

PREVENTING FORCED LABOR IN CORPORATE SUPPLY CHAINS: THE FAIR FOOD PROGRAM AND WORKER-DRIVEN SOCIAL RESPONSIBILITY

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“There is real slavery in the fields of [America]. This is not about lousy jobs, but violent control, vicious exploitation, and the potential for serious harm and even death. Even more heartbreaking is the fact that there has never been a day in the history of [American] agriculture without some amount of slavery tainting the food grown there. That food leaves the hands of slaves and ends up in the meals we eat with our families.”¹

“For its extraordinary efforts to combat human trafficking by pioneering the Fair Food Program, empowering agricultural

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*** The theories and structures discussed in this Article are all the original intellectual work product of the CIW, but the factual assertions of course are not. Additionally, much of the information about CIW and its formation of the Fair Food Program comes from the authors’ personal experiences with the organization. The authors wish to thank the editors of the *Wake Forest Law Review* for their thorough attention to identifying sources for the Article’s many factual assertions, perhaps leading readers to believe the authors are far more erudite than may be the case.

1. Press Release, Modern-Day Slavery Museum, Modern-Day Slavery Museum to Tour Southeast, Explore Connections Between Past and Present, and Offer Solutions to Human Rights Crisis in the Fields (Sept. 25, 2010), <http://www.ciw-online.org/museum/fall2010/advisory.html> (quoting Dr. Kevin Bales).

*workers, and leveraging market forces and consumer awareness to promote supply chain transparency and eradicate modern slavery on participating farms, we award this Presidential Medal.”*²

INTRODUCTION

The Coalition of Immokalee Workers (“CIW”) is a human rights organization composed primarily of farmworkers, most of whom work at least part of the year in Florida’s \$650 million tomato industry.³ In 2011, CIW initiated the Fair Food Program (“FFP” or “Program”), the first manifestation of its Worker-driven Social Responsibility (“WSR”) model for ridding corporate supply chains of human rights violations.⁴ In the six short years since its inception, the Program has nearly ended the scourge of forced labor in the East Coast tomato industry.⁵ The FFP has done so by using an approach that the United Nations Working Group on Business and Human Rights has praised for its “smart mix” of monitoring tools and enforcement strategies and its potential for tackling human trafficking throughout the world.⁶

We examine the FFP’s uniquely successful enforcement mechanisms later in this Article, but to appreciate fully the magnitude of the Program’s accomplishment in eliminating forced labor in the fields, one must first understand the extent to which modern-day slavery in American agriculture represents a continuum from the days of chattel slavery. While the phenomenon of forced labor has taken many forms over the past four centuries, the industry has never been entirely free from its clutches. Florida’s history is instructive on this point.

2. *CIW Receives Presidential Medal for Extraordinary Efforts in Combatting Modern-Day Slavery at White House Forum!*, COALITION IMMOKALEE WORKERS (Jan. 30, 2015), <http://www.ciw-online.org/blog/2015/01/presidential-medal-combatting-slavery/>.

3. COAL. OF IMMOKALEE WORKERS, ABOUT THE CIW 1, <http://www.ciw-online.org/Resources/about/12CIWwho.pdf> (last visited Apr. 28, 2017); FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2015 ANNUAL REPORT 2 (2015), <http://fairfoodstandards.org/15SOTP-Web.pdf>.

4. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 2.

5. *Id.* at 2–3.

6. *The Enforcement Imperative at the Heart of Worker-Driven Social Responsibility*, COALITION IMMOKALEE WORKERS (July 17, 2016), <http://www.ciw-online.org/blog/2016/07/the-enforcement-imperative/>.

I. FLORIDA'S HISTORY OF SLAVERY FROM PLANTATION SLAVERY TO LABOR TRAFFICKING

A. *The Chattel Slavery Period*

Over the first two centuries of Spanish control in North America, chattel “slavery existed in both law and custom, yet relatively few enslaved Africans were imported.”⁷ Rather, colonial authorities in St. Augustine, Florida, utilized a cacique labor draft system whereby young indigenous men planted and harvested corn essential for the colony’s survival.⁸ After Great Britain gained control of Florida in 1763, emigrant planters in the Southeast started developing large-scale commercial agriculture in Florida, and enslaved Africans and their descendants provided the main source of labor.⁹ When Spain regained control of Florida following the American Revolution, the northeastern coast became a key hub for importing slaves to North America.¹⁰

The United States acquired Florida in 1821, transforming the territory’s political economy and labor conditions.¹¹ In the decades prior to the Civil War, slaveholders drove increasing numbers of slaves to Florida to meet the demands of cotton and sugar production.¹² While traditional antebellum plantations existed, another variant of chattel slavery emerged—known as “pushing”—in which transitory planters, in an effort to maximize their wealth, continually raised production requirements, forcing their slaves to work faster to meet the minimum demands.¹³ Pushing required new and harsher forms of abuse, and many of its victims “viewed [it] as different in both degree and kind from their previous experiences in Virginia and the Carolinas.”¹⁴ During this time, slavery comprised

7. Sean Sellers & Greg Asbed, *The History and Evolution of Forced Labor in Florida Agriculture*, 5 RACE/ETHNICITY 29, 32 (2011).

8. Tamara Spike, *St. Augustine’s Stomach: Corn and Indian Tribute Labor in Spanish Florida*, in FLORIDA’S WORKING-CLASS PAST: CURRENT PERSPECTIVES ON LABOR, RACE, AND GENDER FROM SPANISH FLORIDA TO THE NEW IMMIGRATION 17, 17–22 (Robert Cassanello & Melanie Shell-Weiss eds., 2009).

9. Sellers & Asbed, *supra* note 7, at 32.

10. Edward E. Baptist, *The Slave Labor Camps of Antebellum Florida and the Pushing System*, in FLORIDA’S WORKING-CLASS PAST, *supra* note 8, at 31, 35, 39.

11. Sellers & Asbed, *supra* note 7, at 32.

12. *Id.* at 33.

13. *Id.*

14. *Id.*

“the backbone of the Florida economy.”¹⁵ By 1860, the state’s total population was 140,424, nearly 44% of whom were enslaved.¹⁶

B. Post-Civil War Servitude

Even after the Thirteenth Amendment abolished the legal institution of slavery in 1865, the citizenship and labor rights of newly emancipated Floridians remained circumscribed. Large agricultural and industrial interests sought to attract investment with the comparative advantage of a low-wage, disenfranchised workforce.¹⁷ This system of labor relations was maintained through the threat and use of violence. Between 1882 and 1930, black Floridians were lynched at the highest per capita rate in the United States,¹⁸ with many of the hangings linked to labor disputes.¹⁹ Within a hardening Jim Crow racial caste system, forced labor persisted in a combination of legally sanctioned²⁰ and extralegal forms.²¹

An example of state-sanctioned slavery was the convict-lease system, in which “counties and the state leased predominantly African American men—often arrested on flimsy vagrancy charges—to on-site labor camps managed by farms, phosphate mines, and forest industry firms.”²² This practice also suppressed farm and industrial wages for free workers, black and white, who had to compete in the same labor market with convict laborers.²³ Florida

15. LARRY E. RIVERS, *SLAVERY IN FLORIDA: TERRITORIAL DAYS TO EMANCIPATION* 254 (2000).

16. *Results from the 1860 Census*, CIVIL WAR HOME PAGE, http://www.civil-war.net/pages/1860_census.html (last visited Apr. 28, 2017).

17. PAUL ORTIZ, *EMANCIPATION BETRAYED: THE HIDDEN HISTORY OF BLACK ORGANIZING AND WHITE VIOLENCE IN FLORIDA FROM RECONSTRUCTION TO THE BLOODY ELECTION OF 1920*, at 10–12 (2005).

18. *Id.* at 61.

19. See JONATHAN MARKOVITZ, *LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY*, at xxiii–xxiv (2004).

20. See JACQUELINE JONES, *THE DISPOSSESSED: AMERICA’S UNDERCLASSES FROM THE CIVIL WAR TO THE PRESENT* 107 (1992) (discussing legislation designed to enable southern whites to extract free or low-wage labor from black citizens).

21. See ORTIZ, *supra* note 17, at 81.

22. Sellers & Asbed, *supra* note 7, at 34. Mortality rates for lease convicts were high, as they were forced to work under inhumane conditions in isolated camps. *Id.* As one planter notoriously remarked in 1883, “Before the war, we owned the negroes. . . . If a man had a good negro, he could afford to keep him. . . . But these convicts, we don’t own ‘em. One dies, get another.” MATTHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928*, at 2–3 (1996).

23. Seller & Asbed, *supra* note 7, at 35.

was one of the last states to abolish its convict-lease system in 1923.²⁴

Another form of servitude that emerged during this period was debt peonage.²⁵ Specific data for Florida is unknown, but as many as one-third of all tenant farmers in neighboring Georgia, Alabama, and Mississippi were being held against their will in 1900.²⁶ Debt peonage “took root wherever employers were unable to recruit free laborers—that is, in the state’s most undesirable and lowest-paid workplaces,”²⁷ which perfectly describes the agricultural sector. Throughout the twentieth century, farmworkers were subjected to this form of forced labor, accumulating “debt” through charges for rent, food, wine, beer, and cigarettes provided by the employer at enormously inflated prices through a “company store.”²⁸ “Workers were forced to purchase these items from the employer, and deductions at the end of the week regularly exceeded pay, leaving entire crews of workers in a spiraling system of debt from which they could not escape.”²⁹

An opportunity to address many of these injustices was squandered in 1935 when farmworkers were excluded from many of the important New Deal workplace protections, such as the right to a minimum wage, overtime pay, and collective bargaining.³⁰ This racially motivated exclusion³¹ ensured farmworker powerlessness in

24. VIVIEN M.L. MILLER, CRIME, SEXUAL VIOLENCE, AND CLEMENCY: FLORIDA’S PARDON BOARD AND PENAL SYSTEM IN THE PROGRESSIVE ERA 12–13 (2000). Alabama abolished convict leasing in 1928, making it one of the longest lasting uses of the practice by far. MANCINI, *supra* note 22, at 99, 104–05.

25. JONES, *supra* note 20, at 107.

26. *Id.*

27. Sellers & Asbed, *supra* note 7, at 35.

28. *Id.* at 37.

29. *Id.*

30. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 125, 131–32 (2011) (discussing the exclusion of agricultural workers from New Deal protections in the National Labor Relations Act (“NLRA”) and the Fair Labor Standards Act (“FLSA”)). Of these three core labor protections, only the right to a minimum wage has been addressed in the ensuing years. *Id.* at 117. Farmworkers remain outside the ambit of the NLRA, which protects an employee’s right to organize and bargain collectively, and are still not entitled to overtime pay under the FLSA. *Id.* at 117, 126–27 & n.158.

31. Because President Roosevelt needed the support of Southern Democrats to enact the FLSA, their views on race relations prevailed. *Id.* at 132–33. The following comment of Representative J. Mark Wilcox of Florida during a congressional floor debate concerning passage of the FLSA is indicative of the environment at the time:

Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as

relation to their employers, and fertile ground for forced labor, for decades to come.³² Outside of the FFP, the system of debt peonage persists to this day, as evidenced by the recent convictions in the case of *United States v. Evans*.³³

C. *Forced Labor in the 21st Century*

Agricultural labor today remains mired in a human rights crisis made possible by the continuing poverty and powerlessness of farmworkers.³⁴ In 2008, during a fact-finding visit to Immokalee—a small town at the heart of Florida’s tomato production—Senator Bernie Sanders described the conditions he encountered with these words: “[T]he norm is a disaster, and the extreme is slavery.”³⁵

Since 1997, the U.S. Department of Justice (“DOJ”) has successfully prosecuted eight farm labor servitude cases in Florida,³⁶

Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted; but the Federal Government knows no color line and of necessity it cannot make any distinction between the races. We may rest assured, therefore, that . . . it will prescribe the same wage for the Negro that it prescribes for the white man. . . . [T]hose of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge.

82 CONG. REC. 1404 (1937) (statement of Rep. J. Mark Wilcox).

32. Perea, *supra* note 30, at 96–98.

33. See *United States v. Evans*, No. 3:05-cr-159(S3)-J-32MMH, 2006 U.S. Dist. LEXIS 94369, at *7–8 (M.D. Fla. July 14, 2006) (noting that during the execution of a search warrant, workers on Evans’ farm told investigators that they were sold items on credit, and once indebted, were not allowed to leave). The investigation resulted in the indictment of nine people on various charges. Indictment at 1, *United States v. Evans*, No. 3:05-cr-159(S2)-J-32HTS (Oct. 13, 2005), ECF No. 45. Ronald Evans, Sr., was eventually sentenced to 360 months for various crimes. Sentencing Order at 1–2, No. 3:05-cr-159(S4)-J-32MMH (M.D. Fla. Feb. 7, 2007).

34. Perea, *supra* note 30, at 127.

35. Katrina vanden Heuvel, *Slavery in the Union*, NATION (Jan. 30, 2008), <https://www.thenation.com/article/slavery-union/>.

36. See, e.g., *United States v. Evans*, 276 F. App’x 926, 926 (11th Cir. 2006) (unpublished) (per curiam); *United States v. Ramos*, 130 Fed. Appx. 415, 422 (11th Cir. 2005) (unpublished) (per curiam); *United States v. Flores*, No. 98-4178, 1999 WL 982041, at *2 (4th Cir. Oct. 29, 1999) (unpublished); Judgment at 1, *United States v. Mendez-Vazquez*, No. 1:16-cr-20170-cr-RNS (S.D. Fla. Jan. 20, 2017); Judgment as to Cesar Navarrete at 1, *United States v. Navarrete*, 207-cr-136-FtM-29DNF (M.D. Fla. Dec. 24, 2008); Judgment as to Giovanni Navarrete at 1, 207-cr-136-FtM-29DNF (M.D. Fla. Dec. 24, 2008); Judgment at 1, *United States v. Lee*, No. 2:00-cr-14065-DMM (S.D. Fla. Aug. 21, 2001), ECF No. 66; Judgment at 1, *United States v. Cuello*, No. 2:99-cr-

prompting one federal official to label the state “ground zero for modern slavery.”³⁷ CIW was an active participant in all but one of these cases, often conducting the initial investigations that brought the cases to the attention of the DOJ, and sometimes sending members into the labor camps undercover.³⁸ In these cases, captive workers were held against their will by their employers through threats and, all too often, the actual use of violence—including beatings, shootings, and pistol-whippings.³⁹ The eight successful prosecutions resulted in the liberation of over 1200 farmworkers.⁴⁰

Numerous midlevel supervisors went to prison as a result of the prosecutions, but the growers who benefitted from the forced labor were never prosecuted.⁴¹ As a result, nothing changed. This reality eventually led Luis C.deBaca, then the U.S. Ambassador-at-Large of the Office to Monitor and Combat Trafficking in Persons,⁴² and previously one of the prosecutors in the Flores case,⁴³ to conclude that the investigation/prosecution model for combating slavery was

0050-HLA-1 (M.D. Fla. Sept. 29, 1999); Brief for the United States as Appellee at 2, *United States v. Tecum*, No. 01-10822-JJ (11th Cir. May 24, 2002); *see also* COAL. OF IMMOKALEE WORKERS, *SLAVERY IN THE FIELDS AND THE FOOD WE EAT* 1–2, <http://ciw-online.org/wp-content/uploads/12SlaveryintheFields.pdf> (last visited Apr. 28, 2017) (providing brief descriptions of these prosecutions).

37. John Bowe, *Nobodies: Does Slavery Exist in America?*, *NEW YORKER* (Apr. 21, 2003), <http://www.newyorker.com/magazine/2003/04/21/nobodies>.

38. *See Anti-Slavery Program*, COALITION IMMOKALEE WORKERS, <http://www.ciw-online.org/slavery/> (last visited Apr. 28, 2017).

39. *See, e.g., Flores*, 1999 WL 982041, at *1 (“Flores and a supervisor, Sebastian Gomez, beat migrant worker Antonio Perez as punishment for his complaints about the camp conditions. Ramon Pena attempted to intervene, and Flores struck him in the head with a semi-automatic pistol.”).

40. *See Anti-Slavery Program*, *supra* note 38. For their efforts in this area, CIW received a written commendation from then FBI Director Robert Mueller. COAL. OF IMMOKALEE WORKERS, *supra* note 36, at 2.

41. *See* Katy Torralbas, *Immokalee Farmworkers Have Congress’ Attention* (Apr. 15, 2008) (noting that Senator Bernie Sanders called for changes to federal law “to address the problem of growers and others who are avoiding prosecution by remaining willfully blind to the abuses around them”); *cf.* SARA KOMINERS, OXFAM AM., *WORKING IN FEAR: SEXUAL VIOLENCE AGAINST WOMEN FARMWORKERS IN THE UNITED STATES: A LITERATURE REVIEW* 21 (2014), http://deohs.washington.edu/pnash/sites/deohs.washington.edu.pnash/files/documents/SH_OXFAM_lit_review2014.pdf (discussing how growers avoid responsibility for compliance with labor laws by hiring independent contractors to supervise workers).

42. Office of Justice Programs, *Luis C.deBaca, Director: Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Trafficking*, U.S. DEPT’ JUST., https://ojp.gov/about/leadership_lcdebaca.htm (last visited Apr. 28, 2017).

43. *See Coalition of Immokalee Workers Praised During White House Forum on Human Trafficking*, *NEWS-PRESS.COM* (Apr. 15, 2013), https://www.nesri.org/sites/default/files/Coalition_Of_Immokalee_Workers_Praised_During_White_House_forum_On_Human_Trafficking_0.pdf (discussing C.deBaca’s involvement in the *Flores* case).

insufficient to accomplish its intended goal, telling a national gathering of anti-trafficking advocates in 2013 that “We can’t prosecute our way out of this problem.”⁴⁴

II. A NEW THEORY OF CHANGE

Despite its active participation in the prosecution of forced labor cases, CIW had, years before Ambassador C.deBaca’s statement, reached the same conclusion through its distinctive process of community organizing. Farmworkers in Immokalee first started meeting in 1993 to address the abuses they faced in the fields.⁴⁵ They gathered in a local Catholic church to discuss the problems that had plagued their community for generations—from forced labor to subpoverty wages, widespread sexual harassment, verbal abuse, and violence at the hands of local farm bosses⁴⁶—and to examine the root causes of those abuses in search of sustainable solutions.⁴⁷

A. *CIW’s Organizing Philosophy*

CIW employed an organizing philosophy based on the principles of community education and leadership development. Born in Latin America and the Caribbean and known as Popular Education, it was an approach familiar to many early CIW members from their experiences with peasant and community organizations in their home countries.⁴⁸ Popular Education emphasizes the importance of participatory dialogue and critical analysis as communities tackle their problems, and is in many ways the obverse of the traditional American community organizing approach.⁴⁹ While the latter emphasizes individual, charismatic leadership,⁵⁰ Popular Education emphasizes broad-based, participatory leadership with techniques designed to facilitate member participation in group reflections and decision-making.⁵¹ This dedication to the principles of worker

44. Luis C.deBaca, Ambassador-at-Large of the Office to Monitor and Combat Trafficking in Persons, Keynote Address at the Freedom Network Conference on Human Trafficking (Apr. 18, 2013) (notes from this address on file with the authors).

45. *About CIW*, COALITION IMMOKALEE WORKERS, <http://www.ciw-online.org/about/> (last visited Apr. 28, 2017).

46. FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM: 2014 ANNUAL REPORT 2 (2015), <http://fairfoodstandards.org/cms/wp-content/uploads/2015/08/14SOTP-Web.pdf>.

47. *About CIW*, *supra* note 45.

48. Beverly Bell, *Florida Farmworkers Build Unity Through Education and Action*, RACE, POVERTY & ENV’T, Fall 2007, at 39, 39–41.

49. See Paul Castelloe et al., *Participatory Change: An Integrative Approach to Community Practice*, 10 J. COMMUNITY PRAC. 7, 8–9 (2002).

50. *Id.* at 8.

51. See Bell, *supra* note 48, at 40–41; Castelloe et al., *supra* note 49, at 8–9.

participation and a continuous process of analysis and reflection would lead to critical insights into the causes of supply chain abuses and carry over into the development of the FFP, where it continues to prove essential to the Program's success in ending forced labor and other human rights violations.⁵²

It was just such an ongoing community reflection that, in 2000, led to the realization that the huge multinational corporations at the top of the food system were not merely complicit in the human rights abuses occurring in their supply chains, but that their purchasing practices were in fact a major contributing factor.⁵³ Returning to Immokalee from a protest at the Governor's mansion in Tallahassee,⁵⁴ frustrated CIW members gathered at the organization's storefront community center to ponder their next move in their campaign for "dignity, dialogue, and a fair wage."⁵⁵ It was then that an article in a produce industry journal helped signal the strategic path forward,⁵⁶ one that would lead the Immokalee farmworker community to its transformative model for ridding

52. See FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 5. Though their organizing strategy is nontraditional, CIW's initial tactics were very much in keeping with prior U.S. labor struggles, particularly those waged by workers before passage of the NLRA. See *Pre-Wagner Act Labor Relations*, NAT'L LAB. REL. BOARD, <https://www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations> (last visited Apr. 28, 2017). Between 1995 and 2000, CIW organized several major actions, including community-wide work stoppages in 1995, 1997, and 1999, *Ending Abuses and Improving Working Conditions for Tomato Workers: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 110th Cong. 13 (2008) (statement of Lucas Benitez, former farmworker and Co-founder of CIW); a thirty-day hunger strike undertaken by six members in 1998, *About CIW*, *supra* note 45; and a 234-mile march from Ft. Myers to Orlando in 2000, *About CIW*, *supra* note 45. By 1998, these protests had won industry-wide raises of 13% to 25%, which meant an increase of several million dollars in annual income for the community. *About CIW*, *supra* note 45. Unfortunately, the increased wages only brought the tomato picking piece rate back to pre-1980 levels, and these more traditional approaches did little to achieve a meaningful voice in the workplace or to eliminate nonwage labor abuses. *Id.*

53. See FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 5 (discussing how the FFP seeks to reverse the process whereby "multi-billion dollar brands on the retail end of the industry are able to leverage their volume purchasing power to demand ever-lower prices, which has resulted in downward pressure on farmworker wages and working conditions").

54. Kathleen Dolan Seipel, *Coalition of Immokalee Workers*, in *LIVING THE CATHOLIC SOCIAL TRADITION: CASES AND COMMENTARY* 151, 159 (Kathleen Maas Weigert & Alexia K. Kelley eds., 2005); see also *Actions to Date in the Taco Bell Boycott!!*, COALITION IMMOKALEE WORKERS (Aug. 14, 2001), http://www.ciw-online.org/blog/2001/08/complete_action_list/.

55. Seipel, *supra* note 54, at 159.

56. See generally Tracy Roselle, *Shipper Takes Non-Conformist Approach*, PACKER, Dec. 1999, at A1 (discussing how a major tomato producer in Florida focuses on long-term contracts with purchasers like Taco Bell).

corporate supply chains of forced labor and other unwanted behavior, known now as Worker-Driven Social Responsibility (“WSR”).⁵⁷

The article highlighted the direct connection between the fast-food brand Taco Bell and Florida’s largest tomato grower. It underscored the massive volume of sales a buyer like Taco Bell represented to its Florida suppliers and the influence that the multibillion dollar fast-food brands and supermarket chains have over how tomatoes are grown, from the varieties planted and sizes harvested to the price at the farm gate.⁵⁸ As CIW continued to investigate the dynamic between the growers and the large retail buyers of Florida tomatoes, its focus gradually expanded beyond farm labor relations to include the food industry as a whole.⁵⁹ It became increasingly clear that the growers’ share of the profits generated from the labor of farmworkers, while obviously much larger than that of the farmworkers themselves, was not only minuscule compared to that of the retail brands at the top, but was in fact shrinking.⁶⁰

What the CIW realized was that the massive retail food chains were leveraging their volume purchases to demand ever lower prices from their Florida tomato suppliers, and that the downward pressure on prices was in turn translated, year after year, into a concomitant downward pressure on wages and working conditions for farmworkers.⁶¹ This new analysis placed responsibility for farmworker poverty and abuse not only at the feet of the farm bosses and growers whom the CIW had been battling for a decade, but also squarely within the corporate suites of major food retailers.

57. *Worker-Driven Social Responsibility (WSR): A New Idea for a New Century*, COALITION IMMOKALEE WORKERS, (June 16, 2014), <http://www.ciw-online.org/blog/2014/06/wsr/>.

58. Roselle, *supra* note 56, at A1.

59. *About CIW*, *supra* note 45.

60. This analysis was later confirmed in a 2004 study by Oxfam America entitled *Like Machines in the Fields: Workers Without Rights in American Agriculture*, which noted that “[t]he disparity between the retail price and the price received by the grower-shipper is known as the ‘marketing spread.’” OXFAM AM., *LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE* 35 (2004), <https://www.oxfamamerica.org/static/media/files/like-machines-in-the-fields.pdf>. Whereas in 1990 grower/shippers received 41% of the retail price of tomatoes, by 2000 they were receiving barely one quarter. *Id.*

61. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 5.

B. *The Campaign for Fair Food*

In short, CIW concluded that, along with the other megabrands, “*Taco Bell makes farmworkers poor*,”⁶² and it was with that slogan that, in 2001, it launched the Campaign for Fair Food and the seminal Taco Bell boycott.⁶³ CIW called on the fast-food giant to pay one penny more per pound of tomatoes to help raise farmworkers’ wages, to adopt a human rights-based code of conduct, and to only buy Florida tomatoes from suppliers who complied with that code.⁶⁴ Though the slogan mystified most consumers and analysts in 2001,⁶⁵ it soon became clear that CIW’s new analysis was spot on. Economic research began to appear supporting the farmworkers’ claims, including an influential report by Oxfam America entitled *Like Machines in the Fields: Workers Without Rights in American Agriculture*.⁶⁶

Focusing a spotlight on major retail brands’ responsibility for farmworker poverty and abuse generated growing consumer action and support for CIW’s nascent campaign. Students in particular

62. *Now Is the Time Tour*, COALITION IMMOKALEE WORKERS, <http://www.ciw-online.org/now-is-the-time-schedule-1/> (last visited Apr. 28, 2017).

63. “*If You’re Going to Make an Impression, Come to the Place Where the Chairman Is on Holiday*,” COALITION IMMOKALEE WORKERS (Mar. 14, 2016), <http://www.ciw-online.org/blog/2016/03/wvt-palm-beach/>.

64. *Taco Bell Boycott in Brief*, BOYCOTT THE BELL!, http://www.ciw-online.org/tz_site-revision/breaking_news/boycott_in_brief.html (last visited Apr. 28, 2017).

65. “*If You’re Going to Make an Impression, Come to the Place Where the Chairman Is on Holiday*,” *supra* note 63.

66. See OXFAM AM., *supra* note 60, at 2. Oxfam concluded in part:

The U.S. produce market has been transformed since the 1980s. What was once a highly fragmented market has become increasingly consolidated, with tremendous market power flowing to the hands of a decreasing number of huge produce buyers. . . . In today’s market, by contrast, large food retailers purchase directly from grower-shippers, bypassing produce wholesalers. “They do so under a standing agreement or contract specifying various conditions and terms, including marketing services provided by the grower-shipper, volume discounts, and other price adjustments and quality specifications.” These shifts in market organization and function, many of which have increased both the risk and cost of doing business as a grower, have increased downward pressure on wages and heightened worker insecurity at the bottom of the fresh produce production chain.

Id. at 26 (citation omitted). “Increasingly, these companies are adopting the purchasing practices of Wal-Mart, which is reputed to ask its suppliers to show their books so that they can estimate the suppliers’ profit margins on products they supply to Wal-Mart.” *Id.* at 34. “Squeezed by buyers of their produce, growers pass on the costs and risks imposed on them to those on the lowest rung of the supply chain: the farmworkers they employ. Many farmers view their labor expenses as the only area where they are able to make significant cuts.” *Id.* at 36.

began to embrace the CIW's cause, establishing Student/Farmworker Alliance chapters on campuses across the country.⁶⁷ They demanded, with ever-increasing success, that Taco Bell, whose marketing strategy included placing franchises on universities, be "booted" from their campuses unless it met CIW's demands.⁶⁸

By 2005, Taco Bell had signed the first Fair Food Agreement.⁶⁹ Seven years later, ten more multibillion dollar food corporations had followed suit, including McDonald's, Burger King, and Subway in the fast-food industry, Sodexo, Aramark, and Compass Group in the foodservice industry, and Whole Foods and Trader Joe's in the grocery industry.⁷⁰ Today, fourteen companies participate in the FFP.⁷¹ Through the careful, painstaking work of face-to-face meetings at schools, churches, and community centers across the country;⁷² the early adoption of social media;⁷³ and thousands of protests big and small, from fifteen people⁷⁴ to three thousand,⁷⁵ the CIW was able to build a powerful, national farmworker/consumer alliance from scratch.⁷⁶ From those years of tireless organizing emerged a coalition of tens of thousands of individual consumers who raised their voices at the very apex of the same hierarchical

67. See *Our Story*, STUDENT/FARMWORKER ALLIANCE, <http://www.sfalliance.org/who-we-are/> (last visited Apr. 28, 2017).

68. Pamphlet, Student/Farmworker Alliance, *Boot the Bell*, <http://www.ciw-online.org/newdesign/SFA%20Tri-Fold.pdf> (last visited Apr. 28, 2017); Press Release, Coal. of Immokalee Workers, *Successes in the "Boot the Bell" Campaign*, <https://www-tc.pbs.org/now/society/ciwflyer.pdf> (last visited Apr. 28, 2017).

69. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 5.

70. *Id.* at 5–6.

71. *Id.*

72. *Id.* at 2.

73. Though YouTube was still four years from launching, see Laura Fitzpatrick, *Brief History of YouTube*, TIME (May 31, 2010), <http://content.time.com/time/magazine/article/0,9171,1990787,00.html>, when CIW started the Campaign for Fair Food in 2001, *Campaign for Fair Food*, COALITION IMMOKALEE WORKERS, <http://www.ciw-online.org/campaign-for-fair-food/> (last visited Apr. 6, 2017), CIW was posting videos of protests and worker-made films on the web as early as 1999. See, e.g., *Campaign for Dialogue and a Living Wage in 2000*, COALITION IMMOKALEE WORKERS (Apr. 15, 2000) <http://www.ciw-online.org/blog/2000/04/oldindex/> (showing a no longer functional link to a video of a protest that was posted in December 1999).

74. Paige Fry, *Protestors Boycott Gainesville Wendy's*, INDEP. FLA. ALLIGATOR (Oct. 12, 2016), http://www.alligator.org/news/local/article_e936078e-90ef-11e6-91c7-3345488efa92.html.

75. See, OXFAM AM., *supra* note 60, at 10.

76. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 5.

market structure that was driving farmworker poverty.⁷⁷ CIW leveraged that consumer demand to change the behavior of the retail food brands that occupy the next level down in that pyramid, harnessing their purchasing power through binding legal agreements to raise wages and improve working conditions, addressing the damage that had been done for decades.⁷⁸

As a result of the Campaign for Fair Food, Taco Bell and many other similarly situated brands no longer made the farmworkers who pick their tomatoes in Florida poor. Instead, they contributed to unprecedented improvements in wages and working conditions, and to the birth of the FFP.⁷⁹

III. THE FAIR FOOD PROGRAM

The FFP is the first example of the CIW's WSR model. Since its inception in 2011,⁸⁰ the model has proved uniquely capable of tackling even the most pernicious, and previously intractable, problems in corporate supply chains. Most famously, of course, the FFP has for the first time rooted out forced labor of any kind on the farms participating in the Program, transforming the Florida tomato industry from "ground zero for modern slavery"⁸¹ to the "best working environment in American agriculture."⁸² But equally impressive is the fact that sexual violence and harassment, otherwise ubiquitous in American agriculture,⁸³ have also been eliminated.⁸⁴ Indeed, the mechanisms devised by the FFP have

77. See *2016 Year in Review: A Look Back at the Work that Moved Us*, ALLIANCE FOR FAIR FOOD (Dec. 28, 2016), <http://www.allianceforfairfood.org/news/2016/12/26/2016-a-fair-food-year-in-review>.

78. *Campaign for Fair Food*, *supra* note 73.

79. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 2.

80. *Id.*

81. Bowe, *supra* note 37.

82. Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, N.Y. TIMES: BUS. DAY (Apr. 24, 2014), <https://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html>.

83. MARY BAUER & MÓNICA RAMÍREZ, S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY 46 (2010), <https://www.splcenter.org/20101108/injustice-our-plates> (reporting that 80% of farmworker women describe having been sexually harassed on the job). In addition, a mid-1990s Equal Employment Opportunity Commission ("EEOC") investigation in California concluded that "hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors." Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 169 (2002).

84. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. B at 60 (quoting testimony of Judge Laura Safer Espinoza, Executive Director of the Fair Food Standards Council, before the EEOC Select Task Force Meeting on Promising Practices to Prevent Workplace Harassment).

proven so successful that a special panel of the Equal Employment Opportunity Commission recently singled out the Program and suggested the adoption of its methods by others hoping to rid their workplaces of such discrimination.⁸⁵

So how has the FFP succeeded so spectacularly where so many others have failed? The short answer is that the Program is singularly dedicated to enforcement. Unlike Corporate Social Responsibility regimes and other NGO approaches that promulgate flowery codes of conduct but lack any effective mechanisms to enforce their “standards,”⁸⁶ the FFP has at every level of the program constructed mechanisms that ensure, not just promise, lasting social change. Those mechanisms include binding legal agreements between CIW and each participating buyer in the FFP; a code of conduct drafted with the direct input of the workers whose interests it is designed to protect; comprehensive worker-to-worker education; an effective and timely complaint resolution mechanism that workers can access without fear of retaliation; and probing management, payroll, and field audits conducted by a dedicated audit organization, the Fair Food Standards Council (“FFSC”), that has the power to suspend suppliers who fail to bring their operations into compliance with the code.⁸⁷ This Part will examine each of those elements in turn.

A. *Fair Food Agreements*

As discussed, CIW had identified the twin evils of modern day supply chains as, (1) the ability of the megacorporations at the top to demand ever-lower prices from their suppliers and the concomitant inexorable downward pressure which that placed on growers’

85. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL EMP’T OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 36, 67–68 (2016). Similarly, speaking at the 2015 United Nations Annual Forum on Business and Human Rights in Geneva, a U.S. Department of Labor representative lauded the “groundbreaking work of the [CIW]” and described the model as “the ultimate answer” to compliance with labor laws in corporate supply chains that the Department of Labor itself is trying to adapt as a “keystone of strategic enforcement” going forward. CIWvideo, *Miguel Rios - United Nations Working Group on Business and Human Rights 2015*, YOUTUBE (Nov. 29, 2015), <https://www.youtube.com/watch?v=0MazETz4gy0>.

86. See DAVID HENDERSON, INSTITUTE OF ECON. AFFAIRS, MISGUIDED VIRTUE: FALSE NOTIONS OF CORPORATE SOCIAL RESPONSIBILITY 25 (2001), <https://iea.org.uk/wp-content/uploads/2016/07/upldbook126pdf.pdf> (noting that some critics of CSR consider it to be little more than “well-publicised window-dressing”).

87. See FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 2–3, 8–9.

profits, workers' wages, and the overall workplace environment,⁸⁸ and (2) the lack of any requirement or desire on the part of those same corporations to put their purchasing power behind their professed desire for a responsible supply system.⁸⁹ Having thus identified the purchasing power of corporations as the root of the evil, CIW envisioned a world in which that same power, if corporations were properly motivated, could also be the solution. Consequently, each corporation in the FFP, as a condition of participation, has signed a legally binding contract, called a Fair Food Agreement ("FFA"), with CIW.⁹⁰ These contracts, which represent the first indispensable element of the FFP, have evolved over time to cover topics such as marketing, expansion, and support for the Program's monitoring function,⁹¹ but each contains two fundamental provisions.

First, each corporation pays a Fair Food Premium on every pound of covered produce that it purchases from participating growers.⁹² The amount of the premium varies depending on the type of produce purchased, but it is always paid by the corporation to the grower within the corporation's existing purchasing system.⁹³ This means that some corporations pay the premium directly to the grower, while others pass it down through one or more middlemen.⁹⁴ But once the premium reaches the grower, it must be passed on to the farm's qualifying workers as a Fair Food bonus.⁹⁵ Functionally, the premium helps address the historic poverty of farmworkers, exacerbated now by the downward pressure on wages caused by the corporations' massive purchasing power.⁹⁶ Conceptually, it represents a small step in addressing the cost/price squeeze faced by growers in the increasingly monopsonistic system that is today's retail food market.⁹⁷

88. See *supra* note 61 and accompanying text.

89. Cf. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 54 (noting that purchasers who refuse to join the FFP still pose a problem because they are "exert[ing] a destructive downward pressure on farmworker wages through their traditional volume purchasing practices").

90. *About CIW*, *supra* note 45.

91. *What a Year it Was! 2015 Fair Food Year in Review*, COALITION IMMOKALEE WORKERS (Dec. 29, 2015), <http://www.ciw-online.org/blog/2015/12/2015-in-review/>.

92. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 50.

93. *Id.*

94. *Id.*

95. *Id.* at 50–51. Growers must distribute at least 87% of the premium to workers. *Id.* at 51. They are allowed to withhold up to 13% to cover the higher payroll taxes and other expenses associated with the resulting larger payroll. *Id.* No part of the premium payments goes to either CIW or the Fair Food Standards Council ("FFSC"). See *id.*

96. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 50.

97. Sanjay Rawal, *If You Want to Support Farmworkers – Buy a Florida Fair Food Tomato*, HUFFINGTON POST: BLOG (Nov. 3, 2014, 4:30

The other requirement of every FFA is that the corporation only purchase covered produce from participating growers who are in good standing with the Program, as determined by the FFSC, the Program's monitoring organization.⁹⁸ The FFP oversight and remedial regime is discussed in detail below, but if a grower is suspended from the Program for failure to abide by the Fair Food Code of Conduct, participating buyers cannot purchase from that grower until it gains reinstatement.⁹⁹ This binding provision is the *sine qua non* of compliance. Without it corporations could, and therefore would, walk away when confronted with a significant disruption to their existing supply chains. The fundamental social

PM), http://www.huffingtonpost.com/sanjay-rawal/if-you-want-to-support-fa_b_6091600.html (discussing how the consolidated purchasing power of large corporations drives down workers' wages and the FFP's approach to providing farmworkers with a better wage and fair treatment). Easing the price/cost squeeze is not the only business advantage associated with participation in the FFP. Perhaps foremost is the invaluable transformation of the industry's image from "worst to first." Greenhouse, *supra* note 82. No amount of money can buy that sort of advertising on the front page of the *New York Times*, and since the inception of the Program, there has not been a single significant Department of Labor enforcement action, EEOC investigation, or class action lawsuit for labor violations against any participating grower. Also, growers report a significant reduction in turnover, which was extremely high before the advent of the FFP. *Cf. Flrodia* [sic]: *Tomatoes, Citrus*, RURAL MIGRATION NEWS (Apr. 1998), <https://migration.ucdavis.edu/rmn/more.php?id=267> ("One local ex-grower, Johnny Goodnight, said: ' . . . There are more pickers than there are jobs and the people keep on coming . . . ' Goodnight said that he employed an average 60 pickers a day during the harvest season, but issued 4,500 W-2 statements each year, indicating extremely high worker turnover."). Indeed, one large grower reported to the authors having reduced the number of W-2 forms that it issues from about 12,000 to 8000 a year. Further, workers not only return to the same employers more frequently, they stay longer during the season. *See FAIR FOOD STANDARDS COUNCIL, supra* note 3, app. B at 61. Previously, many workers would leave the tomato fields toward the end of a season because, once harvesting slowed down, they could make more money picking other crops, particularly blueberries. *Cf. id.* at 25, 56. But those other crops are still grown under the old, abusive practices of American agriculture, and many workers now stay on at FFP farms through the end of the season because they so value the improved working conditions. *See id.* at 56. Finally, growers now frequently acknowledge to CIW that they have become better employers because of the Program, and that fact has not been lost on workers. Participating growers report that they have become the employer of choice for guest workers in Florida, with large numbers of workers who formerly worked in the citrus industry opting instead to seek employment on FFP farms. *Id.* at 61. Once the FFP label begins appearing on produce in supermarkets nationwide during the 2016 to 2017 season, the Program will become even more of a win-win for both growers and workers. *Fair Food Marketing, FAIR FOOD PROGRAM, http://www.fairfoodprogram.org/fair-food-marketing/* (last visited Apr. 28, 2017).

98. *See FAIR FOOD STANDARDS COUNCIL, supra* note 3, at 9–10.

99. *See id.* at 9–10, 12.

change created by the FFP is not free, and is not always easy. Only the real threat of losing sales provides the necessary motivation for growers to make the sometimes-difficult choices involved in modernizing their labor practices.¹⁰⁰ Time and again, when entreaties to “do the right thing” have not proved persuasive, as they rarely do when money and power are in play, the prospect of a grower losing a significant portion of its sales has carried the day.¹⁰¹

100. See *id.*, app. C at 62; cf. Melissa C. Gouge, *Human Rights in Play, Transnational Solidarity at Work: Creative Playfulness and Subversive Storytelling Among the Coalition of Immokalee Workers*, 42 CRITICAL SOC. 861, 871 (2015) (noting that retailers who receive bad publicity for refusing to join the FFP experience estimated lost profits “well into the millions”).

101. See FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 9. The beauty of the FFP approach, and what offers such promise for its application in other low-wage supply chains, is that very little of the market is required to achieve desired outcomes. For suppliers, the sales at risk are significant if they are more than the supplier is willing to lose. See *id.* app. C at 62. Given the tight profit margins and the competition for an ever-shrinking number of buyers, see Brent Gloy, *Understanding the Margin Squeeze*, PURDUE UNIV. CTR. FOOD & AGRIC. BUS.: BLOG, <http://agribusiness.purdue.edu/blog/understanding-the-margin-squeeze> (last visited Apr. 28, 2017), that percentage is surprisingly low. See FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. C at 60. Thus, even though the FFP accounts for less than 25% of all Florida tomato sales (growers can sell to buyers not in the Program) and certainly less than 25% of all those who buy Florida tomatoes, meaning that few if any growers sell anywhere near that percentage of their crop to participating buyers, it is always the potential for losing those sales that ultimately prompts compliance. See *id.* at 10. Similarly, large numbers of consumers are not required to influence corporate behavior. Here the equation has two components. As with suppliers, profit margins for food retailers are tight. See Courtney Reagan, *What's Behind the Rush into the Low-Margin Grocery Business*, CNBC: CONSUMER NATION (June 6, 2013, 10:59 AM), <http://www.cnbc.com/id/100794988>. If, for example, 1% (or less) of one chain's customers go across the street to shop at a Fair Food store, that matters. Further, a corporation's brand value is at risk whenever consumers publicly call into question its practices. Gouge, *supra* note 100, at 871. In such circumstances, what matters is not the raw number of consumers involved, but rather their visibility and persistence. Karin Astrid Siegmann et al., *Civic Innovation in Value Chains: Towards Workers as Agents in Non-Governmental Labour Regulation*, in EXPLORING CIVIC INNOVATION FOR SOCIAL AND ECONOMIC TRANSFORMATION 123 (Kees Biekart et al. eds., 2016) (noting the importance of the threat of consumer action for enforcement of the Fair Food Code). Exactly because public reputation is so hard to gauge and, once lost, so hard to reclaim, a very small but dedicated number of consumers can often effect real modifications to a corporation's decision making. While CIW has tens of thousands of supporters nationwide, see *2016 Year in Review: A Look Back at the Work that Moved Us*, *supra* note 77 (noting that a petition in support of the boycott of Wendy's received 75,000 signatures), that is a drop in the bucket of all consumers. Nonetheless, in the formative years of the FFP, consumer action was what prompted almost every corporation to join the Program. Siegmann et al., *supra*, at 118. More recent participants, however,

B. Fair Food Code of Conduct

The second indispensable element of the FFP is its unique, human rights-based Fair Food Code of Conduct and Guidance Manual.¹⁰² What distinguishes the Fair Food Code from the plethora of others issued by corporations and various auditing organizations is the fact that workers had, and continue to have, a central role in its formulation and evolution.¹⁰³

The centrality of worker participation is a foundational precept of the CIW's organizing strategy and of the WSR model, but as the Fair Food Code demonstrates, that participation is a functional necessity, not a matter of philosophy.¹⁰⁴ Apart from those perpetrating supply chain abuses, only workers have the requisite knowledge and understanding of the various forms of abuse visited upon them every day.¹⁰⁵ And only workers have an abiding and

have joined voluntarily, perhaps because of the Program's demonstrated success, growing reputation, and/or unprecedented risk protection that it provides for participating brands. *Id.* at 119, 126. But whatever the reason, this development, too, bodes well for the long-term sustainability of other WSR endeavors.

102. *Fair Food Code of Conduct*, FAIR FOOD STANDARDS COUNCIL <http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct/> (last visited Apr. 28, 2017).

103. The Code can only be amended at the recommendation of the Program's Working Group, *see id.*, which meets regularly to discuss, adapt, and adopt Program policy. *See* FAIR FOOD STANDARDS COUNCIL, *supra* note 46, at 50. CIW and some of the industry's leading growers comprise the Working Group, with other growers occasionally invited to participate with regard to particular issues. *Id.* at 7. The group operates by consensus, which has not only resulted in mutual respect among its members, but ensures that no changes to the Program can occur unless CIW is convinced that they further the FFP's goals. The Working Group demonstrates that once the grossly distorted power dynamic between employers and low-wage workers has been addressed, as it is in the FFP through the FFAs that CIW has with participating buyers, these historically antagonistic interests can and will work together to benefit the industry from which they each derive their livings. *See* Siegmann et al., *supra* note 101, at 123 (noting that after Taco Bell joined the FFP, it "later took the lead in bringing on board other companies . . . to commit to the CIW demands"). While Working Group members do not always agree at first on the way forward, increasingly the debate is not about what needs to be done, but rather how best to do it. And to date even the thorniest issues have been successfully resolved.

104. Siegmann et al., *supra* note 101, at 120 ("The CIW sees the fact that the FFP puts workers' agency at the centre as the key to its success.").

105. *Worker-Driven Social Responsibility (WSR): A New Idea for a New Century*, *supra* note 57 (noting that codes of conduct are needed to address "longstanding abuses that only workers could know, the forms of exploitation and humiliation unique to each particular industry that workers have experienced for generations, but no outside 'expert' could ever divine").

personal interest in eliminating those abuses.¹⁰⁶ Without the direct involvement of workers, no outside “standard setting organization,” no matter how well-intentioned, can even identify the relevant problems, much less fashion effective solutions.¹⁰⁷ Two examples from the Fair Food Code demonstrate this point.

Tomato harvesters normally do not pick for an hourly rate. Rather they are paid for their production.¹⁰⁸ However, their production is measured by the piece, not the pound. Workers fill a bucket with tomatoes and carry the bucket to a truck where it is dumped into a large bin.¹⁰⁹ The worker is then given credit and ultimately paid a fixed rate for that bucket.¹¹⁰ A bucket is supposed to contain thirty-two pounds of tomatoes, and it does if filled only to the brim.¹¹¹ But for decades, tomato pickers were required to “cup” their buckets, (i.e., to pile tomatoes above the rim so that each bucket resembled an ice cream cone).¹¹² If workers did not comply with this demand, they were not given credit for the bucket.¹¹³ A cupped bucket contains approximately thirty-five to thirty-six pounds of tomatoes.¹¹⁴ Therefore, for every ten “cupped” buckets for which they were given credit, workers were in fact picking eleven buckets worth of weight (i.e., three to four extra pounds per bucket).¹¹⁵ In addition to representing systemic wage theft, “cupping” was also a flashpoint for countless incidents of violence against workers at the hands of field bosses, as disputes over what constituted a sufficiently cupped bucket often turned physical.¹¹⁶

The practice of cupping was known only to those within the industry, but that of course included the workers. Therefore,

106. *Id.*

107. *Id.* (“No vendor standards drafted by an attorney working for [a grocery retailer in another state] could ever contemplate the need for those reforms, and no code of conduct ever did, until workers in Immokalee finally won the opportunity to implement their blueprint for a fairer tomato industry . . .”).

108. *Facts and Figures on Florida Farmworkers*, COALITION IMMOKALEE WORKERS, https://ciw-online.org/wp-content/uploads/12FactsFigures_2.pdf (last visited Apr. 28, 2017).

109. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 37.

110. FRITZ M. ROKA, COMPENSATING FARM WORKERS THROUGH PIECE RATES: IMPLICATIONS ON HARVEST COSTS AND WORKER EARNINGS 1 (2009), <http://edis.ifas.ufl.edu/pdffiles/FE/FE79200.pdf>.

111. *See* FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 32.

112. *Id.*

113. *Florida: CIW; Southeast: Migrants*, RURAL MIGRATION NEWS (July 2012), <https://migration.ucdavis.edu/rmn/more.php?id=1696> (noting that supervisors who inspected buckets would “require an extra full bucket before crediting the worker for picking the bucket”).

114. *See* FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 32.

115. *Id.*

116. *On the Elimination of the Required Overfilling of Buckets Through the CIW’s Fair Food Code of Conduct*, COALITION IMMOKALEE WORKERS (Apr. 30, 2011), http://www.ciw-online.org/blog/2011/04/bucket_overfilling/.

because workers were responsible for its contents, the original version of the Fair Food Code provided that:

Growers will regularly reconcile wages paid, including buckets picked, to pounds harvested, and if that reconciliation indicates uncompensated pounds harvested, using a 32 pound bucket for calculation for round “gas green” tomatoes (or the appropriate standard weight and container for other types of tomatoes, if different), the Grower shall adjust the amount paid to Workers in the next payroll so that they are fully paid for the uncompensated pounds identified in the reconciliation process.¹¹⁷

Implementation of this provision would result in approximately a 10% pay increase for workers, simply because their labor would no longer be stolen. There was just one problem: the Code provision as written was unworkable. Growers pointed out real, practical problems with doing the required reconciliation. Either production would slow to a crawl, or the adjustments would be inaccurate.

Harmonizing the Code and production requirements was achieved through the first of many collaborations between workers and growers that are now a hallmark of the Program.¹¹⁸ Gathering at CIW’s office, and after several hours of difficult debate, CIW staff and the first two growers to join the Program finally decided to fill a bucket with the correct amount of tomatoes and photograph it. That photograph was then incorporated into the FFP’s *Know Your Rights and Responsibilities* handbook, which is given to every worker upon hire by participating growers and serves as the basis for CIW’s worker education sessions.¹¹⁹ From that point forward, the “visual standard” of a properly filled bucket created by the following photograph became the industry standard within the FFP,¹²⁰ and workers are now paid for all of their labor.

117. FAIR FOOD STANDARDS COUNCIL, FAIR FOOD PROGRAM REPORT, 2011–2013 app. C at 51 (2013), https://www.nesri.org/sites/default/files/Fair_Foods_Standards_Council_First_Annual_Report.pdf.

118. Siegmann et al., *supra* note 101, at 119 (noting that the “partnership among farmworkers, Florida tomato growers, and participating buyers” is a form of regulation to improve working and living conditions for farmworkers).

119. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 8; *see also infra* Subpart III.C.

120. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 32.



The second example of the need for worker involvement concerns perhaps the best-known provision of the FFP, (i.e., the Code's zero tolerance policy for forced labor of any kind).¹²¹ This provision, backed by the mandatory market consequences required by the FFAs, is why the FFP has succeeded in eliminating forced labor where all others have failed. But the inclusion of this provision in the Code is itself a testament to the importance of having workers at the head of the table when establishing acceptable supply chain practices.

When others, including the government, speak of “zero tolerance” events, the term is properly placed within quotation marks because exceptions abound.¹²² From the perspective of suppliers and buyers, any number of situations might justify such an exception. But from the workers' perspective, from the perspective of those who have themselves been subjected to or seen their friends subjected to violence if they refused to work,¹²³ there are no justifiable exceptions. If forced labor is found on a participating grower's farm, that grower is suspended from the Program.¹²⁴ It does not matter if the grower participated in the event, turned a blind eye to it, or even knew about it.¹²⁵ In the FFP,

121. *Id.* at 20.

122. *See, e.g.,* Sariana García-Ocasio, Note, *How Tolerant Is Zero Tolerance? The Loopholes in Anti-Trafficking Federal Contract Regulations*, 44 PUB. CONT. L.J. 551, 568 (2015).

123. *See* discussion *supra* Subpart I.C.

124. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 20.

125. *See id.*

zero tolerance means zero tolerance. While to others the lack of any exception originally seemed harsh, to workers it seemed obvious, and the result has been the transformation of an industry that until recently was a poster child for this most heinous of supply-chain abuses.¹²⁶

C. *Worker-to-Worker Education*

The third necessary element of the FFP, and WSR more generally, is an informed workforce. As discussed in the introduction, CIW's founding philosophy—its organizational DNA—includes a commitment to participatory education and the development of a broad base of active leadership.¹²⁷ Those foundational elements are built into the very structure of the FFP and are responsible in no small part for the Program's unique success.¹²⁸

126. Human trafficking in supply chains is most often an economic crime. People who engage in this behavior may often be the dregs of society, but that is not *why* they traffic human beings. They supply forced labor to employers because they make money from doing so. See Sean Sellers, *A Tale of Two Tomatoes: The Fair Food Program as a New Paradigm of Social Responsibility*, PORTAL, 2014–2015, at 16, 16–17. Forced labor persisted in agriculture, and outside of the FFP persists still, because growers demand ever-cheaper labor in response to corporations' demands for ever-lower prices. See *supra* notes 53, 61 and accompanying text. To meet those demands, the unscrupulous resort to the types of forced labor described earlier in this Article, see *supra* Subpart I.C, allowing them to underbid their competition. While it defies credulity to think that growers were never aware of the forced labor occurring on their farms, they nonetheless benefited from it economically, precisely because they were never held accountable, in court or in the marketplace, even when the supervisors they hired were convicted. See *supra* note 41 and accompanying text. The FFP in general, and this Code provision in particular, have eliminated forced labor by eliminating the economic incentive to engage in that conduct. Growers know that they will, not might, lose a significant portion of their sales for half a growing season (or longer) if forced labor is found on their farms. See Greenhouse, *supra* note 82. That lost income will quickly swallow up any savings from even years of having used involuntary labor. The growers' interests therefore become completely aligned with those of their workers, and they become an additional (although not perfect) barrier to the unwanted behavior. See *id.* So, too, with the midlevel supervisors who previously were the instruments of coercion, see *id.*, because they know they will be banned from working for any of the growers in the Program for five years (or longer) if they are involved with the use of forced labor. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. D at 66–67. So the short answer to how the FFP has eliminated forced labor is that in the FFP the crime of human trafficking simply doesn't pay.

127. See discussion *supra* Subpart II.A.

128. *'Tis the Season to . . . Support the Fair Food Program Education Team!*, COALITION IMMOKALEE WORKERS (Nov. 30, 2014), <http://www.ciw-online.org>

The FFP requires worker-to-worker education in multiple forms at multiple times for every worker under the protections of the Program.¹²⁹ At the point of hire, workers receive the *Know Your Rights and Responsibilities* handbook in Spanish, English, or Haitian Creole.¹³⁰ It describes their rights and responsibilities as set out in the Fair Food Code, including the fundamental right to complain about violations without fear of retaliation.¹³¹ The booklet was written by CIW farmworker staff members in a language and a style that is easily accessible to workers with moderate literacy skills, and there is an audio version on CD for those with little or no literacy.¹³² To further ensure that no workers begin work without an adequate understanding of their rights, all workers are also shown a video at the point of hire.¹³³ The video was written and acted by CIW staff and members, dramatizing their rights under the Code.¹³⁴

In addition, the CIW Education Team holds face-to-face, worker-to-worker education sessions on all participating farms, once again covering workers' rights and responsibilities and answering any questions workers might have about the Program or particular situations they may have encountered.¹³⁵ Teams of three to four farmworker staff from CIW travel the state, from Homestead in the southeastern corner to Quincy in the northwestern panhandle,¹³⁶ from October to May, holding sessions with thousands of workers every season, with the goal of hitting every participating farm twice a season (to account for turnover).¹³⁷ The education teams then follow the Program north during the summer season to participating farms from Georgia to New Jersey.¹³⁸ These sessions are held on the clock and the roughly 35,000 workers covered by the Program are paid under a distinct hourly training code so that worker

/blog/2014/11/ffp-fundraiser/ (“[T]he worker-to-worker education program is at the very heart of the [FFP]’s unprecedented success.”).

129. *Standards Without Enforcement are Nothing More than Empty Promises to Workers, Consumers Alike . . .*, COALITION IMMOKALEE WORKERS (Dec. 22, 2015), <http://www.ciw-online.org/blog/2015/12/standards-without-enforcement/> (noting that workers are educated on their rights at the time of hire and later in educational sessions on the farm).

130. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 8.

131. *Id.* at 25.

132. *Id.* at 8.

133. *Id.*

134. *Id.* at 25.

135. *Id.* at 24.

136. *See id.* at 12, 24.

137. *Id.* at 12, 54; *‘Tis the Season to . . . Support the Fair Food Program Education Team!*, *supra* note 128.

138. *Worker-to-Worker Education Team Wraps up First Summer of Fair Food Program Expansion in Virginia, New Jersey!*, COALITION IMMOKALEE WORKERS (Aug. 5, 2015), <http://www.ciw-online.org/blog/2015/08/ffp-education-va-nj/>.

participation and compensation can be accurately tracked and audited by the FFSC.¹³⁹ Finally, and perhaps counter-intuitively, the sessions are always attended by a member of the farm's upper management so that workers see that the ownership of the farm is committed to the Program.¹⁴⁰ This also allows workers to address crew leaders or other middle management directly about concerns they might have with regard to compliance with their rights under the Code.

The impact of these multiple worker-to-worker education processes on the success of the FFP is difficult to exaggerate. Indeed, the Program's worker education is one of the mechanisms that distinguishes the FFP from any other certification or social responsibility program today. By arming each and every worker with a full knowledge of—and readily available reference materials about—their rights under the Code, the FFP effectively deputizes tens of thousands of workers as frontline defenders of their own human rights. In a world in which the U.S. Department of Labor (“DOL”) deploys one investigator from the Wage and Hour division for approximately every 175,000 workers,¹⁴¹ worker-to-worker education, when coupled with the Program's twenty-four-hour complaint line,¹⁴² provides a quantity and quality of ongoing oversight that would be virtually impossible for any government agency, here or abroad, to replicate.

This wall-to-wall worker education has fostered the widespread use of the Program's complaint resolution process by workers on the dozens of participating farms in seven states. Indeed, over 1700 such complaints have been filed and resolved since November 2011.¹⁴³ But more than this, the informed workforce created by the Program's ongoing educational efforts has prevented an untold number of violations, because growers, crew leaders, and field supervisors all know that workers are aware of their rights and know what to do if those rights are violated. The knowledge that (1) if one attempts to sexually harass, verbally abuse, or steal the wages

139. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 2, 9, 24.

140. *Id.* at 24.

141. Miranda Dietz et al., *Enforcement of Labor Standards*, in WHEN MANDATES WORK: RAISING LABOR STANDARDS AT THE LOCAL LEVEL 229, 239 (Michael Reich et al. eds., 2014) (noting that in 2007, the Wage and Hour Division had 750 investigators, or one for every 173,000 American workers).

142. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 9.

143. See Mary Mogan Edwards, *Protestors Call on Wendy's to Sign Worker-Protection Pledge*, COLUMBUS DISPATCH (Mar. 26, 2017, 7:19 PM), <http://www.dispatch.com/news/20170326/protesters-call-on-wendys-to-sign-worker-protection-pledge> (citing the FFSC's executive director, Judge Laura Safer Espinoza, as saying that 1600 complaints have been resolved). Information about the additional complaints is based on the authors' knowledge from direct involvement with the CIW.

of his or her workers, there is a very high likelihood that the workers involved will avail themselves of the Program's highly effective complaint process to defend their rights, and (2) that the consequences, if caught, will be far greater than the benefit of the violation itself,¹⁴⁴ has resulted in the preemption of some of the very worst abuses on participating farms.¹⁴⁵

D. Complaint Mechanism

While each FFP enforcement mechanism relies on the others for its impact, much as a watch will not function properly unless all of its gears are properly engaged, it is the Program's finely tuned complaint resolution system that has the most immediate and penetrating daily impact on the work environment. Indeed, it is not possible to rid supply chains of forced labor, or any other unwanted behavior, without a complaint resolution mechanism that: (1) fully protects workers who utilize it from retaliation of any kind; (2) operates in languages and at hours that afford workers unfettered access; and (3) provides informed, fair, and *timely* resolutions to complaints.¹⁴⁶ The FFP complaint resolution system contains all of

144. See *supra* note 126.

145. *A Cautionary Tale: Farmworker Women Win Massive Judgment in Sexual Assault, Retaliation Case Against Florida Farm . . .*, COALITION IMMOKALEE WORKERS (Sept. 14, 2015), <http://www.ciw-online.org/blog/2015/09/moreno-farms-eooc/> (noting that, unlike the backward-looking criminal and civil legal systems, the FFP uses a system of market-based incentives, education, and complaint investigation and resolution to prevent abuses before they occur).

146. The timeliness of resolutions is an often-overlooked factor when evaluating complaint systems. In the supply chain context, for example, court resolutions are of little use. Even assuming sufficient resources to pursue such an expensive remedy, by the time any decision can be rendered so much time will have passed that those who witnessed the challenged abuse will have either moved on from the workplace or understandably concluded that no remedy is available. See *id.* ("Courts are famously slow, and in the words of Langston Hughes, justice delayed is justice denied. Furthermore, . . . even if a victim manages, after many years, to win a favorable verdict, the actual collection of any monetary damage is, at best, a hit and miss proposition, especially in the agricultural context."). In contrast, FFP complaints are normally resolved within two weeks, and often more quickly. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 46. The value of such celerity can hardly be overstated. If, for example, a woman on an FFP farm is subjected to sexual harassment involving physical contact, the person responsible must be fired. *Id.* app. D at 67. This means that within days of the abuse, the offender is removed from the workplace and the message that such behavior will not be tolerated is reinforced. *Id.* app. B at 61. In contrast, if the same conduct were addressed through the legal system, even assuming a favorable outcome, the perpetrator would remain on the job for months or possibly years, free, at least in the eyes of the workers, to continue his abusive behavior. See *A Cautionary Tale*, *supra* note 145. That scenario sends an entirely different message, one

these elements.¹⁴⁷

The 24/7 FFP complaint line is staffed by the FFSC,¹⁴⁸ a separate not-for-profit organization created by CIW to oversee the Program.¹⁴⁹ Complaints may be filed confidentially, but not

that will inexorably have the effect of discouraging workers from bringing similar abuses to light. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. B at 61.

147. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 9.

148. *Id.*

149. *About*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/about/> (last visited Apr. 28, 2017). Before concluding that it would have to establish its own monitoring organization, CIW contacted several commercial auditors. All of them lost interest as soon as they discovered the breadth and depth of oversight that CIW had in mind. This is a telling commentary on the typical Corporate Social Responsibility (“CSR”) model. Auditing for human rights abuses is not part-time work. If commercial auditing firms spend little enough time on a particular audit to turn a profit, they are almost certainly not spending enough time to root out abusive workplace practices. Prior to the prosecution of the *Navarrete* brothers, *see supra* note 36, a well-known commercial auditing company, hired by the growers and a major retail corporation that was then the target of a CIW campaign, toured Immokalee-area fields and declared the Florida tomato industry to be slave free. *Fresh Allegations of “Human Slavery” Emerge from the Tomato Fields of Immokalee*, COALITION IMMOKALEE WORKERS (Dec. 10, 2007), http://www.ciw-online.org/blog/2007/12/no_slave_labor/. Tellingly, this declaration was made in Immokalee one day after and within five blocks of the escape by three workers from the box truck in which the Navarretes had been holding them captive. *Id.* So, too, in the Rana Plaza disaster in Bangladesh in 2013, the factory had been inspected shortly before it collapsed, yet surviving workers reported being well aware of the building’s structural flaws. HUMAN RIGHTS WATCH, “WHOEVER RAISES THEIR HEAD SUFFERS THE MOST”: WORKERS’ RIGHTS IN BANGLADESH’S GARMENT FACTORIES 3 (Meenakshi Ganguly ed., 2015), https://www.hrw.org/sites/default/files/report_pdf/bangladesh0415_web.pdf.

They nonetheless entered the building each day precisely because there was no complaint mechanism through which they could make their concerns heard without fear of losing their jobs. *Id.* at 4, 60. One need not assume indifference or incompetence on the part of the auditors in these unfortunately typical cases. Rather, it is the CSR oversight model itself that is dysfunctional. *See* BRIAN FINNEGAN, AM. FED’N OF LABOR-CONG. OF INDUS. ORGS., RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS 3–4 (2014), <https://aflcio.org/sites/default/files/2017-03/CSReport.pdf>. The types and timing of abuses visited upon workers are not static and can be easily hidden from auditors. *Id.* at 27. CIW is confident that the FFSC conducts the most thorough audits available, and coaching or intimidating workers is itself a violation of the Code, FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. D at 66, yet FFSC would be the first to confirm that without the accompanying complaint resolution mechanism none of the Program’s remarkable achievements would have been

anonymously.¹⁵⁰ A worker may not be retaliated against in any way for filing a complaint or threatening to do so.¹⁵¹ All retaliation is addressed, but if the retaliation involves firing or denying work to the complainant, the person responsible for the retaliation must either be fired immediately or given a written warning and reprimanded in front of the affected workers.¹⁵² A second offense then results in mandatory dismissal.¹⁵³ Removing the offender and reinstating the worker in such situations is most often accompanied by a workforce-wide explanation of the resolution,¹⁵⁴ and so further reinforces the FFP message that workers are encouraged to act as the first line of risk prevention and redress on the farm.¹⁵⁵

Those who answer the complaint line (and it is always answered by a person, not a machine) are the very same people who conduct the Program's audits.¹⁵⁶ This means that in addition to speaking the language(s) that the workers speak,¹⁵⁷ those taking complaints have an intimate knowledge of each farm, its work environment, and its history of violations. They also have access to an extensive and growing database generated over time by the complaint process itself.¹⁵⁸ In other words, they are not starting from scratch with each complaint.¹⁵⁹ This greatly facilitates both expeditious and accurate complaint resolutions.

If a complaint is found to be valid, the FFSC normally negotiates a Corrective Action Plan ("CAP") with the grower.¹⁶⁰ The

possible. See *Workplace Harassment: Promising Practices to Prevent Workplace Harassment, Meeting Before EEOC Select Task Force* (2015) (written testimony of Judge Laura Safer Espinosa, Exec. Dir., Fair Food Standards Council).

150. FAIR FOOD STANDARDS COUNCIL, *supra* note 117, app. C at 52.

151. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. D at 65.

152. Fair Food Program Code of Conduct, Policy Art. II, 4.1.

153. *Id.*

154. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 9, 50.

155. *Id.* at 3.

156. *Id.* app. B at 61.

157. *Id.* at 9.

158. *Id.*

159. Having the same people investigate complaints and conduct field audits is part of the Program's intentional constant feedback loop. *Id.* at 10 fig.3. If a complaint is found to be valid and the violation is of a type that might recur, the auditors know to look for that particular conduct during their next audit. See *id.* at 9. And since resolution of the initial violation will normally include an agreed upon Corrective Action Plan with the grower, *id.* app. D at 67, the audit is also a gauge of the farm's compliance with its agreement. Similarly, if an audit suggests, but does not clearly establish, conduct that violates the Fair Food Code, those fielding complaints will be on notice to watch for that conduct. They will also inform the CIW education team of such issues, so that they can be emphasized at the next worker education session held on the relevant farm. That in turn reinforces for the workers that the suspected conduct is impermissible, and thereby emboldens them to complain if it occurs.

160. *Id.* at 21, app. D at 67.

CAP both addresses the relief due the complainant(s) and sets forth any changes in policy or personnel necessary to prevent a recurrence.¹⁶¹ While CAPs are almost always the result of agreement between the FFSC and the farm, if such agreement cannot be reached, the FFSC has the authority to impose a CAP.¹⁶² The grower can then, if it wishes, appeal the CAP to an independent arbitrator. The outcome of that arbitration is binding on all parties.¹⁶³

E. In-Depth Audits

The final element of the FFP's unique approach to comprehensive monitoring and enforcement are the field, payroll, and management audits carried out by the FFSC.¹⁶⁴ "Because workers may not be aware of every possible problem or, for that matter, may not always be willing to trust the complaint system due to prior experiences outside the FFP, in-depth audits are a necessary complement to the complaint process."¹⁶⁵ Since FFSC auditors can access the farm's records and observe operations in the field, they are able to better ensure both that systems exist to facilitate compliance and that those systems are being implemented.

As part of the audit process, the FFSC interviews "a very large percentage of workers—never less than half a company's workforce—far exceeding traditional auditing sample sizes."¹⁶⁶

161. *Id.* at 12, 21.

162. Fair Food Program Code of Conduct app. E § 5.

163. *Id.* app. F § 8. The Program's appeal process is available to challenge complaint resolutions, audit findings, and proposed suspensions from the FFP. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. D at 66. While growers often conduct their own investigations, *see id.* at 39, the FFSC is the designated fact finder in the FFP. Fair Food Program Code of Conduct, app. B § 11. As such, it can conduct its own investigation even after a grower has done so, and its conclusion will prevail. *See id.* Also, on appeal, the findings of the FFSC are treated like those of a trial court, i.e., they will be upheld unless found by the arbitrator to be clearly erroneous or wrong as a matter of FFP law (which is often more protective of workers than public law). *See id.* app. F § 8. Finally, to protect against gaming of the system, if a grower loses an appeal during a season, it cannot appeal any other matter for the remainder of that season and the next. *Id.* app. F § 11. This system was proposed by the Working Group and is one example of the interesting dynamic that develops once a system is in place that truly requires compliance. Those growers who are complying want to compete on a level playing field with other growers. *See* FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 54. They therefore often show less tolerance for undesired behavior than might a group of "outsiders" with less of a financial interest in uniformity of compliance.

164. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 9.

165. *Id.*

166. *Id.*

These interviews are conducted both in the field and at offsite locations, such as worker housing, worker transport buses, and morning pick-up spots.¹⁶⁷ The scope and depth of the FFSC's approach to worker interviews not only reflects the CIW's abiding belief in the essential role of worker participation in effective social change,¹⁶⁸ but also distinguishes the FFP's audit process from that of any other certification or monitoring program in the field today.¹⁶⁹ It is impossible, in a workforce of 500, for example, for a handful of workers to give voice to the concerns of the entire workforce. Building workers' voices into the monitoring structure through the audit process can only be achieved when significant resources are dedicated to interviewing a sufficient number of workers to reliably capture the experience of the whole. Fee-for-service commercial auditing firms are simply not willing to allocate the resources necessary to achieve that goal;¹⁷⁰ the WSR approach is simply not willing to accept anything less.

Additionally, FFSC interviews all levels of management, from senior officers to field supervisors, and reviews company policies and logs to assess implementation of the Code. Auditing also includes . . . review of the company's payroll records to ensure that workers are properly compensated, that timekeeping systems are functional and used for minimum wage calculations, and that the Fair Food Premium is accurately distributed as a line-item bonus on workers' paychecks.¹⁷¹

After the audit is complete, the "FFSC generates reports for Participating Growers and drafts [CAPs], which serve as detailed roadmaps to full compliance and as the launch point for the next round of audits."¹⁷² In keeping with the growing spirit of partnership at the heart of the FFP, the "FFSC has assisted in drafting model company policies and training company supervisors on Program-related policies" for those growers who have requested that service.¹⁷³

This broad and deep auditing regimen is another integral part of the FFP's enforcement-focused approach to social accountability. Together with the mechanisms discussed earlier, they provide the FFSC with a real-time view of grower compliance. In addition, the "FFSC also reviews monthly supply chain records to ensure that

167. *Id.*

168. *Id.* at 2.

169. *Id.* at 10 ("FFSC is the only indigenous, dedicated monitoring organization of its kind in U.S. agriculture . . .").

170. FINNEGAN, *supra* note 149, at 25, 27.

171. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 9.

172. *Id.*

173. *Id.*

Participating Buyers only source Florida tomatoes from Participating Growers in good standing” with the Program.¹⁷⁴ This careful, continuous record review ensures the proper application of the market incentives that lie at the heart of the Program and drive grower compliance.

IV. THE PROMISE OF PRIVATE REGULATORY SYSTEMS FOR PREVENTING HUMAN TRAFFICKING

On a macro level, the FFP is a private regulatory system almost completely divorced from this country’s legal system.¹⁷⁵ The only point of contact between the two is the ability of CIW or a participating buyer to resort to the courts if there has been a breach of a FFA.¹⁷⁶ This near total separation is by design, and reflects two basic realities. First, our legal system has not, to date, proved particularly hospitable to farmworkers or other disempowered people, either legislatively or judicially.¹⁷⁷ Because such groups have a greatly diminished voice in the arena of political debate, their views and interests, if considered at all, are always diluted.¹⁷⁸ However, in the WSR model that is the FFP, the diminished voice of the marginalized is raised in chorus with the powerful voice of consumers.¹⁷⁹ When together they demand that corporations clean up their supply chains, the outside noise and procedural barriers of the legal system fall away, the gears of the marketplace engage, and the interested parties are freed to devise effective solutions that work for both sides.¹⁸⁰

Second, by divorcing the solution from any particular legal system and instead harnessing the power of the market, WSR can more easily address supply-chain problems around the world, largely, although not entirely, without regard to international

174. *Id.* at 10.

175. Siegmann et al., *supra* note 101, at 122–23 (noting that the FFP’s private regulatory system, despite having enforceable contracts, relies on reputational pressure to get market leaders at the top of the supply chain to join the FFP and create wider acceptance of the FFP).

176. See FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. C at 62.

177. See OXFAM AM., *supra* note 60, at 5, 45; Melinda F. Wiggins, *Farm Labor and the Struggle for Justice in the Eastern United States*, in *LATINO FARMWORKERS IN THE EASTERN UNITED STATES: HEALTH, SAFETY AND JUSTICE* 201, 204–06 (Thomas A. Arcury & Sara A. Quandt eds., 2009).

178. Wiggins, *supra* note 177, at 205–06.

179. Siegmann et al., *supra* note 101, at 118 (noting that the alliances CIW has built with consumers and other groups have given “a visibility to its work that the precarious social and legal status of its members often did not allow” in the past).

180. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, app. B at 61; see also Siegmann et al., *supra* note 101, at 122.

borders or differing legal norms.¹⁸¹ If a corporation's consumer base lies in the U.S. or Europe, for example, it is the attitudes of those consumers that matter, not those of government officials in, say, Bangladesh. This reality promises a much more uniform approach to supply-chain reform around the world, for the fear of lost sales to megacorporations is just as great, and effective, for suppliers in third-world countries as it is here.

In addition, the WSR model permits cross-border solutions that are rare at best in more formal legal systems. The FFP, for example, has just entered into an agreement with Mexico that will, on Program farms, rid the U.S. H2A agricultural guest worker program of the illegal recruiting fees¹⁸² that are currently endemic in that program.¹⁸³ Such illegal fees, which are of course known to the DOL, are often the basis for debt bondage,¹⁸⁴ but the DOL is largely powerless to prevent the practice because almost all of the illegal activity takes place in Mexico, beyond the DOL's

181. Although developed independently, the U.N. Guiding Principles ("UNGP") and the WSR model share a largely consonant vision. One difference, however, lies in the nature of the obligation that each would assign to government actors. The UNGP expects governments to be the enforcer of any rights that supply chain workers may have. See U.N. Office of the High Comm'r for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc HR/PUB/11/04 at 3 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse . . ."). While admirable, we believe that expectation is unrealistic, both politically and as a matter of resource allocation. Certainly it is one that to date has been observed almost entirely in the breach. WSR, on the other hand, asks governments in this arena only to create and/or protect the space for market-based programs like the FFP to develop and operate. For example, if one can be sued for libel even if the statements being made are true, as is the case in Great Britain and elsewhere, see Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England's Modern Day*, 20 CARDOZO J. INT'L & COMP. L. 771, 772, 775 (2012), consumer campaigns directed at corporations will be harder, if not impossible, to organize in those countries. So, too, if people can be arrested (or worse) for protesting peacefully. But if governments permit private legal systems like the FFP to develop and operate, it will help clean up the world's supply chains while simultaneously freeing up government resources for other purposes.

182. Press Release, Sec'y of Labor & Social Welfare, Gov't of Mexico, Bull. 748, Firma STPS Acuerdo para una migración laboral segura en Estados Unidos [Secretary of Labor and Social Welfare Signs Agreement for Safe Labor Migration in the United States] (Dec. 18, 2016), <http://www.gob.mx/stps/prensa/firma-stps-acuerdo-para-una-migracion-laboral-segura-en-estados-unidos?idiom=es>.

183. Elyse T. Watkins, Note, *Inhospitable Hosts: Fundamental Flaws in Recruitment Practices for H-2A Guest Workers and Recommendations for Change*, KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 467, 481 (2015–2016).

184. *Id.* at 481.

jurisdiction.¹⁸⁵ In the FFP, however, CIW and the growers agreed they were not willing to import Mexico's problems into the Program. Therefore, as a predicate to using guest workers in the FFP, and based on knowledge originally provided by workers who had participated in Canada's guest worker program,¹⁸⁶ the Program developed a contract-based "clean channel" recruiting process with Mexico's Ministry of Labor, and all participating growers will now use only that channel to recruit guest workers.¹⁸⁷

The FFP has thus demonstrated beyond cavil that its WSR approach can quickly rid supply chains of deep-rooted problems like forced labor and ubiquitous problems like sexual harassment. It has also demonstrated the potential for its precepts to operate internationally, with a dexterity that governments simply cannot match. But ridding corporate supply chains of unwanted behavior requires ongoing vigilance. It is not like painting a house, where the hard work is done up front and one can then enjoy the fruits of that labor for years to come. Rather, maintaining a clean supply chain, a supply chain free of human trafficking, is more like weeding a garden. No matter how thorough a job one does up front, without constant attention the weeds will return.

Last year, in fact, the first forced labor violation in the history of the FFP was discovered on a participating farm. The facts of the case were summarized in a DOJ press release announcing the indictment of the leaders of the slavery ring:

Agustin Mendez-Vazquez, 43, and his son, Ever Mendez-Perez, 23, both originally of Mexico, were charged by indictment with one count of conspiracy to provide and obtain forced labor, in violation of Title 18, United States Code, Section 1594(b). Agustin Mendez-Vazquez was also charged with one count of providing and obtaining forced labor, in violation of Title 18, United States Code, Section 1589(a). If convicted, Agustin Mendez-Vazquez faces a statutory maximum term of imprisonment of 40 years. Ever Mendez-Perez faces a statutory maximum term of imprisonment of 20 years.

According to court records, Agustin Mendez-Vazquez and Ever Mendez-Perez, who work as unlicensed labor subcontractors [known as *nicleros*¹⁸⁸] on tomato farms in the Homestead area,

185. See Elizabeth Johnston, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT'L L. 1121, 1141–42 (2010).

186. For information on Canada's guest worker program, see *Guest Worker Programs*, LIBR.CONGRESS (last updated July 30, 2015), <https://www.loc.gov/law/help/guestworker/canada.php>.

187. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 40–41.

188. As noted in the indictment, *nicleros* are not licensed to act as labor contractors. See Superseding Indictment at 2, United States v. Mendez-

utilized physical force, threats of physical force, threats of deportation, and debt bondage to maintain control over other migrant workers. Workers under the defendants' control were beaten if they did not work every day; were subjected to harassment and abuse; and were required to relinquish large portions of their paychecks – sometimes their entire paychecks – to the Mendezes. The defendants are currently being held without bond pending trial.¹⁸⁹

The case was uncovered by the FFSC.¹⁹⁰ “After receiving complaints on its 24-hour hotline from both a witness to, and a victim of, the forced labor operation, the FFSC conducted its own investigation and referred the allegations to law enforcement.”¹⁹¹ The law enforcement investigation led to the indictment referenced above, to which the defendants have now plead guilty.¹⁹²

The FFSC's own investigation resulted in the suspension from the FFP of the grower on whose farm the forced labor occurred.¹⁹³ Under the Fair Food Code, suspension is automatic “when the FFSC's investigation finds that forced labor has taken place in association with a Participating Grower's operations,” regardless of whether the grower could be found legally liable.¹⁹⁴ That is what zero tolerance looks like in practice.

While the FFP's market-based economic incentives have indeed helped transform the Florida tomato industry into “the best working

Vazquez, No. 16-20170-cr-SCOLA(s) (S.D. Fla. May 26, 2016). Nonetheless, they are paid by labor contractors who are licensed to recruit workers and transport them to the farm. *See id.* These unlicensed recruiters are called *nicleros* because the licensed contractors pay them a nickel (and sometimes more) for each bucket harvested by the workers they bring to the farm. *See id.*; David J. Neal, *He Was Called a Nicolero. He's Going to Jail as a Slavemaster*, MIAMI HERALD (Jan. 22, 2017, 12:17 PM), <http://www.miamiherald.com/news/local/community/miami-dade/homestead/article128082744.html>. The *niclero* system, like any system that pays one person for the work of another, creates fertile ground for human trafficking because the *niclero* loses money whenever one of “his” workers doesn't work. The incentive to not let that happen is obvious.

189. Press Release, Dep't of Justice, U.S. Attorney's Office, S.D. Fla., Two Mexican Nationals Charged with Conspiracy to Provide and Obtain Forced Labor (Mar. 18, 2016), <https://www.justice.gov/usao-sdfl/pr/two-mexican-nationals-charged-conspiracy-provide-and-obtain-forced-labor>.

190. *Fair Food Standards Council Unearths Forced Labor Case on Fair Food Program Farm*. . . , COALITION IMMOKALEE WORKERS (Apr. 6, 2016), <http://www.ciw-online.org/blog/2016/04/ffsc-unearts-forced-labor-case/>.

191. *Id.*

192. Press Release, Dep't of Justice, U.S. Attorney's Office, S.D. Fla., Two Mexican Nationals Sentenced to Prison for Participation in Forced Labor Scheme (Jan. 19, 2017), <https://www.justice.gov/usao-sdfl/pr/two-mexican-nationals-sentenced-prison-participating-forced-labor-scheme-0>.

193. *Fair Food Standards Council Unearths Forced Labor Case on Fair Food Program Farm*. . . , *supra* note 190.

194. *Id.*

environment in American agriculture,”¹⁹⁵ the Program’s architects never assumed that economic incentives alone would be sufficient to eliminate forced labor entirely from the industry. That is why the Program includes the multiple, redundant oversight mechanisms described in this Article—including worker-to-worker education, the twenty-four-hour complaint line, and in-depth field and farm audits¹⁹⁶—to ensure that when violations do arise they are identified and remedied as quickly and effectively as possible.

All three of those mechanisms came into play and worked as designed to unearth and eliminate the particularly harsh situation described above. While the hope was that forced labor would ultimately be a thing of the past due to the swift and certain market consequences for growers associated with such conduct, at the same time no one doubted the need for the FFP’s stringent and thorough enforcement mechanisms.

In short, while the market consequences built into the WSR model will indeed prevent the vast majority of human rights violations in corporate supply chains, the enforcement mechanisms exist to catch the rest. Inexorably, those systems, together, are ridding Florida agriculture of its worst actors and its worst abuses, and, if the same mechanisms are employed, similar results can be achieved in other supply chains that rely on low-wage labor.

In this way, the FFP is very similar to the largest and most successful code compliance system in the country, the Internal Revenue Service’s (“IRS”) monitoring of the U.S. tax code. In the case of the tax code, enforcement is everything. The vast array of government services, from agricultural extension offices to national security, doesn’t pay for itself, so we created a powerful monitoring body to provide tax oversight.¹⁹⁷ The IRS’s job is straightforward: to ensure that if people decide to cheat on their taxes, it is far more likely than not that there will be consequences.¹⁹⁸ Further, those consequences are likely to be more costly than the benefits of cheating in the first place, as the offender normally must pay not only the previously unpaid taxes, but also an additional penalty.¹⁹⁹

As a result, the vast majority of tax revenue is collected through a system of voluntary compliance, whereby all but a relative handful of citizens pay their taxes without any prompting or even contact

195. Greenhouse, *supra* note 82.

196. FAIR FOOD STANDARDS COUNCIL, *supra* note 3, at 8–9.

197. *The Agency, Its Mission and Statutory Authority*, INTERNAL REVENUE SERV., <https://www.irs.gov/uac/the-agency-its-mission-and-statutory-authority> (last updated July 27, 2016).

198. *See id.*

199. *Topic 653 - IRS Notices and Bills, Penalties, and Interest Charges*, INTERNAL REVENUE SERV., <https://www.irs.gov/taxtopics/tc653.html> (last updated Feb. 17, 2017).

with the state compliance apparatus.²⁰⁰ For the small minority of taxpayers who decide to challenge the system, there is a comprehensive system of audits and investigators capable of ensuring that violators are detected and violations corrected.²⁰¹

The FFP is structured similarly, with compliance measured against a different code. Between the certain market consequences built into the CIW's FFAs with participating buyers, and the knowledge among farm bosses that workers not only know their rights but know how to exercise them if violated, the FFP has been able to prevent the vast majority of human rights violations that used to occur on a daily basis. Voluntary compliance under the FFP is the norm, abuse is greatly diminished, and serious abuses are the rare exception. But even a relative handful of abuses is not tolerable for workers who do the inherently difficult and chronically underpaid work of harvesting our nation's produce. From the beginning of the FFP their goal was, and remains today, full, wall-to-wall compliance with the Fair Food Code. And so the multiple monitoring and enforcement mechanisms described above are employed on a daily basis to ensure that violators are detected and violations corrected.

CONCLUSION

WSR offers the promise of slave-free supply chains around the world. By placing workers at the center of design and implementation, WSR better identifies and detects workplace abuses, fashions oversight systems and remedies that work, and brings to bear the vast resources of workers as the first line of defense for their own rights. When backed by the purchasing decisions and power of multinational megacorporations, WSR has demonstrated that it can address even the most pernicious and stubborn workplace abuses, including modern-day slavery.

The FFP embodies the enforcement-driven effectiveness of the WSR model. By focusing on the root cause of abuse (i.e., money), and establishing a private regulatory structure within which such abuse does not pay, the FFP models an approach that can succeed in a multitude of low-wage environments around the globe.

200. *The Agency, Its Mission and Statutory Authority*, *supra* note 197.

201. *How Does the IRS Detect a Tax Fraud*, SUPERMONEY, <https://www.supermoney.com/2016/07/irs-detect-tax-fraud/> (last updated Oct. 19, 2016).
