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PETTY-BOURGEOIS PICKLE PICKERS: AN AGRICULTURAL LABOR-LAW HOAX COMES A CROPPER

Marc Linder*

“You’re a petty bourgeois[.]” . . .

“Is that good or bad?”

“Pretty bad, but not incurable. We liquidate you, then we proletarianize you.”¹

Of all the words which may be used to designate any sort of tenant, the word we heard used least frequently . . . by . . . all local human beings white or black, save only new dealers, communists, and various casts of liberal, was the word sharecropper.

In the north, however . . . sharecropper has . . . become the generic term[,] . . . and . . . absorbed every corruptive odor of inverted snobbery, marxian, journalistic, jewish, and liberal logomachia, emotional blackmail, negrophilia, belated transference, penis-envy, gynecological flurry and fairly good will which the several hundred thousand least habitable and scrupulous minds of this peculiarly psychotic quarter of the continent can supply to it: and it is one of the words a careful man will be watchful of, and by whose use . . . he may take clear

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The following attorneys shared their insights on sharecropping and sharecropper litigation: Jeannie Barrett, Mike Blank, Benjamin Chinni, Peter Dellinger, Leonard Grossman, Mary Lee Hall, William Hoerger, Rick Kessler, Janice Morgan, and Melvyn Silver.

1. E. RICE, IMPERIAL CITY 225 (1937).

measure of the nature . . . of the enemy.²

I. IN THE BEGINNING WAS THE WORD—BUT ONLY THE WORD

Once upon a time there was a system of commodity production³ that arose on Southern cotton plantations during the upheaval following the Civil War.⁴ In order to retain control over the emancipated slaves and their labor, plantation owners adopted the institution of sharecropping.⁵ This relationship of production, which assumed various forms, depending on whether the workers furnished their labor only or also other inputs such as seed or draft animals,⁶ declined precipitously in the wake of the socioeconomic transformation associated with the New Deal agricultural programs and the advance of mechanized cotton picking after World War II.⁷ But predictions of its demise were premature.⁸ For

2. J. AGEE & W. EVANS, LET US NOW PRAISE FAMOUS MEN 455-56 (1960).

3. See Friedland, *Commodity Systems Analysis: An Approach to the Sociology of Agriculture*, 1 RES. IN RURAL SOC. & DEV. 221 (1984); see also W. FRIEDLAND, MANUFACTURING GREEN GOLD: CAPITAL, LABOR, AND TECHNOLOGY IN THE LETTUCE INDUSTRY (1981); R. THOMAS, CITIZENSHIP, GENDER AND WORK: SOCIAL ORGANIZATION OF INDUSTRIAL AGRICULTURE (1985).

4. Sharecropping or métayage in Europe and elsewhere antedated its advent in the American South. See, e.g., 2 DICTIONARY OF POLITICAL ECONOMY 738 (R.H. Inglis Palgrave ed. 1898); E. WEBER, PEASANTS INTO FRENCHMEN 126-27 (1976); D. KERTZER, FAMILY LIFE IN CENTRAL ITALY, 1880-1910: SHARECROPPING, WAGE LABOR, AND CORESIDENCE (1984). For an example of its potentially complicated character in the contemporary Third World, see C. GEERTZ, AGRICULTURAL INVOLUTION 99 (1974).

5. Zeichner, *The Transition from Slave to Free Agricultural Labor in the Southern States*, 13 AGRIC. HIST. 22, 30 (1939). Theoretical economists have recently tended to view sharecropping in the South between the Civil War and World War I as a market-oriented rational mechanism for sharing risks and providing incentives. See, e.g., Reid, *Sharecropping as an Understandable Market Response: The Post-Bellum South*, 33 J. ECON. HIST. 106 (1973); Reid, *Sharecropping in History and Theory*, 49 AGRIC. HIST. 426 (1975); Reid, *The Theory of Share Tenancy Revisited—Again*, 85 J. POL. ECON. 403 (1977); Stiglitz, *Sharecropping*, in 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 320 (J. Eatwell ed. 1987). Historians, by contrast, have emphasized the coercive macrosocial context in which sharecropping arose and developed. See, e.g., D. GRUBBS, CRY FROM THE COTTON: THE SOUTHERN TENANT FARMERS' UNION AND THE NEW DEAL 15 (1971); J. MANDLE, THE ROOTS OF BLACK POVERTY: THE SOUTHERN PLANTATION ECONOMY AFTER THE CIVIL WAR (1978); V. WHARTON, THE NEGRO IN MISSISSIPPI 1865-1890, at 59-73 (1947); J. WILLIAMSON, AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861-1877, at 126-36 (1965). But see R. DAVIS, GOOD AND FAITHFUL LABOR: FROM SLAVERY TO SHARECROPPING IN THE NATCHEZ DISTRICT, 1860-1890 (1982); R. RANSOM & R. SUTCH, ONE KIND OF FREEDOM: THE ECONOMIC CONSEQUENCES OF EMANCIPATION 66-77, 87-99 (1977) (although planters did not initiate sharecropping, the system promoted their interests). On the racially, economically, socially, and politically oppressive character of the plantation sharecropping system during the New Deal period when such labor was excluded from the burgeoning federal social-protective legislative scheme, see Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987). See also *Biggest Cotton Plantation*, FORTUNE, Mar. 1937, at 125; Nelson, *Welfare Capitalism on a Mississippi Plantation in the Great Depression*, 50 J. S. HIST. 225 (1984).

6. See R. RANSOM & R. SUTCH, *supra* note 5, at 92 (table 5.5).

7. P. DANIEL, BREAKING THE LAND: THE TRANSFORMATION OF COTTON, TOBACCO, AND

some wicked Midwestern pickle princes⁹ liked the sound of the word "sharecropper" so much that they decided to rescue it from the undead and to confer it upon their Hispanic migrant pickers. This article is about that metempsychosis.

So-called sharecropping has, at various times, embraced pickles in Ohio, Michigan, Wisconsin, Minnesota, North Carolina, Texas, Colorado, and California; cherries in Michigan; and strawberries, cabbage, peppers, raspberries, blackberries, string beans, and snow peas in California.¹⁰ Although some Michigan pickle farmers have claimed that the practice antedates World War II,¹¹ one grower who was sued in 1976 conceded that eight or nine years earlier he had paid the very same migrants hourly wages as employees.¹² Some growers seek to infuse their position with the fervor of a *Weltanschauung*. Thus Jerry Brandel, a leading Michigan pickle grower and eponymous defendant in a crucial case discussed below, opined that "it's the civil rights of the families to work and train their kids at their own discretion . . ." ¹³ He has also opaquely analogized the initiative he seeks to inculcate in migrant

RICE CULTURES SINCE 1880 (1985); C. JOHNSON, E. EMBREE & W. ALEXANDER, THE COLLAPSE OF COTTON TENANCY (1935); G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 259-261 (1944); H. RICHARDS, COTTON AND THE AAA 135-62 (1936); J. STREET, THE NEW REVOLUTION IN THE COTTON ECONOMY: MECHANIZATION AND CONSEQUENCES (1957); T. WOOFER & A. FISHER, THE PLANTATION SOUTH TODAY (1940); Burford, *The Federal Cotton Program and Farm Labor Force Adjustments*, 33 S. ECON. J. 223 (1966); Daniel, *The Transformation of the Rural South: 1930 to the Present*, 55 AGRIC. HIST. 231 (1981); Day, *The Economics of Technological Change and the Demise of the Sharecropper*, 57 AM. ECON. REV. 427 (1967); Holcomb, *Wage Laborers Versus Sharecroppers*, 23 THE AGRIC. SITUATION, Oct. 1939, at 13; Kirby, *The Transformation of Southern Plantations, c. 1920-1960*, 57 AGRIC. HIST. 257 (1983); *Wage Workers and Sharecroppers on Mississippi Plantations*, 49 MONTHLY LAB. REV. 1104 (1939); Whatley, *Labor for the Picking: The New Deal in the South*, 43 J. ECON. HIST. 905 (1983).

8. The number of white croppers declined from 383,381 in 1930 to 47,650 in 1959; the corresponding figures for blacks were 392,897 and 73,387 respectively. 1 BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, ser. K 135 & K 141, at 465 (1975). In 1959 the Bureau of the Census stopped classifying croppers separately "[b]ecause of the decreasing importance of the cropper system in the South." *Id.* at 453.

9. Michigan has been the largest producer of pickling cucumbers for decades. See U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 1949, at 258 (1949) (table 313); U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 1972, at 208 (1972) (table 251); U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 1988, at 158 (1988) (table 216).

10. Hager, *Legal Challenge Before Court to Test 'Sharefarming' Concept*, L.A. Times, Oct. 30, 1988, pt. I, at 38, col. 1; Echenique, *Children Work in Local Berry Fields*, Salinas Californian, Aug. 30, 1988, at 2, col. 1.

11. *U.S. Suit Tests Cucumber Harvest Tradition*, Booth News Service, dateline Hart, Mich. (undated news clipping) (copy in author's possession).

12. Affidavit of Robert Eilers, Marshall v. Eilers, No. G76-562-CA6 (W.D. Mich. Mar. 2, 1983); Plaintiff's Reply Brief to Defendant's Answer to Plaintiff's Motion for Summary Judgment at 3, *Eilers* (No. G76-552-CA6).

13. *U.S. Suit Tests Cucumber Harvest Tradition*, *supra* note 11.

farmworkers to the (pre-*perestroika*) Soviet practice of permitting collective peasants to farm privately on small plots.¹⁴

Pseudo-sharecropping is merely one variant of a wider trend toward paper conversions of employees into independent contractors. The coincidence that farmers had been paying pickle pickers about fifty percent of the price that they received from processors served as a convenient pretext for calling the employment relationship "sharecropping"—though historical precedent from Southern cotton farming would have supported other divisions of income as well.¹⁵ But such contingencies are superfluous. For imaginative cotton farmers in West Texas for years paid their cotton hoers the sub-minimum wage of \$2.50 per hour merely by calling them independent contractors. Sugar beet farmers in Wyoming and Nebraska have done the same with their piece-rate workers.¹⁶

Although it would be intellectually satisfying to demonstrate some inherent economic or socio-technological basis for the proliferation of sharecropping in pickles precisely in the 1970s and 1980s, no stringent explanation is forthcoming.¹⁷ While it is part and parcel of a widespread trend to reclassify employees as self-employed entrepreneurs in order to avoid employment taxes,¹⁸ neither the economics of the industry¹⁹ nor

14. Telephone interview with Jerry Brandel (1987).

15. See, e.g., G. MYRDAL, *supra* note 7, at 237; R. RANSOM & R. SUTCH, *supra* note 5, at 92 (table 5.5); R. Shlomowitz, *The Transition from Slave to Freedman: Labor Arrangements in Southern Agriculture, 1865-1870*, at 40-55 (1979) (unpublished dissertation, Univ. Chi.).

16. Thus the conclusion to be drawn from the fact that a farmer may treat the same workers as sharecroppers when they pick pickles but as employees when they harvest tomatoes is not that sharefarming is not a subterfuge designed to avoid paying employment taxes and the minimum wage. See, e.g., *Marshall v. Brandel*, No. G76-393-CA6, slip op. at 6 (W.D. Mich. Jan. 17, 1983). The use of non-sharecropping independent contracting in other crops has rendered the more blatant sham unnecessary.

17. Wells, *Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture*, 21 *LAW & SOC'Y REV.* 49, 53, 76 n.25 (1987), argues that the "technoeconomic constraints" on mechanization are the common ground for sharecropping in strawberries and pickles. Apart from the circularity of the argument—mechanization would obviously preclude hand-harvesting and any plausible claim that non-owning workers on expensive machines were anything but employees—the argument fails to explain why sharecropping has not spread to other hand-harvested crops. Moreover, because sharecropping is just a word, it is relatively trivial whether this scam or the run-of-the mill independent contracting scam is used.

18. See Linder & Norton, *The Employee-as-Contractor Dodge*, *The Philadelphia Inquirer*, June 15, 1987, at 15-A; Linder & Norton, *The Latest in Employer Scams*, *The Texas Observer*, Aug. 28, 1987, at 12. On the parallel phenomenon in Britain, see *Report of the Committee of Inquiry Under Phelps Brown into Certain Matters Concerning Labour in Building and Civil Engineering*, 17 *Parl. Papers* para. 393-412, at 141-46 (Cmd. 3714, 1967-68). See also R. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989).

19. Neither the labor intensity, import intensity, capital substitutability, nor demand elasticity associated with pickles appears to single them out for sharecropping. See generally C. NUCKTON, *DEMAND RELATIONSHIPS FOR CALIFORNIA TREE FRUITS, GRAPES, AND NUTS: A REVIEW OF*

any unique natural characteristics of the commodity can explain the custom. And while there is some evidence that sharecropping was introduced by strawberry farmers in California to ward off organizing efforts by the United Farm Workers (UFW),²⁰ in the Midwest, some cucumber growers who treat their pickers as sharecroppers have recognized and collectively bargained with their union, the Farm Labor Organizing Committee (FLOC).²¹

Astonishingly, the metastasis of the sham has witnessed the creation of strange bedfellows as some Marxist sociologists have taken it seriously as part of an alleged recrudescence of the petty bourgeoisie.²² Indeed, whereas Marx identified as the sharecropper's distinguishing characteristic that his claim to part of the product rested not on his being a worker, but rather "his own capitalist," that is, an owner of part of the means of production,²³ the epigones have gone so far as to assert that: "[S]harecropping is undergoing a revival in the vegetable fields of California as landowners and processors invite workers to assume more responsibility for the quality of production in the interest of 'flexibility.' There proletarians are being transformed into petty commodity producers."²⁴ By way of contrast, a non-Marxist economic theorist who has recently proposed the systemic conversion of private fixed-wage contracts into revenue-sharing contracts between firms and workers in order

PAST STUDIES (1978); C. NUCKTON, DEMAND RELATIONSHIPS FOR VEGETABLES: A REVIEW OF PAST STUDIES (1980); B. PRICE, THE POLITICAL ECONOMY OF MECHANIZATION IN U.S. AGRICULTURE (1983); UNIV. CALIF. AGRIC. ISSUES CENTER, MARKETING CALIFORNIA SPECIALTY CROPS: WORLDWIDE COMPETITION AND CONSTRAINTS (1987).

20. See Section V *infra* pp. 229-56.

21. If agriculture were covered by the NLRA, these growers would not be obligated to recognize a union of self-employed workers. See Linder, *Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons*, 66 U. DET. L. REV. (forthcoming 1989). The self-employed are excluded from the California Agricultural Labor Relations Act of 1975, CAL. LAB. CODE, § 1140.4(b) (West Supp. 1989).

22. See, e.g., Steinmetz & Wright, *The Fall and Rise of the Petty Bourgeoisie: Changing Patterns of Self-Employment in the Postwar United States*, 94 AM. J. SOC. 973 (1989). But see Hagelstange, *Niedergang oder Renaissance der Selbständigen? Statistische Daten zur Entwicklung in der EG und in Nordamerika*, 17 ZEITSCHRIFT FÜR SOZIOLOGIE 143 (1988) (relative shares of the nondependent economically active population have continued to decline in the United States and European Community); Linder & Houghton, *Steinmetz and Wright on Self-Employment and the Petty Bourgeoisie*, 95 AM. J. SOC. (forthcoming 1990).

23. 3:2 K. MARX, DAS KAPITAL 337 (1894). Bechhofer & Elliott, *Petty Property: The Survival of a Moral Economy*, in THE PETITE BOURGEOISIE: COMPARATIVE STUDIES OF THE UNEASY STRATUM 182 (1981), also emphasize the importance of property ownership. Inconsistently and bizarrely, James Mill took the position that the capitalist owned the laborer and the product (*i.e.*, that wage labor equals slavery), and that the capitalist bought the laborer's share in advance. J. MILL, ELEMENTS OF POLITICAL ECONOMY (3d ed. 1826), reprinted in J. MILL, SELECTED ECONOMIC WRITINGS 219, 228-29 (D. Winch ed. 1966).

24. Wilson, *The Political Economy of Contract Farming*, 18 REV. RADICAL POL. ECON. 47, 56

to eliminate stagflation and unemployment, expressly acknowledges the continued existence of capital-labor relations.²⁵

II. EVEN REAL SHARECROPPERS MAY BE EMPLOYEES

In analyzing the sharecropping movement and cases, it is necessary to bear in mind that so long as farmworkers were excluded from virtually all protective legislation,²⁶ the fifty-fifty compensation scheme was obviously not designed to avoid employer obligations because none existed. It was only when some farmers began to become subject to social security tax obligations in the early 1950s,²⁷ but especially federal minimum wages in 1966, and unemployment insurance taxes, and workers' compensation premiums in some states in the 1970s and 1980s, that farmers developed an economic incentive to devise schemes to avoid these costs of doing business. Thus in places, such as parts of Michigan, where fifty-fifty arrangements may have antedated these financial impositions, it is possible that sharecropping had become a trade custom to which farmers had grown so accustomed or even wedded that their attachment to it was at first the product of inertia and only later assumed a less innocent coloration. In other areas, however, where farmers did not introduce sharecropping until after they had felt the impact of their new statutory obligations, a presumption of unlawful original intent is more plausible.

When Congress amended the Fair Labor Standards Act²⁸ in 1966 to

(1986). Wilson relies on Wells, who has reproduced this claim in several formats: Wells, *The Resurgence of Sharecropping: Historical Anomaly or Political Strategy?* 90 AM. J. SOC. 1 (1984) [hereinafter Wells, *The Resurgence of Sharecropping*]; Wells, *What is a Worker?, The Role of Sharecroppers in Contemporary Class Structure*, 13 POL. & SOC'Y 295 (1984) [hereinafter Wells, *What is a Worker?*]; Wells, *Sharecropping in the United States: A Political Economy Perspective*, in FARM WORK AND FIELDWORK 211 (M. Chibnik ed. 1987) [hereinafter Wells, *Sharecropping in the United States*]; Wells, *supra* note 17, at 49. At the same time Wilson contends that farmers who contract with processors for the output of their crops are "petty commodity producers . . . being transformed into 'semi-proletarians.'" Wilson, *supra* note 24, at 56. Bizarrely, then, pickle pickers would be self-employed and pickle farmers employees.

25. M. WEITZMAN, *THE SHARE ECONOMY: CONQUERING STAGFLATION* (1984).

26. "[I]t is . . . probable that the New Deal's rejection of agricultural labor is at the root of the farm workers' *Rechtlosigkeit*." R. Lyon, *The Legal Status of American and Mexican Migratory Farm Labor* 118 (1954) (unpublished dissertation, Cornell Univ.). See generally Linder, *supra* note 5.

27. See, e.g., Act of Sept. 1, 1954, ch. 1206, § 205(a), 68 Stat. 1091 (1954).

28. 29 U.S.C. §§ 201-219 (1982). Had sharecroppers been held to be employees and had agricultural workers been included in the FLSA in the 1930s, compulsory payment of even 15 to 20 cents per hour would have shaken the foundations of the plantation. Indeed, testimony before Congress in 1945 indicated that, if the exemption were eliminated, sharecropping "would be completely revolutionized and would have to go on an absolute cash basis . . ." *Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Committee on Labor*, 79th Cong., 1st Sess. 694 (1945) (statement of Charles Holman, Secretary, Nat'l Cooperative Milk Producers).

incorporate some farmworkers into minimum-wage coverage, it directly addressed the issue of sharecroppers:

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. . . . 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.²⁹

The U.S. Department of Labor (DOL) then adopted these directions almost verbatim in its interpretative bulletin.³⁰ That in fact many so-called sharecroppers would be entitled to the minimum wage emerged from the hearings held before the House Rules Committee. When asked about this issue by Representative Martin, Representative Dent cited the above-quoted passage and the following colloquy ensued:

Mr. Dent. Where they do their own selection of work—they are truly in contractual agreement with an employer, and they are not employees of that farmer.

Mr. Martin. The owner of the farm has control as to when the crop is planted and harvested. It is traditional in this country that many of these people work on a percentage of the crop itself.

Mr. Dent. Where they work on a contract, I believe the law is not clear—and there have never been any problems on it to date.

Mr. Martin. Yes. But you haven't gone into agricultural coverage under fair labor standards before. I think you are opening up a very serious problem. It is going to be difficult to determine.

Mr. Dent. Well, I am hoping it doesn't create the trouble.³¹

The issue arose again on the floor of the House when Representative Watts of Kentucky, in the course of describing his own personal situation as a tobacco farmer vis-à-vis his three sharecroppers, inquired whether he would be responsible for paying the minimum wage if at the end of the year the tobacco burned up: "If so, it is an atrocious situation."³² To allay his fears, Representative Adam Clayton Powell of Harlem cited the committee report:

29. H.R. REP. NO. 1366, 89th Cong., 2d Sess. 31 (1966).

30. See 29 C.F.R. § 780.330(a) (1988).

31. *Minimum Wage: Hearings Before the House Comm. on Rules on H.R. 13,712*, pt. II, 89th Cong., 2d Sess. 47 (1966).

32. 112 CONG. REC. 11,623 (1966).

Testimony indicates that there are large numbers of so-called sharecroppers who are not allowed to make a single economic decision regarding the land upon which they live and work. For example, they do not decide what to plant, when to plant, when to harvest, where to purchase seed, or where to sell the product of their labor. For these people, the term "sharecropping" only denotes a means of compensation; it conveys no connotation of independence, individualism, or self-determination. On the other hand, there are true tenant farmers, who make basic economic decisions up [*sic*] which rest the productivity of the farm and consequently the amount of their compensation. Generally these tenants operate farms owned by absentee landlords. They are unsupervised, make day-to-day decisions necessary to the running of the farm, and share in the profits related to the productivity, for which they are greatly responsible. Such persons are not intended to be covered by the Act.³³

Even this degree of explication did not satisfy Representative Watts, who wondered about the consequences of a retired farmer's telling his tenant which field to plow or which crop to grow on the basis of his greater knowledge of the land.³⁴ Although he appeared somewhat relieved to hear Representative Dent tell him that the controlling elements were "whether there is day-by-day supervision . . . and whether you would make the decision on the sales in conjunction with him or whether you would make the decision as to which fields to plant . . .," Representative Watts insisted on an answer to his question about whether he was responsible if the crop was destroyed. At this point Representative Dent appears to have become flustered,³⁵ for his reply was irrelevant:

Mr. Dent. That is absolutely not even within the realm of remote possibility. If you are working in an office with a contract for a year's retainer and the office burns down, the owner does not have to pay you, does he? If a fellow does not open up again, he does not have to pay it, does he?

Mr. Watts. No. But under the bill there is a provision he shall receive the minimum wage for the time he put in.

Mr. Dent. He is then an independent contractor under those conditions.³⁶

At this point Adam Clayton Powell intervened again, this time to

33. *Id.* (citing H.R. REP. NO. 1366, *supra* note 29, at 31).

34. 112 CONG. REC. 11,623 (1966).

35. Representative Dent prejudiced the issue by his claim that if the farmer "has seven sharecroppers, he would not be giving the kind of directions that would be considered to be daily supervision." *Id.* at 11,624. This is just as false when applied to a classical cotton plantation as it would be with regard to pickle pickers.

36. *Id.*

praise Representative Watts for having raised an “excellent” point, which was “exactly correct” and behind which the committee stood. Since Watts had merely asked questions, the only point to which Powell could sensibly have been referring was the absolute obligation to pay the minimum wage. This surmise is strengthened by the rest of the dialogue in which Watts acknowledged that: “I can see that the purpose of covering the sharecropper was probably to keep somebody from ducking out from under the law and claiming so-and-so was a sharecropper. That may have been what was in the committee’s mind. But . . . I hope . . . it is not the intention of this Congress or of this committee that the sharecropper could then say, ‘I am sorry it burned, old buddy, but I have put in so many hours, and you have to pay me.’” To which Powell again ambiguously replied: “That position I subscribe to.”³⁷

In the Senate, it was Cooper of Kentucky who played foil to Yarborough of Texas. Horrified by the thought that a farmer might have to supplement the wages of a sharecropper (or a sharecropper’s employee) if they fell below the minimum wage of \$1.00 per hour, Senator Cooper inquired whether it would be necessary to determine the sharecropper’s status on a case by case basis. The populist senator, who was the prime mover of the bill in the Senate, replied that a sharecropper would not be an employee under the kinds of arrangements that prevailed where he had grown up in Texas. But significantly the cotton sharecropping agreements Yarborough had in mind involved the tenant’s furnishing tools, horses, mules, tractors, and food.³⁸

The year following the enactment of inclusion of farmworkers under minimum-wage protection, the House Agriculture Committee devoted an entire hearing to the question of sharecropper coverage.³⁹ In the course of questioning the Assistant Secretary of Labor and the Wage and Hour Administrator, the chair, Representative Poage of Texas, and Representative Abernethy of Mississippi repeatedly expressed their agreement that a sharecropper who provided only labor—who, for example, merely chopped cotton or harvested sugarcane—would be an employee. Indeed, Poage went so far as to state that:

I never heard of that. I will go farther than you did and say that nobody in my country ever rented a piece of land to somebody else and said that they would give him one-half or any part of it if he would just

37. *Id.*

38. *Id.* at 20,620-21.

39. *The Application of Minimum Wages in Agriculture: Hearing Before the House Comm. on Agriculture, 90th Cong., 1st Sess. (1967).*

do the chopping and the harvesting. *Who planted the land? How did the land get planted—who plowed it? Who cultivated it? Who paid for these items?* I never heard of a contract like that which did not require more of a renter than that. Possibly such contracts exist, but surely they are exceptional.⁴⁰

When pressed, informants at the United States Department of Agriculture admitted that such arrangements were not typical.⁴¹ After agreeing with the DOL officials once again that a labor-only sharecropper would be an employee, the chairman asked them whether "it [would] take the curse off if the landlord makes him pay one-half the cost of the insecticides." To this the Assistant Secretary replied that it would not necessarily so long as the tenant had no opportunity to exercise judgment and foresight or for profit and loss.⁴² When Representative Poage insisted that a tenant could "come out the loser" or "make a profit without putting out any money,"⁴³ the Assistant Secretary sought to explain "[t]he whole basic philosophy . . . of the free enterprise system":

When a man opens a shoeshine parlor, or a peanut stand, he takes the risk—he puts his money and his own initiative and imagination and courage which makes it either work or fail. If this tenant or this employee . . . does nothing more for the landowner than to go out and hire employees to come in and pick the cotton or the tobacco, whatever it may be, he is an employee, in our opinion. He is not an independent contractor.

Mr. Abernethy. Nobody disagrees with that statement.⁴⁴

But when Chairman Poage began to hedge and pointedly asked whether the economic reality test factors controlled or whether the mere fact that a worker provided labor only was itself dispositive, the Wage and Hour Administrator maintained that Congress had intended the latter.⁴⁵

The history of sharecropping in the South belies the claims that labor-only sharecroppers were atypical.⁴⁶ At the outset "[i]n return for his labor the former slave received or kept a part of the crop, depending upon whether he was a cropper or a tenant."⁴⁷ Although both received

40. *Id.* at 9 (emphasis added).

41. *Id.* at 10.

42. *Id.* at 11.

43. *Id.*

44. *Id.* at 11-12.

45. *Id.* at 13.

46. Indeed, as capital investment increases, sharecropping has been viewed as an inherently unstable arrangement destined to give way to outright land rental or a wage system. Stiglitz, *Incentives and Risk Sharing in Sharecropping*, 41 *REV. ECON. STUD.* 219, 251 (1974).

47. Zeichner, *The Legal Status of the Agricultural Laborer in the South*, 55 *POL. SCI. Q.* 412, 414 (1940).

advances of food and clothing, even at that time, when a worker merely supplied his labor and was controlled by the landlord, he was a cropper, that is, an employee receiving as wages a share of the crop.⁴⁸ Because a sharecropper was prohibited by law from disposing of the crop until it had been divided and the landlord had set aside a portion as wages,⁴⁹ disputes arose as to whether the cropper was to receive wages in kind (dividing the crop) or in money (if the proceeds were divided).⁵⁰ Even where the sharecropper supplied all the labor, part or all of the seed and fertilizer, and bore all or part of the cost of marketing, and received a share of the crop, he often still worked under close supervision.⁵¹ Moreover, especially after 1900, sharecropping became a form of piece-rate wage labor and ceased being true tenancy.⁵² "Croppers, the most dependent of all tenants, are little more than wage hands."⁵³ "In reality, the sharecropper was little more than a wage hand being paid in kind Essentially, it was a form of debt peonage."⁵⁴ By the post-World War I period, most black sharecroppers had "practically no voice in deciding what crops to grow, or what methods to follow in cultivation."⁵⁵ Thus it was "only by an ironic travesty" that Southern sharecroppers were classified as entrepreneurs.⁵⁶

By the 1930s, nine-tenths of black plantation tenants "[we]re just ordinary laborers" under supervision.

Their wages, however, are not determined according to supply and demand in a free labor market. . . . Nor is the sharecropping agreement modeled after the ordinary piece-wage system. . . . The wages of the sharecroppers and share tenants . . . vary in such a way that there is no

48. *Id.* at 414, 416.

49. *Id.* at 419.

50. Woodman, *Post-Civil War Southern Agriculture and the Law*, AGRIC. HIST. 319, 324-27 (1979).

51. C. BRANNEN, RELATION OF LAND TENURE TO PLANTATION ORGANIZATION 30 (1928); Brooks, *The Agrarian Revolution in Georgia, 1865-1912*, 3 BULL. OF THE U. WIS. 393, 440 (1914) ("At the present time, an unsupervised 'cropper' . . . is almost never met with. The supervision of his operations is as close as the planter can make it . . .").

52. G. WRIGHT, THE POLITICAL ECONOMY OF THE COTTON SOUTH 162-63, 176-79 (1978).

53. A. RAPER, PREFACE TO PEASANTRY 148-49 (1936). See also R. SCOTT & J. SHOALMIRE, THE PUBLIC CAREER OF CULLY A. COBB: A STUDY IN AGRICULTURAL LEADERSHIP 206 (1973).

54. D. CONRAD, THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL 7 (1965). See also P. DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1901-1969, at 20, 24 (1972); Brandt, *Fallacious Census Terminology and its Consequences in Agriculture*, 5 SOC. RES. 19, 24-28 (1938). J. AGEE & W. EVANS, *supra* note 2, evoke indelible images of the lives of tenants and sharecroppers in Alabama during the New Deal.

55. D. ALEXANDER, THE ARKANSAS PLANTATION, 1920-1942, at 66 (1943). See generally, Linder, *supra* note 5, at 1346-48.

56. A. Ross, *Agricultural Labor and Social Legislation* 18 (1942) (unpublished dissertation, Univ. Cal.).

reason whatever to assume that they . . . would satisfy the supply-and-demand equations of an ordinary free labor market. . . . As a labor or tenant contract, the share tenant agreement reveals its pre-capitalistic character by the fact that the wage . . . is not fixed in a sum of money or product but in a *proportion which remains fixed as a matter of tradition independent of how prices and price relations change*. The products and cost factors in the production other than labor are, however, priced in the market and so is land. Only labor costs (and incomes) are fixed in an arbitrary and traditional proportion. This indicates the dependent status of labor in this economic system. Labor has not even had the protection of being directly related to the objective conditions of price formation in an economic market.⁵⁷

In his massive study of blacks in the United States, Gunnar Myrdal observed that: "While in other parts of our economic system it has been the accepted ideal that risk of investment should be directly correlated with the size of investment, the sharecropper and the share tenant—although nothing but laborers from economic and social viewpoints—have to carry a considerable share of the entrepreneur's risk."⁵⁸ To be sure, the sense in which Myrdal used "risk" is Pickwickian; for although it was true that the share tenant shared in the benefit of a good crop and did not have much capital of his own, "he may find himself having invested a full season's work without having received anything near the wages he would have earned had he been a wage laborer with full employment. . . . That certainly is a business risk just as much as any."⁵⁹ The sharecropper had most of the disadvantages of being an independent entrepreneur without any of the rights. Thus, for example—like today's pickle picker—he had to take the landlord's word for the price obtained for the cotton.⁶⁰ And more importantly, the sharecropper's "autonomy"—like that of the pickle picker—consisted in large part in his ability to make full use of his family's labor.⁶¹

During World War II, the United States Bureau of the Census, in comparing the data collected on sharecroppers since 1920, observed that:

57. G. MYRDAL, *supra* note 7, at 245 & n.b (emphasis in original). Because of the similarity in status to wage laborers, attempts were made to include croppers, even though they were considered self-employed, in the social security bill in 1935. Alston & Ferrie, *Labor Costs, Paternalism, and Loyalty in Southern Agriculture: A Constraint on the Growth of the Welfare State*, 45 J. ECON. HIST. 95, 107-15 (1985).

58. G. MYRDAL, *supra* note 7, at 245.

59. G. MYRDAL, *supra* note 7, at 246.

60. G. MYRDAL, *supra* note 7, at 246.

61. G. WRIGHT, OLD SOUTH, NEW SOUTH 94 (1986). According to Vance, *Human Factors in the South's Agricultural Readjustment*, 1 LAW & CONTEMP. PROBS. 259, 272 (1934), the success of the cotton plantations rested on the unpaid labor of women and children.

Most sharecroppers work under close supervision, and the land assigned each cropper by his landlord is often merely a part of a larger agricultural enterprise operated as a single working unit in respect to a central farm headquarters, to the control of labor, and to the managerial and supervisory functions.⁶²

Capturing the quasi-feudal character of the relationship, the Bureau added that "[i]n many instances, the croppers or tenants and their families are also wage hands on the 'home farm' of the plantation."⁶³ The analogy to the serfs' duties on the medieval manorial demesne is difficult to overlook.⁶⁴

Throughout the postbellum period, sharecroppers were considered wage laborers in many jurisdictions. This classification created, to be sure, an ambiguous legal status; for while it entitled croppers to protection under the lien laws, it also subjected them to the oppressive enticement laws that the plantation oligarchy enacted in the wake of emancipation.⁶⁵

Sharecroppers and tenants of Southern plantations in general were

62. [3 Agriculture: General Report] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, at 136 (1943).

63. *Id.*

64. See A. RAPER & I. REID, SHARECROPPERS ALL! 26 (1941); R. VANCE, FARMERS WITHOUT LAND 7 (1937); R. VANCE, THE NEGRO AGRICULTURAL WORKER UNDER THE FEDERAL REHABILITATION PROGRAM 126 (1934); G. WRIGHT, *supra* note 61, at 91.

65. *But see* Barron v. Collins, 49 Ga. 581 (1873), in which it was held that no enticement action lay where the enticee was a sharecropper, who was a contractor and not a servant of the landowner; *accord* Burgess v. Carpenter, 2 S.C. 7 (1870). This view did not generally accord with the economic realities of Southern sharecropping and was repudiated by statute and state supreme court rulings in a number of Southern states. See, e.g., Salter v. Howard, 43 Ga. 601 (1871); Haskins v. Royster, 70 N.C. 601 (1874). See generally H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 450-77 (1877). For the later development, see Barnhardt v. State, 169 Ark. 567, 275 S.W. 909 (1925); Jones v. Dowling, 12 La. App. 362, 125 So. 478 (La. Ct. App. 1929); Powers v. Wheless, 193 S.C. 364, 9 S.E.2d 129 (1940); Loveless v. Gilliam, 70 S.C. 391, 50 S.E. 9 (1905); McCutchin v. Taylor, 79 Tenn. 259, 261 (1883); Cry v. J.W. Bass Hardware, 273 S.W. 347 (Tex. Civ. App. 1925); Clark v. Harry, 182 Va. 410, 29 S.E.2d 231 (1944); GA. CODE § 61-501 (1933); Book, *A Note on the Legal Status of Share-Tenants and Share-Croppers in the South*, 4 LAW & CONTEMP. PROBS. 539 (1937); BUREAU OF THE CENSUS, *supra* note 62; C. MANGUM, JR., THE LEGAL STATUS OF THE TENANT FARMER IN THE SOUTHEAST (1952); 17 AM. JUR. *Crops* § 45, at 237 (1938). In conformity with case law, the Arkansas Bureau of Labor and Statistics accepted Statements of Claims for Wages from cotton sharecroppers in the 1930s; see, e.g., Claim of Joe Pirani (Dec. 23, 1937), reproduced in SOUTHERN TENANT FARMERS UNION, PAPERS, 1934-1970 (microfilm reel no. 5). See also *Social Security Amendments of 1955: Hearings on H.R. 7225 Before the Senate Comm. on Finance*, 84th Cong., 2d Sess. 144 (1956) (statement of Senator George: "[I]n Georgia it has always been held that the relation of landowner and sharecropper was one of employer and employee."). The courts in many Northern states took the same position. See, e.g., Kelly v. Rummerfield, 117 Wis. 620, 623, 94 N.W. 649, 650 (1903). In Alabama sharecroppers were generally recognized to be tenants. See ALA. CODE tit. 31, § 23 (1940). The decisions in Mississippi were in conflict. Compare Schlicht v. Callicott, 76 Miss. 487, 24 So. 869 (1899) with Jackson v. Jefferson, 171 Miss. 774, 158 So. 486 (1935).

subjected to a unique type of local-regional political socioeconomic subjugation. Whatever the forms and sources of their disempowerment, today's migrant farmworkers fall outside of that historical regime.⁶⁶ Similarly, whatever power they may exercise, Michigan pickle farmers are not the structural or functional homologues of pre-World War II Mississippi planters. Yet by the same token, certain aspects of the master-servant relationship in the narrow sense that is pertinent to modern labor-protective legislation are common to both; and if real labor-only or other closely supervised sharecropping cotton pickers were sufficiently heteronomous to qualify as employees,⁶⁷ then a fortiori in-name-only sharefarming piece-rate pickle pickers must be too.

III. MIDWESTERN METEMPSYCHOSIS: SEM-ANTICS IN ACTION

The first case in which the issue of sharecropping appears to have been litigated in the context of a modern protective labor statute was *Sachs v. United States*.⁶⁸ The dispute did not take place directly between a farmer and farmworkers, but rather between the former and the Internal Revenue Service over payment of Federal Insurance Contributions Act (FICA) taxes. Mr. and Mrs. Sachs employed migrants to cultivate and harvest sugar beets, tomatoes, and pickling cucumbers on their eight-hundred-acre farm in northwestern Ohio in 1971. Mr. Sachs recruited them in Texas as he had in the past and paid their travel expenses to Ohio. He paid them by the hour for cultivating sugar beets and tomatoes; by the piece for harvesting tomatoes; and by half the receipts for the cucumbers. With the exception of hoes, Sachs furnished all the tools and materials and "informed them of the proper way to pick tomatoes and cucumbers."⁶⁹ Whereas Sachs treated the payments for the tomato and sugar beet work as wages and paid FICA taxes on them, he treated the workers as "share farmers" with respect to the cucumber work and did not withhold any FICA taxes. After being assessed FICA taxes, penalties, and interest, Sachs not only protested but also filed for a refund on

66. Labor-only black tenant-sharecroppers in tobacco in areas such as eastern North Carolina represent the vestiges of that historical system. Telephone interview with Mary Lee Hall, attorney, Farmworker Legal Services of North Carolina (May 1989).

67. Undoubtedly it is true that: "[i]mportant differences must be pointed out between the situation in which the Negro paid a share of the crop as rent and that in which he *received* a share as a wage for his labor." V. WHARTON, *THE NEGRO IN MISSISSIPPI 1865-1890*, at 64 (1947). Nevertheless, even closely supervised tenants on whom the planter successfully imposed some risk in the form of a fixed rent might evince sufficient indicia of dependent employment.

68. 422 F. Supp. 1092 (N.D. Ohio 1976).

69. *Id.* at 1093.

the employment taxes paid for the tomato and sugar beet compensation on the ground that the latter was made to the family heads *qua* self-employed crew leaders under 26 U.S.C. § 3121(o). After paying the assessment and filing a claim for refund, which was disallowed, Sachs sued.⁷⁰

He alleged that 26 U.S.C. § 3121(b)(16) excepted from the definition of covered employment the relationship of a farm owner to a share farmer, who was responsible for self-employment taxes pursuant to 26 U.S.C. § 1402(c)(2)(B). Yet curiously, the parties agreed that the migrants were common-law employees.⁷¹ In order to prevail, the farmer had to show that all three elements of § 3121(b)(16) were met:

service performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(A) such individual undertakes to produce agricultural . . . commodities . . . on such land,

(B) the agricultural . . . commodities produced by such individual, or the proceeds therefrom, are to be divided between such individual and such owner or tenant, and

(C) the amount of such individual's share depends on the amount of the agricultural . . . commodities produced.

The court ruled that criteria (B) and (C) were clearly met, noting that the IRS did not argue otherwise.⁷² It is unclear why the IRS acquiesced in these arguments. Strictly understood, subsection (C) manifestly was intended as an indicium of risk-taking: whereas an employer owes wages to an employee regardless of whether the employer can sell the commodities produced by the employee, a share farmer is presumed to share the immediate risks of non-sale. Yet there was no evidence that these—or any other—pickle pickers ever assumed or were deemed by the farmer to have assumed such a risk. Moreover, the judge made matters too easy for himself by failing to go behind the alleged fifty-fifty agreement to determine whether it was merely a form of piece-wage.⁷³ Be that as it may, the case ultimately turned on the meaning of the phrase “undertakes to produce.” The IRS interpreted it as meaning that the workers assumed the responsibility for performing substantially all the physical

70. *Id.* at 1094.

71. *Id.* at 1095.

72. *Id.*

73. During the social security hearings of 1955, Senator Kerr opined that agricultural piece-rate workers—receiving five cents per quart of strawberries for example—were labor contractors rather than employees. *Social Security Amendments of 1955: Hearings on H.R. 7225 Before the Senate Committee on Finance*, 84th Cong., 2d Sess. 144 (1956).

labor from the inception to harvesting of the crop.⁷⁴ Although the court acknowledged that the workers did not meet this requirement, it found the statutory language sufficiently ambiguous to warrant recourse to the legislative history. Congress added subsection (b)(16) in 1956 in order

to dispel doubt as to the intent of the Congress since persons who *operate* farms under a share-farming arrangement with the owner or tenant have some characteristics of employees and some characteristics of self-employed persons. For example, in some instances the landowner may direct the share farmer to nearly the same extent, on an overall basis, as he does individuals who clearly are employees. On the other hand, share farmers participate directly in the risk of farming; their return from the undertaking is dependent upon the amount of the crop . . . produced. The provisions of the bill would remove any doubt as to whether the services performed by the share farmer are rendered as an employee or as a self-employed person by statutorily defining such services to be self-employment. This definition is believed to be consistent with the actual relationships existing under share-farming arrangements in the majority of cases.⁷⁵

Although the court was surely right in holding that "Congress intended to place the emphasis on the risk sharing element,"⁷⁶ it completely missed the point in ruling that Sachs' "exercise of the degree of control over the direction of the migrants is not dispositive."⁷⁷ For as Judge Walinski himself inadvertently remarked, the threshold issue is whether the persons in question "operate" a farm.⁷⁸ The court made no such finding and it would be preposterous to assert that the migrants who merely trained the vines and picked the pickles were in any way operating Sachs' farm.

Although the court was also correct in stating that Congress intended to give statutory effect to the relevant interpretation that the IRS had offered the year before the amendment was enacted, once again the court clearly erred in failing to see that the fact situation depicted in Revenue Ruling 55-538⁷⁹ differed crucially from that of the migrant pickers. Among the facts set forth in the Revenue Ruling indicating that an entirely different socioeconomic situation prevailed there was that the farmer makes available a house as a residence at which "[e]ach share-

74. *Sachs*, 422 F. Supp. at 1095.

75. S. REP. NO. 2133, 84th Cong., 2d Sess. (1956), reprinted in 1956 U.S. CODE CONG. & ADMIN. NEWS 3877, 3883-84 (emphasis added).

76. *Sachs*, 422 F. Supp. at 1096.

77. *Id.*

78. *Id.*

79. 1955-2 C.B. 313.

farmer is offered the use of a garden plot and is allowed to keep livestock and poultry on his premises.” With regard to the costs and risk of production, the share-farmer “agrees to pay a proportionate share of the costs of the fertilizer and insecticides” and enters into an agreement with the owner as to the types and locations of crops grown.⁸⁰ Referring only to the similarities between the two—in particular to the element of control, which it had just characterized as not dispositive—the court then grossly distorted the record by asserting that “[t]he remaining terms of the agreement were substantially similar to the arrangement between Mr. Sachs and the migrant workers”⁸¹ On this basis, the court then held the cucumber harvesters to be share farmers.⁸²

With regard to Sachs’ claim that the family heads were crew leaders and that the family members cultivating sugar beets and harvesting tomatoes were, pursuant to 26 U.S.C. § 3121(o), employees of their fathers or spouses, the court, adopting an economically realistic position, ruled that the heads were not crew leaders. Judge Walinski held that the fathers did not fit the Internal Revenue Code definition of a crew leader inasmuch as they could not be said to “recruit” their own children and wives—rather Mr. Sachs performed that task.⁸³ Moreover, the court read this part of the crew leader test *in pari materia* with the Farm Labor Contractor Registration Act, 7 U.S.C. § 2042(b), which excluded from contractor status those who furnished only family members.⁸⁴

While the IRS decided not to appeal the decision concerning sharecropping,⁸⁵ Sachs appealed the crew leader issue. The Sixth Circuit affirmed in an unpublished opinion.⁸⁶ The Ohio Bureau of Employment Services relied on *Sachs* in determining that service performed by such sharecroppers was self-employment and thus not covered employment

80. *Id.*

81. *Sachs*, 422 F. Supp. at 1096.

82. *Id.*

83. *Id.* at 1097. The Senate Report stated that crew leaders “recruit crews of workers.” S. Rep. No. 2133, 84th Cong., 2d Sess. (1956), reprinted in U.S. CODE CONG. & ADMIN. NEWS 3888. Sachs argued on appeal that it was “in the national interest” for him to travel to Texas to hire. Brief of Plaintiff-Appellant at 12, *Sachs* (No. 77-3128).

84. *Sachs*, 422 F. Supp. at 1098.

85. The IRS decided that “[b]ecause this issue is widespread and of some administrative importance due to the potential for large revenue loss, we believe the Service should continue to litigate this issue. However, we are . . . doubtful as to the chance of prevailing on appeal. It appears more prudent to develop another case” Action on decision, 1977-87 (May 20, 1977).

86. *Sachs v. United States*, No. 77-3128 (6th Cir. Jan. 8, 1979).

for state unemployment compensation purposes.⁸⁷ In 1985, partly at the urging of the migrant farmworker attorneys,⁸⁸ the IRS issued a new revenue ruling,⁸⁹ announcing its disagreement with *Sachs*.⁹⁰ Emphasizing that operating a farm is the threshold issue, the IRS noted that:

The typical share farmer has responsibility for a wide range of farming activities, including participation in the initial planning for the operation, and incurs out-of-pocket business-related expenses. . . . On the other hand, the migrant workers . . . are hired to perform only specific tasks. They do not undertake to produce the crop and they incur no business expenses. They are not operators of the farm merely because they perform certain tasks relating to the cultivation and harvest of the cucumber crop.⁹¹

Perversely, the IRS has failed to enforce its own Ruling. Consequently, although "sharecroppers" are relieved of liability for self-employment social security taxes, the IRS does not seek to collect the employer's share of the FICA tax from the farmers.⁹²

Several years later Judge Walinski, given the opportunity to revisit the issue of pickle sharecropping under the Fair Labor Standards Act (FLSA) in a factual setting "very similar to" *Sachs*, this time would "not allow form to triumph over substance."⁹³ In granting the DOL's motion for summary judgment on the issue of whether the pickle pickers were employees in a child labor case, the court ruled that *Sachs* had no precedential value because the statutory purposes of the Internal Revenue Code differed from those underlying the FLSA. Because the former served to collect taxes and the latter to eliminate low wages, a worker's

87. Interoffice communication from A. Walter, Assistant Unemployment Compensation Director, Contributions, to D. Russell, Chief, Contribution Dep't, and J. Hardway, Chief, Compliance Dep't (Mar. 20, 1978) (copy in author's possession).

88. The author participated in a meeting with the Deputy Assistant Commissioner (Examination) in January 1985.

89. In the interim the IRS prefigured this position in a number of private rulings. *E.g.*, Priv. Ltr. Rul. 78-21-013 (Feb. 21, 1978); Priv. Ltr. Rul. 78-26-062 (Mar. 30, 1978); Priv. Ltr. Rul. 83-50-009 (Aug. 23, 1983).

90. Rev. Rul. 85-85, 1985-1 C.B. 332, 333.

91. *Id.*

92. *See, e.g.*, Priv. Ltr. Rul. 81-50-024 (Aug. 25, 1981) (in which the IRS held that the pickle pickers were employees but that the farmer met the safe haven requirements of § 530, triggering tax relief). *See Linder, The Involuntary Conversion of Employees into Self-Employed: The Internal Revenue Service and Section 530*, 22 CLEARINGHOUSE REV. 14 (1988). In a memorandum dated Feb. 20, 1985, and sent to all regional commissioners (copy in author's possession), making reference to the proposed Revenue Ruling that was later promulgated as Rev. Rul. 85-85, 1985-1 C.B. 332, 333, the IRS changed its position with regard to § 530. Nevertheless, at the regional collection level, the IRS inconsistently accepts amended returns from pickle pickers, in which they contend that the Form-1099 was issued erroneously and that they are tendering offer of the employee's share of the FICA tax, without seeking the employer's share from the farmers.

93. *Donovan v. Gillmor*, 535 F. Supp. 154, 159, 162 (N.D. Ohio 1982).

status could vary from statute to statute. Because Judge Walinski had found in *Sachs* that the migrants were employees under the common law but nevertheless sharecroppers for purposes of the Internal Revenue Code,⁹⁴ it was illogical for him to have considered that case “irrelevant and inapposite.”⁹⁵ Because the facts were the same and the FLSA economic realities test of employment the same as that developed in the cases cited by the *Sachs* court,⁹⁶ *Sachs* was stare decisis.

Nevertheless, the court proceeded through the economic reality test factors: control, opportunity for profit or loss, investment, permanency, and skill.⁹⁷ In order to apply these factors properly, the court made the following fact findings: The farmer owned or rented all the land and all the expensive mechanical equipment, including tractors, cultivator, plow sprayers and irrigation system. The farmer decided when to plow and when and where to plant and cultivate cucumber crops, paid for the seed, decided whether to use, applied, and paid for fertilizer, pesticide and insecticide. All of this activity preceded the migrants' arrival. They, on the other hand, were housed by the farmer at his expense. They worked on other crops than pickles and provided no tools except hoes. They had no control over the price of the pickles or any say in the choice of a buyer.⁹⁸ On this basis the court found “overwhelming control” by the farmer, who had significant investment, and no investment by the unskilled workers. Of potentially greatest significance were twin findings concerning profit and loss. Because the workers “exercise[d] no entrepreneurial discretion whatsoever,” higher piece wages achieved through working faster or more could not be bootstrapped into “profit.” By the same token, the migrants assumed no risk of loss because “they have not invested anything in which to lose”: “If the pickle crop is bad, the loss incurred by the migrant would be a loss in terms of opportunities to pick pickles. However, this loss translates into a loss of wages, and not a loss of profit.”⁹⁹

The Sixth Circuit dismissed the farmer's appeal on the ground that

94. *Id.* at 160.

95. *Id.*

96. On the overruling of the judicially created economic realities test in the social security setting by the Gearhart Amendment in 1948, see M. LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* ch. 6 (1989).

97. The court omitted the vital factor of integration into the alleged employer's business.

98. *Gillmor*, 535 F. Supp. at 161.

99. *Id.* at 162.

it lacked jurisdiction to entertain an appeal of an order that was not final.¹⁰⁰ While this litigation was in progress, the DOL was also prosecuting pickle farmers in the Western District of Michigan for violations of the child labor and record-keeping provisions of the FLSA. In two companion cases decided in 1983, the court there set the stage for renewed review by the Sixth Circuit by holding that the pickle pickers were not employees and that therefore the farmers had not illegally employed children.¹⁰¹ The following year the court of appeals in the closely watched¹⁰² *Brandel* case furnished the first solid judicial support for sharecropping, which, in the event, represented the high-water mark in the efforts by farmers to persuade the courts that unskilled and capital-less workers are not employees.

In seeking to understand how the court came to condone this practice, it is important to keep in mind that the evidentiary record was confused by the intervention of nine migrants who had been induced by the defendant-farmer to proclaim their status as independent contractors.¹⁰³ Relevant and related, too, is the fact that *Brandel* was not presented as a minimum-wage case involving extreme and outrageous exploitation. Thus, the trial judge stated that "it might just as likely be said that Brandel is economically dependent upon the harvesters. There is no indication that these harvesters are in need of the protection of the Act. They work neither long hours nor earn low wages."¹⁰⁴ Indeed, the Sixth Circuit not only accepted this finding, but asserted that the workers had earned "the equivalent of \$6.00-\$9.00 per hour."¹⁰⁵ In point of fact, however, the record-keeping violations committed by the defendant made it unclear whether such hourly wages were not in reality earned by

100. *Donovan v. Gillmor*, 708 F.2d 723 (6th Cir. 1982).

101. *Marshall v. Brandel*, No. G76-393-CA6 (W.D. Mich. Jan. 17, 1983); *Marshall v. Eilers*, No. G76-562-CA6 (W.D. Mich. Mar. 2, 1983).

102. See, e.g., Sinclair, *Calling Migrants 'Sharecroppers' to Skirt Laws Faces Court Test*, Washington Post, May 22, 1982, at A20, col. 1; *Appeals Court Upholds Legality of 'Share-Cropped' Pickle Harvest*, Great Lakes Vegetable Growers News, July 1984, at 1, col. 1; Herald-Journal (Grand Rapids), March 12, 1981, at 4, col. 1. *Gillmor* had also received some local coverage. See, e.g., *Judge Rules Labor Act Includes Farm Workers*, The Blade (Toledo), Apr. 9, 1982 at __, col. __; *Farm Workers Denied Benefits, Group Charges*, The Blade (Toledo), June 3, 1982, at 1, col. 6.

103. *Usery v. Brandel*, 87 F.R.D. 670 (W.D. Mich. 1980). Such perverse intervention by protected workers in cases brought by the DOL is not unique. See, e.g., *Marshall v. CB Sports, Inc.*, No. 79-299 (D. Vt. filed Dec. 4, 1979) (homeknitters).

104. *Marshall v. Brandel*, No. G76-393-CA6, slip op. at 8 (W.D. Mich. Jan. 17, 1983).

105. *Donovan v. Brandel*, 736 F.2d 1114, 1120 n.10 (6th Cir. 1984).

a whole family.¹⁰⁶ Moreover, the DOL committed a tactical error in failing to raise the issue on appeal of whether the children were Brandel's employees regardless of the relationship between their parents and Brandel. For when the DOL belatedly raised the issue in its petition for rehearing,¹⁰⁷ Brandel weakly responded that he had never "asserted that the children of the migrants are each individually, independent contractors. . . . Each child is, simply, solely, and realistically, a member of his or her family functioning within the family environment."¹⁰⁸ The court ruled, without prejudice, that the issue had been raised inappropriately.¹⁰⁹ A final weakness in the *Brandel* litigation lies in the fact that the DOL did not argue that because Congress intended the FLSA to protect even some real Southern sharecroppers, a fortiori sham sharecroppers were covered.¹¹⁰

Astonishingly, despite the virtually identical fundamental structural relationships in both cases, just as the court in *Gillmor* found that every economic-reality-test factor pointed towards an employer-employee relationship, the Sixth Circuit found that no factor supported such a finding in *Brandel*. The essential facts as found by the lower court and adopted by the Sixth Circuit were as follows. Although the court mentioned in passing in a footnote that Brandel's contracts "required that all harvesting be done by family members,"¹¹¹ it never reflected on the extraordinary character of such an invasive restriction on the entrepreneurial freedom of the putative independent contractors. For if Brandel was permitted to impose the biological limits of family size on the migrants' ability to exploit labor, he was in effect making it virtually impossible for the migrants ever to accumulate sufficient capital to climb the "agricultural

106. Petition for Rehearing and Suggestion for Rehearing en Banc on Behalf of the Secretary of Labor at 14 n.9, *Donovan v. Brandel*, 760 F.2d 126 (6th Cir. 1985) (No. 83-1228).

107. *Id.* at 2 n.3.

108. Appellee's Response to Appellant's Petition for Rehearing and Suggestion for Rehearing en Banc at 7, *Brandel* (No. 83-1228).

109. *Brandel*, 760 F.2d at 126.

110. The Brief of Amicus Curiae Farm Labor Organizing Committee on the petition for rehearing to the Sixth Circuit alluded to, but did not develop, this issue. Brief at 19, *Brandel* (No. 83-1228). Because the amici concentrated their efforts on showing the vast historical differences between cotton sharecroppers and pickle pickers in order to divest the word "sharecropper" of any legal relevance to the migrants, they could no longer plausibly marshal the arguments that inferred the latter's employee status from the former's. *Id.* at 13-17.

111. *Brandel*, 736 F.2d at 1116 n.4. Sharecropping contracts run the gamut from the naive to the crude. Thus Steffens Brothers Orchards in Grand Rapids, Michigan, used one (in Spanish) in the 1980s that stated that the owners employed "el peon" and provided for withholding for social security. Copy of agreement used by Steffens Brothers Orchard (in author's possession). Even the more sophisticated versions include the prohibition on furnishing non-family labor. Copy of agreement used by John Faulkner, Decatur, Mich. (in author's possession).

ladder . . . through tenancy to ownership."¹¹² Such a constraint should in itself disqualify the arrangement as independent contracting. Moreover, in the real world of employment such a restriction is manifestly designed to create the prerequisites for the unbridled exploitation of minor family members. By detaching himself from the employment nexus and assigning the family members to the family head, who is privileged by law to engage in exploitation prohibited to strangers, or by classifying the family as a non-hierarchical cooperative group, which is similarly privileged to engage in self-exploitation, the farmer appropriates additional labor time at little cost. The incentive to the family lies in the additional piece-rate earnings it obtains through the children's labor.

The court further found that "Brandel supplies irrigation and pesticides as he determines to be necessary upon notification of the need for such by the migrants."¹¹³ Although the Sixth Circuit stated that "[t]he price for the pickles is set unilaterally by the processors in advance of the harvest season,"¹¹⁴ it failed even to ask whether in economic reality the migrants might be employees of the processor—an important consideration in light of the fact that a few large entities such as Campbell Soup Co. (through its subsidiary, Vlasic Foods, Inc.), General Foods (now part of Philip Morris), and Heinz control the market.¹¹⁵ The parties themselves had stipulated that "each individual harvester's capital investment in their work with Brandel consisted of their pails and gloves," whereas "Brandel ha[d] a substantial capital investment in specialized equipment for his pickle farming operations" including tractors, irrigation equipment, trucks and a grading station that alone cost \$62,000-\$72,000.¹¹⁶ Brandel also contractually agreed to prepare the land, plant, cultivate, hoe, and spray the crop, furnish the seed and fertilizer, "and to pay any other costs incurred in growing of the crop." He also agreed to

112. Memorandum to Paul Appleby, Office of the Secretary of Labor, from A.G. Black, Chief of Bureau of Agricultural Economics (June 4, 1937) (copy furnished by Wayne Rasmussen, Chief, Agricultural History Branch, U.S. Dept. of Agriculture). For belated recognition of the existence of a stratum of farm laborers who would never ascend the ladder, see Ham, *Farm Labor in an Era of Change*, in U.S. DEP'T OF AGRIC., YEARBOOK OF AGRICULTURE 1940, at 907, 909-10.

113. *Brandel*, 736 F.2d at 1116 (footnote omitted).

114. *Id.*

115. Farm Labor Org. Comm., Fact Sheet on Sharecropping (July 25, 1984); Telephone interview with Pickle Packers International, Inc. (June 23, 1989). Some of the smaller farmers may be mere part-time contract farmers operating under adhesion output contracts with the processors. Telephone interview with Jeff Welch, former FLOC attorney (May 23, 1989). On contract farming, see M. Pfeffer, *The Social Relations of Subcontracting: The Case of Contract Vegetable Production in Wisconsin* (Working Paper No. 2, Center for Comparative Studies in the Sociology of Agriculture, Univ. Wis.) (undated [ca. 1982-83]).

116. *Brandel*, 736 F.2d at 1118 & 1118 n.8.

furnish all receptacles used for harvesting and to transport the pickles to the receiving station. The agreement did not even pretend that the picker was involved in the decisions concerning the sale of the crop.¹¹⁷

Crucially the court recited the alleged reason for sharecropping:

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.¹¹⁸

Here the court cavalierly glossed over the fact that asparagus hand-harvesters must also be selective because they are docked for culls and yet have not been subjected to sharecropping, while strawberries are not graded¹¹⁹ but have been the object of sharecropping.¹²⁰ Indeed, it did not even blink at the fact that thirty-six of the families working for Brandel were engaged in heteromorphic operations insofar as they simultaneously worked as Brandel's employees picking strawberries.¹²¹ Moreover, the court failed to go behind its superficial description to get at the underlying economic reality. One possible explanation for this failure to acknowledge the existence of employer-employee-like authority relations between such unskilled hand-laborers and farm operators¹²² is that, although the latter may have the legal power and technological expertise

117. Share the Pickle Crop—Partnership Agreement (1976) (copy in author's possession).

118. *Brandel*, 736 F.2d at 1116.

119. A difference in quality may exist between strawberries for the fresh and frozen markets, but they are not grown in the same field at the same time. Runsten, *Competition in Strawberries*, in *MARKETING CALIFORNIA SPECIALTY CROPS: WORLDWIDE COMPETITION AND CONSTRAINTS: COMPETITIVENESS AT HOME AND ABROAD* 47, 50-51 (1987).

120. Brief of Amicus Curiae Farm Labor Organizing Committee at 18, *Brandel* (No. 83-1228).

121. *Brandel*, 736 F.2d at 1117.

122. This failure is not unique to the judiciary:

Although job incumbents may continue to hold jobs for a considerable period of time, and may claim to be subject to an authority relationship, all that they are essentially doing is continuously meeting bids for their jobs in the spot market. . . . That adaptive, sequential decisionmaking can be effectively implemented in sequential spot labor markets which satisfy the low transition cost assumption (as some apparently do, e.g., migrant farm labor), without posing issues that differ in kind from the usual grocer-customer relationship, seems uncontestable.

Williamson, Wachter & Harris, *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 *BELL J. ECON.* 250, 264-65 (1975).

to supervise and control the former, the importance of their actually exercising that control diminishes as their ability to spell out orders in advance increases;¹²³ and that ability, in turn, increases as the skill required of the workers decreases.

In fact, because the hand-harvesting of many commodities is a simple task that requires supervision only because the combination of low hourly wages and arduousness invites "shirking," and the quality or standard of the output is as costly to monitor as the quantity of the labor input, it may become cheaper for employers to dispense with direct supervision altogether by introducing piece rates.¹²⁴ The obvious advantage of the piece-rate system is that it forces the employee to internalize directly the price-discipline and concomitant self-monitoring that the market normally imposes on the firm.¹²⁵ Some pickle farmers have achieved this result by initiating for their employee-pickers a piece-rate differentiated according to the size of the pickle. The grading machine in effect replaces the field supervisor. What *Brandel* has done, however, is merely to call the internalized piece-rate system "sharecropping,"¹²⁶ because the piece rate happens to approximate fifty percent of the crop price he receives—provided he does not pay social security or unemployment insurance taxes or workers' compensation premiums. Indeed, earlier, farmers had paid pickers on a fifty-fifty basis while treating them as employees, and some still do.¹²⁷ In point of fact, sharecropping contributes no more than a graded piece rate does to the elimination of the costs associated with supervision or to the creation of disincentives for picking large pickles, which are easier to find and to pick but for which the processors pay less.¹²⁸

Finally, the Sixth Circuit virtually preordained the outcome of the

123. W. KLEIN & J. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 12 (3d ed. 1988).

124. See S. CHEUNG, *THE THEORY OF SHARE TENANCY* 67 n.12 (1969).

125. See Stiglitz, *Incentives, Risk, and Information: Notes Toward a Theory of Hierarchy*, 6 *BELL J. ECON.* 552 (1975).

126. His own expert witness, Professor Shapley, admitted that it was merely a "sophisticated form of piece rate." Brief of Amicus Curiae Farm Labor Organizing Committee at 17, *Brandel* (No. 83-1228).

127. *Sharecropping Contract Lowers Workers' Wages*, 3 *UNDER THE BURNING SUN*, July 1976, at 1. In many areas pickle pickers are treated as employees and paid on a piece rate. *E.g.*, *Washington v. Miller*, 721 F.2d 797 (11th Cir. 1983); *Alzalde v. Ocanas*, 580 F. Supp. 1394 (D. Colo. 1984). Telephone interview with Baldemar Velasquez, President, FLOC (May 22, 1989).

128. John Faulkner, a large pickle farmer in Michigan who has been sued more than once, responded evasively but truthfully when asked what sharecropping added to the graded piece-rate system: "We can't afford to pay workers' compensation, unemployment compensation, etc." Telephone interview with Janice Morgan, attorney, Michigan Migrant Legal Assistance Project (May 15, 1989).

case by accepting the trial judge's vacuous characterization of the migrant children's ability to "progress gradually to an active role in the harvesting" as merely the achievement of the parents' primary purpose in "develop[ing their] basic skills and family unity."¹²⁹

Against this situational background, the court embarked upon its march through the economic-reality-test factors, beginning with the least coherent and intelligible one—the permanency of the relationship. Viewing the possible spectrum from temporary to permanent employment with the former apparently contradicting and the latter supporting a conclusion of employee status, the court accepted the trial judge's finding of a temporary relationship. The Sixth Circuit also embraced Judge Gibson's meaningless ruling—designed to undercut the DOL's argument that annually repeated engagements constituted permanency—that such re-engagement "was a product of a mutually satisfactory arrangement rather than the permanent relationship between them."¹³⁰

Adjudications such as this one should prompt consideration of the need to jettison the factor of permanency altogether, especially since a typical setting in which the factor could be dispositive is difficult to imagine. The reason the permanency factor is not calculated to distinguish between economic dependence and independence is that it serves to mask rather than to illuminate what dependence means. To the essence of a capitalist economy belong both free enterprise and the free movement of labor. If the mere exercise of the latter freedom—as enshrined in the prohibition on involuntary servitude embodied in the thirteenth amendment—were per se an indicium of economic independence, the absurd result would be the presumptive conversion of all seasonal and casual workers and day laborers into independent contractors.¹³¹ Attentiveness to this dangerous slippery slope led the Fifth Circuit to hold recently that the remedial purposes of the FLSA "are not defeated merely because essentially fungible piece workers work from time to time for neighboring

129. *Brandel*, 736 F.2d at 1117.

130. *Id.* at 1117. Interestingly, the Sixth Circuit failed to mention Judge Gibson's finding that some pickers remain for only five of the seven or more pickings. *Marshall v. Brandel*, No. G76-393-CA6, slip op. at 4 (W.D. Mich. Jan. 17, 1983). Although these two courts sought to make much of the fact that each family had its field under its own "dominion," the fact that when families regularly leave the harvest early—either to enable their children to return to Texas to school or because the yields are decreasing—the pickle farmers assign other families to pick those fields indicates that a run-of-the-mill employment relationship exists.

131. See Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the "Law and Economics" Agency Doctrine*, 15 N.Y.U. REV. L. & SOC. CHANGE 435, 469-71 (1987).

competitors. Laborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer."¹³²

In analyzing the central factor of skill, the Sixth Circuit again almost willfully misconceived the role played by skill in identifying economic dependence. Skill refers both to some absolute level required by the task and to the relative skill levels as between the worker and the entity for which he is working. The relational property is crucial because it indicates whether the putative employer knows more about the work than the worker and hence can control and integrate him into his business. A high absolute skill level is less dispositive because a highly trained pilot, doctor, or lawyer may still be an employee if his employer can supervise him substantively. A low level or absence of skill, on the other hand, is almost always relevant because it implies that almost any entity has the knowledge to supervise the worker.¹³³

The appeals court's affirmance of Judge Gibson's finding that "an experienced harvester possesses a degree of skill in both the care of the pickle plants and judgment in the picking of the fruit itself,"¹³⁴ misconstrues "skill" to mean nothing more than that with time one can become faster and more proficient at even the most unskilled tasks—for example, ditch-digging. The circumstance that the court engaged is not only irrelevant to a finding of economic independence but also overlooks the fundamental fact that work that seven-year-olds routinely perform competently¹³⁵—such as being able to tell the difference between big and small cucumbers—cannot be skilled: "Farm work performed by the migrant workers is unskilled labor. No argument to the contrary is possible. No special skill . . . is necessary to perform the tasks of pulling vines and weeds, picking cucumbers . . ." ¹³⁶

That the court did not understand the function of skill within the framework of the economic reality test emerged from a footnote in which it stated that it was "mindful of the determination by the Supreme Court . . . that there may be a fine line between pieceworking and skilled labor: 'While profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for

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

133. *See Linder, supra* note 131, at 454 n.125.

134. *Brandel*, 736 F.2d at 1117.

135. Brief of Appellant at 30, *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984) (No. 83-1228).

136. *Haywood v. Barnes*, 109 F.R.D. 568, 588 (E.D.N.C. 1986).

success upon the initiative, judgment or foresight of the typical independent contractor.’ ”¹³⁷ Here the Supreme Court was not discussing skill at all but what constituted an independent business. Skill, however, is not a prerequisite of self-employment—as the peddler or small store owner demonstrates.

Unable to get around the obviously enormous disparity between Brandel’s sizable investment in equipment and facilities and the migrants “investment in . . . their pails and gloves,” both courts sought to downplay this factor by stating that it was not determinative because Brandel had little invested directly in the harvesting process.¹³⁸ With the same crabbed logic it could be said that the worker who uses a five-dollar broom to sweep the floor of a hundred-million-dollar factory all day is an independent contractor because none of the hundred million dollars was invested in sweeping. Moreover, this view disregards the key function that investment fulfills with regard to the opportunity for profit and the risk of loss.

In its only implied criticism or deviation from the lower court, the Sixth Circuit conceded that the record did not “support the finding that these workers are actually exposed to any risk of loss.”¹³⁹ After all, that Brandel had paid the harvesters for their pickles in 1980 even though he had been unable to sell them¹⁴⁰ should have been dispositive of the whole case. Yet despite the fact that the risk of loss rather than the chance for profit essentially defines an independent enterprise,¹⁴¹ the court created all manner of unnecessary confusion by the unfounded and unsupported assertion “that the opportunity for greater earnings based upon management of the fields . . . is not solely a function of a piecework method of compensation.”¹⁴²

The Sixth Circuit also upheld the lower court’s finding that Brandel lacked the right to control the details of the harvesting.¹⁴³ In the first instance it arrived at this conclusion by disregarding the total and pervasive control that the farmer exercised over the entire operation in which the pickers were but a cog. Second, the courts neglected the venerable

137. *Brandel*, 736 F.2d at 1118 n.7 (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

138. *Id.* at 1118.

139. *Id.* at 1119.

140. *Id.*

141. Flannigan, *Enterprise Control: The Servant-Independent Contractor Distinction*, 37 U. TORONTO L.J. 25, 46-47 (1987).

142. *Brandel*, 736 F.2d at 1119.

143. *Id.*

judicial insight that an employer cannot bootstrap his employee into independent contractor status by relying on the fact that the work is so simple that it requires no supervision. And third, the courts viewed the defendant's alleged "design to relinquish control of the harvesting to the migrant worker" as part of "the trend towards subcontracting major aspects of farming operations such as plowing, crop dusting and grain harvesting."¹⁴⁴ This conclusion, adopted verbatim from Judge Gibson's opinion, omitted mention of the latter's major premise: "For at least 40 years, the only profitable method of harvesting pickles has been by subcontracting to 'independent contractors . . .'"¹⁴⁵ Yet, as already noted, various methods of compensating pickle pickers, including hourly and graded and ungraded piece rates for direct employees, have coexisted for years in the Midwest. Moreover, no plausible inferences can be drawn from these activities because they all represent specialized, capital intensive, skilled, and independent operations that are not integrated into the farmer's business. The migrants, by contrast, "were not specialists called in to solve a special problem, but unskilled laborers who performed the essential everyday chores of [the defendant's] operation."¹⁴⁶

The factor of integration the court discussed briefly without benefit of the trial judge's comments. Although Judge Churchill was constrained to imply that the workers were indeed an integral part of Brandel's operation, he quickly shifted ground to deny that the migrants were economically dependent on Brandel. The reasons he adduced were embarrassingly jejune. First, Brandel did not control the pickle prices to which their pay was directly related. By this logic virtually no farmer in the world would be an employer. Second, the migrants could find similar work elsewhere.¹⁴⁷ Again, by this logic no worker except an immobile resident of a company town would qualify as an employee. As the ad absurdum arguments demonstrate, the issue is not whether a worker is economically dependent on a particular employer, but on "finding employment in the business of others"¹⁴⁸—rather than in his own independent business.

Having triumphantly manipulated the economic-reality-test factors, the court in conclusion preemptively denied the DOL's alleged request for a per se rule that all migrant farmworkers are employees under the

144. *Id.* at 1119 & n.9.

145. *Marshall v. Brandel*, No. G76-393-CA6, slip op. at 3 (W.D. Mich. Jan. 17, 1983).

146. *McLaughlin v. Seafood, Inc.*, 867 F.2d 875, 876-77 (5th Cir. 1989).

147. *Brandel*, 736 F.2d at 1120.

148. *Fahs v. Tree-Gold Co-op Growers of Florida, Inc.*, 166 F.2d 40, 44 (5th Cir. 1948).

FLSA.¹⁴⁹ Although the DOL never submitted such a request, solid grounds for granting it exist.¹⁵⁰

Brandel has had a significant real-world impact, strengthening pickle farmers' demands in Michigan (and Ohio) that workers submit to the loss of their rights to minimum wages and unemployment insurance benefits. For fear of running afoul of sanctions for filing frivolous lawsuits,¹⁵¹ some lawyers have refrained from challenging sharecropping. Unless the United States Supreme Court overturns *Brandel* or Congress amends the FLSA, defiance will have to supervene in the form of worker self-help rather than legal skirmishes. And that may in fact be the next step; for now that the Farm Labor Organizing Committee has succeeded in concluding collective bargaining agreements covering half of Ohio's pickle growers, processors and pickers,¹⁵² it intends to push for the abolition of sharecropping, which it considers "the root of our problems,"¹⁵³ during its 1989 negotiations.¹⁵⁴ Yet at the same time, when the court in *Donovan v. Gillmor* decided a new summary judgment motion in light of *Brandel*, it affirmed its decision¹⁵⁵ based on the Sixth Circuit's reference to the "strikingly different" record.¹⁵⁶ Therefore distinguishability may become the path of most resistance.

IV. CUTTING THE GORDIAN KNOT: LAW AND ECONOMICS TO THE RESCUE OF THE PICKLE PROLETARIAT

Shortly after the Sixth Circuit handed down *Brandel*, the DOL filed suit against a pickle grower within the jurisdiction of the Seventh Circuit. Sharecropping was a relatively recent innovation in Wisconsin, encompassing a mere handful of farms, largely inspired by the farmers' judicial

149. *Brandel*, 736 F.2d at 1120.

150. See *infra* notes 157-90 and accompanying text. Even when asked at oral argument in *Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 243 (1988), whether it wanted such a *per se* rule, the DOL declined for fear that someday a migrant with considerable capital investment and skill might appear on the scene. Interview with Leonard Grossman, Solicitor General's Office, Chicago Region, U.S. Dep't of Labor (1987).

151. FED. R. CIV. P. 11.

152. Schneider, *Migrant Workers Sign 4th Contract in Midwest*, N.Y. Times, Aug. 7, 1987, at 9, col. 1 (nat. ed.).

153. B. Velasquez, *Share-Cropping Is the Root of Our Problems* (undated flier, ca. 1984) (copy in author's possession).

154. Telephone interview with Baldemar Velasquez, President, FLOC (May 22, 1989). For a distorted report on the background of these negotiations, see Cain, *Field of Dreams: Vlasic Says New Pay System Benefits Migrant Workers*, Detroit News, July 24, 1989, at 1D. For a rebuttal, see Linder, *Pickle Farmer "Scam,"* Detroit News, Aug. 14, 1989, at 8A.

155. *Marshall v. Gillmor*, C79-163, slip op. at 7 (N.D. Ohio, Dec. 2, 1986). Judge Walinski had reaffirmed his decision on employee status once before on June 6, 1983.

156. *Brandel*, 736 F.2d at 1120 n.11.

successes in Ohio and Michigan. Lauritzen Farms was represented by Brandel's counsel and his litigation expenses were in part borne by a pickle growers' association in those states. Although the original complaint alleged minimum-wage violations as well, these were eventually dropped, in large part because of evidentiary problems, leaving the child labor and record-keeping violations intact. The work situation was essentially the same as in *Brandel*. One twist involved a regulation promulgated pursuant to the Wisconsin Migrant Law, which prescribes, inter alia, the signing of a Migrant Work Agreement and minimum guaranteed hours.¹⁵⁷ Because the Wisconsin Attorney General had already interpreted the Act's provisions to be incompatible with sharecropping agreements,¹⁵⁸ Lauritzen had signed work agreements stating the wage rate to be "50% 3.35 P.H.," which the court interpreted to mean a guarantee of the minimum wage where the sharecropping arrangement did not meet the minimum wage.¹⁵⁹ This wrinkle does not appear to have played any part in the adjudications, perhaps because the defendant stated that he had signed the agreement under compulsion and did not feel bound by it.¹⁶⁰ The trial judge on a motion for partial summary judgment on the issue of employee status expressed his disagreement with *Brandel* because "it disregarded the economic reality of migrant cucumber pickers," who were "completely dependent upon Lauritzen"¹⁶¹ Unremarkably, Judge Evans, like the *Gillmor* court, found that every factor pointed toward employee status.¹⁶² After the court granted an injunction the next year,¹⁶³ Lauritzen appealed to the Seventh Circuit.¹⁶⁴

The opinion of the court of appeals was, like the lower court's, a rather staid rehearsal of the facts and their application to the economic-reality-test factors, all of which it found probative of employee status.

157. WIS. STAT. §§ 103.90-103.97 (1988).

158. 71 Op. Wis. Att'y Gen. 92 (1982). Nevertheless, the attorney general also stated that, because the state supreme court had long held to the view that, absent an intention by the parties to create a landlord-tenant relationship, sharecropping established an employer-employee relationship, "the migrant is not an independent contractor and the agreement is subject to the provisions of" the Act. *Id.*

159. Brock v. Lauritzen, 624 F. Supp. 966, 967 (E.D. Wis. 1985).

160. Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment at 18-19, *Lauritzen* (No. 84-C-980).

161. *Lauritzen*, 624 F. Supp. at 969.

162. *Id.* at 968-69.

163. Brock v. Lauritzen, 649 F. Supp. 16 (E.D. Wis. 1986).

164. Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 243 (1988).

The Seventh Circuit panel directly engaged the Sixth Circuit's interpretation and found it wanting on every point.¹⁶⁵ The only remarkable aspect of the opinion was Judge Wood's closing observation, which obliquely exposed sharecropping as a sham:

The basic arrangement between the defendants and the pickle pickers which, according to the defendants, produces the highest economic return for both grower and picker, need not be altered. *All that need change is the label which the defendants apply to the arrangement.* The defendants need only think of the proceeds paid to the pickle pickers as wages¹⁶⁶

Remarkable was Judge Easterbrook's seven-page concurrence, in which this Reagan-appointed academic leader of Law and Economics subjected the economic reality test to its first-ever judicial meta-critique. Written in the witty and pithy style that he and his brother, Judge Posner, rejuvenating the tradition of Holmes and Learned Hand, have used to enliven judicial pronouncements, the concurrence dripped irony and sarcasm. Thus Easterbrook found it "comforting to know that 'economic reality' is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy."¹⁶⁷ His ire appears to have been sparked by the insight that a half-century after enactment of the FLSA, no legal rule had yet emerged that would eliminate costly and risky litigation over the issue of employee status. The balancing test of economic realities he viewed as symptomatic of this breakdown because it offered little guidance and begged the crucial questions.¹⁶⁸ In particular, Easterbrook noted that enjoining the courts to identify as "those who as a matter of economic reality are dependent upon the business to which they render service" does not help to isolate the elements of 'reality' that matter."¹⁶⁹

After these introductory remarks, Easterbrook took aim at the various test factors with sniper shots, some little more than glib debating points but others more telling. Thus with regard to his colleagues' ruling that the overriding consideration in determining control was the farmer's "right to control . . . the entire pickle-farming operation," Easterbrook countered: "If this is so, Pittsburgh Plate Glass must be an 'employee' of

165. *Id.* at 1536-38.

166. *Id.* at 1538-39 (emphasis added).

167. *Id.* at 1539 (Easterbrook, J., concurring).

168. *Id.*

169. *Id.* at 1540 (citation omitted) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

General Motors because GM controls 'the entire automobile manufacturing process' in which windshields from PPG are used. This method of analysis makes everyone an employee."¹⁷⁰ For one as attuned to neoclassical economics as Judge Easterbrook, his disregard of the crucial fact that PPG and GM are engaged in and produce for different final product markets seems disingenuous. After all, pickle-picking is obviously an integrated part of pickle-farming in a way that glass-making is not vis-à-vis automobile manufacture. Although GM could (vertically) integrate glass-making into its operations—just as Ford for many years integrated steel manufacture—it has not chosen to do so and PPG presumably uses numerous technologies to manufacture many different kinds of glass for various product markets. Thus, a priori the notion that glass makers could be GM employees is hardly far-fetched; it all depends on the concrete relationships—and in the pickle context the pickers' lack of skill together with their complete integration into Lauritzen's operations is dispositive of the issue of control.

While implicitly agreeing with the court that the migrants risked no loss, Easterbrook quibbled over whether they had an opportunity for profit. He managed to do this only by analogizing the family head to a manager deploying labor "in a hierarchical organization."¹⁷¹ If the father parasitically lived on the income generated by the exploitation of his wife and children, the analogy might rise above the status of a joke, but as it stands, the comparison to a consultant without capital is shallow. Although Easterbrook readily agreed that the migrants possessed no physical capital, he objected again that the same was true of many real independent contractors who, however, have heavily invested in "human capital"—such as lawyers. Though surely not incorrect, the reference to human capital is but another way of referring to the next factor, skill, which, Easterbrook agreed—as is only reasonable given the testimony that as a ten-year-old, one worker learned how to pick in five minutes¹⁷²—the migrants generally lack.¹⁷³ The permanency or duration of the relationship he astutely regarded as incoherent and irrelevant since no one-to-one relationship necessarily obtains between it and employment status. Judge Easterbrook properly chided the court for confusing the (meaningless) "integral part of the employer's business" with "part of integrated operation," but failed to see why such integration is

170. *Id.* at 1540.

171. *Id.*

172. *Id.* at 1533.

173. *Id.* at 1540-41.

relevant.¹⁷⁴

Easterbrook reserved his sharpest barbs for the synthetic factor of economic dependence itself. Pared of their cute paradoxical tone, his remarks boil down to this: the notion has been so drained of rigor that it has become conflated with economic interdependence, a relationship that, because it defines virtually all economic agents, cannot function to distinguish between employees and independent contractors.¹⁷⁵ Easterbrook concluded that if the courts insist on adhering to “[a] fact-bound approach calling for the balancing of incommensurables, an approach in which no ascertainable legal rule determines a unique outcome,” then the issue is for a trier of fact rather than one of law.¹⁷⁶

The tenor of Easterbrook’s whole critique combined with the (factually unfounded) complaint that the court overlooked the “wrinkle” that “the migrants share the market risk with Lauritzen”¹⁷⁷ must prompt puzzlement at what remained for Judge Easterbrook to concur in. Here the surprise began. He called for a new beginning rooted in the statute’s policy “‘to correct and as rapidly as practical [to] eliminate’” “the ‘labor conditions detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers.’”¹⁷⁸ Even at this juncture Easterbrook halted the journey again to interject his market-knows-best skepticism about whether such purposes might actually harm those they are intended to benefit “by foreclosing desirable packages of incentives.”¹⁷⁹ But resuming the trek, he conceded that “whether it is efficient or not is none of our business.” Rather, the judiciary’s (Holmesian) function is not to ask whether Congress did the right thing, but to implement its purpose. Back on track, Easterbrook

174. *Id.* at 1541.

175. *Id.* at 1542. For an extended discussion of this flaw in the economic reality test, see M. LINDER, *supra* note 96, at 233-38.

176. *Lauritzen*, 835 F.2d at 1542-43 (Easterbrook, J., concurring).

177. *Id.* at 1542. Because the price is set at the beginning of the season and constitutes a guarantee from the grower to the picker, it is only the grower who bears the risk of price changes. At the end of the concurrence Easterbrook apparently recanted:

The link of the migrants’ compensation to the market price of pickles is not fundamentally different from piecework compensation. Just as the piecework rate may be adjusted in response to the market . . . , imposing the market risk on piecework laborers, so the migrants’ percentage share may be adjusted in response to the market . . . in order to relieve them of market risk. Through such adjustments Lauritzen may end up bearing the whole market risk, and in the long run must do so to attract workers.

Id. at 1545.

178. *Id.* at 1543 (citing 29 U.S.C. § 202 (1982)).

179. Easterbrook revealed a curious ignorance of the facts and of the law in referring to the overtime provisions of the FLSA as “the important ones here.” *Id.* Section 213 of the FLSA excludes agricultural employees from overtime. 29 U.S.C. § 213 (1982).

quickly moved toward an unprecedented judicial denouement. Because the FLSA "was designed to protect workers without substantial human capital, who therefore earn the lowest wages," it was also "designed to defeat rather than implement contractual arrangements" that undermine the paternalistic purpose of the FLSA.¹⁸⁰

The migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. This does not belittle their skills. Willingness to work hard, dedication to a job, honesty, and good health are valuable traits and all too scarce. . . . But those to whom the FLSA applies must include workers who possess *only* dedication, honesty, and good health

There are hard cases under the approach I have limned, but this is not one of them. Migrant farm hands are "employees" under the FLSA—without regard to the crop and the contract in each case.¹⁸¹

It is a devastating commentary on how sanitized and devoid of (com)passion liberal judicial opinions have become since the heyday of paternalistic-humanitarian interpretations in the 1940s¹⁸² that the only judge who, in a quarter-century of federal migrant labor law litigation,¹⁸³ has been bold enough to state the obvious—namely, that if any group remains a certified protected proletariat, migrant farmworkers do—advocates repeal of such legislation.¹⁸⁴

In opposition to Lauritzen's petition for a writ of certiorari to the Supreme Court, the Solicitor General, obviously reluctant to jeopardize the one victory the DOL had managed to win, argued somewhat disingenuously that, although *Brandel* and *Lauritzen* were irreconcilable, the conflict did not justify review.¹⁸⁵ Solicitor Fried sought to buttress this

180. *Lauritzen*, 835 F.2d at 1542, 1543.

181. *Id.* at 1545.

182. *See, e.g.*, *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

183. Including litigation under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872. *See, e.g.*, *United States Dep't of Labor v. Kunkle*, [Wages-Hours] Lab. L. Rep. (CCH) ¶ 31,545 (July 22, 1987). *See also In re Kokesch*, 110 Lab. Cas. (CCH) ¶ 56,006 (Minn. Ct. App. 1987) (applying the Minnesota Fair Labor Standards Act, MINN. STAT. §§ 177.21-.35 (1988)).

184. Taking his cue from his brother Posner's unprecedented critique of the FLSA in *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987), Easterbrook closed his opinion thus: "Once they know how the FLSA works, employers, workers, and Congress have their options. The longer we keep these people in the dark, the more chancy both the interpretive and the amending process become." *Lauritzen*, 835 F.2d at 1545.

185. Brief for the Respondents in Opposition at 10, *Lauritzen v. McLaughlin*, 109 S. Ct. 243 (1988) (No. 87-1853), *denying cert. to Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987).

argument in part by alleging that the cases were not factually identical;¹⁸⁶ yet the differences he cited were not those that make a difference.¹⁸⁷ He further argued that resolution of a dispute over the status of migrant pickle pickers could not press a serious claim on the Court's discretionary docket, especially since *Brandel* was a deviant decision without prospect of imitators.¹⁸⁸ In the event, the Supreme Court declined to review the case.¹⁸⁹

In part because of the unambiguous judicial decision in *Lauritzen*, in part because of the vigorous enforcement of state law,¹⁹⁰ sharecropping appears to have been euthanized in Wisconsin.

V. CALIFORNIA: A CORNUCOPIA OF CROPPERS

As sharecroppers, we were independent in name only.¹⁹¹

A. *A Meta-Marxist Interlude*

In order to understand the peculiarities of sharecropping in California,¹⁹² it is necessary to distinguish among three distinct though perhaps related phenomena. First, pickle and strawberry farmers have resorted to the same pure sham that pickle growers in the Midwest adopted: merely calling their employees another name in order to reduce the costs

186. *Id.* at 14.

187. *Id.* at 14 n.8.

188. *Id.* at 15.

189. *Lauritzen v. McLaughlin*, 109 S. Ct. 243 (1988), *denying cert. to Secretary of Labor v. Lauritzen*, 835 F.2d 1529 (7th Cir. 1987).

190. *See, e.g., Villarreal v. Yeska*, No. 80-IB-42860-FB (Wis. Dep't of Indus., Labor, and Human Rel., Job Serv. Div.—Unemployment Comp. App. Tribunal May 21, 1981); *In re John Knoch*, No. 5057-S (Wis. Dep't of Indus., Labor, and Human Rel., Job Serv. Div.—Unemployment Comp. App. Tribunal July 23, 1984); *Yeska v. Wisconsin*, No. 88-1301 (Wis. Ct. App. Feb. 23, 1989). As early as 1978, the Social Security Administration determined that because Wisconsin law mandated direct payment to migrants, crew leaders could no longer be considered employers of migrant workers under the Social Security Act, 42 U.S.C. § 210 (1982). Social Sec. Admin., Claims Manual, Regional Supplement—Region V, at R1283 (Sept. 1978). In 1982, the acting regional administrator of the Employment and Training Administration of the Department of Labor in Chicago directed State Employment Security Agency administrators not to accept interstate "job orders from agricultural employers who treat their employees as if they are 'independent contractors'" unless they provide written assurances of compliance with all federal and state legal requirements. Letter from Acting Regional Administrator to State Employment Security Agency Administrators (Oct. 13, 1982) (copy in author's possession).

191. Burns, *Hurt Sharecropper Fights for Disability Benefits*, Santa Barbara News-Press, Apr. 30, 1989, at A14, col. 3 (quoting a strawberry picker).

192. Hager, *supra* note 10, at 3, col. 1, states—without a source—that "about 20,000 workers engage in it in some form." Two thousand sharecroppers in addition to 10,000 workers hired by them at the harvest-peak pick strawberries in the Santa Maria Valley. Burns, *State Court Shakes Up Farm System*, Santa Barbara News-Press, Apr. 30, 1989, at A1, A14, col. 1.

of doing business.¹⁹³ Or as one employer phrased it: "If we go 50-50 and pay the benefits, we're not going to have any profits.'"¹⁹⁴ Indeed, Vlasic is said to be singlehandedly responsible for the introduction in California of sharecropping in pickles.¹⁹⁵ Second, California has also witnessed the rise of a variety of strawberry sharecropping in which family heads (together with their own employers) co-exploit not only members of their nuclear family but also relatives, friends, and, to some extent, others. Finally, tenant farming¹⁹⁶ has emerged in the Santa Maria Valley where some strawberry farm owners have leased their land outright to persons who then, in turn, engage pure-sham sharecroppers. While the last phenomenon is of very recent vintage and to some extent involves both tenants who had been small businessmen in Mexico¹⁹⁷ and former sharecroppers,¹⁹⁸ the former two have been dated back to the early 1970s,¹⁹⁹ having been implemented "because it proved effective in frustrating attempts to organize field workers."²⁰⁰

A social scientist specializing in the study of California strawberry sharecroppers has misconceived the issue at stake by failing to distinguish between make-believe sharecroppers and potentially real ones. Although Miriam Wells correctly observes that strawberry farmers were motivated to convert their wage laborers into sharecroppers in order to avoid their obligations as employers, she has fallen victim to the illusion fostered by the farmers that they have actually reorganized production.

193. The center of pickle growing and sharecropping is the Watsonville-Gilroy area, which also accounts for the largest amount of strawberry acreage, although sharecropping does not predominate there. Perhaps as little as 15% of strawberry work in the Salinas area is sharecropped; the major sharecropping area is located in the Santa Maria Valley, while further to the south in Ventura and Oxnard sharecropping is uncommon. Snow peas are sharecropped near Morro Bay, where Filipinos lease land and hire their relatives as sharecroppers, who in turn exploit Mexicans in a particularly brutal manner. Telephone interview with Mike Blank, Cal. Rural Legal Assistance, San Luis Obispo (May 17, 1989); Pryor, *Fair Share?*, CAL. FARMER, Nov. 5, 1988, at 30, 56; Burns, *supra* note 192, at A1, A14, col. 1.

194. Burns, *supra* note 192, at A1, A14, col. 3.

195. Telephone interview, *supra* note 193.

196. Pryor, *supra* note 193, at 30, erroneously suggests that all sharecroppers in California are literally tenant farmers.

197. Information provided to the author by Professor Juan Palerm, Center for Chicano Studies, University of California at Santa Barbara.

198. Burns, *Some Immigrants Can Reap Success*, Santa Barbara News-Press, Apr. 30, 1989, at A15, col. 3.

199. Strawberry sharecropping or perhaps tenancy enjoyed a previous reincarnation before World War II among Japanese families, but it was significantly different from the current form. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 8-11; Wells, *What is a Worker?*, *supra* note 24, at 317 n.24.

200. Letter from Steven Belasco, attorney, Cal. Rural Legal Assistance, to Ralph Faust, Agric. Labor Rel. Bd. (Dec. 13, 1976) (copy in author's possession). See also Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 14-16.

The only piece of evidence that she has adduced in support of any change in organization refers to the fact that in reaction to a court decision, one farmer made a loan to some sharecroppers to buy a small tractor.²⁰¹ In fact, they have not introduced sharecropping, but merely called their employees "sharecroppers." In seeking to bolster this thesis, Wells has also unavoidably mischaracterized the political-economic and socio-psychological forces leading to the workers' acquiescence in or acceptance of their paper conversion into sharecroppers. First, in some areas, such as the Santa Maria Valley, where seasonally sharecropping strawberries is the only way for farmworkers to make a living,²⁰² economic coercion is the most plausible motivation. Second, in many instances workers are not sufficiently aware of the statutory protections afforded employees or of the tax obligations of the self-employed to be in a position to make an informed or rational decision as to the potential trade-offs between the two statuses.

Wells' theoretical ambivalence is reflected in the much more plausible position she has adopted distinguishing among share tenancy, sharecropping, and share labor.²⁰³ The first term refers to independent grain farm operators who rent farmland for a share of the crop in the Midwest; the second to "the most coercive, paternalistic systems" involving blacks in the South; and the last to pickle and strawberry pickers.²⁰⁴ Whereas the sharecroppers "were not free wage laborers," "strawberry sharecroppers . . . are more like wage laborers with a share feature to their labor contract. That is, their share constitutes wages paid by the landowner for the use of their labor."²⁰⁵ In fact, Wells' own descriptions of the working conditions of the sharecroppers and share laborers reveal that the latter are subject to greater economic control by employers than were nineteenth-century black cotton sharecroppers.²⁰⁶

The vacillation comes to the fore again in the unwarranted significance that Wells imputes to a written contract in establishing whether a worker is a sharecropper and with respect to whether it explicitly characterizes the worker as a sharecropper: "Perhaps most importantly, the

201. Wells, *supra* note 17, at 76.

202. Telephone interview with Jeannie Barrett, attorney, Cal. Rural Legal Assistance, Santa Maria (May 26, 1989).

203. Although Wells does not reference the distinction, it is a common one in the literature. See, e.g., R. RANSOM & R. SUTCH, *supra* note 5, at 92 (table 5.5).

204. Wells, *Sharecropping in the United States*, *supra* note 24, at 238-39.

205. Wells, *Sharecropping in the United States*, *supra* note 24, at 238.

206. Wells, *Sharecropping in the United States*, *supra* note 24, at 226-27, 232-33. The "foreman exerts considerable control over strawberry cultivation and harvest, especially in operations requiring business judgment." Wells, *What is a Worker?*, *supra* note 24, at 305.

contract identifies sharecroppers explicitly as independent contractors, rather than employees"²⁰⁷ Because covered workers cannot waive their rights under labor-protective legislation, for purposes of enforcing the FLSA the DOL does not even consider such allegations and the United States Supreme Court provides the macroeconomic and socio-psychological basis for that policy:

[T]he purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue . . . and would be likely to exert a general downward pressure on wages in competing businesses.²⁰⁸

Although Wells cites a French Marxist's cautionary statements as to the "dangers of accepting juridical status as indicative of class boundaries,"²⁰⁹ tellingly, she omits to mention one respect in which the contract is congruent with reality: the workers bear no risk of loss of capital.

The gravamen of Wells' analysis is that these ambiguities in status are objective and account for the workers' subjective ambivalence: "This simultaneous holding of contradictory views of class status and interest reflects the interstitial nature of sharecroppers' structural niche."²¹⁰ Thus sharecroppers define themselves as "small capitalists" in part because "[l]egally, they possess many of the juridical prerogatives of capital; economically, they enjoy economic possession in that they have legal standing as the employers of labor power and are contractually empowered to direct the labor process." And even though their involvement in economic ownership is "very limited,"²¹¹ so that they "cannot be considered unequivocally bourgeois," their "legal tax status . . . reinforces their bourgeois standing, since they have historically represented themselves as self-employed."²¹²

On the other hand, because sharecroppers are "heavily supervised"

207. Wells, *What is a Worker?*, *supra* note 24, at 304. See also Wells, *supra* note 16, at 59, 66.

208. *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985) (citations omitted).

209. Wells, *What is a Worker?*, *supra* note 24, at 313.

210. Wells, *What is a Worker?*, *supra* note 24, at 312-13.

211. Wells, *What is a Worker?*, *supra* note 24, at 309, 312.

212. Wells, *What is a Worker?*, *supra* note 24, at 309. The latter remark is a circular make-weight because contesting their status with the IRS would be tantamount to challenging the non-employee status the owner has imposed on them—a battle that only few are in a position to take up.

and "charged with a limited range of tasks that are virtually identical to those performed by wage laborers in the industry,"²¹³ "they, like sharecroppers in other regions, can easily be viewed as piece-rate wage workers in a system in which the piece rate is variable."²¹⁴ Moreover, if because "sharecroppers also think and act in ways that indicate an identification with the proletariat," such as supporting the UFW, "they are a form of disguised wage labor,"²¹⁵ then the question must be raised as to who has not yet seen through the disguise.

The only evidence that Wells adduces in support of the claim that these workers function as capitalists is that "[d]uring the harvest all sharecroppers hire additional workers, usually illegal immigrants who are friends or relatives. . . . It is in their relations with these hired helpers that sharecroppers experience the autonomy they are otherwise denied."²¹⁶ Yet this analysis fails to do justice to the background even as delineated by Wells—namely, that sharecroppers cite as primary benefits the opportunity "to maximize the income producing potential of wives and children . . . and to 'become [one's] own boss.'"²¹⁷ The opportunity to co-exploit and tyrannize others²¹⁸ is manifestly not the autonomy they seek—which is freedom from the oppressive sort of subordination typical of backward, paternalistic capital-labor relations. This false equation of wanting to be one's own boss with wanting to boss others conforms to Wells' assertion that "[i]n terms of the political and ideological dimensions of the productive process, sharecroppers occupy the contradictory position of the petite bourgeoisie, dominating and exploiting labor in some situations but also being dominated by capital themselves."²¹⁹ Yet many if not most petty bourgeois neither supervise nor are supervised.²²⁰ Moreover, in the United States, as the most highly developed capitalist society without a socialist labor movement, resistance to what is perceived as oppressive working conditions has, even among the core industrial surplus-value-producing proletariat, often assumed the form of (fantasized) escapism into self-employment.²²¹ If indeed any informed, consensual aspect attaches to farmworkers' putative conversion into non-

213. Wells, *What is a Worker?*, *supra* note 24, at 310.

214. Wells, *What is a Worker?*, *supra* note 24, at 310-311.

215. Wells, *What is a Worker?*, *supra* note 24, at 311-312.

216. Wells, *What is a Worker?*, *supra* note 24, at 308.

217. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 18.

218. By one account "most of the abuses are committed by sharecroppers against their own employees." Burns, *supra* note 192, at A1, A14, col. 2.

219. Wells, *What is a Worker?*, *supra* note 24, at 311.

220. On this so-called pure petty bourgeoisie, see Steinmetz & Wright, *supra* note 22, at 980.

221. *E.g.*, E. CHINOY, *AUTOMOBILE WORKERS AND THE AMERICAN DREAM* (1955).

employees, they share it with marginalized workers elsewhere who, for lack of other sources of income, enter into proletarian or sub-proletarian forms of self-employment.²²²

By the same token, Wells inexplicably denies the kind of intrafamilial exploitation that is in fact the driving force behind workers' acquiescence in the loss of their protected status—the opportunity to press their own children unlawfully into service: because “little child labor is used in the industry . . . evasion of FLSA child labor laws is not a motivation for strawberry sharecropping.”²²³ This claim, which is factually erroneous,²²⁴ contradicts Wells' explanation of the attraction of sharecropping to workers. To the extent that the workers try to evade the state's ban on such activities by consenting adults, the workers are in effect seeking to slip back into a phase of original self-accumulation that the working class (and part of the capitalist class) succeeded in outlawing precisely because of its macrosocial Sisyphus-like character: while a few might manage to make a living or even accumulate enough to rise into the semi-hemi-demi petty bourgeoisie, the standards of the lowest stratum of the working class would be degraded. Much like the Southern black cotton sharecropper, today's share-farmer can boast of “autonomy” only to the extent that he can make full use of his family's labor.²²⁵

On balance, then, the image that most clearly emerges from Wells' account of the family head is that of a crewleader who combines the functions of labor recruiter and working foreman on a piece rate.²²⁶ In this context it is of subsidiary importance whether the workers he co-exploits are relatives or strangers. That Wells' explanation of sharecropping in California suffers from overdetermination and underdetermination emerges from a comparison with its analogues in the Rio Grande Valley of Texas.

Although the proximity of a porous border and the total absence of even a hint of union organizing activity provide agricultural employers with unimpeded access to and control over huge numbers of impoverished and desperate workers, farmers nevertheless engage in a whole

222. See D. BÖGENHOLD, *DIE SELBSTÄNDIGEN* 248-53 (1985); Rimer, *Can Patrol: \$35 a Shift, No Bosses*, N.Y. Times, Sept. 6, 1989, at 16, col. 2 (nat. ed.).

223. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 19.

224. Burns, *supra* note 192 at A1, col. 1; telephone interview with Jeannie Echenique, former reporter with the Salinas Californian, who has reported on strawberry sharecropping and witnessed large numbers of children working (May 24, 1989); telephone interview with Jeannie Barrett, attorney, Cal. Rural Legal Assistance, Santa Maria (May 26, 1989).

225. G. WRIGHT, *supra* note 61, at 94.

226. Wells indirectly concedes this point. See Wells, *What is a Worker?*, *supra* note 24, at 308.

range of identical or similar unlawful practices even in crops—such as onions—the machine-harvesting of which already competes with hand labor. That aggregate familial labor power is compensated at sub-minimum wages on a piece rate rather than through sharecropping is secondary.²²⁷ Moreover, in one prominent pickle sharecropping variant, the packing shed, which organizes the harvest on behalf of the farmers under contract with it, makes it a condition of employment that the family head register as a farm labor contractor despite the fact that one who engages in farm labor contracting activity exclusively vis-à-vis immediate family members is not a farm labor contractor.²²⁸ The purported reason for this condition is to protect the shed and the farmers against the claim of using an unregistered crewleader²²⁹ should the family head employ non-immediate-family²³⁰ workers, while the real reason is to buttress the contention that the family head is an independent contractor. Ironically, fantasy then gives birth to reality as some family heads, involuntarily armed with their crewleader cards, permit unrelated single persons, more as a personal favor than as a business transaction, to work with the family, thus extending the universe of workers available to pickle capital for exploitation at sub-minimum wages and without payment of employment taxes.

The crucial point for the family head—whether he is picking pickles in Texas or Michigan, strawberries in California, harvesting asparagus in Washington, hoeing cotton in Texas, or hoeing sugar beets in Wyoming—however, is that the family unit secure as much work, as many rows, as many acres as possible so that as many—especially children’s—hands as possible contribute regardless of the depressive impact on the effective hourly rate of pay.²³¹ Such workers with few or no alternative opportunities and hence low or no opportunity costs are accustomed to a reservation wage significantly below the lawful minimum; living on a

227. Wells asserts that by adopting sharecropping the growers “altered the social and economic relations among social strata” in part because sharecroppers, unlike wage laborers, “work as families on a set plot of land . . .” Wells, *supra* note 17, at 74. Yet, as the text indicates, many families do this as piece-rate laborers in Texas. Wells offers no information on what the remaining wage laborers do and how their work differs from the sharecroppers’.

228. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1802(6), (7), (8)(B), (10)(B) (1985 & Supp. 1989).

229. 20 U.S.C. § 1842 (1982).

230. The “immediate family” includes spouse, children, stepchildren, foster children, parents, stepparents, foster parents, brothers, and sisters. 20 C.F.R. § 500.20(o) (1988).

231. In the mid-1980s, large numbers of migrant families from Texas declined to participate in litigation seeking to limit the scope of the lawful compensation of children 16 and under at below minimum wage on the grounds that, if the suit were successful, the employers would stop permitting such children to work.

margin informed by a time-horizon extending no further than tomorrow, they set their sights on an existential household bottom line that does not even consider hours worked let alone calculate equivalent hourly wages.

In an artfully phrased understatement, Wells concedes that unlawful self-exploitation is the key: "The element of anticipated self-direction is especially important to sharecroppers, because they do not always make more money than farm laborers. . . . In general, long-term sharecroppers report that as a family they make more than they did as farm laborers, although their per person return is below the standard rate for wage labor in the area."²³² Abstracting from the point that Wells could just as accurately have written that the element of anticipated increased family income is especially important because sharecroppers are not always more self-directed than farm laborers,²³³ it would have been more to the point to report that their income qualifies them as "among the poorest of Santa Maria's poor": "'There's very few sharecroppers that have gone to the middle class.'"²³⁴

Wells sees the practice of sharecropping on several thousand acres in California at the end of the twentieth century as undermining the tenability of nineteenth-century economic doctrines that viewed sharecropping as incompatible with modern capitalist production.²³⁵ Yet the sharecropping that nineteenth-century economists analyzed was not labor-only pseudo-sharecropping, but a transitional form towards capitalist ground rent, in which the tenant's share in part represented compensation for having furnished part of the working capital, just as the landowner's share included interest on the capital he provided.²³⁶ Because, in

232. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 18.

233. One recent contract "even specified the color strawberries must be . . . and the size . . ." Burns, *supra* note 192, at A1, A14, col. 1.

234. Burns, *supra* note 192, at A1, A14, cols. 4-5.

235. Among the proponents of this thesis she includes not only "[t]raditional Marxist scholars," that is, Marx and Lenin, but also the "[c]lassical economists" Smith, Mill and Marshall. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 5, 21. In a later article Wells characterizes Mill, Smith, and Marshall as "neoclassical economists." Wells, *Sharecropping in the United States*, *supra* note 24, at 213. Her confusion as to Adam Smith may be connected to the fact that no fewer than six times she dates *Wealth of Nations* to 1869. Wells, *Sharecropping in the United States*, *supra* note 24, at 211, 213, 242; Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 1, 5, 29. To be sure, evidence exists that sharecropping, especially in the Third World, has been adapted to developing the forces of production. *E.g.*, Bardhan, *Marxist Ideas in Development Economics: An Evaluation*, in *ANALYTIC MARXISM* 64, 70-71 (J. Roemer ed. 1986). Wells, however, has not shown that any development other than family-centered sweatshopping is at stake in California strawberry sharecropping. Interestingly, by asserting that sharecropping would not necessarily be inefficient if the landlord regulated the labor, Marshall in effect conceded that it would have to constitute dependent employment. A. MARSHALL, *PRINCIPLES OF ECONOMICS* 642-45 (8th ed. 1920).

236. 3:2 K. MARX, *supra* note 23, at 337.

contrast, strawberry harvesters are merely agricultural sweatshop laborers—"quasi wage laborers" "in a two-class production system"²³⁷—it remains unclear in what sense "[s]harecropping is a new means of controlling and utilizing labor"²³⁸

Indeed, ultimately Wells offers no "new" explanation as to why farmers retain sharecropping at all. For if it is true that: (1) growers consider braceros on hourly wages with close supervision the most efficient and inexpensive labor;²³⁹ (2) the productivity of wage laborers and sharecroppers is comparable; (3) growers still maintain fundamental control over all inputs and basic decisions and supervise sharecroppers closely;²⁴⁰ and (4) the decline of the UFW and the steady increase of readily available illegal and legalized workers²⁴¹ have re-created a large pool of vulnerably exploitable laborers: in what sense can it be said that "the organizational principles of sharecropping are used . . . to perform vital functions that cannot be accomplished at the same cost under the expected capitalist system of wage labor"²⁴²—except that the label facilitates the unlawful reduction of wages and payroll taxes?

B. *Strawberry Fields of Exploitation Forever*

We pause here to remark the notable fact that it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable rights to labor. This inestimable privilege is generally the object of the buyer's disinterested solicitude.²⁴³

By the latter half of the 1970s, the system was already under attack.²⁴⁴ A much cited case that became the overtowering adjudication

237. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 24.

238. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 24.

239. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 13.

240. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 17.

241. See, e.g., Mydans, *Strawberry Fields Bear a New Immigrant Crop*, N.Y. Times, May 22, 1989, at 8, col. 1 (nat. ed.) (Mixtec Indians from southern Mexico as newest most exploitable migrant pickers in California).

242. Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 22.

243. State v. J.J. Newman Lumber Co., 103 Miss. 522, 567-68, 60 So. 215, 217 (1913).

244. In *Hernandez v. Scaglione*, No. SJ-8120 (Cal. Unemployment Ins. App. Bd., Oct. 7, 1977), the California Unemployment Insurance Appeals Board determined that the compensation of cucumber and strawberry pickers was not covered wages because "the grower is dependent upon the picker's interest, managerial ability, and skills . . . , experience, and cooperation" and "has little or no control over the manner in which the cucumbers are picked or the vines cared for." Two years later the Appeals Board, in an appeal brought by the Employment Development Department against a cucumber grower, ruled that "[t]o find that the petitioner had relinquished its right to control would require this Board to close its eyes to the reality of the working conditions of the pickers." *In re Patane*, No. SJ-T-748 (Cal. Unemployment Ins. App. Bd. Sept. 13, 1979).

on the issue, *Real v. Driscoll Strawberry Associates, Inc.*,²⁴⁵ was handed down by the Ninth Circuit in 1979. It is an object lesson in the divergence between judicial pronouncement and real implementation. *Real* came before that court as an appeal from a dismissal on summary judgment. The appellants had filed a class action against Driscoll Strawberry Associates and Donald Driscoll, doing business as Driscoll Berry Farms, for failure to pay the minimum wage,²⁴⁶ which the district court dismissed on the grounds that they were not employees within the meaning of the FLSA. The original complaint, which the plaintiffs had brought expressly as independent contractors, alleged antitrust and contract violations by the defendants. An amended complaint, alleging that the agreements were a "sham," stated that the plaintiffs were employees and were owed back wages.²⁴⁷ Although the workers did not drop their commercial causes of action, they did not appeal their dismissal.

Driscoll Associates, which held patents on certain varieties of strawberries, contracted with Driscoll Farms to grow them.²⁴⁸ The adhesion contracts—which "are so one-sided it's difficult to keep them on your desktop"²⁴⁹—characterized the workers as patent sublicensees of Driscoll. While the farmer undertook to plant the berries, the workers agreed to care for the plants during the growing season and to harvest, sort, grade, and pack the berries. Apart from the hand hoes, shovels, clippers, and hand carts, the farmer contracted to furnish all the necessary tools and materials for these labor tasks. Despite the contractual recital, the farmer in fact paid the workers a piece rate to plant the plants according to directions.²⁵⁰ Although much of the description of control was couched in terms of "recommendations" from the patent holder and the farmer to the workers, the workers testified that the farm foreman

245. 603 F.2d 748 (9th Cir. 1979).

246. In point of fact, opt-out class actions are precluded under 29 U.S.C. § 216(b) (1982); FLSA collective or representative actions may be maintained only as opt-in actions. The reason for this confusion in the opinion, which never reached this issue because employment status was the only issue on appeal, may lie in the fact that the case was not originally brought as an FLSA action. This point is discussed later in the text.

247. *Real*, 603 F.2d at 750.

248. In an unpublished research memorandum prepared for California Rural Legal Assistance in 1978-79 (copy in author's possession), Teresa Hernandez stated that Donald Driscoll was the largest stockholder of Driscoll Associates. Driscoll's attorney, Eugene Garfinkel, has denied that claim. Telephone interview with Eugene Garfinkel (May 22, 1989).

249. Letter from Steven Belasco, attorney, Cal. Rural Legal Assistance, to Richard Pearl (July 27, 1977) (referring to similar contemporaneous strawberry sharecropper contracts).

250. *Real*, 603 F.2d at 750-52.

even prescribed the precise hours of picking.²⁵¹ The patent holder retained complete discretion to market the berries, which were packed in crates bearing the farmer's name, and paid the workers a fixed percentage of the net proceeds weekly.²⁵²

In its brisk promenade through the economic-reality-test factors for purposes of determining whether the workers had raised genuine issues of fact sufficient to defeat the motion for summary judgment, the Ninth Circuit found that Driscoll exercised control, while the workers had little or no opportunity for profit or loss, investment, or skill, and were an integral part of Driscoll operations "rather than an independently viable enterprise."²⁵³ Indeed, the court went so far as to state that it had not even been shown that the farmer was an independent contractor vis-à-vis the patent holder.²⁵⁴

Before the proceedings could be resumed on remand, the case was settled in 1981.²⁵⁵ According to the eponymous sharecropper, Alonzo Real, each worker-plaintiff who remained in the suit received \$1,600 after attorneys' fees.²⁵⁶

The *Real* workers' behavior has, to be sure, been ethnographically analyzed as an expression of the " 'contradictory' class consciousness" congruent with occupation of a "contradictory location"²⁵⁷ that "straddles the boundary between the bourgeoisie and the proletariat."²⁵⁸ Yet, a more plausible and coherent account, based on the foregoing analysis²⁵⁹ and a contemporaneous study,²⁶⁰ suggests instead that the workers were torn between opting for their statutory rights as employees and for the increased total family income that they could generate by acquiescing in a level of exploitation and engaging in a kind of self-exploitation prohibited in an employer-employee relationship. Indeed, many of the workers were insufficiently integrated into the civic culture of the United States

251. *Id.* at 753 n.11. In addition, during the four to five months that elapsed between planting and picking, the workers did "not need to work in their fields daily" whereas farm employees inspected the fields daily. *Id.* at 752 n.7.

252. *Id.* at 752.

253. *Id.* at 755.

254. *Id.* at 756.

255. Wells, *supra* note 17, at 73.

256. Telephone interview with Alonzo Real (May 22, 1989).

257. Wells, *supra* note 17, at 75.

258. Wells, *What is a Worker?*, *supra* note 24, at 313.

259. See *supra* notes 191-242 and accompanying text.

260. Teresa Hernandez, untitled research memorandum, *supra* note 248.

even to be aware of the panoply of rights (such as social security, unemployment insurance benefits, and workers' compensation) of which they were being deprived by virtue of their alleged self-employed status.

In sharp contrast to Wells' unmediated description of the sharecroppers, who suddenly appear on the historical horizon without a prehistory,²⁶¹ Alonzo Real reports²⁶² that before working as a sharecropper for Driscoll he and his wife had worked as hourly employees at another strawberry operation. They shifted to Driscoll for two reasons. First, they hoped to earn more money; and second, they had foreseen union-related turbulence, which they wanted to avoid: although they did not want to be "scabs," they did not wish to be blacklisted and to lose their livelihoods either. Very soon after starting work for Driscoll, they realized that they were earning even less than they had as hourly workers, but they remained because they saw no future at the other farms. Real notes that he performed exactly the same tasks at Driscoll that he had performed as an hourly employee with one unpleasant exception: he had to purchase a pesticide backpack for about \$250, about which he had not known before signing up. He was not given proper training in how to use it, and workers on neighboring fields tended to spray one another and themselves because they were given no protective equipment.

Although only Mr. Real and his wife worked, most of the other families had children working—children too young to have been permitted to work had the parents remained employees; indeed, he confirms that this opportunity to make use of children's labor was perhaps the primary attraction of sharecropping. Although some workers also desired to become "independent," this meant for them not financial independence but freedom from a boss standing over their backs. But even this dream was destined to be shattered; because Driscoll did not consider the workers competent to operate the farm on their own, he supervised them closely. While it is true that the workers were dissatisfied with the discrepancy between the amount of money they were earning and the prices for which they saw the berries being sold, at no point did they wish to receive a share of the crop and to assume the risk of selling it on their own as entrepreneurs. They merely wanted more money, a fact that impressed itself on them when they realized that they were earning less than they had as hourly employees. The one or two workers Mr.

261. Wells, *supra* note 17, at 64, does briefly allude to the fact that many of the *Real* plaintiffs "had previously been *braceros*, or wage laborers, on the same farm," but does not analyze this transition or seek to incorporate it into her account. *Id.*

262. Telephone interview with Alonzo Real (May 22, 1989).

Real did hire were relatives whom, he says, he paid the minimum wage even though he himself was earning less than the minimum wage. Even at the time he realized that he was an employee—a status that was superior to being an independent contractor.

C. *Sharecropping: Old-Fashioned Familial Sweatshopping or a Law-Mediated, Dialectically New Class Relationship?*

More recently Wells has expanded her repertoire to embrace legal analysis as well, arguing on the basis of *Real* that “legal structures and conflicts play a key role in the evolution of modern class structures” while law itself “has become one of the forces of production.”²⁶³ She

263. Wells, *supra* note 17, at 49. Because Wells was manifestly without benefit of legal training when she wrote this article, it may seem unfair to criticize her for errors against the commission of which even a few days of law school would have immunized her. Yet in view of the rather grandiose theoretical claims Wells advances about the law as well as the self-touting as to her extensive case-law research, *id.* at 52 n.2, she has squarely subjected herself to the canons of scholarship. She asserted, for example, that *Sachs* was the controlling case, unaware that the IRS, not acquiescing in mere district court decisions, had issued a new revenue ruling on pickle pickers. *Id.* at 59-60. She did not know that the legislative history on sharecroppers under the FLSA has been codified in the DOL's regulations. *Id.* at 60. She failed to note that the *Sachs* court incorrectly understood and applied the relevant revenue ruling then in effect. She incorrectly asserted that the meaning of “employee” for the purposes of the FLSA “has been established . . . through the application of certain common law tests.” *Id.* The Supreme Court and the subordinate federal judiciary have in fact for more than four decades uniformly held that the common law is not relevant to the FLSA. *Id.* at 59 n.13. Without any authority or argument whatsoever she asserted that among the common law distinctions that have been modified “is the stipulation that the independent contractor status under the FLSA is more inclusive than the common law principles generally applied under the SSA, so that an individual deemed an employee under the FLSA may yet be found an independent contractor under the SSA.” *Id.* at 61. Apart from the superfluous and incorrect use of the term “stipulation,” as a matter of logic her conclusion cannot follow: a more inclusive definition means a broader one. Moreover, she failed to explain that whatever differences have arisen between the FLSA and the SSA coverage stem from congressional reversal in 1947 of the economic reality of dependence test developed by the Supreme Court for the SSA in the very cases she cited. See M. LINDER, *supra* note 96, at ch. 6. She cited a provision of the NLRA as containing a definition of independent contractor that it does not contain. Wells, *supra* note 17, at 62. Wells cited a 1979 case as having established that sharecroppers cannot join unions because they have the power to hire and fire. *Id.* at 52 n.2, 63. Yet the case was merely an unreported review of dismissal by the General Counsel (not “General Council”; Wells, *The Resurgence of Sharecropping*, *supra* note 24, at 26) of the California Agricultural Labor Relations Board (CALRB); statutorily unappealable to the Board or to a court, it remains without any precedential value whatsoever. In point of fact, the CALRB has never resolved this issue. Telephone interview with Don Presley, assistant general counsel of CALRB (May 23 and 26, 1989). She cited extensive passages verbatim from the Ninth Circuit *Real* decision without indicating that they were direct quotations; e.g., Wells, *supra* note 17, at 65. Bizarrely, Wells created a pseudonym for plaintiffs' counsel although his name was stated in the decision published in the *Federal Reporter*, a publication on the shelves of thousands of libraries around the world. *Id.* at 66 n.17. In her account of the *Real* decision, Wells appeared oblivious of the fact that the rulings she ascribed to the court had been enunciated in literally hundreds of earlier FLSA cases. *Id.* at 69. Finally, as an example of careless non-legal research, Wells misstated a secondary source on the exclusions of farmworkers from FLSA. She stated that “only 513,000 agricultural employees or about 2% of the national farm labor force” were covered. *Id.* at 58 n.11. A moment's reflection

contends, for example, that as a result of variations in coverage definitions among statutes, "employers' claims that their workers are exempt . . . tend to be accepted until challenged in the courts."²⁶⁴ This claim illustrates how Wells' impatience with approaches that treat the legal system as a means of maintaining "dominant economic interests" has blinded her to a conspicuous example of precisely such instrumentalism.²⁶⁵ For an employer's power to "make the initial determination as to whether a person performing services for him is an employee,"²⁶⁶ has nothing to do with semantics and everything to do with the fact that:

Typically, the worker as an individual has to accept the conditions which the employer offers. [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment."²⁶⁷

It is, of course, open to a worker at the hiring stage to contest his employer's classification of him as an independent contractor, though experience suggests that this might not be the way for a worker to put his best foot forward at a nonunion place of employment. There is also no inherent reason why a labor-protective statute could not create a rebuttable presumption that all workers are employees, placing the burden on the employer to contest and overcome that presumption.²⁶⁸ Indeed, administrative procedures are conceivable that would make it very difficult for employers—at least outside the so-called informal economy—to use self-help methods to circumvent the aforementioned presumption.²⁶⁹ Yet

would have revealed an impossibly huge farm labor force of more than 25,000,000. In point of fact, her reference said that coverage was limited to 513,000 workers on 2% of the farms.

264. Wells, *supra* note 17, at 63.

265. As an instance of the "dialectical relationship between the law and class struggle," Wells cited the fact that *Real* "has already been used by public interest lawyers attempting to establish the employee status of cucumber sharecroppers in the Midwest." Wells, *supra* note 17, at 74, 76. Ironically, this characterization of the manifestly class-neutral and pre-capitalist aspect of the politically indifferent use of precedent in briefs and decisions underscores the hollowness and shallowness of Wells's own attempt to view the law instrumentally.

266. Streer & Boyd, *Employee or Independent Contractor? Proposed Guidelines May Lessen the Controversy*, 56 TAXES 489, 492 (1978). The worker thus carries the burden of overcoming this initial presumption.

267. O. KAHN-FREUND, *LABOUR AND THE LAW* 6 (2d ed. 1977).

268. See Linder, *supra* note 131, at 472 n.162 (legislative proposal).

269. An important link in such a mechanism would involve withdrawing from employers the initial unilateral authority to issue Form-1099s. See Linder, *supra* note 92, at 14. Britain established such a mechanism in the 1970s in order to curb analogous subterfuges regarding labor-only subcontractors in construction. Finance Act, 1971, 19 & 20 Eliz. 2, ch. 68, §§ 29-30; Finance (No. 2) Act,

even where such a reversal has been implemented—albeit in very modest form—legislatively,²⁷⁰ in the real world of non-self-enforcing law, the worker must take the initiative to vindicate his status.²⁷¹ Where unorganized and atomized workers are more fungible than their employers, who appropriate the work product and pay the workers, they have historically had to rely on the paternalistic intervention of the state to enforce their *already existing* rights on their behalf. Sharecropping is but the latest instance of such defensive intercession designed to restore a protective (paper) status quo ante.

As further evidence “that the law bears a more complex relationship to class conflict” than “instrumental and determinist” “Marxist approaches” can comprehend, Wells adduces the emergence “in some periods” of lawyers “who are advocates for the lower classes.”²⁷² Here the focus on privately retained lawyers who appear like a *deus ex machina* to the exclusion of the more than one hundred legal services attorneys²⁷³ who, financed by ten million dollars from the federally funded Legal Services Corporation, file many suits like *Real* every year, impermissibly skews the relationship and access of migrant farmworkers to the law.

Perhaps even more difficult to reconcile with Wells’ analysis of the class content of law is the fact that some of the most important employee-status cases have been prosecuted by the state itself through its specialized agencies. Whatever class conflict inhered in the initial articulation of the boundaries of the working class that called forth the protection by the state from overreaching employers attached to the inclusion

1975, 23 & 24 Eliz. 2, ch. 45, §§ 39, 68-71, and Schedule 12. On the economic background for this measure, see *Report of the Committee of Inquiry Under Phelps Brown into Certain Matters Concerning Labour in Building and Civil Engineering*, 17 Parl. Papers 107-58 (Cmd. 3714, 1967-68). More recently, the Conservatives have attempted to shift the burden back to the Internal Revenue. 91 PARL. DEB., H.C. (6th ser.) 147 (1986) (Right to Be Self-Employed Bill).

270. Thus the unemployment compensation statutes in approximately three-fourths of the jurisdictions in the United States include a provision to the effect that

any services performed by an individual for wages shall be deemed to be employment subject to this Act *unless and until* it is shown to the satisfaction of the Commission that such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact.

TEX. REV. CIV. STAT. ANN. art. 5221b-17(g)(1) (Vernon 1987) (emphasis added).

271. In the unemployment compensation context, for example, despite the aforementioned statutory presumption, if the employer had issued a Form-1099 to the worker classifying him as an independent contractor and failed to pay Federal Unemployment Tax Act and state unemployment insurance taxes, the worker’s claim would initially be invalid until the agency had conducted a hearing and determined that an employer-employee relationship had existed.

272. Wells, *supra* note 17, at 51.

273. Not to mention those on the staff of the UFW, FLOC, and the Arizona Farmworkers Union.

of better paid, organized, or skilled workers. Although various factions of the agricultural employing class succeeded for several decades in excluding farmworkers from numerous protective schemes,²⁷⁴ that success has never been rooted in an argument that hand-harvesters on large labor-intensive farms are not core members of the most vulnerable segment of the proletariat. Even during the Reagan administration, the DOL and the IRS never took the position that sharecropping is anything but a scam;²⁷⁵ indeed, DOL litigation has contributed significantly to its suppression in certain areas.

This paternalistic intervention on behalf of the most exploited and defenseless stratum of the proletariat strengthens the argument that farmers' efforts to restore the old regime—whether by fiat or by taking advantage of the gullible—constitute a mere blip in the trend toward more comprehensive protection. Similarly, the proposition that employee status determinations have “become a part of class resources”²⁷⁶ fails to reflect the fact that less competitive or profitable employers have been known for some time now to try to restrict the scope of the class of workers on whom the state has paternalistically conferred benefits such as the minimum wage that they could not achieve through their own collective action on the labor market. Because the Driscoll workers were, by precedent, already entitled to the minimum wage, theirs was a purely defensive action designed merely to achieve the restoration of the status quo, which the farmers had unlawfully undone.

Wells portrays the real import of *Real* as pivoting on the “divergence between the contractual representation of the sharecroppers' independence and their experience of day-to-day dependence”²⁷⁷ Although an agency had urged the disgruntled budding entrepreneurs and former Driscoll braceros to bring an antitrust suit, Wells depicts them as having “instructed” their attorney to bring a “class action” against the “joint employers.”²⁷⁸ The workers' attorney, who notes that, as in virtually all such litigation, it was the lawyers who translated the clients' lay complaints into actionable events²⁷⁹—just as it was he who eventually amended the complaint into an FLSA action after listening to

274. See Linder, *supra* note 5.

275. A DOL regional attorney who conducted one of the most important sharecropper cases characterized sharecropping as “bullshit.” Telephone interview with DOL regional attorney (May 17, 1989).

276. Wells, *supra* note 17, at 78.

277. Wells, *supra* note 17, at 66.

278. Wells, *supra* note 17, at 67.

279. Telephone interview with Melvyn Silver (May 22, 1989).

the depositions that Driscoll took of his clients²⁸⁰—confirms that this exceedingly implausible scenario never took place. Under the rubric, “The Dialectics of Legal Struggle,” Wells argues that this contractual “representation as independent,” though initially to the advantage of the owners, “was appropriated in its meaning by workers, and ultimately spurred workers to challenge the economic and legal relationship.”²⁸¹ “[T]he actual process of litigation altered” their perceptions of their status, leaving them even years later “with what could be called ‘contradictory’ class consciousness.”²⁸² In reality what occurred sequentially was that: (1) the workers were economically coerced or deluded into accepting independent-contractor status; and (2) their lawyer, enlightening them as to the unlawfulness of their paper conversion, persuaded them to accept their original and only status as employees. One dialectic on which Wells failed to reflect is how workers can be “militant”²⁸³ and yet permit a piece of paper calling them sharecroppers to undermine their categorical proletarian consciousness.

If in arguing that law (e.g., the applicability of the FLSA to farmworkers in 1966) “has become one of the forces of production” and a “determinant of class relationships,”²⁸⁴ Wells meant that “the potential benefits of utilizing nonemployee, independent contractors are considerable,”²⁸⁵ then surely few will deny that violating the law in order to lower costs at the expense of defenseless employees without an alternative has always had its allures. But then no sophisticated sociological theorizing is required to understand that the enactment of laws imposing burdens on employers (or non-employing taxpayers for that matter) has always created incentives to stimulate every employer’s trivial urge to violate those laws in order to avoid the additional costs. Alternatively, Wells’ claim can also be more plausibly and less grandiosely interpreted to mean that the state-enforced application of a minimum wage can lead and has often led to a real reorganization in the form of labor-saving mechanization. Such a politically induced increase in capital intensity is, of course, so familiar as not to require analysis.

280. Wells states that Silver took his own clients’ deposition. Wells, *supra* note 17, at 67-68. This would have been quite extraordinary and Silver states that it did not happen. Wells naively believes that intervention by a lawyer to state a claim that his clients had not conceived is uncommon. Wells, *supra* note 17, at 78.

281. Wells, *supra* note 17, at 74, 75.

282. Wells, *supra* note 17, at 75.

283. Wells, *supra* note 17, at 77.

284. Wells, *supra* note 17, at 77.

285. Wells, *supra* note 17, at 59.

Ultimately the most problematic aspect of Wells' analysis involves translating her conclusions into the rigidly binary world of social-welfare and labor-protective legislation, which must affirm or deny a worker's status as a covered employee. If the workers' alleged subjective ambivalence corresponds to their objectively ambiguous status, what guidance can her approach—especially given her own tergiversations—furnish legislators, judges, and administrators, who are charged with drawing bright either-or lines? Yet Wells has adduced no evidence to support the claim that sharecroppers' working conditions or income warrant characterizing such workers as even "penny capitalists"²⁸⁶ or "lumpen-capitalists."²⁸⁷ That even well-meaning social scientists, imprisoned by unworldly academic constructs, can generate employer-friendly theses to the effect that "marginal producers hurled into existence by depression, under-employment or simple poverty"²⁸⁸ are petty bourgeois, underscores the need to move away from an employment-based, case-by-case statutory benefits system and towards a guaranteed income based on citizenship.²⁸⁹

D. *The Deukmejian Court Gets the Growers into a Pickle*

Although sharecropping apparently declined to some extent in strawberries after *Real*,²⁹⁰ it survived in other crops in California virtually as if *Real* had never been decided. By the same token, *Real* took on a life of its own as disembodied appellate jurisprudence outside the jurisdiction of the Ninth Circuit. Not only has it maintained its position as

286. J. BENSON, *THE PENNY CAPITALISTS: A STUDY OF NINETEENTH-CENTURY WORKING CLASS ENTREPRENEURS* 3-4 (1983).

287. Gerry & Birkbeck, *The Petty Commodity Producer in Third World Cities: Petit Bourgeois or Disguised "Proletarian"?*, in *THE PETITE BOURGEOISIE: COMPARATIVE STUDIES OF THE UNEASY STRATUM* 121, 141 (F. Bechhofer & B. Elliott ed. 1981).

288. Crossick, *The Petite Bourgeoisie in Nineteenth-Century Britain: The Urban and Liberal Case*, in *SHOPKEEPERS AND MASTER ARTISANS IN NINETEENTH-CENTURY EUROPE* 62, 66 (G. Crossick & H.-G. Haupt ed. 1984).

289. See Standing, *Meshing Labour Flexibility with Security: An Answer to British Unemployment?*, 125 INT'L LAB. REV. 87, 98-102 (1986); Standing, *Labour Flexibility and Older Worker Marginalisation: The Need for a New Strategy*, 125 INT'L LAB. REV. 329, 344-45 (1986). See also Linder, *What Is an Employee? Why It Does, But Should Not, Matter*, 7 LAW & INEQUALITY 155, 183-87 (1989). Cf. Euzéby, *A Minimum Guaranteed Income: Experiments and Proposals*, 126 INT'L LAB. REV. 253 (1987) (objecting to proposal as too radical and offering modification thereof).

290. Wells, *supra* note 17, at 75. Driscoll's son asserted almost a decade later that: "We haven't changed any of our practices since then. We settled out of court with the farm workers for next to nothing. They probably lost their shirts in the case." Echenique, *Court's Decision Gives Farmer Backing to Use Contract Growing*, *Salinas Californian*, Aug. 30, 1988, at 2A, col. 4. Although Echenique reported that she had interviewed Driscoll, presumably she talked to his son Donald F. Driscoll since the father was dead. Telephone interview with Eugene Garfinkel, attorney for Driscoll (May 22, 1989). Several lawyers at CRLA have stated that Driscoll did in fact stop using sharecropping after *Real*.

one of the most frequently cited FLSA-employee-status cases, but unlike most decisions, the citable half-lives of which rival that of a mayfly, it is more frequently cited as authority today than a decade ago.²⁹¹

Why neither the DOL nor California Rural Legal Assistance (CRLA)²⁹² sought to enforce the rights that *Real* had inchoately vindicated for farmworkers on the Pacific Coast is unclear. In large part the answer may lie in the sharecroppers' ignorance of their rights or in their reluctance to jeopardize whatever meager employment and income they had. In other words, rather than false consciousness, the vulnerability associated with the lack of an alternative way of filling an empty stomach may have inhibited the workers. Farmers, on the other hand, have been acutely self-reflective. For while cynically²⁹³ passing off sub-minimum-wage earnings²⁹⁴ as "giv[ing] the farmworker a business opportunity . . . that's the American way," they concede that they "like the sharecropping because it saves them costs for keeping track of payroll requirements such as unemployment insurance, withholding taxes, disability contributions, Social Security contributions and deductions."²⁹⁵

In the event, the next sharecropping battle came almost fortuitously. In the summer of 1985, a deputy labor commissioner of the California Department of Industrial Relations (DIR) issued a stop order and penalty assessment against S.G. Borello & Sons, a pickle grower in Gilroy, for having failed to secure workers' compensation coverage for its fifty migrant cucumber harvesters. Two weeks later Borello appealed the order, which prohibited the use of employee labor until Borello obtained the proper insurance coverage, and a \$5,000 penalty, to the Division of

291. See the relevant volumes of SHEPARD'S FEDERAL CITATIONS.

292. Jeannie Barrett, attorney, Cal. Rural Legal Assistance, Santa Maria, has indicated that for some years CRLA was persuaded by clients who sharecropped that it was better to reform than to destroy sharecropping. Telephone interview with Jeannie Barrett (May 26, 1989).

293. In the Rio Grande Valley of Texas, for example, where pickle sharecropping has arisen in conscious imitation of its Midwestern progenitors—its most prominent practitioner formerly worked for a processor in the Midwest—even workers who know that they have a right to the minimum wage and unemployment benefits decline to file suit because they fear being blacklisted and need the income that a large family can earn. Although employees cannot waive their rights under the FLSA, the pickle shed has sought to thwart legal action by offering adult workers the option of working for minimum wage (including social security and unemployment taxes) for a crew leader; coyly it fails to offer them the lawful functional equivalent of sharecropping: a graded piece rate as employee. Information from author's legal practice.

294. Echenique, *Family Farms the Hard Way*, *Salinas Californian*, Aug. 30, 1988, at 2A, col. 1 (family of eight earning \$1,000 per week equaling \$20 per person per day).

295. O'Sullivan, *Court Ruling Should Ease Sharecrop Woes*, *Telegram-Tribune* (San Luis Obispo County), Aug. 12, 1988, at C-6 (citing Richard Quandt, a lawyer in Santa Maria representing farmers).

Labor Standards Enforcement, which affirmed the order. It based its decision on the control Borello exerted over the entire operation, the contractual prohibition on the workers' use of non-family members, and on the workers' lack of investment.²⁹⁶ Two months later Borello filed a writ petition in superior court. The evidence presented to that court included the adhesion contract that Vlastic Foods, "the only commercial cucumber grower in the area," imposed on the farmer and his workers. The contractual recitals and the real working conditions were very similar to those prevailing in the Midwest. A significant wrinkle was that Vlastic maintained weekly picker summaries showing how many pounds each worker picked of each grade and the amount paid; on that basis Vlastic then issued checks directly to each worker. Borello's subordination to Vlastic was in fact so pervasive that Borello may merely have been Vlastic's dependent contract farmer or farm labor contractor and foreman.²⁹⁷ Finding that the evidence supported the Division's order, the trial court denied the writ in January 1986.²⁹⁸

In order to understand the appellate proceedings, it is necessary to bear in mind that in California, as in most states, the courts have interpreted the employer-employee relationship in the workers' compensation statute by reference not to the economic reality of dependence test developed under the FLSA, but rather to the so-called control test—that is, whether the employer has the right to control the methods by which the work is performed.²⁹⁹ The lower court held that sufficient control was shown to meet the test; the appellate court unanimously disagreed and reversed although it stated that the facts were undisputed.³⁰⁰ Because facts enter into the articulation of law and law into the social construction and perception of facts, distinguishing between law and fact is, over a broad range of circumstances, a virtually fatuous undertaking. This interpenetration protrudes sharply from the appeals court's opinion, making a mockery of its claim that it was merely resolving "a question of law." "The share farmers were free to utilize their own methods and set

296. *Borello & Sons v. State Dep't of Indus. Relations*, 196 Cal. App. 3d 1475, 242 Cal. Rptr. 554, 555 (1987), *superseded by*, 248 Cal. Rptr. 69, 755 P.2d 253 (1988), *rev'd*, 48 Cal. 3rd 341, 769 P.2d 399, 256 Cal. Rptr. 543 (1989).

297. Brief of Petitioner-in-Intervention Cirilo Lopez, at 2 n.1, 4, 25, *Borello & Sons v. State Dep't of Indus. Relations* 48 Cal. 3d 341, 769 P.2d 399, 256 Cal. Rptr. 543 (1989).

298. *Borello*, 196 Cal. App. 3d at ___, 242 Cal. Rptr. at 555.

299. For a critical-historical analysis of the control test and its application in workers' compensation statutes, see M. LINDER, *supra* note 96, at ch. 5; Linder, *supra* note 21.

300. *Borello*, 196 Cal. App. 3d at ___, 242 Cal. Rptr. at 557.

their own hours. Although the Vlastic's [*sic*] pricing schedule was an economic incentive to pick the cucumbers while they were small, the share farmers were free to pick them at any stage of maturity."³⁰¹ Precisely such an approach was subjected to scathing judicial parody long ago:

Under such circumstances although the employer's 'relinquishment' of his right to control has no factual significance whatever, legally it may be regarded as decisive. Thus laborers are employed to empty a car-load of coal. The employer insists that he does not control them, that he did not hire their 'services' but only contracted for the 'result,' an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other. The administration of an act designed to relieve human want should not be made to depend on our resolution of such verbal antics. . . . The laborer with shovel in hand remains an employee even though the employer, under the spur of tax or other liability, solemnly recites to him a legal jingle: I no longer control you. Shovel according to your own methods. I hold you responsible only for the ultimate result, a pile of coal. You render me no shoveling services, but you rather sell me a product: a pile of coal from an emptied car. Likewise the typist on her machine undergoes no transformation into an independent business woman because her employer tells her that she can choose her own method of working, i.e., type with 2 fingers or 10.³⁰²

All five factors that the appeals court adduced to support its finding that the farmer did not control the workers have already been shown to be ridiculous or at best irrelevant: (1) that Borello had no authority to terminate the workers at will (even if true, millions of non-at-will employees are still employees); (2) that the workers were required to furnish their own tools (as do millions of employees); (3) that the work was of limited duration; (4) that the pay was based on results rather than time worked (although piece-rate workers are employees);³⁰³ and (5) that the parties believed they were creating an independent contractor relationship (although workers cannot waive their rights). In a futile effort to deny that the workers were performing a detail task within a larger operation controlled by Borello, the court meaninglessly asserted that it was necessary to " 'distinguish between authoritative control and . . . necessary co-operation where the work furnished is part of a larger undertaking.' "³⁰⁴

301. *Id.* ___, 242 Cal. Rptr. at 558.

302. *Powell v. Appeal Bd. of Mich. Employment Sec. Comm'n*, 345 Mich. 455, 472, 479, 75 N.W.2d 874, 883, 886 (1956) (Smith, J., dissenting).

303. *United States v. Rosenwasser*, 323 U.S. 360 (1945).

304. *Borello*, 196 Cal. App. 3d at ___, 242 Cal. Rptr. at 558 (citations omitted).

At this juncture a funny thing happened on the way to dispute resolution. Instead of acting on the DIR's request to decertify the publication of the appeals court's decision,³⁰⁵ the California Supreme Court, on its own motion, "granted" review in March of 1988.³⁰⁶ Because neither party wished to litigate the matter further, four of the seven justices in effect imposed review on unwilling parties. Shortly thereafter, five justices—including two who had not voted for review—requested that the DIR, "deemed petitioner," brief "[t]he manner and extent to which the decision of the Court of Appeal, and the criteria by which independent contractor status is to be distinguished from an employer-employee relationship, may affect the enforcement of remedial legislation other than the Workers' Compensation Law in the State of California."³⁰⁷ This potentially broad ambit together with the new conservative majority on the California Supreme Court triggered considerable speculation as to the possible motives behind the involuntary review—especially when the court expedited the scheduling of oral argument.³⁰⁸

In the period before oral argument in November 1988 and then again during the interim until the decision was handed down in March 1989, California newspapers provided what was probably unprecedented coverage of an employee-independent contractor adjudication.³⁰⁹ While some reporting served as a vehicle for growers to lobby the Supreme Court with predictions of the destruction of the strawberry industry if sharecropping were outlawed,³¹⁰ other articles were based on original investigations into the actual conditions in the fields.³¹¹ The level of interest was also reflected in the large number of amicus briefs filed.³¹²

305. CRLA filed a supporting request for depublication in February, 1988.

306. 248 Cal. Rptr. 69, 755 P.2d 253 (1988) (pursuant to Rule 28(a)(1) California Rules of Court).

307. No. S003956, filed March 30, 1988.

308. See Leland, *Where Landmarks Come From*, CALIF. LAW., Dec. 1988, at 34.

309. E.g., Echenique, *Children's Harvest*, San Francisco Chronicle, Feb. 19, 1989, *This World* at 10.

310. See, e.g., Siegel, *Sharecropping: Local Challenge a Serious Threat*, Santa Maria Times, Sept. 16, 1988, at 1. *But see* Siegel, *Sharecropping Case Before State Supreme Court*, Santa Maria Times, Dec. 1, 1988, at 7, col. 1 (citing evidence that "[m]ore employers are seeking employees for greater quality control").

311. E.g., Echenique, *Family Farms the Hard Way*, Salinas Californian, Aug. 30, 1988, at 1A, col. 1.

312. CRLA filed an amicus brief after its motion to intervene on behalf of a picker who had worked for Borello was denied. The Farm Bureau Federation and Western Growers Association also filed amicus briefs. The California Applicant Attorneys Association also filed an amicus brief acting in the hope that the court had (perversely) wanted to hear the case because further exemptions from the workers' compensation system would increase the filing of negligence suits in state court. Leland, *supra* note 308, at 35.

The majority opinion is structured differently than earlier sharecropping decisions. The first, very brief part provides a quasi lay prolegomenon; the second part discusses the control test; and the last can be regarded as an extended dictum on the economic reality test. After explaining that they had ordered review because they considered the issue "of substantial importance,"³¹³ the majority stated the outcome succinctly:

The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over *a job which can be done only one way*. . . . In no practical sense are the "sharefarmers" entrepreneurs operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which workers' compensation protection is intended to apply.³¹⁴

Although this skeletal reasoning in itself met the control test standard, the majority proceeded to note that while the right to control was paramount, other secondary indicia were also relevant. Especially in conjunction with the need to construe the employment relationship against the background of the purposes behind the statute; the overriding purpose being "to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society."³¹⁵ It is here that the majority exhibited ambivalence towards the control test.³¹⁶

It emphasized that whereas the common-law distinction between independent contractors and employees was developed in the context of vicarious liability in order to determine an employer's liability for injuries caused *by* his employee, the issue in workers' compensation is

313. *Borello & Sons v. Department of Indus. Relations*, 48 Cal. 3d 341, 345 n.1, 769 P.2d 399, 400 n.1, 256 Cal. Rptr. 543, 544 n.1 (1989).

314. *Id.* at 345, 769 P.2d at 400-01, 256 Cal. Rptr. at 544-45 (emphasis added).

315. *Id.* at 354, 769 P.2d at 406, 256 Cal. Rptr. at 550-51.

316. This ambivalence is also reflected on the doctrinal-interpretive level. Thus, on the one hand the majority adopted a thoroughgoing realistic view in holding that: "A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible workers." *Id.* at 357, 769 P.2d at 408, 256 Cal. Rptr. at 552. On the other hand, it failed to perceive the asymmetric relationship between the requirements of a determination that a worker is an employee and those of one that he is an independent contractor. Especially given the fact that the burden was on *Borello* to prove that the workers were independent contractors, the court overlooked the crucial fact that—even in the common law setting—while the presence of control dispositively identifies an employee, the converse is not valid: its mere absence does not necessarily identify an independent contractor. In other words, the latter determination is a much more complicated undertaking because it requires examination of all factors, no single factor being dispositive.

whether the employer is liable for injuries to his employee.³¹⁷ Yet when the court came to spell out the difference between the two regimes, it disappeared. For just as the employer's power to supervise is deemed relevant to the former inquiry, the exclusion of independent contractors from workers' compensation has been justified by the self-employed service provider's having "primary power over work safety."³¹⁸ To be sure, the majority also added to the list of the criteria pertinent to workers' compensation the self-employed's being "best situated to distribute the risk and cost of injury as an expense of his own business," and having "independently chosen the burdens and benefits of self-employment."³¹⁹ These additional factors, however, transcend the framework not only of the control test, but tendentially even that of the economic reality of dependence test.³²⁰ For they point to the rationality of applying what can best be characterized as a harking back to an inchoate economic-reality-of-class-proverty test developed by nineteenth-century English courts in interpreting the Truck Acts.³²¹

More than to any other modern labor-protective legislation, such a test is appropriate to workers' compensation. Because the workers to be protected are those who without coverage would bear the full economic burden of work-related accidents, the purpose of the statute can best be effectuated by interpreting "employee" to encompass all those unable to channel the costs either through an employer to the final consumer or directly to the latter.³²² Thus a worker who cannot self-insure for medical and disability protection or pass the costs on, should be presumed to be a covered employee. These are only seemingly distinct issues. The financial ability to purchase insurance is a relatively simple quantitative determination. Whether a worker can pass the costs on would be a more complicated question, which would have to be resolved by reference to the extent of his integration into the alleged employer's business. But even if it were determined that the alleged employer were the consumer—that is, that Borello purchases pickle-picking services—if the

317. *Id.* at 352, 769 P.2d at 405, 256 Cal. Rptr. at 549.

318. *Id.* at 354, 769 P.2d at 403, 256 Cal. Rptr. at 547.

319. *Id.* at 357, 769 P.2d at 406, 256 Cal. Rptr. at 550.

320. It is unclear whether the court was acting disingenuously or in genuine ignorance of what it was doing when it stated that it was adopting "no detailed new standards for examination of the issue." *Id.* at 357, 769 P.2d at 406, 256 Cal. Rptr. at 550.

321. See M. LINDER, *supra* note 96, at ch. 3.

322. See 8 A. LARSON, WORKMEN'S COMPENSATION LAW § 43.51 (1987).

economic reality of that relationship is such that the picker cannot bargain for compensation sufficient to enable him to purchase comparable insurance on his own, then the issue is again reduced to financial ability.

Without expressly forging all the foregoing links, the majority appears to have taken this very radical step—albeit in dictum. For it stated that the workers

have no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries. If Borello is not their employer, they themselves, and society at large, thus assume the entire financial burden when such injuries occur. Without doubt, they are a class of workers to whom the protection of the Act is intended to extend.³²³

Amusingly, the dissenters were so preoccupied with fulminating against the majority's empirically "gratuitous assumptions that the sharefarmers do not obtain insurance coverage for themselves,"³²⁴ that they failed to notice the even more momentous legal innovation.

This change in the law, to be sure, the court achieved not through application of the control test, but by anonymous reference to the economic-reality-of-dependence test.³²⁵ Its frank declaration that "[b]y any applicable test, we must dismiss the growers' claims,"³²⁶ was valid for the decision as a whole, but not for the specific shortcut it used to reach the same conclusion. For that end required delineation of the aforementioned economic-reality-of-class-poverty orientation.

Although the two dissenters, who had not voted for review, rebuked the majority for having granted review on a record that was "entirely insufficient to furnish the basis for a decision of major significance,"³²⁷

323. *Borello*, 48 Cal. 3d at 358, 769 P.2d at 409, 256 Cal. Rptr. at 553. According to William Hoerger, who wrote an amicus brief on behalf of CRLA and attended the oral argument, the conservative members of the majority made it clear at oral argument that they did not want to see state welfare expenditures increase because private enterprise was failing to pay its own way. Telephone interview with William Hoerger (May 22, 1989).

324. *Borello*, 48 Cal. 3d at 361 n.2, 769 P.2d at 411 n.2, 256 Cal. Rptr. at 555 n.2 (Kaufman, J., dissenting). The majority did adduce some testimony indicating that, particularly when the loss of statutory financial protections and the total number of hours worked by all family members are taken into account, the workers may have been earning less than employees. *Id.* at 359 n.15, 769 P.2d at 410 n.15, 256 Cal. Rptr. 554 n.15, (Kaufman, J., dissenting). The dissent's effort to undermine the credibility of this testimony was unconvincing. *Id.* at 360 n.7, 769 P.2d at 514-15 n.7, 256 Cal. Rptr. at 558-59 n.7 (Kaufman, J., dissenting). For evidence that sharecroppers are in fact not covered, see Burns, *supra* note 192, at A1, A14, col. 1.

325. *Borello*, 48 Cal. 3d at 354-55, 769 P.2d at 407, 256 Cal. Rptr. at 551.

326. *Id.* at 354-55, 769 P.2d at 407, 256 Cal. Rptr. at 551.

327. *Id.* at 360, 769 P.2d at 411, 256 Cal. Rptr. 555 (Kaufman, J., dissenting).

the gravamen of their criticism was socioeconomic rather than procedural. Judge Kaufman's³²⁸ dissent unintentionally cast a bright light on the difference between self-reflective realistic Law and Economics jurisprudence as practiced by Easterbrook and mere ideological atavism to *Lochner*-era dogmatism.³²⁹ In an opinion oozing false pathos, the dissenters lambasted the majority opinion as "one of the sadder episodes in the history of this court—a wholly unnecessary and inappropriate intermeddling in the affairs of and curtailment of the liberties of California's residents," which would "end up harming the very persons it is paternalistically intended to help" and who had found cucumber sharecropping "satisfactory."³³⁰

In faulting the majority for characterizing sharecropping as "a nefarious subterfuge" without an "iota of evidence,"³³¹ Kaufman failed to provide an adequate epistemological framework for his thesis that economic and cultural coercion creates an appropriate basis for consensual activities that facially debase one's own long-term life chances as well as those of one's class: "[T]here is no law establishing that a person's decision to enter into a transaction is involuntary unless he or she has been offered alternative arrangements."³³² In its unreconstructed *Lochner*-ism, the dissent appeared oblivious to the fact that the entire edifice of modern protective welfare legislation is profoundly rooted in that very "law"—namely, that certain kinds of exploitation are intolerable.³³³ The concept itself of exploitation Kaufman objectively jettisoned by virtue of a Fourth-of-July-ism that extinguished all of economic science's elaborated distinction between labor and capital:

They invest the value of their labor. That may be insignificant to the majority but it is no doubt significant to the sharefarmers, as it is to me. The value of one's labor is ultimately the source of all capital.

328. Judge Kaufman has for many years been notorious for his animus against unions and particularly the UFW. Telephone interview with William Hoerger, CRLA (May 22, 1989).

329. In this respect Kaufman is closer to the professorial Law and Economics of Richard Epstein; see, e.g., Epstein, *A Common Law for Labor Relations: A Critique of New Deal Labor Legislation*, 92 YALE L.J. 1357 (1982).

330. *Borello*, 48 Cal. 3d at 360, 769 P.2d at 410-11, 256 Cal. Rptr. at 554-55 (Kaufman, J., dissenting).

331. *Id.* at 361 & n.2, 769 P.2d 411 & n.2, 256 Cal. Rptr. at 555 & n.2 (Kaufman, J., dissenting).

332. *Id.* at 364, 769 P.2d at 414, 256 Cal. Rptr. at 558, (Kaufman, J., dissenting). Revealingly, the only empirical reference offered for the assertion that sharecropping "is preferred by the sharefarmer families" was the self-serving testimony of the Borellos. *Id.* at 362, 769 P.2d at 412, 256 Cal. Rptr. at 556 (Kaufman, J., dissenting). Judge Kaufman failed to mention that the witnesses to whom he referred were the Borellos.

333. E.g., E. DURKHEIM, *LEÇONS DE SOCIOLOGIE* 235 (2d ed. 1969).

Many generations of American immigrants have become successful entrepreneurs doing just that—investing the only asset at their command, the value of their labor.³³⁴

Within forty-eight hours of *Borello*'s having been handed down, farmers went to the fields to tell sharecroppers that they were now hourly employees.³³⁵ Such a swift renunciation of principle³³⁶ may have been dictated by the growers' strategy of seeking a legislative reversal of *Borello*³³⁷ in keeping with their disingenuous position that *Borello* outlawed independent contracting as such. CRLA promptly filed a class action on behalf of the sharecroppers of one large strawberry farm, pleading both statutory minimum wage, workers' compensation, unemployment compensation, social security, and sanitary facilities claims and a variety of breach of employment and land-rental contracts, quantum meruit, leasehold, unfair competition, and fraud causes of action.³³⁸

This carefully crafted complaint constituted a striking refutation of the aforementioned thesis that the alleged ambivalence of sharecropper-plaintiffs reflects the underlying ambiguity of their "contradictory class location." Instead, this dual-track litigation—alleging both that their designation as independent contractors was "fictitious"³³⁹ and that the farmer nevertheless breached the sharecrop contracts—symbolizes the consistently pragmatic behavior that the sharecroppers have always displayed. " 'When the sharefarmers get paid, they find that they are paid far less than minimum wage. In fact, sometimes, they owe the grower. . . . Everyone (working as a sharefarmer) has high expectations of a big paycheck at the end of the season and it doesn't materialize.' "³⁴⁰

334. *Borello*, 48 Cal. 3d at 364, 769 P.2d at 413, 256 Cal. Rptr. at 557 (Kaufman, J., dissenting).

335. See, e.g., Letter from Furukawa Farms, Inc. to its "growers" (Apr. 11, 1989) (copy in possession of author); Burns, *Workers Won't Get Share of Harvest*, Santa Barbara News-Press, Apr. 13, 1989, at A1. Furukawa began paying workers \$4.65/hour plus seventy cents per box. *Id.* at A8.

336. See, e.g., Duman, *Court Case on Sharecropping Sows Confusion Among Farmers*, San Luis Obispo County Telegram-Tribune, Apr. 14, 1989, at C-7, col. 1; Keckler, *Sharecropping Fallout: Wait and See*, The Packer, Apr. 15, 1989, at 3A. Immediately after *Borello* issued, the Grower-Shipper Vegetable Association of Santa Barbara and San Luis Obispo Counties held a "legal briefing" at which one of the "[a]lternatives for responding to . . . *Borello*" was "[t]he 'find an alternative labor avoidance device' approach." *The Future of Sharecropping Following the Borello Decision* (agenda of Mar. 30, 1989 [copy in author's possession]).

337. See, e.g., Duman, *State Moves Ahead on Sharecrop Ruling*, San Luis Obispo County Telegram-Tribune, Apr. 28, 1989, at C-6 (labor commissioner denies request by state legislators to delay implementation of *Borello*).

338. *Gonzalez v. Furukawa Farms, Inc.*, No. SM62038 (Super. Ct. Santa Barbara filed May 10, 1989).

339. *Id.* at 1.

340. Hodgson, *Workers Under Contract Now May Not Be Affected*, Five Cities Times-Press-Recorder (Arroyo Grande, Cal.), May 5, 1989, at 9 (quoting district deputy labor commissioner).

The same subjective maximizing behavior that induced many workers to try sharecropping in order to earn more than the minimum wage has led them to file suit in order to recover the minimum wage. Perhaps most significantly, these selfsame newly emancipated sharecroppers have chosen the United Farm Workers as their collective bargaining representative in an Agricultural Labor Relations Board election.³⁴¹

VI. PROLEGOMENA TO ANY FUTURE PICKLE-PICKING: PRO-CHOICE OR COLLECTIVE COERCION?

The Bill is a helpful measure, under which anyone can agree with his employer that he or she is henceforth to be treated as self-employed merely by completing a simple form. . . . Self-employment is one of the most obvious escape routes from that sterile employee culture which was recently condemned by His Royal Highness the Prince of Wales. . . . Employers will be able to employ people . . . without the fear of becoming locked in by employment protection laws and the other burdens on businesses. It is a short cut. At a stroke, employers will be relieved of that burden.³⁴²

The political-economic predicament of pseudo-sharecroppers differs radically from the situation in which similarly vulnerable workers found themselves in the era before the rise of the modern welfare state. While the opportunities for self-employment are hardly exhausted today, with more than nine-tenths of the labor force in employee status,³⁴³ Lincolnian notions of democratic social mobility no longer operate—as they did in the mid-nineteenth century³⁴⁴—with a prejudice that wage labor normally functions as a stepping stone to self-employment. The extent and degree of large-scale capitalist industry and the concomitant proletarianization of the labor force have become such a commonplace that the trend towards dependent employment cannot contain the moral shock value that it once did.³⁴⁵ Thus the problem confronting today's sharecroppers is not that legislatures are reluctant to intervene into the labor market on their behalf. Nor does the problem lie with atavistic attitudes

341. Burns, *supra* note 192, at A1, A14, col. 6; telephone interview with William Hoerger, CRLA (May 22, 1989).

342. 91 PARL. DEB., H.C. (6th ser.) 147 (1986) (Michael Forsyth, M.P.).

343. In February 1989, 9,605,000 or 8.4% of all employed civilians were self-employed; the rate of self-employment was 45.9 per cent in agriculture and 7.4% in non-agricultural industries. 36:3 EMPLOYMENT & EARNINGS, Mar. 1989, table A-24 at 30 (calculations by author). It is a research desideratum to determine whether the Bureau of the Census, to the extent that it surveys any sharecroppers in its Current Population Survey, classifies them as self-employed.

344. See, e.g., E. FONER, FREE SOIL, FREE LABOR, FREE MEN 18, 23 (1977).

345. See, e.g., *In re Municipal Fuel Plants*, 182 Mass. 605, 66 N.E. 25 (1903).

of the judiciary. Not even the aberrant *Brandel* litigation resurrected a judicial ideology glorifying the entrepreneurial spirit of impoverished immigrants³⁴⁶ that a paternalistic state was unconstitutionally seeking to suppress.³⁴⁷ Despite an unprecedented public relations celebration of free enterprise orchestrated by the Reagan administration,³⁴⁸ neither the judicial wing of Law and Economics nor the appointees of a right-wing governor could take seriously the claim that pickle pickers are anything but employees par excellence.³⁴⁹

Thus, whereas the late-nineteenth-century and early-twentieth-century segmented labor market counterparts of today's migrant farmworkers—namely, women, children, and men in certain extraordinarily dangerous or unhealthy trades—were rebuffed by legislatures or, more commonly, by the courts in their efforts to secure by state intervention what they could not through direct demands to employers, all three branches of federal government, and state government have been relatively solicitous of the peculiar vulnerabilities of farmworkers. Even under the openly antilabor Reagan administration, the DOL abided by its traditionally capacious view of the scope of employee status.

The contemporary problem, instead, is that in the face of continuing hand-harvest labor market imperfections raised to the level of structurally impervious lopsidedness by overreaching employers, state intervention has not been paternalistic enough. That is to say, neither the state nor worker representatives have summoned the courage to spell out the distinctly antiliberal truth that regulation of this labor market will, for the foreseeable future, continue to be Sisyphean labor requiring much more intrusive methods to prevent employers from taking advantage of those unable to refuse coercive wage offers or to extricate themselves

346. For an example of bathetic exaltation of sharecropping bordering on self-mockery, see Subjagation [sic] or Dignity (undated [ca. Apr. 1989] flier produced by California strawberry growers [copy in author's possession]).

347. See, e.g., *In re Jacobs*, 98 N.Y. 98 (1885).

348. Even the DOL's promulgation in the 1980s of new regulations expanding the permissible scope of industrial homework is premised on the homeworkers' status as employees subject to the FLSA. 49 Fed. Reg. 44,262, 44,266 (1984) (to be codified at 29 C.F.R. pt. 530); 53 Fed. Reg. 45,706 (1988) (to be codified at 29 C.F.R. pts. 516 and 530). In this special context it is therefore misleading to depict the lifting of the ban as having "taken on symbolic significance because [sic] it pits the Administration's advocacy of free enterprise against defenders of New Deal laws that prohibit the exploitation of workers." Noble, *U.S. Will End Ban on Work in Home*, N.Y. Times, Nov. 11, 1988, at 1, 8, col. 6. See generally *HOMEWORK: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON PAID LABOR AT HOME* (E. Boris & C. Daniels ed. 1989).

349. The local newspaper in the town in which Borello's farm is located, editorially referring to the pickle contracts as "ruse" and "bogus independent contractor arrangements," called for putting "this question to rest once and for all." Editorial, *Ruling Halts Picking of Pickle-pickers' Pockets*, Gilroy Dispatch, Apr. 4, 1989.

from the web of "desperation bidding."³⁵⁰ Legislative or judicial adoption of a per se rule that all migrant farmworkers are employees for purposes of all labor-protective statutes would be one of those methods.³⁵¹

Doubtless some truth attaches to claims that a few California strawberry sharecroppers have been able to earn and accumulate enough money to create a standard of living above that of the average migrant farmworker. But piece-rate busters have often enjoyed such a status. The mere fact that a minuscule percentage of workers can, through unlawful exploitation and self-exploitation, rise marginally above or out of their class, constitutes no justification for sacrificing the rest of the class on the altar of uninhibited individual self-enrichment.³⁵² On the contrary, until that class is sufficiently cohesive "to coerce others to choose collective interests over those of the individual,"³⁵³ the state must intervene to prohibit pseudo-consenting adults from undermining their own life chances as well as those of their children and their class: "to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will."³⁵⁴

The necessity of counterposing collective coercion to economic coercion is worth considering in light of the ramifications of farmers' introducing more imaginative arrangements in order to elude the extended scope of judicially interpreted employee status. What is the legal consequence for example, of the imposition of real risk by means of an "agreement" that workers retain half of the crop, which they then must sell on their own? If the farmer can coerce workers into accepting, do they become sharecroppers? If workers actually had the savings, bank loans, or

350. See R. GOODIN, *REASONS FOR WELFARE: THE POLITICAL THEORY OF THE WELFARE STATE* 133, 168, 367 *passim* (1988); R. GOODIN, *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (1985). A particularly blatant example of such self-destructive behavior is contained in a petition by strawberry sharecroppers calling on the governor of California to "overthrow" *Borello*: "Without this form of employment, there is no chance for our children to assist us after school and on days off." Finucane, *Sharecroppers Learn Import of Court Pay Ruling*, Santa Barbara News-Press, Apr. 11, 1989, at B3. A complete response to this argument was offered by Mike Blank, CRLA attorney: "'If mommy and daddy make enough money, the children won't have to be working.'" *Id.*

351. Among other measures urgently needed in order to readjust the underlying supply and demand forces is the strictly enforced abolition of child labor. See generally Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. (forthcoming 1989). Federally organized recruitment of migrant workers and mandated wage bargaining or setting are further desiderata.

352. See generally D. MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* 208, 210 (1987).

353. Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 BUFFALO L. REV. 1, 113 (1988).

354. O. KAHN-FREUND, *supra* note 267, at 14.

cash flow, to tide themselves over until they sold the crop, then they might (involuntarily)³⁵⁵ have become businessmen.³⁵⁶ But nothing extraordinary would inhere in this scenario. For the process of capital accumulation is continuously thrusting up from the ranks of wage laborers some individuals who manage to become entrepreneurs.³⁵⁷ Those who tried to survive on food stamps³⁵⁸ in the interim and failed would arguably remain employees with a cause of action for back wages.³⁵⁹

If strawberry farmers can afford to invest \$40,000 in a bug vacuum,³⁶⁰ yet do not have the cash-flow to "financ[e] the labor" or the profits to share the proceeds fifty-fifty and to "pay the benefits,"³⁶¹ then one of two market responses will follow. If American consumers of strawberries are unwilling to pay the prices required to sustain acceptable wage and profit levels in the industry, then either they will have to forgo eating strawberries while owners seek other outlets for their capital and workers other employment, or strawberries will have to be imported from Latin America.³⁶² But if the Latin Americanization of hand-harvest wages in the United States is to be avoided despite the Latin Americanization of the labor force, scams such as sharecropping must be

355. In a California strawberry variant of sharecropping some workers are actually coerced into this situation even though they do not have the cash-flow to sustain themselves until the harvest comes in. In one instance, when a crop had to be destroyed (because it had been poisoned), several months of (part-time) work went uncompensated, and the workers had to join the migrant stream. Although the farmer may have had the resources to purchase crop insurance, the workers did not. Telephone interview with Jeannie Barrett, Attorney, Cal. Rural Legal Assistance, Santa Maria (May 26, 1989).

356. A similar but not identical issue has arisen in Florida with regard to so-called pin-hookers, that is, persons who pick tomatoes left on the vines after the farmer has picked the tomatoes he requires for his marketing purposes. The pin-hookers buy these tomatoes and then sell them on their own account to brokers. A dispute exists as to whether they are "farm labor" within the meaning of 42 U.S.C. § 1484 and thus eligible to live in farm labor housing projects subsidized by the Farmers Home Administration. *Rivera v. Edenfield*, No. 82-451-Civ-WMH, slip op. (S.D. Fla. July 23, 1984). The FMHA has recently proposed new regulations expressly excluding the self-employed in order to codify the pin-hookers' ineligibility. 54 Fed. Reg. 14,824 (1989) (to be codified at 7 C.F.R. § 1944.153) (proposed Apr. 13, 1989).

357. See Cohen, *The Structure of Proletarian Unfreedom*, in *ANALYTIC MARXISM* 237 (J. Roemer ed. 1986).

358. Food Stamp Act of 1977, 7 U.S.C. § 2014(f)(1)(A) (1988) (provisions concerning calculation of household income for households deriving annual income from self-employment).

359. *But see Sun Shipbuilding & Dry Dock Co. v. Unemployment Compensation Bd. of Review*, 358 Pa. 224, 56 A.2d 254 (1948) (worker may not have best of both possible worlds as self-employed and employee).

360. Stockdale, *Changing Times in Strawberry Valley*, Central Coast, May 1989, at 7, 9.

361. Burns, *supra* note 192, at A14, col. 3.

362. On why Mexican costs of production may not be low enough to supplant U.S. supplies, see RUNSTEN, *Competition in Strawberries*, in *MARKETING CALIFORNIA SPECIALTY CROPS: WORLD-WIDE COMPETITION AND CONSTRAINTS: COMPETITIVENESS AT HOME AND ABROAD* 47, 53-57 (1987). Alternatively to the possibilities mentioned in the text, American strawberry producers

outlawed and penalized. If farmers are ideologically wedded to the fifty-fifty system, no legal impediment bars them from using it—provided that they pay minimum wages and employment taxes.³⁶³ If the alternative is family labor compensated in the aggregate at \$1.40 per hour,³⁶⁴ then, by all means, let's “return to the 1960s . . . where we had nameless faces making minimum wage.”³⁶⁵

might succeed in expanding their exports or moving towards mechanization that does not destroy the plants. *Id.* at 57-58.

363. Duman, *State Moves Ahead on Sharecrop Ruling*, San Luis Obispo County Telegram-Tribune, Apr. 28, 1989, at C-6 (quoting Labor Commissioner Lloyd Aubry Jr.).

364. Editorial, *Ruling Halts Picking of Pickle-Pickers' Pockets*, Gilroy Dispatch, Apr. 4, 1989.

365. Stockdale, *Changing Times in Strawberry Valley*, Central Coast, May 1989, at 7, 10 (quoting Patrick Sheehy, partner in Santa Maria Berry Farms).