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# APPLICATION OF CHRISTIAN PRINCIPLES FOR THE PROMOTION OF THE RIGHTS OF MIGRANT WORKERS AND REFUGEES IN THE FIELD OF LABOR RIGHTS IN THE U.S.A.

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The scope of this paper, concerned with the protection of the labor rights of immigrants and migratory workers in the United States of America, will be limited to a brief outline of United States immigration laws as they affect access to the United States labor market by a foreign worker, and a discussion of the labor problems of migratory agricultural workers. Agricultural labor is the principal occupation in the United States in which an extensive number of migratory workers are found and is at the same time the only major United States occupation which has not enjoyed the benefits of the social and labor legislation of the past half century.

## IMMIGRATION LAWS AS THEY AFFECT ACCESS OF THE FOREIGN NATIONAL TO THE UNITED STATES LABOR MARKET.

### *Historical*

Until 1875, the United States followed a policy of encouraging free and unimpeded entry into the country. In that year, however, Congress passed the first law limiting immigration, one directed at excluding certain classes of social undesirables.<sup>1</sup> The first restrictions directed at protecting the

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<sup>1</sup> Act of March 3, 1875, ch. 141, 18 Stat. 477. Convicts and prostitutes were barred from entering the United States under this statute.

United States labor market from foreign competition were the Contract Labor Laws of 1885 and 1887.<sup>2</sup> These Acts were designed to stop the importation of foreign laborers who had entered into work contracts at wages substantially below the prevailing rates in payment for their passage from abroad.<sup>3</sup> An 1888 amendment permitted deportation of an alien who had entered the country in violation of the 1885 and 1887 Acts.<sup>4</sup> In 1917, an English language literacy requirement was added,<sup>5</sup> and in 1921, quantitative restrictions in the form of a quota system were imposed.<sup>6</sup> After that date, admission as an immigrant was by visa only, which was issued within the framework of a national origin quota system, the apparent purpose of which was to discriminate against the nations of the Orient, and to a lesser degree, the nations of southern Europe. In the aftermath of World War II substantial relaxation of the immigration laws occurred for the purpose of admitting a large number of refugees displaced by the European War.<sup>7</sup> In all, nearly one-half million persons<sup>8</sup> were granted entry during the postwar years as a result of this legislation, and over one hundred thousand more were admitted as war brides and fiancées of United States military personnel who had served abroad.<sup>9</sup>

In 1952, the immigration laws were codified into a single law, known as the Immigration and Nationality Act,<sup>10</sup> which retained the national quota system. In 1965, in response to foreign policy considerations, the Act was substantially amended to remove national origin quotas, and to substitute Eastern and Western Hemisphere quotas, with a limit respectively of 170,000 and 120,000 persons annually.<sup>11</sup>

### *The Situation Today*

As stated above, entry into the United States is by visa only, whether temporarily as a non-immigrant, or permanently as an immigrant eligible for citizenship. The following discussion will focus on labor restrictions placed upon foreign workers entering the United States job market, first

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<sup>2</sup> Act of February 26, 1885, ch. 164, 23 Stat. 332; Act of February 23, 1887, ch. 220, 24 Stat. 414.

<sup>3</sup> These laws were primarily in response to local political considerations resulting from job market depression caused by dumping substantial numbers of aliens on the market following the end of their initial contract labor. An example is the problem which arose in California with oriental labor upon completion of the railroads.

<sup>4</sup> Act of October 19, 1888, ch. 1210, 25 Stat. 565, 566-67.

<sup>5</sup> Act of February 5, 1917, ch. 29, § 2, 39 Stat. 874.

<sup>6</sup> Act of May 19, 1921, ch. 8, § 2, 42 Stat. 5.

<sup>7</sup> Act of June 25, 1948, ch. 647, 62 Stat. 1009, *amended by* Act of June 16, 1950, ch. 262, 64 Stat. 219.

<sup>8</sup> C. GORDON AND H.N. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 1-12 (1972) [hereinafter cited as GORDON AND ROSENFELD].

<sup>9</sup> *Id.*

<sup>10</sup> Act of June 27, 1952, ch. 477, 66 Stat. 163, 8 U.S.C. § 1101 *et seq.* (1970).

<sup>11</sup> Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

as they affect temporary admission, and second as they affect permanent admission.

Temporary admission for employment purposes is possible principally under two kinds of visas, one (designated H-1) for specially skilled workers (distinguished professional, scientific, and artistic personnel), and one (designated H-2) for less-skilled and unskilled workers in occupations in which a shortage of available labor exists.<sup>12</sup> In both cases, application for admission must be submitted by a prospective United States employer, thus, in effect, limiting at the outset temporary entry to cases where substantial preapplication contact with the United States has occurred.

In order to obtain his visa, the specially skilled worker must establish (1) that there is a need for his services, and (2) that they are special and otherwise not available in the United States. He must further submit proof of his competence to fill the job for which he was recruited. Interestingly enough, it is not necessary that the employment itself be of a temporary nature.<sup>13</sup>

The conditions for admission of the less-skilled or unskilled worker are substantially different. He may gain admission only if (1) the job he proposes to fill is temporary, and (2) it cannot be filled by an unemployed United States citizen or resident.<sup>14</sup>

While the specially skilled worker's application is submitted directly to the Immigration and Naturalization Service,<sup>15</sup> the 1965 amendments to the Immigration and Naturalization Act require that the prospective employer of any other worker first obtain a Department of Labor certification approving the employment. The latter Department's approval is only given on finding (1) that the proposed employment will not have an adverse effect on wages and working conditions of Americans performing similar work in both the relevant geographical job market and in the United States as a whole, and (2) that no United States worker is available in the relevant local or regional labor market to fill the opening. The investigation is conducted in the first instance locally by the Employment Service Commission of the state in which the proposed employment is located, and in the second instance regionally by the Department of Labor itself. Only if Department approval is forthcoming may the proposed

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<sup>12</sup> Two other temporary employment visas exist, covering situations outside the scope of this paper. Of these, one (H-3) is for trainees undergoing on-the-job education in preparation for return to work in the industry of their own countries, and the second (L-1) is reserved for temporary transfer to the United States of executives of foreign-based companies with United States operations.

Visitor visas are also issued to aliens for short business or pleasure visits to the United States, but gainful employment of any nature is specifically forbidden, and is a ground for summary deportation.

<sup>13</sup> 8 C.F.R. § 214.2(h)(2) (1974).

<sup>14</sup> 8 C.F.R. § 214.2(h)(3) (1974).

<sup>15</sup> A part of the Justice Department, the Service is charged with the responsibility of administering the Immigration and Naturalization Act.

immigrant-employee then make application to the Immigration and Naturalization Service for an H-2 visa. Effectively, the statute isolates the United States labor market from temporary foreign competition until United States citizens are fully employed or are not available. It should be noted that for a number of years, there was a special program for admission of temporary workers, primarily Mexican agricultural laborers, outside of the normal temporary H-2 visa.<sup>16</sup> This program has been terminated. However, temporary foreign agricultural labor may still be imported as need requires pursuant to the H-2 unskilled labor visa provisions. Once admitted, there is no distinction made under federal labor statutes between holders of temporary visas, United States citizens, and holders of resident visas.

Approval by the Department of Labor is also required for all applicants for permanent immigration visas except those who are admitted as close relatives of United States citizens or resident aliens, or as refugees.<sup>17</sup> For these individuals, entry into the United States labor force is unrestricted upon their arrival. For all others, whether they are of Eastern or of Western Hemisphere origin, and whether they fall within the preferential category of professionals, artists, and scientists, in the preferential category for other skilled and unskilled workers in short supply, or within no preferred status at all, a preliminary determination of the effect of their admission on the United States labor market is required by the statute.

Because of the extreme shortage of health services in the United States, the Department of Labor has granted blanket approval for the issuance of visas to physicians and nurses, and members of certain related medical service professions.<sup>18</sup> For other professionals, and others in the same preference group, individual certification that the applicant's work

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<sup>16</sup> The Agricultural Workers Importation Act, ch. 223, 65 Stat. 119 (1951) (also known as the "Bracero" program). Congress allowed this program to lapse in 1964. For a brief history of this program see *Bustos v. Mitchell*, 481 F.2d 479, 482 (D.C. Cir. 1973).

<sup>17</sup> Applicants from the Eastern Hemisphere are classified either as within one of seven preferential categories or as general, nonpreference immigrants. The first, second, fourth, and fifth preference groups are comprised of various family members of United States citizens and resident aliens. The third preference group is professional workers; the sixth is the category for other skilled and unskilled workers in short supply within the United States; and the seventh is for refugees. In practice, Eastern Hemisphere applicants in the preference categories exhaust the 170,000 total allowable visas each year, so that nonpreference immigration is in effect excluded.

Applicants from the Western Hemisphere are not so broken down into preference groups. Rather they are admitted only upon a finding that they occupy "special" status. Such status arises either from being a family member of a United States citizen or resident in a relationship which would be within the definition of the Eastern Hemisphere preference groups, or by being a professional or worker in short supply within the criteria of the third or sixth Eastern Hemisphere preference groups. The effect of the Western Hemisphere limitation to "special" immigrants, then, is to eliminate the possibility of immigration by a person not within the criteria of the preference categories.

<sup>18</sup> 29 C.F.R. § 60.7 (Schedule A) (1973).

will not displace American job holders, or otherwise adversely affect the labor market, is required. Upon receipt of certification, the applicant is placed on the waiting list to receive a visa within his preference group. It should be noted that admission to the United States as a specially skilled worker does not require that the applicant have received an offer of a specific position from a specific prospective employer before a visa will issue. Hence, specially skilled entrants are likewise able to compete with complete freedom in their professions in the United States job market upon arrival.

An alien worker in the preference group of other skilled and unskilled workers in short supply, as well as an individual who seeks admission without preferential status, can only file a visa petition through a prospective employer, based upon the offer of a specific job. As is the case with an application for temporary employment, the application is referred to the local Employment Service Commission in the state where the job is located and will be approved upon a finding that the proffered work will not displace an American job holder, or adversely affect the labor market. Under the latter criterion, consideration is directed principally to whether the offer departs substantially in wages, hours, or other conditions of employment from those prevailing in the employer's area. Certification for workers within the preference group is apparently approved in the normal course,<sup>19</sup> unless the applicant's occupation falls among those listed on the so-called "Schedule B" of jobs for which the Department will not issue certificates. Schedule B covers a number of occupations, primarily unskilled, in which there is a substantial number of unemployed workers. Failure to obtain labor certification, of course, bars the applicant from further consideration for the issuance of a visa. Among those barred from labor certification, and hence from permanent entry, are farm laborers.

As indicated above, in the case of refugees, no labor certification is required. Rather, it is only necessary that the refugee's sponsor submit to the Immigration and Naturalization Service assurance of employment for the two-year period during which the refugee will be a conditional entrant to the United States. Apparently, the refugee is not bound to accept the particular job provided;<sup>20</sup> the requirement is only that a job be guaranteed available to him.<sup>21</sup>

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<sup>19</sup> GORDON AND ROSENFELD, *supra* note 8, at 3-41.

<sup>20</sup> 29 C.F.R. § 60.5(f) (1973).

<sup>21</sup> One other way to participate in the United States labor market is, of course, through illegal entry into the country. An illegal entrant is, however, subject to fines and imprisonment, as well as deportation and prohibition against consideration for reentry.

In response to recent disclosures of employers allegedly engaged in a systematic course of hiring illegal aliens at substandard wage rates and working conditions, there is currently pending in Congress legislation to render it criminal for an employer to knowingly employ illegal immigrants.

## THE MIGRANT AGRICULTURAL LABORER

*His Position Relative to the Industrial Worker*

Unskilled migrant workers in the United States have tended to concentrate in agriculture. More accurately stated, agriculture affords many unskilled individuals<sup>22</sup> the only employment opportunities which they can find. This is particularly the case for members of minority groups, such as Indians and Mexican-Americans who do not read or speak English, or read or speak it only as a second language. Until recently, these minorities have been excluded from membership in industrial labor organizations by racially discriminatory policies of one form or another. The work which is available to these individuals is perforce temporary, and many become migrants of necessity rather than by choice. They follow the harvest, particularly in hand-labor intensive fruit and vegetable farming, moving from the Florida, Texas, and California-Arizona growing areas northward each year to the Northeast states, Michigan and the Midwest, and the Pacific Northwest. Official studies list about three million agricultural workers in the United States; of these, approximately a quarter million are migrants.<sup>23</sup> Economically, these migrant agricultural workers truly form the lowest stratum of society, with incomes far below the national average, substantially less in many cases than what has been officially defined as the poverty level.<sup>24</sup>

As American society has progressed, migrant workers have simply failed to obtain the benefits of this progress. They have never formed a politically cohesive group, and thus have had no voice in the political process. In fact, few migrants remain in one place long enough to vote in local or national elections.<sup>25</sup> This lack of cohesiveness has not only pre-

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<sup>22</sup> It should be noted that a substantial number of skilled immigrants who are unable to meet licensing requirements in the United States to resume their former occupations have been forced into agricultural jobs.

<sup>23</sup> Although there is some disparity in available figures, a 1969 Senate report lists a figure of 276,000 migratory workers out of a total farm work force of 3.1 million. See SUBCOMMITTEE ON MIGRATORY LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, S. REP. NO. 83, 91st Cong., 1st Sess. 3-5 (1969). For the purpose of the Senate study, migrants were defined as individuals leaving their county of residence to do work. For an estimate of the total migratory population, a substantial number must be added for children too small to engage in work themselves but who accompany their parents.

<sup>24</sup> The Department of Labor in early 1973 redefined the poverty threshold for a farm family of four in the continental United States as \$3575 in annual *net* income. A wage earner in agriculture working 40 hours per week for 50 weeks out of the year would receive \$2600 in annual *gross* income at the minimum agricultural wage rate prevailing between 1966-1974. HOUSE COMM. ON EDUCATION AND LABOR, FAIR LABOR STANDARDS AMENDMENTS 1973, H.R. REP. NO. 93-232, 93d Cong., 1st Sess. 15 (1973).

<sup>25</sup> Of course, the right to vote is restricted to United States citizens, but the overwhelming majority of migratory agricultural labor in the United States is of United States citizenship, even though, as previously indicated, of minority racial or cultural background.

vented direct political representation, but also, until very recently, has impeded formation of a strong unionization movement among agricultural labor parallel to those movements which have won major benefits for industrial workers. Both government and organized labor had virtually forgotten the needs of agricultural workers until recently. And, government has even systematically excluded them from the benefits of nearly every major social welfare law, including the National Labor Relations Act.<sup>26</sup>

The industrial worker is protected by a highly developed umbrella of laws, both state and federal, which guarantee him a minimum wage, insurance against unemployment, compensation for injury on the job, as well as conditions of job safety and security. For the agricultural worker, coverage is either absent, minimal, or ineffective.<sup>27</sup> Judicial attacks on this legislative policy have been attempted in federal court on behalf of migrant farm labor, in an effort to secure a declaration that the congressional policy of excluding farm workers from the benefit of these laws is in violation of the United States Constitution. In *Romero v. Hodgson*,<sup>28</sup> a three judge district court, by a divided vote, dismissed a direct attack on Congress' continuing exclusion of farm labor from unemployment insurance coverage under the Federal Unemployment Tax Act of 1935.<sup>29</sup> Employing the tradi-

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Residence requirements for registration to vote traditionally have been considered a matter of state interest, and under state law had been as long as one year. Residence requirements for presidential voting have been limited to 30 days by recent federal statute. 42 U.S.C. § 1973(a) (a)-1 (1970). And local voting requirements have come under attack in federal court as abridging the right to travel. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Supreme Court held unconstitutional a Tennessee statute requiring state residence for a full year and substituted 30 days as ample to meet the state's need. In *Marston v. Lewis*, 410 U.S. 679 (1973), the Supreme Court sustained an existing Arizona 50-day voter residency and registration statute. Nevertheless, while it is clear that residency and registration requirements will be limited in the future to substantially less than in the past, migratory laborers—even with a 30 to 50-day requirement—remain effectively excluded from participation in the electoral process by the transitory nature of the jobs which they hold.

<sup>26</sup> The NLRA, as amended, sanctions the right of employee collective action. In particular, it gives legislative approval to the right to organize labor unions, affirms the right to strike, and guarantees a workman's right to choose his representative and to bargain collectively with his employer by protecting him from unfair labor practices of employers and unions alike. Commentators have speculated for years concerning the lack of agricultural coverage under the NLRA. See Fuller, *Farm-Labor Relations*, 8 IDAHO L. REV. 66 (1971). Experience has demonstrated that it is simply not true in practice that the farm owner and the farm worker have been able to bargain an employment contract as economic equals. The continuing conditions under which the migrant farm labor population lives provide eloquent testimony.

<sup>27</sup> The migrant farm laborer really does not have a way out of his status either, since migrants are effectively denied access to job training programs for industrial skills which would lead to an occupation allowing them to obtain permanent jobs in the industrial or craft labor force.

<sup>28</sup> 319 F. Supp. 1201 (N.D. Cal. 1970), *aff'd*, 403 U.S. 901 (1971).

<sup>29</sup> Federal Unemployment Tax Act of 1935, enacted as part of the Social Security Tax Act, codified at INT. REV. CODE OF 1954, § 3301 *et seq.* The agricultural exemption is contained in § 3306 (c)(1).



tional constitutional test for the validity of a legislative classification, the court found the continued exclusion not unreasonable,<sup>30</sup> and dismissed the challenge. The Supreme Court summarily affirmed.<sup>31</sup>

A more recent court challenge to the entire legislative scheme of excluding farm labor from coverage under social welfare statutes in general was denied even a hearing before a three judge panel in *Doe v. Hodgson*,<sup>32</sup> on the authority of *Romero*. It seems clear then, that fundamental reform of migratory labor's lot will come only from Congress and state legislatures, but not until governmental and public awareness and sympathy for migrant agricultural labor rises to a higher level.<sup>33</sup> In the interim, protection and improvement of living and working standards must come from administrative enforcement of the existing laws and regulations covering migratory workers, and from the attempts of the laborers themselves to determine and enforce their own individual rights. The balance of this portion of the paper will deal with the effectiveness of each of these potential methods of improving their lot.

### *Protection in Finding Work*

Migrant agricultural laborers traditionally find their jobs in one of two ways; contacts made through private sources, or contacts made by means of the interstate farm labor placement system established by the Wagner-Peyser Act.<sup>34</sup> In the latter case, an employer needing farm labor contacts the State Employment Service of his state, which in turn may contact the State Employment Service of another state to recruit the required workers. The state employment referral agencies are funded by the federal government and linked together under the overall supervision of the Department of Labor. They are also under a concomitant federal obligation to insure that the overall working conditions at the place of employment, including, in particular, wages and housing, meet certain minimum standards set

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<sup>30</sup> 319 F. Supp. at 1203.

<sup>31</sup> 403 U.S. 901 (1971).

<sup>32</sup> 344 F. Supp. 964 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 537 (2d Cir. 1973).

<sup>33</sup> On September 20, 1973, Congressman Roybal (30th Dist., Cal.) introduced legislation in the form of a resolution intended to establish a National Office for Migrant and Seasonal Farmworkers within the Department of Health, Education, and Welfare, and to create a special task force to study their needs and problems.

As of May 21, 1974, no action had been taken on this resolution. H.R. 10,462, 93d Cong., 1st Sess. (1973).

<sup>34</sup> Wagner-Peyser National Employment System Act, 29 U.S.C. § 49 *et seq.* (1970). As will be discussed more fully below, the individual laborer normally deals through a labor contractor, or crew chief, who acts as a broker of jobs for migrants working in his crew. That is, it is a labor contractor who puts a crew together and finds them field work, either through the Wagner-Peyser system, or through a private agency or the farm owner himself, who transports the workers to various job locations, and who in general fills the paternalistic role of shepherd with his flock.

forth in regulations promulgated by the Department.<sup>35</sup> In practice, the Wagner-Peyser Act protections have meant very little in the past. Conditions of migrant housing, both that provided directly by employers, and that supplied in migrant labor camps, demonstrate that local and federal standards, including those of the regulations promulgated under the Act, have been observed primarily in the breach. These conditions have resulted from an appalling lack of interest in migratory labor on the part of many administrators charged with enforcing the existing standards.<sup>36</sup>

In *Gomez v. Florida State Employment Service*,<sup>37</sup> however, the Fifth Circuit decided in 1969 that, even in the absence of an explicit right conferred by the language of the Wagner-Peyser Act and regulations, a migrant worker recruited through the interstate employment system possessed an implicit federal right to working conditions meeting the regulatory minima. Violation of these standards created a remedy for damages under the Act and under the provisions of a federal statute<sup>38</sup> guaranteeing a remedy for the deprivation of civil rights afforded by the Constitution or the laws of the United States. The *Gomez* case thus provided migrant workers a new weapon to protect themselves against abuse of their statutory benefits—direct suit in a federal court.

The number of cases brought under federal labor statutes subsequent to *Gomez* demonstrates that knowledge of this weapon is spreading rapidly through the migrant workers movement. Even so, it should be obvious that merely discovering a right and providing a remedy will solve nothing in the absence of effective means of enforcement by access to adequate and inexpensive legal assistance. Further, whatever rights he may have, and whatever means he may have at his disposal to enforce these rights, an aggrieved workman is unlikely to assert them at the risk of his future livelihood. Cases brought under *Gomez* will probably represent only the tip of the iceberg of violations of the Wagner-Peyser Act's standards as long as

<sup>35</sup> Housing standards are contained in regulations at 20 C.F.R. §§ 620.4-.17 (1973).

<sup>36</sup> For a description of personal experiences as a migratory farm laborer see Chase, *The Migrant Farm Worker in Colorado—The Life and The Law*, 40 COLO. L. REV. 45 (1967) [hereinafter cited as Chase] in which he recounts his adventures during a three-week period as a farm laborer while doing empirical research for the paper. Professor Chase vividly describes living conditions in the labor camps where he stayed in the summer of 1967 and the lack of administrative interest in improving conditions even when brought to official attention. See also the court's comments in *Salinas v. Amalgamated Sugar Co.*, 341 F. Supp. 311 (D. Idaho 1972), discussed in notes 44-46 *infra*.

<sup>37</sup> 417 F.2d 569 (5th Cir. 1969).

<sup>38</sup> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

the employee has no guarantee against discrimination by selective denial of future employment by employers retaliating in concert. At the present, he has none. Further, the *Gomez* case itself offers protection for the migrant recruited through the Act's mechanism, but none for the worker obtaining a job outside the Act. And finally, as subsequent discussion will show, the promise which the *Gomez* case offered has not been borne out in other direct attacks on agricultural labor conditions.

Working arrangements between the employing farmer and migrant workers have traditionally been made through a labor contractor running a work crew. The contractor is sometimes a former laborer who has turned entrepreneur. Such an arrangement is frequently unavoidable because of the many farm labor migrants who speak little or no English and have little or no comprehension of the socio-economic customs of the areas in which they are asked to work. Yet, at least until the imposition of extensive record-keeping requirements upon labor contractors under federal acts of the last decade, the contractor, acting as a middleman collecting and disbursing wages paid by the farm owner, was in a position to skim off a portion of the wages he received without the knowledge of either farm owners or workers. Even in the event they learned about it, laborers were fearful of doing anything since it was the labor contractor who was providing them employment, transportation, and subsistence in an unfamiliar area.<sup>39</sup> In addition, contractors often provided laborers for employment under wage or living conditions which they themselves knew were unsatisfactory.

Moving to combat the well-documented abuses of the contractor system, Congress passed the Farm Labor Contractors Registration Act of 1963,<sup>40</sup> which requires the licensing of anyone providing farm labor for a fee through interstate commerce. It further requires the contractor's prior disclosure of wage rates and working conditions to his workmen, as well as his maintenance of payroll records. The regulations<sup>41</sup> go on to impose the specific obligation of keeping complete records for each worker including hours worked, earnings, and wages withheld. The existing regulations, if they are in fact carefully enforced, probably help to eliminate many of the former problems of corruption in wage payments. Experience shows that either from lack of manpower and budget or from general disinterest, or from both, the regulations have not always been applied with vigor.<sup>42</sup> Since

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<sup>39</sup> The only available remedy would have been a law suit in state court.

<sup>40</sup> 7 U.S.C. § 2041 *et seq.* (1970).

<sup>41</sup> 29 C.F.R. § 41.22 (1973).

<sup>42</sup> Professor Chase documents a case in the summer of 1967, three years subsequent to the adoption of the regulations in question, in which a labor contractor was able, without fear of detection, to satisfy such record-keeping requirements as had been imposed and nevertheless still skim off 40% of his workers' pay. Chase, *supra* note 36, at 58-59, 68-71. Thus, a clear congressional intent to check the exploitation of migrant agricultural labor may easily be frustrated by inadequate administrative supervision and enforcement of the Act.

1973, however, enforcement of the Labor Contractors Act has been entrusted to the Wage and Hour Division of the Department of Labor, which is the agency established to police the Fair Labor Standards Act (FLSA)<sup>43</sup> on minimum wage and other working conditions. The Wage and Hour Division, in conjunction with its inspection of records required under the FLSA, has established a program of policing these records on an unannounced spot-check basis, rather than waiting to act only on the filing of a specific complaint. The Wage and Hour Division's field officers have also been instructed to contact individual laborers to determine if the representations of the contractor concerning wages and working conditions have been correct. In case violations are discovered, the Division will usually seek to obtain voluntary compliance from the offending contractor but may suspend his license in flagrant cases, or initiate a criminal action. The Division is powerless, however, to undertake an action to recover damages for the benefit of a specific aggrieved worker, or to enforce the Act against a person who does not fall within the Department's interpretation of the definition of a labor contractor.

If the two problems last mentioned can be resolved successfully on behalf of migratory labor, the Labor Contractors Act could offer another vehicle for improving working conditions for the migrant recruited outside the Wagner-Peyser Act, by serving as a fulcrum for forcing improvement in living standards. Up to now, however, migratory workers seeking direct redress in federal court under the Labor Contractors Act for alleged knowing misrepresentation or non-disclosure of inadequate working conditions (including housing) have met with limited success. In one such case, *Salinas v. Amalgamated Sugar Co.*,<sup>44</sup> a federal right on behalf of an aggrieved worker to sue a labor contractor for violation of the Act was upheld upon the precedent of the *Gomez* case.<sup>45</sup> Still, recovery was denied for the reason that the defendant, an Idaho sugar company which had recruited the plaintiffs in Texas to work in the fields of sugar beet farmers growing crops under contract to it, was held *not* to be a labor contractor within the terms of the Act, despite the economic benefit it received from recruiting the plaintiffs.<sup>46</sup> The court based its conclusion on the Department of

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<sup>43</sup> 29 U.S.C. § 201 *et seq* (1970). See text accompanying notes 52-56 *infra*.

<sup>44</sup> 341 F. Supp. 311 (D. Idaho 1972).

<sup>45</sup> The complaint in *Salinas* demanded damages for the increased living costs incurred by workers who were forced to live elsewhere than in the labor camp where the defendant had represented they would find adequate accommodations. The court found as a matter of fact that "the Parma Camp and the housing and furniture supplied to plaintiffs were not fit for human habitation." 341 F. Supp. at 315.

<sup>46</sup> The court stated nonetheless that

[a] company of the standing of Amalgamated ought to be ashamed to be connected in any manner, however slight, with the treatment afforded the migrant workers brought into this state [Idaho] to aid in the agriculture industry."

341 F. Supp. at 315.

Labor's own interpretation of the Act, determining sugar processing companies *not* to be labor contractors, and restricting registration to persons who acted in a capacity similar to a crew leader. The court's willingness to afford a remedy is encouraging, but the remedy is illusory if the breadth of the statutory definition is artificially restricted.<sup>47</sup> With the capacities of the new large agri-business companies to recruit directly in interstate commerce, circumventing both the Wagner-Peyser Act and the traditional labor contractor system, it would seem both appropriate as well as within the language of the Act to find the recruiting company to be a labor contractor. To do so would place the burden on it as a matter of federal law to insure the accuracy of the representations concerning employment conditions made by its agents, even if all the provisions of the Act might not literally apply.

Less encouraging is the interpretation of the Act made by the Tenth Circuit in *Chavez v. Freshpict Foods, Inc.*,<sup>48</sup> in which, in contradistinction to the Fifth Circuit in *Gomez*, it was held by a divided court that a federal civil right of enforcement against violations of the Labor Contractors Act does not exist.<sup>49</sup> In a later district court case in another circuit, *27 Puerto Rican Migrant Farm Workers v. Shade Tobacco Growers Agricultural Association*,<sup>50</sup> the court followed the position taken in *Chavez* by denying

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<sup>47</sup> The statutory definition of labor contractor reads as follows:

The term "farm labor contractor" means any person, who for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers (excluding members of his immediate family) at any one time in any calendar year for interstate agricultural employment. Such term shall not include (1) any nonprofit charitable organization; (2) any farmer, processor, canner, ginner, packing shed operator, or nurseryman who engages in any such activity for the purpose of supplying migrant workers solely for his own operation; (3) any fulltime or regular employee of any entity referred to in (1) or (2) above; or (4) any person who engages in any such activity for the purpose of obtaining migrant workers of any foreign nation for employment in the United States if the employment of such workers is subject to (A) an agreement between the United States and such foreign nation, or (B) an arrangement with the government of any foreign nation under which written contracts for the employment of such workers are provided for in the United States by an instrumentality of such foreign nation.

7 U.S.C. § 2042(b) (1970).

<sup>48</sup> 456 F.2d 890 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

<sup>49</sup> This Court will not fashion civil remedies from federal regulatory statutes except where a compelling federal interest of a governmental nature exists or where the intent of Congress to create private rights can be found in the statute or in its legislative history.

456 F.2d at 894. The Tenth Circuit has upheld this position in a number of cases under other federal statutes subsequent to *Chavez*, but neither in the Tenth Circuit nor in any other circuit court has the question of private rights under the Labor Contractors Act come up since *Chavez*. Still, *Chavez* illustrates the reluctance to create any private rights under any of the federal labor laws, even in the face of inadequate administrative enforcement.

<sup>50</sup> 352 F. Supp. 986 (D. Conn. 1973), *aff'd mem.*, 486 F.2d 1052 (2d Cir. 1973). This case was actually brought under the Wagner-Peyser Act; however, it offers both a rationale for distinguishing *Gomez* and *Chavez*, and a suggestion for resolving the migrant's dilemma.

a federal right of suit, distinguishing *Gomez* on the basis that in the latter case, there was a clear and distinct violation of *specific minimum standards* within the federal regulations. This last case suggests that courts might recognize enforceable private federal rights under the Labor Contractors Act which would afford meaningful protection in housing cases outside the Wagner-Peyser Act if the Department of Labor were to impose, by regulation similar to that under the latter act, minimum standards for living conditions.<sup>51</sup>

### *Minimum Wage and Overtime*

With the passage of the Fair Labor Standards Act of 1938,<sup>52</sup> nearly all Americans employed in interstate commerce were federally guaranteed a minimum hourly wage, as well as overtime pay for a work week in excess of a statutory maximum number of hours. Farm labor was expressly excluded from the benefits of the Act.<sup>53</sup> Not until 1966 was the farm worker afforded any coverage under the Act whatsoever, and then only for minimum wages at a lower rate than provided industrial labor. At the same time, a number of limitations to the scope of agricultural coverage were written into the Act. Recently the discrimination against agricultural labor was reduced. In April, 1974, the President signed a bill<sup>54</sup> which will raise minimum agricultural wages up to a par with the minimum industrial wages by 1978. Congress also broadened the coverage of the farm labor minimum wage provisions by removing several of the restrictions imposed in 1966.

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<sup>51</sup> Jobs with conditions below such minimum standards could be forbidden from being knowingly offered to workers by a labor contractor. At the same time, if real benefit is to be obtained from the Act, the Department must reexamine its interpretation of "labor contractor," which can be done consistently with the existing language of the Act, to cover other recruitment situations, like that in *Salinas*, which now exist in the agri-business industry. Of course, the scope of the delegation of authority to adopt regulations is limited by the congressional intent in the adoption of the Act and must be tested by resort to its legislative history, but it is clear that, first and foremost, the Act was designed as a remedial measure to protect agricultural laborers. If the problems of recruitment by others than crew-leader-contractors were not mentioned at the time of its enactment, this does not mean that Congress intended so to restrict the scope of the Act. And certainly the power to impose minimum standards of housing conditions has been upheld under the Wagner-Peyser Act, without any explicit language in that Act authorizing the Secretary to adopt such standards. What then, if the Secretary imposed by regulation upon licensed labor contractors a duty to investigate the housing and working conditions afforded migrant labor to see that they meet the standards promulgated? In any event, an alternative attack on improper housing conditions may be provided under regulations adopted pursuant to the more recent Occupational Safety and Health Act of 1970. See text accompanying notes 66-73 *infra*.

<sup>52</sup> 29 U.S.C. § 201 *et seq.* (1970).

<sup>53</sup> FLSA section 13(a)(6); 29 U.S.C. § 213(a)(6) (1970). The legislative history shows no logic for this exclusion.

<sup>54</sup> Fair Labor Standards Amendments of 1973, Pub. L. No. 93-259.

Prior to 1966, the only protection which migrant farm labor had from wage exploitation was that provided by regulations under the Sugar Act, which required a farm owner producing a sugar crop—beet or cane—to certify as a condition of receiving his annual federal sugar growers' payment that he had paid his field labor the minimum piece-work rate.<sup>55</sup> Coverage, of course, was limited to laborers actually working beet or cane fields. Wage rates in other farm crops were totally unregulated, and in times of bad crops or slack seasons, when the needs of migrant labor for jobs and money were highest, wages sank to incredible lows, measured on a per-hour basis.<sup>56</sup> Low wages offered by farm owners and opportunities for exploitation by labor contractors pocketing a portion of the wages paid, together with the scandalous living conditions under attack in *Gomez*, were the factors which reduced migratory farm laborers below the poverty level.

The 1966 coverage of the FLSA was limited to employers using at least 500 "man-days"<sup>57</sup> of farm labor per calendar quarter, excluding labor performed by his own family and by non-migrant hand workers used exclusively for harvesting. The intention of this limitation was to exclude smaller farm operators from the operation of the Act, including those who recruited local help to harvest fruit and vegetable crops on the piece-work basis, as is customary in some regions. Its justification, of course, was that higher costs would foreclose small operators from effective competition with larger growers. Even if an employer utilizes 500 man-days of labor (as so restricted), certain employees remain excluded from coverage, principally family members, the local hand-harvesting commuting workers mentioned above, and hand harvesters under 17 years of age who are employed on the same farm as their parents and paid the same rate as the excluded local hand harvesters.<sup>58</sup> The effect of the employer limitation is to deny any employee of such an employer the benefit of minimum wage coverage, whether the employee is himself in a class of covered employees or not. Thus, migratory workers, who since 1966 have been covered employees

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<sup>55</sup> Sugar Act of 1948, 7 U.S.C. § 1100 (1970). For record-keeping requirements see 7 U.S.C. § 1131(c)(1) (1970) and 7 C.F.R. § 862.14 (1974).

<sup>56</sup> See Chase, *supra* note 36, for several examples occurring within that author's own experience.

<sup>57</sup> The 1974 amendment raising the minimum wage in agriculture to \$2.30 per hour will also lessen the impact of the 500 man-day exclusion of farm owners from coverage because (1) it denies the exemption to farms owned by certain large agri-business corporations without regard to how much labor is actually used on the farm, and (2) it counts in the total man-day calculations work performed by non-migrant hand-harvesting piece workers, although these workers are themselves still excluded from the benefits of the Act. The justification for extending full coverage to corporate farms was the allegation that agri-business is buying smaller farm units to operate in avoidance of the tax and social welfare laws.

<sup>58</sup> It would appear that the only members of this class would be children of migrant workers, who are thus excluded from the minimum wage coverage until they are 17.

under the Act, are still denied a minimum wage if they work for an operator small enough to fit under the 500 man-day rule.

While the 500 man-day rule and its related exceptions raise interesting legal questions,<sup>59</sup> an ever-increasing percentage of adult migratory labor in this country is covered by the 1966 Amendments, since migrant employment has tended more and more to concentrate on larger farms.<sup>60</sup> Additionally, under the FLSA, a labor contractor-crew chief has been interpreted as being a joint employer with the farm owner, and the Act has been applied to him, thus in practice forcing a farm owner, otherwise within the 500 man-day rule, to pay minimum wages if he contracts for labor provided by a covered labor contractor.<sup>61</sup>

One benefit of the FLSA coverage comes from the record-keeping requirements of the Act and the enforcement powers of the Wage and Hour Division. Although aggressive enforcement was sadly lacking at the outset,<sup>62</sup> the Division has maintained for a number of years field spot-checks of the records of farm operators *and* labor contractors to insure conformity with minimum wage requirements. As pointed out above, these systematic reviews have been coordinated with field enforcement of the Farm Labor Contractors Registration Act since 1973. In general, the Wage and Hour Division has found cooperation by farm owners fairly general (at least among farmers in the Michigan region) once they have understood the provisions of the Act. The Division's compliance officers have been instructed to question field laborers in private in connection with each audit in an effort to insure that not only the FLSA but also the Labor Contractors Act have been complied with. Distressingly, despite the required posting of informational notices on all covered premises, experience has shown that an overwhelming majority of migrants remain unfamiliar with their rights or are unwilling to reveal violations through a continuing fear of loss of their livelihood.<sup>63</sup>

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<sup>59</sup> For an analysis of the application of the 1966 law to agriculture see Champion, *Fair Labor Standards Coverage for Agricultural Employees*, 41 Miss. L.J. 409 (1970).

<sup>60</sup> While it is true that the 500 man-day limitation excludes 98% of all farms and 65% of all farm workers from minimum wage coverage, the vast majority of these farms are owner or owner and family operated, employing local labor on only a sporadic basis. A farmer, to be subject to the FLSA, would have to employ at least seven full-time agricultural workers other than himself and his family during a calendar quarter. SENATE COMM. ON LABOR AND PUBLIC WELFARE, *THE MIGRATORY LABOR PROBLEMS IN THE UNITED STATES*, S. REP. NO. 91-83, 91st Cong., 1st Sess. 56 (1969). The fact that adult migratory labor usually concentrates, of necessity, on farms that can provide employment and housing suggests employment of groups of more than six, thus bringing most larger fruit and vegetable farms under the coverage of the Act.

<sup>61</sup> While the farm owner would not technically be required to pay minimum wages once he has qualified for the exemption under the 500 man-day rule, it would be highly unlikely that a labor contractor would provide laborers for less than this amount when he himself is required to pay the minimum wage.

<sup>62</sup> See, e.g., Chase, *supra* note 36, at 36-39, 68-71.

<sup>63</sup> Interview with Mr. Frank C. Modetz, Area Director, U.S. Dept. of Labor, Wage and Hour



The enforcement powers of the Wage and Hour Division under the FLSA are presently limited exclusively to insuring receipt of the statutory minimum wage. One recurrent problem the Division has been powerless to correct is the refusal of an employer to pay the full contract wage. A worker may be promised a certain wage rate and then receive a substantially smaller amount because of phantom deductions. One such deduction frequently encountered by the Michigan Wage and Hour office is forced reimbursement of the employer's expenses of transporting the migrant from the place of his recruitment to the farm. Although the Wage and Hour Division has successfully maintained the position that, absent a specific agreement, such wage deductions are illegal, its power is limited to insuring that the workers' actual wages received meet the federal minimum.<sup>64</sup>

Unlike the other federal statutes under discussion, the FLSA specifically authorizes a right of action against his employer by a workman who has received less than the minimum wage. However, his right to sue in federal court is limited to the deficiency between his wage and the minimum wage, together with liquidated damages, costs, and attorneys fees.<sup>65</sup>

Although minimum wage coverage for agricultural labor—subject to the exclusions discussed—has finally reached a par with that for industrial workers, the 1974 FLSA amendments failed to extend any overtime benefits to agriculture. Industrial labor is entitled to a minimum of "time and a half" for hours after the first forty in any week. The principle argument for the continued exclusion is that agricultural work is highly seasonal, with heavy demands principally only at harvest times, when far more than forty hours is demanded of every worker to get the job done. Overtime pay, the argument runs, would add an intolerable cost burden to the agricultural employer. Whether the argument is sound or not, it has prevailed in Congress. Over the course of the last few years all efforts to correct this omission by private litigation and extend overtime coverage to agricultural labor, as was not done by legislation, have failed. At most, case law has clarified the definition of agriculture in the Act and regulations, and forced

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Division, Detroit, West Area Office, April 28, 1974. This fear is reinforced by their particular unwillingness to report violations of the child labor provisions of the FLSA, which prohibit farm labor by children under 12, and restrict farm labor by children under 16 to non-school hours, to vacation periods, and to nonhazardous activities. Most migrant families need the earnings produced by working children, and to reveal a child labor violation means the end of a necessary portion of the family's income.

<sup>64</sup> Protection from phantom deductions, that is, an employer's failure to pay the contract amount, remains an area of state concern. The existence, absence, and degree of protection which a worker enjoys against such predatory practices vary from state to state. In Michigan, at least, it is a misdemeanor under a general criminal labor protection statute for an employer to make wage deductions not authorized by the employee. See MICH. COMP. LAWS ANN. § 750.353 *et seq.* (1968).

<sup>65</sup> 7 U.S.C. § 216(b) (1970).

the courts to determine an exact point where the agriculture exemption ends.

### *Job Safety*

In 1970, Congress enacted the most ambitious employment safety program ever adopted, the Occupational Safety and Health Act (OSHA) of 1970.<sup>66</sup> The Act delegates to the Department of Labor power to adopt and enforce employment safety and health standards for *all* non-governmental employers and employees in interstate commerce, including, without restriction, agriculture.<sup>67</sup> Accordingly, the Department has promulgated regulations covering a number of job situations, several specifically for agriculture, and one dealing directly with migrant workers. This last regulation sets minimum sanitation standards for temporary labor camps,<sup>68</sup> which closely parallel the standards under the Wagner-Peyser Act. The regulations are enforced by surprise on-site inspections conducted by compliance officers of the newly created Occupational Safety and Health Division of the Department,<sup>69</sup> as well as by investigations following the lodging of a complaint. Citations may be issued by the Division if violations of the regulatory standards are found, and fines can be levied, but these are usually remitted if the offender voluntarily undertakes to meet the standards for the future.

In addition to the enforcement of specific regulations, the Division's compliance officers have the discretion to issue citations upon the discovery of any "recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees."<sup>70</sup>

As with the Wage and Hour Division's work, the OSHA Division's responsibilities are beyond its present capacities. Regular OSHA inspections, even of labor camps, are impossible. In the Southern Michigan region, for example, there are only eleven compliance officers, and on-site labor camp inspections cannot be undertaken on a systematic basis.<sup>71</sup> They usually have been initiated only when a complaint is received. In addition,

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<sup>66</sup> 29 U.S.C. § 651 *et seq.* (1970).

<sup>67</sup> 29 U.S.C. § 655 (1970).

<sup>68</sup> 29 C.F.R. § 1910.142 (1973). Standards for maximum exposure to certain pesticides, which would protect migrants from working fields to which the chemicals had been applied, have also been promulgated. 29 C.F.R. § 1910.93 (1973).

<sup>69</sup> Curiously, by Department directive, the Division is forbidden to inspect any labor camp sites until they have been occupied by migratory workers and their families, and is thus unable to correct violations during camp construction or reconstruction, when improvement would normally be easiest for all concerned.

<sup>70</sup> Under section 5 of the Act, every employer has the general duty to maintain his premises free of such hazards, and section 9(a) grants the inspector power to cite for violations of either section 5 or section 6. 29 U.S.C. § 658(a) (1970).

<sup>71</sup> Author's interview with Thomas Marble, Compliance Officer, U.S. Dept. of Labor, OSHA Division, Detroit, East Area Office, May 1, 1974.

there is no correlation of inspections with the Wage and Hour Division, even on child safety,<sup>72</sup> although there is, of course, some informal exchange of information.

Despite the direction in the Act for the adoption and enforcement of minimum employment standards, OSHA does not explicitly convey any private right of action in favor of employees damaged by employer violations of the Act. Nor, in a number of court tests, has a private right of action been implied.<sup>73</sup> At least in the area of damage suits for employee injuries suffered under working conditions not meeting regulatory standards, such results can be countenanced, to the extent that recovery would be in addition to awards received under state workmen's compensation laws.<sup>74</sup> In the case of labor camp sanitation standards, however, it would

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<sup>72</sup> The Wage and Hour Division is charged with enforcing the child labor restrictions of the FLSA, both as to employment below the minimum age limitations and as to the use of child labor in activities forbidden as "hazardous" under Department of Labor regulations.

<sup>73</sup> The Act itself specifically states that it does not enlarge, diminish or affect private rights of action under state law for injuries, disease, or death arising out of employment. Section 4(b)(4); 29 U.S.C. § 653(b)(4). Private rights of action have been denied, for example, in *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670 (E.D. La.), *aff'd mem.*, 483 F.2d 67 (5th Cir. 1973). In *Skidmore*, *Breitwieser v. K.M.S. Indus., Inc.*, 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973), was applied and followed. See note 74 *infra*.

<sup>74</sup> The federal courts have been understandably loath to invade an area of traditional state regulation by creating a new federal right in addition to what has long been recognized as the exclusive form of relief. The same has been true under the FLSA. Under this last Act, the Child Labor provisions establish criminal penalties for an employer who utilizes a child in contravention of Department of Labor regulations forbidding designated hazardous jobs to minors under 18. In *Breitwieser v. K.M.S. Indus., Inc.*, 467 F.2d 1391 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973), a divided Fifth Circuit panel rejected the independent existence of a federal civil remedy for damages on behalf of a minor killed while performing work classified as hazardous under the regulations. The majority held that the criminal penalties were both substantial and sufficient to enforce the congressional policy of limiting the exploitation of child labor and specifically cited the existing Georgia state workmen's compensation coverage as grounds for denying the plaintiff's claim. That the workmen's compensation award was \$750 on the death of a minor did not dissuade them. Judge Wisdom, in dissent, posited a federal right of a minor not to be assigned hazardous jobs, and a consequent implied remedy for damages suffered by the employer's breach of his statutory duties. He pointed out, quite correctly, that a criminal sanction does not reimburse the victim for his injuries, nor his family for its loss on his death. In view of the court's reasoning, however, it would appear that a federal claim for relief would still be denied if a child laborer were injured in an agricultural job outside the scope of the typical state workmen's compensation statute. Nevertheless, in any event, one might wonder how this sort of violation of the child labor provisions would come to the attention of the Labor Department prior to the occurrence of an injury which the Act is trying to prevent. It is interesting to note that the "remedy" of criminal prosecution of the employer is nowhere mentioned by the court as having been undertaken by the federal government against the employer involved. One wonders if these provisions are any more carefully enforced than the regulations of other acts considered herein. As Judge Wisdom observed, "The Secretary of Labor has no way of making whole a minor who is injured as a result of being assigned to a hazardous task beyond his competency to perform. Nor does the Labor Department have the manpower or the time that complete enforcement of the law by it alone would require." 467 F.2d at 1396.

appear that the OSHA regulations meet the standards for implying a private right of action as set forth in the *Gomez, Salinas*, and *27 Puerto Rican Migrant Farm Workers* cases. To date, there have been no reported damage suits on this phase of the Act, however.

State workmen's compensation statutes are laws designed to insure a workman injured on the job damages for his injuries regardless of who was at fault. Workmen's compensation statutes have been developed as an exclusive form of relief for the workman with a job-related injury, and are in lieu of common law remedies. Except in a very small number of states,<sup>75</sup> agricultural labor has been explicitly excluded from coverage. These exclusions, of course, have not been intended to be discriminatory against migratory laborers alone, and the exclusionary language has been upheld in court as a reasonable legislative classification.<sup>76</sup> The net result, of course, has been to deny the statutory protection against loss of income to the farm laborer, even though, of course, he may be left with his (largely illusory) rights of action against a negligent employer.

### *Collective Bargaining*

The National Labor Relations Act (NLRA) of 1935 was in principle a guarantee of the right to collective action on the part of employees of any industry engaged in interstate commerce. Its enforcement was accomplished by forbidding employers from engaging in "unfair labor practices" and requiring them to bargain collectively with a duly certified representative of their employees. By excluding agriculture from coverage, Congress simply has withdrawn from farm labor the guarantee of a right to collective action. Furthermore, since the exclusion was carried forward into the 1947 Taft-Hartley amendments to the NLRA, farm labor has been left in a vacuum as far as federal regulation of its rights of organization and collective bargaining are concerned. The refusal of the federal government to

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<sup>75</sup> Two states with migratory labor workmen's compensation coverage are California and Ohio.

<sup>76</sup> In Michigan, the total agricultural exclusion was repealed in 1969, and replaced with a provision which included in the workmen's compensation scheme permanent agricultural labor, and extended limited benefits to agricultural employees working five weeks for the same employer. MICH. COMP. LAWS ANN. § 418.115 (Supp. 1974). The net result was continuing exclusion of migratory field laborers only. A challenge to the validity of this amendatory legislation was sustained by the Michigan Supreme Court. *Gutierrez v. Glaser Crandell Co.*, 388 Mich. 654, 202 N.W.2d 786 (1972). The limitations were held unreasonable on their face by granting farm employers special treatment.

The effect of the *Gutierrez* decision is that migratory labor is now covered to the same extent as all other workers by the Michigan Workmen's Compensation Act. The *Gutierrez* case is, of course, one of the few successful instances in which private litigation achieved what was left undone by the legislature. The legislative situation remedied by *Gutierrez* amply demonstrates the continuing failure of the political process as a forum to resolve the problems of unequal treatment of farm labor.

deal responsibly with the problem has led to continuing organizational disputes, notably that between the United Farm Workers<sup>77</sup> and segments of the fruit and vegetable growing industry, as well as to bitter jurisdictional disputes between the United Farm Workers and the Teamster's Union, as to which shall represent the migratory labor employed by the industry.<sup>78</sup> At the same time, state legislatures have had opportunity to enact their own legislation in the area of farm unionization. Those few states that have affirmatively dealt with agricultural labor's collective bargaining rights have been rural states, moving at the behest of agricultural interests to enact labor statutes supported by the growers themselves.<sup>79</sup> Each of these statutes may fairly be characterized as limiting union organization or freedom of action substantially more than is the case under the NLRA.<sup>80</sup>

### *Conclusions and Recommendations*

A survey of the position of the migrant farm laborer in the United States today leads to the following inescapable conclusion and to three

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<sup>77</sup> The United Farm Workers, affiliated with the AFL-CIO, is an outgrowth of an earlier migratory farm workers service organization by the name of National Farm Workers Association founded by Caesar Chavez.

<sup>78</sup> Under the NLRA, as amended, a union is chosen to represent employees of a given employer as their bargaining agent in negotiations with the employer only after a showing of majority support for that union. Support is evidenced normally by a majority vote in a representation election. Once certified as bargaining agent, the union remains as such until decertified in a subsequent representation election, which may take place no less than one year subsequent to the preceding election.

Since agriculture is outside federal labor law coverage, the rival unions have been attempting to negotiate contracts with employers in the absence of clear expressions of support from the employees in the fields. The employers have similarly been able to favor one union over the other without regard to employee desires. The net effect of the situation has been that the farm laborers have become pawns in a power struggle among institutional combatants.

<sup>79</sup> ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS ACT, ARIZ. REV. STAT. ANN., §§ 23-1381 to 1395 (Supp. 1974); KANSAS STAT. ANN. §§ 44-818 to 830 (Supp. 1972); IDAHO AGRICULTURAL LABOR ACT, IDAHO CODE ANN. §§ 22-4101 to 4113 (Supp. 1972). Hawaii and Wisconsin have included farm labor under their general labor relations acts; other states are silent or have excluded farm labor under their labor relations acts. See generally Comment, *Labor-Management Relations in Agriculture*, 23 AM. U. L. REV. 145 (1973) [hereinafter cited as *Labor-Management Relations*]

<sup>80</sup> The Arizona and Idaho statutes, for example, require a representation election before a union may be certified as bargaining agent, thus excluding the procedure authorized by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), under which a union may be certified as bargaining agent based on election authorization cards. The Kansas statute prohibits strikes during harvest season. It goes without saying that these statutes have not been well received by organized labor, particularly the UFW.

For a discussion of the provisions of each of these laws and the general coverage of agricultural workers under state collective bargaining laws see *Labor-Management Relations*, *supra* note 79.

recommendations. The plight of the migrant agricultural worker is essentially a sociological problem caused by his belonging to a minority racial or linguistic group, by his lack of education or job training, by his fear to protest his living conditions on peril of the loss of his livelihood, or by a combination of these factors. His plight is not caused by an unwillingness to accept employment. To alleviate his problems, the following three proposals are offered:

I. There is a clear need for increased social assistance for the worker and his family to assert their existing rights and to afford them the existing protections of the statutes covering agricultural labor already on the books, in particular through additional funding and support of those divisions of the Department of Labor charged with these tasks.

II. There is a need for an end to the exclusion of agricultural labor from the remaining social welfare legislation passed for the benefit of industrial labor. This is particularly true of the NLRA, the exemption from which has left agricultural unionization in its present chaotic state. Agriculture has evolved since the passage of these laws into a highly organized and substantially mechanized industry which should be afforded the same treatment as any other major industry.

III. There is a need for greater public awareness of the conditions and the problems of the migratory worker and his family. The secondary consumers' boycotts of non-union fruit and vegetable growers indicates a rising (but perhaps misdirected) public concern for migratory labor. However, substantially greater support will have to be voiced to persuade Congress and the state legislatures to further equalize the treatment of agriculture and other industries, which is the keystone of improvement in migratory labor's lot.