A legally-informed definition of volunteering in nonprofits and social enterprises

Unpaid work meets profit motives

Overgaard, Charlotte; A. Kerlin, Janelle

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A legally-informed definition of volunteering: Unpaid work meets profit motives

Abstract

This paper presents a definition of volunteering that will help organizations and workers, especially those engaged in commercial activity for a social purpose, determine when U.S. organizations can legally draw on volunteer labor. By drawing on recent U.S. court cases, the intentions of the *Fair Labor Standards Act* (FLSA) to protect vulnerable workers and the wider framing literature on organizational logics, work, and volunteering, we outline under which circumstances workers are considered employees rather than volunteers and therefore covered by the FLSA and entitled to minimum pay. We show that in order to determine the legalities of work under current law it is necessary, but not sufficient, to consider whether activities are carried out for commercial purposes. What matters most for a legally-informed definition is the role performed within organizations and the promises made to individual workers in terms of compensation.

Introduction

In May 2015, Cause of Action Institute, a nonprofit group 'advocating for economic freedom and individual opportunity advanced by honest, accountable, and limited government' (Cause of Action Institute, N/A), took on the U.S. Department of Labor (DOL) in a battle over unpaid labor, labor that was referred to as 'volunteering'. Cause of Action filed the case on behalf of Rhea Lana, a large for-profit consignment business. In organizing consignment sales, Rhea Lana drew on the labor efforts of predominantly women who participated by setting up the event, writing price tags, checking inventory and helping with sales. In return for their 'volunteering', these women had access to consignment sales before the general public. That is, their compensation consisted of the right to *shop first*. Rhea Lana consistently referred to this form of labor as 'volunteering'. However, the DOL notified Rhea Lana that these

workers were *employees,* not volunteers, under the *Fair Labor Standards Act* (hereafter FLSA) and therefore entitled to minimum wages, a position ultimately supported by the judiciary in *Rhea Lana, Inc. v. DOL*, No. 17-5259 (D.C. Cir. 2019), hereafter referred to as *Rhea Lana* (we intentionally use italics when referring to court cases on all subsequent mentions, rather than full references, to enhance readability for a wide audience. We do not use italics when referring to organizations).

Rhea Lana has raised questions for other organizations, including nonprofits and small for-profit social enterprises, caused by uncertainties of the reach of the court case. For example, does *Rhea Lana* mean that nonprofits, which also rely on unpaid labor in organizing consignment sales, are breaking the law? Or, are these organizations 'safe' from the reach of the FLSA due to their organizational form? Also, more general questions persist about the legalities of paid and unpaid work. For example, scholars have reported on 'volunteer' programs in private hospitals and other for-profit organizations (see e.g. the definition used in Smith et al., 2016: 331) and the court case has prompted an active debate by practitioners and legal experts online about the legalities of such practices due to the court's reference to 'commercial activities'. Finally, the court case has raised questions about whether scholarly definitions of 'volunteering', as well as how lay people and practitioners use the word 'volunteering' are in accordance with legal definitions of such work.

The ruling comes at a time in history when the logics of different forms of organizations have been increasingly blurred (Meagher and Goodwin, 2015; Meagher and Wilson, 2015), not least due to the rise of social enterprises. Use of the term social enterprise, which includes for-profit and nonprofit legal forms, has grown in popularity since the 1980s (Kerlin, 2013). Due to the increase in their use and how many workers are now trying to navigate their everyday workdays in such organizations, it is not surprising that social enterprises have attracted increased attention by scholars, too (Simsa and Brandsen, 2021). Social enterprises take on varying hybrid organizational forms and operate in a contested field where their exact boundaries are difficult to determine (Dart, 2004; Kerlin, 2020a), making it unclear how they are expected to behave as organizations, including their use of volunteer labor. The rise of new organizational forms is part of a shift in thinking in capitalist economies where market-based activities are increasingly encouraged to

address social issues in more sustainable ways (Jenson, 2015). At the same time as we have seen a rise in market thinking in social spaces, volunteering has come to be something of a cure-all for maladies affecting our societies (Overgaard, 2019).

The Department of Labor provides a definition of volunteering. However, while helpful, it does not fully answer the questions organizations have about volunteer labor. For while the definition clearly stipulates that Congress did not intend to discourage volunteer activities, it similarly stipulates that manipulation or abuse of minimum pay requirements should be prevented (29 C.F.R. § 553.101) (See Box 1). Also, the same definition stipulates that volunteers can be identified by the reasons for which they engage, such as charitable and humanitarian reasons, though without taking into consideration that the organizations for which individuals work may have mixed financial and charity / humanitarian motives, rather than the pure motives imagined in the law. Indeed, the DOL's definition of volunteer is in reference to 'public agencies' meaning government-related entities, and it does not discuss volunteering in relation to other types of organizations. In summary, it is increasingly difficult to make sharp volunteer distinctions in a changing landscape that blurs the boundaries between for-profit and nonprofit organizations and between paid and unpaid work.

[Box 1 here]

Despite the rise of new organizational types and new forms of volunteer compensation, academic work is underdeveloped in this area. In fact, the most recent U.S. attempt to provide a definition of "volunteer" based on a systematic effort is from 1996 (Cnaan et al., 1996). At the same time, academic work needs to take into consideration the rulings of U.S. courts. For while it is useful to determine what lay people think of as volunteering—as social categories—organizations need certainty. The primary aim here is to present a legally robust, more durable and contemporarily appropriate, definition of volunteer care work. Therefore, through engagement with the law, case studies and a review of legal precedent this paper sets out to provide a definition of volunteering in the United States that captures current changes. As it will be clear from this paper, a legally-informed definition of volunteering is different to and somewhat at odds with widespread practice and how

workers may define and think of themselves. It is also at odds with how many academic scholars of volunteering use and define that term.

Our initial focus in this article is on the intent behind the central legislative act governing employment in the U.S., the FLSA. We then proceed to engage with the question of 'what is work' before establishing that what matters most to a legally-informed definition is the role performed within organizations and the promises made to individual workers in terms of compensation not the organizational form itself. We complete the outline by showing that the traditional for-profit versus nonprofit divide has been compromised by the rise of especially social enterprises, and—by extension—that the blurring of institutional logics now makes it difficult to distinguish lawful volunteering from unlawful forms of employment. At the end, we present a simple summary of a legally-informed 'what is a volunteer' definition.

The aim of the FLSA: protection of workers, stimulating the economy and ensuring fair competition

The 1938 *Fair Labor Standards Act* (FLSA), championed by the Roosevelt administration during the Great Depression was the product of numerous complimentary policy goals (Wilkins, 2013). One of these was the protection of vulnerable workers. According to the FLSA §206 (2) 'Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages'. Thus a prime concern prompting the FLSA by Congress was to protect vulnerable workers at the bottom end of the labor market from brutally low wages and exploitation (Wilkins, 2013). This protection was seen to be even more pressing as the conditions under the Great Depression meant that workers were experiencing little bargaining power in the labor market and therefore subject to exploitation.

At the same time, the FLSA was about protecting the economy as a whole, not just about protecting individual workers. The problems of the Great Depression were, at least in part, combatted by passing the FLSA as a way to stimulate the economy. In line with what we now think of as Keynesian economic policy (Cass and Freeland, 1994; Kalecki, 1943), it was recognized that increasing workers'

purchasing power would benefit the economy (Wilkins, 2013). That is, in order to get the economy as a whole working, stimulus to purchasing power was essential. The main method to increase individuals' ability to buy goods is to secure their wage.

Furthermore—also to boost the economy as a whole—another aim of the FLSA was to eliminate unfair competition according to §202 (2). Not paying workers a decent wage constitutes unfair business advantage and the implementation of a minimum wage therefore ensures that some companies cannot dominate the market by paying unreasonably low wages—or not paying wages at all. In Roosevelt's vision, the FLSA would create a minimum wage which would cut across geography and industries and eliminate opportunities for companies to undercut each other by suppressing wages (Wilkins, 2013). In summary, it was recognized that a strong, well-functioning labor market not taunted by labor disputes would enable the U.S. to move out of the recession and boost the economy. The protection of workers is therefore not just an individual good, it is also a social good.

At present, the FLSA applies to any organization with annual revenue of at least $500,000 from commercial activities or engaging in interstate commercial activities. At face value, this appears to restrict the FLSA to cover only employees in large companies. However, the FLSA covers nearly all workers because the term 'interstate commerce' is interpreted very broadly (U.S. Department of Labor, 2009). For example, workers who regularly send or receive letters, use company phones or computers to communicate with people in other states, or unload freight arriving from another state are engaged in interstate commerce (U.S. Department of Labor, 2009). Once employers are covered, all of their employees are covered by the FLSA, not just the employees who are themselves engaged in commerce or the production of goods for commerce. Therefore, while there are some exceptions, it is safer for any organization to presume that the FLSA (and/or similar state laws) covers all organizations. In summary, the reach of the FLSA is intentionally wide to include as many organizations and workers as possible. Furthermore, the intention by Congress is to benefit all of society, not just the individual person, by creating greater purchasing power, less unemployment, and more economic growth (Wilkins, 2013).

However, even if the reach is intentionally wide, not all activities within organizations are covered by the FLSA. Volunteer activities are specifically omitted.

‘Congress did not intend to discourage or impede volunteer activities undertaken for civic, charitable, or humanitarian purposes, but expressed its wish to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to ‘volunteer’ their services’, according to 29 C.F.R. Section 553.101, (b). Yet, determining if a person is an employee or a volunteer is not straightforward. Because the FLSA only covers those who work, it is necessary to first engage with the question of ‘what is work?’.

FLSA Protection is only awarded to those who work

Under the Fair Labour Standards Act, 29 U.S.C. § 201 et sec., employees are entitled to earn a minimum wage for the hours they *work* (our emphasis). Therefore, it is necessary to engage with the question of ‘what is work?’. The distinction between work and non-work is not an easy one to make in practice (Glucksmann, 2005). On a daily basis, people engage in a number of activities that are not normally considered work, such as engaging in sports activities, going to the movies, watching TV, eating or surfing the internet. However, at the same time some people do go to the movies or surf the internet as part of their paid jobs. Fashion designers and movie producer assistants might have those tasks included in their job descriptions. That makes it difficult to clearly distinguish when an activity is, in fact, work.

In the academic volunteering literature, there is also some disagreement on this topic (Overgaard, 2019). Older articles support the notion that volunteering was something quite different than work activities. For example, a review from 1996 concerned with investigating ‘who is a volunteer’ (Cnaan et al., 1996) did not even consider ‘work’ as an element in such a definition. Others posit that volunteering is simply a serious form of leisure (Stebbins, 1996) while others again contend that volunteer work is inherently contradictory as it is both work and leisure (Merrell, 2000; Pearce, 1993) However, the leisure perspective has lost ground in recent years; most definitions now include a reference to work, rather than to leisure (Oppenheimer and Edwards, 2011; Mutchler et al., 2003).

The reluctance to omit the whole category of ‘volunteering’ as work is grounded in some wider shifts in what counts as productive activities. Second generation feminists successfully argued that the ability to locate productive work

activities in the market only—and therefore largely as men's business—resulted from the invisibility of women's work, especially caring work and domestic work (Power, 2004). These activities were, according to neo-classical economics, not productive, because such economics focused entirely on economic activities in the market (Power, 2013). This imagining of all work taking place in the market, meant that the provisioning for families and caring for the young, old, and infirm did not show up on systems of national accounts (Waring, 1988), deeming it invisible. That effectively meant that what women did at home in terms of domestic chores and caring activities did not count as work and had no official monetary value (Waring, 1988). It also meant that men worked, while women did not. Rather than doing house*work*, women, wives and mothers were imagined and positioned as inactive and unoccupied (Waring, 1990).

When women entered the public work life in greater numbers during the 60s and 70s, they did it 'via the backdoor' performing tasks that were seen as natural to women (Hernes, 1987; Borchhorst and Siim, 2002). At the time, women struggled to make their paid labor recognized as work (Power, 2013; Waring, 1990; Waring, 1988), making it even harder to position their unpaid efforts as work. Hence, 'voluntary work has been entirely separated from the concept of work itself' (Taylor, 2005: 122). Thus, second wave feminists, concerned with the invisibility of women's work and the disregard for its value inside and outside of the formal labor market, were critical of volunteer work. Backed up by theories of labor market segmentation, they saw volunteering as oppressive and yet another form of exploitative labor (Baldock, 1990; Baldock, 1998) and that patriarchy allowed men to control women's labor power (Hartmann, 1976a). By 'granting' women the opportunity to engage in volunteer activity (non-work), rather than engage in paid work, volunteering constituted a meaningful activity without challenging men's dominance (Hartmann, 1976b).

While more activities are now readily accepted as work, not every activity within an organization is work (Overgaard, 2019). 'Work' as a necessary condition for FLSA to be activated has been tried by U.S. courts. *Walling v. Portland Terminal Co*, 330 U.S. 148 (1947), hereafter referred to as *Portland Terminal,* concerns a training situation in which a railroad provided a practical week-long course to become

brakemen. The Court argued that people who are undertaking an education, even if a practical one, are not employees. The Court reasoned those enrollees were doing it for their own benefit, had no expectation of compensation and that the railway had no immediate advantage. In the more recent case, *Acosta v. Cathedral Buffet, Inc*., No. 17-3427 (6th Cir. 2018), hereafter referred to as *Cathedral Buffet*, the Court similarly placed emphasis on the purpose of the worker with reference to *Portland Terminal*: 'But, as the Court made clear in Portland Terminal, what matters is not the object of the enterprise, but instead the purpose of the worker'. The two court cases signal that courts acknowledge that not all activities within an organization are work. This interpretation of 'what is work' also indicates that internships are exempt from the coverage of the FLSA because they are part of a training situation. It is possible to imagine other activities that are not work, such as a Christmas party or another form of celebration.

In summary, however, it seems that more and more activities are imagined as work. It is therefore advisable for organizations to consider people engaged in any form of activity within the organization as *workers* unless there is strong evidence to suggest otherwise. A secondary assessment then determines whether those who work are volunteers (not covered by the FLSA) or employees (covered by the FLSA). To determine whether a worker is an FLSA employee, U.S. courts look to the *economic reality test* as determined in multiple court cases (see Box 2 for the most relevant court cases). By applying the test, U.S. courts have emphasized the importance of looking at all circumstances of the engagement (Rubinstein, 2007). The economic reality test is the focus of the next section.

[Box 2 here]

FLSA protection is determined according to an assessment of the totality of circumstances, the economic reality test

When determining if a worker is an employee, courts 'have to look at the totality of the circumstances and consider any relevant evidence' stating that 'no one factor standing alone is dispositive', according to *Rhea Lana* (citing *Morrison v. International Programs Consortium, Inc.,* 253 F.3d 5 (2001) at 11). In applying the

‘economic reality’ test, U.S. Courts consider a range of concrete factors to distinguish a volunteer from an employee[i] including whether the employers have normal employer discretions, such as firing, supervision rights, control over work schedules and conditions of employment. The test also allows courts to consider permanency of engagement, the degree of skills to undertake the work and whether the work is an integral part of the business, according to *Rhea Lana*. For example, in *Cathedral Buffet*, the court noticed that paid staff would have had to do the work, if ‘volunteers’ were absent.

In *Rhea Lana*, the Court—supporting DOL’s notifications of breaches of FLSA to Rhea Lana—put emphasis on three main characteristics. One, the degree of control exercised by the employer and two, the extent to which the workers’ services were integral to Rhea Lana’s business. A third consideration, the expectation of pay, we consider separately later. In considering the first, the degree of control, the United States Court of Appeals placed emphasis on the fact that workers ‘were supervised by Rhea Lana’s employees’. In considering the second one, how integral the services were, the Court noticed that the tasks included ‘pre-sale preparation, working the cash-register, setting up display racks, re-stocking the merchandise, assisting customers during the sale, or sorting items and cleaning up after the sale had concluded’ and that these tasks are the ‘bread and butter of retail enterprise’. The Court in *Rhea Lana* also noted that the organization depended on the ‘volunteers’ to run their events, that paid employees would have had to do the work if there was a shortage of ‘volunteers’, and that ‘volunteers’ were offered a wage in the event that insufficient ‘volunteers’ signed up to staff shifts, and that workers were also told that they were the ‘lifeblood of our events’.

That said, in the volunteer-versus-employee context, the Supreme Court has placed particular emphasis on the next consideration: the expectation of in-kind compensation, according to *Rhea Lana*. Therefore, while other factors count, the economic reality test heavily comes down to a question of whether workers depend on the business in an economic sense (Rubinstein, 2007). With this question, we approach the one determining question which U.S. courts have put the most emphasis on in older and newer court cases: what was promised to volunteers? According to the FLSA, 29 U.S.C. § 201 *et sec.,* only *employees* are entitled to earn a minimum wage for the hours they work (our emphasis). First, it is important to

remind the reader that the definition of employee is intentionally broad. Indeed, the Supreme Court stated in *United States v. Rosenwasser*, 323 U.S. 360 (1945): 'A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame' and then goes on to state:

> The use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.

However, while the aim of the legislation is to reach wide, it is not unlimited. Some workers are indeed volunteers, not employees. The first case to engage with this question was *Portland Terminal* in which the Supreme Court defined a volunteer as a 'person who, without promise or expectation of compensation' […] works.

At this point and before going too far into the details, it is important to make a distinction between work having value and not receiving a wage. In the literature, there is agreement that the distinction between paid and unpaid work does not preclude the possibility that voluntary work can be assigned a monetary value, and much research effort goes into that exercise (Bowman, 2009; Brown, 1999; Boje and Ibsen, 2006; Ironmonger, 2000). In the US, the financial value of each volunteer hour is measured by the Independent Sector (see https://independentsector.org/value-of-volunteer-time-2020 for 2020 values). Furthermore, there are other ways to measure value than by measuring the financial value. That is, it is up for discussion what value means (Waring, 1988; Waring, 1990). This makes the distinction between paid work and volunteering more difficult. The one thing that unites these new developments is the recognition that money is not the only form of value. It is beyond the scope of this article to outline all the developments here, but some ideas which move the focus from economic value to other forms of value include corporate social responsibility (McWilliams et al., 2006), social licenses to operate (Horrigan, 2018), social well-being measures as implemented by New Zealand (Social Wellbeing Agency, 2020; Acquah et al., 2019) and capability frameworks (Sen, 2004).

However, U.S. courts have been clear on this question: value is measured in financial terms for the purpose of the FLSA. In the restaurant named Cathedral Buffet, workers were clearly being pressured into working in the Church's restaurant with the Reverend arguing that 'every time you say no, you are closing the door on

God' and church members feeling that they failed the mission of the Church by not agreeing to work for free. However, in *Cathedral Buffet* the Court establishes that since there was no expectation of monetary compensation, workers are not protected by the FLSA. While volunteers had non-material expectations, including societal or spiritual, the test is economic in nature. And since there was 'no economic relationship between the restaurant and the church member volunteer', no employment relationship existed according to *Cathedral Buffet*.

It is the lack of expectation of compensation that prompts a different outcome for workers in *Cathedral Buffet* than in *Tony and Susan Alamo Foundation v. Secretary of Labour*, 471 U.S. 290 (1985), hereafter referred to as *Alamo.* Even though the organizational contexts are almost identical in that both organizations used unpaid labor in for-profit organizations owned by nonprofit religious entities, the outcome is different. In the Alamo Foundation, the 'associates', as their workers were referred to, worked in return for food, clothing, shelter and other benefits. That is, even though the workers had no expectation of a salary, they did expect some in-kind compensation. This places the workers within the protection of the FLSA according to *Alamo* for the purpose of determining their employee status.

Rhea Lana similarly investigated whether there was a promise of compensation—either in money or in-kind. In fact, in the volunteer versus employee question, the Court placed almost sole emphasis on this one consideration, the expectation of compensation. The Court notes that there was an *exchange* between the worker and the organization, an exchange that was expected by the worker. That is, the workers obtained the right to shop first in exchange for their work. Although compensation is in-kind, not monetary, the right to shop early incentivises these women to work. Furthermore, the exchange is direct. That is, the women worked *in order* to get to shop early. The organization created the expectation to receive in-kind compensation with information such as 'Volunteers need to have 5 volunteer hours per sale to shop the sale early'. Furthermore, the organization had a compensation system in place that awarded more work with better shop first rights. For example, the organization awarded a 'Super Mom' to those who worked four shifts, with the basic idea being that the more shifts, the earlier a worker got to shop.

Protection of the FLSA is even awarded to those who do not seek it

It is not possible for workers to legally waive their right to FLSA protection. The U.S. Courts established that as far back as 1945 in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), hereafter referred to as *Brooklyn Savings Bank*. With reference to the original intent of Congress to protect vulnerable workers and citing the societal benefits of worker protection, federal courts have since then established that employees cannot simply give up their protection (Wilkins, 2013). That means that the DOL can bring action against an employer, even when the employee does not want that to happen. When the DOL takes action against organizations, such as against Rhea Lana, it does so in the public interest of protecting the rights of workers (Wilkins, 2013).

In line with *Brooklyn Savings Bank* mentioned above, U.S. courts have consistently refused to let workers' own perceptions guide whether they are in illegal unpaid employment or have volunteer status. The aim is 'to prevent the circumvention or evasion of and to safeguard the minimum wage rate' prescribed by the Act according to *Goldberg v. Whitaker House Co-op*, 366 U.S. 28 (1961). The concern is that allowing workers to opt out of FLSA would open the door to coercion and exploitation of unequal relationships according to *Cathedral Buffet*. Similarly, in *Rhea Lana*—in line with previous rulings—the Court argued that volunteers can be distinguished from employees 'regardless of whether they view themselves as volunteers', cementing that workers' own perceptions do not determine whether they are volunteers or employees

As it should be clear by now, it is not possible to rely on people's own perceptions or their titles within an organization. The consequence of that is that there is likely to be discord between what the law recognizes as volunteering and what the wider society recognizes as volunteering. While the word volunteering is a social category, one that people themselves, lay observers, politicians and academics alike use to describe who they believe to be one and who they think *ought* to be volunteers, U.S. courts have other ways of distinguishing volunteers from employees.

The organizational context of work: The FLSA reaches (only) the ordinary commercial activities of organizations

Volunteering is unpaid work undertaken *for an organization* (original emphasis) (Wilson, 2000: 13) [ii]. Yet, courts in the U.S. rely more on the expectations of individuals than organizational characteristics when determining the legal status of workers. That might seem odd to an international audience and those who associate volunteering only with *voluntary organizations,* nonprofit organizations (Curtis et al., 2001; Salamon and Sokolowski, 2003; Boje et al., 2006; Oppenheimer, 2000). We will therefore briefly outline how U.S. courts limit the use of organizational characteristics in their reasoning and draw on the wider literature on modern organizations to show why organizational context has only a little bearing on the question of whether a person can legally be defined a volunteer.

Volunteering is the product of a specific way of organizing labor in the 19th and 20th Century. Up until that point in time, the word volunteering was mostly used to refer to men who joined temporary armies to respond to various crises (Taylor, 2005; Ellis, 2005). However, with organizations' freedom to incorporate (Mayer, 2016), the forces of the industrial revolution (Bell, 1973) and the divide between home and work (Johnson and Lloyd, 2004), volunteering came to be understood in opposition to employment, as people who were neither employed, nor unemployed (Taylor, 2005). At the same time, volunteering also came to be closely associated with a specific organizational private form, the nonprofit organization (Salamon and Sokolowski, 2003).

Such nonprofit organizations, in the form of formal charitable organizations, started popping up sporadically during the 19th century and it is within these organizations, such as the YMCA and The American Red Cross, that modern volunteering took shape. In the 20th century, nonprofit organizations, such as Rotary and Lions Clubs, continued to promote volunteering (Ellis, 2005). Indeed, the close relationship between this organizational form not designed to accrue profits and volunteering is thought to be so automatic that some studies simply treat volunteering as a dimension of the nonprofit sector (Warburton and Jeppsson Grassman, 2011; Salamon and Anheier, 1998). Thus, until recently nonprofit

organizations were seen as alternative and completely different to the for-profit organizational form (Witesman et al., 2019).

However, few modern organizations have been immune to market forces and market thinking (Eikenberry and Kluver, 2004; Salamon, 1993) partly due to the neo-liberal turn in politics which favors markets (Harvey, 2005). Nonprofits are increasingly adopting or being forced to adopt practices associated with the market (Ebrahim et al., 2014). Nonprofits' engagement in these activities in the U.S. is generally driven by the need for financial sustainability to support mission-related activities (Lee, 2019) and possibly even necessary as argued by some (Chang et al., 2021). Indeed, looking broadly, nonprofits' reliance on commercial revenue has steadily increased in the U.S. (Kerlin and Pollak, 2011). As a result of marketization and organizational quests to identify new ways to address social objectives (Guo, 2006), a hybrid organizational form has been created (Billis and Glennester, 1998). These hybrid companies are inherently 'confused' and subject to competing demands, different *logics* (Pache, 2013).

To understand what we mean by logics, it might be useful to think of organizations as the mass of organizations and draw on the sociology of institutions literature. According to this literature, we can think of society as an institutional system of societal sectors in which each sector represents a different set of expectations for social relations and human organizational behavior (Thornton and Ocasio, 2008). That is, each sector has a different institutional logic, logics that vary according to practices, assumptions, values and beliefs (Durand and Thornton, 2018; Pache, 2013; Thornton and Ocasio, 1999). In ideal type, each of these macro-institutions, the market and the nonprofit sector, thus have a distinct set of values, norms and sources of legitimacy (Thornton and Ocasio, 2008). In the market, 'the source of legitimacy is share price, the source of authority is shareholder activism and the source of norms is self-interest' (Meagher and Goodwin, 2015) while nonprofit organizations draw on social welfare logics, such as reinvesting in the social mission (Pache, 2013), and on community logics which are associated with trust, reciprocity and community values (Meagher and Goodwin, 2015). According to this way of thinking about macro-institutions, market thinking (marketization) has

thus ‘invaded’ the other macro-institutions and imported values, norms and ways of thinking that did not belong in that sphere originally.

One organizational form, the social enterprise, which has grown in popularity since the 1980s (Kerlin, 2013; Guo, 2006) is an example which does not fit easily within either of the ‘pure’ logics outlined above. Instead, social enterprises are arenas of contradictions (Pache, 2013). For our purposes here, we define social enterprise as ‘any market-based approach to address social issues where social benefit is a primary aim and a business source of revenue provides support for an activity or organization.’ (Kerlin, 2017). Thus, social enterprises blend market and social logics because they have aspects of both charity and business at their core and are driven by both social and economic motives (Ávila and Amorim, 2021; Ebrahim et al., 2014; Zahra et al., 2009; Pache, 2013). Adding to their confused existence, in the U.S. a national level *legal* form has not been created for social enterprise and organizational arrangements for social enterprise span both nonprofit and for-profit legal forms (Kerlin, 2020b) although some state legislatures have enacted enabling statutes for specific types of for-profit organizations, such as Benefit Corporations or Low-Profit Limited Liability Companies (L3Cs), which allow social enterprises to focus on both social missions and profit (Brody, 2017). Social enterprises are thus a hybrid form of organization which include for-profit and nonprofit forms (Dart, 2004; Kerlin, 2020b).

In 1961, when the coverage of FLSA was changed to include enterprises ‘[t]here was … broad consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations according to *Cathedral Buffet*. The FLSA §203 (r)(1) stipulates that ‘"Enterprise" means the related activities performed […] by any person or persons for a common business purpose’. Nonprofits are therefore only excluded from FLSA protection to the extent that activities are not performed for commercial purpose (U.S. Department of Labor, 2015). The DOL stipulates in Fact Sheet #14 (2015)[iii]:

> ‘Individuals may volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service and not be covered by the FLSA. Individuals generally may not, however, volunteer in commercial activities run by a non-profit organization such as a gift shop.’

U.S. courts have continued to interpret FLSA 'liberally to apply to the furthest reaches consistent with congressional direction' which was made clear in *Alamo*. The Alamo Foundation is a nonprofit religious organization that 'derives its income largely from the operation of commercial businesses staffed by the Foundation's "associates," most of whom were drug addicts, derelicts, or criminals before their rehabilitation by the Foundation', according to *Alamo*. *Alamo* cemented that religious and other nonprofit organizations are not exempt from the coverage of FLSA. This interpretation—the Court states—is supported by the legislative history and the interpretation of the DOL. *Alamo* also establishes that the FLSA only reaches the 'the ordinary commercial activities' of the organization. By 2018, the application of the FLSA to commercial activities was no-longer disputed. In fact, in *Cathedral Buffet*, 'the restaurant conceded that it is a covered enterprise under the FLSA' despite the sole shareholder being a nonprofit religious organization and despite the restaurant not generating any profits. The determining factor for being subject to FLSA is that the organization 'engages in competitive commercial activity' by running a restaurant.

Despite the goal to protect workers as employees in enterprises, there has been some small movement in terms of the potential use of volunteers by these new organizations, including hybrids registered as for-profit organizations. As our discussion has shown, U.S. courts increasingly refuse to put emphasis on organizational characteristics in isolation. Indeed, the declaration (cited in *Rhea Lana)* from the DOL to Rhea Lana only states this about the company's for-profit status: 'In addition, Rhea Lana was a for-profit company. [The Department's] longstanding position is that, with *very limited exceptions*, for-profit companies cannot treat workers as volunteers instead of employees under the FLSA (our emphasis). This creates a small opening for volunteering (and a simultaneous weakening of employee protection) when compared to a 1996 DOL opinion letter which states, "Please note that we have a longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations" (U.S. Department of Labor, 1996).

Taken together, the shift away from an organizational focus in the courts as well as recent DOL advice (U.S. Department of Labor, n/a) suggest that volunteering outside nonprofit organizations may now be permitted, although it remains unclear

under which circumstances and to what extent. This shift also indicates that the courts are unwilling, and perhaps unable, to make clear distinctions based on the muddy organizational landscape that currently exists, one that is a long way removed from the once clear distinction between for-profit and nonprofit organizations (Witesman et al., 2019). It is also clear that certain borderline organizations are taking the opportunity to engage volunteers, perhaps most notably for-profit hospitals. Long-standing DOL practice suggests to us that for-profit organizations, such as private hospitals, would struggle to convince U.S. courts that 'volunteering' in say the hospital gift shop is lawful practice because these workers so clearly engage in commercial activities, even if for-profit hospitals also have a social motive. However, no such court case has come to bear on the question despite widespread use of volunteers in for-profit hospitals who engage in activities beyond compassionate comfort[iv] and an unequivocal, though dated, 1996 DOL opinion letter on the topic (Department of Labor, 1996).

Summary of a legally-informed 'what is a volunteer' definition

Organizations without commercial motive: As it should be clear, U.S. courts have not meant to challenge the ordinary and widespread volunteer work which observers from Tocqueville (cited in Skocpol, 1996: 1) to Putnam (2000) have identified as a dersirable aspect of American life. Legislators and U.S. courts have therefore clearly not wanted to discredit or discourage the work that goes on in traditional charities, churches, community sports clubs, self-help groups and other organizations not driven by commercial purposes. Volunteering in these forms of organizations is largely undisputed because volunteering developed alongside this organizational form as explained earlier.

For example, the Court argues in *Alamo* that the FLSA only reaches the ordinary commercial activities of organizations. Therefore, volunteers who are engaged in non-commercial activities—what the court calls 'ordinary volunteering'—is not covered by the FLSA. What matters here is whether the activity is for commercial purposes, not whether it has the potential to be. This means that traditional nonprofit organizations have wider access to providing in-kind tokens of appreciation as long as the activities are not undertaken for commercial purposes.

For example, volunteers can drive elderly church members to church and receive a cup of coffee in appreciation. However, if the same person drives elderly church members to church with the meter running in order for the church to generate profit, this worker is an employee and must be paid a minimum wage, not be paid in coffee.

Organizations with a commercial motive: As we established earlier, virtually *all* organizations engaged in commercial activity must comply with the FLSA which assumes that *all* workers are employees. Commercial organizations' access to volunteer labor is intentionally limited—and for good reasons. For while volunteering is a valued and worthwhile activity in the minds of many Americans, so is paid work, as we also established earlier. Therefore, in situations where nonprofits engage in commercial revenue generation, it should be clear that U.S. courts are prepared to protect the intentions of the FLSA. The purpose of the FLSA is to reach wide, and a charity that lures vulnerable workers into commercial work situations with promises of sandwiches, a six-pack of soda, a place to sleep or similar, will find it difficult to convince a court that their workers are not employees.

Organizations with a commercial motive also include for-profit social enterprises that have simultaneous profit and direct social good motives, where the social and profit motives might be more or less dominant (Kerlin, 2020b). As we have outlined above, the DOL's long-standing practice has been to limit volunteering to nonprofit organizations, suggesting that for-profit organizations risk prosecution by the DOL if they attempt to take on volunteers. However, in *Rhea Lana,* the Court did not argue purely in terms of the organizational form. Therefore, it appears that U.S. courts have made some allowance for volunteering in for-profit organizations. This leaves practitioners and organizations with a grey area, where it is difficult to determine if the DOL—and U.S courts—would now allow volunteering in all or some categories of for-profit organizations, such as private hospitals, if there was no promise of compensation.

One thing is clear though. If an organization with a commercial motive would like to claim volunteer status for its workers, it must be able to demonstrate that those workers have no expectation of *any* kind of economic benefit. Although courts look to the totality of circumstances, it appears that the expectation of compensation has a large bearing on the outcome of the case. Therefore, if workers expect *any*

form of compensation in organizations with a commercial motive, whether in-kind or monetary, they are covered by the FLSA. Paying workers in sandwiches, shop-first rights or other in-kind is illegal according to the FLSA, and organizations engaging in this form of practice, face law enforcement by the DOL and U.S. courts. The label, title or description attached to an individual is of no significance. Further to this, how people perceive themselves is also of no significance. It is therefore impossible for organizations to exclude their workers from FLSA coverage simply by asking them to sign a contract that labels them as 'volunteers'.

Conclusion

This article set out to present a more legally-informed, durable and contemporarily appropriate, definition of volunteer care work. Through recent and older court cases and by situating those court rulings in the wider literature on work, organizational logics and volunteering, we have provided an operational definition of volunteering in the United States in relation to different forms of organizations. Without doubt, many labor practices in the U.S. run contrary to this legally-informed definition and organizations and practitioners may have to alter practices if they want to stay on the right side of the law. We also realize that this legally-informed definition may run contrary to how workers perceive themselves. However, we set out to cement what the *legal* status is, not uncritically endorse unlawful and unfair labor practices made with a reference to people being volunteers.

However, at least two important questions remain to be investigated. One, are individuals adequately protected in the current legal framework, a framework which places emphasis on the expectations of and promises to individuals, when we know that the workplace always holds more power than workers? Two, is it possible to develop a more systematic test according to which it is possible to position (even rank) organizations relative to their social good and profit motives, rather than focus on the individual worker, and use that framework to assess the desirability of paid and unpaid work within such a mix of motives? Some promising developments have already happened in this space[v] (Ávila and Amorim, 2021; Young and Longhofer, 2016; Ridley-Duff, 2008; Jäger and Schröer, 2014) and it would be helpful to link critical thinking about *desirable* labor practices to these attempts to organize

organizational developments. However, these are questions of what ‘ought to’ be, not what ‘is’. We set out to investigate what ‘is’, a legal definition of volunteering, and the ‘ought’ question deserves to be explored elsewhere.

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[i] This is similar to the way in which Courts have created an 'economic reality test' to determine employee vs. independent contractor status. In fact, 'the factors that govern the independent-contractor question share substantial overlap with the factors that govern the volunteer question' according to the United States Court of Appeal opinion in *Rhea Lana*.

[ii] We recognise that the word volunteering is sometimes used to describe work that takes place outside organizations, see e.g. Wilson J. (2000) Volunteering. *Annual Review of Sociology* 26: 215-240.

[iii] This lack of special treatment of nonprofits in the context of unpaid commercial labor thus diverges from treatment found in the 1950 Revenue Act that gives a tax-exemption to tax-exempt organizations for regularly carried out commercial activity 'in which substantially all the work is performed for the organization without compensation' (Yale Law Journal, 1951: 856; Cordes and Weisbrod, 1998).

[iv] See Alexander Eltman et al vs. Columbia-HCA Healthcare Corp. where the judge dismissed such a case on the grounds the claimant did not phrase his complaint convincingly.

[v] See also Fourth Sector initiative: https://www.fourthsector.org/