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## Comment: Unpaid Internships and the Rural-Urban Divide

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# Comment: Unpaid Internships and the Rural-Urban Divide

Susan D. Carle\*

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## INTRODUCTION

Thank you to Lara Morris and the editors of the *Washington & Lee Law Review* for inviting me to submit these comments. It was a pleasure to be Morris's Note supervisor and now to think more broadly about the Note's contributions. The piece has many virtues; this Comment will focus on what it adds to an emerging legal literature addressing rurality. Morris's Note identifies an institution—the working student system in the equestrian competition industry—which, as she points out, has developed without attention to the legal requirements of the Fair Labor Standards Act (FLSA).<sup>1</sup> Negotiating work relations outside the realm of law is a characteristic of rural communities, as I will discuss further

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\* Professor of Law, American University Washington College of Law (WCL). My year as a Visiting Professor at Washington & Lee University School of Law (W&L) in southwestern Virginia led me to think about the issues I write about here. My thanks to Law Librarian for Montana Franklin Runge (previously of W&L) for introducing me to the work of Wendell Berry and Jwalin Raval for expert research assistance.

1. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

below, and the phenomenon is worth more scholarly and policymaker attention, as I will also suggest below.

Morris explains that participants in the system she studied view the exchange in which they engage as a form of “barter.”<sup>2</sup> Barter invokes an image of a rural farmer trading plums for another community resident’s home-baked bread.<sup>3</sup> Morris describes a barter exchange of labor rather than goods: Working students give labor and barn owners give lessons and other opportunities to learn about equestrian competition. Barter, of course, is not part of the usual vocabulary applied to unpaid internship analysis. This presents an interesting disjunction between how law, on the one hand, and participants in a historically derived rural practice, on the other hand, think about the work-like relationships in which they engage. These and related themes suggest future paths for analyzing the role of law, and employment law specifically, in relation to the rural-urban divide.

In this Comment, I first note how much the existing literature on unpaid internships under the FLSA focuses on urban contexts. Next, I briefly sketch some of the literature on the rural-urban divide, a topic I argue needs much more analysis from legal scholars in coming years. Third, I show how Morris’s work brings together these two literatures, which to this point have not been in conversation with each other. Finally, I note a few questions Morris’s work raises for future attention.

## I. THE GENERAL LITERATURE ON UNPAID INTERNSHIPS

As Morris explains in her Note, the topic of how to evaluate unpaid internships under the FLSA is a long-standing and vexed one. It is hard to find the right balance between creating opportunities for learners to obtain educational experience through field placements in the work world while at the same time avoiding problems of worker

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2. Lara Morris, Note, *Looking a Gift Horse in the Mouth: Unpaid Working Students Under the Fair Labor Standards Act*, 80 WASH. & LEE L. REV. 445, 447 (2023).

3. See BARBARA KINGSOLVER, *PRODIGAL SUMMER* 213–18 (2000) (describing such a neighborly transaction loaded with meaning in a novelistic treatment of a rural community).

exploitation through unpaid work. The Department of Labor (DOL) and the courts have been working on this problem for quite some time, as Morris ably explains.<sup>4</sup> There is also a substantial secondary literature commenting on and proposing solutions to the many legal problems unpaid internships raise.<sup>5</sup>

Morris's work got me thinking about what is not there in this literature, however, which is attention to unpaid internships in rural environments. Almost all of the attention of the DOL, courts, and scholars has focused on positions in non-rural contexts. There are many reasons for this. For one, as a number of observers have noted, unpaid internships tend to be prevalent in so-called "glamour" industries.<sup>6</sup> These involve prospective careers that are viewed as highly desirable, elite, or prestigious. The industries involved include entertainment, journalism, electronic media, music, and more.<sup>7</sup> Fierce competition characterizes careers in such industries, especially at the entry level. Because many people want to enter, it is hard to get in the door. To stand out and have a chance of being hired for one of the limited number of paid positions available, a candidate must have prior experience.

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4. See Morris, *supra* note 2, at 454–65.

5. See generally, e.g., Maurice S. Pianko, *Dealing with the Problem of Unpaid Interns and Nonprofit/Profit-Neutral Newsmagazines: A Legal Argument That Balances the Rights of America's Hardworking Interns with the Needs of America's Hardworking News Gatherers*, 41 RUTGERS L. REC. 1 (2013); Patricia L. Reid, *Fact Sheet #71: Shortchanging the Unpaid Academic Intern*, 66 FLA. L. REV. 1375 (2014); David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 NE. U. L.J. 357 (2016); Ashley G. Chrysler, Note, *All Work, No Pay: The Crucial Need for the Supreme Court to Review Unpaid Internship Classifications Under the Fair Labor Standards Act*, 2014 MICH. ST. L. REV. 1561 (2014).

6. See, e.g., Jim Frederick, *Internment Camp*, THE BAFFLER no. 9, March 1997, <https://perma.cc/3F5X-3KKC> ("The real abusers of the intern economy, however, are the glamour industries [such as] [f]ashion, architecture, and virtually every media outlet [without unions]."). Frederick's essay is widely regarded as the "opening salvo" in a movement to tighten unpaid internship rules. David C. Yamada, "Mass Exploitation Hidden in Plain Sight": *Unpaid Internships and the Culture of Uncompensated Work*, 52 IDAHO L. REV. 937, 938 (2016).

7. See Mark Sweich, Note, *You'll Never Work in this Town Again: Employment, Economics, and Unpaid Internships in the Entertainment and Media Industries*, 49 LOY. L.A. L. REV. 475, 478–83 (2016) (listing some of these entertainment and media industries that have faced lawsuits for exploiting unpaid interns).

But because it is an employer's market, candidates can only get that experience by volunteering to work for free. That equation obviously creates the conditions for exploitation of workers who are paid nothing for valuable services they provide to employers. The DOL is completely right to regulate in such a way as to crack down on such exploitation of unpaid labor.

It bears noting that many professions, as well, have similar barriers to entry and use unpaid internships as a means of attaining valuable labor without paying for it. Clinical psychology has been called out for exceedingly long internship periods during which people must work for little or no pay and some other medical positions have these features as well.<sup>8</sup> The legal profession, too, is developing mandatory entry requirements of unpaid experience,<sup>9</sup> in part because, long ago, the American legal profession eschewed establishing the structured apprenticeship programs characteristic of legal professions in many other countries.<sup>10</sup>

To be sure, people need a great deal of training to perform the complex tasks professionals perform.<sup>11</sup> The problem, however, in both glamour jobs and these professions, is that extended periods of quasi-apprenticeship, in which one gives away one's intensive work energy without pay, create barriers to entry into elite careers for persons who do not have family or other resources to support themselves during long periods of unpaid work. This is a problem about which other scholars

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8. See generally, e.g., G.W. Albee, *The Uncertain Future of Clinical Psychology*, 25 AM. PSYCH. 1071 (1970); D.G. Rice & A.S. Gurman, *Unresolved Issues in the Clinical Psychology Internship*, 4 PRO. PSYCH. 403 (1973).

9. New York State for example, now requires bar applicants to perform at least fifty hours of unpaid work in order to qualify for admission. See N.Y. CLS RULES Ct. APP. § 520.16.

10. See Philip Girard, *American Influences, Canadian Realities: How "American" Is Canadian Legal Education?* in AMERICAN LEGAL EDUCATION ABROAD: CRITICAL HISTORIES 67, 70 (Susan Bartie & David Sandomierski, eds., 2021) (noting that the lack of a mandatory clerkship after law school is one of the key distinguishing features of entry into the legal profession between the United States and Canada).

11. See TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 29 (1987) (noting that professions are characterized by specialized knowledge).

have written much.<sup>12</sup> I agree with them that the problems of perpetuating privilege and closing doors to socioeconomic mobility through unpaid internships is one of the most important issues that the regulation of unpaid internships in non-rural contexts must address.<sup>13</sup> As Morris's Note documents, however, the opposite dynamic occurs in rurally based equine competition: there it is less elite students who gain from the working student system, as I discuss further below. This difference calls for further attention as scholars and policymakers think about how to regulate unpaid work.

As this example highlights, Morris's Note provides intriguing evidence that different dynamics may be at play in unpaid internship-type positions that are distinctively rural. Are the characteristics of rural unpaid internships different, as a general matter, from those typifying non-rural unpaid internships? Morris's Note suggests that the answer to this question may sometimes be yes. Before further discussing Morris's Note, however, it will be helpful to briefly consult the literature that is emerging on the general topic of law and the rural-urban divide.

## II. LITERATURE ON THE RURAL-URBAN DIVIDE

Researchers have long studied the differences between rural and urban communities, both within the United States and globally.<sup>14</sup> The advent of high-impact legal scholarship focusing on the distinctive aspects of U.S. rural communities in

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12. See, e.g., Yamada, *supra* note 6, at 938; Nick Martiniano, Comment, *Intern's Lament: Distinguishing an Employee and an Intern Under the FLSA*, 126 PENN. ST. L. REV. 307, 327 (2021) (noting that "confusion" surrounding the failure to regulate unpaid internships "has resulted in increased litigation and an inability for students from lower socioeconomic backgrounds to proportionally participate in the internship market").

13. And, it should be pointed out, unpaid internships are not only a problem in elite industries. They are a problem in any industry in which people want to enter but must obtain specialized skills and, often, be licensed, before doing so. Thus, as Morris's Note reports, important cases have arisen in the context of so-called working-class jobs as well, such as cosmetology. Morris, *supra* note 2, at 463–65. Many of those non-elite jobs exist in communities all over the country; they are not particularly rural or urban, so what I will proceed to discuss does not apply to them.

14. See generally, e.g., JOHN KNIGHT & LINA SONG, *THE RURAL-URBAN DIVIDE: ECONOMIC DISPARITIES AND INTERACTIONS IN CHINA* (1999).

attitudes about law is perhaps best marked by Robert Ellickson's case study of neighboring farmers and ranchers in a rural California county.<sup>15</sup> Ellickson found that these rural residents knew the legal rules governing boundary lines and trespass damages claims but they paid virtually no attention to them, even as starting points for negotiating resolution of land-related disputes among themselves. Instead, these neighbors developed and relied on informal social norms, which were entirely different from the default legal rules.<sup>16</sup> They viewed their alternative norms as working best for them in the long run.<sup>17</sup> In other words, in the rural community Ellickson studied, property dispute law was largely irrelevant; community members created their own norms for handling potential conflicts, which suited them better than resorting to law. They viewed law as a construct designed for communities different from theirs. To Ellickson, this finding was particularly important because it supported the Coase theorem proposition that "the norms that govern relations among members of a group tend to maximize the aggregate wealth of the group members."<sup>18</sup> But it has significance in the context of Morris's Note as well, in resonating with Morris's finding that the equestrian working student system developed and continues to operate with virtually no attention to employment law requirements.

Morris's point about the irrelevance of law in the development of the equestrian working student system may have implications beyond the equestrian industry. Brought together with Ellickson's classic work, Morris's observations highlight the important ways in which a rural-urban divide may characterize differences in the application (or non-application) of law generally, and employment law specifically, depending on community context. This provides a potentially fruitful line for further research by legal scholars. To what extent are FLSA standards regarding unpaid internships being disregarded in rural America and, if so, for

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15. See generally Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

16. *Id.* at 685–86.

17. *Id.* at 674.

18. *Id.* at 687.

what reasons? To what extent is prosecution of such violations the best way to proceed and to what extent should regulators and prosecutors consider alternative strategies for protecting the interests of unpaid learners in rural America? It is well established that agricultural employers sometimes disregard minimum wage and hour regulations. The DOL prosecutes these cases, as it well should.<sup>19</sup> Should it aggressively prosecute unpaid internship violations as well? Will such prosecutions drive the kinds of barter practices Morris documents further into invisibility and avoidance of law? These are questions that need serious attention at a general as well as an industry- or position-specific level.

Morris's insights about the perceived lack of relevance of law and legal standards to employment-type relationships in one rural industry taps into a burgeoning contemporary literature on the rural-urban divide.<sup>20</sup> That literature documents the growing divide between urban and rural communities in general sensibilities, political opinions, voting behavior, and attitudes on social issues such as same-sex marriage, abortion, and whether obstacles still exist for women "to get ahead" (note the value-laden nature of the very wording of this question).<sup>21</sup> This divide is one, and perhaps the largest,

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19. *See generally, e.g.*, DOL v. N.C. Growers Ass'n, 377 F.3d 345 (2004) (holding that tree farmers violated the FLSA and other statutes in failing to pay overtime wages to seasonal workers who worked for them).

20. An excellent compilation of this law-related literature organized by topic can be found at The National Agricultural Law Center. *See Research by Topic*, NAT'L AGRIC. L. CTR., <https://perma.cc/UB2M-B5XB>. The literature ranges very widely. *See generally, e.g.*, Shaakirrah R. Sanders, *Ag-Gag Free Nation*, 54 WAKE FOREST L. REV. 491 (2019) (critiquing state laws that purport to enhance "agriculture security" by prohibiting tactics labor organizers use, such as photographing facilities and like acts, as violating the First Amendment); Symposium, *Revitalizing Rural*, 13 HARV. L. & POL'Y REV. 1 (2018) (presenting an important symposium on legal issues facing rural America); Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273 (2002) (leading the way in arguing that in U.S. society an urban focus marginalizes and discriminates against individuals in rural communities).

21. *See generally, e.g.*, PEW RSCH. CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES (2018), <https://perma.cc/59MS-SL7K> [hereinafter PEW STUDY] (presenting results of a study finding significant differences based on membership in rural, suburban, and urban communities on a host of matters). As of 2018, these include political affiliation, *id.* at 5 (finding that urban residents skew 62% Democrat; while rural residents are 54% Republican); attitudes on same sex marriage, *id.* at



factor contributing to increased political polarization in the U.S., which in turn has exacerbated the increasing civil unrest and dysfunctional government that plague the U.S. political system today.<sup>22</sup> Research has documented the enormity of this political divide. Rural voters, for example, are more sympathetic and favorable to former President Donald Trump.<sup>23</sup> Rural residents are more likely to be Republican.<sup>24</sup> Even within the ranks of Republicans, rural residents are more likely to be more conservative on a wide range of social issues, including not only same sex-marriage and abortion but also immigration. In fact, even though rural and urban residents face—and realize they face, some of the same issues to a greater extent than suburban voters do—such as high rates of drug addiction in their communities, they fail to see commonalities between them.<sup>25</sup> Instead, a majority of rural and urban residents see a values gap between themselves and members of the other type of community.<sup>26</sup>

In the twentieth century, observers focused on socioeconomic and race differences as key divides relevant to labor and employment law.<sup>27</sup> In the twenty-first century, it

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29 (finding that 63% of urban residents report believing that legalization of same-sex marriage is “a good thing,” while only 46% of rural residents do, and 63% of urban residents say that abortion should be legal in most cases while only 46% of rural residents do); and views about women’s participation in the workforce, *id.* at 37 (noting that 60% of urban residents think women still face significant obstacles while only 53% of rural residents do, though rural women are more likely to agree with this proposition than rural men). Rural residents also are more likely to have lived in their community for more than a decade, *id.* at 54, and are the least optimistic about their economic future, *id.* at 75, but report having more support networks, especially as they grow older, *id.* at 77.

22. See, e.g., Rachel Kleinfeld, *The U.S. Shows All the Signs of a Country Spiraling Toward Political Violence*, WASH. POST (Sept. 11, 2020), <https://perma.cc/KQ4J-7GZQ> (discussing evidence of increasing polarization and risk of political violence as geographic and other identities exacerbate division).

23. PEW STUDY, *supra* note 21, at 11, 30.

24. *Id.* at 9.

25. *Id.* at 12.

26. *Id.* at 39.

27. Cf. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2003) (arguing for using workplaces as a forum for increasing bonds between persons who are diverse on the basis of race, class, and other social identity characteristics).

may be that the rural-urban divide will develop as a key division relevant to labor and employment. It is too soon to be confident about this prediction in these early decades of this new century, but there are many tell-tale signs of its growing significance. One goes to perceptions of relative advantage versus disadvantage. Rural residents believe they are disadvantaged under the nation's policies to a greater degree than residents of either urban or suburban communities.<sup>28</sup> Questions about whether rural communities truly are disadvantaged in the nation's political system are complex. On the one hand, due to the disproportionate power given rural American under the nation's constitutional design, rural residents in fact enjoy far greater electoral power than urbanites and suburbanites.<sup>29</sup> They also, possibly as a result of this constitutional design, receive a higher proportion of federal funds.<sup>30</sup> Nevertheless, the general public perception is that rural communities are disadvantaged in government spending—and here it is residents of all communities, not just rural ones, who hold this view.<sup>31</sup>

Although rural residents enjoy greater electoral strength than their proportion in the population, the facts as to the economics of rural communities apart from federal spending indicate that rural residents are not enjoying advantage. To the contrary, there is fairly widespread agreement that rural communities are experiencing increasing *disadvantage* as the forces of late capitalism operate, seeming inexorably, to destroy traditional rural ways of life. Professor Ann Eisenberg puts

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28. PEW STUDY, *supra* note 21, at 49; *see also* WENDELL BERRY, *The Work of Local Culture*, in *THE NEVER-ENDING FIRE: THE ESSENTIAL WORKS OF WENDELL BERRY* 102, 115 (2018) [hereinafter BERRY, *ESSENTIAL WORKS*] (“[B]oth the nation and the national economy are living at the expense of localities and local communities—as all small-town and country people have reason to know.”)

29. *See* Susan D. Carle, *Why the Founders’ Conceptions of Human Agency Matter Today: The Example of Senate Malapportionment*, 9 *TEX. A&M L. REV.* 533, 576–77 (2022) (discussing the greater electoral power smaller, often more rural, states enjoy under the U.S. Constitution’s design).

30. *Id.* at 577 (citing research showing that smaller, often more rural, states receive more federal monies even though they also tend to be wealthier).

31. PEW STUDY, *supra* note 21, at 44.

this case in compelling terms in a recent law review article arguing:

[R]ural communities have not just “died.” They were sacrificed . . . [P]olicymakers consistently decided to trade rural welfare for some perceived societal benefit . . . In agriculture, policies favoring consolidated agribusiness hollowed out once-multidimensional farm communities . . . [L]ackluster oversight enabled the environmental and economic devastation of fossil fuel communities . . . [I]nadequate mitigation of international competition facilitated whole towns’ dismantlement . . . [T]he rural story [is] not morally neutral, but one infused with value judgments that determined winner and losers.<sup>32</sup>

Eisenberg is far from the only observer to point out this process of damage to rural communities. A leading public intellectual who has expounded in great detail on this perspective is Wendell Berry, whose prolific writings repeatedly return to themes about the deep differences between rural and urban ways of life.<sup>33</sup> Berry calls for reversing the nation’s diminishment of rural values for what he sees as the undue avarice and ambition characterizing the sensibilities of people living under industrialization.<sup>34</sup> Berry

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32. Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 189 (2020).

33. BERRY, *The Agrarian Standard*, in *ESSENTIAL WORKS*, *supra* note 28, at 132, 133 (“[T]his contest between industrialism and agrarianism now defines the most fundamental human difference, for it divides . . . two nearly opposite ways of understanding ourselves, our fellow creatures, and our world.”).

34. See, e.g., BERRY, *Think Little*, in *ESSENTIAL WORKS*, *supra* note 28, at 48, 53 (arguing that farmers are looked down on as “hicks and Yokels, whose lives do not fit into the modern science”); BERRY, *The Agrarian Standard*, in *ESSENTIAL WORKS*, *supra* note 28, at 132, 132 (“[T]he abuses of farmland and farming people[] have persisted and become worse.”); *id.* at 132–33 (“What we have undertaken to defend is the complex accomplishment of knowledge, cultural memory, skill self-mastery, good sense, and fundamental decency . . . for which we probably can find no better name than ‘good farming.’”); *id.* at 135 (“The industrial economy thus is inherently violent.”); *id.* at 139 (noting that the industrial economy “depends on ‘growth’ of the wrong things such as roads and dumps and poisons . . . and on greed.”); BERRY, *The Prejudice Against Country People*, in *ESSENTIAL WORKS*, *supra* note 28, at 201, 203 (“The industrial and corporate powers, abetted and excused by their many dependents in government and the universities, are

argues for valuing duty and responsibility over ambition and self-promotion.<sup>35</sup> To Berry, the essential project is to pull public consciousness back to a way of life rooted in place, relationships, traditional roles between women and men, care for the land, modesty in conduct and aspiration, neighborliness, religious commitment, and barter economies.<sup>36</sup> Of course rural communities do not present a monolith in terms of points of view, just as is true of any community, but Berry helps illuminate deep differences in general viewpoints across the rural-urban divide. Berry draws from his background in both rural and elite urban settings<sup>37</sup> to paint a picture vividly contrasting the characteristics of the two ways of life, thus capturing the wellsprings from which differences in fundamental values and basic orientation arise.

Along with other aspects of the rural values Berry articulates, Berry eschews labor laws as an avenue to regulate work in rural communities. Berry's descriptions match with Morris's observations concerning the perceived irrelevance—or possibly even unhelpfulness—of law to the equestrian working student system. Participants in the equestrian competition industry appear to view federal fair employment standards as not useful or worth attending to—as basically irrelevant, in

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perpetrating a sort of economic genocide.”); BERRY, *The Work of Local Culture*, in ESSENTIAL WORKS, *supra* note 28, at 102, 116 (“I keep returning in my own mind to the thought of the renewal of the rural communities.”).

35. See, e.g., BERRY, *Nature as Measure*, in ESSENTIAL WORKS, *supra* note 28, at 59, 64 (arguing that “ambition has reduced and enslaved us”); BERRY, *The Way of Ignorance*, in ESSENTIAL WORKS, *supra* note 28, at 318, 330 (“[H]ere is where we turn back from our ambitions to consult both the local ecosystem and the cultural instructions conveyed to us by religion and the arts.”); BERRY, *The Making of a Marginal Farm*, in ESSENTIAL WORKS, *supra* note 28, at 38, 39 (“Before I had lived according to expectation rooted in ambition. Now I began to live according to a kind of destiny rooted in my origins.”).

36. See BERRY, ESSENTIAL WORKS, *supra* note 28, *passim*. On neighbors, see, for example, BERRY, *The Total Economy*, in ESSENTIAL WORKS, *supra* note 28, at 66, 79 (“[I]n a viable neighborhood neighbors ask themselves what they can do or provide for one another.”).

37. Berry's elite educational and professional credentials distinguish him from many other members of the communities he writes about. See *Wendell Berry*, LIBR. OF AM., <https://perma.cc/9SQQ-JGHK> (describing Berry's education at institutions including Stanford University, writing fellowships in Italy and France, and professorships at New York University and University of Kentucky).

other words, to the world in which they live. A question that Morris's work raises is whether that perception exists more pervasively in rural employment systems. In other words, has Morris captured another example of the phenomenon Ellickson documented in his case study of Shasta County ranchers and farmers? Do rural residents view employment and labor laws as not embodying the values important to them?

Berry articulates negative views of urban labor mores on a host of topics. In one set of essays, for example, Berry criticizes the movement of women into the outside labor force, arguing that this involves women "submitting to the same specialization, degradation, trivialization, and tyrannization of work that men have submitted to."<sup>38</sup> Berry feels the same way about labor in the industrial economy more generally; those jobs, he states, typically lack pleasure whereas work at or close to home can be pleasurable as well as productive, even when it is very hard.<sup>39</sup> Berry, of course, is far from the first prominent public intellectual to write about the problems of alienation that arise under modern economic arrangements,<sup>40</sup> but his is a leading voice capturing an important critique based distinctively in the rural-urban divide so salient at this historical moment.

Given Berry's perspectives as introduced above, we can forecast what Berry and others who share his general views would say about DOL enforcement of unpaid internship rules in rural communities. They would argue it is much better to barter—that is, to trade labor for room and board along with opportunities to learn—than to complain to a distant, city-based agency, such as the DOL or state labor regulators, or bring lawsuits to enforce legal rules designed for a very different context. Like Ellickson's study subjects in California, rural residents sharing Berry's viewpoint may query the sense

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38. BERRY, *Why I Am Not Going to Buy a Computer*, in *ESSENTIAL WORKS*, *supra* note 28, at 234, 248.

39. See BERRY, *Economy and Pleasure*, in *ESSENTIAL WORKS*, *supra* note 28, at 268, 277–79 (describing what the author finds to be the lack of pleasure in industrialized work and the presence of pleasure in the hardest work of cutting tobacco with companions).

40. See generally HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* (1964) (presenting a classic critique of conditions of life under capitalism, even for the well-off, which emblemized the critical perceptions of the 1960s and 1970s generation).

of resorting to law when matters could be resolved much better through informal norms.

Given these considerations, the question becomes how best to proceed in rural communities in which barter-based, unpaid, work-apprenticeship relationships may be occurring, not only among equestrians but also in other occupations such as animal husbandry, skilled crafts, and small-scale horticulture. Morris's thoughtful working through of questions as to how to proceed in reconciling the FLSA and the equestrian working student system is one of the facets of her work I most admire. It is to that section of her Note that I turn below.

### III. WHERE FROM HERE?

Morris's fair and balanced assessment of how equestrian working student positions should be analyzed under the FLSA provides an excellent denouement to her Note. As Morris points out, there are many aspects of the equestrian working student system that do not neatly fit the various unpaid internship tests currently in use under the FLSA. For one, she notes, in many other unpaid internship situations students are enrolled in academic programs and internships are designed around academic schedules. Equestrian working students, on the other hand, typically are not simultaneously enrolled in academics because there are few academic programs that help persons interested in such careers.<sup>41</sup> Thus one factor typically influential in FLSA primary beneficiary tests does not fit Morris's setting. Likewise, Morris's survey shows that the vast majority of working students do not receive academic credit for their work;<sup>42</sup> this factor, which courts frequently use to distinguish legitimate from illegitimate unpaid internships, cuts against the working student system even though, in context, it probably is not nearly as probative of whether the student is getting a good experience as it would be for positions in the more formal, regularized environment of an urban or suburban employer.

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41. Morris, *supra* note 2, at 480–81. As Morris points out, there are equine college degrees, *id.* at 489, but students would choose that route as an alternative to rather than a part of their working student experience.

42. *Id.* at 492–93.

Morris further explains why this is the case: The skills students seek to acquire through being a working student are not the kind that classroom teaching of theory and information can impart. Instead, they are physical and judgment skills, more in line with the old-fashioned apprenticeship model for learning skilled trades. Likewise, Morris points out other differences, such as the tendency to rely on handshake agreements and eschew clear, formal contracts spelling out the parties' understandings of duties and benefits.<sup>43</sup> These, too, mark the internships she investigates as different from the norm in a more tightly regulated, likely urban or suburban, environments. Similarly, the tendency to work as needed, including disregarding overtime rules, is characteristic of non-formal positions (very similar to human dependent care) in which the primary needs of living beings can arise at any time and must be responded to.<sup>44</sup>

Yet another way equestrian working student positions differ from most urban (and suburban) unpaid internships involves the operation of class privilege. As Morris points out, unlike in contexts in which unpaid positions tend to benefit more privileged students who can afford to work for free, in equestrian competition working student positions help provide access to *less* privileged students who do not have the resources to purchase and board the expensive animals involved in this sport.<sup>45</sup> Although, as Morris further notes, working students do need some resources to help support themselves while they are working with only modest room and board being provided, the sport becomes *more* accessible through the working student option.<sup>46</sup> Here again, some of the assumptions about unpaid internships in urban settings, as discussed in Part I, may no longer hold when the setting changes to rural communities.

Of the two reform options Morris fairmindedly considers, I like the restructuring option best. This option would push the equestrian industry toward developing a more formalized

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43. *Id.* at 475.

44. *Id.* at 476–77 (noting that many working students travail for a number of hours exceeding the overtime threshold).

45. *Id.* at 467, 476.

46. *Id.* at 467.

working student program, which would include written contracts, curricula, stated goals, and certification.<sup>47</sup> These are all measured, terrific ideas. They would help minimize the potential for abuse and exploitation that should drive any unpaid internship analysis and ensure that working students receive the learning experiences they are seeking.

But I also might ask Morris to consider not only what law teaches the equestrian industry but also what the practices that have developed in this industry might teach law about how to craft and enforce legal standards in rural environments. One of the tremendous challenges that labor law faces, of course, is the vast diversity of work settings.<sup>48</sup> One-size-fits-all regulation tends not to work.<sup>49</sup> Might there be ways for the DOL to investigate conditions and practices in the equestrian industry and then negotiate with industry participants for workable safe-harbor policies?<sup>50</sup> Should the DOL first concentrate on voluntary compliance, as the Equal Employment Opportunities Commission did in the South in its first decades of existence enforcing Title VII of the Civil Rights Act of 1964?<sup>51</sup> In other words, could this discrete area offer one opportunity to make inroads into altering law's arguably arrogant approach and concomitant exacerbation of hostilities

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47. *Id.* at 61.

48. *See generally* STUDS TERKEL, *WORKING* (1974) (documenting the many vastly different settings in which people work).

49. *See* STEPHEN BREYER, *REGULATION AND ITS REFORM* 102 (1982) (pointing out the slew of problems created when the Occupational Safety and Health Administration (OSHA) adopted voluntary industry standards as mandatory rules, creating "such absurdities as forbidding workers to put ice in drinking water"); *id.* at 105 (exploring OSHA's use of design standards, such as rules stating "precisely what the distance must be between rivets used to attach guards to pulleys").

50. Of course, the DOL cannot make rules outside the rulemaking process, but it could possibly address some issues through its Field Operations Handbook and Field Assistance Bulletins. *See generally* WAGE & HOUR DIV., DOL, *FIELD OPERATIONS HANDBOOK*, <https://perma.cc/W7TJ-ZTV2>; WAGE & HOUR DIV., DOL, *FIELD ASSISTANCE BULLETINS*, <https://perma.cc/8Z38-YGTT>. My thanks to Stephanie Holloway, Acting Senior Advisor at the U.S. Department of Labor, for steering me to this resource.

51. *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Doctrine*, 63 *FLA. L. REV.* 251, 289 (2011) (describing the Equal Employment Opportunity Commission's early efforts to encourage voluntary compliance with Title VII in targeted Southern industries).



across the rural-urban divide? Might Morris's Note prompt regulators to listen to participants engaged in the historically long-existing practice she documents, which developed outside the reach of law but in some ways may serve participants better than legal rules crafted for a different context?<sup>52</sup> These are some of the fascinating questions I see arising from Morris's top-notch work.

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52. Cf. Ellickson, *supra* note 15, at 687 (making this point about the property rights law ignored by ranchers and farmers in rural California).