

NOTES

A TALE OF TWO APPELLATIONS: A COMPARATIVE STUDY OF
INTERNATIONAL AGREEMENTS AND PREVAILING LAW IMPACTING THE
AVAILABILITY OF SEASONAL EMPLOYEES FOR THE WINE-GRAPE
HARVEST IN CALIFORNIA’S NAPA VALLEY AND FRANCE’S BORDEAUX
APPELLATION

Michael K. Edmonson*

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* J.D. 2003, University of Georgia School of Law; B.S. 1987, Geology, University of California, Davis.

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I. INTRODUCTION

France and the United States were the first and fourth leading producers of wine by volume in the world, respectively, in 1999.¹ French wineries produced over 1.59 billion gallons of wine, while United States wineries produced about a third of that of their French counterparts, or about 534 million gallons of wine.² The state of California is the largest producer of wine within the United States, producing approximately 445 million gallons of wine, or roughly 70 percent of all wine produced in the United States during the year 2000.³

The wine industry is an important economic engine of both California and France.⁴ The wine industry is comprised of two main components: viticulture, or grape growing; and enology, or wine making. The growing of the grapes for use in wine making is a labor-intensive project, with the heaviest workload in terms of man-hours occurring in the fall at harvest time.⁵ The wine-grape harvest in California and France generally occurs during the months of September and October.⁶

The window of opportunity to harvest the wine-grape crop is smaller compared to that of the table-grape crop, as the wine-grape is allowed to remain on the vine longer in order to develop a richer flavor through

¹ See Wine Institute, *Key Facts: World Wine Production by Country*, at http://www.wineinstitute.org/communications/statistics/keyfacts_worldwineproduction99.htm (last visited Feb. 2, 2003).

² See *id.*

³ See Wine Institute, *2000 California Wine Sales Up for Seventh Consecutive Year*, http://www.wineinstitute.org/communications/statistics/Sales_00.htm (inferring that if California were to be measured independently from the remainder of the United States, it would rank as the fourth greatest producer of wine by volume in the world) (last visited Feb. 2, 2003).

⁴ See Motto et al., *Economic Importance of California Wine is \$33 Billion to State*, at <http://www.wineinstitute.org/communications/statistics/economicimportance.htm> (last visited Feb. 2, 2003); see OXFORD COMPANION TO WINE 339-400 (Jancis Robinson ed., 1994).

⁵ See Pamela Podger, *Vineyard housing slowed by tax rules, Owners need new law to shelter farmworkers*, SAN FRANCISCO CHRON., July 16, 2001, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/07/16/MNL123347.DTL> (stating that an additional 5000 workers are employed during the peak harvest season in Napa County); see Agence National pour l'Emploi (The National Employment Agency), *Les Vendanges 2002*, at http://www.anpe.fr/actualite/opportunite/actu_opportunite63.jsp (translated using <http://babelfish.altavista.com>) (stating that the Bordeaux region will require an additional 9000 workers to complete its 2002 harvest) (last visited Feb. 2, 2003) [hereinafter *Les Vendanges 2002*].

⁶ See HACHETTE WINE GUIDE, THE FRENCH WINE BIBLE 45 (Hachette UK trans., Catherine Montalbetti ed., 2000).

development of increased sugar content, or brix, and a proper balance of acidity to brix, both of which are important to the production of a premium wine.⁷ Since the harvest time is shortened by the need to pick the fruit while it possesses just the right balance of sugar content and acidity, the grapes must then be picked, sorted and processed quickly so that the precious fruit does not rot or get damaged by unfavorable weather.⁸ The delicate wine-grape is often picked by hand to minimize bruising and fruit and juice loss.⁹ Therefore, it is necessary to hire an enlarged workforce for the four to eight weeks of harvest season.

Due to the importance of the wine-grape crops to the influential wine industries within California and France, their respective governments have crafted laws and regulations designed to help the grape growers find and maintain an adequate temporary or seasonal workforce for the labor intensive grape harvest. The methods used to assist the grape growers in their acquisition of temporary laborers include not only the regulation of the terms of employment, but also the regulation of immigration for migrant agricultural workers and housing requirements for temporary agricultural workers.

This Note attempts to evaluate and compare the different approaches taken by the governments of California and the United States, and France and the European Union to meet the labor needs of their respective wine industries. To develop this comparison, and ensure that the areas studied for this Note were comparable, the most renowned wine-grape growing and wine making regions of California, the Napa Valley, and of France, the Bordeaux Appellation, were selected.

II. THE IMPORTANCE OF THE WINE-GRAPE CROP

The wine industry is important to the economy and people of both California and France.¹⁰ The industry provides employment to many, is a source of patriotism to some, and to others it is so deeply imbued in their

⁷ See generally JEFF COX, FROM VINES TO WINES: THE COMPLETE GUIDE TO GROWING GRAPES AND MAKING YOUR OWN WINE 97-104 (Julia Rubel & Nancy Ringer eds., 3d ed. 1999).

⁸ See ROGER BOULTON ET AL., PRINCIPLES AND PRACTICES OF WINEMAKING 52 (1996) (discussing the effect of weather on the timing of the grape harvest).

⁹ See *id.* at 59 (noting that while there has been a tendency in France toward using mechanized harvesting machines for the grape harvest, the premium vineyards still rely on manual labor for the majority harvest to maintain the quality of the grapes).

¹⁰ See *supra* note 4.

culture and daily existence that it defines them as individuals and as a society.¹¹

A. Importance to Napa County and California

Viticulture and enology are major agricultural-related industries within the strong California agricultural marketplace. According to one recent market study, wine is the number one “finished” agricultural product in the state, with an estimated annual economic impact of \$33 billion.¹² The estimated retail value of the wines produced in California in 2000 was \$13 billion.¹³

The Napa Valley, which is located in Napa County, is perhaps the most renowned of the wine-grape growing and winemaking regions of California. Vineyards in Napa County account for approximately 4 percent of California’s wine-grape harvest as measured by tonnage in 2000,¹⁴ while wineries in Napa County produce only about 3.5 percent of the state’s wines.¹⁵ The disparity between the percentage of wine-grapes grown in Napa County and the wine produced in Napa County as a percentage of all California wine-grapes and wine, is possibly due in part to the selling of grapes grown in Napa County to vintners located outside of the county.

Napa County is home to over 27 percent, or 232 of the 847 wineries, located in California.¹⁶ Collectively, the Napa County wine industry generated \$4 billion of the estimated \$33 billion generated by the California wine industry.¹⁷ Thus, while the Napa County wine industry produces about 3.5

¹¹ See ANTONIO NIEDERBACHER, *WINE IN THE EUROPEAN COMMUNITY* 5-6 (2d ed. 1987).

¹² See Motto et al., *supra* note 4. The economic impact not only includes sales of the finished product, but also the wages of those involved in the manufacturing of the product (both the viticulturists and the enologists) as well as those involved in peripheral industries related to the wine industry (including tourism). See *id.*

¹³ See Wine Institute, *supra* note 3.

¹⁴ See Wine Institute, *California Winegrowers Crush Record 3.3 Million Tons of Wine Varieties*, at <http://wineinstitute.org/communications/statistics/cnsh2000.html> (last visited Feb. 17, 2003) (stating Napa accounted for about 137,000 tons of about 3.3 million tons of grapes harvested in California).

¹⁵ See Napa Valley Vintners Association, *Napa Valley Wine Industry Facts*, at <http://www.napavintners.com/news/nplink2.htm> (last visited Feb. 2, 2003); see also Cellar Notes, *California Winery Statistics*, at http://www.cellarnotes.net/california_wine_statistics.html (last visited Feb. 2, 2003). Percentage of wine produced in Napa County synthesized from data obtained from both sources.

¹⁶ See Cellar Notes, *California Winery Statistics*, at http://www.cellarnotes.net/california_wine_statistics.html (last visited Jan. 11, 2002).

¹⁷ See Napa Valley Vintners Association, *Napa County Wine Industry*, at <http://www.napavintners.com/news/nplink2.htm>

percent of the wine produced in California, and grows only a little more than 4 percent of the wine-grapes grown in the state, it accounts for more than 12 percent of the annual revenue generated within the state by the wine industry.

Napa County consists of about 500,000 acres and has a population of 124,200.¹⁸ Approximately 9 percent of land in Napa County, or 45,275 acres, is utilized for grape growing.¹⁹ Further, an additional 3 percent of the land which is currently undeveloped is reserved for future grape growing.²⁰ So strong is the community's identity with grape growing and wine production, that the county domiciliaries recently established through a referendum that all future land rezonings of existing vineyards for another use must be approved by a vote of the citizenry.²¹

The successful wine production industry is strongly associate with a robust tourism industry.²² The Napa County tourism industry relies upon the allure of fine wines, and the incredible climate and inherent beauty of Napa, as its main draws. Napa draws an estimated 4.9 million visitors each year,²³ and those visitors spent an estimated \$600 million in 1997, generating approximately \$11 million in local sales tax revenue.²⁴ Aside from the tourism attracted by its moderate climate and scenic beauty, Napa is also conveniently located approximately fifty miles north of San Francisco, and has developed as a bedroom community to the geographically challenged population growth occurring in the San Francisco Bay Area.²⁵ The development of Napa as a

napavintners.com/community/duk_napacounty.html (last visited Feb. 2, 2003).

¹⁸ See California Employment Development Department, *County Snapshot, Napa 2002*, at <http://www.calmis.ca.gov/htmlfile/subject/cosnaps.htm> (last visited at Feb. 7, 2003) (claiming Napa county comprises 504,320 acres; but see Napa Valley Vintners Association, *supra* note 17 (claiming Napa county comprises 485,120 acres).

¹⁹ See *supra* note 17.

²⁰ See Napa Chamber of Commerce, *Napa Valley Agriculture, The Wine Industry Report*, at <http://www.napachamber.org/Visitorinfo/crop.html> (last visited Jan. 12, 2002).

²¹ See Stephen J. Thomas, *California Supreme Court upholds Napa County Measure J*, at <http://napalaw.com/forms/measurej> (last visited Feb. 12, 2003). County Measure J was passed by the voters in 1990, and incorporated into the County General Plan. See *id.*

²² See Napa Chamber of Commerce, *Demographics*, at <http://www.napachamber.org/relocation/demographics.htm> (last visited Jan. 11, 2002).

²³ See *id.*

²⁴ See Napa Valley Vintners Association, *Napa Valley Wine Industry Facts*, at <http://www.napavintners.com/news/nplink2.htm> (last visited Jan. 11, 2002).

²⁵ See *Bay Area's Biggest Bedroom*, MARTINEZNEWS.COM, Aug. 29, 2002, at <http://www.martineznews.com/articles/index.cfm?artOID=21914&webpage=527&s=1> (last visited Feb. 26, 2003) (citing 2000 census data showing 23 percent of Napa county's population leave the county for work).

suburb of San Francisco has led to increased demand for housing and thus has increased the cost of available housing.²⁶

B. Importance to Bordeaux and France

The Bordeaux Appellation of France is perhaps the most renowned of the many famous grape growing and wine producing appellations in France, and indeed in the world.²⁷ The city of Bordeaux is a coastal city in the southwestern portion of France. The Bordeaux appellation encompasses roughly eight times the area of Napa County.²⁸ Bordeaux vineyards cover approximately 284,000 acres, or roughly 7 percent of the land in the appellation.²⁹ In 1999, grapes grown in the Bordeaux Appellation produced over 181.6 million gallons of wine under the appellation's control regulations.³⁰ Of the wine produced in the Bordeaux Appellation, approximately 70 percent meets the stringent requirements for appellation origin control certification.³¹ Bordeaux's output of wine under the appellation control regulations accounted for approximately 11.4 percent of France's entire 1999 wine output.³² The Bordeaux region is home to more than 13,000 individual vineyards and 9,000 wine producing châteaux.³³ The average size of a vineyard in the Bordeaux region encompasses slightly less than twenty-two acres of land.³⁴

²⁶ See Custom Lending Group, *Real Estate Market Trends: A Thirteen-Year History*, at <http://www.marketwiz.net/shared/re/mtrends-13yrs-cb.htm> (last visited Jan. 11, 2002) (citing data from Napa County Multiple Listing Service showing a 110 percent increase in the average home price between 1989 and 2001, from \$204,836 to \$430,323 during that time).

²⁷ The strict French Appellation Origin Control laws of 1935 allow the wine producer to list the appellation of origin of the grapes and wine, a coveted addition to the wine's label, only if the grape grower and wine producer comply with stringent requirements concerning the grape growing and wine making practices. See Felicia Sherbert, *What is Quality Wine?*, at <http://www.wineanswers.com/22.asp> (last visited Feb. 27, 2003).

²⁸ See Napa Valley Vintners Association, *Region*, at <http://www.napavintners.com/region/index.html> (last visited Feb. 17, 2003).

²⁹ See HACHETTE WINE GUIDE, *supra* note 6, at 207.

³⁰ See *id.*

³¹ See *Wine Classification Systems*, at <http://www.history-of-bordeaux.com/html/classifications.html> (last visited Jan. 13, 2002).

³² See Wine Institute, *World Wine Production by Country*, at http://www.wineinstitute.org/communications/statistics/keyfacts_worldwineproduction99.htm (last visited Jan. 7, 2002).

³³ See *Bordeaux Overview*, at <http://Bordeaux.com/taste/easy/overview.html> (last visited Jan. 7, 2002).

³⁴ Average vineyard size is determined by using the approximate number of vineyards and appropriate acreage devoted to the wine-grape. See *id.*; see also *supra* notes 27, 29.

As with Napa Valley in California, the Bordeaux Appellation in France is associated with the production of premium grapes and wines. Further, because of the long and close connection developed between French society and wine, its importance to France touches not only tangible economic benefits, but intangible cultural benefits as well.³⁵

III. THE SEASONAL MIGRANT LABOR ISSUE

A. *The Need for Seasonal Migrant Labor*

Between 3,000 and 4,000 migrant workers come to Napa County each year during the course of the wine-grape growing season.³⁶ One-half to two-thirds of the migrant workers come to Napa to work the vineyards for the wine-grape harvest in the fall.³⁷ The grape harvest, and indeed, much of the work done in the vineyards, is still performed by hand, due to the extremely delicate nature of the crop.³⁸ Further, the time frame within which the actual picking of a varietal grape crop (e.g., Cabernet sauvignon or Chardonnay) takes place at a vineyard is very short, as the grapes must be picked while they possess specific sugar content and acidity.³⁹ Therefore, a massive workforce is required for a very short duration to complete the harvest when the sugar content and the acidity of the grapes are at their optimum. The Napa wine-grape harvest, which includes all varietals, generally lasts about two months.⁴⁰

Although no specific studies have been completed on the migrant farmworkers that harvest the Napa County wine grapes, statistical data has been compiled on a national level for migrant agricultural workers. One such

³⁵ See NIEDERBACHER, *supra* note 11, at 5-6.

³⁶ See Janice Fuhrman, *Napa Vintners Work to Increase Farm-Worker Housing*, SAN FRANCISCO CHRON. Mar. 23, 2001, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/03/23/NB111954.DTL> (last visited Oct. 29, 2001).

³⁷ See Napa Valley Grape Growers Association, *Ag and Wine Industry Organizations Fund Study to Determine Actual Farmworker Housing Needs*, at <http://www.napagrowers.org/pr.htm> (last visited Oct. 29, 2001).

³⁸ See DR. PHILIP MARTIN, NAPA: WINE, FARMWORKERS AND HOUSING 4, available at http://migration.ucdavis.edu/rmn/changingface/cf_oct2000/Martin_Napa.html (last visited Sept. 27, 2000).

³⁹ See ROGER BOULTON ET AL., PRINCIPLES AND PRACTICES OF WINE MAKING 54 (1996).

⁴⁰ See Napa Valley Vintners Association, *Napa Valley's Diverse Climates, Soils and Elevations Provide Vintners and Growers with a 2002 Harvest That's Fast, Ripe and Delicious*, at <http://www.napavintners.com/region/rharvest.html> (stating that the 2002 Napa harvest is 95 percent complete after two months) (last visited Jan. 10, 2003).

compilation was presented in a National Agricultural Worker Study conducted by the United States Department of Labor.⁴¹ This study defined a migrant farmworker as a worker who traveled 75 miles or more to find crop work.⁴² The nationality of the worker was not a defining characteristic in classifying him as a migrant worker. This study, conducted between 1989 and 1991, found that 94 percent of the migrant workers were of Hispanic origin and 80 percent were born in Mexico.⁴³

Similarly, the vineyards of Bordeaux require an influx of workers for the grape harvest. Part of that need has been reduced by some vineyard operators by the use of farm machinery to conduct their harvest.⁴⁴ However, many of the vineyards, especially those producing grapes for premium wines, still rely on manual labor to pick the delicate grape crop by hand.⁴⁵ Vineyards in Bordeaux required approximately 9,000 additional workers to complete the 2002 wine-grape harvest.⁴⁶

For those vineyard operators who utilize manual labor to harvest their wine-grape crop, their ability to find French citizens to work the harvest has become increasingly difficult.⁴⁷ In 1999, France saw its unemployment rate drop to 9.6 percent.⁴⁸ Further, those on the "dole" are not encouraged to take on seasonal employment, as their seasonal wages are merely subtracted from their "dole" payments.⁴⁹ Further compounding the labor shortage, students, who traditionally make up the largest contingent of outside workers, were scheduled to return to classes earlier in 2000, and thus were not available to work the harvest.⁵⁰

⁴¹ The National Agricultural Workers Survey (NAWS) was conducted by the U.S. Department of Labor, and was first initiated in 1988. Its goal was to collect comprehensive data on the crop workers employed in the United States. The data collected includes information concerning the farmworker's household composition, wage and working conditions, and legal or immigration status. See U.S. Department of Labor *National Agricultural Workers Survey*, at <http://www.dol.gov/asp/programs/agworker/naws.htm> (last visited Sept. 20, 2002).

⁴² See Dr. Philip Martin, *Migrant Farmworkers and their Children*, at <http://aelliot/acl.org/~eric/digests/edorc947.html> (last visited Jan. 9, 2002). Dr. Martin is a lecturer and researcher in the Department of Agricultural Economics at the University of California at Davis. See *id.*

⁴³ See *id.*

⁴⁴ See HACHETTE WINE GUIDE, *supra* note 6, at 44.

⁴⁵ See *id.*

⁴⁶ See *Les Vendanges 2002*, *supra* note 5.

⁴⁷ See Lara Marlowe, *Drop in Jobless Leaving Beujolais Vineyards Short of Labourers*, IRISH TIMES, Aug. 23, 2000, at 13.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

Further, because of the number of individual vineyards, the average size of the vineyard is smaller than that in the United States;⁵¹ thus, many vineyards may require fewer helpers outside of their family than the average Napa vineyard. An estimated 90 percent of the individuals working on farms in France are farm managers or members of their families.⁵²

B. Problems Stemming from the Need for Seasonal Migrant Labor

Wine-grape harvest occurs in the fall, typically September and October,⁵³ and requires many additional laborers to those permanently employed by the vineyard for year round routine vine and soil care. There are many problems facing the vineyard owner who must find and maintain a workforce adequate to complete the task of harvesting the grapes within the short harvest period. Some vineyard operators in France have recently turned to a more automated solution, such as the use of mechanized harvesters, to help solve their labor problems.⁵⁴ However, the premium vineyards continue to maintain the traditions and the quality control benefits of the human harvest.⁵⁵ Further, those vineyards located on the slopes of hills, and not in the more level valley floors, are precluded from utilizing mechanized harvesters and must rely on manual labor to conduct their grape harvest.⁵⁶ Many Napa County vineyard operators have thus far been able to avoid the question of automating their harvest practices holding on to the manual labor practice preferred by the premium growers. This is likely due to the typically inexpensive and available, often immigrant, labor force in California.

The issue of migrant labor for the agricultural industry is of such worldwide importance that the United Nations has weighed in, adopting a convention to ensure the humane treatment of the migrant or seasonal workers of the world.⁵⁷

⁵¹ See Cristophe Joly, *France Agricultural*, MACHINERY MARKET REPORTS, Mar. 1, 1997 (finding that nearly half, or 48 percent, of French vineyards are comprised of less than fifty acres).

⁵² See *Comprehensive Survey of Agriculture & Agribusiness, Population and Employment in Agriculture and Agribusiness*, at http://adepta.heb.fr.colt.net/asp/panorama_page.asp?page=23&lng=anglais (last visited Jan. 8, 2002).

⁵³ See HACHETTE WINE GUIDE, *supra* note 6, at 45.

⁵⁴ See *id.* at 44.

⁵⁵ See *id.*

⁵⁶ See MARTIN, *supra* note 38.

⁵⁷ See *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158, U.N. GAOR, 45th Sess., U.N. Doc. A/Res/45/158 (1990) [hereinafter *Convention*].

The goal of the United Nations Convention on the Protection of the Rights of all Migrant Workers and Members of their Families is not only to establish minimum standards of treatment for migrant workers, but also to discourage and eliminate clandestine movements of migrant workers and the trafficking in migrant workers.⁵⁸

From an operational and logistical standpoint, the problems facing the Napa or Bordeaux vineyard operator relying on manual labor to conduct their harvest are remarkably similar. Those problems can be phrased as follows:

1. How do the vineyard operators attract and maintain an adequate seasonal work force for harvest?
2. How can the local seasonal workforce be supplemented with migrant workers to fulfill the labor need?
3. How can vineyard operators provide low cost or subsidized housing to the short-term seasonal employee?

Solutions or partial solutions to these problems can be arrived at through private means, for instance through negotiation and contract between the principal players, the wine growers and the laborers. However, perhaps because of the importance of the wine industry and the unequal bargaining power between the parties, the respective governments have also participated in developing the solutions.

C. Governmental Solutions to the Seasonal Migrant Labor Problem

United States governments at the local, state, and federal levels, and the French and European Union governments have been active partners with the vineyard operators in an attempt to help maintain the viability of the economically and socially beneficial wine industry.⁵⁹ These government entities have made attempts, both directly and indirectly, to help the vineyard operators ameliorate the problems associated with the heavy labor requirements of the grape harvest.⁶⁰ However, such governmental policies should also require the consideration of the rights and needs of the migrant workers.⁶¹ Often, a balance must be struck between assistance to the industry and the humane

⁵⁸ See *id.*

⁵⁹ E.g., *infra* note 109; e.g., *infra* note 197.

⁶⁰ E.g. *infra* note 70; e.g., *infra* note 96; e.g., *infra* note 109; e.g., *infra* note 197.

⁶¹ See generally *supra* note 57.

treatment of the temporary workforce, to ensure the supply of temporary labor is plentiful.

Governmental assistance to the industry and migrant workers has taken three main forms:

1. passing or promulgating labor regulations that directly regulate the agricultural industry in general and the wine-grape industry specifically;⁶²
2. modifying or creating immigration laws to allow increased numbers of foreign workers to enter France and the United States to undertake seasonal agricultural work;⁶³
3. either mandating that the housing and other essentials be provided to the migrant workers, or mandating and encouraging the development of low cost housing for the farmworkers among others.⁶⁴

Regulations have been enacted by the various governmental entities as a result of lobbying efforts by the vineyard owners (*e.g.*, the Napa Valley Grape Growers Association)⁶⁵ and by groups representing the migrant workers (*e.g.*, the National Council of La Raza).⁶⁶ Regulations enacted as a result of each of the aforementioned lobbying efforts have been crucial in delivering the number of seasonal workers necessary to perform the wine-grape harvest. It seems equally important in times of economic prosperity and tight labor markets, such as during the latter half of the 1990s, to protect the interests of the laborers as it is the vineyard operators. Therefore, some of the more recent regulations promulgated appear to be designed to satisfy the requirements of the seasonal farmworker, especially pertaining to housing and sanitation, rather than the requirements of vineyard operators.⁶⁷

⁶² *E.g.*, *infra* note 70.

⁶³ *E.g.*, *infra* note 127.

⁶⁴ *E.g.*, *infra* note 198.

⁶⁵ The Napa Valley Grape Growers Association is an industry coalition of vineyard owners and operators in Napa County, California.

⁶⁶ The National Council of La Raza is the "largest constituency-based national Hispanic organization . . . established to reduce poverty and discrimination and improve life opportunities for Hispanic Americans." See Cecilia Munoz, Statement on the Agricultural Opportunities Act, June 15, 2000, at <http://www.house.gov/juiciary/muno0615.htm> (last visited Feb. 13, 2003).

⁶⁷ *E.g.*, Occupational Safety and Health Standards, General Environmental Control, 29 C.F.R. § 1910.142 (West 2001) (regulating temporary labor camps).

IV. LABOR REGULATIONS

Through the use of labor laws, *e.g.*, laws regulating wages paid and hours worked, governments can control much about the humane treatment of the seasonal workers harvesting the crops of that state. For example, higher wages paid to seasonal workers directly relate to the workers' standard of living, including their ability to purchase reasonable sustenance and housing.

A. United States Perspective

The United States Department of Labor has promulgated regulations under the authority of Congressional legislation⁶⁸ that, under certain circumstances, exempt farm operators, including vineyard operators, from complying with some fundamental labor laws.⁶⁹ Exemptions available to the farm operator include relief from paying a minimum wage and from paying overtime to certain workers engaged in the hand harvesting or processing of an agricultural crop.⁷⁰ Exemptions are applicable to the small farmer who utilizes less than 500 man-days of agricultural labor per quarter.⁷¹ Exemptions also apply to the farmer who employs his family members, local hand harvest laborers, and migrant hand harvesters under the age of sixteen.⁷²

These exemptions appear to be designed to help the smaller farmer and the traditional family-farmer to remain economically viable in an age where economy-of-scale considerations inhibit the viability of the small farmer. The benefit from this exemption is magnified since the harvest period, typically September through October,⁷³ spans parts of two quarters. Therefore, the vineyard operator is able to utilize an increased work force in both September and October in an effort to meet the labor demands of the harvest while minimizing the possibility that he will exceed the 500 man-day per quarter

⁶⁸ See Labor Management Relations Act of 1947, 29 U.S.C. § 141 et seq. (1994) (authorizing the Department of Labor to promulgate regulations relating to labor, including the agricultural sector).

⁶⁹ See generally Migrant and Seasonal Agricultural Worker Protection, 29 C.F.R. § 500 (2001) (finding the regulations necessary to provide protection for the workers).

⁷⁰ See Exempting Applicable to Agriculture, Processing of Agricultural Commodities, and Related Subjects Under the Fair Labor Standards Act, 29 C.F.R. § 780.3 (2001).

⁷¹ See 29 C.F.R. § 780.300 (2001); see also 29 C.F.R. § 780.305 (2001) (defining 500 man-days).

⁷² See Exemptions Applicable to Agriculture, Processing of Agricultural Commodities and Related Subjects Under the Fair Labor Standards Act, 29 C.F.R. § 780.3 (2001).

⁷³ See HACHETTE WINE GUIDE, *supra* note 6, at 45.

limit, which would preclude exemption from the otherwise applicable Federal mandatory minimum wage and overtime wage requirements.

California is a state sensitive to the demands of its strong agricultural industry, which ranks as the top producing state in the country for many perishable fruit and vegetable crops.⁷⁴ As a result, the State Industrial Welfare Commission has promulgated regulations designed to aid farmers in securing affordable labor for the harvesting and processing of perishable crops before they spoil and become unusable.⁷⁵ The grape crops grown by the vineyard operators are especially prone to spoilage, as the harvest is delayed as long as possible to allow the grapes to develop optimum sugar and acidity content.⁷⁶ Spoilage of the grape crop would likely occur if the vineyard operator was limited to using only his full time employees and family working standard 8-hour workdays, as opposed to the use of an increased labor force and/or the utilization of an increased working day.⁷⁷

This regulation allows farm operators to work employees performing agricultural activities, including harvesting, for up to ten hours per day and up to six days per week without paying overtime wages.⁷⁸ The effect of this regulation is to allow to farmers temporarily utilize their human resources to their maximum capacity for the benefit of society in harvesting the perishable food crop. The allowance of the longer work hours, up to 50 percent more

⁷⁴ See 1997 Vegetable Crop Ranking, at <http://usda2.mannlib.cornell.edu/data-sets/crops/9X180/98180/2/vegtbles.txt> (last visited Feb. 13, 2003) (ranking California's 1997 yield as the top state for strawberries, artichokes, broccoli, brussel sprouts, cabbage, carrots, cauliflower, celery, garlic, leaf lettuce, head lettuce, romaine lettuce, cantaloupes, honeydew, watermelons, onions, bell peppers and spinach); see also SUSAN POLLACK AND AGNES PEREZ, FRUIT & TREE NUT OUTLOOK, FTS-297, Mar. 21, 2001, available at <http://www.ers.usda.gov> (last visited Feb. 13, 2003) (reporting that California's 2001 fruit and tree nut crop was worth an estimated \$6.75 billion, which is over half of the total value of the U.S. fruit and tree nut crop which is estimated at \$11.61 billion).

⁷⁵ See CAL. CODE REGS. tit. 8, § 11140(3) (2001).

⁷⁶ See COX, *supra* note 7 (describing the conditions for wine-grape harvest).

⁷⁷ See CAL. CODE REGS. tit. 8 § 11140(3) (2001). Certain vineyard operators actually encourage the onset of a fungal disease, botrytis cinerea, which causes the grape to rot. This beneficial fungus is known as the "noble rot," as it is crucial to the production of select sweet wines such as the Sauternes of the Bordeaux Appellation. The rot causes the wine-grape to lose some of its moisture content, but does not diminish its sugar content. Thus the infected wine-grape possesses a much more concentrated sugar content. See *Viniculture and Grape Growing, Wine 101*, at <http://www.winepros.org/wine101/viniculture.htm> (last visited Sept. 22, 2002); see also *American Vineyard, Viticulture & Enology Lab*, at <http://www.wineserver.ucdavis.edu/av/AV9410.html> (last visited Sept. 22, 2002).

⁷⁸ See CAL. CODE REGS. tit. 8, § 11140(3) (2001).

than a standard work week, is clearly in the best interest of the farmer, as he does not have to seek up to 50 percent more workers. This regulation thus saves him the effort of not only locating those additional workers, but of processing the additional paperwork required to document new hires through all phases of employment, at the time of hiring, at payroll dates, and at tax time or year end. The only potential downside, from the employer's perspective, is the possibility of the employee's diminished productivity during those hours worked over forty in a week. However, this concern should not be a major issue, as the duration of the longer working conditions for the wine grape harvester, up to two months, is relatively short; therefore, the longer hours required during the harvest period should be sustainable by the laborer over that short period. This regulation benefits society in that it facilitates the arrival of a usable crop in the marketplace, rather than risking its spoilage and the loss of its usefulness. The burden placed upon the laborers does not appear to be too onerous as the increased hours are only for a limited time frame, two months, and should be sustainable by the laborer over the short term. Further, as the seasonal work is temporary, the laborer is likely to welcome the ability to increase his income within that limited time frame that he may otherwise not receive if not for the corresponding benefit of reduced wages to his employer. The employer would likely hire additional workers at the standard wage rate rather than pay overtime wages. Thus, the regulations appear to have struck a balance between the needs of the farmer, of society and of the laborer.

The California Industrial Welfare Commission has also promulgated regulations regarding minimum wages that must be paid to agricultural workers within the state.⁷⁹ California requires farm operators to pay agricultural laborers a minimum of \$6.75 per hour,⁸⁰ which is commensurate with the minimum wage that must be paid to all workers employed in the state of California.⁸¹ Exemptions to the minimum wage apply for those inexperienced workers who are learning the trade.⁸² The inexperienced minors may be paid at a rate of 85 percent of the minimum wage.⁸³

The California Legislature has recently passed two bills, signed into law in August 2001 by the Governor, to help extend protection to migrant farmworkers from wage abuses by a farm labor contractor.⁸⁴ A farm labor

⁷⁹ See CAL. CODE REGS. tit. 8, § 11140(4) (2001).

⁸⁰ See CAL. CODE REGS. tit. 8, § 11140(4)(A) (2001).

⁸¹ See CODE REGS. tit. 8, § 11000 (2001).

⁸² See CAL. CODE REGS. tit. 8, § 11140(4) (2001).

⁸³ See *id.*

⁸⁴ See *infra* notes 86, 90.

contractor acts as a labor broker, linking the seasonal labor pool with the farm operators needing that temporary labor.⁸⁵

One bill, introduced by President Pro Tempore Burton of the California Senate, amends the California Labor Code to close loopholes related to payments from a mandatory bond posted by the farm labor contractors for their employment transgressions.⁸⁶ Existing law requires the farm labor contractor to post a bond with the state Labor Commissioner to obtain a license.⁸⁷ This bill would allow certain penalties and interest accrued from the nonpayment or the late payments of wages to seasonal workers to be drawn from the bond.⁸⁸ Further, the bill would make the bond payable for any monetary relief awarded to an agricultural worker resulting from a violation of labor laws by the farm labor contractor.⁸⁹

The second bill, introduced by Speaker Hertzberg of the California Assembly, also amends the California Labor Code to place more of a burden on the farm operator to help regulate the farm labor contractors.⁹⁰ Existing law requires that a farm operator make a reasonable inquiry to ensure that the farm labor contractor possesses a valid operating license.⁹¹ This bill would mandate that the farm operator has an affirmative duty to inspect the farm labor contractor's license, and to verify its validity.⁹² Additionally, the bill contains a provision which raises the applicable civil penalties to farm operators and farm labor contractors who knowingly and willfully violate the wage, hour or health and safety regulations.⁹³

B. French and European Union Perspective

In France, labor laws are codified in the Code de Travail.⁹⁴ The French Labor code is extremely structured, and thus leaves little room for individual-

⁸⁵ See CAL. LAB. CODE § 1682 (West 1989).

⁸⁶ See S.B. 1125, 2001-2002 Reg. Sess. (Cal. 2001).

⁸⁷ See CAL. LAB. CODE § 1684(c) (West 1989).

⁸⁸ See S.B. 1125, *supra* note 86.

⁸⁹ See *id.*

⁹⁰ See A.B. 423, 2001-2002 Reg. Sess. (Cal. 2001).

⁹¹ See CAL. LAB. CODE § 1695.7 (West 1989).

⁹² See A.B. 423, *supra* note 90.

⁹³ See *id.*

⁹⁴ See Matthew Bender & Co., *Doing Business in France*, vol. 2 § 12.01[2] (2000), available at LEXIS, Legal, Secondary Legal, Matthew Bender®, International Law [hereinafter *Doing Business in France*].

ized contracts between an employer and his employee.⁹⁵ Employment agreements are executed between employer and employee and contain relevant aspects of the terms of employment, such as location of job, nature of the work, dates of work, and wages.⁹⁶ As the vineyard operator's need for workers to conduct the grape harvest is seasonal, it is reasonable to assume that he will enter into employment agreements for fixed periods of time, or for temporary employment.

In the context of employment that is seasonal in nature, such as grape harvesting, the Code de Travail offers a few exemptions from standard labor law pertaining to the employment agreement that are of benefit to the employer.⁹⁷ For example, generally the employment agreement must specify the exact dates of the employment.⁹⁸ If the worker's employment was terminated prior to the specified end date, the employer would be obligated to pay the laborer through the end date regardless of his need.⁹⁹ However, for a seasonal employee, the agreement must merely specify the condition upon which the employment will be terminated, e.g., the completion of the harvest.¹⁰⁰ Further, an employer who continues to employ a worker after the fixed term of the agreement has ended without executing a new agreement must ordinarily pay the worker a premium wage to compensate him for working under such an unprotected status.¹⁰¹ However, the employer is exempt from making such premium payments to a seasonal employee.¹⁰²

The Code de Travail specifies the minimum wage in France, which applies to temporary as well as permanent workers.¹⁰³ In 1999, the minimum wage in France was 40.72 French Francs per hour.¹⁰⁴ This minimum wage equates to an hourly wage of 6.56 U.S. dollars at the prevailing exchange rate of August 1999.¹⁰⁵ Further, the code also specifies a standard workweek of thirty-five hours, and requires that additional compensation shall be paid to employees for

⁹⁵ See *id.* at vol. 2 § 12.01[1].

⁹⁶ See *id.* at vol. 2 § 12.02[4].

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *Bulletin EU 7/8-1999: The Euro*, available at <http://europa.eu.int/abc/doc/off/bull/en/9907/p000529.htm> (providing the prevailing exchange rates for Euros, French Francs and U.S. Dollars for August 1999) (last visited Sept. 23, 2002).

hours worked beyond that standard.¹⁰⁶ For hours worked beyond thirty-five but not exceeding forty-three in a given week, the employer must pay the employee at a rate of one and one-quarter times his standard hourly salary.¹⁰⁷ For hours worked beyond forty-three in a given week, the employer must pay the employee at a rate of one and one-half times his standard hourly rate.¹⁰⁸

Recently, the French Parliament approved legislation that would allow salaried employees to take leave from their job in order to take on secondary employment harvesting the wine-grape crop.¹⁰⁹ This practice had previously been forbidden; however, due to the tightening of the labor pool available to work the seasonal wine-grape harvest, the French Parliament acted to give this exemption only to the vineyard operators and only for the harvest.¹¹⁰ The effectiveness of this legislation remains to be seen, as it assumes that the salaried worker is willing to forego his vacation in order to perform hard manual labor at a minimum wage.

V. TREATMENT OF MIGRANT WORKERS

A. *International Community Perspective*

Recognizing the potential for disparate treatment of farmworkers hailing from the farm operator's state and the farmworker hailing from a foreign state, the General Assembly of the United Nations has prepared a resolution adopting the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (The Convention).¹¹¹

The purpose of the Convention is to provide a broad spectrum of human rights to non-native migrant workers, including basic liberties such as freedom of thought, religion and privacy; equitable treatment and protection under the criminal justice system of the state in which they currently reside; equitable

¹⁰⁶ See *Doing Business in France*, *supra* note 94, vol. 2 § 12.03.

¹⁰⁷ See *id.* vol. 2 § 12.02. Note that the code calls for the employer to pay the employee the standard wage and provide him with 25 percent compensatory time off without pay, but allows for the payment of that compensatory time off at the standard wage. See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See C. TRAV., 2, ch. 2, Sec. 1, sub sec. 2, arts. L122-3-18, 19, 20, Law No. 2001-1246 of Dec. 21, 2001, J.O. Dec. 26, 2001, art. 8 1 B; see also Alan Spencer, *New Law will Help Shortage of Pickers*, Oct. 26, 2001, at <http://www.Decanter.com/news/newsdefault.asp?newsstoryid.=61092liststart=1> (last visited Oct. 29, 2001).

¹¹⁰ See Spencer, *supra* note 109.

¹¹¹ See *Convention*, *supra* note 57.

treatment with respect to the availability of health care and educational services; the right to free movement within and between states; and the right to organize associations and trade unions.¹¹² The Convention attempts to establish the means for the protection of such equitable rights of migrant workers and their families within the international community by requiring that foreign migrant workers and their families given the same rights as naturalized workers performing the same jobs.¹¹³

The Convention defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a [s]tate of which she is not a national."¹¹⁴ The Convention also defines a seasonal worker as "a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year."¹¹⁵

Article 25 of the Convention states that "migrant workers shall enjoy treatment not less favorable than that which applies to nationals of the state of employment in respect of remuneration. . . ."¹¹⁶ Other conditions or work contemplated by Article 25 of the Convention include: "overtime, hours of work, weekly rest, safety, health, (and) termination of employment . . .," whereby the regulations for agricultural workers in the employers state must also apply to the migrant workers.¹¹⁷ The convention also addresses terms of employment, by restricting the minimum age of employment to that set by the employer's state.¹¹⁸

Article 25 of the Convention further states that it shall be illegal for a migrant worker to bargain away his aforementioned rights to fair pay and working conditions.¹¹⁹ Finally, Article 25 of the Convention holds that

[s]tates parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any contractual

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *See id.* art. 2 ¶ 1.

¹¹⁵ *See id.* art. 2 ¶ 2(b).

¹¹⁶ *See id.* art. 25 ¶ 1.

¹¹⁷ *See id.* art. 25 ¶ 1(a).

¹¹⁸ *See id.* art. 25 ¶ 1(b).

¹¹⁹ *See id.* art. 25 ¶ 2.

obligations, nor shall their obligations be limited in any manner by reason of such irregularity.¹²⁰

The standard of treatment set out in Article 25 should be desirable from the standpoint of the worker, as he can expect to be treated in a manner like a national of the state performing the same function. Therefore, the foreign migrant grape harvester will not receive less pay or work more hours at lower rates (i.e. overtime) than a domiciliary of that state working the same grape harvest. The labor leaders, unionized labor groups, and those opposed to the relaxation of immigration laws should be satisfied by the wage and working condition requirements, as migrant workers will then be placed on equal footing with respect to labor costs; therefore, foreign migrant workers should not be taking away jobs from citizens of the employer's state.

Further, the Convention attempts to force the employer's state to regulate the agricultural industry to prevent the abuse and mistreatment of the migrant workers.¹²¹ This includes the provision declaring that the employer is not relieved from contractual obligations due to any irregularity in the stay of the immigrant worker.¹²² In other words, it protects the migrant worker from losing any pay owed him if he is deported. This is likely aimed at preventing the farm operator from calling the state's immigration department or police to round up any illegal immigrants prior to payday to avoid paying their wages for the week.

Finally, the language of the monitoring requirement, "all appropriate measures,"¹²³ creates an ominous-sounding, and seemingly expensive, burden on the employer's state to expend resources to monitor the treatment of migrant workers in the field. This is likely a service that is not provided to nationals of many states that perform the same work on the same level that is apparently contemplated by the Convention. As a result, this provision might sometimes be neglected in a state's implementation of the Convention.

Article 26 of the Convention calls for the states to recognize the right of migrant workers to join any trade union or association, and to attend and take part in any union or association meetings or activities.¹²⁴ This Article attempts to create equality between the foreign migrant workers and those workers from

¹²⁰ See *id.* art. 25 ¶ 3.

¹²¹ See *id.* art. 25.

¹²² See *id.* art. 25 ¶ 3.

¹²³ See *id.*

¹²⁴ See *id.* art. 26 ¶ 1.

the employer's state, by allowing them equal access to organize for the purpose of negotiating for better employment terms and better working conditions.

Although the Convention was adopted by the United Nations without vote, it is not binding on France or the United States until it is ratified by the governments of those countries. Both governments have yet to ratify the Convention.¹²⁵

B. United States Perspective

The United States Congress, recognizing that labor shortages would occur if its agricultural industry had to rely solely on domestic workers, included a provision in the Immigration Reform and Control Act of 1986¹²⁶ that allowed the entry of non-immigrant workers into the United States to perform seasonal agricultural work on a temporary basis.¹²⁷ The Immigration Reform and Control Act was an attempt by Congress to control unauthorized immigration into the United States. The Act attempted to achieve control over unauthorized immigration through three main methods (enforcement, employment and immigration).¹²⁸ The Act also authorized greater enforcement activity by the Immigration and Naturalization Service.¹²⁹ The Act makes it illegal to hire an illegal immigrant, and subjects the employer who hires illegal immigrants to sanctions for non-compliance.¹³⁰ The Act also established an amnesty program for illegal immigrants who had resided continuously in the United States for a period of years.¹³¹

The Act called for employers to check the documentation of its workers to verify their citizenship and residency status, thus putting the employer on notice if they were hiring illegal immigrants.¹³² Checks of employee citizenship and residency documentation began in November 1986.¹³³ Employers discovered to be non-compliant with the documentation checking

¹²⁵ See United Nations Treaty Collection, at <http://untreaty.un.org/English/sample/EnglishInternetBible/PartI/ChapterIV/Treaty18.asp> (last visited Jan. 19, 2003).

¹²⁶ See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

¹²⁷ See 8 U.S.C. § 1188 (1994).

¹²⁸ See 8 U.S.C. §§ 1101, 1324a, 1160 (1994).

¹²⁹ See 8 U.S.C. § 1101 (1994).

¹³⁰ See 8 U.S.C. § 1324a (1994).

¹³¹ See 8 U.S.C. § 1160 (1994).

¹³² See 8 U.S.C. § 1324a (1994).

¹³³ See *id.*

or found to employ illegal immigrants were subject to sanctions.¹³⁴ Sanctions include civil penalties of up to \$10,000 per violation for repeat offenders, and criminal penalties, including fines of up to \$3,000 per illegal immigrant employee and six months in jail for employers engaging in a systematic effort to hire illegal immigrants.¹³⁵

Because of the importance of the agricultural industry in the United States and the industry's reliance on illegal immigrants, primarily from Mexico, to supply the necessary labor force to conduct the harvest of seasonal agricultural crops, Congress acquiesced to the agricultural industry and included in the Act a Special Agricultural Worker exemption.¹³⁶ The special exemption still requires the growers of perishable crops, such as grapes, to adhere to the requirement to check the documentation of its employees and not hire any illegal immigrants, but delayed the implementation of sanctions against those growers.¹³⁷

The Act also authorized the Department of Labor to regulate the minimum wages that can be paid to migrant farmworkers under the Federal H-2A program.¹³⁸ Wages under the H-2A program are required to be the greatest of three possible rates.¹³⁹ Those three wage rates include:

- 1) The federal or state minimum wage;¹⁴⁰
- 2) The local, job-specific prevailing wage;¹⁴¹ and,

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See 8 U.S.C. § 1160 (1994).

¹³⁷ See 8 U.S.C. § 1324a(i) (1994), *repealed by* Act of Sept. 30, 1997, Pub. L. No. 104-208 § 412(c), 1996 U.S.C.C.A.N. 3009-668 (110 Stat. 3009) (eliminating provisions of Act of Nov. 6, 1986).

¹³⁸ See 20 C.F.R. § 655.102 (2001).

¹³⁹ See *supra* note 66.

¹⁴⁰ See 10 C.F.R. § 510.1 (2001). Current Federal minimum wage is \$5.15 per hour; see also CAL. LAB. CODE § 1182 (West 2001). Current California minimum wage is \$6.75 per hour.

¹⁴¹ The local prevailing wage is determined by the California Department of Labor relying upon state agency sponsored surveys. See *supra* note 66; see, e.g., California Employment Development Department, *California Agricultural Bulletin, North Coast Agricultural Employment*, at <http://www.calmis.ca.gov/htmlfile/subject/agric.june2001> (last visited Jan. 11, 2002). The average hourly wage for agricultural workers in the grape industry for June 2001 in the North Coast region of California, which encompasses Napa County, was \$8.74. This was the highest average hourly wage for workers in the agricultural production/crops sector for that region during June 2001, approximately \$0.30 higher per hour than the total agricultural production/crops sector average for that same time period. See *id.* at 7.

3) The adverse effect wage rate.¹⁴²

The wages to be paid to the foreign migrant workers must be the highest of the three categories to ensure that the workers are paid commensurate to local or native employees performing the same job.¹⁴³ This wage mandate protects the migrant worker from being exploited by the farm operators by requiring that they be paid at the prevailing rate, but not less than the minimum wage. This wage mandate also protects the local and domestic laborers who compete for agricultural jobs if they desire to do so, as they will not be in competition against a cheaper labor force from another country. However, because the farm operator does not have to pay social security and unemployment taxes on the H-2A temporary workers that he employs,¹⁴⁴ the farm operator will ultimately save money by hiring the foreign migrant worker as opposed to a citizen or resident worker. This gives the farm operator little incentive to fill his labor needs domestically.

The adverse effect wage rate (\$7.04)¹⁴⁵ on an annualized basis, based on a forty-hour work week, amounts to approximately \$14,600; the prevailing wage for the area (\$8.74)¹⁴⁶ on the same basis amounts to approximately \$18,200. Neither of these wages is compatible with the relatively high cost of living in Napa County. These wages are approximately 33 percent to 40 percent of the current median annual household income of \$45,935 for Napa.¹⁴⁷ Further, because the area is a magnet for tourism, the cost and availability of short-term rentals or hotels is likely not a realistic option.

C. French and European Union Perspective

The European Union predicts that a trend of decreasing numbers of full time agricultural employees, with a corresponding increase in the number of

¹⁴² See 20 C.F.R. § 655.107 (2001) (stating that the adverse effect wage rate is determined from U.S. Department of Agriculture data concerning the regional average of hourly wage data for field and livestock employees); see also Munoz, *supra* note 66 (stating that the current adverse effect wage rate in California is \$7.04).

¹⁴³ See Munoz, *supra* note 66.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See California Employment Development Department, *supra* note 141.

¹⁴⁷ See Napa Chamber of Commerce, *Demographics*, at <http://www.napachamber.org/demographics.html> (last visited Jan. 11, 2002).

temporary or seasonal agricultural employees, will continue to develop.¹⁴⁸ Traditionally, farmworkers migrate to the southern European Union member states (i.e., France, Italy and Spain, which are also the top three producers of wine, respectively, in the European Union and indeed in the world)¹⁴⁹ from the non-European Union countries that surround the Mediterranean Sea.¹⁵⁰

The French Parliament, in an effort to minimize the need for foreign labor to fill the anticipated increased number of seasonal agricultural jobs, has contemplated legislation to aid the vineyard operators in their effort to find an adequate work force for the harvest.¹⁵¹ Legislation was recently passed by the French Parliament that allows salaried employees, who had previously been prohibited from holding a second job, to accept a temporary contract to work the wine-grape harvest.¹⁵² The European Union is also contemplating legislation that would aid the vineyard operator, as well as other farmers, in the harvesting of their crops.¹⁵³ One such proposal contemplates the use of study leaves, so that students can break from their studies to return to the farm to assist with the harvesting of crops.¹⁵⁴

VI. IMMIGRATION REGULATIONS

A. *International Community Perspective*

The General Assembly of the United Nations has prepared a resolution adopting the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (the "Convention").¹⁵⁵ The Convention seeks to protect the rights of migrant workers and their families through the establishment of minimum standards of humane treatment applicable to them.¹⁵⁶ However, realizing that it is difficult to build a consensus among states regarding their policies on the admission of foreigners,

¹⁴⁸ See Opinion of the Economic and Social Committee on the impact of the CAP on the employment and social situation of farmers and farmworkers in the European Union, 1996 O.J. (C 18) 68, ¶ 3.2 [hereinafter Opinion].

¹⁴⁹ See Wine Institute, *World Wine Production by Country*, at http://www.wineinstitute.org/communications/statistics/keyfacts_worldwineproduction99.htm (last visited Jan. 7, 2002).

¹⁵⁰ See Opinion, *supra* note 148, ¶ 3.1.

¹⁵¹ See Spencer, *supra* note 109.

¹⁵² See *supra* note 109.

¹⁵³ See Opinion, *supra* note 148, ¶ 8.1, 8.4.

¹⁵⁴ See *id.* ¶ 8.4.

¹⁵⁵ See *Convention*, *supra* note 57.

¹⁵⁶ See *id.*

the Convention explicitly states that “[n]othing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.”¹⁵⁷ Thus, immigration policies are left up to the individual states.

B. United States Perspective

In the United States, congressional action related to immigration was deemed necessary to ease the burden on the farm operator of finding an adequate supply of seasonal workers for the agricultural industries.¹⁵⁸ Seasonal work in the agricultural industry is generally low paying and requires strenuous physical labor, and thus is likely not favored by those having the ability to seek alternative employment. This is likely to be especially true in a region such as the Napa Valley, which has a relatively high cost of living, and has an apparent abundance of “good jobs” in the surrounding metropolitan areas (San Francisco, Oakland and San Jose). The Immigration Reform and Control Act of 1986 created the “H-2A” agricultural worker program to allow foreign nationals to enter the United States to perform labor “of a temporary or seasonal nature.”¹⁵⁹

However, the Immigration Reform and Control Act contains multiple provisions which mandate that the farm operator makes a positive effort to locate and employ domestic workers before turning to foreign countries for labor.¹⁶⁰ Several other provisions of the Act provide penalties and sanctions for employers and aliens who abuse the system for their own gain.¹⁶¹ According to the National Council of La Raza, farm operators can easily satisfy the criteria to obtain permits for the seasonal workers under the H-2A program as evidenced by the fact that “[t]he current H-2A program approves 99 percent of the applications filed by agricultural employers despite [a] labor surplus [in H-2A workers].”¹⁶² The Department of Labor’s high approval rate for the temporary worker permit applications exists in spite of a 1998 Labor Department Inspector General report criticizing the program for failing to

¹⁵⁷ *Id.* art. 79.

¹⁵⁸ *See* 8 U.S.C. § 1160 (2000).

¹⁵⁹ *See id.* § 1188 (2000).

¹⁶⁰ *See id.* § 1188(b) (2000).

¹⁶¹ *See id.*

¹⁶² *See* Munoz, *supra* note 66.

protect U.S. farmworkers by holding the employers accountable for the local advertising of available jobs.¹⁶³

Due to the undesirable nature of seasonal farm work, and the multitude of other available job opportunities for citizens or legal residents of the United States, the farm operators often encounter difficulties in obtaining a sufficient labor force of nationals to conduct the seasonal crop harvest.¹⁶⁴ Further, because of this need, and the perceived availability of cheap labor in neighboring Latin American countries, the United States' policy toward immigration will likely remain tied to the H-2A or an equivalent program. The H-2A program is likely popular not only with the farm operators, who enjoy the benefits of a cheap source of temporary labor, but also with the xenophobic segment of the population, who favor little if any permanent immigration of foreigners into the United States.

C. French and European Union Perspective

Like the United States, France recognizes the need for foreign workers to perform seasonal work, such as the harvesting of crops.¹⁶⁵ France maintains standards concerning the terms of seasonal work and relating to the eligibility of the seasonal worker.¹⁶⁶ The employment agreement for seasonal work cannot be for longer than six months in any year, and all employment agreements for an individual worker cannot total more than six months in any consecutive twelve-month period.¹⁶⁷ The foreign seasonal worker must be at least seventeen years old and be no more than fifty years old, unless the older worker is specifically requested by name.¹⁶⁸ Further, the foreign seasonal employee must return to his home state upon completion of his term of employment.¹⁶⁹

¹⁶³ See *id.*

¹⁶⁴ See also PHILIP MARTIN ET AL., REPORT OF THE CHANGING FACE CONFERENCE, FOCUS ON NAPA VALLEY, Oct. 5-7, 2000, available at http://migration.ucdavis.edu/rmn/changingface/cf_oct2000/report_napa.html (noting that 81 percent of farmworkers surveyed by the National Agricultural workers survey were foreign born).

¹⁶⁵ See Isabelle Andre, *France Immigration and Nationality Law*, in 2 INTERNATIONAL IMMIGRATION AND NATIONALITY LAW, FRA-0-1, FRA-VII-2 (Denis Campbell et al. eds., 1993) (citing § 341-7-2 of the French Code de Travail, which indicates that employers can employ foreign laborers for seasonal work).

¹⁶⁶ See *id.* (presenting the conditions of employment for seasonal work).

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at FRA-VII-2 to FRA-VII-3.

¹⁶⁹ See *id.* at FRA-VII-3.

Employment of non-EU citizens for seasonal work is subject to another layer of regulation. One example of the more stringent requirements which apply to this class of foreign seasonal workers is that the number of this class of worker hired by each employer cannot be increased from the number hired in the previous year.¹⁷⁰ Thus the available pool of non-EU seasonal workers can only diminish and can never grow.

The procedure used by a farm operator to hire a foreign migrant worker entails filing an application requesting the worker with the National Agency for Employment.¹⁷¹ The Agency then verifies that there is no suitable French or immigrant worker available to perform the work in the local labor market; that the wages to be paid are commensurate with the minimum wage; and, that the living conditions for the migrant worker are adequate.¹⁷² The farm operator's application is forwarded to a local agency, which can request further information from the farm operator and rule on the application.¹⁷³ If the agency grants the application, it then issues a visa tied to the farm operator's employment contract, either for a specified worker, or if unspecified from a pool of applicants seeking such seasonal employment.¹⁷⁴

Immigrant farmworkers working on farms of European Union member states have traditionally migrated from non-European Union countries around the Mediterranean to nearby European Union countries.¹⁷⁵ Recent political strife in Eastern and Central Europe have caused changes in these traditional migratory patterns.¹⁷⁶

The French appear to be attempting to balance the need for the foreign migrant worker to perform the seasonal agricultural crop harvesting, with the desire to protect its citizens who may be seeking employment by requiring a rigorous approval process for the admittance of immigrant seasonal laborers. This policy may be predicated on the nationalistic policy of taking care of its own first, and perhaps from an underlying desire of the citizens or government to minimize the flow of immigrants into France, especially those from outside of Western Europe. The French also appear to offer protection to the immigrant worker through assurance of a minimum wage and the provision of housing and meals. However, this protection may exist merely to protect the

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See Opinion, supra* note 148, ¶ 3.1.

¹⁷⁶ *See id.*

interest of the French worker who may otherwise be replaced entirely by immigrants, if the farm operators were able to pay those immigrants substantially substandard wages and ignore other workplace regulations that affect the conditions of work.

VII. PROVISION OF HOUSING AND DEVELOPMENT OF LOW COST HOUSING BENEFITING FARMWORKERS

A. United States, California and Napa County Perspective

The United States government has made it a requirement for the employers of immigrant workers involved in the H-2A agricultural worker program to offer housing, and provide that housing at no cost to the H-2A permitted immigrant farmworkers they employ.¹⁷⁷ No such mandatory housing requirement exists for the employers of migrant or seasonal workers who are either United States citizens or have United States residency status, however.

For those farmers required to provide housing as a result of the H-2A immigration policy, or who choose to provide housing to their workers, there are, of course, regulations with which they must comply to ensure that the housing provided is fit for human habitation.¹⁷⁸ The Occupational Safety and Health Administration (OSHA) of the Department of Labor has promulgated the Federal Migrant Housing Regulations.¹⁷⁹ The regulations cover various aspects of the housing, including: site selection, where each site "shall be adequately drained" and "be adequate in size to prevent overcrowding";¹⁸⁰ shelter requirements, "constructed in a manner which will provide protection against the elements" and "each room used for sleeping purposes shall contain at least 50 square feet of floor space for each occupant";¹⁸¹ toilet facilities, "adequate for the capacity of the camp";¹⁸² specific ratios for laundry, hand washing and bathing facilities;¹⁸³ and an "adequate and convenient water supply approved by the local health authority."¹⁸⁴ Additionally, kitchen and mess hall requirements, where permitted or provided "shall comply with the

¹⁷⁷ See 8 U.S.C. § 1188(c)(4) (1994).

¹⁷⁸ See 29 C.F.R. § 1910.142 (West 2001).

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* at (a).

¹⁸¹ See *id.* at (b).

¹⁸² See *id.* at (d).

¹⁸³ See *id.* at (f).

¹⁸⁴ See *id.* at (c).

Food Service Sanitation Ordinance and Code V of the Food Service Sanitation Manual,"¹⁸⁵ and first aid facilities, "approved by a health authority shall be maintained and made available."¹⁸⁶ The provision of such facilities is a costly endeavor for the farmer, and can likely only be undertaken by the large farmer who employs a large workforce and can take advantage of economies-of-scale. Because of the costs associated with the provision of housing for the seasonal workers, compliance with the H-2A immigrant agricultural worker program is likely cost prohibitive and thus not an option for the small family farmer.

If the seasonal workers are not part of the H-2A immigrant worker program, and their employer does not choose to provide housing for them, then the workers are on their own to locate housing for the harvest season. While several vineyard operators in Napa County do supply housing for its seasonal workforce, the majority of the vineyard operators do not.¹⁸⁷ Finding an adequate supply of decent and affordable housing for the influx of seasonal workers is perhaps the biggest challenge facing the workers as they arrive in Napa.¹⁸⁸ Currently, Napa has established three labor camps, totaling 136 beds, for migrant workers.¹⁸⁹ The Napa Valley Housing Authority operates one temporary labor camp with forty beds, which utilizes yurts for migrant worker housing.¹⁹⁰ Still, the Napa Housing Authority estimates that an additional 200 to 300 beds are needed to adequately shelter the migrant workers working the grape harvest.¹⁹¹

¹⁸⁵ See *id.* at (i).

¹⁸⁶ See *id.* at (k).

¹⁸⁷ See Napa Valley Grape Growers Association, *Press Release: Ag and Wine Industry Organizations Fund Study to Determine Actual Farmworker Housing Needs*, at <http://www.napagrowers.org/pr.htm> (last visited Oct. 29, 2001).

¹⁸⁸ See MARTIN, *supra* note 38. Dr. Martin concludes that "[m]any of the current farm labor problems seem to revolve around finding housing for the newest arrivals who have the most seasonal jobs." See *id.*

¹⁸⁹ See Napa Valley Grape Growers Association, *Press Release: Ag and Wine Industry Organizations Fund Study to Determine Actual Farmworker Housing Needs*, at <http://www.napagrowers.org/pr.htm> (last visited Oct. 29, 2001).

¹⁹⁰ See Pamela Podger, *Vineyard Housing Slowed by Tax Rules, Owners Need New Law to Shelter Farmworkers*, SAN FRANCISCO CHRONICLE, July 16, 2001, at A13, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/07/16/MNL123347.DTL> (last visited Oct. 29, 2001) (classifying a yurt as a rugged tent-like structure made of solid framing, on a raised flooring, and having doors).

¹⁹¹ See Napa Valley Grape Growers Association, *Press Release: Ag and Wine Industry Organizations Fund Study to Determine Actual Farmworker Housing Needs*, at <http://www.napagrowers.org/pr.htm> (last visited Oct. 29, 2001).

Due to the need for additional housing for the seasonal vineyard workers, the wine industry has taken it upon itself to assist the migrant workers in obtaining the temporary housing that they need.¹⁹² The Napa Valley Vintners Association, made up of wine makers, has donated money raised from their charity wine auctions to cover the operating shortfalls for some of the community-run farmworker housing camps.¹⁹³ The President of Joseph Phelps Vineyards in Napa Valley has donated five acres of land adjacent to the Napa River to be developed as a sixty-bed migrant worker housing facility.¹⁹⁴ Additionally, the Napa Valley vineyard operators donated money to the migrant housing camps by way of a voluntary payment of \$10 per acre of grapes.¹⁹⁵

The California legislature has been increasingly creative in an attempt to help spur the development of farmworker housing. One recent attempt by the California Assembly resulted in Bill 1550, which establishes a mechanism by which the vineyard owners in Napa County can vote to levy an assessment on themselves as a class, on a per acre basis, for the explicit purpose of creating a fund to obtain land and build housing for migrant vineyard workers.¹⁹⁶ The bill, which codifies the voluntary \$10 per acre assessment the vineyard operators had placed on themselves the year before, was recently signed into law by the Governor.¹⁹⁷ The battle to obtain this bill was hard fought. One Napa County Counsel member noted, "doing a tax is a toughie because it has to be uniformly applied, whereas with an assessment you can target the population that will benefit."¹⁹⁸

The difficulty in passing a tax law that covers select individuals or a select industry is enormous in California since the passage of state Proposition 13¹⁹⁹

¹⁹² See Napa Chamber of Commerce, *Napa Valley Agriculture The Wine Industry Report*, at <http://www.napachamber.org/visitorinfo/crop.html> (last visited Jan. 12, 2002).

¹⁹³ See *id.*

¹⁹⁴ See Podger, *supra* note 190.

¹⁹⁵ See Napa Chamber of Commerce, *supra* note 192.

¹⁹⁶ See A.B. 1550, 2001-2002 Sess. (Cal. 2001).

¹⁹⁷ See Wine Institute, *Governor Signs Farmworker Protection Bills*, at <http://www.wineinstitute.org/legislation/farmworkerbills.htm> (last visited Jan. 7, 2002).

¹⁹⁸ See Podger, *supra* note 190.

¹⁹⁹ See Howard Jarvis Taxpayers Association, *Proposition 13: A Look Back*, at http://www.hjta.org/content/arc000024b_prop13.htm (last visited Jan. 19, 2002). Proposition 13 was an awakening of the California community to the excessive property taxes paid by homeowners caused by the real estate price inflation of the early 1970s. See *id.* Proposition 13 froze property taxes at 1978 levels, and placed a 2 percent cap on their annual growth. See *id.* The tax basis, however, would be raised upon sale, causing disproportionate taxation within a neighborhood

in 1978 and Proposition 218²⁰⁰ in 1996. California Assembly Bill 1550, which applies only to Napa County, authorizes Napa County to collect the \$10 per acre assessment and spend that revenue exclusively to provide housing to farmworkers.²⁰¹ Expenditures authorized by the bill include those for “[a]cquiring farmworker housing, [b]uilding farmworker housing, [l]easing farmworker housing, [and p]roviding maintenance or operations for farmworker housing.”²⁰² Napa County will appoint an advisory committee from stakeholders including farmworkers, and vineyard landowners to advise the county on how to disburse the assessment fees.²⁰³ Vineyard operators who already provide housing to their own farmworkers are exempt from the assessment.²⁰⁴ Vineyard operators across California will likely wait and see if Assembly Bill 1550 proves successful in helping to solve Napa’s farmworker housing problem before lobbying to pay a similar assessment for housing their temporary farmworkers.

In addition, California Senate Bill 1186, which proposes to amend the state tax code, has a provision contained in it to provide income tax credits for corporations that construct or rehabilitate farmworker housing.²⁰⁵ Qualified housing includes housing within the state that meets the requirements of the Farmworker Housing Assistance Program, which specifies applicable health and safety codes.²⁰⁶ However, this bill does not provide income tax credits for costs incurred in the acquisition of the property for the farmworker housing camp, or for the cost of financing the acquisition of such property.²⁰⁷

California Assembly Bill 807 authorizes the California Department of Housing and Community Development to make grants to local non-profit

of like homes. *See id.* Proposition 13 survived a legal challenge from the U.S. Supreme Court: the Court held it did not violate the Constitutional guarantee of equal protection in *Nordlinger v. Hahn*, 505 U.S. 1 (1992). *Id.*

²⁰⁰ *See* California Secretary of State, *Voter Approval for Local Government Taxes. Limitations on Fees, Assessments, and Charges Initiative Constitutional Amendment*, at <http://vote96.ss.ca.gov/Vote96/html/BP/218.htm> (last visited Feb. 14, 2003) (“[l]imit[ing] the authority of local governments to impose taxes and property related assessments” and requiring that two-thirds of those impacted by assessment must approve any special tax, and that assessment fees must be limited to the cost of providing the service and cannot be imposed for general governmental services for the benefit of the public).

²⁰¹ *See* Cal. Assemb. Bill No. 1550 (2001).

²⁰² *See id.* § 2(e).

²⁰³ *See id.* 2(f).

²⁰⁴ *See id.* § 2(h).

²⁰⁵ *See* S.B. 1186 § 11, 2001-2002 Sess. (Cal. 2001).

²⁰⁶ *See id.* § 9(f)(4).

²⁰⁷ *See id.* § 11.

entities within the state in order to establish temporary housing for migrant farmworkers and their families.²⁰⁸ As contemplated by the bill, funds available under this program will be for the purchase of land, for the construction of facilities, and for the lease or purchase of existing facilities.²⁰⁹ Recipients of the grants must enter into a written agreement with the state to set the terms of repayment of the funds, and the state will hold a security interest in the property until the funds are repaid.²¹⁰

California Assembly Bill 520 requires municipal governments within the state to promote the development of housing for all economic segments of the community including agricultural employees "through appropriate zoning and development standards. . . ."²¹¹ The City of Napa previously had enacted its own inclusionary zoning ordinance that requires a minimum of 10 percent of new single-family home developments to be built as affordable housing.²¹² While this ordinance was not targeted directly at establishing affordable housing for the migrant vineyard workers, it does have the effect of helping to provide lower cost housing for the general populace, thus increasing the stock of affordable housing. This ordinance recently withstood a due process challenge in the California courts.²¹³ In a move that shows just how important inclusionary zoning measures are to the development of affordable housing for the agricultural community, the Napa Valley Grape Growers Association joined a coalition of other concerned community members to prepare an Amicus Curiae brief in support of the City's ordinance.²¹⁴

Napa County has developed zoning ordinances specifically related to farmworker housing, which the county defines as "permanent or seasonal

²⁰⁸ See A.B. 807, 2001-2002 Sess. (Cal. 2001).

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See S.B. 520, 2001-2002 Sess. (Cal. 2001).

²¹² See Bob Egelko, *Court Backs Low-Income Housing Units Developers' Challenge to Napa Law Rejected*, SAN FRANCISCO CHRON., June 8, 2001, <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/06/08/MN128672.DTL> (last visited Oct. 29, 2001).

²¹³ See *Home Builders Ass'n of N. Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60 (Cal App. 2001) (holding that the Home Builders Association's facial due process challenge to the City's ordinance must fail). The court further held that the seminal U.S. Supreme Court cases *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which require a rough proportionality and an essential nexus between the exaction required by the ordinance and the impacts caused by development of property, respectively, do not apply to the Napa case. See *id.*

²¹⁴ *City of Napa*, 108 Cal. Rptr. at 60.

accommodations for persons . . . employed principally in agriculture,"²¹⁵ and farm labor camps, which the county defines as "permanent or seasonal farmworker housing . . . which is either contained in two or more units, or provides beds for at least five farmworkers and is regulated by the state."²¹⁶ Napa requires that farmworker housing developments be situated on property comprised of at least forty acres for permanent developments and of at least twenty acres for temporary or seasonal developments.²¹⁷ Further, the ordinance controls the amount of rent that can be charged to the occupants of those housing developments.²¹⁸ To further extend what precious few resources have, in the past, been allocated to the farmworker housing situation, the Napa County Board of Supervisors has agreed to modify their zoning ordinance (Napa County Code 18.104.300) that requires a forty-acre minimum property size, to allow smaller properties to be utilized for publicly owned farmworker housing.²¹⁹

Napa requires that farm labor camps be occupied only portions of the year, and that they contain no more than twenty units, or sixty beds per acre.²²⁰ The code allows the labor camps to be built using temporary structures.²²¹ Further, the code requires sensitivity to neighboring land uses; for example, it requires that lighting be shielded from residential areas, that labor camp parking be screened from public roads, and that any permanent structures be screened using landscaping.²²²

²¹⁵ See Napa County Code 18.08.294, at http://mynapa.info/code2000/_data01/title18/chapter_18_08_definitions/18_08_294_farmworker_housing_.html (last visited Feb. 14, 2003).

²¹⁶ See Napa County Code 18.08.293, at http://mynapa.infor/code2000/_data01/title18/chapter_18_08_definitions/18_03_293_farm_labor_comp_.html (last visited Feb. 14, 2003).

²¹⁷ See Napa County Code 18.104.300, at http://mynapa.info/code2000/_data01/title18/chapter_18_104_additional_zoning_d/18_104_300_farmworker_housing_.html (last visited Feb. 14, 2003).

²¹⁸ See *id.*

²¹⁹ See Janice Fuhrman, *Napa Vintners Work to Increase Farm-Worker Housing*, SAN FRANCISCO CHRON., Mar. 23, 2001, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2001/03/23/NB111954.DTL> (last visited Sept. 26, 2001).

²²⁰ See Napa County Code 18.104.310, at http://mynapa.info/code2000/_data/title18/chapter_18_104_310_additional_zoning_d/18_104_310_farm_labor_camps_.html (last visited Feb. 14, 2003).

²²¹ See *id.* at A.3.

²²² See *id.* at B.1.

B. French and European Union Perspective

French law similarly requires that vineyard operators provide their alien migrant workers with adequate bed space and toilets.²²³ Regulations require that the employer also provide the migrant grape harvester with three meals for each eight-hour day worked.²²⁴ In fact, one of the conditions placed upon French employers seeking to obtain a temporary visa for a migrant foreign nationals is that they provide living conditions that are "normal."²²⁵ One can only assume that the required employer arranged housing not be substandard.

Past efforts at providing sleep and toilet facilities have entailed the establishment of farmworker labor camps utilizing tents.²²⁶ For the 2001 harvest, the Bordeaux Wine-Trade Council rented buses to transport workers from the city of Bordeaux out to the vineyards to work.²²⁷ Other vineyards in Bordeaux rented out a campground to house their workers during their three-week harvest.²²⁸ Due to the more stringent regulations concerning the housing of the migrant laborers, vineyard operators may be tempted to turn away from the traditional migrant farm labor in favor of illegal immigrants, who presumably would not receive the requisite housing from their employers that their "legal" counterparts would.²²⁹

VIII. COMPARISON OF THE SYSTEMS IN OPERATION IN THE BORDEAUX
APPELLATION AND IN NAPA COUNTY REGARDING THE
TREATMENT OF THE WINE-GRAPE HARVESTER

The vintners in Napa County and the Bordeaux Appellation rely upon the vineyard operators within their respective provinces to grow premium grapes in order to produce their famed fine wines. While the total acreage of the vineyards of France is much greater than the total acreage of the vineyards of the United States,²³⁰ the average size of each individual vineyard in France is

²²³ See Spencer, *supra* note 109 (citing French Law).

²²⁴ See Lara Marlowe, *Drop in Jobless Leaving Beaujolais Vineyards Short of Labourers*, IRISH TIMES, Aug. 23, 2002.

²²⁵ See Isabelle Andre, 2 *France*, in INTERNATIONAL IMMIGRATION AND NATIONALITY LAW, FRA-VII-3 (Denis Campbell et al. eds., 1993).

²²⁶ See Spencer, *supra* note 109 (citing French Law).

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ See Wine Institute, *World Vineyard Acreage by Country*, at <http://www.wineinstitute.org/>

typically smaller than the average size of the individual vineyard in the United States.²³¹ The average size of a vineyard in the Bordeaux Appellation of France is approximately seventeen acres,²³² while the average size of a vineyard in California is approximately 750 percent larger than its Bordeaux counterpart at about 126 acres.²³³

Due to the smaller average size of the vineyards in France, their operating requirements are likely somewhat different than those of their larger counterparts in the United States, although many of the operational tasks performed are the same. One of the main differences is that the smaller vineyard likely requires less labor to conduct both the routine operations and the intensive operations such as the grape harvest. Many of the vineyards in both the Bordeaux Appellation and the Napa Valley are family owned and operated, and the family members are often involved in the operation of the winery, especially on those occasions that require the greatest manpower, i.e. the grape harvest. Therefore, when both the smaller and larger family operated vineyards have similar sized families, the smaller vineyard operator has an advantage in that a larger proportion of his grape harvest needs are met by his family. Thus, the smaller vineyard operator typically requires less outside help to handle the labor-intensive periods experienced during the grape harvest, making him more self-reliant and less dependent on the labor market than the larger vineyard operator.

As the needs of the wine grape growers are slightly different in France and the United States, the approaches that their respective governments take in helping their economically important wine industries maintain an adequate temporary workforce for the grape harvest should reflect this difference. Since the United States growers require greater numbers of manual laborers from outside of the vineyard to conduct the grape harvest, their laws and regulations should be structured to meet this important labor need. Further reinforcing this

communications/statistics/keyfacts_worldacreage3.htm (last visited Jan. 7, 2002) (finding that France, having the second most acres of vineyards in the world at 2,258,000, has nearly 250 percent more acres of vineyards than the United States, which is fifth in the world with 905,000 acres).

²³¹ See Cristophe Joly, National Trade Data Bank, Mar. 1, 1997, *Agricultural Machinery Market Report for France*.

²³² See *Wine Classification Systems*, at <http://www.history-of-bordeaux.com/html/classifications.html> (last visited Jan. 13, 2002).

²³³ See Napa Valley Vintners Association, *Did You Know? California Wine Industry*, at http://www.napavintners.com/community/duk_california.html (last visited Jan. 11, 2002) (average size calculated by dividing total vineyard acreage in California by the total number of growers in California).

disparity in the need for manual laborers between the vineyard operators in France and the United States to conduct the grape harvest is the trend among the vineyard operators in France to utilize mechanized harvesters to pick their grape crops.²³⁴

The international community, through action of the United Nations, has weighed in on the need to protect the rights of the migrant farmworker by adopting a resolution entitled the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.²³⁵ While the Convention provides rights to migrant farmworkers across a broad spectrum of human rights concerns, it is only binding for member countries when ratified by their respective governments.²³⁶ Neither the government of France nor the government of the United States have signed the Convention though it was adopted over twelve years ago.²³⁷ Although the Convention is not binding on France or the United States, both countries generally comply with the main provisions and the spirit of the Convention. For example, as stated in the Convention, both governments require that immigrant workers receive the same wages and work no more hours than local workers as stated in the Convention.²³⁸ Additionally, both France and the United States require farm operators to provide immigrant seasonal farmworkers with living quarters as stipulated by the Convention.²³⁹

The governments of France, as well as the European Union, and the United States, including the government of the state of California and the local government of Napa County, have all taken active roles in assisting their respective wine industries in securing the required labor force to complete the wine grape harvest. Both the United States and France are members of the United Nations, which adopted the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (the Convention).²⁴⁰ The principles of the Convention appear to be present in the laws and regulations of both France and the United States. The underlying goals of the Convention are to establish minimum standards of treatment for migrant workers to maintain their dignity and humane working and living

²³⁴ See HACHETTE WINE GUIDE, *supra* note 6, at 45.

²³⁵ See Convention, *supra* note 57.

²³⁶ See *id.*

²³⁷ See United Nations Treaty Collection, *supra* note 125.

²³⁸ See *supra* note 143; see Andre, *supra* note 165.

²³⁹ See *supra* note 178; see *supra* note 224.

²⁴⁰ See Convention, *supra* note 57.

conditions, and to discourage and eliminate clandestine movements of migrant workers and the trafficking in migrant workers.²⁴¹

California has recently passed two new bills that attempt to crack down on the farm labor contractor industry.²⁴² The farm labor contractors generally work as brokers matching the demand of the farm operators to the supply of labor. The two bills generally provide for tougher penalties for the farm labor contractor who abuses laborers by failing to pay wages as required, and for immigration law violations.²⁴³ The phenomenon of the farm labor contractor is unique to the United States, as the French government takes on that role.²⁴⁴

Migrant farmworkers in the United States are allowed to work many more hours per week than their counterparts in France.²⁴⁵ This is true for several reasons, primarily because most workers in the United States are permitted, if not required, to work more hours per week than most workers in France.²⁴⁶ Further, the United States has relaxed the criteria for paying seasonal farmworkers overtime wages, thus creating a greater incentive for a farm operator to work its employees more hours, which would thereby reduce the number of laborers he must find and reduce the number of workers for whom he must provide living quarters.

The laws and regulations of California and the United States appear to be more developed with regard to the provision of living quarters for migrant farmworkers than those regulations in France. The California Legislature, at the request of the vineyard operators, representatives of farmworkers and other interested parties joined forces and pushed to get legislation approved that would annually assess each vineyard owner a fee based on the number of acres planted.²⁴⁷ The proceeds of the assessment would be used to provide and maintain temporary housing developments for the migrant seasonal farmworkers.²⁴⁸

The City of Napa's affordable housing requirement for new residential housing developments, which mandates that 10 percent of new single-family

²⁴¹ *See id.*

²⁴² *See* Cal. S.B. 1125, 2001-2002 Sess. (Cal. 2001); *see* A.B. 423, 2001-2002 Sess. (Cal. 2001).

²⁴³ *See id.*

²⁴⁴ *See supra* note 171.

²⁴⁵ *See infra* note 247.

²⁴⁶ This assumes the standard workweek in France to be thirty-five hours, while assuming the standard workweek in the United States to be forty hours.

²⁴⁷ *See* A.B. 1550, 2001-2002 Sess. (Cal. 2001).

²⁴⁸ *See id.*

home developments be built as "affordable housing,"²⁴⁹ likely has a positive effect on the workers employed by the vineyards by providing an available stock of housing that is more affordable to the typically lower paid laborer. The affordable housing requirement may also indirectly reduce the strain on the affordable rental market, in that many former renters are likely to purchase the "affordable housing," thus freeing up rental inventory.

One bill currently being considered by the California Legislature will provide tax breaks to companies that provide or rehabilitate housing for farmworkers.²⁵⁰ This creates an economic incentive to vineyard operators or entities that would like to help the farmworkers, but may not be able to because of the cost. Such a tax break may offset the cost of the project enough to economically justify the socially worthy project. Another bill also under consideration by the state legislature seeks to provide grants to entities to purchase or rehabilitate housing for farmworkers.²⁵¹ This bill, if passed, would provide direct assistance to the groups attempting to help the farmworkers.²⁵²

These regulations may not be merely to benefit the workers, although they clearly do, but they may also be designed to protect the important Napa tourism industry. By providing housing to the farmworkers, it would keep them out of the parks and off the streets, thus providing a more tourist-friendly environment. The harvest time in the Napa Valley is coincidentally also the most popular time of year for the tourist industry.²⁵³

The concern for migrant farmworker housing is not nearly as urgent a concern in France as it is in the Napa Valley. This is likely due to the fact that the need for additional laborers outside of the vineyard and local community is less than that of their California counterparts. It also seems that the standards for what qualifies as "suitable housing" is less stringent in France, as evidenced by the allowance of the use of campgrounds as living quarters.

²⁴⁹ See *Home Builders Ass'n of Northern California v. City of Napa*, 108 Cal. Rptr. 2d at 63 (Cal. Ct. App. 2001).

²⁵⁰ See S.B. 1186 § 9(f), 2001-2002 Sess. (Cal. 2001).

²⁵¹ See A.B. 807, 2001-2002 Sess. (Cal. 2001).

²⁵² See *id.*

²⁵³ See Napa Chamber of Commerce, *Demographics*, <http://www.napachamber.org/relocation/demographics.htm> (last visited on Jan. 11, 2002) (reporting that 38 percent of the area's visitors come during the summer months (July through September)).

IX. CONCLUSION

Due to the importance of the wine-grape crops to the influential wine industries within California and France, their respective governments have crafted laws and regulations designed to help the grape growers find and maintain an adequate temporary or seasonal workforce for the labor intensive grape harvest.

The grape harvest is still primarily performed by hand in Napa County and the Bordeaux Appellation, due to the extremely delicate nature of the crop and the premium nature of the wine-grapes in those regions. Since the time frame within which the picking of a varietal wine-grape crop is very short, a massive workforce is therefore required for that short, one to two month duration harvest period.

The international community, through actions of the United Nations, has expressed its desire to protect the migrant workers who travel to the industrialized nations to assist with the harvesting of their food crops.²⁵⁴ While the Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families provides rights to migrant farmworkers across a broad spectrum of human rights concerns, it is only binding on the member countries when ratified by their respective governments. Neither France nor the United States has signed the Convention. However, the governments of France and the United States generally comply with the main provisions of the Convention. Both governments have regulations in place to treat the migrant farmworker in a manner similar to the treatment received by the local or native farmworker.

The governments of France and the United States have similar immigration policies, in that they generally support the immigration of workers into their borders for seasonal or temporary work as necessary to harvest and process their perishable food crops. However, the administration and implementation of the immigrant regulations in France and the United States are as different as the governments of the two countries. The French government controls the distribution of migrant laborers to the farm operators that need their services, while the United States relies on private farm labor contractors to perform that function. Privatization typically streamlines and makes more efficient the

²⁵⁴ See *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158, U.N. GAOR, 45th Sess., U.N. Doc. A/Res/45/158 (1990).

processes, however, privatization can also lead to abuse by the dominant party due to the lessened governmental oversight.

The laws and regulations of California and the United States appear to be more developed with regard to the provision of living quarters to the migrant farmworkers than those regulations in France. This difference may be due to the social enlightenment of the citizenry of California, especially that of Napa County, or it may be driven by economic factors. The housing regulations not only benefit the farmworkers, but also the robust tourism industry of the Napa Valley, by sweeping the streets and parks clean of those migrant workers who otherwise would not have a yurt to sleep in. Whatever the true motivation, it is admirable to see the socially and economically important wine industries of both France and the United States take the socially responsible course and take care of those vulnerable members of society who enable the industry to be successful, and without whose efforts society would be deprived of much joy.