(HIDDEN) IN PLAIN SIGHT: MIGRANT CHILD LABOR AND THE NEW ECONOMY OF EXPLOITATION

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[P]eople often say that [migrant child labor] is something that's hiding in plain sight. But, I mean, it's barely hiding. It is in plain sight. —Hannah Dreier[1]

INTRODUCTION: STORIES FROM THE NEW ECONOMY OF EXPLOITATION

Oppressive child labor in America is both an age-old problem and one that is relatively new. Its old embodiment flourished during the Industrial Revolution of the late nineteenth and early twentieth centuries, especially among poor children, many of whom were immigrants.[2] This began to change only after a century-long battle that pitted anti-child labor activists and

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1. Sabrina Tavernise, *A New Child Labor Crisis in America: Migrant Children are Ending Up in Some of the Most Dangerous Jobs in the Country*, N.Y. TIMES: THE DAILY, at 26:22 (Mar. 9, 2023), [https://perma.cc/XYS6-H6QY].

2. *See* J. Hansan, *Child Labor: The American Era of Child Labor*, VCU LIBRS. SOC. WELFARE HIST. PROJECT (2011), [https://perma.cc/88WB-2C59].

reformers against powerful industries and states' rights advocates.[3] The former sought to eradicate the most exploitative aspects of this practice, which included young children toiling in dangerous workplaces for excessive hours to the detriment of their health, safety, well-being, and future prospects.[4] Assisted by shifting cultural norms, especially with respect to mandatory education and political dynamics during the New Deal Era, these groups prevailed in passing the first federal legislation outlawing the worst forms of child labor with the enactment of the Fair Labor Standards Act ("FLSA") in 1938.[5] For a moment, the nation allowed itself to believe it was free from oppressive child labor and marched forward wrapped in the self-assured rhetoric of progress.[6]

Almost one hundred years later, a "new economy of exploitation" has arisen.[7] In February 2023, Hannah Drier, a New York Times investigative journalist who, along with her colleagues, has interviewed hundreds of migrant children in about half of the states, began reporting her findings in articles revealing that approximately 200,000 migrant children currently work in extremely harmful and hazardous workplaces in clear violation of federal and state laws.[8] The stories Ms. Drier unearthed are gut-

3. *See* Michael Schuman, *History of Child Labor in the United States—Part 2: The Reform Movement*, U.S. BUREAU OF LAB. STAT., MONTHLY LAB. REV. (Jan. 2017), [https://perma.cc/R8RK-SJ2B].

4. *Id*.

5. *Id*.

6. The eradication of oppressive child labor was never true for the poorest of young Americans, often the children of migrant farm laborers; but this group, like their exploited migrant farmworker parents, was and always has been largely ignored. *See* Nina Krauth, *Do Farmers Reap More than Their Child Laborers Sow—The Conflict Between the Fair Labor Standards Act and State Workers' Compensation Laws*, 5 SAN JOAQUIN AGRIC. L. REV. 213, 218, 222 (1995).

7. *See* Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023) [hereinafter *Alone and Exploited*], [https://perma.cc/6A7G-EZ7K].

8. *Id*. ("The Times examination also drew on court and inspection records and interviews with hundreds of lawyers, social workers, educators and law enforcement officials."); Hannah Dreier et al., *Children Risk Their Lives Building America's Roofs*, N.Y. TIMES (Dec. 14, 2023) [hereinafter *Children Risk Their Lives*], [https://perma.cc/9NR4-96A9] (this article is based on interviews with over 100 migrants in nearly two dozen states; it states that some of the interviewed boys began working on roofs when they were still in elementary school).

wrenching and heartbreaking. In stark prose that verges on haunting poetry, she writes:

> Cristian works a construction job instead of going to school. He is 14.
>
> Carolina packages Cheerios at night in a factory. She is 15.
>
> Wander starts looking for day-labor jobs before sunrise. He is 13 . . .
>
> In town after town, children scrub dishes late at night. They run milking machines in Vermont and deliver meals in New York City. They harvest coffee and build lava rock walls around vacation homes in Hawaii. Girls as young as 13 wash hotel sheets in Virginia.[9]

More children, some as young as twelve, work twelve-hour shifts in meat-packing plants de-boning chicken sold at Whole Foods, making rolls in hot ovens for bakeries that supply Walmart and Target, and processing milk in factories that sell to Ben & Jerry's.[10] Others, mostly boys, work in one of the most dangerous construction jobs in the country—roofing.[11] "They wake before dawn to be driven to distant job sites, sometimes crossing state lines . . . carry[ing] heavy bundles of shingles that leave their arms shaking . . . [to] work through heat waves on black-tar rooftops that scorch their hands."[12] Studies have shown that roofing is among "the most dangerous job[s] for minors . . . [o]ne slip can be fatal."[13]

Many migrant children work long, overnight shifts, in part, so that they can attend school during the day, which is a federal government requirement that sponsors of unaccompanied minors must agree to fulfill.[14] Even when they make it to school, they

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9. *See Alone and Exploited*, *supra* note 7.

10. *Id*.

11. *See Children Risk Their Lives*, *supra* note 8.

12. *Id*. ("Roofing is particularly risky; it is the most dangerous job for minors other than agricultural work, studies show.").

13. *Id.* ("About 100 roofers are killed on the job each year, most often in falls, according to the Department of Labor. The government does not publish data about injuries or fatalities among child roofers—a category of workers that is not supposed to exist.").

14. *See Alone and Exploited*, *supra* note 7; Hannah Dreier, *The Kids on the Night Shift*, N.Y. TIMES MAG. (Sept. 20, 2023) [hereinafter *The Kids on the Night Shift*], [https://perma.cc/4F6H-2DDB]; Plyler v. Doe, 457 U.S. 202, 221-23, 230 (1982) (recognizing undocumented children's constitutional right to attend public school free of charge).

have trouble focusing and struggle because it is impossible to stay awake to learn, especially in a foreign language, after working all night in intense jobs that require manual labor, repetitive motion, and constant vigilance to prevent bodily injury.[15] Often, migrant children drop out of school, but they do so reluctantly because they know that learning English can help them obtain better, less physically demanding, jobs.[16]

Cristian, who has been working in construction, is remiss that he has not attended school in two years.[17] Another child, Kevin Tomas, began working at an auto parts manufacturer for Ford and General Motors at age thirteen where "he struggled to lift the heavy boxes" and when "his shift ended at 6:30 in the morning . . . he could not stay awake in school" even though he wished otherwise.[18] Carolina, who works the night-shift stuffing "a sealed plastic bag of cereal into a passing yellow carton" in ten-second increments, manages to attend school but reported to Drier that "[s]ometimes I get tired and feel sick" after she leaves her night shift and that "[h]er stomach often hurt" while she was at school.[19]

Public school teachers in English Language Learner programs across the country have noticed that many if not most of their students work long hours when they are not in school.[20] One teacher who routinely sees "the toll that long shifts take on his students," stated that a girl in his class "was working nights at a commercial laundry, [and] began passing out in class from fatigue and was hospitalized twice."[21] She eventually dropped out of school because she could not keep working and learning—and she had to choose work. This is a common refrain among migrant child workers who are bewildered to learn how much it

15. *See Alone and Exploited*, *supra* note 7.

16. *See* Stephanie L. Canizales, *Work Primacy and the Social Incorporation of Unaccompanied, Undocumented Latinx Youth in the United States*, 101 SOC. FORCES 1372, 1384-85 (2022).

17. *Alone and Exploited*, *supra* note 7.

18. *Id*.

19. *Id*.

20. *Id*.

21. *Id*.

costs to "simply live[] in the United States."[22] One thirteen-year-old, Jose Vasquez, who works twelve-hour shifts, six days a week, stated to Drier, "I didn't get how expensive everything was . . . I'd like to go to school, but then how would I pay rent?"[23] Kevin Tomas added to Jose's sentiment saying, "[i]t's not that we want to be working these jobs. It's that we have to help our families."[24]

Being unable to earn an education, however, pales in comparison to the injuries—and in some cases deaths—that have befallen migrant children who work in extremely hazardous jobs and industries. The factory work that Carolina engages in, for example, is extremely dangerous "with fast-moving pulleys and gears that ha[ve] torn off fingers and ripped open a woman's scalp."[25] A fourteen year-old boy, Marcos, nearly lost an arm while working for a janitorial company that cleans a chicken processing factory owned by Tyson Foods.[26] Marcos had been working overnight shifts cleaning the factory since he was thirteen.[27] A fifteen-year old boy, Antoni, fell almost thirty feet

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22. Canizales, *supra* note 16, at 1382 (In one study, a former migrant child worker, Carlos, "did not anticipate how quickly expenses would accumulate . . . [t]o his surprise, people 'buy everything here,' including the water they drink.").

23. *Alone and Exploited*, *supra* note 7.

24. *Id.*

25. *Id.*

26. *The Kids on the Night Shift*, *supra* note 14. Dreier's reporting is sometimes gruesome and purposefully so. Reporting on Marcos's injury, she wrote:

> After he finished hosing down the machines, he started scrubbing blood and fat off the steel parts with chemicals that, if they hit skin, created welts that could take months to heal. Shortly after 2:30 a.m., he thought he saw a bit of torn rubber glove within the conveyor belt of the deboning area and reached in to grab it. Suddenly, the machine came to life. Across the factory, another worker had failed to see Marcos crouched with his left arm deep inside the assembly line and turned it on. The belt caught the sleeve of Marcos's baggy jacket and pulled him across the floor. Hard plastic teeth ripped through his muscles, tearing open his forearm down to the bone. By the time someone heard his screams and shut off the power, his arm was limp, a deep triangular gash running down the length of it. A rope of white tendons hung from his elbow to his wrist, horrifying the workers who gathered around him. He understood from their faces that something was badly wrong but didn't feel any pain as the wound began gushing blood and he started to lose consciousness.

Id.

27. *Id.*

while working as a roofer on a beach house in South Carolina.[28] Miraculously, he survived but sustained severe brain injuries that have left him unable to perform basic daily tasks.[29]

The horrific stories do not end.[30] Edwin, a fourteen-year-old food delivery worker, was killed when hit by a car on his bike at a Brooklyn intersection; Oscar, a sixteen-year-old, was crushed under a thirty-five-ton tractor-scraper outside Atlanta while working in a construction job; Juan, a fifteen-year-old laying shingles on a roof, fell fifty feet to his death on his first day on the job; Andrés, sixteen-years-old and Crisanto, seventeen-years-old, both died while working as roofers—one from a fall and the other from being electrocuted.[31] Since 2017, the New York Times has unearthed at least a dozen such cases, but more recent information is unavailable because the Department of Labor ("DOL") has not reported on work-related deaths for the past five years.[32]

Dreier's reporting demonstrates that migrant child labor permeates supply chains throughout the United States, including those necessary for the production of beloved American goods such as Cheerios, Lucky Charms, Cheetos, Fritos, J. Crew, and Fruit of the Loom.[33] These popular brands, however, do not, strictly speaking, hire children in contravention of child labor laws. Instead, an elaborate scheme consisting of layers of contractors and subcontractors—what former DOL Wage and Hour Division ("WHD") Administrator David Weil refers to as "the fissured workplace"—permit large corporations to benefit

28. *Children Risk Their Lives*, *supra* note 8 ("He was inching backward collecting shingles when he slipped and fell nearly 30 feet. He slammed into this cement patio. At the hospital, Antoni lay in a coma with severe brain trauma, breathing through a tube in his neck. His skull was fractured, a lung was punctured, and he was bleeding internally throughout his body.").

29. *Id.* ("No rehabilitation facility would accept him without health insurance. Unable to speak or stand, he went back to the trailer he had been sharing with his uncle's family.").

30. *Id.* ("A 16-year-old fell off a roof in Arkansas and shattered his back. A 15-year-old in Florida was burned all over after he slipped from a roof and onto a vat of hot tar. A child in Illinois stepped through a skylight and fractured his spine . . . [o]ne 15-year-old boy from Central America who had been traveling around the country with a crew boss was abandoned last year after being injured on a work site. The boy was found alone and crying in a ditch.").

31. *Alone and Exploited*, *supra* note 7; *Children Risk Their Lives*, *supra* note 8.

32. *Alone and Exploited*, *supra* note 7; *see also National Census of Fatal Occupational Injuries in 2022*, U.S. DEP'T OF LAB. (Dec. 19, 2023, 10:00 AM), [https://perma.cc/2LC7-QZ2K] (excluding workers under the age of sixteen).

33. *See generally Alone and Exploited*, *supra* note 7.

from cheap migrant child labor while professing to abhor child labor practices.[34] In other words, it is often smaller subcontractors—for example janitorial companies that clean Tyson Foods' warehouses—that engage in the unlawful employment of migrant children, not Tyson Foods itself. The fissured workplace has long insulated America's most powerful industries from the immigration consequences of hiring undocumented workers, and this well-worn machinery is now being employed to shield businesses from child labor violations too.

The fissured workplace, though, is merely a symptom of a much larger reason that the new economy of exploitation is imperturbable to traditional calls for legal reform of child labor laws. That bigger problem is that migrant children are situated at the collision of two American legal systems that work against one another: employment and labor law on the one hand and immigration law and policy on the other.[35] The former are designed to protect workers' rights, including the rights of child workers and migrant workers, while the latter, for the most part, are designed to do the opposite by preventing adult migrant workers from lawfully entering the country. The tension inherent in this protect-prevent dyad is further exacerbated by severe labor shortages in America and massive upheavals in migrants' home countries. This legally constructed dilemma encourages exactly the kind of oppressive child labor practices that Dreier has so deftly exposed. In this sense, American industry is not the grand villain of Dreier's story, however tempting it may be to cast companies that profit from child labor in that light.[36] Rather, this crisis is the result of decades of disharmony between U.S.

34. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD AND WHAT CAN BE DONE TO IMPROVE IT 16-18 (2017).

35. Shefali Milczarek-Desai, *Opening the Pandemic Portal to Reimagine Paid Sick Leave for Immigrant Workers*, 111 CAL. L. REV. 1171, 1180-91 (2023).

36. Dreier's reporting shows that corporations and their many layers of contractors and subcontractors understand, perhaps in ways that well-meaning child labor reformers do not, how essential migrant child labor is both for the American economy as well as for migrant children themselves. *See The Kids on the Night Shift*, *supra* note 14; *Alone and Exploited*, *supra* note 7.

immigration law and policy and U.S. employment and labor laws.[37]

The twenty-first century version of oppressive child labor will not be resolved by wholesale adoption of the rhetoric and action used to combat child labor in the nineteenth and twentieth centuries, which relied on child labor laws that were never intended to protect the migrant children who are at the center of today's crisis.[38] Since Dreier's articles were published, however, that is exactly what has happened. Outraged by the level and scope of the migrant child labor crisis, law and policymakers have called for the immediate abolishment of oppressive child labor through enhancement of child labor laws, increased enforcement of existing laws, and harsher penalties for those who violate them.[39] Not only have these traditional proposals failed to help migrant children, they threaten to make their situation worse.[40] As demonstrated by Dreier's reporting, employers who are caught violating child labor laws initially terminate all minors working in violation of the law, only to re-hire them once the enforcement storm has passed.[41] Even when an employer refuses to re-hire a migrant child worker, the child—desperate for work—subsequently finds equally if not more dangerous work deeper in the shadow economy that is even less likely to be regulated by child labor laws.[42] Thus, addressing the contemporary migrant child labor crisis will require more than lop-sided efforts to strengthen child labor laws that are incapable of wide-scale enforcement and constantly undermined by much more powerful anti-immigration laws and policies.

To be effective, responses to the migrant child labor crisis must take migrant children's lived realities into consideration. Unlike the oppressive child labor of the past two centuries, the

37. Milczarek-Desai, *supra* note 35, at 1180-81.

38. *See infra* Section I.A.

39. Hannah Dreier & Luke Broadwater, *Lawmakers Clamor for Action on Child Migrant Labor as Outrage Grows*, N.Y. TIMES (Mar. 3, 2023), [https://perma.cc/LT94-L8UL]; Protecting Children Act, H.R. 4440, 118th Cong. (2023) ("To protect children from oppressive child labor and unsafe workplaces, and for other purposes.").

40. *The Kids on the Night Shift*, *supra* note 14; *Children Risk Their Lives*, *supra* note 8.

41. *The Kids on the Night Shift*, *supra* note 14.

42. *Id.*

new economy of exploitation is built around unaccompanied minors, mostly from Central America.[43] They fled homelands where they and their families can no longer survive due to corrupt or impotent governments, famine, violence, and/or climate change.[44] They made the arduous and dangerous journey north at the mercy of smugglers whom their families took on massive amounts of debt to pay.[45] They entered the United States alone under the auspices of so-called humanitarian immigration policies and, as soon as they were released to sponsors, began searching for work so that they could send money back to help desperate families.[46] These children occupy a new position of precarity—one that is born at the intersection of migration and labor at a moment when the country is riddled with anti-immigration sentiment alongside an insatiable demand for low-wage labor.

While significant legal literature analyzes child labor in the United States, no previous legal scholarship discusses the current migrant child labor crisis. As the first to do so, this Article situates the new economy of exploitation at the confluence of migration and labor to analyze why traditional calls for child labor law reforms cannot successfully address this crisis. This Article then offers a different legal framework—one that centers migrant children's experiences as children, migrants and low-wage workers—to chart a multi-faceted course that might realistically address the challenges faced by migrant child workers who are precariously perched at the intersection of migration and labor. This Article proceeds in the following parts.

Part I presents the tumultuous history of child labor regulation in the United States—a history that provides clues as to why contemporary child labor laws fall far short of comprehensively addressing oppressive, migrant child labor. It

43. *Alone and Exploited*, *supra* note 7; *The Kids on the Night Shift*, *supra* note 14.

44. *Alone and Exploited*, *supra* note 7; *The Kids on the Night Shift*, *supra* note 14; *see also* Deborah Levison, *Thoughts on the Regulation of Child Labor in Agriculture*, 21 U.C. DAVIS J. INT'L L. & POL'Y 81, 82 (2014) (predicting that climate change will force children to migrate in search of work).

45. *Alone and Exploited*, *supra* note 7; *The Kids on the Night Shift*, *supra* note 14.

46. *Alone and Exploited*, *supra* note 7; *The Kids on the Night Shift*, *supra* note 14; 8 U.S.C. § 1232(c)(1) (2018) (Government agencies "shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity . . . .").

then pivots to the contemporary child labor crisis by describing the new economy of exploitation and the unaccompanied migrant children upon which it relies. This Part highlights the similarities and differences between the old and new forms of oppressive child labor to aid in Part II's evaluation of the efficacy of existing child labor laws to address current child labor issues.

Part II sets forth the current U.S. legal landscape surrounding child labor laws, including these laws' failure to protect migrant children. Drawing a parallel between immigrant and migrant ("im/migrant") workers' struggles to access employment and labor law protections and unaccompanied minors' inability to benefit from child labor laws, this Part locates migrant children at the intersection of migration and labor to demonstrate the laws' inability to protect them.[47] Next, Part II surveys the existing legal literature on the topic of child labor and evaluates the recommendations for reform set forth therein. It concludes that these proposals do not satisfactorily address the situation of migrant child workers, most of whom enter the United States alone in search of work, and in fact might worsen their predicament.

Part III posits a new legal framework for understanding and analyzing migrant child labor that considers migrant children's lived realities and utilizes the theory of work primacy from cultural sociology. It argues for centering migrant child workers' experiences in order to make meaningful legal recommendations. This Part draws on international child labor scholarship as well as qualitative interviews of former migrant child workers. Part III then outlines a multi-pronged approach that might be used to holistically address the predicament of migrant children who cross into the United States for the express purpose of working and who have no choice but to work.[48]

This Article concludes by exhorting contemporary child labor reformers not to fall into the trap of earlier counterparts who pursued one-size-fits-all legislation to abolish child labor without

47. Milczarek-Desai, *supra* note 35, at 1218 Appendix A.

48. *Alone and Exploited*, *supra* note 7; *The Kids on the Night Shift*, *supra* note 14 (describing the various reasons migrant children must work, including to pay off debts to smugglers; send remittances to support desperate families in their countries of origin; and pay for rent, food, and clothing in order to survive in the United States).

considering the on-the-ground consequences these laws would have on the children they hoped to protect. This will require more research and data than we currently have regarding unaccompanied migrant children, their needs, and their experiences in their countries of origin as well as in the United States.

I. CHILD LABOR IN AMERICA THEN AND NOW

Before analyzing the current migrant child labor landscape, it is imperative to understand America's tumultuous history of child labor regulation because it illuminates the shortcomings baked into existing legal structures that impact the law's ability to address today's crisis. This, in turn, necessitates reviewing the complex and multi-layered social, economic, and legal milieu that existed from the passage of the first state child labor laws in the early 1800s to the enactment of national child labor standards through provisions of the FLSA in the late 1930s.

A. Child Labor in Historical Perspective

Child labor is as old as the United States, and, consequently, so is the debate over whether, and if so how, child labor should be regulated to safeguard young workers who are otherwise at risk of exploitation.[49] The widespread acceptance of child labor was a concept imported from England during the colonial era and viewed as a moral good necessary for a young nation's economic growth and to further a Puritan ethos that extolled the virtues of work while preventing the societal burdens of pauperism.[50] Framing child labor as a moral virtue also furthered the significant economic value child labor held for America's largest early industries such as cotton spinning, textile manufacturing, and, of

49. JOHN A. FLITER, CHILD LABOR IN AMERICA: THE EPIC LEGAL STRUGGLE TO PROTECT CHILDREN 12 (2018) ("Anyone who studies child labor acknowledges that throughout history, in every region of the world, children have labored. The history of the United States offers no exception. From the colonial period through the present, kids in America have always worked."); BETSY WOOD, UPON THE ALTAR OF WORK: CHILD LABOR AND THE RISE OF A NEW AMERICAN SECTIONALISM 2 (2020) ("child labor in America can be traced back to colonial child apprenticeship, the Poor Law in England, and the Puritan ethic of virtuous work").

50. FLITER, *supra* note 49, at 12.

course, agriculture.[51] Children not only had small, nimble hands and fingers necessary for some of these jobs, but they also constituted cheap labor that could be paid orders of magnitude less than adult workers.[52] Moreover, children were often obedient workers who were less likely to protest dismal working conditions and low pay, especially since many of them were being sent to work by their parents.[53]

Having become an integral component of the American economy early on, child labor exploded exponentially with the advent of the nineteenth century's Industrial Revolution. There were two interrelated reasons for this. First, large corporate industries such as "railroads, steel, oil, mining, meat packing," and food production grew more powerful and prevalent during this period and began relying on the cheap labor of children from poor families who had no choice but to require all family members, including children sometimes as young as four, to work and earn an income to support the family.[54] Second, the Industrial Revolution drew large numbers of poor European immigrants to the United States, and, since public assistance programs did not exist at the time, immigrant children's labor was necessary for the survival of entire immigrant households.[55] Indeed, child labor in

51. *Id.* at 17-18.

52. *Id.* at 18 (For instance, "the father of American manufacturing initially employed children between seven and twelve years old to work at his Rhode Island mill, and by 1800 he employed over a hundred children in his factory.") (internal quotations omitted).

53. *Id.* at 41. However, there are instances in U.S. history where child workers protested their work conditions such as when girls who worked in cotton mills staged some of the first strikes in that industry in the 1830s. *Id.* at 19.

54. FLITER, *supra* note 49, at 3, 23-24, 26. The breadth of work children performed during this time period was astounding—they "labored as tinsmiths, paint scrapers, blacksmith shop assistant, breaker boys, errand boys, engravers, cigar makers, porters, office boys, finishers for dresses and coats, and wagon drivers. They worked at sewing machine, insect powder, ink, and twine factories" as well as hundreds of other jobs. *Id.* at 23-24. A New York Times editorial from 1871 stated "that nearly two thousand children under fifteen, with some as young as four, were found working in tobacco factories." *Id.* at 24; *see also* Symore Moskowitz, *Save the Children: The Legal Abandonment of American Youth in the Workplace*, 43 AKRON L. REV. 107, 132 (2010) ("Massachusetts passed [a] child labor law in 1836 and an asymmetrical web of state laws spread during the next 100 years.") (internal citations omitted).

55. FLITER, *supra* note 49, at 3-4, 23-24 ("Mass immigration . . . brought millions of poor Irish, French Canadians, Germans, Poles, Italians, and other ethnic groups into the industrial cities of the Northeast and Midwest as a cheap source of labor.") (reports by officials inspecting factories after some child labor laws were passed revealed that large numbers of factory workers were immigrant children); WOOD, *supra* note 49, at 10.

America quickly became synonymous with the dismal conditions that had once existed in Dickens's England.[56]

The earliest movements against child labor in the United States arose in New England and focused on the harm that excessive work did to children, including that "long hours at arduous tasks injured the health and education of future citizens."[57] It was the second part of this argument—that work interfered with children's education, leading to an illiterate and uneducated populace that could not meaningfully participate in the nation's democracy—that became the focus of early child labor law advocates.[58] Reformers pointed to findings that thousands of child laborers could not write, read, articulate facts about the world beyond their homes and jobs, or demonstrate a basic working knowledge of American history.[59] In this way, early condemnations of child labor went hand-in-hand with the movement to increase mandatory education for children because children's work hours had to be limited so they could attend school. This resulted in the first so-called child labor law in the country, introduced in Connecticut in 1813 by a former revolutionary war officer who owned a mill, mandating that employers "provide schooling for their young employees and made factory owners responsible for the moral education of their [child] workers."[60] Similar sentiments were echoed by officials and reformers throughout New England during the early to mid-1800s, and "[t]heir efforts helped secure the first compulsory school attendance laws" in the nation.[61]

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56. FLITER, *supra* note 49, at 23.

57. *Id.* at 20. Southern child labor reformers existed too, and they often referred to child labor as "white child slavery" given that black children (and adults) were not permitted to work in many of the mills and factories that employed white children due to segregation. *Id.* at 24.

58. *Id*. at 20 ("Some of the earliest calls for reform noted that child labor resulted in masses of illiterate children who, when grown to adulthood, would not be able to contribute to representative democracy."). These fears continued throughout the Nineteenth Century, with the New York Times in 1871 warning that "poor working children will 'swell the great mass of ignorant voters who now threatens the very structure of our society.'" *Id*. at 24.

59. *Id. at* 24-25. Some children even believed that "the world might be a hundred miles long." *Id*. at 24.

60. *Id.* at 20.

61. FLITER, *supra* note 49, at 21.

Child labor laws followed close behind school attendance laws and sought to address several issues at once: setting a minimum working age, curtailing the number of hours children could work by creating a maximum work hours requirement, and ensuring children's safety and health by prohibiting certain types of work altogether.[62] From 1848 to 1857, Pennsylvania enacted a law stating that children younger than twelve could not work in mills and factories, New Jersey created a ten-year age limit for manufacturing, Rhode Island legislated that children younger than twelve could not work in factories, and Connecticut set the minimum age for factory and manufacturing work at ten years of age.[63] By the time the Civil War began in 1861, seven states had also legislated the maximum number of hours children could work and typically restricted children to work "twelve- to thirteen-hour days, six days a week."[64] Although this amount of work may seem excessive by today's standards, it was a radical departure from the custom at the time, as evidenced by the fact that both parents and employers regularly violated these laws by requiring under-age children to work more hours than they were permitted often in jobs that were considered unsafe and unfit for children.[65]

Indeed, this uneven patchwork of state child labor laws, mostly confined to New England, were largely ineffective due in large part to a near-total lack of enforcement.[66] This was not surprising given that states did not yet have "professional administrative system[s]" for labor enforcement and instead left enforcement up to individuals through private lawsuits.[67] Because poor parents often required their children to work, they were unlikely to sue employers who employed their children in contravention of child labor legislation.[68] Employers not only

62. *Id.*

63. *Id.* at 21-22.

64. *Id.* at 22. The concept of child protection laws also did not arise until this time period. Howard Markel, *Case Shined First Light on Abuse of Children*, N.Y. TIMES (Dec. 14, 2009), [https://perma.cc/D86S-4C99] (reporting on the first child abuse case to result in legal action in New York in 1874).

65. FLITER, *supra* note 49, at 22.

66. *Id.* at 7; WOOD, *supra* note 49, at 88.

67. FLITER, *supra* note 49, at 7, 21.

68. *Id.* at 26.

had little to no impetus to comply with child labor laws, they had large incentives to violate them because, as they regularly complained, they experienced steep losses in market share given that many states—especially those in the South—freely used child labor to their economic benefit due to the absence of child labor regulations in those states.[69] This meant that despite early child labor laws, child labor thrived in the United States as underscored by the 1880 census, which found that the American workforce was comprised of approximately 1.1 million children ages ten to sixteen, or one out of every sixteen workers.[70]

By the early 1900s, child labor reformers, acknowledging that child labor laws limited to northern states were ineffective in combatting child labor, coalesced into a national movement by forming the National Child Labor Committee ("NCLC").[71] Importantly, the NCLC initially pledged not to advocate for a national child labor law due to strong objections within its ranks to federal interference with local governance.[72] The stated purpose of the early national movement against child labor was "'not to advance federal legislation' but 'to aid in creating and interpreting a national sentiment upon the subject of child labor' that could become 'operative under local conditions and through the specific laws of each of our several States.'"[73] In other words, the NCLC's more progressive members, many of whom hailed from northern abolitionist families, tacitly agreed not to challenge members who vehemently objected to federal interference with the "new 'Southern way of life.'"[74] This is where the story of America's child labor laws takes an unexpected turn.

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69. *Id.* at 25.

70. *Id.* (this number was admittedly an undercount since children under ten years of age who worked were not part of the census figures). Additionally, even Northern states "with child labor laws on the books [were] . . . full of loopholes, and not strictly enforced." *Id*. at 43. For example, "[t]he word 'knowingly' was inserted into many state child labor laws, providing additional indemnity for employers." WOOD, *supra* note 49, at 88.

71. WOOD, *supra* note 49, at 71.

72. *Id.* at 72 (stating that Edgar Murphy, the "'founder and father' of the NCLC was insistent that 'national' did not mean 'federal' . . . [t]he national committee was 'not to act as a substitute for State committees nor to cross the lines of local initiative; but to serve in relation to existing committees as a clearing house of information and suggestion'").

73. *Id.*

74. *Id.* at 72-73.

The NCLC framed child labor as the "new 'white child slavery,'" stating that dismal working conditions in factories and mills oppressed poor white children by threatening their health, robbing them of an education, and stunting their physical and mental development.[75] Although reformers targeted industries that relied heavily on child labor in both northern and southern states, they were especially critical of southern states, most of which lacked child labor regulations.[76] In an attempt to shame the South and its industries into curbing child labor, the NCLC took the view that child labor was "a crisis of white racial deterioration," and stoked Jim Crow fears by warning that permitting poor white children to work in abysmal conditions would allow black children and communities to gain advantages over whites.[77] The "'founder and father' of the NCLC," Edgar Murphy, a pastor from Montgomery, Alabama, openly "spoke and wrote about the necessity for Jim Crow even as he forged alliances with the most prominent 'Progressive' reformers from the North over the issue of child labor."[78] A popular article at the time echoed the NCLC's discourse by stating that the "future strength of the nation was under threat" as a result of white child labor and "North and South had 'banded [together]' to 'save the [white] children of the nation.'"[79]

By framing child labor in this way, reformers also "linked the physical, mental, and spiritual degeneration of [white] child laborers with the fate of American civilization," implying that if the nation did not eradicate white child slavery, it would negatively impact the "superiority of American values, the

75. *Id.* at 95.

76. WOOD, *supra* note 49, at 87.

77. *Id.* at 4, 63. The NCLC went so far as to support the book *Children in Bondage*, which argued that "the South's new 'white child slavery' was worse than the South's old slavery . . . describ[ing] the 'negro of the old days' as 'well fed and sure of shelter,' 'singing as he toiled,' and 'finding time to weave . . . a poetic folklore,' whereas the new white slavery 'suck[ed] life dry of all vigor and joy.'" *Id.* at 95.

78. *Id.* at 72-73. Murphy's crusade against white child labor began after he toured Montgomery's cotton mills and was "[s]hocked by the number of poor white children working at the mills." *Id.* at 51.

79. *Id.* at 77.

Christian faith, and the Anglo-Saxon race."[80] This concern was especially salient at the turn of the twentieth century when America was engaged in empire building through the Spanish-American War and other colonial enterprises.[81] The NCLC's rhetoric resonated strongly with imperialist-minded politicians, including President Theodore Roosevelt, who became an honorary member of the NCLC and spoke out against child labor even though he did not, at least initially, support the creation of federal legislation to eradicate it.[82]

The strongest political voice against child labor was Senator Albert J. Beveridge from Indiana, who was "one of the best known and most outspoken imperialists in the US Congress."[83] Consistent with the NCLC's arguments, Beveridge's condemnation of child labor was infused with "a concern for the strength of the so-called American race" and a conviction that child labor should be eliminated through federal legislation.[84] Moreover Beveridge, who had worked on earlier laws like the Meat Inspection Act that permitted federal regulation of state activity through the Constitution's Commerce Clause, believed that child labor, like meat processing, could be regulated on a federal level in a constitutional manner.[85] In 1906, Beveridge,

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80. *Id.* at 74, 76; FLITER, *supra* note 49, at 51 (stating that it was believed that "[c]hild labor . . . stunted the physical and intellectual growth of children, which in turn produced future generations of degenerates that threatened the health of the nation").

81. WOOD, *supra* note 49, at 78, 79; FLITER, *supra* note 49, at 51; *see also* Daniel Immerwahr, *How the U.S. Has Hidden Its Empire*, THE GUARDIAN (Feb. 15, 2019, 1:00 AM), [https://perma.cc/JWL8-ZXYC] ("At the turn of the 20th century, when many were acquired (Puerto Rico, the Philippines, Guam, American Samoa, Hawaii, Wake), their status was clear. They were, as Theodore Roosevelt and Woodrow Wilson unabashedly called them, colonies.").

82. FLITER, *supra* note 49, at 51; WOOD, *supra* note 49, at 78, 82 (Although Roosevelt decried child labor, he was wary of meddling in what he considered to be states' duties and stopped short of supporting federal legislation regulating child labor).

83. FLITER, *supra* note 49, at 50-51; WOOD, *supra* note 49, at 78. Indeed, "framing the national child labor problem in popular discourse resonated with questions of race, empire, and civilization that Beveridge had been interested in for years." WOOD, *supra* note 49, at 79.

84. FLITER, *supra* note 49, at 51; WOOD, *supra* note 49, at 79. For example, Beveridge "made an appeal to white racial solidarity: the white race could not 'keep superior by *asserting* superiority . . . the South is face to face with the situation of their white children in the mills and their black children in the schools.'" WOOD, *supra* note 49, at 82.

85. WOOD, *supra* note 42, at 79; FLITER, *supra* note 49, at 50, 54, 60 (given staunch states' rights defenders in Congress during the post-Reconstruction Era, Beveridge was well aware that federal legislation must be firmly located within the Constitution so as not to be considered an unlawful overreach of federal power—for example, the Meat Inspection Act,

along with his counterpart in the House, Henry Parsons, introduced the "Beveridge-Parsons Bill"—it was the first law to propose regulation of child labor on a federal level.[86] Thus, the movement that ultimately resulted in the first federal attempt to regulate child labor was firmly rooted in the belief that poor white children must be freed from oppressive labor so that they may thrive and take their proper place in American society in order to preserve the racialized hierarchy of the nation.[87]

The Beveridge-Parsons Bill, however, was doomed to fail. Southern senators stood firmly against federal child labor regulations, which they characterized as unlawful incursions of federal authority into purely local matters.[88] Others, including President Roosevelt, refused to back the bill for fear that it was an unconstitutional exercise of congressional power and might be struck down by the Lochner Era Supreme Court.[89] By 1908, the Beveridge-Parsons Bill was dead and for almost a decade after, no serious attempt was made to enact federal child labor legislation.[90]

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which created federal oversight of the entire nation's meat processing industry, banned interstate shipment of uninspected meat thereby placing the law within Congress's Commerce Clause power).

86. WOOD, *supra* note 49, at 79-80; FLITER, *supra* note 49, at 52-54. Like the Meat Inspection Act, the Beveridge Bill "prohibited common carriers (railroads and steamboats) from transporting the products of factories and mines unless the business owners could produce a certificate stating that no child under fourteen years of age was employed at the establishment." FLITER, *supra* note 49, at 52. The NCLC was divided on the Beveridge Bill given their earlier agreement not to pursue federal legislation in support of their southern members' dedication to state's rights; in the end, however, the NCLC endorsed the law over the objection of Edward Murphy, who resigned from the organization as a result. WOOD, *supra* note 49, at 80; FLITER, *supra* note 49, at 51, 56.

87. WOOD, *supra* note 49, at 77, 82 ("Echoing the discourse of NCLC reformers," an article indicting child labor published in 1906 "created a stir" by stating that, "[t]hese are not the children of recent immigrants . . . nor are they negro children . . . [t]hey are white children of old and pure colonial stock" who are being "starved, stunted, and stunned").

88. FLITER, *supra* note 49, at 59-64; WOOD, *supra* note 49, at 82.

89. FLITER, *supra* note 49, at 59, 71-72 (explaining that the U.S. Supreme Court's decision in Lochner v. New York, 198 U.S. 45 (1905), which defended and upheld business interests against a New York law requiring maximum work hours for bakers, was viewed as potentially limiting the ability to enact child labor laws). Initially, President Roosevelt's successor, President Woodrow Wilson, similarly believed that federal child labor legislation would constitute congressional overreach and wrote that "[i]f the power to regulate commerce between the states can be stretched to include regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization and action of the country." WOOD, *supra* note 49, at 90.

90. FLITER, *supra* note 49, at 64-65; WOOD, *supra* note 49, at 87.

In the meantime, the number of children working in dangerous and dismal conditions increased. In 1912, "one million children under the age of sixteen were employed in industry . . . while another million were estimated to be working in agriculture."[91] Although there are no official records of children's workplace injuries from this era, historians piecing together child labor in the early twentieth century have painted a grim picture in which children routinely suffered from exhaustion and injury.[92] A growing national consciousness around the problems of child labor, created in part by the highly publicized debates regarding the evils of child labor that surrounded the Beveridge-Parsons Bill, led to an increase in state child labor laws.[93] By 1912, "thirty-four states and the District of Columbia had established age limits, most commonly fourteen," for children working in factories.[94] Some states also prohibited children under sixteen from working at night and prevented them from working more than eight hours per day.[95] These laws, however, continued to lack any meaningful enforcement and contained numerous loopholes, which kept the NCLC and their allies working towards a national solution to the child labor problem.[96]

After significant political debate and maneuvering, Congress finally passed the first federal law regulating child labor in the United States in 1916, known as the Keating-Owen Act.[97] The Senate debate over the law's passage focused on whether the bill "fell within the limits of the congressional power to regulate interstate commerce . . . [and specifically], [t]he crux of the debate was to what extent the commerce clause gave Congress the power to regulate capitalism on the basis of morality."[98] By

91. WOOD, *supra* note 49, at 88.

92. Alan Derickson, *Making Human Junk: Child Labor as a Health Issue in the Progressive Era*, 82 AM. J. OF PUB. HEALTH 1280, 1281-82 (1992).

93. WOOD, *supra* note 49, at 86, 88.

94. WOOD, *supra* note 49, at 88; *see* FLITER, *supra* note 49, at 69 ("From 1902 to 1909, forty-three states passed significant child labor legislation, either new laws, including in southern states, or strengthening existing statutes.").

95. WOOD, *supra* note 49, at 86.

96. *Id.* at 88, 89; FLITER, *supra* note 49, at 69 (commenting that state laws "varied widely . . . in their stringency and enforcement" and contained numerous exemptions that "seriously weakened the fourteen-year minimum" requirement).

97. FLITER, *supra* note 49, at 86; WOOD, *supra* note 49, at 101.

98. WOOD, *supra* note 49, at 101.

this point, few politicians disputed that "child labor was an 'evil' that should be regulated in some manner" but senators vehemently argued over whether that evil "had already been committed before the interstate transport had taken place or whether interstate transportation should be considered a 'necessary instrument' that enabled that evil."[99]

After President Woodrow Wilson signed the bill into law, the Democratic Party to which he belonged "distributed placards that read: 'Lincoln freed the slaves; Wilson freed the children.'"[100] This rhetoric mirrored the concerns animating supporters of the earlier Beveridge-Parsons Bill. One popular publication supporting a national law unabashedly stated that the children who would benefit from child labor regulation "are not the children of recent immigrants . . . . Nor are they negro children who have shifted their shackles from field to mill. They are white children of old and pure colonial stock."[101] In this way, the nation's first law regulating child labor continued to be motivated by a desire to safeguard America's racial hierarchies by providing protections, first and foremost, to poor, white children.[102]

Despite the persuasive power of the moral argument against white child labor, the drafters of the Keating-Owen Act knew they would likely face constitutional challenges in court.[103] For this reason, they chose to indirectly regulate child labor through the Constitution's Commerce Clause, which gives Congress the authority to regulate interstate commerce.[104] Specifically, the law prohibited companies from shipping their products across state lines if those products were made by children in contravention of the law's requirements.[105] The law forbade factories, mills, and canneries from employing children under the age of fourteen and prohibited other manufacturers from employing children between

99. *Id.* at 101-02.
100. *Id.* at 102.
101. *Id.* at 94.
102. *Id.* at 94-102.
103. WOOD, *supra* note 49, at 101; FLITER, *supra* note 49, at 88.
104. H.R. 8234, 64th Cong. (1916).
105. FLITER, *supra* note 49, at 87; WOOD, *supra* note 49, at 101.

fourteen and sixteen years of age for more than eight hours of work per day, six days a week, or at night.[106]

Perhaps most concerning to states' rights advocates, the law also authorized the Secretary of Labor to enter and inspect any workplace covered by the law, seize any products made in violation of the law within thirty days of entering interstate commerce, and impose civil fines of $200 to $1,000 as well as criminal penalties that could result in up to three months' worth of imprisonment.[107] During the time the law was in effect, officials inspected over seven-hundred factories, mills, and mines and found almost three-hundred violations.[108] Nine months after its passage, however, the Keating-Owen Act was struck down as unconstitutional by the U.S. Supreme Court in *Hammer v. Dagenhart*.[109]

At issue in *Hammer v. Dagenhart* was whether the Commerce Clause permitted Congress to regulate child labor that occurred in the states.[110] The lawsuit was filed by a father in North Carolina who worked in a cotton mill alongside his thirteen- and fifteen-year-old sons.[111] Mr. Dagenhart, supported by the Southern Cotton Manufacturers, argued that as a man of modest means, he needed his sons to work in the cotton mill in order to support their family, but that the law prevented his younger son from working at all and limited his older son from working more than eight hours per day.[112] In a 5-4 decision, the Court held that while the law's limits on child labor were in the public's interest, they were an unlawful exercise of congressional authority because the making or production of goods did not, in and of itself, implicate interstate commerce.[113]

The Court contrasted earlier commerce clause legislation it had upheld by stating that in those cases, the actual goods being

106. FLITER, *supra* note 49, at 87.

107. *Id.* at 87 (the law was enforced by the Child Labor Division of the Children's Bureau).

108. *Id.* at 88 (additionally, "[c]lose to one thousand children were discovered working more than eight hours a day").

109. Hammer v. Dagenhart, 247 U.S. 251 (1918).

110. *Id*. at 269.

111. FLITER, *supra* note 49, at 88.

112. *Id.* at 88; WOOD, *supra* note 49, at 106.

113. *Hammer*, 247 U.S. at 272.

transported—such as alcohol, lottery tickets, or prostitutes—were harmful whereas in the case of goods made by unlawful child labor, "[t]he goods shipped are themselves harmless."[114] The Court distinguished the previous cases because there "the use of interstate transportation was necessary to the accomplishment of harmful results," but that was not the case here because goods made by children were not in and of themselves harmful once they were shipped through interstate commerce.[115] In other words, the Court opined that the harm that Congress sought to address through the Keating-Owen Act—child labor—occurred before the goods regulated by the law were placed within the stream of commerce, setting those goods outside the purview of the Constitution's Commerce Clause. In its closing salvo, the Court harshly admonished Congress for usurping a "purely state authority," invoking the Tenth Amendment's reservation of powers to the states that are not expressly delegated to the federal government.[116]

Legal scholars, reformers, and the media issued scathing critiques of *Hammer v. Dagenhart*, especially given the four-justice dissent, penned by and read from the bench by Oliver Wendell Holmes and joined by Louis Brandeis.[117] In it, Holmes argued that the regulation of goods made by child labor was a matter that fit squarely within Congress's Commerce Clause powers because "[t]he act does not meddle with anything belonging to the States" since as soon as "they seek to send their products across the state line, they are no longer within their rights."[118] Holmes also pointed to earlier legislation that the Court had upheld, including congressional acts taxing products

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114. *Id.* at 270-72.

115. *Id.* at 271-72.

116. *Id.* at 275-76. The Court's rebuke of Congress was just shy of hysterical:

> It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend . . . . [I]f Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

Id. at 276.

117. FLITER, *supra* note 49, at 91.

118. *Hammer*, 247 U.S. at 281.

such as oleomargarine, to argue that it was disingenuous for the Court to say that products could not be subject to federal regulation if they were produced within and regulated by states.[119] Even though Holmes's argument did not carry the day, it contained the seedlings of the next federal attempt to regulate child labor. Soon after the decision, Representative Keating "suggested that Congress might tax goods from factories that employed children" and Congress turned to debating the use of its taxing power to do what the Commerce Clause could not.[120]

In February 1919, Congress passed a second law to regulate states' use of child labor through what came to be known as The Child Labor Tax Law.[121] Spurred in part by a sharp increase in child labor due to industrial needs during War World I, which the United States entered in 1917,[122] the law levied "an excise tax of 10 percent on the profits derived from any mills, factories, or canneries where children under the age of fourteen had been employed during the year."[123] This law was also struck down by the U.S. Supreme Court.[124] Those in favor of child labor regulation were furious at the Court, and more determined than ever to find a way to "abolish completely child labor."[125] Some of them believed that the Child Labor Tax Law case "was a blessing in disguise, since indirect methods of abolishing child labor—by means of interstate commerce or the taxing power—were actually too limited."[126]

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119. *Id.* at 278-79.

120. FLITER, *supra* note 49, at 94.

121. WOOD, *supra* note 49, at 124.

122. FLITER, *supra* note 49, at 96-98.

123. WOOD, *supra* note 49, at 124; Child Labor Tax Law, ch. 18, 40 Stat. 1138 (1919). The Child Labor Tax Law was not the only attempt to curb child labor during the war years. The War Labor Policies Board, "chaired by Felix Frankfurter, a Harvard-trained lawyer who had an established reputation as a social reformer" created a national policy whereby federal contractors could not "directly or indirectly employ child labor contrary to provisions contained in the Keating-Owen Act." FLITER, *supra* note 49, at 97.

124. Child Labor Tax Case, 259 U.S. 20, 36, 39 (1922) ("The docket title of this case is *J.W. Bailey and J.W. Bailey, Collector of Internal Revenue for the District of North Carolina, v. Drexel Furniture Company*.") (holding that the tax at issue was not an excise tax but a coercive measure to impermissibly regulate child labor, which the Tenth Amendment reserved to the states).

125. WOOD, *supra* note 42, at 125.

126. *Id.* at 124.

In that spirit, reformers and activists set about to pursue what in their minds would end child labor once and for all—a constitutional amendment that unequivocally provided Congress with the constitutional authority to pass child labor legislation.[127] Despite broad support, passage in both houses of Congress by large majorities, and a fifteen-year ratification run, this strategy, too, ultimately failed.[128] A coalition of corporate interests including manufacturers, mill owners, agricultural businesses, small farmers, rural voters who opposed progressive reformers on a number of cultural issues,[129] and southern fear of federal authority over purportedly purely local matters came together to soundly reject the amendment in every single southern state but one and even in some non-southern states such as Massachusetts.[130] Although the story of child labor regulation in the United States did not end with the defeat of the Child Labor Amendment, it "signaled not only a rejection of federal authority over child labor but also the emergence of a collective resistance to the modern bureaucratic state that would persist for decades to come."[131] A version of this resistance continues to hobble child labor laws today, even though they are now ubiquitous on both federal and state levels. But to understand the contemporary plight of federal child labor laws, it is first important to understand the context in which they finally came to be—a political calculation that doomed them to limited success from the very beginning.

Two forces are often cited for the eventual passage of child labor regulations within the landmark federal wage and hour legislation known as the FLSA. One was the Great Depression, which "led many [desperate] employers to replace adult workers with children," resulting in organized labor demanding that "all

127. H.R.J. Res. 184, 68th Cong. (1923); WOOD, *supra* note 49, at 124-47; FLITER, *supra* note 49, at 124-44.

128. FLITER, *supra* note 49, at 124-25.

129. For instance, a major organization opposed to ratification of the Child Labor Amendment, the National Committee for the Protection of Child, Family, School, and Church, argued against "government interference with parental authority, an agrarian way of life, and religious education." WOOD, *supra* note 49, at 150.

130. *Id.* at 145-46; FLITER, *supra* note 49, at 126 (stating that Arkansas was the only southern state to ratify the Child Labor Amendment).

131. WOOD, *supra* note 49, at 146.

available jobs . . . go to adult workers."[132] The other was the U.S. Supreme Court's decision to invalidate the National Recovery Administration ("NRA"), which was created through executive order by President Franklin Roosevelt as an emergency measure to provide relief from the disastrous impacts of the depression.[133] After the Court struck down the NRA, an executive order that had far-reaching implications well beyond child labor regulations, Roosevelt threatened the Court with a court-packing plan that would dilute the votes of justices on the Court who regularly ruled against New Deal Era measures that Roosevelt supported.[134] What followed, for reasons that historians and legal scholars continue to debate, were a series of Court decisions broadening the interpretation of Congress' power under the Constitution's Commerce Clause.[135]

Seeing this as an opportunity to finally pass federal legislation addressing workers' rights that might survive Supreme Court review, Roosevelt and his administration worked with allies in Congress to pass the FLSA, which contained "a clause prohibiting goods produced with the labor of children under sixteen in industries engaged in or affecting interstate commerce."[136] Because the law would face staunch opposition from southern congressmen who continued to bristle at the thought of any manner of federal workers' rights requirements, including child labor regulations, the bill had to be carefully crafted to fit within Congress' power to regulate interstate

132. *Id.* at 150.

133. *Id.*; *see also National Recovery Administration Publications*, GOVINFO, [https://perma.cc/QA54-GPKZ] (last visited Mar. 12, 2024) (describing the National Recovery Administration and its publications).

134. WOOD, *supra* note 49, at 151 (the plan was formally known as the Judicial Procedures Reform Act).

135. *Id.*

136. WOOD, *supra* note 49, at 151; FLITER, *supra* note 49, at 191-92. The FLSA was upheld by the Supreme Court in United States v. Darby, 312 U.S. 100, 116, 123-24 (1941) (holding that the Tenth Amendment did not limit congressional authority under the Commerce Clause, that Congress had the power to regulate wages, work hours, and child labor that impacted interstate commerce, and overturning *Hammer v. Dagenhart*). Commenting on the landmark decision, Justice Harlan Fiske Stone, who authored the majority opinion, explained that *Darby* "was designed to make two things clear . . . (1) that the commerce power of Congress is not restricted to intrinsically harmful commodities, and (2) that the motive of Congress in passing commerce clause laws is none of the Court's business." FLITER, *supra* note 49, at 212 (internal quotations omitted).

commerce.[137] For example, with respect to child labor, the law banned companies from shipping in interstate commerce "any goods produced in an establishment" that had engaged in "oppressive child labor" within thirty days.[138] Under the law, "oppressive child labor" meant non-parental employment of children under sixteen years of age in the mining and manufacturing industries.[139] It did not, however, include the employment of children ages fourteen to sixteen in industries that did not "interfere with a child's education or health and well-being," as determined by the Children's Bureau.[140]

Even so, the bill was amended many times before it passed, leading to gaping exclusions that rendered the law much less effective than its proponents had hoped at regulating workers' rights in general.[141] When it came to the FLSA's child labor provisions, the law did not apply to businesses that did not produce goods for shipment in interstate commerce, businesses that handled, as opposed to manufactured, products made by unlawful child labor such as transportation companies, and it also exempted the agricultural industry from restrictions on employing children younger than sixteen.[142] Indeed, at the time of the law's passage in 1938, "the Children's Bureau estimated that only one-fourth of child labor in the United States would be affected by the provisions of the FLSA."[143] The agricultural exemption, in particular, was a huge blow to child labor reformers because, at the time, that industry employed an estimated seventy percent of

137. FLITER, *supra* note 49, at 191-92, 201. Francis Perkins, who was President Franklin Roosevelt's Secretary of Labor and the first woman to serve in a presidential cabinet, "reminded [the president] that the [FLSA] had been written more with an eye toward Supreme Court review rather than for the average layman." *Id*. at 201.

138. 29 U.S.C. § 212(a) (1974); WOOD, *supra* note 49, at 151; FLITER, *supra* note 49, at 193, 205.

139. 29 U.S.C. § 203(l) (2018); FLITER, *supra* note 49, at 205.

140. FLITER, *supra* note 49, at 205.

141. *Id.* at 192-96; WOOD, *supra* note 49, at 151.

142. 29 U.S.C. § 212(a); WOOD, *supra* note 49, at 151; FLITER, *supra* note 49, at 205 (other industries exempted from the FLSA's child labor provisions were domestic services, and "local service trades at laundries, hotels, restaurants, and beauty parlors").

143. WOOD, *supra* note 49, at 151 (stating that the FLSA's child labor provisions were largely seen as regulating child labor only in mines and factories); FLITER, *supra* note 49, at 196 (noting that "[c]hild labor in interstate commerce encompassed only about 25 percent of the children employed, excluding agriculture . . . [leaving] 75 percent of working children outside federal regulation").

all child workers, which also included large numbers of migrant child workers.[144] Although the FLSA was eventually amended and expanded to regulate the non-agricultural employment of all children who worked "in commerce" and to include all non-agricultural goods produced by children "in commerce" (as opposed to in "interstate commerce"),[145] its child labor provisions did not achieve reformers' wish to abolish and eradicate oppressive child labor in America.[146]

Although there is no doubt and no dispute that the FLSA's child labor provisions have succeeded in protecting many American children from oppressive work, it is equally true that America's child labor laws have been flawed from the very beginning.[147] As the historical record demonstrates, the nation's child labor laws were largely born from a desire to protect white, non-immigrant children from the deleterious effects of mind-dulling and dangerous work so that they could obtain an education, enjoy their childhood, and take their rightful place in the stratified social order created by American slavery, colonialism, sectarianism, and imperialism.[148] These laws were not devised with *all* children in mind and, as the FLSA's gaping agricultural exemptions show, they intentionally excluded some of the most vulnerable child workers—migrant children—from their protection.[149] Even when child labor regulations protected

144. WOOD, *supra* note 49, at 151; FLITER, *supra* note 49, at 196, 205 (noting that even though the FLSA technically only exempted agricultural employers from its child labor provisions if children were working during hours when they were not legally required to be in school, this requirement was practically non-existent because states often had laws that permitted children working in agriculture—whether on small family farms or large commercial farms—to be absent from school). Additionally, given the FLSA's agricultural exemptions, "[m]igrant . . . children working in tobacco or cotton fields, where some of the worst exploitation existed, received little protection" under the FLSA. FLITER, *supra* note 49, at 205.

145. 29 U.S.C. § 212(c); FLITER, *supra* note 49, at 222.

146. FLITER, *supra* note 49, at 225-30 (discussing the continued use of oppressive child labor after passage of the FLSA, especially during World War II and again in the late 1980s); WOOD, *supra* note 49, at 152.

147. Betsy Wood, Assistant Professor of Am. Hist., Bard Coll., Regulation of Children in the Workplace Presentation at University of Arkansas Law Review Symposium: Children at Work (Oct. 13, 2023) (on file with author).

148. *Id.*

149. FLITER, *supra* note 49, at 230 (noting that "[a]griculture has always been an area with the weakest child labor protections" on both federal and state levels because in addition

children from oppressive labor, they fell far short of doing so in large part due to the numerous compromises among Progressive Era reformers, powerful industries, and southern states' rights advocates that ultimately shaped the laws and severely restricted their reach and impact.[150] Before turning to today's child labor laws, which are a product of that history, the next Section describes the contemporary child labor landscape.

B. Oppressive Child Labor in Contemporary America

Until fairly recently, the nation appeared to believe that oppressive child labor was a relic, relegated to America's Industrial Era past.[151] Perhaps this was due in part to the passage of national legislation regulating child labor as well as many state-level laws imposing additional restrictions above and beyond those contained in the FLSA.[152] It may also be because the scale of unlawful and oppressive child labor in America is difficult to discern given that no government agency formally collects information on the number of children employed in violation of federal and/or state child labor laws.[153] The best data available are kept by the DOL's WHD, which tracks the number of child labor violations that occur in DOL cases, but this does not account for instances of child labor that the DOL lacks the information or investigative resources to pursue.[154] Nevertheless, just a

to the FLSA's exemptions, "[s]eventeen states exempt farmwork from child labor laws" and that "[t]hose most at risk are the children of poor migrant farmworkers").

150. WOOD, *supra* note 49, at 151-52.

151. Ana Maria Echiburu, *Immigration Raid Results in Charges Filed Against Iowa Slaughterhouse for Child Labor Violations*, 14 PUB. INT. L. REP. 93, 93 (2008); Jennifer Sherer & Nina Mast, *Child Labor Laws Are Under Attack in States Across the Country*, ECON. POL'Y INST. (Mar. 14, 2023), [https://perma.cc/5X97-7PLR].

152. FLITER, *supra* note 49, at 220-21.

153. The DOL does not keep youth employment data but directs queries to the Bureau of Labor Statistics. *Child Labor Statistics*, U.S. DEP'T OF LAB., [https://perma.cc/7NUE-6YXZ] (last visited March 12, 2024). The Bureau of Labor Statistics, however, includes everyone ages sixteen to twenty-four in its "youth" employment figures and these figures only include lawfully employed youth. *Employment and Unemployment Among Youth Summary*, U.S. BUREAU OF LAB. STAT. (Aug. 16, 2023), [https://perma.cc/4WFZ-B2PS]. Given this lack of investigation on the part of government agencies, it is possible that, absent Hannah Dreier's reporting for the New York Times, the staggering scale of unlawful child labor may have gone uncovered and unnoticed.

154. *Child Labor*, U.S. DEP'T OF LAB., [https://perma.cc/F3GJ-ECMV] (last visited Mar. 12, 2024).

smattering of federal and state investigations of child labor violations over the past few decades serve to show that oppressive child labor is alive and well in modern-day America.

In the late 1980s, the DOL discovered child labor violations at "twice the rate of the first half of the decade and the highest number of violations since the [FLSA] was enacted in 1938."[155] Many of these violations involved children of immigrants who were filling jobs at a time when the nation was experiencing labor shortages and "intensified competition from foreign companies."[156] The DOL made heroic efforts to investigate these increased child labor violations but was thwarted by lack of funding and personnel, as well as the small fines authorized by the FLSA, which "amounted to just a few hundred dollars and were considered by child employers to be just another cost of doing business."[157] In 2008, an infamous federal immigration raid at a large meat-processing plant in Iowa surprised officials when over thirty migrant children were found working in clear violation of federal and state laws in extremely dangerous and hazardous jobs.[158] One of these children, a sixteen-year old boy from Guatemala who did not have work authorization, stated that he worked in the slaughterhouse "for seventeen hours a day, six days a week . . . was subject to extreme conditions . . . [but] did not complain . . . for fear of retaliation by his employer."[159]

By 2010, "[t]he United States ha[d] the highest percentage of working children of any developed nation," many of whom were working in violation of the FLSA's child labor laws.[160] These children, including those engaged in farm work and therefore exempt from the FLSA's requirements, were injured at

155. FLITER, *supra* note 49, at 226.

156. *Id.* (commenting on the sweatshop industry, one advocate "stated that some children, especially in neighborhoods with recent Latin American immigrants, did not attend school and worked long hours for wages that rarely reached the legal minimum. This is a trap for them . . . . They sacrifice their education and literally commit themselves to a life of working in a sweatshop . . . [without a] future").

157. *Id.*

158. Echiburu, *supra* note 151, at 94 (stating that "[t]he brutal environment of a meatpacking plant is not an appropriate place for children" given that workers are "exposed to dangerous machines and chemicals and often have to make thousands of cuts every day with sharp knives, risking lacerations, nerve damage, or muscle damage").

159. *Id.*

160. Moskowitz, *supra* note 54, at 108, 122.

a rate of 200,000 per year and some died from the dangerous labor they performed.[161] This included children whose oppressive labor resulted in permanent disability, scarring, illness, and chronic pain.[162] Most recently, in 2023, Hannah Dreier's New York Times articles exposed large numbers of migrant children working under extremely hazardous and dangerous conditions—many in the meat-processing and construction industries.[163]

On the heels of Dreier's investigations, the DOL "issued new findings in an ongoing investigation of Packers Sanitation Services, Inc." for engaging in oppressive child labor at thirteen meatpacking facilities owned by large, well-known corporations such as Tyson Foods and Cargill.[164] The investigation found that over 100 children ages thirteen to seventeen were working in violation of the FLSA during "overnight shifts cleaning razor-sharp saws and other high-risk equipment on slaughterhouse kill floors" leading to at least three serious injuries including "burns from caustic cleaning chemicals."[165] Later in the year, the DOL announced that it was investigating Tyson Foods and Perdue Farms, "which together produce a third of the poultry sold in the United States," for alleged violations of the FLSA's child labor laws when they employed children to clean slaughterhouses, which is "some of the most dangerous work in the country."[166] In addition to these investigations, the DOL also has recently been investigating multiple factories in the Hyundai-Kia supply chain in Alabama for child labor violations.[167] Like in the meatpacking industry investigations, the DOL discovered that it was mainly migrant children, especially from Guatemala, who were working in these hazardous jobs.[168] Notably, the companies under investigation do not represent "isolated mistakes of ill-informed individual employers"—rather, these businesses, like Packers

161. *Id.* at 108-09.

162. *Id.* at 122.

163. *Alone and Exploited*, *supra* note 7; *The Kids on the Night Shift*, *supra* note 14; *Children Risk Their Lives*, *supra* note 8.

164. Sherer & Mast, *supra* note 151, at 3 (according to the DOL, the violations were "systemic" across eight states, and "clearly [indicated] a corporate-wide failure").

165. *Id.*

166. Hannah Dreier, *Tyson and Purdue Are Facing Child Labor Investigations*, N.Y. TIMES (Sept. 23, 2023), [https://perma.cc/Q6DA-VP9Z].

167. Sherer & Mast, *supra* note 151, at 3.

168. *Id.*

Sanitation Services, Inc., are among the country's largest and most sophisticated corporations.[169]

Then, this past summer, the DOL released data showing that "[c]hild labor violations in the United States soared in the 2022-2023 fiscal year . . . rising to their highest level in nearly two decades."[170] Based on the DOL's archived data, this was part of a larger trend showing that the number of minors employed in violation of child labor laws rose by 283% from 2015 to 2022.[171] The violations spanned several states, over one hundred child workers, and included children as young as thirteen as well as children working overnight shifts up to thirteen hours in meat processing facilities.[172] An attorney in the DOL's Solicitor's Office stated that based on their investigations, the DOL has discovered nearly 1,000 companies employing around 6,000 children in violation of the FLSA.[173] Of these children, about 500 work in extremely dangerous jobs.[174] These staggering figures combined with Ms. Dreier's reporting have demonstrated that oppressive child labor is not a remnant of the past, bringing this issue firmly back into the nation's collective consciousness.

The contemporary resurgence in child labor has been tied by many observers, including the DOL, to an increase in the number of unaccompanied minors who have crossed into the United States from the southern border over the past several years.[175] Since 2021, more than 250,000 unaccompanied minors have come to the United States, and most are from Guatemala,

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169. *Id.* (noting that Packers Sanitation Services, Inc. "is owned by the Blackstone Group, the world's largest private equity firm").

170. Lauren Kaori Gurley, *Child Labor Violations Soared in Fiscal 2023*, WASH. POST (Oct. 19, 2023, 5:20 PM), [https://perma.cc/SR57-TL9L]; *see Child Labor*, *supra* note 154 (chart of current and historical data on child labor violations collected by the DOL's Wage and Hour Division).

171. *Child Labor*, *supra* note 154; *Is Child Labor Increasing in the US?*, USA FACTS (June 16, 2023), [https://perma.cc/WQC8-GNJF].

172. *Is Child Labor Increasing in the US?*, *supra* note 171.

173. Laura Huizar, Senior Counsel, Dep't of Lab. Office of the Solicitor, Child Lab., Presentation at University of Arkansas Law Review's Symposium: Children at Work (Oct. 13, 2023) (on file with author).

174. *Id.*

175. *Id.*; Terri Gerstein, Director, State & Local Enforcement Project at Harv. Law Sch.'s Ctr. for Lab. & a Just Econ., Keynote Address: State Policy Approaches to Combat Oppressive Child Labor at University of Arkansas Law Review's Symposium: Children at Work (Oct. 13, 2023) (on file with author).

Honduras, and El Salvador—Central American countries that are riddled with political destabilization, gang-based violence, and extreme poverty exacerbated by the pandemic and climate change.[176] Fleeing "war, famine, [and] natural disasters," and facing separation from family, these mostly Central American but also Mexican minors "migrate to the United States alone to pursue employment" primarily so that they can send remittances back home to ensure the survival of impoverished family members.[177]

Under the law, an unaccompanied minor is a child under eighteen years of age who does not have a parent or legal guardian in the United States and lacks immigration authorization to be in the country.[178] When the Department of Homeland Security ("DHS") comes into contact with unaccompanied minors, either at formal border checkpoints or through apprehensions made during crossing attempts or after minors have already entered the United States, it places these children in the care of the Office of Refugee Resettlement ("ORR") within the Department of Health and Human Services ("HHS").[179] Once children are in HHS custody, ORR begins the process of finding a sponsor, most of whom, according to a government fact sheet, "are a parent or a

176. *Unaccompanied Children (UC) Program*, U.S. DEP'T OF HEALTH & HUM. SERVS., (Mar. 1, 2023), [https://perma.cc/T49U-FZP4] (stating that the Department of Homeland Security processed 122,731 unaccompanied minors in fiscal year 2021 and 128,904 in fiscal year 2022—in the latter year, 47% were from Guatemala, 29% were from Honduras, and 13% were from El Salvador); *Alone and Exploited*, *supra* note 7 (reporting that migrant children, largely from Central America, have been coming to the United States without their parents in record numbers over the past two years); Diana Roy & Amelia Cheatham, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS. (July 13, 2023, 2:55 PM), [https://perma.cc/6P68-FD49] (setting forth statistics showing that poverty, crime, and climate change have forced over two million people to leave these countries since 2019).

177. Canizales, *supra* note 16, at 1376.

178. 6 U.S.C. §279(g)(2) (2008); *Unaccompanied Children (UC) Program*, *supra* note 176.

179. *Unaccompanied Children (UC) Program*, *supra* note 176 (stating that the ORR within the HHS "has custody and must provide care for each unaccompanied child, defined as a child who has no lawful immigration status in the United States; has not attained 18 years of age; and, with respect to whom, there is no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody").

close family relative" living in the United States.[180] Some children, however, end up with sponsors they do not know.[181]

Regardless of whether migrant children are related to sponsors or not, Dreier's reporting shows that the vast majority of unaccompanied minors "are under intense pressure to earn money" to send back to their families experiencing "economic desperation" in their home countries; to pay off debts to smugglers who brought them across (sometimes multiple) borders; and to pay for basic living expenses like rent, food, and clothing.[182] This is true even for children who end up living with "bona fide relatives" because those relatives are poor too and need children to work if they are going to live with them.[183] As a result, unaccompanied migrant children "end up in the most punishing jobs in the country" even though the government knows they are here and "is responsible for ensuring sponsors will support them and protect them."[184] Moreover, Dreier's investigation found ample evidence that teachers, school officials, employers, and adult co-workers ignored or remained quiet about child labor violations in their communities because they understood the desperation that had driven migrant children to come to America in search of work to begin with and believed that reporting the unlawful work these children were engaged in to authorities would hurt migrant children more than help them.[185] One English Language Learner teacher described the situation as "a moral dilemma because [attending school] is not the best thing for them

180. *Id.*

181. *Alone and Exploited*, *supra* note 7 (interviewing a caseworker in Florida who stated she saw unaccompanied migrant children being put to work by sponsors who were not relatives). The government states, however, that ORR engages in significant vetting of sponsors—especially non-relative sponsors—before placing children with them. *Unaccompanied Children (UC) Program*, *supra* note 176 (including background checks, criminal public records check, and fingerprinting).

182. *Alone and Exploited*, *supra* note 7 (providing information based on an interview with a Florida social worker).

183. *Id.*

184. *Id.* (remarking that "[t]hese are not children who have stolen into the country undetected," and yet "more than 100 migrant child workers in 20 states . . . described jobs that were grinding them into exhaustion").

185. *Id.* ("There were reasons that supervisors, teachers, federal inspectors and even police officers had said nothing for years about children working at slaughterhouses. Everyone understood that the children were under extraordinary pressure to earn money to pay off their travel debts and help their families back home.").

. . . [t]hey're not going to cut their hours, and sleep deprivation is one of the worst things you can do to your body. I question whether they should be here because they don't really need to know geography or trigonometry."[186]

This, then, is the crux of the contemporary child labor crisis—it is predicated upon children who must work in order to survive and who must help desperate families who also rely on their labor for survival. In this way, the "new" child labor of the twenty-first century echoes the "old" child labor of the previous two centuries that relied on poor children, often from immigrant families.[187] Then as now, the central conundrum in viewing oppressive child labor as an unequivocal evil, as has been done by historical and contemporary reformers alike, is that it sets up a zero-sum game that cannot be won because the children at the heart of the dilemma are determined to work in ways that violate existing child labor laws.[188] It also obscures the underlying causes of oppressive child labor, which "has always been a problem of poverty" that often intersects with migration.[189] When understood in this light, oppressive child labor is not a phenomenon that can be eradicated by more or better child labor laws. This, however, is exactly what most scholars and advocates have focused on when proposing solutions to the migrant child labor problem.[190] Before analyzing that literature, it is necessary to review today's child labor laws and their limitations when it comes to addressing the new economy of exploitation.

186. *The Kids on the Night Shift*, *supra* note 14.

187. Wood, *supra* note 147; Huizar, *supra* note 173; Gerstein, *supra* note 175.

188. Wood, *supra* note 147 (quoting Samuel Gompers, an early twentieth century child labor reformer to argue that today's reformers must finish the job of emancipating childhood that was left incomplete by the failure to ratify the Child Labor Amendment); WOOD, *supra* note 49 at 125 (stating that it was the goal of early twentieth century child labor reformers like Samuel Gompers to "abolish completely child labor"); *Fact Sheet: Protecting Children Act*, ED. & WORKFORCE DEMOCRATS, [https://perma.cc/7X9K-PY3P] (last visited Mar. 25, 2024) (setting forth a recent congressional effort to end child labor).

189. FLITER, *supra* note 49, at 3.

190. *See infra* Section II.C.

II. CHILD LABOR LAWS, THEIR FAILURES, AND TRADITIONAL RECOMMENDATIONS FOR CHANGE

This Part describes existing federal and state child labor laws to demonstrate the limited scope and reach of child labor regulations in the United States. It also situates migrant child workers within the larger context of im/migrant workers' rights to show how the decline of workers' rights enforcement in general impacts child labor issues as well. Finally, this Part analyzes traditional recommendations for reform to child labor laws, which focus on increasing enforcement of and penalties for child labor violations and argues that these proposed remedies will not help migrant child workers and might even make their situation worse.

A. Today's Child Labor Laws

Generally, to be covered under the FLSA, an employer must have at least two employees and a minimum gross annual revenue of $500,000.[191] Employees of businesses that do not meet these minimum thresholds will still be covered by the FLSA if a given employee's job requires them to regularly engage in commerce or the production of goods in commerce.[192] These provisions notwithstanding, the FLSA also prohibits employment of children under eighteen in non-agricultural jobs deemed hazardous by the U.S. Secretary of Labor.[193] Currently, these include meat processing, mining, manufacturing, operating heavy machinery, baking, and most construction.[194] Sixteen and seventeen year-olds who work in jobs not prohibited by the Secretary of Labor may work at any time and for any number of hours that are not

191. 29 U.S.C. § 203(s)(1)(A)(ii) (2018). Even if an employer does not meet these minimum employee and dollar thresholds, they are covered by the FSLA if they are a hospital, business providing medical or nursing care for residents, schools, or government agencies. 29 U.S.C. § 203(s)(1)(B).

192. 29 U.S.C. § 203(s)(1)(A)(i). For example, employees have been held to engage in commerce when they produce goods that will be shipped out of state, work in facilities in which such goods are made, swipe credit cards, make out of state telephone calls, handle records of interstate transactions, unload trucks with goods for the business from out of state, or purchase products for the business from other states. *See Field Operations Handbook*, U.S. DEP'T OF LAB. (Aug. 31, 2016), [https://perma.cc/54ZM-CRWP].

193. 29 U.S.C. § 203(l); 29 U.S.C § 212(a) (1974); 29 C.F.R. pt. 570 (2017).

194. 29 C.F.R. §§ 570.50-570.68.

prohibited by the laws of the state in which they reside because the FLSA does not restrict their hours of work.[195] Fourteen- and fifteen-year-old children, on the other hand, are heavily regulated by the FLSA. They are not permitted to work more than three hours on a school day or eight hours on a non-school day, may not work more than eighteen hours per week when school is in session or forty hours per week when it is not, and are completely barred from working overnight shifts.[196] Finally, children under fourteen may not work in any non-agricultural job covered by the FLSA.[197]

Unlike the FLSA's minimum wage, overtime, and anti-retaliation laws, the FLSA's child labor provisions do not contain a private right of action, which means that only the DOL may enforce child labor laws.[198] The WHD "has exclusive responsibility for administration of the FLSA's child labor provisions."[199] When the WHD, through an investigation, finds that children are working in violation of child labor laws, it has two main tools at its disposal: penalties and injunctions. Under the FLSA's civil penalties, the WHD may fine an employer approximately $15,000 for each child worker found to be working in violation of the FLSA's child labor provisions.[200] If the violation resulted in a child worker's "death or serious injury," then the penalties increase to approximately $130,000 per violation.[201] The FLSA also authorizes criminal penalties, but these are limited to situations in which the employer violations

195. 29 C.F.R. §§ 570.50-570.68; *Fact Sheet #43: Child Labor Provisions of the Fair Labor Standards Act (FLSA) for Nonagricultural Occupations*, U.S. DEP'T OF LAB. (Dec. 2016) [hereinafter *Fact Sheet #43*], [https://perma.cc/F2C6-PUKU].

196. 29 C.F.R. §§ 570.31-570.39; *Field Operations Handbook*, *supra* note 192.

197. 29 C.F.R. § 570.2; *Fact Sheet #43*, *supra* note 195 (outside of agriculture, children under fourteen may be employed in a handful of occupations including newspaper delivery, acting, minor chores, and casual babysitting).

198. *Cf.* 29 U.S.C. § 206 (2016) (minimum wage); 29 U.S.C. § 207 (2022) (overtime); and 29 U.S.C. § 215(a)(3) (2022) (retaliation prohibition); with 29 U.S.C. § 212(a) (child labor).

199. Moskowitz, *supra* note 54, at 137; 29 U.S.C. § 212.

200. 29 U.S.C. § 216(e)(1)(A) (2022) (adjusted for inflation); *see also* Moskowitz, *supra* note 54, at 137-38 (explaining that "[c]ivil penalties of $1,000 per [child labor] violation were first added in 1974," increased to $10,000 per violation in 1990, and amended again "in 2008 to increase the civil penalty to $11,000").

201. 29 U.S.C. § 216(e)(1)(A) (adjusted for inflation); *see also* Moskowitz, *supra* note 54, at 138 (this civil penalty was created in 2008, at which time an employer faced a $50,000 fine for death or serious injury, which could be doubled in cases of willful violations).

were "deliberate, voluntary and intentional," or exemplified "reckless indifference to, or disregard for, the act's requirements."[202] This willfulness standard is extremely difficult to meet and even if "prosecutions [can be] brought, the penalty is a fine of not more than $10,000 or imprisonment for not more than six months, the latter only after a prior criminal conviction."[203] Even when the WHD decides to pursue monetary penalties for child labor violations, the FLSA requires that the government consider the size of the business, the gravity of the violation, history of prior violations, and other factors before assessing fines against employers.[204] If monetary penalties are collected, the law requires that they must be placed in the U.S. Treasury Department's general fund rather than being paid to the children who were working in violation of the law.[205] Child labor reformers as well as the DOL have repeatedly bemoaned that the civil and criminal penalties authorized by the FLSA are too small and therefore insufficient to deter large, heavily resourced employers from engaging in child labor violations.[206]

The second tool, which many, including the DOL, regard as more impactful than fines, is the child labor law's "hot goods" provision, which has its roots in the Beveridge-Parsons Act of 1906.[207] This portion of the law relies on congressional Commerce Clause powers, and permits the DOL to seek an injunction from a federal district court to allow the agency to seize goods that are the product of oppressive child labor if those goods are shipped within thirty days of the use of oppressive child

202. 29 U.S.C. § 216(a); Moskowitz, *supra* note 54, at 141-42 (observing that criminal enforcement of the FLSA's child labor provisions is "effectively ruled out" by the willfulness requirement coupled with minimum criminal penalties; indeed, "there has not been a federal prosecution under this section since the Act was adopted seventy years ago").

203. 29 U.S.C. § 216(a); Moskowitz, *supra* note 54, at 142 (stating that "[v]iolators are . . . accorded 'one free bite' before there is even the possibility of a misdemeanor conviction with the possibility of jail time").

204. 29 U.S.C. § 216(e)(3); 29 C.F.R. § 579.5 (2016); Moskowitz, *supra* note 54, at 138.

205. 29 U.S.C. § 216(e)(5).

206. Huizar, *supra* note 173; Gerstein, *supra* note 175; Moskowitz, *supra* note 54, at 137-38.

207. 29 U.S.C. § 212 (1974) (hot goods provision); Huizar, *supra* note 173; Gerstein, *supra* note 175.

labor.[208] The DOL has interpreted the hot goods provision to apply to oppressive child labor that takes place in the same facility that the goods were produced even if children are not directly involved in the manufacture of a given product.[209] In other words, if children clean a facility where goods are produced in violation of the FLSA, the hot goods provision will apply—and this is true even if the facility is not owned by the product's manufacturer.[210] Subjecting the entire chain of production of a given product to the hot goods provision is consistent with the plain language of the FLSA, which states that "[n]o employer shall employ oppressive child labor . . . in the production of goods *for commerce*."[211] Because removing goods from commerce has serious, negative monetary implications for manufacturers, the hot goods provision of the law is viewed as a more meaningful deterrent for large employers than are monetary penalties.[212]

In addition to the FLSA's child labor provisions, there are also state child labor laws that, while they cannot fall below the minimum requirements set forth by the FLSA, can and in some cases do impose additional restrictions such as the number of hours and times of day that children can work and requiring employers to verify "work permits" signed by parents or guardians before hiring children.[213] Several states, many in the South and Midwest, however, have recently relaxed or removed their child labor restrictions.[214] Thus, given the FLSA's

208. 29 U.S.C. § 211(a) (1985); 29 U.S.C § 212; 29 U.S.C. § 217 (1961); This expanded definition of Congress' Commerce Clause powers dates to *United States v. Darby Lumber*, 312 U.S. 100, 115 (1941).

209. Huizar, *supra* note 173.

210. *Id.*

211. 29 U.S.C. § 212(c) (emphasis added).

212. Huizar, *supra* note 173 (explaining that even if manufacturers are not the owners of facilities, and therefore not subject to the child labor provision's fines, they are still subject to the seizure of their goods, which prompts them to ensure there is no oppressive child labor in the entire chain of their products' manufacturing even if part of that chain is in the hands of smaller contracted or subcontracted employers).

213. *Fact Sheet #43*, *supra* note 195; *Selected State Child labor Standards Affecting Minors Under 18 in Non-farm Employment as of January 1, 2024*, U.S. DEPT. OF LAB. (Jan. 1, 2024), [https://perma.cc/8PMN-Z87F].

214. *See* Sherer & Mast, *supra* note 151, at 5; Chris Gilligan, *Child Labor Violations on the Rise as States Look to Roll Back Laws*, U.S. NEWS & WORLD REP. (July 11, 2023, 3:07 PM), [https://perma.cc/EJ9R-YZGZ]; FLITER, *supra* note 49, at 233-38; Moskowitz, *supra* note 54, at 147-48 (describing state child labor laws and enforcement as "laissez-faire" because, at the time, "a mere twenty-one states limit[ed] children under the age of 16 to three

agricultural exemption and the many states that lack robust child labor laws, there are large swaths of children who are not protected by America's child labor laws.[215]

Even children covered by federal and state laws may not receive actual protection under the law given limited investigative and enforcement capacity at both the DOL and state labor agencies. Indeed, enforcement of workers' rights violations in general has been in decline for several decades. Consistent underfunding and lack of resources for workers' rights enforcement means that the DOL investigates only a tiny fraction of all workplaces in the United States.[216] For example, in November 2022, the DOL had 810 employees dedicated to investigating violations of federal workplace rights for the *entire nation*.[217] Today's number of DOL investigators is down by 422 people since 1978.[218] As of September of 2023, the DOL had 750 investigators overseeing all FLSA violations for 11 million workplaces around the country, including 3,000 slaughterhouses where many of the recent child labor violations exist.[219] This lack of resources is mirrored at the state level, too, where many states have fewer than ten investigators to enforce *all* workers' rights statewide.[220] Thus, as Dreier's investigative reporting has found, even when workplaces are subject to child labor regulation, they

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hours of work per day during the school year . . . only thirty-eight jurisdictions require parental consent for children under age 16 to work . . . [o]nly sixteen states mandate parental consent for 16- and 17-year-old adolescents to work, three of which only mandate consent during school hours . . . [f]orty-four states allow children aged 16 and 17 to work forty or more hours during weeks while school is in session . . . [and] [t]hirty states do not even require work or age permits for youths aged 16 or 17"). A handful of states, however, have been working to strengthen their child labor laws. Nina Mast, *As Some States Attack Child Labor Protections, Other States Are Strengthening Standards*, ECON. POL'Y INST. (Nov. 7, 2023, 1:56 PM), [https://perma.cc/B98Z-YJY3].

215. Sherer & Mast, *supra* note 151, at 9.

216. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMPAR. LAB. L. & POL'Y J. 59, 62, 70 (2005) (stating that a 2004 study showed that "the annual probability of receiving an inspection for one of the 7.0 million establishments covered [by the FLSA] is well below .001").

217. Gerstein, *supra* note 175 (stating that at its current rate of investigations, it would take the DOL 190 years to investigate every covered U.S. workplace).

218. *Id.*

219. *The Kids on the Night Shift*, *supra* note 14.

220. Gerstein, *supra* note 175.

may not be stopped from or penalized for engaging in unlawful child labor.[221]

B. Child Labor Laws Within the Context of Im/migrant Workers' Rights

In addition to the lack of federal and state workers' rights enforcement resources, existing child labor law penalties—on both federal and state levels—do not account for what David Weil, the former Administrator of DOL's WHD, has referred to as the "fissured" workplace.[222] Weil's term is meant to capture the layers of contracting and subcontracting that many employers—especially large corporations—engage in for a variety of reasons, including to "shift labor costs and liabilities to smaller business entities."[223] Although there may be legitimate reasons for engaging in this practice, some businesses do so in order to benefit from unlawful child labor without having to risk penalties for violating the FLSA's child labor prohibitions.[224] In other words, a large (and arguably image-conscious) employer like Perdue Farms might subcontract with a small, local, cleaning business such as Fayette Industrial in a manner that permits Perdue to access lower cost workers without fearing DOL prosecution and fines for doing so.[225]

The fissured workplace has long been a common business model used by industries that employ large numbers of adult im/migrant workers who lack documentation.[226] Like with unlawful child labor, large corporate employers often engage in contracting and subcontracting so that they can benefit from cheap labor while avoiding DHS raids and immigration law penalties for employing workers without authorization.[227] Large businesses engaged in fissuring schemes also stand to benefit

221. *The Kids on the Night Shift*, *supra* note 14.

222. WEIL, *supra* note 34, at 7-10; DAVID WEIL, REPORT TO THE WHD: IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT 9 (2010) [hereinafter REPORT TO THE WHD], [https://perma.cc/3VDT-RZ9F].

223. REPORT TO THE WHD, *supra* note 222, at 10.

224. *Id.* at 9-10; Gerstein, *supra* note 175.

225. *The Kids on the Night Shift*, *supra* note 14.

226. REPORT TO THE WHD, *supra* note 222, at 20.

227. *Id.* at 21.

when smaller employers fail to pay legally required minimum wage and overtime, which is an all-too-common phenomenon among employers of unauthorized workers, without risking employment and labor violations and penalties.[228]

Even direct employers rarely face legal accountability for their violations of undocumented workers' rights.[229] This is due to im/migrant workers' deep-seated fear of employer retaliation primarily in the form of immigration enforcement—i.e., that the boss will call law enforcement—and also in the form of termination, which most low-wage im/migrant workers cannot afford.[230] This fear of retaliation, in turn, prevents workers from complaining, either to their employers or labor agencies, when their workers' rights are violated.[231] But complaint-making, especially to government agencies, is key to accessing workers' rights because labor agencies, including the DOL, rarely investigate workplace rights violations, prosecute employers, and provide remedies to workers in the absence of complaints due to their woefully limited investigatory resources as set forth above.[232] This results in a vicious cycle in which vulnerable workers become more likely to experience workers' rights violations and less likely to do anything to ameliorate them.[233]

Although retaliation fears among migrant child workers have not been studied in the same way as they have with undocumented adult workers, there are strong indicators that migrant children also do not complain when they are subjected to hazardous and dangerous work requirements because they do not want to lose their jobs.[234] Arguably, migrant children have even less incentive to assert their workers' rights than unauthorized adult workers because, since the FLSA does not provide a private right of action for child labor law violations, the only "remedy" migrant children would attain is removal from their unlawful

228. *Id.*

229. *See* RUTH MILKMAN, IMMIGRANT LABOR AND THE NEW PRECARIAT 115 (2020); Milczarek-Desai, *supra* note 35, at 1195-97.

230. Milczarek-Desai, *supra* note 35, at 1192-93 n.134.

231. *Id.* at 1195-97.

232. *Id.* at 1194.

233. *Id.* at 1197-98.

234. Echiburu, *supra* note 151, at 94; *Alone and Exploited*, *supra* note 7.

employment.[235] This, of course, provides no relief at all for children who must work for their and their families' survival and, in fact, has the opposite effect by further imperiling unaccompanied migrant children as discussed below.

C. Traditional Calls for Reform Are Ineffective and Dangerous

The failures of U.S. child labor laws, as outlined above, long predate the new economy of exploitation. The FLSA has never covered all child labor as exemplified by the agricultural exemptions, DOL enforcement has always been inadequate, and what little enforcement exists has been thwarted by the fissured workplace and the threat of employer retaliation. Given these long-standing shortfalls, legal scholars and policymakers have been advancing arguments for at least two decades to reform existing child labor laws. To date, none have been adopted into law and, as this Section argues, even if they were implemented, they will not benefit migrant child workers and, in fact, may be harmful to them.[236]

One of the most common reforms that scholars and policymakers advocate for is an increase in employer penalties and sanctions for violations of federal child labor laws.[237] These arguments correctly note that the FLSA's civil and criminal penalties for child labor violations are so low that that "[a]n economically rational employer, motivated to maximize profit, will calculate the chance of detection as negligible and the cost of sanction, if detected, as an eminently affordable cost of doing business."[238] For example, the only fine levied against an employer for the severe injuries Antoni suffered after falling thirty feet from a roof while laying shingles was $500.[239]

235. 29 U.S.C. § 212(a) (1974).

236. Like contemporary child labor reformers, the nineteenth and early twentieth century child labor reformers also framed their goal in terms of the abolishment of all child labor and like their contemporary counterparts, their efforts in this regard failed. *See supra* Section I.A.

237. Moskowitz, *supra* note 54, at 141-42; Gerstein, *supra* note 175; Protecting Children Act, H.R. 4440, 118th Cong. (2023); Shima Baradaran & Stephanie Barclay, *Fair Trade and Child Labor*, 43 COLUM. HUM. RTS. L. REV. 1, 5 (2011).

238. Moskowitz, *supra* note 54, at 141.

239. *Children Risk Their Lives*, *supra* note 8.

Employers of migrant children who have died in the past few years while on roofing jobs have not been fined anything at all.[240] The lack of deterrent effect from these minimal penalties is further exacerbated by the DOL's limited enforcement capacity, which reduces the likelihood that a given employer will be found in violation in the first place.[241] For this reason, advocates also recommend increasing DOL funding for investigation and enforcement purposes.[242] Despite decades of advocacy around these proposed changes to federal child labor regulations, none have thus far made it into law due largely to the impasses and lack of bipartisanship in Congress.[243]

Even if the wish-list of recommended solutions to the FLSA's failed child labor provisions were miraculously ushered into law soon, these reforms will not help migrant child workers. It is true that enhancing the amount of enforcement actions and the degree of civil and criminal penalties against employers who violate child labor laws will increase punishment of employers who engage in oppressive child labor. Conflating employer sanctions with protecting children from oppressive child labor,

240. *Id.*

241. *Id.* (stating that the DOL's lack of enforcement resources means that the department "has brought only an average of seven cases a year over the past decade, imposing less than $6,000 in fines per case . . . [i]n a statement, the department noted that it had just 731 investigators overseeing 11 million workplaces. Jessica Looman, administrator of the department's wage and hour division, said the department was requesting more funding from Congress to protect migrant children.").

242. Moskowitz, *supra* note 54, at 152; Megan McGinnis, *Child Farm Labor Under the Fair Labor Standards Act*, 20 KAN. J.L. & PUB. POL'Y 155, 172-73, 177 (2010); Gerstein, *supra* note 175; Protecting Children Act, H.R. 4440, 118th Cong. (2023). Some child labor law reformers also believe that including a private right of action in the FLSA would help to deter, if not abolish, oppressive child labor. *See, e.g.*, Moskowitz, *supra* note 54, at 137; Krauth, *supra* note 6, at 237-47; Gerstein, *supra* note 175. A private right of action would only be helpful, however, if migrant children were able to locate attorneys who would take their cases on a contingent fee or pro bono basis—a dubious assumption given the well-known, national lack of access to justice for low-wage im/migrant workers seeking justice for wage and hour violations based on existing private rights of action under the FLSA. Ty Frankel, *Immigrants' Rights Are Workers' Rights, and Workers' Rights Are Immigrants' Rights: Recovering Unpaid Wages Under the Fair Labor Standards Act*, FLORENCE IMMIGRANT & REFUGEE RTS. PROJECT (Aug. 19, 2016), [https://perma.cc/67XW-DCMX].

243. *The Kids on the Night Shift*, *supra* note 14. This is not for lack of trying, as demonstrated by numerous bills introduced in Congress to make these very changes. McGinnis, *supra* note 242, at 155, 173, 177; *see e.g.*, Protecting Children Act, H.R. 4440, 118th Cong. (2023).

however, is a mistake especially when it comes to unaccompanied minors as demonstrated by recent enforcement efforts by the WHD and Hannah Dreier's investigative reporting.

Since Hannah Dreier's articles brought oppressive child labor back into the American consciousness, DOL and WHD have been engaged in Herculean efforts, given their extremely limited resources, to investigate employer violations of the FLSA's child labor provisions. In late October 2023, the DOL issued a press release stating that WHD had been investigating a Southern California meat processor that supplied poultry to large companies such as Ralphs Grocery Stores and SYSCO Corp.[244] Specifically, WHD found that The Exclusive Poultry Inc. and related companies owned by Tony Bran "employed children as young as fourteen years old to debone poultry using sharp knives, operate power-driven lifts to move pallets" and work excessive hours—all in violation of the FLSA's child labor provisions.[245] In December 2023, as a result of these and other violations, including failure to pay overtime wages, Bran and his companies agreed to pay nearly $3.8 million in penalties, back wages, and damages.[246] With respect to the child labor violations, WHD obtained an injunction mandating that Bran and his companies cease engaging in unlawful child labor practices.[247]

This narrative appears to be a bona fide legal success demonstrating that child labor laws work. A lucrative business supplying major companies in the meat-processing industry was caught violating federal child labor laws by putting minors to work in extremely dangerous and hazardous jobs. Thanks to the

244. Eric Lagatta, *Kids Used Sharp Knives, Power Equipment: California Poultry Plant to Pay $3.5M Fine*, USA TODAY (Dec. 6, 2023, 11:56 AM), [https://perma.cc/45FV-39H6]; *Court Orders Poultry Processors to Stop Endangering Children, Withholding Pay, Retaliating, Shipping 'Hot Goods' at La Puente, City of Industry Locations*, DEP'T OF LAB. (Oct. 23, 2023) [hereinafter *Court Orders Poultry Processors to Stop Endangering Children*], [https://perma.cc/U7SF-UAPL].

245. *Court Orders Poultry Processors to Stop Endangering Children*, *supra* note 244 (WHD also alleged that Bran and his companies "directed young workers—including employees under age 16—to work full time and not go to school and to engage in dangerous jobs, including deboning poultry in meat coolers . . . and threatened them with retaliation if they spoke to investigators about their illegal activity").

246. *Id.*; Lagatta, *supra* note 244 (stating that just a little over $200,000 of these penalties were specifically tied to child labor violations).

247. *Court Orders Poultry Processors to Stop Endangering Children*, *supra* note 244.

law and its enforcement, the company is now barred from engaging in oppressive child labor and can no longer employ children in violation of the FLSA's regulations. The on-the-ground reality, however, tells a very different story.

After Dreier's first article was published and the DOL began investigating child labor violations in the meat-processing industry, large companies such as Perdue Farms and Tyson Foods put pressure on the subcontracted janitorial companies cleaning their plants to stop engaging in unlawful child labor.[248] As a result, large numbers of unaccompanied minors lost their jobs.[249] Several months later, Dreier went back to those same poultry plants and reported that "[e]ventually, adult[] [workers] started to see young faces again" and that several of the minors who were let go had been hired back to work in the same factories as they worked in a few months earlier.[250] In one instance, a "teenager who could no longer work at [a] Tyson [plant] was able to switch to the Perdue cleaning shift with a set of fake papers."[251]

Then there is the heartbreaking story of Marcos, the fourteen-year-old boy from Guatemala who nearly lost his arm cleaning a meat-processing machine at a Perdue poultry plant.[252] After his terrible injury, which required multiple surgeries and left him with very limited use of his arm, Perdue's sanitation contractor, Fayette, terminated Marcos and refused to re-hire him as required under the law.[253] With no choice but to work, Marcos ended up working a "job that even the most desperate migrants shunned: sifting through industrial chicken warehouses [marked 'Perdue family farmer'] and pulling out dead birds."[254] This new job requires him to wear two masks "to guard against the overpowering smell of ammonia . . . search the ground carefully for carcasses amid layers of excrement as [tightly packed

248. *The Kids on the Night Shift*, *supra* note 14.

249. *Id.* (one supervisor who had to terminate unaccompanied minors working in violation of child labor laws stated that the children "were looking at me with tears in their eyes").

250. *Id.*

251. *Id.*

252. *Id.*

253. *The Kids on the Night Shift*, *supra* note 14.

254. *Id.*

chickens] pecked frantically at his hands and feet."[255] Marcos' twelve-hour shift starts at five in the morning and pays less than what he made cleaning the Perdue factory but it enabled him to "send $100 home to his parents after a few weeks" of working at his new job.[256]

Viewed from the perspective of unaccompanied migrant children as reported in Dreier's articles, child labor reformers' proposed solutions—increased enforcement and penalties for child labor law violations—do not result in a net benefit for these children. Desperate for work, they find ways, even if months later, to come back to the same jobs they had earlier once the enforcement storm has subsided. Or, worse, like Marcos, they are driven deeper into the shadow economy to jobs that are just as, if not more, dangerous but less likely to be regulated than the ones they had before.[257] In this way, child labor laws have the unintended consequence of forcing the most destitute children "to choose between a life of increased poverty or more exploitative, often illegal, work."[258]

This is, in fact, exactly what has happened in the international child labor context when international or U.S. laws have targeted child labor abroad.[259] From 1992 to 1999, lawmakers in Congress proposed a complete ban on imported products made by children in other countries.[260] The law was well intentioned and Democratic Senator Tom Harkin from Iowa, who introduced the bill, believed that "[c]hildren in developing

255. *Id.* (quoting Marcos as saying, "There are some dead chickens that are good and rotten—they explode" when you pick them up).

256. *Id.*

257. *Id.* (Although unclear from Dreier's reporting, Marcos' new job likely is not subject to the FLSA's child labor provisions because it appears to come under the FLSA's agricultural exemption).

258. S. Denay Brown, *Protecting the Children: The Need for Modern Day Balancing Test to Regulate Child Labor in International Business*, 20 J. TRANSNAT'L L. & POL'Y 129, 148 (2010) (also citing economist Paul Krugman who has argued that some of the unintended consequences of child labor laws in the developing world have been to force destitute parents to sell their children into slavery).

259. *Id*. ("Forcing child labor underground and into concealment only further hinders any attempts at monitoring or regulating such labor."); *see also* M. Neil Browne et al., *Universal Moral Principles and the Law: The Failure of One-Size-Fits-All Child Labor Laws*, 27 HOUS. J. INT'L L. 1, 35 (2004) ("Sometimes, an outright ban on the use of child labor has resulted in children being pushed into worse forms of labor for even lower pay.").

260. The Child Labor Deterrence Act of 1997, S. 332, 105th Cong. (1997).

countries, for the sake of their future and that of their economies, should be in schools and not in factories working long hours for little or no pay under hazardous conditions."[261] There were, however, grave unintended consequences. Soon after the law was proposed, "50,000 Bangladeshi children garment workers lost their jobs" and "[a]s a result of the firings, the ILO and UNICEF found that many of the children took on more dangerous work such as stone crushing or prostitution to make ends meet."[262]

These types of on-the-ground realities have led scholars who study international child labor to argue that increased legislation and prosecution of child labor violations are rarely successful, in large part because they "ignore the root causes of child labor," the greatest by far of which is poverty.[263] Although these scholars do not sanction oppressive child labor, they critique developed countries' goals to completely abolish child labor because they do not have any meaningful impact on poor children who must work for their and their families' survival.[264] Given the legacy of colonial lawmaking that is at odds with child workers' widespread poverty and indigenous cultural norms, these scholars

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261. Brown, *supra* note 258, at 146.

262. *Id.* at 147-148 (also stating that "[c]omplete bans on child labor or imports born of child labor, have led to instances in which companies, after a threat of action by importing governments or companies, have eliminated the use of all child labor" which resulted in forcing "children to resort to more drastic measures for employment such as prostitution, begging, or new employment in even worse working conditions."). Scholars who study sex work in the United States have similarly criticized laws regulating sex work that fail to take sex workers' intersectional identities and circumstances into account. Linda S. Anderson, *Let's Talk About Sex (Work): The Irony of Partial Decriminalization of Sex Work*, 26 U. PA. J.L. & SOC. CHANGE 37 (2023); NINA LUO, DECRIMINALIZING SURVIVAL: POLICY PLATFORM AND POLLING ON THE DECRIMINALIZATION OF SEX WORK 4 (2020), [https://perma.cc/9G6C-KGSJ]; *Is Sex Work Decriminalization The Answer? What The Research Tells Us*, ACLU 10 (Oct. 21, 2020), [https://perma.cc/HT77-PB62].

263. Baradaran & Barclay, *supra* note 237, at 1, 14-18; *see also* Brown, *supra* note 258, at 133 ("First and foremost, poverty is the leading cause of child labor."); Ranee Khooshie Lal Panjabi, *Sacrificial Lambs of Globalization: Child Labor in the Twenty-First Century*, 37 DENV. J. INT'L L. & POL'Y 421, 432 (2009) ("[i]t is a truism that child labor prevails because poverty prevails . . . the great majority of children work because their families are poor") (internal citations omitted); Browne et al., *supra* note 259, at 6 ("To begin, we should note that historically the only children who have needed to work have been poor children.").

264. Brown, *supra* note 258, at 129-30; Browne et al., *supra* note 259, at 3, 35 ("Are the toiling children truly better off because of these laws, or do supporters of such statutes risk losing sight of the larger goal of what is good for the children while attempting to ban the use of child labor?").

conclude that more and better laws and enforcement will not help as much as programs that might help families survive without their children's income or excellent educational opportunities for children that might justify loss of income to their families.[265]

The DOL, America's top labor agency, is aware that international child labor reformers and experts "believe that the issue of child labor, especially in the more impoverished countries of the developing world, cannot be viewed in isolation but must be addressed in the broader context of social, economic, and educational development as a whole."[266] To date, however, this has not been the law or policy approach that has been taken when confronting child labor within the United States itself.

Most legal scholarship concerning domestic child labor has similarly been focused on the abolition of oppressive child labor through increased legislation, enforcement, and penalties.[267] One exception is Dana Dohn and Amy Pimer's law review article scrutinizing existing child labor laws' inability to account for the unique situation of emancipated minors.[268] Through a detailed description of minors who seek emancipation and their circumstances, including their need to work in jobs that are off-limits to them under the law, Dohn and Pimer argue that the law must take these children's situation as minors *and* individuals who must work into consideration.[269] Doing so allows the authors to make recommendations for change that go beyond traditional calls for revisions to the FLSA (although they make those too) and seek potentially more attainable changes at the state level that will provide actual protection for these children.[270]

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265. Browne et al., *supra* note 259, at 36.

266. BY THE SWEAT AND TOIL OF CHILDREN: THE USE OF CHILD LABOR IN AMERICAN IMPORTS 4 (1994) [hereinafter BY THE SWEAT AND TOIL OF CHILDREN], [https://perma.cc/5MNG-QM9V].

267. Brown, *supra* note 258, at 130; Moskowitz, *supra* note 54 (arguing for enhancement of penalties and enforcement of child labor laws); McGinnis, *supra* note 242, at 155-56 (arguing for increased protection for child agricultural workers under the FLSA).

268. Dana M. Dohn & Amy Pimer, *Child Labor Laws and the Impossibility of Statutory Emancipation*, 33 HOFSTRA LAB. & EMP. L.J. 121, 122 (2015).

269. *Id.* at 151-53 (stating that "hour limitations combined with job restrictions make it practically impossible to make a month's rent, let alone buy other essentials, such as utilities, groceries, and clothing," which is necessary for a minor to accomplish in order to obtain emancipation).

270. *Id.* at 155-61.

For the most part, however, scholars, advocates, and law and policy makers presume that all children working in oppressive jobs would benefit if existing child labor laws worked as intended.[271] A thought experiment shows why that is not the case for the children caught in today's migrant child labor crisis. Assume that somehow all oppressive child labor were wholesale eradicated within the borders of the United States.[272] What would happen to children who currently work in those jobs? Some, especially, those who are native born and living with at least one custodial parent who is a citizen, might manage through some combination of familial support and public assistance programs such as unemployment insurance or other state-based programs.[273] In other words, these children might have a tenable "fallback" position if they could no longer engage in unlawful child labor.[274] But that would not be the case for unaccompanied migrant children. First, unaccompanied minors, by definition, have no custodial parent in the country and most cannot rely on familial help since their sponsors, even if family members, are unable to financially support them.[275] Second, migrant children, because they do not receive work authorization documentation, are barred from applying for unemployment insurance benefits and many, if not most, state welfare programs.[276] Thus, even if the goal of ending oppressive child labor could be achieved, it is unclear what would become of unaccompanied migrant child who

271. *See supra* note 267 and accompanying text.

272. Admittedly, this is an unfathomable scenario in the current political and economic moment. It is, however, worth considering, and I thank my colleague Andy Coan for posing it.

273. An immigrant mother who worked in the same poultry processing plant as Marcos and many of the other unaccompanied minors featured in Dreier's reporting stated to Dreier that she would never permit her children, who lived with her, to do the kind of work that the unaccompanied minors were engaged in. *The Kids on the Night Shift*, *supra* note 14.

274. This may also have been true for the poor white children who were the focus of the campaign, and ultimate success, behind the passage of federal child labor laws. *See supra* Section I.A.

275. *See supra* Section I.B.

276. 26 U.S.C. § 3304(a)(14)(A) (2018) ("[C]ompensation [under a state's unemployment compensation program] shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed . . . .").

could no longer work in jobs to support themselves and their families.[277]

Thus, even at their best, U.S. child labor laws fail to protect, and may even harm, migrant children because they do not address or ameliorate the specific conditions that lead migrant children to seek out dangerous and hazardous jobs in the first place. This means that better laws and more enforcement will not alleviate unaccompanied migrant child workers' precarious predicament, and in fact may make things worse. Part III explores alternative solutions that might benefit migrant children beyond traditional calls for child labor reform.

III. ADDRESSING THE NEW ECONOMY OF EXPLOITATION

Addressing the new economy of exploitation requires a legal framework that differs from traditional calls for child labor reform. This Part posits such a framework by centering migrant children's experiences at the confluence of migration and labor and employing the theory of work primacy from cultural sociology. It then applies this novel framing to make recommendations for immediate action that could alleviate migrant child workers' suffering in the short-term as well as to recommend longer-term, systemic changes necessary to solve the migrant child labor crisis.

A. Centering Migrant Children's Experiences

Traditional calls for enforcement of child labor laws and reforms do not consider migrant children's on-the-ground experiences. Rather, as demonstrated in Parts I and II, past and present advocates crusading for the abolition of child labor often have had the paradigmatic American child in mind.[278] That child lives with at least one custodial parent and needs protection from

277. This view comports with what the DOL has recognized as something of a consensus among experts in the international child labor realm—that "immediate abolition of all child labor is unrealistic and, in many cases, contrary to the interests of the children themselves." BY THE SWEAT AND TOIL OF CHILDREN, *supra* note 266.

278. *See supra* Parts I-II.

excessive labor in order to enjoy an idyllic American childhood free from the cares of daily survival.[279] This, of course, is far from the lived reality of unaccompanied minors who form the bulk of the nation's migrant child worker population.[280] If the goal is to help the actual children at the heart of the current child labor crisis, these specific children's circumstances and needs must be taken into account when positing changes that will comprehensively address their predicament.[281] This can be done by locating unaccompanied minors "within the larger socio-economic and political context in which they labor."[282]

Migrant children's experiences as migrants, and low-wage workers result in what sociologist Stephanie Canizales terms "work primacy," which refers to "the centrality of work" in these children's lives.[283] Canizales interviewed seventy former migrant child workers in Los Angeles and, like Dreier, found that the combined pressures of "*sobrevivencia* (survival)" in the United States and the need to send financial support to families back home shape every aspect of migrant children's lives.[284] Importantly, work primacy is what drives migrant children into "precarious occupations within the secondary labor market," which Canizales defines as work with "long hours, low wages, labor market restrictions, and unsafe and unsanitary work conditions."[285]

Work primacy, however, does not mean that work is what defines migrant children.[286] To the contrary, work primacy

279. Browne et al., *supra* note 259, at 6 ("[H]istorically the only children who have needed to work have been poor children. Not surprisingly, such children tended to be overlooked by those in society with the power to stop such practices.").

280. *See supra* Section I.B.

281. This is also the position that many scholars have taken when writing about international child labor. *See e.g.*, Browne et al., *supra* note 259, at 4-6 (stating that in the international child labor context, child labor law reformers should not assume that "what is good for Cleveland is good for Bangladesh is good for Guatemala"); Brown, *supra* note 258, at 154 ("One major part of understanding what is in a child's best interest is understanding the unique situations in which individual children live.").

282. Shefali Milczarek-Desai & Tara Sklar, *Immigrant Workers' Voices as Catalysts for Reform in the Long-Term Care Industry*, 55 ARIZ. ST. L.J. 891, 909 (2023).

283. Canizales, *supra* note 16, at 1377.

284. *Id.* at 1372 (also theorizing that these economic pressures shaped migrant youth's "educational opportunities, community embeddedness, and family relationships").

285. *Id.*

286. *See* Angela D. Morrison, *Framing and Contesting Unauthorized Work*, 36 GEO. IMMIGR. L.J. 651, 662 (2022) (contesting the legal framing of low-wage, im/migrant workers

showcases migrant children's deep ties and sense of obligation to their parents and families. Canizales' interviews unequivocally show that migrant children are, above all, "motivated by empathy for [their] parents' sacrifices and a sense of responsibility . . . familial loyalty," and a belief that their "[l]abor migration may alleviate financial pressures on left-behind parents who struggle to provide for other family members."[287] Thus, it is as children and migrants who care deeply for left-behind, needy families that forces migrant youth's "entry into and relegation to the exploitative occupations that make up the secondary labor market."[288]

This is confirmed by Dreier's reporting. Marcos, whose arm was mangled, stated that even though his work was extremely exhausting and dangerous, it "paid better than he could have imagined—around $100 for each six-hour shift, [which was] more than he could make in a month back home."[289] Although Marcos wished he could go back home, he had come to the United States "because things were so desperate [for his family, and] if he went back, there would be no way to pay off his family's debt, and they would lose their land."[290] Antoni, who now suffers permanent brain damage as a result of a thirty-foot fall while placing shingles on a roof, was doing this extremely dangerous work because "[r]oofing [work] is plentiful and pays better than many of the other jobs these children can get . . . he says 'I was sending home $300 a month.'"[291] Kevin, who started working for manufacturers who made parts for Ford and General Motors when he was thirteen, further stated that "[i]t's not that we want to be

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as "unauthorized workers" and explaining that the law, by ignoring familial and community-based identities, furthers narratives that normalize denying low-wage im/migrant workers employment and labor rights).

287. Canizales, *supra* note 16, at 1376.

288. *Id.* at 1376-77 ("For unaccompanied immigrant youth, family ties can contribute to the primacy of work—both because of the economic vulnerability of family and the absence or fragmented nature of ties to family or community. With strong familial economic obligations in the home country and few attachments in the host country, youth have little to do but work.").

289. *The Kids on the Night Shift*, *supra* note 14.

290. *Id.*

291. *Children Risk Their Lives*, *supra* note 8 ("[T]his roofing work force continues to grow as fast as children arrive, anxious to find a way to support themselves and help their families out of poverty.").

working these jobs. It's that we have to help our families [back home]."[292] What motives these children more than anything is their deep desire to help their families back home. When a school exercise asked Marcos what his dream job was, he wrote "[t]o help my family," and when it asked what made him happy, he responded, "my parents."[293]

The theory of work primacy also provides a lens for understanding migrant children's extreme vulnerability. Without "the human and social capital shared by parents . . . and community ties," migrant children are often left to navigate the complex reality of life and work in the United States on their own.[294] This is made worse when migrant children drop out of school because they then also become "disconnected from K-12 education and supportive school-based [adult] figures" who have their best interests in mind.[295] As a result, most migrant children enter the U.S. labor market with very little understanding of what it means to engage in low-wage work and how much they will, in fact, need to work in order to meet their financial obligations.

In addition to needing money for "housing, food, clothing, and in some cases, medical attention," most migrant children also arrive with "migration debt between $3,000 and $11,000, which is often accumulating interest with each day the lender goes unpaid" on top of the financial support they promised to send to their families back home.[296] Jose, who is thirteen and works twelve-hour shifts, six days a week, told Dreier that he "didn't get how expensive everything was" and Marcos, the same boy who almost lost his arm working in a Perdue factory, agreed that "the work was harder than [he] expected."[297] Nery, who started working in a restaurant until three in the morning when he was only thirteen years old, explained that it was not until he arrived in Florida that "he discovered that he owed more than $4,000 [in debt] and had to find his own place to live."[298] Similarly,

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292. *Alone and Exploited*, *supra* note 7.

293. *The Kids on the Night Shift*, *supra* note 14.

294. Canizales, *supra* note 16, at 1375.

295. *Id.*

296. *Id.* at 1381.

297. *Alone and Exploited*, *supra* note 7; *The Kids on the Night Shift*, *supra* note 14.

298. *Alone and Exploited*, *supra* note 7 (Nery's sponsor, who "kept a running list of new debts: $140 for filling out H.H.S. paperwork; $240 for clothes from Walmart; $45 for a

Carolina, who works seventeen-hour night shifts packaging Cheerios confided to Dreier that although she "didn't have expectations about what life would be like here . . . it's not what [she] imagined."[299] A seventeen-year-old named Mauricio who works another meat processing job echoed this sentiment when he said to Dreier, "I still have to pay back my debt, so I still have to work."[300] One former migrant child worker who could not find work because employers were worried about violating child labor laws put it best when he stated that, in response to employers who told him to go to school, he thought to himself,

> yes, I would like to go to school but no one is going to [financially] support me. Just me. Who else? It's me by myself. . . . It was really difficult for me to get a job. No one wanted to help me. But I needed it. I needed to find a job to *sobrevivir* (survive), to pay the rent, the food, to take care of myself.[301]

This explains why, when employers have terminated migrant children in order to comply with child labor laws, many of the children become very upset, saying "they need[] the[ir] jobs to survive" and look at the supervisor who terminated them "with tears in their eyes."[302]

The extreme financial pressure migrant children face is further exacerbated by migrant youth's lack of knowledge regarding workers' rights and workplace norms. For instance, Andrés, who fell to his death while working on a roofing job, may not have realized the grave danger of not being clipped into a required safety harness.[303] Although occupational health and safety violations in the workplace are the most dangerous type of workers' rights abuses that migrant child workers face, they also

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taco dinner," was later prosecuted for labor trafficking but "[t]hat outcome is rare: In the past decade, federal prosecutors have brought only about 30 cases involving forced labor of unaccompanied minors.").

299. *Id.*

300. *Alone and Exploited*, *supra* note 7.

301. Canizales, *supra* note 16, at 1381.

302. *The Kids on the Night Shift*, *supra* note 14.

303. *Children Risk Their Lives*, *supra* note 8 ("After his death, the federal Occupational Safety and Health Administration found that the employer had 'nine laborers on the crew, but only six harnesses.'").

experience wage-theft, irregular hours, wage instability, and discrimination.[304]

Perhaps most importantly, work primacy illustrates the stark differences between migrant children and the American children that child labor laws were meant to protect. As Canizales states, migrant children's "growing up as workers contrasts Western notions of childhood that are idealized in the United States, such as school-going, delayed workplace entry, and dependence on an adult caregiver alongside sentimentalization in the family and community."[305] Understanding the differences between this idealized child and unaccompanied minors' reality, however, does not mean that migrant child workers have no hopes or dreams beyond working.

Both past and present migrant child workers interviewed by Canizales and Dreier expressed a desire to attend school, to learn, and to pursue a brighter future than the dismal present in which they are trapped.[306] For instance, Jose said, "I'd like to go to school, but then how would I pay rent?"[307] Marcos began attending school in earnest after his arm injury thinking that "[i]f he learned English, he might get a higher-paying job outside the poultry industry . . . [a]t the end of the school year, Marcos was the only ninth grader in the newcomers program to earn a passing score on a statewide standardized test on his first try."[308] But the urgency to make money, especially to send back home, is always in the back of migrant child workers' minds. For example, Uriel who was interviewed by Canizales stated that

> not going to school has to do with the fact that when you come here very young and you don't have support, you are working. You try to study but your mind does not have sufficient energy. You only think about work. . . . That's why it's difficult to speak [English].[309]

304. Canizales, *supra* note 16, at 1367-77, 1382-83 (commenting that indigenous youth and girls face disproportional levels of racism and sexism in the workplace).

305. *Id.* at 1376.

306. *Id.* at 1382-85.

307. *Alone and Exploited*, *supra* note 7.

308. *The Kids on the Night Shift*, *supra* note 14.

309. Canizales, *supra* note 16, at 1385.

Tomás explained the conflict this way, "[n]o one helped me. I had to pay rent, I had to pay [for] food. Okay, so, either I go to school and I didn't have money for rent or my food, or I don't go to school and I have money for rent and to eat."[310] Similarly, Marcos told Dreier that he "felt torn" because reducing his working hours in order to attend and do well in school meant that "most days he was earning just $20," whereas "[i]f he dropped out and worked full time, he might be able to pay off his family's debt within a year."[311]

Centering migrant child workers' experiences and viewing them through the lens of work primacy produces a complex and nuanced picture that paints these children not solely as victims of exploitative employers and cruel immigration policies, but also "agentic economic actors and labor migrants who act on their personal and familial best interest" to ensure their and their families' survival.[312] As devastating as it is to hear their stories, they provide an opportunity to create law and policy solutions that move beyond traditional calls for reform to effectively address migrant child workers' precarious predicament.

B. Law and Policy Solutions to Benefit Migrant Child Workers

Theories of intersectionality and work primacy illustrate that solutions to the migrant child labor crisis must be tied to migrant child workers' circumstances, imbued as they are with work primacy. This final Section employs that analytical framing to propose law and policy solutions to benefit migrant child workers.

International child labor scholars have posited that "[i]f we want to help working children, we need to find better options for them, not take away the ones they have chosen to survive; if we are to do this effectively, we must take their opinions seriously."[313] In 1996, at the first international conference on child labor, child worker delegates had an opportunity set forth these opinions—they said they wanted to "work with dignity,

310. *Id.* at 1384.
311. *The Kids on the Night Shift*, *supra* note 14.
312. Canizales, *supra* note 16, at 1372, 1376.
313. Brown, *supra* note 258, at 154.

with hours adapted so that we have time for education and leisure along with professional training, access to good health care, and more actions that would address the root causes of our situation, primarily poverty."[314] Hearing these needs and desires, international child labor scholars and policymakers have made legal and extra-legal recommendations for change that "focus less on formal employment and more on how children are treated."[315]

A similar strategy should be employed to address migrant child labor in the United States. First, more data and research concerning America's unaccompanied, migrant child workers is badly needed. Aside from Hannah Dreier's reporting and Stephanie Canizales' field work, very few first-hand descriptions exist of migrant child workers' experiences both before and after they arrive in the United States. The federal government, as well as state governments, should be involved in collecting as much information as possible on migrant child workers in the same way that the federal government did prior to the passage of federal child labor laws.[316] This information should include migrant child workers' own thoughts and opinions about what kinds of law and policy changes would be beneficial to them—something it seems no one has yet asked them and/or that they have not been able to articulate.

It is difficult, if not impossible, to articulate legal needs without an understanding of legal rights.[317] For this reason, the collection of data on migrant child workers in the United States should be coupled with mandatory workers' rights education for migrant youth that emphasizes industry-specific information on occupational safety and health and that also includes rights under wage and hour, collective activity, and anti-discrimination laws. Moreover, this type of comprehensive workers' rights education is exactly the type of solution that takes migrant child workers' intersectional identities into consideration because it recognizes

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314. *Id.* at 151 (internal quotations omitted).

315. *Id.* at 154.

316. WOOD, *supra* note 49, at 89 (In the early 1900s, "Congress ordered an investigation into the condition of . . . child wage-earners in the United States. The results were published in 1910 and 1911 in nineteen volumes" and in 1912, supported the approval of a bill creating a federal children's bureau that would "investigate and report upon all matters pertaining to the welfare of children . . . .") (internal quotations omitted).

317. Milczarek-Desai & Sklar, *supra* note 282, at 934.

that whether lawful or not, these children are working in dangerous jobs and therefore need legal tools and resources to navigate the many hazards in their workplaces. California recently did exactly this by enacting AB 800, a law that requires all public and charter high schools to provide workers' rights education to their students during one week in April that is designated as "Workplace Readiness Week."[318] Providing basic workers' rights education that includes industry-specific, health and safety information to all public and charter high school students could be lifesaving for migrant child workers who would not otherwise know that they have the right to certain protections, such as to request a safety harness before climbing on top of a three-story house to lay down roof shingles.

Mandatory workers' rights education for migrant children should also include information about state workers' compensation laws because these laws would allow migrant child workers to earn income even when they are injured and cannot work. Unlike state unemployment benefits, workers' compensation laws do not require work authorization (which is not provided to unaccompanied minors).[319] State-based workers' compensation programs, however, seem to have been largely overlooked as a temporary avenue for relief. Although workers' compensation payouts are small and by no means a panacea, they could provide a basic level of medical care and income while children recover from injuries.[320] Depending on what state a migrant child lives in, workers' compensation amounts might even be more than what they would be for an adult worker because nearly half of all states increase—sometimes by doubling—workers' compensation awards for children who are injured while working in violation of child labor laws.[321] Additionally, workers' compensation schemes often fix

318. A.B. 800, 2023-2024 Leg., Reg. Sess. (Cal. 2023) (codified at CAL. EDUC. CODE § 49110.5).

319. Milczarek-Desai, *supra* note 35, at 1215.

320. Benjamin J. Godfrey, *3 Concerning Trends for Injured and Ill Workers*, U.S. DEP'T OF LAB. BLOG (Nov. 18, 2022), [https://perma.cc/P9MJ-CZR3].

321. *See* ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, 5 LARSON'S WORKERS' COMPENSATION LAW § 66.02 (2023); Rebecca Shafer, *Hiring Youth: Minors and Workers Compensation*, WORKERS COMP. RES. CEN. (Dec. 14, 2010), [https://perma.cc/TPD8-K5C9].

contingent fees for attorneys, which would provide migrant children, who otherwise could not afford an attorney, with access to justice.[322] The obvious disadvantage to this solution, however, is that migrant children may not seek workers' compensation benefits if they are still able to work despite an injury because they would likely face job loss once their employer is known to have violated child labor laws. The fissured workplace may also be an obstacle to migrant child workers seeking workers' compensation. Antoni, the boy who suffered permanent brain damage, is "likely eligible for workers' compensation, but the company that had been hired to do the roofing job had subcontracted it out to a smaller company, which subcontracted it again. The three contractors spent a year arguing over who should be held liable" and only now are in the process of settling Antoni's claims.[323]

Another potential solution is predicated upon the reality that unaccompanied minors will continue making the arduous journey north as long as their countries of origin are mired in poverty and violence, and as long as the United States has jobs that need to be filled. Instead of forcing migrant children into oppressive child labor, federal and state governments, including public schools, should provide them with vocational training and jobs programs in sectors of the U.S. economy that are experiencing massive labor shortages such as healthcare, long-term care, and hospitality. Allowing migrant children to work reasonable hours in lawful jobs in such industries is a win-win-win for unaccompanied minors, employers, citizens, and the nation as a whole.[324]

Research, data collection, workers' rights education, workers' compensation, vocational training, and jobs programs are all short-term solutions that recognize the work primacy that

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322. Benjamin Douglas, *The Unrepresented Class: Why the Ninety-Nine Percent Are Losing the War for Workers' Compensation*, 57 TORT TRIAL & INS. PRAC. L.J. 605, 634 (2022).

323. *Children Risk Their Lives*, *supra* note 8.

324. Jobs programs and entry into labor-hungry sectors of the U.S. economy, however, would require providing work authorization documentation to unaccompanied minors. Currently, unaccompanied minors must apply for certain types of immigration relief in order to obtain work authorization. ELLEN MESSALI, IMMIGRATION OPTIONS FOR UNACCOMPANIED CHILDREN (2014), [https://perma.cc/9ZKM-MZ8P].

pervades migrant child workers' lived realities. Longer-term solutions that do the same will require changes to immigration law and/or policy. One such reform is to treat unaccompanied minors like refugees or asylees who can access federal benefits including cash, food, and medical assistance. Another is to amend federal law so that migrant child workers can access cash and food assistance based on need.[325] This, admittedly, is unlikely to occur given the gridlock in Congress, but lawmakers could make it a condition of an immigration reform deal. States could also be part of the solution by removing work authorization restrictions on state-based welfare benefits or creating new cash and food assistance available to migrant child workers and/or their sponsors.

A third solution is to expand the Labor Trafficking Visa ("T visa") definition to include all migrant children engaged in oppressive child labor. This would address migrant child workers' inability to access work authorization, pathways to legalized status, and an ability to reunite with their parents due to border militarization, draconian immigration policies, and outdated per country immigration caps that make it nearly impossible for Mexican and Central American migrants to lawfully enter the United States.[326] Currently, to apply for a T visa, migrant child workers must show they are working as a result of fraud, coercion, or force.[327] Broadening this definition to include migrant children who are subject to oppressive child labor addresses migrant children's work primacy rather than holding it against them. Once a T visa is obtained, migrant children would be able to petition for parents and other family

325. 7 U.S.C. §§ 2011-2036 (2023) (Supplemental Nutrition Assistance Program (SNAP) provisions); 42 U.S.C. §§ 601 et seq. (2022) (Temporary Assistance for Needy Families (TANF) provisions).

326. Naureen Shah, *Child Labor Investigation Reveals Immigration Policy Changes We Need Now*, ACLU (Mar. 3, 2023), [https://perma.cc/8W9L-WMQ2]; 8 U.S.C. § 1227 (2008).

327. 8 C.F.R. § 214.11 (2022). Migrant child workers who have been subject to labor and/or sex trafficking as defined by the current T visa requirements could and should apply for a T visa immediately. Applying for T visa relief, however, is complicated and often requires the aid of an experienced immigration attorney. Sarah Betancourt & Jennifer B. McKim, *For Labor Trafficked Immigrants, T-Visas Are a Life-Saving but Flawed Relief*, WGBH (Aug. 7, 2023), [https://perma.cc/4JEM-JL7Y].

members to join them in the United States.[328] Alternatively, DHS could broaden its work-based deferred action program to include family reunification for migrant child workers engaged in oppressive child labor.[329] Finding a way for parents of migrant child workers to join their children in the United States is key because migrant child workers would not be in the predicament they are in today if their parents could be working to help support them and needy relatives back home. As Dreier's reporting shows, when migrant children have one or more custodial parents in the country, they are far less likely to engage in oppressive child labor and far more likely to attend school.[330]

A final, admittedly remote, long-term solution is to overhaul America's badly broken immigration laws so that adults desperate for work in impoverished countries could legally work in the United States to fill large labor gaps in this country that are forecasted to get much worse as America's population ages.[331] This might mean that parents could be admitted into the country with their children or it might mean that adult family members could obtain temporary visas to work in the United States for limited amounts of time in order to support their families back home.[332] Either way, desperate families would not be forced to send their children alone on the perilous journey to the U.S. border to be admitted as unaccompanied minors who must then live and work under horrific circumstances.

These solutions are not perfect; indeed, many seem out of reach. They may, however, provide alternatives to enhanced enforcement and increased penalties for violations of existing

328. Betancourt & McKim, *supra* note 327.

329. Milczarek-Desai, *supra* note 35, at 1216 n.296.

330. *The Kids on the Night Shift*, *supra* note 14 (in interviewing Marcos, Dreier learned that he had "[a]n aunt [who] had come from Guatemala a month earlier with her 15-year-old daughter, Antonieta. His aunt had planned to work while Antonieta went to school . . . .").

331. Lauren Weber & Alana Pipe, *Why America Has a Long-Term Labor Crisis, in Six Charts; While the Hot Pandemic-Era Job Market is Cooling, It Is Set to Remain Tight for Years*, WALL ST. J. (Sept. 25, 2023), [https://perma.cc/Q8D7-FREU].

332. This is how the border functioned for most of American history under what has been referred to as "circular migration patterns" before militarization of the border forced migrants to seek work through unlawful entry. Milczarek-Desai, *supra* note 35, at 1180-81; *see also* Tony Payan, "Integration through trade: Labor markets and worker rights in the USMCA" in THE FUTURE OF TRADE: A NORTH AMERICAN PERSPECTIVE, EDS. DAVID A. GANTZ AND TONY PAYAN 127-51 (2023) (describing how temporary work visas might be broadened to ameliorate America's labor shortages and immigration concerns).

child labor laws and, in that way, might help more than hurt migrant child workers.

CONCLUSION

Thanks in large part to Hannah Dreier's investigative reporting, the terrible truth about migrant child labor is at the forefront of the American consciousness. Reformers, legal scholars, and policymakers should not squander this moment by calling for revisions to existing laws that, even if they could be made, will drive unaccompanied minors who have no choice but to work deeper into the dangerous, unlawful, underground workforce. This Article provides a new framework for addressing the current migrant child labor crisis by centering migrant child workers' experiences, employing work primacy theory, and drawing from international labor scholarship. It is a necessary first step to proposing viable solutions to address the oppressive child labor documented in Dreier's articles and to provide legal protections for migrant children who are trapped in the new economy of exploitation.