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Comments

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Agricultural Exemptions from the
Fair Labor Standards Act
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It has long been a criticism of much of the nation's array of social legislation that they offer extensive coverage to those people who have the least need while often exempting those who have the most need.¹ Over the years, gradual efforts have been made to reduce the scope of this indictment. Progress has been made. But there remains a significant element of truth to the general assertion--especially with respect to those workers and their families who depend upon the agricultural and ranching sector of the economy for part or all of their income. For if there has ever existed a class of second class workers in this country, it is agricultural workers. Consistently, they have either been totally excluded from coverage or treated less equally than nonagricultural workers by most of the nation's evolving social legislation system (e.g., coverage by the National Labor Relation's Act, unemployment compensation, worker's compensation, child labor protections, and minimum wage laws and overtime hours laws). In most instances, the explanations for the denial of equal protection under these laws has stemmed from the political powerlessness of agricultural workers rather than from any sound economic rationale.² I take it that it is the mission of Elterich and Holt to provide data from which the Commission can decide if the continuation of the exclusion of some agricultural workers from coverage by the federal minimum wage and of all agricultural workers from the overtime pay requirements of the Fair Labor Standards Act is justified.

It is a major contribution of this study that for the first time some documentation is given to the magnitude of these agricultural worker exemptions from equal treatment under the Fair Labor Standards Act. It is certainly revealing--even shocking--to find that one half of the agricultural employees of the nation as of 1980 are excluded from any coverage of the wage provisions of the FLSA. This exclusion exists despite the fact that these workers do exactly the same occupational work as do those workers who are covered by the law. Obviously, the principle of equal minimum wage protection for equal work does not exist in this industry. The cause for this disparity is simply that the FLSA exemption is based on hours of labor use (i.e., 500 man hours per quarter) rather than simply the fact that people are employed which is the general standard for most non-agricultural workers.

A second stunning finding is the fact that there is widespread non-compliance in the agricultural and ranching industries by those employers who are subject to the law (i.e., 20 percent of the supposedly covered workers in 1980 did not receive the required \$3.10 an hour to which they were entitled). This finding gives credence to the widespread anecdotal evidence that has long noted the widespread FLSA violations in this industry. It also supports the findings of some of the special "strike forces" of the U.S. Department of Labor that in recent years have documented massive abuse in the selected agricultural communities in which they have conducted their concentrated investigations. Certainly, whatever the reasons for these flagrant violations of the nation's laws are, this Commission now has the data to justify recommendations to end these willful violations. This study certainly provides sufficient evidence to justify increased funding for enforcement agencies and much more severe financial penalties for repeat offenders.

The fact that the study shows that one quarter of the currently exempt workers also receive wages below the \$3.10 an hour level in 1980 adds even further evidence to the obvious conclusion that low wages are an endemic feature of working conditions in this industry. This data strongly suggests that the percentage has probably increased substantially now that the federal minimum wage has been increased in 1981 to \$3.35 an hour. Certainly it is both ironic and tragic that the most important workers in the nation's food production chain are the worst paid in that entire employment process. It is simply unjust that these people who contribute so much and from whom so much is required should be paid so little for their efforts. It is even a sadder commentary on our nation's protective wage law that it is so inadequate that almost a majority of the workers in this vital industry are not afforded any wage protections and that one-fifth of those who are supposed to be covered are not protected due to inadequate enforcement and trivial penalties.

Thirdly the study documents what all students of agricultural labor markets have long known. Namely, long hours of work for at least part of the work year are a common condition of work. With almost three quarters (72%) of all subject firms employing one or more workers in excess of 40 hours a week and with overtime hours accounting for 15 percent of all work hours on subject firms (30% of all work hours on all exempt farms), it is obvious that overtime is a normal employment practice in this industry. What is not normal in this country is that this particular industry should be the only industry that is totally exempt from the overtime provisions of the FLSA. As this report is the first national data ever to be collected and tabulated on this critical question, it is to be hoped it will be put to good public use and not be allowed to be lost in the Federal Archives. As Elterich and Holt note, the secular trend in FLSA legislation has been to reduce exemptions. The termination of the overtime exemption for agricultural workers is long overdue.

The paucity of enterprises that were voluntarily providing overtime (only 5.6 percent of subject employers) shows that there is little inclination by the employer to provide such compensation on their own.

Having noted and commented on what I believe to be the most important findings of this comprehensive study, I would like to comment briefly on what I feel is its major limitation. The comments should not be interpreted as being critical of the study itself. Rather, I only wish to say that by the nature of the data source, the study can only go so far. The study draws entirely on data collected by employers on wages and hours. In the parlance of statistical surveys, it is a study based entirely on establishment data. In this sense, it is a study that reflects the demand conditions for agricultural workers. This is the traditional focus of research by agricultural economists in their studies of both agricultural products and agricultural workers.

There is, of course, another side of the wage and hours issue in agriculture as in any other industry. That is, of course, a focus on the supply side--to use a popular contemporary phrase. Who is it that receives the low wages and who works the long hours? The report notes that agricultural employers were not required to report personal data characteristics about their workers. It is the general experience of questionnaires of this nature that to the degree that employers are asked to supply such data, the response rate to surveys declines precipitously. But there is absolutely no reason why decisions about wages and hours should be made solely on employer considerations irrespective of worker considerations.

Indeed, the legal history of legislation regulating working hours begins for all intents and purposes with the U.S. Supreme Court's decision in Muller vs. Oregon in 1908 that upheld the legality of a ten-hour work day for women.³

In that case, Louis D. Brandeis first achieved national prominence by developing his sociological jurisprudence theory. He contended that "the facts" concerning the impact of laws that excluded people from coverage were as important as the legal logic of laws themselves. The trouble at that time, according to Brandeis, was that lawyers, legislators and judges knew nothing of the social conditions that gave rise to the wage and hour reform movements that were beginning in that era. I think that this is still largely the case with respect to agricultural workers in the United States in 1981. Only, this time, it is the syllogisms of the economics profession rather than those of the legal profession that are the barrier to both thought and action.

The Elterich and Holt study does note in a number of places that it is workers in the South who account for most of those effected by the current exemptions from wage coverage. They are also the workers who have the highest incidence of overtime employment. But aside from these passing comments not much is made of the point. In my view, the disproportionate impact of these exclusions on southern workers is lost in the broad national averages that constitute the bulk of the report. I think that it is unfortunate that the Commission has apparently not sought to conduct research on precisely who the workers are who are most affected by these exclusions. Since Brandeis, there has always been a legitimate social as well as an economic dimension to wage and hour discussions.

In the lengthy appendices to the Elterich and Holt study, it is shown that the South has the largest number of agricultural workers of any of the nation's four geographic regions. With a little rearrangement of their data, it is soon apparent that of all of the agricultural workers in the nation who received less than \$3.10 an hour in 1980, 56 percent of them were in the South. Not surprisingly, the South had the highest number of

firms that are exempt from the FLSA wage coverage. Of special importance is the fact that the South had by far the highest regional percentage (34 percent) of workers that are supposedly employed by firms that are subject to the FLSA who were not receiving \$3.10 in 1980. Even if some allowances are made for the legal payment of subminimal wages to students and the payment of the inkind services in lieu of wages (which is not common in southern agriculture), it is obvious that there is widespread and flagrant violation of the FLSA in the South. Logic from the data as well as evidence from the scant southern rural labor market research that is available would suggest that most of the minimum wage violations of the nation are coming in the southern region.

Although the study data is not quite as explicit with respect to the hours worked issue, the study does show that the highest absolute number of firms who are subject to FLSA wage provisions which were employing workers in excess of 40 hours a week in 1980 were in the South. It is logical to conclude that, given the inordinately high number of exempt agricultural enterprises in the South, the issue of long hours for agricultural workers is most extensive in this region.

Having noted the high incidence of adverse wage and hour conditions in the rural South, it is important to look at "the facts" that describe the rural South. The South to this day--despite all of the superficial journalistic writing that extols the supposed virtues of "the sunbelt"--is the most rural and the most impoverished region in the nation. In 1970 the region accounted for 41 percent of the nation's rural population. In 1977 the South contained 42 percent of the nation's total poverty population. Of this southern rural poverty population, 54 percent lived in non-metropolitan

areas.⁴ A presidential study commission as late as 1967 declared that "most of the rural South is one vast poverty area."⁵ Moreover, over half of the nation's black population lives in the South. The non-metropolitan areas of the South accounted for almost 43 percent of the black population of the South. Almost all of the rural black population of the nation is found in the South. With respect to employment in the rural South, no industry is more important to blacks than agriculture.⁶

It is of consequence also to note that a disproportionate share of the nation's second largest racial minority--Mexican Americans (often called Chicanos) are also employed in agriculture. Mexican Americans are more than a majority of the Hispanic population of the nation. But in contrast with the two other major Hispanic populations--persons of Puerto Rican and of Cuban origin, Chicanos are the only part of the Hispanic population to have a significant portion of their labor force employed in agriculture. In 1970, 9 percent of Chicano males in the Southwest were employed as farmers or farm labor.⁷ For rural Chicanos and for many Chicanos who reside in urban areas but who work in agriculture as migrant farm workers, low wages and long hours are also common.⁸ In the Holt and Elterich study, the data is not broken-out by separate states. In their study, the data for Texas is included in the statistics for the South. Hence, some portion of the discussion of the aforementioned problems with wages and hour laws in the South also applies to the welfare of Chicano agricultural workers. The remainder of Chicano agricultural work force covered by Elterich and Holt are included in the data on the West.

All research on the available labor supply in the rural South notes that it is a region of considerable labor surplus. Although official

unemployment rates are generally lower than national averages, there is ample documented evidence of the existence of an extensive number of discouraged workers and involuntary part-time employment.⁹ Even more importantly, the problem of the working poor is widespread throughout the region. Most local labor markets are characterized by a narrow range of occupational and industrial opportunities. There are few job options. Under conditions of labor surplus labor productivity has very little to do with the wage determination process. To many agricultural employers, the labor supply seems to be perfectly elastic. That is to say, it appears to them that they can secure all the workers they need at any given wage rate. They do not feel any necessity to raise wages to attract additional workers. There is also evidence that there are often conscientious efforts made by local government officials and employers to manipulate the local labor markets in such a way as to guarantee that agricultural employers will have an over supply of workers who have little choice but to work on farms. Economic development strategies that will disrupt agricultural labor markets are consistently avoided.¹⁰ Under these circumstances, it is obvious that minimum wage laws have a social obligation to protect those workers trapped into such employment circumstances.

Obviously, wage and hour laws cannot by themselves solve the entire problem of southern rural poverty. The causative conditions are too varied. But there is no doubt that the labor market in general and agricultural employment in particular is part of the explanation for the continuation of the massive impoverishment in the region. Under circumstances of labor surplus, reliance on market forces can only lead to the types of intolerable working conditions and low wages that were the basic rationale for the establishment of minimum wage and maximum hour

laws in the first place. In these instances, social considerations alone are sufficient reason for the extension of minimum wage and overtime pay coverage to all agriculture workers (with the only possible exception being family workers on family owned enterprises). It goes hopefully without challenge that greater enforcement of the existing statutes for those who are supposedly covered by the wage provisions is mandatory. In fact, for a Commission such as this one, I would think that strict enforcement would be its number one recommendation.

Since the 1960s the nation has manifested through an array of social programs a desire to eliminate poverty conditions and to improve the general climate of economic opportunities for black and Hispanic workers within American society. Improvements and expansion of the nation's minimum wage law and overtime work laws have been part of this general tide. But for purely political reasons, workers in agriculture have usually been "the forgotten workers" in these social reform movements. It is time for social legislation to treat agricultural and non-agricultural worker equally. Wage and working conditions in American agriculture need to be brought into the Twentieth Century before the Twenty-first Century is upon us.

Footnotes

- ¹Michael Harrington, The Other America: Poverty in the United States (Baltimore: Penquin Books, 1965).
- ²Ray Marshall, Rural Workers in Rural Labor Markets, (Salt Lake City: Olympus Publishing Company, 1974), pp 158-162 and Chapter 6; and Vernon M. Briggs, Jr., Chicanos and Rural Poverty, (Baltimore: Johns Hopkins Press, 1973), Chapter 5.
- ³Muller v. Oregon, 203 U.S. 412
- ⁴U.S. Department of Commerce, Bureau of Census, Current Population Reports--Consumer Income, Series P-60, No. 119, (Washington, D.C.: U.S. Government Printing Office, March 1979). See also Paul Good, The American Serfs: A Report on Poverty in the Rural South (New York: G. P. Putnam, 1968).
- ⁵Presidents' National Advisory Commission on Rural Poverty, The People Left Behind, Washington, D.C.: U.S. Government Printing Office, 1967, p X.
- ⁶Virgil Christian and Adamantios Pepelasis, "Rural Problems," Chapter 2 and Virgil Christian and Carl C. Erwin, "Agriculture," Chapter 3 in Employment of Blacks in the South edited by Ray Marshall and Virgil Christian (Austin: University of Texas Press, 1978).
- ⁷Vernon M. Briggs, Jr., Walter Fogel, and Fred H. Schmidt, The Chicano Worker, (Austin: University of Texas Press, 1977), Chapters 4 and 5.
- ⁸Brian Rungeling, Lewis H. Smith, Vernon M. Briggs, Jr., and John Adams, Employment, Income, and Welfare in the Rural South. (New York: Praeger, 1977), pp 259-281.
- ⁹Ibid. Chapter 5.
- ¹⁰Vernon M. Briggs, Jr. and Brian Rungeling, "Economic Development: A Poverty Solution for the Rural South?" Growth and Change, (October, 1980), pp 31-35.