IN THE DEFENSE OF UNPAID INTERNSHIPS: PROPOSING A WORKABLE TEST FOR ELIMINATING ILLEGAL INTERNSHIPS

ABSTRACT

Sex, drugs, subterfuge, and murder are a few of the themes that earned Black Swan *$329,398,046 in box office sales and five Academy Award nominations in 2011. However, an additional theme has kept the attention of employers to this day: the film's systematic exploitation of unpaid interns. The film's use of unpaid interns resulted in a momentous lawsuit,* Glatt v. Fox Searchlight Pictures Inc.,[1] *that will likely define the legality of unpaid internships under the Fair Labor Standards Act (FLSA).*

As Glatt *and its successor cases work their way through the courts, a split of authority has emerged regarding the level of protection the FLSA affords unpaid interns, which does not expressly address internships. The Department of Labor's unpaid internship guidelines are vague and inapposite, thereby adding to the confusion. The resulting uncertainty has chilled employers' willingness to retain unpaid interns. At the same time, the demand for internships is at an all-time high.*

Although the legality of unpaid internships under the FLSA has received substantial academic treatment, the literature to date almost exclusively advocates for eliminating the system entirely. There is a dearth of scholarly writing about the value of legitimate unpaid internships. This Note helps fill the void by proposing a workable test that courts and employers can use to clearly distinguish between legal and illegal internships.

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1. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013), *motion to certify appeal granted*, No. 11 Civ. 6784 (WHP), 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

I. INTRODUCTION

A simple Google search helps illustrate how commonplace internships are today. However, the first result from the search query "internship statistics" is somewhat surprising.[2] It is not a statistical document from the Bureau of Labor Statistics.[3] Nor is it an offer from a private company for statistics and empirical studies at a low, one-time membership fee. Rather, the first result—"Internship Opportunities-American Statistical Association"—is a solicitation for internships in various statistic-oriented companies.[4] Although this was not the target of the initial search, it answers the question forcefully: internships are more ubiquitous today than ever before.[5] Recent estimates put the number of unpaid internships in the United States as high as 750,000.[6] However, that number is declining and

2. *See* GOOGLE (Mar. 14, 2014), https://www.google.com/#q=internship+statistics.

3. The Bureau of Labor Statistics does not keep track of unpaid internships. Rachele Kanigel, *Will Lawsuits Prompt Media Companies to Pay Student Interns?*, MEDIASHIFT (Feb. 13, 2013), http://www.pbs.org/mediashift/2013/02/will-lawsuits-prompt-media-companies-to-pay-student-interns044/.

4. *See Internships*, AM. STATISTICAL ASS'N., http://www.amstat.org/education/internships.cfm (last visited Nov. 26, 2014).

5. *Cf.* PHIL GARDNER, ET AL., RECRUITING TRENDS 2012–2013, at 33 (Mich. State Univ. Career Servs. and Collegiate Emp't Research, Inst., 42d ed.), *available at* http://www.ceri.msu.edu/wp-content/uploads/2012/11/FRecruiting-Trends-2012-2013.pdf.

6. *See* Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME BUS. (May 2, 2012), http://business.time.com/2012/05/02/the-beginning-of-the-end-of-

may continue to plummet until it no longer exists.[7] The legality of unpaid internships has been called into question by an increasing number of unpaid wage claims brought by ex-interns under the Fair Labor Standards Act (FLSA).[8] Disillusioned interns raise powerful arguments for eliminating a model of employment that takes advantage of students and recent graduates to the detriment of society.[9] But wait: is that really a fair characterization of unpaid internships? Perhaps there is more than meets the eye.[10]

This Note is intended to bring perspective to the seemingly one-sided debate over the value of unpaid internships in America. Part II introduces the topic with a brief overview of unpaid internships in America. Part III explores the legal framework courts use to evaluate unpaid internships, which necessarily includes a discussion of the FLSA;[11] the Department of Labor's (DOL) guidelines regarding unpaid internships, contained in Fact Sheet #71;[12] and *Walling v. Portland Terminal Co.*, the seminal Supreme

the-unpaid-internship-as-we-know-it/.

7. *See* Dylan Matthews, *Are Unpaid Internships Illegal?*, WASH. POST (June 13, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/13/are-unpaid-internships-illegal/. This Note does not question the stability of unpaid internships within nonprofit and government sectors, as these programs are expressly allowed by the FLSA. 29 U.S.C. § 203(e)(4)–(5) (2012).

8. *See generally* Peter Sterne, *The Great Intern Revolt*, CAPITAL (June 30, 2014), http://www.capitalnewyork.com/article/magazine/2014/06/8548091/great-intern-revolt. *Glatt v. Fox Searchlight Pictures Inc.*, is the seminal case on unpaid intern litigation. *See id.*; Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013). After a favorable ruling for the plaintiffs in *Glatt*, a wave of similar cases were filed. *See* Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, PROPUBLICA, http://projects.propublica.org/graphics/intern-suits#corrections (last updated Nov. 14, 2014).

9. *E.g.*, Class Action Complaint at ¶¶ 39–58, Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 11 Civ. 6784), 2011 WL 4479356 [hereinafter Complaint].

10. For example, the media has almost completely neglected to mention that Eric Glatt, one of the plaintiffs in the *Black Swan* case, was not a student. Glatt was a 41-year-old man with a master's degree, an MBA, and a desire to suddenly enter the film industry. Paul Solman, *How Unpaid Interns Are Exploited, Fighting Back and Winning*, PBS NEWSHOUR (Sept. 27, 2013), http://www.pbs.org/newshour/businessdesk/2013/09/how-unpaid-interns-are-exploit.html; Sterne, *supra* note 8.

11. 29 U.S.C. §§ 201–219.

12. U.S. DEP'T OF LABOR WAGE & HOUR DIV., FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter FACT SHEET], *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf. In 1975, the Department of Labor Wage and Hour Division issued guidelines in its Field Operations Manual that were analogous to those found in Fact Sheet #71. *Compare id.*, *with* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025–26 (1993) (quoting U.S. DEP'T OF LABOR

Court case interpreting the meaning of "employee" under the FLSA.[13] Part IV compares two cases, *Glatt v. Fox Searchlight Pictures, Inc.* and *Wang v. Hearst Corp.*, to demonstrate and analyze the emerging split of authority regarding the application of the FLSA to unpaid interns.

Finally, Part V contains two subparts: Part V.A. examines additional problems with Fact Sheet #71 in light of *Glatt* and *Wang*. Because these problems demonstrate that the guidelines are based on defective reasoning and are inconsistent with prior DOL interpretations of how employment should be determined under the FLSA, this Note concludes that Fact Sheet #71 is not entitled to judicial deference. With this conclusion in mind, Part V.B. proposes a new test for analyzing the legality of unpaid internships. The new test looks at the totality of the circumstances surrounding the internship program, focusing on the objective benefits to the intern and the subjective expectations of the employer to determine whether the employer or the intern primarily benefited from the internship. If adopted by courts, the test would bring much-needed clarity to this area of the law and provide employers with a workable tool to clearly identify and eliminate illegal internships.

II. UNPAID INTERNSHIPS IN AMERICA

America's internship system can be traced back to England in the Middle Ages, when young apprentices actually paid to work and learn a trade.[14] With the emergence of vocational schools came the death of the traditional apprenticeship system.[15] But the basic underpinnings of the system found a new home in the medical profession.[16] Medical students

WAGE & HOUR DIV., WAGE & HOUR MANUAL, 91:416 (1975)). The only substantive difference between the two guidelines is Fact Sheet #71 inserted the word "intern" where the old guidelines used the word "trainee." *Compare* FACT SHEET, *supra*, *with Reich*, 992 F.2d at 1025–26 (quoting WAGE & HOUR MANUAL, *supra*). There is no substantive difference between the two sets of guidelines, as both were derived directly from *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). Because the two guidelines are the same, this Note does not distinguish between them. The remainder of this Note uses the following terms interchangeably to refer to the DOL guidelines: "Fact Sheet #71," the "guidelines," and the "Fact Sheet."

13. *See Portland Terminal*, 330 U.S. 148.

14. *See* Meaghan Haire & Kristi Oloffson, *Brief History: Interns*, TIME (July 30, 2009), http://content.time.com/time/nation/article/0,8599,1913474,00.html. Apprenticeships still exist today but are highly regulated and limited to certain industries. *Id.*

15. *Id.*

16. *See id.*; Sanburn, *supra* note 6.

began participating in residencies where they received additional training and experience by working under the close supervision of doctors before practicing on their own.[17] Starting in the 1960s, co-op programs began removing the internship concept from the exclusive province of the medical profession.[18] Co-ops allowed students to work in a wide variety of industries, which enabled them to learn about companies and careers of their choice.[19] Those programs grew drastically in the 1970s and 1980s, eventually evolving into the modern-day internship.[20]

Today's internship system is undergoing a concerning regression toward the pay-to-work system of the days of yore.[21] Although students no longer directly pay their employers to learn a trade, direct payments have been replaced by student payments to educational institutions.[22] Ironically, the DOL guidelines actually compel students to purchase school credit for their unpaid work.[23] At the same time, the primary benefit of the apprentice system—job prospects for the apprentices—is startlingly absent. In fact, the DOL guidelines expressly prohibit unpaid interns from being entitled to a job.[24]

In the last decade, internships have become more pervasive than ever before.[25] The growth is largely attributable to the recession, which made internships a de facto necessity for most students and recent graduates.[26]

17. *See* Sanburn, *supra* note 6.

18. *See* Haire & Oloffson, *supra* note 14.

19. *Id.*

20. *Id.* ("From 1970 to 1983, the number of colleges and universities offering the programs increased from 200 to 1,000.").

21. Kevin Carey, *Giving Credit, but Is It Due?*, N.Y. TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/02/03/education/edlife/internships-for-credit-merited-or-not.html (discussing the rising number of employers that require students to purchase school credit to participate in their internship program).

22. *Id.*

23. The comments to Fact Sheet #71 state that the first factor will often be satisfied "where a college or university . . . provides educational credit." FACT SHEET, *supra* note 12, at 2.

24. *Id.* at 1 (stating an analysis of whether "[t]he intern is not necessarily entitled to a job at the conclusion of the internship" is a required consideration in determining whether an unpaid internship is legal).

25. *See generally* GARDNER ET. AL., *supra* note 5.

26. Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), http://www.insidehighered.com/views/2010/07/13/aoun (discussing a 2010 survey that found "75 percent of employers prefer job candidates with relevant work experience," and "[m]ore than 90 percent prefer to hire interns" from within their

Although the job market has improved somewhat since the initial economic downturn in 2008,[27] there still has not been a general return to prerecession hiring levels.[28] The lingering level of high unemployment means many experienced workers are now seeking entry-level positions.[29] Employers naturally choose to hire workers with more experience, much to the chagrin of recent graduates.[30] Thus, for many young Americans, internships are a matter of economic survival, as they provide the work experience that is necessary to be competitive in today's labor market.[31]

However, internships are not entirely a product of economic necessity. Aside from increasing one's marketability, internships provide many intangible benefits that are important to a student's education and difficult to replicate in a permanent job.[32] Internships allow students to explore an industry before taking on the increasingly onerous amount of debt required to obtain a postsecondary education.[33] Other intangible benefits include

organization); Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection—Reforming the Regulation of Student Internships*, ECON. POL'Y INST. (Apr. 9, 2010), http://www.epi.org/publication/pm160/ ("The increasingly competitive labor market for college graduates, combined with the effects of the recession, has intensified the trend of replacing full-time workers with unpaid interns." (citations omitted)).

27. *See* BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION, 1943 TO DATE 2, *available at* http://www.bls.gov/cps/cpsaat01.pdf (last visited Nov. 4, 2014) (showing unemployment has decreased by 1.9 percent since 2009).

28. *See id.* The unemployment rate before the 2008 recession was 5.8 percent, whereas the 2013 unemployment rate was 7.4 percent. *Id.*

29. *See, e.g.*, Cliff Collins, *Slowly but Surely: Lawyer Hiring is Returning–Tentatively–After the Downturn*, OR. ST. B. BULL. (Apr. 2012), http://www.osbar.org/publications/bulletin/12apr/slowly.html (discussing how new lawyers are being required to gain more experience before being hired for entry-level positions).

30. *See id.*

31. *See* REP. CAROLYN B. MALONEY, U.S. CONG. JOINT ECON. COMM., UNDERSTANDING THE ECONOMY: UNEMPLOYMENT AMONG YOUNG WORKERS 9 (2010), *available at* http://www.jec.senate.gov/public/?a=Files.Serve&File_id=adaef80b-d1f3-479c-97e7-727f4c0d9ce6.

32. *See* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 531 (6th Cir. 2011) (discussing the value of intangible benefits provided by unpaid internships); Natalie Bacon, Note, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71,"* 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 68 (2011); Aoun, *supra* note 26; Heather Huhman, *Why You Should Get A Summer Internship*, U.S. NEWS & WORLD REP. (Apr. 29, 2011), http://money.usnews.com/money/blogs/outside-voices-careers/2011/04/29/why-you-should-get-a-summer-internship.

33. Huhman, *supra* note 32.

building basic workplace skills like accountability, work ethic, leadership, and responsibility.[34] Unfortunately, courts often fail to consider the value of intangible benefits when analyzing the legality of unpaid internships.[35] Supreme Court precedent nevertheless suggests that intangible benefits are important considerations within the context of primary, secondary, and postsecondary education.[36]

Not surprisingly, some employers have taken advantage of the rising demand for unpaid internships.[37] Just as students are seeking out internships more than ever before, employers are happy—perhaps too happy—to make room for the free labor.[38] It is generally agreed that the type of work many unpaid interns preform violates the FLSA, but until recently, nobody seemed to care.[39] And why would they? It seems like the perfect situation—students are eager to work for free, and employers are eager to let them. However, one additional factor turned the perfect situation into the perfect storm: high unemployment.[40] Students found themselves graduating and

34. *Solis*, 642 F.3d at 531.

35. *See, e.g.*, Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013) (finding that an intern "did not acquire any new skills aside from . . . how the photocopier or coffee maker operated"); *but see Solis*, 642 F.3d at 532 ("The overall value of broad educational benefits should not be discounted simply because they are intangible.").

36. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

37. *See, e.g.*, Wang v. Hearst Corp., 293 F.R.D. 489, 491 (S.D.N.Y. 2013) ("Since 2008, Hearst worked to reduce costs by decreasing its headcount and expenses at the magazines as a response to the recession, and . . . instructed the staff to use interns . . . to save costs."); *see also* David R. Sands, *Is Use of Interns Abuse of Labor?*, WASH. TIMES (Apr. 7, 2010), http://www.washingtontimes.com/news/2010/apr/07/is-use-of-interns-abuse-of-labor/ ("Interns . . . do not enjoy federal legal protections against sexual harassment and discrimination and are increasingly used by struggling employers as a source of free labor . . . .").

38. Since the economic downturn, employers have increased the amount of unpaid interns they utilize and expanded the types of duties their interns perform. *See* Sands, *supra* note 37.

39. Bacon, *supra* note 32, at 67 (noting that, until two years ago, the "standard business practice [was] to have unpaid interns work in ways that violate the law").

40. *See* Edwards & Hertel-Fernandez, *supra* note 26 (asserting the system is problematic because it "[p]ermits (and even incentivizes) the replacement of regular workers with unpaid college students and recent graduates"); *see also supra* notes 27–28 and accompanying text; *Databases, Tables & Calculators by Subject: Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR AND STATISTICS, http://data.bls.gov/timeseries/LNS14000000 (last visited Nov. 4, 2014).

interning for free, only to end up with even more debt and still no job.[41] Now, many ex-interns are reexamining the type of work they performed for their former "employers" and reaching an important conclusion: they can sue for unpaid wages under the FLSA.

III. THE LEGAL FRAMEWORK

A. *The Fair Labor Standards Act*

The FLSA was enacted in 1938.[42] It applies to private and public employers and requires them to pay nonexempt employees at least the federal minimum wage and overtime pay.[43] "The Act is administered by the Employment Standards Administration's Wage and Hour Division" (WHD) within the DOL.[44] The minimum wage requirements are subject to only a few narrow statutory exceptions.[45] These exceptions allow the Secretary of Labor to issue special certificates that permit employers to pay reduced wages to apprentices, learners, messengers, disabled persons, and full-time students working in retail, service, or agricultural establishments.[46] Importantly, the Supreme Court, in *Portland Terminal*, established an additional exception for trainees.[47]

The FLSA does not exempt, or even define, interns. Rather, the Act's protections apply to all "employees."[48] The protections are absolute and cannot be waived.[49] Therefore, the threshold question in every unpaid intern case is whether the intern is an employee under the FLSA.[50] Unfortunately,

41. *See* Sands, *supra* note 37.

42. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

43. §§ 203(d)–(e), 206(b).

44. *The Fair Labor Standards Act (FLSA)*, U. S. DEP'T OF LABOR, http://www.dol.gov/compliance/laws/comp-flsa.htm (last visited Nov. 4, 2014).

45. *See* § 214.

46. *Id.*

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

48. 29 U.S.C. § 206(a); *see also id.* § 203(e).

49. *See Portland Terminal*, 330 U.S. at 150 ("[E]mployers *must* pay all employees who work in activities covered by the Act." (emphasis added)).

50. *See, e.g.*, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 522–23 (6th Cir. 2011) (starting the opinion with an analysis of whether the plaintiff was the defendant's employee); *Portland Terminal*, 330 U.S. at 150 (framing the issue by stating, "[I]f they are employees with the Act's meaning, their employment is governed by the minimum wage provisions.").

the FLSA leaves the question unanswered by providing a circular definition of employee: "any individual employed by an employer."[51] Therefore, courts often search for guidance in the DOL's guidelines regarding unpaid internships under the FLSA, found in Fact Sheet #71.[52] Unfortunately, the guidelines only add to the morass.[53]

B. *Fact Sheet #71*

The major precursor to the recent boom in unpaid intern litigation came in 2010 when the DOL issued Fact Sheet #71—its unpaid internship guidelines.[54] The guidelines merely restate the law that has been in effect since 1947.[55] But the reissuance was widely understood as a sign of an impending DOL crackdown on illegal unpaid internships.[56] Although the DOL crackdown never occurred, the guidelines opened the courtroom doors for unpaid interns to bring suit under the FLSA.[57]

Fact Sheet #71 sets forth six criteria, the presence of which support the legality of an unpaid internship program:

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;

51. 29 U.S.C. § 203(e)(1).

52. *See, e.g.*, Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013); Wang v. Hearst Corp., 293 F.R.D. 489, 493 (S.D.N.Y. 2013).

53. *See Wang*, 293 F.R.D. at 493 (noting that the weight to be given to each of the six factors detailed in Fact Sheet #71 "is far from crystal clear").

54. *See* Suen & Brandeisky, *supra* note 8; *see also* FACT SHEET, *supra* note 12.

55. *See* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) ("The six criteria in the Secretary's test were derived almost directly from *Portland Terminal* . . . ."); *compare* FACT SHEET, *supra* note 12, *with Portland Terminal*, 330 U.S. at 149–53 (establishing the legal framework that is applied to unpaid internship litigation today).

56. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), http://www.nytimes.com/2010/04/03/business/03intern.html.

57. *See, e.g.*, *Wang*, 293 F.R.D. at 493 ("[Plaintiffs] argue that Hearst 'must meet all of the factors' in the Department of Labor's . . . six-factor test and that it has failed to do so."); *see also* Suen & Brandeisky, *supra* note 8.

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.[58]

Courts often lambaste these guidelines for being vague and contradictory.[59] Although an affirmative finding of the Fact Sheet's six criteria in an internship program clearly point toward legality,[60] the exact weight of the criteria is unclear.[61] That is, are they nonexclusive factors, or are they necessary elements? The question is often determinative of a case's outcome,[62] and not surprisingly, plaintiffs and defendants vehemently disagree about its answer.[63] Fact Sheet #71 contains language to support either conclusion.[64] Plaintiffs often argue that the Fact Sheet mandates a

58. FACT SHEET, *supra* note 12.

59. *See e.g.*, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011); *Reich*, 992 F.2d at 1026–27; *Wang*, 293 F.R.D. at 493 (quoting FACT SHEET, *supra* note 12) ("While the weight to be given to these factors is far from crystal clear, the Fact Sheet adds to the confusion with the introductory language: 'whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program.'").

60. Even the courts that largely ignore the guidelines acknowledge that they point toward legality. *See Reich*, 992 F.2d at 1027 ("We are satisfied that the six criteria are relevant but not conclusive to the determination of whether these firefighter trainees were employees under the FLSA . . . ."); *Wang*, 293 F.R.D. at 493–94 ("All that said, I am also of the mind that the six factors in Fact Sheet #71 ought not be disregarded; rather, it suggests a framework for an analysis of the employee–employer relationship.").

61. *Wang*, 293 F.R.D. at 493.

62. *Compare* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532–34 (S.D.N.Y. 2013) (applying the criteria from Fact Sheet #71 as necessary elements and finding that plaintiffs were employees as a matter of law) *with Wang*, 293 F.R.D. at 493–94 (applying the criteria as nonessential factors and declining to hold that the plaintiffs were employees as a matter of law).

63. *See Reich*, 992 F.2d at 1026 ("The parties disagree, however, over how this test is to be applied."); *Wang*, 293 F.R.D. at 493 ("Not surprisingly, the parties disagree as to the appropriate test for defining an 'employee' under [*Portland Terminal*].").

64. *See* FACT SHEET, *supra* note 12 ("The determination . . . depends upon all of the facts and circumstances," but "[i]f all of the factors . . . are met, an employment relationship does not exist . . . .").

rigid application of all six criteria when making the legality determination.[65] This approach interprets the guidelines as an "elements test," in which each criterion must be present to pass.[66] Defendants typically advocate for a very different position.[67] They argue that the Fact Sheet merely requires the determination to be based on a totality of the circumstances.[68] This approach interprets the guidelines as a flexible "factor test," in which each factor is relevant to the ultimate inquiry but none is determinative.[69]

To make matters worse, the Fact Sheet adds further confusion to the task of weighing its factors by stating that the determination of whether someone is an employee under the FLSA depends on "all of the facts and circumstances."[70] On one hand, the statement is consistent with a flexible factor test. Indeed, many other areas of the law that employ totality of the circumstances tests do so within the context of a flexible factor test.[71] On the other hand, the language is also arguably consistent with an elements test, to the extent that the totality of the circumstances should only be considered in analyzing each element.

Unfortunately, there is no clear answer to the riddle that is Fact Sheet #71. Courts are split,[72] and the DOL has not provided any clarification. Until

65. *See Reich*, 992 F.2d at 1026 ("Nevertheless, the essence of the [plaintiff]'s argument is that unless all six criteria are met, the trainees are employees for purposes of FLSA."); *Wang*, 293 F.R.D. at 493 ("[Plaintiffs] argue that Hearst 'must meet all of the factors' in the . . . six-factor test and that it has failed to do so." (citation omitted)).

66. *See Wang*, 293 F.R.D. at 493 (identifying the plaintiffs' attempt to apply Fact Sheet #71 as "a rigid checklist." (internal quotation marks omitted)).

67. *See Reich*, 992 F.2d at 1026; *Wang*, 293 F.R.D. at 493.

68. *Wang*, 293 F.R.D. at 493; *see* FACT SHEET, *supra* note 12.

69. *See Reich*, 992 F.2d at 1026 ("Defendant argues that, as a true 'totality of the circumstances' test, this determination should not turn on the presence or absence of one factor in the equation.").

70. FACT SHEET, *supra* note 12; *see also Wang*, 293 F.R.D. at 493.

71. *E.g.*, United States v. Kozminski, 487 U.S. 931, 970 (1988) (Stevens, J., concurring) (arguing that a totality of the circumstances test is the best way to determine whether servitude is involuntary); Illinois v. Gates, 462 U.S. 213, 233 (1983) (abandoning the Court's longstanding, rigid two-element test for determining probable cause and replacing it with a flexible totality of the circumstances test that considers a variety of factors); Brown v. Illinois, 422 U.S. 590, 603–04 (1975) (applying a totality of the circumstances test and considering a variety of factors in determining if a defendant's *Miranda* rights have been violated).

72. *Compare* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (citing Manhart v. City of L.A., Dep't of Water, 558 F.2d 581, 590 (9th Cir. 1976)) (holding that the DOL guidelines are entitled to "substantial deference"), *with* Solis v.

the FLSA is amended to expressly address unpaid internships, the courts must work their way through the confusion and develop a workable test. The search for clarity must start from the beginning, before the guidelines were ever conceived, with *Walling v. Portland Terminal Co.*[73] *Portland Terminal*, a 1947 Supreme Court case, is the basis of Fact Sheet #71—and surprisingly, it had absolutely nothing to do with interns.[74]

C. Walling v. Portland Terminal Co.

Portland Terminal involved an enforcement action brought by the WHD against Portland Terminal Company for alleged violations of the FLSA.[75] Portland Terminal had a hands-on training program that required applicants for yard brakeman jobs to shadow the yard crew before qualifying for the position.[76] The program was a necessary prerequisite to entrusting applicants with the dangerous work.[77] It was unpaid and lasted approximately seven to eight days.[78]

Applicants enlisted in the program for the express purpose of qualifying for employment as brakemen.[79] If the applicants completed the program successfully, they were included in a pool of people who were qualified to fill the position.[80] Although immediate employment was not guaranteed, only individuals in the pool of qualified candidates could obtain the job.[81] Additionally, the trainees did not displace regular employees, and Portland Terminal did not receive any immediate advantage from the trainees, who even occasionally hindered the company's operations.[82] The primary beneficiaries of the training program were the employees, and both parties understood the training would be unpaid.[83] With these factors in

Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) (holding that the DOL guidelines were not entitled to deference because it was a "poor method for determining employee status in a training or educational setting").

73. Walling v. Portland Terminal Co., 330 U.S. 148 (1947).
74. *See id.*
75. *Id.* at 149.
76. *Id.* at 149–50.
77. *Id.* at 149.
78. *Id.*
79. *Id.* at 150.
80. *Id.*
81. *Id.* at 149–50.
82. *Id.*
83. *Id.* at 150.

mind, the Court concluded the trainees were not employees under the FLSA.[84]

D. *The Logic Gap Between* Portland Terminal *and Fact Sheet #71*

Portland Terminal was a case about trainees, not interns. In fact, the word "intern" was never used in the opinion. This comes as no surprise, since internships were largely unheard of at the time of the decision.[85] Nevertheless, it is well settled that *Portland Terminal* is the controlling case on the legality of unpaid internships under the FLSA.[86] Indeed, when the DOL created Fact Sheet #71, it simply replicated the factors considered by the Court in *Portland Terminal*, replacing the word "trainee" with "intern."[87]

The fundamental differences between trainees and interns make Fact Sheet #71's verbatim incorporation of the *Portland Terminal* Court's rationale inapposite. Internships are often undertaken for far longer than a week with an understanding that, regardless of performance, the intern is in no way entitled to employment at its conclusion.[88] A training program, on the other hand, is typically a necessary prerequisite to work for the employer offering the program.[89]

Additionally, the mutual exchange between interns and employers is distinguishable from the exchange between trainees and employers. In the latter scenario, the trainee benefits from the prospect of gainful employment

84. *Id.* at 153.

85. *See* Haire & Oloffson, *supra* note 14 (noting that internships did not gain traction in the U.S. until the early 1960s).

86. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525–26 (6th Cir. 2011) (stating that *Portland Terminal* is the controlling authority in unpaid-intern cases); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025 (10th Cir. 1993) (noting the same); Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 530–31 (S.D.N.Y. 2013) (noting the same); Wang v. Hearst Corp., 293 F.R.D. 489, 492 (S.D.N.Y. 2013) (noting the same); Bacon, *supra* note 32, at 73 ("It is widely accepted and unquestioned that *Portland Terminal* is the case from which the rules governing unpaid interns come.").

87. *See Portland Terminal*, 330 U.S. at 148 (applying the term "trainee" to persons training for a railroad job); *Wang*, 293 F.R.D. at 493 (noting that Fact Sheet #71 "puts some meat on the [*Portland Terminal*] bones"); FACT SHEET, *supra* note 12.

88. *See Glatt*, 293 F.R.D. at 534; *Wang*, 293 F.R.D. at 492 ("Hearst made it clear that there was little likelihood, and certainly no guarantee, of a job at the end of their internship." (citations omitted)).

89. *See Portland Terminal*, 330 U.S. at 149 ("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.").

from his trainer, and the employer benefits from the prospect of increasing the pool of qualified candidates from which it can draw upon when needed.[90] A typical intern's benefits are far broader. Interns hope to gain experience that can be applied at a variety of different companies and to make connections that will help their overall career prospects.[91] More important, internships provide valuable intangible benefits to students whose limited work experience has prevented them from networking and developing basic work skills.[92]

Furthermore, internships are more exploratory than training programs.[93] The typical trainee undergoes the program solely for the purpose of obtaining a certification or a particular job within a particular company.[94] Safety and liability concerns aside, the trainee would likely rather skip the program and go right to stable employment within the company. Many internships, on the other hand, are undertaken for the purpose of exploring an industry, company, or position to which the intern is by no means committed.[95] Internships are therefore important mechanisms by which students can explore potential career paths without incurring unnecessary debt or creating gaps in their resumes if they determine they do not like a particular industry or company.[96]

All in all, applying the trainee test to interns is like forcing a square peg through a round hole. The incongruent test leaves interns, employers, and courts struggling with a bevy of problems.[97] However, at least for the time being, the courts are bound to apply *Portland Terminal*.[98] The remainder of this Note, therefore, focuses on how courts can use *Portland Terminal* to

90. *See, e.g.*, *id.* at 150.

91. Aoun, *supra* note 26.

92. *See supra* notes 32–36 and accompanying text.

93. Aoun, *supra* note 26.

94. *See, e.g.*, *Portland Terminal*, 330 U.S. at 150.

95. Huhman, *supra* note 32.

96. *Id.*

97. *See generally* Alfred B. Robinson Jr., *A Top Ten Look at Unpaid Student Interns: Can You Be Penalized if You Do Not Pay Them?*, ASS'N OF CORP. COUNS. (Dec. 1, 2012), http://www.acc.com/legalresources/publications/topten/attlausi.cfm.

98. It could be argued that *Portland Terminal* is not controlling because it simply analyzed whether a group of workers were employees within the FLSA. *Portland Terminal*, 330 U.S. at 153. Therefore, the FLSA definition of employee is what actually controls. Nevertheless, every circuit court to address the issue so far has adopted *Portland Terminal*, so lower courts are by and large bound. *See, e.g.*, cases cited *supra* note 86.

efficiently and predictably adjudicate unpaid wage claims brought by ex-interns.

IV. CONFUSION IN PRACTICE: A COMPARATIVE STUDY OF *GLATT* AND *WANG*

Since 2011, private litigation has been the primary mechanism by which the FLSA is enforced against private employers who utilize unpaid interns.[99] The first significant case, *Glatt v. Fox Searchlight Pictures Inc.*, is a class action filed on September 28, 2011.[100] Just four months later, Xuedan Wang filed a class action against the Hearst Corporation on behalf of a class of unpaid interns.[101] *Glatt* and *Wang* involve analogous facts and are being litigated before the U.S. District Court for the Southern District of New York.[102] Yet, the cases reached opposite conclusions on the employment issue.[103] The inconsistency is likely the result of the judges' application of different legal tests—both of which find support in Fact Sheet #71.[104] Judge William Pauley III, who is presiding over *Glatt*, adopted a rigid application of Fact Sheet #71 and determined, as a matter of law, that the plaintiffs were employees under the FLSA.[105] Judge Harold Baer, Jr., who is presiding over *Wang*, rejected a rigid application of Fact Sheet #71 and instead adopted a totality of the circumstances test, focusing on who primarily benefited from the internship.[106] Under the totality of the circumstances, Judge Baer refused to find that the plaintiffs were the defendant's employees as a matter of

99. *See* Suen & Brandeisky, *supra* note 8.

100. *Id.*; *see* Complaint, *supra* note 9. *Kaplan v. Code Blue Billing & Coding, Inc.* was filed 12 days before *Glatt*. Suen & Brandeisky, *supra* note 8. *Kaplan* is of little significance, however, because the court granted the defendants' motion for summary judgment, finding that the students were not employees under the FLSA. Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831, 832, 834 (11th Cir. 2013) *cert. denied*, 134 S. Ct. 618 (2013).

101. Wang v. Hearst Corp., 293 F.R.D. 489, 490 (S.D.N.Y. 2013); Suen & Brandeisky, *supra* note 8.

102. *Compare* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 522 (S.D.N.Y. 2013), *with Wang*, 293 F.R.D. 489, 490–92. Both cases are currently on interlocutory appeal before the Second Circuit.

103. *Compare Glatt*, 293 F.R.D. at 539, *with Wang*, 293 F.R.D. at 498.

104. *Compare Glatt*, 293 F.R.D. at 531–34, *with Wang*, 293 F.R.D. at 493.

105. *Glatt*, 293 F.R.D. at 531–34. Judge Pauley's order stated that he was analyzing the issue under the totality of the circumstances, but he did not consider any factors beyond those enumerated in Fact Sheet #71. *Id.*

106. *See Wang*, 293 F.R.D. at 493.

law.[107]

A. Glatt v. Fox Searchlight Pictures, Inc.

Eric Glatt was an unpaid intern who worked on the production of *Black Swan* in New York.[108] On behalf of similarly situated interns, Glatt brought a class action against Fox Searchlight Pictures, Inc. (Searchlight) for violations of the FLSA, New York Labor Law, and California Unfair Competition Law.[109] Searchlight is a film production and distribution company and a subsidiary of codefendant Fox Entertainment Group, Inc. (FEG).[110]

Glatt alleged that he and his coplaintiffs worked 40 to 50 hours per week reviewing and filing paperwork, running errands, and keeping the coffee pot full.[111] Viewing the facts in the light most favorable to the plaintiffs, all unpaid interns at FEG's subsidiaries were subject to the same policies, which were "administered by a small team of intern recruiters."[112] Two FEG employees oversaw the internship program and were responsible for "soliciting 'intern request forms' from supervisors at subsidiaries interested in hiring interns, approving those requests, screening internship applicants, and processing interns' paperwork."[113]

On cross-motions for summary judgment, the court was asked to determine whether Glatt was an employee of Searchlight within the meaning of that term under the FLSA.[114] The court noted that the meaning of "employment" under the FLSA is much more inclusive than it was under the common law.[115] It then rejected the "primary beneficiary" test endorsed by the defendants.[116] Under that test, the court would weigh the internship's benefits to the intern against those to the employer.[117] If the intern was the

107. *Id.* at 494.

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

109. *Id.* 521–22.

110. *Id.* at 522. Searchlight does not actually produce films itself. *Id.* Rather, it enters into financing contracts "with corporations created for the sole purpose of producing particular films." *Id.*

111. *See* Complaint, *supra* note 9, at 12–16.

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

113. *Id.*

114. *Id.* at 530–31.

115. *See id.* at 531 (quoting FACT SHEET, *supra* note 12, at 1).

116. *Id.* at 531–32.

117. *Id.* at 131.

primary beneficiary, he would not be an employee under the FLSA.[118] The court determined that although other circuits have adopted the primary beneficiary test, the test is unpredictable and unsupported by *Portland Terminal*.[119] The court instead adopted a rigid application of the DOL six-factor test and concluded that the plaintiffs were employees under the FLSA.[120]

To be sure, the *Glatt* court claimed to apply a totality of the circumstances test.[121] However, the court clearly adhered to a rigid application of Fact Sheet #71's six factors.[122] Therefore, to the extent the court considered the totality of the circumstances, it did so only with respect to each of Fact Sheet #71's six criteria.[123]

Glatt was the proving ground for unpaid intern wage claims under the FLSA, and a judgment for the plaintiffs on the employment issue opened the litigation floodgates.[124] As of this Note's publication, plaintiffs have filed 35 similar cases in the wake of *Glatt*.[125] One of those cases was *Wang v. Hearst Corp*.[126]

B. Wang v. Hearst Corp.

The facts of *Wang* are very similar to those of *Glatt*.[127] Plaintiff Xuedan Wang, on behalf of similarly situated unpaid interns for various Hearst Corporation magazines, brought suit against Hearst for alleged violations of the FLSA and New York Labor Law.[128] The court began by noting that Hearst, the world's largest monthly magazine publisher, had utilized "more than 3,000 interns over the past six years."[129]

The parties stipulated that, since the 2008 recession, Hearst had an

118. *Id.*
119. *Id.* at 531–32.
120. *See id.* at 531–34.
121. *See id.* at 534.
122. *See id.* at 531–34.
123. *See id.*
124. Suen & Brandeisky, *supra* note 8 (discussing each unpaid intern case filed after *Glatt*).
125. *Id.*
126. Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013).
127. *Compare id.* at 490–92, *with Glatt*, 293 F.R.D. at 522.
128. *Wang*, 293 F.R.D. at 490–91.
129. *Id.*

express policy of using interns rather than paid employees to reduce costs.[130] In an effort to comply with the FLSA, all interns were required to receive school credit.[131] Although the plaintiffs interned in different departments within a variety of Hearst's companies, their work duties were similar and generally included the following: researching, cataloging, organizing files, running errands, performing secretarial work, preparing for and attending events, and reviewing products.[132] Additionally, each department assigned its interns work that was specific to that area of the company.[133] For example, booking interns held casting calls, editorial interns responded to emails from readers, fashion interns received clothing and ensured that it adhered to order specifications, and beauty interns came up with stories and reviewed potential products for inclusion in magazines.[134]

Wang and her coplaintiffs moved for partial summary judgment urging the court to adopt an "immediate advantage" test and find they were the defendant's employees under the FLSA.[135] Under the immediate advantage test, an intern is an employee if the employer obtains an immediate advantage from the intern's work.[136] The court declined to adopt that test, finding it logically unsound, and provided the following explanation:

> Although the Supreme Court held in [*Portland Terminal*] that the men in that case were not employees because the defendant railroads received "no immediate advantage" from the trainees, it does not logically follow that the reverse is true, i.e. that the presence of an "immediate advantage" alone creates an employment relationship under the FLSA.[137]

The plaintiffs argued, in the alternative, that the court's analysis should be governed by a rigid application of Fact Sheet #71.[138] The court again disagreed and instead adopted a totality of the circumstances test aimed at

130. *Id.* at 491.
131. *Id.*
132. *Id.* at 491–92.
133. *Id.*
134. *Id.*
135. *Id.* at 493.
136. *See id.*; *see also* Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947) ("Accepting the unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employees within the Act's meaning."); FACT SHEET, *supra* note 12.
137. *Wang*, 293 F.R.D. at 493 (citation omitted).
138. *See id.*

finding the primary beneficiary of the internship.[139] The court determined that the primary beneficiary test is more consistent with *Portland Terminal* than a rigid application of Fact Sheet #71.[140] "To make the cheese more binding," as the court put it, Second Circuit precedent holds that "whether an employer–employee relationship exists does not depend on isolated factors but rather upon the circumstances of the whole activity," with a particular focus on who the activity primarily benefits.[141] Nevertheless, the court refused to completely disregard Fact Sheet #71, noting that it is entitled to "some deference."[142] Applying the primary beneficiary test to the facts of the case, the court refused to find that the plaintiffs were the defendant's employees as a matter of law.[143]

Thus, *Glatt* and *Wang* both couched their analysis in the totality of the circumstances.[144] In that sense, they ostensibly applied the same test. But the bigger issue underlying the conflicting opinions, and the larger split of authority, is *how* the totality of the circumstances test is applied.[145] Under the *Glatt* approach, a rigid application of Fact Sheet #71 subsumes the totality of the circumstances.[146] In other words, the totality of the circumstances are only relevant to the extent they inform whether the DOL's six factors are present.[147] Conversely, under the *Wang* approach, the totality of the circumstances subsumes Fact Sheet #71.[148] That is, the six criteria in Fact Sheet #71 are merely factors to guide the ultimate primary beneficiary inquiry.[149] No one factor is dispositive, and additional factors

139. *Id.*

140. *See id.* at 493–94; *but see* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013) (holding that the primary benefit test "has little support in [*Portland Terminal*]").

141. *Wang*, 293 F.R.D. at 493 (quoting Velez v. Sanchez, 692 F.3d 308, 326, 330 (2d Cir. 2012)) (internal quotation marks omitted).

142. *Id.* at 494 (quoting United States v. Mead Corp., 533 U.S. 218, 234 (2001)).

143. *See id.*

144. *Glatt*, 293 F.R.D. at 532, 534; *Wang*, 293 F.R.D. at 493.

145. *See* Wang v. Hearst Corp., No. 12 CV 793 (HB), 2013 WL 3326650, at *2 (S.D.N.Y. June 27, 2013) ("Both *Wang* and *Glatt* applied the totality of circumstances test spelled out in [*Portland Terminal*]and the DOL Fact Sheet #71. Despite careful analysis provided in each opinion, the District Courts reached very different results." (citations omitted)).

146. *See Glatt*, 293 F.R.D. at 532–34.

147. *See id.*

148. *See Wang*, 293 F.R.D. at 493–94.

149. *See id.*

may be considered.[150]

V. SUGGESTIONS FOR PRESERVING THE INTEGRITY OF UNPAID INTERNSHIPS

As discussed above, internships have become a vital tool by which students can compete in a job market increasingly dominated by experienced workers.[151] At the same time, some businesses, acting in their natural profit-maximizing capacity, have started taking advantage of students' eagerness to work for free.[152] Some of these employers maintain exploitative internship programs that violate federal law.[153] Courts should therefore protect students and workers by identifying and eliminating illegal internship programs while preserving the valuable ones.

A. *Fact Sheet #71 Is Broken Beyond Repair*

Unfortunately, Congress and the DOL have not provided the courts with a workable tool for sorting out illegal unpaid internship programs. The DOL guidelines are a problem not worth fixing. As revealed by a comparison of *Glatt* and *Wang*, some courts strictly apply the DOL guidelines in Fact Sheet #71, while others take a more pragmatic approach.[154] Employers understandably focus on the courts that strictly apply the guidelines.[155] Consequently, the response by many employers has been to eliminate their internship programs altogether.[156] Other employers have severely reduced their internship programs.[157] However, even these employers tend to conform their internship programs to a rigid interpretation of Fact Sheet #71 in an effort to reduce liability under the FLSA.[158] Conformation means stripping the program of any productive work

150. *See id.; see also* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 523 (6th Cir. 2011).

151. *See supra* notes 26–36 and accompanying text.

152. *See supra* notes 37–41 and accompanying text.

153. Bacon, *supra* note 32, at 67.

154. *Compare* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532–34 (S.D.N.Y. 2013), *with Wang*, 293 F.R.D. at 493–94.

155. *See* Aoun, *supra* note 26.

156. Sarah Braun, Comment, *The Obama "Crackdown:" Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. U. L. REV. 281, 298 (2012); Hilary Stout, *The Coveted but Elusive Summer Internship*, N.Y. TIMES, July 2, 2010, http://www.nytimes.com/2010/07/04/fashion/04Internship.html; *see* Bacon, *supra* note 33, at 81.

157. Stout, *supra* note 156.

158. *See* Carey, *supra* note 21.

and requiring students to purchase college credit for the remaining (presumably unproductive) unpaid work they are allowed to perform.[159] This result is repugnant, and luckily, it can be avoided. Because Fact Sheet #71 is inherently vague and contradictory, contains inconsistent interpretations of *Portland Terminal*, and violates public policy and the underlying purpose of the FLSA, it is not entitled to judicial deference.[160]

1. *Inherent Ambiguities and Contradictions*

Fact Sheet #71 should be abandoned because it is vague and self-contradictory.[161] For example, consider the Fact Sheet's first factor: "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."[162] One problem with this factor is that it cannot be reconciled with its comment, which explains that if the intern is doing any "productive work" or performing any "operations of the employer"—including clerical work or assisting customers—the intern is an employee regardless of the program's educational benefit to the intern.[163] Additionally, the factor defeats the very purpose of an internship: gaining work experience.[164] It is hard to imagine how one could gain work experience without doing any productive work.[165]

Similarly, the fourth factor, that "[t]he employer . . . derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded[,]"[166] is overinclusive and therefore fundamentally flawed. For example, assume a fashion intern shows up on his first day and assists with a photo shoot after a paid employee calls in sick. Without more, the internship in this hypothetical would certainly fail the fourth factor, and as a result, it would be illegal under a rigid application of Fact Sheet #71.[167]

159. *Id.*; *see* FACT SHEET, *supra* note 12.
160. *See infra* Part V.A.1–4.
161. *See* FACT SHEET, *supra* note 12.
162. *Id.*
163. *Id.* at 2.
164. *See* Aoun, *supra* note 26.
165. *See id.*
166. FACT SHEET, *supra* note 12.
167. Perhaps it would also fail the third factor: "The intern does not displace regular employees, but works under close supervision of existing staff[.]" *Id.*

No amount of benefit to our hypothetical fashion intern could save the internship from illegality. Nevertheless, few people would question the value of the internship if, over the remainder of its course, the intern received professional training and certification greater than what he would have received in a classroom. Moreover, if the intern proved to be a valuable member of the photo team on his first day, he may continue to assist with photo shoots, which could connect him with important professionals in the industry. In the end, he may leave the internship with a greatly enhanced education and priceless connections, enabling him to obtain a great job right out of school. Regardless, the internship would be illegal under a rigid application of the guidelines.[168]

2. *Inconsistencies and Hostility Toward the Underlying Purpose of the FLSA*

As discussed above, the guidelines create another ambiguity by incorporating two inconsistent interpretations of *Portland Terminal*: a liberal factor test considering the totality of the circumstances and a rigid six-element checklist.[169] Courts are split on which test to apply.[170] Although the courts that apply the guidelines as a rigid checklist of legal elements find some support in the text of the guidelines,[171] such an application contravenes one of the FLSA's primary purposes: increasing opportunities for gainful employment.[172]

In *Portland Terminal*, the Supreme Court interpreted the FLSA as being intended "to increase opportunities for gainful employment."[173] Moreover, the Court interpreted Section 14 of the Act as expressly making this goal paramount to that of ensuring minimum wage.[174] As the Court explained:

> Many persons . . . have so little experience in particular vocations that

168. *See id.*

169. *See supra* Part IV.

170. *Compare* Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532–34 (S.D.N.Y. 2013), *with* Wang v. Hearst Corp., 293 F.R.D. 489, 493–94 (S.D.N.Y. 2013).

171. *See* FACT SHEET, *supra* note 12 ("If *all* of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act's minimum wage and overtime provisions do not apply to the intern." (emphasis added)).

172. *See* 29 U.S.C. § 201.

173. Walling v. Portland Terminal Co., 330 U.S. 148, 151 (1947).

174. *Id.*

> they are unable to get and hold jobs at standard wages. Consequently, to impose a minimum wage as to them might deprive them of all opportunity to secure work, thereby defeating one of the Act's purposes, which was to increase opportunities for gainful employment.[175]

A rigid application of Fact Sheet #71 to unpaid internships turns the legislature's intent on its head by subordinating the goal of increasing gainful employment opportunities to that of ensuring minimum wage. Additionally, a rigid application of the Fact Sheet sends a message to employers that they must pay interns minimum wage or eliminate their internship programs altogether.[176] As a result, many employers have become less willing to retain interns, which decreases students' and recent graduates' opportunities for gainful employment.[177]

3. *Violations of Public Policy*

The evisceration of unpaid internships is detrimental to America's interest in bolstering the education and financial security of our youth.[178] An increasing number of colleges are stressing the importance of unpaid internships and the intangible benefits they produce as a critical component of experiential learning.[179] The DOL guidelines are hostile to experiential learning, as they favor internships in which the intern does little or no actual work.[180] Indeed, a number of courts have rejected Fact Sheet #71 because of its failure to account for the importance of intangible benefits.[181]

Equally problematic, the guidelines increase the financial burden borne by unpaid interns. Fact Sheet #71's comments provide that the first factor will often be satisfied "where a college or university . . . provides

175. *Id.*

176. *See* Braun, *supra* note 156, at 286 (quoting NAT'L ASSOC. OF COLLEGES AND EMP'RS, UNPAID INTERNSHIPS: A SURVEY OF THE NACE MEMBERSHIP 5 (2010)).

177. *See supra* notes 156–59 and accompanying text.

178. *See generally* Huhman, *supra* note 32.

179. *See, e.g.*, *Experiential Learning*, NORTHEASTERN U., http://www.northeastern.edu/experiential-learning/ (last visited Nov. 4, 2014); *Mission & Goals*, UNIV. COLO. DENVER EXPERIENTIAL LEARNING CTR., http://www.ucdenver.edu/life/services/ExperientialLearning/about/Pages/MissionGoals.aspx (last visited Nov. 4, 2014).

180. Aoun, *supra* note 26; *see* FACT SHEET, *supra* note 12.

181. *See, e.g.*, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 531–32 (6th Cir. 2011); Woods v. Wills, 400 F. Supp. 2d 1145, 1166 (E.D. Mo. 2005); Bobilin v. Bd. of Educators, State of Haw., 403 F. Supp. 1095, 1108 (D. Haw. 1975).

educational credit."[182] This has caused many employers to require interns to receive school credit for their work.[183] Of course, college credit must be purchased.[184] As a result, many unpaid interns must now actually pay to work.[185] Students could, of course, choose to forgo unpaid internships all together. However, that choice may cause even greater financial harm, as forgoing the experience could make the student less employable.[186] Students are therefore required to choose between the lesser of two financial evils: pay to work or risk unemployment.

Finally, the guidelines exacerbate one of the primary problems with unpaid internships as they existed even before Fact Sheet #71: they have the potential to institutionalize socioeconomic disparities.[187] Opponents of unpaid internships are rightfully concerned with their tendency to favor more affluent students who can actually afford to work for free.[188] Because internships have a significant effect on one's ability to secure employment, unequal access to them may further ensconce economic disparities in the nation's social fabric.[189] The DOL policy compounds this problem by compelling unpaid interns to obtain costly college credit.[190] Fact Sheet #71, therefore, pushes unpaid internships and the employment opportunities they produce further into the exclusive province of affluent students at the

182. FACT SHEET, *supra* note 12, at 2.

183. *See* Carey, *supra* note 21 ("Companies seem to have seized on the educational credit provision as a way of minimizing their legal liability.").

184. *See e.g.*, *Degree Program Tuition and Fees*, BERKELEY COLL., https://berkeley college.edu/admissions_bc/3291.htm (last visited Nov. 4, 2014).

185. Carey, *supra* note 21.

186. *See supra* notes 23–31 and accompanying text.

187. Wendy N. Davis, *More Unpaid Interns Say They Want to be Compensated*, A.B.A. J. (Apr. 1, 2013), http://www.abajournal.com/magazine/article/more_unpaid_int erns_say_they_want_to_be_compensated/ (quoting Fordham University law professor Jim Brudney); Edwards & Hertel-Fernandez, *supra* note 26, at 3–4.

188. Davis, *supra* note 187, at 15, 20 (quoting Fordham University law professor Jim Brudney); Edwards & Hertel-Fernandez, *supra* note 26, at 3–4; Robert Farley, *Unpaid Labor Illegal? In America?*, LAWYERS, GUNS AND MONEY (Apr. 3, 2010), http://www. lawyersgunsmoneyblog.com/2010/04/unpaid-labor-illegal-in-america.

189. Davis, *supra* note 187 (quoting Fordham University School of Law professor Jim Brudney).

190. FACT SHEET, *supra* note 12 ("In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit).").

expense of economically disadvantaged students.[191]

By avoiding a rigid application of the DOL guidelines, courts can promote judicial consistency, the underlying purpose of the FLSA, and important public policy goals. Fortunately, courts are free to make this choice, as the guidelines are not entitled to judicial deference.

4. *Judicial Deference*

It is well settled that certain administrative decisions are granted judicial deference.[192] This is generally termed "*Chevron* deference."[193] However, *Chevron* deference only applies to administrative actions that are intended to carry the force of law.[194] Fact Sheet #71 expressly states that it is not intended to carry the force of law: "This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations."[195] Therefore, courts and litigants generally agree that Fact Sheet #71 is not entitled to *Chevron* deference.[196]

Importantly, some agency decisions that are not entitled to *Chevron* deference may nevertheless be entitled to a lower level of deference under *Skidmore v. Swift & Co.*[197] However, deference is only granted under *Swift* if the agency interpretation is persuasive, thorough, well-reasoned, and consistent with the agency's other interpretations.[198] As discussed above, the reasoning behind Fact Sheet #71 is subject to a litany of criticisms.[199] Additionally, the Fact Sheet is inconsistent with prior DOL interpretations

191. *See id.*; *see also supra* notes 187–89 and accompanying text.

192. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

193. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

194. *Id.*

195. FACT SHEET, *supra* note 12, at 2.

196. *See e.g.*, Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521, 525 (5th Cir. 1999) (citing Kilgore v. Outback Steakhouse of Fla., Inc., 160 F.3d 294, 302 (6th Cir. 1998); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993)); *but see* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (noting that the DOL's interpretation contained in Fact Sheet #71's predecessor was entitled to substantial deference).

197. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

198. *Id.*

199. *See supra* Parts III.B–D., V.A.1–3; *see also* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) (criticizing the guidelines as promoting the application of a rigid factor test to a necessarily fact-intensive inquiry).

promoting a flexible approach to determining whether a worker is an employee under the FLSA.[200] For these reasons, the Sixth and Tenth Circuits have rightfully refused to grant the Fact Sheet even the lower level of deference under *Skidmore*.[201] Logic demands that other courts follow suit.[202]

B. *The Solution*

Courts should continue to apply a totality of the circumstances test when adjudicating claims brought by interns for unpaid wages under the FLSA.[203] However, the test should be aimed toward determining who primarily benefits from the internship.[204] If the intern is the primary beneficiary, the intern is not an employee under the FLSA.[205] With the exception of the sixth factor,[206] the remaining factors from the DOL guidelines are just that—factors. They should not be applied as rigid elements. Courts should use them to the extent they help inform the ultimate primary beneficiary inquiry, but the absence of any one factor should not be dispositive.[207]

200. *See Solis*, 642 F.3d at 525 (citing *Reich*, 992 F.2d at 1026).

201. *See id.*; *Reich*, 992 F.2d at 1026–27; *but see* Wang v. Hearst Corp., 293 F.R.D. 489, 494 (S.D.N.Y. 2013) ("[A]n agency's interpretation may merit some deference whatever its form, given the [agency's] specialized experience and broader investigations and information . . . ." (first alteration in original) (quoting United States v. Mead Corp., 533 U.S. 218, 234 (2001)) (internal quotation marks omitted)).

202. The Fifth and Ninth Circuits have held that the DOL guidelines are entitled to "substantial deference." Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (citing Donovan v. American Airlines, Inc., 686 F.2d 267 (5th Cir. 1982); Manhart v. City of Los Angeles, Dept. of Water, 553 F.2d 581, 590 (9th Cir. 1976)). Nevertheless, courts within those circuits should still apply the guidelines in a way that is consistent with Supreme Court precedent, the underlying purpose of the FLSA, and important public policy goals. As discussed below, those courts should therefore apply Fact Sheet #71 as a flexible factor test. *See infra* Part V.B.

203. A totality of the circumstances approach finds express support in *Portland Terminal*. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 149–50 (1947).

204. *See id.* at 153 ("The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees."); *Wang*, 293 F.R.D. at 493 ("[A] key consideration in the analysis depend[s] on 'who is the primary recipient of benefits from the relationship . . . .'" (third alteration in original) (quoting Velez v. Sanchez, 693 F.3d 308, 326, 330 (2d Cir. 2012))).

205. *See Portland Terminal*, 330 U.S. at 153; *Wang*, 293 F.R.D. at 493; FACT SHEET, *supra* note 12.

206. *See infra* notes 227–29 and accompanying text.

207. *See, e.g.*, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th

This test should look familiar, as it is similar to the one adopted in *Wang*.[208] However, the *Wang* court's test should be expanded in an important way: it should focus on the objective benefits available to the intern and the subjective expectations of the employer.[209] Such a test would enable courts to easily weed out exploitative, illegal internships. It would also send a powerful message to employers that their internship programs must comply with the FLSA. At the same time, the test would breed predictability, enabling employers to maintain legitimate, beneficial internship programs without the fear of liability under the FLSA.

A flexible factor test finds support in Fact Sheet #71 itself, which states: "The determination of whether an internship or training program meets this exclusion depends upon *all of the facts and circumstances* of each program."[210] That statement is inconsistent with a rigid elements test. For example, if the factors were applied as necessary elements, any internship program in which the intern displaced a regular employee would be illegal.[211] Thus, the legality determination would not depend on all of the facts and circumstances of the program; rather, it would depend on just one fact: that the intern displaced a regular employee.

Furthermore, many courts already use an objective totality of the circumstances test when determining employee status under the FLSA.[212]

Cir. 2011) ("[T]he proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship. Factors such as whether the relationship displaces paid employees and whether there is educational value derived from the relationship are relevant considerations that can guide the inquiry.").

208. *See Wang*, 293 F.R.D. at 493.

209. The *Glatt* court specifically rejected the primary beneficiary test because it was concerned with the test's subjectivity. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532 (S.D.N.Y. 2013) ("[A] 'primary beneficiary' test is subjective and unpredictable. Defendants' counsel argued the very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who learned a lot. Under this test, an employer could never know in advance whether it would be required to pay its interns. Such a standard is unmanageable." (footnote omitted)). These concerns are not applicable to the test proposed here, because under this test, the employer is in control of whether the intern is the primary beneficiary. As long as the employer structures its program such that the average, reasonable intern would be its primary beneficiary, intern laziness and irrationality could not expose the employer to liability under the FLSA.

210. FACT SHEET, *supra* note 12 (emphasis added).

211. *Id.*

212. *E.g.*, Purdham v. Fairfax Cnty. Sch. Bd., 637 F.3d 421, 428 (4th Cir. 2011) ("[W]e

Although these courts apply the objective test when determining whether a worker is a volunteer as opposed to an employee, the rationale supporting the objective test is equally applicable when distinguishing between an intern and an employee. For example, as one court explained, "a person who performs services in the face of a regulation or stated policy that specifies that such services will be unpaid . . . should not be permitted to satisfy the definition of 'employee' simply by unreasonably insisting that he has a subjective expectation of receiving wages."[213] Likewise, an intern should not be entitled to wages for unreasonably refusing to take advantage of the internship's benefits.[214]

Additionally, *Portland Terminal* supports focusing the inquiry on who primarily benefited from the internship.[215] In addition to focusing on the primary beneficiary of the railroad training program, the *Portland Terminal* Court disapproved of construing the term "employee" so as to include "each 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."[216] Not surprisingly, several circuit courts have taken notice of the above-quoted language and adopted the primary beneficiary test.[217] Courts favor the test because its flexibility

review 'the objective facts surrounding the services performed to determine whether the totality of the circumstances' establish volunteer status, or whether, instead, the facts and circumstances, objectively viewed, are rationally indicative of employee status." (citation omitted)); Cleveland v. City of Elmendorf, Tex., 388 F.3d 522, 528 (5th Cir. 2004) ("We look at the objective facts surrounding the services performed to determine whether the totality of the circumstances supports a holding that, under the statute and under the regulations, the non-paid regulars are volunteers."); Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1007 (N.D. Cal. 2010) ("[T]he issue is not what the trainees' subjective impressions of the training were, but rather what was the objective content of the training, *i.e.*, whether it is the type of training that would benefit trainees.").

213. Todaro v. Twp. of Union, 40 F. Supp. 2d 226, 230–31 (D.N.J. 1999).

214. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 532–33 (S.D.N.Y. 2013).

215. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947) ("The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.").

216. *Id.* at 152.

217. *See* Velez v. Sanchez, 693 F.3d 308, 330 (2d Cir. 2012); Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518, 529 (6th Cir. 2011); Blair v. Willis, 420 F.3d 823, 829 (8th Cir. 2005) (quoting Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944)); McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989); Donovan v. Am. Airlines, Inc., 686 F.2d 267, 272 (5th Cir. 1982) (approving of the district court's balancing of the benefits to the company against those to the trainee).

provides them with a single tool by which they can evaluate all of the diverse internship programs that may be challenged under the FLSA.[218]

Under the proposed test, courts should simply look at the challenged program and determine whether the average, reasonable intern would be the primary beneficiary. The factors enumerated in Fact Sheet #71, such as educational value and employer supervision, *may* inform the court's analysis. However, no factor should be dispositive.[219] A number of additional considerations could also guide the court's analysis.[220] For example, courts could consider whether the majority of past or present interns primarily benefited from the program. However, the intern's age, education level, and other personal characteristics should not be considered when evaluating the benefit to the intern, as those considerations do not fit within an objective test.[221]

The court could, however, consider the intern's age, education level, and experience when analyzing the employer's subjective expectations.[222] Adding the employer's subjective expectations to the legal equation would encourage employers to award internships to those who are actually in a position to benefit from them.[223] It may seem odd that the same test would

218. *See Solis*, 642 F.3d at 529.

219. *See supra* notes 150, 207.

220. *Solis*, 642 F.3d at 529 ("Factors such as whether the relationship displaces paid employees and whether there is educational value derived from the relationship are relevant considerations that can guide the inquiry. Additional factors that bear on the inquiry should also be considered insofar as they shed light on which party primarily benefits from the relationship.").

221. *See* Yarborough v. Alvarado, 541 U.S. 652, 667 (2004) (holding that a defendant's age and experience should not be considered when using an objective test to determine whether a criminal defendant was in custody).

222. Under this analysis, Glatt's internship would likely be illegal. Glatt was not a student. He was a 41-year-old man with a master's degree, an MBA, and a desire to suddenly enter the film industry. Paul Solman & Eric Glatt, *How Unpaid Interns Are Exploited, Fighting Back and Winning*, PBS NEWSHOUR (Sept. 27, 2013), http://www.pbs.org/newshour/businessdesk/2013/09/how-unpaid-interns-are-exploit.html. Glatt was in no position to benefit from the intangible benefits offered by the typical internship. Although Glatt's decision to apply for an unpaid internship in the film industry at age 41 is questionable, it is no excuse for an employer's violation of federal law. He should never have been allowed to intern for Fox.

223. For example, if Hearst had known it would be subject to this test, it would have hired an intern who was in a position to benefit from the intangible benefits offered by the internship, rather than hiring Wang, who had already completed six prior internships in a variety of industries. *See* Sanburn, *supra* note 6.

consider the objective benefits to one party and the subjective expectations of the other.[224] However, the employer's superior bargaining power justifies the approach.[225] If the employer intends to be the primary beneficiary of its internship program, it is almost always in a position to achieve that goal. Of course, there will rarely be any direct evidence of an employer's intent, and therefore the court must determine the employer's subjective expectations from circumstantial evidence.[226]

For example, suppose an employer only hires interns who are unemployed, physically fit males in their mid-30s. The interns have substantial experience in manual labor but do not attend or plan to attend school. Further assume the interns only assist in assembling and disassembling heavy equipment. Of course, these interns are not in a position to receive any intangible benefits from the internship, as they have already acquired the necessary work skills for manual labor in their prior paid jobs. Under the proposed test, these facts would allow a court to infer that the employer subjectively intended to be the primary beneficiary of the internship.[227]

A final word of caution: courts cannot disregard Fact Sheet #71's sixth factor—"The employer and the intern understand that the intern is not entitled to wages . . . ."[228] This is black letter law expressly provided by the FLSA.[229] This factor therefore does not depend on Fact Sheet #71 at all. If a

224. Courts will be in the best position to understand the true nature of the program if they analyze it from the perspective of both parties, as opposed to solely from the intern's perspective. The Supreme Court endorsed a similar approach in the context of determining whether a statement is "testimonial" for Confrontation Clause purposes. *See* Michigan v. Bryant, 131 S. Ct. 1143, 1160 (2011) (focusing on the statements and actions of both the declarant and the interrogators).

225. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) (noting that the FLSA was enacted in part out of Congress's concern with employers' unequal bargaining power).

226. The Supreme Court has endorsed this approach for determining an employer's maligned intent within the context of disparate treatment employment discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803–04 (1973).

227. Alternatively, the court could just as easily apply an objective standard and conclude that a reasonable employer would know that middle-aged construction workers would not be the primary beneficiaries of laboring for free in a film studio.

228. FACT SHEET, *supra* note 12.

229. *See* Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947) ("The Act's purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.").

plaintiff–intern can show an objective understanding that she was entitled to compensation for time spent in the internship, she is entitled to minimum wage under the FLSA.[230]

All in all, the question is one of common sense. Courts should objectively consider the internship as a whole and determine whether it constitutes an employment relationship. To be sure, the proposed test does not mandate consistent results between cases like *Glatt* and *Wang*. It does, however, attribute any discrepancies among judicial decisions to their rightful source: the facts of the cases.

VI. CONCLUSION

Defending free labor is not a popular position. But unpaid internships are so much more than that. The intangible benefits they offer students must not be underestimated. At the same time, society cannot tolerate unscrupulous employers taking advantage of the nation's youth. At its core, the unpaid internship debate is really about protecting students and young workers. The solution is a simple matter of sorting: eliminate the illegal internships and preserve the legal ones.

However, this goal can only be achieved by eschewing a rigid application of Fact Sheet #71. The guidelines not only fail to effectively sort internships, but they also defeat the purpose of sorting in the first place—protecting students and young workers. Strict adherence to the guidelines deprives students of meaningful internships and compels them to take on additional debt in order to remain competitive in the job market. That result cannot stand.

Instead, courts should determine the legality of unpaid internships by focusing on the totality of the circumstances surrounding each such program. The ultimate inquiry should center on determining who primarily benefited from the program. If it was the intern, there is no cause of action for unpaid wages under the FLSA. By focusing the analysis on both the objective benefits the program offers the intern and the employer's subjective expectations, courts can reach fair, consistent results that are in accord with Supreme Court precedent, the underlying purpose of the FLSA, and important public policy goals.

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230. *See id.* at 151–52.

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