

Exploiting Chinese Interns As Unprotected Industrial Labor

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I. INTRODUCTION: STUDENT FACTORY LABOR IN CHINA

“[N]o organization or individual has the privilege of overstepping the constitution and laws, and no one in a position of power is allowed in any way to take one's own words as the law, place one's own authority above the law or abuse the law.”¹

Private employers in the People’s Republic of China (“China”) rely increasingly on intern labor as a major component of their workforce. All over China, industrial and service sector student interns work full and overtime schedules performing unskilled labor alongside workers, who enjoy pay and benefits that comply with or exceed the standards set by Chinese labor law. However, the interns are paid below China’s standard

¹ President Hu Jintao, Report to the 18th Congress of the Communist Party, (Nov. 8, 2012), available at http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_6.htm.

wages and benefits, and are barred from access to the judicial and other remedies for labor law abuses. These industrial and service “internships” are largely devoid of educational, technical or vocational content and often unrelated to the vocational aspirations of the students.² Employers and business-friendly local authorities in China have adopted a self-interested interpretation of the labor laws and regulations that places interns outside the protections of the labor law and bars them from taking their disputes to the labor tribunals. Understandably, these workers believe that they are being unfairly treated and have protested through strikes and other direct industrial actions.

Industrial interns are but the latest class of “cheap” labor to be deployed in Chinese industry. As early as 1979, in the wake of the economic and social devastation wrought by Mao Zedong’s³ Cultural Revolution, China’s new leader, Deng Xiaoping, began to put forward an economic growth strategy based on cheap labor for foreign investors and cheaper goods for export.⁴ As a result of this approach to development, China has experienced phenomenal industrial growth as well as massive internal migration from the country to the huge new cities that have sprung up on China’s coast and in the South.⁵

The Chinese government and the ruling Chinese Communist Party (“CCP” or the “Party”) acknowledge that this furious industrialization and growth has also led to yawning social inequality, and has spawned widespread industrial unrest.⁶ Chinese labor laws from the more socialist

² This paper uses the term “industrial interns” to describe students working in industrial and service settings without educational benefit and under substandard labor conditions.

³ Mao Zedong, also transcribed as Mao Tse Tung (Dec. 26, 1893 – Sept. 9, 1976), was a Chinese Communist revolutionary and governed the People’s Republic of China from its establishment in 1949 until his death. *See generally* JONATHAN SPENCE, MAO ZEDONG: A LIFE (2006).

⁴ JOHN KEAY, A HISTORY OF CHINA 532-33 (2009); *see also* RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 6-12 (2010) (reviewing the history of China’s opening to direct foreign investment and the relationship of this phase of industrialization to wages and to labor legislation); MARY GALLAGHER, CONTAGIOUS CAPITALISM 76, 85-86 (2007) (referencing the “infamous sweatshops of the South [of China] . . .” and describing the labor relations consequences of a “cheap labor, cheap goods for export” policy); GRAHAM HUTCHINGS, MODERN CHINA: A COMPANION TO A RISING POWER 90-93 (2000) (providing a succinct description of the Cultural Revolution that convulsed China from roughly 1966-76); EZRA F VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA 405-11 (2011) (describing early experiments in low wage, labor intensive production in South China).

⁵ VOGEL, *supra* note 4, at 703-711.

⁶ *See* Wayne M. Morrison, *China’s Economic Rise, History, Trends, Challenges and Implications for the United States*, CONGRESSIONAL RESEARCH SERVICE, Feb. 3, 2014, 9-10, *available at* <https://www.fas.org/sgp/crs/row/RL33534.pdf>; *see also* Eli Friedman, *China In Revolt*, JACOBIN, <https://www.jacobinmag.com/2012/08/china-in->

era prior to 1979 proved unsuited to deal with private market labor relations, where private employers establish conditions for wages, hours and working conditions unilaterally, often below legal standards.⁷ During the early 1990s, China struggled to enact labor laws that would force employers to adhere to legislated labor standards concerning wages, hours, working conditions, discrimination, child and forced labor, and other abusive labor practices.⁸ The principal new labor law, the 1995 Labor Law,⁹ rooted the obligations of the employer in the individual labor contract, which interpreted the legislated labor standards.¹⁰ Despite this legislative effort, pay in China's new employment market remained low, and wage theft was rampant in industries like construction and manufacturing. Cheated and abandoned by their employers, Chinese workers—including younger, less docile workers—initiated protests all over industrial China.¹¹ These pervasive labor protests prompted China to rethink its policy of cheap labor and to begin to tread on the path to higher value production that its East Asian neighbors—Japan, Taiwan and Korea—had so successfully pursued.¹² As a result of the continuing disruption to China's manufacturing and service sectors caused by labor unrest, the Chinese government launched a series of further reforms between 2006 and 2008 aimed at ensuring basic industrial fairness for workers. These laws provided for, among other things, the prompt payment of wages and legal channels for the peaceful resolution of labor disputes.¹³

revolt/; Manfred Elfstrom and Sarosh Kuruvilla, *The Changing Nature of Labor Unrest in China*, available at <http://ilera2012.wharton.upenn.edu/NonRefereedPapers/Kuruvilla,%20Sarosh%20and%200Elfstrom,%20Manfred.pdf> (prepared for the International Labor and Employment Relations Conference, Philadelphia, July 2-5, 2012); see also CHINA STRIKES: MAPPING LABOR UNREST ACROSS CHINA, <https://chinastrikes.crowdmap.com/> (last visited Mar. 13, 2014).

⁷ BROWN, *supra* note 4, at 42-47.

⁸ See *infra* Part II; BROWN, *supra* note 4, at 86-91. Additionally, China had also been dependent on the *hukou* system, which rendered access to social and educational services, as well as full citizenship rights, dependent on owning a residency permit.

⁹ Labor Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) [hereinafter 1995 Labor Law].

¹⁰ BROWN, *supra* note 4, at 86-91.

¹¹ BROWN, *supra* note 4, at 6-12; GALLAGHER, *supra* note 4, at 127-32.

¹² *The Shifting Geography of Global Value Chains: The Implications for Developing Countries and Trade Policy*, WORLD ECONOMIC FORUM, 11-15, available at http://www3.weforum.org/docs/WEF_GAC_GlobalTradeSystem_Report_2012.pdf.

¹³ See *infra* Part III(A); BROWN, *supra* note 4, at 1-12.

The reform laws¹⁴ reflect the Chinese Party-State's¹⁵ awareness that achieving fair treatment, wages, hours, working conditions, and providing skills training are critical to China's ascent up the economic value chain along a path of labor and social peace.¹⁶ The labor legislative framework stands alongside China's vast network of higher education institutions established in 1982; this includes universities and vocational schools aimed at enhancing employment skills among young workers entering the job market.¹⁷ However, China-based export manufacturers and service providers have diverted young students from these institutions to unskilled labor at substandard wages and benefits without discernable technical or vocational benefits. Famous enterprises such as the Taiwanese company Foxconn, which manufactures and assembles most of the world's computers and mobile phones in its Chinese plants, have come to rely on large numbers of interns to staff their facilities.¹⁸ Interns are often compelled to undertake this substandard employment in order to obtain the certifications needed to compete in China's job market after graduation.

¹⁴ Labor Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) (establishing strict and more enforceable rules for paying workers and protecting job rights) [hereinafter 2008 Labor Contract Law]; Labor Dispute Mediation and Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) (delineating processes for resolving labor disputes and providing remedies for labor law violations) [hereinafter 2008 Labor Dispute Mediation and Arbitration Law]; Employment Promotion Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) (promoting employment and higher wage jobs, banning discrimination, including mistreatment of migrant workers and requiring intensified technical and vocational training) [hereinafter 2008 Employment Promotion Law].

¹⁵ Given the leading role of the Party in state legislation and governance, China is often referred to as being governed by the Party-State. *See generally* RICHARD MCGREGOR, *THE PARTY, THE SECRET WORLD OF CHINA'S RULERS* (2011) (using the phrase to sum up the control of all state organs by the Party and the fusion of the Party with the State).

¹⁶ *The Shifting Geography of Global Value Chains: The Implications for Developing Countries and Trade Policy*, *supra* note 12, at 14:

The Chinese leadership is acutely conscious of these issues, challenges and pressures. These are reflected in the 12th Five Year Plan (2011-2015). A key goal is to achieve greater social harmony and inclusiveness, reflecting dramatically rising inequality in China. The plan also emphasizes the goal of shifting the economy from investment-export driven to domestic-consumption driven. To bring China more into high-tech/high-value production, great efforts will be extended in education and research as well as by selecting emerging strategic industries. The vision is for China to become a high-tech economy in an environmentally clean and harmonious society.

¹⁷ *See infra* Part III(C).

¹⁸ *See infra* Part II (detailing the scale of Foxconn's exploitation of industrial interns in its manufacturing processes).

This form of exploitation corrupts the supply chains of global companies such as Honda, Toyota, Apple, and Chinese companies.¹⁹ The fact that a large numbers of interns perform work identical to that of regular factory workers for subminimum wages has fueled dissatisfaction and work stoppages all over China.²⁰

Industrial interns at Honda and Toyota sparked widespread strikes during the summer of 2010, bringing newfound attention to the problems they face.²¹ Despite these adverse consequences to economic development, Chinese and foreign employers have thus far successfully exploited intern labor by propagating the notion that interns working at unskilled factory work are not protected by Chinese labor laws when they perform work alongside and identical to that of formal employees—even when such work does not contribute to the acquisition of vocational, technical professional skills. Chinese labor and educational authorities at the local level appear to have ignored the scale and disruptive impact on industry of this form of “second tier” labor.²²

Arbitrarily leaving a significant segment of industrial and service workers out of China’s emerging framework for preventing and resolving labor disputes by legal processes serves only to thwart China’s recent,

¹⁹ See *infra* Part II (describing the processes through which multi-national corporations have contracted with vocational schools to exploit students as form of industrial interns for cheap labor).

²⁰ See generally *The Mass Production of Labour: The Exploitation of Students in China’s Vocational School System*, CHINA LABOUR BULLETIN, Jan. 12, 2012, available at http://www.clb.org.hk/en/files/share/File/general/vocational_school_system.pdf [hereinafter *Mass Production of Labour*].

²¹ See, e.g., Jonathan Watts, *Chinese workers strike at Honda Lack parts Supplier*, THE GUARDIAN, Jun. 11, 2010, <http://www.theguardian.com/business/2010/jun/11/honda-china>; Jonathan Watts, *Strikes in China signal end to era of low-cost labour and cheap exports*, THE GUARDIAN, Jun. 17, 2010, <http://www.theguardian.com/world/2010/jun/17/china-strikes-economy>; Wei Le, *Honda Strike Goes On*, CAIXINONLINE, Jun. 1, 2010, <http://english.caixin.com/2010-06-01/100149185.html>; *Workers strike third Honda auto parts plant*, CHINA.ORG.CN, Jun. 10, 2010, http://www.china.org.cn/business/2010-06/10/content_20223069.htm; see, e.g., *Strikes halt work at Toyota and Honda plants in China*, BBC NEWS, Jun. 23, 2010, <http://www.bbc.com/news/10389762>.

²² See *Mass Production of Labour*, *supra* note 20, at 5 (noting that courts do not hear labor cases from interns, claiming that the interns lack labor relationships); Liang Shumei, *Cheap Labour in Essence, Students in Name: Vocational School Interns in China*, ASIAN MONITOR RESOURCE CENTRE, Sept. 14, 2011, <http://www.amrc.org.hk/print/1179> (noting that, because student workers are believed to be unprotected by labor laws, the Labour Inspection Bureau will not address complaints by interns); *A Political Economic Analysis of the Strike in Honda and the Auto Parts Industry in China*, IHLO, July 2010, at 13, available at <http://www.ihlo.org/LRC/W/000710.pdf> (observing that the All-China Federation of Trade Unions (“ACFTU”) does not have a position that protects intern labor).

laudable efforts to fashion a workable labor law for a market economy.²³ Yet that is exactly what many Chinese employers and their allies in government are doing—classifying students recruited from technical and vocational schools as “interns” (and therefore outside the coverage and protections afforded to ordinary workers under Chinese labor law) and requiring these “interns” to perform ordinary labor without the educational, technical, or vocational benefits inherent to an internship. The results of excluding these intern laborers from the protections of the newer labor law standards regarding wages, hours and working conditions, as well as from access to labor law remedies, are plain: wide-spread, intern sparked strikes that marred China’s path to development.²⁴

In an analogous (but hardly identical) context, the United States Supreme Court Justice Felix Frankfurter cautioned against reading reform legislation designed to cure defects in the labor law with “a spirit of mutilating narrowness,” lest the overriding policy of peaceful industrial dispute resolution and uninterrupted production be undermined.²⁵ The “mutilating narrowness” underlying the misclassification of these intern workers slights the supremacy of China’s own legislative and administrative processes for setting policy—here the crucial industrial and social policy of social harmony. This paper argues that industrial interns laboring in the private sector should be covered under Chinese labor law when they perform unskilled work unrelated to their educational, technical or vocational aims.²⁶

Some interns working in bona fide technical or vocational programs may indeed not be fully covered by labor laws. Such genuine and beneficial educational programs have no need for the full weight of labor law. However, many Chinese students are compelled to work long hours for substandard pay in industrial internships, devoid of any technical and vocational benefit to students, at companies like Foxconn. Under these circumstances, these nominal students cease to be interns and should,

²³ See 2008 Labor Contracts Law, *supra* note 14, art. 1 (stating that the purpose of the law is “to improve the labor contract system, specify the rights and obligations of both parties to the labor contracts, protect the legitimate rights and interests of the workers and construct and develop a harmonious and steady employment relationship”).

²⁴ See *infra* Part II (describing how the brutal conditions under which industrial interns work has provoked collective action).

²⁵ United States v. Hutcherson, 312 U.S. 219, 235 (1941) (Frankfurter, J.).

²⁶ See *infra* Part III. We use the term “industry” or “industrial” to cover mainly unskilled factory work, or unskilled work in mines, mills, transportation and other facilities, including infrastructure, where goods are produced and transported to market. By “service” we mean service sector. We also use the terms “industry and industrial” to sweep in unskilled work in factories, mines, mills, transport and service.

instead, be treated as “workers” under Chinese labor law and afforded the full legal rights that are provided to their full-time counterparts.

In many cases, the current practice of compelling industrial interns to work at substandard wages as a condition of being certified to compete for jobs not only violates Chinese labor laws, but also amounts to forced labor under international law.²⁷ This paper also identifies the international and comparative approaches to the labor law status of industrial interns to provide comparative law context for addressing the looming problem of intern labor in China.²⁸

Part II of this article discusses the historical development of industrial internships and the current exploitation of such students working under substandard conditions alongside full-time employees. Part III examines contemporary Chinese labor laws to conclude that a reasonable reading of the legal framework covers industrial interns performing work equivalent to that of their full-time counterparts, without any educational benefit in their chosen fields of specialization. Part IV identifies how such exploitation of industrial interns constitutes forced labor under international law. Part V criticizes the enforcement of China’s labor law framework as deficient in light of comparable legal frameworks.

II. HISTORY AND STRUCTURE OF CHINESE VOCATIONAL INTERNSHIPS

The Maoist Cultural Revolution emptied the institutions of higher education, dispersing faculty and students often for work in agriculture.²⁹ Following this decimation of the China’s educational infrastructure, the Central Government began aggressively promoting vocational education in 1980 to create a workforce for private industry and services.³⁰ It paired this promotion with the liberalization of its economy.³¹ The government’s accelerated cooperation between vocational schools and enterprises³² was one method to promote the transition of the workforce from agriculture to

²⁷ See *infra* Part IV.

²⁸ See *infra* Part V.

²⁹ The Cultural Revolution (1966-76) was a “cataclysmic” attack launched by Mao on most Chinese institutions, including the Communist Party, schools and universities. Institutions of higher education emptied as students were sent to the fields to work as peasants in a campaign to reeducate students. See generally HUTCHINGS, *supra* note 4, at 90-96.

³⁰ Shumei, *supra* note 22 (noting that the Cultural Revolution reduced the number of vocational schools from 60,000 in 1965 to 4,700 in 1978).

³¹ Shumei, *supra* note 22.

³² Shumei, *supra* note 22 (describing the system of school-enterprise cooperation as “factory in front, school at the back”).

industry.³³ As Chinese industry expanded rapidly on the coast and in the south, labor shortages at all levels of the vocational ladder emerged, even for unskilled labor in industry and the service sector. As enterprises recovered from the financial crisis of 2008 in response to Beijing's robust stimulus program, further industrial expansion meant more acute labor shortages for even unskilled labor. Vocational schools and provincial governments responded by placing interns primarily according to the needs of the enterprise, rather than according to the educational projects and history of the students.³⁴

Vocational schools are now a significant source of industrial and service labor. In 2010, forty-two percent of the 18.1 million Chinese students completing their nine years of compulsory education opted to enroll in vocational school.³⁵ Out of China's 10,864 operating secondary vocational schools in 2010, the local and provincial governments managed 7,700 schools, the central government managed 41 schools, and 3,123 schools were privately operated.³⁶ Given the large number of vocational students in China, the categorical exclusion of student interns from the protections of Chinese labor law would have a substantial and immediate impact on industrial relations.

Students in vocational schools select a wide variety of majors, ranging from fields such as manufacturing, finance, tourism, and medicine.³⁷ However, when the students enter the workforce, their assignments too often turn out to be unrelated to their chosen field. For example, interns majoring in infrastructure construction are assigned to provide security checks in subway stations.³⁸ Foxconn interns assembling electronics feature diverse majors like nursing, languages, and art.³⁹ The disconnect between an intern's educational aspirations and their internship is hardly the result of the intern's choice. Interns are by fiat assigned to positions completely unrelated to their studies, and they have no choice; schools often claim that assignments are made under color of provincial authority and that the interns must accept the internship in order to receive

³³ Shumei, *supra* note 22; *see also* Vocational Education Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Sept. 1, 1996).

³⁴ Shumei, *supra* note 22.

³⁵ *Mass Production of Labour*, *supra* note 20, at 2.

³⁶ *Mass Production of Labour*, *supra* note 20, at 3.

³⁷ *Mass Production of Labour*, *supra* note 20, at 2.

³⁸ *Mass Production of Labour*, *supra* note 20, at 4.

³⁹ Juliette Garside, *Apple's Chinese iPhone Plants Force Student 'Internships': Rights Group*, THE GUARDIAN (Apr. 2, 2012), <http://www.rawstory.com/rs/2012/04/02/apples-chinese-iphone-plants-employ-forced-interns-rights-group>.

their diplomas.⁴⁰ Redress in these situations is limited: interns are unable to file complaints to the school about poor working conditions for fear that the school will retaliate by denying them their diplomas.⁴¹ These interns become less competitive job applicants in their chosen fields due to a lack of progress in appropriate skill acquisition. Abruptly switching the education and training focus from the prior curriculum in the vocational schools to an unrelated internship also does not foster acquisition of those higher skills required to build the higher value added economy that is the stated goal of Chinese economic policy.

Recent attention brought to Foxconn's (China's largest non-state owned employer) extensive reliance on student intern labor demonstrates that these industrial internships are devoid of educational value. Foxconn runs what may be the largest internship program in the world, with vocational students directed by their schools and provincial governments to work for Foxconn or leave school.⁴² While Foxconn claims that only fifteen percent of its workforce is intern labor, Students and Scholars Against Corporate Misbehavior (SACOM) estimate the percentage of interns being as high as thirty-three percent, or 430,000 of the company's 1.3 million factory laborers.⁴³

To help assemble such an enormous workforce, the company arranged in 2010 to receive 100,000 interns from Henan as well as interns from the student bodies of 119 schools in Chongqing.⁴⁴ At the end of 2011, Foxconn reportedly contracted with 100 vocational schools to provide intern labor for its growing production needs.⁴⁵ Interns work for a

⁴⁰ *Mass Production of Labour*, *supra* note 20, at 3; *see, e.g.*, Garside, *supra* note 39 (reporting that a vocational school in Henan ordered students, nine days before they were to leave for holiday, to work over the holiday or else drop out of school).

⁴¹ *Mass Production of Labour*, *supra* note 20, at 1.

⁴² David Barboza and Charles Duhigg, *China Contractor Again Faces Labor Issue on iPhones*, N.Y. TIMES (Sept. 10, 2012), *available at* http://www.nytimes.com/2012/09/11/technology/foxconn-said-to-use-forced-student-labor-to-make-iphones.html?_r=1&pagewanted=all (reporting that teachers have forced students to work at a Foxconn factory in Zhengzhou in order to ease worker shortages before the release of the iPhone 5); Alex Pasternack, *Foxconn's Other Dirty Secret: The World's Largest 'Internship' Program*, VICE (Feb. 15, 2012) <http://motherboard.vice.com/2012/2/15/foxconn-s-other-dirty-secret-the-world-s-largest-internship-program> (quoting Ross Perlin, author of the book INTERN NATION).

⁴³ Pasternack, *supra* note 42; Mimi Leung, *Abuse of Student Internships 'Not Fully Revealed' by Investigation*, UNIVERSITY WORLD NEWS (Apr. 3, 2012), <http://www.universityworldnews.com/article.php?story=20120403165527482>.

⁴⁴ *Mass Production of Labour*, *supra* note 20, at 5.

⁴⁵ Open Letter to Tim Cook for an End of Labour Abuses in Apple's Supply Chain, STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOUR (Mar. 26, 2012), *available at* <http://sacom.hk/archives/945>. SACOM is a Hong Kong based worker rights advocacy organization. Because China has no autonomous unions to articulate worker voice and interests, that function of robust worker rights advocacy is often assumed by

period of three to twelve months; according to worker rights advocates, they often work ten hours per day, sometimes as much as thirteen hours, between six and seven days per week.⁴⁶ A prominent Chinese scholar notes that Foxconn interns receive none of the benefits of formal workers and less compensation for identical work.⁴⁷ These interns are exposed to the same work environment as their full-time counterparts, including Foxconn's system of military discipline, which publicly humiliates workers for small infractions and permits corporal punishment.⁴⁸ The grueling and punitive working conditions at Foxconn have led to a disturbing rise in employee suicide. In 2010, the company reacted by installing nets outside worker dormitories to prevent suicides.⁴⁹ Indeed, the employee suicide issue had grown to the point where, according to labor rights advocates, workers were compelled to sign a most curious document pledging not to commit suicide.⁵⁰

non-governmental organizations and advocates. See Kwan Lee and Yuan Shen, *The Anti-Solidarity Machine? Labor Non-Governmental Organizations in China*, in FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA 173, 173-87 (2011).

⁴⁶ Open Letter to Tim Cook, *supra* note 45; Jason Chan, A Joint NGO Submission Concerning China for Consideration under the Universal Periodic Review by the United Nations Human Rights Council at its 17th Session from 21 October to 1 November 2013, n. 26, GLOBALIZATION MONITOR, available at <http://www.globalmon.org.hk/sites/default/files/attachment/Joint%20NGO%20Submission.pdf> (describing a factory in Guiyang where students were sent to an electronics factory to work for over twenty months in a three year period, working eleven to thirteen hours per day).

⁴⁷ Ross Perlin, *Chinese Workers Foxconned*, DISSENT MAGAZINE, Spring 2013, <http://www.dissentmagazine.org/article/chinese-workers-foxconned> (citing information from Chan Sze Wan of the Hong Kong based worker rights campaign organization, Students and Scholars Against Corporate Misbehavior).

⁴⁸ *Id.* The practice of physical discipline of employees in China is commonplace. Labor rights activists characterize management practices in many large Chinese companies as "military style . . . with talking forbidden on some factory floors and certain forms of corporal punishment . . . considered acceptable." See also Paul Mozur, *New Labor Attitudes Fed Into China Riot*, WALL ST. J., Sept. 26, 2012, available at <http://online.wsj.com/news/articles/SB1000087239639044454920457802034297951881>. See generally *Workers as Machines: Military Management in Foxconn*, STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOUR (Oct. 12, 2010), available at http://sacom.hk/wp-content/uploads/2010/11/report-on-foxconn-workers-as-machines_sacom.pdf (describing how harassment from security guards, who have even hit workers with electrical batons for small infractions, have provoked suicides) [hereinafter *Workers as Machines*].

⁴⁹ Tom Randall, *Inside Apple's Foxconn Factories*, BLOOMBERG (May 30, 2012, 3:36 PM), <http://www.bloomberg.com/slideshow/2012-03-30/inside-apple-s-foxconn-factory.html#slide9>.

⁵⁰ Pun Ngai, *A New Age of World Factory: Foxconn Production and the Struggle of Foxconn Workers in China*, at 19, http://labourchina.univie.ac.at/fileadmin/user_upload/labourchina/presentations/Abschluss

As a result of the public outcry against Foxconn's practices, Apple enlisted a labor consultant, the Fair Labor Association (FLA), and claimed that it had improved conditions for its workers.⁵¹ In light of the continuing strikes and protests surrounding this employer, this claim remains subject to doubt.⁵² Current reports continue to be unreliable and misleading.⁵³

Foxconn admitted that, as recently as October 2013, over one thousand students labored in the production of gaming consoles, and a May 2013 report by Apple that claimed to find no intern labor at a Chengdu factory was also found to be false.⁵⁴ The persistent abuses at Foxconn recently provoked 2,000 workers to strike at a Taiyuan plant in September 2012, where 79,000 laborers worked; the protest injured about forty workers and required about 5,000 police officers to quell.⁵⁵ While Hewlett Packard has also announced new standards for its student labor, including reducing the percentage of student labor at its suppliers'

s-Keynote_-_Pun_Ngai_-_Powerpoint.pdf.

⁵¹ *Work Conditions Said to Improve at Apple Supplier*, N.Y. TIMES (Aug. 22, 2012), available at http://www.nytimes.com/2012/08/23/technology/23iht-apple23.html?_r=0.

⁵² See, e.g., Ivan Broadhead & Earl Brown, *U.S. Solidarity Center: FLA's Apple Labor Audit at Foxconn Factories was Flawed*, OUTLOOK SERIES (Sept. 4, 2012), http://www.outlookseries.com/A0991/Infrastructure/3927_Earl_Brown_US_Solidarity_Center_FLA_Apple_Labor_Audit_Foxconn_Factories_Flawed_Earl_Brown.htm (noting that the FLA receives significant funding from many multinational employers, including Apple, rendering the findings not truly independent. Further, workers fear that their answers can be traced to them when they respond to surveys handed out by the employer, so their answers are often dishonest because they fear being fired); see, e.g., Jay Greene, *'No More iSlave: An Activist Fights for iPhone Workers*, CNET (Sept. 25, 2012), http://news.cnet.com/8301-13579_3-57516096-37/no-more-islave-an-activist-fights-for-iphone-workers/ (noting that the FLA did not respond to questions over why the FLA expressed no concern over Foxconn's plain violations of Chinese law, despite promises to abide).

⁵³ *Well-Polished Apple's CSR Report Is Just Another Fairytale for Workers*, STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOR (Mar. 1, 2014), available at <http://sacom.hk/statement-well-polished-apple%E2%80%99s-csr-report-is-just-another-fairytale-for-workers/> (targeting flaws in Apple's recent Corporate Supplier Responsibility Progress Report).

⁵⁴ Aditya Chakraborty, *Forced Student Labour is Central to the Chinese Economic Miracle*, THE GUARDIAN (Oct. 14, 2013), http://www.theguardian.com/commentisfree/2013/oct/14/forced-student-labour-china-apple?CMP=twf_fd&commentpage=1.

⁵⁵ *Foxconn Workers Labor Under Guard After Riot Shuts Plant*, BLOOMBERG NEWS (Sept. 26, 2012), <http://www.businessweek.com/news/2012-09-26/foxconn-workers-labor-under-police-watch-after-riot-shuts-plant> (observing that the riot likely started when guards used excessive force in one of the worker dormitories).

factories, the company faces continuing challenges in monitoring practices at individual factories.⁵⁶

Foxconn is emblematic of the harmful consequences of exploiting young interns in the huge electronics sector, given its vast size and ties to Apple. However, it is hardly the only electronics manufacturer that exploits intern labor. For example, labor rights activists charge that Wintek Corporation, which supplies products to Apple and Nokia, requires interns to work eleven hours per day, seven days a week.⁵⁷ HEG Electronics, which produces electronic components for Samsung, Motorola, and LG, is reported to use students for eighty percent of its workforce.⁵⁸ Those interns are paid only 750 yuan per month, while the average minimum wage in the province is 950 yuan per month.⁵⁹ HEG is further alleged to employ underage workers as young as fourteen years of age.⁶⁰

Similar treatment of student interns exists in other industries. In one of the Honda factories that went on strike throughout China in 2010, eighty percent of the 1,800 workers were student interns.⁶¹ Honda's interns performed identical work to that of regular workers. While the formal employees earned 1,544 yuan per month, the interns earned only 900 yuan per month without any social benefits such as accident protection.⁶² Immediately following the strike, interns' wages increased to 1,500 yuan per month, but that increase was still far less than the increase received by full-time workers who saw their wages increased to 2,044 yuan per

⁵⁶ Keith Bradsher and David Barboza, *H.P. Directs its Suppliers in China to Limit Student Labor*, N.Y. TIMES (Feb. 7, 2013), http://www.nytimes.com/2013/02/08/business/global/hewlett-packard-joins-push-to-limit-use-of-student-labor-in-china.html?_r=2&.

⁵⁷ *Apple Owes Workers and Public a Response over the Poisonings*, STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOR (May 2010), <http://sacom.hk/wp-content/uploads/2010/05/apple-owes-workers-and-public-a-response-over-the-poisonings.pdf> (describing the company's poor response to the widespread n-hexane poisoning of workers in a factory in the Jiangsu Province).

⁵⁸ Adi Robertson, *Samsung Supplier Employs Underage Workers, says China Labor Watch*, THE VERGE (Aug. 7, 2012), <http://www.theverge.com/2012/8/7/3226024/samsung-supplier-heg-uses-underage-labor-report-says>.

⁵⁹ *Id.* In China, the minimum wage varies from one locality to the next. *See, e.g., Guangdong Revises Minimum Wage Levels*, CHINA BRIEFING, Mar. 6, 2013, <http://www.china-briefing.com/news/2013/03/06/guangdong-revises-minimum-wage-levels.html> (in 2013, minimum wages in some of Guangdong Provinces factory areas were increased to RMB 1130-1310 per month).

⁶⁰ *See* Robertson, *supra* note 58.

⁶¹ CHRISTOPH SCHERRER (ED.), CHINA'S LABOR QUESTION 136-37 (2011) (referring to a strike at a Honda factory in Foshan city in Guangdong province).

⁶² *Id.*

month.⁶³ In the garment and textile industry, interns are the most common source of temporary labor and receive less remuneration than full-time workers performing the same tasks.⁶⁴ Not only are industrial interns' wages less than those of their full-time counterparts, but they are also further reduced by their vocational schools, which extract steep tuition payments even while the interns are performing their internships outside of the classroom.⁶⁵

Of the nine million students graduating from Chinese vocational schools each year, the exact number of interns forced into non-educational internships is unknown. However, given media reports of extensive forced internship programs, as well as the hundreds of schools that contract with individual enterprises, this practice of relying on subminimum intern labor is emerging as a major cause of industrial discord.⁶⁶ The refusal to expand labor protections to interns allows enterprises to exploit interns as a malleable pool of unskilled second tier cheap labor.⁶⁷ Enterprises benefit from intern labor not only because it is cheaper than hiring full-time employees, but also because it advances a model of lean production: by creating a tier of comparatively secure regular long term laborers over a lower tier of industrial interns, companies can exploit the differences when workers engage in collective action such as strikes.⁶⁸ Adult workers feel content with their compensation because it is higher than that of interns doing the same work, and the interns are less inclined to align with the adults in a labor dispute because they resent the better pay of the adult laborers.⁶⁹ Thus, the two factions that might unite to improve working conditions are set at odds with one another.

⁶³ *Id.* at 138.

⁶⁴ *Id.* at 122.

⁶⁵ See generally *Mass Production of Labour*, *supra* note 20, at 4 (noting that schools often deduct commissions from interns' income or receive compensation directly from the enterprise for supplying the labor, even though the Ministry of Education recommends against such labor). See also Chan, *supra* note 46 (describing how a school in Guiyang confiscated student wages as tuition fees).

⁶⁶ See *Mass Production of Labour*, *supra* note 20, at 4 (synthesizing forty-two media reports involving sixty-two schools and factories).

⁶⁷ Shumei, *supra* note 22.

⁶⁸ SCHERRER, *supra* note 61, at 137.

⁶⁹ SCHERRER, *supra* note 61, at 137 (explaining the difficulties that prevent the two groups from uniting in industrial disputes, but noting that such difficulties were overcome during a Honda strike).

III. READING CHINESE LABOR LAW IN THE CONTEXT OF RAPID INDUSTRIAL DEVELOPMENT: CHINESE LAW PROTECTS INDUSTRIAL WORKERS EVEN IF THEY ARE MISCLASSIFIED AS “INTERNS.”

- A. *Contemporary Chinese labor law developed to emphasize the broad inclusion of workers into legal coverage and access to remedial processes.*

Reading Chinese law is not always easy. Chinese legal and regulatory frameworks are frequently criticized for incoherence, sometimes amounting to subversion of the rule of law. “At first glance, aspects of this system appear aberrational or even dysfunctional.”⁷⁰ Too often:

Chinese legislation is perpetually in half focus as it fades into its background context of Party decisions and policy documents ... The continued reliance of Chinese decision makers on policy directives and makeshift regulations to introduce reforms clearly compromises any movement towards a legislative model in which formal sources of law provide a coherent foundation for interpretation ... elaboration.⁷¹

But this “incoherence” cannot be understood outside the context of China’s perplexing diversity and furious economic development since 1982, when China began to open up to outside investment. Since then, Chinese legislators and regulators have struggled to keep pace with the rapid development in all areas of law and regulation, including industrial relations.⁷² The proliferation of strikes and protests over industrial grievances has imparted urgency to the project of fashioning an effective private sector labor law for China.

China’s journey to a socialist market economy⁷³ was wrenching.⁷⁴ In the planned economy era (1949-77), many industrial workers held “iron

⁷⁰ Keith J. Hand, *Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 137, 146 (2013).

⁷¹ Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 731 (1994).

⁷² STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO, 102-37 (1999).

⁷³ The socialist market economy is the label attached to the policies of accommodating private enterprise and privatizing state enterprises in China during Den Xiaoping’s time as paramount leader. *Id.* at 108-09.

⁷⁴ See Luigi Tomba, *Remaking China’s working class: Gongren and nongmingong*, in CHINA’S CHANGING WORKPLACE: DYNAMISM, DIVERSITY, AND DISPARITY 144, 144-59 (Sunghoon Kim et al. eds., 2011) (describing the problems faced

rice bowl” jobs in state owned enterprises; the “iron” referred to the high level of job security in this labor relations system.⁷⁵ A rigid registration system also kept the population in place. Thus, mobility was severely restricted.⁷⁶ To allow for the growth of a new private industrial sector, China loosened restrictions on job and residency mobility and further allowed the new private industrial employers, and even state owned enterprises, to hire and fire more freely and thus absorb migrant workers.⁷⁷

In the late seventies, China began to promote rural-urban migration to absorb excess rural population.⁷⁸ In the nineties, China laid off hundreds of thousands of state enterprise workers. At the same time, millions of migrant workers from the countryside began to work in unregulated private sector industries, often in abusive conditions.⁷⁹ The inevitable result was increased labor and social protests. In the early nineties, China began to formulate a comprehensive law of national scope to allow for increased employer discretion in hiring and firing, and at the same time to address social unrest arising from job insecurity and employer abuses.

In 1994, China enacted a far reaching national labor law that became effective in 1995, affording employers, including state owned enterprises, the ability to more freely terminate the implicitly secure socialist, “iron rice bowl” employment relationship.⁸⁰ The employment relationship, under that law, was based on individual contract and not status. To balance the loss of job security implicit in this system of individual employment contracts, and enhanced employer power to hire and fire, the drafters established basic standards regarding minimum wages, maximum hours of work, decent housing conditions, and protections for women workers to prevent employer abuses and the

by heavy industry workers coping with mass lay-offs and the struggles of new entrants into the job market during this transitional period).

⁷⁵ Iron rice bowl, or “铁饭碗” in simplified Chinese, is a term used in China to refer to the system during China’s planned economy period that provided employees guaranteed lifetime employment, as well as benefits delivered through one’s work unit (单位), including pension, housing and medical care. The system was gradually abolished in the process of China’s transition to a market economy.

⁷⁶ SEAN COONEY ET AL., *LAW AND FAIR WORK IN CHINA* 38 (2013).

⁷⁷ *Id.* See also Marc Blecher, *Globalization, Structural Reform, and Labour Politics in China*, 1 *GLOBAL LAB. J.* 1, 104 (2010), available at <http://digitalcommons.mcmaster.ca/cgi/viewcontent.cgi?article=1025&context=globallabour> (“[The 1995 Labour Law] has also been intended . . . to canalize . . . dispute – to drive it [away] from strikes and demonstrations towards arbitration and mediation . . .”).

⁷⁸ See Tomba, *supra* note 74.

⁷⁹ See generally ANITA CHAN, *CHINESE WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY* (2001).

⁸⁰ See *supra* note 9.

industrial unrest caused by violations of labor rights.⁸¹ Therefore, the 1995 Labor Law set out basic worker protections such as the eight hour work day, overtime restrictions, prohibitions against discrimination and maternity and social insurance benefits.⁸²

Despite its intent to address abuses and labor unrest, the 1995 Labor Law did not work. As two scholars of Chinese labor relations, Mary Gallagher and Dong Bao Hua, note:

[G]iven the large expansion of the migrant and informal workforces in the 1990s, large swaths of the Chinese workforce found the law almost completely irrelevant to their working lives. Even though the law should cover them, enterprises ignored the law with impunity because of the lack of effective implementation and enforcement by local regulatory or supervisory organizations, including the trade union, the local labor bureau and the courts.⁸³

The scale of persistent labor abuses can be gleaned from a report by the state- and party-controlled union, the All-China Federation of Trade Unions (ACFTU), that, in 2003, a total of USD \$ 6.1 billion dollars were in arrears.⁸⁴ Eli Friedman and Ching Kwan Lee estimate that this figure is “but a small portion of the total sum.”⁸⁵

⁸¹ 1995 Labor Law, art. 1 (describing the intent of the law as to “protect the legitimate rights and interests of laborers, readjust labor relationship, establish and safeguard the labor system suiting the socialist market economy, and promote economic development and social progress.”); COONEY ET AL., *supra* note 76, at 50-52.

⁸² 1995 Labor Law, arts. 12, 36, 41-43, 61-63, 70-76.

⁸³ Mary E. Gallagher and Baohua Dong, *Legislating Harmony: Labor Law Reform in Contemporary China*, in FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA 36, 44 (2011). *See also* Chang Hee Lee, *Industrial Relations and Collective Bargaining in China*, INDUSTRIAL AND EMPLOYMENT RELATIONS DEPARTMENT: INTERNATIONAL LABOUR OFFICE WORKING PAPER NO. 7, 5 (2009) (describing the 1995 Labor Law as “far too sketchy or abstract to provide any meaningful protection to workers exposed to entirely new market-based employment relations”); Eli Friedman and Ching Kwan Lee, *Remaking the World of Chinese Labour: A 30-Year Retrospective*, BRITISH JOURNAL OF INDUSTRIAL RELATIONS 507, 513-14, Sept. 2010 (listing labor abuses that persisted unremedied despite the promulgation of the 1995 Labor Law - long hours; low pay; employer failure to pay overtime and social insurance; wage arrears, lack of occupational health and safety, discrimination, illegal firings and severe fines for common workplace errors). *See generally* ANITA CHAN, CHINA’S WORKERS UNDER ASSAULT, THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY (2001).

⁸⁴ Friedman and Lee, *supra* note 83, at 513-14.

⁸⁵ Friedman and Lee, *supra* note 83, at 513-14.

In light of widespread labor abuse and worker unrest, the government sought to address the “evils”⁸⁶ unresolved by the 1995 Labor Law. In order to more precisely frame those abuses and to target remedies, it actively reached out to all sides of the industrial debate; employers, the official union, scholars, labor rights advocates and thousands of individual workers weighed in on detailed proposals to remedy the problems sparking industrial unrest. A consensus developed that the key to achieving uninterrupted production was to lay out basic labor standards, rigorously enforce those standards, and channel industrial disputes into peaceful dispute resolution processes.⁸⁷

This process yielded three labor laws: the 2008 Labor Contract Law, the 2008 Labor Dispute Mediation and Arbitration Law, and the 2008 Employment Promotion Law.⁸⁸ These reform measures aimed at framing an encompassing structure of basic rights, and establishing dispute resolution processes for industry to settle grievances and to ensure peaceful and uninterrupted economic development in manufacturing and related sectors.⁸⁹ The centerpiece of the three labor reform laws, the Labor Contract Law, restated many of the worker’s rights articulated in the 1995 labor law.⁹⁰ The Labor Contract Law, however, went further by focusing on wage arrears, illegal terminations, and other acute labor

⁸⁶ See SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 60:2 (West, Westlaw 2014) (the term “evil,” as used in U.S. statutory interpretation law, describes the evils or precise problems a reform statute aims to rectify).

⁸⁷ See Ronald C. Brown, *China’s New Labor Contract Law*, 3 CHINA LAW REPORTER 4 (2007) (remarking on the wide participation and transparency in the consultation prior to the law’s enactment, and in the tightening of labor law standards to correct known abuses that thrived despite the 1995 Labor Law); Earl V. Brown, Jr., *Chinese Labor Law Reform: Guaranteeing Worker Rights in the Age of Globalism*, JAPAN FOCUS (2006); Gallagher and Dong, *supra* note 83, at 45-56 (describing the broad outreach initiated by the government in the run up to the promulgation of the 2008 labor laws, and the unprecedented range of stakeholder input, including employer resistance to the reforms, to the NPC). See also TIM COSTELLO ET. AL., BEHIND THE GREAT WALL OF CHINA: U.S. CORPORATIONS OPPOSING NEW RIGHTS FOR CHINESE WORKERS, *available at* http://laborstrategies.blogs.com/global_labor_strategies/files/behind_the_great_wall_of_china.pdf (a labor advocacy piece widely circulated in English by Global Labor Strategies arguing for passage of the reforms in the drafts preceding the final passage of the 2008 Act); American Chamber of Commerce, People’s Republic of China, Comments on Draft Labor Contract Law submitted to the Standing Committee of the National People’s Congress Law Committee, Financial and Economic Affairs Committee, Legislative Affairs Committee (Apr. 19 2006) (on file with Earl V. Brown Jr., Solidarity Center).

⁸⁸ See *supra* note 14 and accompanying text.

⁸⁹ See 2008 Labor Contract Law, arts. 1-3; 2008 Labor Dispute Mediation and Arbitration Law, art. 1; 2008 Employment Promotion Law, art. 1 (articulating the purpose of each statute as establishing worker’s rights and promoting industrial harmony).

⁹⁰ 2008 Labor Contract Law, art. 17 (listing the mandatory labor protections required in every labor contract).

abuses by establishing more stringent enforcement remedies for labor violations. Judicial and alternative remedies were strengthened, and workers were empowered as the monetary remedies for employer abuses increased.⁹¹

The companion law on labor dispute resolution, the 2008 Labor Dispute Mediation and Arbitration Law, addressed the unrest bedeviling Chinese industry by channeling labor grievances into extensive legal mechanisms for dispute resolution—mediation, arbitration and the courts.⁹² Finally, the Employee Promotion Law laid out more detailed prohibitions against discrimination on the basis of gender, ethnicity, disability and status as a carrier of an infectious disease.

Significant exclusions of industrial workers from this basic framework of rights and access to legal processes for industrial dispute resolution would undermine the government's overriding industrial policy of ensuring labor and social harmony.⁹³ Excluding interns, who have assumed a large role in Chinese manufacturing and service sectors, leaves significant industrial actors with the capacity to disrupt production outside

⁹¹ See 2008 Labor Contract Law, arts. 30 (wage arrears), 48 (illegal termination), 80-95 (setting forth penalties for labor law violations, mostly those of the employer). See also Friedman and Lee, *supra* note 83, at 514.

⁹² See 2008 Labor Dispute Mediation and Arbitration Law, arts. 10-16 (mediation process), 17-26 (arbitration), 48 (judicial action to challenge adverse ward).

⁹³ Promoting social harmony and, specifically, labor harmony as an essential element of constructing social harmony has long been an explicit centerpiece of Chinese domestic policy. In 2008, President and CCP General Secretary Hu Jintao described labor peace as “. . . an indispensable cornerstone of the construction of a harmonious society” (和谐社会建设不可或缺的重要基石) when addressing the 2008 International Forum on Globalization and the Trade Union. 和谐劳动关系是社会和谐稳定的基石, Nov. 26, 2008, <http://theory.people.com.cn/GB/49154/49156/8414651.html>. In remarks at a national meeting on labor relations held in August, 2011, then-Vice and current President and CCP General Secretary Xi Jinping stated that building harmonious relations between workers and their employers was an important and urgent political task. *Vice-President urges better labor relations*, CHINADAILY.COM.CN, Aug. 17, 2011, http://www.chinadaily.com.cn/china/2011-08/17/content_13127522.htm. Xi also praised a textile company for maintaining harmonious labor relations during his visit to the enterprise on November 26, 2013. 习近平夜访纺织企业：促进和谐劳动关系, Nov. 26, 2013, http://news.xinhuanet.com/politics/2013-11/26/c_118300430.htm.

Constructing labor peace is an expressed policy and goal of China's jobs policy in its current Five-Year Plan (2011-2015), which governs China's economic and social development and was approved by the National People's Congress in March 2011. See 我国国民经济和社会发展十二五规划纲要(全文), Pt. VIII, Ch. 31, available at <http://news.sina.com.cn/c/2011-03-17/055622129864.shtml> (Chinese version of the Five-Year Plan); see also *China's Twelfth Five Year Plan (2011-2015) the Full English Version*, BRITCHAM, Pt. VIII, Ch. 31, available at <http://www.britishchamber.cn/content/chinas-twelfth-five-year-plan-2011-2015-full-english-version> (English translation of the Five-Year Plan).

this 2008 framework of rights and remedies designed to resolve labor disputes in a fair and peaceful manner. Any such exclusion clashes with the industrial policy of the 2008 labor reforms favoring broad coverage for workers and the peaceful resolution of labor disputes.

B. *Policy and text converge to establish that industrial interns are covered by labor law.*

China's earlier 1995 Labor Law and the more recent three 2008 Labor Laws were intended to protect the rights and secure equal treatment for all workers, and to direct their industrial grievances into mechanisms for peaceful dispute resolution. The statutory texts and their administrative elaborations reflect this consistent statutory endeavor to embrace all workers.

The first national labor law statute enacted after 1982, the 1995 Labor Law, uses sweeping terms to define its reach:

This Law applies to all enterprises, individual economic organizations . . . and laborers who form a labor relationship therewith (企业、个体经济组织和与之形成劳动关系的劳动者)⁹⁴

The 1995 Labor Law further proclaims that “[l]aborers shall have the right to be employed on an *equal basis*,” (平等就业) and therefore enjoy basic labor standards.⁹⁵ This statute contains no express exclusions for any category of workers.⁹⁶ The 1995 Labor Law also establishes a set of remedial mechanisms for labor disputes, recognizing that rights enforcement and prompt resolution of disputes are essential to industrial peace.⁹⁷ Once such threshold questions of labor law coverage are resolved, then Article 2 requires only two factual predicates: (1) an employing entity, and (2) a subordinate worker in *a labor relationship* with the employing entity. Exclusions of significant groups of industrial workers in specific enterprises would be at odds with this scheme of comprehensive labor protection and industrial peace.

⁹⁴ 1995 Labor Law, art. 2 (emphasis added).

⁹⁵ 1995 Labor Law, art. 3 (emphasis added).

⁹⁶ 1995 Labor Law, art. 2; *but see* 1995 Labor Law, art. 106 (allowing the issuance of implementing regulations below the national level “according to this law and in light of local conditions . . .”). However, even if article 106 allows for some local adaptation and variation, adaptation should not undermine the central premise of the law to provide broad coverage for workers. *See* Legislation Law of the People's Republic of China, art. 63 (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000) (allowing “provinces, autonomous regions, and municipalities . . . [to] formulate local regulations, provided that such regulations do not contradict the Constitution, the laws and the administrative regulations.”)

⁹⁷ 1995 Labor Law, arts. 77-78.

Because of its relationship to the 1995 Labor Law, the stated intention of the National People's Congress ("NPC") in enacting the 2008 Contract Labor Law was a reformist one: "...to improve the employment contract system," eliminate abuses, prevent disruptions in production, and promote "harmonious and stable employment relations" by enforcing basic standards.⁹⁸ Rather than propounding a list of the specific categories of workers it covers, the 2008 Labor Contract Law emphasizes the empirical dimension of the work relationship as the key to its scope, which strongly argues for inclusion and not exclusion of industrial interns. Echoing the two requirements of Article 2 of the 1995 law, Article 2 of the 2008 Labor Contract Law defines as its scope:

[T]he establishment of *[labor] relationships* between, and the conclusion, performance, amendment, termination and ending of employment contracts by, *organizations such as enterprises, individual economic organizations and private non-enterprise units* in the People's Republic of China ("Employers") on the one hand and *workers* in the People's Republic of China on the other hand.⁹⁹

More sweeping language is hard to imagine. The language of both the 1995 Labor Law and the 2008 Labor Contract Law is broadly written and should be construed accordingly.

When judges have been confronted with the question of whether a worker is covered under the 1995 and 2008 Labor Laws, empiricism has dominated over invocation of labels. In order to determine whether a laborer is a covered worker as opposed to an uncovered independent contractor, judges first examine whether the employing entity is an individual, because both the 1995 Labor Law and the 2008 Labor Contracts Law describe the employing party in the labor relationship as an entity other than an individual.¹⁰⁰ Some judges under the 1995 law required proof of the existence of a labor contract as a prerequisite of an action when the worker is employed by a non-commercial organization, even though the 1995 law compels employers to issue labor contracts.¹⁰¹ The absence of such a contract would be a plain violation of that law.

⁹⁸ 2008 Labor Contract Law, art. 1.

⁹⁹ 2008 Labor Contract Law, art. 2 (emphasis added).

¹⁰⁰ Compare 2008 Labor Contract Law, art. 2, with 1995 Labor Law, art. 2. See also COONEY ET AL., *supra* note 76, at 53 (noting that an individual employer cannot be read as an employer in a labor relationship).

¹⁰¹ See COONEY ET AL., *supra* note 76, at 53-54 (clarifying the general recognition that a labor relationship can exist without a formal contract under the contemporary legal framework).

Under this “mutilating[ly] narrow,”¹⁰² indeed perverse reading, an employer who violates the law by refusing to issue a contract to workers benefits greatly, as the worker then cannot seek judicial relief for the employer’s violation.

Article 11 of the 2008 Labor Contract Law firmly forecloses this judicially created loophole by instructing judges to impose a labor contract by law where an employer has violated the law. Article 11 specifies the requirements for labor relationships where employers refuse to conclude contracts with their workers.¹⁰³ In order to ascertain that an employment or labor relationship exists, judges often look to empirical evidence such as the pay system involved, and the requirements of the Notice of the Ministry of Human Resources and Social Security, which details factors that evidence the existence of a labor relationship.¹⁰⁴ Such an empirical approach should also apply to ascertaining whether a nominal intern is an employee because often interns are treated by the employer like industrial workers in terms of when they are paid.

Further, the 2008 Labor Contract Law, like the 1995 Labor Law, espouses the value of “equal treatment” of similarly situated workers in employment.¹⁰⁵ The statutory principle of “equal pay for equal work” is articulated in both the 1995 and 2008 laws.¹⁰⁶ Applying this principle, interns who work full and overtime as unskilled industry labor should receive compensation equal to the regular workers alongside whom they toil. The statutory principle of equal treatment is not consistent with a two-tiered system of labor rights and compensation.¹⁰⁷

In addition to not being excluded from coverage of the labor reform laws of 2008, industrial interns simply do not fall under the purview of any other statute. Article 96 of the 2008 Labor Law

¹⁰² *United States v. Hutcheson*, 312 U.S. 219, 235 (1941) (Frankfurter, J.).

¹⁰³ 2008 Labor Contract Law, art. 11 (“In the event that an Employer fails to conclude a written employment contract with a worker at the time it starts to use him, and it is not clear what labor compensation was agreed upon with the worker, the labor compensation . . . shall be decided pursuant to the rate specified in the collective contract; where there is no collective contract . . . equal pay shall be given for equal work.”).

¹⁰⁴ See COONEY ET AL., *supra* note 76, at 54. See also *infra* part III(D)(ii) for a detailed discussion of the Ministry of Human Resources and Social Security’s specific requirements for determining the existence of a “labor relationship” subject to regulation under Chinese law.

¹⁰⁵ Compare 2008 Labor Contract Law, art. 3, with 1995 Labor Law, art. 3.

¹⁰⁶ *Id.*

¹⁰⁷ See generally Lu Zhang, *The Paradox of Labor Force Dualism and State-Labor-Capital Relations in the Chinese Automobile Industry*, in FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA 107 (2011) (detailing the problems that imposing a two-tiered labor model pose on industrial relations in China’s auto industry).

contemplates the exclusion of certain employees working for public institutions pursuant to State Council regulations. For instance, active military and police personnel are excluded because distinct statutes govern them.¹⁰⁸ The general Contract Law governs contractors such as independent service providers and consultants because they are outside the scope of private labor relations.¹⁰⁹ Genuine independent contractors engage in relationships covered by Chapter 15 of the general civil Contract Law, where “the hiree completes certain work as required by the hirer and delivers the work product, and the hirer pays the remuneration.”¹¹⁰ This means that contractors, where the subordination present in the facts of the worker-employer relationship is largely absent, can appropriately be required to look to the civil contract law for rights and processes from remedying wrongs. Consequently, because industrial interns do not fall into any of these excluded categories, the protections of Chinese labor law apply if the specific factual circumstances indicate that the work performed in an internship is solely for the benefit of their employer and does not confer any educational benefit on the intern. Any other reading subverts the Party State’s statutory policy of protecting workers and ensuring industrial harmony.

The use of the term “labor relationship” in the labor statutes, in the view of some commentators, opens the door to distinctions between protected and unprotected workers, between “real” workers and those that are merely empirically workers offering labor and being directed as to wages, hours and working conditions by employers.¹¹¹ Yet these conceptions derive largely from academic and ideological concepts that have never been enshrined in contemporary Chinese labor law expressly or by necessary implication, and may have roots in Marxist or Maoist

¹⁰⁸ See Military Service Law of the People’s Republic of China, art. 7 (promulgated by the Standing Comm. Nat’l People’s Cong., May 31, 1984, amended Dec. 29, 1998); Civil Servant Law of the People’s Republic of China, art. 20 (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 27, 2005, effective Jan. 1, 2006) (police).

¹⁰⁹ Since its enactment, employers have abused provisions of the 2008 Labor Contract Law allowing for “dispatch” or contract labor relationships. See 2008 Labor Contract Law, arts. 57-67 (governing dispatch relationships). “Dispatch” workers receive wages and benefits well below the wages and benefits received by regular workers. To correct these abuses, the Standing Committee of the National People’s Congress recently amended the 2008 Law to limit the use and misclassification of dispatch workers. See Pei Zhang, *New Amendments to China Labor Contract Law Set Restrictions on the Use of Labor Dispatch*, LEXOLOGY, <http://www.lexology.com/library/detail.aspx?g=86b31aec-13dc-4a28-a441-c17497af9f2c>

¹¹⁰ Contract Law of the People’s Republic of China, art. 251 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999) [hereinafter Contract Law].

¹¹¹ COONEY ET AL., *supra* note 76, at 55 (distinguishing between employment contracts and labor contracts, with only the latter being covered by labor law).

conceptions.¹¹² Instead of drawing untenable distinctions from a strained reading of Chinese labor law, the reasoned approach is simply to follow Chinese labor law and apply an empirical, totality of the circumstances approach to determine the existence of a labor relationship

Labor law coverage means that disputes between a covered worker and the employer are remitted to legal dispute resolution procedures under both the 1995 Labor Law and the 2008 Labor Dispute Settlement law. A determination that a complainant is not covered would mean that the excluded person would have access only to the slower, interstitial, and costly litigation procedures of the civil law, versus the more expeditious, cheaper processes of labor mediation, conciliation and arbitration.¹¹³ In the context of “just-in-time” production processes, this inevitably means that disputes would fester.¹¹⁴

Finally, requiring student interns facing labor abuses to comb through statutes and regulations to institute an expensive civil action of uncertain outcome is, in fact, to condemn this class of workers to futile legal remedies. Students who toil on assembly lines in factories, like those in Foshan in the summer of 2010, will take to the streets rather than to the civil law courts or the murky administrative law processes that might be available in exceptional test cases.¹¹⁵ The denial of legal remedies, while interns continue to be impressed as low wage foot soldiers in industry and service, augurs for further abuse of industrial interns and strikes.

C. *Statutes providing for vocational and technical training render the educational component critical to an individual’s legal status as an intern*

Chinese labor law aspires to make training with real vocational content widely available to both students and employers. Article 5 of the 1995 Labor Law imposes a duty on the State to “develop vocational education.”¹¹⁶ Article 68 of the 1995 Labor Law establishes a parallel duty on employers to fund and provide vocational training.¹¹⁷ In 1996,

¹¹² COONEY ET AL., *supra* note 76, at 55.

¹¹³ *Mass Production of Labour*, *supra* note 20, at 5.

¹¹⁴ “Just-in-time” production is a “lean” manufacturing system whereby the employer does not stock large inventory, but produces and ships on tighter schedules. This is thought to reduce costs, by eliminating the need for large storage facilities and by tailoring production to existing and imminent orders. Strikes on such tight schedules can stop delivery of product to the customer. *See generally Just-in-Time*, *ECONOMIST* (Jul. 6, 2009), available at <http://www.economist.com/node/13976392>.

¹¹⁵ SCHERRER, *supra* note 61, at 136-37.

¹¹⁶ 1995 Labor Law, art. 5.

¹¹⁷ 1995 Labor Law, ch. 8 (describing the role of the State in regulating vocational training and the responsibility of the employing unit in acting “in accordance with [such] provisions”).

China passed a statute governing vocational education, and has since expounded upon that statute through administrative measures.¹¹⁸ The 1996 Vocational Education Law seeks to expand vocational training throughout the provinces and localities of China and make skill enhancing training available to more students everywhere as part of a strategy of modernizing and rejuvenating China's economy.¹¹⁹ The law obliges enterprises to "accept students and teachers from vocational schools and vocational training organizations to perform internships, and provide appropriate work compensation."¹²⁰

The 1996 Vocational Education Law does not write specific curriculum for job and skill training in the diverse and vast Chinese economy. The law does, however, establish that vocational and technical education should have educational content and benefits:

Vocational education is an important component of the educational undertakings of the State and an important way to promote economic and social development and employment. The State shall develop vocational education, propel vocational education reform, raise the quality of vocational education, establish and improve a system of vocational education that keeps abreast of the socialist market economy and social progress.¹²¹

Article 4 of the 1996 Vocational Education Law further states:

Vocational education shall follow the state's educational policy, giving the education receivers education on ideology, politics and vocational ethics; teaching vocational knowledge, developing vocational technical abilities, conducting vocational directions and raising the quality of the education receivers in an all-round way.¹²²

Thus, the statute places development of the student's potential and aptitudes "in an all-round way" as one of the cardinal objectives of the law and on equal footing with economic development. Forcing students into vocational internships unrelated to their chosen fields of specialization

¹¹⁸ Run-Zhi Lai et al., Vocational Education and Training in China 5 (Winter 2011) (unpublished graduate paper, University of Michigan), http://sites.fordschool.umich.edu/china-policy/files/2011/10/PP716_VET-Paper_Final_042911-1.pdf.

¹¹⁹ Vocational Education Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Sept. 1, 1996), art. 1 [hereinafter 1996 Vocational Education Law].

¹²⁰ 1996 Vocational Education Law, art. 37.

¹²¹ 1996 Vocational Education Law, art. 3.

¹²² 1996 Vocational Education Law, art. 4.

completely disregards the 1996 Vocational Education Law's emphasis on the educational component of an internship and the Law's admonition to develop well-rounded students.

Moreover, the 2008 Employment Promotion Law illustrates that the needs of the student are of critical importance in designing a compliant vocational educational program. The 2008 Employment Promotion Law, the third of the 2008 labor reform laws, points to expanded vocational and technical training at the center of a policy of promoting higher skilled, higher paid employment. The law restates the governmental duty, at all levels, to expand vocational training and education.¹²³ Specifically, "governments at and above the county level" shall plan and implement vocational education programs that meet "economic and social developmental and market needs."¹²⁴ Accordingly, market forces alone do not dictate the specific contours of these programs. Instead, the law requires consideration be given to the market, the overall economy, and social developmental needs such as preparing young people for employment in their chosen areas of specialization when creating vocational education programs.¹²⁵

Chinese labor and vocational and technical education laws do not attempt to particularize content requirements for the training and educational components of internships. This sort of precision would be hard to achieve in a way that would be effective to define content for a very diverse and expanding economy in an era of astoundingly rapid change. Even the United Nation (UN)'s expert agencies in matters of vocational education—the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO)—do not lay down specific content for all industries, settings, and times. However, some relevant markers of a bona fide vocational or technical training program do emerge from the literature.

The ILO's 1977 Convention 142, on human resource development, stipulates that vocational and technical education should "be designed to improve the ability of the individual to understand and, individually or collectively, to influence the working and social environment."¹²⁶ ILO Recommendation 195 stresses the need for vocational training to develop

¹²³ See 2008 Employment Promotion Law, ch. 5.

¹²⁴ 2008 Employment Promotion Law, art. 45.

¹²⁵ See 2008 Employment Promotion Law, arts. 44-51 (tying the expansion of vocational training to job market needs and the enhancement of skills for vocational students).

¹²⁶ International Labour Organization, Human Resources Development Convention (No. 142), arts. 1-4, June 23, 1975, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312287. China is not a signatory to the Convention, but it does explicate the commonly accepted contours and benefits of genuine vocational education.

“portable competencies” and link to “life-long learning” so that skills and qualifications are instilled, which can accompany a worker over a lifetime of work in a technically advanced and diverse economy.¹²⁷ A joint recommendation from the ILO and UNESCO on vocational training reinforce the theme that vocational training, like all education, should be linked to the individual’s interests, career choices and attributes.¹²⁸

In line with these recommendations by international doctrines concerning vocational education, the Chinese Ministry of Education is currently considering draft rules to govern work internships for vocational students (referred to as “Draft Rules”).¹²⁹ These Draft Rules, if issued, will require that work internships have substantial educational content and labor protections. This further supports the notion that the 1996 Vocational Education Law treats the educational component as a fundamental aspect of the internship. The type of unskilled labor internships in industrial and service sector enterprises that has become prevalent will not satisfy the stringent tests of educational content and relevance set forth in the Draft Rules.¹³⁰ This more rigorous approach to vocational education will end the practice of using the internship label as a shelter within which to construct a substandard workforce.

¹²⁷ International Labour Organization, Human Resources Development Recommendation (No. 195), June 17, 2004, *available at* http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312533:NO.

¹²⁸ *See generally* UNESCO & INTERNATIONAL LABOUR ORGANIZATION, TECHNICAL AND VOCATIONAL EDUCATION AND TRAINING: RECOMMENDATIONS BY UNESCO AND THE INTERNATIONAL LABOUR ORGANIZATION (1964), *available at* <http://unesdoc.unesco.org/images/0015/001510/151063eo.pdf>.

¹²⁹ Draft Rule for Comments on the Management of Vocational School Students On-Post Internship, Ministry of Education, Nov. 2012 (China), *available at* <http://www.moe.gov.cn/publicfiles/business/htmlfiles/moe/s6197/201211/144557.html> [hereinafter Ministry of Education Draft Rule].

¹³⁰ The Organization for Economic Co-operation and Development (“OECD”), an international organization comprised of the world’s largest economies, recently issued a report that contained this telling critique of China vocational training:

While workplace training is actively encouraged by government policy which anticipates that each student should spend one year on workplace training, co-operation with employers is variable. Sometimes when it does occur it involves very close relations with a single local employer, with a risk that the skills acquired may not be transferable. There are few quality standards for workplace training and few regional, sectoral or national bodies to engage employers and link them to the VET system.

MALGORZATA KUCZERA & SIMON FIELD, OECD, LEARNING FOR JOBS REVIEW OF CHINA 2010 (June 2010), *available at* http://www.oecd-ilibrary.org/education/oecd-reviews-of-vocational-education-and-training-a-learning-for-jobs-review-of-china-2010_9789264113749-en).

Repeatedly, the Draft Rules emphasize that work internships must be related to the students' chosen fields of specialization,¹³¹ match the students' major,¹³² and contribute to the enhancement of the students' professional skills.¹³³ The Draft Rules would also require that interns enjoy labor protections and safe workplaces by requiring that such items be addressed in the mandatory internship agreement between the *danwei*,¹³⁴ the school, and the students.¹³⁵

Requiring industrial and service sector internship programs to place students into internships that directly relate to the students' "majors" and contribute to the students' skills development and job qualifications would, without more, end the wholesale use of intern labor on factory floors and in other unskilled work situations throughout China. Enterprises like Foxconn and Honda could no longer use the label "student" or "intern" to create a subminimum tier of factory labor. Any suggestion that merely "training" factory workers in punctuality and obedience is somehow educational in any sense is makeweight; this suggestion cannot serve as a policy or legal basis for excluding intern factory workers from the protections afforded by Chinese labor law.

D. *Neither the Standing Committee of the National People's Congress nor the Supreme Court have excluded interns who labor from labor law's protections.*

The Standing Committee of the National People's Congress is the chief vessel for interpretation of the laws for the purpose of their implementation.¹³⁶ This feature of Chinese law emphasizes the legislative supremacy of national government, as well as its authority of the central government to review provincial and local law.¹³⁷ Both the 1995 Labor Law and the 2008 Labor Contract Law cover laborers broadly, and the

¹³¹ Ministry of Education Draft Rule, *supra* note 129, art. 2.

¹³² Ministry of Education Draft Rule, *supra* note 129, art. 4.

¹³³ Ministry of Education Draft Rule, *supra* note 129, art. 3.

¹³⁴ "Work unit."

¹³⁵ Ministry of Education Draft Rule, *supra* note 129, art. 12; art. 13 (5)-(8) (stating that the mandatory internship agreement must address hours, time off, labor protections, work safety and compensation). While article 16 of the Draft Rule suggests that enterprises should compensate interns only if they can afford it, that language contradicts other articles in the draft that call for compensating the interns. *See* Ministry of Education Draft Rule art. 13(8). Further, any reading of article 16 that would allow enterprises to not pay vocational interns would contradict the 1996 Vocational Education Law. *See* 1996 Vocational Education Law, art. 37 (stating that students participating in vocational education programs "shall be paid properly for their work.").

¹³⁶ XIANFA art. 67, § 8 (1982) (China).

¹³⁷ XIANFA art. 57 (1982) (China) ("The National People's Congress of the People's Republic of China is the highest organ of state power.").

Standing Committee has refrained from interpreting these labor laws to remove any workers from coverage. Provinces and local governments more subject to pressures from local industries might impose laws that purport to exempt workers from labor protections due to their status as interns. However, such exemptions would be hard to square with the labor statutes, and the Standing Committee is responsible for annulling such regulations contradicting national legislation.¹³⁸

Crucially, the Chinese Supreme Court has recently rejected invitations to expressly exclude vocational school interns from labor protections. In 2010, the Supreme People's Court drafted an interpretation of all labor laws to explicitly exclude vocational interns.¹³⁹ However, the final version of the 2010 Interpretation includes no such exclusion.¹⁴⁰ The 2010 Interpretation is an advisory, guidance document for local authorities and courts and does not reveal why the Court declined the invitation to announce a wholesale exclusion of interns from coverage under labor law. The rejection of this opportunity to exclude these misclassified workers is nonetheless crucial because it reveals that the exclusion of workers as interns faultily misreads the law for the benefit of certain employers.

- E. *Administrative interpretations of Chinese labor laws look to empirical facts when determining whether a worker has a "labor relationship," and do not favor the categorical exclusion of intern-laborers.*
- a. Administrative interpretations of Chinese labor law confirm that the law contains no exclusion of intern-laborers.

On August 11, 1995, the Ministry of Labor and Social Security interpreted the new 1995 Labor Law.¹⁴¹ The seminal Opinion on the Implementation of the Labor Law echoes the broad language of the statutes: "[A]s long as workers and enterprises and private economic units

¹³⁸ See XIANFA art. 67, § 8 (1982) (China) ("[The Standing Committee exercises authority to] annul those regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the Central Government that contravene the Constitution, the statutes or the administrative rules and regulations").

¹³⁹ Zhejiang Zhelien Lawyer Office (Sept. 15, 2010) www.zllawyer.com/DesktopModule/BulletinMdl/BulContentView.aspx?BulID=1450&ComName=default (noting differences between the third draft and the final opinion).

¹⁴⁰ Interpretation of the Supreme People's Court (III) on Certain Issues Regarding Application of Laws for the Trial of Labor Dispute Cases, *available at* http://www.court.gov.cn/qwfb/sfjs/201009/t20100915_9409.htm (stating that the 2010 Interpretation is compliant with the 1995 Labor Law, the 2008 Labor Contract Law, the Labor Dispute Mediation and Arbitration Law of the PRC, the Civil Procedure Law of the PRC and other related laws and regulations, and based on civil adjudication practices).

¹⁴¹ COONEY ET AL., *supra* note 76, at 53-54, 57 (this Opinion sought to clarify ambiguities in the 1995 Labor Law; however, the strength of its persuasiveness is unclear).

located within China form labor relations, such as when workers have become members of the enterprise and provide paid labor, then the labor law applies.”¹⁴² This interpretation is in line with the purposes and text of the statute, and confirms the commonsense proposition that the labor law should have comprehensive coverage to advance peaceful labor relations, and be applied in an empirical, logical manner in light of this industrial policy.

The 1995 Opinion does indeed exclude students (在校生), but solely in the context of work performed during their spare or free time (业余时间): “when students work in their spare time, it is not considered as employment, and they may not sign labor contracts (在校生利用业余时间勤工助学, 不视为就业, 未建立劳动关系, 可以不签订劳动合同).”¹⁴³ The text of this Opinion references students carrying a substantial academic load with casual or part-time work outside their academic schedule to help with costs. It does not reach compulsory full-time industrial internships characterized by scant deference to the goals of educational or vocational enrichment. Furthermore, a student can also be a laborer in a labor relationship and go to school. Interpretations of this Opinion or the underlying law that would divide students and workers into mutually exclusive categories fails to account for the empirical evidence that many workers go to school, and many students perform full and overtime work equivalent to that of laborers who are covered under the 1995 Labor Law.¹⁴⁴

All of the workers excluded by the Ministry’s 1995 Opinion follow from the language of the statute and the facts of the employment relationships. The Opinion explicitly excludes government employees, individuals serving in the armed forces, domestic workers, and agricultural workers.¹⁴⁵ As shown above, the exclusions for employees of public

¹⁴² Opinion on the Implementation of the Labor Law, Ministry of Labor and Social Security art. 2 (Aug. 11, 1995), available at http://law.lawtime.cn/d628597633691_2_p1.html (the English translations were provided by a program officer at the Solidarity Center) [hereinafter *Opinion on the Implementation of the Labor Law*]. Given the nearly identical scopes of the 1995 and 2008 labor laws analyzed *supra* Part III(B), this Opinion’s application of the 1995 law was not likely affected by the 2008 laws.

¹⁴³ Opinion on the Implementation of the Labor Law, *supra* note 142, art. 12.

¹⁴⁴ See Shumei, *supra* note 22 (noting that enterprises hire high proportions of cheap intern labor in order to reduce the proportion of regular workers); see, e.g., SCHERRER, *supra* note 61, at 137 (explaining that, despite how interns performed the exact same work as formal workers at Honda, the formal workers earned 1544 yuan per month plus social benefits, while interns earned 900 yuan per month without the social protection). The 2008 statutes did not, as noted, repeal the 1995 law. The 1995 law and the 2008 reform laws should be interpreted in *pari materia*.

¹⁴⁵ Opinion on the Implementation of the Labor Law, *supra* note 142, art. 4.

institutions and military personnel are, at bottom, statutory as they are expressly within the purview of other statutes.¹⁴⁶

Additionally, the exclusions of farm workers and domestic workers derive from the 1995 law's requirement that the employer must be an "enterprise or individual economic organization" (企业、个体经济组织) rather than an individual to be in a "labor relationship" (劳动关系).¹⁴⁷ Most domestic workers in 1995 worked for individuals. Fitting these isolated workers with the vast number of dispersed individual employers did not fit neatly in the traditional model of industrial relations. China's contemporary support for the ILO's Domestic Workers Convention certainly calls into question the force of the 1995 domestic worker exclusion and argues for reliance on contemporary facts about work and not on antiquated categories. Whatever the current validity of the Opinion's exclusion of domestic workers, these exclusions in the Opinion derive from the language of the statute and the facts of the relevant employment relationships.

The empirical methodology underlying the exclusions is emphasized by the Opinion's treatment of rural laborers.¹⁴⁸ The Opinion states that the law excludes rural laborers except for employees at township and village enterprises, and farmers who engage in employment and business in cities.¹⁴⁹ The Opinion's distinction between farm workers engaged in business transactions and rural laborers engaged in rural agriculture demonstrates that labels are not dispositive and that an empirical methodology is employed by Chinese administrative agencies to determine the existence of a labor relationship covered by Chinese labor law.

The Opinion omits industrial interns from its roster of excluded persons and its empirical thrust argues that interns who work full-time on assembly lines and sleep in factory dorms are not, in fact, students in libraries and classrooms, but laborers in a labor relationship. Moreover, vocational school interns work in many sectors. The designation of a student as an "intern" inaccurately portrays the nature of the work performed by students in industrial internships with employers like Foxconn. The Opinion, with its focus on the nature of the work performed, cuts strongly against a categorical, non-empirical exclusion of interns who perform routine, unskilled work completely unrelated to their chosen fields of specialization.

¹⁴⁶ See *supra* note 108 and accompanying text.

¹⁴⁷ See 1995 Labor Law, art. 2.

¹⁴⁸ Opinion on the Implementation of the Labor Law, *supra* note 142, art. 4.

¹⁴⁹ Opinion on the Implementation of the Labor Law, *supra* note 142, art. 4.

- b. Vocational interns performing work equal to that of formal laborers satisfy the Ministry's empirical test for whether a worker has a labor relationship.

In 2005, the Ministry of Human Resources and Social Security (successor to the Labor and Social Security Ministry) published a Notice clarifying when a "labor relationship" (劳动关系) exists between an employer and employee (the "2005 Notice"). It states that, even in the absence of a labor contract, a labor relationship exists when:

- 1) both the employer and workers meet the requirements established by law and regulations for being a qualified subject;
- 2) all labor rules and regulations established by the employer apply to workers, workers are subject to labor management by the employer, and workers perform paid labor under the arrangement of the employer;
- 3) labor provided by the worker is a component of the employer's business.¹⁵⁰

Further, the 2005 Notice lists the following facts as evidence for the existence of a labor relationship where no labor contract exists:

- 1) pay stubs or records (roster of employee wage distribution), records of social insurance payments;
- 2) "work badge" and "service card" and other documents issued by the employer to the worker as identification;
- 3) registration forms, application forms and other documents for hiring filled out by the worker;
- 4) attendance records;
- 5) other workers' testimony.¹⁵¹

¹⁵⁰ Notice of the Ministry of Human Resources and Social Security, May 25, 2005. (Editor's Note: This source is available in Chinese only. The relevant portions of the 2005 Notice are reprinted in Chinese here and in the next footnote for your information).

一、用人单位招用劳动者未订立书面劳动合同，但同时具备下列情形的，劳动关系成立。

(一)用人单位和劳动者符合法律、法规规定的主体资格；

(二)用人单位依法制定的各项劳动规章制度适用于劳动者，劳动者受用人单位的劳动管理，从事用人单位安排的有报酬的劳动；

(三)劳动者提供的劳动是用人单位业务的组成部分。

¹⁵¹ *Id.*

Because vocational internships are typically negotiated between the schools and the enterprises, students do not usually have labor contracts with their employers. However, the absence of a labor contract between the intern and the enterprise does not negate the existence of a labor relationship. The 2008 Labor Contract Law forecloses this possibility by requiring employers to conclude labor contracts where none exist and by imposing one by operation of law where the employer has not yet produced any contract. Interns are in “labor relationships” because they satisfy all the criteria of the labor statutes, the 1995 Opinion and the 2005 Notice, despite the fact that the students have no direct labor contract, but instead, commence their work under the umbrella of an agreement between government, their school, and the enterprise.

Intern workers laboring in manufacturing industry jobs unrelated to their majors satisfy the three criteria of the 2005 Notice for establishing the existence of a labor relationship. As a preliminary matter, industrial interns are working for employing entities and are, as such, “qualified subjects” of China’s labor relations laws. Chinese law has no simple guidelines for registering workers as laborers or entities as employing units. Interns and the entities for which they labor satisfy the first requirement (that they are employers and workers who meet the requirements established by law and regulations for being a qualified subject), because industrial interns perform work identical to that of their full-time counterparts and are not, as discussed previously, excluded from labor law protections. Further, given requirements that the employer must be an entity and not an individual, enterprises like Honda and Foxconn, which employ vocational school interns, also satisfy the first requirement, as they are entities registered under Chinese law.

Industrial internships satisfy the second requirement of the 2005 Notice because student interns at companies like Foxconn and Honda must abide by the same workplace regulations as their full-time counterparts.

二、用人单位未与劳动者签订劳动合同，认定双方存在劳动关系时可参照下列凭证：

- (一)工资支付凭证或记录(职工工资发放花名册)、缴纳各项社会保险费的记录；
- (二)用人单位向劳动者发放的“工作证”、“服务证”等能够证明身份的证件；
- (三)劳动者填写的用人单位招工招聘“登记表”、“报名表”等招用记录；
- (四)考勤记录；
- (五)其他劳动者的证言等。

Many employers of interns seek cheap labor because the interns work alongside full-time workers while imposing the same regulations on both groups. If interns perform work indistinguishable from that of full-time employees, enterprises have no incentive to impose two different systems of workplace regulations. For example, Foxconn has developed an elaborate disciplinary system that applies to all factory workers, and includes demerits that are issued to workers and are publicly posted.¹⁵²

Finally, the interns' labor in these particular internships is a component of the employer's business, thus satisfying the third requirement of the 2005 Notice. This is seen not only through the Administrative Measures for Internships at Secondary Vocational Schools, which encourages third year vocational students replace full-time workers, but also because student interns perform tasks identical to tasks performed by full-time employees.¹⁵³ If interns contribute to the factory's production, then they play a role in creating goods that drive the employer's business. As such, these so-called interns directly contribute to the profits gained by the employer, meeting that important requirement of the 2005 Notice.

In short, the 2005 Notice sought to promulgate a test to determine when a labor relationship exists that would qualify a worker for protection under contemporary labor laws. Industrial interns at companies like Foxconn and Honda are in "labor relationships" that satisfy the Notice because (1) both the industrial interns and their employers are qualified subjects of Chinese labor law; (2) industrial interns abide by the same workplace regulations as their full-time counterparts; and (3) the work of industrial interns in these types of internships is a component of their respective employers' businesses and directly contributes to employer profits. Accordingly, industrial interns and their employers, under these circumstances, are in a "labor relationship" and should be afforded the protections of Chinese labor law.

¹⁵² *Workers as Machines*, *supra* note 48, at 13.

¹⁵³ See Administrative Measures for Internships at Secondary Vocational Schools, Ministry of Education (2007) (China), *available at* http://www.moe.gov.cn/publicfiles/business/htmlfiles/moe/s3566/201001/xxgk_79114.html.

IV. CHINESE VOCATIONAL SCHOOL INTERNSHIPS VIOLATE THE INTERNATIONAL LABOUR ORGANIZATION'S CONVENTION ON FORCED LABOR WHEN INTERNS MUST ACCEPT THEIR ASSIGNMENTS IN ORDER TO RECEIVE THEIR DIPLOMAS, INTERNSHIPS ARE UNRELATED TO THE INTERN'S EDUCATIONAL GOALS, AND INTERNS WORK AMONG FULL-TIME EMPLOYEES BUT RECEIVE LESS THAN THE MINIMUM COMPENSATION.

The current exploitation of industrial interns by companies like Foxconn runs contrary not only to Chinese labor and educational laws, but also to international labor laws prohibiting forced labor. This section does not argue that all vocational internship programs in China qualify as *per se* forced labor under the standards of the ILO, which promotes a global baseline of labor protection. Rather, the violation of international law follows from the facts. When interns perform an internship unrelated to their vocational aspirations as a requirement for graduation and receive less than the minimum compensation required by law despite doing similar work as full-time workers, then such internships qualify as forced labor. Unfortunately, thousands of schools requiring internships of this sort exist throughout China.¹⁵⁴

Even though China has not ratified the Forced Labor Convention or the Abolition of Forced Labor Convention, both are among the core labor conventions followed by the majority of the international community.¹⁵⁵ More importantly, China has committed itself as an ILO member state to abide by the Declaration of Fundamental Principles and Rights at Work. The Declaration clarifies that the abolition of forced labor is a fundamental principle.¹⁵⁶ As a member of the ILO, China has an “obligation . . . to respect, to promote and to realize, in good faith and in accordance with the Constitution,” the abolition of forced labor.¹⁵⁷

China even recognizes that it is not fully in compliance with the Forced Labor Convention, though it claims to be open to ratifying the

¹⁵⁴ See generally *Mass Production of Labour*, *supra* note 20.

¹⁵⁵ See *Ratifications by Country*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/dyn/normlex/en/f?p=1000:11001:0::NO::> (detailing which ILO member states have ratified which of the core conventions). See also International Labour Organization, Forced Labor Convention (No. 29), June 28, 1930, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029 [hereinafter Forced Labor Convention]; International Labour Organization, Abolition of Forced Labor Convention (No. 105), June 25, 1957, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C105

¹⁵⁶ International Labour Organization, Declaration on Fundamental Principles and Rights at Work, June 18, 1998, available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>

¹⁵⁷ *Id.*

Convention “at the appropriate time.”¹⁵⁸ The ACFTU desires rapid ratification, while the Federation of Chinese Enterprises worries that the Convention defines forced labor too broadly.¹⁵⁹ To date, the Chinese government has not addressed whether the condition of vocational school interns qualifies as forced labor. The Forced Labor Convention defines forced labor as

all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,” though the Convention excludes military service, normal civic obligations, community service from court convictions, work exacted during states of emergency, and minor communal services.¹⁶⁰

The ILO’s General Survey on the Eradication of Forced Labor extrapolates three criteria from this definition of forced labor: 1) work or service, 2) menace of any penalty, and 3) involuntariness.¹⁶¹ Vocational school internship programs do not fall within any of the exceptions to the Convention on Forced Labor and, therefore, the Convention would apply. Further, the current treatment of industrial interns by certain vocational schools and by companies like Foxconn satisfies the three criteria for establishing a “forced labor” relationship under the Convention.

A. *The formal classification of vocational school internships as vocational training is not enough to exempt the programs from meeting the work or service element of forced labor because the ILO considers the specific nature of the program.*

In the 2007 General Survey on Forced Labor, the Committee of Experts on the Application of Conventions and Recommendations (“CEACR”) wrote that international standards distinguish between vocational training and work, noting that compulsory vocational training cannot qualify as compulsory work if it is an extension of compulsory general education.¹⁶² However, the General Survey acknowledges that the

¹⁵⁸ See International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (“CEACR”), *General Survey Concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957*, para. 27 (2007), available at <http://www.ilo.org/public/libdoc/ilo/P/09661/09661%282007%291B.pdf> [hereinafter CEACR General Survey of 2007].

¹⁵⁹ See *id.* (noting that the Forced Labor Convention’s expansive language regarding overtime work and wages especially troubled the Federation).

¹⁶⁰ See Forced Labor Convention, *supra* note 155, art. 2.

¹⁶¹ See CEACR General Survey of 2007, *supra* note 158, para. 35.

¹⁶² See CEACR General Survey of 2007, *supra* note 158, para. 36 (“[A] compulsory scheme of vocational training, by analogy with and considered as an

distinction between training and work is subtle.¹⁶³ Therefore, “only by reference to the various elements involved in the general context of a particular scheme of training” can one determine whether the scheme is “unequivocally one of vocational training or on the contrary involves the exaction of work or service within the definition of ‘forced or compulsory labor.’”¹⁶⁴

Vocational internship programs that send interns to large production facilities owned by companies like Foxconn, Honda, and Toyota do not qualify as vocational education, but instead, as “work or service” under the ILO Convention on Forced Labor. Chapter Three of the Administrative Measures for Internships at Secondary Vocational Schools advises that vocational internships should meet the objectives of a student’s major.¹⁶⁵ One way the Ministry of Education protects this is by discouraging first-year interns from replacing full-time workers, though it states that third-year students should replace full-time workers.¹⁶⁶ This rule will be frequently violated if the demand for cheap labor is strong enough.¹⁶⁷ Interns at factories may be as young as sixteen years old, which is the age students typically begin vocational school. Students at this age do not have the theoretical or practical background for skilled internships because they have not yet taken classes relevant to the development of skills required for these positions.¹⁶⁸ By placing students to work without the prior practical and theoretical background that a vocational school education should provide, students enter the workforce with no advantages over uneducated workers. Thus, the work performed in these internships does not supplement an intern’s education and cannot properly be characterized as vocational training.

Further, students are often assigned to positions regardless of their majors. While most vocational school interns acquire technical majors, labor rights activists assert that students often perform work totally

extension to compulsory general education, does not constitute compulsory work or service within the meaning of Convention 29.”).

¹⁶³ See CEACR General Survey of 2007, *supra* note 158, para. 36 (noting that the difficulties in distinguishing vocational training from work stem from vocational training’s requiring some degree of practical work).

¹⁶⁴ See CEACR General Survey of 2007, *supra* note 158, para. 36.

¹⁶⁵ See Administrative Measures for Internships at Secondary Vocational Schools, *supra* note 153, ch. 3.

¹⁶⁶ See Administrative Measures for Internships at Secondary Vocational Schools, *supra* note 153, ch. 3.

¹⁶⁷ See *Mass Production of Labour*, *supra* note 20, at 4 (observing that, if the first year students are as young as fifteen years old, then the student interns are child laborers).

¹⁶⁸ Garside, *supra* note 39.

irrelevant to their studies.¹⁶⁹ A study of sixteen schools found that students commonly complained that their internships were unrelated to their fields of study.¹⁷⁰ Foxconn interns working on the assembly line include majors as diverse as tourism, pharmacy, and music.¹⁷¹ The work these students perform during their internships is therefore not an extension of their education. Rather, it can only be characterized as “work or service” as defined in the ILO Convention on Forced Labor and, therefore, satisfies the first element of the test for determining the existence of a forced labor relationship.

B. *Vocational school internships operate under the menace of penalty by withholding diplomas when interns refuse to engage in their work assignments and by denying students access to complaint mechanisms.*

The CEACR defines “penalty” more broadly than simply penal sanctions by noting that the word can also include “a loss of rights or privileges.”¹⁷² To clarify the definition of forced labor, the General Survey describes ways that forced labor can be used in voluntary labor: a person who refuses to participate in voluntary labor may lose certain advantages in a workplace environment where good performance results in workers receiving additional privileges and advantages.¹⁷³ The “menace of penalty” element may therefore be understood to refer to any adverse employment action taken by an employer against an employee for failing to voluntarily comply with an employer’s demands.

Vocational school interns engaged in internship programs suffer from losses of rights, privileges, and advantages for failing to participate in their work. Participation in their internships is a mandatory aspect of their vocational training, and schools withhold diplomas from students that refuse to participate in their internships.¹⁷⁴ For example, a school in Henan

¹⁶⁹ See *Foxconn and Apple Fail to Fulfill Promises: Predicaments of Workers After the Suicides*, STUDENTS & SCHOLARS AGAINST CORPORATE MISBEHAVIOR, 18 (May 6, 2011), http://sacom.hk/wp-content/uploads/2011/05/2011-05-06_foxconn-and-apple-fail-to-fulfill-promises1.pdf (noting that Foxconn, which has agreements with schools throughout the country, frequently hires interns even though the work they perform is unrelated to their majors).

¹⁷⁰ See *Mass Production of Labour*, *supra* note 20, at 3-5 (noting various examples of student complaints).

¹⁷¹ Garside, *supra* note 39.

¹⁷² CEACR General Survey of 2007, *supra* note 158, at para. 37.

¹⁷³ See CEACR General Survey of 2007, *supra* note 158, at para. 37 (stating that these benefits may include “promotion, transfer, access to new employment, the acquisition of certain consumer goods, [or] housing or participation in university programmes,” among others).

¹⁷⁴ *Mass Production of Labour*, *supra* note 20, at 1 (noting that schools are unsympathetic to the complaints of students); see, e.g., *Foxconn Defends Internships After Reports of Forced Work*, BLOOMBERG NEWS (Sept. 6, 2012),

ordered students, nine days before leaving for holiday, to begin work at Foxconn or drop out of school.¹⁷⁵ If an intern can only receive his or her diploma by working at a company like Foxconn,¹⁷⁶ then the intern may face punishment in the form of scolding or humiliation for minor infractions.¹⁷⁷

As noted in Part II of this paper, industrial interns suffer legal violations or fail to receive their promised compensation but cannot access legal remedies, even though Part III has demonstrated that they legally qualify for such protections. Industrial interns lack access to the labor courts because the government refuses to acknowledge that the interns are laborers under the law.¹⁷⁸ Further, interns cannot complain to their respective schools for fear of being denied a diploma.¹⁷⁹ These practices amount to a loss of the rights and privileges provided to similarly situated workers under Chinese labor law and thus penalizes industrial interns simply for being students. The ILO recognizes this loss of access to remedies as a crucial aspect of the menace of penalty.

<http://www.bloomberg.com/news/2012-09-07/foxconn-defends-internships-after-reports-of-forced-work.html> (describing one girl who majored in preschool education but was sent to Foxconn to produce USB cables to meet her credit requirements for graduation, even though Foxconn claims that students can leave the program voluntarily); *see also* Chakraborty, *supra* note 54 (reporting that students at a Foxconn factory in Shenzhen were required to break other internship arrangements in order to satisfy their school's order to work at Foxconn).

¹⁷⁵ Garside, *supra* note 39.

¹⁷⁶ As it imposes some of the worst working conditions among internship employers, Foxconn is not an insignificant example: in 2010, the company had agreements with 119 vocational schools in Chongqing alone, and has operations all over the country. *See* Hu Yinan and Wang Yu, *Foxconn Mulls Move Northward*, CHINA DAILY (June 29, 2010), http://www.chinadaily.com.cn/m/shandong/c/2010-06-30/content_517356.html.

¹⁷⁷ *Workers as Machines*, *supra* note 48, at 13-15.

¹⁷⁸ In an analogous context, the inability and unwillingness of United States law enforcement to effectively investigate and prosecute abuses contributed to widespread forced labor in the American South long after the Civil War, leaving African-Americans without legal remedies. The relationship between lack of access to legal remedy and the menace of penalty as an instrument of forced labor is clear. *See generally* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

¹⁷⁹ *See* Martha C. White, *Advocates Decry Foxconn Treatment of Student Interns*, NBCNEWS.COM (Apr. 12, 2012, 2:11 PM), http://bottomline.msnbc.msn.com/_news/2012/04/02/10984486-advocates-decry-foxconn-treatment-of-student-interns (referencing the China Labor Bulletin report).

- C. *Vocational school interns could not have voluntarily offered their labor to enterprises if they enter into work only under the threat of schools withholding diplomas and if universities and enterprises under color of government authority engage in indirect coercion by assigning students regardless of their major.*

The ILO does not provide a definition of what constitutes a voluntary offer of labor. However, the CEACR requires that a determination of a worker's freedom to labor voluntarily requires an examination of "the [applicable] legislative and practical framework."¹⁸⁰ The CEACR also provides that external coercion sufficient to interfere with a worker's voluntariness may derive not only from the law, but also from the employer's practices.¹⁸¹ Further, the CEACR emphasizes that workers have an inalienable right to freely leave their employment.¹⁸²

Since students consent to receiving vocational school education, the framework of the non-educational internships, paired with the external coercion students face before accepting their assigned internships, indicate that such consent is not voluntary. As noted above, many schools and enterprises do not assign internships according to the students' fields of study. Provincial governments that encourage these programs play active roles facilitating agreements between schools and private sector enterprises. These agreements are often (quite naturally) more deferential to the needs of the enterprise and the province's economic development, than they are to the vocational needs of the far less powerful students.¹⁸³ Further, when the school in Henan ordered the internship assignment to

¹⁸⁰ See CEACR General Survey of 2007, *supra* note 158, at para. 38 (observing that, because voluntary offers are impossible if they result from threats, the voluntariness criteria overlaps with the menace of penalty criteria).

¹⁸¹ See CEACR General Survey of 2007, *supra* note 158, at para. 39 (providing that an example of indirect coercion from an employer can include the induction of migrant workers by "deceit, false promises and retention of identity documents").

¹⁸² See CEACR General Survey of 2007, *supra* note 158, at para. 40 (concluding that laws preventing the termination of indefinite employment risks turning contractual relationships into legal compulsion, and therefore are incompatible with the Forced Labor Convention).

¹⁸³ See *Mass Production of Labour*, *supra* note 20, at 5 (describing how provincial governments urge vocational schools to cooperate with business by providing the example of the Henan government, which was crucial to arranging 100,000 to work for Foxconn); *A Political Economic Analysis of the Strike in Honda and the Auto Parts Industry in China*, IHLO, July 2010, at 14, available at <http://www.ihlo.org/LRC/W/000710.pdf> (explaining that governments in urban and rural provinces have arranged internship schemes to transfer students between the provinces in order to advance economic development while also ensuring that the enterprises employed as many workers as needed).

Foxconn immediately before the holiday, teachers informed the affected students that the internship was by orders of the provincial government.¹⁸⁴

Not only does the reality of interns performing work unrelated to their fields of study reveal that their work cannot qualify as vocational training under the first criteria, but it also demonstrates that the workers are not voluntarily accepting their internships if their schools and the government require them to work in fields completely irrelevant to the kind of work for which they paid tuition to learn. For example, interns working at Foxconn attended vocational school with the intent to study a wide range of unrelated subjects like tourism, language, and journalism.¹⁸⁵ Despite the lack of educational benefits, teachers monitor student attendance at the factories, and students must choose between accepting the internship and dropping out of school.¹⁸⁶ Not only are students deceived into performing work unrelated to their major, as they had originally expected to engage in work relevant to their studies, but they are being denied the ILO's fundamental right to leave their employment arrangements.

V. LABOR PROTECTIONS FOR VOCATIONAL INTERNS IN CHINA ARE DEFICIENT UNDER INTERNATIONAL STANDARDS AND WEAK COMPARED TO THE STANDARDS OF OTHER COUNTRIES.

China's increasing role as a global economic power should require that the government consider how to best develop domestic policies in line with customary international law. This section merely notes that the government's legal protections of vocational interns are deficient compared to those of other developed countries.¹⁸⁷

Furthermore, China's ascent up the economic ladder means that its laws governing student internships should more closely resemble the internship laws of other more developed countries to ensure a fundamentally sound and productive workforce. As such, this section examines the legal protections provided to interns in the United States,¹⁸⁸ Japan,¹⁸⁹ and the European Union.¹⁹⁰ All of these governments have

¹⁸⁴ Garside, *supra* note 39.

¹⁸⁵ See Open Letter to Tim Cook, *supra* note 45 (describing how the government of Henan has arranged for 100 vocational schools to provide labor at Foxconn factories).

¹⁸⁶ See *id.* (noting that, while Apple prohibits the use of involuntary labor, its Supplier Responsibility Report has not addressed the problem of intern labor).

¹⁸⁷ See *infra* Part, V(A).

¹⁸⁸ See *infra* Part V(B).

¹⁸⁹ See *infra* Part V(C).

responded to increasing attempts to provide basic labor protections to interns. Further, all of these developed countries emphasize the formal recognition of interns and their educational needs. In sum, the situations under which Chinese interns suffer at plants run by companies like Foxconn and Toyota would be illegal under these developed countries' regulatory frameworks.

A. *Protections of interns under international law.*

The Preamble to the ILO Constitution sets forth standards for vocational students' well-being, providing that vocational education is a field it strives to improve.¹⁹¹ After developing a series of recommendations explicitly regarding vocational training, both general and targeted to specific industries,¹⁹² the ILO settled in 1975 on Convention Number 142 on Human Resources Development and Recommendation Number 150 on Human Resources Development, the latter superseding all previous recommendations regarding vocational training and guidance.¹⁹³ China has not ratified Convention Number 142.

While Convention Number 142 requires member states to use vocational programs to aid development, they must also "encourage and enable all persons, on an equal basis . . . to develop and use their capabilities for work in their own best interests and in accordance with their own aspirations, account being taken of the needs of society."¹⁹⁴ This requires that member states "adapt and harmonise" their training programs "to meet the needs for vocational training throughout life of both young

¹⁹⁰ See *infra* Part V(D).

¹⁹¹ See CONST. OF THE INTERNATIONAL LABOUR ORGANIZATION pmbl. (amended Nov. 1, 1974) ("And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, by . . . the organisation of vocational and technical education and other measures . . ."); see *generally* N. VALTICOS, INTERNATIONAL LABOUR LAW 123-25 (overviewing the history of ILO and international law regarding vocational training).

¹⁹² See VALTICOS, *supra* note 191, at 123-24 (noting that, in addition to broad recommendations, the ILO has also passed recommendations targeting the agricultural, building, seafaring, and fishing industries).

¹⁹³ See International Labour Organization, Human Resources Development Convention (No. 142), June 23, 1975, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312287 [hereinafter Human Resources Development Convention]; International Labour Organization, Human Resources Development Recommendation (No. R-150), June 23, 1975, *available at* http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312488 [hereinafter Human Resources Development Recommendation].

¹⁹⁴ Human Resources Development Convention, *supra* note 193, art. 1 § 5.

persons and adults in all sectors of the economy and branches of economic activity and at all levels of skill and responsibility.”¹⁹⁵ Similarly, Recommendation Number 150 elaborates on the Convention by emphasizing that member states must balance the needs of national development with those of individual workers.¹⁹⁶ Part IV of the Recommendation focuses on vocational training, and it emphasizes that such training must be educational for the student workers in that the education provided in school should correspond to training given on the job, and that programs generally are related to real work situations.¹⁹⁷ Further, such workers must, over the course of their training, “receive adequate remuneration” and “be covered by the social security measures applicable to the regular workforce of the undertaking.”¹⁹⁸

Thus, the ILO stresses the need to balance the well-being of intern workers with concerns regarding economic development. This stands in stark contrast to the current practices of Chinese schools and provincial governments in managing student internships. Schools and provisional governments have, to this point, focused solely on the needs of the market and completely disregarded student well-being and academic development. If schools and provincial governments were to consider the educational well-being of students, interns would receive assignments in their fields of vocational study, rather than assigned work at Foxconn or Honda. Interns would also be paid equivalently to full-time workers when they perform equivalent work and schools would provide greater concern for the safety and other interests of interns as they perform their factory or other industrial work. Given that ILO law also emphasizes the ability of individuals to choose their professions, such internships fail to abide by the Convention and the Recommendation when vocational interns are required to perform work completely unrelated to their desired fields of specialization in order to receive their degrees.

B. *The United States*

While recent attention in the United States has focused on the quality of internships, particularly in regards to compensation,¹⁹⁹

¹⁹⁵ Human Resources Development Convention, *supra* note 193, art. 4.

¹⁹⁶ *See, e.g.*, Human Resources Development Recommendation, *supra* note 193, art. 15 (noting that member states can harmonize these needs by providing opportunities for promotion and upward mobility, by improving training in all sectors of the economy, by extending training to disadvantaged groups, and by coordinating general and vocational education).

¹⁹⁷ Human Resources Development Recommendation, *supra* note 193, art. 19.

¹⁹⁸ Human Resources Development Recommendation, *supra* note 193, art. 23.

¹⁹⁹ *See, e.g.*, Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (April 2, 2010), *available at* <http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all> (reporting that the Wage and Hour Division of the Department of Labor has increased efforts to

internships have long been subject to federal regulation.²⁰⁰ The Fair Labor Standards Act (FLSA) broadly defines the term “employ” as “to suffer or permit to work.”²⁰¹ The U.S. Department of Labor applies six criteria for determining whether a worker qualifies as an employee—and thus subject to relevant labor and employment laws—or only an intern that an employer can exclude from most of those laws, including those regarding payment. The six factors are:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.²⁰²

Under the U.S. Department of Labor’s standards, workers must satisfy all of these criteria to legally qualify as a trainee or unpaid intern,²⁰³ though courts have not applied the standards as strictly.²⁰⁴ Under this test, mere academic credit is not enough to shelter the intern from labor laws, because the employer must also supplement the credit by

respond to illegal unpaid internships).

²⁰⁰ See *Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1025-26 (10th Cir. 1993) (explaining that the Department of Labor’s current test for determining whether interns are “employees” within the meaning of the FLSA has been in place since 1967, in response to *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947)).

²⁰¹ See 29 U.S.C. § 203(g) (2006).

²⁰² *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP’T OF LAB. WAGE AND HOUR DIVISION (Apr. 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>; see also 5 C.F.R. § 551.104 (2007) (explaining the factors in the context of “trainees”).

²⁰³ *Id.* (“If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern.”).

²⁰⁴ See, e.g., *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026-27 (10th Cir. 1993) (applying the factors but noting that they do not all need to be satisfied, in the context of firefighters training at the defendant’s academy); *Atkins v. General Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983) (applying the six factors to trainees of an auto company).

assigning the intern supervised work that develops the intern's skills. Even courts that decline to apply the standards, preferring a "primary benefit" test that examines which party benefits more than the other, emphasize that internships and training programs are fundamentally educational.²⁰⁵

As a result, American courts agree that training exemptions from federal law depends on whether the program is educational or whether the intern function as a source of free labor. This emphasis on educational value would greatly benefit the operation of vocational education programs in China. If a nursing student is required to assemble machinery at Foxconn, the worker is not only denied the education they expect from their assignment, but the intern also fails to develop the skills and work history crucial to their intended profession in nursing.

C. Japan

Internships in Japan were not as widespread as in developed Western countries until recently, when economic recession in the early 2000s reduced the number of positions available and employers grew concerned about whether the country's youth population would be qualified for such jobs.²⁰⁶ Japan's Labor Standards Law explicitly states that "[a]n employer shall not exploit an apprentice, student, trainee, or other worker, by whatever name such person may be called, by reason of the fact that the person is seeking to acquire a skill."²⁰⁷ Courts have even expanded upon this law in recent years.²⁰⁸

Further, Japan's Employment Security Law requires that Japan's Public Employment Security Office cooperate with schools to provide as many job offerings as possible.²⁰⁹ Schools are encouraged to reject job offers from employers whose work is unrelated to the school's fields of

²⁰⁵ See *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (finding the six factors too rigid, and noting that the broader "primary benefit" test targets the same evils and considers similar factors like displacement of workers and exploitation of labor); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-1210 (4th Cir. 1989) (noting that the kind of work, and the experiences learned, are factors that help determine the primary beneficiary).

²⁰⁶ *Student Internships Gain in Popularity*, 40 JAPAN LAB. BULL. 5 (May 2001).

²⁰⁷ Labor Standards Law, Law No. 49 of 1947, art. 69 (Japan), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/27776/64846/E95JPN01.htm#a069>.

²⁰⁸ See, e.g., *Medical Interns Should Get Real Wage: Top Court*, JAPAN TIMES (June 4, 2005), available at http://www.japantimes.co.jp/text/nn20050604a2.html#.UAOHu_VdC1c (reporting a Supreme Court ruling that medical interns should be covered as workers under the Labor Standard Law).

²⁰⁹ Employment Security Act, Act No. 141 of 1947, art. 26 (Japan), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_117326.pdf [hereinafter Employment Security Act].

study.²¹⁰ Further, extensive cooperation is organized between the schools, the Public Employment Security Offices, and the businesses to ensure that students receive proper vocational guidance.²¹¹ In contrast, many of the vocational internships in China require the presence of teachers on the factory floor; however, the purpose of this practice is to ensure attendance and promote workplace discipline rather than to promote vocational guidance as Japan's Employment Security Law promotes.²¹²

D. *The European Union*

European member states have long protected individual interns and trainees, and the European Social Charter emphasizes that citizens have a right to vocational training.²¹³ The European Union is currently supplementing these with an explicit Charter regarding internships.²¹⁴ The Charter, which has four articles, is intended to improve working conditions for young people.²¹⁵ First, the Charter affirms that internships are fundamentally educational endeavors.²¹⁶ Second, interns should benefit from decent conditions of which they are made aware beforehand.²¹⁷ Third, internships should exist only within the formal educational process, but those that do not should provide interns with full benefits.²¹⁸ Fourth, stakeholders should adequately develop and monitor such programs.²¹⁹

All four of these principles, if adopted, would greatly improve the quality of internships in China by addressing the lack of relevant vocational education and poor working conditions that a substantial number of industrial interns are currently forced to endure. Additionally, requiring in fact a formal educational process as a component of vocational education would better serve Chinese vocational students by guaranteeing that internships would provide students with skills applicable to their intended professions. Finally, requiring the relevant stakeholders,

²¹⁰ Employment Security Act, art. 27, para. 3.

²¹¹ Employment Security Act, art. 22-25.

²¹² See Open Letter to Tim Cook, *supra* note 45.

²¹³ Council of Europe, European Social Charter (revised 1996), art. 10, available at <http://conventions.coe.int/Treaty/en/Treaties/html/163.htm> (placing the burden of providing access to adequate training on the 47 member states of the Council).

²¹⁴ European Youth Forum, European Quality Charter on Internships and Apprenticeships, available at <http://qualityinternships.eu/>

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

like private companies doing business in China and vocational school programs, to adequately develop and monitor vocational educational programs would greatly improve the quality of such internships by holding these stakeholders accountable to the appropriate governing authority.

VI. CONCLUSION

Under Chinese law, the National Peoples' Congress and its standing committee, constitute the highest legislative authority.²²⁰ When these unique institutions for crafting Chinese social and industrial policy arrive at a defined structure for implementing basic labor standards and securing peaceful industrial development, the framework should be respected by employers and bureaucracies. The legislature's control over China's basic industrial policy and development is subverted when interested employers and allies advance the view that interns who simply work at subminimum wages are by definition not covered by Chinese labor laws. There is no policy support in any of these labor statutes for the exclusion of such a huge segment of the Chinese industrial and service sector work force. In fact, the overarching policy of China's 2008 labor law reforms, with its focus on broad coverage for workers and empirical methods for determining the existence of a labor relationships, counsels against such a categorical exclusion of student interns based solely on labels applied by employers with vested interests in reducing operating costs.

China's rapid growth carries the promise of economic opportunity to all of its citizens, but such opportunities remain illusory as long as enterprises exploit vocational internships for cheap labor. This practice not only lies to students, who began their education believing that they would develop skills in their desired field, but it also undermines the Chinese government, whose current labor laws strongly suggest that industrial interns, like the ones who work for Foxconn and other large Chinese manufacturers, are ordinary workers afforded the protections of Chinese labor laws when these interns are in labor relationships. China should comply with international law and actively enforce its own laws by ensuring that these interns receive the educational benefits they should reasonably expect from a vocational program. When these programs are devoid of any relevant educational component and maintained solely for the benefit of the employer's bottom line, these interns should be afforded the full protection of China's labor laws.

²²⁰ XIANFA art. 57 ("The National People's Congress of the People's Republic of China is the highest organ of state power."); art. 67, § 8. *See also* Legislation Law of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China, Mar. 15, 2000), art. 7.