

# FAMILY FARM ADVOCACY AND REBELLIOUS LAWYERING

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*This article reflects on how two particular aspects of rebellious lawyering – work with community organizations and lay legal advocacy – might apply in the context of legal struggles on behalf of family farmers. Farm advocates, arising from the 1980s farm crisis, are non-lawyers who help other farmers address legal and other matters. Grass roots farm organizations, including both longstanding organizations and movement groups, fight for small-scale farmers. Farmers’ Legal Action Group, Inc. (FLAG), is a nonprofit law firm that advocates on behalf of family farmers. FLAG has relied on and worked closely with farm advocates, and FLAG has relied on grass roots farm organizations as its primary clients. This article considers how the principles of Rebellious Lawyering works in the legal struggles for family farming.*

## INTRODUCTION

This article examines how two aspects of rebellious lawyering – work with community organizations and lay legal advocacy – might apply in the context of the legal struggles of family farmers.

The article discusses the intersection of:

(1) the self-generated rise and ongoing work of “farm advocates” – people without professional backgrounds who help themselves and their neighbors on various matters, including the law;

(2) grass roots progressive farm organizations, including longstanding membership organizations, newer, often short-lived, movement organizations, and coalitions of membership organizations, that fight for small-scale farmers, seek legal advice and assistance as organizations themselves, and that sometimes make legal strategies an important part of their organizing and activism; and

(3) Farmers’ Legal Action Group, Inc. (FLAG), a nonprofit law

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firm in Minnesota that works on behalf of family farmers and makes working through grass roots farm organizations and lay advocates a central focus of its practice.

This article embraces the aims and concerns expressed in *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* – that rebellious lawyers should seek to “nurture sensibilities and skills compatible with a collective fight for social change” – and provides one view on how those concerns work themselves out in one organization.<sup>2</sup> In the years since the publication of *Rebellious Lawyering*, considerable thought has gone into understanding, categorizing, and analyzing rebellious, and other, possibly different, forms of public interest lawyering.<sup>3</sup> This article makes occasional reference to this literature but does not try to situate FLAG in these strands of thought and analysis.<sup>4</sup> Instead, the article relies on a reading of *Rebellious Law-*

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<sup>2</sup> GERALD R. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 38 (1992) [hereinafter *REBELLIOUS LAWYERING*].

<sup>3</sup> Were French Communist lawyers in the 1930s and 1940s who opposed Nazi occupiers and the numerous fascist French collaborators in the Vichy state – often at the price of execution – “cause lawyers”? See Liori Israël, *From Cause Lawyering to Resistance: French Communist Lawyers in the Shadow of History, 1929-1945*, in *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* 147-70 (Austin Sarat & Stuart A. Scheingold eds., 2008).

<sup>4</sup> For example, at a basic descriptive level, FLAG seems certainly to be a form of public interest lawyering, and might fit into the Scott L. Cummings “organizational chart” as: within public interest law; in the nonprofit sector (not for profit, not public); a public interest law organization (not an educational organization); cause-oriented (not legal aid); and, depending on how one defines it, either liberal or conservative. The chart, along with an over-arching description of various forms of alternative lawyering, is included in ALAN K. CHEN & SCOTT L. CUMMINGS, *PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE* 126 (2013) [hereinafter *PUBLIC INTEREST LAWYERING*].

Nor does this article aim to situate the theory, or theories, that undergird *REBELLIOUS LAWYERING*, *supra* note 2. An interesting account that places rebellious lawyering within an intellectual, social, political, and historical context is Eduardo R.C. Capulong, *Client Activism in Progressive Lawyering Theory*, 16 *CLINICAL L. REV.* 109 (2009). In it and other classification schemes, it is sometimes hard to place FLAG's work, and such a classification is not attempted in this article.

One account of the way rebellious lawyering might work for a “backup center” that, perhaps surprisingly, in some ways resembles FLAG, is described in Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: a Case Study of the Immigrant Legal Resource Center*, 28 *WASH. U. J.L. & POL'Y* 265 (2008). Comparison to other actual lawyering efforts, however, is not attempted here.

The role of stories and their telling in the law is more appreciated now than when *REBELLIOUS LAWYERING*, *supra* note 2, was written. The book was doubly unusual in the sense that it relied on story-telling and also made both lawyers and clients subjects of the story. The former aspect has many adherents, the latter perhaps less. One effect of this narrative approach is that the theories suggested in the book are sometimes implicit in a story and not stated as an explicit, ideological viewpoint. Drawing out the theory and applying it to FLAG is not attempted here except in a very general way.

Accounts of the possibility of lawyering rebelliously tend, at least implicitly, to incorporate counter-intuitive intellectual insights from the non-lawyering world. See, for example, the way the author analyzes power in Lucie E. White, *To Learn and Teach: Lessons*

ying and its vision and looks closely at the work of a single organization over the last few decades.

Part II provides background on crises in family farming, farm advocates who responded to assist fellow farmers, and grass roots farm organizations. Part III discusses FLAG's history and culture and some of the legal issues that have been important in FLAG's work. Part IV discusses how FLAG has sought to leverage resources by working closely with farm advocates and farm organizations. Part V includes a description of six examples of FLAG's work over the years. Part VI offers a judgment on the role of lay farm advocacy and grass roots organizations in legal efforts and considers the future of family farm legal advocacy.

## I. SOME BACKGROUND

### A. *The Ongoing Crisis in Family Farming*

There are roughly two million farms in the United States. The actual practices on these farms are remarkably varied. In general, however, farming is hard work, dangerous, and less lucrative than other uses of capital and labor. Additionally, due to weather, pestilence, and other calamities, farming results in income swings more pronounced than in other sectors of the economy.<sup>5</sup> Far more important, however, is that wealth and income are more unequally distributed among farmers than in society as a whole, and that poverty is common among farmers.<sup>6</sup> Even the United States Department of Ag-

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from Driefontein on *Lawyering and Power*, 1988 WIS. L. REV. 699. Analysis of these intellectual premises is interesting and useful, but also is not attempted in this article.

Finally, regarding various theories of "collaborative" and other lawyering strategies theories, Ascanio Piomelli reminds us that at least part of the point of such alternative approaches, and the theories that undergird them, is to be useful for practicing lawyers and their clients. See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLIN. L. REV. 427 (2000). In this sense, REBELLIOUS LAWYERING, *supra* note 2, provides an ongoing model for academic scholarship and an inspiration for this article.

<sup>5</sup> STEVEN C. BLANK, *THE ECONOMICS OF AMERICAN AGRICULTURE: EVOLUTION AND GLOBAL DEVELOPMENT* 45-81, 121-31 (2008) [hereinafter *ECONOMICS OF AMERICAN AGRICULTURE*].

<sup>6</sup> This is not an aspect of agriculture that USDA seems anxious to track. One estimate in the 1990s calculated that 20 percent of all farm production came from farms where the farm household lived in poverty. A discussion of poverty among family farmers is included in Stephen Carpenter & Randi Ilyse Roth, *Family Farmers in Poverty: A Guide to Agricultural Law for Legal Services Practitioners*, 29 CLEARINGHOUSE REV. 1087 (1996) [hereinafter *Family Farmers in Poverty*] and Stephen Carpenter, *Poverty, Racial Discrimination, and the Family Farm*, in *CHALLENGES IN EQUALITY: POVERTY AND RACISM IN AMERICA* 123-29 (Chester Hartman ed., 2001).

In previous decades, farmer incomes were well below that of the non-farm population. For a remarkable and neglected view see Ann Rochester, *WHY FARMERS ARE POOR: THE AGRICULTURAL CRISIS IN THE UNITED STATES* (1940). The mean income of farm households now approaches that of the general population. This point is often emphasized by

riculture (USDA) acknowledges the substantial presence of “limited-resource farmers.”<sup>7</sup> Additionally, farmers not technically in poverty often face foreclosure and dispossession that can involve the loss of their livelihoods, homes, and place in the community.<sup>8</sup>

The farmer poverty discussed here does not include farm workers and their very low incomes.<sup>9</sup> The vast majority of farms do not hire wage labor.<sup>10</sup> Only about a third of all hours worked on farms is performed by wage laborers; farm operators and members of their families perform the other two-thirds.<sup>11</sup> Not surprisingly, use of hired labor is heavily concentrated among large farms.<sup>12</sup> The largest farms – literally the largest two percent – average \$2.5 million in gross cash farm income annually, account for more than half of all farm production in the country, and rely overwhelmingly on hired labor.<sup>13</sup>

The federal government, particularly USDA with its decentralized county office system of bureaucracy, billions of dollars in grants, cost share awards, and loans can play a significant role in the success or failure of a farm.<sup>14</sup> This continues to be true notwithstanding the

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those arguing that no real income problems exist for farmers. The same logic, of course, would suggest that the mean income in, say, New York City, suggests that poverty is not a feature of New York life.

<sup>7</sup> Limited resource farmers, for USDA, means the farm has low sales, and low income in both the current and previous year. Income is low if it is less than the poverty level for a family of four with two children or is less than half of the county median household income. By this definition, according to USDA, about 11 percent of farm households are limited resource farms. Limited resource farmers are more likely than other farms to be, in the words of USDA, female, members of a racial minority group, or Hispanic. See ROBERT A. HOPPE, USDA, ECON. RES. SERV., STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARMS REPORT: 2014 EDITION 45-50 (2014) [hereinafter STRUCTURE AND FINANCES].

<sup>8</sup> An anthropological discussion that focuses on those that survived the crisis is KATHRYN MARIE DUDLEY, DEBT AND DISPOSSESSION: FARM LOSS IN AMERICA’S HEARTLAND (2000). Little is written about the lives of dispossessed farmers.

<sup>9</sup> Some of those hired on farms, for example farm managers, are often paid well. Contractors, some paid well, some not, also confuse the statistical picture. In general, farm laborers can expect to make roughly ten dollars per hour. Additionally, about half of all farm workers have year-round jobs, while the other half work seasonally. USDA, ECON. RES. SERV., FARM LABOR: BACKGROUND (2016).

<sup>10</sup> Approximately 30 percent of farms hire labor. The 2012 USDA Census showed that around 566,000 farms, out of 2.1 million, hired labor. USDA, NAT’L AGRIC. STAT. SERV., 2012 CENSUS OF AGRICULTURE 7 tbl.1, 15 tbl.7 (2014), [https://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf), [hereinafter USDA, 2012 CENSUS OF AGRICULTURE].

<sup>11</sup> About 32 percent of total hours worked on farms are hired or contract labor. See STRUCTURE AND FINANCES, *supra* note 7, at 11 tbl.1.

<sup>12</sup> Perhaps no more than five percent of all farms hire more than half of the wage labor performed on farms. See *id.* at 11 tbl.1.

<sup>13</sup> ROBERT A. HOPPE, PENNI KORB & DAVID E. BANKER, , USDA, ECON. RES. SERV., MILLION-DOLLAR FARMS IN THE NEW CENTURY 29 tbl.11 (2008).

<sup>14</sup> Gross and net farm incomes vary greatly from year to year. Over the last seven years, USDA payments to farmers amounted to between 10 and 14 billion dollars per year.

loss of hundreds of thousands of farms over the last several decades; the robust interest in sustainable and organic agriculture; and the interest in farming of a new generation of younger people, often inspired by an interest in food and food movements.<sup>15</sup> The Due Process Revolution, the Civil Rights Revolution, and virtually every other progressive change came slowly to the USDA despite the Department's relatively egalitarian purpose and occasionally radical experiments that were designed to increase opportunity for poor farmers.<sup>16</sup>

### 1. *Defending and Defining Family Farming*

The population at large has a sympathetic, if ambivalent, feeling about farming, especially family farming. There is a case to be made for family farming. It can be based on individual justice for farmers, on social equality and the hope for viable rural communities, on environmental and animal welfare concerns, and on aesthetics.<sup>17</sup>

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For those seven years, gross receipts for farms have varied from 341 billion to 466 billion dollars. Returns to farmers have varied from 42 billion to 111 billion dollars. In those seven years, USDA payments have amounted to about 10 to 25 percent of farmer net income for the nation as a whole. See *Farm Income and Wealth Statistics*, USDA, ECON. RES. SERV., <http://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics/> (last visited Dec. 15, 2016).

<sup>15</sup> The young and newly inspired wave of farmers may be beginning to encounter all too predictable financial difficulties. See, e.g., Jaclyn Moyer, *What Nobody Told me About Small Farming: I Can't Make a Living*, SALON (Feb. 9, 2015) (source on hand with author); Derek Emadi, *Nine Months, 20 Chickens, and \$300: Bootstrap at Emadi Acres Farm*, NAT'L YOUNG FARMERS COALITION (Dec. 4, 2015), <http://www.youngfarmers.org/nine-months-20-chickens-and-300/>. Even conventional power brokers in agriculture acknowledge that young and new farmers face heightened challenges. See *Growing Farm Financial Pressure Being Felt Across Countryside*, FEEDSTUFFS (Apr. 14, 2016).

<sup>16</sup> Abraham Lincoln described USDA as the "The Peoples' Department." See Tom Vilsack, *The People's Department: 150 Years of USDA*, USDA BLOG (May 11, 2012, 12:45 PM), <http://blogs.usda.gov/2012/05/11/secretarys-column-the-peoples-department-150-years-of-usda/>. For interesting examples of programs, mainly long forgotten, that could be an inspiration now, see JESS GILBERT, *PLANNING DEMOCRACY: AGRARIAN INTELLECTUALS AND THE INTENDED NEW DEAL* (2015), and SIDNEY BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* (1965).

<sup>17</sup> The country's understanding of what constitutes a family has changed over the last several decades, and family has always meant different things to different people. The point here is not to privilege any particular household arrangement or to minimize the forms of inequality that are common within families, including farm families. Agriculture in the United States has tended to follow three main routes: family farms; plantations and other similar arrangements, including haciendas; and wage labor businesses. The latter two offer little hope for a just future. A feminist family farm provides such hope. Other less well-known alternatives, such as multi-family cooperatives or other communal or commons-like arrangements, are not merely theoretical possibilities. They, too, offer a hope for a just future for agriculture. A defense of family farming, as presented here, is not meant to criticize or exclude such alternative efforts. It is instead meant to defend family farming from the vastly more inegalitarian alternatives that actually threaten family farming at present.

A case for family farming is STEPHEN CARPENTER, *THE RELEVANCE OF FAMILY*

The definition of a family farm – that is to say, whether a farm is a family farm – is inevitably contested.<sup>18</sup> The entity structure of the farm, for example whether it is a corporation, the total acres farmed or ranched, the extent of mechanization and the character of the technology used, and other handy comparisons can be misleading when the question is whether an enterprise is a family farm. The best definition of a family farm looks principally at the question of who performs the work on the farm.<sup>19</sup> FLAG considers an operation a family farm if

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FARMS TODAY (2006) [hereinafter RELEVANCE OF FAMILY FARMS]. Regarding the merits of small-scale farming, many people find Wendell Berry convincing. See WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* (1977). A variety of views are presented in *IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM?* (Gary Comstock, ed. 1987). Regarding the stakes for rural communities, see LINDA M. LOBAO, *LOCALITY AND INEQUALITY: FARM STRUCTURE AND SOCIOECONOMIC CONDITIONS* (1990). Environmental issues pertaining to agriculture are discussed briefly in Stephen Carpenter, *A New Calling for Agricultural Law*, 18(1) *DRAKE J. AGRIC. L.* (2013) [hereinafter *A New Calling*] and, from a more detailed and environmental law perspective, in MARY JANE ANGELO, JASON J. CZARNEZKI & WILLIAM S. EUBANKS II, *FOOD, AGRICULTURE AND ENVIRONMENTAL LAW* (2013), and J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27(2) *ECOLOGY L. Q.* 263 (2000). A case for a more sustainable agriculture is James Stephen Carpenter, *Farm Chemicals, Spoil Erosion, and Sustainable Agriculture*, 13 *STAN. ENVTL. L.J.* 190 (1994).

Different historical modes of agricultural production are discussed in Max J. Pfeffer, *Social Origins of Three Systems of Farm Production in the United States* 48(4) *RURAL SOC.* 540 (1983). One example of an egalitarian experiment in larger scale agriculture is New Communities in Georgia. For a description of that farm see SHIRLEY SHERROD, *THE COURAGE TO HOPE, HOW I STOOD UP TO THE POLITICS OF FEAR* (2013) [hereinafter *COURAGE TO HOPE*]. Reservation land offers interesting possibilities and difficulties in this regard. See the work of the INTERTRIBAL AGRICULTURE COUNCIL, <http://www.indianaglink.com/> (last visited Dec. 22, 2016). See also JESSICA A. SHOEMAKER, *FARM AND RANCH ISSUES IN INDIAN COUNTRY* (1996). For an account of egalitarian possibilities springing from a family farm worldview, see LAWRENCE GOODWYN, *POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1979).

<sup>18</sup> This can be true based on good faith differences of opinion. Defenders of industrial scale agriculture, however, often make the cynical claim that very large operations are family farms if one family owns most of the business. This definition has a technical plausibility, but it certainly is not what most people have in mind when they think of a family farm. Defenders of the ongoing concentration and industrialization of agriculture often want to enjoy the warmth of public sympathy for family farmers and simultaneously undermine the very characteristics of farming — modest in scale, dependent on extremely hard work, independent, and sustainably operated — that are the basis of that public support. For example, the largest hog producer in the nation, owner of tens of thousands of sows, named itself “Murphy Family Farms.” The same industrial agriculture that enjoys the sympathy the public has for farmers scolds the public as ignorant and nonscientific when the public looks behind the curtain and blanches at the sight of life in a confined animal feeding facility.

<sup>19</sup> See RELEVANCE OF FAMILY FARMS, *supra* note 17, for a defense of the definition generally used by FLAG that emphasizes the extent of hired labor, and considers the extent to which some operations might be too small to be farms, or not have enough autonomy to be considered an independent farm. The complexity and variety of viewpoints regarding family farms by farmers themselves is suggested by Susan Machum, *Articulating Social Class: Farm Women’s Competing Visions of the Family Farm*, in *RESHAPING GEN-*

a large proportion of the labor on the farm is performed by people within the family – no matter how our clients define their own families. Potential difficulties with this working definition, however interesting in theory, tend not to present dilemmas in the actual practice of deciding if a possible client is a family farm or represents family farmers.<sup>20</sup> FLAG often receives pressure to expand its client base by declaring that any farm owned by a family is a family farm – even if the farm is very large and relies overwhelmingly on wage labor.<sup>21</sup> It is then that the definition of a family farm has practical significance.

## 2. Race, Gender, Farmers

Many farmers, counter to common assumptions, are not white men. The actual number and identities of farmers is difficult to know. While USDA conducts a Census of Agriculture, those numbers should be viewed with skepticism. The Census may undercount smaller farms, farms where the connection to USDA is limited, and farmers who do not view USDA and the government favorably.<sup>22</sup>

All that said, based on 2012 Census of Agriculture data, and using

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DER AND CLASS IN RURAL SPACES 53-72 (Barbara Pini and Belinda Leach eds., 2011).

<sup>20</sup> Could a highly sympathetic operation, say a collective of dozens of families organized into a cooperative venture in which all cooperative members did farm labor, or perhaps an intentional religious and farming community, fall outside of this definition? Yes. We have often rejected clients and issues because the operation in question was larger than a family farm or the policy in dispute favored larger than family farms. I know of no case, however, in which an egalitarian entity with a novel organization or family structure was rejected by FLAG for not being a family farm.

<sup>21</sup> A similar argument holds that FLAG should side with farmers against the rest of the world, no matter what. A substantial portion of the agricultural community would like to see all of agriculture as a coherent whole and to think of the non-agriculture “other” as the main political and economic threat to farmers. FLAG clients tend to disagree with this view and instead often see the enemies of justice for family farmers within the world of agriculture, agribusiness, and the government that purports to support farming. A more detailed discussion is in *A New Calling*, *supra* note 17.

<sup>22</sup> Underreporting of nonwhite farmers has been an ongoing problem. For example, it is hard to believe that the number of African American farmers, enumerated at roughly 18,000 in 1997, suddenly jumped to 29,000 in 2002 and then to 33,000 in 2012. The number of Native American farms reported held steady at under 10,000 for a few decades but jumped to 15,000 in 2002 and then 35,000 in 2007. How farms are actually counted in Indian Country, where much tribal land is leased, and considerable farming is for subsistence purposes, is hard to know. For Native American farming data problems, see John R. McKean, R. Garth Taylor & Wen Lin Liu, *Inadequate Agricultural Database for American Indians?*, 8(4) SOC’Y & NAT. RESOURCES 361 (1995). For Latino farmers, see Victor Garcia & Juan Martinez, *Exploring Agricultural Census Undercounts Among Immigrant Hispanic/Latino Farmers with and Alternative Enumeration Project*, 43(5) J. OF EXTENSION (2005). As of 1969, an all-encompassing “Black and Other Races” category was reported. It seems likely that the Census is more accurate now than it was a few decades ago. Until 1997, for example, it was conducted by the Department of Commerce, not USDA. Census of Agriculture issues are discussed in Jess Gilbert, Spencer D. Wood & Gwen Sharp, *Who Owns the Land: Agricultural Land Ownership by Race/Ethnicity*, 17(4) RURAL AM. 55 (2002).

USDA's categories, about 94 to 95 percent of what USDA calls "principal" operators are non-Hispanic and white.<sup>23</sup> About 5 percent of all principal operators are Hispanic, and about 96 percent of all Hispanic principal operators identify as white.<sup>24</sup> So, extrapolating, close to 10 percent of all farmers are either not white or are white and Hispanic. Additionally, roughly 14 percent of all principal operators are women.<sup>25</sup> When all operators are counted, there are about one million women farmers in the country and nearly a third of farm operators are women.<sup>26</sup> Thus rough estimates suggest that about 60 to 65 percent of all farmers are non-Hispanic white men.

Discrimination, not surprisingly, is a longstanding and ongoing obstacle for many farmers and goes a long way in explaining the current farming demographics.<sup>27</sup> The history of non-white and non-male farmers – women, Native American, African American, Latino, Japanese, Hmong, and Chinese – deserves more academic attention.<sup>28</sup> It is fair to observe, however, that discrimination in agriculture seems to have been especially powerful.<sup>29</sup> Yet, power brokers and policy makers in the agricultural world rarely see discrimination as worth discussing.<sup>30</sup> An unfortunate symmetry in this respect is that among those

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<sup>23</sup> USDA, 2012 CENSUS OF AGRICULTURE, *supra* note 10, at 59 tbl. 60, 64 tbl.62. An operator "operates a farm, either doing the work or making day-to-day decisions about such things as planting, harvesting, feeding, and marketing." The census collects data on total number of operators, the total number of women operators, and demographic information for up to three operators per farm. About 40 percent of farms have more than one operator. A principal operator is the person primarily responsible for the on-site, day-to-day operation of the farm or ranch business. *Id.* at app. B. *General Explanation and Census of Agriculture Report Form*, [https://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_US/usappxb.pdf](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter_1_US/usappxb.pdf).

<sup>24</sup> Another USDA survey conducted in 2011 suggests that about 4 percent of all principal operators are not white, and that about 4 percent are Hispanic. Non-Hispanic white men, according to this survey, make up 83 percent of principal operators. *See STRUCTURE AND FINANCES*, *supra* note 7, at 48.

<sup>25</sup> Women were not enumerated separately until 1978. Changes in reporting categories lead to a nearly four-fold increase in women farm operators between 1997 and 2002.

<sup>26</sup> There are close to 3.18 million farm operators. USDA, 2012 CENSUS OF AGRICULTURE, *supra* note 10. Women farmers, interestingly, are less likely to be non-Hispanic and white.

<sup>27</sup> These issues are discussed briefly in Stephen Carpenter, *An Overview of the USDA Discrimination Cases*, 17(1) DRAKE J. AGRIC. L. 1 (2012) [hereinafter *Discrimination Cases*]. A thoughtful discussion focusing on African American farmers is Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001).

<sup>28</sup> For a beginning, see *Discrimination Cases*, *supra* note 27.

<sup>29</sup> For newer scholarship pertaining to African American farmers, see PETE DANIEL, *DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN AN AGE OF CIVIL RIGHTS* (2013); and BEYOND FORTY ACRES AND A MULE: AFRICAN AMERICAN LANDOWNING FAMILIES SINCE RECONSTRUCTION (Debra A. Reid & Evan P. Bennet eds., 2014). *See also Discrimination Cases*, *supra* note 27.

<sup>30</sup> It continues to be possible for influential discussions of American agriculture to omit



concerned with civil rights, agriculture has not been an area of particular interest.

### 3. Farming: Rural and Urban

Farming in and near metropolitan areas, once quite common, never really disappeared, and in the last decade, interest in local food and urban agriculture has increased dramatically. Some urbanites are still without a bee hive, a turnip patch, and a goat. For the rest, however, an enthusiastic and practical-minded literature celebrates and supports urban farming.<sup>31</sup> City planners and scholars are also increasingly interested in urban food production.<sup>32</sup> The renewed interest in supporting this farming presents a number of legal problems for these producers.<sup>33</sup> It also deserves attention from those concerned with social justice and community economic development.<sup>34</sup> Of particular importance when thinking about urban food production is that a great deal of commercial farming – that is to say, farm products produced to be sold or bartered – occurs in metropolitan areas. Commercial farming food production often ends up in farmers markets and other local food venues. A large proportion of those producers are poor.<sup>35</sup> In

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all mention of discrimination. See, e.g., RONALD B. KNUTSON, J.B. PENN & BARRY L. FLINCHBAUGH, *AGRICULTURAL AND FOOD POLICY* (4th ed., 1997); *ECONOMICS OF AMERICAN AGRICULTURE*, *supra* note 5. The Obama Administration said that civil rights at USDA was a priority. Thomas J. Vilsack, *Memorandum to all USDA Employees: A New Civil Rights Era for USDA*, EEO21.COM (Apr. 21, 2009), [http://eeo21.com/files/NewCivilRightsEra\\_USDA\\_memo\\_4\\_21\\_09.pdf](http://eeo21.com/files/NewCivilRightsEra_USDA_memo_4_21_09.pdf).

<sup>31</sup> For prospective farmers, there is NOVELLA CARPENTER & WILLOW ROSENTHAL, *THE ESSENTIAL URBAN FARMER* (2011), and Curtis ALLEN STONE, *THE URBAN FARM: GROWING FOR FOOD AND PROFIT ON LEASED OR BORROWED GROUND* (2015).

<sup>32</sup> See, e.g., ANDRE VILJOEN & KATRIN BOHN, *SECOND NATURE URBAN AGRICULTURE: DESIGNING PRODUCTIVE CITIES* (2014); *AGRICULTURAL URBANISM: HANDBOOK FOR BUILDING SYSTEMS IN 21ST CENTURY CITIES* (Janine de la Salle & Mark Holland eds., 2010); *CITIES AND AGRICULTURE: DEVELOPING RESILIENT URBAN FOOD SYSTEMS* (Henk de Zeeuw & Pay Dreshsel eds., 2015).

<sup>33</sup> For some legal issues see the ABA summary, *URBAN AGRICULTURE: POLICY, LAW, STRATEGY, AND IMPLEMENTATION* (Lawrence E. Bechler et al. eds., 2015).

<sup>34</sup> The exciting promise of urban farming can be seen in SARITA DAFTARY-STEEL, *GROWING YOUNG LEADERS IN EAST NEW YORK: LESSONS FROM EAST NEW YORK FARMS! YOUTH INTERNSHIP PROGRAM* (2015), <http://fooddignity.org/wp/wp-content/uploads/2015/04/ENYF-15-04-28-report-Growing-Young-Leaders.pdf>. Social justice implications of urban farming are explored in RACHEL SANTO, ANNE PALMER, & BRENT KIM, , *VACANT LOTS TO VIBRANT PLOTS: A REVIEW OF THE BENEFITS AND LIMITATIONS OF URBAN AGRICULTURE* (2016), and more generally in *CULTIVATING FOOD JUSTICE: RACE, CLASS AND SUSTAINABILITY* (Alison Hope Alkon & Julian Agyeman eds., 2011) and Kirsten Valentine Cadieux & Rachel Slocum, *What Does it Mean to do Food Justice?*, 22 J. POL. ECOLOGY 1 (2015).

<sup>35</sup> The phenomenon of local food has received a great deal of attention. A good summary of what is known about the economics of such efforts is SARAH A. LOW, AARON ADALJA, ELIZABETH BEAULIEU, NIGEL KEY, STEPHEN MARTINEZ, ALEX MELTON, AGNES PEREZ, KATHERINE RALSTON, HAYDEN STEWART, SHELLYE SUTTLES, STEPHEN VOGEL &

Minneapolis and St. Paul, Minnesota, and the surrounding area, urban farmers are often Hmong American immigrants. FLAG's work with the Twin Cities immigrant farmers is discussed in Part V.

While urban farming has increased in the last decade, the clear majority of farms are still rural. The overwhelmingly rural character of agriculture affects the fate of farmers in many practical ways.<sup>36</sup> In addition, to be rural is to be the subject of broad and longstanding stereotypes of rural residents, and these stereotypes, some particularly applicable to farmers, continue to affect the country's sense of whether these problems should be of concern to and affect farmers themselves. "I'm just a farmer, but . . . ."

### B. Farm Advocates

Beginning in the early 1980s, many farmers and others in farming communities began to practice what we now might call lay legal advocacy. These people tended to call themselves farm advocates.<sup>37</sup> The notion of farm advocacy was self-generated within various communities across the country – especially in the Midwest and the South. People active in movements to address what was then called "The Farm Crisis" – some political, others religious – turned to farm advo-

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BECCA B.R. JABLONSKI, TRENDS IN U.S. LOCAL AND REGIONAL FOOD SYSTEMS: A REPORT TO CONGRESS (2015). Focusing only on farmers markets (there are many other avenues for local food production), a great deal of writing addresses why consumers should and do like the markets, the extent to which farmers markets can help alleviate "food deserts," and promote economic development more generally, but little is known about the actual farmers who do this type of production. The basics are that that less than 10 percent of all farmers market directly to consumers, and that this amounts to less than 1 percent of all farm sales. There are about 8000 farmers markets in the country. Based on our observations, these farmers, if they are growing the food, struggle to make a living. They work hard to raise the crops and then must present themselves nicely and politely to customers at the farmers market. This is not a job for everyone. Interesting assessments of farmers markets include GILBERT GILLESPIE, DUNCAN L. HILCHEY, C. CLARE HINRICHS & GAIL FEENSTRA, *Farmers' Markets as Keystone in Rebuilding Local and Regional Food Systems*, 65-83 and LARRY LEV, GARRY STEPHENS & LINDA BREWER, *Practical Methods to Enhance Farmers' Markets*, 88-98 in REMAKING THE NORTH AMERICAN FOOD SYSTEM: STRATEGIES FOR SUSTAINABILITY (C. Clare Hinrichs & Thomas A. Lyson, eds. 2008).

<sup>36</sup> At a minimum, rural suggests that people are dispersed. There is much to be said about what it means to be rural, and how one learns to be rural. A good start is RURAL PEOPLE AND COMMUNITIES IN THE 21ST CENTURY: RESILIENCE AND TRANSFORMATION (David L. Brown & Kai A. Schaff eds., 2011); CORNELIA BUTLER FLORA & JAN L. FLORA, RURAL COMMUNITIES: LEGACIES AND CHANGE (4th ed., 2012); CHALLENGES FOR RURAL AMERICA IN THE TWENTY-FIRST CENTURY (David L. Brown & Louis Swanson eds., 2004); and RICHARD E. WOOD, SURVIVAL IN RURAL AMERICA: SMALL VICTORIES AND BITTER HARVESTS (2008).

<sup>37</sup> Other names are sometimes used, in part for political reasons, especially when even minimal levels of state or federal funding are involved. "Negotiators," people providing "technical assistance," and other terms have been used.

cacy as a means of helping themselves and their neighbors.<sup>38</sup>

There were, and continue to be, very few lawyers to assist farmers facing foreclosure, dispossession, and discrimination. Farm advocates had many aims, but filling the legal gap for farmers became a central one. Some farm advocates affiliated with organizations, some did not.<sup>39</sup> Early farm advocates remember going to the library, asking the librarian for something that had been described to them as the “Code of Federal Regulations,” finding the first book under volume 7, “Agriculture,” and beginning to read it straight through. In the South, several farm advocates sought to work especially with African American farmers. Farm advocates, who are most often women, continue to be active.

Farm advocates often go to people’s homes and work with them at the kitchen table. They generally are or were farmers themselves. They know their own communities and neighbors and can identify the type of problem patterns that occur.<sup>40</sup> Over time, many farm advo-

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<sup>38</sup> A brief summary of the origins of the crisis and its extent is Barry J. Barnett, *The U.S. Farm Financial Crisis of the 1980s*, 74 *AGRIC. HIST.* 336 (2000). A sense of the issues grass roots farm organizations saw as important is in UNITED FARMER AND RANCHER CONGRESS, *A REPORT ON THE UNITED FARM AND RANCHER CONGRESS* (1986). Academic accounts of farmer activism in the period include William P. Browne, *Challenging Industrialization: The Rekindling of Agrarian Protest in a Modern Agriculture, 1977-1987*, 7(1) *STUD. AM. POL. DEV.* 1 (Spring 1993); and William C. Pratt, *Using History to Make History? Progressive Farm Organizing During the Farm Revolt of the 1980s*, 55 *ANNALS IOWA* 24 (1996). The extreme right wing was active as well. See the account by journalist and activist DANIEL LEVITAS, *THE TERRORIST NEXT DOOR: THE MILITIA MOVEMENT AND THE RADICAL RIGHT* (2002) [hereinafter *TERRORIST NEXT DOOR*].

<sup>39</sup> Interviews of farm advocates about their work that took place at a public event in 2015 at a Farm Aid event are available as *THE FRONTLINES OF THE FARM CRISIS: FARM ADVOCATES*, *YOUTUBE.COM*, <https://www.youtube.com/watch?v=RDcAtrwHPGU&nohtml5=false> (last visited Dec. 19, 2016). A documentary film, *HOMEPLACE UNDER FIRE*, is near release. For the trailer, see *HOMEPLACE UNDER FIRE TRAILER*, *YOUTUBE.COM*, <https://www.youtube.com/watch?v=cfdcZLBVmwY> (last visited Dec. 19, 2016). Relatively little has been written about farm advocates. A valuable oral history from the Upper Midwest is DIANNA HUNTER, *BREAKING HARD GROUND: STORIES OF THE MINNESOTA FARM ADVOCATES* (1990) [hereinafter *BREAKING HARD GROUND*]. Shirley Sherrod’s memoir, *COURAGE TO HOPE*, *supra*, note 17, provides her own account. One of the few academic discussions is Mark Friederberg, *Women Advocates in the Iowa Farm Crisis of the 1980s*, 67(2) *AGRIC. HIST.* 224 (Spring 1993).

<sup>40</sup> Farm advocates are akin, therefore, to the lay advocates described in *REBELLIOUS LAWYERING*, *supra* note 2, at 38-56, 275-331. Also interesting conceptually in this regard is Gerald P. López, *Lay Lawyering*, 32 *UCLA L. REV.* 1 (1984) [hereinafter *Lay Lawyering*]. Farm Advocates are probably more institutionalized than the lay lawyers described in the above work. One of the interesting, often implicit, aspects of this and other academic discussions of lay lawyering is the question of what constitutes the “law” in lay lawyering. At times scholars seem to assume that it means that lawyers and community advocates focus less on litigation and law reform as a means of redress and instead orient toward active participation in a movement in a way that would seem to many to part from lawyering. See, for interesting discussions of such efforts, Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *CAL. L. REV.* 1879 (2008) [hereinafter *RESISTANCE*

cates begin to work on a regional or state-wide level.<sup>41</sup> In such cases, they know the general circumstances facing the producer but tend not to know the farmer in advance. One way to think about farm advocates is that they exist to help keep people alive, keep them on the farm, and preserve a chance for the future.<sup>42</sup> Often, their skill and problem-solving abilities are not primarily legal. That said, what we tend to think of as legal problems are, at certain critical moments, paramount to farm advocate work. Advocates always have an impressive grasp of what lawyers think of as legal questions and often perform the problem-solving tasks often associated with lawyering.<sup>43</sup> They tend to be formidable people.

### C. Grass Roots Farm Organizations

There are a number of strong agricultural organizations that essentially serve prosperous producers, agribusiness, food processors, and so forth. Farmers can be hard to organize. Activism by struggling farmers, however, has taken various forms and continues in the present. Grass roots farm organizations often seek legal advice about issues affecting their membership, such as repossession, foreclosure, regulations, administrative and policy matters, and potential changes of the law.

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MOVEMENTS] and Orley Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007). From a FLAG point of view, lay lawyering blurred roles more in the sense that lay people acted in ways lawyers have often been thought to work, and less in the sense that lawyers abandoned law and moved into extralegal activism.

<sup>41</sup> As a journalistic account of one advocate observed:

“By gosh, they weren’t going to take that farm away from us and they weren’t going to take it from my neighbors either. It was deep inside of me.” Her activism grew from the grass roots. “A neighbor came over and said he had a problem with a loan . . . and they were going to foreclose.” With her help, her neighbor won his appeal and stopped the sale of his farm. “He told somebody else and somebody else and somebody else.” As she continued to work with farmers under threat of foreclosure . . . she discovered “what they were doing to farmers, and how they had lied and cheated them.” As requests for training and advocacy rolled in, Kling travelled across the state and nation.

Mary Turck, *Speaking Out: Profile: Farm Activist Lou Anne Kling: From Pastures to Protests*, MINNESOTA WOMEN’S PRESS (July 28, 2016) [hereinafter *Farm Activist*], <http://womenspress.com/main.asp?SectionID=1&SubSectionID=20&ArticleID=5036>.

<sup>42</sup> Farm advocacy, both on an individual and organizational level, often began as a grass roots effort to prevent suicides in the community. See, e.g., BREAKING HARD GROUND, *supra* note 39. For useful journalistic context, see Max Kutner, *Death on the Farm*, NEWSWEEK (Apr. 10, 2014 6:12 AM), <http://www.newsweek.com/2014/04/18/death-farm-248127.html>.

<sup>43</sup> Deborah L. Rhode describes, in a general way, various forms of “self-representation and non-lawyer assistance” and the legal profession’s adamant and, in my view, unfortunate opposition to this type of activity in DEBORAH L. RHODE, ACCESS TO JUSTICE 14-16, 74-77, 81-84 (2004).

Grass roots farm organizations that have worked with FLAG include: Farmers Unions in various states, Arkansas Land and Farm Development, Land Stewardship Project, the Rural Advancement Foundation International – USA (RAFI); movement-like member organizations, with names like “Prairiefire” “Groundswell”; and coalitions of membership organizations, such as the Campaign for Family Farmers, the National Family Farm Coalition, the Rural Coalition, the Western Organization of Resource Councils, the Intertribal Agriculture Council, and the Federation of Southern Cooperatives. Some organizations are longstanding, while others are ephemeral.<sup>44</sup>

One of the tricky aspects of having grass roots farm organizations as clients is that some organizations see themselves as representing the interests of farmers but tend to have no real farmer constituency or accountability. FLAG has worked well with these organizations, which might fairly be called think tanks as opposed to farm organizations, but tries not to represent them as clients. These think-tank like organizations tend not to understand why we would make such a distinction.

Overwhelmingly, FLAG clients are historically farm organizations. This general statement has three main exceptions. First, as will be discussed below, FLAG lawyers worked as court-appointed neutrals in a large class action case, *Pigford v. Glickman*.<sup>45</sup> By definition, in this situation, we did not have a client. Second, with some clients, we work with groups of people, but there is no functional organization. This has especially been true in work with immigrant farmers. FLAG has tried to help foster client organizational capacity, but this has been challenging. Because these farmers are nearby in the Twin Cities metropolitan area, or just outside it, and a FLAG lawyer can be essentially embedded in the community, the work can still be thought of as having a rebellious aim – working with the community – even though we do not represent an organization in a typical FLAG fashion.

The third exception to FLAG’s client base is that FLAG also gives very brief advice to farmers who call. We receive some funding

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<sup>44</sup> In many cases, FLAG work may more resemble what some have described as “cause lawyering” for “social movements” than it would lawyering for an interest group. For a social science view of lawyering and social movements, see CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart Scheingold eds., 2006) and Michael W. McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 506-22 (Austin Sarat, ed., 2004). A lawyerly discussion of some of the same issues is RESISTANCE MOVEMENTS, *supra* note 40. Farm movements more generally are discussed from a sociological perspective in PATRICK J. MOONEY & THEO J. MAJKA, FARMERS’ AND FARMWORKERS’ MOVEMENTS: SOCIAL PROTEST IN AMERICAN AGRICULTURE (1995).

<sup>45</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C.1999).

to do this work but not enough to cover our costs. We do not solicit the calls. A number of organizations refer people to us, however, and people find us on their own. While these are not clients in a formal sense, we provide brief consultations that are helpful to the caller in the short term. Through the calls, we sometimes hear about emerging problems that would not necessarily reach us by other means. That said, we also speak to people about bizarre and relatively unique problems, and also to many people whose problems are all too familiar. The net result is that individual farmer calls are not a significant source of new information regarding larger trends. While FLAG has often considered ending the telephone assistance effort, we always fail to do so. It may be that we simply cannot bear the idea of telling people who call that we cannot help them and that a lawyer will not even speak with them about their problems.

One final point about working with grass roots farm organizations is that FLAG tries to ensure the client is front and center in both decision making and in how the client organization publicly presents itself and the legal discussion. For example, one would be hard-pressed to find evidence of a press conference or journalist interview that featured a FLAG lawyer acting as a spokesperson for the farm organization or its position. Our longstanding clients expect this and have been taken aback when other lawyers they deal with take center stage. Based on some of the academic scholarship about public interest lawyering, the extent and character of FLAG's work with grass roots organizations, and in particular the importance of client organizations taking the lead in the public realm, may be uncommon.<sup>46</sup>

## II. FLAG AND SOME LEGAL ISSUES OF IMPORTANCE

FLAG was formed in the 1980s. It has an origin in three intertwined threads. First was the lack of assistance from the private bar to

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<sup>46</sup> The language used to describe this relationship is revealing. Lawyers, according to scholars on lawyers and social movements, “may find themselves relegated to ‘second chair’ status within the movement” and experience a “second class, indeed . . . dependent status of the lawyers, within the movement hierarchy.” Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 2-3 (Austin Sarat & Stuart A. Scheingold eds., 2016).

Deborah Rhode, in her survey of 50 organizations, found that only about 60 percent of public interest firms engaged in “grass roots collaboration” and only a portion of those firms represent grass roots groups. Rhode reports that public interest organizations feuded with the organizations regarding “turf,” felt that organizations were too interested in building organizations strength, and wanted to take the lead in press conferences when “lawyers have done the work.” Rhode notes specifically that public interest lawyers are sometimes unnerved by client group interest in “raising hell.” Deborah Rhode, *Public Interest Law: The Movement at Midlife*, 60 *STAN. L. REV.* 2027, 2064-67 (2007). This does not resemble the way FLAG normally works.

help struggling farmers. There are relatively few country lawyers, and few of these understand much about agriculture.<sup>47</sup> Further, the typical farm law practice will provide little assistance to struggling farmers, particularly if the lawyer expects to make a living charging clients. A typical farm law practice can involve estate planning, configuring farm entities to avoid taxes and maximize USDA farm program benefits, seeking permits for immense animal feeding operations, fending off the legal consequences of environmental problems traceable to the farm, and other legal issues.<sup>48</sup> Rural lawyers often are, or at least should be, conflicted out of representing farm borrowers in debtor-creditor matters. This matters a great deal because virtually every failing farm has debtor-creditor issues.<sup>49</sup> The point here is not to minimize the contributions of rural practitioners who take on struggling farm clients – in fact, we try to keep track of them and refer farmers to them where possible – rather, it is to say that their efforts are especially notable because of their rarity.

The second thread leading to the creation of FLAG originates in 1980s grass roots farm organizations that fought foreclosures via direct action and protest and sought legal assistance. When Farm Aid, a public charity founded by Willie Nelson, Neil Young, and John Mellencamp was created, grass roots farm organizations and farm advocates told Farm Aid that they needed lawyers – in particular, “a farm law center where farmers could get help without cost and lawyers knew the right stuff.”<sup>50</sup>

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<sup>47</sup> On a general shortage in rural areas see Ethan Bronner, *No Lawyer for Miles, So One Rural State Offers Pay*, N.Y. TIMES (Apr. 9, 2013), <http://www.nytimes.com/2013/04/09/us/subsidy-seen-as-a-way-to-fill-a-need-for-rural-lawyers.html>; Lorelei Laird, *In Rural America, There are Job Opportunities and a Need for Lawyers*, ABA JOURNAL (Oct. 1, 2014), [http://www.abajournal.com/magazine/article/too\\_many\\_lawyers\\_not\\_here\\_in\\_rural\\_america\\_lawyers\\_are\\_few\\_and\\_far\\_between](http://www.abajournal.com/magazine/article/too_many_lawyers_not_here_in_rural_america_lawyers_are_few_and_far_between); and Danielle Paquette, *8,500 Residents, 12 Attorneys: America's Rural Lawyer Shortage*, WASH. POST (Aug. 24, 2014), [https://www.washingtonpost.com/news/storyline/wp/2014/08/25/how-do-you-keep-them-down-on-the-farm-once-theyve-passed-the-bar/?utm\\_term=.de42dca911ff](https://www.washingtonpost.com/news/storyline/wp/2014/08/25/how-do-you-keep-them-down-on-the-farm-once-theyve-passed-the-bar/?utm_term=.de42dca911ff).

For two efforts to identify legal needs of farmers, see A. Bryan Endres, Stephenie B. Johnson, Donald L. Uchtmann & Ann H. Silvis, *The Legal Needs of Farmers: An Analysis of the Family Farm Legal Needs Survey*, 71 MONT. L. REV. 135 (2010) and PAUL GOERINGER, WANDING ZHANG, LORI LYNCH, STEPHAN TUBENE & WILLIAM PONS, UNDERSTANDING THE DIVERSE LEGAL NEEDS OF THE MARYLAND AGRICULTURAL COMMUNITY 7 (2014). The latter, interestingly, found farmers raised “discrimination” as a legal issue facing them in Maryland in about 9 percent of the interviews conducted.

<sup>48</sup> Some of these rural practice areas have more to do with protection of substantial wealth than anything related to the struggles of actual farming. As one lawyer-authored article put it, *Do Farm Kids Need a Prenup?*, AGWEB.COM (Dec. 30, 2015), <http://www.agweb.com/article/do-farm-kids-need-a-prenup-naa-clinton-griffiths/>. Of course they do.

<sup>49</sup> In a small town, a lawyer representing agricultural creditors with some regularity could easily have a conflict of interest when representing a farmer debtor.

<sup>50</sup> This account of the founding comes from *Farm Activist*, *supra* note 41. For the bene-

Third, although some legal aid and legal services offices assisted farmers, not many offices did so.<sup>51</sup> Rural legal services lawyers in Minnesota, for example, remember a wave of clients during the early 1980s with living standards below those typical for a poverty law practice. Willie Nelson asked these legal services lawyers to create a legal nonprofit that Farm Aid could fund. The flabbergasted lawyers agreed, and the result was FLAG.<sup>52</sup>

From a lawyer's black letter law perspective, FLAG's work came to merge three different types of legal problems that rarely overlap. First, FLAG's work is a subset of agricultural law. That means a somewhat arcane combination of debtor-creditor, real estate, contract, administrative, environmental, tax law, and pieces of a number of other specialties.<sup>53</sup> A notable and possibly counter-intuitive aspect

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fit of younger readers, and utterly out of touch older readers, Willie Nelson, Neil Young, and John Mellencamp, the co-founders of Farm Aid, are country and rock and roll artists. Several musicians continue to serve on the board. Farm Aid concerts turn out to be an annual conference of sorts for progressive farm organizations. A seven-minute video on the origins and mission of the organization is FARM AID 30: A SONG FOR AMERICA, YOUTUBE.COM (Feb. 4, 2015), <https://www.youtube.com/watch?v=pttrqXR4CFo>.

<sup>51</sup> A few legal services offices in the Midwest continue to do this work. See, e.g., *Farm and Ranch Project*, LEGAL AID OF NEBRASKA, <http://www.legalaidofnebraska.org/node/595/farm-and-ranch-project> (last visited Dec. 19, 2016). In many ways, reluctance to do this work is understandable. Given the level of rural poverty in most of the country, and the lack of a big law firm presence to supplement budgets, it is certainly the case that rural legal aid offices are stretched even by legal aid standards. In addition, farm clients tend to present complicated and widely varied legal issues that are time-consuming to learn. At FLAG, we (or least your author) tend to think that a lawyer needs a full two years of learning to be much of a net positive in substantive work. Further, some rural offices see significant farm assets as disqualifying. This, again, is understandable, although the farm is income and a home bundled together, and the loss of the farm can leave people with few assets or prospects. Finally, as foundations and other funders look increasingly at quantitative measures of success when making grants, the time-consuming character of farm-based legal work means the number of clients served per dollar is lower than in other substantive areas. FLAG spends considerable time trying to convince legal aid and other lawyers to take farm clients and to provide lawyers who take on the clients with back-up support. For written examples of this type of effort, see Carl Flink, *Finding a Place for Low-Income Family Farmers in the Legal Services Equation*, 35(11-12) CLEARINGHOUSE REV. 677 (2002); *Family Farmers in Poverty*, *supra* note 6; James Massey, *Farmers in Crisis: A Challenge for Legal Services*, 18 CLEARINGHOUSE REV. 702 (1984).

For a discussion of relatively forgotten rural poverty, see CYNTHIA M. DUNCAN, *WORLDS APART: POVERTY AND POLITICS IN RURAL AMERICA* (2d ed., 2015) [hereinafter *WORLDS APART*].

<sup>52</sup> The cultural history of an organization is difficult to describe and account for, but it seems likely that FLAG's origin in legal services helped preserve an emphasis on poverty among farmers.

<sup>53</sup> The topic is not often taught in law schools, although Food Law and Policy appears to be drawing increased interest. Harvard, for example, has a Food Law and Policy Clinic. Three law schools focus on agricultural law: Arkansas (LLM), Drake, and Vermont (LLM). Educationally oriented materials include: SUSAN SCHNEIDER, *FOOD, FARMING AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW* (2010); DONALD P. PEDERSON & KEITH G. MEYER, *AGRICULTURAL LAW IN A NUTSHELL* (1995); and JOHN H. DAVID-



of the legal issues is the overwhelming importance of a three-fold combination of: lending and credit in farming operations; the ever-growing use of one-sided contracts with farmers on the short end of extremely uneven power and economic relationships; and the importance of a range of administrative actions that affect agriculture. As noted above, a private bar does agricultural law and represents prosperous farmers, agribusiness, lenders, and large cooperatives. Government lawyers at various levels also practice what could be called agricultural law. The private agricultural law bar often takes an adversarial position to FLAG's clients, rarely represents poor farmers, and with a few notable exceptions, especially in the South, shows little interest in civil rights.

Second, FLAG's work uses a poverty law lens to focus on a combination of procedural rights and one-sided economic relationships. In debtor-creditor disputes and other matters, procedural rights are important and resemble other low income legal problems. In addition, contracts with a notably one-sided character that disadvantage farmers are common. For matters relating to USDA, procedural fairness, as well as the nature of the policies themselves, is important.

Third, a significant part of FLAG's work has involved civil rights issues. Of particular importance, given the role of credit in almost every agricultural operation, is credit discrimination.<sup>54</sup> In general, civil rights specialists seem unfamiliar with agriculture and issues faced by farmers.<sup>55</sup>

### III. LEVERAGING RESOURCES: FLAG, FARM ADVOCATES, AND FARM ORGANIZATIONS

The logic of FLAG's work methods, and work with farm advocates and farm organizations, rests on the fact that the legal needs of our potential clients utterly dwarf our ability to represent individuals directly. Compounding the raw numbers of need and resources is the rurality of clients. Two million farms, including many hundreds of thousands that are struggling to survive, are spread throughout the

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SON, DONALD B. PETERSON & KEITH G. MEYER., *AGRICULTURAL LAW: CASES AND MATERIALS* (1985). For food, law schools, and social justice, see KIM KESSLER & EMILY CHEN, *FOOD EQUITY, SOCIAL JUSTICE, AND THE ROLE OF LAW SCHOOLS: A CALL TO ACTION* (2015).

<sup>54</sup> Credit turns out to be the life-blood of agriculture. The natural life cycle of plants and animals means that most farmers have significant up-front costs every year. Income arrives months later. Discrimination in the form of delayed credit, for example, can be devastating if crucial production practices are delayed, even by a few weeks.

<sup>55</sup> An exception is work by the National Consumer Law Center. See JEREMIAH BATTLE, JR., SANDRA MITCHELL WILMORE, ALYS I. COHEN, CHI CHI WU, CHARLES DELBAUM, EMILY GREEN CAPLAN, GEOFF WALSH & ARIELLE COHEN, *CREDIT DISCRIMINATION* (6th ed., 2013).

country. Farmers are subject to immense variations in law. Generally, FLAG has only a handful of lawyers on staff. Throughout the country, there have always been a few lawyers and organizations willing to represent struggling farmers, at least part time, but not very many. Nor have there been other FLAG-like organizations spread throughout the country. With the notable exception of Land Loss Prevention Project in North Carolina, ongoing legal efforts to serve low-income farmers have been rare.<sup>56</sup> The choice then is whether to represent a few clients or develop a different strategy.

With a few exceptions, discussed below, FLAG has adopted a different strategy: leverage our work in every way possible. Step by step, case by case, FLAG developed a set of guidelines about clients, the type of substantive areas we are willing to cover, and work products and activities, all of which we viewed through the lens of leveraging our work. These internal guidelines are unwritten and informally maintained. We work out questions in what can seem like interminable staff meeting discussions. FLAG's guidelines discussed below are in no particular order and they overlap significantly.

#### A. *Substantive Work Topics*

Substantively, where possible, FLAG focuses on federal law. We have developed an ability to convey useful general information about contracts, leases, fraud, the Uniform Commercial Code (UCC), real estate issues, and other topics generally governed by state law without, we think, engaging in the unauthorized practice of law. Because FLAG is based in Minnesota, we are able to add a layer of expertise in Minnesota law. For our Twin Cities urban farming clients, almost entirely immigrant farmers, we developed expertise in certain areas of local law, especially direct marketing rules and land use regulation. In other jurisdictions, we work with local counsel.

FLAG is often asked to expand beyond its substantive parameters, and we are occasionally persuaded to do so. A large temptation is to move into work areas that are more attractive to funders but that do not closely fit our mission. We could focus more on the legal issues of farmers generally without limiting the work to those who are really struggling. We could become more of an environmental firm with expertise in agriculture, or we could represent people in the organic in-

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<sup>56</sup> The focus of Land Loss has been North Carolina. For information, see LAND LOSS PREVENTION PROJECT, <http://landloss.org/> (last visited Dec. 19, 2016). Other organizations, including legal aid offices, have done excellent work, and other newly developed entities have related missions, but this has not changed the overwhelming dilemma faced when trying to develop a strategy of practice. It should be obvious, but apparently it is not always, that working with other lawyers making a similar effort is important.

dustry as a whole and mainly focus on larger scale organic farmers. We could, in other words, limit our representation of poor people and still do useful and interesting work. We do a good job, however, of avoiding this type of mission drift in our substantive work.

### B. *Written Materials*

FLAG produces thorough and, in theory, accessible materials on important topics. We work hard to make our materials usable for non-lawyers. They are as close to being comprehensive as possible (from a farmer's point of view) so people can depend on the content, and we thoroughly footnote every proposition so that others can follow our footsteps, find how we got to our conclusion, and possibly use the citations in other ways.<sup>57</sup> It also makes revising materials more convenient if the legal authority is explicit. It is easy to underestimate the time and work necessary to write something that is accessible and accurate, easy to overestimate the level to which a text is accessible, and very easy to make a mistake when translating the law into something useable for our clients. We sometimes think of our writing as having a FLAG style that must be learned. Typical FLAG produced books are *A Farmers' Guide to Minnesota Lending Law*,<sup>58</sup> *Farmers' Guide to FmHA*,<sup>59</sup> and *Farmers' Guide to Disaster Assistance*.<sup>60</sup> There is really nothing else like them. They are explicitly from the farmer's perspective, long, contain hundreds of footnotes and, fair warning, are dry as dust.

### C. *Farm Advocates*

FLAG has always sought to work with farm advocates. As one would guess, there is a great deal to learn from farm advocates. Some FLAG lawyers absorbed farm issues by traveling in a car with a farm

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<sup>57</sup> At least in agriculture, there is a notable difference between a one-page summary of a topic or issue and a comprehensive effort to understand and explain the crucial, detailed issues involved and the extent of the rights of the farmer on an issue.

<sup>58</sup> This book covers mortgages, contracts for deed, secured credit, unsecured credit and judgments, lease of land and equipment, farmer-lender mediation, and other issues. In essence, it is a 250-page account, with many hundreds of footnotes, of rights of a farmer borrower and the various ways lenders can and cannot enforce a debt. FARMERS' GUIDE TO MINNESOTA LENDING LAW (SECOND EDITION), FLAG, INC. (Mar. 1, 2013), <http://www.flaginc.org/publication/farmers-guide-to-minnesota-lending-law-second-edition/>.

<sup>59</sup> This book, hundreds of pages long, explains in detail the rights of borrowers who got farm loans from USDA, FARMERS' GUIDE TO FMHA (FOURTH EDITION), FLAG, INC. (Apr. 9, 1990) [hereinafter FARMERS' GUIDE TO FMHA], <http://www.flaginc.org/publication/farmers-guide-to-fmha-fourth-edition/>.

<sup>60</sup> Also hundreds of pages long, this book describes all federal disaster assistance programs that could apply to farmers. FARMERS' GUIDE TO DISASTER ASSISTANCE (SIXTH EDITION), FLAG, INC. (June 1, 2008), <http://www.flaginc.org/publication/farmers-guide-to-disaster-assistance-sixth-edition/>.

advocate from farm house to farm house and meeting to meeting for days at a time. A famous FLAG moment has a new FLAG lawyer asking a farm advocate “What do they do with those little packages of hay after they get them tied up?”<sup>61</sup> She worked another twenty years at FLAG. The lesson for new FLAG lawyers that would come along over the next two decades: if this young lawyer from urban Chicago and Yale can figure it out, so can you. No need to be a farmer to begin. You do, however, need to pay attention to farm advocates at every opportunity.

FLAG materials are explicitly designed to be used by farm advocates. We look to farm advocates for which questions to address, and they can poke and prod to uncover the ambiguities and gaps in the writing itself. FLAG lawyers often do presentations – we call them trainings – exclusively for farm advocates. This allows a level of detail and thoroughness of interaction that is not possible in mass farmer meetings. FLAG lawyers also provide backup up for advocates and help answer specific questions raised by advocates. Farm advocates sometimes delight in stumping lawyers on legal matters and look unfavorably on speculative guessing by lawyers. An internal FLAG mantra is that if you do not know the answer to a question, you best say so, promise to look it up, and follow up quickly.

#### *D. Lawyers and Legal Organizations*

FLAG has a somewhat ambivalent relationship with other lawyers, the legal profession, and legal organizations. We try to stay involved with professional organizations that concern themselves with agricultural law. This generally means making presentations at Continuing Legal Education (CLE) seminars in hopes that the private bar can be convinced to take on low income clients. We also learn many things at conferences and CLE seminars. Technical advice on how to repossess equipment or foreclose on real estate, after all, is information, presented in a reverse image, on how to represent borrowers.<sup>62</sup> FLAG also has been a longstanding member of public interest law organizations, such as the National Legal Aid and Defender Association (NLADA), and has made presentations at NLADA conferences with the hope of convincing people to represent farm clients. Additionally, FLAG counts as valuable allies and board members some law

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<sup>61</sup> A four-minute video on YouTube answers this question. See *BALING HAY INTO SMALL SQUARE BALES*, YOUTUBE.COM (June 1, 2008), <https://www.youtube.com/watch?v=N1ZZoNy5ysY>.

<sup>62</sup> Interesting, sympathetic, nice people attend such meetings. One will also hear about unfortunate work – for example, clever efforts to prevent USDA food safety inspector access to meat processing plants.

school academics. We have had a close relationship with legal services organizations in Minnesota and other states.

In choosing areas of substantive expertise, we avoid competing with the private bar. The logic is that there is plenty of work private firms are willing to do, so why should FLAG do the same work? We can simply refer people. Further, we always hope to convince people in larger firms to do pro bono or limited fee work on certain matters, so it does not make sense to antagonize them with competition. For example, the private bar is willing to help people create farm cooperatives. Because certain big firms have the expertise for very large cooperative clients, they are often willing to help smaller cooperatives for relatively modest fees.<sup>63</sup> Cooperative law is complicated and involves significant and peculiar federal income tax considerations. FLAG may, however, help farmers with very small cooperatives when those groups are unable to pay for cooperative lawyers. A second example is bankruptcy. In some parts of the country, there are experienced bankruptcy lawyers that understand agriculture and do a nice job with farm bankruptcy cases. A separate bankruptcy chapter, Chapter 12, can be an effective tool for farmers if used correctly, so it is important for farmers to have aid in understanding and using it.<sup>64</sup> FLAG is good at identifying candidates for bankruptcy, but we have never developed the practical expertise to handle bankruptcies ourselves.

### *E. Farmer Trainings*

FLAG lawyers train farmers using presentations. Over the years, we have provided hundreds of training presentations attended by tens of thousands of farmers. Unless the organization has a different name for it, internally at least, we call them trainings. These are almost always associated with a grass roots farm organization, although events sponsored by governmental entities, for example state departments of

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<sup>63</sup> Farm cooperatives, which have an immense transformative potential, are at present dominated by monumentally sized organizations. Some thirty agricultural cooperatives each have revenues of over a billion dollars per year, and the largest 100 cooperatives have a total of more than 50 billion dollars in assets. For an example of what has been possible with cooperatives, see JESSICA GORDON-NEMBARD, *COLLECTIVE COURAGE: A HISTORY OF AFRICAN-AMERICAN COOPERATIVE THOUGHT AND PRACTICE* (2014) [hereinafter *COLLECTIVE COURAGE*], or, for that matter, W.E. BURGHARDT DUBOIS, *ECONOMIC CO-OPERATION AMONG NEGRO AMERICANS* (1907). For data on large agricultural cooperatives, see Eldon Eversull, Sarah Ali & David Chesnick, *Top 100 Co-ops's Sales Soar 9 Percent Over 2012*, 2014 *RURAL COOPERATIVES* 8.

<sup>64</sup> National Consumer Law Center publications on bankruptcy include an excellent discussion of Chapter 12. See HENRY J. SOMMER, JOHN RAO, SUSAN A. SCHNEIDER, TARA TWOMEY & GEOFF WALSH, *CONSUMER BANKRUPTCY LAW AND PRACTICE* (11th ed., 2016).

agriculture, or land grant university agricultural programs, are also common. This means FLAG lawyers are not responsible for organizing the meeting, ensuring publicity for the meeting, and so on. The theory is that organizers are good at organizing, and we therefore use a division of labor. If a meeting is organized by an actual farm group, the leadership of the organization can explain the sorts of issues of the most concern at the time, although the topic can change relatively quickly. These trainings work best when there are materials available to distribute to people, but sometimes that is not possible. We take pride in making presentations understandable and precise. An interesting and important part of farm organization trainings is that lawyer participation itself draws farmers to meetings and is an organizing tool for the farm group.

#### *F. Litigation, Legislative, and Administrative Advocacy*

FLAG has an ambivalent relationship with litigation. Given our limited resources, litigation on behalf of individual clients has almost never been a practical option. Virtually all litigation FLAG participates in is in conjunction with a farm organization. FLAG only works on litigation with organizations that we know well and trust, if the stakes involved seem very high, and the chance of success, however that is defined by the client, seem reasonable. Clients tend to be more excited about using litigation than we are. In general, we only litigate when we have the resources to complete it. We always fear that one large unfunded lawsuit could sink FLAG forever. FLAG will work on discrete parts of litigation, sometimes, for example working as an expert for a firm that is working on a case we see as within our mission.

Much of the work of our client farm organizations involves legislative action or efforts to change administrative policy. Among the ways FLAG lawyers help organizations is to identify whether an issue requires a legislative change or an administrative action. Far more often than filing a lawsuit or threatening to file a lawsuit, FLAG helps clients propose legislation, draft testimony, comment on proposed rules or administrative policies, and write letters to administrative agencies. When our clients are well-informed on various administrative law options, they are effective advocates.

#### *G. Staffing, Community Involvement, and Office Culture*

There are many ways to think about how to staff a public interest law firm and the culture that would best serve such an organization.<sup>65</sup>

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<sup>65</sup> As is noted in *REBELLIOUS LAWYERING*, *supra* note 2, at 9, we know relatively little about the way small public interest law offices actually function.

FLAG prefers to hire lawyers for what we hope is the long term given the complex substantive work and the frankly unfamiliar world of agriculture that FLAG lawyers need to learn. To do this, FLAG offers good benefits and has tried to pay people about what a legal services lawyer of similar experience would earn. It has been difficult to raise money to pay people at this scale, and some funders balk at how expensive we are.

Ideally, FLAG lawyers would be a lot like our clients. We would be farmers, would be racially diverse, and would often be female. Lawyers would live and be active in the community of our clients.<sup>66</sup> These aspirations confront uncooperative realities at nearly every turn.<sup>67</sup>

We do not assume that FLAG lawyers need a background in agriculture. There are not many people who have experience in farming and who go to law school or, for that matter, college. Further, growing up on a farm in one part of the country may not tell you much about what happens on a different type of farm in a different region. Ultimately, we think, if you are clever, committed to social equality, and interested, then everything else can be learned on the job.

In FLAG's work with Hmong farmers, it has been essential to have a lawyer who speaks Hmong.<sup>68</sup> We function better, even in a small office, if we have a support staff person who speaks Hmong. Further, trusting relationships require a well-developed familiarity with farmers and their culture, their farms, and the farmers markets where they sell.

Finally, in terms of a work culture, FLAG has thrived when clever and skilled lawyers worked more hours than should reasonably be expected.<sup>69</sup> Additionally, in our best years, we each had areas of special expertise but were, to a significant extent, interchangeable on many substantive matters. Our best written work products have gone

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<sup>66</sup> The aspiration is well described as “ground[ing] work in the lives and communities of clients.” *REBELLIOUS LAWYERING*, *supra* note 2, at 30-38, provides a narrative of what this might look like.

<sup>67</sup> Our lawyers have mainly been white and female.

<sup>68</sup> The primary attorney on staff is Hmong, has family members that farm and sell in the area, and our organizer farms. It is hard to imagine this work proceeding successfully without this level of contact with the farmers.

<sup>69</sup> The notion that a nonprofit public interest firm is appealing because one can avoid working long hours and can escape concern for financial pressures affecting the viability of the office does not reflect lawyer experiences at FLAG. For a discussion of “salaried cause lawyering” that suggests such pressures are minimized, see *STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONAL, AND CAUSE LAWYERING* 80-88 (2014). Deborah Rhode, who studied dozens of organizations (virtually all of them were much larger than FLAG), noted that nearly all the organizations studied “faced major challenges raising revenue.” See Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 *STAN. L. REV.* 2027, 2056 (2008).

through multiple person drafts and edits. That is a difficult culture to develop and maintain.

One of the less discussed aspects of principles of rebellious lawyering is an insistence on ongoing intellectual curiosity about the social, economic, and historical bases of our current circumstances. Listening to clients and the community and constantly experimenting with new ideas is important for rebellious lawyering, but so is an intellectual knowledge of the context of one's work. One of the not so rebellious lawyers described by López, for example, shows little intellectual curiosity about the origins of problems in the community, knows little of research centers, self-help groups, other legal offices, and others that might have useful information.<sup>70</sup> The do-gooder lawyers that prompted López to think that the whole lawyering project should be destroyed and rebuilt knew little of the "political economy" of jobs, labor migration and other important matters affecting East Los Angeles.<sup>71</sup> The not rebellious lawyers, we read, have only a "modest grasp" on how large structures – regional, national, and international or political, economic, and cultural – shape and respond to challenges to the status quo.<sup>72</sup> Every area of substantive law, and every sector of the economy, is complicated. Agriculture is no exception. At FLAG, doing one's best to keep up with what is happening in the world that affects our clients mainly seems like an implicit assumption. Farm magazines, agribusiness trade periodicals, and the like always float through the office.<sup>73</sup> The best sources tend to be publications by our client organizations.<sup>74</sup> If FLAG lawyers did not know the basics in the agricultural realm, our effectiveness as lawyers would be limited. For most FLAG lawyers, though certainly not all, the agricultural world is interesting. For some FLAG lawyers, however, a nearly opposite problem arises. Curiosity about policy and the larger economic world can lure one into acting more like a think-tank and less like a law firm with clients. We sometimes struggle to resist the temptation to move toward the former. There are many people writing and speaking about farm and food policy. With notable exceptions, such as Land Loss Prevention Project, and a few others, few

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<sup>70</sup> REBELLIOUS LAWYERING, *supra* note 2, at 16.

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.* at 24. Good lawyers are in contact with policy makers, lobbyists, and think tank types. *Id.* at 33.

<sup>73</sup> Many such periodicals are now on line. But not all. See, for example, the wonderful GRAZE, THE MAGAZINE THAT'S "BY GRAZIERS, FOR GRAZIERS" out of Wisconsin. Grazing is a sustainable alternative to concentrated livestock operations for dairy, beef, hogs, and poultry producers.

<sup>74</sup> See, e.g., THE LAND STEWARDSHIP PROJECT NEWSLETTER, <http://landstewardship-project.org/about/landstewardshipletter> (last visited Dec. 19, 2016).



lawyers represent struggling farmers. When at our best, we let our grass roots farm organization clients articulate policy goals and advocate for those policies.

Setting aside FLAG's work with immigrant farmers in the Twin Cities for a moment, it is difficult, if not impossible, for lawyers to live in and be a part of our client community in the way that is envisioned in *Rebellious Lawyering*. Therefore, we lose the rebellious lawyering form of solidarity that comes from sharing the experience of the community of a client. For our work with non-white farmers, this problem is magnified because, with a few exceptions, our lawyers have been white and FLAG has never employed an African American lawyer.<sup>75</sup> "Great, here comes the white, hippy lawyer from the North to Albany, Georgia," is what you hear in your mind sometimes.<sup>76</sup> FLAG tries to combat this difficulty in several ways. For instance, long-term relationships are necessary. These are only possible by working with an organization over time, being conscientious, respectful, following through on tasks, being reasonably sensitive – really just doing a good job of being a person and a lawyer. Easily said, of course, but very challenging in practice.

One of the most important lessons of *Rebellious Lawyering* is twofold. First, rebellious lawyering requires a connection to clients that is vastly more intimate and mutual than traditional attorney-client relationships. Cultural, racial, gender, and language differences present barriers that are profoundly important to navigate. The required level of shared understanding is always hard to accomplish, and that is true even if one shares a great deal with his or her clients. *Rebellious Lawyering* is a reminder for me that even when in small, struggling, rural Midwestern towns like the one in which I grew up, the level of connection that is the basis of the lawyering one hopes for is not immediate or inevitable. That attorney-client connection, in other words, is harder than it looks.

The second half of this essential *Rebellious Lawyering* argument is that with a conscious effort a better connection between client and attorney is possible. Recognizing the distance between the lawyer and the client can seem intimidating. While an understanding of the dis-

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<sup>75</sup> In FLAG's *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C.1999), work, described below, the Monitor hired a number of African American attorneys that worked on *Pigford* but did not work at FLAG.

<sup>76</sup> Images of Konstantin Levin, Tolstoy's noble in *Anna Karenina*, appear as well. Levin enters fields, harvests grain with great effort in an apparently genuine effort to minimize in some way the distance between a nobleman landlord and his Russian peasants. The gesture is puzzling and amusing to the peasants. Some Tolstoy readers find Levin's field work admirable. I am not so sure. See LEO TOLSTOY, *ANNA KARENINA* pt. 3, chs. 2-5 (Richard Pevar & Larissa Volokhonsky trans. 2004) (1887).

tance between a lawyer and a client is necessary for lawyering rebelliously, so also is an understanding that with effort and care these barriers can – in part – be transcended. Fear of mistakes can be paralyzing. The few general principles that would almost always seem to apply can sound banal. For example, one should absorb criticism, deserved or not, without defensiveness. Do not expect to have your work accepted and valued until you have actually done something useful and treated people with dignity. Listening well, as *Rebellious Lawyering* reminds us often, seems essential. On the other hand, everyone is different, and for each person the day-to-day interactions implied by *Rebellious Lawyering* will inevitably vary greatly and will depend on one's own personality. In my estimation, there can be no truly universal rebellious lawyering formula. To a surprising extent, however, rebellious lawyering – really, in the end, living a good life – is possible.

#### IV. SIX EXAMPLES OF FLAG'S EFFORTS

Six examples of FLAG efforts are discussed below and evaluated in terms that are suggested by *Rebellious Lawyering*. These examples were picked to include as many different lawyers as possible and to include efforts that, cumulatively, span the thirty years of FLAG's existence. It would be hard to say to what extent they are representative of FLAG's work, but in some important respects, I believe they are. In these examples, some things worked out reasonably well, some did not. The below cases include instances in which I think FLAG was not especially successful. The interpretation of the work in these examples, it must be emphasized, is my own.

##### A. *USDA Foreclosures, Coleman v. Block, and the Follow-Up*

In *Coleman v. Block*, the plaintiffs argued that USDA was in the process of foreclosing on tens of thousands of farmers without due process. The case was certified as a class action and temporarily stopped 80,000 foreclosures.<sup>77</sup> Ultimately, thousands of farmers in the plaintiff class stayed on their land. The case was initially the creation of private firm lawyers who had a farm law practice. FLAG lawyers subsequently handled the litigation. It was not, therefore, farm organ-

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<sup>77</sup> The case was certified as a class, made a nation-wide class, and an injunction was ordered that stopped the foreclosures. See *Coleman v. Block*, 562 F. Supp. 1353 (D.N.C. 1983); *Coleman v. Block* 100 F.R.D. 705 (D.N.D. 1983); *Coleman v. Block*, 580 F. Supp. 192 (D.N.D. 1983). See also James T. Massey, *The Coleman Decision: What Does it Mean for You?*, 18 CLEARINGHOUSE REV. 704 (1984). The 1984 film *Country*, with Jessica Lange and Sam Sheppard, got a number of things right in the depiction of a family facing foreclosure by USDA during this period, and the film includes a brief mention of the lawsuit at the end.

ization-driven litigation. The case is interesting for a few reasons. Here, the crisis in the early 1980s was so immense, so acute, and so intensely legal that the initial lawyers should not be criticized for not following what we might think of as rebellious lawyering principles.

From a rebellious lawyering perspective, however, interesting opportunities were seized in the wake of halting the foreclosures. First, farm organizations had the opportunity to lobby Congress to make the temporary ban on foreclosures more effective and to create a way for debt to be serviced. This resulted in the 1987 Agricultural Credit Act. It codified into statute the substantive and procedural protections that the court required.<sup>78</sup> FLAG worked with groups to craft the 1987 Act and, nearly as important, the rules implementing it.<sup>79</sup>

FLAG lawyers then spent months traveling through farm country presenting at meetings of farmers and farm advocates to explain the 1987 Act and what it meant. The rights of borrowers included a counter-intuitive and complicated set of options and procedures that, when used correctly, was a powerful means of keeping farmers on the land. It also required a precise and timely set of actions by borrowers. FLAG wrote a book on the rights of borrowers and created a “game board” to help people work through where they were in the USDA loan servicing process.<sup>80</sup> Thousands of these books were used all over the country. *Coleman* is an example of how rebellious lawyering principles can work well in large litigation. It is also an instance in which it was possible to make headway in litigation without the level of consultation and group participation that one would expect from rebellious lawyering.

### B. *Pork Checkoff and the Campaign for Family Farming*

Once upon a time, hog production provided a crucial source of income for farmers of very modest means. Marty Strange, in one of the best books written about American agriculture, put it this way in 1988:

For years, the hog was the beginning farmer’s best moneymaker. Older, better established farmers were especially pleased to leave the time-consuming, vigilant job of taking care of pregnant sows and baby pigs to young farmers. The steady income from selling two crops of pigs per year, the minimal investment requirement in facilities, and the efficiency with which the animal converts corn into

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<sup>78</sup> Agricultural Credit Act of 1987, Pub. L. 100–233, 101 Stat. 1568 (1988).

<sup>79</sup> Lengthy regulations are explained in several versions of FARMERS’ GUIDE TO FMHA, *supra* note 59.

<sup>80</sup> Farmers remember seeing the Gameboard, which in appearance resembled Candy Land or Chutes and Ladders, on the wall in the USDA offices. Farmers would call with a question, and say, “I’m at step four.” They meant their place along the Gameboard.

meat all made the hog an ideal animal for the beginning farmer with time and enthusiasm for the job, but not a lot of money. Many Iowa farms started with little more than the willing labor of a young farm couple and two dozen sows.<sup>81</sup>

As even economists at USDA have acknowledged, one of the most striking features of the U.S. hog industry in recent decades has been the rapid shift to fewer and larger operations.<sup>82</sup> There were roughly 330,000 hog farms in the country in 1982. By 2007 that had dropped to 75,000 and by 2012 to about 56,000.<sup>83</sup> The social, economic and environmental consequences of this transition have been profound.<sup>84</sup> In the midst of this decline, FLAG and its clients sought to stop an especially galling policy by which USDA taxed small and independent hog farmers and used the proceeds to promote large-scale hog operations. The outcome was not successful.

USDA has the authority to establish what are technically called promotion programs. These promotions are widely known as check-offs. Producers of a commodity are forced to pay into a fund that then promotes the commodity “generically.”<sup>85</sup> “The Other White Meat,” “Beef, its What’s for Dinner,” and other familiar marketing slogans, are one product of these checkoffs. Checkoffs raise tens of millions of dollars per year from producers.

One FLAG client, a group of grass roots farm organizations called Campaign for Family Farms, forced USDA to call a referendum among producers to decide whether to continue the pork checkoff.<sup>86</sup>

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<sup>81</sup> MARTY STRANGE, *FAMILY FARMING: A NEW ECONOMIC VISION* 156 (1988). Sows are the mother hogs.

<sup>82</sup> WILLIAM MCBRIDE & NIGEL KEY, *USDA ECON. RES. SERV., U.S. HOG PRODUCTION FROM 1992 TO 2009: TECHNOLOGY, RESTRUCTURING, AND PRODUCTIVITY GROWTH* (2013); NIGEL KEY & WILLIAM MCBRIDE, *USDA ECON. RES. SERV., THE CHANGING ECONOMICS OF U.S. HOG PRODUCTION* (2007); WILLIAM D. MCBRIDE AND NIGEL KEY, *USDA ECON. RES. SERV., CHARACTERISTICS AND PRODUCTION COSTS OF U.S. HOG FARMS, 2004* (2007).

<sup>83</sup> See USDA, *NAT’L AGRIC. STAT. SERV., 1982 CENSUS OF AGRICULTURE, TABLE 29: HOGS AND PIGS-INVENTORY: 1982 AND 1978* (1984), <http://usda.mannlib.cornell.edu/usda/AgCensusImages/1982/01/51/121/Table-29.pdf>; USDA, *NAT’L AGRIC. STAT. SERV., 2007 Census of Agriculture, TABLE 20. HOGS AND PIGS - SALES: 2007 AND 2002* (2009), [https://www.agcensus.usda.gov/Publications/2007/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_020\\_022.pdf](https://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_020_022.pdf); USDA, *2012 CENSUS OF AGRICULTURE*, *supra* note 10, at 22.

<sup>84</sup> See the various Pew Commission Reports, and their predecessors cited in *CENTER FOR A LIVEABLE FUTURE, JOHN HOPKINS, INDUSTRIAL FOOD PRODUCTION IN AMERICA: EXAMINING THE IMPACT OF THE PEW COMMISSIONS PRIORITY RECOMMENDATIONS* (2013).

<sup>85</sup> A short description of the programs that includes their legal and regulatory basis, is GEOFFREY S. BECKER, *CONGRESSIONAL RESEARCH SERVICE, FEDERAL FARM PROMOTION (“CHECK-OFF”) PROGRAMS* (2008).

<sup>86</sup> FLAG worked closely with our clients to shape the rules for a petition drive that triggered the referendum, the criteria to be applied to deciding which farmers could vote, and other matters, such as how many signatures were required, who could sign, what was the total number of hog producers. These and several other legal questions were crucial

Our client's objection to the checkoff was that by promoting generic pork and taking positions that resisted environmental and animal welfare regulation of the hog industry, the checkoff harmed sustainable and family-sized hog operations.<sup>87</sup> Our clients mobilized thousands of farmers across the Midwest and the South and, to the utter surprise of almost everyone, the checkoff was struck down in a referendum of tens of thousands of hog farmers. USDA then reversed position, abandoned the conclusion of the referendum, and decided to retain the checkoff.

The subsequent litigation challenging USDA's actions was controlled from the outset by the clients. After success in federal district court (holding the checkoff "unconstitutional and rotten") and the Sixth Circuit, the United States Supreme Court took cases on both the pork and the beef checkoffs, and the Court, in an opinion written by Justice Scalia, saved the checkoff as a form of government speech.<sup>88</sup>

The organizations, however, used the litigation to organize. Their mode of operation was, to use a scientific term, "hell-raising populism."<sup>89</sup> The pork industry felt so threatened by the Campaign that

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for the fate of the petition and then the referendum. In this instance, legally informed letters to USDA administrators proceeded hand in hand with farmer mobilization.

<sup>87</sup> Elizabeth Becker, *Unpopular Fee Makes Activists of Hog Farmers*, N.Y. TIMES (June 11, 2001), <http://www.nytimes.com/2001/06/11/us/unpopular-fee-makes-activists-of-hog-farmers.html>. Economists and others evaluating the checkoff programs tend not to consider these issues. See, e.g., Gary W. Williams & Oral Capps, Jr., *Measuring the Effectiveness of Checkoff Programs*, CHOICES (2006), <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-05.htm>.

<sup>88</sup> *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). A summary of the administrative and litigation history is Jennifer Williams Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That The Legal Battles Have Quieted*, 14 DRAKE J. AGRIC. L. 149 (2009). For the view that the checkoff is "at the bottom unconstitutional and rotten," see *Mich. Pork Producers v. Campaign for Family Farms*, 229 F. Supp. 2d 772, 791 (W.D. Mich. 2002).

<sup>89</sup> Populist orator Mary Elizabeth Lease is said to have advised farmers to "raise less corn and more hell." The history of farm protest, not emphasized in general education, and certainly not in schools in countryside, seemed important to the farm movements that were FLAG clients. Missouri farmers the author met in the 1980s, for example, had read John L. Shover's, *CORNBELT REBELLION: THE FARMERS' HOLIDAY ASSOCIATION* (1965) with its description of open rebellion during the Great Depression and a government that enforced farm foreclosures with martial law. One FLAG client, Rural Advancement Foundation International – USA (RAFI), traces its history in the Carolinas to the remarkable Southern Tenant Farmers' Union (STFU), another Depression-era movement. For one account of STFU history see, H.L. MITCHELL, *ROLL THE UNION ON: A PICTORIAL HISTORY OF THE SOUTHERN TENANT FARMERS UNION* (1987).

An interesting account of farm protests and activism on this issue is an interview with Rhonda Perry, an activist with the Missouri Rural Crisis Center. See *Grass Roots Missouri Organizing Since 1985: a Variety of Tactics, Consistent Strategies*, IN MOTION (Jan. 24, 2006), [http://www.inmotionmagazine.com/ra06/rperry\\_int05.html](http://www.inmotionmagazine.com/ra06/rperry_int05.html). Perry describes occupying a USDA office, the creation of alternative direct marketing hog farming cooperatives, a fight against the largest hog farm in the country, advocating for rural people to use food

they hired a union busting firm to “investigate” the challenge to the checkoff.<sup>90</sup> Then again, our clients protested at the National Pork Board offices – actually inside the offices themselves – and did not leave right away.<sup>91</sup> Checkoffs continue, and FLAG and our client organizations continue to monitor checkoff operations, budgets, and spending.<sup>92</sup>

### C. Milk Pricing

The production of milk – nature’s “perfect food” – has an interesting and strange history.<sup>93</sup> For the last century, milk production has occurred mainly on modestly sized farms. Those in the farm household tend to milk the cows – twice a day, every day, no exceptions. The inflexible time commitment, long work hours, daily close interaction of feeding, moving, and milking thousand pound animals with minds of their own, common farm deaths and injuries on dairy farms, and long-term damage to dairy farmer bodies has left dairying with the reputation among farmers as perhaps the hardest way of all to make a living.<sup>94</sup>

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stamps, and the organizing and legal fight against the pork checkoff – and how they are all related.

<sup>90</sup> *National Pork Producers Council Accused of Spying on Family Farm Organizations*, FARM AID NEWS & VIEWS (Mar. 1997), <http://www.ibiblio.org/london/agriculture/forums/sustainable-agriculture1/msg00692.html>.

<sup>91</sup> For competing views, see *Farmers Protest Pork Tax*, IN MOTION (Mar. 30, 2001), <http://www.inmotionmagazine.com/usdarej2.html>, and Joe Vansickle, *Protestors Attack NPPC Washington Office*, NAT’L HOG FARMER (Mar. 27, 2001), [http://www.nationalhogfarmer.com/news/farming\\_protesters\\_attack\\_nppc](http://www.nationalhogfarmer.com/news/farming_protesters_attack_nppc).

<sup>92</sup> Checkoffs continue to fund dubious activities. For example, the Egg Board was caught, via the Freedom of Information Act (FOIA), designing and implementing what might be called a smear campaign against a firm that sought to sell egg-less mayonnaise. Checkoff institutions now seek to be exempted from the FOIA. See Ted Genoways, *Schmear Campaign*, NEW REPUBLIC (June 15, 2016), <https://newrepublic.com/article/133871/big-food-doesnt-want-know>, and Dan Nosowitz, *Big Ag Lobbyists Fight to Keep the Public From Knowing What They’re Up To*, MODERN FARMER (May 6, 2016), <http://modernfarmer.com/2016/05/checkoff-programs-freedom-of-information-act/>. Ironically, the checkoff survived because the United States Supreme Court found the checkoff was essentially government speech over which the government exerted substantial control.

<sup>93</sup> The story of how milk reached an iconic status in the United States is well told by E. MELANIE DUPUIS, *NATURE’S PERFECT FOOD: HOW MILK BECAME AMERICA’S DRINK* (2002). Accounts of the economics of milk production are JAMES M. MACDONALD, ERIK O’DONOGHUE, WILLIAM D. MCBRIDE, RICHARD NEHRING, CARMEN SANDRETTO & ROBERTO MOSHEIM, *USDA ECON. RES. SERV., PROFITS, COSTS, AND THE CHANGING STRUCTURE OF DAIRY FARMING* (2007); and JAMES M. McDONALD, JERRY CESSNA, ROBERTO MOSHEIM, *USDA ECON. RES. SERV., CHANGING STRUCTURE, FINANCIAL RISKS, AND GOVERNMENT POLICY FOR THE U.S. DAIRY INDUSTRY* (2016).

<sup>94</sup> For safety, see *Farms Continue to Be Dangerous Places for Children and Adults*, HOARD’S DAIRYMAN (May 1, 2012), <http://hoards.com/blog-5082-farms-continue-to-be-dangerous-places-for-children-and-adults.html>.

Milk pricing is highly regulated.<sup>95</sup> The pricing system has been bizarre and harmful for Upper Midwest dairies, where modestly sized dairies are still common, and beneficial to Western and other dairies with very large dairy farms.<sup>96</sup> For this and other reasons, the Upper Midwest in the mid-1990s was losing thousands of dairy farms annually. Dairy farmers in Minnesota who were a part of the Minnesota Milk Producers Association (MMPA) each gave a small amount to FLAG to launch a litigation strategy.<sup>97</sup> This litigation ultimately failed in the Eighth Circuit, but our clients felt the litigation helped push Congress to change the milk pricing policy.<sup>98</sup> The Minnesota farmers had very modest policy aims and were not interested in movement-style politics. Although different in style and politics from our anti-checkoff clients, MMPA also carefully controlled every step of the litigation.

This case is an example of how hard it is to use the Administrative Procedure Act and other administratively-based litigation strategies to force the government to act reasonably. The District Court initially dismissed the case. The Eighth Circuit reversed. The District Court then held that USDA had not shown there was substantial evidence for retaining the pricing system. USDA issued another formal explanation. The District Court again found the explanation not le-

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<sup>95</sup> The milk pricing system, possibly the most complicated regulatory system yet devised, is explained in ED JESSE & BOB CROPP, U. WIS. EXTENSION, BASIC MILK PRICING CONCEPTS FOR DAIRY FARMERS (2014), <http://future.aae.wisc.edu/publications/a3379.pdf>, and ALDEN C. MANCHESTER & DON P. BLANYET, USDA ECON. RES. SERV., MILK PRICING IN THE UNITED STATES (2001). The origin of the milk marketing system can be traced to the highly perishable nature of milk and the relative difficulty in transporting it long distances. In theory, the system was designed to insure a steady milk supply throughout the year for every region in the country.

<sup>96</sup> The three largest dairy states are Minnesota, Wisconsin, and California. Remarkably, the milk pricing system essentially paid a producer more per pound of milk the further the farm was from Eau Claire, Wisconsin. In other words, the system paid the lowest price per pound of milk to the tens of thousands of family farmers that milked in the Upper Midwest “dairyland” of Minnesota and Wisconsin and higher prices per pound of milk to everyone else. In 1997, most Minnesota and Wisconsin milk came from farms with fewer than 100 cows. The median farm in both states was under fifty cows. Thus, for those two states, the majority of farms are what one would intuitively think of as a family farm where one household does the labor. In California, by contrast, most milk in 1997 came from farms with more than 1000 cows. Those milking were inevitably hired employees. Other western states benefited from these rules, and also had very large farms. In New Mexico, for example, the majority of milk, in 1997, came from very large dairy farms. USDA, NAT’L AGRIC. STAT. SERV., 1997 CENSUS OF AGRICULTURE (1999), <http://agcensus.mannlib.cornell.edu/AgCensus/censusParts.do?year=1997> (showing Table 29 for California, Minnesota, New Mexico, and Wisconsin).

<sup>97</sup> The legal issues are summarized briefly in Lynn A Hayes & James T. Massey, *Milk Marketing Order Challenged*, 7(15) AGRIC. L. UPDATE (1990).

<sup>98</sup> A client view, published in her local newspaper, is Linda Stelling, *Farmers Lobbying for New Milk Pricing System*, PAYNESVILLE AREA NEWS (Jan. 7, 1998), <http://www.paynesvillearea.com/news/headlines/articles/archives/010798/Farmerslobbyingfornewmilk.htm>.

gally adequate. USDA tried again. An exasperated District Court found the formal explanation lacking and struck down the regulation. Eventually, the Eighth Circuit reversed this decision and concluded that the Court should defer to USDA on the rule.<sup>99</sup> The case took about eight years to resolve.

For each of the hearings in Minneapolis federal court, several dozen farmers milked cows in the morning and then drove to the Twin Cities to watch. They thought the Judge should know that the case mattered to them and they wanted to support the lawyers. They dressed in church clothes, sat quietly, and just looked like Minnesota dairy farmers. Memorably, at one hearing a young Justice Department lawyer told the Judge that the milk pricing system “was working.” “We should not,” she observed, “fix what is not broken.” It seemed that everyone in the room shifted in his or her seat ever so slightly, but no one said a word. The hearing ended and the dairy farmers drove home to milk cows again that night.

The dairy industry has continued to move to a fully industrialized model as the number of dairy farms declines and the number of cows per farm increases annually.<sup>100</sup>

#### D. Contract Poultry Production

Virtually all poultry production – that is to say, all of the chicken we eat unless it comes from a highly-specialized niche operation – involves contract poultry production as part of a vertically integrated sector of the economy.<sup>101</sup> Put a different way, there is essentially no widely used open market for broilers. The production system at the farm level is so counter to what most people would think of as farming it makes sense to describe it in detail.<sup>102</sup>

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<sup>99</sup> *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632 (8th Cir. 1998).

<sup>100</sup> JAMES MACDONALD, USDA ECON. RES. SERV., *CHANGING STRUCTURE, FINANCIAL RISKS, AND GOVERNMENT POLICIES FOR THE U.S. DAIRY INDUSTRY* (2015).

<sup>101</sup> Independent operations account for less than 1 percent of all birds produced. Organic and free range operations are each less than 2 percent of the total. JAMES M. MACDONALD, USDA ECON. RES. SERV., *THE ECONOMIC ORGANIZATION OF U.S. BROILER PRODUCTION* 8 (2008) [hereinafter *MACDONALD* (2008)].

<sup>102</sup> A current summary of the economics is JAMES MACDONALD, USDA ECON. RES. SERV., *TECHNOLOGY, ORGANIZATION, AND FINANCIAL PERFORMANCE IN U.S. BROILER PRODUCTION* (2014) [hereinafter *MACDONALD* (2014)]. Vertical integration refers to the ownership and control by a single company of the multiple stages production. Thoughtful academic treatments include C. ROBERT TAYLOR & DAVID A. DOMINA, *RESTORING ECONOMIC HEALTH TO CONTRACT POULTRY PRODUCTION* 5 (2010) [hereinafter *RESTORING ECONOMIC HEALTH*]. Read carefully, university and extension publications are helpful for understanding the industry. *See, e.g.*, DAN L. CUNNINGHAM, U. GA. EXTENSION, *GUIDE FOR PROSPECTIVE BROILER PRODUCERS* (2012), and WILLIAM A. DOZIER, III, MICHAEL P. LACY, LARRY R. VEST, *BROILER PRODUCTION AND MANAGEMENT* (2004). Defenders of this system are not hard to find. The National Chicken Council (NCC) is dependable in



Farmers, often called growers, contract with one of the few large poultry “integrators” to raise “broilers,” chickens destined to be eaten. In general, farmers own the land, buildings and equipment, and perform the labor. The integrator owns the birds (unless they die, then they are property of the grower), and provides feed, drugs, extensive legally binding direction on building requirements and improvements and on day-to-day management. In each production cycle, young birds are delivered to the farm. The farmer feeds and cares for the birds from five to nine weeks – depending on the size of the bird. The birds are then picked up by the integrator. The majority of labor comes from the farmer and or his or her family.<sup>103</sup> Farmers are responsible for the waste the chickens produce, which is substantial.

The legal relationship between the grower and the integrator is established in a production contract.<sup>104</sup> While many farmers deliver on a contract, a production contract is special in that it does not merely require delivery of a certain product; it instead controls the production process on the farm in detail.<sup>105</sup> The contracts are notable for the extent of control exercised by the integrator regarding the required buildings and the farming practices. Growers report that oral representations by integrator employees to prospective and active growers are often radically counter to the written contract.<sup>106</sup>

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this regard. One “study” sponsored by the NCC is THOMAS E. ELAM, NAT’L CHICKEN COUNCIL, LIVE CHICKEN PRODUCTION TRENDS (2015). See also NAT’L CHICKEN COUNCIL, NEW STUDY HIGHLIGHTS BENEFITS OF THE PARTNERSHIP BETWEEN CONTRACT FARMERS AND CHICKEN COMPANIES (2016).

<sup>103</sup> Lee Schrader & John Wilson, *Broiler Grower Survey Report*, in ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS 2-1 (2001) [hereinafter *Broiler Grower Survey Report*].

<sup>104</sup> FLAG writing, intended to be used by advocates, attorneys, and farmers includes: FLAG, CONTRACT POULTRY GROWERS HAVE RIGHTS UNDER FEDERAL LAW (2004); FLAG, YOUR POULTRY CONTRACT IS CUT OFF DUE TO PLANT CLOSING: WHAT SHOULD YOU DO? (2003); DAVID MOELLER, LIVESTOCK PRODUCTION CONTRACTS: RISKS FOR FAMILY FARMERS (2003); *Broiler Grower Survey Report*, *supra* note 103; Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207 (1995); RANDI ILYSE ROTH, CONTRACT FARMING BREEDS BIG PROBLEMS FOR GROWERS, FARMERS’ LEGAL ACTION REPORT (1992).

Production contracts are well analyzed in Neil D. Hamilton, *A Current Broiler Contract Analysis Addressing Legal Issues and Grower Concerns*, in ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS 3-1 (2001).

<sup>105</sup> James MacDonald, *Trends in Agricultural Contracts*, 30(3) CHOICES 1 (2015).

<sup>106</sup> RESTORING ECONOMIC HEALTH, *supra* note 102, at 7. The oral representations “routinely misstate and omit expenses,” for example, and “erroneous expectations are a product of poor information growers receive prior to signing their contract.” Tara Shofner, *Development of the Interactive Broiler Income Spreadsheet*, 82(5) AM. J. AGRIC. ECON. 1240-46 (2000). Information about poultry growing for farmers comes mainly from the integrators. *Broiler Grower Survey Report*, *supra* note 103, at 6. In one survey, nearly half

In general, the contracts, which are take or leave it offers with no negotiation, tend to have the following features. First, they are for a short duration.<sup>107</sup> Although they vary in length, in the main they range from only one month to several years. Nearly half of all producers report that their contracts were flock to flock and therefore covered only the birds in the houses at present. Certainly, most contracts are for a year or less. Second, the contracts require single purpose facilities that are a substantial investment – and therefore almost always involve substantial debt for the farmer.<sup>108</sup> Often, growers are required to update the buildings if they want to continue to receive birds.<sup>109</sup> In theory, once the building is paid off, there would be better returns. In reality, integrator mandates of expensive new equipment often keep growers in debt.

As a practical matter, once farmers make the capital investment, they have little choice but to continue to produce poultry to pay off their debt. A century ago, farms typically had multi-use barns. Barns held grain and hay, provided shelter and a feeding place for livestock, and so forth. This allowed a farm to, over time, shift an emphasis from one commodity to another depending on prices and weather. Contract poultry production facilities are the exact opposite. They have almost no use except raising broilers. FLAG clients are adamant that complaints regarding any of these matters subject growers to integrator retaliation.<sup>110</sup>

With some frequency, contracts are terminated by the integrator despite the large investment the grower has made in single-purpose buildings.<sup>111</sup> Contract terminations and non-renewals are crucial for

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of all farmers earned less money than they had expected when signing contracts. *Id.* at 7.

<sup>107</sup> MACDONALD (2008), *supra* note 101, at 11, 13; Hamilton, *supra* note 104, at 3-7.

<sup>108</sup> Cost estimates vary. Costs for a new housing site, according to University of Georgia Extension, “often exceed \$220,000 per house,” and generally a minimum of two houses is required to make a production unit. An average producer can “easily have \$800,000 or more invested in housing and growing equipment.” CUNNINGHAM, *supra* note 102, at 2. In order to enter a poultry contract a farmer must buy or build a poultry barn that has no economically useful function if there is no contract to raise chickens. For discussion of houses, see as well, MACDONALD (2008), *supra* note 101, at 7-8, who estimates houses cost about \$300,000.

<sup>109</sup> MACDONALD (2008), *supra* note 101, at iv, 14; McDONALD (2014), *supra* note 102, at 32; RESTORING ECONOMIC HEALTH, *supra* note 102, at 7.

<sup>110</sup> This is certainly the case for FLAG clients. Journalists writing about the issue often find it hard to get farmers to speak, even without identification of the farmer’s name, for fear of retaliation. Andrew Jenner, *Chicken Farming and its Discontents*, MODERN FARMING (Jan. 24, 2014), <http://modernfarmer.com/2014/02/chicken-farming-discontents/>; Dave Murphy, *Farmers Look for Justice in the Poultry Industry: Met with Fear, Threats, Intimidation and Hope in Alabama*, FOOD DEMOCRACY NOW (May 26, 2010), <http://www.fooddemocracynow.org/blog/2010/may/28/farmers-look-justice-poultry-industry-met-fear-thr>. See also *Broiler Grower Survey Report*, *supra* note 103, at 6.

<sup>111</sup> Lauren Etter, *Farmers Face Empty-Nest Syndrome Amid Chicken Housing Crisis*,

understanding the contract poultry production system. In most cases, the grower has almost no other way to pay off the cost of the loan for the poultry houses. There are often no alternative processing plants in the area, so in a local sense the integrator has a monopoly.<sup>112</sup> Growers contend that when there is an overlap of feasible processing plants, a form of black listing among integrators prevents growers from moving from one integrator to another, thus circumventing true competition. Not surprisingly, therefore, even where more than one integrator might theoretically hire growers away from the competition, this rarely happens.<sup>113</sup>

Payment to growers is confusing and a source of substantial controversy.<sup>114</sup> Payment and how it is calculated can be a puzzle. Contracts often require payment to be based on complicated formulas that use weight gain of the birds and bird death, and the extent to which birds are condemned during processing. Weighing is done by the integrator. Many growers find the weighing to be suspect. Payment is also generally based on an odd ranking system in which the growers in an area compete with one another for a higher price based on the efficiency of each grower's production.

There is no publicly available data to examine grower returns. Even agricultural extension workers note that anticipating the actual income of a poultry operation is extremely difficult. Therefore, it is nearly impossible to determine the overall financial situations of poultry growers – or for potential growers to get a straight story on what to expect in returns. Even when things go normally, however, poultry farmers certainly make very little for their labor.<sup>115</sup> One Alabama University Extension study, for example, found that for a five-house operation over a fifteen-year period, farmers lost money for ten years.

A farm advocate from the Rural Advancement Foundation International (RAFI), a grass roots North Carolina organization and

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WALL ST. J., (Feb. 12, 2009), <http://www.wsj.com/articles/SB123440092979675383>.

<sup>112</sup> About 60 percent of growers report there is no alternatives to their current contractor. MACDONALD (2008), *supra* note 101, at 13-14.

<sup>113</sup> RESTORING ECONOMIC HEALTH, *supra* note 102, at 5.

<sup>114</sup> Grower contract, even USDA economists admit, “can be quite complex and difficult to understand.” MACDONALD (2014), *supra* note 102, at 26.

<sup>115</sup> H. L. Goodwin, *Spreadsheet for Broiler Farm Economic Analysis*, 4(1) AVIAN ADVICE 1 (2002). Some analysts such as Goodwin resolve this dilemma by asking for data about growers from integrators. Integrators provided names of growers that were drawn from the top one third of growers based on past performance and record keeping. Goodwin then gathered data from the growers. Even with this skewed basis of information Goodwin found that a four-house operation had a net income of about \$9200. As one critic observes, “what is called a net income is really a return to unpaid labor, management equity, and risk.” See also Shofner, *supra* note 106; JANET PERRY ET AL, DAVID BANKER & ROBERT GREEN, USDA ECON. RES. SERV., BROILER FARMS ORGANIZATION, MANAGEMENT, AND PERFORMANCE (1999).

FLAG client, first brought these contract poultry production issues to the attention of FLAG. She and others were beginning to organize poultry contract farmers. When this advocate first began to organize, she and the farmers organizing were so fearful of retaliation that she kept her sole list of active farmers on her person, “and not,” as some added, “in her pocket.” She would not, as the FLAG lawyer recalls, leave it hidden at home. The result was the National Contract Poultry Growers Association (NCPGA), a coalition of state-level organizations in about thirteen states. At its peak, perhaps fifteen years ago, the NCPGA had several thousand members in twenty-seven states.<sup>116</sup>

FLAG’s role in this work was three-fold. First, FLAG worked to help farmers understand what the contract actually said before it was signed. Second, FLAG helped NCPGA craft a legislative strategy to add some basic fairness to the contracts and to prohibit retaliation against farmers who complained about the system. Arguably, much of the system is illegal based on largely unenforced federal law. Third, FLAG served as a clearinghouse for litigation ideas with lawyers who were willing to sue the integrators on behalf of farmers.

The contract poultry system, several years later, retains its basic character. The NCPGA and its affiliates are less active.<sup>117</sup> Legislative efforts are also at a relative standstill. The 2008 Farm Bill called for USDA to enact some basic protections for growers. As USDA prepared to implement the rule, a rider in an appropriations bill prevented USDA from acting.<sup>118</sup> Each year since, a similar rider has made it into law. It may be the case that the economic and political power of integrators – at this point at least – is simply too great for farmers to fundamentally change the system with a legal strategy.<sup>119</sup> The fate of the NCPGA also highlights the point that if there is not a solid grass roots organization to work with, it cannot be created out of thin air. FLAG depends on these organizations.

As one would suspect, there are some common-law remedies for

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<sup>116</sup> *Introduction*, in *ASSESSING THE IMPACT OF INTEGRATOR PRACTICES ON CONTRACT POULTRY GROWERS* 1-4 (2001).

<sup>117</sup> They have not disappeared, however. See Jenner, *supra* note 110.

<sup>118</sup> An account of the statute, the proposed rule, and the successive riders is JOEL L. GREENE, CONGRESSIONAL RESEARCH SERVICE, *USDA’S “GIPSA RULE” ON LIVESTOCK AND POULTRY MARKETING PRACTICES* (2015).

<sup>119</sup> A television show, *Last Week Tonight with John Oliver*, may have triggered some movement on the issue. See Nathaniel Haas, *John Oliver v. Chicken*, POLITICO (June 1, 2015), <http://www.politico.com/story/2015/06/john-oliver-vs-chicken-118510>. See also *Chickens: Last Week Tonight with John Oliver*, YOUTUBE (May 17, 2015), <https://www.youtube.com/watch?v=X9wHzt6gBgI#t=12>. The poultry industry, of course, is fighting back. See Tina Nguy, *Chicken Lobbyists Launch PR Offensive Against John Oliver*, MEDIATE (June 15, 2015), <http://www.mediaite.com/tv/chicken-lobbyists-launch-pr-offensive-against-john-oliver/>.

the practices described above. The most successful litigation on behalf of poultry growers has involved skilled plaintiff trial lawyers in the South who do not appear to heed many of the principles of rebellious lawyering. Their strategy, however, of turning a selective few individual cases into trials in which integrators or other defendants are described as “lyin’, cheatin’, and stealin’” has been somewhat effective. One U.S. District Court jury in Alabama awarded growers \$13.6 million, including nine million dollars in punitive damages, after being convinced that the integrator systematically cheated growers by under weighing the birds as they were delivered for processing.<sup>120</sup>

*E. Discrimination Against African American Farmers and  
Pigford v. Glickman*

Civil rights work is a priority for FLAG.<sup>121</sup> Grass roots organizations, such as the Federation of Southern Cooperatives (Federation) and Arkansas Land and Farm Development have been ideal in rebellious lawyering terms in the sense that they are rooted in the farming community, longstanding, have a significant and active membership, and use farm advocates to support member farmers.<sup>122</sup>

In conjunction with the Land Loss Prevention Project, mentioned above, FLAG and the Federation sought to launch a significant discrimination case on behalf of African American farmers. This generally failed, in part due to lack of funding and interest from the private bar and in part due to legal problems, in particular, a short statute of limitations period for claims under the Equal Credit Opportunity Act (ECOA). Freedom of Information Act (FOIA) requests and FOIA litigation, however, produced records concerning USDA investigation of civil rights complaints that were useful over the long term.

FLAG also sought to work on USDA discrimination issues in unconventional ways. For example, FLAG got a contract from USDA’s Office of Civil Rights to produce a comprehensive handbook for use by USDA civil rights investigators when they investigate farmer discrimination complaints.<sup>123</sup> The handbook described the history of

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<sup>120</sup> *Chicken Growers Unite in Fight Against Processor*, GREENSBORO NEWS (Nov. 30, 1990), [http://www.greensboro.com/chicken-growers-unite-in-fight-against-processors/article\\_afd0494a-9cd1-5ee8-83fe-0b396859f729.html](http://www.greensboro.com/chicken-growers-unite-in-fight-against-processors/article_afd0494a-9cd1-5ee8-83fe-0b396859f729.html). The case was appealed and reported. *See Braswell v. ConAgra*, 936 F. 2d 1169 (11th Cir. 1991).

<sup>121</sup> For a discussion of some pre-1990 work, see BREAKING HARD GROUND, *supra* note 39, at 59-66; *Family Farmers in Poverty*, *supra* note 6; Stephen Carpenter, *Discrimination in Agricultural Lending*, 33 CLEARINGHOUSE REV. 166 (1999); Stephen Carpenter, *USDA Begins to Face Up to Its Own Discrimination*, 9 FARMERS’ LEGAL ACTION REPORT 12 (1994).

<sup>122</sup> Little scholarship exists on these organizations. An exception is COLLECTIVE COURAGE, *supra* note 63, at 193-212, which discusses the Federation.

<sup>123</sup> This effort is summarized in Randi Ilyse Roth, *USDA Discrimination Against Afri-*

USDA discrimination, the law that governs USDA programs, typical patterns of contemporary discrimination, how to identify discrimination under ECOA, how damages might be calculated, and so forth. FLAG even trained USDA civil rights investigators in person regarding how to use the handbook. It is not clear, however, how much this effort changed USDA's historically poor record in investigating discrimination complaints.<sup>124</sup>

In the meantime, lead plaintiff lawyers in *Pigford v. Glickman*, who were not especially familiar with civil rights litigation, and were not known to grass roots African American farming organizations, had success with litigation.<sup>125</sup> In sum, the plaintiffs filed, and when the government raised statute of limitation issues farmers protested, the Congressional Black Caucus mobilized, and Congress included a waiver of the statute of limitations in a much larger bill.<sup>126</sup> Soon, the case settled. Litigation, if we needed a reminder, is always political.

FLAG had little working relationship with the *Pigford* class counsel and thus was not a part of the negotiations leading to a settlement. At FLAG, we mainly looked on from a distance, wrote a careful piece for the Federation of Southern Cooperatives describing how to file a claim in the case, and wondered how we might participate on behalf of our clients without a role on the class counsel team.

Ironically, however, FLAG lawyers ultimately became court appointed neutrals in the case and played a significant role in how the settlement was implemented.<sup>127</sup> A FLAG lawyer was named by the Court as the Monitor, and another FLAG lawyer was named as the Monitor's Senior Counsel. The Consent Decree included provisions for a Monitor that was to solve problems in the implementation of the Decree and to provide a review of the individual determinations that each claimant received in the case.<sup>128</sup> If a claimant was denied in the

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*can American Farmers*, POVERTY & RACE ACTION COUNCIL (2000), [http://www.prrac.org/full\\_text.php?text\\_id=151&item\\_id=1839&newsletter\\_id=48&header=Race+%2F+Racism](http://www.prrac.org/full_text.php?text_id=151&item_id=1839&newsletter_id=48&header=Race+%2F+Racism).

<sup>124</sup> For an overview of discrimination complaints at USDA, see *Discrimination Cases*, *supra* note 27.

<sup>125</sup> For a basic summary, see TADLOCK COWAN & JODY FEDER, CONGRESSIONAL RESEARCH SERVICE, *THE Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers* (2013).

<sup>126</sup> P.L. 105-277, §741.

<sup>127</sup> It seems clear that the parties did not anticipate a significant Monitor role. USDA offered us a small office at the Department. An especially nervous moment for us came to an end when the government chose not to appeal an Order of Reference that allowed denied claimants to provide supplemental information in their Monitor petitions. This had not been a provision in the Consent Decree and turned into a significant factor in the Monitor review of petitions.

<sup>128</sup> The Consent Decree, important Orders, Monitor Updates, voluminous Monitor Court Reports and statistical information about the settlement, USDA internal Handbook

determination, he or she could petition the Monitor, and if the Monitor found a clear and manifest error that would create a fundamental miscarriage of justice the decision was sent back to the original decision-maker for review. Thousands of claimants sought review of their individual denials from the Monitor. The Monitor issued lengthy decisions – probably on average more than twenty pages – for each decision. Claimants prevailed on about half of these petitions, and when returned to the Adjudicator and Arbitrator, these ultimate decision makers agreed with the Monitor roughly 90 percent of the time and reversed the earlier denial. As a result, thousands of individual denials turned into successful claims. Each Track A approved claim resulted in a payment of \$62,500 (\$50,000 in cash, \$12,500 to the IRS on behalf of the claimant), and in some cases debt forgiveness of outstanding USDA loans.<sup>129</sup> In total, the government paid more than one billion dollars to claimants.<sup>130</sup>

As a part of our problem solving role, the Monitor's Office attended more than fifty meetings of claimants that were sponsored by a grass roots farm organization or a historically black land grant university.<sup>131</sup> Thousands of claimants attended these meetings, and individual meetings drew hundreds of people. We met with the parties and the Court for dozens of lengthy in-person meetings. Part of our task was to work through a confounding series of settlement implementation problems with the parties. The parties were on such bad terms with one another they would not meet in the same room. Thus, we held separate in-person meetings in Washington, D.C. – one meeting with the government team, and one with the class counsel team – with

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instructions regarding the settlement, letters sent to the class, redacted examples of Monitor petition decisions, Monitor congressional testimony regarding the case, and other materials are at the Monitor's website, now maintained by the Court: *Office of the Monitor*, USCOURTS.GOV, <http://media.dcd.uscourts.gov/pigfordmonitor/>.

*Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C.1999), documents amount to a vast first person history of African American farming in the second half of the twentieth century. Each Claim Form, letter, request to be admitted late, and petition to the Monitor was a chance for claimants to tell their story. One of our goals as the case ended was to make sure that everything was preserved at the National Archive.

<sup>129</sup> Track A was the streamlined version of the claims process. Claimants could also elect "Track B," which allowed an arbitration, in which the burden of proof was higher, but the awards unlimited.

<sup>130</sup> This is in addition to attorney fees and administrative costs. In brief, there were almost 23,000 class members. More than 15,000 ultimately prevailed on an individual claim. Combined, cash payments to claimants, payments to claimant IRS tax accounts on behalf of claimants, and forgiveness of debt to USDA amounted to about 1.06 billion dollars. Money paid to or on behalf of claimants came from the Judgment Fund. USDA paid Monitor costs.

<sup>131</sup> There is a historically black land grant university in each state across the South. These underfunded institutions have supported African American farmers for more than 125 years.

the same long agenda, the results of which we wrote up and distributed to both parties. In briefings filed on the record, class counsel called a Justice Department lawyer a racist, and DOJ lawyers responded in briefings by calling a class counsel team member a hatermonger. We worked extensively with IRS officials on confusing federal income tax issues for claimants and reviewed in detail every single prevailing claim to determine if the proper debt relief had been awarded by USDA. We wrote and distributed extensive Monitor Updates that described the case and the problems people were encountering with it and received and answered thousands of phone calls and letters. We also worked closely with the Court, other neutrals, various outside counsel, and government investigators of various types. There were many implementation problems to address.<sup>132</sup>

Two issues regarding the case and this work might be of note. First, what should we think about the case as a whole?<sup>133</sup> Second, can working as a court appointed neutral be thought of as rebellious lawyering?<sup>134</sup>

Regarding the merits of the case, our sense from the beginning was that the case was flawed but that our role could make a substantial difference for the class members. A significant amount of academic literature is skeptical of litigation for social reform generally

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<sup>132</sup> The following are examples originating with each party, and one for which it is hard to know the origin: First, class counsel had deadlines to file petitions for Monitor review and was unable to file thousands of the petitions in a timely way. We learned of this days before the petition deadline. Most petitions were eventually allowed. Second, USDA was required to forgive certain outstanding USDA debt for prevailing claimants. For some reason, the Consent Decree did not require all claimant debt to be forgiven. USDA failed to act on debt that the Monitor's office concluded should be forgiven. The Court ordered the Monitor to review every prevailing claim to make sure debt relief was implemented properly. This added millions of dollars to the total debt relief. Third, IRS Forms 1099 did not go out in a timely way for thousands of claimants. This, and the fact that many people believed (because they were told by people who should have known better) that an award was "tax free," led to substantial confusion and failure to file IRS forms in a timely and accurate way. Each of these problems is discussed in the Monitor Court Reports. For a sense of the complications derived from the systematic difficulties based on Form 1099 problems, see INTERNAL REVENUE SERVICE, MEMORANDUM TO SPECIAL COUNSEL TO THE NATIONAL TAXPAYER ADVOCATE: *Pigford v. Schafer*: Debt Relief Issues (2009). A word of advice: The National Taxpayer Advocate is an indispensable resource for low-income taxpayers and should be consulted before any large settlement is negotiated or concluded, and once problems arise should be consulted with immediately.

<sup>133</sup> Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLA L. REV. (2016), is a thoughtful and detailed discussion that includes several references to other materials.

<sup>134</sup> An account of the use of court-appointed neutrals that discusses types of appointments, ethical issues, and the mechanics of how neutrals can be useful is ACADEMY OF COURT APPOINTED MASTERS, APPOINTING SPECIAL MASTERS AND OTHER JUDICIAL ADJUNCTS: A HANDBOOK FOR JUDGE AND LAWYERS (2d ed., 2009).



and of the “hollow hope” of civil rights litigation in particular.<sup>135</sup> The entire concept of antidiscrimination law, for that matter, is suspect for some proponents of civil rights and equality.<sup>136</sup> Further, there is skepticism among many regarding whether class actions of any type can be effective tools for social justice.<sup>137</sup> *Pigford* was a relatively pure example of antidiscrimination litigation and was a class action. Regarding this type of theoretical critique of cases like *Pigford*, we felt that

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<sup>135</sup> See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (2d ed., 2008). López suggests rights litigation can become a way to forestall progressive change. See *REBELLIOUS LAWYERING*, *supra* note 2, at 68.

Ironically, by limiting efforts to reform the Department, and instead providing for a remedy for past discrimination, *Pigford* sidestepped some of the most effective criticisms of litigation for social reform. The fact that the Consent Decree did not include USDA reform was understandably a point of failure in the settlement for some, although it is exactly the sort of institutional civil rights reform that is missing in *Pigford* – a large, slow moving institution, in theory reformed under direct court supervisions – that strikes many academic observers as generally ineffectual.

*Pigford* certainly challenged, unsettled, and destabilized an institution that had seemed insulated from accountability, to apply the thinking used in one defense of public law litigation. The publicity of the case, and the political discussion it triggered, provided more of an impetus for USDA to “respond to previously excluded stakeholders” than did the court-sanctioned remedy itself. See Charles F. Sabel & William Simon, *Destabilization Rights: How Public Law Litigations Succeeds*, 117 *HARV. L. REV.* 1015, 1056 (2004).

<sup>136</sup> See, for example, the discussion, and especially the sources cited, that “cast doubt on the concept of discrimination as a vehicle for achieving equality” in GEORGE A. RUTHERGLEN & JOHN J. DONOHUE II, *EMPLOYMENT DISCRIMINATION: LAW AND THEORY* 37 (2012). One version of this critique is Kimberlé Williams Crenshaw, who makes the careful argument that the notion of antidiscrimination is fundamentally ambiguous, and that when antidiscrimination law takes as its premise the aim of a colorblind society it has incorporated a white majority view that fails to consider other distinctive experiences. See Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988). An accessible discussion of the way antidiscrimination logic can be seen as a form of liberal integrationism, and of the Black Power critique of that ideology, is GARY PELLER, *CRITICAL RACE CONSCIOUSNESS: RECONSIDERING AMERICAN IDEOLOGIES OF RACIAL JUSTICE* 1-40 (2012). These debates emerged decades ago. See, for example, several of the selections in *NEGRO PROTEST THOUGHT IN THE TWENTIETH CENTURY* (Meier & Francis L. Broderick eds., 1965) and the subsequent editions of this collection. A notable contemporary and non-legal analysis of the way race, class, and politics interact in the United States, and of the political strategies that might move us forward, is Adolph Reed, Jr., *The “Color Line” Then and Now: Souls of Black Folk and the Changing Context of Black American Politics*, in *RENEWING BLACK INTELLECTUAL HISTORY: THE IDEOLOGICAL AND MATERIAL FOUNDATIONS OF AFRICAN AMERICAN THOUGHT* 252-303 (2010). Reed emphasizes that racism in the United States has not been self-sustaining. A broad sociological and historical account of how we got to this place, and how we might get out of it, is ALI RATTANSI, *RACISM: A VERY SHORT INTRODUCTION* (2007).

<sup>137</sup> A summary of the logic of class actions and a consideration of the main critiques of them is DEBORAH R. HENSLER, NICOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOAD AND PRIVATE GAIN* (2000). Shauna I. Marshall shows that class actions, when used well, can be effective reform mechanisms in *Class Actions as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 *U.S.F. L. R.* 911 (1995).

the framework established in the Consent Decree, and in particular the scale of resources made available to class members, made the case one that was worth our participation. FLAG clients, no strangers to the ambivalent results of litigation for civil rights and the way civil rights progress can advance, stall, and recede, seemingly all at once, agreed that it was worth it for FLAG lawyers to participate in *Pigford*.

People criticize *Pigford* on several counts. The case provided little in the way of institutional reform.<sup>138</sup> Many note that despite a significant total payout, the awards were not close to the harm done to many of the farmers.<sup>139</sup> Others note that many deserving claimants lost their individual claims, that tens of thousands of putative claimants missed the deadline and were left out of the settlement, and many suggest that undeserving claimants were allowed to prevail. Some argue that many fraudulent claims were filed and that the case was merely a political proxy for slave reparations.<sup>140</sup> There is some legitimate basis for nearly all such criticisms, both broad and narrow – ex-

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<sup>138</sup> USDA admitted no wrongdoing. Successful claimants received priority consideration for future loans from USDA and an extra level of technical assistance, but this is not the same things as institutional reform. As critics have observed, the lawsuit appears to have resulted in little change of personnel or regulations at USDA.

<sup>139</sup> NATASHA BOWENS, *THE COLOR OF FOOD: STORIES OF RACE, RESILIENCE AND FARMING* 29-34 (2015).

<sup>140</sup> Sharon La Franiere, *U.S. Opens Spigot After Farmers Claim Discrimination*, N.Y. TIMES (Apr. 25, 2013). See also CONOR FRIEDERDORFT, *How Did Progressive Journalists Get Pigford So Wrong*, ATLANTIC (May 7, 2013), <http://www.nytimes.com/2013/04/26/us/farm-loan-bias-claims-often-unsupported-cost-us-millions.html>. For a criticism of the Times report, see Pete Daniel, *Farmland Blues: The Legacy of USDA Discrimination*, SOUTHERN SPACES (Oct. 30, 2015), <https://southernspaces.org/2013/farmland-blues-legacy-usda-discrimination>; and Susan Schneider, *Discrimination at USDA: Response to the New York Times*, AGRIC. L. BLOG (May 1, 2013), <http://aglaw.blogspot.com/2013/05/discrimination-at-usda-response-to-new.html>.

Fewer concerns seem to be expressed when USDA farm programs result in improper payments. Information on such problems is widely available. See, e.g., US GOV'T ACCOUNTABILITY OFFICE, GAO-14-428, FARM PROGRAMS HAVE BEEN ELIGIBLE FOR MULTIPLE PROGRAMS AND FURTHER EFFORTS COULD HELP PREVENT DUPLICATIVE PAYMENTS (2014); US GOV'T ACCOUNTABILITY OFFICE, GAO-13-503, FARM PROGRAMS: USDA NEEDS TO DO MORE TO PREVENT IMPROPER PAYMENTS TO DECEASED INDIVIDUALS (2013); USDA OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF AGRICULTURE IMPROPER PAYMENTS ELIMINATION AND RECOVERY ACT OF 2010 REVIEW FOR FISCAL YEAR 2013 (2014); US GOV'T ACCOUNTABILITY OFFICE, GAO-13-781, FARM PROGRAMS: CHANGES ARE NEEDED TO ELIGIBILITY REQUIREMENTS FOR BEING ACTIVELY INVOLVED IN FARMING (2013).

Certainly fraud in *Pigford* is not to be excused, but critics do not have any idea of how much fraud occurred, and further tend not to think about how *Pigford* might compare with other USDA programs, or for that matter with federal income tax. GAO and IRS estimate that the federal income “tax gap,” defined as the difference between taxes owed and taxes paid on time as has been a persistent problem for decades. At present the tax gap is about 17 percent of the total that IRS is legally owed. This is of course hundreds of billions of dollars annually. See US GOV'T ACCOUNTABILITY OFFICE, GAO-12-651T, TAX GAP: SOURCES OF NONCOMPLIANCE AND STRATEGIES TO REDUCE IT (2012).

cept for the notion that the case was riddled with fraud. We often thought that we would have crafted a different settlement, but we always concluded that the case was a very good thing and that our participation improved the result. In total, very substantial resources were moved in the right direction because of the litigation.

One could fairly argue that in the role of a court appointed neutral, FLAG might have done good work, but it was not rebellious lawyering.<sup>141</sup> This may well be the case. FLAG lawyers, however, would have had no significant role in the case if we had not worked extensively with African American farm organizations. These clients approached FLAG about taking on the role as Monitor. To the Court, it seemed to matter that we were experts on the USDA programs in question and had a good working relationship with African American farm organizations. We also applied what could be thought of as rebellious lawyering principles in the way we identified implementation problems and responded to them. The Monitor ended up being the central conduit of information for a 23,000-member class that was spread throughout most of the South. Accurate information, delivered in person with the authority of the Court, was especially important because class counsel did not provide a great deal of information to the class. More importantly, several people and organizations moved through the countryside taking advantage of potential claimants by promising that for a payment of two hundred dollars – or some other amount – prospective claimants would be allowed in the case.<sup>142</sup> We tried hard to make our petition decisions understandable to as many claimants as possible. Even if the decision was not in favor of the claimant, we hoped that the claimant would know that he or she had been heard and that someone had looked closely at the case. In person, our most important job in many instances was to explain to people that their claims had been denied and that there was not a way for the decision to be reversed.

#### *F. Hmong American Immigrant Farmers*

A significant portion of FLAG's work is on behalf of immigrant farmers in Minnesota and Wisconsin – particularly Hmong farmers. The region has been a significant destination point for Hmong immi-

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<sup>141</sup> Someone in Congress apparently thought the Monitor warranted an inquiry. Thus inspiring the report US GOV'T ACCOUNTABILITY OFFICE, GAO-06-469R, PIGFORD Settlement: The Role of the Court-Appointed Monitor (2006). A word of advice: If you become the subject of a GAO investigation, cooperate fully, answer all questions in detail, and ask to review drafts of the report.

<sup>142</sup> Some of these people may have been delusional. More often, I believe, they were no better than confidence artists. Farmers are often the target of such scams, and novel legal theories are a common element of the scam.

grants from Southeast Asia.<sup>143</sup> Most, though certainly not all, of these immigrants are now citizens. They generally have very low incomes, and in many cases they have little formal education. Historically a rural people, many Hmong immigrants in the Upper Midwest farm. The farms are very small, usually one to ten acres in size, generally rented within the Twin Cities metropolitan area, often for only one year at a time, and almost all the farm product is marketed directly, especially at farmers markets.<sup>144</sup> In the suburbs of the Twin Cities, roughly 70 percent of all farmer market sellers are Hmong. In the Cities themselves, the proportion is about half.

FLAG's work with Hmong American farmers focuses on what seem to be the central barriers to their success. FLAG works individually with farmers and conducts trainings either solely or in conjunction with other organizations. In a typical year, FLAG might conduct two dozen trainings involving small groups of farmers. While there currently are not Hmong farm advocates in Minnesota (although this is a primary goal at present), one effective strategy within group train-

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<sup>143</sup> The Hmong people are an ethnic group of approximately 11 million people globally, depending on how one categorizes populations. Hmong people and their ancestors lived in China for roughly five thousand years. There, the history has been one of oppression, rebellion, and a continued search for a safe and prosperous place to live that led to repeated migrations in China and, eventually, in the nineteenth century, a significant migration to Southeast Asia. In Southeast Asia Hmong people tended to live in rural areas and farm. Significant migration to the United States began in 1975 when United States backed regimes began to fall. Many Hmong people supported and fought with pro-United States forces during the wars, secret and otherwise, in Southeast Asia. After the fall of anti-communist regimes, many Hmong people lived in refugee camps and eventually made their way to the United States. A summary of this complicated saga emphasizing pre-1975 developments is THOMAS S. VANG, *A HISTORY OF THE HMONG: FROM ANCIENT TIMES TO THE MODERN DIASPORA* (2008) [hereinafter *HISTORY OF THE HMONG*]. An account discussing life in the Upper Midwest is CHAIA YOUYEE VANG, *HMONG IN MINNESOTA* (2008). Some estimate that perhaps a third of the Southeast Asian Hmong population died either during or soon after what people in the United States have called the Vietnam War. See Choua Ly, *The Conflict Between Law and Culture: The Case of the Hmong in America*, volume 2001 issue 2 2001 *Wis. L. Rev.* 471, 476 (2001).

<sup>144</sup> Hmong American farmers and some of their circumstances in the Twin Cities are described in the following: SUE MURPHY MOTE, *HMONG AND AMERICAN: STORIES OF TRANSITION TO A STRANGE LAND* 9-11 (2004); KENT OLSON, *RESULTS OF A FARM AND MARKET SURVEY OF HMONG SPECIALTY CROP FARMING IN MINNEAPOLIS, ST. PAUL METRO AREA* (2003); Gary Yia Lee, *The Shaping of Traditions: Agriculture and Hmong Society*, 6 *HMONG STUDIES J.* 28 (2005); THADDEUS MACCAMANT, *CTR. RURAL POL'Y DEV., EDUCATIONAL INTERESTS, NEEDS AND LEARNING PREFERENCES OF IMMIGRANT FARMERS* (2014); JESS ANNA SPEIER, *HMONG FARMERS: IN THE MARKET AND ON THE MOVE* (2006); Susan E. Stokes, *Justice for Hmong American Farmers in Minnesota*, 47 (3-4) *CLEARINGHOUSE REV.* 122 (2013).

Chinese records from the Shang Period (beginning about 3800 years ago) note that in addition to swidden agriculture, sometimes called slash and burn farming, and raising livestock, ancestors of the Hmong had practiced rice farming "in the distant past." *HISTORY OF THE HMONG supra* note 143, at 44-47.

ings is to work through a topic, then break into groups in which a small number of people work through the same set of problems again and help each other with forms and ideas. More than is typical for FLAG, our lawyers and organizers often arrange the event, recruit the participants, help with transportation, planning, and so forth. Additionally, FLAG is a significant organizer of an annual Immigrant and Minority Farmer Conference.<sup>145</sup> We believe it to be the largest of its kind in the country.

Five types of barriers have emerged as the most significant areas of work with Hmong American farmers. First, although language skills vary greatly in the Hmong community, communication is a problem in most interactions between Hmong farmers and the non-Hmong world. Given the specific issues for farmers, even generally culturally competent translators have a hard time with, for example, a discussion of rules for USDA programs. As a result, it has been essential for FLAG lawyers working with Hmong farmers to speak Hmong and to be extremely familiar with the daily routines of Hmong farming and farmers markets. Due to cultural barriers, and the peculiarity of the lives and problems of the farmers, literal translation is often not adequate, and would not result in participation by the farmers. In addition to a Hmong-speaking lawyer, we also have had a Hmong speaking organizer on staff who is also a farmer. When non-Hmong speaking lawyers have worked with groups of Hmong farmers, we have had translators, but even this has not been ideal. Because a portion of farmers do not read well in either English or Hmong, written materials, usually a staple for FLAG, are less valuable. This makes individual interaction with farmers even more important.

Second, land access is an extremely difficult problem for Hmong American farmers.<sup>146</sup> Although some producers have longer term arrangements, very few Hmong farmers own land, and every spring there is a scramble to rent farmable land in the metropolitan area. A FLAG lawyer often ends up not just reviewing leases, but brokering leases with landlords. This takes an immense amount of time. There are local organizations that work with and for Hmong farmers and that have Hmong speaking staff. We work as close as possible with these organizations. Surprisingly, some of the organizations in the Twin Cities are not as interested as FLAG is in working with extremely low-income Hmong farmers. One can imagine that over time

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<sup>145</sup> For a description of the Eleventh Annual Conference see 11TH IMMIGRANT AND MINORITY FARMERS CONFERENCE (Jan. 30, 2016), <http://www.flaginc.org/wp-content/uploads/2016/01/11th-IMFC-General-Press-Release-FINAL.pdf>.

<sup>146</sup> This is true for all beginning farmers and all urban farmers. The problem is magnified for Hmong growers.

clear class differences will emerge among Hmong farmers.<sup>147</sup>

Third, Hmong American farmers have been left out of USDA and other government programs designed to assist farmers. While it is true that many farm programs are not designed for local fruit and vegetable growers, some are. State and federal programs offer extensive technical assistance regarding growing practices and business record-keeping. In addition, an array of programs are available for farmers in general. While some programs might not serve a particular grower, historically there has been a nearly uniform exclusion of Hmong farmers from farm loans, conservation cost-shares, crop insurance, disaster assistance, and other government programs. Many local officials attempt to assist Hmong growers, but the programs are just not designed and staffed to support the Hmong population. A FLAG lawyer essentially does a significant part of USDA's job by figuring every detail, for example, for a disaster program that virtually every Hmong farmer should have.<sup>148</sup> We also have worked to make sure lending institutions and other entities are available to Hmong growers. Language and cultural differences have made this difficult, and progress is slow. It seems the various large institutions are simply not interested in making their resources available to very low income Hmong farmers. With a bit of prodding, assistance, and thoughtful hires, however, government agencies in the Twin Cities increasingly make government programs available to Hmong producers.

Fourth, regulatory problems that are difficult for all producers who market directly to consumers are a special challenge for Hmong American farmers. Rules covering food safety and other regulation of food sellers that emerge from various governmental entities have all been problems for Hmong farmers. These rules include those governing sellers at farmer markets and address very specific details like stall assignments, rules on what can be sold, and the contract that growers sign with the market. FLAG works directly with individual growers on understanding and negotiating these rules.

Finally, Hmong farmers call FLAG for what might be considered ad hoc emergencies. These range from transportation problems to

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<sup>147</sup> For the very long view of this tendency, see DAVID GOODMAN & MICHAEL RED-CLIFT, *FROM PEASANT TO PROLETARIANS: CAPITALIST DEVELOPMENTS AND AGRARIAN TRANSITIONS* (1981).

<sup>148</sup> The Noninsured Crop Disaster Assistance Program (NAP) is one such USDA program. NAP provides something like crop insurance (itself a fountain complex set of rules of policies) for farmers that raised non-insurable crops. The rules for the current NAP program, 728 pages long, can be found at, Noninsured Crop Disaster Assistance Program (NAP) for 2015 and Subsequent Years, can be found at, USDA, FSA HANDBOOK, NONINSURED CROP DISASTER ASSISTANCE PROGRAM, [http://www.fsa.usda.gov/Internet/FSA\\_File/1-nap\\_r02\\_a08.pdf](http://www.fsa.usda.gov/Internet/FSA_File/1-nap_r02_a08.pdf).

dire episodes in which shotgun toting neighbors of Hmong farmers confront and threaten them.<sup>149</sup> In one incident, without any prior notice, a township in the metropolitan area of the Twin Cities passed a series of strict regulations pertaining to “agricultural garden plots.” The rules did not apply to those who reside on the premises or to “traditional large acreage mechanized agriculture,” and would almost certainly have driven about forty Hmong farmers off roughly 110 acres within the township. The farmers called FLAG, elected a representative, and FLAG worked with the farmers to convince the city to repeal the ordinances.<sup>150</sup> Clients told the stories of their lives at a formal proceeding – an escape from Laos across the Mekong River, refugee camps in Thailand, and eventually a chance to farm in Minnesota. Those stories proved decisive in securing policy changes.

The overwhelming needs in the Hmong farming community has meant that FLAG lawyers depart from the normal course of FLAG work. For example, FLAG lawyers often do a great deal of the organizational run up to Hmong farmer trainings. We work with groups of loosely organized farmers, but the type of grass roots farm organization that is the typical FLAG client has not been available. Efforts to help Hmong farmers gain access to USDA programs and to overcome legal barriers to land access require a deep level of individual work and small group training regarding record keeping and other difficulties that many people would not think of as lawyering.

## V. FIVE FINAL THOUGHTS

Five themes regarding the intersection of rebellious lawyering and the family farm advocacy could be said to emerge from FLAG’s work.

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<sup>149</sup> See, e.g., Cory Mitchell, *Tension Rises at Hmong Farm: Dozens of Urban Farmers Have Found New Plots among Subdivisions in Eagan, But an Alleged Threat by a Neighbor May Uproot Them*, MINNEAPOLIS STAR TRIBUNE (Aug. 3, 2010), <http://www.startribune.com/tension-rises-at-hmong-farm/98686024/>. At the behest of our clients, this particular incident resulted in a healing ceremony involving religious leaders of quite different orientations.

<sup>150</sup> FLAG also readied a litigation strategy with pro bono counsel in case there was no repeal. Journalistic accounts are: Andy Greder, *Growing Pains: Hmong Farmers, May Township at Odds Over Farming Regulations*, TWIN CITIES PIONEER PRESS (Aug. 18, 2012); <http://www.twincities.com/2012/08/18/growing-pains-hmong-farmers-may-township-at-odds-over-farming-regulations/>; Jon Tevlin, *New Rules in May Township Hit Hmong Farmers Hardest*, MINNEAPOLIS STAR TRIBUNE (Aug. 20, 2012), <http://www.flaginc.org/wp-content/uploads/2016/03/20120820-StarTrib-New-rules-in-May-Township-hit-Hmong-farmers-hardest.pdf>; Laura Yuen Hmong, *Farmers Prompt May Township to Revisit Growing Rules*, MPR NEWS (Aug. 20, 2012), <https://www.mprnews.org/story/2012/08/20/news/may-township-hmong-farmers>.

### A. *Ruralness Matters, and Demands a Strategy*

The rural or urban character of farming matters when thinking about lawyering rebelliously. For much of our work, farmers are rural, which makes it hard for lawyers to be a part of the community of our clients in a meaningful way.<sup>151</sup> Where we have clients in the Twin Cities, the sort of immersion in a community envisioned in *Rebellious Lawyering* is possible. Individual and small group work with Hmong farmers where functioning farm organizations are lacking is hard work. The burden on the lawyer is greatly magnified, and the client numbers must necessarily remain modest, but the farmers seem to benefit greatly. To put it differently, for FLAG's immigrant farmer work, it is possible for a lawyer to live and work in daily contact with clients and to share the traditions and experiences of life in the margins.<sup>152</sup> For rural work, there must be a substitute for that daily intimacy.

### B. *Lay Farm Advocacy Can Work*

Farm advocates seem to be an almost quintessential avenue for rebellious lawyering. From a FLAG point of view, it is an effective way to leverage resources and to gain knowledge of what is really happening in the world. From a rebellious lawyering perspective, farm advocates are either in communities in which they work or nearby, are usually farmers themselves, and are extremely skilled in what *Rebellious Lawyering* would call problem solving.<sup>153</sup> Farm advocates also help to partially dissolve the hierarchy between lawyer and client by creating a layer of expertise that reaches from a farmer's kitchen table into the formal practice of law. They also provide a bridge between López's arguments that emphasize the lay lawyering skills all clients have – the “marginalized experiences, neglected intuitions and dormant imagination” – and the skepticism articulated by thoughtful scholars and others regarding limits on client self-advocacy.<sup>154</sup> The success of working with lay advocates carries only the caveat that these remarkable people are rare and many are growing older, retiring, or passing away. How will they be replaced? Who can now summon the gumption and wisdom to carry on?

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<sup>151</sup> The importance of living in a community, being in it and of it, appears often in *REBELLIOUS LAWYERING*. See *REBELLIOUS LAWYERING*, *supra* note 2, at 31.

<sup>152</sup> *Id.* at 37.

<sup>153</sup> Some farm advocates develop positive reputations that lead to people calling them from other regions.

<sup>154</sup> *Id.* at 29. See, as well, Martha Minnow, *Lawyering at the Margin: Lawyering for Human Dignity* 11 *AM. U. J. GENDER SOC. POL'Y & L.* 143 (2003).



### C. Grass Roots Farm Organizations as Clients Can Work

Grass roots farm organizations can be an excellent rebellious lawyering client. From a FLAG perspective, this can almost completely resolve questions of client decision-making and autonomy.<sup>155</sup> The notion that working with community and other organizations can and should form the core of a lawyering practice may, surprisingly enough, have merged as one of the more controversial aspects of *Rebellious Lawyering*. At issue is whether working with groups is consistent with client autonomy.

From *Rebellious Lawyering*, we learn that organizations can be an effective way to represent people. The details of how one makes judgments regarding the organizations to represent can be murky. Perhaps it is here that López's preference for stories that do not set explicit directions and a quasi-pragmatist do-whatever-seems-to-work philosophy, as opposed to pursuing a grand narrative, leaves one without much direction.<sup>156</sup> In *Rebellious Lawyering*, the dilemma is perhaps best captured in the discussion of the labor law office. The labor lawyer, a bit tired and besieged by decades of legal and political efforts to stifle the labor movement, has a practice in which the directions come from union leadership. The lawyer thinks, accurately, that unions in general, and this union client in particular, have been good for workers and for society. No institution is perfect, and no matter how one criticizes unions, they are important for economic equality in the United States and elsewhere. Further, once we accept the union as a legitimate organization, there is a strong argument that a lawyer should defer to the leadership of the organization. López suggests, however, that a better path might involve action with insurgent union activity. When and why would that be appropriate? Using what kind of measure? Comparing the current and insurgent activities in what way? These are important questions that lawyers working with organizations answer one way or another, explicitly or implicitly.

The merit of working with and for organizations, as suggested in *Rebellious Lawyering*, and adopted as a core principle of FLAG's work, is not without skeptics. Five points are relevant regarding these criticisms. First, there sometimes seems to be a double standard re-

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<sup>155</sup> AS REBELLIOUS LAWYERING, *supra* note 2, at 68-70, suggests, legal strategies can seem to upstage organizing. Autonomy issues are discussed by various scholars. Of interest are Corey S. Shdaimah, who brings a social work perspective to the analysis, in Corey S. Shdaimah, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE 67-98 (2009), and Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

<sup>156</sup> For grand narratives, see REBELLIOUS LAWYERING, *supra* note 2, at 66. López uses telling a story as a way to persuade. See *Lay Lawyering*, *supra* note 40.

garding principles of client autonomy for lawyers represent organizations. Within organizations, there will always be issues of agency. Of course we should be attuned to these. In FLAG's case, our work is often with longstanding organizations that have a membership, elections, and boards. The double standard can arise when community or other popular organizations are assumed by critics to be suspect when it comes to representing the real interests of the group. It is hard to see, however, how many of the farm organizations that are FLAG clients are any less accountable to their membership than almost any other entity. Obviously, there are hierarchies in virtually all organizations of a certain size. But the criticism sometimes applied to rebellious lawyering for community organizations – that the groups are not faithful representatives of organization members – might just as easily be applied to almost any other institution, including business corporations.

Second, a reasonable question is how does one know that the organization represents its membership or the broader community with integrity?<sup>157</sup> An assessment of the extent to which an organization is accountable to its members can be hard. There is no obvious measurement for weighing democratic institutions. How could there be? The very notion of democracy is contested. An obsession with procedural or other forms of accountability can lead one into an abyss of democratic theory, the impossibility of proving democratic accountability, and paralysis. Judgments inevitably need to be made by lawyers as they consider taking on and retaining clients. Observations, intuition, experience, and listening – all emphasized in *Rebellious Lawyering* – must be made to go a long way. If one believes in client autonomy and wishes not to dominate the relationship with a client, how does one judge accountability? For FLAG, the answer is to pay as close attention as possible to what is going on in the world of our clients and how the organization functions as a practical every day matter. If you work with a group often, and pay attention, an assessment can be made. FLAG has had ornery and difficult organizations as clients. We have had trainings under a pole barn without walls.

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<sup>157</sup> REBELLIOUS LAWYERING, *supra* note 2, at 18-21, addresses this question in part by discussing a lawyer that has labor unions as clients. That lawyer tends to do whatever it is the union leadership wants even when that work is “distasteful.” This includes siding with the leadership when leadership interests seem to conflict with the membership. In terms of deference to a client organizations, the union lawyer appears to follow roughly what FLAG does. FLAG's work has differed from the union lawyering described in REBELLIOUS LAWYERING, *supra* note 2, in that the organizations do not have bureaucracies, many employees, or features like those described about the union lawyer. For the few organizations that have more resources, FLAG does not represent organizations on such matters. To my knowledge, we have never been asked to do so. If we were, we would certainly say that it is beyond our expertise and seek to make a referral.

Old carpets covered bare ground, farmers sat in seats retrieved from cars in the junk yard and used our handouts as fans as one would use a program in church. In every case, however, my sense is that when FLAG has worked with organizations they have been in a fundamental sense representative of their membership.

Third, the question of working for organizations becomes more complicated if the organizations are more of a movement than a long-standing institution. Many good organizations, at least farm organizations, operate without a great deal of structure. In many cases, this is for the best.<sup>158</sup> Movements, to be clear, are messy, self-contradictory, and sometimes chaotic. They also work. They change the world. Those writing about rebellious and other forms of lawyering who agree that organization lawyering is important and useful risk paralyzing lawyers if they do not recognize this messiness and the merits of movements.

Fourth, a related criticism of this rebellious lawyering principle is essentially that client autonomy is impossible.<sup>159</sup> According to this argument, effective lawyers inevitably make judgments, based on their own values, and influence clients to adopt those judgments. The FLAG version of a rebellious lawyering response to this criticism is that it should almost go without saying that lawyers have judgments based on their own values and experiences and that a lawyer's perspective will affect the thinking of the client – but that is a far distance from lawyer domination of client decision making. Avoiding such a scenario requires one to try to actively avoid the lawyer's domination of the organization, through many ways, large and small. It is here, if nowhere else, that good lawyering involves “ambiguity, paradox, depth, and detail.”<sup>160</sup>

At FLAG, our best clients think and act critically and assert themselves. For us, they are typically grass roots farm organizations. FLAG solicits and follows the instructions of clients almost to a fault. I have not heard a single complaint about FLAG seeming to take over an organization or to impose lawyering or a legal perspective that limited or distorted farmer decision making in my twenty-four years at FLAG. We make errors, like anyone else, but it would not be the case that a client organization could “nearly vanish” as litigation ap-

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<sup>158</sup> The following make a persuasive case for movements without much formal structure: FRANCES FOX PIVEN & RICHARD CLOWARD, *POOR PEOPLE'S MOVEMENTS* (1978), and FRANCES FOX PIVEN & RICHARD CLOWARD, *REGULATING THE POOR* (1993).

<sup>159</sup> See, e.g., William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994), and, regarding community lawyering, see PUBLIC INTEREST LAWYERING, *supra* note 4, at 393-99.

<sup>160</sup> REBELLIOUS LAWYERING, *supra* note 2, at 10.

proaches as described in the *Rebellious Lawyering* example.<sup>161</sup>

Finally, does this form of ideologically driven choice by FLAG representation create a mere circle in which the lawyers defer to an organization, but choose the organization to work with and therefore control the work? To an extent this is true in the sense that FLAG's mission concerns social justice for family farmers. At times, we work with organizations – farm and otherwise – that do not have this explicit goal, but we also do not take them as clients. What about extreme right wing groups that profess to support family farms but are essentially Klansmen and fascists? These groups are out there.<sup>162</sup> We do not work for or with them, and doing so has never been a hard call. More difficult is working in groups, or meeting with individuals, that express views – generally racist or anti-Semitic – that require one to interrupt the discussion.<sup>163</sup> Some things must be interrupted, of course, but if a FLAG lawyer only worked with or for people that shared our individual perspective on culture, politics, and so forth, we would not have many clients. Further, just because your client has weird or bad politics does not mean that he or she should be the object of exploitation and dispossession.

A much more fundamental problem for FLAG is that farm organizations are strong in some places and with some farmers, but not in other places or with other farmers. It can be difficult to work with organizations that seem only to be barely functioning, and it is generally extremely difficult for FLAG to be effective when working with a

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<sup>161</sup> *Id.* at 16.

<sup>162</sup> See TERRORIST NEXT DOOR, *supra* note 38. No one asked FLAG to represent the Bundy crew, but they are suggestive of some of the strains of organizations and activity that has been out there for at least thirty years. Journalists have noted some plausible grievances that could legitimately agitate contemporary western ranchers. See Tim Philpott, *The Oregon Militia is Picking the Wrong Beef with the Feds*, MOTHER JONES (Jan. 13, 2016), <http://www.motherjones.com/tom-philpott/2016/01/malheur-militants-are-picking-wrong-beef-feds>; and National Johnson, *One of the Angry Ranchers' Complaints Might Make More Sense than You Think*, GRIST (Jan. 7, 2016), <http://grist.org/politics/one-of-the-angry-ranchers-complaints-might-make-more-sense-than-you-think/>.

For an antidote to Bundy-like discussions of the problems ranchers face in the west, see the FLAG client Western Organization of Resource Councils (WORC), a group that includes grass roots organizations in North Dakota, South Dakota, Idaho, Montana, Oregon, Colorado, and Indian Country. WORC “addresses one of the fundamental problems facing rural America: the need to advance the economic and environmental sustainability of family farms and ranches.” WORC “challenges an industry that has little regard for biodiversity, sustainability, animal well-being, public health or the rural economy” and aims to “revitalize rural communities through grass roots action and local projects that foster sustainable agricultural practices, owner-operated businesses and cooperatives, fair competition in agricultural markets, conservation of land, water and air, and availability of fresh, healthful, locally-produced foods.” See WORC, <http://www.worc.org/what-we-care-about/agriculture-and-food/> (last visited Dec. 19, 2016).

<sup>163</sup> See, e.g., BREAKING HARD GROUND, *supra* note 39.

segment of exploited farmers who have no real group representation. *Rebellious Lawyering* sometimes seems to imply that lawyers should step in and do a form organizing in such circumstances.<sup>164</sup> As noted above, we do that in the Twin Cities, but in rural areas in Minnesota, and the rest of the nation, FLAG has generally not tried to organize people. Our sense is that such organization is essentially impossible from a distance. Further, we are generally in awe of the organizers that we know and admire, and know we could never do the job they do. For some organizers, we have a half-joking rule, “Never ride in a car with [a certain organizer], or you will be organized into a ton of unfunded work before you get out.”

Some scholars articulate the concern that organizations and movements, when lacking a consensus view on priorities or strategies, will rely too much on lawyers, making this a different way for lawyers to control things that emerge. This view has a reasonable basis. For FLAG’s work, it seems, we have not actually faced such dilemmas. This is not to say that farmers and farm organizations are not divided on issues. As anyone who has spent time in agricultural circles knows, this is far from true. Instead, it means that FLAG tends not to straddle the central fault lines in farm politics. While it is extremely important to maintain client autonomy as a rebellious lawyer, it is also true that organizations, and especially movement-oriented groups, as noted above, are messy. Precise organizational structures with plenty of funding, well established procedures, and so forth exist for a few of our clients. For many clients, however, structures of decision making and ultimate priorities are much less clear. FLAG stays as much as possible out of resolving the various difficulties or crises that inevitably arise. Again, it is important not to underestimate the inevitably messy nature of social movements. Waiting for a precise direction or a clear organization structure means not acting at all. Does this inevitably mean making choices about which groups to work with? Of course. One hopes that a conscious effort to think about lawyering rebelliously will help with such questions, but this aspect of our work will always be confusing and ambiguous.

#### *D. The World Twists and Sometimes Turns Upside Down*

At FLAG, some of our work, especially concerning discrimination issues, has involved surprising turns and sometimes left us with an unusual client or no client at all. For example, FLAG trained USDA civil rights investigators and worked as court appointed neutrals in a billion-dollar class action in which thousands of African Americans

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<sup>164</sup> See, e.g., *REBELLIOUS LAWYERING*, *supra* note 2, at 22.

sued USDA for discrimination. FLAG work has, however, permitted the application of rebellious lawyering principles. The use of accessible written materials and a reliance on grass roots farm organizations are familiar rebellious lawyering strategies. Further, without working previously with grass roots farm organizations, we would not have had what we needed to do work in *Pigford*: expertise in USDA programs, knowledge of how USDA programs were used in a discriminatory way in the South, and a familiarity with antidiscrimination law.<sup>165</sup> Conventional lawyering would have left us unprepared for this work. We could do our work well in *Pigford* because we tried to implement some of the strategies that are emphasized in *Rebellious Lawyering*. To put the point differently, sometimes good work can lead to surprising opportunities to, at least for a moment, turn a little part of the world upside down.<sup>166</sup>

### E. Funding the Work

Considering family farming and rebellious lawyering suggests one final thought: FLAG's work, and the work of our clients and of farm advocates, has been difficult to fund and is increasingly so.<sup>167</sup> This is hardly news for a legal nonprofit. It appears, however, that foundations, which fund FLAG and many of our clients, may be overlooking rural problems. A recent study shows large foundations give far less money to rural areas than they do to the rest of the country based on comparisons of population and need.<sup>168</sup> Perhaps there is an assumption that few people are left in rural areas. The 2010 Census concluded that 21 percent of the country was rural or in a small town, 49 percent in suburban and exurban areas, and 30 percent in urban ar-

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<sup>165</sup> The programs in question were governed by an odd collection of statutes, cases, regulations, internal handbooks, notices, and letters; were largely counter-intuitive in terms of substance; and we needed to understand them going back more than fifteen years. It would be hard to imagine understanding the program, and working through the ways people were sometimes subtly mistreated, without having worked on behalf of struggling clients for years.

<sup>166</sup> The phrase comes from the inspiring work of CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* (1991).

<sup>167</sup> FLAG could change its mission in ways that might look subtle to some: relax our mission's focus on family farmers, take individual clients that could pay well, represent agriculture organizations of various types that are not focused on social justice and sustainability, represent environmental organizations without farmer members, represent organic food processors and retailers, or any number of other options. These alternatives might secure the organization financially, but we have not pursued them.

<sup>168</sup> JOHN L. PENDER, *USDA ECON. RES. SERV., FOUNDATION GRANTS TO RURAL AREAS FROM 2005 TO 2010: TRENDS AND PATTERNS* (2015). The study concludes that foundations give no more than 7 percent of their grants to rural communities. The study notes that even when foundations give to a rural community, it is often to well-funded nonprofit organizations such as colleges and universities. While that spending certainly has a positive impact, it is not necessarily a direct conduit to those struggling in rural areas.

eas.<sup>169</sup> That is about 65 million rural people. Perhaps people assume that everyone does financially well in the countryside. Rural poverty rates are actually higher than in the rest of the country and have been for a long time.<sup>170</sup> Maybe there is an assumption that rural residents are nearly all white and that work on racial justice can, therefore, be focused elsewhere. Actually, according to the 2010 Census, 22 percent of rural and small town residents are not white or Hispanic. By comparison, about 36 percent of the total population is not white or Hispanic. Another issue is that organizations balk at the idea that the rural parts of the country are more conservative and more religious than much of the rest of the country.<sup>171</sup> The situation is more complicated than is sometimes assumed.<sup>172</sup> Even if farmers and rural residents are more politically conservative than the rest of the country, however, one would hope that this would not affect funding for rural and farm issues. Justice, after all, can never be a form of political patronage. We know as well that familiar stereotypes of rural people continue to bounce around in the culture.<sup>173</sup> One would hope that

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<sup>169</sup> A summary of Census data can be found in HAC RURAL RESEARCH BRIEF, RACE AND ETHNICITY IN RURAL AMERICA (2012).

<sup>170</sup> For the data in general, see WORLDS APART, *supra* note 51. Poverty rates for rural children have been higher than that of urban children for many years, and the gap is increasing. Also, rural children are more likely to live in extreme poverty, and to live in poverty for longer periods than urban children. See William O'Hare, *Poverty is a Persistent Reality for Many Rural Children in U.S.*, POPULATION REFERENCE BUREAU (2009). Even USDA's Economic Research Service acknowledges that in 2015 that "the problem of high and rising rural poverty has been widespread." David McGranahan, *Understanding the Geography of Growth of Rural Child Poverty*, AMBER WAVES (July 2015), <https://www.ers.usda.gov/amber-waves/2015/july/understanding-the-geography-of-growth-in-rural-child-poverty/>.

If the raw data does not convince, try one actual story: Rupert Neate, *America's Trailer Parks: The Residents May be Poor but the Owners are Getting Rich*, THE GUARDIAN (May 3, 2015), <https://www.theguardian.com/lifeandstyle/2015/may/03/owning-trailer-parks-mobile-home-university-investment>.

For why this poverty might not prompt much concern, see Layren Burley, *Why the Left Isn't Talking About Rural American Poverty*, IN THESE TIMES (Oct. 22, 2015), <http://inthesetimes.com/rural-america/entry/18526/why-the-left-isnt-talking-about-rural-american-poverty>.

<sup>171</sup> For a journalist account emphasizing this distinction in terms of voting, see Philip Bump, *There Really Are Two Americas. An Urban One and a Rural One*, WASH. POST (Oct. 21, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/10/21/there-really-are-two-americas-a-urban-one-and-a-rural-one/?utm\\_term=.5d52df16e5f5](https://www.washingtonpost.com/news/the-fix/wp/2014/10/21/there-really-are-two-americas-a-urban-one-and-a-rural-one/?utm_term=.5d52df16e5f5), and in a book-length account in THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS* (2004).

<sup>172</sup> For that complexity regarding politics, see the work of Larry M. Bartels, briefly in *Who's Bitter Now?*, N.Y. TIMES (Apr. 17, 2008), <http://www.nytimes.com/2008/04/17/opinion/17bartels.html>, and in detail in LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE NEW POLITICAL ECONOMY OF THE NEW GILDED AGE* (2010); and see Andrew Gelman, Boris Shor, Joseph Bafumi & David Park, *Rich State, Poor State, Red State, Blue State: What's the Matter with Connecticut?*, 2 J. POLITICAL SCIENCE 345 (2007).

<sup>173</sup> For a discussion of one variety of this stereotype, see ANTHONY HARKINS, *HILLBILLY: A CULTURAL HISTORY OF AN AMERICAN ICON* (2003). For an interesting ap-

this, too, does not affect the way people think about rural poverty. Despite the soft spot that the general population seems to have for farmers, and, in particular, family farmers, one can sometimes wonder what urban intellectual culture really thinks about farmers.<sup>174</sup> Sometimes even efforts to defend rural life and farmers seem to subtly diminish rural people and their communities.<sup>175</sup>

#### CONCLUSION

The country has lost hundreds of thousands of farms in the last few decades. The exploitation of farmers and the industrialization of agriculture continues to accelerate, and the fight against discrimination in agriculture has lagged. The struggle for justice is up hill, as it always is. But people are fighting back. And when they do there is a role in that struggle for rebellious lawyering.

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proach to understanding and learning from what the authors call the “literacy practices” of “ordinary women and men in rural places,” see KIM DONEHOWER, CHARLOTTE HOGG & EILEEN E. SCHELL, *RURAL LITERACIES* (2007).

<sup>174</sup> For the discussion of that soft spot, see RELEVANCE OF FAMILY FARMS, *supra* note 17. A study of admission decisions for elite universities found that high school student activities generally increase chances for admissions, and that leadership in those activities was a further plus. The study found, however, that participation in 4-H and FFA (formerly Future Farmers of America) actually reduced the student’s chance for admission, and leadership in those organizations reduced the student’s chances even more. FFA is a youth organization that “promotes and supports” agricultural education. 4-H was founded to instruct rural youth in “improved farming and farm-homemaking” practices, although it has since broadened its aims. The study triggering this discussion is in THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE* (2011).

<sup>175</sup> The Obama Administration Secretary of Agriculture, for example, thinks that one reason to support rural America is national security. “Rural America is a key in keeping the nation secure: It produces enough food to feed its people and, though it comprises just 16 percent of the population, it provides 40 percent of those who enlist in the military, Vilsack said.” Perhaps this is overly sensitive, but is the point here that the country needs soldiers and sailors, and rural America is the place to produce them? Dan Moser, *Vilsack: Rural America has Much to Gain but Must Tell Story Better*, IANR NEWS SERV. (Nov. 6, 2013), <http://ianrnews.unl.edu/vilsack-rural-america-has-much-gain-must-tell-story-better>.