

THE RECURRING NIGHTMARE OF CHILD LABOR ABUSE—CAUSES AND SOLUTIONS FOR THE 90s

MICHAEL A. PIGNATELLA*

Jeris Petersen was born to farming and looks the part, with hair the color of fresh corn silk and blue eyes that look right at you when she talks. But the love she once had for that life died in a work accident on the farm. . . . That's the day her 12-year-old son, Shaun, climbed in a cement silo to help his father finish the day's chores using a sweep auger. Minutes later, the powerful screwlike device used to pull corn from the silo floor caught the young boy's pants leg . . . slicing through his left leg in a bloody whirl and crushing his arms, chest and leg.

It took Otto Petersen nearly 20 minutes to untangle his son from the machine. . . . An hour later he died . . . his body so shattered the attending doctor recalls struggling to find a single unruptured vein in which to insert an intravenous line.¹

I. INTRODUCTION

Like a recurring nightmare, the specter of abusive child labor is once again haunting the workplaces of America.² Despite anti-child labor legislation by Congress,³ and affirmation of that legislation by the Supreme Court,⁴ child labor abuse is flourishing on farms and in the garment districts, grocery stores, and restaurants of the United States⁵—injuring and killing children, and locking them into a lifelong cycle of poverty.⁶

* Executive Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

¹ Bruce D. Butterfield, *Youths at Risk on the Family Farm, Hundreds Killed Yearly By Machinery*, BOSTON GLOBE, Apr. 23, 1990, at 1 [hereinafter Butterfield I].

² Brian Dumaine, *Illegal Child Labor Comes Back*, FORTUNE, Apr. 5, 1993, at 86.

³ See Fair Labor Standards Act, 29 U.S.C. §§ 201–17 (1988 & Supp. IV 1992) [hereinafter FLSA]. The Fair Labor Standards Act of 1938 provides for federal regulation of wages, hours, and child labor. *Id.*

⁴ See *United States v. Darby*, 312 U.S. 100, 121–26 (1941).

⁵ See Dumaine, *supra* note 2, at 86. See also Bruce D. Butterfield, *The Tragedy of Child Labor, In America's Shops, Eateries and Farms Conditions Endanger a New Generation*, BOSTON GLOBE, Apr. 22, 1990, at 1 [hereinafter Butterfield II].

⁶ See generally Dumaine, *supra* note 2, at 86.

Although the causes of this resurgence are manifold, ineffective legislation, lack of sufficient funding to enforce existing laws, and lack of societal awareness are paramount. There are numerous loopholes in the Fair Labor Standards Act⁷ (FLSA) that allow for the abuse and exploitation of children, particularly in agricultural occupations.⁸ The penalties for violating these laws are also ineffective deterrents.⁹ Moreover, the FLSA does not provide a cause of action for parents or guardians of working children who are abused.¹⁰ Finally, enforcement of this act has been sporadic and inefficient, and funding for enforcement has continued to decrease.¹¹

A cursory inspection of the statistics shows the distressing extent of the problem. The number of federal child labor law violations has risen steadily in the past decade, from 10,000 in 1983 to over 40,000 in 1990.¹² The National Safety Workplace Institute¹³ has noted that at least 300 children are killed annually while at the workplace, and 70,000 more are injured.¹⁴

Known violations may reflect only a small portion of the problem. Because of a lack of funding, the Labor Department has been forced to cut back investigators, from 1059 in 1980 to 833 in 1993.¹⁵ That these investigators are responsible not only for child labor violations, but also for all other labor violations, compounds the problem further.¹⁶ Because of this overburdening, investigators can only respond to complaints, and cannot actively seek out violations.¹⁷ Accurate statistics that are truly representative of this growing problem therefore may not even exist.

In addition to legislative and administrative weaknesses, society's awareness of the problem, particularly from a legal perspective, is

⁷ 29 U.S.C. §§ 201-17.

⁸ 29 U.S.C. § 213 (1988 and Supp. IV 1992).

⁹ See 29 U.S.C. § 216 (1988 and Supp. IV 1992).

¹⁰ *Id.*

¹¹ See Linda Golodner, *The Children of Today's Sweatshops*, 73 BUS. AND SOC'Y REV. 51, 52-53 (1990); Tom Lantos, *The Silence of the Kids: Children at Risk in the Workplace*, 43 LAB. L.J. 67, 68-69 (1992) (highlighting the relaxation of child labor abuse investigation between 1990 and 1991, during which there was a 9% drop in the number of labor investigators, of whom only 5% actually investigate child labor abuses).

¹² Lantos, *supra* note 11, at 68.

¹³ The National Safety Workplace Institute is an independent, Chicago-based watchdog group that monitors workplace safety.

¹⁴ Dumaine, *supra* note 2, at 92.

¹⁵ *Id.* at 86.

¹⁶ Lantos, *supra* note 11, at 69 (investigators are responsible for minimum wage, overtime, FLSA, Immigration Nursing Relief Act, Immigration Reform Act, and Employee Polygraph Act); see also Golodner, *supra* note 11, at 52.

¹⁷ See Golodner, *supra* note 11, at 52.

minimal. Whereas a few law review articles have addressed isolated areas of child labor abuses (particularly abuses of migrant farm workers),¹⁸ only one or two have been written that address the severity and scope of the overall problem.¹⁹ Some articles written over the past two decades have actually proposed loosening restrictions and regulations on the labor of those under eighteen.²⁰ Although attention has been given to child labor abuse in both newspaper and magazine articles,²¹ the fact remains that for most people, these abuses are but relics of a bygone era, having little or no relevance in today's workplace.²²

This Note examines the resurgence of child labor abuse during the 1980s and early 1990s, and suggests changes in legislation and enforcement that will help quell this disturbing phenomenon. Part II examines the history of federal child labor legislation, by focusing on the Fair Labor Standards Act of 1938 and subsequent amendments. Part III discusses the various reasons that child labor abuses have been allowed to flourish, including both deficiencies in the existing legislation and the effect of chronic underfunding. Part IV examines the areas in which illegal child labor has resurfaced, and focuses on the various detrimental effects of these abuses, both to individuals and to society. Finally, Part V proposes various ways to curb this alarming trend, through both better legislation and more effective enforcement techniques.

II. HISTORY OF FEDERAL LEGISLATION AIMED AT CURBING CHILD LABOR

A. Pre-1938 Attempts at Controlling Child Labor Abuse

Oppressive child labor practices have plagued the United States virtually since its inception as a nation.²³ With the onset of the Indus-

¹⁸ See generally Jeanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455 (1991) (migrant farm workers); Andrea Giampetro-Meyer & Timothy S. Brown, *Protecting Society From Teenage Greed: A Proposal for Revising the Ages, Hours, and Nature of Child Labor in America*, 25 AKRON L. REV. 547 (1992) (middle-class child labor abuses).

¹⁹ See generally Lantos, *supra* note 11.

²⁰ See Note, *Child Labor Laws—Time to Grow Up*, 59 MINN. L. REV. 575, 601–03 (1975).

²¹ See, e.g., Dumaine, *supra* note 2, at 86; see also *Valley Sweep Finds Child Labor Offenses*, SACRAMENTO BEE, Sept. 4, 1993, at B5; Michael Specter, *Illegal Child Labor Resurging in U.S.; Immigrant Schoolgirls Toil in Modern-Day Sweatshops*, WASH. POST, Apr. 14, 1991, at A1; Butterfield II, *supra* note 5, at 1.

²² See Specter, *supra* note 21, at A8 (quoting Peter Eide, manager of labor law for the U.S. Chamber of Commerce, as saying, "children may be better off in the sweatshops than in the streets selling drugs."); see also S. Rep. No. 1487, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3003.

²³ See WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL*

trial Revolution, this abuse intensified, worsening already oppressive conditions and making child labor more akin to child enslavement.²⁴ By 1872, the Prohibition party, a political party whose main foundation was the abolition of alcoholic beverages, had recognized the growing problem of child labor oppression, and had included in its platform a clause condemning it.²⁵ In 1897, the American Federation of Labor ("AFL")²⁶ proposed a constitutional amendment that would have granted the federal government the power to regulate child labor.²⁷ The AFL's attempt to amend the Constitution, however, was ultimately unsuccessful.²⁸

The first effort by the federal government to regulate child labor came with the Child Labor Act of 1916.²⁹ This Act prohibited the transportation in interstate commerce of manufactured goods, the product of a factory in which:

. . . within thirty days prior to the removal of such product therefrom, children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian or before the hour of six o'clock antemeridian³⁰

CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 23-42 (1970). This book describes the indenture system of colonial America, where children were taken from parents (who could not support them) or from public institutions, and forced into apprenticeships. The author cites an early New England statute that required the apprentice to serve his master faithfully, and to "gladly obey" his "lawful commands." *See id.* at 23-24.

²⁴ *Id.* at 22. Trattner states:

The industrial revolution and the use of power machinery, then, did not create the child labor problem or all of the abuses connected with it. It did, however, provide more opportunities for the further exploitation of the young. Industry now transferred their employment from the home or shop to the factory, which usually worsened the conditions under which they worked and the way in which they were treated; child labor became child slavery.

Id.

²⁵ *Id.* at 32.

²⁶ *See id.* at 164. The American Federation of Labor is a labor organization founded in 1886 by Samuel Gompers, with an original membership consisting of twenty-five separate trade groups.

²⁷ *Id.* at 33.

²⁸ For more information on the proposed Constitutional amendment, *see id.* at 163-86; *see also* Proposed Amendment to the Constitution, 43 Stat. 670 (1924).

²⁹ Child Labor Act of 1916, ch. 432, 39 Stat. 675 (1916).

³⁰ *Id.* at 675; *see also* *Hammer v. Dagenhart*, 247 U.S. 251, 269 (1918).

The Supreme Court declared this Act unconstitutional in 1918 because it did not regulate commerce directly, but instead regulated the manufacture of goods, which at that time was beyond the scope of the Commerce Clause.³¹ That same year, Congress again attempted to regulate child labor through the Child Labor Tax Act of 1919, which imposed a ten percent tax on the net profits of all manufacturing establishments that employed oppressive child labor.³² Once again, however, the Supreme Court declared this legislation unconstitutional.³³ It would not be until 1938 that the Supreme Court would uphold federal legislation limiting the oppressive use of child labor.³⁴

B. 1938—*The Enactment of the Fair Labor Standards Act*

The third attempt to use federal legislation to end the problem of oppressive child labor was the Fair Labor Standards Act of 1938 (FLSA).³⁵ The FLSA was broad in scope, addressing minimum wages, maximum hours, overtime pay, and oppressive child labor.³⁶ Predictably, opponents subjected this legislation to challenge before the Supreme Court.³⁷ In *United States v. Darby*, the Court reversed its holding in *Hammer v. Dagenhart*, and ruled the FLSA constitutional, thereby validating the federal government's attempt to end oppressive child labor.³⁸

The child labor provisions of the original bill, as proposed by the House of Representatives, were almost identical to those that the Supreme Court had declared unconstitutional in *Dagenhart*.³⁹ The bill prohibited child labor under the age of sixteen, and delegated to the chief of the Children's Bureau of the Labor Department the power to ban the labor of children under eighteen in any occupation that was "particularly hazardous" or detrimental to children's health and well-being.⁴⁰ The Senate Committee version of the bill, however, relaxed

³¹ See *Dagenhart*, 247 U.S. at 276–77.

³² Child Labor Tax Act of 1919, ch. 18, 40 Stat. 1057 (1919).

³³ *Bailey v. Drexel Furniture*, 259 U.S. 20, 39–44 (1922). Here, the Supreme Court found the tax to be a penalty, and thus only an unconstitutional pretext for regulating an area of commerce. *Id.*

³⁴ See *Darby*, 312 U.S. at 125–26.

³⁵ Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–17 (1988 & Supp. IV 1992)).

³⁶ *Id.*

³⁷ See *Darby*, 312 U.S. 100, 121–26; see *supra* text accompanying note 4.

³⁸ See *supra* notes 29–34 and accompanying text.

³⁹ See *supra* note 30 and accompanying text; see also John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW AND CONTEMP. PROB. 464, 466 (1939).

⁴⁰ Forsythe, *supra* note 39, at 466.

these standards. This version inserted a provision to allow children under sixteen to occupy positions which would not interfere with their schooling or their health.⁴¹

What followed was a struggle between the House of Representatives and the Senate to determine exactly what the child labor section of the FLSA would prohibit. For example, the bill that passed the Senate on July 31, 1937 contained the Wheeler-Johnson Amendment,⁴² which replaced all of the child labor provisions of the Senate committee bill.⁴³ The Wheeler-Johnson Amendment used the "convict-made goods" formula, which permitted one state to ban the importation of goods produced by another state with lower child labor standards than its own.⁴⁴ The House Committee on Labor, however, which voted favorably on the Senate bill on August 6, 1937, changed the bill by replacing the Wheeler-Johnson child labor provisions with the Senate committee child labor provisions.⁴⁵ On June 14, 1938, the final version of the bill was ratified.⁴⁶ The Act generally prohibited employers from hiring children under sixteen years of age, except in certain circumstances.⁴⁷

One of the primary ways that the Senate Committee version of the child labor provisions, which replaced those in the original bill, lowered the protection provided by the FLSA to child labor, was by allowing the Chief of the Children's Bureau (today, the Secretary of Labor) to permit the employment of children under sixteen in occupations found to be compatible with school, and which would not prove a detriment to their health.⁴⁸ In addition, the Senate committee bill also exempted children, of any age, employed in agriculture, if not legally required to be in school.⁴⁹

⁴¹ *Id.* at 469.

⁴² The Wheeler-Johnson amendment was named after Senator Burton K. Wheeler and Congressman Edwin C. Johnson. It employed a three-part approach to child labor: (1) it prohibited interstate shipment of goods produced by child labor; (2) it applied a "prison-made goods" theory, which prohibited transportation of goods produced by child labor into states where similar child labor was prohibited by state law; and (3) it required labelling of goods produced by child labor. *Id.* at 489. Proponents of this method hoped that in the event this law came under Supreme Court review, at least the prison-made goods provision would be found constitutional. *Id.*

⁴³ *Id.* at 469-70.

⁴⁴ *Id.* at 470.

⁴⁵ *Id.*

⁴⁶ *Id.* at 473.

⁴⁷ *See id.* at 487-89.

⁴⁸ *Id.* at 487.

⁴⁹ *Id.* at 488. Note that this school requirement was not nearly as rigid as it may seem, because at the time, one of the most prevalent legal excuses for missing school was the need to work. *Id.*

The FLSA protects against oppressive child labor in three major ways: (1) the regulation of hours, (2) the establishment of age limitations, and (3) the regulation of hazardous occupations.⁵⁰ The Act, as originally enacted, prohibited "the shipment in interstate commerce of any goods produced in any establishment in or about which any 'oppressive child labor' has been employed."⁵¹ It defined "oppressive child labor" as the employment of children under sixteen in any area of work, or the employment of children sixteen to seventeen in areas determined to be particularly hazardous by the Children's Bureau⁵² of the Department of Labor.⁵³ The Act also contained a provision that allowed the Children's Bureau of the Department of Labor to exempt fourteen- and fifteen-year-old children from the FLSA, allowing them to perform work that did not affect their health, education, or safety.⁵⁴

The FLSA was not as far reaching as was necessary to end oppressive child labor. For example, it exempted children who were employed in agriculture when they were not legally required to be in school, thereby allowing many states to manipulate school years and class schedules through legislation that optimized the potential for using child labor in agriculture.⁵⁵ In addition, the FLSA provided no protection for children of migrant farm workers.⁵⁶

Perhaps the most egregious shortcoming in the original legislation was that it did not regulate child labor per se, but only "the shipment in interstate commerce of goods" manufactured through the use of oppressive child labor.⁵⁷ Accordingly, the transportation and communication industries, which did not produce goods, were held to be exempt.⁵⁸ Thus, although the original version of the Fair Labor Standards Act protected many child workers, oppressive child labor in agri-

⁵⁰ 29 U.S.C. §§ 203(1), 212, 213(c) (1988 & Supp. IV 1992).

⁵¹ Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 721 (1988) (citation omitted).

⁵² The Children's Bureau of the Department of Labor was responsible for the administration of child labor laws and regulations, including the FLSA. It was later disbanded. For more information on the Children's Bureau, see TRATTNER, *supra* note 23, at 95-142.

⁵³ See Nordlund, *supra* note 51, at 721 (citation omitted); see also TRATTNER, *supra* note 23, at 204.

⁵⁴ TRATTNER, *supra* note 23, at 204.

⁵⁵ *Id.*

⁵⁶ *Id.* Only permanent residents were required by state law to attend school, and under the terms of the FLSA, only children who were required to be in school were protected. Because children of migrant farm workers were transient, and thus not required to attend school, they were not protected by the FLSA. *Id.*

⁵⁷ Nordlund, *supra* note 51, at 721; see also TRATTNER, *supra* note 23, at 205.

⁵⁸ TRATTNER, *supra* note 23, at 205.

culture and service industries⁵⁹ continued.⁶⁰ It would be left to future sessions of Congress to amend the Act in order to protect the many child workers not covered in the original legislation.

C. *Fair Labor Standards Act: 1938–1992*

The first major revision of the FLSA of 1938 occurred in 1949, when the Fair Labor Standards Amendments altered almost every provision of the original legislation—including child labor.⁶¹ These amendments gave the child labor provisions of the FLSA the general structure that they possess today.⁶²

The principal goal of the child labor amendments was to broaden the scope of these provisions, as well as to give them more bite.⁶³ Coverage was extended mainly by applying the FLSA to those “engaged in commerce.”⁶⁴ This extended the application of the original FLSA, which had only covered child labor in establishments that were actually engaged in the *production* of goods for commerce.⁶⁵ By adding this provision, Congress in effect prohibited the use of oppressive child labor both in commerce and in the production of goods for commerce.

A second change to the original version of the FLSA was a change in the definition of the term “oppressive child labor.” Congress de-

⁵⁹ In addition to agriculture and service industries, other areas, including newspaper sales and delivery occupations, were also left unprotected by the FLSA. *Id.*

⁶⁰ See, e.g., *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945). The Supreme Court, in a 5-4 decision, held that telegraph companies were not subject to the restraints of the FLSA. *Id.* at 507–08. While acknowledging that the FLSA was silent on this issue, the Court relied on legislative history, strict statutory interpretation, and pragmatic business concerns to find that telegraph companies were not covered under the child labor provisions of the FLSA. *Id.* at 507–09. In a strongly worded dissent, Justice Murphy, joined by Justices Black, Douglas, and Rutledge, declared “[o]ppressive child labor in any industry is a reversion to an outmoded and degenerate code of economic and social behavior.” *Id.* at 510. The dissent would have relied on legislative motive and a looser statutory interpretation to find that the FLSA covered children working in the telegraph industry. *Id.* at 510–11.

⁶¹ See generally BUREAU OF NATIONAL AFFAIRS, *THE NEW WAGE AND HOUR LAW* 1 (1949) [hereinafter *THE NEW WAGE AND HOUR LAW*].

⁶² Compare Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (1938), with 29 U.S.C. §§ 201–17 (1988 & Supp. IV 1992).

⁶³ See *THE NEW WAGE AND HOUR LAW*, *supra* note 61, at 109.

⁶⁴ *Id.* at 110.

⁶⁵ A statement by Senator Douglas, included as part of the Congressional record, explains why the original legislation only covered children employed in the production of goods for interstate commerce. Congress, in 1938, feared that the Supreme Court would not allow the extension of Congressional power to regulate the employment of children in industries that engaged in interstate commerce. Accordingly, the original FLSA only prohibited the shipment in interstate commerce of goods which, within the previous thirty days, had been produced by oppressive child labor. *Id.* at app. 164 (statement of Senator Douglas).

signed this change to close a loophole that allowed parents to employ their children under the age of sixteen in occupations considered hazardous.⁶⁶ In order to prevent this use of child labor, Congress added the general parental exemption to oppressive child labor, so that oppressive child labor included employment by a parent in "an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being. . . ."⁶⁷ The addition of this clause had the effect of providing uniform protection for children ages sixteen through eighteen, regardless of parental involvement.

A third change to the FLSA was the attempt to modify the child labor exemption for agricultural labor.⁶⁸ Originally, this provision exempted child labor used in agriculture when the child was not ". . . legally required to attend school. . . ."⁶⁹ An amendment changed this provision. Under this amendment, the child labor exemption used in agriculture applied only "outside of school hours for the school district where such employee is living while he is so employed."⁷⁰ The purpose of this change was to alleviate the difficulties involved under the original version in determining the legal status, under each particular state law, of a child's absence from school.⁷¹ In addition, this change equalized the educational opportunities of children from state to state.⁷²

The 1949 amendments restricted child labor in certain areas, but they also expanded the use of child labor by providing two exemptions that were absent in the original legislation. First, Congress expanded the exemption for actors and performers in motion pictures and theatrical performances to include child performers in radio and television.⁷³ In addition, the amendments of 1949 also provided an exemption for any employee engaged in the home delivery of newspapers.⁷⁴

⁶⁶ *Id.* at app. 164-65 (statement of Senator Pepper).

⁶⁷ *Id.* at app. 2.

⁶⁸ *Id.* at 109.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at app. 58.

⁷² *Id.* Note that Congress at this time still believed strongly in the relatively superior value of child labor in the agricultural setting as opposed to other settings. Senator Douglas reflected this feeling, stating during Congressional debates: "Let us be clear from the outset. There is no Federal regulation at anytime or anyway for children who work on their parent's farms and we do not propose that there should be any." *Id.* at app. 165 (statement of Sen. Douglas).

⁷³ *Id.* at 109.

⁷⁴ *Id.*

The next amendments to the FLSA occurred in 1961.⁷⁵ Although they substantially overhauled the wage and hour provisions of the legislation, they only minimally affected the child labor provisions. The major child labor amendment extended the protection from oppressive child labor to "*any enterprise engaged in commerce or the production of goods for commerce.*"⁷⁶ In effect, this extended the protection of the child labor provisions of the FLSA to retail establishments, the construction industry, and gas stations, the main industries covered by the term "enterprise engaged in commerce or the production of goods for commerce" as defined by the FLSA.⁷⁷

The only other change made by the 1961 amendments to the child labor provisions of the FLSA was to add a new exemption. This provision exempted from minimum wage, maximum hours, and child labor provisions "any homemaker engaged in the making of wreaths com-

⁷⁵ Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65 (1961).

⁷⁶ *Id.* at 70 (emphasis added).

⁷⁷ The complete definition of enterprise as used in the 1961 Amendments includes: any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person: (1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than \$1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that moved or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to \$250,000 or more; (2) any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier if the annual gross volume of sales of such enterprise is not less than \$1,000,000, exclusive of any excise taxes at the retail level which are separately stated; (3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than \$1,000,000; (4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than \$350,000; (5) any gasoline service establishment if the annual gross volume of sales of such establishment is not less than \$250,000, exclusive of excise taxes at the retail level which are separately stated: *Provided*, That an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner thereof or persons standing in the relationship of parent, spouse, or child of such owner.

75 Stat. 66 (1961).

Note that while this provision extended protection to employees of retail, construction, and gas stations, it did not extend protection to children working for their parents. *Id.* at 66.

posed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths).⁷⁸ This amendment seems to have been added because of Congress' feeling that this activity was akin to agriculture, and therefore should be regulated only to the extent that agriculture is regulated by the FLSA.⁷⁹

In 1966, Congress again addressed the problem of child labor in agriculture, prohibiting the employment of children under sixteen in agricultural occupations that the Secretary of Labor finds to be particularly hazardous.⁸⁰ Note, however, that this provision does not protect children employed on family farms.⁸¹ In addition, this amendment does not equalize the protection of agricultural child workers with that of non-agricultural child workers, because the Secretary of Labor is authorized to prohibit the employment of children below age eighteen in hazardous non-agricultural occupations.⁸² The Senate, however, refused to extend further protection to child agricultural workers, partially because of the belief that agricultural work was "somehow cleaner, somehow more fun, less dangerous, and really educational—or at least 'healthy'."⁸³

The FLSA amendments of 1974 were the first to substantially limit the use of child labor in agriculture. The amendments barred children under the age of twelve from working on any farm, except for family farms.⁸⁴ Children between the ages of twelve and fourteen could be

⁷⁸ *Id.* at 74.

⁷⁹ 107 CONG. REC. 6260 (1961) (Statement of Sen. Williams), *reprinted in* UNITED STATES CONGRESS—HOUSE COMMITTEE ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS AMENDMENTS OF 1961, 828–829 (1963). This amendment was proposed by Senator Williams of Delaware, who claimed that wreaths were "an agricultural product and never should have been covered." 106 CONG. REC. 16702 (1960). It appears from the introduction of this amendment that a recent Labor Department ruling had classified this activity as within the scope of the FLSA, and this amendment was added to defeat that ruling. *See id.*

⁸⁰ *See* 29 U.S.C. § 213(c)(2) (1988).

⁸¹ *Id.* This provision contains the disclaimer "except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person." *Id.*

⁸² *Id.* at § 203(l) (1988). Note that in 1966, the Senate committee rejected an amendment that would prohibit employment of children in agriculture under age 12, and between ages 12 and 14 in hazardous occupations. S. REP. NO. 1487, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3012.

⁸³ S. REP. NO. 1487, 89th Cong., 2d Sess., (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3040, (supplemental views of Senators Jacob Javits and Harrison Williams, Jr., of New Jersey). These Senators, who supported extending FLSA protection to agricultural child laborers said, "In agriculture, as in industry, long ago, it is the same old practice—perhaps less noticed, but just as harmful—and it ought to be stopped." *Id.* at 3042.

⁸⁴ GERALD FEDER, BUREAU OF NATIONAL AFFAIRS, HIGHLIGHTS OF THE NEW WAGE AND HOUR LAW 4 (1974).

employed on farms other than a family farm, but only if their parents worked on the same farm.⁸⁵ This amendment did not cover children over fourteen. The effect of this amendment was to prohibit children above the age of eleven but below the age of fourteen from employment in agriculture, unless the employment was outside of school hours, and the employment was either with the consent of the parent, or the children worked on a farm where their parents worked.⁸⁶

In addition, amendments of 1974 also strengthened the ability of the Department of Labor to enforce child labor regulations. They established a civil penalty of up to \$1000 for any violation of the child labor provisions of the FLSA.⁸⁷ Congress also added an amendment that authorizes the Secretary of Labor to require employers to obtain proof of age from their employees.⁸⁸

Finally, the Omnibus Budget Reconciliation Act of 1990⁸⁹ also amended the FLSA in two ways. First, it raised the civil penalty provisions of the FLSA from a ceiling of \$1000 to a floor of \$1000 and a ceiling of \$10,000 per violation.⁹⁰ In addition, it provided for penalties to be deposited in the general Treasury as opposed to being applied to the Labor Department's Wage and Hours Department.⁹¹

D. *The Fair Labor Standards Act: Today*

1. Overview

The FLSA is not the same legislation it was fifty years ago. Various amendments have expanded both the scope of the FLSA and the protection it offers.⁹² To understand the effect of the FLSA on child

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3103, 104 Stat. 1388-1429 (1990).

⁹⁰ *Id.* Note that, while the statute calls for a penalty of up to \$10,000 per violation, until June 16, 1994, the Labor Department's policy was only to impose this fine per accident. Thus, employers could only be penalized a maximum of \$10,000 when an accident occurred, even if several violations existed at once. The Labor Department's reluctance to impose this penalty as it was intended reflects society's general unresponsive attitude toward child labor abuse. See Jeff Leeds, *U.S. Raises Penalties for Child Labor Safety Violations*, L.A. TIMES, June 17, 1994, at A4. This article stated that a Labor Department study at six Los Angeles high schools found that 50% of fourteen- and fifteen-year-olds were working in violation of hour limitations; 15% of fourteen- and fifteen-year-olds were employed illegally in construction jobs; and 5% of sixteen- and seventeen-year-olds were illegally using meat-slicing and/or dough-making equipment. *Id.*

⁹¹ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 3101, 104 Stat. 1388-1429 (1990). The significance of this change is discussed further in Section IV(A).

⁹² See *supra* notes 61-91 and accompanying text.

labor abuses today, it is important to examine first exactly how the FLSA addresses child labor abuse.

The FLSA forbids the use of "oppressive child labor."⁹³ It defines "oppressive child labor" as:

a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years . . . employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being⁹⁴

The definition provides that an employer will not be held liable if there is a certificate on file, issued pursuant to the Department of Labor, certifying the child is "above the oppressive child-labor age."⁹⁵ Finally, the definition also allows the Secretary of Labor to promulgate rules allowing industries, other than mining and agriculture, to employ children aged fourteen to sixteen as long as such employment is determined not to interfere with their schooling, and the working conditions will not interfere with their health and well-being.⁹⁶

Once these criteria for "oppressive child labor" are established, the FLSA then proscribes areas in which such labor cannot be used. Section 212(a) states that "[n]o producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment . . . in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed"⁹⁷ Subsection (b) provides that the Department of Labor, subject to Attorney General approval, shall "bring all actions

⁹³ 29 U.S.C. § 212 (1988).

⁹⁴ *Id.* at § 203(l).

⁹⁵ *Id.* at § 203(l)(2).

⁹⁶ *Id.*

⁹⁷ *Id.* at § 212(a).

. . . to enjoin any act . . . which is unlawful by reason of the existence of oppressive child labor . . .” as well as to “administer all other provisions of this chapter relating to oppressive child labor.”⁹⁸ Subsection (c) provides that “no employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce.”⁹⁹ In addition, Subsection (d) provides that the Secretary of Labor may require employers to obtain proof of age—a requirement that has not yet been implemented.¹⁰⁰

As well as providing this ban on the use of oppressive child labor, the FLSA also includes several exemptions. The employment of children in agriculture outside of school hours is exempted from section 212, provided that the child is (1) less than twelve years old, and employed by a parent or guardian on a farm owned or operated by said parent, or employed, with permission of the parent, on a farm exempt from minimum wage regulations;¹⁰¹ (2) between twelve and fourteen, and employed on a farm with the consent of a parent, or on a farm where a parent is also employed;¹⁰² or (3) over age fourteen.¹⁰³ In addition, the FLSA exempts child actors and allows the Secretary of Labor to waive section 212 regulations for child “hand harvest laborers” who have traditionally been used in rural areas to pick crops for relatively short periods of time.¹⁰⁴ Finally, the FLSA also provides exemptions from child labor regulations for newspaper delivery and for child homeworkers engaged in wreath making.¹⁰⁵

2. Nonagricultural Regulations

Through the authority granted to the Secretary of Labor under section 212(b), numerous regulations have been promulgated that add

⁹⁸ *Id.* at § 212(b).

⁹⁹ *Id.* at § 212(c).

¹⁰⁰ *Id.* at § 212(d).

¹⁰¹ *Id.* at § 213(c)(1)(A).

¹⁰² *Id.* at § 213(c)(1)(B).

¹⁰³ *Id.* at § 213(c)(1)(C). Section 212 does, however, apply to children under sixteen employed in agricultural occupations deemed “particularly hazardous for the employment of children below the age of sixteen” by the Secretary of Labor. 29 U.S.C. § 213(c)(2)(C) (1988). Note that this provision does not apply to children working on farms owned and operated by the child’s parent(s). *Id.*

¹⁰⁴ 29 U.S.C. § 213(c)(3), (c)(4)(A) (1988).

¹⁰⁵ 29 U.S.C. § 213(d) (1988). For a discussion of the newspaper delivery exemption, see generally Mark Linder, *From Street Urchins to Little Merchants: the Juridical Transvaluation of Child Newspaper Carriers*, 63 TEMP. LAW REV. 829 (1990). For a discussion of the home wreathmaking phenomenon, see *supra* note 79 and accompanying text.

body to the skeletal legislation embodied in the FLSA. For example, in nonagricultural occupations, children under the age of fourteen are generally not allowed to work, except for specific exemptions such as newspaper carriers and child actors.¹⁰⁶ Children between the ages of fourteen and sixteen are allowed to work in non-hazardous jobs outside of school hours, subject to the following hour restrictions: no more than three hours per day and eighteen hours per week while school is in session, and no more than eight hours per day and forty hours per week when school is not in session.¹⁰⁷ In addition, fourteen- and fifteen-year-olds can work only between 7:00 a.m. and 7:00 p.m. during the school year, and between 7:00 a.m. and 9:00 p.m. between June 1 and Labor Day.¹⁰⁸ Finally, children aged sixteen and seventeen are not subject to any hourly restrictions.¹⁰⁹ They are, however, prohibited from working in occupations considered hazardous to their health, safety, or welfare.¹¹⁰

¹⁰⁶ 29 C.F.R. §§ 570.124-25 (1993).

¹⁰⁷ 29 C.F.R. § 570.35 (1993). The Secretary of Labor has listed the following occupations as *specifically* being hazardous to fourteen- and fifteen-year-olds: (1) Mining, manufacturing, or processing occupations; (2) occupations requiring the use of hoisting apparatus or any power driven machinery other than office machines; (3) the operation of motor vehicles, or helpers/service on motor vehicles; (4) public messenger service; (5) occupations in connection with transportation, warehousing and storage, communications and public utilities, or construction. 29 C.F.R. § 570.33 (1993).

In retail and service establishments, fourteen- and fifteen-year-old children are permitted to work in occupations involving: (1) office and clerical work; (2) cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping; (3) price marking, assembling orders, packing and shelving; (4) bagging and carrying out customers' orders; (5) errands and delivery by foot, bicycle, and public transportation; (6) cleanup work, including the use of vacuum cleaners, floorwaxers, and ground maintenance, excluding the use of power driven mowers or cutters; (7) kitchen work, including but not limited to the use of dishwashers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, and coffee grinders; (8) work in connection with cars and trucks, limited to dispensing gas and oil, courtesy service, car cleaning, washing and polishing, but not involving the use of pits, racks, or lifting apparatus, or the inflation of any tire mounted on a rim with a removable retaining ring; (9) cleaning vegetables and fruits, wrapping, sealing, labeling, weighing, pricing, and stocking goods when performed in areas physically separate from those where meat is prepared. 29 C.F.R. § 570.34 (1993).

However, these occupations are limited by prohibitions against the following: (1) work in or about boiler rooms; (2) maintenance or repair of establishments, machines, or equipment; (3) outside window washing involving work on sills, requiring ladders, scaffolds, or their like; (4) cooking (except at soda fountains, lunch counters, snack bars, or cafeteria serving counters) and baking; (5) occupations involving the operation, setting up, adjusting, cleaning, oiling, or repairing of power-driven food slicers, food grinders, food choppers, food cutters, and baking mixers; (6) work in freezers and meat coolers; (7) loading and unloading goods from trucks, railroad cars, or conveyors; and (8) all warehouse jobs, except office and clerical work. *Id.*

¹⁰⁸ 29 C.F.R. § 570.35 (1993).

¹⁰⁹ See generally 29 C.F.R. §§ 570.117-118 (1993).

¹¹⁰ 29 C.F.R. § 570.120 (1993). Examples of these hazardous occupations include: (1) occu-

3. Agricultural Regulations

Children employed in agricultural occupations are subject to a different set of restrictions. In general, the FLSA permits the employment of children over the age of sixteen in agriculture, subject to certain restrictions.¹¹¹ For example, if the agricultural occupation has not been declared hazardous, section 212 does not apply to any child over the age of fourteen, as long as the work is done outside of school hours.¹¹² In addition, child labor restrictions do not apply to: (1) children aged twelve or thirteen who are employed with written consent of a parent, or who are working on a farm where a parent is employed, as long as it is outside of school hours;¹¹³ (2) children under twelve employed by a parent on a farm owned by the parent, or employed with the consent of a parent on a farm exempt from minimum wage requirements, as long as it is outside of school hours;¹¹⁴ and (3) children aged ten or eleven working as hand harvest laborers for no more than eight weeks in a calendar year, subject to a Department of Labor waiver.¹¹⁵ Although these provisions are much less restrictive, they do prohibit employment of children under sixteen in hazardous conditions as identified by the Secretary of Labor.¹¹⁶

pations involving the handling or storing of explosives; (2) occupations involving motor vehicle driving and the use of outside helpers; (3) mining occupations; (4) occupations in the logging industry; (5) occupations requiring the use of power-driven woodworking machines; (6) occupations involving exposure to radioactive substances; (7) occupations requiring the operation of power-driven hoisting apparatus; (8) occupations requiring use of power-driven metal forming, punching, and shearing machines; (9) occupations requiring use of power-driven meat processing machines (including meat slicers) and occupations involving meat slaughtering and packing; (10) occupations involving use of bakery machines; (11) occupations using power-driven paper product machines; (12) occupations involved in manufacturing of brick, tile, or other kiln products; (13) occupations requiring the use of circular or band saws, or guillotine shears; (14) occupations in wrecking, demolition, and shipbreaking; (15) occupations in the roofing industry; and (16) excavation occupations. *See generally* 29 C.F.R. §§ 570.51–68 (1993) (complete list of hazardous occupations).

¹¹¹ 29 U.S.C. § 213(c) (1988).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 29 C.F.R. § 575.1(b)(5) (1993).

¹¹⁶ 29 C.F.R. § 570.71 (1993). These hazardous occupations include (1) operating a tractor with more than 20 horsepower, or connecting or disconnecting an implement or any of its parts to or from such a tractor; (2) operating or assisting to operate any of the following: corn picker, cotton picker, grain combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, feed grinder, crop dryer, forage blower, auger conveyor, power post-hole digger, power post-driver, or non-walking type rotary tiller, or the unloading mechanism of a non-gravity-type rotary tiller; (3) operating or assisting to operate a trencher, earthmoving equipment, fork lift, potato combine, or power-driven circular, band, or chain saw; (4) working in an area with a bull,

4. Remedies Provided by the FLSA

Finally, if it is not reasonable to believe that these child labor offenses will be discontinued, the FLSA provides three possible corrective measures that the Secretary of Labor may use. The first is to seek an injunction against any further violations.¹¹⁷ The FLSA also provides for more remedial punishments. For example, a 1990 amendment provides for a \$10,000 fine for any child labor violation, assessed for each employee who was the victim of a violation.¹¹⁸ Lastly, employers may, at the discretion of the Secretary of Labor, be criminally prosecuted for "willfully" violating child labor standards, with penalties of up to \$10,000 in fines and a jail term of up to six months.¹¹⁹

Overall, the FLSA has been somewhat successful in combating the evils of oppressive child labor. As Part III of this Note will demonstrate, however, abusive child labor has increased in the United States since 1980, partly due to deficiencies in the FLSA and partly due to political and social attitudes and policies discussed below.

III. THE RESURGENCE OF CHILD LABOR ABUSE AND OFFENSES DURING 1980-1994

A. *Areas of Child Labor Abuses That Have Resurfaced in the Past Decade*

The abuse of child labor has become a virtual epidemic in the United States, with experts claiming that "[w]e've gone backward six or seven decades. . . . Child labor is probably at a point where violations are greater in number than at any point in the 1920s."¹²⁰ A

boar, stud horse, sow suckling pigs, or cow with newborn calf; (5) working with timber with butt diameter of over six inches; (6) working from a ladder or scaffold at a height of over 20 feet; (7) driving a truck, bus, or auto while carrying passengers, or riding a tractor as a passenger; (8) working inside fruit, forage, or grain storage designed to be oxygen deficient, an upright silo within two weeks of silage being added, or when a top loading device is in operation, a manure pit, or a horizontal silo while operating a tractor for packing purposes; (9) handling or applying agricultural chemicals classified under the Federal Insecticide, Fungicide, and Pesticide Act as Category I or Category II; (10) handling or using a blasting agent; (11) transporting, transferring, or applying anhydrous ammonia. *Id.*

¹¹⁷ 29 C.F.R. § 570.127 (1993).

¹¹⁸ 29 U.S.C. § 216(e) (1988 & Supp. IV 1992).

¹¹⁹ 29 U.S.C. § 216(a) (1988). It is important to note, however, that the regulations do not create a private cause of action against an employer for the injury or wrongful death of a child, even if the child is employed in violation of the FLSA. *See Breitweiser v. KMS Industries, Inc.*, 467 F.2d 1391, 1394 (5th Cir. 1972).

¹²⁰ Joseph P. Ritz, *Crackdown on Child Labor Violations*, BUFFALO NEWS, May 30, 1993, available in LEXIS, News Library, Major Papers File.

National Workplace Safety Institute Report characterized the neglect in combating child labor abuses as "... put[ting] the lives, health, and futures of hundreds of thousands of working children at risk. . . ."¹²¹ In particular, four areas of industry seem to be most egregious in their violations of child labor law: (1) the garment industry; (2) agricultural occupations (particularly migrant farm workers); (3) fast food and grocery industries, and, strangely enough; (4) door-to-door candy selling.¹²²

1. The Garment Industry: Does the Legacy of the Sweatshops Live On?

In 1989, a task force sponsored by the New York Apparel Industry found deplorable abuses of child labor. The report stated that "[on] the 12th floor of 333 West 39th Street, a fifteen-year-old Mexican immigrant boy works. . . . He could be found by his table sewing pleats into cheap white chiffon skirts. He hopes to make \$1 an hour. The temperature inside is eight degrees."¹²³ In New York City alone, there are approximately 1500 of these sweatshops thriving on any given day.¹²⁴ Despite New York being one of the more diligent states in terms of child labor law enforcement, these sweatshops illegally employ approximately 7000 children, some as young as eight years old.¹²⁵

The problem, however, is not confined to New York City. A 1991 sting operation executed by the California State Labor Department found 70 out of 200 garment factories in San Francisco to be in violation of child labor laws.¹²⁶ The conditions of these sweatshops is reminiscent of the 1920s: no heat or air conditioning, lack of fire safety equipment or exits, long hours, and subminimum pay.¹²⁷ Children, mostly immigrants, live their days squinting at sewing machines, starting before the sun rises and ending after it sets.¹²⁸ One investigator stated the problem this way: "[the garment industry] love[s] kids because they tend to be willing workers. They don't complain, and they think they're making a lot of money when they're not."¹²⁹ Eleanor

¹²¹ See Jack Lesar, *Study Says U.S. Negligent On Child Labor*, UPI, Sept. 6, 1992, available in LEXIS, News Library, UPI File.

¹²² See Dumaine, *supra* note 2, at 87.

¹²³ Golodner, *supra* note 11, at 51-52 (citing a 1989 New York Apparel Industry Task Force report).

¹²⁴ See Dumaine, *supra* note 2, at 87.

¹²⁵ Ritz, *supra* note 120.

¹²⁶ Specter, *supra* note 21, at A8.

¹²⁷ See *id.*; see also Golodner, *supra* note 11, at 51-52.

¹²⁸ See generally Bruce D. Butterfield, *Wave of Children Toil in New Sweatshops*, BOSTON GLOBE, Apr. 25, 1990, at A1 [hereinafter Butterfield III]. This Boston Globe series documents a 10-year-old Chinese boy who spends his day "hunched over a sewing machine stitching women's pants." The boy claims "My mother in China . . . I come here." Butterfield II, *supra* note 5, at 27.

¹²⁹ Dumaine, *supra* note 2, at 88.

Roosevelt once described a turn-of-the-century sweatshop as "women and children working in dark, crowded, dirty quarters, toiling. . . ." ¹³⁰ Unfortunately, in thousands of sweatshops across the United States, this description holds true today.

2. Farming and the Migrant Farm Worker: The "Harvest of Shame" Continues¹³¹

Another area in which child labor is still heavily employed, often abusively, is the farming industry. Farming abuses can largely be separated into two distinct areas: (1) abuses stemming from children working on family farms, and (2) the continuing abuse of migrant farm child workers. Although these two areas are very dissimilar in the types of abuse and child labor violations that occur, both often result in the injury or death of the abused child worker.¹³²

There is a belief in America that farm life—growing up and working on a farm—is a wholesome way for children to live.¹³³ This ideal is propelled mainly by the feeling that working outdoors is somehow healthier than working indoors, and that farm work instills in a child an appreciation for nature and a strong work ethic.¹³⁴ Thus, many Americans believe that "working in the field is wholesome and worthwhile in comparison to working indoors and that long hours and low wages somehow should be more acceptable to field workers no matter how backbreaking their work or how despicable their work conditions."¹³⁵ These beliefs are unfounded. The death rate for child laborers on farms is the highest for any occupation in the nation: 300 or more children under sixteen are killed each year on farms, while over 23,500 are injured.¹³⁶ There are nine-year-old children losing arms to grain augers on family farms in Indiana.¹³⁷ There are twelve-year-old

¹³⁰ Golodner, *supra* note 11, at 51.

¹³¹ See generally Glader, *supra* note 18, at 1455–90.

¹³² See Butterfield II, *supra* note 5, at 1. "More than 23,000 injuries and 300 deaths each year among those under 16 years old [occur while] working in agriculture . . ." Golodner, *supra* note 11, at 53.

¹³³ Glader, *supra* note 18, at 1460.

¹³⁴ See *id.* at 1463. See also *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, 499 (1945) (Justice Jackson referring to agriculture as "a relatively inoffensive type of child labor"); see also *supra* note 60 and accompanying text.

¹³⁵ Glader, *supra* note 18, at 1460. For a more thorough examination of the myths of agricultural labor, see RONALD B. TAYLOR, *SWEATSHOPS IN THE SUN* 1–24 (1973).

¹³⁶ Butterfield II, *supra* note 5, at 22.

¹³⁷ *Id.* The Boston Globe story describes nine-year-old Omer Schabach, who lost his arm to a grain auger, only to say smilingly, "It doesn't hurt . . . I'm learning how to do things." The story goes on to describe eleven-year-old Glenn Nisley, whose right leg was severed in a feed conveyor only a few days before the story was written. *Id.*

workers being pulled into sweep augers—giant swirling blades used to pull grain from silo floors—and being disemboweled.¹³⁸ As one commentator notes, “[t]here’s no other industry in the country that has so many kids working with hazardous equipment.”¹³⁹ Yet family farms remain, for the most part, unregulated, and the exact number of deaths and injuries remains unreported.¹⁴⁰ Whereas the family farm once may have been a good place to raise a child, today it is unfortunately frequently an equally good place for a child to be maimed or killed.

Although the problem of abusive child labor on family farms has not been the subject of much public scrutiny, the plight of migrant farm workers—and, in particular, their children—has come under intensive review.¹⁴¹ Although estimates vary widely, between one and two million children labor in the fields of this country.¹⁴² They begin work before dawn, and finish after dusk. They spend their days stooped in fields, with little time off to rest. They miss school.¹⁴³ They are sprayed with pesticides.¹⁴⁴ In general, theirs is a life of misery.¹⁴⁵

¹³⁸ See Butterfield I, *supra* note 1, at 1. The story describes several other deaths and injuries to children working on family farms. *Id.*

¹³⁹ *Id.* at 10.

¹⁴⁰ As one commentator stated, “I can have my son, if I’m a farmer, lose both arms in a piece of farm machinery, and I don’t have to report that to anybody.” *Id.* at 10. This comment refers to the fact that under the FLSA, children are allowed to work on family farms with little or no regulation in the area of child labor. See 29 U.S.C. § 213 (c)(1)(A)-(C) (1988).

¹⁴¹ See, e.g., TAYLOR, *supra* note 135; see also Arlene Hirschweiler, Note, *The Toxic Workplace of the Child Farmworker*, 32 BUFF. L. REV. 343 (1983); Tracy Waimer, *Migrant Life Makes School Even Harder*, USA TODAY, Apr. 29, 1991, at A11.

¹⁴² See Butterfield II, *supra* note 5, at 22; see also Bruce D. Butterfield, *The New Harvest of Shame; For Farmworkers’ Children, Cycle of Poverty and Work Unbroken*, BOSTON GLOBE, Apr. 26, 1990, at 1 [hereinafter Butterfield IV].

¹⁴³ For a good description of the life of a child migrant farm worker, and all migrant farm workers, see TAYLOR, *supra* note 135; see also Glader, *supra* note 18; Butterfield IV, *supra* note 142, at 1.

¹⁴⁴ See Hirschweiler, *supra* note 141; see also Glader, *supra* note 18, at 1458. Under 29 U.S.C. § 213 (c)(4) (1988), the Department of Labor has provided a waiver process that allows for the employment of ten- and eleven-year-old children in the hand-harvesting of certain short season crops. 29 C.F.R. § 575.1-575.9 (1993). In an effort to protect these young children from the effects of pesticides, the Secretary of Labor has conditioned this waiver, in part, to areas where “[t]he level of pesticides will not adversely affect ten- and eleven-year-olds.” 29 C.F.R. § 575.3 (b)(2)(iv) (1993). In order to satisfy this condition, it is not enough to show that the level and type of pesticides meet the standards of safe re-entry established for adults by the Environmental Protection Agency; instead, the applicant for the waiver must show that either no pesticides were used on the crop, or must submit data that will establish a safe re-entry time for ten- and eleven-year-olds. 29 C.F.R. § 575.5(d) (1993). Even this minimal regulation of pesticide use on children has been challenged by the farming industry. See, e.g., *Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 301 (9th Cir. 1980) (members of farm industry attempted to obtain ruling that regulations were void, so that adult standards for tolerable pesticide levels could be applied to ten- and eleven-year-olds). Note that even under this regulation, children twelve and over are no more protected from pesticides than are adults.

¹⁴⁵ A few examples show just how tragic, abusive, and serious the migrant farmworker’s

Overall, the farms of America are among the most dangerous places for child workers today. As a result of a combination of low federal standards,¹⁴⁶ lack of enforcement of the FLSA, parents' and employers' lack of interest, or lack of awareness, children continue to be injured, maimed, and worn down by illegal and/or abusive farm labor.¹⁴⁷ As one commentator has stated, "farm labor is child labor. . . . When you look at modern agriculture, it still depends on the labor of children."¹⁴⁸

3. Middle-Class Child Labor Abuse: The Grocery and Restaurant Businesses

Although not as shocking as the more traditional, sometimes more egregious forms of child labor abuse discussed above, the abuse of America's middle-class children by the restaurant and grocery industries may be even more widespread and fast-growing.¹⁴⁹ A 1987 University of Michigan study revealed that one third of male high school seniors and one quarter of female high school seniors worked more than twenty hours per week.¹⁵⁰ In addition, it is estimated that two thirds of America's teenagers are employed.¹⁵¹ More and more frequently, these "middle-class" jobs require illegal hours and illegal responsibilities, often resulting in injury and even death.¹⁵²

children's situation is. At the March 1990 hearings of the House Subcommittee on Employment and Housing, addressing the escalation of child labor violations, United States Representatives heard the testimony of Augustinio Nieves, a then fourteen-year-old migrant farm worker, who recounted thirteen-hour workdays spent on his hands and knees, picking strawberries in the midst of pesticides, for no more than \$2.80 an hour. See Lantos, *supra* note 11, at 67. A 1990 Boston Globe investigation highlighted the plight of eight-, nine-, and ten-year-old children, who spent their days in the fields employed at hard labor, instead of attending school. See Butterfield IV, *supra* note 142. A 1992 story in the Chicago Tribune found children as young as six working in the cucumber fields of Ohio. Mitch Weiss, *Children of Migrant Workers Toil Illegally in Fields of Ohio*, CHI. TRIB., Sept. 13, 1992, § 7, at 8.

¹⁴⁶ For a discussion of federal agricultural regulations, see *supra* notes 111-16 and accompanying text.

¹⁴⁷ For a discussion of the causes for the upsurge in child labor abuses, farm and otherwise, see *infra* Section III (B).

¹⁴⁸ Butterfield IV, *supra* note 142, at 26.

¹⁴⁹ See generally Butterfield IV, *supra* note 142; see also Lantos, *supra* note 11, at 67 (citing 1991 General Accounting Office report finding a larger percentage of children from families with income over \$60,000 likely to be employed in these industries than those from families with annual incomes under \$20,000).

¹⁵⁰ Golodner, *supra* note 11, at 54.

¹⁵¹ Lantos, *supra* note 11, at 67.

¹⁵² See Butterfield IV, *supra* note 142. For a more in-depth look at the problems faced by middle-class child workers, see Giampetro-Meyer & Brown, *supra* note 18; see generally JOHN CLAPP & DANIEL J.B. MITCHELL, LEGAL CONSTRAINTS ON TEENAGE EMPLOYMENT: A NEW LOOK AT CHILD LABOR AND SCHOOL LEAVING LAWS (1979); ELLEN GREENBERGER & LAURENCE STEINBERG, WHEN TEENAGERS WORK: THE PSYCHOLOGICAL AND SOCIAL COSTS OF ADOLESCENT EMPLOYMENT (1986).

For example, working in a grocery store has long been a favorite "first job" for American children. Within any grocery store, there are teenagers ringing up purchases, bagging groceries, and stocking the shelves. Yet today, grocery stores may be among the most persistent violators of child labor laws.¹⁵³ On July 28, 1993, the Great Atlantic and Pacific Tea Company (A&P) settled with the Department of Labor, agreeing to pay a \$490,000 fine in order to resolve more than 900 child labor violations, including employing fourteen- and fifteen-year-olds for excessive hours per week and during prohibited times, as well as allowing children under the age of eighteen to use equipment deemed hazardous by the Department of Labor.¹⁵⁴ On August 16, 1993, the Department of Labor announced a \$500,000 settlement with Publix Supermarkets, Inc. (Publix), a Florida-based chain.¹⁵⁵ Publix was found to have used thirty-eight minors to "operate, load and unload or clean hazardous equipment such as paper balers and dough mixers . . ." as well as to have "employed workers age fourteen and fifteen during prohibited times and in excess of permissible hours. . . ."¹⁵⁶ In yet another case, on August 3 of that same summer, the Labor Department announced a 16.2 million dollar settlement with Food Lion, Inc., a Southern grocery store chain, one million of which was for child labor violations.¹⁵⁷ From these examples, it is clear that grocery stores may not provide the safe, wholesome first job for children that parents and children once thought.

Middle-class child labor violations also occur—often with very severe results—in the fast food and restaurant industries.¹⁵⁸ The restaurant industry has come to rely heavily on the employment of teenagers, and with this reliance have come various problems: long hours, dangerous conditions, and even death. At Congressional subcommittee hearings held in 1990, representatives heard testimony from Jennifer

¹⁵³ See *infra* notes 154–57 and accompanying text. See, e.g., *Brock v. Big Bear Mkt.* No. 3, 825 F.2d 1381, 1383–84 (9th Cir. 1987) (ruling that motion for permanent injunction against supermarket for child labor violations could not be denied simply because of current compliance with the FLSA, particularly in light of the store's long history of FLSA violations). The Court also noted "Congressional policy is to abolish substandard labor conditions by preventing recurrences of violations . . ." *Id.* at 1383.

¹⁵⁴ *A & P Agrees to \$490,000 Settlement to Resolve Child Labor Law Charges*, Daily Lab. Rep. (BNA) No. 144, at D-10 (July 29, 1993). This equipment included paper balers, meat cutters, and power mixers.

¹⁵⁵ *Publix Super Markets To Pay \$500,000 to Settle Child Labor Violations*, Daily Lab. Rep. (BNA) No. 157, at D-10 (Aug. 17, 1993).

¹⁵⁶ *Id.*

¹⁵⁷ *Food Lion to Pay \$16.2 Million in Record FLSA Settlement with DOL*, Daily Lab. Rep. (BNA) No. 148, at D-4 (Aug. 4, 1993).

¹⁵⁸ For a good article on the perils of restaurant work, see Bruce D. Butterfield, *Long Hours*,

Forshee, then fifteen, who cut off the top of her right middle finger while illegally using a power slicing machine.¹⁵⁹ In Exeter, New Hampshire, fifteen-year-old Justin Lowell split his hand while attempting to cut fifty-four blocks of cheese in twenty minutes, through the illegal use of a power slicer.¹⁶⁰ These are typical consequences of the restaurant business's push for child labor, a push that often results in injury and death.¹⁶¹

Perhaps the most common child labor violation to occur in the restaurant and grocery industries is the illegal employment of children for more hours than prescribed by the FLSA, and outside of legal working hours.¹⁶² The restaurant industry has been a strong supporter of relaxing hour restrictions on minors, claiming that, "[t]he laws simply don't deal with modern practices and modern equipment."¹⁶³ Statistics show, however, that 20,000 workers between the ages of twelve and seventeen were injured in restaurants in 1990.¹⁶⁴ It is not uncom-

Late Nights, Low Grades, In Labor-Short Towns Across America, Teen-Agers Are Overworked, BOSTON GLOBE, Apr. 24, 1990, at 1 [hereinafter Butterfield V].

¹⁵⁹ Lantos, *supra* note 11, at 67.

¹⁶⁰ Butterfield V, *supra* note 158, at 13.

¹⁶¹ See, e.g., *Donovan v. ELCA of New Hampshire, Inc.*, 615 F. Supp. 106, 109 (D.N.H. 1984) (court ordered permanent injunction against defendant for allowing fifteen-year-old children to work past specified hours, and for allowing minors to operate meat slicers and vertical dough mixers, thereby causing injury to at least one minor). Despite the prevalence of injuries caused by common restaurant machinery such as meat-slicers and dough-mixers, members of the restaurant industry have attempted to have these regulations voided. See *Dole v. Stanek, Inc.*, 29 Wage and Hour Cas. (BNA) 1422 (N.D. Iowa 1990) (court rejected defendant's contention that Hazardous Order No. 10, which bans sixteen- and seventeen-year-olds from being employed in occupations requiring use of, among other things, "meat and bone cutting saws," does not apply to restaurants); see also *Winchell's Donut House, Division of Denny's, Inc. v. United States Dep't of Labor*, 526 F. Supp. 608, 610 (D.D.C. 1980) (court rejected plaintiff restaurant's claim that Hazardous Order No. 11, which bans the employment of sixteen- and seventeen-year-olds in occupations requiring the use of power-driven bakery machines, was an unconstitutional application of the FLSA, because the defendant claimed a lack of due process).

¹⁶² See, e.g., *DeArmant v. Rax Restaurants, Inc.*, 785 F. Supp. 1251, 1253 (S.D. Ohio 1991) (defendant restaurant's motion to dismiss plaintiff's request for a permanent injunction against future child labor violations denied by court, citing to 193 separate violations of various hour restrictions placed on the employment of minors).

¹⁶³ Michael Romano, *Minor Characters; Advocates are Pushing for Even Stricter Child Labor Laws*, RESTAURANT BUS. MAG., May 1, 1993, at 56, (quoting Richie Jackson, Vice-President of the Texas Restaurant Association).

¹⁶⁴ *Id.* (citing a September report by the National Safe Workplace Institute). Fast-food chains are well-known violators of child labor laws. For example, on November 19, 1992, Burger King agreed to a \$500,000 settlement with the Department of Labor, in a case involving 1,200 illegally employed minors and over 1,500 violations of restrictions on minors' hours and occupations. See *Labor Department, Burger King Reach Tentative Settlement of Child Labor Charges*, Daily Lab. Rep. (BNA) No. 225, at A-10 (Nov. 20, 1992). The article also identifies Burger King as being a repeat offender of child labor violations. *Id.*; see also *Secretary of Labor v. Burger King Corp.*, 955 F.2d 681, 684 n.2 (S.D. Fla. 1992) (recounting thirteen previous investigations of Burger King, eight

mon for teenagers to work thirty to forty hours a week while attending school or attempting to attend school, and yet restaurant representatives are pushing to further loosen these restrictions.¹⁶⁵ America's children are therefore illegally employed, in dangerous occupations, risking everything from simple exhaustion to death and dismemberment, while the restaurant industry justifies its practices with claims that "it's not like . . . [child employees] need to get home and bring the cows in anymore."¹⁶⁶

4. Door-to-Door Candy Selling—The Wave of Future Violations?

Although the garment industry, agricultural industry, and to a large extent, the grocery and restaurant industries, are areas where child labor violations might be expected, new areas of abuse are also emerging. Another example of child labor exploitation has occurred in a traditional avenue for children to raise money for their school, church, or civic groups: door-to-door candy selling.¹⁶⁷

In many states, including New York, California, Washington, and Texas, door-to-door candy selling has become one of the fastest growing areas of child labor violations.¹⁶⁸ These candy selling scams bear little resemblance to the neighborhood phenomenon of kids selling candy bars for their Little League teams. Instead, small, fly-by-night operations recruit inner-city children, some as young as seven, to sell door-to-door for them.¹⁶⁹ The children are taken into suburbs after school, usually in vans in which it is not uncommon for drugs and

of which had resulted in \$184,500 in fines, and five of which were still pending. Because of these consistent violations, the court refused Burger King's contention that a permanent injunction had been rendered moot because Burger King had taken steps to remedy its child labor abuses).

¹⁶⁵ See generally *Butterfield V*, *supra* note 158, at 1.

¹⁶⁶ Romano, *supra* note 163, at 50 (quoting Marcia Harris, Executive Vice President of the Restaurant Association of Maryland, asserting that child labor laws are no longer "realistic"). Ms. Harris made this comment in response to school-aged children not being allowed to work past 7:00 p.m. Monday through Friday during the school year, a law which she termed an "anachronism." *Id.*

¹⁶⁷ See, e.g., *Thomas v. Brock*, 617 F. Supp. 526 (W.D. N.C. 1985). In *Thomas*, the court issued an injunction against the plaintiff, for various violations of the child labor provisions of the FLSA. *Id.* at 535. These violations included keeping children out selling candy past 9:00 p.m. on weeknights and past 11:30 p.m. on weekends, employing children under the age of fourteen (including children as young as nine years old), and refusing to pick up children if they performed poorly. *Id.* at 528-32. It is interesting to note that Mr. Thomas attempted to use an "independent contractor" defense, similar to the one used by migrant farm workers. *Id.* at 534; see also *infra* note 184 and accompanying text.

¹⁶⁸ Dumaine, *supra* note 2, at 87. Northern California had nine investigations into these scams as of April 1993, and according to Bob Smith, Chief State Labor Investigator for the region, they "hadn't even scratched the surface." *Id.*

¹⁶⁹ See *id.*

alcohol to be used.¹⁷⁰ The children begin to work immediately after school, often until as late as 10:00 p.m. on weekdays and midnight on weekends.¹⁷¹ In addition, the children often wait hours to be picked up by the vans, if they get picked up at all.¹⁷² In Washington, an eleven-year-old girl was killed by a car at 10:00 p.m. on a school night. She was selling candy—one hundred and sixty miles from her home.¹⁷³

Finally, the potential danger to children may not be limited solely to abusive candy-selling conditions. Instead, danger may be posed by the children's employers as well. In California, one of the so-called "candy merchants" was actually a convicted child molester,¹⁷⁴ while another, Gerald Winters, is presently serving a thirty-four-year jail sentence for, among other things, threatening a rival candy seller with a bat and setting a rival's van on fire.¹⁷⁵ Door-to-door candy selling is but one example that child labor abuse is not limited to traditional means, but is expanding to other, less traditional areas.

B. *Causes for the Resurgence of Child Labor Abuse and Violations in the Past Decade*

In analyzing why child labor violations and abuses have been on the rise in the past decade, and why America's youth continue to be overworked, injured, and killed in the workplace, it is obvious that there is no one catalyst. There are, however, at least three major contributors to this phenomenon. First, it is apparent that although the FLSA has done much to protect child workers, it has not succeeded in protecting them all.¹⁷⁶ Second, there is a public perception, mostly in error, that child labor violations have been completely eradicated.¹⁷⁷ Third, the conservative policies of the 1980s and early 1990s have left the problem of child labor, at the federal level, where it remains underfunded, underregulated, and inefficient.¹⁷⁸

¹⁷⁰ See *id.* at 87–88.

¹⁷¹ *Id.* at 88.

¹⁷² See *id.* A thirteen-year-old California girl recounts the misfortune of a child who was forced to walk fifteen miles home. The same girl tells of stealing from houses, and being forced to wait two hours for the van to come to take her back home. *Id.* Similarly, in a Los Angeles Times article, California Labor Commissioner Victoria Bradshaw claims that "children have been driven hundreds of miles from their homes and left to find their way back if they do not sell their quota." Anne C. Roark, *Child Laborers Still Exploited, Study Finds*, L.A. TIMES, Sept. 6, 1992, at A30.

¹⁷³ Dumaine, *supra* note 2, at 86.

¹⁷⁴ Roark, *supra* note 172, at A30.

¹⁷⁵ Dumaine, *supra* note 2, at 87–88. Mr. Winters was known as the "Candy King." *Id.*

¹⁷⁶ See, e.g., *supra* notes 111–116 and accompanying text.

¹⁷⁷ See, e.g., *supra* note 19 and accompanying text.

¹⁷⁸ See *supra* note 11 and accompanying text.

1. Deficiencies in the Fair Labor Standards Act

In examining the FLSA, one of the most glaring deficiencies is the inadequate protection given to children working on farms. A problem of particular concern is that children working on family farms are simply exempt from all federal regulation.¹⁷⁹ Children are permitted to operate dangerous machinery, work in silos, and drive tractors with little or no supervision. In addition, children are permitted to work, not only on family farms, but, with parental consent, also on small farms that are not regulated by the FLSA.¹⁸⁰ Furthermore, the FLSA simply does not apply to minors over fourteen,¹⁸¹ and the prohibition on hazardous employment of children in agricultural occupations only extends to children sixteen and under.¹⁸² Plainly then, children working on a farm are simply not as well protected as those in other occupations. Child agricultural workers are given this exemption despite farms being the most dangerous workplaces in America—with one out of every five farm deaths occurring to children under sixteen years of age.¹⁸³ This gap in coverage exacerbates the problems of child farm workers on family farms and child migrant farm workers, both of whom are similarly unprotected.

Migrant farm workers, however, often attempt to circumvent the protection of the FLSA by referring to themselves as independent contractors instead of as employees of the farmer for whom they are working.¹⁸⁴ If successful, the children of these migrant farm workers become the employees of their parents, and thus are not subject to

¹⁷⁹ 29 U.S.C. § 213(c)(1) (1988 and Supp. IV 1992).

¹⁸⁰ See 29 U.S.C. § 213(c)(1)(A) (1988); *id.* at § 213(a)(6)(A) (specifies these small farms as those "who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man days of agricultural labor")

¹⁸¹ 29 U.S.C. § 213(c)(1)(C) (1988). According to this provision, children in agricultural occupations are allowed to work two years earlier than those employed in nonagricultural occupations.

¹⁸² *Id.* at § 213(c)(2) (1988). Again, children are allowed to work in hazardous agricultural occupations two years earlier than children in non-agricultural occupations. Compare 29 U.S.C. § 203 (forbidding children under the age of eighteen from working in hazardous, non-agricultural occupations).

¹⁸³ Butterfield I, *supra* note 1, at 10. A Purdue University study found 300 or more child laborers killed per year on farms. *Id.*

¹⁸⁴ See generally Glader, *supra* note 18. Interestingly, one of the most popular areas for this type of circumvention is pickle cucumber farming. Because pickle cucumbers require closer attention from farmworkers, in order to assure that the pickles are harvested at the right time, migrant farmworkers are often given responsibility over certain plots of land. The cucumber farming industry, and often the migrant farmers themselves, then claim that they (the migrant farmworkers) are independent contractors, and thus not regulated by the FLSA. The courts have been split on this issue. Compare *Donovan v. Brandel*, 736 F.2d 1114, 1120 (6th Cir. 1984) (court

most of the agricultural restrictions of the FLSA.¹⁸⁵ The cycle of poverty and despair that characterizes the migrant farm workers' lives is thus introduced to their children.¹⁸⁶

Whereas the standards set for child agricultural workers are perilously low, the standards for other child workers are not much better.¹⁸⁷ In particular, it is problematic that children, in order to receive a high school diploma, often must stay in school until they are at least seventeen, yet at age sixteen, they are able to work unrestricted hours.¹⁸⁸

2. Deficiencies in the Enforcement and Penalties for Child Labor Violations

Another area where the FLSA provides inadequate protection is in its provisions for enforcement and penalties for violations of child labor laws. The worst penalty that may be imposed upon an employer is \$10,000 per violation, with a maximum six-month prison sentence for repeat offenders.¹⁸⁹ Although on the surface these penalties would seem to be an adequate deterrent, in reality they do little to stop child labor violations. For example, one major fast food chain, fined \$94,000 for several violations of the FLSA pertaining to child labor, admitted that the fine was "not a severe financial deterrent."¹⁹⁰ Jail sentences are seldom, if ever, imposed. Moreover, the fines collected, which used to go back to the Wage and Hours Division,¹⁹¹ are now funnelled into the Treasury because of a provision of the 1990 Omnibus Budget Recon-

holding that migrant farm workers are not employees under the FLSA, because of the special relationship involved in pickle farming) *with* Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1538-39 (7th Cir. 1987) (court finding migrant farm workers who are employed as pickle harvesters are not independent contractors, and thus are protected by the FLSA, explicitly declining to follow *Donovan v. Brandel*).

¹⁸⁵ Glader, *supra* note 18, at 1456.

¹⁸⁶ *Id.* at 1459.

¹⁸⁷ See generally 29 U.S.C. § 212 (1988); see also notes 111-16 and accompanying text.

¹⁸⁸ See generally 29 U.S.C. § 212 (1988). In an apparent attempt to attach performance in school with the ability to work, the FLSA gives discretionary power to the Secretary of Labor to institute a national work permit requirement, but this power has yet to be invoked. See 29 U.S.C. § 212(d) (1988).

¹⁸⁹ 29 U.S.C. § 216(a),(e) (1988 & Supp. IV 1992).

¹⁹⁰ Lantos, *supra* note 11, at 69 (quoting the President of the Jack in the Box fast food chain, Robert Nugent, Jr.).

¹⁹¹ See Lantos, *supra* note 11, at 68. Note that in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the Supreme Court declared that applying the fines collected for child labor violations to the Employment Standards Administration (ESA) of the Department of Labor was constitutional. Appellee Jerrico, a company that managed forty restaurants found guilty of over 150 violations of the child labor provisions of the FLSA, contended that allocating fines collected to the ESA violated the Due Process Clause of the Fifth Amendment, because it would create "an impermissible risk of bias in the Act's enforcement and administration." *Id.* at 239. The Court, in an

ciliation Act.¹⁹² Because the Wage and Hour Division used these fines to fund child labor abuse investigations, there is now less money for child labor enforcement than ever before.

3. The Effects of Chronic Underfunding and Deregulation

Underfunding and deregulation have led to decreased efforts to end child labor violations and abuses. A General Accounting Office report in November 1989 showed a 250 percent increase in child labor violations between 1983 and November 1989.¹⁹³ Yet, despite this increase in violations, the staff of the Labor Department's Wage and Hours Division, which is responsible for enforcing child labor violations, was cut nine percent, from 961 investigators in 1990 to 878 in 1991.¹⁹⁴ Because these investigators have many other duties, it is estimated that only five percent of their time is spent investigating child labor practices.¹⁹⁵

In addition, the federal government spends little on safety programs, particularly for child farm workers. In 1989, the federal government spent \$180 per mining worker on safety, compared with thirty cents per farmer.¹⁹⁶ Whereas there are no more than four hundred state and federal investigators responsible for investigating child labor violations, there are over 12,000 federal and state fish and game inspectors.¹⁹⁷

In addition to government underfunding, there has been increasing pressure from the private sector—particularly the restaurant and fast food industry—to relax federal regulation of child labor.¹⁹⁸ In 1991, the National Restaurant Association¹⁹⁹ presented the Senate with a proposal for changes in the FLSA concerning child labor.²⁰⁰ Among

unanimous opinion, refuted this argument, finding the function of the investigators to be more akin to a prosecutor or plaintiff, noting that in the event employers dispute any penalties assessed by the Department of Labor, they are entitled to a de novo review before an administrative law judge. *Id.* at 247.

¹⁹² Lantos, *supra* note 11, at 68.

¹⁹³ Golodner, *supra* note 11, at 52.

¹⁹⁴ Lantos, *supra* note 11, at 69.

¹⁹⁵ *Id.*

¹⁹⁶ Butterfield IV, *supra* note 142, at 27.

¹⁹⁷ Lesar, *supra* note 121.

¹⁹⁸ See generally James Morales, *Governmental Restraints on the Employment of Sixteen- and Seventeen-Year Olds: Vestiges of a Bygone Era*, 13 CLEARINGHOUSE REV. 941 (1980).

¹⁹⁹ The National Restaurant Association is a lobbying group, located in Washington D.C., composed of approximately 25,000 restaurant owners. See generally, *Employer Groups Say Certain Limits on Child-Labor Hour Statutes Should Be Eased*, Daily Lab. Rep. (BNA) No. 201, at D-10 (Oct. 20, 1994).

²⁰⁰ Romano, *supra* note 163, at 56. Michael Hurst, the president of the National Restaurant

the changes was a proposal to extend allowable working hours for fourteen- and fifteen-year-olds.²⁰¹ Some commentators have even suggested lifting the bans on hazardous occupations for sixteen- and seventeen-year-olds.²⁰² With this type of subtle pressure being applied to loosen restrictions on child labor, it is no wonder that many Americans have been relatively indifferent to, or unaware of, the extent of the problem.

4. Societal Inaction and Myths About Child Workers

There has always existed in American society a cultural undercurrent that believes, often erroneously, that child labor is no longer exploited, and that at any rate, child labor is good.²⁰³ Senator Charles S. Thomas expressed this sentiment most tellingly in the 1920s:

The real problem in America is not child labor, but child idleness. You cannot convince me that it hurts a child either physically or morally to make him work. Where one child, in my experience, has been injured from work, ten thousand have gone to the devil because of lack of occupation.²⁰⁴

Although this statement was made over sixty years ago, many Americans still hold these sentiments. Commentators have suggested that restrictions placed upon children by child labor laws are no longer justified, and that there is no longer a need to protect children.²⁰⁵ The proponents of increased child labor suggest removing all restrictions from child workers who work for their parents, and allowing children older than fourteen to work in any non-hazardous occupation.²⁰⁶ The experience of the United States in the 1980s and early 1990s, showing a rapid increase in child labor abuse—contributed to by deregulation and underfunding—underlines the fact that *more* restrictions are necessary, not fewer. Despite certain public sentiment, our nation's history suggests that child labor must be constantly watched.²⁰⁷ As one chil-

Association in 1991, is quoted as saying "[w]e cannot discuss this issue constructively if politicians continue to equate clocking out at 7:10 instead of 7 o'clock with 'child abuse,' or equate fast-food kitchens with 'sweatshops.'" *Id.*

²⁰¹ *Id.*

²⁰² Morales, *supra* note 198, at 944.

²⁰³ See generally TAYLOR, *supra* note 135, at 1–23.

²⁰⁴ *Id.* at 1 (citation omitted).

²⁰⁵ See generally Note, *supra* note 20.

²⁰⁶ *Id.* at 601.

²⁰⁷ See TRATTNER, *supra* note 23 and accompanying text.

dren's rights activist has said, "the wolf is always at the door in child labor. All you have to do is look the other way."²⁰⁸

C. *Effects of Illegal and Abusive Child Labor on the Health and Welfare of America's Children*

1. Physical and Statistical Evidence of Child Labor Abuse and Violations in the United States

The most obvious, and possibly the most shocking way to appreciate the extent of the child labor problem in the United States is simply to look at the statistics. Although there is no reliable governmental source of statistics, a survey of other sources points to one inescapable conclusion: child labor is increasingly causing early death and injury.²⁰⁹

The extent of death and injury to child workers in agriculture alone is staggering. More than 23,000 injuries and 300 deaths per year occur among children under sixteen working on farms.²¹⁰ Among farm workers, the Food and Drug Administration estimates over 1000 deaths and 9000 injuries annually due to pesticides, yet children as young as twelve are allowed to work on these farms with little more than a note from their mothers.²¹¹

The statistics for children working in non-agricultural occupations are equally shocking. The General Accounting Office reported that at least forty-eight children under the age of eighteen were killed in non-agricultural occupations in 1987 and 1988, and over 128,000 more were injured.²¹² A study by the Mount Sinai School of Medicine found that, based on worker's compensation data, 1333 worker's compensation awards were provided to New York children in 1986 alone.²¹³

In addition to this escalation in injury and death, child labor violations have also risen at a correspondingly skyrocketing rate. The number of federal child labor violations quadrupled over a seven year period—from 10,000 in 1983 to over 40,000 in 1990.²¹⁴ As large as these figures are, they probably underestimate the number of violations.

²⁰⁸ Butterfield IV, *supra* note 142, at 27 (quoting Jeffrey Newman, Director of the National Child Labor Committee).

²⁰⁹ See *infra* notes 211–17 and accompanying text.

²¹⁰ Golodner, *supra* note 11, at 53 (citing a Mayo Clinic study).

²¹¹ *Id.*

²¹² *Id.* (These statistics use data from 33 states, and do not include agricultural injuries).

²¹³ Lantos, *supra* note 11, at 69. These statistics, however, are most likely below the actual figures. See *id.*

²¹⁴ *Id.* at 68.

Because of underfunding and deregulation, the Department of Labor only responds to child labor complaints; it does not actively seek out violations. The General Accounting Office, based on available data, has estimated that 166,000 fifteen-year-olds alone are illegally employed, over ten times the number of all children found working illegally by the Labor Department in 1988.²¹⁵ In a series of four three-day sweeps in 1990, entitled "Operation Child Watch," the Labor Department, using 500 child labor investigators, found over 29,000 child labor violations.²¹⁶ Unfortunately, aside from these sweeps, it was business as usual at the Department of Labor, with only 13,000 or so violations reported for the remainder of the year.²¹⁷ It is unquestionable, then, that the reported incidents of abuse are an extremely conservative estimate of the true number of abuses.²¹⁸

Another symptom of the abusive use of child labor in America is its influence on school dropout and truancy rates. A 1980 study conducted by Ohio State University revealed that about fifteen percent of male high school dropouts reported that they had dropped out because they "chose to work" or "were offered a good job."²¹⁹ Indeed, studies show that intensive employment during tenth and eleventh grade is associated with increased probability of dropping out of school.²²⁰ Another study showed that children engaged in extensive labor (more than fifteen to twenty hours per week during school) were more likely to use drugs and alcohol, experienced less closeness to their parents, and developed cynical attitudes toward work.²²¹

One area where the school dropout and truancy rates are particularly high is in migrant farm worker communities. Because of the constant migrancy and need for children to contribute to the families' incomes, most children receive little, if any, stable education.²²² Indeed, one commentator notes that "fewer than ten percent of the school-age children are enrolled in migrant education programs."²²³ The dropout rate among migrant children is about eighty percent in Florida and

²¹⁵ *Id.*

²¹⁶ *Id.* Child labor violations were found at about 41% of the businesses investigated, with over 1,000 children under age fourteen being found illegally employed. *Id.*

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ Thomas A. Coens, *Child Labor Laws, A Viable Legacy for the 1980s*, 33 LAB. L.J. 668, 682 (1982).

²²⁰ GREENBERGER & STEINBERG, *supra* note 152, at 152.

²²¹ Giampetro-Meyer & Brown, *supra* note 18, at 564 (citation omitted).

²²² For a good discussion of the difficulty of educating migrant farm children, *see* TAYLOR, *supra* note 135, at 121-49.

²²³ Glader, *supra* note 18, at 1458 (citation omitted).

ninety percent in Texas.²²⁴ Unfortunately, this lack of education is all too common among migrant farm children. One commentator has described the unique educational problems that migrant farmworkers must face:

Education is the classic route out of poverty. A painful reality is that the very migrancy of these farmworkers often forecloses this route to their children. Inherent in the migrant life is the special problem of educating the young. When always on the move, there can be no stable school life for the children. Migrants live in many different places during the school year, their children are constantly in and out of different schools They have no assistance at home because their parents are away all day and often are without means and abilities to be helpful when they return. These children are strangers in a hard and puzzling world.²²⁵

Overall, this description also holds true for children who work in garment factories—who are lucky to receive any schooling at all.²²⁶ Moreover, regulators have not even begun to examine the effect that door-to-door candy selling for eight hours a day, often until late at night, will have on the young victims.²²⁷ In addition to physical injury and death, abusive child labor therefore harms children in yet another way—by inhibiting and destroying their opportunities for education, often leaving them disadvantaged for life.

2. The Sociological Costs of Child Labor Abuses and Violations

Child labor violations and abuses cause damage in yet another way—by invidiously supporting a vicious cycle of poverty for the child worker, and by sabotaging a large portion of the future workforce, who will find themselves unable to compete in an increasingly technological society.²²⁸

In analyzing the sociological and societal damages caused by abusive child labor, it is important to note that some experts believe that working by minors, in general, does more harm than good.²²⁹ Indeed,

²²⁴ Butterfield IV, *supra* note 142, at 27. Alfredo Diaz is a typical example of this problem. The Boston Globe, in an investigatory series in April of 1990, reported that the then fourteen-year-old had not been in school for “nearly a year.” *Id.* at 26.

²²⁵ RONALD GOLDFARB, *MIGRANT FARMWORKERS: A CASTE OF DESPAIR* 46 (1981).

²²⁶ See Golodner, *supra* note 11.

²²⁷ See *supra* notes 162–70 and accompanying text.

²²⁸ See Golodner, *supra* note 11, at 54.

²²⁹ GREENBERG & STEINBERG, *supra* note 152, at 157. Based on the authors’ studies, they suggest that:

the United States' reliance on child labor seems a unique practice when compared to our major economic competitors. In the United States, over two-thirds of our teenagers work, whereas in Japan, that figure is only two percent.²³⁰ This disparity led Congressman Tom Lantos (D, Calif.) to remark that: "[w]hile Japanese teenagers are in school studying math and science and learning about bullet trains, American teenagers are working to deliver pizzas in less than thirty minutes."²³¹

While the value of any type of employment for children can be debated, it seems clear that the use of oppressive child labor, either in law or in fact, does exact a large societal price. One could hardly argue that immigrant children working in sweatshops, or migrant farm children, are receiving many benefits from the brutal, often backbreaking work that they do.²³² Moreover, abusive child employment becomes a vicious cycle, so that by age "13 or 14 they are full-fledged workers."²³³ As one commentator stated, "[t]he problems of poor education, poor health, inadequate day-care facilities, and oppressive child labor all contribute to the plight of the migrant child, creating a vicious cycle of poverty."²³⁴ To one degree or another, this vicious cycle affects all victims of oppressive child labor.

IV. PROPOSED INITIATIVES TO HELP FIND A SOLUTION TO CHILD LABOR ABUSES AND VIOLATIONS IN THE UNITED STATES

The problem of oppressive child labor in the United States is a multi-faceted one, which cannot be remedied by any easy solutions. Arguably, the key to meeting the expansive nature of this problem is threefold. First, changes and revisions in federal legislation, particularly in the FLSA, will help close many of the avenues open to abuse child workers. Second, there must be development of better enforcement and identification procedures within the government. Third, greater efforts should be made to make the extent and nature of the

[e]xtensive part-time employment may have a deleterious impact on youngsters' schooling; that working appears to promote, rather than deter, some forms of delinquent behavior; that working, especially in the high-stress jobs held by many teenagers, leads to higher rates of alcohol and drug use; and that, for many youngsters, working fosters the development of negative attitudes toward work itself.

Id.

²³⁰ Lantos, *supra* note 11, at 67.

²³¹ *Id.* at 67-68.

²³² See *supra* notes 123-48 and accompanying text.

²³³ TAYLOR, *supra* note 135, at 9.

²³⁴ Glader, *supra* note 18, at 1459.

abuse known to those best able to prevent it: parents, teachers, social workers, and employers.

A. *Proposed Changes to the FLSA*

One of the areas most in need of re-examination is the disparity of coverage the FLSA provides to agricultural child workers as opposed to non-agricultural child workers.²³⁵ This disparity becomes particularly troubling when one considers that the death rate for child agricultural workers is the highest for any occupation in the United States.²³⁶ One way for Congress to rectify this is to re-examine the provisions of section 213(c) of the FLSA.²³⁷ Currently, children fourteen or older, employed in agriculture, are not protected by the FLSA, and various exemptions are also provided to exclude a large number of children under fourteen who are employed in agriculture.²³⁸ In order to provide more uniform coverage of the FLSA, Congress should consider modifying this provision in order to encompass more children working in agricultural occupations. In addition, Congress should reconsider section 212(a), which restricts the use of child labor by "producer[s], manufacturer[s], or dealer[s]"²³⁹ In re-examining the distinction that the FLSA has made between agricultural and non-agricultural child employees, Congress should consider extending the protection of the FLSA to agricultural employers by including them within the definitional scope of "producers, manufacturers and dealers."

In re-examining the distinctions drawn between agricultural and non-agricultural child laborers, Congress should also seriously rethink the distinction it has drawn between hazardous occupations in each setting. Section 213(c)(2) currently allows children employed in agricultural occupations to work in hazardous conditions at age sixteen,²⁴⁰ whereas under section 203(l)(2),²⁴¹ the Secretary of Labor may ban the use of children under eighteen in hazardous, non-agricultural occupations.²⁴² In order to extend protection to child agricultural workers

²³⁵ See *supra* Section II (B) for a discussion of the differences in the regulation of agricultural and non-agricultural employment of children.

²³⁶ See generally Butterfield II, *supra* note 5, and accompanying text. The article claims "[i]t is a child labor death and injury rate unparalleled in the nation." *Id.* at 1.

²³⁷ 29 U.S.C. § 213(c)(1)(A),(B),(C) (1988).

²³⁸ *Id.*; see also *supra* Section II (B)(2).

²³⁹ 29 U.S.C. § 212(a) (1988).

²⁴⁰ 29 U.S.C. § 213(C)(2) (1988).

²⁴¹ 29 U.S.C. § 203(l),(2) (1988).

²⁴² The Secretary of Labor has exercised the discretion provided by section 203(l)(2) by promulgating a list of non-agricultural occupations that are banned from employing children.

employed in hazardous occupations, Congress should consider allowing the Secretary of Labor to prohibit children under eighteen from being employed in agricultural occupations that are found to be particularly hazardous, while still allowing the lower age of sixteen for less egregiously hazardous agricultural occupations. This would create a two-tiered system of hazardous agricultural occupation regulation, one that would give the Secretary of Labor discretion in protecting children under eighteen from the more extremely hazardous aspects of agriculture, but would still acknowledge the need for farms, particularly family farms, to employ sixteen- and seventeen-year-olds in agricultural tasks.

Another area of the FLSA that deserves reconsideration by Congress is section 203(l)(1).²⁴³ Section 203(l)(1) currently exempts from FLSA protection all children, regardless of age, who are employed by their parents, with exceptions for children employed in manufacturing or mining, and children employed in occupations found to be hazardous to the health and well-being of sixteen- and seventeen-year-olds.²⁴⁴ In order to strike a balance between the needs of family farms and businesses and the well-being of children under sixteen, Congress should consider granting the Secretary of Labor discretion in prohibiting children from being employed in hazardous conditions by their parents. For example, section 203(l)(1) might be amended to read:

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a child under the age of sixteen years employed by a parent or a person standing in the place of a parent, in occupations declared by the Secretary of Labor to be suitable for the employment of a child under sixteen employed by their parent, subject to regulations promulgated by the Secretary of Labor for the employment of children under eighteen in hazardous occupations) in any occupation.

29 C.F.R. § 570.120 (1993). For a list of these occupations, see *supra* note 101 and accompanying text.

²⁴³ 29 U.S.C. § 203(l)(1) (1988).

²⁴⁴ *Id.* This section reads: "'oppressive child labor' means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in the place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation. . . found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health and well-being) . . ." *Id.*

This change would not prohibit the use of children under sixteen in parent-supervised occupations or necessarily limit these children only to occupations approved by the Secretary of Labor for fourteen- and fifteen-year-olds in general.²⁴⁵ Instead, the Secretary of Labor's regulations would provide specific areas of employment in which children under the age of sixteen could be employed, taking into account the value of children in family-run businesses, the likelihood of closer supervision by parents than by other employers, etc. Again, in restructuring this provision, Congress would maintain a balance between the realities of running a family business and protecting children from abusive child labor, including abuses by parents.

In addition, the Secretary of Labor should closely monitor the regulations that allow for the employment of fourteen- and fifteen-year-olds.²⁴⁶ Section 203(l)(2) allows the Secretary of Labor to promulgate areas of employment where children aged fourteen and fifteen may be employed.²⁴⁷ The Secretary of Labor has subsequently enacted regulations, allowing fourteen- and fifteen-year-olds to obtain employment in a variety of occupations.²⁴⁸ Care should be taken that these regulations do not go too far in allowing fourteen- and fifteen-year-olds to be employed, and these children should be restricted to areas of employment that are found to be extremely safe for the employment of children.

The result of these changes would be a more balanced set of child labor regulations, designed to protect all child workers on a more equal basis by extending protection to child agricultural workers, as well as giving the Secretary of Labor more discretion in prohibiting or allowing child labor in particular occupations. These changes would allow child labor to be utilized in areas that are not detrimental to children, and curtail more strongly the use of child labor in occupations dangerous to the health or well-being of children. In general, these changes would extend Congressional protection of the FLSA to more agricultural child workers, as well as to their non-agricultural counterparts, while acknowledging and providing for the different needs and risks of the agricultural industry. In addition, regulation of hazardous occupations would be more standardized, yet it would still allow for differences between the agricultural and non-agricultural use

²⁴⁵ *Cf.* 29 U.S.C. § 203(l)(2) (1988). For a list of these occupations, see *supra* note 107 and accompanying text.

²⁴⁶ 29 C.F.R. § 570.34 (1993).

²⁴⁷ 29 U.S.C. § 203(l)(2) (1988).

²⁴⁸ 29 C.F.R. § 570.34 (1993).

of child labor. Special regulations would also extend more protection to children who work for their parents, yet they would give the Secretary of Labor discretion in adjusting these regulations to the particularities of this distinct subgroup of child laborers. Overall, Congress could protect children from child labor abuse, yet acknowledge the benefits of employing children in the workplace, when properly controlled.

In re-evaluating the child labor provisions of the FLSA, Congress should also seriously consider reducing the number of hours that children between the ages of sixteen and eighteen are allowed to work. Currently, the FLSA does not restrict the number of hours children over sixteen may work per week.²⁴⁹ As a matter of public policy, Congress should decide whether to place a higher priority on the education and preparation of children for effective competition in the marketplace, or the maximization of the labor of children over age sixteen. In implementing the former priority, Congress could use the FLSA to restrict the number of hours that a sixteen- or seventeen-year-old may work to twenty hours a week during the school year, while allowing unlimited employment during the summer and vacations.²⁵⁰ Again, this approach balances the immediate benefits of employing children over sixteen with the possible long-term detriment that can result from the abuse of this labor.

Finally, Congress should also reexamine the enforcement provisions of the FLSA to ensure that they effectively deter violations of the Act. In *Breitweiser v. KMS Indus., Inc.*, the Fifth Circuit court ruled that the FLSA does not provide a private cause of action in child labor violations, basing its holding on the lack of an explicit cause of action in the FLSA, relying on theories of judicial restraint and strict statutory interpretation.²⁵¹ This absence is a strong detriment to the enforce-

²⁴⁹ Under 29 U.S.C. § 203(l)(1) (1988), oppressive child labor is generally restricted to the employment of children under sixteen, except in certain areas considered hazardous. *Id.* Although the Secretary of Labor has limited the number of hours that fourteen- and fifteen-year-olds may work per week, no similar restrictions have been placed on children over sixteen. *Cf.* 29 C.F.R. § 570.119 (1993); *see also supra* note 107 and accompanying text.

²⁵⁰ Several commentators have suggested that employment of under twenty hours per week during school does not harm students' performance and may actually help it. *See Butterfield II, supra* note 5, at 23. In 1991, legislation was introduced into both the House and Senate that would limit to five hours per day/twenty-five hours per week the number of hours sixteen- and seventeen-year-olds could work while school was in session. *See Lantos, supra* note 11, at 69. (This legislation has not yet garnered enough support to become law).

²⁵¹ *Breitweiser v. KMS Industries, Inc.*, 467 F.2d 1391, 1394 (5th Cir. 1972). The court reasoned that because the FLSA provides for criminal penalties, fines, and injunctions, it would be inappropriate for the court to infer a private cause of action. *Id.* The court pointed to other

ment of child labor laws, because there is no other way for victims or their parents to hold employers liable for violations.²⁵² Because worker's compensation only provides for lost wages and/or medical care, and because many children employed in violation of the FLSA are not covered by worker's compensation, they have no recourse but to hope the Department of Labor imposes fines and/or jail sentences on offenders.²⁵³ In order to provide an alternative means of enforcement, as well as to help compensate for damage inflicted by child labor abuse, Congress should consider providing for a private cause of action in tort for damages for the wrongful death of, or injury to, a child employed in violation of the FLSA.²⁵⁴ This would provide a more effective deterrent to child labor abuse, as well as help compensate for the destruction caused by child labor.

In addition, Congress should examine the allocation of fines collected by the Department of Labor for child labor violations. In doing so, they should mandate that fines collected for child labor violations once again be allocated to the Wages and Hours Division of the Labor Department—the division responsible for investigating violations of the FLSA—instead of diverting them to the Treasury.²⁵⁵ Congress should decide, as a matter of public policy, that these fines are better used for enforcing the FLSA than as a tool to shrink the deficit.²⁵⁶

B. Other Useful Reforms

Although the above refinements of the FLSA are necessary to form a base for ending the abuse of child labor, there are still other

cases where causes of action were necessary, because the remedy provided by the statute was either unclear, nonexistent, or grossly inadequate. *Id.* at 1393. In his dissent, Circuit Judge Wisdom argued that the remedies provided for in the FLSA benefit society as a whole, but do not benefit the individual minor or the minor's heirs in any way. *Id.* at 1394–96 (Wisdom, J., dissenting). He contended that the strong Congressional policy against the illegal use of child labor, combined with the inadequacy of remedies provided, allowed the court to fashion a remedy that would not only benefit society, but compensate the victim for the infringement of his federally created right. *Id.* (Wisdom, J., dissenting).

²⁵² See generally Joseph H. King, Jr., *The Exclusiveness of an Employee's Worker's Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405 (1988).

²⁵³ *Id.*

²⁵⁴ A private cause of action was also part of the legislation introduced into Congress in 1991. Lantos, *supra* note 11, at 70.

²⁵⁵ See 29 U.S.C. § 216(e)(3) (1988 & Supp. IV 1992).

²⁵⁶ In an encouraging sign, a bill to amend the FLSA was proposed by the Senate in January of 1993. S. 86, 103rd Cong., 1st Sess. (1993). This bill would amend the FLSA in several ways. First, it would increase penalties for child labor abusers, by making them ineligible for federal grants, contracts, or loans, for three years. *Id.* at § 102(2)(A). Second, it would direct the Secretary of Labor to publicize the names of child labor violators, particularly within school systems. *Id.* at

changes that should be considered. Funding is the area of greatest concern and most needful of reform. All the regulations in the world will be insufficient if the federal government does not properly fund the Labor Department, particularly its investigatory arm. With fewer than 1000 investigators (a number that continues to shrink) able to donate only five percent of their time to child labor investigation, it is no wonder that child labor abuse has flourished.²⁵⁷ Congress and the Clinton Administration must allocate more resources to the problem, and make more efficient use of the resources that they have.

One way to do this is through an inter-agency approach. State Board of Health and Fire Code inspectors, who already make annual inspections, could work in tandem with the Department of Labor, reporting child labor violations that they see or suspect.²⁵⁸ Additionally, the Department of Labor could work with other agencies, such as the IRS, Social Security, or Worker's Compensation, to pinpoint egregious offenders and likely culprits, and devote more time investigating these businesses. Areas of the country where child labor violations are more prevalent—such as New York, San Francisco, and Texas—could be targeted for higher scrutiny.²⁵⁹ Thus, an increase in funding, justified by the increase in violations, could be combined with more efficient and effective means of enforcement to put sharper and stronger teeth in the FLSA.

C. *Educational Deterrents to Child Labor*

Finally, education must be used as a tool to combat child labor abuses. The first and most important place to start is the school systems of America. Teachers, guidance counselors, and social workers need to be educated as to the nature and extent of child labor violations in this country, and encouraged to report suspicions of these violations, much as they would report suspicions of child abuse. Also, parents must be educated as to the rights of their children, in order to identify abuses as they occur.

§ 102(3). Third, it would require each state to require work permits for all students under age eighteen. *Id.* at § 103. Finally, the bill would also require more in-depth reporting of deaths and injuries to minors on the job, as well extend more protection to child agricultural workers. *Id.* at §§ 104, 106. The House has proposed a similar bill, entitled the "Young American Workers' Bill of Rights." H.R. 1106, 103rd Cong., 1st Sess. (1993). As of this writing, neither of these bills has become law, and both are tied up in committee.

²⁵⁷ Butterfield IV, *supra* note 142, at 27.

²⁵⁸ See generally Golodner, *supra* note 11; Butterfield II, *supra* note 5.

²⁵⁹ See Butterfield II, *supra* note 5, at 27.

A final recommendation is to increase funding for social programs aimed at helping children most likely to enter the workforce too soon—a good example being farm workers. For example, in the Midwest, a program called “Farm Safety Just for Kids” teaches farmers the particular dangers to children on the farm, through speeches and warning labels.²⁶⁰ Although this program has succeeded in informing farmers of the dangers of child labor, it is somewhat of an aberration. Governmental encouragement, in the form of grants and educational programs must be developed, so that society does not remain unaware of the dangers of child labor abuse and violations.

V. CONCLUSION

Oppressive child labor is a problem that, having been ignored and denied, has grown at an astonishing rate. Through a combination of lax enforcement, underfunding, societal apathy, and an influx of immigration, child labor abuse is as bad—and in some areas, worse—than it was in the 1920s. Congress should reexamine this problem in light of the recent rise in child labor abuse, and the toll that this abuse has taken on children, as well as the detriment it imposes to the future productivity of our nation. There are no easy answers. If Congress is to succeed in controlling this problem, it will require a combination of legislative reform, political support, intergovernmental cooperation, and education of the public. By allowing thousands of children to be employed by abusive employers in our fields, restaurants, and sweatshops, our society contributes to their illnesses, injuries, and deaths. Congress needs to distinguish between the productive employment of children and the abusive use of child labor, and take the necessary steps to ensure that thousands of children are not victimized by abusive child labor.

²⁶⁰ Butterfield I, *supra* note 1, at 11. Marilyn Adams, whose eleven-year-old son was trapped and suffocated in flowing corn, started the program. *Id.*