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No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical

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No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical

By ERIC M. FINK*

Introduction

A. Unpaid Internships: Context and Controversy

UNPAID INTERNSHIPS, once a relatively marginal practice, have become a widespread and substantial feature of the contemporary economy.¹ The proliferation of the “intern economy”² and some high-profile lawsuits, in which putative interns contend that they should have been paid as employees,³ have brought the phenomenon under increased scrutiny and spurred intense debate over its pros and cons.⁴

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1. See ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY*, at xvii (2011); Roger D. Hodge, *Less than Zero: The Value of Intern Labor in an Age of Economic Inequality*, BOOKFORUM, Summer 2011, at 16, available at http://www.bookforum.com/inprint/018_02/7802; Jonny Diamond, *Internment: Inside the Black Market Intern Economy*, L MAG. (May 11, 2011), <http://www.themagazine.com/gyrobase/internment-inside-the-black-market-intern-economy/Content?oid=2085983&showFullText=true>; Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, N.Y. TIMES, May 6, 2012, at A1 [hereinafter Greenhouse, *Grads Flock to Unpaid Internships*].

2. See, e.g., David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 224 (2002) (arguing “the law is fueling some of the worst aspects of the Intern Economy”); Diamond, *supra* note 1.

3. See *infra* note 91 and text accompanying notes 92–105.

4. See PERLIN, *supra* note 1; Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 2, 2010, at B1; 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/>; Katy Waldman, *Get Your Own Damn Coffee!*, SLATE (Feb. 13, 2012), http://www.slate.com/articles/business/moneybox/2012/02/intern_xuedan_wang_sues_harper_s_bazaar_why_don_t_more_unpaid_interns_protest_.html; *Room for Debate: Do Unpaid Internships Exploit College Students?*, N.Y. TIMES (Feb. 4, 2012), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/>; Steven Greenhouse, *The Uses and Misuses of Unpaid Internships*, N.Y. TIMES ECONOMIX BLOG (May 7, 2012), <http://economix.blogs.nytimes.com/2012/05/07/the-uses-and-misuses-of-unpaid-internships/> [hereinafter Greenhouse, *Misuses of Unpaid Internships*]; Greenhouse, *Grads Flock to Unpaid Internships*, *supra* note 1; Hodge, *supra* note 1.

Proponents defend internships as a valid and viable option, providing mutual benefits for interns and employers. In this view, internships enable students and entry-level workers to gain practical experience, develop skills, and make connections that may enhance their future job prospects.⁵ For employers, internships offer an opportunity to try out potential hires without incurring the expenses and legal obligations associated with formal employment.⁶

Opponents criticize unpaid internships as exploiting those who work without pay, exacerbating a bleak labor market, and excluding less-privileged individuals from occupational opportunities, while offering little in the way of meaningful experience or skill development.⁷

Unpaid internships have essentially become the last resort for job seekers, particularly recent college graduates, who face an economy offering fewer paid entry-level jobs.⁸ The trend is driven at least in part by employers' strategic decisions to save on labor costs by substituting unpaid interns for paid employees.⁹ Critics condemn the practice as exploitative:

This week, thousands of young people will work for 40 hours (or more) answering phones, making coffee or doing data entry—without earning a cent. These unpaid interns receive no benefits, no legal protection against harassment or discrimination, and no job security. They generate an enormous amount of value for their employers, and yet they are paid nothing. That is the definition of exploitation.¹⁰

5. See, e.g., David Lat, *Why Mess With a Win-Win Situation?*, N.Y. TIMES (Feb. 4, 2012), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/government-should-allow-most-unpaid-internships>; Camille Olson, *A Valuable Idea, If We Follow the Law*, N.Y. TIMES (Feb. 4, 2012) <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/internships-are-valuable-if-they-follow-the-law>; Steve Cohen, *Minimum Wage for Interns? It Misses the Point*, WALL ST. J., Jan. 9, 2013, at A17.

6. See Greenhouse, *Misuses of Unpaid Internships*, *supra* note 4.

7. See *infra* notes 11–16 and accompanying text.

8. Greenhouse, *Grads Flock to Unpaid Internships*, *supra* note 1; see also Jessica L. Curiale, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1533 (2010) (“The number of unpaid internships is increasing in the United States, and one can surmise that they will become even more common as the economy continues to deteriorate.” (citation omitted)).

9. Hodge, *supra* note 1 (“[I]nternships have simply become, for many businesses, a convenient means of minimizing labor costs.”). Perlin estimates that internships save companies \$600 million to \$1 billion annually. PERLIN, *supra* note 1, at 124; Waldman, *supra* note 4.

10. Raphael Pope-Sussman, *Let's Abolish This Modern-Day Coal Mine*, N.Y. TIMES (Feb. 7, 2012), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/unpaid-internships-should-be-illegal>; see also Diamond, *supra* note 1

Against those who claim that unpaid internships offer valuable practical experience, critics suggest that the promise of gaining valuable experience through unpaid internships is often illusory:

[I]nterns often end up stuffing envelopes, fetching coffee, answering the phone, or collecting the boss's dry cleaning. Not all their work is trivial, of course, and some internships offer useful training, but it is safe to say that 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.¹¹

Consistent with this criticism, a recent study found that while paid internships led to greater job opportunities and higher starting salaries for recent college graduates, unpaid internships yielded no such benefits.¹² Indeed, students who performed unpaid internships fared less well than those who performed no internships at all.¹³

Critics further contend that in a society marked by extreme and growing socio-economic inequality,¹⁴ unpaid internships have the effect of providing further advantage for the privileged and restricting mobility for the rest. "Lucrative and influential professions—politics, media and entertainment, to name a few—now virtually require a period of unpaid work, effectively barring young people from less privileged backgrounds."¹⁵ As a result, critics argue, "[u]npaid internships function as a class filter, ensuring that the children of the affluent and

(quoting Ross Perlin: "[w]hen you reach the point in an industry where interns are displacing regular workers, and where working unpaid has become a crucial prerequisite for getting any kind of entry-level job, it's definitely a sign that things are out of control").

11. Hodge, *supra* note 1; see also Pope-Sussman, *supra* note 10 ("[I]nternships often involve mindless or menial work.").

12. NAT'L ASS'N OF COLLS. & EMP'RS, *THE CLASS OF 2011 STUDENT SURVEY REPORT* 38–42 (2011).

13. *Id.* at 41–42.

14. See Wojciech Kopczuk, Emmanuel Saez & Jae Song, *Earnings Inequality and Mobility in the United States: Evidence from Social Security Data Since 1937*, 125 Q.J. ECON. 91, 104–09 (2010); Emmanuel Saez, *Top Incomes in the United States and Canada Over the Twentieth Century*, 3 J. EUR. ECON. ASS'N 402, 405–06 (2005); see generally Annie Lowrey, *For Two Economists, the Buffett Rule Is Just a Start*, N.Y. TIMES, Apr. 16, 2012, at A1 (discussing work by Emmanuel Saez on income inequality in the U.S.); *Forum: What to Do About Inequality*, BOS. REV. (Mar./Apr. 2012), http://www.bostonreview.net/BR37.2/ndf_inequality.php; Tami Luhby, *Global Income Inequality: Where the U.S. Ranks*, CNNMONEY (Nov. 8, 2011), http://money.cnn.com/2011/11/08/news/economy/global_income_inequality/index.htm.

15. Ross Perlin, *These Are Not Your Father's Internships*, N.Y. TIMES (Feb. 6, 2012), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/todays-internships-are-a-racket-not-an-opportunity>; see also Curiale, *supra* note 8, at 1536 ("While interns who can afford and are willing to work for free gain valuable experience and make lucrative connections, those who do not have the luxury of accepting an unpaid position find it harder and harder to advance in society.").

well connected are overwhelmingly represented in our elite cultural institutions.”¹⁶

The scant empirical evidence on this point is mixed. A recent study examined internship participation among undergraduate students.¹⁷ Contrary to the popular belief that unpaid internships are predominantly filled by those from wealthy families, the study found “a much higher level of participation in unpaid internships” among low-income students.¹⁸ Yet, the study also lends support to critics who maintain that unpaid internships perpetuate social inequality. Among those who participated in unpaid internships, high-income students were more likely to do so at for-profit companies, while low-income students were more likely to do so at non-profits.¹⁹ Moreover, high-income students participating in unpaid internships were most likely to do so at larger companies²⁰ and were concentrated in the retail, finance, and arts and entertainment sectors.²¹

There is an apparent inconsistency between the two criticisms. If it is true that unpaid internships don’t really provide much valuable experience, the exclusion of less privileged individuals from those positions might be less cause for concern from a social justice perspective. The findings of the Intern Bridge study²² suggest a scenario in which the two criticisms are not at odds. There may be a sorting process, through which the most privileged enjoy greater access to the “key résumé boosting’ internships”²³ 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.²⁴ From a social justice perspective, this pattern would be doubly undesirable.

The sociological theory of cultural and social capital provides a useful lens through which to view and understand unpaid intern-

16. Hodge, *supra* note 1.

17. PHIL GARDNER, INTERN BRIDGE, INC., THE DEBATE OVER UNPAID COLLEGE INTERNSHIPS (2011), available at <http://www.ceri.msu.edu/wp-content/uploads/2010/01/Intern-Bridge-Unpaid-College-Internship-Report-FINAL.pdf>.

18. *Id.* at 12.

19. *Id.* at 8.

20. *Id.* at 10.

21. *Id.* at 10–11.

22. Gardner, *supra* note 17.

23. See Curiale, *supra* note 8, at 1536 (quoting Yamada, *supra* note 2, at 217).

24. Given the limited empirical evidence on both the socio-economic barriers to entry and the career advantages of participating in unpaid internships, further research would be useful to test the validity of both criticisms.

ships.²⁵ Access to unpaid internships requires both a stock of cultural and social capital—that is, the educational credentials and social ties that open internship doors—and sufficient economic capital to enable the intern to forgo wages. Experience as an intern promises capital gains: cultural capital, including both the credential of having served as an intern and whatever skills or knowledge the intern gains through the experience; and social capital, through the reinforcement of existing social ties and the acquisition of new ones. These gains may be exchangeable for economic capital (income) over the future course of a career.²⁶

B. Unpaid Internships at Private Law Firms

While hard data are lacking, there is at least a widespread perception that the proliferation of unpaid internships has touched the legal profession.²⁷ The focus of this article is unpaid internships for law stu-

25. See Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241–58 (John G. Richardson ed., 1986). Bourdieu offers his sociological theory of “cultural capital” and “social capital” as a critical alternative to standard economic theories of “human capital.” Compare *id.*, with GARY BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION 16–17 (2d ed. 1994). In Bourdieu’s formulation, cultural capital refers to an individual’s disposition toward cultural goods, institutionalized in the form of academic qualifications. Bourdieu, *supra* note 25, at 248. Social capital refers to the set of social network relationships within which an individual is embedded. *Id.* at 248–49. In simple terms, cultural capital consists of “what you know,” while social capital consists of “who you know.” Both cultural and social capital may be acquired through expenditures of, and may be exchanged or traded upon to acquire, economic capital (i.e., money). *Id.* at 252–53.

26. However, as previously noted, further research would be useful to assess the social and cultural capital dynamics and long-term career effects of internships, both paid and unpaid. See *supra* note 24.

27. See, e.g., Greenhouse, *Grads Flock to Unpaid Internships*, *supra* note 1 (observing that “unpaid postcollege internships . . . have recently spread to fashion houses, book and magazine publishers, marketing companies, public relations firms, art galleries, talent agencies—even to some law firms”); *Unpaid Internship at a Patent Law Firm?*, STYLEFORUM (Mar. 30, 2011), <http://www.styleforum.net/t/234556/unpaid-internship-at-a-patent-law-firm>; Randall Ryder, *Are Unpaid Interns and Law Clerks Illegal?*, LAWYERIST.COM (Apr. 8, 2010), <http://lawyerist.com/unpaid-interns-and-law-clerks-illegal/>; Maryam K. Ansari, *So, You Want to Hire an Unpaid Intern?*, STRATEGIST: FINDLAW L. FIRM BUS. BLOG (Feb. 4, 2010), <http://blogs.findlaw.com/strategist/2010/02/so-you-want-to-hire-an-intern.html>; Andrew Chow, *Make Sure Your Unpaid Interns, Paralegals are Legal*, STRATEGIST: FINDLAW L. FIRM BUS. BLOG (Jan. 5, 2012, 5:57 AM), <http://blogs.findlaw.com/strategist/2012/01/make-sure-your-unpaid-interns-paralegals-are-legal.html>; *Paid and Unpaid Internships at Law Firms*, COMMONINTERVIEW.COM, http://commoninterview.com/Interview_Advice/paid-and-unpaid-internships-at-law-firms-2/ (last visited Feb. 4, 2013); Elie Mystal, *Firms Now Looking for Unpaid Summer Associates*, ABOVE THE LAW (Aug. 23, 2010, 1:32 PM), <http://abovethelaw.com/2010/08/firms-now-looking-for-unpaid-summer-associates/>; Debra Cassens Weiss, *Fla. Law Schools See Flood of Law Firm Requests for Unpaid Summer Associates*, ABA J. (Aug. 23, 2010, 6:06 AM), http://www.abajournal.com/news/article/fla._law_schools_see_flood_of_

dents at private law firms,²⁸ particularly during the summers following the first and second years of law school.²⁹ The practice of law firms offering unpaid internships in lieu of paid employment should concern law students and law school graduates who face an increasingly tight market for entry-level legal jobs.³⁰

This Article argues that such unpaid internships are impermissible under the Fair Labor Standards Act (“FLSA”).³¹ It further argues

law_firm_requests_for_unpaid_summer_associate/; Staci Zaretsky, *We Don't Care About Your Credentials, But That's Probably Because We Can't Pay You*, ABOVE THE LAW (Mar. 20, 2012, 11:21 AM), <http://abovethelaw.com/2012/03/we-dont-care-about-your-credentials-but-thats-probably-because-we-cant-pay-you/#more-144571>.

28. Law students also work as unpaid interns at non-profit organizations and government agencies. Federal law expressly permits the use of unpaid volunteer workers by state and local government agencies. *See* 29 U.S.C. § 203(e)(4)(A) (2006) (excluding public agency volunteers from statutory definition of employee); 29 C.F.R. § 553.104 (2011) (clarifying Fair Labor Standards Act (“FLSA”) exemption for “[p]rivate individuals who volunteer services to public agencies”). The Department of Labor (“DOL”) has also interpreted the FLSA to permit part-time volunteers at non-profit organizations. *See* U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK ch. 10, pt. 10b03(c) (1993) (discussing exclusion from FLSA employee status for volunteers at non-profit organizations); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA 2002-9 (Oct. 7, 2002), *available at* 2002 WL 32406599 (same).

29. Throughout the article, I will use the term “law clerk” to refer to a law student working at a law firm, whether over the summer or during the academic year. This article does not address unpaid work as part of a bona fide law school externship program for academic credit. *See* Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internships*, 45 J. LEGAL EDUC. 1, 3 (1995) (distinguishing “education-directed externship programs” from “the unstructured world of summer and part-time clerkships”). The principle reason for drawing that distinction here is that, unlike part-time and summer law firm clerkships, law school externship programs are governed by ABA Standard 305, which imposes educational requirements as a condition for awarding credit to students participating in a “field placement program.” ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS standard 305 (2012) [hereinafter ABA STDS.]; *see also* James H. Backman, *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, 17 CLINICAL L. REV. 21, 51 (2010) (“The externship is fundamentally different from a summer job or an employment arrangement. It adds a faculty member to set the criteria to be met in order for the student to earn academic credit.”). That distinction has significant implications for the applicability of the FLSA. *See infra* notes 36–39 and accompanying text.

30. *See generally* Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J. (June 25, 2012), <http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html>; *Law School Grads Face Worst Job Market Yet—Less Than Half Find Jobs in Private Practice*, NAT’L ASS’N FOR L. PLACEMENT (June 7, 2012), <http://www.nalp.org/2011selectedfindings> release; Elie Mystal, *ABA Employment Stats Are Just as Dire as We Expected*, ABOVE THE LAW (June 18, 2012), <http://abovethelaw.com/2012/06/aba-employment-stats-are-just-as-dire-as-we-expected/>; *Class of 2011 Legal Employment and Underemployment Numbers Are In, And Far Worse Than Expected*, L. SCH. TRANSPARENCY (June 15, 2012), <http://www.lawschooltransparency.com/2012/06/class-of-2011-legal-employment-and-underemployment-numbers-are-in-and-far-worse-than-expected/>.

31. 29 U.S.C. §§ 201–219; *see also infra* Part I.

that lawyers who illegally hire unpaid interns should be subject to discipline under the ethics rules of the legal profession.³²

While law students collectively have an interest in ending this exploitative practice, they have a disincentive against taking action themselves, lest they hurt their prospects in the already unfavorable postgraduate job market. To address this collective action problem, this Article urges an institutional response. First, the United States Department of Labor (“DOL”) should exercise its authority under the FLSA to bring enforcement actions against employers whose use of unpaid interns violates the law. Second, state bar authorities should take disciplinary action against lawyers and firms whose practices regarding unpaid law student interns violate legal ethics rules. The Article concludes by suggesting that the American Bar Association (“ABA”) also join in the effort to raise awareness about the problems with unpaid internships and to discourage the practice within the legal profession.

I. Unpaid Law Firm Internships Are Illegal

The first problem with unpaid internships for law students at private law firms is that the failure to pay interns for their work is generally illegal. Where an intern performs work that is part of a firm’s ordinary business such that the firm benefits from the intern’s labor, the intern should properly be regarded as an employee for whom payment of at least the statutory minimum wage is required.³³ Even assuming that internships provide law students with the opportunity to enhance their social and cultural capital by honing their skills and developing contacts,³⁴ these benefits do not relieve firms of the legal obligation to pay for an intern’s labor.

While federal law gives employees a private right of action against employers who fail to pay wages as legally required,³⁵ this private remedy is inadequate to deter violations and protect against exploitation because law students will naturally be reluctant to sue members of the very profession they soon hope to join. For this reason, an institutional response in the form of public enforcement by the DOL is warranted.

32. See *infra* Part II.

33. See *infra* note 38 and accompanying text.

34. See Bourdieu, *supra* note 25 (discussing theories of social and cultural capital).

35. 29 U.S.C. § 216(b).

A. Law Student Interns at Private Law Firms Are Employees Entitled to Wages Under the FLSA

The FLSA³⁶ regulates wages and hours of work for covered employees.³⁷ Under the FLSA, covered employees must receive at least a minimum hourly wage³⁸ with premium pay for overtime hours.³⁹ These requirements do not apply to practicing lawyers who fall under the “professional” exemption from the FLSA’s minimum wage and overtime provisions.⁴⁰ Generally, in order to qualify for this exemption, an employee must satisfy a two-prong “salary basis” and “primary duty” test.⁴¹ Lawyers, however, are categorically exempt without regard to the test.⁴²

Consequently, there is no impediment under the FLSA to a law firm paying an attorney a sub-minimum wage or even no wage at all. Some recent examples have garnered media attention⁴³ and provoked

36. 29 U.S.C. §§ 201–219; *see also* 29 C.F.R. §§ 531, 541 (2012) (containing DOL regulations pertaining to the wage and hour provisions of the FLSA).

37. The FLSA defines “employee” broadly as “any individual employed by an employer.” 29 U.S.C. § 203(e)(1); *see also* *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) (“[T]he definitions [of employee, employer, and employ] are exceedingly broad and generally unhelpful.”). Certain types of work are categorically excluded from statutory coverage. *See* 29 U.S.C. § 203(e)(3)–(5). Furthermore, certain employees are exempt from the statute’s minimum wage and overtime provisions. *See id.* § 213(a).

38. *Id.* § 206(a)(1). The current minimum wage under the FLSA is \$7.25/hour. *Id.*

39. *Id.* § 207(a)(1).

40. *Id.* § 213(a)(1) (exempting “any employee employed in a bona fide executive, administrative, or professional capacity” from minimum wage and overtime requirements); 29 C.F.R. § 541.304(a)(1) (defining “employee employed in a bona fide professional capacity” to include “[a]ny employee who is the holder of a valid license or certificate permitting the practice of law . . . and is actually engaged in the practice thereof”).

41. 29 C.F.R. §§ 541.300 & 541.600(a). The “salary basis” test requires that the employee be paid “on a salary or fee basis at a rate of not less than \$455 per week.” *Id.* § 541.300(a)(1). The “primary duty” test requires that the employee’s work requires “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction” or “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.” *Id.* § 541.300(a)(2).

42. *Id.* § 541.304(a)(1) (applying professional exemption to “[a]ny employee who is the holder of a valid license or certificate permitting the practice of law . . . and is actually engaged in the practice thereof”); *id.* § 541.304(d) (providing that the salary basis and primary duty requirements under the general professional exemption do not apply to lawyers exempt under § 541.304(a)(1)).

43. *See, e.g.*, Staci Zaretsky, *Law School Writes in Defense of Jobs With Salaries Below Minimum Wage*, ABOVE THE LAW (June 1, 2012), <http://abovethelaw.com/2012/06/law-school-writes-in-defense-of-jobs-with-salaries-below-minimum-wage/> (reporting on job advertised by Gilbert & O’Brian firm, discussed *infra* text accompanying notes 45–46).

indignation⁴⁴ but appear to be lawful.

A Boston firm, Gilbert & O'Bryan, advertised a first-year associate position at an annual salary of \$10,000.⁴⁵ One report noted that this salary is less than what a full-time employee would earn at minimum wage.⁴⁶ Indeed, taking a hypothetical employee working fifty hours a week for fifty weeks in a year (a modest assumption for a law firm associate), the federal minimum wage and overtime premium would yield annual pay of nearly \$20,000. Thus, the Gilbert & O'Bryan associate will earn about half as much as their non-lawyer minimum-wage counterpart (whose job most likely did not require three years of post-graduate study entailing \$100,000 or more in student loan debt).

In an even more extreme example, an ad by a "Boutique immigration and criminal defense law firm" in New York sought "Admitted Attorneys, Foreign Attorney, Law Graduates, Paralegals" for a "3-month regimented internship program."⁴⁷ The advertisement did not indicate any salary, and the characterization of the position as an "internship" suggested that it was unpaid. For a licensed attorney, such an arrangement would be permissible under the FLSA exemption for legal professionals.⁴⁸

Unlike attorneys, law students are not categorically exempt from the FLSA under the DOL's regulations.⁴⁹ In addition, an unpaid student law clerk would not qualify for the general professional exemp-

44. See *id.* (arguing, in reference to the Gilbert & O'Bryan ad, that, "[i]nstead of posting every single job listing that's submitted, Boston College Law should strive to post employment opportunities that don't demoralize and insult its graduates").

45. Martha Neil, *More than 50 Would-Be Associates Have Now Applied for \$10,000-a-Year Boston Law Firm Job*, ABA J. (June 11, 2012), http://www.abajournal.com/news/article/more_tha_50_have_now_applied_for_10000-a-year_boston_law_firm_associate_job/.

46. Lisa van der Pool, *Legal Job Market Hits New Low: BC Law Lists Job Below Minimum Wage*, BOSTON BUS. J. (May 31, 2012), http://www.bizjournals.com/boston/blog/bottom_line/2012/05/how-tough-is-the-legal-job-market-bc.html?page=2.

47. See Paul Campos, *My Offer Is Nothing*, LAW., GUNS & MONEY (June 19, 2012), <http://www.lawyersgunsmoneyblog.com/2012/06/my-offer-is-nothing> (reproducing New York Craigslist posting ID No. 3065858209 (posted June 8, 2012, 4:59 PM)).

48. See 29 C.F.R. § 541.304(a)(1) (2012) (applying exemption to "[a]ny employee who is the holder of a valid license or certificate permitting the practice of law . . . or any of their branches and is actually engaged in the practice thereof"). The advertisement also indicates that the internship is open to "paralegals" who generally do not fall under the professional exemption. *Id.* § 541.301(e)(7). Likewise, a law graduate who is not yet licensed to practice would be exempt only if both the salary basis and primary duty tests are satisfied, as the special professional exemption for lawyers requires possession of a license. See *id.* § 541.304(a)(1).

49. See *id.* (limiting exemption to those who both "[hold] . . . a valid license or certificate permitting the practice of law" and are "actually engaged in the practice thereof").

tion.⁵⁰ While the work that a summer associate performs likely satisfies the primary duty test,⁵¹ an unpaid intern by definition would not meet the salary basis test.⁵²

Absent an applicable statutory exemption, the remaining possibility for denying law student interns coverage under the FLSA is to exclude them from the statutory definition of “employee” altogether. This is essentially the purpose of classifying certain positions as “internships.” Applying the label “intern” rhetorically asserts a distinction between those so-labeled and true “employees.” The label suggests that the intern is a mere “learner,”⁵³ as opposed to a productive “worker” and implies that the social norms and legal rules governing employment relationships do not apply.⁵⁴ As with a student, an intern’s compensation ostensibly comes in the form of accumulated knowledge and experience, which constitutes a stock of cultural and social capital⁵⁵ that may yield monetary returns in the future when the intern enters the labor market proper.⁵⁶

50. *Id.* § 541.300.

51. *Id.* § 541.300(a)(2); *see also supra* note 41.

52. 29 C.F.R. § 541.300(a)(1); *see also supra* note 41.

53. Etymologically, the word “intern” derives from the French *interne* (literally “internal”), originally meaning “an assistant resident physician or surgeon in a hospital, usually a student or recent graduate, acting in the absence of the attending physician or surgeon.” *Intern Definition*, OXFORD ENGLISH DICTIONARY (2013), <http://www.oed.com/view/Entry/98061?rskey=civNEM&result=1#eid>. By extension, the term came to refer to “individuals in other professions . . . who are receiving practical experience under supervision.” *Id.* (noting that this usage is “Chiefly U.S.”).

Socio-historically, the contemporary idea of an “internship” has its roots in the apprenticeship system of medieval European guilds. *See* J. Isaac Spradlin, *The Evolution of Interns*, FORBES.COM (Apr. 27, 2009), <http://www.forbes.com/2009/04/27/intern-history-apprenticeship-leadership-careers-jobs.html>. The current usage of the term to refer to students or recent graduates gaining on-the-job experience appears to have emerged in the 1960s and become more widespread in the 1970s and 1980s. *Id.*; *see also Intern Definition, supra* note 53.

54. In *Walling v. Portland Terminal Co.*, the Supreme Court distinguished trainee employees entitled to wages under the FLSA from students learning a trade or craft in an educational setting. 330 U.S. 148, 152–53 (1947) (“Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act.”).

55. *See* Bourdieu, *supra* note 25.

56. A similar argument has been asserted against graduate student teaching and research assistants seeking to organize and engage in collective bargaining under the National Labor Relations Act (“NLRA”). *See* N.Y. Univ., 356 N.L.R.B. No. 7, 2010 WL 4386482 (2010) (finding “there are compelling reasons for reconsideration of the decision in *Brown University*” and thus remanding to Regional Director for hearing and decision on representation petition by graduate teaching and research assistants); *Brown Univ.*, 342 N.L.R.B. 483 (2004) (overturning *New York University* and holding graduate teaching and research assistants are not employees under the NLRA because they hold those positions in connec-

However, mere application of the intern label does not alter the legal status and rights of a worker.⁵⁷ Rather, classification under the FLSA turns on the “economic reality” of the relationship between the worker and the hiring party.⁵⁸ Thus, while the federal courts and the Department of Labor have recognized that individuals engaged in on-the-job training might be excluded from the definition of employee under the FLSA, they have done so by focusing on the particular circumstances of the position and not on the worker’s label as a “student,” “trainee,” or “intern.”

The principal case addressing this issue is *Walling v. Portland Terminal Co.*⁵⁹ Reviewing an FLSA wage claim on behalf of railway yard brakemen-trainees, the United States Supreme Court held that the trainees were not statutory employees and thus not covered by the minimum wage requirement. In the weeklong training, the trainee “first learn[ed] the routine activities by observation, and [was] then gradually permitted to do actual work under close scrutiny.”⁶⁰ All applicants were required to complete this training before being hired.⁶¹

The *Walling* Court relied heavily on the assumption that the statutory definitions of “employee” and “employ” must not be construed “to stamp all persons as employees who, without any express or implied compensation agreement, *might work for their own advantage on the premises of another*. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages.”⁶² Rather, the terms employee and employ must be un-

tion with their education program); N.Y. Univ., 332 N.L.R.B. 1205 (2000) (holding graduate students working as teaching and research assistants are employees with organizing and collective bargaining rights under the NLRA).

Universities and other opponents of organizing and bargaining rights for graduate assistants contend that they are not employees performing work in the labor market, but rather students (or “apprentices”) learning their future craft. *See* *Brown Univ.*, 342 N.L.R.B. at 489. Implicit in the argument is the claim that “student” and “employee” are somehow mutually exclusive social and legal categories, that one cannot simultaneously be a “learner” and a “worker.” Particularly as applied to knowledge-based work, like that of academics or lawyers, the claim appears facially preposterous.

57. “[The FLSA], of course, like other statutes, can and should be applied to strike down sham and artifice invented to evade its commands.” *Walling*, 330 U.S. at 154 (Jackson, J., concurring).

58. *See* *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985).

59. 330 U.S. 148 (1947).

60. *Id.* at 149.

61. *Id.* at 148–49 (“An applicant for such jobs is never accepted until he has had this preliminary training.”).

62. *Id.* at 152 (emphasis added) (citing statutory definition of employee as “any individual employed by an employer” and employ as including “to suffer or permit to work”).

derstood in relation to the Act's underlying legislative policy: to regulate the labor market.

The Act's purpose as to wages was to insure that *every person whose employment contemplated compensation* should not be compelled to sell his services for less than the prescribed minimum wage. The definitions of "employ" and of "employee" are broad enough to accomplish this. But, broad as they are, they cannot be interpreted so as to make *a person whose work serves only his own interest* an employee of another person who gives him aid and instruction.⁶³

Significantly, in *Walling*, the Court noted that "[w]ithout doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation."⁶⁴ That is, the mere fact that a worker gains knowledge, skills, or experience on the job does not exclude that worker from employee status. Rather, the *Walling* Court's justification for excluding trainees from FLSA coverage rested on the fact that "the railroads receive[d] no 'immediate advantage' from any work done by the trainees."⁶⁵ The trainees did not supplant paid employees; on the contrary, paid employees directly supervised the trainees as they learned.⁶⁶ Moreover, the work that trainees performed was not directly useful to the employers, whose operations were to some extent "impede[d]" by the training.⁶⁷

On its face, the Court's language in *Walling* might appear to hold that interns are not employees under the FLSA so long as they enter the internship with the understanding that they are to be unpaid (i.e. "without promise or expectation of compensation").⁶⁸ But such a reading misses the crux of the Court's analysis. According to *Walling*, the key to the distinction between "trainees" and "employees" is not whether the workers subjectively contemplate being paid but rather whether the workers are the sole or primary beneficiaries of the experience. It is the lack of substantial benefit to the employer, not the express or implied agreement of the parties, which renders a trainee a "non-employee."⁶⁹ Conversely, where the employer substantially benefits from the work performed, the worker is an employee, entitled to

63. *Id.* (emphasis added).

64. *Id.* at 151.

65. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947).

66. *Id.* at 149–50.

67. *Id.* at 150.

68. *Id.* at 152.

69. *See id.* at 153 ("Accepting the unchallenged findings here that *the railroads receive no 'immediate advantage' from any work done by the trainees*, we hold that they are not employees within the Act's meaning." (emphasis added)).

compensation for her labor regardless of whether she also gains valuable skills and experience.⁷⁰

Relying on *Walling*, the DOL's Wage and Hour Division developed a test for determining when trainees and student-trainees should be excluded from employee status under the FLSA.⁷¹ More recently, the DOL reiterated the test as applied specifically to "Internship Programs."⁷² The test identifies six criteria for distinguishing an internship from employment for FLSA purposes:

1. The internship, 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 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.⁷³

Under the DOL test, "[if] all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern."⁷⁴

70. *See id.*

71. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, ch. 10, pt. 10b11 (1993) [hereinafter FIELD OPERATIONS HANDBOOK]; *see also* Solis v. Laurelbrook Sanitarium & Sch., Inc. 642 F.3d 518, 524 (6th Cir. 2011) (citing FIELD OPERATIONS HANDBOOK, *supra* note 71); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025-26 (10th Cir. 1993) (citing Wage & Hour Man. (BNA) 91:416 (1975)).

72. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (April 2010) [hereinafter FACT SHEET NO. 71]; *see also* Natalie Bacon, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71"*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67 (2011).

73. FACT SHEET NO. 71, *supra* note 72.

74. *Id.* David Yamada has suggested replacing the six-part DOL test with "a single inquiry that asks whether the primary activity of an internship is to perform bona fide work of any kind." Yamada, *supra* note 2, at 235. Yamada's proposed test has the virtue not only of simplicity but also, and more significantly, of focusing the inquiry on the economic exchange of labor for wages, which is at the heart of the employment relation. *See* KEITH TOWNSEND & ADRIAN WILKINSON, RESEARCH HANDBOOK ON THE FUTURE OF WORK AND EMPLOYMENT RELATIONS 34 (2011) (identifying "the cash nexus as the basis of employment"); Madeleine Schwartz, *Opportunity Costs: The True Price of Internships*, DISSENT, Winter 2013, at 41, 45 ("Work is an exchange of time for money.").

In cases involving alleged trainees, federal courts are divided with respect to their acceptance and application of the DOL test. Four approaches have emerged:

1. Wholesale adoption of the DOL test, requiring that all six criteria be met for the trainee exception to apply;⁷⁵
2. Modified adoption of the DOL test, employing a “totality of the circumstances” assessment rather than the “all-or-nothing” approach to the six factors;⁷⁶
3. Rejection of the DOL multi-factor test in favor of an analysis focused solely on whether the principal beneficiary of the arrangement is the trainee-worker or the employer;⁷⁷
4. Application of the “economic realities” test, normally used to distinguish employees from independent contractors under the FLSA,⁷⁸ with the DOL factors treated as relevant but not conclusive indicators of the “economic reality” in the relationship between trainee-worker and employer.⁷⁹

Under any version of the test, student law clerks at private firms will nearly always be deemed employees for FLSA purposes.⁸⁰ Irre-

75. See, e.g., *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir. 1983); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 (5th Cir. 1982).

76. See, e.g., *Reich*, 992 F.2d at 1027; accord *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010) (following “totality of the circumstances” approach in *Reich*).

77. See, e.g., *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989). In *Laurelbrook Sanitarium*, the court stated that the DOL’s “six factors may be helpful in guiding [the principal beneficiary] inquiry” but are not conclusive. 642 F.3d at 525.

78. *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp. 504, 531–35 (S.D.N.Y. 1998).

79. *Id.* at 531–32.

80. Students participating in for-credit law school externship programs are likely to be excluded from FLSA coverage under the DOL test. The ABA’s Standards for Approval of Law Schools, which governs such programs, require that the law school provide “adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy program goals and are sufficiently available to students” and “a clearly articulated method of evaluating each student’s academic performance involving both a faculty member and the field placement supervisor.” ABA STDS., *supra* note 29, standard 305(e)(2)–(3). Because the ABA currently prohibits law schools from granting academic credit to students in paid placements, it is important that law schools structure their externship programs to avoid FLSA violations. See *id.* The requirements of Standard 305(e) ensure that for-credit externships provide meaningful learning opportunities for students—not merely free labor for employers—and satisfy the DOL test.

In contrast, Standard 305 does not apply to placements, whether paid or unpaid, for which students receive no academic credit. Consequently, there is no assurance that students in such placements receive meaningful training, supervision, or assessment. Some lawyers and firms may nonetheless be diligent in training, supervising, and assessing law student interns, whether because they view such mentoring as part of their duty to the legal profession, or because they view it as a sound investment in potential future employees.

spective of differences in formulation and articulation, the crux of the test remains whether the intern's efforts directly benefit the firm. For student law clerks, this is almost inevitably the case. The work they typically perform—conducting legal research; drafting memoranda, pleadings, briefs, discovery requests, and other legal documents; reviewing discovery materials; and similar tasks⁸¹—are core functions of a legal practice. Absent a student law clerk, these tasks would have to be performed by an attorney, paralegal, or other firm employee. In other words, law student interns are simply one means by which law firms fulfill their ordinary workforce needs, at substantially lower cost than hiring other employees.⁸²

A recent *Wall Street Journal* op-ed unwittingly makes this very point while extolling the virtues of unpaid internships and berating former interns who have sued for unpaid wages.⁸³ The author, a media executive who took time out from his thirty-five-year career to attend law school, describes the work he and his college-student son each performed in their respective internships:

[M]uch of what we both did was grunt work: boring, mindless, repetitious. Preparing documents as part of the discovery-turnover to opposing lawyers, I mastered the copy machine. And as a glorified messenger picking up clothing for photo shoots, my son mastered the subway system. Yet *both our jobs were essential to the workings of our offices.*⁸⁴

Given the clear and substantial “immediate advantage” that firms realize from the work of student law clerks, it is of little or no significance that the law clerks may also benefit by way of enhancing their

Many, however, will decline to expend potentially billable time on non-billable training, supervision, and assessment of interns. As law firms, particularly the smaller firms that more typically offer unpaid positions, face increasing economic pressure, the disincentives against forgoing revenue in favor of mentoring grow stronger. See Cynthia Baker & Robert Lancaster, *Under Pressure: Rethinking Externships in a Bleak Economy*, 17 CLINICAL L. REV. 71, 85 (2007) (citing dual effect of economic pressure prompting firms to increase reliance on unpaid law students but decrease time spent supervising those students in educationally-relevant tasks).

81. See Givelber, *supra* note 29, at 27 (identifying the relative frequency of various tasks performed by law students working as interns).

82. See AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 268 (1992) [hereinafter MACCRATE REPORT] (“[Legal] employers use [law] students as cheap labor on assignments that usually do not complement or enhance their studies.”). Givelber challenges the MacCrate Report's contention that law students' part-time and summer work in law offices lacks educational value. See Givelber *supra* note 29, at 9. Even if Givelber is correct in this regard, it remains true that law firms benefit materially from the free work that unpaid interns perform.

83. Cohen, *supra* note 5.

84. *Id.* (emphasis added).

legal practice skills,⁸⁵ becoming socialized to the world of the legal workplace,⁸⁶ or making contacts that might lead to future paid employment.⁸⁷ In that respect, student law clerks are no different from other employees, who routinely develop occupational skills, gain applicable knowledge, and build professional networks on the job. This accrual of cultural and social capital by employees does not excuse employers from the obligation to pay wages.⁸⁸ The FLSA requires payment of wages in cash (or its equivalent)⁸⁹ and does not permit employers to deduct the value of skills, knowledge, or experience that an employee may acquire on the job.⁹⁰

B. The DOL Should Investigate and Take Enforcement Action Against Illegal Unpaid Internships at Law Firms

The FLSA grants a private right of action to any employee denied payment of minimum wages or overtime compensation as required under the statute.⁹¹ Thus, law students or others who perform unpaid internships may sue to recoup the wages to which they are legally entitled. However, this statutory private remedy is inadequate to address the problem of illegal unpaid internships, particularly where the risk of reputational harm within the occupational community law students

85. Givelber, *supra* note 29, at 9–15 (arguing that law students can develop practical lawyering skills through part-time and summer work in law offices).

86. Cohen, *supra* note 5 (“The most valuable purpose is exposure. Interns get to see the real work that real people do, and to see how disparate pieces come together to make an organization function. Internships are about self-discipline, showing up on time, dressing and comporting oneself properly—conforming to the norms of the organization, not merely to the fashion of the classroom. They are about learning how to listen and observe, to be responsive and responsible.”).

87. *Id.* (“[T]hose in charge—who have the power not only to hire but also to recommend graduates to other companies—see who among the interns takes advantage of being on the inside.”).

88. Schwartz, *supra* note 74, at 45 (“Interns must make clear that their time and effort, too, have value and that value is more than the remote idea of a ‘networking opportunity’ or one step further up a mythical career ladder. Work is not, as the internship setting would suggest, an exchange of gifts. Work is an exchange of time for money.”).

89. 29 C.F.R. § 531.27 (2011).

90. *See* 29 U.S.C. § 203(m) (2006); 29 C.F.R. §§ 531.27–531.33. The FLSA permits employers, under certain circumstances, to count “the reasonable cost . . . to the employer of furnishing [an] employee with board, lodging, or other facilities” toward the employee’s wages. 29 U.S.C. § 203(m); *see also* 29 C.F.R. §§ 531.27–531.33. But the Act does not authorize any deduction for the more amorphous in-kind benefits of occupational experience, such as those putatively associated with internships.

91. 29 U.S.C. § 216(b) (granting a private right of action and providing for recovery of damages equal to “the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages” plus recovery of attorney’s fees and costs).

hope to join will likely deter many from asserting their rights in court. An institutional response by the DOL will more effectively protect interns from exploitation and promote compliance with the law.

Some recent suits by former unpaid interns seeking compensation under the FLSA have attracted media attention.⁹²

In *Bickerton*,⁹³ former interns sought unpaid wages for their work on the Charlie Rose television show.⁹⁴ The lead plaintiff alleged that she worked twenty-five hours a week performing research, producing press packets, contacting guests, and cleaning up after the shows.⁹⁵ Rose insisted that “our interns are not employees; they did not perform ‘work’ for the program and none of them ever expected to be paid for their internship.”⁹⁶ The parties recently settled that suit for a reported \$250,000 in back pay plus \$50,000 in attorney fees.⁹⁷

In *Wang*, a former intern at Harper’s Bazaar magazine alleges that she worked between forty and fifty-five hours per week without pay.⁹⁸ Her responsibilities included handling fashion sample deliveries, maintaining records, processing expense reports, and supervising other interns.⁹⁹ Hearst has denied liability and maintains that its internships “offer young people an up-close view of the magazine business.”¹⁰⁰ The case has been conditionally certified as a class action and

92. See *Wang v. Hearst Corp.*, No. 12 CV 793(HB), 2012 WL 2864524, at *3 (S.D.N.Y. July 12, 2012) (granting conditional certification of class and collection action on behalf of unpaid interns at magazines published by Hearst); *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784(WHP), 2012 WL 2108220, at *1 (S.D.N.Y. June 11, 2012) (complaint asserting wage and hour claims under the FLSA and New York state law, on behalf of unpaid interns for Fox Searchlight’s movie *Black Swan*); Class Action Complaint & Demand for Trial by Jury, *Bickerton v. Rose*, No. 650780/2012 (N.Y. Sup. Ct. Mar. 14, 2012) [hereinafter *Bickerton Complaint*]; Waldman, *supra* note 4 (discussing *Wang* and *Glatt*); Sanburn, *supra* note 4 (same); Greenhouse, *Grads Flock to Unpaid Internships*, *supra* note 1 (same).

93. *Bickerton Complaint*, *supra* note 92.

94. Steven Greenhouse, *PBS Show Settles Suit Over Pay For Interns*, N.Y. TIMES, Dec. 21, 2012, at B3.

95. *Id.*

96. *Id.*

97. *Id.*

98. See generally *Wang v. Hearst Corp.*, No. 12 CV 793(HB), 2012 WL 2864524 (S.D.N.Y. July 12, 2012); Steven Greenhouse, *Former Intern Sues Hearst Over Unpaid Work and Hopes to Create a Class Action*, N.Y. TIMES MEDIA DECODER BLOG (Feb. 1, 2012, 2:02 PM), <http://mediadecoder.blogs.nytimes.com/2012/02/01/former-intern-sues-hearst-over-unpaid-work-and-hopes-to-create-a-class-action/?src=tp>.

99. *Id.*

100. Kayleen Schaefer, *The Norma Rae of Fashion Interns*, N.Y. MAG., THE CUT BLOG (Sept. 11, 2012, 10:30 AM), <http://nymag.com/thecut/2012/09/norma-rae-of-fashion-interns.html> (quoting Hearst corporate representative).

remains pending.¹⁰¹

In *Glatt*, two former interns sued to recover unpaid wages for their work on the movie *Black Swan*.¹⁰² The plaintiffs contend that they performed routine tasks like making coffee, cleaning the production office, and various clerical duties.¹⁰³ The case, which the plaintiffs seek to pursue as a class action on behalf of all unpaid interns at Fox Entertainment Group, remains pending.¹⁰⁴

These cases have garnered so much interest in part because such suits are extremely rare.¹⁰⁵ A primary reason for the lack of litigation is the would-be plaintiffs' fear that bringing a lawsuit would only brand them as troublemakers and thus hurt their future job prospects.¹⁰⁶

The same fear effectively deters law students from complaining about, or suing over, illegal unpaid law firm internships. The dismal state of the legal employment market¹⁰⁷ makes this concern particularly acute for law students and gives rise to a classic collective action problem.¹⁰⁸ Law students, collectively, would benefit from the elimination of unpaid internships in favor of paid clerkships, but for indi-

101. *Wang*, No. 12 CV 793(HB), 2012 WL 3642410, at *1–2 (S.D.N.Y. Aug. 24 2012) (denying defendant's motion to reconsider); *see also* Christopher Zara, *Hearst Corp. Seeks Allies in Lawsuit Against Unpaid Interns*, INT'L BUS. TIMES (Dec. 5, 2012), <http://www.ib-times.com/hearst-corp-seeks-allies-lawsuit-against-unpaid-interns-report-922413>.

102. *See generally* *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784(WHP), 2012 WL 2108220 (S.D.N.Y. June 11, 2012); Steven Greenhouse, *Interns, Unpaid by a Studio, File Suit*, N.Y. TIMES, Sept. 29, 2011, at B3.

103. *Id.*

104. *See* Eriq Gardner, *Judge Oks Bigger Lawsuit Over Fox's Intern Programs*, THE HOLLYWOOD REP., HOLLYWOOD, ESQ. (Oct. 10, 2012), <http://www.hollywoodreporter.com/thr-esq/bigger-lawsuit-foxs-intern-programs-377901>.

105. *See* Waldman, *supra* note 4 (noting that "there are surprisingly few complaints by interns"); Greenhouse, *Grads Flock to Unpaid Internships*, *supra* note 1 (noting that the *Glatt* case represents "one of the few interns with the courage to sue for wages over the work he did").

106. *See* Waldman, *supra* note 4 (quoting Adam Klein, plaintiff's attorney in *Wang*, stating "[u]npaid interns are usually too scared to speak out . . . because they are frightened it will hurt their chances of finding future jobs in their industry"); Greenhouse, *Grads Flock to Unpaid Internships*, *supra* note 1 (noting that "unpaid interns are loath to file complaints for fear of jeopardizing any future job search"); Hodge, *supra* note 1 (citing "reluctance of unpaid workers to file complaints" as "the primary obstacle to a wave of lawsuits").

107. *See* NAT'L ASS'N FOR LAW PLACEMENT, EMPLOYMENT FOR THE CLASS OF 2011—SELECTED FINDINGS (2012), available at <http://www.nalp.org/uploads/Classof2011SelectedFindings.pdf> (reporting historically low employment rates, and substantially reduced starting salaries, for recent law school graduates); Elizabeth Lesly Stevens, *Will Law School Students Have Jobs After They Graduate?*, WASH. POST, Nov. 4, 2012, at A41.

108. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 48 (1965) (explaining the group dynamics leading to suboptimal provision of collective goods).

vidual law students, the cost of taking action is too high.¹⁰⁹ Consequently, reliance on private lawsuits is insufficient to deter law firms from exploiting law students by offering unpaid internships in violation of the FLSA.

To address the problem more effectively, an institutional response is necessary. Fortunately, the FLSA provides for just such a response. In addition to granting employees a private right of action, the FLSA empowers the Secretary of Labor to bring actions against employers who violate the statute's wage and hour provisions.¹¹⁰

Indeed, in 2010, the DOL identified unpaid internships as a priority, promising new efforts to educate employers and workers about the law as applied to unpaid interns, and stepped-up enforcement against violators.¹¹¹ As part of that initiative, the DOL issued Fact Sheet #71 in April 2010,¹¹² which clarifies its application of the six-factor test for *bona fide* training programs to unpaid internships.¹¹³

However, the DOL has not followed up with much in the way of enforcement action.¹¹⁴ As Alex Footman, a plaintiff in the *Glatt* suit, suggests, "It is time for the Labor Department to take this matter seriously and step in to enforce its regulations."¹¹⁵ The DOL should investigate unpaid internships and bring enforcement actions against employers (including, but not limited to, law firms) who are violating the law.

II. Unpaid Law Firm Internships Are Unethical

With regard to the FLSA, student internships at law firms do not differ fundamentally from internships in other private sector, for-profit settings. The same standard applies, and the same analysis sup-

109. *See id.* ("[S]ince the larger the group, the smaller the share of the total benefit going to any individual, or to any . . . small subset of members of the group, the less the likelihood that any small subset of the group, much less any single individual, will gain enough from getting the collective good to bear the burden of providing even a small amount of it . . .").

110. 29 U.S.C. § 216(c) (2006).

111. *See* Greenhouse, *Grads Flock to Unpaid Internships*, *supra* note 1; Hodge, *supra* note 1; Sanburn, *supra* note 4.

112. FACT SHEET NO. 71, *supra* note 72; *see also* Bacon, *supra* note 72.

113. *See supra* note 72 and accompanying text.

114. *See* Hodge, *supra* note 1.

115. Alex Footman, *Government, Not Interns, Should Enforce the Rules*, N.Y. TIMES (Feb. 4, 2012), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/government-not-interns-should-enforce-labor-laws> (arguing that lack of "experience in a work environment" undermines ability of interns themselves to enforce their legal rights).

ports the conclusion that interns must be paid when they perform work for the benefit of the employer. What sets law firm internships apart is the fact that they are also subject to the rules governing ethical conduct in the legal profession, which do not apply to other employers.

This section makes two arguments concerning the application of professional ethics rules to the hiring of unpaid interns. First, an attorney should not charge a client for work performed by an unpaid intern, at least not without the client's informed consent. Second, and perhaps more controversially, an attorney who hires an unpaid intern in violation of the FLSA (or analogous state or local law) should be subject to discipline for conduct involving dishonesty and misrepresentation.

A. Ethical Problems with Unpaid Law Firm Internships

The first ethical issue concerning unpaid law firm internships pertains to attorney fees. Legal ethics rules require honesty and transparency with respect to attorney fees. Model Rule 1.5 provides that fees be reasonable and that "the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client."¹¹⁶ At a minimum, Model Rule 1.5 would require that an attorney inform a client if any part of the work for which the attorney has billed them has been performed by an unpaid intern.¹¹⁷

At least one jurisdiction has gone further, adopting a rule specifically providing that, "[i]n no event may a person (including private corporations) be charged for the services of a legal intern acting in a representative capacity."¹¹⁸ Other jurisdictions should follow suit, and clarify their rules to protect clients against unreasonable and deceptive fees, and to reduce the incentive for attorneys to engage unpaid interns as a way of enhancing their own profits.

A second concern goes more to the heart of the unpaid internship problem. Where a law student clerk performs work that is integral to the operation of a law office, characterizing the clerk as an "unpaid intern" is, in essence, an act of deception. It misrepresents

116. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2009).

117. See Lisa G. Lerman, *Professional & Ethical Issues in Legal Externships: Fostering Commitment to Public Service*, 67 FORDHAM L. REV. 2295, 2307-08 (1999) (discussing application of Model Rule 1.5 to hypothetical case where attorney includes unpaid law student intern's time in fee petition).

118. INDIANA RULES OF COURT, RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATT'YS R. 2.1, § 4 (2012).

the student as something other than what she is: an employee, with a legal entitlement to be paid for her work. At the same time, it unjustly enriches the attorney, who dishonestly pockets the economic value of the intern's labor. To put the point more bluntly, the attorney has cheated the intern out of money she has earned.

In this sense, hiring an unpaid intern in violation of the FLSA¹¹⁹ amounts to "conduct involving dishonesty, fraud, deceit or misrepresentation," which Model Rule 8.4(c) declares to be "professional misconduct for a lawyer."¹²⁰ "Dishonesty," as defined in Model Rule 8.4(c), is not limited to actionable fraud, deceit, or misrepresentation.¹²¹ Rather, it encompasses "a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness."¹²²

An employer who knowingly¹²³ misclassifies a student law clerk as an "intern" and fails to pay her as required by law shows just such a lack of integrity. An attorney who does so is even more culpable, as there is less excuse for ignorance of the law. Discipline under Model Rule 8.4(c) (or its local equivalent) is thus appropriate, and would provide an added deterrent to an unlawful and inequitable practice.

B. State Bar Authorities Should Clarify the Status of Unpaid Law Firm Internships Under Professional Ethics Rules and Impose Discipline for Violations

As with the FLSA,¹²⁴ it is unreasonable to expect law student

119. The argument here is limited to circumstances where the unpaid intern would be deemed an employee under the FLSA. While unpaid internships are arguably exploitive even where permitted under the FLSA, it is less clear that such lawful, albeit inequitable, arrangements would be subject to discipline under Model Rule 8.4(c), as they would at least not entail a misrepresentation of the intern's legal status.

120. MODEL RULES OF PROF'L CONDUCT R. 8.4(c); *see also* MODEL CODE OF PROF'L RESPONSIBILITY CANON 1 DR 1-102(A)(4) (1980); Peter R. Jarvis & Bradley F. Tellam, *The Dishonesty Rule—A Rule With a Future*, 74 OR. L. REV. 665 (1995).

121. *See, e.g., In re Bikman*, 760 N.Y.S.2d 5, 8 (N.Y. App. Div. 2003); *In re Romansky*, 825 A.2d 311, 315 (D.C. 2003).

122. *Romansky*, 825 A.2d at 315 (quoting *Tucker v. Lower*, 434 P.2d 320, 324 (Kan. 1967)); *see also In re Kluge*, 66 P.3d 492, 501 (Or. 2003) (defining "dishonesty" as "conduct evidencing a disposition to lie, cheat, or defraud, as well as a lack of trust worthiness or integrity").

123. *See, e.g., id.* at 503 (finding attorney subject to discipline under Model Code of Professional Responsibility DR 1-102(A)(3) based on a "knowing" misrepresentation); *In re Worth*, 92 P.3d 721, 722 (Or. 2004) (explaining that discipline is proper under DR 1-102(A)(3) where "a lawyer acts knowingly"); *Romansky*, 825 A.2d at 315 (stating that discipline is proper under Rule 8.4(c) where dishonest "action is obviously wrongful and intentionally done").

124. *See supra* notes 105–06 and accompanying text (discussing interns' reluctance to bring FLSA suits for fear of harming their employment prospects).

interns themselves to report attorneys for unethical conduct in connection with unpaid internships. An institutional response by state bar authorities is crucial for identifying and redressing violations.

As a preliminary matter, state bar authorities should consider and clarify the status of unpaid internships under legal ethics rules. A mechanism for doing so already exists in most jurisdictions, through the process of issuing ethics advisory opinions.¹²⁵ This process would enable state bar authorities to examine the issue of unpaid internships, investigate the prevalence of the practice within their respective jurisdictions, and decide whether they agree that the practice should be regarded as misleading or deceptive conduct subject to discipline. The issuance of a formal advisory opinion would then put attorneys on notice that the practice is improper.

Assuming that state bar authorities do adopt this view, they should then follow through with disciplinary action against lawyers who continue to improperly use unpaid interns. They should also make particular efforts to promote awareness among law students and encourage them to report violations.

Conclusion

Unpaid internships for law students in private law firms are illegal under the FLSA and raise concerns under legal ethics rules. The practice of offering unpaid internships—rather than paid law clerk positions—harms law students and law graduates alike by further impairing an already unfavorable labor market. Yet, law students have a disincentive to challenge the practice because doing so may hurt their future employment prospects.

Given the impediments to complaints and lawsuits by those law students directly affected, an institutional response is better calculated to rectify the problem. Accordingly, the DOL should exercise its statutory authority to investigate and bring suits against illegal unpaid internships at private law firms (ideally as part of a broader crackdown on illegal unpaid internships in other sectors). Likewise, state bar authorities should take the initiative to clarify that illegal unpaid internships are also grounds for disciplinary action, and follow through with disciplinary action against attorneys who engage in the practice.

125. See Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 384 (2002) (identifying authorities in 49 states and the District of Columbia that issue formal and informal ethics advisory opinions).

Finally, the ABA, as the primary organization representing the legal profession and overseeing legal education, can play a valuable role in addressing the problem. First, the ABA should undertake efforts to educate lawyers and law students about the legal and ethical problems surrounding unpaid internships. Second, the ABA should promote compliance with the law through its law school approval standards. Specifically, the ABA should adopt an interpretation of Standard 511¹²⁶ to provide that law school career services offices should not promote or otherwise facilitate unpaid internships that violate the FLSA or similar state and local laws.

126. ABA STDS., *supra* note 29, standard 511 (mandating that an approved law school provide an “active career counseling service to assist students in making career choices and obtaining employment”).

