
COMMENT

TO BENEFIT OR NOT TO BENEFIT: MUTUALLY INDUCED
CONSIDERATION AS A TEST FOR THE LEGALITY OF
UNPAID INTERNSHIPS

CRAIG DURRANT[†]

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INTRODUCTION

From October 2009 to February 2010, Alex Footman worked as a production intern on the Oscar-winning film *Black Swan*, where he spent his days filling coffee pots, taking out the trash, getting lunch for the staff, and cleaning floors.¹ *Black Swan* went on to make more than \$300 million, but Footman, a graduate of Wesleyan University's well-known film studies program, received no compensation.² When asked whether he had gained experience from the position, Alex replied, "The only thing I learned on this internship was to be more picky in choosing employment opportunities."³

Diana Wang is also no stranger to unpaid internships. In trying to break into competitive industries like publishing and public relations, she went through seven.⁴ Her most recent stint was at *Harper's Bazaar*, and she described her time there as "disgusting."⁵ Her normal workday consisted of shipping merchandise between New York and London, carrying heavy bags throughout Manhattan, working through dinner, and finally leaving the office at around 10 PM.⁶ She even served a management function at the company, overseeing eight other interns.⁷ Yet she, like them, made nothing.⁸

The banality and lack of value in the work given to unpaid interns is a common complaint. Marra Green, for example, had an unpaid internship at the Diane von Furstenberg fashion house in Manhattan, where she felt "as if she was . . . her boss's valet."⁹ In discussing her internship, Ms. Green said, "I did a lot of lunch runs. I also did some weird personal errands. I picked up clothes which my boss ordered from the store. I returned her children's clothes to various stores. I went to Barneys to pick up Christmas presents . . ." ¹⁰

[†] Articles Editor, *University of Pennsylvania Law Review*, Volume 162. J.D. Candidate, 2014, University of Pennsylvania Law School; B.A., 2011, Villanova University. I am grateful to Professor Tess Wilkinson-Ryan, Kirsten Boreen, Sarah Besnoff, and Chris Martin for their help in editing this Comment. All errors are, of course, my own.

¹ Steven Greenhouse, *Interns, Unpaid by a Studio, File Suit*, N.Y. TIMES, Sept. 29, 2011, at B3.

² *Id.*

³ *Id.*

⁴ 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>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Steven Greenhouse, *The Uses and Misuses of Unpaid Internships*, N.Y. TIMES (May 7, 2012), <http://economix.blogs.nytimes.com/2012/05/07/the-uses-and-misuses-of-unpaid-internships>.

¹⁰ *Id.* Stories like these, however, are not limited to recent graduates or current students. Kristina Shands is thirty-eight and lost her job in the hard-hit nonprofit industry during the

This year, some unpaid interns have begun to fight back.¹¹ Footman and another intern who worked on *Black Swan* won a lawsuit in federal court against Fox Searchlight Pictures.¹² They alleged that the production company violated minimum wage and overtime laws by not compensating more than one hundred interns.¹³ The complaint stated, “Fox Searchlight’s unpaid interns are a crucial labor force on its productions, functioning as production assistants and bookkeepers and performing secretarial and janitorial work. . . . Fox Searchlight has denied them the benefits that the law affords to employees”¹⁴ Similarly, Diana Wang and her fellow interns filed a class-action lawsuit against the Hearst Corporation, which owns *Harper’s Bazaar*, in which they claimed that Hearst’s treatment of its interns violated federal and state labor laws.¹⁵

While these two lawsuits against major corporations are the most prominent, similar claims are certain to arise as the pool of unpaid interns keeps growing and as interns continue to become disgruntled after their unsatisfying, uncompensated experiences.¹⁶ Yet when judges finally hear these cases, they will have little case law and only vague instructions from the Department of Labor to guide them.¹⁷

My proposal is that, in assessing unpaid internship cases, judges should borrow the doctrine of consideration from contract law to decide whether there really is an employment relationship. Under such a system, if the employer and intern exchanged mutually induced promises, then an employment relationship exists that requires (1) at least the minimum wage in compliance with the Fair Labor Standards Act¹⁸ and (2) the typical employee protections against harassment and discrimination in compliance with the

recession. See Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME (Apr. 12, 2010), <http://www.time.com/time/magazine/article/0,9171,1977130,00.html>. In an effort to find employment in a different field, she began interning with the Knoxville Ice Bears hockey team, distributing programs and writing game summaries—for free. *Id.*

¹¹ See Greenhouse, *supra* note 1; Sanburn, *supra* note 4.

¹² Steven Greenhouse, *Judge Rules That Movie Studio Should Have Been Paying Interns*, N.Y. TIMES, June 12, 2013, at B1.

¹³ Greenhouse, *supra* note 1.

¹⁴ Complaint ¶ 3, *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11-6784, 2013 WL 2495140 (S.D.N.Y. June 11, 2013).

¹⁵ Sanburn, *supra* note 4. Marra Green, as of the time of this writing, appears not to have taken legal action.

¹⁶ See *infra* Section I.B. At least one law firm, Schneider & Rubin, LLC, seems poised to try to capitalize on this emerging field of litigation. Schneider & Rubin, LLC, *Schneider & Rubin, LLC Company Profile*, LINKEDIN, <http://www.linkedin.com/company/internlaw-com-schneider-&-rubin-llc> (last visited Oct. 25, 2013) (profiling a new law firm, Schneider & Rubin, LLC, which will be dedicated to litigation on behalf of interns).

¹⁷ See *infra* Section I.B.

¹⁸ 29 U.S.C. § 206 (2006 & Supp. V 2012).

Civil Rights Act,¹⁹ Americans with Disabilities Act,²⁰ and the Age Discrimination in Employment Act.²¹

In this Comment, I discuss the need for, details of, and advantages of my proposal. In Part I, I provide a background of unpaid internships in the United States to display their pervasiveness and their negative effects on our country. In Part II, I lay out the test I propose judges use when determining the legality of unpaid internships. In Part III, I demonstrate how this test will work in the courts by applying it to six concrete examples that range from the clearest illegal scenario to the clearest legal scenario. Finally, in Part IV, I discuss and counter potential challenges to my proposal.

I. HISTORY AND BACKGROUND OF UNPAID INTERNSHIPS

A. *Origins*

Any history of unpaid internships must begin with the passage of the Fair Labor Standards Act (FLSA),²² in 1938, which President Franklin Delano Roosevelt called “the most farsighted program for the benefit of workers ever adopted.”²³ Passed during the Great Depression in response to injustices to the working class,²⁴ this monumental piece of legislation had three primary objectives:

to establish minimum wages, to discourage the employment of workers for long hours by providing that wage payments for all hours in excess of the statutory maximum shall be at a rate not less than one and one-half times the regular rate, and to discourage the employment of oppressive child labor.²⁵

The Act’s overarching purpose is to ensure a “minimum standard of living necessary for health, efficiency, and general well-being . . . without substantially curtailing employment.”²⁶ For this Comment, the most relevant provisions

¹⁹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. V 2012) (protecting employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin).

²⁰ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006 & Supp. V 2012).

²¹ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006 & Supp. V 2012).

²² Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006 & Supp. V 2012).

²³ Laura Fitzpatrick, *The Minimum Wage*, TIME (July 24, 2009), <http://www.time.com/time/magazine/article/0,9171,1912408,00.html>.

²⁴ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22, 26 (noting that proponents of the bill wanted to end oppressive child labor and unnecessarily long working hours).

²⁵ Edwin M. Dodd, *The Supreme Court and Fair Labor Standards, 1941–1945*, 59 HARV. L. REV. 321, 321 (internal citations and quotation marks omitted).

²⁶ 29 U.S.C. § 202(a)–(b).

of the FLSA are the definitions of employee, the minimum wage,²⁷ and the one and one half–time overtime rate.²⁸

The FLSA defines an employee as “any individual employed by an employer.”²⁹ “Employ,” under the FLSA, means “to suffer or permit to work.”³⁰ The Supreme Court in *Walling v. Portland Terminal Co.*,³¹ however, narrowed this definition so that “‘employ’ does not make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another.”³² In response to heightened criticism of unpaid internships, the Department of Labor released *Fact Sheet #71* (the *Fact Sheet*) to clarify when an intern is an “employee” deserving minimum wage and overtime rates.³³

According to the Act, “an employer [must] pay the prescribed minimum wage ‘to each of his employees who is engaged in commerce or in the production of goods for commerce.’”³⁴ The intent here “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.”³⁵ Thus, if an intern is an “employee” under the meaning of the FLSA, she is entitled to the minimum wage of \$7.25 per hour³⁶ and one and one-half times that rate if she works more than forty hours per week.³⁷

²⁷ *Id.* § 206.

²⁸ *Id.* § 207.

²⁹ *Id.* § 203(e)(1).

³⁰ *Id.* § 203(g).

³¹ 330 U.S. 148, 152–53 (1947).

³² See Letter from Wage and Hour Division, U.S. Dep’t of Labor, FLSA2004-5NA (May 17, 2004) [hereinafter Letter from Wage and Hour Division] (addressee’s name omitted for privacy purposes), available at http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.pdf.

³³ See U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> [hereinafter FACT SHEET]. For a detailed discussion of the *Fact Sheet*, see *infra* Section I.B.

³⁴ Dodd, *supra* note 25, at 324 (citation omitted).

³⁵ *Walling*, 330 U.S. at 152.

³⁶ See 29 U.S.C. § 206(a)(1)(C) (Supp. V 2012) (declaring that the current minimum wage is \$7.25 per hour); see also Fitzpatrick, *supra* note 23 (noting the historical minimum wage rates).

³⁷ See FACT SHEET, *supra* note 33 (“Interns in the ‘for-profit’ private sector who qualify as employees rather than trainees typically must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.”).

B. Description of the Current State of the Law

The number of unpaid internships has been increasing since the recession.³⁸ Unpaid internships have tended to be most popular in industries like media, communications, entertainment, and publishing. In such fields, industry experiences and achievements are necessary qualifications for a job.³⁹ Moreover, unpaid internships are particularly prevalent among small businesses, “which often look to save money while benefiting from the productivity of the students they hire.”⁴⁰

Exactly how many unpaid internships have been added since the recession, or even the exact number of unpaid interns currently working, however, is difficult to calculate because the Department of Labor’s Bureau of Labor Statistics does not track the number of unpaid internships.⁴¹ Despite this empirical deficiency, the United States saw increasing skepticism of unpaid internships, beginning in early 2010. Most notably, President Obama’s Administration called unpaid internships “abusive and unfair because less-affluent students can’t afford to spend a summer working as an unpaid intern.”⁴² Additionally, in April 2010, the Economic Policy Institute

³⁸ See Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, April 3, 2010, at B1 (stating that “[e]mployers posted 643 unpaid internships on Stanford’s job board in [the 2009–2010] academic year, more than triple the 174 posted two years [prior]”); Tahmniciglu, *supra* note 10 (noting that both Monster.com and Careerbuilder.com have seen increases in the number of unpaid internships since the recession); see also Adam Barnosky, *Labor of Love: Unpaid Internships in the Music Industry*, PERFORMER MAG. (Sept. 17, 2012), <http://performermag.com/labor-of-love-unpaid-internships-in-the-music-industry> (noting that in the music industry, “[t]he prevalence of ‘unpaid’ internships has increased over the past several years”); Nicholas Pologeorgis, *The Impact Unpaid Internships Have on the Labor Market*, INVESTOPEdia (Dec. 14, 2012), <http://www.investopedia.com/articles/economics/12/impact-of-unpaid-internships.asp> (listing new internship coordinators and consultants and the economic recession as some of the reasons for this exponential growth).

³⁹ See Kaitlin Madden, *The Ongoing Debate over Unpaid Internships*, CHI. TRIB. (Feb. 14, 2012), http://articles.chicagotribune.com/2012-02-14/classified/chi-unpaid-internship-rules-20120214_1_unpaid-internships-companies-in-competitive-industries-past-interns (quoting Heather Huhman, founder of the public relations firm Come Recommended, as stating that “[u]npaid internships are common in media, communications, writing, and other creative fields” because these fields rely more on experience).

⁴⁰ Peter W. Fulham, *Unpaid Interns and Labor Laws: Gaining Experience, Enduring Abuse*, POL. DAILY (May 12, 2010), <http://www.politicsdaily.com/2010/05/12/unpaid-interns-labor-laws-students-experience-abuse>.

⁴¹ See *id.* (“There is no official count of unpaid interns in the U.S. . . .”); Stephanie Steinberg, *Unpaid Internships Can Cost—or Pay Off for—College Students*, USA TODAY (July 26, 2010), http://usatoday30.usatoday.com/news/education/2010-07-27-internship27_ST_N.htm (“The Department of Labor and the Bureau of Labor Statistics do not track the number of paid and unpaid internships.”).

⁴² Brann & Isaacson, *Hiring Unpaid Interns: Advice for Employers*, 16 EMP. L. LETTER, Aug. 2011, at 4; see also Greenhouse, *supra* note 38 (quoting Nancy J. Leppink, the acting director of the

launched a comprehensive critique of unpaid internships on three distinct grounds: (1) a majority of interns are unprotected against harassment and discrimination because they do not qualify as employees, and therefore are not afforded employee protections; (2) the current state of the law promotes the growth of unpaid internships, which are often limited to wealthy individuals who can afford to work for free; and (3) the availability of “free labor” encourages employers to replace regular employees with unpaid interns.⁴³

In response to these criticisms and to increased scrutiny by state governments of unpaid internships,⁴⁴ in April 2010, the Department of Labor released the *Fact Sheet* to clarify when an unpaid intern is an “employee” who must be paid under the FLSA.⁴⁵ This report is meant to restate the pertinent law as promulgated in *Walling v. Portland Terminal Co.*⁴⁶ and the FLSA—not to reflect a change to existing law and jurisprudence regarding unpaid internships.⁴⁷ Furthermore, though these guidelines are not as authoritative as the FLSA or a court ruling, Judge Pauley in *Glatt v. Fox Searchlight Pictures, Inc.*—the only case yet to address the issue of unpaid internships—held that the *Fact Sheet* was “entitled to deference” and adopted the entire six-point test in his opinion.⁴⁸

For an unpaid internship to be legal under the *Fact Sheet*, it must adhere to the following six criteria:

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;

Department of Labor’s Wage and Hour Division, who said that there are few circumstances where a for-profit employer can offer unpaid internships and “still be in compliance with the law”).

⁴³ See Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection: Reforming the Regulation of Student Internships*, POL’Y MEMORANDUM (Econ. Pol’y Inst., Washington, D.C.), Apr. 9, 2010, at 1, available at http://epi.3cdn.net/f7d635c82f738offfo_8sm6bxrz.pdf.

⁴⁴ See Greenhouse, *supra* note 38 (stating that officials in Oregon, California, and other states have increased investigations of unpaid internships and fined employers).

⁴⁵ FACT SHEET, *supra* note 33.

⁴⁶ 330 U.S. 148, 152-53 (1947) (holding that the word “employ” does not make all persons who work on another’s premises “employees” and outlining the “trainee” exception).

⁴⁷ See Steinberg, *supra* note 41 (“The U.S. Department of Labor, concerned about companies taking advantage of interns, reissued guidelines in the spring that have been in effect since 1947, when the Supreme Court established rules under the Fair Labor Standards Act that employers must follow to offer unpaid internships.”).

⁴⁸ *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11-6784, 2013 WL 2495140, at *12 (S.D.N.Y. June 11, 2013) (stating that the *Fact Sheet*’s factors have “support in *Walling*” and “are entitled to deference”). It is unclear whether judges in future cases will adopt the *Fact Sheet*, as Judge Pauley did, or stray from it.

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.⁴⁹

If an internship does not satisfy these criteria, the intern is an “employee,” not a “trainee.”⁵⁰ These criteria apply only to for-profit firms; interns at nonprofit organizations are classified as volunteers under the FLSA and are thereby excluded.⁵¹

An important aspect of this test is that it is conjunctive—that is, every prong must be satisfied for the intern not to be classified as “employed.”⁵² The language of the test appears to place the burden of proof on the defendant. The *Fact Sheet* states that “[i]nternships in the ‘for-profit’ private sector will most often be viewed as employment, unless the test described [above] relating to trainees is met.”⁵³ The word “unless” seems to indicate that internships in the for-profit sector are *presumed* to be employment, and the defendant can rebut this presumption only by showing that its internship program adheres to the six-prong test.

⁴⁹ FACT SHEET, *supra* note 33; see also *Are Unpaid Internships Legal in Ontario?*, ONTARIO MINISTRY OF LAB. (2011), available at http://www.labour.gov.on.ca/english/es/pubs/is_unpaidintern.php (putting forth almost identical criteria for the legality of unpaid internships in Ontario, Canada).

⁵⁰ Because the intern is an “employee,” he is entitled at least to a minimum wage and overtime rates. See 29 U.S.C. § 206 (2006 & Supp. V 2012) (requiring that employees be paid at least the minimum wage); FACT SHEET, *supra* note 33 (“[I]ndividuals who are ‘suffered or permitted’ to work must be compensated under the law for the services they perform for an employer.”).

⁵¹ See 29 U.S.C. § 203(4)(A) (excluding unpaid public agency volunteers from the FLSA’s definition of “employee”); FACT SHEET, *supra* note 33 (“The FLSA makes a special exception . . . for individuals who volunteer to perform services for a state or local government agency . . . [and] for individuals who volunteer their time . . . for charitable, civic, or humanitarian purposes to non-profit organizations.”).

⁵² This conclusion follows directly from the notes following the test that state, “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.” FACT SHEET, *supra* note 33 (emphasis added). Interestingly, however, Judge Pauley diverged from this particular aspect of the *Fact Sheet* and instead opted for a “totality of the circumstances” approach. *Glatt*, 2013 WL 2495140, at *14.

⁵³ FACT SHEET, *supra* note 33.

In addition to the test, the *Fact Sheet* expounds on some of the criteria in supplemental paragraphs. For instance, the first paragraph explains the part of the test that deals with the internship's educational aspect. It reads as follows:

In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (*this often occurs where a college or university exercises oversight over the internship program and provides educational credit*).⁵⁴

C. *Flaws of the Fact Sheet*

Despite addressing the growing criticism about unpaid internships, the *Fact Sheet* still requires improvement because (1) the informative paragraph's language about the legality of unpaid internships where the intern receives college credit is misleading and unsupported by evidence, (2) the conjunctive test is unnecessarily complex because the first, third, and fifth prongs are just derivatives of the second and fourth prongs, and (3) the fourth prong's immediacy requirement ignores the substantial long-term and delayed-realization benefits that unpaid interns confer on employers.

First, judges or employers may be misled by the *Fact Sheet's* discussion of college oversight. The *Fact Sheet* states that internships in which the intern receives educational credit are more likely to be viewed as a permissible "extension of the individual's educational experience," further noting that "this *often* occurs where a college or university exercises oversight over the internship program and provides educational credit."⁵⁵ This language implies that a significant number of internships for college credit are legal. Thus, because of this paragraph, an employer—or judge—may believe that an intern's receipt of school credit is *sufficient* to render an unpaid internship legal, and therefore, the employer can derive a benefit from that intern. This assumption, however, is incorrect. The fourth prong of the test mandates that the employer receive "no immediate advantage" from the intern, regardless of whether that intern is having an educational experience.⁵⁶ Further, "educational environment" and school credits are distinct concepts. A

⁵⁴ *Id.*

⁵⁵ *Id.* (emphasis added). It is important to note that, since the Department of Labor does not track information on unpaid internships, the word "often" is not supported by the Department of Labor's available data. Steinberg, *supra* note 41, at 2 (noting that the Department of Labor keeps no record of unpaid internships).

⁵⁶ FACT SHEET, *supra* note 33.

student can receive credits from her college but nevertheless work in an environment that is far from educational. For instance, her school may give her three credits to intern for a newspaper, but her work may consist solely of running personal errands for the editor.

Second, on a more general level, this test is overly complicated because each prong—other than the second and the fourth—is really just supplemental to the broader question of whether the relationship entails mutual benefits. The first prong pertaining to education, for example, cannot be a sufficient test in itself; it can instead only be an indicator of whether the relationship primarily benefits the employer or the intern (which is the issue in the second and fourth prongs). If the workplace environment resembles a classroom setting, this is evidence that the employer is helping the intern without benefitting himself. Similarly, with respect to the third prong regarding displacement, if the intern displaces regular workers, this fact would be evidence that the intern is conferring a benefit upon the employer by cutting his labor costs. And finally, if the intern is hired for a trial period with the expectation that the employer will later hire her on a permanent basis (per the fifth prong), this fact would support the conclusion that the employer was trying to get a free ride on the training portion of the employment relationship.

Third, the *Fact Sheet's* final flaw is the use of the word “immediate” in the fourth prong.⁵⁷ This adjective is problematic because it permits unpaid internships where the intern, though he may not provide an *immediate* advantage to the employer, nevertheless confers a *long-term* advantage on the employer. Examples of such long-term advantages include improving an employer's goodwill with clients, the community, and universities, and providing industry-wide, cost-free training.

Under the current *Fact Sheet*, employers are able to derive these long-term benefits, while the interns remain unpaid and still have no basic protections against harassment or discrimination. There should not be a distinction between immediate and future advantage. In both cases, unpaid interns are increasing employers' bottom lines.

To understand how these long-term advantages may occur, consider a hypothetical. Suppose an employer, ABC Investments, is located in a central New Jersey suburb and hires ten unpaid interns each summer. Of these ten interns, eight are sophomores from Princeton University, and the other two are children of wealthy clients. This hiring practice generates long-term advantages for ABC.

⁵⁷ See *id.* (“The employer that provides the training derives no immediate advantage from the activities of the intern.”).

First, ABC generates goodwill with universities by hiring sophomores from one of the most prestigious universities in the United States. This relationship will promote the ABC brand among graduating students applying for full-time jobs, enabling ABC to attract some of the nation's top talent. Second, ABC generates goodwill with the community by hiring students from a nearby school. People in the community will presumably hear about this practice, feel a stronger connection to ABC, and be more prone to seek the firm's services. Third, ABC generates goodwill with wealthy clients by hiring their children to fill the remaining spots. ABC has thereby increased the loyalty of these clients, assuring that they will remain with ABC or even increase their business with the firm.

Furthermore, if these low-cost unpaid internships are prevalent in the industry, ABC and firms like it may avoid training costs. For example, even if ABC does not directly guarantee each of its interns a full-time job after the internship (which would make the firm compliant with the fifth prong of the *Fact Sheet's* test), ABC will most likely hire employees with similar internship experience. Likewise, similar firms may hire some of ABC's previous interns.⁵⁸ Hence, rather than have to hire a new employee and train her for, say, \$2000, firms in the industry can hire previous interns who have already been trained for free. Thus, all such unpaid interns are working for the industry as a whole and thereby each firm within it.

D. *Negative Effects of Unpaid Internships*

The adverse consequences of unpaid internships include financial detriment to interns, discriminatory benefits among different socioeconomic classes, an increase in the unemployment rate, and a lack of workplace harassment statutes protecting interns.

1. Financial Detriment to the Intern

Though the harm to an intern's finances from an unpaid internship may be obvious, consider the following real-world example.

Felicia Melvin was a communications student at Cabrini College, near Philadelphia, Pennsylvania.⁵⁹ When she landed an unpaid internship with

⁵⁸ See Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), <http://www.insidehighered.com/views/2010/07/13/aoun> (“[Seventy-five] percent of employers prefer job candidates with relevant work experience[and m]ore than 90 percent prefer to hire interns or co-ops who have worked for their organization.”).

⁵⁹ Emma Jacobs, *Do Unpaid Internships Make Sense for Students?*, NEWSWORKS (July 6, 2012), <http://www.newsworks.org/index.php/local//business-a-economy/41042-do-unpaid-internships-make-sense-for-students>.

CBS in New York City, she was happy to work for such a well-respected company.⁶⁰ Felicia avoided the prohibitive costs of renting an apartment in New York City by remaining in Philadelphia, and instead woke up at five o'clock in the morning to take the bus every day.⁶¹ In the office, "she worked in the creative services department, mostly putting together promos."⁶²

The main expenses Felicia incurred were transportation and opportunity costs. First, with respect to transportation, she spent \$34 each way for her bus ticket.⁶³ Assuming she worked three times a week for a ten-week summer, her bus tickets would total \$2040 (not including parking at the bus station, gas to drive to and from the bus station, and subway fare between the station and CBS).

Felicia also incurred significant opportunity costs. Rather than receive no income, she could have earned \$12 per hour as a waitress.⁶⁴ If she had waitressed eight hours per day, three days per week during this same ten-week timeframe, she would have earned \$2880 and netted this sum less driving costs. In taking the CBS internship, then, Felicia realistically lost almost \$5000.⁶⁵

This scenario, however, becomes more complicated when Felicia does not have the \$2040 for Greyhound bus tickets. In this hypothetical, Felicia must actually get a second job to pay for her unpaid internship. This situation may not be uncommon, at least at Cabrini College, where the career services counselor states, "Our students are working sometimes two and three jobs . . . [because] in order to do a co-op or internship, they need income."⁶⁶ If we take a second look at the opportunity costs of Felicia's internship—assuming she does not have the capital for traveling to and from New York City—we find that her costs are actually greater than just revenue from waitressing less transportation costs. In fact, because she must now have a side job to pay for the CBS internship, the opportunity costs also include the benefit she could have gained from doing productive activities during the time she now spends at that job. More simply, in the

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Estimating Felicia's exact expenses is complicated because she completed her internship a year ago, and transportation costs fluctuate. The current price is \$34 for a one-way ticket on a Greyhound bus. See *Philadelphia: Traveling from Philly to NYC*, TRIP ADVISOR, <http://www.tripadvisor.com/Travel-g60795-c3501/Philadelphia:Pennsylvania:Traveling.From.Philly.To.Nyc.html> (last visited Oct. 25, 2013).

⁶⁴ For simplicity, I make the assumption that Felicia could actually get a job as a waitress at \$12 per hour.

⁶⁵ See Steinberg, *supra* note 41 ("Even with the recession, students are willing to dish out hundreds, or even thousands, of dollars to cover expenses for internships far from home.").

⁶⁶ Jacobs, *supra* note 59 (internal quotation marks omitted).

scenario where she works only as a waitress, she works twenty-four hours per week. But in the scenario where each week she works twenty-four hours each with CBS and as a waitress, she has twenty-four fewer hours in her week that could be spent on her studies or on recreational activities.

One could, of course, view Felicia as an extreme example because most interns do not travel from Philadelphia to New York City every day. Though even in less extreme cases, the interns incur transportation costs and similar opportunity costs. Additionally, some interns, unlike Felicia, may choose to live in the city of their internship, which means that the costs of the internship include transportation, living, and opportunity costs—a sum presumably even greater than Felicia's.

2. Unfair Advantage to Wealthier Students

Another effect of unpaid internships is that they favor wealthy students at the expense of economically disadvantaged ones because (1) student debt is not uniform and (2) some students have parents or other third parties who will pay for the costs of the internship.⁶⁷

Regarding the first point, the average student-loan debt of borrowers in the undergraduate class of 2011 was \$26,500, a 5% increase from the previous year.⁶⁸ In addition, almost two-thirds of students with a bachelor's degrees graduate with debt—some with significantly higher debt than the average.⁶⁹ Furthermore, the interest rate for Stafford Loans is currently 3.86% for undergraduates and 5.41% for graduate students,⁷⁰ and student loans are nondischargeable in bankruptcy.⁷¹

It also follows, however, that one-third of students have no debt at all. Due to this disparity, students with debt have an *incentive* to get paying jobs as opposed to unpaid internships, because they seek to pay off their loans as soon as possible to realize the full value of their eventual salaries. Likewise, they have a *disincentive* to take unpaid internships because such uncompensated positions do nothing to reduce the size of their nondischargeable student loan debt.

⁶⁷ See Brann & Isaacson, *supra* note 42 (“The Obama administration has expressed concerns about unpaid internships, commenting that the practice may be abusive and unfair because less-affluent students can’t afford to spend a summer working as an unpaid intern.”).

⁶⁸ Tamar Lewin, *Student-Loan Borrowers Average \$26,500 in Debt*, N.Y. TIMES, Oct. 18, 2012, at A22.

⁶⁹ INST. FOR COLLEGE ACCESS & SUCCESS, THE PROJECT ON STUDENT DEBT AND THE CLASS OF 2011 (2012), available at <http://projectonstudentdebt.org/files/pub/classof2011.pdf>.

⁷⁰ *Stafford Loan Interest Rates*, STAFFORDLOAN.COM, <http://www.staffordloan.com/stafford-loan-info/interest-rates.php> (last visited Oct. 25, 2013).

⁷¹ 11 U.S.C. § 523(a)(8) (2012).

Regarding the second point, some students' families can subsidize their cost of living during an internship or even pay for consultants to help them obtain one.⁷² If we turn back to Felicia's situation, and this time assume she has a wealthy family, she would not have to worry about taking, let alone paying for, a Greyhound bus because her parents would pay for her apartment in NYC, her meals, and her subway fare. As a result, the cost-benefit analysis of whether to take the position at CBS or to work as a waitress would weigh heavily in favor of CBS because of the position's long-term benefits.

The eventual consequence of these disparities in loan debt and parent subsidization is that wealthier students have a greater ability to take unpaid internships. Accordingly, they have a competitive advantage in their respective industries from better work experience and connections over students who took paid positions at local golf courses or restaurants.⁷³ Thus, the unpaid internship, though meant as a means of education, in fact becomes a mechanism for impeding intergenerational class mobility.

Moreover, from an economic standpoint, this feature of unpaid internships is unsettling because it means that the U.S. labor market rewards those from privileged upbringings, as opposed to those with merit, which renders our labor pool less competitive and efficient.⁷⁴ This inefficiency could result in higher prices to consumers and disadvantage U.S. companies relative to their foreign competitors.

3. Increase in Unemployment Rate

Another effect of unpaid internships is that they will eventually increase the unemployment rate. To cut costs, employers will hire unpaid interns and thereby displace paid employees, who will then add to the number of unemployed workers in the labor force.⁷⁵ Rising costs of healthcare and other employee benefits will only exacerbate this tendency, because they make hiring a paid employee even more expensive, increasing the incentive

⁷² See Sue Shellenbarger, *Do You Want an Internship? It'll Cost You*, WALL ST. J. (Jan. 28, 2009), <http://online.wsj.com/article/SB1231069999022549.html> (noting that some parents pay \$5000 to \$9500 for internship consultants to help their children find internships).

⁷³ See Greenhouse, *supra* note 9 (“[C]ollege graduates with wealthy parents who can underwrite their living costs during their internships get a leg up because they get a head start with coveted employers But college grads whose parents cannot support them say they often have to turn to an \$8.50-an-hour job at McDonald's or Target and cannot afford to take an unpaid internship.”).

⁷⁴ See Pologeorgis, *supra* note 38 (stating that unpaid internships hurt the labor market “by undermining the job allocation based on meritocracy which rewards people for their skills rather [than] their socioeconomic background”).

⁷⁵ See Edwards & Hertel-Fernandez, *supra* note 43, at 4.

to hire unpaid interns.⁷⁶ Furthermore, employers have ready access to these interns, especially in economic downturns, because students want relevant professional experience to give them an advantage in their post-graduation job hunt.⁷⁷ This large supply makes finding unpaid interns easy and provides employers a constant flow of free labor. This flow then permanently displaces the full-time employee(s) who would otherwise be doing that work.⁷⁸

Real world examples support this point. A freshman from Connecticut worked as an unpaid intern at a university close to his home.⁷⁹ There, his supervisor gave the interns a stack of files, which they then input into a computer database. “We were doing a lot of the work that people there were getting paid to do,” the young man says.⁸⁰ “Basically, we just got thrown in. A couple of people had been fired, and we had to do their jobs.”⁸¹

Alex Footman’s story also corroborates this trend. While working on *Black Swan*, he and the other unpaid interns filled coffee pots, took out the trash, got lunch for the staff, and cleaned the office.⁸² Rather than pay assistants to get lunch and coffee or janitors to take out the trash and clean the office, the studio exploited these Hollywood-hopefuls’ need for experience by replacing paid employees with unpaid interns. When situations like these are aggregated, the result is that more people are working for free and fewer people are working for money.⁸³

4. Lack of Protection Against Discrimination and Harassment

A final negative consequence of unpaid internships is that they do not afford interns the same legal rights as employees.⁸⁴ For example, unpaid

⁷⁶ See *id.*

⁷⁷ See Pologeorgis, *supra* note 38 (stating that high unemployment causes students to “flock to unpaid internships in hopes of transitioning to a full-time paid job” or to gain experience to make themselves more desirable candidates in a crowded labor market).

⁷⁸ See *id.* (“[I]nternships are supposed to be recruiting pipelines Instead they are being used as a way to free labor where employers . . . cycl[e] through interns without any intent to hire them on a full-time basis.”).

⁷⁹ Fulham, *supra* note 40.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Greenhouse, *supra* note 1.

⁸³ There has been no convincing hard research to correlate unemployment and unpaid internships. The link, however, seems intuitive based on a basic grasp of supply and demand. I also concede that there may be positive economic arguments for unpaid internships—for instance, that they decrease costs to consumers by decreasing labor costs. But this argument is one that could be made for eliminating minimum wage laws in general. The economics of unpaid internships, however, is outside the scope of this Comment.

⁸⁴ See Edwards & Hertel-Fernandez, *supra* note 43, at 1 (“[A] lack of clear regulation . . . leaves many interns unprotected by workplace discrimination and harassment statutes . . .”).

interns are not protected by workplace and discrimination statutes such as the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.⁸⁵ More specifically, unpaid interns are not considered “employees” under Title VII of the Civil Rights Act of 1968 due to their unpaid status.⁸⁶ This lack of protection leaves interns particularly vulnerable to harassment, because they are “generally on the lowest rung of a workplace hierarchy.”⁸⁷

For instance, Bridget O’Connor was an unpaid intern at “Rockland, a hospital for the mentally disabled.”⁸⁸ There, her supervisor continually abused her by repeatedly calling O’Connor “Miss Sexual Harassment,” suggesting that they have an “orgy” with other women, and telling O’Connor to remove her clothes before a meeting.⁸⁹ O’Connor’s eventual lawsuit, however, was dismissed because her unpaid status meant she was not an employee.⁹⁰

O’Connor’s story shows that unpaid interns, hoping to have beneficial learning experiences with employers that will make them attractive candidates for paid positions, are sometimes subject to harassment and discrimination, yet have no recourse in the judicial system.

E. *Why Unpaid Internships Persist*

Even under the *Fact Sheet*’s murky six-prong standard, it is clear that some unpaid internships are outright illegal.⁹¹ Marra Green’s internship,⁹² for example, which involved Christmas shopping and returning clothes for her boss, violates the *Fact Sheet*’s test for three reasons. First, Marra’s tasks immediately benefitted her boss. Second, her experience taught her nothing about the fashion industry. And third, her internship did not resemble an educational environment.⁹³ Nevertheless, internships like Marra’s continue to exist throughout the country because of the unequal bargaining power

⁸⁵ *Id.*

⁸⁶ See *O’Connor v. Davis*, 126 F.3d 112, 115-16 (2d Cir. 1997) (“Where no financial benefit is obtained by the purported employee from the employer, no ‘plausible’ employment relationship of any sort can be said to exist because . . . [compensation] is an essential condition to the existence of an employer–employee relationship.”).

⁸⁷ *Edwards & Hertel-Fernandez*, *supra* note 43, at 3.

⁸⁸ *O’Connor*, 126 F.3d at 113.

⁸⁹ *Id.* at 113-14.

⁹⁰ *Id.* at 115-16.

⁹¹ See *Greenhouse*, *supra* note 38 (“[M]any employers failed to pay even though their internships did not comply with the six federal legal criteria that must be satisfied for internships to be unpaid.”); see also *supra* Section I.C.

⁹² See *supra* text accompanying notes 9-10.

⁹³ For the full six-prong test, see *supra* text accompanying note 49.

between the intern and the employer and inadequate oversight by the U.S. Department of Labor.

One reason for the unequal bargaining power is that the recession has hit young college graduates hard. Indeed, the unemployment rate for college graduates in 2011 was 8.8%, and this number does not even take into account students who chose to attend graduate school but preferred to be working.⁹⁴ Moreover, of the young graduates who were employed in 2011, 37.8% had jobs that did not require a college degree, which depressed their wages.⁹⁵ These statistics are particularly problematic in light of the more than \$26,000 in loan debt the average 2011 graduate carried.⁹⁶ The ultimate result of this weak labor market and high debt load is that young Americans will do whatever they can to get ahead—even work for free.⁹⁷

It is no secret that employers prefer candidates with prior experience.⁹⁸ A 2010 job outlook survey reported that “75 percent of employers prefer candidates with relevant work experience[, and m]ore than 90 percent prefer to hire interns or co-ops who have worked for their organization.”⁹⁹ Another study found that “[a]pproximately 42 percent of graduates with internships who applied for a job received an offer compared with only 30 percent for students who had no internship experience.”¹⁰⁰ As a corollary, interns do not have the power to request the minimum wage because, if they do, their employer will just hire someone else for free.¹⁰¹

⁹⁴ Mark Memmott, *Tough Times, Even Higher Debts for College Graduates*, NPR (Oct. 18, 2012), <http://www.npr.org/blogs/thetwo-way/2012/10/18/163137239/tough-times-even-higher-debts-for-college-graduates>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Jacobs, *supra* note 59 (“For many college students and recent graduates, one of the most attractive paths into the workforce has become an internship, often unpaid.”).

⁹⁸ See Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2617 (1998) (noting that a catch-22 exists in the job market where “[e]mployers tend to hire only experienced personnel, but college graduates possess little applicable experience”). But see Jordan Weissmann, *Do Unpaid Internships Lead to Jobs? Not for College Students*, ATLANTIC (June 19, 2013), <http://www.theatlantic.com/business/archive/2013/06/do-unpaid-internships-lead-to-jobs-not-for-college-students/276959> (noting that, according to a recent survey of students who received at least one job offer, only 1.8% more had previously held an unpaid internship than those who had never held an internship).

⁹⁹ Aoun, *supra* note 58.

¹⁰⁰ NAT'L ASS'N OF COLLS. & EMP'RS. (NACE), NACE RESEARCH BRIEF: 2010 STUDENT SURVEY 4 (2010), available at http://www.naceweb.org/research/student_survey_brief.

¹⁰¹ See Steinberg, *supra* note 41 (“It’s frustrating,’ [one student] says. ‘I know they’re not going to pay me because I know there’s always somebody who would take this instead of me.’”).

Another explanation for the continuance of unpaid internships is that there is little oversight.¹⁰² In the Labor Department, investigations are “complaint-driven.”¹⁰³ The problem with this is that interns have an incentive to keep their unpaid internships and thus a disincentive to report abuses. They believe these internships will increase their chances of getting a paid full-time job. But at the same time, they worry about the personal repercussions for being a whistleblower. They fear that if they alert the Labor Department or personally file a lawsuit, their reputation in the industry will be sullied, or their employers will fire them or withhold a recommendation.¹⁰⁴ Furthermore, because so many students want unpaid internships, potential whistleblowers may feel like any action taken would be futile since other people, willing to put up with the illegal violations, would readily take their place.¹⁰⁵

II. MY PROPOSAL

To clarify and simplify the *Fact Sheet*, I propose that judges borrow the contract law doctrine of consideration to determine whether an intern is in fact an employee or a volunteer. Specifically, judges should ask whether the employer offered the unpaid internship to receive a benefit from the intern.¹⁰⁶ If such a bilateral exchange of consideration occurred, a valid contract was formed, and the relationship was one of employer–employee. If, on the other hand, the employer offered a gratuitous promise (e.g., “I’ll give you work, and I don’t expect to benefit from it myself”), the relationship is one of employer–unpaid intern.

I do not propose, however, that the current six-prong test be discarded altogether. Instead, I recommend that the first, third, and fifth prongs¹⁰⁷ be

¹⁰² See Greenhouse, *supra* note 38 (“Many regulators say that violations are widespread, but that it is unusually hard to mount a major enforcement effort because interns are often afraid to file complaints.”).

¹⁰³ See Jacobs, *supra* note 59 (stating that “investigations remain complaint-driven” and that “[t]he Labor Department . . . still does not track intern cases”).

¹⁰⁴ See Greenhouse, *supra* note 1 (“Unpaid interns are usually too scared to speak out and to bring such a lawsuit because they are frightened it will hurt their chances of finding future jobs in their industry.”); Jacobs, *supra* note 59 (“Melvin[, an unpaid intern,] did think sometimes she should get paid, but wanted a recommendation and she felt intimidated.”).

¹⁰⁵ See Edwards & Hertel-Fernandez, *supra* note 43, at 2 (“The crucial role of internships in obtaining later employment and the highly competitive market for placement means that no one student has an incentive to report their employer, even in cases of blatant abuses, since another student will readily work for free.”).

¹⁰⁶ That the intern is expecting to receive a benefit from the employer—most likely an intangible benefit such as experience, connections, or credentials—is presumed.

¹⁰⁷ As a reminder, the first prong is, “The internship . . . is similar to training which would be given in an educational environment;” the third prong is, “The intern does not displace regular

converted into nondispositive factors that will help the trier of fact determine whether there were mutually induced promises.¹⁰⁸ Because these factors are ways of determining whether the relationship comprises mutual benefits,¹⁰⁹ removing them will create a simpler, more condensed test for judges. I incorporate the second and fourth prongs¹¹⁰ into my overarching test to show that a benefit to the intern or the employer is a way of demonstrating a bilateral exchange of consideration. Finally, the sixth prong¹¹¹ should not be treated as a factor, but instead as a threshold question. If the employer and the intern did not understand that the intern was to work for free, then no additional analysis is necessary, because there was never a meeting of the minds.

In summary, I propose the following steps to test for the legality of unpaid internships:

1. Did both parties understand that the internship would be unpaid?¹¹²
2. Did the employer offer the position to receive a benefit¹¹³ from the intern? The emphasis here is *ex ante*. The question is whether the employer *sought to receive* a benefit from the intern, not whether a benefit was *actually conferred*.¹¹⁴

employees, but works under close supervision of existing staff;” and the fifth prong is, “The intern is not necessarily entitled to a job at the conclusion of the internship.” FACT SHEET, *supra* note 33.

¹⁰⁸ By “mutually induced promises,” I mean two promises that are caused by each other. For example, *A* promises to pay *B* in exchange for *B* painting *A*’s house. *A*’s promise to pay *B* is caused by *B*’s promise to paint his house, and vice versa.

¹⁰⁹ By “mutual benefits,” I mean a situation in which both parties accrue advantages that would not have occurred had the employment relationship not existed.

¹¹⁰ The second prong is, “The internship experience is for the benefit of the intern,” and the fourth prong is, “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.” FACT SHEET, *supra* note 33.

¹¹¹ The sixth prong is, “The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.” *Id.*

¹¹² The employer and the intern both must have understood that the intern would not be entitled to wages for the time spent in the internship.

¹¹³ Note that, contrary to the *Fact Sheet*, I do not use the adjective “immediate.”

¹¹⁴ There will be evidentiary problems in discovering the employer’s *ex ante* intent. Such problems, however, also beset the factfinder in any criminal or civil trial that requires a finding of intent. Factors helpful in making this determination include (1) whether the internship was similar to training given in a classroom, (2) whether the intern displaced regular employees, (3) whether the employer promised the intern a job at the conclusion of the internship, and (4) whether the employer did, *ex post*, receive a benefit—though none of these is dispositive. The burden of proof is on the defendant to show that the exchange of consideration was actually unilateral on his part. Putting the burden of proof on the defendant is consistent with my earlier interpretation of the *Fact Sheet*. See *supra* notes 52-53 and accompanying text.

3. Did the agreement entail a bilateral exchange of consideration? If it did, a valid employment contract was formed and the intern is, in fact, an “employee” deserving at least a minimum wage, an overtime rate, and protections against discrimination and harassment.¹¹⁵ If the agreement did not entail a bilateral exchange of consideration, then it is instead a gratuitous promise, and the intern is a “trainee” entitled to no wages.¹¹⁶

III. APPLICATION OF MY PROPOSAL

In this Part, I apply my proposal to hypothetical unpaid internships.

A. *Situation 1: Blatant Illegality*

Molly is a student at a premier fashion institute, and she just had a conversation with Sophia, the president of XYZ Fashion Company (XYZ). Sophia told Molly that she could work for her over the summer for forty hours each week. Sophia would not pay Molly, but Molly would be able to learn about the fashion industry and would have a great name to put on her resume. Molly agrees, but over the summer, she is disappointed by her work. Molly checks Sophia’s mail, makes coffee for the office, takes lunch orders, cold-calls department stores to ask if they will carry XYZ’s products, and sweeps the floors at the end of every day. In fact, during two particularly busy weeks, Molly works ten hours each day. At the end of her internship, she files a lawsuit against XYZ.

¹¹⁵ Note that, under my test, even if an intern did not receive wages, she could still be entitled to sexual harassment protection. This logic is in contrast to the logic employed by the court in *O'Connor v. Davis*, 126 F.3d 112, 113 (2d Cir. 1997). There, the court held that, because the intern was unpaid, she was not protected under sexual harassment statutes. *Id.* at 119. I argue that, in cases like this, if the internship fails my test, the plaintiff could sue not only for back pay, but also for violations of harassment statutes because she should have been paid wages. That she was wrongfully not paid should not ruin her sexual harassment claim.

¹¹⁶ I avoid the question here of whether *legally* unpaid interns should be protected against workplace sexual harassment. In the Second Circuit, they are not protected. *See supra* subsection I.C.4. However, both legislative chambers in Oregon recently passed a law protecting all unpaid interns from harassment and discrimination. *See* Kristian Foden-Vencil, *Oregon Bill to Protect Unpaid Interns from Harassment, Discrimination*, OPB (June 5, 2013), <http://www.opb.org/news/article/oregon-bill-to-protect-unpaid-interns-from-harassment-discrimination>; *see also* Ortner, *supra* note 98, at 2645 (arguing that unpaid interns should receive protections under Title VII because they are “employees” since they receive nonmonetary compensation). This topic, while relevant, is beyond the scope of this Comment.

I concur with Ortner and believe that if there is a bilateral exchange of consideration, there is a valid employment contract and the intern is an “employee.” Therefore, as an employee, the intern deserves the protection of harassment and discrimination laws, even if judges refuse to mandate that such employment contracts warrant monetary consideration.

This example is the most clear cut. Put simply, Molly will win her civil suit. Nevertheless, I apply my test step by step.

First, we must ask, “Did Molly and Sophia understand that Molly was to work for free?” Yes, both the employer and Molly understood this fact in their preliminary conversation.

Second, we must ask, “Did Sophia offer the internship to Molly to receive a benefit from the internship?” Factors helpful in making this determination are (1) whether the internship was similar to training given in a classroom, (2) whether the intern displaced regular employees, and (3) whether the employer promised the intern a job at the conclusion of the internship. Yes, the benefit to Sophia here is very clear. A work environment that entails making coffee, taking lunch orders, and sweeping floors is nothing like the classroom environment of Molly’s premier fashion institute, where the professors speak about how to create clothes and jewelry that match seasonal trends and satisfy consumers. Additionally, it seems obvious that Molly is doing the work of a janitor and a secretary and is thereby displacing a paid worker who could be, or perhaps was, employed by Sophia. No employment was promised to Molly, but this fact alone is not enough to overcome the overwhelming evidence that Sophia hired Molly to receive Molly’s work product without paying her in return.

Under my test, Molly is entitled to at least the minimum wage of \$7.25 for every hour she worked up to forty hours a week and then \$10.88 for the forty-first to fiftieth hours she worked in the two particularly busy weeks.¹¹⁷ If Sophia or another employee had harassed or discriminated against Molly, she would also have standing to bring a harassment or discrimination suit.

B. *Situation 2: Latent Illegality*

Molly, Sophia, and XYZ are the characters again, and Sophia and Molly have the same conversation in which they agree that Molly is not to be paid. This time, however, they stipulate that Molly will not be sweeping floors or answering phones. Instead of hiring a paid consultant for XYZ’s busy summer, Sophia has hired Molly as an intern to do substantive, challenging work. During her time, Molly works with a team of eight people in the “Fall Trends” department, and Molly is treated just like every other employee. She comes up with new designs for necklaces and earrings (her specialties) and helps conceive marketing plans for XYZ’s fall catalogue. Molly’s hours are the same as in the previous example.

¹¹⁷ See *supra* notes 36-37 and accompanying text.

Here, our intuition changes from the previous example, and we feel more comfortable with the internship—most likely because Molly is receiving increased intangible consideration in the form of experience.¹¹⁸ The outcome, however, is the same as in the previous example: the internship is illegal.

As a threshold matter, Molly and Sophia both understand that the internship is unpaid. So again, the core issue is whether there was mutually induced consideration.¹¹⁹ To test this, we ask whether Sophia expected to receive a benefit from Molly. Molly's expectation of a benefit is presumed. Recall, the focus is on the parties' *ex ante* expectations.

In this scenario, Sophia seems to have offered Molly the internship to receive a benefit from her. Rather than hire a creative consultant for the summer, whom Sophia would have to pay, she hired Molly for free, expecting Molly to confer a benefit upon the company through her creativity and work product. Contractually, Sophia's promise to provide Molly experience induced Molly's promise to provide product ideas and marketing schemes to Sophia—and vice versa.¹²⁰ Thus, because we have a bilateral exchange of mutually induced consideration, we have a valid employment contract that deserves at least the minimum wage and that gives Molly standing to file a harassment or discrimination lawsuit.

C. *Situation 3: Superficially Unsettling Illegality*

The preliminary agreement is the same as that of the previous example (no pay), and the *kind* of work Molly does is also the same. What changes in this situation, however, is Molly's work product. Her jewelry and necklace designs are hideous, her loud singing in the office is a constant distraction, and her rudeness offends the customers who enter the premises. In fact, Sophia tells her to leave two weeks before the conclusion of the summer.

In this situation, intuition tempts us to believe that Molly deserves no compensation because Sophia has been harmed by Molly's internship, yet Molly can still benefit from the relationship by putting the prestigious XYZ name on her resume. Here, however, our intuition leads us astray.

¹¹⁸ Note, though, that some people may be even more uncomfortable with this scenario than the previous one because Sophia is receiving more valuable work from Molly. Nevertheless, intuition is not the focus of this Comment.

¹¹⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 71(2) (1981) ("A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.").

¹²⁰ Even though Molly received increased intangible consideration, nonmonetary compensation does not satisfy the minimum wage laws of the United States. See 29 U.S.C. § 206(a)(1) (2006 & Supp. V 2012) (requiring wages of \$7.25 per hour or more).

Again, the first step is not a problem because both Molly and Sophia understood the internship was unpaid. As for the second step, however, a careful look at the language is necessary. The key inquiry is whether the employer offered the unpaid internship to receive a benefit from the intern. The emphasis is not on whether actual benefit *was conferred* upon the employer, but instead on whether the employer, *ex ante*, *sought* a benefit. Situations 2 and 3 demonstrate why this emphasis is proper.

Any employer, in making a hiring decision, is taking a risk. *Ex post*, an employee might have benefitted the firm or hurt it. Regardless, the employee—in this case, the intern—deserves at least a minimum wage because this risk is properly placed on the employer since it is the employer who stands to benefit from such hiring decisions. For instance, let us presume that Sophia will hire one hundred people over the next five years, and that she makes her decisions after a two-round interview process. These five years show that ninety of the employees each conferred a net benefit of \$1000 to XYZ, but ten of the employees each caused a net loss to the firm of \$1000. Therefore, in total, Sophia's hiring practice benefitted her firm by \$80,000.

In fact, Sophia rationally undertook those ten bad eggs and their resulting \$10,000 cost to XYZ. For example, suppose that Sophia could have 100% accuracy in hiring competent individuals, but that this accuracy would entail a four-round interview process that would cost her an additional \$25,000. Therefore, if she chose this four-round interview process, she would have one hundred persons, each providing a \$1000 benefit to XYZ, but because of the high costs of achieving 100% accuracy, the net benefit would be only \$75,000—\$5000 lower than the alternative scenario in which she had chosen ninety competent persons and ten incompetent persons.

Thus, Sophia should be required to pay for Molly's internship, even though Molly's work was unproductive, because Sophia consciously and rationally undertook that risk. In fact, Sophia benefits from the reward of that risk over the course of time.¹²¹ To hold contrarily would be to allow Sophia to freeride on her choice of interns until they proved themselves worthy.

¹²¹ This logic is similar, though not identical, to Marvin Chirelstein's analysis of mutual mistakes, where he states that

the dealer calculates that he will lose \$X through misappraisals unless he spends \$X *plus* \$Y to hire another appraiser. Since the cost of employing additional personnel exceeds the expected benefit, the dealer wisely decides not to take that step. But having made that decision, he cannot also claim that he has made a 'mistake' and should be permitted to rescind

Now, a complication to this scenario is that the *Fact Sheet* uses the language “immediate advantage.”¹²² One could arguably construe this situation as not providing Sophia with an “immediate” advantage; Sophia would only benefit in the long run from her hiring scheme. I, however, eliminated the “immediate” language from my test because it could conceivably prevent employers from having to pay interns in situations such as these and bring about other complications that I will discuss later.¹²³

In conclusion, Molly would be entitled to the same damages as before (minus the two weeks she did not work due to her dismissal) and would have standing to bring harassment and discrimination lawsuits.

D. *Situation 4: Simple Legality*

Here, we have a similar preliminary agreement in which Molly and Sophia understand that Molly is not to be paid and not promised a full-time job. This time, the internship proceeds differently, and Molly shadows Sophia throughout the day. Molly sees how Sophia talks to clients, why she chooses to market jeans *A* over jeans *B*, how she deals with her employees, and generally how the fashion industry works. In fact, during the summer, Sophia stays late some days telling Molly about how she got started in the industry and Molly often interrupts Sophia’s work with her questions. On the last day, Molly gives Sophia her consummative project: a new necklace design, but Sophia does not, and never intended to, include it in her catalogue and only gives Molly constructive criticism on it.

Applying my proposal, we find that this unpaid internship is legal.¹²⁴ Ex ante, Sophia expected no benefit from Molly; indeed, Sophia did not even anticipate receiving a work product from Molly. Molly’s capstone project, while relevant to XYZ, was really just a training exercise. Indeed, Sophia was even hurt by hiring Molly, because Molly’s questions interrupted her workflow and because Sophia spent time talking to Molly that she could otherwise have spent working. Molly, on the other hand, received a great benefit because she can put XYZ on her resume and she has learned how to be successful in the fashion industry from an expert.

Another crucial point here is that Sophia did not promise Molly a full-time job at the conclusion of the internship. If she had, one could make the

¹²² See FACT SHEET, *supra* note 33.

¹²³ For a more detailed discussion regarding my omission of “immediate,” see *supra* subsection II.A.2.

¹²⁴ To avoid redundancy, we presume hereafter that both parties understand the internship is to be unpaid.

argument that Molly should be considered an employee because Sophia expected to receive a benefit from the internship: a cost-free training period.

E. *Situation 5: Unexpected Benefit*

This situation has the same premise as the previous one except that, one day, while Sophia is showing Molly the new fall catalogue, Molly suggests making the primary dress orange instead of purple. Sophia likes the idea and, at the last minute, changes the color of XYZ's main dress of the season to orange. The dress flies off the shelves, and XYZ, as a result, sees a 10% increase in revenue.

Though this scenario is complicated, if we adhere to the test, the outcome is clear. First, we ask whether Sophia offered the position to Molly to receive a benefit from the internship. The answer is that, *ex ante*, Sophia merely intended for Molly to be her shadow and, indeed, expected Molly to sometimes hinder her work—as occurred in Scenario 4. Ultimately, however, Molly conferred an unexpected benefit upon Sophia.

Our analysis, though, must remain rigid and focused on the *ex ante* intentions. Actual benefits can be evidence of the employer's *ex ante* intentions, but they are not dispositive. If we look at the facts of the situation, it is clear that Sophia initially offered Molly the internship and the experience that came with it with no expectation of reciprocal benefits—in essence, it was a gift. What demonstrates this intention is that Sophia required Molly to shadow her throughout the summer.

Molly, for her part, conferred her benefit upon Sophia unexpectedly; Sophia never bargained for it. Indeed, the color idea can be construed as an unexpected *gift* from Molly's standpoint, so the entire situation is best thought of as the exchange of two unconnected gifts—in contractual language, as gratuitous promises that were not mutually induced. The scenario of the unexpected benefit, therefore, passes my test, and the unpaid internship is legal.

F. *Situation 6: Conditional Gratuitous Promise*

Our final situation is a complicated one, and to illustrate it properly, we need new characters. Now, we have Gary, an owner of a construction company, and Fred, a young man hoping to be a carpenter. In a conversation, Gary tells Fred, "I'll show you the ropes of being a carpenter, but I think that, to really learn the trade, you have to do real work. To help you out, I'll give you some very small projects on my construction sites, and I'll watch

over you to make sure you do them correctly, even though it will mean less time for me to watch over my other guys.”

Applying our test here is complex and requires close attention to the precise language. Again, the second step is to examine whether the employer offered the position *to* receive a benefit from the internship. The vital word, in this situation, is “to” because it goes to the employer’s motive. In essence, “to” refines the question to ask whether the internship’s potential benefit induced the employer’s promise of an internship.

In this scenario, Fred has secured an internship through Gary’s good will. Fred *is* conferring a benefit upon Gary—doing these small projects that Gary might have otherwise had to do himself—but Fred’s conferred benefit does not seem to have induced Gary’s promise.¹²⁵ In other words, Gary did not give Fred the internship *so that* Fred could do small projects; Gary gave Fred the internship simply to help Fred. It just so happens that a condition for Fred to receive the gratuitous gift—Gary’s supervision and guidance—is that Fred must confer some benefit upon Gary—doing the small projects, which help him learn to be a carpenter. In contractual language, Gary gave Fred a conditional gratuitous promise. Under my test, this unpaid internship is valid because the condition to Gary’s promise was just that—a condition—and not full-blown consideration that induced Gary’s promise.

Compliance with theoretical formalities, however, does not always bode well for practical application. Here, it seems the employer could often raise the assertion that the benefit received by him was not bargained for; it was just a condition to the gratuitous promise. More bluntly, the employer may be able to abuse the conditional-gratuitous-promise defense by saying something like, “The intern had to confer a benefit upon me in order to learn; I did not actually care about that benefit.”

If this defense is raised, however, we can overcome its potential abuse by applying a comparative cost–benefit analysis.¹²⁶ An employer’s receipt of

¹²⁵ Again, there will be evidentiary problems in discovering Gary’s *ex ante* intent, but not more than in any criminal or civil trial that requires a finding of intent. Factors helpful to making such a conclusion include whether the employer—*ex post*—receives a comparative cost–benefit advantage, whether the intern displaced a regular employee, whether the work environment was educational in nature, and typical kinds of evidence like emails, phone calls, and in-person conversations that display the true purpose of the relationship.

¹²⁶ See Edwards & Hertel-Fernandez, *supra* note 43, at 4 (claiming that the proper test for the legality of unpaid internships is whether “the per-hour cost to the employer of an intern . . . [exceeds] the per-hour benefit to the employer of an intern” (emphasis omitted)).

Though I think this test has great merit, in my view, it should be confined only to situations wherein the defense asserts that the employer really only offered a conditional gratuitous promise. Later, I discuss the danger of using it as the sole test for the legality of unpaid internships. For present purposes, I do not think that the “per-hour” metric is necessary and instead believe that a

some net benefit could be strong evidence that his promise actually was induced by the potential benefit of the internship, and therefore the intern is actually an employee who deserves a wage and protections against workplace discrimination and harassment. For the employer to receive a net benefit, the net difference between the costs and benefits of not having an intern must exceed the net difference between the costs and benefits of having an intern. Formulaically, $B_1 - C_1 > B_2 - C_2$.¹²⁷

I next apply this formula to our situation. For argument's sake, there are ten projects for the internship, and they would each take Gary, who earns \$50 an hour, thirty minutes. Each project, therefore, costs Gary—without Fred—\$25. In total, they cost Gary \$250. Fred, however, takes three hours to complete them. To make sure they are done properly and Fred is learning, Gary dedicates one hour personally to each one. For Gary with Fred, then, each project costs \$50 in Gary's labor plus the replacement value of any materials Fred ruined during his learning curve, which comes to an average of \$10 per project. Gary's total cost of Fred's internship, therefore, is \$600, which exceeds the \$250 cost of the small projects if Gary had not hired Fred.

In sum, though Gary received Fred's labor, which can be construed as a benefit, Gary did not receive a net advantage. Rationally, this lack of a net advantage supports (though does not prove)¹²⁸ the conclusion that Gary did not bargain for the consideration; it was merely a condition to his gratuitous promise.

Therefore, this situation would pass my test because there was no mutually induced consideration. There was no exchange, and thus there was no valid contract that makes the intern an employee who deserves at least minimum wage.

total cost–benefit analysis, ignoring hourly timeframes, is more appropriate. Moreover, note that my test is distinct because Edwards and Hertel-Fernandez's test focuses only on costs. *See infra* Section III.B.

¹²⁷ For this formula, B_1 is the benefit for the scenario with an intern, while B_2 is the benefit for the scenario without an intern. C_1 is the cost for the scenario with an intern, while C_2 is the cost for the scenario without an intern.

¹²⁸ No one factor or evidentiary consideration is dispositive. Rather, this inquiry will be more of a balancing test, which considers the totality of the circumstances. Again, other useful evidentiary factors are whether the intern displaced a regular employee, whether the work environment was educational in nature, and the typical kinds of evidence like emails, phone calls, and in-person conversations that display the true purpose of the relationship.

IV. CHALLENGES

A. *Challenge 1: Perversion of Contract Law*

Though I suggest that judges borrow from the law of contracts, my proposal runs counter to it because it calls for supernormal consideration.¹²⁹ Essentially, the formation of a contract requires a bargain, to which the parties mutually assent, and consideration, which can most simply be thought of as “the receipt by the promisor of ‘something of value’ from the promisee.”¹³⁰

The beauty of the doctrine of consideration is that it is in accord with the human spirit. In the words of Adam Smith,

Whoever offers to another a bargain of any kind, proposes to do this: Give me that which I want, and you shall have this which you want, is the meaning of every such offer . . . It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.¹³¹

The same reasoning applies to unpaid internships. Though the interns are not receiving money, they are still acting in their own self-interest. In exchange for providing the employer with their work product, they are receiving experience, connections, and credentials for their resumes—all of which will aid them in their eventual search for a paying job.¹³² Under the bargain theory of consideration, then, unpaid internships are valid contracts because each party—the employer and the intern—receives a benefit for which they bargained: the employer gets work from the intern, and the intern gets experience, a line on a resume, and networking opportunities from the employer.

The *Fact Sheet*, the FLSA, and my test can be seen as unfairly favoring interns because they require employers to provide supernormal consideration—that is, on top of an intern receiving intangible benefits like experience,

¹²⁹ By “supernormal consideration,” I mean consideration that is not necessary for the parties to come to an agreement. For instance, if *A* promises to paint *B*'s house and *B* promises to wash *A*'s car in return, forcing *B* to pay *A* an additional sum would constitute supernormal consideration.

¹³⁰ CHIRELSTEIN, *supra* note 121, at 12. A famous example of a unique mutual consideration situation is the case of *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891). There, Hamer's uncle said that if Hamer did not smoke or drink until he was twenty-one, he would give him \$5000. *Id.* at 256. Hamer fulfilled his end of the bargain, so the court awarded him \$5000—the return consideration for Hamer's consideration of not smoking or drinking. *Id.* at 259.

¹³¹ 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 21-22 (London, Strahan & Cadell, 5th ed. 1789) (1776).

¹³² See Jacobs, *supra* note 59; NACE, *supra* note 100 (finding that individuals who have held internships are “considerably more likely to receive a job offer than their counterparts who did not have any experiential education in their background”).

connections, and credentials, he must also receive at least \$7.25 per hour. In this sense, my test is perverse to contract law because it casts aside otherwise valid, mutually beneficial agreements and demands that they include monetary consideration to be legal. Because the premise of contract law is that mutually beneficial contracts create a net gain to society and thus increase the aggregate welfare,¹³³ the *Fact Sheet* and my test can be viewed as inhibiting such an increase, because they prohibit some mutually beneficial contracts.

Though my proposal does deviate from traditional contract law, my goal is merely to borrow the doctrine of consideration, not to adhere to contract law completely. Ultimately, through my proposal, I seek to clarify and simplify the *Fact Sheet* so that judges have a workable standard to use when addressing the legality of unpaid internships. Moreover, policymakers have decided that nonmonetary consideration alone cannot satisfy the minimum wage.¹³⁴ Therefore, though a bilateral exchange of consideration between an employer and an intern wherein the consideration conferred upon the intern is intangible may be valid under contract law, it contradicts the FLSA and thereby the policies Congress has established for our country.

B. Challenge 2: *Edwards and Hertel-Fernandez's Proposal Is Superior*

In *Not-So-Equal Protection: Reforming the Regulations of Student Internships*, Kathryn Anne Edwards and Alexander Hertel-Fernandez propose a test for the legality of unpaid internships in which a court would “compare the per-hour cost to the employer of an intern (through supervision and training) relative to the per-hour benefit to the employer of an intern (through an intern’s production).”¹³⁵ Under their proposal, if the cost exceeds the benefit,

¹³³ See CHIRELSTEIN, *supra* note 121, at 2 (asserting that a contract “is a kind of joint undertaking which increases the wealth of both parties and from which both emerge with a measure of enhanced utility”).

¹³⁴ See 29 U.S.C. § 206(a)(1) (2006 & Supp. V 2012) (requiring wages of \$7.25 per hour or more). It is worth asking, though, whether the use of nonmonetary consideration, such as prestige, is increasing in our country and perhaps should be considered valid under the FLSA. For example, a law student choosing to work for the law firm of Cravath, Swaine & Moore over Cahill Gordon & Reindell exemplifies this choice. Each year, some top law students choose to work for Cravath over Cahill, despite Cahill’s superior compensation, presumably because Cravath provides them with superior intangible benefits like prestige and experience. See Elie Mystal, *Associate Bonus Watch: Cahill Gordon DESTROYS the Cravath Bonus*, ABOVE THE LAW (Dec. 8, 2010, 5:16 p.m.), <http://abovethelaw.com/2010/12/associate-bonus-watch-cahill-gordon-destroys-the-cravath-bonus> (“[S]ome Cahill Gordon associates are going to take home total bonus money that’s \$35,000 . . . more than Cravath associates.”). In this respect, one could argue that students are rationally choosing to forego monetary income and are instead opting for prestigious unpaid internships that carry advantageous nonmonetary consideration that will benefit them in the long run—just as some *paid* workers forego extra income to receive seemingly more valuable intangible benefits.

¹³⁵ Edwards & Hertel-Fernandez, *supra* note 43, at 4 (emphasis omitted).

the relationship is that of employer–intern; if the benefit exceeds the cost, the relationship is that of employer–employee, meaning that the intern should be compensated under the FLSA.¹³⁶ In addition to this test, Edwards and Hertel-Fernandez also retain prongs one, three, five, and six (the prongs not pertaining to the primary beneficiary of the relationship) of the *Fact Sheet*.¹³⁷ Though this idea has merit, retaining the first, third, and fifth prongs renders it underinclusive, too focused on actual costs as opposed to expected costs, impractical, and overly complicated.

First, this test is underinclusive because it only focuses on the costs to the employer without considering the benefits. In their analysis, Edwards and Hertel-Fernandez assume that the benefit an intern confers upon her employer is equal to the cost to the employer of a comparable hire.¹³⁸ In the simplest example, if an intern is working forty hours per week, doing work that the employer would otherwise have to hire a \$10 per hour employee to do, the employer is benefitting \$400 per week from the internship. Therefore, under Edwards and Hertel-Fernandez’s test, the internship would require at least the minimum wage.

Edwards and Hertel-Fernandez, however, rightly recognize that the costs of an internship are not as simplistic as those of the previous example.¹³⁹ They therefore provide the following hypothetical:

Because of the intern’s lack of experience, a regular worker must spend half of his time observing the intern’s work. If the regular worker’s normal compensation is \$25 an hour and he normally works 40 hours per week, then the total cost to the employer of having the intern is \$3,500. If the intern works 40 hours a week for seven weeks, and the wage of a comparable worker is \$10 an hour, then the benefit to the employer is \$2,800. In this case, the cost (\$3,500) exceeds the benefit (\$2,800) so the intern does not legally have to be compensated, assuming that the other four tests were also met.¹⁴⁰

In line with their test, the authors view benefit only as the cost of hiring a comparable worker. This definition, however, is overly narrow because it ignores benefits like goodwill with the community, goodwill with clients, goodwill with the intern’s school, and industry-wide unpaid training.

To further my argument, I tweak Edwards and Hertel-Fernandez’s hypothetical such that the cost of a comparable worker is \$12.49 per hour

¹³⁶ *Id.*

¹³⁷ *See id.* (“We propose applying a new, straightforward, quantitative test to two of the most ambiguous but most important elements of the guidelines: points two . . . and four . . .”).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 5.

and make the employer an investment management firm. After this change, the cost of having the intern remains at \$3500 due to the cost of supervision, but the costs of not having the intern have risen to \$3497.20 (\$12.49 per hour \times 280 hours). Still, this hypothetical passes their test because the cost of having the intern exceeds the cost of not having one by \$2.80 (\$3500 (the cost to the employer of having an intern) - \$3497.20 (the cost of not having an intern)).

Now, let us apply the above calculation to the facts of my previous hypothetical concerning ABC Investments. ABC is located in a suburb of central New Jersey and hires ten unpaid interns each summer, eight of whom are sophomores from Princeton University and two of whom are the daughters of wealthy clients. By having this hiring practice in place, the firm operates at an immediate loss of \$28 per summer (-\$2.80 per intern \times 10 interns); however, this scheme generates considerable goodwill for the company with respect to Princeton University, the community, and clients, and provides industry-wide, cost-free training.

Thus, using Edwards and Hertel-Fernandez's concept of "cost," ABC's unpaid internships are valid because they impose a net cost to ABC of \$28 per summer, but in reality, the unpaid internships may increase ABC's bottom line by tens of thousands of dollars in the long run.¹⁴¹ As a result, their test is underinclusive in that it would not prohibit exploitative unpaid internships that confer great benefits upon employers, because it focuses only on costs, not benefits. My mutually induced consideration test, to the contrary, would forbid such exploitative internships because it takes into account both costs and benefits. Under my test, ex post benefits from unpaid internships, like long-term increases to an employer's profits, can be evidence of an ex ante intent to receive a benefit from the intern.

Second, their test is flawed because its focus is *only* ex post as opposed to ex ante. Under an ex post review, interns could receive unequal treatment depending on their level of production.¹⁴² For example, hypothetical Hometown News hired John and Nancy as unpaid interns, expecting them to confer a benefit upon Hometown News by doing free editing. The cost of hiring a paid editor would be \$10 per hour, and they each work ten hours per day. Thus, the "benefit" to Hometown News under the Edwards and Hertel-Fernandez

¹⁴¹ To arrive at the "thousands of dollars" conclusion, I assumed that the investment firm would have paid each intern \$7.25 per hour, 40 hours a week, ten weeks a year. Because there are ten interns in the hypothetical who are working for free, that amounts to a savings of \$29,000. Even this figure, though, is conservative. The firm would also be benefitting from better services and more clients, most likely resulting in lower costs and more revenue.

¹⁴² The heart of this critique of Edwards and Hertel-Fernandez's test is identical to my discussion of why the focus in my test is whether, ex ante, the employer sought a benefit. *See supra* Section III.C.

test is \$200 per day ($2 \times (\$10 \times 10 \text{ hours})$). The monitoring cost to Hometown News differs depending on the intern, however. John requires no monitoring, but Nancy requires five hours of attention from Dave, the supervisor, who makes \$40 per hour. Thus, John's net benefit is \$100 per day to Hometown News, but Nancy's net benefit to Hometown News is \$0 per day ($\$100 \text{ benefit} - (\$20 \text{ monitoring costs} \times 5 \text{ hours})$).

Ex post, therefore, John would require payment under the Edwards and Hertel-Fernandez test, but Nancy would not—even though, ex ante, Hometown News anticipated deriving a net benefit from both interns. This result eliminates Hometown News's risk of hiring incompetent interns, which is problematic because it is saving money in the long run by reducing due diligence costs.

Third, their test is impracticable. The defendant in *Glatt v. Fox Searchlight Pictures, Inc.* proposed a similar “‘primary benefit test,’ [which would require] determining whether ‘the internship’s benefits to the intern outweigh the benefits to the engaging entity.’”¹⁴³ The court rejected the proposal, calling it “unmanageable.”¹⁴⁴ Judge Pauley of the Southern District of New York reasoned that such a test is “subjective and unpredictable” because “the very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who ‘learned a lot.’”¹⁴⁵

Finally, the Edwards and Hertel-Fernandez test is overly complicated because it retains the first, third, and fifth prongs of the *Fact Sheet*'s test. As I previously discussed, these prongs are unnecessary because they are derivatives of the second and fourth prongs, which deal with the costs and benefits of the internship. The third prong is particularly redundant in this context, since it asks whether the intern displaces a regular employee,¹⁴⁶ and their test requires that the cost of a comparable employee be calculated. Under their test, then, if a comparable employee would be more costly than an unpaid intern, the intern necessarily displaces a regular employee, rendering the third prong superfluous.

In conclusion, though calculating the costs to the employer of having and not having an intern may be useful in determining the ex ante motivation of the employer for the purposes of my test, Edwards and Hertel-Fernandez's overall proposal is flawed because it does not take into account

¹⁴³ *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11-6784, 2013 WL 2495140, at *11 (S.D.N.Y. June 11, 2013).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See FACT SHEET, *supra* note 33 (“The intern does not displace regular employees, but works under close supervision of existing staff.”).

important benefits like goodwill and reduced training costs that unpaid interns confer upon employers. Furthermore, the notion that this comparative cost test should be used in conjunction with the first, third, and fifth prongs of the *Fact Sheet* is overly complicated and redundant.

CONCLUSION

While working on *Black Swan*, which grossed over \$300 million, Alex Footman took out the garbage, swept floors, and got coffee for the crew.¹⁴⁷ For his efforts, he received no compensation.¹⁴⁸ Natalie Portman, the film's lead actress, received \$2 million.¹⁴⁹ My proposal is not that Alex should make as much—or even a tenth as much—as the Oscar-winning Portman. I only suggest that he receive at least \$7.25 per hour and have standing to bring a harassment or discrimination lawsuit.

The FLSA defines an employee as “any individual employed by an employer.”¹⁵⁰ “Employ,” under FLSA, means to “suffer or permit to work.”¹⁵¹ The court in *Walling v. Portland Terminal Co.*,¹⁵² however, narrowed this definition so that “employ” does not “make all persons employees who, without any express or implied compensation agreement, may work for their own advantage on the premises of another.”¹⁵³ In response to heightened criticism of unpaid internships, the Department of Labor released the *Fact Sheet* to clarify when an intern is an “employee” deserving minimum wage and overtime rates.

This *Fact Sheet*, however, proposes a complicated and redundant six-point test accompanied by muddled notes that will make rendering a decision for judges in upcoming lawsuits unnecessarily difficult, thereby increasing the chances of incorrect verdicts.¹⁵⁴ This risk of preventing legal unpaid internships and especially of allowing illegal ones is dangerous to our society. Legal unpaid internships, if prevented, will deprive our labor force of an effective source of training. Illegal unpaid internships, if allowed, will financially hurt interns, distribute discriminatory benefits among different socioeconomic

¹⁴⁷ Greenhouse, *supra* note 1.

¹⁴⁸ *Id.*

¹⁴⁹ Dan Sabbagh, *Natalie Portman Sparks Hollywood Battle*, GUARDIAN: ORGAN GRINDER BLOG (Mar. 16, 2011), <http://www.guardian.com/business/organgrinder/2011/mar/16/natalie-portman-actor-fee>.

¹⁵⁰ 29 U.S.C. § 203(e)(1) (2006).

¹⁵¹ *Id.* § 203(g).

¹⁵² 330 U.S. 148 (1947).

¹⁵³ Letter from Wage and Hour Division, *supra* note 32.

¹⁵⁴ See *Wang v. Hearst Corp.*, No. 12-0793, 2012 WL 2864524, at *3 (S.D.N.Y. July 12, 2012) (certifying a class action lawsuit against the Hearst Corporation for allegedly violating minimum wage laws by not paying or underpaying interns).

classes, increase the unemployment rate, and fail to provide interns with statutory protection from workplace discrimination and harassment.

To avoid these problems, I propose a simpler, cleaner test for judges to use. If the employer and intern expect, *ex ante*, to receive a benefit from one another, then a valid employment relationship has been formed. This relationship deserves at least the minimum wage and gives standing to the intern to file a harassment or discrimination lawsuit. If only the intern expects to receive a benefit, then the employer is conferring a gift upon the intern, and the intern need not be paid.¹⁵⁵

The primary advantage of my proposal is that it gives judges an easy to use, accurate test that will reduce costs to society such as a higher unemployment rate, an inefficient work force, and interns who are unwarrantedly burdened with steep financial costs. Furthermore, my hope is that if this test creates meaningful judgments against employers who are exploiting interns, more unpaid interns will surmount the fear of retribution and launch lawsuits against their employers, and companies will be deterred from installing *illegal* unpaid internship programs in the first place.

¹⁵⁵ Again, in this Comment, I avoid the issue of whether the intern should nevertheless have standing to sue on harassment or discrimination grounds despite being a legal unpaid intern.