

February 2019

## “Mass Exploitation Hidden in Plain Sight”: Unpaid Internships and the Culture of Uncompensated Work

David C. Yamada

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/idaho-law-review>

---

### Recommended Citation

David C. Yamada, *“Mass Exploitation Hidden in Plain Sight”: Unpaid Internships and the Culture of Uncompensated Work*, 52 IDAHO L. REV. 937 (2019).

Available at: <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol52/iss3/6>

This Article is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Law Review by an authorized editor of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

# “MASS EXPLOITATION HIDDEN IN PLAIN SIGHT”: UNPAID INTERNSHIPS AND THE CULTURE OF UNCOMPENSATED WORK

DAVID C. YAMADA\*

## TABLE OF CONTENTS

I. THE EMERGENCE OF THE INTERN ECONOMY.....	938
II. INTERNSHIPS AND COMPENSATION.....	940
A. U.S. Department of Labor Fact Sheet No. 71 .....	940
B. <i>Glatt v. Fox Searchlight Pictures, Inc.</i> .....	941
1. District Court Decision .....	942
2. Court of Appeals Decision .....	943
C. Assessing the Primary Beneficiary Test.....	944
III. INTERNSHIPS AND EMPLOYMENT DISCRIMINATION LAW .....	946
IV. THE EXPANDING ECONOMIC CULTURE OF UNPAID WORK .....	948

Although gaining internship experience has become a largely expected rite of passage for those seeking entry into many professions and vocations, until recently the legal implications of unpaid internships remained something of a sleeping giant. In recent years, however, growing attention has been directed to this subject through litigation, legislative advocacy, social activism, and media coverage. This essay, building on my previous scholarship on this topic<sup>1</sup> and written in connection with the *Idaho Law Review's* April 2016 symposium on employment issues, will summarize the emergence of the so-called intern economy, examine the two primary legal issues relating to unpaid internships, and discuss several significant, broader policy themes concerning the intersection of internships, education, and the nature of paid employment. Ultimately, I suggest that unpaid internships are contributing to an expanding, ex-

---

\*. Professor of Law and Director, New Workplace Institute, Suffolk University Law School, Boston, Massachusetts. J.D., New York University. In addition to publishing scholarship on the legal aspects of internships, the author has actively supported advocacy efforts to extend legal protections to unpaid interns, including being a party to amicus briefs for the plaintiffs in the *Glatt v. Fox Searchlight Pictures* litigation discussed below and serving as a subject matter expert for the media. The portion of the essay title in quotes borrows a line from ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* xiv (updated ed. 2012), with the author's blessing. The relevant passage is quoted at greater length in the text below.

1. See David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002) [hereinafter *Student Interns*]; David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 NE. U. L. J. (forthcoming 2016) [hereinafter *Unpaid Internships*].

exploitative economic culture of uncompensated work and contingent labor, one supported by our legal system.

### I. THE EMERGENCE OF THE INTERN ECONOMY<sup>2</sup>

Some thirty or forty years ago, obtaining an array of internships at the undergraduate and graduate levels was not widely expected of students, at least beyond those enrolled in professional degree programs. Especially at the undergraduate level, internships were still regarded as the province of those privileged by socio-economic status or enrollment at a prestigious university. In order to distinguish herself, a typical middle class college student with upwardly mobile ambitions would likely focus on getting strong grades and participating in meaningful extra-curricular activities and volunteer work. Work experience was gained through whatever part-time and summer jobs could be secured to help pay for tuition and expenses, usually entry-level retail and service sector positions paying around the minimum wage, or perhaps manufacturing or construction work paying somewhat more.

Since then, the landscape has changed considerably. Internships have become an expected rite of passage for post-secondary students and even recent graduates. No central registry of internships exists, so it is impossible to determine how many existed over a course of years. Nevertheless, as virtually any faculty member or university career counselor of more than twenty years experience can attest, the lists of internships appearing on typical student resumes have grown considerably. Furthermore, although there are no records establishing how many of these internships provided compensation, it is safe to say that a substantial share – roughly half based on available estimates – are unpaid.<sup>3</sup>

Two published works, one article, and one book, have provided notably insightful, informative commentary about the burgeoning intern economy. In 1997, *The Baffler*, a popular journal devoted to social and cultural issues, published a feature article that could be considered the opening salvo in an eventual movement against unpaid internships.<sup>4</sup> Focusing especially on the entertainment, media, and creative industries, author Jim Frederick wrote:

Somewhere over the past two or three decades, a secret and shrewdly undeclared war between the titans of the glamour industries and a small undefended segment of the labor pool has been fought, and labor has lost. By deft public relations maneuvering, innovation in the face of decreasing cash flow, and the merciless leveraging of an ever-younger, starry-eyed, and un-

---

2. For expanded descriptions of the growth of the intern economy, please see my articles cited previously, *supra* note 1.

3. See *Student Interns*, *supra* note 1, at 218 (reporting 50 percent estimate).

4. See Jim Frederick, *Internment Camp: The Intern Economy and the Culture Trust*, 9 THE BAFFLER (1997), <http://thebaffler.com/salvos/internment-camp>.

wary segment of the population, the media mandarins have cemented the institution of the internship—working for free—as not merely an acceptable route up the corporate ladder, but the expected one. Tomorrow’s Mike Ovitzes, David Geffens, and Barry Dillers won’t have started in the mailroom at William Morris, they will have been interns there.<sup>5</sup>

*The Baffler* piece did not have an immediate impact on the law, public policy, or employer practices concerning internships. However, it was perhaps the first significant piece in a non-specialized periodical to document the quiet evolution of a gap stage between classroom education and entry-level paid work and to discuss the legal gray areas created in terms of basic employment protections. Even today, those active in the emerging intern rights movement point to it as a significant commentary.

Nearly 15 years later, Ross Perlin’s *Intern Nation* would provide the first book-length assessment of the intern economy.<sup>6</sup> *Intern Nation* covered a lot of ground first surveyed in *The Baffler*, but at a much greater level of depth and breadth, sharing the fruits of the author’s multi-year investigative project. Perlin unambiguously set out his basic position:

Internships are changing the nature of work and education in America and beyond. Over the last few decades, they have become the principal point of entry for young people into the white-collar world. A significant number of these situations are unethical and even illegal under U.S. law – a form of mass exploitation hidden in plain sight. Those who can’t afford to work without pay are effectively shut out, while a large group of interns from low- and middle-income backgrounds barely scrapes by. Plum internships are overwhelmingly for the wealthy and well-connected – to an extent that would be shocking if it involved regular jobs. Yet no one budes, nothing happens.<sup>7</sup>

Yet someone did budge, and something did happen, as result of Perlin’s book. *Intern Nation* devoted an entire chapter to exploring the legality of unpaid internships<sup>8</sup> under the federal Fair Labor Standards Act, which, among other things, prescribes the federal minimum wage.<sup>9</sup> Among the book’s readers was Eric Glatt, the holder of an MBA and a

5. *Id.*

6. Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (updated ed. 2012) [hereinafter, *Intern Nation*]. Perlin’s original edition appeared in 2011.

7. *Id.* at xiv.

8. See *INTERN NATION*, *supra* note 6 at 61–82 (chapter titled “A Lawsuit Waiting to Happen”).

9. Fair Labor Standards Act, 29 U.S.C. § 206 (2012).

former unpaid intern with Fox Searchlight Pictures. Glatt's reading of *Intern Nation* and my law review article cited within it gave him reason to believe that a legal claim for unpaid wages might be viable, and he eventually became a lead plaintiff in the litigation discussed below.<sup>10</sup> This emerging confluence of developments would help to spur a grass-roots intern rights movement, including additional litigation, social media outreach, and social activism. The media began to take notice as well, giving this movement a good dose of public visibility.<sup>11</sup>

## II. INTERNSHIPS AND COMPENSATION

Among the legal and policy issues concerning unpaid internships, the question of their legality under minimum wage laws has attracted by far the greatest attention. This section centers on the most significant development within this realm to date, court rulings in a leading lawsuit seeking back wages for unpaid interns at a major film production company.<sup>12</sup>

### A. U.S. Department of Labor Fact Sheet No. 71

In April 2010, the U.S. Department of Labor issued memorandum, Fact Sheet No. 71, which provides "general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the services that they provide to 'for-profit' private sector employers."<sup>13</sup> Fact Sheet No. 71 articulated a six-part test that private sector employers would have to meet in order to be exempt from paying the minimum wage to interns.<sup>14</sup> This test was drawn from its approach for determining minimum wage exemptions for training and apprenticeship programs, which was first defined by the

---

10. This story has been related to me by Eric Glatt, via ongoing personal meetings and discussions.

11. See, e.g., Melissa Schorr, *The Revolt of the Unpaid Intern*, BOSTON GLOBE MAGAZINE (Jan. 12, 2014), <https://www.bostonglobe.com/magazine/2014/01/12/unpaid-internships-are-they-doomed/vi8MVlqfeJQHlMY3vlBpJ/story.html> (reporting on the intern economy and challenges to it); Michelle Chen, *For Disgruntled Young Workers, Lawsuits May Spark Intern Insurrection*, IN THESE TIMES (June 24, 2013), [http://inthesetimes.com/working/entry/15190/for\\_disgruntled\\_young\\_workers\\_lawsuits\\_may\\_portend\\_intern\\_insurrection/](http://inthesetimes.com/working/entry/15190/for_disgruntled_young_workers_lawsuits_may_portend_intern_insurrection/) (discussing intern lawsuits for unpaid wages); 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/> (observing that "(a)s college students make the annual rite of passage from college classroom to summer internship, those unpaid positions may have finally peaked").

12. I provide considerably more details about unpaid internships and minimum wage laws in *Student Interns*, *supra* note 1 at 224–38 (setting out the legal basis for possible challenges to unpaid internships); *Unpaid Internships*, *supra* note 1 (discussing recent legal developments concerning litigation challenging unpaid internships).

13. U.S. Dep't of Labor, Wage and Hour Div., Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (April 2010) [hereinafter Fact Sheet # 71].

14. *Id.*

U.S. Supreme Court in a 1947 decision, *Walling v. Portland Terminal Co.*<sup>15</sup> The six criteria are:

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

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.<sup>16</sup>

As the language of the Fact Sheet indicates, the six-part test is to be applied conjunctively,<sup>17</sup> that is, an employer must meet all six criteria in order to be exempt from the wage requirements.

#### B. *Glatt v. Fox Searchlight Pictures, Inc.*<sup>18</sup>

In 2011, Eric Glatt, Alex Footman, and other named plaintiffs filed a putative class action lawsuit in a New York federal district court, claiming violations of federal and state minimum laws on the grounds that they were misclassified “as unpaid interns instead of paid employees” while working on the Fox Searchlight Pictures production of the motion pictures “Black Swan” and “500 Days of Summer.”<sup>19</sup> In the

---

15. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149–50 (1947) (holding that railway yard trainees were not employees under the Fair Labor Standards Act). The federal district court in *Glatt* relied on these factors in reaching its decision, noting, in particular, that the lead plaintiffs performed work that otherwise would have been done by paid workers. See *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013), *vacating and remanding* 791 F.3d 376 (2d Cir. 2015).

16. Fact Sheet # 71, *supra* note 13.

17. *Id.*

18. The *Glatt* litigation is discussed in greater detail in *Unpaid Internships*, *supra* note 1.

19. *Glatt*, 293 F.R.D. at 522.

course of their respective internships, both Glatt and Footman performed a variety of back office clerical and administrative tasks.<sup>20</sup>

### 1. District Court Decision

In 2013, the court ruled on cross motions for summary judgment, holding, *inter alia*, that Glatt and Footman were employees for purposes of the FLSA and the New York Labor Law,<sup>21</sup> entitling them to back pay. The court also certified the class of other unpaid interns who worked on the production.<sup>22</sup> The court further held that a third named plaintiff, Kanene Gratts, was time-barred from pursuing a claim.<sup>23</sup>

Citing favorably to *Walling v. Portland Terminal* and applying the six-part test defined in Fact Sheet No. 71,<sup>24</sup> the court analyzed the claims of Glatt and Footman, finding that they were employees within the meaning of federal and state wage and hour laws.<sup>25</sup> Among other things, noted the court, “Searchlight received the benefits of their unpaid work, which otherwise would have required paid employees.”<sup>26</sup> Glatt performed a variety of tasks for the accounting department, such as tracking purchase orders and invoices, obtaining signatures on documents, and completing clerical assignments.<sup>27</sup> Footman’s work assignments were of a similar nature, though perhaps leaning toward the clerical side.<sup>28</sup> With both plaintiffs, the court observed, had they not been available, paid employees would have had to do the work they performed.<sup>29</sup> The court concluded that, “[c]onsidering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are ‘employees’” under the FLSA and the [New York Labor Law].<sup>30</sup>

In applying the six-part test, the court also rejected the defense argument for the adoption of a “primary beneficiary” test that examines whether “the internship’s benefits to the intern outweigh the benefits to the engaging entity,” noting that such a standard had little support in relevant case law and would prove “subjective and unpredictable” in its application.<sup>31</sup> However, the court found that even if this test was used to determine employee status, “the Defendants were the ‘primary beneficiaries’ of the relationship, not Glatt and Footman.”<sup>32</sup>

---

20. *See id.* at 533.

21. *Id.* at 534.

22. *Id.* at 538.

23. *Id.* at 525.

24. *See id.* at 531.

25. *Glatt*, 293 F.R.D. at 534.

26. *Id.*

27. *Id.*

28. *See id.*

29. *Id.*

30. *Id.*

31. *Glatt*, 293 F.R.D. at 531–32.

32. *Id.* at 533.

## 2. Court of Appeals Decision

In July 2015, the U.S. Court of Appeals for the Second Circuit vacated the district court’s orders and remanded the case for further proceedings.<sup>33</sup> In January 2016, the court issued an amended decision that superseded its 2015 opinion, once again vacating the district court decision and remanding the case.<sup>34</sup> On the question of the legal standard to be applied for determining when for-profit employers are exempt from paying the minimum wage to interns, the court adopted the very “primary beneficiary” test that had been rejected by the lower court.<sup>35</sup> The court concurred “with defendants that the proper question is whether the intern or the employee is the primary beneficiary of the relationship.”<sup>36</sup> The court proceeded to enumerate “a non-exhaustive set of considerations” for determining with the intern or employer is the primary beneficiary of an internship:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

---

33. *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 379 (2d Cir. 2015). This included vacating the certification of class status. *Id.* at 388.

34. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016).

35. *Id.* at 536.

36. *Id.*



7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.<sup>37</sup>

The court added that “[n]o one factor is dispositive” and that “courts may consider relevant evidence beyond the specified factors in appropriate cases.”<sup>38</sup>

In adopting this test, the court acknowledged, but did not address, the plaintiffs’ position that the central legal inquiry should be whether “the employer receives an immediate advantage from the interns’ work.”<sup>39</sup> It expressly rejected the Department of Labor’s six-part test, finding it “too rigid for our precedent to withstand.”<sup>40</sup> Rather, stated the court, the primary beneficiary test properly “focuses on what the intern receives in exchange for his work” and “accords courts the flexibility to examine the economic reality as it exists between the intern and the employer.”<sup>41</sup> In attempting to characterize the contemporary nature of internships, the court noted that the primary beneficiary test “reflects the central feature of the modern internship – the relationship between the internship and the intern’s formal education,” while asserting that a “bona-fide internship . . . integrate[s] classroom learning with practice skill development in a real-world setting.”<sup>42</sup>

### C. Assessing the Primary Beneficiary Test

The July 2015 Court of Appeals ruling in *Glatt* was properly seen as a setback for the intern rights movement and a victory for employers,<sup>43</sup> and the January 2016 decision is hardly different.<sup>44</sup> While not fully closing the door on legal challenges to unpaid internships, the enumerated factors are heavily weighted toward employers, especially for intern-

---

37. *Id.* at 536–37.

38. *Id.* at 537.

39. *See id.*

40. *See id.* at 535.

41. *Glatt*, 811 F.3d at 536.

42. *Id.* at 537.

43. *See, e.g.*, Thomas E. Chase, *When Are Interns Employees?*, N.Y. L.J. (Aug. 3, 2015), <http://www.newyorklawjournal.com/id=1202733626053/When-Are-Interns-Employees> (stating that “[m]edia coverage characterized the Second Circuit’s decision as a decisive victory for employers and a defeat for interns”); Noam Scheiber, *Ruling on Unpaid Interns May Raise Bar for Claims*, N.Y. TIMES, N.Y. edition, July 3, 2015, at B1 (noting that “the opinion raises the bar much higher for future interns who may seek to bring claims against their employers”); Susan Adams, *Why The Second Circuit Made A Flawed Decision In Upholding Unpaid Internships*, FORBES.COM (July 7, 2015, 11:58 AM), <http://www.forbes.com/sites/susanadams/2015/07/07/why-the-second-circuit-made-a-flawed-decision-in-upholding-unpaid-internships/#2715e4857a0b3793daac3759> (criticizing the decision).

44. *Compare Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 531 (2d Cir. 2016) *with Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 379 (2d Cir. 2015).

ships associated with educational institutions.<sup>45</sup> To date, this is the most significant judicial decision on this issue, and thus the primary beneficiary test merits closer analysis. Several points are worth making here, while saving for later observations on the broader implications of this ruling.

First, *Glatt* is very likely to have ripple effects. According to information compiled by the non-profit investigative news organization ProPublica, as of April 2014, over 30 wage and hour lawsuits had been filed on behalf of former unpaid interns since 2011, with a noticeable increase in filings following the *Glatt* district court decision.<sup>46</sup> Although other federal circuits and state courts interpreting their respective state labor standards statutes are not obliged to follow this holding, the Second Circuit Court of Appeals has historically been an influential court.<sup>47</sup>

Second, the primary beneficiary test gives considerable leeway and discretion to businesses in weighing whether or not to pay their interns. By simply pasting "intern" on what otherwise might be considered a part-time, summer, or post-graduate entry-level job, an employer now can take its chances and make the position unpaid, claiming that the training, experience, and networking opportunities provided to the intern exceed the benefits provided to the employer by the intern's labor. The intern is left in the unenviable position of either accepting what are likely to be unilaterally imposed terms or challenging the unpaid status and thus jeopardizing her future career.

Third, the Court's conceptualization of the primary beneficiary test largely dismisses the significant benefits of internships to employers. Internship programs allow employers to train, mentor, and evaluate the next generation of new people into a profession, in addition to gaining the tangible work contributions that many interns provide. In some cases, that contribution will be substantial.

Fourth, by favoring exemptions for internships associated with colleges and universities, the court furthered the likelihood that more private sector employers will partner with internship programs sponsored by post-secondary institutions. This, in turn, means that more students will be paying tuition to work without compensation for companies who may profit from their work. There is nothing, for example, in the primary beneficiary test that precludes a service providing company from billing a client for the work of an intern who will not be paid for it. In addi-

---

45. See *Glatt*, 811 F.3d at 536 (factors emphasizing how internships benefit interns and favoring exempt status for internships associated with educational programs).

46. See Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, PROPUBLICA (last updated Apr. 15, 2014) <http://projects.propublica.org/graphics/intern-suits>.

47. See generally William M. Landes, et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 302-05 (1998) (showing Second Circuit among the influential circuits based on citation frequency).

tion, while colleges and universities are not part of the primary beneficiary calculus, they, too, reap the benefits of being able to charge full tuition for credit-earning internships, even though such arrangements rarely require the same level of educational resources, content, and oversight as formal coursework.

Finally, the primary beneficiary test relies on inherently flawed logic. As the district court in *Glatt* aptly observed:

Moreover, a “primary beneficiary” test is subjective and unpredictable. Defendants' counsel argued 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. Under this test, an employer could never know in advance whether it would be required to pay its interns. Such a standard is unmanageable.<sup>48</sup>

In fact, the question of who is the primary beneficiary may not be clear until *after* the internship has concluded.

Overall, the primary beneficiary test bolsters the already strong likelihood that internships will exploit the labor of those designated as interns. If the courts and agencies are willing to consider a different approach, then the six-part test and the primary beneficiary test should be replaced by a narrower, work-specific inquiry: First, interns should be paid for the time they work, like any other employee. Second, interns should be paid for time spent in training meetings or sessions intended primarily to prepare them to do work on behalf of the internship provider. The rationale for this streamlined approach is that people should be paid for their labor; the title of a position should be irrelevant.

### III. INTERNSHIPS AND EMPLOYMENT DISCRIMINATION LAW<sup>49</sup>

Unpaid interns also may face difficulties seeking legal relief for employment discrimination and sexual harassment. Federal employment discrimination statutes require an individual to be an employee, and a lack of compensation may preclude an intern from meeting the standard for employee status. Three laws provide the bulk of federal anti-discrimination protections: Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin”;<sup>50</sup> the Age Discrimination in Employment Act prohibits discrimination on the basis of age, with individ-

---

48. *Glatt*, 293 F.R.D. at 532.

49. For more extensive commentary on employment discrimination law and unpaid internships, see Yamada, *Student Interns*, *supra* note 1 at 238-48; Yamada, *Unpaid Internships*, *supra* note 1.

50. 42 U.S.C. § 2000e-16b(a)(1) (2012).

uals 40 or over constituting the protected class;<sup>51</sup> and, the Americans with Disabilities Act prohibits discrimination on the basis of disability.<sup>52</sup>

Interns, like any potential plaintiffs, must meet the statutory definition of “employee” in order to raise a claim under these statutes. Each of these three statutes, in the same circular language used by the Fair Labor Standards Act, defines an employee as “an individual employed by an employer.”<sup>53</sup> An intern supervised and directly paid by her internship site presumably meets the definition of employee under these statutes. However, when an internship site is not paying an intern, an aggrieved intern may lack standing to pursue a claim.

The leading case on this point is *O’Connor v. Davis*, a 1997 decision by the Second Circuit Court of Appeals involving a student social work intern who alleged that she was sexually harassed by a staff psychiatrist in the course of an internship with the Rockland Psychiatric Center in New York.<sup>54</sup> The plaintiff filed suit, claiming, in part, that she was subjected to sexual harassment in violation of Title VII.<sup>55</sup> The District Court granted summary judgment for the defendants on that count, finding that O’Connor was not an “employee” within the statutory meaning of Title VII.<sup>56</sup> The Court of Appeals affirmed.<sup>57</sup> The court reasoned that compensation “is an essential condition to the existence of an employer-employee relationship.”<sup>58</sup> The absence of any kind of salary, wages, health insurance, vacation, and sick pay, or any promise of such direct or indirect remuneration from Rockland was fatal to O’Connor’s claim of employee status, and consequently, to the Title VII count of her complaint.<sup>59</sup>

Especially in view of the Second Circuit’s adoption of the primary beneficiary test in *Glatt v. Fox Searchlight Pictures*, the holding of *O’Connor v. Davis* puts unpaid interns at grave risk of being without legal protections against discrimination and harassment. At this juncture, the best remedy appears to be a legislative one that amends the relevant employment discrimination statutes to cover interns.<sup>60</sup> Tangible efforts to close this gap are now in play. In January 2016, the U.S.

---

51. See generally 29 U.S.C. §§ 621–634 (2012).

52. See generally 42 U.S.C. §§ 12101–12213 (2012).

53. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2012); Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (2012); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2012).

54. *O’Connor v. Davis*, 126 F.3d 112, 113–14 (2d Cir. 1997), cert. denied, 118 S.Ct. 1048 (1998).

55. *Id.* at 115.

56. *Id.* at 114.

57. *Id.* at 116.

58. *Id.*

59. *Id.*

60. See Yamada, *Student Interns*, supra note 1 at 246–47; Yamada, *Unpaid Internships*, supra note 1 (forthcoming 2016).

House of Representatives passed a bill that protects interns working in the federal sector from discrimination.<sup>61</sup> Similar legislation has been filed to extend employment discrimination protections to interns generally.<sup>62</sup>

#### IV. THE EXPANDING ECONOMIC CULTURE OF UNPAID WORK

I offer the hypothesis that unpaid internships are contributing to an expanding economic culture of uncompensated labor. Indeed, the status of interns connects to broader social concerns about the future of work and the contingent workforce, the funding of higher education (including the dramatic rise of student loans), and the challenges of creating a sustainable, entry-level job market for those attempting to enter professions and vocations.<sup>63</sup> These dots need to be connected more explicitly in order for us to understand the full brunt of circumstances that face new generations preparing to enter the workforce. Fortunately, some commentators are starting to do this, although the discussion has yet to occupy the mainstream of public discourse.<sup>64</sup> I would like to raise three clusters of points in hopes of fostering this discussion:

First, let us dig into the underlying policy rationale of the primary beneficiary test adopted in *Glatt v. Fox Searchlight Pictures*. The Court of Appeals's decision indirectly, but powerfully, has given the label of intern a standalone legal status, creating a space between classroom education and training and entry-level employment whereby entitlement to compensation is dependent upon a subjective legal factor analysis. Because, in the words of *Intern Nation's* Ross Perlin, the intern economy is, "(i)nformal, barely studied, and little regulated,"<sup>65</sup> we do not know the quantum of tangible work contributions that have been made by unpaid interns. Under the primary beneficiary test, however, it is even more likely that companies will reap the benefits of interns' work without having to pay them even the statutory minimum wage, simply by applying the label and daring someone to challenge it.

---

61. See Federal Intern Protection Act of 2016, H.R. 3231, 114th Congress (Rep. Cummings, sponsor), <https://www.govtrack.us/congress/bills/114/hr3231>; Samantha Cooney, *Congress might grant more protection to unpaid interns—but there's a catch*, MASHABLE.COM (Jan. 15, 2016), <http://mashable.com/2016/01/15/congress-might-grant-more-protection-to-unpaid-interns-but-theres-a-catch/#H4ly6jekI5qI>.

62. See Intern Protection Act, H.R. 2034, 114th Congress (Rep. Meng, sponsor), <https://www.govtrack.us/congress/bills/114/hr2034>.

63. See *Student Interns*, *supra* note 1 at 223–24.

64. See, e.g., The Editors, *The Free and the Anti-Free: On Payment for Writers*, N+1 (Fall 2014), <https://nplusonemag.com/issue-20/the-intellectual-situation/the-free-and-the-antifree/> (linking the decline in payment for writers with the growth of unpaid internships); Madeleine Schwartz, *Opportunity Costs: The True Price of Internships*, DISSENT (Winter 2013), <http://www.dissentmagazine.org/article/opportunity-costs-the-true-price-of-internships> (suggesting that interns “must make clear that their time and effort, too, have value and that value is more than the remote idea of a ‘networking opportunity’ or one step further up a mythical career ladder”).

65. PERLIN, *INTERN NATION*, *supra* note 6 at xv.

The *Glatt* holding placed heavy emphasis on the educational nature of internships, claiming to set out factors that are more reflective of the modern dynamic between intern and internship provider. The court avoided addressing the increasingly common practice of offering post-graduate internships and fellowships, some of which are also unpaid. Perhaps the judges were unaware of these developments, though it is well known among college and professional students and recent graduates that unpaid positions labeled as internships or fellowships continue to present themselves well after graduation.

In addition, the primary beneficiary test is implicitly laden with white-collar hierarchy. Those tagged as interns must pass muster under a multi-factor test in order to qualify for the minimum wage. If their experience is too heavily weighted toward training or instruction about how to do their entry-level tasks, they are likely to be deemed unworthy of pay.

But what about those higher up on the organizational chart who undergo periods of training or on-the-job learning, or badly failed executives who leverage contacts and connections made on the job to secure new, plum positions? The overarching rationale of the primary beneficiary test suggests that these individuals should not be compensated either. If interns are to be subjected to the twisted strictures of the primary beneficiary test, then perhaps everyone should face some variation of it, if only to demonstrate the likely unfairness of its application.

Second, let us consider how unpaid work has spilled into post-graduate positions, sometimes repackaged as "fellowships,"<sup>66</sup> including some specified as "non-stipendiary" in order to clarify their unpaid status for unsuspecting applicants.<sup>67</sup> In short, the period during which (mostly) younger people are expected to do unpaid work to earn a chance at a real job is lengthening. For example, in 2013 the Bard Graduate Center of Bard College, located in Manhattan, posted a notice for the following position:

The Bard Graduate Center invites applications for up to four non-stipendiary research fellowships lasting from 3 to 9 months. Since its founding in 1993, the Bard Graduate Center has aimed to become the leading institute for study of the cultural history of the material world through its MA and PhD programs, schol-

---

66. See Kathrine Bindley, *Fellowship or Internship? In Media, That Depends on Whom You Ask*, N.Y. TIMES, N.Y. edition, Nov. 24, 2014, at B4 [hereinafter Bindley, *Fellowship or Internships?*] (examining the blurring lines between post-graduate internships versus fellowships in media professions).

67. See David Yamada, *Tired of unpaid internships? Go for a "non-stipendiary fellowship" next!*, MINDING THE WORKPLACE (April 30, 2013) <https://newworkplace.wordpress.com/2013/04/30/tired-of-unpaid-internships-go-for-a-non-stipendiary-fellowship-next/> (discussing the growth of unpaid, post-graduate fellowships in the creative and artistic sectors).

arly exhibitions, and publications, seminars, and symposia. . . . We provide office space, and rental accommodation maybe [*sic*] available at Bard Hall. Visiting scholars are expected to participate in the public intellectual life of the BGC, and to give one more talks on their current work. The Research Fellow may take up residence at any point after 15 August 2013.<sup>68</sup>

Until one digs beneath the surface, the significance of this announcement may not be evident. The opportunity looks very appealing for those who are devoted to scholarly research and the exchanges of ideas. But absent outside funding, personal savings, or family resources, not many people can afford to work for up to nine months without compensation, especially in one of the nation's most expensive locations.

Finally, we must tie internships into the whole of the contingent workforce and the struggles of others who seek full-time, secure employment with decent pay and benefits. After all, the jump from unpaid intern to flexible, low-paid, part-time "gig" worker is a short one.<sup>69</sup> Madeleine Schwartz argues that "(i)f we are to fix the problems of contingent work, we need to find a new way to talk about work that encompasses all the work done today—unpaid, part-time, and insecure."<sup>70</sup> This will not be easy, but if we fail to address this, then surely we will see more people trapped in what Sarah Kendzior describes as the "post-employment economy":<sup>71</sup>

A lawyer. A computer scientist. A military analyst. A teacher.

What do these people have in common? They are trained professionals who cannot find full-time jobs. Since 2008, they have been tenuously employed - working one-year contracts, consulting on the side, hustling to survive. They spent thousands on undergraduate and graduate training to avoid that hustle. They eschewed dreams - journalism, art, entertainment - for safer bets, only to discover that the safest bet is that your job will be contingent and disposable.<sup>72</sup>

Ultimately, the practice of unpaid internships often boils down to exploitation and the affirmation of privilege. It undermines the basic exchange of compensation and decent treatment in return for work ren-

---

68. Bard Graduate Center, *Non-Stipendiary Research Fellowship*, ARTHIST (April 10, 2013) <http://arthist.net/archive/5061>.

69. See Micha Kaufman, *Goodbye, Free Interns; Hello, Freelancers*, FORBES.COM (April 17, 2014) <http://www.forbes.com/sites/michakaufman/2014/04/17/goodbye-free-interns-hello-freelancers/#689383388817> (suggesting that if legal challenges to unpaid internships succeed, then hiring freelancer workers on a contingent basis might be the next best flexible, low-cost labor option).

70. Schwartz, *Opportunity Costs*, *supra* note 64.

71. Sarah Kendzior, *Surviving the post-employment economy*, ALJAZEERA (Nov. 3, 2013) <http://www.aljazeera.com/indepth/opinion/2013/11/surviving-post-employment-economy-201311373243740811.html>.

72. *Id.*

dered. The sooner we realize that many, if not most, internships should be regarded as entry-level jobs meriting entry-level pay, the faster we will restore opportunities in this challenging labor market for students and recent graduates.