

# **Migrant Workers & Minimum Wages**

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**Regulating the Exploitation  
of Agricultural Labor  
in the United States**

**Marc Linder**

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Laws and government may be considered...in every case as a combination of the rich to oppress the poor.... The government and laws hinder the poor from ever acquiring the wealth by violence which they would otherwise exact on the rich; they tell them they must either continue poor or acquire wealth in the same manner as they have done....

ADAM SMITH, LECTURES ON JURISPRUDENCE  
208-209 (R. Meek ed. 1982 [1763])

[A] good wage law must show so many effective teeth that its threat will be ever present to all whom it is meant to curb. [T]he administrative agency...should have a set of thumb-screws so assorted as to fit every unfairly grasping hand.

Standing Comm. on Legal Aid Work, Am. Bar Ass'n,  
*First Draft of a Model Statute for  
Facilitating Enforcement of Wage Claims*,  
52 A.B.A. REP. 324, 325 (1927)

The social invisibility of these migrant workers and their families, their insulation from the mainstream of industrial development...is perhaps the major reason why most Americans do not believe that their country's agricultural history has much to do with proletarianization.

Gavin Wright, *American Agriculture and the Labor Market:  
What Happened to Proletarianization?*  
62 AGRIC. HIST. 182, 209 (1988)

The capacity of our society to mangle people who lack the power to stand up for their own rights is virtually limitless.

*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-A, at 5112 (1970)  
(statement of Sen. Mondale)

## Acknowledgments

Several chapters in this book draw on the following previously published work, all of which has been thoroughly revised and refocused for the interdisciplinary purposes of this book; where necessary, permission to use this material has been granted by the copyright holders. *Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers*, 23 U.C. DAVIS LAW REV. 733 (1990); *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151 (1990) (● Journal of Legislation); *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the "Law and Economics" Agency Doctrine*, 15 N.Y.U. REV. L. & SOC. CHANGE 435 (1986-87); *Petty-Bourgeois Pickle Pickers: An Agricultural Labor-Law Hoax Comes a Cropper*, 25 TULSA L.J. 195 (1989) (● Tulsa Law Journal).

In the few instances in which situations described in this book are not documented, the underlying facts have been gathered in the course of the author's representation of migrants at Texas Rural Legal Aid since 1983.

If, as that proto-deconstructionist Heine observed, "der Pfeil gehört nicht mehr dem Schützen, sobald er von der Sehne des Bogens fortfliegt,"<sup>1</sup> then Gail Hollander nocked this arrow before the archer even knew that it had been in his quiver.

Marc Linder

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<sup>1</sup>HEINRICH HEINE, ZUR GESCHICHTE DER RELIGION UND PHILOSOPHIE IN DEUTSCHLAND, in 8 HEINRICH HEINE, SÄKULARAUSGABE 127 (Renate Francke ed. 1972 [1852]).

## Preface

[T]he annual inundation of grain fields in harvest time, hop yards in the picking season, fruit picking in districts of extensive market orchards, and similar harvest seasons requiring large numbers of hands for a short time, has a demoralizing effect on farm labor.... Such employments demand little skill.... They constitute a low order of farm labor...and are excrescences upon its fair face.<sup>1</sup>

A sizable segment of our population, through community and State neglect, has been robbed of so many normal American and human rights that it is almost unbelievable.<sup>2</sup>

Starr County, Texas, situated along the Rio Grande in the extreme southern part of the state, is, by many indicators, the poorest county in the United States. It has by far the lowest per capita personal income (\$4,549), only one-quarter that of the national average. A greater proportion (forty-five per cent) of families living there have money incomes below the official poverty level than anywhere else. It also has the second highest unemployment rate (36.4 per cent).<sup>3</sup> In the border town of Roma, whose 4,500 almost exclusively Mexican-American residents have the lowest per capita money income of any place in the country (\$2,953),<sup>4</sup> a large propor-

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<sup>1</sup>11 REPORT OF THE INDUS. COMM'N ON AGRIC., H.R. DOC. NO. 180, 57th Cong., 1st Sess. 79 (1901) (Rep. on American Farm Labor by J. Dodge).

<sup>2</sup>FEDERAL INTERSTATE COMM. ON MIGRANT LABOR, MIGRANT LABOR...A HUMAN PROBLEM v (1947).

<sup>3</sup>5 U.S. BUREAU OF ECON. ANALYSIS, LOCAL AREA PERSONAL INCOME 1984-89, tab. 2 at 4 (1991) (data for 1989); U.S. BUREAU OF THE CENSUS [BOC], COUNTY AND CITY DATA BOOK, 1988, at 514, xxv (1988) (data for 1979 and 1986 respectively). The per capita income of the next poorest county, Shannon County, S. Dakota, where Pine Ridge Indian Reservation is located, was \$5,294. Four of the five and six of the ten poorest counties, where many migrant farm workers reside, are also located in South Texas.

<sup>4</sup>Calculated according to 1 BOC, 1980 CENSUS OF POPULATION: CHARACTERISTICS



tion of the population must migrate north every summer. Most families wait until school is out so that their children can also work. The children's availability is crucial because the families earn the bulk of their annual income during the summer.<sup>5</sup>

A faint reminder of the hundreds of thousands of Mexican workers who once migrated throughout Texas to pick cotton,<sup>6</sup> a typical family of seven from Roma drives to West Texas every June to hoe weeds on cotton farms. "It is," a federal appeals court took notice, "a menial, unskilled task which requires no aptitude, no training, and no ability to reason. It is a work of drudgery which can be performed by persons ranging from very young to quite old...."<sup>7</sup> Although many farmers are legally obligated to pay \$3.35 per hour, \$2.50 is the going rate all over West Texas for chopping cotton

OF THE POPULATION, CHAPTER C: GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, pt. 45: TEXAS, sect. 1, tab. 59 at 26 (1983) (97.4 per cent Hispanic); BOC, COUNTY AND CITY DATA BOOK at 790 (population data for 1986; income data for 1985). "Place" means a settlement with a population of 2,500 or more. The only other place reported by the BOC as having a lower per capita income (\$2,610) was Alton, Texas, a neighboring settlement in Hidalgo County. *Id.* at 788. Since a subsidiary of Coca-Cola Enterprises agreed to pay \$67.5 million to fifteen families in an out-of-court settlement involving the deaths in 1989 of twenty-one children in a school bus accident, it is doubtful whether Alton still holds this distinction. See World Insurance Report, Apr. 27, 1990 (NEXIS); Paul Weingarten, *Lawsuits, Greed Tear Grieving Texas Town*, Chicago Tribune, May 27, 1990, at 23 (NEXIS).

<sup>5</sup>For a relatively realistic description of the economic conditions of migrant farm workers in South Texas, see PAUL MILLER, *THE ROLE OF FARM LABOR MARKET INSTITUTIONS IN THE LOWER RIO GRANDE VALLEY OF TEXAS* (1971). In the latter half of the 1960s a series of important strikes by farm workers convulsed Starr County. See *Migratory Labor Legislation: Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare*, pt. 2, 90th Cong., 1st Sess. (1968).

<sup>6</sup>See CAREY MCWILLIAMS, *ILL FARES THE LAND: MIGRANTS AND MIGRATORY LABOR IN THE UNITED STATES* 230-40 (1942). At the beginning of the century a leading economic historian observed:

Cotton picking suits the Mexican for several reasons: It requires nimble fingers rather than physical strength, in which he cannot compete with the white man or the Negro; it employs his whole family; he can follow it from place to place, living out of doors, which seems to suit the half-nomadic instinct of a part of the Mexican race....

Victor Clark, *Mexican Labor in the United States*, in U.S. BUREAU OF LABOR STATISTICS [BLS], BULL. No. 78, at 466, 482 (1908). It is unclear whether Clark was engaging in self-criticism when he added: "The race sentiment of Americans is, like most race sentiment, peculiar and illogical." *Id.* at 512.

<sup>7</sup>Castillo v. Givens, 704 F.2d 181, 183-84 (5th Cir. 1983).

toward the end of the 1980s.<sup>8</sup> At the height of the season all seven members of the family work ten to fourteen hours a day, seven days a week, for several farmers. Even at \$2.50 an hour, that works out to over \$1,200 a week, which to a family with a cash income of only \$6,000-7,000 a year is and seems like a large amount of money.<sup>9</sup> With many other families and illegal aliens in the vicinity desperate for work at any wage, this family would not dare jeopardize its livelihood by complaining that the farmers are depriving them of \$400-500 a week by paying eighty-five cents an hour below the minimum wage. But they are not even aware of their entitlement: they (mistakenly) believe that piece-rate work (*por contrato*) supersedes the minimum wage law.<sup>10</sup> Moreover, having estimated the total income that they will need to survive the long spell of unemployment in the winter, their primary concern at this moment is not how many hours it will take them to earn that sum.

In August the family returns home in time for the children to begin school. The following January the father receives from each of the farmers, instead of IRS Form W-2 ("Wage and Tax Statement"), a Form 1099-MISC ("Statement for Recipients of Miscellaneous Income"). They unlawfully list him as the recipient of the entire income that all seven workers earned. Later the Internal Revenue Service sends the father "Proposed Changes" informing him that he owes self-employment social security tax on his "non-employee compensation." With interest and a late payment penalty tacked on, the IRS requests payment of almost a thousand dollars. In addition,

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<sup>8</sup>Salinas v. Rodriguez, No. CA-5-87-057-C (N.D. Tex. Jan. 18, 1990) (order). Some farmers are exempt from the federal minimum wage because they hire too little labor; see *infra* ch. 7.

<sup>9</sup>Interviews with hundreds of migrants and examination of the wage, tax, social security, unemployment insurance, workers compensation, food stamp, and welfare records of thousands more suggest that the BOC overstates migrants' income. Among larger migrant families, none earned the \$25,000 in a year that would have generated a per capita money income of \$3,000.

<sup>10</sup>They are not alone in this erroneous belief; see, e.g., JACQUELINE JONES, *THE DISPOSSESSED: AMERICA'S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT* 185 (1992). The point was settled in *United States v. Rosenwasser*, 323 U.S. 360 (1945). When Congress amended the Fair Labor Standards Act in 1966 to cover agricultural workers, some members unsuccessfully sought to include an across-the-board modification for piece-rate workers. 112 CONG. REC. 22,343, 22,652-64 (1966); S. REP. NO. 1487, 89th Cong., 2d Sess., reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 3003, 3021. Several state minimum wage laws have contained such provisions at various times. See, e.g., Texas Minimum Wage Act of 1970, Tex. Rev. Civ. Stat. Ann. art. 5159d, § 7 (Vernon 1971).



until the workers pay, the Social Security Administration will not credit them with any coverage credits towards their old-age pensions or disability insurance payments.<sup>11</sup> Finally, when the parents apply for unemployment compensation benefits, the farmers contest coverage on the ground that no employment relationship existed. The workers now must bear the burden of proving that they were employees rather than self-employed.

Migrant farm workers are *the* archetypical dependent employees, "selling nothing but their labor," whose location within the social division of labor systemically constructs them as a uniquely atomized and disempowered stratum.<sup>12</sup> As used here, the term *migrant farm workers*<sup>13</sup> is not restricted to those who travel long distances across state borders to pick fruits and vegetables. Instead, this synecdoche also includes the racial and ethnic minorities who

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<sup>11</sup>26 U.S.C. §§ 6051, 6041 (1989 & 1988); 26 U.S.C. § 73(a) (1988) (prohibiting imputation to parents of income earned by their children); 26 U.S.C. §§ 6601, 6651 (1989). If the employer properly files the W-2s, employees will receive social security credits regardless of whether the employer has actually paid in the employer's and employees' shares of the social security tax. This automatic mechanism does not apply to Form 1099: without actual payment, no credit will be recorded.

<sup>12</sup>Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). William Friedland & Enrico Pugliese, *Class Formation and Decomposition in Modern Capitalist Agriculture: Comparative Perspectives*, 29 SOCIOLOGIA RURALIS 149, 154 (1989), call international migrant agricultural workers "underprivileged proletarians." For an introduction to the working and living conditions of contemporary migrants, see KATHRYN BISSEL, *THE MIGRANT FARMWORKER* (1976); TONY DUNBAR & LINDA KRAVITZ, *HARD TRAVELING: MIGRANT FARMWORKERS IN AMERICA* (1976); STEPHEN SOSNICK, *HIRED HANDS* (1978); RONALD GOLDFARB, *MIGRANT FARM WORKERS* (1981).

<sup>13</sup>U.S. GAO, *HIRED FARMWORKERS: HEALTH AND WELL-BEING AT RISK* 8 (HRD-92-46, 1992), adopts the same term. This book does not engage the debate concerning the number of migrants in the United States. See, e.g., Louis Ducoff, *Migratory Farm Workers: A Problem in Migratory Analysis*, 16 RURAL SOCIOLOGY 217 (1951); PHILIP MARTIN, *HARVEST OF CONFUSION: MIGRANT WORKERS IN U.S. AGRICULTURE* (1988). Analysis of an earlier version of Martin's study suggests that its methodological flaws resulted in significant errors concerning the number and distribution of migrants. See Marc Linder, Martin/Holt, Draft Report, *Migrant Farmworkers: Number and Distribution: A Texas Critique* (unpub. 1987). For an earlier review of the sources, see William Schlenger, Lynn Ordriek, & Jerome Hallan, *An Examination of Methods Used to Estimate the Number of Migratory Seasonal Farmworkers*, FARMWORKER J., Winter 1978-79, at 21. Official ignorance of the number of migrants is emblematic of public indifference toward them. On the incomplete and contradictory data sources, see STAN DABERKOW & LESLIE WHITENER, *AGRICULTURAL LABOR DATA SOURCES: AN UPDATE* (U.S. Econ. Research Serv. [ERS], Agric. Handbook No. 658, 1986).

work as seasonal hand-harvesters or in packing sheds and may or may not migrate as well as those who engage in preparatory work such as weeding and thinning cotton, sugar beets, and soy beans, planting pine seedlings, and detasseling hybrid seed corn.<sup>14</sup> Excluded, however, are persons such as the high-school-age children of white middle-class families in the Midwest who detassel corn (and are being displaced by Hispanic migrants) because they lack the marginality characteristic of the lifelong agricultural proletariat. This racial dichotomization in terms of attachment to the hired farm work force has finally become the received wisdom of agricultural labor economics.<sup>15</sup>

When the New Deal excluded farm workers from its strategy of imposing national limits on the exploitation of the unorganized,<sup>16</sup> "a conscious and articulated policy of exclusion replaced an unexpressed policy of general omission." Barring farm workers from the

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<sup>14</sup>Latin American workers have been supplanting other groups to become the mainstay of the seasonal labor force. See 1 MONICA HEPPLE & SANDRA AMENDOLA, IMMIGRATION REFORM AND PERISHABLE CROP AGRICULTURE: COMPLIANCE OR CIRCUMVENTION 23, 27, 65-74, 80 (1991). A recent study found that seventy-one per cent of seasonal agricultural workers are Hispanic. U.S. DEP'T OF LABOR [DOL], FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1990: A DEMOGRAPHIC AND EMPLOYMENT PROFILE ON PERISHABLE CROP FARM WORKERS 16-19 (Office of Program Econ. Research Rep. No. 1, 1991). On the predominance of nonwhite workers on fruit and vegetable farms, see Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1383-87 (1987). On the life circumstances of the dwindling number of white migrants, see Peter Kilborn, *Days of Fruit's Painful Harvest Fade*, N.Y. Times, July 14, 1990, at 1, col. 2 (nat. ed.).

<sup>15</sup>See, e.g., Leslie Whitener, *A Statistical Portrait of Hired Farmworkers*, MONTHLY LAB. REV., June 1984, 49, 51:

[T]here are two distinct groups of farmworkers. One is comprised of those who are engaged in hired farmwork on a casual or seasonal basis and use their earnings from farmwork to supplement family income; they are generally young and/or White; the majority are attending school or keeping house as their primary activity. The second group consists of persons who are more dependent on hired farmwork for their livelihood and family support.... They are more likely to be members of racial/ethnic minorities, and their agricultural dependence is partially due to the lack of alternatives to farmwork. ... White workers were more likely than Hispanics and Blacks to move out of hired farmwork as they become older. This suggests that farmwork serves more as an entry level and/or supplemental job for Whites.

<sup>16</sup>Prominent among resurgent sweatshops during the Depression were fly-by-night employers that literally paid no wages at all by employing a succession of workers under the pretense of hiring "learners" for several weeks until they learned the business. See DOL, HANDBOOK OF LABOR STATISTICS 202-204 (Bull. No. 616, 1936).

National Labor Relations Act (NLRA), old-age pensions, unemployment insurance, and the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act (FLSA), left them exposed to the full brunt of employer overreaching well into the post-World War II period: "The policy of excluding farm labor from social and labor legislation was designed, in part, to assist farm employers by keeping them free of legislatively imposed, labor-connected costs. Such a policy necessarily involved unstated legislative decisions to perpetuate a low-income, disadvantaged farm labor force."<sup>17</sup>

Yet paradoxically, although migrant farm workers have still not achieved statutory parity with the rest of the protected working class, they have nevertheless become the largest discrete subclass of paternalized workers in the United States. This tension between the lasting consequences of agricultural exceptionalism and state guardianship of migrants informs this book. Whatever truth ever inhered in the idyll of the family farm, whose employees needed no state protection, the imagery plays a particularly cruel hoax on migrant farm workers, who rarely work on idyllic farms. Rather, when not living in permanent poverty in shanty towns along the Rio Grande, they are driven seasonally to chase crops from one end of the continent to the other. Not the least of the ironies generated by prepotent agricultural myths is that such improbable farm families as Weyerhaeuser, International Paper, Campbell Soup, Upjohn, Procter & Gamble, and Sandoz are among the chief beneficiaries of the lawful and unlawful exploitation of migrants.<sup>18</sup>

Scholarly writing on labor law and labor relations in the United States has displayed a decided bias in favor of the organized sector of the economy subject to the NLRA and similar statutory regimes, which establish procedural rather than substantive guidelines for resolving distributive conflicts.<sup>19</sup> Sustained theoretical discussion of the economic, juridical, and philosophical principles

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<sup>17</sup>DONALD PEDERSON & DALE DAHL, *AGRICULTURAL EMPLOYMENT LAW AND POLICY: A STUDY OF THE IMPACT OF MODERN SOCIAL AND LABOR RELATIONS LEGISLATION ON AGRICULTURAL EMPLOYMENT* 1 (Minn. Agric. Experiment Station Bull. 526, 1981) (author's name misspelled; should read "Pedersen"). They were also excluded from state workers' compensation statutes as well as a raft of other protective legislation. *Id.* at 97-102.

<sup>18</sup>See *infra* ch. 1 § III.

<sup>19</sup>On the distinction between facilitative and prescriptive labor law, see PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 212 (1969). For a broad international overview centered on marginal workers in the Third World, see JEFFREY HARROD, *POWER, PRODUCTION, AND THE UNPROTECTED WORKER* (1987).

underlying state intervention on behalf of the most vulnerable workers, however, has been lacking. This book begins to fill that gap in particular by illustrating both how political-economic power acquires the oppressive force of law and how circumscribed the law's achievements on behalf of weak workers have been or arguably can ever be.<sup>20</sup>

By creating formal legal equality, that is, by conferring legal capacity on individual workers whose socioeconomic dependence incapacitates them from taking advantage of their legal rights, the state either further divides the population between haves and have-nots or must intervene on the side of those who lack the power to enforce those rights.<sup>21</sup> But even where migrants seek to vindicate statute-book entitlements through litigation, that act itself demonstrates their economic prostration because it signifies their inability to secure that end through concerted labor market action. Pleas for judicial intercession therefore typically symbolize either the failure of a statutory regime to institute a new environment of compliance or a breakdown of agency enforcement. Even where migrants appear as plaintiffs firmly in control of their litigation, they are merely defensively requesting a restoration of the paper status quo ante, which recalcitrant employers have unlawfully contested.<sup>22</sup> Only in rare instances do migrants' lawsuits seek let alone achieve outcomes for which legislatures have not already provided.

With the resurgence of market-oriented economic and legal thinking and policy in the 1970s and 1980s, state interference with the 'natural' operation of the labor market has come under strong attack.<sup>23</sup> As representative of such intervention, FLSA is the focus

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<sup>20</sup>Cf. ANTHONY WOODIWISS, *RIGHTS V. CONSPIRACY: A SOCIOLOGICAL ESSAY ON THE HISTORY OF LABOUR LAW IN THE UNITED STATES* 16-17 (1990).

<sup>21</sup>See REINHARD BENDIX, *NATION-BUILDING AND CITIZENSHIP: STUDIES OF OUR CHANGING SOCIAL ORDER* 123-24 (new enlarged ed. 1977 [1964]); Simon Deakin & Frank Wilkinson, *Labour Law, Social Security and Economic Inequality*, 15 CAMBRIDGE J. ECON. 125, 143 (1991).

<sup>22</sup>It is typical of agricultural exceptionalism that extension service economists see their mission as furnishing farm employers with information about the costs and benefits of complying with labor laws rather than as encouraging them to obey the law. See Jeffrey Alwang, David Wooddall-Gainey, & Thomas Johnson, *Farm Labor Legislation: A Computer Program to Assist Growers*, 73 AM. J. AGRIC. ECON. 1027, 1027-28 (1991).

<sup>23</sup>For an argument that Chicago-school economics is the first attempt to supply a purely capitalist morality, see ALAN WOLFE, *WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION* ch. 1 (1989).

of this book.<sup>24</sup> Pilloried by the *Wall Street Journal* as "one of the most destructive pieces of economic legislation ever devised," "[f]ew statutes have been so widely denounced by any group as minimum wage laws have been by economists," who contend that they perversely "intensify poverty and diminish the living standards of the poor."<sup>25</sup>

In the case of agriculture, some policy analysts have argued that "simple changes like minimum wage rates and regulated working conditions are not the answer--at least not the whole answer. Rising labor costs as compared to capital costs are what are making these workers obsolete in the first place."<sup>26</sup> But where an overabundance of low-wage labor has thwarted the introduction of mechanized harvesting of some crops--in at least one case "an increase in the availability of hand labor" actually prompted "a major shift from mechanical back to hand harvesting"--supplanting sweatshop labor is precisely the function of a minimum wage.<sup>27</sup> And despite Marx's riposte to

<sup>24</sup>Throughout this book, *FLSA* is used without the definite article as it is pronounced in common parlance: *Flissa*. Despite its name, *FLSA* is confined to the regulation of minimum wages, premium overtime wages, and child labor. As an example of a statute of comprehensive scope, see the Japanese Labor Standards Law, which deals with such detailed conditions as menstruation leave. Roodoo jooken hoo, Law No. 49 of 1947. In particular this book does not touch at all on the very severe occupational health and safety risks to which migrants are exposed. From the large literature on the subject, see *Use of 'Short Hoe' on Farms Debated in Arizona*, N.Y. Times, Mar. 26, 1984, at 9, col. 2 (nat. ed.); George Rust, *Health Status of Migrant Farmworkers: A Literature Review and Commentary*, 80 AM. J. PUB. HEALTH 1213 (1990); Marsha Goldsmith, *As Farmworkers Help Keep America Healthy, Illness May Be Their Harvest*, 261 J. AM. MED. ASS'N 3207 (1989); Marc Schenker & Stephen McCurdy, *Occupational Health Among Migrant and Seasonal Farmworkers: The Specific Case of Dermatitis*, 18 AM. J. INDUS. MED. 345 (1990).

<sup>25</sup>*The Inhuman Minimum*, Wall St. J., Mar. 16, 1989, at A16, col. 1 (editorial); ROBERT FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 144 (1985); Simon Rottenberg, *Introduction*, in THE ECONOMICS OF LEGAL MINIMUM WAGES 1 (S. Rottenberg ed. 1981). *FLSA* has, for example, been held accountable for increasing criminal activity among young black males. See Llad Phillips, *Some Aspects of the Social Pathological Behavioral Effects of Unemployment among Young People*, in *id.* at 174. But see Keith Leffler, *Minimum Wages, Welfare, and Wealth Transfers to the Poor*, 21 J. LAW & ECON. 345 (1978) (it may be rational for poor to support minimum wage laws insofar as latter, by increasing unemployment, lower costs of establishing eligibility for ever more generous welfare benefits).

<sup>26</sup>HARLAND PADFIELD & WILLIAM MARTIN, FARMERS, WORKERS, AND MACHINES: TECHNOLOGICAL AND SOCIAL CHANGE IN FARM INDUSTRIES OF ARIZONA 296 (1965).

<sup>27</sup>D. Lenker, *Factors Limiting the Harvest Mechanization of Some Major Vegetable Crops in the United States*, in FRUIT, NUT, AND VEGETABLE HARVESTING MECHANIZATION: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON FRUIT, NUT, AND

John Stuart Mill that it is not the purpose of capitalistically applied mechanical inventions to lighten any worker's toil, the elimination of some of the hardest labor in the First World should be welcomed. Strategies for breaching employers' monopoly of the initial private distribution of the gains generated by such increases in productivity in favor of well-planned and equitable retraining and reemployment of the redundant workers must be built into applied research programs.<sup>28</sup>

Finally, the regulation of migrant farm workers' wages inevitably raises the issue of the social construction of income distribution. Implicated are not only the equities as between labor and capital, producers and consumers, and rich and poor, but also the distribution of wages within the manual working class. That industrial

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VEGETABLE HARVESTING MECHANIZATION 29, 31 (Am. Soc'y Agric. Engineers 1984) (lettuce, asparagus, cantaloup, cauliflower, and chili pepper); Gary Van Ee, Richard Ledebuhr, & Imad Haffar, *Development and Testing of a "Threshing Concept" Cucumber Harvester*, in *id.* at 284, 285. "Given the real or perceived reduction in labor constraints associated with recent economic conditions, producers have not created a strong demand for mechanization progress." Ervin Humphries, *Multiple-Pick Cucumber Harvesting Machines*, in *id.* at 317, 323. A pickling cucumber harvester capable of replacing eighty workers was produced as early as the mid-1960s. MICH. EMPLOYMENT SECURITY COMM'N, POST SEASON FARM LABOR REPORT 1967, at 80 (n.d.). The DOL even noted that: "Pickle-harvest mechanization is an accomplished fact.... Enough machines are in existence to fully mechanize the harvest, almost at will, but...[w]ith sufficient labor available, no change is anticipated in the current harvest practices." Harold Stanley, *Mechanization and the Recruitment of Farm Workers*, FARM LABOR DEVELOPMENTS, Aug. 1968, at 11, 16. See also Ervin Humphries, *Multiple-Pick Cucumber Harvesting: Status and Potential*, PICKLE PAK SCIENCE, Dec. 1974, at 1. Yet thousands of migrants still hand-pick pickling cucumbers. See *infra* ch. 6.

<sup>28</sup>1 KARL MARX, DAS KAPITAL: KRITIK DER POLITISCHEN ÖKONOMIE 301 (1867), as republished in 2:5 KARL MARX [&] FRIEDRICH ENGELS, GESAMTAUSGABE (MEGA) (1983); Andrew Schmitz & David Seckler, *Mechanized Agriculture and Social Welfare: The Case of the Tomato Harvester*, 52 AM. J. AGRIC. ECON. 569 (1970). The Farm Labor Organizing Committee [FLOC], a union of migrants who harvest tomatoes and cucumbers in the Midwest, has taken the position that "[s]toop labor is the kind of work machines should do." James Terry, *The Political Economy of Migrant Farm Labor: Immigration, Mechanization and Unionization in the Midwest*, INSURGENT SOCIOLOGIST, Spring 1983, at 63, 70 (citing Nuestra Lucha, July 1975, at 4). But see John Vandermeer, *Science and Class Conflict: The Role of Agricultural Research in the Midwestern Tomato Industry*, in STUDIES IN LABOR THEORY AND PRACTICE 41, 54-55 (William Rowe ed. 1982) (mechanization research should be directed toward making work less noxious without reducing number of jobs or wages). The research bias in favor of farmers to the neglect of farm workers is reflected even in planning for the decline of agriculture. See, e.g., Lester Thurow, *Agricultural Institutions under Fire*, in SOCIAL SCIENCE AGRICULTURAL AGENDAS AND STRATEGIES I-55 (Glenn Johnson et al. ed. 1991).



workers whose work requires marginally higher levels of training and skill and arguably imposes less disutility receive hourly wages (including benefits) five or six times greater than those of migrants solely because they are employed by firms with a dominant market position and are members of strong unions, makes less and less economic or moral sense in an increasingly interdependent world in which the correlations between individual inputs and aggregate output have become tantalizingly tenuous.

Chapter 1 explains how the mechanisms of sweated labor have applied to migrant farm workers; how the system of labor contracting has imparted a peculiar shape and texture to agricultural sweatshops; and what role the State has played in this process. Chapter 2 constructs a theoretical foundation for evaluating FLSA and other state intervention on behalf of migrants; it situates the substantive analysis within the setting of modern welfare-state paternalism and establishes a framework for exploring the limits imposed on what the State can achieve on behalf of self-defenseless workers. Chapter 3 offers a policy analysis that breaks the current impasse in liberal-conservative debates by interpreting the minimum wage not as an antipoverty measure but as an instrument of macro-economic allocative efficiency, akin to the Swedish solidaristic wage policy, designed to eliminate sweatshops as a form of legitimate competition.<sup>29</sup>

Chapter 4 presents a new understanding of agricultural exceptionalism by uncovering the neglected historical roots of the current truncated protective scope of FLSA. This political-economic account of the exclusion of farm workers from the social legislation of the New Deal as a reflection of the unique strength of the southern plantation oligarchy stresses the continuity of race as an underlying determinant of agricultural labor-capital relations.

Chapter 5 is a theoretical analysis of the juridical manipulation of class relations designed to cast proletarians as hemi-demi-semi-entrepreneurs unprotected by labor laws. It focuses on the process by which the law permits agricultural employers to place the

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<sup>29</sup>On the use by the Socialist government of France in the early 1980s of a statutory minimum wage as a solidaristic income policy but not as an anti-sweatshop measure, see ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, OECD ECONOMIC SURVEYS: FRANCE 49-51 (1985); MICHAEL HARRINGTON, *THE NEXT LEFT: THE HISTORY OF A FUTURE* 127-29 (1988 [1987]). Clifford Thies, *The First Minimum Wage Laws*, 10 CATO J. 715 (1991), overlooks both the historical origins and contemporary function of minimum wage laws as anti-sweating measures.

burden on workers who, more so than any others, are subject to authority that is overwhelmingly coercive (rather than remunerative or normative), to prove that they are in fact protected employees.<sup>30</sup> Chapter 6, which concretizes the approach of the previous chapter, is a case study of litigation testing the employer-employee relationship among the marginalized. The need for this inquiry is underscored by the astonishing success with which agricultural employers have numbed the public into indifference to such tactics, in part by convincing even *The New York Times* that they are merely "new accounting practices."<sup>31</sup>

The last chapter proposes a program of self-liquidating weak paternalism designed to enable migrants to realize the free labor principle or perhaps even to transcend it.

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<sup>30</sup>See DOROTHY NELKIN, ON THE SEASON: ASPECTS OF THE MIGRANT LABOR SYSTEM 10 (1970).

<sup>31</sup>Jason DeParle, *New Rows to Hoe in the 'Harvest of Shame,'* N.Y. Times, July 28, 1991, § 4 at 3, col. 1. The harmful impact of ignorance about migrants' rights was further on display at the same congressional hearing covered by this article when a group of farm worker advocates submitted testimony stating that agricultural employers paying their workers on a piece-rate basis are exempt from FLSA. *Farmworkers' High Mortality: Government Neglect? Hearing Before the House Select Comm. on Aging*, 102d Cong., 1st Sess. 79 (1991) (Ass'n of Farmworker Opportunity Programs, *Farmworkers and the Need for Increased Labor Standards Protection, Government Oversight, and Statistical Information*). The same type of harmful ignorance is offered by a pro-migrant attorney, who sympathetically explains that the need to calculate the minimum wage for workers on a piece rate "creates an accounting nightmare for the grower." Antonio Maciel, "There's More to Pickle Pickers Than Picking Pickles": *Reflections on the Migrant Experience in Wisconsin*, 1991 Wis. MULTI-CULTURAL L.J. 86, 93. Not only is there no difficulty in principle, but the calculation is made even easier in practice by the U.S. Department of Labor, which makes available to employers a wage statement form for this purpose.

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