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# Learning through Experience: Borrowing Lessons from Abroad to Understand the Legality of Unpaid Internships in America

*William Soule*<sup>†</sup>

## ABSTRACT

*Unpaid internships in the United States often result in social waste by employing workers with valuable skills in positions that fail to efficiently use those skills. Because information asymmetry exists between the employer and the intern, interns are at a disadvantage in determining whether an employer will actually compensate the intern with the opportunity to engage in future, valuable work. Current U.S. law on the issue remains a confusing mess of precedent and administrative law that differs from circuit to circuit. United Kingdom (U.K.) law provides a better solution by resting internship classification on mutuality of obligation combined with the presence of implied employment contracts. As a result, the United States should embrace the judicial ideas of courts in the United Kingdom, and Congress should pass legislation that creates a new employment classification for interns. In tandem, these two solutions should lessen the information asymmetry between employers and potential interns while incentivizing companies to hire interns by providing clear, stable rules.*

## INTRODUCTION

Unpaid internships are not a foreign subject to the legal community. Many young law students receive their first legal experience working as a volunteer for a government agency or a non-profit organization during their first summer in law school. In its simplest form, these internships function as an opportunity for young students to wrestle with nuanced legal issues and contribute to the public good. In fact, the Department of Labor specifically exempts government and non-profit organizations from wage provisions of the Fair Labor Standards Act<sup>1</sup> if

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<sup>1</sup> 29 U.S.C. §§ 201–219 (2012).

the interns understand that their role is purely voluntary.<sup>2</sup> For government agencies and non-profit organizations, the current law on unpaid internships seems to be adequate and uncontroversial.<sup>3</sup>

However, it has become apparent to many that the legality of unpaid internships outside of government agencies and non-profit organizations remains an open question. The Supreme Court discussed a similar issue in *Walling v. Portland Terminal Co.*,<sup>4</sup> but that ruling came seventy years ago. Since then, numerous authorities have suggested criteria to determine what constitutes a valid unpaid internship.<sup>5</sup> In an attempt to provide guidance to employers, the Department of Labor developed six criteria, which were drawn from the *Portland Terminal* decision in 2010.<sup>6</sup> However, five years after issuing the guidance, both the Second Circuit<sup>7</sup> and the Eleventh Circuit<sup>8</sup> flatly rejected the Department of Labor's six criteria. Instead, both courts embraced a "non-exhaustive set of considerations" including seven factors, not all of which need to point in the same direction or be weighted equally.<sup>9</sup> As a result, not only is the law unclear on a national basis, but attempts to provide clarity by the Second Circuit and Eleventh Circuit are equally confusing and unwieldy.

The confusion surrounding the legality of unpaid interns is particularly problematic given the prevalence of unsatisfactory internship experiences. While unpaid internships are not a particularly recent phenomenon, the Great Recession drew attention to the plight of unpaid interns.<sup>10</sup> As countless students attempted to bolster their résumés with experience, an opportunity for experiential learning devolved into the performance of menial tasks for no compensation. One animation student from New York University received an internship at Little Airplane, a children's film company in Manhattan.<sup>11</sup> Instead of working on

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<sup>2</sup> See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), <https://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [<https://perma.cc/RNC7-DTSA>].

<sup>3</sup> But see Thomas Johnson, Comment, *The Fox Searchlight Signal: Why Fox Searchlight Marks the Beginning of the End for Preferential Treatment of Unpaid Internships at Nonprofits*, 102 VA. L. REV. 1127 (2016).

<sup>4</sup> 330 U.S. 148 (1947).

<sup>5</sup> See, e.g., Michael Pardoe, Comment, *Glatt v. Fox Searchlight Pictures, Inc.: Moving Towards a More Flexible Approach to the Classification of Unpaid Interns under the Fair Labor Standards Act*, 75 MD. L. REV. 1159 (2016).

<sup>6</sup> U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *supra* note 2.

<sup>7</sup> *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015).

<sup>8</sup> *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015).

<sup>9</sup> *Glatt*, 811 F.3d at 384.

<sup>10</sup> See Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), <http://www.nytimes.com/2010/04/03/business/03intern.html> [<https://perma.cc/6FXJ-MFBT>].

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

projects related to her education, the student was “assigned to the facilities department and ordered to wipe the door handles each day to minimize the spread of swine flu.”<sup>12</sup> Many stories of unpaid internships read similarly. Some stories, unfortunately, are far more tragic. For instance, Kyle Grant, an unpaid intern at Warner Music Group who lived in a homeless shelter for the duration of this eight-month internship, garnered national attention in 2014.<sup>13</sup> Similarly, twenty-two-year-old David Hyde spent two weeks living in a tent while working as an unpaid intern for the United Nations.<sup>14</sup> Every morning, David would put on his suit and pack his home into his backpack before heading to work, but David’s story differs from Kyle Grant’s story slightly: David is a New Zealander working for the United Nations at its headquarters in Geneva, Switzerland.<sup>15</sup> Even the massive expanse of employment law promulgated by the European Union failed to fix a broken internship system. In struggling with the legality of unpaid internships, the United States is in good company.

Other nations in the European Union and throughout the G20 economic powers have crafted solutions to this persistent issue. Most of the solutions have fallen into two broad categories: a ban on all unpaid work unless associated with a short-term university program<sup>16</sup> or the introduction of judicially created factors that distinguish employee and non-employee classifications.<sup>17</sup> Unfortunately, neither solution adequately addresses the problem. On one hand, the first category eliminates unpaid internship opportunities that can be beneficial to interns and businesses. For example, if a law professor wanted to spend five hours a week working at a French restaurant for no pay, gaining valuable skills and insight into French cuisine, it would be economically inefficient to disallow that arrangement. If the owner of the restaurant had to cate-

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<sup>12</sup> *Id.*

<sup>13</sup> Zach Schonfeld, *Formerly Homeless Unpaid Intern Leading a Lawsuit against Warner Music*, NEWSWEEK (July 16, 2014), <http://www.newsweek.com/2014/08/01/unpaid-internships-warner-music-group-warner-interns-lawsuits-257025.html> [<https://perma.cc/LSY3-4H77>].

<sup>14</sup> Loulla-Mae Eleftheriou-Smith, *Unpaid UN Intern David Hyde Forced to Live in a Tent in Geneva*, INDEPENDENT (Aug. 12, 2015), <http://www.independent.co.uk/news/world/europe/unpaid-united-nations-intern-david-hyde-forced-to-live-in-a-tent-in-geneva-10451775.html> [<https://perma.cc/Y3J9-HEST>].

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

<sup>16</sup> See Marc Spielberger & Angela Schilling, *Minimum Wages in Germany—You Might Be Affected, Too: An Overview of the New German Minimum Wage Act (Mindestlohngesetz, MiLoG)*, 65 LAB. L. J. 163 (2014) (describing the German approach to compensation for interns).

<sup>17</sup> See, e.g., Dave J.G. McKechnie & Stefanie Di Francesco, “*Intern(al) Affairs*”: *Managing Unpaid Internships in Ontario*, MCMILLAN (June 2015), <http://www.mcmillan.ca/Managing-Unpaid-Internships-in-Ontario> [<https://perma.cc/U7LM-834U>] (describing the Canadian system of classifying interns for purposes of compensation).

gorize the law professor as an employee, it seems unlikely that the arrangement would exist, leaving both sides worse off.<sup>18</sup> On the other hand, any employment decision based on a list of non-exhaustive, unweighted factors will lack clarity and lead to substantial confusion. Although lessons about unpaid internship law can be learned from other legal regimes, most nations throughout the world are no better off than the United States.

This Comment examines a possible modification to current law based on the experience of one nation that shares much in common with the United States: the United Kingdom. The United Kingdom shares similarities with the United States that extend beyond language. Both nations share a legal tradition and similar levels of economic development and composition. However, each nation has a slightly different approach to the legality of unpaid internships.<sup>19</sup> The current system in the United States occupies a middle ground between hard categorizations and extensive, numerous factor tests. In contrast, the United Kingdom has added an additional employment category of “worker” to potentially encompass interns. Comparing these two different approaches focuses the Comment on an intense debate between the efficacy of rules and standards.

After analyzing U.K. law, this Comment suggests that the United States should take two steps to creating better law surrounding internships. First, the United States should move to a system that adds a new employment category of “intern” that incorporates some, but not all, of the employment protections afforded to employees, as seen in the United Kingdom. For instance, the United Kingdom provides minimum wage protection for some labor participants but does not protect them from certain types of employment dismissal. The United States could define “interns” as a separate employment category with the desired protections. Second, American judges should focus on mutuality of obligation like their U.K. counterparts. Specifically, instead of the numerous common law tests that have developed, American courts should focus solely on whether the employer and intern share mutuality of obligation. Focusing on mutuality of obligation will correctly sort socially useful and socially wasteful unpaid internships based on the core of the distinction: information asymmetry.

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<sup>18</sup> See, e.g., *The Law School's Top Chef*, U. CHICAGO L. SCH. <http://www.law.uchicago.edu/node/2653> [<https://perma.cc/FZY9-CRXA>].

<sup>19</sup> See David Ellis, *Unpaid Internships: Work for Pay, Never Pay for Work*, TELEGRAPH (Mar. 20, 2015), <http://www.telegraph.co.uk/education/universityeducation/student-life/10709334/Unpaid-internships-work-for-pay-never-pay-for-work.html> [<https://perma.cc/KS4M-ZPGD>] (explaining attempts to reform intern classification in Great Britain).

This Comment proceeds in three parts. Part I contains an analysis of the current law surrounding unpaid internships in the United States. After considering the seeds of confusion sown by the vague definition of “employee” within the Fair Labor Standards Act, Part I will focus on the resulting case law that persists to the current moment. Part II will examine employment law in the United Kingdom, beginning with its fourth employment category, which attempts to fill in the cracks caused by using rigid employment categories in fluid definitions of employment. In this Part, common law tests from U.K. courts will be used to create clearer lines between employment categories in the United States. In addition, Part II will consider the process of adding another employment category and the United Kingdom’s continued struggle with eliminating abusive unpaid internships. Part III will examine the efficacy of the laws and judicial reasoning employed by U.K. courts to determine if the United States should pursue similar reforms. Additionally, Part III will discuss how small elements of common law precedent can be incorporated into legal debates about the validity of unpaid internships. Finally, Part III will propose a dual solution to curbing abusive unpaid internships. First, Congress should adopt a new employment classification specifically for interns that provides civil rights protection but not minimum wage protection. Second, courts in the United States should employ the logic of U.K. courts by holding mutuality of obligation to be determinative in classification conflicts.

#### I. THE FLSA AND UNPAID INTERNSHIPS IN THE UNITED STATES

The confusion regarding the legality of unpaid internships centers on the Fair Labor Standards Act<sup>20</sup> (FLSA) and its definition of “employee.” Under the FLSA, every employee is entitled to a minimum wage, and every employer is required to provide at least that amount to all employees.<sup>21</sup> However, there is considerable dispute as to who should be considered an employee. An “employee” is defined by the FLSA as “any individual employed by an employer.”<sup>22</sup> Under the FLSA, the definition of “employ” is so broad that it merely “includes to suffer or permit work.”<sup>23</sup> Within these broad confines are several statutory exceptions. First, the law does not apply to immediate family members working on a family farm.<sup>24</sup> Second, the law exempts “any individual

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<sup>20</sup> 29 U.S.C. §§ 201–219 (2012).

<sup>21</sup> *Id.* § 206.

<sup>22</sup> *Id.* § 203.

<sup>23</sup> *Id.*

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

who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency,” so long as the individual receives “no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered.”<sup>25</sup> Finally, the term “employee” does not apply to those who “volunteer their services solely for humanitarian purposes to private non-profit food banks.”<sup>26</sup> With only three statutory exceptions, a significant amount of weight rests on what it means to “suffer or permit work.”<sup>27</sup>

A. *Portland Terminal* and the Meaning of “Employ”

In 1947, the Supreme Court spoke for the first and last time on the subject of “trainees” and crafted a decision filled with unanswered questions. In *Walling v. Portland Terminal Co.*,<sup>28</sup> the Court considered whether workers who had been trained as prospective brakemen for a railroad constituted employees under the FLSA. For the Court, this issue was certainly a case of first impression that forced a difficult decision largely based on factual circumstance. Although lengthy, the recitation of the facts provided by the Court is important to understanding later arguments made by the Department of Labor regarding what constitutes a valid internship:

For many years the . . . railroad has given a course of practical training to prospective yard brakemen. This training is a necessary requisite to entrusting them with the important work brakemen must do. An applicant for such jobs is never accepted until he has had this preliminary training, the average length of which is seven or eight days. If accepted for the training course, an applicant is turned over to a yard crew for instruction. Under this supervision, he first learns the routine activities by observation, and is then gradually permitted to do actual work under close scrutiny. His activities do not displace any of the regular employees, who do most of the work themselves, and must stand immediately by to supervise whatever the trainees do. The applicant’s work does not expedite the company business, but may, and sometimes does, actually impede and retard it. If these trainees complete their course of instruction satisfactorily and are certified as competent, their names are included in a list

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

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

<sup>27</sup> *Id.*

<sup>28</sup> 330 U.S. 148 (1947).

from which the company can draw when their services are needed. Unless they complete the training and are certified as competent, they are not placed on the list. Those who are certified and not immediately put to work constitute a pool of qualified workmen available to the railroad when needed.<sup>29</sup>

While it may be easy to dismiss this recitation as unrelated to the definition of “employee,” this understanding of important factual aspects of the employer-employee relationship is the basis for the current disagreement in the law.

In addition to the Court’s factual evaluation of what constitutes an “employee” in *Portland Terminal*, the Court also elucidates the confines of “employ” under the FLSA. First, the Court defines “employee” based on a common sense reading of congressional intent. For instance, the Court states that “suffer or permit to work” cannot be construed so broadly as to include “employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.”<sup>30</sup> If this were the case, the Court notes, then students would be employees of the school they attended. The Court also expresses concern for a situation in which a “person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.”<sup>31</sup> Second, the Court maintains that the definition of “employ” is broad enough to guarantee fair compensation but no broader. According to the Court, the purpose of the FLSA “as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”<sup>32</sup> However, the Court also states that “employ” cannot be construed “so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”<sup>33</sup> Unfortunately, neither of these arguments regarding the definition of “employ” substantially clarified the confusion first brought before the court.

Finally, the Court in *Portland Terminal* suggests that a determination of “immediate advantage” could be necessary to divine who should be considered an employee under the FLSA.<sup>34</sup> Although the

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<sup>29</sup> *Id.* at 149–50.

<sup>30</sup> *Id.* at 152.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.* at 152.

Court only discusses “immediate advantage” in one sentence of the opinion, the Court appears to rest its decision on this concept. The Court states that “[a]ccepting the unchallenged findings here that the railroads receive no ‘immediate advantage’ from any work done by the trainees, we hold that they are not employees within the [FLSA’s] meaning.”<sup>35</sup> Nevertheless, the Court itself notes that abuse may arise from such a determination, but disregards any discussion on the topic until such a case arises.<sup>36</sup> Of course, no such case has come before the Court in the past seventy years, despite cases that seem to entail the evasion the Court described.<sup>37</sup> Perhaps the strangest part about the Court’s unwillingness to speak on what might be a legitimate evasion of the FLSA is that *Portland Terminal*, in essence, is about potential evasion of the FLSA. Regardless of the circuitry of the Court’s logic, its inability to speak on the topic has generated a significant portion of the confusion that plagues the legality of unpaid internships to this day.

#### B. The Department of Labor Fact Sheet #71

In April 2010, the Department of Labor issued Fact Sheet #71<sup>38</sup> to address confusion among employers surrounding the legality of unpaid internships. Noting that “employ” is used broadly in the FLSA, the fact sheet states that internships in the private sector besides those for non-profit organizations will “most often be viewed as employment.”<sup>39</sup> Fact Sheet #71 also places a fair amount of weight on the educational aspect of the internship. For instance, the Fact Sheet states that “[t]he more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer’s operation, the more likely the intern would be viewed as receiving training.”<sup>40</sup> Although this emphasis differs from the facts present in *Portland Terminal*, the rest of Fact Sheet #71 adheres closely to the Court’s main arguments. In addition to an emphasis on education, Fact Sheet #71 also emphasizes the importance of supervision from other employees and the opportunity to work in full-time employment immediately following the internship.<sup>41</sup>

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<sup>35</sup> *Id.* at 153.

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

<sup>37</sup> See, e.g., Cody Brookhouser, Comment, *Whaling on Walling: A Uniform Approach to Determining Whether Interns Are “Employees” under the Fair Labor Standards Act*, 100 IA. L. REV. 751, 756 (2015).

<sup>38</sup> U.S. DEP’T OF LABOR, WAGE & HOUR DIV., *supra* note 2.

<sup>39</sup> *Id.*

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

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

Fact Sheet #71 has caused disagreement among courts by extracting a six-factor test from the observations of *Portland Terminal*. While *Portland Terminal* did not create a specific test, Fact Sheet #71 borrowed the Court's observations in light of the facts and attempted to distill these observations into concrete principles. Such a distillation is problematic given the Court's largely fact-based decision in *Portland Terminal*. According to Fact Sheet #71, if all of the following six factors are met, then an intern is not an "employee" under the FLSA:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.<sup>42</sup>

All six factors must be present according to Fact Sheet #71; thus, the exception to the FLSA is narrow. Fact Sheet #71 notes that the exclusion is narrow "because the FLSA's definition of 'employ' is very broad."<sup>43</sup> Indeed, considering all six factors above reveals a fairly limited set of situations that fit neatly into the created exclusion. While this rigid approach to classification may have introduced clarity into the discussion, it certainly introduced disagreement over the application of the proposed factors.

Circuit courts are divided over adopting Fact Sheet #71 and the six-factor test it introduced. For instance, the Fifth Circuit has given a version of the six-factor test originally used for trainees "substantial deference"—and it seems likely that this deference would extend to a similar

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

test for internships, all things being constant.<sup>44</sup> Both the Fourth Circuit<sup>45</sup> and the Sixth Circuit<sup>46</sup> have also determined that the test deserves deference. On the other hand, the Tenth Circuit has treated the factors as relevant to a discussion of the definition of “employee” under the FLSA but not determinative.<sup>47</sup> Going further, the Eleventh and Second Circuits have flatly rejected deference to Fact Sheet #71, with the Eleventh Circuit stating, “with all due respect to the Department of Labor, it has no more expertise in construing a Supreme Court case than does the Judiciary.”<sup>48</sup>

In addition to questions of deference, circuit courts are also divided over whether the six-factor test in Fact Sheet #71 is consistent with *Portland Terminal* and, if inconsistent, what to use in its place. There are four broad groups that encompass the different opinions of those circuits that have considered the issue. First, only the Fifth Circuit accepts that test as consistent with *Portland Terminal*.<sup>49</sup> Second, the Fourth Circuit<sup>50</sup> and the Sixth Circuit<sup>51</sup> have eschewed the six-factor test in favor of an analysis commonly known as the “primary beneficiary” test.<sup>52</sup> Third, the Eighth Circuit<sup>53</sup> and the Tenth Circuit<sup>54</sup> have embraced the “economic reality” test, which examines employment relationships on a broad spectrum “with the ultimate criterion being the economic reality of the relationship.”<sup>55</sup> Finally, the Second Circuit<sup>56</sup> and the Eleventh Circuit<sup>57</sup> have created a hybrid of the “primary beneficiary” test mixed with elements of the “economic reality” test, where the “primary beneficiary” test may serve as an initial sorting device. However, both the Second Circuit and the Eleventh Circuit are the only circuits that have directly discussed the applicability of Fact Sheet #71

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<sup>44</sup> See, e.g., *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983).

<sup>45</sup> *McLaughlin v. Ensley*, 877 F.2d 1207, 1211 (4th Cir. 1989).

<sup>46</sup> *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011).

<sup>47</sup> See, e.g., *Reich v. Parker Fire Prof. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993).

<sup>48</sup> *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015); see also *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2015).

<sup>49</sup> See, e.g., *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982).

<sup>50</sup> *McLaughlin*, 877 F.2d at 1209–10 (“[T]he proper legal inquiry in this case is whether . . . the new workers principally benefitted from the weeklong orientation agreement.”).

<sup>51</sup> *Solis*, 642 F.3d at 525–26 (“[T]he district court focused on which party receives the primary benefit of the work performed by [the] students. This was the appropriate inquiry to make.”).

<sup>52</sup> See Paul Budd, *All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor*, 63 KAN. L. REV. 451 (2015).

<sup>53</sup> *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005).

<sup>54</sup> *Johns v. Stewart*, 57 F.3d 1544, 1557–58 (10th Cir. 1995).

<sup>55</sup> *Id.* at 1558.

<sup>56</sup> *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015).

<sup>57</sup> *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1203 (11th Cir. 2015).

and *Portland Terminal* to unpaid internships. While the other circuits were still considering the definition of “employee” under the FLSA, they were not directly addressing the legality of unpaid internships. This tension between direct confrontation of unpaid internships and a general definition of “employee” under the FLSA established the importance of the opinions issued recently by the Second Circuit and the Eleventh Circuit.

C. *Glatt, Schumann*, and the Direct Assessment of Unpaid Interns under the FLSA

In *Glatt v. Fox Searchlight Pictures, Inc.*,<sup>58</sup> the Second Circuit maintained that the use of the six-factor test laid out in Fact Sheet #71 was inadequate to determine the status of unpaid interns under the FLSA. Instead, the court stated, “the proper question is whether the intern or the employer is the primary beneficiary of the relationship.”<sup>59</sup> According to the court, there are three particular reasons why the primary beneficiary test is the correct starting point for analysis. First, the primary beneficiary test centers on what the intern receives in exchange for his work.<sup>60</sup> Second, the test provides courts with greater flexibility than a six-factor test.<sup>61</sup> Third, the test pushes the analysis of the employer-intern relationship away from standard notions of the employer-employee relationship, which is necessary because “the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment.”<sup>62</sup> In determining what qualifies under the primary beneficiary test, the court also provided “a non-exhaustive set of considerations,” including:

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

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<sup>58</sup> 811 F.3d 528 (2d Cir. 2015).

<sup>59</sup> *Id.* at 536.

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

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

<sup>62</sup> *Id.*

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.

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>63</sup>

Unlike Fact Sheet #71, the absence of one or more of these factors is not necessarily determinative. The *Glatt* approach allows weighing the totality of these circumstances to determine whether a worker is an intern or an employee. The court also emphasized that this approach "reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education—and is confined to internships and does not apply to training programs in other contexts."<sup>64</sup>

Following in the footsteps of *Glatt*, the Eleventh Circuit in *Schumann v. Collier Anesthesia, P.A.*<sup>65</sup> embraced the primary beneficiary test along with the non-exhaustive list of considerations provided by the Second Circuit. In the discussion of *Portland Terminal* and Fact Sheet #71, the court notes how impractical it seems to compare the modern internship experience with factors laid forth almost seventy years ago.<sup>66</sup> However, the court also states that only considering the primary beneficiary test to determine the legality of unpaid internships is insuffi-

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<sup>63</sup> *Id.* at 536–37.

<sup>64</sup> *Id.* at 537.

<sup>65</sup> 803 F.3d 1199, 1203 (11th Cir. 2015).

<sup>66</sup> *Id.* at 1210–11.

cient. For instance, the court states that a “dilemma arises in determining how to discern the primary beneficiary in a relationship where both the intern and the employer may obtain significant benefits.”<sup>67</sup> The court states that the best way to evaluate this tension is “to focus on the benefits to the student while still considering whether the manner in which the employer implements the internship program takes unfair advantage of or is otherwise abusive towards the student.”<sup>68</sup> This language suggests that the court in *Schumann* sees the primary beneficiary test as a threshold evaluation instead of a final determinative factor.

While *Glatt* provided the barebones structure necessary to evaluate interns instead of trainees, *Schumann* imposes a measure of clarity and rationale on why the criteria proposed in *Glatt* is so effective.<sup>69</sup> The court points to the fourth, fifth, and sixth factors as those that most properly consider the problems facing modern internships.<sup>70</sup> However, the court in *Schumann* cautions that, unlike Fact Sheet #71’s hard-edged, six-factor test, there may be instances where the primary beneficiary test in *Glatt* will fall short of a clear answer. The court states:

We can envision a scenario where a portion of the student’s efforts constitute a *bona fide* internship that primarily benefits the student, but the employer also takes unfair advantage of the student’s need to complete the internship by making continuation of the internship implicitly or explicitly contingent on the student’s performance of tasks or his working of hours well beyond the bounds of what could fairly be expected to be a part of the internship.<sup>71</sup>

It is difficult not to interpret the court’s statement above as an admission that there will likely never be a perfect bright line rule regarding what constitutes illegitimate unpaid internships under the FLSA. Indeed, with four different stances between seven different circuits, barring legislative action by Congress or an opinion from the Supreme Court, clarity within the law seems out of reach when only considering the precedent laid forth by the courts of the United States.

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<sup>67</sup> *Id.* at 1211.

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

<sup>69</sup> *Id.* at 1213.

<sup>70</sup> *Id.* at 1213–14.

<sup>71</sup> *Id.* at 1214–15 (emphasis in original).

#### D. Information Asymmetry and “Abusive” Unpaid Internships

Before considering a new framework to address unpaid internships, it is necessary to specifically divide a socially useful unpaid internship from an “abusive” unpaid internship. In order to actually understand how a solution to a problem might work, some sort of differentiation is required beyond a “know-it-when-we-see-it” test. The two extremes of the issue seem clear. On one side, an internship that allows a young student to gain experience by working on nuanced problems without any restraints is a socially useful activity. For instance, a situation where a law student volunteers for a government agency could be considered the pinnacle of a good unpaid internship. On the other side, internships that deceive students into performing menial tasks in the hope of eventually working on more important items are socially wasteful. Many stories of unpaid internships that pushed the plight of unpaid interns to the forefront of employment law contained similar elements. As is often the case in law, the real difficulty lies in the middle between these two extremes.

Additionally, some unpaid internships prevent or delay a person from using her skills at the highest value, which can harm economic efficiency. This economic harm has a dual nature: the harm caused by depriving the economy of the unpaid intern’s skills and the harm caused to another person that could better perform the unpaid intern’s job. For example, say a film student works on a movie set as an unpaid intern and mainly runs errands for the director and staff that may or may not be related to the production of the film. Presumably, the film student has above average skills at making movies (because she is a film student) that are not being used in her current role. It would be more economically efficient for that film student to do what she is best at than to run errands for the film crew. The film student is simply much better at working on a film production than doing errands. On the other hand, someone in the economy is likely better at running errands than the film student. In her current role, the film student is both depriving the economy of her unique skills, which society values more than running errands, and preventing someone else that is more efficient in the role from using his skills. In turn, that person’s skills are not contributing to the economy as a whole, likely occupying a spot that he is less efficient at than running errands. When interns occupy roles that deprive them of the opportunity to use their most highly valued skills, society suffers as a result.

Consequently, the most logical way to think about what causes harm in unpaid internships is through information asymmetry. In the previous example, the film student chooses to work as an unpaid intern

in the hope that the role will eventually result in employment. Unfortunately for that intern, she does not know what the probability is that she will be offered employment eventually. In contrast, the employer likely knows with some certainty what the probability is that the intern will eventually be offered employment. It seems fair to say that the unpaid intern would not work in that role if she knew that the chances of employment were zero percent. In fact, some risk-averse unpaid interns might avoid any role that did not have greater than a seventy-five percent chance of manifesting in employment. In a different take, interns that increase their chances of employment in a similar role with a different employer may still overvalue the worth of an unpaid internship. Unfortunately, persons considering an unpaid internship cannot estimate the odds of eventual employment with any certainty. If the information asymmetry were decreased, those considering unpaid internships could make decisions that align with their risk tolerance. In order to rectify the problem of unpaid internships, the information asymmetry that exists between employers and potential unpaid interns must be removed or lessened.

## II. THE UNITED KINGDOM'S APPROACH TO EMPLOYMENT CLASSIFICATION

Unlike the United States, which only has three employment categories (employee, independent contractor, and volunteer), the United Kingdom has four statutorily defined categories: employee, worker, self-employed or contractor, and voluntary worker.<sup>72</sup> An "employee," as defined by the Employment Rights Act of 1996,<sup>73</sup> is "an individual who has entered into or works under . . . a contract of employment."<sup>74</sup> A contract of employment can be written or oral and can also be express or implied.<sup>75</sup> On the other hand, a "worker" is defined as:

[A]n individual who has entered into or works under . . .

(a) a contract of employment, or

(b) any other contract, whether express or implied and . . . whether oral or in writing, whereby the individual undertakes

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<sup>72</sup> See Katie Clark & Paul McGrath, *Employment and Employee Benefits in UK (England and Wales): Overview*, MCDERMOTT WILL & EMERY UK LLP (Jan. 1, 2017), [https://uk.practicallaw.thomsonreuters.com/7-503-4973?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-503-4973?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last visited Aug. 31, 2017).

<sup>73</sup> Employment Rights Act 1996, c. 18, § 230 (Gr. Brit.).

<sup>74</sup> *Id.*

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

to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.<sup>76</sup>

In addition to “worker” and “employee,” the United Kingdom also defines “voluntary worker.”<sup>77</sup> The statutory definition of who qualifies as a “voluntary worker” is quite narrow, but “voluntary workers” are exempt from minimum wage requirements.<sup>78</sup> First, the worker must be employed “by a charity, a voluntary organisation, an associated fundraising body or a statutory body.”<sup>79</sup> Second, the worker must not receive any compensation for his services except for expenses “actually incurred in the performance of his duties.”<sup>80</sup> Finally, the worker may not receive any “benefits in kind of any description, or . . . benefits in kind other than the provision of some or all of his subsistence or of such accommodation as is reasonable in the circumstances of the employment.”<sup>81</sup> At first glance, it seems that the categories provided by the United Kingdom’s laws are superior to the vague definitions of “employee” provided by the FLSA in the United States. However, the lines between each employment category are equally chaotic within the courts.

#### A. “Employee” vs. “Worker”

In the United Kingdom, employment law differentiates between “employee” and “worker” on statutory definitions and common law tests. The statutory distinction is fairly thin, as an “employee” is engaged under an employment contract, but a “worker” is engaged under a contract to render services.<sup>82</sup> Even this line is muddled though, and the easiest way to interpret the distinction is to think of a “worker” as a casual worker that does not have to accept work and an “employee” as full-time laborer that does not have a choice.<sup>83</sup> This further distinguishes a “worker” from an independent contractor, as “[t]he intention behind the regulation is plainly to create an intermediate class of protected worker, who is on the one hand not an employee but on the other

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<sup>76</sup> *Id.*

<sup>77</sup> National Minimum Wage Act 1998, c. 39, § 44 (Gr. Brit.).

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

<sup>79</sup> *Id.*

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

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

<sup>82</sup> *See* Employment Rights Act 1996, c.18, § 230 (Gr. Brit.).

<sup>83</sup> *See, e.g.,* Drake v. Ipsos Mori UK Ltd. [2012] EAT 2012 WL 2922990 (Eng.).

hand cannot . . . be regarded as [an independent contractor].”<sup>84</sup> Conceptually, this allows a clear picture of what the different statutory provisions imply. Of course, such a clear distinction can exist in the abstract but not hold constant in reality.

Workers receive fewer employment rights than employees overall. For instance, workers are entitled to the national minimum wage,<sup>85</sup> protection against unlawful deductions from wages, protection against unlawful discrimination, and protection for reporting wrongdoing in the workplace.<sup>86</sup> However, workers are not entitled to minimum notice periods if employment is ending, protection against unfair dismissal, and time off for emergencies.<sup>87</sup> The addition of a fourth employment category allows the United Kingdom to mix and match which employment protections that different workers receive. In relation to internships, the addition of this fourth category allows the United Kingdom to protect interns with certain employment rights.

At common law, the starting point to determine whether or not an employment relationship exists is to look for the existence of a contract. If there is a contract, three main factors distinguish whether or not it is a “contract of employment.” First, an employee must be under an obligation to perform the work personally.<sup>88</sup> Second, there must be mutuality of obligation between the parties involved.<sup>89</sup> Third, the employer must have a sufficient right of control over the employee.<sup>90</sup>

In the past, courts in the United Kingdom have found that a contract exists unless there is strong evidence of employment as a third party for a limited duration. For instance, in *Hewlett Packard Ltd. v. O’Murphy*,<sup>91</sup> the court determined that an implied contract did not materialize purely because the worker was with a company longer than the original contract stated. Because the contract with the employment agency stated that the work was for a limited duration in a non-employment capacity, the court chose to find no contract of employment.<sup>92</sup> In

<sup>84</sup> *Bryne Brothers (Formwork) Ltd. v. Baird*, [2002] I.C.R. 667 (Eng.).

<sup>85</sup> See National Minimum Wage Act 1998, c. 39, § 1 (Gr. Brit.) (guaranteeing the national minimum wage to “an individual who . . . is a worker . . . [or] is working . . . in the United Kingdom under his contract”).

<sup>86</sup> *Employment Status: Employee*, GOV’T OF THE U.K. (2016), <https://www.gov.uk/employment-status/employee> [<https://perma.cc/ZXX5-MJM3>].

<sup>87</sup> *Employment Status: Worker*, GOV’T OF THE U.K. (2016), <https://www.gov.uk/employment-status/worker> [<https://perma.cc/8UDW-RL67>].

<sup>88</sup> See *infra* notes 95–99 and accompanying text.

<sup>89</sup> See *infra* notes 100–104 and accompanying text.

<sup>90</sup> See *infra* note 105 and accompanying text.

<sup>91</sup> [2001] EAT 2001 WL 1135163 (Eng.).

<sup>92</sup> *Id.* at [21].

contrast, in *Franks v. Reuters Ltd.*,<sup>93</sup> the court determined that a worker who had worked for several years had developed an implied contract because of explicit interactions with her employer. The presiding judge stated that “a person cannot become an employee simply by reason of the length of time for which he does work for the same person. . . . [However], it is not irrelevant evidence in the context of an individual who sought a temporary placement.”<sup>94</sup> Overall, courts are likely to find that a contract exists with relationships of a significant duration.

After finding the existence of a contract, courts look to whether the employee must carry out the work personally. If the contract states that the work must be done personally, then that factor weighs in favor of finding the contract to be a contract of employment. In *Express & Echo Publications Ltd. v. Tanton*,<sup>95</sup> the court held that a contract, which allowed a person other than the worker to provide services, was not an employment contract. However, employers cannot avoid classifying their workers as employees simply by always including a clause in a contract that allows delegation. For example, in *Autoclenz Ltd. v. Belcher*,<sup>96</sup> the U.K. Supreme Court found that a contract allowing valet drivers to contract out their work to other drivers did not stop that contract from qualifying as a contract of employment. The Court discussed that the spirit of the contract “was that the claimants would show up each day to do work and that the respondent would offer work provided that it was there for them to do.”<sup>97</sup> Furthermore, courts in the United Kingdom do not consider all circumstances where subcontracting is available to instantly disqualify the worker as an employee.<sup>98</sup> In this circumstance, allowing a worker to draw from a pool of replacements in case of illness or absence does not prevent classification as an employee.<sup>99</sup> Overall, it appears that courts in the United Kingdom consider a contract to be a contract of employment if the heart of the contract mandates personal service.

Next, courts in the United Kingdom determine a contract to be a contract of employment if the contract contains mutuality of obligation. Under U.K. law, mutuality of obligation entails that employers must provide employees work and that employees must perform the work

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<sup>93</sup> [2003] EWCA (Civ) 417 (Eng.).

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

<sup>95</sup> [1999] AC (Civ) ICR 693 (Eng.).

<sup>96</sup> [2011] UKSC 41 (Eng.).

<sup>97</sup> *Id.* at [37].

<sup>98</sup> *MacFarlane v. Glasgow City Council* [2000] EAT 2000 WL 699290 (Eng.).

<sup>99</sup> *Id.* at [11].

when it is offered.<sup>100</sup> Requiring mutuality of obligation prevents casual workers from gaining status as employees. In the past, courts in the United Kingdom have refused to read in clauses defining mutuality of obligation into contracts that explicitly deny such a relationship.<sup>101</sup> Additionally, courts have also refused to imply a clause in contracts that states mutuality of obligation where the arrangement between the parties was casual.<sup>102</sup> Nevertheless, status as a casual worker does not necessarily prevent classification as an employee. The court in *Drake v. Ipsos Mori UK Ltd.*<sup>103</sup> found that once an employer gave a work assignment to a casual worker, then the casual worker was obligated to carry out the work personally for payment. It is unclear whether this case is distinguishable from past contemplations of what is required for mutuality of obligation. Temporary agency workers also face difficulty establishing employee status because of the nature of their arrangement with the employer. Courts in the United Kingdom reject the idea that a temporary agency worker is necessarily guaranteed work during the limited period he is employed.<sup>104</sup> Outside of a few minor exceptions, courts in the United Kingdom consider mutuality of obligation to exist only if specifically provided for in the contract.

Finally, courts in the United Kingdom require an employer to have control over the work that its employee does. If the employer retains an overarching right of control throughout the relationship, then the worker is considered an employee.<sup>105</sup> It is incorrect to treat “the absence of actual day-to-day control as the determinative factor rather than addressing the cumulative effect of the totality of the provisions in the [contract] and all the circumstances of the relationship created by it.”<sup>106</sup> Requiring an overarching right of control throughout the employment relationship also makes it difficult for temporary workers to establish employee status. Even temporary workers who eventually become permanent employees have difficulty establishing the required level of control.<sup>107</sup> Generally, however, if the employment relationship is not set for a limited time and delegated by an agency contract, then an overarching right of control is likely to be found.

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<sup>100</sup> See *Drake v. Ipsos Mori UK Ltd.* [2012] EAT 2012 WL 2922990 (Eng.).

<sup>101</sup> *Stevedoring & Haulage Services Ltd. v. Fuller* [2001] EWCA (Civ) 651 [2001] IRLR 627 at 628 (Eng.).

<sup>102</sup> *Carmichael v. National Power Plc.* [1999] ICR 1226 (HL) (Eng.).

<sup>103</sup> [2012] EAT 2012 WL 2922990 (Eng.).

<sup>104</sup> *Stephenson v. Delphi Diesel Ltd.* [2002] EAT 2002 WL 31962063 (Eng.).

<sup>105</sup> See *White v. Troutbeck SA* [2013] EWCA (Civ) 1171 (EAT) (Eng.).

<sup>106</sup> *Id.* at [38].

<sup>107</sup> *Dacas v. Brook Street Bureau (UK) Ltd.* [2004] EWCA (Civ) 217 (AC) (Eng.).

Analyzing the common law tests that divide a “worker” from an “employee” is crucial to understanding U.K. law on interns. Consider an intern that is employed for a limited period of time through her post-secondary institution’s program that matches students with internships. This intern would have very little chance of establishing herself as an employee because of her status as a temporary agency worker. It is unclear whether the company hiring the intern would have to provide work on a regular basis for the intern. If the company explicitly stated in the contract that no mutuality of obligation existed, it is extremely unlikely that the intern could be classified as an employee. While classification as a worker is more protective than classification as a voluntary worker, the intern would still lack certain protections, including parental leave and protection from unlawful dismissal.<sup>108</sup>

#### B. Voluntary Worker vs. Worker

Distinct from a volunteer, a “voluntary worker” is best understood as a “worker” that labors in the “voluntary sector,”<sup>109</sup> and unlike a “worker” or an “employee,” “voluntary workers” are defined specifically within statute. First, a worker can only be classified as a “voluntary worker” if that worker is employed “by a charity, a voluntary organization, an associated fund-raising body or a statutory body.”<sup>110</sup> Second, a “voluntary worker” cannot receive compensation outside of reimbursement for actual expenses incurred.<sup>111</sup> It is not possible to avoid this rule by providing benefits in kind in place of compensation.<sup>112</sup> An exception is made for some compensation though, as a worker can receive compensation “solely for the purpose of providing him with means of subsistence.”<sup>113</sup> Additionally, “any training (other than that which a person necessarily acquires in the course of doing his work) shall be taken to be a benefit in kind.”<sup>114</sup> However, “training provided for the sole or main purpose of improving the worker’s ability to perform the work which he has agreed to do” is not considered to be a benefit in kind.<sup>115</sup>

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<sup>108</sup> *Employment Rights and Pay for Interns*, GOV’T OF THE U.K. (2016), <https://www.gov.uk/employment-rights-for-interns> [<https://perma.cc/S5Y3-BW34>].

<sup>109</sup> See *Best v. St. Austell China Clay Museum Ltd.* [2004] EAT 2004 WL 1640208 (Eng.).

<sup>110</sup> National Minimum Wage Act 1998, c. 39, § 44.

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

<sup>112</sup> *Id.*

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

<sup>114</sup> *Id.*

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

In the past, courts in the United Kingdom have rejected concrete legal rules in favor of common sense factual determinations with voluntary workers. For instance, in *Migrant Advisory Service v. Chaudri*,<sup>116</sup> the court ruled that a voluntary worker who was compensated for reasonable expenses did not qualify as a voluntary worker because the compensation was too excessive. Ms. Chaudri was paid £25 per week in compensation for “voluntary expenses” in need of reimbursement, which is allowed for voluntary workers.<sup>117</sup> Ms. Chaudri worked for twelve hours every week and walked to the office where she volunteered.<sup>118</sup> After a few years on the job, Ms. Chaudri began receiving £40 per week.<sup>119</sup> Despite the parties’ attempts to claim that this reimbursement was suited to “voluntary expenses,” the court disagreed, stating that “this is a very simple case and it is perhaps, in a way, like the elephant—you know one when you see one.”<sup>120</sup> Similarly, the court in *Armitage v. Relate*<sup>121</sup> found that a voluntary worker qualified as an employee because of the obvious exchange of work for training, requirement to work at scheduled times, and eventual incorporation as an employee upon completion of all requirements.<sup>122</sup> Like the court in *Chaudri*, the court remarked that “this case is such that allowing the workers to masquerade as voluntary workers is nothing but a poor attempt to circumnavigate the clearest of statutory distinctions.”<sup>123</sup>

If a voluntary worker is held to a certain set of obligations related to performance of work, courts in the United Kingdom have generally found an employment relationship to exist. In an effort to capture the essence of the relationship, U.K. courts do not limit definition to strict contractual terms. In the United Kingdom, most voluntary workers sign “volunteer agreements” that state the terms under which a person can volunteer.<sup>124</sup> Many volunteer agreements straddle the line between valid agreements and hidden contracts of employment. For instance, in *Murray v. Newham Citizens Advice Bureau*,<sup>125</sup> the court determined that a volunteer agreement—which included time commitments of a minimum time period, time period requirements to complete basic

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<sup>116</sup> [1998] EAT 1400/97; 1998 LEXIS 5254 (Eng.).

<sup>117</sup> *Id.* at \*2; see National Minimum Wage Act 1998, c. 39, § 44.

<sup>118</sup> *Chaudri*, 1998 LEXIS 5254 at \*1–\*2.

<sup>119</sup> *Id.* at \*2.

<sup>120</sup> *Id.* at \*3.

<sup>121</sup> [1994] IT 43438/94 (ET) (Eng.).

<sup>122</sup> *Id.*

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

<sup>124</sup> See, e.g., *Murray v. Newham Citizens Advice Bureau* [2001] EAT 1096/99 [2001] ICR 708 (Eng.).

<sup>125</sup> [2001] EAT 1096/99 [2001] ICR 708 (Eng.).

training, grievance and disciplinary processes, expense requirements, and commitments related to claiming holidays—amounted to an employment contract. Unlike *Relate* or *Chaudri*, the court did not point to a single issue as key to finding the existence of an employment contract. Instead, the court stated that “[i]t is simply not right to say that under the agreement there is no obligation on either party. On the contrary the document sets out for each party to the agreement a series of separate obligations and commitments.”<sup>126</sup> Of course, the court also notes that the mere presence of obligations in a contract does not necessarily imply whether the contract is for the performance of services or for employment.<sup>127</sup> In addition to common sense evaluations of factual situations, courts in the United Kingdom have adopted a holistic approach to determine whether or not an implied contract exists between an organization and a voluntary worker.

Courts in the United Kingdom also consider voluntary workers to be subject to an employment contract if the employer has any legal remedy against the voluntary workers for failure to perform work. In *South East Sheffield Citizens Advice Bureau v. Grayson*<sup>128</sup> the court stated that the critical question in cases concerning volunteer agreements is “whether the volunteers were contractually obliged to provide their services.”<sup>129</sup> In this particular case, the court found that the volunteer agreement was a list of expectations, rather than a contract of obligations. According to the court, “someone who is indisputably engaged under a contract of service, or for services, will not usually find his and his employer’s respective contractual obligations expressed in terms of ‘reasonable expectations.’”<sup>130</sup> Furthermore, the court determined that the presence of a contractual relationship with regard to reimbursement did not result in a contract of employment.<sup>131</sup> The court distinguishes this situation by acknowledging that voluntary workers can be bound by contracts, just not contracts that create obligations to perform services. In recent years, courts in the United Kingdom have continued to embrace the reasoning that a contract of obligations is the only true determinative factor between a voluntary worker and an employment relationship.<sup>132</sup>

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<sup>126</sup> *Id.* at [9].

<sup>127</sup> *Id.* at [14].

<sup>128</sup> [2003] EAT 0283/03 [2004] ICR 1138 (Eng.).

<sup>129</sup> *Id.* at [13].

<sup>130</sup> *Id.* at [15].

<sup>131</sup> *Id.* at [20].

<sup>132</sup> *See X v. Mid Sussex Citizens Advice Bureau* [2011] EWCA (Civ) 28 [2011] ICR 460 (Eng.).

### C. Interns as Volunteers

An intern in the United Kingdom may be classified by any of the three terms previously discussed. However, an intern may also operate as a volunteer. Under U.K. law, a “voluntary worker” is statutorily defined and is not synonymous with a volunteer; there is no statutory definition for a volunteer.<sup>133</sup> In this way, U.K. law is fairly similar to the United States, but the presence of three employment categories and strict conditions on implied contracts of obligation help to curtail the amount of interns who work as volunteers. Nevertheless, there are circumstances in which interns, acting as volunteers, have successfully demonstrated the existence of an implied contract to perform services or an implied contract of employment. In order to determine whether an intern is actually an “employee” or “worker,” courts consider similar factors to whether or not a worker is a “voluntary worker.”

In the past, courts in the United Kingdom have found that an intern should be considered an employee when mutual obligations are present. For instance, in *Vetta v. London Dreams Motion Pictures Ltd.*,<sup>134</sup> an employment tribunal found that an assistant for an art department who was paid on an expenses-only basis was an employee because of mutual obligations within an intern agreement. In the agreement, the intern was required to log her hours, keep a regular schedule, and perform certain tasks in exchange for continued work.<sup>135</sup> The court found little evidence that the intern was purely a volunteer and stated that “[t]here is no doubt that the Claimant was a worker within . . . the definition of worker both in the National Minimum Wage and Working Time Regulations legislation.”<sup>136</sup> The mutuality of obligation laid out in the agreement created an implied contract of employment or at the very least an implied contract to perform services.<sup>137</sup>

Furthermore, courts in the United Kingdom have considered interns to be more than volunteers when they are required to keep certain hours as a condition of employment. In *Hudson v. TPG Web Publishing Ltd.*,<sup>138</sup> an employment tribunal determined that an intern who was told by her supervisor to work between the hours of 10 a.m. and 6 p.m.

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<sup>133</sup> Doug Pyper, *The National Minimum Wage: Volunteers and Interns* 6, HOUSE OF COMMONS (Dec. 21, 2015), <http://researchbriefings.files.parliament.uk/documents/SN00697/SN00697.pdf>.

<sup>134</sup> [2008] ET 2703377/08 (Eng.).

<sup>135</sup> *Id.* at [10].

<sup>136</sup> *Id.* at [14].

<sup>137</sup> *Id.*

<sup>138</sup> [2011] ET 2200565/11 (Eng.). For a summary of the case in the press, see Shiv Malik, *Unpaid Website Intern Celebrates Court Victory*, GUARDIAN (May 23, 2011), <https://www.theguardian.com/media/2011/may/23/unpaid-website-intern-court-victory> [<https://perma.cc/T4VD-GXDX>].

was an employee because an implied contract was formed that entailed obligations. Although there was no written contract of employment between the employer and the intern, the court determined that an implied obligation to be present during certain hours was sufficient to find a relationship greater than that of a volunteer.<sup>139</sup> In this case, the court also determined that informal discussions between the intern and her supervisor about the potential of pay in the future were sufficient consideration in exchange for working certain hours.<sup>140</sup> The court also noted that any requirement related to hours for interns would provide some evidence of an employment relationship.<sup>141</sup>

Overall, the United Kingdom provides a solid foundation for protecting against abusive unpaid internships. Part of this foundation is a result of the expansive employment categories previously defined in this Comment. However, an even larger level of protection comes from the judicial reasoning employed by judges in the United Kingdom regarding the existence of an employment contract or a contract to render services. In many cases regarding the fine line between an “employee” and an intern, the difference comes from the existence of an agreement that is not tangible but still effective. This reasoning mirrors many of the complaints given by unpaid interns regarding their volunteer status under the law: even if there is no contract binding their actions, many volunteers feel that there are unspoken obligations that they must follow for risk of losing the opportunity. Such a keen judicial awareness on the particular subject of internships helps provide a strong backing for interns in the United Kingdom.

### III. THE EFFICACY OF U.K. LAW AND BENEFIT TO THE UNITED STATES

The purpose of analyzing the laws and common law precedent of the United Kingdom is to provide some understanding of two employment systems that seem similar but are actually fairly different. Including a fourth employment category greatly expands which workers are given certain protections under U.K. law. A substantial number of U.S. interns would likely be considered “workers” in the United Kingdom. Of course, the central question is how these different laws actually impact internship levels in the United Kingdom compared to the United States. Furthermore, much of the discussion of the two different employment systems seems to note some tension between the following questions: which nation’s employment law is best for interns and which nation’s

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<sup>139</sup> *Hudson*, ET 2200565/11.

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

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

employment law is best for all members of the labor force. However, it does not seem that such considerations are opposed based on the extensive case law in both nations covering the topic; in fact, this Comment argues that the answers to those two questions are one and the same. To solve this issue, the United States should adopt contractual standards from the United Kingdom to cure information asymmetry between employers and interns.

#### A. Unpaid Internship Levels in the United Kingdom and the United States

Overall, levels of unpaid internships are lower in the United Kingdom than in the United States. For both nations, data is not extensive on the actual number of unpaid interns at any given time. However, the figures that do exist are illustrative of the broader point that there are significantly fewer unpaid internships in the United Kingdom than in the United States. As of 2015, only twenty-one thousand university graduates and students in the United Kingdom reported that they had participated in an unpaid internship in the past year.<sup>142</sup> Generally, the U.K. labor force total hovers around thirty-two million people at work.<sup>143</sup> Thus, only one in every 1,523 workers in the United Kingdom worked in an unpaid internship during 2015. For comparison, in 2012 through 2014, between five hundred thousand and one million workers in the United State reported participating in an unpaid internship in the past year.<sup>144</sup> About 152 million Americans participated in the labor force overall during these years.<sup>145</sup> In the United States between 2012 and 2014, one in every 304 workers participated in an unpaid internship at minimum, with numbers potentially as high as one in every 152 workers participating in an unpaid internship. From a numerical standpoint, it seems that employment laws in the United Kingdom may prevent high levels of unpaid internships.

Several clarifications must be made to this numerical data, however. One argument may be that the United States as a whole has a

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<sup>142</sup> Federica Cocco, *There Are 21,000 Unpaid Workers in the UK—They're Interns*, MIRROR (Jan. 16, 2015), <http://www.mirror.co.uk/news/ampp3d/21000-unpaid-workers-uk—4984262> [https://perma.cc/8MKY-6KJF].

<sup>143</sup> *UK Labour Market: February 2016*, UK OFFICE OF NAT'L STAT. (2016), <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/february2016> [https://perma.cc/DK3T-QHUC].

<sup>144</sup> Blair Hickman, *What We Learned Investigating Unpaid Internships*, PROPUBLICA (July 23, 2014), <https://www.propublica.org/article/what-we-learned-investigating-unpaid-internships> [https://perma.cc/62AL-W2HK].

<sup>145</sup> *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 3, 2017), <https://data.bls.gov/timeseries/LNS11300000> [https://perma.cc/V2L6-F9TH].

substantially larger media sector than the United Kingdom. Media companies are among the most notorious offenders in creating and using abusive unpaid internships.<sup>146</sup> In fact, seventeen of the world's largest media companies are based in the United States, posting a combined \$200.23 billion in media revenue during 2016.<sup>147</sup> However, it is likely that if these companies were located in the United Kingdom and attempted to hire unpaid interns in a similar manner to those in the United States, courts would find that the interns would qualify as "employees" or "workers." In *Glatt v. Fox Searchlight Pictures, Inc.*<sup>148</sup> a court in the United Kingdom would have considered the mutuality of obligation present from the employment relationship as an implied contract of employment, based on a similar rationale to that used in intern cases in the United Kingdom.<sup>149</sup> Another argument about the inadequacy of this data may focus on the extent of unreported unpaid internships that occur through the exception of job shadowing.<sup>150</sup> Some reports suggest that there are many more unpaid internships in the United Kingdom than reported.<sup>151</sup> There is little evidence that the practice of job shadowing occurs to any great extent though. Even organizations that campaign to end all unpaid internships do not consider the loophole to be a significant cause of unreported unpaid internships.<sup>152</sup>

## B. Potential Legislative and Judicial Solutions in the United States

This Comment recommends that the United States take action both legislatively and judicially to fix current flaws in employment law that proliferate abusive unpaid internships. Furthermore, this Comment looks exclusively to the current laws and precedent of the United Kingdom to inform decisions that can be made by the U.S. government and courts of the United States in particular.

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<sup>146</sup> See, e.g., Neil Howe, *The Unhappy Rise of the Millennial Intern*, FORBES (Apr. 22, 2014), <http://www.forbes.com/sites/realspin/2014/04/22/the-unhappy-rise-of-the-millennial-intern/#179ceaae5b73> [<https://perma.cc/R3C8-VYPW>].

<sup>147</sup> Lara O'Reilly, *The 30 Biggest Media Companies in the World*, BUSINESS INSIDER (May 31, 2016), <http://www.businessinsider.com/the-30-biggest-media-owners-in-the-world-2016-5/#30-time-inc-287-billion-in-media-revenue-1> [<https://perma.cc/3ZBC-AVfy>].

<sup>148</sup> 811 F.3d 528 (2d Cir. 2015).

<sup>149</sup> See *Hudson v. TPG Web Publishing Ltd.*, [2011] ET 2200565/11 (Eng.).

<sup>150</sup> See *Employment Rights and Pay for Interns*, GOVERNMENT OF THE UNITED KINGDOM (2016), <https://www.gov.uk/employment-rights-for-interns> [<https://perma.cc/78EQ-4284>].

<sup>151</sup> See, e.g., THE SUTTON TRUST, RESEARCH BRIEF: INTERNSHIP OF INDENTURE? 1 (Nov. 2014), <http://www.suttontrust.com/wp-content/uploads/2014/11/Unpaid-Internships.pdf> [<https://perma.cc/YZB8-4SPL>].

<sup>152</sup> See, e.g., *What Does the Law Say About Unpaid Internships?*, INTERN AWARE, [http://www.internaware.org/understand\\_the\\_law](http://www.internaware.org/understand_the_law) [<https://perma.cc/Y5X4-2JGC>] (last visited Apr. 1, 2017).

First, Congress should introduce legislation that would define a new employment category of “intern.” An intern would be defined as any worker that participates in employment for a fixed duration of time with the primary goal of gaining experience. The law would look to the tests established by the United Kingdom to determine whether a contract of employment exists. A crucial component of this categorization would be the recognition of implied contracts created between employers and interns that create mutual obligations even if not specified in a contractual arrangement. Leaving recognition of implied contractual relations to the judiciary is perfectly normal within the typical understanding of laws created by the legislature. Furthermore, the law would specifically state the considerations and determinative factors that should be present in an employment relationship, including mutuality of obligations. Alternatively, the United States could adopt a system similar to the United Kingdom’s by creating a category like “worker.” Judges may not want to consider unpaid interns employees in the United States because of the substantial acquisition of protection that such a designation brings. Additionally, the government may think that interns should have the ability to bring discrimination claims like employees currently can, while also wanting to avoid mandating that all interns receive the minimum wage. Creating an employment category between the two extremes of no protection and full protection might enable judges to view the claims of unpaid interns more favorably. However, this Comment recognizes that legislative change in the United States can be slow at times and such a massive change to the entire American employment structure may be too much to ask in a short period of time.

Second, judges in the United States should embrace the judicial reasoning used by courts in the United Kingdom to determine whether an intern qualifies as an employee. Although some U.S. courts in the past have shown a willingness to consider a mutual beneficiary test, courts instead should look to mutuality of obligations described in implied contracts or agreements that typically do not hold contractual weight. Such an interpretation is perfectly in line with the FLSA definitions of “employee” and “employ.” After all, the current definition of “to suffer or permit work” is so truly vague that considering employment as mutual obligations does not seem too far-fetched.<sup>153</sup> Modifying judicial reasoning to comport with a different understanding of employment relationships would help judges to narrow down cases that contain instances of abuse. Furthermore, it would allow courts the latitude to consider all aspects of a factual situation in a way that is less obtuse

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<sup>153</sup> 29 U.S.C. § 203 (2012).

than the presence of yet another multi-factor test. Of course, this Comment recognizes that such a simplistic, holistic approach could likely fade into confusion after some time because of the myriad forms of judicial reasoning that would result. However, even though this new approach could become clouded, it would still be clearer than the status quo.

In essence, the two proposed solutions work in tandem to reduce information asymmetry. If the judiciary embraces the mutuality of obligation test combined with the presence of implied contracts, two situations will emerge. First, employers will explicitly disclaim the possibility of full-time employment for unpaid interns in some sort of contractual agreement. This first safeguard will force companies to place in writing that employment will likely not follow an unpaid internship. For some potential interns, this statement will be sufficient to narrow the information asymmetry to an appropriate level. Some may still choose to participate in the internship, but they will be aware that the work they perform does not obligate the employer to later hire them. Second, employers who explicitly disclaim in writing but dangle the opportunity of employment through actions or statements will be subject to the finding of an implied contract of employment because of the mutual obligations present. Both situations will force companies to honestly assess and disclose whether the unpaid internships could lead to employment, reducing the information asymmetry that causes unpaid internships to be socially wasteful.

However, the two solutions that would improve the law of unpaid internships cannot work separately. If Congress defines a new employment category of “intern” and assigns that category the proper protections, but the judiciary refuses to accept a new approach to separating employment from internship, the new categorization will be for naught. It might be the case that some judges would be more likely to assign internship status in some questionable cases without the mutuality of obligation test, but many cases would still exist in the common law limbo of past precedent. Similarly, if the judiciary adopts a mutuality of obligation test with the presence of implied contracts, but Congress refuses to change existing law, employers could react by scrapping most intern positions all together. The sharp slope between a worker that is not protected by any law and an employee that is protected by all employment law might be too substantial of a risk for any company to face. If the solutions do not operate together, there is a risk that the current situation will simply continue in a different form or that opportunities for students will be severely limited. Nevertheless, if both solutions work together, the underlying issue that causes unpaid internships to

be socially wasteful will be mitigated, while still providing students plenty of opportunities.

#### CONCLUSION

The laws surrounding unpaid internships in the United States are a confusing mess of precedent and government suggestions that hold little coherence. Although employment law in the United Kingdom is far from perfect, the classifications given by U.K. law are a useful approach to better define employment categories and the protections that the law should give each distinct group. Unpaid interns, as a whole, can be a fairly distinct group that would benefit substantially from certain legal protections, like the right to bring discrimination actions. More importantly, borrowing the laws and legal reasoning of the United Kingdom would allow the United States to define which protections are important for interns. The current system that creates a stark choice between full legal protection and no legal protection is unclear, and it certainly cannot stand on the grounds of efficacy.