

**GREAT EXPECTATIONS, GRIM REALITY:  
UNPAID INTERNS AND THE DUBIOUS BENEFITS OF THE  
DOL *PRO BONO* EXCEPTION**

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I. INTRODUCTION

In recent years, the question of which standard governs the legality of unpaid internships has received widespread attention and criticism. Today, the legal debate surrounding unpaid internships is at a peak; the sheer number of interns, the recent litigation challenging the practices of for-profit companies employing unpaid interns, and the unprecedented economic challenges for recent college graduates have created a perfect storm of disgruntlement and backlash.<sup>1</sup> College students lament a system that requires performance of uncompensated and often tedious work in an attempt to advance

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<sup>1</sup> David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 215 (2002) (stating that the number of interns is significant and participation is regarded as an “integral part of a professional education”); Ella Delaney, *Interns Resist Working Free*, N.Y. TIMES (Sept. 29, 2013), <http://www.nytimes.com/2013/09/30/us/interns-resist-working-free.html?pagewanted=all> (“U.S. graduates are increasingly challenging the idea that they should work for free in order to gain a foothold in the global job market . . .”); Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES, May 6, 2012, at A1, *available at* <http://www.nytimes.com/2012/05/06/business/unpaid-internships-dont-always-deliver.html?pagewanted=all> (“Confronting the worst job market in decades, many college graduates who expected to land paid jobs are turning to unpaid internships to try to get a foot in an employer’s door.”).

their professional careers<sup>2</sup> and penetrate a challenging job market.<sup>3</sup> Employers, on the other hand, welcome the opportunity for students to provide free labor.<sup>4</sup> Critics describe the scheme as exploitative and illegal,<sup>5</sup> and proponents defend it as a necessary rite of passage for

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<sup>2</sup> See Ariel Kaminer, *The Internship Rip-Off*, N.Y. TIMES, Mar. 11, 2012, at MM20 (“I took an unpaid internship that I figured would give me experience and help me land somewhere in six months. Instead I’m picking up coffee and dry cleaning and performing other tasks that the company would otherwise have to pay someone for.”); Rebecca Greenfield, *The Uselessness of Unpaid Internships*, THE WIRE (June 19, 2013, 12:13 PM), <http://www.thewire.com/business/2013/06/uselessness-unpaid-internships/66390/> (“Many unpaid internships, while valuable to a company, are pretty useless for someone trying to learn actual career building skills and thus pretty useless to future potential employers.”). Cf. Derek Thompson, *In Defense of Unpaid Internships*, THE ATLANTIC (May 10, 2012, 1:45 PM), <http://www.theatlantic.com/business/archive/2012/05/in-defense-of-unpaid-internships/257000/> (“Employers want cheap workers, especially with the economy weak, and it doesn’t get any cheaper than free. Students and recent graduates want experience and work at any price, and they’re willing to settle for zero.”). But see Sonia Smith, *Biting the Hand That Doesn’t Feed Me: Internships for College Credit Are a Scam*, SLATE (June 8, 2006, 12:41 PM), [http://www.slate.com/articles/news\\_and\\_politics/hey\\_wait\\_a\\_minute/2006/06/biting\\_the\\_hand\\_that\\_doesnt\\_feed\\_me.html](http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/2006/06/biting_the_hand_that_doesnt_feed_me.html) (“If they can afford to work for free, students jump at the opportunity to stock their résumés in hope of bettering their future job prospects.”).

<sup>3</sup> Ross Perlin discussed the connection between an increase in unpaid internships and the Great Recession, stating:

[T]he recession has really exacerbated things. It has especially led to many more students who just graduated from college or even are a year or two out taking on unpaid internships, and even people in their 30s, 40s, and 50s who are trying to change careers or are looking to get a foothold in the labor market. I think people have come to recognize it as a broader issue than just what are students doing with their summer.

Alexis Grant, *The Growing Culture of Unpaid Internships*, U.S. NEWS (Aug. 3, 2011, 12:00 AM), <http://money.usnews.com/money/careers/articles/2011/08/03/the-growing-culture-of-unpaid-internships>. See also Alex Williams, *For Interns, All Work and No Payoff*, N.Y. TIMES, Feb. 14, 2014, <http://www.nytimes.com/2014/02/16/fashion/millennial-s-internships.html> (“The moribund economy is, without question, a primary factor behind the shift [increase in unpaid internships].”).

<sup>4</sup> One can readily find unpaid internship opportunities on college websites or online postings. For example, [www.internmatch.com](http://www.internmatch.com) lists thousands of opportunities for internships, both paid and unpaid. See also Linda Federico-O’Murchu, *March of the Interns: Good or Bad for the Economy?*, NBC (Nov. 18, 2013, 7:44 AM) <http://www.nbcnews.com/business/business-news/march-interns-good-or-bad-economy-f2D11603306> (“Employers know they can fill vacant positions with a virtually unlimited supply of bright, hard-working young helpers, and at the same time try them out risk-free for future paid positions.”).

<sup>5</sup> See, e.g., David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227 (1998) (“Unlike the more blatant forms of labor exploitation, student intern labor is a more subtle, but perhaps equally persuasive, manifestation of the contemporary exploitation of labor in capitalist political economy today.”); Mitchell H. Rubenstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 150–151 (2006)

students to prove their competence before earning post-graduate jobs.<sup>6</sup> After all, many argue, the job market is tough, and any opportunity to work—albeit unpaid—is better than none.<sup>7</sup> But the political climate has changed drastically since 2010, and the legal risks of employing interns without compensation are higher than ever.<sup>8</sup> For-profit

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(“[S]ome volunteers may be exploited by employers looking for a source of inexpensive—or worse, free—labor.”); Yamada, *supra* note 1, at 257 (arguing generally for reform that will provide student interns with basic legal protections and rights, which they currently lack); *Former Interns Debate Worth and Legality of Unpaid Gigs* (PBS television broadcast Sept. 26, 2013), available at [http://www.pbs.org/newshour/bb/business/july-dec13/interns\\_09-26.html](http://www.pbs.org/newshour/bb/business/july-dec13/interns_09-26.html) (“This is a form of generational exploitation that I think a lot of people fail to appreciate.”). Even Former Secretary of State Hillary Clinton has denounced unpaid internships. Alex Seitz-Wald, *Hillary Clinton’s Love Letter to Millennials*, NAT’L J., (Mar. 5, 2014), <http://www.nationaljournal.com/white-house/hillary-clinton-s-love-letter-to-millennials-20140305> (“She [Clinton] decried—to applause from the audience—businesses that have ‘taken advantage’ of young people with unpaid internships.”).

<sup>6</sup> See, e.g., Leanna Smith, *An Unpaid Intern’s Two Cents*, HUFFINGTON POST (Oct. 30, 2013, 10:31 PM), [http://www.huffingtonpost.com/leanna-smith/an-unpaid-interns-two-cen\\_b\\_4175217.html](http://www.huffingtonpost.com/leanna-smith/an-unpaid-interns-two-cen_b_4175217.html) (“Sure, I got my fair share of coffees and spent a good chunk of time underground, in the Subway on various errands—among other intern rites of passage.”); *Unpaid Internships: Not Necessarily Un-Awesome*, FOX NEWS (June 25, 2008), <http://www.foxnews.com/story/2008/06/25/unpaid-internships-not-necessarily-un-awesome/> (describing an unpaid internship as “a rite of passage”).

<sup>7</sup> See, e.g., David Lat, *Why Mess With a Win-Win Situation?*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internshipsexploit-college-students/government-should-allow-most-unpaid-internships> (last updated July 18, 2013, 11:41 AM) (arguing for keeping the status quo despite some obvious problems such as class divisions); Yuki Noguchi, *An Intern at 40-Something, and Paid in Hugs*, NAT’L PUB. RADIO (Apr. 1, 2014, 3:08 AM), <http://www.npr.org/2014/04/01/293882686/an-intern-at-40-something-and-paid-in-hugs> (profiling an adult intern who expected to gain full-time employment through her unpaid internship); John Stossel, *Popular Nonsense*, BILLO’REILLY.COM (June 9, 2014), <http://www.billoreilly.com/b/Popular-Nonsense/-817788993181175398.html> (“Government ‘help’ ends up doing harm. Leave people free—both as workers and employers—to pursue opportunities they find worthwhile, and we will prosper in ways government planners could never imagine.”).

<sup>8</sup> See, e.g., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP’T OF LABOR (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> [hereinafter *Fact Sheet #71*]; Michael S. Arnold, *Employment Law Summer Recap 2014: Part 8 of 11 – New York’s Coldest Summer, Especially for Employers Who Utilized Unpaid Interns*, NAT’L L. REV. (Sept. 24, 2014), <http://www.natlawreview.com/article/employment-law-summer-recap-2014-part-8-11-new-york-s-coldest-summer-especially-empl> (describing the unprecedented number of class action suits that interns have filed); Ross Perlin, *Unpaid Interns: Silent No More*, N.Y. TIMES (July 20, 2013), [http://www.nytimes.com/2013/07/21/jobs/unpaid-interns-silent-no-more.html?\\_r=01](http://www.nytimes.com/2013/07/21/jobs/unpaid-interns-silent-no-more.html?_r=01) (noting interns’ displeasure for lack of respect and lack of pay); Mary Swanton, *Unpaid Internships Pose a Litigation Risk for Employers*, INSIDE COUNSEL (May 1, 2013), <http://www.insidecounsel.com/2013/05/01/unpaid-internships-pose-a-litigation-risk-for-empl> (“[A] spate of well-publicized lawsuits has changed what was once viewed as a win-win—free help for employers and resumé-building experience for interns—into yet another litigation risk.”). Many law firms are now advising their clients to be

employers are on notice and proceeding with caution, and scorned interns are empowered and proceeding with lawsuits.<sup>9</sup>

The website [www.unpaidinternslawsuit.com](http://www.unpaidinternslawsuit.com), hosted by Outten & Golden LLP, encourages unpaid interns to fill out a questionnaire if they have information related to lawsuits against NBC Universal, Condé Nast, the Hearst Corporation, or Fox Searchlight.<sup>10</sup> The firm is “committed to ensuring that interns are fairly compensated for their work.”<sup>11</sup> This commitment reflects great success. In December 2012, the firm secured a roughly \$110,000 settlement with the PBS Charlie Rose Show, which will provide minimum wage back pay to interns who worked on the show for ten weeks without compensation.<sup>12</sup> Even Late Show host, David Letterman, was named in a lawsuit filed by a former unpaid intern alleging violations of the New York State Labor Statute.<sup>13</sup> In June 2013, the Southern District of New York ruled against Fox Searchlight Pictures and Fox Entertainment Group for violating the Fair Labor Standards Act (FLSA) as well as state labor laws.<sup>14</sup> Once again represented by Outten & Golden LLP, the interns secured a victory in the fight for compensation.<sup>15</sup>

In fact, interns are in a better position than ever to gain fair compensation because of recent court rulings and widespread public attention to their plight.<sup>16</sup> Most recently, various states (and New York City) began adopting legal measures to protect interns from workplace

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cautious when hiring interns. See, e.g., *Do We Have to Pay Our Interns, Including Summer Interns?*, JACKSON LEWIS (May 8, 2013), <http://www.jacksonlewis.com/resources.php?NewsID=4477>.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> *Should You Have Been Paid for Your Unpaid Internship?*, UNPAID INTERNS LAWSUIT, <http://www.unpaidinternslawsuit.com/> (last visited Feb. 16, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> Amanda Becker, *PBS' Charlie Rose Settles with Unpaid Interns as Lawsuits Spread*, REUTERS (July 1, 2013, 7:47 PM), <http://www.reuters.com/article/2013/07/01/entertainment-us-interns-lawsuit-charlie-idUSBRE9601E820130701>.

<sup>13</sup> Dominic Patten, *CBS & David Letterman Slapped With Latest Intern Class Action Lawsuit*, DEADLINE (Sept. 8, 2014, 7:58 AM), <http://deadline.com/2014/09/david-letterman-lawsuit-intern-labor-laws-cbs-worldwide-pants-831063/>. The intern, Mallory Musallam, dropped the lawsuit shortly after the complaint was filed and stated that she had made false allegations because her lawyer pressured her to do so. Dareh Gregorian, *Former Intern Drops Lawsuit Against David Letterman, Issues Apology Citing Lawyer Coercion*, N.Y. DAILY NEWS (Sept. 10, 2014, 5:30 PM), <http://www.nydailynews.com/entertainment/tv/intern-apologizes-david-letterman-drops-lawsuit-article-1.1935333>.

<sup>14</sup> *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784 (WHP), 2013 U.S. Dist. LEXIS 121964 (S.D.N.Y. Aug. 26, 2013).

<sup>15</sup> *Id.*

<sup>16</sup> Perlin, *supra* note 8.

discrimination and abuses.<sup>17</sup> The shift in power towards interns is not by chance; it is the culmination of exploited students' resistance coupled with intense media and political scrutiny on the practice of unpaid internships, including the Obama administration's focus on reducing such practices.<sup>18</sup> When asked about the current strength of the Department of Labor's (DOL) regulation, the acting director of the agency stated: "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."<sup>19</sup> The DOL also indicated that the administration would target for-profit employees who continue the practice.<sup>20</sup> Such DOL criticism and student intern litigation created a perceived presumption of illegality for unpaid internships at for-profit institutions following the summer of 2013.<sup>21</sup>

Simultaneously, the media, particularly online news sources, took notice of both the real life stories of unpaid interns and the rapidly changing legal developments, and expressed outrage for the continuing practice.<sup>22</sup> But this momentum was checked when the DOL

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<sup>17</sup> Cindy Schmitt Minniti, *New York Becomes the Fourth Jurisdiction to Protect Unpaid Interns From Employment Discrimination*, FORBES (July 28, 2014, 12:45 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/07/28/new-york-state-becomes-the-fourth-jurisdiction-to-protect-unpaid-interns-from-employment-discrimination/> ("[A]lthough currently interns are only protected by the employment discrimination laws in Oregon, Washington, D.C., and New York, employers in all jurisdictions need to stay abreast of developments in this area, as the trend to protect interns may spread in the months and years to come."). See *infra* Part III for a detailed discussion of recent state legislation protecting interns.

<sup>18</sup> Molly Henneberg, *Obama Administration Considers Cracking Down on Unpaid Internships*, FOX NEWS (Apr. 17, 2010), <http://www.foxnews.com/politics/2010/04/17/obama-administration-considers-cracking-unpaid-internships/>.

<sup>19</sup> Steven Greenhouse, *The Unpaid Intern, Legal or Not?*, N.Y. TIMES (Apr. 2, 2010), <http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all&r=0>.

<sup>20</sup> Liz Peek, *Obama Criminalized Unpaid Internships and Killed Jobs*, FISCAL TIMES (June 19, 2013), <http://www.thefiscaltimes.com/Columns/2013/06/19/Obama-Criminalized-Unpaid-Internships-and-Killed-Jobs#sthash.1b4FcCWU.dpuf>.

<sup>21</sup> See *infra* Part IV.

<sup>22</sup> See, e.g., Katy Waldman, *Get Your Own Damn Coffee!*, SLATE (Feb. 13, 2012, 6:10 PM), [http://www.slate.com/articles/business/moneybox/2012/02/intern\\_xuedan\\_wang\\_sues\\_harper\\_s\\_bazaar\\_why\\_don\\_t\\_more\\_unpaid\\_interns\\_protest\\_.html](http://www.slate.com/articles/business/moneybox/2012/02/intern_xuedan_wang_sues_harper_s_bazaar_why_don_t_more_unpaid_interns_protest_.html). Noting the Department of Labor requirements, recent lawsuits against for-profit corporations, and speaking from experience about the downside of unpaid internships, Waldman stated:

Most unpaid internships flagrantly ignore the rules set out by the Labor Department. . . . If there is widespread agreement that unpaid interns are being exploited—and that it's against the law—why is nothing changing? Why, in fact, does it seem that there are more unpaid interns

issued a seemingly inconsistent exception for for-profit law firms in a letter to the American Bar Association (ABA) in September 2013.<sup>23</sup> Following a request for clarification from the ABA, the DOL stated its position that private law firms may hire unpaid interns to perform legal *pro bono* work, subject to rigorous conditions.<sup>24</sup>

The DOL's adoption of a *pro bono* exception fails to comport with its previous hardline approach to reducing and eliminating unpaid internships at for-profit companies. While it has long been established that non-profits and government agencies have a categorical exception to the FLSA's general wage requirements, no exception previously existed for *pro bono* work at for-profit institutions.<sup>25</sup> Moreover, if law firms can employ unpaid interns to provide free legal services, can other professionals similarly employ unpaid interns to provide free services? Could accounting firms hire student interns to provide free tax preparation to low-income community members? Or could restaurants hire culinary students to prepare meals on premise for soup kitchens?

This Comment argues that the *pro bono* exception the DOL recently announced does not comport with the legal standard for unpaid internships and creates more complexity than it does clarity. To be sure, there is a virtually infinite need for *pro bono* legal work in the United States.<sup>26</sup> But attempting to fill such a vast need by encouraging practicing attorneys and private law firms to shift the burden onto inexperienced law students is an ineffective solution.

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than ever? What's holding back the intern revolution?

*Id.* See also Ross Perlin, *Today's Internships Are a Racket, Not an Opportunity*, N.Y. TIMES (Feb. 6, 2012, 12:04 PM), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/todays-internships-are-a-racket-not-an-opportunity> ("The damage is everywhere."); Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), <http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/> (posing the question "Internship or Internment?").

<sup>23</sup> Letter from M. Patricia Smith, Solicitor of Labor, Dep't of Labor, to Laurel G. Bellows, Immediate Past President, Am. Bar Ass'n (Sept. 12, 2013), available at [http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS\\_Letter\\_re\\_FLSA\\_091213.pdf](http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_re_FLSA_091213.pdf) [hereinafter "DOL Letter to the ABA"].

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Molly McDonough, *Lawyers Urged To Take on More Pro Bono Work to Offset Increase in Demand for Legal Services*, ABA J. (Aug. 20, 2012, 8:45 PM), [http://www.abajournal.com/news/article/lawyers\\_urged\\_to\\_take\\_on\\_more\\_pro\\_bono\\_work\\_to\\_offset\\_increase\\_in\\_demand/](http://www.abajournal.com/news/article/lawyers_urged_to_take_on_more_pro_bono_work_to_offset_increase_in_demand/) ("There's a crisis in this country . . . Courthouses are being filled with people just showing up, trying to figure out what their rights are. If you're a low-income person and you have a legal need, it is not easy to get it addressed.").

Furthermore, creating such an exception not only blurs the lines of legality for unpaid internships but also has the potential to set back the unpaid internship movement and thus continue the injustices of free intern-labor. Part II of this comment discusses the history, background, and applicability of the FLSA. Part III analyzes the recent developments that have called attention to unpaid internships and the resulting social issues. It further discusses the inapplicability of Title VII of the Civil Rights Act of 1964, the associated workplace problems, and recently enacted state legislation aimed at filling the federal statutory void in order to protect unpaid interns. Part IV argues that the DOL's recently announced *pro bono* exception is inconsistent with the law and, furthermore, creates a risk that law firms will exploit students. Finally, Part V concludes by arguing that the DOL should abrogate a *pro bono* exception for private law firms in order to prevent the abuse of unpaid interns. Then, it focuses on the remaining challenges facing unpaid interns, despite their notable progress.

## II. HISTORY AND BACKGROUND

### A. Fair Labor Standards Act (FLSA)

The FLSA, first enacted in 1938, establishes regulations and standards affecting employment for workers in the United States.<sup>27</sup> The Act's standards, however, apply only to "employees."<sup>28</sup> The FLSA defines an "employee" as "any individual employed by an employer,"<sup>29</sup> and the term "employ" is broadly defined to include "to suffer or permit to work."<sup>30</sup> Additionally, "whether an employer-employee relationship exists for the purposes of the FLSA should be grounded in 'economic reality rather than technical concepts.'"<sup>31</sup> Ultimately, courts determine if an employee-employer relationship exists on a case-by-case basis, by examining the totality of the circumstances.<sup>32</sup>

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<sup>27</sup> Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060; Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LABOR, <http://www.dol.gov/oasam/programs/history/flsa1938.htm> (last visited Mar. 30, 2015).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Fair Labor Standards Act, 29 U.S.C.A. § 203(e)(1) (West 2013).

<sup>31</sup> *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008) (citation omitted).

<sup>32</sup> *Id.* at 141-42.

The Supreme Court first established an exception to the definition of employee in 1947.<sup>33</sup> In *Walling v. Portland Terminal Co.*, the Supreme Court held that workers who participated in a week-long training program for a railroad company, in order to learn the skills of brakemen and be eligible for potential employment, were “trainees” and not employees of the railroad company.<sup>34</sup> The company argued that because the program offered critical training, the benefits of the program accrued to the workers—not the company itself—and the FLSA did not intend to penalize such training.<sup>35</sup> Furthermore, the Court discerned no “immediate advantage” to the railroad company; on the contrary, it found that the training would sometimes inhibit and slow the operations of the railroad company.<sup>36</sup> Following *Walling*, the DOL developed a six-part test to determine if a worker is a trainee and not an employee under the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainees or students;
3. The trainees or students do not displace regular employees, but work under their close observation supervision;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and, on occasion his/her operations may actually be impeded;
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainee or students understand that the trainees or students are not entitled to wages for the time spent in training.<sup>37</sup>

The DOL consistently has held in its opinion letters that the six-factor test for the trainee exception should apply to student interns as well.<sup>38</sup>

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<sup>33</sup> *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

<sup>34</sup> *Id.* at 149–50.

<sup>35</sup> *Id.* at 150–53.

<sup>36</sup> *Id.*

<sup>37</sup> See Wage & Hour Div., U.S. Dep’t of Labor, Op. Letter (Mar. 13, 1995); Wage & Hour Div., U.S. Dep’t of Labor, Op. Letter (May 8, 1996); Wage & Hour Div., U.S. Dep’t of Labor, Op. Letter (May 17, 2004).

<sup>38</sup> Wage & Hour Div., U.S. Dep’t of Labor, Op. Letter (Mar. 13, 1995); Wage & Hour Div., U.S. Dep’t of Labor, Op. Letter (May 8, 1996); Wage & Hour Div., U.S. Dep’t of Labor, Op. Letter (May 17, 2004).

*B. Application of Trainee Exception after Walling*

There are several different applications of the trainee exception in the federal courts, resulting in various interpretations and modifications of the *Walling* factors. Although the concept of providing an exception to the FLSA for trainees remains intact, some courts have applied the factors conjunctively, disjunctively, or not at all. There is an additional question of the appropriate amount of deference to be given to the factors, considering that the DOL articulated in an opinion letter.

1. Adoption of the Six-Factor Test

In 1982, the United States Court of Appeals for the Fifth Circuit, applying the six-factor test, held that workers for American Airlines were trainees and thus not subject to applicable employee standards under the FLSA.<sup>39</sup> The plaintiffs were full-time students participating in the airline's learning center training to become flight attendants or sales agents.<sup>40</sup> The Secretary of Labor brought suit, alleging that the students were employees and entitled to at least minimum wage for their time in the learning center.<sup>41</sup> The court disagreed; applying the six-factor test conjunctively in accordance with the DOL Wage and Labor Manual, the Fifth Circuit ruled for the defendants and held that the students were not employees under the FLSA definition.<sup>42</sup>

2. "Primary Beneficiary Test"

The United States Court of Appeals for the Fourth Circuit declined to apply the six-factor test, however, instead adopting a "primary beneficiary test" in *McLaughlin v. Ensley*.<sup>43</sup> The defendant, a proprietor of snack foods and employer of truck drivers, worked solely on commission to distribute and restock snacks.<sup>44</sup> Drivers generally worked fifty to sixty hours per week.<sup>45</sup> Potential drivers, before being hired, would travel with experienced drivers for a trial period of about five days (fifty to sixty hours of labor).<sup>46</sup> The defendant claimed that

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<sup>39</sup> *Donovan v. Am. Airlines*, 686 F.2d 267, 267 (5th Cir. 1982).

<sup>40</sup> *Id.* at 268.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 273 ("[I]f all six of the criteria are met, no employment relationship exists.").

<sup>43</sup> 877 F.2d 1207 (4th Cir. 1989).

<sup>44</sup> *Id.* at 1208.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

the apprentice drivers were trainees, not employees, and thus not entitled to wages for the alleged training period.<sup>47</sup> The court framed the dispositive question as whether the proprietor or the trainees “principally benefitted” from the weeklong orientation period.<sup>48</sup> The court held that the apprentice drivers were employees within the definition of the FLSA under the “primary beneficiary test.”<sup>49</sup> The dissent argued that the court erred in adopting the “primary beneficiary test.”<sup>50</sup>

### 3. “Totality of the Circumstances”

The United States Court of Appeals for the Tenth Circuit also declined to apply the six-part test and instead adopted the *Reich v. Parker Fire Protection District* “totality of the circumstances” test, which partially incorporates the DOL’s six factors.<sup>51</sup> In *Reich*, the Secretary of Labor sued the Parker Fire Department for not providing wages to future firefighters while they participated in mandatory initial training.<sup>52</sup> The department conditioned permanent employment upon the successful completion of a ten-week training period.<sup>53</sup> Although the trainees *were* necessarily entitled to a job at the completion of the training period (not satisfying the fifth element), the court held that the firefighters were not employees during their time as trainees at the academy.<sup>54</sup> The court noted that a “totality of the circumstances test” was appropriate and that, contrary to the Secretary of Labor’s argument, the fire department did not have to satisfy all six factors in order to qualify under the trainee exception.<sup>55</sup>

Similarly, the United States Court of Appeals for the Sixth Circuit rejected a strict application of the DOL six-factor test and deemed it a “poor method for determining employee status in a training or educational setting.”<sup>56</sup> In *Solis v. LaurelBrook Sanitarium and School Inc.*, a Seventh-Day Adventist boarding school required students to perform various work as part of their stay and training at the school.<sup>57</sup> Some

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1209.

<sup>49</sup> *McLaughlin*, 877 F.2d. at 1210.

<sup>50</sup> *Id.* at 1210–11 (Wilkins, J., dissenting).

<sup>51</sup> 992 F.2d 1023 (10th Cir. 1993).

<sup>52</sup> *Id.* at 1025.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1026.

<sup>56</sup> *Solis v. LaurelBrook Sanitarium and Sch. Inc.*, 642 F.3d 518, 525 (6th Cir. 2011).

<sup>57</sup> *Id.* at 520–21.

2015]

COMMENT

623

duties included kitchen training, medical training, and education training.<sup>58</sup> The Secretary of Labor brought the charges under the FLSA.<sup>59</sup> The court held that the boarding school's sole purpose was to serve as a "training vehicle" for the students.<sup>60</sup> Accordingly, it held that the students were not employees under the FLSA.<sup>61</sup>

C. "Fact Sheet #71"

In 2010, the DOL issued Fact Sheet #71, an opinion clarifying the legality of internship programs under the FLSA.<sup>62</sup> The DOL set forth a familiar test—the six-factor test, originally developed in *Walling* and used thereafter—but slightly modified the language to tailor it to unpaid internships.<sup>63</sup> The "new" test sets forth six elements that an intern must meet in order to meet the trainee exception under the FLSA:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.<sup>64</sup>

Furthermore, the DOL claimed that, "[t]his publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations."<sup>65</sup> Given this disclaimer, and the departure of several circuits from the DOL factors, the clear question is whether the courts accorded the DOL the

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<sup>58</sup> *Id.* at 520.

<sup>59</sup> *Id.* at 519.

<sup>60</sup> *Id.* at 520.

<sup>61</sup> *Id.* at 523.

<sup>62</sup> *Fact Sheet #71*, *supra* note 8.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

appropriate deference under current views of the interpretive power of administrative agencies. Few courts, surprisingly, have looked at the agency's factors through this lens.

*D. Appropriate Deference to the DOL Six Part-Test*

1. *Chevron* Deference

Under *Chevron v. Natural Resources Defense Council, Inc.*, when determining the amount of deference to be given to an administrative interpretation of a statute, the court should apply a two-step analysis.<sup>66</sup> The first question is whether Congress has specifically addressed the issue at hand.<sup>67</sup> If Congress has addressed the interpretation or ambiguity, the court must give full deference to congressional intent.<sup>68</sup> On the other hand, if Congress has not addressed the issue at hand, the court will ask whether the administrative agency's interpretation is a reasonable construction of the statute.<sup>69</sup> If so, the court will defer to the agency when it is clear that Congress delegated authority to the administrative agency to interpret the law and provide regulations.<sup>70</sup> Express authorization of interpretative power indicates that *Chevron* deference is proper.<sup>71</sup>

2. *Skidmore* Deference

The court in *Reich* noted that the DOL's interpretation of the FLSA employee definition (six-factor test) should not be given the highest level of *Chevron* deference.<sup>72</sup> Instead, the court determined that *Skidmore* deference was proper.<sup>73</sup> Under *Skidmore*, the "rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>74</sup> The court, however, provided no analysis or reasoning for its determination that *Skidmore* deference applies.<sup>75</sup>

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<sup>66</sup> 467 U.S. 837, 842 (1984).

<sup>67</sup> *Id.* at 842–43.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 843.

<sup>70</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>71</sup> *Id.* at 230.

<sup>72</sup> *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993).

<sup>73</sup> *Id.*

<sup>74</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>75</sup> *Id.*

The Supreme Court has addressed the level of deference for DOL “opinion letters,” but with some disagreement.<sup>76</sup> In *Christensen*, the majority held that the opinion letter in question was not entitled to *Chevron* deference because it was not a departmental interpretation founded upon a formal adjudication or notice and comment process.<sup>77</sup> Accordingly, the Court held that “interpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore*.”<sup>78</sup> Justice Scalia, concurring in part, criticized the majority’s approach, calling *Skidmore* deference to an authoritative agency an “anachronism.”<sup>79</sup> Justice Scalia would accord *Chevron* deference when the opinion letter represents the views of the agency.<sup>80</sup> Nevertheless, he sided with the majority because he agreed that the agency’s position was not a reasonable interpretation.<sup>81</sup> Justice Stevens stated, in his dissent, not only that *Skidmore* deference was proper, but also that in applying such deference the opinion letter was reasonable and “unquestionably merits our respect.”<sup>82</sup> In his dissent, Justice Breyer, with whom Justice Ginsburg joined, agreed that the agency letter might in fact be entitled to *Chevron* deference, but disagreed that *Skidmore* deference was an anachronism;<sup>83</sup> regardless of the deference, in his opinion, the agency interpretation was proper.<sup>84</sup>

The proper amount of deference for DOL opinion letters depends on the reasonableness of the statutory interpretation, but it is proper to apply, at most, *Skidmore* deference because Fact Sheet No. 71 is not an official regulation; rather, it is an opinion issued by the relevant agency. The DOL opinion letter and subsequent affirming letters are not formal regulations. Although Fact Sheet #71 is entitled only to *Skidmore* deference, it has garnered substantial attention in

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<sup>76</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000).

<sup>77</sup> *Id.* at 587.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 589 (2000) (Scalia, J., concurring). Merriam-Webster defines anachronism as: 1. an error in chronology; *especially*: a chronological misplacing of persons, events, objects, or customs in regard to each other 2. a person or a thing that is chronologically out of place; *especially*: one from a former age that is incongruous in the present. 3. the state or condition of being chronologically out of place. *Anachronism Definition*, Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/anachronism> (last visited Sept. 25, 2014).

<sup>80</sup> *Id.* at 591.

<sup>81</sup> *Id.*

<sup>82</sup> *Christensen*, 529 U.S. 576, 595 (Stevens, J., dissenting).

<sup>83</sup> *Id.* at 596 (Breyer, J., dissenting).

<sup>84</sup> *Id.* at 597 (majority opinion).

both the courts and the media.<sup>85</sup>

*E. Obama Administration Hardline Approach*

Coinciding with the reiteration and tailoring of the six-factor *Walling* standard for trainee exception, the Obama Administration (the “Administration”) has stated its concerns about unpaid internships.<sup>86</sup> While the Administration did not reinvent the FLSA exception for trainees, it did bring attention to the matter by tailoring the six factors specifically to unpaid internships and publicly denouncing the practice at for-profit institutions.<sup>87</sup> For the first time, a presidential administration or government agency explicitly stated its position that, “[i]f you’re a for-profit employer or you want to pursue an internship with a for-profit employer, there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.”<sup>88</sup> The DOL’s statement itself was a firm stance in opposition to the practice of unpaid internships. At the same time the Administration expressed its concerns, the media began heavily scrutinizing the issue and Ross Perlin published his influential book, *Intern Nation*.<sup>89</sup> The issue became a contentious topic that was pushed to the forefront of legal and social debate.<sup>90</sup>

### III. THE RISE AND DECLINE OF UNPAID INTERNSHIPS

*A. Prevalence and Participation*

The full extent of student participation in unpaid internships is not precisely known, but as one commentator noted, “there is widespread agreement that the number has significantly increased.”<sup>91</sup> The National Association of College and Employers (NACE) conducted a survey from February 15, 2013 to April 30, 2013 to gain information concerning student internships.<sup>92</sup> The survey yielded

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<sup>85</sup> Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES, May 6, 2012, at A1.

<sup>86</sup> See generally Sarah Braun, Note, *The Obama “Crackdown:” Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281 (2012); Henneberg, *supra* note 18.

<sup>87</sup> David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, at 18 (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2338646](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338646).

<sup>88</sup> Greenhouse, *supra* note 19.

<sup>89</sup> Yamada, *supra* note 87.

<sup>90</sup> Yamada, *supra* note 87.

<sup>91</sup> Greenhouse, *supra* note 1.

<sup>92</sup> *Class of 2013: Paid Interns Outpace Unpaid Peers in Job Offers, Salaries*, NAT’L ASS’N

more than 38,000 responses from college students.<sup>93</sup> According to the survey, two-thirds of college students participated in an internship, co-op, or both during their four-year baccalaureate degree program.<sup>94</sup> Among the class of 2013, 56.3% of internships were at for-profit institutions and 38.1% of those were unpaid.<sup>95</sup> The overall amount of participation in internships was the highest since the NACE began tracking statistics in 2007.<sup>96</sup> With the increase in unpaid internships came the increase in questions.

### *B. Exploitation of Students*

Unpaid internships are potentially exploitative in a variety of ways, because the very nature of working as a non-employee bars students from obtaining workplace rights or power. Although conventional wisdom holds that unpaid internships are intrinsically and economically valuable for the interns,<sup>97</sup> recent studies and anecdotal

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OF COLLEGES AND EMPLOYERS (May 29, 2013), <http://naceweb.org/s05292013/paid-unpaid-interns-job-offer.aspx?land-intern-lp-1-spot-intjb-09132013> [hereinafter *Class of 2013*].

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Lat, *supra* note 7 (“Let the government largely look the other way on unpaid internships, but leave existing prohibitions on the books, so the most egregious violators can be individually sued.”); David Schick, *Viewpoint: In Defense of Unpaid Internships*, USA TODAY (June 4, 2013, 11:40 AM), <http://college.usatoday.com/2013/06/04/opinion-in-defense-of-unpaid-internships/> (describing his intern experience as invaluable); Alison Green, *Why Unpaid Internships Should Be Legal*, U.S. NEWS (July 1, 2013, 8:55 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2013/07/01/why-unpaid-internships-should-be-legal>

(“For many recent graduates, unpaid internships—even the ones that consist mainly of grunt work – are the difference between having a résumé with some experience on it or having an empty résumé that will go straight into an employer’s reject pile. In this job market, unpaid internship experience can be what makes the difference between getting interviews and job offers or remaining unemployed.”);

Thompson, *supra* note 2 (describing some students’ positive internship experiences). One student stated, “I took an active initiative in shaping my internship into a positive and valuable learning experience. I knew what I wanted to get out of it and I asserted myself to make sure that I got it.” *Id.* Another source suggested that an unpaid internship, even over the age of forty, is valuable.

While moving from management to intern can humble the ego and put a kink in the bank account, it could be a vital step in gaining the experience and contacts needed to make a career change or get back into the workforce after a break. Adding new responsibilities to your resume from an adult internship also can make you a more attractive job candidate.

Christina Couch, *Can a Midcareer Internship Boost Your Career?*, FOX BUS. (May 8, 2014),

evidence directly challenge that presumption.<sup>98</sup> The perceived advantage in obtaining employment may be greatly exaggerated.<sup>99</sup> This exaggeration is particularly true when comparing the relative benefits of paid internships versus unpaid internships. While paid internships lead to greater job prospects, unpaid internships have almost no net economic benefit.<sup>100</sup> According to NACE, 63.1% of paid interns received at least one job offer upon graduation.<sup>101</sup> In contrast, only 37% of students who participated in unpaid internships received at least one job offer.<sup>102</sup> The statistic is especially troubling since 36% of students who did not intern at all received at least one job offer.<sup>103</sup> These statistics suggest that participation in an unpaid internship provided virtually no discernable advantage in obtaining a job.

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[http://www.foxbusiness.com/personal-finance/2014/05/07/can-midcareer-internship-boost-your-career/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+foxbusiness%2Ffinancial\\_planning+%28Internal++Financial+Planning++Text%29](http://www.foxbusiness.com/personal-finance/2014/05/07/can-midcareer-internship-boost-your-career/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+foxbusiness%2Ffinancial_planning+%28Internal++Financial+Planning++Text%29).

<sup>98</sup> See Eric M. Fink, *No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 437 (2013) (“[I]t is safe to say that the vast numbers of interns are condemned to performing the mundane, vaguely humiliating chores that are the necessary if despised conditions of life in the white-collar world of work to which so many young people aspire.”); Kaminer, *supra* note 3 (quoting a student intern who stated, “I took an unpaid internship that I figured would give me experience and help me land somewhere in six months. Instead I’m picking up coffee and dry cleaning and performing other tasks that the company would otherwise have to pay someone for”); Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. TIMES, April 3, 2011, at WK11 (“[M]ore often, internships are a cheap way for universities to provide credit—cheaper than paying for faculty members, classrooms and equipment.”); Rachel Burger, *Why Your Unpaid Internship Makes You Less Employable*, FORBES (Jan. 16, 2014, 8:00 AM), <http://www.forbes.com/sites/realspin/2014/01/16/why-your-unpaid-internship-makes-you-less-employable/> (“What’s even more astonishing is the pay disparity between those with paid, unpaid, and no internships. Those with unpaid internships tended to take lower-paying jobs than those with no internship experience whatsoever (\$35,721 and \$37,087, respectively). Students with paid internships far outpaced their peers with an average \$51,930 salary.”); Jordan Weissmann, *Do Unpaid Internships Lead to Jobs? Not for College Students*, THE ATLANTIC (June 19, 2013, 8:30 AM), <http://www.theatlantic.com/business/archive/2013/06/do-unpaid-internships-lead-to-jobs-not-for-college-students/276959/> (“The common defense of the unpaid internship is that, even if the role doesn’t exactly pay, it will pay off eventually in the form of a job. Turns out, the data suggests that defense is wrong, at least when it comes to college students.”); Greenfield, *supra* note 2 (“Often, the only thing these free laborers get is a company name on their resume — but, turns out, that doesn’t even help much when looking for jobs.”).

<sup>99</sup> *Class of 2013*, *supra* note 92.

<sup>100</sup> See Fink, *supra* note 98 at 436.

<sup>101</sup> *Class of 2013*, *supra* note 92.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

In addition to the lack of advantage in obtaining a job, unpaid internships provide no salary increases to students after graduation.<sup>104</sup> The median starting salary for interns who participated in a paid internship was \$51,930 as opposed to \$35,721 for students who participated in unpaid internships.<sup>105</sup> The median starting salary for unpaid interns was in fact less than the \$37,087 paid to students who did not intern at all.<sup>106</sup> The notion that internships are necessary to advance students' careers, particularly for those with limited job experience, does not hold true when it comes to unpaid internships. While there are advantages to paid internships, the type of students who receives such jobs is an elite class.<sup>107</sup>

In addition to the questionable economic benefits, there are two more equally significant problems stemming from unpaid internships: (1) the lack of protection from workplace discrimination and (2) the expansion of socio-economic (and gender) disparity.

#### 1. The Inapplicability of Title VII

The fundamental barrier to unpaid interns' legal protection is lack of standing to bring an employment claim under Title VII of the Civil Rights Act of 1964 and analog state laws. Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex and national origin.<sup>108</sup> Title VII, however, protects only "covered" employees.<sup>109</sup> Being an "employee" within the statutory definition is the threshold requirement for such protection.<sup>110</sup> The statute tautologically defines an employee as "an individual employed by an employer,"<sup>111</sup> but courts have refused to interpret this phrase to reach individuals who are not paid for their work.<sup>112</sup> As one observer stated, "the landmark civil rights legislation prohibiting age, gender, and race-based discrimination in schools and workplaces simply passes over unpaid interns."<sup>113</sup> Not providing any statutory discrimination

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<sup>104</sup> *Id.*

<sup>105</sup> *Class of 2013, supra* note 92.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 42 U.S.C. § 2000e (2006).

<sup>109</sup> 42 U.S.C. § 2000e(f).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (Aspen 8th ed. 2012).

<sup>113</sup> See ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 78–79 (2012).

protection for student interns creates tremendous harm.<sup>114</sup> Moreover, women are more at risk for sexual harassment and workplace discrimination.<sup>115</sup>

For example, Bridget O'Connor interned at a psychiatric center where she was continuously subjected to sexual harassment and unwanted sexual advancements.<sup>116</sup> The doctor who employed O'Connor routinely touched her unwantedly, and even nicknamed her "Miss Sexual Harassment."<sup>117</sup> But he did not stop there, and further suggested that O'Connor participate in an orgy with him; on one occasion he even ordered her to remove her clothing.<sup>118</sup> Despite the humiliation and distress she suffered, O'Connor was unable to obtain any remedy.<sup>119</sup> When she left her internship and sued, the court dismissed her case for lack of standing under Title VII.<sup>120</sup>

In *Wang v. Phoenix Satellite Television. US, Inc.*,<sup>121</sup> the United States District Court for the Southern District of New York confirmed that Title VII does not cover unpaid interns when it dismissed a graduate

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<sup>114</sup> See, e.g., James J. LaRocca, *Lowery V. Klemm: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131 (2006) (discussing the consequences of designating unpaid interns as non-employees who are not titled to statutory protection); Blair Hickman and Christie Thompson, *How Unpaid Interns Aren't Protected Against Sexual Harassment*, PROPUBLICA (Aug. 9, 2013, 8:00 AM), <http://www.propublica.org/article/how-unpaid-interns-arent-protected-against-sexual-harassment> ("[I]f for-profit employers paid their interns when they should (and usually they should be paid), protection from discrimination and sexual harassment would automatically apply.").

<sup>115</sup> See, e.g., Natalie Kitroeff, *Intern Calls Out Sexism in Venture Capital, Finds Out Why Women Rarely Speak Up*, BUSINESSWEEK (Aug. 22, 2014, 2:23 PM), <http://www.bloomberg.com/bw/articles/2014-08-22/venture-capital-firm-yelled-at-intern-who-cited-sexism>. The intern describes the sexual harassment she experienced in college:

The episode highlights a growing debate about sexism in the technology industry and how to deal with discrimination at work. Women in startups and venture capital have spoken—often anonymously—about sexism and harassment at venture capital firms. Their reluctance to be named speaks to the risks some women associate with speaking out about discrimination.

*Id.*; Indre Viskontas, *26 Percent of Female Scientists Say They've Been Sexually Assaulted Doing Fieldwork*, MOTHERJONES (Aug. 22, 2014, 6:00 AM), <http://www.motherjones.com/environment/2014/08/inquiring-minds-kate-clancy> (describing the prevalence of sexual harassment and assault for female scientists doing graduate fieldwork).

<sup>116</sup> *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997).

<sup>117</sup> *Id.* at 113.

<sup>118</sup> *Id.* at 113–14.

<sup>119</sup> *Id.* at 115.

<sup>120</sup> Perlin, *supra* note 113, at 79.

<sup>121</sup> 13 Civ. 218, 2013 U.S. Dist. LEXIS 143627 (S.D.N.Y. Oct. 3, 2013).

student's claim for sexual harassment.<sup>122</sup> A young woman interning at a Washington D.C. media group filed the lawsuit and alleged *quid pro quo* harassment.<sup>123</sup> After positively evaluating her job performance and suggesting that she may even receive a full-time job, the intern's boss took her to his hotel room, threw his arms around her, and then "squeezed her buttock."<sup>124</sup> After she fought off his advances, her boss suddenly lost interest in employing her.<sup>125</sup> The intern's (alleged) injuries were two-fold: first, she had to suffer through the sexual harassment itself, and second, she had to face the professional consequences of losing a career opportunity. Because women are more at risk for workplace sexual harassment than men, the lack of Title VII protection is particularly problematic for them.<sup>126</sup> The claims of discrimination against unpaid interns are abundant and many share the same common facts and grievances.<sup>127</sup>

## 2. Socio-economic (and Gender) Disparity

Commenters note the correlation between the benefit of internships in general and the relative wealth of the students, and have discussed the relationship extensively.<sup>128</sup> Several reasons exist for these socio-economic disparities. As a general matter, paid interns gain an advantage in both the ability to obtain a job after graduation and

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<sup>122</sup> *Id.* See also Emily Jane Fox, *Unpaid Interns Not Protected from Sexual Harassment*, CNN (Jan. 25, 2014, 12:52 PM), [www.money.cnn.com/2013/10/09/news/economy/unpaid-intern-sexual-harassment/](http://www.money.cnn.com/2013/10/09/news/economy/unpaid-intern-sexual-harassment/) (describing Wang's case).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Perlin, *supra* note 113.

<sup>127</sup> For more examples of discrimination against unpaid interns and the lack of protection, see generally Perlin, *supra* note 113.

<sup>128</sup> Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1534 (2010) ("But, without being paid, low-income individuals often cannot afford to take them. The increasing prevalence of internships thus raises a stark class divide between entry-level jobseekers who can afford the luxury of unpaid experience and those who cannot."); Fink, *supra* note 98, at 437 ("[T]he most privileged enjoy greater access to the 'key resume boosting internships' that provide meaningful experience and valuable connections, while the less fortunate are relegated to internships offering little other than the raw exploitation of their uncompensated labor."); Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So Equal Protection: Reforming the Regulation of Student Internships*, ECON. POL'Y INST. (Apr. 9, 2010), <http://www.epi.org/publication/pm160/> ("[A] lack of clear regulations and enforcement of internship related laws . . . [f]osters the growth of unpaid internships, which in turn limits participation to only the student who can forego wages and pay for living expenses, effectively institutionalizing economic disparities . . .").

median starting salary.<sup>129</sup> Unpaid internships, however, are far more problematic. Nevertheless, because students see internships as a necessary line on their resumes, or at least perceive them to be a constructive requirement, students will go to great lengths to obtain internships in their respective fields.<sup>130</sup> For a student with limited income, the consequences of taking an unpaid internship can further lower her socio-economic status and hinder her mobility.<sup>131</sup> Many low-income students commonly take on additional loans to sustain themselves while working for free.<sup>132</sup> And some students, who work during school, cannot participate in an internship at all.<sup>133</sup> Even though unpaid internships, overall, provide questionable benefits for students' jobs and salary prospects, there could be individual circumstances where an internship might be beneficial. For certain situations, preclusion from an internship could preclude a student from full-time employment, particularly if the employer requires participation in its company's internship before hiring. In such a situation, lower socio-economic students would lose out on this opportunity.

In addition to the prevalence of—and lack of protection from—sex discrimination and harassment, women, as a whole, have lower socio-economic status than men in the United States, and participation in unpaid internships exacerbates the problem.<sup>134</sup> Ross Perlin summarizes the negative effects by noting, “internship injustice is closely linked to gender issues, both because of the fields that women gravitate toward and possibly also because female students have been more accepting of unpaid, unjust situations.”<sup>135</sup> And according to one study, women are 77% more likely to participate in an unpaid

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<sup>129</sup> *Supra* notes 99–107 and accompanying text.

<sup>130</sup> Curiale, *supra* note 128, at 1536.

<sup>131</sup> *E.g.*, Jennifer Lee, *Crucial Unpaid Internships Increasingly Separate the Haves from the Have-Nots*, N.Y. TIMES, Aug. 10, 2004, at A16 (“But as internships rise in importance as critical milestones along the path to success, questions are emerging about whether they are creating a class system that discriminates against students from less affluent families who have to turn down unpaid internships to earn money for college expenses.”).

<sup>132</sup> Perlin, *supra* note 113, at 74–80.

<sup>133</sup> *Id.* at 168.

<sup>134</sup> *Fact Sheet: Women & Socioeconomic Status*, AM. PSYCHOLOGICAL ASS'N, <https://www.apa.org/pi/ses/resources/publications/factsheet-women.aspx> (“[W]omen are overrepresented among those living in poverty.”) (last visited Apr. 6, 2015).

<sup>135</sup> Perlin, *supra* note 113, at 27.

internship than their male colleagues.<sup>136</sup>

The exploitation and lack of protection for unpaid interns creates a need to properly enforce the FLSA. Many argue that, if a student is willing to work for free, then the government should not interfere with such freedom of contract.<sup>137</sup> But the core purpose of the FLSA is to protect workers, and if unpaid interns are not participating in a mutually beneficial training program, but rather are performing the work of an employee, then the employer must come into compliance with the law. Turning a blind eye creates a class of workers who have no protection and are at the mercy of for-profit institutions.<sup>138</sup> Unpaid internships present multi-faceted problems for our society, and the focus on eliminating and regulating the practice has positive benefits.

### *C. Recent Statutory Developments and Protections*

There have been some positive recent developments for unpaid interns concerning discrimination protection. In June 2013, Oregon became the first state to enact a law outlawing discrimination against interns and providing a state cause of action to seek relief.<sup>139</sup> A few months later, the New York Legislature took steps to address the issue as well when it introduced a similar bill that would give unpaid interns the same statutory rights as employees.<sup>140</sup> Although New York City has already acted to protect interns, Senator Liz Krueger, whose district represents part of Manhattan, noted that she proposed the bill in response to *Wang*.<sup>141</sup> While this may be only a small step towards complete protection and equality, it indicates growing support to protect unpaid interns.<sup>142</sup>

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<sup>136</sup> *Id.* at 26.

<sup>137</sup> *See supra* note 7 and accompanying text.

<sup>138</sup> *See generally* Perlin, *supra* note 113.

<sup>139</sup> Jacob Gershman, *New Bill Would Outlaw Discrimination Against Unpaid Interns*, WALL ST. J. (Nov. 24, 2013, 7:06 PM), available at <http://blogs.wsj.com/law/2013/10/18/new-bill-would-outlaw-discrimination-against-unpaid-interns/>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* (quoting Professor David C. Yamada “Until very recently, the legal implications of unpaid internships provided by American employers have been something of a sleeping giant”).

IV. THE *PRO BONO* EXCEPTIONA. *The Legal Exception*

The momentum of the intern rights movement seemed to hit a peak in 2013. Politicians and the media focused their attention on the plight of unpaid interns and lent their support to enforcing the FLSA.<sup>143</sup> For good reason, many expressed great concern for the general practice of for-profit institutions hiring students to perform laborious work for no compensation and with no legal protections.<sup>144</sup> A recent New York decision, *Glatt v. Fox Searchlight Pictures, Inc.*, represented a seismic shift in the unpaid interns' fight for compensation.<sup>145</sup> The court deemed interns who had worked on the film production of *Black Swan* to be employees and awarded them back pay.<sup>146</sup> Just months earlier, interns working for free on the set of *The Charlie Rose Show* were also awarded back pay when they settled out of court with their former employer.<sup>147</sup> And, on the heels of these victories, the press widely scrutinized Condé Nast for its highly intensive and highly illegal internship program, which the company ended amidst the negative press.<sup>148</sup> Two former interns sued the magazine publishing company, which publishes high-profile

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<sup>143</sup> *Supra* notes 8–9 and accompanying text.

<sup>144</sup> *See supra* Part III.

<sup>145</sup> Perlin, *supra* note 8.

<sup>146</sup> *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11-Civ-6784 (WHP), 2013 U.S. Dist. LEXIS 121964 (S.D.N.Y. Aug. 26, 2013).

<sup>147</sup> Cara Buckley, *Sued Over Pay, Conde Nast Ends Internship Program*, N.Y. TIMES (Oct. 23, 2013), available at [http://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html?\\_r=0](http://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html?_r=0).

<sup>148</sup> *Id.* (“The 15 pounds frantically lost in the weeks before the interview. The predawn drive from New Hampshire to Times Square. The bed shared with a fellow penny-pinching friend near Pennsylvania Station, and the morning and evening walks — in heels — because she could not afford subway fare.”); Christine Haughney, *Conde Nast Faces Suit from Interns Over Wages*, N.Y. TIMES (June 13, 2013), [http://www.nytimes.com/2013/06/14/business/media/two-ex-interns-sue-conde-nast-over-wages.html?\\_r=0](http://www.nytimes.com/2013/06/14/business/media/two-ex-interns-sue-conde-nast-over-wages.html?_r=0) (profiling a former intern who described the poor working conditions and stressful environment). *But see* Akane Otani, *Former Interns Upset By End of Conde Nast Internships*, USA TODAY (Oct. 29, 2013), <http://www.usatoday.com/story/news/nation/2013/10/29/interns-disapprove-conde-nast-intern-cut/3308179/> (noting that potential interns believed that the end of the program will hurt aspiring college students); Erin Cunningham, *Conde Nast Ends Internship Program*, THE DAILY BEAST (Oct. 23, 2013), <http://www.thedailybeast.com/articles/2013/10/23/conde-nast-ends-internship-program.html> (“On the company side, a lack of interns could definitely slow down the operations of the fast-paced magazine environment. Interns are utilized for a variety of vital—although menial and time-consuming tasks—including sample handling and trafficking, assisting with market appointments, and assisting on photo shoots.”).

magazines such as *Vanity Fair*, alleging they were employees and entitled to minimum wage.<sup>149</sup> Condé Nast eventually settled the suit for \$5.8 million.<sup>150</sup> Former interns, some with employment dating back to 2007, will receive between \$700 and \$1,900 for entitled wages.<sup>151</sup> The trend continued well into 2014, and unpaid interns continued to sue prominent employers for unfair labor practices.<sup>152</sup>

<sup>149</sup> Ricardo Lopez, *Conde Nast Cancels Internship Program Amid Lawsuit*, L.A. TIMES (Oct. 23, 2013), <http://www.latimes.com/business/money/la-fi-mo-cond-nast-cancels-internship-program-amid-lawsuit-20131023,0,2118264.story#axzz2jhBjvUV>.

<sup>150</sup> Mica Rosenberg, *Conde Nast Agrees to \$5.8 Million Settlement in Intern Lawsuit*, HUFFINGTON POST (Nov. 13, 2014, 3:59 PM), [http://www.huffingtonpost.com/2014/11/13/conde-nast-settlement-agreement-intern-lawsuit\\_n\\_6153400.html](http://www.huffingtonpost.com/2014/11/13/conde-nast-settlement-agreement-intern-lawsuit_n_6153400.html).

<sup>151</sup> *Id.*

<sup>152</sup> In the summer of 2014 a local Illinois newspaper profiled a young college student who was “lucky” enough to land an unpaid internship at The Wendy Williams Show, a nationally syndicated television program. Despite the lack of pay, celebrities and the New York Lifestyle mesmerized the young woman. She was very close to the celebrity diva, Williams, while working for free the entire summer, as the student stated, “I didn’t actually get to meet her, but one day she told me she liked my skirt.” Suzanne Boyle, *Summer With a Star: Interning on Wendy Williams’ Show*, BND.COM (Aug. 24, 2014), <http://www.bnd.com/2014/08/24/3362081/summer-with-a-star-interning-on.html>. This sentiment illustrates why many young students are willing to participate in unpaid internships and why the unbalanced power dynamic makes it difficult to crackdown on unpaid internships. Ironically, a former intern seeking class action for wages and other damages sued The Wendy Williams Show a little over a month later. Complaint, *Tart v. Lions Gate Entm’t*, (S.D.N.Y. Oct. 3, 2014), available at <https://pmcdeadline2.files.wordpress.com/2014/10/lionsgate-wendy-willims-intern-lawsuit.pdf>. A wave of similar class action suits were brought in late 2014. They include suits against Calvin Klein, Gucci, Oscar de la Renta, and Kenneth Cole. Complaint, *Kaur v. PVH Corp.*, No. 160264/2014 (N.Y. Sup. Ct. Oct. 20, 2014), available at <http://assets.law360news.com/0589000/589154/calvin%20klein.pdf> (intern suit against Calvin Klein); Complaint, *Huggins v. Gucci America Inc.*, No. 161446/2014 (N.Y. Sup. Ct. Nov. 18, 2014), available at <http://assets.law360news.com/0597000/597418/Gucci.pdf> (suit against Gucci); Complaint, *Ramirez v. Oscar de la Renta LLC*, (N.Y. Sup. Ct. Oct. 3, 2014), available at <http://assets.law360news.com/0573000/573763/oscar.pdf> (suit against de la Renta); Complaint, *Awogbile v. Kenneth Cole Productions Inc.*, No.161886/2014 (N.Y. Sup. Ct. Dec. 2, 2014), available at <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=i65o4XbfjffXhYmLzOMWgA==&system=prod> (suit against Kenneth Cole). Kenneth Cole allegedly paid interns \$10 per day and compensated with lunch for over 20 hours of work a week. The internship posting is still available online: <http://palmerblog.liu.edu/wp-content/uploads/2012/10/Kenneth-Cole-intern.pdf>. For an article discussing the first wave of intern lawsuits in 2013, following *Glatt*, see Susan Adams, *Is the Unpaid Internship Dead?*, FORBES (June 6, 2014, 11:47 AM), <http://www.forbes.com/sites/susanadams/2013/06/14/is-the-unpaid-internship-dead/>. The wrath of interns was widespread in the summer of 2013. Even rap mogul and perennial bad boy Sean “P. Diddy” Combs was sued by his former interns. Courtney Subramanian, *Former Intern Sues Diddy’s Bad Boy Entertainment*, TIME (Aug. 21, 2013), <http://newsfeed.time.com/2013/08/21/former-intern-sues-diddys-bad-boy-entertainment/>. Unpaid internship lawsuits have continued to increase in 2015. For the sake of making this footnote finite, this is just an eclectic sampling of all current litigation.

These positive victories for interns leading up to the DOL's letter to the ABA in September 2013 made the decision that much more unexpected. The President of the ABA, Laurel Bellows, wrote to the DOL to clarify whether law students could perform *pro bono* work at for-profit law firms.<sup>153</sup> Many found the response surprising. Solicitor of Labor Patricia Smith affirmatively stated the permissibility of such programs under the FLSA, subject to certain conditions.<sup>154</sup>

The Solicitor of Labor started the letter by stating, “[g]enerally, the FLSA does not permit individuals to volunteer their services to for-profit businesses such as law firms.”<sup>155</sup> Solicitor Smith then summarized the FLSA trainee exception and explained its narrow applicability.<sup>156</sup> But then, she asserted, “under certain circumstances, law school students who perform unpaid internships with for-profit law firms for the student’s own educational benefit may not be considered employees entitled to wages under the FLSA.”<sup>157</sup> Solicitor Smith noted that the law student must meet the six trainee exception factors and that the program would have to be designed to provide the law student with “professional practice in the furtherance of his or her education,” and must be “academically oriented for the benefit of the student[.]”<sup>158</sup>

As previously noted, however, the letter was not an official regulation, but rather an interpretation by the DOL.<sup>159</sup> Given that the DOL itself brought cases against for-profit companies between 2010–2012,<sup>160</sup> its interpretation allowing for-profit firms to employ interns

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<sup>153</sup> See DOL Letter to the ABA, *supra* note 23.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* The DOL further explains what constitutes a program as academically oriented and thus exempt from paying interns wages:

Where law firm internships involve law students participating in or observing substantive legal work, such as drafting or reviewing documents or attending client meetings or hearings, the experience should be consistent with educational experience the intern would receive in a law school clinical program. Such internships also offer significant benefit to law students because legal representation and licensing requirements necessitate that unlicensed law students receive close and constant supervision from the firm’s licensed attorneys. Such supervision both provides an educational benefit to the law student, and reduces the time that firm attorneys may spend on other work, potentially impeding the firm’s operations.

DOL Letter to the ABA, *supra* note 23.

<sup>159</sup> *Id.* (“This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.”).

<sup>160</sup> Perlin, *supra* note 8.

seems inconsistent, even if it is for *pro bono* work. There are two central flaws with the DOL's interpretation and opinion letter: (1) the letter states that law firms receive no immediate advantage (one of the six trainee exception factors), only possible intangible benefits—but that is questionable; and (2) the exception encourages practicing attorneys and law firms to shift the burden to perform *pro bono* work onto inexperienced law students.

### 1. "No Immediate Advantage"

One of the six factors is ensuring that an employer receives "no immediate advantage" from the student internship.<sup>161</sup> Accordingly, the DOL addressed the issue in its letter to the ABA and stated its belief that having a student perform *pro bono* work at a for-profit firm need not provide an immediate advantage.<sup>162</sup> The DOL proposed:

[W]here a law student works only on *pro bono* matters that do not involve potential fee-generating activities, and does not participate in a law firm's billable work or free up staff resources for billable work that would otherwise be utilized for *pro bono* work, the firm will not derive any immediate advantage from the student's activities, although it may derive intangible, long-term benefits such as general reputational benefits associated with *pro bono* activities.<sup>163</sup>

Contrary to this view, the benefit a law firm receives is not intangible. In fact, empirical evidence suggests a direct correlation between profitability and *pro bono* work at law firms.<sup>164</sup> One study indicates that vigorous *pro bono* work increases (large) law firms' overall revenue by recruiting quality associates and laterals, building the reputation of the firm, retaining productive partners, training and developing associates' skills, improving morale, and improving client

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<sup>161</sup> DOL Letter to the ABA, *supra* note 23.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See ROBERT A. KATZMANN, *THE LAW FIRM AND THE PUBLIC GOOD* (1995); Esther F. Lardner, *Making The Business Case For Pro Bono* (2000), available at [http://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi\\_businesscase.pdf](http://www2.nycbar.org/mp3/DoingWellByDoingGood/pbi_businesscase.pdf). ("[I]t is essential that *pro bono* supporters, without abandoning the moral and ethical principles at the heart of *pro bono* service, can confidently identify those elements of *pro bono* practice that, when appropriately structured and integrated into the fabric of the firm, result in positive benefits for the law firm and its attorneys, as well as for the clients and communities served. These benefits support a hard-headed business rationale for *pro bono* work and for institutional law firm support for that work. While some of the benefits are relatively easy to quantify, others are not.") (emphasis added).

*Id.*

relationships.<sup>165</sup> Law firms have evolved into more business-like enterprises, and like a business, firms are constantly seeking acquisition and retention of the best clients.<sup>166</sup> An institutionalized *pro bono* program provides both a profitable marketing tool to clients and a training scheme for associates.<sup>167</sup> While the DOL recognized the potential for reputational benefits, and stated its permissibility, these advantages go beyond goodwill—they are financial gains.

In the competitive climate for legal clients, *pro bono* work is a way for large firms to differentiate themselves from their peer competition by using it as a marketing tool to clients.<sup>168</sup> Although the vast majority of firms provide some sort of *pro bono* service, the more resources that are spent and the more extensive the institutionalized program is, the greater the benefit to the firm.<sup>169</sup> Former managing partner at Holland & Knight, Bill McBride, proclaimed that, “every dollar his firm spends on *pro bono* generates ten times its value in good publicity and heightened visibility for the firm.”<sup>170</sup> Although it is arguable that that this sort of human capital is “intangible,” as DOL Solicitor Patricia Smith characterized it, it can only be partly intangible to the extent of reputational benefits. Because there are measurable financial gains, *pro bono* work provides an immediate benefit. There are certain public relations benefits that are not readily known or quantified; but, when partners at major national firms are stating the positive net benefits of their firms’ *pro bono* programs, that is an actualized advantage.<sup>171</sup> One need not look any further than the firm’s own assertion that *pro bono*

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<sup>165</sup> Lardnent, *supra* note 164. The study was conducted in 1995 by Law Professors Marc Galanter and Thomas Palay who used data on firm finances and *pro bono* scores of the United States’ 100 largest law firms between 1990 and 1993. Because the study is limited to 100 law firms, it is narrow in its applicability; it is, however, the best study on point between the *pro bono* and business revenue connection. *Id.*

<sup>166</sup> Katzman, *supra* note 164, at 30 (“The new aggressiveness of in-house counsel, the breakdown of retainer relationships, and the shift to discrete transactions has made conditions more competitive. Law practice has become more openly commercial and profit-oriented—more like a business.”) *Id.*

<sup>167</sup> *Id.* at 33.

<sup>168</sup> Lardnent, *supra* note 164, at 10.

<sup>169</sup> Katzman, *supra* note 164, at 47.

<sup>170</sup> Lardnent, *supra* note 164, at 10.

<sup>171</sup> See DOL Letter to the ABA, *supra* note 23 (arguing that the *pro bono* advantages are intangible); Lardnent, *supra* note 164, at 11 (“Hogan & Hartson, similarly, received a great deal of play in the media concerning its representation of African-American plaintiffs alleging that Denny’s restaurants had discriminated against them. In both instances, the firms undertook these time-consuming, controversial cases because it was the right thing to do. However, their creative, successful lawyering became front-page story.”).

work generates profit to find an “immediate advantage.”<sup>172</sup> After all, law firms are businesses.

Even if the benefits to the firm are to some degree intangible, or more reputational than financial, they are still benefits, and the second DOL trainee exception element requires the internship experience to be for the benefit of the intern.<sup>173</sup> It may be unreasonable to expect the firm to receive no benefit, but the benefit should be incidental, or else it does not satisfy a plain reading of the element.

## 2. Encouraging a Shift in Performance of *Pro Bono* Work

There are valid public policy reasons to encourage private law firms to perform *pro bono* work. By providing private legal services to the public, lawyers are filling a gap of great need, performing community service, and improving the reputation of the legal profession.<sup>174</sup> As Justice O’Connor remarked, “there has probably never been a wider gulf between the need for legal services and the availability of legal services.”<sup>175</sup> A fundamental component of the legal profession is justice and, more importantly, providing access to justice.<sup>176</sup> It is not surprising, then, that so many firms proudly encourage their lawyers to perform *pro bono* service as a means of developing the lawyers’ professional character. Furthermore, it improves the overall morale of the law firm and provides a community service benefit.<sup>177</sup> It is surprising, however, that the DOL would want to shift the costs of this *pro bono* scheme onto law students.

Of course, allowing law students to perform *pro bono* work at private firms does not necessarily mean that any lawyers would abate their *pro bono* service, but it raises that risk while providing an incentive to bolster the *pro bono* program through free labor. The benefits of *pro bono* work are well-established, and if law firms can gain and amplify such benefits by bringing on willing students to work for free (and without legal consequence), there is a real incentive to do so. Then, there is significant potential to conflate *pro bono* student intern

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<sup>172</sup> Lardner, *supra* note 164 and accompanying text.

<sup>173</sup> Fact Sheet #71, *supra* note 8.

<sup>174</sup> Katzman, *supra* note 164, at 1–14.

<sup>175</sup> *Id.* at 2. This remark was made in 1991, but it is still applicable. See, e.g., *Equal Justice Under the Law*, SANTA CLARA UNIV., <http://www.scu.edu/ethics/publications/submitted/rhode/equal-justice.html> (last visited Mar. 30, 2015) (“An estimated four-fifths of the legal needs of the poor, and the needs of two to three fifths of middle-income individuals, remain unmet.”).

<sup>176</sup> Katzman, *supra* note 164, at 5–6.

<sup>177</sup> *Id.*

assignments with for-profit assignments. A firm could ask a student to do research for a paying client, and unbeknownst to the student, disguise it as *pro bono* work. Or the student's work—mainly research and writing—on *pro bono* cases could be duplicative of work needed for paying clients. Thus, there are numerous opportunities for students to knowingly or unknowingly work on matters that financially benefit the firm and go beyond permissible *pro bono* assignments.

*B. Reconciling the Pro Bono Exception and the FLSA*

If law students want to perform *pro bono* work and provide a much-needed service to the public and community, then why would any agency or person object, even if it does provide a simultaneous benefit to the firm? The answer is that the *pro bono* exception is inconsistent with the FLSA and trainee exception; it makes it easier for law firms to violate the law. Firms can use unpaid interns for their own reputational advantage and to perform non-*pro bono* work. Under the six-factor DOL test, it would be difficult for a private law firm to employ unpaid interns to provide *pro bono* work, supervised by the firm, and satisfy the “no immediate advantage” and “for the benefit of the intern” requirements. It would also perpetuate the exploitation and lack of protection for unpaid intern students.

As the DOL stated itself, there is no other *pro bono* exception for any other profession or job.<sup>178</sup> One may wonder then, what is so unique about a law firm that the DOL would provide such an exception? Perhaps the DOL did not fully consider the implications of creating a *pro bono* exception that would ultimately benefit the law firm financially. Or perhaps the DOL is too idealistic. Even if the DOL is not concerned about (and willing to accept) the potential benefits unpaid student interns could provide through *pro bono* work, there is a problem of which law firms will take advantage of this exception and how they will structure such a program.

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<sup>178</sup> Letter from DOL to ABA, *supra* note 23.

*C. More Resources, Less Interest*

National Biglaw firms<sup>179</sup> have neither incentive nor desire to hire unpaid interns to perform *pro bono* work because of the potential costs and risks.<sup>180</sup> That is not to say they have little interest in *pro bono* work; on the contrary, top law firms have active *pro bono* programs to which they dedicate copious amounts of resources.<sup>181</sup> *Pro bono* commitment is beneficial to both the attorney and the client. And law firms frankly admit that *pro bono* work provides a multitude of financial and reputational benefits.<sup>182</sup> But using law students to perform *pro bono* work is costly and time-consuming. An attorney at a top, national law firm regards the training necessary to assist summer associates with *pro bono* cases as a big strain on an organization.<sup>183</sup> Of course, summer associates working at Biglaw firms are likely to get offers of permanent employment, and to that end, firms invest training, time, and money in the students. It is logical, then, that firms accordingly provide training in *pro bono* matters, despite its costs, because firms have a long-term interest in the professional development of their summer associates.

The interest to invest in unpaid interns is far more questionable. When asked directly about the possibility of having unpaid interns (who are not summer associates) perform *pro bono* work, the responses from Biglaw firms were consistent. They ranged from, “we have not considered this issue” to a very succinct, “we do not use unpaid

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<sup>179</sup> “BigLaw” is used throughout this section to describe the nation’s largest and most prestigious law firms, though prestige and size are not mutually inclusive. At minimum, Biglaw refers to the Top 100 ranked firms. See generally *The Best Law Firms*, VAULT, <http://www.vault.com/company-rankings/law/vault-law-100/rankings> (last visited Feb. 22, 2015); *The NLJ 350: Our Annual Survey of the Nation’s Largest Law Firms*, NAT’L L. J. (June 9, 2014), <http://www.nationallawjournal.com/id=1202658249779/THE-NLJ-350>.

<sup>180</sup> This section will explore the potential risks, incentives, and costs associated with Biglaw firms taking advantage of the *pro bono* exception. Much of the argument is based on the traditional business model of Biglaw firms and from anecdotal evidence. The author reached out to approximately thirty top-ranked Vault 100 firms asking for opinions and insight. Most responded, but very few offered any comments. The responses, however, supported the proposition that this tier of firms has virtually no interest in hiring law students as unpaid interns.

<sup>181</sup> See *Ranking The Firms’ Pro Bono Work*, THE AM. LAWYER (July 1, 2013, 7:02 PM), <http://www.americanlawyer.com/id=1202608682486> [hereinafter “Am Law Rankings”].

<sup>182</sup> Lardner, *supra* note 170 and accompanying text.

<sup>183</sup> Telephone Interview with Attorney, National Law Firm with over 1,000 attorneys in New York, New York (Jan. 22, 2014) [hereinafter “Attorney Interview”]. The attorney and law firm wish to remain anonymous. The author conducted a phone interview with the attorney.

interns.”<sup>184</sup> Given the negative attention to unpaid internships, it is not surprising that many of the firms declined to comment extensively, but still noted they had no interest in hiring unpaid interns.

In fact, the same attorney who explained the strain of assisting law students with *pro bono* work stated unequivocally that the firm had no desire to take advantage of the DOL’s exception.<sup>185</sup> The attorney offered several, thoughtful reasons for this response. First is the cost: time costs money, and it is costly for an experienced attorney to supervise and aid a law student in his *pro bono* project. And because the particular firm takes its *pro bono* work seriously, attorneys work on the projects along with summer associates at all times.<sup>186</sup> It would seem to be truly for the benefit of the law student to participate in a *pro bono* case at a top firm and not vice versa, because the law student is gaining valuable career development from experienced attorneys.

The same source also raised another interesting aspect beyond time and financial costs: The American Lawyer’s annual *pro bono* rankings.<sup>187</sup> The publication ranks the nation’s 200 highest-grossing firms according to their *pro bono* score.<sup>188</sup> The methodology takes into account the average number of *pro bono* hours performed per lawyer.<sup>189</sup> It does not include, however, any *pro bono* work completed by paralegals or summer associates.<sup>190</sup> Presumably, any *pro bono* work performed by unpaid law students would not be counted for the American Lawyer rankings either.<sup>191</sup>

In short, if Biglaw firms hire unpaid interns to exclusively perform *pro bono* work, it would cost money and resources, not contribute to their *pro bono* rankings, and pose a legal risk.<sup>192</sup> It is difficult to conceive why Biglaw firms would act pursuant to the *pro bono* exception, with the qualification that the *pro bono* exception could serve its purpose in one

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<sup>184</sup> These responses are quotations from e-mail correspondence with the aforementioned law firms. The author does not have permission to identify the attorney or firm and, accordingly, they will remain anonymous.

<sup>185</sup> Attorney Interview, *supra* note 183.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Am Law Rankings, *supra* note 181.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See *supra* notes 172–173 and accompanying text. In the conversation with the attorney previously mentioned, he expressed his firm’s desire to stay ranked in the American Lawyer *pro bono* rankings and acknowledged that unpaid interns would not help to bolster its ratings.

<sup>192</sup> The possibility of being sued under the FLSA is the potential legal risk, especially given the increase in lawsuits and negative attention to unpaid interns.

situation. When law students complete their summer associate work and return to school, they occasionally have outstanding *pro bono* projects that they wish to continue working on.<sup>193</sup> The survey suggests that firms, nonetheless, do not permit students to continue working on the project other than to observe subsequent judicial proceedings.<sup>194</sup> The problem is that the law students are no longer employees and thus are not being compensated. The DOL *pro bono* exception can potentially solve this problem, but there is an unresolved question.

Since Biglaw firms generally offer permanent (though deferred) employment to their summer associates, those students *are necessarily* guaranteed employment—which violates one of the DOL six trainee factors.<sup>195</sup> Thus, the *pro bono* exception requires further clarification for the situation in which law firms are most likely to utilize it. Until the DOL clarifies this question, law firms will hesitate to allow past summer associates (dually future associates) to continue to work on *pro bono* assignments when such action would clearly violate one of the DOL six trainee factors.<sup>196</sup>

Additional uncertainties regarding the various interpretations of the DOL's six factors further exacerbate the risk;<sup>197</sup> one might think it probable that there would be no FLSA violation for allowing summer associates to continue *pro bono* work, but not be confident in that prediction. That is because, if the “totality of the circumstances” test applies, a reasonable court could conclude that, despite the guarantee of employment, the students are legal interns.<sup>198</sup> Similarly, under the “primary beneficiary” test, there are reasons to suggest that the continuation of *pro bono* work is for the primary benefit of the students.<sup>199</sup> Considering the costs involved with allowing students to work on *pro bono* issues and the fact that the firm will perform the project regardless of the students' participation, it is probable that courts will conclude that the unpaid work is for the benefit of the

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<sup>193</sup> Attorney Interview, *supra* note 183.

<sup>194</sup> *Id.*

<sup>195</sup> Jennifer Smith, *The Coveted Summer Job*, WALL ST. J. (Sept. 9, 2012, 7:49 PM), <http://online.wsj.com/news/articles/SB10000872396390443779404577641611988518878> (“Large law firms have long followed an unusual custom to replenish their ranks: recruit junior lawyers two years before their hire date. So firms interview second-year law students now for summer jobs starting in May or June 2013. Students who do well are offered permanent jobs after they graduate . . . .”); Fact Sheet #71, *supra* note 8.

<sup>196</sup> Attorney Interview, *supra* note 183.

<sup>197</sup> See *supra* Part II.

<sup>198</sup> See *supra* notes 51–61 and accompanying text for “totality of circumstances” test.

<sup>199</sup> See *supra* notes 43–50 and accompanying text for “primary beneficiary” test.

students. But given the backlash against unpaid internships, the risk of negative attention may trump legal probability.

If Biglaw firms decline to use the *pro bono* exception, then perhaps smaller firms will not be willing to do so either. But if smaller firms choose to use interns under the *pro bono* exception, the stance of Biglaw suggests skepticism. Perhaps firms will be inclined to have students perform *pro bono* work out of pure altruism, motivated to benefit the client and the student, but that is not likely. Even small firms would incur costs to train *pro bono* students, and because the students in smaller firms are less likely to be offered permanent employment, the inclination to invest in students' development seems doubtful. Conversely, the potential to deceive students and abuse the exception appears likely.

This may turn on how feasible it is to distinguish students' *pro bono* work at law firms from non-*pro bono* work. There can be overlapping legal questions for a *pro bono* project and a paid client's project; consequently a student's related research would be providing a benefit to the firm. Moreover, a student may not be aware of whether her assignments are actually for paid or unpaid clients. When students work at a non-profit, there is no risk of cheating; it is clear that they are performing *pro bono* work and are unpaid. But if students are working at private law firms, the lines are blurred. One of the initial obstacles for the unpaid interns' rights movement was having students recognize and execute their rights. The negative attention paid to unpaid internships empowered students to take action. The *pro bono* exception is detrimental because it once again jeopardizes students' rights by allowing a working situation where employers have a means of exploiting law students.

## V. CONCLUSION

If the DOL does stand by its decision to allow a *pro bono* exception, there are several pressing questions: What level of deference will this opinion letter be given? What is the proper application of the six-factor test? Will summer associates be allowed to continue working on *pro bono* projects after their summer has ended, but before their permanent employment begins? Ultimately, will a court uphold this exception as a proper interpretation of the FLSA?

*Pro bono* service is an integral, vital, and noble aspect of the legal profession that should be encouraged at every level of lawyers' careers. Law students should certainly perform as much *pro bono* work as possible as a means of service and learning. But there is no shortage

2015]

COMMENT

645

of *pro bono* opportunities for law students. Government agencies, non-profits, and local clinics have an enormous need for volunteers. While it is important for lawyers to perform *pro bono* work at their private law firms, it is problematic for law students to do so because of the lack of protection and potential for exploitation. Furthermore, it is difficult to discern what part of the student's work is for the benefit of herself, or for the client, or for the law firm.

The potential exploitation of students likely outweighs the potential benefits. There is an abundance of *pro bono* work for law students at organizations that are not private law firms. Biglaw firms are uninterested in taking advantage of this exception and they have the most resources to make a meaningful difference in student training and service to needy clients. Small law firms may or may not be interested in employing unpaid interns, but they also have the potential to exploit students. In addition, it is questionable that the *pro bono* exception will motivate students, who would not otherwise perform *pro bono* work, to suddenly participate. And if there is a surge in interest, perhaps the enthusiasm stems from a student's aspiration to obtain potential employment, rather than his selfless passion to help. Suddenly this exception becomes an avenue for employers to use students for free work, or a trial period. It is not difficult to imagine a scenario where a firm and a law student have a silent understanding that a *pro bono* internship might eventually lead to a paid position. Of course, the six factors require that the student not necessarily be entitled to a job, but that does not preclude the possibility of a job. The DOL's *pro bono* exception is shortsighted; it does not take into account who will be most likely to utilize it. Despite its presumably benevolent intention, the exception could have unfortunate consequences for law students and for the interns' rights movement.