of Robert Ford, Nat'l Pickle Growers Ass'n). Even this amount was not a guaranteed hourly rate, but merely the sum to which the piece rate worked out for the braceros. That the employers had aggregate data on hours and earnings to the penny is implausible.

⁴⁸See ROBERT MACDONALD, *COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY: A STUDY OF WAGE STRUCTURE AND COMPETITIVE RELATIONS* tab. 13 at 142 and tab. 14 at 144 (1963); *Extension of Mexican Farm Labor Program* at 197 (testimony of H. Turner). See also *Extension of Mexican Farm Labor Program* (Senate) at 124-25 (testimony of A. Hildebrand, Heinz Growers Employment Comm'n) (competition with such crops as cherries, blueberries, and tomatoes "that are more glamorous and are easy to pick").

⁴⁹*Extension of Mexican Farm Labor Program* at 185 (testimony of R. Ford).

⁵⁰See *infra* ch. 6 on the large number of "domestic" migrants now picking pickles.

less than \$5 an hour.⁵¹ At the same time, in Orange County, fifty miles from New York City, onion and sod farmers have no trouble finding migrants from South Texas willing to travel 2,000 miles to work for \$3.35 an hour; at sixty hours weekly, the workers consider six months of minimum-wage employment a good job. The availability of a vast permanent reserve army of impoverished yet nationally mobile unemployed farm workers functions as such a massive depressant that even significant surges in demand do not result in higher wage rates.⁵²

In urging Congress to make even larger numbers of Third-World workers available to agricultural employers, an agribusiness representative unabashedly extolled the one-sided advantages of the migrant system for employers:

This migration has been very effective in meeting the production needs of the growers and represents the product of an intelligence system that has developed and directs migrant workers to those farms where the need exists for a particular crop at a particular time.

The system is unstructured but it is highly effective in providing the necessary manpower to harvest a large number and variety of crops that ripen in rapid succession, and which are highly susceptible to changes in weather conditions. The fact that the system is so effective should not be surprising because what it does, in simplest terms, is employ the basic principles of a free market system—supply and demand. When the demand for workers is there, even when it is an emergency requiring help within hours, the free market system as now exists is flexible enough to supply those workers in time to harvest the crops.⁵³

And despite the fact that "[t]he mass importation of Mexican

⁵¹Anthony DePalma, *Bounties and Vans: Facing a Labor Shortage*, N.Y. Times, Jan. 26, 1989, at 41, col. 4 (nat. ed.); see also Dirk Johnson, *Youth Labor Scarcity Forcing Up Low-Level Pay in New York Area*, *id.*, Mar. 17, 1986, at 15, col. 2; (nat. ed.); Nick Ravo, *Connecticut Raises Its Minimum Wage*, *id.*, Oct. 2, 1987, at 39, col. 1 (nat. ed.).

⁵²"[I]n the Rio Grande Valley farmers could cut wages in half and still have fields of pickers. [T]he available supply of labor makes all other wage considerations unimportant...." Tina Rosenberg, *Farm Workers Don't Have to Be Poor*, WASH. MONTHLY, April 1989, at 22, 26. C. MACPHERSON, *THE RISE AND FALL OF ECONOMIC JUSTICE* 138 (1987 [1985]), uncovers a similar mechanism at work in the seventeenth-century political economy of Hobbes.

⁵³*Immigration Reform and Control Act of 1985: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 186–87 (1985) (statement of Michael Durando, Pres., Cal. Grape & Tree Fruit League & Farm Labor Alliance).

nationals...ha[d] made the law of supply and demand inoperative,"⁵⁴ Congress vindicated the employers' position by amending the immigration laws so as to throw even more penurious workers onto the farm labor market.⁵⁵

This 'willingness' to work for wages otherwise unacceptable in the United States undermines another indispensable prerequisite of the so-called perfect labor market: informational rationality. With individual firms and the entire industry aware that they have at their disposal an inexhaustible supply of labor living on the margin--one farm employer in the Rio Grande Valley glowingly described the 1.5 million inhabitants of the Reynosa-Matamoros area as having an "infinitesimal" per capita income--employers are often under no compulsion to reveal truthful or even any information about wage rates.⁵⁶ Many workers do not ask how much they will be paid; the intrepid ones who do are frequently told that they will find out when they get to fields--whether they are two or 2,000 thousand miles away. Others who cannot repress their curiosity as to how much they will be paid may be told that they will find out when they are paid at the end of the week.

The flimsiest of 'safety nets' constantly depresses the reservation wage of Texas migrants. Texas offers the third lowest Aid to Families with Dependent Children monthly grant in the country--\$184 for a family of three and \$284 for a family of six--amounting to a mere twenty-one per cent of the official poverty threshold. Even when food stamps are included, the income of an AFDC recipient-family in Texas rises to only fifty-three per cent of the poverty level. And unlike the two states (Alabama and Mississippi) with even lower AFDC grants, Texas lacks a general

⁵⁴107 CONG. REC. 7188 (1961) (Rep. Coad).

⁵⁵H. REP. NO. 682 PT. 1: IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1986, 99th Cong., 2d Sess. 84 (1986) ("Most consistent with the objective of creating a free-market atmosphere within the sphere of agricultural employment...is to permit any workers who now or in the future may be allowed to perform perishable agricultural labor in the United States to become lawful permanent resident aliens...").

⁵⁶JOHN MCBRIDE, *VANISHING BRACERO: VALLEY REVOLUTION* 1 (1963). McBride was a cotton farmer who published his complaints about having been caught by the DOL falsifying wage and hour records of braceros. His description of the strategy that his lawyer, a partner in the principal defense firm representing farm employers in South Texas, used in a lawsuit they filed against the DOL is extraordinarily revealing.

assistance program for adults without children.⁵⁷

Reinforced by such meager income security, the effective absence of a reservation wage exacerbates the migrants' labor market position by causing them to respond 'irrationally' to market cues. Many incumbents of low-income jobs, such as spouses working to supplement family earnings or youth living at home and "working for pin money to finance leisure-time activities," are said to be so-called target earners. Because they are seeking to earn a certain fixed amount of money, they create a perverse labor-supply curve insofar as they offer more of their labor as wage rates decline.⁵⁸ Empirically, migrant farm workers in the United States do not fit this model in the sense that they are not working to finance the purchase of a car or other consumer durable.⁵⁹ By the same token, however, because the known customary limits on the aggregate annual wages that a migrant family can piece together are far below the prevailing consumption norms even for low-income families, the

⁵⁷The poverty threshold for a three-person family in 1990 was \$10,419. HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS (1991 GREEN BOOK), 102D CONG., 1ST SESS. tab. 7 and 8 at 597-600 (Comm. Print WMCP 102-9, 1991); Don Terry, *To Avoid Deficit, Michigan Ends Welfare to Some Adults*, N.Y. Times, Oct. 7, 1991, at A1, col. 1 (nat. ed.).

⁵⁸MICHAEL PIORE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* 95-96, 95-99 (1979). PAUL SAMUELSON, *ECONOMICS* 579 n.2 (10th ed. 1976), concedes this possibility: "The labor force sometimes tends to grow in recessions: when a husband is thrown out of work, his wife and children may seek work."

⁵⁹*But see* Leslie Whitener, *The Migrant Farm Work Force: Differences in Attachment to Work*, 50 RURAL SOCIOLOGY 163 (1985), who identifies one segment of migrants as supplementing nonfarm income. Her findings result in part from concentrating on white workers and in part from the severe defects in the Hired Farm Working Force Survey. *See supra* Preface. Piore's model of "the pocket money wage earner" seems better adapted to the turn-of-the-century urban sweatshops in the industrialized economies:

A girl may wish to have a little work to do although she may possibly live in a very comfortable home. Wages with her are not the primary consideration. She simply wants to supplement her income, and she is not particular as to the rate of wages that she may get. Thus we have the paradox that the same result is achieved by the ignorant whim of the comparatively well-to-do person and of the dire necessity of the starving. Both accept work at sweated rates, and the result is sweated trade.

4 PARL. DEB. H.C. (5th ser.) 344 (1909) (H. Tennant, Parl. Sec'y of Bd. of Trade, discussing the Trade Boards Act).

drive for subsistence requires migrants to engage in the perpetual "forced sale" of their labor.⁶⁰ In this sense, a reduction of wage-rates leaves families with little choice but to increase their supply of labor by working longer hours or seasons or pressing still younger members of the family into service.⁶¹

Although farmers may be embarrassed to concede publicly that they benefit from this 'irrational' supply mechanism, they frequently confirm its existence by reference to its operation in the other direction. The personnel manager of the monopoly sugar cane producer in Florida justified the United States Sugar Corporation's opposition to an increase in the statutorily mandated wage rate for cane cutters in these terms:

[I]f we were to pay 1 cent more to these men it would be disastrous to the laborers. Now that sounds funny coming from me, being a Northerner and used to high wages...but if you were to give the 'nigger' more money than he gets now he would leave 2 months sooner because he has too much money to spend.⁶²

Ironically, however, in the case of migrants, this backward-bending (upward-sloping) supply curve does not exist.⁶³ The reason lies in the flexible scope of subsistence. A family knows from experience that it must earn (say) \$8,000 annually to survive. This target income creates the necessity of working longer hours to compensate for a decline in wage rates.⁶⁴ By the same token, however, the family would very much like to earn more income;

⁶⁰4 PARL. DEB., H.C. (5th ser.) 382 (1909) (Mr. Balfour); Robert Hale, *Minimum Wages and the Constitution*, 36 COLUM. L. REV. 629, 630 (1936).

⁶¹See Clark Kerr, *Industrial Relations in Large-Scale Cotton Farming*, in 19 PAC. COAST ECON. ASSOC. PROC. 62, 65 (1940).

⁶²*National Defense Migration: Hearings Before the Select House Comm. Investigating National Defense Migration*, 77th Cong., 2d Sess., pt. 33 at 12,969 (1942) (statement of M. Von Mach at hearing at Clewiston, Fla., Dec. 4, 1937, at 76). Similarly, a South Texas cotton farmer told Congress: "[T]he Negroes and the Mexicans...would never add much as a class...to the material goods of this world by an increase in wages, because as soon as they get an increase of wages, they simply work fewer days...." *Temporary Admission of Illiterate Mexican Laborers: Hearings Before the House Comm. on Immigration and Naturalization*, 66th Cong., 2d Sess. 94 (1920) (testimony of Fred Roberts).

⁶³See, e.g., Robert Emerson, *The Hourly Labor Supply of Agricultural Workers*, 7 SOUTH. J. AGRIC. ECON. 217, 221 (1975).

⁶⁴For contradictory speculations on this point, see LLOYD FISHER, *THE HARVEST LABOR MARKET IN CALIFORNIA 16-19* (1953).

therefore, even if wage rates rose, it would work the same or even additional hours because its income never reaches a level at which it would choose to substitute leisure--which chronic unemployment and underemployment always keep in abundant supply--for potential additional income.⁶⁵

II. Agricultural Sweatshops

[A]n attorney representing the U.S. Department of Labor meeting with pickle growers...stated that it would be necessary for growers to continue to raise the hourly rate until workers could be found who would do stoop labor. It was stated that, if picking pickles was considered difficult, we must realize that the job of a sandhog in a tunnel job was also difficult and that the latter was a job paying \$7 or more an hour. It was implied that the sky was the limit.⁶⁶

Although hand-harvesting of fruits and vegetables by migrants has not traditionally been seen as sweatshop labor,⁶⁷

⁶⁵See John Mason, *The Aftermath of the Bracero: A Study of the Economic Impact on the Agricultural Hired Labor Market of Michigan from the Termination of Public Law 78 at 65-68* (Ph.D. diss. Mich. State U. 1969) (arguing against the existence of a backward-bending supply curve of low-paid agricultural labor). In the canonical case, a theoretically indeterminate conflict emerges when a worker is offered a wage-rate increase and can also choose how many hours he will work:

You are torn two different ways: One the one hand, you are tempted to work some extra hours because now each hour of work is better paid. Each hour of leisure has become more expensive--hence you are tempted to substitute extra work for leisure. But acting against this so-called "substitution-effect" is an opposing "income-effect." With the higher wage, you are, in effect a richer man. Being richer...you will tend also to buy more leisure! Now you can afford to take Saturday off, have a week's vacation....

SAMUELSON, *ECONOMICS* at 580. Because migrants do not become significantly "richer men," they do not reach the point on the curve at which they react to a wage-rate increase by reducing the amount of labor they offer. For the example of foreign migrants in France wishing to maximize their income by working more hours at lower rates, see Jean-Pierre Berlan, *Labor in Southern French Agriculture*, in *MIGRANT LABOR IN AGRICULTURE* at 61, 64.

⁶⁶*Importation of Foreign Agricultural Workers: Hearings Before the Senate Comm. on Agriculture and Forestry*, 89th Cong., 1st Sess. 352 (1965) (statement of Paul Wolff, Sec'y, Nat'l Pickle Growers Ass'n).

⁶⁷Its use has largely been rhetorical; see, e.g., Jean Begeman, *Sweatshops on the Farm*, *NEW REPUBLIC*, July 30, 1951, at 16; Raymond Britton, *Open Sky Sweatshops*,

economic analysis suggests that that framework is appropriate.

What is the sweat shop? For the people who work in it, who compete with it...the sweat-shop has always meant a single thing. ... When pressed to specify it more exactly... they have generated a list of defining characteristics. These include abysmally low wages, long hours, piece rates, special charges for electricity, rent, and equipment, child labor, crowded shops or work at home, fire hazards, threats to safety and health, filth and decay, unscrupulous, penny pinching employers and so on. ... It seems doubtful...that sweated labor could be cured by removing any single element.⁶⁸

Common to all of these variants of the sweatshop is a distinct technique of production that makes it possible to convert all production costs into variable costs.⁶⁹ Sweating, therefore, is feasible where capital investment is relatively low⁷⁰ or can be shifted to the workers. But one further element is deemed necessary:

Whenever payment is at least partially on a time basis, labor is, during that time period, a fixed factor of production and the

1 HOUSTON L. REV. 131 (1963); *The Blue-Sky Sweatshop*, AM. FEDERATIONIST, June 1964, at 7; RONALD TAYLOR, SWEATSHOPS IN THE SUN: CHILD LABOR ON THE FARM (1973); THOMAS, CITIZENSHIP, GENDER, AND WORK at 4-5.

⁶⁸Thomas Bailey & Michael Piore, *Defending the Minimum Wage* 17 (Sept. 1979) (unpub. MS prepared for the Int'l Ladies Garment Workers U.).

⁶⁹Many analyses, especially those of the nineteenth century, take low wages as an undifferentiated defining characteristic: "maximum amount of work is performed for a minimum wage." Henry White, *The Sweating System*, in 1 BULL. OF THE [U.S.] DEPT OF LABOR 360, 360 (1896). See also, Sheila Blackburn, *Ideology and Social Policy: The Origins of the Trade Boards Act*, 34 HISTORICAL J. 43, 46 (1991). But see David Schloss, *The Sweating System*, 42 FORTNIGHTLY REV. (n.s.) 835 (1897). Contemporaries also stressed the factor of homework-subcontracting. See, e.g., REPORT TO THE BOARD OF TRADE ON THE SWEATING SYSTEM AT THE EAST END OF LONDON, at 3 (89 PARL. PAP. 331 [H.L.] 1887); H. MACROSTY, SWEATING: ITS CAUSE AND REMEDY (Fabian Tract No. 50, 1894).

⁷⁰See WILLIAM WILLOUGHBY, REGULATION OF THE SWEATING SYSTEM 4 (1900). In contrast to the situation in agriculture, employers in the sweated clothing trades could avoid fixed investment in buildings and equipment by requiring workers to operate their own sewing machines in their own apartments. See PAUL BOYAVAL, LA LUTTE CONTRA LE SWEATING-SYSTEM: LE MINIMUM LÉGAL DE SALAIRE, LE EXEMPLE DE L'AUSSTRALASIE ET DE L'ANGLETERRE 39-40 (1911). For the distinct case of cutthroat competition in industries (such as cotton textiles) with significant capital investment (and excess capacity) that is sustained by an above-average degree of exploitation, see Lloyd Reynolds, *Cutthroat Competition*, 30 AM. ECON. REV. 736 (1940).

employer has an incentive to get as much work out of his labor force during the payment period as possible. When payment is by the piece, however, and plant and equipment costs are trivial or are shifted to the worker..., the employer has no incentive to worry about efficiency. His costs are the same, no matter how much or how little is produced per hour. ... The key factor is that...hourly productivity is low because...nobody is concerned about hourly productivity. Because hourly productivity is low, wages are low. Hours are long because, given payment by the piece, the incentive...to economize on hours is missing. The sweat-shop is associated with an inordinate amount of child labor because once payment is by the piece, an incentive to avoid workers with a low hourly productivity like children is removed.⁷¹

These fundamental prerequisites of sweated labor, especially the conversion of all costs into variable ones, are all given in the hand labor that migrant farm workers perform.⁷² If agricultural employers, unencumbered by capital investment in hand-harvesting, increase the number of workers beyond that necessary to harvest the crop, the total wage bill may remain unchanged, but the average wage of the larger work force declines. "But the grower, in contrast to the worker, is in consequence better off with too many workers rather than too few"⁷³ insofar as "more workers will get the job done

⁷¹Bailey & Piore, *Defending the Minimum Wage* at 19.

⁷²See Berlan, *Labor in Southern French Agriculture* at 64. "Workers employed in hand harvest of most fruits, berries, many vegetables...and in the hand thinning and weeding of many vegetable and field crops are still performing their jobs in about the same way they were done many years, even decades ago." *Extension of Mexican Farm Labor Program* (Senate) at 9 (testimony of Matt Triggs, Am. Farm Bureau Fed'n). As Elizabeth Brandeis, *Migratory Labor in Wisconsin*, in *LABOR, MANAGEMENT, AND SOCIAL POLICY: ESSAYS IN THE JOHN R. COMMONS TRADITION* 197, 223 (Gerald Somers ed. 1963), noted: "If the fruit and vegetable fields resemble factories, it is the factories of the very early 1800's, not of the twentieth century." Although agricultural employers of migrants may have significant capital investments, migrants typically do not work in those phases of the operation. Significantly, the principal federal legislation protecting migrants excludes those working in certain mechanized operations. 29 U.S.C. § 1803(a)(3)(E) (1985).

⁷³*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 201 (1960) (prepared statement of Lloyd Gallardo, Dep't Econ., Mich. State U.). Because "[p]iece rates ensure that wage costs per unit of output are constant, regardless of how many workers are employed or the speed at which they work...wage costs do not impose a constraint on recruiting decisions." Howard Leftwich, *The Migratory Harvest Labor Market: An Illinois Case Study* 111 (Ph.D. diss. U. Ill. 1965). In explaining why Congress should have permitted farm employers to pay piece rates that would not have guaranteed all workers the minimum wage, Senator Prouty asserted that the

faster and minimize weather risks."⁷⁴ This built-in incentive to overrecruit thus systemically shifts risk to the workers while leaving unit labor costs independent of labor productivity.⁷⁵

In theory, "[t]he sweatshop system begins to disappear as soon as one introduces a minimum hourly rate which is high enough to create an employer concern with productivity...[which] also forces the employer to reorganize the shop in order to gain control over the pace of work...."⁷⁶ In fact, however, the peculiar defects of the "unstructured" market for migrant labor⁷⁷ make it possible for employers to sweat even hourly paid employees.⁷⁸ Given the

exploitation of piece-rate workers in industrial sweatshops was irrelevant because they were associated with assembly lines which forced all workers to work at the same fast pace, whereas in farming "[t]he earnings of one worker are in no way dependent upon the production of any other worker...." 112 CONG. REC. 22,653 (1966). The latter claim is wrong: since there is a finite acreage, faster workers can increase their wages by taking away acreage from their slower co-workers. More importantly, the capital embodied in mechanically driven assembly lines disciplines industrial employers with regard to the size of the work force and productivity. In order to show that "the agricultural work process changed...as rapidly as in any of the most advanced industries," Valdés refers to "classic speed-up tactics...that pushed...pickers." That this claim understates the fundamental difference between agricultural sweatshops and industrial methods of relative surplus value production emerges when Valdés notes that the pickle-picking "system was so lax that growers and corporations seldom knew how long workers spent in the fields." DENNIS VALDÉS, *AL NORTE: AGRICULTURAL WORKERS IN THE GREAT LAKES REGION, 1917-1970*, at viii, 142, 145 (1991).

⁷⁴Philip Martin, *Introduction*, in *MIGRANT LABOR IN AGRICULTURE* at 1, 4.

⁷⁵Lloyd Gallardo, *An Evaluation of United States Department of Labor Policy Regarding Wages Paid Mexican Nationals: Michigan Pickles, A Case Study* 51 (Ph.D. diss. U. Cal. 1962). See generally, Max Pfeffer, *The Labor Process and Corporate Agriculture: Mexican Workers in California*, *INSURGENT SOCIOLOGIST*, Fall 1980, at 25.

⁷⁶Michael Piore, *Labor Standards and Business Strategies*, in *LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY* 35, 38 (Stephen Herzberg & Jorge Perez-Lopez ed., U.S. Bureau Int'l Lab. Affairs, 1990).

⁷⁷FISHER, *THE HARVEST LABOR MARKET IN CALIFORNIA* at 7-9, defines an unstructured labor market by reference to five characteristics: 1. the absence of unions; 2. impersonal employer-employee relationships; 3. an unskilled and unspecialized labor force; 4. piece-rate compensation making the employees' competence irrelevant (at least in the period before the applicability of a mandatory minimum wage); and 5. little or no capital investment in machines, which would impose a structure on the number of workers required.

⁷⁸It nevertheless remains the case that "[w]here they are paid by the piece, there the interest which the workman has in the value of his work supersedes the use of coercion, and of every expedient calculated to give force to it." JEREMY BENTHAM, *PANOPTICON; OR THE INSPECTION-HOUSE*, in 4 *THE WORKS OF JEREMY BENTHAM* 60 (John Bowring ed. 1843 [1791]).

enormous overhang of supply, the desperate economic situation of the reserve army of the underemployed, and the extreme at-will day-to-day tenure, employers can, at little or no cost of supervision, slough off the least productive workers at the end of the day or even of an hour.⁷⁹ The workers' urgent need for any amount of income and the inveterate practice of overrecruiting will still insure that the requisite output will be forthcoming.⁸⁰ Finally, weak enforcement of the statutory minimum may in effect restore the piece-rate system.

The typical macroeconomic consequence of the sweatshop is particularly prominent in agriculture: the employer avoids internalizing the full social costs of the labor it employs by externalizing a part onto taxpayers at large in the form of welfare payments, medicaid, food stamps, and housing allowances--or, as Walter Lippmann once phrased it, onto the workers themselves "in slow starvation." Under sweatshop conditions, "agricultural wage labor...is simply an auxiliary to a system of public poor relief."⁸¹

The unpaid labor is in part family and especially child labor--a feature which almost uniquely links farm work to old-fashioned tenement sweatshops.⁸² Significantly, the agricultural family sweatshop is not restricted to (migrant) wage laborers: the massive use of unpaid spousal and child labor by juridically self-

⁷⁹But when asked why cotton farmers did not pay pickers hourly or daily wages, one farmer replied that "that would call for supervision and foremen to keep them at work." *Temporary Admission of Illiterate Mexican Laborers* at 92 (testimony by Fred Roberts in response to question from Rep. Raker).

⁸⁰The foregoing scenario should be contrasted with the following sanitized model:

Workers voluntarily undertake to be supervised; a certain amount of compulsion will be characteristic of competitive equilibrium. . . . They submit to being compelled to work harder than direct incentives provide for, because the consequence is a higher expected utility. Although each worker may resent this compulsion and feel it is unnecessary on his own part, he prefers to work for firms which use this compulsion, recognizing that without it, some of his colleagues will slough on the job, and thus firms which employ some degree of compulsion are able to pay higher wages.

Joseph Stiglitz, *Incentives, Risk, and Information: Notes Toward a Theory of Hierarchy*, 6 BELL J. ECON. 552, 571-72 (1975). See also Steven Cheung, *The Contractual Nature of the Firm*, 26 J. LAW & ECON. 1, 8 (1983) (riverboat-pullers in pre-1949 China "actually agreed to the hiring of a monitor to whip them").

⁸¹Walter Lippmann, *The Campaign Against Sweating*, NEW REPUBLIC, Mar. 27, 1915, Supp., at 1; 88 CONG. REC. 8327 (1941) (Sen. La Follette) (explaining the need for comprehensive regulation of the farm labor market).

⁸²See, e.g., MCWILLIAMS, *ILL FARES THE LAND* at 243-47.

employed farm operators underwrites agricultural sweating at large.⁸³ Most dramatically this paternal and self-exploitation manifests itself in sub-minimum-wage income returns to family farm labor. Legislators opposed to FLSA have used this trope repeatedly to highlight an inconsistency in the law. At the time of the original enactment in the 1930s, southern congressmen urged the unfairness of mandating forty-cent hourly wages for industrial workers while cotton farmers received eight to eleven cents an hour for their labor. And when Congress debated extending the minimum wage to farm workers in 1966, one legislator declared that "when you take into account all the hours that a farmer works and then take into account the dollar amount of his investment, many are working to end up with something like 42 or 45 cents per hour...."⁸⁴

Although small farm employers remained exempt from minimum-wage obligations even after the 1966 amendments to FLSA covered agricultural employment for the first time, some legislators sought to soften their potential ideological resistance to any coverage by asserting that a FLSA that restricted coverage to

⁸³The failure to secure ratification of the federal child labor amendment in the 1920s and 1930s in part reflected farmers' success in keeping parental exploitation of children a private matter. See *Proposed Child-Labor Amendments to the Constitution of the United States: Hearings Before the House Comm. on the Judiciary*, 68th Cong., 1st Sess. 34-35 (1924) (statement of Grace Abbott, Chief, Children's Bureau). This enclave of exploitation has been rigorously and expansively preserved in FLSA so that family labor does not even count toward the threshold level of nonfamily labor that triggers coverage. 29 U.S.C. §§ 203(e)(3) & (u) and § 213(a)(6)(B) (1978 & Supp. 1991). During the postwar period, as farms became fewer but larger, hired labor as a share of all farm labor has risen. VICTOR OLIVEIRA, *TRENDS IN THE HIRED FARM WORK FORCE, 1945-87* tab. 1 at 1, tab. 2 at 2 (ERS, Agric. Infor. Bull. No. 561, 1989). Because unpaid family workers—as contradistinguished from the farm operator—are counted only if they work fifteen hours or more during the survey week, the data are understated. See USDA, *AGRICULTURAL STATISTICS 1989*, tab. 551 at 388 n.2 (1989). Thus recent data implausibly show that there is only one unpaid family worker in agriculture for every fourteen self-employed farm operators. *EMPLOYMENT & EARNINGS*, Jan. 1991, tab. 23 at 191. In 1969, the ratio was almost one to three. *Id.*, Jan. 1970, tab. A-18 at 116. Although the exclusion of children under sixteen from data collection also understates the number of unpaid family workers, the fact that only 10,000 sixteen and seventeen year-old farm boys were returned as unpaid family workers in 1990 suggests that the data are flawed. See generally, Patricia Daly, *Unpaid Family Workers: Long-Term Decline Continues*, *MONTHLY LAB. REV.*, Oct. 1982, at 3; DOL, *FARM LABOR FACT BOOK 55-64* (n.d. [1959]).

⁸⁴82 CONG. REC. 1099 (1937) (Rep. Dies); 83 CONG. REC. 7404 (Rep. Rankin); *id.* at 7426 (Rep. McClellan); 112 CONG. REC. 11,381 (1966) (Rep. Stratton). See also 95 CONG. REC. A3560-61 (1949) (Rep. Murray). For calculations suggesting that these figures are roughly accurate, see *infra* Appendix.

"large agri-business enterprises" was a "bill of rights for the family farmer." Lobbyists for small farmers enthusiastically welcomed the imposition of a statutory minimum wage on large farms in order to deprive the latter of access to "labor at sweatshop and sub-sweatshop wages."⁸⁵ This position, however, doubly inverts the economic causality. First, it is the state-subsidized family sweatshop farm that sustains agriculture as a low-wage sector.⁸⁶ And second, by freeing family farmers from the obligation of paying minimum wages to their employees, the state reinforces the vicious circle: "Self-exploitation by the farmer of himself and his family...has become the basis for the farmer's claim to the right to exploit his labor force."⁸⁷

⁸⁵H.R. REP. NO. 1366: FAIR LABOR STANDARDS AMENDMENTS OF 1966, 89th Cong., 2d Sess. 31 (1966); 112 CONG. REC. 22,655 (1966) (Sen. Yarborough) (chief sponsor of bill). See also H.R. REP. NO. 1366 at 32 (imposing a minimum wage on the largest agribusinesses would mean that "[t]he imputed wage for the family farm operator and his family would no longer be so drastically undermined by the tragic wages of workers on the largest farms"); *Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Comm. on Labor*, 79th Cong., 1st Sess. 722 (1945) (statement of Russ Smith, Legis. Sec'y, Nat'l Farmers Union [NFU]); *Fair Labor Standards Amendments of 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 570-71 (statement of Mack Lyons, Dir., Leg. Dep't, UFW); COMM'N ON AGRICULTURAL WORKERS, WORKSHOP--WHETHER AND HOW FOREIGN WORKERS SHOULD BE ADMITTED 22-23 (Mar. 13, 1991) (statement of Rudy Oswald, Dir., Econ. Research, AFL-CIO). By the 1960s, the NFU opposed the bracero program on the ground that the low wages paid those workers by large farms lowered the price level for farm products and thus reduced the net earnings of farm operator families. *Extension of Mexican Farm Labor Program (Senate)* at 243 (statement of Richard Shipman, Ass't Dir. Legis. Services, NFU). See also *Importation of Foreign Agricultural Workers* at 100-103 (statement of Reuben Johnson, Dir. Legis. Services, NFU).

⁸⁶Low average per capita income in agriculture is a result of the willingness of farm people to offer their labor for a low return. ... So long as farm people have few alternative opportunities and compete keenly with one another in the supplying of labor..., they will drive down the return to the farm operator." DON PAARLBERG, *AMERICAN FARM POLICY: A CASE STUDY OF DECENTRALIZED DECISION-MAKING* 60, 62 (1964). See also ANNA ROCHESTER, *WHY FARMERS ARE POOR* (1940).

⁸⁷JOHN GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 71 (1975 [1973]). Exploitation and self-exploitation in the agricultural sector, which undergird the so-called cheap food policy--which has expressed itself in a secular decline in the share of budgets devoted to food--serve to depress the aggregate value of labor power, thus in effect subsidizing non-agricultural employers. For articulation of the policy, see COMM'N ON AGRICULTURAL WORKERS, WORKSHOP--WHETHER AND HOW FOREIGN WORKERS SHOULD BE ADMITTED 22 (Mar. 13, 1991) (statement of Comm'r Clarence Martin). Even for urban wage and clerical consumer units, food as a share of consumption expenditures has declined monotonically from 43.0 per cent in 1901 to 18.8 per cent in 1988-89. BLS, *CONSUMER EXPENDITURE SURVEY, 1988-89*, text tab. 3 at

III. Labor Catchers

[W]e cannot agree with *Punch's* representation of him [the middleman] as a spider devouring healthy flies. If we must decribe him as a noxious insect we should picture him much more truly as the maggot that appears in meat after decay has set in.⁸⁸

I do not wish the reader to imagine that I deny the existence of the *sweater* in the sweated industries. But I deny that the sweater is necessarily or usually a sub-contractor or employing middleman. The sweater is, in fact, the whole nation.⁸⁹

The unorganized and disorganized migrant labor market has made possible a phenomenon shared by few other industries: the labor contracting system, which does not involve subcontracting production, but inserts a layer of parasitic exploitation conditioned by and mediating cultural barriers between the employer and employees.⁹⁰ "In no other industry...do those who finally utilize labor rely as extensively upon a middleman to hire, transport, and, in many instances, house, feed, and pay their workers."⁹¹ In agriculture

3 (Bull. 2383, 1991). See also ALDEN MANCHESTER, *US FOOD SEPNDING AND INCOME: CHANGES THROUGH THE YEARS* app. tab. 9 at 18 (ERS, Agric. Info. Bull. 618, 1991); DENNIS DUNHAM, *FOOD COSTS...FROM FARM TO RETAIL IN 1990*, at 9 (ERS, Agric. Info. Bull. 619, 1991).

⁸⁸Beatrice Webb, *How to Do Away with the Sweating System*, in SIDNEY WEBB & BEATRICE WEBB, *PROBLEMS OF MODERN INDUSTRY* 139, 142 (1898 [1892]).

⁸⁹Beatrice Potter, *The Lords and the Sweating System*, 27 *NINETEENTH CENTURY* 885, 889 (1890).

⁹⁰The garment industry, heavily reliant on illegal aliens, is honeycombed with subcontracted sweatshops, but the intermediaries are, by and large, not mere labor contractors. See FISHER, *THE HARVEST LABOR MARKET IN CALIFORNIA* at 42-43; *Return of the Sweatshop*, Washington Post, Dec. 12, 1983, at A18 (editorial) (NEXIS); Carey English, *Sweatshops are Back--And They're Thriving*, U.S. NEWS & WORLD REP., Jan. 16, 1984, at 68 (NEXIS); ROGER WALDINGER, *THROUGH THE EYE OF THE NEEDLE: IMMIGRANTS AND ENTERPRISE IN NEW YORK'S GARMENT TRADES* (1986); Michael Freitag, *New York Is Fighting Spread of Sweatshops*, N.Y. Times, Nov. 16, 1987, at 1, col. 2 (nat. ed.); GAO, "SWEATSHOPS" IN THE U.S. (HRD-88-130BR, Aug. 1988); SAKSIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* (1988); Lisa Belkin, *Abuses Rise Among Hispanic Garment Workers*, N.Y. Times, Nov. 28, 1990, at A10, col. 3 (nat. ed.).

⁹¹*Farm Labor Contractor Registration Act Amendments, 1974: Hearings Before the Subcomm. on Employment, Poverty, and Migratory Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 2d Sess. 115 (1974) (statement of Sen. Nelson).

today, as at the turn of the century in the clothing industry, "[t]he contractor holds his own mainly because of his ability to get cheap labor, and is in reality merely the agent of the manufacturer for that purpose."⁹² The sweating system, however, as the previous section showed, does not necessarily presuppose an intermediary; it also flourishes where agricultural employers engage workers directly.

While the physical conditions of outdoor sweatshops differ from those of tenement workers, migrant farm workers, as the largest subclass of sweated workers in the United States, are caught in the same web of exploitation that Congress pilloried a century ago: "[T]he compensation of the contractor is the margin between the price he receives and the price he pays...which margin, in the vernacular, is said to be 'sweated' from the compensation of his employés."⁹³ And as with the padrone who took advantage of his Italian-immigrant compatriots a century ago, the size of that margin still "depends largely upon the number of ways in which he can mulct the families in his charge of a portion of their meager wages."⁹⁴

The labor contractor system arose--and has continued to flourish in agriculture--under specific economic, labor-market, and cultural conditions.

The basic explanation for the ubiquity and persistence of the labor contractor is to be found in the character of the farm labor market. If stable and direct employment relations had developed in harvest work, as they have in manufacturing industry, there would be no place for the contractor. If harvest laborers in general were managed and allocated by inclusive employer associations, as are the legally imported laborers, the services of the contractor could be dispensed with. Or if they were organized and deployed by labor unions, as are the workers in the equally casual longshore and construction industries, again the contractor would

⁹²15 REPORTS OF THE INDUSTRIAL COMMISSION ON IMMIGRATION, H.R. DOC. NO. 184, 57th Cong., 1st Sess. 321 (1901). The section on sweating was written by John Commons and was reprinted as J. Commons, *The Sweating System in the Clothing Trade*, in *TRADE UNIONISM AND LABOR PROBLEMS* 316 (J. Commons ed. 1905).

⁹³H. Rep. No. 2309: REPORT OF THE COMM. ON MANUFACTURES ON THE SWEATING SYSTEM, 52d Cong., 2d Sess. vi (1893). Earlier Marx had noted that the hallmark of the sweating system was the intervention of "parasites" between the capitalist and the worker, which was facilitated by piece-rate compensation. 1 KARL MARX, *DAS KAPITAL*, in 23 KARL MARX [&] FRIEDRICH ENGELS, *WERKE* 577 (1962 [1867]).

⁹⁴KATHARINE LUMPKIN & DOROTHY DOUGLAS, *CHILD WORKERS IN AMERICA* 70 (1937). See also Charles Chute, *The Cost of the Cranberry Sauce*, 27 *SURVEY* 1281 (1911-12).

be unnecessary.⁹⁵

Public acceptance of agricultural exceptionalism has underwritten this regime, which enables farm employers "to attach a very special meaning to the concept of an adequate labor supply. The term may connote a supply large enough that every grower could harvest simultaneously without having to worry about lack of labor, even though growers may be harvesting only 2 or 3 days a week." Today's early post-industrial era is continuous with the Great Depression in imposing a unique set of consequences on migrants:

Although ineffective in rationalizing the labor market, the contractor system is a highly effective device for transferring the risks of agricultural employment to the workers. ... Anyone familiar with urban industrial relations would suppose, for example, that employers would have some responsibility for workers who are brought to a work situation and held there for several weeks although no work is furnished to them. In agriculture, however, it frequently happens that workers are brought into a grower's camp, upon specific instructions of the grower, several weeks before they are needed, and remain entirely on their own until work begins....⁹⁶

An important truth inheres in the insight that "[a]griculture is perhaps unique for its substantial number of middlemen whose *raison d'être* is reducing labor costs by violating labor laws."⁹⁷ By the same token, however, labor catchers are "more a symptom than a basic cause of the difficulty. The basic cause is the conjunction of substandard labor supply with irregular labor demand." These

⁹⁵Arthur Ross & Samuel Liss, *The Labor Contractor System in Agriculture*, in *Migratory Labor: Hearings before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare on Migratory Labor*, 82d Cong., 2d Sess. 1017, 1023 (1952).

⁹⁶*Id.* at 1024, 1028. See also William Friedland, *Labor Waste in New York: Rural Exploitation and Migrant Workers*, TRANS-ACTION, Feb. 1969, at 48, 49, 53. Such extraordinary opportunistic behavior is not confined to farms. A pumpkin cannery in Illinois, which is owned by a large multinational firm and employs Texas migrants, imposes the same condition of employment (or of retaining seniority). Scott Pendleton, *Where Pumpkin Pies Come From*, Christian Sci. Monitor, Oct. 31, 1990, at 15 (NEXIS).

⁹⁷PHILIP MARTIN, SEASONAL WORKERS IN AMERICAN AGRICULTURE: BACKGROUND AND ISSUES 38 (Nat'l Comm'n for Employment Policy, Research Rep. RR-85-04, 1985). Competition among labor catchers may also "drive down wages" by "under-bid[ding] one another." COMM'N ON AGRICULTURAL WORKERS, WORKSHOP—INTERNATIONAL COMPETITIVENESS 4 (Oct. 23, 1991) (testimony of David Runsten, Cal. Instit. Rural Studies).

intermediaries would become superfluous if labor demand were regularized or labor supply normalized "so that distressed worker groups willing to accept the hardships and inequities of a labor broker system would be minimized." For it is precisely the "uprooted, unprotected, underprivileged" status of the "Mexican Americans, Puerto Ricans, West Indians, and native born black Americans" who constitute "the bulk of the migrant workforce" that enables the crew leader to exploit his position.⁹⁸

Two examples of the labor contracting system in settings not widely known to the public may illuminate its typical contemporary operation. These are the brief summer corn detasseling season in the Midwest and the winter-long planting of pine tree seedlings in the South. The employers are not small farmers but very large multinational corporations that have adopted the system intact from fruit and vegetable harvesting. The fact that these agro-industrial users have generated exactly the same unlawful and exploitative results for migrants suggests that sweating can reproduce itself in the backward interstices of modern sectors of production based on the technologies of genetic manipulation.⁹⁹

Firms producing hybrid seed corn use labor catchers to recruit migrants to detassel corn and to police them while they are engaged in this horticultural castration (that is, removal of the tassel of the female parent before it sheds pollen).¹⁰⁰ The production of

⁹⁸Ross & Liss, *The Labor Contractor System in Agriculture* at 1033; H.R. REP. NO. 358, 88th Cong., 1st Sess. 3 (1963); S. REP. NO. 1295, 93d Cong., 2d Sess. 1, 2 (1974).

⁹⁹The seed corn companies by and large do not own the land on which they grow seed corn. Instead they contract with farmers. The control or supervision that the companies exercise over these farmers varies greatly from company to company. Whether the contract-farmer is a joint employer of the detassellers does not appear to have been litigated. Timber companies, on the other hand, generally do own the forests in which migrants plant trees.

¹⁰⁰See John Airy, L. Tatum, & J. Sorenson, Jr., *Producing Seed of Hybrid Corn and Grain Sorghum*, in USDA, SEEDS: THE YEARBOOK OF AGRICULTURE 1961, at 145 (1961); D. Harpstead, *Man-Molded Cereal--Hybrid Corn's Story*, in USDA, THAT WE MAY EAT: THE YEARBOOK OF AGRICULTURE 1975, at 213 (1975); Robert Cooke, *A New Growth Industry for Crops: Powerful Crossbreeding Could Boost Production of Wheat, Rice and Corn*, *Newsday* at 73, Dec. 10, 1991 (NEXIS). The hybridization process "begins with two pairs of homozygous inbred lines.... Each pair is crossed...by planting the two lines in alternating rows and emasculating the female parent by manual removal of the pollen-shedding tassel.... Only seed from the female parents is collected to insure that no selfed seed is obtained." JACK KLOPPENBURG, JR., *FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY, 1492-2000*, at 100 (1988).

hybrid seed corn, which is associated with higher yields than open-pollinated varieties, has become an extraordinarily profitable oligopoly controlled by six to eight companies, most of which have been acquired by multinational pharmaceutical, petroleum, and chemical companies.¹⁰¹ This time-sensitive and labor-intensive activity, which employs 70,000 to 140,000 workers for approximately one month in the Midwest, has been characterized as "at the best...strenuous and at the worst...one of the most disagreeable kinds of work."¹⁰² Historically, local school-age children and college students have constituted the bulk of this labor force. Recently, however, the seed companies have both become dissatisfied with the quality of work performed by local workers and found it increasingly difficult to recruit the requisite numbers--at the wages they are willing to offer (about the minimum wage). Consequently, these firms have become increasingly reliant on migrants whom they

¹⁰¹Pioneer Hi-Bred, which is the major independent seed producer not yet acquired by a firm outside the industry, wondered in 1978 whether the high profit margins (forty per cent of the sales price) would "foment resentment." Harvard Business School, Pioneer Hi-Bred International, Inc. 11 (Case Study 4-579-125, 1978). Pioneer Hi-Bred alone controls thirty-seven per cent of the market followed by DeKalb (nine per cent), and Northrup King (4.5 per cent). Barnaby Feder, *Wonder Seeds Now Yielding Profits*, N.Y. Times, Aug. 17, 1991, at 15, col. 3 (nat. ed.); H. Murphy, *New DeKalb-Pfizer Seed Chief to Harvest R&D Breakthroughs*, CRAIN'S CHICAGO BUS., May 7, 1990, at 38 (NEXIS); ROBERT LEIBENLUFT, COMPETITION IN FARM OUTPUTS: AN EXAMINATION OF FOUR INDUSTRIES 111-13 (Office of Pol'y Planning, Fed. Trade Comm'n, 1981); KLOPPENBURG, FIRST THE SEED at 147-49; DAN MORGAN, MERCHANTS OF GRAIN 313-14 (1980).

¹⁰²A. CRABB, THE HYBRID CORN-MAKERS: PROPHETS OF PLENTY 269 (1947). Detasseling accounts for ten to fourteen per cent of the cost of production of hybrid seed corn. Goldman, Sachs & Co., *The Hybrid Seed Corn Industry: Implications of a Changing Environment*, reprinted in Harvard Business School, Pioneer Hi-Bred International, Inc. 29, 37 (Case Study 4-375-109, 1978). Firms are estimated to spend \$75,000,000 to \$120,000,000 annually on detasseling. Robert Cooke, *A New Growth Industry for Crops; Genetically Engineered Corn: Breakthrough Brings Market Closer*, GENETIC TECHNOLOGY NEWS, Oct. 1990, at 8 (NEXIS). Pioneer Hi-Bred International, "the world's largest developer of seed corn," alone is estimated to employ 42,000 to 80,000 detassellers. Keith Schneider, *Scientific Advances Lead to Era of Food Advances Around World*, N.Y. Times, Sept. 9, 1986, at 19, col. 3, at 20 col. 1 (nat. ed.); Bob Sexter, *American Album: Summer Jobs Still Sprout in a Fertile Field*, L.A. Times, July 29, 1991, at A5, col. 1 (NEXIS); Nancy Dailey, *Pioneer Hi-Bred: Tipton's Amazing Employer*, INDIANA BUS., Nov. 1985, at 44 (NEXIS); information provided by Pioneer Hi-Bred. On the origins of Pioneer Hi-Bred in the 1920s and the key role played by the future Secretary of Agriculture, Henry A. Wallace, see CRABB, THE HYBRID CORN-MAKERS at 140-66. PAUL MANGELSDORF, CORN 239 (1974), cites an estimate of a peak of 125,000.

recruit in Texas, California, Arizona, and Florida.¹⁰³ This shift may be associated with employers' perceptions that whereas students complain about everything, migrants "don't complain. They don't complain about anything."¹⁰⁴

Plodding down endless rows, reaching up to yank thousands of resistant tassels carefully off corn plants forms one small but vital part of a scientifically and technologically sophisticated process of genetic engineering which the seed companies control from beginning to end and in which they have invested significant amounts of capital.¹⁰⁵ As part of their organization and control of the entire production process these firms rely in part on labor contractors to recruit and assemble detassellers. Crew leaders may also act as first-line foremen, making sure that the detassellers work. The seed companies oversee this operation with their own payroll supervisor-technicians, whose agronomic learning enables them to control quality. Often they pay the labor contractor varying amounts per

¹⁰³For a self-serving account by a corn farmer-labor contractor of the employment of migrants to detassel, see MARILYN DAVIS, *MEXICAN VOICES/AMERICAN DREAMS: AN ORAL HISTORY OF MEXICAN IMMIGRATION TO THE UNITED STATES* 77-93 (1990). During World War II adult women performed much of the detasseling. CRABB, *THE HYBRID CORN-MAKERS* at 268-69. Some Hispanic migrant farm workers detasseled in Indiana and Ohio before World War II. See VALDÉS, *AL NORTE* at 62. Migrants working for grower-canneries detasseled in Illinois until the development of a male-sterile plant eliminated the need for detasseling in the beginning of the 1960s. Leftwich, *The Migratory Harvest Labor Market* at 146-47. Personnel and production managers at Pioneer Hi-Bred, Garst Seed, and Asgrow Seed also claim that the demographic decline of rural Midwest has contributed to the dearth of available labor.

¹⁰⁴Interview with Jonathan Krutz, general manager, Oetting's Detasseling, Inc., in Lincoln, Nebraska (Sept. 8, 1989). Sept. 8, 1989. With 4,000 employees, Oetting's purports to be "the Midwest's largest...detasseling company." JONATHAN KRUTZ & DAN OETTING, *THE DETASSELLER'S HANDBOOK* (no pagination) (1989).

¹⁰⁵For an introduction to the science of detasseling, see John Airy, *Current Problems of Detasseling*, in AM. SEED TRADE ASS'N, *IMPROVED TECHNIQUES IN HYBRID SEED CORN PRODUCTION* 7, 11-17 (1951). Just as genetic engineering created the need for a labor force to detassel, it may also do away with it. "[P]ublic agricultural science provided the hybrid corn industry with a genetic solution to its labor problem" by incorporating "cytoplasmic male sterility...into female parent lines" thus making them sterile and "eliminating the need for manual detasseling." KLOPPENBURG, *FIRST THE SEED* at 113. The narrow genetic base of the germplasm used in this process, however, made it highly vulnerable to an epidemic of corn blight in 1970, leading to the resumption of the use of normal cytoplasm and manual detasseling. *Id.* at 122. The blight resulted in a massive class action by farmers against seed companies; *Lucas v. Pioneer, Inc.*, 256 N.W.2d 167 (Iowa 1977). Pioneer Hi-Bred expects that renewed research will eliminate the need for detasseling by the end of the century.

acre, leaving it to them to manage the payroll.¹⁰⁶ At this point it is a matter of indifference to the companies how much, when, or even whether the labor recruiters pay the workers.¹⁰⁷ With virtually nothing but labor costs, the labor catcher can obviously maximize his income by minimizing his payments to the workers. At the most egregious extreme, he absconds with the payroll.

The geography of the forestry industry in the United States has been transformed during the past several decades by a massive shift of landholding and operations from the North to the South. Pulp and paper manufacturing firms have been attracted by the lower wage levels and less restrictive environmental regulations associated with large nongovernment owned forests. One of the keys to enhanced profitability has been the development of systematic, scientific sustained-yield reforestation. As with hybrid seed corn, the genetic manipulation of loblolly pine plantations, which has resulted in significantly higher yields, rests on a premodern labor base: the hand-planting of the genetically engineered seedlings.¹⁰⁸

¹⁰⁶The highest acreage rates are paid for "full-pull," that is, for fields that the seed company has not previously machine-detasseled. Where such machines, which can pull 25%-80% of the tassels, are used, the acreage rates for hand-detasseling are reduced. In order to avoid selfing, which would frustrate the production of hybrid seeds, 99.5% of the tassels must be pulled. In order to achieve this standard and to be paid, workers must detassel a field several times. Given the urgent need for detassellers, the seed companies may offer individual workers--both local students and migrants--working alone or in very small groups, the same full acreage rate that they pay crew leaders in the same fields.

¹⁰⁷Pioneer Hi-Bred may be a major exception insofar as it purports, as a result of litigation and the desire to avoid litigation, to have adopted the practice of placing all detassellers and crew leaders on its payroll as employees. See *Martinez v. Pioneer Hi-Bred Int'l, Inc.*, No. B-79-98 (S.D. Tx. filed Apr. 27, 1979).

¹⁰⁸See generally, PHILIP WAKELY, *PLANTING THE SOUTHERN PINE* (1954); Jack Oden, *Development of the Southern Pulp and Paper Industry, 1900-1970*, at 513-69 (Ph.D. diss., Miss. State U. 1973); Bruce Ferguson, *Costs of Forest Land Ownership*, in *COST CONTROL IN SOUTHERN FORESTRY* 44 (Robert McDermid ed. 1964); Peter Farnum, Roger Timmis, & J. Kulp, *Biotechnology of Forest Yield*, 219 *SCIENCE* 694 (1983); Thomas Ricks, *Timber Firms Moving to the South as Supplies in Northwest Diminish*, *Wall St. J.*, July 19, 1983, at 29, col. 4; *HISTORY OF SUSTAINED-YIELD FORESTRY: A SYMPOSIUM* (Harold Steen ed. 1984); T. CLARK, *THE GREENING OF THE SOUTH* (1984); ROBERT HEALY, *COMPETITION FOR LAND IN THE AMERICAN SOUTH: AGRICULTURE, HUMAN SETTLEMENT, AND THE ENVIRONMENT* 77-121 (1985); Andrew Pollack, *Planning Forests from Lab Cultures*, *N.Y. Times*, Apr. 29, 1987, at 40, col. 1 (nat. ed.); *IP TIMBERLANDS, LTD., 1987 ANNUAL REPORT* 10, 12, 14 (1988). A vast expansion tree planting in southern industrial forests began in the latter half of the 1960s. *HAMLIN WILLISTON, A STATISTICAL HISTORY OF TREE PLANTING IN THE SOUTH* 30-31, fig. 1 at 36-37 (U.S. Forest Serv. 1980). Planters use a cheap hand tool

Like the seed companies, the large integrated forestry-products companies performed the bulk of this work until recently with seasonal payroll crews of local workers paid by the hour. As with detasseling, the timber firms' refusal to pay hand-planters more than the minimum wage created the appearance of an exhaustion of local labor reserves. The call therefore went out for migrant farm workers. In order to insure that migrants would cost no more than locals, the companies 'contracted out' the hand-planting. For the same reasons as in detasseling, the planting contractors cannot offer and the timber companies would not accept turnkey service contracts. Such arm's length dealing is not possible because the forestry firms have themselves generated or acquired all known scientific-technical knowledge about forestry practices, whereas planting contractors are merely first-line supervisors of menial-manual workers who have been incorporated into one small but vital "part of the integrated unit of production."¹⁰⁹ The companies must therefore contractually specify a great many details about inputs, compliance with which is monitored and rewarded. Thus these firms control all of the following aspects of the work: genetic engineering of many varieties of seedlings dedicated to various types of soil and terrain, which the contractor is unable to distinguish; designation of the tracts where each variety is to be planted; specification of how and where seedlings are to be stored, transported and handled; specification of spacing, configuration, and directionality of seedlings; and specification of how seedlings are and are not to be planted in such detail that effectively no discretion is left to contractors or planters.¹¹⁰

(dibble bar) to dig the hole for the seedling. Like detasseling, this work can be done semi-mechanically—but not on rough terrain.

¹⁰⁹Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947).

¹¹⁰In forestry, then, even more than on cucumber farms, it is the case that:

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...simple manual labor which can be performed in only one correct way. ... It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary.

Borello & Sons v. Department of Indus. Relations, 48 Cal.3d 341, 345, 357, 769 P.2d 399, 400-401, 408, 256 Cal. Rptr. 543, 544-45, 552 (1989).

The key to understanding why even a large labor contracting entity economically speaking has not become and legally should not be considered the sole employer of the migrant planters is that its growth has been purely quantitative; the labor performed by the contractor's planters remains unchanged--namely, unskilled and without significant physical capital. Precisely because the contractor has failed to transform the nature of the work process, for example, by creating or appropriating a new technology, planting has not become a new specialty business in a new product market but has remained a core segment--and therefore under the control--of the forestry company. Consequently, no matter how large the contractor may become, at the worksite it and its employees remain subject to control by the forestry company.¹¹¹ The mere fact that the contractors, who are ex-planters, have recruited so many 'helpers' that they themselves no longer need to plant and can live on the compensation they receive for furnishing and supervising labor does not fundamentally alter the relationship between the forestry companies and the laborers. The insertion of additional layers of supervisors and middlemen into the chain of command does not undermine the control ultimately exercised by the forestry companies over all those integrated into their business.¹¹²

In this primitive sub-segment of an otherwise technologically advanced production process, migrants planting pine seedlings for the largest paper and timber companies throughout the South have been victimized by some or all of the following unlawful acts.¹¹³ At

¹¹¹In other words, at the worksite little has changed vis-à-vis the time when the present owners of the planting entity themselves personally planted trees for the forestry companies. Whatever relationship obtained between them then is now replicated between the planting entity and the new generation of planters. "What better situation can his employé occupy? Is his position higher than that of his employer would have been, had he been standing in the shoes of the former...? Can a stream rise higher than its source?" *Knically v. West Virginia Midland R.R.*, 64 W. Va. 278, 61 S.E. 811, 812 (1908).

¹¹²The need to exercise control in order to contain costs led one timber company to treat its loggers as "dependent contractors," i.e., as "piecework employees." William Darwin, *Logging Cost Control with Dependent Logging Contractors*, in *COST CONTROL IN SOUTHERN FORESTRY* 125, 126-27, 130-31 (Robert McDermid ed. 1964).

¹¹³See, e.g., *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271 (5th Cir. 1988); Jane Juffer, *Peonage in the Pines*, *THE PROGRESSIVE*, Nov. 1987, at 24; Ted Kenney, *Migrants in the Forests*, *THE WEEKLY* (Seattle), Jan. 20-26, 1988, at 21. Forestry firms engage in the same practices in the Northwest. See *Bresgal v. Brock*, 833 F.2d 763 (9th Cir. 1987). Polish migrant farm workers in Germany at the turn of the century were subject to the same abuses. See JOHANNES NICHTWEIB, *DIE AUSLÄNDISCHEN*

the time of recruitment, the company's labor catchers fraudulently induce the workers to sign up by misinforming them that they will be paid \$25 per 1000 seedlings when in fact they will be paid only \$15. Once at the worksite, the employer issues packets containing 1200-1300 seedlings, which are deemed to contain the standard piece unit of 1000. The contractors then falsify the number of hours worked in order to avoid payment of the minimum wage or any overtime. Although the recruiters promise free housing, weekly deductions are made to defray the cost of the (often substandard) housing. In some cases, withholdings for social security taxes may be feloniously embezzled.¹¹⁴ Finally, the most flagrant violators abscond without having paid their workers for the last pay period or perhaps at all.

Frequently agricultural employers use such intermediaries precisely in order to secure the advantages accruing from unlawful acts without appearing liable for their commission.¹¹⁵ This set piece then includes a solemn disavowal of any knowledge of, let alone responsibility for, the allegedly unauthorized actions taken by the crew leader, who in turn denies the allegation, disappears, or has no money to satisfy a court judgment. In an alternative scenario, the employer may resort to "a species of law evasion, known all over the world where social legislation exists, viz., the dodging of the legal protection given to an employee by making him appear as an independent contractor..."¹¹⁶ These structural characteristics coalesce in the case of employers who share the proceeds of exploitation with largely judgment-proof labor contractors in

SAISONARBEITER IN DER LANDWIRTSCHAFT DER ÖSTLICHEN UND MITTLEREN GEBIETE DES DEUTSCHEN REICHES: EIN BEITRAG ZUR GESCHICHTE DER PREUBISCH-DEUTSCHEN POLITIK VON 1890 BIS 1914, at 77-78, 216-24 (1959). Consideration of the possibility that the exploitation of racially or ethnically 'alien' migrant workers may be systemic is prompted by Max Weber's observation that the barracks used to house these Polish workers were functionally the money-economy analog of slave barracks in antiquity. Max Weber, *Entwicklungstendenzen in der Lage der ostelbischen Landarbeiter*, in MAX WEBER, *GESAMMELTE AUFSÄTZE ZUR SOZIAL- UND WIRTSCHAFTSGESCHICHTE* 470, 492 (1924 [1894]).

¹¹⁴26 U.S.C. § 7202 (1990).

¹¹⁵"Part of the reason for the increased use of farm labor contractors seems to be an attempt by farmers (growers) to shift liability for using illegal workers to individuals or businesses that have few real resources on average." Wallace Huffman, *Costs and Returns: A Perspective on Estimating Costs of Human Capital Services and More* at 19, n. 9.

¹¹⁶Otto Kahn-Freund, *Legislation Through Adjudication: The Legal Aspect of Fair Wages Clauses and Recognised Conditions*, 11 MOD. L. REV. 269, 275 (1948).

exchange for the latter's willingness to accept civil (and even criminal) liability.¹¹⁷

In an important socioeconomic sense, then, the most prominent characteristic of migrant farm workers' employment relationships is that they are built on extra-legal measures that fall below the standards immanent to a mature capitalist economy.¹¹⁸ General Motors, IBM, and thousands of much smaller entities do not accumulate capital by stealing social security taxes, tampering with time cards, or absconding with the payroll. But a labor market overpopulated by workers with virtually no reservation wage apparently represents an irresistible temptation even to large employers to commit outright fraud and knowing violation of statutory minima.¹¹⁹ Some of the largest multinational firms, which are too fastidious to risk engaging in such practices with payroll employees, have no compunctions about hiring labor catchers to do it for them in the pre-modern enclaves of their technologically sophisticated production processes.¹²⁰ Thus in detasseling and forestry, two of the world's largest pharmaceutical firms, Sandoz (Northrup King) and Upjohn (Asgrow Seed), one of the largest chemical firms, Imperial Chemical Industries (Garst Seed), and one of the largest grain firms, Cargill, "the world's largest papermaking organization," International Paper, the wealthiest industrial timberland owner in the United States, Weyerhaeuser, Procter & Gamble as well as the United States Government all profit from such practices.¹²¹

¹¹⁷In mid-Victorian England, where no protective legislation insulated workers from overreaching, large farmers still used gang masters to exploit child crews. F. Longe, *Report on Agricultural Gangs*, in CHILDREN'S EMPLOYMENT COMM'N, SIXTH REP. OF THE COMM'RS, App., at 1-3 (16 PARL. PAP. 1867).

¹¹⁸Marx referred to the framework of ideal-typical capitalist exploitation as "the mute compulsion of economic relations," which no longer needed to rely on extra-legal measures. 1 MARX, *DAS KAPITAL* at 765.

¹¹⁹See, e.g., E. BROWN, *THE GROWTH OF BRITISH INDUSTRIAL RELATIONS: A STUDY FROM THE STANDPOINT OF 1906-14*, at 198 (1974 [1959]).

¹²⁰While Pioneer Hi-Bred, for example, is busy testing 7,000 new inbred lines and 15,000 new experimental hybrids yearly, labor catchers are "managing high school kids." Tobin Beck, *Football Coach Finds Management Niche in Cornfields: Company Thrives on "Hassling with Detasseling"*, UPI, July 23, 1989 (NEXIS); Dailey, *Pioneer Hi-Bred*.

¹²¹BLS, *WAGE CHRONOLOGY: INTERNATIONAL PAPER CO., SOUTHERN KRAFT DIVISION DECEMBER 1937-MAY 1973*, at 1 (Bull. No. 1788, 1973); GRANT SHARPE, *INTRODUCTION TO FORESTRY 484-85* (5th ed. 1986); Buckeye (or, as it is now called, Procter & Gamble) Cellulose, a wholly owned subsidiary of Procter & Gamble,

In so doing they are merely emulating the large firms in the highly concentrated canning industry such as Green Giant, Libby, Campbell, Del Monte, Heinz, Beatrice, and Stokely-Van Camp, which since the 1940s have themselves engaged in and promoted exactly the same overreaching by labor catchers and farmers in the Midwest vis-à-vis migrants harvesting asparagus, peas, corn, string beans, and tomatoes.¹²² Not coincidentally, it was these same firms, which employ armies of tax lawyers to drill loopholes in the thousands of pages of the Internal Revenue Code, that lobbied against a very short federal migrant statute on the ground that its rules--such as posting wage rates--were "so detailed that compliance is often difficult."¹²³

The National Farmers Union corroborated the links in this structural relationship in its testimony before Congress that "large commercial agricultural organizations" profit from the "vicious system" of exploitation and "the contractor's way of keeping the labor in line."¹²⁴ Such commentary eerily echos Marx's observations on

produces the fiber for Pampers from the trees which migrants plant on the firm's vast land holdings in the South. See *Ross v. Buckeye Cellulose Corp.*, 733 F. Supp. 344, 347 (M.D. Ga. 1989). The U.S. Forest Service lets bids to plant trees on thousands of acres of national forests annually. See generally, Richard Guldin, *The Silviculture Contractor*, J. FORESTRY, Jan. 1984, at 28. These "contractors," whose employees it refuses to acknowledge as its own, engage in the same practices as other crew leaders. These workers do, however, enjoy one protection not available to other migrants: under the Service Contract Labor Standards Act, the Secretary of Labor can, if the contractor fails to pay the workers their wages, withhold the necessary amounts from accrued payments due on the contract and pay the workers directly. 41 U.S.C. § 352(a) (1987).

¹²²See VALDES, AL NORTE at 90; *idem*, *From Following the Crops to Chasing the Corporations: The Farm Labor Organizing Committee, 1967-1983*, in THE CHICANO STRUGGLE: ANALYSES OF PAST AND PRESENT EFFORTS 42 (Nat'l Ass'n for Chicano Studies ed. 1984); *Abraham v. Beatrice Foods Co.*, 418 F. Supp. 1384 (E.D. Wis. 1976); *Espinoza v. Stokely-Van Camp*, 641 F.2d 535 (7th Cir. 1981); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir. 1983). The canneries also engage in these unlawful practices without intermediaries. For an analysis of concentration trends, see STAFF REPORT TO THE FED. TRADE COMM'N, ECONOMIC INQUIRY INTO FOOD MARKETING, pt. III: THE CANNED FRUIT, JUICE AND VEGETABLE INDUSTRY (1965).

¹²³*A Migrant Labor Law Harries Big Companies*, BUS. WK, Aug. 11, 1980, at 38J (indus. ed. NEXIS) (naming inter alia Ciba-Geigy, Pfizer, Stokely-Van Camp, Gulf & Western, and Purex).

¹²⁴*Registration of Farm Labor Contractors: Hearings before the General Subcomm. on Labor of the House Comm. on Education and Labor on H.R. 5060*, 88th Cong., 1st Sess. 46 (1963) (statement of Richard Shipman, Asst. Dir. Legis. Serv. Div., Nat. Farmers Union).

the English crew leaders of the 1860s, whose income also depended on their ability to extract as much labor from their crew members as possible. Marx, too, emphasized that the gang system existed for the enrichment of the large farmers, for whom there could be no more ingenious system to depress workers' wages below the normal level while extracting as much labor as possible.¹²⁵ In combining these additional aspects of sweating, employers of migrant agricultural workers have become a uniquely lawless atavism.¹²⁶ The whole pathos with which the liberal urban middle class has invested the plight of migrants is rooted precisely in the sense of horror at indignities otherwise thought to belong to a long bygone era.¹²⁷

IV. The State

Just as the steel industry established "captive mines" from which to get their coal, so now do canners turn to "captive farms" for their vegetables. To get the labor needed to operate their large plantings of vegetables, these canners turn to Government, and Government assists them in getting a supply of foreign workers.¹²⁸

¹²⁵1 MARX, *DAS KAPITAL* at 723-25.

¹²⁶*But see Union Accuses Grocery Chain Of Profiting by Free Overtime*, N.Y. Times, Sept. 12, 1991, at A8, col. 6 (nat. ed.) (Food Lion, Inc. alleged to derive more than a third of its profits from unlawfully forcing employees to work overtime without pay).

¹²⁷"It's difficult to believe these types of abuses occur in this day and age." Neil Roland, *Homeless, Turned Migrants, Find Abuse*, Legal Times, Sept. 16, 1991, at 2, col. 1, 4 (quoting DOL official on peach pickers in South Carolina who received as little as forty cents per hour). Employers of migrants are often even unencumbered by the straightforward methods of nineteenth-century statutory self-help for piece-rate workers, which, for example, authorized coal miners to check the weights for which they were credited and prohibited owners from screening out smaller pieces of coal before weighing a miner's output. 1883 Pa. Laws Pub. L. No. 46, § 3 at 52; 1897 Pa. Laws Pub. L. No. 224 at 286. In a stereotypical example of class-biased formalism, this latter act was held unconstitutional as interfering with the workers' right to contract not to receive compensation for their full production as an incentive to work more carefully and to mine only larger pieces of coal. *Commonwealth v. Brown*, 8 Pa. Super. 339 (1898). Other state statutes were upheld. *See, e.g., McLean v. Arkansas*, 211 U.S. 539 (1909). For a survey of the comparable nineteenth-century legislation in Iowa, see E. DOWNEY, *HISTORY OF LABOR LEGISLATION IN IOWA* 63-66 (1910). For a sampling of opinion by miners and owners, see 12 REP. OF THE INDUS. COMM'N ON THE RELATIONS AND CONDITIONS OF CAPITAL AND LABOR EMPLOYED IN THE MINING INDUSTRY, H.R. DOC. NO. 181, 57th Cong., 1st Sess. 34, 48, 115 (1901).

¹²⁸PRESIDENT'S COMM'N ON MIGRATORY LABOR, *MIGRATORY LABOR IN AMERICAN AGRICULTURE* 23 (1951).

As the structural-functional descendants of a racially segregated plantation labor force, migrants still suffer from the failure of Reconstruction to vindicate the free labor principle for that sector of the working class.¹²⁹ Ironically, their hypermobility has not subverted their status as a quasi-captive labor force. When confronted with an unfavorable supply and demand, twentieth-century agricultural employers, like former slave masters vis-à-vis postbellum freedmen,¹³⁰ have been in a position to treat migrants as a proprietary resource not subject to the normal workings of the labor market. Competitors seeking to hire them at higher wages have been denounced as "steal[ing] our labor." Once familiar images of chattel are easily resurrected when employers matter-of-factly refer to "[v]ery large shipments" of labor.¹³¹ Thus the Texas farmer typically "resented the influence of supply and demand" and "was not willing to pay wages...which would keep somebody else from competing with him in the labor market." Nor did he have to. As one cotton farmer testified in the course of urging a congressional committee to open the border to Mexican laborers: he was not above "borrow[ing] the Mexican's shoes and pants until morning." "You have got to hold 50 or 75 Mexicans costing you \$600, to hold them over from week to week. What would you do? ... You would

¹²⁹For an expansive conception of the plantation, see Paul Taylor, *Plantation Agriculture in the United States: Seventeenth to Twentieth Centuries*, 30 *LAND ECON.* 141 (1954). "[B]ecause of the feeling, prevalent in the Southwest, that Mexicans are inferior to Anglo-Americans, employers had few compunctions about paying this group starvation wages and forcing them to work under almost any conditions." GEORGE COALSON, *THE DEVELOPMENT OF THE MIGRATORY FARM LABOR SYSTEM IN TEXAS: 1900-1954*, at 13 (1977). On the free labor principle, see ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991); KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 *U. PA. L. REV.* 437 (1989).

¹³⁰See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 132-42, 166-67, 170-75, 198-210, 372-78, 405-409 (1989 [1988]). See also *infra* ch. 4.

¹³¹*Western Hemisphere Immigration: Hearings on H.R. 8523 Before the House Comm. on Immigration and Naturalization*, 71st Cong., 2d Sess. 176-77 (1930) (statement of J. Canales); 1 PAUL TAYLOR, *MEXICAN LABOR IN THE UNITED STATES: VALLEY OF THE SOUTH PLATTE COLORADO*, printed as 6 *U. CALIF. PUBLICATIONS IN ECON.* 95, 141 (1929) (citing letter from the Beet Growers Association to its members, Jan. 30, 1924).

not let the Mexicans leave."¹³²

Where self-help has proved ineffective,¹³³ farm employers have successfully requested state and federal intervention to suppress out-migration and to promote in-migration of low-paid workers. When, for example, the use of violence by Texas farmers¹³⁴ failed to prevent out-of-state sugar-beet companies from "taking them [Mexican laborers] away from us" in the 1920s,¹³⁵ the State of Texas, like the southern states that sought to restrain black sharecroppers in pursuit of higher wages out-of-state, promptly responded by criminalizing the act of "go[ing] on the premises or plantation of any citizen of the State, in the night time, or between sunset and sunrise, and mov[ing]...any laborer...without the consent of the owner...." In order to deter those who managed to "entice" laborers without entering the master's plantation, the Texas legislature then imposed a \$7,500 license fee on agents seeking to recruit laborers to work outside of Texas.¹³⁶ Even after World War II complaints continued

¹³²*Temporary Admission of Illiterate Mexican Laborers* at 249 (Rep. Vaile, Colo.); *id.* at 59 (testimony of Fred Roberts, cotton farmer, Corpus Christi). Rep. Raker asked the farmer: "Do they make that sort of departure without their clothes? When you have taken away their trousers they do not vamoose." "No, sir; they stay then." *Id.* at 63.

¹³³An outraged strawberry farmer in California stated after the termination of the bracero program: "They want us to go to Los Angeles and screen scum." *Who'll Pick the Strawberries?* TIME, June 4, 1965, at 19.

¹³⁴See CAREY MCWILLIAMS, NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES 180-82 (1975 [1949]); COALSON, THE DEVELOPMENT OF THE MIGRATORY FARM LABOR SYSTEM IN TEXAS at 36-37.

¹³⁵*Seasonal Agricultural Laborers from Mexico* at 42 (testimony of S. Nixon, cotton farmer, Robstown).

¹³⁶Ch. 189, § 1, 1929 Tex. Gen. Laws 408; ch. 104, § 2, 1929 Tex. Gen. Laws 253 (1st Called Sess.). Emigrant agents were also obligated to post a bond to pay any debts owed by such laborers. *Id.* § 3. After a court enjoined enforcement, the legislature reduced the fee to a still hefty \$1,300. Occupation Tax on Emigrant Agents Act, ch. 11, § 1, 1929 Tex. Gen. Laws 16 (2d Called Sess.). The legislature enacted a longer act regulating emigrant agents, which required them to file monthly reports with the Tex. Comm'r of Labor Statistics stating the names of the recruited laborers and their employers. Regulating and Providing for Supervision of Emigrant Agents Act, ch. 96, § 6, 1929 Tex. Gen. Laws 203, 206-207 (1929) (2d Called Sess.). A federal court upheld the new lower fee, but struck down § 4, which required an emigrant agent who furnished transportation out of state to transport the laborer back to Texas if the latter so requested in writing. *Hanley v. Moody*, 39 F.2d 198 (N.D. Tex 1930). Nevertheless, the statute severely impeded recruitment by sugar beet companies. See generally, WILLIAM MAY, JR., THE GREAT WESTERN SUGARLANDS: THE HISTORY OF THE GREAT WESTERN SUGAR COMPANY AND THE ECONOMIC DEVELOPMENT OF THE

to be voiced in the North that the Texas statute permitted the "wealth of relatively cheap...Mexican workers...[to be] jealously guarded by growers from the possibility of excessive out-of-state emigration."¹³⁷

So deeply rooted is the rhetoric of state-enforced agricultural exceptionalism that even liberal economists unthinkingly embrace it. Thus when the Mexican bracero program was terminated, a panel charged with making recommendations concerning labor needs during the transition from a legally to a merely economically captive labor force revealed that:

One pickle grower reported...that this year's Texans were much harder to handle than the braceros; the Texans all had cars, the grower said, and if you spoke sharply to them they just drove away. This complaint suggests that past reliance on braceros may have impeded or made unnecessary in this industry the development of supervisory practices that are appropriate for dealing with American citizens. [B]raceros were forbidden by law to perform any work than that for which they were brought into the country. Thus, their mobility and their alternatives were sharply limited, and individual growers had little need to engage in the usual tasks of supervision.¹³⁸

Rather than suggesting that a significantly higher wage might be necessary to attract free labor to perform hard work previously dominated by workers with Third-World living standards, the panel, implicitly accepting the traditional structure of agricultural sweatshops, was content to stress public relations and discipline.¹³⁹

GREAT PLAINS 415-16 (1989 [1982]); DAVID MONTEJANO, *ANGLOS AND AMERICANS IN THE MAKING OF TEXAS, 1836-1986*, at 197-219 (1987). On statutes restraining sharecroppers, see *infra* ch. 4.

¹³⁷Z. ROWE & J. KOHLMAYER, *MIGRANT FARM LABOR IN INDIANA* 28 (Purdue U. Agric. Experiment Station Bull. 543, 1949).

¹³⁸*Final Report of the Michigan Farm Labor Panel to the Secretary of Labor, December 30, 1965*, in DOL, *YEAR OF TRANSITION: SEASONAL FARM LABOR 1965, A REPORT FROM THE SECRETARY OF LABOR*, appendix J-32 (n.d. [1966]). The chairman of the panel was Charles Killingsworth. One of the other panelists was Daniel Fusfeld, a longtime advocate of high minimum wages as a tool of industrial policy. See e.g., Daniel Fusfeld, *A Living Wage*, *ANNALS OF THE AM. ACAD. POL. & SOC. SCI.*, Sept. 1973, at 34.

¹³⁹The panel found that the minimum wage of \$1.25 that the Secretary of Labor had set for domestic employees of agricultural employers that desired to apply for H-2 workers had "submerged...completely" the incentive that had existed under the piece-rate system. *Final Report of the Michigan Farm Labor Panel* at J-33.

The debates in the 1980s and 1990s over "immigration reform and control," the latest in a long historical series extending back to World War I, are ideologically repetitive.¹⁴⁰ Now, as then, they center on demands by a relatively small number of labor-intensive agribusinesses¹⁴¹ for a captive but disposable supply of cheap seasonal harvest laborers from Latin America to be quarantined from competing labor markets and even from other farm employers.¹⁴² Whereas firms in other industries increase their capital intensity in order to deal with rising wages when the demand for workers exceeds supply, when exceptionalist agriculture is "forced" by labor shortages "into a bidding war" requiring it to pay detassellers five dollars an hour, it successfully induces the federal government to open the borders to noncombatants from Latin America.¹⁴³

While the underlying substance of the arguments concerning the importation of agricultural laborers has remained frozen in time,

¹⁴⁰Robert Thomas, *The Mythology of Agricultural Exceptionalism: Some Comments*, in 9 IN DEFENSE OF THE ALIEN 17 (Lydio Tomasi ed. 1987). Using the doubtful authority of the newly enacted immigration statute, the Secretary of Labor issued orders authorizing the temporary entry of otherwise inadmissible aliens to engage only in agricultural labor. See Act of Feb. 5, 1917, ch. 29, § 3, 9th proviso, 39 Stat. 874, 878 (1917); Departmental documents reproduced in *Emergency Immigration Legislation: Hearings Before the Senate Comm. on Immigration*, 66th Cong., 3d Sess. 696-710 (1921). See generally, Otey Scruggs, *The First Mexican Farm Labor Program*, 2 ARIZONA & THE WEST 319 (1960).

¹⁴¹Even at the height of the bracero program, fewer than 50,000 farms employed imported Mexican workers, who worked chiefly in Texas and California harvesting lettuce, cucumbers, and tomatoes, and cotton, and hoeing sugar beets in other states. See HOUSE COMM. ON THE JUDICIARY, ADMISSION OF ALIENS INTO THE UNITED STATES FOR TEMPORARY EMPLOYMENT AND "COMMUTER WORKERS" tab. 3-13 at 44-48. Some smaller employers, for example, cotton farmers in Arkansas and sugar beet and processed vegetable growers in the Midwest and Rocky Mountain states, also employed braceros. See *Extension of Mexican Farm Labor Program* (Senate) at 302-305 (testimony of Harvey Adams, Exec. vice pres., Agric. Council of Ark.), 352-53 (testimony of Charles Creuzinger, pres., Veg. Growers Ass'n of Am.).

¹⁴²See CONG. RESEARCH SERVICE, TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES, 96th Cong., 2d Sess. 117 (Comm. Print 1980). The whole point of the so-called H-2A worker program is that these imported "nonimmigrants" are admitted "temporarily" solely "to perform agricultural labor." 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (Supp. 1991). Because H-2A workers are admitted to the United States to work for an identified employer, they can be deported for being enticed to a higher-paying one.

¹⁴³See Sean Means, *Idaho Farmers Happy with Easing of Immigration Rules*, UPI, June 30, 1987 (NEXIS).

only their frankness has diminished. In the 1920s, farm employers, instead of bemoaning the alleged fact that no American citizen would do the kind of work in question,¹⁴⁴ purported to be very solicitous of their racial brethren:

[T]here is not a white man of any intelligence in our country that will work an acre of beets. I do not want to see the condition arise again when white men who are reared and educated in our schools have got to bend their backs and skin their fingers to pull those little beets. But you can do one of two things: You can let us have the only class of labor that do the work, or close the beet factories, because our people will not do it, and I will say frankly I do not want them to do it.¹⁴⁵

Members of the House Immigration and Naturalization Committee, concerned primarily about the dangers they perceived in large cities teeming with aliens, sought to engage the farmers' racial pride. Representative Bacon of New York confided to a Texas cotton farmer that "I am in favor of keeping Texas white." And Representative Box of Texas told the farmers straightforwardly that their demands would "not be helping the country at large." In response to farmers' suggestions that Mexican laborers be admitted exclusively to work in agriculture and then be sent back to Mexico, committee members recalled "that this is America, and you can not put men under serfdom now." Such a radical step was unnecessary, protested the employers: "The Mexican is a child, naturally. Some children need a good deal of discipline."¹⁴⁶

¹⁴⁴"Many U.S. workers prefer not to take jobs which are physically demanding, may be temporary and may require travelling long distances to the place of employment." *Immigration Reform and Control Act of 1985: Hearings Before the Subcomm. on Immigration and Refugee Policy* at 511 (statement of R. Keeney, V.P., United Fresh Fruit & Vegetable Ass'n). Congress heard abundant testimony to the effect that farm employers, who prefer intimidated "guestworkers," use various ploys to reject non-guestworker applicants. See *Temporary Workers: Hearings on a New Temporary Worker Program with Mexico Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 178-86* (1981) (statement of Garry Geffert, attorney, W. Va. Legal Serv.) (discussing apple pickers); *Immigration Reform and Control Act of 1983: Hearing Before the House Comm. on Agriculture 79-81, 280-85* (1983) (statement of Garry Geffert) (discussing apple pickers).

¹⁴⁵*Seasonal Agricultural Laborers from Mexico* at 62 (testimony of Fred Cummings, sugar-beet farmer from Colorado). The chairman of the committee was unimpressed, noting that "[i]t makes no one shed any tears" in France and Belgium to see women and children do that work. *Id.* (Rep. Albert Johnson, Dem. Wash.).

¹⁴⁶*Id.* at 46, 66, 49 (testimony of S. Nixon), 49 (Rep. Bacon), 107 (testimony of J.

The role of the state in the political construction of an enclave¹⁴⁷ of sweated agricultural labor has, at least since the incipient incorporation of farm workers into labor-protective legislation, been self-contradictory. Although the avowed purpose of FLSA is to combat sweating, not until 1966 were any farm workers protected by it. Even today, when fewer than two-fifths of agricultural employees are covered, those most vulnerable to sweating--including many children, piece-rate workers, and employees of small employers--are expressly excluded.¹⁴⁸ Moreover, in certain areas, such as the Rio Grande Valley, enforcement agencies appear to have a tacit understanding with employers that they will provide merely token administration of labor laws in order to sustain enclaves capable of competing with the Third World.¹⁴⁹

The state has, perhaps even more importantly, intervened at crucial junctures to insure the relatively restricted stratum of employing farmers, who have succeeded in shaping public policy based on the assumption that "they cannot and need not compete for workers in the general labor market," an overabundant supply of wage-depressing Third-World, particularly Mexican, labor.¹⁵⁰ By the mid-1950s, the federal government was facilitating the importation

Whitehead, Nebraska). Rep. Box stated that the restrictive contracts sought by the farmers were indistinguishable from the peonage contracts condemned by the courts. *Id.* at 168.

¹⁴⁷See THOMAS, CITIZENSHIP, GENDER, AND WORK at 103, 116.

¹⁴⁸See *infra* ch. 3; Fair Labor Standards Act of 1966, Pub. L. No. 89-601, § 203, 80 Stat. 830, 833-34 (1966); 29 U.S.C. § 213(a)(6) (Supp. 1991).

¹⁴⁹See generally, ROBERT MARIL, POOREST OF AMERICANS: THE MEXICAN-AMERICANS OF THE LOWER RIO GRANDE VALLEY OF TEXAS (1989); ARTHUR RUBEL, ACROSS THE TRACKS: MEXICAN-AMERICANS IN A TEXAS CITY (1966). On a nonagricultural area, see Deborah Yeager, *New York's Chinese Man Apparel Factories Much Like Sweatshops*, Wall Street J., May 31, 1978, at 1, col. 1.

¹⁵⁰DOROTHY NELKIN, ON THE SEASON: ASPECTS OF THE MIGRANT LABOR SYSTEM 9 (1970). James Holt, *Labor Market Policies and Institutions in an Industrializing Agriculture*, 64 AM. J. AGRIC. ECON. 999 (1982), distorts the active pro-employer role played by the state. On the one hand he argues that the two goals of agricultural labor market policy have been improving workers' bargaining power "by reducing the wage-depressing effects of surplus labor" and protecting workers from abusive employers. *Id.* at 999. On the other hand, he claims that the failure of policy "has been due to largely fortuitous access to successive sources of readily available labor over the decades." *Id.* at 1004. As the discussion below shows, state-sponsored importation of wage-depressing foreign labor has been a direct response to requests by certain groups of farm employers.

of almost a half-million braceros annually.¹⁵¹ As that program came under attack in the early 1960s, a farm-state congressional opponent sketched the socioeconomic model underlying the program in these terms:

Years ago the English economist, Ricardo, defined what he called the natural rate of wages, as being "that price which is necessary to enable the laborer, one with another, to subsist and perpetuate their race without increase or diminution" and thereby be able to serve the owners or producers. This is the basis of the class system theory of the 19th century liberal economists.... We have rejected the theory...that laborers compose a special race somewhat akin to the "workers" of the bee and ant families. ... Yet, in American agriculture, we still have proponents of the Ricardo school of economics. These growers tell us that if American workers are not available at the prevailing rate--the modern substitute for Ricardo's natural rate of wages--we must recruit workers from the poor of foreign countries. Presumably, these growers believe that there will always be a sufficient amount of poverty in the world to provide workers who are willing to perform jobs that higher class people will not accept. This theory is based, of course, on placing a very low economic and social value on those jobs associated with the harvest.¹⁵²

¹⁵¹In the peak year, 1957, 450,422 Mexican (and a total of 466,713) agricultural laborers were admitted into the United States. U.S. IMMIGRATION & NATURALIZATION SERVICE, ANNUAL REPORT FOR 1957, tab. 18 at 42 (n.d.); *idem*, ANNUAL REPORT FOR 1966, tab. 18 at 72 (n.d.). From the large literature on the history of the bracero and related programs, see Ellis Hawley, *The Politics of the Mexican Labor Issue, 1950-1965*, 40 AGRIC. HIST. 157 (1966); RICHARD CRAIG, *THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY* (1971); PETER KIRSTEIN, *ANGLO OVER BRACERO: A HISTORY OF THE MEXICAN WORKER IN THE UNITED STATES FROM ROOSEVELT TO NIXON* (1977); J. Jenkins, *The Demand for Immigrant Workers: Labor Scarcity or Social Control?*, 12 INT'L MIGRATION REV. 514 (1978); CONG. RESEARCH SERVICE, *TEMPORARY WORKER PROGRAMS* at 32-58; LINDA MAJKA AND THEO MAJKA, *FARM WORKERS, AGRIBUSINESS, AND THE STATE* 136-66 (1982); Manuel García y Griego, *The Importation of Mexican Contract Laborers to the United States, 1942-1964: Antecedents, Operation, and Legacy*, in *THE BORDER THAT JOINS: MEXICAN MIGRANTS AND U.S. RESPONSIBILITY* 49 (Peter Brown and Henry Shue ed. 1983). Frances Howell, *A Split Labor Market: Mexican Farm Workers in the Southwest*, 52 SOCIOLOGICAL INQUIRY 132 (1982), offers a crude reductionist analysis. For the counterpart process in Canada, see Vic Satzewich, *The Canadian State and Racialization of Caribbean Migrant Farm Labour 1947-1966*, 11 ETHNIC AND RACIAL STUDIES 282 (1988). Thus far nothing seems to have come of a latter-day plan to import Chinese peasants. See Fox Butterfield, *Chinese-American Concern Ready To Bring Peasant Workers to U.S.*, N.Y. Times, Sept. 25, 1987, at 1, col. 3 (nat. ed.).

¹⁵²107 CONG. REC. 7187 (1961) (Rep. Coad, Iowa).

By virtue of its promotion of worker-import programs that have overwhelmed the agricultural labor market with hundreds of thousands of impoverished workers from Mexico (and the Caribbean), the federal government bears major responsibility for locking farm workers into a state of market powerlessness.¹⁵³ Local workers in the surplus labor regions, where the inexhaustible reservoirs of the Mexican hinterlands constitute a permanent overhang of supply, "are forced to migrate" northward, taking with them their even further depressed wage standards as a point of comparison.¹⁵⁴ "Wage levels in the low-wage farm areas thus have a central, and pervasive, influence on the level of the wage structure for hired farm labor."¹⁵⁵ The circle of government-enforced powerlessness is completed by the role played by local governments in their "conscientious efforts...to manipulate local labor markets...to guarantee that agricultural employers will have an oversupply of workers with little choice but to work on farms. Economic development strategies that will disrupt agricultural labor markets are consistently avoided."¹⁵⁶

The approach that even the relatively pro-labor Roosevelt administration adopted underscores the continuity of policy. When the United States entered World War II, the Farm Security Administration (FSA) within the Department of Agriculture was assigned responsibility for reducing agricultural labor shortages.¹⁵⁷ It proceeded to carry out this charge by regulating the recruitment,

¹⁵³See THOMAS, CITIZENSHIP, GENDER, AND WORK.

¹⁵⁴According to the then-Secretary of Labor, the importation of 130,000 braceros into Texas forced 90,000 Texas migrants to look for seasonal work out of state. *Extension of Mexican Farm Labor Program* (Senate) at 226 (statement of Arthur Goldberg). See also BRUCE MEADOR, "WETBACK" LABOR IN THE LOWER RIO GRANDE VALLEY (1951); JOHN ELAC, THE EMPLOYMENT OF MEXICAN WORKERS IN U.S. AGRICULTURE, 1900-1960: A BINATIONAL ANALYSIS 115 (1972 [1961]). On the impact of so-called border commuters, see Note, *Commuters, Illegals, and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U.L. REV. 439 (1973).

¹⁵⁵1 HARRY KANTOR, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS 81 (DOL 1959).

¹⁵⁶Vernon Briggs, Jr., *Comments*, in 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 475, 479 (1981). See also BRIAN RUNGELING ET AL., EMPLOYMENT, INCOME AND WELFARE IN THE RURAL SOUTH 243-44 (1977).

¹⁵⁷On the pre-history of this program, see WAYNE RASMUSSEN, A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM, 1943-1947 20-28 (U.S. Bureau of Agric. Econ. Monograph No. 13, 1951).

transportation, employment, and wages and conditions of domestic and Mexican workers.¹⁵⁸ Among other terms, it imposed a requirement that farmers for whom the federal government recruited workers pay the latter a minimum wage of thirty cents per hour and "a minimum subsistence allowance" of three dollars per day for at least seventy-five per cent of the workdays of the term of the contract.¹⁵⁹ The Secretary of Agriculture explained this subsistence guarantee with the following anti-exceptionalist argument: "Because...with people trying to earn a living, it would be very unsatisfactory to them to transport them and let them stay there 2 or 3 weeks before they were given any work or only given work intermittently."¹⁶⁰

The objective of giving mandatory effect to the feeling that "people...ought to be given some assurance before they are going to be willing to move"¹⁶¹ proved completely unacceptable to agricultural employers. Speaking on behalf of the major farm organizations, Ezra Benson, himself a future Secretary of Agriculture, informed Congress that "[u]nder the guise of the war effort, a social revolution is being perpetrated upon the American people."¹⁶² Congress apparently agreed that suppression of such employment practices as overrecruitment or luring workers to farms weeks before the harvest began to insure their presence when needed did amount to undesirable "social reforms." It promptly acceded to farm employers' request that such legal norms be eliminated.¹⁶³

¹⁵⁸See *Farm Labor Program, 1943: Hearings Before the Subcomm. of the House Comm. on Appropriations, 78th Cong., 1st Sess. 113-18 (1943)* ("Statement of Policy for the Recruitment and Employment of Agricultural Workers in the United States"). See generally, Otey Scruggs, *Evolution of the Mexican Farm Labor Agreement of 1942*, 34 AGRIC. HIST. 140 (1960); *idem*, *The United States, Mexico, and the Wetbacks, 1942-1947*, 30 PAC. HIST. REV. 149 (1961); *idem*, *Texas and the Bracero Program, 1942-1947*, 32 PAC. HIST. REV. 251 (1963).

¹⁵⁹*Farm Labor Program, 1943* (House) at 49 (USDA-FSA "Cooperative Employment Agreement").

¹⁶⁰*Id.* at 169 (statement of Claude Wickard).

¹⁶¹*Farm Labor Program, 1943: Hearings Before the Senate Comm. on Appropriations, 78th Cong., 1st Sess. 18 (1943)* (statement of Claude Wickard).

¹⁶²*Farm Labor Program, 1943* (House) at 88. The Farm Bureau correctly intuited that the FSA was seeking an opening wedge in the regulation of farm labor. See GRANT MCCONNELL, *THE DECLINE OF AGRARIAN DEMOCRACY* 93 (1953); Otey Scruggs, *The Bracero Program under the Farm Security Administration 1942-1943*, 3 LAB. HIST. 149 (1962).

¹⁶³S. REP. NO. 157, 78th Cong., 1st Sess. 5 (1943); *Farm Labor Program, 1943*

Prior diplomatic commitments to the Mexican government, however, persuaded Congress to exempt the imported Mexican workers from this prohibition.¹⁶⁴ Indeed, over and above the aforementioned seventy-five per cent guarantee, the Mexican government negotiated an amended agreement in 1943 requiring farmers to provide free lodging and subsistence for the remaining twenty-five per cent of the days as well. And despite farm employers' protests to the effect that they were being forced to assume liability for unemployment caused by bad weather, the federal government imposed the condition.¹⁶⁵ Consequently, to this day, agricultural laborers imported under the auspices of the federal government are theoretically entitled to protection denied domestic workers--except, ironically, where the latter are brought under that protection by virtue of being employed together with such imported workers.¹⁶⁶

(House) at 88-89, 134-35; RASMUSSEN, A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM at 41-46.

¹⁶⁴S. REP. NO. 157 at 4; H.J. Res. 96, § 4(b), 57 Stat. 70, 72 (1943); RASMUSSEN, A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM at 199-208.

¹⁶⁵RASMUSSEN, A HISTORY OF THE FARM LABOR SUPPLY PROGRAM at 207-209. Even at the height of the bracero program in the 1950s, the Mexican government succeeded in incorporating into the agreement and standard work contract a provision securing Mexican workers "the right to elect their own representatives to maintain contact between themselves and the Employers, and the latter must recognize them as such...." Migrant Labor Agreement of 1951, Aug. 11, 1951, United States-Mexico, T.I.A.S. No. 2331, (§ 17, Standard Work Contract, at 1994).

¹⁶⁶See 20 C.F.R. §§ 655.102(a) & (b)(6) (1991). Secretary of Agriculture Wickard noted the irony. *Farm Labor Program, 1943* (House) at 161. The Farm Bureau opposed conditioning the bracero program on extending the full panoply of protection to domestic migrant workers employed by farmers who imported braceros on the ground that only a captive labor force needed protection against overreaching. See *Extension of Mexican Farm Labor Program* (Senate) at 15 (statement of Matt Triggs). For a description of the dismal lack of enforcement during the bracero program, see ERNESTO GALARZA, *STRANGERS IN OUR FIELDS* (2d ed. 1956); *idem*, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964); ERASMO GAMBOA, *MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942-1947* (1990). For an optimistic contemporary portrait, see ROBERT JONES, *MEXICAN WAR WORKERS IN THE UNITED STATES: THE MEXICAN-UNITED STATES RECRUITING PROGRAM AND ITS OPERATION 1-26* (1945). When the bracero program was terminated, Secretary of Labor Wirtz amended the regulation governing the importation of temporary agricultural (H-2) workers so that no employer could be certified to import H-2 workers unless it offered domestic workers specified hourly wage rates (ranging between \$1.15 and \$1.25) as well as the guarantees to which braceros had been entitled. 20 C.F.R. § 602.10(c) (1965). Some agricultural employers and legislators argued unsuccessfully that Congress had not authorized the Secretary of Labor to

The unilaterally pro-employer function of these importation programs has shown remarkable continuity.¹⁶⁷ The state has stood ready to underwrite precipitous decisions by agricultural employers to force production of commodities in remote locations not densely populated enough to support a labor supply adequate for peak harvesting periods, thus necessitating large-scale importations.¹⁶⁸ Only at rare moments has any official asked whether it "would...not be best if these holdings were reduced so that the farmers could do their work, with occasional help."¹⁶⁹

The history of mobilizing and maintaining a "perpetually cheap" seasonal labor force in the sugar-beet industry that "boost[ed] the income and diminish[ed] the manual labor of the farmer and his family" while "exclud[ing] the poorest class...from the Anglo comity" is crucial to understanding the role of the state in the formation of an agricultural proletariat in the United States.¹⁷⁰ And although the cultivation of sugar beets may not, as its promoters' puffery boasted, have been "work that has to be done or civilization will cease,"¹⁷¹ it

impose a minimum wage except under the Sugar Act, but the regulation remained in force. *See Importation of Foreign Agricultural Workers* at 97 (Sen. Holland), 196 (Matt Triggs, Ass't Legis. Dir., Am. Farm Bureau Fed'n).

¹⁶⁷Philip Martin & David North, *Nonimmigrant Aliens in American Agriculture*, in SEASONAL AGRICULTURAL LABOR MARKETS IN THE UNITED STATES 168 (Robert Emerson ed. 1984).

¹⁶⁸"We feel that we have the right to build up and develop arid America...." THE SUGAR-BEET INDUSTRY OF THE UNITED STATES, S. DOC. NO. 705, 60th Cong., 1st Sess. 38 (1908) (address by Truman Palmer, Sec'y of the Am. Sugar-Beet Ass'n, 1906). *See generally*, Philip Martin, *The Outlook for Agricultural Labor in the 1990s*, 23 U.C. DAVIS L. REV. 499, 514 (1990); D. MARSHALL BARRY, THE ADVERSE IMPACT OF IMMIGRATION ON FLORIDA'S FARMWORKERS (Center for Labor Research & Studies, Florida Int'l U., Occasional Paper No. 3, Nov. 1, 1989); JOHN ELAC, THE EMPLOYMENT OF MEXICAN WORKERS IN U.S. AGRICULTURE, 1900-1960: A BINATIONAL ECONOMIC ANALYSIS 53-77 (1972 [1961]).

¹⁶⁹*Temporary Admission of Illiterate Mexican Laborers* at 94 (Rep. Raker). The congressman's interlocutor, a South Texas cotton farmer, admitted that the answer would be Yes—if the South diversified and were not dependent on one crop. *Id.* at 94-95.

¹⁷⁰SARAH DEUTSCH, NO SEPARATE REFUGE: CULTURE, CLASS, AND GENDER ON AN ANGLO-HISPANIC FRONTIER IN THE AMERICAN SOUTHWEST, 1880-1940, at 124 (1987); F. TAUSSIG, SOME ASPECTS OF THE TARIFF QUESTION: AN EXAMINATION OF THE DEVELOPMENT OF AMERICAN INDUSTRIES UNDER PROTECTION 87 (3d ed. 1931 [1915]).

¹⁷¹*Seasonal Agricultural Laborers from Mexico* at 72 (testimony of Fred Cummings, Colorado sugar-beet farmer).

contributed powerfully to the rise of the modern ethnic minority and alien migrant farm labor system in the United States (and--not coincidentally--in Germany as well).¹⁷²

Because, at the beginning of the twentieth century, sugar beet production required considerably more labor than any other farm product, no farmer could perform more than a small part himself.¹⁷³ As one congressman described the work to his colleagues:

How would any of you, gentlemen or your sons, like to undertake the job of getting down on your hands and knees, thinning out the beets in a row to one beet to every 12 inches, 5,280 in a mile, and 211,200 in 40 miles, and pulling out all the weeds around and between each remaining beet, and hoeing that row backward and forward; a row of beets 40 miles long...and then pulling them up in the fall, knocking the dirt off of them, and cutting off the tops and piling them up?¹⁷⁴

In fact, the degree of labor intensity was "so out of proportion with what [wa]s usually necessary in growing other crops" that "[i]t require[d] all the fortitude of a community in establishing a beet-sugar factory to meet the first shock when the revelation of the amount of labor to be performed...first dawn[ed] upon them."¹⁷⁵

In the early period of sugar beet growing, around the turn of the century, the contemporary configuration of the state of

¹⁷²In Germany the labor-intensive cultivation of sugar beets gave rise to a largely Polish and female migrant labor force at the end of the nineteenth century. See NICHTWEIß, *DIE AUSLÄNDISCHEN SAISONARBEITER* at 11, 30-33; RICHARD KRZYMOWSKI, *GESCHICHTE DER DEUTSCHEN LANDWIRTSCHAFT UNTER BESONDERER BERÜCKSICHTIGUNG DER TECHNISCHEN ENTWICKLUNG DER LANDWIRTSCHAFT BIS ZUM AUSBRUCH DES 2. WELTKRIEGS* 1939, at 382-86 (1961); FRIEDA WUNDERLICH, *FARM LABOR IN GERMANY 1810-1945*, at 63 (1961). Germany also witnessed an oligopolization of the refining industry. See John Perkins, *The Organisation of German Industry, 1850-1930: The Case of Beet-Sugar Production*, 19 J. EUR. ECON. HIST. 549 (1990).

¹⁷³"More than ten times as much hand labor is required to raise an acre of beets as to raise an acre of wheat...." F. HARRIS, *THE SUGAR-BEET IN AMERICA* 45 (1919); USDA, *SPECIAL REPORT ON THE SUGAR-BEET INDUSTRY IN THE UNITED STATES* 170 (1898). On the secular diminution in labor inputs, see VLADIMIR TIMOSHENKO & BORIS SWERLING, *THE WORLD'S SUGAR* 90-124 (1957); Wayne Rasmussen, *Technological Change in Western Sugar Beet Production*, 41 AGRIC. HIST. 31 (1967).

¹⁷⁴*Seasonal Agricultural Laborers from Mexico* at 266 (Rep. Taylor, Col.).

¹⁷⁵USDA, *SPECIAL REPORT ON THE SUGAR-BEET INDUSTRY IN THE UNITED STATES* 204 (1898).

technology elevated field labor into a major concern. The fruits of science and its application that potentially could eliminate hand labor operations during the seasonal cycle of plant growth were maturing very unevenly. Mechanization of ground preparation, planting, and cultivating was well advanced. Already performance of these operations on whatever scale the growth of the industry might require had been brought within the capacity of the local supply of workers.... But the other operations necessary to production of sugar beets had not. ... If beet-growing was to be expanded without delay, large numbers of hand laborers from outside the community would be needed to "block and thin" with hoes and fingers in the spring, and again to "top" beets with heavy knives in the fall—given, of course, (1) the existing farm and population structures of most Western farm communities and (2) a determination by enterprise to make beet-growing and beet sugar manufacture into an industry promptly.¹⁷⁶

At the turn of the century, when the production process required four to five field laborers--in addition to the farmers--for every sugar factory worker, "the great problem that confronted capitalists contemplating the building of factories and the managements of factories actually established was: 'Where are we going to secure the labor to grow the beets?' It certainly was the hardest problem they had to solve." Since "[t]hinning and weeding by hand while on one's knees is not a work or a posture agreeable to the average American farmer," "it seem[ed] miraculous at times where they [laborers] all c[a]me from." The owners, however, could count on the state to insure the sequential importation of laborers from Eastern Europe, Asia, and Latin America: "There is a class of labor accustomed to and inclined to do this hand work. They take it in preference to any other kind of work. As a rule they have been reared to do it. It is the work they...apparently...desire most to do. ... It is a calling with them." The use of one racial or ethnic group to compete with and even to break the strikes of others was a conscious element of the plan.¹⁷⁷ Hence the origin of the

¹⁷⁶Paul Taylor, *Hand Laborers in the Western Sugar Beet Industry*, 41 AGRIC. HIST. 19, 19 (1967).

¹⁷⁷USDA, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1904, SEN. DOC. NO. 160, 58th Cong., 3d Sess. 36-37, 103 (Rep. No. 80, 1904); *idem*, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1906, H. DOC. NO. 799, 59th Cong., 2d Sess. 24 (Rep. No. 84, 1907); *idem*, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1907, at 20-25 (Rep. No. 86, 1908). The author of a how-to treatise stated matter-of-factly that "the labor problem is solved by hiring foreigners...." HARRIS, THE SUGAR-BEET IN AMERICA at 46. For a self-celebratory paean to the virtues of sugar-beet labor (including child labor) that verged

involvement of generations of Mexican and Mexican-American migrants (including young children)¹⁷⁸ in the sugar-beet industry in the West and Midwest, where they were caught in a web of exploitative practices that constituted them as a quasi-captive labor force: "the wages of the Mexicans were kept so low to prevent them from accumulating any capital to buy farms."¹⁷⁹

on self-caricature, see USDA, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1903, at 103-107 (1904).

¹⁷⁸The author of a practical treatise praised child labor: "children often can thin beets better and more rapidly than their parents." HARRIS, THE SUGAR-BEET IN AMERICA at 255. See also USDA, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1904 at 39 (beet labor "removes the boy from the temptation of idleness and the school of vicious habits"). The hypocrisy was more obvious still in the claim that while farmers did "not like to get down on their knees, "it was sort of a picnic for the boys" paid five to twelve cents an hour. 10 REP. OF THE INDUS. COMM'N ON AGRIC. & AGRIC. LABOR, H.R. DOC. No. 179, 57th Cong., 1st Sess. 555-56 (1901) (testimony of Julius Rogers, Pres., Binghamton Beet Sugar Co.). See also LEONARD ARRINGTON, BEET SUGAR IN THE WEST: A HISTORY OF THE UTAH-IDAHO SUGAR COMPANY, 1891-1966, at 134 (1966) ("[N]o one questions that thinning and topping were backbreaking and wearisome, whether performed by husky Hispanos or earth-loving Mormons"). On the widespread labor by children of other ethnic groups (especially German-Russians), see CHILD LABOR AND THE WORK OF MOTHERS IN THE BEET FIELDS OF COLORADO AND MICHIGAN (U.S. Children's Bureau, Pub. No. 115, 1923). Cultivation of sugar beets was by no means the only example of hired child labor in agriculture before World War II. The parents of thousands of largely Italian children in Philadelphia removed them from school as early as February to work with them on truck farms in Pennsylvania, Delaware, and New Jersey harvesting asparagus, strawberries, tomatoes, raspberries, blackberries, peas, beans, cranberries, and potatoes. Owen Lovejoy, *The Cost of the Cranberry Sauce*, 26 SURVEY 605 (1910-11); *Farm Work and City School Attendance*, MONTHLY LAB. REV., Dec. 1922, at 150. Perhaps the highest child labor force participation rate was found in the Rio Grande Valley in the early 1940s, where among farm worker families one-sixth of the six and seven-year-olds and more than one-half of the eight and nine-year-olds worked. AMBER WARBURTON, HELEN WOOD, & MARIAN CRANE, THE WORK AND WELFARE OF CHILDREN OF AGRICULTURAL LABORERS IN HIDALGO COUNTY, TEXAS tab. 6 at 20 (U.S. Children's Bureau Pub. No. 298, 1943).

¹⁷⁹For accounts of the use of migrant labor in sugar-beets before World War II, see 1 TAYLOR, MEXICAN LABOR IN THE UNITED STATES: VALLEY OF THE SOUTH PLATTE COLORADO; W. ABBOTT, REPORT FOR THE COMMITTEE ON LABOR CONDITIONS IN THE GROWING OF SUGAR BEETS (1934); Elizabeth Johnson, *Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers*, 46 MONTHLY LAB. REV. 322 (1938); *National Defense Migration: Hearings Before the House Select Comm. Investigating National Defense Migration*, 77th Cong., 1st Sess., pt. 19 at 7862-7910 (1941) (History of Sugar Beet Labor in Michigan: Report by Labor Div., FSA, USDA); MCWILLIAMS, ILL FARES THE LAND at 109-29, 257-81; HARRY SCHWARTZ, SEASONAL FARM LABOR IN THE UNITED STATES 102-39 (1945); Dennis Valdés, *Betabeleros: The Formation of an Agricultural Proletariat in the Midwest, 1897-1930*, 30 LAB. HIST. 536

The migrant agricultural wage policy that underlay the aforementioned self-fulfilling racist prophecy¹⁸⁰ led to early predominance by Mexican workers in the sugar-beet labor force.¹⁸¹ Because the employing firms adopted "a wage level based on family labor," the whole family was constrained to work.¹⁸² Even before the large-scale use of Mexican laborers, promoters of the new industry praised its receptivity to family labor. "Germans, French, Russians, Hollanders, Austrians, Bohemians...naturally sought this new avenue of employment [which] appealed to them" because:

in the beet fields they could find work for their whole families. In this respect it differed from other lines of work. The head of the house could go out and dig in the trenches of the city, or work on the sections of the railroad, or in excavations and other kinds of employment under a contractor. The women and children of the family could not do this.¹⁸³

During the Depression, the Great Western Sugar Company explicitly

(1989); *idem*, *Settlers, Sojourners, and Proletarians: Social Formation in the Great Plains Sugar Beet Industry, 1890-1940*, 10 GREAT PLAINS Q. 110 (1990); *idem*, AL NORTE. Until the expiration of the bracero program in 1964, large numbers of Mexican workers were imported to cultivate sugar beets. See S. REP. NO. 1549: THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, 89th Cong., 2d Sess. 9 (1966). In 1962, for example, they accounted for twenty-four per cent of all seasonal sugar-beet workers in the United States. HOUSE COMM. ON THE JUDICIARY, ADMISSION OF ALIENS INTO THE UNITED STATES FOR TEMPORARY EMPLOYMENT AND "COMMUTER WORKERS" tab. 12 at 48. On the considerably lower wages paid "Mexican" "contract labor" (vis-à-vis "regular labor") for thinning and topping, see ROY BLAKEY, THE UNITED STATES BEET-SUGAR INDUSTRY AND THE TARIFF tab. LIII at 268 and LIV at 269 (1912); Charles Meyers, *The Mexican Problem in Mason City*, 27 IOWA J. HIST. & POL. 227, 233-34 (1929); MAY, THE GREAT WESTERN SUGARLANDS at 415-17.

¹⁸⁰"[T]he only fellow we can keep under our feet is the Mexican or the negro...." *Temporary Admission of Illiterate Mexican Laborers* at 94 (testimony of Fred Roberts, South Texas cotton farmer).

¹⁸¹By 1927, three-quarters of sugar-beet laborers in Ohio, Michigan, Minnesota, and North Dakota were Mexican; in 1939, 53,929 (56.8 per cent) of 93,109 beet workers nationally were said to be Mexican. *National Defense Migration* pt. 19 at 7873, 7874.

¹⁸²*Johnson Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers* at 327. A family wage based on the labor of the whole family was not unique to migrant farm work. See, e.g., HERBERT LAHNE, THE COTTON MILL WORKER 129-36 (1944). For the nineteenth-century British context, see Jane Mark-Lawson & Anne Witz, *From "Family Labour" to "Family Wage"? The Case of Women's Labour in Nineteenth-Century Coalmining*, 13 SOC. HIST. 151 (1988).

¹⁸³USDA, PROGRESS OF THE BEET-SUGAR INDUSTRY OF THE UNITED STATES IN 1904 at 37.

advertised that beet work was very "convenient" for families because they would not have to rely exclusively on the father's wages. This enforced incorporation of small children working "very long hours at strenuous labor" had, in turn, a "depressing effect on wage rates." By contracting only with the father, however, employers could make it appear that the parents, not they, were responsible for widespread child labor.¹⁸⁴

The New Deal, ostensibly animated by the glaring inequities associated with the subsidies that taxpayers and consumers provided to the oligopolistic sugar refiners,¹⁸⁵ which were joint employers with the farmers,¹⁸⁶ purported to impose limits on the exploitation of beet

¹⁸⁴MAY, *THE GREAT WESTERN SUGARLANDS* at 361; Johnson, *Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers* at 328, 329; CHILD LABOR AND THE WORK OF MOTHERS IN THE BEET FIELDS OF COLORADO AND MICHIGAN at 2; Valdés, *Betabeleros* at 549, 556. Children six to sixteen years old accounted for one-quarter of all family workers cultivating sugar beets. ELIZABETH JOHNSON, *WELFARE OF FAMILIES OF SUGAR-BEET LABORERS: A STUDY OF CHILD LABOR AND ITS RELATION TO FAMILY WORK, INCOME, AND LIVING CONDITIONS IN 1935*, at 3 (U.S. Children's Bureau Pub. No. 247, 1939).

¹⁸⁵See generally, MCWILLIAMS, *ILL FARES THE LAND* at 122-27. The Secretary of the Interior confided to his diary in 1934 that for precisely these reasons Pres. Roosevelt was considering phasing out the high tariff over a twenty year period. THE SECRET DIARY OF HAROLD L. ICKES: THE FIRST THOUSAND DAYS 1933-1936, at 147 (1953). For a different view, see Leonard Arrington, *Science, Government, and Enterprise in Economic Development: The Western Sugar Beet Industry*, 41 *AGRIC. HIST.* 1 (1967). Vis-à-vis the farmers, the sugar refiners were often monopsonists since the bulkiness and perishability of the beets limited their sale to the local plant. On the origins of the oligopoly, see ALFRED EICHNER, *THE EMERGENCE OF OLIGOPOLY: SUGAR REFINING AS A CASE STUDY* (1969). On the early history, location, and government support of the sugar beet industry, see FTC, *REPORT ON THE BEET SUGAR INDUSTRY IN THE UNITED STATES* 2-16 (1917). In the 1920 and 1930s, the Great Western Sugar Co. alone produced 30-40% of the sugar in the United States. *Seasonal Agricultural Laborers from Mexico* at 245 (statement of C. Maddaux, Labor Comm'r, Great Western Sugar Co.); ABBOTT, *REPORT FOR THE COMMITTEE ON LABOR CONDITIONS IN THE GROWING OF SUGAR BEETS* at 24.

¹⁸⁶In Michigan, for example, sugar companies paid the workers directly, deducting the wages from the crop payments to the farmers. J. THADEN, *MIGRATORY BEET WORKERS IN MICHIGAN* 29 (*Mich. State Coll. Agric. Experiment Station Spec. Bull.* 319, 1942). See also Johnson, *Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers* at 324-27; *Seasonal Agricultural Laborers from Mexico: Hearing Before the House Comm. on Immigration and Naturalization* at 121 (statement of J. Breakenridge, Iowa sugar beet farmer). The triangular contracts—refinery and grower/refinery and laborer/grower and laborer—suggest in addition that the farmers may also have been employees of the manufacturers. See the sample contracts in 24:2 U.S. IMMIGRATION COMM'N, *IMMIGRANTS IN INDUSTRIES: RECENT IMMIGRANTS IN AGRICULTURE*, S. DOC. NO. 633, 61st Cong., 2d Sess. 573-75 (1911); HARRIS, *THE SUGAR-BEET IN*

laborers. The result was the first--and until the 1960s the only--federal legislation designed to protect domestic agricultural workers.¹⁸⁷ Its administration and enforcement revealed the same ambivalence and half-heartedness that was to characterize all later regulation of agricultural sweatshops.

The Sugar Act of 1937 did not establish a minimum wage laying an absolute floor under workers' earnings; instead, it conditioned receipt by farmers of government subsidies on their refraining from employing children under fourteen and on their contracting with workers at "fair and reasonable" wage rates to be determined by the Secretary of Agriculture after holding public hearings.¹⁸⁸ Since beet workers had little or no representation at these hearings,¹⁸⁹ however, and the Department of Agriculture unabashedly administered the program to benefit its agricultural-employer constituents,¹⁹⁰ the minimum rates tended to become a

AMERICA at 94-102. In the post-World War II period, the sugar refinery firms also paid for transporting braceros from Mexico to the farms and back. *Extension of Mexican Farm Labor Program* at 164-65 (testimony of Fred Holmes, labor comm'r, Great Western Sugar Co.).

¹⁸⁷Jones-Costigan Act of 1934, ch. 263, § 4(E)(3), 48 Stat. 670, 674 (1934). After the Supreme Court held it unconstitutional, Congress enacted the Sugar Act of 1937. See generally, William Ham, *Regulation of Labour Conditions in Sugar Cultivation under the Agricultural Adjustment Act*, 33 INT'L LAB. REV. 74 (1936); Clay Cochran, *Hired Farm Labor and the Federal Government* 116-18 (diss., U. N. Carolina, 1950 [1951]).

¹⁸⁸Sugar Act of 1937, ch. 898, § 301, 50 Stat. 903, 909-10 (1937), as amended by Sugar Act of 1948, ch. 519, § 301(c)(1), 61 Stat. 922, 930 (1947) (codified at 7 U.S.C. § 1131(c)(1) (1973)). The short-lived Jones-Costigan Act authorized but did not require the Secretary of Agriculture to condition payments on compliance with child labor and minimum wage regulations. § 4, 48 Stat. at 674. During World War I Britain created a precedent for such regulation by imposing a minimum wage for agricultural workers in connection with guaranteeing farmers a minimum price for wheat and oats. Corn Production Act, 1917, 7 & 8 Geo. 5, ch. 46. By the mid-1920s it was replaced by the Agricultural Wages (Regulation) Act, 1924, 14 & Geo. 5, ch. 37, which regulated agricultural wages generally through agricultural wages boards.

¹⁸⁹Workers were unrepresented because the USDA chose to hold public hearings in the beet-growing areas during the winter after the migrants had already returned home. This situation was not corrected until 1964, when the USDA began holding hearings in South Texas. See 29 FED. REG. 4871-72 (1964). Even then the USDA remained unresponsive to workers' demands. See, e.g., *Wage-Setting Procedures under the Sugar Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. (1972); *Angel v. Butz*, 487 F.2d 260 (10th Cir. 1973). On the short shrift given the few worker representatives at the very first hearings in 1937 and 1938, see VALDÉS, *AL NORTE* at 44.

¹⁹⁰See Kent Hendrickson, *The Sugar-Beet Laborer and the Federal Government: An*

maximum, which employers could then justify as a government mandate not subject to further negotiation.¹⁹¹ To the extent that the Secretary's determination merely mirrored and perpetuated the historical relationship between workers' wages per acre and farmers' gross income per acre, which resulted from the extreme disparity in power between employees and employers (including the sugar oligopolies), this New Deal innovation did nothing but "place the stamp of legitimate authority upon the private agreements of employers."¹⁹²

Because the Sugar Act never addressed the issue of the family labor/wage system, compliance with the minimum wage provision was scarcely enforceable.¹⁹³ The wage-rate determinations

Episode in the History of the Great Plains in the 1930's, 3 GREAT PLAINS J., Spring 1964, at 44. Until the very end the USDA rejected all worker recommendations that would have made enforcement possible. See, e.g., 31 Fed. Reg. 5002, 5005-5007 (1966); 38 Fed. Reg. 8164, 8167-69 (1973); 39 Fed. Reg. 4750, 4753-54 (1974). The USDA's pro-employer bias was nowhere expressed more clearly than with regard to a regulation permitting farmers to escape liability for wage deficiencies by paying workers through crew leaders. Even after a federal court held the regulation invalid, the USDA amended it in such a way as to make it very unlikely that an employer would ever be held liable. See *Salazar v. Hardin*, 314 F. Supp. 1257 (D. Col. 1970); 7 C.F.R. § 862.15(b), in 38 Fed. Reg. 8166 (1973).

¹⁹¹See *National Defense Migration: Hearings Before the House Select Comm. Investigating National Defense Migration* at 7884; VALDES, *AL NORTE* at 45; FISHER, *THE HARVEST LABOR MARKET IN CALIFORNIA* at 107; SCHWARTZ, *SEASONAL FARM LABOR IN THE UNITED STATES* at 124; *Minimum Wages for Sugar-Beet and Sugar-Cane Labor*, 53 MONTHLY LAB. REV. 167 (1941). See also JAMIESON, *LABOR UNIONISM IN AMERICAN AGRICULTURE* at 243-48, 385-87 (unsuccessful efforts by sugar-beet unions to negotiate higher piece rates).

¹⁹²14 Fed. Reg. 1171 (1949); Loren Scott & Lamar Jones, *The USDA and Wages in the Sugar Crop Industry*, 25 LAB. L.J. 18 (1974); FISHER, *THE HARVEST LABOR MARKET IN CALIFORNIA* at 147. This effect of mandatory wage guarantees remains the rational kernel of the claim that under more recent importation programs "the right to organize becomes meaningless if all work terms are predetermined...." Edward Tuddenham, *The False Promise of Legalized Immigration in Agriculture*, in 8 IN DEFENSE OF THE ALIEN: IMMIGRATION ENFORCEMENT, EMPLOYMENT POLICY, MIGRANT RIGHTS AND REFUGEE MOVEMENTS 37, 40 (Lydio Tomasi ed. 1986). R. Hurt, *Agricultural Technology in the Twentieth Century*, in J. WEST, Apr. 1991, 5, 78, states without documentation that the wage settings promoted the introduction of labor-saving technologies.

¹⁹³

Where it is common for a family of migrant laborers to work as a group, and the wages for the family are paid to the head of the family, there may be some difficulty in ascertaining compliance with a minimum wage required by law. This problem is apparently handled under the Sugar Act by an attestation by the head of the family that each member's compensation is not less than the minimum wage requirement.

by the Secretary of Agriculture actually reinforced that system by permitting farmers to pay piece (acreage) rates in lieu of the prescribed hourly rates, which largely remained a dead letter. Moreover, even if payment of the hourly minimum wage had been widespread, the procedure by which workers were entitled to submit wage claims was preposterously biased: the tribunal adjudicating the dispute consisted exclusively of local farmers.¹⁹⁴ The pre-modern character of this quasi-protective statute is seen most clearly in a 1940 amendment that effectively offered amnesty to those who had violated the child labor provision from 1937 through 1939 by retroactively reducing the penalty from total loss of the subsidy to a mere ten dollars per child-day of violations.¹⁹⁵ The final speech in the debates captured the spirit of the legislation: "I suppose the gentlewoman from Massachusetts would have us penalize a farming operative \$50,000 or \$100,000 or \$300,000 for violating some crazy law that Congress enacted...?"¹⁹⁶ And finally, the Department of Agriculture undermined wage standards by authorizing payment of only two-thirds of the mandatory rate to "workers between 14 and 16 years of age." The inevitable consequence was the massive

1 KANTOR, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS at 192-93. Simulating compliance with federally mandated hourly wages by "including an entire family's earnings on one pay slip" was commonplace among employers in the sugar-beet industry. VALDÉS, AL NORTE at 102. Current experience confirms that migrants typically are economically coerced into signing such statements, have internalized the compulsion and need no prompting, or are unaware of their entitlement to the minimum wage when they are working on a piece rate.

¹⁹⁴J. THADEN, MIGRATORY BEET WORKERS IN MICHIGAN at 28; *Sugar Act Extension, 1974: Hearings Before the House Comm. on Agriculture*, 93d Cong., 2d Sess. 142-45 (1974) (statement of James Herrmann, attorney, Migrant Legal Action Program). Until the termination of the Sugar Act, the USDA repeatedly rejected workers' proposals that the county Agricultural Stabilization and Conservation committee "include a worker or worker representative, or an impartial third party mutually acceptable to workers and producers...." 38 Fed. Reg. 8167 (1973). The USDA stated that such an arrangement "would eliminate an equitable and workable means of resolving wage claims." *Id.* at 8169; 39 Fed. Reg. 4754 (1974). Ironically, at the same time that Congress finally saw fit to resolve wage claims through neutral adjudicators and to mandate payment of a minimum hourly wage to piece-rate workers, it also terminated the Sugar Act altogether. See H. REP. NO. 1049: SUGAR ACT AMENDMENTS OF 1974, 93d Cong., 2d Sess. 7-8, 57-58 (1974); 120 CONG. REC. 17,864-72 (1974).

¹⁹⁵Act of June 25, 1940, 54 Stat. 571 (1940).

¹⁹⁶86 CONG. REC. 8437 (1940) (statement of Rep. Crawford).

subsidization of agricultural employers through public relief of its underpaid workers.¹⁹⁷

Since the termination of the Sugar Act in 1974, migrant families hoeing sugar beets have frequently been without any legal recourse vis-à-vis employers, many of whom treat them as independent contractors.¹⁹⁸ Because many of the farms employ no other hired labor, they do not reach the threshold for coverage under FLSA.¹⁹⁹ Where state minimum wage laws exclude "any individual employed in agriculture,"²⁰⁰ the workers can seek no

¹⁹⁷See, e.g., 23 Fed. Reg. 2093 (1958); Johnson, *Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers* at 337-38. In Michigan, shortly before U.S. entry into World War II, the state relief agency was not supposed to make relief payments so as to subsidize an industry that did not pay a living wage. And despite the (ironic) complaint by sugar-beet farmers that offering such relief to sugar-beet workers would create a labor shortage, the agency at times determined that workers were eligible in part because their wages were so low and in part because they were not paid at all while employed. See *National Defense Migration* at 7886-87. Employers frequently held back part of the acreage rate for springtime thinning in order to discourage workers from not returning for the fall topping. *Id.* at 7881-82.

¹⁹⁸Pub. L. No. 92-138, § 412, 85 Stat. 379, 390 (1971). On conditions shortly before the termination of the Sugar Act, see Jonathon Chase, *The Migrant Farm Worker in Colorado--The Life and the Law*, 40 U. COL. L. REV. 45 (1967); *Extension of the Sugar Act: Hearings Before the House Comm. on Agriculture*, 92d Cong., 1st Sess. 181-88 (1971) (testimony of Jonathon Chase); Note, *Legal Problems of Migrant Agricultural Workers in the Red River Valley of North Dakota and Minnesota*, 50 N.D.L. REV. 459 (1974). In 1970 there were an estimated 71,000 sugar-beet workers in the U.S. See *Wage-Setting Procedures under the Sugar Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education & Labor*, 92d Cong., 2d Sess. 61 (1972).

¹⁹⁹The minimum wage provision of FLSA does not apply to "any employee employed in agriculture...if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor." 29 U.S.C. § 213(a)(6)(A) (Supp. 1991). In the Rocky Mountain states, for example, sugar-beets farmers employ on the average only three seasonal workers. *Extension of Mexican Farm Labor Program* at 165 (testimony of Fred Holmes, labor comm'r, Great Western Sugar Co.). The Migrant & Seasonal Agricultural Worker Protection Act (AWPA) adopts as its small business exemption for agricultural employers the FLSA 500-man-day standard. 29 U.S.C. § 1803(a)(2) (1985).

²⁰⁰See, e.g., NEB. REV. STAT. § 48-1202(4) (1987). The minimum wage laws in most states in which migrant beet laborers work do not cover agricultural employees. See, e.g., IDAHO CODE § 1504 (Supp. 1991); WYO. STAT. § 27-4-201(a)(iv)(A) (1987). The minimum wage law in Montana covers farm workers, but permits farmers to pay piece rate workers a minimum of \$635 per month (minus housing), which, given the hours that migrants work at the height of the sugar-beet season, would work out to far less than the state minimum wage. MONT. CODE. ANN. § 39-3-404(2)(b) (1991). Although

protection there. Because the sugar-beet farmers largely recruit workers directly without the use of farm labor contractors, state laws regulating agricultural labor contractors also provide no remedy. Thus so long as the farmer pays the workers the agreed-upon acreage piece rate, even if it worked out to ten cents per hour, the farmer would have done nothing actionable.²⁰¹

For decades agricultural employers throughout the Midwest and West have failed to offer wages high enough to induce local workers to perform the very hard and unpleasant labor that thinning sugar beets, detasseling corn, and weeding soybeans require. Consequently, these industries, which are vital to the economy of many midwestern states, would, as the general counsel for the Great Western Sugar Co. once told Congress, "probably be very hard put to remain viable" without importing Mexican and Mexican-American migrants from Texas²⁰²--and paying them wages unacceptable to local workers.

These permanently substandard conditions under which agricultural firms have been able to employ migrants--and which are merely illustrative of migrant labor standards generally--have in large part been made possible by state intervention. The next chapter examines the structure and consequences of state intervention on behalf of the workers themselves.

the statutes in North Dakota and Colorado authorize the state labor commissioner to prescribe a wage standard for agricultural employees, no such standards have been adopted. See FEDERAL AND STATE EMPLOYMENT STANDARDS AND U.S. FARM LABOR: A REFERENCE GUIDE TO LABOR PROTECTIVE LAWS AND THEIR APPLICABILITY IN THE AGRICULTURAL WORKPLACE 127-28, 553 (Brian Craddock ed. 1988).

²⁰¹See, e.g., Nebraska Farm Labor Contractors Act, NEB. REV. STAT. §§ 48-1701-1714 (1988). A former migrant beet worker from the Rio Grande Valley, who had long since become a white-collar worker, discovered that his relatives thinning beets for the Great Western Sugar Co. in Colorado in the 1980s were being paid eighteen dollars per acre--only two dollars more than he had received thirty years earlier. When a reporter interviewed the company, its first line of defense was that "independent farmers" paid the workers. Dianna Solis, *On the Move: From Farm to Farm, Migrant Workers Struggle to Survive: Texans and Illegal Hispanics Vie for Jobs Paying Below Minimum Wage*, Wall St. J., May 15, 1985, at 1, col. 1, at 18, col. 1.

²⁰²*Farm Labor Contractor Registration Act Amendments of 1976: Hearings before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor on H.R. 14254, 94th Cong., 2d Sess. 131 (1976) (statement of Peter Adolph). As late as 1968, Great Western Employment Agency accounted for forty-two per cent of all workers (15,185 of 35,846) sent out-of-Texas by licensed agents. MILLER, THE ROLE OF FARM LABOR MARKET INSTITUTIONS, tab. D-36 at 175.*

Appendix:
Hourly Wage Equivalents for Farm Family Labor

The argument in this chapter included the claim that migrants' low wages are in part accounted for by the low incomes and underemployment of farm family labor. The analogy extends also to the fact that, in spite of the rationality models underlying econometric studies,²⁰³ farm families, like migrants, are probably unaware of "the marginal value" of their farm work hours because they do not think in those terms, but rather in terms of the total income necessary to maintain a customary standard of living. Remarkably little research appears to have been done on the issue of calculating such hourly wage equivalents.²⁰⁴

The 1964 Census of Agriculture collected a unique set of data (for the period March 1965-March 1966) on the annual hours worked by all members of the farm household (including the operator), which makes possible a rough estimate of family labor compensation. Unpaid family workers (including children ten to thirteen years old) recorded 7,951,565,000 hours of labor (or about 2,404 hours per farm) for the year.²⁰⁵ The returns to operators (including returns to management, labor, and equity capital)²⁰⁶ in

²⁰³See, e.g., J. Tokle & Wallace Huffman, *Local Economic Conditions and Wage Labor Decisions of Farm and Rural Nonfarm Couples*, 73 AM. J. AGRIC. ECON. 652, 657 (1991).

²⁰⁴Conversations with agricultural economists at the Economic Research Service (ERS) of the USDA revealed that those in charge of collecting the underlying data neither made such calculations nor knew of studies that had, although one speculated that farm family members probably earned no more than the minimum wage. The data in this appendix should not be confused with statistical or econometric studies in which "unpaid labor is assumed to be worth the equivalent of the hired wage rate." ERS, 12 MAJOR STATISTICAL SERIES OF THE U.S. DEPARTMENT OF AGRICULTURE: COSTS OF PRODUCTION 4 (Agric. Handbook No. 671, 1987). See also Wallace Huffman, *The Productive Value of Human Time in U.S. Agriculture*, 58 AM. J. AGRIC. ECON. 672, 676 (1976).

²⁰⁵Calculated according to data in 3 BOC, 1964 CENSUS OF AGRICULTURE, PT. 2: FARM LABOR 11, 60-61 (1967).

²⁰⁶These returns are "calculated as the residual income after all nonfactor payments and payments to other factors of production are made." ERS, ECONOMIC INDICATORS OF THE FARM SECTOR: NATIONAL FINANCIAL SUMMARY, 1985, at 4 (1986).

1965 amounted to \$11,832,000,000.²⁰⁷ This income translates into an hourly wage of \$1.49. The minimum wage at the time was \$1.25, while the average wage in manufacturing was \$2.61.²⁰⁸ A somewhat higher wage equivalent (\$1.62) results from using the broader category of net farm income (which includes noncash income from home consumption of farm products and the imputed rental value of dwellings).²⁰⁹

This aggregate average figure is misleading because the smaller the farm, the greater the amount of family labor--itself an indicator of the greater intensity of self-exploitation on small farms. Thus, for example, on the 506,000 class IV farms, the largest class of commercial farms (with sales valued at between \$5,000 and \$9,999), unpaid family members (including 10-13 year-olds) worked 3,564 hours in 1965. Even using the broad category of net farm income (which averaged \$3,211 per class IV farm), for the almost 900,000 such workers, who accounted for more than one-quarter of all unpaid family workers, the hourly income amounted to only \$0.90.²¹⁰ The significantly larger number of hours of farm family labor found in a survey conducted by the USDA the following year²¹¹ would result in even lower calculated hourly incomes.

These equivalent hourly rates comport with a USDA series (discontinued in the 1960s) showing that, for most types of farms, returns per hour to operator and family labor were "lower than wage rates for hired labor" on such farms. Some of the low returns were

²⁰⁷ERS, ECONOMIC INDICATORS OF THE FARM SECTOR: INCOME AND BALANCE SHEET, 1983 tab 2 at 11 (1984).

²⁰⁸BOC, HISTORICAL STATISTICS OF THE UNITED STATES ser. D-802 at 169 (bicentennial ed. 1975).

²⁰⁹ERS, ECONOMIC INDICATORS OF THE FARM SECTOR: INCOME AND BALANCE SHEET, 1983 tab 49 at 73 (1984). For a schematic chart explaining the inclusiveness of the various farm income categories, see ERS, 3 MAJOR STATISTICAL SERIES OF THE U.S. DEPT' AGRIC.: FARM INCOME 1-7 (Agric. Handbook No. 671, 1988).

²¹⁰Calculated according to data in 3 BOC, 1964 CENSUS OF AGRICULTURE, PT. 2: FARM LABOR 11, tab. 1 at 13, tab. 2 at 14, tab. 6 at 68; ERS, ECONOMIC INDICATORS OF THE FARM SECTOR: NATIONAL FINANCIAL SUMMARY, 1985, tab. 34 at 49 (1986). Hourly family labor incomes also differed significantly according to the crop produced. Thus although vegetable and fruit farms were by far the most labor intensive (10,203 and 7,576 total hours annually respectively), the share performed by unpaid family members was also by far the lowest (17.5 and 19.2 per cent respectively compared with an aggregate average of 71.6 per cent). 3 BOC, 1964 CENSUS OF AGRICULTURE, PT. 2: FARM LABOR at 11.

²¹¹Calculated according to data in ERS, FAMILY AND HIRED LABOR ON U.S. FARMS IN 1966 tab. 2 at 3 (Stat. Bull. No. 459, 1972).

attributed "to the lack of alternative employment for other members of the operator's family."²¹² Despite the different data base used, these hourly wage equivalents are also consistent with findings that in 1960 only ten per cent of farm family workers--those on the largest farms in terms of value of sales--"received average labor incomes on a full par with factory worker earnings...." Had off-farm and nonmoney income been excluded, only three per cent of family workers would have received factory-worker-like earnings.²¹³

Such calculated equivalent hourly wages are, finally, also consistent with the following conclusion of another study using the same 1964 Census of Agriculture data: "Being self-employed or working as an 'unpaid' family worker are ways [sic] of circumventing the unemployment effects of minimum wage legislation."²¹⁴

²¹²ERS, FARM COSTS AND RETURNS: COMMERCIAL FARMS BY TYPE, SIZE, AND LOCATION 5 (Agric. Infor. Bull. No. 230, rev. 1963). The hourly returns varied greatly according to type of farm. *Id.*, tab. 3 at 6. See also *idem*, COSTS AND RETURNS ON COMMERCIAL FARMS: LONG-TERM STUDY, 1930-57 (Stat. Bull. No. 297, 1961); *idem*, COSTS AND RETURNS ON COMMERCIAL FARMS: LONG-TERM STUDY, 1954-63 (Stat. Bull. No. 368, 1966).

²¹³Luther Tweeten, *The Income Structure of Farms by Economic Class*, 47 J. FARM ECON. 207, 213 (1965). Even this figure is an overstatement since Tweeten assumed the same number of family workers (1.2) per farm. See also THEODORE SCHULTZ, AGRICULTURE IN AN UNSTABLE ECONOMY 108 (1945); D. Johnson, *Functioning of the Labor Market*, 33 J. FARM ECON. 75, 77-78 (1951).

²¹⁴Wallace Huffman, *The Value of the Productive Times of Farm Wives: Iowa, North Carolina, and Oklahoma*, 58 AM. J. AGRIC. ECON. 836, 841 (1976). The ERS has synthesized an unpublished series of aggregate hours data which, when set in relation to the aforementioned returns to operators data, reveal that from the end of World War II until approximately the end of the postwar international food order (marked by the Soviet grain deal of 1973), the aggregate average hourly wage equivalent hovered in the vicinity of the federal minimum wage. Despite some sharp fluctuations, the hourly equivalents significantly exceeded the minimum wage by the end of the 1980s. These later wage equivalents may result from defects in the construction of the hours data leading to considerable understatement of the hours. In 1989, for example, when there were at least two million farms, the hours data were based on an estimate of only 1,200,000 operators and unpaid family workers. The hours data (for 1947-89) were made available by Eldon Ball, Resources & Technology Div., ERS. The returns to operators data are taken from ERS, ECONOMIC INDICATORS OF THE FARM SECTOR: NATIONAL FINANCIAL SUMMARY, 1985, tab. 1 at 12; unpublished data furnished by Linda Farmer, ERS, Agric. & Rural Economy Div. (1987-90). On the break in the trend line in 1973, see Harriet Friedmann, *The Political Economy of Food: The Rise and Fall of the Postwar International Food Order*, in MARXIST INQUIRIES: STUDIES OF LABOR, CLASS, AND STATES S248 (Michael Burawoy & Theda Skocpol ed. 1982) (= 88 AM. J. SOC. Supp. 1982).