

THE DOMINION OF AGRICULTURAL SUSTAINABILITY: INVISIBLE FARM LABORERS

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INTRODUCTION

Increasingly, individuals and organizations are promoting an integrated, sustainable food systems approach.¹ Moreover, federal and state legislation underscores integrated sustainability specific to the environment, which “satisf[ies] human food and fiber needs,” promotes “viability of farm operations,” and “enhance[s] the quality of life for farmers and society as a whole.”² Consumers’ demand for fresh food and vegetables, with an emphasis on safe food, is further coupled with

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1. Universities are also opening their curriculum to sustainable agriculture. See, e.g., *Center for Sustainable Agriculture and Natural Resources*, WASH. ST. U., <http://csanr.wsu.edu> (last visited Mar. 4, 2014).

2. See, e.g., 7 U.S.C. § 3103(19) (2012) (addressing, among other things, the environment, natural resources, economic viability of farming operations, and ways to “enhance quality of life for farmers and society as a whole”); 3 PA. CONS. STAT. § 2103 (2013); RICHARD EARLES, ATTRA, SUSTAINABLE AGRICULTURE: AN INTRODUCTION 1 (2005), available at <https://attra.ncat.org/attra-pub/summaries/summary.php?pub=294> (“Sustainable agriculture is one that produces abundant food without depleting the earth’s resources or polluting its environment.”); SUSTAINABLE AGRIC. RESEARCH & EDUC., WHAT IS SUSTAINABLE AGRICULTURE? 2, available at <http://www.sare.org/Learning-Center/SARE-Program-Materials/National-Program-Materials/What-is-Sustainable-Agriculture> (discussing profit, stewardship, and quality of life for farmers, ranchers, and their communities).

pursuing sustainability and seeking alternatives to industrialized food production.³

A major difficulty, however, is that integrated systems that cultivate food offered to consumers omit farmworkers.⁴ Notwithstanding their unique placement at the bottom of food production, farmworkers are systemically omitted from integrated food systems discussions and related scholarly inquiry. The *Wisconsin Law Review* Symposium's focus on promoting an integrated, sustainable food system thereby highlights the silence that governs the jurisprudence and reality of the labor conditions of farmworkers.

This Article asks whether integrated sustainability is possible without deliberation on the causal links between the status and working conditions of hired farm laborers and the food production system. While farmworkers might not appear related to integrated sustainability, agricultural economists, the United States Department of Agriculture (USDA), and others recognize the unique importance of farm laborers to food production.⁵ From an economic-value perspective, without farmworkers, crops remain in fields, guaranteeing economic hardship for growers, producers, and agricultural economies.⁶ In contrast to the

3. "From 2004 to 2011, organic food sales more than doubled from \$11 billion to \$25 billion, accounting for over 3.5 percent of food sales in 2011." U.S. DEP'T OF AGRIC., AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS, at v, 37 (Craig Osteen, Jessica Gottlieb & Utpal Vasavada eds., 2012), available at <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib98/report-summary.aspx#UrEgS2RDtbE>. The U.S. Department of Agriculture (USDA) defines "organic farming as an ecological production system that fosters resource cycling, promotes ecological balance, and conserves biodiversity." *Id.* at 37. Deaths and hospitalizations of industry-related foodborne illness are extensive. FOOD & DRUG ADMIN., *FOODBORNE ILLNESS-CAUSING ORGANISMS IN THE U.S.: WHAT YOU NEED TO KNOW* (2013), available at <http://www.fda.gov/downloads/food/resourcesforyou/consumers/ucm187482.pdf>.

4. "Hired farmworkers include field crop workers, nursery workers, livestock workers, farmworker supervisors, and hired farm managers." *Farm Labor: Background*, U.S. DEP'T AGRIC. ECON. RES. SERVICE (last updated Feb. 14, 2013), <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx#UuVmvP16jLY>.

5. WILLIAM KANDEL, U.S. DEP'T OF AGRIC., *PROFILE OF HIRED FARMWORKERS, A 2008 UPDATE 3-4* (2008) [hereinafter *PROFILE OF HIRED FARMWORKERS*], available at <http://www.ers.usda.gov/publications/err-economic-research-report/err60.aspx#UrEzdGRDtbE>. The definition of agriculture in this Article is taken from the Fair Labor Standards Act, 29 U.S.C. § 203(B)(5)(f) (2012) ("'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities.").

6. Alabama's anti-immigration law directly caused citizens and non-citizens to flee the state, thereby causing economic challenges for fruit and vegetable growers. *See, e.g., Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1240-42 (11th Cir. 2012); JOHN C. MCKISSICK & SHARON P. KANE, *AN EVALUATION OF DIRECT AND INDIRECT ECONOMIC LOSSES INCURRED BY GEORGIA FRUIT AND VEGETABLE PRODUCERS IN*

limiting economic-value perspectives, this Article asserts that integrated sustainability approaches to the nation's food systems are stymied without consideration of the labor workforce.⁷ It proposes that relegating farmworkers to invisible roles foregoes opportunities to improve food systems and systemically repeats the cycle of harm that farmworkers and other agricultural laborers endure⁸—in essence, duplicating the pattern of financially empowering owner-operators while simultaneously disempowering the workers who are primarily impoverished.

Related to integrated sustainability is the encouraged decreased use of pesticides with the goal of diminishing harm to the environment.⁹ Yet farmworker illnesses or deaths due to pesticide exposure, employment in harsh environmental regions without proper clothing, improper safety training, and the absence of shade breaks illustrate glimpses of challenging working conditions.¹⁰ Such conditions further underscore the widening gaps between diminishing environmental degradation and the sustainability goals that consumers and land-use advocates pursue.

SPRING 2011, at 5–9 (2011), available at <http://www.caes.uga.edu/center/CAED/pubs/2011/documents/CR-11-01.pdf>.

7. Vertical integration results where various former diverse tiers of food production are collapsed into one model with the goal of increasing economic efficiencies that could lead to lower food costs. See, e.g., STEVE W. MARTINEZ, U.S. DEP'T OF AGRIC., VERTICAL COORDINATION OF MARKETING SYSTEMS: LESSONS FROM THE POULTRY, EGG, AND PORK INDUSTRIES 23–24 (2002), available at <http://www.ers.usda.gov/publications/aib-agricultural-information-bulletin/aib747.aspx#.UrE2MWRDtE>.

8. See, e.g., ASS'N OF FARMWORKER OPPORTUNITY PROGRAMS, AMERICA'S FARMWORKER CHILDREN: HARVEST OF BROKEN DREAMS 3, 14 (2011) [hereinafter AMERICA'S FARMWORKER CHILDREN], available at <http://afop.org/wp-content/uploads/2010/07/Americas-FW-Children-09-12-11.pdf>; MARSHFIELD CLINIC, BLUEPRINT FOR PROTECTING CHILDREN IN AGRICULTURE: THE 2012 NATIONAL ACTION PLAN, 5, 8 (Barbara C. Lee et al. eds., 2012), available at http://www3.marshfieldclinic.org/proxy///mcrf-centers-nfmc-nccrahs-2012_blueprint_for_child_ag_inj_prev.1.pdf; THE N.M. CTR. ON LAW & POVERTY, HUMAN RIGHTS ALERT: NEW MEXICO'S INVISIBLE AND DOWNTRODDEN WORKERS: REPORT OF A 2012 SURVEY OF NEW MEXICAN FIELD AND DAIRY WORKERS 2–7 (2013), available at <http://nmpovertylaw.org/WP-nmclp/wordpress/WP-nmclp/wordpress/wp-content/uploads/2013/07/Report-FINAL-2013-07-23.pdf>.

9. See, e.g., *Pesticides on Food*, PESTICIDE ACTION NETWORK N. AM., www.panna.org/issues/food-agriculture/pesticides-on-food (last visited Mar. 7, 2014).

10. See, e.g., *Bautista v. California*, 133 Cal. Rptr. 3d 909, 911, 914, 922 (Ct. App. 2011) (discussing heat-related deaths and noting that the state did not meet its statutory obligations); PAMELA RAO, FARMWORKER JUSTICE, HEAT RELATED ILLNESSES: AN OCCUPATIONAL HEALTH CONCERN FOR FARMWORKERS 5 (2007) (“Illnesses caused by heat are often overlooked when considering occupational health and safety issues of farmworkers because they are not specific to any crop, task, or equipment, and can develop in commonly occurring environmental conditions.”); *Chronology on Heat Death of Maria Isabel Vasquez Jimenez*, UNITED FARM WORKERS (Mar. 7, 2011), http://www.ufw.org/_board.php?mode=view&b_code=cre_leg_back&b_no=9098 (noting that Maria Jimenez perished after working nine hours without a break on May 14, 2008).

An additional consideration is the focus on enhancing the quality of life for farmers.¹¹ Consistently, legislation and policies focus primarily on the capital formation of growers and producers.¹² This focus, however, is not sustainable; nor is it possible to reconcile such divergent trajectories with goals of integrating the labor workforce critical to the financial success of farming operations. These causal links illustrate that without a sustained inquiry into farmworker employment conditions, the law structures a template that irreparably injures workers and also stymies the broader development of integrated, sustainable models and practices. Accordingly, focusing on the labor workforce opens the door to new pathways that not only enhance alternative safe food practices but could also protect workers in agriculture.¹³

Part I provides farmworker demographics on those that cultivate and harvest the nation's fruits and vegetables and perform miscellaneous farming tasks. Part II addresses the jurisprudence of agricultural law that structurally produces difficult working conditions for farm laborers and facilitates their impoverishment. Part II also illustrates how farmworker exclusion engenders yet greater challenges for an integrated food system. More specifically, in response to the detractors of sustainability who argue for less government intrusion, Part II addresses the federal exclusions that protect non-agricultural workers but—paradoxically within the same legislation—purposely omit agricultural workers.¹⁴ The absence of state regulation concretely demonstrates the realized consequences that structurally shield farm laborers from improved employment conditions and impoverishment. Part III offers several alternatives to advance sustainability opportunities within food production.

I. AT THE BOTTOM: FARMWORKERS IN THE FIELDS

Federal and state legislation omits farmworkers in sustainability provisions. In comparison, United Nations officials—who declared October 18, 2013, World Food Day—provided a contrary contemplation

11. 7 U.S.C. § 3103(19) (2012).

12. *See, e.g., id.* § 1421 (providing for parity payments); *id.* § 3101 (promoting “agricultural research, extension, and education”).

13. U.S. DEP’T OF AGRIC., ECON. RESEARCH SERV., BULLETIN NO. 98: AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS, at vi (Craig Osteen, Jessica Gottlieb & Utpal Vasavada eds., 2012) (emphasizing “economic, technology, policy, resource use, input use, and land management changes”).

14. *See generally* National Labor Relations Act, 29 U.S.C. § 152(3) (2012) (noting that the definition of employee “shall not include any individual employed as an agricultural laborer”).

of an inclusive food production model. Specifically, Secretary-General Ban Ki-moon asserted:

“The key to better nutrition, and ultimately to ensuring each person’s right to food, lies in better food systems – smarter approaches, policies and investments encompassing the environment, people, institutions and processes by which agricultural products are produced, processed and brought to consumers in a sustainable manner.”¹⁵

Accordingly, the silence governing federal and state legislation, coupled with the difficult consequences of farm employment, demonstrates a lost opportunity in the search for an integrated, sustainable food systems approach.

More specifically, placing workers outside of integrated models underscores that additional vast opportunities remain lost to archaic and harm-inducing legislation, which structurally reinforces challenging working conditions.¹⁶ In comparison, this legislation encourages capital formation among owner-operators and larger industrialized food operations. Farmworkers’ isolation, coupled with the invisibility of disparate working conditions, further facilitates unsafe food cultivation practices, obscures the overuse of pesticides, and widens the distance from sustainability objectives in law.¹⁷ In turn, this ultimately hinders transformative models and places at risk integrated sustainability of the

15. *Sustainable Food Systems Vital to End Hunger, Malnutrition, UN Says on World Food Day*, UN NEWS CENTRE (Oct. 16, 2013) [hereinafter *Sustainable Food Systems Vital to End Hunger*], <http://www.un.org/apps/news/story.asp?NewsId=46269> (quoting Secretary-General Ban Ki-moon).

16. Numerous examples illustrate the danger and inequities of agricultural employment whether in the past or in the present. *See, e.g.*, BRUCE GOLDSTEIN, BARBARA HOWE & IRIT TAMIR, FARMWORKER JUSTICE, OXFAM AM., WEEDING OUT ABUSES: RECOMMENDATIONS FOR A LAW-ABIDING FARM LABOR SYSTEM 2–14 (2010), available at <http://www.oxfamamerica.org/explore/research-publications/weeding-out-abuses/?searchterm=Weeding%20out%20Abuses>; NORTH CAROLINA ADVISORY COMM. TO THE U.S. COMM. ON CIVIL RIGHTS, WHERE MULES OUTFRTE MEN: MIGRANT AND SEASONAL FARMWORKERS IN NORTH CAROLINA 22–24 (1979).

17. *See, e.g.*, BON APPÉTIT MGMT. CO. FOUND., UNITED FARM WORKERS, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES 46–49 (2011); DON VILLAREJO ET AL., CAL. INST. FOR RURAL STUDIES, SUFFERING IN SILENCE: A REPORT ON THE HEALTH OF CALIFORNIA’S AGRICULTURAL WORKERS 6–7 (2000) (noting farmworker health problems such as high blood pressure, cholesterol, anemia, and dental conditions); President Barack Obama, Proclamation at National Farm Safety and Health Week (Sept. 13, 2013) (“For many agricultural workers, the risk of injury and illness is a daily reality.”); *Agricultural Safety*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/topics/aginjury> (last updated May 21, 2013) (“Agriculture ranks among the most hazardous industries.”).

sector.¹⁸ To illustrate, farmworker demographics follow next and underscore that harm-inducing legislation should not default to facilitating injurious working conditions.

A. Farmworker Groups

Agricultural workers consist of documented and undocumented men,¹⁹ women,²⁰ and children.²¹ Farm laborers who are in agricultural fields or who are performing miscellaneous farm tasks are also enslaved, held hostage, and vulnerable to human trafficking—all of which trigger Thirteenth Amendment violations.²² Additionally, an estimated three hundred to eight hundred thousand children are in agricultural employment,²³ either as direct hires providing seasonal work or—in the worst of situations—as workers laboring alongside their families to supplement their parents’ income.²⁴ Children as young as age five pick

18. The Environmental Protection Agency is promoting sustainable communities along with partnerships with mention to “workers.” Yet the Agency does not specify farmworkers in its promotional materials. *HUD-DOT-EPA Partnership for Sustainable Communities*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/livability/partnership/index.html> (last updated Feb. 27, 2014). See also Shannon Adair Tool, *Farmworkers and FIFRA: Laboring under the Cloud*, 31 SW. U. L. REV. 93, 93 (2001) (noting the “fail[ure] to develop and enforce adequate protections for farmworkers”).

19. Men comprise approximately 78 percent of workers. NAT’L CTR. FOR FARMWORKER HEALTH, FARMWORKER HEALTH FACT SHEET (2012), available at www.ncfh.org/docs/fs-Migrant%20Demographics.pdf (citing the 2007–09 National Agricultural Workers Survey (NAWS)).

20. Women are estimated at 22 percent of workers. *Id.* See also KANDEL, *supra* note 5, at 8.

21. NAWS data indicate that children make up approximately 5.5 percent of workers, although this number has declined since 1995. KANDEL, *supra* note 5, at 10. See also *Farm Labor Background*, *supra* note 4 (discussing NAWS survey data regarding the legal status of noncitizen farmworkers).

22. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466–68 (codified as 22 U.S.C. §§ 102(b), 7101 (2012)); *United States v. Garcia*, No. 02-CR-110S-01, 2003 WL 22938040 (W.D.N.Y. 2003) (alleging conspiracy, forced labor, trafficking in persons, social security fraud, immigration violations, and unsanitary living conditions); Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC’Y 133, 134 (2012).

23. HUMAN RIGHTS WATCH, FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS 10 (2000), available at <http://www.hrw.org/reports/2000/06/02/fingers-bone>. Federal law authorizes children to work in agriculture at younger ages in contrast to non-agricultural employment. If employed on family farms, children under twelve are exempt from federal age restrictions. See, e.g., AMERICA’S FARMWORKER CHILDREN, *supra* note 8, at 3 (“[T]here is systemic abusive child labor in the United States, primarily in agriculture.”).

24. See, e.g., AMERICA’S FARMWORKER CHILDREN, *supra* note 8, at 3.

blueberries,²⁵ and youth detassel corn,²⁶ harvest tomatoes, and work in fields harvesting tobacco.²⁷

Precise enumeration of the farmworker population nonetheless remains difficult due to various impediments that include the timing of the census. Migrants, for example, leave their homes in the South for the cornfields of the Midwest or follow other crops during census periods, which bars meticulous enumeration. Additional challenges derive from the undocumented status of some workers—including language differences—further precluding accuracy.²⁸ In addition to Spanish, for example, numerous workers are proficient in diverse Indian dialects such as Mixtec and Triqui.²⁹ Languages “such as Creole, Tagalog, Marshellese or Chukese” are also heard from workers of yet other countries.³⁰

Notwithstanding imprecise data collection, the sector employs just over 3 million workers with the majority primarily from Mexico.³¹ Of that group, an estimated 1.01 million are direct-hire farmworkers or hired through labor contractors.³² Farmworker origins include regions of western Mexican states such as Guanajuato, Jalisco, and Michoacán, but non-traditional sending states also extend to the southern regions, including Guerrero, Oaxaca, Chiapas, Puebla, Morelos, and Veracruz.³³ Yet extraneous factors also impact the demographics of this workforce.

25. The federal government fines growers for unlawful labor practices, but the lack of federal inspectors disallows adequate protection of workers. *See, e.g.*, Annette Cary, *Feds Sue Burbank Blueberry Farm*, TRI-CITY HERALD (Kennewick, Wash.), Aug. 4, 2013, <http://www.tri-cityherald.com/2013/08/03/2503988/feds-sue-burbank-blueberry-farm.html>.

26. For an example of a company recruiting youth to detassel during specific summer periods in Indiana, Iowa, and Illinois, see *Team Corn Detasseling*, TEAM CORN & SOIL INC., <http://www.teamcorn.com> (last visited Mar. 7, 2014).

27. This Article employs the following definition: young children are zero to six years old; young workers on family farms are seven to seventeen years old; and young hired workers are twelve to seventeen years old. *See* MARSHFIELD CLINIC, *supra* note 8, at 5.

28. *See, e.g.*, KANDEL, *supra* note 5, at 39; Peter Callan, *Role of Illegal Hispanic Labor Force in American Agriculture*, VA. COOPERATIVE EXTENSION (Oct. 12, 2011), http://pubs.ext.vt.edu/news/fbmu/2011/10-11/article_2_fbmu-10-11.html.

29. *See, e.g.*, Lisa Gale Garrigues, *Indigenous Farmworkers Are Breaking New Ground in California*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Jan. 25, 2013), indiancountrytodaymedianetwork.com/2013/01/25/indigenous-farmworkers-are-breaking-new-ground-california-147229.

30. *Who Are Farmworkers?*, S. POVERTY L. CENTER, <http://www.splcenter.org/sexual-violence-against-farmworkers-a-guidebook-for-legal-providers/who-are-farmworkers> (last visited Mar. 7, 2014).

31. *See, e.g.*, NAT'L CTR. FOR FARMWORKER HEALTH, *supra* note 19.

32. KANDEL, *supra* note 5, at 2.

33. NAT'L CTR. FOR FARMWORKER HEALTH, *supra* note 19.

Presently, various external factors influence the direct hiring of farm laborers and extend to vertical integration of individual owner-operated farms,³⁴ such as the instance of owners abandoning farming.³⁵ Restrictive anti-immigration laws that are eventually rejected on federal supremacy grounds further control the flow of labor into local communities.³⁶ Notwithstanding litigation challenges to anti-immigration laws, the legislation induces labor shortages, with growers and producers at risk of fluctuating prices and divergent costs associated with finding an alternative workforce.³⁷ Additionally, such restrictions demonstrate that regions forego farmworker financial contributions in purchasing, for example, fuel and food when commuting between the fields and their homes.³⁸

B. Locus of Farmworkers in Agriculture

In ascertaining demographic data on farmworker populations, Paul S. Taylor once explained the relationship between migrant laborers and crop employment: “The use of migrant labor depends upon crop specialization extending production within an area beyond the capacity of either farmers or local communities to supply workers for peak seasonal requirements in sufficient numbers”³⁹ Current geographical

34. Domestic workers are further distinguished by category. For example, a “migrant or agricultural worker” is defined as “an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence.” 29 U.S.C. § 1802(8)(A) (2012). “Seasonal agricultural worker” is defined as “an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence.” *Id.* § 1802(10)(A).

35. KANDEL, *supra* note 5, at 3. See also JAMES MACDONALD, ROBERT HOPPE & DAVID BANKER, U.S. DEP’T OF AGRIC., ECONOMIC BRIEF NO. 6: GROWING FARM SIZE AND THE DISTRIBUTION OF FARM PAYMENTS 2 (2006) (shifting commodity programs); CAROLYN DIMITRI, ANNE EFFLAND & NEILSON CONKLIN, U.S. DEP’T OF AGRIC. ECON. RESEARCH SERV., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2–3 (2005).

36. See, e.g., *Hispanic Interest Coal. of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1248–49 (11th Cir. 2012); *Immigrant Policy Project*, NAT’L CONF. ST. LEGISLATURES (Aug. 27, 2012), <http://www.ncsl.org/research/immigration/omnibus-immigration-legislation.aspx>.

37. See KANDEL, *supra* note 5, at 20–21.

38. Although somewhat dated, the research on migrant financial contributions to Wisconsin provide a realm of insight on their purchases in a region. Doris P. Slesinger & Steven Deller, *Economic Impact of Migrant Workers on Wisconsin’s Economy* 8–13 (Ctr. for Demography & Ecology, Working Paper No. 2002-06, 2003).

39. Paul S. Taylor, *Perspective on Housing Migratory Agricultural Laborers*, 27 LAND ECON. 193, 193 (1951).

distribution and crop production studies reflect the accuracy of Taylor's studies.⁴⁰

Specifically, the majority of farmworkers are employed "on the nation's largest farms, with sales over \$500,000 per year."⁴¹ Texas and California employ "one-third of all farmworkers," while the Midwest employs approximately 25 percent of all workers.⁴² California, with an "abundance" of commodities, benefits extensively from farm labor, with the state garnering "a 15 percent increase in the sales value of its products in 2011."⁴³ The state is one of the nation's top agricultural regions and joins the Southwest in employing the largest farmworker population.⁴⁴ Outside of the Southwest, farmworkers are geographically distributed throughout the vegetable and fruit fields of the South, in the cornfields of the Midwest,⁴⁵ and in tomato and other crop fields in the Southeast. Fruit orchards, nurseries, slaughterhouses, canneries, and dairy and egg production also characterize agricultural employment.⁴⁶

In a dangerous occupation and without parity comparable to non-rural employment, farm laborers—and, in numerous instances, other agricultural workers—confront difficult employment conditions. The jurisprudence guiding this exclusionary status is addressed next.

II. AGRICULTURAL JURISPRUDENCE: STRUCTURING INEQUALITY

Presently, detractors of sustainability objectives and goals argue that governmental regulations are intrusive and infringe on the property rights of landholders.⁴⁷ This focus, however, is primarily on urban landholders, and it fails to recognize the complexities of law that govern a property holder of farming operations, which can also occur in urban regions. This worldview of restricting governmental regulations not only masks the agricultural laws, policies, and jurisprudence that operate freely without

40. See KANDEL, *supra* note 5, at 6; *Farm Labor: Background*, *supra* note 4.

41. *Farm Labor: Background*, *supra* note 4.

42. *Id.*

43. U.S. DEP'T OF AGRIC. NAT'L AGRIC. STATISTICS SERV. CAL. FIELD OFFICE, CALIFORNIA AGRICULTURAL STATISTICS: 2011 CROP YEAR 1 (2012), available at http://www.nass.usda.gov/Statistics_by_State/California/Publications/California_Ag_Statistics/Reports/2011cas-all.pdf.

44. KANDEL, *supra* note 5, at 6.

45. Wisconsin has witnessed farmworker activities, including a farmworker union. See, e.g., Mark Erenburg, *Obreros Unidos in Wisconsin*, 91 MONTHLY LAB. REV. 17 (1968).

46. See *Who Are Farmworkers?*, *supra* note 30.

47. See, e.g., Randal O'Toole, *Reducing Livability: How Sustainability Planning Threatens the American Dream*, POL'Y ANALYSIS, Oct. 28, 2013, at 1, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa740_web.pdf.

intrusive regulatory restrictions, but it also ignores the consequences that result from such “theories.”

This Part addresses the jurisprudence of agricultural law that structurally defines working conditions with both domestic and international law entanglements.⁴⁸ Farmworkers’ exclusion from legislation applicable to non-agricultural employees—which has been identified as a legal culture of agricultural exceptionalism⁴⁹—demonstrates a workforce held captive to irregular employment, impoverishment, and inadequate and unsafe housing with attendant health consequences.⁵⁰ Agricultural exceptionalism has not only causally instigated formidable working conditions in the United States, but it also entails further links with and consequences for Mexico.⁵¹ Agricultural exceptionalism denying laborers beneficial legislation and policies ultimately diminishes capacities to promote a viable, sustainable, and integrated food system with attendant tangible economic misfortunes for the sector.

In comparison, historical and legal scholarship on the agrarian insurgency of the 1920s and 1930s illustrated such populism and inspired a new direction in federal food and farm policy.⁵² Agrarian activists and supporters seeking economic parity with the industrial sector (and to

48. See, e.g., Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 (2012); Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012) (facilitating entry of foreign-based workers for agricultural purposes); Ziwei Hu, *Equity’s New Frontier: Receiverships in Indian Country*, 101 CALIF. L. REV. 1387 (2013) (discussing the struggle over housing indigenous farmworkers on a domestic-based Indian Reservation); Guadalupe T. Luna, *United States v. Duro: Farmworker Housing and Agricultural Law Constructions*, 9 HASTINGS RACE & POVERTY L.J. 397 (2012) (demonstrating direct consequences of the loss of indigenous farms in Mexico and lack of safe, adequate farmworker housing in California).

49. The statutory exemptions specific to agricultural law and not applicable to the non-agricultural sector comprise the doctrine of agricultural exceptionalism. See, e.g., Agreement between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, U.S.-Mex., Aug. 4, 1942, 56 Stat. 1759; ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 106 (1964); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1335–37 (1987).

50. See *infra* Part II.C.

51. See *infra* Part II.B.

52. See, e.g., LAWRENCE GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978) (describing the agrarian revolution of the 1880s and 1890s and how that movement influenced farm policies during the New Deal period); Mary Summers, *The New Deal Farm Programs: Looking for Reconstruction in American Agriculture*, 74 AGRIC. HIST. 241 (2000). The history of government involvement in the regulation of milk is extensive. “‘Federal programs have been deeply imbedded in the economic fabric of the United States dairy industry’ since the late 1930s.” *Cochran v. Veneman*, 252 F. Supp. 2d 126, 128 (M.D. Pa. 2003) (quoting S. REP. NO. 98-163, at 13 (1983), reprinted in 1983 U.S.C.C.A.N. 1658, 1670).

stem the surging tide of farm foreclosures) facilitated congressional adoption of the nation's first farm bill.⁵³ The subsequent five- to seven-year adoption of farm bills promoted material gains to the agricultural sector and underscored the activism of that earlier period.

Federal and state legislation has thus fostered a relationship that renders sustainability at risk. Federal law, for example, assists agricultural owner-operators in promoting the best prices for their products. A broad scope of legislation—such as marketing promotions, contracts, loans, subsidies, and other price control mechanisms—improves the financial well-being of innumerable growers and operators.⁵⁴ In producing federal benefits to the agricultural economy, the New Deal era nonetheless also expedited segregation, Jim Crow, and enslavement. In its totality, it governed and stifled workers' organizing for improved terms and conditions of employment while it ensured continued benefits to employer/operators into the present.⁵⁵

A. Statutory Exemptions: Domestic Links

Since the New Deal, farmworker exclusions have remained consistent and legislation to protect workers has been uniformly rejected. In turn, this has further produced a fluctuating and non-organized workforce with owner-operators presently expressing concerns over farm labor shortages.⁵⁶

53. See, e.g., Agricultural Adjustment Act of 1938, 7 U.S.C. § 1282 (2012); THEODORE SALOUTOS & JOHN D. HICKS, TWENTIETH CENTURY POPULISM: AGRICULTURAL DISCONTENT IN THE MIDDLE WEST 1900–1939 (1951) (describing New Deal history specific to the Midwest); Mordecai Ezekiel, *The Shift in Agricultural Policy toward Human Welfare*, 24 J. FARM ECON. 463 (1942); J.H. Kolb, *Agriculture and Rural Life*, 39 AM. J. SOC. 787 (1934) (explaining the purpose of the Agricultural Adjustment Act).

54. See, e.g., 7 U.S.C. § 1282(a) (giving authority to the Secretary of Agriculture to regulate prices); *id.* § 1303 (authorizing parity payments); *id.* § 1421 (price support); *id.* § 1622 (marketing powers); *id.* § 7211 (production flexibility contracts).

55. The segregation and racism of the times precluded federal benefits from accruing to sharecroppers and farmworkers of color. See, e.g., DWIGHT MACDONALD, HENRY WALLACE: THE MAN AND THE MYTH 39–62 (1947); Linder, *supra* note 49 (demonstrating causal relationships between and among legislation, racism, slavery, and sectoral labor demands).

56. Farm labor shortages remain a constant in food production with corresponding congressional responses in immigration and domestic laws. See, e.g., Philip Martin, Professor of Cal. Research Econ., Univ. of Cal., Davis, *Farm Labor Shortages: How Real? What Response?*, Address to Teleconference for the Center for Immigration Studies (Nov. 2007) (transcript available at cis.org/articles/2007/farmtranscript.html) (critiquing public perception of a farm labor shortage); Debbie Holmes, *Ohio Farmers Blame Migrant Worker Shortage on Immigration Fears*, WOSU (July 30, 2012, 5:00 AM), wosu.org/2012/news/2012/07/30/ohio-migrant-farm-workers-under-intense-scrutiny/.

The National Labor Relations Act of 1938 (NLRA) is an example of legislation that defines the lack of parity between agricultural and non-agricultural employment within the same statute. The NLRA authorizes collective activity for non-agricultural workers and specifically omits agricultural workers from its own legislative mandate.⁵⁷ The labor struggles that led to the NLRA underscore congressional concern over their effect on commerce and on promoting parity between workers and employers.⁵⁸ Yet the legislation purposely excluded farmworkers and barred them from negotiating fair wages and improved conditions in agricultural employment at the federal level.⁵⁹

State law and litigation, moreover, also curtail farm laborers from seeking improvement of their working conditions.⁶⁰ State action has challenged farmworker advocacy with threats of massive arrests, and harsh tactics from employers further curtailed meetings for collective action.⁶¹ Federal action through extensive immigration, job-site raids, and deportations that “curiously” coincide with the workers attempting collective action and unionization also stymies their efforts.⁶² In sum, these actions underscore the disparities between agricultural and non-agricultural workers protected through the NLRA. The NLRA does not stand alone but is joined with the Fair Labor Standards Act (FLSA).

57. National Labor Relations Act, 29 U.S.C. § 152(3) (2012) (Employee “shall not include any individual employed as an agricultural laborer . . .”).

58. *Id.* U.S.C. § 151 (including findings and declaration of policy).

59. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 213(a)(6), (b)(12)–(16) (2012).

60. OXFAM AM., *LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE* 44 (2004), available at <http://www.oxfamamerica.org/files/like-machines-in-the-fields.pdf>. Farmworker advocates have also confronted trumped-up charges that result in their imprisonment. *See, e.g., Allee v. Medrano*, 416 U.S. 802, 804–08 (1973) (charging improper police conduct against leaders and members of a farmworkers’ union in Texas); U.S. GEN. ACCOUNTING OFFICE, *GAO/HRD-90-144, LEGAL SERVICES CORPORATION: GRANTEE ATTORNEYS’ HANDLING OF MIGRANT FARM WORKERS DISPUTES WITH GROWERS* 2 (1990) (discussing the challenges of representing agricultural laborers).

61. Agricultural history is grounded with examples of employers hindering the ability of farmworkers attempting to effectuate change. *See, e.g.,* H.L. MITCHELL, *MEAN THINGS HAPPENING IN THIS LAND: THE LIFE AND TIMES OF H.L. MITCHELL CO-FOUNDER OF THE SOUTHERN TENANT FARMERS UNION* (1979); *Migrant and Seasonal Farmworker Powerlessness: Hearings before the Subcomm. on Migratory Labor of the Comm’n on Labor & Pub. Welfare*, 91st Cong. 552 (1969) (statement of Dolores Huerta, Vice President, United Farm Workers Organizing Comm., Am. Fed. of Labor & Cong. of Indus. Orgs.) (detailing federal government purchase of grapes during union boycott against grape growers).

62. For example, a workplace raid at a food processing plant in Postville, Iowa, resulted in the apprehension of 389 individuals for criminal violations. Amalia Greenberg & Shanti Martin, *How ICE Threatens the Ethical Responsibilities of Key Players in Worksite Raids: Postville Study*, 16 HUM. RTS. BRIEF 16, 16 (2008).

The FLSA, seeks to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency and general well-being of workers”⁶³ This declaration, however, purposely excluded agricultural workers from its legislative framework specific to overtime.⁶⁴ Notwithstanding changes to include overtime in specific instances, this exclusion has allowed unscrupulous employers to force workers to work without compensation.⁶⁵ The forced-labor issue is compounded when workers are undocumented and fear retaliation if they complain or protest about their abusive working conditions.⁶⁶

In contrast, accompanying the above legislative framework are further federal exemptions beneficial to the economic coffers of the employer—but without application to farm laborers. For example, legislation authorizes collective action on the part of “farmers, planters, ranchmen, dairymen, nut or fruit growers”⁶⁷ Accordingly, those authorized under legislation “may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing [produce] in interstate and foreign commerce.”⁶⁸ Notwithstanding this beneficial legislative tool, farmworkers are federally prohibited from forming associations while their employers accrue both tangible and intangible economic federal benefits.⁶⁹

At the same time that this realm of exclusionary rules directly impacts agricultural workers, the exceptionalism facilitates their employment in the sector.

63. 29 U.S.C § 202.

64. *Id.* § 213(b)(12).

65. *See, e.g.*, COLIN GORDON ET AL., WAGE THEFT IN IOWA 1 (2012), available at <http://www.iowapolicyproject.org/2012docs/120827-wagetheft.pdf>; Dan Barry, *The ‘Boys’ in the Bunkhouse*, N.Y. TIMES, Mar. 9, 2014, at A1 (describing men with “intellectual disabilities” employed “to eviscerate turkeys at a processing plant” held in servitude for over thirty years in Atalissa, Iowa, and compensated only \$65 monthly).

66. OXFAM AM., *supra* note 60, at 43.

67. 7 U.S.C. § 291 (2012).

68. *Id.* *See also id.* § 2301 (explaining the benefit of allowing farmers to form cooperatives). The beneficial gains include fixing prices and enhancing monopoly power. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037, 1039–40 (2d Cir. 1980); *United States v. Hinote*, 823 F. Supp. 1350, 1352–55 (S.D. Miss. 1993); Jim Chen, *American Ideology*, 48 VAND. L. REV. 809, 812–13 (1995).

69. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-781, FARM PROGRAMS: CHANGES ARE NEEDED TO ELIGIBILITY REQUIREMENTS FOR BEING ACTIVELY INVOLVED IN FARMING 15–19 (2013) (describing compliance deficiencies and non-eligible participants).

B. Domestic and International Links

The above comprises the principal federal legislation that shapes and structurally controls the employment and socio-economic status of workers primarily residing in impoverished circumstances. Yet the reach of domestic law with international application and consequences not only influences the working and living conditions of farm laborers but also promotes access to a ready source of laborers.⁷⁰

Notwithstanding restrictive periods of entry into the United States, Congress has historically authorized immigration exemptions to permit foreign labor employment in agriculture.⁷¹ Foreign workers are at an advantage over domestic-based workers because the employer—in contrast with domestic-based workers—is required to provide housing and other benefits.⁷² Notwithstanding these so-called advantages, foreign laborers have also faced extenuating and harmful employment circumstances and, in one instance, instigated litigation from Mexico on behalf of the workers.⁷³

Yet another major influence on farm labor employment includes the North American Free Trade Agreement (NAFTA).⁷⁴ NAFTA created the world's largest agricultural marketplace with its signatories Mexico, the United States, and Canada. In easing trade barriers between and among the three nations, NAFTA only provided guiding principles specific to workers.⁷⁵ The shortsighted nature of the relationship between lessening trade barriers and labor has resulted in the loss of independent farming operations in Mexico. Unable to compete with large-scale operations and subsidies extended to U.S. farmers, former owner-operators in Mexico have become farmworkers in the United States, and many of them reside in uninhabitable and unsafe residences.⁷⁶ These include indigenous

70. See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012) (authorizing temporary visas for qualifying unskilled laborers to meet agricultural demands). For information on the relationship between labor and immigration law, see LINDA LEVINE, CONG. RESEARCH SERV., RL30395, FARM LABOR SHORTAGES AND IMMIGRATION POLICY (2007).

71. *Salazar-Martinez v. Fowler Brothers, Inc.*, 781 F. Supp. 2d 183, 188 (W.D.N.Y. 2011) (migrant worker action sought joining non-H-2A visa workers with H-2A workers).

72. *Id.* at 190–91. See also 20 C.F.R. § 655.122(d) (2012).

73. See *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000).

74. 19 U.S.C. §§ 3301–3473 (2012). See also Joseph E. Stiglitz, *The Broken Promise of Nafta*, N.Y. TIMES, Jan. 6, 2004, <http://www.nytimes.com/2004/01/06/opinion/the-broken-promise-of-nafta.html>.

75. Stiglitz, *supra* note 74.

76. See generally Timothy A. Wise, *The Impacts of U.S. Agricultural Policies on Mexican Producers*, in SUBSIDIZING INEQUALITY: MEXICAN CORN POLICY SINCE NAFTA 163 (Woodrow Wilson International Center for Scholars ed., 2010), available at

communities from Mexico and countries in Central America, who in turn confront harsh treatment in the United States.⁷⁷ NAFTA has also generated undocumented entry where unscrupulous employers hire workers and, under threats of retaliation, harbor a workforce that is thereafter fearful of leaving.⁷⁸

The above examples are just part of the haphazard legislation applicable to farm laborers. The isolation of the workers—further exacerbated by the inapplicability of the Occupational Safety and Health Administration's (OSHA) regulations to operations with less than ten workers⁷⁹—has created a lengthy history of injurious circumstances for those working at the bottom of the agricultural spectrum. The lack of incentives and accountability—coupled with the racism of the New Deal era, which heralded agriculturally beneficial legislative laws and policies—reveals maltreatment of farmworkers that cannot be reconciled with the sustainability presently sought.

Not infrequently, farmworker advocates assert that the lack of enforcement of the few regulations available to enhance worker safety also facilitates difficult agricultural employment conditions.

C. Fixed Challenges and Consequences for Farmworkers

Although consumers, educational models, and others—including a few government programs—advocate for sectoral sustainability, the fixed legislation program's omission of farmworkers precludes an integrated system. Furthermore, the jurisprudence that dominates agricultural law and laborers will promote neither healthy agricultural economics nor integrated sustainable practices. More specifically, the legal formalism of case law and legislation that purposely omit agricultural workers spells out the inadequate care that is taken of a workforce deemed critical to the nation's food production policies. With

<http://www.ase.tufts.edu/gdae/Pubs/rp/AgricDumping.pdf> (detailing NAFTA costs to small farmers in Mexico).

77. See, e.g., *United States v. Duro*, 625 F. Supp. 2d 938 (C.D. Cal. 2009) (discussing unsanitary farmworker housing caused by lack of safe, affordable housing for workers and county reprisals); AGUIRRE INT'L, *THE CALIFORNIA FARM LABOR FORCE: OVERVIEW AND TRENDS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY* 11–13 (2005); RICHARD MINES ET AL., *CALIFORNIA'S INDIGENOUS FARMWORKERS: FINAL REPORT OF THE INDIGENOUS FARMWORKER STUDY (IFS) TO THE CALIFORNIA ENDOWMENT* 9–13 (2010).

78. See, e.g., DEP'T OF MICH. CIVIL RIGHTS, *A REPORT ON THE CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS IN MICHIGAN* 21, 96 (2010) (offering an example of workers' retaliation fears).

79. 29 C.F.R. § 1904.1(a)(1) (2012) (exempting employers with fewer than ten employees from "keep[ing] OSHA injury and illness records").

their continued omission, opportunities for change are lost, with farmworkers enduring ongoing and future deleterious circumstances.

Farmworker advocacy reports illustrate the demanding environments that the silence and invisibility permeating farmworker employment obscures. Against this framework, agricultural employment “is among the more hazardous industries in the United States” Farmworkers face exposure to pesticides, risk of heat exhaustion and heat stroke, inadequate sanitary facilities, and obstacles in obtaining health care due to high costs and language barriers.⁸⁰ In the egregious circumstances in which children labor, they confront workplace hazards and illnesses such as stroke, pesticide, and musculoskeletal trauma.

Wage theft,⁸¹ severe environmental situations,⁸² unsanitary and unsafe housing conditions,⁸³ pesticide exposure illnesses,⁸⁴ and impoverishment illustrate why farmworkers are identified as among the most disadvantaged.⁸⁵ Children as young as age five are found in blueberry fields, which underscores the lack of living wages that would keep them from joining their families in the fields.⁸⁶ The great distance between agricultural fields and investigating agencies adds to the

80. KANDEL, *supra* note 5, at 31.

81. Without any incentives or sanctions, farmworkers are forced into litigation where and if available. *See, e.g.*, Complaint – Class Action, *Luna v. Del Monte Fresh Produce (Southeast), Inc.*, No. 06-21015 (S.D. Fla. Apr. 20, 2006); Andy Furillo, *Bitter Harvest: Farm Workers Fight to Get Paid The Central Valley Laborers Say They’re Owed \$87,480*, SACRAMENTO BEE, Dec. 24, 2003, at A3.

82. *See, e.g.*, RAO, *supra* note 10, at 5.

83. *See, e.g.*, Ilene J. Jacobs, Dir. of Litig., Advocacy & Training, Cal. Rural Legal Assistance, Public Comment at the National Commission on Fair Housing & Equal Opportunity’s Moving toward Equity Panel 4: Fair Housing and its Effects of Land Use Reform: Fair Housing and Poverty in Rural Areas: Local Government, Municipal Services, Farmworkers and Colonias (Sept. 9, 2008) (written testimony available at http://www.prrac.org/projects/fair_housing_commission/los_angeles/jacobs.pdf).

84. *See* FARMWORKER JUSTICE, EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION’S FARMWORKERS (2013), available at <http://www.farmworkerjustice.org/sites/default/files/aExposed%20and%20Ignored%20by%20Farmworker%20Justice%20singles%20compressed.pdf>; Ivette Perfecto & Baldemar Valásquez, *Farm Workers: Among the Least Protected*, 18 EPA J. 13 (1992).

85. *Compare* ACLU, THE HANDS THAT FEED US: UNDOCUMENTED FARMWORKERS IN FLORIDA: NATIONAL IMMIGRATION AND ALIEN RIGHTS PROJECT REPORT NO. 2 (1986), with MARSHFIELD CLINIC, *supra* note 8 (citing the factual data on the work hazards confronting youth in agriculture).

86. *See, e.g.*, HUMAN RIGHTS WATCH, FIELDS OF PERIL: CHILD LABOR IN US AGRICULTURE 19 (2010), available at <http://www.hrw.org/reports/2010/05/05/fields-peril-0> (discussing child labor in the United States); *Nightline: The Blueberry Children* (ABC television broadcast Nov. 11, 2009), available at <http://abcnews.go.com/Nightline/video?id=8962908> (five-year-old Suli lugging two heavy buckets picked by her parents and brothers, aged seven and eight).

difficulties women confront when they experience sexual harassment.⁸⁷ When injured, their exclusion from workers' compensation coverage also makes evident the reality of employment in the sector.⁸⁸ Advocacy reports moreover reveal numerous labor abuses.⁸⁹ It is impossible to reconcile this reality and its persistence with the ideals sustainability advocates seek—whether to the environment, to the viability of farming operations, or to rural communities.

The lack of incentives, transparency, and accountability illustrate the agricultural exceptionalism and consequences that challenge farm laborers. In the aggregate, however, this totality also presents opportunities that could facilitate a new direction in integrated sustainability objectives.

III. TRACKING SUSTAINABILITY: LABOR INPUT

The dominance of exclusion that disassociates workers from sustainable trajectories—joined with the law that benefits owner-operators—precludes opportunities for transforming the sector. Normative jurisprudence attempts to show what law ought to look like, and in this instance a contrasting view is taken from the United Nations. The United Nations declaration of “smarter approaches” extends to the “people, institutions and processes by which agricultural products are produced, processed and brought to consumers,” and it illustrates a smarter alternative to the silence that governs workers.⁹⁰ It not only encompasses farmworkers but also opens opportunities to advance sustainability efforts in agricultural communities.

Presently, U.S. agricultural employers assert a lack of workers, which historically has expedited further harm-inducing legislation such as the Bracero Program.⁹¹ Such declarations, however, further distance opportunities to create beneficial change for workers. In contrast, the following proposals are meant to initiate a dialogue to “develop new, innovative strategies to produce and distribute food, fuel, and fiber

87. See *Who Are Farmworkers?*, *supra* note 30. Workers fear law enforcement and government officials “based on their experience or perception of the government in their country of origin or from rumors and experiences suffered by other farmworkers.” *Id.* This helps explain their “reluctan[ce] to report sexual violence . . .” *Id.*

88. The lack of workmen’s compensation is particularly egregious where health care is not accessible to injured agricultural workers.

89. GOLDSTEIN, HOWE & TAMIR, *supra* note 16.

90. *Sustainable Food Systems Vital to End Hunger*, *supra* note 15.

91. See Agreement between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, *supra* note 49; *The Bracero Program*, FARMWORKERS.ORG, www.farmworkers.org/bracerop.html (last visited Mar. 7, 2014).

sustainability.”⁹² They are aimed at not only expanding the sustainability dialogue to include farmworkers, but also at encouraging the production of “abundant food without depleting the earth’s resources or polluting its environment.”⁹³

Specifically, Tracks One through Six promote incentives to expedite integrated sustainability in agriculture. They parallel federal law asserting its promotion of sustainability in the sector, but Tracks One through Six additionally underscore the integrated model *Wisconsin Law Review*’s Symposium sought to address. Tracks Seven through Ten are geared towards opening pathways to integrated sustainability while simultaneously asserting the need for new agricultural jurisprudence to improve the working conditions of workers.

Track One begins with the requirement of using precise language when seeking legislation reform of the sector. Specifically, promoting farming as an ideal in sustainability law models should not distinguish between the different forms and sizes of farming operations.⁹⁴ When pro-farmworker legislation is proposed, the reaction is adverse and immediate—without regard to whether it stems from agri-industry as opposed to smaller independent farmers.

For example, criticism of the Department of Labor (DOL)’s proposed amendment to the FLSA in the fall of 2011, came not only from small family farmers but also from the agri-industry—which displayed heated animosity in opposing the amendment.⁹⁵ The proposed regulations would have ensured parity between children and youth employment in agriculture with the non-agricultural workforce.⁹⁶ The

92. SUSTAINABLE AGRIC. RESEARCH & EDUC., *supra* note 2.

93. EARLES, *supra* note 2.

94. DIMITRI, EFFLAND & CONKLIN, *supra* note 35.

95. See, e.g., Brad Iverson-Long, *Idaho Farming Groups Eye Proposed Child Labor Regs*, IDAHO BUS. REV., Nov. 23, 2011 (providing criticism of the Idaho Farm Bureau and calling some of the proposed requirements “silly”); *Nebraska Cattlemen Do Not Support Proposed Child Labor Regulations*, NEB. CITY NEWS-PRESS, Oct. 28, 2011; Letter from Mary Fallin, Governor of Okla. & Jim Reese, Sec’y of Agric., to The Honorable Hilda L. Solis, Sec’y, U.S. Dep’t of Labor (Dec. 1, 2011) (reprinted at <http://agblog.ok.gov/2011/12/02/governor-fallins-and-secretary-reeses-letter-to-us-dept-of-labor/>) (detailing the Oklahoma Governor’s and State Agriculture Secretary’s opposition to the proposed legislation and stating in part that there were “already necessary and proper laws in place” to protect youth workers); see also Mariya Strauss, *Regulations Are Killed, and Kids Die*, THE NATION (Nov. 12, 2013), <http://www.thenation.com/article/177138/regulations-are-killed-and-kids-die>.

96. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pts. 570, 579); Press Release, Dep’t of Labor, Labor Department Statement on Withdrawal of Proposed Rule Dealing with Children Who Work in Agricultural Vocations (Apr. 26, 2012), available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20120426.xml> (“The decision to

proposed regulations were also specific to non-family farm youth.⁹⁷ Yet the immediate reaction from farmers, large agri-industry, and others misled and misrepresented the DOL's proposed legislation. One presidential candidate, for example, argued that the legislation would have intruded on the right of parents to employ their own children on family farms, which exceeded the scope of the proposed rules.⁹⁸ This reaction ranged from large agricultural interests to small farmers and additionally accompanied the Preserving America's Family Farm Act.⁹⁹ This Act expanded legislative language to bar the Secretary of the DOL from passing similar legislation on non-farm youth in the future.¹⁰⁰ Without the proposed reform legislation, children and youth from non-farm families remain on the outside of protective legislation.

Track Two seeks to incentivize farmworker safety. This Track encompasses linking farm programs with farmworker safety and safe food production. The sustainability objective of diminishing environmental degradation ignores its relationship with those laboring in the fields.¹⁰¹ These issues obligate joint and collective effort tethered to sustainable definitions of protecting the environment. For example, the broad protests against the fumigant methyl iodide and its use in strawberry fields led to collective action and ultimately caused its manufacturer to cease producing the product.¹⁰²

withdraw this rule . . . was made in response to thousands of comments expressing concerns about the effect of the proposed rules on small, family-owned farms. To be clear, this regulation will not be pursued for the duration of the Obama administration.”).

97. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,875–76.

98. Amy Sherman, *Ban on Children's Farm Chores Was Not Proposed*, TAMPA BAY TIMES, Aug. 30, 2012, at 4.

99. Preserving America's Family Farms Act, H.R. 4157, 112th Cong. (2012). This Act was initially introduced by Senators John Thune (R.–S.D.) and Jerry Moran (R.–Kan.), and thirty-six other senators on March 21, 2012. S. 2221, 112th Cong. (2012). The House of Representatives passed the Act on July 24, 2012, but the Act later died in the Senate. *S. 2221 (112th): Preserving America's Family Farms Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s2221> (last visited Mar. 7, 2014).

100. See H.R. 4157 (declaring “[a]n Act [t]o prohibit the Secretary of Labor from reissuing or issuing a rule substantially similar to a certain proposed rule under the Fair Labor Standards Act of 1938 relating to child labor”).

101. See Letter from Robert G. Bergman, Gerald E.K. Branch Distinguished Professor, Univ. of Cal., Berkeley, Roald Hoffman, Frank H.T. Rhodes Professor of Humane Letters, Cornell Univ. & 54 other scientists, to Stephen Johnson, Adm'r, U.S. Env'tl. Prot. Agency (Sept. 24, 2007), available at http://www.epa.gov/pesticides/factsheets/iodomethane_letter.pdf; see generally Phil Zahodiakin, *Scientists Debate Impact of FQPA on Farmworker Safety*, PESTICIDE & TOXIC CHEMICAL NEWS, Sept. 17, 1998.

102. Tom Philpott, *Bye Bye, Cancer-Causing Strawberry Fumigant*, MOTHER JONES (Mar. 21, 2012, 9:50 AM), <http://www.motherjones.com/tom-philpott/2012/03/strawberries-methyl-iodide-cancer>.

In the alternative, federal legislation must link abuse of the labor workforce with recipients of subsidies or other federal benefits. Attendant sanctions would also follow if employers were found to have violated fair labor practices, wage theft actions, or other labor mandates.¹⁰³ If sanctions follow from labor violations, the perpetrator would also face offsets from federal subsidy programs or other federal programs.¹⁰⁴ Conversely, operators with favorable labor practices or without sanctions for a period of time could benefit from tax deductions that would enhance their farming operations.

Tracks Three and Four seek to promote alternative agricultural models. These Tracks would expedite diversity of food products that contrast with monocultural crop production. Track Three further responds with legislation “to foster and encourage family farms.”¹⁰⁵ Yet the USDA, and the legislation that stemmed from odious Jim Crow laws seeking cheap labor, denied farmworkers access to land or farming operations. This Track urges increasing federal and state programs that encourage workers to enter farming. Latina/o communities have retained ancient seeds not seen in the United States for decades or that have disappeared under the control of industrialized agriculture.¹⁰⁶ The United Nations, moreover, has declared 2014 the International Year of Family Farming.¹⁰⁷ Various groups are also carrying the burden of promoting small farming.¹⁰⁸ This Track is thus closely joined with Track Four’s call for a critical analysis of the laws that destroy local markets.¹⁰⁹

103. See *supra* note 81 and accompanying text. See also *United Farmworkers of Am. v. Chao*, 227 F. Supp. 2d 102 (D.C. Cir. 2002); *The Darigold Saga of Abuses Continues at a New Location*, UNITED FARM WORKERS, <http://www.action.ufw.org/page/speakout/darigold1013> (last visited Feb. 1, 2014).

104. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-781, FARM PROGRAMS: CHANGES ARE NEEDED TO ELIGIBILITY REQUIREMENTS FOR BEING ACTIVELY INVOLVED IN FARMING 1–7 (2013) (responding to lack of accountability of subsidy recipients in some cases involving \$5.2 billion).

105. 7 U.S.C. § 2266 (2012).

106. *Losing the Farm: How Corporate Globalization Pushes Millions off the Land and into Desperation*, MULTINATIONAL MONITOR, July–Aug. 2003, at 30, 31.

107. See *2014 The International Year of Family Farming*, FOOD & AGRIC. ORG., <http://www.fao.org/family-farming-2014/en/> (last visited Apr. 7, 2014); see also INT’L FUND FOR AGRIC. DEV. & UNITED NATIONS ENV’T PROGRAMME, SMALLHOLDERS, FOOD SECURITY, AND THE ENVIRONMENT (2013), available at http://www.unep.org/pdf/SmallholderReport_WEB.pdf (report aimed at eliminating hunger and poverty across the world).

108. See, e.g., ERIC HOLT-GIMÉNEZ, *CAMPESINO A CAMPESINO: VOICES FROM LATIN AMERICA’S FARMER TO FARMER MOVEMENT FOR SUSTAINABLE AGRICULTURE* (2006); *Leading the Fight for Food Sovereignty, An Interview with La Via Campesina’s Dena Hoff*, WORLDWATCH INST., <http://www.worldwatch.org/node/6514> (last visited Nov. 23, 2013).

109. See generally § 2266 (reaffirming Congress’s policy of fostering and encouraging family farms); JEFFERY K. O’HARA, UNION OF CONCERNED SCIENTISTS,

Track Four is directed at protecting community-based agriculture. The direct dismantling of the Los Angeles South Side Market in Los Angeles, California, provides an example of failing to protect diverse food alternatives. The market offered ancient, indigenous seeds and food products, but it was ejected from the site—thwarting a landscape of otherwise diverse food products. The eviction of the market is irreconcilable with federal law that promotes protection of small owner-operators.¹¹⁰

Track Five seeks promotion of corporate responsibility such as the Fair Food Campaign, but it would also create incentives for corporations that rely on USDA-supported food products. This Track extends to purchases made by the USDA, which in the past have been used to thwart farmworker unionization attempts.¹¹¹ The campaign seeks participation among farmworkers, Florida tomato growers, and participating buyers with an emphasis on worker wages and safety.¹¹² This Track, however, would also extend to school lunch and other food programs, as well as to direct government purchases of food, by requiring fair wages for workers producing the commodities. Finally, Track Six seeks to reestablish work centers throughout the nation. The isolation of workers—including great distances from readily accessible information—promotes an unhealthy work environment. Strategically placed work centers could provide “know-your-rights” literature and safe working practices information for both workers and employers.¹¹³

Tracks Seven through Ten are directed at the legal norms that are perpetuating harm to the agricultural labor workplace. For example, Track Seven seeks to restore legal services for the sector and to

MARKET FORCES: CREATING JOBS THROUGH INVESTMENT IN LOCAL AND REGIONAL FOOD SYSTEMS (2011), available at http://www.ucsus.org/assets/documents/food_and_agriculture/market-forces-report.pdf (suggesting a restructuring of agricultural programs); Allison Brown, *Counting Farmers Markets*, 91 GEOGRAPHICAL REV. 655 (2001) (blaming the construction of irrigation and interstate highway infrastructure for the destruction of local farms).

110. See, e.g., Devon C. Pena, Professor of Anthropology, Univ. of Wash., *Farmers Feeding Families: Agroecology in South Central Los Angeles*, Keynote Address Presented to the National Association for Chicana and Chicano Studies (Mar. 4, 2006) (transcript available at <http://www.josealamillo.com/keynotespeech.pdf>).

111. See *supra* note 61.

112. See, e.g., Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 45 (2013); *Campaign for Fair Food*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/campaign-for-fair-food/> (last visited Jan. 17, 2014).

113. The distributed information would ensure it reaches a population that does not have access to electronically based information. See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 2001-111, *SIMPLE SOLUTIONS: ERGONOMICS FOR FARM WORKERS* (Sherry Baron et al. ed., 2001); William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. DAVIS L. REV. 1075 (2000).

encourage more rural lawyers. Rural communities struggle with the lack of legal representation and inconsistent legal interpretations.¹¹⁴ Yet, legal services have experienced congressional and grower challenges and have endured curtailed funding for their representation of agricultural workers.¹¹⁵ It is beyond time to restore legal representation to a highly isolated, at-risk group against the environmental and workplace harms they confront.¹¹⁶

Track Eight seeks to remove the continued exclusion of farmworkers from the NLRB and other disparate omissions from federal legislation.¹¹⁷ Their omission facilitates the involvement of labor contractors who bring insurmountable legal hurdles for aggrieved workers.¹¹⁸ For example, outdated independent contractor relationships govern child labor by disassociating the relationship between employers from the labor contractors that recruit workers.¹¹⁹ Yet, when workers are harmed, this relationship is problematic for farmworkers seeking remedial relief, as courts demand multi-tiered tests as a prerequisite for distinguishing the contractor from the operator-employer.¹²⁰ Issues specific to who owns the land encompassing the site of the injuries ties up litigation, rendering any form of remedy unavailable to victims of agricultural accidents. Finally, legal interpretations of the law that do provide small remedies for farmworkers remain inconsistent and difficult to reconcile with the intent and purpose of the legislation.¹²¹ It is beyond

114. Kristi Eaton, *Rural Communities Struggle with Lack of Lawyers*, RAPID CITY J., Dec. 11, 2011, http://rapidcityjournal.com/news/rural-communities-struggle-with-lack-of-lawyers/article_b7aeaa02-243c-11e1-b331-0019bb2963f4.html.

115. Fedline Ferjuste, *The Agricultural Worker Protection Act & Florida's Migrant Worker: The Hands That Feed Florida*, 1 AM. U. LABOR & EMP. L.F. 279, 282–84 (2011).

116. See, e.g., Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1, 1–2 (1972); José R. Padilla, *Lawyering against Power: The Risks of Representing Vulnerable and Unpopular Communities*, 11 SEATTLE J. SOC. JUST. 173, 176–77 (2012–13) (discussing political repercussions and challenges from dairy industry).

117. See, e.g., Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 536–41 (1999).

118. See, e.g., Howard R. Rosenberg, *More Than an IRCA Offshoot: Growth of Labor Contracting in California Agriculture* (Dep't of Agric. & Res. Econ., Working Paper No. 693, 1993), available at <http://ageconsearch.umn.edu/bitstream/25068/1/wp693.pdf>.

119. Ferjuste, *supra* note 115, at 285–88, 285 n.38.

120. *Napoles-Arcila v. Pero Family Farms, L.L.C.*, 2009 WL 1585970, at *1–2 (S.D. Fla. June 4, 2009) (addressing reimbursement of preemployment battles and labor contractor disputes).

121. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 (2012).

time to reconcile this realm of legislation and the resulting harm from legal formalism's demand for evasive and difficult-to-prove "tests."

Lastly, Tracks Nine and Ten are geared toward the workers, specifically whether workers are domestic based or from other nations. Track Nine specifically opposes guest-worker programs; their own lengthy history of adverse treatment of workers suggests that newly proposed guest-worker programs should not repeat this history.¹²² Guest workers, moreover, are used to thwart state-driven farmworker unionization efforts.¹²³ Once the workers arrive in the United States, many face wage theft and payroll deductions for transportation and other "expenses." These consequences mandate rejecting proposed guest-worker programs to alleviate the growers' demand for workers.

Finally, Track Ten recommends that the law protect small family farmers as well as agri-industry. This Track seeks to increase the wages of farmworkers. Reports illustrate that raising the wages of workers does not substantially increase the average family's grocery bill.¹²⁴ Labor costs comprise only 6 percent of the price consumers pay for fresh produce. "Thus, if farm wages were allowed to rise 40 percent, and if all the costs were passed on to consumers, the cost to the average household would be only about \$8.00 a year."¹²⁵ Workers should not default to a position that hinders their efforts to promote employment parity with non-agricultural workers.

The above pursuit of integrated, sustainable food production and the use of law as a weapon to curtail improved working conditions sustain environmental degradation and demonstrate challenges to transformative efforts. This outdated agricultural landscape further curtails diverse food

122. Guest Worker Programs resulted in the extensive abuse of workers, ranging from wage theft to enslavement. *See, e.g., The Bracero Program, supra* note 91; Fred L. Koestler, *Bracero Program*, TEX. ST. HIST. ASS'N (June 12, 2010), <http://www.tshaonline.org/handbook/online/articles/omb01>. The Act was amended several times, such as in the Agricultural Act of 1949, Pub. L. No. 78, 65 Stat. 119 (1951). The USDA, however, is examining the consequences of immigration policy on farm laborers. *See* STEVEN ZAHNISER ET AL., U.S. DEP'T OF AGRIC., ECON. RESEARCH REP. NO. 135, THE POTENTIAL IMPACT OF CHANGES IN IMMIGRATION POLICY ON U.S. AGRICULTURE AND THE MARKET FOR HIRED FARM LABOR: A SIMULATION ANALYSIS 19–23 (2012) (linking fewer workers with less output and fewer exports).

123. Lornet Turnbull & Anna Boiko-Weyrauch, *Striking Farmworkers Afraid of Guest-Worker Program*, SEATTLE TIMES, July 23, 2013, http://seattletimes.com/html/localnews/2021456869_migrantworkersxml.html.

124. *Protecting America's Harvest: Hearing before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law of the H. Comm. on the Judiciary*, 111th Cong. 1, 13 (2010) (statement of Professor Carol M. Swain, Ph.D., Vanderbilt University).

125. PHILIP MARTIN, CTR. FOR IMMIGRATION STUDIES, BACKGROUND: FARM LABOR SHORTAGES: HOW REAL? WHAT RESPONSE? 12–13 (2007), *available at* <http://www.cis.org/sites/cis.org/files/articles/2007/back907.pdf>.

products and, in sum, should yield to an integrated, sustainable food system.

CONCLUSION

Including farmworkers in sustainability templates could open areas resistant to transforming the environment and alternative food production. The jurisprudence of agricultural law has long thwarted the objectives that seek to transform how food is produced and the choices offered to consumers. Exploring farm labor terms and conditions of employment could enhance opportunities for change. Ultimately, pursuing the Tracks could also provide employers with a reliable and consistent workforce.¹²⁶

126. *Id.* at 1–2. See also Madeleine Sumption, *Filling Labor Shortages through Immigration: An Overview of Shortage Lists and Their Implications*, MIGRATION INFO. SOURCES (Feb. 23, 2011), <http://www.migrationinformation.org/Feature/display.cfm?ID=828>.