

“Unpaid Interns: ‘Breaking Persistent Barriers’ Without Employee Status and Anti-Discrimination Protections”

Chelsea Borg

University of California, Santa Barbara

Department of History

Abstract

This research project examines the history of women's involvement in internships. It looks at how women used internships to break into higher paying non-traditionally feminine employment while also discussing the problems that interns encountered with sexual harassment. This project explores the rhetoric that allowed for interns to be unpaid and unprotected against discrimination throughout the 20th century. Through examining the rhetoric surrounding internships in the 20th century, this paper found that the framing of interns as students, rather than as workers, caused interns to be excluded from employee status and left them without legal protection from sexual harassment.

Introduction

In 1995, a 22-year-old woman gained a sought-after unpaid internship position at the White House chief of staff's office. She answered phone calls and retrieved coffee, hoping that her unpaid labor would pay off with letters of recommendations or professional connections. When the government shut down that November, she and her peers-- unpaid interns and therefore not on the payroll--continued to labor while all employees were barred from work. During this period, she became involved in a romantic relationship her boss, President Bill Clinton. The Lewinsky/Clinton scandal is often viewed as a moral failure on the part of President Bill Clinton. However, this scandal also encompasses many negative aspects of internship labor. The Starr report, the culmination of the investigation into the Lewinsky/Clinton scandal, stated that when terminating their sexual relationship, the "President had told Ms. Lewinsky that he hoped they would remain friends, for he could do a great deal for her."¹ Clinton's promises demonstrate the power that he, like many other bosses and supervisors, had over interns. While the Lewinsky/Clinton scandal was distinctive due to its national and international scale, the core dynamic to the scandal is not unique in the slightest.

Although internships have existed in a variety of career paths in the United States throughout the 20th century, scholarship has rarely covered the topic outside of medical internships, until the 21st century. In 2011, journalist Ross Perlin published the first expose of "the exploitative world of internships," revealing how the 2008-2009 recession initiated the rise of the "Intern Nation," wherein universities were pivotal in both legitimizing and perpetuating this form of highly exploitable labor.² Some scholars such as Malcolm Harris have also addressed the world of internships. Harris argues that recent economic trends have placed the cost of producing "human capital" on the individuals by forcing potential employees to be economically responsible for their own training before attaining paid work.³ Additionally, both journalists and scholars have examined the legal foundations of unpaid internships. Scholarship on women's involvement in internships has mainly revolved around sexual harassment law in the 21st century. In her analysis of the plight of unpaid interns, Jessica Greenvald discussed the 21st-

¹ "The Starr Report; Full Text of Findings Sent to Congress -- Part Five of Thirteen," The New York Times, September 12, 1998, accessed March 03, 2019.

² Ibid.

³ Ibid., pg. 95.

century developments in sexual harassment protections for interns.⁴ Here, Greenvald laid out how a limited number of individual states including California and Oregon have taken action against the lack of sexual harassment protections for interns.⁵

This thesis broke with previous scholarship, which has focused on the 21st century, by taking the conversation back to the second half of the 20th century. This project examines Women's Educational Equity Act-funded internship programs and utilizes a variety of news articles and legal documents to explore women's experiences with internships in the latter-half of the 20th century. Due to the uncertain job prospects of interns and the increasing rate of women interns entering male-dominated workplaces during this period, supervisors had positions of power of their interns that fostered sexual harassment and discrimination, making it a specific focus of this project. Through taking a more historical approach, this thesis reveals that 20th-century rhetoric framing internships as outside of employment resulted in interns being excluded from many American labor laws and Title VII Anti-discrimination, which includes sexual harassment protections. From the 1970s to the turn of the century, internships were seen as an avenue to expand employment prospects and feminists also framed internships as a way for women to tackle “persistent barriers” to upward mobility. However, the rhetoric that was utilized framed interns as students rather than as workers by emphasizing the future benefits or compensation of the positions instead of the current realities of the labor. Throughout the 1990s, the compensation that unpaid interns were supposed to receive in the form of future benefits, were found to differ from the legal definition of compensation. This disconnect of meanings ultimately prevented interns who faced discrimination, including sexual harassment, from holding employers legally accountable throughout the 20th century.

Analysis

Since the induction of the Fair Labor Standards Act (FLSA) of 1938, employers are required to compensate their workers with a federally-mandated minimum wage; however, the Fair Labor Standards Act (FLSA) only covers employees.⁶ In 1947, the court case *Walling v. Portland Terminal Co.* placed *trainees* into a different category of worker than *employees*, which

⁴ Jessica Greenvald, "The Ongoing Abuse of Unpaid Interns:How Much Longer Until I Get Paid?," *Hofstra Law Review*, 45, 673 (Winter, 2016).

⁵ Ibid.

⁶ Ibid., pg. 70.

excluded them from the FLSA.⁷ In the years following *Walling v. Portland Terminal Co.*, Congress created more exemptions, including in 1985 when the Department of Labor amended the FLSA to only cover employees who work with the expectation of financial compensation to establish that employers do not need to pay volunteers for their efforts.⁸ Thus, *trainees* and *volunteers*, both categories that courts have placed interns in, are considered exceptions to many American labor laws.

American women have participated in internships throughout the 20th century, first in the medical field and then, later, in other professions in the creative, academic, and educational careers. When the economy took a downturn in the 1970s, a greater number of men and women undertook internships. By the early-1980s, an estimated one million people and one-in-five college students throughout the United States were participating in internship labor.⁹ Throughout the 1970s and beyond, many American families could no longer support themselves through a sole breadwinner, making women's economic contributions to the household increasingly necessary. Although women's wages were essential for many families, women were concentrated in lower-paid fields, mainly in the service sector.¹⁰ Some avenues around these economic constraints were through education, training, and internships. To combat the barriers preventing women from breaking into higher paying fields and positions, feminist groups fought for the passage of the Educational Amendment of 1972 Title IX which states that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹¹ Thus, women were gaining greater opportunities and protections in education and career training.

Throughout this period, women-specific internship programs began to pop-up at universities throughout the United States. For example, in the mid-1970s, Pace University began advertising for their MS and Professional diploma programs in Educational Administration that

⁷ Natalie Bacon. "Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet # 71"." *Entrepreneurial Business Law Journal* 6 (2011): pg. 72.

⁸ "United States Department of Labor," Elaws - Employment Laws Assistance for Workers and Small Businesses, accessed March 18, 2019.

⁹ Ibid.

¹⁰ Thomas L. Steiger and Mark Wardell, "Gender and Employment in the Service Sector," *Oxford University Press*, Feb. 1995.

¹¹ Ibid.

included on-the-job supervised internships.¹² There were also various community-based programs affiliated with universities such as Yale that included internships to aid women in entering the “business or professional world on a higher level.”¹³ These internship programs often aimed to increase women’s ability to get higher paying and leadership positions in careers that were traditionally male-dominated.

Women’s Educational Equity Act

Although there were a number of internship programs aimed at increasing women’s employment opportunities, many of these were federally funded by one particular public policy: the Women's Educational Equity Act. Driven by women’s concentration in low paying careers, feminists’ lobbying efforts culminated in the passage of the Women’s Educational Equity Act (WEEA), authored by Representative Patsy Mink as part of the Special Projects Act of 1974, two years after Title IX.¹⁴ WEEA internships focused on giving women chances to demonstrate their competence and to create networking opportunities.¹⁵ The development of female or gender-inclusive professional networks would reduce the exclusive nature of certain male-dominated professions that were controlled by “old-boys networks.” The existence of the “old-boys networks” as a cause for concern, was demonstrated by an all-male club in early 1980s Texas.¹⁶ One of the 17 female administrators in Texas, none of which were invited to join the club, titled it part of the “Good old-boys network” that impedes women’s advancement because, like any sex-restricted group, it “put forth the goals of that sex at the expense of the other.”¹⁷ Hence, WEEA-funded programs emphasized that women would have better chances of succeeding in careers they had historically been excluded from by neutralizing “persistent barriers.”¹⁸

This thesis will now examine two of the numerous WEEA funded internship programs: Internships, Certification, Equity Leadership and Support (ICES) and Women’s Management for Professional Job Re Entry. Although it is unclear to what extent these specific programs

¹² Classified ad 1488 -- no title. *New York Times* October 23, 1977.

¹³ Classified ad 1425 -- no title. *New York Times* December 9, 1979.

¹⁴ Senate, Subcommittee on Education of the Committee of Labor and Public Welfare United States Senate, *The Women's Educational Equity Act 1973*, 93 Cong., 1st sess., S. Bill (Washington, DC: U.S. Government Printing Office).

¹⁵ Ibid.

¹⁶ "Administrators warm up cattle prods for initiation". *United Press International*. January 15, 1984.

¹⁷ Ibid.

¹⁸ *Women's Educational Equity Act Annual Report 1987-1992*, report, U.S. Department of Education, Women's Educational Equity Act.

influenced the intern market, they did make an impact through their visibility with their produced models that were distributed nationwide within their fields, which garnered interest from other employers, universities, and students who wanted to create and participate in similar programs.¹⁹ Further, these programs demonstrate some of the common successes and concerns with female interns placed in male-dominated professions.

ICES was formed in 1977 to combat the lack of women in educational administrative and decision making positions through placing thirteen women in administrative internship positions in school districts throughout the state of Kansas.²⁰ ICES strongly emphasized giving interns the opportunity to demonstrate their competence through using strategies such as daily logs in which interns had to determine if they were “passive” or “active” participants in the day’s activities.²¹ The ICES program attempted to make it easier for individuals heading single parent households to participate, ensuring that all interns were paid and providing each intern with a support team to aid in the transition; due to ICES’s numerous considerations, ten out of the thirteen participants received job offers in administrative positions.²²

However, the potential for sexual harassment as a major concern for women interns, was made evident in the self-reported description of ICES’s own successes. In the final section of the ICES report titled “Dissemination,” the author describes the progression of how people perceived the participating interns at the United School Administrators (USA) National Convention for education administration over the three years in which the interns attended.²³ It is casually mentioned that the interns were initially considered as “oddities” and even as “sexual objects” at the convention during the first years. However, by the last year, the interns were “treated as professionals.”²⁴ The short mentioning of interns being treated as “sexual objects” suggests that this was a common occurrence and not viewed as a major concern to be dealt with in a serious manner. There is no mention of either the interns or facilitators of the internship programs

¹⁹ ICES, *A Project of Internships, Certification, Equity Leadership, and Support Final Report*.

²⁰ *Ibid.*

²¹ *Ibid.*, pg. 8.

²² Judith Adkison, *A Project of Internship, Certification, Equity-Leadership, and Support* (“Example of a Daily Log”), report, Sponsoring Agency: Women’s Educational Equity Act, Kansas University Lawrence School of Education (WEEA Publishing Center). pg. 58.

²³ Judith Adkison, *A Project of Internship, Certification, Equity-Leadership, and Support*, report, Sponsoring Agency: Women’s Educational Equity Act, Kansas University Lawrence School of Education (WEEA Publishing Center). pg. 1.

²⁴ *Ibid.*, pg. 81.

²⁵ *Ibid.*, pg. 82.

attempt to alleviate this issue, and there is no inclusion of training or preparation for unwanted sexual harassment, which had become a newly recognized issue in the early 1970s, within the model.²⁶ Thus, the ICES program, although careful to make the internships paid and educational, failed to prevent the participants from facing sexual discrimination.

Similar to the ICES program, Goucher College's Developing Women's Management Program for Professional Job Reentry aimed to place women in leadership positions.²⁷ The most significant element of the Goucher College's model program was a timeshare model that provided schedule flexibility by allowing "displaced mothers" to intern on a part-time basis. Although these work-share programs were beneficial in making the internships more accessible and short-term, they resulted in low-rates of offers for permanent positions.²⁸ The program creators stated that the internship should be regarded as a "transitional aid" rather than a direct route to employment since there "is no guarantee" of job offers.²⁹ Furthermore, they emphasized that a "positive recommendation from the intern's supervisor" and fostering "valuable contacts" would be essential in the women's attempts to gain permanent positions.³⁰ Therefore, the benefits of internships on the participants relied heavily on the goodwill of the interns' supervisors.

The combination of the position of power, placing supervisors over their interns due to intern's uncertain job prospects, and the fact that women interns were entering male-dominated workplaces, led to sexual harassment and discrimination. Despite this danger, the sample documents utilized to facilitate employer-intern-university cooperation do not mention sexual harassment training under any terminology.³¹ As for the educational training course of the program, unwanted sexual advances were only addressed once in a write-up question, but did not include steps for preventative training.³² The write up gives hypothetical situation in which a "close working" male associate would act in an uncomfortable and sexual manner toward the intern, who would continually brush it off until the male associate committed a third offense.³³

²⁶ Ibid., pg. 81-81.

²⁷ Judie Jubin, *Developing Women's Management Programs: A Guide for Professional Job Reentry*, report, Sponsoring Agency: Women's Educational Equity Act, Goucher College (WEEA Publishing Center). pg.1.

²⁸ Ibid.

²⁹ Ibid., pg. 117.

³⁰ Ibid.

³¹ Ibid.

³² Judie Jubin, *Developing Women's Management Programs: A Guide for Professional Job Reentry*. pg. 218.

³³ Ibid.

This hypothetical implies that action would only need to be taken once the harassment had occurred multiple times rather than suggest that interns should inform supervisors or take other action immediately. Additionally, the single hypothetical scenario would not prepare students to deal with sexual harassment if the perpetrator was their supervisor or someone with power over their current and future career prospects. Both ICES and the Goucher College internship programs illustrate how internships could be utilized to help women attain positions in non-traditionally feminine career paths. However, the interns in these programs nevertheless faced job insecurity, uncertainty regarding the balance between education and labor, economic inaccessibility, and lack of training or protections against unwanted sexual advances from their coworkers and supervisors.

Sexual Harassment Law Applicable to Interns

Throughout the 20th century, both employees and students were able to take legal action against the institutions that failed to adequately handle their experiences with sexual harassment. The passage of Civil Rights Act in 1964 Title VII made sex-based discrimination against an *employee* illegal in the workplace.³⁴ In the initial years after the Act's passage, the courts did not find that sexual harassment was discrimination eligible for protection under Title VII.³⁵ However, in the 1970s a number of women were able to successfully utilize Title VII to sue their employers for sexual harassment, which was upheld by the Supreme Court in 1986 with *Meritor Saving Bank v. Vinson*.³⁶ Similarly to Title VII, Title IX of The Educational Amendments Act of 1972 prevented discrimination in an educational setting on the "basis of sex."³⁷ In 1992, with the case *Franklin v. Gwinnett County Schools*, the Supreme Court found that sexual harassment would be considered "discrimination on the basis of sex" for Title IX purposes.³⁸ Therefore, by the early 1990s both *students*, with Title IX, and *employees*, with Title VII, had clear legal avenues to contest the improper handling of sexual harassment by the institutions they were involved with.

³⁴MacKinnon, and Siegel. "A Short History of Sexual Harassment." *Yale Press*, 2003. pg. 8.

³⁵ *Ibid.* 8-11.

³⁶ *Ibid.*, pg. 9-11 and 20.

³⁷ Douglas P. Ruth, "Note title VII: Is Title VII The Exclusive Remedy for Employment Discrimination in the Educational Sector?," *Cornell Journal of Law and Public Policy*, 5, 185 (Winter, 1996).

³⁸ Bernice Resnick Sandler, Title IX: How We Got It and What a Difference it Made, 55 *Clev. St. L. Rev.* 473 (2007)

By definition and in practice, internships are work-experiences. However, due to the 1947 *Walling v. Portland Terminal Co.* decision that created the worker category of “trainee” and the cultural association of interns with youthful students, unpaid interns are not legally considered “employees.” Interns’ lack of employee status exempts them from Fair Labor Standard Act (FLSA) protections, allowing them to legally be unpaid.³⁹ Since interns lack “employee” status, they are also exempted from the 1964 Civil Rights Act Title VII anti-discrimination protections.⁴⁰ Therefore, throughout the 20th century, unpaid interns could not sue their employing institutions for either violating Title VII through direct discrimination against them or violating it by not adequately handling discrimination on the basis of race, color, religion, sex, or national orientation.⁴¹

The 1996 court case *O’Connor v. Davis* established that unpaid interns qualify as *volunteers* rather than *employees*, for the purposes of Title VII and that the institutions in which unpaid interns’ labor cannot be regarded as educational institutions for the purpose of Title IX unless educating is their “primary purpose.”⁴² The plaintiff-appellant Bridget O’Connor was enrolled at Marymount College where she was required to conduct field work which led her to obtain an unpaid internship with Rockland Psychiatric Center where she received federal funding as “work study” for her labor.⁴³ O’Connor stated that while interning at Rockland, she was sexually harassed repeatedly by Dr. James Davis, a Rockland employee, who called her “Miss Sexual Harassment” and suggested that they participate in an orgy.⁴⁴ O’Connor reported these occurrences to her supervisor, Lisa Punzone, who stated that Davis said similar things to her and that O’Connor should try to ignore him.⁴⁵ Eventually, Punzone did report Davis’ behavior towards O’Connor to her own supervisor, who failed to take further action.⁴⁶ In 1995, O’Connor filed lawsuits against Marymount and Rockland claiming sexual harassment in violation of Title VII and Title IX.⁴⁷

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *O’Connor v. Davis*, 126 F.3d 112, 1997 U.S. App. LEXIS 26401, 74 Fair Empl. Prac. Cas. (BNA) 1561 (United States Court of Appeals for the Second Circuit September 19, 1997, Decided).

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

The district court concluded that O'Connor was not an *employee* under Title VII due to "volunteering" her labor at Rockland rather than receiving compensation for it.⁴⁸ O'Connor argued that the district court's decision was "improperly concluded" because she satisfied the common-law agency definition⁴⁹ and that she was compensated through federal work-study.⁵⁰ The Court of Appeals disagreed with O'Connor's argument by stating that a "hire," or agreement for compensation, by the institution itself must occur for the common-law agency definition to apply.⁵¹ Therefore, O'Connor would be considered a *volunteer* rather than an *employee* of Rockland, disqualifying her from claiming that the institution violated Title VII through their inadequate handling of Davis' sexual harassment of O'Connor.⁵²

O'Connor also claimed that for the purposes of Title IX, Rockland was an educational institution because it "both receives federal financial assistance either through the state, its patients, or its employees" and also operates "vocational training through an organized educational program."⁵³ However, the court of appeals also disagreed with O'Connor's argument because it declined "to convert Rockland's willingness to accept volunteers into conduct analogous to administering an "education program" as contemplated by Title IX."⁵⁴ The court concluded that Rockwell was not an educational institution because its "primary purpose" was not to educate.⁵⁵ Ultimately, O'Connor's unpaid intern status prevented her from gaining reparations for the sexual harassment that she encountered from the institution that inadequately handled the situation either through the utilization of Title VII or Title IX. *O'Connor v. Davis* was a significant case because it established that unpaid interns would be limited in their legal options for fighting harassment or any other forms of discrimination since they are considered *volunteers* rather than *employees*.⁵⁶ The term "volunteer" means that an intern is not controlled by the employer to the extent that an *employee* would be through the employers economic control over them meaning that they are not tied to the employer in a substantial way, allowing

⁴⁸ Ibid.

⁴⁹ Where "Common Law Agency" means that employer has the agency to speak/take action on behalf of the employee.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid.

them to leave more easily.⁵⁷ However, the issue with this reasoning is that in *O'Connor*, the intern's educational career would be hindered by her leaving Rockwell without finishing her internship. Although O'Connor was able to be placed in another internship with the help of Marymount, this still raises the issue of how much control an employer really has over an unpaid intern.

A similar case, *Lippold v. Duggal Color Projects* (1998), was brought up in New York a year later where the Plaintiff, an intern named Jennifer Lippold, claimed that Duggal Color Projects violated Title VII by failing to adequately address her supervisor's sexual harassment of her.⁵⁸ Lippold was training to become a teacher through a vocational program run by the Board of Education which required that she work at an outside site for three years leading to her become an intern at Duggal Color Projects.⁵⁹ Lippold argued that, "Duggal Color Projects exercised employment-type control over her hours, daily activity, and work assignments."⁶⁰ In order for Lippold to get credit towards her educational program for her work as an intern, she was required to produce supervisor-signed time cards and evaluation sheets.⁶¹ While Lippold was interning at the company, her supervisor sexually harassed her and refused to sign her time cards and evaluation sheets. Although she argued that Duggal had "employment-type control" over her labor, the court cited cases such as *O'Connor* which established that in order to be considered an *employee* for Title VII purposes, the plaintiff must have been directly compensated by the employer.⁶² As in *O'Connor*, Lippold's claims against the corporation were "dismissed" because she was considered a "volunteer" and the corporation did not *directly* compensate her with a "wage or salary" or other forms of compensation such as health care.⁶³

Conclusion

The *O'Connor* and *Lippold* cases established that although in order for someone to be an *employee* they should either be paid or receive "other compensation." They also established that direct financial compensation was a prerequisite of *employee* status even when the intern

⁵⁷ Ibid.

⁵⁸ *Lippold v. Duggal Color Projects*, 1998 U.S. Dist. LEXIS 335, 1998 WL 13854 (United States District Court for the Southern District of New York January 15, 1998, Filed).

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

position was “employee-like” and that unpaid internships are compensated through other means.⁶⁴ As made clear by the WEEA-funded internship programs examined earlier, the benefit of the temporary internship position is the ability to increase your chances of gaining permanent employment through making connections and attaining recommendations from supervisors. Thus, advocates of women’s specific involvement in internships argued that the real compensation for their labor lay with the *potential* for *future* economic compensation, through increased job opportunities, etc. Both O’Connor and Lippold were compensated for their labor as unpaid interns through positive supervisor evaluation forms that were essential for them to gain credit at their educational institutions and advance their careers. Since that compensation was withheld from Lippold by her supervisor due to her rebutting his sexual advances, he had immediate control over her educational, financial, and career prospects. O’Connor and Lippold’s cases show the inconsistency of the utilization of the term “compensation” for interns. Moreover, this inconsistency demonstrated the legal loopholes in which the categorization of interns as volunteers, regardless of the economic value for the intern of this form of labor, created.

The breaking of the intern from the student identity allows for the labor essence of internships to be increasingly visible and the notion of mandatory compensation for internships more palatable even though it contrasts the rhetoric of early internship advocates. This thesis has stressed that work as an intern is indeed labor and that the framing of interns as student, trainees, or volunteers without an adequate emphasis on their labor aspects established the foundation of pervasive concerns about and problems of sexual harassment in the intern economy. Moreover, the pro-internship rhetoric utilized by those attempting to expand opportunities for individuals, especially women, fostered problematic power-dynamics and legal ambiguities that made discrimination in the form of sexual harassment a real concern and a partially uncontestable legal issue, whose effects were felt by people just beginning their path towards employment.

⁶⁴ Ibid.

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