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Unsavory Associations - Placing Migrant Children in Harm's Way: The Withdrawal of Child Labor Rules from the Fair Labor Standards Act.

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UNSAVORY ASSOCIATIONS — PLACING MIGRANT CHILDREN IN HARM’S WAY: THE WITHDRAWAL OF CHILD LABOR RULES FROM THE FAIR LABOR STANDARDS ACT

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I. Introduction.....	333
II. Death by Electrocution and Agricultural Hegemony	340
A. Death in a Cornfield: Jade Garza and Hannah Kendall	341
B. Agrarian Cultural Norms	345
C. Agrarian Cultural Norms: Children and Food Production	348
III. Seeking Parity: The Department of Labor Proposed Child Labor Regulations	357
A. The 2011 Revisions to the Fair Labor Standards Act of 1938.....	357
B. A Congressional Response: Agrarian “Fundamentalism” and the Preserving America’s Family Farms Act	360
IV. Family Farms and Agrarian Deceit	363
A. “McFrankenstein Creatures” and a Proposal	367
V. Conclusion	373

I. INTRODUCTION

Nationwide over 500,000 children plant, tend, and harvest food for consumption, or spend their days on farms performing miscellaneous tasks.¹

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1. See *Children in the Fields Campaign*, ASS’N OF FARMWORKER OPPORTUNITY PROGRAMS, <http://afop.org/children-in-the-fields> (last visited Dec. 16, 2013) (highlighting the number of children currently working in agriculture across the country, and also stating children working in agriculture are the “among least protected of all working children”); see also *Agricultural Safety*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/topics/aginjury> (last updated May 21, 2013) (“Agriculture ranks among the most hazardous industries.”).

They work up to ten or more hours per day at jobs in which they are four times more likely to die at work than children in any other jobs in the nation.² “In 2010, the latest figures available, [sixteen] children under age sixteen were fatally injured at work in the [United States]; twelve of them worked on farms.”³ Outside of fatal injuries, youth working in the agricultural sector experience work-related injuries and difficult environmental circumstances, with thousands harmed each year.⁴ As will be further shown in this Article, these statistics indicate a culture in which profits supersede the need to protect children from serious injury and even death.

The Department of Labor (DOL) enforces child labor rules in the agricultural sector through the Fair Labor Standards Act (FLSA).⁵ The inherent and systemic dangers of employment in agriculture necessitate a range of federal and state laws to protect youth farmworkers.⁶ Contrary to non-agricultural employment, children as young as twelve, and at times even younger, are in food production, a sector federally recognized as a dangerous industry.⁷ Notwithstanding inherent dangers, the agricultural

2. *Take Action: End Child Labor in U.S. Agriculture*, HUMAN RTS. WATCH, <http://www.hrw.org/support-care> (last visited Dec. 16, 2013).

3. *Proposed Rules to Shield Children from Most Dangerous Tasks Withdrawn*, HUMAN RTS. WATCH (Apr. 27, 2012), <http://www.hrw.org/news/2012/04/27/us-labor-department-abandons-child-farmworkers>.

4. *Id.*; see also CTRS. FOR DISEASE CONTROL & PREVENTION, INJURIES TO YOUTH ON FARMS AND SAFETY RECOMMENDATIONS, U.S. 2006, at 1 (2006), available at <http://www.cdc.gov/niosh/docs/2009-117/pdfs/2009-117.pdf> (“Results from the 2006 Childhood Agricultural survey (CAIS) estimated 22,900 injuries occurring to youth who lived on, work on, or visited farms in 2006.”). Additionally, over half of the injuries that occurred affected youth living on the farm. *Id.* Finally, more than 10,000 of the injuries reported occurred to child aged ten to fifteen. *Id.*

5. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006). The FLSA applies absent a “specific exemption.” U.S. DEP’T OF LABOR, WH-1295, CHILD LABOR REQUIREMENTS IN AGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT (CHILD LABOR BULLETIN 102), at 2 (2007), available at <http://www.dol.gov/whd/regs/compliance/childlabor102.pdf>. “Other Federal and State laws may have higher standards. When these apply, the more stringent standard must be observed.” *Id.*

6. See generally MARSHFIELD CLINIC, BLUEPRINT FOR PROTECTING CHILDREN IN AGRICULTURE: THE 2012 NATIONAL ACTION PLAN, at Summary, 14–15 (2012), available at http://www3.marshfieldclinic.org/proxy/MCRF-Centers-NFMC-NCCRAHS-2012_Blueprint_for_Child_Ag_Inj_Prev.1.pdf (discussing steps that must be taken in order to protect children working in the agricultural sector and noting that laws aimed at protecting youth working in agriculture have not kept pace with technological advancements made in that sector).

7. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1 (“Agriculture ranks among the most hazardous industries.”). In 2010, 1,823,000 full-time workers were employed in production agriculture and the fatality rate of those who perished in agricultural-related tasks was 26.1 deaths per 100,000 workers. *Id.*; see also *Teens Face Serious Risk of Job-Related Death in Agricultural Operations, NIOSH Finds*, CTRS. FOR DISEASE

sector employs two primary clusters of youth: (1) children of family owned farms; and (2) migrant children.

The first cluster of youth involves children of independent farm family operators who work on family-owned farms, without regard to their age. The FLSA specifically exempts “[y]outh of any age . . . in any occupation in agriculture on a farm owned or operated by their parent or person standing in place of their parent.”⁸ This exemption from the FLSA is strictly limited to farming families that rely on their children for farm-related tasks. Thus, without regard to their age, children of farm families can operate equipment, cultivate and harvest food, or even accompany their parents in the performance of their own dangerous tasks.⁹

The second cluster of youth is comprised of migrant worker children. Migrant worker children often harvest fruits and vegetables or provide miscellaneous farm labor as employees or while working alongside their families.¹⁰ This second cluster of youth farmworkers also toils in a haz-

CONTROL & PREVENTION (Sept. 22, 2000), <http://www.cdc.gov/niosh/updates/farmag.html> (“find[ing] that 12.2 occupation fatalities occurred for every 100,000 youths working in agriculture”); MARSHFIELD CLINIC, *supra* note 6, at 5 (employing the following definitions of “children”: young children are zero to six years old; young workers on family farms are seven to seventeen years old; and young hired workers are twelve to seventeen years old). This Article adopts those terms.

8. See, e.g., *Exemptions from Child Labor Rules in Non-Agriculture*, U.S. DEP’T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/cl/exemptions.asp> (last visited Dec. 16, 2013).

9. *But see id.* (limiting the exemption for fourteen and fifteen-year-olds). Fourteen and fifteen-year-olds may engage in certain hazardous activities when the “[w]ork is incidental to the training; [is] intermittent, for short periods of time, and under the direct and close supervision of a qualified, experienced person; [the child receives] safety instruction coordinated by the employer with on-the-job training; and a schedule of organized and progressive work processes to be performed on the job has been prepared.” *Id.* Youth accompany their families because of the absence of childcare facilities in agriculture as well as to enhance their parents’ income. See, e.g., HUMAN RTS. WATCH, *FIELDS OF PERIL: CHILD LABOR IN U.S. AGRICULTURE*, 5 (2010), available at http://www.hrw.org/sites/default/files/reports/crd0510webwcover_1.pdf; ASS’N OF FARM WORKER OPPORTUNITY PROGRAMS, *CHILDREN AT WORK* (2010), available at <http://afop.org/content/upload/NC-Blueberry-Photo-Booklet-2009.pdf> (illustrating children harvesting blueberries).

10. Federal law distinguishes between migrant and seasonal agricultural workers. 29 U.S.C. § 1802 (8)(A) (2006) (defining migrant agricultural worker as “an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence”); 29 U.S.C. § 1802 (10)(A) (2006) (defining seasonal agricultural worker as “an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence when employed on a farm or ranch performing field work related to planting, cultivating, or harvesting operations; or when employed in canning, packing, ginning, seed conditioning or related research, or processing operations, and transported, or caused to be transported, to or from the place of employment by means of a day-haul operation”). The distinction is critical if remedial relief is sought for workplace injuries or other forms of relief under the Migrant

ardous environment where they face illness, injuries, or death. Instances of youth injuries or death in both clusters eventually compelled DOL response with the proposed rules discussed in this Article.

For the first time since the 1970s, the DOL, through the proposed Child Labor Regulations, sought to improve safety standards for children employed in agriculture.¹¹

The DOL's proposed Child Labor Regulations would have promoted parity between agricultural and non-agricultural child labor provisions through specifically targeted Hazardous Orders.¹² The Child Labor Regulations would have further offset the "unsavory association"¹³ between food production and youth associated injuries or would have diminished the fatalities that confront young workers who harvest crops to feed the nation.¹⁴ The proposed rules would have ultimately obligated increased standards and shifted the cultural norm in the agricultural sector of employing youth with little regard to the harm they often face in that industry.

Pursuant to established rulemaking procedures, the DOL published the proposed Child Labor Regulations in the Federal Register providing the public an opportunity to advance "written data, views, or arguments."¹⁵ During the notice and comment period, without concern for the consequences to non-farm family youth, the DOL witnessed unmitigated hostility.¹⁶ The opposition, armed with thousands of letters and primarily

and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801–1803 (2006). *See, e.g.,* Ramirez v. DeCoster, 194 F.R.D. 348, 348, 356 (D. Me. 2000) (holding workers of Mexican descent were neither "migrant" nor "seasonal" workers under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), because the egg factory at which they were employed operated year-round, not on a seasonal basis).

11. Child Labor Regulations, Orders and Statements of Interpretation, 76 Fed. Reg. 54836 (proposed Sept. 2, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-09-02/pdf/2011-21924.pdf>. The definition of agriculture used in this Article is taken from the Fair Labor Standards Act. Fair Labor Standards Act, 29 U.S.C. § 203(f) (2006). "'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities" *Id.*

12. Orders and Statements of Interpretation, 76 Fed. Reg. at 54836.

13. WILLIAM G. WHITTAKER, CONG. RES. SERV., RL31501, CHILD LABOR IN AMERICA: HISTORY, POLICY, AND LEGISLATIVE ISSUES, at Summary (2005) ("The history of child labor in America is long, and, in some cases, unsavory.").

14. *See Prohibited Occupations for Agricultural Employees*, U.S. DEP'T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/docs/hazag.asp> (last visited Dec. 18, 2013) (discussing prohibited occupations for young agricultural employees by age categories).

15. Administrative Procedure Act, 5 U.S.C. § 553(c) (2012).

16. *See* News Release, U.S. DEP'T OF LABOR, Wage and Hour Div., Labor Department Statement on Withdrawal of Proposed Rule Dealing with Children Who Work in Agricultural Vocations (Apr. 26, 2012), *available at* <http://www.dol.gov/opa/media/press/whd/WHD20120826.htm> [hereinafter Statement on Withdrawal of Proposed Rule] (stating

anecdotal evidence from farm families and their political representatives, argued the proposed revisions would eliminate the “parental exemption” from the Fair Labor Standards Act.¹⁷ Against this unrelenting backlash, and notwithstanding the stated purpose and intent of the revisions, the DOL retreated and withdrew the proposed standards.¹⁸ It is difficult to reconcile the DOL’s withdrawal with the language, original intent, and literal meaning of the proposed revisions.¹⁹

Farming families along with agri-industry representatives nonetheless continued voicing their opposition to the proposed rule changes. Subsequent to the DOL withdrawal of the proposed revisions, several state representatives, on behalf of “small farm families,” introduced legislation known as the “Preserving America’s Family Farm Act” (PAFF).²⁰ The stated rationale of the Act was to protect family farms. However, the Act, ostensibly aimed at preserving “family farms,” failed to address the inequality of treatment and injuries or deaths confronting youths in agricultural employment.²¹ Even more astonishingly, the Act further barred

the rule was withdrawn “in response to thousands of comments expressing concerns about the effect of the proposed rules on small family-owned farms. To be clear, this regulation will not be pursued for the duration of the Obama administration”).

17. Preserving America’s Family Farms Act, H.R. 4157, 112th Cong. (2012), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4157rfs/pdf/BILLS-112hr4157rfs.pdf> (claiming the proposed child labor regulations would eliminate the “parental exemption” and have various adverse affects); *see also* Rena Steinzor, *The Age of Greed and The Sabotage of Regulation*, 47 WAKE FOREST L. REV. 503, 515 (2012) (“DOL’s tightening of its interpretation of the parental exemption . . . was intended to eliminate the exemption for those circumstances.”).

18. Statement on Withdrawal of Proposed Rule, *supra* note 16.

19. *See* Child Labor Regulations, Orders and Statements of Interpretation, 76 Fed. Reg. 54836 (proposed Sept. 2, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-09-02/pdf/2011-21924.pdf>.

The proposal would implement specific recommendations made by the National Institute for Occupational Safety and Health, increase parity between the agricultural and nonagricultural child labor provisions, and also address other areas that can be improved, where were identified by the Department’s own enforcement actions. The proposed agricultural revisions would impact only hired farm workers and in no way compromise the statutory child labor parental exemption involving children working on farms owned or operated by their parents.

Id.

20. H.R. 4157 (“An Act, To Prohibit the Secretary of Labor from reissuing or issuing a rule substantially similar to a certain proposed rule under the Fair Labor Standards Act of 1938 relating to child labor.”).

21. *Id.*; *see also* Sara Wyant, *Proposed DOL Child Labor Regs Draw Fire From All Sides*, AGRI PULSE (Feb. 1, 2012), <http://www.agri-pulse.com/Proposed-DOL-child-labor-regs-draw-fire-from-all-sides-02012012.asp> (“The Department’s Bureau of Labor Statistics (BLS) notes that the fatality rate for agricultural workers who are 15 to 17 years of age is 4.4. times greater than the risk for the average worker in that age range.”).

the DOL Secretary from implementing a similar and “misguided” rule in the future.²²

This Article addresses the intersection of the withdrawn proposed federal legislation with an agricultural agenda that specifically places children at risk to injury, if not death, in the production of agriculture. While no child should face exposure to harm, innumerable children across the nation who would have benefited from the proposed DOL regulations remain children of color from non-farm families.²³

Rejecting the improved standards fits within a broader history of withdrawing proposed legislation, labor battles, and instances in which farm workers seeking to improve their terms and conditions of employment have encountered hostility and subsequent denial of parity with employment outside of agriculture.²⁴ The resulting lack of protection for children of color that fall outside of the parental exemption thereby raises critical questions spanning equality of treatment and the role and safety of non-farm family youth in our nation’s food production. Thus, this Article emphasizes the treatment of non-farm family youth.

Part I of this Article begins with an example of youth falling outside of the parental exemption and how this influences the frequency with which they face serious injuries and possible fatalities. To that end, this Article addresses a dangerous culture within the agricultural sector in which children are aggressively recruited for their labor, without regard for their safety. Further, this Article explores the political agenda of the agricul-

22. H.R. 4157 (“[P]rohibit[ing] the Secretary of Labor from reissuing or issuing a rule substantially similar.”).

23. See ASS’N OF FARMWORKER PROGRAMS, AMERICA’S FARMWORKER CHILDREN: HARVEST OF BROKEN DREAMS 3 (2011), available at <http://afop.org/wp-content/uploads/2010/07/Americas-FW-Children-09-12-11.pdf> (“[T]here is systemic abusive child labor in the United States, primarily in agriculture.”); WILLIAM KANDEL, U.S. DEP’T OF AGRIC., ECON. RES. SERV., ERR-60, PROFILE OF HIRED FARMWORKERS, A 2008 UPDATE 8–10 tbl.1 (2008) (explaining the majority of hired workers are Hispanic and almost all undocumented workers are Hispanic). Other racial and ethnic groups represented include non-Hispanic Blacks, Native Americans, and Asians; however their percentages are significantly lower. *Id.*; see also Ketty Mobed et al., *Occupational Health Problems Among Migrant and Seasonal Farm Workers*, 157 W. J. MED. 367, 367–68 (1992), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1011296/pdf/westjmed00085-0157.pdf> (providing a general background on agricultural labor in the United States and its migratory and seasonal nature).

24. See, e.g., *Ball v. State*, 95 S.W.2d 632, 632–33 (Ark. 1936) (upholding anti-union tactics and use of law to deter unionization); *Johnson v. State*, 126 S.W.2d 289, 290–93 (Ark. 1939) (describing an incident in which activists and others were charged with night riding to stymie unionization efforts). The National Labor Relations Act specifically excludes agricultural workers from seeking improved terms and conditions of employment. 29 U.S.C. § 152 (3) (2014) (“[B]ut shall not include any worker employed as an agricultural laborer . . .”).

tural sector and the attendant cultural norms and influences of race and class.

Part II of this Article addresses the distance between the intent and purpose of the proposed legislation, as asserted and promulgated by the DOL, and the anecdotal assertions of the agricultural-based obstructionists that caused its retreat. This section questions why the safety of migrant children, who are principally children of color, was overruled by the myth of protecting small and independent family farms. The fact that a Latina was the Secretary of Labor at the time of the proposed legislation exposes an additional layer of racial animosity against protecting migrant worker children in a dangerous employment sector.²⁵ This section argues that vague assertions of “protecting family farms,” which underscored the opposition to the new rules, must yield to primary empirical evidence of causative injury and harm.²⁶

At a time when vertical integration is eliminating small family farming operations,²⁷ this section thus urges testing assertions made by and on behalf of family farmers opposed to the proposed legislation against verifiable empirical data. This Article concludes with a plea to approach food justice issues involving children targeted by the DOL revisions from the jurisprudence of critical legal inquiry investigations. Any proposed rules to enhance the health and safety of youth working in agriculture, with specific application encompassing non-farm family children, should not yield to broad-based and misleading declarations, when primary and contradictory evidence demonstrates the new rules are critically required.²⁸

25. News Release, U.S. DEP'T OF LABOR, Statement by U.S. Department of Labor on Resignation of Secretary Hilda L. Solis (Jan. 9, 2013), available at <http://www.dol.gov/opa/media/press/opa/OPA20130053.htm> (discussing DOL Secretary Hilda Solis's resignation from her post on January 22, 2013, shortly after the proposed Child Labor Regulations failed).

26. See, e.g., Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2012).

27. See, e.g., ELANOR STARMER & TIMOTHY WISE, LIVING HIGH ON THE HOG: FACTORY FARMS, FEDERAL POLICY, AND THE STRUCTURAL TRANSFORMATION OF SWINE PRODUCTION, GLOBAL DEVELOPMENT AND ENVIRONMENT INSTITUTE, WORKING PAPER NO. 07-04 (2007), <http://www.ase.tufts.edu/gdae/Pubs/wp/07-04LivingHighOnTheHog.pdf> (providing specifics on transformation from small farm hog production to large-scale models); *Factory Farms*, FARM AID, http://www.farmaid.org/site/c.q115IhNVJsE/b.2723715/k.852A/Factory_Farms.htm (last visited Dec. 30, 2013) (explaining the process of vertical integration and the manner in which it affects small farmers and their surrounding communities).

28. The intent of this Article is not to diminish the small farm owner-operator, but to distinguish the validity of harmful claims and consequences when the health, welfare, and safety of children and youth are contemplated. For an example of protecting small and independent farming operations when history is negated, as in this instance, but specific to gender see, e.g., Guadalupe T. Luna, “Women in Blue Jeans:” *Connecting the Past with Agricultural Transformations in the Present*, 23 WIS. J. L. GENDER & SOC'Y 313, 339–40 (2008) (arguing current agricultural legislation does not take into account the historical

II. DEATH BY ELECTROCUTION AND AGRICULTURAL HEGEMONY

“*[Detasseling corn is] a little industry around here.*” —
Challand Middle School Principal Kathy Howard.²⁹

The deaths of two eighth graders employed in the dangerous agriculture sector are representative of the hegemony of the agricultural status quo.³⁰ Farming is grounded on a series of cultural norms with assertions that are specific to youth employment. Specifically, agricultural hegemony is based on the norms that farm employment helps youth develop a work ethic, and offers both “rewarding employment” and “experiential learning.”³¹

A critical aspect of this agrarian cultural norm includes the active recruitment of youth to work on farms throughout the Midwest.³² The process of corn detasseling in the Midwest provides an instructive example. The Midwest is a major corn producing region, and each summer teachers, school principals, and independent contractors working for the agricultural industry heavily recruit the hand labor of approximately 100,000 youth to performing corn detasseling.³³

inequalities that rural women farmers have faced). Removal of proposed child labor regulations resulted from lawmakers failing to account for the needs of non-farm family youth working in the agricultural sector.

29. Brian Wellner, *Whiteside Detasseling Deaths Raise Questions*, QUAD-CITY TIMES, July 27, 2011, http://qctimes.com/news/local/whiteside-detasseling-deaths-raise-questions/article_c4afb46c-b6ea-11e0-a516-001cc4c03286.html; see also Luke Nichols, *Beatrice Teacher Makes Detasseling a Tradition*, BEATRICE DAILY SUN (Neb.) (July 27, 2011, 6:00 AM), http://beatricedailysun.com/news/local/beatrice-teacher-makes-detasseling-a-tradition/article_a6e0a69e-b7fd-11e0-a8de-001cc4c03286.html (describing a middle school teacher who takes busloads of middle school children to area corn fields every summer to detassel).

30. See NAT'L CONSUMERS LEAGUE, FIVE MOST DANGEROUS JOBS FOR TEENS 2012: TIPS TO STAY SAFE AT WORK THIS SUMMER 3, 10–12 (2012), available at http://www.nclnet.org/images/PDF/2012_worst_jobs.pdf. (demonstrating agriculture is dangerous for teenagers because of unsafe work conditions and their limited working experience).

31. Preserving America's Family Farms Act, H.R. 4157, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4157rfs/pdf/BILLS-112hr4157rfs.pdf>.

32. See Tracy Motz, *Children of the Corn*, MODERN FARMER, <http://modernfarmer.com/2013/09/children-of-the-corn> (last visited Dec. 18, 2013) (explaining the surge of corn blight in the 1970s was caused by the use of a cytoplasm starting twenty years earlier to create sterile corn plants, but which also contained a gene causing corn fungus). The mutated corn with fungus resulted in the need to recruit youth in the summer to detassel.

33. Nichols, *supra* note 29 (describing middle school teacher Mike Policky's experience with detasseling corn every summer for nine years and taking over 100 children with him each year to work the fields in Nebraska); Motz, *supra* note 32 (“Every summer, thousands of Midwestern kids climb aboard school buses, headed out to fields to detassel corn.”).

Corn detasseling is performed on seed corn, meaning the corn is not harvested for consumption but will be planted in a subsequent year.³⁴ Detasseling selects the best traits of a particular ear of corn to promote an “enhanced product,” and requires manually removing the “pollen-laden tassel from one of two varieties.”³⁵ This allows pollination of corn seeds growing on the detasseled plant by the other variety.³⁶ The newly created corn hybrid can, for example, fight insects or survive certain environmental hardships and thereby increase yields.³⁷ The process is expedited with teenaged detasselers walking up and down the rows and manually removing the pollen from the tassels.³⁸ Corn detasseling is difficult work and in one particular instance, the process resulted in the death of two teenagers.³⁹

A. *Death in a Cornfield: Jade Garza and Hannah Kendall*

In the summer of 2011, two fourteen-year-old girls, Jade Garza and Hannah Kendall, were part of a crew detasseling corn for the Monsanto

34. *About Seed Corn Detasseling*, NTR, <http://ntrdetassel.com/detasseling> (last visited Dec. 18, 2013) (“The seed from the detasseled . . . plants is then harvested for use as hybrid seed, used in the commercial production of corn.”). Corn detasseling has led to contract disputes between the grower and seed provider. *See, e.g., Strickler v. Pfister Associated Growers, Inc.*, 319 F.2d 788, 789, 791 (6th Cir. 1963) (finding plaintiff did not properly show the seed was defective).

35. *See Motz, supra* note 32 (“[D]etasseling . . . [is] where the male pollinating organs are removed from specific stalks and left on others at a ratio of 4:1 to allow for cross-pollination, with the intended result being a more vigorous, productive seed.”); *see also Team Corn Detasseling*, TEAM CORN, <http://www.teamcorn.com> (last visited Oct. 28, 2013) (explaining the purpose of detasseling is to enable the farmer to grow more corn).

36. *About Seed Corn Detasseling, supra* note 34.

Detasseling removes the tassels from the ‘female’ rows of corn which the seed corn grower wants to be pollinated so that the ‘female’ rows cannot self-pollinate. Leaving the tassels on only the ‘male’ rows allows the female rows to receive pollen from the ‘male’ plants which are a different type of corn plant than the ‘female’ plants.

Id. (internal quotations omitted).

37. *Id.* “Major improvements have also been made in such traits as early maturity, disease resistance, drought tolerance, and insect tolerance.” *Id.*; *see also* John Reynolds, *Local Corn Detasseling Begins Amid Heat*, SJ-R.COM (Ill.), July 3, 2012, <http://www.sj-r.com/top-stories/x1762349864/Corn-detasseling-begins-amid-heat> (“It allows a grower to create a corn hybrid, corn designed to produce specific characteristics and drastically improve yields.”).

38. *See, e.g., SMAK INC. DETASSELING*, <http://www.smakdetasseling.com> (last visited Dec. 19, 2013) (explaining detasseling machines do most of the detasseling and that the work crews detassel the corn the machines miss); Reynolds, *supra* note 37 (“Most of the people on [sic] crew are high schoolers or college students.”).

39. *See NAT’L CONSUMERS LEAGUE, supra* note 30, at 10 (noting the dangers teens face in agricultural work and highlighting Jade Garza and Hannah Kendall’s deaths).

Corporation on the private land of an area farm owner.⁴⁰ The teens were best friends—Hannah once wrote on a photo of them: “Jade Garza is my bestest [sic] friend in the whole world . . . and that is never going to change.”⁴¹ Her statement proved true; both girls were electrocuted on the same day by the field’s irrigation system.⁴²

During this particular “summer rite of passage,”⁴³ the two girls were killed “after they came in contact with irrigation equipment or a nearby puddle conducting high voltage.”⁴⁴ The girls began working that day at seven in the morning with a crew of approximately seventy workers.⁴⁵ The workers entered the fields after heavy weekend rains.⁴⁶ Thus, as reported by yet another fourteen-year-old on the crew, the workers quickly became soaked.⁴⁷ Jade and Hannah worked with Jade’s two sisters and “were always talking, always laughing . . . [and] [i]t was always about boys and clothes and shoes and school.”⁴⁸ Hannah and Jade worked for Monsanto through R&J Enterprises, a company based in Rock Falls, Illinois.⁴⁹ The company is one of more than 120 contract labor providers Monsanto uses nationally.⁵⁰

Jade screamed when she first made contact with the electricity that stole her life.⁵¹ After hearing Jade’s distress, Hannah rushed to her side and consequently met the same fate.⁵² Thirteen-year-old Tristen Dudley of Rock Falls stated, “I heard them yelling. I went over to help[.] . . . I

40. Erin Meyer & George Knue, *Teens Die in Detasseling Electrocution*, CHI. TRIB., July 27, 2011, http://articles.chicagotribune.com/2011-07-27/news/ct-met-sterling-farm-deathes-20110727_1_electrical-shock-tampico-corn.

41. *Id.*

42. *Id.*

43. Douglas Belkin & Scott Kilman, *Midwest Teenage Rite Ends in Tragedy*, WALL ST. J., July 29, 2011, <http://online.wsj.com/news/articles/SB10001424053111904888304576474452455817760>.

44. *Id.* Hannah and Jade’s deaths were not isolated incidents. See, e.g., NAT’L CONSUMERS LEAGUE, *supra* note 30, at 10–13 (listing many examples of recent farm tragedies involving teens); see also CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 7 (discussing dangers youth experience when engaged in agricultural operations).

45. Belkin & Kilman, *supra* note 43.

46. *Id.*

47. *Id.*

48. *Id.*

49. Georgina Gustin, *Electrocution of Two Teen Girls Haunts Corn Country*, ST. LOUIS POST-DISPATCH, Aug. 21, 2011, http://www.stltoday.com/business/local/electrocution-of-two-teen-girls-haunts-corn-country/article_a4375f5b-e78d-57fa-a290-e64c75dac8be.html.

50. *Id.*

51. Belkin & Kilman, *supra* note 43.

52. *Id.*

didn't do anything because I would have been sucked in."⁵³ Yet another crew member, Chevy Conkling, reported that he saw "[o]ne of the girls was lying on [the] ground and couldn't feel her legs and she was screaming for help, then two were passed out on it[.]"⁵⁴ Several other workers were also injured and taken to area hospitals, yet thankfully survived their encounter with the electricity.⁵⁵ Jade and Hannah's presence in a cornfield was not unusual, because in Illinois children as young as twelve can detassel corn with the consent of their parents.⁵⁶ Because the parents consented to the girls' employment, prevailing law failed Jade and Hannah, who will never experience womanhood, build their careers, or perhaps create their own families.

It is unknown whether Jade or Hannah, or the crew as a whole, received "safety information."⁵⁷ Nor is it known whether their parents, in signing the employment form, were informed as to the danger of working in such an environment and the difficulty in seeking remedies for a worker performing under an independent contractor agreement in the event of harmful circumstances.⁵⁸ Monsanto, however, has consistently asserted they neither owned the land nor the irrigation equipment involved in this incident.⁵⁹ In the wake of the girls' deaths, Monsanto spokesman Thomas Helscher asserted "the company provides safety training to its contract employees, and crews are reminded not to touch irrigators."⁶⁰ Todd Smith, the attorney representing Hannah's father, Brian Kendall, against Monsanto and R&J Enterprises, believes that the two teens received "virtually nothing" by way of safety training.⁶¹ Worker Mike Terry stated, "Nobody ever told me not to touch those irrigators," and said he "used to swing on them like they were jungle gyms."⁶²

53. D. Steffen, *Why Regulation Comes to Be: Death in the Cornfields*, DAILY KOS (July 31, 2011, 2:00 PM), <http://www.dailykos.com/story/2011/07/31/1001138/-WHY-regulation-comes-to-be-Death-in-the-Cornfields#>.

54. *Id.*

55. Gustin, *supra* note 49.

56. Wellner, *supra* note 29.

57. *See* Gustin, *supra* note 49 (noting Todd Smith, attorney for Brian Kendall—Hannah's father—"believes the workers were given little safety training."). *But see* Wellner, *supra* note 29 (indicating the family who owned the farm and contracted with Monsanto claims "the company educated its workers on the possible dangers of irrigation systems").

58. Wellner, *supra* note 29 (quoting an experienced detassler who has never worked for Monsanto, but who, in her experience in general has never been told to refrain from touching the field irrigators).

59. Gustin, *supra* note 49.

60. *Id.*

61. *Id.*

62. *Id.*

Six months after their deaths, the Occupational Safety and Health Administration (OSHA) declined to issue citations in the deaths of the two teens.⁶³ OSHA asserted “lightning . . . [had] caus[ed] a fault and ‘energiz[ed]’—or sen[t] an electrical current through—the whole system” on the irrigator, and thus neither the sub-contractor, R&J Enterprises, nor Monsanto were sanctioned.⁶⁴ Whether OSHA contemplated the history of hazardous risks associated with pivot irrigation systems is not known at the present.⁶⁵ OSHA did, however, forward letters to Monsanto and R&J Enterprises with information on preventing such deaths in the future.⁶⁶

The use of so many teens in corn detasseling may be nearing its end now that Monsanto is creating a new corn variant that will not require detasseling.⁶⁷ Notwithstanding such development, detasseling contractors still recruited laborers to work in cornfields in the summer of 2013.⁶⁸

Still, a fundamental issue remains: children employed in farm work are laboring in dangerous conditions. While many farm operators are safety conscious, youth in agriculture are exposed to “unique risks that are not present for many other young workers, including machinery, large animals, electrical hazards, chemical hazards[,] and excessive noise.”⁶⁹ To the detriment of aggrieved families, worker deaths occur in agriculture. In general, farmers are at risk to “fatal and nonfatal injuries,” which further underscores that agricultural tasks can produce detrimental conse-

63. See Lisa Black, *OSHA: No Penalties in Cornfields Electrocutions*, CHI. TRIB., Jan. 25, 2012, http://articles.chicagotribune.com/2012-01-25/news/chi-osha-no-penalties-in-cornfield-electrocutions-20120125_1_cornfield-osha-electrocutions (“[OSHA] [could not] identify violations that led to the electrocutions . . . [so] it declined to issue citations but recommended changes in farming procedures.”); Bill Mayeroff, *No OSHA Citations in Detasseling Deaths*, QUAD-CITY TIMES (Iowa & Ill.), Jan. 26, 2012, <http://qconline.com/archives/qco/display.php?id=578777> (stating no citations were issued, only warnings and tips to prevent future deaths).

64. Mayeroff, *supra* note 63.

65. See generally ROBERT W. SCHOTTMAN ET AL., ELECTRICAL SAFETY FOR CENTER PIVOT IRRIGATION SYSTEMS 1695 (1993), available at <https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/9362/ElectricalSafetyIrrigation.pdf?sequence=3> (reporting inspections revealing a host of “hazardous situations” and providing information on how to ensure a safe irrigation system involving the use of electricity).

66. Mayeroff, *supra* note 63.

67. *2013 Research & Development Pipeline – Corn: 2013 Pipeline Advancements*, MONSANTO, <http://www.monsanto.com/products/Pages/corn-pipeline.aspx> (last visited Dec. 19, 2013) (promoting Monsanto’s research and development in corn production).

68. SMAK INCORPORATED DETASSELING, *supra* note 38 (recruiting detasselers for 2013).

69. David L. Hard & John R. Myers, *Fatal Work-Related Injuries in the Agricultural Production Sector Among Youth in the United States, 1992–2002*, 11 J. OF AGROMEDICINE 57, 57 (2006).

quences for laborers.⁷⁰ Jade Garza and Hannah Kendall were not the only teens that perished while employed in agriculture production. They provide, however, a clear example of the dangers youth face, and the emotional and legal consequences their families are left to overcome.

B. Agrarian Cultural Norms

Agrarian cultural norms are based on shared values relating to the production of food. One such value includes the employment of youth in the cornfields throughout the Midwest. Every summer in the Midwest, large agricultural companies, through independent contractors, recruit youth through various websites providing information on corn detasseling and the necessary employment applications.⁷¹ Websites provide contracts, federal forms, and scheduling information on bus pickup sites for transportation to the cornfields.⁷²

Corn detasseling is considered a “rite of passage,”⁷³ with its promoters claiming it provides youth with income for, *inter alia*, school clothing and college tuition.⁷⁴ Farm families assert it teaches youths a “work ethic.”⁷⁵ As one high school teacher who has detasseled for nine years asserted: “It’s a good social experience as well as a job experience. If I had my way, I’d require every kid to detassel one year so they understand what work is, what commitment is[,] and how to wake up early in the morning.

70. CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 1; *see also* D.T. Stuelan et al., *A Population Based Case Control Study of Agricultural Injuries in Children*, 2 *INJ. PREVENTION* 192, 192 (1996) (discussing agriculture-related injuries to children who are family members of agricultural workers); F. P. Rivara, *Fatal and Non-Fatal Farm Injuries to Children and Adolescents in the United States, 1990–93*, 3 *INJ. PREVENTION* 190, 190 (1997) (stating “[a]griculture is one of the most dangerous occupations in the United States, and unlike other industries, children and adolescents make up a substantial portion of the agricultural workforce[.]” and concluding “farm injuries continue to be a major problem to children living on farms”).

71. *See, e.g.*, NATS DETASSELING, INC., <http://www.notafraidtosweat.com> (last visited Dec. 19, 2013); SMAK INCORPORATED DETASSELING, *supra* note 38. These websites promote teen employment in agriculture and assure families of the value of corn detasseling work.

72. *See, e.g.*, NATS DETASSELING INCORPORATED, *supra* note 71; SMAK INCORPORATED DETASSELING, *supra* note 38.

73. Don Hinkel and Lisa Black, *Detasseling Corn a Summer Rite of Passage for Many Rural Teens*, *CHI. TRIB.*, Aug. 01, 2011, http://articles.chicagotribune.com/2011-08-01/news/ct-met-cornfield-deaths-sidebar-20110801_1_detasseling-rural-teens-child-labor.

74. *See, e.g.*, SMAK INCORPORATED DETASSELING, *supra* note 38.

75. *See* Sharon Selz, *The A-Maize-ing Race*, *COUNTRY WOMAN MAG.*, June/July 2011, at 14, 16, *available at* <http://www.notafraidtosweat.com/pdf/nats-country-woman-article.pdf> (promoting detasseling as a means to teach teenagers the value of work and the ability to persevere under tough conditions).

I think it'd make them all better in the long run.”⁷⁶ In my own experience while teaching Agricultural Law, it was not uncommon to find students who had detasseled, or engaged in other corn production tasks, in order to save money for high school or their college funds. It was also not uncommon to find students who reported receiving a limited amount of safety training when they were engaged in corn detasseling.

In terms of safety training, one website promoting employment in corn detasseling offers safety glasses, yet many of the sites neither provide information on the potential harm associated with corn detasseling, nor provide links to the DOL with its standards applicable to youth employment. The only “safety training” the websites offer extends to advice on suitable clothing recommendations to avoid corn burn and reminders to drink a substantial amount of water while working.⁷⁷ The companies do not provide water but recommend bringing frozen water in jugs for consumption during the day.⁷⁸

Additionally, under the Occupational Safety Health Act, the requirement to provide safety information does not apply to employers of less than ten individuals where chemicals, herbicides, and other environmental, health, and safety harms remain.⁷⁹ However, these are conditions inherent in production agriculture. Notwithstanding such use, if an employee is declared an independent operator family members who might also work are not included and thus the employer could feasibly have greater than ten individuals under their employ and still not violate OSHA regulations.⁸⁰

76. Nichols, *supra* note 29 (quoting middle school teacher Mike Policky on the “fun” of corn detasseling with “attendant benefits”).

77. SMAK INCORPORATED DETASSELING, *supra* note 38. The Company offers “training on pesticide safety, as well as training on other safety practices used during detasseling . . . includ[ing] weather safety, preventing heat exhaustion, bus transportation safety, field safety and worker safety.” *Id.* The website, however, does not state specifically what the training includes. *Id.* Nor does it include information on the limitations of an independent contractor employee relationship. *Id.* Case law on migrant labor challenges in seeking relief illustrates the entangled legal tests required of workers. *See, e.g.*, 29 C.F.R. § 500.20 (2013) (establishing criteria for distinguishing independent contractors from employees among farm laborers); *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1188–89 (9th Cir. 2001) (discussing Arizona’s eight factors test for out of state labor contractors that recruit Arizona residents to work on farms in other states).

78. *See, e.g.*, NATS DETASSELING INCORPORATED, *supra* note 71, at *Frequently Asked Questions* (providing answers to frequently asked questions about detasseling work to parents); *Advanta U.S.A., Inc. v. Chao*, 350 F.3d 726, 727 (8th Cir. 2003) (holding the DOL’s requirement for toilet and hand washing facilities in cornfields for seasonal workers is unreasonable in some situations).

79. Occupational Safety & Health Act, 29 U.S.C. §§ 651–678 (2013).

80. *Id.*; *see also Agricultural Operations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dsg/topics/agriculturaloperations> (last visited Nov. 1, 2013) (“Agri-

Despite implicit dangers of production agriculture, information on the nuanced legal status of independent contractor employment and the lack of legal protections they have in the event of injuries or death is also omitted on the websites.⁸¹ This is additionally critical because children younger than fourteen require parental consent to work in agricultural vocations, and it is difficult to discern whether their parents, many of whom are not from farming families, are made aware of the dangers of working in agriculture before providing consent.⁸²

Promotion of such cultural work “ethics” nonetheless bears witness to youth who are harmed and, in some instances, are killed.⁸³ When seeking legal remedy, aggrieved parties encounter evidentiary obstructions obligating discovery of who owns the field or who employed the youth directly.⁸⁴ This quest for remedy also typically involves distinguishing

culture ranks among the most dangerous industries” because “[f]armworkers are at high risk for fatal and nonfatal injuries, work-related lung diseases, noise-induced hearing loss, skin diseases, and certain cancers associated with chemical use and prolonged sun exposure Between 2003 and 2011, 5,816 agricultural workers died from work-related injuries in the U.S.”).

81. Independent contractor relationships have perpetuated laws dissuading recovery for injuries or other workplace accidents. *See, e.g.*, *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237–38 (5th Cir. 1973) (summarizing a five-factor test to determine agricultural producer liability to farm laborers supplied by independent labor contractors); *Antenor v. D & S Farms*, 88 F.3d 925, 925, 932 (11th Cir. 1996) (holding “growers and labor contractor were joint employers for purposes of FLSA and AWP” after examining eight factors); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 403 (7th Cir. 2007) (describing corn detasseling conditions and the relationship with an independent contractor where the independent contractor “was not [held] liable under AWP for alleged failure to provide adequate housing to workers[,] and . . . failing to post required notices”); *Guillaume v. Hall Farms, Inc.*, 914 N.E.2d 784, 788–89 (Ind. Ct. App. 2009) (applying a ten-factor test to determine agricultural producer liability to farm laborers supplied by independent labor contractors).

82. *See Wellner, supra* note 29 (quoting Jerry Binder, a parent of a detasseler: “I never felt, as a dad, that my son was in peril . . . I assumed crews showed up, told him what to do and how to do it.”).

83. *See Agricultural Operations, supra* note 80 (explaining the 2011 fatality rate for agricultural workers was seven times higher than that of workers in private industry and that youth who work on farms are exposed to potentially dangerous hazards); *HUMAN RTS. WATCH, supra* note 9, at 5, 7 (reporting risks to the health, safety and education of child farmworkers).

84. *See, e.g.*, *Cavazos v. Foster*, 822 F. Supp. 438, 442, 445 (W.D. Mich. 1993) (recognizing migrant farm workers are not necessarily considered “employees” covered under the FLSA and the AWP, and, to make such a determination, the court listed six factors to consider); *Guillaume*, 914 N.E.2d at 788–89 (offering ten factors—including ownership of the place of work—to assist in determining whether an employee is an “employee” or an “independent contractor”).

ownership of the field from independent contractor relationships.⁸⁵ The importance of discerning who owns the field or site of the injury or death also obligates illustrating causal connections to the harm.⁸⁶ If a farm worker is deemed an independent contractor, then certain protective statutory provisions do not apply, and harmed youth or their aggrieved families encounter difficulties in chasing remedial relief.⁸⁷ Injured farm workers and their families must also prove their classification as “employees” under the FLSA, as well as link causation to a statutory violation by their supervisors, which renders inadequate remedial relief for injured parties and their families.⁸⁸

Next, this Article considers how agrarian cultural norms have created a structure that keeps youth farmworkers at the margins of the law.

C. *Agrarian Cultural Norms: Children and Food Production*

“Farmworkers are at high risk for fatal and nonfatal injuries”⁸⁹

Hannah and Jade were part of the second cluster of youth farmworkers that consists primarily of migrants, seasonal workers, and others not related to the family farmers that own the particular fields.⁹⁰ It is worth noting that large portions of migrant farmworkers are primarily of Mexican descent and frequently come from indigenous communities in Latin America.⁹¹ The other principal cluster of youth deemed legally permissi-

85. See *Guillaume*, 914 N.E.2d at 788 (“[W]hether the employer or the workman supplies . . . the place of work for the person doing the work.”).

86. See generally Black, *supra* note 63 (explaining failure of OSHA officials to impose penalties in the case of the electrocution of two teen farm workers where no violation could be identified as the cause of death).

87. See *Cavazos*, 822 F. Supp. at 444–45 (explaining migrant farm workers must be classified as “employees” rather than “independent contractors” under the FLSA). See generally Davin C. Curtiss, Note, *The Fair Labor Standards Act and Child Labor in Agriculture*, 20 J. CORP. L. 303, 306 (1995) (providing history on the legislative oversight of agricultural child laborers).

88. See *Cavazos*, 822 F. Supp. at 444–45 (holding under the FLSA, migrant farm workers are “employees,” rather than “independent contractors”); see also Black, *supra* note 63 (describing OSHA’s failure in the deaths of Hannah Kendall and Jade Garza).

89. *Agricultural Operations*, *supra* note 80.

90. See generally *Youth in Agriculture*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <http://www.osha.gov/dsg/topics/agriculturaloperations/youngworkers.html> (last visited Nov. 2, 2013) (comparing the number of children in 2009 working on farms owned by their families to those who were hired to work on farms); Mobed et al., *supra* note 23, at 367 (listing common work-related health problems facing migrant and seasonal agricultural workers).

91. E.g., KANDEL, *supra* note 23, at 8–11 tbl.1, fig.6–7 (discussing demographic characteristics of hired farmworkers).

ble in food production or in operating machinery or other farm tasks include the children of family farm operators.⁹²

Despite the dramatic shift in food production from small, independent farms to large-scale farming operations,⁹³ as of 2009 approximately 750,000 children and adolescents under the age of twenty still worked on farms.⁹⁴ Since the 1930s Congress has authorized numerous federal exemptions that allow children to be employed on their family's farm.⁹⁵ In support of this cultural norm, the Fair Labor Standards Act Section 13(c) provides a "limited parental exemption" in which youth employment of any age is permitted without restrictions on the number of hours that may be worked.⁹⁶

State laws also permit youth labor in agriculture, with varying age limitations, and often depending on when a particular commodity, such as corn, requires cultivating or harvesting.⁹⁷ Small family farms, however,

92. See generally U.S. DEP'T OF LABOR, *supra* note 5, at 3 (providing information on child labor requirements for agricultural occupations under the Fair Labor Standards Act, including the parental exemption from the FLSA).

93. See Melanie J. Wender, Comment, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy is Destroying the Family Farm and the Environment*, 22 VILL. ENVTL. L.J. 141, 141 (2011) (describing the shift in agriculture from small farm production to larger operations commonly known as agribusinesses).

94. *Youth in Agriculture*, *supra* note 90.

An estimated 1.03 million children and adolescents under 20 years of age resided on farms in 2009, with about 519,000 of these youth performing work on the farms. In addition to the youth who lived on farms, an additional 230,000 children and adolescents were hired to work on U.S. farms in 2009.

Id.

95. See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 28 (1978) (providing history of the Fair Labor Standards Act of 1938 and its regulation of child labor, while recognizing that, "[e]xemptions were numerous"); UNITED STATES DEPARTMENT OF LABOR, *supra* note 5, at 3-4 (providing information on child labor requirements for agricultural occupations under the Fair Labor Standards Act, including the parental exemption, age standards, minimum wage and overtime, and school hours and employment); Curtiss, *supra* note 87 (detailing legislative oversight of agricultural child laborers); RENÉE JOHNSON, CONG. RESEARCH SERV., RL22131, WHAT IS THE "FARM BILL"? CRS-1 (2008) (explaining the Farm Security and Rural Investment Act of 2002 and giving background on the types of programs covered by farm bills).

96. U.S. DEP'T OF LABOR, *supra* note 5, at 3; Curtiss, *supra* note 87.

97. *Id.* (listing types of agricultural work that may be performed a specific ages). Ages vary among states dependent on whether certain crops are in season, such as corn detasseling in Iowa. See, e.g., *Farmworkers' Rights: Can My Children Work?* IOWA LEGAL AID, <http://www.iowalegalaid.org/resource/farmworkers-rights?ref=D4edM> (last visited Dec. 30, 2013) (affirming Iowa state and Federal law allow children at least fourteen years of age to detassel corn during July and August, with no limits on the number of hours they can work).

no longer dominate food production across the nation.⁹⁸ In stark contrast, larger agricultural operations with aggressive vertical integration practices and globalization of the marketplace are displacing small family farm operations.⁹⁹ This re-structuring of food production thereby underscores that removal of the proposed DOL regulations without empirical studies could not diminish systemic displacement of smaller owner-based operations.

In the second cluster, data collection gaps hinder accuracy of non-family farm youth population estimates, but one report asserts “230,000 youth were hired to work on . . . farms in 2009[,]”¹⁰⁰ and are commonly characterized as “forgotten farmworkers.”¹⁰¹ However, this figure is inaccurate. Estimates are imprecise for various reasons including undocumented employees and their employers who, fearing discovery by immigration and law enforcement officials, hide employees during census enumeration periods.¹⁰² Outside of their own direct employment, farmworker children work alongside their parents to supplement their families’ low wages.¹⁰³ Recognized as critical to the agricultural

98. See generally CAROLYN DIMITRI ET AL., U.S. DEP’T OF AGRIC., *THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY*, i (2005), available at http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib3.aspx#.Um0_SHUo5jo (providing a description of the marked, century-long evolution of “[t]he structure of farms, farm households, and the rural communities in which they exist”).

99. See generally WILLIAM G. WHITTAKER, CONG. RES. SERV., RL33002, *LABOR PRACTICES IN THE MEAT PACKING AND POULTRY PROCESSING INDUSTRY: AN OVERVIEW* CRS-6 (2006), available at http://assets.opencrs.com/rpts/RL33002_20061027.pdf (explaining vertical integration through the context of the meat packing and poultry processing industry); DIMITRI ET AL., *supra* note 98, at 12 (stating fewer small farms survive from on earnings from the farm, but instead rely on other off-farm sources).

100. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1.

101. See Alex Pulaski, *Children: The Forgotten Farmworkers*, FRESNO BEE, Dec. 13, 1992, at A1, available at 1992 WLNR 1438364 (describing children as young as three working in the fields—but more commonly ages ten and eleven—who lose thumbs, break out in rashes from pesticides, get run over by tractors or passing cars, and miss school, fall behind their peers, and have a forty-five percent dropout rate).

102. ROBERT C. SMITH, CTR. FOR SURVEY METHODS RESEARCH, STATISTICAL RESEARCH DIV., BUREAU OF THE CENSUS, *COUNTING MIGRANT FARM WORKERS: CAUSES OF THE UNDERCOUNT OF FARMWORKERS IN THE NORTHEASTERN UNITED STATES IN THE 1990 CENSUS AND STRATEGIES TO INCREASE COVERAGE FOR THE CENSUS IN 2000*, at Executive Summary, 1 (1995), available at <https://www.census.gov/srd/papers/pdf/ex95-22.pdf>. This rationale also applies to documented and domestic-based workers with children in the fields.

103. U.S. GOV’T ACCOUNTABILITY OFF., GAO/HRD-92-46, *Hired Farmworkers: Health and Well-Being at Risk* 20, 35 (1992), available at <http://www.gao.gov/assets/160/151490.pdf> (finding about one-third of parents interviewed in a 1988 National Child Labor Committee Survey stated their children were working in the fields in order “to contribute to the family income” so that their families can survive).

agenda,¹⁰⁴ farmworkers perform labor in difficult, harsh conditions.¹⁰⁵ In exchange, farmworkers rank among the most impoverished in the nation's workforce.¹⁰⁶ This results, in part, from federal exclusions which structure the terms and conditions of their employment relationships.¹⁰⁷ With federal officials aware of the risks, the children of farmworkers are nonetheless working in difficult conditions, at times operating heavy farm equipment, such as tractors, hay balers, and grain combines¹⁰⁸ or performing other farm-related tasks that require excessive kneeling, stooping, or arm-raising.¹⁰⁹

Despite such rules, children under the age of sixteen drive tractors or harvest fruits and vegetables dusted with pesticides, and may work in extremely harsh environmental conditions.¹¹⁰ Additionally, children be-

104. KANDEL, *supra* note 23, at 1 (“Hired farmworkers make up an estimated third of the total U.S. agricultural labor force and are critical to U.S. agricultural production, especially for labor-intensive agricultural sectors such as fruits and vegetables.”).

105. *See id.* (describing agriculture as “one of the most hazardous industries in the [n]ation,” and noting unique risks for farmworkers, such as “pesticides as well as . . . heavy equipment operation and physically strenuous labor”).

106. *See* NAT'L CTR. FOR FARMWORKER HEALTH, FARMWORKER HEALTH FACTSHEET (2012), available at <http://www.ncfh.org/docs/fs-Migrant%20Demographics.pdf> (summarizing the 2007–2009 National Agricultural Workers Survey conducted by the U.S. Department of Labor). The survey reported “[t]he average individual farmworker income ranged from \$12,500 to \$14,999 and the average total family income ranged from \$17,500 to \$19,999.” *Id.* “Twenty-three percent . . . of all farmworkers had total family incomes below the U.S. government's poverty guidelines.” *Id.* “Forty-three percent . . . of farmworkers said they, or someone in their household, had used need-based or contribution-based public assistance within the last two years.” *Id.*

107. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 103, at 2 (“Hired farmworkers are not adequately protected by federal laws, regulations, and programs; therefore, their health and well-being are at risk.”).

108. *Id.* at 21.

109. *See* HUMAN RTS. WATCH, *supra* note 9, at 8 (noting even at young ages child farmworkers reported pain in their hands, feet, backs, and knees, and that children are more vulnerable to injuries from repetitive motion because their bodies are still developing).

110. *See, e.g.,* Luthien L. Niland, Comment, *The Cost of the Bright Red Strawberry: The Dangerous Failure of Pesticide Regulations to Account for Child Farmworkers*, 4 GOLDEN GATE U. ENVTL. L.J. 363, 364, 367 (2011) (noting thousands of children working in agricultural fields are exposed to pesticides on a regular basis due to outdated labor laws, and exposure to these dangerous chemicals can lead to “lasting physical and mental health problems”); Mary H. Ward et al., *Proximity to Crops and Residential Exposure to Agricultural Herbicides in Iowa*, 114 ENVTL. HEALTH PERSP. 893, 893 (2006) (reporting people in agricultural areas whose homes are close to agricultural fields are at increased risk for pesticide exposure, especially if there is an agricultural worker in the home, and that children in these areas had a concentration of pesticide in their urine five times higher than that of urban children); Gloria D. Coronado et al., *Agricultural Task and Exposure to Organophosphate Pesticides Among Farmworkers*, 112 ENVTL. HEALTH PERSP. 142, 142 (2004) (reporting pesticides clear out of children's bodies less quickly because their im-

tween the ages of eleven and twelve, for example, often work full-time, in addition to attending school.¹¹¹ Some children, such as fourteen-year-old Olivia A., described working six to seven days a week, from six in the morning until six or seven in the evening, harvesting blueberries in Michigan; similarly, fifteen-year-old Felix D. worked the same hours “deflowering tobacco” in North Carolina.¹¹² In numerous situations, children as young as seven harvest blueberries and other fruits and vegetables in the fields.¹¹³ Their employment in agriculture results in high dropout rates or gaps in their education.¹¹⁴

Hostile working conditions are another harsh reality facing young farm workers. These working conditions prevent children from experiencing the innocence and positive aspects of childhood.¹¹⁵ In addition to being robbed of their childhood, young farm workers often receive minimal compensation.¹¹⁶ In the blueberry fields of North Carolina, for example,

munne systems are less developed than adults’, thus prolonging the effects of exposure in children); *Farming Can Be Deadly[-]Grim Reaper Visits Too Often*, FRESNO BEE, Feb. 17, 1991, at D1 (stating the rate of fatal injuries for farmworkers is four times as high as the rest of the working population); HUMAN RTS. WATCH, *supra* note 9, at 8 (“Children work in extreme temperatures, heat and cold . . . [and] [w]orking long hours in high temperatures places children at risk of heat stroke and dehydration . . . [which] can lead to brain damage and death.”) Additionally, many employers do not provide workers with drinking water, toilets, or hand washing facilities. *Id.*

111. HUMAN RTS. WATCH, *supra* note 9, at 19.

112. *Id.* at 6.

113. *Id.* at 19, 24 (“[C]hildren . . . said they picked strawberries at ages seven and eight in Florida, picked blueberries at age seven in Michigan, picked and shucked green peas in Virginia at age eight, and hoed cotton at ages seven, eight, and nine in Texas.”).

114. *See, e.g.*, *Zavala v. Contreras*, 581 F. Supp. 701 (S.D. Tex. 1984) (holding school district’s educational programs violated constitutional and statutory rights of migrant children, and ruling that the school’s cut-off date did not consider the special educational needs of migrant children); HUMAN RTS. WATCH, *supra* note 9, at 33–35 (“Thirty-three percent of [U.S.]-born farmworkers had dropped out of school in 2005–2006 . . . among all farmworkers the median highest grade completed was 8th By comparison, the national dropout rate was [eight] percent in 2008”). Factors contributing to these rates include the fact migrant workers end their school year to coincide with farm seasons, returning weeks or months after the school year has begun; migrant farm children change schools three times a year on average; and start dates, curriculum and credits vary from state to state. *Id.*

115. *Id.* at 3, 6 (highlighting the story of seventeen-year-old Marcos S., who began working in the fields at twelve.) Marcos S. reflected, “I really didn’t have a childhood and I don’t want [my own children] to go through what I did You’re a kid only once. Once you get old you have to work.” *Id.* Another farmworker from Texas said that she had “stolen her 11-year-old daughter’s childhood” by making her work beside her on the farm. *Id.*

116. *See id.* at 6 (reporting child agricultural workers usually make less than minimum wage, which is further cut by having to purchase tools, gloves, and water, and by employers who underreport hours).

youth workers in “pool[ing] their income . . . [e]arn \$2.50 per one-gallon bucket of picked berries.”¹¹⁷ In working “unlimited hours outside of school in fields or orchards[,]” they encounter a dire realm of circumstances such as sunburns, excessive heat, thirst, hunger, and, at times, encounters with snakes.¹¹⁸ Moreover, without immediate access to health care, workers endure a range of heat-related illnesses, and in some situations, casually endure death.¹¹⁹ Such consequences result from soaring temperatures and the lack of breaks from work or shade from the sun while working in the fields.¹²⁰

Injuries, however, are not limited to instances of thirst, hunger, and heat-related illnesses. Additional injury resulting from pesticides used in fields further plague youth laborers.¹²¹ Seventeen-year-old Gloria, for example, was picking oranges and experienced “nausea, dizziness, blurred vision and stomach cramps.”¹²² Children in agriculture also face additional hurdles in agricultural employment including malnourishment.¹²³ Lack of insurance and medical care further compounds workers’ risk of illness and life-threatening conditions, notwithstanding data illustrating workers are at a high risk for nonfatal and fatal injuries.¹²⁴

117. ASS’N OF FARMWORKER OPPORTUNITY PROGRAMS, *CHILDREN AT WORK: A GLIMPSE INTO THE LIVES OF CHILD FARMWORKERS IN THE UNITED STATES*, at i (2009), available at <http://afop.org/wp-content/uploads/2010/07/NC-Blueberry-Photo-Booklet-2009.pdf>.

118. *Id.* at i, 1, 7, 9.

119. Sasha Khokha, *Teen Farmworker’s Heat Death Sparks Outcry*, NPR (June 6, 2008 11:50 AM), <http://www.npr.org/templates/story/story.php?storyId=91240378> (reporting that seventeen-year-old Maria Isabel Vasquez Jimenez died after nine hours of working in the field under intense heat conditions, without access to shade or water).

120. *Id.* (highlighting California’s enactment of more stringent laws aimed at preventing heat-related illnesses among workers). The laws require employers to provide workers with adequate water, shade, and breaks from work. *Id.*

121. FARMWORKER JUSTICE, *EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION’S FARMWORKERS 4* (2013) (including “headaches, nausea, shortness of breath, or seizures . . . chronic health problems, such as cancer, infertility (and other reproductive problems), neurological disorders, and respiratory conditions”).

122. *Learn the Facts*, ASS’N OF FARMWORKER OPPORTUNITY PROGRAMS, http://afop.org/children-in-the-fields/learn-the-facts/#Farmworker_children (last visited Nov. 4, 2013).

123. HUMAN RTS. WATCH, *supra* note 9, at 38–39, 45 (listing “working with sharp tools and heavy machinery, expos[ure] to chemicals and extreme temperatures, climbing ladders, lugging heavy buckets and sacks” as ways in which children are injured and sometimes die). “Farmworker children’s health is also affected by substandard farmworker housing, low incomes that result in poor diet, pregnant farmworkers’ exposure to pesticides and lack of access to adequate prenatal health care, and mental health problems related to poverty, migration, and drug and alcohol abuse in farmworker camps.” *Id.* at 39. Children also feel pressured to “work as fast as possible, with few breaks, and to keep working even when injured or when sickened by pesticides, heat, tobacco, colds, flu, or other illnesses.” *Id.* at 38–39, 45.

124. *Id.* at 59.

Furthermore, without the benefit of gloves, shoes, or protective gear, child employees confront a host of repetitive-motion injuries, pain in their knees, backs, hands, and feet, along with other physical difficulties.¹²⁵ The nature of agricultural employment thereby elevates the risk of harm to youth and small children in fields and orchards and emphasizes necessity for FLSA proposed revisions.¹²⁶

Notwithstanding data collection gaps and varying estimates spanning the population group and assigned agricultural tasks,¹²⁷ agricultural employment is widely recognized among the most perilous in the nation.¹²⁸ A measure of protection is thus provided in DOL regulations prohibiting “oppressive child labor”¹²⁹ and barring activities deemed particularly dangerous.¹³⁰ Specifically, a series of federal Hazardous Orders preclude youth employment in several categories.¹³¹ Under the Hazardous Orders, youth under sixteen are precluded, for example, from “[o]perating a tractor of over 20 PTO (Power-Take-Off) horsepower, or connecting or disconnecting implements or parts to such a tractor.”¹³² In contrast, non-agricultural occupations are barred at eighteen and not at sixteen under various hazardous orders.¹³³ Additional exclusionary categories include operating various machines such as a “fork lift; potato combine; . . . chain saw[;]” working in a pen occupied by suckling pigs or cows with a newborn calf; loading and unloading timber; laboring from various heights;

Only [twenty] percent of migrant and seasonal farmworkers reported in 2000 using any healthcare services in the preceding two years . . . and in 2004, [a North Carolina study] found that for over half of the children sampled, the child’s caretaker reported a time in the past year when the caretaker felt the child needed medical care but the child did not receive it.

Id.

125. *Id.* at 8.

126. ALEXIS M. HERMAN, U.S. DEP’T OF LABOR, REPORT ON THE YOUTH LABOR FORCE 58 (2000), available at <http://www.bls.gov/opub/rylf/pdf/rylf2000.pdf> (“Youths aged 15 to 17 who have jobs in agriculture had a risk of fatality that was more than 4.4 times as great as the average worker aged 15 to 17.”).

127. MARSHFIELD CLINIC, *supra* note 6, at 9.

128. Secretary Hilda L. Solis, United States Department of Labor, *Foreword to MARSHFIELD CLINIC, BLUEPRINT FOR PROTECTING CHILDREN IN AGRICULTURE: THE 2012 NATIONAL ACTION PLAN* (2012).

129. 29 C.F.R. § 570.1(b) (2013) (providing definition for “oppressive child labor” as that which does not meet the minimum age standards in 29 C.F.R. § 570.2).

130. *Id.* § 570.50.

131. *Id.* § 570.71 (listing the “occupations in agriculture [that] are particularly hazardous for the employment of children below the age of [sixteen]”).

132. *Prohibited Occupations for Agricultural Employees: *HO/A #1*, U.S. DEP’T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/docs/hazag.asp> (last visited Nov. 4, 2013).

133. 29 C.F.R. § 570.2(a)(1)(ii) (2013) (“[S]et[ting] an [eighteen]-year minimum age with respect to employment in any occupation found and declared by the Secretary of Labor to be particularly hazardous for the employment of minors.”).

and driving various vehicles.”¹³⁴ To the extent children are at risk of bodily injury, the proposed DOL Hazardous Orders illustrate prohibitions the sector requires but which have escaped congressional approval.¹³⁵ Notwithstanding the perils enumerated in Hazardous Orders, the consequences result with employment of children and youth in the aforementioned risks with dire results.¹³⁶

The causal relationship between cultural norms found in the agrarian sector and injuries or fatalities of youth working in agriculture, and the minimal response over the last half-century, underscores the conscious disregard of the dangerous nature of food production and renders the proposed DOL revisions imperative.¹³⁷ This is critical in light of disparate industry recording practices of tracking children’s injuries. Obtaining complete evidence of youth injuries is challenging because of incomplete data collection resulting from the lack of a unified approach among the different agencies that collect information.¹³⁸ There is further absence of reporting methods and responsibilities that independent farmers are required to fulfill, particularly when those independent farmers are in relationships with independent contractors employing farm laborers.¹³⁹ Studies based on varying disciplines are also performed without a defined schedule and the variability in data collection yields haphazard standards.¹⁴⁰

Notwithstanding data collection challenges, the nature of farm employment, whether in the fields or in operating large-scale machinery, involves risks to youth in rural working environments, even when youth are

134. *Id.* § 570.71 (listing all agricultural occupations deemed too hazardous for children under sixteen years of age).

135. Ayrienne Parks, *AFOP Supports Strengthening DOL’s Hazardous Orders in Agriculture*, ASS’N OF FARMWORKER OPPORTUNITY PROGRAMS (Sept. 2, 2011), <http://afop.org/2011/09/02/afop-supports-strengthening-dol%E2%80%99s-hazardous-orders-in-agriculture>.

136. *See* U.S. DEP’T OF LABOR, *supra* note 5, at 4–6 (summarizing the Hazardous Occupations Orders).

137. Solis, *supra* note 128 (stating youth agriculture protections are insufficient and “Americans can do better”).

138. MARSHFIELD CLINIC, *supra* note 6, at 6.

139. *See id.* (noting due to various counting methods, certain populations of farm workers may not be captured in statistical analysis).

140. NELSON ADEKOYA & STEPHANIE G. PRATT, DEP’T OF HEALTH & HUMAN SERVS., *FATAL UNINTENTIONAL FARM INJURIES AMONG PERSONS LESS THAN 20 YEARS OF AGE IN THE UNITED STATES: GEOGRAPHIC PROFILES 1 (2001)*, available at <http://www.cdc.gov/niosh/docs/2001-131/pdfs/2001-131.pdf> (addressing the deficit of national data on youth and adolescent fatal farm injuries by providing a report on the causes of death at the regional and state level).

trained and farmers are observant.¹⁴¹ The reported data illustrates that consequently, every year youth are “killed, injured or permanently disabled on farms in the United States,” with the cost of nonfatal injuries “estimated at \$1 billion annually.”¹⁴² An estimated 33,000 children are injured while conducting farm work in any given year.¹⁴³ The Centers for Disease Control and Prevention also report that “[o]n average, [one hundred and thirteen] youth less than [twenty] years of age die annually from farm-related injuries.”¹⁴⁴ While not one youth should be subjected to hazardous farm-related risks and injuries, of the [six hundred and ninety-five] fatalities between 1995 and 2000, “[twenty-three] percent affected Hispanic and other minority youth.”¹⁴⁵ For all youth, data shows “[w]hile only about four percent of all working youth were employed in agriculture in the 1990s, they experienced more than [forty] percent of the youth occupational fatalities”¹⁴⁶

Examples of children exposed to agricultural employment dangers or performing farm tasks are accordingly neither rare nor unknown events.¹⁴⁷ Notwithstanding proposed DOL rules and the Hazardous Orders, companies frequently violate FLSA child labor provisions, and youth injuries, or, in the worst-case scenario, fatalities occur in turn.¹⁴⁸ Thus, a host of additional injuries are “the result of children being directly involved in farm work,” further illustrating how death can result from myriad causes such as operating tractors, falling off trailer beds, being run over by tractors, electrocution, hypothermia, scalping, drowning, and suffocating in silos.¹⁴⁹

141. *See id.* at 5 (“Between 1982 and 1996, there were 2,174 farm deaths among youth less than [twenty] years of age.”).

142. *Youth in Agriculture*, *supra* note 90.

143. *Id.*

144. CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 1.

145. MARSHFIELD CLINIC, *supra* note 6, at 8.

146. Solis, *supra* note 128.

147. *See Vehicle Hazards*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/dsg/topics/agriculturaloperations/hazards_controls.html (last visited Oct. 28, 2013) (explaining and illustrating how farm workers face many dangers ranging from vehicle hazards, heat, ladders and falls, musculoskeletal injuries, hazardous equipment and machinery, grain bins and silos, unsanitary conditions, pesticides and other chemicals, zoonotic infections, noise, and a host of additional hazards).

148. Tara Becker, *Six Ag-Related Fatalities in Less than 2 Years*, DAILY GAZETTE (Ill.), July 7, 2012 (citing an example of the Department of Labor Wage and Hour Division sanctioning the now defunct company Haasbach, LLC for violating FLSA child labor provisions “by allowing workers younger than 18 to perform hazardous jobs”).

149. *Youth in Agriculture*, *supra* note 90; *see also* Becker, *supra* note 148 (citing examples of injuries suffered by children while working on farms).

The proposed FLSA rules that would have diminished the risks to youth working in food production are examined next, with emphasis placed on the impact of the proposed Hazardous Orders revisions.

III. SEEKING PARITY: THE DEPARTMENT OF LABOR PROPOSED CHILD LABOR REGULATIONS

Responding to the rate of injuries and fatalities of youth in agriculture, the DOL's proposed rules sought revisions to the Fair Labor Standards Act (FLSA) for non-family farm youth employees, without intending to dissuade farm-family youth from working in the sector.¹⁵⁰ This section addresses the proposed revisions, and the dangers that young, non-family farm workers will continue facing as a result of agricultural employers and lawmakers challenging the validity of the proposed revisions.

A. *The 2011 Revisions to the Fair Labor Standards Act of 1938*

Following a series of reports on the annual number of youth injuries and fatalities, the DOL adopted National Institute for Occupational Safety and Health (NIOSH) recommendations and introduced the FLSA proposed revisions for public comments.¹⁵¹ The new rules not only sought improved revisions to offset injuries and fatalities in agriculture, but would have brought "parity between the agricultural and nonagricultural child labor provisions"¹⁵² The proposed regulations further sought to improve the DOL's enforcement actions against violators by increasing its protections for agricultural workers ages fourteen to fifteen and increasing penalties.¹⁵³

In support of the new rules, the DOL cited the 2010 deaths of two youths—ages fourteen and nineteen—as a result of agricultural work.¹⁵⁴ Both children were killed in "a large bin used to store corn . . . when they were engulfed by corn."¹⁵⁵ Additionally, the DOL reported in 2009, a seventeen-year-old was also killed while working inside a large bin that

150. See Brian Mann, *War of Words Escalates Over Farm Safety for Kids*, N. COUNTRY PUB. RADIO (Apr. 18, 2012), <http://www.northcountrypublicradio.org/news/story/19688/20120418/war-of-words-escalates-over-farm-safety-for-kids> (stating the DOL affirmed that the new safety regulations proposed by the Obama Administration would not affect the family exemption that is in place).

151. Child Labor Regulations, Orders and Statements of Interpretation, 76 Fed. Reg. 54836, 54836 (proposed Sept. 2, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-02/pdf/2011-21924.pdf>.

152. *Id.*

153. *Id.*

154. *Id.* at 54847.

155. *Id.*

stored grain.¹⁵⁶ The DOL reported: “Since 2000 . . . at least [thirteen] such establishments [have been investigated], and several of these investigations were initiated because of the death or injury of a working minor.”¹⁵⁷ In yet another instance, a fifteen-year-old female was seriously injured when she “was pressed against a metal corral by a stampeding calf.”¹⁵⁸ She was hired to help “herd livestock in and out of pens in preparation for sale and/or transport.”¹⁵⁹ While working she was “knocked down and then stomped by hooves, [and] suffered a life-threatening laceration of her liver, broken ribs, a cracked femur, and a crushed bile duct. Complications arising from her injuries prolonged her hospital stay to over five weeks.”¹⁶⁰

If enacted, the proposed agricultural rules would have not only diminished instances of harmful injury or death but also reshaped agricultural working norms which, permit employment of youth in harmful circumstances. Yet based on the perceived fears of a group falling outside its literal application, lawmakers erroneously mischaracterized the legislation as harmful to “family farms,” without regard to the factual specificity of the rules’ intent. It is difficult to reconcile withdrawal of the proposed rules with the dangers confronting children and youth in agricultural employment.

The DOL’s proposed regulation changes were the first since the 1970s.¹⁶¹ Over time, existing rules proved inadequate in protecting children employed in agriculture.¹⁶² The proposals were thereby limited “only [to] hired farm workers and in no way [would] compromise the statutory child labor parental exemption involving children working on farms owned or operated by their parents.”¹⁶³ As the proposed rules recognized and provided: “Only the sole owner or operator of a farm is in a position to regulate the duties of his or her child and provide guidance.”¹⁶⁴

The DOL distinguished family-owned operations from instances where third parties employ children:

156. *Id.*

157. Child Labor Regulations, Orders and Statements of Interpretation, 76 Fed. Reg. 54636, 54847 (proposed Sept. 2, 2011).

158. *Id.*

159. *Id.*

160. *Id.*

161. Solis, *supra* note 128.

162. *Id.*

163. Child Labor Regulations, Orders and Statements of Interpretation, 76 Fed. Reg. 54636, 54836 (proposed Sept. 2, 2011).

164. *Id.* at 54880.

Where the ownership or operation of the farm is vested in persons other than the parent, such as a business entity, corporation or partnership (unless wholly owned by the parent(s)), the child worker is responsible to persons other than, or in addition to, his or her parent, and his or her duties would be regulated by the corporation or partnership, which might not always have the child's best interests at heart.¹⁶⁵

Despite parental exemption reminders “family farm operators,” representatives from the agriculture industry, and political representatives waged an aggressive campaign against the proposed rule changes.¹⁶⁶

Opposition coalesced around perceptions that the new rules would denigrate small family farms by negating the recognized parental exemption—a gross mischaracterization of the DOL's intent and goals.¹⁶⁷ State and federal representatives who failed or refused to recognize the literal and plain meaning of the new rules further joined the opposition's chorus.¹⁶⁸ These assertions are difficult to reconcile with the proposed statutory declaration:

None of the revisions proposed . . . in any way change or diminish the statutory child labor parental exemption in agricultural employment contained in FLSA section 13(c)(1). The child labor provisions of the FLSA, just like the Act's minimum wage and overtime provisions, apply only when an employment relationship exists between an employer and a young worker. The concept of an employment relationship, which is the same for agricultural and nonagricultural employment, is well established under the FLSA.¹⁶⁹

Relying on the non-fatality and fatality rates specific to youth, the legislation recognized: “Because the parental exemption for agricultural employment is so broad, allowing exempt youth to perform any work at any

165. *Id.* at 54841.

166. Justin Franz, *New Labor Rules Worry Farmers, Educators*, FLATHEAD BEACON (Mont.), Apr. 08, 2012, http://www.flatheadbeacon.com/articles/article/new_labor_rules_worry_farmers_educators/2741.

167. *See id.* (describing viewpoints of people with varying backgrounds concerned about the effect of the labor rules).

168. *See, e.g.*, Preserving America's Family Farms Act, H.R. 4157, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4157rfs/pdf/BILLS-112hr4157rfs.pdf> (passing in the House when it was re-introduced on July 24, 2012, but died in the Senate). The bill states the DOL's “proposed regulations would have curtailed opportunities for youth to gain experiential learning and hands-on skills for enrollment in vocational agricultural training . . .” *Id.*

169. Child Labor Regulations, Orders and Statements of Interpretation, 76 Fed. Reg. 54636, 54841 (proposed Sept. 2, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-02/pdf/2011-21924.pdf>.

age (except in manufacturing and mining) and at any time of the day, the Federal child labor provisions generally apply only to youth who are hired farm workers.”¹⁷⁰ The DOL rationale provided:

[A]pplication of the parental exemption in agriculture has been for over forty years limited to the employment of children exclusively by their parent(s) on a farm owned or operated by the parent(s) or person(s) standing in their place. Any other applications would render the parental safeguard ineffective.¹⁷¹

Notwithstanding its clear statements against unmitigated reactions from large-scale industrial agriculture, representatives, politicians and farm families, the DOL withdrew the proposed rules.

Following the rule's withdrawal, former DOL Secretary Hilda Solis responded in a subsequent report to objections that the new legislation would have eliminated the parental exemption, stating:

The Department is not seeking to disrupt the proud intergenerational tradition of passing the agrarian work ethic down from one generation to the next. Instead, we are proposing some reasonable parameters on especially dangerous tasks that data show have killed or injured a disproportionate number of young workers.¹⁷²

Without the protective structural emphasis introduced above, status quo harm to youth remains alive and well. Their perceived minimal value bears witness to an untouched agricultural sector receiving massive amounts of federal money, support, and beneficial legislation.¹⁷³

Adding to the misguided opposition to the proposed legislation, an additional response followed and is addressed next.

B. *A Congressional Response: Agrarian “Fundamentalism” and the Preserving America’s Family Farms Act*

*“Do you know who picked your food?”*¹⁷⁴

170. *Id.* at 54842.

171. *Id.* at 54841.

172. Solis, *supra* note 128.

173. The aggregate of benefits to the sector are beyond the scope of this Article. See U.S. GOV'T ACCOUNTABILITY OFF., FEDERAL FARM PROGRAMS, UNITED STATES NEEDS TO STRENGTHEN CONTROLS TO PREVENT PAYMENTS TO INDIVIDUALS WHO EXCEED INCOME ELIGIBILITY LIMITS GAO 09-67 (2008) for a report critical of subsidies management. This report identifies 2,702 potentially ineligible individuals who reported an average adjusted gross income loss of \$2.5 million over a period of three years. *Id.*

174. *Do You Know Who Picked Your Food?*, CHILDREN IN THE FIELDS CAMPAIGN, <http://afop.org/wp-content/uploads/2010/07/CIF-Postcard-Final.pdf> (last visited Dec. 29, 2013).

Elected officials supporting those who feared the proposed legislation would negate the agricultural parental exemption rushed to save small family farms in the form of the “Preserving America’s Family Farms Act” (PAFFA).¹⁷⁵ The Act would further prevent introduction of similar legislation by the Secretary of Labor in the future, and included the following provisions:

SECTION 1. SHORT TITLE AND FINDINGS.

(a) **SHORT TITLE.**—This Act may be cited as the “Preserving America’s Family Farms Act.”

(b) **FINDINGS.**—Congress finds that—

- (1) family farms have a long history and tradition of providing youth with valuable work experience;
- (2) [DOL] regulations should not adversely impact the longstanding tradition of youth working on farms where they can gain valuable skills and lessons on hard work, character, and leadership;
- (3) the [DOL’s] proposed regulations would have curtailed opportunities for youth to gain experiential learning and hands-on skills for enrollment in vocational agricultural training;
- (4) the proposed regulations would have obstructed the opportunity for youth to find rewarding employment and earn money for a college education or other meaningful purposes;
- (5) the proposed regulations would have limited opportunities for young farmers wishing to pursue a career in agriculture at a time when the average age of farmers continues to rise; and
- (6) working on a farm has become a way of life for thousands of youth across the rural United States.

SEC. 2. RULE RELATING TO CHILD LABOR.

The Secretary of Labor shall not reissue in substantially the same form, or issue a new rule that is substantially the same as, the proposed rule entitled “Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties” (published at 76 Fed. Reg. 54836 (September 2, 2011)).¹⁷⁶

Had the DOL adopted the revisions, and thereafter, had challenges to the adopted revisions been brought in court, statutory rules of judicial construction would have prevented courts from finding the proposal had eradicated the parental exemption, because the intent of the proposed

175. Preserving America’s Family Farms Act, H.R. 4157, 112th Cong. (2012), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4157rfs/pdf/BILLS-112hr4157rfs.pdf>.

176. *Id.*

rules was clear.¹⁷⁷ A literal interpretation of the rules would have directed judicial acknowledgment that the revisions were not intended to eliminate the child exemption.¹⁷⁸ Nonetheless, Idaho Congressman Mike Simpson declared:

This DOL proposal was a misguided idea that threatened the ability of America's youth to work on family farms and other agricultural operations . . . It would also restrict families in their efforts to pass on the generational knowledge and the hands-on learning that is critical to the survival of the agricultural industry.¹⁷⁹

The Act and inaccurate assessment of the FLSA revisions also signal yet another class based distinction. Unlike children who are not part of farm-owning families, children of farmers are more likely to have the opportunity to attend safety forums, 4-H programs, and a host of additional resources not easily available to farmworker children.¹⁸⁰ More specifically, farmworkers and their children employed in the industry do not enjoy easy access to information about their rights—after all, there are typically no computers or smartphones in farm fields. Nor are there on site DOL or OSHA offices nearby in most instances that would promote agricultural worker protection. Consequently, without the proposed leg-

177. *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (declaring when courts review an agency's construction of a statute, if the intent of Congress is clear, the court and the agency must give effect to Congress' expressed intent; if it is ambiguous, then the court determines if the agency's construction is reasonable); *W. Union Tel. Co. v. F.C.C.*, 665 F.2d 1112, 1125 (D.C. Cir. 1981) (holding Western Union's petition for review of an FCC order was not appropriate for the courts consideration).

178. *See* Steinzor, *supra* note 17, at 504 (commenting on framer's intent).

[T]he new requirements would have exempted children who work for their parents or a relative or friend standing in the place of a parent, no matter what their age or activity for which they are paid But the proposal would have prohibited children under sixteen years old from working for hire to operate farm machinery; feed, heard, or otherwise handle farm animals when their activities would cause pain to the animal or result in 'unpredictable' behavior; manage crops stored in grain elevators or silos, or pick tobacco

Id.

179. *Preserving America's Family Farms Act Passes House*, U.S. CONGRESSMAN MIKE SIMPSON (July 25, 2012), <http://simpson.house.gov/news/documentsingle.aspx?DocumentID=304630> (revealing Congressman Simpson thought the rule would have changed the way of life for thousands of family farms resulting in his co-sponsoring of H.R. 4157 to prevent the rule from being considered in the future).

180. *E.g., USDA For Kids*, U.S. DEP'T AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=FOR_KIDS (last updated Sept. 11, 2013); *4-H Youth Development, Extension and Outreach*, IOWA ST. U., <http://www.extension.iastate.edu/4h> (last visited Feb. 24, 2014). Such programs are not limited to children of farmers. However, they are not easily available to migrant and seasonal workers.

isolation, the nation's non-family farm youth in the second cluster remain at risk to continued and systemic injuries and possible demise.

Sponsors and supporters of the PAFFA misrepresented the intent and purpose of the proposed legislation. As a result of these reckless actions by lawmakers, youth from non-farming families in agricultural employment are left unprotected from the dangers of their workloads. Resisting rule changes continues to have a disproportionate effect on children of color employed or otherwise relied upon in the sector.¹⁸¹ Presently, the DOL has yet to introduce new rules to the FLSA.¹⁸²

IV. FAMILY FARMS AND AGRARIAN DECEIT

Without regard to the extensive histories of the involvement of the Indigenous population and early Chicana/o farmers in food production,¹⁸³ Thomas Jefferson is historically recognized as the chief promoter of the "agrarian ideal," itself just one realm of "agrarian fundamentalism."¹⁸⁴ "[A]gricultural fundamentalism includes a number of basic ideas[]" comprising more than just "the belief in the economic importance of farming."¹⁸⁵ Other tenets of the agricultural rationale are that "there is something special and unique about the rural way of life."¹⁸⁶

181. See KANDEL, *supra* note 23, at (noting the majority of hired agricultural workers are Hispanic).

182. Statement on Withdrawal of Proposed Rule, *supra* note 16.

183. See Guadalupe T. Luna, "Agricultural Underdogs" and International Agreements: *The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV 9, 11 (1996) (detailing the historical connections of Mexicans to agriculture and their ownership of land in the United States); Lisi Krall, *Thomas Jefferson's Agrarian Vision and the Changing Nature of Property*, 36 J. ECON. ISSUES 131, 135 (2002) (revealing that Jefferson's intent was to "civilize" the Native Americans and change the way they farmed the land to a system based on peasant proprietorship).

184. Krall, *supra* note 183, at 131 ("Thomas Jefferson is recognized as the foremost proponent of the agrarian ideal which he . . . articulated [as] . . . '[t]hose who labor in the earth are the chosen people of God'"). The agrarian ideal is "a vision of a nation of independent farmers who would provide the bedrock on which to build our republic." *Id.* The author also asserts agriculture is viewed as providing a nation with "virtue, morality, and independence," which are all "necessary ingredients for a sound democracy." *Id.*; see also WILLIAM P. BROWNE ET AL., SACRED COWS AND HOT POTATOES: AGRARIAN MYTHS IN AGRICULTURAL POLICY 7-13 (1992) (discussing Jefferson's original agrarian notions and their development and modification by history and other agrarian policies over time); Richard S. Kirkendall, *Up to Now: A History of American Agriculture from Jefferson to Revolution to Crisis*, in SUSAN A. SCHNEIDER, FOOD, FARMING AND SUSTAINABILITY, READINGS IN AGRICULTURAL LAW 3-4 (2011) (highlighting the development of Thomas Jefferson's agrarian philosophy).

185. Gilbert C. Fite, *The Historical Development of Agricultural Fundamentalism in the Nineteenth Century*, 44 J. FARM ECON. 1203, 1203 (1962).

186. *Id.*

Agricultural advocates have long asserted “farmers are more dependable and stable politically than city-dwellers, and that they have moral character exemplified by honesty, integrity, and reliability. A man on the land is independent and self-reliant.”¹⁸⁷ Numerous agricultural scholars have also documented Jefferson’s belief that “[t]hose who labor in the earth are the chosen people of God”¹⁸⁸ Historians generally agree that Jefferson’s vision for agricultural policy and laws providing “special treatment” of farmers were founded on a belief that such policies would promote “virtue, morality, and independence of its citizenry.”¹⁸⁹ Thus, Jefferson envisioned the above assertions as “necessary ingredients for a sound democracy.”¹⁹⁰

Against the backdrop of Jefferson’s philosophy, a populist movement advocating agrarian ideals emerged, ultimately instigating a broad, extensive range of federal legislation aimed at protecting small family farming operations.¹⁹¹ For example, attendant to The New Deal and the agricultural insurgency of the 1930s,¹⁹² Congress responded by passing farm bills that set into force the nation’s agricultural agenda in approximately five-year increments.¹⁹³ The farm bill is an omnibus bill that promotes the nation’s agricultural, nutrition, conservation, and forestry agendas.¹⁹⁴ Agrarian populism further spawned subsequent New Deal legislation and a wide spectrum of federal and state laws promoting small family farm-

187. *Id.*

188. Krall, *supra* note 183, at 131.

189. *Id.* (detailing the high regard in which Jefferson held farmers and the agrarian ideal); *see also* Jim Chen, *Of Agriculture’s First Disobedience and Its Fruit*, 48 VAND. L. REV. 1262, 1264, 1266–74, (1995) (noting “the bipolar battle between conventional and alternative agriculture” and describing the dominion and stewardship ethics of agriculture).

190. Krall, *supra* note 183, at 131.

191. *See generally* DENNIS ROTH ET AL., U.S. DEP’T OF AGRIC. ECON. RESEARCH SERV., FEDERAL RURAL DEVELOPMENT POLICY IN THE TWENTIETH CENTURY ch. 2 (2002), *available at* http://www.nal.usda.gov/ric/ricpubs/rural_development_policy.html (outlining the agricultural policy adopted by President Franklin D. Roosevelt as part of The New Deal, and citing the influence of the rural way of life and various philosophical movements on President Roosevelt’s view of American agriculture).

192. *See, e.g.*, DENNIS ROTH ET AL., U.S. DEP’T OF AGRIC. ECON. RESEARCH SERV., FEDERAL RURAL DEVELOPMENT POLICY IN THE TWENTIETH CENTURY ch. 2, p. 2 (2002), *available at* http://www.nal.usda.gov/ric/ricpubs/rural_development_policy.html (“Since the recovery of the rural economy was central to the general economic recovery, USDA became one of principal architects of the New Deal, attracting able and enthusiastic people to the Department’s expanding headquarters in Washington, D.C. The New Deal would do far more than offer economic assistance. It would transform the face of rural America.”).

193. JOHNSON, *supra* note 95.

194. *Id.* at CRS-2.

ers.¹⁹⁵ Farm bills are not limited to farming operations and encompass a set of policies and rules impacting the employment of twenty-one million individuals, fostering agricultural research, and extending beyond the nation's geographical boundaries into international arenas.¹⁹⁶

As a result of segregation, sharecroppers and people of color were excluded from benefitting equally in federal and state programs protecting their family homesteads.¹⁹⁷ Additionally, agrarian cultural norms produced the heinous practice of slavery, with segregation disallowing Blacks and Latinos from protecting their places in rural arenas and their own agricultural operations.¹⁹⁸ Until recently, entrenched, purposeful exclusion denied women farmers and farmers of color access to farm loan credit from federal officials; that purposeful exclusion often caused forfeiture of their farms.¹⁹⁹ This cultural norm underscoring a dominance of

195. Populism in the agricultural sector surfaced during different periods, but the period following the Great Depression brought forth beneficial programs to the sector that further includes the Farm Bills. See THEODORE SALOUTOS & JOHN D. HICKS, *TWENTIETH CENTURY POPULISM: AGRICULTURAL DISCONTENT IN THE MIDDLE WEST 1900–1939*, at 372, 452 (1951) (providing various examples of agricultural populism, such as the McNary-Haugen movement in the 1920s, and subsequent New Deal programs starting in the 1930s).

196. See, e.g., MARK MULLER & MICHAEL PURSELL, INST. FOR AGRIC. & TRADE POLICY, *MAKING PUBLIC AGRICULTURAL RESEARCH WORK FOR THE PUBLIC: RESEARCH AND THE FARM BILL 1–4* (2012), available at http://www.iatp.org/files/07_Research_f_web.pdf (explaining the impact of the Farm Bill on agricultural research); *Fast Facts About Agriculture*, AM. FARM BUREAU FED'N, <http://www.fb.org/index.php/index.php?action=newsroom.fastfacts> (last visited Dec. 31, 2013) (highlighting the number of people in the U.S. agricultural workforce, and noting that fifteen percent of the nation's total workforce is employed in the agricultural sector); Federal Agriculture Reform and Risk Management Act of 2013, H.R. 2642, 113th Cong. § 1204(a)(3)(D) (2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2642eh/pdf/BILLS-113hr2642eh.pdf> (“Allow the commodity produced in the United States to be marketed freely and competitively, both domestically and internationally . . .”).

197. See e.g., Louis Ferleger, *Sharecropping Contracts in the Late-Nineteenth-Century South*, 67 *AG. HIST.* 31 (1993), Keith J. Volanto, *Leaving the Land: Tenant and Sharecropper Displacement in Texas During the New Deal*, 20 *SOC. SCI. HIST.* 533 (1996).

198. See, e.g., Luna, *supra* note 23, at 319 (“Across the agricultural landscape, the federal agrarian laws and policies that displaced significant minority population groups spans a wide realm of legislation, including homestead laws that expedited settlement onto their properties.”).

199. See U.S. DEP'T OF AGRIC., *CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE: A REPORT BY THE CIVIL RIGHTS ACTION TEAM 3–4* (1997) (reporting on the USDA's discriminatory treatment of minority and women farmers). Many farmers have experienced “hostility, greed, ruthlessness, rudeness, and indifference” from USDA employees and the local county committees. *Id.* “Minority, socially disadvantaged, and women farmers charge[e] that USDA has . . . conspire[ed] to acquire [their] land” and transfer it to wealthy landowners. *Id.* USDA officers have been noted to “shut out minority . . . farmers . . . from the benefits of the programs that have helped larger non-minority producers survive the changes in agriculture in the last [fifty] years.” *Id.* at 14. This “shutting out” includes denying loans and ignoring discrimination claims causing minority operators

exclusion also resulted in federal law barring the improvement of working conditions for minority farmworkers and farmers in the agricultural sector.²⁰⁰ Agrarian exclusionary methods have also denied safe and affordable housing in the nation's farm bills where workers perform critical labor in feeding consumers.²⁰¹ Without fair employment practices providing adequate benefits, workers are forced to take their young children into the fields for their labor in a dangerous sector.²⁰² This history illustrates failure to provide incentives that would further bar unsafe conditions where farm laborers reside.

In the aggregate, and yielding to the unmitigated and hostile backlash against the proposed revisions to the FSLA, its rejection adds to the long history of exclusion applicable to people of color in the agricultural sector. The fact that the Secretary of Labor at the time of the revisions was a Latina raises even more questions as to the intent of the "Preserving America's Family Farm Act" legislation and its antecedents. DOL preclusion from adopting safer, more transparent farm operations practices to protect youth—primarily consisting of Indigenous, African American, and Latino—yields to the agricultural history of exclusion and the racism that taints the sector. Withdrawal of the proposed rules duplicates and underscores the sordid history of exclusion for migrant youth. Under the guise of the so-called protection of family farms, legislators eschewed the objective facts and allowed the influence of agrarian cultural norms to obstruct efforts to protect children working in agriculture. A new direction and approach is thereby necessitated.

to forfeit their farms, which often, allegedly, get sold to non-minority operators who are the friends or family of the loan administrators. *Id.* at 16, 22–23.

200. *E.g.*, Luna, *supra* note 23, at 314 (explaining exclusion in such a way as to parallel the exclusion of working conditions of women with farmers of color); U.S. DEP'T OF AGRIC., *supra* note 199 (detailing mistreatment of black and other minority farmers in the United States).

201. The history of farmworker housing battles is beyond the scope of this Article, but the insufficiency of safe housing is well documented. *See, e.g.*, MICH. CIVIL RIGHTS COMM'N, A REPORT ON THE CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS IN MICHIGAN 2–3 (2010), available at http://www.michigan.gov/documents/mcrr/MSFW-Conditions2010_318275_7.pdf (finding housing was substandard, "including structural defects, lack of clean running water, exposed wires, overcrowding, close proximity to fields . . . and poor sanitation"); N.C. ADVISORY COMM. TO THE U.S. COMM'NS OF CIVIL RIGHTS, WHERE MULES OUT RATE MEN: MIGRANT AND SEASONAL FARMWORKERS IN NORTH CAROLINA 15–17 (1979) (finding camp conditions "usually unsanitary, often unsafe, and always inhumane"); David Olinger, *Separate and Unequal*, ST. PETERSBURG TIMES (Fla.), Dec. 20, 1992, at 1D (finding the mobile homes available to migrant families are "shabbier than those used as emergency shelters for homeless families" and are expensive, so usually one mobile home has to be shared by two or three families).

202. *E.g.*, U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 103.

A. “McFrankenstein Creatures”²⁰³ and a Proposal

When the DOL introduced the revised, proposed legislation, the immediate reaction and protests asserted that the new rules would harm farming operations by “eliminating the child exemption” in the FLSA.²⁰⁴ Since early in this nation’s history, the rationale of protecting family farms has, at times, proved beneficial and the DOL’s withdrawal provided it was based in part on protecting family farming operations. Additionally, a vast body of scholarship supports the importance of protecting small, independent farming operations, including my own research agenda with its focus on minority farmers. Notwithstanding this emphasis, the reality remains that a wide realm of scholarship and government reports underscore small independent farm ownership is yielding to large-scale family farming corporations or corporate farming conglomerates.²⁰⁵ In a number of instances, the globalization of the sector further removes food production from independents to agro-maquilas across the nation.²⁰⁶ In other circumstances, the gap between genetically modified products and organic foods consumers seek also increases and distances

203. See *Pelman v. McDonald’s Corp.*, 237 F. Supp.2d 512, 535 (S.D.N.Y. 2003) (“Chicken McNuggets, rather than being merely chicken fried in a pan, are a McFrankenstein creation of various elements not utilized by the home cook.”). While McDonald’s has since changed its menu, the “McFrankenstein” characterization is used to emphasize large-scale food production and use of genetically modified crops.

204. Statement on Withdrawal of Proposed Rule, *supra* note 16; see also Preserving America’s Family Farms Act, H.R. 4157, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4157rfs/pdf/BILLS-112hr4157rfs.pdf> (mandating that the Department of Labor refrain from proposing such child labor regulations in the future); 7 U.S.C. § 2266 (2012) (“Congress reaffirms the historical policy of the United States to foster and encourage the family farm system of agricultural in this country.”).

205. See, e.g., Wender, *supra* note 93, at 141–42 (“United States farm production has shifted to larger operations, usually referred to as agribusinesses . . . ninety-eight percent of America’s food supply is produced by agribusinesses.”); DIMITRI ET AL., *supra* note 98, at 2 (“The agricultural sector of the 21st century . . . is concentrated on a small number of large, specialized farms.”). See, e.g., Megan Peck, *Attack of the Kevlar Tomatoes*, GAMBIT (New Orleans), Sept. 13, 2011, <http://www.bestofneworleans.com/gambit/attack-of-the-kevlar-tomatoes/Content?oid=1878951>, for an example of products being produced by the new “norms,” and revealing how America’s year-round demand for tomatoes has become “a trade fueled by low prices and . . . incidents of slave labor.”

206. See Sylvia R. Lazos Vargas, “*Latina/o-Ization*” of the Midwest: *Cambio de Colores (Change of Colors) As Agromaquilas Expand Into the Heartland*, 13 BERKELEY LA RAZA L.J. 343, 347 (2002) (noting agro-maquilas are “multinational corporate oligopolies which aggressively aim to keep costs low and corporate profits high.”); Patrick Oslo, Jr., *Moving Our Food Supply to Mexico*, SAN DIEGO UNION-TRIBUNE (Apr. 4, 2008), http://www.utsandiego.com/uniontrib/20080404/news_lz1e4osio.html (discussing the Mexican government’s endorsement of the “agri-maquila” policy, which would allow American farmers to establish farming operations in Mexico).

small farm enterprises from industrialized food production.²⁰⁷ In still other instances, the final product is not something commonly “utilized by the home cook.”²⁰⁸ The above transformations have produced a new chapter in the “agrarian myth.”²⁰⁹

From early in this nation’s agricultural history, innumerable scholarly investigations promoted the agrarian myth template of protecting small operations; and yet even then critics charged the rhetoric with romanticizing an ideal.²¹⁰ A study of systemic changes to the agricultural landscape reveals that one small class of independent family farmers no longer produces enough food on its own.²¹¹ Increasingly, independent farming operations involve hierarchical working relationships with large, corporate industries that control what type of seeds to plant and in what conditions in which they must be planted. The day Hannah and Jade died in a cornfield, a family farmer did not employ them, and they did not perish on a small family farm.²¹² On the contrary, Monsanto retained the independent contractor who, in turn, hired Hannah and Jade in an extremely popular means of hiring labor for detasseling corn.²¹³

A host of additional legislation further distinguishes large-scale from smaller operations the broad based PAFFA sought to “protect.” In contrast, the Act distracted from challenges facing independent owner-operators. Smaller independent operations promoting organic, sustainable farming practices, for example, are facing barriers over food labeling spurred by genetically modified food products. Independent farmers

207. See, e.g., Paul Voosen, *King Corn Takes Root in Hawaii*, N.Y. TIMES (Aug. 22, 2011), <http://www.nytimes.com/gwire/2011/08/22/22greenwire-king-corn-takes-root-in-hawaii-28466.html?pagewanted=all> (discussing large scale biotech farm trials in Hawaii).

208. *Pelman*, 237 F. Supp. 2d 512, 535 (S.D.N.Y. 2003) (referencing the McFrankenstein phenomenon in which “Chicken McNuggets [are not] merely chicken fried in a pan, [but] a McFrankenstein creation of various elements not utilized by the home cook”).

209. See, e.g., Joyce Appleby, *Commercial Farming and the “Agrarian Myth” in the Early Republic*, 68 J. AM. HIST. 833, 834 (1982) (discussing the agrarian myth as a model for economic and social policy); Timothy W. Kelsey, *The Agrarian Myth and Policy Responses to Farm Safety*, 7 AM. J. PUB. HEALTH 1171, 1171 (1994) (“America’s cultural image of agriculture—the ‘Agrarian Myth’— . . . helped create the current occupational environment, and . . . could be used to craft the environment in the future.”).

210. Kelsey, *supra* note 209, at 1171–72.

211. See, e.g., Gilbert M. Gaul et al., *Federal Farms Turn Subsidies into Big Business*, WASH. POST, Dec. 21, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/12/20/AR2006122001591_pf.html (“The transformation of the family farm from a small, self-contained business to a complex, technology-driven enterprise is seen today in a rapidly changing rural landscape dominated by larger and wealthier farms.”). Thus, these marked changes in the agricultural landscape drastically contradict the commonly held notion of the small, family farm. *Id.*

212. Wellner, *supra* note 29.

213. *Id.*

struggle because they receive far fewer federal privileges than are available to large scale food producers.²¹⁴ Coupled with federal support, the impact of yet greater industrialization from increased mechanization does not bode well for remaining small family farms or workers employed in large scale food production.²¹⁵ In sum, withdrawal of the DOL's proposed rules to help protect young farm workers, on the supposed basis of promoting a particular agricultural myth, is accordingly based on a romanticized falsehood.

Presently, when the health of young farm workers is so obviously at stake, the gap between proposed legislation favoring so-called small owner-operators on the basis of a false norm must thereby be tested against whether that legislation is truly protecting or threatening smaller operations. Specific and detailed examination is required in determining whether small, independent farming operations are truly benefitting from the legislation or whether large-scale farms are actually reaping the benefits.

Purposely ignoring the above class distinctions of how food is produced in the United States failed the proposed DOL revisions and underscores manipulation of the agrarian myth at the expense of young workers. The forced withdrawal of the proposed revisions not only marked another instance in which benefits to farmworkers were denied, but also figured into the political process during the 2012 Presidential election, when, it is worth noting, the Democratic candidate was a person of color.

During the 2012 presidential election the Republican candidate and former governor of Massachusetts, Mitt Romney, also perpetuated the falsehood that the present administration was "telling farmers what their 15-year-old sons and daughters can and can't do on the family farm."²¹⁶ Some of Romney's Republican supporters in Congress also led the charge, falsely asserting the "Obama administration 'proposed banning

214. See *Kernel Watch: 9 Farm Subsidy Myths*, ENVIRONMENTAL WORKING GROUP (Aug. 18, 2011), <http://www.ewg.org/agmag/2011/08/kernel-watch-9-farm-subsidy-myths> ("Data from USDA clearly show that the top [ten] percent of subsidized farms—the largest plantation-scale operations—took in three-quarters of all farm subsidies since 1995."); see also TADLOCK COWAN, CONG. RESEARCH SERV., RL32809, *AGRICULTURAL BIOTECHNOLOGY: BACKGROUND AND RECENT ISSUES 1* (2011), available at http://justlabelit.org/wp-content/uploads/2011/09/CRS%20Agricultural_Biotechnology2011.pdf (highlighting expansion of biotechnology in agriculture and how this expansion has affected the agricultural regulatory environment).

215. See, e.g., KATHLEEN MAPES, *SWEET TYRANNY: MIGRANT LABOR, INDUSTRIAL AGRICULTURE, AND IMPERIAL POLITICS* 29–53 (2009) (citing the example of the industrialization of the sugar industry in rural Michigan in the late 1800s, and noting its ensuing influence on American foreign policy and the country's political landscape).

216. Ben Finely, *Romney Flubs Farmers Claim*, FACTCHECK.ORG, <http://www.factcheck.org/2012/03/romney-flubs-farmers-claim> (last updated Apr. 27, 2012).

farm kids from doing basic chores!’”²¹⁷ Agricultural history brims with such assertive rationales that “[y]oung people on a farm learn how to work, how to be thrifty[,] and how to do things with their hands.”²¹⁸ On the contrary, this same agricultural history overflows with examples in which farmworkers were ultimately denied proposed legislation that would protect them in a dangerous working environment.²¹⁹ In this instance oppositional rhetoric did not reflect the stark reality of youth employment in agriculture. However, such rhetorical successfully brought about the proposed rule’s withdrawal.

A direct and literal reading of the proposed rules illustrates, however, that they applied only to non-family farm youth. Children who are not working on their family farms, moreover, are not employed exclusively on small family farms. To the contrary, farmworker children and youth are employed in large-scale operations, such as the rural environment in which Jade and Hannah were killed while detasseling corn for Monsanto.

The DOL, however, did not quote or provide any evidence, other than the rationalization of its withdrawal of the rules based on the need to protect family farms. It specifically stated that the Administration “respecting the rural way of life, especially the role that parents and other family members play in passing those traditions down through the generations.”²²⁰ The DOL further declared, “The decision to withdraw this rule—including provisions to define the ‘parental exemption’—was made in response to thousands of comments expressing concerns about the effect of the proposed rules on small family-owned farms.”²²¹ This renders

217. Amy Sherman, *Ban on Children’s Farm Chores Was Not Proposed*, TAMPA BAY TIMES, Aug. 30, 2012, at 4 (quoting South Dakota Senator John Thune at the Republican National 2012 Convention and explaining its falsity).

218. Fite, *supra* note 185.

219. In addition to the numerous examples applicable to children in this Article, farmworkers, whether documented or undocumented, have witnessed battles against unionization, excessive use of pesticides in fruits and vegetable crops, inferior housing conditions, sexual harassment of women, and in exchange have faced impoverishment and other dire economic consequences. *See, e.g.*, *Cavazos v. Foster*, 822 F. Supp. 438, 439 (W.D. Mich. 1993) (challenging company’s failure to pay minimum wage, provide decent housing, and social security); Marlene Dixon et al., *Chicanas and Mexicanas Within a Transnational Working Class: Theoretical Perspectives*, 7 REV. FERNAND BRAUDEL CTR. 109, 133 (1989); Thomas E. Murphy, *An End to American “Serfdom”—The Need for Farm Labor Legislation*, 25 LAB. L.J. 85, 85–87 (1974) (discussing Cesar Chavez’s efforts to improve migrant working conditions through the use of collective bargaining); Ellen S. Greenstone, Comment, *Farmworkers in Jeopardy: OSHA, EPA, and the Pesticide Hazard*, 5 ECOLOGY L.Q. 69, 72–73 (1975) (discussing instances in which the government has failed to pass legislation to protect farmworkers);

220. Statement on Withdrawal of Proposed Rule, *supra* note 16.

221. *Id.*

impossible reconciling the intent of the rule with the basis of its withdrawal.

In contrast, this Article urges a more critical analysis of instances in which generalized assertions are made, such as protecting “small family-owned farms,” particularly where the lives of youth are at stake. In sum, the politics of agrarian rejection reflected in the backlash against improving safety for non-farm children who are primarily from Latino and Indigenous backgrounds, exists both domestically and internationally.

When contemplated against an agricultural agenda that targeted and disenfranchised minority farmers from their operations,²²² assigned them to sharecropper or migrant status,²²³ denied them federal credit privileges,²²⁴ and relegated them to inferior and unsafe working and housing conditions,²²⁵ this ongoing cycle of animosity against agriculture laborers—in this instance primarily children and youth—continues with the rejection of the DOL’s proposed rules to protect children and youth working on farms.

Against broad-based declarations of protecting “small family-owned farms,” evidence of such “standing” must therefore be examined from the “bottom up” and must be distinguished between fact and conjecture. Generalized declarations in the aggregate based on romanticized “ideals” of protecting “small family farms” must yield to a new layer of scrutiny based on primary evidence—specifically, during the public notice and comment period and when tethered to the reality of youths in dangerous conditions. Although in some instances farmers neither directly nor intentionally harm their workers, data on injuries and fatalities, when examined against the prism of race and class and gender, illustrate a different construct. Accordingly, additional primary evidence of youth injuries and deaths must be contemplated against generalized statements based on a disappearing landscape of independent family operations.

In this instance, the evidence reveals a dangerous intersection whereby status quo’s hegemony has long sought and acquired beneficial legislation that empowers and emboldens industrialized food production with cheap labor policies, all while knowingly and recklessly placing children and youth at risk. Against the framework of such rationales as protecting “small family-owned farms,” it is clear federal laws and policies are consequently and directly placing children and youth in the agricultural sector in harm’s way.

222. Luna, *supra* note 183; Luna, *supra* note 28, at 314.

223. THEY CAME TO FIGHT, *supra* note 197.

224. U.S. DEP’T OF AGRIC., *supra* note 199.

225. MICH. CIV. RTS. COMM’N, *supra* note 201.

This Article proposes a four-pronged approach in enhancing youth protections and to shifting the agrarian myth that mischaracterized the DOL's proposed revisions. First, in instances in which agrarian myths are presented as a basis for opposing public safety involving youth, the DOL must, as a condition precedent, collect primary, empirical evidence showing that the proposed legislation is, in fact, harmful to small family farms. Accordingly, before withdrawing a rule seeking to protect youth, the DOL should reflect upon primary evidence of whether the proposal is, in fact, harming small owner operations as asserted by various opponents.

Farming differs across the nation and distilling all farming operations into one model diverges from the vast differences of agricultural models in food production.²²⁶ Conflicting data repeatedly shows that small, independent family farms are dwindling in numbers and generalized assertions of the "agrarian ideal" in contrast are benefiting large-scale production operations.²²⁷ Federal policies promoting vertical integration of food production and economies of scale are further accelerating the demise of independent owner operations.²²⁸ Any legislation purporting to protect independent or smaller farming operations should reject the inconsistent treatment of globalization and corporate structures that are further harming owner-operators struggling to survive.

Second, in such an absence, and notwithstanding the literal reading of the most recent proposed revisions, generalized agrarian assertions must be proved before the DOL withdraws such revisions. The basis of these assertions follows from data showing small and independent family farming operations are succumbing to ever-expanding larger scale agri-industries in which youth are employed. In withdrawing a proposed rule, the DOL must delineate and remove any conjecture by demanding empirical proof that a proposed rule is, in fact, harmful to "small and independent family farms," and that such rhetoric is not used in an ad hoc manner. Without empirical evidence, the sector's youngest laborers remain at risk.

Third, equating labor standards that fail to protect youth in agriculture with labor standards in non-agricultural employment that successfully protect youth is also imperative. In innumerable instances children in the fields also reside in impoverished conditions without access to the nutri-

226. DIMITRI ET AL., *supra* note 98, at 2 (providing an overview of the changing role of farming in the Nation's economy since the early 20th century).

227. *Census of Agriculture*, U.S. DEP'T OF AGRIC., <http://www.agcensus.usda.gov/index.php> (last visited Dec. 29, 2013) (providing facts and figures about American agriculture).

228. DIMITRI ET AL., *supra* note 98, at 9–11 (describing how the U.S. government's agricultural policy has influenced farming).

tional food products they harvest.²²⁹ Accordingly, removing the federal prohibition against National Labor Relations Act protections applicable to non-agricultural workers must undergo federal scrutiny and subsequent repeal in light of globalization and changing structural transformations of food production in the nation.

Fourth, improving reporting standards of instances in which youth are employed to incentivize employers into protecting them from exploitation is also required. This prong would exist as a condition precedent added to the nation's forthcoming farm bills. Any large-scale enterprising employing youth and or recipients of federal subsidies would be held accountable in receiving additional funding. To do less than the above, and leave young farmworkers in harm's way, leaves no other trajectory. In this instance exposing children and youth in production agriculture to harm, specifically placing children of color who are disproportionately injured, maimed, or killed, obligates critical scrutiny. Alternatively, hurdles and opposition to the proposed FLSA rules tacitly became yet further "acceptable norms" in the pantheon of agricultural jargon which thereby tacitly become "acceptable norms" in the pantheon of agricultural jargon. Implementing the above proposals or even other rationales could in fact promote a new cultural norm in which the health and safety of youth are protected and not harmed.

V. CONCLUSION

Agricultural law, priorities, and policies coincide to help farm operators procure "cheap labor" while jeopardizing the health, safety, and welfare of children and youth across the nation. Agricultural laborers of very young ages are thereby harmed, whether from their terms and conditions of employment, dangerous realities from dire environments, or the impoverishment that directly places some of them in the fields. The increased mechanization of agriculture and pursuit of economies of scale exacerbate this construct and further disregards the increased injury and fatality rates of youth in fields.

229. See, e.g., ALISHA COLEMAN-JENSEN ET AL., U.S. DEP'T OF AGRICULTURE, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2011, at v, 12 (2012), available at <http://www.ers.usda.gov/media/884525/err141.pdf> (reporting the number of minority Americans that experience food insecurity—meaning "access to food is limited by a lack of money and other resources"—during the year including children in ten percent of households, 10.5 percent of black, non-Hispanic households, and 8.3 percent of Hispanic households); CATHY WIRTH, RON STROCHLIC & CHRISTY GETZ, CAL. INST. FOR RURAL STUDIES, HUNGER IN THE FIELDS: FOOD INSECURITY AMONG FARMWORKERS IN FRESNO COUNTY, at v, 1 (2007), available at <http://www.cirsinc.org/index.php/publications/archives/category/8-rural-health.html> (finding farmworkers in California lack access to adequate and nutritious food in spite of California's thriving agricultural market).

With the withdrawal of the DOL's proposed rules, the health and safety of children of color has yielded to a group of misrepresentations, antiquated ideals, lies, and deceit. To protect against such a construct, the DOL should adopt objective and empirical evidence to test generalized assertions. In light of the heinous legislative trajectory confronting people of color in the fields and in production agriculture, the withdrawal of the proposed rules due to agrarian mischief and deceit otherwise ultimately fails all children working in food production.