


3-20-2018

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Recommended Citation

Margaret Hennessy, *2017 Symposium Lecture: Challenges of Working with Immigrant Farmers in the Trump Administration*, 21 RICH. PUB. INT. L. REV. 43 (2018).
Available at: <https://scholarship.richmond.edu/pilr/vol21/iss2/7>

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2017 SYMPOSIUM LECTURE:
CHALLENGES OF WORKING WITH IMMIGRANT FARMERS
IN THE TRUMP ADMINISTRATION

*Margaret Hennessy**

* Margaret Hennessy supervises a farmworker program for the Legal Aid Justice Center in Charlottesville, Virginia. She started at LAJC in January 2017, and formed a team of lawyers and organizers that visits farm labor camps and other isolated workers' communities, and addresses the legal needs of low wage immigrant workers. In this minimally-edited transcript, Hennessy refers to slides that accompanied her address, which can be viewed at <https://goo.gl/2oEdTk>.

LECTURE

Thank you very much for allowing me to spend some of your time with here with you here today. I have to tell you one thing that, this is a lesson for you law students here, in the program that you've got it says that I'm a supervising attorney. I am not a Virginia attorney. I practice law in other states, but I have not practiced law in the state of Virginia and it wasn't said in the introduction, but as you'll find out, that's a very critical distinction for the state bars that you not practice law in their jurisdictions when you aren't licensed in their jurisdictions. So that was the first sort of housekeeping.

So I work with the Virginia Justice Project for Farm and Immigrant Workers, which, for obvious reasons, we call "the farmworker program." And I am here speaking about a tiny, tiny, tiny piece of immigration law. I work in a context of lawyers. I work in a law firm called the Legal Aid Justice Center, and we're a legal services program. We do not get legal services funding from the federal government, which is a big advantage when you're trying to work with farmworkers, many of whom are undocumented. And just briefly for those of you who don't know, if you get that federal funding you cannot work with undocumented workers. Period. End of story. And as you'll see, the workers that we work with are the—or at least the group that I'm going to be talking about—are not undocumented, but a lot of the people that we work with on other issues are. So that's another sort of piece of the puzzle. I appreciate being invited to talk here today, and I'm wowed by what I've heard so far in terms of the speakers and the knowledge that they've presented in a very short period of time about immigration law and the options, and the problems.

The title of my talk today is "Challenges of Working with Immigrant Farmworkers in the Time of Trump." Obviously, that's a huge subject. I'm going to narrow it down to—or maybe just rename it to—"Control by Fear." We are in a time where our government believes that the best way to control our immigration, to control our borders, and to regulate those aspects of our laws that have always been very complicated and fraught with many different concerns and considerations—that the best way to do that now is to make people afraid. And I have to say it is one thing that the administration has succeeded at. When we're out in the farm labor camps, when we're out in the rural communities, when we're out in the immigrant communities, the fear is palpable. It's always been there for undocumented workers, but as some of the previous speakers have indicated, there's been a certain humanity in the way that the laws have been enforced. I practiced immigration law a long time ago when it was the INS that everybody was

afraid of instead of ICE. It wasn't a walk in the park then for immigrants either, but at least it wasn't like this imposition of fear on their world. And that's something that I'm—a reason that I'm happy to be talking to you, and for those of you who are particularly law students is that I want you to think about practicing immigration law, and, of course, I also want you to think about representing farmworkers.

So I'm talking about one piece of that fear here today, and it's the guest worker programs. And I'm going to go into a little bit more of what that means. You've probably heard some talk about stuff that's in Congress right now that's being presented about how to address issues that employers have with the guest worker programs. Guest worker programs go way back to the Bracero Program, which started in World War I. And then there was a program in World War II that was bringing in workers. Back then it was the idea that there weren't enough men to do work in the fields. It was an agreement between the Mexican government and the U.S. government to bring workers in to fill in the temporary and seasonal needs of employers here, in this country. The last Bracero program ended—I think it was 1964. But since 1956, I believe there has been a form of guest worker in the immigration statutes. It used to be called H-2, and then in the [Immigration Regulation and Control Act of 1986 (IRCA)], in 1987 or [19]88, they split it into two: H-2A and H-2B, which are, basically, H-2B is non-agricultural workers who are brought in on temporary non-immigrant visas. H-2A are the agricultural workers and that's what I'm going to concentrate on today. They are very similar programs. They are programs that bring workers in for a temporary period of time on these visas to work for one employer.

Because the other speakers have done such a great job of giving you a run down of some of the laws and issues as I was sitting there, I want to go a different way, because I want you to put something in your mind at the beginning of the talk about these guest workers, and that is the definition of "Human Trafficking." It is "the recruitment, harboring, transportation, provision, or obtaining of a person for labor, or services through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." Let me narrow that down because I want you to plant it in your mind as I'm talking. I'm going to narrow that down to "obtaining a person for labor through the use of fraud or coercion, for the purpose of subjecting that person to involuntary servitude." So I'm sure your brains aren't as shallow as mine; plant that in there as I'm talking, and hopefully when we get to the end, we'll circle back around to why I put that in your minds.

So, we have this program, the H-2A and H-2B, which I'm going to tell you briefly how they work. The employers that have seasonal or temporary

labor needs that they can't meet, or believe that they can't meet by hiring U.S. workers. They have to go to the United States Department of Labor and essentially establish, through various means, that there are not enough U.S. workers to perform this work, and that the wages that they will pay these workers will not adversely affect the wages of U.S. workers in the same industries, in the same areas. It is a somewhat complicated process. They have to advertise with local—the local labor boards, labor agencies—they have to advertise the jobs. They have to have certain terms, which includes a certain wage rate. Those wage rates tend to be over the minimum wage that you hear about, the state minimum wage, or whatever. I'm not going to go into how those wage rates are established. But, basically, they are supposed to be based upon surveys of what is the prevailing wage in the local area. It's much more complicated than that, but the general idea is that they don't want to be offering wages that will depress the wages of American workers. The idea is also that if there are

American workers available, as in, U.S. workers, they're here working legally, they have to hire them first, and they have to find them. So that's sort of the gist of what is required.

The employers have complaints about it. Needless to say, the advocates have complaints for quite a number of reasons, which I'll go into in a minute. The programs have been wrought with difficulties from day one, from back in the time of the Bracero program, and the difficulties are obvious when you are bringing workers in. They are promised a lot of things. The employers submit what are called "job orders" or "clearance orders." They can be multi-page long things, and what they say is, "We have X number of jobs we can't fill by American workers. We want that number of visas for foreign workers to come in." It's usually Mexico, although Jamaica and other countries as well—most of them are from Mexico. We have—I think it's about 8,000 H-

2As and H-2Bs here in Virginia, but don't quote me on that. "We have this work." They have to describe the work. They have to say what wage they're paying. They have to say what period of time they're offering the work for. In the case of the agricultural laborers, the H-2As, they also have to offer free housing. They have to offer, and it has to meet standards. They have to pay for the transportation to and from the home of the worker where the worker is recruited. And they have to put all this in writing and provide it to the worker.

So, let me give you sort of the story line of how that works for a worker. You're in a little town in Mexico, and, often it's somebody in your town, sometimes it's a relative or whatever, comes to you and says, "You know,

you're making ten bucks a day. If you come up to Virginia you can make eleven bucks an hour at this job, so you should consider doing that. And the employer is going to offer you all of this..." They might get it in writing—they're supposed to get it in writing. "And you'll get paid back for the transportation, so even though it's 3,000 miles away, don't worry about it. And I'm going to charge you a \$1,000 bucks for it, but don't worry about it, because you're going to make so much money and you don't have to pay me back until you get home." Or, "I'm going to charge you a \$1,000 bucks, but I know you don't have any money, so I'll lend you the money or I'll take the title to your house, or to your family's house, and you're going to make so much money, don't worry about it when you get there, that's fine." That's a big problem, right there, needless to say. Employers are not allowed to charge fees for recruiting their workers, but it happens all the time and it happens because it happens in a foreign country. We have virtually no control over that. Oftentimes, I'm sure, it happens without the knowledge of the employer. Oftentimes it happens with the knowledge of the employer. Oftentimes it happens by a specific agent of the employer who's being employed to do that. That's one issue. That's the beginning of the issue.

So, the worker gets on a bus from Mexico, [and] is brought to a Virginia labor camp. I don't know how many of you are aware of how many labor camps there are in this state, but there are hundreds of them. They all have to be certified as meeting the conditions by the state health department, and the health department has a list of the ones that are licensed. They aren't all licensed either. And the H-2Bs, by the way, which I'm not going to talk about very much, who are the non-agricultural workers, they don't get free housing, which means we don't know where they are. We don't know where they're living. It's sort of the same process in terms of recruitment and in terms of requirements except the employer's not required to provide housing, and so that creates a problem for the people who are trying to connect with those workers. And those workers, by the way, you also may not be aware are landscapers, housekeepers, sometimes construction workers; it's a whole variety of workers that you might not think we're bringing in foreign workers for, but we are by the thousands, and they face the same kind of problems that agricultural workers face.

But the idea of these guest worker programs—and I say it that way because it's an annoying term for me, because we don't treat these people like guests, they are brought in. These programs are based on the idea that there are employers who have legitimate seasonal and temporary needs for workers. That's what they were based on. That's what they started on. That's kind of been the excuse all the way along of why they're necessary. There are proposals in Congress to make changes. As you can imagine, there are

really two sides to what people want. Advocates for farmworkers and for these other low-wage workers for decades have been trying to get the programs improved. Perhaps one of the biggest problems is that the Department of Labor administers this whole process, and there's always been very lax enforcement. It depends on who's in political power. It depends on who the local [Department of Labor (DOL)] person is. Now, of course, it also depends hugely on budget. And it's my understanding, for the state of Virginia, that the department—the U.S. Department of Labor—has two Spanish-speaking investigators for the entire state, and they're supposed to investigate the housing for all of these workers, including the H-2Bs. They're supposed to be investigating the health and safety issues of the workers, along with [Occupational Safety and Health Administration (OSHA)], of course. They're supposed to be investigating whether workers are getting paid properly, so on and so forth. It simply doesn't happen on the scale that it needs to happen if we want to—if we want any integrity in this whole process of bringing in foreign workers to work here. You may know that our President has H-2B workers on his winery, out in his vineyards in Charlottesville there, and, of course, at Mar-A-Lago down in Florida. And I know that—it's still surprising to me that there's a justification for bringing in workers in a lot of these areas. But that's just my personal opinion, which you might find that I have a certain bias here. So that's one problem.

Another problem is these wage surveys that they use to decide what farm workers should get paid when they're brought in on these visas or these H-2B workers, as well. The surveys around the country are generally very, very outdated, and in some cases they're using ones going back to the [19]80s. And that's what they're saying, "Okay, we're not going to adversely affect local workers' wages, because this is what local workers' wages are and we're actually going to pay more than that." In rare circumstances, that may be the case, but, generally speaking—and there's all kinds of studies on this—that they actually do depress the wages of the local workers.

The growers maintain that—and I don't mean to put all growers into the same category at all, but there are enough around the country and my own personal experiences tell me this—that it really taints the whole program. They maintain that this program is just impossible to deal with. However, they keep asking for more workers. The number of workers keep going up on these visas, and the proposal in Congress—there was a proposal on October 2nd that Representative [Bob] Goodlatte put out, and I just want to tell you a few of the things that are in the proposal because this might bring it back to what I started with, which was the definition of human trafficking. The proposal wanted to expand the program to year-round jobs. So, basical-

ly, any of these jobs that we can't find American workers for, we want to get these visas to bring workers in to work for me and nobody else.

Imagine the implications of that. Let me just ask you a question. How many of you would take a job that you that you would get a whole list of "this is what you're going to get paid, this is how long the work is going to last, these are the conditions, this is what you're offered," and then, when you get there, none of that happens? You get half of what you thought you were going to get paid. The work is 20 hours a week instead of 40 hours a week. The housing sucks. You don't get reimbursed for your transportation like you were told, but that's okay with you? No, of course, it's not okay with you. So what do you do? You try to enforce that. You try to enforce the fact that I have a contract with this employer. Wrong-o! In the H-2B context, in particular, the courts have been terrible. They've said, "Nope. That's not a contract between the worker and the employer." Who enforces it? In Goodlatte's bill, nobody enforces it except the worker and the employer together. You have to go to mediation. You have to go to arbitration. Guess what, worker-who-just-got-here-and-didn't-get-paid? You have to pay for half of that mediation and arbitration. And guess what else? There's not going to be an attorney who's going to help with it, because (A) there's not attorneys fees provided, which means private attorneys aren't going to take it, and (B) the legal services attorneys that otherwise would have to help you can't help you, because we have put restrictions on them so that they cannot represent you in these cases. That's already true for H-2A workers. It's not true for H-2B workers. And you are working for this employer no matter how abusive the employer is to you. That's your employer. You can't go to another employer. How many of you would take a job like that?

These are desperate people coming from desperate economic circumstances in their home countries, and they are our guest workers. I would venture to say that I wouldn't consider them guest workers. As guests, of course, they have absolutely no right to immigrate legally. The employer who brings them in and doesn't follow through, doesn't follow the rules, doesn't provide them what they said they would provide, says to this worker, "You better not complain, because, if you complain, I'll fire you, which makes you an illegal alien." Because when you lose that job that that visa is attached to, you are an undocumented alien in our country. Doesn't sound like a guest to me, or the way you treat a guest.

Let me swing back to trafficking. I think that this Goodlatte bill is really a proposal—and it has been yanked, by the way, but it wasn't yanked because advocates (farmworker advocates) were against it. It was yanked, because (A) there's a whole group of people, as you know, who just don't

want any foreigners in our country, and (B) the growers had some problems with various things which I don't have time to go into. But remember that trafficking is "obtaining a person for labor through the use of fraud, as in making promises you don't comply with, or coercion, for the purpose of subjecting that person to involuntary servitude."

"I want to quit your job." "Fine. You quit my job and ICE is coming after you."

I have some resources that you might want to look at: the Southern Poverty Law Center has an article by Mary Bower, who's my director. It's called, "Close to Slavery," and you can find that on their website.¹ It'll tell you a lot about these guest worker programs. And a group called Centro de los Derechos del Migrante has an article called, "Picked Apart: The Hidden Struggles of Migrant Worker Women in Maryland," and that's at cdmigrante.org.² Thank you for listening!

¹ Mary Bower, *Close to Slavery: Guestworker Programs in the United States*, SOUTHERN POVERTY LAW CTR. (2013).

² Centro de los Derechos del Migrante, Inc., *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry*, AM. U. WASH. COLLEGE OF LAW (2011).