FALLING THROUGH THE CRACKS OF TITLE VII: THE PLIGHT OF THE UNPAID INTERN

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INTRODUCTION

Brigid O'Connor is a twenty-year-old undergraduate student studying social work.[1] Things are going well for Brigid—aware of the importance of obtaining an internship in order to secure a job after graduation, she beat out many applicants to land an internship at a hospital for the mentally disabled. The work challenges Brigid, providing her with valuable hands-on experience in her field. Moreover, Brigid has the opportunity to network with other professionals, learning about their career paths and creating contacts for her future.

The problems begin only two days into Brigid's internship. A male psychiatrist, Dr. Davis, begins to make demeaning, sexually harassing comments toward Brigid. Uneasy and offended, Brigid hesitates to speak up because of her status as a student intern. She is counting on recommendations from this employer, and it is too late to apply for another summer internship. Brigid was fortunate enough to get this internship, considering the competition levels among undergraduates. Despite her attempts to ignore Dr. Davis, the comments worsen. Dr. Davis openly refers to Brigid as "Miss Sexual Harassment," which he explains he intends as a compliment because attractive women are subject to sexual harassment. The next day, Dr. Davis comments that Brigid looks tired, saying that she and her boyfriend must have had "a good time" the night before. At one point, Dr. Davis tells Brigid to remove her clothing before meeting with him, remarking, "Don't you always take your clothes off before you go into the doctor's office?"

Faced with such blatant sexual harassment, Brigid could not remain silent. Despite her fears of gaining a reputation as a troublemaker and jeopardizing her recommendation, Brigid reported Dr. Davis's conduct to several levels of managers at the hospital, none of whom did anything to remedy the situation. Brigid left her internship.

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[1] This hypothetical is based closely on the facts set out in *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997).

The indignation that naturally arises from reading such a narrative is likely tempered by a certainty that Dr. Davis's behavior will not go unpunished. Surely there are employment laws in place to protect a young intern from disparaging and derogatory remarks from a superior in the workplace? Yet Brigid found the opposite to be true. After commencing an action against the hospital, Brigid discovered that unpaid interns are not technically "employees" under Title VII of the Civil Rights Act of 1964 and therefore receive no protection against discrimination and harassment in the workplace.[2] As an unpaid student intern, Brigid has no employment rights to protect her from Dr. Davis's persistent harassment. The question arises: should she?

In light of the current pervasiveness of unpaid internships in society,[3] the fact that the entire class of unpaid student interns lacks essential employment law rights is astonishing. Stephen Colbert, a political comedian, satirized the issue of student interns on his television program, referring to interns as the "lifeblood of modern business," while simultaneously mocking employers' poor treatment of unpaid student interns.[4] Surprisingly, after the decidedly unjust outcome in Brigid's case, the rule from her case still stands.[5] Congress took no legislative action in response.

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[2] *Id.* at 116; *see also* Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 150 (2006) ("An employer's exposure to labor and employment legal liability is largely dependent upon whether volunteers are classified as employees.").

[3] *Compare* Jean Chatzky, *Why Students Shouldn't Take Unpaid Internships*, DAILY BEAST (Nov. 21, 2011, 12 AM), http://www.thedailybeast.com/newsweek/2011/11/20/why-students-shouldn-t-take-unpaid-internships.html (citing a 2011 National Association of Colleges and Employers study finding that more than half of graduates had held an internship), *with* Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), http://www.nytimes.com/2010/04/03/business/03intern.html (citing a Northwestern University study showing that seventeen percent of 1992 graduates had held an internship). *See also* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 217 (2002) ("Between 1981 and 1991, the proportion of college graduates who interned jumped from one in thirty-six to one in three . . . ."); Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, The Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1535 (2010) (noting that in 1994, only 60 percent of graduating college students had held internships, whereas in 2004 roughly 80 percent of graduating college students had participated in internships).

[4] *The Colbert Report* (Comedy Central television broadcast Apr. 12, 2010), *available at* http://www.colbertnation.com/the-colbert-report-videos/270709/april-12-2010/unpaid-internship-crackdown.

[5] *See, e.g.*, Varlesi v. Wayne State Univ., 909 F. Supp. 2d 827, 841 (E.D. Mich. 2012) (finding the facts "nearly indistinguishable" from *O'Connor*, and thus denying the plaintiff Title IX benefits); Romero v. City of New York, 839 F. Supp. 2d 588, 614-15 (E.D.N.Y. 2012) (also employing the *O'Connor* analysis); Keller v. Niskayuna Consol. Fire Dist. 1, 51 F. Supp. 2d 223, 229-30 (N.D.N.Y. 1999) (applying the *O'Connor* compensation method of analysis to volunteer firefighters).

As it stands now, for students, an internship has become "a virtual requirement in the scramble to get a foot in the door."[6] The number of internships continues to grow exponentially,[7] yet the law fails to even address the status of being an intern. Indeed, the fact that the vast majority of interns are unpaid suggests that they need other protections.[8] Perhaps most upsetting is the fact that student interns already occupy a vulnerable position. Uncertain of their position and seeking either a positive recommendation or future full-time employment, interns are less likely to speak up about discrimination in the workplace.[9] And, as Brigid discovered the hard way, even when a student intern does speak up, the law does not achieve justice.[10]

In an age where an internship is often a prerequisite to employment, if not graduation from college, a modern change in employment laws is vital to protect this emerging class of workers. Current student interns exist in a "legal void," unprotected under employment or education laws.[11] This Comment begins in Part I by laying the foundation of employment laws in place today—namely, the legislative purpose, intent, and history of both Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act. Part I also describes the new "Intern Economy,"[12] illustrating the importance of unpaid internships in today's employment world. Part I concludes by briefly considering tort law remedies available to unpaid student interns. Part II then explores judicially-developed tests for defining "employee" under these statutes, highlighting the tests' advantages and disadvantages in protecting unpaid interns. Part II then addresses the U.S. Department of Labor's administrative reaction to the prevalence of internships. Finally, in Part III, this Comment proposes that, through a modern benefits analysis that acknowledges non-monetary benefits, coupled with a consideration of the employer's right to control, unpaid student interns can, and should, constitute "employees" under Title VII. Such an analysis would afford unpaid student interns the workplace protection interns deserve.

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6 Yamada, *supra* note 3, at 215; *see also* Glenn C. Altschuler, *College Prep; A Tryout for the Real World*, N.Y. TIMES (Apr. 14, 2002), http://www.nytimes.com/2002/04/14/education/college-prep-a-try-out-for-the-real-world.html?pagewanted=all&src=pm (stating that internships "have become as much a part of a college education as large lecture courses, small dormitory rooms and all-nighters," citing a 2001 National Association of Colleges and Employers study finding that "57 percent of . . . former interns were offered full-time positions by the organization that sponsored them").

7 Sarah Braun, Comment, *The Obama "Crackdown:" Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. U. L. REV. 281, 283 (2012).

8 *See* James J. LaRocca, Note, Lowery v. Klemm*: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131, 139-40 (2006).

9 *See id*. at 140 (considering "the fact that unpaid internships and volunteer work are necessary for many to obtain employment," people in these positions require "greater protections. A supervisor or employee may be more likely to harass those workers he or she knows will soon leave an organization").

10 *See* O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997).

11 Yamada, *supra* note 3, at 217.

12 *Id.* at 218.

I. BACKGROUND

To gain protection under federal employment laws, an individual must first meet the prerequisite test of proving employee status.[13] Unfortunately, a number of federal statutes govern employee status, and the courts are not always consistent in interpreting the statutes.[14] Section A of this Part explores the legislative beginnings of the Civil Rights Act of 1964, because this history helps guide judicial interpretation. Examining the legislative purpose and history of Title VII—and of the Fair Labor Standards Act for a comparative perspective, as discussed in Section B—provides guidance to courts' interpretation of employee status under Title VII. Next, Section C offers a description of the "intern economy," illustrating its importance and prevalence in today's working environment and providing a lens through which to view the legislative purpose and history of Title VII. Finally, this Part concludes in Section D with a brief look at potential tort law remedies available to unpaid student interns to remedy harassment in the workplace.

A. *Discrimination and Harassment Under Title VII of the Civil Rights Act of 1964*

The U.S. Congress passed the Civil Rights Act of 1964 in the midst of other expansive civil rights legislation to combat discrimination against African Americans.[15] Title VII specifically prohibits discrimination by employers based on race, color, religion, sex, or national origin.[16] Interestingly, during the passage debate concerning this bill in Congress, opponents of the bill added gender discrimination language in a failed effort to defeat the bill.[17] Thanks to these ill-motivated efforts, sex discrimination in employment became illegal upon passage of the bill.[18] As a consequence of this odd passage history, legislative history specifically addressing sex discrimination is lacking.[19] That said, historically, courts have liberally interpreted and broadly construed Title VII, a remedial statute, in order to achieve its wide-sweeping

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13 *See, e.g.*, *O'Connor*, 126 F.3d at 115-16; Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 74 (8th Cir. 1990); Tara Kpere-Daibo, Note, *Unpaid and Unprotected: Protecting Our Nation's Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135, 142-43 (2009).

14 Rubinstein, *supra* note 2, at 158-59; *see also* Seattle Opera v. NLRB, 292 F.3d 757, 764 (D.C. Cir. 2002) (in which a divided court held that an individual was an employee under the National Labor Relations Act even though he was not paid the minimum wage and did not receive a W-2 tax form).

15 LAURA W. STEIN, SEXUAL HARASSMENT IN AMERICA: A DOCUMENTARY HISTORY 32 (1999).

16 The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

17 STEIN, *supra* note 15, at 32.

18 *Id.*

19 *Id.*

goal of equality in employment.[20] Considering its expansive aims, the Act should cover unpaid student interns.[21] Despite this, by relying on the common law definition of "employee," courts allow unpaid interns to fall through the cracks of the class of protected employees, leaving interns vulnerable to harassment in the workplace.[22] Absent a clear statutory definition of "employee" in the Act which encompasses unpaid student interns, interns lack protection from sexual harassment and other important employment rights.[23]

It is curious that the courts (and the Equal Employment Opportunity Commission) have left interns out from under the protective umbrella of the common law definition of "employee." One of the principal authors of the Civil Rights Act intended for courts to understand the term "employer" using its common dictionary meaning, which includes an individual working in exchange for salary, wage, or other consideration.[24] Interns certainly work in exchange for compensation, albeit non-monetary.[25] Exposure to a professional field, professional contacts, and experiential learning, for example,

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20 Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 93-94, 94 n.98 (1984) (noting that the Supreme Court has made clear that Congress must employ restrictive language to avoid the broad interpretation of a term). "If Congress intended that the term 'employee' in Title VII was to be narrowly defined, Congress would not have chosen to draft this term in language that the Court had consistently construed to indicate a liberal definition of employee status." *Id.* at 94 n.98.

21 *See* Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2615 (1998) ("Given the trend favoring an expansive reading of Title VII, the Second Circuit's ruling [in *O'Connor*] that all unpaid interns are excluded from protection under Title VII appears to be misplaced.").

22 *See, e.g.*, Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992); O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997).

23 In 1980, the Equal Employment Opportunity Commission, the agency in charge of enforcing Title VII, adopted a regulation that interpreted Title VII as including sexual harassment, noting that "[h]arassment on the basis of sex is a violation of section 703 of [T]itle VII." Such harassment encompasses "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct." 29 C.F.R. § 1604.11 (1995); *see also* STEIN, *supra* note 15, at 33-34.

24 110 CONG. REC. 7,216 (1964) (memorandum of Sen. Clark to Sen. Dirksen, in which the leading proponent of the bill explained that the term "employer" was "intended to have its common dictionary meaning, except as expressly qualified by the act"); NEW WEBSTER'S DICTIONARY AND THESAURUS 318 (1992) (defining "employer" as "someone who pays another or others to work for him"); *see also* Patricia Davidson, Comment, *The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors*, 53 U. CIN. L. REV. 203, 206 (1984) ("Without exception, every issue debated by the Congress assumed an understanding of the word 'employee.' The courts have thus been left with an essentially barren legislative history with which to interpret a term that is the basic component of the jurisdictional requirement of the statute." (footnote omitted)); Ortner, *supra* note 21, at 2625-26 ("Reliance on the dictionary meaning favors a broad reading of the term 'employee': Webster's Dictionary defines an 'employee' as '[o]ne who works for another in return for a salary, wages, or *other consideration*.' That definition invites a comprehensive understanding of the term 'employee' for purposes of Title VII in that the word 'consideration' can refer to a number of things besides salary." (alteration in original) (footnotes omitted)).

25 Kpere-Daibo, *supra* note 13, at 149.

could easily fall into the category of "other consideration." Further, construing "employee" to include unpaid interns by no means circumvents the intent of the Act, especially considering the general agreement among scholars and courts alike that Congress intended for courts to interpret Title VII in the broadest possible terms.[26]

B. *The Fair Labor Standards Act*

In 1938, Congress enacted the Fair Labor Standards Act ("FLSA"), which established a minimum wage, mandated overtime pay for hours worked beyond a forty-hour workweek, and restricted child labor.[27] Though Congress has amended the FLSA several times since its 1938 passage,[28] it has never addressed the status of student interns. While this Comment does not seek to argue that student interns should qualify as employees under the FLSA, thereby requiring employers to pay interns, a discussion of the FLSA serves to illustrate that the complexity of defining "employee" under a federal statute is not an issue exclusive to Title VII.

Protection under the FLSA "depends on the existence of an employer-employee relationship."[29] However, any guidance from the actual language of the FLSA is circular: the FLSA definition of "employee" is "any individual employed by an employer,"[30] and the Act defines "employ" as "to suffer or permit to work."[31] The FLSA does not provide a definition of "intern," nor does it give courts guidance on whether or not employers may even legally hire unpaid student interns.[32] What does this boil down to? Essentially, under the FLSA, "there is no such thing as an 'intern.'"[33]

Courts and the U.S. Department of Labor experience similar difficulties in defining "employee" under both the FLSA and Title VII. As with Title

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26 *See, e.g.*, Ambruster v. Quinn, 711 F.2d 1332, 1339-42 (6th Cir. 1983) (concluding that, under Title VII, employees of a subsidiary corporation also constitute employees of the parent corporation rather than independent contractors because Congress intended Title VII "to cover the full range of workers who may be subject to the harms the statute was designed to prevent"); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) ("[B]ecause . . . [Title VII] is remedial in character, it should be liberally construed, and ambiguities should be resolved in favor of the complaining party." (footnote omitted)); Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) ("The elimination of discrimination in employment is the purpose behind Title VII and the statute is entitled to a liberal interpretation." (quoting Hearth v. Metro. Transit Comm'n, 436 F. Supp. 685, 689 (D. Minn. 1977))); Ortner, *supra* note 21, at 2625.

27 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 261, 263 (2d ed. 1999).

28 *Id.* at 261.

29 *Id.* at 265.

30 The Fair Labor Standards Act, 29 U.S.C. § 203(e) (2006).

31 *Id.* § 203(g).

32 *Id.*

33 Noel Tripp, *We Don't Have to Pay Our Interns - Do We?*, WAGE & HOUR L. UPDATE (Apr. 6, 2010), http://wageandhourlawupdate.com/2010/04/articles/minimum-wage/we-dont-have-to-pay-our-interns-do-we/.

VII, Congress enacted the FLSA with broad scope and language.[34] Most courts enlist the economic realities test to determine employee status under the FLSA.[35] Under this test, student interns who possess training but do not hold "any formal job" do not constitute employees under the statute.[36]

The Supreme Court addressed the employee status of trainees in *Walling v. Portland Terminal Co.*,[37] holding that the FLSA did not cover individuals in training to be railroad brakemen because the trainees provided no immediate benefit to the railroad, and the trainees had no expectation of remuneration.[38] The Court noted that the FLSA was "obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."[39]

In response to *Portland Terminal*, the Department of Justice developed a six-prong test to evaluate whether an individual qualifies as an employee under the FLSA.[40] If all factors are met, an employment relationship does not exist, and the Act is therefore inapplicable.[41] The six-prong test is: (1) the training is similar to that provided by a vocational school; (2) the training is for the benefit of the trainees; (3) the trainees do not displace regular employees, but work under close observation; (4) the employer gains no immediate advantage from the training, and in fact may have its operations impeded by the training; (5) the trainees are not necessarily entitled to a job at the end of the training period; and (6) the employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.[42]

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34 *See, e.g.*, Johns v. Stewart, 57 F.3d 1544, 1557 (10th Cir. 1995) ("The definition 'suffer or permit work' was intended to make the scope of employee coverage under the FLSA very broad."); Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143-44 (6th Cir. 1977) (stating that the Fair Labor Standards Act of 1938 "was enacted by Congress to be a broadly remedial and humanitarian statute," and that "courts have construed the Act's definitions liberally to effectuate the broad policies and intentions of Congress"); Anthony J. Tucci, Note, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1367 (2012).

35 ROTHSTEIN ET AL., *supra* note 27, at 265-66. See *infra* Part II.A.4 for a discussion of the economic realities test.

36 ROTHSTEIN ET AL., *supra* note 27, at 267.

37 330 U.S. 148 (1947).

38 *Id.* at 151-52.

39 *Id*. at 152.

40 *See Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR (Apr. 2010), http://www.dol.gov/whd/regs/compliance/whdfs71.pdf [hereinafter *Fact Sheet #71*].

41 *See id.*

42 *See id.*

C. *The "Intern Economy"*

Unpaid internships are a crucial and mutually beneficial tool in today's working economy for both interns and employers alike. For students, internships have become a quasi-requirement for future employment.[43] Internships serve as an opportunity for students to gain pragmatic, hands-on experience, as well as to network with professionals in the students' fields of interest.[44] For employers, interns represent a glimpse at the incoming applicant pool and provide educated labor at only the cost of training.[45] Moreover, employers get a sneak preview of the student's potential, as the internship can effectively serve as a months-long interview of the student intern. In this way, employers benefit from internship programs by using them as a recruiting tool.[46] Considering these factors in light of the current economic recession, employers are more eager than ever to take advantage of unpaid internships as a cost-saving measure.[47] Likewise, in this environment, students are more

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43 Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN'S L.J. 95, 107 (2000); *see also* MARK OLDMAN & SAMER HAMADEH, STUDENT ADVANTAGE GUIDE TO AMERICA'S TOP INTERNSHIPS: 1997 EDITION xiii (1996) ("For many employers, good grades and the right college major are just not enough; they seek employees who have paid their dues in the working world."); Andrea Perera, *Paying Dues in Internships*, L.A. TIMES, Apr. 22, 2002, at B4 (interviewing the assistant director of internships and study-abroad services at the University of California, Los Angeles, who described how colleges across the United States are recognizing that internships at the undergraduate level are no longer a choice).

44 Bowman & Lipp, *supra* note 43, at 106; *see also* Jay Heflin & Richard Thau, *The Internship Experience*, *in* PETERSON'S INTERNSHIPS 1997, at 3, 15 (17th ed. 1996) (noting that the payoff of some internships is "not reflected in the paycheck," but rather in the experience gained). Indeed, especially in many graduate programs, students emphasize the importance of obtaining work prior to completing their degree. Lisa Musolf Karl, *Interns Can Be a Valued Resource*, BALT. BUS. J., Oct. 31-Nov. 6, 1997, at 15 (describing the "valuable experience[s]" gained by both a Ph.D. student who worked as an unpaid intern in a laboratory and an MBA student who had an unpaid marketing internship); Leslie Hook & Joseph Sternberg, *Confessions of Two Unpaid Interns*, WALL ST. J. (Apr. 8, 2010), http://online.wsj.com/article/SB10001424052702303720604575169550156113686.html ("That three-month [unpaid] internship . . . ended up setting him on a career path that has led to a full-time job . . . ."); Casey Prusher, *Rise in Unpaid Internships Leads to Legal Questions*, DAILY FREE PRESS (Apr. 8, 2010), http://dailyfreepress.com/news/rise-in-unpaid-internships-leads-to-legal-questions (quoting a student as saying, "Although you aren't making any money, you are gaining valuable experience that can help you decide your future career" (internal quotation marks omitted)); *see also* Donald N. Zillman & Vickie R. Gregory, *Law Student Employment and Legal Education*, 36 J. LEGAL EDUC. 390, 399 (1986) (describing a survey of recent law school graduates which revealed that obtaining a legal clerkship (a position at a law firm, corporation, or government agency) during law school has a large effect on a law student's ability to obtain a full-time legal position after graduation).

45 Ortner, *supra* note 21, at 2621.

46 *Id.*

47 *See* Eugene H. Fram, *Today's Mercurial Career Path*, MGMT. REV., Nov. 1994, at 40, 41 (lamenting the "economic turmoil" that had left many "scrambling for jobs—any type of job"); Christopher

than willing to accept an unpaid position in the hopes that doing so will eventually pay off in the form of paid full-time employment.[48] Indeed, the number of unpaid internships has skyrocketed.[49] Experts predict that the prevalence of internships, mostly unpaid, will continue to expand as more and more employers demand an internship on student resumes as the entrance cost into such a competitive job market.[50] Thus is the state of affairs in the "Intern Economy,"[51] in which employers no longer hire solely based on an impressive GPA from a prestigious university.[52] Rather, when making hiring decisions, employers skip ahead to the experience section of students' resumes, ticking off the number of internships completed.[53] Consequently, unpaid interns represent a uniquely vulnerable, growing sector of the working force—a sector that the law largely fails to protect, thus amplifying the worst aspects of the intern economy.

Conte, *Labor Letter*, WALL ST. J., June 15, 1993, at A1 ("Use of unpaid student interns grows, as youths seek a way into the tight labor market and employers cope with staff cuts.").

48 Braun, *supra* note 7, at 284; *see also* Stephen E. Frank, *Taking Out the Garbage, Walking the Boss's Dog and Other Interns' Tales*, WALL ST. J., July 19, 1994, at B1 (citing one MTV executive as acknowledging that paid and unpaid interns have "similar responsibilities"); Mary Beth Marklein, *Interns Invest Time in Future*, USA TODAY, June 7, 1995, at 5D (commenting that sometimes the long-term rewards of an unpaid internship are more important than salary, and quoting an author as stating that in some of the highly competitive internship fields employers "can get away without paying people . . . because the competition's stiff" (alteration in original) (internal quotation marks omitted)); Lou Prato, *Internships: Invaluable Experience or Slave Labor?*, ELECTRONIC MEDIA, Aug. 19, 1996, at 1 (quoting a professor as stating that radio and television stations would pay interns but for the fact that students are "lined up [and] willing to work for free" (alteration in original) (internal quotation marks omitted)).

49 Braun, *supra* note 7, at 283.

50 Tucci, *supra* note 34, at 1365 (relying on a 2011 National Association of Colleges and Employers study); *see also* Braun, *supra* note 7, at 284 (noting that most employers "really prefer to hire a student who has experience in their field through an internship or something similar, rather than a student without any experience" (quoting David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 241-42 (1998) (internal quotation marks omitted))).

51 Yamada, *supra* note 3, at 217-18.

52 *See id.* at 217; *see also* OLDMAN & HAMADEH, *supra* note 43, at xiii.

53 Braun, *supra* note 7, at 297; *see also* Yamada, *supra* note 3, at 217 (citing a 1996 survey in which "70% of 434 respondent employers (private and public sector) required 'new hires to have had internships or other job training'").

D. *Tort Law Remedies*

Neglected under employment law, unpaid interns may find relief under the common law.[54] Tort law actions lack the barrier of proving an employment relationship and thus may be an alternative for unpaid interns.[55] Common law theories of recovery available to unpaid interns may include "infliction of emotional distress, assault and battery, false imprisonment, invasion of privacy, defamation, misrepresentation, [and] breach of public policy."[56] The most used and most litigated tort action in sexual harassment cases is intentional infliction of emotional distress, though unpaid interns have invoked this tort with mixed results.[57]

Depending on the circumstances of the intern's case, both the alleged harasser and the intern's employer could be held liable.[58] For example, in a 2001 case before the Appellate Court of Illinois regarding a worker who physically assaulted a student intern on the company's premises, the court held that the internship employer had a legal duty of care under tort law to the student intern.[59]

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54 *See* Yamada, *supra* note 3, at 254.

55 The Restatement of Torts, on which most courts heavily rely for guidance in IIED claims, does not include a requirement of an employment relationship in its definition. *See* RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.").

56 BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 351-52 (1992) (footnotes omitted).

57 *Id.* at 352; *see also* Yamada, *supra* note 3, at 254-55 (discussing *Hoy v. Agelone*, 691 A.2d 476 (Pa. Super. Ct. 1997), *aff'd*, 720 A.2d 745 (Pa. 1998)). This author explains that "many IIED claims based upon allegations of discrimination or harassment are dismissed." *Id.* at 254. In *Hoy*, the Pennsylvania Superior Court dismissed a plaintiff-intern's IIED claim regarding sexual harassment in the workplace following a jury verdict for the plaintiff. The court's rationale was that, "absent the presence of an aggravating factor such as retaliation for refusing sexual advances, sexual harassment does not constitute conduct sufficiently outrageous to support an IIED claim." *Id.* The author highlights the fact that the plaintiff in *Hoy* was subjected to treatment more abusive than Brigid faced in *O'Connor* (both Hoy and Brigid were subjected to pervasive sexual harassment, but only Hoy experienced unwanted "physical groping"). The author uses this distinction to note that, "had O'Connor pursued an IIED claim against her internship employer or the individual doctor who harassed her, it is possible that she, too, would have lost." *Id.* at 255. This example demonstrates that, "for unpaid interns who are subjected to harassment or discrimination, IIED is not an easy alternative means for recovery." *Id.*

58 Yamada, *supra* note 3, at 253-54.

59 Platson v. NSM, Am., Inc., 748 N.E.2d 1278, 1287-88 (Ill. App. Ct. 2001).

II. THE PROBLEM LIES IN THE DEFINITION: DEFINING "EMPLOYEE"

Most employer and putative employee relationships are ambiguous and very fact-specific, complicating the judicial determination of employee status.[60] Additionally, courts do not utilize a standard, uniform test to determine when an individual qualifies as an employee.[61] Section A considers judicial responses to the ambiguity in Title VII by discussing the five major tests courts use when analyzing employee status under this statute. Section B outlines President Obama's attempt to curtail the widespread presence of unpaid student internships through U.S. Department of Labor guidelines as a comparative administrative response.

A. *The Systematic Exclusion of Unpaid Interns Under Title VII*

In light of the ambiguous language of Title VII of the Civil Rights Act, courts have adopted tests to aid their case-by-case determination of whether individuals are entitled to protection under the Act.[62] Generally, courts seek to determine whether an "employment relationship" between the parties exists.[63] However, the statute does not define what constitutes an employment relationship.[64] Therefore, courts have developed five primary tests to guide their decision making: (1) a benefits analysis test; (2) a common law agency test; (3) a primary purpose test; (4) an economic realities test; and (5) a hybrid test.[65] Courts most frequently use the common law agency test and the economic realities test, or the hybrid test (which is a combination of the common law agency and economic realities analyses).[66] Additionally, oftentimes courts use the benefits analysis test in conjunction with any of the latter

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60 *See* Rubinstein, *supra* note 2, at 158-59 ("[M]any modern work relationships are ambiguous and highly fact specific."); *see also* O'Brien v. Spitzer, 851 N.E.2d 1195 (N.Y. 2006) (resolving the issue of whether a private lawyer who was appointed as referee in a mortgage foreclosure proceeding was an independent contractor or a state employee); MARION G. CRAIN ET AL., WORKLAW: CASES AND MATERIALS 883-84 (2005) (noting that one test to determine when an individual qualifies as an employee, the "right to control" test, is difficult to apply in practice to specific facts).

61 See Rubinstein, *supra* note 2, at 158-59, for a discussion of the different tests courts use to determine the existence of an employer-employee relationship.

62 Many courts use a case-by-case determination because rigid tests do not often accurately describe the reality of the employment relationship. *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997) (declining to apply the common law agency test to determine employment status before finding the existence of a "hire"); Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 74 (8th Cir. 1990) (declining the use of the economic realities test or the right-to-control test because the court found no approximation of an employment relationship between the parties); Tadros v. Coleman, 717 F. Supp. 996, 1004 (S.D.N.Y. 1989) (combining various tests to determine employment status), *aff'd*, 898 F.2d 10 (2d Cir. 1990).

63 Kpere-Daibo, *supra* note 13, at 142.

64 *See* 42 U.S.C. § 2000e (2006).

65 Ortner, *supra* note 21, at 2627.

66 Kpere-Daibo, *supra* note 13, at 143.

tests.[67] The following subsections will explore the use of each of the judicially created tests and note how each analysis affects unpaid interns.

1. Benefits Analysis Test

Courts use the benefits analysis test either as a stand-alone test to determine employee status, or as a preliminary threshold test before proceeding to another one of the tests.[68] If used alone, the benefits test requires that courts make a determination of the sufficiency of the benefits the putative employee receives from the employer.[69] However, courts look only to financial benefit received—if none can be identified, courts hold that there exists "no 'plausible' employment relationship,"[70] because monetary compensation is an essential condition to an employment relationship under Title VII.[71] Barring a salary or an hourly wage, a court may still find the existence of an employment relationship using the benefits analysis test so long as the worker receives "numerous job-related benefits."[72] As seen in Brigid's case, however, student interns do not overcome the hurdle of this test as applied by courts.[73]

If, on the other hand, the court uses the benefits analysis as a threshold test before delving into another analysis, the key question is whether, and to what extent, the worker receives remuneration, whether direct or indirect.[74] If the court answers this question in the affirmative, finding remuneration, then the employer has "hired" the employee, and the court proceeds to another test to then determine whether that employment relationship is sufficient to classify the individual as an "employee" under Title VII.[75] The two tests commonly used in conjunction with the benefits analysis threshold test are the common law agency test and the economic realities test.[76]

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67 *Id.*

68 *Id.* at 143, 146.

69 *Id.* at 146.

70 O'Connor v. Davis, 126 F.3d 112, 115-16 (2d Cir. 1997).

71 Several cases use this "essential condition" language as a prerequisite to the existence of an employer-employee relationship. *See, e.g.*, *id.* at 116; Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990); Neff v. Civil Air Patrol, 916 F. Supp. 710, 712-13 (S.D. Ohio 1996); Smith v. Berks Cmty. Television, 657 F. Supp 794, 796 (E.D. Pa. 1987); *see also* Kpere-Daibo, *supra* note 13, at 146-47.

72 Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999); Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221-22 (4th Cir. 1993).

73 O'Connor v. Davis, 126 F.3d 112, 118 (2d Cir. 1997).

74 *Pietras*, 180 F.3d at 473; *O'Connor*, 126 F.3d at 116; Kpere-Daibo, *supra* note 13, at 145.

75 Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 353-54 (6th Cir. 2011) (discussing the district court's use of a benefits test as a threshold analysis to determine first whether or not a "hire" has occurred before delving into the common law agency test or the economic realities test); Kpere-Daibo, *supra* note 13, at 145-46.

76 Kpere-Daibo, *supra* note 13, at 145-46.

In *Haavistola v. Community Fire Co. of Rising Sun, Inc.*,[77] a volunteer firefighter was sexually assaulted by another volunteer firefighter.[78] When the plaintiff sued for sex discrimination under Title VII, the district court granted summary judgment for the defendant on the grounds that the plaintiff was not an employee covered by Title VII.[79] The Fourth Circuit remanded her case, noting that while the plaintiff received no *direct* remuneration in the form of wages, she did receive several benefits as the result of her services.[80] These benefits included a pension, group life insurance, reimbursement for courses in emergency medical and fire service techniques, and workers' compensation coverage.[81] Accordingly, the Fourth Circuit held that summary judgment was improper because a determination of whether these benefits were sufficient to constitute an employment relationship was a genuine issue of material fact, not law.[82] Though the Fourth Circuit's use of the benefits analysis test in this case likely would not accord employee status to most interns, as interns rarely if ever receive such benefits, this case signaled that courts may be willing to consider non-monetary benefits in defining an employment relationship.

Indeed, six years later in *Pietras v. Board of Fire Commissioners of the Farmingville Fire District*[83]—and in a shift from its technical application of the benefits analysis test in Brigid's case, *O'Connor v. Davis*,[84] only two years prior—the Second Circuit cited the Fourth's Circuit's *Haavistola* decision in finding that a trainee firefighter was an "employee" of a fire department.[85] State law entitled the *Pietras* trainee firefighter to several benefits, including a retirement pension, life insurance, death benefits, disability insurance, and some medical benefits.[86] The Second Circuit determined that these benefits distinguished this case from *O'Connor*, where there were no benefits such as health insurance or sick pay,[87] holding that an employment relationship can exist without a salary so long as the putative employee receives numerous job-related benefits.[88]

The most liberal application of the benefits test thus far occurred several years later in *Rafi v. Thompson*,[89] in which the D.C. District Court found that

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77 6 F.3d 211 (4th Cir. 1993).

78 *Id.* at 213.

79 *Id.*

80 *Id.* at 221.

81 *Id.*

82 *Id.* at 221-22.

83 180 F.3d 468 (2d Cir. 1999).

84 126 F.3d 112 (2d. Cir. 1997).

85 *Pietras*, 180 F.3d at 473.

86 *Id.* at 471.

87 *Id*. at 473; *O'Connor*, 126 F.3d at 116.

88 *Pietras*, 180 F.3d at 473.

89 Civil Action No. 02-2356 (JR), 2006 WL 3091483 (D.D.C. Oct. 30, 2006).

a plaintiff's plausible showing that his volunteer position had a "clear pathway to employment" might constitute sufficient benefits received to qualify the volunteer as an employee under Title VII.[90] This broad interpretation of both Title VII and the benefits analysis may lead the way for extensive Title VII employees in future cases, including the coverage of unpaid interns on the path to full-time employment.

2. The Common Law Agency Test

One of the most commonly applied tests to determine whether an individual is an "employee" under a statute is the common law agency test.[91] As applied, the common law agency analysis considers the degree of control the employer exhibits over the putative employee.[92] The Supreme Court summarizes the common law agency test as a comprehensive evaluation of the following factors:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. No one of these factors is determinative.[93]

Though lower courts have traditionally viewed the common law agency test as being primarily concerned with the degree of control exhibited,[94] the Supreme Court clearly stated that courts must assess the entire putative employment relationship, holding no single factor as decisive.[95]

Critics of the common law agency test as applied by lower courts argue that the test is limited by its emphasis on an overly formal structure between

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90 *Id.* at *1.

91 *See* Rubinstein, *supra* note 2, at 161; Ortner, *supra* note 21, at 2628.

92 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989); *see also* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) (suggesting that courts consider a number of factors when determining the employer's right to control the worker, including the extent of control, the nature of the employee's occupation, the method of payment, and the degree of integration of the employee's work into the employer's regular business).

93 *Reid*, 490 U.S. at 751-52 (footnotes omitted) (citation omitted).

94 Indeed, some courts even refer to the common law agency test as the "right to control" test. *See, e.g.*, Oestman v. Nat'l Farmers Union Ins. Co., 958 F.2d 303 (10th Cir. 1992); Equal Emp't Opportunity Comm'n v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983); Caston v. Methodist Med. Ctr. of Ill., 215 F. Supp. 2d 1002 (C.D. Ill. 2002); Kpere-Daibo, *supra* note 13, at 143.

95 *Darden*, 503 U.S. at 324; *Reid*, 490 U.S. at 751-52.

the employer and the putative employee, rather than considering the reality and context of the relationship.[96] Courts tend to focus only on characteristics indicating control within the putative employment relationship that are easily measured, which may ignore the reality of the interaction between the employer and the putative employee.[97]

3. The Primary Purpose Test

In *NLRB v. Hearst Publications, Inc.*,[98] the Supreme Court rejected the application of the common law agency test to determine whether or not an individual constituted an "employee" under the National Labor Relations Act.[99] The Court cited the importance of uniformity when interpreting federal legislation, noting that the application of the common law agency test would result in inconsistent rulings across states.[100] Instead, the Court adopted the primary purpose test:

> Whether, given the intended national uniformity, the term "employee" includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather it takes color from its surroundings . . . [in] the statute where it appears," and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."[101]

By looking at the primary purpose of the relationship between the putative employer and employee,[102] courts can consider all the incentives and benefits on both sides of the table with respect to student interns. The Supreme Court indicated that lower courts may consider the underlying economic relationship in their determination in doubtful and vague situations.[103] However, lower courts have used this indication to focus their analysis on the underlying economic relationship, rather than use it as a mere secondary consideration.[104] In doing so, courts now use the primary purpose test to exclude putative employees from Title VII protection solely because the individuals

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96 Rubinstein, *supra* note 2, at 162-63; *see also* Dowd, *supra* note 20, at 80-81.

97 Dowd, *supra* note 20, at 81-82 (noting that factors include "whether the individual is supervised and the degree and nature of the supervision; whether the individual must work at scheduled times or is free to set his or her own hours . . . and whether the individual has discretion in performing the work and, if so, to what degree" (footnotes omitted)).

98 322 U.S. 111 (1944), *overruled in part by Darden*, 503 U.S. 318.

99 *Id.* at 122.

100 *Id.*

101 *Id.* at 124 (alterations in original) (citation omitted) (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 545 n.29 (1940); S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

102 Rubinstein, *supra* note 2, at 163.

103 *Hearst Publ'ns*, 322 U.S. at 129; Rubinstein, *supra* note 2, at 163.

104 *Hearst Publ'ns*, 322 U.S. at 129; Rubinstein, *supra* note 2, at 163.

are unpaid.[105] In fact, this emphasis on economics laid the groundwork for a later-developed judicial test determining "employee" status, the economic realities test.[106]

4. The Economic Realities Test

The Sixth Circuit developed the economic realities test in response to the primary purpose test, which, in the Sixth Circuit's view, was overly technical and "divorced from the broadly humanitarian goals" of Title VII.[107] The Sixth Circuit created the economic realities test in *Armbruster v. Quinn*,[108] in which the court resolved the issue of whether a manufacturer's representatives fell within the meaning of "employee" under Title VII.[109] The employer in *Armbruster* paid the representatives no salary apart from their commissions, and controlled neither their work hours nor the timing of their sales calls.[110]

The Sixth Circuit rejected the district court's application of the primary purpose test, noting that the legislative history of Title VII supports the view that Congress intended broad coverage over any workers who may be subject to the discrimination or harassment that Congress designed the Act to prevent.[111] The court stated that, rather than the primary purpose test, the proper method for evaluating employee status under Title VII was to "examine the economic realities underlying the relationship . . . in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate."[112] This test essentially centers on the economic dependence of the putative employee on the work he or she performs.[113] As such, courts must examine the balance of power in the alleged employment relationship.[114]

The Eleventh Circuit applied the economic realities test in *Cuddeback v. Florida Board of Education*,[115] finding that a graduate student constituted an "employee" of the university for the purposes of Title VII.[116] The court

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105 *See* Rubinstein, *supra* note 2, at 163.

106 *Id.*

107 Armbruster v. Quinn, 711 F.2d 1332, 1341 (6th Cir. 1983).

108 711 F.2d 1332 (6th Cir. 1983).

109 *Id.* at 1334-35.

110 *Id.* at 1339.

111 *Id.*

112 *Id.* at 1340.

113 Kpere-Daibo, *supra* note 13, at 143-44.

114 Rubinstein, *supra* note 2, at 165.

115 381 F.3d 1230 (11th Cir. 2004).

116 *Id.* at 1236; Rubinstein, *supra* note 2, at 166-67 (noting that even though the court's focus was on economic realities, the court did mention common law definitions of "employee," and therefore this could be considered an application of the hybrid test).

focused heavily on the fact that the university provided the graduate student with a stipend, benefits, and sick and annual leave—all of which, according to the court, illustrated that the economic reality of the relationship indicated actual employment.[117]

In stark contrast with the Eleventh Circuit's broad interpretation of Title VII in *Cuddeback*, the Middle District of North Carolina interpreted Title VII's purpose very narrowly.[118] In *McBroom v. Western Electric Co.*,[119] the court stated that, through Title VII, "Congress sought to eliminate a pervasive, objectionable history of *denying or limiting one's livelihood* simply because of one's race, color, sex, religion, or national origin."[120] By including the phrase "denying or limiting one's livelihood" in the aim of the Act, the court significantly narrowed the purpose of the statute.[121] Under this interpretation of the Act's aim, the focus is on eliminating discrimination that may economically threaten putative employees.[122] This narrow analysis does not include a consideration of future economic livelihood.

5. Hybrid Test

The final test courts use when determining employment status for the purposes of Title VII protection is the hybrid test, which combines elements of both the common law agency test and the economic realities test.[123] In do-

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117 *Cuddeback*, 381 F.3d at 1234-35.

118 *See, e.g.*, McBroom v. W. Elec. Co., 429 F. Supp. 909, 911-12 (M.D.N.C. 1977).

119 429 F. Supp. 909 (M.D.N.C. 1977).

120 *Id.* at 911 (emphasis added).

121 Kpere-Daibo, *supra* note 13, at 141.

122 *Id.*

123 *See, e.g.*, Zinn v. McKune, 143 F.3d 1353, 1357 (10th Cir. 1998) (applying a hybrid test in determining whether a state whistleblower is an employee under Title VII); Lambertsen v. Utah Dep't of Corr., 79 F.3d 1024, 1028 (10th Cir. 1996) (applying the hybrid test to determine whether a teaching assistant employed by the department of corrections is an employee for Title VII purposes); Folkerson v. Circus Circus Enters., No. 93-17158, 1995 U.S. App. LEXIS 30137, at 6 (9th Cir. Oct. 16, 1995) (adjudicating a Title VII retaliation claim for sex discrimination by a casino entertainer by applying the hybrid test); Wilde v. Cnty. of Kandiyohi, 15 F.3d 103, 106 (8th Cir. 1994) (advocating a hybrid test in the contexts of the Age Discrimination in Employment Act ("ADEA") and Title VII); Deal v. State Farm Cnty. Mut. Ins. Co. of Tex., 5 F.3d 117, 119 (5th Cir. 1993) (applying the hybrid test under the ADEA and Title VII to determine whether an insurance salesperson is an employee); Mares v. Marsh, 777 F.2d 1066, 1067-68 (5th Cir. 1985) (utilizing a hybrid test under Title VII); Equal Emp't Opportunity Comm'n v. Zippo Mfg. Co., 713 F.2d 32, 37-38 (3d Cir. 1983) (outlining several standards and applying a hybrid test to resolve an ADEA claim made by a sales agent); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) (utilizing a hybrid test under the Civil Service Act and Title VII); Cornish v. Tex. Dep't of Criminal Justice, No. Civ.A. 3:04-CV-0579R, 2006 WL 509416, at *6 (N.D. Tex. Mar. 2, 2006) (adjudicating a racial discrimination claim under Title VII and the Texas Commission on Human Rights Act by applying the hybrid test); Scott v. City of Minco, 393 F. Supp. 2d 1180, 1190 (W.D. Okla. 2005) (using

ing so, courts "consider the economic realities of [an employment] relationship in light of the employer's right to control, with the emphasis being on the latter."[124] The hybrid test has gained popularity, and now a majority of courts utilize the hybrid test in Title VII employee status determinations.[125] However, this test, as currently applied, fails to protect student interns for the same reasons that the pure economic realities and common law agency tests fail.[126]

B. *The Obama Administration's Failed Attempt*

In April 2010, the U.S. Department of Labor ("DOL") attempted to curb the expansion of unpaid, unprotected interns by releasing guidelines that set forth specific requirements internship programs must meet in order to legally remain ineligible for FLSA coverage.[127] The guidelines thus established legal criteria that employers must meet before employers can legally hire unpaid interns.[128] The Obama administration released the guidelines in an attempt to crack down on unpaid internships, hoping to make it more difficult for employers to create legally unpaid internships.[129] The DOL released a fact sheet to guide employers, recycling a six-factor test from the Wage and Hour Division.[130] The fact sheet lists the six factors as follows:

> (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.[131]

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the hybrid test to determine whether an officer is an employee of the state for gender discrimination purposes); *see also* Rubinstein, *supra* note 2, at 168 ("The hybrid test combines elements of both the common law test reflected in the Restatement of Agency and the economic reality test.").

124 Ortner, *supra* note 21, at 2630.

125 Rubinstein, *supra* note 2, at 168.

126 For example, the economic realities test fails because it does not take into account future livelihood, and its application can be overly technical and divorced from the broad, humanitarian goals of Title VII. Similarly, courts utilizing the common law agency test frequently focus on an overly formal structure of the employment relationship rather than the reality. The common law agency test also fails to take into account the vast control employers have over interns.

127 Braun, *supra* note 7, at 285.

128 *Id.*

129 *Id.*

130 *Id.* at 292.

131 *Fact Sheet #71*, *supra* note 40.

If the employer's internship program fulfills all factors, the DOL asserts that no employment relationship exists under the FLSA and the unpaid internship is thus legal.[132]

The three major violations common to unpaid internship employers are (1) when the internships are used as trial periods for individuals eventually seeking paid, full-time positions;[133] (2) when employers benefit from interns' work because the interns are engaged in "the operations of the employer or are performing productive work;"[134] and (3) when the employer derives immediate advantage from the intern.[135] If the employer engages in any of these practices, the intern is covered under the FLSA and is entitled to payment.[136] Employers are also skeptical of the first requirement, however, which mandates that experiential training at internships must be similar to training that an educational setting would provide.[137] A primary purpose of internships is to provide training that the student's educational institution cannot and does not provide—hence giving the student hands-on, real life experience to increase his or her marketability to future employers.[138] Moreover, employers generally are not equipped to provide an educational institution-like training for interns.[139] The severity of the obstacles employers must overcome in order to legally employ unpaid interns is likely intentional, however.[140] Nancy J. Leppink, then the acting director of the DOL's Wage and Hour Division, asserted that, "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."[141] Though the DOL enacted these regulations in 2010, it is not yet apparent how, and to what extent, employers are responding to the Obama administration's attempt to limit the number of legal unpaid internship programs.

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132 *Id.*

133 Braun, *supra* note 7, at 292.

134 *Fact Sheet #71*, *supra* note 40. *But see* Braun, *supra* note 7, at 296 ("[I]f a company derives no benefit from the intern, it will have absolutely no incentive to offer internship opportunities.").

135 *Fact Sheet #71*, *supra* note 40.

136 Braun, *supra* note 7, at 292.

137 *Fact Sheet #71*, *supra* note 40.

138 *See* Yamada, *supra* note 3, at 217.

139 *See, e.g.*, *The Colbert Report*, *supra* note 4 (in which Stephen Colbert mocks the academic instruction requirement by teaching his intern the Pythagorean theorem on a dry-erase board); *see also* Braun, *supra* note 7, at 298-99 ("According to the [Wage and Hour Division], internships must contain an educational component that is similar to training given in an educational environment. However, most unpaid internships fail to meet this criterion because the internship is not inextricably linked to academia[,] . . . companies are not educational institutions, and they cannot be expected to transform for purposes of legitimizing their internship programs." (footnotes omitted)).

140 Greenhouse, *supra* note 3.

141 *Id.* (internal quotation marks omitted).

III. ANALYSIS

The pervasiveness of unpaid student internships in today's working economy requires a modern judicial or administrative response, updating tests and statutes to expand employment law protections to unpaid interns consistent with the historical intent of Title VII of the Civil Rights Act. Section A of this Part highlights the shortcomings of each of the judicial analyses in failing to protect the class of unpaid student interns, as well as the limitations of the Obama administration's attempted response. Section B of this Part then proposes that courts adopt a modified benefits analysis test coupled with a right to control consideration in order to expand crucial employment law protections to unpaid student interns. Failing the widespread application of this updated judicial analysis, an alternative remedy is for Congress to amend the language of Title VII. This Part concludes with an application of this proposed judicial analysis to Brigid's narrative, demonstrating the more just outcome that results.

A. *Insufficiency of Current Venues Available to Unpaid Student Interns*

Considering the expansive goal underlying Title VII to ensure economic employment equality as well as equality and fair treatment generally[142] in conjunction with the judicial trend to advance the statute's goal of eliminating workplace discrimination,[143] Title VII should encompass unpaid student interns.[144] However, each of the judicially created tests courts use to determine employee status under Title VII has shortcomings that prevent it from protecting the class of unpaid student interns. These shortcomings will be highlighted below.

Turning first to the benefits analysis, courts' current application of the test ignores a pathway to apply protection to unpaid student interns. Either application of the benefits test, whether as a stand-alone or threshold test, ignores the non-monetary benefits that employers and student interns alike receive from unpaid internships.[145] Internships are mutually beneficial to the student and the employer. Students benefit from the availability of experiential learning and professional networking, while employers stand to gain

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142 Kpere-Daibo, *supra* note 13, at 136.

143 Ortner, *supra* note 21, at 2615.

144 *See* Kpere-Daibo, *supra* note 13, at 140 ("[M]ost courts and litigants have relied on the United States Supreme Court's reasoning that, in employment law, statutes should be interpreted in context rather than just examining their plain meaning."). The Act should interpret the definition of "employee" in the context of the prevalence of internships and the role internships play in society.

145 Braun, *supra* note 7, at 295 ("One employment lawyer noted that, in her experience, 'many employers agreed to hire interns because there is a strong mutual advantage to both worker and the employer.'").

from both the future recruitment advantage and the interns' substantive work product at minimal to no cost.[146] In fact, for many employers, there is "little discernable difference" in work product from unpaid interns and paid employees at an entry-level position.[147]

Excepting the Second Circuit's resolution of Brigid's case, to a large extent, the trend of judicial decisions actually shows a general movement toward applying the benefits analysis in a broader and more liberal way, which is a positive sign for student interns. The Second Circuit's decision presents one of the harshest and most technical applications of the benefits analysis in its determination that remuneration was an essential condition of an employer-employee relationship.[148] Yet only four years prior, the Fourth Circuit in *Haavistola* signaled that significant employee benefits *could* signify the existence of an employer-employee relationship, despite the lack of monetary remuneration.[149] Fortunately, the Second Circuit favored this more liberal interpretation in *Pietras*, six years after *Haavistola* and only two years after *O'Connor*. In *Pietras*, the Second Circuit distinguished its *O'Connor* decision, determining that significant employment benefits could in fact indicate employee status.[150]

The most encouraging application of the benefits test yet was in *Rafi*, in which a D.C. District Court judge continued with the expansive interpretation trend in finding that a showing of a clear pathway to full-time, paid employment might constitute significant benefits to constitute an employer-employee relationship.[151] From this line of cases, it appears that courts using the benefits analysis are willing to accept a broader analysis of employment relationships under Title VII. This interpretational shift is vital, as the greatest benefits from internships to students are often non-monetary. Indeed, these non-monetary benefits are essential in obtaining a future job that will provide monetary benefits. Unpaid workers rarely contribute for completely selfless

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146 Greenhouse, *supra* note 3.

147 *See* Ortner, *supra* note 21, at 2619.

148 O'Connor v. Davis, 126 F.3d 112, 115-16 (2d Cir. 1997) ("Where no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist because although 'compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, … it is an essential condition to the existence of an employer-employee relationship.'" (alteration in original) (quoting Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990))).

149 Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221-22 (4th Cir. 1993).

150 Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999).

151 Rafi v. Thompson, Civil Action No. 02-2356 (JR), 2006 WL 3091483, at *1 & n.1 (D.D.C. Oct. 30, 2006) (ruling that a volunteer doctor made a plausible showing that the position would qualify for "employee" status under Title VII where he presented evidence of a high conversion rate of volunteers moving to full-time paid positions).

reasons. Rather, interns soak up the non-monetary benefits of experiential learning and networking for future payoff.[152]

Regardless of the courts' assessment of the value of benefits that student interns receive from employers, courts must not underestimate the reality that student interns are uniquely vulnerable.[153] Student interns are hesitant to speak out simply because they fear risking what benefits they do receive, even if the sole benefit is permission to continue to show up at their internship.[154] Indeed, it may be the case that interns are *more* prone to become victims of harassment *because* of their non-employee status and lack of protection under Title VII.[155] Employers may abuse their positions of power by taking advantage of the fact that interns are unlikely to leave and unlikely to speak up for fear of gaining a reputation as a troublemaker or receiving a poor recommendation.[156] This scenario is exacerbated by the fact that, even if an unpaid intern does speak up and report harassment, he or she lacks any protection under current employment laws.

The common law agency analysis faces comparable obstacles to the benefits test in overcoming the exclusion of unpaid student interns. Indeed, application of this analysis can be "limited, mechanical, and inconsistent with consideration of contextual circumstances."[157] These very shortcomings of the common law agency test cause the exclusion of the ever-growing number of student interns from Title VII protection. Yet, courts need look no further than the Supreme Court's summation of the common law agency test to find room under the Title VII umbrella for student interns.[158] The Court clearly stated that no factor is decisive in a judicial determination,[159] yet courts seemingly focus only on the lack of payment and benefits before summarily rejecting student interns' claims.[160] While student interns may not win out un-

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152 Kpere-Daibo, *supra* note 13, at 149; *see also* Tucci, *supra* note 34, at 1377 ("As more employers require previous work experience for entry-level positions, students view the experience and contacts they acquire as compensation for an unpaid internship." (footnote omitted)).

153 Kpere-Daibo, *supra* note 13, at 149.

154 *Id.*

155 *Id.* at 150; *see also* Gregory, *supra* note 50, at 241-43 (noting that many unpaid college interns are desperate to obtain jobs, which can lead to exploitation by opportunistic employers). Professor David L. Gregory notes that some employers view unpaid interns as a method of reducing, if not eliminating, labor costs. Other employers may assign interns "grunt" work, such as making coffee and photocopies, rather than provide the interns with a valuable learning experience. *Id.*

156 Braun, *supra* note 7, at 301.

157 Kpere-Diablo, *supra* note 13, at 145.

158 *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

159 *Id.* ("No one of these factors is determinative.").

160 *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) (stating that the fact that the putative employee received no salary or wages was dispositive in finding that no employment relationship existed); Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990) ("Compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, but it is an essential condition to the existence of an employer-employee relationship.").

der those factors, most unpaid interns can still point to other factors, including their employers' right to assign projects and control the duration, location, and timing of their work to find the existence of an employment relationship between unpaid interns and employers.

The primary purpose test similarly fails to create a protective haven for unpaid student interns under Title VII. Unfortunately, because in *Hearst* the Court indicated that "in doubtful situations" courts could *consider* the underlying economic relationship in its determination,[161] courts now use the primary purpose test to exclude student interns for protection simply because they do *not* receive payment. In fact, this emphasis on money laid the groundwork for a later-developed test courts use to determine employee status: the economic realities test.[162]

Returning to the original language the Court used in *Hearst*, however, there is a way in which unpaid student interns can pass the primary purpose employee status test. The Court said that courts should take into account contextual circumstances when evaluating the meaning of a vague term.[163] In other words, the term "takes color from its surroundings . . . [in] the statute where it appears."[164] Courts could consider that the substantive work product student interns provide can be comparable to that of entry-level paid employees to find "coloring" factors, making a legitimate determination that, in context, the internship's primary purpose is akin to employment. Furthermore, the Court's declaration that the determination must be made in light of the "mischief to be corrected and the end to be attained" is particularly relevant with respect to the principal aims of Title VII.[165] Title VII seeks to end workplace discrimination and harassment and provides broad methods for doing so.[166] From this, there is no reason why courts could not determine that, contextually speaking, interns are employees and therefore require protection under Title VII.

Traditional applications of the economic realities test also face obstacles. As noted earlier, the Eleventh Circuit's decision in *Cuddeback* emphasized the fact that the university provided the graduate student a stipend and some benefits to illustrate that the economic reality of the relationship indicated actual employment.[167] Though the case represents a broad and liberal application of the economic realities test, it does not quite go far enough. Had

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161 NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 129 (1944); Rubinstein, *supra* note 2, at 163.

162 Rubinstein, *supra* note 2, at 163.

163 *Hearst Publ'ns*, 322 U.S. at 124.

164 *Id.* (alterations in original) (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 545 n.29 (1940)) (internal quotation marks omitted).

165 *Id.* (quoting S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)) (internal quotation marks omitted).

166 *See* Ortner, *supra* note 21, at 2615 ("Given the trend favoring an expansive reading of Title VII, the Second Circuit's ruling [in *O'Connor*] that all unpaid interns are excluded from protection under Title VII appears misplaced.").

167 Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1234-35 (11th Cir. 2004).

the university not awarded the graduate student with a stipend or benefits, but rather with the allure of potential future full-time employment, should that distinction matter? The "economic reality" of the graduate student in both scenarios is that the student is dependent upon the university's tutelage in order to achieve *future* economic stability. Indeed, the student in either scenario is more vulnerable than a traditional employee facing harassment in the workplace who can save a couple months' paychecks in order to find other employment. Despite this, the traditional employee benefits from expansive employment law protections.[168]

The Middle District of North Carolina's application of the economic realities test in *McBroom* was far harsher than the Eleventh Circuit in *Cuddeback*.[169] By including "denying or limiting one's livelihood" into the Congressional purpose of Title VII, the court significantly narrowed the aim of the statute.[170] Once again, this shortsighted analysis fails to consider future economic livelihood. If sexual harassment forces an unpaid, unprotected intern to leave the position, the student loses the ability to gain the hands-on experience necessary to gain employment after graduation.[171] In light of the competitive nature of internships, as well as start and end dates centered around the school year, escape from harassment cannot simply be a matter of quitting and finding a new internship. Consequently, unpaid student interns must be able to seek shelter under federal employment laws.

The economic realities test fails to capture the full picture of the unpaid student intern. Its primary shortcoming is its failure to appreciate the multitude of incentives that exist for student interns to endure harassment. Consider the examples above where the court examined economic dependence.[172] The underlying basis of the theory is, of course, that "the more economically dependent" the putative worker is on the employer, the more likely that person would endure harassment or discrimination in an effort to maintain the position.[173] However, this theory neglects to consider other reasons individuals may continue to endure harassment and discrimination to maintain a position, which is an especially important consideration in light of the essential nature of internships for students to graduate, obtain jobs after graduation, and network with professionals in their field. Because of this dynamic, it is unrealistic to expect student interns to readily speak out.[174]

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168 ROTHSTEIN ET AL., *supra* note 27, at 261.

169 McBroom v. W. Elec. Co., 429 F. Supp. 909, 911-12 (M.D.N.C. 1977).

170 Kpere-Daibo, *supra* note 13, at 141.

171 *See* Braun, *supra* note 7, at 284 (noting that internships provide "the necessary hands-on learning experience that many employers ultimately require").

172 *Cuddeback*, 381 F.3d at 1235 (finding that Cuddeback was an employee because her completion of research in the university's laboratory was one of her course requirements); *McBroom*, 429 F. Supp. at 911-12; *see also* Kpere-Daibo, *supra* note 13, at 145.

173 Kpere-Daibo, *supra* note 13, at 145.

174 Braun, *supra* note 7, at 301 ("Even if interns have negative experiences while interning, they are often afraid to file complaints because many fear that they 'will become known as the troublemakers in

Finally, the hybrid test, a combination of the common law agency test and the economic realities test,[175] faces the same problems as each of its parts. Though courts could construe each of the tests to include unpaid student interns, courts seem unwilling to take a modern stance in its evaluations of employee status.

Unfortunately, student interns find little relief from the Obama administration's attempt to regulate unpaid internships. The DOL's guidelines present severe obstacles to legally employ unpaid interns, which employers are unlikely to be able to—or willing to—overcome. Yet it seems the DOL is all bark and no bite, as unpaid internships that seemingly violate many, if not all, of the DOL's factors still abound.[176] It is not clear that employers' apparent dismissal of the DOL's new guidelines for unpaid internships is a bad thing, however.[177] The DOL's guidelines essentially prohibit what most would consider the "good" unpaid internships.[178] In this economy, if employers cannot both receive benefit from and award benefit to the interns alike without monetary cost, these "good" internships will likely disappear. This chilling effect thus not only eliminates crucial opportunities for students to build professional contacts, but also defeats the purpose of internships—to provide real-life, hands-on experiential learning in the first place.[179]

Ultimately, the DOL's regulations regarding internships may actually harm the very class of workers the guidelines purport to protect.[180] The DOL's mandate of payment for the majority of substantive internships, if enforced, likely will significantly reduce employers' willingness to offer internships in the first place.[181] Even more significant, perhaps, is the fact that,

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their chosen field, endangering their chances with a potential future employer.' According to employment lawyer, Michael Tracy, [sic] the problem revolves around the fact that there are 'willing victims.' In light of the fact that students constantly worry about offending their employers, getting fired or creating a bad name for themselves, it is unrealistic to rely on the students to step forward. Without confidentiality safeguards in place, 'one cannot expect college students to assert their rights unilaterally against a corporation.'" (footnotes omitted) (quoting Greenhouse, *supra* note 3; ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 63 (2011); Gregory, *supra* note 50, at 262)).

175 *See supra* note 123.

176 *See* Braun, *supra* note 7, at 293 ("At present, so many internships are likely in violation of the law . . . .").

177 *See, e.g.*, Tucci, *supra* note 34, at 1376 ("Those against increased regulations extol the benefits that unpaid internships offer, such as contacts, experience, and greater accessibility to the job market for low-income students.").

178 Braun, *supra* note 7, at 286, 295 ("The WHD's recommendation, however, that interns perform 'no or minimal work' is entirely antithetical to the experiential value inherent in the internship process. . . . By providing an intern with work that provides little or no value to the employer to ensure that the employer gains *no* advantage from these activities, the employer effectively eliminates the educational component, which ultimately renders the experience worthless." (footnotes omitted)).

179 *Id.* at 286.

180 *Id.*

181 *Id.*

if enforced, the DOL regulations still do little to address the lack of important employment law rights for student interns in the workplace.[182]

Taking into account the hurdles interns must overcome to speak out about discrimination or harassment within their own organization, as well as the financial status generally present in this age group, tort remedies are also insufficient to combat against workplace discrimination and harassment. Even if an intern gathers funds to sue, without a statutory employment relationship, it is difficult to hold an employer liable.[183] Obtaining justice against only the individual offender, but not the organization that permitted the illegal behavior, does little to remedy the problem at hand.[184]

B. *Proposal*

The "intern economy" job market requires internships, yet it leaves interns unpaid and unprotected.[185] Either by judicial reinterpretation or congressional action, the creation of a new legal status for unpaid interns is crucial. Interns can qualify as "employees" under Title VII without changing their status (or lack thereof) under the FLSA.

Qualifying unpaid interns under the FLSA, as the Obama administration attempted to do, creates perverse outcomes. Employers who wish to assign their interns substantive work must then pay the interns at least a minimum wage, whereas interns completing menial assignments can remain unpaid under the new regulations.[186] The most perverse outcome of this regulation is that seemingly "good" internships, which supply interns with experience and exposure to a given field, are disappearing in an economy where employers simply cannot afford to pay interns.[187] The DOL's new regulations will likely have the opposite of the Administration's desired effect, ultimately eradicating valuable internships, leaving only meaningless and menial internships.

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182 *See, e.g.*, O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) (demonstrating that DOL regulations do not address employment rights for individuals who are legally determined to be interns).

183 *See supra* Part I.D.

184 Kpere-Daibo, *supra* note 13, at 138.

185 *Id.* at 135.

186 *Fact Sheet #71*, *supra* note 40; *see also* Braun, *supra* note 7, at 295 (explaining that because the fourth prong of the DOL regulations requires that the employer receive no immediate advantage from the intern's activities, mutually-beneficial unpaid internships disappear).

> By providing an intern with work that provides little or no value to the employer to ensure that the employer gains *no* advantage from [internship assignments], the employer effectively eliminates the educational component, which ultimately renders the experience worthless. If the purpose of an internship is to mimic a real work experience, then the employer will undoubtedly gain some advantage from the intern's work.

Braun, *supra* (footnote omitted).

187 *See* Braun, *supra* note 7, at 295-96 (explaining that, because the new regulations expect companies to provide unpaid internships without receiving any benefit in return, companies have "absolutely no incentive to offer [unpaid] internship opportunities").

Considering today's economy, internships are unlikely to disappear from the market.[188] Mending the current economic status to a level where paid internships are plentiful is unlikely, but courts and lawmakers can and ought to protect the current class of unpaid interns with expansive employment law rights under Title VII of the Civil Rights Act. Subsection 1 will first describe a modern judicial response sensitive to the plight of unpaid interns which courts should apply when determining employee status under Title VII. Subsection 2 proposes that, failing a judicial solution, Congress must enact an alternative remedy.

1. An Enlightened Judicial Response

The proper response to correct the current plight of unpaid, unprotected student interns is a judicial one, as Congress has already implicitly granted protections against discrimination and harassment under the broad, remedial aims of Title VII of the Civil Rights Act. The problem arises in shortsighted judicial interpretations.

When a court faces the issue of determining the employment status of an unpaid student intern in a Title VII discrimination or harassment suit, courts need to apply a modified benefits analysis test. Courts must look at the non-monetary benefits that both student interns and employers receive from the internship,[189] noting the role that internships play in granting students on-the-job training[190] and the benefit employers receive in the form of free, substantive work and a preview of the applicant pool. As this Comment has shown, unpaid interns receive non-monetary benefits from the internship experience and frequently provide the employer with work similar to a regular, entry-level, full-time paid employee,[191] in exchange for real-world experience and a recommendation upon completion of the internship.

Courts should also consider the right-to-control aspect of the common law agency test, as employers have vast and expansive control over unpaid interns due to intern vulnerability. Courts should highlight an employer's right to assign projects to interns; the employer's control over the duration, location, and timing of interns' work; and the source of instrumentalities and tools to find an employment relationship between unpaid interns and employ-

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188 *Id.* at 283 ("[I]n the midst of a catastrophic economic recession, the number of unpaid internships has skyrocketed.").

189 *See supra* Part I.C.

190 Ortner, *supra* note 21, at 2618.

191 *See, e.g.*, OLDMAN & HAMADEH, *supra* note 43, at xv (reporting that interns at 3M and Reebok have contributed to substantive projects); Frank, *supra* note 48 (noting that the *Wall Street Journal*'s internship program has been described as "a full-body plunge into a chilly sea of journalistic responsibility" (internal quotation marks omitted)); Musolf Karl, *supra* note 44 (noting that interns can be valuable to employers, particularly small businesses that require assistance with special projects); *see also* Ortner, *supra* note 21, at 2621.

ers. By acknowledging the vast control that employers have over unpaid internships, courts can further bolster their determination of the existence of an employment relationship.

2. A Legislative Alternative

Failing a modified judicial interpretation, it is left to Congress to rectify the current state of unequal and unfair treatment toward unpaid student interns. To do so, Congress could pass an amendment to Title VII explicitly covering student interns, regardless of their monetary compensation. Congress could also add a secondary definition to the term "employee" under the definitions section of the Act. The secondary definition would read, "for the purposes of this statute, an 'employee' will also include unpaid student or post-graduate interns." A legislative amendment would address the two significant aspects of student intern realities: first, this amendment would acknowledge the "obvious reality" that although Congress could not have originally predicted the prevalence of student interns in the workplace, the policy and expansive aims of the Act are completely compatible with intern protection;[192] and second, current and future college-aged students applying for and completing internships are becoming more diverse, increasing both the possibilities for discrimination and harassment in the workplace and the need for employment law protections for this vulnerable class.[193] However, Congress seems unwilling and unlikely to take this action, considering the fact that Congress took no action after the unjust outcome in *O'Connor*.[194] Additionally, this legislative alternative is not entirely necessary considering the broad aims of the Act already included in the statute. A better solution is a correct judicial interpretation.

C. *Application of Enlightened Judicial Response to Opening Narrative*

The problems that arise from the current lack of legal protections for student interns against harassment and discrimination in the workplace are highlighted best in the narrative described in the beginning of this Comment.[195] Recall Brigid's story. Brigid was a vulnerable, harassed, unpaid intern who received no protection under the Second Circuit's interpretation of Title VII when she took a chance and spoke out. Applying the above-proposed judicial response, using a modified benefits analysis coupled with a consideration of the right-to-control test, produces a far more just result.

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192 Yamada, *supra* note 3, at 246-47.

193 *Id.* at 247.

194 *See supra* note 5.

195 *See supra* Introduction; *see also* O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997).

Under this modified approach, a court would begin by making a determination of the sufficiency of the benefits Brigid received from her internship at the mental hospital. Brigid majored in social work and, with this internship, developed professional contacts to serve as mentors throughout her career, received hands-on experiential learning to supplement her academic degree, and potentially obtained a recommendation from her supervisor which she could use to obtain additional internships later in her academic career. These are three intangible, but highly important, benefits for Brigid's future career and academic development. A court could definitively answer the benefits test in Brigid's case in the affirmative.

Delving next into the right-to-control consideration, Brigid overcomes this hurdle as well. Her employer mandates her hours, provides assignments and projects, and sets the start and end dates of her internship. Brigid's employer commands an obvious control over her work as an intern. Under the modified benefits analysis with a consideration of the right-to-control test, Brigid qualifies for protection from harassment and discrimination in the workplace under Title VII. Additionally, such protection is not an extra burden on employers, as they already have the programs in place to provide the necessary employment law protections to their full-time, paid employees. Employers need only include their unpaid student interns in these programs as well.

CONCLUSION

All signs imply that the intern economy is here to stay. Unless there is a judicial response to the changing makeup of the workforce, a vast class of workers will continue to fall into a legal void. Student interns and other unpaid interns deserve protection from discrimination and harassment under Title VII. Interns are in a uniquely vulnerable position and are exactly the type of workers that the broad aims and principles of Title VII sought to protect. Courts must cease denying unpaid interns the basic employment rights and legal protections afforded to traditional, paid employees. Failing a modern judicial response, Congress must step in to correct the current ineffective state of affairs.