

Explaining Peripheral Labor: A Poultry Industry Case Study

Charlotte S. Alexander[†]

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[†] Assistant Professor of Legal Studies, Department of Risk Management and Insurance, J. Mack Robinson College of Business, Georgia State University; Secondary Appointment, Georgia State University College of Law. Thanks to Matthew Bidwell, Tom Fritzsche, Tim Glynn, Jennifer Gordon, Barry Hirsch, Pauline Kim, Noah Zatz, and Madeline Zavodny for their insights, to Arthi Prasad and Nicole Sykes for excellent research assistance, and to the participants in the Sixth Annual Labor and Employment Law Colloquium, the Georgia State University College of Law Junior Faculty Scholarship Workshop, and the Southeastern Association of Legal Studies in Business Annual Conference, where I presented early versions of this paper.

INTRODUCTION

Poultry work stinks, literally and figuratively. To satisfy America's vast appetite for chicken and turkey, approximately 225,000 primarily immigrant workers perform the manual labor required to reduce live birds to marketable poultry products.¹ They work covered in feces, fat, skin, and blood.² They are paid forty percent less than the average manufacturing worker,³ suffer among the highest rates of occupational injury and illness in any industry,⁴ and receive little training, no job security, and vanishingly

1. Americans consume about eighty pounds of chicken and seventeen pounds of turkey per capita annually, or sixteen chickens and one large turkey per person, per year. U.S. Dept. of Agric. Econ. Research Serv., *Meat Supply and Disappearance*, tbls.6, 8 (Oct. 26, 2012) <http://www.ers.usda.gov/data-products/livestock-meat-domestic-data.aspx#26168> (follow "Historical" hyperlink for "All supply and disappearance") (listing 79.8 pounds of broiler chicken and 17 pounds of turkey consumed per capita by U.S. retail consumers in 2009). With respect to the number of workers employed, figures differ slightly depending on the data source. See U.S. CENSUS BUREAU, QUARTERLY CENSUS OF EMP'T & WAGES, NAICS 311615 POULTRY PROCESSING (2012) (listing 224,632 poultry processing workers in 2010); U.S. CENSUS BUREAU, ANNUAL SURVEY OF MANUFACTURES: GENERAL STATISTICS: STATISTICS FOR INDUSTRY GROUPS AND INDUSTRIES: 2010 AND 2009 (2011) (listing 219,908 poultry processing workers under NAICS 311615). For a description of the demographics of the peripheral poultry workforce, see *infra* notes 100-102 and accompanying text.

2. WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL33002; LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW 46 (2005) ("Chicken catchers are exposed to . . . skin debris, broken feather barbules, insect parts, aerosolized feed . . . poultry excreta . . . bacteria [and] dangerous gases."); Steve Striffler, *Inside a Poultry Processing Plant: An Ethnographic Portrait*, 43 LAB. HIST. 305, 306 (2002) ("The smell [inside a poultry processing plant] is indescribable, suffocating, and absolutely unforgettable . . . [B]lood, [feces], and feathers are flying everywhere."); MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 171 (2006) ("The air [inside a chicken house] was warm and humid and smelled powerfully of ammonia; the fumes caught in my throat.").

3. See, e.g., author-computed statistics from U.S. CENSUS BUREAU, ANNUAL SURVEY OF MANUFACTURES: GENERAL STATISTICS: STATISTICS FOR INDUSTRY GROUPS AND INDUSTRIES: 2011 AND 2010 (2011), available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ASM_2011_31GS101&prodType=table (for 2011, dividing "Production Workers Wages (\$1,000)" by "Production Workers Avg Per Year" for "311615 - Poultry Processing" and multiplying by \$1,000 to produce \$25,128.50 average annual poultry processing wage, compared to \$42,164.51 average annual wage for "31-33 Manufacturing," for a difference of \$17,036.01, or 40%; for 2010, comparing \$24,780.12 for poultry processing workers to \$40,967.05 for manufacturing workers, for a difference of \$16,186.93, or 40%).

4. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-096, WORKPLACE SAFETY AND HEALTH: SAFETY IN THE MEAT AND POULTRY INDUSTRY, WHILE IMPROVING, COULD BE FURTHER STRENGTHENED 21 (Jan. 2005) (reporting that the injury and illness rates in meat and poultry processing "continue to be among the highest of any industry"); see also U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, TABLE I: INCIDENCE RATES OF NONFATAL OCCUPATIONAL INJURIES AND ILLNESSES BY INDUSTRY AND CASE TYPES (2010) (listing annual nonfatal injury incidence rate of 5.9 per 100 full time employees for poultry processing).

few opportunities for promotion.⁵ They are rarely union members and have few avenues for raising complaints or making claims.⁶ In the language of labor economics, this is “peripheral” labor.

The distinction between “core” and “peripheral” labor derives from the work of economists Michael Piore, Peter Doeringer, and others on labor market segmentation.⁷ Labor market segmentation theory developed in reaction to the neoclassical economic view that workers sort themselves into the jobs they desire and for which they are qualified.⁸ In this conception, there is no such thing as a “good” or “bad” job, as market mechanisms assign each worker to the most appropriate work for his or her preferences and skills.⁹

Labor market segmentation theorists contend that there are in fact two labor markets, the primary and the secondary. Primary jobs are “good” jobs, with relatively high pay, job security, and promotion ladders. Secondary jobs are “bad” jobs, with low wages, job insecurity, and no

5. See discussion *infra* Part 0–C. Promotions on the poultry industry’s periphery do rarely happen, and the lowest-level supervisory positions are often held by bilingual former line workers, but vanishingly few workers are able to make their way from the periphery to the core. PUB. JUSTICE CTR., *THE DISPOSABLE WORKFORCE: A WORKER’S PERSPECTIVE* 29 (2009) (reporting that Latino workers are not promoted to supervisory positions); Striffler, *supra* note 2, at 308 (observing that, “unlike workers,” core supervisor Michael “enjoyed a job with some variety, almost never got his hands dirty, and could hope to move up the corporate ladder”).

6. *Union Membership, Coverage, Density, and Employment by Industry, 2010*, UNIONSTATS.COM, <http://www.unionstats.com/> (follow “2010” hyperlink) (last visited Jan. 26, 2012) (compiling data from the U.S. Census Bureau’s Current Population Survey and listing 23% union coverage of employees in the Animal Slaughtering and Processing Industry category (COC 1180)); *Union Membership, Coverage, Density, and Employment by Occupation, 2010*, UNIONSTATS.COM, *supra* (listing 26.4% union coverage of employees in the Butchers and Meat, Fish, and Poultry Processing category (COC 7810)); see also Tony Horwitz, *9 To Nowhere—These Six Growth Jobs Are Dull, Dead-End, Sometimes Dangerous*, WALL STREET JOURNAL, Dec. 1, 1994, at A1 (“Roughly 80% [of poultry workers] are nonunion . . .”); see also discussion *infra* Parts B and 0. Although only about 20% of poultry workers are unionized, this rate is in fact higher than the roughly 12% national average. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, ECONOMIC NEWS RELEASE USDL-12-0094 (2012) available at <http://www.bls.gov/news.release/union2.nr0.htm> (last visited July 23, 2012) (listing the 2011 union membership rate as 11.9 percent).

7. The concept of the core and periphery comes from the dual labor market, labor market segmentation, and dual economy theories. See generally MICHAEL J. PIORE & PETER B. DOERINGER, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* 165-66 (1971) (discussing the dual labor market theory); PAUL OSTERMAN, *EMPLOYMENT FUTURES* 69, 85 (1988) (discussing “the creation of a relatively small-core labor force organized along the lines of the salaried model and a peripheral labor force consisting of temporaries, part-timers, and other employees who are simply not provided with the protections afforded the core workers”); see also Michael Reich, David M. Gordon & Richard C. Edwards, *A Theory of Labor Market Segmentation*, 63 AM. ECON. REV. 359 (May 1973) (discussing labor market segmentation theory); Charles Tolbert, Patrick M. Horan & E. M. Beck, *The Structure of Economic Segmentation: A Dual Economy Approach*, 85 AM. J. SOC. 1095, 1096 (1980) (describing the differences between the primary (core) and secondary (peripheral) industries and labor markets).

8. Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 91-92 (1998) (explaining neoclassical view).

9. *Id.*

opportunity for promotion. In contrast to the neoclassical assumption, labor market segmentation theory holds that workers may be sorted into jobs not on the basis of their preferences and skills, but instead their race, sex, socio-economic class, or other characteristics beyond their control. For example, workers may be excluded from “good” jobs due to outright discrimination or their inability to gain access to the social networks that provide an entrée to better work.¹⁰ Once in the secondary segment, workers may find it impossible to leave. The mere fact of having held a secondary job becomes a stigma in itself, and secondary workers may not have the time or resources required to obtain additional education or skills training.

Labor market segmentation theory has largely merged with a related body of thought, dual economy theory, in which firms themselves may be categorized as core or peripheral. Core firms are generally large and profitable, with a stable workforce drawn from the primary labor market.¹¹ They can afford to invest in their workforce by training workers for successively higher positions and promoting from within.¹² Workers in core firms are therefore quite valuable and able to demand the favorable wages and working conditions associated with the primary labor market.¹³

Peripheral firms, in contrast, tend to be smaller, less stable, and less profitable. They draw their workforce from the secondary labor market, require little worker skill, and provide little training.¹⁴ Peripheral firms do not invest in their workforce, and workers become fungible and easily replaceable, with low bargaining power. The results are low wages, job

10. *Id.* at 107 (“Rather than resulting solely from education, experience, and preferences, the segment into which a worker initially falls also depends on social class, family background, neighborhood, race, gender, etc.”).

11. Tolbert et al., *supra* note 7, at 1098 (citing BARRY BLUESTONE, WILLIAM M. MURPHY & MARY STEVENSON, *LOW WAGES AND THE WORKING POOR* 28-29 (1973)).

12. *Id.* at 1096.

13. The structure that allows promotion of workers from within is known as an internal labor market. In such a market, the terms and conditions of work are better than what the external labor market would otherwise dictate and better than the minimum required by law. Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1954 (1996) (describing the norms that govern internal labor markets as “worker protective”); Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1922 (1996) (noting that although “workers are, to a large degree, legally unprotected . . . they nonetheless receive these protections” of the internal labor market).

14. I use the terms “low skill” and “de-skilled” throughout this article to describe peripheral poultry work. However, I acknowledge that these jobs in fact require significant skill, but may not be recognized as such. See, e.g., William P. Bridges & Wayne J. Villemez, *Employment Relations and the Labor Market: Integrating Institutional and Market Perspectives*, 56 AM. SOC. REV. 748, 751 n.2 (Dec. 1991) (challenging the notion of “unskilled” jobs by noting that “[T]he literature in the sociology of work is replete with examples of ‘unrecognized skills.’”).

insecurity, and lack of promotion opportunities – the hallmarks of secondary jobs.¹⁵

Labor market segmentation theory suggests that, over time, as firms gain stability and profitability, they move from the periphery to the core, and their once-secondary workforce takes on primary workforce characteristics. Wages should rise and job security increase.¹⁶ However, a different scenario has emerged in much of the U.S. economy. Instead of moving wholesale to the core, firms are adopting an internal core-periphery structure and maintaining a dual labor market within their own walls. Firms maintain a core of managerial and supervisory workers in primary jobs, but shift what work they can to low-paid, insecure, secondary jobs on the periphery.¹⁷

This development is the result of a variety of factors. According to Marion Crain, building on the work of economist Peter Cappelli, global competition has forced U.S. firms to “cut costs, reduce time to market, and differentiate themselves from competitors,” meaning that “long-term investments in people . . . no longer [make] good business sense.”¹⁸ Likewise, Kenneth Dau Schmidt contends that developments in trade and technology have “brought the external labor market into American firms in ways that we have not previously experienced and shifted the balance in our economy away from the paradigm of lifetime employment . . . and decidedly in favor of the paradigm of short-term or contingent employment”¹⁹ And as anthropologist Robert Hackenberg has

15. Marion Crain, *Managing Identity: Buying Into the Brand at Work*, 95 IOWA L. REV. 1179, 1188 (2010) (“Employers calibrate[] compensation [for peripheral workers] to the external labor market rather than to the firm’s internal market structure.”); Reich et al., *supra* note 7, at 364 (describing “fire trails” built across vertical job ladders that prevent movement from peripheral to core jobs).

16. Robert A. Hackenberg, *Joe Hill Died for Your Sins: Empowering Minority Workers in the New Industrial Labor Force*, in ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL-TOWN AMERICA 231, 240–41 (Donald D. Stull, Michael J. Broadway, & David Griffith eds., 1995) (“The concepts predict that as peripheral enterprises evolve into core industries, their secondary labor markets should become primary. Indeed, food industries were first classified as peripheral by industrial sociologists and later reassigned to core status. However, there has been no parallel shift in upgrading the food industry labor market.”).

17. OSTERMAN, *supra* note 7, at 69 (“Under this arrangement firms reduce the portion of their work force covered by the salaried model and attempt to shift some of their work load outside the protected portion of the internal labor market . . .”).

18. Crain, *supra* note 15, at 1188.

19. Kenneth G. Dau Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 8 (2001) (“[T]he rise of the new age of trade and technology has brought the external labor market into American firms in ways that we have not previously experienced and shifted the balance in our economy away from the paradigm of lifetime employment in an internal labor market and decidedly in favor of the paradigm of short-term or contingent employment in a spot market.”).

observed, “[T]he *meat and poultry industries* appear to be prime examples of intentional reduction of dependence on primary labor.”²⁰

Drawing on data and anecdotal accounts from a wide variety of sources, this Article investigates the mechanics of peripheral labor,²¹ using the poultry industry as a case study. The answer to the question of *why* firms rely on peripheral labor is likely that it is cheap and effective; this Article explores *how* conditions on the periphery came to be. What are the mechanisms that produce the characteristic low wages, job insecurity, and lack of promotions? How did those characteristics come about, and why do they persist? The Article examines four sets of factors: poultry firms’ labor practices, their modes of economic organization, the transnational nature of the labor market for peripheral poultry jobs, and the structure of the labor, employment, and immigration laws that apply to peripheral poultry work.

The Article proceeds as follows. Part I examines the specific poultry firm labor practices that have degraded conditions on the periphery: the deskilling of work and reduction in worker training; firms’ tolerance, and perhaps encouragement, of very high turnover rates; and processing plants’ location in low wage, right-to-work Southern states. Part II explores the aspects of poultry firms’ economic organization that have influenced conditions on the periphery: vertical integration, the drive to achieve economies of scale, and industry concentration in relatively few firms, with plants located in rural areas.

Part III examines the effects of transnationality on peripheral poultry work. I propose that the transnational character of the labor market combines with and exacerbates the influences of poultry firms’ labor practices and economic organization in three interconnected ways: (1) it provides a seemingly inexhaustible stream of peripheral workers; (2) it allows firms to externalize the transaction costs of recruiting and hiring; and (3) it establishes a transnational reference point for both employees and employers.

Part IV examines the labor, employment, and immigration laws that apply to peripheral poultry work, identifying the exemptions, exclusions, and assumptions embedded in those laws’ structures that complicate workers’ attempts to change conditions at work. Part IV also considers that the transnational labor market supplies workers who may have limited legal knowledge and a legal consciousness, or self-perception, that is inconsistent

20. Hackenberg, *supra* note 16, at 241 (emphasis added).

21. The theories of labor market segmentation and the dual economy have merged somewhat in the literature, with primary workers sometimes referred to as core and secondary workers referred to, variously, as precarious, contingent, or peripheral. Because of the evocative—and I think useful—image of workers on the periphery, I adopt the terms “peripheral labor,” “peripheral jobs,” and “peripheral workers” here.

with overt methods of resistance, protest, or complaint. The key point here is that conditions at work are not solely the result of economic forces, but are also influenced by both the applicable legal and regulatory structures and the methods for rights enforcement that are available to peripheral workers.

Part V then explores whether the labor market for peripheral poultry jobs is now in flux due to changing background legal and economic conditions. These conditions include the economic crisis of the past half-decade, demographic changes in Mexico that have reduced out-migration from that country to the United States, and the highly punitive anti-immigration laws recently passed by Georgia and Alabama, the first and third-largest poultry producing states. Part V begins to address the effects of these changes on the terms and conditions of peripheral poultry work and worker bargaining power. Finally, Part VI concludes by suggesting ways that the nature of peripheral work might be improved.

I.

LABOR PRACTICES

A. *De-skilling of Jobs and Minimal Training*

The task of converting live birds to millions of pounds of marketable poultry products is performed by approximately 225,000 primarily immigrant workers who are employed on the poultry industry's periphery.²² These workers' job duties are dictated by the place they occupy in the production and processing chain. The processing of broiler chickens, so named because they can be broiled, baked, or fried without extensive stewing, are the focus of this Part due to their dominance of the industry; the production and processing of other birds such as turkeys, ducks, and geese, which represent a much smaller segment of poultry output, follow the same general outlines.²³

After hatching, broiler chickens spend the first six to eight weeks of life on grow-out farms.²⁴ Once they have reached market weight, crews of

22. See *supra* note 1.

23. See, e.g., John C. Voris, *Poultry Fact Sheet No. 16c: California Turkey Production* UNIV. CAL. DAVIS COOP. EXTENSION (1997), <http://animalscience.ucdavis.edu/avian/pfs16C.htm> (last visited Nov. 7, 2012) (describing turkey production process). For a full glossary of poultry slaughter and disassembly terms, see Occupational Health & Safety Admin., *Poultry Processing Industry E-Tool*, <http://www.osha.gov/SLTC/etools/poultry/glossary.html> (last visited Nov. 7, 2012).

24. See generally *Poultry Tour*, GA. POULTRY FED'N, <http://www.gapf.org/IndustryTour/default.cfm> (last visited Nov. 29, 2011); DONALD D. STULL & MICHAEL J. BROADWAY, *SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA* 54 (2d ed. 2013) (describing chicken catching); Striffler, *supra* note 2, at 306-07 (same).

“chicken catchers” are dispatched into the chicken houses to grab the live birds, cage them, and load them onto trucks for transport to the processing plant.²⁵ Working for ten to twelve hours a night, under the theory that the birds are calmer then, a crew of eight or nine men can “catch” a house full of 20,000 to 25,000 birds in three hours.²⁶

At the processing plant, “live hang” workers, again operating in the dark to calm the chickens, attach each bird by the feet to a hook at a collective rate of 200 birds per minute.²⁷ These hooks are connected to a line that transports the birds through a series of machines. First, the chickens are stunned and then killed by a machine that slits their throats. Some survive and are dispatched by the knife of a worker known as “the backup killer.”²⁸ Machines then drain the carcasses of blood, scald them to loosen the feathers, strip the feathers, and decapitate them. Eviscerating, neck-breaking, washing, and chilling machinery next perform their respective tasks, with workers operating the machines and finishing any steps left incomplete by the automated process.²⁹

“Rehang” workers then place each carcass on a hook or cone, which travels down the disassembly line to a series of workers who wield saws, scissors, and knives.³⁰ These workers are grouped three to four to a station and perform the same cuts thousands of times per day to debone the chicken and reduce it to its component parts.³¹ They collectively process between forty and ninety birds per minute.³² The repetitive, high-speed motion and close-quarters cutting required to perform these jobs contribute to poultry workers’ having one of the highest rates of occupational injury and illness in any industry.³³

25. STULL & BROADWAY, *supra* note 24, at 54; see *Poultry Tour*, *supra* note 25.

26. See STULL & BROADWAY, *supra* note 24, at 51, 54.

27. Striffler, *supra* note 2, at 306.

28. Interview with Tom Fritzsche, Staff Attorney, S. Poverty Law Ctr., in Atlanta, Ga. (Sept. 7, 2011).

29. *Id.*; Horwitz, *supra* note 6; MARY K. MUTH ET AL., RTI INT’L, POULTRY SLAUGHTER AND PROCESSING SECTOR FACILITY-LEVEL MODEL (2006) 2-4 fig. 2-1 (illustrating the poultry disassembly process). A U.S. Department of Agriculture official also performs a cursory visual inspection after evisceration. Bradley Watkins et al., *Economic Feasibility Analysis for an Automated On-Line Poultry Inspection Technology*, 79 POULTRY SCI. 265 (2000).

30. Fritzsche, *supra* note 28; see Striffler, *supra* note 2, at 306-07.

31. See Striffler, *supra* note 2, at 307.

32. See *id.* at 306; Horwitz, *supra* note 6 (“[L]ine speeds in poultry plants have been revved up to a maximum allowable rate of 91 chickens a minute from the high 50s.”).

33. See *supra* note 4. Worker advocates report that very high rates of on-the-job injuries are one of poultry workers’ biggest work-related concerns and are perhaps the biggest driver of the very high industry turnover figures. Fritzsche, *supra* note 28. Occupational illnesses and injuries in peripheral jobs, and the interrelationships among worker health and safety, transnationality, and turnover, are complex issues that merit more thorough consideration than space here allows.

Workers then throw chicken wings, breasts, thighs, tenders, and other parts onto conveyor belts to be “further processed.”³⁴ Depending on the final product, other workers operate tenderizing, seasoning, breading, frying, baking, and freezing machines, and another set of workers package, seal, label, and ship out the chicken parts, often marked with the poultry firm’s own brand.³⁵

As poultry firms have mechanized the slaughter and disassembly processes, there has been a related de-skilling of workers’ jobs and a drop off in worker training. Though poultry processing plants have not accomplished complete mechanization, they have automated their processes significantly, and compartmentalized and simplified the job duties of the remaining workers to a remarkable extent.³⁶ As the co-founder of IBP, a meat packing company now owned by poultry firm Tyson Foods, remarked to a *Newsweek* reporter as early as 1965, “We’ve tried to take the skill out of every step . . . We wanted to be able to take boys right off the farm and we’ve done it.”³⁷ A *Wall Street Journal* reporter describes the results of this “de-skilling” process, relating that “[w]orkers on ‘the knife line’ at most chicken plants . . . aren’t even allowed to sharpen their own knives; this task . . . is given over to workers whose sole job is honing blades.”³⁸ Whatever knife-sharpening skills the line workers once had have now been removed from their jobs and transferred to other workers, whose jobs are similarly simplified and routine.

The de-skilling of jobs produces a corresponding drop in worker training. One account describes training as consisting of being shown a video and being told “to do what the person next to [you] is doing.”³⁹ The *Wall Street Journal* describes a worker in the Pilgrim’s Pride chill-pack department who “trained” the reporter by saying, “Here’s all I know and all you need to. Breasts go 28 to a box, drumsticks go 24, and wings go 20.

34. Striffler, *supra* note 2 at 306.

35. *Id.* at 306-07.

36. ROGER HOROWITZ & MARK J. MILLER, JULIAN SAMORA RESEARCH INST., MICH. STATE UNIV., IMMIGRANTS IN THE DELMARVA POULTRY PROCESSING INDUSTRY: THE CHANGING FACE OF GEORGETOWN, DELAWARE AND ENVIRONS 3 (1999) (“In the ‘modern’ processing plant, mechanical devices are extensively applied in a wide variety of cutting operations once performed by workers with knives. . . . But the chicken still needs to be inserted into the machines and positioned properly for the cuts to be applied in the right place Labor may have been deskilled, and the number of knife workers reduced, but the need for labor remains in the many positioning and transitional stages of the dismembering and cutting operations . . .”).

37. WHITTAKER, *supra* note 2, at 31.

38. Horwitz, *supra* note 6.

39. HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS 44 (2004); *see also* Striffler, *supra* note 2, at 307 (“[The supervisor] cannot really do the job himself and his instructions are simple: ‘Do what Roberto does.’ Roberto provides little formal training, a fact that makes learning my new job a bit tricky.”).

And make sure the numbers stenciled on the box are facing forward when you shove the box down the conveyor belt.”⁴⁰ In fact, training is so minimal and de-skilling so complete that workers in some plants regularly rotate among positions, apparently with little interruption to production, easily replacing one another in a policy designed to minimize the repetitive motion injuries that plague the poultry industry.⁴¹ As summarized by a U.S. Department of Agriculture report, “[Poultry] jobs require dexterity with a cutting knife but few other skills, making the tasks easily trainable and allowing the use of abundant low-skill labor.”⁴²

Because poultry companies have created peripheral jobs that require little skill and little training, each individual worker holds very little value for the employer. Peripheral workers become fundamentally interchangeable. Due to workers’ fungibility, employers have no incentive to increase wages, encourage employment longevity, or promote from within—the sort of worker-protective terms and conditions that traditionally appear in “core” jobs. For the same reasons, workers themselves have very little bargaining power, because any threat to leave by a worker would likely be met with indifference by his or her employer.

B. Tolerance of High Turnover Rates

Poultry firms’ de-skilling of peripheral jobs and reduction in training go hand-in-hand with their tolerance, and perhaps encouragement, of extremely high worker turnover rates. With the exception of the small number of workers who have job protection as a result of union membership (see Part I.C, *infra* at 365), workers are “at will” and can be terminated for nearly any reason. Indeed, workers are terminated, or choose to leave, in staggering numbers. Though poultry firms do not release turnover figures, industry observers estimate that annual turnover is between forty and one hundred percent.⁴³ At the high end, this means that a single plant will have to replace its entire chicken catching and disassembly workforce of between 400 and 2,000 workers every year.⁴⁴ In comparison, the annual worker turnover rate for all nondurable goods manufacturing

40. Horwitz, *supra* note 6.

41. Fritzsche, *supra* note 28.

42. MICHAEL OLLINGER ET AL., U.S. DEPT. OF AGRIC. ECON. RESEARCH SERV., AER-13, EFFECT OF FOOD INDUSTRY MERGERS AND ACQUISITIONS ON EMPLOYMENT AND WAGES 28 (Dec. 2005) [hereinafter OLLINGER ET AL. (Dec. 2005)].

43. WHITTAKER, *supra* note 2, at 30, 42 (listing annual poultry turnover rates as “between 40% and 100% annually”); STULL & BROADWAY, *supra* note 24, at 106 (describing turnover in the poultry and meat processing industries as being “higher than virtually any other industry”).

44. WHITTAKER, *supra* note 2, at 30.

firms, a category to which poultry belongs, ranged between 2000 and 2011 from a low of 28.9% to a high of 42.7%.⁴⁵

General turnover statistics do not distinguish between workers who have quit and those who are fired. The statistics include voluntary departures due to workplace illnesses and injuries, discontent with pay and working conditions, and a variety of other reasons. For immigrant workers, turnover might also be driven by a desire to return to their home countries or by deportation or removal from the United States. Turnover statistics also include terminations that result from failure to keep up with the line speed or production quotas, whether due to injury or otherwise, or from violations of one of the many rules that govern life on the line.⁴⁶ Finally, these statistics also include workers terminated as a result of legally prohibited discrimination or for other unlawful reasons, such as retaliation for attempting to enforce protected rights.

High turnover presents no problem for poultry firms as long as replacement workers are readily available and easily recruited to fill vacancies. For reasons explored further in Part III, the transnational labor market supplies a seemingly inexhaustible stream of such replacement workers, who can be recruited and installed in peripheral jobs at very low transaction costs. The transnational labor market also supplies workers who might be particularly turnover-prone, as recent immigrants may have few local ties to the communities where poultry plants are located and might be especially likely to leave work in search of better opportunities.⁴⁷

Nevertheless, turnover among peripheral workers creates at least *some* costs for poultry firms, who must provide *some* level of new employee orientation, even if it is only a fellow worker's explanation of the disassembly process.⁴⁸ Firms must also employ human resources staff to

45. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, JOB OPENINGS AND LABOR TURNOVER SURVEY (2012) data.bls.gov/pdq/querytool.jsp?survey=jt (for "Industries," select "Nondurable goods manufacturing," for "Regions," select "Total US," for "Data Elements," select "Total separations," for "Rate and/or Level," select "Rate," for "Seasonal Adjustment," select both "Seasonally adjusted" and "Not seasonally adjusted"; filter results to show 2000-2011).

46. In some plants, these rules prohibit disassembly line workers from leaving the line to go to the bathroom during their shift or talking while working. Horwitz, *supra* note 6 ("[the company's] message on bathroom trips: 'Walking off the line without someone to relieve you is not allowed. This is considered a voluntary quit.'"); PUB. JUSTICE CTR., *supra* note 5, at 29 (discussing rules prohibiting talking while working).

47. See discussion *infra* Part 0.

48. See, e.g., MICHAEL J. PIRE, *BIRDS OF PASSAGE* 97 (1979) ("[D]espite the quite unskilled character of most of the work in this labor market and the consequent ability to tolerate what seem to be incredibly high turnover rates, there is in fact an independent concern about turnover. The jobs, one can argue, are quite simple but involve enough skill so that new workers must be shown how to perform them and spend time, albeit a *short* time, perfecting what they have learned. In this atmosphere, there is a premium placed upon labor-force continuity: The older workers show the newer ones how to perform the job and maintain a base level of output while novices are being absorbed.").

check workers' employment eligibility and update constantly changing payroll records. Indeed, anecdotal accounts suggest that some poultry firms have experimented with reducing turnover rates, and the associated costs, by adopting policies that allow immigrant workers leave to return to their home countries during holidays.⁴⁹

Maintaining high turnover rates is therefore likely an intentional strategy for poultry firms. As economist John Pencavel points out, "The employer has to balance the advantages of operating with a low turnover rate against the costs of higher remuneration paid to keep his labor force contended."⁵⁰ In this calculation, many poultry employers appear to have accepted high turnover on the periphery in exchange for the ability to offer low wages and other employer-friendly terms and conditions of work, rather than investing in workers and promoting employment longevity as in the core.⁵¹

Poultry firms may benefit in at least two other ways from frequent turnover in the peripheral workforce. First, for those firms that offer employee benefits, high turnover means that many workers leave before completing the vesting period, thus relieving firms of the obligation under their own policies to pay benefits or grant paid vacation leave.⁵² Turnover rates may be the reason for the relatively low amounts that poultry employers allot to employee benefits: the average annual per-worker cost of health insurance for poultry employers is less than half the average cost for manufacturing generally, and per-worker poultry employer contributions to pension plans and other fringe benefit programs similarly lag behind manufacturing averages.⁵³ Second, employers may generally profit from

49. Greig Guthey, *The New Factories in the Fields: Georgia Poultry Workers*, 19 S. CHANGES 23, 23 (1997) ("Other factors influencing this stabilization [of turnover rates] include changes in some companies' policies, which discourage rapid turnover and encourage long-term employment with vacation incentives to accommodate immigrant workers' needs to visit family in Mexico.").

50. John H. Pencavel, *Wages, Specific Training, and Labor Turnover in U.S. Manufacturing Industries*, 13 INT'L ECON. REV. 53 (Feb. 1972).

51. WHITTAKER, *supra* note 2, at 35 ("In a carefully structured and highly competitive industry, high turnover may not be accidental. Some would argue that worker retention may be neither desirable nor profitable.").

52. *Id.* at 37 (quoting a meat packing manager that "the way fringe benefits have been negotiated or installed, they favor long-term employees. For instance, insurance, as you know, is very costly. Insurance is not available to new employees until they've worked there for a period of a year or, in some cases, six months. Vacations don't accrue until the second year. *There are some economies, frankly, that result from hiring new employees.*") (emphasis added).

53. See, e.g., author-computed statistics from U.S. CENSUS BUREAU, ANNUAL SURVEY OF MANUFACTURES, *supra* note 3 (for 2011, dividing "Employer's cost for health insurance (\$1,000)" by "Number of employees" for "311615 - Poultry Processing" and multiplying by \$1,000 to produce \$2,954.13 average health insurance cost per employee for poultry employers, compared to \$6,530.18 for "31-33 Manufacturing," more than twice the poultry figure; computing total per-worker cost of pensions and other fringe benefits in the same way and comparing poultry (\$4,371.24) to manufacturing figures (\$9,781.06)).

high turnover's dampening effect on worker bargaining power, as workers rarely have the time on the job to develop a relationship with a union or otherwise to demand higher wages, job security, and opportunities for promotion.

Unscrupulous employers may even exaggerate the extent to which they can absorb the costs of high turnover on the periphery, as a way to encourage workers' beliefs that they are interchangeable and to discourage worker activism. An account by a peripheral poultry worker at Tyson Foods illustrates this phenomenon:

Tyson always gets rid of workers who protest or who speak up for others. When [the speed of the disassembly line] jumped from thirty-two chickens a minute to forty-two, a lot of people protested. The company came right out and asked who the leaders were. Then they fired them. *They told us "If you don't like it, there's the door. There's another eight hundred applicants waiting to take your job."*⁵⁴

Thus, while the de-skilling of jobs and high turnover are themselves indicators of poultry labor's peripheral status, these two factors also contribute to the emergence and persistence of other peripheral characteristics, including low wages, low worker bargaining power, lack of job security, and lack of promotion ladders.

C. Plant Location

In the poultry industry, location is a labor practice. Most poultry firms have chosen to locate their processing operations in the rural South, primarily in Georgia, Arkansas, and Alabama.⁵⁵ Locating in Southern states allows firms to take advantage of the mild climate, low feed prices, and proximity to grow-out farms. Importantly for the terms and conditions of peripheral work, locating in the South also places poultry firms in states with employer-friendly wage laws, low prevailing wages, and right-to-work legal regimes. This allows firms to keep wages low for peripheral workers and reduce the influence and impact of unions.

In Georgia, Arkansas, and Alabama, the top three poultry-producing states, there is no state requirement that companies pay higher than the

54. HUMAN RIGHTS WATCH, *supra* note 39, at 80 (emphasis added); see also Leigh Binford, *From Fields of Power to Fields of Sweat: The Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada*, 30 THIRD WORLD Q. 503, 514 (2009) (quoting a "Mexican male with 20 seasons work experience in Canada," who noted that "it is really hard to do something [to make a difference]. If we protest, even if all 3000 workers stationed in Leamington did, we'd get sent back to Mexico. They can do that because there are another 3000 Mexican workers ready to come to Canada and work.").

55. U.S. Dep't of Agric. Econ. Research Serv., *Poultry & Eggs: Background*, <http://www.ers.usda.gov/Briefing/Poultry/>, (last updated May 28, 2012) ("The top broiler-producing State is Georgia, followed by Arkansas, Alabama, Mississippi, and North Carolina.").

\$7.25 federal minimum wage.⁵⁶ Even if a firm did decide to pay higher-than-required wages, the five top poultry-producing states – Georgia, Arkansas, Alabama, Mississippi, and North Carolina – have between the seventeenth and forty-ninth lowest average weekly wages in the country, and all have average weekly wages that are below the national average.⁵⁷ In fact, according to a 2011 report on manufacturing, “when all costs are taken into account, certain U.S. states, such as South Carolina, Alabama, and Tennessee, will turn out to be among the least expensive production sites in the industrialized world.”⁵⁸ Poultry industry wage data bears this out: wages paid to peripheral poultry workers, who work primarily at plants in the U.S. South, are forty percent lower than manufacturing wages and twenty percent lower than wages paid in other animal processing industries.⁵⁹

Moreover, many Southern states in which poultry-processing plants are located have “right-to-work” laws, under which union membership cannot be made a condition of employment.⁶⁰ These pro-employer laws complicate peripheral workers’ attempts to organize and contribute to relatively low union membership rates in private industry in Southern states.⁶¹ In the poultry industry, about twenty percent of workers hold union membership, half the unionization rate of workers in other meatpacking

56. In some states, state law supplements federal law, requiring a higher hourly wage, but in South Carolina, Georgia, Alabama, Mississippi, Tennessee, Louisiana, and Arkansas, the state minimum wage is either below or at the federal minimum wage of \$7.25 per hour. See U.S. Dept. of Labor Wage & Hour Div., *Minimum Wage Laws in the States - January 1, 2012*, <http://www.dol.gov/whd/minwage/america.htm> [hereinafter *Minimum Wage Laws*].

57. Author-computed statistics from U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, QUARTERLY CENSUS OF EMPLOYMENT AND WAGES, TABLE 6: PRIVATE INDUSTRY BY STATE, 2011 ANNUAL AVERAGES (2011), available at www.bls.gov/cew/ewl1table6.pdf (last visited Nov. 8, 2012) (computing national average weekly wage as \$893; ranking states by average weekly wage, with Georgia as #17 (\$852), Arkansas as #46 (\$689), Alabama as #33 (\$755), Mississippi as #49 (\$645), and North Carolina as #28 (\$786)).

58. BOS. CONSULTING GRP., *MADE IN AMERICA AGAIN: WHY MANUFACTURING WILL RETURN TO THE U.S.* 5-6 (2011).

59. See, e.g., author-computed statistics from U.S. CENSUS BUREAU, ANNUAL SURVEY OF MANUFACTURES, *supra* note 3 (calculating average per-worker poultry wages as being 40% less than average per-worker manufacturing wages; for 2011, comparing \$25,128.50 for poultry processing workers to \$31,554.07 for “Animal (except poultry) slaughtering and processing” workers, for a difference of \$6,425.57, or 20%; for 2010, comparing \$24,780.12 for poultry processing workers to \$31,085.48 for other animal processing workers, for a difference of \$6,305.35, or 20%).

60. See, e.g., Thomas R. Haggard, *Right-to-Work Laws in the Southern States*, 59 N.C. L. REV. 29 (1980).

61. Author-computed statistics from BARRY HIRSCH & DAVID MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK: COMPILATIONS FROM THE CURRENT POPULATION SURVEY, Union Membership, Coverage, Density and Employment by State, 2011 (2011), available at <http://www.unionstats.com/> (computing national average private employer union membership rate of 6.2%; comparing to rates in Alabama (6.7%), Arkansas (2.5%), Georgia (2.7%), Mississippi (3.4%), and Texas (3.0%)).

industries such as beef and pork.⁶² There have been occasional, successful organizing campaigns at poultry plants, and there are active community union organizations such as the Delmarva Poultry Justice Alliance that advocate for worker rights.⁶³ However, non-union plants remain the norm, and organizing drives have historically been met with aggressive anti-union strategies by poultry management.⁶⁴ Low unionization also means that poultry workers lack formalized grievance procedures and opportunities for collective bargaining that would allow them to demand concessions in the areas of wages, job security, and promotion ladders.⁶⁵

II.

ECONOMIC ORGANIZATION

In addition to their labor practices, the modes of economic organization that poultry firms have adopted contribute to a downgrading of the terms and conditions of peripheral work and a diminishment of worker bargaining power. Three characteristics of poultry firms' economic organization are important: vertical integration, the drive to achieve economies of scale, and industry concentration in relatively few firms, with plants located in rural areas.

A. Vertical Integration

Beginning in the late 1950s and early 1960s, poultry companies became so highly vertically integrated that they became known within the industry as "integrators."⁶⁶ Integrators own or control every step of poultry

62. See *supra* note 6; see also Robert Bussel, *Taking on "Big Chicken": The Delmarva Poultry Justice Alliance*, 28 LAB. STUD. J. 1, 7 (Summer 2003) ("Nationally, less than thirty percent of the poultry industry's more than 200,000 workers are unionized, as compared to over double that percentage in other forms of meatpacking.").

63. See, e.g., LEON FINK, *THE MAYA OF MORGANTON: WORK AND COMMUNITY IN THE NUEVO NEW SOUTH* 104-139 (2003) (describing victorious organizing campaign among peripheral poultry workers in North Carolina); Steven Greenhouse, *Union Organizers at Poultry Plants in South Find Newly Sympathetic Ears*, N.Y. TIMES, Sept. 6, 2005, at A16 (describing union organizing campaign at Tennessee poultry plant); DONALD D. STULL & MICHAEL J. BROADWAY, *SLAUGHTERHOUSE BLUES: THE MEAT AND POULTRY INDUSTRY IN NORTH AMERICA* 74 (2004) (describing union contract at a Tyson chicken plant in Robards, KY).

64. Horwitz, *supra* note 6 ("[I]ndustry leaders such as Tyson and Perdue Chicken have long been renowned for combating unions. Asked about their views of unions, poultry workers typically responded with cautionary stories about vocal workers who were dismissed, harassed or reassigned to undesirable jobs on the cramped de-bone line or in the chiller.").

65. See MICHAEL OLLINGER ET AL., U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., AER-787, *STRUCTURAL CHANGE IN U.S. CHICKEN AND TURKEY SLAUGHTER* 17 (2000) ("Using mainly nonunion labor in rural areas, poultry producers have been able to compensate workers with far lower wages than red meat producers pay.") [hereinafter OLLINGER ET AL. (2000)].

66. *Id.* at 3; see also STEVE STRIFFLER, *CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA'S FAVORITE FOOD* 57 (2005) (describing the history of the industry).

production and processing.⁶⁷ With respect to broiler chickens, for example, integrators own the hatcheries in which chicks hatch from integrator-owned eggs. Integrators do not own the grow-out farms on which the chicks are raised to market weight, but they tightly control every aspect of a grow-out farm's operation.⁶⁸ Integrators supply the growers with chicks, feed from integrator-owned processing mills, additives, medications, veterinary services, and extensive technical instruction.⁶⁹ Integrators then send integrator-employed chicken catching crews to the farms, who capture and transport the birds to integrators' processing plants.⁷⁰ At the plants, more integrator-employed workers kill the birds, reduce them to their component parts, and package them for sale with the integrators' brand.

Poultry firms' vertical integration means that they can reduce the risk of fluctuation in the supply and quality of chickens and turkeys, as they own or control production and processing in its entirety.⁷¹ However, integrators are heavily exposed to fluctuations in input costs, including transportation, energy, and raw materials for feed, which are purchased from outside suppliers.⁷² These costs can change significantly due to weather conditions and other exogenous factors. Firms cannot quickly adjust production in response to changes in input costs, as they are locked into a six to eight week growing cycle for chickens and a sixteen to twenty week growing cycle for turkeys at any given time.⁷³ In addition, the window for slaughtering a bird when it has reached market weight is narrow, and poultry meat is perishable, meaning that processing cannot be delayed.⁷⁴ Moreover, despite its concentrated, seemingly oligopolistic

67. OLLINGER ET AL. (2000), *supra* note 65, at 11-12.

68. For a detailed economic analysis of the structure of the grower-integrator relationship, see Charles Knoeber & Walter N. Thurman, "Don't Count Your Chickens . . .": Risk and Risk Shifting in the Broiler Industry, 77 AM. J. AGRIC. ECON. 486 (1995); Charles Knoeber & Walter N. Thurman, *Testing the Theory of Tournaments: An Empirical Analysis of Broiler Production*, 12 J. LAB. ECON. 155 (1994); Charles Knoeber, *A Real Game of Chicken: Contracts, Tournaments and the Production of Broilers*, 5 J.L. ECON. & ORG. 271 (1989).

69. OLLINGER ET AL. (2000), *supra* note 65, at 11.

70. STULL & BROADWAY, *supra* note 24, at 54 (describing chicken catching); Striffler, *supra* note 2, at 306-07 (same).

71. See OLLINGER ET AL. (2000), *supra* note 65, at 11 ("In the vertical coordination framework of poultry contracting, integrators accept much of the risk of poultry growing in exchange for greater control over both the quality and quantity of the birds.").

72. *Id.* at 12 ("The integrator bears all of the risks of a short-term price change affecting feed and broiler prices."); see also *id.* at 19, 24 tbl. 5-1 (listing firms' inputs used to model poultry costs).

73. *Poultry Tour*, *supra* note 24 (listing the broiler chicken grow-out period as six to eight weeks); Voris, *supra* note 23 (listing the turkey grow-out period as sixteen weeks for hens and twenty weeks for toms).

74. HOROWITZ & MILLER, *supra* note 36, at 3 ("Ownership of the bird from conception both guarantees a constant supply for the plant and increases exposure to risk. Minor fluctuations in feed or transportation expenses, labor costs, and retail chicken prices can have devastating effects on profits, as

structure (discussed in Part II.C below), poultry production is a highly competitive business, and most firms operate with relatively slim profit margins.⁷⁵

Given these constraints, one key input cost that integrators can and do control is labor.⁷⁶ This results in downward pressure on wages and a reluctance on the part of employers to offer anything like the worker-protective job security and promotion ladders of core jobs. It also creates incentives for employers to constrain peripheral workers' bargaining power, and to limit workers' ability to demand costly reforms, by encouraging high turnover and emphasizing the fact of workers' fungibility.

B. Economies of Scale

As poultry firms have integrated vertically, they have also attempted to achieve economies of scale by decreasing per-bird processing costs and increasing plants' (and workers') efficiency and productivity. Firms have used three strategies in their drive to achieve scale economies. First, they have consolidated their processing operations into relatively large plants. Between 1972 and 1992, for example, the share of poultry output handled by plants with over four hundred employees jumped from approximately twenty-five to eighty percent.⁷⁷ Second, firms have invested in feed and breeding technology to produce birds that are a uniform size and weight.⁷⁸ This allows birds, an inherently variable natural product, to be processed by machines to some extent.⁷⁹ Third, firms have invested in increasingly sophisticated, and expensive, slaughter and disassembly machinery.⁸⁰

A 2000 U.S. Department of Agriculture analysis found that these strategies generated significant savings for poultry firms, concluding that "scale economies have enabled plants operating at four times the sample mean size to produce chicken at a cost about 15 percent less than a plant

the firms have great difficulty reducing production levels without allowing chickens to exceed optimal weights.").

75. See Steve Bjerklie, *On the Horns of a Dilemma: The U.S. Meat and Poultry Industry*, in ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL-TOWN AMERICA 41, 42 (Donald D. Stull, Michael J. Broadway, & David Griffith eds., 1995) (discussing narrow profit margins); THOMAS E. ELAM, FARMCON LLC, COMPETITION IN THE U.S. CHICKEN SECTOR 5 (2010) ("[P]rofit margins for [chicken] producer-processors have not improved in recent years, indicating that most, if not all, benefits of lower real costs were competed away by market forces.") [hereinafter ELAM (2010)].

76. Bussel, *supra* note 62, at 4-5 ("[E]xercising tight control over the cost of labor has long preoccupied the poultry industry and powerfully influenced employment and managerial policies.").

77. OLLINGER ET AL. (2000), *supra* note 65, at 6.

78. *Id.* at 3 (citing growers' provision of "uniform quality birds" and "more efficient feeding operations" as contributors to poultry firms' economies of scale).

79. *Id.* at 30 ("Modern high-speed chicken slaughter operations must have uniform-size chickens because changeovers require operational adjustments and shifting worker responsibilities . . .").

80. *Id.* at 7, 13.

operating at the same sample mean size.”⁸¹ Similarly, turkey plants achieved savings of seventeen percent per pound.⁸²

To realize these gains, however, poultry firms must bear the high capital costs of constructing large processing plants and outfitting them with the sophisticated machinery that will slaughter, pluck, eviscerate, cook, freeze, and package turkeys and chickens. They must also invest significantly in both feed and breeding technology and in monitoring the grow-out process to ensure consistent bird size and quality. Taken together, poultry firms’ investment in capital and live bird production represents nearly seventy-six percent of their input costs for broiler chickens and sixty-eight percent for turkeys.⁸³ Labor and material costs make up the difference.⁸⁴

In order to make a return on these investments, firms must keep productivity high and labor costs low. The editor of the *Meat & Poultry* industry trade journal puts it as follows: “In terms of the labor force, commodity economics holds down wage rates while increasing the pressure for greater production, thus forcing the industry to grow ever more dependent on cheap, and most often immigrant, labor.”⁸⁵ This downward pressure on the terms and conditions of peripheral work may not be restricted to newer, larger processing plants that attempt to achieve scale economies, as smaller, older, competitor plants will also be forced to reduce wages to avoid losing market share.⁸⁶ Large plant size, high machinery costs, and expensive investment in breeding, feed, and grow-out technology thus drive firms to keep peripheral wages low and line speeds high, to maximize each worker’s productivity and derive the greatest possible benefit from economies of scale.

C. Industry Concentration and Location

Along with vertical integration and scale economy trends, the poultry industry has seen a greater concentration of the business in the hands of fewer firms. One way that economists measure industry concentration is by using the four-firm concentration ratio, which calculates the market share

81. *Id.* at 42.

82. *Id.*

83. MUTH ET AL., *supra* note 29, at 2-5 tbl. 2-2.

84. *Id.*

85. Bjerklie, *supra* note 75, at 45; *see also* OLLINGER ET AL. (2000), *supra* note 65, at 1 (“The need to continuously reduce production costs to capture the cost savings of large plants raises worker safety and compensation concerns for farmers who raise chickens and turkeys and for slaughter plant workers.”).

86. OLLINGER ET AL. (Dec. 2005), *supra* note 42, at 24 (“[G]reater scale economies from newer plants in all industries due to organizational and technological changes pressured existing plants . . . to reduce costs, particularly wages or face a loss of profitability.”).

held by the industry's four largest producers.⁸⁷ The ratio is not particularly high in poultry as compared to other food manufacturing industries – 58.5% for broilers and 55% for turkeys in 2007, as compared to 83.5% percent in beef processing; however, the poultry industry has become markedly *more* concentrated over time, increasing from a low of 23% for turkeys and 14% for chickens in 1963.⁸⁸ If a fifth firm is added to the analysis, the ratio rises to 54%, and if the top ten poultry firms are considered, the market share held rises to 77%.⁸⁹ Moreover, the absolute number of broiler chicken processors has fallen to between 38 and 50 nationwide, depending on the study, from a high of 360 in 1960.⁹⁰

The trend toward concentration, combined with processing plants' location in rural areas, means that a single firm's plant is often a community's only significant employer and may be the only employer for miles around. If rival firms operated multiple processing plants in a given town, they would presumably compete for workers by offering superior wages and working conditions. Workers would then be relatively empowered vis-à-vis poultry firms. Instead, industry concentration and rural plant location mean that no such competition exists, and plants have monopsony power to set substandard and sometimes sub-legal peripheral wages and working conditions.⁹¹

87. See, e.g., Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973) (describing four-firm concentration ratio).

88. Mary Hendrickson & William Heffernan, *Concentration of Agricultural Markets: April 2007*, UNIV. MO. DEPT. RURAL SOCIOLOGY (2007), <http://www.foodcircles.missouri.edu/07contable.pdf> (last visited Nov. 8, 2012); JAMES M. MACDONALD ET AL., U.S. DEPT. OF AGRIC. ECON. RESEARCH SERV., AER-785, CONSOLIDATION IN U.S. MEATPACKING 8 tbl. 3-1 (2000). Concentration is also not particularly high using another measure, the Herfindahl-Hirschman Index. See ELAM (2010), *supra* note 75, at 3-4; MUTH ET AL., *supra* note 29, at 2-20 (discussing HHI index measures).

89. Bussel, *supra* note 62, at 4 ("From 1990 to 2000, the market share among the top five firms increased from forty-six percent to fifty-four percent, and the top ten firms control over seventy percent of the market."); THOMAS E. ELAM, FARMECON LLC, GLOBAL POULTRY COMPETITION 19 (2007) (reporting 2006 statistics for top ten producers that account for 77% of U.S. production); see also Wayne Labs, *Poultry Processors Uncover New Ways to Reduce Costs*, FOOD ENGINEERING 103 (2009) ("Fifty of the largest companies (such as Tyson Foods, Pilgrim's Pride and Perdue Farms) hold more than 90% of the market.").

90. PUB. JUSTICE CTR., *supra* note 5, at 5 ("Presently, approximately fifty chicken processors exist nationwide – 'down from 125 in 1985, and 360 in 1960.'"); ELAM (2010), *supra* note 75, at 18 ("There were 38 commercial chicken production companies listed in the 2010 *Poultry USA* annual survey of commercial producer-processors."). The number of companies is to be distinguished from the number of the number of plants. See MUTH ET AL., *supra* note 29, at 2-16 (listing number of plants).

91. In economic terms, industry concentration may result in an oligopolistic structure in relation to poultry consumers and a monopsonistic structure in relation to poultry growers and workers. In an oligopoly, a small group of sellers (poultry firms) may abuse their market power over a large group of buyers (poultry consumers). In a monopsony, a single buyer (the local poultry plant) may abuse its market power over a large group of sellers or suppliers (grow-out farmers and workers).

Analogous observations about the deleterious effect of poultry firms' concentration and plant location have been made in the context of chicken grow-out farmers who raise integrator-owned chicks to market weight. According to a U.S. Department of Agriculture report:

Because production occurs in localized networks, growers in most areas have very few integrators from which to choose. Many growers have only a single integrator in their area and most have no more than three. The lack of alternatives has led to controversy over production contracts and to legislative and regulatory proposals to regulate them.⁹²

Some growers allege that integrators act as local monopsonies by taking unfair and perhaps illegal advantage of their strong position in rural communities.⁹³ For example, in 2010, an Oklahoma jury awarded \$7.3 million to ten chicken grow-out farmers in a lawsuit against Tyson Foods.⁹⁴ The farmers claimed that Tyson coerced them to grow chickens at less than break-even costs and retaliated against growers who refused to go along.⁹⁵ Also in 2010, the Antitrust Division of the U.S. Department of Justice conducted joint public workshops with the U.S. Department of Agriculture on the issues of concentration and contracting in the poultry industry.⁹⁶ Just as growers complain that they are at the mercy of the integrators, must accept bad deals, and suffer from unequal bargaining power, so do industry concentration and location conspire to depress the terms and conditions of peripheral work and constrain worker bargaining power.

III.

TRANSNATIONALITY

This Part turns from the effects of poultry firms' labor practices and economic organization on peripheral work to an examination of the impact of the transnational nature of the labor market that supplies firms' largely immigrant and often undocumented peripheral workers.

92. JAMES M. MACDONALD, U.S. DEPT. OF AGRIC., ECON. RESEARCH SERV., EIB-38, THE ECONOMIC ORGANIZATION OF U.S. BROILER PRODUCTION 4-5 (2008).

93. See, e.g., Dave Murphy, *Farmers Look for Justice in the Poultry Industry*, HUFFINGTON POST (June 1, 2010), http://www.huffingtonpost.com/dave-murphy/farmers-look-for-justice_b_594582.html (reporting that "poultry farmers daily face fear, uncertainty and intimidation from those companies they contract with").

94. Curtis Killman, *Tyson to appeal chicken farmers' \$7.3 million verdict*, TULSA WORLD, April 5, 2010, http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100405_11_0_IDABEL387630.

95. *Id.*

96. See, e.g., U.S. Dep't of Justice, *Public Workshop Agenda: Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy* (2010), <http://www.justice.gov/atr/public/workshops/ag2010/alabama-agenda.html>.

Americans no longer purchase whole turkeys and chickens and cut them up in their kitchens. Peripheral poultry workers now perform these tasks; they cut, saw, and snip poultry carcasses to produce a range of “further processed” products.⁹⁷ The growth in further processing, which is labor intensive, has offset the labor reductions achieved by the automation of other parts of the slaughter and disassembly process, and has resulted in a net increase in poultry employment even as other food production and processing industries have seen a net decrease.⁹⁸

Driven by the growth in further processing, the poultry industry’s demand for workers has outstripped the labor supply available in the rural communities in which processing plants are located. One might imagine in this situation that the unequal bargaining power that is common on the periphery would disappear. Firms would begin to offer higher wages and superior working conditions, akin to those available in the core, to entice U.S. workers to relocate. The oil industry in North Dakota, for instance, has increased wages to attract workers to such an extent that even employees at local McDonald’s restaurants are paid fifteen dollars per hour, more than double the federal minimum wage.⁹⁹ Instead, poultry firms have looked to the transnational labor market to recruit an additional supply of workers who are willing to relocate, but who, for a variety of reasons explored in this Part, do not demand higher wages or better working conditions in return.

Today, observers estimate that immigrant workers hold between twenty-five and sixty percent of peripheral poultry jobs.¹⁰⁰ Large numbers of workers are undocumented, having crossed the border without

97. Striffler, *supra* note 2, at 306 (“A quarter of a century ago, most Americans bought chicken in one form: the whole bird. Today, Tyson alone produces thousands of “further processed/ value-added” poultry products, including nuggets, patties, franks, pet food, and a range of parts that come in a multiplicity of shapes, sizes, textures, and flavors.”).

98. MICHAEL OLLINGER ET AL., U.S. DEP’T OF AGRIC. ECON. RESEARCH SERV., ERR-3, STRUCTURAL CHANGE IN THE MEAT, POULTRY, DAIRY, AND GRAIN PROCESSING INDUSTRIES, (2005) (“[T]he number of workers declined by about one-fourth in meatpacking and by about one-half in fluid milk, but rose more than 150 percent in poultry slaughter and processing.”).

99. See Brian A. Shactman, *Unemployed? Go to North Dakota*, MSN MONEY (Oct. 5, 2011), <http://money.msn.com/investing/unemployed-go-to-north-dakota-cnbc.aspx> (reporting an “oil boom” in which “wages are so high that even McDonald’s pays \$15 an hour”).

100. See, e.g., W.V. Jamison, *Cultural Issues in Processing Plants and on Farms*, 14 J. APPLIED POULTRY RES. 387, 387 (2005) (“It is not atypical to find processing plants with an excess of 50% immigrant workers, and anecdotal data indicate that some plants now employ a predominantly Latino workforce.”); Horowitz & Miller, *supra* note 36, at 5 (“Currently, between 40% and 60% of the workforces in various plants are thought to be non-citizens, the bulk of whom are Mexicans and Guatemalans.”); WHITTAKER, *supra* note 2, at 30 (“By the late 1990s the Tyson work force was very heavily Hispanic — 40% according to Tyson, 60% or more according to union officials.”); HUMAN RIGHTS WATCH, *supra* note 39, at 110 (quoting a Tyson Foods official’s estimate that twenty-five percent of poultry workers are Hispanic immigrants and poultry workers’ own estimates that a “majority” of workers are immigrants).

authorization or overstayed a visa.¹⁰¹ These workers come primarily from Mexico and Guatemala, but also from countries as dispersed as Laos, Haiti, the Marshall Islands, Somalia, and Burma.¹⁰² The labor market for peripheral poultry jobs is therefore transnational, drawing from a worldwide pool of immigrant workers to meet poultry firms' labor demands.

In many ways, the transnational labor market supplies the ideal worker for poultry firms. Writing in the *Journal of Applied Poultry Research*, one author commented, "[Immigrants] readily work for locally competitive wages, their work ethic is acknowledged to be outstanding, they do not readily unionize, and they actively recruit their relatives and friends from their native country into the poultry industry."¹⁰³

This Part provides an explanatory framework for statements such as these, proposing a theory of the transnational labor market as a way to explain transnationalism's influence on the terms and conditions of work and worker bargaining power on the periphery. I suggest that transnationalism combines with and exacerbates the influences of the poultry industry's labor practices and economic organization in three interconnected ways: the transnational labor market provides a seemingly inexhaustible supply of peripheral workers; it allows firms to externalize the transaction costs of recruiting and hiring; and it sets up a transnational reference point for both employees and employers.

A. Inexhaustible Labor Supply and Externalization of Worker Replacement Costs

As Part I explained, poultry companies have de-skilled peripheral jobs. De-skilling allows firms to tolerate extremely high turnover because workers become interchangeable: each departing low skill worker can be easily replaced with a new low skill worker. In such a system, labor is a

101. As in all industries, estimates of the number of undocumented workers are uncertain and variable, but most commentators agree that the majority of peripheral poultry workers who are immigrants are also undocumented. Fritzsche, *supra* note 28 (estimating that sixty percent of workers in the Alabama poultry processing industry are Spanish-speaking immigrants and ninety percent of those workers are undocumented); HUMAN RIGHTS WATCH, *supra* note 39 at 101 (quoting a poultry worker's estimate that two-thirds of the workforce is undocumented).

102. HOROWITZ & MILLER, *supra* note 36, at 5, 9 (discussing Mexican, Guatemalan, and Haitian workers); Fritzsche, *supra* note 28 (discussing workers from Somalia and Burma); Striffler, *supra* note 2, at 305 ("Today, about three-quarters of plant labor forces are Latin American, with Southeast Asians [including Laotians] and Marshallese accounting for a large percentage of the remaining workers.").

103. Jamison, *supra* note 100, at 387-88; see also ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* 37 (2003) ("Because the jobs in the secondary sector are the least attractive, and since capitalism's dynamism regularly leads it to exhaust the available pool of labor, vacancies at the bottom of the totem pole recurrently emerge. And so opens a portal of entry to immigrants, who however poorly educated or unskilled in the conventional sense, nonetheless turn out to be wanted.").

commodity and workers are fungible. Such a high-turnover labor regime can only function, however, if (1) there is an unending supply of new workers ready to take the vacant jobs and (2) transaction costs are low enough such that turnover is relatively costless. The transnational labor market meets both criteria.

In the transnational labor market, the entire developing world, populated by millions of potential peripheral poultry workers, provides a seemingly inexhaustible labor supply. As Michael Piore has observed:

[The] supply [of migrant labor] is extremely elastic. For practical purposes, it should perhaps be viewed as indefinitely so. . . . Given the wide disparities in income between developed and undeveloped areas and the size of the underdeveloped world, there are an infinite number of new sources of labor to draw upon as existing channels dry up.¹⁰⁴

Migration becomes “a labor-supply system,” providing unending replacement workers to fill the poultry industry’s peripheral jobs.¹⁰⁵

By participating in the transnational labor market, poultry firms are also able to hold down the transaction costs associated with identifying, recruiting, and hiring replacement workers. Firms externalize these worker replacement costs by relying on “ethnic network recruitment,” in which employers spread word of job openings through tightly-knit immigrant communities.¹⁰⁶ Not only do firms *not* have to worry about their labor supply “drying up,” to use Michael Piore’s term, but they also do not have to concern themselves with the logistics or costs of hiring, since they rely on their own workers’ transnational linkages to fill vacancies.

Access to an inexhaustible transnational labor supply may also provide unscrupulous employers with a way to further reduce worker bargaining power. When faced with resistance, complaints, or demands by their immigrant labor force, employers can always switch recruiting areas and swap one more fractious immigrant group for another. While immigrants might actually be very effective in spreading word about “bad apple” employers through the very same ethnic networks used for recruiting,¹⁰⁷

104. PIORE, *supra* note 48, at 98.

105. Binford, *supra* note 54, at 504.

106. David Griffith, *Hay Trabajo: Poultry Processing, Rural Industrialization, and the Latinization of Low-Wage Labor*, in ANY WAY YOU CUT IT: MEAT PROCESSING AND SMALL-TOWN AMERICA 129, 141 (Donald D. Stull, Michael J. Broadway, & David Griffith eds., 1995) (“In Georgia, 50 percent of the plants pay bonuses to current workers who bring new workers into the plants, as long as the new employees stay for a designated period (usually 30 to 90 days).”); HUMAN RIGHTS WATCH, *supra* note 39, at 109 (“Meat and poultry companies often find workers through what researchers call ‘ethnic network recruitment.’”); PIORE, *supra* note 48, at 98 (“Employers are generally in a position to stimulate an increased supply of workers through existing channels simply by spreading the word among their own employees that they are recruiting.”).

107. See Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 18 (“Workers in the external labor market might also learn of the employer’s

employers can avoid reputational harm merely by shifting their recruiting practices to separate immigrant communities.

This phenomenon can be seen in another context in the patterns followed by agricultural employers who participate in guestworker programs, under which employers sponsor temporary visas to import foreign workers during periods of local labor shortage. In Canada, for example, anthropologist Leigh Binford maintains that “Mexico was invited to join the [Seasonal Agricultural Worker Program] in 1974 in order to provide a check on the growing negotiating power of Caribbean workers. . . .”¹⁰⁸ Similarly, lawsuits filed by Mexican guestworkers in the United States claim that employers shifted recruitment to new networks of recruiters and new parts of Mexico to avoid rehiring workers who had sued over unpaid wages.¹⁰⁹

Employees become less willing to take steps to change conditions on the job when they understand that they are commodities traded on the transnational labor market, and when employers communicate the fact of their fungibility. Worker bargaining power is suppressed by workers’ awareness of their own replaceability, and by their firsthand knowledge of the extremely large transnational labor supply (their family members, neighbors, friends, and millions of others like them who are looking for work) from which employers can draw. Instead of engaging in overt forms of resistance, workers may instead choose to leave their jobs, or may channel their resistance into less obvious (and less effective) methods of resistance. I explore these everyday forms of resistance further in Part IV.

B. Transnational Reference Point

In addition to supplying a seemingly inexhaustible stream of peripheral workers, the transnational labor market prompts both workers and employers to develop what some have called a “dual frame of reference.”¹¹⁰ Both groups assess U.S. wages and working conditions against the backdrop of wages and working conditions in workers’ home countries and against the legal requirements and prevailing practices in the United States. As Leigh Binford observes, the “conditions in the [home] living sites serve

reputation and shy away from entering into an agreement with the employer or demand additional guarantees.”).

108. Binford, *supra* note 54, at 508; *id.* at 510 (“If Mexico refuses to supply agricultural workers on Canadian growers’ terms . . . plenty of other underdeveloped Latin American and Caribbean countries, inside and outside the [Seasonal Agricultural Worker Program], are eager to do so.”).

109. See, e.g., Complaint ¶¶ 85-90, *Reyes-Fuentes v. Shannon Produce Farm, Inc.*, 671 F. Supp. 2d 1365 (S.D.Ga. 2009) (No. 608CV059) (alleging that Georgia grower switched recruiters and recruiting areas in Mexico to avoid rehiring H-2A workers who had previously sued the farm for unpaid wages).

110. See, e.g., WALDINGER & LICHTER, *supra* note 103, at 9, 40-41, 152-53, 161-63, 179.

as a constant, and indispensable, transnational reference point” for both parties in the employment relationship.¹¹¹

1. *Workers*

The transnational reference point allows immigrant peripheral poultry workers to accept substandard, and sometimes sub-legal, terms and conditions of work. Workers are not blind to the fact that they are laboring under poor conditions by U.S. measures. However, the options and opportunities at home are often significantly worse. As a result, even jobs that are peripheral in the United States may be desirable in the transnational labor market. For example, the federal minimum wage in the United States is \$7.25 per hour and higher in some states¹¹²; in comparison, the average minimum wage for non-professional occupations in Mexico is the equivalent of roughly \$4.68 *per day*; while the minimum wage in Guatemala is the equivalent of roughly \$8.75 *per day*.¹¹³ And large percentages of workers in those countries may not earn even the minimum wage amounts.¹¹⁴ As one live hang-worker in a Georgia poultry processing plant remarked, “When I came over here, I didn’t want to hang chicken because nobody wants to do that. But I was glad to have a job.”¹¹⁵

111. Binford, *supra* note 54, at 507. Put in different terms, workers come to the United States because they are “pushed” by inferior conditions at home and “pulled” by the prospect of higher wages in U.S. jobs. See, e.g., DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* 6-7 (1998) (discussing factors that drive immigration). Interestingly, the dual frame of reference may apply on both side of the border. Once migrants return to their home countries, they may refuse to work for inferior pay or import “Bolshevik” ideas about their rights at work. Alternatively, they may have acquired more sophisticated and disciplined work habits. See DAVID FITZGERALD, *A NATION OF EMIGRANTS: HOW MEXICO MANAGES ITS MIGRATION* 146-48 (2009).

112. U.S. Department of Labor, Wage and Hour Division (WHD), *Minimum Wage Laws in the States - January 1, 2012*, available at <http://www.dol.gov/whd/minwage/america.htm#UK1IoYYQMtc> (showing seventeen states and the District of Columbia with higher-than-federal minimum wage rates).

113. *Minimum Wage Laws*, *supra* note 56; Gobierno Federal de Mexico, Servicio de Administración Tributaria, *Salarios Minimos 2012*, http://www.sat.gob.mx/sitio_internet/asistencia_contribuyente/informacion_frecuente/salarios_minimos/ (last visited Feb. 3, 2012); Cent. Am. Data, *Guatemala January 2012 Tax Calendar*, http://centralamericadata.biz/en/article/home/Guatemala_January_2012_Tax_Calendar (last visited Feb. 3, 2012).

114. See, e.g., Barbara Schieber, *Guatemala: 60 Percent of Workers Earn Less Than [sic] Minimum Wage*, GUAT. TIMES (Nov. 16, 2011) <http://www.guatemala-times.com/news/guatemala/2661-guatemala-60-percent-of-workers-earn-less-than-minimum-wage.html>.

115. Greig Guthey, *Mexican Places in Southern Spaces: Globalization, Work, and Daily Life in and Around the North Georgia Poultry Industry*, in *LATINO WORKERS IN THE CONTEMPORARY SOUTH* 57, 65 (Arthur D. Murphy et al. eds., 2001).. A “recently sacked factory worker” interviewed by political scientist and anthropologist James C. Scott expressed the same sentiment: “The only thing worse than being exploited is *not* being exploited.” JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 243 (1985).

Contributing to immigrant poultry workers' dual frame of reference is their status as target earners. Though some immigrants put down roots in the United States and become long-term residents, many poultry workers view their stay as temporary, planning to return home once they have reached a target savings goal.¹¹⁶ In the words of Jennifer Gordon and R.A. Lenhardt, this self-perception as temporary, target earners combines with the transnational reference point to "make even abusive working conditions seem more tolerable, in part because they are perceived as a temporary sacrifice for a valuable payoff," in the form of improved economic and social status in the home country.¹¹⁷

Not only does the transnational reference point compel workers to accept peripheral jobs in the first place, it may also prevent them from challenging conditions once they have the job. In Albert Hirschman's famous framework, a worker faced with problems on the job has three options: exit, voice, or loyalty.¹¹⁸ As evidenced by extremely high turnover rates, many workers choose "exit."¹¹⁹ Those workers who remain on the job can either be "loyal," accepting conditions as they are, or exercise "voice" to try to effect change. For the workers who choose to stay, the forces of transnationality array themselves overwhelmingly against overt "voice" (e.g., filing a lawsuit, complaining to a government agency, or forming a union) and in favor of relatively silent "loyalty."¹²⁰

To be sure, peripheral poultry workers do join unions or participate in lawsuits against poultry firms. Yet union membership among poultry workers is quite low compared to other meatpacking industries, and worker advocates report that fear keeps class and collective action lawsuits smaller

116. Gregory DeFreitas, *Hispanic Immigration and Labor Market Segmentation*, 27 INDUS. REL. 195, 197 (1988) ("Recent immigrants are willing to take these 'deadend' jobs because they typically view their stay as temporary, a means to amass some target level of savings to improve their families' living standard and social status upon return home.").

117. Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1220 (2008).

118. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30 (1970) ("Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs . . ."); *id.* at 21-25 (discussing the option to "exit," or take one's labor or business elsewhere); *id.* at 76-105 (discussing a "theory of loyalty").

119. SCOTT, *supra* note 115, at 245 ("[T]hroughout the centuries one of the common man's most frequent and effective responses to oppression [has been] flight.' . . . '[A]voidance protest' has *always* proved more attractive than the risk of open confrontation.") (footnotes omitted).

120. HIRSCHMAN, *supra* note 118, at 92 (acknowledging that firms may institute "loyalty-promoting institutions and devices . . . [that] are often meant to *repress* voice alongside exit") (emphasis in original); WALDINGER & LICHTER, *supra* note 103, at 41 ("[T]he dual frame of reference makes it easier for immigrants to produce the appropriate performance in workplaces where displays of subordination are de rigueur.").

than they likely otherwise would be.¹²¹ For the bulk of “loyal” peripheral workers who have made the choice to stay on the job, engaging in overt methods of protest may be irrational and dangerous, as this behavior puts workers at risk of retaliatory job loss, social ostracism, and deportation.

Anecdotal accounts suggest that retaliation - actual or threatened - is a common reality for peripheral poultry workers. For example, a manager in a Tyson Foods processing plant circulated a memo to workers stating, “You have the right to make your own decisions but I am telling you that if you do try [to strike] you will no longer be employed here. If myself or any of the other management team members hear you say this or another employee tells us about this and it can be backed up, *you will no longer work here.*”¹²²

Furthermore, for undocumented workers, the constant specter of removal or deportation creates what Gordon and Lenhardt call a state of “legally constructed subservience.”¹²³ In the words of a poultry worker in Northwest Arkansas:

They have us under threat [*bajo amenaza*] all the time. They know most of us are undocumented— probably two-thirds. All they care about is getting bodies into the plant. My supervisor said they say they’ll call the INS [Immigration and Naturalization Service, the predecessor to today’s Immigration and Customs Enforcement agency] if we make trouble.¹²⁴

Another undocumented peripheral worker in Tennessee asks, “How can we raise our voice if we know that we don’t have papers? That we are in danger, because if you don’t like me, you can call INS, you can get somebody that has some kind of pull and says, ‘Okay, just come and pick so many Hispanics.’”¹²⁵

Workers may fear not only their own termination and deportation, but also that the plant may shut down, or that the employer will shift recruiting to another immigrant pool. Then *everyone* – not only the workers who have complained but also their friends, families, and neighbors – will lose their jobs. Workers who exercise “voice” may therefore trigger wide-ranging harm that endangers others who are essentially bystanders, and the workers who complain may face social ostracism as a result.

121. Fritzsche, *supra* note 28; see also Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 465-74 (2010) (calculating opt-in rates for Fair Labor Standards Act collective actions at only fifteen percent and identifying worker fear of retaliation as a possible reason for low plaintiff participation).

122. HUMAN RIGHTS WATCH, *supra* note 39, at 80 (emphasis added).

123. Gordon & Lenhardt, *supra* note 117, at 1215; see also Binford, *supra* note 54, at 508 (“It is deportability, and not deportation as such, that has historically rendered Mexican labor to be a distinctly disposable commodity.”).

124. HUMAN RIGHTS WATCH, *supra* note 39, at 101.

125. Frances Lee Ansley, *Rethinking Law in Globalizing Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 391 (1998).

2. Employers

The dual frame of reference that arises within the transnational labor market likely also affects poultry employers. Under a freedom of contract conception of immigrant labor, employers may see workers' continued presence in peripheral jobs as acquiescence to the terms and conditions of work.¹²⁶ If conditions are really so bad, employers might ask, why do workers stay? (Of course, large numbers of workers do leave, but some stay, and others continue to arrive to replace those who have left.) By adopting workers' home countries as a reference point, poultry employers may answer the question of "why stay?" by reasoning that workers are better off in peripheral U.S. poultry jobs than they would be as subsistence farmers or poverty wage earners in dusty corners of the developing world. Measuring working conditions in the U.S. against the transnational backdrop of workers' home countries – or at least the employers' perception of those countries – allows otherwise law-abiding employers to become comfortable offering substandard wages and working conditions. In this way, the transnational reference point gives employers a moral "out." Employers can choose to see themselves as charitable actors rather than, as some accounts have it, exploiters of vulnerable people.¹²⁷

Though there is a dearth of studies on this particular phenomenon, hints of this sort of attitude occasionally crop up in analogous circumstances. For example, at a public hearing in the mid-2000s on conditions at the T. Don Hutto Family Immigration Detention Center in Taylor, Texas, a converted medium-security prison which had been roundly criticized for confining children,¹²⁸ a county commissioner commented:

In the earlier part of this year, I did tour the facility, and I think that a lot of the misconceptions are unfortunate, but it is far from any prison that I've

126. Kathleen Kim, Professor of Law, Loyola Law Sch. L.A., Remarks at the Sixth Annual Labor and Employment Law Colloquium, L.A., Cal. (Sept. 2011) (discussing "freedom of contract" conception); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955 (1984) ("So long as it is accepted that the employer is the full owner of his capital and the employee is the full owner of his labor, the two are free to exchange on whatever terms and conditions they see fit . . ."); see Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 973-74 (2006) (discussing the "myth" that employees alone are responsible for "interest in, and decisions about, which jobs to take"); see also Binford, *supra* note 54, at 511 (suggesting that Mexican workers may "collaborate in their exploitation by working more intensively, and placing themselves more readily at the beck and call of employers than their self-perceived Caribbean rivals").

127. This self-transformation into charitable actors may also be an internal justification for retaliation taken against immigrant workers who dare complain, as they are then biting the proverbial hand that feeds them.

128. See THE LEAST OF THESE: FAMILY DETENTION IN AMERICA, at 1:36-2:22, 2:57-3:25 (Clark Lyda & Jesse Lyda 2009).

ever seen, and it is far better than the conditions that the vast majority of those people have left.¹²⁹

Psychologists' and behavioral economists' notion of "framing" also supports the hypothesis that employers are influenced by, and make use of, their own transnational reference point. Framing theory, particularly "issue framing," asserts that the way a controversial issue is presented can significantly influence an individual's opinion of the underlying substantive question.¹³⁰ Here, employers may be engaging in their own internal, self-framing process, constructing a way of perceiving peripheral work that justifies their own place in the employment relationship.

IV.

LEGAL STRUCTURES

Part IV examines the additional influence that legal structures have on the terms and conditions of peripheral poultry work. This Article has already discussed the effects of the background employment-at-will rule and state right-to-work laws in encouraging turnover and suppressing organizing efforts by peripheral poultry workers.¹³¹ This Part turns to three additional topics: peripheral poultry workers' lack of knowledge about the U.S. legal system and laws, the exemptions and exclusions built into labor and employment law that leave peripheral workers without coverage, and the assumptions about private law enforcement embedded in these laws' enforcement schemes that diminish the laws' effectiveness. As a result, rather than provide a mechanism for changing the state of peripheral poultry work, legal structures may help cement peripheral conditions in place.

A. Knowledge of U.S. Laws and Legal System

The transnational labor market provides a supply of peripheral poultry workers who are particularly unlikely to have accurate knowledge of the laws and legal system of the United States. In order to engage in formal, overt expressions of "voice" such as filing a lawsuit, complaining to a government agency, or forming a union, workers must know their

129. *Id.*, at 33:35-33:55 (emphasis added) (showing comments of Cynthia Long, Williamson County Commissioner, during public hearing); see also ACLU, *Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigrant Detention Center in Texas* (Aug. 27, 2007), <http://www.aclu.org/immigrants-rights-prisoners-rights/landmark-settlement-announced-federal-lawsuit-challenging> (reporting changes to be made at Hutto facility).

130. See, e.g., Thomas E. Nelson & Zoe M. Oxley, *Issue Framing Effects on Belief Importance and Opinion*, 61 J. POL. 1040, 1041 (1999) (noting that an issue frame can provide "alternative definitions, constructions, or depictions of a policy problem").

131. See Part IV.A (discussing the at-will employment rule); Part I.C (discussing right-to-work legal regimes).

substantive rights and how to access the legal system to exercise those rights. Pauline Kim's research on U.S. employees' knowledge about job security suggests that workers may be deeply misinformed about the law.¹³² In Kim's studies, U.S. workers assumed that they had *more* protection from discharge than they actually did under an "at will" employment regime.¹³³ Conversely, peripheral workers in the poultry industry may believe that they have *less* protection than they actually do. Peripheral poultry workers may carry over legal knowledge from their home countries, which may have less robust, or even less robustly enforced, labor and employment rights regimes. They may have experience with corruption in the justice systems of their home countries. Undocumented workers in particular may have a deep mistrust of the U.S. government, believing that interaction even with "friendly" or "status-neutral" agencies puts the worker at risk of deportation.¹³⁴ Even if workers are fully informed about their rights at work, they may not know how to find a lawyer who speaks their language, will accept what they can pay, and is willing to challenge the biggest, most powerful employer in town.¹³⁵

B. Coverage of the Laws

Even if peripheral poultry workers had perfect information about their substantive workplace rights in the U.S. legal system, those rights may not actually be of much help. Generally, labor and employment laws cover all employees without regard to immigration status, but there are at least four significant areas of exemption and exclusion that may leave peripheral

132. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110 (1998) ("[R]espondents overwhelmingly misunderstand the background legal rules governing the employment relationship. More specifically, they consistently overestimate the degree of job protection afforded by law, believing that employees have far greater rights not to be fired without good cause than they in fact have."); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 447 (1999) ("Contrary to the assumption commonly made by defenders of the at-will rule, [surveys of workers in Missouri, New York, and California] indicate that workers do not understand the default presumption [of at-will employment], but erroneously believe that the law affords them protection akin to a just cause contract, when, in fact, they can be dismissed at will."); see also Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 562 (2010) ("[I]t is clear that immigrant workers, like the average low-wage worker, often lack sufficient knowledge about the laws governing work in America. Language barriers and lack of culturally appropriate information intensify this barrier.").

133. Kim (1998), *supra* note 133 at 110; Kim (1999), *supra* note 133 at 447.

134. See, e.g., Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1101-03 (2011) (discussing unauthorized immigrants' mistrust of even friendly or status-neutral U.S. government institutions); see also Associated Press, *U.S. Ends Job 'Safety' Immigration Raids*, ASSOC. PRESS NEWS SERV., Mar. 30, 2006 (describing immigration agents masquerading as occupational health and safety workers to arrest illegal immigrant workers).

135. In poultry plants in rural Southeastern Alabama, for example, groups of workers speak the indigenous Guatemalan languages of Chuj, Q'anjobal, and Mam. Fritzsche, *supra* note 28.

poultry workers without protection.¹³⁶ These gaps in coverage may also trigger a dynamic response from firms, prompting them to structure their operations to avoid legal liability, which in turn ensures that conditions on the periphery do not change.¹³⁷

First, though labor and employment laws may cover all *employees* without regard to immigration status, they do not cover all *workers*. Independent contractors are generally excluded from coverage, incentivizing firms increasingly to “contract out” their labor under temporary, contingent, or part-time arrangements.¹³⁸ A lawsuit by over one hundred chicken catchers against Perdue Farms illustrates this phenomenon. Until 1992, Perdue had directly employed its chicken catchers. That year, the company changed many chicken catchers’ status from “employee” to “independent contractor” and ceased paying overtime and benefits.¹³⁹

In 1998, the chicken catchers sued Perdue, claiming unpaid overtime under the Fair Labor Standards Act and Maryland wage and hour law.¹⁴⁰ Perdue argued that the chicken catchers were independent contractors employed by middle-man “crew leaders.”¹⁴¹ As a Perdue spokesperson commented to the *Baltimore Sun*, “We have nothing to do with the way these individuals are compensated.”¹⁴²

Ultimately, the court ruled for the chicken catchers and ordered Perdue to pay three years’ back overtime pay.¹⁴³ Though this result favored peripheral poultry workers, it also likely provided a reorganizational blueprint for poultry firms to avoid similar outcomes in future lawsuits. In fact, after the chicken catchers’ overtime case was filed, Perdue purchased its first automated chicken catching machine.¹⁴⁴ Recently, the company laid

136. Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361 (2009) (exploring the coverage of undocumented workers under labor and employment law).

137. Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 440 (1995) (“If employers change their policies in response to a complaint or lawsuit, they often do so in a way that is tailored only to avoid legal liability, leaving the core exploitative conditions intact.”).

138. Dau Schmidt, *supra* note 19, at 3-5 (discussing changing structure of the employment relationship).

139. Kate Shatzkin, *Perdue Sued by Chicken Catchers, Suit Claims They are Employees, Not Contract Workers, Issue is Overtime*, BALTIMORE SUN, Sept. 19, 1998, http://articles.baltimoresun.com/1998-09-19/business/1998262085_1_perdue-chicken-catchers-overtime..

140. *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452 (D. Md. 2000).

141. *Id.* at 456.

142. Shatzkin, *supra* note 139.

143. *Heath*, 87 F. Supp. 2d at 457-58, 463.

144. Christopher Thorne, *Perdue Workers Cry Fowl Over Automated Chicken-Catcher*, FREE LANCE-STAR, June 10, 2000, at A12, available at <http://news.google.com/newspapers?nid=1298&dat=20000610&id=q-8yAAAAIbAJ&sjid=nAgGAAAAlbAJ&pg=4964,2509551>.

off some of its last directly-employed chicken catchers in Maryland and Delaware, replacing them with subcontractor-supplied workers with whom Perdue will likely disclaim any employment relationship.¹⁴⁵ In effect, Perdue has reduced its exposure to lawsuits by removing the liability's source: the workers themselves.

Second, the Fair Labor Standards Act exempts from overtime pay any employee who, broadly speaking, performs a supervisory or managerial role. The Act also establishes rules for what activities constitute compensable "work." Unscrupulous employers respond to these provisions by misclassifying workers as exempt from overtime or by requiring workers to perform uncompensated "off the clock" activities.

A 2000 investigation by the U.S. Department of Labor found that such abuses were widespread in the poultry industry, observing "across-the-industry" failure to fully comply with the federal laws that govern wages.¹⁴⁶ Of the fifty-one poultry companies randomly audited, none had paid workers for all hours worked and sixty-five percent had misclassified workers as exempt from overtime.¹⁴⁷ A decade later, illegal pay practices have persisted. In 2010, the Department of Labor reached a consent agreement with poultry giant Pilgrim's Pride for over \$1 million in back wages owed to 798 poultry processing workers.¹⁴⁸ In 2011, Tyson Foods paid \$32 million to resolve more than twenty lawsuits by 17,000 poultry processing workers alleging that the workers had not been paid for all of their working time, including significant amounts of time spent "donning" and "doffing" their company-required safety gear.¹⁴⁹

A third exclusion in labor and employment law that degrades conditions on the poultry industry's periphery has its genesis in the U.S. Supreme Court's 2002 decision, *Hoffman Plastic Compounds v. National Labor Relations Board*.¹⁵⁰ In that case, the Court held that an undocumented worker who had been fired in retaliation for union organizing activity was covered by the National Labor Relations Act, but

145. Associated Press, *Perdue to Cut 100 Jobs in March to Save Money*, THE DAILY RECORD, Feb. 17, 2011, <http://thedailyrecord.com/2011/02/17/perdue-to-cut-100-jobs-in-march-to-save-money/>.

146. U.S. DEPT. OF LABOR, POULTRY PROCESSING COMPLIANCE SURVEY FACT SHEET 1 (2001).

147. *Id.* at 1-2.

148. U.S. Dept. of Labor, Release 10-1073-DAL, *U.S. Labor Department Resolves Back Wage Case Against Pittsburg, Texas-based Pilgrim's Pride Corp.* (Jan. 29, 2010), <http://www.dol.gov/opa/media/press/whd/whd20100073.htm>.

149. *Meat and Migrants*, 17 RURAL MIGRATION NEWS, No. 4, Oct. 2011, available at http://migration.ucdavis.edu/rmn/more.php?id=1635_0_2_0 (last visited Nov. 7, 2012) (noting that a federal judge approved the settlement in September 2011); see also *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (defining which donning and doffing time was compensable under the FLSA).

150. 535 U.S. 137 (2002).

could recover no back pay, the remedy typically available in such cases.¹⁵¹ The Court assured readers that its decision “does not mean that the employer gets off scot-free,” and that the retaliating employer would still be required to “cease and desist its violations of the NLRA” and to “conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices.”¹⁵²

However, courts have extended *Hoffman* to varying degrees into other areas of labor and employment law, weakening the legal protections available to undocumented workers.¹⁵³ Put simply, without the back pay remedy, receiving a “cease and desist” order and being required to hang a poster are unlikely to dissuade unscrupulous employers from violating the rights of undocumented workers, if the violating conditions continue to benefit the employers’ bottom lines. Thus, to the extent that peripheral poultry workers are undocumented, and observers believe that number to be substantial,¹⁵⁴ *Hoffman Plastic Compounds* erodes workplace rights and is a barrier to workers’ attempts to make change on the periphery.

Fourth, and finally, the exclusion of undocumented workers from unemployment insurance (UI) coverage means that extremely high turnover among peripheral poultry workers, many of whom are undocumented, avoids triggering unemployment costs for employers.¹⁵⁵ If undocumented workers cannot make UI claims, then their employers’ UI rates do not increase. As Noah Zatz has commented, the experience rating feature of the UI system is one of the only areas of employment law that discourages turnover.¹⁵⁶ By excluding undocumented workers, the UI system allows turnover and replacement to continue unabated within the poultry industry. And turnover, as this Article has explored, is a key factor in creating and maintaining conditions on the periphery.

151. *Id.* at 151-52; 29 U.S.C. § 160(c) (2006) (allowing award of back pay for unfair labor practices).

152. *Hoffman*, 535 U.S. at 152.

153. See, e.g. Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004). *Hoffman* has not been applied to bar back pay owed to workers under the Fair Labor Standards Act for hours actually worked, however.

154. See *supra* note 101 and accompanying text.

155. See 26 U.S.C. § 3304(a)(14)(A) (2006) (“[Unemployment] compensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed . . .”).

156. E-mail from Noah Zatz, Professor of Law, Univ. of Cal. L.A. Sch. of Law, to author (Mar. 16, 2012) (on file with author); see also Frank Brechling, *Unemployment Insurance Taxes and Labor Turnover: Summary of Theoretical Findings*, 30 INDUS. & LAB. REL. REV. 483, 483 (finding that “the UI tax tends to discourage labor turnover in the form of both voluntary quits and layoffs that are replaced by hires or rehires”).

C. *Effectiveness of the Laws*

In addition, the assumptions about private law enforcement that are embedded in employment and labor laws' enforcement schemes may be wholly inapplicable to peripheral poultry workers, further undermining the effectiveness of legal protections.

This Article argues that workers' fear of retaliatory job loss, social ostracism, and deportation drives them to choose either "exit" or "loyalty" over "voice," avoiding overt methods of protest such as filing a lawsuit, complaining to a government agency, or forming a union. Of course, union organizing, agency complaints, and participation in a lawsuit are all protected activities under state and federal law for which employers may not retaliate. There is also a memorandum of understanding between the U.S. Departments of Labor and Homeland Security (ICE's parent agency), to reduce the availability of deportation as a direct tool for employer retaliation.¹⁵⁷ In addition, certain employment laws such as the Fair Labor Standards Act offer double damages and attorneys' fees to victorious plaintiffs as an incentive for workers to challenge sub-legal pay practices.¹⁵⁸

I refer to this set of protections and incentives as "operational rights." Operational rights encourage statutory enforcement through private lawsuits by directly influencing potential plaintiffs' decision-making; they put substantive rights into operation. They are designed to increase the benefits of taking legal action and decrease the costs, acting as a thumb on a worker's cost-benefit scale and tipping it in the direction of exercising "voice" on the job. Embedded in this system of operational rights is a series of foundational assumptions about private law enforcement: that if a potential plaintiff knows about her substantive rights, knows that those rights were violated, and knows about her operational rights, her cost-benefit analysis will automatically produce a decision to sue, complain, or unionize.¹⁵⁹

157. See, e.g., 29 U.S.C. §§ 151-169 (2006) (prohibiting retaliation under the National Labor Relations Act); 42 U.S.C. § 2000e-3(a) (2006) (prohibiting retaliation under Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 215(a)(3) (2006) (prohibiting retaliation under the Fair Labor Standards Act); U.S. DEPT. OF LABOR & U.S. DEPT. OF HOMELAND SEC., REVISED MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF HOMELAND SECURITY AND LABOR CONCERNING ENFORCEMENT ACTIVITIES AT WORKSITES (2011), available at http://www.dol.gov/_sec/media/reports/HispanicLaborForce/DHS-DOL-MOU.pdf.

158. 29 U.S.C. § 216(b) (2006) (providing for attorneys' fees and liquidated damages under the Fair Labor Standards Act).

159. Cf. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003) ("The idea behind the 'private attorney general' can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit . . . [T]he current reliance on private attorneys general . . . consists essentially of providing a cause of action for individuals who have been injured by the conduct Congress wishes to proscribe, usually with the additional incentive of attorney's fees for a prevailing plaintiff.").

However, the experience of peripheral poultry workers confounds these expectations in two ways. First, the set of protections and incentives embodied in laws' operational rights is miscalibrated, failing to take into account the influence of transnationality on a worker's cost-benefit analysis.¹⁶⁰ Even if a worker has full knowledge of her substantive and operational rights, the costs of retaliatory job loss, social ostracism, and deportation - viewed in light of the transnational reference point - simply dwarf the benefits of double damages and attorneys' fees, the promise of restraint by the Department of Homeland Security, and the availability of a cause of action for retaliation.¹⁶¹

High-profile immigration enforcement actions, such as the 2008 raid on a Postville, Iowa slaughterhouse and meat packing plant, as well as "silent" raids, the name for immigration-compliance audits by the Immigration and Customs Enforcement agency, merely add to worker fear.¹⁶² The net result is a peripheral poultry workforce that, in the aggregate, rationally accepts and then tolerates substandard terms and conditions of work and rarely exercises worker power or voice.¹⁶³

Second, even if a peripheral poultry worker's cost-benefit analysis were to tip in favor of some overt expression of "voice," she still may not take action, as she might not *perceive* herself as a claims-maker within her workplace. Sociologist Shannon Gleeson, building on the work of Gordon and Lenhardt, calls this concept "legal consciousness," or workers' sense of themselves in relation to their rights.¹⁶⁴ Gleeson proposes that undocumented workers view themselves as temporary, hard workers who

160. See David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y. J. 59, 61-65 (2006) (discussing workers' cost-benefit analyses in deciding whether to complain at work).

161. Indeed, as Emily Spieler has observed, "Retaliatory discharge lawsuits are a useful tool primarily for professionals, managerial, and other upper income workers," but not for low wage, low skill, non-English-speaking undocumented workers like those who labor in the poultry industry's peripheral jobs. Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 230 (1995).

162. Antonio Olivo, *Immigration Raid Leaves Damaging Mark on Postville, Iowa*, L.A. TIMES, May 12, 2009, at A9, available at <http://articles.latimes.com/2009/may/12/nation/na-postville-iowa12> (describing the arrest of 389 undocumented workers at Postville's meat packing plant in a 2008 immigration raid); Miriam Jordan, *More 'Silent Raids' Over Immigration*, WALL ST. J., June 16, 2011, at A1, available at <http://online.wsj.com/article/SB10001424052702304186404576387843087137216.html> (describing the Obama administration's "crackdown on employers of illegal immigrants" using ICE audits).

163. This miscalibration is particularly severe in the case of claims brought under the Fair Labor Standards Act, which prohibits typical class actions, in which most class members are anonymous (and therefore relatively protected against retaliation), and instead requires each individual plaintiff affirmatively to "opt in," thereby publicly announcing that she is suing her employer and potentially opening herself up to employer reprisals. See generally Alexander, *supra* note 121.

164. Gleeson, *supra* note 132; see also Gordon and Lenhardt, *supra* note 117.

do not complain.¹⁶⁵ By tolerating substandard conditions, peripheral workers strike a sort of bargain with society at large: their work ethic “sets them apart from their native-born and documented counterparts, and ultimately justifies their undocumented presence” in the United States.¹⁶⁶ Filing a lawsuit, complaining to a government agency, or organizing into a union would upset the implicit exchange of labor for presence. In this way, immigration law writ large, and the state of “legally constructed subservience” that it creates for undocumented workers, serves as a powerful silencing force.¹⁶⁷ An undocumented worker in Tennessee explains, “We know that this is not our home, that you are not going to put up with us. So we need to show you what we are worth – that we can do it as fast or better than Americans.”¹⁶⁸

Instead of engaging in lawsuits and union organizing or complaining to government agencies, peripheral poultry workers may exercise different forms of worker power. In this conception, transnationalism does not extinguish worker “voice” completely, even in those workers who choose “loyalty,” but rather channels protest and resistance into different modes that better protect workers from the consequences of complaint. James C. Scott pioneered the study of these “weapons of the weak” in his 1970s research on the Indonesian peasantry. In Scott’s construction, seemingly powerless social groups do not exercise forms of resistance that are broadly recognizable as such.¹⁶⁹ Instead, they make an outward show of conformity while engaging in minor forms of resistance that are “carefully hedged” and

165. Gleeson, *supra* note 132, at 590 (“When asked why they chose not to come forward about long days or dangerous working conditions, many undocumented workers repeatedly explained that to do so would simply not be characteristic of a good worker, championing their willingness to do work others would not.”).

166. *Id.* at 589 (concluding from forty-one interviews with undocumented restaurant workers in Houston, TX and San Jose, CA that many hold the view that their work ethic “ultimately justifies their undocumented presence here”); Gordon & Lenhardt, *supra* note 117, at 1223 (labeling this “identity work designed to respond in some way to the negative stereotypes and stigma associated with their particular groups”); Barbara Ellen Smith, *Market Rivals or Class Allies? Relations between African American and Latino Immigrant Workers in Memphis*, in GLOBAL CONNECTIONS AND LOCAL RECEPTIONS: NEW LATINO IMMIGRATION TO THE SOUTHEASTERN UNITED STATES 299, 309 (Fran Ansley & Jon Shefner eds., 2009) (“Out-performing American workers . . . was a pragmatic strategy for maximizing the likelihood of retention and referral by employers, as well as a cultural posture that countered any disparagement attached to ‘immigrant,’ ‘illegal alien’ or ‘Mexican.’”).

167. Gordon & Lenhardt, *supra* note 117, at 1215.

168. Ansley, *supra* note 125, at 391.

169. SCOTT, *supra* note 115, at xv (“[M]ost subordinate classes throughout most of history have rarely been afforded the luxury of open, organized, political activity. Or, better stated, such activity was dangerous, if not suicidal. . . . Formal, organized political activity, even if clandestine and revolutionary, is typically the preserve of the middle class and the intelligentsia; to look for peasant politics in this realm is to look largely in vain. It is also—not incidentally—the first step toward concluding that the peasantry is a political nullity unless organized and led by outsiders.”).

designed to avoid “all-or-nothing confrontations.”¹⁷⁰ Into this category of “ordinary weapons of relatively powerless groups,” Scott places “foot dragging, dissimulation, desertion, false compliance, pilfering, feigned ignorance, slander, arson, [and] sabotage.”¹⁷¹ He also discusses the ability of relatively powerless groups to create “backstage” social spaces from which the more powerful are excluded.¹⁷²

First person accounts of twenty-first century peripheral poultry work in the rural U.S. South echo Scott’s observations about workers’ using “weapons of the weak” in 1970s agricultural Indonesia. Anthropologist Steve Striffler worked in an Arkansas poultry processing plant as a *harinero*, literally “flour man,” or operator of a “rebreader” machine that breads cuts of chicken. In his telling:

Forms of worker expression are necessarily muted on the plant floor by the intensity of the work, the noise, and the supervision. *Knowing glances, practical jokes, cooperation, and shared pain bind workers in ways that require little acknowledgment or expression.* In the cafeteria or break room, however, the situation is quite different. What the plant floor suppresses, the break room embraces. Twice a shift, for 30 minutes, workers watch Spanish-language television, eat and exchange food, complain about supervisors, and relax their bodies. . . *Supervisors almost never enter the break room, and when they do they are noticeably uncomfortable.* At least here, the inmates are in charge.¹⁷³

Striffler also describes his and a fellow worker’s covert acts of resistance against Michael, their overbearing supervisor. When the rebreader jammed:

Roberto would suddenly forget how to fix the machine. He would simply watch Michael try to correct the impending disaster by frantically calling a mechanic on his walkie-talkie. The mechanic would eventually arrive, talk to Michael, stare at the machine for 10 minutes, and then swallow his pride and ask Roberto what the problem was. Roberto would then look at Michael, smile at [Striffler], and fix it in a matter of seconds.¹⁷⁴

Worker advocates familiar with peripheral poultry work also report stories of workers jamming machines with chicken bones to protest too-fast line speeds.¹⁷⁵ These muted expressions of worker “voice” call to mind one explanation for the etymology of the term “sabotage”: textile workers in the Netherlands in the 15th century jammed their wooden shoes, or *sabots*, into

170. *Id.* at 285.

171. *Id.* at xvi.

172. SCOTT, *supra* note 114, at xvii.

173. Striffler, *supra* note 2, at 311 (emphasis added).

174. *Id.* at 310.

175. Fritzsche, *supra* note 28.

the cogs of looms to stop production in order to “force concessions from their employers.”¹⁷⁶

Many other examples of everyday forms of resistance by peripheral poultry workers likely exist. These unobtrusive protests are ways that otherwise “loyal” peripheral workers can challenge the terms and conditions of work and exercise “voice” without endangering their own and their communities’ livelihoods. These become especially important when the law does not cover peripheral workers, when they lack legal knowledge, or when their legal consciousness does not permit overt acts of resistance. However, though these anonymous, small-scale acts may provide some outlet for worker “voice,” even for those who remain loyal on the whole, they rarely produce structural reform.¹⁷⁷

V.

A TRANSNATIONAL LABOR MARKET IN FLUX?

This Article has described and explained the mechanics of peripheral labor in the U.S. poultry industry. It has examined the terms and conditions of peripheral poultry work, the level of peripheral workers’ bargaining power, and the availability of opportunities for “voice.”

I find explanations for the state of peripheral poultry work in firms’ labor practices and modes of economic organization. To this analysis I add the effects of the transnational labor market and its delivery of a seemingly inexhaustible supply of laborers from the developing world to fill peripheral poultry jobs. Finally, I consider the impact of the labor, employment, and immigration laws that apply to peripheral poultry work. The result of the confluence of these forces is a peripheral poultry workforce that accepts inferior terms and conditions of work with relatively little protest, and what protest does occur is covert, anonymous, and generally ineffective at achieving structural reform.

Presently, however, the transnational labor market for peripheral poultry work may be best described as dynamic, in a period of flux due to the economic crisis of the past half-decade, demographic changes in countries that traditionally send immigrants to the U.S., and new, highly punitive anti-immigration laws passed by Georgia and Alabama, the first- and third-largest poultry producing states. What effect, if any, have these background legal and economic changes had on the supply of peripheral poultry workers, the power of their transnational reference point, and their

176. RANDY HODSON & TERESA A. SULLIVAN, *THE SOCIAL ORGANIZATION OF WORK* 71 (5th ed. 2012). Thanks to Paul Lombardo for this observation.

177. SCOTT, *supra* note 115, at 29-30 (“The ‘weapons of the weak’ . . . are unlikely to do more than marginally affect the various forms of exploitation that peasants confront.”).

legal knowledge and legal consciousness? Beyond the effect on transnational *workers*, what effect have these changes had on the terms and conditions of peripheral poultry *work* itself?

Answering these questions may pose a chicken and egg problem (pun intended). What came first: bad conditions on the periphery, or the transnational nature of the labor market? Put another way, would conditions on the poultry industry's periphery exist today if those jobs were held by U.S. workers? Is it fair to blame the transnational worker for causing the sub-minimum and sometimes sub-legal conditions under which he or she works? These complex questions deserve their own full treatment in a separate article, though I offer some initial suggestions here.¹⁷⁸

Since the economic crisis began in the mid-2000s, immigration to the United States from Mexico has dropped precipitously, to the point that out-migration from Mexico to the United States may have stopped or even reversed course. According to the Pew Hispanic Center, this "standstill" results from a combination of factors, including the faltering U.S. economy, intensified border enforcement, and the falling Mexican birth rate.¹⁷⁹ In addition, immigration to the United States from all sending countries appears to have "paused" during the period of the Great Recession.¹⁸⁰

Compounding the effects of the stagnant economy are the anti-immigration laws passed in 2011 by Georgia and Alabama.¹⁸¹ Among other provisions, these laws empower local police to enforce federal immigration laws; mandate that most employers participate in e-Verify, a federal program designed to check workers' immigration status; require that people

178. For an interesting exploration of these questions, see Kathleen C. Schwartzman, *Lettuce, Segmented Labor Markets, and the Immigration Discourse*, 39 J. BLACK STUD. 129 (2008).

179. Pew Hispanic Ctr., *Net Migration from Mexico Falls to Zero – and Perhaps Less*, 6-7, (2012), http://www.pewhispanic.org/files/2012/04/Mexican-migrants-report_final.pdf (last visited Nov. 7, 2012)..

180. Demetrios G. Papademetriou, Madeleine Sumption & Aaron Terrazas, *Migration and Immigrants Two Years After the Financial Collapse: Where Do We Stand?* MIGRATION POLICY INST. 24 (2010), <http://www.migrationpolicy.org/pubs/MPI-BBCreport-2010.pdf> (last visited Nov. 7, 2012); Damien Cave, *Better Lives for Mexicans Cut Allure of Going North*, N.Y. TIMES, July 6, 2011, at A1, available at <http://www.nytimes.com/interactive/2011/07/06/world/americas/immigration.html> (discussing the depressed U.S. economy as one of many reasons that Mexican workers have chosen not to emigrate). But see Miriam Jordan, *Far Fewer Enter U.S. Illegally From Mexico*, WALL ST. J., Dec. 13, 2011, at A1, available at <http://online.wsj.com/article/SB10001424052970203518404577094722741385882.html> (reporting contentions by scholars that the drop in Mexican immigration has been driven in part by demographic changes within Mexico, and that immigration "won't rebound back to levels we saw in the early 2000s").

181. Ann Morse et al., Immigration Policy Project, *State Omnibus Immigration Legislation and Legal Challenges*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 27, 2012), <http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx> (describing Georgia and Alabama state immigration laws).

prove their immigration status before receiving any government services; and force public schools to verify students' immigration status.¹⁸²

Media and industry outlets report that these laws have resulted in an outflow of immigrant workers from the two states, causing labor shortages in poultry processing, agriculture, and other immigrant-reliant industries.¹⁸³ A 2011 survey of 132 agricultural employers by the Georgia Agribusiness Council, for example, reported that forty-six percent were experiencing a labor shortage, and many blamed Georgia's new immigration law for driving away undocumented and documented workers alike.¹⁸⁴

Some Georgia employers have raised wages and provided other benefits in an attempt to lure replacement workers to the state. Blackberry grower J.W. Paulk has increased the per-box piece rate paid to pickers by seventeen percent (from \$3.00 to \$3.50). Blueberry grower Lynn McKinnon has been "passing out fliers in Florida, promising workers free transportation to Georgia, and free motel stays" for the course of the harvest season.¹⁸⁵

It is not yet known whether poultry firms in Alabama and Georgia have begun offering higher wages or other benefits to recruit new workers to fill peripheral jobs, or whether the workers who have stayed in peripheral poultry jobs have demanded these sorts of concessions. However, one immigrant fish processing worker in Alabama interviewed by *Bloomberg Businessweek* seems to have found his "voice," commenting, "I will say to [my supervisors], 'If you pay me a little more—just a little more—I will stay working here . . . Otherwise, I will leave. I will go to work in another state.'"¹⁸⁶

182. *Id.*

183. See, e.g., Campbell Robertson, *In Alabama, Calls for Revamping Immigration Law*, N.Y. TIMES, Nov. 17, 2011, at A15, available at <http://www.nytimes.com/2011/11/17/us/in-alabama-calls-for-revamping-immigration-law.html?pagewanted=all> (discussing complaints of "severe labor shortages" by "farmers and poultry plant operators"); Ga. Agribusiness Council, *Agriculture Industry Labor Survey* 3 (June 2011), http://aghost.net/images/e0191701/June_2011_Ag_Industry_Labor_Survey.pdf (last visited Nov. 4, 2012) ("[E]ven my legal Hispanic workers don't want to stay in our state for fear of being harassed!").

184. John C. McKissick & Sharon P. Kane, *An Evaluation of Direct and Indirect Economic Losses Incurred by Georgia Fruit and Vegetable Producers in Spring 2011 - A Preliminary Data Analysis and Summary Working Paper*, UNIV. OF GA. CTR. FOR AGRIBUSINESS AND ECON. DEV. (2011), <http://www.caed.uga.edu/publications/2011/pdf/GeorgiaFruitandVegetableSurveyAnalysis-3.pdf> (last visited Nov. 4, 2012) (reporting that "148 [of 189] survey respondents . . . had experienced labor shortage, representing 80.3% of the survey production acreage and 37.3% of Georgia's 2009 acreage").

185. Craig Schneider, *Farm Owners, Workers Worry About Immigration Law's Impact on Crops*, ATLANTA J.-CONST., June 3, 2011 (profiling Paulk); Richard Fausset, *Fewer Hands in the Fields*, L.A. TIMES, June 18, 2011 (profiling McKinnon).

186. Elizabeth Dwoskin, *Why Americans Won't Do Dirty Jobs*, BLOOMBERG BUSINESSWEEK, Nov. 9, 2011, available at <http://www.businessweek.com/magazine/why-americans-wont-do-dirty-jobs-11092011.html>.

These anecdotes suggest that the seemingly inexhaustible stream of workers supplied by the transnational labor market is being constricted by both legal and economic forces. As a result of the limited labor supply, wages may be rising and workers may be becoming more empowered, at least in the few Georgia and Alabama cases profiled by the media. Ostensibly, this confirms this Article's hypothesis that transnationality helps to depress the terms and conditions of peripheral work and reduce peripheral workers' bargaining power. Once transnationality is constrained, these effects seem to be reversed. Carried to its conclusion, the trend of stagnant or declining immigration could result in poultry and other immigrant-employing firms' ceasing to rely on the transnational labor market. They would be forced to improve the nature of peripheral work, much like the oil industry of North Dakota, in order to attract local workers to peripheral jobs.¹⁸⁷

As alluring as this simple supply-and-demand story may be, however, the real story is probably more complicated, for at least three reasons. First, while legal and economic forces might currently be constricting the transnational labor supply, this constriction may be temporary. Other sending countries may replace Mexico; the economy will eventually improve; and state immigration laws will likely be modified or overturned by court decisions like 2012's *Arizona v. United States*,¹⁸⁸ repealed in the face of opposition by powerful business lobbies, or preempted by a federal-level overhaul of the country's immigration laws.¹⁸⁹ Meanwhile, in response, poultry firms could move their operations to states with more lenient (or no) immigration policies, which have likely already attracted the undocumented workforce that has fled Georgia and Alabama.

Each of these scenarios would reopen peripheral jobs to the transnational labor market and restore the *status quo ante*. And even if federal immigration reform were to provide legal status to the country's undocumented workforce, thereby increasing peripheral workers' bargaining power, many reform proposals include "guestworker" programs that would require a worker to keep a job with a particular employer in

187. See Shactman, *supra* note 101 (describing high wages offered to attract oil industry workers).

188. *Arizona v. U.S.*, 132 S. Ct. 2492 (2012) (striking down portions of Arizona's anti-immigration law, the template for the Georgia and Alabama legislation).

189. For example, Alabama's governor, House speaker, and Senate president have recently announced that they will work together to revise that state's law. Robert Barnes, *Supreme Court to Hear Challenge to Arizona's Immigration Law*, WASH. POST, Dec. 12, 2011, http://www.washingtonpost.com/politics/supreme-court-to-hear-challenge-of-arizonas-restrictive-immigration-law/2011/12/12/gIQA4UYepO_story.html; George Talbot, *Immigration Law a Political Quandary for Alabama Gov. Robert Bentley*, MOBILE PRESS-REG., Dec. 21, 2011 (reporting that Alabama's governor, House speaker, and Senate president announced jointly that they would work to revise the state's immigration law).

order to keep his or her immigration status. This sort of employer-specific immigration system would merely reinstate the power imbalance that presently exists on the periphery in the guise of “legalization.”¹⁹⁰

Second, there is no evidence that immigrant-employing industries’ labor practices or modes of economic organization have undergone structural change. This Article argues that labor practices and economic organization set the terms and conditions of peripheral work, whereas transnationality merely acts as an accelerant. As Fran Ansley, Leticia Saucedo, and others have rightly pointed out, the very structure of the U.S. economy and employers’ preference for a cheap, subservient workforce may be more to blame for the nature of peripheral jobs than immigrants’ willingness to work for less, under worse conditions.¹⁹¹ Therefore, even if the transnational labor market does remain less accessible to U.S. employers, then the nature of peripheral work still will not improve unless the fundamental nature of *work* improves, until, as Marion Crain puts it, “long-term investments in people . . . [again make] good business sense.”¹⁹²

Third, despite their efforts, employers like Georgia growers Paulk and McKinnon have been unsuccessful in recruiting local workers to fill the vacuum left by the departing immigrant workforce. Georgia and Alabama employers have been widely quoted lamenting that “[l]ocal people show no interest in the types of jobs that we need filled and the few who do apply last only a couple days before quitting”¹⁹³ Employers blame the difficult, physical nature of peripheral work for local workers’ inability or unwillingness to keep these jobs. However, it is possible that employers have not sufficiently sweetened the deal or improved the fundamental

190. See, e.g., Suzy Khimm, *Gingrich: Citizen Juries Should Decide Which Illegal Immigrants Stay or Go*, WASH. POST, Nov. 27, 2011, http://www.washingtonpost.com/blogs/ezra-klein/post/gingrich-citizen-juries-should-decide-which-illegal-immigrants-stay-or-go/2011/11/27/gIQAjIOL2N_blog.html (discussing “Red Card” program proposed by Republican presidential candidate Newt Gingrich, a large-scale expansion of the current guest-worker program which ties workers’ immigration status to a particular employer). In fact, immigrant-employing industries may be exaggerating the extent and impact of their labor shortages so that the discussion around immigration reform will bend in their favor, producing immigration laws that favor employers over workers.

191. See generally Saucedo, *supra* note 126; Ansley, *supra* note 125, at 395-96 (“What is frequently missed is that these phenomena are integral to the new economies of the center, not the result of alien persons carrying ‘third world conditions’ on the sheen of their skins, in the folds of their clothes, or in the habits of their homeland.”); Gordon & Lenhardt, *supra* note 117, at 1178-79 (“Employers actively created the conditions that led native workers to leave the industry and hastened the process by recruiting immigrants to replace them.”).

192. Crain, *supra* note 15, at 1188.

193. See, e.g., Ga. Agribusiness Council, *supra* note 184, at 1, 3 (“Georgia residents do not want to do the hard physical labor required in my business. . . . Since we cannot find immigrant labor, we are trying to hire non-immigrant labor. Even with pay rates above \$10 an hour, we cannot find people interested in working outdoors, in the heat. They will stay for one or two days and then leave.”).

nature of the jobs, to attract local workers. The higher wages offered by Paulk, for example, would increase workers' earnings by only eight dollars per day.¹⁹⁴ Similarly, a survey of 230 Georgia farmers by the state agricultural commissioner in the wake of the immigration law's enactment reported that, of 11,000 vacant jobs typically filled by immigrant workers, almost sixty percent paid just eight dollars per hour (\$320 per week), another thirty percent paid between nine and eleven dollars per hour, and only two percent paid sixteen or dollars or more.¹⁹⁵

In addition, though peripheral work may now be less transnational in reality, the perception of transnationalism can be "sticky." Peripheral jobs have become branded as "immigrant work," and the associated stigma may repel local workers.¹⁹⁶ There is a question, then, whether the concessions that employers would have to offer to attract a local workforce would be so costly as to drive companies out of business or off shore to access the transnational workers directly who firms once employed within the United States.

CONCLUSION

Neither legal and economic restrictions on immigration, nor collective bargaining through unionization, nor private enforcement of workplace laws appear to hold the key to improving conditions on the periphery. If not these strategies, what might work? What might make these jobs better, regardless of who holds them? Federal immigration reform that provides legal status to undocumented workers that is *not* tied to a particular employer would be a positive development.¹⁹⁷ However, that may be a long term and politically treacherous process. Moreover, any solution that focuses only on the transnational aspect of peripheral work would be incomplete, as it would fail to address the role of firms' own labor practices

194. Schneider, *supra* note 185 (reporting Paulk wage increase).

195. Jay Bookman, *Ga's Farm-Labor Crisis Playing Out as Planned*, ATLANTA J.-CONST. (June 17, 2011, 7:22 AM), <http://blogs.ajc.com/jay-bookman-blog/2011/06/17/gas-farm-labor-crisis-playing-out-as-planned/>; see also Fausset, *supra* note 185 ("Few here believe that native Southerners, white or black, wish to return to the land their ancestors once sharecropped or tended in bondage.").

196. Gordon & Lenhardt, *supra* note 117, at 1178-79 (discussing "immigrant work"); Dwoskin, *supra* note 186 (quoting immigration scholar Douglas Massey noting that the category of "immigrant work" is culturally contingent, as automobile manufacturing is stigmatized as "immigrant work" in Europe but not in the United States).

197. The longer a worker remains in the United States, the more attenuated her connection to her "home" reference point may become. In other words, an individual worker's dual frame of reference may diminish over time. The distorting effects of the transnational labor market may therefore be countered if undocumented peripheral workers are allowed a path to permanent legal status. See, e.g., PIORE, *supra* note 48, at 64-65 (discussing the "settlement process" in which immigrants anticipate staying in the host country for a longer period of time and begin to value a higher income stream, job security, and prospects for advancement).

and modes of economic organization, as well as the structure of labor, employment, and immigration law, in depressing the terms and conditions of work and limiting worker bargaining power.

One solution, perhaps, is suggested by Lola Smallwood Cuevas, director of the Los Angeles Black Worker Center, who has remarked, "The problem with sweatshops is that they are not integrated."¹⁹⁸ She refers not to integration in the structural, organizational sense, but rather in the sense of the demographics of the workforce. This may be the problem with the poultry industry as well, in which, as Part III described, the workforce is becoming increasingly immigrant. Alliances across immigration status, language, race, and ethnicity lines could allow workers to focus on their shared interest in changing the structure of peripheral work: improving wages, reducing workplace injuries and illnesses, achieving job security, and winning promotions from the periphery to the core. There are examples of this sort of cross-group cooperation in the community union movement. The Delmarva and Georgia Poultry Justice Alliances, the Mississippi Poultry Workers for Equality and Respect, and the Poultry Workers Justice Project unite African American and Latino workers, as well as workers and poultry grow-out farmers, in their struggles to improve conditions throughout the industry.¹⁹⁹ Creating inter-group solidarity, reducing balkanization in the workplace, and developing a sense of community among peripheral workers is a gradual and difficult process, but may hold some promise for improving the state of peripheral work.²⁰⁰

Another possible solution might lie in consumer-driven market discipline. Change on the periphery would be more likely if poultry firms had economic incentives to improve conditions. Consumers' increasing savvy about the origins and safety of their food supply could provide just such an incentive. Maintaining a high-turnover replacement regime on the periphery results in a disengaged, devalued workforce with little training, little experience on the job, and little motivation to comply with food safety

198. Lola Smallwood Cuevas, L.A. Black Worker Ctr., Remarks at the Sixth Annual Labor and Employment Law Colloquium, L.A., Cal. (Sept. 2011).

199. See, e.g., Greenhouse, *supra* note 63 (discussing community unionism); Bussel, *supra* note 62 (profiling the Delmarva Poultry Justice Alliance); Angela C. Stuesse, *Race, Migration, and Labor Control: Neoliberal Challenges to Organizing Mississippi's Poultry Workers*, in *LATINO IMMIGRANTS AND THE TRANSFORMATION OF THE U.S. SOUTH* 91 (Mary E. Odem & Elaine Lacey eds., 2009) (profiling Mississippi Poultry Workers for Equality and Respect).

200. See generally Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 MICH. J. L. REFORM 447 (2008); Noah Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135 (2010) (all discussing strategies for coalition-building among social groups).

protocols.²⁰¹ Food safety experts agree that “[e]xtensive training of line workers is critical” in maintaining food safety standards; the more experience and training an employee has, the more motivated she is to produce an uncontaminated product.²⁰² Studies have shown that high turnover rates like those in the poultry industry impede effective implementation of food safety procedures and pave the way for contamination.²⁰³

Further, contamination is extremely costly to both consumers and firms. A 2011 study found that bacteria-infected poultry products have caused over 1.5 million illnesses annually, nearly 12,000 hospitalizations, and 180 deaths.²⁰⁴ In addition, when product recalls by publicly-traded poultry and meat companies involve serious threats to consumer health, shareholder value is reduced by up to three percent, and this loss persists for months after the recall announcement.²⁰⁵ An observer of the impact of an *E. Coli* outbreak in spinach in 2006 put it starkly, “[O]ne harvest from a single field of spinach literally destroyed the spinach market overnight from which the industry has yet to fully recover.”²⁰⁶

In an era in which movies like *Food, Inc.* are nominated for Academy Awards, and books like *The Omnivore’s Dilemma* are bestsellers, poultry

201. Food safety experts report a link between high worker turnover and difficulties in maintaining food safety standards and a positive association among an employee’s job experience, training, and motivation to follow food safety protocols. T.R. McAloon, *HACCP Implementation in the United States*, in MAKING THE MOST OF HACCP 70 (Tony Mayes & Sarah Mortimore eds., 2005) (reporting that “the greatest difficulty” in implementing a food safety plan at food producer Cargill “was experienced by locations with the highest number of employees with the highest turnover rate”); cf. Margaret Binkley & Richard Ghiselli, *Food Safety Issues and Training Methods for Ready-to-Eat Foods in the Grocery Industry*, 68 J. ENVTL. HEALTH 27, 28 (2005) (describing employee turnover as a major food safety concern for grocery store executives); Ungku Fatimah Ungku Zainal Abidin, Susan W. Arendt & Catherine H. Strohbehn, *An Exploratory Investigation on the Role of Organizational Influencers in Motivating Employees to Follow Safe Food Handling Practices*, IOWA STATE UNIV. (2011), http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1284&context=gradconf_hospitality (last visited Nov. 8, 2012) (finding, in a study of foodservice employees’ motivations to comply with food safety protocols, that employees with longer foodservice experience who had also received food safety training “were more motivated to follow safe food handling” guidelines).

202. JULIE K. NORTHCUTT & SCOTT M. RUSSELL, UNIV. OF GA. COOP. EXTENSION, BULLETIN 1155, GUIDELINES FOR IMPLEMENTATION OF HACCP IN A POULTRY PROCESSING PLANT 2 (2010).

203. McAloon, *supra* note 201, at 70.

204. MICHAEL B. BATZ, SANDRA HOFFMANN & J. GLENN MORRIS, JR., UNIV. OF FLA. EMERGING PATHOGENS INST., THE 10 PATHOGEN-FOOD COMBINATIONS WITH THE GREATEST BURDEN ON PUBLIC HEALTH 11 tbl. ES-3 (2011).

205. Michael R. Thomsen & Andrew M. McKenzie, *Market Incentives for Safe Foods: An Examination of Shareholder Losses from Meat and Poultry Recalls*, 83 AM. J. AGRIC. ECON. 526, 536 (2001).

206. Cary Blake, *Fresh Tomato Industry Shaken by FDA Salmonella Link, Seeks Answers*, WESTERN FARM PRESS, Aug. 1, 2008, at 16.

firms have every incentive to avoid this sort of loss.²⁰⁷ The nature of peripheral work – the conditions under which our food is produced – thus has a significant impact on poultry firms' profit, perhaps giving firms an incentive to improve the periphery in order to improve the bottom line.

Finally, the particular economic organization of the poultry industry might justify a more vigorous role for government in monitoring, investigation, and enforcement.²⁰⁸ A targeted campaign by the U.S. Department of Labor could fill the enforcement gap created by low union density and a lack of private claims-making by peripheral poultry workers.²⁰⁹ Because the poultry industry is highly vertically integrated and concentrated in the hands of relatively few firms, poultry firms present discrete targets for government oversight. For example, in its current Strategic Plan, the Department of Labor's Wage and Hour Division has already named "meat and poultry processing" as an industry with prevalent overtime misclassification.²¹⁰ The Department, working with the relevant partner agencies, should expand its efforts beyond overtime to take on occupational health and safety, discrimination in promotion opportunities, and actual and threatened retaliation against workers who organize, raise complaints, and otherwise express "voice" in the workplace.

Of course, as Cynthia Estlund has observed, it is impossible to expect "regulators' sights . . . to remain permanently fixed on the targeted sectors," as there will "simply never be enough government inspectors to do the job alone."²¹¹ Only Lobel and other new governance scholars have also detailed the deficiencies inherent in government enforcement regimes, including a lack of funding, absence of political will, and, in some cases, reliance on

207. See *Hungry for Change*, FOOD, INC., <http://www.foodincmovie.com/about-the-film.php> (last visited Nov. 7, 2012) ("In *Food, Inc.*, filmmaker Robert Kenner lifts the veil on our nation's food industry, exposing the highly mechanized underbelly that has been hidden from the American consumer . . . Our nation's food supply is now controlled by a handful of corporations that often put profit ahead of consumer health, the livelihood of the American farmer, the safety of workers and our own environment."); POLLAN, *supra* note 2, at 318 ("The industrial animal factory offers a nightmarish glimpse of what capitalism is capable of in the absence of any moral or regulatory constraint whatsoever.").

208. Cf. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 436 (2007) (making the case for increased government enforcement of the Americans with Disabilities Act).

209. A federal effort would likely be more effective than state or local initiatives. States, gripped as they are by the economic crisis and a wave of anti-immigrant sentiment, are not likely to fill this enforcement gap, nor are localities, which, though some have enacted living wage ordinances, are not large or well-financed enough to have any real impact on conditions on the periphery. Compare *Living Wage Program*, L.A. COUNTY, http://doingbusiness.lacounty.gov/living_wage.htm (last visited Dec. 7, 2011) with Rong-Gong Lin II & David Zahniser, *L.A. County Won't Face Drastic Cuts*, L.A. TIMES, Apr. 19, 2011, at A1 (reporting a budget shortfall of \$220.9 million).

210. U.S. DEP'T. OF LABOR, STRATEGIC PLAN: FISCAL YEARS 2011-2016, 32 (2010).

211. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 219, 376-77 (2005).

tipsters and whistleblowers who, if discovered, run the same risks of retaliatory job loss, deportation, and social ostracism described in this Article.²¹²

In the end, no one strategy is likely to be effective in reforming the periphery. Some combination of immigration reform, inter-group alliances, consumer pressure, and government enforcement may finally convince employers that it is in their interest to make “long-term investments in people,”²¹³ to improve the fundamental nature of peripheral work.

212. Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433 (2009); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998); see also DAVID WEIL, BOSTON UNIV., *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 3*, 5-6 (2010) (reporting that “almost 75 percent of all [U.S. Department of Labor Wage and Hour Division] investigations are initiated by worker complaints” and that the budgets of the U.S. Department of Labor’s four main enforcement units rose by only 3.1 percent between 1998 and 2007, while the number of workplaces the agency is charged with regulating rose by eleven percent).

213. Crain, *supra* note 15, at 1188.

