Internships as Invisible Labor

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INTERNSHIPS AS INVISIBLE LABOR

BY
MELISSA HART*

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I. INTRODUCTION

Sitting at the bar in one of my favorite restaurants a couple of months ago, I overheard the following conversation: two of the other customers were talking about how they were about to open a restaurant in the neighborhood, and they were going to start hiring staff. One of them asked the bartender, “How much do you have to pay a junior bartender?” He responded that because it was a tip job, the Colorado minimum wage was $4.98. “Or,” he continued, “you could call them interns, and then you don’t have to pay anything.”

He said it with a little laugh, but he wasn’t really joking. Unpaid work is going on all around us, often in jobs – like bartending – that people don’t typically associate with internship positions. The shortage of paying jobs and the stiff competition for those jobs in the struggling economy has made it easy for employers to demand free labor in return for experience and the often elusive hope of future pay. In a context like tending bar, it is relatively easy to see how

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using an unpaid intern to do work for which the establishment would otherwise have to pay is both ethically and legally problematic.

Do the same legal and ethical problems exist when the intern is a hopeful future journalist and the internship is with The New Yorker magazine? Or if the intern is a hopeful future lawyer and the internship is with a prominent law firm? The path to white-collar and professional employment in the United States is increasingly paved with unpaid internships, and this reality "is changing the nature of work and education in America and beyond."\(^2\) White collar internships (or, as they are called in law schools, externships) present significant legal and ethical concerns, most of them tied up with the fact that the work an intern does loses its status as work because the intern has no status as a worker.

The work of interns is invisible in part because interns are everywhere. "Three-quarters of the 10 million students enrolled in America’s four-year colleges and universities will work as interns at least once before graduating."\(^3\) Many programs require internships for graduation, but offer little oversight to ensure that the internship is in fact an educational experience. And internships are today not just for students in school. The number of graduating students who are working as interns after school increased between 1992 and 2008 from 17 percent to 50 percent.\(^4\) Many graduates do not take just one internship, but instead find themselves in serial internship positions, working without pay as they wait for paying jobs to materialize. "Call them members of the permanent intern underclass: educated members of the millennial generation who are locked out of the traditional career ladder and are having to settle for two, three and sometimes more internships after graduating college, all with no end in sight."\(^5\)

Students and graduates are willing to do this unpaid work –

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2. ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY xiv (2011).
5. Williams, supra note 1.
indeed, clamoring for it—because internships are an increasingly important resume line. Employers want to hire entry-level workers with more than entry-level experience. In the law school context, for example, it has become a commonplace understanding that law firms want "practice-ready lawyers" in their new hires. The training that used to be part of an attorney's first years of paid employment is now supposed to happen before employment. Law schools, seeking to meet this demand, are offering more and more externship opportunities that permit students to get on-the-job training before they are on the job. The same is happening in other fields. There is little downside for the schools; students who can afford it are paying full tuition but basically staying away from campus. Of course, for students and graduates who cannot afford internships—those who need to be paid for their work—the resume value of the internship defines a growing divide between them and their more fortunate peers.6

Companies, meanwhile, have been more than happy to "hire" interns. While it is difficult to estimate how much money interns save firms through their unpaid work, a conservative estimate is about $600 million a year.7 Where does that savings come from? It is money that companies can avoid paying "real" workers. Displacement of paid workers by unpaid workers has become so standard that most of us don't even give it much thought. But this "shadow labor force" of interns is real. And, as one labor attorney recently put it, "when you dig in and start to examine what interns are doing it becomes exceptionally difficult to take the position, under the Fair Labor Standards Act and comparable state laws, that this isn't just unpaid labor."8

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The fact that employers don't label interns as employees, and don't offer them the protections afforded by law to employees, in many cases does indeed run afoul of the federal Fair Labor Standards Act (FLSA). And that is just a part of the problem. Economists have noted that unpaid internships slow overall economic recovery; because they have no income, unpaid interns cannot contribute to economic growth. The long-term impact of working for free is also significant; unpaid interns are not contributing to social security or otherwise saving for retirement or accruing capital. As a complaint filed in a 2012 lawsuit challenging the use of unpaid internships put it: "Employers' failure to compensate interns for their work, and the prevalence of the practice nationwide, curtails opportunities for employment, fosters class divisions between those who can afford to work for no wage and those who cannot, and indirectly contributes to rising unemployment."

This issue has begun to attract significant attention in two very different contexts. First is the spate of lawsuits that interns in publishing and entertainment have filed against employers like Conde Nast and Fox Searchlight. Second is the ongoing discussion between the American Bar Association (ABA) and the Wage and Hour Division of the Department of Labor (WHD), and the related debate about whether to amend the ABA's standards for law school accreditation to permit students to receive externship credit for paid work. This article will consider both of these ongoing challenges to the current structure of internships.

In Part II, I will briefly explain the legal issues raised by internships and the WHD interpretation of the FLSA. I will then discuss the recent lawsuits against giants in the entertainment and publishing industries, challenging the use of internships in those contexts. Part III will consider the use of interns in the law firm context and in particular will examine whether the labor issues that arise in this context are different in relevant ways from those in other industries.

II. HOW THE FLSA APPLIES TO INTERNS

Under the FLSA, covered employees must be paid the minimum

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10. See, e.g., Tucci, supra note 6, at 1379-80.
wage and overtime for hours over forty worked each week.\textsuperscript{12} The only way to avoid these requirements is if the employee falls within one of the several exceptions contained in the Act.\textsuperscript{13} Interns are not included among these statutory exceptions. If an individual can be characterized as a “trainee” rather than an “employee,” however, then the provisions of the FLSA do not apply to that person’s activities in a workplace.\textsuperscript{14}

\textbf{A. Wage and Hour Division Interpretation of the FLSA}

In 2010, the WHD of the Department of Labor, which is authorized to interpret and implement the FLSA, released a Fact Sheet to provide “general information to help determine whether interns must be paid the minimum wage and overtime under the [FLSA] for the services that they provide to ‘for-profit’ private sector employers.”\textsuperscript{15} The Fact Sheet explains that interns will be considered employees unless they meet a multi-factor test for “trainees.”\textsuperscript{16} In assessing whether an intern is an employee or a trainee, WHD has articulated six factors:

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

\textsuperscript{12} 29 U.S.C. §§ 206, 207.
\textsuperscript{13} 29 U.S.C. § 213.
\textsuperscript{15} \textit{WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter FACT SHEET #71], available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>. The factors in this WHD publication are drawn from the Supreme Court’s 1947 \textit{Walling} decision.
\textsuperscript{16} \textit{Id.} The Fact Sheet excludes government and nonprofit internships. There is no such broad exception in the FLSA. The statute itself excludes volunteer work for “a State, a political subdivision of a State, or an interstate governmental agency,” 29 U.S.C. § 203(e)(4)(A) (2012). The Wage and Hour Division has made an enforcement decision that it will not interpret the statute to apply to volunteer work at private non-profit organizations either. \textit{FACT SHEET #71, supra} note 15. Some commentators have questioned that decision. \textit{See, e.g.}, Tucci, \textit{supra} note 6.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.\textsuperscript{17}

The language of the WHD’s Fact Sheet makes it clear that all six factors must be met to exempt an internship from the requirements of the FLSA and that the trainee exception is “necessarily quite narrow.”\textsuperscript{18}

The first four of the WHD’s six factors require fact-specific evaluation and the Division has emphasized that a “determination of whether an employment relationship exists under the FLSA must be based on all the facts in a particular case.”\textsuperscript{19} Still, the Division has tried to provide some general guidance. According to WHD, the kinds of questions most relevant to an assessment of whether an internship is similar to an educational environment and primarily for the benefit of the intern are how much the “program is structured around a classroom or academic experience as opposed to the employer’s actual operations,” to what extent the program teaches “skills that can be used in multiple employment settings, as opposed to skills particular to one employer’s operation,” and whether the intern is “perform[ing] the routine work of the business on a regular and recurring basis.”\textsuperscript{20} In general:

[I]f the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers) then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA’s minimum wage and overtime requirements because the employer benefits from the interns’ work.\textsuperscript{21}

The fact sheet provides some further guidance in assessing whether other workers are displaced or the internship offers employers too much of an immediate advantage. “If an employer uses interns as substitutes for regular workers [or if] the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work,” then interns are employees, entitled to minimum wage and overtime pay.\textsuperscript{22} On the other hand, “if the employer is providing job shadowing

\textsuperscript{17} \textit{FACT SHEET} \textsuperscript{#71}, supra note 15.

\textsuperscript{18} \textit{Id.} (stating that “the following six criteria must be applied”; “If all of the factors listed above are met, an employment relationship does not exist under the FLSA”).


\textsuperscript{20} \textit{FACT SHEET} \textsuperscript{#71}, supra note 15.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.}
opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience."

In releasing the 2010 Fact Sheet, WHD suggested that it would make unpaid internships an enforcement priority. The government has not, however, pursued any notable challenges to internship programs in the intervening years. Instead, private litigants have stepped into the fray.

B. Litigation Challenging Unpaid Internships

Since 2012, a number of lawsuits have been filed by interns at companies like Conde Nast, Hearst Corporation, Fox Searchlight Pictures, Atlantic Records, and Donna Karan. The gist of these suits is that the interns were in fact employees, and as such were entitled to the minimum wage and overtime pay guaranteed by federal and state wage laws. Each of these intern suits alleged that the interns in question were promised that their unpaid experiences at these companies would educate them about the particular industries and give them a foot in the door in the form of networking connections and a good resume line.

Ultimately, the suits have alleged, the internships offered no real vocational training or education. Instead, as explained by Valentino Smith, a former intern who filed suit against Donna Karan in 2013, his two-day-a-week, eight-hour-per-day job consisted of creating Excel spreadsheets with information about products, assisting with shipping inventory, organizing merchandise in storage, and getting coffee for paid employees. Other interns have similarly described extensive

23. Id.
24. Interestingly, however, several states have recently pursued investigations and fined companies for violating minimum wage laws through unpaid internships. See Katherine S. Newman, The Great Recession and the Pressure on Workplace Rights, 88 CHI.-KENT L. REV. 529, 535-36 (2013).
27. See Igor Kossov, Donna Karan Latest to Face Suit by Unpaid Interns, LAW 360 (Aug,
photocopying, FedEx deliveries, and personal errands.\textsuperscript{28}

While many of these cases have settled or are still in the earliest stages, a couple of them have generated published opinions that offer some insight into how courts are applying the WHD factors to this type of internship experience. In June 2013, Judge William H. Pauley III in the Southern District of New York largely denied Fox Searchlight’s motion for summary judgment on the claims of two interns who alleged that the company had violated the FLSA.\textsuperscript{29} Judge Pauley concluded that the interns were in fact employees because

\begin{quote}
[they worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received—such as knowledge of how a production or accounting office functions or references for future jobs—are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer.]
\end{quote}

In denying the defendant’s motion for summary judgment, the court actually concluded that the Fox interns \textit{were} employees and not just that there were disputed facts about the question.\textsuperscript{30} In another recent case, by contrast, the district court denied the plaintiff’s motion for summary judgment, concluding that genuine issues of material fact existed as to whether unpaid interns at the company’s magazines were trainees or employees.\textsuperscript{31} Interestingly, no court up to now has concluded that interns working under these conditions are \textit{not} employees subject to the protections of the FLSA.\textsuperscript{32}

The uncertainty that these suits have created for employers has led to varied responses. In the fall of 2013, publishing company Conde Nast announced that it was ending its externship program.\textsuperscript{33}


\textsuperscript{30} Id. at 534.

\textsuperscript{31} Id.


\textsuperscript{33} I am not offering here an analysis of the different ways that courts have either applied the WHD six factors or their own alternative approaches to the assessment of whether an intern should be characterized as a trainee or an employee. Several fine descriptions of the various judicial approaches to this question have been written. See, e.g., Fink, supra note 6, at 448-50; Curiale, supra note 6, at 1542-46.

\textsuperscript{34} James, supra note 8.
Other companies are predicted to do the same.35 A few companies, notably NBC, have responded instead by paying their interns.36 Others are trying to make their internship programs more educational and to conform them to the WHD factors.37 And many have continued business as usual, most likely counting on the fact that these lawsuits, while they have garnered a lot of media attention, are in fact quite rare.

In a culture that favors internships as an educational and training model and in a very tight labor economy, the personal risks that come with challenging an externship program are significant.38 Interns most likely are not protected by the array of worker-protection statutes that protect employees. Interns are almost always early in their careers. And they are doing these internships to build their resumes so that they can one day obtain paying work. Given these realities, it is hard to predict a significant continuation or expansion of these lawsuits. But the suits that have been filed have made visible the difficult lives of these invisible laborers. These unpaid workers are one side of a practice that has significant consequence for labor markets in the fields in which interns are commonplace. The other side of the practice is, of course, the unemployed worker whose demand for pay makes her uncompetitive with the interns doing the work she might otherwise be doing.

III. THE FLSA AND LAW SCHOOL EXTERNSHIPS

Until quite recently, very little attention was paid to the possibility that unpaid law school externships at for-profit firms or companies might violate the FLSA.39 In many ways, law school externships just seem like an entirely different thing than the programs run at Fox Searchlight and the Hearst Corporation. In those contexts, interns are complaining that they took the jobs to get real experience and exposure to their fields of interest and ended up instead as unpaid menial labor. In law school externships, the interns

36. Williams, supra note 1.
38. Fink, supra note 6, at 452.
do substantive work of the sort that professionals in their field are doing. In both circumstances, however, the interns are relieving their employers of the need to pay for the work that they are doing.

This is often starkly true in the law firm context. Indeed, I first became interested in the legality of law school externships at private firms when I heard about a student who had been paid by a firm for her work during the summer and wanted to keep working with the firm in the fall. The student and the firm decided to shift from paid employment to a for-credit externship. But the work the student did as a paid law clerk was identical to the work she did as an extern, as was the supervision she received in the two different situations. This arrangement almost certainly violated the FLSA. And yet, it is by no means an anomaly.

In 2012, I surveyed the websites of American Association of Law School (AALS) member schools and made follow-up calls as necessary in an effort to determine how many law schools offer externships with for-profit firms, and how those externships were structured. I found that seventy-eight (44.3 percent) law schools at that time permitted their students to do externships only in non-profit or government organizations. A majority of schools (ninety-six or 54.5 percent) permitted their students to earn academic credit doing unpaid work at for-profit organizations. Among the ninety-six law schools that permitted for-profit externships, however, there was a great deal of variation in the scope of work permitted. Some of the schools only authorized externship credit for pro bono work done at for-profit organizations. Others only permitted these externships in certain legal fields, such as entertainment law. And a couple of schools had recently changed their policies from permitting externships at for-profit organizations to allowing only non-profit and government externships. 40

The pressure on law schools to provide unpaid externship opportunities is considerable. ABA Accreditation Standards require schools to provide substantial experiential opportunities. 41 The ABA Standards have historically also prohibited schools from giving

40. See also Bernadette T. Feeley, Examining the Use of For-Profit Placements in Law School Externship Programs, 14 CLINICAL L. REV. 37, 37 & n. 1 (2007).
academic credit for paid work, so for-credit externships must be unpaid. The current tight job market and the demands that law schools graduate "practice-ready" lawyers exacerbate the pressures created by these ABA rules. Some law schools heavily market their externship programs to both potential students and employers, and at least one school has gone so far as to trademark its externship program – involving a substantial number of placements in for-profit firms – as part of "The Experiential Advantage." In this climate, the idea that unpaid internships at for-profit placements might violate the law is not well-received.

Indeed, schools confronted with the question generally respond that their program is FLSA-compliant because the school offers significant oversight and a robust classroom component as part of the externship opportunity. This reasoning might arguably rely on a series of WHD Opinion Letters issued in 1995 and 1996 in response to queries about the legality of unpaid college internships. In these letters, the WHD stated that:

In situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction.

Each of these opinion letters, however, also emphasize that the training must be "academically oriented for the benefit of the students" and that the six factors for assessing trainee status must still all be met.

42. Id., interpretation 305-3. At the March meeting of the Council for the Section of Legal Education and Admissions to the Bar, the Standards Review Committee recommended that interpretation 305-3 be changed to delete the blanket prohibition on credit for paid externships. See Interpretation 305-3, Explanation of Changes, AM. BAR ASS'N, <http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_proposed_interpretation_305_3.authcheckdam.pdf>.

43. See, e.g., William D. Henderson, A Blueprint for Change, 40 PEPP. L. REV. 461, 462 (2013) ("Creating more 'practice ready' graduates will help some law schools more effectively place their graduates in the finite – and likely shrinking – market for traditional entry level legal jobs.").


It is hard to reconcile these statements with the realities of law school externships. It may well be the case that some externship programs offer enough oversight, guidance, and supervision that the educational benefit of the externship would be similar to that of classroom learning, thus satisfying one factor of the WHD test. It is very hard to assess what schools require in terms of classroom work for their externship programs. If the student is required to attend regular classes and provide regular reflection about the externship experience, that will certainly bring the experience closer to the ambit of the traditional law school class. Of course, the more students are asked to do outside of their work for the employer in an externship, the less attractive externships become to students, and the more expensive and administratively burdensome they are for the law school.

It is also hard to know what schools do or can require of the environment in the externship placement itself. The WHD suggests that, to avoid the FLSA, the externship must be "academically oriented for the benefit of the students." A common criticism of externship programs is that "the quality of supervision varies considerably depending on the experience of the field placement supervisor and the amount of time he or she is able to devote to such supervision." Although law schools are required to provide oversight of the quality of the learning experience provided by an externship, much of the oversight at many law schools consists of self-reporting by students and field placement supervisors. Recent years have definitely seen law schools invest more in externship programs with more robust oversight and high-quality externship teachers, but the challenge of ensuring that each externship is "academically oriented for the benefit of the students" remains significant. And at some point, the demands that a legally compliant program would put on a lawyer offering an externship would be enough that hiring an extern would lose its appeal.

Moreover, since the WHD has been very explicit that all of the factors must be satisfied in order to classify an internship as training, the possibility that an externship program could satisfy this one factor still does not exempt it from the FLSA. Three of the other factors

seem to pose a significant challenge for law school externships: whether the program is for the benefit of the intern, whether the employer derives immediate benefit, and whether the intern displaces other workers. Law students wouldn’t be doing externships if they didn’t view them as beneficial. By the same token, law firms wouldn’t hire externs if they derived no advantage from the work being done. And the work externs do is generally work that the employer needs done – if the extern is not there, a young lawyer will have to do the work. Given these factors, it is extremely difficult to see how unpaid externships at for-profit firms are legal under the FLSA.

The case for the legal infirmity of law school externship programs under the WHD interpretation of the FLSA is very strong. And yet it is a legal problem that could easily remain unresolved. Some schools have acknowledged it by eliminating externship placements in private firms. Others have sought to be compliant by requiring the field placement supervisors to agree to offer sufficiently academic experiences. Many, though, seem to be counting on the remoteness of the possibility that externships will ever face legal scrutiny. As with other unpaid internships, legal externships are unlikely to be challenged by the students who participate in them. The likely career-destroying choice to sue an employer who gave you an externship opportunity is not one that it is easy to imagine any student making. The legal status of unpaid law school externships with for-profit firms will have to be resolved in some other way or remain in its current state of limbo.

To some extent, the issue of FLSA coverage of law firm externships looked like it was coming to a head in 2013, when ABA President Laurel Bellows wrote a letter to the Solicitor of Labor, asking for clarification as to whether law firms that employed unpaid student interns to do pro bono cases would be in violation of the law. In framing her question to the Solicitor, Bellows assumed that placement of unpaid interns in law firms to do work for paying clients would violate the FLSA. Her letter reflects the concern that even law firm placement to work on pro bono cases might be interpreted as illegal.

Solicitor of Labor M. Patricia Smith responded to the ABA
query in September 2013. Her response confirmed that a law student could do pro bono work with a private firm, so long as the student was under “close and constant supervision from the firm’s licensed attorneys” and the extern did not “participate in a law firm’s billable work or free up staff resources for billable work that would otherwise be utilized for pro bono work.”50 However, “a law student would be considered an employee subject to the FLSA where he or she works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimal supervision and guidance from the firm’s licensed attorneys or displaces regular employees (including support staff).”51

Law schools have struggled with how best to respond to this exchange. Some read it as a clear statement that for-profit placements for anything other than pro bono work are not permissible.52 Others have fastened onto sentences in Solicitor Smith’s response that seem to open the door for non-pro bono placements so long as the externships are structured in ways that highlight their educational elements and provide little real benefit to the employers.53 And still others have concluded that even pro bono placements risk violating the law, given that work done by an unpaid student intern does generally free up the resources that the firm would otherwise dedicate to the pro bono matter.54

Law firms, too, have had to grapple with how to manage the uncertainties that these interpretive questions leave. Like employers in the publishing and entertainment industries, some law firms have decided that the best course is simply to pay the law students who work for them. This option eliminates the FLSA concern, but it creates a different one: under current ABA Standards, students cannot receive credit for paid work.55

51. Id.
55. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, supra note 41,
In part as a result of these concerns, the Section of Legal Education and Admissions to the Bar proposed in 2013 the elimination of the requirement that schools offer credit only for unpaid placement. In its Explanation of Changes, the Committee explained that “[t]hey felt that a blanket prohibition puts significant limits on the available field placement opportunities.” The proposal has generated significant debate in the clinical education community. The Clinical Legal Education Association has issued a statement opposing the change, as have the Society of American Law Teachers and many individual externship supervisors. Those opposed to the change have primarily argued that the academic value of the externship will diminish significantly if students are being paid for their work because the primary motivation for the work will be the salary, and not the educational experience. And they have asserted that the concerns about the FLSA are unwarranted. Comments from individual externship supervisors and students who support the change focus instead on the enormous costs of some externship placements (particularly those in foreign countries) and the fact that permitting payment for externships would make it easier for lower-income students to benefit from these and other externship experiences.

As these comments reflect, the debate about law school externships has focused predominantly on how best to ensure their academic value, with the FLSA concerns as a hurdle to clear, but not a central concern. This focus leaves the impression that law school

interpretation 305-3.


58. See, e.g., Comment by Soc’y of Am. Law Teachers, supra note 53.

59. Id.

60. See, e.g., Comment by Jesse Medlong, Krantz Fellow, DLA Piper (Mar. 30, 2014), available at <http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/201403_comment_int_305_3_jesse_medlong.authcheckdam.pdf>.

61. Although beyond the scope of this paper, it bears note that the educational value of externships as they are currently structured at most law schools is contestable whether the programs are with for-profit employers or with government or non-profit placements. See, e.g.,
externships are entirely different from the internships being challenged in the publishing and entertainment industries. The difference, however, is more about where the debate is happening – in the context of school accreditation standards rather than a courtroom – than about the substantive questions raised by the use of unpaid workers.

In the legal employment market, as in other fields, work that is provided for free displaces potential paid employment. If law firms cannot use externs to do some of the basic work they need done, they won't stop doing the work. Either lawyers at the firm will work harder, or the firm will hire more lawyers. By making the debate about law school externs a debate about education, rather than one about labor, we have rendered invisible the reality that unpaid externs are doing legal work that would otherwise be done by paid attorneys. It also seems entirely possible that, by normalizing the idea of free labor, pre-graduation legal externships have helped to pave the way for post-graduation unpaid legal positions. The United States Department of Justice and U.S. Attorney's Offices around the country have instituted a position called a “Special Assistant U.S. Attorney” – a one-year, unpaid position doing the same work that paid lawyers are doing. In a struggling legal job market, these unpaid positions are attractive to applicants for the same reason that externships have been – they offer training, a great resume line, and some hope for making connections that will lead to a paying job. Unpaid government attorney positions do not raise the same FLSA problem raised by externships at private firms. But the significant concerns raised by the displacement of paid work with free labor are as real in both cases.

IV. CONCLUSION

Interns who have challenged the legality of unpaid internships

Nancy M. Maurer & Liz Ryan Cole, Design, Teach and Manage: Ensuring Educational Integrity in Field Placement Courses, 19 CLINICAL L. REV. 115, 117-19 (2012) (describing the tendency in many law school externship programs for limited academic supervision or involvement).


under the FLSA have met with varying public responses. From employers, as discussed above, these responses have ranged from cancellation of the internship programs to paying interns for their work. From other interns, there has been a mix of congratulation and criticism. Given that internships are one of the only apparent paths to experience and connections in some fields, the possibility that those paths might close as a result of litigation has engendered anxiety and resentment. But the questions these lawsuits have brought to light about the appropriateness of permitting businesses to profit from free labor are precisely the questions that led to the passage of the FLSA nearly eight decades ago. Now, as then, some fear that "a fair day's wage for a fair day's work" will ultimately limit the amount of available work. What the outspoken interns who are bringing lawsuits, blogging, and speaking out in the media are pushing us to recognize is that the work is available and it is getting done. It is just getting done for free.

Disrupting the current reliance on free labor through internships and externships would involve significant institutional adjustment, not just from employers who will have to pay for work they need done, but also from universities. The current structure has students – both at colleges and law schools – paying for credits that they are earning off campus, in most cases with little or no active supervision from any faculty member. It is a very cost-effective way for schools to offer practical experience, but the ethical concerns raised by encouraging students into free labor are mirrored by similar concerns about the appropriateness of universities taking tuition dollars from students for learning experiences they are not themselves providing.64

The scope of the institutional disruption that a serious challenge to the current structure of unpaid internships would involve is not a reason to avoid that challenge. Instead, the fact that there is so much resistance to change should prompt both employers and educators to take stock of the reasons for our reliance on unpaid labor and often-unsupervised learning.

64. See, e.g., James H. Backman & Jana B. Eliason, The Student-Friendly Model: Creating Cost-Effective Externship Programs, 28 TOURO L. REV. 1339, 1363 (2012) ("There is something intuitively wrong with charging a student full tuition for an experience taking place away from the law school that is primarily supervised and in most respects dependent on experienced lawyers and judges who are not charging the law school anything for their valuable service.").
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