

## THE BALLENGER–GREEN DIVERSITY PAPER

The *Vermont Law Review* established the Ballenger–Green Memorial Diversity Paper in 2001 to commemorate the lives of Vermont Law School students Chandra Ballenger '02 and Orlando Green '01. The Ballenger–Green Paper is an opportunity for any student to address issues of human diversity through legal scholarship. Each year a paper is selected from open submissions that best reflects the commitment to excellence Orlando and Chandra demonstrated in their burgeoning legal careers. The *Vermont Law Review* is pleased to present the 2004 Ballenger–Green Paper.

### MODERN-DAY SERVITUDE: A LOOK AT THE H-2A PROGRAM'S PURPOSES, REGULATIONS, AND REALITIES

That part of the agricultural industry that depends on hand-harvest labor has never completely adjusted to the adoption of the Thirteenth Amendment to the Constitution, the amendment that abolished slavery.<sup>1</sup>

#### INTRODUCTION

Farmworkers feed the world. Farmworkers in the United States are, and have always been, from all over the world, but no nationality predominates more than those from Mexico.<sup>2</sup> The desire for wealth and profit has helped to instill the discriminatory belief that some people may be equated to “machine[s] in the fields.”<sup>3</sup> The injustices that persist today in agriculture “have become ingrained in its very structure because of discrimination and greed, due in large part to the control of agricultural power structures increasingly centered in large corporations.”<sup>4</sup> The greed that motivates these corporations and the agricultural industry in the United States has its roots in slavery.<sup>5</sup> Most Americans believe that slavery is a

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1. Garry G. Geffert, *H-2A Guestworker Program: A Legacy of Importing Agricultural Labor*, in *THE HUMAN COST OF FOOD* 113, 113 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002).

2. Student Action with Farmworkers, United States Farmworker Fact Sheet [hereinafter SAF Fact Sheet], available at <http://cde.aas.duke.edu/saf/pdfs/fwfactsheet.pdf> (last visited Sept. 22, 2004).

3. Leah Beth Ward, *Desperate Harvest: N.C. Growers' Trade in Foreign Farmworkers Draws Scrutiny*, CHARLOTTE OBSERVER, Oct. 31, 1999, at 1A (quoting grower David Sherill of Ellerbe, North Carolina); see also OXFAM AMERICA, *LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 1* (2004) (“Like machines, nearly two million of workers in America’s fields labor without rights, earn sub-living wages, and exist in dehumanizing circumstances.”), available at [http://www.oxfamamerica.org/pdfs/labor\\_report\\_04.pdf](http://www.oxfamamerica.org/pdfs/labor_report_04.pdf).

4. Charles D. Thompson, Jr., *Introduction to THE HUMAN COST OF FOOD* 2, 3 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002).

5. As Thompson states, “While the [agricultural system] is not a holdover from the days of

thing of the past, a dirty secret in the garrets of United States history. Yet, injustices reminiscent of slavery exist today in the world, and within the United States.

The United States has allowed agricultural employers to exploit farmworkers throughout its history.<sup>6</sup> One might expect that farmworkers would be rewarded, or at least protected, for their persistence in feeding the world at the expense of their own health and safety and that of their children. Yet, farmworkers are excluded from many protections that are commonly enjoyed by other workers.<sup>7</sup>

Today, through the H-2A program, U.S. farmers are given legal authorization by the Department of Justice, and are assisted by the Department of Labor (DOL), to import people for labor from foreign nations.<sup>8</sup> Unlike slaves, H-2A workers are willing participants who are granted minimal legal protections and are sometimes paid a wage.<sup>9</sup> Yet, H-2A workers suffer many abuses akin to those suffered by slaves since the early 1600s in the United States.

The legal guarantees provided to H-2A guestworkers amount to very little protection in practice.<sup>10</sup> These legally documented H-2A guestworkers carry work visas issued by the government authorizing them to work within the United States.<sup>11</sup> But, these guestworkers are excluded from U.S. labor and employment laws.<sup>12</sup> For example, H-2A guestworkers are unduly excluded from the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).<sup>13</sup> These workers are treated not like guests in our country, but more like slaves.

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slavery, comparisons of present-day farm work to slavery are warranted.” *Id.* at 10. By no means do I intend to equate the institution of forced slavery in the United States with the voluntary H-2A program (discussed below). Instead, I wish to compare the related effects resulting from the similar attitudes and motivations, which encourage economic oppression based on race. As Professor Marc Linder has stated, “Slavery in America was motivated by the economic need for cheap farm labor . . . consequently, issues of farm labor became issues of economics and race.” Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1348 (1987). The desire for cheap labor drives the abuses within the H-2A Program. Geffert, *supra* note 1, at 135.

6. See generally Geffert, *supra* note 1, at 113–14 (describing the history of agricultural labor since the Thirteenth Amendment to the U.S. Constitution).

7. See *infra* Part II.B.

8. The non-immigrant workers employed through the program are referred to as “H-2A workers” or “guestworkers” throughout this article.

9. See *infra* Part I.B.

10. See *infra* Part II.

11. Geffert, *supra* note 1, at 116.

12. See *infra* Part II.B.

13. Christopher Ryon, Comment, *H-2A Workers Should Not Be Excluded from the Migrant and Seasonal Agricultural Protection Act*, 2 MARGINS 137, 138 (2002).

H-2A workers are in a unique and unprotected position that evokes impressions of racial discrimination—not unlike slavery—in the United States today. Lack of enforcement and strategic wording of the law have allowed cries for justice to go unheard for so long that there are hardly any cries today.

Part I of this article addresses the history of Mexican farm labor in the United States, including the current H-2A agricultural guestworker program. Part II discusses the alleged rights of the H-2A program by reviewing the applicable federal labor laws and regulations. Part III illustrates the realities and abuses within the H-2A program and compares the forms of exploitation and control existing during the age of slavery to those used in the H-2A program today to control Mexican workers in North Carolina. Part IV briefly reviews other legal problems associated with the H-2A program, including the constitutionality of the AWPA exclusion, violation of international laws, and illegal immigration.

#### I. MEXICAN FARMWORKERS IN THE UNITED STATES.

Ninety-five percent of all foreign-born farmworkers in the United States were born in Mexico.<sup>14</sup> Three-fifths of all adult foreign-born farmworkers have families.<sup>15</sup> Yet, not all of those families come to the United States with the workers; ninety percent of them live in Mexico while one family member works in the United States.<sup>16</sup> The median income for farmworkers ranges from \$2,500 to \$7,500 annually.<sup>17</sup> Contrary to popular belief, very few farmworkers use, or are even eligible for, public social services such as Medicare, food stamps, or the Women, Infants, and Children Supplemental Nutrition Program (WIC).<sup>18</sup>

Farm work is one of the most dangerous industries in the United States. Thus, Mexican farmworkers “suffer from the highest rates of toxic chemical injuries of any workers in the [United States].”<sup>19</sup> Farmworkers also suffer higher rates of heat stress, dermatitis, influenza, pneumonia, urinary tract infections, pesticide-related illness, and tuberculosis.<sup>20</sup> Few have health

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14. U.S. DEP'T OF LABOR, FINDINGS OF THE NATIONAL AGRICULTURAL WORKERS SURVEY 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 5 (2000), available at [http://www.dol.gov/asp/programs/agworker/report\\_8.pdf](http://www.dol.gov/asp/programs/agworker/report_8.pdf). The report also found that 77% of all farmworkers are Mexican. *Id.*

15. SAF Fact Sheet, *supra* note 2, at 1.

16. *Id.*

17. *Id.*

18. *Id.*

19. FARMWORKER HEALTH ALLIANCE, N.C. OFFICE OF RURAL HEALTH & RES. DEV., FACTS ABOUT NORTH CAROLINA'S FARMWORKERS (1996).

20. *Id.*

insurance.<sup>21</sup> Migrant farmworker children suffer from especially high rates of parasitic infections, malnutrition, and dental disease.<sup>22</sup> Infant mortality rates, too, are higher among the farmworker population.<sup>23</sup> Mexican citizens are desired and actively recruited to fill these perilous jobs in the fields of the United States through various programs initiated to fulfill these demands.

#### A. History of the Bracero Program

“To be a bracero is to be sold to the United States.”<sup>24</sup>

The United States generally welcomed Mexican immigrants until the 1930s because their labor was greatly needed.<sup>25</sup> Enacted for the duration of World War I, the United States and Mexico initiated the first foreign labor program,<sup>26</sup> which was maintained until 1922, allowing mostly Southern agricultural employers to import foreign “temporary” workers.<sup>27</sup> A demand for labor in agriculture caused the government to contradict its harsh 1917 immigration policy and invite Mexican workers into the United States to work in the fields.<sup>28</sup> These workers established families, homes, and lives here in the United States.<sup>29</sup> Yet, as the Great Depression spread across America, Mexican labor was suddenly unnecessary.<sup>30</sup> Mexican workers were viewed as a threat to U.S. workers and were treated with extreme hatred and profound racism.<sup>31</sup> As a result, nearly a half-million Mexicans were “repatriated” to Mexico through harsh and deceitful methods.<sup>32</sup> This

21. *Id.*

22. *Id.*

23. *Id.*

24. DANIEL ROTHENBERG, WITH THESE HANDS 39 (1998) (interviewing Norberto Herrera, a former bracero from Penjamillo, Michoacan, Mexico, about his experience with the bracero program).

25. Gilbert Paul Carrasco, *Latinos in the United States*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 190, 192 (Juan F. Perea ed., 1997).

26. *Id.* at 193.

27. *Id.*

28. *Id.* Congress enacted “the most restrictive immigration legislation in U.S. history” when it passed the Immigration Act of 1917, ch. 29, 39 Stat. 874 (1917). *Id.* Mexican agricultural laborers who would otherwise have been inadmissible into the U.S. were allowed to enter under this temporary worker program. *Id.*

29. *Id.* at 194.

30. *Id.* at 193.

31. *Id.* at 193–94.

32. *Id.* Such methods included: signs in Texas demanding that Mexicans get out of town; threats made in Oklahoma that Mexicans would be burned out of their homes; denial of welfare benefits to Mexican laborers; social workers lying to Mexican officials that lawful resident Mexican workers wished to return to Mexico; separation of families by deporting “alien” parents while allowing U.S.

number included thousands of “legal” U.S. citizens.

When its men went off to fight in World War II, the United States again had a need for labor.<sup>33</sup> The Mexican and U.S. governments were parties to a formal agreement creating the Bracero program in 1942, which again allowed U.S. employers to import temporary agricultural laborers from Mexico.<sup>34</sup> From one perspective, Mexicans merely replaced those who had been sent off to war; braceros “freed up” Mexican-American citizens who just happened to be “eligible” for the even more deadly positions as machines of twentieth-century warfare.<sup>35</sup> From another perspective, the utilization of braceros replaced and spawned bias against organized black farmworkers:

Accustomed to workers disciplined by the starvation wages of the Depression years, growers were outraged to find black workers uncooperative and organized. They demanded the importation of foreign workers who could be deported for refusing to work, and their demands were heeded. In 1945 alone, the War Food Administration put 178,000 importees and POWs to work in the nation’s fields, while domestic migrants remained frozen in their home counties, denied the right to leave without the permission of county officials.<sup>36</sup>

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citizen children to remain; and “repatriation” of U.S. citizens of Mexican descent. *Id.* at 193.

33. *Id.*

34. *Id.* at 194; see also Lorenzo A. Alvarado, Comment, *A Lesson from My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 55 (2001) (“Because these temporary agricultural contract workers worked with their arms, they were given the name ‘Braceros’—derived from the Spanish word ‘brazos,’ which means ‘arms.’”).

35. Carrasco, *supra* note 25, at 195–96.

Deferments were given to those who held defense industry jobs, few of whom were Mexican-American, while workers in the agricultural industry, heavily staffed by Mexican-Americans, were eligible for the draft. . . . Because Mexican-Americans seem to have gravitated to the most dangerous sections of the armed forces, they were overrepresented on military casualty lists.

*Id.*

36. Cindy Hahamovitch, *Standing Idly By: “Organized” Farmworkers in South Florida During the Depression and World War II*, in THE HUMAN COST OF FOOD 89, 89 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002). Hahamovitch adds:

African American farmworkers’ wartime struggle did not fail for lack of organization. It was the growers’ ability to enlist the aid of federal authorities that crushed their promising but short-lived initiative. Yet the consequences of African American farmworkers’ wartime defeat were profound—and not just for them, but for all farmworkers on the East Coast . . . . [T]heir living and working conditions remained desperate.

*Id.* at 104.

The Mexican government demanded many protections, including an anti-discrimination provision, in the 1942 agreement,<sup>37</sup> but, U.S. growers largely ignored them.<sup>38</sup> Carrasco explains:

Under the *bracero* agreement . . . conditions stipulated methods of recruitment, transportation, standards of health care, wages, housing, food, and the number of hours the *braceros* were allowed to work. There was even a stipulation that there should be no discrimination against *braceros*. . . . Unfortunately, the conditions were, for the most part, ignored by both the growers and the U.S. government; thus, migrant laborers were subjected to most oppressive working environments.<sup>39</sup>

Texas, in particular, abused bracero workers so much that the state was not allowed to utilize the program until after the war.<sup>40</sup> In that period, wages for cotton pickers in Texas rose 236% as Texan growers were forced to recruit less easily exploited groups to work in their fields.<sup>41</sup> For the rest of the country, when the war was over and U.S. workers returned home, U.S. growers were so unwilling to give up bracero labor that the program continued until 1947.<sup>42</sup>

Just two years later, the United States and Mexico made a new bracero agreement, which legalized and incorporated nearly a quarter-million workers into the U.S. workforce.<sup>43</sup> From a U.S. perspective, the program was intended to curb immigration from Mexico into the United States. It thoroughly failed.<sup>44</sup> The U.S. growers' desire for Mexican labor was accompanied by a significant increase in the number of undocumented workers.<sup>45</sup>

Nonetheless, along with the start of the Korean War, a new bracero program was enacted in 1951 with Mexico, which continued until 1964.<sup>46</sup> The bracero program ended shortly after abuses within the program were

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37. Carrasco, *supra* note 25, at 195.

38. *Id.* The term "grower" is commonly used to refer to the landowner or farmer of the farm.

39. *Id.* at 194–95.

40. *Id.* at 195.

41. *Id.* Examples of others who were recruited included "Mexican Americans, college students, school children, and prisoners of war." *Id.*

42. *Id.* at 196.

43. *Id.* at 196–97.

44. *Id.* at 197.

45. *Id.* at 196–97.

46. *Id.* at 197.

revealed to the public in a 1964 television documentary entitled *Harvest of Shame* by Edward R. Murrow.<sup>47</sup>

### B. *The Current H-2A Guestworker Program*

In 1952, the McCarran–Walter Immigration and Nationality Act (INA) established the current H-2A guestworker program, which allows the Attorney General to issue visas for temporary agricultural labor.<sup>48</sup> Still in effect, many U.S. growers continued to employ Mexicans under the bracero program rather than the H-2A program, which then imported workers from other nations.<sup>49</sup> Regardless, once the bracero program expired in 1964, the H-2A program gained popularity among growers.<sup>50</sup>

#### 1. The Laws and Regulations: Protections on Paper

The current H-2A program is governed by the INA, which allows the Department of Justice to issue temporary work visas “to import nonimmigrant aliens for agricultural labor or services . . . of a temporary or seasonal nature.”<sup>51</sup> The H-2A program’s purpose is “to assure agricultural employers an adequate labor force while at the same time protecting the jobs of U.S. workers.”<sup>52</sup> The INA was subsequently reformed by the Immigration Reform and Control Act of 1986, which “streamlined the application process” for H-2A guestworkers.<sup>53</sup>

The H-2A program is administered under various subdivisions of the Department of Labor (DOL) and the Immigration and Naturalization Service (INS).<sup>54</sup> The process for importing foreign labor is initiated when employers or agricultural labor associations apply to the DOL for certification to import H-2A workers.<sup>55</sup> The DOL must certify that there

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47. Ward, *supra* note 2, at 1A.

48. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2000); *see also* Geffert, *supra* note 1, at 116 (explaining the Attorney General’s authority under the INA).

49. Geffert, *supra* note 1, at 117.

50. *Id.*; Carrasco, *supra* note 25, at 198.

51. 8 U.S.C. § 1101 (a)(15)(H)(ii)(a).

52. U.S. GEN. ACCOUNTING OFFICE, THE H-2A PROGRAM: PROTECTIONS FOR U.S. FARMWORKERS 12 (1988) [hereinafter 1988 GAO REPORT], available at <http://archive.gao.gov/t2pbat16/137107.pdf>.

53. Immigration Reform and Control Act of 1986, Pub. L. No. 99-3603, § 301 (codified as amended at 8 U.S.C. § 1188 (2000)); Geffert, *supra* note 1, at 118.

54. Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. §§ 655.90–655.113 (2003) (detailing DOL regulations for H-2A workers); Nonimmigrant Classes, 8 C.F.R. § 214.2(h) (2003) (describing INS classification of temporary employees).

55. 1988 GAO REPORT, *supra* note 52, at 12.

exists an insufficient supply of U.S. workers and that the employment of H-2A workers will not depress U.S. farmworker wages or affect their conditions.<sup>56</sup> This is the “bedrock principle” of the H-2A program: “that the use of guest workers will not adversely affect domestic workers or work conditions.”<sup>57</sup>

Growers must follow certain procedures utilizing state employment service offices and offer prescribed wages, conditions, and benefits at a level that protects U.S. farmworkers.<sup>58</sup> Growers must offer the highest of the following wages: the Adverse Effect Wage Rate (AEWR), the prevailing wage in the local area, or the federal or state minimum wage.<sup>59</sup> The DOL establishes the AEWR annually, based on regional average hourly wages computed from the U.S. Department of Agriculture wage surveys.<sup>60</sup> The prevailing wage is based on a survey conducted by state employment services and includes hourly wage or piece rates specific to each area and crop or activity.<sup>61</sup> Growers who pay the piece rate must pay, at a minimum, the hourly AEWR rate.<sup>62</sup>

In addition, under the H-2A regulations, growers must provide workers with a written contract and reimbursement for transportation to and from the worker’s home country.<sup>63</sup> The grower must also provide, at no cost to the worker, housing during employment, daily transportation to and from the worksite, workers’ compensation insurance, and tools.<sup>64</sup> Growers must, at the least, pay workers twice monthly and guarantee three-fourths of the total amount of work offered in the job announcement.<sup>65</sup> Employers are also required to maintain records of the number of work hours offered, hours worked, rate of pay, earnings per pay period, and deductions.<sup>66</sup>

As well as the above requirements, growers are prohibited from discriminating against U.S. workers and must replace any H-2A worker

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56. § 1188(a); 1988 GAO REPORT, *supra* note 52, at 12–13.

57. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 592 (2001).

58. 1988 GAO REPORT, *supra* note 52, at 13.

59. *Id.*

60. *Id.* at 13–14.

61. *Id.* at 14. Thus, farmworkers who are paid by the piece rate usually are given a “minimum productivity standard” that must be met to retain employment, allowing growers to get rid of less productive workers easily. The DOL does limit the standard, either to the level set by the grower in 1977 or, for new applicants, to the level set by growers in the first year of certification. *Id.* at 13–14.

62. *Id.* at 13. For example, if the AEWR is \$8.00 per hour, and the grower pays a piece rate of forty cents per bucket, the grower must pay \$8.00 per hour even if the worker picks less than twenty buckets per hour.

63. Geffert, *supra* note 1, at 125, 129.

64. *Id.*; Holley, *supra* note 57, at 592.

65. Geffert, *supra* note 1, at 127–29.

66. *Id.* at 128.



with a U.S. worker if one is available, up to the mid-point of the H-2A worker's contract period.<sup>67</sup> Employers circulate job offers (called "clearance orders") through the U.S. Employment Service in hopes of recruiting U.S. workers to fill the positions.<sup>68</sup> The employer must also engage in private "positive" recruitment efforts such as placing newspaper or radio ads.<sup>69</sup>

Although H-2A employers are required to actively recruit and hire U.S. workers up until the mid-point of the H-2A contract, this rarely happens.<sup>70</sup> Growers' associations and employers provide the DOL with examples of "positive" recruitment such as tiny, half-inch classified ads run during the middle of the week or radio ads run at 4 A.M. when nobody is listening.<sup>71</sup>

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67. *Id.* at 119. This means that H-2A workers are not even guaranteed employment through the contract end date unless the mid-point is reached. In practice, this poses no real threat to H-2A workers since growers routinely discriminate against U.S. workers.

68. *Id.* at 123.

69. Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers), 20 C.F.R. § 655.103 (2004).

70. The GAO reports that in 1987 only thirty-three referrals were made in the State of Virginia, the majority of which included workers who "never showed up, refused the job, quit, or were fired for cause after a short period." 1988 GAO REPORT, *supra* note 52, at 72. After interviewing ten of those referred, the researchers found that seven disagreed with the reasons given by the grower as to why they were no longer employed. *Id.* at 73. The report further provides:

For the disputed cases, we cannot independently verify the account of either the worker or the grower. However, the workers' statements available to us suggest that accounts can considerably differ. Two, who had worked on a cabbage H-2A order before being referred to tobacco, said they quit because they were accused unfairly of lighting a fire in employer-provided housing and using drugs, and another worker we interviewed agreed with them that the accusation was untrue. One man said he was told by the employer that he had arrived too early but that the employer would call when work became available; he said the employer never called back. One said the employer fired him for working too slowly but that he believed his work was adequate. The father of a college student assigned to a tobacco farm said his son left because the living conditions were intolerable. Two experienced tobacco workers said they left a farm after being told to dig holes or move pipe, which they did not believe was the work they had been referred to do. One of these also said he worked five days and did all the tasks assigned to him but left after the farmer threatened him. A friend of this worker had seen the episodes and confirmed the worker's statement about harassment by the employer.

*Id.* at 73 n.2.

71. These statements are based on the author's experiences as an Outreach Paralegal at the Farmworker Unit of Legal Aid of North Carolina from July 2002 to August 2003. In my position there, I traveled thousands of miles across the State of North Carolina visiting farm labor camps in rural locations. I spoke to hundreds of Mexican H-2A and undocumented farmworkers, as well as several growers. I personally witnessed and experienced the abusive tactics employed by growers who were driven by greed, power, and discrimination. See Barry Yeoman, *Silence in the Fields*, MOTHER JONES, Jan./Feb. 2001, at 40, 43 ("In Idaho, the Snake River Farmer's Association urged its members to write back-breaking job descriptions to discourage Americans from applying.").

Tactics also include writing “backbreaking” job descriptions or conducting inefficient and hostile phone interviews.<sup>72</sup> Growers have “turned away U.S. residents for being a few minutes late for interviews, or for not knowing the fine points of federal labor law.”<sup>73</sup> In 1999, the North Carolina state employment service found 12,700 jobs for domestic workers on non-H-2A farms and only seven on H-2A farms.<sup>74</sup>

If a sufficient number of U.S. workers cannot be found—or enough workers are deterred—the DOL issues a labor certification.<sup>75</sup> The grower then petitions INS for the H-2A temporary visas.<sup>76</sup> Again, the Attorney General must approve only petitions that have been certified by the DOL to ensure: (1) that there exists an insufficient supply of U.S. workers, and (2) that the employment of H-2A workers will not affect or depress U.S. farmworker wages or conditions.<sup>77</sup> The employer then petitions the INS for a visa.<sup>78</sup> If the employer’s petition is approved and issued, the worker can then petition for a visa. After being declared eligible, and after paying processing and visa fees, the worker must then suffer a search by the INS at the point of entry into the United States.<sup>79</sup>

## 2. No Protection Makes for Cheaper Labor

H-2A workers, with all the protections granted on paper, should cost more than their domestic counterparts.<sup>80</sup> Since U.S. or undocumented workers are at best only guaranteed the minimum wage,<sup>81</sup> the additional costs associated with H-2A workers (such as transportation and housing) raise the costs of H-2A workers.<sup>82</sup> Michael Holley, a staff attorney with Texas Rural Legal Aid, theorizes “[i]f these substantive rights were being

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72. *Id.* at 43.

73. *Id.*

74. *Id.* at 45.

75. 8 U.S.C. § 1188(c)(3)(A) (2000). See generally U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 40–41, fig. 3.1 (1997) [hereinafter 1997 GAO REPORT] (providing a flowchart that outlines the H-2A process), available at <http://www.gao.gov/archive/1998/he98020.pdf>.

76. 1997 GAO REPORT, *supra* note 75, at 41, fig. 3.1.

77. 8 U.S.C. § 1188(a)(1)(A)–(B).

78. 1997 GAO REPORT, *supra* note 75, at 41, fig. 3.1 (outlining the “process for obtaining permission to bring in foreign workers”).

79. *Id.*

80. Holley, *supra* note 57, at 593 (“In short, the H-2A worker must be provided free housing, transportation and insurance, which others are not entitled to, and the H-2A worker also tends to earn a higher hourly wage.”).

81. See Ryon, *supra* note 13, at 141 (“FLSA [Fair Labor Standards Act] explicitly excludes many agricultural workers from the minimum wage protection.”).

82. Holley, *supra* note 57, at 593.

enforced, no profit-minded grower would jump through bureaucratic hoops to hire H-2A workers . . . .”<sup>83</sup>

Yet, the number of H-2A workers tripled from 1995 to 1999; compounded with discoveries from a 1997 U.S. General Accounting Office (GAO) report that there existed no shortage of farmworkers in the United States, it is clear that “H-2A workers do not cost as much as it appears on paper.”<sup>84</sup> “H-2A workers—like their forerunners, the slaves, sharecroppers, migrants restricted by pass systems, day laborers compelled by vagrancy laws, workers chased away at the point of a shotgun, and braceros—are exceptionally vulnerable and, therefore, exceptionally desirable.”<sup>85</sup> Simply put, federal laws governing the H-2A program “have been written in a manner which deliberately renders H-2A workers more vulnerable.”<sup>86</sup>

## II. THE REALITY AND THE ABUSES WITHIN THE H-2A PROGRAM

In addition to the practices utilized to obtain H-2A workers, further obstacles prevent these workers from demanding better work conditions. The obstacles reviewed in this section include: ineffective enforcement of H-2A regulations and other laws by the DOL; exclusion of H-2A workers from U.S. labor laws, including the Migrant and Seasonal Agricultural Worker Protection Act (AWPA); and the denial of a private right of action to enforce the H-2A regulations.

### A. *Ineffective Enforcement of H-2A Regulations*

The scattering of H-2A rules and regulations creates confusion for program participants and for those charged with enforcing H-2A regulations. Determining which of several agencies is responsible for a particular policy can be very difficult. A GAO report noted that “[p]rogram participants can also be confused by the multiple agencies and levels of government involved in the H-2A program, which fosters redundant agency oversight and the inability to determine compliance with program requirements.”<sup>87</sup> Those involved in the program agreed: “[W]e identified

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83. *Id.*

84. *Id.* at 576–77; *see also* 1997 GAO REPORT, *supra* note 75, at 6 (“A widespread farm labor shortage does not appear to exist now and is unlikely in the near future.”).

85. Holley, *supra* note 57, at 593.

86. *Id.*

87. U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKERS: STATUS OF CHANGES TO IMPROVE PROGRAM SERVICES 9 (2000) [hereinafter 2000 GAO REPORT] (statement of Cynthia M. Fagnoni, Director, Educ., Workforce, & Income Sec. Issues of the Health, Educ., & Human Servs. Div.), *available at* <http://www.gao.gov/archive/2000/he00134t.pdf>.

an instance in which confusion over responsibilities may have prevented action from being pursued against an employer abuse.”<sup>88</sup>

The 2000 GAO testimony further details the DOL’s administrative roles within the program:

[The DOL’s] Wage and Hour Division (WHD) of the Employment Standards Administration is the primary agency for enforcing existing H-2A contracts and other labor standard provisions, while the Employment and Training Administration (ETA) administers the H-2A program, working with state job services and agricultural employers to facilitate the application process. However, under current law, ETA exercises [the DOL’s] authority to suspend an employer’s participation in the H-2A program in the event that the employer has committed a serious labor standard or contract violation, and WHD, when conducting an enforcement action, must request that ETA consider using this authority. Given the overall separation of program functions between WHD and ETA, placing this suspension authority in ETA seems incongruent.<sup>89</sup>

Michael Holley describes the vast obscurity within the DOL complaint system that leads to a bias in favor of growers:

Basically, the Labor Department has created a “black hole” variety administrative complaint system for handling H-2A workers’ complaints against growers. . . [T]he H-2A system does not even require the agency to notify the complainant of the status of the complaint. . . . [T]he H-2A system says absolutely nothing about when or in what manner the agency must act. Therefore, the H-2A remedy appears to be the blackest of the black hole remedies created by federal agencies to date. . . .

Furthermore, a broader review of the H-2A regulations suggests that the creation of an inadequate remedy for workers’ complaints reflects not mere carelessness on the Labor Department’s part, but rather an institutional bias in favor of growers.<sup>90</sup>

The DOL is so biased in favor of growers that it even allows self-investigation by employers accused of violating regulations. In 1998, a

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88. Leah Beth Ward, *Legislation Targets Farm Labor Dilemma*, CHARLOTTE OBSERVER, Nov. 2, 1999, at 10A (quoting Robert Wallace, the regional inspector general for the U.S. Dep’t of Labor).

89. 2000 GAO REPORT, *supra* note 87, at 10.

90. Holley, *supra* note 57, at 601.

North Carolina job-service employee received complaints from H-2A workers employed by the North Carolina Growers Association (NCGA) and called the employer to schedule an interview to hear the other side of the story.<sup>91</sup> Before he could investigate, the DOL ordered the meeting to be cancelled.<sup>92</sup> The DOL allowed the NCGA to investigate its own member-grower and, unsurprisingly, it discovered no problems.<sup>93</sup>

So how can H-2A workers enforce their rights and guaranteed protections in such a biased system? The next section illustrates even more obstacles to access to the justice system for H-2A workers in the United States.

*B. Outside the Law: The Exclusion of Farmworkers from U.S. Labor Laws*

It is no secret that agricultural growers exert much influence in American politics.<sup>94</sup> The agricultural lobby has influenced Congress for the exemption of farmworkers from many critical employment and labor laws, including the National Labor Relations Act (NLRA), which provides protections for workers who strike, organize, and bargain collectively and the overtime provisions of the Fair Labor Standards Act (FLSA).<sup>95</sup> Most notably, H-2A workers are excluded from the AWP and have been denied a private right of action to enforce the H-2A regulations.<sup>96</sup>

Growers and grower associations deny communication between Legal Services lawyers and H-2A workers.<sup>97</sup> This is but one of several tactics farmers use to prevent enforcement of H-2A protections.<sup>98</sup> Grower associations and lobbies have deterred Legal Aid representation of H-2A workers by exerting pressure upon Congress to enact Legal Aid Corporation regulations prohibiting class actions and defining

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91. Yeoman, *supra* note 71, at 47.

92. *Id.*

93. *Id.*

94. See ROTHENBERG, *supra* note 24, at 208 (interviewing Mark Schacht, former lobbyist for the California Rural Legal Assistance Foundation (CRLAF) and former legislative director of the Migrant Legal Action Program, who stated: “The agricultural industry is the best-organized, most powerful, ruthless, unscrupulous special-interest group in America.”).

95. Ryon, *supra* note 13, at 140–41 (referencing the NLRA, which is codified at 29 U.S.C. §§ 151–187 (2000), and the overtime provision of the FLSA, which is codified at 29 U.S.C. § 207 (2000)); see also HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 147 (2000) (“As agricultural workers, [H-2A workers] are not covered by the NLRA’s anti-discrimination provision meant to protect the right to organize.”).

96. Ryon, *supra* note 13, at 138. See generally 29 U.S.C. § 1854 (2000) (providing a private right of action for workers covered by the AWP).

97. HUMAN RIGHTS WATCH, *supra* note 95, at 155–56.

98. See *infra* Part III.B.

communication with former H-2A workers in Mexico as prohibited solicitation.<sup>99</sup> Although H-2A workers are eligible for legal representation by Legal Aid attorneys, this benefit is substantially weakened due to the lack of communication between attorneys and workers, the existence of well funded grower defendants, as well as the lack of a private right of action to enforce either the H-2A regulations or protections under the AWPA.<sup>100</sup>

Extending coverage of the AWPA to H-2A farmworkers is extremely vital since some federal courts have ruled that they do not have standing to sue to enforce the federal H-2A regulations. The Supreme Court created a test in *Cort v. Ash* to determine whether a private right of action exists under statutes that do not expressly provide for one.<sup>101</sup> The test instructs:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff “one of the class for whose *especial* benefit the statute was enacted,”—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>102</sup>

In 1984, the Ninth Circuit applied the test to guestworkers and found that H-2A workers have no private right of action to enforce the program’s regulations:

[W]e believe that under the standards articulated by the Supreme Court for determining the availability of an implied private right of action, *Cort v. Ash*, appellants have no right of action available to them here. First, neither the INA, 8 U.S.C. § 1101(a)(15)(H)(ii), nor the WPA, 29 U.S.C. § 49, nor the H-2 regulations were intended to especially benefit alien workers

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99. Holley, *supra* note 57, at 614–15; OXFAM AMERICA, *supra* note 3, at 49.

100. See ROTHENBERG, *supra* note 24, at 231 (interviewing Greg Schell, a legal services attorney, who stated: “Our problem is that the legal system allows a well-funded defendant to delay, harass, intimidate, and harangue long enough to avoid liability unless our side is willing to dig in for the long fight.”).

101. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

102. *Id.* (alteration in original) (citations omitted).

*such as appellants; rather, their stated purpose is to protect the jobs of United States citizens.*<sup>103</sup>

One recent federal court decision, however, has found a private right of action for workers under H-2A provisions.<sup>104</sup>

*C. No Right to Sue: Effects of the Exclusion of H-2A Workers from AWP*

The Migrant and Seasonal Agricultural Worker Protection Act (AWPA) was named for one of its chief purposes: “to assure necessary protections for migrant and seasonal agricultural workers.”<sup>105</sup> The main difference between “migrant” and “seasonal” workers is that migrant workers are required to be absent overnight from their permanent place of residence while seasonal workers are not.<sup>106</sup> H-2A workers are explicitly excluded from the definitions of both “migrant” and “seasonal” workers under § 1802 of the AWP.<sup>107</sup>

Subchapters II and IV of the AWP detail requirements for employers. Employers must provide, at the time of *recruitment*, written disclosure to the worker of the place and period of employment, wages to be paid, the crops and activities in which the worker will be employed, any benefits or expected costs to the worker, and whether workers’ compensation coverage is provided.<sup>108</sup> Employers must post the provisions of the AWP at the place of employment, as well as the terms and conditions of housing occupancy.<sup>109</sup> Recordkeeping protections mandate preservation of employment records for three years.<sup>110</sup> Those records must include: “(A) the basis on which wages are paid; (B) the number of piecework units earned [if applicable]; (C) the number of hours worked; (D) the total pay period earnings; (E) the specific sums withheld and the purpose of each sum withheld; and (F) the net pay.”<sup>111</sup> The employer must provide the worker with this information, as in a pay stub, for each pay period

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103. *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 641 (1984) (citation omitted) (emphasis added).

104. *Vega v. Nourse Farms Inc.*, 62 F. Supp. 2d 334, 344 (D. Mass. 1999) (finding a private right of action exists for H-2A workers).

105. 29 U.S.C. § 1801 (2000). Additionally, the statute’s purpose is “to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers.” *Id.*

106. § 1802 (8)(A), (10)(A).

107. § 1802 (8)(B)(ii), (10)(B)(iii).

108. § 1821(a).

109. § 1821(b)–(c).

110. § 1821(d)(1).

111. § 1821(d)(1)(A)–(F).

worked.<sup>112</sup> Employers are prohibited from “knowingly providing false or misleading information to workers”<sup>113</sup> and are required to issue all information in the “language common to the migrant agricultural workers who are not fluent or literate in English.”<sup>114</sup>

The AWPAs provide that the employer shall pay wages when due, shall not force workers to purchase goods or services solely from the employer, and shall not violate the terms of the working arrangement.<sup>115</sup> Housing must comply with, and be certified according to, federal and state health and safety standards.<sup>116</sup> The Act also includes protections for workers ensuring the safety of motor vehicles utilized for transporting workers during the course of employment.<sup>117</sup> Employers may not “intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against” agricultural workers for asserting their rights under the AWPAs.<sup>118</sup> Perhaps most importantly, section 1854 of the AWPAs provides workers with a private right of action and grants federal-question jurisdiction to the federal courts.<sup>119</sup> The private right of action allows a worker to recover either actual damages or statutory damages up to \$500 per worker, per violation.<sup>120</sup>

These provisions, especially the private right of action, make the AWPAs stronger than other labor protections for agricultural workers. Extending AWPAs coverage and protections to H-2A workers would provide strong protection for H-2A workers in the United States. It would also mean that the workers would receive information regarding their prospective employment before arriving in the United States.<sup>121</sup>

Without AWPAs protection, H-2A workers who have any complaints have only one avenue of redress—DOL enforcement. Since H-2A workers face extreme difficulty in getting administrative agencies to enforce H-2A regulations, AWPAs coverage would create a real threat of legal action for violations which otherwise, in practical terms, are not enforceable through the appropriate federal agencies.<sup>122</sup> If AWPAs protections were extended to H-2A workers, the H-2A workers would have a private right of action to

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112. § 1821(d)(2).

113. § 1821(f).

114. § 1821(g).

115. § 1822.

116. § 1823(a)–(b).

117. § 1841.

118. § 1855.

119. § 1854.

120. § 1854(c)(1).

121. Ward, *supra* note 3, at 1A (“Most [H-2A workers] don’t see their contracts until they arrive in North Carolina.”).

122. *See supra* Part II.A.



sue for actual or statutory damages for each violation of the Act's provisions. The threat of statutory damages under the AWPAs would be effective in ensuring that employers comply with the standards or face economic consequences.

Currently in North Carolina, H-2A employers who violate housing, field sanitation, pesticide, or transportation standards are rarely investigated by the DOL.<sup>123</sup> Other problems with DOL enforcement include outright lack of enforcement;<sup>124</sup> notice of investigations given to suspected employers; "chosen" employees who "volunteer" to speak to DOL investigators, and who repeatedly deny any such problems or violations; and silent workers who are too afraid of losing their jobs to speak to DOL regarding complaints.<sup>125</sup> Those employers who have been sanctioned and fined by the state DOL for violations frequently request administrative "settlements" or hearings, where fines are greatly reduced, resulting in weak deterrence.<sup>126</sup>

If H-2A workers were entitled to sue an employer for a housing violation under the AWPAs, each worker in that housing unit would be able to recover up to \$500 in statutory damages.<sup>127</sup> With some residences housing up to 100 workers, this would provide significant deterrence to growers contemplating substandard housing. In addition, the retaliation provisions under § 1855 would enable workers to recover statutory damages for blacklisting or retaliation due to assertion of their rights.<sup>128</sup>

Further, since undocumented workers are prohibited from representation by Legal Aid, it is very rare that undocumented agricultural workers assert their rights under AWPAs.<sup>129</sup> Thus, in order to achieve the AWPAs's stated goal of protecting agricultural workers, guestworkers must assert their rights through the courts, since administrative agencies are "black holes" for complaints.<sup>130</sup> Including H-2A workers in the AWPAs would effectively further the purposes of the AWPAs and the INA.

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123. Holley, *supra* note 57, at 592–93.

124. Geffert, *supra* note 1, at 133.

125. *Id.*

126. Ward, *supra* note 3, at 1A. A state investigation of a guestworker's serious neurological injury resulted in a fine to a farmer of \$875 out of a maximum \$7,000. *Id.* "U.S. Labor Department records show that only a handful of H-2A complaints were investigated in the last two years, resulting in either no action or marginal fines." *Id.*

127. 29 U.S.C. § 1854(c)(1) (2000).

128. § 1855(a).

129. OXFAM AMERICA, *supra* note 3, at 49 ("In addition, Congress has prohibited federally-funded legal services programs from representing undocumented workers . . .").

130. Holley, *supra* note 57, at 601.

Congress, however, believed that the H-2A regulations were sufficient to protect H-2A workers.<sup>131</sup> In a 1982 hearing before the Subcommittee on Education and Labor in the House of Representatives, Robert Collyer, Deputy Under Secretary of Labor for Employment Standards, stated that “all the H-2 protections are substantially more than the protections afforded . . . under the [AWPA] . . . [w]e believe strongly that immigration legislation is the place to deal with foreign workers, rather than [AWPA].”<sup>132</sup>

### III. SLAVERY? SERVITUDE? EMBARRASSINGLY FEW DIFFERENCES

The history of systematically exploitative farmwork in the United States began with the importation of African slaves as tools of labor due to their dark “black” skin and the belief that they were somehow subhuman and inferior to people with “lovely White and Red” complexions.<sup>133</sup> Historian Howard Zinn describes “two elements that made American slavery the most cruel form of slavery in history: the frenzy for limitless profit that comes from capitalistic agriculture; [and] the reduction of the slave to less than human status by the use of racial hatred, with that relentless clarity based on color.”<sup>134</sup>

Greed motivated the U.S. tobacco industry to import slaves in the early 1600s when Virginians discovered the profitability of “pleasurable drugs tainted with moral disapproval.”<sup>135</sup> “[F]or keeping power and wealth where it [was],” American slaveowners developed a system of physical and psychological control to “maintain their labor supply.”<sup>136</sup> As Zinn describes:

The slaves were taught discipline, were impressed again and again with the idea of their own inferiority to “know their place,” . . . . To accomplish this there was discipline of hard labor, the breakup of the slave family, the lulling effects of religion . . . , the creation of disunity among slaves by separating them into field slaves and more privileged house slaves, and

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131. Ryon, *supra* note 13, at 149.

132. *Id.* (first alteration added).

133. BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND (1755), reprinted in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA, at 99 (Juan F. Perea et al. eds., 2000).

134. HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT (1995), reprinted in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA, at 94 (Juan F. Perea, et al. eds., 2000).

135. *Id.* at 92.

136. *Id.* at 96.

finally the power of law and the immediate power of the overseer to invoke whipping, burning, mutilation, and death.<sup>137</sup>

A. *Modern-Day Servitude in North Carolina*

The discrimination that has existed against Africans since the early 1600s persists today in many aspects of American life. Not many African Americans are farmworkers today, but the kind of discrimination that existed during the time of slavery in America continues today against Mexicans, who put food on tables around the world and wealth in the hands of those who rule the agricultural industry.<sup>138</sup> Although they are paid a wage and granted legal protections on paper, H-2A workers are subjected to “system[s] of control” similar to those used by slaveowners to maintain their labor supply.<sup>139</sup> H-2A workers are forced by economic necessity to leave their homeland and endure racial discrimination and economic oppression in the United States. They are imported by American farms and indoctrinated about their “place” in the economic scheme, and, when they ask for basic human treatment, the growers respond with greed and, sometimes, violence—silencing the workers to unyielding service.

The vast majority of guestworkers imported into the United States each year through the H-2A program are citizens of Mexico.<sup>140</sup> H-2A workers are predominantly men.<sup>141</sup> They are driven to the United States by economic necessity to support the families they are forced to leave behind.<sup>142</sup> They are willing to become indebted to afford a legal route into the United States, instead of the more dangerous and illegal route involving the risk of death.<sup>143</sup> While undocumented workers arrive in the United States on their own, or by paying a *contratista* to help them cross the border and find employment, H-2A workers are actively recruited by U.S. growers’ representatives throughout Mexico to work legally on U.S. farms for a temporary period.<sup>144</sup>

H-2A workers arrive on buses from Mexico instead of slave ships. Because these workers usually do not speak English, they struggle to

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137. *Id.*

138. Yeoman, *supra* note 71, at 42.

139. ZINN, *supra* note 134, at 96.

140. IMMIGRATION & NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 122–24 (1997); *see also* 1997 GAO REPORT, *supra* note 75, at 45 (surveying where H-2A workers came from between 1987 and 1996).

141. SAF Fact Sheet, *supra* note 2.

142. Philip L. Martin, *Economic Integration and Migration: The Case of NAFTA*, 3 UCLA J. INT’L L. & FOREIGN AFF. 419, 422 (1998).

143. Holley, *supra* note 57, at 596.

144. *Id.*

understand their new world.<sup>145</sup> They are treated like animals, living in filthy, substandard housing and are forced to work until they get sick or die.<sup>146</sup> They are denied civil rights and access to the courts to assert their rights to fair treatment and equality, much like slaves, who had no legal rights at all. Worse still, they are intimidated, manipulated, discriminated against, and vulnerable to violence, assault, and robbery.<sup>147</sup>

Like the slaves, Mexican farmworkers come to “know their place.” In particular, H-2A workers are quick to learn that they are in a unique employment situation and that they should not assert any of the nominal rights afforded to them on paper. Moreover, they are extremely vulnerable to the whims of their employers and get little or no protection from the rules their employers promised to follow.<sup>148</sup>

### *B. Abusive Tactics and the Tools of Oppression*

When H-2A workers arrive in North Carolina, they are “oriented” in a warehouse with one adobe-red wall sardonically decorated like a Mexican street scene with woven blankets draped over a balcony and a shrine to the Virgin Mary.<sup>149</sup> The workers are forced to look up and listen while an NCGA employee spews unfamiliar rules and information down to them from the balcony.<sup>150</sup>

They are warned not to speak to farmworker advocates and are told, “[w]hen the attorneys from Legal Services show up, watch out . . . [t]hey want to take your job away from you.”<sup>151</sup> An intern with the Farmworker Project in North Carolina attended an orientation and confirmed that NCGA employees “spoke at length about the Farmworker Unit of Legal Services of North Carolina . . . [and] told the workers that Legal Services was their ‘enemy.’ He told the workers they should avoid Legal Services . . . [and] to contact only the NCGA, and not Legal Services, if they had any problems.”<sup>152</sup> Subsequently, workers were instructed to throw away their books entitled “Know Your Rights,” or “Conozca Sus Derechos.”<sup>153</sup> The Farmworker Unit of Legal Services of North Carolina creates and distributes these books annually to busloads of H-2A workers headed for

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145. SAF Fact Sheet, *supra* note 2.

146. Ward, *supra* note 3, at 1A.

147. Carrasco, *supra* note 25, at 199–200.

148. *Id.* at 199.

149. Yeoman, *supra* note 71, at 42.

150. *Id.*

151. *Id.*

152. HUMAN RIGHTS WATCH, *supra* note 95, at 157.

153. *Id.*

North Carolina from Mexico.<sup>154</sup> Under the watch of their new employers, and on their very first day of employment, few workers are willing to question or resist the instructions given by the NCGA, so they comply.<sup>155</sup> Workers later stated that an NCGA employee told them they would “be fired or have serious problems with the [NCGA]” if they were seen with a “Know Your Rights” booklet.<sup>156</sup>

Unlike undocumented migrant workers, and like slaves, H-2A workers are “essentially indentured to a single employer.”<sup>157</sup> As Attorney Holley detailed: “If the work is insufficient, the employer is abusive, or the housing is intolerable, the H-2A worker does not have the option of finding another job during the remainder of the work visa; his only option is to tolerate it or quit and return immediately to his native country.”<sup>158</sup> This gives growers “a weapon usually reserved for the government”—deportation.<sup>159</sup>

Since H-2A regulations do not cover the recruitment process in Mexico, most H-2A workers have incurred debt in obtaining their employment, making it more likely that they will tolerate the horrible work conditions they may face.<sup>160</sup> Regularly, workers arrive to find that they will have to provide food and basic necessities for themselves in the first days or weeks of their employment.<sup>161</sup> Many have already used up the money they borrowed to get to the United States to pay recruitment and visa fees and other travel expenses. They are forced to borrow money from the grower, starting a cycle of debt and unlawful deductions from their pay.<sup>162</sup>

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154. *Id.* Workers are given a handbook from the NCGA, which warns that:

FLS [Farmworker Legal Services] has a hidden motive when they approach you. They say they’re your freinds [sic] and they are concerned about your rights and well being, but in reality their motive is to destroy the program which brings you to North Carolina legally.

. . . .

FLS discourage [sic] the growers with excessive suits which are for the most part without merit. The history of FLS shows that the workers who have talked with them have harmed themselves. So don’t be fooled and allow them to take away your jobs.

N.C. GROWERS ASS’N, UNDERSTANDING THE WORK CONTRACT 191 (1998).

155. HUMAN RIGHTS WATCH, *supra* note 95, at 158.

156. *Id.* Workers have also professed to the author that they have been specifically warned that they could be sent back to Mexico if seen with a booklet—an example of exploitative deportation power used by growers.

157. Yeoman, *supra* note 71, at 46.

158. Holley, *supra* note 57, at 595 (footnotes omitted).

159. Yeoman, *supra* note 71, at 46.

160. Holley, *supra* note 57, at 596.

161. *See supra* note 71 (regarding the author’s personal observations).

162. *See* Matthew Calabria, *Tired, Poor, and Huddled: The Inadequate Treatment of Migrant Farmworkers in North Carolina*, THE HILL: CHAPEL HILL POLITICAL REVIEW, May 2003, at 6 (discussing the \$300 fee that migrant workers must pay to the North Carolina Growers Association “to

Like African slaves in early America, H-2A workers from the same family or village in Mexico are usually separated by placement at different farms separated by large distances.<sup>163</sup> This exacerbates the workers' lack of connection with the outside world, leaving them dependent on their employer for housing, meals or groceries, or transportation to banks, to churches, to obtain social or medical services, or to make phone calls to their families in Mexico.<sup>164</sup>

Since H-2A workers do not usually have access to their own transportation, they may have to walk miles from their isolated camp to the nearest convenience store, which may be owned by their grower, or into town to take care of necessities.<sup>165</sup> H-2A workers are often assaulted along highways and roads by locals who know that Mexican farmworkers walk with pockets full of money to stores to wire their earnings home to their families in Mexico.<sup>166</sup> H-2A camps have also been the target of break-ins and robberies.<sup>167</sup>

Growers, too, rob H-2A workers of their deserved earnings by cheating on work records and "shaving off" hours.<sup>168</sup> In July 1998, workers fled from an H-2A camp to the nearest church because they did not trust their supervisor to keep accurate records of the number of buckets they picked.<sup>169</sup> The workers told a state employee that they were forced to work fifteen hours a day with only one break for lunch and no drinking water,<sup>170</sup> that their supervisor threw cucumbers at them for not working fast enough, and that they were being cheated by the use of an unorthodox accounting system.<sup>171</sup>

One woman in North Carolina encountered several H-2A workers leaving their farm because the grower had drawn a pistol on them.<sup>172</sup> Another H-2A worker abandoned his contract in 2002 after his employer

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be part of the H2A program").

163. See *supra* note 71 (regarding the author's personal observations).

164. See Ward, *supra* note 3, at 1A ("H-2A workers must depend on their employer . . . for transportation to the store and church, and loans when they are short of cash."); see also Calabria, *supra* note 162, at 7 ("[M]ost workers do not have transportation to medical facilities [and] in some rural areas, the nearest phone is an hour's walk away.").

165. See Ward, *supra* note 3, at 1A (noting the workers' dependency on their employers for transportation).

166. See *supra* note 71 (regarding the author's personal observations).

167. *Id.*

168. *Id.* One grower even admitted to a state employee, "You know how we cheat them? We fuck 'em on the hours." Yeoman, *supra* note 71, at 45.

169. Ward, *supra* note 3, at 1A.

170. Yeoman, *supra* note 72, at 47.

171. *Id.*; Ward, *supra* note 3, at 1A.

172. Yeoman, *supra* note 71, at 45.

pointed and shot a gun next to his head.<sup>173</sup> Beatings and other acts of violence and intimidation, like those inflicted upon slaves in earlier times, are used against Mexican farmworkers to ensure that they endure these harsh conditions. This intimidation, coupled with the constant fear of deportation, most likely results in the underreporting of crimes against Mexican farmworkers in the United States.

As slaves had no choice in the housing that was provided to them by their “owners,” H-2A workers frequently have no choice in their housing and face conditions intolerable for any human being. Upon arrival, they are presented with cramped quarters with little or no privacy; moldy, worn-out mattresses; water not fit for drinking; filthy portable toilets or fully exposed and communal toilets; exposure to live electrical wires; and nonfunctional smoke detectors, refrigerators, and stoves.<sup>174</sup> Investigators have noted that H-2A workers are housed in “crumbling, rat-infested buildings where sewage bubbles up through the drains.”<sup>175</sup>

A report conducted by Human Rights Watch (HRW) in 2000 exposed abuses of H-2A workers’ freedom of association.<sup>176</sup> H-2A workers usually are not allowed to receive visitors, including labor organizers and legal aid providers.<sup>177</sup> The report cited a clause in the H-2A worker’s contract with the NCGA that stated “[n]o tenancy in such housing is created; employer retains possession and control of the housing premises at all times.”<sup>178</sup> The “Work Rules” issued by the NCGA include: “[T]he employer reserves the right to exclude any person(s) from visiting housing premises.”<sup>179</sup> Although the language of the work agreement has been modified since 2000 to include a waiver, HRW noted that “[a] farmworker in Mexico would have to be able to read and understand a dense legal contract and then muster the courage to write a ‘request of waiver’ to avoid its restrictions, something that in practice is simply not going to happen.”<sup>180</sup> Retaliation by growers against farmworkers who speak to farmworker advocates, even without voicing a concern, has included prohibitions from attending church, withholding transportation into town to purchase groceries, firing,

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173. See *supra* note 71 (regarding the author’s personal observations).

174. *Id.*; see also Ward, *supra* note 3, at 1A (describing worker housing); Yeoman, *supra* note 71, at 42 (same).

175. Yeoman, *supra* note 71, at 42.

176. See HUMAN RIGHTS WATCH, *supra* note 95, at 147 (addressing obstacles to H-2A workers’ freedom of association).

177. *Id.* at 153.

178. *Id.*

179. *Id.*

180. *Id.*

deportation, and even violence.<sup>181</sup> One H-2A worker told an HRW researcher privately, “They don’t let us talk to Legal Services or the union . . . . They would fire us if we called them or talked to them.”<sup>182</sup>

The most forceful tool used to suppress H-2A worker complaints is the blacklist, or “*lista negra*,” which teaches H-2A workers that silence and obedience are essential for job security.<sup>183</sup> H-2A recruiters in Mexico retain lists of workers who are no longer eligible for employment.<sup>184</sup> Recruiters claim that the list includes names of those who abandoned or overstayed the length of their contract, but workers know that those who complain about conditions, or even those who request necessary medical services, end up on the lists.<sup>185</sup> A 1999 Carnegie Endowment study found that the blacklisting of H-2A workers is “widespread, is highly organized, and occurs at all stages of the recruitment and employment process.”<sup>186</sup> In addition, the word “gets out” to other farmworkers when one of their peers has been punished, further reinforcing a code of silence. The National Farm Worker Ministry has been told that “[w]ord is spread of any H-2A workers who have spoken up about their working or living conditions, and those workers are sent back to Mexico and do not get rehired.”<sup>187</sup> Mary Lee Hall, managing attorney of Farmworker Legal Services of North Carolina, agrees that the blacklisting system “is known to every H-2A worker, and I have yet to meet one who did not take this threat seriously.”<sup>188</sup>

A report for the DOL prepared by the Office of the Inspector General confirms that H-2A workers are “malleable and less likely to voice complaints about wages and working conditions.”<sup>189</sup> Knowing they can be deported at any time, H-2A workers “are unlikely to complain about worker protection violations . . . fearing they will lose their jobs or not be hired in the future.”<sup>190</sup> “Workers say they have adopted several unwritten rules: Don’t gripe about wages and working conditions. Don’t seek the benefits you’re entitled to. Don’t make noise, even when your health is in jeopardy.”<sup>191</sup> All in all, the H-2A program allows racism and greed to perpetuate human rights abuses, giving the impression of modern-day

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181. See *supra* note 71 (regarding the author’s personal observations).

182. HUMAN RIGHTS WATCH, *supra* note 95, at 156.

183. *Id.* at 159; Ward, *supra* note 3, at 1A.

184. HUMAN RIGHTS WATCH, *supra* note 95, at 159.

185. *Id.*

186. *Id.* at 159 (quoting DEMETRIOS G. PAPADEMETRIOU & MONICA L. HEPPEL, BALANCING ACTS: TOWARD A FAIR BARGAIN ON SEASONAL AGRICULTURAL WORKERS 13 (1999)).

187. *Id.*

188. *Id.*

189. Ward, *supra* note 3, at 1A.

190. 1997 GAO REPORT, *supra* note 75, at 9–10.

191. Yeoman, *supra* note 71, at 42.



servitude.

#### IV. OTHER PROBLEMS WITH THE H-2A PROGRAM

If U.S. employers can escape from adhering to the regulations that govern the H-2A program, continually exploiting easily deportable workers, we must not only ask why a nation that stands for equality and justice allows such treatment of workers, but also, how these failures serve the stated purposes of the H-2A program. This section addresses that question and other problems with the H-2A program.

##### A. *Constitutionality of the AWPA Exclusion*<sup>192</sup>

Article I, Section 8 of the United States Constitution grants Congress the power “[T]o establish an uniform Rule of Naturalization.”<sup>193</sup> The Supreme Court has long recognized Congress’s plenary power over immigration; the Court has held that “over no conceivable subject is the legislative power of Congress more complete.”<sup>194</sup> Yet, absent compelling justification, any legislation that explicitly denies H-2A workers’ fundamental rights likely violates the principle of equal justice embodied in the Constitution. Considering that it is the branch of government responsible for enforcing the Fourteenth Amendment, how can Congress itself deny H-2A workers fundamental constitutional protection?<sup>195</sup>

At least one federal court has held that the “near-unrestrained” power of Congress over immigration may be limited when it violates constitutional protections.<sup>196</sup>

It would be ironic, indeed, to allow the Government’s assertion of plenary power to transform the First Amendment from the great instrument of open democracy to a safe harbor from public scrutiny. In the words of Justice Murphy, “[such a] conclusion would make our constitutional safeguards transitory and discriminatory in nature . . . . [We] cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom.”<sup>197</sup>

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192. See *supra* Part II.C (explaining the effects of H-2A workers’ exclusion from the AWPA).

193. U.S. CONST. art. I, § 8, cl. 4.

194. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

195. See U.S. CONST. amend. XIV (prohibiting state infringement of fundamental constitutional rights and granting Congress the power to enforce the Amendment).

196. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 686 (6th Cir. 2002) (citing *Bridges v. Wixon*, 326 U.S. 135, 162 (1945) (Murphy, J., concurring)).

197. *Id.* at 686.

We can only hope that other federal courts will continue to follow this line of reasoning if asked to rule on the constitutionality of excluding H-2A workers from the AWPA.

*B. Violation of International Law: NAFTA*

In addition to the issue of its constitutionality, the exclusion of H-2A workers from U.S. labor laws such as the AWPA likely violates the North American Free Trade Agreement (NAFTA). A request for action was filed in February 2003 on behalf of H-2A workers in North Carolina by the *Central Independiente de Obreros Agrícolas y Campesinos* (CIOAC) of Mexico, and by the Farmworker Justice Fund, based in Washington, D.C.<sup>198</sup> The complaint was accepted for review by the National Administrative Office (NAO) in Mexico City on September 5, 2003.<sup>199</sup> The NAO is part of the North American Agreement on Labor Cooperation (NAALC), which is part of NAFTA.<sup>200</sup> Under NAALC, the three nations involved in NAFTA (Canada, Mexico, and the United States) agree to “cooperate to improve [their] treatment of workers and [their] enforcement of labor laws.”<sup>201</sup> The complaint requests that the following problems be addressed: exclusion of H-2A workers from AWPA; denial of collective bargaining and organizing rights; denial of tenancy rights; blacklisting; manipulation by employers of the length of season to avoid obligations to workers; and denial of access to workers’ compensation.<sup>202</sup> The Mexican NAO will issue a report based on its findings, and if violations are found, further proceedings are possible.<sup>203</sup>

*C. Illegal Immigration and the Protection of U.S. Jobs for U.S. Citizens*

Latinos are the largest minority group in the United States, according to the latest census.<sup>204</sup> As of July 1, 2003, approximately thirteen percent (38.8 million) of the total U.S. population is Hispanic.<sup>205</sup> Immigration and high birth rates are major causes of the increase in the Latino population.<sup>206</sup>

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198. *Mexico to Investigate Guestworker Abuse in North Carolina*, TRIANGLE FREE PRESS (Nov. 2003), available at <http://www.trianglefreepress.org/nov03/local.html>.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Haya El Nasser, *39 Million Make Hispanics Largest U.S. Minority Group*, USA TODAY, June 1, 2003, available at [http://www.usatoday.com/news/nation/census/2003-06-18-Census\\_x.htm](http://www.usatoday.com/news/nation/census/2003-06-18-Census_x.htm).

205. *Id.*

206. *Id.*

Left out of the equation is the unquenchable desire of U.S. employers for an exploitable workforce. More and more people from Mexico, as well as many other nations, immigrate to the United States to find jobs, and to live and work in pursuit of the American dream.

Forgetting that immigrants colonized, populated, and founded the United States, many U.S. citizens endorse the persecution of undocumented immigrants and support harsh immigration restrictions against Mexicans.<sup>207</sup> The poor economic situation in Mexico encourages Mexican citizens to immigrate to other countries where they can work to support their families. Due to strict U.S. immigration laws, Mexican immigrants must risk their lives attempting to evade authorities as they cross the United States–Mexico border. They arrive in the “land of the free,” to find that, for some reason, they are considered illegal. From October 2002 through September 2003, there were at least 346 migrant deaths along the border.<sup>208</sup>

Yet, undocumented immigrants readily find jobs once they are in the United States.<sup>209</sup> In October 2003, the Department of Homeland Security conducted raids at sixty Wal-Mart stores across the nation, discovering more than 250 undocumented workers.<sup>210</sup> The workers consisted of ninety Mexicans, thirty-five Czechoslovakians, twenty Brazilians, twenty-two Mongolians, and twelve each from Russia, Poland, Uzbekistan, Georgia, and Lithuania, and several from Slovakia and El Salvador.<sup>211</sup> The workers were mainly janitors, all employed by a company contracted by Wal-Mart to do nighttime cleaning.<sup>212</sup> Migration expert Muzaffar Chishti noted, “We all recognize these are highly important, needed, jobs and U.S. workers are not available or interested in taking these jobs.”<sup>213</sup>

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207. See Numbers USA, *Americans Talk About Illegal Immigration* (March 2003) (noting that a large majority of Americans favor mandatory prison terms for illegal immigrants), at [http://www.numbersusa.com/interests/Roperpoll\\_0303.html](http://www.numbersusa.com/interests/Roperpoll_0303.html).

208. Deborah Tedford, *Migrant Deaths Rise on U.S.-Mexico Border in 2003* (Oct. 1, 2004), at <http://news.phaseiii.org/article1324.html>.

209. The term “undocumented” has been adopted by immigrant advocates who seek to end the use of the term “illegal.” Most claim that no person can be “illegal,” instead they are “undocumented” or “unauthorized” to work. See Rick Badie, *‘Illegal’: Slur or Accurate Label?*, ATLANTA J. CONST., Jan. 28, 2004 (chronicling the debate over language used to describe aliens), available at [http://www.ajc.com/news/content/news/atlanta\\_world/0104/28illegal.html](http://www.ajc.com/news/content/news/atlanta_world/0104/28illegal.html).

210. Laura Bonilla, *Mass Arrest of Migrant Workers at Wal-Mart Reopens Immigration Debate* (Nov. 5, 2003), available at [http://quickstart.clari.net/qs\\_se/webnews/wed/ch/Qus-employment-migrants.Rt2v\\_DN6.html](http://quickstart.clari.net/qs_se/webnews/wed/ch/Qus-employment-migrants.Rt2v_DN6.html).

211. *Id.*

212. *Id.* The issue of “layering” or subcontracting work is yet another intricate legal obstacle in obtaining equal rights and worker protection for immigrants in the United States. See Press Release, National Employment Law Project, *Subcontracting Results in Decreased Wages, Benefits, and Protections for Workers* (Mar. 20, 2002) (noting that “subcontracting hits low-wage and immigrant workers the hardest”), available at <http://www.nelp.org/document.cfm?documentID=39>.

213. Bonilla, *supra* note 210.

The fear that immigrants take jobs away from U.S. workers perpetuates racism and discrimination toward immigrants. Looking closely at the source of labor in this country, the United States is fed, clothed, cleaned, sheltered, and provided with many luxuries by the labor of immigrants. Many U.S. workers are simply unwilling to undertake these essential jobs because of horrible work conditions and low pay. Immigrants are more attractive to U.S. employers because they will put up with substandard wages and work conditions that U.S. workers will not accept. Employers have no incentive to make improvements or raise wages to attract U.S. workers when cheaper labor is available. The United States should be motivated to ensure that all workers receive fair wages and satisfactory work conditions.

The H-2A program was enacted to protect U.S. workers and curb illegal immigration, yet its practical effect is exactly the opposite.<sup>214</sup> The failure to enforce the H-2A program's regulations and protections renders H-2A workers a cheap-labor commodity whose presence drives down wages.<sup>215</sup> The harsh treatment and poor working conditions that guestworkers face leave them with few options. Thus, H-2A workers find themselves "stuck" in a situation of servitude. Since workers are "indentured" to one employer and cannot legally seek alternative employment, many workers simply choose to leave the H-2A program to find illegal work in other sectors.

"[G]overnment officials openly acknowledge that the program has actually created a new conduit for illegal immigration."<sup>216</sup> In 1998, four times more H-2A workers were requested than were required.<sup>217</sup> For the 1999 season, the NCGA reported that 4,164 workers did not complete the season and that forty percent of the workers abandoned their work contracts.<sup>218</sup> Such figures reveal that the abuses within the program are too much to bear for many workers. Despite this rate of abandonment, North Carolina had a sufficient workforce to harvest its crops. In turn, working conditions remain poor, abuses go unreported, and the exploitation of Mexican H-2A farmworkers continues.<sup>219</sup>

John Sweeney, president of the AFL-CIO, stated, "We must fix our nations [sic] immigration laws so that they discourage rather than

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214. See 1997 GAO REPORT, *supra* note 75, at 4, 9–10 (explaining how the H-2A program was designed to provide legal, non-immigrant guestworkers to U.S. growers but protects them inadequately).

215. See *supra* Part I.B.2.

216. Yeoman, *supra* note 71, at 83.

217. *Id.*

218. *Id.*

219. *Id.*

encourage the exploitation of workers.”<sup>220</sup> Gabriela Lemus of the League of United Latin American Citizens, speaking for immigrant workers, noted that “[t]he American dream has turned into a nightmare.”<sup>221</sup> Employers must be penalized, pursuant to federal statutes, when they employ undocumented immigrants.<sup>222</sup> Employers should face additional consequences when they threaten, intimidate, silence, oppress, or enslave these workers. At the very least, workers who are legally authorized to work should be allowed to pursue their complaints in court. This would help to strengthen employment laws and ensure safe working conditions for *all* U.S. workers. Allowing employers to easily exploit workers does not strengthen U.S. labor laws, conditions for U.S. workers, or the economy.

Overall, the most effective tool for creating better conditions for immigrant farmworkers, and all immigrant workers, is support from U.S. citizens. U.S. workers need to be more sensitive to the plight of immigrant workers in the United States and to realize that improvements in conditions for these workers will further enhance labor standards for all workers. In some instances, such reforms may even create more jobs that U.S. workers are willing to take. U.S. workers should always actively support labor rights for themselves, as well as for those who do not have the opportunity to challenge oppressive labor practices within the United States.

Fair, equal, and respectful treatment of immigrants in the United States is essential to the credibility of this nation’s claim to democracy and to its promise of equal opportunity and constitutional freedoms. Fundamental liberties that were created for *all* people cannot be granted only to *some* people and still be deemed democratic. For if these guarantees only apply to some people and not others within its borders, how can the United States truly consider itself a nation that believes “all men are created equal”?<sup>223</sup> How can a nation that, year after year, spends the majority of its budget purportedly protecting democratic freedoms continue to deny those freedoms to those legally present and working within its own borders? Perhaps it is because we as a nation do not truly deem all persons equal.

#### CONCLUSION

The evolution of agricultural labor in the United States from slavery to modern-day servitude, as evidenced by the H-2A program, shows that the

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220. Bonilla, *supra* note 210.

221. *Id.*

222. See 8 U.S.C. § 1324(a) (2000) (providing criminal penalties for those who knowingly employ illegal aliens).

223. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

racism and discrimination of the past persist today and are supported by governmental acts of omission and commission. The cruel discrimination and subhuman treatment experienced by imported African slaves, and the subhuman treatment that slaveowners in early America afforded them, still subtly persists in the United States against Mexican H-2A workers. The injustices faced by guestworkers are reminiscent of America's history of slavery and indentured servitude. Congress, supposedly representing the will of U.S. citizens, assists growers in oppressing H-2A workers, principally by excluding them from the AWP. The effect of this exclusion is plain: H-2A workers have unequal access to justice in the United States.

The H-2A program is deeply flawed. Substantial changes must be made to mitigate discrimination against agricultural guestworkers. David North, a former DOL official from the Johnson administration who has called the H-2A program "a disgrace," stated, "American employers can do quite well without such programs . . . . [H-2A] simply transfers funds from American farmworkers to agribusiness."<sup>224</sup> The United States should comply with the provisions of NAFTA and ensure that Mexican workers are entitled to protections equal to those afforded to U.S. workers by including H-2A workers in the AWP and by granting them further protections such as overtime pay and the right to organize.

At a minimum, the United States should ensure that the meager farmworker protections currently in place are enforced. The DOL must exercise its authority over the processes of the guestworker program and enforce those minimal regulations equally and effectively. This would be a good first step toward ending discrimination against immigrants, who, citizens or not, should be treated equally while they feed the world by working in the nation that runs the planet's largest food system, the United States of America.<sup>225</sup>

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224. Yeoman, *supra* note 71, at 85.

225. See Thompson, *supra* note 4, at 9 ("Farmworkers receive too little pay and remain poor even as the U.S. food system outpaces in productivity and output every other system on the planet and as U.S. farms 'feed the world.'").