

# Justice on Our Fields: Can “Alt-Labor” Organizations Improve Migrant Farm Workers’ Conditions?

Manoj Dias-Abey\*

*This article examines how non-traditional labor organizations, also known as “alt labor,” can improve the working conditions of migrant farm workers in the United States and Canada. I consider the work of three labor organizations—the Agricultural Workers Alliance (Canada) (“AWA”), Justice in Motion (U.S.) (“JIM”), and the Coalition of Immokalee Workers (U.S.) (“CIW”)—by focusing on the variety of “legal engagements” that these organizations have to create better working conditions for migrant farm workers. I argue that labor organizations engage with the law in numerous ways, including: improving the rights consciousness of workers; supplementing the work of regulators to increase compliance; undertaking private enforcement of their own; instituting new rights and entitlements through court challenges; building and coalescing social movements; and designing and implementing private regulatory system. I find that the AWA and JIM perform important work to build the rights consciousness of workers and improve compliance with existing legal standards in ways which public regulators are unable to do. However, most workers do not bring forth claims because they fear employer retaliation. The CIW, on the other hand, has devised a private regulatory system that overcomes some of the limitations of public regulatory systems, for example, by allowing farm workers to vindicate their rights regardless of their migration status. Most importantly, the CIW’s private regulatory system requires business entities at the top of the supply chain to take responsibility for working conditions on farms. This system engages with the political economy of the food system because those businesses at the top of the supply chain are best positioned to effect working conditions. I conclude by suggesting that labor organizations actively trying to achieve justice on our fields, like the AWA, JIM and CIW, may point the way for a rejuvenated labor movement.*

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\* Postdoctoral Fellow, Centre for Law in the Contemporary Workplace, Faculty of Law, Queen’s University (Canada); B.A., LL.B., LL.M. (UNSW), Ph.D. (Queen’s). Earlier drafts of this article were presented at the Law & Society Conference in June 2016, U.C. Berkeley Centre for the Study of Law and Society’s Visiting Scholar Speaker Series in October 2016, and Cornell ILR School’s ILRLR/ICL Workshop Series in February 2017. I would like to thank the participants at these fora for their helpful comments. I am also grateful to Harry Arthurs, Kevin Banks, Brishen Rogers and Matt Canfield who read early versions of this article and gave me invaluable advice for improving it. Thanks also to the editors of the *Harvard Civil Rights-Civil Liberties Law Review* for their constructive suggestions. Finally, I owe a huge debt of gratitude to the Agricultural Workers Alliance, Justice in Motion, and Coalition of Immokalee Workers for agreeing to participate in my study. The author wishes to make clear that in his legal opinion these organizations are not “labor organizations” for the purposes of the National Labor Relations Act and Labor Management Reporting and Disclosure Act.

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INTRODUCTION

Recent times have seen the emergence of new types of labor organizations (“labor organizations” or “organizations”), colloquially known as “alt-labor,” which seek to improve wages and conditions for working people. These organizations have arisen in a context where traditional unions struggle to contain powerful market forces in North America, forces that have returned working conditions to a level reminiscent of the early days of the industrial revolution.<sup>1</sup> Representing another face of the labor movement, these organizations draw on a variety of innovative legal and political strategies to achieve their objectives, acutely demonstrating the human capacity for resilience, ingenuity, and creativity. They often serve immigrant workers in low-wage industries that unions have struggled to represent. A growing number of scholars from a variety of disciplines have attempted to critically analyze their potential.<sup>2</sup>

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<sup>1</sup> See, e.g., Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 AM. SOCIOLOGICAL REV. 1, 5 (2009) (arguing that most work in the United States was precarious before the 1930s, and the stable, secure employment that characterized industrial employment in the three decades following WWII was an exception to this. According to Kalleberg, however, the dynamics of precarious employment today are notably different).

<sup>2</sup> See, e.g., NEW LABOR IN NEW YORK (Ruth Milkman & Ed Ott eds., 2014); JANICE FINE, WORKER CENTERS (2006); RUTH MILKMAN, L.A. STORY (2006); Seth D. Harris, *Don't Mourn—Reorganize! An Introduction to the Next Wave Organizing Symposium Issue*, 50 N.Y.L. Sch. L. Rev. 303 (2005/06); EMERGING LABOR MARKET INSTITUTIONS FOR THE

This article contributes to this growing literature by studying the work of labor organizations aiming to improve the conditions of migrant workers in the fruit and vegetable sector in the United States and Canada. Fruit and vegetable production, an extremely labor-intensive process, is responsible for engaging the vast majority of waged farm workers in the agricultural sector.<sup>3</sup> One of the most notable features of fruit and vegetable production in North America is that the workforce is primarily comprised of migrants.<sup>4</sup> Waged farm workers mostly fall into one of three categories: recent immigrants, temporary or seasonal workers entering under temporary migrant worker programs, or undocumented migrants.

Dismal working conditions have been a continuous feature of the agricultural sector. For example, the intrepid muckraking journalist, Carey McWilliams, surveyed the state of farm workers' conditions in California in 1939 and found that the "housing situation was indescribably wretched," "health and sanitary conditions were. . . equally appalling," and farm workers were struggling to support their families on "incredibly low wages."<sup>5</sup> This picture has changed little in the intervening period.<sup>6</sup> Farm workers earn sub-poverty wages,<sup>7</sup> work seasonally only when there is work, are subject to

TWENTY-FIRST CENTURY (Richard B. Freeman et al. eds., 2004); JENNIFER GORDON, *SUBURBAN SWEATSHOPS* (2005); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 95 HARV. C.R.-C.L. L. REV. 407 (1995).

<sup>3</sup> See PHILIP L. MARTIN, *PROMISE UNFULFILLED* 9-10 (2003).

<sup>4</sup> While it may be problematic to use the catch-all term "migrant" to refer to a group of workers with vast cultural, ethnic and linguistic differences, my use is simply intended to analytically group a range of workers incorporated into North American agriculture in a similar way.

<sup>5</sup> CAREY MCWILLIAMS, *Factories in the Field* 316-22 (1939).

<sup>6</sup> See, e.g., SETH HOLMES, *FRESH FRUIT, BROKEN BODIES* (2013) (providing a richly textured account of the lived experiences of migrant farm workers in the United States); SOUTHERN POVERTY LAW CENTER, *CLOSE TO SLAVERY* (2013), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf) [<https://perma.cc/LT3P-45FY>] (providing a portrait of current farm working conditions in the United States); FARMWORKER JUSTICE, *NO WAY TO TREAT A GUEST* (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf> [<https://perma.cc/H8NL-4EY5>] (same); OXFAM, *LIKE MACHINES IN THE FIELD* (2004), <https://www.oxfamamerica.org/static/oa3/files/like-machines-in-the-fields.pdf> [<https://perma.cc/3MDP-RMPN>] (same); UNITED FOOD AND COMMERCIAL WORKERS CANADA, *THE STATUS OF MIGRANT FARM WORKERS IN CANADA* (2010-2011), [http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Stat us\\_of\\_MF\\_Workers\\_2010-2011\\_EN.pdf](http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Stat%20us_of_MF_Workers_2010-2011_EN.pdf) [<https://perma.cc/X4PP-RYJ9>] [hereinafter UFCW, 2011 REPORT] (providing an overview of the situation in Canada); UNITED FOOD AND COMMERCIAL WORKERS CANADA & CANADIAN LABOUR CONGRESS, *NATIONAL REPORT: STATUS OF MIGRANT FARM WORKERS IN CANADA* (2002) [hereinafter UFCW & CLC, NATIONAL REPORT] (same).

<sup>7</sup> U.S. DEPT OF LABOR, *FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS)* iii (2013-2014), [https://www.doleta.gov/agworker/pdf/NAWS\\_Research\\_Report\\_12\\_Final\\_508\\_Compliant.pdf](https://www.doleta.gov/agworker/pdf/NAWS_Research_Report_12_Final_508_Compliant.pdf) [<https://perma.cc/GQ5X-XS4Z>] (noting that U.S. farm workers earned a mean and median income of between \$15,000 to \$17,499 from agricultural employment in the previous year); STATISTICS CANADA, *EMPLOYMENT INCOME STATISTICS IN 2010, 2011 NATIONAL HOUSEHOLD SURVEY: DATA TABLES*, <http://www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?LANG=&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=0&PID=106738&PRID=0&PTYPE=105277&S=0&>

discrimination and harassment by labor contractors and supervisors,<sup>8</sup> and are exposed to dangerous occupational hazards.<sup>9</sup> Often, repaying debts incurred as a result of illegally charged “recruitment fees” further reduces the take home pay of migrant workers.<sup>10</sup> The working conditions of farm workers presents in stark form the situation facing many precarious workers in North America today.

A number of factors are responsible for this situation. I suggest that powerful economic transformations, such as increased international competition, growing operating costs and more demanding buyers, are affecting agricultural employers and applying downward pressure on the working conditions of farm workers.<sup>11</sup> Equally important, farm workers are excluded from many of the legal protections available to other workers.<sup>12</sup> In the United States, for example, farmworkers are excluded from the application of the federal National Labor Relations Act<sup>13</sup> (“NLRA”) and vast swathes of the Fair Labor Standards Act<sup>14</sup> (“FLSA”). In Ontario, one of Canada’s most fecund provinces for fruits and vegetable production, farm workers are excluded from the general labor relations statute and several important em-

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SHOWALL=0&SUB=0&Temporal=2013&THEME=98&VID=0&VNAMEE=&VNAMEF=[<https://perma.cc/UW9U-9QNB>] (reporting that Canadian agriculture and horticulture workers earned a median wage and salary of CDN\$11,608).

<sup>8</sup> See, e.g., THE FARMWORKER SEXUAL VIOLENCE TECHNICAL ASSISTANCE PROJECT, SEXUAL VIOLENCE AGAINST FARMWORKERS 10 (2010), [https://www.splcenter.org/sites/default/files/ovw\\_legalproviders.pdf](https://www.splcenter.org/sites/default/files/ovw_legalproviders.pdf) [<https://perma.cc/E8G5-WNKE>]; Richard Kamm, *Extending the Progress of the Feminist Movement to Encompass the Rights of Migrant Farmworker*, 75 CHI.-KENT. L. REV. 765, 769 (2000); Maria M. Dominguez, *Sex Discrimination and Sexual Harassment in Agricultural Labor*, 6 AM. U. J. GENDER & SOC. POL’Y & L. 231, 240–42 (1997).

<sup>9</sup> See, e.g., BON APPÉTIT MANAGEMENT COMPANY FOUNDATION & UNITED FARM WORKERS, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES (2011), <https://www.oxfamamerica.org/static/oa3/files/inventory-of-farmworker-issues-and-protections-in-the-usa.pdf> [<https://perma.cc/6ZB8-L7CS>] (setting out the occupational health and safety issues of farm workers in the United States); U.S. DEP’T OF AGRICULTURE, PROFILE OF HIRED FARMWORKERS (2008), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1564&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1564&context=key_workplace) [<https://perma.cc/Y3MN-FSUU>] (same); Arthur L. Frank et al., *Issues of Agricultural Safety and Health*, 25 ANNU. REV. PUBL. HEALTH 225 (2004) (same); Janet McLaughlin et al., *Paper vs. Practice: Occupational Health and Safety Protections and Realities for Temporary Foreign Agricultural Workers in Ontario*, 16-2 PERSPECTIVES INTERDISCIPLINAIRES SUR LE TRAVAIL ET LA SANTÉ (2014) (providing an overview of the occupational health and safety issues facing farm workers in Canada); Michael Pysklywec et al., *Doctors within Borders: Meeting the Health Needs of Migrant Farm Workers in Canada*, 183 CAN. MED. ASSOC. J., no. 9, 1039 (2011) (same); Kerry Preibisch & Jenna Hennebry, *Temporary Migration, Chronic Effects: The Health of International Migrant Workers in Canada*, 183 CAN. MED. ASSOC. J., 1033 (2011) (same).

<sup>10</sup> See, e.g., Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 448–49 (2017); FAY FARADAY, PROFITING FROM THE PRECARIOUS: HOW RECRUITMENT PRACTICES EXPLOIT MIGRANT WORKERS 32–36 (2014), <http://metcalffoundation.com/wp-content/uploads/2014/04/Profiting-from-the-Precarious.pdf> [<https://perma.cc/2MB9-DUTE>]; VERITÉ, IMMIGRANT WORKERS IN US AGRICULTURE: THE ROLE OF LABOR BROKERS IN VULNERABILITY TO FORCED LABOR 6 (2010), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2174&context=globaldocs> [<https://perma.cc/X65F-7H4Z>].

<sup>11</sup> See *infra* discussion Part II.

<sup>12</sup> This varies from state to state in the United States, and province to province in Canada.

<sup>13</sup> 29 U.S.C. § 152(3).

<sup>14</sup> 29 U.S.C. § 203(5)(f).

ployment standards. These exclusions were justified on the grounds that farming was primarily a family affair and the small number of waged laborers in the industry lived and worked alongside the owners.<sup>15</sup> Despite this no longer being the case in the modern era of industrial agriculture, farmers and their powerful lobbies have continued to deploy these arguments to great effect to maintain the farming sector's exceptionalism.<sup>16</sup>

In addition, farm workers have difficulty realizing the few labor rights they have as a consequence of the weak enforcement of labor standards by government agencies. Most scholars agree that "proactive enforcement," through unannounced audits and inspections, is the most effective way to detect violations and provide redress for vulnerable workers.<sup>17</sup> However, proactive enforcement of labor rights by public agencies tends to be weak, due to resource constraints, over-large mandates, and conflicting political priorities.<sup>18</sup> This is especially the situation in the agricultural sector, where the scale of the problem seems to defeat bureaucratic resolve.

Collective action by farm workers has intermittently improved their plight. In the United States for example, farm worker mobilizations during the 1960s and 1970s, led by the United Farm Workers ("UFW"), managed to win a number of concessions. In this period, the minimum wage under the FLSA was extended to farm employers that employed more than 10 full-time workers, although farm employers continued to be exempt from overtime provisions and were permitted to use child labor.<sup>19</sup> While farm workers continued to be excluded from the NLRA, in 1975, farmworker advocacy resulted in the passage of the Agricultural Labor Relations Act<sup>20</sup> ("ALRA") in California, which established collective bargaining rights for agricultural workers in that state based on the prevalent "Wagner Act-model" (which includes enterprise-level bargaining and the exclusive right of unions to ne-

<sup>15</sup> MARTIN, *supra* note 3.

<sup>16</sup> See generally KATHRYN S. OLMSTED, *RIGHT OUT OF CALIFORNIA* (2015); Eric Tucker, *Will the Vicious Circle of Precariousness Be Unbroken? The Exclusion of Ontario Farm Workers from the Occupational Health and Safety Act*, in *PRECARIOUS EMPLOYMENT* 256, 262 (Leah F. Vosko ed., 2006).

<sup>17</sup> DAVID WEIL, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION* (2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<https://perma.cc/HW89-FXME>]; LEAH F. VOSKO ET AL., *NEW APPROACHES TO ENFORCEMENT AND COMPLIANCE WITH LABOUR REGULATORY STANDARDS: THE CASE OF ONTARIO, CANADA 100* (2011), <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1069&context=clpe> [<https://perma.cc/K2SU-KLFG>].

<sup>18</sup> David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 *ECON. LAB. RELAT. REV.* 33, 34 (2011); VOSKO ET AL., *supra* note 17, at 26.

<sup>19</sup> Amy K. Leibman et al., *Occupational Health Policy and Immigrant Workers in the Agriculture, Forestry, and Fishing Sector*, 56 *AM. J. IND. MED.* 975, 976 (2013); Zama Courten-Neff, *FIELDS OF PERIL: CHILD LABOR IN US AGRICULTURE* (2010), <https://www.hrw.org/report/2010/05/05/fields-peril/child-labor-us-agriculture> [<https://perma.cc/CTX9-BPUE>] (estimating that several hundreds of thousands of children work in U.S. agriculture as a result of the FLSA because the FLSA does not contain the same prohibitions on child labor that apply to non-agricultural industries—e.g., children can work on the family farm at any age, and can work as hired farm workers after the age of 12).

<sup>20</sup> Cal. Labor Code § 1166.3.

gotiate on behalf of employees once majority support is established).<sup>21</sup> Subsequently, the Migrant and Seasonal Agricultural Worker Protection Act of 1983<sup>22</sup> was passed federally, amending the much weaker Farm Labor Contractor Registration Act.<sup>23</sup> Collective bargaining under the ALRA led to some notable successes in the 1970s. However, these gains were soon nullified by concerted employer action, which included farmers vigorously contesting union elections, committing unfair labor practices, engaging in surface bargaining, and utilizing strike-breakers.<sup>24</sup> Traditional unions today continue to attempt to organize farm workers under collective bargaining regimes where they can. This is despite the well-known challenge of organizing farm workers on an enterprise-by-enterprise basis, which the prevailing model demands.<sup>25</sup>

Alt-labor organizations, however, employ a range of different strategies. In this article, I consider case studies of three labor organizations working to improve farm workers' conditions in order to draw lessons that can be applied more broadly. I focus on the work of *organizations* rather than grassroots movements because an organizational form is important for actors to agglomerate political, economic and cultural resources and fuse these with the creativity and motivation necessary to bring about change.<sup>26</sup> The organizational form also allows labor organizations to experiment with legal and political engagements over a matter of several years, learning from mistakes and winnowing down those strategies that yield results. This is not to suggest that grassroots movements are not also significant players in improving the lives of migrant farm workers. In fact, labor organizations are often

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<sup>21</sup> Herman M. Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza De California Para El Futuro*, 15 SANTA CLARA L. REV. 783, 785 (1975); MARTIN, *supra* note 3, at 72.

<sup>22</sup> 29 U.S.C. §§ 1801–1872.

<sup>23</sup> Pub. L. No. 88-582, 78 Stat. 920 (1964).

<sup>24</sup> MARTIN, *supra* note 3, at Pt. II.

<sup>25</sup> See, e.g., LEAH F. VOSKO, *Tenuously Unionised: Temporary Migrant Workers and the Limits of Formal Mechanisms Designed to Promote Collective Bargaining in British Columbia*, 43 IND. L. J. 451, 459 (2014); Eric Tucker, *Farm Worker Exceptionalism: Past, Present, and the post-Fraser Future*, in CONSTITUTIONAL LABOUR RIGHTS IN CANADA 30 (Fay Faraday et al. eds., 2012) (noting that are many challenges to organizing farm workers under the Wagner Act-model, which include: getting access to workers who may live on employer-owned residences, overcoming workers' distrust of unions, building solidarity among a workforce that is linguistically and culturally diverse, and having to contend with various forms of employer resistance to unionization); Kate Andrias, *The New Labor Law*, 126 YALE L. J. 1, 67 (2016) (arguing that alternative model of sectoral bargaining might hold more promise for agricultural workers).

<sup>26</sup> See, e.g., Marshall Ganz, *Resources and Resourcefulness: Strategic Capacity in the Unionization of California Agriculture, 1959–1966*, 105 AM. J. OF SOCIOLOGY 1003, 1041 (2000). See generally DOUG McADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970* (2d ed. 1999); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* (1986).

deeply embedded in social movements, and thus, can be considered a form of “social movement organization.”<sup>27</sup>

The three labor organizations analyzed in this article have been selected for their prototypical value.<sup>28</sup> Each performs different functions: the Agricultural Workers Alliance (“AWA”) support centers operate a network of worker centers that help workers claim their legal rights; Justice in Motion<sup>29</sup> (“JIM”) facilitates cross-border litigation; and the Coalition of Immokalee Workers (“CIW”) monitors and enforces a private system of regulation that it devised. To study the work of these organizations I used a variety of means. First, I reviewed archival material, which included relevant documentary and online sources—reports, annual reviews, websites and the like. I also reviewed secondary sources—such as journal articles, book chapters, and theses—that provide additional details about the organizations. Finally, I conducted interviews with key participants in each of the organizations, either by phone or in person.<sup>30</sup> There are of course many more labor organizations active in the field, and I would suggest that close examination of their strategies is warranted. In the meantime, deep contextual analysis of even three organizations reveals some significant insights.

I argue that labor organizations perform a number of important functions. To properly evaluate the impact of these strategies it is necessary to examine a range of contextual factors. It is for this reason that I consider the work of the AWA, JIM, and CIW against the background of the political economy of the food system. The relevant political economy includes how production and consumption is organized in the food system, particular features of the regulatory systems that govern farm workers’ working conditions, and the migrant status of the workers who lead lives materially and imaginatively affected by borders.

I find that the AWA and JIM perform important work to build the rights consciousness of workers and improve compliance with existing legal standards in ways that public regulators are unable. However, most workers do not bring forth claims because they fear employer retaliation. The CIW, on the other hand, has devised a private regulatory system that overcomes some of the limitations of public regulatory systems, for example, by allowing farm workers to vindicate their rights regardless of their migration status.

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<sup>27</sup> See, e.g., Lauren B. Edelman et al., *On Law, Organizations, and Social Movements*, 6 ANNU. REV. LAW SOC’Y SCI. 653, 659-61 (2010); Mayer N. Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 SOC. FORCES 327 (1966).

<sup>28</sup> See, e.g., Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, 12 QUAL. INQ. 219, 232 (2006); John Gerring, *What is the Case Study and What is it Good For?*, 98 AM. POLIT. SCI. REV. 341, 348 (2004).

<sup>29</sup> Justice in Motion was formerly known as the Global Justice Workers Alliance.

<sup>30</sup> The following people were interviewed, often on multiple occasions: Stan Raper (Coordinator, Agricultural Workers Alliance), Cathleen Caron (Executive Director, Justice in Motion), Nan Schivone (Legal Director, Justice in Motion), and Marley Moynahan (Communications Officer, Coalition of Immokalee Workers). Stan Raper, a mainstay of farm worker advocacy in Canada, tragically passed away in June 2017.

Most importantly, the CIW's private regulatory system requires business entities at the top of the supply chain to take responsibility for working conditions on farms. This system engages with the political economy of the food system because those businesses at the top of the supply chain are best positioned to effect working conditions.

This article consists of three parts. In *Part I*, I provide a typology of the various strategies, or "legal engagements," that labor organizations utilize. I introduce the term legal engagements to capture the various ways in which both public and private norms can be mobilized.<sup>31</sup> In *Part II* of this article, I consider in detail the legal engagements of the AWA, JIM and CIW and evaluate their effectiveness. In the final part, *Part III*, I discuss the circumstances under which labor organizations can improve farm workers' conditions.

#### I. MAKING SENSE OF THE WORK OF LABOR ORGANIZATIONS: A TYPOLOGY OF LEGAL ENGAGEMENTS

The work of the UFW in the 1960s and 1970s, possibly the most well-known and successful example of organized resistance by farm workers in North America in recent history, provides a useful starting point to consider the relationship between law, organizations, and social transformation. When the UFW started organizing farm workers in California in the early 1960s, it faced several seemingly insurmountable obstacles: hostile growers, indifferent federal and state governments, labor law regimes that specifically excluded farm workers, and a labor migration program—the "Bracero" program—that gave employers ready access to a vast pool of unorganized workers from Mexico.<sup>32</sup> Within the span of two decades, the UFW, with Cesar Chavez and Dolores Huerta at its helm, managed to transform working conditions in the agricultural sector in California. It organized farm workers to secure agreements with hundreds of farm employers, forged important links with sympathetic allies, brought pressure to bear on the federal government to end temporary labor programs that were intended as replacements for the Bracero Program, and at its zenith, secured the passage of labor relations legislation in California that gave farm workers the option of bargaining collectively with their employers for better working conditions.<sup>33</sup>

<sup>31</sup> See generally Sally Engle Merry et al., *Law from Below: Women's Human Rights and Social Movements in New York City*, 44 *LAW SOC'Y REV.* 101, 108 (2010); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 *ANNU. REV. LAW SOC. SCI.* 17, 18 (2006); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS* (2nd ed., 2004); DAVID M. ENGEL & FRANK W. MUNGER, *RIGHTS INCLUSION* (2003); MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY* (1986) (these sources cover the instrumental and cultural ways in which rights can be used to effect social change). Since the extensive literature on "rights mobilization" does not expressly consider the role of private regulation, I introduce the term legal engagements to encompass the ways in which both public and private norms can be utilized.

<sup>32</sup> See, e.g., KITTY CALAVITA, *INSIDE THE STATE* 122, 156 (1992).

<sup>33</sup> See, e.g., GILBERT FELIPE MIRELES, *CONTINUING LA CAUSA* (2013); MARSHALL GANZ, *WHY DAVID SOMETIMES WINS* 7 (2009); Jennifer Gordon, *Law, Lawyers, and Labor: The*



Although the UFW's successes in developing collective agreements to regulate labor conditions eventually proved to be fleeting, they do provide a valuable lesson for us today about the need to have a strategic orientation towards state law. The UFW started organizing workers in 1962, but it did not manage to win the passage of collective bargaining legislation until 1975.<sup>34</sup> In the intervening period, the UFW managed to win 150 contracts with growers covering some 50,000 workers, often creatively using the law in a way that asked not only "what are our rights here?" but also "how can we best turn this legal situation to the union's organizing advantage?"<sup>35</sup> Legal engagement for the UFW during this period did not include relying upon the suite of labor and employment rights that we usually associate with worker advocacy. Instead, the UFW understood that law could build a sense that farm workers shared a common struggle and joint fate. In this way, by creatively and strategically engaging with legal categories and norms, the UFW used legal rights to build a movement. For example, the UFW brought a variety of legal claims and defended a range of suits initiated by farmers, and during these proceedings treated the court as a theater of resistance, often filling the courts with farm workers and their supporters.<sup>36</sup>

In this section, I unpack the variety of legal engagements that labor organizations have with law to create better working conditions for migrant farm workers. I introduce the term "legal engagements" to refer to both fairly conventional ways of using law (for example, seeking to improve compliance with existing laws and pursuing the expansion of the suite of rights that migrant farm workers can access) and less conventional approaches, such as treating law as a cultural and political resource and building private regulatory systems that mimic state regimes. In the tradition of socio-legal scholars, I consider these various actions to be interconnected because law and politics are closely intertwined.<sup>37</sup>

### A. *Building rights consciousness*

One way in which labor organizations can empower workers is by informing them of their legal rights. Employment and health and safety standards in the United States and Canada are enforced primarily through worker

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*United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 8 (2005); Miriam J. Wells & Don Villarejo, *State Structures and Social Movement Strategies: The Shaping of Farm Labor Protections in California*, 32 POL. & SOC'Y 291, 296 (2004); MARTIN, *supra* note 3.

<sup>34</sup> Agricultural Labor Relations Act, Cal. Labor Code § 1140 (1975).

<sup>35</sup> Gordon, *supra* note 33, at 17.

<sup>36</sup> *See id.*

<sup>37</sup> *See generally* Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011); Harry W. Arthurs & Brent Arnold, *Does the Charter Matter?*, 11 REV. CONST. STUD. 37 (2005); SCHEINGOLD, *supra* note 31; W. A. BOGART, *COURTS AND COUNTRY* (1994); McCANN, *TAKING REFORM SERIOUSLY*, *supra* note 31; JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978).

complaints.<sup>38</sup> In order for workers to be able to make a complaint to the relevant government authority, they must possess knowledge about their legal rights and entitlements. Although migrant farm workers are more than capable of recognizing exploitative working conditions, they may not have the necessary knowledge to recognize when their treatment constitutes a breach of a specific law, take the appropriate steps to lodge a complaint, and advocate for their entitlements through the relevant bureaucratic process.

Some socio-legal scholars caution that knowledge about the law does not necessarily translate into action.<sup>39</sup> As a result, these scholars developed the notion of legal consciousness to explain how people understand and experience law. As Laura Beth Nielsen explains, “legal consciousness not only explores how people think about the law (consciousness about law) but also the ways in which largely unconscious ideas about the law can affect decisions they make.”<sup>40</sup> This means that broader notions about the law may shape workers action (or inaction), and that knowledge does not always result in self-advocacy.

In the case of migrant farm workers, their interactions with the law in their home countries (e.g. negative experiences with state officials) may affect their readiness to make use of formal law to resolve workplace issues.<sup>41</sup> Furthermore, for undocumented migrants, fear of revealing their lack of authorization, a greater willingness to endure immediate pain for the attainment of long-term goals, and feelings of a lack of legitimacy, may inhibit claim-making.<sup>42</sup>

Of course, lack of self-advocacy through the legal-bureaucratic channels does not mean that workers do not resolve disputes with their employers through alternative avenues,<sup>43</sup> or register their resistance to exploitative working conditions in a myriad of other ways, such as walking off premises to protest health and safety concerns.<sup>44</sup> Labor organizations should adopt a

<sup>38</sup> See, e.g., VOSKO ET AL., *supra* note 17, at 5 (Canada); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 59 (2005) (United States).

<sup>39</sup> See, e.g., Adrian A. Smith, *Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers*, 20 CAN. J. L. & SOC'Y 95, 105 (2005) [hereinafter Smith, *Legal Consciousness*]; Laura Beth Nielsen, *Situating Legal Consciousness: Experience and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 LAW SOC'Y REV. 1055, 1059 (2000); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998); Austin Sarat, “. . . *The Law is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344–47 (1990); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN* (1990).

<sup>40</sup> Nielsen, *supra* note 39, at 1058.

<sup>41</sup> See, e.g., Smith, *Legal Consciousness*, *supra* note 39, at 103–05.

<sup>42</sup> See Shannon M. Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claim Making*, 35 LAW & SOC. INQUIRY 561, 561 (2010).

<sup>43</sup> See Catherine Albiston et al., *The Dispute Tree and the Legal Forest*, 10 ANNU. REV. LAW & SOC. SCI. 105, 105 (2014).

<sup>44</sup> See Adrian A. Smith, *Racialized Justice: The Legal and Extra-Legal Struggles of Migrant Agricultural Workers in Canada*, 31 WINDSOR Y.B. ACCESS JUST. 15, 26 (2013) [hereinafter Smith, *Racialized Justice*]; Smith, *Legal Consciousness*, *supra* note 39, at 105.

more nuanced understanding of rights consciousness when thinking about how they can help farm workers identify the ways in which their working conditions are exploitative, name the responsible party, and seek redress.

*B. Improving compliance with statutory standards*

Labor organizations can also work to improve compliance with existing legal standards. As Harry Arthurs notes, “[I]abour standards ultimately succeed or fail on the issue of compliance,”<sup>45</sup> and unfortunately, compliance tends to be particularly poor in the agricultural sector.<sup>46</sup> We know that employers routinely ignore minimum employment standards that are designed to provide a basic floor of working conditions.<sup>47</sup> In this context, the enforcement strategies adopted by regulators, which are charged with ensuring compliance with these laws, can play a major role in changing employer behavior to promote compliance.<sup>48</sup> Labor organizations can assist public regulators with their enforcement work, and take direct steps of their own.

How can labor organizations serve a useful role supplementing the enforcement work of regulatory agencies? Generally speaking, most labor inspectors use a combination of “reactive” and “proactive” methods to identify violations: reactive methods involve waiting for workers to come forward with complaints, and proactive methods involve agencies identifying non-compliant employers through audits and inspections.<sup>49</sup> Workers may have difficulty making complaints because they lack knowledge about their rights and do not know how to navigate the complaints process.<sup>50</sup> They may also fear the risk of reprisal by their employer.<sup>51</sup> Given this context, labor organizations can play a role in helping workers prepare their claims and guide them through the complaints-resolution process.<sup>52</sup> It is also possible to imagine labor organizations assisting directly with agencies’ proactive enforcement efforts, for example, by monitoring for breaches of labor standards and providing information and technical expertise.<sup>53</sup> Because regulatory agencies cannot be present everywhere, labor organizations may have a comparative advantage with providing up-to-date information, which

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<sup>45</sup> HARRY W. ARTHURS, *FAIRNESS AT WORK* 53 (2006).

<sup>46</sup> *See, e.g.*, OXFAM, *supra* note 6, at 40.

<sup>47</sup> *See id.*

<sup>48</sup> *See* WEIL, *supra* note 17.

<sup>49</sup> VOSKO ET AL., *supra* note 17, at 4–6.

<sup>50</sup> *See* Weil & Pyles, *supra* note 38, at 63–64.

<sup>51</sup> *See id.*

<sup>52</sup> *See, e.g.*, Matthew Amengual & Janice Fine, *Co-enforcing Labor Standards: The Unique Contribution of State and Worker Organizations in Argentina and the United States*, 11 REG. & GOVERNANCE 129, 135 (2017); SHANNON GLEESON, *CONFLICTING COMMITMENTS* 27–28 (2012); Jennifer Gordon, *The Lawyer is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2136 (2007); FINE, *supra* note 2.

<sup>53</sup> *See, e.g., id.*

can help agencies determine their proactive inspection strategies.<sup>54</sup> That is, labor organizations can act as “knowledge providers, watchdogs, [and] auditors.”<sup>55</sup>

Labor organizations can also undertake enforcement work of their own. They could provide information to farm employers who may not understand their legal obligations. What constitutes legal compliance is often ambiguous and dynamic, and labor organizations can shape more broadly what it means to be in compliance with legal rules.<sup>56</sup> Where employment standards legislation allows workers to sue employers directly, labor organizations can undertake this work. For example, in California, the Private Attorneys General Act<sup>57</sup> allows private citizens to sue for certain “serious violations” of the California Labor Code, which previously could only be initiated by the state regulator, the Labor and Workforce Development Agency. Subsequent judicial decisions have also allowed these private suits to proceed as class actions.<sup>58</sup> Similarly, private actions are permitted under the federal FLSA. This provides labor organizations with another powerful avenue to promote compliance.

### C. *Using litigation to win new rights for migrant farm workers*

Progressive movements have often looked to the courts as a source of social reform, particularly in circumstances where the political process has been unreceptive to their demands.<sup>59</sup> Labor organizations may be able to engage with the courts in a similar manner to win new rights for migrant farm workers, for example, by invoking constitutional rights and principles.<sup>60</sup>

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<sup>54</sup> See, e.g., Janice Fine, *Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States*, 50 OSGOODE HALL L.J. 813, 825–26 (2013); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnership with Workers’ Organizations*, 28 POLITICS & SOC’Y 552, 553 (2010); JOHN BRAITHWAITE, *REGULATORY CAPITALISM* 64–86 (2008); BRIDGET M. HUTTER & JOAN O’MAHONY, *THE ROLE OF CIVIL SOCIETY ORGANISATIONS IN REGULATING BUSINESS* 5–6 (2004), <http://www.lse.ac.uk/accounting/carr/pdf/dps/disspaper26.pdf> [https://perma.cc/D333-24ZS].

<sup>55</sup> HUTTER & O’MAHONY, *supra* note 54, at 10.

<sup>56</sup> See LAUREN B. EDELMAN, *WORKING LAW* (2016).

<sup>57</sup> Cal. Labor Code § 2698 *et seq.* (2004).

<sup>58</sup> See, e.g., Blake R. Bertagna, *PAGA: One Decade Later*, 39 EMP. REL. L. J. 44, 47 (2013).

<sup>59</sup> See, e.g., McCANN, *TAKING REFORM SERIOUSLY*, *supra* note 31.

<sup>60</sup> For example, in *Dunmore v. Ontario (AG)*, [2001] 3 S.C.R. 1016 (Can.), the United Food and Commercial Workers Canada and the Agricultural Workers Alliance challenged the exclusion of farm workers from the collective bargaining regime in Ontario, arguing that it violated section 2(d) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) [hereinafter Canadian Charter]. Similarly, in *Griego v. New Mexico Workers’ Compensation Administration*, No. CV-2009-10130 (N.M. Dist. Ct. Bernalillo Cnty. Dec. 27, 2011), the New Mexico Center on Law and Poverty together with the National Center for Law and Economic Justice and the Sargent Shriver National Center on Poverty Law, brought a successful suit, which argued that

The socio-legal literature highlights a number of criticisms about the use of litigation as a tool for progressive change. Some question whether constitution-based litigation actually improves the lives of those on whose behalf these suits are brought.<sup>61</sup> There are several reasons for why court action might not provide results. Courts may be ill-equipped to receive and resolve issues involving collective interests because they are structured to privilege individual freedom and private ownership of property.<sup>62</sup> Furthermore, courts can only make *declarations* about rights, they cannot *implement* them. In Gerald Rosenberg's words, "court decisions, requiring people to act, are not self-executing."<sup>63</sup> Finally, critics question whether court-centric tactics monopolize resources, dominate a movement's priorities, and simply legitimate existing power arrangements.<sup>64</sup>

While perceptive, many of these criticisms depend on context. The Canadian Supreme Court, for example, recently found that the right to strike—one of the most quintessentially collective activities—was constitutionally protected.<sup>65</sup> Labor organizations may also be able to overcome some of the challenges through careful consideration and planning. For example, Rosenberg's objection can be overcome if court-centered strategies are accompanied by movements on the ground that continue to apply pressure on recalcitrant administrators to actualize the rights that have been won through litigation.

#### *D. Drawing on law as a strategic resource to achieve secondary objectives*

Advocates can also use legal mobilization to achieve aims other than simply winning in court. The law can serve as a cultural and political resource regardless of whether the litigation succeeds.<sup>66</sup> For the sake of analytical clarity, many of these secondary effects can be categorized as either internal or external to the movement.<sup>67</sup> Internal effects include those factors that relate to the movement itself, such as participants' sense of identity and cohesion, and external effects encompass matters relevant to the targets of the movement.

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the exclusion of farm and ranch laborers from the state's Workers' Compensation Act, N.M. Stat. § 52-1-1 *et seq.* (1996), breached the state constitution's equal protection clause.

<sup>61</sup> See, e.g., Judy Fudge & Harry Glasbeek, *The Politics of Rights: A Politics with Little Class*, 1 SOC. & LEGAL STUD. 45, 55 (1992); Arthurs and Arnold, *supra* note 37, at 38.

<sup>62</sup> See, e.g., BOGART, *supra* note 37, at 74.

<sup>63</sup> See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 15 (1993).

<sup>64</sup> See, e.g., Orly Lobel, *The Paradox of Extra-Legal Activism Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 942 (2007).

<sup>65</sup> Saskatchewan Federation of Labour v. Saskatchewan, [2015] 1 S.C.R. 245, 248 (Can.).

<sup>66</sup> See, e.g., SCHEINGOLD, *supra* note 31 (one of the earliest and most comprehensive articulations of the case that rights are a contingent resource, which can serve a number of extralegal purposes).

<sup>67</sup> See Albiston, *supra* note 37, at 63; Douglas, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011) (analyzing the literature on rights mobilization using this distinction).

Turning first to the *internal* secondary effects, labor organizations can use legal norms as a tool to build movements and collective power. The most obvious way in which labor organizations can do this is by using collective bargaining laws to organize workers. This avenue is mostly closed off for farm workers because, with the exception of California and some of the provinces in Canada (e.g. British Columbia, Manitoba), farm workers are excluded from collective bargaining regimes.<sup>68</sup> However, legal norms can provide a language to name injustice and build a sense of entitlement, which can shape and strengthen movements.<sup>69</sup> Michael McCann argues that “legal norms and traditions can become important elements in the process of explaining how existing relationships are unjust, in defining collective group goals, and in constructing common identity among diversely situated citizens.”<sup>70</sup> So, even if migrant farm workers do not technically enjoy particular labor rights, their exclusion from rights enjoyed by other workers can be framed in a way that promotes mobilization.

With respect to secondary *external* effects, legal mobilization may be a way to exact political concessions that would otherwise not be forthcoming.<sup>71</sup> For example, by launching a constitutional challenge in 2003, unions managed to force the hand of the Ontario government to extend coverage of the province’s health and safety laws to farm workers.<sup>72</sup> This means that law can be used as both a cultural and political resource.

### *E. Devising and enforcing private regulatory systems*

The UFW routinely used consumer pressure to achieve better working conditions for farm workers; the Delano grape boycott was the most visible of these efforts.<sup>73</sup> Similarly, as global economic production shifted in the later twentieth century from vertically integrated corporations to global supply chains, activists turned to consumer pressure to force apparel companies based in the Global North to take measures to improve working conditions in their suppliers.<sup>74</sup> From these efforts, activist-decreed codes of conduct, voluntary corporate social responsibility initiatives, and private certification systems (collectively “private regulatory systems”) developed to govern la-

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<sup>68</sup> See, e.g., National Labor Relations Act §152, 29 U.S.C. §§ 151–169 (1935) (defining employee as excluding agricultural laborers).

<sup>69</sup> See generally Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11, 12 (2005); SCHEINGOLD, *supra* note 31; MCCANN, *TAKING REFORM SERIOUSLY*, *supra* note 31.

<sup>70</sup> McCann, *Law and Social Movements*, *supra* note 31, at 25–26.

<sup>71</sup> See, e.g., Albiston, *supra* note 37, at 64.

<sup>72</sup> Tucker, *supra* note 16, at 274–75.

<sup>73</sup> MARTIN, *supra* note 3, at 68–69.

<sup>74</sup> See generally JILL LOUISE ESBENSHADE, *MONITORING SWEATSHOPS: WORKERS, CONSUMERS, AND THE GLOBAL APPAREL INDUSTRY* (2004); GAY W. SEIDMAN, *BEYOND THE BOYCOTT* (2007).

bor and environmental standards.<sup>75</sup> Private regulatory systems usually have four discernible components: (a) privately set standards determined by a variety of stakeholders; (b) monitoring of compliance by accredited auditors; (c) certification or recognition of participating firms; and (d) the provision of information to consumers to institute boycotts in the event of non-compliance.<sup>76</sup>

In some cases, these initiatives have been in operation for several decades, and as a result, we know a great deal about the various factors that make private regulation effective.<sup>77</sup> Learning from these experiences, labor organizations may be able to create domestic or transnational private regulatory systems, enforced through market sanctions, as a way to improve working conditions for the migrant farm worker community.

In *Part II*, I use the typology of legal engagements developed above to consider the work of three labor organizations active in supporting migrant farm workers in North America.

## II. LEARNING FROM THE FIELD: THREE PROTOTYPICAL LABOR ORGANIZATIONS

Generating sharp, socially-engaged scholarship requires learning from organizations that are at the coalface of working with the migrant farm worker community. Studying the work of labor organizations active in assisting migrant farm workers can help provide insight into how the various legal engagements operate in practice.

In the following section, I describe the work of three labor organizations—the AWA, JIM, and CIW—which I have studied using empirical methods, such as reviewing archival material and conducting interviews with key players. In the process of describing the labor organizations' legal engagements, I also examine their effectiveness against the background of the political economy of the food system. The three main aspects of the political economy that are relevant for evaluating the legal engagements of labor organizations are: the way in which food is produced and consumed in

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<sup>75</sup> Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 *AM. J. SOCIOL.* 297, 300–06 (2007).

<sup>76</sup> *Id.* at 301.

<sup>77</sup> See, e.g., RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER* (2013); Tim Bartley, *Transnational Governance and the Re-Centered State: Sustainability or Legality*, 8 *REG. & GOVERNANCE* 93, 96–101 (2014); Frederick Mayer & Gary Gereffi, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, 12 *BUS. & POL.*, no. 3, 1–2, 7–18 (2010); Dara O'Rourke, *Monitoring the Monitors: A Critique of Corporate Third-Party Labour Monitoring*, in *CORPORATE RESPONSIBILITY AND LABOUR RIGHTS* 196 (Rhys Jenkins et al. eds., 2002). The literature on private regulation reveals several important lessons: (1) the monitoring work of independent auditors is key to their implementation; (2) private regulatory systems work best when private standards are "layered" with public standards and local regulators are involved in their design and enforcement; (3) private regulations cannot substitute for strong local workers' movements and worker voice.

the contemporary era; the nature of the regulatory systems that govern working conditions on farms; and the particular features of farm workers. The ultimate purpose of my empirical work is to generate findings about what legal engagements have allowed labor organizations to improve the working conditions of migrant farm workers given the nature of the food system in North America. The three aspects of the political economy identified above require some explanation.

First, fruit and vegetable production sits within a vast, global food system in which food is grown, processed, distributed, and ultimately consumed. Although the agricultural sector, which grows and produces the raw ingredients that become food, is a vital part, as Harriet Friedmann points out “[f]ood, not agriculture, is the appropriate unifying principle of politics and policy. . . [because]. . . [a]griculture has, in fact, been subordinated to food industries and services by agro-food corporations during the past half-century.”<sup>78</sup> Three governing characteristics of the modern food system are: (1) trade liberalization;<sup>79</sup> (2) the growth of agribusinesses that operate transnationally;<sup>80</sup> and (3) concentration at every level of the food system.<sup>81</sup> Each of these features impacts the efficacy of strategies adopted by labor organizations. For example, due to the increasing competitive pressures faced by farmers because of trade liberalization and concentration among buyers that consequently exercise monopsony power, farmers seek to lower labor costs and demand greater flexibility from their workers.<sup>82</sup> To take account of these broader trends, labor organizations might target those entities, such as buyers, with the most power to effect working conditions.

Second, the regulatory systems that govern working conditions on farms need to be carefully considered. Farm workers enjoy a patchwork of federal and state/provincial protections in Canada and the United States, and a number of different regulatory agencies hold mandates to enforce these regulations. Labor organizations must carefully negotiate a variety of gaps in

<sup>78</sup> Harriet Friedmann, *Food Politics: New Dangers, New Possibilities*, in *FOOD AND AGRARIAN ORDERS IN THE WORLD-ECONOMY* 15, 29–30 (Philip McMichael ed., 1995).

<sup>79</sup> See, e.g., Harriet Friedmann, *The Political Economy of Food: A Global Crisis*, 197 *NEW LEFT REV.* 29, 47 (1993); Harriet Friedmann & Philip McMichael, *Agriculture and the State System: The Rise and Decline of National Agricultures, 1970s to the Present*, 29 *SOCIOLOGIA RURALIS* 93, 103 (1989) [hereinafter Friedmann & McMichael, *Agriculture and the State System*]; Philip McMichael, *A Food Regime Genealogy*, 36 *J. OF PEASANT STUDIES* 139, 150–51 (2009); Gabriela Pechlander & Gerardo Otero, *The Neoliberal Food Regime: Neoregulation and the New Division of Labor in North America*, 75 *RURAL SOCIOL.* 179, 179 (2010).

<sup>80</sup> See, e.g., *CORPORATE POWER IN GLOBAL AGRIFOOD GOVERNANCE 1* (Jennifer Clapp and Doris Fuchs eds., 2009); Friedman & McMichael, *Agriculture and the State System*, *supra* note 79, at 103; McMichael, *A Food Regime Genealogy*, *supra* note 79, at 145–46.

<sup>81</sup> See, e.g., PHILIP H. HOWARD, *CONCENTRATION AND POWER IN THE FOOD SYSTEM* (2016); Kerry L. Preibisch, *Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada*, 72 *RURAL SOC.* 418, 427–28 (2007); U.S. DEP’T OF JUSTICE, *VOICES FROM THE WORKSHOPS ON AGRICULTURE AND ANTITRUST ENFORCEMENT IN OUR 21ST CENTURY ECONOMY AND THOUGHTS ON THE WAY FORWARD* (2012).

<sup>82</sup> See, e.g., Preibisch, *supra* note 81.



regulatory coverage and enforcement when they seek to assist migrant farm workers.

Finally, it is no coincidence that farm workers tend to be primarily migrants because their migrant status justifies and renders invisible their treatment. In the United States, the agricultural sector historically provided ready employment for waves of immigrants with few other job options—this included the Chinese, Japanese and South Asian migrants before World War I, and migrants from the Philippines and Mexico in the 1920s.<sup>83</sup> Since the 1940s, the major group of immigrants obtaining waged work in agriculture has been Mexicans.<sup>84</sup> Another important component of the farm workforce is temporary or seasonal migrant workers who enter the United States under the H-2A visa program.<sup>85</sup> The H-2A visa program allows temporary migrant workers to enter the U.S. to fill temporary or seasonal need (defined as not lasting longer than 12 months) where there are certified labor shortages.<sup>86</sup> Although migrant farm workers under the H-2A program constitute a small component of the total agricultural workforce, the number of H-2A workers is quickly rising, with over a 100% increase noted in the period between 2012 and 2016.<sup>87</sup> The H-2A visa program allows employers to bring in workers from any eligible country, and in 2016, 134,368 H-2A visas were issued.<sup>88</sup> Undocumented migrant workers, however, comprise close to half the crop worker population, a state of affairs that has prevailed since the Bracero Program ended in 1964.<sup>89</sup>

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<sup>83</sup> See, e.g., CLETUS E. DANIEL, BITTER HARVEST 24–66, 108–09 (1981); MARTIN, *supra* note 3, at 36–43.

<sup>84</sup> See, e.g., CALAVITA, *supra* note 32, at 55, 218 (stating that most of the Mexican workers who entered the United States between the period 1947–1964, did so under now-defunct Bracero Program; at its peak, the Bracero Program supplied 445,000 workers annually to farms); PHILIP L. MARTIN ET AL., THE NEW RURAL POVERTY 3–4, 13–18 (2006).

<sup>85</sup> See, e.g., CINDY HAHAMOVITCH, NO MAN'S LAND 5 (2013) (noting that the precursor to the modern H-2A program was the H-2 visa program, which until the 1980s mainly provided temporary labor to sugar growers in Florida and fruit orchards in the North East); H-2A Visa, JUSTICE IN MOTION (Nov. 4, 2017, 2:03 PM), <http://www.globalworkers.org/visas/h-2a> [<https://perma.cc/PCS4-AHZF>]. H-2A workers are found in almost all fifty states of the U.S., and work in crops ranging from apples to pears, tobacco to watermelons; however, H-2A workers tend to be concentrated in South-Eastern U.S. (North Carolina, Georgia, Louisiana, and Florida).

<sup>86</sup> The rules governing the H-2A program are found in 8 U.S.C. § 1188 and *Labor Certification Process for Temporary Agricultural Employment in the United States (H-2A Workers)*, 20 C.F.R. Part 655, Subpart B (the duration of a H-2A visa is generally one year, but a worker may apply to extend the visa as long as the maximum period of stay does not exceed 3 years. Workers from over 84 countries, including Mexico, El Salvador, Honduras, Belize, Guatemala and Jamaica, are eligible to participate).

<sup>87</sup> U.S. DEP'T OF STATE, REPORT OF THE VISA OFFICE (2016), Table XVI(B).

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY, *supra* note 7, at 53 (finding 47% of workers surveyed did not have the proper work authorization); Philip L. Martin, Outlook: *Immigration Reform and California Agriculture*, 67 CAL. AGRIC. 196, 198 (2013) (stating the proportion of undocumented workers in California may be higher).

The composition of the Canadian agricultural workforce provides an interesting counterpoint. In Canada, seasonal or temporary migrant workers entering under formal temporary migrant worker programs provide a significant proportion of the farm workforce.<sup>90</sup> An agriculture-specific temporary migrant worker program has been in operation since 1966, known as the *Seasonal Agricultural Worker Program* (“SAWP”), and these workers have become a structurally embedded feature of the industry.<sup>91</sup> It is generally assumed that undocumented workers form only a very small component of the workforce since the SAWP meets the agricultural sector’s labor needs. In 2015, 41,702 workers entered Canada under the SAWP.<sup>92</sup> The SAWP allows workers to be brought in for periods of up to eight months each year to work in commodities deemed to be “seasonal.”<sup>93</sup> The SAWP only allows farmers to bring in workers from countries with which Canada has bilateral agreements, which currently include Mexico, Jamaica and several other eastern Caribbean states. The vast majority of these workers end up in Ontario (58%), followed by British Columbia (17%) and Quebec (15%).<sup>94</sup> In addition, employers can also bring in temporary workers under the *Agricultural Stream* and the *Stream for Low-Wage Positions* of the general *Temporary Foreign Worker Program* (“TFWP”) for longer durations (up to two years). In 2015, 9,977 workers entered under the *Agricultural Stream* and a further 1,139 workers came under the *Stream for Low-Wage Positions*.<sup>95</sup> The longer duration of the TFWP makes it a valuable tool for employers seeking workers for non-seasonal projects, such as, mushroom and greenhouse production.<sup>96</sup>

In the next part, I set out the work of the AWA, JIM and CIW and evaluate the various legal engagements of these organizations against the political economy of the food system in North America.

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<sup>90</sup> See ANN WESTON AND LUIGI SCARPA DE MASELLIS, HEMISPHERIC INTEGRATION AND TRADE RELATIONS: IMPLICATIONS FOR CSAWP (2003) (noting that workers under the SAWP contribute 45% of total employment hours in the commodities in which they are employed).

<sup>91</sup> See generally VIC SATZEWICH, RACISM AND THE INCORPORATION OF FOREIGN LABOUR: FARM LABOUR MIGRATION TO CANADA SINCE 1945 (1991).

<sup>92</sup> GOV’T OF CANADA, ANNUAL LABOUR MARKET IMPACT ASSESSMENT STATISTICS 2008-2015, PRIMARY AGRICULTURE STREAM, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/reports/2014/lmia-annual-statistics/agricultural.html> [https://perma.cc/B929-8UHY] (last visited Feb. 1, 2017) [hereinafter GOV’T OF CANADA, ANNUAL LABOUR MARKET IMPACT ASSESSMENT STATISTICS].

<sup>93</sup> Eligible commodities include fruits, vegetables, mushrooms, and tobacco.

<sup>94</sup> GOV’T OF CANADA, ANNUAL LABOUR MARKET IMPACT ASSESSMENT STATISTICS, *supra* note 92.

<sup>95</sup> *Id.*

<sup>96</sup> Kerry Preibisch, *Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture*, 44 INT. MIGR. REV. 404, 428–29 (2010).

### A. *Agricultural Workers Alliance*

The AWA, which is an initiative of the United Food and Commercial Workers Canada (“UFCW”),<sup>97</sup> operates a network of ten support centers in rural Canada where large numbers of migrant farm workers are employed. The support centers provide legal services, run information sessions, and organize social events for migrant farm workers entering under the SAWP and TFWP programs. Today, the AWA support centers are the “most accessible support system for temporary migrant agricultural workers in Canada.”<sup>98</sup>

In the summer of 2001, the UFCW, the Canadian Labour Congress and a number of other labor organizations provided funding for volunteers to travel around rural Southern Ontario to speak with migrant farm workers about their conditions of employment and housing.<sup>99</sup> Southern Ontario is a fertile farming area that grows crops such as apples, peaches, pears, cherries, asparagus, cucumbers, sugar beets, tobacco, and tomatoes.<sup>100</sup> The majority of migrant farm workers that enter Ontario under the SAWP work on farms in this region.<sup>101</sup> The project, known as the “Global Care Van Project” (“Caravan Project”), was “a portable outreach vehicle on wheels.”<sup>102</sup> The Caravan Project spoke to migrant farm workers to find out about their experiences in Canada. A former union organizer with the United Farm Workers (Canada), Stan Raper, led the Caravan Project. He was joined by a number of Spanish-speaking volunteers.

The Caravan Project made clear the need for a permanent center that could provide assistance to the migrant farmworker community.<sup>103</sup> The UFCW had been trying to unionize SAWP farm workers since the 1970s,<sup>104</sup> and given its limited success, the UFCW was moved to experiment with a “worker center” model. Janice Fine describes worker centers as “community-based mediating institutions that provide support to and organize among communities of low-wage workers.”<sup>105</sup> In 2002, UFCW established the first

<sup>97</sup> This initiative is also known by the acronym “TUAC” in the province of Quebec.

<sup>98</sup> Giselle Valarezo, *A Voice for the Silenced: UFCW Canada and the National Campaign to Empower Vulnerable Migrant Agricultural Workers*, 2 J. ACTIVIST SCI. & TECH. EDUC. 20, 20 (2010).

<sup>99</sup> See UFCW & CLC, NATIONAL REPORT, *supra* note 6, at 3.

<sup>100</sup> See SATZEWICH, *supra* note 91, at 57–58.

<sup>101</sup> See GOV'T OF CANADA, ANNUAL LABOUR MARKET IMPACT ASSESSMENT STATISTICS, *supra* note 92.

<sup>102</sup> Wayne Hanley, *The Roots of Organizing Agricultural Workers in Canada* in CONSTITUTIONAL LABOUR RIGHTS IN CANADA 57, 66 (Fay Faraday et al. eds., 2012).

<sup>103</sup> Kerry Preibisch, *Forcing Governments to Govern in Defence of Noncitizen Workers: A Story about the Canadian Labor Movement's Alliance with Agricultural Migrants: An Interview with Stan Raper*, in ORGANIZING THE TRANSNATIONAL: LABOR, POLITICS, AND SOCIAL CHANGE 115 (Luin Goldring & Sailaja Krishnamurti eds., 2007).

<sup>104</sup> Donald Swartz, *Labour Rights and Union Strategies*, 69 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 447, 447 (2014).

<sup>105</sup> FINE, *supra* note 2, at 11.

support center in Leamington, Ontario, a town at the epicenter of the agricultural sector in Southern Ontario. Since then, nine other support centers have opened—three in Ontario, three in British Columbia, two in Quebec, and one other in Manitoba. In 2008, the UFCW launched the AWA to better coordinate the work of the various support centers.

The UFCW provides the AWA with all of its funding. As a consequence of this funding arrangement, the AWA operates as an outpost of the UFCW, although the AWA provides its services to the migrant farm worker community free of charge.

The AWA engages with the law in some very productive ways. First, the AWA attempts to build rights consciousness of workers throughout the entire migration process, not just once workers are present in Canada. Second, the AWA promotes compliance by facilitating claims that cross a number of jurisdictional boundaries by functioning as a “one-stop shop” for workers. On the other hand, my analysis of the AWA’s legal engagements also reveals one fundamental limitation: the AWA has aggressively pursued litigation as a tool to win social change without any significant effort to marry its judicial strategy with political mobilization.

### *1. Building rights consciousness across the entire labor migration cycle*

The migrant status of farm workers requires interventions to build legal consciousness that span the entire “labor migration cycle.”<sup>106</sup> The AWA’s rights consciousness work recognizes that workers’ knowledge of their legal rights can be improved before they arrive in their destination country, during the process of migration, and after they have arrived. The AWA acts at each of these points.

First, the AWA has established formal relationships with authorities in Mexico to distribute material about Canadian laws to workers before they arrive in Canada. To achieve this objective, the AWA recently signed several agreements with Mexican state and municipal agencies.<sup>107</sup> Using these local partners, the AWA works to inform workers of their rights under the SAWP and TFWP, the applicable provincial labor regulations, and the locations of support centers that can assist workers who encounter difficulties. Although the Mexican authorities do provide some information to workers before they

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<sup>106</sup> FAY FARADAY, *MADE IN CANADA: HOW THE LAW CONSTRUCTS MIGRANT WORKERS’ INSECURITY* 5–6 (2012) (describing the concept of “labor migration cycle” in the context of the range of interventions necessary to assist workers entering under temporary migrant worker programs, but which can also be used in relation to recent immigrants and undocumented workers).

<sup>107</sup> See, e.g., *UFCW Canada and Michoacan’s SEMIGRANTE Sign New Agreement to Protect Migrant Worker’s Rights*, UFCW CANADA (Dec. 21, 2015), [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=30869:ufcw-canada-and-michoacan-s-semi-grante-sign-new-agreement-to-protect-migrant-workers-rights&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=30869:ufcw-canada-and-michoacan-s-semi-grante-sign-new-agreement-to-protect-migrant-workers-rights&lang=en) [https://perma.cc/CTQ8-VKJ3].

depart Mexico about their employment-related rights in Canada, the information that they provide is often partial and incomplete. Recently, some evidence came to light that Mexican authorities had advised their citizens not to participate in union organizing because they feared that employer complaints could jeopardize the continuance of the SAWP.<sup>108</sup>

Second, after the workers arrive, the AWA is able to access migrant farm workers by having support centers based in rural areas of Canada where the farming sector is concentrated (e.g. Southwestern Ontario, Fraser Valley and the Okanagan region in British Columbia, Portage La Prairie in Manitoba, and Saint-Eustache in Québec). Once they establish contact with the workers, the support centers educate workers about their rights and entitlements using multi-lingual pamphlets and workshops.

Third, in more recent times, the AWA has started to work closely with the Mexican consulates in Canada to improve their knowledge of local laws. Before the AWA began its work, the consulates lacked the resources to help workers,<sup>109</sup> and in any event, they were insufficiently motivated to help their compatriots.<sup>110</sup> The AWA's work has resulted in the slow evolution in the attitude of staff at the Mexican consulate based in Leamington.<sup>111</sup> Xóchitl Bada and Shannon Gleeson recently surveyed the extensive engagements that civil society organizations had with Mexican consular offices in the United States, which included consulates referring matters to relevant organizations and working together to process claims.<sup>112</sup> The Mexican consulates in Canada are still far from being this cooperative,<sup>113</sup> and in fact, closer working relationships of this sort may not be possible in the Canadian context given the structural features of the SAWP.<sup>114</sup> But even in the absence of these closer forms of cooperation, the AWA has been instrumental in inform-

<sup>108</sup> See *Certain Emps. of Sidhu & Sons Nursery Ltd. and Sidhu & Sons Nursery Ltd. v. UFCW, Local 1518*, BCLRB No. B56/2014 (Can.), at 10 (alleging in proceedings before the British Columbia Labour Relations Board that Mexican workers were informed by representatives of the Mexican government not to participate in union activity while in Canada).

<sup>109</sup> VEENA VERMA, *THE MEXICAN AND CARIBBEAN SEASONAL AGRICULTURAL WORKER PROGRAM* (2003), [http://s3.amazonaws.com/migrants\\_heroku\\_production/datas/95/Verma\\_2003\\_original.pdf](http://s3.amazonaws.com/migrants_heroku_production/datas/95/Verma_2003_original.pdf) [<https://perma.cc/CGP2-LQZJ>].

<sup>110</sup> Christine Hughes, *Costly Benefits and Gendered Costs: Guatemalans' Experiences of Canada's "Low-Skill Pilot Project,"* in *LEGISLATED INEQUALITY: TEMPORARY LABOR MIGRATION IN CANADA* 146–47 (Patti Tamara Lenard & Christine Straehle eds., 2012).

<sup>111</sup> Interview with Stan Raper, AWA Coordinator, conducted by phone (Dec. 15, 2015) [hereinafter Raper, Interview].

<sup>112</sup> Xóchitl Bada & Shannon M. Gleeson, *A New Approach to Migrant Labor Rights Enforcement: The Crisis of Undocumented Worker Abuse and Mexican Consular Advocacy in the United States*, 40 *LAB. STUDIES J.* 32, 39–47 (2015).

<sup>113</sup> Raper, Interview, *supra* note 111.

<sup>114</sup> The Mexican state, which has become dependent on the remittances sent back to Mexico by farm workers, has an interest in seeing the SAWP continue. Under the SAWP, the Mexican state acts as a broker that selects workers and facilitates workers' emigration. Fear of jeopardizing the program may dampen enthusiasm for more zealous advocacy by the Mexican government on behalf of its citizens.

ing consular staff about the workers' legal entitlements while in Canada so that they can pass this information on to their citizens.<sup>115</sup>

Government departments in Canada, at both the federal and provincial level, only provide information to workers once the workers have arrived in the country. In this context, simply providing information about workers' rights in an impartial and comprehensive manner at the various stages of the migration cycle, represents an important legal engagement.

## 2. *Promoting compliance with a range of laws*

The staff and volunteers at the AWA support centers do a large amount of casework to help the workers claim their existing legal rights. The support centers have helped workers with wage theft claims under provincial employment standards legislation; claims for Employment Insurance, Canada Pension Plan, and Quebec Pension Plan; obtaining coverage under provincial medical schemes; and workers' compensation claims.<sup>116</sup> The casework involves speaking to workers to find out about their issues, advising them of their rights, filling out forms, and helping workers navigate the process of making a claim.<sup>117</sup> Workers can either come in person to see a staff member or volunteer at the AWA support centers, or alternatively, the AWA operates a 24-hour hotline that can answer any questions that workers may have.<sup>118</sup> In 2010, for example, the support centers responded to 35,000 enquiries in the form of drop-in visits, phone calls, and outreach to workers on farms.<sup>119</sup>

This aspect of the AWA's work supplements the efforts of regulatory agencies to receive and process claims in two main ways. First, the various public agencies are responsible only for enforcing the standards in their domains, and farm workers may have problems that cross a number of areas such as employment, health and safety, housing, and immigration. The AWA centers provide advice and support in a way that prioritizes the needs of the workers, which public regulators are unable to do because they operate in a more compartmentalized fashion. Second, once a complaint is lodged, Canadian regulatory agencies make little serious effort to meet the needs of workers who lead lives in multiple countries. The AWA operates an online database that helps workers keep track of their claims once a complaint has been lodged with a government agency.<sup>120</sup> The database is particularly important for migrant workers because it allows them to track their claims and

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<sup>115</sup> See Christina Gabriel & Laura Macdonald, *Citizenship at the Margins: The Canadian Seasonal Agricultural Worker Program and Civil Society Advocacy*, 39 *POLITICS & POL'Y* 45, 55 (2011).

<sup>116</sup> See UFCW, 2011 Report, *supra* note 6, at 12–14.

<sup>117</sup> See Raper, Interview, *supra* note 111.

<sup>118</sup> See Valarezo, *supra* note 98, at 23.

<sup>119</sup> UFCW, 2011 Report, *supra* note 6, at 11–12.

<sup>120</sup> *Id.*

provide any requested information to keep the claims progressing even when the workers are no longer in Canada.

The assistance that the AWA provides to workers to make legal claims runs up against the problem that most workers are afraid to complain. Workers under the SAWP and TFWP cannot meaningfully exercise their labor rights because the spectre of deportation haunts them.<sup>121</sup> Workers are fearful that lodging a claim against their employer could result in retaliation in the form of the termination of their employment, which could lead to their deportation.<sup>122</sup> The SAWP allows farm employers the power to unilaterally terminate a worker's employment. Unless the structural features of the SAWP and TFWP programs, which makes workers reliant on their employer's beneficence are first addressed, the AWA's strategy of facilitating legal claims is unlikely to lead to significantly more workers asserting their rights.<sup>123</sup>

### 3. Using litigation to win collective bargaining rights

The UFCW, along with the National Union of Public and General Unions ("NUPGU"), has been at the forefront of seeking collective bargaining rights for migrant farm workers by making the argument that section 2(d) of the *Canadian Charter of Rights of Freedom*<sup>124</sup> ("Canadian Charter"), which provides a guarantee of freedom of association, protects the right to collectively bargain. This litigation commenced before the formation of the AWA, and indeed even before the founding of the first support center in 2002, but there is an important link with farm workers: the original case was brought by the AWA's patron on behalf of farm workers in Ontario because they were

<sup>121</sup> See, e.g., Tanya Basok et al., *Reproducing Deportability: Migrant Agricultural Workers in South-western Ontario*, 40 J. OF ETHNIC AND MIGRATION STUDIES 1394, 1394 (2014); Gabrielle E. Clark, *Coercion and Contract at the Margins: Deportable Labor and the Laws of Employment Termination Under U.S. Capitalism (1942–2015)*, L. & SOC. INQUIRY at 1, 3, 5, 7–8 (early access, Nov. 4, 2016); Judy Fudge & Fiona MacPhail, *The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour*, 31 COMP. LAB. L. & POL'Y J. 5, 43–44 (2009); Leah F. Vosko, *Blacklisting as a Modality of Deportability: Mexico's Response to Circular Migrant Agricultural Workers' Pursuit of Collective Bargaining Rights in British Columbia, Canada*, 42 J. OF ETHNIC AND MIGRATION STUDIES 1371, 1373–74 (2016); Mimi Zou, *The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations*, 31 INT'L J. OF COMP. LAB. L. 141, 151 (2015).

<sup>122</sup> See, e.g., Chris Ensing, *Labrador Whistleblowers' 'Heart is Broken,' Faces Deportation*, CBC NEWS (Jan. 26, 2017), <http://www.cbc.ca/news/canada/newfoundland-labrador/tfw-deportation-labrador-city-arhur-lorenzo-1.3953077> [<https://perma.cc/A5WQ-WWGG>] (describing how a migrant worker faced deportation after engaging in workplace advocacy); Aaron M. Orkin et al., *Medical Repatriation of Migrant Farm Workers in Ontario: A Descriptive Analysis*, 2 CAN. MED. ASSOC. J. E192, E192 (2014) (finding that in 2001–2011, 787 repatriations occurred in Ontario, mostly for medical reasons).

<sup>123</sup> A number of features of the SAWP increase the vulnerability of farm workers by making them dependent on their employer's goodwill. For example, if a worker's employment is terminated, they lose their right to remain in the country unless they can find an alternative employer. Further, if a worker would like to return to Canada for future harvesting seasons, they must receive their employer's nomination. These features of the program make workers reluctant to complain.

<sup>124</sup> Canadian Charter, *supra* note 60.

excluded from the province's collective bargaining regime. The UFCW (and NUPGU) had multiple reasons for bringing this litigation. One was to provide protection for farm workers in Ontario to collectively organize, notwithstanding the challenges of organizing workers under the Wagner Act-model of collective bargaining.<sup>125</sup> A second rationale was to use collective bargaining as a way to challenge the agricultural sector's reliance on temporary migrant workers.<sup>126</sup> In Alberta and Manitoba where farm workers enjoy collective bargaining rights, the UFCW has been able to negotiate collective agreements requiring farm employers to nominate temporary migrant workers to obtain permanent residency through the Provincial Nominee Program (PNP). The PNP allows provinces to select categories of migrants that they want promoted for permanent residence. Yet another motivation was to halt the gradual corrosion of statutory collective bargaining rights for all workers.<sup>127</sup>

The UFCW's attempt to use the *Canadian Charter* to entrench collective bargaining rights commenced in the late 1990s, and has seen a number of twists and turns since it began.<sup>128</sup> Farm workers in Ontario have been excluded from the collective bargaining regime that was implemented in Ontario in the 1950s, with the exception of a very brief period.<sup>129</sup> In 2001, the UFCW brought a case on behalf of the excluded farm workers, arguing that the exclusion of agricultural workers from the province's general labor relations statute constituted a violation of these workers' freedom of association rights. The Supreme Court ruled that farm workers were entitled to the "exercise of certain collective activities, such as making majority representations to one's employer."<sup>130</sup> However, the conservative provincial government in power at the time responded by enacting the *Agricultural Employee Protection Act*<sup>131</sup> ("AEPA"), a specific collective bargaining regime for agricultural workers that only narrowly complied with the court's ruling. The AEPA only allowed farm workers to present their claims to the employer, without any concomitant duty on the employer to consider these representations in good faith, and further, deprived farm workers of the right

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<sup>125</sup> See *supra* note 25.

<sup>126</sup> See generally Naveen Mehta, *A Changing Union Tide Hurts Vulnerable Workers*, in UNIONS MATTER 115 (Matthew Behrens ed., 2014).

<sup>127</sup> See LARRY SAVAGE & CHARLES W. SMITH, UNIONS IN COURT (2017); Eric Tucker, *Shall Wagnerism Have No Dominion?*, 21 JUST LAB.: CAN. J. OF WORK & SOC'Y 1, 2 (2014).

<sup>128</sup> See, e.g., FAY FARADAY, ET AL., CONSTITUTIONAL LABOUR RIGHTS IN CANADA 5–6, 15 (Faraday et al. eds., 2012) (containing insightful commentary on the Canadian Charter litigation, including discussion of the decisions' social context); Kevin Banks et al., 16 CAN. LAB. EMP. L.J. 177, 184, 234, 303–04, 327–29, 336–37, 361–64, 372–76, 420 (focusing on the legal implications of the litigation).

<sup>129</sup> Tucker, *supra* note 25, at 36.

<sup>130</sup> *Dunmore v. Ontario (Attorney Gen.)*, [2001] S.C.R. 1016, para. 30 (Can.).

<sup>131</sup> *Agriculture Employees Protection Act*, S.O. 2002, c. 16 (Can.).



to take strike action to further their claims.<sup>132</sup> The UFCW's efforts to challenge the constitutionality of the AEPA failed, and it was found to pass constitutional muster.<sup>133</sup> More recently, in response to another unrelated legal challenge, the Supreme Court of Canada ruled that section 2(d) also protects the right to strike,<sup>134</sup> and since the AEPA does not explicitly protect this aspect of collective bargaining, its current legal status is once again unclear.

The decade-long litigation did not ultimately result in meaningful collective bargaining rights for farm workers. Some critics have pointed out that the UFCW/AWA's orientation to the courts diverted valuable resources from more active political forms of struggle, such as organizing protest actions and lobbying Parliament to change the laws.<sup>135</sup> Drawing on the typology of legal engagements described, which emphasizes the cultural and political dimensions of litigation, the more salient critique is that the UFCW/AWA failed to treat litigation as a cultural and political resource to strengthen movements and win political concessions.

The UFCW did not use litigation to build a popular movement, because it did not use the constitutional claim to tactically build public support and encourage popular mobilization, what Fay Faraday and Eric Tucker call "democratic constitutionalism."<sup>136</sup> For these authors, claims that have a constitutional imprimatur communicate that they "are supported by the fundamental and widely shared norms of a just society."<sup>137</sup> During the life of the litigation to win collective bargaining rights for farm workers, the UFCW did not actively attempt to mobilize popular support among workers and the public.<sup>138</sup> Not only did the UFCW/AWA fail to mobilize workers and their allies to take collective political action, its stated position implied that collective action could only result once legally sanctioned collective bargaining rights were achieved. The lack of a vibrant political campaign running alongside the constitutional litigation also meant that the UFCW could not use the court action to win political concessions when the courts proved unreceptive to the UFCW's arguments.

In fact, the UFCW/AWA's focus on constitutional litigation to win collective bargaining rights shows that legal action can sometimes act as a conservative force that undermines more radical avenues. SAWP workers regularly engage in illegal "wildcat" strikes when conditions become un-

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<sup>132</sup> C.f. David J. Doorey, *Graduated Freedom of Association: Worker Voice Beyond the Wagner Model*, 38 QUEEN'S L.J. 512, 525–26 (arguing that the AEPA has some unrealized potential because it provides protection for farm workers to form collective organizations).

<sup>133</sup> Attorney Gen. of Ontario v. Fraser, [2011] S.C.R. 3, 166 (Can.).

<sup>134</sup> Saskatchewan Federation of Labour v. Saskatchewan, [2015] S.C.R. 245 (Can.).

<sup>135</sup> Jonah Butovsky & Murray E.G. Smith, *Beyond Social Unionism: Farm Workers in Ontario and Some Lessons from Labour History*, 70 LABOUR/LE TRAVAIL 69, 70, 93 (2007).

<sup>136</sup> Fay Faraday & Eric Tucker, *Who Owns Charter Values?* in UNIONS MATTER 125, 126–29 (Matthew Behrens, ed., 2014).

<sup>137</sup> *Id.* at 126.

<sup>138</sup> See, e.g., SAVAGE & SMITH, UNIONS IN COURT, *supra* note 127.

bearable.<sup>139</sup> For example, workers have set down their tools and left the employer's premises to protest imminent health and safety hazards. The UFCW/AWA's commitment to legally sanctioned collective bargaining prevented it from actively supporting these spontaneous and extra-legal forms of activity.<sup>140</sup> Given the difficulties that migrant farm workers have collectively organizing under the Wagner-Act model, these other forms of strike activity might hold more promise for improving working conditions.<sup>141</sup> It is worth remembering that some of the UFW's early successes in California in the 1960s occurred as a result of wildcat strikes that took place in the absence of labor relations legislation.<sup>142</sup> If the UFCW and AWA were not so heavily invested in officially sanctioned channels of collective bargaining, they might have been more open to recognizing and supporting extant expressions of collective power.

### B. *Justice in Motion*

JIM is a unique organization based Brooklyn, United States that links employment advocates representing migrant farm workers with its network of Human Rights Defenders ("Defenders") in the workers' home countries.<sup>143</sup> Advocates who launch private litigation in the United States on behalf of migrant workers soon find that the workers' transient status presents an enormous barrier to succeeding in court. Litigation often takes years to complete, and in most cases, migrant farm workers have returned to their countries of origin while the litigation process trudges on, with neither the means nor resources to stay involved in the process. The Defenders can assist because they have easier access to these workers once they have returned to their home countries. The Defenders can recruit workers for pending class actions, meet in person with the workers, organize depositions at their offices, ask the workers to fill out any outstanding paperwork, and facilitate the distribution of settlement or award amounts. In the words of JIM's founder and Executive Director, Cathleen Caron, JIM has pioneered a form of "portable justice" for transnational workers who are denied their entitlements because of the strict procedural requirements created by court-based rights adjudication.<sup>144</sup>

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<sup>139</sup> See, e.g., Smith, *Racialized Justice*, *supra* note 44, at 27 n. 61.

<sup>140</sup> See Butovsky & Smith, *supra* note 135, at 84.

<sup>141</sup> Tucker, *supra* note 25, at 46, 50, 55–56 (arguing that farm workers have not been able to organize under this model, and in fact, strategies that "skirt around" the law might hold more promise).

<sup>142</sup> MARTIN, *supra* note 3, at 66–71.

<sup>143</sup> The change in name from Global Workers Justice Alliance, which took place in January 2017, was in recognition of the fact that JIM had moved beyond labor issues to focus on raising awareness about migrant exploitation more generally, to include matters such as abandonment, violence, persecution and human trafficking.

<sup>144</sup> Cathleen Caron, *Portable Justice, Global Workers, and the United States*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 549, 550 (2007).

In 2016, JIM's Defenders allowed 111 legal actions to proceed that otherwise might not have.<sup>145</sup> JIM's Defender network assists advocates working with a range of migrant workers, including those working on farms, in food processing, and in hospitality. Roughly one-third of the cases that come through JIM's doors are related to labor exploitation on farms.<sup>146</sup>

At present, JIM obtains the majority of its funding from two large private philanthropic foundations: Neo Philanthropy and Public Welfare. These foundations provide crucial funding to numerous progressive social causes. There are, however, quite a few drawbacks to relying on this type of funding. For example, the money can suddenly disappear if a foundation decides that its priorities lie elsewhere<sup>147</sup> and the process of applying for these funds, abiding by the terms of the award, and completing acquittal reports is extremely resource-intensive.<sup>148</sup> To overcome these drawbacks, JIM is looking to diversify its funding by appealing to individual donors.<sup>149</sup>

### 1. *Building rights consciousness*

JIM builds the rights consciousness of workers entering the United States by working closely with its Defenders, which form the backbone of JIM. JIM finds and trains organizations and individuals in migrant worker sending countries to form the network. At present, the Defender network is made up of close to 40 organizations and individuals in Mexico, Guatemala, El Salvador, Nicaragua and Honduras.<sup>150</sup> Most organizational members of the Defender network are not labor organizations; they include feminist, Indigenous and Catholic Church legal clinics.<sup>151</sup> The Defender network also includes three individual Defenders.<sup>152</sup> JIM works with the Defenders and its other partners to distribute material on workers' rights to workers in their own countries, and prior to their departure for the United States.

For two main reasons, the Defenders operate as effective "community brokers" and intermediaries to build the rights consciousness of workers. First, the Defenders are in a unique position to disseminate information to workers because they can utilize local partnerships and media to spread the message. For example, the *Jornaleros SAFE* project, which began in May 2010 as a joint endeavor between JIM, three organizations from the United

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<sup>145</sup> E-mail from Cathleen Caron, Justice in Motion to author (Jan. 24, 2017, 16:24 EST) (on file with author).

<sup>146</sup> JUSTICE IN MOTION, 2016 RESULTS (on file with author).

<sup>147</sup> Previously, JIM received most of its funding from the Ford and McArthur Foundations, but this funding came to an end when these foundations shifted their focus.

<sup>148</sup> See, e.g., THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX (Incite! Women of Color Against Violence ed., 2007).

<sup>149</sup> Telephone Interview with Cathleen Caron, Exec. Dir., Justice in Motion (Dec. 21, 2015) [hereinafter Caron, Interview].

<sup>150</sup> Global Workers Justice Alliance, *Defenders*, <http://www.globalworkers.org/advocates/defender-network> [<https://perma.cc/TJ3B-7LN2>] (last visited Feb. 2, 2017).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

States, one Mexican organization, and one Mexican foundation, estimates that it has been able to reach more than 100,000 workers through community radio to inform them of their rights as agricultural workers.<sup>153</sup> The Defenders have also educated thousands of Mexican workers about the “Chamba Mexico” case, one of Mexico’s largest recruitment fraud schemes.<sup>154</sup> Second, these Defenders raise the rights consciousness of the workers because they can reach them where they live, and since the Defenders often come from the same communities as the workers themselves, the workers have a high degree of trust in them. This allows the Defenders to provide information in a way that avoids the suspicion and skepticism, which often greets U.S.-based actors.

## 2. *Improving compliance by facilitating private enforcement across borders*

The Defenders’ main role is to facilitate the private employment actions of workers who lead transnational lives. Migrant farm workers have a number of statutory rights in the United States,<sup>155</sup> although in practice, immigration laws often intersect with labor protections to make their realization difficult.<sup>156</sup> Although these statutory rights are enforced by federal and state

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<sup>153</sup> GLOBAL WORKERS JUSTICE ALLIANCE, MEXICAN H2A FARM WORKERS IN THE U.S.: THE INVISIBLE WORKFORCE, JORNALEROS SAFE REPORT, EXECUTIVE SUMMARY (2013), [www.globalworkers.org/our-work/publications/jornaleros-safe](http://www.globalworkers.org/our-work/publications/jornaleros-safe) [https://perma.cc/WD8U-LZBX].

<sup>154</sup> *Our Impact: Program Summaries* (2014), GLOBAL WORKERS JUSTICE ALLIANCE, <http://www.globalworkers.org/our-work/successes/2014-year-review> [https://perma.cc/R32-3HHQ] (last visited Feb 2, 2017).

<sup>155</sup> In the federal sphere, the minimum wage provisions in the FLSA apply to farm workers employed at farms with more than 10 full-time workers, although farm employers continued to be exempt from overtime provisions. Further, the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1872 (1983) (AWPA) establishes a number of specific employment standards for migrant and seasonal agricultural workers, including those relating to housing, transport, and record-keeping. Most importantly, the AWPA requires the registration of farm labor contractors and makes farm employers and farm contractors jointly responsible for worker entitlements. The AWPA does not apply to workers under the H-2A program because specific regulations cover their employment. Under these regulations, the Department of Labor enforces wage rates and contractual obligations that farm employers have towards H-2A workers, such as the guarantee that workers will be provided with 75% of the hours they were contractually promised, transportation and housing requirements, and disclosure and record-keeping duties. These regulations operate as provisions in the employee’s contract of employment. In addition, workers are also covered by the Occupational Health and Safety Act, 29 U.S.C. § 651 *et seq.* (1980), and a range of civil rights legislation. Laws in the various states may provide farm workers with greater rights. For example, in California, farm workers must receive the state minimum wage (\$10.50 per hour as opposed to the federal \$7.25), and will soon have an entitlement to overtime pay.

<sup>156</sup> See Maria Ontiveros, *Migrant Labour in the United States: Working Beneath the Floor for Free Labour?*, in *MIGRANTS AT WORK: IMMIGRATION AND VULNERABILITY IN LABOUR LAW* 11–13 (Cathryn Costello and Mark Freedland eds., 2014).

government agencies,<sup>157</sup> some statutes, such as the FLSA, also contain a private right of enforcement.<sup>158</sup> Critics argue that the Department of Labor does not do a sufficient job of enforcement,<sup>159</sup> and therefore, private actions fill an enforcement void left by public agencies. However, private enforcement can never fully substitute for public efforts because workers bear a steep cost in claiming their rights through the court system.<sup>160</sup>

Private litigation, notwithstanding its limitations, can have three main benefits. First and foremost, it provides remedies for workers who have been denied their entitlements. Second, it acts as a deterrent to the specific employer targeted by the action, sending a clear message that any future violation will be punished. Finally, private actions can act as a general deterrent to other farm employers in the same industry or locality who may operate under the assumption that they will face no consequences for breaching the rights of their employees.

Litigation filed on behalf of workers often proceeds as class actions.<sup>161</sup> These procedures offer an efficient way of achieving all three objectives.<sup>162</sup> Private actions for individual farm workers are not usually viable because of the small amounts of money involved—even if the action is successful, the amount recovered might not meet the legal costs of bringing the claim. Class actions allow employment advocates to aggregate a number of claims so that the sum awarded meets all legal fees. The damages that can be awarded in class action cases also tend to be much higher, and as a result, these cases have a much bigger specific and general deterrence effect.<sup>163</sup>

Due to the transient nature of the lives that migrant workers lead, employment advocates face a number of barriers to bringing legal claims on

<sup>157</sup> These agencies include, for example, the federal Department of Labor (Wage & Hour Division and Occupational Health and Safety Administration), and the Equal Employment Opportunity Commission, or state equivalents.

<sup>158</sup> 29 U.S.C. § 216(b).

<sup>159</sup> See, e.g., FARMWORKER JUSTICE, *supra* note 6, at 36–40.

<sup>160</sup> See Weil & Pyles, *supra* note 38, at 63–65.

<sup>161</sup> This includes collective actions under the FLSA or class actions under rules of civil procedure. Fed. R. Civ. P. 23 and similar state civil procedure rules allow for class actions in many cases (for both statutory claims and common law claims—e.g. under anti-discrimination law, some state wage/hour laws, common law) when certain factual conditions are met. In class action litigation, individual class members are automatically included in any resolution unless they affirmatively opt-out. In contrast, the FLSA has a different and more difficult “opt-in” procedure that is commonly referred to as a collective, or representative, action—“An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought” (§ 261(b)).

<sup>162</sup> Telephone Interview with Nan Schivone, Leg. Dir., Justice in Motion (Jan. 6, 2015) [hereinafter, Schivone, Interview].

<sup>163</sup> Cf. Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 5 (Cynthia L. Estlund & Michael L. Wachter eds., 2013) (noting the important caveat that court adjudication of employment disputes favor the well-resourced).

their behalf. At the outset, lawyers have difficulty getting access to the workers, who generally live in housing on the employers' property.<sup>164</sup> Once a claim is lodged, advocates may need to obtain further information from affected workers during the litigation process. Even after a claim has commenced, there are several procedural rules that prevent migrant workers from accessing justice.<sup>165</sup> For example, the Federal Rules of Civil Procedure require plaintiffs in a lawsuit to participate in pre-trial discovery, which may include providing in-person testimony about the case.<sup>166</sup> In circumstances where a farm worker has returned to their home country, advocates may have difficulty getting in touch with their clients to ensure their participation in the case.

To overcome these challenges, JIM links Defenders with employment advocates in the United States, acting as an intermediary to facilitate the litigation process. The Defenders can locate clients in their home countries and tell them about the opportunity to join litigation, help clients answer interrogatories, organize telephonic or on-site depositions, and assist with settlement and award distribution.<sup>167</sup> The Defenders can navigate their local terrain, for example, circumventing some of the security threats created by the illicit "Narco trade."<sup>168</sup> They may be able to find clients who have lost contact with their advocates, and through personal interaction, encourage workers to exercise their rights and seek justice for legal violations. In many cases, Defenders are able to carry out these tasks because the workers, who may be fearful or distrustful of outsiders for a variety of reasons, place trust in them by virtue of being part of the same community.<sup>169</sup>

Defenders based in Mexico and Guatemala were recently instrumental to the success of two cases involving farm workers.<sup>170</sup> The first concerned a claim against a large citrus company based in Florida. Orange pickers under the H-2A program who were paid a "piece rate"<sup>171</sup> alleged that they were not provided with the "Adverse Effect Wage Rate"<sup>172</sup> for Florida. The col-

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<sup>164</sup> Letter from Sarah Paoletti, Dir., Transnational Legal Clinic, Univ. of Penn. to Emilio Álvarez Icaza Longoria, Exec. Sec'y, Inter-Am. Comm'n on Hum. Rts. (Aug. 13, 2014) (on file with author) (stating that the U.S. does not have a consistent federal legal framework that governs advocates' access to migrant workers living on camps; a confusing array of state laws, court decisions, and Attorney-General opinions regulate camp access, and in practice, local officials routinely ignore the legal protections even when they do exist).

<sup>165</sup> Caron, Interview, *supra* note 149.

<sup>166</sup> See Fed. R. Civ. P. 16.

<sup>167</sup> See Caron, *supra* note 144.

<sup>168</sup> Caron, Interview, *supra* note 149.

<sup>169</sup> Whitney Eulich, *For Migrants, A Push for Cross-Border Justice*, THE CHRISTIAN SCIENCE MONITOR (Dec. 14, 2015), <http://humantrafficking.csmonitor.com/for-mexicos-migrants-push-for-cross-border-justice> [https://perma.cc/AY4T-YB9Y].

<sup>170</sup> Schivone, Interview, *supra* note 162.

<sup>171</sup> In this case, the workers were provided with a rate of pay based on the amount of oranges picked.

<sup>172</sup> 20 C.F.R. 655.120 (employers of H-2A workers must provide the highest of the Adverse Effect Wage Rate, the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage, or the Federal or State minimum wage).

lective action that Florida Rural Legal Services initiated on behalf of the workers stalled because the Middle District Court of Florida required that affected workers provide signed interrogatories, and many workers had already returned to Oaxaca, Mexico. JIM connected the lawyers with a Defender based in the region who managed to collect the signed interrogatories. In another collective action against a large vegetable producer for violations relating to unpaid transportation costs, the Georgia Legal Services needed the services of a Defender in Guatemala to obtain the signed consent of workers. Both cases resulted in settlements.

Private enforcement, even accounting for class actions, can be likened to putting out spot fires and it is doubtful whether it has the capacity to drive long-term improvements in the agricultural sector. Most workers are afraid to pursue a legal claim against their employer for fear of retaliation.<sup>173</sup> Other barriers to filing a claim may result from perceptions about the ineffectiveness or unfairness of the process.<sup>174</sup> Further, even if a claim is filed, most claims are settled privately rather than being resolved by a court. Accordingly, these matters do not become a matter of public record, and therefore, do not demonstrate to other employers the dangers of non-compliance.

Recognizing this fact, JIM has recently redoubled its efforts to advocate for systemic change to the immigration system and to assist its Defenders fight for more protective laws in their home states. JIM has built up a “transnational advocacy network” that it is putting to use for this new purpose. Margaret Keck and Kathryn Sikkink describe a transnational advocacy network as “actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services.”<sup>175</sup> Although this facet of JIM’s work is relatively new, by facilitating the exchange of knowledge between itself, advocates and Defenders based in migrant-sending countries, the transnational advocacy network has the potential to influence legal and policy outcomes in multiple jurisdictions. Further, as sending states strengthen local laws, and as legal capacity to bring claims gradually develops among the Defenders, Caron predicts that the network will start to engage in more litigation in migrant-sending countries.<sup>176</sup>

### C. *Coalition of Immokalee Workers*

The CIW is a grassroots collective of workers based in Immokalee, a small town in the Southwest horn of Florida. The CIW formed in the early 1990s when a group of farm workers from Mexico, Haiti and Guatemala decided to come together to take action to improve the dismal conditions on

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<sup>173</sup> See, e.g., Weil & Pyles, *supra* note 38, at 63–64.

<sup>174</sup> *Id.*

<sup>175</sup> MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 2 (1998).

<sup>176</sup> Caron, Interview, *supra* note 149.

Florida's fields. Recognizing that farm workers in Florida enjoyed few legal rights, and that government agencies were indifferent to enforcing the limited rights that workers did have, the CIW decided to pursue a different path.

Today, the CIW is best known for the Fair Food Program, which covers the tomato industry in Florida. Florida produces 50% of the total volume of tomatoes consumed in the United States each year,<sup>177</sup> and during the winter months, Florida meets 90% of the country's tomato needs.<sup>178</sup> The Fair Food Program binds participating large-scale buyers of tomatoes, such as fast food chains and supermarkets, to purchase tomatoes from growers observing labor standards set out in the *Fair Food Code of Conduct & Selected Guidance* ("Code of Conduct"). The CIW pressured buyers to purchase their produce from participating growers by mobilizing public support. It waged a public campaign that threatened fast food chains, food service companies and supermarkets with loss of business and damage to reputation unless they agreed to take responsibility for labor conditions in their supply chains.<sup>179</sup> At present, the Fair Food Program covers 90% of tomato growers in Florida, which employ close to 30,000 migrant farm workers.<sup>180</sup> If a grower refuses to sign on to the Code of Conduct, or is found in persistent breach of its terms, it loses the ability to sell produce to participating buyers.

Prior to the CIW's efforts, labor conditions on Florida's tomato farms were some of the worst in the country.<sup>181</sup> Workers would toil for 10–12 hours each day in blistering heat to pick tomatoes for which they were paid 40

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<sup>177</sup> *Tomato 101*, THE FLA. TOMATO COMM., <https://www.floridatomatoes.org/tomato-101> [<https://perma.cc/Y829-RGST>] (last visited Oct. 6, 2017).

<sup>178</sup> Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. TIMES (Apr. 24, 2014), <http://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html> [<https://perma.cc/2JKG-4NZZ>].

<sup>179</sup> Since 2000, the CIW has been campaigning to pressure large buyers of Florida's tomatoes to sign on to the Fair Food Program. The CIW first targeted the fast food giant, Taco Bell, owned by Yum! Foods, which also owns the KFC and Pizza Hut chains. At first, Taco Bell was unwilling to agree to the CIW's terms, citing the fact that the working conditions in its suppliers had little to do with the company. After a grueling five-year campaign, Yum! Foods eventually capitulated. The CIW's national campaign, run in concert with students and faith groups, was able to cause commercial damage to Taco Bell and credibly threaten Taco Bell's reputation. The boycott of Taco Bell that the CIW called between 2000 and 2005 was aided by the Student/Farmworker Alliance (SFA), which managed to pressure 25 schools, colleges and universities to either remove or prevent new Taco Bell restaurants opening, or to end sponsorship agreements with Taco Bell. After further campaigning, the CIW was able to pressure McDonalds in 2007 to agree to its terms. Burger King, Whole Food Market and Subway followed suit in 2008. In March 2009, the SFA launched its "Dine with Dignity" campaign to pressure food service providers on campus to join the Fair Food Program. This ultimately led to Bon Appétit, Compass Group, Aramark and Sodexo acceding to the CIW's demands. Trader Joe's and Chipotle Mexican Grill signed in 2012, and Walmart and Fresh Market signed in 2014. There are still a number of businesses that operate in Florida that have not yet signed an agreement with the CIW—Wendy's is the last of the five major fast food corporations and the Publix supermarket chain is one of the few remaining retailers. These corporations are currently the targets of a wide-ranging campaign and boycott.

<sup>180</sup> *Campaign for Fair Food*, COAL. OF IMMOKALEE WORKERS, <http://ciw-online.org/campaign-for-fair-food> [<https://perma.cc/GSQ4-M5LT>] (last visited Feb. 1, 2017).

<sup>181</sup> Sean Sellers & Greg Asbed, *The History and Evolution of Forced Labor in Florida Agriculture*, 5 RACE/ETHNICITY: MULTIDISCIPL. GLOBAL CONTEXTS 29 (2011).



cents a bucket (roughly 32 lbs. of tomatoes).<sup>182</sup> This meant that workers were forced to pick close to 2 tons of tomatoes (or 125 buckets) to make \$50 per day.<sup>183</sup> Rest periods were rare or non-existent. Female workers complained of sexual harassment and of routinely being asked to provide sex in exchange for ongoing work.<sup>184</sup> Even slavery and human trafficking were not unheard of—the Department of Justice brought seven claims of servitude against farm labor operations in Florida between 1998 and 2013.<sup>185</sup> As a result, in this period, law enforcement authorities released more than 1,000 workers held as slaves by crew bosses.<sup>186</sup>

The situation on the ground has changed markedly since the implementation of the Fair Food Program. The CIW's Code of Conduct regulates working conditions such as wages, health and safety, workplace violence, and anti-discrimination.<sup>187</sup> It also contains a sophisticated dispute resolution process that allows workers to make complaints about violations without fear of reprisal. Further, compliance with the Code of Conduct is subject to regular external auditing. The dispute resolution and auditing is carried out by an organization that is independent from the industry, called the Fair Food Standards Council ("Standards Council"). Judge Laura Safer Espinoza, a retired judge of the New York Supreme Court, currently is the head of the Standards Council.<sup>188</sup>

The CIW is not incorporated and has no legal personality. It does not contain a hierarchical decision-making structure, and in fact, all workers are encouraged to participate. The CIW has about 4,500 members although formal membership confers few additional benefits. All tomato workers in Immokalee and surrounding regions are welcome to join a fluid "board" of self-appointed members that meet on a monthly basis to determine the CIW's campaign directions. Many of the original founders of the group are still active participants.

However, a formal structure is necessary for certain functions, such as applying and holding foundation grants. For these purposes, the Standards Council is incorporated and listed as a 501(c)(3) organization to have tax-

<sup>182</sup> Eric Schlosser, *Penny Foolish*, N.Y. TIMES (Nov. 29, 2007), <http://www.nytimes.com/2007/11/29/opinion/29schlosser.html> [https://perma.cc/VQ5D-HA2D].

<sup>183</sup> See *id.*

<sup>184</sup> See John Bowe, *Nobodies*, THE NEW YORKER (Apr. 21, 2003), <http://www.newyorker.com/magazine/2003/04/21/nobodies> [https://perma.cc/2KB5-VCPR].

<sup>185</sup> Sellers & Asbed, *supra* note 181.

<sup>186</sup> *Id.*

<sup>187</sup> *Fair Food Code of Conduct*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct> [https://perma.cc/EU3G-L9T3] (last visited Feb. 2, 2017).

<sup>188</sup> *Judge Laura Safer Espinoza*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/about/judge-laura-safer-espinoza> [https://perma.cc/EU3G-L9T3] (last visited Feb. 1, 2017); *About*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/about> [https://perma.cc/PKX8-BXMT] (last visited Sept. 24, 2017).

exempt status.<sup>189</sup> The CIW receives most of its current funding from a few private philanthropic organizations. These amounts pay the CIW's operating costs and staff wages. The CIW is acutely aware that operating in this manner is precarious because the loss of a single grant could cause havoc to its operations. As a result, the CIW is currently in the process of designing a Fair Food certification scheme that it can license to generate revenue on a more sustainable basis.<sup>190</sup> The Fair Food certification would entitle retailers to mark either the tomatoes they are selling with a sticker or to have a point-of-sale display indicating that they are participating in the Fair Food Program.

In 2015, the CIW expanded the Fair Food Program to tomato producers in other nearby states (Georgia, North Carolina, South Carolina, Virginia, Maryland, New Jersey) and other crops (peppers and strawberries).<sup>191</sup>

### 1. *Building an effective private regulatory system*

The Fair Food Program represents a form of private regulation, shaping the behavior of farm employers through standards developed by workers, monitored by an independent organization, and enforced through market sanctions. Enforcement takes place through a potent mix of proactive and reactive enforcement mechanisms. Any detected violation must be immediately remedied, and failure to do so results in exclusion from the program for a stipulated period of time. Such exclusion can have serious financial impact on the grower, which must then find a non-participating buyer to take the perishable stock off its hands. The Fair Food Program applies many of the lessons that civil society groups have learned from successfully regulating transnational supply chains.<sup>192</sup> Another factor behind the Fair Food Program's success is that it makes powerful entities at the top of the food supply chain responsible for working conditions of those employed throughout.

The Fair Food Program works as a successful private regulatory system for four main reasons.<sup>193</sup> First, the standards contained in the Code of Conduct have been determined in close coordination with workers, and as a result, reflect matters that are of deep interest to them.<sup>194</sup> For example, workers have long complained about the pervasive practice of being required to fill their collection buckets above the brim—a practice that effectively denied

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<sup>189</sup> *Donate*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/donate> [<https://perma.cc/66M9-E9MN>] (last visited Sept. 24, 2017).

<sup>190</sup> Interview with Marley Moynahan, Communication Officer, Coalition of Immokalee Workers (Dec. 10, 2015) [hereinafter Moynahan, Interview].

<sup>191</sup> FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2015 ANNUAL REPORT 2 (2015), <http://fairfoodstandards.org/15SOTP-Web.pdf> [<https://perma.cc/PWH2-MXAX>] [hereinafter FAIR FOOD STANDARDS COUNCIL, 2015 REPORT].

<sup>192</sup> See *supra* note 77.

<sup>193</sup> See James J. Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, in *TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHALLENGES* 361–70 (Joanna Howe & Rosemary Owens eds., 2016).

<sup>194</sup> *Id.* at 364–65.

workers payment for up to 10% of the tomatoes they harvested.<sup>195</sup> The Code of Conduct requires that employers require their workers to fill the buckets to the brim and not above.<sup>196</sup> Second, compliance with the Fair Food Program is subject to regular and thorough audit by an independent and credible third party.<sup>197</sup> The auditing process is thorough because it involves examination of complete payroll records, discussions with all levels of management, and interviews with at least 50% of the workers employed at any particular enterprise.<sup>198</sup> Third, workers can also directly complain if there has been a violation, and these claims are swiftly investigated and resolved.<sup>199</sup> When making these complaints, workers can take comfort in knowing that employer reprisals will be punished and that they will be reinstated if their employment is terminated.<sup>200</sup> Fourth, non-compliance is subject to transparent sanctions that hold serious commercial implications for wrongdoers.<sup>201</sup>

The standards contained in the Code of Conduct are comprehensive. The initial purpose of the Code of Conduct was to require tomato purchasers to pay 1.5 pennies more per pound of tomatoes purchased, which then would be passed on to the workers in a verifiable way.<sup>202</sup> The wage premium in most cases resulted in the real wages of farm workers increasing by 20-35%, with workers subsequently receiving an hourly wage of \$8.75.<sup>203</sup> This premium has resulted in millions of dollars of additional wage payments for workers.<sup>204</sup> In the ensuing years, the Code of Conduct has evolved into a sophisticated document containing several substantive rights and entitlements. The main provisions of the Code of Conduct require growers to abide by all applicable federal, state and local laws; directly hire workers rather than through labor contractors; provide employees with protective gear and training for their use; create mobile shade structures; eliminate workplace violence, forced labor, child labor, and sexual harassment; keep comprehensive records; and provide paid training to workers about the terms of the Code of Conduct and their rights.<sup>205</sup>

The Standards Council conducts external audits of growers to ensure compliance with the terms of the Code of Conduct. When growers sign the

<sup>195</sup> *On the Elimination of the Required Overfilling of Buckets through the CIW's Fair Food Code of Conduct*, COALITION OF IMMOKALEE WORKERS (Apr. 30, 2011), [http://www.ciw-on-line.org/blog/2011/04/bucket\\_overfilling](http://www.ciw-on-line.org/blog/2011/04/bucket_overfilling) [<https://perma.cc/P4CH-WS5Y>].

<sup>196</sup> *Id.*

<sup>197</sup> Brudney, *supra* note 193, at 365–69.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 365.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 369.

<sup>202</sup> Moynahan, Interview, *supra* note 190 (growers are entitled to retain the other 0.5 cents for administrative costs in administering the Fair Food Program).

<sup>203</sup> Greenhouse, *supra* note 178.

<sup>204</sup> FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2014 ANNUAL REPORT 2 (2014) <http://fairfoodstandards.org/cms/wp-content/uploads/2015/08/14SOTP-Web.pdf> [<https://perma.cc/S7VY-7MS7>] [hereinafter FAIR FOOD STANDARDS COUNCIL, 2014 ANNUAL REPORT].

<sup>205</sup> *Fair Food Code of Conduct*, *supra* note 187.

Code of Conduct, they agree to participate in the auditing process, which means allowing all payroll records and other company documents to be inspected and requiring all crew leaders, supervisors and members of management to answer questions while being interviewed.<sup>206</sup> The auditing process is extensive. It can last anywhere from two days to two weeks.<sup>207</sup> The auditors inspect payroll and other records to ensure that the wage premium is being passed on to workers and that workers are being provided with the minimum wage. The Standards Council makes it a practice to interview at least 50% of the workforce irrespective of size of the grower.<sup>208</sup> In addition, the auditors interview each level of management. In the 2014-2015 growing year for example, 27 management audits, 32 payroll audits, and 36 operation audits were carried out in Florida (3,617 workers and 102 crew leaders were interviewed).<sup>209</sup> Every grower is audited each season. The results from four seasons of audits show that the situation is gradually improving on the ground with fewer violations being found. Fine has described the monitoring process in glowing terms, stating that, “[t]his is the best workplace-monitoring program I’ve seen in the U.S.”<sup>210</sup>

Once an audit detects a violation, the most common remedial action taken is the development of a corrective action plan. The grower is also suspended from the program until the corrective measures are implemented. To date, 13 growers have been placed on probation and 7 growers have been suspended from the Fair Food Program for varying lengths of time for failing to implement a corrective action plan.<sup>211</sup> The purposes of the corrective action plans are to drive systemic change, set out a clear path for doing so, and achieve buy-in from key stakeholders.

The Fair Food Program recognizes that auditing will not pick up all violations. In these cases, a credible complaint-resolution process supports workers exercising “voice.” The process is underpinned by three elements: education of workers, a 24-hour bilingual complaints line operated by the Standards Council (workers can also complain directly to the CIW or growers, although this is less common), and a process for investigating and resolving complaints. Complaints are investigated, and where a violation is found, resolved by discussion with the relevant crew leaders and growers to ensure that appropriate redress is made. According to the Standards Council, participating growers have “adopted a cooperative attitude towards jointly resolving worker complaints.”<sup>212</sup> In the 2014-2015 growing year, the Standards Council dealt with 261 complaints in Florida (91 complaints were

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<sup>206</sup> *Id.* at Part IV.

<sup>207</sup> FAIR FOOD STANDARDS COUNCIL, 2014 ANNUAL REPORT, *supra* note 204, at 2, 17.

<sup>208</sup> Moynahan, Interview, *supra* note 190.

<sup>209</sup> FAIR FOOD STANDARDS COUNCIL, 2015 REPORT, *supra* note 191, at 44.

<sup>210</sup> Greenhouse, *supra* note 178.

<sup>211</sup> FAIR FOOD STANDARDS COUNCIL, 2015 REPORT, *supra* note 191, at 45.

<sup>212</sup> *Id.* at 14.

made to the CIW and a further 30 complaints made directly to growers).<sup>213</sup> This represented a significant increase from the 2011-2012 growing year, which saw 84 complaints in total.<sup>214</sup> The increase in complaints is likely due to growing worker awareness about their rights under the Code of Conduct and to mounting confidence among workers that they will not face negative consequences for complaining.<sup>215</sup>

Credible sanctions are the final key to the success of the Fair Food Program. Employers that violate the terms of the Code of Conduct realize that the Standards Council or CIW will learn of this and that they will face consequences.<sup>216</sup> There are three categories of violations prescribed. “Article I violations,” the so-called “zero tolerance provisions,” are the most serious and include the use of forced labor and systemic use of child labor.<sup>217</sup> “Article II violations” include discrimination, sexual harassment, systematic wage violations, and any reprisal against a worker exercising their rights under the Code of Conduct. Article III violations are the least serious and include non-systematic wage violations. Article I violations result in an immediate suspension. Suspension periods from the Fair Food Program increase in severity with each suspension—the first suspension is for 90 days, the second is for 180 days, and the third is for one full calendar year. Article II and III violations require the grower to develop and implement a corrective action plan, and failure to abide by the terms of this plan can result in a suspension for a period of time until compliance is achieved. The Code of Conduct also stipulates disciplinary measures for crew leaders and other supervisory staff found to be in breach of the terms of the Code of Conduct, which range from the termination of employment to a lifetime ban on working for a participating grower. The Standards Council or the CIW may also refer certain illegal conduct to law enforcement authorities—for example in cases of assault, sexual harassment and slavery.<sup>218</sup>

If a grower is suspended or excluded from the Fair Food Program altogether, it loses the ability to sell to those buyers that are signatories of the program, because the buyers have agreed to purchase their tomatoes only from certified suppliers. James Brudney argues that the potential loss of this business constitutes an effective incentive even though tomato sales through the Fair Food Program only constitute around 20% of growers’ total sales.<sup>219</sup> Due to the perishable nature of tomatoes, it is extremely difficult for a suspended producer to organize an alternative buyer on short notice.

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<sup>213</sup> *Id.* at 46.

<sup>214</sup> *Id.*

<sup>215</sup> See Brudney, *supra* note 193, at 364–65.

<sup>216</sup> A working group consisting of growers and CIW members advises the Standards Council about how best to practically implement the various provisions of the CIW.

<sup>217</sup> *Fair Food Code of Conduct*, *supra* note 187.

<sup>218</sup> Moynahan, Interview, *supra* note 190.

<sup>219</sup> Brudney, *supra* note 193, at 369 & n.86.

The real strength of the Fair Food Program is that it takes into account the fact that working conditions in the agricultural sector are directly impacted by broader transformations in the food industry.<sup>220</sup> Farm producers are subject to enormous pressure on account of two significant trends in the food industry, and therefore, might not be in the best position to provide better wages and conditions. First, the consolidation of a global food market due to increased trade liberalization has increased the competition to which farmers are subject.<sup>221</sup> Second, increasing concentration amongst companies—particularly among those responsible for producing the inputs that farmers use (such as seeds and pesticides), and buying the products that farmers produce—has shifted the balance of power away from farmers.<sup>222</sup>

The mechanisms by which sellers and buyers exercise market power are multifaceted and complex. Although governments have generally been alive to the issue of monopolistic and oligopolistic sellers abusing market power to command higher prices, the pernicious effects of concentrated buyer power have been less well understood.<sup>223</sup> Harvey James and colleagues argue that farmers' weakness vis-à-vis buyers can be explained through factors such as high switching costs and lack of alternative buyers.<sup>224</sup> This means that farmers are paying higher costs for inputs and receiving lower prices for their produce due to structural changes in the food system. They often respond by seeking to gain greater surplus value from their workers' labor.<sup>225</sup>

The CIW understands these broader political economy dynamics, and as a result, the Fair Food Program targets those at the top of the food supply chain to guarantee decent working conditions of those employed by its suppliers. When the CIW first targeted Yum! Foods in 2000 (which owns Taco Bell, Pizza Hut and KFC fast food chains), the company predictably claimed that it could not be held responsible for labor conditions in its supply chain. The CIW, however, did not falter and waged a campaign to pressure those entities to wield their power to improve working conditions on farms. It is these entities that have the real power to change the situation for farm workers.

These four aspects of the Fair Food Program—standards determined by workers, enforcement predicated on thorough monitoring, a robust worker-complaint mechanism, and imposing real responsibility on the lead firms through meaningful sanctions—represent a particularly effective form of private regulation. Some have taken to using the moniker “worker-driven social responsibility” to distinguish this form from previous corporate-led

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<sup>220</sup> See *supra* discussion Part II.

<sup>221</sup> See *supra* note 79.

<sup>222</sup> See *supra* note 81.

<sup>223</sup> Peter C. Carstensen, *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, 52 ANTITRUST BULL. 271, 272 (2008).

<sup>224</sup> Harvey S. James, Jr., Mary Hendrickson & Philip H. Howard, *Networks, Power and Dependency in the Agrifood Industry*, in THE ETHICS AND ECONOMICS OF AGRIFOOD COMPETITION (Harvey S. James, Jr. ed., 2013), at 99–126.

<sup>225</sup> See, e.g., Preibisch, *supra* note 96, at 406; Preibisch, *supra* note 81, at 421.

incarnations that were characterized by “voluntary commitments, broad standards that often merely mirror[ed] local law, ineffective or non-existent monitoring, and the absence of any commitment to or mechanisms for the enforcement of the meagre standards that. . . exist[ed].”<sup>226</sup>

### III. WHEN CAN LABOR ORGANIZATIONS MAKE A DIFFERENCE?

The purpose of the following discussion is to analyze the work of these organizations along two axes. The first axis of investigation is to compare organizations performing similar types of work in order to draw conclusions about when these legal engagements work best. The second axis of investigation is to consider these legal engagements against the political economy of the food system, the regulatory framework, and the demographics of the migrant farm workforce, to arrive at some findings about which legal engagements should be preferred. This analysis reveals that labor organizations may be able to extend existing regulatory protections in a way that current actors cannot and design private systems of regulation that transcend the limitations of public ones.

The AWA and JIM engage with the law in similar ways, although they operate under different legal and political conditions. Both organizations build the rights consciousness of workers, seek to improve compliance with existing laws, and achieve legal reform to broaden the suite of rights available to migrant farm workers. In building the rights consciousness of workers and in improving compliance with laws, these two labor organizations operate in ways that traditional regulatory agencies are unable to do.<sup>227</sup> Matthew Amengual and Janice Fine invoke the idea of the “non-substitutable capabilities of state and society” in appealing for regulators to “co-enforce” standards with labor organizations.<sup>228</sup> This research supports the notion that rather than simply filling existing regulatory gaps, labor organizations are able to operate in ways that expand existing protections for farm workers.

Migrant farm workers lack knowledge about their existing statutory rights and the mechanisms to enforce them, and labor organizations can play a critical role in improving workers’ rights consciousness in ways that are cognizant of their experiences. Rather than waiting until workers have arrived in the United States or Canada, the AWA and JIM work across the entire labor migration cycle to increase knowledge of rights. The AWA works with Mexican state institutions to distribute material to temporary migrant workers before they reach Canada, and it operates ten support centers in regional locations to conduct further outreach once workers have arrived.

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<sup>226</sup> WORKER-DRIVEN SOCIAL RESPONSIBILITY NETWORK, WHAT IS WORKER-DRIVEN SOCIAL RESPONSIBILITY (WSR)? 1 (2017), <https://www.nesri.org/programs/worker-driven-social-responsibility-collaborative> [<https://perma.cc/9JW2-GBVZ>] (last visited Aug. 16, 2017).

<sup>227</sup> Although traditional labor organizations can perform a similar function, at least in North America, this tends to not be the case.

<sup>228</sup> Amengual and Fine, *supra* note 52, at 129.

Similarly, JIM works with its Defender network in the migrant workers' home countries to distribute information. These Defenders act as trusted intermediaries, providing information in an appropriate way so that it is accurately received.

Migrant farmworkers need extra support to claim their employment rights through administrative or judicial processes, and state regulators currently do not have the resources to provide this assistance. Labor organizations such as the AWA are in a position to offer the kinds of language, logistical and emotional supports that state agencies cannot, so that workers can vindicate their rights. Migrant workers also lead lives in several countries, and once they enter the United States or Canada for work, several overlapping regimes of regulation apply to them. The narrow legislative mandates that regulatory agencies work within prevent them from crossing policy boundaries or operating in other jurisdictions. Labor organizations are not so encumbered—they can cross policy and national boundaries with more agility to act in the interests of migrant workers as the AWA and JIM cases demonstrate.

While many of the measures just described allow workers to claim some measure of justice, it is questionable whether they make an impact on working conditions in the sector more broadly. The strategies adopted by the AWA and JIM require workers to come forward and pursue claims either with enforcement agencies or through the courts. There is significant evidence that low-wage workers are unwilling to complain because they fear retaliation.<sup>229</sup> This is especially the case for migrant farm workers, who are “unfree” in the sense that they have various restrictions placed on their ability to sell their labor power.<sup>230</sup> For these workers, the costs of complaining can be very high. Migrant farm workers entering under temporary worker programs (e.g. H-2A, SAWP and TFWP) are the archetypical unfree workers in the contemporary economy, because they have politico-legal restrictions that tie them to a single employer, and prevent them from working in different sectors.<sup>231</sup> Similarly, undocumented workers, who labor under the fear that migration rules will be invoked at any time to remove them from the country, also exist closer to the “unfreedom” pole.<sup>232</sup> This unfreedom prevents migrant farm workers from exercising the few labor rights they have

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<sup>229</sup> Weil & Pyles, *supra* note 38, at 63–64.

<sup>230</sup> See, e.g., Clark, *supra* note 121 at 3–4; Kendra Strauss, *Coerced, Forced and Unfree Labour: Geographies of Exploitation in Contemporary Labour Markets*, 6 GEOGRAPHY COMPASS 137 (2012); HAHAMOVITCH, *NO MAN'S LAND*, *supra* note 85, at 2; ROBERT MILES, *CAPITALISM AND UNFREE LABOUR* (1987) (noting that the concept of unfreedom, located in Marxist political economy, seeks to explain the migrant farm workers' vulnerability through their circumscribed ability to circulate in the labour market—e.g. changing employers is extremely difficult, and workers cannot work in another industry).

<sup>231</sup> See e.g., Clark, *supra* note 121, at 10.

<sup>232</sup> Strauss, *supra* note 230, at 141 (proposing a continuum approach to the issue of labor unfreedom because powerful and persistent forms of unfreedom can result among workers who are free to sell their labor due to economic compulsion and disparities in gender, citizenship status, race, and ethnicity).



because employer retaliation can have disastrous consequences. As a result, the claims that the AWA and JIM make possible, as important as they are in achieving justice for individual workers, are simply not enough to change the cost-calculus for farm employers.<sup>233</sup>

The AWA and JIM also fight vigorously for more legal rights for farm workers. The AWA has prioritized launching constitutional litigation to achieve freedom of association rights for farm workers, while JIM mainly lobbies governments in sending and receiving countries for new laws that would lessen the vulnerability of workers, such as laws to punish the charging of recruitment fees.

The political process is generally receptive to those with power and wealth, and since the migrant farm worker community is lacking in both, it may appear that legal channels might prove to be more receptive. However, the experience of the AWA suggests that the legal path is also fraught with danger. The AWA/UFCW's decade-long struggle to win collective bargaining rights for farm workers only resulted in an irredeemably compromised labor relations statute. Because the AWA/UFCW did not prioritize movement building, when the court action failed, it had little to show for its efforts. The AWA's and JIM's experiences reinforce the fact that a legal strategy must be married with a political one to obtain the greatest benefit. That is, when using litigation to win new rights for migrant farm workers, the law should also be harnessed to build and coalesce movements.

Comparing the work of the CIW and JIM yields another set of insights about the relative merits of different legal engagements because both operate in a similar legal and political context, but take diametrically different approaches to the law. The difficulty that the CIW had gaining the attention of government authorities to address farm workers' conditions led to its leadership losing faith in public regulatory systems. As a result, the CIW devised its own system of private rights backed up by a sophisticated monitoring and enforcement regime—the Fair Food Program. In contrast, JIM tries to uphold the few statutory rights that migrant farm workers have.

The Fair Food Program puts into practice several of the lessons that public regulators have learned about enforcing employment standards in low-wage industries, as well as lessons activists have learned coming out of several decades of experience with designing private regulatory systems to regulate global supply chains.<sup>234</sup> The Fair Food Program contains robust standards, empowered workers, thorough auditing by an independent third party, and all of this is backed up with credible sanctions. But the CIW's system of private regulation is not merely a surrogate for a public system; in many

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<sup>233</sup> See, e.g., Kevin Purse & Jillian Dorrian, *Deterrence and Enforcement of Occupational Health and Safety Law*, 27 INT'L J COMP. LAB. L. & INDUS. REL. 21, 35–36 (2011); Dorothy Thornton et al., *General Deterrence and Corporate Environmental Behavior*, 27 L. & POL'Y 262, 279–81 (2005); Frank Pearce & Steve Tombs, *Ideology, Hegemony, and Empiricism: Compliance Theories of Regulation*, 30 BRIT. J CRIMINOLOGY 423, 435–37 (1990).

<sup>234</sup> See generally, LOCKE, *supra* note 77.

respects, it is better. Given that most workers in the Florida tomato industry are undocumented, it is less likely that they would complain to a public authority even assuming the existence of a committed and invigorated labor inspectorate. By virtue of the Fair Food Program being a worker-driven private system, the workers' migration status does not become a salient issue when lodging a complaint. The fact that the number of worker complaints has been steadily rising during the Fair Food Program's lifetime demonstrates that private regulatory systems can be engineered to empower workers to counterbalance their unfreedom.

Another real strength of the CIW's Fair Food Program is that it addresses several of the major features in the political economy of contemporary food production. Enforcing current existing law on the books against farm employers does not adequately engage with powerful transformations in the food industry that have created a competitive global market in which farmers struggle to survive and thrive. As a result of these changes, farmers look to offset their dwindling profit margins by demanding more flexibility and value from their workers, thereby contributing to worsening working conditions. Further, concentration in the food industry means that a greater share of power and value is being retained by large corporations that provide farm inputs and purchase the fruits and vegetables that farmers produce; in practical effect, these entities control working conditions in the agricultural sector. Cognizant of this political economy, the Fair Food Program attempts to address working conditions in agriculture by making those entities at the top of the food supply chain responsible for workers' rights on farms.

The CIW's strategy of targeting businesses at the apex of the food chain would not have been possible if it were a traditional union. Labor organizations have an advantage in the agricultural sector when compared with more traditional unions representing workers in other industries because they are not subject to the same legal restrictions that apply to unions. For example, unions are prohibited from carrying out secondary boycotts,<sup>235</sup> but by virtue of the CIW's non-union status, no such prohibition applies to it.<sup>236</sup> This allows the CIW to focus its energy on those who wield the actual power to affect working conditions in the agricultural sector without falling afoul of

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<sup>235</sup> See Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 843–45 (2014) (defining a secondary boycott or action as when a labor union seeks help from other workers at companies doing business with their employer).

<sup>236</sup> See *id.* at 848–49 (arguing that if a statutorily-recognized traditional labor union were to call for a boycott of entities conducting business with a farm employer in the same manner as the CIW, this would arguably constitute a secondary boycott prohibited under § 8(b)(4)(B) of the NLRA); see also Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 333–35 (2009) (discussing the applicability of labor laws to a worker organization that is not a statutorily-recognized union); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 403–410 (2006) (discussing how non-union labor entities might be regulated by the union-centered framework of national employment law).

these rules. However, as the power of alt-labor organizations grow, so do calls by their conservative opponents to regulate them to minimize their radical potential. There is currently a strong push to have worker centers declared unions, and regulated by the same restrictions facing trade unions.<sup>237</sup>

While the CIW's unique model for addressing farm workers' working conditions has been successful, it is unclear whether it can be replicated more widely. The fact that a significant component of the tomatoes grown in Florida are consumed by a few fast food companies with widespread brand recognition means that they are ripe targets for boycotts. In addition, Florida is one of the biggest suppliers of tomatoes for the American market, particularly during the winter months. Although it may be more difficult to design a Fair Food Program for farm produce with more diffuse consumption patterns, this obstacle is not insurmountable. First, a significant proportion of farm produce is purchased and sold by supermarkets. There has been major consolidation among food retailers—six supermarket brands dominate the Canadian market<sup>238</sup> and the United States market is similarly concentrated (for example, Walmart accounts for between one quarter to one third of retail grocery sales in the United States).<sup>239</sup> These supermarket brands may be just as susceptible to consumer boycotts, as evidenced by the fact that the CIW has already pressured a number of supermarkets to sign on to the Fair Food Program, most notably Walmart.<sup>240</sup> Further, the Fair Food Program demonstrates that a participating buyer need only consume a proportion of the total before it starts to make financial sense for a grower to agree to the buyer's more stringent standards. However, the balance of forces between farm employers, purchasers and consumers in particular markets will have to be carefully analyzed before other labor organizations decide to follow the path of the CIW. What is clear is that the CIW's model of targeting entities at the top of the food supply chain offers a more durable solution to the general problem of dismal working conditions than current models imposing liability solely on farm employers.

The foregoing discussion makes clear the ongoing need for a *meso*-level analysis of labor organizations, focusing on their legal engagements. Comparing the legal strategies of various labor organizations allows us to understand the conditions under which they can succeed.<sup>241</sup> As the compari-

<sup>237</sup> One organization at the forefront of this conservative backlash against the perceived threats of alt-labor was Worker Center Watch, a "shadowy" website with ties to the CEO of Walmart. See Lee Fang, *Former Wal-Mart Exec Leads Shadowy Smear Campaign Against Black Friday*, THE NATION (Nov. 26, 2013), <https://www.thenation.com/article/former-walmart-exec-leads-shadowy-smear-campaign-against-black-friday-activists> [<https://perma.cc/LRG5-DQ73>].

<sup>238</sup> In Canada, the top six retailers control 80% of retail food. Preibisch, *supra* note 81, at 427.

<sup>239</sup> James et al., *supra* note 224.

<sup>240</sup> For example, Walmart, Fresh Market, Trader Joe's, and Whole Food Markets are all members of the Fair Food Program. See Greenhouse, *supra* note 178.

<sup>241</sup> S. KARTHICK RAMAKRISHNAN AND IRENE BLOEMRAAD, CIVIL HOPES AND POLITICAL REALITIES, 31–33 (2008).

son between the AWA and JIM indicates, analyzing similar legal engagements of different labor organizations reveal important insights even when these organizations operate in different legal and political contexts. A comparative case study method centered on their strategies also tells us about the respective utility of specific legal engagements given similar political economic considerations.

### CONCLUSION

The response of labor organizations to working conditions in the agricultural sector presents a useful way to approach the broader question of labor movement revitalization. Migrant farm workers, and the organizations that look after their interests, represent some of the most creative and energetic elements of the broader labor movement. But what can the rest of the labor movement learn from these actors?

First, labor organizations must understand and respond to the political economy in determining a course of action. This includes engaging seriously with the question of production arrangements. The CIW, for example, has devised a private regulatory system that is based on a sound analysis of how tomatoes are grown and consumed in Florida. It has compelled those entities with the most power to affect working conditions to take responsibility. Engaging with the political economy also means identifying and addressing the conditions that give rise to the situation in which workers find themselves. In the case of migrant farm workers, claiming individual employment rights can be difficult because employment and immigration regimes interact to create forms of unfreedom. The AWA and JIM take a two-pronged approach to this problem. While facilitating more individual claims, the AWA and JIM are also involved in political advocacy to change the deeper structures that impede claim-making, such as immigration rules.

Second, labor organizations must use a range of strategies, drawing on law, but also transcending it. Labor organizations that represent farm workers often operate at the interstices of the law because these workers lack effective labor regulation. As a result, while labor organizations maneuver to make existing laws more effective, they also treat law as a cultural and political resource. In certain circumstances, they have even developed their own regulatory systems that mimic state law regimes. As conventional labor laws lose their ability to influence working conditions for a growing segment of the workforce, the legal engagements of labor organizations may point the way for a labor movement struggling to find its way in a hostile legal environment.

Third, to achieve sustainable change, labor organizations must ultimately build popular movements consisting of workers and allies. Popular mobilizations are necessary to pressure governments to properly enforce their existing rules or to create new laws. Popular movements are also a necessary feature of private regulatory systems because they are required to

implement sanctions that encourage business compliance. Building powerful movements of workers will necessitate patient and thoughtful work and require asking questions such as: where does power reside? Who should be targeted? Who should be sought out as allies? What tactics (e.g. strikes, boycotts, marches, rallies etc.) should be employed? Labor organizations, such as the CIW, show the potential of organizations embedded in bigger social movements to achieve transformative and durable change.

As many commentators on the alt-labor movement have recognized, the Achilles heel of labor organizations remains their funding situation.<sup>242</sup> Labor organizations are funded for the most part through private foundation funds, leaving them susceptible to the influence of private donors as well as vulnerable to shifting priorities. In the case of the AWA, it is entirely funded by the UFCW. Unlike trade unions, which are funded through membership dues, labor organizations lack sustainable funding models. As one prominent union organizer, Karen Nussbaum, astutely points out, “worker organizations that aren’t self-sustaining can’t be democratic.”<sup>243</sup> Obtaining ongoing and sustainable sources of funding will be critical to their ultimate success.

Terrible working conditions have been a persistent feature of non-subsistence agriculture in North America, but recent economic restructuring has only made these conditions more pronounced. The agricultural sector may be a harbinger of working conditions under advanced capitalism caused by shifts in production and business organization, regulatory degradation, and a large migrant workforce. We should come to see labor organizations actively trying to achieve justice on our fields as pointing the way for a rejuvenated labor movement.

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<sup>242</sup> See, e.g., Jonathan Timms, *A Labor Movement That’s More About Women*, THE ATLANTIC (Aug. 25, 2016), <http://www.theatlantic.com/business/archive/2016/08/the-womens-labor-movement/497294> [<http://perma.cc/L4LV-9HEQ>]; Josh Eidelson, *Who Should Fund Alt-Labor?*, THE NATION (Jul. 17, 2013), <https://www.thenation.com/article/who-should-fund-alt-labor> [<http://perma.cc/3CPR-AKE6>].

<sup>243</sup> See Eidelson, *supra* note 242.

