

CULTIVATING THE NEXT GENERATION: WHY FARMING INTERNSHIPS SHOULD BE LEGAL

I. INTRODUCTION

First-generation farmer David Retsky, the son of a Beverly Hills doctor, grew up with an interest in, but no exposure to, agriculture.¹ As a slightly lazy twenty-year-old who was “barely able to discern a carrot from a beet,” he opted to learn the trade by participating in an internship program at a small organic farm in Santa Barbara called Fairview Gardens.² Education occurred in the fields rather than classrooms, through both observation and performance of repetitive and laborious tasks, often for long hours.³ Compensation for labor came in the form of free, rustic, housing; abundant seasonal, organic food; and a hands-on education in how to run a successful organic agricultural operation.⁴ Until recently, Retsky continued this tradition by sharing his knowledge with interns of his own at his Sonoma County, California farm, County Line Harvest.⁵ Retsky’s interns received room and board along with a small stipend in exchange for staffing his farmers’ market booths and assisting his crew of farm laborers.⁶ About half of the fifty-six organic farms in neighboring Marin County have also utilized intern labor to keep their operating costs manageable and educate new farmers.⁷

In the past two years, however, unpaid internships in many industries—including agriculture specifically⁸—have been called into question

¹ Cassidy Friedman, *Marin’s Organic Farms Wilt Under Labor Laws*, THE BAY CITIZEN, June 24, 2010, <http://www.baycitizen.org/labor/story/marins-organic-farms-wilt-under-labor/>.

² MICHAEL ABLEMAN, *ON GOOD LAND: THE AUTOBIOGRAPHY OF AN URBAN FARM* 116 (Cynthia Wischart ed., Chronicle Books 1998).

³ *Id.*

⁴ *Id.*

⁵ Twilight Greenaway, *The Farm Intern Conundrum*, CIVIL EATS, May 11, 2010, <http://civileats.com/2010/05/11/the-farm-intern-conundrum/>.

⁶ *Id.*

⁷ Friedman, *supra* note 1.

⁸ See, e.g., *Archived Q&A Session with WHD*, U.S. DEP’T OF LABOR, <http://www.dol.gov/regulations/chat-whd-static.htm> (Dec. 8, 2009) (“[T]he division will target industries in which vulnerable workers are employed . . . Industries that employ

across the country and several states have begun scrutinizing this common agricultural practice.⁹ In California, inspectors from the Division of Labor Standards Enforcement discovered the existence of these internships and found them in violation of both state and federal labor laws.¹⁰ Retsky was audited and fined \$18,000 for payroll violations.¹¹ As a result, he no longer offers internships and has been forced to deny each of the several requests he receives every week from hopeful young farmers.¹² As consensus grows among farmers that hosting interns simply is not worth the risk, agricultural internship opportunities are beginning to dry up across California and the rest of the country.¹³

Agricultural internships play a critical role in educating the next generation of food producers. As the current farming population creeps ever closer to retirement age, it is imperative that replacements be properly trained to ensure continued food production.¹⁴ If the years of accrued knowledge and hands-on experience are not passed on, the consequences for our nation's food supply could quickly become dire.¹⁵ Therefore, federal and state labor laws must be revised to allow mutually beneficial internship experiences for a new generation of farmers.

This Comment proceeds in four parts. Part II will introduce the federal Fair Labor Standards Act and the six-point test used by the Department of Labor to analyze employee status under the Act. Part III will discuss the application of this test to agricultural internships to analyze their legality, ultimately showing that most interns will actually be considered employees under the existing scheme. Part IV argues that farming internships are vital to the continued viability of agriculture and food

vulnerable workers include agriculture, restaurants, janitorial, construction and car washes, among others.”).

⁹ See Steven Greenhouse, *Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 2, 2010, <http://www.nytimes.com/2010/04/03/business/03intern.html> (noting that officials in Oregon, California, and other states have begun investigating and fining employers, and that the federal Wage and Hour Division is “stepping up enforcement nationwide”).

¹⁰ See Friedman, *supra* note 1 (“[T]his spring, state labor inspectors stumbled upon the internships and determined that they violate state and federal labor law.”).

¹¹ Greenaway, *supra* note 5.

¹² *Id.*

¹³ *Id.*

¹⁴ See U.S. DEP’T OF AGRIC., 2007 CENSUS OF AGRICULTURE: DEMOGRAPHICS (2007), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/demographics.pdf (detailing demographics of aging farmers).

¹⁵ See, e.g., *Farms and Community*, U.S. DEP’T OF AGRIC., http://afsic.nal.usda.gov/nal_display/index.php?info_center=2&tax_level=2&tax_subject=301&topic_id=1442 (last modified Sep. 12, 2011) (“Half of all current farmers in the U.S. are likely to retire in the next decade. Enlisting and supporting new farmers is essential to the future of family farms, the farm economy and healthy rural communities.”).

security in the United States and warrant codification as legitimate and legal labor relationships. Finally, Part V will discuss the merits and shortcomings of several attempted solutions to ultimately highlight the most important considerations lawmakers must take into account when crafting an exemption for agricultural internships.

II. THE CURRENT STATE OF UNPAID INTERNSHIPS

A. *The Fair Labor Standards Act – A Brief History*

Between the Reconstruction Era and the enactment of the federal Fair Labor Standards Act of 1938 (“FLSA”), the United States underwent a period of extremely rapid industrial growth.¹⁶ Heightened productivity demands from this boom strained workers and created increasingly squalid, perilous factory conditions.¹⁷ The stock market crash of 1929 unleashed a chain of events leading to worldwide economic instability, ending this period of unprecedented prosperity and industrial excess.¹⁸ “Low wages, long working hours and high unemployment plagued the Nation” as the Great Depression took hold.¹⁹ The FLSA was passed to address these ill effects by attempting to “correct and as rapidly as practicable to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.”²⁰

From its original enactment, the FLSA has always contained some form of coverage exemption for agricultural workers.²¹ While initially no such employees were subject to minimum wage requirements,²² the 1966 amendments extended coverage to employees engaged in agriculture and agricultural processing, as well as overtime compensation for the latter.²³ The FLSA continues, however, to exempt employers using less than five

¹⁶ Pamela N. Williams, *Historical Overview of the Fair Labor Standards Act*, 10 FL. COASTAL L. REV. 657, 658 (2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Senate Comm. on Labor and Public Welfare, *Fair Labor Standards Amendments of 1966*, S. Rep. No. 1487, 89th Cong., 2d Sess. 1 (1966). The unemployment rate grew rapidly from an estimated 3.3 percent during 1923-29 to a peak of 25 percent in 1933. U.S. DEP’T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 69 (2001), available at <http://www.bls.gov/opub/rtaw/pdf/chapter2.pdf>.

²⁰ *Id.*

²¹ See Autumn L. Canny, *Lost in a Loophole: The Fair Labor Standards Act’s Exemption of Agricultural Workers From Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 365 (2005).

²² See Fair Labor Standards Act of 1938, 29 U.S.C. § 213 (2004).

²³ S. Rep. No. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3006.

hundred man-days of agricultural labor “during any calendar quarter during the preceding calendar year,” as well as an employer’s spouse or immediate family members, certain hand harvest laborers paid on a piece rate basis, and employees engaged in livestock range production.²⁴ The Act is administered by the Wage and Hour Division (“WHD”) of the Department of Labor (“DOL”).²⁵

Legislative reasoning behind such exemptions is rooted in fear of the “consequences of applying wage and hour regulations to agriculture,” a concern based on “the farmer’s traditional position in American society, the seasonal nature of agriculture production, and the financial burden on farmers.”²⁶ The potential for small farmers to be overwhelmed by the administrative and financial costs of compliance with the FLSA has been of particular concern,²⁷ and the practice of supplementing agricultural workers’ incomes with room and board has been perceived as posing an obstacle to regulation.²⁸

Workers who fit the definition of an “employee” under the FLSA must typically be compensated in compliance with the minimum wage and overtime provisions.²⁹ The Act broadly defines the terms “employee” as “any individual employed by an employer,”³⁰ and “employ” as including “to suffer or permit to work.”³¹ Thus, the question most critical to determining whether an intern is entitled to minimum wage payment under the FLSA is whether the intern fits the statutory definition of an “employee.”³² While internships in the for-profit private sector are generally

²⁴ Fair Labor Standards Act of 1938, § 213(a)(6). A “man-day” is defined as “any day during which an employee performs any agricultural labor for not less than one hour.” *Id.* at § 203(u). 500 man-days equates to approximately seven full-time employees. S. Rep. No. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3011. The labor performed must also fall within the statutory definition of agriculture for these exemptions to apply. *See* Fair Labor Standards Act of 1938, § 203(f) (defining agriculture and providing examples of covered agricultural activities).

²⁵ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2011).

²⁶ Canny, *supra* note 21, at 368.

²⁷ *See id.*

²⁸ *See* Bowie v. Gonzalez, 117 F.2d 11, 18 (1st Cir. 1941) (finding attempts to regulate agricultural wages difficult in light of the practice of employers providing room and board).

²⁹ *See* 29 U.S.C. § 206 (describing minimum wage regulations); 29 U.S.C. § 207 (describing overtime regulations).

³⁰ 29 U.S.C. § 203(e) (2011). This definition has been said to be “the broadest definition that has ever been included in any one act.” *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement by Sen. Hugo Black)).

³¹ 29 U.S.C. § 203(g) (2011).

³² *See* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 225 (2002).

considered to constitute employment, minimum wage compensation may be waived if a program meets all six points of the DOL's test for legitimately unpaid interns.³³

B. The Six-Part Test for Establishing Intern Status

In the seminal case *Walling v. Portland Terminal Company*, the Supreme Court held that railroad trainees were not employees within the meaning of the Act where the railroad received no immediate advantage from work performed by the trainees and they were training primarily for their own benefit.³⁴ Borrowing heavily from the Court's reasoning in this case, the WHD has articulated a six-factor test in its field operations manuals and a series of opinion letters to aid employee status determination under the FLSA.³⁵ If all six factors are satisfied, an intern will not be considered an employee under the Act.³⁶

The first requirement is that the internship, "even though it includes actual operation of the facilities of the employer, [must be] similar to training which would be given in a vocational school."³⁷ The more an internship program resembles or is structured around an academic experience, and the higher the level of applicability of learned skills to situations beyond that of one particular employer's operation, the more likely the internship will be deemed a continuation of an individual's education or training.³⁸

³³ U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (April 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> [hereinafter *Fact Sheet #71*].

³⁴ *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

³⁵ See, e.g., DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK CH. 10, §10B11 (1993) ("If all six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA."); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2006-12 (Apr. 6, 2006) (same); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-16 (Oct. 19, 2004) (same); U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2002-8 (Sept. 5, 2002) (same). The Department of Labor uses the terms "intern" and "trainee" interchangeably for the purposes of this test. See, e.g., *Fact Sheet #71*, *supra* note 27 (describing the six-part test for unpaid internship or training programs).

³⁶ See, e.g., DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK CH. 10, §10B11 (1993) ("If all six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA.").

³⁷ See, e.g., U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

³⁸ *Fact Sheet #71*, *supra* note 33.

Second, the internship experience must be for the benefit of the intern.³⁹ This generally means that “the intern does not perform the routine work of the business” on a recurring basis, and “the business is not dependent upon the work of the intern.”⁴⁰ The incidental benefit that an intern may reap from performing routine work, such as improvement of work habits, is not enough to save an employer from minimum wage compensation requirements.⁴¹

Third, it is required that the intern “do[es] not displace regular employees, but work[s] under their close observation.”⁴² An employer cannot use interns as substitutes for regular employees, nor can it use interns to augment its workforce in place of additional employees it would have found necessary to hire.⁴³ Conversely, opportunities to shadow existing employees and to learn certain job functions under their supervision are presumptively educational experiences, particularly if the intern is performing minimal to no actual work.⁴⁴ However, if an intern receives no more supervision than regular employees, it is likely that they will not be considered as receiving training.⁴⁵

Fourth, it is required that “the employer that provides the training derives no immediate advantage from the activities of the [intern] and on occasion the employer’s operations may actually be impeded.”⁴⁶ The DOL has further clarified this rather vague and impractical rule by interpreting it to mean that the “productive work performed by the mentees would be offset by the burden to the employers . . . from the training and supervision provided.”⁴⁷ Thus, the dispositive question is whether the employer or the trainee is the primary beneficiary of the relationship.

Fifth, the intern “is not necessarily entitled to a job at the completion of the training period.”⁴⁸ The duration of the internship should be deter-

³⁹ See, e.g., U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

⁴⁰ *Fact Sheet #71*, *supra* note 33.

⁴¹ *Id.*

⁴² E.g., U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

⁴³ *Fact Sheet #71*, *supra* note 33.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ E.g., U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

⁴⁷ Open Letter from the U.S. Department of Labor, Wage and Hour Division (Sep. 5, 2002), available at http://www.dol.gov/whd/opinion/FLSA/2002/2002_09_05_8_FLSA.htm.

⁴⁸ E.g., U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

mined prior to its commencement.⁴⁹ Use of unpaid internships as a trial period before hiring on a permanent basis is not allowed, and an employment relationship will generally be found to exist where an intern has been placed with an employer for such a trial period with an expectation of permanent employment.⁵⁰

Finally, it is required that “the employer and the [intern] understand that the [intern is] not entitled to wages for the time spent in training.”⁵¹ Both parties must comprehend and acknowledge the nature of the unpaid intern relationship. If all six factors of the DOL’s test are satisfied, an employment relationship does not exist and the intern is not covered by the minimum wage and overtime requirements of the FLSA.⁵²

III. HOW AGRICULTURAL INTERNSHIPS MEASURE UP TO THE EXISTING UNPAID INTERN TEST

Some elements of the DOL’s existing six-part test could prove attainable for agricultural internships with conscious planning on the part of the farmer. Other elements, however, pose difficult, if not impossible, obstacles to overcome.

A. Agricultural Internships Could Satisfy the First, Fifth, and Sixth Prongs

The first element of the test requires that an internship provide training similar to that offered in educational environments, such as an apprentice program or vocational school.⁵³ For example, the University of California in Santa Cruz offers a six-month apprentice program in Ecological Horticulture in the typical format of a formal apprenticeship.⁵⁴ The program culminates in the award of a certificate and twenty extension credits that may transfer to another institution, and aims to provide students with a mastery of the basic practical skills and concepts required to run a farm through a combination of structured fieldwork sessions, lectures,

⁴⁹ *Fact Sheet #71*, *supra* note 33.

⁵⁰ *Id.*

⁵¹ *E.g.*, U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

⁵² *See, e.g.*, U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK CH. 10, §10B11 (1993) (“If all six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA.”).

⁵³ *See, e.g.*, U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

⁵⁴ *See* Univ. of Cal. Santa Cruz, *Apprenticeship Information*, THE CENTER FOR AGROECOLOGY & SUSTAINABLE FOOD SYSTEMS, <http://casfs.ucsc.edu/apprentice-training/apprenticeship-information> (last visited Oct. 24, 2010).

and practical skills classes.⁵⁵ Apprentices can live in tent cabins on the farm, share group meals, and are expected to engage in strenuous physical work five days a week.⁵⁶

Most farming internships appear identical to this scenario; interns are provided room, board, and free meals, and in exchange labor in the fields under the supervision and guidance of experienced farmers.⁵⁷ The key difference, aside from tuition payment, is that an apprenticeship includes a highly structured classroom component in addition to hands-on learning.⁵⁸ Thus, for an employer to be certain that an internship experience will satisfy the first element of the test, it must be sure to develop a curriculum providing lectures and workshops that impart core information and a theoretical background for the skills taught in the field.⁵⁹

As a general rule, agricultural internships will usually satisfy the fifth prong of the test requiring that an intern not necessarily be entitled to a job upon completion of the experience.⁶⁰ Most interns wish to build a foundation of agricultural knowledge with which to start their own farming operation or manage one already in existence.⁶¹ They are likely not pursuing a permanent position continuing the same work performed during the internship.⁶² It is possible, however, that they may anticipate the extension of a management opportunity at the internship farm, making it important for the farmer to be clear about the arrangement from the outset.⁶³ The most straightforward way to achieve this clarity is by memori-

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Christine Muhlke, *Field Report: Will Work for Food*, N.Y. TIMES, Sept. 8, 2010, <http://www.nytimes.com/2010/09/12/magazine/12food-t-000.html> (describing typical farming internships).

⁵⁸ See *Apprenticeship Information*, *supra* note 54 (describing classroom component).

⁵⁹ See generally WESTERN SUSTAINABLE AGRICULTURE RESEARCH AND EDUCATION (SARE), FARM INTERNSHIP CURRICULUM, http://attra.ncat.org/intern_handbook/pdf/full_intern_curriculum.pdf (2010) (detailing a sample curriculum comprised of both classroom and hands-on components).

⁶⁰ See, e.g., U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

⁶¹ See, e.g., *Farm School*, FOUNDATION FARM, http://www.foundationfarm.com/farm_school.htm (last modified Dec. 26, 2010) (calling for "trainees interested in establishing their own farm in the near future.>").

⁶² Most farm internship programs claim training new farmers to successfully run their own operations as a primary goal, as opposed to simply training workers for continued labor in the fields. See, e.g., *Work on the Farm*, IVY CREEK FAMILY FARM, http://ivycreekfamilyfarm.com/?page_id=79 (last visited Nov. 15, 2011) ("Our goal is to provide apprentices with the experience and knowledge they need to start their own farming operation.>").

⁶³ See, e.g., *Farm Apprenticeships*, THE LAW FOR FOOD BLOG, http://www.lawforfood.com/Law_for_Food/Blog/Entries/2011/2/7_Farm_Apprenticeships.html (Feb. 17, 2011)

alizing the understanding in a contract.⁶⁴ This is also the easiest means of satisfying the sixth requirement that a mutual understanding of non-payment exists between the farmer and the intern.

B. Agricultural Internships Likely Cannot Satisfy the Second, Third, and Fourth Prongs

The second and fourth factors of the test, requiring that internships be for the benefit of the intern and that the employer derive no immediate advantage, ostensibly exist to protect workers from exploitative internships.⁶⁵ If an experience is truly for the benefit of the intern and not the farmer, then the farmer must be willing to have production slowed by teaching efforts and to invest time and energy into the growth of the intern.⁶⁶ Mentorship and education must be prioritized above productivity. While a farmer could potentially be successful in structuring an internship experience for the benefit of the intern, it is difficult to imagine a scenario where the farmer would not also then derive some sort of immediate advantage from the relationship. Indeed, affordable farm labor may be the primary justification for devoting the time and effort necessary to host interns.⁶⁷

While many small farms may be tempted to use internships as a way to cut costs, it is clear that under the existing second and fourth prongs interns cannot legally be regarded solely as a source of inexpensive labor. This conclusion is further supported by consideration of factor three, which prevents the use of interns in lieu of regular employees.⁶⁸ The makeup of the farm's workforce must remain undisturbed save the addition of interns.⁶⁹ Thus, the existing test allows only a system where

("The better the farmer and apprentice's ability to communicate expectations, the fewer challenges will arise that cannot be resolved. . .").

⁶⁴ See *id.* ("Clearly memorializing the expectations of both sides in writing is always a good start to a successful apprenticeship.").

⁶⁵ See, e.g., U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004) (laying out DOL's six-part test).

⁶⁶ See MAUD POWELL, WESTERN SARE FARM INTERNSHIP HANDBOOK, WESTERN SUSTAINABLE AGRICULTURE RESEARCH AND EDUCATION (SARE) 1, 2 (2007), http://attra.ncat.org/intern_handbook/pdf/full_intern_curriculum.pdf ("[I]nternships entail a great deal of negotiation, patience, energy, and time.").

⁶⁷ See *Farm Apprenticeships*, LAW FOR FOOD BLOG (February 7, 2011), http://www.lawforfood.com/Law_for_Food/Blog/Entries/2011/2/7_Farm_Apprenticeships.html ("Surveys indicate the farm labor received by the farmer mentor makes up a primary justification for hosting interns in the first place.").

⁶⁸ See, e.g., U.S. Dep't of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

⁶⁹ *Fact Sheet #71*, *supra* note 33.

farmers altruistically train interns, slowing the regular operations of the farm and its employees, while receiving no financial benefit in return.

Even a farmer who takes the precautionary steps of crafting a detailed curriculum and ensuring complete agreement contractually will still be found liable for back-wages under the existing scheme if interns have not been compensated with minimum wage.⁷⁰ The DOL test unwaveringly requires all six pieces of its test be fulfilled for an exemption from employee status under the FLSA to apply.⁷¹ Until recently, however, the time-honored tradition of agricultural internships remained off the DOL's enforcement radar.⁷² As enforcement action has ramped up against this common practice, the unpredictable financial risk is causing many farmers to discontinue internship offerings altogether,⁷³ with potentially disastrous long-term consequences for the nation's agriculture.

III. WHY INTERNSHIPS ARE CRUCIAL TO THE FUTURE OF AGRICULTURE IN THE UNITED STATES

A. America's Aging Farmers

"The proportion of farmers in the United States age fifty-five and over rose from thirty-seven percent in 1954 to sixty-one percent in 1997."⁷⁴ The average age of farmers has since continued this upward trend, growing from 55.3 in 2002 to 57.1 in 2007.⁷⁵ In this same short period, the number of farmers aged seventy-five years and older grew twenty percent while those aged twenty-five and under decreased by thirty percent.⁷⁶ As many farmers near retirement, it has become imperative to counteract this trend by attracting and properly educating a new generation to whom the torch can be passed.

⁷⁰ Even in this scenario, the employer will derive an immediate advantage from the unpaid labor of the intern—thus failing prong four of the six-point test.

⁷¹ See, e.g., DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK CH. 10, §10B11 (1993) ("If all six of the following criteria apply, the trainees or students are not employees within the meaning of the FLSA.").

⁷² See, e.g., Friedman, *supra* note 1 ("[T]his spring, state labor inspectors stumbled upon the internships and determined that they violate state and federal labor law.").

⁷³ See generally *id.* ("Organic farming internships dried up, with disastrous consequences for farmers . . . and would-be farmers working for them.").

⁷⁴ See Ralph Grossi, *Intergenerational Succession & New Farmer Opportunity* 53 (July 2009) (unpublished manuscript) available at http://www.cdffa.ca.gov/agvission/docs/Intergenerational_Succession.pdf.

⁷⁵ See U.S. DEP'T OF AGRIC., 2007 CENSUS OF AGRICULTURE: DEMOGRAPHICS (2007), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/demographics.pdf.

⁷⁶ *Id.*

While farming involves many technical skills, it is as much an art as it is a trade, a science, and a business.⁷⁷ To be successful, a farmer must understand the unique soils, slopes, climatic conditions, and corresponding management practices of each field, as well as the varieties, qualities, and adaptability of contemplated crops.⁷⁸ They must comprehend the health and proper care of animals, equipment operation and repair, fundamentals of irrigation and differing water needs of plants, and many other practical skills best learned by doing.⁷⁹ Indeed, “working on a farm is the only way to really learn farming.”⁸⁰ Without the practical skills necessary to farm successfully, many new operations would likely not survive past their first year. As one farmer noted, “You need to know what you’re doing, because you can’t make any mistakes to keep the equity going With low margins, you have to do everything right.”⁸¹ As an increasing number of young people with no experience are becoming interested particularly in sustainable agriculture, it is clear that internships are not only an important educational tool, but also an essential opportunity for newcomers to sample the difficult lifestyle of a farmer.

B. Farming Internships are Mutually Beneficial

Farming internships have historically provided a mutually beneficial relationship for both parties.⁸² While the farmer obviously receives the benefit of free or inexpensive labor, it is not without a price. Valuable time must be invested in training and teaching the intern that would not have been necessary to expend on an experienced employee.⁸³ Interns,

⁷⁷ Oregon Dep’t of Agric., *Farm Internships in Oregon: Introduction*, OREGON.GOV, http://oregon.gov/ODA/farm_internships.shtml (last visited April 26, 2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Joy Powell & Kevin Diaz, *Young Farmers Face Big Obstacles: With Fewer People Going Into Farming, Many Worry About Where the United States Will Get Its Next Generation of Farmers*, THE STAR TRIBUNE, Sept. 16, 2001.

⁸² See, e.g., Greenaway, *supra* note 5 (“Interns have staffed booths at farmers markets, supported [a] core crew of farm laborers, and they’ve had the opportunity to learn about the inner workings of the business. In return, [they are] provided [] with room and board and [a small stipend]. ‘It’s a resume builder and they get to find out if they really like agriculture,’ says Retsky. ‘It’s been a win-win.’”).

⁸³ See Marcia Hahn, *Student Interns Bring New Energy to Farms*, FARMERS’ MARKETS TODAY, http://www.farmersmarketstoday.com/fmt/index.php?option=com_content&view=article&id=56%3Astudent-interns&Itemid=126 (last visited Sept. 30, 2011) (“It may be cheap financially, because the stipends are generally low, but there is an investment the farmer and farm family must make to the student intern – in training [and] monitoring what they’re doing’ [John M. Gerber, a professor of Plant Science and Sustainability Studies], says. ‘It’s not a low cost enterprise at all.’”).

on the other hand, have always enjoyed compensation in nontraditional currency, namely access to and education from the accumulated wisdom of an experienced farmer, housing, food, and a modest stipend. All of these things carry a market value in traditional currency; indeed, the apprentice program at UC Santa Cruz charges each student \$5,300 in tuition and \$100 a month for food during its six-month program.⁸⁴

While an employer is allowed to include in wages the “reasonable cost . . . of furnishing [an] employee with board, lodging, or other facilities, if such [items] are customarily furnished” to employees,⁸⁵ the cost of education is not considered in the regulations.⁸⁶ Agricultural internships’ conflict with labor laws, then, appears to stem simply from the attempt to substitute education, a valuable commodity, for the payment of actual wages and subsequent purchase of these services.

In the absence of such a substitution, however, many hopeful young farmers would find themselves unable to procure an education. With no practical knowledge or experience in running a farm, such an aspirant would likely be unable to obtain an agricultural job doing anything more than menial, unskilled labor, while seeking this knowledge from formal vocational programs can be prohibitively costly and competitive.⁸⁷ In response to the increasing regulatory pressure, farmers have been forced to make a choice between charging former interns as justification for time lost to teaching and paying appropriate wages to them as employees while minimizing any educational component.⁸⁸ Neither alternative presents a viable opportunity for the average aspiring agrarian to learn the skills necessary to run a successful farming operation.

⁸⁴ See *Apprenticeship Information*, *supra* note 54.

⁸⁵ Fair Labor Standards Act of 1938, 29 U.S.C. § 203(m) (2011). See also 29 C.F.R. § 531.29 (2011) (clarifying that board, lodging, and other facilities may either be furnished in addition to or deducted from a stipulated wage); 29 C.F.R. § 531.32 (2011) (deeming meals furnished by an employer and housing furnished for dwelling purposes as within the meaning of “other facilities”); U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2001-7 (Feb. 16, 2001) (“An employer may either claim a credit towards its minimum wage and overtime obligations for the reasonable cost or fair value of furnishing qualifying section 3(m) facilities, or deduct the amounts from the compensation due, even if the . . . deductions reduce an employee’s pay below the statutorily-required minimum.”).

⁸⁶ See 29 C.F.R. § 531.32 (defining “other facilities” as “something like board or lodging” and providing examples).

⁸⁷ See Greenaway, *supra* note 5.

⁸⁸ Mark Noack, *Organic Farms Face Scrutiny*, HALF MOON BAY REVIEW, Apr. 21, 2010, http://www.hmbreview.com/news/article_00bc3e67-2258-5771-afe0-172aba4ba9fb.html.

C. *Small and Organic Farms May Be Overwhelmed by the Costs of Compliance*

In addition to adverse effects on interns, the government's recent crackdown has had a disproportionate impact on small and organic farming operations.⁸⁹ Due to the inherent lack of pesticide and herbicide use, organic farm workers must perform the laborious tasks of weeding and pest control manually.⁹⁰ This necessarily requires a larger workforce, which by their very nature most small farms cannot afford to maintain. These farms have historically relied on intern labor to remain viable, and removal of this resource will eventually force many to fold under the financial strain of increased labor costs.⁹¹ Large operations utilizing methods that produce higher yields, such as use of genetically modified seed, bring in larger profits.⁹² They can afford to pay workers minimum wage and thus have no need for intern labor. Furthermore, the use of synthetic pesticides eliminates much of the manual labor requiring a larger workforce.⁹³ Small and organic farms are the clear victim of the sudden application and enforcement of labor laws to farming internships.

As awareness of the environmental and health impacts of conventional agriculture grows in the United States, so too does the public desire for organic, local, and sustainably produced food from small farms.⁹⁴ Such

⁸⁹ See Friedman, *supra* note 1 (“[U]npaid or underpaid and work-trade programs have fueled the organics movement since the Bay Area’s first certified organic farms sprung up in the 1970s in Bolinas. But this spring, state labor inspectors stumbled upon the internships and determined that they violate state and federal labor law. Organic farming internships dried up, with disastrous consequences . . .”).

⁹⁰ See Greenaway, *supra* note 5 (“Internships have a long-standing role on organic farms — and for good reason. Labor is generally the biggest expense for these farmers, who rely on elbow grease over the work of synthetic pesticides and fertilizers.”).

⁹¹ See Friedman, *supra* note 1 (quoting an organic farmer saying of internships: “We can’t afford to make a living producing these commodities unless we use this type of labor.”).

⁹² Press Release, National Research Council, Genetically Engineered Crops Benefit Many Farmers, But The Technology Needs Proper Management to Remain Effective (Apr. 13, 2010) (reporting study finding that genetically modified crops result in bigger yields and higher profits for farmers).

⁹³ See, e.g., Frank G. Zalom, *Pesticide Use Practices in Integrated Pest Management*, in HANDBOOK OF PESTICIDE TOXICOLOGY 275 (Robert Kreiger et al. eds., 2d ed. 2001) (“[T]he introduction of synthetic pesticides reduced on-farm labor requirements . . . [F]ewer people must work on farms to produce the food and fiber products required to sustain an ever-growing population.”).

⁹⁴ CHRISTOS VASILIKIOTIS, CAN ORGANIC FARMING “FEED THE WORLD”?, UNIV. OF CAL. BERKELEY (2005), http://www.cnr.berkeley.edu/~christos/articles/cv_organic_farming.html (“[C]onsumer demand for organic products is driving the organic movement ahead at a 20% annual rate of market growth . . .”).

operations are also vital to long-term food security, as “[t]he world’s agricultural biodiversity – the ultimate insurance policy against climate variations, pest outbreaks, and other unforeseen threats . . . depends largely on the millions of small farmers who use this diversity in their local growing environments.”⁹⁵ Without the use of intern labor, however, many of these farming operations will no longer be able to maintain viability.⁹⁶ Likewise, if aspiring young farmers are denied the opportunity for an educational internship, the number of capable farmers in the country will begin to dwindle as the majority reaches retirement age while leaving no qualified replacement.⁹⁷ The consequences for the nation’s food supply would be dire, quickly leading to food shortages.

D. New Farmers are Vital to the Nation’s Food Security

Texas Agriculture Commissioner Todd Staples recently stated that “our nation’s food security is tied to domestic agricultural production With many farmers and ranchers close to retirement, we must encourage new talent to ensure we meet the food demands of a growing population.”⁹⁸ Shortages pose a threat not only to keeping the nation fed, but also to ensuring that America does not become dependent upon foreign countries for its food supply.⁹⁹ The USDA recently created a new program encouraging retired or retiring farmers to transition their land to beginning farmers precisely because “ensuring that our nation’s land is returned to production using sustainable methods is critical . . . for our future food supply.”¹⁰⁰ The program is part of the USDA’s response to the problem of aging and retiring farmers, and is designed to combat the challenge many new farmers face in gaining access to workable land.¹⁰¹

⁹⁵ Brian Halweil, *Where Have All the Farmers Gone?*, WORLD WATCH MAGAZINE, Sept., 2000, at 25.

⁹⁶ See Friedman, *supra* note 1 (quoting an organic farmer saying of internships: “We can’t afford to make a living producing these commodities unless we use this type of labor.”).

⁹⁷ See discussion *supra* Part III.A.

⁹⁸ News Release, Texas Department of Agriculture, Texas Department of Agriculture Seeks Young Farmers, Ranchers Starting or Expanding Operations (April 11, 2011), available at http://www.texasagriculture.gov/agr/media/media_render/0,1460,1848_17053_44469_0,00.html.

⁹⁹ Powell & Diaz, *supra* note 62.

¹⁰⁰ News Release, U.S. Dep’t of Agric., USDA Helps Retiring Farmers Transition their Land to Beginning Farmers in New Farm Bill Program (May 14, 2010), available at http://www.usda.gov/wps/portal/usda/usdahome?contentid=2010/05/0265.xml&navid=FARM_BILL_NEWSRT&navtype=RT&parentnav=FARMBILL2008&edeployment_action=retrievecontent.

¹⁰¹ *Id.*

However, many beneficiaries of the program will likely struggle to maintain economic viability through the crucial first years due to a lack of proper training in the management of their new farming operations.

Congress has attempted to bridge this education gap by allocating \$18-19 million each fiscal year in the 2008 Farm Bill to educate new growers across the country.¹⁰² The Beginning Farmer and Rancher Development Program (“BFRDP”) awards grants through a competitive process, giving priority to “partnerships and collaborations led by or including non-governmental and community-based organizations with expertise in new agricultural producer training and outreach.”¹⁰³ This includes post-secondary institutions such as Oregon State University (“OSU”), which has used its government grant to develop a workshop series imparting the core knowledge new farmers need to manage the biological, physical, financial, and family aspects of farming.¹⁰⁴

While the BFRDP and its resultant educational programs are surely beneficial to beginning farmers, they fall well short of the internship experience in several crucial respects. First, workshops like that of OSU provide a total of only around twenty-five hours in classroom and field sessions.¹⁰⁵ In contrast, interns generally work and learn under an experienced farmer’s supervision for an entire growing season.¹⁰⁶ This enables not only a deeper understanding of the material, but also an opportunity to capitalize on the farmer’s expertise in troubleshooting any problems that may arise. Second, internships allow a hopeful farmer to learn in an environment with less pressure.¹⁰⁷ In contrast, workshop participants and other BFRDP beneficiaries are either considering starting or have already established their own new farming business, making the financial stakes

¹⁰² Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 3319f(h)(1) (2008).

¹⁰³ 7 U.S.C. § 3319f (2008).

¹⁰⁴ *Growing Farms Workshop Series*, OR. STATE UNIV. EXTENSION SERV.: SMALL FARMS, <http://smallfarms.oregonstate.edu/growing-farms-workshop-series> (last visited Apr. 30, 2011).

¹⁰⁵ See, e.g., *2011 Central Oregon Growing Farms Workshop Series*, OR. STATE UNIV. EXTENSION SERV.: SMALL FARMS, <http://smallfarms.oregonstate.edu/central-oregon-growing-farms-workshop-series> (last visited Sept. 30, 2011) (detailing dates of six four-hour workshop sessions totaling twenty-four hours, as well as one field trip date).

¹⁰⁶ See, e.g., *Farms Next Internship Program*, ROGUE FARM CORPS, <http://www.roguefarmcorps.org/farms-next-internship-program> (last visited Sept. 30, 2011) (exemplifying a typical internship where interns “live and work full time on a host farm for an entire growing season, receiving ongoing instruction, and learning in-depth skills unique to the host farmer’s operation.”).

¹⁰⁷ See, e.g., *Apprentice Program*, LIVE POWER COMMUNITY FARM, <http://www.livepower.org/Apprentice/> (last visited Sept. 30, 2011) (describing internship as “provid[ing] the opportunity to try small-scale sustainable farming without capital investment, risk, or living expenses . . .”).

very high.¹⁰⁸ Low profit margins leave very little room for mistakes.¹⁰⁹ Third, legalization of the common, time-honored tradition of agricultural internships costs American taxpayers nothing in a time when the federal budget deficit continues to soar.¹¹⁰ Indeed, exempting these internships would likely save the government money by relieving some of the regulatory and enforcement burdens.

In sum, the long-standing tradition of farming internships in the United States presents the most logical and effective means of training the next generation of farmers to fill the production gap that will soon be left by many retiring farmers. In return for helping many small and organic farms remain profitable, interns receive an extremely valuable educational experience that teaches them the skills necessary to run their own successful farming operation.¹¹¹ Without such an educational mechanism, the impending loss of truly capable growers could quickly threaten our national food supply and food security. Therefore, the farming internship should be legally recognized as a necessary means of ensuring agricultural viability in the future for the United States.

IV. ATTEMPTED SOLUTIONS AND IMPORTANT CONSIDERATIONS FOR LAWMAKERS

As it became increasingly clear that farming internships were no longer safe from DOL enforcement actions, at least two states have attempted to create suitable replacement options that would not offend labor laws.¹¹² California's effort ultimately amounts to little more than what is already offered by existing university apprentice programs.¹¹³ Washington's legislative experiment, while innovative, has achieved

¹⁰⁸ See Powell & Diaz, *supra* note 62 ("For beginning farmers who are unable to handle it financially, we're talking about lost dreams and fading hopes in what they had planned for their futures. . . . You need to know what you're doing, because you can't make any mistakes to keep the equity going. . . . With low margins, you have to do everything right.").

¹⁰⁹ See *id.*

¹¹⁰ See CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 TO 2021 (January 2011), http://www.cbo.gov/ftpdocs/120xx/doc12039/01-26_FY2011Outlook.pdf ("As a share of gross domestic product (GDP), [2011]'s deficit will be . . . nearly 1 percentage point higher than the shortfall recorded [in 2010] and almost equal to the deficit posted in 2009, which was . . . the highest share in nearly 65 years.").

¹¹¹ See discussion *supra* Part III.B.

¹¹² See discussion *infra* Parts IV.A, IV.B.

¹¹³ See, e.g., *Apprenticeship Information*, *supra* note 54 (describing a typical apprenticeship program already in existence).

limited success due to anemic enrollment rates.¹¹⁴ As lawmakers continue to grapple with crafting a workable exemption, several untested possibilities should be considered – including exempting agricultural internships from minimum wage requirements under the longstanding doctrine of “agricultural exceptionalism.”¹¹⁵

A. California’s Attempted Solution

In response to the string of labor citations issued in 2010, prominent members of California’s agricultural community recently came together to discuss options for the future.¹¹⁶ As a result, the University of California Cooperative Extension helped broker an agreement between the College of Marin and the state Department of Apprenticeship Standards to launch the nation’s first apprenticeship program in organic farming and gardening.¹¹⁷ Fresh Run Farm in Bolinas will pay apprentices for 1,800 hours of hands-on work at the farm while the college provides eleven courses of related instruction, including such topics as landscape ecology, fertility management, and composting.¹¹⁸

While the program is specifically designed to address the problem of training the next generation of food producers without violating labor laws, it has one fatal shortcoming. Only hopeful farmers with the time and resources to enroll in a full-time college program could realistically participate, significantly limiting the applicant pool.¹¹⁹ In this sense, the program’s promise of a new opportunity is illusory; although it is the first to focus specifically on organic practices, college farming apprenticeship programs are not a novel concept.¹²⁰ Marin’s program requires

¹¹⁴ See *Small Farm Internship Pilot Program Needs More Farms*, THE WASH. SUSTAINABLE FOOD & FARMING NETWORK, <http://wsffn.org/small-farm-internship-pilot-program> (last visited May 5, 2011) (stating that more farms are needed for the program); News Release, Wash. State Dep’t of Labor & Indus., *New Opportunities to Learn Farming in Skagit, San Juan Counties* (Mar. 21, 2011), <http://www.lni.wa.gov/News/2011/pr110321a.asp> (“If there is enough interest in the project, it could be renewed or expanded to include other counties.”).

¹¹⁵ “Agricultural exceptionalism” has been defined as “the use of legal exceptions to protect the agricultural industry.” Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. LAW & POL’Y REV. 935, 935–36 (2010).

¹¹⁶ Rob Rogers, *College of Marin Launches Apprentice Program for Farmers*, MARIN INDEPENDENT JOURNAL, March 24, 2011.

¹¹⁷ *Id.*; California Department of Industrial Relations, *Press Release: California Launches Nation’s 1st Organic Farming Apprenticeship Program*, March 24, 2011.

¹¹⁸ *Id.*

¹¹⁹ Rob Rogers, *Organic Farmers Probed by State Over Free Labor*, MARIN INDEPENDENT JOURNAL, July 3, 2010.

¹²⁰ See *Apprenticeship Information*, *supra* note 54.

the farmer to pay apprentices for their hours spent in training, but any money earned is likely not enough to cover tuition costs.¹²¹ Thus, the program is not a viable option for the traditional farming intern looking to exchange labor for education, food, and housing for the summer without investing money or taking out student loans. The program is also not particularly beneficial for farmers, as Fresh Run Farm appears to be the only participant.¹²² The granting of apprentice status to students may allow the farm to compensate them with a subminimum wage, but savings would likely not be terribly significant.¹²³ Therefore, while the College of Marin's new apprenticeship program is a step in the right direction, it amounts to a very small step with limited beneficiaries.

B. Washington's Innovative Pilot Program

In 2010, the Washington state legislature passed the Small Farm Internship Pilot Program, which is the first law in the country to allow internships on small farms "as a means to learn about farming practices and farm enterprises."¹²⁴ Participating farms are exempt from minimum wage requirements, with no pay or other compensation to interns required.¹²⁵ A "small farm" is defined as one whose annual sales are less than \$250,000 a year, and participating farms may hire up to three interns per year.¹²⁶ Details of the internship program and plan must be laid out in the application, which will be approved upon a determination of several factors.¹²⁷ These include a requirement that the farm will not gain an unfair advantage due to lowered labor costs, that the intern "will not displace an experienced worker," and a demonstration of the legitimacy of the internship curriculum.¹²⁸

While this law is a positive step toward legitimizing agricultural internships, it is not without pitfalls. First, it is unclear what the legislature would regard as an "unfair advantage" derived from reduced labor costs. By free market standards, the very continuation of a farming operation that may not otherwise be viable if held to the statutory minimum wage

¹²¹ *Press Release: California Launches Nation's 1st Organic Farming Apprenticeship Program*, *supra* note 117.

¹²² *See id.* (listing only Fresh Run Farm as a program participant).

¹²³ *See* 29 C.F.R. § 520.409 (allowing special wage rates for authorized apprenticeship programs).

¹²⁴ Farm Internship Pilot Project, R.C.W. 49.12.0001. This Pilot Program remained in effect until the end of 2011. *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

required of all businesses could be seen as an unfair advantage.¹²⁹ Likewise, the increased profit margins of a farm that opts into the program over one that does not could be deemed improper.¹³⁰ This ambiguity requires further clarification to ensure understanding and compliance.

The requirement that an intern not displace an experienced worker is likewise subject to several interpretations. While common sense would suggest that a current employee cannot be fired and replaced with an intern, it is unclear whether an intern may be taken on as a solution to a potential need to hire an additional employee. On the other hand, perhaps the intern would not technically displace such an employee because the skill sets of the two are so divergent. Either way, as with the corresponding requirement of the DOL's test, this condition could create an impasse for many of the small farms that the Pilot Program aims to assist. Presumably farmers must derive some benefit from hosting interns in order to make the endeavor a worthwhile expenditure of resources and not simply an altruistic donation to the profession. This means that internships must have a financial upside, namely that of saving on labor costs by displacement of paid employees. The overall threat to the jobs of agricultural workers by this practice is minimal, as a farm can only have a maximum of three interns per year, who will not likely be competing for day laborer positions in the long run. Rather, interns are likely aspiring to management or ownership positions upon completion of the program. The displacement requirement directly counters the purpose of the Act, and should either be revised to a more lenient standard or removed.

If these provisions are revised, the Small Farm Internship Pilot Program could be used as a template after which lawmakers can model an exemption for internships on small farms from existing federal and state labor laws. The application process involved would serve to provide farmers with certainty that their internship practices are acceptable and approved, thereby offering much-needed predictability and reduction of risk. Interns would likewise be protected by the assurance of participation in a program with an approved educational curriculum in place to ensure a mutually beneficial outcome.

¹²⁹ Associate counsel for the California Farm Bureau Federation Carl Borden has said, "Small organic farms seem to have a particular mindset about the righteousness of their cause... Some of them said, 'This is the way we've been doing it, and if we had to treat interns as employees and comply with these standards, we wouldn't be able to stay in business.' But that's the cost of doing business. If they can't compete that way, then they can't be in that particular business." Rob Rogers, *Organic Farmers Probed by State Over Free Labor*, MARIN INDEPENDENT JOURNAL, July 3, 2010.

¹³⁰ *See id.*

C. Policy Considerations

As lawmakers attempt to craft creative new exemptions to allow for agricultural internships, they must consider and address the shortcomings of previous efforts such as those of California and Washington. Additionally, they must take several important policy considerations into account that may safeguard against exploitation. First, they must choose whether to include a limit on the allowed duration of an unpaid agricultural internship. One possibility would be to impose a ninety-day limitation to correspond with the existing youth minimum wage provision that allows payment of a sub-minimum wage to individuals under twenty years old during the first ninety consecutive calendar days of employment.¹³¹ While this would ensure that internships be used only as a temporary learning experience, lawmakers must also consider that a time limitation could have the unintended consequence of preventing interns from being exposed to a full growing season on the farm depending on location and climate.

Second, lawmakers must decide which agricultural employers will be allowed to host interns. The potential for exploitation could be much greater in large farming operations, where managing a larger workforce would likely leave a farmer little time to spend educating interns and internships could be seen solely as a means of increasing profit margins.¹³² Confining the allowed use of unpaid interns to small farms only, as Washington lawmakers have done, would help ensure more one-on-one training and a more fulfilling experience for interns.¹³³ Similarly, limiting the number of interns that may be hosted each year can safeguard against abuse of the privilege and create higher quality internships.¹³⁴

¹³¹ See Fair Labor Standards Act of 1938, 29 U.S.C. § 206(g) (allowing payment of a wage not less than \$4.25 an hour to newly hired employees under age twenty during the first 90 consecutive calendar days).

¹³² See *Occupational Outlook Handbook, 2010-2011 Edition: Farmers, Ranchers, and Agricultural Managers*, BUREAU OF LABOR STATISTICS (June 9, 2011), <http://www.bls.gov/oco/ocos176.htm> (“Operators of small farms usually perform all tasks, physical and administrative. . . . Operators of large farms, by contrast, have employees who help with the physical work. Although employment on most farms is limited to the farmer and one or two family workers or hired employees, some large farms have 100 or more full-time and seasonal workers.”).

¹³³ See Farm Internship Pilot Project, R.C.W. 49.12.0001 (confining eligibility to host unpaid interns to small farms with annual sales less than \$250,000).

¹³⁴ See Farm Internship Pilot Project, R.C.W. 49.12.0001 (limiting amount of interns allowed to three per year).

Finally, lawmakers could consider modifying existing exemptions to accommodate agricultural internships. Many small farms likely fit within the five hundred man-day exemption from minimum wage and overtime requirements, but in order to maintain the exemption activities of interns are tightly restricted to those falling within the statutory definition of agriculture.¹³⁵ Interns would benefit from participation in a wider range of activities, such as operation of a farmers' market stand or learning an artisan craft like cheese making. Thus, lawmakers might wish to consider adjusting the five hundred man-day exemption to allow interns a more complete and diverse on-farm experience. Likewise, the DOL's six-part test for unpaid interns and trainees could be tailored to create a new test specific to farming internships in consideration of existing incompatibilities.¹³⁶

D. One Possible Solution – Exempting Agricultural Internships Altogether

In many different United States policy arenas, agriculture has historically been “singled out for special treatment due to its particular social, cultural, and political importance.”¹³⁷ One major rationale for providing government support to agriculture over other economic sectors considers both the interests of farmers and of the nation more broadly.¹³⁸ The government must provide support to farmers to counteract unique and uncontrollable factors that may interfere with the ability to produce a safe and secure food supply for the nation.¹³⁹ Progressive atrophy of the farming population and the loss of capable growers present just such a threat

¹³⁵ See Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(6) (exempting employers using less than 500 man-days of agricultural labor during any calendar quarter during the preceding calendar year); Fair Labor Standards Act of 1938, 29 U.S.C. § 203(f) (defining agriculture).

¹³⁶ See discussion *supra* Part II (describing incompatibilities of farming internships with the DOL's existing six-part test for unpaid interns and trainees).

¹³⁷ Phoenix X. F. Cai, *Think Big and Ignore the Law: U.S. Corn and Ethanol Subsidies and WTO Law*, 40 GEO. J. INT'L L. 865, 868 (2009). The use of legal exceptions to protect the agricultural industry, dubbed “agricultural exceptionalism,” can be seen not only in labor law, but also in protection for farmers from involuntary bankruptcy and exemption from certain environmental and anti-trust regulations. Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. LAW & POL'Y REV. 935, 935–36 (2010). Other legal benefits unique to farmers include federal subsidies for producers of certain crops, federally subsidized crop insurance, special estate planning considerations, farm loan program, and a bankruptcy tool only available to “family farmers.” *Id.*

¹³⁸ Grace Skogstad, *Ideas, Paradigms and Institutions: Agricultural Exceptionalism in the European Union and the United States*, 11 GOVERNANCE 463, 468 (1998).

¹³⁹ *Id.*

in justification of creating a unique exemption for agricultural internships.¹⁴⁰

While the potential for labor exploitation in agriculture generally poses a real and very serious problem, many of the fundamental concerns motivating regulation are not present in the typical internship scenario. Most employment opportunities in agriculture require long, arduous workdays performing difficult, menial tasks.¹⁴¹ The demographic that has proven willing to undertake such tasks for little pay has consistently proven to be largely minority and immigrant populations, many of whom are undocumented.¹⁴² Such workers “continue to be less organized or vocal as compared with other groups of industrial workers,” either out of fear of losing their jobs or because they may simply be unaware of their workplace rights.¹⁴³ In contrast, interns are typically young people with little to no farm experience or skills,¹⁴⁴ and are often “city folk[,] born and bred. . . . [They] aren’t child laborers or enslaved in factory compounds. They are, in fact, begging farmers to teach them the tricks of the trade.”¹⁴⁵ Interns are not generally part of a disadvantaged or underserved class, and are free to simply walk away from an arrangement they feel is exploitative.¹⁴⁶

Agricultural internships also differ from internships generally in several important respects. While it may appear otherwise to labor officials, farming interns are not displacing other workers and driving wages down by working for free.¹⁴⁷ They simply do not possess the skills and qualifications necessary to be viable replacements for agricultural workers. Moreover, they are typically learning in order to successfully run their own future operation and not to obtain a position on another’s farm.¹⁴⁸

¹⁴⁰ See discussion *supra* Part III.A.

¹⁴¹ See Canny, *supra* note 21, at 385 (stating that agricultural “employment opportunities typically consist of long, arduous working days.”).

¹⁴² See *id.* (stating minority and immigrant demographics are primarily filling difficult agricultural positions).

¹⁴³ *Id.*

¹⁴⁴ See Shelley Elkovich & Maud Powell, *Agriculture Labor Management Series Offered in Southern Oregon*, OR. SMALL FARM NEWS, Winter 2009, at 8.

¹⁴⁵ Abra Bennett, *The Farming Underground*, EDIBLE SEATTLE, Jan./Feb. 2011.

¹⁴⁶ Indeed, the DOL’s time may well be better spent assisting exploited immigrant and minority workers rather than going after agricultural internships.

¹⁴⁷ See Jessica L. Curiale, *America’s New Glass Ceiling: Unpaid Internships, The Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1558 (2010) (“The FLSA is meant to prevent a “volunteer” from “displac[ing] a bona fide applicant who desire[s] to sell his services at prevailing rates.” (quoting *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1310 (4th Cir. 1971)).

¹⁴⁸ See, e.g., *Farm School*, *supra* note 61 (calling for “trainees interested in establishing their own farm in the near future.”).

Thus, they avoid a major concern associated with most internships—that workers feel pressured to perform work with little or no compensation as a way to get their foot in the door toward eventual full-time, compensated employment.¹⁴⁹

Another concern of unpaid internship critics is also noticeably absent from the agricultural context. Many fear that internships are contributing to a growing class divide, as low-income individuals cannot afford to work unpaid and only affluent individuals will obtain job experience necessary to get hired.¹⁵⁰ Farming interns, however, are generally supplied with housing and food and therefore need not be concerned with these large living expenses.¹⁵¹ A small stipend to cover most additional costs makes agricultural internships quite accessible to all socioeconomic classes.

Agriculture is an industry historically singled out for special treatment due to its unique and imperative role in sustaining our country.¹⁵² The concerns motivating both the FLSA and the recent scrutiny of unpaid internships generally are significantly weakened in a farm setting.¹⁵³ If agricultural exceptionalism is justified in the wide array of legal arenas in which it is currently employed, then it can certainly be justified in furtherance of such a compelling national interest as ensuring a sufficient population of skilled farmers to grow our national food supply.

V. CONCLUSION

The recent crackdown on agricultural internships could have potentially disastrous consequences for the nation's food supply.¹⁵⁴ Such internships are a vital and time-honored means of training the next generation of food producers to successfully run a farming operation. They are also the most accessible option for hopeful farmers from all socioeconomic classes, as they require no tuition payments and generally cover most living expenses. As the nation's current farming population collectively creeps closer to retirement age, it has become increasingly impera-

¹⁴⁹ See Curiale, *supra* note 141, at 1531.

¹⁵⁰ *Id.* at 1534; see also Steven Greenhouse, *The Unpaid Internship: Legal or Not*, N.Y. TIMES, April 2, 2010, <http://www.nytimes.com/2010/04/03/business/03intern.html> (“Many less affluent students say they cannot afford to spend their summers at unpaid internships . . .”).

¹⁵¹ See, e.g., *Apprentice Program*, *supra* note 107 (describing internship as “provid[ing] the opportunity to try small-scale sustainable farming without capital investment, risk, or living expenses . . .”).

¹⁵² See Schneider, *supra* note 115.

¹⁵³ See *supra* Part II.A for a discussion of the motivations behind the FLSA.

¹⁵⁴ See discussion *supra* Part III.D.

tive to provide a simple, attractive option for passing on the knowledge accrued over many years and educating adequate replacements. Lawmakers must continue to search for workable solutions, learning from the successes and failures of previous attempts to craft a feasible exemption balancing the concerns of agricultural interns and employers alike.

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