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**Farm Workers in Illinois: Law Reforms and  
Opportunities for the Legal Academy to Assist  
Some of the State's Most Disadvantaged Workers**

by

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# FARM WORKERS IN ILLINOIS: LAW REFORMS AND OPPORTUNITIES FOR THE LEGAL ACADEMY TO ASSIST SOME OF THE STATE'S MOST DISADVANTAGED WORKERS

Beth Lyon\*

## I. INTRODUCTION

This essay is the published version of the author's presentation at the Southern Illinois University School of Law Immigration Matters Conference. The first goal of the essay is to highlight Illinois state laws that disfavor farm workers and to argue that they merit reconsideration. The essay's second purpose is to suggest how the legal academy can become involved with law reform and service to farm workers, and why such efforts are pedagogically desirable. The essay begins by describing the demographics and situation of farm workers (Section II). It then provides an overview of the federal and state laws that discriminate against farm workers (Section III). The essay then suggests reforms for improving four Illinois laws that disadvantage farm workers (Section IV), as well as opportunities for the legal academy to involve itself with this community (Section V).

## II. BACKGROUND

It is something of a commonplace in American social history that farm workers are vulnerable and deprived.<sup>1</sup> A flow of exposés and advocacy movements has brought the issue to the national forefront in recent generations, most notably John Steinbeck's 1939 novel, *The Grapes of Wrath*,<sup>2</sup> Edward R. Murrow's politically pivotal 1960 documentary "Harvest of

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1. See PHILIP L. MARTIN AND DAVID A. MARTIN, *THE ENDLESS QUEST; HELPING AMERICA'S FARM WORKERS* 1, 1 (1994) (stating that "[m]igrant farm workers are perhaps the most pitied but least understood component of the American work force.") [hereinafter MARTIN AND MARTIN].
2. JOHN STEINBECK, *THE GRAPES OF WRATH* (Penguin Books 1992) (1939).

Shame<sup>3</sup> and Cesar Chavez's grape boycott.<sup>4</sup> Over the decades, the situation of farm workers has improved in some respects but remains quite bleak when compared with the standard of living and expectations of other laborers.<sup>5</sup> Agricultural labor is an extremely dangerous and low-paying occupation, fueled by immigrants and child laborers.

There are an estimated two-and-a-half million farm workers in the United States.<sup>6</sup> The U.S. Department of Labor's national estimate is that 52% of all agricultural workers are unauthorized immigrants.<sup>7</sup> In Illinois, which has the nation's tenth highest agricultural payroll,<sup>8</sup> a majority of the estimated 66,750 farm workers<sup>9</sup> are Mexican nationals or Mexican Americans.<sup>10</sup>

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3. HARVEST OF SHAME (Edward R. Murrow 1960).
  4. SUSAN FERRISS ET. AL., *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT* (Harvest Books 1998).
  5. See Walter Goodman, 'New Harvest, Old Shame,' *About Farm Workers*, NY TIMES, Apr. 17, 1990, at C18 (describing new documentary that updates and confirms conditions noted in Edward R. Murrow's original documentary); See generally, *America's Continuing Harvest of Shame: Hearing Before the Select Committee on Aging*, 101st Cong. (1991); THE HUMAN COST OF FOOD (Charles D. Thompson, Jr., & Melinda F. Wiggins, eds., Univ. of Tex. Press 2002); Catherine K. Ruckelshaus, *From Orchards to the Internet: Confronting Contingent Work Abuses* (Mar. 2002), available at <http://www.nelp.org> (last visited Feb. 15, 2005).
  6. U.S. DEP'T OF AGRIC., 2002 CENSUS OF AGRICULTURE - STATE DATA: TBL. 7 (giving figure of 3,036,470 farm workers in United States), available at [http://www.nass.usda.gov/census/census02/volume1/us/st99\\_2\\_007\\_007.pdf](http://www.nass.usda.gov/census/census02/volume1/us/st99_2_007_007.pdf) (last visited Feb. 15, 2005) [hereinafter USDA CENSUS 2002 AGRICULTURE CENSUS] with E-mail from Philip Martin, Professor, Department of Agricultural and Resource Economics, University of California at Davis, to Beth Lyon, Assistant Professor of Law, Villanova University School of Law (Jan. 17, 2005, 18:04:19 PST) (on file with author) (noting that because USDA census numbers include duplication where one farm worker is hired by multiple employers, standard number used is 2.5 million, and this number is confirmed by U.S. Census Bureau Current Population Survey); see also, MARTIN AND MARTIN, *supra* note 1, at 133 (noting that "the number of hired farm workers is likely to remain in the 1 to 3 million range").
  7. KALA MEHTA ET. AL., OFFICE OF THE ASSISTANT SEC'Y FOR POLICY, U.S. DEP'T OF LABOR, RESEARCH REP. NO. 8, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS), 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 22 (2000) (approximating that in 1997-98, fifty-two percent of employed farm workers were unauthorized) [hereinafter KALA MEHTA ET. AL.], available at [http://www.dol.gov/asp/programs/agworker/report\\_8.pdf](http://www.dol.gov/asp/programs/agworker/report_8.pdf) (last visited Feb. 15, 2005).
  8. Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too - A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers*, 6 U. PA. J. LAB. & EMPL. L. 525, 530 n.20 (2004).
  9. See USDA CENSUS 2002 AGRICULTURE CENSUS, *supra* note 6 (listing total number of farms and farm workers in each state as of 2002).
  10. See interview with Vincent Beckman, Supervisory Attorney of the Migration Project, Legal Assistance Foundation of Metropolitan Chicago (LAF), (Mar. 15, 2004) (stating that nearly all Illinois farm workers are Mexicans or Mexican-Americans) (notes on file with author) [hereinafter Beckman interview]. A 1994 report states a similar figure for migrant farm workers in other Midwestern states. See also W.K. BARGER AND ERNEST M. REZA, THE FARM LABOR IN THE MIDWEST: SOCIAL CHANGE AND ADAPTATION AMONG MIGRANT FARMWORKERS (1994) (noting that "most" of estimated 60,000 farm workers who migrate into central Midwestern states of Indiana, Michigan, and Ohio to perform agricultural labor are Mexican-American).

At least six percent of farm workers are minors.<sup>11</sup> The law itself lowers the minimum working age for some family farms,<sup>12</sup> but many children working in agriculture do not fit that exemption.<sup>13</sup> On a daily basis, children break bones and suffer serious tendon and muscle injuries as a result of their labor on farms.<sup>14</sup> In 1998, a Department of Labor monitor found a four-year-old working in an Arizona field.<sup>15</sup>

Agricultural work is the second most dangerous occupation in America.<sup>16</sup> In addition to experiencing higher fatality rates,<sup>17</sup> agricultural workers suffer many occupational diseases relating specifically to pesticides, fertilizers, and general growing conditions.<sup>18</sup> Moreover, agricultural work is also temporary

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11. OXFAM AMERICA, *LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE* 23 (Mar. 2004) (noting that six percent of farm workers are between fourteen and seventeen years old) [hereinafter OXFAM AMERICA], available at [http://www.oxfamamerica.org/pdfs/labor\\_report\\_04.pdf](http://www.oxfamamerica.org/pdfs/labor_report_04.pdf) (last visited Feb. 15, 2005).
  12. See Fair Labor Standards Act, 29 U.S.C. §§ 212–213 (2004). There is a general prohibition on employment of children under the age of sixteen in the Fair Labor Standards Act, but there are exceptions for agricultural employment reducing the age to twelve when it is a family owned farm, or fourteen without parental permission on a non-family owned farm.
  13. See HUMAN RIGHTS WATCH, *FAILURE TO PROTECT CHILD FARMWORKERS*, available at [www.hrw.org/campaigns/crpf/farmchild/failure.htm](http://www.hrw.org/campaigns/crpf/farmchild/failure.htm) (last visited Feb. 15, 2005). While an estimated one million child labor violations occur in U.S. agriculture every year, only a small fraction are ever discovered by the U.S. Department of Labor. Also, employer sanctions are usually too weak to discourage the use of illegal child labor. See also HUMAN RIGHTS WATCH, *FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS* 3 (June 2000) (stating “all but a handful of states perform no enforcement whatsoever regarding juvenile labor in agriculture”) [hereinafter FINGERS TO THE BONE], available at <http://www.hrw.org/reports/2000/frnwrkr/> (last visited Feb. 15, 2005).
  14. See Shelly Davis & James B. Leonard, *The Ones the Law Forgot: Children Working in Agriculture* 1 (July 2000) (noting that “farm work is frequently a cause of sprains, strains, lacerations, fractures and other injuries to young workers.”), available at <http://www.fwjustice.org/images/CHILD%20LABOR%20REPORT%20-%20FINAL.pdf> (last visited Feb. 15, 2005).
  15. See CATHOLIC LEGAL IMMIGRATION NETWORK, INC., *FARMWORKERS IN WORK WITHOUT JUSTICE: LOW WAGE IMMIGRANT LABORERS* 3, 19 (2000) (describing one incident involving Department of Labor investigators who found “one four-year old and 11 other children under the age of 12 working on Arizona farms picking onions.”) [hereinafter CATHOLIC LEGAL IMMIGRATION NETWORK].
  16. FINGERS TO THE BONE, *supra* note 13, at 3 (stating agriculture is second most dangerous occupation in United States behind mining).
  17. See DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *CENSUS OF FATAL OCCUPATIONAL INJURIES (CFOI)—CURRENT AND REVISED DATA* (Aug. 14, 2001) (stating total number of fatalities in agriculture was 707 in 2003 compared to mining industry, for example, where total fatalities equaled 141), available at <http://stats.bls.gov/iif/oshwc/foi/cfch0002.pdf> (last visited Feb. 15, 2005).
  18. See FINGERS TO THE BONE, *supra* note 13, at 15 (estimating that 300,000 farm workers suffer pesticide poisonings each year). See also CATHOLIC LEGAL IMMIGRATION NETWORK, INC., *FARMWORKERS IN WORK WITHOUT JUSTICE: LOW WAGE IMMIGRANT LABORERS* 3 (2000) (noting one study that estimates 10,000 to 20,000 agricultural workers are diagnosed with pesticide-related illnesses each year while many go undetected). It should be noted that Illinois is one of 13 states that have field sanitation laws. See UNITED STATES GENERAL ACCOUNTING OFFICE, *HIRED FARMWORKERS: HEALTH AND WELL-BEING AT RISK* 3 (1992); *U.S. Urges States to Set Farmhand*

and uncertain in nature.<sup>19</sup> Workers can travel great distances, only to find that their work is less remunerative and of shorter duration than promised.<sup>20</sup>

Despite the risks and uncertainties involved in the work, salaries for agricultural workers are exceedingly low. A 1998 estimate placed the average farm worker salary between \$5,000 and \$7,500 annually.<sup>21</sup> Life on these salaries is predictably difficult. For example, a 2003 study demonstrated that 47 percent of North Carolina's "Latino migrant and seasonal farm worker families" have insufficient food, and that fifteen percent use strategies of either cutting their children's meals or not eating for an entire day.<sup>22</sup>

Farm workers live in conditions that fall dramatically short of what the rest of the country experiences. A federally funded study by the Housing Assistance Council (HAC)<sup>23</sup> noted that farm workers are "among the nation's poorest and worst-housed groups."<sup>24</sup> Documenting conditions in twenty-two

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*Health Rules*, CHICAGO TRIBUNE (Sept. 12, 1985) (discussing Labor Secretary William Brock's action towards establishing state rules on sanitation).

19. See Laura Lockard, *Colloquium: Toward Safer Fields: Using AWPAs Working Arrangement Provisions to Enforce Health and Safety Regulations Designed to Protect Farmworkers*, 28 N.Y.U. REV. L. & SOC. CHANGE 507, 510 (noting many farm workers only procure temporary work with no job security).
20. See, e.g., *Ochoa v. J.B. Martin & Sons Farms*, 287 F.3d 1182, 1187 (9th Cir. 2002) (involving Arizona farm workers who were recruited to work in New York, but did not receive promised wages or promised transportation back to Arizona when work was done).
21. See U.S. DEP'T OF LABOR, *PROFILE OF FARM WORKERS: DEMOGRAPHICS, HOUSEHOLD COMPOSITION, INCOME AND USE OF SERVICES* (Oct. 14, 2004) (discussing income, earnings and assets of farm workers based on data from the 1997-1998 National Agricultural Workers Survey (NAWS)) [hereinafter *NAWS Profile*], available at <http://www.dol.gov/asp/programs/agworker/report/main.htm> (last visited Feb. 15, 2005). The NAWS report was prepared for the Department of Labor's Commission on Immigration and examined the income of farm workers. The report noted that "many (28%) had personal incomes that were less than \$2,500." *Id.* Another important fact is that the median income (\$5,000-\$7,500) has remained the same since 1988. *Id.* Therefore, after accounting for inflation it is probable that the income fell between 1988 and 1997 when this report was written. Additionally, there are differences in income based on immigration status: "Green card holders or legal permanent residents earned between \$7,500 and \$10,000 a year whereas citizens and people with other work authorizations (such as amnesty and family unity) tended to have a lower median income of between \$5,000 and \$7,500. Unauthorized workers had the lowest median income—between \$2,500 and \$5,000." *NAWS Profile*, available at <http://www.dol.gov/asp/programs/agworker/report/ch3.htm> (last visited Feb. 15, 2005).
22. Wake Forest University Baptist Medical Center, *N.C. Latino Farm Workers Can't Afford Sufficient Food, Wake Forest Study Shows* (Mar. 6, 2003) available at [http://www.bgsu.edu/school/Archives/03-06-03\\_NCLatinoFarmWorkersCantAffordFood.htm](http://www.bgsu.edu/school/Archives/03-06-03_NCLatinoFarmWorkersCantAffordFood.htm) (last visited Feb. 15, 2005).
23. Housing Assistance Council, *No Refuge from the Fields: Findings from a Survey of Farmworker Housing Conditions in the United States 2* (2001) (noting research for study was supported with funds from U.S. Department of Agriculture's Rural Housing Service and U.S. Department of Housing and Urban Development; included provisos that HAC, not federal government, was responsible for report's accuracy and interpretations) [hereinafter *HAC Findings*], available at <http://www.ruralhome.org/pubs/farmworker/norefuge/norefuge.pdf> (last visited Feb. 15, 2005).
24. *Id.* at 8.

states and Puerto Rico,<sup>25</sup> the 2001 report noted that more than half of the farm worker housing units surveyed were crowded, as compared with two percent of all U.S. households, and three percent of non-metropolitan households nationwide.<sup>26</sup> In the nineteen Illinois counties surveyed,<sup>27</sup> 33.5 percent of the farm worker units were crowded, and 69.9 percent of those units housed children.<sup>28</sup> Nearly twenty percent of the Illinois units surveyed were directly adjacent to pesticide-treated fields, and children lived in 35.7 percent of those pesticide-adjacent units.<sup>29</sup>

Of the estimated three million farm workers nationwide, those working under union contracts number in the low tens of thousands.<sup>30</sup> According to Vincent Beckman of the Chicago Legal Assistance Foundation Migrant Project, *no* farm workers in Illinois belong to a union.<sup>31</sup>

Moreover, farm workers are an invisible population. The federal government conducts various surveys of farm workers that provide partial, contradictory and inconclusive information.<sup>32</sup> The General Accounting Office conceded in a 2003 report that the federal government is doing an inadequate job of tracking farm workers.<sup>33</sup> The best demographic estimates available regarding farm workers in Illinois were published in a general study conducted more than a decade ago.<sup>34</sup>

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25. *Id.*

26. *Id.* at 9 (noting that fifty-two percent of farm worker housing units surveyed were overcrowded).

27. *Id.* at 56, App. C. The counties were Boone, Champaign, Clinton, DeKalb, Jackson, Johnson, Kane, Kankakee, Lake, Lee, Marshall, McHenry, McLean, Peoria, Randolph, Tazewell, Union, Vermilion, and Woodford. *See id.*

28. *See* HAC Findings, *supra* note 23, at 51, Tbl. A-4.

29. *Id.* at 52.

30. *See* PHILIP L. MARTIN, PROMISE UNFULFILLED: UNIONS, IMMIGRATION, & THE FARM WORKERS 81-87 (2003) (description and analysis of farm labor union rates and trends nationwide); *see also* Email from Marc Grossman, Principal Spokesman/Communications Director, United Farm Workers of America/AFL-CIO, to Sara Havas, Research Assistant to Professor Beth Lyon, Villanova University School of Law (Oct. 26, 2004, 05:59:56 EST) (on file with author) (stating UFW currently has 27,000 members); Farm Labor Organizing Committee (FLOC) (Jan. 1, 2000) (stating approximately 7,000 farm workers are now represented under FLOC union contracts).

31. *See* Beckman interview, *supra* note 10.

32. *See* MARTIN AND MARTIN, *supra* note 1, at 139-46.

33. *See* U.S. GEN. ACCOUNTING OFFICE, DECENNIAL CENSUS: LESSONS LEARNED FOR LOCATING AND COUNTING MIGRANT AND SEASONAL FARM WORKERS, GAO-03-605 at 2 (July 2003) ("One of the United States Census Bureau's long-standing challenges has been counting migrant farm workers.") [hereinafter GAO REPORT].

34. *See* MIGRANT LEGAL SERVICES, MIGRANT ENUMERATION PROJECT: 1993 45-46 (1993). Later estimates do exist, but they provide limited demographic information compared with the data from the 1993 study. *See, e.g.,* USDA CENSUS 2002 AGRICULTURE CENSUS, *supra* note 6 (listing total number of farms and farm workers in each state as of 2002). The occasional reports on farm labor provided by the Illinois Agricultural Statistics Service are similarly limited, listing only the number of farm workers by state region and their estimate salaries. *See* Illinois Agricultural Statistics Service, *Farm Labor*, ILLINOIS FARM REPORT, IFR-04-12 (Sept. 13, 2004), available at <http://www.agstats.state.il.us/farmreport/ifr0412.htm#milk> (last visited Feb. 15, 2005).

In addition, consider the practical reality of these workers' lives: they are geographically, culturally and linguistically isolated, and many of them are leading nomadic lives that preclude the formation of community ties.<sup>35</sup> When you add it all up, it sounds like a recipe for special protection, and indeed governments and private agencies do take some steps to respond to the pressing social and humanitarian issues raised by this large population living in a state of deprivation.<sup>36</sup> There are some laws that provide specialized protection to farm workers, most importantly the Migrant and Seasonal Agricultural Worker Protection Act of 1983 (AWPA).<sup>37</sup> Most significantly, the AWPA expanded the definition of an agricultural employer to extend legal responsibility to new actors in the agricultural labor market, such as farm labor contractors, and gave agricultural workers a private right of action to enforce the terms and conditions of their working arrangements.<sup>38</sup> Even in light of AWPA, however, federal and state laws provide agricultural workers, and many of the immigrants that make up this class, with *lesser* rather than greater protection when compared with workers in all other occupations.<sup>39</sup>

With this severe deprivation and the differential laws described below, it may not be surprising that the U.S. government's treatment of farm workers and other migrant workers is criticized around the world, much like our death penalty policies.<sup>40</sup> In recent years the treatment of farm workers in America

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35. See GAO REPORT, *supra* note 33, at 6, 11. See also Kimi Jackson, *The Louis Jackson National Student Writing Competition: Farmworkers, Nonimmigration Policy, Involuntary Servitude, and a Look at the Shepherding Industry* 76 CHI.-KENT. L. REV. 1271, 1277 ("[The] H-2 worker is for the cane growers the perfect farm laborer...A man without a family who will never be part of the larger community; who has no hope of a better job or indeed any job in this country other than swinging a machete eight hours a day...") (emphasis added).
36. See, e.g., Rural Migration News, *Changes in Federal MSFW Programs* (describing ten federal assistance programs for migrant and seasonal farm workers and their children), available at [http://migration.ucdavis.edu/rmn/comments.php?id=98\\_0\\_3\\_0](http://migration.ucdavis.edu/rmn/comments.php?id=98_0_3_0) (last visited Feb. 15, 2005); Migration International, *Rural Laws: January, 1998 - Number #10* (stating federal government spends more than \$600 million annually on assistance programs for migrant and seasonal farm workers and their families), available at [http://www.migrationint.com.au/ruralnews/belfast/jan\\_1998-10rmn.asp](http://www.migrationint.com.au/ruralnews/belfast/jan_1998-10rmn.asp) (last visited Feb. 15, 2005). See also Recommendation 92-4: *Coordination of Migrant and Seasonal Farmworker Service Programs*, 1 C.F.R. § 305.92-4 (1993). Many of these programs were created as an alternative to directly suggested legislating labor market reforms, such as closing the child labor loophole and ending the then-existing immigrant guest worker program. See MARTIN AND MARTIN, *supra* note 1, at 22.
37. 29 U.S.C. §§ 1801-72 (2000).
38. 29 U.S.C. § 1854 (2004).
39. See Section III, *infra* notes 48-62 and accompanying text.
40. See, e.g., Amnesty International (listing multiple reports and articles criticizing U.S. policy toward death penalty and policy's implications for human rights), available at <http://www.amnesty.org> (last visited Feb. 15, 2005); Human Rights Watch (discussing U.S. policy toward death penalty and child farm worker rights abuses), available at <http://www.hrw.org/wr2k1/usa/> (last visited Feb. 15, 2005); Rita Maran, *International Human Rights in the U.S.: A Critique*, 26 SOC. JUST. 49 (1999) (discussing death penalty in context of international human rights).

has been the subject of critical reports by the NAFTA secretariat,<sup>41</sup> the Commission on Security and Cooperation in Europe,<sup>42</sup> Human Rights Watch,<sup>43</sup> and Oxfam.<sup>44</sup> Recently, the International Labor Organization<sup>45</sup> and the Organization of American States Inter-American Court of Human Rights declared that refusing worker rights to unauthorized immigrants solely on the basis of their immigration status violates international law.<sup>46</sup>

### III. LAWS THAT DISADVANTAGE FARM WORKERS

The extreme vulnerability and differential legal treatment of farm workers appears in the law on many levels. The following section provides a general overview of differential employment rights, immigration laws as they relate to agricultural workers, and enforcement concerns.

#### 1. Lesser Legal Protections for Agricultural Workers

During the 1930s, when many farm workers were African-Americans in the segregated South, agriculture was explicitly exempted from having to

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41. See Commission for Labor Cooperation, *Protection of Migrant Agricultural Workers in Canada, Mexico and the United States* 37–50 (discussing U.S. immigration policies resulting from North American Free Trade Agreement and how they do not benefit migrant workers), available at <http://www.naalc.org/english/pdf/study4.pdf> (last visited Feb. 15, 2005) [hereinafter Commission for Labor Cooperation].
  42. See Commission on Security and Cooperation in Europe, *Briefing: Migrant Farmworkers In The United States* (Apr. 21, 1993), available at [http://www.csce.gov/briefings.cfm?briefing\\_id=145](http://www.csce.gov/briefings.cfm?briefing_id=145) (last visited Feb. 15, 2005).
  43. See FINGERS TO THE BONE, *supra* note 13 (delineating human rights violations associated with treatment of child farm workers in United States).
  44. See OXFAM AMERICA, *supra* note 11.
  45. See Case No. 2227 (United States): Report in which the Committee Requests to Be Kept Informed of Developments, Complaints Against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), in 332nd Report of the Committee on Freedom of Association, GB.288/7 (Part II), 288th Session (November 2003) 142, available at <http://www.ilo.org/public/english/standards/reln/gb/docs/gb288/pdf/gb7.pdf> (last visited Feb. 15, 2005) [hereinafter Case No. 2227]. See also Supplementary Provisions Convention, 1975 (143) – *Migration in Abusive Conditions: Memorandum by the International Labour Office* at Art. 9, Part I, ¶ 551 (Nov. 1, 2003), available at <http://www.ilo.org/public/english/standards/reln/gb/docs/gb288/pdf/gb-7.pdf> (last visited Feb. 15, 2005).
  46. See Advisory Opinion OC-18/3, *Juridical Condition and Rights of Undocumented Migrants*, InterAm. Ct. H.R. (Sept. 17, 2003) (stating that individual rights guarantees apply to migrants regardless of immigration status and therefore emphasizing critical importance of extending core economic, social, and cultural rights to all migrant workers), available at [http://www.corteidh.or.cr/serieapdf\\_ing/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/serieapdf_ing/seriea_18_ing.pdf) (last visited Feb. 15, 2005). See also Beth Lyon, *The Inter-American Court Of Human Rights Defines Unauthorized Migrant Workers' Rights For The Hemisphere: A Comment On Advisory Opinion 18, 28 N.Y.U. REV. L. & SOC. CHANGE* 547, 588 (2004) (discussing Inter-American Court's opinion in OC-18/3).



comply with many of the provisions of the New Deal legislation.<sup>47</sup> These race exemptions conformed to a broader policy strain in the industrialized world known as "agricultural exceptionalism."<sup>48</sup> The notion that agriculture is materially different because of the uncertainties inherent in the industry and because of the fragility of the family farm has long been advanced as a reason for exempting agriculture from mainstream regulatory regimes.<sup>49</sup> The industrialization of agriculture has substantially altered the makeup of farms in intervening years, and there is now an argument that the family farm justification no longer supports exempting the industry from standard requirements.<sup>50</sup>

Nonetheless, many of the New Deal era exemptions remain today.<sup>51</sup> Agriculture remains exempted from the National Labor Relations Act (NLRA), which means farm workers have no federal protection for union and collective bargaining activities.<sup>52</sup> Likewise, most farm workers, including those working in Illinois, have no state labor law protection either.<sup>53</sup> As a result, agricultural workers have no protection and little to no recourse when faced with unfair labor practices.<sup>54</sup>

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47. See Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 307-08 (2003) (describing pressure by southern Congressmen on President Roosevelt to ensure preservation of plantation system of South, in which farm workers were African-Americans and other ethnic minorities). Since 1960, the farm worker population has changed, with immigrants from Latin America and Mexico increasingly dominating the work force.
  48. *Id.* at 307-308. See also MARTIN, *supra* note 30, at 98-99, 180-81; Grace Skogstad, *Ideas, Paradigms and Institutions: Agricultural Exceptionalism in the European Union and the United States*, 11 GOVERNANCE 463, 463-490 (1998) (positing two main reasons for agricultural exceptionalism: (1) farmers have special needs and interests due to nature of farming; and (2) agriculture serves national role of food security).
  49. See, e.g., MARTIN, *supra* note 30, at 98-99, 180-91; Gerald Torres, Symposium: *Changing Structures and Expectations in Agriculture*, 14 N. ILL. U. L. REV. 799, 800-802 (1994).
  50. See, e.g., Torres, *supra* note 49, at 800-02.
  51. See Perea, *supra* note 47, at 307.
  52. See National Labor Relations Act, 29 U.S.C. § 152(3) (2004) (excluding from definition of "employee" "any individual employed as an agricultural laborer," and therefore excluding agricultural laborers from rights and protections afforded by NLRA.). By excluding agricultural laborers from the definition of "employee," such laborers are not entitled to the same rights and protections afforded by the NLRA, including the right to organize and engage in collective bargaining. See 29 U.S.C. § 157. Early versions of the NLRA did include farm labor, but, according to contemporary observers, the NLRA would not have passed had farm labor remained within the bill's scope. See MARTIN, *supra* note 30, at X.
  53. See, e.g., 820 ILL. COMP. STAT. § 105/3 (2004) (excluding from definition of "employee" those individuals employed in agriculture if employer did not use more than 500 days of agricultural labor). *But see* Agricultural Labor Relations Act, CAL. LAB. CODE §§ 1140-1166 (Deering 1996) (denoting California law that gives agricultural workers right to self-organize, to form, join or assist labor organizations, or to bargain collectively through representatives of their own choosing). For a detailed analysis of these exclusions, see Read, *supra* note 8, at 527-28; MARTIN, *supra* note 30, at 63, 107-108.
  54. See National Labor Relations Act, 29 U.S.C. §§ 152(3), 158 (2004). See also Read, *supra* note 8, at 532, 558-68.

Moreover, agricultural workers are not entitled to overtime pay, a right that was a key provision of the New Deal's Fair Labor Standards Act (FLSA).<sup>55</sup> Further, prohibitions against child labor are also exempted from FLSA, making agriculture even more distinct from other industries.<sup>56</sup>

Agricultural exceptionalism is also manifest in state laws. Most significantly, some states, including Illinois, exempt certain categories of agricultural employers from responsibility under their workers' compensation statutes.<sup>57</sup> Another issue of particular concern to farm workers is the question of farm labor camp access. Unlike many states,<sup>58</sup> Illinois does not have any law ensuring advocates access to farm labor camps to notify workers of their rights. In Illinois the only provision is a criminal law stating that such advocates cannot be prosecuted for trespass.<sup>59</sup> That law, however, does not affirmatively protect or guarantee access,<sup>60</sup> by, for example, forbidding labor camp operators from using physical or visual obstacles to impede service providers. Thus, the lack of a camp access law impedes access to camps on private farms in Illinois.<sup>61</sup>

This section has described the key exclusions from worker protection faced by farm workers, demonstrating that at least some of the blame for the

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55. 29 U.S.C. § 213(b)(12) (1994 & Supp. V 1999). See also Paul D. Lall, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 COLUM. HUMAN RIGHTS L. REV. 597, 599-605 (2000) (discussing history of FLSA and exclusion of agricultural laborers from overtime pay and other FLSA worker protections).
  56. See 29 U.S.C. § 213(c)(2) (1994 & Supp. V 1999). See also Celeste Corlett, *Impact of the 2000 Child Labor Treaty on United States Child Laborers*, 19 ARIZ. J. INT'L & COMP. L. 713, 719 (2002) (emphasizing that even though Section 212 of FLSA prohibits "oppressive" child labor, Section 213(c) exempts agricultural industry from this restriction).
  57. See 820 ILL. COMP. STAT. § 305/3(19) (2004). See also NEB. REV. STAT. § 48-106(2)(d) (2004) (excluding agricultural employers from workers' compensation requirements of Nebraska labor law); VA. CODE ANN. § 65.2-101(2)(g) (2004) (excluding from definition of "employee" agricultural laborers unless employer has at least two full-time farmers on staff).
  58. See, e.g., FLA. STAT. ANN. § 381.00897(2) (2004) (granting right of access to non-farm laborers or employees to visit migrant labor camps); PA. STAT. ANN. tit. 43, § 1301.403 (2004) (noting that no person shall deny access to farm labor camp by guests of farm workers with purpose of protesting farm worker health, safety, welfare or dignity). See also Letter from Stephen H. Sachs, Attorney General of Maryland, to Leon Johnson, Chairman, Governor's Commission on Migratory and Seasonal Farm Labor 2-8 (July 19, 1982) (on file with author); Letter from Marshall Coleman, Attorney General of Virginia, to Robert C. Scott, Delegate, Virginia General Assembly 1-2 (Aug. 9, 1979) (on file with author); Letter from Robert L. Shevin, Attorney General of Florida, to Robert Eagan, State Attorney 1-2, 4 (Apr. 26, 1979) (on file with author).
  59. See 720 ILL. COMP. STAT. § 5/21-3 (c) (2004) (specifying that criminal trespass does not apply to migrant workers or any person invited onto land by migrant workers).
  60. *Id.*
  61. See Beckman interview, *supra* note 10. It should be noted that at the non-profit farm worker camp in Cobden, Illinois, local advocates do have access to workers. See *id.* For a discussion of the camp at Cobden, see Rachel Lindsay, *Symposium on Immigration Laws Issues to Visit Campus*, DAILY EGYPTIAN REPORTER, Mar. 18, 2004, at 8 (noting existence of Cobden camp and migrant housing issues).

deplorable conditions under which farm workers live and work lies with agricultural exceptionalism. The following sections examine other areas of the law that substantially weaken legal protection for farm workers: immigration law, differential treatment for unauthorized immigrant workers, and insufficient government monitoring.

## 2. Immigration Law

Immigration law is relevant to the situation of farm workers because the vast majority of agricultural workers are foreign nationals.<sup>62</sup> Although there is little evidence that domestic workers are not available to perform agricultural labor,<sup>63</sup> the law facilitates a flow of low-paid and heavily disadvantaged immigrant workers into agriculture in two major ways. First, a specialized guestworker program has been created to bring immigrant workers legally and temporarily into the United States to work on farms. Second, at least half of the nation's agricultural workers are not authorized to work, meaning that more than one and a half million people are employed in this industry in contravention of immigration law.<sup>64</sup> How does the law facilitate the flow of unauthorized workers? Two key policies contribute to this paradoxical result: (1) in America there are virtually no visas for immigrant farm workers; and (2) a "don't ask, don't tell" policy enables employers to hire unauthorized workers with virtual impunity.

### a. Limited Immigration Options for Farm Workers

In America, we have established a visa regime that offers immigration options to educated professionals and people with certain skills, like athletes and models, but which is, for all intents and purposes, closed to foreign laborers, including farm workers.<sup>65</sup> Very few permanent and temporary visas

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62. See OXFAM AMERICA, *supra* note 11, at 11 (stating eighty-one percent of farm workers in United States are foreign-born).

63. See Linda Levine, *Farm Labor Shortages and Immigration Policy*, CRS Report RL30395, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (redistributed as service of THE NATIONAL LIBRARY FOR THE ENVIRONMENT), 8-17 (updated Feb. 9, 2004) (demonstrating that typical indicia of labor shortage do not appear in agricultural labor industry), available at <http://www.ncseonline.org/NLE/CRS> (last visited Feb. 15, 2005).

64. See KALA MEHTA ET. AL, *supra* note 7, at 22.

65. See U.S. CITIZENSHIP AND IMMIGR. SERV., TEMP. WORKERS ADMITTED BY OCCUPATION: FISCAL YEAR 2002, tbl. 614 (Oct. 2003) (displaying number of temporary workers admitted by occupation in fiscal year 2002), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2002NIMSupTbles/FY2002table614.xls> (last visited Feb. 15, 2005). See generally, INA § 101(a)(15)(O)-(P) (2004) (stating requirements for visas available to people with extraordinary skill in sciences, arts, education, business or athletics, as well

are allocated to agricultural immigrant workers.<sup>66</sup> For example, under the "H2-A" visa program, agricultural employers request roughly 45,000 temporary visas for laborers entering on tightly controlled agricultural guestworker programs on an annual basis, an insignificant number compared with the number of immigrant farm laborers working illegally.<sup>67</sup> Meanwhile, at least a million people enter the United States each year legally for other types of work, most of it professional or white collar.<sup>68</sup>

#### b. "Don't Ask Don't Tell" Employer Sanctions Regime

Nationwide, there are roughly 5.5 million unauthorized immigrant workers in all sectors of the economy.<sup>69</sup> As described above, a majority of farm workers in America fall into this group.<sup>70</sup> Since 1986 it has been illegal to hire for pay a non-U.S. national who is not authorized by our immigration laws to work.<sup>71</sup> Nonetheless, U.S. immigration law looks the other way when employers hire someone who presents purchased or borrowed documents.<sup>72</sup>

In most hiring situations in which fraudulent documents are presented, employers are not technically breaking the law. The rules established by the INS, now referred to as the U.S. Citizenship and Immigration Services, state that employers need only review an identification card and a work

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as actors and models).

66. Cf. U.S. CITIZENSHIP AND IMMIGR. SERV., *supra* note 65, at tbl. 614 (demonstrating that only 15,628 H-2A visas were provided to agricultural workers in 2002).
67. Compare DEP'T OF LABOR, OFFICE OF THE INSPECTOR, EVALUATION OF THE NORTH CAROLINA GROWERS ASSOCIATION 4 (Mar. 31, 2004) (stating that 45,000 H-2A visas were awarded in 2001), with KALA MEHTA ET. AL., *supra* note 7, at 22 (approximating that 1.25 million farm workers are currently undocumented).
68. See U.S. CITIZENSHIP AND IMMIGR. SERV., *supra* note 65, at tbl. 614 (displaying 1,295,228 as total temporary workers admitted in fiscal year 2002).
69. See Beth Lyon, *When More "Security" Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. OF LAB. & EMP. L. 571, 585 (2004) (using 2002 Pew Hispanic Center study to deduce "conservative" estimate of 5.5 million unauthorized workers in United States) [hereinafter *When More "Security" Equals Less Workplace Safety*]; See also B. LINDSAY LOWELL & ROBERT SURO, THE PEW HISPANIC CENTER, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 7 (2002), available at <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf> (last visited Feb. 15, 2005) [hereinafter PEW HISPANIC CENTER STUDY].
70. See KALA MEHTA ET. AL., *supra* note 7, at 22.
71. See generally Immigration Reform and Control Act of 1986, Act of Nov. 6, 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359 (1986).
72. See *United States*, WILLIAM L. KELLER, ET AL. EDS., INTERNATIONAL LABOR AND EMPLOYMENT LAWS, at 23a-1, 23j-27 - 23j-40 (2003) (describing employer sanctions regime and citing law relating to workplace rights of unauthorized workers). See also IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK (8th ed. 2002), Chapter 12 (I)(B) Employer Verification System (citing INA §274A(b)(6)(A)) (stating "the employer is not liable for technical or procedural failure to meet the verification requirements if it acted in good faith.") (citing 8 C.F.R. §274a.2(b)(3) (noting employer may photocopy employee's documents)) (emphasis added).

authorization document and ascertain that from their surface, or facial appearance, the documents reasonably appear to be valid.<sup>73</sup> Moreover, immigration raids are very infrequent relative to the number of employers who have unauthorized immigrant employees.<sup>74</sup> Even those employers who fail to comply with the documentation requirements are very rarely fined or prosecuted.<sup>75</sup> Thus, what America has is a “don’t ask, don’t tell” policy under which employers can accept false documents and do not have to ask their employees about their immigration status.<sup>76</sup>

The relatively shielded arrangement enjoyed by employers is not shared by unauthorized immigrant workers themselves. By seeking and accepting employment in the United States, unauthorized immigrants are violating federal law and placing themselves at risk for civil penalties ranging from \$250 to \$2000 for *each* fraudulent document used.<sup>77</sup> They are further exposing themselves to criminal penalties of imprisonment for up to five years.<sup>78</sup>

This lopsided incentive structure creates concerns about unscrupulous employers who knowingly hire unauthorized immigrants in order to have a more pliant workforce. Stories of abuse of the employer sanctions regime abound.<sup>79</sup> The author spoke with the former human resources manager of a large farm in upstate New York. The former manager said that part of her job was to inspect immigration papers, and that she had been instructed not to look too closely. What she disliked about the job, she said, was allowing potential employees who were clearly children to present false documentation indicating that they were of working age, but her boss would not let her turn the children away because they were good and docile workers.<sup>80</sup>

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73. See 8 U.S.C.A. § 1324a(b)(1)(A) (1994). See also Sarah Cleveland et. al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Worker's Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 810 (2003) (noting employers can accept documents that are only facially legitimate).
74. See, e.g., Nic Paget-Clarke, *Border Operations/ Migrant Life/ Organizing for Human Rights*, IN MOTION MAG. (Dec. 4, 2001) (discussing INS tendency of citing employers and providing warnings while reducing number of sanctions), available at <http://www.inmotionmagazine.com/hrctr/m2001a.html> (last visited Feb. 15, 2005).
75. Michael J. Wishnie, *Colloquium: The Border Crossed Us: Current Issues In Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 393 (noting “employers are rarely fined for hiring or employing unauthorized workers or failing to maintain required paperwork”).
76. See Cleveland et. al., *supra* note 73, at 810 (illustrating that employers ignore documents they suspect are invalid).
77. Immigration and Nationality Act, 8 U.S.C. § 1324 c(d)(3)(A) (2004) (stating “not less than \$250 and not more than \$2,000 for each document that is the subject of a violation....”).
78. 8 U.S.C. § 1324c(e)(1) (2004) (stating anyone who conceals false documents “shall be fined in accordance with Title 18, imprisoned for not more than 5 years, or both....”).
79. See e.g., Peter Margulies, *Stranger and Afraid: Undocumented Aliens and Federal Employment Law*, 38 DePaul L. Rev. 553, 578–81 (1989) (providing multiple examples of employer exploitation).
80. Based on a discussion at the University of Pennsylvania Journal of Labor and Employment Law Conference, “Workers on the Fringe: Exploring the Legal Status of America’s Most Marginalized Workers,” held on Feb. 15, 2003. The author is withholding the informant’s name because she could not be reached to secure permission.

Some unscrupulous employers selectively apply the “don’t ask, don’t tell” policy throughout all phases of the working relationship. When a worker becomes a “problem,” through, for example, union activity or an on-the-job injury, his or her immigration status can suddenly become an issue.<sup>81</sup> For example, one of the Villanova Farmworker Clinic’s clients was fired after he was hurt on the job at a mushroom growing facility and the company nurse alerted human resources to the fact that his “green card” had expired. A workers’ compensation judge later found that the worker had been fired because of his work injury and that the document justification had been a pretext. The Farmworker Clinic is also representing an unauthorized immigrant worker who was injured in an auto accident while on the job. The employer denied to the auto insurance company that he had been their employee, then called the worker to threaten that it (the employer) would report him to the Department of Homeland Security (DHS) if he continued to contend that he had ever worked for them. The employer did in fact call the DHS when we filed a notice of injury to initiate the workers’ compensation claim. The DHS has an internal policy that the agency will not act on tips that appear to arise from employment disputes,<sup>82</sup> but that policy is not codified as

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81. See Maria L. Ontiveros, *Lessons From the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 168 (2003) [hereinafter *Lessons From the Fields*]. “An employer who employs an undocumented worker possesses the incredibly powerful threat of contacting immigration officials to try to have a worker deported. This threat is used to prevent employees from complaining about wages that are too low or conditions that are unjust. Farm workers fear deportation because of the hardships involved in the deportation process (including detention and transport), the separation from their family, and the specter of a dangerous border crossing to return to the United States. Growers and contractors realize this and use the threat to their advantage.” *Id.*
82. See INS Operations Instructions 287.3a, reprinted in 74 Interpreter Releases 199 (1997), redesignated as § 33.14(h) of the INS Special Agent Field Manual (Apr. 28, 2000). Professor Aleinikoff, who helped promulgate O.I. 287.3a, testified that one of O.I.’s main goals was “to ensure that the INS not intrude into areas governed by federal labor law that protected important rights of both labor and employers” and stressed that, although the O.I. policy is not codified as a regulation with the force of law, “the Service expected field agents to follow it” and it was enforced in the breach here. See also *In re Herrera-Priego*, U.S. D.O.J. EOIR, at 23 (Lamb., I.J., July 10, 2003), available at <http://www.lexisnexis.com/practiceareas/immigration/pdfsweb428.pdf> (last visited Feb. 15, 2005). See also National Immigration Law Center (NILC), *Immigration Judge Rules INS Agents are Bound by Former OI 287.3A Regarding Enforcement Actions During Labor Disputes*, 7 IMMIGRANTS’ RIGHTS UPDATE 1 (2003), available at <http://www.nilc.org/immsemplymnt/inswkplce/wkplcenfr018.htm> [hereinafter NILC] (last visited Feb. 15, 2005). The OI requires that “whenever information received from any source creates suspicion that an INS enforcement action might involve the Service in a labor dispute, a reasonable attempt should be made by Service enforcement officers to determine whether there is a labor dispute in progress.” *Id.* The OI lists three sources that the INS can contact to determine whether a labor dispute is in progress: the NLRB, the DOL, and the state department of labor. *Id.* The immigration judge rejected the INS’s arguments and granted the workers’ motion, finding that the workers had demonstrated that the INS obtained the evidence of their removability or deportability in an “illegal and egregious manner.” *Id.* She concluded that the OI was binding on the INS agents because it affects individual rights under federal labor laws. See *id.* The IJ also concluded that the INS agents who conducted the raid had not followed the agency’s own procedures, including obtaining approval from senior INS officials and consulting with state and

a regulation and has been enforced in the breach.<sup>83</sup>

One potential avenue for holding employers accountable for knowingly hiring unauthorized immigrant workers is the Racketeer Influenced and Corrupt Organizations Act (RICO). RICO can be invoked to sanction employers who, over the course of a year, knowingly hire at least ten unauthorized workers who entered the country illegally.<sup>84</sup> Some such lawsuits have survived motions to dismiss.<sup>85</sup> Because of the particular requirements of the RICO statute, however, this avenue is "studded with impediments."<sup>86</sup> For example, the U.S. Supreme Court recently let stand a ruling by the Seventh Circuit Court of Appeals dismissing a case brought against IBP, a meat preparation business.<sup>87</sup> In the appellate decision, the Court of Appeals found that the two plaintiffs, previous IBP workers, had demonstrated that IBP knowingly hired illegal immigrants. However, the court decided that IBP did not violate RICO because the plaintiffs failed to prove that IBP is a "person" who "manages or operates some other enterprise" engaged in racketeering, and that "without a difference between the defendant and the 'enterprise' [engaged in racketeering,] there can be no violation of RICO."<sup>88</sup>

Instead of focusing on workplace enforcement of immigration laws, major immigration enforcement initiatives in America are focused on deportation and border and port of entry control.<sup>89</sup> Border control is relevant

federal labor agencies before undertaking it. See NILC, available at <http://www.nilc.org/immsemplmnt/inswkplce/wkplcencfr018.htm> (last visited Feb. 15, 2005). Further, because the OI "was designed to protect fundamental labor rights, the Services' failure to adhere to OI 287.3a invalidates [the] removal proceedings."

83. See *In re Herrera-Priego*, *supra* note 82, at 16 (finding that Service ignored OI 287.3a, thus invalidating removal proceedings for Respondents). See also Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 385 (2001) (opining that OI "fails because it contains no enforcement mechanism.").
84. *Sys. Mgmt., Inc. v. Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000), judgment at 138 F. Supp. 2d 78 *rev'd on other grounds*, 303 F.2d 100 (1st Cir. 2002).
85. See, e.g., *Williams v. Mohawk Indus., Inc.*, 314 F. Supp. 2d 1333 (N.D. Ga. 2004); *Trollinger v. Tyson Foods Inc.*, 370 F.3d 602, 612-620, 622 (6th Cir. 2004); see also Stanley Mailman and Stephen Yale-Loehr, *RICO and the Exploitation of Undocumented Aliens*, 9 BENDER'S IMMIGRATION BULL. 1102, 1102-103 (Sept. 15, 2004).
86. Mailman and Yale-Loehr, *supra* note 85, at 1104.
87. See *Baker v. IBP, Inc.*, 2002 WL 31696701 (C.D.Ill. Oct. 21, 2002), *aff'd*, 357 F.3d 685 (7th Cir. 2004), *cert. denied*, 125 S.Ct. 412 (2004) [hereinafter *Baker*]. See also 18 U.S.C. §§ 1961-68 (2004) (codifying Racketeer Influenced and Corrupt Organizations Act).
88. *Baker*, *supra* note 87, at 691-92 (citing holding of Seventh Circuit). See also Mailman and Yale-Loehr, *supra* note 85, at 1103 (referring to *Baker* opinion and noting that Seventh Circuit failed to find RICO violation because IBP acted "unilaterally").
89. See DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 149 (2003) (stating that in fiscal year 2003, there were 186,151 formal removals, or "deportations," from U.S.), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf> (last visited Feb. 15, 2005).

to agricultural workers because most cross the land border from Mexico into the United States.<sup>90</sup> Many commentators agree that for all the recent increases in spending, our border control is ineffectual for the purposes of thwarting entry of unauthorized workers,<sup>91</sup> as well as being a humanitarian nightmare that is resulting in untold, pointless suffering and by conservative estimates, a death a day.<sup>92</sup> Thus, given the lack of sufficient legal work visas for agricultural laborers, the legal loophole in the employer sanctions regime, and lax enforcement, the law is facilitating the heavy use of unauthorized immigrant workers in agriculture.

### 3. Fewer Rights for Farm Workers Who Are Immigrants

In addition to the industry-based exceptions described above, many worker rights protections are conditioned upon nationality and immigration status. The high percentage of immigrant farm workers means that limitations in employment protections for immigrants disproportionately impact the agricultural workforce. Some employment laws exclude any foreign nationals, whether they are authorized or unauthorized. Some laws excluding authorized workers depend on the type of visa that the legally working immigrant holds. Additionally, a significant body of exclusions precludes unauthorized immigrant workers from a range of employment protections.

#### a. Lesser Worker Rights for Authorized Immigrant Workers

Non-U.S. citizens authorized to accept employment in agriculture can experience limited rights simply because they are not U.S. citizens. For example, the workers who enter the United States legally pursuant to the

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90. See DANIEL ROTHENBERG, WITH THESE HANDS: THE HIDDEN WORLD OF MIGRANT FARMWORKERS TODAY 1, 126 (Univ. of Cal. Press 2000) (1998) (noting that most of estimated 1.5 to 2.5 million annual illegal border-crossings occur at U.S./Mexico border).

91. Kiera LoBreglio, *The Border Security and Immigration Improvement Act: A Modern Solution To A Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 958 (2004) (stating "by all accounts, contemporary United States immigration policy has been ineffective in significantly reducing the flow of illegal migration from Mexico.").

92. See *Lessons From the Fields*, *supra* note 81, at 166. The United State's government policy of militarizing the U.S.-Mexican border with operations like "Gatekeeper" and "Hold the Line" in the early 1990's pushed the flow of undocumented immigrants into the deserts and mountains and away from the more visible and populated areas. *Id.* The extreme temperatures and rough terrain of the deserts and mountains are responsible for the death of approximately one immigrant trying to cross into the United States a day. *Id.* The number of immigrants that are apprehended entering the United States each year has not decreased; rather the location of apprehension has shifted. *Id.* See also Paget-Clarke, *supra* note 74 (discussing expenditures by United States government of personnel, money and equipment to border control and blaming operations as main cause of hundreds of deaths that occur each year on border).



temporary agricultural guestworker programs described above are excluded from certain protections.<sup>93</sup> Agricultural guest workers do not have the right to change employers, and if they are fired for cause, they lose the right to paid transportation home.<sup>94</sup> They are specifically excluded from coverage by the federal Migrant and Seasonal Agricultural Worker Protection Act, which, as discussed above,<sup>95</sup> covers some terms and conditions of agricultural work.<sup>96</sup>

#### b. Lesser Legal Protection for Unauthorized Immigrant Workers

The employment rights of unauthorized immigrant workers are significantly abridged, both at the federal and state levels. These exclusions affect a range of substantive rights and remedies crucial to farm workers. Moreover, immigration restrictions on legal services funding place further obstacles in the way of unauthorized immigrant farm workers who wish to vindicate their legal rights. Finally, exclusion from drivers' licensing regimes places agricultural workers at greater risk both in terms of physical safety and criminal liability.

At the federal level, the 2002 U.S. Supreme Court decision in *Hoffman Plastic Compounds v. NLRB* sparked a wave of exclusions.<sup>97</sup> The decision excluded unauthorized workers from the back pay remedy for violations of unauthorized workers' organizing and collective bargaining rights.<sup>98</sup> Without this monetary remedy, in the view of the four *Hoffman* dissenters and subsequent commentators, the federal labor rights of unauthorized workers are

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93. See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 608 (2001) (arguing that federal government "has abdicated responsibility for protecting H-2A guest workers from labor abuses" leaving jurisdiction to state courts).

94. See, e.g., 20 C.F.R. § 655.106(c)(2) (2003). Temporary alien agricultural labor certifications may not be transferred from one employer to another, except between employers who are members of the association. See also Commission for Labor Cooperation, *supra* note 41, at 38 (describing limited mobility for agricultural workers who enter United States under H-2A visa program; such workers can only work for employer who obtained visa; if worker wants to change employers, new employer must file new petition for new H-2A visa).

95. See discussion of AWP, *supra* notes 38–39 and accompanying text.

96. See 29 U.S.C. § 1802(8)(B)(ii) (excluding temporary non-immigrant aliens from category of "migrant agricultural worker[s]" covered by Act). See also 29 U.S.C. §§ 1801–72 (2000) (authorizing equitable relief including injunctions for retaliation in violation of that Act).

97. 535 U.S. 137 (2002) [hereinafter *Hoffman Plastic Compounds*].

98. *Id.* The majority held that employers no longer had to pay unauthorized workers for unperformed work they were not legally available to perform. *Id.* at 143. See also *When More "Security" Equals Less Workplace Safety*, *supra* note 69, at 572 (discussing how *Hoffman Plastics Compounds* undercut unauthorized workers' rights by holding that they are no longer entitled to back pay for work that would have been performed had employee not been fired in contravention of employee's labor rights).

left virtually without protection.<sup>99</sup> In the wake of *Hoffman Plastic Compounds*, the Equal Employment Opportunity Commission confirmed its view that unauthorized victims of workplace discrimination would no longer be entitled to back pay remedies.<sup>100</sup> Unauthorized workers have no right to unemployment insurance.<sup>101</sup> They cannot participate in, or even recoup their contributions to, the social security system.<sup>102</sup> Nor may unauthorized workers, even those who pay all their taxes, receive the earned income tax credit.<sup>103</sup>

State law protection is also limited. For example, while most states do provide equal workers' compensation coverage to unauthorized immigrant workers,<sup>104</sup> others do not.<sup>105</sup> Employers and insurance companies are currently seeking to enter Illinois in the ranks of the states that refuse coverage to unauthorized workers by advancing the argument that such workers should not

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99. See *Hoffman Plastic Compounds*, *supra* note 97, at 154 (Breyer, J., dissenting) (citations omitted). According to Justice Breyer, "Without the possibility of the deterrence that back pay provided, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal." *Id.* at 154. Furthermore, "in the absence of the back pay weapon, employers could conclude that they can violate the labor laws at least once with impunity." *Id.* See also Shahid Haque, Student Note and Comment: *Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT. L. REV. 1357 (2004) (discussing impact of *Hoffman Plastic Compounds* decision).
100. See *When More "Security" Equals Less Workplace Safety*, *supra* note 69, at 602 (mentioning that U.S. Equal Employment Opportunity Commission (EEOC) reneged on their decision to assure remedies for undocumented laborers). See also U.S. Equal Employment Opportunity Commission, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html> (last visited Feb. 15, 2005).
101. See 820 ILL. COMP. STAT. § 405/614 (2004) (stating aliens are ineligible for benefits unless they are individuals who are lawfully admitted for permanent residence). See also Andrew Scott Kosegi, *The H2-A Program: How the Weight of Agricultural Employer Subsidies is Breaking the Backs of Domestic Migrant Farm Workers*, 35 IND. L. REV. 269, 296 n.225 (citing congressional resolution increasing minimum amount that growers are required to make from \$20,000 to \$50,000 to subject them to unemployment tax).
102. See 20 C.F.R. § 422.104(a)(2) (2003) (stating that social security numbers are only assigned to non-U.S. citizens with lawful permanent residence, "green cards", "or under other authority of law permitting him or her to work in the United States.>").
103. See 26 U.S.C. § 32(c)(1)(D) (2004). Undocumented immigrants are ineligible for the earned income tax credit as "nonresident alien individual[s]." *Id.*
104. See NATIONAL EMPLOYMENT LAW PROJECT, *LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS' RIGHTS* 53–55 (2003).
105. See, e.g., *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 810 A.2d 99, 108 (Pa. 2002) (holding that wage loss compensation benefits for undocumented workers may be suspended by employer because of their immigration status). Cf. *DDP Contracting, Inc. v. Workers' Comp. Appeal Bd.*, 808 A.2d 592, 595 (Pa. Commw. Ct. 2002) (reversing lower court's suspension of undocumented claimant's wage loss compensation benefits and expanding applicability of *Reinforced Earth* to larger class of claimants); Wyo. Stat. Ann. § 27–14–102 (a)(vii) (2004) (statutory coverage for "documented aliens" only). See also NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 104, at 53–54; Robert Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 LA RAZA L.J. 103, 151–55 (2003).

receive lost wages pursuant to *Hoffman Plastic Compounds*.<sup>106</sup> Interestingly, after a 1999 ruling by the Virginia Supreme Court excluding unauthorized immigrant workers from workers' compensation coverage,<sup>107</sup> the Virginia legislature overturned the decision with a new statute.<sup>108</sup> The legislature passed an explicit statutory inclusion of unauthorized immigrant workers in Virginia's workers' compensation system at the urging of the insurance industry.<sup>109</sup> Insurance carriers had decided that workers' compensation premia would be less prohibitive than the cost of tort liability that would have resulted in the absence of workers' compensation coverage.<sup>110</sup>

In addition to these substantive limitations on rights and remedies, unauthorized workers are also severely disadvantaged in vindicating the worker rights they do have. Delivery of legal services in rural areas is significantly weaker than in metropolitan areas, because of practical problems that make rural clients more expensive to serve,<sup>111</sup> coupled with the reality that rural areas receive *lower* per capita legal aid spending from the government.<sup>112</sup> For example, in 2003 the Legal Services Corporation reported that in California legal aid expenditures "per poor person" run from \$8.73 in Kings County, which is a rural county, to \$82.94 in San Francisco County.<sup>113</sup>

In addition to the difficulties of accessing affordable counsel in rural areas, unauthorized farm workers are also shut out from the major source of affordable legal aid in the United States. Agencies funded by the Legal Services Corporation (LSC) may not assist undocumented immigrants.<sup>114</sup> The lack of LSC funding is an especially serious concern in Illinois, where state funding for the provision of civil legal services is comparatively low.<sup>115</sup> Even

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106. See Beckman interview, *supra* note 10. See generally, *Hoffman Plastic Compounds*, *supra* note 98 (stating holding of case).

107. *Granados v. Windson Dev. Corp.*, 509 S.E.2d 290 (1999).

108. Va. Code Ann. §§ 65.2-101.

109. See NATIONAL EMPLOYMENT LAW PROJECT, *supra* note 104, at 54.

110. *Id.*

111. See LEGAL SERVICES CORPORATION, A REPORT ON RURAL ISSUES AND DELIVERY AND THE LSC-SPONSORED SYMPOSIUM (Apr. 2003). These practical problems include the need for more offices, increased travel costs, toll-free telephone expenses, increased technology and connectivity costs, difficulty of recruiting attorneys. See *id.* at 14-15. Moreover, these problems lead to difficulty in providing specialized services. See *id.* at 9.

112. *Id.* at 9.

113. *Id.* at 16.

114. See Holley, *supra* note 93, at 613-14 (citing Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(11)(B)(F), 100 Stat. 1321, 1321-53 to 1321-55 (1996), which prohibits use of LSC funds for legal assistance for undocumented persons).

115. See Adam Lasker, *Drop in Indigent "Bad News" For Legal Aid Funding Here*, CHICAGO DAILY LAW BULLETIN, (July 30, 2002) (noting that as one of ten most populous states, Illinois ranks last in state funding for legal services). See also Prairie State Legal Services, *State Funding for Legal Aid Continued in FY 2003* (Aug. 2004), available at

in Pennsylvania, where state funding for legal aid is more significant,<sup>116</sup> the addition of Villanova's clinic students each semester nearly doubles the number of licensed not-for-profit legal workers with a mandate to assist unauthorized farm workers in Pennsylvania.

Finally, the question of drivers licensing for undocumented immigrants with which Illinois is wrestling<sup>117</sup> is vital for unauthorized agricultural workers, many of whom must drive in order to work, working as they often do in areas where public transportation is limited.<sup>118</sup> The National Immigration Law Center (NILC) released a 2004 report stating that many states either require a Social Security number (SSN) or alternative proof of lawful immigration status in order to obtain a driver's license.<sup>119</sup> At the same time, ten states presently allow undocumented workers to obtain a license without regard to their unlawful presence in the U.S.<sup>120</sup>

With these significant limitations on unauthorized workers rights, the majority of farm workers are doubly compromised.<sup>121</sup> These restrictions on unauthorized immigrant workers, which, by their nature, make immigration status relevant in many different employment enforcement regimes, make litigation a frightening and potentially dangerous process for individual claimants, and undermine protections for workers of every status in the workplace.<sup>122</sup>

[http://www.pslegal.org/Articles/State\\_Funding\\_2003.htm](http://www.pslegal.org/Articles/State_Funding_2003.htm) (last visited Feb. 15, 2005) (noting that state provides less than two percent of total funding for legal aid programs in Illinois).

116. See American Bar Association (ABA), Division of Legal Services, *2001-2002 Resource Development Successes*, 7 DIALOGUE 2, ¶ 6 (Winter 2003) (stating that "In Pennsylvania, legal services providers received \$2 million in 2002 in one-time funding from TANF dollars for systems improvements (primarily technology-related)."), available at [http://www.abanet.org/legalservices/dialogue/03winter/dial\\_03wintersclaid.html](http://www.abanet.org/legalservices/dialogue/03winter/dial_03wintersclaid.html) (last visited Feb. 15, 2005).
117. See Russel Lissau, *Candidates Debate Immigrant Licenses*, CHICAGO DAILY HERALD, (Oct. 20, 2004) (discussing whether unauthorized workers in Illinois should be allowed to have drivers licenses).
118. See Marc Cabrera, *UFW Backs Driver's License Bill: Two Dozen Supporters Rallied In Favor of the Immigrant Responsibility and Security Act*, MONTEREY HERALD (section unknown), Sept. 3, 2004 (quoting undocumented construction worker, "...there are times you need a license just to get a job. Without a license you can't work."), available at <http://www.montereyherald.com/mld/montereyherald/news/local/9572213.htm?template=contentModules/printstory.jsp> (last visited Feb. 15, 2005).
119. See NILC, *Eighteen States Introduce Driver's License Bills in 2004; Two States Reject Restrictive Bills*, 18 IMMIGRANT'S RIGHTS UPDATE 1 (Feb. 17, 2004).
120. See *id.*
121. See GREG SCHELL, *Farmworker Exceptionalism Under the Law*, in THE HUMAN COST OF FOOD 145-51 (Charles D. Thompson, Jr., & Melinda F. Wiggins, eds., Univ. of Tex. Press 2002).
122. See, e.g., *When More "Security" Equals Less Workplace Safety*, *supra* note 69, at 595-97.

#### 4. *Obstacles to Enforcement*

The dangerous working and housing conditions faced by farm workers could be addressed by simply devoting greater resources to enforcing the laws already on the books. Government monitoring and enforcement occurs primarily at the state level, and is a perennial problem both in agriculture and in labor protections in general.<sup>123</sup> For example, while there are more than two million farms in the United States, only 330 random field checks were conducted by State Workforce Agencies in the last year.<sup>124</sup>

### IV. OPPORTUNITIES FOR LEGAL REFORM IN ILLINOIS

The preceding sections of this essay demonstrate a situation of unnecessary suffering, caused at least in part by a comprehensive framework of laws and policies that collectively disadvantage one of the most vulnerable populations in our society. The implicit suggestion is that these prejudicially differential laws need to be rectified at many levels, and that law reform is needed to extend additional protections to farm workers. In light of the foregoing discussion, I would argue that there are important opportunities for legal reform and action by the legal academy in Illinois. The essay is not suggesting that Illinois reformers, legislators and courts move into untested waters. On the contrary, these suggested legal reforms are patterned on states that, as described above, have already implemented them.

First, the state should engage in a more detailed demographic study of farm workers to ensure that policy is based on updated information. The study should include indicia of vulnerability, such as age, immigration status, gender, dependents for which responsible, and English language proficiency.

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123. See, e.g., Child Labor Coalition, *Press Release: State Child Labor Survey Reveals Lackluster Enforcement Efforts* (Sept. 9, 2004), available at <http://www.stopchildlabor.org/pressroom/2003statesurvey.html> (discussing disappointing results that indicate states are not doing enough to enforce child labor laws) (last visited Feb. 15, 2005); California Dept. of Labor, Dept. of Industrial Relations, *TIPP's Enforcement Success Continued in Second Year; Joint Effort Becomes Permanent*, (describing need to increase California's enforcement efforts in its agriculture and garment industries), available at <http://www.dir.ca.gov/bulletin/may%5Fjune%5F95/tipp%5F1994.html> (last visited Feb. 15, 2005).

124. See 2002 Census of Agriculture, US-State Data (listing total number of farms and land in farms), at [http://www.nass.usda.gov/census/census02/volume1/us/st99\\_1\\_009\\_010.pdf](http://www.nass.usda.gov/census/census02/volume1/us/st99_1_009_010.pdf) (last visited Feb. 15, 2005). See also Email from Erik Lang, National Monitor Advocate for Migrant & Seasonal Farmworkers, U.S. Employment Training Administration ("ETA"), to Cheryl Tedder, Research Assistant to Professor Beth Lyon, Villanova University School of Law (Oct. 28, 2004, 01:55:42 EST) (on file with author) (providing inspection statistics for State Workforce Agencies, which are overseen by ETA).

Second, state law should be modified to: (1) create an effective farm labor camp access law that would include affirmative duties for farm labor camp operators to permit and not to obstruct access to housing by service providers; (2) expand workers' compensation coverage for agricultural workers, resisting attempts to import the *Hoffman Plastic Compounds* reasoning into Illinois workers' compensation law; (3) critically evaluate the level of agricultural workplace monitoring and take necessary steps to strengthen it; and (4) increase resources for legal aid that reaches farm workers.

## V. OPPORTUNITIES FOR ACTION BY THE LEGAL ACADEMY

Law schools in Illinois can do much to assist the state's farm workers. Scholarship can identify and evaluate models for law reform, and provide support to legislative advocacy efforts. Law schools can advance novel arguments in key cases, a particularly important contribution in the upcoming years as employers and insurance companies advance arguments relating to the applicability of *Hoffman Plastic Compounds* and to the applicability of the RICO to employers abusing the employer sanctions laws. For example, the Massachusetts Department of Industrial Accidents adopted the reasoning of Harvard Law School's brief *amicus curiae* when it determined in 2003 that unauthorized immigrant workers are entitled to full workers' compensation protection.<sup>125</sup>

Furthermore, law schools can provide direct services to farm workers to address the serious gap in rural services as well as the void left by legal services funding restrictions on service to undocumented immigrants. Law students should be encouraged to devote externships, spring break service trips, clinical casework and post-graduate fellowships to providing legal services to farm workers. Language barriers can be at least partially overcome by recruiting bilingual undergraduate and graduate students in colleges near farm worker housing or in law schools' own universities.

These services would offer opportunities to students that are lacking in most law schools. Eight of the nine law schools in Illinois are located in metropolitan areas,<sup>126</sup> meaning that students and faculty must make a

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125. See *Guillermo Medellin v. Nat'l Union Fire Ins. Co.*, 2003 WL 23100186, at \*6 (Mass. Dept. Ind. Acc. Dec. 23, 2003) (stating Court's agreement with argument set forth in amicus brief by Harvard Legal Aid Bureau).

126. See U.S. Department of Commerce Economics and Statistics Administration, Bureau of the Census, Illinois – Metropolitan Areas, Counties, Independent City, and Central Cities, available at <http://www.census.gov/geo/www/mapGallery/stma99.pdf> (last visited Feb. 15, 2005) with AALS Member Schools, available at <http://www.aals.org/members.html> (last visited Feb. 15, 2005).

conscious effort to reach beyond the cities for educational opportunities. The unique experiences of rural minorities living in poverty provide important legal and life lessons to law students. Familiarity with the web of legal regimes that bar farm workers from the most fundamental worker protections can give law students important insights into the damage that geography, racism and the peculiar confluence of globalization and national sovereignty can visit on a politically powerless population.

## V. CONCLUSION

The proposals preliminarily outlined in this essay could serve as a starting point for action by social justice advocates and law schools interested in the rights of farm workers in Illinois. The continuing execrable condition of farm workers contrasts cruelly with the bounty of American agriculture and arises from a network of outdated and discriminatory laws. By challenging these laws at the state level and turning the attention of law students to this community, the legal academy can play an important role in restoring dignity to a neglected community.