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DEALING WITH THE PROBLEM OF UNPAID INTERNS AND NONPROFIT/PROFIT-NEUTRUAL NEWSMAGAZINES: A LEGAL ARGUMENT THAT BALANCES THE RIGHTS OF AMERICA'S HARDWORKING INTERNS WITH THE NEEDS OF AMERICA'S HARDWORKING NEWS GATHERERS

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> With the sweat of your face you shall eat bread[,] till you return to the ground.[1]

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[1]Genesis 3:19.

INTRODUCTION

Whether one is a religious person or not, the wisdom of the Bible that deals with the inescapable human need to labor rings true. While some lucky souls can go through life happily living off the fruits of the work of others, and while other greatly unfortunate people lose everything (including sometimes even their lives) despite having worked diligently to produce a valuable estate, and planned intelligently to secure it, the vast majority of us are born into, and live in, the great middle class.In the middle class,both profit and security are possible, but only through toil and labor immersed in "the sweat of your face." Labor is nearly always rewarded, and its rewards are nearly always enjoyed, at least to some extent. Life in the great middle class in the United States is neither perfect nor terrible, but it is a blessing for nearly all of us mortals.

But of course, labor cannot be rewarded if the entire purpose of the agreement to labor was that the labor would come to the employer for free. This is the case with the modern unpaid internship. A situation wherein one works for no money, but instead for inchoate "experience" or "networking connections," the unpaid internship is fraught with danger of injustice to the worker. There isalmost nothing in this American world of ours, if it involves interaction with professionals of any kind, which cannot bring up-and-coming workers "experience" and "networking connections." Sporting events, alumni events, social gatherings at bars, restaurants, and concerts, and on and on the list could go. All of these venues, if they are frequented by the right people, can bringup-and-coming workers"experience" and "networking connections." But a paycheck (or some other payment of goods that have a clear monetary worth) given for a specific amount of time worked is not so easy to come by.

According to the National Association of Colleges and Employers, close to 38% of workers on the lowest rung of the professional ladder get no monetary compensation for their travails[2]. It's a cruel practice in a country that enacted a constitutional amendment stating that people, intending to work for their own profit, cannot agree to work for nothing.[3]

Working on the for-profit premises of another without significant (or any) benefit to the worker, is a problem that the Anglo-American common law system has long encountered. Writing roughly 250 years ago, Sir William Blackstone stated the following when describing his reasons for trying to move more of the training of lawyers to the university system:

> The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal [arts and university system] education, as of no use to students in the law and placing them, in its stead, at the desk of some skillful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of [the] business. A few instances of particular persons (men of excellent learning and unblemished integrity), who, in spite of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biased many parents of shortsighted judgment, in its favor: not considering that there are some geniuses formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing that those very persons have frequently recommended by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education. . .
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> Making, therefore, due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus educated to the bar, in subservience to attorneys and solicitors, will find he has begun at the wrong end. If practice be the whole he is taught, practice must

[2] NATIONAL ASSOCIATION OF COLLEGES AND EMPLOYERS, 2012 INTERNSHIP AND CO-OP SURVEY (2013), http://www.naceweb.org/research/intern-co-op/2012-survey/.
[3] U.S. CONST. amend. XIII.

> also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* (so the law is written) is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn a *priori*, from the spirit of the laws and the natural foundations of justice.
>
> Nor is this all; for (as few persons of birth, or fortune, or even of scholastic education, *will submit to the drudgery of servitude and the manual labor of copying the trash of an office*) should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is [a] matter of very public concern.[4]

The situation Blackstone was in, and the views Blackstone had, were very different from our own today. Blackstone grew up in an England where new lawyers were trained through a system of apprenticeship accompanied by informal classroom teaching.[5] England had only two universities, Oxford and Cambridge,[6] and the law students "being excluded from" both of them had "found it necessary [hundreds of years earlier] to establish a new university of their own," namely, the Inns of Court.[7] Blackstone grew up with the Inns of Court as the "law school" of England, and yet he saw problems with it. While the Inns of Court had many lawyers and judges who went about them, lecturing and teaching,[8] about more than, to use Blackstone's phrase,the "mechanical part of the business" of practicing law, and instead gave young law students some education in philosophy and politics, this could never be more than just a small garnish on the intellectual meal that the law students ingested over their years in study.

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[4] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69) *31-33 (footnote call numbers omitted) (first and second emphases in the original, third emphasis added).

[5] *Id.* at *23-24.

[6] *See id.* at *23-24, 30.

[7] *Id.* at *23.

[8] William Carey Jones ed. *Annotation* in SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 34 n.12 (William Carey Jones ed., Claitor'sPubl'g Div. 1915) (1765-1769).

Blackstone himself had graduated from Oxford, both with a Bachelor's Degree, and a Doctorate, in the Civil Law (that is, the Roman Law).[9]He did much of this before he had completed his study of the English statute and common law and was called to the Bar.[10] Thus, he had a uniquely good perspective of what a lawyer lacked if he was able to be called to the Bar, but had never even attended college. With this information in mind, Blackstone became a great supporter of the idea that the training of lawyers should be fundamentally transferred to *law schools* within the universities of England, and that new lawyers, in addition to, and before they start, their training in the"mechanical part of the business" of practicing law, should at least get the university education that would accompany the new law degrees that the law schools would give out, and probably should avail themselves of an undergraduate education too while attending the university.[11]

These new lawyers would be better lawyers for all the reasons Blackstone listed. They would be "instructed in the elements and first principles upon which the" law "is founded" and established; they would "comprehend" arguments "drawn a *priori*, from the spirit of the laws and" from "the natural foundations of justice." Blackstone was never able to convince the leaders of England's universities to create such law schools, and teaching what became his famous *Commentaries on the Laws of England* as a class on English common law to the students of the University of Oxford is as close as Blackstone ever got to that goal.[12]Ironically, not only is it true that it was only after Blackstone's death that England began to adopt something similar to the method of teaching young lawyers-in-training that

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[9] William Carey Jones, *Introduction in*SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at xvi, xx (William Carey Jones ed., Claitor'sPubl'g Div. 1915) (1765-1769). On the Civil Law being the Roman Law, *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *17-20.

[10] William Carey Jones, *Introduction in*SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at xvi (William Carey Jones ed., Claitor'sPubl'g Div. 1915) (1765-1769).

[11]*Id.* at xxix; 1 WILLIAM BLACKSTONE, COMMENTARIESat *33-34.

[12] William Carey Jones, *Introduction in*SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at xv, xxix (William Carey Jones ed., Claitor'sPubl'g Div. 1915) (1765-1769).

he had advocated for, but, it was the United States that adopted the Blackstonian ideal of legal training most completely.[13]

And so the story Blackstone told, and that I have retold, is most concerned with the reform and progress of legal education in the English-speaking world. And yet, that moral of that story is not our concern here. And there are other morals of this story that, I certainly hope, we all positively disagree with. For instance, the aristocratic worry that "few persons of birth" and/or "fortune" would become lawyers were Blackstone's proposed reforms to not be acted upon is a worry that is inappropriate in our egalitarian Republic (If anything, the problem today is that too many new lawyers are men and women of "birth" and/or "fortune," while it is too hard for the common man and the common woman to get a leg up in the world of the law.).

Yet, we do not have to endorse all of Blackstone's opinions for us to find great wisdom in at least a few of them. His statements describing how a totally apprenticeship-filled (even more than the usual method of the Inns of Court in his time) legal education would go, on how it would consist of the "drudgery of servitude and the manual labor of copying the trash of an office," sounds familiar to anyone who knows anything about the abuses of unpaid intern workers in today's world.[14] One of the things Blackstone seems to be getting at in this passage is that a lawyer, already in the day-to-day business of the practice of law for profit, often has a significant conflict of interest with respect to any law students put into his care for the purpose of teaching them the law. That conflict of interest is obvious - the law students are supposed to be trained via doing the "real" work of lawyers, but "real" work done for the lawyer-teacher can profit that lawyer-teacher in his practice immensely and immediately, while the trial-and-error phenomenon associated with the

[13]Id. at xxix.
[14]Paul Lucas, Blackstone and the Reform of the Legal Profession, 77 ENG. HIST. REV. 304, 456 (1962).

teaching of each new technique to the law student only takes more time and money away from the lawyer-teacher.

It is obvious that the lawyer-teacher has some interest in getting the law student to be able to do, repeatedly, the same simple and boring (but lucrative) tasks, in telling the law student that it is in the law student's interest to "keep on practicing" these tasks until the law student "is absolutely perfect" at them, and in never teaching the law student much beyond that. At the same time, the law student has an interest in one, largely opposite, thing: in being taught as much of the law as is possible. But since the lawyer-teacher is the boss, and the law student is the subordinate, we end up with a situation where the law student spends years learning nothing, or next to nothing, as he "copies the trash of" the law "office" and endlessly completes the same boring and simple tasks of "manual labor," again, and again, and again.

Using a form of analysis that my own "Blackstones" at my former law school have taught me, I am going to take it as true a priori that this sad story Blackstone tellsus about the abused mid-1700's law student is also descriptive of the unpaid intern workers in the United States today. Both work for no pay, and are told that if they work for no pay, they will still be compensated by a kind of education. The promise of "experience" and "networking connections" are what unpaid intern workers today are offered, while the law students of the mid-1700's were offered a chance to learn how to become lawyers. Both end up getting nothing, or next to nothing, for this "drudgery of servitude" that they endured. There is ample evidence in favor of this view. But for now the following quote will suffice:

> The first problem with unpaid internships for law students at private law firms is that the failure to pay interns for their work is generally illegal. Where an intern performs work that is part of a firm's ordinary business, such that the firm benefits from the intern's labor,

> the intern should properly be regarded as an employee, for whom payment of at least the statutory minimum wage is required.[15]

The problems outlined with unpaid internships for law students at private law firms by Professor Fink are, I firmly believe, common to nearly all unpaid intern workers in the United States.[16] But, as I have already stated, that situation is taken to be the case *a priori* in this article. Having set out as much, I am most interested in looking at what the people of the United States *will do* once state and federal courts begin to finally act against illegal unpaid internships.[17] I ask this question, and worry about its answer, because not all unpaid labor is illegal and unethical. Indeed, there are ways to work for free that are both legal and highly laudable.

The example I want to put at the heart of the analysis in this article is that of nonprofit and profit-neutral newsmagazines in the United States today.[18] Such magazines exist for the good of the ideas and ideology that they promote, and not for the making of profit by the people who own the corporation that is the magazine. Insofar as they do this

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[15]Eric M. Fink, *No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV.435, 441 (2013).

[16]*See id.*at 3, 16-20. In the end, Professor Fink's words can be used, with minor changes, to state my firm opinion: "Unpaid internships for law students in private law firms," and unpaid internships at for-profit businesses in general, "are illegal under the Fair Labor Standards Act and raise concerns under legal ethics rules" and under the general rules of ethics as well. *Id.* at 24. But, as I have already stated, this debate concerning unpaid internships in general in the United States, is not what is at issue in this article. I ask my readers to take my firm views for granted as they read on in this piece, and to see if I have found a way to protect nonprofit and profit-neutral newsmagazines, while also protecting the rights of unpaid intern workers.

[17] Federal Courts have already decided some preliminary matters surrounding unpaid internships. In Wang v. Hearst Corp., No. 12 CV 793 (HB) (S.D.N.Y. May 8, 2013), a federal district court ruled that internships varied so much in scope and duties that the same issues did not predominate in a class consisting of all unpaid interns at Hearst Corporation. However, the court did allow individual lawsuits to proceed.In Glatt v. Fox Searchlight Pictures, Inc. No. 11CV 6784 (WHP) (S.D.N.Y. June 11, 2013) another judge in the same federal district court ruled that a class of unpaid interns should have been classified as employees. The judge certified the class.

[18] I dub some newsmagazines "profit-neutral" because not all of the newsmagazines in the United States today that never make a profit, and continue to publish out of a sense that they are producing a public good, are officially nonprofit corporations. Some were founded as for-profit corporations, and even though the hope of making a profit became a fantastical notion for them long ago, they refuse to change their status to that of nonprofits because, as nonprofits, they would be unable to legally write editorials endorsing certain political candidates at election time. They have no hope anymore of making a profit, but, they value being able to play a direct role in elections in the United States so much that they retain the (technical) status of being "for-profit." *See infra* note 33. As a result of this, I think it is most fair to call these particular newsmagazines "profit-neutral" and group them with newsmagazines that are completely nonprofit corporations, at least for the purpose of figuring out what the law of unpaid internships should be.

in particular, they are opinion journals. And yet, as simply magazines run by professional journalists, they—likeall other newspapers and newsmagazines—are interested in disseminating the news of happenings that are important to considerations of law, morality, aesthetics and politics.

Insofar as they do this, they are traditional news-reporting journals. Therefore, such magazines also exist for the good of telling American citizens (and the citizens of the world) the news. Both of these goods are legitimate public goods that often cannot be produced without the people producing them incurring a loss. That loss, compounded year after year, would eventually drive the nonprofit and profit-neutral newsmagazines out of business. Society can counteract this in two main ways. First, persons with enough wealth can donate funds to keep the newsmagazines running. Second, persons with some time and energy to spare can donate some of their hours of labor to keep the newsmagazines running. The second phenomenon can be described as an "unpaid internship," though it is completely unlike the sad tale Blackstone told. The eighteenth century law student worked for the benefit of education necessary to complete his training as a lawyer.

As has been stated, the unpaid intern worker of today works for "experience" and "networking connections." But, the unpaid worker who volunteers to help an opinion journal he believes in, that he thinks has a particularly good perspective on newsgathering, and who knows that but for the help of people like him, the opinion journal would go out of business, is making a decision to give his labor away. Fundamentally, he is performing an act of charity. This act of charity is no different than the acts of people who give their time to museums they believe in, to houses of worship that they believe in, and to other institutions and causes they believe in.

The laws that command the minimum wage are there to make sure that workers, who are laboring for their own profit, get a bare minimum for their efforts. Those laws are there to protect workers as they make for-profit contracts for labor. They were not created to make charity impossible for those who choose to donate labor instead of money. Thus, it is important for the United States that as courts finally act against illegal unpaid internships they do not go too far and also destroy the charity of donated labor. And the nonprofit and profit-neutral newsmagazines of the United States are a perfect example of the kind of institution in need of charity that is threatened by the possibility that courts might go too far.

The first part of this article will tell the story of two such opinion journals/profit-neutral newsmagazines, one progressive and one conservative. In so doing, I will show the extent of public interests that are wrapped up in the future of such newsmagazines. In the second part of this article I will explain the federal statute and Supreme Court interpretations that govern this area of American life. In the last part of this article I will apply the law to the situation and characteristics of the newsmagazines, which will show to the reader the legal pathway by which courts can put an end to illegal unpaid internships without endangering at all the charity of donating labor to a cause one believes in.

I. THE DIRE SITUATION OF NONPROFIT AND PROFIT-NEUTRAL NEWSMAGAZINES

The state of news reporting in the United States today is either dire, or very close to being so. What has happened, ironically, is that the lack of profit that has long plagued the American opinion journals now has come to also plague the traditional news-reporting journals as well. And thus, the great irony is that we may be looking at the beginnings of a world where the model of the nonprofit and profit-neutral newsmagazines of the United

States becomes the template on which almost all future newsgathering (for print) is based.[19] Before the future, however, comes the present and came the past, and that is where I should start. The oldest, longest-running, and continuously-running progressive and conservative profit-neutral newsmagazines/opinion journals in the United States are The Nation and National Review, respectively. If how they do business is the future, we should start our discussion by looking at how they have already managed to not only exist, but flourish, over roughly the past 100 years.

Two leading American historians have written of The Nation that:

> Magazines partially satisfied the public appetite for good reading. . Possibly the most influential journal of all was the liberal and highly intellectual New York Nation, which was read largely by professors, preachers, and publicists as 'the weekly Day of Judgment.' Launched in 1865 by the Irish-born Edwin L. Godkin, a merciless critic, it crusaded militantly for civil-service reform, honesty in government, and a moderate tariff. The Nation attained only a modest circulation—about 10,000 in the nineteenth century—but Godkin believed that if he could reach the right 10,000 leaders, his ideas through them might reach. . .millions.[20]

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[19] By "print" in this sentence I mean not televised or delivered by radio broadcast. Thus, a written article that the reporter publishes for a journal that has both an online and a "hard copy" version, and which sells no hard copies of the journal, and is therefore read by no one in hard copy form, but is also read by 100,000 people online, who are strong patrons of the journal, but only of its online version, that written article I call a "print" article. It is "print" when some online readers like the article so much that they print it out on a printer they have access to, for their personal files; it is "print" when other online readers do not print it out because they think the very idea of printing out an article is obsolete (if they like it, it should be saved to some place that they use to hold their files—the last thing in the world they need is more paper lying around, taking up space); it is "print" because it is written and read, and not spoken and heard. News that is primarily spoken and heard, and that can also be demonstrated/delivered and viewed, is not the subject of this article at all.

[20] THOMAS A. BAILEY & DAVID M. KENNEDY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 572 (9th ed. 1991). At this point, some readers may be wondering if it is correct to call The Nation a "progressive" opinion journal in its 1800's phase of its existence. It is questionable to some that Edwin Godkin was ever a "progressive" in the sense that "progressive" means "modern liberal." Indeed, there are people who believe that The Nation was a classically liberal (and therefore a modern conservative), and not a modern liberal/progressive, opinion journal well into the 1900's:

> After college he [Albert Jay Nock] attended divinity school, and he became a minister in the Episcopal Church in 1897. A dozen years later he quit the clergy and became a full-time journalist and editor, first at American Magazine and then at The Nation (which was still a classically liberal publication). In 1920 he became the co-editor of the original Freeman magazine, which, in its four-year run, managed to inspire the men who would one day launch NATIONAL REVIEW and the second incarnation of The Freeman, run by Nock's disciple Frank Chodorov.

The implication of this quote from Professors Bailey and Kennedy, that *The Nation* had rather few readers in the first 35 years of its existence, is relevant to us as more than a random historical fact about the United States in the nineteenth-century. Rather, this historical fact was the beginning of the story of the way *The Nation*, and all opinion journals after it, would have to stay in business for the next century-and-a-half. That is, opinion journals would have to learn how to stay in business without a very large circulation. They would aim for *influence* instead of *profit*. In the end, this endeavor would be worth it, because,

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Jonah Goldberg, *Mortal Remains: The Wisdom and Folly in Albert Jay Nock's Anti-Statism*, NAT'L REV., May 4, 2009, at 36, 37 (all emphases in the original).

While all of this may be true, it is not the purpose of this article to be a perfect intellectual history of the opinion journals of the United States. Therefore, these questions of intellectual evolution are beyond the scope of this article. Suffice to say, the editors of *The Nation* view modern liberalism (or "progressivism" as I prefer to call it) as the correct outgrowth of the hard work of the liberals of the past. Some opinion journals have, literally, switched sides, in the past 100 years. But *The Nation*, obviously, does not admit to, shall we say, having "left liberalism behind." My view is to take them at their word, and to take everyone else at their word too. Thus, when we will come to discuss *National Review* in a bit, it will be assumed that it has been a true conservative opinion journal since 1955, when it published its first issue. *See infra* notes 31-46 and accompanying text. This is obviously what the editors of *National Review* believe, and is part of the story that drives them to continue to work onward, in the job of putting out the magazine. Basically, what I mean when I say "oldest, longest-running, and continuously-running" about *The Nation* and *National Review*, is that *The Nation* is older than all the other progressive opinion journals, it has run for more years as a progressive opinion journal than all the other progressive opinion journals, and it has continuously been in existence as a *progressive* opinion journal for that entire time up to the present, *and* that, *National Review* is older than all the other conservative opinion journals, it has run for more years as a conservative opinion journal than all the other conservative opinion journals, and it has continuously been in existence as a *conservative* opinion journal for that entire time up to the present. Indeed, as the above quote from Jonah Goldberg shows there *were* other conservative opinion journals older than *National Review*, but they did not survive, or they came back into an existence of some sort, but were therefore clearly not continuously in existence. And also, for instance, while *The New Republic* has continuously been in existence as a *progressive* opinion journal for the entire time from its birth up to the present, that has only been about 100 years. *See* JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING 98-99 (1st ed. 2007). That means that *The New Republic* is roughly 50 years younger than *The Nation*. So, it is both younger and has been running for less time than *The Nation*. That it is decades older than *National Review* is immaterial to our present discussion, because *The New Republic* has never been a conservative opinion journal, certainly not in the minds of its editors or its readers. I believe this is a fair way to go about the inquiry at the heart of this part of this article: to evaluate the oldest, longest-running, and continuously-running conservative opinion journal, and to evaluate the oldest, longest-running, and continuously-running progressive opinion journal. I believe that their experiences will give readers an understanding of the problems that such opinion journals face, because such journals are also profit-neutral newsmagazines. Last, I give no opinion here concerning the general conservative commentary of Jonah Goldberg, either in his articles for *National Review* or in his book, *Liberal Fascism*. I think what is more important is that Goldberg is an example of an opinion journalist/editor who understands very well the history of the kind of profit-neutral newsmagazine he has been working at for most of his adult life. Therefore, the results of his research *in that area* can be very valuable to both conservatives and progressives alike who care about the fate of the American opinion journals.

if they "could reach the right…leaders," their "ideas through them might reach" millions and millions of American citizens.

That influence itself would provide the way they would compensate for their lack of profit. If people who read such an opinion journal truly felt that it made a difference, despite its relatively low circulation, they might be persuaded to donate to the journal to keep it afloat. They would do this in addition to purchasing it from a newsstand or bookstore, or subscribing to it and getting it in the mail. Basically, these "leaders," Professors Bailey and Kennedy speak of, who were the newsmagazine's most loyal readers as well, would keep it in business.[21]*The Nation* was not originally founded to be an operation that could not make a profit, or, at least it is still not officiallya nonprofit corporation today.[22] Therefore, it is not specifically correct to refer tothese newsmagazines as "nonprofit," and instead I have used the term "profit-neutral" in this article.[23]

But readers should not let anything here fool them: *The Nation*, and newsmagazines like it, have no plans to ever make a profit again. They will not make any profits. They believe that the traditional journalism and opinion journalism that they do, and the effect it can have for political reform in the United States, are reward enough. In this sense, in the sense of an evaluation of their motivesand of their ability to gain from what they are doing, *The Nation* and newsmagazines like it are no different from official nonprofit charities at all.

In the past few decades the circulation of *The Nation* has gone from a mere 22,194 (only roughly double the 10,000 of its nineteenth-century circulation rate) in 1978, to a high of 186,269 in 2006, before tapering off to 163,356 in 2009.[24] These numbers, however, can

[21]*See infra*note 46 and accompanying text (Which one is this referring to? Seems wrong)
[22]*See infra*note 33. (same here).
[23]*See supra* note 14.
[24] E-mail from Caitlin Graf, Publicity Dir., The Nation, to Bradford William Short, Researcher, Pianko Law Group, PLLC (Apr. 3, 2013) (on file with author). Numbers for the year 2009 were the last year of data that

be misleading. They seem to tell us of exponential growth in the readership of The Nation, and with that, presumably, an exponential growth in profits at the newsmagazine. But, we must first remember how small, indeed, tiny, a circulation of 22,194 was in 1978, and how The Nation would have had to survive on such a circulation in the tens of thousands for the first, roughly, 110 years of its existence.

A deeper look at The Nation's circulation numbers reveal another facet of opinion journal publishing that shows another considerable financial weakness in such journals. This phenomenon is what I and my researchers have dubbed "the counter-cyclical effect." The counter-cyclical effect consists in the fact that opinion journals thrive financially, reduce their losses, and increase in circulation (and presumably in readership beyond paid circulation) when the political party that most holds to their political philosophy fails in the American electoral arena. Conversely, the other side of the counter-cyclical effect is that opinion journals falter financially, increase their losses, and decrease in circulation (and presumably in readership beyond paid circulation) when the political party that most holds to their political philosophy succeeds in the American electoral arena.

The data from The Nation confirms this counter-cyclical effect.In 1979, The Nation's circulation rose to 32,110, followed by a rise to 40,219 in 1980, and another rise to 44,041 in 1981.[25]Basically, circulation of The Nation doubled in about four years (in a sense, since we know circulation in the 1800's, the last year of which was 1899, was roughly 10,000, and in 1978 it was 22,194, The Nation did in the four years around the year 1980, what it took abouteighty years for it to do from—at the latest—1899 to 1978).

my research team was given by Ms. Graf, and I thought that it was a perfectly fine year to stop with, being rather close to the present, all things considered. Id.

[25]Id.

To be fair and up front about this statement of mine, I am guessing at The Nation's circulation numbers from the years from the 1800's until 1978, and since so many cataclysmic events with political implications happened during that time—World War I, World War II, the Great Depression, the beginning of the Cold War, the Korean War, the Vietnam War, etc.—that it would be wise for me to admit that I do not know if any of those events got Nation circulation up to, say, 30,000, 40,000, or 50,000. Nevertheless, the mere fact that, after all that work from the 1800's until 1978, The Nation had only risen from about 10,000 to 22,194, as its hard, real, numbers in 1978, is important to remember as we look at the growth that was about to come, and not go away.

In 1982 circulation rose again to 48,360, and yet, in 1983 the rise was only to 49,616, the first rise of only about one thousand, and not thousands, in years at that point of The Nation's history.[26] And why did this happen? The counter-cyclical effect is why it happened. In 1979 and 1980 Ronald Reagan began to win all the Republican Presidential primary elections needed to become the Republican Party's nominee, and after becoming such a nominee, he defeated then-President Carter in one of the most devastating losses for progressives in American Political History. Nevertheless, once Reagan actually started governing, he ran into many obstacles, and there was significant resistance to him, which, in the 1982 mid-term elections for both Houses of Congress, resulted in massive losses for the Republicans. This was a real sign of hope for progressives in the United States in the early 1980's. Basically, as the party that, in general, defends Progressivism—the Democratic Party—did poorly, circulation for The Nation went up; and as the Democrats did better, circulation for The Nation went down. This is the counter-cyclical effect in action.

[26]Id.

As the Democrats were completely routed by President Reagan in the 1984 elections, circulation for The Nation rose to 53,640 in 1984, and to 60,102 in 1985.[27] But after circulation hit 71,928 in 1986, Reagan suffered another harmful set of mid-term elections (indeed, the Republicans lost the Senate that year), and The Nation's circulation in 1987 actually dropped to 58,309.[28] And the counter-cyclical effect shows itself again and again in The Nation's circulation numbers during the years that came after the end of the 1980's. In 1991 and 1992, after progressives in America just could not stand Republican Presidential Administrations anymore, after twelve long years of such happenings, circulation hit 97,196 and 96,932, respectively.[29] But then Bill Clinton finally won the Presidency for the Democrats, and circulation dropped to 83,755 in 1994.[30] Shocked by the (to them) horror of the Republicans winning both Houses of Congress in the 1994 mid-term elections, and the election of Newt Gingrich as Speaker, progressives sprang back to grab copies of The Nation, and circulation rose back up to 91,358 in 1995 and 99,180 in 1996.[31] But the best thing to ever happen to The Nation's circulation numbers was the Presidency of George W. Bush. In 2000, when Bush was still only the Governor of Texas, The Nation's circulation stood at 95,437, but, after the Florida recount and resulting Supreme Court battle that Bush won, in 2001 circulation jumped up to 107,521.[32] In the two years, of the happening and the aftermath, of the (to progressives) devastating mid-term elections to both Houses of Congress (where Bush's Republicans actually gained seats, in both Houses, in mid-term elections no less), that is, in 2002 and 2003, The Nation's numbers rose to 123,174 and

[27]Id.
[28]Id.
[29]Id.
[30]Id.
[31]Id.
[32]Id.

148,815, respectively.[33] In a similar period consisting of the time wherein John Kerry failed in his bid to end the Bush Presidency after one term, 2004 and 2005, The Nation's numbers rose dramatically again, to 173,473 and 184,181, respectively.[34]

The previously mentioned high came in 2006, at 186,269, after which point Bush and the Republicans lost both Houses of Congress in 2006 (and Nancy Pelosi became Speaker), and Barack Obama thoroughly crushed John McCain's attempt to extend Republican control of any of the branches of government in Washington in 2008, and we see the completion of the tapering off of The Nation's circulation numbers that I just mentioned, at a final number of 163,356 in 2009. The counter-cyclical effect helps to explain all of these variations in all of these numbers.

Jack Fowler, the current publisher of National Review, provides us with testimony and data that we can use to understand why the counter-cyclical effect happens. As Fowler describes it, angercanbe a powerful motivator to makepeople act.[35] In years when Democrats in Washington advance progressive policies, and undermine or repeal conservative policies, conservatives are more motivated to read news that helps them organize resistance to Democratic officeholders.[36] Anger at, one might say, "the way things are going in Washington" when such things happen is what motivates many people to subscribe to a newsmagazine like National Review. Fowler describes a world where unpaid intern volunteers have only been used by National Review in the last three or four years.[37]

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[33] Id.
[34] Id.
[35] Telephone Interview by Bradford William Short with Jack Fowler, Publisher, Nat'l Review (Mar. 24, 2013).
[36] Id.
[37] Id. In general, Fowler downplays the need, right now, for unpaid intern volunteers at National Review.Id. Of course, he cannot tell the future, and the need for unpaid intern volunteers at opinion journals may increase in the future, even in the near future. Beyond this, it is Fowler who stresses that National Review has always maintained its technical for-profit status in order to be able to continue to endorse political candidates who best represent the conservative philosophy in elections in the United States. Id. He states that he believes The Nation is technically for-profit for much the same reason. Id. He also states that he believes that the

And circulation numbers from *National Review* complete this story, and tell the rest of it in a way consistent with what has gone before.In 1993 and 1994, right after Bill Clinton won the White House from the Republicans for the first time in twelve years, *National Review* had circulation numbers of 223,004 and 250,654, respectively.[38] These numbers, which easily beat *The Nation*'s best numbers, did not last long.After the Republicans won both Houses of Congress and Newt Gingrich became the Speaker at the start of 1995, *National Review*'s circulation numbers went down to 218,322.[39] In the four years wherein George W. Bush won the Presidency, and was President for his first three years, 2000, 2001, 2002 and 2003, *National Review*'s circulation was 155,664, 157,388, 154,413 and 155,584, respectively.[40] Then, in 2007, once the horrible realization (for conservatives) was clear that the Democrats had taken back both Houses of Congress and Nancy Pelosi would be the Speaker, circulation numbers shot back up to 170,285.[41]

In 2008, 2009 and 2010, as Barack Obama ran for President, won the Presidency with a great many votes to spare, and began to do quite well at getting his agenda passed through Congress, *National Review*'s circulation numbers went up to 187,968, 187,774 and 192,821, respectively.[42] Then in 2011, once the Democrats were defeated again, and Republicans won back the House of Representatives, made gains in the Senate, and John

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conservative opinion journal *The American Spectator* became a true nonprofit in the past, and was willing to give up its ability to endorse political candidates, because it was not ever making a profit and felt that it would then be best for it to have the legal advantages of being a nonprofit in every way. *Id.* The point here is not to begin a long discussion of *The American Spectator*, but instead to note how the opinion journals, none of which make any money, are truly one family of nonprofit and profit-neutral newsmagazines that should be seen as the same with respect to unpaid intern volunteers. They can make no profits, and they carry on their labors anyway, out of love for their ideological and reporting mission. Others, who want to giveto that mission as well, should be allowed to do so, whether they want to give to it with cash or with their own personal labor. Volunteering to a needed charity should not be, and is not, illegal; not paying your workers when you are engaged in a profit-making enterprise should be, and is, illegal.

[38] E-mail from Madison V. Peace, Assistant to the Editor, Nat'l Review, to Bradford William Short, Researcher, Pianko Law Group, PLLC (Mar. 25, 2013) (on file with author).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

Boehner was beginning his tenure as Speaker, *National Review*'s circulation dropped again to 174,447.[43] All of this data from *National Review*provides more and more evidence for the counter-cyclical effect.

My point in writing about the counter-cyclical effect is not to say that all of the ups and downs of the opinion journals can be attributed to it. They cannot be. Editorial talent, good writing, hard work in reporting, and just plain luck, all are huge factors as well. But, clearly the counter-cyclical effect is real. What it means is that many readers of the opinion journals only become such readers because they feel that their political philosophy is under assault in Washington. Once the party they adhere to begins to do well again, many of them stop reading the opinion journals that are some of the most importantmechanisms of converting people to the political philosophy they believe in so much to begin with.

With that, the political philosophy and political party they adhere to grows weaker and weaker. It is almost as if political success has within it the very seeds of the next political failure.Before long, that *next* failure becomes the *current* failure, and the opposing party and political philosophy is in power in Washington once again. And with that, the whole cycle begins again. At this point, one can even hear the faint echo of Alexis DeTocqueville, telling us about how every "American feels a sort of personal interest in obeying the laws, **for a man who is not today one of the majority party may be so tomorrow**, and so he may soon be demanding for laws of his choosing that respect which he now professes for the lawgiver's will."[44]

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[43] *Id.* I do trust that readers now see how low that circulation number of 22,194 in 1978 for *The Nation* was. *National Review* never reported any number below 100,000 in all the data my researchers and I were able to get from them. *Id.* Evidently, President Ronald Reagan was very good for *The Nation*, in giving it the reason for a fighting spirit that got it over some kind of "hump" it had been trying to get over for much of the twentieth century. Or, at least that is the way it seems to me based on the data I have in front of me.

[44] ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA 240-41 (J.P. Mayer ed., George Lawrence trans., Harper Perennial 1988) (1835) (emphasis added).

Democracy in America, in which this description of American political life appears, was published almost 200 years ago, but it still describes the currently accurate fact that in the United States, no party is the "majority party" forever, or even, for very long. Part of what makes this fact happen is the natural human tendency to overestimate good turns in human events, and then to overcompensate for bad turns in human events. And, in the United States in recent decades, one of the main ways that that natural human tendency manifests itself is in the form of the counter-cyclical effect.

The financial weakness for the opinion journals in all of this is that as they make better and better arguments, and actually change the direction of Washington in a way that they believe is salutary, they are helping to change the overall situation with their readers to something where they will no longer be able to make as much money. The better side of that phenomenon is that when the next political failure does come, there may be financial rewards on the way for the opinion journal in question. But, in recent years the counter-cyclical effect may be becoming blunted, and this may be very ominous for the opinion journals, and indeed, for traditional newsmagazines as well.

Indeed, as Jonah Goldberg has written:

> There's a kind of catholicism among journalists. We're as susceptible as anyone to petty jealousies and hatreds of colleagues, but at the same time, we denizens of the print realm weep for the demise of almost any print publication. For no magazine is an island, entire of itself. Each is a piece of the continent, and should a rag be washed away by the digital sea, journalism is the less for it. Each magazine's death diminishes me, for I too am involved in this wretched business, and the loss of a potential paycheck down the road hits me hard. So ask not, fellow scribes, who pays the digitization toll; that toll is paid by thee.
>
> But let's not kid ourselves. Every death may be regrettable, but some are less so than others. Which brings us to the demise of the print edition of *Newsweek*, that old, if not quite venerable, publication. This December 31, the last issue of it will roll off the presses. ….*Newsweek*'s operating losses in 2009, following the redesign, were

> $28.1 million—a loss 82.5 percent greater than the previous year's hemorrhaging of $15.4 million.[45]

One does not need to share Goldberg's schadenfreude at the death of *Newsweek* for one to see how well he describes the ominous phenomenon that is developing these days, which threatens the future of all print[46] journalism. Print journalism seems to be less and less able to make a profit in our brave, new, online world. Basically, people who consume news reporting in general (not just those citizens who are more ideological, who often look to the opinion journals for their news) have been turning from "hard copy" newsmagazines—which must be bought with money—over the past couple of decades to online print journalism—which is usually free of charge. This phenomenon is the "digitization toll" and the waves of the "digital sea" of which Goldberg speaks. Obviously, his quote shows how this phenomenon can even destroy the old, *mainly for-profit*, traditional news-reporting journals, like *Newsweek*, by giving it a loss that exceeded $40 million in about two years. But, the opinion journals have also been suffering under this new plague for quite some time. As *National Review*'s most recent circulation numbers show, the recent catastrophe (from conservatives' vantage point) of Barack Obama's very politically successful early Presidency only increased their numbers by a little over 20,000. Worse, as

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[45] Jonah Goldberg, *Let the Bell Toll: Celebrating the Demise of* Newsweek, NAT'L REV., Nov. 12, 2012, at 33-34. Needless to say, any characterization by Goldberg, or anyone else, that *Newsweek* is actually a progressive newsmagazine, masquerading as a nonpartisan journal, and is part of the "liberal news media," is something that I am not going to endorse, and indeed,I am not going to even comment on, in this article. As I have already stated, for the purposes of this article, I am treating every American newsmagazine as it *wants to be treated*. *See supra* note 16. Opinion journals that claim to be in the conservative tradition are treated as conservative opinion journals; opinion journals that claim to be in the progressive tradition are treated as progressive opinion journals; and last, journals that claim to be in the traditional nonpartisan heritage are treated as traditional nonpartisan newsmagazines. Also, while I think it is clear from the passage, it should be noted to the reader, just to make sure that this is not missed, that Goldberg is clearly using the word "print" here in a different way than the technical meaning I ascribe to the word "print" throughout this article. For my definition of "print," *see supra* note 15.

[46] For my definition of "print," *see supra* note 15.

soon as the current Republican majority in the House of Representatives came to power, their numbers went back down to about where they were before the fear-of-Obama bump.[47]

In looking at these facts, Jack Fowler does worry that more and more of *National Review*'s new readers are only coming to the online version of the newsmagazine, and thus not enabling *National Review* to profit (or at least profit as much) from these people'spost-Democratic victory consumption of *National Review*.[48]

Again, it does not take a great deal of insight to see what is happening here. Americans, both progressives and conservatives, get frightened when the opposing political philosophy, and the political party that is most associated with it, come to power in Washington. Once that happens, and they hear more and more about various policy changes that they fear and loathe becoming reality, they begin to look for news reporting and opinion writing that ably expresses their anger at the current leadership in Washington. But, they do not do this out of some charitable impulse *per se*. They are trying to find a product, namely conservative or progressive opinion journalism, and they would prefer to purchase that product as cheaply as they can.

The online versions of *The Nation* and *National Review* (and all the other newsmagazines like them) largely supply the same product as the more expensive hard copy versions. Therefore, as time goes on, and print readers who prefer hard copy die out, while print readers who mostly (or only) read print online become more and more the universal norm, it will be the case that the up-side of the counter-cyclical effect will be expressed *only* in increases in the *online readership* of the opinion journals. But, this will blunt the counter-cyclical effect on the main circulation numbers of the opinion journals, and since that is

[47] And this all happened while Obama was still in office, with conservatives praying for his defeat in 2012! A defeat, one should remember, *that did not even happen!*This is how strong Progressivism has been during this period (that we are actually still in), and yet we see *National Review*'s numbers remaining this low.
[48] Telephone Interview by Bradford William Short with Jack Fowler, Publisher, Nat'l Review (Mar. 24, 2013).

where they make the majorityof their money, it will prevent them from making more money when the opposing party and political philosophy comes to power in Washington. Over time, like the traditional newsmagazines (such as *Newsweek*), the opinion journals might have to shut down their hard copy print editions. The great fear, of course, is that in this brave, new, online world both opinion print journalism and traditional print journalism will go out of business.[49]

These fears, however, can be overstated, and one should always realize that extrapolations of current trends into future events can only be taken so far. Just as the counter-cyclical effect was one phenomenon amongst many affecting the growth of the opinion journals over past decades, so too what Goldberg dubbed the "digitization toll" and the waves of the "digital sea" is only one facet amongst many of the modern world of news and opinion consumption. And people have reason and free will too: As they see that they cannot continue to get all their print news writing for free, without all of such sources of print news writing going out of business, they will most likely change their behavior. And indeed, this leads me to why I stated earlier that the opinion journals of the United States might just be about to become the template on which almost all future print news writing is based. To better understand what I am about to describe, let us take a look at a typical *National Review* fundraising letter:

> When we set out in 1955 to found a conservative journal we knew for sure that its founding was vital to the explication and health of conservative thought. But I wasn't sure, exactly, how to keep the magazine alive. That it would live was a matter of faith. Willi Schlamm, a founding editor, said to me when one day I spoke to him with melancholy about our diminishing capital, 'Bill, if we get 25,000 subscribers, the readers won't let the magazine go down.' We have

[49]One might think to oneself here that the *online* versions of the newsmagazines will not go out of business, but, because at present the online versions of the newsmagazines are subsidized by the hard copy sales, one cannot help but conclude that if people do not start paying for news writing *somehow*, and soon, hard copy print news writing will die out, and the online equivalents to it will follow it to the grave.

> 150,000 subscribers, and Willi's faith was prophetic. Forty-eight years later, we are still alive …. A concern for the probity of the conservative movement is a continuing concern of National Review. The exercise of that concern is possible only because of your trust and loyalty. That independence is indispensable, and relies absolutely on the support we get from selected readers who, even in bad economic times, have acted year after year on the quiet understanding that there isn't any such thing as a free lunch, and that nourishment is National Review's mission.[50]

Though this fundraising letter is ten years old, it is highly representative of such correspondence which opinion journals have been using for some time to get themselves sufficient donations to stay in business.This fundraising letter inspires the most committed reader-subscribers to the opinion journal to pay what is needed to keep it afloat by pointing out how it is equally, if not more, committed to the ideology and the intellectual tradition that the letter writer and the letter reader both hold. These letters always point out how rare such ideological and intellectual commitment is in the news media of the present. The worldview of such letters is based on the value people will ascribe to such a rare gem of an ideological newsmagazine, and that, if called upon in a time of true need, people will respond to that value by not "letting the magazine go down."

Because the opinion journals are, and always have been, nonprofit and profit-neutral newsmagazines, we can safely assume that these fundraising appeals have been quite successful over the past decades. In a sense, the readers of newsmagazines like The Nation and National Review have been paying more than the cover price, or in the subscription agreement, for thesenewsmagazinesbecause a reader usually donates to his political journal of choice on a yearly basis. That charitable act keeps that opinion journal up and running for another year. Without donations, the journal would have gone out of business long

[50]Letter from William F. Buckley, Jr., Editor-at-Large, Nat'l Review, to subscriber-donor (Feb. 10, 2003) (all emphases in the original) (on file with author).

ago.The donation is part of the price the most committed readers pay so that they can continue to have the opinion journal that they love and rely on so much.

Suggested donation amounts are nothigh (numbering in the hundreds of dollars mostly).[51] It is reasonable to think that if a newsmagazine like The Nation or National Review began to face more bankruptcy-threatening circumstances, emanating from the counter-cyclical effect by the coming "digitization toll" and the waves of the "digital sea," then committed readers of The Nation and National Review would find a way to donate more than a few hundred dollars each year. Consequently, The Nation, National Review, and all other newsmagazines like them, seem to already be ahead of the curve. They are already doing what they will have to do to survive until the time comes that consumers of online print journalism finally realize that they must also pay for the reporting and opinion that they love. Newsweek does not have such a list of donors yet. And indeed, organizations like Newsweek still hope to make a profit again, either by focusing their efforts online, or by some other method.

The United States is a free country, and that is their right, and I wish them the best of luck. But, if the traditional reporting journals fail to become successful for-profit companies again, it will not be the end of the world. The traditional reporting journals have many more readers than the opinion journals, and until very recently these legions of readers have not had reason to consider becoming donors to their favored journals. If in the near future, even a small percentage of such readers consider donating to a journal, and then agree to it, it should do a great deal to keep newsmagazines like Newsweek in business. Indeed, the situation of print journalism will become much like the situation of museums in American life. Everyone has been to a museum, but very few of us have given money to a

[51]Id.

museum. This is true despite the fact that were it not for those few of us who give money to museums, museums could not exist. And yet, everyone can still go to a museum, and enjoy and learn and grow from interactions with such institutions throughout the United States, because there is a dedicated minority that sees to it that the museums continue to exist.

If the United States becomes a place where everyone has read a newsmagazine, but very few of such people have ever donated to a newsmagazine, despite the fact that it is as needed for some of such people to donate to newsmagazines for them to exist, as it is needed for people to donate to museums for them to exist, it will not be the end of the world. The charity of "news and opinion" will simply become the protectorate of a dedicated minority as the charity of "art" has already become the protectorate of a different dedicated minority. It might be remarked that this turn of events will give too much power over the press to that dedicated minority, but in the end this cannot be true. The only reason that dedicated minority will get to have all the say over the print newsmagazines is because most readers will not make themselves paying customers of those same print newsmagazines.

If ever they come back to paying for the news and opinion they read, they will automatically gain a say in what is written in those news and opinion print sources again. The community of stakeholders to whom print newsmagazines are, and will be, responsive to is, and will be, precisely as large as the number of people who are willing to pay some amount of money for the news and opinion they consume. An exclusive minority will never control all the news and opinion in the United States because the United States is a free country, and in a free country people will always be able to come to, and become stakeholders in, the nation's newsmagazines, whether they are for-profit or charitable.

But the only way this new ship of the press that the United States seems to be embarking on a voyage onecan sail is if we treat nonprofit and profit-neutral newsmagazines the same way as we treat museums. Additionally, people intending to work for their own profit, cannot agree to work for nothing. In our society, companies, intending to pay people to work for the company's profit, cannot agree to pay them to work for nothing. But, under our laws and mores, it is legal, and indeed, laudable, for people to work for, or give money to, a charitable cause that gives them nothing in return. Those who give their money to such causes are called "donors." The people who donate their labor arecalled "volunteers," but they can also be called "unpaid interns" in today's parlance. Consequently, because the status of unpaid intern workers is so very illegal and immoral today, but also because the status of volunteers at nonprofit and profit-neutral newsmagazines is so very important to the future of the whole American print press, I think we *must* find a way to help the courts to ban illegal unpaid intern work *without* threatening volunteerism at nonprofit and profit-neutral newsmagazines. The next part of the Article will describe how we can go about doing just that.

II. THE FAIR LABOR STANDARDS ACT AS IT STANDS

The leading Supreme Court case interpreting the Fair Labor Standards Act of 1938 (F.L.S.A.)[52] is *Walling v. Portland Terminal Co.*[53] A leading scholar in the fields of labor law and employment law, David Yamada, has written that at "the federal court level, there is no published case authority specifically considering whether student interns are employees

[52]Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2006).
[53]330 U.S. 148 (1947).

under the" F.L.S.A.[54] Indeed, in the decade since Professor Yamada wrote these words the situation has changed little. This is not just the case for "student" interns either.

As of today, unpaid intern workers, whether they are still in school or not, have had no adjudication on the merits concerning their rights to pay under the F.L.S.A. by the Supreme Court of the United States.[55] Consequently, under federal law, there is no clear case law demanding that unpaid intern workers have their right to pay vindicated. Therefore, the answer to the question of "what will federal judges do" is still in flux. What is not in flux, however, is that whatever they chose to do must be consistent with the Supreme Court's labor law jurisprudence in *Walling*.

In *Walling* the Court was faced with allegations on behalf of yard brakeman trainees that the railroad terminal company from which they wanted to obtain employment, and that they had to train under for roughly a couple of workweeks with no pay, in order to obtain such employment, was violating the F.L.S.A. by enforcing this no-pay-for-trainees policy.[56] The Court found that the F.L.S.A. "contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to…[the F.L.S.A.], were not deemed to fall within an employer-employee category."[57] What is relevant to our analysis here is that this marks the beginning of the Court taking the firm view that the F.L.S.A. "contains its own definitions" of what is, and is not, an employee.It is the place of the Supreme Court (and the inferior federal courts under it) to determine what are those "definitions" that are "contained" within the F.L.S.A.

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[54]David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 230 (2002).
[55]Instead, the situation we face today is one where cases have been filed in courts inferior to the Supreme Court, including at least two cases in the United States District Courts within the last year-or-so. Fink, *supra* note 12, at 18-21. Obviously, even if the rights to pay of the intern workers are found to be violated by the District Courts that will not settle the matter as to the *national* meaning of the F.L.S.A. Only the Supreme Court can settle the meaning of, and the rights of unpaid intern workers under, the F.L.S.A.
[56]*Walling*, 330 U.S. at 149-50.
[57]*Id.* at 150-51.

What this means is that it is the Court's jurisprudence that defines who is a trainee that is not required to be paid an "employee's" minimum wage; it is also the Court's jurisprudence that defines who is a volunteer that is not required to be paid an "employee's" minimum wage.Indeed, as the Court went on to declare:

> The definition 'suffer or permit to work' 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. Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages. So also, such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these.[58]

As the reader can tell from the quote just related, the Court held in favor of the railroad terminal company that it was not in violation of the F.L.S.A.,[59] because persons, doing what was to them hard work, who were nevertheless being taught for their own good, were too analogous to "students" whom the F.L.S.A. was never intended to make into "employees." But again, what is most relevant to our analysis here is that the Court also maintained that a person who "solely for his personal…pleasure" labors "in activities carried on by other persons...for their pleasure" is also not an "employee" under the F.L.S.A. This particular definition would cover what most of us understand to be volunteers.

The F.L.S.A. itself states, in its language that actually puts the obligation of paying the minimum wage onto businesses in the United States, that:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or

58 Id. at 152.
59 Id. at 153.

> in the production of goods for commerce, wages at the following rates:[60]

Consequently, the important distinction to be made is between "employees," who must be paid the minimum wage under the F.L.S.A., and volunteers, who are not "employees" under the F.L.S.A. at all. That was precisely the question that confronted the Supreme Court in its leading case concerning volunteerism under the F.L.S.A.[61] In Tony and Susan Alamo Foundation v. Secretary of Labor, Justice White, writing for a unanimous Court,[62]restated with approval the language from the Walling opinion concerning working for a cause in which one simply takes "pleasure."[63] And so, as Professor Mitchell Rubinstein has put it, "the Court has recognized that ordinary or pure volunteers are not subject to the" F.L.S.A.[64] Indeed, as Justice White explicitly stated, the F.L.S.A. "reaches only the 'ordinary commercial activities' of religious organizations, and only those who engage in those activities in expectation of compensation.

Ordinary volunteerism is not threatened by this interpretation of the statute."[65] While Justice White concluded in the end that the Tony and Susan Alamo Foundation was not employing mere volunteers,[66] it is nevertheless true that these "requirements" Justice White put upon the Foundation applied "only to commercial activities undertaken with a"

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[60]29 U.S.C. § 206(a) (2006). After this point in the statute, the F.L.S.A. proceeds to list the various minimum wage requirements that have been in force in various years. 29 U.S.C. § 206(a)(1) (2006).
[61]Tony and Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).
[62]Id. at 291.
[63]Id. at 295.
[64]Mitchell H. Rubinstein, Our Nation's Forgotten Workers: The Unprotected Volunteers, 9U. PA. J. LAB. & EMP. L.147, 154 (2006).
[65]Tony and Susan Alamo Found., 471 U.S. at 302-03 (citation omitted).
[66]The Tony and Susan Alamo Foundation did "not solicit contributions from the public." Id. at 292. Instead, it obtained its income "largely from the operation of a number of commercial businesses." Id. These included everything from "grocery outlets" to "hog farms." Id. And since these regular, commercial businesses that the Tony and Susan Alamo Foundation owned were the main source of provisions for the supposed volunteers, in some cases for years of their lives (and therefore, they obviously relied on this payment for their labor, in a deal that thereby had elements of a quid pro quo), Justice White concluded that both the nature of the business, and the nature of the work done by the supposed volunteers, meant that they were employees under the F.L.S.A.Id. at 301.

business purpose.[67] Therefore, and obviously, if the Courtinstead was analyzing a true nonprofit or profit-neutral organization, which did not even make money as a subdivision of a larger charitable foundation, and which did not have so-called "volunteers" who actually relied on the organization's pay to them for their livelihood, then this true nonprofit or profit-neutral organization would receive all of the F.L.S.A.'s protections for volunteerism that Justice White had to deny to the Tony and Susan Alamo Foundation.

There is one final inquiry that we have to make before we can be sure that the Court's opinions in *Walling* and *Tony and Susan Alamo Foundation* as to where the status of "employee" ends, and that of "volunteer" begins, are the clear and true law of the land on this subject of unpaid intern volunteers. A recently published student note, by Anthony Tucci, dealing with this subject points out that the Department of Labor has issued a test that has the potential to regulate much of the unpaid intern worker situation in the United States.[68]Tucciand I haveboth focused on the problem with banning unpaid intern working arrangements in this country, without first making sure that nonprofit and profit-neutral organizations can continue to legally access at least some of the services of unpaid intern volunteers.[69]

Unlike the analysis in this article, Tuccistates that the Labor Department test can, at least in some way, be applied to the unpaid intern volunteers of the United States.[70] I believe

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[67]*Id.* at 305.
[68]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, 1363-66, 1389-92 (2012). It should be noted that Tucci*proposes* to modify the already-in-existence Labor Department test so that it can become administrative law that is also applied to nonprofit and profit-neutral organizations (that is, Tucci's proposed test is not the law yet). *Id.* at 1390-92.
[69]Tucci and I both have pointed out that nonprofit and profit-neutral organizations face danger if they are denied the use of unpaid intern volunteers as much as for-profit organizations should be denied the use of unpaid intern workers. *See id.*
[70]Tucci believes that the use of unpaid intern volunteers by nonprofit and profit-neutral organizations is a matter that can be determined by something like this Labor Department test. *Id.* at 1390-91. In the final analysis, I believe that is clearly wrong, and that the implications of the Supreme Court's F.L.S.A. jurisprudence

that in doing this Tucci is applying controlling principles of federal administrative law incorrectly.

Any analysis of the administrative law of the F.L.S.A. must begin with a discussion of Chevron deference.[71] In Chevron U.S.A. v. Natural Resources Defense Council the Supreme Court issued a groundbreaking opinion defining the fundamental foundation of whento grant deference to an administrative agency that has interpreted a federal statute that it has a specificjurisdiction over. The Court ruled in Chevron in the following way:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[72]

The Court's opinions in Walling and Tony and Susan Alamo Foundation clearly asserted that theF.L.S.A. had "directly spoken to the precise question" of who is an employee and who is a volunteer under the law. The Court stated in Walling,[73] and then favorably cited this statement in Tony and Susan Alamo Foundation,[74] that any person who, "solely for his personal purpose or pleasure, worked in activities" (such as charities) was not an employee who had to be paid the minimum wage under the F.L.S.A. In so doing, the Court did not defer to any federal administrator of the F.L.S.A. It did not even take such administrators into account. The

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have already settled the issue: The use of unpaid intern volunteers by nonprofit and profit-neutral organizations is completely legal.

[71]Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

[72]Id. at 842-43(footnote call numbers omitted).

[73]See supranote 54 and accompanying text.

[74]See supranote 59 and accompanying text.-(refers to Walling?)

Court viewed this question of law as one to be decided under step one of the *Chevron* framework. In step two of this framework, where the Court would "determine" if "Congress" had "not directly addressed the precise question at issue," and where (if Congress had not done so) *then* the Court would see if "the agency's answer is based on a permissible construction of the statute," which, if it was, the Court would then *defer to* as the meaning of the statute at issue, *that step* (which is the famous "*Chevron* deference") is a very important intellectual construct in modern administrative law. It is also not part of answering the question of where unpaid intern workers end, and where unpaid intern volunteers begin, at all.

Furthermore, as has already been stated by two noted administrative law scholars:

> More accurately considered, however, the question of what to do about judicial precedent does not present an exception to *Chevron*, but illustrates the need for a transitional rule—a special rule of adjustment that mediates between the pre-*Chevron* and the post-*Chevron* worlds. This can be seen by considering, first, what role judicial precedent should play in a world in which all relevant decisions have been made in full awareness of *Chevron* and its two-step procedure. In such a world, all judicial precedent should be self-consciously rendered as either a 'step-one precedent' or a 'step-two precedent.' If step one, then the previous court will have determined that the statute had an unambiguous meaning that forecloses the exercise of any interpretational discretion on the part of the agency; the statute either compelled or forbade the previous agency view. Such a precedent would obviously be entitled to full stare decisis effect in a later case presenting the same interpretational issue. Such a decision, in effect, tells us that the statute has only one possible meaning, which precludes any exercise of agency discretion.
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> In contrast, if the previous judicial decision was a step-two precedent, then the court found that the statute admits of the exercise of agency discretion in its interpretation. If the court upheld the agency interpretation at step two, then we know that the previous agency interpretation was reasonable. This does not, however, foreclose the possibility that a different agency interpretation would also be reasonable. If the court struck down the previous agency interpretation at step two, then we know the previous interpretation was unreasonable. But this too does not mean that a different agency

> interpretation would not be reasonable. In either event, the previous judicial decision should not be given full stare decisis effect in fixing the meaning of the statute. Instead, it should be given stare decisis effect only for the proposition that the statute admits of multiple interpretations—in other words, for the proposition that the case should be resolved at step two—and that at least one interpretation (the agency's previous interpretation) was either reasonable or unreasonable. The fact that the court upheld (or invalidated) the agency's prior construction of the statute would not, however, be determinative in deciding whether the current interpretation is permissible. Thus, in a post-*Chevron* world in which all relevant decisions are taken in full awareness of *Chevron*'s two-step procedure, judicial precedent should be categorized as being either step-one precedent or step-two precedent, and should be given the stare decisis effect appropriate to its status.
>
> The analysis becomes more complicated, however, when we introduce the possibility that one or more of the relevant judicial decisions were *not* rendered in full awareness of the *Chevron* framework. The most obvious circumstance is where the judicial precedent predates 1984. …
>
> There are really only two options for such decisions. One is to examine each pre-*Chevron* precedent on a case-by-case basis, in an attempt to determine as best as is possible whether the precedent would have been a step-oneprecedent or a step-two precedent if, counterfactually, the court had applied the *Chevron* doctrine. The other is to adopt a blanket presumption that all pre-*Chevron*precedent is step-one precedent. … The Supreme Court's treatment of its own precedent is best understood as adopting the second option—the blanket presumption that all past Supreme Court precedents are step-one precedents.[75]

The above quote from Professors Merrill and Hickman is very long, but it deserves to be shown at length in this article because it so thoroughly describes why deference to any agency action is not the paradigm under which we should be answering the question of the legality of unpaid intern volunteers under the F.L.S.A. First, Merrill and Hickman's statement that the "Supreme Court's treatment of its own precedent" is best seen as just accepting all pre-*Chevron* interpretations of statutes as step one interpretations—that is, as

[75]Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO.L.J. 833, 916-17 (2001) (all emphases are in the original) (footnote call numbers omitted).

interpretations that lay out what the law is, and that no agency can change—alone buttresses the view that Walling, a 1947 precedent,[76] is determinative of whether the F.L.S.A. allows unpaid intern volunteers, contrary views of the Labor Department notwithstanding. Second, even if one ignoresWalling, then it is still the case that Tony and Susan Alamo Foundation, a 1985 precedent,[77] is certainly part of the "post- Chevron world" in which the Court was acting with "full awareness of the Chevron framework."

Because Tony and Susan Alamo Foundation is also a step one precedent, it is also where we should go to find out if the F.L.S.A. allows unpaid intern volunteers, contrary views of the Labor Department notwithstanding. Third, and most important, is the fact that, even if one wanted to perform the pre-1984 "case-by-case" analysis that Merrill and Hickman say current Supreme Court practice makes unnecessary, one would find that Walling's language implying that unpaid intern volunteers were never meant to be made illegal under the F.L.S.A. was part of the decision in Tony and Susan Alamo Foundation.[78] That means that one would then know that the Court itself viewed the pre-1984 precedent of Walling to be a step-one precedent. That means that whatever "case-by-case" analysis was done of Walling in 1985 yielded the view on the Court that every federal agency had to bow to the Walling view of what the F.L.S.A. meant.

And last, Tucci's article does not even call for Chevron deference to be applied to the Labor Department's test. It instead calls for a lower standard of deference to be applied.[79] But this shows Tucci's case for a Labor Department test as what we turn to in this area of

[76]See supranote 49 and accompanying text.
[77]See supranote 57 and accompanying text.
[78]See supranote 59 and accompanying text.
[79]Tucci believes that the Labor Department test that should be applied to this issue should be accorded Skidmore respect. Tucci, supra note 64, at 1390& n.177. It is irrelevant to this article what exactly is Skidmore respect, and how it is different from Chevron deference; all that is important for the reader to understand is that Skidmore respect is an even weaker deference (by the federal courts) to the agency's interpretation of the statute than Chevron deference. SeeSkidmorev. Swift & Co., 323 U.S. 134 (1944).

the law to be even more clearly wrong. If the Supreme Court's jurisprudence, in *Walling* and *Tony and Susan Alamo Foundation*, clearly tells us what the F.L.S.A. means (that unpaid intern volunteers are completely legal), and those cases do that under step one of the *Chevron* framework, and then it is therefore the case that no *Chevron* deference is accorded to anyone who wants anything contrary to the two Court opinions (when it comes to unpaid intern volunteers), then, *a fortiori*, an even lower standard of deference that calls for federal courts to be *more willing* to second-guess the interpretations of agencies is not going to help the Labor Department to substitute its own interpretation of the F.L.S.A. for that of the Court in the two aforementioned cases.

Simply put, the Supreme Court of the United States, in *Walling* and *Tony and Susan Alamo Foundation*, has already interpreted the F.L.S.A. *to mean* that unpaid intern volunteers are legal because such volunteers "without promise or expectation of compensation, but solely for" their own "pleasure," labor in the service of a cause that they believe in. Now that that interpretation of the F.L.S.A. has been made, there is nothing that the Department of Labor can do to change it, *Chevron* (or any other kind of) deference notwithstanding. It is the law of the land. And thus, we should now see if those who volunteer their labor as unpaid interns at the nonprofit and profit-neutral newsmagazines of the United States are protected by it.

III. CONCLUSION: THE FAIR LABOR STANDARDS ACT APPLIED TO THE SITUATION OF THE NONPROFIT AND PROFIT-NEUTRAL NEWSMAGAZINES

Opinion journals, such as *The Nation* and *National Review*, clearly are profit-neutral and nonprofit organizations whose unpaid intern volunteers are exempt from the minimum

wage requirements of the F.L.S.A. The law of the land is that a person who "solely for his personal…pleasure" labors "in activities carried on by other persons...for their pleasure" is not an "employee" under the F.L.S.A.[80] The "activity" of putting out *National Review* is carried on by the leadership of *National Review*, with them taking "pleasure" in the feelings of pride engendered by keeping *National Review* alive for all the world to read, and these leaders have regularly solicited the aid of others in their mission, as can clearly be seen from the fundraising letter written by William F. Buckley, quoted at length earlier in this article.[81] When such leaders of *National Review* solicit the aid of unpaid intern volunteers, instead of cash donors, they thereby receive the labor of a like-minded conservative, engaging in such labor "solely for his personal…pleasure." While this labor is certainly hard work, it is *not* "employment" under the F.L.S.A. A similar description of motives and actions could be stated with respect to unpaid intern volunteers at *The Nation*, with the exact same legal results.

Because this protection for *The Nation* and *National Review* (and newsmagazines like them) comes from the Supreme Court's own opinions in *Walling* and *Tony and Susan Alamo*

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[80]*See supra*note 54 and accompanying text. We should also remember Justice White's statement in *Tony and Susan Alamo Foundation* that, when we are talking about a nonprofit organization, the minimum wage requirements of the F.L.S.A. apply "only to commercial activities undertaken with a" business purpose. *See supra*note 63 and accompanying text. What that meant was that when the Tony and Susan Alamo Foundation was employing what it called "volunteers" at "grocery outlets" and "hog farms," which themselves were no different from any other for-profit grocery stores and for-profit hog farms in the United States, it had to pay them the minimum wage. *See supra*note 62 and accompanying text. But nonprofit and profit-neutral newsmagazines like *National Review* and *The Nation* do not have any such for-profit divisions; there is no secret hog farm that makes a large profit that then goes to balancing the books at *The Nation*, nor is there any secret franchise of grocery stores that make a large profit that goes to help balance the books at *National Review*. *The Nation* and *National Review* , and newsmagazines like them, are profit-neutral (or nonprofit) through and through. Therefore they are entitled to the precise legal protections that Justice White had to deny to the Tony and Susan Alamo Foundation, and such is the direct implication of the interpretation of the F.L.S.A. that was given by the Supreme Court itself in that case. However, The Nation decided to pay their interns. Rebecca Greenfield, The Wire, *Interns at The Nation Decline to Sue, Write a Letter, Get Better Pay*, THE WIRE (Aug. 2, 2013), http://www.thewire.com/national/2013/08/dont-want-sue-intern-pay-write-letter-instead/67922/. Other companies, like Lean In, are being pressured to "pay up." Rachel Feitzeig, *After Internship Posting, Some Say Lean In Should Pay Up*, THE WALL STREET JOURNAL (Aug. 15, 2013), http://blogs.wsj.com/atwork/2013/08/15/after-internship-posting-critics-say-lean-in-should-pay-up/.

[81]*See supra*note 46 and accompanying text.

Foundation, no mere administrative action by the government agencies of the United States can overturn, or even undermine, it. This fact is consistent with, and known from, an analysis of the Court's opinion in *Chevron*, and is basically indisputable as a matter of administrative law. While this legal state of affairs protects the nonprofit and profit-neutral newsmagazines of today, it also has the salutary effect of protecting the nonprofit and profit-neutral newsmagazines of tomorrow. Unlike the opinion journals, many traditional journals(such as *Newsweek*) are still trying mightily to make a profit in their business of reporting.[82]

The purpose of this article is not to engage in any kind of schadenfreude at the expense of a newsmagazine like *Newsweek*, or even to in any way predict that such, still for-profit, traditional journals will eventually become doomed to never make a profit again. But, I must say this: As time has gone on, things have looked more and more like that is going to be the case. We must at least consider the possibility that the United States is reaching a stage where print journalism can only survive as a nonprofit, or a profit-neutral, enterprise. And yet, if this is true it is not the end of the world. If *Newsweek* cannot survive as a for-profit newsmagazine, it can (and I predict it would) become either a nonprofit or a profit-neutral newsmagazine.

In the end, American print journalism would survive, and live on, to continue to make a difference in the country. What is important for our analysis here, however, is that this would all be more likely to happen because such nonprofit and profit-neutral newsmagazines of tomorrow would also be protected by the *Walling* and *Tony and Susan Alamo Foundation* interpretations of the F.L.S.A. that I have described above.

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[82] *See supra*notes 41-47 and accompanying text.

Consequently, we can now fully see how important for both present and future public policy in the United States is this question of the rights of the nonprofit and profit-neutral newsmagazines to unpaid intern volunteers under the F.L.S.A. Indeed, as Professor Rubinstein has put it: "This country needs volunteers for several critically important reasons. They provide free labor, which is critical to certain non-profit organizations that need more workers than they can afford to pay."[83] But, I want to issue one caveat here. Rubinstein's moral rule should be enforced. That is, the charities that truly do "need more workers than they can afford to pay" are the ones that should be provided with "free labor."

The protections supported and defended in this article should not be used so individuals can make great profits at the expense of others in some other way. Indeed, Justice Jackson, in writing his concurring opinion in Walling, touched upon what I am trying to get at here when he stated that the F.L.S.A., "like other statutes, can and should be applied to strike down sham and artifice invented to evade its commands."[84] Charities are not supposed to make a profit. If an organization provides the good that the organization seeks to distribute to the world in such a way that its customers want to pay a great deal for it, so much so that the organization makes a profit on the sale of that good, then the organization should consider itself a for-profit business, and not a nonprofit or profit-neutral charity.

Some charities do, effectively, make a profit, only they pay that profit out, not to stockholders in the form of dividends or increased value of shares, but instead they pay it out to their highest officers of the "charity" in the form of overcompensation. Ridiculously

[83]Rubinstein, supra note 60, at 181.
[84]Walling v. Portland Terminal Co., 330 U.S. 148, 154 (1947) (Jackson, J., concurring). Justice Jackson's opinion in Walling is rather idiosyncratic, and it is rather heated in its disagreement with the opinion of the Court, even though it concurred in the judgment; nevertheless, I am not bringing it up here because it represents the Court's F.L.S.A. jurisprudence on just when and where the minimum wage would go into effect, but rather because it helps to express the moral and legal proposition I am arguing for here concerning the overcompensation of officers of nonprofit and profit-neutral organizations. See id. at 154-57.

high salaries and/or bonuses[85] of chief officers of an organization should nullify that organization's nonprofit or profit-neutral status for F.L.S.A. purposes. There is nothing wrong with one working in the for-profit sector, or thinking to himself that he is providing the world with a tremendous good via that for-profit business, but it is a "sham and artifice" for this person to call what they do "nonprofit" or "profit-neutral." It is neither of those things. And, as I have already stated, in the United States today, people, intending to work for their own profit, cannot agree to work for nothing. Therefore, people working for such an organization, which is for-profit, but that masquerades as nonprofit or profit-neutral, also cannot agree to work for nothing.

I am nowhere near the only person trying to sound the alarm as to the grave dangers posed to the United States by the proliferation in recent years of unpaid intern worker agreements.[86] Such agreements are completely illegal, and the federal courts should use the F.L.S.A. to stamp them out once and for all. As was alluded to by the Blackstonian story with which we began this article, such internships involve something close to the "submission" by the intern"to the drudgery of servitude."[87] That is a grossly unethical, and illegal, thing. But, I want to end this article by relating to readers one of my greatest fears in this whole matter. It is the chance that, if, in the process of commencing and carrying forward legal actions against unpaid intern working arrangements at for-profit companies, we lawyers failed to show the way in which the F.L.S.A. under which we sue does not

85 I believe that yearly compensation extending beyond $250,000 would be ridiculously high, for the purposes of this analysis.
86 Indeed, I am not even the only person who is worried about the F.L.S.A. being applied to true nonprofit and profit-neutral organizations. For instance, *see*Tucci,*supra* note 64, at 1363 *passim*. It is the case, as far as I can tell, that the worry that enforcement of the F.L.S.A. to (finally) put a stop to unpaid intern worker arrangements in this country might also have the negative side-effect of putting the nonprofit and profit-neutral *newsmagazines* out of business, is unique to my writings here. Nevertheless, this article is still just one small piece of the ocean of civic-minded writings out there aiming towards an America where there are no unpaid interns being exploited by for-profit companies anymore.
87*See supra*note 2 and accompanying text.

threaten the valuable work done by unpaid intern volunteers at nonprofit and profit-neutral newsmagazines, and indeed, at all other such charitable organizations.

If we fail to show judges and juries that legal pathway, the pathway that I believe I have marked out in this article, it might just be the case that those judges and juries will be reluctant to declare unpaid internships of any kind illegal under the F.L.S.A. Basically, for lack of effort made to discriminate between nonprofit and profit-neutral organizations that deserve unpaid intern help, and for-profit companies that do not deserve such help, we might lose the chance to finally put a stop to this illegal labor practice once and for all. And that would be the greatest shame in this whole affair.

Volunteering as an unpaid intern at a nonprofit or profit-neutral newsmagazine, or at any other such charity, is legal. Agreeing to work, for one's own profit, as an unpaid intern for a for-profit company is illegal. Each individual American considering "doing an internship" should choose the first road, and eschew the second road, if faced with such a choice. That is the legal pathway that I advise all who read this article, especially the lawyers who practice in this area, to stay on. Taking any other road will only serve to further muddle this area of the law, to indirectly give illegal unpaid internships another chance to survive, and to give to the United States, in this area of its life, even more problems than it has already. It is my solemn hope and prayer that all of those unfortunate consequences can and will still be prevented.