A Harvest of Shame: the Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children

Jeanne M. Glader
A Harvest of Shame: 
The Imposition of Independent Contractor 
Status on Migrant Farmworkers and Its 
Ramifications for Migrant Children 

by
JEANNE M. GLADER

Alejandra Sanchez stands in the hot sun, swipes at a wisp of hair 
with her plastic-gloved hand and grabs the handle of a bucket filled 
with cucumbers. The eleven-year-old girl is accustomed to spending 
her summer vacations picking cucumbers with her parents and those 
of her thirteen brothers and sisters old enough to work. Her eight-year-
old brother, Fidel, first pulled on the plastic gloves that protect a pick-
er's hands from the prickly cucumber skin last summer.

The Sanchez children's child labor is legal under the employment 
contract their sharecropper father, Pedro, signed with the grower. The 
contract says Sanchez is a "share farmer"—an independent contractor 
running his own business. Children under state and federal law are 
allowed to work in family businesses, except when school is in session.1

A continuing development in agricultural labor is the trend among 
major growers to classify migrant farmworkers as "independent con-
tractors" rather than "employees." How these farmworkers are clas-
sified determines what protections they are afforded from sub-standard 
working conditions. Independent contractor status arises from "share-
farming" (or sharecropping) agreements.2 Under a typical sharefarm-
ing agreement, the grower or landowner generally agrees to "furnish 
and prepare the land; plant the crop; cultivate, spray, and fertilize the 
crop; and pay all the costs incurred with respect thereto."3 In return, 
the "sharefarmer" agrees "to furnish the labor necessary to care for 
the land and plants during the growing season, to harvest the . . . 
crop, and to sort, grade and pack the [crop] for marketing by [the

2. The terms "sharefarming" and "sharecropping" are synonyms and are used inter-
changeably.
3. S.G. Borello & Sons v. Dept of Indus. Relations, 48 Cal. 3d 341, 346, 769 P.2d 399, 
401, 256 Cal. Rptr. 543, 545 (1989).
After the crop is sold, the grower and sharefarmer equally split the gross proceeds of the harvest.

By classifying workers in sharefarming arrangements as independent contractors, agricultural employers are able to avoid the expense and inconvenience of complying with worker protection provisions of the Fair Labor Standards Act (FLSA), including health and safety standards, unemployment and disability insurance, and, perhaps most importantly, protections against oppressive child labor.

The relevant regulation defines "oppressive child labor" as "a condition of employment under which (1) any employee under the age of sixteen years is employed . . . in any occupation [except for children employed by a parent in a non-hazardous occupation] or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being . . . ." Since farmworkers classified as "independent contractors" do not fall within the FLSA definition of "employee," growers are not required to provide such workers with any of the protections the Act affords.

This Note analyzes the significance of the distinction between independent contractor and employee status for the migrant agricultural worker, focusing on the importance of this distinction to any attempt at eliminating child labor abuses from agriculture.

4. Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 751 (9th Cir. 1979) (footnote omitted).
5. See, e.g., Borello, 48 Cal. 3d at 347, 769 P.2d at 403, 256 Cal. Rptr. at 547 (cucumber contract between grower and Vlasic pickle company).
6. See, e.g., id. at 346, 769 P.2d at 401, 256 Cal. Rptr. at 545.
10. The legislative history of the FLSA indicates that Congress intended to protect only employees under the Act, and not independent contractors:

   It is intended that the minimum wage provisions of the Act be extended to certain sharecroppers and tenant farmers. The test of coverage for these persons will be the same test that is applied to determine whether any other person is an employee or not. Employer, employee, and employ, are all defined terms in the Act. Coverage is intended in the case of certain so-called sharecroppers or tenants whose work activities are closely guided by the landowner or his agent. These individuals, called sharecroppers and tenants, are employees by another name. Their work is closely directed; discretion is nonexistent. True independent-contractor sharecroppers or tenant farmers will not be covered; they are not employees.

Part I introduces the continuing plight of the migrant farmworker in the United States, especially the situation of the child worker. Part II begins with a brief history of the Fair Labor Standards Act and its child labor provisions. Particular emphasis is given to the Act's failure to address adequately the needs of migrant workers. Part II also explains the current inequity of the "family farm" exemption, which expressly excludes children from the Act's protective provisions when the child's "employer" is a parent. Lastly, this Part explains the various reasons growers find the independent contractor designation so appealing. Part III analyzes the importance of employee rather than independent contractor status in light of recent developments in California agricultural labor law and the effect of the joint employer doctrine. Part IV exposes the defects inherent in case-by-case determination of the employment status of migrant workers and their children. Part V underscores the importance of ending child labor abuses in agriculture by revising laws that presently allow employers to avoid FLSA requirements by designating migrant workers as independent contractors. Finally, Part VI proposes three remedies for the inadequacies of existing case law regarding employee status under the FLSA: (1) the abolition of the "family farm" exemption under the Act; (2) proposed legislation designating migrant workers and their children as employees per se; and (3) increased enforcement, meaning more zealous investigation and prosecution of violators, of the child labor provisions of the FLSA.

I. Introduction: Migrant Farmworkers in America

According to Edward R. Roybal, Chairman of the House Select Committee on Aging, "There are no standards or standard Federal definitions for migrant and seasonal farmworkers. Generally, the term refers to people whose main source of income depends on hand labor, farm work which either takes them away from their home or depends on seasonal crops." Although statistics about migrant farm laborers are difficult to compile because of the temporary nature of their working and living

11. See infra note 62.
12. The joint employer doctrine posits that the "statutory definition of 'employer' can encompass two or more individuals with respect to the same employee." Maldonado v. Lucca, 629 F. Supp. 483, 487 (D.N.J. 1986).
conditions, it is believed that at least seventy percent of the migrant work force currently in the United States is Hispanic—Mexican-Americans, Mexican nationals, Puerto Ricans, and Central Americans.\textsuperscript{14} Blacks and whites comprise about fifteen percent and ten percent of the migrant work force, respectively.\textsuperscript{15}

George L. Ortiz, President of the California Human Development Corporation, testified before the House Select Committee on Aging that the national farmworker population is currently estimated to be approximately six million people.\textsuperscript{16} Of those six million, approximately two-thirds, or four million, are either elderly or minor dependents; "[w]ithin that subpopulation of dependents, fewer than ten percent of the school-age children are enrolled in migrant education programs."\textsuperscript{17}

The migrant farmworker is among the most oppressed of all American workers. Pesticide poisoning is estimated to kill as many as one thousand agricultural workers annually, and results in approximately ninety thousand injuries annually.\textsuperscript{18} Tuberculosis, flu, pneumonia, intestinal parasites, and other preventable diseases occur at a rate 200 to 500 percent higher among migrant farm families than the general population.\textsuperscript{19} The average life expectancy of the migrant worker is only forty-nine years.\textsuperscript{20} Because farm work is extremely hazardous, the risk of injury is very high.

The disability rate for migratory or seasonal farmworkers is three times that of the general population. Falls from ladders in apple and citrus orchards are common, as are accidents with loaders and other field equipment. Migrants work at a feverish pace because they usually are paid by the amount they pick. They are always fighting fatigue as the workday progresses, particularly the children, and their thoughts are not on safety but on filling buckets and bins.\textsuperscript{21}

In addition, migrant farmworkers are among the poorest paid workers in America. In 1983, the average migrant farm family's income was only about $6,000 a year.\textsuperscript{22}

Migrant workers are unable to fight for or protect their legal rights because of inadequate access to legal services. "One report to the United States Civil Rights Commission noted that 'migrants, perhaps more..."
than any other group, have historically been confronted with the great-
est need for, but the least access to, legal services." 23

This oppression is most striking in the migrant child. As noted
by Senators Jacob Javits and Harrison Williams in a Senate Com-
mittee report on the 1966 FLSA amendments:

[T]he child we seek to protect is among the most oppressed and de-
prived of our citizens—the child of a Mexican-American family living
far below the poverty level, whose parents, for lack of a permanent
residence, cannot even vote and therefore exert no political influ-
ence . . . . In sum, this is a child who desperately needs to be brought
in from the fields and made a part of the society which the rest of
our children take for granted. 24

The problems of poor education, poor health, inadequate day-care
facilities, and oppressive child labor all contribute to the plight of the
migrant child, creating a vicious cycle of poverty.

Ronald Goldfarb, who has written extensively on the subject of
migrant farmworkers, explains the ill effects of migrancy on educa-
tion:

Education is the classic route out of poverty. A painful reality is that
the very migrancy of these farmworkers often forecloses this route
to their children. Inherent in the migrant life is the special problem
of educating the young. When always on the move, there can be no
stable school life for children. Migrants live in many different places
during the school year; their children are constantly in and out of
different schools . . . . They have no assistance at home because their
parents are away all day and often are without means and abilities
to be helpful when they return. These children are strangers in a hard
and puzzling world. 25

Many parents understand that education is the only way out of this
cycle of poverty and discourage their teenagers from working in the
fields. 26 Yet, some parents have little choice but to have their children
work alongside them in the fields, because the average family income
is at poverty level. 27

This seemingly inescapable cycle of poverty is complicated by the
problems of inadequate day-care facilities and the oppressive condi-
tions in which migrant children must work. Because many fields are
located in areas where there are not adequate day-care facilities, par-
ents usually bring their children with them to the field. 28 Once the

26. McConahay, supra note 22, at col. 2.
27. Id.
children are between five and seven years old they begin to participate in the harvest of the crops themselves. As noted by Mr. Ortiz in his comments to the House Committee on Aging, "Major efforts to aid this community must be directed to the dependents, especially school-age children and youth, in order to break the cycle [of poverty]."

II. The Fair Labor Standards Act and Child Labor Protections

The original enactment of the Fair Labor Standards Act in 1938 failed to provide any protection to farmworkers and, in fact, explicitly exempted agricultural workers from its coverage. This version of the Act was passed despite President Roosevelt's May 24, 1937 statement to Congress: "Legislation can, I hope, be passed at this session of the Congress further to help those who toil in factory and on farm." The exclusion of farmworkers was due, in part, to the view (promoted by powerful growers' lobbies) that agriculture was a unique industry. The myth persists even today that "working in the fields is wholesome and worthwhile in comparison to working indoors and that long hours and low wages somehow should be more acceptable to field workers no matter how back-breaking their work or how despicable their work conditions." Actually, migrant farm laborers may be the most vulnerable of all workers. Their health and malnutrition is among the worst in the nation. The incidence of malnutrition is higher among migrant workers than any other demographic group in the country. Moreover, the infant mortality rate for migrants is 125 percent higher than the national average, and the life expectancy of the migrant farmworker is only forty-nine years.

*Harvest of Shame,* Edward R. Murrow's 1960 documentary on the deplorable conditions of migrant labor in American agriculture,

---

29. Id.
30. Id. at 14 (statement of George L Ortiz).
32. Id. (emphasis added).
34. R. GOLDFARB, supra note 23, at 154.
35. Hunger Among Migrant and Seasonal Farmworkers: Hearing Before the House Select Comm. on Hunger, 99th Cong., 2d Sess. 5-6 (1986) [hereinafter Hunger Among Farmworkers Hearing].
36. Id. at 59.
37. Id.
drew national attention to the plight of the migrant farmworker in the United States. The film helped garner popular support for the movement to change this deplorable situation.39 The 1960s were marked by a shift in attitudes toward migrant farmworkers, with the result that both the Democratic and Republican party platforms featured promises to improve living and working conditions for migrant laborers.40 In 1966, the Fair Labor Standards Act was amended to raise minimum wages and extend protection to employees not previously covered under the Act, including agricultural workers.41 The 1966 amendments also imposed prohibitions against oppressive child labor in agriculture.42 The Senate report on the proposed 1966 amendments discusses Congress' purpose in passing the FLSA in 1938 and the proven effectiveness of the Act in affording worker protections and stimulating the economy.43 Congress extended the protections of the Act to farm-

39. The film was aired on Thanksgiving Day, 1960, and implored the American people to hold themselves accountable to the agricultural workers that had labored to provide them with the food on their tables:
   
   A hundred and fifty different attempts have been made in Congress to do something about the plight of the migrants. All except one has failed. The migrants have no lobby. Only an enlightened, aroused, and perhaps angered public opinion can do anything about the migrants.
   
   The people you have seen have the strength to harvest your fruit and vegetables. They do not have the strength to influence legislation. Maybe we do.
   
   Id. (closing remarks of Edward R. Murrow).


42. Id. at 29 U.S.C. § 213(c) (Supp. IV 1965-1968).

43. The Fair Labor Standards Act was enacted in 1938 to meet the economic and social problems of that era. Low wages, long working hours, and high unemployment plagued the Nation, which was then in the midst of an unprecedented depression. The policy of the act, as set forth therein, was to correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.

   The Fair Labor Standards Act has proven through the years that its basic concept is sound. Despite the warnings of some critics who predicted the act would produce economic disaster, we have seen our economy emerge stronger than ever. Far from being an impediment to progress, the act has served as a foundation upon which has been built a standard of living for our citizens which is second to none. It has enabled countless Americans to enjoy a dignity, security, and a general well-being which would not otherwise have been possible.

   It is imperative, if the act is to have real meaning, that the minimum wage provide earnings above the poverty level. It is a shocking fact that demands immediate remedy that 41 percent of all children living in poverty were in families where there is a worker who has a full-time job throughout the year.

workers in 1966, because it recognized the correlation between the migrant workers' oppressive working conditions, poverty, and their exemption from the original FLSA:

Poverty is not restricted to the unemployed alone. Many who are counted among the ranks of the poor are workers who receive less than a living wage. One of the reasons for this is that they are employed in industries outside the protections of the Fair Labor Standards Act. Extending the coverage of the act will do much to relieve the plight of these "working poor." 44

Today, however, more than fifty years after the original passage of the Fair Labor Standards Act, and twenty-five years after the 1966 amendments extended FLSA protections to agricultural workers, the plight of the migrant farmworker continues. Edward R. Roybal, Chairman of the House Select Committee on Aging, recently remarked:

I have called this hearing today after 30 years when we first saw a documentary by Edward R. Murrow who called it "The Harvest of Shame."

Unfortunately, little has changed in the past 30 years . . . . We will again hear that the farmworker still lives in the same deplorable conditions . . .

Across the board, farmworkers seem to be treated as second class citizens. Different labor standards, including child labor, exemption from employee taxes, and lower Federal housing standards are allowed for employed farm labor distinct from standards for all other citizens. 45

Thus, the plight of the migrant worker persists. Despite the inclusion of agricultural employees under the FLSA, migrant farmworkers may be the most underrepresented sector of workers in our society, 46 and their children are still more vulnerable to exploitation.

A. Child Labor Provisions of the Fair Labor Standards Act

Like their adult counterparts, child farmworkers were excluded from the 1938 Act and consequently remained vulnerable to oppressive child labor practices. 47 Despite a national outcry against children performing sweatshop labor, the country seems to have ignored the problem of oppressive child labor in agriculture. One commentator has
noted, "The reason for this shocking neglect was the continuing misconception that agriculture was not hard, difficult, or dangerous labor." It is the persistence of this myth that has kept children in the fields:

We have been told . . . that the toil of children in the fields is somehow different from the sweat and strain of children in the textile mills—that it is somehow cleaner, somehow more fun, less dangerous, and really educational—or at least "healthy." The opponents of child labor laws will say this even though the cold facts are that agriculture is the third most dangerous of all our Nation's industries, exceeded only by mining and construction in the rate of death caused by on-the-job accidents.

In 1974, further amendments were adopted prohibiting the employment of all children under the age of twelve in agriculture. But children working outside of school hours on a family farm or with the consent of the parents were exempted. A section was also added requiring employers to provide proof of the child's age.

Protections for child farmworkers remain inadequate because even children under twelve can work on a "family farm," and can hand-harvest with their parents' consent on smaller farms exempt from FLSA minimum wage protection. Nonetheless, FLSA does carefully detail the conditions under which children may and may not work. The Act focuses primarily upon the age of the child, limiting or prohibiting work by children during school hours.

For purposes of the FLSA "oppressive child labor" is defined as the "employment of a minor in an occupation for which he does not meet the minimum age standards of the Act, as set forth in § 570.2 [of the regulations implementing the FLSA]." Section 570.2 provides

---

53. Id. at 29 U.S.C. § 213(c)(1)(A).
54. Id.
"Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child
generally that children in agriculture must be sixteen years old before they can work during school hours. If four to sixteen-year-olds may work in agriculture after school hours. Twelve- and thirteen-year-olds may work after school hours with the written consent of a parent. After amendment in 1974, the FLSA prohibited nearly all agricultural employment of child laborers under age twelve. Under a 1977 amendment, however, the Secretary of Labor was given authority to waive this prohibition with respect to ten- and eleven-year-old children harvesting short-season crops under non-hazardous conditions, as long as the children are not employed for more than eight weeks during the summer months and the grower certifies that workers over the age of twelve are not available. Despite these complex rules against oppressive child labor, many children remain completely unprotected by the FLSA.

B. The “Family Farm” Exemption

Although these rigid guidelines proscribe oppressive child labor in many contexts, section 213(a)(6)(B)—the “family farm” exemption—expressly excludes children from the protective provisions of the Act when they are employed by a member of their “immediate family.” When the parent is classified as an independent contractor, in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age.

56. 29 C.F.R. § 570.2(b) (1990).
57. Id.
58. Id.
62. 29 U.S.C. § 213(a)(6)(B) (1988) exempts "any employee employed in agriculture . . . if such employee is the parent, spouse, child, or other member of his employer's immediate family."
the child no longer is considered an employee of the grower. Therefore
the child labor provisions and other protections afforded "employees"
do not apply.63 Thus, under a scheme in which migrant farmworkers
are treated as independent contractors, their children, who also work
the fields, are left unprotected from the abuses of oppressive child
labor. Under the family farm exemption, even children under twelve
are allowed to work in the fields without any federal regulation of
hours or working conditions.64 The only protective regulations appli-
cable to these children are state regulations requiring school-age chil-
dren to be physically present in school while it is in session.65 Thus,
during the summer months children may be forced to toil all day
alongside their parents in fields owned by large agricultural concerns,
and this does not constitute a violation of any federal child labor laws.
So long as a child is employed by a parent on a farm nominally owned
or "operated" by the parent, and works outside of normal school
hours, there is no age or hour limitation on the child's agricultural
labor.66

The family farm exemption stems from a tradition deeply imbed-
ded in the American value system. According to the American model
of the privately owned and managed family farm, all members of the
family, including the children, contribute their labor and share equally
in the fruits of the harvest. Indeed, "by 1910, nearly two million chil-
dren between ten and fifteen years of age were at work full-time, and
of these, nearly three-quarters were agricultural workers, the majority
of them employed by their own parents on the family farm."67 When
the family was unable to contribute enough labor to run the farm
efficiently, outsiders or "hired hands" were sometimes brought in.68
These hired hands were the predecessors of today's migrant farm-
workers, albeit on a far different socio-cultural footing:

The "hired hand" had a place in this family farm agriculture only
to the extent that he worked for wages on a neighbor's farm until

---

63. See Donovan v. Brandel, 736 F.2d 1114, 1115 (6th Cir. 1984).
between the ages of six and eighteen to attend public or private school full-time). Most states
have education codes similar to that of California. All states, with the exception of Mississippi,
have compulsory school attendance laws. The standard age requirement is seven to fifteen
years old but varies. C.L. BRADEN, COMPULSORY SCHOOL ATTENDANCE LAWS AND THE JUVENILE
STAT. ANN. § 120.101 (West Supp. 1991) (compulsory instruction from ages seven to sixteen);
N.Y. EDUC. LAW § 3205 (McKinney 1981) (compulsory education from ages six to sixteen).
66. See 29 C.F.R. § 570.2(b) (1990).
67. NATIONAL INDUSTRIAL CONFERENCE BOARD, THE EMPLOYMENT OF YOUNG PERSONS IN
THE UNITED STATES 24-25 (1925).
he moved up the agricultural ladder by buying or homesteading his own farm. Hired hand was only a temporary occupation; since these future farmers were culturally and socially similar . . . . [F]armworkers were believed to be interested primarily in the same high farm prices and low transportation costs that concerned farmers, not higher wages or job security.69

Today the "hired hand" has been replaced by the migrant worker, and the "family farm" is fast becoming a thing of the past.70 Studies indicate that between 113,000 and 220,000 migrant farmworkers are employed in California alone.71

Migrant farmworkers employed by large agricultural concerns do not fit this historical prototype of the "hired hand." To characterize the migrant worker as an independent business person contracting freely with the grower is an extremely inaccurate portrayal of the true balance of power in the working relationship. Furthermore, characterizing migrant child workers as children "helping out" on the family farm or in an independent business operation is pure fiction. As noted by Roger Sawyer in his book, Children Enslaved, the levels of exploitation suffered by farmworkers can be conceptualized as a series of concentric circles: "[W]ithin the outer circle are the American agricultural workers; next come the migrant workers; next the child workers, finally, in the centre, the more exploited category of all, the child migrant workers."72

Familiar designations—"sharecropper" or "sharefarmer"—now are applied in wholly inappropriate circumstances. Traditionally, a sharefarmer entered into an agreement with the landowner allowing him to enter onto the land, run an independent farming operation, and repay the landowner with a portion of the crops harvested.73 It is a stretch of the imagination, however, to characterize today's migrant farmworkers and their families as managers of "independent farming operations." In a majority of the contractual arrangements between migrant workers and landowners, the farmworker exercises little control over the care and management of the entire operation.74

---

69. P. MARTIN, supra note 40, at 4.
70. "Statistics on farm foreclosures indicate that the family managed farm, once a traditional American institution, is quickly moving toward extinction." Farm Crisis: Growing Poverty and Hunger Among America's Food Producers, Hearing before the Domestic Task Force House Select Committee on Hunger, 100th Cong., 1st Sess. 1 (1987).
71. P. MARTIN, supra note 40, at 103.
73. "In essence, 'sharefarming agreements,' are those entered into by an owner of land, who agrees to permit another to enter onto his land and cultivate/utilize it, in consideration for a share of the profits/produce derived from the sharefarmer's cultivation/utilization." Byrne, Sharefarming Agreements, 60 LAW INST. J. 686, 686 (1986).
74. See Linder, Employees, Not-So-Independent Contractors, and the Case of Migrant
Workers often sign these independent contractor agreements only because they are forced to as a condition of employment. Workers thus manage to avoid liability under the FLSA provisions by manipulating the formal designation of their relationship with their migrant workforce.

In enacting the FLSA, Congress clearly stated its intent that only sharefarmers who are truly employees, and not independent contractors, should enjoy the labor protection provisions of the FLSA. By requiring migrant workers with children to sign sharefarming contracts as a condition of employment, and labeling them as independent contractors, growers effectively escape liability for violations of the child labor provisions of the FLSA. Congress, however, did not intend this result. The legislative history of the 1966 amendments indicates that workers who are closely directed by the landowner and exercise no discretion are employees for purposes of the Act and are entitled to its protections.

III. The Importance of the Distinction Between Independent Contractor and Employee Status to the Migrant Worker

Creation of a class of workers exempt from FLSA protections is not the only economic incentive for growers to insist on sharefarming contracts. Sharefarming arrangements also tend to increase harvest quality and decrease labor supervision costs. Taken together, these economic factors constitute a powerful motivation for growers to improperly classify workers as independent contractors, when the economic reality of the situation dictates that they should be designated employees. As a result, a number of cases arising in state and federal
courts have addressed the issue whether a migrant farmworker should be labeled an independent contractor rather than an employee, and if so, under what circumstances.\textsuperscript{80}

A. FLSA Definitions: Employer and Employee

The Fair Labor Standards Act of 1938 was enacted by Congress as a remedial and humanitarian statute to address "the plight of working men and women who labored under unhealthy conditions for unlimited numbers of hours."\textsuperscript{81} The Act was designed to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."\textsuperscript{82}

The terms "employee" and "employer" were defined in very broad terms under the Act in order to protect workers from such deleterious working conditions.\textsuperscript{83} The FLSA defines "employee" as "any individual employed by an employer" and defines "employ" as "to suffer or permit to work."\textsuperscript{84} These broad, vague definitions require fact specific judicial interpretation of the Act's applicability in order to serve its remedial and humanitarian purposes.\textsuperscript{85} So far, courts have engaged in a case-by-case determination of employee versus independent contractor status, rather than strictly applying common law principles.\textsuperscript{86}

or overtime pay. Nor do their employers pay for FICA, or state workers' compensation, disability, or unemployment insurance.


80. See, e.g., Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1538 (7th Cir. 1987) (migrant farmworkers picking pickles were employees of farmers); Donovan v. Brandel, 736 F.2d 1114, 1115 (6th Cir. 1984) (migrant farmworkers who contracted to harvest pickle crops were not "employees"); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 755 (9th Cir. 1979) (strawberry grower was employer of farmworkers); Maldonado v. Lucca, 629 F. Supp. 483, 484 (D.N.J. 1986) (blueberry grower and crew leader were "joint employers" of farmworkers); Donovan v. Gillmor, 335 F. Supp. 154, 163 (N.D. Ohio 1982) (migrant workers were "employees" for purposes of the FLSA); S.G. Borello & Sons v. Dep't of Indus. Relations, 48 Cal. 3d 341, 346, 769 P.2d 399, 401, 256 Cal. Rptr. 543, 545 (1989) (migrant cucumber harvesters under sharefarming contracts were "employees" for purposes of the FLSA).

81. R. GOLDFARB, supra note 23, at 153.


86. Donovan v. Brandel, 736 F.2d 1114, 1116 (6th Cir. 1984).

87. Id. Under English common law, two tests were utilized to determine employee status. Linder, supra note 74, at 443-44. These two tests are: the "nature of work test," emphasizing
The United States Supreme Court has endorsed a broad interpretive approach toward the terms "employee" and "independent contractor" under the Fair Labor Standards Act:

The very specificity of the exemptions [to FLSA protections] . . . and the generality of the employment definitions indicates that the terms "employment" and "employee," are to be construed [broadly] to accomplish the purposes of the legislation. . . . [A] constricted interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation. These considerations have heretofore guided our construction of the Act. 88

Consistent with this broad approach, the Court has held that the existence of an agreement labeling the worker an "independent contractor" is not dispositive of the issue: "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." 89 Unfortunately, the Supreme Court's endorsement of a "broad interpretation" of the term "employee" for purposes of the FLSA does not indicate how expansive this "broad interpretation" is to be. As noted by Judge Easterbrook, "[A]lways the question about a 'remedial' statute is, how much help was it intended to give the benefited group?" 90 Because there is no legislative guidance as to when an agricultural worker properly is deemed to be an independent contractor rather than an employee, 91 courts must make this determination on a case-by-case basis.

B. Advantages of the Independent Contractor Designation for Growers

In addition to creating a legal category of workers exempt from FLSA labor protections, sharefarming arrangements offer other ad-
vantages to growers. For example, sharefarming discourages unionization of the workers. Professor Miriam Wells describes some motivations of strawberry growers for creating sharefarming contracts:

The adoption of sharecropping . . . promised some relief from the pressures confronting the industry. It was a course of action pursued primarily by larger growers whose scale made them likely targets for the union, rendered them subject to protective legislation, and hampered the close personalistic ties through which smaller berry growers discouraged unionization.92

These arrangements are particularly attractive to growers when the quality of hand labor is a major determinant of profitability. Workers logically will pay more attention to the quality of their work if their livelihoods depend upon the quality of the harvest, rather than mere quantity. For example, with crops such as cucumbers destined for pickle production, the size and shape of the cucumbers determine the market price paid for the harvest.93 The sharefarmer receives a proportionate share of the profits from the produce sold and therefore has a stake in the quality of the crop. This arrangement provides worker incentive and reduces the need for supervision. The Sixth Circuit further described the advantages of sharefarming contracts to cucumber growers:

This method of “subcontracting” was found to have been implemented because of the unique aspects of pickle marketing. Unlike most other crops, the market price of the pickles does not increase proportionately with their size, i.e., there are seven specific size grades, and the smaller pickles bring a higher price per pound than larger pickles. Paying harvesters on a piecework basis had proved to be less profitable because of the extensive and ineffective supervision it required.94

“Piecework” or “piece rate” payment is a system by which workers are paid a set price per basket picked. “The ‘piece rate’ varies with the size of the particular vegetable or fruit being harvested.”95 The same is true of strawberries:

The fragility of the fruit, along with the need to constantly manicure and weed the plants in the course of harvest, means that workers must exert care, some skill, and judgment. Crop yields are a function of carefully monitored planting and harvest schedules, and harvest

92. Wells, supra note 79, at 73-74.
94. Id.
selection, handling and packing are prime determinants of market price. 96

Under a straight piece rate arrangement, in which the farmworker is paid by the bucket picked or by weight, the worker is more likely to be sloppy and include crops of inferior quality. Having to constantly police workers in the fields to ensure that they pick only the crops most suitable for market is very costly to the grower.

In a sharefarming arrangement, however, the worker is given considerable incentive to pay attention to quality control. Obviously, if the migrant worker's income is derived solely from a percentage share of the profits made, the worker will have an increased incentive to maximize profits by picking only the most marketable crops. Thus, the burden and expense of quality control are shifted from the grower to the worker. Sharefarming arrangements are used by growers not only to avoid the expense of compliance with the FLSA, but also to shift the burden of harvest selection and worker supervision onto the workers themselves.

C. Crew Leaders and the Joint Employer Doctrine

(1) Crew leaders

Under the Fair Labor Standards Act, only an "employer" 97 is responsible to the migrant farmworker for compliance with the Act's protections. A grower must comply with the FLSA only if he, rather than some other person or entity, is determined to be the worker's "employer." A method used by growers to avoid the requirements of the Fair Labor Standards Act is to shift employer responsibilities to a crew leader. Crew leaders are contractually hired labor recruiters. They supply growers with sufficient numbers of migrant farmworkers during critical periods in the harvest season. 98 The crew leaders are responsible for recruiting workers, transporting them to the work site (sometimes from more than a thousand miles away), and directing the workers in the fields. 99 Almost all crew leaders themselves have spent much of their lives as migrant farmworkers, 100 but they somehow man-

---

96. Wells, supra note 79, at 54 (citation omitted).
98. B. ASHBRANNER, supra note 14, at 32.
99. Id.
100. Id. at 33.
aged to acquire the start-up capital for the equipment and transportation necessary to go into business as crew leaders. The crew leaders usually receive a percentage of their crew’s earnings, which makes their earnings subject to the same vagaries of weather, market fluctuation, and labor supply that affect growers and farmworkers. In addition, the crew leader must pay for the costs of recruitment, such as transportation, equipment (including buses, gasoline, repairs), and insurance. As a result, many crew leaders lead as shaky a financial existence as the workers and eventually go out of business. The crew leader is hired by the grower as an independent contractor, and growers usually attempt to shift responsibility for worker protections under the FLSA to the crew leader by claiming that the crew leader is the workers’ sole employer. The growers often are able “to shift responsibility for violations of various legal protections to crew leaders.”

This works a hardship on migrant farmworkers “who are underpaid in the first instance and who cannot realistically recover unpaid wages from a crew leader who is undercapitalized and nowhere to be found.” Despite the fact that the migrant farmworkers designated as the crew leader’s employees are theoretically protected by the FLSA, actual protection under the Act is extremely elusive given that the crew leaders themselves are migrant workers.

(2) The Joint Employer Doctrine

Despite claims by growers that the crew leaders are the sole employers of the migrant workers and thus solely responsible for compliance with the FLSA, courts sometimes look beyond this subterfuge and hold both the crew leader and the grower responsible as “joint employers.” Under the joint employer doctrine, two or more separate entities or individuals are considered simultaneous “employers” of the farmworker:

101. Id. at 32-33.
102. Id. at 33.
103. Id.
105. Tierce notes that “[f]armers have often sought to avoid compliance and liability under federal and state statutory and common law by claiming that the crew leaders who recruited the farmworkers are independent contractors and, therefore, responsible for any statutory violations or duties imposed by law.” Id. at 865.
A joint employment relationship is generally deemed to exist (1) where one employer is acting directly or indirectly in the other's interest in relation to the employee and (2) where the employers are "not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."108

By holding both the growers and the crew leaders responsible for compliance with the FLSA as joint employers, the courts can defeat growers' attempts to insulate themselves from liability by interposing a middleman, the crew leader, between themselves and their workers.

In Hodgson v. Griffin & Brand of McAllen, Inc.,109 a leading case on the joint employer doctrine, the court pierced the "independent contractor veil" and held both the crew leader and the grower liable as joint employers. The plaintiff in Hodgson sought to enjoin a grower from violating the minimum wage, record-keeping, and child labor provisions of the FLSA.110 The grower did not dispute that violations had occurred, but vigorously denied that it was the farmworkers' employer because the workers had been hired by a crew leader who was an independent contractor.111 The court disagreed with the grower and held that "independent contractor status does not necessarily imply the contractor [crew leader] is solely responsible for his employees under the Fair Labor Standards Act. Another employer may be jointly responsible for the contractor's employees."112 Thus, the grower could not escape liability for violating child labor provisions of the FLSA by merely passing on the "employer" title to the crew leader. The Hodgson court emphasized the need to focus on the economic reality underlying these relationships in determining whether the grower is, in fact, the farmworkers' employer.113 The joint employer doctrine thus allows the courts to examine the totality of the circumstances and recognize that a crew leader, himself a migrant worker, is not the sole employer of the farmworker. Instead, the crew leader is really no more than an agent of the grower.114 By naming the grower a joint employer of the farm labor crew, the court focuses on the realities of the ec-

108. Maldonado, 629 F. Supp. at 487 (citing 29 C.F.R. § 791.2(0)(2), (3) (1990)).
110. Id.
111. Id. at 237.
112. Id. (citing Boire v. Greyhound Corp., 376 U.S. 473 (1964); Mitchell v. Hertzke, 234 F.2d 183 (10th Cir. 1956); Fahs v. Tree-Gold Co-op Growers, 166 F.2d 40 (5th Cir. 1948)).
113. Id. (citing Shultz v. Hinojosa, 432 F.2d 259, 264 (5th Cir. 1970)).
onomic power structure involved and eliminates a legal loophole by which a grower may escape his duty to provide FLSA protections by shifting "employer" responsibilities to the crew leader.

D. Recent Developments in the Controversy Over Migrant Worker Employment Status in California

The California Supreme Court considered the question whether sharefarmers should be treated as "employees" or "independent contractors" to be of such vital importance that it reviewed sua sponte a ruling on the issue by the Sixth District Court of Appeal. In Borello & Sons v. Department of Industrial Relations,115 the court held that the sharefarmers in question were employees of the grower, not independent contractors, and therefore were entitled to the protections of the FLSA.116 The primary focus of Borello was the growers' duty to pay workers' compensation premiums. Although the growers originally were cited for violating the child labor laws as well, those charges were dropped.117 Nevertheless, the decision is important to the issue of migrant child farm labor in California because the court's determination that a parent sharefarmer is an employee of the grower, rather than an independent contractor, removes migrant child labor from the "family farm" exemption. As a result of this decision, "fewer independent contractor relationships will be recognized and employers will have to make people employees."118 Thus, any grower found to be a joint employer can no longer evade the child labor provisions of the FLSA.

Borello sent a clear message to California growers that the courts will uphold the remedial and humanitarian purposes of the FLSA in determining whether sharefarmers are employees or independent contractors. This is apparent from the court's reluctance to classify sharefarmers as independent contractors because such a classification would remove them from statutory protection:

A conclusion that the sharefarmers are "independent contractors" under the Act would suggest a disturbing means of avoiding an employer's obligations under other California legislation intended for the protection of "employees," including laws enacted specifically for the protection of agricultural labor . . . [such as] laws governing

---

115. 48 Cal. 3d 341, 769 P.2d 399, 256 Cal. Rptr 543 (1989) (en banc).
116. Id. at 346, 769 P.2d at 401, 256 Cal. Rptr at 545.
117. Id. at 348 n.4, 769 P.2d at 402 n.4, 256 Cal. Rptr. at 546 n.4.
118. Sharefarmer Deemed Employee Under Workers' Comp., L.A. Daily J., Mar. 24, 1989, at 10, col. 1. It is estimated that about 20,000 sharefarmers in California will be directly affected by this decision. Echenique, supra note 1, at 33.
minimum wages, maximum hours, and (as illustrated in this case) employment of minors . . . .119

Joan Graff, Executive Director of the Employment Law Center, an intervenor in Borello, stated, “[M]any members of the working poor who are often the victims of independent contractor arrangements will now be properly considered employees and be protected by [the] wealth of laws that exist for them.”120

In Borello, the California Supreme Court rejected earlier state decisions that followed common law tradition. Those earlier decisions uniformly had declared that “the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”121 This common law approach focused on the degree of control involved in the working relationship.122 Rejecting this approach, the California Supreme Court held that while the “right to control” test is a significant factor to be weighed in determining whether or not a worker is an employee, other considerations also must be weighed. The court included in those considerations the six-factor test employed in Real v. Driscoll Strawberry Associates.123 This test is to be applied in light of the remedial purposes of the FLSA124 and the intent of Congress to “[f]ree commerce from production of goods under conditions that [are] detrimental to the health and well-being of workers.”125 The test adopted by the Borello court is virtually identical to the test used by federal courts.126 The first five factors to be considered are:

(1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business.127

119. Borello, 48 Cal. 3d at 359, 769 P.2d at 410, 256 Cal. Rptr. at 554.
121. Borello, 48 Cal. 3d at 350, 769 P.2d at 404, 256 Cal. Rptr. at 548 (quoting Tieberg v. Unemployment Ins. Appeals Bd., 2 Cal. 3d 943, 946, 471 P.2d 975, 88 Cal. Rptr. 175 (1970)).
122. Linder, supra note 74, at 444.
123. 603 F.2d 748, 754 (9th Cir. 1979).
124. Id.
126. See, e.g., Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1536-38 (7th Cir. 1987); Donovan v. Brandel, 736 F.2d 1114, 1117-20 (6th Cir. 1984); Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979); Donovan v. Gillmor, 535 F. Supp. 154, 161-63 (N.D. Ohio 1982).
127. Borello, 48 Cal. 3d at 355, 769 P.2d at 407, 256 Cal. Rptr. at 551 (citing Real v. Driscoll Strawberry Assocs., 603 F.2d 748, 754 (9th Cir. 1979)).
The sixth factor used by the *Borello* court is the employer’s “right to control the work.”

Although *Borello* uses a six-part test in determining employee status, the five enumerated factors plus the “right to control” test, some courts use essentially the same factors but as a five-part test. For example in *Donovan v. Brandel,* the U.S. Court of Appeals for the Sixth Circuit listed five factors identical to five of the *Borello* factors: (1) permanency of the relationship; (2) degree of skill required; (3) worker’s capital investment; (4) opportunity for profit or loss; and (5) employer’s right to control. The court then added that an additional factor, not specifically addressed by the trial court, “may be whether the service rendered is an integral part of the alleged employer’s business.” This, of course, parallels the fifth *Borello* factor.

In other words, both federal and California courts determine whether workers are “employees” under the Act on a case-by-case basis, with the determination of a worker’s status depending “upon the circumstances of the whole activity.” Despite a thorough judicial analysis of the totality of the circumstances surrounding the employment relationship, decisions of such vital importance to the lives and livelihoods of migrant workers arguably should be handled by the legislature and should not be left to the inconsistencies of ad hoc judicial determination.

---

128. *Id.* at 354, 769 P.2d at 407, 256 Cal. Rptr. at 551. The “right to control” test has been criticized because it “looks exclusively at the personal, physical subordination of the worker to the employer at the work site and ignores the overriding socioeconomic dependence of employees on the employing class that manifests itself in the individual employment relationship.” *Linder,* supra note 74, at 446.

This overriding socioeconomic dependence is aptly illustrated by Sonia Nazario, reporter for the Wall Street Journal:

The life [migrant farmworkers] lead isn’t much different from migrants’ life 20 years ago. Today’s migrants earn, on the average, only about $7,000 a year, and they have problems receiving welfare benefits because they must reapply for assistance and wait one month to receive benefits again every time they move . . . . Cases of peonage, where workers are enslaved by crew chiefs, still exist, according to the Department of Labor. Child labor remains common. Housing is short, and . . . some families here still live in trucks or in the lemon groves.

[According to one migrant worker], [h]er crew chief wouldn’t pay the minimum wage, but work was hard to get and a complaint could get you blacklisted . . . . “People want out, but they don’t see any options. They think, ‘This is all I can do.’”


Nevertheless, courts, continue to rely on the “right to control” factor in determining employee status in sharefarming cases.

129. 736 F.2d 1114 (6th Cir. 1984).
130. *Id.* at 1117-19.
131. *Id.* at 1119-20.
IV. Inherent Defectiveness of Case-By-Case Analysis

A case-by-case determination encourages growers to designate all migrant farmworkers as independent contractors because it is unlikely that any worker will go to the expense and burden of litigating the issue to secure worker protections. Judge Easterbrook, in his concurring opinion in Secretary of Labor v. Lauritzen,\(^{133}\) notes the undesirability of de novo, case-by-case determination of employee status:

Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs.... Courts have had plenty of experience with the application of the FLSA to migrant farmworkers. Fifty years after the Act’s passage is too late to say that we still do not have a legal rule to govern these cases. My colleagues’ balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of “economic reality” matter, and why.\(^{134}\)

An opposite result would be reached if the courts or the legislature created a presumption that migrant farmworkers are employees and not independent contractors. Without this protection, however, workers will continue to be forced, as a condition of employment, to sign statements labeling them as independent contractors and not employees.\(^{135}\)

A case-by-case determination of employee status presents three additional problems. First, requiring migrant farmworkers to challenge the growers in court in order to vindicate their rights under the FLSA ignores the reality of the workers’ extreme economic dependence upon the grower. Second, even if federal and state courts uniformly adopt the Borello six-part test for determining employee status, there would be a lack of uniformity in its application. This could force parties to litigate without any clear predictability as to how the test will be interpreted under varying factual circumstances. Finally, liti-

\(^{133}\) 835 F.2d 1529 (7th Cir. 1987).

\(^{134}\) Id. at 1539 (Easterbrook, J., concurring).

\(^{135}\) See Linder, supra note 74, at 438. These are often lengthy, complicated contracts, written in English. See, e.g., Real v. Driscoll Strawberry Assocs., 603 F2d. 748, 750 n.1 (9th Cir. 1979). The Real court described the contract between the grower and the migrant worker:

The Agreement, written in English, consists of seventeen, legal-size pages containing much legal terminology. The appellants, all Spanish-speakers, allegedly never have mastered the English language. In most cases, a sublicensee signs the Agreement only once. Thereafter, the parties annually extend the Agreement by means of a one- to two-page “addendum” signed by Driscoll [the grower], DSA [the produce buyer] and the individual “Sub-Licensee.”

Id.
gation may be tainted by erroneous attitudes and insensitivity to the plight of the migrant family in general.

A. Economic Realities

Perhaps more than any other laborers, migrant workers are economically dependent on their employers. They customarily receive pay well below the federal minimum wage. Because they migrate across the country to follow the cycle of seasonal crops, they are dependent on these limited seasonal periods for the bulk of their annual incomes. Their economic dependence allows them little choice as to their employment relationships and working conditions.

Yet despite this economic reality, a migrant worker's only recourse when faced with unfair labor practices is the tremendous burden of litigation. Moreover, the worker is pitted not only against a powerful grower, but also against other area growers who clearly have a stake in the outcome of the litigation. The workers are further burdened by the courts' application of FLSA provisions defining employee status because the courts fail to uniformly recognize the realities of economic dependency. Even if an amendment to the FLSA were enacted creating a presumption of employee status in sharefarming contracts, a worker's only recourse in vindicating his FLSA rights would still be through the judicial system, a system fraught with inconsistent and unpredictable rulings. Marc Linder, a labor lawyer from south Texas argues:

For the purposes of federal employment relations legislation, migrant farm labor should qualify as the prototype of employment dependency. Yet in spite of more than two decades of federal labor law directed towards guaranteeing protection of migrant agricultural workers, a considerable portion of all private actions brought under legislation such as the FLSA on their behalf of migrant farmworkers has been and continues to be bogged down in the Sisyphean labor of proving time and again that the plaintiffs are not independent contractors or employees of judgment-proof, straw-men crewleaders or contractors, but are indeed employees of powerful and financially responsible agricultural employers.

Aside from the obvious expense of litigation, workers are reluctant to seek redress in the courts for other reasons. They often are ignorant of their rights and are "afraid to press their complaints be-

136. Only 44% of all farmworkers are legally entitled to the federal minimum wage. Harvest of Shame Hearing, supra note 13, at 216 (Report of JoAnne Kane, McAuley Inst.); see 29 U.S.C. $206 (1988) for minimum wage provisions.
137. Linder, supra note 74, at 436-47 (citations omitted).
cause of the strength of the forces working against them."\footnote{138}

\textbf{B. Arbitrariness in Application of the Six-Part Test}

The second problem inherent in a case-by-case determination of employee status is the lack of uniformity and predictability in applying the \textit{Borello} six-part test. Despite using virtually identical guidelines in determining employment status, various federal courts have come to different conclusions about employment relationships in virtually identical fact situations.

For example, in \textit{Donovan v. Gillmor},\footnote{139} an Ohio district court determined that migrant pickle farmers were employees rather than independent contractors.\footnote{140} The growers therefore were held liable for violations of the FLSA child labor provisions. The court listed the bases for its conclusion: (1) the defendant growers had entire control over the cucumber crop; (2) the investment contributed by the migrant workers was nearly zero; (3) the migrant workers' "opportunity for profit" must be seen for what it really was—wages paid for pickles picked with no possibility of loss because the migrants had no investment to lose; (4) the job required little skill, demonstrated by the fact that children under the age of twelve were working in the fields; and (5) the working relationship was, in essence, permanent.\footnote{141}

Two years later, in \textit{Donovan v. Brandel},\footnote{142} the Sixth Circuit, focusing on the same factors,\footnote{143} reached the opposite conclusion under nearly identical factual circumstances. The \textit{Brandel} court held that migrant pickle farmers in Michigan were not employees under the FLSA, but rather independent contractors.\footnote{144} The defendant grower in \textit{Brandel} was charged with continuous violations of the FLSA's child labor and record keeping provisions.\footnote{145} The Sixth Circuit found that: (1) The grower lacked the right to control the details of the harvesting (despite the fact that he supplied irrigation and pesticides);\footnote{146} (2) the grower's ownership of a large amount of farming equipment was insignificant because that equipment was not primarily involved in the workers' actual task of pickle harvesting;\footnote{147} (3) because the pickle har-

\footnotesize{138. R. GolDFARB, \textit{supra} note 23, at 65.}\n\footnotesize{139. 535 F. Supp. 154 (N.D. Ohio 1982).}\n\footnotesize{140. \textit{Id.} at 163.}\n\footnotesize{141. \textit{Id.} at 161-63.}\n\footnotesize{142. 736 F.2d 1114 (6th Cir. 1984).}\n\footnotesize{143. \textit{Id.} at 1117-20.}\n\footnotesize{144. \textit{Id.} at 1120.}\n\footnotesize{145. \textit{Id.} at 1115.}\n\footnotesize{146. \textit{Id.} at 1119.}\n\footnotesize{147. \textit{Id.} at 1118-19.}
vesters' "remuneration increases by their successful managing of the harvest process," the workers realized opportunity for profit (though no possibility of loss existed);\textsuperscript{148} (4) knowledge of methods of maximizing cucumber production constituted a "skill," setting the laborers apart from harvesters of other crops (despite the fact that young children regularly exercised this "skill");\textsuperscript{149} and (5) the relationship between the grower and the workers was not permanent.\textsuperscript{150}

The conflicting disposition of these two very similar cases clearly illustrates that the language of the six-factor test can be manipulated to support arbitrary and inconsistent conclusions. Therefore, uniform legislation is necessary to prevent ad hoc determinations that may not further the congressional purposes behind the FLSA.

C. Erroneous Attitudes

Another problem inherent in case-by-case determination of employer liability for violations of the FLSA is the courts' insensitivity to the plight of the children forced to work alongside their parents in the field. In \textit{Brandel}, the trial court was of the opinion that "the migrants' primary purpose in bringing their children to Brandel's fields was the opportunity to develop basic skills and family unity."\textsuperscript{151} Glibly noting that the younger children spend more of their time playing than working,\textsuperscript{152} the \textit{Brandel} court completely missed the point that most migrant parents desperately need the income produced by their school-age children and are unable to afford child care for their pre-school age children. It is doubtful that a migrant parent would prefer to have her young child playing alongside irrigation ditches tainted with pesticides while she tries to earn her "share" of the harvest profits. Indeed, migrant children working or playing alongside their parents in the fields may be exposed to more deleterious conditions than any other group of children in the nation:

Widespread health problems among migrant and seasonal farm-worker children include high infant mortality, below average height, upper respiratory infections, parasitic conditions, skin infections, chronic diarrhea, and vitamin A deficiency. Poor nutrition coupled with water deprivation increases the toxic effects of pesticides.\textsuperscript{153}

\textsuperscript{148} \textit{Id.} at 1119.

\textsuperscript{149} \textit{Id.} at 1117-18.

\textsuperscript{150} \textit{Id.} at 1117.

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.} at 1116.

\textsuperscript{153} \textit{Hunger Among Farmworkers Hearing, supra} note 35, at 59 (citing the Farmworker Justice Fund, \textit{The Occupational Health of Migrant and Seasonal Farmworkers in the U.S.} (1986)).
Such misperception and insensitivity to the needs of migrant children are prevalent in many courts and administrative agencies. United States Department of Labor Administrative Law Judge James J. Butler was quoted as saying, "it's customary for migrant children to be in the fields with their parents. They probably can't speak English anyway, and would be bored in school." Perhaps Judge Butler has failed to notice that malnutrition, disease, pesticide poisoning, and an early mortality rate are also "customary" for migrant children. But clearly, their being "customary" cannot justify these oppressive and dangerous conditions of child labor.

Not surprisingly, many growers share Judge Butler's attitude. A Hollister, California, cucumber grower commented, "The children would much rather be with their families than at day care. They don't learn anything in day care anyway. Here they're learning to be self-sufficient."

Judicial insensitivity and misperception, however, are not universal. Ohio District Judge Walinski disagrees with the prevailing assessment of migrant child labor as a form of "self-sufficiency" training:

Farm work performed by migrant workers is unskilled labor. There can be no argument to the contrary on this issue. No special training or experience is necessary to perform the task of picking pickles. The fact that this migrant labor is unskilled is borne out by the allegations that children under the age of 12 were in the fields working.

Judge Walinski, unlike other judges and administrative officers, is unwilling to perpetuate the myth that the labor of migrant children in the fields is healthy or provides safe, early "vocational training." On the contrary, working in the fields is extremely dangerous for children and teaches them no special "skills."

---

155. Taylor reports the following anecdotal evidence of the tragic toll field work and poverty take on migrant children:

In Colorado, Dr. Peter Chase, a pediatrician teaching at the University of Colorado medical school, studied 300 migrant children from 151 families. Clinical tests revealed various signs of serious malnutrition, including evidence of growth retardation, rickets, and marasmus. One or two children showed early symptoms of kwashiorkor, a gross form of malnutrition normally seen only in the most underdeveloped nations.

Dr. Chase reported these seasonal farm worker families suffered an infant mortality rate three times the national average; half their children had never been immunized against diphtheria, pertussis, tetanus, or polo; 10 percent had never seen a doctor. Fifty percent of the children had serious vitamin deficiencies and among this deficient group the doctor found more frequent skin and upper respiratory tract infections.

The argument that family unity and the teaching of traditional "skills" justify either oppressive conditions of child labor or the denial of basic educational privileges to migrant children is not only inherently wrong, it is racist. It implies that parents of Hispanic origin, unlike other parents, would rather see their children continue the tradition of poverty and disenfranchisement than obtain an education; that they choose this course out of preference, not necessity. This assumption completely ignores the reality of migrant parents. They struggle to provide for their families in a labor market in which they compete with similarly desperate workers who are willing to work for sub-minimum wages.

Such racist assumptions about migrant parents' value systems ought not to obscure the real human tragedy of child agricultural labor. School age children and infants should not be in the fields. The fields are especially dangerous for developing children: "Toxic chemical pesticides, such as 'Monitor,' are being widely used, and already there have been deaths despite a Californian regulation prohibiting workers from entering a field within twenty-four hours of its being sprayed."\(^{158}\) Also, the burdens of agricultural labor, such as "stoop labor," can warp the physical development of children employed in the fields.\(^{159}\) In light of the undeniable harm child agricultural labor causes, judicial insensitivity to the plight of migrant families is inexcusable.

V. The Importance of Employment Status in the Abolition of Abuses Against the Child Migrant Farmworker

To avoid violating the FLSA's child labor provisions,\(^ {160}\) an employer who wishes to employ a child ordinarily must acquire a work permit certificate for that child.\(^ {161}\) But if the grower successfully classifies the child's parent as an independent contractor, the child becomes, in effect, an "employee" of her parent rather than the grower, and the grower is exempt from the FLSA's permit requirement. Moreover, the grower is not required to comply with any of the Act's child protection provisions because the child is not considered the grower's

\(^{158}\) R. Sawyer, supra note 72, at 105.

\(^{159}\) Id. at 104.


\(^{161}\) 29 C.F.R. §§ 570.5-570.12 (1990). Penalties for violations of the Act's child labor provisions include civil fines up to $1000 for each violation, 29 C.F.R. § 579 (1990), and criminal fines of up to $10,000 or imprisonment of up to six months or both for any person who willfully violates those provisions, 29 U.S.C. § 216(a) (1988) (imprisonment only after repeat offenses).
“employee.” A child working for a parent in an “independent business operation” is exempt from the Act’s coverage. Thus, the child worker completely slips through the cracks of the FLSA. For example, in Brandel, the grower defendant was charged with continually violating the FLSA’s child labor provisions over a period of years. The court of appeals upheld a lower court ruling that migrant pickle harvesters were not the grower’s employees and, thus, were not covered by the Act. The court weighed the various elements of the six-part test and found an independent contractor relationship despite the fact that Brandel had invested between $62,000 and $72,000 in the operation, whereas the farmworkers only invested in their pails and gloves. Furthermore, Brandel supplied and controlled all irrigation, and determined pesticide use. The court also found that, unlike a person running a true independent business operation, the workers were not exposed to any actual risk of loss. And, though the court noted that the harvesters earned the equivalent of $6.00 to $9.00 per hour, it did not indicate how child labor figured into these estimated earnings, or whether the additional labor of their children was taken into consideration in calculating the harvesters’ hourly wage. Notwithstanding the fact that the parents involved had no real investment in or control over the harvest operation, the Brandel court held them not to be employees and, thus, beyond the reach of the FLSA. Similarly, under Brandel, migrant child laborers in a typical sharefarming arrangement are not considered the grower’s employees, leaving such children unprotected by the FLSA and growers free from any liability for conditions of oppressive child labor.

Decisions like Brandel characterize the migrant worker as an independent business person, free to choose the terms and the grower with whom he will work. This characterization, however, does not reflect the economic realities of the relationship between the grower and the migrant worker. As Linder states, “no valid socio-economic or legal reason can be adduced for classifying cotton-hoers as self-employed business people. If such profoundly dependent workers (in-
cluding seven-year-old children) are independent contractors, the category ‘employees’ is a null-set.”\textsuperscript{172} In addition, Linder aptly describes the almost total lack of bargaining power of the migrant farmworker in west Texas and the grower’s power to exploit the workers, given the competition among migrant workers:

Where the entire structure of the agricultural industry and the tone of its industrial relations are based on the availability of a vast reservoir of impoverished, unskilled workers with no alternative to competing with one another for the same kind of work at the same wage, the commands issued by agricultural employers assume a particularly authoritative character. In parts of west Texas, the going rate for cotton hoeing is $2.50 per hour, eighty-five cents per hour below the federally mandated level. Of the large families of Mexican-American migrant farmworkers who travel to these areas each summer, many must rely on their earnings during this short season for the bulk of their annual income. Competing in a labor market composed in large degree of children and illegal aliens “willing” to work for even less than $2.50 per hour, these workers cannot bargain over, let alone reject, this coercive wage offer.\textsuperscript{173}

As in the Borello case, growers argue that workers seek out and prefer sharefarming arrangements because as “independent business persons,” rather than mere employees, they make more money.\textsuperscript{174} Although the family may in fact make more money, it is because these arrangements allow parents and growers to exploit the labor of children without complying with the Act’s prohibitions against oppressive child labor. In the Borello case, for example, the court found that a sharefarmer’s weekly earnings ranged from a high of $634.34 to a low of $136.04.\textsuperscript{175} The court, however, also noted that:

Richard Borello acknowledged that these amounts must be split among all the members of the sharefarmer’s family who are working in his plot, sometimes as many as eight or nine people—“[h]owever large the family is.” This may produce an effective hourly rate far below that which each worker would presumably have received as an employee.\textsuperscript{176}

Characterizing these workers as independent contractors running independent business operations belies the reality of worker exploitation behind such arrangements.

Because of the farmworkers’ economic dependence, it is the grower, not the farmworker, who is in a position to eradicate the continuing conditions of child oppression in agricultural labor. Many mi-

\textsuperscript{172}. Linder, supra note 74, at 438 n.15.
\textsuperscript{173}. Id. at 466 (example taken from the author’s legal practice).
\textsuperscript{175}. Id.
\textsuperscript{176}. Id. (emphasis in original).
grant workers actually need their children to work; they see no other option to ensure their family’s survival but to get as many family members as possible to work in the fields. The parents’ desire to have their children work alongside them in the fields stems from brutal need, not a reasoned decision about what is best for the child’s development. One government study summed up the reason for oppressive labor among migrant children:

Child labor has all but disappeared from American industry. Only in agriculture does it remain a serious problem. Children work in agriculture today primarily for the same reason they formerly worked in industry—because of poverty in the family. The child’s earnings are needed. This is the same reason given years ago why child labor could not be eliminated in industry.

The growers, on the other hand, have the power to eradicate this problem by classifying each worker—child or adult—as an employee and paying them the federally mandated minimum wage. Even if this creates a hardship on the growers and, ultimately, increased prices passed on to the consumer, it is a reasonable price to pay for the abolition of oppressive labor practices, especially oppressive child labor.

In 1942, one commentator noted the fundamental evils of child agricultural labor:

Due to the absence of labor standards, many of our farms are nothing but sweatshops . . . . Few states even make a pretense of regulating the hours of employment for . . . children in agriculture. Farm labor should no longer be idealized . . . . There is no reason to be sentimental about farmers. We are, as E. C. Lindeman pointed out years ago, a resourceless people if we must rely upon the unpaid labor of women and children to save farming from bankruptcy.

A system which has codified labor standards, but still allows children to fall through the cracks under a legal fiction, works the same evils as the system of sweatshop labor that flourished before the enactment of the FLSA. Surely, this inconsistency cannot be what Congress intended.

More than twenty-five years ago, Senator Javits of New York and Senator Williams of New Jersey argued for reforms in FLSA legislation regarding child agricultural laborers:

177. McConahay, supra note 22, at col. 4; see also R. Taylor, supra note 155, at 21.
179. The legislative history examining the relation of the cost of field labor to the price of farm products to the consumer, indicates that remedial legislation would have only a minor effect on consumer prices. “The conclusion is clear. Field labor is a very small percentage of costs to the consumer.” S. Rep. No. 1487, 89th Cong., 2d Sess. 20, reprinted in 1966 U.S. Code Cong. & Admin. News 3002, 3022.
[W]hat we condemned with indignation over a generation ago in the textile mills and industrial plants of this Nation we continue to accept in an often equally oppressive form—agricultural child labor. There are the same long hours, the same negligible pay, the same back-breaking work, the same exposure to the elements, the lack of educational opportunity despite the nominal restrictions on working “during school hours”—all the same practices which deprive the child of a real childhood . . . .

Considering Congress’ remedial purposes in enacting the Fair Labor Standards Act, it is absurd for courts to exempt migrant children, perhaps the most vulnerable segment of our society, from the protections of this detailed legislation designed to safeguard workers from deleterious labor practices. There can be no justification for allowing industrialized growers to exploit children through a loophole in the law and escape liability under the FLSA’s child labor provisions. “The law of independent contractors has an important place in the law, but surely it was never intended to apply to humble employees of this sort, so completely subject to the domination and control of the employer.”

Sharefarming agreements often force the whole family to pool their earnings, with no single family member earning the minimum wage. A system dependent upon child labor decreases wages by forcing adult workers to compete with cheap child labor. Treating migrant workers as employees, and thus ensuring that they receive at least the minimum wage is essential to the abolition of oppressive child labor. As noted by Cesar Chavez, sufficiently high adult rates of pay will make the family work unit obsolete and migration unnecessary.

VI. Proposed Remedies to the Dilemma of Child Labor in Agriculture

Child migrant workers historically have been denied the FLSA’s protections against oppressive child labor afforded children in other labor markets. In order to provide children working in agriculture the same degree of protection afforded children in other industries and

184. Linder, supra note 74, at 466.
185. R. Sawyer, supra note 72, at 105.
further the congressional goal behind the FLSA of protecting these vulnerable workers from deleterious working conditions, several reforms are necessary. Needed reforms include an amendment to the FLSA abolishing the family farm exemption, judicial recognition of farmworkers as employees per se, and increased enforcement of the child labor provisions of the FLSA.

A. FLSA Amendment Abolishing the "Family Farm" Exemption

An amendment abolishing the FLSA's "family farm" exemption is urgently needed to protect the child agricultural worker. The justifications for treating children in agriculture differently than other children and affording them less protection against oppressive labor conditions are founded on an American myth, the falsity of which can no longer be ignored. For too long, Americans have held the erroneous belief that agricultural work is salubrious, that it teaches vocational skills, and that it somehow enhances child development. In some instances, this assumption may be based on an individual's own life experience, in which he performed some sort of agricultural labor as a child and was unharmed. In fact, agricultural labor is one of the most dangerous of all occupations, severely hindering many children's growth and development and sometimes resulting in injury or death. Furthermore, an amendment abolishing the "family farm" exemption would not proscribe all child farm labor. Such an amendment would simply require that growers hiring child farmworkers comply with the same FLSA child labor provisions that other employers must comply with when hiring other types of child laborers.

B. Migrant Farmworkers as Employees Per Se

Another promising solution to the problem of oppressive child agricultural labor would be categorical recognition, by both state and

187. See supra notes 33-46 and accompanying text.
188. The author's grandmother, Clara Lee Hensel, was unharmed as a child agricultural worker in the early 1920s, despite the fact that, at age 14 she was dynamiting tree stumps without supervision and alone. Indeed, she thought it was "great fun."
189. It has recently been observed that: "Farm work is enormously dangerous, due to both the machinery used and the toxic pesticides and herbicides to which workers are exposed on a daily basis. As a result, farmworkers suffer high rates of serious, occupation-related illness and injury." Staff of the Migrant Legal Action Program, Migrant Law Developments, 23 CLEARINGHOUSE Rev. 1202, 1203 (1990).
190. The Food and Drug Administration has estimated that there are as many as 1,000 deaths and 9,000 injuries among agricultural workers exposed to pesticides. Yet current law allows 14-year-old children to work in the fields without restrictions. And with just a note from their parents, 12- and 13-year-olds also can harvest crops alongside adults. Golodner, The Children of Today's Sweatshops, 73 Bus. & Soc'y Rev. 51, 53 (1990).
federal courts, of unskilled migrant farmworkers and migrant child agricultural laborers as *employees* of agricultural businesses. This will defeat attempts by growers to escape liability under the FLSA and will accurately reflect the economic reality of the migrant worker. The courts need not engage in a case-by-case inquiry to determine whether unskilled migrant farm laborers are employees. A per se rule making all migrant farmworkers employees under the FLSA would send a clear message to growers that any subterfuges designed to avoid FLSA provisions will not be tolerated. Judge Easterbrook has already adopted this position, opining: "Migrant farm hands are 'employees' under the FLSA—without regard to the crop and the contract in each case. We can, and should, do away with ambulatory balancing in cases of this sort. Once they know how the FLSA works, employers, workers, and Congress have their options."191 A presumption that all migrant workers are per se employees would eliminate growers' incentives to circumvent regulation under the FLSA by labeling their workers "independent contractors."

The Fair Labor Standards Act was enacted by Congress to protect workers against deleterious working conditions.192 It was intended to be construed broadly in the best interest of workers.193 Migrant farmworkers and especially their children are the type of workers Congress intended to protect:

> [T]he child we seek to protect is among the most oppressed and deprived of our citizens—the child of a Mexican-American family living far below the poverty level, whose parents, for lack of a permanent residence, cannot even vote and therefore exert no political influence, whose parents have no legal right to collective bargaining. In sum, this is a child who desperately needs to be brought in from the fields and made a part of the society which the rest of our children take for granted.194

The creation of a per se rule that migrant farmworkers and child laborers are employees and not independent contractors is necessary because of the present lack of judicial guidance and the failure of courts to implement Congress' intent. Under a per se rule, growers would quickly realize that they had no hope in court. Consequently, such a rule would deter growers from creating schemes to avoid compliance with the FLSA, and would obviate the need for litigation.

193. See supra note 83 and accompanying text.
C. Increased Enforcement and Penalties to Deter Child Labor Law Violations

If migrant children are to be protected against oppressive agricultural labor, the penalties for child labor violations must be made tougher, and the investigation and prosecution of violations must be pursued more zealously. A recent General Accounting Office study showed a 250 percent increase in child labor law violations from 1983 to 1989.\textsuperscript{195} This figure appears to represent only the tip of the iceberg, since the Labor Department's enforcement of the FLSA's child labor provisions is badly underfunded and understaffed: "Fewer than 1,000 Labor Department compliance officers enforce all provisions of the Fair Labor Standards Act, including wage and hour violations for adult workers. Only 4 percent of the department's enforcement activities are devoted to child labor, according to the General Accounting Office."\textsuperscript{196} This translates into a total of only about forty federal officers nationwide to investigate child labor abuses in all industries.

Current regulations set a maximum fine of $1,000 for violations of the Act's child labor provisions.\textsuperscript{197} Some violators view the current low fines as just a cost of doing business.\textsuperscript{198} To deter such egregious exploitation, Representatives Charles Schumer and Don J. Pease have proposed: increased criminal penalties as high as $100,000; at least six months in jail for recidivists; and civil penalties up to $10,000 for less serious violations.\textsuperscript{199}

One commentator urges that the general increase in child labor violations is a crisis of extreme proportions in American society.\textsuperscript{200} She supports the need for increased fines and in some cases jail sentences, warning that without expedient action, "'turn of the century' child labor exploitation will refer not only to 1900, but to 2000 as well."\textsuperscript{201}

\textsuperscript{195} Golodner, \textit{supra} note 190, at 52.
\textsuperscript{197} 29 C.F.R. § 579.1(a) (1990).
\textsuperscript{198} \textit{Labor Secretary's Proposals Not Nearly Tough Enough}, L.A. Daily J., Apr. 25, 1990, at 6, col. 3. Linder notes the efforts of Colorado to crack down on employers who intentionally mischaracterize their employees as independent contractors:
An interesting alternative approach is that taken by the Governor of Colorado in his Executive Order of Apr. 30, 1987, requiring the attorney general to prosecute and to bring civil claims against employers who knowingly mischaracterize their employees as independent contractors and therefore cause a loss of revenues to the State and a loss of benefits to employees.
Linder, \textit{supra} note 74, at 472 n.162.
\textsuperscript{199} Id. at 51-54.
\textsuperscript{200} Golodner, \textit{supra} note 190, at 51-54.
\textsuperscript{201} Id. at 52.
Conclusion

Because of widespread confusion over the classification of migrant farmworkers as “employees” or “independent contractors” under the Fair Labor Standards Act, children of migrant workers often are left completely unprotected from oppressive conditions of child labor. The growers, usually large agricultural corporations, seek to classify migrant workers as independent contractors through share-farming agreements, thus creating the fiction of an independent business person running an independent farming operation. If the worker is classified as an independent contractor, his children fall under the “family farm” exemption. Under this exemption, a child agricultural worker is completely unprotected by the FLSA provisions against oppressive child labor. The family farm exemption was passed over half a century ago to allow children to help out in small, family-owned and operated farms, but today this exemption is being misapplied to migrant child laborers working for large-scale growers and agricultural corporations.

Given these unique circumstances, courts should abolish the family farm exemption and adopt a per se rule that migrant farmworkers are employees under the FLSA. Furthermore, investigation and prosecution of child labor violations must be zealously pursued, and increased penalties must be imposed to deter further violations.

Migrant farmworkers have no political voice and little power to organize for their own protection. Within this migrant community, the child worker is perhaps the most vulnerable and exploited member. A system that allows employers to exploit such a vulnerable segment of society through clever schemes to avoid responsibly complying with the FLSA’s protective provisions is gravely defective. Legislative abolition of the family farm exemption; unequivocal judicial pronouncement of a presumption that migrant farmworkers are per se employees; and strict prosecution of those who violate child labor laws—these measures can and must be taken to eradicate oppressive child labor once and for all. An agricultural process that continues to rely on oppressive child labor fifty-three years after the enactment of the Fair Labor Standards Act is truly a Harvest of Shame.