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SINKING THE UNPAID EXTERNSHIP: HOW MANY UNPAID EXTERNSHIPS VIOLATE THE FAIR LABOR  
STANDARDS ACT AND YIELD EXCEPTIONALLY BROAD JOINT LIABILITY

Hunter Swain<sup>1</sup>

**INTRODUCTION**

In recent decades, unpaid internships and externships—internships administered by university programs through which interns can earn school credit—have become an increasingly ubiquitous part of American university education, particularly for graduate students in law school and business school. At some law schools, participation in an externship program has become a de facto graduation requirement. Proponents of such programs tout them as a novel, highly useful form of experiential learning that fills in the gaps left by traditional classroom education.<sup>2</sup> To those proponents, unpaid internships and externships are a critical tool for on-the-job training, and they provide both necessary experience and an opportunity for students to demonstrate their skills to prospective employers. However, critics of unpaid internships and externship programs question the actual educational value of unpaid labor and view with skepticism the considerable cost savings that such programs generate both for universities and for sponsoring employers.

The legality—and morality—of certain unpaid internships and university externship programs is highly questionable, and the practice has begun to generate a substantial amount of

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<sup>1</sup> J.D. Candidate, University of Colorado Law School, 2013; B.A., The Colorado College, 2009. I wish to express my heartfelt gratitude to Professor Scott Moss at the University of Colorado Law School for his insights and for his ongoing encouragement and support. This Article is dedicated to all workers who do not receive a fair wage for their work. All mistakes are the author's alone.

<sup>2</sup> See generally, e.g., James H. Blackman, *Practical Examples for Establishing an Externship Program Available to Every Student*, 14 CLINICAL L. REV. 1 (2007); Michael A. Yarnell, *An Externship Program: Start It, Grow It, Improve It*, 3 PHOENIX L. REV. 473 (2010).

litigation. For example, class-action lawsuits are pending against both Hearst Publications<sup>3</sup> and Fox Searchlight Pictures<sup>4</sup> alleging that the companies violated the minimum wage and overtime provisions of the Fair Labor Standards Act by illegally employing unpaid interns. Beyond these recent lawsuits, unpaid internships for private-sector employers are a widespread, controversial practice whose legality is at best unclear.

This Article argues that unpaid internships and externships for private-sector employers are illegal because they violate the minimum wage provisions of the Fair Labor Standards Act of 1938. More specifically, private-sector unpaid interns and externs are entitled to be paid a minimum wage because they are statutory employees under the Fair Labor Standards Act, and all employees are entitled to a minimum wage under the Act by default. This Article argues the additional points, which to date have not been argued elsewhere, that (1) universities that place externs in illegal unpaid externships are jointly liable for unpaid wages, and (2) many individuals, including university administrators and externship supervisors, are individually liable for the unpaid minimum wages of student workers in their externship programs.

Part I describes the minimum wage provisions of the Fair Labor Standards Act of 1938, and explains why many unpaid interns and externs for private-sector entities qualify as covered “employees” under the Act. Part I also both explains the Act’s legal mechanisms for paying full-time students less than the minimum wage and identifies some circumstances under which unpaid private-sector internships and externships do not violate the law.

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<sup>3</sup> Wang v. Hearst Corp., 1:12-cv-00793 (S.D.N.Y. Filed Jan. 31, 2012). See also Outten & Golden LLP, *Hearst Corporation Class Action Litigation*, Unpaid Interns Lawsuit, <http://unpaidinternslawsuit.com/hearst-corporation> (last visited Jan. 3, 2013).

<sup>4</sup> Glatt v. Fox Searchlight Pictures, Inc., 1:11-cv-06784 (S.D.N.Y. Filed Sept. 27, 2011). See also Outten & Golden LLP, *Fox Searchlight Class Action Litigation*, Unpaid Interns Lawsuit, <http://unpaidinternslawsuit.com/fox-searchlight> (last visited Jan. 3, 2013).

Part II explains that the scope of FLSA liability for the unpaid minimum wages of private-sector unpaid interns and externs is extraordinarily broad. Other scholarship and lawsuits have argued that the employers of unpaid interns and externs are FLSA-liable; Part II contributes the following two previously ignored FLSA liabilities. First, universities that place externs in illegal unpaid externships may be jointly liable for unpaid wages both as joint employers and as third-party employers who directly cause violations of the Act. Second, individual university administrators may be individually liable for the unpaid minimum wages of externs who participate in the university externship programs that they oversee. Given that FLSA liability can reach into academia, schools sponsoring unpaid externships may ultimately receive less of a bargain than they had assumed.

#### **I. MANY UNPAID EXTERNSHIPS VIOLATE THE FAIR LABOR STANDARDS ACT OF 1938**

The Fair Labor Standards Act of 1938<sup>5</sup> (“the FLSA” or “the Act”) comprehensively regulates the wages of employees to whom the Act applies.<sup>6</sup> Originally intended to alleviate oppressive working conditions,<sup>7</sup> the New Deal-Era statute imposes a number of requirements upon employers, including the requirement that many employees be paid “time-and-a-half”

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<sup>5</sup> 29 U.S.C.A. §§ 201–219 (West 2012).

<sup>6</sup> The FLSA’s minimum wage and overtime requirements apply only to employees “in industries engaged in commerce or in the production of goods for commerce,” *id.* § 202(a), and only to employers with gross sales or revenue of at least \$500,000, *id.* § 203(s)(1). Most businesses qualify: the United States Supreme Court currently employs a broad interpretation of “engaged in commerce”; and even most small businesses have revenue (not profits) in a gross (not net) volume above \$500,000 (e.g., a solo-practice lawyer would have to bill barely 1500 hours at \$350 hourly to exceed that threshold, and almost any small store netting just \$100,000 in income almost surely generated over \$500,000 gross revenue because profit margins above 20% are not common). Accordingly, the remainder of this Article assumes that the employers discussed herein are among the vast majority deemed to be “engaged in commerce.”

<sup>7</sup> *Id.* § 202. *See also* H.R. REP. NO. 101-260 (Sept. 26, 1989), 1989 U.S.C.C.A.N. 696–97 (recounting President Franklin D. Roosevelt’s May 24, 1937, statement to Congress regarding the nascent FLSA that “[a] self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers’ wages or stretching workers’ hours,” and that “[a]ll but the hopelessly reactionary will agree that to conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor”)

overtime wages for any hours over forty worked in one week,<sup>8</sup> restrictions upon the employment of children,<sup>9</sup> and a minimum hourly wage.<sup>10</sup> This Part first describes which workers are covered as “employees” under the FLSA. Second, this Part explains the mechanism by which employers may legally pay students less than minimum wage. Third, this Part explains the narrow exemptions from the Act’s protections for volunteer work, vocational training, and bona fide educational externships that do not substantially benefit the employer. Finally, this Part argues that the vast majority of externships at private-sector employers fail to fall within any of the FLSA’s narrow exemptions, and therefore violate the Act’s minimum wage protections by illegally taking advantage of unpaid labor.

***A. Who is an Employee under the FLSA?***

Because the FLSA aims to correct oppressive working conditions, its coverage is extraordinarily broad, and the terms “employ,” “employee,” and “employer” as defined under the Act encompass a significantly larger swath of working relationships than the traditional common law definitions of the terms do. Under the FLSA, “employee” is defined somewhat circularly as “any individual employed by an employer,”<sup>11</sup> but “employ” is defined simply, and notably broadly, as “to suffer or permit to work.”<sup>12</sup> Furthermore, under the FLSA, “‘employer’ includes *any person acting directly or indirectly in the interest of an employer* in relation to an employee.”<sup>13</sup> The FLSA’s purposefully broad and general definitions of these terms converge to give the Act’s protections an extraordinarily large scope.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* § 212.

<sup>10</sup> *Id.* § 206(a).

<sup>11</sup> *Id.* § 203(e)(1).

<sup>12</sup> *Id.* § 203(g).

<sup>13</sup> *Id.* § 203(d) (emphasis added).

The exceptionally expansive scope of the employer-employee relationship under the FLSA has been repeatedly recognized both by the United States Supreme Court and by numerous Courts of Appeals. In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court contrasted the definition of “employee” under the FLSA with definitions of the term under other statutes, such as ERISA, the National Labor Relations Act (“the NLRA”), and the Social Security Act (“the SSA”), noting the comparatively “striking breadth” of the term under the FLSA.<sup>14</sup> In that case, the Court also noted that the FLSA, “whose striking breadth we have previously noted, stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>15</sup> Additionally, Courts of Appeals, acknowledging the Supreme Court’s emphatically broad interpretation of the FLSA’s definitions, consistently interpret the terms of the Act expansively in accordance with the “remedial nature of the statute[, which] warrants an expansive interpretation of its provisions so that they will have ‘the widest possible impact in the national economy.’”<sup>16</sup> Because courts interpret the definitions of “employer,” “employee,” and “employ” broadly to effectuate the remedial purposes of the Act, the scope of the employer-employee relationship is uniquely expansive in the FLSA context and is not constrained by traditional common-law agency definitions of the terms.

Just as employee status under the FLSA is not constrained by traditional common-law definitions of the terms, neither is it limited by contractual terminology designed to bring a particular relationship outside the scope of the Act’s minimum wage protections. In fact, rather

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<sup>14</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–26 (1992)

<sup>15</sup> *Id.* at 325 (internal citation omitted). Such agency principles, which govern the scope of the employment relationship under other statutes, are significantly narrower. However, the remainder of this Article discusses the terms “employee,” “employer,” and “employ” only as defined under the FLSA.

<sup>16</sup> *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 139, 139 (2d Cir. 1999) (*quoting* *Carter v. Dutchess Comm. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)). *See also* *Wallington v. Rutherford Food. Corp.*, 156 F.2d 513, 516 (10th Cir. 1946) (“[T]he definitive provisions of the [FLSA] are *extremely comprehensive* in their sweep.”) (emphasis added); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003) (“This is ‘the broadest definition of “employ” that has even been included in any one act.’”) (*quoting* *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)) (other citations and alterations omitted).

than rely upon common law definitions of control or upon the terms of a contract to determine whether an individual is an employee under the FLSA, courts employ an “economic reality” test, which examines the actual working relationship between the parties. In *NLRB v. Hearst Publications*, the Supreme Court first adopted the economic reality test to determine employee status under the NLRA, simultaneously rejecting the “right to control” test that separated employees from independent contractors at common law.<sup>17</sup> The Court reasoned that because the NLRA was designed to alleviate industrial strife and inequality of bargaining power in labor relations, employee status should be evaluated with a view toward the statute’s purposes, and concluded that a relationship should come under the statute’s protections when “the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation.”<sup>18</sup>

Shortly thereafter, in *Rutherford Food Corp. v. McComb*,<sup>19</sup> the Court first applied the economic reality test in the FLSA context, outright rejecting the same common-law right-to-control test rejected in the NLRA context three years earlier in *Hearst Publications*. *Rutherford Food Corp.* concerned a group of “beef boners”<sup>20</sup> who worked at a cattle slaughterhouse.<sup>21</sup> Because the employer slaughterhouse had contractually labeled the beef boners as independent contractors, who are exempt from the FLSA’s protections, most of the boners worked well over the maximum hours prescribed by the FLSA for a standard workweek without overtime pay.<sup>22</sup> Moreover, the employer did not maintain records of the hours worked by the boners.<sup>23</sup> In response,

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<sup>17</sup> *NLRB v. Hearst Publ’ns*, 322 U.S. 111, 126–29 (1944) [hereinafter *Hearst Publications*].

<sup>18</sup> *Id.* at 128.

<sup>19</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728–31 (1947) [hereinafter *Rutherford Food Corp.*].

<sup>20</sup> A “beef boner” is a specialized type of butcher who removes the bones from cattle carcasses during the industrial production of beef. *See id.* at 724–26.

<sup>21</sup> *Id.*

<sup>22</sup> *Wallington v. Rutherford Food. Corp.*, 156 F.2d at 515.

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

the Department of Labor’s Administrator of the Wage and Hour Division (“the Division”) brought an action to enjoin the employer slaughterhouse’s continued violations of the FLSA, arguing that the beef boners had been improperly classified as independent contractors when they were, in fact, employees.<sup>24</sup> The district court held that the beef boners were not employees of the slaughterhouse,<sup>25</sup> but the Tenth Circuit reversed, holding that the beef boners were employees, in part because the shop steward heavily supervised their work and the slaughterhouse provided their uniforms and tools.<sup>26</sup> The Circuit reasoned that “in doubtful situations, coverage is to be determined broadly by reference to the underlying economic realities rather than by traditional rules governing legal classifications of . . . employer and independent contractor.”<sup>27</sup> The Supreme Court affirmed, cementing economic reality as the primary test to determine employee status under the FLSA.<sup>28</sup>

The Supreme Court further explained the economic reality test’s factors in a companion case, *United States v. Silk*, which concerned whether coal workers were employees under the Social Security Act.<sup>29</sup> *Silk* found that the workers were employees, rather than independent contractors,<sup>30</sup> and considered the following factors relevant to a determination of employee status under the economic reality test: (1) the degree of control exercised over the worker’s actions by the employer, (2) the relative investment in facilities by the worker and the employer, (3) the relative opportunity for profit and loss between the two, (4) the permanency of the relationship,

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<sup>24</sup> *Id.* at 514, 516.

<sup>25</sup> *Id.* at 516.

<sup>26</sup> *Id.* at 515–16.

<sup>27</sup> *Id.* at 516.

<sup>28</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. at 730–31. The Court also added, unequivocally, that “[the FLSA] contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.” *Id.* at 728–29.

<sup>29</sup> *United States v. Silk*, 331 U.S. 704, 705–06 (1947).

<sup>30</sup> *Id.* at 716–17.

and (5) the skill required to perform the worker's job.<sup>31</sup> Some other courts have also considered an additional factor, (6) whether the service rendered by the worker is an integral part of the employer's business operations.<sup>32</sup>

The economic reality test is the established way to determine "employee" status under the Act. The next Section discusses the relevant law with respect to employee status and exemptions from the minimum wage requirement for full-time students, vocational trainees, volunteers, and unpaid interns and externs.

### ***B. Many Unpaid Internships and Externships for Private Employers Violate the FLSA***

The preceding Section established that employee status under the FLSA is determined neither by traditional common-law definitions nor by contractual terminology or the characterizations of the parties. Rather, employee status under the FLSA and the applicability of its minimum wage protections depend on the economic reality of the relationship between the parties. By default, every statutory employee is entitled to be paid minimum wage under the Act, subject to some *per se* exemptions inapplicable here.<sup>33</sup> However, Department of Labor guidelines and Supreme Court decisions interpreting the scope of the FLSA's protections have made exceptions to the FLSA's blanket minimum wage guarantee for volunteers, vocational trainees, some interns and externs who work in a bona fide educational environment and do not substantially benefit their employers, and full-time student labor. This Section first briefly

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<sup>31</sup> *Id.* at 716.

<sup>32</sup> See, e.g., *Baystate v. Alternative Staffing, Inc.*, 163 F.3d 668 (1st Cir. 1998); *Donovan v. DialAmerica Mktg.*, 757 F.2d 1376 (3d Cir. 1985), *cert. denied*, 474 U.S. 919 (1985); *Secretary v. Lauritzen*, 835 F.2d 1359 (7th Cir. 1987), *cert. denied sub nom.* *Lauritzen v. McLauthlin*, 488 U.S. 898 (1987); *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989); *Freund v. Hi-Tech Satellite, Inc.*, 185 F. App'x. 782 (11th Cir. 2006).

<sup>33</sup> See 29 U.S.C.A. § 213(a)-(g). For a non-exhaustive list of occupations exempt from the FLSA's minimum wage protections in more easily digestible form, see Fair Labor Standards Act Advisor, U.S. DEPARTMENT OF LABOR, <http://www.dol.gov/elaws/esa/flsa/screen75.asp> (last visited November 20, 2012). Despite the odd specificity of some of the occupational exemptions, like wreathmakers, 29 U.S.C.A. § 213(d), babysitters, *id.* § 213(a)(15), and computer programmers, *id.* § 213(a)(17), interns or those otherwise working either primarily or incidentally for educational benefit are not exempted altogether, and almost none would fall within the jobs or industries exempted by the Act.

explains the exclusive mechanism by which the wages of full-time student employees may lawfully fall below the standard minimum wage. Second, this Section explains the Supreme Court's exemption from the FLSA for volunteer labor and vocational trainees, and argues that unpaid externs are neither. Third, this Section explains the narrow range of circumstances under which unpaid internships may be lawfully exempted from the FLSA's minimum wages guarantees. Finally, this Section argues that unpaid internships and externships for private-sector employers do not fit within any of the FLSA's exemptions and thus violate its minimum wage provisions.

### **1. Statutory Mechanism for Lower Minimum Wage for Full-time Students**

The FLSA provides a statutory mechanism by which employers may reduce a full-time student's wages below the standard minimum wage:<sup>34</sup> 29 U.S.C. § 214(b) allows employers to reduce the wages of full-time students in certain industries to 85% of the minimum wage.<sup>35</sup> The covered industries able to use this provision are narrow: retail or service establishments; agriculture; or institutions of higher learning where the students are enrolled.<sup>36</sup> Further, before employing any full-time students at subminimum wages, an employer must apply to the appropriate regional administrator of the Division for a certificate authorizing the employer to pay subminimum wages.<sup>37</sup> Section 214's subminimum wage reduction mechanism thus is rarely applicable. It is relevant to this Article's argument only insofar as its very existence illustrates that

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<sup>34</sup> 29 U.S.C. § 214.

<sup>35</sup> *Id.* § 214(b). The section actually allows employers to reduce the minimum wage to the greater of either (1) \$1.60 per hour or (2) 85% of the current general minimum wage. *Id.* The current federal minimum wage as of publication is \$7.25 per hour, 85% of which will always be greater than \$1.60 per hour. See *Minimum Wage*, U.S. DEPARTMENT OF LABOR, <http://www.dol.gov/whd/minimumwage.htm#.ULPvoYc818E> (last visited November 26, 2012).

<sup>36</sup> Specifically, section 214(b) allows for the reduction of wages of a full-time student employed by a retail or service establishment, *id.* § 214(b)(1)(A), engaged in agriculture, *id.* § 214(b)(2), or employed by an institution of higher learning where the student is enrolled, *id.* § 214(b)(3).

<sup>37</sup> 29 C.F.R. § 519.3(a). See also *id.* § 519.4(a)(2) (an application for a certificate to pay subminimum wages to full-time students must be submitted "not later than the start of such employment"); *id.* § 519.6(a) (certificates will not be issued retroactively).

failure to pay full-time student employees any wage at all is clearly a violation of the FLSA's minimum wage provisions. Because the section allows employers to reduce the minimum wages of their full-time student employees to 85% of the minimum wage at the least, it is axiomatic that there is no plenary "student" exception that allows an employer to reduce a student worker's wages to zero.

## **2. Volunteer Labor and Vocational Training Are Exempted from the FLSA's Minimum Wage Guarantees**

Although the definition of "employee" under the FLSA is extraordinarily broad, the Supreme Court has acknowledged that certain categories of working relationships do not fall within the employer-employee category, and therefore are not subject to the Act's minimum wage guarantees. The primary exceptions carved out by the Supreme Court are (1) "those who, without any express or implied compensation agreement, might work for their own advantage on the premises of another,"<sup>38</sup> also known as vocational trainees, and (2) volunteers. This Section describes the two seminal Supreme Court cases that limited the scope of the FLSA's uniquely expansive definition of "employ" to exclude those who use an employer's resources strictly for their own benefit and volunteers, *Walling v. Portland Terminal Co.*<sup>39</sup> and *Tony & Susan Alamo Foundation v. Secretary of Labor*,<sup>40</sup> respectively.

In *Portland Terminal Co.*, the Supreme Court reined in the FLSA's uniquely expansive definition of "employee" by clarifying that it "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."<sup>41</sup> The case was a challenge to a railroad's practice of

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<sup>38</sup> *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) [hereinafter *Portland Terminal Co.*].

<sup>39</sup> *Portland Terminal Co.*, 330 U.S. at 148.

<sup>40</sup> *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985).

<sup>41</sup> *Portland Terminal Co.*, 330 U.S. at 152.

offering unpaid “practical training to prospective yard brakemen” that lasted seven or eight days.<sup>42</sup> The railroad hired its brakemen only from a list it maintained of qualified workers, and successful completion of the training program was a prerequisite to being included on the list.<sup>43</sup> After successful completion of the program, each brakeman was given a retroactive daily allowance of four dollars.<sup>44</sup> The Division brought suit against the railroad company, arguing that the railroad company’s practice violated the Act’s minimum wage provisions.<sup>45</sup>

The Supreme Court held that the practice did not violate the Act, and found especially dispositive that the each worker’s “activities do not displace any of the regular employees, who do most of the work themselves, and must stand immediately by to supervise whatever the trainees do. The applicant's work does not expedite the company business, but may, and sometimes does, actually impede and retard it.”<sup>46</sup> The Court especially focused on the fact that the employer received no immediate and material advantage from the work performed by the trainees, contrasting the practice with a hypothetical situation where “an employer has evasively accepted the services of beginners at pay less than the legal minimum without having obtained permits from the administrator.”<sup>47</sup> As discussed in Part II.B.3, *infra*, the Court’s reasoning for exempting the railroad company’s training program in *Portland Terminal Co.* underlies the Department of Labor’s entire policy about the applicability of the FLSA to unpaid interns and externs.

In *Tony and Susan Alamo Foundation v. Secretary of Labor*, the Court acknowledged an exemption from the FLSA for bona fide volunteers.<sup>48</sup> The Division had brought suit against a

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<sup>42</sup> *Id.* at 149.

<sup>43</sup> *Id.* at 150.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 149.

<sup>46</sup> *Id.* at 149–50.

<sup>47</sup> *Id.* at 153.

<sup>48</sup> *Tony and Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 291 (1985) [hereinafter *Tony & Susan Alamo Foundation*].

private nonprofit religious organization for the unpaid minimum wages of the organization’s “associates.”<sup>49</sup> The organization ran several commercial businesses to finance its nonprofit religious operations, and the associates were rehabilitated “drug addicts, derelicts, [and] criminals” who worked for the organization’s commercial businesses in exchange for food, shelter, clothing, and other benefits,<sup>50</sup> but no wages.<sup>51</sup> Notably, despite the protestations of the associates that they were not employees and did not expect to be paid, the Supreme Court held that they were statutory employees and therefore that the organization had violated the Act by failing to pay them a minimum wage.<sup>52</sup>

In holding that the associates were employees under the Act, the Court emphasized the economic reality test that it first applied in the FLSA context in *Rutherford Food Corp.*,<sup>53</sup> and distinguished the associates from the brakemen in *Portland Terminal Co.*, noting that the associates were financially dependent on the organization for long periods of time, up to several years.<sup>54</sup> The Court held that a compensation agreement can be implied-in-fact and need not be explicit or even acknowledged by the employee.<sup>55</sup> In applying the economic reality test to find that the associates were statutory employees, the Court insisted that a worker’s protestation that she is not actually an employee entitled to minimum wages is entirely irrelevant, stating that “the purposes of the Act require that it be applied even to those who would decline its protections.”<sup>56</sup>

The Court further explained that to allow the Foundation to employ its associates at substandard

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<sup>49</sup> *Id.* at 292–93.

<sup>50</sup> *Id.* at 292.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 300–02. The Court also pointed out that the Act does not demand payment of wages in cash and that in-kind wages may satisfy its requirement of payment of a minimum wage to employees. *Id.*

<sup>53</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

<sup>54</sup> *Tony and Susan Alamo Foundation v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (*citing* *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 33 (1961) (*citing* *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947))).

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

<sup>56</sup> *Id.* at 301 (*citing* *Walling v. Portland Terminal Co.* 330 U.S. 148, 152 (1947)).

<sup>57</sup> *Id.* at 302.

wages would give it an unfair commercial advantage that the FLSA was intended to prevent.<sup>58</sup> However, the Court expressly noted that bona fide volunteers are not employees under the Act,<sup>59</sup> and it distinguished such actual volunteers from those who work voluntarily in otherwise nonexempt positions for substandard pay in violation of the FLSA's minimum wage protections.

*Portland Terminal Co.* and *Tony & Susan Alamo Foundation* are the seminal decisions that define the rough boundary among “those who, without any express or implied compensation agreement, might work for their own advantage on the premises of another,”<sup>60</sup> bona fide volunteers, and implied-in-fact employees who claim that they are volunteers but are actually entitled to minimum wages under the Act. This Article argues that unpaid interns and externs who work at private-sector businesses fall into the latter category, and are covered employees who are entitled to be paid minimum wage despite their protestations to the contrary. The following Section describes the Department of Labor's advisory publications that attempt to clarify the employee status of unpaid interns and externs under the FLSA.

### **3. Unpaid Internships and Externships Do Not Violate the FLSA Under Certain Circumstances**

Following the Supreme Court's jurisprudence that exempts both “those who, without any express or implied compensation agreement, might work for their own advantage on the premises of another” and bona fide volunteers from the FLSA's minimum wage guarantees, the Wage and Hour Division has recently distributed some advisory publications that clarify the employee status

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<sup>58</sup> *Id.* at 298–99.

<sup>59</sup> “[There is no] reason to fear that, as petitioners assert, coverage of the Foundation's business activities will lead to coverage of volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy. The Act reaches only the ‘ordinary commercial activities’ of [exempt nonprofit] organizations, and only those who engage in those activities in expectation of compensation. Ordinary volunteerism is not threatened by this interpretation of the statute.” *Id.* at 302–03 (internal citations omitted).

<sup>60</sup> *Portland Terminal Co.*, 330 U.S. at 152.

of unpaid interns and externs under the FLSA.<sup>61</sup> Although the Division’s advisory opinions and fact sheets do not carry the full force of law of administrative regulations,<sup>62</sup> they provide useful guidance about the applicability of the FLSA’s minimum wage guarantees both to unpaid interns and participants in university externship programs. Moreover, the Department of Labor considers its opinion letters to be binding rulings,<sup>63</sup> and the Supreme Court has deferred to the Department of Labor’s interpretations of both the FLSA and the Department’s own regulations.<sup>64</sup>

In a 2006 opinion letter sent to a redacted party, the Wage and Hour Division responded to a query whether participants in a university externship program were employees under the FLSA.<sup>65</sup> The program was organized as follows:

[T]he students spend one week “shadowing” an employee at a sponsoring employer. The students are not compensated for time spent at the sponsoring employer, nor do they receive college credit for their time. The purpose of the program is purely educational, and the sponsors invest significant effort into designing experiences for the externs. The students do not generally perform work for the employers, but may perform small office tasks or assist with a project. Because of the short duration of the program, the sponsors do not derive any benefit from the externs’ labor, and the externs do not displace any regular employees. . . . [T]he only benefit to the sponsor, aside

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<sup>61</sup> See, e.g., Wage and Hour Opinion Letter # FLSA2006-12, U.S. Dep’t of Labor, Emp’t Standards Admin., Wage and Hour Div. (April 6, 2006), available at [http://www.dol.gov/whd/opinion/FLSA/2006/2006\\_04\\_06\\_12\\_FLSA.pdf](http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.pdf) [hereinafter April 6, 2006, Wage and Hour Opinion Letter] (describing the test for whether an unpaid participant in a scholastic externship program is an employee of the sponsoring entity under the FLSA); Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act, U.S. Dep’t of Labor, Emp’t Standards Admin., Wage and Hour Div. (April 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter Fact Sheet #71] (describing the test for whether an unpaid intern working for a private, “for-profit” entity is an employee under the FLSA).

<sup>62</sup> *Christensen v. Harris Cnty.*, 529 U.S. 576, 586 (2000) (declaring that Department of Labor opinion letters, because they are not subject to notice-and-comment and other rigorous procedural requirements of Administrative Procedure Act, lack the force of law and are entitled only to limited deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). See also *Ramos v. Lee Cnty. Sch. Bd.*, 2005 WL 2405832, at \*4 (M.D. Fla. 2005) (holding that although Department of Labor fact sheet was not binding upon the court and was “on the low end” of the spectrum of authority, it was “entitled to some respect”).

<sup>63</sup> *In re Wal-Mart Stores, Inc.*, 395 F.3d 1177, 1184 (10th Cir. 2005); see also 29 C.F.R. § 790.17(d) (“The term ‘ruling’ commonly refers to an interpretation made by an agency as a consequence of individual requests for rulings upon particular questions. Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.” (internal citation and quotation marks omitted)).

<sup>64</sup> The degree of deference afforded to a Department of Labor opinion letter depends primarily upon whether the letter interprets the agency’s own regulation or whether it expresses a general opinion on a statute. The former receives greater deference, while the latter receives lesser deference. For a more thorough analysis of standards of judicial deference to Department of Labor publications, see David Borgen & Jennifer Liu, *Significant Developments in Wage & Hour Law: Deference Standards*, [http://www.gdblegal.com/documents/ArticlesAmicus\\_Briefs/NELA\\_Paper\\_final.pdf](http://www.gdblegal.com/documents/ArticlesAmicus_Briefs/NELA_Paper_final.pdf).

<sup>65</sup> April 6, 2006, Wage and Hour Opinion Letter, *supra* note 36.

from satisfaction in assisting students' career development, is the potential opportunity to screen future interns or employees. The externs are not guaranteed future internships or employment from their participation in the program.<sup>66</sup>

In its reply letter, the Division, citing *Portland Terminal Co.*,<sup>67</sup> opined that if all of the following factors are present, "a trainee, intern, extern, apprentice, graduate student, or similar individual" is not an employee of a sponsoring organization under the FLSA:

1. The training is similar to what would be given in a vocational school or academic educational instruction;
2. The training is for the benefit of the trainees or students;
3. The trainees or students do not displace regular employees, but work under their close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded;
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.<sup>68</sup>

The Division concluded that under the facts presented, the externs were not employees of the sponsoring organization because all of its six factors were present in the externship program.<sup>69</sup>

Proceeding to apply the list of factors to the organization's operations, the Division explained:

The training the externs receive is a practical application of material taught in a classroom; therefore, it qualifies as training similar to what would be given in a vocational school or academic educational instruction. The training primarily benefits the students because the students participate in the program to observe the practical application of the classroom instruction in the workplace, thus fulfilling the second requirement. The students' participation for only one week, the virtual absence of actual work, and the sponsor's need to assign a shadowed employee means the sponsor does not receive any tangible benefit and may in fact lose productive work from the employee assigned to the student, satisfying the fourth requirement. Because the externs "shadow" an employee, they do not displace any regular employees. Finally, the students are clearly told that

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<sup>66</sup> *Id.*

<sup>67</sup> The letter reiterates the *Portland Terminal Co.* Court's proclamation that the expansive "definition [of "employee" under the Act] '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.'" *Id.* (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)).

<sup>68</sup> *Id.* It should be noted that the factors 2-4 are drawn almost verbatim from the language of *Portland Terminal Co.* and factors 5-6 directly mirror its factual background. See Part I.B.2, *supra*.

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

they will not receive a job at the conclusion of the externship and that they will not receive compensation for the week.<sup>70</sup>

Thus, wrote the Division, the externs are not employees under the Act, and therefore are not entitled to the Act's guarantee of a minimum wage.<sup>71</sup> In so concluding, the Division stressed that "[t]his opinion is based exclusively on the facts and circumstances described in your request," and added that the "[e]xistence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein."<sup>72</sup> This warning is not merely a boilerplate disclaimer attached to the bottom of an opinion letter; rather, it reflects the centrality of the economic reality test to the entire holistic inquiry of employee status under the Act. The heavily factual and circumstantial nature of the test means that sponsoring organizations that employ unpaid interns and externs must carefully examine their own operations and cannot simply rely upon a blanket assumption that unpaid participants in a university externship program are not statutory employees as a general proposition.

The April 6, 2004, Wage and Hour Opinion Letter draws its reasoning directly from *Portland Terminal Co.*, which created a narrow exemption from the FLSA's minimum wage mandate strictly for the purpose of vocational, "on the job" training solely for the benefit of the trainee. Thus, the Letter's factors for FLSA minimum wage exemption for trainees focus heavily upon the vocational training and educational aspects of the programs that it discusses. Because of the Act's uniquely broad ambit of coverage and the historically remedial purposes for which it was enacted, courts should continue to construe any exemptions to the Act's coverage narrowly to discourage employers from improperly taking advantage of unpaid student labor. While the Division's April 6, 2004, Wage and Hour Opinion Letter opined only about participants in a

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

university externship program or in a vocational training program, the Division has also issued guidance about the employee status of unpaid interns who work for private-sector, “for profit” organizations independent of a university externship program.

The Division’s Fact Sheet #71,<sup>73</sup> distributed in April 2010, provides crucial guidance about the employee status of unpaid interns for private, “for profit” entities. As in the April 6, 2004, Wage and Hour Opinion Letter, the Division opines both (1) that the determination of employee status is emphatically a function of facts and circumstances and (2) that, under certain circumstances, such unpaid interns will not be considered employees under the Act.<sup>74</sup> In the Fact Sheet, the Division articulates a version of the six factors for employee status that subtly but notably differs from the Wage and Hour Opinion Letter’s version:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.<sup>75</sup>

Unsurprisingly, the factors described in Fact Sheet #71 are remarkably similar to those promulgated in the April 6, 2004, Wage and Hour Opinion Letter because both closely track the Court’s decision in *Portland Terminal Co.*. Notably, however, Fact Sheet #71 differs from the April 6, 2004, Wage and Hour Opinion Letter because it stresses the first and fourth—educational

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<sup>73</sup> Fact Sheet #71, *supra* note 36.

<sup>74</sup> April 6, 2004, Wage and Hour Opinion Letter, *supra* note 36; Fact Sheet #71, *supra* note 36.

<sup>75</sup> Fact Sheet #71, *supra* note 36.

similarity between the internship and a bona fide educational environment and the requirement that an employer derive no immediate benefit from an intern's work. The Fact Sheet clarifies that

if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.<sup>76</sup>

This clarification underscores the troubling reality of unpaid internships with private employers—that many unpaid interns routinely perform productive work that directly benefits their employers. While the characterization of the work of unpaid interns and externs as substantially productive and directly beneficial to employers is of course debatable, we should more carefully interrogate the reality of the widespread, normative use of entirely unpaid labor. Certainly there is significant variation in the quality and quantity of work performed by unpaid interns and externs, but the FLSA demands (1) that workers be paid a minimum wage by default, (2) that any exceptions be narrowly construed and individually evaluated with an eye to the remedial purposes of the minimum wage requirement, and (3) that quality or speed of work is not a factor in determining entitlement to minimum wage, so there is no defense that an inexperienced novice took too many hours or generated amateurish work product.

The following Part describes the extraordinarily broad ambit of liability under the FLSA, which includes both joint liability for joint employers and individual liability for individual actors who qualify as employers. Additionally, the Act may impose joint liability for third-party employers who are directly responsible for the violations of other employers. Additionally, the next Part argues that (1) universities often will qualify as joint employers of unpaid interns and externs, and therefore would be jointly liable for unpaid minimum wages; (2) even if universities are not joint employers under the FLSA, they may be jointly liable as third-party employers who

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

directly cause minimum wage violations; and (3) a broad class of individuals, including university administrators and private-sector internship supervisors, may be individually liable for any unpaid minimum wages.

**II. SPONSORING ORGANIZATIONS, UNIVERSITIES, AND INDIVIDUAL EXTERNSHIP PROGRAM ADMINISTRATORS ARE JOINT EMPLOYERS WHO ARE JOINTLY AND INDIVIDUALLY LIABLE FOR UNPAID MINIMUM WAGES**

The previous Section established the uniquely broad ambit of working relationships covered by the FLSA. Whether any particular worker is an “employee” under the Act, and therefore is entitled to a minimum wage for her work, is a facts and circumstances inquiry governed by the economic reality test. In short, if the economic reality of a working relationship is that the worker is working under the employer’s supervision for the benefit of the employer, then that worker is a statutory employee. Although the FLSA makes exemptions for certain types of employees, and the Department of Labor has issued guidance that certain classes of workers are not employees if working primarily for their own benefit, these exemptions are narrow, and the vast majority of working relationships will be covered by the Act.

This Part describes the extraordinarily long reach of liability for damages under the Act. Liability for unpaid minimum wages under the Act extends to any “employer” of an employee. Like its definition of “employee,” discussed in the previous Part, the Act’s definition of “employer” is uniquely broad, and the label potentially extends to a broad range of actors primarily because of two mechanisms. First, the FLSA imposes joint liability for unpaid wages upon joint employers of an employee. Because the Act imposes liability for unpaid minimum wages upon any employer of an employee, liability for those damages can simultaneously extend

to multiple culpable entities. Second, individual actors can qualify as employers under the Act, and therefore the Act imposes individual liability upon guilty individuals as well as other entities.

This Part first explains the mechanisms for joint liability for joint employers under the Act. Second, this Part argues that liability may extend to third-party employers who directly cause a violation of the FLSA, even if there is no direct or joint employer-employee relationship between that employer and the aggrieved employee. Third, this Part explains that contrary to normal notions of limited liability under the corporate structure, liability for unpaid wages extends to individual persons who qualify as an “employer” by exercising significant control over employees, regardless of whether the entity is a corporation or not. Fourth, this Part argues that, under the FLSA, many universities will qualify as joint employers of unpaid interns and externs that they sponsor, and therefore that liability for the unpaid minimum wages of law student externs will often extend to sponsoring schools in addition to the sponsoring organizations that directly employ interns and externs. Fifth, this Part argues that, even if universities are not joint employers under the Act, liability for unpaid wages will often extend to them nonetheless as third-party employers who directly cause violations of the FLSA. Finally, this Part argues that university administrators who administer externship programs and internship supervisors are “employers” under the Act in their individual capacities, and therefore that they should be, and often will be, individually liable for unpaid wages due to interns and externs.

#### ***A. FLSA Imposes Joint Liability for Unpaid Wage Violations upon Joint Employers***

The FLSA imposes liability for unpaid minimum wages upon any “employer” of an employee.<sup>77</sup> The Act defines the term broadly to include “any person acting directly or indirectly in the interest of an employer in relation to the employee.”<sup>78</sup> Moreover, as the next Section

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<sup>77</sup> 29 C.F.R. § 791.2(a).

<sup>78</sup> 29 U.S.C.A. § 203(d) (West 2012).

discusses in more detail, the Act further defines “person” to include any “individual,”<sup>79</sup> creating liability for damages for individual natural persons as well as for legal persons. The broad definition of “employer” means that multiple employers can be liable for the same unpaid minimum wage damages if the employee is employed by both at the same time. Whether a joint employment relationship exists among two or more employers and an employee depends on the facts of each case and is a function of the employee’s working relationship with each employer.<sup>80</sup> This Section describes Department of Labor regulations and the leading judicial standard, expressed in *Zheng v. Liberty Apparel Co.*,<sup>81</sup> for determining whether a joint employment relationship exists under the Act.

The Department of Labor has helped clarify the circumstances that give rise to a joint employment relationship by issuing a set of binding regulations called “Joint Employment Relationship Under the Fair Labor Standards Act of 1979.”<sup>82</sup> These regulations set the responsibilities of joint employers for payment of minimum wages under the Act, and declare that “if the facts establish that the employee is employed jointly by two or more employers, . . . all of the employee’s work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.”<sup>83</sup> Under these regulations, all joint employers are “responsible, both individually and jointly, for compliance with all of the applicable provisions of the [A]ct. . . .”<sup>84</sup> Having established general joint and several liability between joint employers for any violations of the Act, the regulations proceed to identify three more specific situations where a joint employment relationship will exist:

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<sup>79</sup> *Id.* § 203(a) (defining “person” under the Act as “an individual, partnership, association, trust, legal representative, or any organized group of persons”).

<sup>80</sup> 29 C.F.R. § 791.2(a).

<sup>81</sup> *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003)

<sup>82</sup> *See* 29 C.F.R. § 791.2.

<sup>83</sup> *Id.* § 791.2(a).

<sup>84</sup> *Id.*

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

- (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
- (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
- (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, or is controlled by, or is under common control with the other employer.<sup>85</sup>

Although these regulations described above carry the force of law, few court decisions have relied upon them to reach a decision about joint employment under the FLSA.<sup>86</sup>

Rather, courts apply a substantially similar multi-factor test, somewhat akin to the economic reality test, to determine whether a joint employment relationship exists among an employee and multiple employers. For decades courts applied a four-factor test initially developed by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*.<sup>87</sup> However, in 2003 the Second Circuit, calling the *Bonnette* four-part test “unduly narrow” and holding that it could not be reconciled with the uniquely expansive definition of “employee” under the FLSA, developed a new, more expansive six-part test in *Zheng v. Liberty Apparel Co.*<sup>88</sup> The *Zheng* test for joint employment draws from the reasoning of *Rutherford Food Corp.*, and considers the following factors: (1) whether the putative joint employer's premises and equipment are used for the employee's work; (2) whether the subcontractor (or the employee's primary employer, generally) has a business that can or does shift from one other employer to another; (3) the extent

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<sup>85</sup> *Id.* § 791.2(b).

<sup>86</sup> David Borgen & Matthew S. Makara, *Coverage*, 1 THE FAIR LABOR STANDARDS ACT § 3.II.D.3, at 3-27 (2010).

<sup>87</sup> *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). The four-factor test considered the following: whether the alleged employer (1) has the power to hire and fire the employees; (2) supervises and controls the work schedules or conditions of employment of employees; (3) determines the rate and method of payment of wages; and (4) maintains employment records. *Id.* See also Borgen & Makara, *supra* note 78, at 3-32–3-34.

<sup>88</sup> *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003).

to which the workers perform a line job integral to the joint entity's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the putative joint employer supervises the employee's work; and (6) whether the workers work "exclusively or predominantly" for the putative joint employer.<sup>89</sup> Additionally, the test urges district courts to "consider any other factors it deems relevant to its assessment of the economic realities" of the working relationship.<sup>90</sup>

In *Zheng*, the plaintiffs were a group of garment workers directly employed by a small contractor.<sup>91</sup> A much larger garment manufacturer had hired the contractor to work on its garment manufacturing line, and the workers worked in the manufacturer's own factory.<sup>92</sup> Additionally, their work was integral to the business operation of the manufacturer, and they worked under the close supervision of the manufacturer's inspectors.<sup>93</sup> The workers sued the manufacturer for FLSA violations, claiming that it was a joint employer under the Act.<sup>94</sup> Applying the *Bonnette* factors,<sup>95</sup> a district court granted summary judgment for the manufacturer, holding that no joint employment relationship existed.<sup>96</sup> The Second Circuit reversed and rejected the *Bonnette* test, holding that the manufacturer was a joint employer under the economic reality of the working relationship, and created the *Zheng* test. Because the *Zheng* court was considering joint employment in the context of garment workers who worked as subcontractors for a manufacturing company, certain of its factors speak in manufacturing terms, but the precedent, and its broad list

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Zheng v. Liberty Apparel Co.*, 2002 WL 398663, at \*1 (S.D.N.Y. Mar. 13, 2002), *vacated* 355 F.3d 61, 72 (2d Cir. 2003).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at \*2.

<sup>94</sup> *Id.* at \*1.

<sup>95</sup> The Court actually applied the four-factor test from *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984), which is substantially identical to the *Bonnette* test. For analytical clarity, this section will continue to refer to it as the *Bonnette* test.

<sup>96</sup> *Zheng v. Liberty Apparel Co.*, 2002 WL 398663, at \*6–\*7, \*9–\*10 (S.D.N.Y. Mar. 13, 2002), *vacated* 355 F.3d 61, 72 (2d Cir. 2003).

of factors, applies in any employment context. The scope of liability for joint employers is notably broad under *Zheng*, and employers may be exposed to liability as joint employers through a wide variety of working relationships. However, liability for an employee's unpaid minimum wages can likely also extend even to an employer who neither directly employs that employee nor qualifies as a joint employer under *Zheng*, but rather simply causes another employer's violation.

***B. Joint Liability May Also Extend to a Third-party Employer Who Directly Causes Another Employer's FLSA Violation***

The scope of liability for joint employers under the FLSA is broad. However, the scope of liability may be considerably broader yet, extending to employers who, although they do not directly employ an employee or qualify as a joint employer under the *Zheng* test, are an employer who directly causes a violation. The court in *Sibley Memorial Hospital v. Wilson*<sup>97</sup> held that in the Title VII context, an employer can be liable for a violation if it directly causes the violation, even if that employer does not directly or jointly employ the aggrieved employee. This Section argues that *Sibley*'s broad conception of the scope of employer liability under Title VII should also apply in the FLSA context to properly effectuate the remedial purposes of the Act and to prevent employers from circumventing employee rights to be paid a minimum wage.

In *Sibley*, the plaintiff was a male nurse who worked directly for his patients.<sup>98</sup> A nonprofit hospital helped match nurses to their employer patients but did not directly employ the nurses.<sup>99</sup> The nurse sued the hospital that coordinated his patient assignments, alleging that the hospital had violated Title VII's prohibition on sex discrimination over a period of thirty-four years by assigning him only to male patients while female nurses routinely worked for both male

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<sup>97</sup> *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1342 (4th Cir. 1973).

<sup>98</sup> *Id.* at 1339.

<sup>99</sup> *Id.*

and female patients.<sup>100</sup> The hospital moved for summary judgment on jurisdictional grounds, arguing that it could not be liable for discrimination against the nurse under Title VII because it was not his employer, and that Title VII liability can only accrue between an employer and an employee who have a direct employment relationship.<sup>101</sup> The district court entered summary judgment for the nurse because the hospital had not denied any of the nurse's allegations, but rather had argued solely that it was not his employer.<sup>102</sup>

The Court of Appeals for the District of Columbia Circuit agreed that Title VII liability is not limited solely to employers that have a direct employer-employee relationship to an employee, holding instead that damages “may be available, in an appropriate case, against respondents who are neither actual nor potential direct employers of particular complainants.”<sup>103</sup> Acknowledging that the nurse and the hospital did not have any direct employment relationship in a traditional sense, the court nonetheless found dispositive that the hospital did “control the premises upon which [the nurse's] services were to be rendered, including [his] access to the patient for purposes of the initiation of such employment.”<sup>104</sup> By discriminatorily intervening between the nurse and his patient employer, the hospital had exposed itself to Title VII liability.<sup>105</sup>

The *Sibley* court's extension of Title VII liability to an employer that did not have a direct employment relationship with the complainant was based primarily upon Title VII's declaration that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against *any individual*.”<sup>106</sup> The court decided that Title VII's grant of a cause of action to “any individual”

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<sup>100</sup> *Id.* at 1340.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1339.

<sup>103</sup> *Id.* at 1342.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> 42 U.S.C.A. § 2000e-2(a)&(1) (West 2012) (emphasis added). *See also* *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341–42 (4th Cir. 1973).

rather than to “any employee” meant that the statute did not contemplate that liability could only accrue if an employer discriminated against an individual whom it directly or prospectively employed.<sup>107</sup> Rather, liability accrues if the person effectuating the discriminatory act is *an employer*.<sup>108</sup> Additionally, the court examined the policy of Title VII to prevent and remedy employment discrimination, and concluded that “neither the spirit nor, more essentially, the language of the Act leave . . . outside the reach of Title VII” liability for a third party discriminator that is *an employer* but not *the* direct employer of the aggrieved party.<sup>109</sup> In doing so, the court prioritized the remedial policy and the anti-discriminatory substance of the Act over a narrow, mechanistic reading that would have limited the vigor of Title VII.

Courts should extend *Sibley*’s reasoning to the FLSA context and allow plaintiffs to recover against third-party employers who cause minimum wage violations even in the absence of a direct or joint employer-employee relationship. If the *Sibley* court had held that only direct employers can be liable for a Title VII violation against an employee, it would have encouraged employers to limit their Title VII liability by setting up complicated structures that channel claims of violations to other actors. Such is also the case in the FLSA context; at the very least, extension of *Sibley* liability to third-party employers who cause a violation would discourage career placement services, law school career development offices, and like entities from knowingly encouraging FLSA violations by placing job seekers in sub-minimum-wage unpaid jobs.

One problem with the argument that *Sibley* liability should extend to the FLSA context is that the wording of the FLSA may not allow it. While the *Sibley* court found especially dispositive that the text of Title VII forbids “an employer” from discriminating against “any

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<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *Id.* at 1342.

individual,”<sup>110</sup> the text of the FLSA minimum wage section, 29 U.S.C. § 206, commands that “[e]very employer shall pay to each of his employees . . . not less than the minimum wage.”<sup>111</sup>

However, the text of the FLSA “penalties” section arguably extends civil liability to “any employer” that “violates” the rights of any “employees affected” by declaring that “[a]ny employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages.”<sup>112</sup>

Interpretation of this arguably ambiguous language may be informed by the broader point that the *Sibley* court’s reasoning carries over entirely intact. Like the text of Title VII at issue in *Sibley*, which creates liability for “an employer” who causes a violation of Title VII, the text of the FLSA certainly allows for the inference that it should apply to “[e]very employer” who causes a minimum wage or overtime violation to occur, regardless of whether it directly or jointly employs the aggrieved party.

Remember that the FLSA defines “employer” broadly as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>113</sup> Under the reasoning of *Sibley*, a third-party who does not have a direct or joint employer-employee relationship with an employee should still qualify as “an employer” under the FLSA because it is “acting . . . indirectly in the interest of an employer”<sup>114</sup> by facilitating a minimum wage violation. While Part II.E., *infra*, argues that universities should be liable for the unpaid minimum wages of their student interns and externs under *Sibley*, the next Section describes the individual liability the FLSA assigns to individual persons who exercise sufficient control over employees.

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<sup>110</sup> See 42 U.S.C.A. § 2000e-2(a)&(1) (West 2012); *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341–42 (4th Cir. 1973).

<sup>111</sup> 29 U.S.C.A. § 206(b) (West 2012).

<sup>112</sup> *Id.* § 216(b).

<sup>113</sup> *Id.* § 203(d).

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

***C. FLSA Imposes Individual Liability for Unpaid Wage Violations upon Individuals  
Who Exercise Sufficient Control Over Employees***

As discussed above, the FLSA defines “employer” broadly to include “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>115</sup> “Person” is also defined notably broadly to include, *inter alia*, “an individual.”<sup>116</sup> Thus, any individual can be subject to individual liability for a minimum wage violation if he qualifies as an “employer” by acting in the interest of an employer in relation to an employee. The primary consideration whether an individual will be subject to individual liability under the FLSA is whether the individual has exerted sufficient control over significant aspects of the employer’s employment practices, particularly pay.<sup>117</sup> In any case, the standard for imposing individual liability under the FLSA is considerably lower than the veil-piercing requirements required by traditional corporate law.<sup>118</sup> Generally speaking, courts have found employer status for an individual when the individual has managerial responsibilities and exercises significant control over the terms and conditions of an employee’s employment.<sup>119</sup> Additionally, an individual will qualify as an employer if that individual has supervisory authority over an employee, is partially or wholly responsible for the violation, or has control over the employer’s compliance with the FLSA.<sup>120</sup>

As with all other inquiries of employer and employee status under the FLSA, whether an individual qualifies as an employer, and therefore is subject to individual liability, is a matter of

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

<sup>116</sup> *Id.* § 203(a).

<sup>117</sup> See Borgen & Makara, *supra* note 78, at 3-39 (*comparing* Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983) with Sandom v. Travelers Mortg. Servs., 752 F. Supp. 1240, 1251 (D.N.J. 1990)).

<sup>118</sup> *Id.*

<sup>119</sup> See, e.g., Agnew, 712 F.2d at 1514; Donovan v. Sabine Irrigation, 695 F.2d 190, 194–95 (5th Cir. 1983).

<sup>120</sup> See, e.g., Saunders v. Ace Mortg. Funding, Inc., 2007 WL 4165294 (D. Minn. Nov. 16, 2007) (individuals who hired and fired employees and who made decision to implement compensation plan at issue were employers); Alba v. Brian Loncar, P.C., 2004 WL 1144052 (N.D. Tex. May 20, 2004) (individual attorney with no ownership interest in firm was individual employer because he directed employees, exercised control over firing, distributed memoranda on matters of employment); Luder v. Endicott, 86 F. Supp. 2d 854 (W.D. Wisc. 2000) (individual state government supervisors were employers because of supervisory status).

facts and circumstances governed by the economic reality of the situation. The following Sections argue that (1) universities often will qualify as joint employers of unpaid interns and externs that they sponsor and therefore should be held jointly liable for unpaid minimum wages under the Act; (2) even if universities are not joint employers under the Act, they should be held liable as third-party employers who cause FLSA violations under *Sibley*; and (3) university administrators and externship supervisors often will individually qualify as employers because they exercise significant control over the terms and conditions of the employment of interns and externs.

***D. Sponsoring Organizations and Universities Are Joint Employers of Interns and Externs and Are Jointly Liable for Unpaid Minimum Wages***

Universities will often qualify as joint employers of unpaid interns and externs under the *Zheng* test because they are FLSA-covered employers who (1) significantly benefit from the work of unpaid interns and externs, (2) exercise significant control over the terms and conditions of an unpaid intern or extern's employment relationship, (3) and furnish the facilities and resources necessary for the completion of internship work. Universities are FLSA-covered entities per se so long as they have at least two employees,<sup>121</sup> so generally they do not need to satisfy any other jurisdictional prerequisites to fall under FLSA coverage. Although student interns and externs are not employees of the universities they attend in a conventional sense, universities should qualify as joint employers, and therefore be subject to joint liability for unpaid minimum wages, because they benefit significantly from the unpaid working arrangement with sponsoring organizations and because they exercise a significant amount of control over almost every aspect of the terms and conditions of the employment of interns and externs, including, and especially, the decision to pay the interns no wage.

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<sup>121</sup> Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA), U.S. Dep't of Labor, Emp't Standards Admin., Wage and Hour Div. (July 2009), available at <http://www.dol.gov/whd/regs/compliance/whdfs14.pdf>.

Universities significantly benefit from the unpaid work of participants in externship programs primarily because the operation of an externship program helps to dramatically reduce the university's operating costs. The traditional educational model for a university is that students take classes taught by professors in exchange for school credit. Each professor is paid either a yearly salary or a per-credit salary based on the number of credits she teaches, and, generally speaking, each professor is expected to teach some classes each semester. Therefore, ordinarily the amount of tuition each student pays is directly correlated to the school's costs of operation via its faculty salaries – students are expected to take, say, ninety credits over the course of their education, and the school must pay professors to teach ninety credits per student. Thus is the traditional model of university education.

However, a school's decision to offer credits in exchange for participation in an externship program can dramatically reduce a school's operating costs. Imagine a university that requires its students to earn ninety credits to graduate. If half of the university's students receive six credits through an externship program over the course of their time at the school, the school can offer 87 rather than 90 credits of classes to each student without increasing its average class size. Assuming that each credit costs a university the same amount to offer, offering three fewer credits out of a catalogue of ninety allows a school to save 3.3 percent of its faculty budget.

Universities also exercise significant control over the terms and conditions of student unpaid externships, primarily because they can refuse to approve the award of credits to participants in the programs. Many externship programs require participants to have their jobs pre-approved, and participants must explain the substance of the work they will be performing in varying levels of detail depending on the university. Furthermore, many schools require externship program participants to file hour logs and periodically write check-in assignments

throughout the length of their externships. Because a university can deny credits to externship participants if it is not satisfied with any of the terms and conditions of the student's externship—i.e. the number of hours worked or the substantive character of the work performed—universities should qualify as joint employers under *Zheng*.

Finally, universities should qualify as joint employers because they furnish many of the facilities and resources necessary for an extern's completion of his unpaid work. For example, in the context of law school externship programs, many externs continue to use their access to the Westlaw and LexisNexis research databases, provided by the school ostensibly for academic purposes, throughout their externships and for the benefit of their employers. Some authors have suggested that many private sector law firms hire unpaid interns solely for the free access to legal research databases that students bring with them.<sup>122</sup> Additionally, universities offer their library resources, the expertise of library staff, and library space itself for the unfettered use of students, many of whom certainly use these resources and facilities to help them complete externship work.

Because many universities benefit significantly and materially from the unpaid work of their student interns and externs, exercise substantial control over the terms and conditions of the work of those interns and externs, and furnish resources and facilities necessary for the completion of externship work, they should be considered joint employers under *Zheng*, and therefore jointly liable for unpaid minimum wages. The next Section argues that even if universities are not joint employers under *Zheng*, many should be jointly liable regardless under *Sibley* as third-party employers who proximately cause FLSA violations.

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<sup>122</sup> See, e.g., James B. Levy, *Utah opinion notes "numerous" law students report employment is conditioned upon criminal misuse of free Westlaw access*, LEGAL SKILLS PROF BLOG (Jan. 18, 2013, 11:52 AM), [http://lawprofessors.typepad.com/legal\\_skills/2012/01/utah-opinion-notes-numerous-law-students-report-employment-is-conditioned-upon-criminal-misuse-of-fr.html](http://lawprofessors.typepad.com/legal_skills/2012/01/utah-opinion-notes-numerous-law-students-report-employment-is-conditioned-upon-criminal-misuse-of-fr.html).

***E. Many Universities May be Liable for Unpaid Minimum Wages under Sibley Because They Are “An Employer” Who Directly Caused an FLSA Violation***

The previous Section argued that many universities are jointly liable for the unpaid minimum wages of their students who participate in externship programs because they are joint employers under *Zheng*. However, even if universities do not qualify as joint employers under *Zheng*, many of them should be jointly liable nonetheless under *Sibley*'s extension of liability to third-party employers who proximately cause a violation. Although *Sibley* was a Title VII case, Part II.B argued that it should also apply in the FLSA context both because the text of the FLSA allows it and because such an application would effectuate the remedial policy of the Act. Universities that administer externships that do not qualify for FLSA exemption would be liable under *Sibley* because they are FLSA-covered employers who, although not in a direct or joint employer-employee relationship with their student externs, directly cause FLSA minimum wage violations by acting as the sole intermediary between unpaid externs and their sponsoring entities, thereby directly facilitating minimum wage violations.

Universities that administer unpaid externships that violate the minimum wage requirement are in a remarkably similar position to the defendant hospital in *Sibley*. In that case, the hospital was not the plaintiff nurse's direct employer, but the court found it enough to impose liability upon the hospital that it did “control the premises upon which [the nurse's] services were to be rendered, including [his] access to the patient for purposes of the initiation of such employment.”<sup>123</sup> Like the hospital in that case, universities have absolute control over student access to the externship employers for whom they work. Without university-administered externship programs, for-credit unpaid externship jobs would not exist at all. In a very real sense, universities absolutely control externs' access to their employers for initiation of their

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<sup>123</sup> *Sibley Mem. Hosp. v. Wilson*, 488 F.2d 1338, 1342 (4th Cir. 1973).

employment. Universities do not typically have absolute control over the premises upon which unpaid externs render their services. However, as the previous Section argued, it is likely that externs perform a significant portion of their work on school premises and using school resources.

Universities may, and should, be jointly liable for the unpaid minimum wages of any externship program participants who qualify as “employees” under the FLSA, both as joint employers under *Zheng* and as third-party employers who directly cause an FLSA violation under *Sibley*. Moreover, because the FLSA imposes individual liability upon any individuals who also qualify as an “employer” under the FLSA, a significant number of people may also be individually liable, including university administrators and extern supervisors.

***F. Many University Externship Program Administrators and Other Individuals Should Be Individually Liable for the Unpaid Minimum Wages of Interns and Externs***

Because the FLSA imposes individual liability upon any individual who qualifies as an employer, broadly defined as any person who acts in the interest of an employer in relation to an employee, the class of people potentially individually liable for unpaid minimum wages of interns and externs is large. Generally speaking, individuals will be subject to individual liability if they exert significant control over an employer’s employment practices, particularly pay; if they exercise managerial authority over employees; if they are personally responsible for the violation; or if they are responsible for the employer’s general compliance with the FLSA. In the context of unpaid interns and externs who work for private-sector employers, two classes of people may be subject to individual liability: (1) university officials who administer illegal externship programs and other school officials significantly involved in the decision to sponsor illegally unpaid internships and externships, and (2) individuals responsible for hiring and supervising unpaid interns and externs at their sponsoring employers.

University officials who administer externship programs that place interns and externs in illegally unpaid jobs may be subject to individual liability under the FLSA because they exercise managerial authority over externs and they are significantly responsible for the university's continued FLSA violations. In many externship programs, such administrators exercise managerial authority over externs by having the ultimate discretion whether to award school credit. Additionally, externship program administrators have significant managerial authority over the terms and conditions of an extern's employment such that they act as de facto supervisors. For example, in many externship programs administrators must approve the number of hours an extern will work, who will supervise the extern, and exactly what types of work the extern will be doing before she can even begin the externship. Such involvement in the terms and conditions of the extern's employment, coupled with the administrator's ultimate authority to decide whether the extern will receive credit, means that externship program administrators may be individually liable for any illegal unpaid externships that they oversee.

In addition to university officials who actively administer externship programs, school administrative officials who approve the existence and maintenance of illegal externship programs, such as law school deans, may also be subject to individual liability under the Act. High-ranking university officials are partially responsible for university FLSA compliance, and their decisions to maintain the existence of such programs directly affect the pay (or lack thereof) of many student participants. Like CEOs and company presidents who have been held individually liable for widespread FLSA violations at their companies, higher-ranking university administrators may be subject to individual liability for widespread violations at their universities.

Finally, supervisors of illegally unpaid interns and externs may be held individually liable for FLSA violations if they are significantly involved in hiring and the decision to pay zero wages

to interns and externs. Such supervisors are likely to have significant authority over the substantive terms and conditions of an extern's employment. Moreover, supervisors and those in charge of hiring are directly complicit in violations by being personally involved in the day to day work of unpaid employees. Of course, like the holistic inquiry of employer status under the FLSA, whether any particular individual will be held individually liable is a function of facts and circumstances, but any individual who falls within the FLSA's uniquely broad definition of "employer" will be individually liable for damages if the unpaid internship or externship does violate the FLSA.

## **CONCLUSION**

Unpaid internships and externships are a commonplace—almost ubiquitous—experience for many university students and younger workers. Opinions about the morality, usefulness, and educational value of such unpaid jobs vary considerably, but the legality of such unpaid jobs is far from clear. This Article has argued that many unpaid internships and externships for private employers actually violate the minimum wage provisions of the Fair Labor Standards Act of 1938. Universities that sponsor externship programs and private-sector employers that hire unpaid interns and externs should carefully evaluate the unpaid jobs that they offer, lest they be exposed to potentially considerable liability for unpaid minimum wages.

This Article has further argued that universities that administer externship programs may be, and should be, jointly liable for any damages due to unpaid interns and externs that they sponsor, both as joint employers and as third-party employers that directly cause and facilitate FLSA violations. Furthermore, a broad class of individuals may be individually liable for the illegally unpaid minimum wages of interns and externs. Some such individuals include university administrators, particularly externship programs administrators and deans, and individuals who

supervise and hire unpaid interns at their private-sector jobs. The goal of this Article is to encourage employers to pay interns and externs a fair wage for their work. Additionally, this Article encourages universities to more carefully examine the educational value—and morality—of the unpaid internships and externships that they sponsor, so that they can ensure that students who work for no wages will have a genuinely edifying, educational experience rather than simply serve as a source of free labor.