

Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers

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The capacity of our society to mangle people who lack the power to stand up for their own rights is virtually limitless. I think that we must not pursue the old strategy of assuming that another paternalistic program is going to work. Somehow the disadvantaged have to be empowered with a right to speak for themselves, they must be empowered with the right to do for themselves, and those rights must be given, not as a hoax, but without repressive government program interference.

— Walter Mondale¹

Human nature is so constituted, that it cannot honor a helpless man, though it can pity him, and even this it cannot do long if signs of power do not arise.

— Frederick Douglass²

I. WEAK WORKERS AND THE WELFARE STATE

Can legislatures and courts enable workers with little or no economic power to bypass disadvantageous labor market forces long enough to create a breathing space in which to forge such power? Or are the laws of economics stronger than those of legislatures?³ Despite the fact that

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¹ *Migrant and Seasonal Farmworker Powerlessness: Hearings Before the Subcomm. on Migratory Labor of Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess., pt. 8-A, at 5112 (1970) (statement of Senator Mondale).

² F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 143 (1962).

³ Kahn-Freund stated that:

Where labour is weak — and its strength or weakness depends largely on factors outside the control of law — Acts of Parliament, however well intentioned and well designed . . . cannot do much to modify the power relation between labour and management. The law has important functions in labour relations, but they are secondary if compared with the impact of the labour market (supply and demand) and . . . with the sponta-

“The Road to Serfdom”⁴ appears to have been definitively paved in the advanced capitalist societies,⁵ debate still surrounds the issues of the extent to which states need to protect individuals against disruptive, anarchic market forces and of the state’s superior competence to make decisions on behalf of individuals.⁶ More poignant still is the perennially unresolved dilemma of how to empower groups in a capitalist society without frustrating the emergence of their autonomy by that very act of state benevolence.⁷

This Article explores these issues within the framework of labor protective, welfare-state paternalism. As an example of this intervention, it focuses on what the arch-antipaternalistic *Wall Street Journal* has styled “one of the most destructive pieces of economic legislation ever devised”⁸ — the Fair Labor Standards Act (FLSA);⁹ and as the atomized and disempowered stratum par excellence it examines migrant farmworkers.

In his internationally oriented discussion of the late nineteenth century working class, Eric Hobsbawm argues that:

[T]he state unified the class, since increasingly any social group had to pursue its political aims by exerting pressure on the *national* government,

neous creation of a social power on the workers’ side to balance that of management. Even the most efficient inspectors can do but little if the workers dare not complain to them about infringement of the legislation they are seeking to enforce.

O. KAHN-FREUND, *LABOUR AND THE LAW* 8 (2d ed. 1977).

⁴ F. HAYEK, *THE ROAD TO SERFDOM* (1944). Yet Hayek acknowledges that: “We must face the fact that the preservation of individual freedom is incompatible with a full satisfaction of our views of distributive justice.” F. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 22 (1948).

⁵ See generally K. FRIEDMAN, *LEGITIMATION OF SOCIAL RIGHTS AND THE WESTERN WELFARE STATE* (1981). Some retrograde movement occurred under the Thatcher Government and Reagan Administration in the 1980s. See, e.g., *Lifting the Burden* (Cmd. 9571, 1985).

⁶ For the view that the debate has never even been properly joined, see G. STIGLER, *THE CITIZEN AND THE STATE* 3-13 (1975).

⁷ See MOON, *The Moral Basis of the Democratic Welfare State*, in *DEMOCRACY AND THE WELFARE STATE* 27, 28-30 (A. Gutmann ed. 1988) (tracing origin of idea-historical reflection of contradiction to Hegel).

⁸ *The Inhuman Minimum*, *Wall St. J.*, Mar. 16, 1989, at A16, col. 1.

⁹ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982 & Supp. V 1987)) [hereafter FLSA]. For a conventional analysis of the legislative history of and legislative voting on FLSA, see I. BERNSTEIN, *A CARING SOCIETY: THE NEW DEAL, THE WORKER AND THE GREAT DEPRESSION* 116-45 (1985). For an unconventional analysis, see R. STEINBERG, *WAGES AND HOURS: LABOR AND REFORM IN TWENTIETH-CENTURY AMERICA* 109-14 (1982).

in favour of or against the legislation and administration of *national* laws. No class had a more consistent and continuous need for positive state action on economic and social matters, to compensate for the inadequacies of their unaided collective action.¹⁰

In this context, one must distinguish between two different modes of interaction between the working class and the state.¹¹ On the one hand, the working class may use the state apparatus as a convenient mechanism for imposing uniformity on working conditions or social security that it has extracted from the employing class through concerted effort on a local or industrial basis. In these situations, the working class has mediated collective self-help through the state.¹² On the other hand, the working class may have to influence the state politically to achieve economic conditions that it cannot achieve on its own. In some instances, workers may engage in a "civil war" against the capitalist class to enforce shorter working hours, while at the same time coerce individual workers to submit to class-wide standards.¹³ In other historical situations, the working class may be so weak that parts of the liberal bour-

¹⁰ E. HOBSBAWM, *THE AGE OF EMPIRE, 1875-1914*, at 129 (1989).

¹¹ Dicey's notion of "collectivism" subsumes both of these modes by combining *laissez faire* policies with those based on a belief in the superior capacity of the government to protect individuals even when it interferes with their individual liberty. See A. DICEY, *LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 259-301 (1905).

¹² In an interesting variant, in the late 1940s and early 1950s, the United Auto Workers (UAW) union, having been out-lobbied by the large automobile companies in its effort to secure increased old age social security pensions from Congress, succeeded in securing improved private pensions from those companies through industrial action and collective bargaining. Once the companies had the inducement of reducing their private pension costs and increasing those of other employers, the UAW succeeded in persuading them to join in renewed congressional lobbying. See J. QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN WELFARE STATE* 159-68 (1988).

¹³ On the complicated dialectical relationship between class struggle and the needs of capital, see 1 K. MARX, *DAS KAPITAL* ch. 10, §§ 6-7 (1867); C. NYLAND, *REDUCED WORKTIME AND THE MANAGEMENT OF PRODUCTION* 11-16, *passim* (1989). At the extreme, it has been argued that:

Law is bound to serve . . . the class responsible for social production . . . holds true even if, within the ruling class, there are no groups which are both willing and able to enforce the general interests of a capitalist society against individual capitalists, so that the pressure necessary to have the law enacted must be exercised by the [workers] themselves.

R. SCHLESINGER, *SOVIET LEGAL THEORY: ITS SOCIAL BACKGROUND AND DEVELOPMENT* 19-20 (2d ed. 1951). A major gap in this approach is its failure to provide an account of the political filtration and decisionmaking processes that would inexorably generate the result most functional to capital.

geoisie constitute the driving force behind state imposed conditions on the employing and employed classes.¹⁴ “Voluntarism” (trade union self-sufficiency and abstentionism vis-à-vis state intervention)¹⁵ “is as weak or as strong as the *social*, not the *legal*, conditions allow; for it rests to a significant extent upon autonomous union bargaining strength.”¹⁶

A significant component of state intervention, as embodied in labor law, is continuous with an older, pre-industrial and partially pre-capitalist tradition of poverty law relief.¹⁷ Failure to distinguish between the two fundamentally different types of working class recourse to the state makes it difficult to grasp this concept. Yet, a policy that borders on the philanthropic-humanitarian, solidaristic or even coercive — such as outlawing wages below a certain level where neither labor market forces nor the workers’ bargaining strength can sustain such a level — should not be analyzed as if it were the result of programmatically confrontational class conflict even when the fear of disorder and upheaval that might follow widespread hunger largely motivates the ruling classes.¹⁸ At this juncture, it is crucial to differentiate between

¹⁴ “If those who wish to use state regulation as a means of raising the plane of competition are primarily middle class reformers, then this method is likely to be restricted to the most sweated industries or classes.” Douglas, *The Economic Theory of Wage Regulation*, 5 U. CHI. L. REV. 184, 194 (1938). For a 19th-century example, see J. HAMMOND & B. HAMMOND, LORD SHAFTESBURY 83-146, 162-74 (1939).

¹⁵ See generally H. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA 132-35 (1978) (describing labor union leader’s position on legal remedies); Rogin, *Voluntarism: The Political Functions of an Antipolitical Doctrine*, 15 INDUS. & LAB. REL. REV. 521 (1962) (tracing development of labor union’s voluntarism doctrine).

¹⁶ K. WEDDERBURN, *THE WORKER AND THE LAW* 847 (3d ed. 1986).

¹⁷ See J. QUADAGNO, *supra* note 12, at 6, 24-27; Simitis, *Zur Verrechtlichung der Arbeitsbeziehungen*, in VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT UND SOZIALER SOLIDARITÄT 73, 86-87 (F. Kübler ed. 1985).

¹⁸ See, e.g., I. WALLERSTEIN, *THE MODERN WORLD-SYSTEM III: THE SECOND ERA OF GREAT EXPANSION OF THE CAPITALIST WORLD-ECONOMY, 1730-1840*, at 120 (1988). The rates-in-aid-of-wages regime that existed in Britain between the 1790s and the inception of the New Poor Law in 1834 (the so-called Speenhamland system) functioned, contrary to Wallerstein’s view, not only as a minimum wage but also as a maximum wage. See R. COWHERD, *POLITICAL ECONOMISTS AND THE ENGLISH POOR LAWS* 117 (1977); E. HOBBSAWM & G. RUDÉ, *CAPTAIN SWING* 49-51 (1975); K. POLANYI, *THE GREAT TRANSFORMATION* 77-102 (1944). See generally 7 S. WEBB & B. WEBB, *ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY: PART I. THE OLD POOR LAW* 168-89 (1927). Ironically, whereas traditional liberal support of statutory minimum wages has been couched in terms of antipauperism, such a policy is more usefully rationalized as an industrial policy. Current proposals for minimum wages in tandem with an Earned Income Tax Credit differentiated according to family size are the functional equivalent of the principle of less-eligibility, which guided able-

two related but nevertheless distinct constellations of labor market forces. One concept refers to the general relationship between supply and demand. The other involves the opportunity afforded employers to take advantage of individual workers' extraordinary need in order to press the wage below its customary minimum level. In effect, unions operate as "insurance societies" to prevent the latter possibility.¹⁹

The aforementioned two modes of interaction between the working class and the state correspond to these two labor market situations.²⁰ Where the working class merely seeks state ratification of an existing *de facto* minimum wage secured through market forces and negotiation, legislation appears more as an extension of the private collective ordering of the labor market than as state intervention. It is, rather, the second scenario in which the state imposes a minimum on the parties that invites analysis as paternalism.

bodied relief under the New Poor Law and still underlies welfare policy in the United States. See Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. (1989) (forthcoming).

¹⁹ Karl Marx, *Das Kapital* (Ökonomisches Manuskript 1863-1865), Erstes Buch, Einzelne Seiten, in Karl Marx [and] Friedrich Engels, *Gesamtausgabe (MEGA) II:4: Text Pt. 1: Karl Marx, Ökonomische Manuskripte 1863-1867*, at 11-12 (1988).

²⁰ Rubin envisions a third situation:

[I]f class actions were generally allowed, then we would expect the same types of agents to litigate as now lobby for statutes. That is, to the extent that the legal system allows class interests to litigate, then the common law system approaches the statutory system and the sort of inefficient legislation that has been statutorily established in recent years would occur instead through common law means. For example, if unions filed *amici* briefs for some low-paid workers, the issue of wages could have been litigated by arguing that wages below some minimum were "unconscionable" and hence, a minimum wage law would have passed by litigation rather than by statute.

P. RUBIN, *BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES* 31 (1983). One reason why unions presumably do not pursue this strategy overlaps with the reason why they have not lobbied more vigorously for higher minimum wages — namely, such an approach would reduce the incentive low-paid workers would have to join unions in industries in which organizing is not "cost-effective." Moreover, perhaps because of the unwieldy ramifications of applying the doctrine of contractual unconscionability to labor contracts, it appears that courts have never ruled on the issue. See C. MACPHERSON, *THE RISE AND FALL OF ECONOMIC JUSTICE* 18-19 (1987); *RESTATEMENT (SECOND) OF CONTRACTS* § 208 (Supp. 1988). Comparative labor law historian Otto Kahn-Freund found no British labor case "in which a court invalidated a contract by reason of gross exploitation." O. KAHN-FREUND, *supra* note 3, at 23.

II. THE STRUCTURE OF WELFARE STATE PATERNALISM

Caution, however, is called for in structuring historical understanding through use of the category "paternalism."

[P]aternalism is a loose descriptive term. It has considerably less historical specificity than such terms as feudalism or capitalism. . . . It has as much and as little value as other generalized descriptive terms — authoritarian, democratic, egalitarian — which cannot in themselves, and without substantial additions, be brought to characterize a system of social relations. No thoughtful historian should characterize a whole society as paternalist or patriarchal. But paternalism can, as in Tsarist Russia, in Meiji Japan, or in certain slave-holding societies, be a profoundly important component not only of ideology but of the actual institutional mediation of social relations.²¹

These snares of ahistoricity scarcely imperil the present context, which invokes no such macrosocial analysis. Instead, this context is confined to a heuristic application of the concept of paternalism to examine the consequences that state protection has on labor-market-powerless workers. Relevant in this setting, as well as for earlier paternalist agents such as preliberal authoritarian states,²² eighteenth century Tory patriarians,²³ slaveowners,²⁴ or capitalist employers²⁵ is that:

Comparisons . . . have some validity, so long as they are restricted to the psychological model of the family as the universal prototype for the exercise of authority. . . . Paternalism does not exist indiscriminately across time and place. Specific paternalisms represent specific social and cultural bridges across the gap of ultimately irreconcilable interests. They afford a measure of maximizing the decency and self-respect with which the powerful and the unarmed can share the same territory.²⁶

²¹ Thompson, *Eighteenth-Century English Society: Class Struggle Without Class?* 3 SOC. HIST. 133, 137 (1978). David Roberts characterizes the basic assumptions of paternalism as authoritarian, hierarchic, organic, and pluralist, and its basic duties as ruling, guiding, and helping. D. ROBERTS, PATERNALISM IN EARLY VICTORIAN ENGLAND 1-22 (1979).

²² See, e.g., M. RAEFF, THE WELL-ORDERED POLICE STATE: SOCIAL AND INSTITUTIONAL CHANGE THROUGH LAW IN THE GERMANIES AND RUSSIA, 1600-1800 (1983) (exploring 17th and 18th century political mechanisms in Germany and Russia).

²³ See, e.g., E. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 543-44 (1963).

²⁴ See, e.g., E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 4-7, 661-62 (1976).

²⁵ See, e.g., D. BRODY, *The Rise and Decline of Welfare Capitalism*, in WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE 48 (1980).

²⁶ Fox-Genovese, *Poor Richard at Work in the Cotton Fields: The Psychological and Ideological Presuppositions of Time on the Cross and Other Studies of Slavery*, in E. FOX-GENOVESE & E. GENOVESE, FRUITS OF MERCHANT CAPITAL: SLAVERY AND

The socioeconomic paternalism that constitutes a key aspect of the modern labor-protective welfare state appears in a form qualitatively different from that of any of these historical predecessors.²⁷ For unlike other paternalisms, this agent neither expects nor demands reciprocity or willing obedience from the beneficiaries, nor is it perceived as purporting to offer moral justification for the exploitation of the paternalized *sub rosa*.²⁸ As the first formal, democratic paternalist this agent purports to be without ulterior motive in implementing the will of the majority and of the majority of the paternalized.²⁹ To the extent that the welfare state reproduces the working population in the specific capitalist form of the modification of the reproduction of labor power,³⁰ needs of capital and basic social-welfare needs of the working class become fused in reality and consciousness. In the amalgam of elements constituting social security programs, it then becomes difficult to disengage the aspects of capitalist social control from working class demands.³¹ Unlike the other paternalisms, labor-protective regimes re-

BOURGEOIS PROPERTY IN THE RISE AND EXPANSION OF CAPITALISM 90, 130 (1983).

²⁷ Indeed, Genovese takes the position that "[t]he subordination . . . of the people of any country to a welfare state does not constitute a paternalistic order in any historically meaningful sense." E. GENOVESE, *supra* note 24, at 661. *But see* L. MOREAU DE BELLAING, *L'ÉTAT ET SON AUTORITÉ: IDEOLOGIE PATERNALISTE* (1976).

²⁸ *See generally* A. FOX, *HISTORY AND HERITAGE: THE SOCIAL ORIGINS OF THE BRITISH INDUSTRIAL RELATIONS SYSTEM* 3-4 (1985); E. GENOVESE, *supra* note 24, at 4, 6. It must be stressed that the analysis here is directed at nonmeans-tested labor-related programs. That a strong element of subordination and obedience has marked the means-tested poor-law sector of the welfare state is a commonplace. *But see* Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *YALE L.J.* 1198, 1198 (1983) (noting that "moralism, personal manipulation, and invasion of privacy" of welfare system of 1960s were replaced by "indifference, impersonality and irresponsibility" by 1980).

²⁹ *But see* Cunningham, *Labor-Management Relations in the Federal Sector: Democracy or Paternalism?* 31 *LAB. L.J.* 636, 638-39 (1980) (describing paternalistic attitude of federal government toward civil service employees); Susskind & Elliott, *Paternalism, Conflict, and Coproduction: Learning from Citizen Action and Citizen Participation in Western Europe*, in SUSSKING & ELLIOTT, *PATERNALISM, CONFLICT, AND COPRODUCTION: LEARNING FROM CITIZEN ACTION AND CITIZEN PARTICIPATION* 3, 7 (1983) (describing paternalism as control by government officials of "when and how residents and consumers voice their concerns").

³⁰ In other words, the wage may be expanded into a social wage through taxation and redistribution. *See* I. GOUGH, *THE POLITICAL ECONOMY OF THE WELFARE STATE* 44-48 (1979) (analyzing welfare activities of modern capitalist state).

³¹ *But see* I. GOUGH, *supra* note 30, at 12 (stating that capitalist economic system constrains social security policy); J. MYLES, *OLD AGE IN THE WELFARE STATE: THE POLITICAL ECONOMY OF PUBLIC PENSIONS* (1984); Wolfgang Müller & Christel Neusüss, *Die Sozialstaatsillusion und der Widerspruch zwischen Lohnarbeit und*

present an alien yet necessary element: conflict with the self-regulating mechanisms of market-mediated capital accumulation together with protection of capitalism from self-destruction. In this sense, “[m]orality arises from market failure.”³² The underlying principle of such paternalism is

That it is justified to restrict a person’s liberty of choice, without his consent, even when the person’s action would affect himself only, when the person is not considered to be in a position to know his best interests and the behavior imposed is believed to be in those best interests.³³

John Stuart Mill is the modern philosophical fountainhead of deontological prohibitions on such community interference with competent adults’ self-regarding decisions.³⁴ However, he also furnished powerful act-utilitarian underpinning for the view that state prescription, for ex-

Kapital, SOZIALISTISCHE POLITIK, No. 6-7, 1970, at 4. Bismarck’s introduction of social security programs in the 1880s as part of his antisocialist agenda, opposed as it was by the Social Democratic Party and the free unions, obviously does not fit the model of democratic paternalism. See F. TENNSTEDT, SOZIALGESCHICHTE DER SOZIALPOLITIK IN DEUTSCHLAND 181-83 (1981).

³² D. GAUTHIER, MORALS BY AGREEMENT 84 (1987). Gauthier reaches this conclusion through a whimsical argument that “wage slavery” is incompatible with competitive markets. *Id.* at 97, 111-12.

³³ Kelman, *Regulation and Paternalism*, 29 PUB. POL’Y 219, 220 (1981). Donald VanDeVeer offers the following canonical definition of paternalism: A deliberately does X, believing that doing X is contrary to S’s operative preference, intention, or disposition at the time A does X; and A does X with the primary or sole purpose of promoting a benefit for S which A believes would not accrue to S in the absence of A’s doing X. D. VANDEVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE 22 (1986). Andreas Papandreou uses “paternalistic” in a deviant sense to apply to nonbenevolent, autocratic command economies. See A. PAPANDREOU, PATERNALISTIC CAPITALISM 6, 166 (1972).

³⁴ See J. MILL, ON LIBERTY chs. 1, 4 (1859) [hereafter ON LIBERTY]. Donald Regan finds no “influential philosophical discussion” after Mill. Regan, *Justifications for Paternalism*, 15 NOMOS 189, 189 (J. Pennock & J. Chapman eds. 1974). For general philosophical discussions, see J. FEINBERG, HARM TO SELF (1986); J. KLEINIG, PATERNALISM (1984); D. VANDEVEER, *supra* note 33; Brock, *Paternalism and Autonomy*, 98 ETHICS 550 (1988). Though a libertarian, Mill “part[ed] company . . . with the democratic reformers” on the issue of “giving equal weight to the vote of every individual . . . until all are equal in worth as human beings.” J. MILL, *Thoughts on Parliamentary Reform*, in 4 JOHN STUART MILL, DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 5, 22-23 (1973). While conceding that one person one vote might be appropriate “if control over his own government were really the thing in question,” Mill rejected the notion “that every individual has an equal claim to control over the government of other people.” *Id.* at 22. In effect shifting paternalism one step backward, Mill proposed an education-based electoral hierarchy that would insure that those who possessed the qualifications for exercising power over others “beneficially” would receive multiple votes. *Id.* at 23-27.

ample premium pay for maximum hours, may not come within the scope of paternalism. For such “interference of law is required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment: they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law.”³⁵ Mill alludes to a variation of the “free rider” problem. In the canonical case, some class members have an incentive to desert their fellow workers because they can secure the benefits of class action without bearing any of the associated costs.³⁶

For however beneficial the observance of the regulation might be to the class collectively, the immediate interest of every individual would lie in violating it. . . . If nearly all restricted themselves to nine hours, those who chose to work for ten would gain all the advantages of the restriction, together with the profit of infringing it; they would get ten hours' wages for nine hours' work, and an hour's wages besides. . . . Probably . . . so many would prefer the ten hours' work on the improved terms, that the limitation could not be maintained as a general practice: what some did from choice, others would soon be obliged to do so from necessity, and those who had chosen long hours for the sake of increased wages, would be forced in the end to work long hours for no greater wages than before. . . . [S]uch an enactment . . . serves to exemplify the manner in which classes of persons may need the assistance of law to give effect to their deliberate collective opinion of their own interest, by affording to every individual a guarantee that his competitors will pursue the same course, without which he cannot safely adopt it himself.³⁷

In the case Mill posits, the problem is not that some workers will reap the benefits that others have sown. Rather, the force of competition will deprive all workers of a shorter workday unless all workers agree to resist working longer hours. If state intervention solves the free rider problem, Gerald Dworkin argues that such intervention is not paternalistic because “compulsion is not used to achieve some benefit which is not recognized to be a benefit by those concerned, but rather because it is the only feasible means of achieving some benefit which is recognized as such by all concerned.”³⁸ This view rests on the definitional proposition that if it is necessary to substitute state action for class action not because of cognitive failings but because the class is

³⁵ J. MILL, *PRINCIPLES OF POLITICAL ECONOMY*, Book V, ch. XI, § 12, at 963 (W. Ashley 7th ed. 1936).

³⁶ See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); J. ELSTER, *MAKING SENSE OF MARX* 347-48 (1985).

³⁷ J. MILL, *supra* note 35, at 964-65.

³⁸ Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 112 (R. Wasserstrom ed. 1971) (emphasis in original).

simply not able to achieve its ends, "one should not talk about paternalism."³⁹

It may seem intuitively obvious that no cognitive obstacle is at issue because all workers would prefer a statutory minimum wage of \$3.35 per hour to a contractual wage of \$2.00. In practice, however, some workers may acquiesce in the lower wage. These workers may believe that a willingness to accept lower wages will increase their chances of securing employment when more job seekers than jobs exist. In any event, confining paternalism to imposing values⁴⁰ to the exclusion of enforcing preferences⁴¹ that a person holds, but is unable to implement alone, appears semantic at best.⁴² A more fruitful approach distinguishes between strong paternalism (state action in a person's best interest without regard to the person's stated preferences) and weak paternalism (state substitution of its will⁴³ and/or power when a person or class lacks power to achieve her or its goals).⁴⁴ This position also

³⁹ J. ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 84 (rev. ed. 1986). In other words, only where the state places impositions on individuals against their preferences would paternalism be implicated. Duncan Kennedy, adopting an individualistic perspective, arrives at the same conclusion. He thereby fails to see the paternalistic implications of what he refers to as "distributive motives." Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 571-72 (1982).

⁴⁰ See Dworkin, *Paternalism: Some Second Thoughts*, in *PATERNALISM* 105, 106-107 (R. Sartorius ed. 1983). David Luban schematically analyzes paternalistic intervention as encompassing values over values, values over wants, interests over values, and interests over wants. Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 472-74.

⁴¹ Analysis of paternalism presupposes ideal conditions in which macrosocial processes do not systemically thwart the formation of "true" preferences. For a discussion of the impact of the political process on individual preference formation, see Lindblom, *The Market As Prison*, 44 J. POL. 324, 335 (1982).

⁴² Atiyah uses "paternalism" capaciously to refer to judicial imposition of contractual terms on both parties even where one side lacked not so much the power as the foresight to assert the terms. P. ATIYAH, *PROMISES, MORALS, AND LAW* 215 (1981). Similarly, Daniel Boorstin uses "the paternalism of the marketplace" to refer to producers offering consumers what they did not have the foresight to know they wanted. D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 290 (1974).

⁴³ John Rawls views paternalism as including the protection of persons "against the weaknesses and infirmities of their reason and will in society." J. RAWLS, *A THEORY OF JUSTICE* 249 (1971).

⁴⁴ In a different pairing, John Kleinig distinguishes between strong paternalism, which does not consider the person's capacity to choose the imposed good for herself, and weak paternalism, which is based on the person's incapacity to make that decision. J. KLEINIG, *supra* note 34, at 14.

appears to accord more closely with the original, familial context of paternalism.⁴⁵

Thus, a parent may substitute her judgment for her child's by interfering with the child's preference for candy over spinach. Substituted judgment and attempted coercion go hand-in-hand. Consider the scenario in which a parent substitutes her abilities for the child's to help promote the child's attainment of a goal formulated by the child. For example, the child may like to eat apples, and the parent may agree that apples are good for the child to eat. Unfortunately, the child is neither tall nor agile enough to reach the apples growing on a nearby tree. Is it paternalistic for the parent to use her adult height to secure them? Since lack of apples is not life threatening, a parent might take the position that substituting her abilities for the child's discourages the child's development. For example, the parent may deprive the child of a needed incentive to learn how to climb.⁴⁶ By analogy, if the state intervenes to secure the minimum wage for workers, the workers may regard themselves as wards instead of developing the social-psychological skills needed to organize and to sustain successful collective action.⁴⁷ There is an important distinction between the workers' goals being achieved and the workers achieving those goals.⁴⁸ Indeed, paradoxically, unless paternalists succeed in realizing their hidden agenda or goal of educating their beneficiaries to become autonomous masters of general-

⁴⁵ For an historical example, see L. STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800* (1977).

⁴⁶ "Genetic paternalism is by far the most important form of *sincerely cooperative paternalism* . . . in which those acting paternally are sincerely acting to help the other person become more independently competent over the long run." Douglas, *Cooperative Paternalism Versus Conflictful Paternalism*, in *PATERNALISM*, *supra* note 40, at 171, 174 (emphasis in original).

⁴⁷ As Justice Cardozo summarized the argument of an early opponent of social security: "Counsel . . . has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings." *Helvering v. Davis*, 301 U.S. 619, 644-45 (1937). The alternative reaction — that workers conclude from the state's ability to coerce employers into paying higher wages that they too can exercise such power — is not typical.

⁴⁸ See Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM*, *supra* note 40, at 113, 116. The president of the AFL expressed a similar thought when he testified before Congress that he "would rather preserve the principle of industrial democracy than to yield a right to the Board to interfere in the free exercise of collective bargaining" when a labor union agrees to wages lower than those stipulated by law. *Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Comm. on Education and Labor and the House Comm. on Labor*, 75th Cong., 1st Sess. 226 (1937) [hereafter *FLSA Hearings*] (testimony of William Green).

ized problem solving, the latter may never secure permanently their first-order goals.⁴⁹

A distinction must also be drawn between state interference such as mandatory minimum wages and mandatory contributory old-age pensions. For a social security regime can be interpreted as an instance of precommitment in which dependent workers, knowing that they do not have the willpower to abstain from current consumption in order to provide for their post-working years, bind themselves to an involuntary savings plan, whereby they irrevocably authorize the state to prevent them from opting out.⁵⁰ To the extent that this deferred gratification is imposed rather than self-imposed, this interpretation becomes less plausible and paternalism more plausible.⁵¹ In contrast, introduction of a minimum wage does not hinge on temporal self-denial: the root problem is not a lack of individual rationality or will, but of individual and collective power.⁵²

A final distinction pertains to the spectrum of individual and collective involvement in contractual relationships.⁵³ This distinction arises

⁴⁹ "Unfortunately, a paternalistic intervention that will maximize opportunities for choice in the long run may also interfere with the development of the ability to choose." Regan, *supra* note 48, at 121.

⁵⁰ Such systems appear to satisfy all five criteria of self-binding adduced by Elster. J. ELSTER, *supra* note 39, at 39-46.

⁵¹ This interpretation makes sense only if workers empirically have a margin of current savings on which they could draw. If the old-age pensions are based on redistributive subsidies or other collective mechanisms, then the Ulysses-Sirens analogy would not apply. Most workers in the United States in the 1930s had no savings. See *Helvering v. Davis*, 301 U.S. 619, 642-43 (1937).

⁵² It can be argued that if workers had the will to strike, that is, to accept a reduction of current consumption, they could force their employers to pay higher wages (i.e., a collectively bargained minimum wage). If workers are willing to strike but unable to subsist without income, then it is not a question of weakness of will, and paternalism reasserts itself as the solution. Even if the workers could survive a strike and it were a matter of *akrasia*, then the relevant act of self-binding would not be a mandatory minimum wage but a state-enforced lockout to prevent the workers from working for less than the minimum wage — a bizarre and heretofore unheard-of institution of working class self-education. To the extent that established unions of the skilled and better paid workers exclude the unskilled and the latter's employers gain access to even cheaper sources of labor (immigrants), a de facto lockout occurs without any of the positive educative effects. For a broad historical interpretation consistent with this scenario, see G. MINK, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT: UNION, PARTY, AND STATE, 1875-1920* (1986). For empirical analysis, see S. LIEBERSON, *A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880* (1980); P. SHERGOLD, *WORKING-CLASS LIFE: THE AMERICAN STANDARD IN COMPARATIVE PERSPECTIVE, 1889-1913*, at 53-55 (1982).

⁵³ For discussion of contractual paternalism, see Kennedy, *supra* note 39, at 563;

between state intervention that directly restricts a beneficiary's freedom and that which also impinges on third parties. In the case of direct or "pure paternalism," those persons whose freedom is restricted are the same persons who benefit from the restrictions. Conversely, indirect or "impure paternalism" restricts the freedom of persons other than those benefitted.⁵⁴ This intervention may require stronger justification because those whose liberty is infringed are not interfered with in their own interest.⁵⁵ Whereas pure paternalism appears generally implausible in bilateral, voluntary contractual relations, even impure paternalism does not describe intervention such as a statutory minimum wage in a uniformly accurate way. For the minimum wage may or may not benefit the employers whose economic freedom to exploit it restricts while benefitting other employers whose substantive freedom to contract is not affected.⁵⁶

III. THE MANDATORY MINIMUM WAGE

State intervention into the wage aspect of the capital-labor relationship is thus more complex than that proposed by the Mill-Dworkin

Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

⁵⁴ See Dworkin, *supra* note 40, at 111.

⁵⁵ See *id.*

⁵⁶ While it may be possible, by construing external effects everywhere, ultimately to dissolve all pure paternalism into the impure variety, rhetoric rather than logic undergirds the denial, for example, that forcing people against their will and judgment to save for their old age is paternalistic. See Kelman, *supra* note 33, at 244. Abstracting from the aspect of redistribution, even such a staunch libertarian as Hayek does not object to such programs despite the element of paternalistic coercion.

Once it becomes the recognized duty of the public to provide for the extreme needs of old age, unemployment, sickness, etc., irrespective of whether the individuals could and ought to have made provision themselves, and particularly once help is assured to such an extent that it is apt to reduce individuals' efforts, it seems an obvious corollary to compel them to insure . . . against those common hazards of life.

. . . Such a program . . . would involve some coercion, but only coercion intended to forestall greater coercion of the individual in the interest of others; and the argument for it rests as much on the desire of individuals to protect themselves against the consequences of the extreme misery of their fellows as on any wish to force individuals to provide more effectively for their own needs.

F. HAYEK, *THE CONSTITUTION OF LIBERTY* 286 (1960). In particular, when the problem of so-called moral hazard — that is, "neither the desire to avoid such calamities nor the efforts to overcome their consequences are . . . weakened by the provision of assistance" — does not intervene, Hayek sees no incompatibility with liberty. F. HAYEK, *THE ROAD TO SERFDOM*, *supra* note 4, at 120-21.

approach to the regulation of hours.⁵⁷ The state enforces a statutory minimum wage for the good of the individual employee and the class of employees⁵⁸ as well as for the protection of the sub-class of employers against their “chiseling”⁵⁹ competitors. The only deviant motivation that might impel an individual employee to accept a subminimum wage is that, given unemployment, she otherwise might not be employed. This situation requires even more extreme action than the one Mill envisioned because both employers and employees seek protection against fellow class members who need to be restrained from acting against the interest of their class and their own long-term interests.⁶⁰ Although this protection may subject both sweating employers and their sweated employees to short-term income losses, eventual concentration of employment in more productive and higher paying employment theoretically should offset this disruption.⁶¹

Extensive testimony at the original FLSA hearings in 1937 confirmed the view that capital, as a born leveller, demands as its innate right equal conditions of exploitation for all capitals in all spheres of production.⁶² As Isador Lubin, U.S. Commissioner of Labor Statistics, stated, FLSA was designed to create “a competitive system which gives to every business enterprise an equal opportunity in the struggle for existence.” By setting

[T]he rules of the industrial game . . . it . . . determines the manner in which competition will take place. . . . It incorporates into law standards which, even though acceptable to the majority, could not be put into effect

⁵⁷ In one sense this is obvious inasmuch as workers cannot bargain individually about hours in large industrial establishments that require the coordinated presence of hundreds or thousands of employees. See R. MACDONALD, *COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY: A STUDY OF WAGE STRUCTURE AND COMPETITIVE RELATIONS* 62 (1963).

⁵⁸ Insofar as earning subminimum wages makes it impossible to sustain a family and thus results in external effects in the form of state-mediated redistributive subsidies, the decision whether to acquiesce in such wages is not purely self-regarding. State intervention, to that extent, would be subject to a lower degree of justificatory scrutiny.

⁵⁹ See, e.g., 93 CONG. REC. 1500 (1947) (statement of Rep. Robison).

⁶⁰ See J. ELSTER, *supra* note 39, at 96-97; Karl Marx, *Zur Kritik der Politischen Ökonomie (Manuskript 1861-1863)*, in Karl Marx [and] Friedrich Engels, *Gesamtausgabe (MEGA)*, II:3: “*Das Kapital*” und Vorarbeiten, Text Pt. 1, at 162 (1976) (stating that “the individual capitalist constantly rebels against the aggregate interest of the capitalist class”). On “capitalists against capitalism” during the New Deal, see M. WEINSTEIN, *THE GREAT DEPRESSION: DELAYED RECOVERY AND ECONOMIC CHANGE IN AMERICA, 1929-1939*, at 204 (1988).

⁶¹ See Linder, *supra* note 18. For a similar account, see Thurow, *The Post-Industrial Era Is Over*, N.Y. Times, Sept. 4, 1989, at A19, col. 1.

⁶² See 1 K. MARX, *supra* note 13, ch. 15, § IIIa.

without governmental authority as long as a handful of men in any given industry refused to conform to them.⁶³

When one organization, purporting to represent over half of all industrial employment in the United States, stated "that it is an unfair competitive advantage for one manufacturing establishment to gain a commercial advantage over another through the exploitation of its labor,"⁶⁴ it neglected to explain that it had only one subset of exploitation in mind. For once the larger capitals can maintain profitability by relying mainly on the increased productivity from labor-saving capital investment and the machine-forced intensification of labor,⁶⁵ they can afford to dispense with lengthening the working day and wage-chiseling.⁶⁶ Only in this sense, was the bill "a step away from what we have been doing in the past, where we had absolute liberty of action to exploit labor to our hearts' content."⁶⁷ Consequently, the formal equalization of conditions of exploitation through a national statutory floor under wages and a ceiling on nonovertime hours⁶⁸ in fact created unequal conditions because it deprived smaller capitals of their basic methods of exploitation.⁶⁹ Precisely for this reason, numerous industry as-

⁶³ *FLSA Hearings*, *supra* note 48, at 309, 310 (statement of Isador Lubin). Numerous witnesses echoed this sentiment. "In this industry, as in many others, 'free competition' and 'fair labor standards' . . . cannot coexist." *Id.* at 464 (statement of Paul Brissenden, Vice-Chairman, N.Y.C. Millinery Stabilization Comm.). "As an employer, as long as you make my competitors do the same thing, I don't care what wages you force me to pay." *Id.* at 475 (statement of E. Lane, The Lane Co., largest furniture producer in U.S.). "[S]weatshop practices' . . . [are] not a matter which industry itself can correct." *Id.* at 710 (statement of G. Harrington, Nat'l Publishers Ass'n). "It is difficult to induce employers to enter into collective bargaining agreements when the unions are not in [a] position to protect the employers from the undercutting of labor costs in other areas." *Id.* at 946 (statement of Sidney Hillman, Pres., Amalg. Clothing Workers of Am.).

⁶⁴ *Id.* at 134 (statement of John Paine, Chairman of Management Group of Nat. Council for Indus. Progress).

⁶⁵ See 1 K. MARX, *supra* note 13, chs. 16-17; D. MASSEY & R. MEEGAN, *THE ANATOMY OF JOB LOSS* (1982).

⁶⁶ Thus, the president of Johnson & Johnson Co. testified that he had introduced the six-hour day in his plants because that "is the longest operating period that a man or woman can work without interruption." *FLSA Hearings*, *supra* note 48, at 99 (statement of Robert Johnson).

⁶⁷ *Id.* at 138 (statement of John Paine, Chairman of Management Group of Nat'l Council for Indus. Progress).

⁶⁸ Indeed, the owner of numerous cotton spinning mills in Alabama who was a former President of the American Cotton Manufacturers Association urged a ban on overtime altogether. His recommendation: "Get another man." *Id.* at 451 (statement of Donald Comer).

⁶⁹ *Id.* at 487 (statement of E. Lane, The Lane Co.). "The little fellow is the fellow

sociations and companies urged Congress not to exempt small employers.⁷⁰

FLSA was clearly paternalistic in its approach to workers who earned below the minimum wage.⁷¹ As many witnesses testified, the Act purported to “protect[] only poorly paid workers who are not in a position to protect themselves.”⁷² As to those largely adult, white male workers whose wages already exceeded the level for which any plausible consensus could be marshalled,⁷³ their agent, the American Federation of Labor, put Congress on notice that it would strenuously oppose any legislation that fixed general minimum wage standards for men in private industry.⁷⁴ The CIO⁷⁵ and many large employers,⁷⁶ who emphasized the need to preserve voluntary collective bargaining, joined the AFL in this view.⁷⁷

who is going to catch the devil, who is not mechanized, who has got probably inefficient labor.” *Id.*

⁷⁰ See, e.g., *id.* at 149 (statement of Paul Hanway, Exec. Sec’y-Treasurer, Nat’l Can & Tube Ass’n). Several witnesses, including the National Association of Manufacturers (NAM), noted that exempting small employers would undermine the goal of eliminating sweatshops. See *id.* at 645-46, 654 (statement of N. Sargent, Sec’y, NAM); *id.* at 752 (statement of H. Gutterson, Pres., Inst. Carpet Mfrs. of Am.).

⁷¹ Kleinig adopts the following puzzling position. In defending itself against a lawsuit charging it with having entered into subminimum wage agreements with its employees, a company argues that the workers entered into the agreements freely. In arguing that workers need to be protected against unwise agreements, “the judge has acted paternalistically toward the workers . . . though the law is not paternalistic in its intent. Though the workers have been treated paternalistically, they would not be justified in claiming that the law forbidding them from entering the particular wage contract was itself paternalistic.” J. KLEINIG, *supra* note 34, at 11. Precisely the opposite is the case. The entire motivation of the minimum wage law is to prevent workers from submitting to, acquiescing in, or agreeing to offers that the state deems not to be in their interest. This type of legislation paternalistically constricts the permissible scope of consensual agreements by declaring that only economic coercion could induce a worker to accept such an exploitative offer. The judge is merely ministerially executing the letter, spirit, and purpose of the law.

⁷² *FLSA Hearings, supra* note 48, at 10 n.1 (statement of Robert Jackson, Asst. Atty. Gen.). Senator Claude Pepper referred to the bill as an effort “to build up the last group that is down at the bottom that have not been able to build themselves up by their own bootstraps.” *Id.* at 234. John L. Lewis characterized this group as the “submerged element in our working people who are incapable of helping themselves and whom the organized labor movement has not been permitted to serve.” *Id.* at 286.

⁷³ See, e.g., *id.* at 1195 (statement of Donald Richberg).

⁷⁴ *Id.* at 219 (statement of William Green, Pres., AFL).

⁷⁵ *Id.* at 281 (statement of John L. Lewis).

⁷⁶ See, e.g., *id.* at 848-49 (statement of J. Battle, Exec. Sec’y, Nat’l Coal Ass’n).

⁷⁷ This opposition took the form of objecting to the proposed Labor Standards Board, which would have had the power to establish a “fair wage” if it believed that

State intervention vis-à-vis employers, however, assumed a different quality. The relatively few low paying firms that were either forced to pay higher minimum wages⁷⁸ or were forced out of business obviously were not treated paternalistically. Those whose good the state was seeking to achieve were these firms' low-paid employees or larger competitors.⁷⁹ Only insofar as FLSA was designed to save capitalism for the next generation of capitalists from the rapacity of the current generation of chiselers,⁸⁰ did the state act paternalistically on behalf of these most exploitative employers. Even this claim would have been true only of those capitalists who were shocked into reorganizing production and increasing productivity. Those who were proletarianized or otherwise expropriated received no benefit.

Large employers, however, benefitted from the enhanced viability and legitimation of capitalism as well as from the elimination of competitors who destabilized aggregate conditions of profitability.⁸¹ If these

collective bargaining was inadequate or ineffective to secure such a wage for employees. S. 2475, 75th Cong., 1st Sess., § 5(a) (1937). For an example of this opposition, see *FLSA Hearings, supra* note 48, at 564 (statement of A. Besse, Pres., Nat'l Ass'n Wool Mfrs.). An attenuated version of this provision emerged in FLSA in the form of industry committees that recommended minimum wage rates to the Wage and Hour Administrator. These recommendations were made with a view to raising the minimum wage from 30 to 40 cents between the second and seventh year the Act was in effect. See *FLSA, supra* note 9, §§ 5, 6, 8, 52 Stat. at 1062-65 (codified as amended 29 U.S.C. §§ 205, 206, 208 (1982 & Supp. V 1987)). When Congress raised the minimum wage from 40 to 75 cents in 1949, it eliminated the committees except for Puerto Rico and the Virgin Islands. See *Fair Labor Standards Amendments of 1949*, Pub. L. No. 81-393, § 8, 63 Stat. 910, 915-16 (codified as amended at 29 U.S.C. § 205 (1982)).

⁷⁸ When FLSA went into effect in 1938, the percentage of covered employees earning less than the initial minimum wage of 25 cents was minuscule. See Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study*, 6 *LAW & CONTEMP. PROBS.* 406, 407 (1939).

⁷⁹ *FLSA Hearings, supra* note 48, at 18. Assistant Attorney General Robert Jackson stated that FLSA sought "to protect the man who is engaged in interstate commerce on a fair and lawful basis from the competition of those who would go into it on an unfair basis." *Id.*

⁸⁰ *Id.* at 309. Commissioner of Labor Statistics Isador Lubin stated that "this legislation . . . is essential . . . to permit and protect the functioning of the competitive system as we know it in this country." *Id.* Manufacturers of some consumer goods also stood to benefit from the purchasing power redistributed to low-paid workers through a minimum wage. *Id.*

⁸¹ A poll conducted soon after FLSA went into effect revealed that small manufacturers and retailers supported it more than their larger counterparts. *What Business Thinks*, *FORTUNE*, Oct. 1939, at 52, 90. This surprising result may derive from the fact that the smaller firms may have been exempt because they were not engaged in interstate commerce. See *FLSA, supra* note 9, § 13(a)(1), (2), 52 Stat. at 1067 (ex-

benefits were not contrary to large capital's intentions,⁸² were they beyond its power to promote without state intervention? If so, can capital's lack of absolute sovereignty be analogized to farmworkers' inability to secure the minimum wage from their employers through collective action?

Whereas the workers' weakness manifested itself vis-à-vis an antagonistic class, the impediment to large capital's accumulation lay not in the working class, but rather in its relationship to a competitive faction of capital that exploited its workers. Here it is necessary to distinguish between industries in which large capital and this chiseling faction competed directly and industries that the latter dominated. The former conflict played itself out at the time of the FLSA largely as a regional antagonism between northern industrial capital on the one hand and southern mills and agriculture on the other; the latter urged and the former successfully resisted regional differentials.⁸³ Large capital's direct action to contain the disruptive effects of unbridled absolute surplus-value production by smaller employers presumably entailed competing them out of business. Given the development of capital-intensive, labor-saving mechanization in industries in which the two competed, the wage differential was too great to offset. Industries controlled by

emptying intrastate retailer employees from minimum wage and maximum hours requirements).

⁸² The National Association of Manufacturers (NAM), while instinctively opposing any expansion of federal power or state economic regulation (but not state subsidies to capital), did not deny the need for local minimum wage laws. *FLSA Hearings, supra* note 48, at 623-25 (statement of James Emery, Gen. Counsel, NAM). *But see* A. TAYLOR, *LABOR POLICIES OF THE NATIONAL ASSOCIATION OF MANUFACTURERS* 166 (1928) (finding NAM's opposition to "class legislation" inconsistent). On the eve of the Roosevelt Administration's presentation of FLSA, NAM opposed such legislation on the grounds that it would impede economic recovery by increasing uncertainty, costs, and prices. *Peril to Recovery Seen in Wage Bill*, N.Y. Times, May 24, 1937, at 7, col. 2. By the end of World War II, NAM was willing to concede that a wealthy society could afford to help those it excluded from employment with a mandatory minimum wage. 1 NAT'L ASS'N OF MFRS., *THE AMERICAN INDIVIDUAL ENTERPRISE SYSTEM: ITS NATURE, EVOLUTION, AND FUTURE* 167-68 (1946). Yet at the same time, a minority faction within NAM led by steel and automobile manufacturing corporations that were concerned with overtime and portal-to-portal pay issues advocated repeal of FLSA. Porter, *NAM Group Seeks Labor Acts' Repeal*, N.Y. Times, Dec. 23, 1946, at 1, col. 2.

⁸³ *See, e.g., FLSA Hearings, supra* note 48, at 813-14 (statement of C. Murchison, Pres., Cotton-Textile Instit.). For a graphic account of the significant differences in wage rates between the North and the South, see *How a Minimum Wage of 40¢ an Hour Would Hit the Hiring Rates of Unskilled Labor*, BUS. WK., Dec. 18, 1937, at 26.

sweatshop methods were little amenable to mechanization. Finally, the largest employers in the most capital-intensive industries, which precluded entry by small firms, were unable to exert any direct market-mediated impact on chiselers. In the absence of competition and given their confrontational anti-unionism in the 1930s, such large capitals (organizationally represented by the NAM) apparently lacked a long view of the realizable needs of capital in general.⁸⁴ It is precisely at such a critical political-economic juncture that capital in general benefits from the fact that strong yet short-sighted factions of capital do not directly control the state.⁸⁵

IV. CHILD LABOR

Child labor legislation⁸⁶ creates a double layer of paternalism⁸⁷ with the state paternalistically overriding or sanctioning the literal paternal-

⁸⁴ In the 1930s, NAM's leadership appears to have been captured by representatives of the largest manufacturing capitals that were closely associated with extreme right-wing political organizations. See Burch, *The NAM as an Interest Group*, 4 POL. & SOC'Y 97, 102-03, 110-14 (1973).

⁸⁵ See generally J. ELSTER, *supra* note 36, at 409-11 (noting Marx's observations on short- and long-term interests of capital). On NAM's ineffectiveness, see Gable, *NAM: Influential Lobby or Kiss of Death?*, 15 J. POL. 254 (1953). Skeptics questioned whether NAM even represented its membership, let alone manufacturing capital in general. *Renovation in N.A.M.*, FORTUNE, July 1948, at 72; Cleveland, *NAM: Spokesman for Industry?*, 26 HARV. BUS. REV. 353 (1948).

⁸⁶ Until FLSA was amended in 1966, it exempted from the child labor provisions "any employee employed in agriculture while not required to attend school." FLSA, *supra* note 9, § 13(c), 52 Stat. at 1068; see also Felt, *The Child Labor Provisions of the Fair Labor Standards Act*, 11 LAB. HIST. 467 (1970); Lumpkin, *The Child Labor Provisions of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 391 (1939). On the historical background of child labor regulation, see *FLSA Hearings*, *supra* note 48, at 381-401; 1 GRACE ABBOTT, *THE CHILD AND THE STATE: LEGAL STATUS IN THE FAMILY, APPRENTICESHIP AND CHILD LABOR* 259-636 (1938); CHILDREN'S BUREAU, U.S. DEP'T OF LABOR, INDUSTRIAL SERIES NO. 1, CHILD LABOR LEGISLATION IN THE U.S. (1915); M. LOUGHRAM, *THE HISTORICAL DEVELOPMENT OF CHILD-LABOR LEGISLATION IN THE UNITED STATES* (1921); O. PHELPS, *THE LEGISLATIVE BACKGROUND OF THE FAIR LABOR STANDARDS ACT* 9-24 (1939). The Sugar Act of 1937, Pub. L. No. 75-414, 50 Stat. 903, which expired at the end of 1974, conditioned growers' eligibility for federal payments on compliance with a ban on the employment of children under fourteen and of those between fourteen and sixteen for more than eight hours daily. *Id.* § 301(a), 50 Stat. 909. The law provided an exception for children who were "member[s] of the immediate family of a person who was the legal owner of not less than 40 per centum of the crop at the time such work was performed." *Id.* Violation of these provisions did not constitute an absolute bar to eligibility, but merely triggered a penalty deduction. See 7 U.S.C. § 1131(a) (1970). In amending FLSA to phase in coverage of agricultural workers and to prohibit some

ism of parents who wish to compel their children to work.⁸⁸ The latitude permitted migrant and seasonal farmworkers, for example, with regard to their children's labor is considerable.⁸⁹ Children of *any* age may, with parental permission, work outside of school hours on farms that do not employ enough workers to be subject to the minimum-wage provision of FLSA.⁹⁰ Twelve- and thirteen-year-old children may be

child labor, what was arguably the most liberal Congress of the postwar period rejected an amendment that would have outlawed the employment of 13- and 14-year-olds as migrant farmworkers. *See* 112 CONG. REC. 11605-11607, 20639, 20776-20790 (1966). For an overview of current state child labor laws and their applicability to agriculture, see FEDERAL AND STATE EMPLOYMENT STANDARDS AND U.S. FARM LABOR: A REFERENCE GUIDE TO LABOR PROTECTIVE LAWS AND THEIR APPLICABILITY IN THE AGRICULTURAL WORKPLACE (Brian Craddock ed. 1988); 3 N. HARL, AGRICULTURAL LAW § 23.06 (1987); Coens, *Child Labor Laws: A Viable Legacy for the 1980s*, 33 LAB. L.J. 668 (1982). Historically, extensive use of child labor in agriculture was not confined to the United States. As late as 1904, almost one-fifth of all German elementary school pupils under the age of 14 were agricultural wage workers outside of their families. *See* F. TENNSTEDT, *supra* note 31, at 162. On the contemporary extent of child labor throughout the world, see Mendelievich, *Child Labour*, 118 INT'L LAB. REV. 557 (1979).

⁸⁷ For an example of inverted Benthamite paternalism, see G. HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* 79-82 (1985).

⁸⁸ Arguably the most famous example of successful literal-paternal resistance to state paternalism is *Hammer v. Dagenhart*, 247 U.S. 251 (1918). In *Hammer*, a father, on behalf of his two sons employed in a cotton mill, succeeded in his challenge to the Owen-Keating Act, which prohibited the shipment in interstate commerce of products produced by children under 14.

⁸⁹ Although all parents possess this discretion, its most poignant contemporary exercise relates to migrant and seasonal farmworkers. By the same token, the very high accident and mortality rates among farmers' children who are under 16, and therefore exempt from the Occupational Safety and Health Act, raise significant issues of state acquiescence in biological paternalism. A farmer whose 11-year old son had suffocated in a grain wagon revealed the commercial orientation of such paternalism by referring to him as "a good little worker." *See* Wilkerson, *Farms, Deadliest Workplace, Taking the Lives of Children*, N.Y. Times, Sept. 26, 1988, at A1, col. 5, A21, col. 3. On agricultural child labor, see K. LUMPKIN & D. DOUGLAS, *CHILD WORKERS IN AMERICA* 59-81 (1937); R. TAYLOR, *SWEATSHOPS IN THE SUN: CHILD LABOR ON THE FARM* (1973).

⁹⁰ *See* 29 U.S.C. § 213(c)(1)(A)(ii) (1982). Harsh and oppressive conditions may nevertheless prevail on these exempt farms that do not "use more than five hundred man-days of agricultural labor," *see id.* § 213(a)(6)(A), in any calendar quarter during the preceding year. Many cotton farms in West Texas and sugar beet farms in the Plains states that do not meet this threshold requirement make extensive use of families with small children to hoe weeds for as many as 12 to 14 hours daily at the height of the summer. *See* Linder, *The Involuntary Conversion of Employees into Self-Employed: The Internal Revenue Service and Section 530*, 22 CLEARINGHOUSE REV. 14, 14-15 (1988). A fictional turn-of-the-century Colorado sugar beet farmer is described

employed in agriculture with parental permission or on the same farm as their parents.⁹¹ Children fourteen and older may be employed on farms without any restrictions provided that the Secretary of Labor does not find the work to be hazardous to children under sixteen.⁹² The Secretary of Labor can grant farmers a waiver to employ ten- and eleven-year-old children to hand harvest crops as nonmigrant commuters on a piece-rate basis for as long as eight weeks.⁹³ In addition, agricultural employers need not pay the minimum wage to children sixteen or under who hand harvest for a piece rate on the same farm as their parents provided they are paid the same piece rate as adults.⁹⁴

Because statutory prohibitions apply only to children who are employees, unscrupulous employers dodge such legislation by hiring children as "independent contractors."⁹⁵ Thus, when employers treat their child laborers as self-employed independent contractors, they are not subject to restrictions. Although it is unclear whether farmers have expressly characterized individual twelve-year-olds as entrepreneurs,⁹⁶ they have sought to categorize them as functioning components of en-

as knowing that

[T]hinning beets was among the most miserable jobs on earth. Hour after hour, bent double, eyes close to the earth, back knotted with pain, knees scabbed where they dragged along the ground. He had great respect for a man, or more likely a child, who could thin beets properly, and he brooded about where he would find his next crop of workers.

J. MICHENER, *CENTENNIAL* 808 (1975). On sugar beet growers' use of migrant children to "crawl on their hands and knees" in the thinning process, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 616: *HANDBOOK OF LABOR STATISTICS* 44-45 (1936).

⁹¹ 29 U.S.C. § 213(c)(1)(B) (1982).

⁹² *Id.* § 213(c)(2).

⁹³ *Id.* § 213 (c)(4)(A); 29 C.F.R. §§ 575.1-9 (1989).

⁹⁴ 29 U.S.C. § 213(a)(6)(D) (1982).

⁹⁵ See Kahn-Freund, *Legislation Through Adjudication: The Legal Aspect of Fair Wages Clauses and Recognised Conditions*, 11 *MOD. L. REV.* 269, 275 (1948) (stating that scope of such legislation inspires "a species of law evasions known all over the world where social legislation exists, *viz.*, the dodging of the legal protection given to an employee by making him appear as an independent contractor"). The substance of these workers' independence consists "in the necessity of bearing their misery independently." H. SPEIER, *DIE ANGESTELLTEN VOR DEM NATIONALSOZIALISMUS: EIN BEITRAG ZUM VERSTÄNDNIS DER DEUTSCHEN SOZIALSTRUKTUR 1918-1933*, at 65 (1989).

⁹⁶ Katharine Du Pre Lumpkin referred to "the long-familiar argument of newspaper publishers that child distributors of newspapers are not employees, but 'little merchants' who hold independent contracts with them, and that hence the publishing companies are not responsible for the conditions under which the children work." Lumpkin, *supra* note 86, at 401.

trepreneurial migrant farmworker families.⁹⁷ If farmers succeed in classifying as self-employed parents who employ their own children as laborers, they can evade the ban on employing “oppressive child labor,”⁹⁸ because parents can employ their own children under the age of sixteen.⁹⁹

By granting parents and farm employers waivers from the bans on child labor and subminimum wages, the state defers not only to biological paternalism, but also to precapitalist master-paternalism. Within the limits described above, the state deems fathers and farmers to know the children’s best interests.¹⁰⁰ The state’s deference extends to the point of entitling them to deprive children of the freedom not to perform hard labor.¹⁰¹ This deference is particularly ironic in light of three consequences. First, the state apparently regards the parents’ and employers’ judgment as unclouded and unbiased despite the fact that it is exercised solely to maximize family income or profit and has little or no rational relation to the children’s welfare.¹⁰² Second, by acquiescing in such private commercial judgments and hence in the flooding of the farm labor market with a large number of low-paid workers, the state reinforces

⁹⁷ See Linder, *Petty-Bourgeois Pickle Pickers: An Agricultural Labor-Law Hoax Comes A Cropper*, 25 TULSA L.J. 195, 215 (1989).

⁹⁸ 29 U.S.C. § 203(l) (1982); *id.* § 212(c).

⁹⁹ 29 C.F.R. § 570.126 (1988); Lumpkin, *supra* note 86, at 402. This freedom is restricted in manufacturing, mining, and other hazardous employment. In an attempt to circumvent the child labor regulations contained in federal sugar beet contracts under the Agricultural Adjustment Act, growers in 1935 “made their laborers sign sharecropper contracts and thus become in law independent ‘producers’ themselves — with their children free to continue working.” K. LUMPKIN & D. DOUGLAS, *supra* note 89, at 73.

¹⁰⁰ In early 19th-century American cotton mills that employed whole families, “the many children could hardly be expected to distinguish between the tyranny of an employer and that of a parent.” C. WARE, *THE EARLY NEW ENGLAND COTTON MANUFACTURE: A STUDY IN INDUSTRIAL BEGINNINGS* 290 (1966).

¹⁰¹ “We eliminated stoop labor among the wetbacks, and I ask why can we not do the same thing for the children in America on American farms.” 112 CONG. REC. 11606 (1966) (statement of Representative Carey). “It is very easy to idealize farmwork. Most of us have had experience in it and benefited from it, but the farmwork of children today, particularly in the field of fruits and vegetables or stoop labor, is very different from the farm labor of 50 years ago on a general farm.” 112 CONG. REC. 20784 (1966) (statement of Senator Douglas).

¹⁰² Marx spoke of working fathers as slave merchants vis-à-vis their wives and children insofar as the latter did not have unfettered disposition of their own labor power. 1 K. MARX, *supra* note 13, ch. 15, § IIIa. Remarkably, whereas Marx viewed early capitalism’s voracious appetite for child labor as a product of the most advanced mechanization and the highest capital-labor ratios, contemporary child labor is confined to atavistic, labor-intensive niches in the division of labor that use little capital.

the vicious circle that induces farmworker parents to cause their children to work in the first place.¹⁰³ Although the state, by treating parents and employers as lacking the will to refrain from exploiting children, could intervene to prohibit employment that exploits children,¹⁰⁴ the state works instead at cross-purposes with the otherwise paternalistic minimum wage legislation by exacerbating the very conditions that make such laws necessary.¹⁰⁵ Finally, state deference to commercial and familial paternalism perversely transforms parents into the labor-market appendages of their working children.¹⁰⁶

V. PROTECTING FARMWORKERS FROM UNCONSCIONABLE CONTRACTUAL PROCEDURES

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA)¹⁰⁷ is a unique regime of labor-protective paternalism. This federal legislation is designed to protect migrant and seasonal farmworkers from overreaching employers. The state cannot be deemed to impose a value on workers in the form of a statutory minimum wage because market rationality presumes that all workers prefer \$3.35 to \$2.00 per hour. But does the state substitute its judgment for migrant farmworkers' or merely supplement their will and power when it prescribes requirements regarding written disclosures, labor contractor registration, recruiting, recordkeeping, wage payment, transportation, and housing — matters that the federal government does not regulate on behalf of other privately employed workers?¹⁰⁸ If, that is, workers

¹⁰³ "Even more ironic is the fact that child labor does not solve the family low income problem. The employment of children in agriculture — a source of cheap labor — in the long run depresses the general wage level." 112 CONG. REC. 20780 (1966) (statement of Senator Williams); see also S. REP. NO. 696: *Fair Labor Standards Amendments of 1961*, 87th Cong., 1st Sess. 3 (1961) (providing virtually identical statement).

¹⁰⁴ "I was not at all impressed by the idyllic description of these happy people, children and mothers and fathers, kids under 14 years of age going out in the golden sunlight to pick strawberries. Of course, these children are going out to be exploited." 112 CONG. REC. 11607 (1966) (statement of Representative Joelson).

¹⁰⁵ See Bryce, *Alternative Policies for Increasing the Earnings of Migratory Farm Workers*, 18 PUB. POL'Y 413, 414, 417-18 (1970).

¹⁰⁶ "Many Mexican fathers and mothers are being hired today because they have a large family of young children who will work next to them on their knees . . . picking crops." 112 CONG. REC. 20779 (1966) (statement of Senator Pastore).

¹⁰⁷ Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2583 (1983) (codified as amended at 29 U.S.C. §§ 1801-1872 (1982 & Supp. V 1987)).

¹⁰⁸ *But see id.* §§ 591-608 (prescribing content and form of agreements between

preferred to trade off some of these protections for higher wages, would the state act paternalistically in proscribing the exercise of that judgment? This question might be moot if this tradeoff did not exist and the wage level would be even lower absent such state-enforced protections. Empirical evidence of the farm labor market during the postwar period strongly suggests that before the advent of protective legislation workers were not in a position to negotiate this tradeoff because they lacked collective bargaining power. Farm workers continue to lack bargaining power when the state fails to enforce this legislation. Rather than giving rise to a tradeoff, substandard nonwage terms of employment¹⁰⁹ typically go hand in hand with more exploitative wages. The question is worth pursuing, however, for its theoretical implications for paternalistic interference with "choices" that are made in ignorance or under economic coercion. This particular paternalism is, moreover, ironically compensatory as the state must bear partial responsibility for farmworkers' historical self-defenselessness by virtue of having excluded them from such statutory rights as collective bargaining, premium overtime rates, social security, unemployment insurance, and workers compensation.¹¹⁰

To this end, AWPA may be analyzed in two parts: substantive protections and formal-contractual guidelines. The former are largely restricted to the safety and health aspects of transportation and hous-

masters and seamen, provision of meals, time of wage payments, advances, etc.). Even in the *Lochner* era, the U.S. Supreme Court upheld a paternalistic seamen's-payment law as in the best interest of a peculiarly powerless class. *Patterson v. Bark Eudora*, 190 U.S. 169, 175 (1903). A recent legislative initiative to limit employees' waiver of rights under the Age Discrimination in Employment Act in connection with mass terminations reveals that even avowed opponents of paternalism bow to it. In opposing such a bill, they characterized it as saying "that Congress is in a better position than the employee to decide whether he or she should voluntarily sign a release because we can't trust employees to make such a decision for themselves." S. REP. NO. 79: *The Age Discrimination in Employment Waiver Protection Act of 1989*, 101st Cong., 1st Sess. 30 (1989). Yet in offering an alternative approach, opponents propose mandatory disclosure of sufficient information "to make knowing and voluntary decisions." *Id.* at 35. In other words, they, too, do not trust employees to know when they do not know enough to make such decisions or to know how to secure such information on their own.

¹⁰⁹ For a general discussion of substandard nonwage terms of employment unrelated to agricultural labor, see W. WESSELS, *MINIMUM WAGES, FRINGE BENEFITS, AND WORKING CONDITIONS* (1980).

¹¹⁰ On the origins of these exclusions, see Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).

ing.¹¹¹ In this regard they do not differ qualitatively from consumer safety or health requirements. Mandating bolted-down seats for migrant farmworkers transported by agricultural employers¹¹² is no different than mandating safety belts for passengers transported by common-carrier airlines.¹¹³ Just as an air passenger might prefer to risk traveling without safety belts to secure a cheaper ticket, a migrant might prefer to take his chances sitting on the floor for a thousand miles¹¹⁴ to receive a higher hourly wage. Given the penury of most migrants, the costs associated with injuries that might have been avoided by compliance with safety regulations would have to be socialized. These external effects and public charges thus reduce the justificatory weight that this particular "impure" paternalistic argument must bear.¹¹⁵

In contrast, a state-imposed requirement that employers give migrant workers a written disclosure of the terms and conditions of their employment at the time of recruitment and a detailed written statement of the basis of their wages and all deductions¹¹⁶ can plausibly be nonpaternalistic because without such information workers cannot make rational decisions about the various offers on the labor market. This blind contracting lacks the consensual element that is putatively inherent in the autonomy of the individual in her commercial relationships.¹¹⁷ In other words, those without an alternative may be subject to

¹¹¹ See 29 U.S.C. §§ 1823, 1841 (1982). For regulations pertaining to these protections, see 29 C.F.R. §§ 500.100-.105, .130-.135 (1989).

¹¹² 29 C.F.R. § 500.104(l) (1989).

¹¹³ 14 C.F.R. § 121.311 (1989).

¹¹⁴ The importance of the transportation conditions for migratory farmworkers is enhanced by the fact that, "In the ordinary sense of the word, they do not travel; most of them are hauled." THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE 94 (1951).

¹¹⁵ See J. KLEINIG, *supra* note 34, at 92-96; ON LIBERTY, *supra* note 34, ch. 4. Some housing regulations arguably present a different case. Prescribing 16-mesh screens or a window area one-tenth that of floor area does not rise to the level of preventing life-threatening dangers. See 29 C.F.R. § 1910.142(b)(7), (8) (1989). Given the massive presence of small children and infants, however, failure to provide sanitary conditions may give rise to such dangers. Whereas it might well be paternalistic for the state to bar migrant farmworkers from sacrificing relatively minor housing standards for higher wages, state intervention that prohibits parents from making major trade-offs on behalf of their children is another instance of second-order social paternalism in contravention of biological paternalism.

¹¹⁶ 29 U.S.C. § 1821 (1982).

¹¹⁷ Interestingly, Congress chose to confer a lower level of protection on local commuter workers whom crew leaders or farmers do not transport to work. These workers are not entitled to a written disclosure of the terms and conditions of their employment unless they request it. *Id.* § 1831(a); see also 29 C.F.R. § 500.20(g) (1989) (defining

such economic coercion that their autonomy becomes so attenuated that the state, rather than violating it, creates its prerequisites.¹¹⁸

This type of state intervention, which prevents the creation of a temporarily captive labor force,¹¹⁹ can be analogized to Mill's exemption of agreements to enter into slavery from the general presumption in favor of liberty of contract because they defeat the purpose of the justification for allowing people to dispose of themselves.¹²⁰

VI. THE FAILURE OF PATERNALISM

From any plausible perspective, the foregoing types of intervention constitute avowedly paternalistic regimes designed to restrain atomized workers from acquiescing in their own exploitation. Incompatible with the moral groundwork of liberal capitalist society, the state can justify this paternalism only if it ultimately prepares the states' wards for the

day-haul operation). Because these workers are not a captive labor force and can leave the worksite immediately upon discovering that the work does not meet their expectations, Congress presumably believed that any damages they might suffer would be minimal and could therefore safely be chalked up to experience. The text can be read logically — albeit whimsically — to support the interpretation that because employers are not required to disclose any information to these workers, voluntary disclosure of false or misleading information would not violate the statute. *See* 29 U.S.C. § 1831(e) (1982). Ironically, the seasonal farmworkers' employers who lobbied for this type of lesser protection were eager to testify that "when you have been transported to a housing facility thousands of miles away, you really do not have the freedom to negotiate, to work or not to work, that you would have living at your own home." *Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 78 (1976) [hereafter *Oversight Hearings*] (statement of S. Toothaker).

¹¹⁸ Kahn-Freund states that:

As a social fact that which the law calls "freedom of contract" may . . . be no more than the freedom to restrict or to give up one's freedom. Conversely 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.

O. KAHN-FREUND, *supra* note 3, at 13-14. Similarly, Cass Sunstein, takes the position that when preferences are not autonomous and state intervention serves to promote autonomy of preference, liberty is enhanced rather than curtailed. *See* Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

¹¹⁹ Luring vulnerable workers to travel long distances on the basis of false or misleading information is a long-recognized abuse. In the mid-19th century, New England cotton manufacturers paid labor recruiters bonuses for recruiting workers from such long distances that it was not easy for them to return home. *See* C. WARE, *supra* note 100, at 215.

¹²⁰ *See* ON LIBERTY, *supra* note 34, ch. 5.

collective autonomy that the nonpaternalized working class is presumed to have achieved.¹²¹ Like the infantry-industry exception to free trade, labor protection is supposed to act as a temporary shield behind which childlike workers can develop to the point of being able to dispense with such supports.¹²²

But unlike some beneficiaries of affirmative action programs who doubt whether they deserve their positions,¹²³ the migrant farmworkers' problem is not that their employers believe that they could not have achieved the minimum wage or better housing without state intervention. Because the latter's purpose is to suppress the spontaneous workings of a defective labor market, that fact can scarcely be denied. Rather, the farmworkers' problem lies in their inability to vindicate — let alone to build on — these rights even with state intervention.¹²⁴ To extend the comparison with affirmative action: Where affirmative action candidates obtain positions for which they are currently less "qualified" than other candidates, a positive self-fulfilling prophecy may be acted out in which merely occupying the positions invests the individuals with the self-confidence to perform as well as the excluded competitors. It is the analogous (collective) self-transformative process that migrants farmworkers have yet to complete: circumventing market forces in the short run in order to forge conditions and consciousness under which they can ultimately confront their employers in conformity with

¹²¹ A profound irony inheres in the neglected fact that farmers (including employers) benefit to a much greater extent than migrant farmworkers from the perpetual largesse of a panoply of state paternalistic programs in the form of price supports, production controls, marketing orders, payment-in-kind programs, commodity loans, and export credits. See 11 N. HART, *supra* note 86, chs. 90-92; 9 *id.*, ch. 70. The Perishable Agricultural Commodities Act of 1930, Pub. L. No. 71-325, 46 Stat. 531 (codified as amended at 7 U.S.C. § 499a-499t (1988)), for example, protects farmers from unfair, deceptive, and fraudulent practices by the commission merchants, dealers, and brokers who buy their perishable commodities in ways analogous to the protections that AWPAs affords farmworkers against overreaching farm employers. Atiyah argues that Anglo-American legislatures and courts have paternalized contractual relations generally. P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

¹²² "In one sense, the first objective of any [Minimum] Wages Council should be to commit suicide." K. WEDDERBURN, *supra* note 16, at 352.

¹²³ "[P]referential treatment may . . . stigmatize its recipient groups, for . . . such a policy may imply to some the recipients' inferiority and especial need for protection." *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring).

¹²⁴ Significantly, in explaining the Roosevelt Administration's FLSA bill to Congress, Assistant Attorney General Jackson indicated that he anticipated that enforcement would be fueled largely by complaints from labor unions and business competitors, rather than from the affected unorganized workers. *FLSA Hearings, supra* note 48, at 71.

a normally operating labor market.

The key to understanding the predicament of migrant farmworkers is that where most minimum wage jobs are purportedly for entry level positions that workers occupy for a short time before advancing to higher paid positions,¹²⁵ migrant farmworkers are permanently immobilized in their positions.¹²⁶ Thus, instead of producing successive graduating classes, state paternalism degenerates into lifelong support of the same workers it seeks to benefit. This effect should create the presumption that the sectors in which these workers are exploited are structurally impervious to the automatically corrosive effects that market forces exert on pockets of local and historically contingent disequilibria.¹²⁷

That migrant and seasonal farmworkers who hand harvest fruits and vegetables receive wages near the bottom of wage scale rates in the United States is not disputed. Even the reasons are relatively uncontroversial. Because this highly labor-intensive work is unskilled, it is performed by uneducated workers. The low level of skill — in tandem with the virtual absence of physical capital — translates into a low and stagnant level of productivity which narrows the scope for raising the

¹²⁵ 1 *Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education on Labor*, 100th Cong., 1st Sess. 82-83 (1987) (statement of Nat'l Grocers Ass'n).

¹²⁶ Were its implications for policy not so pernicious, the following observation could be dismissed as irony:

The harvest labor market has an earnings pattern similar to professional sports: high-wage years are typically followed by lower earnings. A rational wage-earner who realized that his or her earnings will decline with age would save from current high earnings or acquire other skills likely to enhance earnings in the next career.

P. MARTIN, *SEASONAL WORKERS IN AMERICAN AGRICULTURE: BACKGROUND AND ISSUES* 28 (1985).

¹²⁷ In this regard, socioeconomic paternalism is, once again, similar to affirmative action programs or the promotion of single-member electoral district with cohesive, bloc-voting black or Hispanic majorities. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982); Finder, *Obstacles to Council Minority Groups*, N.Y. Times, May 30, 1989, at 28, col. 4. On the party-political effects of single-member districts, see D. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1967). Designed to overcome the effects of generations of race and sex discrimination, these remedies must rest on an underlying conception that they will become superfluous because substantive equality of opportunity will have been achieved. The suggestion that affirmative action might be required in perpetuity would be tantamount to an admission that discrimination is not merely historical, but inherent in the U.S. political economy — or, alternatively, that the historical impact is ineradicable. Neither of these claims would be compatible with liberal theories of a morally neutral market-driven society. See, e.g., D. GAUTHIER, *supra* note 32, at 83-112 (assessing claims of moral anarchy).

wage level. Because the supply side of the labor market is unorganized, the only power unskilled workers traditionally have used to enforce higher wages is unavailable.¹²⁸ The permanent presence of a huge reserve army of unemployed means that labor market forces inexorably press down the wage level. In a vicious circle, the low wages and physically hard work attract only the most desperate and vulnerable workers, who are least able to defend themselves.

Conditions in the New York City area illustrate the chronic labor market failure in hand-harvest agriculture. The shortage of accessible labor for retail, service, and clerical employment in the surrounding counties has led to recruiting employees from as far away as thirty-five miles. Consequently, "the minimum wage of \$3.35 an hour is meaningless; no one works for less than \$5 an hour."¹²⁹ At the same time, in Orange County, fifty miles from New York City, onion and sod farmers are constrained to recruit virtually all their hired laborers from South Texas. Yet the farmers have no trouble finding migrant farmworkers willing to travel 2,000 miles to work at \$3.35 an hour. At sixty hours weekly, the laborers consider six months of minimum wage employment "a good job."¹³⁰ The availability of a vast permanent reserve army of impoverished yet nationally mobile unemployed farmworkers functions as such a massive depressant that even significant surges in demand do not result in higher wage rates.¹³¹

VII. A PARADOXICAL ALTERNATIVE: EVEN MORE PATERNALISM

In light of the failure of socioeconomic paternalism to attain its self-liquidating ends on behalf of migrant farmworkers, it is necessary to consider the alternative to this self-perpetuating program. Paradoxical

¹²⁸ "The market value of their labor may be low, reflecting the low degree of compulsion they can bring to the bargaining process, as compared to the compulsion brought to bear by the employer." Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 627 (1943); see also Hale, *Minimum Wages and the Constitution*, 36 COLUM. L. REV. 629, 630 (1936) (discussing "forced sale" of labor).

¹²⁹ DePalma, *Bounties and Vans: Facing a Labor Shortage*, N.Y. Times, Jan. 26, 1989, at C17, col. 4; see also Johnson, *Youth Labor Scarcity Forcing Up Low Level Pay in New York Area*, *id.*, Mar. 17, 1986, at 15, col. 2; Ravo, *Connecticut Raises Its Minimum Wage*, *id.*, Oct. 2, 1987, at 39, col. 1.

¹³⁰ Statements furnished by author's clients.

¹³¹ "[I]n the Rio Grande Valley farmers could cut wages in half and still have fields of pickers. . . . [T]he available supply of labor makes all other wage considerations unimportant." Rosenberg, *Farm Workers Don't Have to Be Poor*, WASH. MONTHLY, Apr. 1989, at 22, 26. Macpherson uncovers a similar mechanism at work in the 17th-century political economy of Hobbes. C. MACPHERSON, *supra* note 20, at 138.

cally, the crucial weakness of the traditional approach is that it has not been paternalistic enough to break up the structural barriers to the normalization of migrant agricultural capital-labor relations. In that sense, these relations represent the most extreme instantiation of the claim that:

The modern model of the employment contract, as a voluntary consensual relationship sanctioned by the civil law, is suffused with an individualism that ignores the economic reality behind the bargain. Indeed, the entire basis of our law of contract is fragile in a society in which terms of "agreement" are increasingly dictated by the powerful party. . . . The question arises whether an employment contract on "sweated" terms dictated to a destitute worker by a take-it-or-leave-it employer would ever be seen as one induced by "economic duress."¹³²

Remedying this extraordinary configuration warrants and requires a comprehensive program of state intervention that will provide an array of substantive guarantees of wages and working and living conditions similar to those mandated for temporary foreign workers.¹³³

To determine the appropriate intervention, it is necessary to explore how these low wages work their way through the micro- and macroeconomic wage-profit-price matrix. This *cui bono* can be broken down into two large classes of potential beneficiaries: consumers and producers. In other words, are the low wages passed on to consumers in the form of low fruit and vegetable prices or do producers achieve above-average profits?¹³⁴ And, more specifically, how does this set of structural constraints operate to limit the scope of wage increases? To create a framework for analyzing these questions, four key variables have to be studied carefully.¹³⁵

First, what share of final prices do wages represent? For example, if wages account for ten percent of final prices, a ten percent increase in wages would, if passed on fully, force a price increase of only one percent. If, on the other hand, they represent fifty percent of final prices, such a wage increase would necessitate a five percent price increase.

Second, to what extent can producers substitute capital for labor so

¹³² K. WEDDERBURN, *supra* note 16, at 143.

¹³³ See 20 C.F.R. § 655.202 (1989); U.S. GENERAL ACCOUNTING OFFICE, THE H-2A PROGRAM: PROTECTIONS FOR U.S. FARMWORKERS (1988) (examining effectiveness of H-2A program for temporary foreign workers).

¹³⁴ "Producers" is, of course, too global a category to be useful. It embraces farmers, packing sheds, processors, wholesalers, transporters, and retailers, as well as integrated entities performing several of these functions.

¹³⁵ For an example of the cavalier rejection of such analysis, see Rosenberg, *supra* note 131, at 24.

that the increased capital intensity could absorb wage increases? An adequate response to this question first requires an inquiry into the technological underpinnings of a shift toward harvest mechanization. Not all consumer tastes will sustain the new varieties of fruits and vegetables that might have to be developed to accommodate mechanical harvesting.¹³⁶ Global answers are inappropriate; each crop has to be examined separately.¹³⁷ Where nature can accommodate machines, the workers' skill and productivity can be expected to rise while the supply of and demand for machine operators will increase compared to prior supply and demand schedules for hand-harvesters. Some wage increase for a reduced labor force can be anticipated. Enforcement of this process of increasing productivity and wages by substituting capital for labor represents one of the primary economic functions of labor unions. By the same token, employers consciously use the same process to discipline workers that seek to take advantage of a temporarily favorable constellation of supply and demand forces on the labor market.

Where mechanization is infeasible, and neither labor nor capital can trigger the substitution process, producer-employers may have recourse to more overtly conflictual strategies that no longer carry the authority of seemingly quasi-automatic rational economic processes. Although these responses may be superfluous without an organized labor force, when employers are unable to increase wages without raising prices, the next critical turning point in the economic transmission belt is the final consumer product market.

Namely, third, what is the price elasticity of demand for fruits and vegetables?¹³⁸ In other words, do consumers devote a constant absolute

¹³⁶ "Machines are not made to harvest crops; in reality, crops must be designed to be harvested by machines." Webb & Bruce, *Redesigning the Tomato for Mechanized Production*, in U.S. DEP'T OF AGRIC., SCIENCE FOR BETTER LIVING: THE YEARBOOK OF AGRICULTURE 1968, at 103, 104 (1968).

¹³⁷ See, e.g., W. FRIEDLAND, *MANUFACTURING GREEN GOLD: CAPITAL, LABOR, AND TECHNOLOGY IN THE LETTUCE INDUSTRY* (1981); B. PRICE, *THE POLITICAL ECONOMY OF MECHANIZATION IN U.S. AGRICULTURE* (1983); Brown, *Fruit and Vegetable Mechanization*, in *MIGRANT LABOR IN AGRICULTURE: AN INTERNATIONAL COMPARISON* 195 (P. Martin ed. 1984); Friedland, *Commodity Systems Analysis: An Approach to the Sociology of Agriculture*, in 1 *RESEARCH IN RURAL SOCIOLOGY AND DEVELOPMENT* 221 (H. Schwarzzeller ed. 1984); Friedland, Barton & Thomas, *Conditions and Consequences of Lettuce Harvest Mechanization*, 14 *HORTSCIENCE* 110 (1979); Friedland & Barton, *Tomato Technology*, *SOCIETY*, Sept.-Oct. 1976, at 34; N. ROBERTS, *Tree Shaker Saves Our Cherry Pies*, in *SCIENCE FOR BETTER LIVING: THE YEARBOOK OF AGRICULTURE 1968*, *supra* note 136, at 84; Whitaker, Webb, & Zaumeyer, *Tailoring Vegetable Crops to Order*, in *id.*, at 58.

¹³⁸ To avoid complications, this Article assumes that wage increases affect all fruits

amount of income or share of their budgets to fruits and vegetables so that an increase in price will leave total expenditure unchanged (for example, is demand unit elastic)? Or will consumers increase expenditures to consume the same physical amounts (for example, is demand inelastic)? Or, finally, will a price increase reduce total expenditures? The answers to these questions concerning consumer response to price changes will vary from product to product and among consumers according to their incomes. Thus, relatively low-income consumers may stop buying discretionary items such as strawberries if the price exceeds a certain level, whereas their demand for lettuce or apples may be much more inelastic. However, many low-income consumers may consider all fruits and vegetables to be discretionary items, so that a budget sensitive price increase might lead these consumers to substitute food groups that the increases do not affect.¹³⁹

Fourth, and last, to what extent will an increase in wages lead producers to shift production to Latin America, where much lower wages can overcome higher transport costs and translate into lower total costs and higher profits?¹⁴⁰ Similarly, at what point will consumers prefer fruit and vegetable imports from Mexico, Chile, and Guatemala?¹⁴¹

Against the background of these societal constraints, several steps would have to be taken to restructure the labor market and to strengthen the bargaining power of hand-harvesters of fruits and vegetables. These steps include decreasing supply or increasing demand, increasing the required level of skill and productivity, eliminating atavistic forms of fraud, and facilitating or mandating self-organization.

and vegetables uniformly. This assumption eliminates the issue of the substitutability of apples for oranges and cross-elasticities of demand.

¹³⁹ Unfortunately, empirical price-elasticity studies are much too crude to furnish useful answers to these questions. See C. NUCKTON, DEMAND RELATIONSHIPS FOR VEGETABLES: A REVIEW OF PAST STUDIES (Giannini Foundation Special Rep. 80-1, 1980); C. NUCKTON, DEMAND RELATIONSHIPS FOR CALIFORNIA TREE FRUITS, GRAPES, AND NUTS: A REVIEW OF PAST STUDIES (Giannini Foundation Special Rep., No. 3247, 1978).

¹⁴⁰ See, e.g., COMPETITIVENESS AT HOME AND ABROAD: REPORT OF A 1986-87 STUDY GROUP ON MARKETING CALIFORNIA SPECIALTY CROPS: WORLDWIDE COMPETITION AND CONSTRAINTS (U. California Agricultural Issues Center, 1988).

¹⁴¹ Assuming similar quality and no additional health hazards, it must be presumed that nonpolitical consumers would have no reason to pay more for produce grown in the United States. On the market shares of Latin American nations exporting fruit to the United States, see Christian, *A Bumper Crop of Grapes and Uncertainty*, N.Y. Times, Mar. 27, 1989, at C1, col. 3.

A. *Compulsory Reduction of the Supply of Labor*

The primary means would entail: (1) the absolute prohibition of child labor below the age of sixteen,¹⁴² (2) a total ban on the employment of illegal aliens,¹⁴³ and (3) the termination of all special programs to import foreign workers.¹⁴⁴ Faced with a smaller potential labor force, agricultural employers would be forced to pay higher wages and to provide better working conditions. This in turn should increase the use of labor-saving machinery,¹⁴⁵ which would result in a rise in the required skill level. If society accepts that a lifetime of the back breaking, stoop labor of hand harvesting is unnecessary and inappropriate to a wealthy "post industrial" society, then it must welcome mechanizing these jobs out of existence.¹⁴⁶ If the wage-price-profit matrix of this sector of the economy is such that significantly increased wages would bring higher consumer prices, then economic logic compels the conclusion that consumers previously benefitted from the exploitation of farmworkers.¹⁴⁷

¹⁴² Because migrant farmworkers' low annual income is as much a function of few hours of employment as of low wage rates, it may not be possible to raise the minimum wage sufficiently to induce parents, through purely market forces, to refrain from causing their children to work. Proponents of the application of minimum wages to agriculture believed that such coverage in itself would eliminate the "dilemma." SUBCOMM. ON MIGRATORY LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 86TH CONG., 2D SESS., *THE MIGRANT FARMWORKER IN AMERICA: BACKGROUND DATA ON THE MIGRANT WORKER SITUATION IN THE UNITED STATES TODAY* 56 (1960); S. NEARING, *THE SOLUTION OF THE CHILD LABOR PROBLEM* 126-45 (1913).

¹⁴³ The ban could be bolstered by adding this employment to the catalog of violations subject to civil penalties and injunctions under the so-called "hot goods" provisions of FLSA. See 29 U.S.C. §§ 215, 216(e), 217 (1982).

¹⁴⁴ One of the determinants of the powerlessness of migrant farmworkers is that so few are integrated into the political and civic culture of the United States. The passivity of those without a long-run stake is also characteristic of permanent resident aliens who are in effect commuters. One way to combat this phenomenon would be to confer citizenship on them.

¹⁴⁵ The same result would ensue if it turned out that the shrunken labor force was absolutely inadequate to perform the work previously done by children and aliens.

¹⁴⁶ "The answer to the social problems incident to migrancy is to continue . . . [t]he investment by farmers in the new machinery . . . necessary to reduce handwork employment in agriculture." *Registration of Farm Labor Contractors: Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor on H.R. 5060*, 88th Cong., 1st Sess. 8 (1963) [hereafter *Registration Hearings*] (statement of Matt Triggs, Asst. Legis. Dir. Am. Farm Bur. Fed.). The possible employment opportunities for the "released" workers are discussed below.

¹⁴⁷ Mechanization might result in certain agricultural products becoming luxury commodities. Public discussion of this consequence would present a rare opportunity in capitalist society for discussion between consumers and producers of the difficulties the latter must undergo to satisfy the former's needs. From this debate might emerge a new

If, on the other hand, consumers decided that the new prices were too high, and the farmers decided that the new profits were too low, cheaper fruits and vegetables might be imported. U.S. producers would reinvest their agribusiness capital in Latin America to finance these crops. Thus, instead of U.S. farmers importing Latin American farmworkers, U.S. consumers would import Latin American farm products. This approach, however, merely externalizes the problem.¹⁴⁸

*B. Mandating an Increase in the Federal Minimum Wage for and Application of the Overtime Provision of FLSA to Farmworkers*¹⁴⁹

Although subsection *B* appears to be merely another version of subsection *A*, so long as supply and demand forces on the labor market generate the desperation and vulnerability that prevent workers from defending their own working conditions let alone from acting together, a state-enforced wage increase would depend on the continuation of the old paternalistic regime. Until farmworkers are able to enforce their paper rights themselves, this approach would not qualitatively differ from current practice. Thus, subsection *B* would require some form of subsection *A* as a flanking measure. The same would be true of a significantly higher level of enforcement of FLSA¹⁵⁰ and AWP¹⁵¹ by a U.S. Department of Labor that was staffed by compliance and enforcement officers subjectively committed to the eradication of unlawful exploitation.¹⁵²

C. Abolition of the Farm Labor Contracting or Agricultural Sweating System

This proposal would eliminate an elusive and evasive abuse by judgment-proof middlemen. Additionally, by focusing attention on the real agricultural employer, this measure would make the system of exploita-

structure of perceived needs. *See generally* U. PAGANO, *WORK AND WELFARE IN ECONOMIC THEORY* (1985).

¹⁴⁸ The program pursued by the Arizona Farmworkers Union of organizing Mexican farmworkers in cooperatives in Mexico to compete with U.S. producers represents one way of dealing with the externalities mentioned in the text.

¹⁴⁹ *See* Linder, *supra* note 110, at 1335-36, 1381-82.

¹⁵⁰ 29 U.S.C. §§ 201-219 (1982 & Supp. V 1987).

¹⁵¹ *Id.* §§ 1801-1872.

¹⁵² "The best administrative machinery in the world will break down utterly if intrusted to incompetent officials." Standing Comm. on Legal Aid Work, *First Draft Of a Model Statute for Facilitating Enforcement of Wage Claims*, Commentary on § 6, in 52 A.B.A. REP. 324, 331 (1927).

tion more transparent to workers.

While the physical conditions of outdoor sweatshops differ from those of tenement workers,¹⁵³ migrant farmworkers, as the largest subclass of sweated workers in the United States today, face the same exploitation that Congress pilloried a century ago: "[T]he compensation of the contractor is the margin between the price he receives and the price he pays . . . which margin, in the vernacular, is said to be 'sweated' from the compensation of his employés."¹⁵⁴ Like the *padrone* who took advantage of his Italian immigrant compatriots a century ago, the farm labor contractor is employed for his ability to secure an abundant and docile work force.¹⁵⁵ Just as his counterpart, the contractor's profits depend largely on the number of ways he can milk portions of the worker's meager wages.¹⁵⁶

The labor contractor system arose under specific cultural, economic, and labor-market conditions and continues to flourish in agriculture.

The basic explanation for the ubiquity and persistence of the labor contractor is to be found in the character of the farm labor market. If stable and direct employment relations had developed in harvest work, as they have in manufacturing industry, there would be no place for the contractor. If harvest laborers in general were managed and allocated by inclusive employer associations, as are the legally imported laborers, the services of the contractor could be dispensed with. Or if they were organized and deployed by labor unions, as are the workers in the equally casual long-shore and construction industries, again the contractor would be unnecessary. The combination of irregular labor demand, casual labor supply, and general lack of inclusive organization on either side of the market creates a context in which the contractor . . . is well nigh indispensable.¹⁵⁷

The farm employers' concept of an adequate labor supply exacerbates this situation. They may view this supply as large enough to permit every grower to harvest simultaneously even though they harvest only two or three days a week.¹⁵⁸ The consequences that the workers must bear are unique:

¹⁵³ On contemporary indoor sweatshops, see U.S. GENERAL ACCOUNTING OFFICE, "SWEATSHOPS" IN THE U.S. (Aug. 1988).

¹⁵⁴ U.S. HOUSE OF REPRESENTATIVES, 52D CONG., 2D SESS., REPORT OF THE COMMITTEE ON MANUFACTURES ON THE SWEATING SYSTEM vi (1893).

¹⁵⁵ K. LUMPKIN & D. DOUGLAS, *supra* note 89, at 70.

¹⁵⁶ *Id.*

¹⁵⁷ Arthur Ross & Samuel Liss, *The Labor Contractor System in Agriculture*, in MIGRATORY LABOR: HEARINGS BEFORE THE SUBCOMM. ON LABOR AND LABOR-MANAGEMENT RELATIONS OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE ON MIGRATORY LABOR, 82d Cong., 2d Sess. 1017, 1023 (1952).

¹⁵⁸ *Id.* at 1024.

Although ineffective in rationalizing the labor market, the contractor system is a highly effective device for transferring the risks of agricultural employment to the workers. It is a sound principle of industrial relations that the various economic risks incident to employment ought to be distributed fairly or else insured against. This principle is notably absent in agricultural harvest work. Anyone familiar with urban industrial relations would suppose, for example, that employers would have some responsibility for workers who are brought to a work situation and held there for several weeks although no work is furnished to them. In agriculture, however, it frequently happens that workers are brought into a grower's camp, upon specific instructions of the grower, several weeks before they are needed, and remain entirely on their own until work begins.¹⁵⁹

Frequently the farmer will disavow any responsibility, pointing to the crewleader's allegedly unauthorized actions. The crewleader, in turn, denies the allegation, disappears or has no money to satisfy a judgment.

Almost fifty years of unsuccessful federal and state¹⁶⁰ efforts to suppress the abuses inherent in the private recruiting system by regulating crewleaders¹⁶¹ demonstrate that making the crewleader the centerpiece of enforcement is ineffective. Precisely because crewleaders, or "body-brokers," as the Executive Director of the National Council of Agricultural Employers has referred to them,¹⁶² are typically intellectually,¹⁶³

¹⁵⁹ *Id.* at 1028.

¹⁶⁰ The historical proprietary purpose, function, and spirit of state farm contractor laws — particularly in the South — were spelled out by counsel for the Texas Citrus and Vegetable Growers and Shippers in testimony before Congress. Referring to migrant farmworkers as "our workers," he described the Texas labor contractor registration statute which he wrote in 1943 as requiring labor recruiters operating on behalf of: [O]ut-of-state employers to be bonded and licensed so that if our workers were taken to other states with the promise of employment, and on arrival found that work was not available or that housing, wages and working conditions were not as promised, they would not be stranded far from home without means of getting back to their places of permanent residence.

Oversight Hearings, supra note 117, at 67 (statement of Scott Toothaker).

¹⁶¹ More than two decades passed between the time the first bills to regulate crewleaders were submitted in Congress and passage of the Farm Labor Contractor Registration Act (FLCRA) in 1963. See *To Regulate Private Employment Agencies Engaged in Interstate Commerce: Hearings Before a Subcomm. of the House Comm. on Labor on H.R. 5510*, 77th Cong., 1st Sess. 1 (1941); Note, *A Defense of the Farm Labor Contractor Registration Act*, 59 TEX. L. REV. 531 (1981).

¹⁶² *Administration of Laws Affecting Farmworkers: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 3 (1980) [hereafter *Administration Hearing*] (statement of Perry Elsworth).

¹⁶³ Perversely, the President of the Vegetable Growers Association of America opposed enactment of the Farm Labor Contractor Registration Act on the grounds that, because of limited education, the average crewleader could not fill out the forms re-

morally,¹⁶⁴ and/or financially incapable of complying with the law, enforcement should focus on the real employer — the farmer, packing shed, processor or seed company. These large entities already have routinized bureaucratic record keeping and payroll procedures in place that can guarantee prompt, accurate, and full payment of wages to migrants.¹⁶⁵ To force migrants to rely upon the vagaries of the middleman's cash flow situation for their meager wages when the real employer in effect hides behind a civil outlaw is not only unjust but unnecessary and irrational. In this sense the National Farmers Union was correct when it testified before Congress that "large commercial agricultural organizations" profit from the "vicious system" of exploitation and "the contractor's way of keeping the labor in line."¹⁶⁶

Numerous legislators have repeatedly stated at hearings over the years that this labor contracting system is incorrigible.¹⁶⁷ Therefore, it may be politically feasible to amend the relevant statutes so that crewleaders are never the migrant or seasonal farmworkers' sole employers.¹⁶⁸ Thus, if Congress amended FLSA and AWP (as well as the social security, unemployment, and tax laws) to create an irrebuttable presumption that farmers are the farmworkers' employers even when they use crewleaders, farmers would have less incentive to rely on that system. Nor is this approach necessarily an anathema to agricultural employers. The counsel to the Citrus Industrial Council testified before Congress that employers should be provided incentives to make all

quired to comply with the Act. *Migratory Labor: Hearings Before the Select Subcomm. on Labor of the House Comm. on Education and Labor on H.R. 5288*, 87th Cong., 1st Sess. 83 (1961) (statement of C. Creuziger).

¹⁶⁴ Marx observed this characteristic in 19th-century English crewleaders ("gangmasters"). 1 K. MARX, *supra* note 13, ch. 23, § 5e.

¹⁶⁵ In order to furnish such entities with a powerful disincentive to hide behind crewleaders, state wage payment and collection statutes could be amended to provide for forfeiture of the corporate charter or of the right to do business in the state for failure to pay wages owed when due. The Standing Committee on Legal Aid Work proposed such forfeiture in accord with its guiding principle that the wage collection agency "should have a set of thumbscrews so assorted as to fit every unfairly grasping hand." Standing Committee on Legal Aid Work, *supra* note 152, at 325.

¹⁶⁶ *Registration Hearings*, *supra* note 146, at 46 (statement of Richard Shipman, Asst. Dir. Legis. Serv. Div., Nat. Farmers Union).

¹⁶⁷ See, e.g., *Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 88 (1973) (statement of Representative Lehman).

¹⁶⁸ See Linder, *The Doctrine of Joint Employment: Clarifying Joint Legislative-Judicial Employment*, 10 HAMLIN J. PUB. L. & POL'Y (1989) (forthcoming).

workers their own employees and to pay them directly.¹⁶⁹ These measures would reduce the crewleader's opportunity to skim from the workers' wages. In urging Congress to consider "a rethrusting" of the federal Farm Labor Contractor Registration Act,¹⁷⁰ the employers' counsel correctly observed that these steps would help the workers begin to enter the "mainstream."¹⁷¹

By the same token, crewleaders are "more a symptom than a basic cause of the difficulty. The basic cause is the conjunction of substandard labor supply with irregular labor demand." If labor demand is regularized or labor supply normalized, the number of workers that will accept the harsh conditions of a labor broker system will decrease.¹⁷² Even in the absence of labor organizations and with bargaining power strongly in favor of employers, the employment relationship would be no worse than at present. In addition, growers' associations could operate more responsibly, eliminate "much of the petty graft and exploitation," and better coordinate labor supply and demand in a more rational labor market.¹⁷³

A combination of public employment services, labor organizations, and agricultural employer associations could assume the functions that crewleaders currently perform. If government agencies can assist large agricultural associations to recruit temporary harvest workers from Mexico, Jamaica, and other countries, they can similarly organize recruitment in the United States. For this effort to succeed, the federal government would have to create a coordinated interstate employment and referral service and to process complaints when employers breach the terms of job offers.¹⁷⁴ Crucial to this regime would be an enforced guarantee of a weekly minimum number of hours to dissuade agricultural employers from requesting workers before they are willing to provide them paid employment.¹⁷⁵

¹⁶⁹ *Administration Hearing*, *supra* note 162, at 8 (statement of Roderick K. Shaw, Jr.).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 8, 18.

¹⁷² ROSS & LISS, *supra* note 157, at 1033.

¹⁷³ *Id.* at 1034.

¹⁷⁴ Under the Wagner-Peyser Act, 29 U.S.C. §§ 49-49l (1982 & Supp. V 1987), the obligations of the Employment and Training Administration and of the U.S. Employment Service of the Department of Labor are very circumscribed. Neither they nor the cooperating state agencies are "guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers." 20 C.F.R. § 653.501(a) (1989).

¹⁷⁵ Employers who request temporary labor certification for temporary foreign workers must "guarantee[] to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract" is in effect. *Id.*

D. *Amending the National Labor Relations Act to Cover Farmworkers*

An orchestrated campaign by the federal government and existing unions to encourage unionization would have to accompany this step. Leading officials and politicians would have to enunciate a public bias in favor of farmworker organization to create support for this program. As a transitional phase for hand-harvest agriculture, the government should reintroduce industry-wide wage advisory committees under FLSA. These committees will give employers and workers experience with and education about collective bargaining techniques.¹⁷⁶

E. *Technological and Social Transformation of the Prevailing System of Agricultural Production and Land Tenure*

Large-scale, mechanized, chemical-dependent farming has brought about an ecological catastrophe for the stock of arable farmland and has injected intolerable levels of poisons into the population's nutritional base. Restructuring row-crop agriculture along small-scale, labor and knowledge-intensive, organic lines serves several purposes. A family farm can operate more efficiently on fifty acres of mixed products than current specialized agribusinesses.¹⁷⁷ Because this system requires approximately the same land base, many more farmers, and vastly fewer wage workers, the new pattern of rural land use creates the possibility of instating at least some proportion of "released" farmworkers as new-regime farmers.¹⁷⁸

CONCLUSION

The super-paternalistic proposals¹⁷⁹ are oriented toward the sphere of production and designed to improve the conditions of exchange for migrant farmworkers by remedying the defects of their labor market. Given the current international division of labor, however, it may no longer be possible to achieve these goals in a work-for-profit context.

§ 655.202(b)(6)(i).

¹⁷⁶ *FLSA Hearings*, *supra* note 48, at 180 (testimony of Frances Perkins, Sec'y of Labor).

¹⁷⁷ For recent evidence that supports this conclusion, see Schneider, *Weaning Chemical Use: Seeds of Revolt on Farms*, N.Y. Times, Sept. 11, 1989, at A1, col. 1; Schneider, *Science Academy Says Chemicals Do Not Necessarily Increase Crops*, *id.*, Sept. 8, 1989, at A1, col. 1.

¹⁷⁸ The modalities of the land redistribution program — especially the kind and level of compensation to landowners — would have to be carefully considered.

¹⁷⁹ See *supra* notes 142-78 and accompanying text.

For farmworkers may well be the vanguard of a growing sector of would-be workers for whose services there is virtually no solvent demand or the market value of whose labor is insufficient to sustain the societally acknowledged, minimal family standard of life.¹⁸⁰ Without independent access either to the means of production or to the necessities of life, this class must be alimeted in one way or another. Both the right and the left have suggested how purchasing power might be transferred to such contingent members of the working class — the one to buttress the remaining for-profit market system,¹⁸¹ the other to signal that system's demise and the emergence of a new principle of social organization.¹⁸² As the problems inherent in linking income to employment become increasingly intractable for migrants and similarly situated strata, a political decision may have to be made to transcend traditional paternalism.¹⁸³

¹⁸⁰ On the legal aspects of this access issue, see R. HALE, *Freedom Through Law: Public Control of Private Governing Power* 3-37 (1952); Hale, *supra* note 127, at 629.

¹⁸¹ See, e.g., 2 F. HAYEK, *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 87 (1976).

¹⁸² See, e.g., Fourier, *L'allocation universelle*, 41 *LA REVUE NOUVELLE* 345 (1985); Gorz, *Allocation universelle: version de droite et version de gauche*, *id.* at 419 (1985); van der Veen & van Parijs, *A Capitalist Road to Communism*, 15 *THEORY & SOCIETY* 635 (1986).

¹⁸³ *But see* L. MUMFORD, *TECHNICS AND CIVILIZATION* 403 (1963). Mumford rests the claim to a livelihood in "basic communism" "upon the fact that, like the child in a family, one is a member of a community" in which "the individual contributions and differences are completely insignificant." *Id.*