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Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers

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CREWLEADERS AND AGRICULTURAL SWEATSHOPS: THE LAWFUL AND UNLAWFUL EXPLOITATION OF MIGRANT FARMWORKERS

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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. . . .[1]
>
> "Agriculture is perhaps unique for its substantial number of middlemen whose raison d'etre is reducing labor costs by violating labor laws."[2]

MIDDLEMEN AND SWEATSHOPS

While the physical conditions of outdoor sweatshops differ from those of tenement workers,[3] migrant farmworkers, as the largest sub-class of sweated workers in the United States today, 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."[4] And like the *padrone* who took advantage of his Italian-immigrant compatriots a century ago, the farm labor contractor

> is employed first and foremost for his success in getting and keeping on hand an abundant and docile labor force. What margin he can squeeze between his intake and his outgo de-

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1. ADAM SMITH, LECTURES ON JURISPRUDENCE 208-209 (R. Meek ed. 1978).

2. P. MARTIN, SEASONAL WORKERS IN AMERICAN AGRICULTURE: BACKGROUND AND ISSUES 38 (National Commission for Employment Policy, Research Rep. RR-85-04, 1985).

3. On contemporary indoor sweatshops, *see* U.S. GENERAL ACCOUNTING OFFICE, "SWEATSHOPS" IN THE U.S. (HRD-88-130BR, Aug. 1988).

4. U.S. House of Representatives, *Report of the Committee on Manufactures on the Sweating System*, 52d Cong., 2d Sess. vi (1893). On sweating in England see J. SCHMIECHEN, SWEATED INDUSTRIES AND SWEATED LABOR: THE LONDON CLOTHING TRADERS 1860-1914 (1984). For a more modern American example, *see* Walling v. Twyeffart, 158 F.2d 944 (2d Cir. 1947).

> pends largely upon the number of ways in which he can mulct the families in his charge of a portion of their meager wages.[5]

In Nebraska, the prime variant involves the use of crewleaders to recruit and supervise migrant farmworkers to detassel corn[6] for companies producing hybrid corn seed.[7] The production of hybrid seed corn, which is associated with higher yields than open-pollinated varieties, has become an extraordinarily profitable[8] oligopoly controlled by six to eight companies,[9] most of which have been acquired by multi-national pharmaceutical and chemical companies.[10] This time-sensitive activity,[11] which employs 70,000 to 140,000 workers for approximately three weeks in the Midwest,[12] has been characterized as "at the best. . .strenuous and at the worst. . .one of the most disa-

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5. K. DU PRE LUMPKIN & D. DOUGLAS, CHILD WORKERS IN AMERICA 70 (1937). For similar observations on the English crewleaders of the 1860's, *see* F.D. Longe, *Report on Agricultural Gangs*, in PARLIAMENTARY PAPERS, 1867 (3796) XVI, Children's Employment Commission, Sixth Report of the Commissioners, Appendix at 1, 3.

6. Detasseling is the removal of the tassel of the female parent before it sheds pollen. 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." J. KLOPPENBURG, JR., FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY, 1492-2000, at 100 (1988).

7. *See* J. AIRY, L. TATUM, & J. SORENSON, JR., PRODUCING SEED OF HYBRID CORN AND GRAIN SORGHUM, in U.S. DEP'T OF AGRIC., SEEDS: THE YEARBOOK OF AGRICULTURE 1961 145 (1961); D. HARPSTEAD, MAN-MOLDED CEREAL—HYBRID CORN'S STORY, U.S. DEP'T OF AGRIC., THAT WE MAY EAT: THE YEARBOOK OF AGRICULTURE 1975, at 213 (1975).

8. Pioneer Hi-Bred wondered in 1978 whether the high profit margins (forty percent of the sales price) would "foment resentment." Harvard Business School, PIONEER HI-BRED INTERNATIONAL, INC. 11 (Case Study 4-579-125, 1978).

9. Pioneer Hi-Bred alone controls about one-third of the market. R. LEIBENLUFT, COMPETITION IN FARM OUTPUTS: AN EXAMINATION OF FOUR INDUSTRIES 111-13 (Office of Policy Planning, Fed. Trade Comm'n, 1981).

10. J. KLOPPENBURG, JR., *supra* note 5, at 147-49; D. MORGAN, MERCHANTS OF GRAIN 313-14 (1980). Pioneer Hi-Bred is the major independent. *Id.*

11. Detasseling accounts for 10-14% 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).

12. Interview with Jonathan Krutz, General Manager, Oetting's Detasseling, Inc. in Lincoln, Neb. (Sept. 8, 1989). With 4,000 employees, Oetting's purports to be "the Midwest's largest . . . detasseling company." J. KRUTZ & D. OETTING, THE DETASSELER'S HANDBOOK (1989). In 1989, Pioneer Hi-Bred International, "the world's largest developer of seed corn," employed 42,000 detasselers. Schneider, *Scientific Advances Lead to Era Of Food Surplus Around World*, N.Y. Times, Sept. 9, 1986, at C1, col. 3 information provided by Pioneer to author in 1989. 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* A. CRABB, THE HYBRID CORN-MAKERS: PROPHETS OF PLENTY 140-66 (1947). Paul Mangelsdorf, *Corn* 239 (1974), cites an estimate of a peak of 125,000.

greeable kinds of work."[13] Historically, local school-age children and college students constituted the bulk of this labor force.[14] Recently, however, the seed companies have become dissatisfied with the quality of work performed by these local workers and have found it increasingly difficult to recruit the requisite numbers at the wages they are willing to offer (slightly in excess of the minimum wage). Consequently, the seed companies have become increasingly reliant on migrant farmworkers recruited in Texas, California, Arizona, and Florida.[15]

Although the seed companies organize and control the entire production process in accordance with advanced genetic and agronomic methods,[16] they rely in part on labor contractors to furnish detasselers[17] and to act as first-line foremen. They pay the labor contractor varying amounts per acre,[18] leaving it to them to manage the payroll. At this point it is a matter of indifference to the company how much, when, or even whether the contractor pays the workers.[19] In this sense, the National Farmers Union was correct in testifying before Congress that "large commercial agricultural organizations" profit from the "vicious system" of exploitation and "the contractor's

13. A. CRABB, *supra* note 12, 269 (1947).

14. During World War II, adult women performed much of the detasseling. *Id.* at 268-69.

15. Information is based on author's conversations with personnel and production managers at Pioneer Hi-Bred, Garst Seed Co. (a subsidiary of ICI), and Asgrow Seed Co. (a subsidiary of Upjohn). These managers also emphasize that the demographic decline of the rural Midwest has contributed to the dearth of available labor. "[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." J. KLOPPENBERG, JR., *supra* note 6, 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).

16. For an introduction to the science of detasseling, *see* J. Airy, *Current Problems of Detasseling*, in AMER. SEED TRADE ASS'N, IMPROVED TECHNIQUES IN HYBRID SEED CORN PRODUCTION 7, 11-17 (1951).

17. Given the urgent need for detasselers, 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 crewleaders in the same fields.

18. The highest acreage rates are paid for "full-pull," that is, for fields that the seed company has not previously machine-detasseled. When such machines, which can pull 25% to 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.

19. Pioneer Hi-Bred is the 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 detasselers and crewleaders on its payroll as employees. *See* Martinez v. Pioneer Hi-Bred Int'l, Inc., No. B-79-98 (S.D. Tex. filed Apr. 27, 1979).

way of keeping the labor in line."[20] With virtually nothing but labor costs, the contractor can obviously maximize his income by minimizing his payments to the workers. At the most egregious extreme, he can just abscond with the payroll.

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 be unnecessary. The combination of irregular labor demand, casual labor supply, and general lack of inclusive organization on either side of the market creates a context in which the contractor . . . is well nigh indispensable.[21]

This situation is exacerbated because

> farm employers are apt 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.[22]

The consequences that the workers are made to bear are unique:

> 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. It is a sound principle of industrial relations that the various economic risks incident to employment ought to be distributed fairly or else insured against. This principle is notably absent in agricultural harvest work. Anyone familiar with

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20. *Registration of Farm Labor Contractors: Hearings on H.R. 5060 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 46 (1963) (statement of Richard Shipman, Assistant Director Legislative Service Division National Farmers Union). As one detasseling labor contractor stated, local students complain about everything, but migrants "don't complain. They don't complain about anything." Interview with Jonathan Krutz, *supra* note 12.

21. A. ROSS & S. 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*, 82d Cong., 2d Sess. 1017, 1023 (1952).

22. *Id.* at 1024.

> 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. . . .[23]

By the same token, crewleaders 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."[24] These middlemen would therefore 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."[25] For it is precisely the "uprooted, unprotected, underprivileged"[26] 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 crewleader to exploit his position "as a sort of cultural broker, mediating between the worker and the outside, often alien, community."[27] Ironically, detasseling in Nebraska does not even present the traditional case for crewleaders. Because detasseling lasts only three weeks with one company, crewleaders do not perform the function of patching together bits and snatches of work to provide employment for the whole summer.

THE FUTILITY OF POLICING CREWLEADERS

The accumulated experience of almost a half-century of federal efforts[28]—and even older state laws[29]—to regulate crewleaders and

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23. *Id.* at 1028. *See also* W. Friedland, *Labor Waste in New York: Rural Exploitation and Migrant Workers*, TRANS-ACTION, Feb. 1969, at 48, 49, 53.

24. A. ROSS & S. LISS, *supra* note 21, at 1033.

25. *Id.*

26. H.R. REP. NO. 358, 88th Cong., 1st Sess. 3 (1963).

27. S. REP. NO. 1295, 93d Cong., 2d Sess. 1, 2, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS, 6441, 6441-42.

28. More than two decades passed between the submission of the first bills in Congress to regulate crewleaders and passage of the Farm Labor Contractor Registration Act (FLCRA) in 1963. *See To Regulate Private Employment Agencies Engaged in Interstate Commerce: Hearings on H.R. 5510 Before a Subcomm. of the House Comm. on Labor*, 77th Cong., 1st Sess. 1 (1941); Note, *A Defense of the Farm Labor Contractor Registration Act*, 59 TEX. L. REV. 531 (1981).

29. The historical proprietary purpose, function, and spirit of state farm contractor laws—particularly in the South—was spelled out by counsel for the Texas Citrus and Vegetable Growers and Shippers in testimony before Congress. Referring to migrant farmworkers as "our workers," he described the Texas labor contractor registration statute which he wrote in 1943 as requiring labor recruiters operating on behalf of

to suppress the abuses inherent in the private recruiting system demonstrates that making the crewleader the centerpiece of enforcement is inefficient.[30] As one Congressman noted many years ago: "There is something in the whole idea of contracting human labor . . . that is feudalistic and less than human, and . . . maybe we . . . don't need a lot of regulators but a law to abolish it."[31] Precisely because crewleaders as "body-brokers"[32] are typically intellectually,[33] morally, and financially incapable of complying with the law, enforcement would be promoted by focusing on the real employer—in detasseling, the seed company.[34] As the National Council of Agricultural Employers explained:

> Let us assume . . . that an itinerant farm labor contractor were hired each year by an agricultural employer as a regular seasonal employee to perfrom [sic] the function of field foreman. At that time he would cease to be a farm labor contractor. He would have no crew of his own. He would be a direct employee of the employer. The workers he would

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> out-of-state employers to be bonded and licensed so that if our workers were taken to other states with the promise of employment, and on arrival found that work was not available or that housing, wages and working conditions were not as promised, they would not be stranded far from home without means of getting back to their places of permanent residence.

Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 67 (1976) (statement of Scott Toothaker).

30. *But see* S. VAUPEL & P. MARTIN, ACTIVITY AND REGULATION OF FARM LABOR CONTRACTORS 17 (Giannini Information Series No. 86-3, 1986) (recommending reliance on crewleader sanctions).

31. *Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 88 (1973) (statement of Rep. Lehman).

32. *Administration of Laws Affecting Farmworkers: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 3 (1980) (statement of Perry Elsworth, Executive Director, National Council of Agricultural Employers).

33. Perversely, the President of the Vegetable Growers Association of America opposed enactment of the FLCRA on the grounds that, because of limited education, the average crewleader could not fill out the forms required to comply with the Act. *Migratory Labor: Hearings on H.R. 5288 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 1st Sess. 83 (1961) (statement of C. Creuziger).

34. The seed companies by and large do not own the land on which they grow the 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 detasselers does not appear to have been litigated. On the range of control exercised by processors and canners over contract farmers, *see* Hershey, Jr., *Drought's Toll on Cannery*, N.Y. Times, July 26, 1988, at D1, col. 3; Wilson, *The Political Economy of Contract Farming*, *Rev. Rad. Pol. Econ.*, Winter 1986, at 47; M. PFEFFER, THE SOCIAL RELATIONS OF SUBCONTRACTING: THE CASE OF CONTRACT VEGETABLE PRODUCTION IN WISCONSIN (Center for Comparative Studies in the Sociology of Agriculture, University of Wisconsin-Madison, Working Paper No. 2, n.d. 1982-83).

> supervise would be the direct employees of the employer, hired by the employer. . . . The corporate employer by making this individual a "full-time or regular employee" assumes full responsibility for his acts . . . and for any violations of the law the employee may commit. The corporate employer has a fixed situs. It is amenable to legal process and subject to law enforcement procedures. . . . The corporate employer also, be it a farmer, processor, packer, or whatever, presumably has assets and is financially responsible. It would certainly appear that under these circumstances the agricultural employee has far greater protection against abuses or exploitation than he would have if he were required to look to an itinerant farm labor contractor, whether that farm labor contractor were registered or not. Merely requiring the farm labor contractor to be registered . . . affords this employee little, if any, protection, if that farm labor contractor is here today and gone tomorrow, and if he is financially irresponsible and has no fixed situs, and if he is not amenable to process. . . . *The net result would be the elimination of the crew leader as such, and that is not all bad.*[35]

Large corporate entities already have routinized bureaucratic record-keeping and payroll procedures in place that can guarantee prompt, accurate, and full payment of wages to migrants. To force migrants to rely upon the vagaries of the middleman's cash-flow situation (and moral integrity) for their meager wages when the real employer is in effect hiding behind a civil outlaw is not only unjust but unnecessary and irrational.[36]

The Nebraska Farm Labor Contractors Act[37] (FLCA) fails to deviate from the outmoded tradition of crewleader-oriented protective legislation. At first blush it appears to create a rigorous regime. By erecting relatively high financial thresholds in the form of a $750 annual licensing fee[38] and a surety bond of at least $5,000 to satisfy wage claims,[39] FLCA seems to screen out economically irresponsible contractors. Yet the system is dysfunctional. Funding enforcement of the FLCA solely through the $750 application fee[40] has created a

35. *Administration of Laws Affecting Farmworkers: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 75 (1980) (letter from Perry Elsworth, Executive Vice President, National Council of Agricultural Employers, to Rep. Collins) (emphasis added).

36. For an economically unrealistic account of the crewleader-farmer relationship, *see* W. FRIEDLAND & D. NELKIN, MIGRANT: AGRICULTURAL WORKERS IN AMERICA'S NORTHEAST 71-75 (1971).

37. NEB. REV. STAT. §§ 48-1701 to 1714 (1988).

38. NEB. REV. STAT. § 48-1710(5) (1988).

39. NEB. REV. STAT. § 48-1705 (1988).

40. NEB. REV. STAT. §§ 48-1706-1707 (1988).

vicious circle. Because only a handful of contractors register, the enforcement fund is minuscule; therefore little money is available to investigate and to prosecute unregistered contractors. With no sanctions to fear, contractors have no incentive to register. The bond requirement is similarly ineffective. A contractor with a large crew of 100 workers could be the conduit (for the seed company) for a weekly payroll in excess of $25,000 or $100,000 for a whole season. At these levels, a $5,000 bond will not go very far toward meeting wage claims.

Nor can these problems be avoided by means of more careful legislative drafting. Rather, they are inherent in any system of regulation that is centered on the crewleader.

THE INDEPENDENT CONTRACTOR PLOY: AN EGREGIOUS EXAMPLE IN NEBRASKA

Another way crewleaders—and sugar-beet farmers in western Nebraska[41]—increase their income is by engaging in "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. . . ."[42] If the workers were in fact independent contractors, the crewleaders would not be liable for the payment of employment taxes, which can exceed ten percent of payroll wages.[43] Crewleaders implement this pretense by issuing Internal Revenue Service (IRS) Form-1099 to their workers, thereby declaring to all relevant enforcement agencies that the workers are independent contractors and not employees and thus not covered by the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), state unemployment compensation statutes, federal or state minimum wage laws, or the federal Migrant and Seasonal Agricultural Worker Protection Act (AWPA).

Unlike the AWPA, the FLCA prevents contractors from making employment status a threshold issue of considerable dilatory value by providing for coverage of those who "subcontract" with their work-

41. The treatment by agricultural employers of migrant farmworkers as independent contractors has spread to many states and crops. Linder, *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, 436-37 (1987); idem, *The Involuntary Conversion of Employees into Self-Employed: The Internal Revenue Service and Section 530*, 22 CLEARINGHOUSE REV. 14 (1988); idem, *Petty-Bourgeois Pickle Pickers: An Agricultural Labor-Law Hoax Comes a Cropper*, 25 TULSA L.J. 195 (1989).

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

43. Such taxes involve 7.51% Federal Insurance Contributions Act (FICA), 0.8% Federal Unemployment Tax Act (FUTA), plus state unemployment insurance tax.

ers.[44] Yet at the same time, this provision impliedly condones and authorizes such treatment, which has much less benign consequences under the aforementioned statutes. The better approach, as Judge Frank Easterbrook, one of the most conservative members of the federal judiciary, recently noted in a Fair Labor Standards Act (FLSA) case, would be to deem all migrant farmworkers employees.[45] Judge Easterbrook stated that:

> The migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. This does not belittle their skills. Willingness to work hard, dedication to a job, honesty, and good health, are valuable traits. . . . [T]hose to whom the FLSA applies must include workers who possess *only* dedication, honesty, and good health. . . . The migrant workers labor on the farmer's premises, doing repetitive tasks. . . . Migrant farm hands are "employees" under the FLSA—without regard to the crop and the contract in each case.[46]

The Nebraska Department of Labor, however, recently approved precisely the kind of injustice that Judge Easterbrook's approach is designed to thwart. The Commissioner of Labor adopted the tax recommendation of a hearing officer who, in reversing a determination by the Unemployment Insurance Tax Administrator, ruled that migrant farmworkers weeding fields for farmers and a crewleader were independent contractors, thereby relieving the crewleader of unemployment insurance tax liability with regard to them.[47] The opinion deviates so blatantly from the statutorily mandated rules of decision that it raises a question as to whether the state's partisan position in favor of farmers is so deeply ingrained that the Nebraska Department of Labor pursues crewleaders rather than farmers even when unambiguous legislative commands proscribe that procedure. Because the decision is also out of touch with the socioeconomic reality of migrant agricultural labor relations, it merits close analysis.

The bias of the opinion is built into the very structuring of the fact findings. The hearing officer found at the outset that "[f]armers in need of help weeding their fields contact" the crewleader who then "obtains workers to do the work."[48] It is improbable that an administrative law judge would ever find that "General Motors, in need

44. NEB. REV. STAT. § 48-1702(4) (1988).

45. Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987), *cert. denied*, — U.S. —, 109 S. Ct. 243 (1988) (Easterbrook, J., concurring).

46. *Id.* at 1545.

47. *In re* Zenon Rivera, Jr., No. LS-009-87 (Neb. Dep't of Labor, June 3, 1987); Letter from Comm'r of Labor to Employer (Aug. 24, 1987).

48. *In re Rivera* at 1.

of help manufacturing its cars, hired Mr. X."[49] The hearing officer, in other words, overlooked the fact that the farmer was hiring workers like any other employer—in this case, to do a back-breaking and unskilled job that is a core part of row-crop farming; instead, he conjured up an idyllic pastoral image of a cooperative setting.

He further found that "[t]he laborers are paid on a per job or per acre basis although Mr. Rivera [the crewleader] said that they must keep track of their hours for federal minimum wage law compliance."[50] This startling admission against interest by the crewleader that the workers were employees for purposes of FLSA should have forewarned the hearing officer; yet he never mentioned it again. But his use of "although" is revealing for it implies that the hearing officer found it peculiar that a piece-rate worker should be covered by FLSA. Nevertheless, the United States Supreme Court ruled almost fifty years ago that "[n]o reason is apparent why piece workers who are underpaid . . . do not fall within the spirit or intent of this statute, absent an explicit exception as to them."[51] Nor is it true that the workers "must keep track of their hours"; rather, the "employer . . . shall make, keep, and preserve" wage and hour records.[52] FLSA is not the only statute requiring the employer to keep pay and time records. For the crewleader's failure to "make, keep, and preserve" such records for three years under the AWPA, a judge could award each worker $500 and a like sum for failing to provide such written statements to them.[53] And yet the hearing officer, in recommending that the Commissioner waive any penalties, attested that the crewleader had "acted in good faith to determine his responsibilities under the law. . . ."[54]

Finally, the hearing officer suggested, again *sub rosa* the tenuousness of the whole employment context by finding that "[t]he workers do not work exclusively for him but may and sometimes do

49. This image is not unique. Thus in his testimony before the Committee on Business and Labor of the Nebraska Legislature, the Director of Government Relations of the Western Sugar Company, in urging the committee to exempt seasonal employers from unemployment insurance taxes, referred to those workers as "work[ing] the beet campaign." *Hearing on Seasonal Labor Before the Business and Labor Committee*, Neb. Unicameral, 91 Leg., 1st Sess., 3 (Mar. 6, 1989) (statement of Jack Fulton). At a later hearing, an official of the Nebraska Department of Labor used the same term. *Hearing on Unemployment Insurance Before the Business and Labor Committee*, Neb. Unicameral, 91st Leg., 2d Sess., — (Sept. 8, 1989) (statement of Legislative liaison).

50. *In re Rivera* at 2.

51. United States v. Rosenwasser, 323 U.S. 360, 361 (1945).

52. 29 U.S.C. § 211(c) (Supp. 1987).

53. 29 U.S.C. §§ 1821(d), 1854(c)(1) (1982).

54. *In re Rivera* at 7.

find additional work through other means."[55] In light of the abolition of involuntary servitude as enshrined in the thirteenth amendment,[56] the workers' freedom to pull weeds for other farmers and crewleaders is irrelevant here; for "essentially fungible piece workers . . . who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer."[57]

The hearing officer then proceeded to set forth and to apply the law. The fundamental statutory provision with which he was concerned deals with the test of employment. This so-called ABC test is designed to distinguish covered employees from excluded independent contractors.[58] Section 48-604(5) of the Nebraska Revised Statutes provides that:

> Services performed by an individual for wages shall be deemed to be employment, unless it be shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact, (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business.[59]

In applying the ABC test, it is important to observe, as the hearing officer did not, that the test creates a rebuttable presumption that the workers in question are engaged in covered employment. The employer bears the burden of rebuttal.

In regard to part A or the control element of the test, the opinion emphasized that the crewleader did not supervise the work or even "inspect the finished work unless the farmer complain[ed] or refuse[ed] to pay."[60] What the opinion failed to mention was that the whole purpose of piece-rate compensation is to reduce supervision costs by "forc[ing] employees to internalize the price-discipline and

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55. *In re Rivera* at 2.

56. U.S. CONST. amend. XIII (providing freedom from slavery).

57. McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989), *modifying* 861 F.2d 450 (1988).

58. On the ABC test, *see* M. LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 211-15 (1989) (stating the necessary elements to be liable for unemployment taxes).

59. NEB. REV. STAT. § 48-604(5) (1988).

60. *In re Rivera* at 3.

the self-monitoring normally imposed by the market on the firm."[61] The hearing officer has thus effectively signaled farm employers that by calling 'supervision' "inspection" and causing workers to re-do the work without additional compensation, farmers will be deemed not to control them as employees.

This mentality has been described by a court stating that:

> Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their "services" but only contracted for the "result," an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other. . . . [T]he employer, under the spur of tax or other liability, solemnly recites to him a legal jingle: "I no longer control you. Shovel according to your own methods. I hold you responsible only for the ultimate result, a pile of coal. You render me no shoveling services, but you rather sell me a product: a pile of coal from an emptied car."[62]

In the case of the weeders, although no explanation is needed as to how to weed, both the farmer and the crewleader reserved the right to control and apparently exercised it when necessary. Nevertheless, the hearing officer has invited employers to manipulate forms to eliminate part A for migrant piece-rate workers.

The hearing officer based his conclusion with regard to part A directly on the fact that "[t]he circumstances here are substantially the same between Mr. Rivera, the worker and the farmer as in [another] case between Welfare, the worker and the recipient."[63] The case to which he referred is *State v. Saville*.[64] The court in *Saville* held that so-called service-providers paid by the state Department of Welfare to clean the houses of and perform other chores for welfare recipients were independent contractors and not employees of the Welfare Department for unemployment insurance purposes. That the triangular relationship in *Saville* was in fact not at all analogous to that in *Rivera* emerges from the court's statement that "Welfare is not in the business of cleaning houses. . . ."[65] The analogy is doubly flawed because while the welfare recipient was also "not in the business of cleaning houses," the farmers are in the farming business in general and in the weeding business in particular. Consequently, despite the hearing officer's intimation that the workers were akin to

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61. Linder, 15 N.Y.U. REV. L. & SOC. CHANGE at 466-67.

62. Powell v. Appeal Bd. of Mich. Emp. Sec. Comm'n, 345 Mich. 455, 75 N.W.2d 874, 883, 886 (1956) (Smith, J., dissenting).

63. *In re Rivera* at 3.

64. 219 Neb. 81, 361 N.W.2d 215 (1985).

65. *Id.* at 85, 361 N.W.2d at 218.

custom combine operators with arcane skills and heavy capital investments, "[t]he workers were not specialists called in to solve a special problem, but unskilled laborers who performed the essential everyday chores of" the farmer's operations.[66]

The opinion made short shrift of part B of the test. The hearing officer stated that "the farm laborers performed the work on the farmer's farm and not on any of the premises of Mr. Rivera's enterprise."[67] Because farm labor contractors are, by definition, not farmers,[68] the hearing officer has established, *sub silentio*, a per se rule that a migrant farmworker can never qualify as performing services in covered employment for a crewleader for unemployment compensation purposes under part B. Because migrant farmworkers will never work in the crewleader's place of business (he has none), the hearing officer has in effect eliminated part B of the test.

In applying part C, the hearing officer recited that "the piece rate workers travel throughout the country doing farm field work. They provide their own tools. They are provided no equipment or benefits except the payment for services on a per job basis."[69] Without express acknowledgment, he has thus transmogrified virtually all migrant farmworkers in the United States into self-employed entrepreneurs, exercising the venerable and honorable profession of weed-pulling. What are the elements underlying this determination? First, they "travel throughout the country doing farm field work"—a rough definition of migrant farmworkers.[70] Second, "[t]hey provide their own tools."[71] This is the second mention of tools, although the opinion never identifies them. The reason may have been embarrassment over hoisting a migrant farmworker into an independent profession on a five-dollar hoe. Insofar as tens of thousands of migrant hand-harvesters of fruits and vegetables have—or are coerced by crewleaders into purchasing from them—their own scissors, rubber gloves, or plastic buckets, this decision converts virtually all migrants into capitalist investors in tools. Finally, "[t]hey are provided no equipment or benefits. . . ."[72] Because the hallmark of hand-harvesting is the lack of equipment, the former criterion will also apply to virtually all migrants. As to the lack of benefits, it circularly and perversely rewards the crewleader for his scheme: by the very fact of not paying these social security taxes (what other "benefits" do mi-

66. *McLaughlin*, 867 F.2d at 876-77.
67. *In re Rivera* at 3-4.
68. NEB. REV. STAT. § 48-1702(2) (1988).
69. *In re Rivera* at 4.
70. *Id.*
71. *Id.*
72. *Id.*

grants receive?) he can claim that his weed-pullers are businessmen—or, as in the case of his precocious twelve-year-old weeders, " 'little merchants.' "[73] Ultimately, then, the hearing officer has in principle dispossessed all migrant agricultural piece-rate workers of their right to unemployment compensation benefits based on their work in Nebraska.[74]

Ironically, neither Nebraska nor federal law even authorized the hearing officer to embark upon this tortuous march through the ABC test as to the crewleader. Instead, FUTA and the Nebraska Employment Security Law[75] (ESL) mandate a wholly different procedure.[76] The relevant provision in FUTA, which the ESL tracks,[77] is titled, "[s]pecial rule in case of certain agricultural workers."[78] Making statutory employees of all farmworker-crew members, its purpose is solely to create a rule of decision as to whether the agricultural employer or the crewleader is liable for payment of the un-

73. Du Pre Lumpkin, *The Child Labor Provisions of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 391, 401 (1939) (using term applied by newspaper publishers to child distributors).

74. Nebraska Legislative bill 636 would achieve the same result more expeditiously by disqualifying all seasonal employees for benefits based on wages earned in seasonal employment. *See* L.B. 636, Neb. Unicameral, 91st Leg., 1st Sess. (1989).

75. NEB. REV. STAT. §§ 48-601 to 671 (1988).

76. The federal-state structure of the unemployment compensation system creates incentives for the states and employers to maintain state programs. Failure to comply with the requirements of FUTA would lead to the loss of the tax credit to which covered employers are entitled. Thus, for example, had the states failed to follow FUTA in introducing limited coverage for agricultural labor in 1978, covered agricultural employers would have been liable for the full FUTA tax (currently 6.2%), rather than the reduced rate (0.8%) to which payment of state unemployment insurance taxes entitles them. *See* 26 U.S.C. §§ 3301-3302 (Supp. IV 1986). Although the Internal Revenue Service would be authorized to collect the FUTA tax in such cases, no agricultural workers in Nebraska would have been entitled to benefits. This doubly irrational result insures that the states will comply with FUTA. *But see* J.W. HURST, LAW & ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915, 499 (1964) (discussing doubly irrational exclusion of logging in Wisconsin). Failure to enact coverage for agricultural workers would not, however, fall within the category of violations that would trigger decertification of the program by the Secretary of Labor. *See* 26 U.S.C. § 3304 (1982).

77. The Nebraska statute provides that:

> [A]ny individual who is a member of a crew furnished by a crew leader to perform services in agricultural labor for any other person *shall be treated as an employee* of such crew leader if such crew leader holds a valid certification of registration under the Farm Labor Contractor Registration Act of 1963; . . . and if such individual is not an employee of such other person within the meaning of any other provisions of this section; . . . in [the] case [of] any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader under subdivision (c)(iii); [*sic*] such other person and not the crew leader *shall be treated as the employer* of such individual. . . .

NEB. REV. STAT. § 48-604(4)(c)(iii), (iv) (1988) (emphasis added).

78. 26 U.S.C. § 3306(o)(1) (1989).

employment insurance taxes for those constructive employees. The provision states that:

> (1) [A]ny individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person *shall be treated as an employee* of such crew leader—
>
> (A) if—
>
> (i) such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; . . . and
>
> (B) if such individual is not an employee of such other person within the meaning of subsection (i).
>
> (2) . . . [I]n the case of any individual who is furnished by a crew leader to perform any agricultural labor for any other person and who is not treated as an employee of such crew leader under paragraph (1)—
>
> (A) such other person and not the crew leader shall be *treated as the employer* of such individual. . . .[79]

The overriding principle, therefore, is that all crew members are employees for purposes of unemployment compensation[80]—provided that they perform agricultural labor "for a person who . . . during any

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79. 26 U.S.C. § 3306(o) (Supp. IV 1986) (emphasis added).

80. When Congress considered the incorporation of farmworkers into FUTA in the mid-1970s, the original bills made the farmer and only the farmer liable for FUTA taxes. Thus section three of H.R. 8366, the bill offered by Representative Corman, the Chairman of the Subcommittee on Unemployment Compensation of the Ways and Means Committee, stated that "in the case of any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person . . . such other person and not the crew leader *shall be treated as the employer* of such individual. . . ." SUBCOMM. ON UNEMPLOYMENT COMPENSATION OF THE HOUSE COMM. ON WAYS AND MEANS, INFORMATION ON UNEMPLOYMENT AND UNEMPLOYMENT COMPENSATION PROGRAMS, 94th Cong., 1st Sess. 73 (1975) (emphasis added). Similarly, section 103 of H.R. 8614, offered by Republican Representative Steiger, provided that "any person to whom individuals are furnished by a crew leader or other labor contractor to perform agricultural labor shall keep all records . . . and shall pay the taxes required by this chapter *as if such person employed* such individuals. . . ." *Id.* at 96-97 (emphasis added). Even earlier the Republican administration's proposed bill, the Job Security Assistance Act of 1974, contained similar language in section 104. HOUSE COMM. ON WAYS AND MEANS, INFORMATION RELATING TO FEDERAL-STATE UNEMPLOYMENT COMPENSATION LAW, 93d Cong., 2d Sess. 36 (1974). The only relevant testimony before Congress came from counsel for the Citrus Industry Council, who suggested that crewleaders be made primarily liable, with farmers and processors secondarily responsible. *Unemployment Compensation: Hearings Before the House Comm. on Ways and Means*, 93d Cong., 2d Sess. 268-74 (1974) (statement of R. Shaw); *Phase III: Proposed Changes in the Permanent Federal-State Unemployment Compensation Programs: Hearings Before the Subcomm. on Unemployment Compensation of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 630-37 (1975) (statement of R. Shaw). The following year, but apparently without intervening testimony, Representative Corman then offered H.R. 10210, section 112 of which contained the language ultimately embodied in 26 U.S.C. § 3306(o). 122 CONG. REC. 33,058 (1976). Both the testimony and the changes in the bill support the underlying premise that Congress's sole concern related to establishing rules of decision for determining who was the responsible employer of crew members, all of whom were to be covered for FUTA purposes.

calendar quarter in the calendar year or the preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor. . . ."[81]

The first rule in identifying the proper employer is that unregistered crewleaders do not qualify as employers for unemployment compensation purposes.[82] When the crewleader is not registered, the second rule of decision is that the farm operator is the default employer. This rule states that:

> The farm operator is the employer if the crew leader is not registered under the Farm Labor Contractor Registration Act. . . . The farm operator is also the employer of workers furnished by a registered farm labor contractor when such workers are the employees of the farm operator under the common law test.[83]

That is to say, the third rule is that the common-law or ABC test is applied as to the relationship between the farm operator and the workers only where the crewleader is registered.[84] But even if the crewleader is registered, the common-law test is applied not to determine whether the farmworkers are employees as opposed to independent contractors—Congress has already created statutory-employee status for all crew members—but merely as to whether the crew members are employees of the farmer (or other agricultural employer) on behalf of whom the crewleader has recruited the workers. If application of the common-law test leads to the conclusion that the farmer is not the employer, then the fourth and final rule of decision makes the registered crewleader the employer of last resort—without regard to the common-law test under FUTA.

Once the hearing officer found that the crewleader was registered,[85] he was bound to proceed directly to the third rule in order to determine whether the farmer was the employer under the ESL by applying the ABC test.[86] As already indicated, the services that a worker performs for wages "shall be deemed to be employment, un-

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81. 26 U.S.C. § 3306(c)(1)(A)(i) (1982).

82. Except where "substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crewleader." 26 U.S.C. § 3306(o)(1)(A)(ii) (1982). Hand-harvesting migrant farmworkers, by definition, do not engage in such work.

83. UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1975, H. REP. NO. 755, 94th Cong., 1st Sess. 39 (1975).

84. On the so-called common-law test for social security purposes, *see* M. LINDER, *supra* note 58.

85. *In re Rivera* at 1.

86. The Nebraska legislature amended the ESL, in reaction to a Nebraska Supreme Court decision, to provide that the ABC test is "not intended to be a codification of the common law. . . ." NEB. REV. STAT. § 48-604(5) (1988).

less" the employer can show that the worker is an independent contractor under the A, B, and C parts of the test.[87] With regard to part B, the employer would have to show that "such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed. . . ."[88] This the farmer will virtually never be able to show for the work will always be performed on his farm and weed-pulling—or any other kind of labor performed by migrants—is clearly within the usual course of farming. By failing to show this one element of the test, the farmer has already failed to rebut the presumption and is therefore the employer for unemployment insurance tax purposes. Consequently, rather than the hearing officer's implied per se rule that all piece-rate migrants are independent contractors vis-á-vis crewleaders, there emerges a virtual per se rule that all migrant farmworkers are employees of the farmers, seed companies, etc., regardless of whether crewleaders are involved.[89]

Had the application of the ABC test revealed that the farm operator was not the employer, then—and only then—would it have been proper to look to the crewleader as the employer. Once the process reaches this juncture, however, the issue is no longer whether the workers are employees as opposed to independent contractors or even the identification of the proper employer. The fourth rule of decision under the ESL dictates the outcome by prescribing that the workers are the crewleader's employees. The fourth rule states that "any individual who is a member of a crew furnished by a crew leader . . . shall be treated as an employee of such crew leader. . . ."[90]

POLICY RECOMMENDATIONS

At the state level, the Legislature can secure compliance with a whole raft of laws by eliminating any incentive that agricultural employers might have for interposing judgment-proof middlemen between themselves and their workers. The abuses of the crewleader system can be significantly reduced by making the agricultural employer jointly liable for all violations committed by the crewleader. This end could be achieved by amending the FLCA so as to preclude

87. *In re Rivera* at 4.

88. NEB. REV. STAT. § 48-604(5)(b) (1988).

89. Provided that the farmer "during any calendar quarter in either the current or preceding calendar year paid remuneration in cash of twenty thousand dollars or more to individuals employed in agricultural labor, or for some portion of a day in each of twenty different calendar weeks . . . employed in agricultural labor ten or more individuals. . . ." NEB. REV. STAT. § 48-604(4)(c)(i) (1988).

90. NEB. REV. STAT. § 48-604(4)(c)(iii) (1988).

a farm labor contractor from ever being considered the sole employer of a farmworker. A fixed-situs employer—be it seed company, farmer, or processor—would always be co-responsible for performing all duties pertaining to wage payments, written disclosures, contract compliance, and wage statements.[91] Once these entities are put on notice that they are legally responsible for the crewleaders' acts, they will have an incentive to acknowledge the crewleaders (and the workers) as their employees and to control them so as to avoid violations of the law, or to eliminate their role entirely.

Nor should it be thought that this approach is necessarily anathema to agricultural employers.[92] A decade ago the counsel to the Citrus Industrial Counsel testified before Congress that "there should be incentives provided to encourage employers to cause all workers to become their own employees . . . and . . . to encourage them to pay each worker directly by check rather than paying off in cash to someone who would thereby have an opportunity to skim. . . ."[93] In urging Congress to consider "a rethrusting" of the federal Farm Labor Contractor Registration Act, the employers' counsel correctly observed that by causing both the workers and the crewleaders to become the employer's employees, "so that the farm labor contractor never had the opportunity to get his hands on any part of that worker's money," the workers could begin to be brought "into the mainstream"[94] or "traditional system . . . under which workers are the direct employees of . . . the farmer. . . ."[95]

Even before the advent of the federal labor-protective statutes associated with the New Deal, the Legal Aid Committee of the American Bar Association modeled its draft wage claim collection statute on the principle that:

[A] good wage law must show so many effective teeth that

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91. NEB. REV. STAT. § 48-1711(3)-(7) (1988).

92. Agricultural employers' proposals to take responsibility for crewleaders' acts were in part motivated by the desire to avoid registration under the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-2055, *repealed by* Migrant and Seasonal Agricultural Worker Protection Act (AWPA), Pub. L. No. 97-470, 96 Stat. 2584 (1983) (*codified at* 29 U.S.C. §§ 1801-1872 (1982 & 1988)). Although agricultural employers were ultimately exempted from the registration requirements of AWPA, Congress did not succeed in mandating their status as joint employers. 29 U.S.C. § 1802(7) (1982). *See* Linder, *The Doctrine of Joint Employment: Clarifying Joint Legislative-Judicial Confusion*, 10 HAMLINE J. PUB. L. & POL'Y — (1989).

93. *Administration of Laws Affecting Farmworkers: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 8 (1980) (statement of Roderick K. Shaw, Jr.).

94. *Id.* at 18, 8.

95. *Farm Labor Contractor Registration Act Amendments of 1976: Hearings on H.R. 14254 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. 77 (1976) (statement of Roderick K. Shaw, Jr., General Counsel, Citrus Industrial Council).

> its threat will be ever present to all whom it is meant to curb. Wage claimants as a class pitifully lack the means for enduring even a moderate amount of delay. That law helps them most which forestalls wrongs meditated but yet undone, not confining its effect to the correction of wrongs already done. And because some cases of correction must be encountered and quickly dealt with, there is a double reason for giving the administrative agency more than one clear method of inflicting prompt painful pressure on defaulting employers. The agency should have a set of thumbscrews so assorted as to fit every unfairly grasping hand.[96]

Iowa has gone furthest in this regard by making the seed company the employer of last resort for unpaid wages regardless of whether the contractor posts the bond. Specifically, the Iowa Wage Payment Collection Law states that:

> A farm labor contractor who contracts with a person engaged in the production of seed or feed grains to remove unwanted or genetically deviant plants or corn tassels or to hand pollinate plants shall file with the commissioner a bond of at least twenty thousand dollars on behalf of the person engaged in the production of seed or feed grains, with a corporate surety approved by the commissioner, securing the payment of all wages due the employees of the farm labor contractor. . . . If the bond is not filed as required or if the farm labor contractor fails to pay all wages due the employees of the farm labor contractor, the person engaged in the production of seed or feed grains shall be liable to the employees for wages not paid by the farm labor contractor.[97]

It has become a customary cost of doing business for seed companies operating in Iowa to comply with the law.

As an additional flanking measure, Nebraska could emulate its western neighbor. In an Executive Order of April 30, 1987, the Governor of Colorado required the attorney general to prosecute and to bring civil claims against employers who knowingly mischaracterize their employees as independent contractors and therefore cause a loss of revenues to the state and a loss of benefits to employees.[98]

Such a step would be particularly beneficial for the families of Mexican-American migrants from Texas who block and thin sugar beets in western Nebraska.[99] Since the termination of the Sugar Act in 1974,[100] farmers have treated them as independent contractors

96. 52 A.B.A. REP. 324, 325 (1927).

97. IOWA CODE § 91A.3.7 (Supp. 1989).

98. Exec. Order No. D003387 (Apr. 30, 1987).

99. *See* H. HUGHES & E. HENSON, CROP PRODUCTION: PRINCIPLES AND PRACTICES 529-30 (1948).

100. Pursuant to 7 U.S.C. § 1131(c)(1) (1973), growers' eligibility for federal pay-

with impunity. These workers are largely without any legal recourse. Because many of these farms employ relatively little hired labor, they do not reach the threshold for coverage under the federal FLSA[101] or AWPA.[102] Because the Nebraska Wage and Hour Act excludes "any individual employed in agriculture," the workers can seek no protection there.[103] Because the sugar-beet farmers largely recruit workers directly without the use of farm labor contractors, the FLCA provides no remedy. Thus, so long as the farmer pays the workers the agreed-upon acreage piece-rate, even if it were the equivalent of a dollar per hour, the farmer would have done nothing actionable.

Finally, a combination of public employment services, labor organizations, and agricultural employer associations could assume the functions currently performed by crewleaders. But even in the absence of labor organizations and with bargaining power lopsidedly in favor of employers, "the employment relationship would be inequitable but no more so than at present."[104] In addition, growers' associations could operate more responsibly, eliminate "much of the petty graft and exploitation," and better coordinate labor supply and demand in a more rational labor market.[105]

Agricultural employers in Nebraska are apparently failing to offer sufficiently high wages to induce state residents to perform the very hard and unpleasant labor that detasseling, weeding, and hoeing require. If the sugar-beet, corn, and soybean industries, which are so vital to the economy of Nebraska, cannot operate without importing Mexican and Mexican-American migrants from Texas—and as the general counsel for the Great Western Sugar Co. once testified before Congress, "our industry would probably be very hard put to remain viable" without them[106]—it behooves the Legislature to confer upon

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ments was conditioned on their paying to their laborers the wage rates prescribed by the Secretary of Agriculture.

101. The 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) (1982).

102. The small business exemption for agricultural employers adopts the FLSA five hundred-man-day standard. 29 U.S.C. § 1803(a)(2) (1982).

103. NEB. REV. STAT. § 48-1202(3)(a) (1988).

104. A. ROSS & S. 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*, 82d Cong., 2d Sess. 1017, 1023 (1952).

105. A. ROSS & S. 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*, 82d Cong., 2d Sess. 1017, 1034 (1952).

106. *Farm Labor Contractor Registration Act Amendments of 1976: Hearings on H.R. 14254 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 94th Cong., 2d Sess. 131 (1976) (statement of Peter Adolph).

these workers the same modicum of rights and protections that other employees enjoy. As the twenty-first century approaches, it is only reasonable that Nebraska join the other states that have finally accorded farmworkers the same benefits that industrial workers achieved fifty years ago.[107]

107. For an overview of the extent to which farmworkers are covered by federal and state labor-protective statutes, *see* FEDERAL AND STATE EMPLOYMENT STANDARDS AND U.S. FARM LABOR (B. Craddock ed. 1988).