UNIVERSITY OF FLORIDA
LEVIN COLLEGE OF LAW

Vol. 33

Issue 3

UNIVERSITY OF FLORIDA JOURNAL OF LAW & PUBLIC POLICY

SUMMER 2023

UNIVERSITY OF FLORIDA

# JOURNAL OF LAW & PUBLIC POLICY

## ARTICLES



## NOTES



Volume 33 | Summer 2023 | Issue 3

# University of Florida Journal of Law & Public Policy

VOLUME 33 SUMMER 2023 ISSUE 3

## STATEMENT OF PURPOSE

The *University of Florida Journal of Law & Public Policy* is an interdisciplinary organization whose primary purpose is the publication of scholarly articles on contemporary legal and social issues facing public policy decisionmakers. The *Journal* is composed of two governing bodies: the Advisory Board and the Executive Board. The Advisory Board is comprised of faculty and honorary members who provide independent guidance. The Executive Board, which includes both law and graduate students, is responsible for researching and preparing each volume for publication. The Executive Board also selects the articles that are published. All student members must complete a writing requirement and help research and prepare the *Journal* for publication.

**ACKNOWLEDGMENT**

This issue of the *University of Florida Journal of Law & Public Policy* is a direct result of the collaboration and hard work of the *Journal* members, staff, advisors, sponsors, and contributing authors.

The *Journal* extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law and the Huber C. Hurst Fund in supporting and assisting the *Journal* in its publication of this issue and for supporting our interdisciplinary journal concept.

Special thanks to our faculty advisor, Professor Stacey Steinberg, and our staff editor, Lisa-Ann Caldwell.

The *University of Florida Journal of Law & Public Policy* (ISSN# 1047-8035) is published three times per year and is sponsored by the Warrington College of Business Administration and the Levin College of Law, University of Florida. Printed by Western Newspaper Publishing Co., Indianapolis, IN.

Editorial and Business Address: Fredric G. Levin College of Law, University of Florida, P.O. Box 117636, 309 Village Dr., 127 Holland Hall, Gainesville, FL 32611. Phone: (352) 273-0671. Email Address: jlpp@law.ufl.edu.

Subscriptions: $60.00 U.S. domestic per volume plus sales tax for Florida residents and $65.00 U.S. international. Single issues are available for $25.00 U.S. domestic and $30.00 U.S. international.

# University of Florida Journal of Law & Public Policy

VOLUME 33 SUMMER 2023 ISSUE 3

## ARTICLES



## NOTES

# UP IN SMOKE: PREPARING THE AIR FORCE FOR THE LEGALIZATION OF MARIJUANA

*Major Jeffrey D. Baldridge*[*]

## Abstract

Over the last four decades, public sentiment regarding marijuana has changed drastically. Many states now allow medicinal marijuana to be prescribed and consumed, while some even permit recreational use. The federal government, as both sovereign and employer, is behind the curve. In both roles, the federal government has failed to act meaningfully. Lax enforcement and the shift in public sentiment will force Congress and the President to enact some significant changes to marijuana law in the very near future. If no action is taken, a dramatic clash between state and federal law will ensue within the nation's court system.

The Department of Defense (DoD), specifically the Air Force, has maintained drug testing programs for decades in compliance with federal mandates. Unfortunately, the Air Force and other federal agencies are clinging to outdated policies of the past to justify their current actions. As the professed leader in innovation, the Air Force has a moral responsibility to pioneer a shift in focus within the DoD and the broader federal government. In order to continue its heritage in innovation and adapt to current trends, the Air Force needs to depart from previous policies regarding marijuana. Although such a shift cannot be

---

* B.A., April 2009, Brigham Young University – Idaho; J.D., May 2015, the University of Utah S.J. Quinney College of Law. This Article is a thesis submitted to the faculty of the George Washington University Law School in partial satisfaction of the requirements for the degree of Master of Laws, awarded May 17, 2020. Thesis directed by Hank R. Molinengo, Senior Associate Dean for Administrative Affairs and John S. Jenkins Family Professorial Lecturer in Law and Policy. First, I am extremely appreciative of the patience and love shown to me by my family over the last year. Stephanie, Piper, Jack, Teddy, and Milo, thank you. Many of my classes were in the evenings, which was an unexpected difficulty. You were all very supportive, and I am thankful for that support. I am also appreciative to both the George Washington University Law School and the U.S. Air Force Judge Advocate General's (JAG) Corps for the opportunity I had to pursue an LL.M. I appreciate working for an employer that values continued investment in its people. Through this experience, I have expanded my knowledge of the law by leaps and bounds. I hope to convert the time and financial investment of this education into value for our country. Next, I would like to say good luck and thank you to Major Ashley Norman and Captain Andrew Woodbury; it has been a pleasure to get to know you both over the last year as we pursued our education together. Major Sean McGarvey and Technical Sergeant Cameron Green were gracious enough to review a draft of this document, and for their time, I am truly grateful. I owe a lot to the faculty of the George Washington University Law School; the school offers an incredible experience of both location and legal education. Being able to study law in the nation's capital will always be a fond memory for me. Lastly, I would like to thank Dean Molinengo for his support through this challenging but rewarding time. Major Baldridge currently serves in the U.S. Air Force JAG Corps. The views expressed in this Article are solely those of the author and do not reflect the official policy or position of the U.S. Air Force, the Department of Defense, or the U.S. government.

accomplished alone, the Air Force is responsible for leading the DoD and the federal government in a new direction. A proactive three-pronged approach to marijuana in 2023 would include retaining reasonable suspicion and safety mishap testing, devoting greater attention to marijuana use within existing treatment programs, and working with stakeholders to remove marijuana from random urinalysis testing.



## INTRODUCTION

As of January 1, 2020, 145,789 full-time civilian employees were working for the Department of the Air Force.[1] These employees include maintenance personnel, childcare providers, medical professionals, and a

1. U.S. AIR FORCE ACAD., INTERNAL RACIAL DISPARITY REVIEW 12 (2020), https://www.judicialwatch.org/wp-content/uploads/2023/03/STARRS-v-DOD-prod-1-02894.pdf [https://perma.cc/C7R2-V2X2].

host of other skilled and unskilled contributors to the military mission.[2] In the Fiscal Year (FY) 2020 Budget overview, the DoD stated that "[c]ivilian personnel within the DoD are key to warfighter readiness, essential enablers to DoD's mission capabilities and operational readiness, and critical to supporting our All-Volunteer Force and their families . . . . The Department's civilian workforce brings to bear capabilities, expertise, and skills directly impacting DoD's operational warfighting capabilities . . . DoD's civilians are an essential part of our National Defense Strategy."[3] Every single one of these positions is critical to Air Force operations, so much so that the Air Force requested a 1.5% increase for its civilian workforce from FY 2019 to FY 2020, the largest of any military branch of service.[4] To further illustrate how important civilian employees are to the military mission, the Congressional Budget Office (CBO) conducted an analysis published on December 13, 2018, discussing the possibility of converting certain military positions to civilian positions.[5] The CBO concluded that 80,000 active-duty military positions could be converted to 64,000 civilian positions.[6] If Congress had implemented the CBO's proposed conversions, a projected $14 billion would have been saved from 2019 to 2028.[7] Civilian employees make sense in terms of total financial savings and efficiency in their roles.[8] This conclusion is not a slight against military workers but praise for their civilian counterparts. Often, civilian employees can stay in a particular position for far longer than a military member. Civilian employees are not subject to mandatory permanent change of station moves, promotions, or deployments. These employees can develop expertise in their particular field, have the ability to become very efficient, and have a tremendous impact on the Air Force and the entire DoD.

According to the Office of Personnel Management (OPM), there are three categories of federal employees: the Competitive Service, the

2. *Id*. Air Force Personnel Center categories are: Administrative- 40.2%, Professional- 21.9%, Blue Collar- 21.3%, Technical- 11.5%, Clerical- 2.6%, Other- 2.5%.

3. OFF. OF THE UNDER SECRETARY OF DEF. (COMPTROLLER) / CHIEF FIN. OFF., DEFENSE BUDGET OVERVIEW 2–8 (Mar. 2019), https://comptroller.defense.gov/Portals/45/Documents/def budget/fy2020/fy2020_Budget_Request_Overview_Book.pdf [https://perma.cc/P68C-9HA4].

4. *Id.* at 2–9. Although it is not explicitly stated which civilian positions are for the newly created Space Force, as currently constituted, the Space Force is a component of the Department of the Air Force. Presumably some of the new civilian positions are destined for that component.

5. *Replace Some Military Personnel with Civilian Employees*, CONG. BUDGET OFF. (Dec. 13, 2018), https://www.cbo.gov/budget-options/2018/54756 [https://perma.cc/E54U-UQVV].

6. *Id.*

7. *Id.*

8. *Id.*

Excepted Service, and the Senior Executive Service.[9] Since this Article discusses the day-to-day employee, and the overwhelming majority of civil service employees are within the Competitive Service, the term "employee" will refer to a member of the Competitive Service.

Members of the armed forces, both civilian and military, are members of the executive branch. According to federal law, the President has the authority to regulate the conduct of executive branch employees.[10] Nearly two decades after Congress gave the President this authority, President Ronald Reagan issued an executive order on September 15, 1986, demanding that federal workplaces be drug-free.[11] President Reagan had very strong feelings against drug use by federal employees. He stated:

> The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;
>
> Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs . . . .[12]

In Section 3 of Executive Order 12564, President Reagan tasked each Executive Agency to develop its own drug testing programs.[13] In subsequent years, the Air Force promulgated a manual and program entitled the *Air Force Civilian Drug Demand Reduction Program* to implement both Executive Order 12564 and 5 U.S.C. § 7301.[14] Specifically, the program includes "guidance and procedures for providing assistance to employees with suspected or identified drug abuse problems, employee education and training, and the identification of illicit drug use through drug testing . . . ."[15]

---

9. *Competitive Hiring*, OFF. OF PERS. MGNT., https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/ [https://perma.cc/SRA3-UP3H] (last visited Apr. 19, 2023).

10. 5 U.S.C. § 7301.

11. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

12. *Id.*

13. *Id.*

14. *Air Force Manual 44-198*, U.S. AIR FORCE (Jan. 24, 2019), https://static.e-publishing.af.mil/production/1/af_sg/publication/afman44-198/afman44-198.pdf [https://perma.cc/7VJB-UXYF] [hereinafter AFMAN 44-198] (the latest revision of the Air Force's drug testing program); Exec. Order No. 12,564, 3 C.F.R. § 224 (1986); 5 U.S.C. § 7301. The Air Force has had a drug testing program in place for nearly three decades.

15. AFMAN 44-198, *supra* note 14, at para 1.1.2.

The Air Force considers its role in national defense to include the maintenance of a drug-free workplace.[16] This requirement prohibits civilian employees from on- and off-duty illegal drug use.[17] Few would disagree that "[p]erforming duties under the influence of illicit drugs adversely affects safety, risks damage to government property, impairs day-to-day operations, and may expose sensitive information to compromise."[18] The real question is, what is the compelling government interest to regulate *off-duty* employee conduct? Specifically, what is the justification for regulating off-duty marijuana use while not regulating off-duty alcohol consumption? The official reasoning had been that "[f]ederal employees entrusted with the national defense must be free from the possibility of coercion or influence of criminal elements."[19]

But what if marijuana was *legal*? As several states have begun to legalize either medicinal or recreational marijuana use, the foundation of the government's interest in off-duty marijuana use has started to erode. The Air Force's governing regulation states, "[t]his guidance is based on the federal criminal statutes on controlled substances and is not affected by any state laws legalizing use of marijuana or other controlled substances."[20] What happens if the federal law changes with respect to marijuana? On November 3, 2020, Joe Biden was elected to the Executive Office of the President. President Biden inherited a significantly more relaxed national attitude on marijuana than that reflected in the executive orders of President Reagan. Even former-President Trump, a man who has famously abstained from smoking, alcohol, and drug use during his lifetime, has vocally supported medicinal marijuana use in the past if not full recreational legalization.[21] Trump's opponents in the 2020 presidential election from the Democratic Party possessed an even *more* relaxed position. In fact, out of the top four nationwide Democratic Presidential candidates as of mid-January 2020[22] (Senator Bernie Sanders, Senator Elizabeth Warren, former Mayor Pete Buttigieg, then-former Vice President Joe Biden), only Biden supported *merely* decriminalizing marijuana.[23] The other three candidates favored

16. *Id.* at para 1.2.1.

17. *Id.*

18. *Id.*

19. *Id.* at para 1.2.4.

20. *Id.* at para 1.2.2.

21. Jon Gettman, *Pot Matters: Trump on Marijuana*, HIGH TIMES (Feb. 12, 2016), https://hightimes.com/news/politics/pot-matters-trump-on-marijuana [https://perma.cc/82Y3-F8QG].

22. FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/polls/president-primary-d/ [https://perma.cc/3YPP-YZTZ] (last visited June 28, 2023).

23. *Legalizing Marijuana*, POLITICO (Feb. 19, 2020), https://www.politico.com/2020-election/candidates-views-on-the-issues/marijuana-cannabis-legalization/legalizing-marijuana/ [https://perma.cc/GR7R-HY58].

complete legalization, and Senators Warren and Sanders even supported the expungement of convictions for prior marijuana offenses.[24] Regardless of the White House occupant in the coming years, they will have a significantly different position regarding marijuana than President Reagan.

Accordingly, as the leading edge of our nation's armed forces,[25] the Air Force should act now to position itself for the inevitable change in federal law. Drafting reactive policies has never been how the Air Force fulfills its mission to "Fly, Fight, and Win."[26] The Air Force is the branch of innovation.[27] As an institution, it has continued to scale its capability and knowledge since its formal inception after World War II.[28] Later in the 20th century and into the 21st century, the Air Force broke the sound barrier, developed countless technologies used in everyday life, and pioneered an uncrewed flight.[29] Yet for some reason, the Air Force remains apprehensive of the impact should its civilian employees—in their off-duty time, with no mission impact—legally consume a substance that has been around since 500 B.C.[30] That cannot be the end of the story. Instead of enforcing the policies of the 1980s, the Air Force should advocate a proactive approach to marijuana use, aligned with public opinion, for its employees in 2020.

Such a proactive drug policy would include three key components: (1) retaining reasonable suspicion and safety mishap testing; (2) devoting more attention to marijuana use within existing drug treatment programs; and (3) working with stakeholders to remove marijuana from random urinalysis testing. This approach would be a responsible change, while affording maximum protection of the Air Force's military mission. Implementing such a policy will poise the Air Force to lead the way when the inevitable arrives, the federal legalization of marijuana.

---

24. *Id.*

25. *History*, AIR FORCE, https://www.airforce.com/history [https://perma.cc/MRU6-8QB2] (last visited June 28, 2023).

26. *Mission*, U.S. AIR FORCE, https://www.airforce.com/mission?gclsrc=aw.ds&gclid=Cj0KCQjwpfHzBRCiARIsAHHzyZq_WzLdGojPcQZ0eU5PNq-NNahbnOeMu_Hk91KdRRcpBxNk5L2-CZ4aAoimEALw_wcB&gclsrc=aw.ds [https://perma.cc/5TMH-JWEH] (last visited Apr. 19, 2023).

27. *See Inside Air Force Innovation*, U.S. AIR FORCE, https://www.airforce.com/experience-the-air-force/airmen-stories/inside-air-force-innovation [https://perma.cc/PE2D-8WPA] (last visited June 26, 2023) (detailing the latest innovations that the Air Force is working on).

28. *History*, U.S. AIR FORCE, https://www.airforce.com/history [https://perma.cc/GA72-AWCA] (last visited Apr. 19, 2023).

29. *Technological Innovations in the History of the U.S. Air Force*, AEROTECH NEWS (Sept. 15, 2017), https://www.aerotechnews.com/nellisafb/2017/09/15/technological-innovations-in-the-history-of-the-u-s-air-force/ [https://perma.cc/X4YU-3HPU]; *History*, U.S. AIR FORCE, https://www.airforce.com/history [https://perma.cc/V78V-PMM6] (last visited Apr. 19, 2023).

30. *Marijuana*, HISTORY (Oct. 10, 2019), https://www.history.com/topics/crime/history-of-marijuana [https://perma.cc/ER7H-QHCC].

# I. BACKGROUND

## A. *The History of Drugs in America and the Controlled Substances Act*

In the 19th Century, America became enamored with morphine, heroin, and cocaine.[31] In 1906, Congress passed the Pure Food and Drug Act, which required manufacturers to disclose the presence of alcohol, opiates, cocaine, and cannabis in certain circumstances.[32] While illegal drug use dropped dramatically after World War II, use was revitalized in the 1960s.[33] A new generation of Americans embraced marijuana, amphetamines, and psychedelics.[34] In response, Public Law 91-513, known as The Comprehensive Drug Abuse Prevention and Control Act of 1970 (CSA), was passed on October 27, 1970.[35] The CSA created the substance schedule system, which remains in place today.[36] The CSA categorizes substances into five schedules, with the most potentially harmful drugs having limited medical purposes at one end and less dangerous drugs at the other.[37] Since its passage, the CSA has remained largely unchanged through Congress.[38] Most of the work of classifying

31. *The History of Drug Use in America*, DRUG ENF'T ADMIN. MUSEUM, https://museum.dea.gov/history-drug-use-america [https://perma.cc/CHU9-UXGG] (last visited Apr. 19, 2023).

32. Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

33. *Illegal Drugs in America: A Modern History*, DRUG ENFORCEMENT ADMINISTRATION MUSEUM & VISITORS CENTER (2004), https://web.archive.org/web/20041222230320/http://www.deamuseum.org/museum_idarmdc.html [https://perma.cc/TEQ6-ZR5Q].

34. *Id.*

35. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970). The Drug Enforcement Agency was not created until 1973. *History*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/about/history [https://perma.cc/KJ2E-S2DD] (last visited Apr. 20, 2023).

36. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

37. *Id.*

38. The significant exception to this statement is the Hillory J. Farias and Samantha Reid Date-Rape Prevention Act which put a substance, "GHB", in Schedule I and a derivative of "GHB" in Schedule III. Hillory J. Farias and Samantha Reid Date-Rape Prevention Act, Pub. L. No. 106-172, 114 Stat. 7 (2000). After first passing the House of Representatives in a 423-1 vote, it was sent to the Senate. H.R. 2130, 106th Cong. (1999). The Senate made some modifications and passed the revised version by unanimous consent. *Id.* After receiving the Senate's version, the House of Representatives passed the legislation by a 339-2 margin. *Id.* The namesakes of the legislation are high-school aged teenagers who died as a result of "GHB" being slipped into a soda that they were drinking. Keith Bradsher, *Daughter's Death Prompts Fight on "Date Rape' Drug*, N.Y. TIMES (Oct. 16, 1999), https://www.nytimes.com/1999/10/16/us/daughter-s-death-prompts-fight-on-date-rape-drug.html [https://perma.cc/3GRT-94CG]; *Girl's Death Linked to 'Date Rape Drug'*, L.A. TIMES (Sept. 11, 1996), https://www.latimes.com/archives/la-xpm-1996-09-11-mn-42602-story.html [https://perma.cc/Y59Q-E8D3]. Sadly, neither one of these young ladies knew that they had been drugged. *Id.*

or scheduling substances is left to the determination of Executive agencies, like the Drug Enforcement Agency.

### B. *Present-Day Public Sentiment*

In order to understand the current public sentiment, it is essential to account for the gradual changes in attitudes toward marijuana. At the state level, many states have taken advantage of federal legislative inaction and lax enforcement. Certain states acceded to evolving public views on marijuana use. They recognized their primacy in the sphere of criminal justice by *acting* when they saw an opportunity for the legalization of recreational and medicinal marijuana use within their sovereignty. Although various state efforts to decriminalize marijuana began as early as 1973, the mid-1990s ushered in a broad and dramatic shift in marijuana policy.[39]

Starting with California in 1996 and continuing through the present day, many states have legalized medical marijuana.[40] However, in a blatant assault on the CSA, both Colorado and Washington became the first states to legalize recreational marijuana in 2012.[41] Both pieces of legislation were ballot measures soundly approved by the voters in their respective states.[42] In Colorado, just over 2.5 million people voted on Amendment 64, with fifty-five percent approval.[43] The Washington

---

39. Patrick Anderson, *High in America: The True Story Behind NORML and the Politics of Marijuana*, SCHAFFER LIBR. OF DRUG POL'Y, http://www.druglibrary.org/special/anderson/highinamerica.htm [https://perma.cc/RSY8-4ZAH] (last visited Apr. 23, 2023).

40. *California Proposition 215, Medical Marijuana Initiative (1996)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_215,_the_Medical_Marijuana_Initiative_(1996) [https://perma.cc/J9B6-CJJN] (last visited Apr. 23, 2023); *State Medical Cannabis Laws*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 17, 2023), https://www.ncsl.org/health/state-medical-cannabis-laws [https://perma.cc/5XL4-DLCJ]; CAL. HEALTH & SAFETY CODE § 11362.5 (West 2023); Municipalities have been decriminalizing marijuana as well. For the purposes of this article, only the conflict between state and federal authorities are applicable.

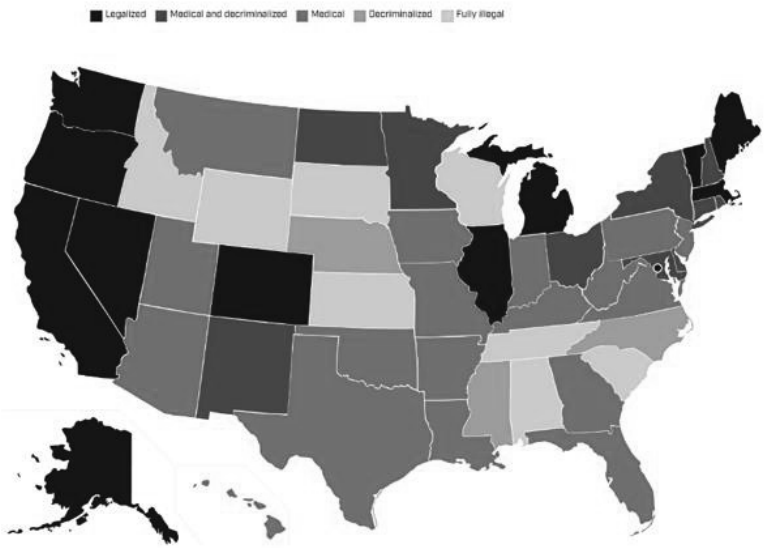
41. COLO. LEGIS. COUNCIL STAFF, MARIJUANA, https://leg.colorado.gov/sites/default/files/14_marijuanalegis.pdf [https://perma.cc/5RWE-DNYV]; Jonathan Martin, *Washington State Voters Made History Tuesday by Legalizing the Recreational Use of Marijuana.*, SEATTLE TIMES (Feb. 23, 2017), https://www.seattletimes.com/seattle-news/voters-approve-i-502-legalizing-marijuana/ [https://perma.cc/4X24-2BGR]

42. *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_(2012) [https://perma.cc/HG97-STG8]; *November 06, 2012 General Election Results*, WASH. SEC'Y OF STATE (Nov. 27, 2012, 4:55 PM), https://results.vote.wa.gov/results/20121106/initiative-measure-no-502-concerns-marijuana.html [https://perma.cc/5PYQ-6T8C].

43. *Colorado Marijuana Legalization Initiative, Amendment 64 (2012)*, BALLOTPEDIA, https://ballotpedia.org/Colorado_Marijuana_Legalization_Initiative,_Amendment_64_ [https://perma.cc/3QWS-HWZM](2012).

initiative received approval with nearly the same margin of victory.[44] While there seems to be a gap between support for medical and recreational marijuana, a majority of Americans support medicinal marijuana.[45] As the map below depicts, discordant marijuana laws permeate the country across state lines.[46]

Figure 1 - A map of state marijuana laws (as of February 2020)[47]



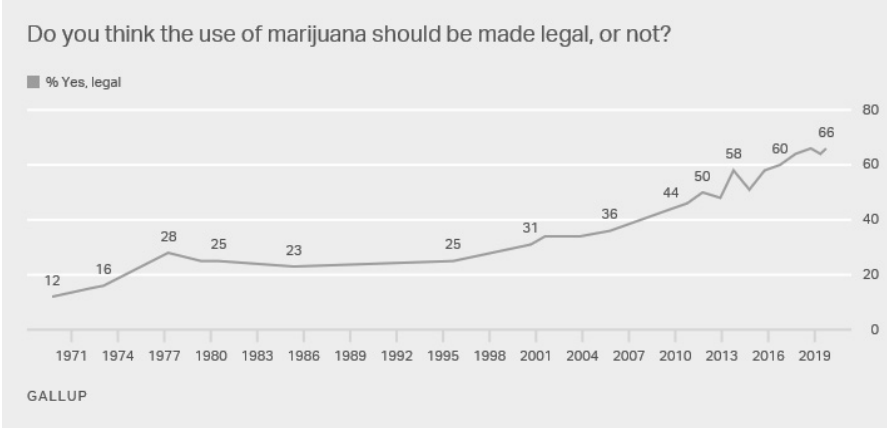

44. *November 06, 2012 General Election Results*, WASH. SEC'Y OF STATE (Nov. 27, 2012, 4:55 PM), https://results.vote.wa.gov/results/20121106/initiative-measure-no-502-concerns-marijuana.html [https://perma.cc/Y8C3-FNDT].

45. Ted Van Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Medical or Recreational Use*, PEW RSCH. (Nov. 22, 2022), https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/ [https://perma.cc/BS5M-J3BU].

46. *Map of Marijuana Legality by State*, DISA GLOBAL SOL., https://disa.com/map-of-marijuana-legality-by-state [https://perma.cc/E2J9-RK36] (last updated Feb. 2020).

47. *Id.*

Figure 2 - Public opinion polling regarding marijuana legalization[48]

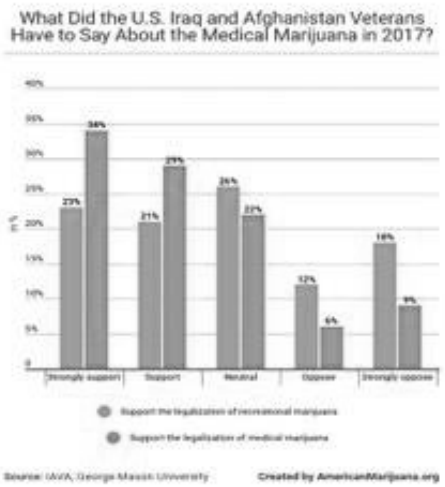



President Reagan stated drug use "undermines public confidence in [federal employees]."[49] With respect to marijuana, the charts above and below do not reflect that position.

48. *Illegal Drugs*, GALLUP, https://news.gallup.com/poll/1657/Illegal-Drugs.aspx?g_source=link_newsv9&g_campaign=item_258149&g_medium=copy [https://perma.cc/UE4Z-2YSM] (last visited Apr. 23, 2023). Unfortunately, this particular question only asks whether or not marijuana should be legalized. It does not delineate between recreational and medicinal use. More specific polling indicates there is a significant drop-off between those who support all legalization and medical marijuana legalization. *See id.* (finding that 86% of people believe that marijuana should be used to help medical issues while 60% believe that people should have the freedom to use marijuana).

49. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

Figure 3 - Veteran opinion regarding marijuana use[50]




Medical marijuana only faces fifteen percent opposition among our nation's veterans.[51] United States veterans are a cross-section of society, and their opinion on this particular matter should be given great weight in any discussion of the public perception of the morality of marijuana use.[52] The idea that marijuana use is morally repugnant, at this point, is entirely outdated.[53]

## C. *Current Legislation*

In response to the advancement of state law regarding recreational and medicinal marijuana, as well as the change in public support, members of both the House of Representatives and the United States Senate have introduced legislation designed to update federal law with respect to the use of marijuana.[54]

Some of these pieces of legislation are modest acknowledgments of the current situation. For example, one piece of legislation attempts to

50. Dwight Blake, *Medical Marijuana in the United States – Statistics & Facts*, AM. MARIJUANA, https://americanmarijuana.org/medical-marijuana-statistics/ [https://perma.cc/D2K5-8UR4] (last visited March 10, 2020).

51. *Id.*

52. *See* David Kuhns, *Commentary: Soldiers Represent the Best of America*, U.S. ARMY (May 15, 2009), https://www.army.mil/article/21173/commentary_soldiers_represent_the_best_of_america [https://perma.cc/5MNA-JSW3] (arguing that soldiers represent the best of America).

53. *See generally* Dwight Blake, *Medical Marijuana in the United States – Statistics & Facts*, AM. MARIJUANA (Mar. 10, 2020), https://americanmarijuana.org/medical-marijuana-statistics/ [https://perma.cc/NMZ8-MFXA] (showing an increase in marijuana usage, sale, and acceptance in the past few years).

54. *See* Marijuana Opportunity Reinvestment and Expungement Act, H.R. 3617, 117th Cong. (2021) (seeking to decriminalize and deschedue cannabis).

recognize that states should determine for themselves whether they wish to permit the use of marijuana, and it would prohibit the federal government from regulating that space.[55] Another piece of legislation of particular importance to federal civilian employees seeks to protect federal employees from workplace discipline for medicinal marijuana use that complies with applicable state law.[56]

The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act would add a specialized rule at the end of the CSA regarding marijuana.[57] The bill was introduced on April 4, 2019, in the House of Representatives and the Senate. Subsequently, the bill proceeded to various committees but languished there since its introduction.[58] The STATES Act would amend the CSA to say that it "shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marijuana."[59] Despite bipartisan support, the bill is estimated to possess only a three percent chance of passing.[60]

A different bill, the proposed Fairness in Federal Drug Testing Under State Laws Act, would protect federal employees who legally use medicinal marijuana under state law.[61] It would eliminate the negative consequences of testing positive on a random urinalysis for those federal employees who are consuming medical marijuana legally in an applicable jurisdiction.[62] The proposed bill states:

> [a]n individual . . . who is tested under a drug testing program of any Executive agency without probable cause to believe that the individual is under the influence of marijuana, who tests positive for marijuana use (determined by the presence of tetrahydrocannabinol or marijuana metabolite in the sample provided by the individual), and, in the case of an individual whose use of marijuana was for medical purposes, who is able to provide documentation . . . attesting to the

55. STATES Act, H.R. 2093, 116th Cong. § 5 (2019).

56. Fairness in Federal Drug Testing Under State Laws Act, H.R. 1687, 116th Cong. (2019).

57. H.R. 2093 § 5.

58. *Id.*

59. *Id.*

60. *S. 1028 (116th): States Act*, GOVTRACK, https://www.govtrack.us/congress/bills/116/s1028/details [https://perma.cc/5BC6-M8CC] (last visited June 27, 2023) (using a third party to estimate the probability that a piece of legislation will pass). The Senate version was cosponsored by four Democrats and five Republicans. *Id.* The House version had forty-four Democrats and nineteen Republicans listed as cosponsors. *H.R. 2093 (116th): States Act*, GOVTRAK, https://www.govtrack.us/congress/bills/116/hr2093 [https://perma.cc/W4KL-6MUH] (last visited June 27, 2023).

61. Fairness in Federal Drug Testing Under State Laws Act, H.R. 1687, 116th Cong. (2019).

62. *Id.* § 2.

> lawful nature of such use under the law of the State, may not, based solely on such a positive test be . . . if the individual is an employee of an Executive Agency, subject to any adverse personnel action.[63]

Like the STATES Act, this proposed legislation garnered bipartisan support, but only a three percent chance of passing stands.

In contrast to the modest proposals above, other pieces of legislation are significantly more aggressive. H.R. 3884 in the House of Representatives (and its partner S. 2227 in the Senate), entitled the Marijuana Opportunity Reinvestment and Expungement (MORE) Act of 2020, is a bill that would drastically change existing federal law.[64]

Introduced on July 23, 2019, the MORE Act not only seeks to establish the marijuana policy of our country moving forward, but it also seems to indicate that, collectively, our country has been wrong all along with respect to marijuana.[65] The MORE Act states that it is going "[to] decriminalize and deschedule cannabis, to provide for reinvestment in certain persons adversely impacted by the War on Drugs, to provide for expungement of certain cannabis offenses, and for other purposes."[66] The House version has 120 cosponsors, including Mr. Earl Blumenauer, from Oregon, who has been a cosponsor of both the STATES and Fairness in Federal Employment Acts mentioned above.[67] Similar to its House version, S. 2227 has nine cosponsors, who are all Democrats.[68]

The MORE Act does not simply try to remove marijuana from Schedule I—it would remove marijuana from the entire CSA.[69] If enacted, "[not] later than 180 days after the date of the enactment of this Act, the Attorney General shall . . . [make rules] removing marihuana and

---

63. *Id*.

64. *H.R. 3884 (116th): MORE Act of 2020*, GOVTRACK, https://www.govtrack.us/congress/bills/116/hr3884 [https://perma.cc/KS9Z-WJJH] (last visited Apr. 2, 2023). Although the MORE Act is currently circulating through Congress, it certainly is not the first time that Congress has discussed the issue. *See generally* Alicia Lozano, *House Passes Historic Bill to Decriminalize Cannabis*, NBC NEWS (Dec. 4, 2020), https://www.nbcnews.com/politics/congress/congress-takes-historic-bill-decriminalize-cannabis-n1249905 [https://perma.cc/N8XK-YCTP] ("The House voted Friday on the Marijuana Opportunity Reinvestment and Expungement Act, or MORE Act, which decriminalizes cannabis and clears the way to erase nonviolent federal marijuana convictions.").

65. *H.R. 3884 (116th): MORE Act of 2020*, GOVTRACK, https://www.govtrack.us/congress/bills/116/hr3884 [https://perma.cc/7PVC-P549] (last visited Apr. 2, 2023).

66. Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116th Cong. (2020).

67. *H.R. 3884 (116th): MORE Act of 2020*, GOVTRACK, https://www.govtrack.us/congress/bills/116/hr3884/cosponsors [https://perma.cc/9GAY-T79J] (last visited Apr. 16, 2023).

68. *S. 2227 (116th): MORE Act of 2019*, GOVTRACK, https://www.govtrack.us/congress/bills/116/s2227/cosponsors [https://perma.cc/PW83-VULP] (last visited Apr. 16, 2023).

69. H.R. 3884.

tetrahydrocannabinols from the schedules of controlled substances."[70] A critical component of this piece of legislation is its effective date. On that score, the MORE Act states that:

> amendments made by this section to the Controlled Substances Act (21 U.S.C. 801 et seq.) are retroactive and shall apply to any offense committed, case pending, conviction entered, and, in the case of a juvenile, any offense committed, case pending, or adjudication of juvenile delinquency entered before, on, or after the date of enactment of this Act.[71]

Of particular note for current or prospective federal employees, Section 7(b) would prohibit federal agencies from using "past or present cannabis or marijuana use as criteria for granting, denying, or rescinding a security clearance."[72] Lastly, it prescribes the path to expunge numerous convictions related to marijuana use.[73]

Regardless of what legislation does or does not pass, there are enough members of Congress sponsoring marijuana legislation that it has become a significant issue in the national discourse.

### D. *Private Sector Employers*

At the end of 2013, public sector employment accounted for just sixteen percent of the labor force, with the federal government employing only two percent of our nation's workers.[74] Ensuring that federal workers are free from drugs in the workplace is a necessary and noble cause. However, given its relatively small share of the national workforce, it is worth comparing federal policy to those governing the private sector. Unsurprisingly, private-sector employers vary greatly in their approach to drugs and policing drug use. For example, companies like Starbucks, Apple, Microsoft, Twitter, and Google do not conduct drug testing.[75] These companies employ hundreds of thousands of people yet do not test

---

70. *Id.* § 3(a)(2).

71. *Id.* § 3(d).

72. *Id.* § 7(b).

73. *Id.* § 10. While not discussed in this note, the MORE Act has additional sections about a cannabis trust fund, the impact of cannabis use on immigration, etc. Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884, 116th Cong. (2019); S. 2227, 116th Cong. (2019).

74. Gerald Mayer, *Selected Characteristics of Private and Public Sector Workers*, CONG. RSCH. SERV. (Mar. 21, 2014), https://fas.org/sgp/crs/misc/R41897.pdf [https://perma.cc/ETM8-XHSR]. Interestingly, state and local governments all experienced an increase in their percentages from 1955–2013. *Id.* The federal government decreased from 4.5% to 2%. *Id.*

75. Dragana Randjelovic, *5 Public Companies That Don't Do Drug Tests in 2019*, YAHOO (Nov. 8, 2019), https://finance.yahoo.com/news/5-public-companies-don-t-174400405.html [https://perma.cc/25B4-W6TC].

for the consumption of substances. Notably, these companies have thrived despite their lack of testing (or perhaps due to their lack of testing). The companies mentioned above revolutionize the world regularly yet are not concerned with their worker's substance use.

In September 2018, after Elon Musk, the CEO of Tesla and SpaceX, inhaled marijuana on a live YouTube broadcast, NASA announced a safety review of Boeing and SpaceX.[76] Incidentally, Musk's company, Tesla, does not drug test employees in states that permit marijuana use.[77] Even amidst this turmoil, Tesla continued to profit. Tesla's share price on February 1, 2016, was $162.60.[78] In just over four years, the share price of Tesla on February 17, 2020, was $901, a 454% increase.[79] If Tesla's CEO openly smoking marijuana was a concern for stockholders, the numbers do not reflect that concern.

Goodwill, the nationally recognized chain of thrift stores, stopped its testing in February 2020.[80] According to Goodwill's Director of Workforce Development, "[y]ou can't have people show up high. But just because someone uses pot recreationally doesn't mean it will impact their work."[81] With this very quote, Goodwill's Director of Workforce Development is challenging the former Commander-in-Chief. Recall that President Reagan stated that "employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs."[82] Goodwill recognized the error of testing their entire workforce and adapted, while the federal government's policies remain. In addition, one of Goodwill's retail competitors, Target, moved from testing all job applicants to only those applying for "safety-sensitive" positions starting in 2014.[83]

One of the most high-profile industries in the United States, the National Football League (NFL), just reached a collective bargaining agreement with its players in March 2020.[84] The agreement enacts

---

76. Margo Roosevelt, *In the Age of Legal Marijuana, Many Employers Drop 'Zero' Tolerance' Drug Tests*, L.A. TIMES (Apr. 12, 2019), https://www.latimes.com/business/la-fi-marijuana-drug-test-hiring-20190412-story.html [https://perma.cc/9MCE-MA3R].

77. *Id.*

78. *Tesla, Inc.*, YAHOO, https://finance.yahoo.com/quote/TSLA/history?period1=1277784000&period2=1535428800&interval=1mo&filter=history&frequency=1mo [https://perma.cc/BFX2-VJKP] (last visited Apr. 16, 2023).

79. *Id.*

80. Roosevelt, *supra* note 76.

81. *Id.*

82. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

83. Roosevelt, *supra* note 76.

84. *Collective Bargaining Agreement*, NFLPA (Mar. 5, 2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [https://perma.cc/F9HK-HBBC].

significant changes in the league's drug testing program to include: no game suspensions for marijuana use (only fines allowed); an increase in nanograms required for a positive urinalysis test (35 ng/mL to 150 ng/mL); and a reduction in the possible testing window to only the two weeks at the beginning of training camp.[85]

If private sector employers are not as concerned with marijuana use, what is the federal government's interest as an employer? Common sense dictates that the federal government's interest as an employer is not to have employees who are openly breaking federal law.

### E. *The Federal Government's Interest*

Despite the political and societal momentum toward the decriminalization and legalization of marijuana, possession of marijuana is still illegal under federal law.[86] Specifically, in Part D (§§ 841–865), simple possession of a controlled substance is illegal under 21 U.S.C. § 844.[87] Simply having a small amount of marijuana on your person could subject an individual to relatively stiff penalties according to federal law. For example, a first-time offender who is in possession of *any* amount of marijuana could face a year in prison and at least a $1,000.00 fine.[88] Of course, that does not necessarily mean that every first-time offender will face such a punishment, but that punishment is available to federal judges. Due to law enforcement, prosecutorial, and judicial discretion, data suggests this provision is not enforced evenly throughout the United States.[89]

Since 1973, the Drug Enforcement Administration (DEA) has been the federal enforcer of the CSA.[90] As recently as August 11, 2016, the DEA outlined their legal and factual reasons for denying rescheduling or

85. Mike Florio, *New CBA Removes All Substance-Abuse Suspensions for Positive Drug Tests*, NBCSPORTS (Mar. 5, 2020), https://profootballtalk.nbcsports.com/2020/03/05/new-cba-removes-all-substance-abuse-suspensions-for-positive-drug-tests/ [https://perma.cc/29T6-3S GY].

86. *See generally* 21 U.S.C. §§ 801–904 (explaining the control and enforcement of illegal drugs under federal law).

87. The definition of a controlled substance is contained in 21 U.S.C. § 802(6), which states that a controlled substance is "a drug or other substances, or immediate precursor, included in schedule I, II, III, IV, or V . . . . [t]he term does not include distilled spirits, wine, malt beverages, or tobacco[.]"

88. 21 U.S.C. § 844.

89. *See The War on Marijuana in Black and White*, AM. C.L. UNION (June 2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf [https://perma.cc/GDN6-CMY8] (finding that although the use of marijuana in Black and White communities was similar, Black people were "3.73 times more likely to be arrested for marijuana possession" than White people).

90. *History*, DRUG ENF'T ADMIN., https://www.dea.gov/about/history [https://perma.cc/W5SP-J9MY] (last visited Apr. 5, 2022).

removing marijuana from the CSA.[91] In deferring to the burdensome scientific process managed by the Food and Drug Administration (FDA), the acting DEA Administrator stated that marijuana "does not have a currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse."[92] While reaching this conclusion, the acting DEA Administrator conceded that it is entirely possible that science could eventually render this decision incorrect.[93] He stated that the DEA "will remain tethered to science . . . as the statute demands. It certainly would be odd to rely on science when it suits us and ignore it otherwise."[94] The DEA basically came to their decision to keep marijuana as a Schedule I substance by virtue of the fact that the FDA had not approved the substance for medical use.[95] The DEA's action begs the question, if there are no valid medical purposes for marijuana, why are states authorizing its medical use? Are the states disregarding science? Are the medical professionals who prescribe its use failing to use proper treatment protocols? Alternatively, is the FDA process too slow to react to a growing body of medical research? The DEA's deference to the FDA approval process does not seem in concert with their statutory mandate to enforce the CSA.

### F. *The Air Force Civilian Random Drug Testing Program*

The Air Force has a responsibility under federal law to test its employees, and the Air Force complies with that requirement. In addition to that requirement, the Air Force has its own institutional goals. Those goals are outlined in paragraph 1.3 of AFMAN 44-198, the governing regulation for the testing program, entitled the *Air Force Civilian Drug Demand Reduction Program*.[96] The first goal is to support and enforce Executive Order 12564.[97] As mentioned earlier, Executive Order 12564 was signed by President Reagan in an effort to combat illegal drug use by federal employees.[98] The second goal is to support the Anti-Drug Abuse

91. Letter from Chuck Rosenberg, Acting Administrator, Drug Enf't Admin., to Gina M. Raimondo et al., Governor, R.I, https://www.dea.gov/sites/default/files/divisions/hq/2016/Letter 081116.pdf [https://perma.cc/FH5R-SJ46] (last visited Aug. 11, 2016).

92. *Id.* at 5.

93. *Id.*

94. *Id.*

95. *Id.*

96. AFMAN 44-198, *supra* note 14, at para. 1.3.

97. *Id.* at para. 1.3.1.

98. *See* Exec. Order No. 12,564, 3 C.F.R. § 224 (1986) (declaring that federal employees must comply with a drug-free workplace).

Act of 1988.[99] The Air Force testing program "strives to improve the health, productivity, and overall quality of the civilian force and enhance total force readiness . . . ."[100] The program does so by:

> Preventing, reducing, and eliminating illicit drug use.
>
> Advising and training managers, supervisors, and employees on how best to address drug abuse issues.
>
> Referring employees to rehabilitative services and treatment.
>
> Restoring employees to full effectiveness.
>
> Maintaining the health and wellness of a fit and ready workforce and drug-free Air Force community.
>
> Deterring civilian personnel from illicit drug use.
>
> Detecting and identifying those individuals who engage in illicit drug use.
>
> Assisting commanders/directors in assessing the security, fitness, readiness, and good order and discipline of their commands.
>
> Providing a basis for action, disciplinary or otherwise, based on an employee's positive test result.
>
> Ensuring that urine specimens collected as part of the *Anti-Drug Abuse Act* of 1988 are supported by a legally defensible chain of custody procedure at the collection site, during transport, and at the testing laboratory.
>
> Ensuring that all specimens collected under the *Anti-Drug Abuse Act* of 1988 guidelines are tested by a laboratory certified by HHS.
>
> Ensuring that all civilian personnel recognize that the ingestion of non-prescription products that contained controlled substances (as defined by Federal law) and/or illicit ingestion of prescription products may subject the individual to a suspicion of drug abuse and thereby compromise his/her status as an Air Force employee.[101]

---

99. AFMAN 44-198, *supra* note 14, at para. 1.3.1; *see generally* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (preventing the manufacturing, distribution, and use of illegal drugs, and for other purposes). This legislation contained a large amount of drug policy that will not be addressed directly in this Article.

100. AFMAN 44-198, *supra* note 14, at para. 1.3.1.

101. *Id*. at para. 1.3.1.

The Air Force implements this program at the installation level. At each installation, there is typically one testing center. The Installation Commander (generally a Colonel in the Grade of O-6) is responsible for ensuring that this program is implemented.[102] The Commander typically delegates this responsibility to a subordinate. This delegation most often occurs in a small office staffed by one base-level employee responsible for all aspects of the testing program.

That employee is known as the Drug Demand Reduction Program Manager (DDRPM) or Drug Testing Program Administrative Manager (DTPAM).[103] These positions exist to oversee the program, including collection, processing, shipping, and safeguarding information relative to the program.[104] A DDRPM or DTPAM can be a military member or civilian employee, and the same person can fill both management positions.[105] The DDRPM or DTPAM is the "focal point for base level Air Force Civilian Drug Testing Program drug testing issues."[106] This personnel "will have received training in collecting urine specimens in accordance with HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs."[107] They train supervisors, commanders, and directors on recognizing, documenting, and referring employees suspected of drug abuse.[108] The DDRPMs or DTPAMs ensure this training includes "behavioral and performance patterns warranting referral for evaluation, procedures for referring employees for initial assessment, and the basis for, as well as the requirements of, the drug testing program."[109]

The DDRPMs or DTPAMs are also responsible for verifying the results for each sample taken, tracking the outstanding results, and coordinating with the forensic laboratory to resolve testing issues.[110] Lastly, and most importantly for civilian employees, the DDRPM or DTPAM "[e]nsure[] timely notification, in writing, to the CPS or HRO, the employee's supervisor, Installation SJA, and the employee's commander/director of all MRO-verified positives and substituted or adulterated results."[111] Once this notification to the supervisors, the

102. *Id*. at para. 2.14. Since this article only discusses what happens to a current Air Force employee, hiring procedures and testing will not be addressed.

103. *Id.* at Abbreviations and Acronyms; *id.* at Terms.

104. *Id.* at Terms.

105. *Id.* at para. 2.18.1.

106. AFMAN 44-198, *supra* note 14, at para. 2.18.2.

107. *Id.* at para. 2.18.3.

108. *Id.* at paras. 2.18.4–2.18.5.

109. *Id.*

110. *Id.* at para. 2.18.9.

111. AFMAN 44-198, *supra* note 14, at para. 2.18.10. The Installation SJA, who is the senior attorney at a given military installation, is a Staff Judge Advocate who evaluates compliance of

human resources staff, and the installation's attorney occurs, disciplinary procedures are typically initiated. Before doing so, however, the regulation requires that a medical review officer (MRO) review the results to rule out a lawful medical reason for the failure.[112]

According to AFMAN 44-198, paragraph 3.1.4.1, "[t]he Air Force will randomly test employees in positions identified by Civilian Personnel as TDPs."[113] A "TDP" is a testing designated position.[114] The term "Testing Designated Positions" is defined in the terms of the regulation as:

> Positions described in Section 7(d) of Executive Order 12564 that are designated by the Air Force. TDPs are characterized by their critical safety or security responsibilities as they relate to the mission of the DOD component. The job functions associated with these positions have a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or U.S. national security. These positions require the highest degree of trust and confidence.[115]

Every employee that is in a TDP is on notice that they occupy such a position. In fact, the human resources office at the base "must ensure all employees receive written notice when assigned to a TDP."[116] Even employees that move from non-TDP positions to a TDP will receive notice that they are now in a TDP.[117] This provision aims to ensure that no employee is subject to random urinalysis testing without prior knowledge of their potential for testing.

The Air Force accomplishes random urinalysis testing of its civilian employees no less than two days per month.[118] The testing is completed at random using drug testing software.[119] The DDRPM or DTPAM implement measures to guard the process closely.[120] The names and dates of the individuals selected for testing are kept confidential.[121] The Air Force expects an individual to provide a sample on the same day they are

---

the procedures under AFMAN 44-198. *Id.* at paras. 2.15.2., Abbreviations and Acronyms. MRO is a "licensed physician with the appropriate training to interpret and evaluate positive test results." *Id.* at Terms.

112. *Id*. at para. 2.18.10.

113. *Id.* at para. 3.1.4.1.

114. *Id.* at Terms.

115. *Id.* at para. 3.3.1. Attachment 2 provides categories of employees that are in TDPs; the list is quite extensive. *Id.* at A2.12.

116. *Id*.

117. AFMAN 44-198, *supra* note 14, at para. 3.3.1.

118. *Id.* at para. 3.1.4.4.

119. *Id.*

120. *Id.* at para. 3.1.4.5.

121. *Id.*

notified.[122] The notification reaches completion through close coordination with the employee's commander and immediate supervisor.[123] The employee's supervisor notifies the employee that they must provide a sample within two hours of notification.[124] Random testing is the heart of the Air Force's attempt to keep the workforce drug-free.

### 1. Disciplinary Outcomes

If a civilian employee's random urinalysis test is positive without a medical justification, it satisfies a "finding of drug use."[125] As such, the DDRPM or DTPAM must remove the employee from a TDP and assign other duties pending "appropriate disciplinary action."[126] The supervisor then directs the employee to complete an initial substance abuse assessment.[127] The supervisor engages with the human resources office to determine "appropriate" discipline.[128]

Using illicit drugs makes an Air Force employee subject to the disciplinary guidance in Air Force Instruction (AFI) 36-704, *Discipline and Adverse Actions of Civilian Employees*.[129] Drug use in the Air Force, "including marijuana, is subject to disciplinary and adverse action . . . regardless of state laws on their use."[130] In the Air Force, civilian discipline could include admonishment, reprimand, suspension, or removal.[131] In selecting the appropriate disciplinary penalty, "careful judgment is to be used so that the penalty is not out of proportion to the character of the offense, especially a first offense, and to assure that the penalty is imposed with consistency and equity."[132] In reaching this decision, the regulation requires consideration of "Douglas Factors."[133] A proposed disciplinary penalty must consider the following:

---

122. *Id.*

123. AFMAN 44-198, *supra* note 14, at para. 3.1.4.6.

124. *Id.* at paras. 3.1.4.6–3.1.4.7. If an individual is not available for some reason, it is the supervisor's responsibility to coordinate this issue with the DDRPM or DTPAM. *Id.* at para. 3.1.4.8.

125. *Id.* at para 5.1. A finding of drug use could also be found through direct observation, evidence from an arrest or criminal conviction, or an employee's voluntary admission. *Id.*

126. *Id*. at para. 5.2.1.

127. *Id*. at para. 5.2.2.

128. *Id*. at para. 5.2.3.

129. AFMAN 44-198, *supra* note 14, at para. 5.2.3.1. AFI 36-704 was updated in September 2022, now referred to as AFI 36-148. *See Air Force Instruction 36-148*, U.S. AIR FORCE (Sept. 27, 2022), https://static.e-publishing.af.mil/production/1/af_a1/publication/dafi36-148/dafi36-148.pdf [https://perma.cc/2LGP-ZDD7] [hereinafter AFI 36-148].

130. AFMAN 44-198, *supra* note 14, at para. 5.2.3.1.1.

131. AFI 36-148, *supra* note 129, at para. 1.4.

132. *Id.* at para. 4.1.

133. *Id.*

Seriousness of Offense – The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

Job Level and Type of Employment – The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

Prior Misconduct – The employee's past disciplinary record.

Employee's Past Work Record – The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

Erosion of Supervisory Confidence – The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.

Consistency of Penalty – Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Consistency of Penalty with Table of Penalties – Consistency of the penalty with an applicable agency table of penalties.

Notoriety – The notoriety of the offense or its impact upon the reputation of the agency.

Notice of warning about conduct – The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

Potential for Rehabilitation – Potential for the employee's rehabilitation.

Mitigating Circumstances – Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

Effectiveness of a lesser sanction – The adequacy and effectiveness of alternative sanctions to deter such conduct

> in the future by the employee or others.[134]

Regardless of any other factors, employees will face a proposed removal action if they:

> [Refused] to obtain counseling or treatment through a treatment program as required by the Executive Order after having been found to have engaged in illicit drug use.
>
> Continued illicit drug use after a first offense of illicit drug use.
>
> Altering or attempting to alter a urine specimen or substituting or attempting to substitute a specimen for their own or that of another employee.
>
> Failure to successfully complete the mandated and/or agreed upon medically approved drug rehabilitation program.[135]

After deciding on the "appropriate" discipline, the "Proposing Official"[136] proposes the adverse action via a "notice of proposed action."[137] This written notice describes the adverse action, the reasons for the action, a statement concerning the employee's rights regarding the action, and what evidence is being relied upon for the action.[138] After time to respond to the notice and evidence passes for the employee, a "Deciding Official"[139] makes a final determination.[140] According to the Air Force's table of penalties, incidents of either intoxication at work or driving while under the influence of alcohol carry a much lighter punishment than the use of illegal drugs.[141] Why are off-duty marijuana

---

134. *Id.* at Attachment 2.

135. AFMAN 44-198, *supra* note 14, at paras. 5.2.3.2.1–5.2.3.2.4.

136. The regulation defines a Proposing Official, stating "Generally, the first level supervisor recommends, signs and issues the notice of proposed action. However, a supervisor or manager at a higher level within the chain of command may recommend, sign, and issue proposal if first level supervisor if appropriate." AFI 36-148, *supra* note 129, at Terms.

137. *Id*. at para. 5.1.

138. *Id*. at paras. 5.1.1–5.1.4.

139. A Deciding Official is defined as:

> The person who signs the notice of final written decision received the employee's oral and/or written answer. Management may designate another person to receive the answer as long as that person has the authority to recommend a final decision and serves in a position superior to the employee (not necessarily in a supervisory position or in a higher grade)

*Id.* at Terms.

140. *See id*. at para. 5.4 (discussing the next steps after an employee receives notice).

141. *See id.* at Attachment 3 (stating that the penalty for the second offense of either intoxication at work or driving while under the influence of alcohol ranges from a five-day

use and on-duty alcohol consumption viewed so differently? This illogical reality is due to an outdated understanding of the toxicology of marijuana and what actually happens to the user.

## II. THE TOXICOLOGY AND EFFECTS OF MARIJUANA

Comprehending the toxicology of marijuana is critical to understanding how and why the United States should appropriately regulate the substance. As stated by the previously cited acting DEA Administrator, we should rely on science:

> After smoking, blood levels rise very rapidly and then decline to around 10% of the peak values within the first hour. The maximum subjective high is also attained rapidly and persists for about 1 to 2 hours, although some milder psychological effects last for several hours. After oral ingestion the peak for plasma THC and the subjective high is delayed and may occur anywhere from 1 to 4 hours after ingestion, with mild psychological effects persisting for up to 6 hours or more. Although in each case unchanged THC disappears quite rapidly from the circulation, elimination of the drug from the body is in fact quite complex and takes several days. This is largely because the fat-soluble THC and some of its fat-soluble metabolites rapidly leave the blood and enter the fat tissues of the body. As the drug and its metabolites are gradually excreted in the urine (about one-third) and in the feces (about two-thirds) the material in the fat tissues slowly leaks back into the bloodstream and is eventually eliminated. This gives an overall elimination half-time of 3-5 days, and some drug metabolites may persist for several weeks after a single drug exposure.
>
> The unusually long persistence of THC in the body has given cause from some concern, but it is not unique to THC—it is seen also with a number of other fat-soluble drugs, including some of the commonly used psychoactive agents, e.g., diazepam (Valium®). The presence of small amounts of THC in fat tissues has no observable effects, as these tissues do not contain any receptors for cannabis. There is no evidence that THC residues persist in the brain, and the slow leakage of THC from fat tissues into blood does not give rise to drug levels that are high enough to cause any psychological effects. Smoking a second marijuana cigarette a couple of hours after the first generates virtually the same

---

suspension to removal, while the penalty for the second offense of use of illegal drugs is an automatic removal). While the guide "prescribes no minimum penalty for any cause of action" recall that one of the factors is an agency's own determination of their severity. *Id.* at paras. 4.2, Attachment 3.

> plasma levels of THC as previously. Nevertheless, the drug will tend to accumulate in the body if it is used regularly. While this is not likely to be a problem for occasional or light users, there have been few studies of chronic high-dose cannabis users to see whether the increasing amounts of drug accumulating in fat tissues could have harmful consequences. Is it possible, for example, that such residual stores of drug could sometimes give rise to the flashback experience that some cannabis users report—the sudden recurrence of a subjective high not associated with drug taking?
>
> The persistence of THC and its metabolites in the body certainly causes confusion in other respects, particularly as drug testing procedures can now detect very small amounts of THC and its metabolites. Urine or blood tests for one of the major metabolites, 11-nor-carboxy-THC, for example, use a very sensitive immunoassay and can give positive results for more than 2 weeks after a single drug exposure. The proportion of the carboxy metabolite relative to unchanged THC increases with time and measurements of this ratio can indicate fairly accurately how long ago cannabis was consumed.[142]

Marijuana is only effective in the body for a few hours after ingestion but remains dormant as the body slowly eliminates its metabolites.[143] How does that compare to alcohol? Generally, "a person will eliminate one average drink or .5 oz (15ml) of alcohol per hour."[144] Again, an average alcohol user would reduce what they ingest in only hours, thus marijuana would remain stored in the body longer than alcohol. This distinct aspect of marijuana makes it easier on Tuesday to detect a Friday night user long after the effects of the drug have dissipated. The real question for those who persist in testing federal employees for marijuana use is, why do we care?

---

142. LESLIE L. IVERSON, THE SCIENCE OF MARIJUANA 50–51 (2001).

143. *See Marijuana Drug Information*, REDWOOD TOXICOLOGY LAB'Y, https://www.redwoodtoxicology.com/resources/drug_info/marijuana [https://perma.cc/C53U-RM3L] (last visited Mar. 27, 2023) ("Initially, THC is quickly absorbed into the body tissues and then is slowly released back into the blood stream where it is carried to the liver and metabolized."); *see How Long Does Weed / THC Stay in Your System?*, WEEDMAPS, https://weedmaps.com/learn/cannabis-and-your-body/how-long-does-marijuana-stay-system [https://perma.cc/QQ37-MTGE] (last visited Mar. 27, 2023) ("The study claims that THC is detectable in blood for about five hours, but the THC metabolite THC-COOH has a detection time of up to 25 days.").

144. *Alcohol and the Human Body*, INTOXIMETERS, https://www.intox.com/physiology/ [https://perma.cc/A82H-9JUY] (last visited Mar. 27, 2023).

## III. REMOVAL OR RESCHEDULING WITHIN THE CONTROLLED SUBSTANCES ACT

Marijuana's classification within the CSA is on par with severe drugs, such as heroin, LSD, and MDMA (ecstasy), and even *higher* than cocaine.[145] How did that happen? After the CSA passed in 1970, marijuana was placed as a Schedule I substance while President Nixon commissioned a study to assess the potential harm from marijuana use.[146] That study, known as the Shafer Commission Report, declared that marijuana "should not be in Schedule I and even doubted its designation as an illicit substance."[147] Further, it concluded that discouraging marijuana through civil fines and seizure, not criminal means, was the best way to address marijuana use.[148] Specifically, that criminal law is:

> [T]oo harsh a tool to apply to personal possession even in the effort to discourage use. It implies an overwhelming indicted of the behavior which we believe is not appropriate. The actual and potential harm of use of the drug is not great enough to justify intrusion by the criminal law into private behavior, a step which our society takes only 'with [sic] the greatest reluctance.[149]

Unfortunately, the federal government took no action in the past, and in the decades to follow, to remedy this mistake.

As previously discussed, Congress can legislate the removal of marijuana from the CSA. While Congress debates appropriate legislation (for who knows how long), the Executive branch could effectively remove marijuana from the list of controlled substances. The current version of the CSA delegates the authority to schedule controlled substances to the Attorney General.[150] Further, the Attorney General may "add to such a schedule or transfer between such schedules any drug or other substance . . . ."[151] The Attorney General may do so if he "finds that such drug or other substance has a potential for abuse, and makes with respect to such drug or other substance the findings prescribed by

145. U.S. DEP'T OF JUST., CONTROLLED SUBSTANCES – ALPHABETICAL ORDER 12, https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf [https://perma.cc/762U-3PMC] (last visited Mar. 27, 2023).

146. Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place?*, DRUG POLICY ALLIANCE (Oct. 8, 2014), https://drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place [https://perma.cc/NA8S-SKY6].

147. *Id.*

148. *Marihuana: A Signal of Misunderstanding*, U.S. NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE (1972), http://www.druglibrary.org/schaffer/Library/studies/nc/ncrec1_17.htm [https://perma.cc/3EMG-3YWH].

149. *Id.*

150. 21 U.S.C. § 811(a).

151. 21 U.S.C. § 811(a)(1).

subsection (b) of section 812 of this title for the schedule in which drug is to be placed . . . ."[152] Apart from adding a substance to the CSA, the Attorney General also has the authority to "remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule."[153]

The Attorney General must consider several factors with each substance to determine whether or not that substance should be included:

> Its actual or relative potential for abuse.
>
> Scientific evidence of its pharmacological effect, if known.
>
> The state of current scientific knowledge regarding the drug or other substance.
>
> Its history and current pattern of abuse.
>
> The scope, duration, and significant of abuse.
>
> What, if any, risk there is to the public health.
>
> Its psychic or physiological dependence liability.
>
> Whether the substance is an immediate precursor of a substance already controlled under this subchapter.[154]

To be considered a Schedule I substance, a substance must meet even more specific guidelines in addition to the above factors. According to the requirements of the Controlled Substances Act, the Attorney General must find, to place a substance in Schedule I, that the drug (1) "has a high potential for abuse"; (2) "has no currently accepted medical use in treatment in the United States"; and (3) "[t]here is a lack of accepted safety for the use of the drug or other substance under medical supervision."[155] Due to its lack of medicinal properties, Schedule I substances prohibit prescriptions from being issued.[156] Schedule II substances are very similar in that the drugs (1) "ha[ve] a high potential for abuse"; (2) "ha[ve] a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions"; and (3) abuse "may lead to severe psychological or physical dependence."[157] The notable difference between Schedule I and Schedule II substances is that Schedule II substances have some recognized

152. *Id.* § 811(a)(1)(A)–(B).
153. *Id.* § 811(a)(2).
154. *Id.* § 811(c).
155. *Id.* § 812(b)(1).
156. *Id.* § 829.
157. 21 U.S.C. § 812(b)(2).

medical purpose or use.[158] Schedule III substances are quite different—the drugs (1) "ha[ve] a potential for abuse less than the drugs or other substances in Schedule I and II" (2) "ha[ve] a currently accepted medical use in treatment in the United States[,]" and (3) "may lead to moderate or low physical dependence or high psychological dependence."[159]

While cocaine is firmly entrenched in Schedule II (since it does have some verified medical purposes), marijuana remains a Schedule I substance.[160] You simply cannot get a prescription for medical marijuana under federal law.[161] It seems clear from current medical use prescriptions that marijuana should not be considered a Schedule I or Schedule II substance.[162] If there were legitimate medical concerns about the abuse patterns of medical marijuana users, the DEA and the Attorney General could compile data on its use through the multitude of states that have permitted its use in the medical sphere. At a maximum, marijuana is a Schedule III substance, and the Attorney General could easily make that finding.

## IV. THE PROACTIVE APPROACH; HOW THE AIR FORCE CAN DRIVE CHANGE WITHIN THE FEDERAL WORKPLACE

### A. *Maintaining Reasonable Suspicion and Safety Mishap Testing*

Unlike random testing, reasonable suspicion and safety mishap testing are specifically tailored to the impact drug abuse may have on the Air Force mission. Facts and circumstances lead trained federal employees to the conclusion that drugs might be involved in a given scenario. Alternatively, testing may be required to rule out drugs as a contributing factor to a mishap or misconduct.

Reasonable suspicion testing is a:

> fact-based belief that an employee has engaged in illicit drug use, and that evidence of illicit drug use is presently in the employee's body, drawn from specific and particularized facts, and reasonable inferences from those facts. Employees in TDP may be tested on a reasonable suspicion of illicit drug use on or off duty. Employees in non-TDP may be

158. *Controlled Drugs: What is a Controlled (Scheduled) Drug,* TEX. STATE BD. PHARMACY, https://www.pharmacy.texas.gov/consumer/broch2.asp [https://perma.cc/6Q37-XH F8] (last visited Mar. 28, 2023).

159. 21 U.S.C. § 812(b)(3).

160. 21 U.S.C. § 812(c)(10) (Schedule I), (a)(4) (Schedule II).

161. *See* 21 U.S.C. § 812(b)(1)(B) (stating that Schedule I drugs have "no currently accepted medical use in treatment in the United States").

162. *See Marihuana, A Signal of Misunderstanding*, HATHITRUST DIGITAL LIBR., 546 (Mar. 1972), https://hdl.handle.net/2027/umn.31951d03118410v [https://perma.cc/4WQG-5JRW] ("[E]quating marijuana with heroin is an inappropriate view of available information as to the effects of cannabis.").

> tested on a reasonable suspicion of on-duty drug use or impairment. If an employee is suspected of illicit drug use or in possession of drug paraphernalia, the appropriate supervisor will gather all information, facts, and circumstances leading to, and supporting this suspicion, then refer the employee to the Drug Demand Reduction Program office for testing.[163]

The evidence accompanying this type of testing could be:

> Direct Observation of illicit drug use or possession and /or physical symptoms of being under the influence of a controlled substance. Physical symptoms are based on the behavior, speech, appearance, and/or body odors of the employee.
>
> A pattern of abnormal conduct or erratic behavior consistent with the use of illicit drugs where no other rational explanation or reason for the conduct is readily apparent.
>
> Evidence of drug-related impairment supported by hearsay from identified or unidentified sources supported by corroboration from a manager or supervisor with training and experience in the evaluation of drug-induced job impairment.
>
> Recent arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illicit drug possession, use or trafficking.
>
> Information of illicit drug use provided either by reliable and credible sources or independently corroborated.
>
> Evidence the employee has tampered with or avoided a recent or current drug test.[164]

Since this type of testing is specific and fact-based, coordination prior to testing is critical. Coordination must be completed with the installation staff judge advocate (attorney), a higher-level supervisor, and the human resources office as to whether reasonable suspicion testing is appropriate before any testing occurs.[165] This coordination includes the attorney's opinion regarding whether or not reasonable suspicion exists in a given fact pattern.[166] The supervisor then prepares a written memorandum that includes "the appropriate dates and times of reported drug-related incidents, the reliable/credible sources of information considered (in

163. AFMAN 44-198, *supra* note 14, at para 3.1.5.1.
164. *Id*. at para 3.1.5.1.1.
165. *Id*. at para. 3.1.5.2.
166. *Id*.

other words, the rationale leading to the test)."[167] The collection procedures are similar to the process outlined in the discussion above concerning random testing, except that the DDR Program office maintains the supervisor's fact memorandum for two years, and the notice to provide a specimen states explicitly that the test is a reasonable suspicion test.[168]

Safety mishap testing is a little different but still crucial to the integrity of safety protocols. When a specific "class" of mishap (e.g., loss of life, a significant amount of money involved, or nuclear in nature) occurs, "employees will be subject to testing for evidence of illicit drug use if the employee's supervisor reasonably concludes an employee's conduct may have caused or contributed to the mishap."[169] In addition to the requirements imposed by the Air Force's safety program, DoD employees:

> may also be subject to testing when, based upon the circumstances of the accident, their actions are reasonably suspected of having caused or contributed to an accident[,] . . . [t]he accident results in a death or personal injury requiring immediate hospitalization[, or] . . . [t]he accident results in damage to government or private property estimated to be in excess of $10,000.[170]

Similar to reasonable suspicion testing, safety mishap testing requires coordination with medical, legal, and safety personnel.[171] A factual memorandum is prepared and presented to the higher supervisor for initiation.[172] The employee also receives notice detailing that the testing is occurring pursuant to a safety mishap.[173]

Both reasonable suspicion and safety mishap testing are critical to ensuring a drug-free workplace and protecting mission effectiveness. One possible modification would be to remove reasonable suspicion testing for off-duty drug use. However, due to the breadth of the CSA and the ability of the Air Force to test for any Schedule I or II substance, the value

---

167. *Id*.

168. *Id*. at para. 3.1.5.2–3.1.5.3.

169. AFMAN 44-198, *supra* note 14, at para 3.1.6.1; *see also Air Force Instruction 91-204*, U.S. AIR FORCE, (Mar. 10, 2021), https://static.e-publishing.af.mil/production/1/af_se/publication/dafi91-204/dafi91-204.pdf [https://perma.cc/NRN7-5W7H] ("For all classes and categories of mishaps, commanders have the discretion to test crewmembers or any additional involved military members under their command whose actions or inactions, in their judgment, may have been factors in the mishap.").

170. AFMAN 44-198, *supra* note 14, at para 3.1.6.2; *see generally* U.S. DEP'T OF DEF. INSTRUCTION 1010.09, DOD CIVILIAN EMPLOYEE DRUG-FREE WORKPLACE TESTING PROGRAM (2012) (prescribing procedures for establishing and maintaining a drug-free workplace).

171. AFMAN 44-198, *supra* note 14, para. 3.1.6.3.

172. *Id*.

173. *Id*.

to supervisors and commanders is too high to alter these procedures.[174] While the effects of marijuana dissipate quickly, other Schedules I and II substances continue to affect the user for far longer. However, marijuana metabolizes more slowly and is detectable for far longer.[175]

Moreover, neither reasonable suspicion nor safety mishap testing begins due to a randomized software algorithm. Both systems require significant coordination before receiving a specimen. Testing based on off-duty conduct under reasonable suspicion differs from random testing that includes marijuana. By allowing supervisors to test for any Schedule I or II substance, supervisors could ensure that their employees are drug-free while working. Additionally, by providing a mechanism to test employees after a safety incident, the Air Force protects people and property from the damage or harm that could result from an intoxicated worker. Finally, there are enough procedural safeguards to ensure that reasonable suspicion and safety mishap testing truly achieve the goal of a drug-free workplace. Accordingly, these testing programs should remain in place to further protect the people and mission of the Air Force.

### B. *Increase ADAPT Focus on Civilian Marijuana Use*

The Air Force already has a treatment program for alcohol and drug abuse. This program is known as the Air Force Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT)[176] and is governed by Air Force Instruction 44-121.[177] In the Air Force, regulations are organized by series, with the first set of numbers indicating who owns responsibility for a given regulation (e.g., 36-personnel). Interestingly, under its "44" designation, the medical community is responsible for the ADAPT program.[178] Its designation seems to demonstrate the Air Force's commitment to the medical treatment of alcohol and drug abuse rather than the disciplinary trajectory of the regulations previously mentioned in this Article.

As with most programs (like the drug testing program described above), the Installation Commander is responsible for the ADAPT program.[179] The Installation Commander is responsible for ensuring that ADAPT receives the funding needed to "support counseling, treatment,

174. *Id*. at para. 3.1.2.

175. *Id.*

176. *Id.* at para. 2.6.

177. *Air Force Instruction 44-121*, U.S. AIR FORCE (July 18, 2018); https://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-121/afi44-121.pdf [https://perma.cc/6PDA-KRD3] [hereinafter AFI 44-121].

178. *Id.*

179. *Id.* at para. 1.7.1.

prevention and outreach efforts."[180] However, the daily operations are vested in a local ADAPT Program Manager.[181]

The ADAPT Program Manager must be a privileged mental health provider.[182] The ADAPT Program Manager will have attended or must attend, within six months of assignment, specific training on ADAPT.[183] The ADAPT Program Manager is responsible for assisting leadership "with identifying and referring individuals needing" ADAPT services and leading treatment team meetings.[184] In many cases, these individuals supervise a staff of certified and non-certified alcohol and drug abuse counselors.[185]

First, to use the ADAPT Program, a person has to be eligible for their services.[186] ADAPT's eligibility is narrow to the outside world but relatively broad within the military community. Any military healthcare beneficiary can use ADAPT, as well as civilian employees, per AFMAN 44-198.[187] The primary purposes and objectives of the ADAPT Program are:

> [to] promote readiness, health, and wellness through the prevention and treatment of substance misuse and abuse; to minimize the negative consequences of substance misuse and abuse, to the individual, family, and organization; to provide comprehensive education and treatment to individuals who experience problems attributed to substance misuse or abuse; and to restore function and return members to unrestricted duty status, or to assist them in their transition to civilian life, as appropriate.[188]

ADAPT records are treated as mental health treatment records and will "reflect findings during the initial assessment, intake and patient orientation, diagnosis, treatment plan, course of treatment, referrals, case management activities, progress reviews, and status upon termination."[189] As they are medical records, they are subject to the

180. *Id*. at para. 1.7.4.

181. *Id*. at para. 1.9.1.

182. *Id*. at para. 1.9.5 (noting that although this requirement can be manipulated if the program manager is not licensed, functions requiring a license must be verified and co-signed by a licensed mental health provider).

183. AFMAN 44-198, *supra* note 14, at para. 1.9.6.

184. *Id*. at para. 1.9.7–1.9.8.

185. *Id*. at para. 1.9.11.

186. AFI 44-121, *supra* note 177.

187. *Id.* at para. 3.6. The most current edition of this regulation references an outdated version of the civilian drug testing program.

188. *Id.* at para. 3.4.1.

189. *Id.* at para. 2.1.1.

Health Insurance Portability and Accountability Act (HIPAA).[190] Generally, if patients are undergoing treatment, military commanders typically have a HIPAA exemption that allows a covered healthcare provider to disclose information to make a fitness for duty determination using the minimal amount of information necessary.[191] However, HIPAA includes modifications for this exemption for mental health and substance abuse treatment at a DoD healthcare facility. Specifically, "DoD healthcare providers shall **not** notify a Service member's commander when the member obtains mental health care and/or substance misuse education services—**unless** one of the below conditions or circumstances apply. If they apply, then disclosure is required."[192] Those conditions are harm to self, harm to others, harm to mission, special personnel, inpatient care, acute medical conditions interfering with duty, substance misuse treatment program, command-directed mental health evaluation, or other special circumstances.[193] While civilian employees can self-refer to ADAPT services, the restriction on sharing information with the employee's commander does not apply to civilian employees.[194] If a civilian employee self-refers to ADAPT, it is a guarantee that the commander will find out about this action. Effective immediately, civilian employees should receive the same protection from disclosure of protected health information to their supervisors as is currently enjoyed by military members.

ADAPT has treatment protocols for alcohol and illicit drug use, but the language of the provisions is very different. For example, the alcohol paragraph of ADAPT states that:

> The Air Force policy recognizes that alcohol misuse negatively affects individual behavior, duty performance, and/or physical and mental health. The Air Force provides comprehensive clinical assistance to Active Duty Service Members, and will support referral coordination for other

190. *Air Force Instruction* 41-200, U.S. AIR FORCE (July 25, 2017), https://static.e-publishing.af.mil/production/1/af_sg/publication/afi41-200/afi41-200.pdf [https://perma.cc/D5YH-K82J].

191. DHA Privacy and Civil Liberties Office, *The Military Command Exception and Disclosing PHI of Armed Forces Personnel*, HEALTH.MIL 1 (2022), https://www.health.mil/Reference-Center [https://perma.cc/2UA5-923Q] (search "Military Command Exception"; then click on "Military Command Exception and Disclosing PHI of Armed Forces Personnel"); *see generally* 45 CFR § 164.512(k)(1) (2023) (listing the exceptions where an entity may disclose protected health information).

192. DHA Privacy and Civil Liberties Office, *supra* note 191, at 2.

193. *Id*.

194. Memorandum from the Defense Health Agency to the Dep't of Defense (Mar. 19, 2020).

> eligible beneficiaries, seeking help for an alcohol problem.[195]

This language is incredibly supportive, seemingly without disdain or disapproval of the individual experiencing the addition. Compare that provision with the one for illicit drug use:

> The Air Force does not tolerate the illegal or improper use of drugs by Air Force personnel. Such use is a serious breach of discipline; is incompatible with service in the Air Force; automatically places the member's continued service in jeopardy; can lead to criminal prosecution resulting in a punitive discharge or administrative actions, including separation or discharge under other than honorable conditions.[196]

These two paragraphs, included in the regulation right next to one another, could not be more different in approach.

The assertion "addiction is addiction" is backed up by numerous studies that show what happens to the brain when an addict performs their chosen activity.[197] According to experts, addiction "is a complex condition, a brain disease that is manifest[ed] by compulsive substance use despite harmful consequence."[198] Usually, people "with a substance use disorder have distorted thinking, behavior and body functions."[199] These effects are primarily due to a change in how the brain functions.[200] The shift in brain function causes the addict to "have intense cravings for the drug and make[s] it hard to stop using the drug."[201] Imaging "show[s] changes in the areas of the brain that relate to judgment, decision making, learning, memory, and behavior control."[202] Sadly, people with addictive disorders "may be aware of their problem, but be unable to stop it even if

195. AFI 44-121, *supra* note 177, at para. 3.1.1.

196. *Id*. at para. 3.2.1.

197. While sex addiction, gambling, and other addictive behaviors are performed differently, they share commonality with addiction when it comes to the brain. In order to limit the scope of this discussion, I will only address substance addiction. Psychology Today Staff, *What is Addiction?,* PSYCH. TODAY, https://www.psychologytoday.com/us/basics/addiction [https://perma.cc/Y7BH-RYXJ] (last visited Apr. 2, 2023).

198. *Glossary*, CNTY. OF L.A. PUB. HEALTH, http://publichealth.lacounty.gov/sapc/managepainsafely/docs/Glossary%20FINAL.pdf?pdf [https://perma.cc/85ZQ-EB47] (last visited Apr. 2, 2023).

199. *What is a Substance Use Disorder?*, AM. PSYCHIATRY ASS'N, https://www.psychiatry.org/patients-families/addiction/what-is-addiction [https://perma.cc/9F T7-ZY9M] (last visited Apr. 3, 2023).

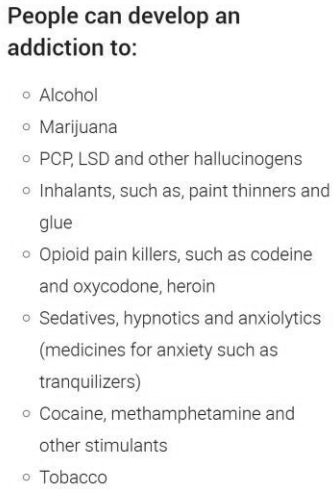
200. *Id*.

201. *Id*.

202. *Id*.

they want and try to. The addiction may cause health problems as well as problems at work and with family members and friends."[203]

Figure 4 - A clipping from the American Psychiatric Association website.[204]




Alcohol and marijuana are next to each other on the American Psychiatric Association website, but in the Air Force's assessment, these two substances are entirely different.

While safe haven provisions are in place, they are weak. According to the Air Force, it will not initiate disciplinary action for illicit drug use for any employee who meets each of the following conditions:

> Voluntarily identifies himself/herself as a user of illicit drugs prior to being notified of the required to provide a specimen for testing or being identified through other means (in other words, drug testing, investigation)
>
> Obtains and cooperates with appropriate counseling or rehabilitation
>
> Agrees to and signs a last chance or state of agreement
>
> Thereafter refrains from illicit drug use.[205]

Even if a member meets every condition, this does not stop the Air Force from initiating disciplinary action against the individual employee for

203. *Id*.
204. *Id*.
205. AFMAN 44-198, *supra* note 14, at para. 5.3.

other misconduct.[206] Drug possession or paraphernalia can subject an individual to disciplinary action in the regulation. A logical hypothetical would include an individual self-referring to ADAPT but having a pipe in their car parked at the treatment facility. While the individual is receiving treatment or trying to change their behavior, a law enforcement officer receives notice of a pipe in the car, and the employee undergoes discipline. The outcome seems illogical.

If the goals of ADAPT are as described above, why would the Air Force pursue discipline for that individual? The answer appears rooted in the foundation of the drug-free workplace regulations of the Reagan era. Rather than viewing marijuana use like alcohol, the federal government chose to ascribe moral failure to this particular substance, despite overwhelming evidence from the scientific community. The Air Force regulation should undergo revision immediately and should not differentiate between alcohol and marijuana. Since this regulation and program exist within the medical sphere, they should endure as medical conditions and not criminal misbehavior.

The Air Force's safe haven provision needs editing. Placing a "last chance" restriction on a recovering addict more than likely chills the likelihood of a habitual user struggling to quit from self-referring to ADAPT. Without revision, why would an employee not sit and wait for a random urinalysis and take their chances with a random test? By waiting for a positive random urinalysis sample, only random choice would expose their use. If they self-refer to ADAPT, they will make their use known. The Air Force and the DoD should focus on keeping drugs and alcohol out of the workplace. Moreover, employees who are trying to make a significant course correction in their life should not receive unclear employment. The dichotomy only exacerbates the problems that the employee is already facing. Instead, the Air Force should look towards long-term care and outcomes for the individual employee. The Air Force will likely see its safe haven provision used more effectively as a result.

### C. *The Removal of Marijuana from Random Drug Testing*

Removing marijuana from the CSA via legislation may be the best solution, but it will not come quickly. Even with widespread and bipartisan support, a bill takes time to get through Congress. If the CSA did not include marijuana, the Air Force would no longer be required to test for its "illegal" or "illicit" use. As long as marijuana has been subject to the CSA, organizations have asked the federal government to either

206. *Id*.

move it from Schedule I or remove it altogether, with no success.[207] After the acting DEA Administrator penned his response to the Governors of Washington and Rhode Island in 2016,[208] it does not seem likely that the DEA would support such an action. However, the fact that an acting DEA Administrator does not support rescheduling marijuana does not mean that others who outrank him in the Executive branch would, or should, come to the same conclusion.

The Air Force should be asking for policy changes from the various Executive branch stakeholders. The first policy change should be a modification of Executive Order 12564. Second, the Air Force should ask that the Attorney General determine that marijuana does not belong within Schedule I, or Congress should remove it entirely. Lastly, the Air Force should ask that Congress remove marijuana from the mandatory testing requirements of the Department of Health and Human Services (HHS) regulations. These policies were well-intentioned at their inception, but current scientific data and evolved popular opinion now demand action to revise these outdated policies.

President Reagan issued Executive Order 12564 to prohibit the "use of illegal drugs, on or off duty."[209] In some states, marijuana is "legal," whether recreational or medicinal. As such, the Air Force should advocate for a reading of that Executive Order that would not include testing for marijuana in a random urinalysis. The testing process is overly complicated, but the interplay between state and federal law is even more complex. The testing program is supposed to be able to produce a right or wrong response. Yet every installation across the Air Force (and every entity with federal employees) is asked to address a grey issue. How much time and resources are siphoned from mission accomplishment to handle an otherwise legal behavior? Marijuana in 2023 is significantly more nuanced than it was in the late 1980s. A new Executive Order with a simple paragraph removing marijuana from the federal drug-free workplace requirements would remedy this issue without threatening the mission.

President Trump signed the First Step Act on December 21, 2018, in one of the signature pieces of legislation passed during his administration.[210] While this act revised many Bureau of Prisons' (BOP)

---

207. John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why it's Unlikely Anytime Soon*, BROOKINGS (Feb. 13, 2015), https://www.brookings.edu/articles/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/ [https://perma.cc/9M3Y-BDNR].

208. Letter from Chuck Rosenberg, Acting Adm'r, U.S. Drug Enf't Admin., to Gina Raimodo, Governor, R.I., and Jay Inslee, Governor, Wash. (Aug. 11, 2016).

209. Exec. Order No. 12,564, 3 C.F.R. § 224 (1986).

210. *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp [https://perma.cc/N42S-U6VS] (last visited Mar. 30, 2023).

policies, it also modified mandatory minimum drug sentences.[211] As a result of this legislation, 16,000 inmates are enrolled in a drug treatment program, and 721 defendants received sentence reductions.[212] Out of the 721 people that have received modified sentences, the program has released 573 people.[213] It is fair to say that President Trump has an eye focused on drug offenses. Given the current state of public opinion and that 2024 is an election year, Executive Order 12564 is particularly ripe for modification.

Next, the Attorney General carries the responsibility under the CSA to determine the appropriate scheduling of substances.[214] Marijuana lacks two essential qualifying elements of a Schedule I substance under the CSA requirements. First, Schedule I should no longer define marijuana as not having an accepted medical use. To find otherwise would be insulting to the medical community and patients who are currently prescribe and use marijuana in the jurisdictions where medicinal use is approved. In reality, states that approved medicinal marijuana prescribed 1,826 fewer doses of pain medications over three years than states where medicinal marijuana remained illegal.[215] In May 2018, there were approximately 2.1 million "legal" medical marijuana users.[216] That amount of use merits some decisive action from the federal government.

Second, marijuana does not belong in Schedule I because there is an accepted safe use of the drug under medical supervision. Millions consume marijuana for medicinal purposes safely. Logically, medical professionals prescribing medicinal marijuana would risk significant tort litigation if the medical field viewed the prescribed medicines as unsafe. Medical professionals are unlikely to act against their interests and risk their careers. Therefore, the argument that marijuana is dangerous for medical supervision fails to pass muster.

Even if Congress does not remove marijuana entirely from the CSA, it should be moved from Schedule I to a lesser regulated Schedule, ideally Schedule III or below. If marijuana remains a Schedule I drug, America's leadership must ignore the tsunami of popular opinion lauding its usefulness.

---

211. *Id*.

212. *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, THE WHITE HOUSE (Apr. 1, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/ [https://perma.cc/34JE-3ZD5].

213. *Id*.

214. 21 U.S.C. § 811.

215. Dwight K. Blake, *Medical Marijuana in the United States – Statistics & Facts*, AM. MARIJUANA (July 29, 2021), https://americanmarijuana.org/medical-marijuana-statistics/ [https://perma.cc/3HN8-NKD6].

216. *Id*.

Assuming that marijuana stays a Schedule I substance, there are still actions the Air Force could pursue in its own best interest. Unfortunately, a significant burden to change testing would occur in changing the requirements of the federal drug-free workplace program. As noted in DoDI 1010.09, the *DoD Civilian Employee Drug-Free Workplace Program*, the program's purpose is to establish and maintain a drug-free workplace program in compliance with the HHS mandatory guidelines.[217] The DoD published a revised guideline on January 23, 2017, effective October 1, 2017.[218] HHS clarifies which substances are testable in a urine specimen. According to the guidelines, a federal agency (like the Air Force) "*must* ensure that each specimen is tested for marijuana and cocaine metabolites" yet "*is authorized* to test each specimen for opioids, amphetamines, and phencyclidine . . . ."[219] How HHS concluded that marijuana *had* to be tested for, while significantly more serious drugs were optional to the agency, is confusing at best. This conclusion allows the agencies little discretion in attempting to enact policies on their own.

The Air Force could pursue one last change by working with other administrative agencies. This change would be similar to one change enacted by the NFL. That change would raise the laboratory cutoff to a number that would indicate habitual use rather than a one-time or infrequent ingestion. As of October 1, 2017, the initial test cutoff was 50 ng/ML, with a confirmation of 15 ng/ML.[220] Recall that the NFL raised its cutoff value three times higher than the Air Force's. Working with HHS, the Air Force could still implement (however misguided) testing for marijuana. The result of having a higher cutoff would be that you would more than likely catch more frequent users of marijuana, and the resulting discipline would merit administrative effort.

Even in the status quo, the likelihood of significant discipline disbursed for infrequent and low-volume marijuana use is low. Several factors account for this assessment, including the discretion available to supervisors, human resource professionals, and the attorneys defending the agency's action. Similar to prosecutorial discretion for criminal offenses, the agency could choose not to pursue the removal of a first-time marijuana user, instead focusing on the more problematic habitual users.

As noted earlier, the recommended disciplinary action in response to drug use ranges from a reprimand to removal. Under the governing

---

217. U.S. DEP'T OF DEF., DoDI 1010.09, DOD CIVILIAN EMPLOYEE DRUG-FREE WORKPLACE PROGRAM, (2012). Change 1 becomes effective June 28, 2018. *Id.*

218. Mandatory Guidelines for Federal Workplace Drug Testing Programs, 82 Fed. Reg. 7920 (Jan. 23, 2017).

219. *Id*. at Subpart C—Urine Drug and Specimen Validity Tests § 3.1 (emphasis added).

220. *Id.* at § 3.4.

regulation for adverse actions for civilian employees, the removal of a federal employee "is the most severe disciplinary action."[221] As such, removal actions require a significant amount of administrative procedures, including a notice of proposed action that provides:

> A written notice stating the specific reason(s) for the proposed action and inform the employee of his or her right to review the material relied upon to support the reason(s) for the action given in the notice.
>
> The right to representation by an attorney or other representative at the employee's expense.
>
> A reasonable amount of official time to review the material relied upon to support the proposed action, to prepare a response, and to secure affidavits.[222]

Generally, the employee is given thirty days of advance notice during a removal action.[223] After the Deciding Official has made their decision, "a written notice specifying the reason(s) for the decision and advising the employee of his or her appeal rights is provided at the earliest practicable date."[224] Further, if the Deciding Official does decide to remove the employee, the employee can appeal to the Merit Systems Protection Board (MSPB).[225] The average MSPB case resolves within 180 days of filing.[226] Even if the Air Force seeks to remove an individual, an administrative law judge at the MSPB could disagree and reinstate the employee.[227] After reinstatement, that employee would be surrounded by people who sought their termination. Thus, the employee's likelihood of seeking treatment after such an episode would be low.

Suppose the ultimate goal is a drug-free workplace, and the agency wants to remove the drug user from federal employment. In that case, there are too many variables to account for in having marijuana remain a "must" test substance. Thus, Air Force should aim to pursue these different avenues to remove marijuana from its random urinalysis testing.

---

221. AFI 36-148, *supra* note 129, at para. 9.4.

222. *Id*. at para. 9.5.1.

223. *Id*. at para 9.5.2.

224. *Id*. at para 9.5.4.

225. *Id*. at para. 5.9.2.

226. *Federal Employees – Discipline / Removal*, WORKPLACE FAIRNESS IT'S EVERYONE'S JOB, https://www.workplacefairness.org/federal-employee-adverse-action [https://perma.cc/AYY6-26YX] (click on question 4. "How long will it take to process my case?").

227. *Id.* (click on question 12. "What remedies are available to me?").

## CONCLUSION

According to a study completed in 2018, 43.5 million Americans above the age of 12 used marijuana within the past 12 months.[228] That is a remarkable number, considering marijuana's status as an illegal controlled substance under the CSA. Similar "illegal" drugs recorded much lower consumption.[229] Alcohol, however, had nearly three times as many users and three times as many users with a use disorder.[230] The United States is moving towards societal acceptance of marijuana. Perhaps our country is not ready for the recreational version (sorry, Washington and Colorado). Still, overwhelming opinion polling and data demonstrate that the federal government needs to depart from its past policies concerning medical marijuana.

*Merriam-Webster Dictionary* defines the word "ignore" as "[to] refuse to take notice of" or "to reject (a bill of indictment) as ungrounded."[231] This definition is the gentlest assessment of the federal government's inability to regulate this sphere. Despite not being accurate, the popularized myth of an ostrich burying its head in the sand is more accurate.[232] In this myth, an ostrich recognizes the danger, and instead of the typical "fight or flight," the ostrich buries its head in the sand to avoid further detection of that danger, hoping that it will simply go away.[233] The federal government has chosen to pretend the battle for legalized marijuana is not an issue, despite popular opinion and state action, causing significant problems across the country.

Despite the efforts of some members of Congress, the federal government has not acted in any meaningful way. While the Fairness in Federal Drug Testing Under State Laws Act[234] (which solves the core issues identified in this Article) languishes in the House Committee, the Air Force should align itself with popular sentiment. The Air Force has a solemn responsibility to move as proactively as possible toward

---

228. Rachel N. Lipari & Eunice Park Lee, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2018 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. (2019), https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUHNationalFindingsReport2018/NSDUHNationalFindingsReport2018.htm [https://perma.cc/3NM8-G9FM].

229. *Id*. (finding that 1.9 million people used methamphetamine, 5.5 million people used cocaine, 808,000 people used heroin, 10.3 million people used opioids, 58.8 million people used tobacco with 47 million of the users via cigarette smoke, and 139.8 million people use alcohol).

230. *Id.*

231. *Ignore*, MERRIAM-WEBSTER, (11th ed. 2023).

232. Bambi Turner, *Do Ostriches Really Bury Their Heads in the Sand?*, HOWSTUFFWORKS (Apr. 5, 2021), https://animals.howstuffworks.com/birds/do-ostriches-really-bury-heads-in-sand.htm [https://perma.cc/GW9E-UAYS].

233. *Id.*

234. Fairness in Federal Drug Testing Under State Laws Act, H.R. 1687, 116th Cong. (2019) (as referred to the House Committee on Oversight and Reform on Mar. 12, 2019).

responsible policies that afford the maximum protection of its mission. These policies would include: (1) leaving reasonable suspicion and safety mishap testing in place; (2) devoting more attention from ADAPT to marijuana treatment; and (3) working with other Executive branch stakeholders to remove marijuana from random urinalysis testing. By accomplishing these objectives, the Air Force will prepare itself for what is sure to come, which is the federal legalization of marijuana.

# ARTIFICIAL INTELLIGENCE AS A LESS DISCRIMINATORY ALTERNATIVE

*Allan G. King & Alice H. Wang*[*]

Abstract

This Article considers the role of the "less discriminatory alternative" (LDA) in disparate impact litigation under Title VII of the Civil Rights Act and related statutes. The question posed is: has assigning the burden of proof of identifying LDAs to plaintiffs resulted in the adoption of these alternatives? The answer is no. But well-meaning employers have been reluctant to adopt practices that might increase the presence of minority employees in the workplace because the anti-discrimination laws prohibit reverse discrimination. This Article discusses the legal constraints that impinge on employers who wish to unilaterally search for and adopt an LDA, and explains how artificial intelligence (predictive analytics, specifically) can prove helpful. Artificial intelligence may improve the accuracy of employee selections and, by constraining the algorithm regarding its analysis of seed data but not selections themselves, can lawfully enhance the presence of minorities and women in the workplace.



* The authors are attorneys at Littler Mendelson, P.C. They wish to thank Michael Selmi, Bradford Kelley, and Nicholas Sarokhanian for their helpful comments and contributions and take responsibility for any remaining errors and omissions.

## INTRODUCTION

Title VII views discrimination as a dichotomy. Either an employer acts in a discriminatory manner, or they do not. If an employer uses technology in a decision-making process, either that technology discriminates against demographic groups, or it does not. Or, as it pertains to this Article, either a selection procedure[1] discriminates against one or more demographic groups, or it does not. There is an exception regarding claims of disparate impact, as discrimination may become more visible by comparing alternatives. For example, once an employer has established the legitimacy of a selection procedure, the plaintiff still may prevail by demonstrating that there is a less discriminatory alternative (LDA) to the employer's current selection procedure, which the employer has refused to adopt. This sole provision of Title VII requires employers to engage in "less discrimination," countenancing an alternative that may allow residual disparities between groups to persist.

As we will explain, this provision, aimed at the discriminatory impact of neutral selection procedures, has not borne fruit. It appears that in no instance have plaintiffs persuaded a court that an LDA served the employer's legitimate interest in efficiently making valid selections. This reality hardly is surprising because most plaintiffs lack the means, in terms of resources, data, and expertise, to design their own alternatives. If they could, rather than being plaintiff-employees, they would be in the human resources consulting business. Instead, when less discriminatory selection procedures have met with court approval, they typically have been advocated by employers and analyzed as "voluntary affirmative action plans." These are scrutinized by criteria that have minimal overlap with a plaintiff's burden to establish an LDA. As a result, two standards apply in assessing the lawfulness of LDAs, which differ depending on whether employees or employers propose them. In a nutshell, plaintiffs must propose a viable substitute for a current discriminatory procedure, and employers must be accountable for offering an acceptable remedy for past discrimination.

1. "Selection procedure," as used herein, refers to "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision." 29 C.F.R. § 1607.16.

This Article explains how the Supreme Court's opinion in *Ricci v. DeStefano*,[2] coupled with artificial intelligence (AI), provides a bridge between these approaches. First, it discusses how LDAs became an adjunct to Title VII law, initially developed by the courts and ultimately codified by the Civil Rights Act of 1991. Second, it documents how courts have refused to adopt LDAs proposed by plaintiffs and have instead approved those proposed by employers if they are "voluntary affirmative action plans." Consequently, Title VII has failed to realize its promise as an engine for reducing the adverse impact of employee selection procedures. Finally, this Article explains how AI can devise LDAs that increase the representation of women and minorities while minimizing the risk of violating Title VII.

## I. THE EVOLUTION OF THE "LESS DISCRIMINATORY ALTERNATIVE"

Since the Supreme Court first recognized that neutral selection procedures might impact demographic groups discriminatorily, the use of objective selection procedures has grown considerably. Despite their objectivity, these selection procedures may favor one demographic group over another. In such instances, an employer must demonstrate that these procedures are "valid" to avoid liability and continue using the challenged selection procedure.[3] An employer may nevertheless be liable if the plaintiff demonstrates an LDA selection procedure that equally serves the employer's legitimate business needs, which the employer refuses to adopt.[4]

Only the rare plaintiff, or plaintiff's counsel, has at hand a library of alternative selection procedures with the potential to prove themselves less discriminatory but equally valid. In the nearly sixty years since Title VII's inception, only a handful of cases have reached this last element of proof, and none we can find in which the plaintiff ultimately prevailed.

The LDA reflects the wisdom that less discriminatory selection procedures ought to be encouraged, despite some disproportionality that may remain. In other words, if an employer uses a test that adversely impacts a protected group but learns of a less discriminatory substitute, the public interest is served if the LDA, although imperfect, replaces the previous selection procedure. If this were the norm, we would see steady

---

2. 557 U.S. 557, 559 (2009).

3. *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.5, 1607.14 (1978) (explaining the general and technical standards for validity studies). These Guidelines are intended to provide a framework to assist organizations in determining the proper, i.e., "valid," use of employment selection procedures based on validation techniques. Courts have held that a "validated" selection procedure is one that has "a manifest relationship to the employment in question." *See, e.g.,* Clady v. Los Angeles Cnty., 770 F.2d 1421, 1427 (9th Cir. 1985), quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

4. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

progress towards more equal outcomes. Yet, as the neglected stepchild of Title VII litigation, the LDA has failed to reach its potential. In our view, AI has the potential to identify efficient LDAs that invigorate this provision of Title VII, which until now has been dormant.

Plaintiffs were assigned the burden of identifying an LDA in an era when courts mistakenly anticipated that plaintiffs could provide them a set of selection procedures, assess their utility, and order employers to adopt one deemed least discriminatory.[5] As opposed to relying principally on Plaintiffs to identify an LDA when they are ill-equipped to do so, AI will make it easier for courts to fulfill that role for at least three reasons. First, AI describes the creation and selection of selection procedures. AI tools typically are developed and evolve based upon metrics regarding a particular group of employees. Second, the inner workings of these tools are likely to be proprietary and, even if disclosed, are unlikely to be understood by laypersons, such as plaintiffs. As a result, casting plaintiffs as the engines of progress toward LDAs is inevitably futile because they lack the information necessary to suggest refinements to existing methods. It is far better to encourage employers and developers of AI to spearhead those efforts. In particular, as explained, AI can provide the "strong basis in evidence" necessary for an employer to adopt an LDA. Third, AI can explicitly distinguish between permissible goals and impermissible quotas, providing a lawful alternative for increasing the representation of women and minorities.

We begin by documenting the fruitless search for LDAs, as led by plaintiffs, throughout the history of Title VII. Next, we explain in broad strokes how AI works in employee selection. Lastly, we illustrate how AI can be constrained to search for LDAs and minimally disruptive affirmative action plans and explain why this search lies within the bounds of Title VII, as the Supreme Court prescribes.

## A. *The Supreme Court's Formulation*

### 1. Plaintiffs Must Prove There is a Less Discriminatory Alternative

Title VII prohibits both intentional discrimination (disparate treatment) and discrimination emanating from practices that are fair in form but nevertheless work to the disadvantage of one or more demographic groups (disparate impact).[6] A disparate-treatment claim arises "where an employer has 'treated [a] particular person less

5. *See Ricci*, 557 U.S. at 578 (discussing case law that required plaintiffs to provide legitimate alternatives in disparate impact suits).

6. *Federal Laws Prohibiting Job Discrimination Questions And Answers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 21, 2009), https://www.eeoc.gov/fact-sheet/federal-laws-prohibiting-job-discrimination-questions-and-answers [https://perma.cc/WB52-TSQ3].

favorably than others because of' a protected trait."[7] If a claimant brings a disparate-treatment claim, they must establish that an employer possessed a "discriminatory intent or motive" for an adverse employment action.[8] Disparate-impact claims seek to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate . . . ."[9] In *Griggs v. Duke Power Co.*, Black employees at Duke Power Company's Dan River Steam Station brought suit alleging employment discrimination.[10] The company had openly discriminated on the basis of race before Title VII became effective.[11] At the Dan River Steam Station, employees were assigned to one of five different departments: (1) labor; (2) coal handling; (3) operations; (4) maintenance; or (5) laboratory and test.[12] Black employees were employed only in the labor department.[13] The highest-paying job in that department paid less than the lowest-paying jobs in other departments.[14] The company had two employment policies that caused this pattern of job assignments. First, the company required a high school diploma for any new hire in all departments except for the labor department, and for transfer from the labor department to the other, better-paying departments.[15] Second, new hires to any department besides the labor department, or employees seeking to transfer out of the labor department, had to pass two professionally prepared aptitude tests and possess a high school education.[16] These requirements permitted few Black employees to be hired or transferred to the better-paying departments.[17] A group of thirteen Black employees sued, and the Fourth Circuit affirmed a decision by the district court in favor of the employer, finding no discriminatory motive in adopting the education and testing requirements.[18]

The Supreme Court reversed, holding that Title VII proscribes overt discrimination as well as practices that are "fair in form, but

---

7. *Ricci*, 557 U.S. at 577 (quoting Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 985–86 (1988)).

8. *Id.*

9. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

10. *Id.* at 426.

11. *Id.* at 426–27.

12. *Id.* at 427.

13. *Id.*

14. *Id.*

15. *Griggs*, 401 U.S. at 427.

16. *Id.* at 427–28.

17. *Id.* at 430 ("[W]hites register far better on the Company's 'alternative requirements' than Negroes."); *see also id.* at 430 n.6 (discussing how an Equal Employment Opportunity Commission (EEOC) decision found that the Wonderlic and Bennett Mechanical Comprehension Test—the two aptitude tests used by Duke—resulted in fifty-eight percent of White employees passing the tests, compared to just six percent of Black employees).

18. *Id.* at 428.

discriminatory in operation."[19] The Court held that practices, procedures, or tests, neutral on their face, were unlawful if they operated to discriminate based upon an impermissible classification.[20] The holding stated that "touchstone is business necessity," meaning if a job qualification or requirement is job-related, its use may be permissible notwithstanding its adverse impact.[21] But if a requirement is not job-related and operates to exclude members of a protected class, the requirement is unlawful.[22] Ultimately, it is the employer's burden to establish that a given requirement is a business necessity or has a "manifest relationship" to the employment in question.[23]

The Supreme Court elaborated in *Albemarle Paper Co. v. Moody* a three-step process for proving disparate impact cases.[24] First, a plaintiff must prove that the employment practice in question had an adverse impact on members of a protected class.[25] Second, the employer has the burden of proving the business necessity or job-relatedness of the employment practice.[26] Third, suppose the employer is able to meet its burden of proving its practice is job-related. In that case, the plaintiff may show that an alternative employment practice, without a similarly undesirable discriminatory effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."[27]

### B. *Plaintiffs' Fruitless Search for LDAs*

Once the Supreme Court specified the burden-shifting standard to disparate impact claims, lower courts faced a series of cases in which plaintiffs proposed an LDA, which the employer refused to adopt. We discuss these cases at some length to illustrate why seemingly nothing plaintiffs could propose could pass muster in the eyes of the courts.

In *Gillespie v. Wisconsin*, unsuccessful minority applicants for the position of Personnel Specialist I or Personnel Manager I with the State of Wisconsin alleged a disparate impact resulting from the state's written employment test.[28] The test's design sought to test the applicants' abilities to use standard English and to analyze and organize

19. *Id.* at 431.
20. *Id.* at 430–31.
21. *Griggs*, 401 U.S. at 431.
22. *Id.*
23. *Id.* at 432.
24. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).
25. *See id.*
26. *See id.*
27. *See id.* The phrase "efficient and trustworthy workmanship" comes from the EEOC Guidelines on Employee Selection Procedures. 29 C.F.R. § 1607.3(B). The Supreme Court gives "great deference" to the EEOC Guidelines. *Griggs*, 401 U.S. at 433–34.
28. Gillespie v. Wisconsin, 771 F.2d 1035, 1037 (7th Cir. 1985).

information.[29] The test consisted of three questions, which asked applicants to write a sample job description, a memorandum to another department, and an evaluation of statistical data.[30] The plaintiffs contended that the state could have used an essay examination that required shorter answers to more questions, a multiple choice examination, or a commercially developed test.[31] However, the court held that a plaintiff could not make "bare assertion[s]" about the possibility of alternatives, especially without supporting data.[32] Thus, with statistical support, a plaintiff must demonstrate more than the simple possibility that an alternative exists.

In *Contreras v. City of Los Angeles*, Hispanic auditors argued that oral examinations were an LDA to written examinations.[33] The Ninth Circuit affirmed the district court's decision that the plaintiffs lacked sufficient supporting evidence.[34] The plaintiffs' expert opined that persons with Spanish surnames tended to do better in oral interviews than in written examinations and that oral interviews *could* adequately screen applicants.[35] Although this sufficed to prove oral interviews were less discriminatory, the court held the plaintiffs failed to show that the interviews would satisfy the city's merit hiring requirements—a legitimate business need.[36]

Another illustrative case is *Clady v. County of Los Angeles*, in which Black and Hispanic candidates for firefighter positions alleged that the county's selection procedures caused a disparate impact.[37] The county previously had operated under a consent decree from 1973 to 1978, which required quotas for minorities.[38] Once the decree dissolved in 1979, the county evaluated candidates based on a written and physical examination.[39] The plaintiffs asserted the exams adversely impacted these minorities and that even if the county could prove the exams were valid, it nevertheless was liable for not using LDAs for the written and

29. *Id.* at 1038.
30. *Id.*
31. *Id.* at 1045.
32. *Id.*
33. Contreras v. City of Los Angeles, 656 F.2d 1267, 1285 (9th Cir. 1981).
34. *Id.*
35. *Id.*
36. *Id.*
37. Clady v. County of Los Angeles, 770 F.2d 1421, 1423 (9th Cir. 1985).
38. *See id.* at 1424 ("The court entered a remedial hiring order requiring that at least 20% of all new recruits be black and 20% be Mexican-American.").
39. *Id.* at 1424–25. The written portion measured mechanical comprehension, spatial perception, and verbal ability. *Id.* at 1424. Next came an oral interview for all applicants who passed the exam. *Id.* The county then placed those who passed that stage on a list of eligibility, and as spots opened up, the highest-ranked candidates moved on to the physical agility test. *Id.* at 1425.

physical exams.[40] The district court found for the county, and the plaintiff appealed.[41]

On appeal, the Ninth Circuit affirmed the district court's decision. It found the county's search for LDAs was "extensive" and included a survey of the examinations administered by more than 100 counties and cities throughout the state, as well as professionally developed tests.[42] The county then investigated if there was an LDA by using those procedures in their selections.[43] The plaintiffs asserted that the county should have used one of two different LDAs: the procedures specified by the consent decree or a previously used "banding" procedure.[44] Regarding the first alternative, the plaintiffs relied on testimony from the county fire chief that recruits hired during the quota years were "equally as competent as those hired under the [challenged] procedures."[45]

The Ninth Circuit found that testimony fell short of establishing an LDA because there was evidence that the new procedure adopted by the county was more cost-efficient than the one required by the consent decree, a consideration the court recognized as a "legitimate need."[46] Regarding the second alternative, banding, the court explained that the plaintiffs failed to present evidence that this alternative would have a less discriminatory impact when standing alone.[47] Consequently, the Ninth Circuit concluded that the plaintiffs failed to sustain their burden.[48]

*Zamlen v. City of Cleveland* also concerned firefighters—a ubiquitous group of plaintiffs.[49] In this case, female applicants to the entry-level firefighter position challenged the city's use of rank-ordered scores on written and physical examinations.[50] The physical examination required job candidates to perform anaerobic exercises, including dragging a 100-pound bag seventy feet and lifting weights overhead.[51] The written and physical examinations were worth fifty points for a total of 100 points,

---

40. *See id*. at 1432–33.
41. *Id.* at 1423.
42. *Id.* at 1432.
43. *Id.*
44. Clady v. County of Los Angeles, 770 F.2d 1421, 1432 (9th Cir. 1985). "Banding" is a means of grouping a range of test scores, which, in statistical terms, lie in the same confidence interval. Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 723 (9th Cir. 1992). The practice is indicative that these scores are, for all practical purposes, the same. *See, e.g.*, *id.* ("The 'band' is a statistically derived confidence range that is applied to the examination results. Differences between scores within the band are considered to be statistically insignificant due to measurement error inherent in scoring the examination.").
45. *Clady*, 770 F.2d at 1432.
46. *Id.*
47. *Id.*
48. *Id.* at 1434.
49. Zamlen v. City of Cleveland, 906 F.2d 209, 212 (6th Cir. 1990).
50. *Id.* at 211.
51. *Id.* at 213.

with additional points added for a veteran or minority status.[52] The female candidates argued that an LDA could test for aerobic traits, such as stamina and endurance, which women and men possessed more equally.[53] However, the Sixth Circuit affirmed the district court's finding that the current physical examination was valid as each event represented a firefighting task.[54] Although a physical examination including aerobic traits would be more effective, the court stated "the deficiencies of this examination are not of the magnitude to render it defective, and vulnerable to a Title VII challenge."[55] Additionally, the female candidates demanded the city implement a different scoring system.[56] However, the Sixth Circuit noted that:

> although the use of a different scoring system might raise the rank-order of women on the eligibility list, given the fact that the woman with the highest test score still only ranked 334 on the eligibility list, and that the city only hired approximately forty firefighters each year, it is doubtful that any alternative scoring system would have had less of a disparate impact on women. The evidence suggests that, at best, an alternative scoring system would result in female applicants ranking higher on the eligibility list, but still too low to actually be hired. Since rescoring the examination is unlikely to result in higher numbers of successful female applicants, it is an insufficient reason to invalidate an otherwise lawful examination.[57]

In *Smith v. City of Des Moines*, a former fire captain brought a lawsuit against the city for allegedly firing him in violation of the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) because he could not pass a physical fitness test required for approval to wear a self-contained breathing apparatus.[58] Significantly, the city had established a business necessity for its fitness test as a defense to the disparate impact ADEA claim, and the court held that the fire captain failed to show that an alternative means of assessing fitness would have a less disparate impact on older firefighters.[59]

---

52. *Id.*

53. *Id.* at 219.

54. *Id.* at 218

55. Zamlen v. City of Cleveland, 906 F.2d 209, 219 (6th Cir. 1990).

56. *Id.* ("[P]laintiffs contend that a different scoring system—one which would eliminate the addition of variable numbers of minority points, the use of the capping system and the addition of veterans' points—would have raised the rank-order of women on the eligiblity [sic] list.").

57. *Id.* at 220.

58. Smith v. City of Des Moines, 99 F.3d 1466, 1468 (8th Cir. 1996).

59. *Id.* at 1471, 1473.

The fire captain argued on appeal that the use of spirometry and stress tests could determine which firefighters may be unfit for the job and require only those firefighters to undergo a physical exam and a "battery of tests" to determine if they are fit for duty.[60] The Eighth Circuit faulted the fire captain for not advancing this argument in the district court, but even if he had,

> [he] had not made any showing that his proposed alternative (which is in any case rather vague) would have less of a disparate impact on older firefighters than the city's present system does. At most, [he] has asserted that he would be able to pass his proposed battery of tests, but he has not shown the effect of his system on other firefighters. Nor has he shown that his more subjective approach would serve the city's legitimate interest in the fitness of its firefighters as well as the current system.[61]

In *International Brotherhood of Electrical Workers v. Mississippi Power & Light Co*., two unions, along with two Black members, sued their employer, alleging disparate impact based on race.[62] Mississippi Power & Light Company laid off the individual plaintiffs due to a general reduction in force.[63] At the time of the layoffs, the unions and the employer agreed that laid-off workers with a certain level of seniority could "bump" into positions held by more junior employees, assuming the senior employees could qualify for the new jobs.[64] The two individual plaintiffs attempted to bump into Storekeeper positions held by junior employees but first had to pass an aptitude test.[65] Both failed to meet the cutoff score, and the employer denied them the Storekeeper positions.[66]

Plaintiffs argued that the employer's cutoff score—not the test itself—caused the disparate impact.[67] On appeal, the Fifth Circuit agreed with the district court's finding that the plaintiffs succeeded in establishing a *prima facie* case of disparate impact but found that the employer adequately demonstrated that its challenged business practices were job-

60. *Id.* at 1473.

61. *Id.* at 1473–74.

62. Int'l Bhd. of Elec. Workers v. Miss. Power & Light Co., 442 F.3d 313, 316 (5th Cir. 2006).

63. *Id.* at 315.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 315–16. After an acquisition, the employer raised the cutoff score from 150 to 180 for the Storekeeper positions in 1993. *Id.* at 316. Thus, when the two individual plaintiffs attempted to bump into the Storekeeper positions, the cutoff score was 180. *Id.* The employer used a cutoff score of 150 from 1989 to 1993 for the Storekeeper positions. *Id.* Prior to 1993, the employer used a cutoff score of 178 for the Storekeeper positions. *Id.*

related and consistent with business necessity.[68] In relevant part, the employer demonstrated that a cutoff score of 180, rather than the 150 advocated by plaintiffs, significantly increased the likelihood that successful applicants would develop into proficient employees.[69] The cutoff score also pointed to "specific and sizable savings estimates related to its challenged practices."[70] Moreover, the plaintiffs failed to prove the viability of their alternative employment practices to respond to the employer's demonstrated business necessity.[71]

In *Lopez v. City of Lawrence*, Black and Hispanic police officers passed over for promotion to sergeant brought a Title VII action against the city, alleging that the criteria used for selecting officers for promotion, which consisted of a written exam and an education and experience rating followed by a rank-order selection, resulted in a disparate impact based on race.[72] After a bench trial, the district court agreed that the use of the test had a disparate impact on promotions in the city of Boston but found the test was a valid selection tool that helped the city select sergeants based on merit.[73] The court further held that the plaintiff failed to demonstrate an alternative selection tool that was available, that was as (or more) valid than the test utilized, and that would have resulted in the promotion of a higher percentage of Black and Hispanic officers.[74]

On appeal, the pivotal question was whether the evidence compelled a finding that the city refused to adopt an LDA that served its legitimate needs.[75] The First Circuit found that the Black and Hispanic police officers failed to adduce sufficient evidence that adding test components such as an assessment center, structured oral interviews, or performance review to the exam process would have enhanced the validity of the test while reducing the adverse impact on minorities.[76]

These synopses are merely illustrative of the forty to fifty cases we have found in which plaintiffs failed uniformly in their attempts to prove an LDA.

---

68. *Int'l Bhd. of Elec. Workers.*, 442 F.3d at 319.

69. *Id.*

70. *Id.*

71. *Id.* While the plaintiffs' brief did not address alternative employment practices, in oral arguments, the plaintiffs' counsel claimed that the plaintiffs' expert provided evidence of acceptable alternative practices "by describing a process in which [the employer] might require applicants to perform sample Storekeeper tasks." *Id.* While the plaintiffs' counsel also conceded that this showing was not particularly "precise," the plaintiffs' counsel maintained it was "sufficiently specific to meet Plaintiffs' burden of demonstrating acceptable alternative employment practices." *Id.* The Court disagreed. *Id.*

72. Lopez v. City of Lawrence, 823 F.3d 102, 107 (1st Cir. 2016).

73. *Id.* at 107.

74. *Id.*

75. *Id.* at 120.

76. *Id.* at 120.

### C. *May an Employer Unilaterally Adopt an LDA, Per the Guidelines?*

29 C.F.R. § 1607.3(B) prescribes that whenever there needs to be a validity study, the employer should include an investigation of suitable alternatives as part of that study.[77] "If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other section procedure may continue . . . ."[78] Thus, part of an employer's proof of validity encompasses a search for an LDA.

If the courts widely accept these Guidelines, employers would be permitted to adopt an LDA unilaterally, with courts presumably finding this exercise unlawful only if it failed to meet other provisions of the Guidelines or the statute. Yet, just two months before these Guidelines were published, the Supreme Court decided *Furnco Construction v. Waters*,[79] seeming to anticipate the Guidelines' required search for a minimally impactful alternative. Writing for the Court, Justice Rehnquist observed:

> The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII.[80]

Notwithstanding *Furnco*, some courts require or permit employers to search for LDAs.[81] In *Erdman v. City of Madison*, the court concluded that the fire department met its obligation to investigate "alternative selection procedures with evidence of less adverse impact . . . to determine the appropriateness of using or validating it in accord with [the Uniform] guidelines."[82]

---

77. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3(B) (1978).

78. Uniform Guidelines on Employee Selection Procedures, 41 C.F.R. § 60-3.3(B) (1978).

79. 438 U.S. 567 (1978).

80. *Id.* at 576–77. We have found no case in which a court has reconciled the contradiction between *Furnco* and the Guidelines, nor have we found a case in which an employer that adopted an alternative selection procedure that adversely affected a favored group (a type of reverse discrimination) relied successfully on § 1607.3B of the Guidelines.

81. *See Erdman v. City of Madison*, 615 F. Supp. 3d 889, 899 (W.D. Wis. 2022).

82. *Id.* at 897 (citation omitted).

### D. *The Burden of Proving an LDA Prior to the 1991 Civil Rights Act*

Before *Watson v. Worth Bank and Trust*[83] and Wards Cove *Packing Co. v. Atonio*,[84] the two Supreme Court decisions partially motivating the 1991 amendments to Title VII, lower courts regarded proof of the LDA as the plaintiff's burden.[85] From there, courts seem to bifurcate the plaintiff's burden into two distinct prongs: (1) that the proposed LDA "would be of substantially equal validity" and (2) such LDA "would be less discriminatory" than the challenged employment practice.[86] After that, the plaintiff must show that the defendant refused to adopt the LDA.[87]

*Watson v. Fort Worth Bank and Trust*[88] foreshadowed a change. In this case, a Black woman applied for four different supervisory positions and was turned down, only to see a White person take the job each time.[89] The question confronting the Supreme Court was whether the disparate impact theory could challenge subjective employment practices or whether it was limited to objective criteria such as written and physical tests or height and weight requirements.[90] Justice O'Connor wrote the plurality opinion and discussed the rationale for finding that subjective employment practices were amenable to disparate impact analysis.[91]

On the one hand, there was concern that by excluding subjective decisions from Title VII's reach, the Court would encourage employers to substitute subjective criteria having similar discriminatory effects for prohibited objective criteria.[92] On the other hand, there was concern that by including subjective criteria, the Court would force employers to

---

83. 487 U.S. 977 (1988).

84. 490 U.S. 642 (1989).

85. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("If an employer does then meet the burden of proving that its tests are job related, it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.").

86. *E.g.*, Allen v. City of Chicago, 351 F.3d 306, 312 (7th Cir. 2003) ("[T]he only remaining issue in the burden-shifting analysis is the existence of a substantially equally valid, less discriminatory alternative employment practice.").

87. Adams v. City of Chicago, 469 F.3d 609, 613 (7th Cir. 2006). Here, the court rephrased the statute's use of "refuses" to "refuse[d]." *Id.* at 615. This change suggests that the court made a logical leap of faith that Congress intended a one-time demonstration of an LDA by the plaintiff and its subsequent refusal to adopt it by the employer. This, however, presupposes that Congress so intended. It is equally likely that Congress meant to impose a continual burden to employ the *least* discriminatory alternative. Furthermore, it glosses over the possibility that Congress intended what it enacted and that an employer may refuse to adopt an LDA all the way up to a judgment.

88. 487 U.S. 977 (1988) (plurality opinion).

89. *Id.* at 982.

90. *Id.* at 989.

91. *Id.* at 989–90.

92. *Id.* at 989.

institute informal quotas, contrary to Congress' intent.[93] Notably, the plurality determined that a disparate impact claim could challenge subjective criteria.[94] They also sought to shift the evidentiary burden concerning the "job relatedness" defense.[95]

The plurality thought it "imperative to explain in detail why the evidentiary standards that apply in these cases should serve as adequate safeguards" against quotas, seemingly recognizing a potential for abuse.[96] It also reformulated the *Albemarle* analysis by placing the "ultimate burden" of proving discrimination on the plaintiff "at all times."[97]

*Watson* departed from established Court precedent in three ways.[98] First, the plurality changed the employer's burden for rebutting the plaintiff's *prima facie* case.[99] Justice Blackmun refused to join the plurality because, in his view, the second step of the process required that the employer carry a burden of *proof*, not just one of *production*, citing *Albemarle*.[100] In Justice Blackmun's view, disparate treatment cases need a scheme of burden allocation that "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination,"[101] and thus, a plaintiff's proof of a *prima facie* case results in a *presumption* that intentional discrimination took place.[102] It would be unfair to require employers to *prove* that there was no intent, especially when inferences

93. Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 993 (1988) (plurality opinion) (stating that Congress, through 42 U.S.C. § 2000e-2(j), did not intend for Title VII to lead to preferential treatment or quotas).

94. *Id.* at 990.

95. *Id.*

96. *Id.* at 993.

97. *Id.* at 997. The exact wording Justice O'Connor used is: "the burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times." *Id.* As Justice Blackmun explained in his concurrence, Justice O'Connor imports the disparate treatment analysis nearly verbatim into the disparate impact analysis. *See id.* at 1001–02 (Blackmun, J., concurring in part) ("in the context of an individual disparate-*treatment* claim, '[the] ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'") (quoting Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–56 (1981)).

98. In fact, Justice Blackmun argued that O'Connor's formulation of the *Albemarle* analysis was "flatly contradicted" by the Court's previous disparate impact cases. *Id.* at. 1001.

99. *See Watson*, 487 U.S. at 986 (plurality opinion) ("[T]he employer in turn may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision.").

100. *Id.* at 1001 (1988) (Blackmun, J., concurring in part); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 422–25 (1975) (noting that the employer must "meet the burden of proving that its tests are 'job related"); Dothard v. Rawlinson, 433 U.S. 321, 329 (noting that the employer must prove that the challenged requirements are "job related").

101. *Watson*, 487 U.S. at 1003 (Blackmun, J., concurring in part).

102. *Id.* at 1004.

are needed to determine intent. Therefore, in his view, it is inappropriate to require employers to produce evidence to rebut the plaintiff's case.

In contrast, disparate impact cases are proven directly with statistical evidence.[103] Once the plaintiff does so, it is fair to require an employer to *prove* the challenged practice has a "manifest relationship to the employment in question"[104] because the plaintiff uses direct evidence instead of inferences found in disparate treatment cases.

Second, the plurality weakened the standard of proof necessary to justify a challenged employment practice. While the Court's cases since *Griggs* generally have required an employer to prove a challenged practice was "necessary to safe and efficient job performance,"[105] the *Watson* plurality only asked for "evidence that . . . employment practices are based on legitimate business reasons."[106] Again, the plurality borrowed from disparate treatment cases, requiring an employer accused of intentional discrimination to only "offer[] *any* legitimate, nondiscriminatory justification."[107] This case law also departed from the Court's precedent, which required more than an "indirect or minimal relationship to job performance."[108] Third, the plurality expanded the analysis of LDAs to consider whether it "would be equally as effective" in serving the employer's legitimate business goals.[109]

A year later, the Court again addressed the disparate impact theory in *Wards Cove Packing Co. v. Atonio*[110] and largely adopted Justice O'Connor's plurality opinion in *Watson*.[111] The majority reiterated that the burden of proof at all times rested with the plaintiff,[112] and the employer's burden was only to show that a challenged practice "serves, in a significant way, the legitimate employment goals of the employer."[113] The majority clarified the standard and cautioned that the challenged practice was not required to be "essential" or "indispensable" to the employer's business.[114] Furthermore, the majority confirmed that the employer's burden was one of production and not proof.[115]

---

103. *Id.*

104. Connecticut v. Teal, 457 U.S. 440, 446 (1982).

105. *Dothard*, 433 U.S. at 332 n.14,

106. Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 988 (1988) (plurality opinion).

107. *Id.* at 1004 (Blackmun, J., concurring).

108. *Id.* at 1005.

109. *Id.*

110. 490 U.S. 642 (1989).

111. *See id.* at 655–56 (holding that plaintiffs did not establish a prima facie case under the framework established in *Watson*).

112. *Id.* at 660. The majority not only cited *Watson* for this proposition but added emphasis to the words "at all times." *Id.* at 659.

113. *Id.* at 659.

114. *Id.*

115. *Id.* at 660. To add further insult to injury, the majority acknowledged that "some of [their] earlier decisions can be read suggesting otherwise." *Id.*

## II. THE LDA SUBSEQUENT TO THE 1991 CIVIL RIGHTS ACT

The effort to legislatively overrule *Wards Cove* began just two weeks after the Court handed down its decision.[116] Congress later incorporated an initial version of the bill into the ill-fated Civil Rights Act of 1990, a bill introduced by Senator Edward Kennedy.[117] Most of the debate centered on the employer's burden to establish a business reason for a challenged practice; however, President George H.W. Bush vetoed the 1990 Act.[118]

Proponents of the Act regrouped, and Representative Jack Brooks introduced the Civil Rights Act of 1991 in the House of Representatives in January of that year.[119] After eight months of wrangling, Senator John Danforth introduced a compromise bill in the Senate,[120] which ultimately was enacted. § 105 of the Act amended § 703 of the Civil Rights Act of 1964 by adding a new subsection, which is codified as 42 U.S.C. § 2000-e-2(k)(1)(A), and has two subsections allocating burdens of proof:

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

---

116. Senator Metzenbaum introduced the Fair Employment Reinstatement Act with the intent to overrule *Wards Cove* and "reinstate[] the well-settled system of proving unlawful employment practices in disparate impact cases under Title VII of the Civil Rights Act of 1964." Fair Employment Reinstatement Act, S. 1261, 101st Cong. (1989); 135 CONG. REC. S7512-13 (daily ed. Jan. 3, 1989). Metzenbaum's proposed legislation was the most aggressive version of what later became 42 U.S.C. § 2000-e. It had only two real steps. First the plaintiff had to "demonstrate," defined as carrying the burden of production and persuasion, a disparate impact. S. 1261 § 2. Next, the employer had an opportunity to "demonstrate" that a challenged practice was "required by business necessity." *Id.* "Required by business necessity" was defined as "essential to effective job performance." *Id.* If either party failed to carry their burdens, they lost. Notably absent from Metzenbaum's legislation was any mention of LDAs.

117. 136 CONG. REC. S1018 (1990) (Sen. Kennedy remarked that "Senator Howard Metzenbaum, has previously introduced S. 1261, a measure to overrule the *Wards Cove* decision, which has been substantially incorporated into the Civil Rights Act of 1990 . . . ."). The 1990 Act nearly mirrors Sen. Metzenbaum's language. *See* 136 CONG. REC. S1019 (daily ed. Jan. 23, 1990).

118. 136 CONG. REC. S16,457 (daily ed. Oct. 2, 1990). President Bush argued that the 1990 bill "employ[ed] a maze of highly legalistic language to introduce the destructive force of quotas into our Nation's employment system." *Id.*

119. H.R. 1, 102d Cong. (1991). January 1991 was the first time the concept of LDAs came up in proposed legislation. *See id.* § 4 (holding employment practices unlawful, despite the employer's demonstration of business necessity, if the plaintiff demonstrated that a different employment practice with less disparate impact served the employer as well).

120. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

> (ii) the complaining party makes the demonstration described in subsection (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.[121]

Subsection (C) explains that "[t]he demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'"[122] Because the *Wards Cove* opinion is dated June 5, 1989, it is apparent that Congress intended to override that decision with legislation regarding what constitutes an LDA and how to prove it.

§ 105(b) provides that the Interpretive Memorandum authored by Senator Danforth is the exclusive legislative history for purposes of "construing or applying any provision of this Act that relates to . . . alternative business practice."[123] Danforth's Interpretive Memorandum reads: "[t]he terms 'business necessity' and 'job related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)."[124] Most courts dealing with LDAs after the 1991 Civil Rights Act regard the statute as a codification of *Albemarle* and a repudiation of *Wards Cove.*[125]

Nevertheless, in ensuing cases, plaintiffs extended their losing streak at proving an LDA. In *Chicago Teachers Union v. Board of Education of Chicago*, a class of Black plaintiffs challenged the process by which the Chicago school district determined layoffs.[126] The school district claimed to have based its decisions on neutral student enrollment projections.[127] The plaintiffs contended the school district could have adopted other less discriminatory criteria instead of student enrollment projections.[128] These alternatives included, either separately or in combination, "(1) transferring class members to open positions; (2) conducting an adverse impact analysis preceding the layoffs; (3) avoiding the use of enrollment projections to determine layoffs; or (4) using other sources of funding instead of laying off employees."[129]

---

121. 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii).

122. *Id.* § 2000e-2(k)(1)(c).

123. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1074.

124. 137 CONG. REC. S15276 (daily ed. Oct. 25, 1991).

125. *See* P.S. Runkel, *The Civil Rights Act of 1991: A Continuation of the Wards Cove Standard of Business Necessity Standard of Business Necessity*, 35 WM. & MARY L. REV. 1177 (1993) (reviewing the legislative history of the Civil Rights Act of 1991).

126. Chi. Tchrs. Union v. Bd. of Educ. of Chi., 14 F.4th 650, 653 (7th Cir. 2021).

127. *Id.*

128. *Id.* at 656.

129. *Id*. at 655.

Regarding the transfer alternative, the Seventh Circuit found "without more evidence as to how the Board could have simply overridden the existing system, CTU [Chicago Teachers Union] has failed to carry its burden of demonstrating a 'viable' alternative that the Board refused to adopt."[130] The plaintiffs fared as poorly with their remaining alternatives, as the court's opinion states:

> But for each proposed alternative, CTU falls far short of providing the sort of detail necessary to meet its burden of establishing an alternative to the Board's system: it fails to spell out what factors other than enrollment should have been used; fails to explain precisely how the Board could have accessed "other sources" of funding or how that funding would have allowed it to keep teaching positions open in schools with declining enrollments; and fails to identify how conducting an adverse impact study would obviate the need to base layoffs on declining enrollment.[131]

Thus, the district court correctly concluded that CTU did not carry its burden of establishing an equally valid LDA the Board could have used in lieu of layoffs based on enrollment numbers.[132]

In *Erdman v. City of Madison*, a district court rejected an LDA proposed by a class of female applicants for firefighter positions in the city of Madison, Wisconsin.[133] Although crediting their proof that an alternative method, a Candidate Physical Abilities Test (CPAT), may be less discriminatory than the challenged procedure, a physical abilities test (PAT), the court found the alternative would be more burdensome in several respects, including:

> (1) the need to perform a transferability study; (2) the PAT having been a good predictor of outcome historically, as defined by a high passage rate out of the academy; (3) the Department's comparatively high percentage of female firefighters, leading to a possible inference that the CPAT may have a favorable disparate impact on women but results in the washing out of ultimately unsuccessful applicants after the additional expenditure of time and money at the academy phase; and (4) certain elements of the PAT were designed specifically for Madison, in light of characteristics of the city, the Department's equipment or other considerations, including safety. Given plaintiff bears the burden to prove the CPAT would serve the Madison Fire Department's

130. *Id*. at 656.

131. *Id.* at 657.

132. Chicago Tchrs. Union v. Bd. of Educ. of the City of Chicago, 14 F.4th 650, 657 (7th Cir. 2021).

133. Erdman v. City of Madison, 615 F. Supp. 3d 889, 891 (W.D. Wis. 2022).

> legitimate needs, when coupled with the Seventh Circuit's admonition that "courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it," . . . the court concludes that plaintiff has not demonstrated by a preponderance of the evidence that the CPAT meets the Department's legitimate needs as an alternative to the 2014 PAT.[134]

Thus, notwithstanding the codification of the disparate impact theory, plaintiffs continue to find the LDA unavailing as a rebuttal to an employer's proof of validity.[135] In addition, employers are constrained by other provisions of Title VII in their efforts to increase the representation and responsibilities of women and minorities in the workplace. Among the most impactful is 42 U.S.C. § 2000e-2(j), titled "Preferential treatment not to be granted on account of existing number or percentage imbalance," which provides:

> Nothing contained in this title [42 U.S.C. §§ 2000e et seq.] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title [42 U.S.C. §§ 2000e et seq.] to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[136]

---

134. *Id*. at 899–900.

135. Plaintiffs have been more successful in proposing alternative selection criteria as a *remedy* subsequent to a finding of past discrimination. *See* Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721 (9th Cir. 1992). In *Officers for Justice*, the plaintiffs proposed "banding" test scores rather than distinguishing among applicants whose scores differed by merely a point. *Id.* at 723–24. The court found this plan lawful as a type of voluntary affirmative action plan designed to remedy prior discrimination. *Id.* at 727; *see also* Sims v. Montgomery Cnty. Comm'n, 890 F. Supp. 1520, 1523 (M.D. Ala. 1995), *aff'd sub nom.*, Sims v. Montgomery Cty. Comm'n, 119 F.3d 9 (11th Cir. 1997).

136. 42 U.S.C. § 2000e-2(j).

This prohibition, by its terms, applies only to what employers may be required to do, not what employers might do voluntarily, an issue to which we shall return.

Regarding the use of tests selected to improve demographic balance, 42 U.S.C. § 2000e-2(l) provides:

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.[137]

This practice is referred to as "race norming," a concept illustrated in a case decided by the Seventh Circuit. Fearing exposure to a lawsuit alleging disparate impact, the Chicago Fire Department created separate promotional lists for White and Black firefighters to ensure that a representative number of Black firefighters would receive promotions.[138] The Seventh Circuit found this practice violated § 2000e-2(l), as the court's opinion notes:

> The Civil Rights Act of 1991 explicitly forbids the dual-list response to disparate impact. (That section also forbids differential validation, under which scores predicting an equal probability of success on the job lead to an equal probability of favorable decision even though this may mean that minorities are promoted with scores lower than those of white applicants.).[139]

The remainder of this Article explains how AI can assist employers in navigating these cross currents, steering a course between permissible efforts to enhance minority representation and the prohibitions against favoring one protected demographic group at the expense of another. We begin by providing a brief overview of how AI works—at least that facet of AI concerned with "predictive analytics"—and address whether and how employers may search for and adopt an LDA.[140]

---

137. *Id.* § 2000e-2(l).

138. *See* Biondo v. City of Chicago, 382 F.3d 680, 682–83 (7th Cir. 2004) (discussing the Department's establishment of promotional lists to conform with the EEOC's Uniform Guidelines on Employee Selection Procedures).

139. *Id.* at 684.

140. In this respect, our article is focused somewhat differently than Professor Bent's discussion of AI in his article titled, *Is Algorithmic Affirmative Action Legal*. Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L.J. 8 (2020). Professor Bent's excellent article is concerned primarily with bias and validation issues accompanying the use of AI in employee selection. *See id*; *see al*so David M. Skanderson, *Managing Discrimination Risk of Machine*

## III. WHAT IS ARTIFICIAL INTELLIGENCE?

### A. *Artificial Intelligence Defined*

"Artificial intelligence," or AI, is ubiquitous in common parlance and has assumed a variety of meanings as it continues to permeate popular culture and transform the workplace. Working definitions for AI or automated and computerized decision systems have developed in specific contexts. Still, for purposes of this Article, it is best to focus on the facet of AI dealing with "predictive analytics." To lend concreteness, we are concerned with methods designed to select the "best" employees among a pool of possible candidates. A selection procedure will be deemed more or less discriminatory depending on the representation of women and minorities among those deemed "best" relative to their representation in a pool of minimally qualified candidates.[141] The procedures by which AI discerns who is best qualified are correlative. The goal is to identify employee characteristics, called "features," most highly correlated with an employer's criteria for success.

Three primary sources of data may be input as features into an AI selection algorithm. The first is information supplied by the employee and the employer.[142] This information may come from an employment application or resume, such as educational attainment, training, experience, etc., or an employer's job description. Second, an employer may develop its own data regarding applicants for the algorithm. For example, an applicant may need to take a test, participate in an interview, either with a human or a machine, or participate in a gamified assessment constructed by the developer of the AI product. Data from these exercises may then be incorporated as features that maximize the algorithm's correlation with various success criteria.

---

*Learning and AI Models*, 35 ABA J. LAB. & EMP. LAW 339, 340 (2021) (discussing considerations in managing the risk posed by predictive models to discriminate, and how risk management concepts developed in the financial sector may be applied to managing discrimination risk in other sectors); Jenny R. Yang, *Adapting Our Anti-Discrimination Laws to Protect Workers' Rights in the Age of Algorithmic Employments Assessments and Evolving Workplace Technology*, 35 ABA J. LAB. & EMP. LAW 207, 210 (2021) (discussing, in relevant part, how to ensure fairness in the use of algorithmic hiring, how algorithmic management and surveillance have impacted workers' civil rights, and how technology can serve as a catalyst for workers ability to organize for more equity)..

141. By "best" we refer to the group of applicants the algorithm deems best-suited for employment. In the paradigm case, the algorithm arrives at this determination by determining the attributes that distinguish "successful" from "less successful" employees, with the success criterion or criteria determined by what is most meaningful to a particular employer. This could be an employee's attendance record, tenure, or accuracy in performing particular tasks.

142. This information also should be available from applicants but, as explained, if information is unavailable from incumbents, it is unlikely to be of use in the algorithm.

Third, the employer may scrape data on each employee applicant from the internet.[143] Depending on a candidate's electronic footprint, AI developers may be able to glean information from an applicant's postings, on social media or professional websites, and a variety of other sources an applicant encounters while going about their daily lives. The scope of these searches may be prescribed in advance, a type of AI known as "supervised learning," or may be open-ended, meaning the algorithm is free to search for those features most highly correlated with success, which is known as "unsupervised learning."[144]

These features next must be related to the criteria deemed to indicate a "successful" hire. Once again, an employer may specify job-related criteria, such as long tenure, rapid promotions, minimal disciplinary events (supervised learning), or identify a group of successful and unsuccessful employees and permit the algorithm to search for criteria (which may or may not be related to the job) that distinguish the members of each group (unsupervised learning).

In most applications, the search for the algorithm that serves as the best predictor of successful job performance begins with "seed" data, also known as "training" data.[145] An artificial intelligence algorithm optimized to predict the "best" qualified candidates within a pool of candidates, would naturally be trained on data in that context: information regarding present and past employees, so an initial calibration of the model can be estimated with data on hand.[146] No information exists regarding the performance of those yet to be hired. Based on this initial model, the predictive power of the artificial intelligence algorithm may subsequently be improved by including the track record compiled by incumbent employees in subsequent iterations.[147] This iterative process

143. Typically, this same generic information must be available for a sample of incumbent employees, because it is their data that generally is necessary to "train" the algorithm.

144. Julianna Delua, *Supervised v. Unsupervised Learning: What's the Difference*, IBM (Mar. 12, 2021), https://www.ibm.com/cloud/blog/supervised-vs-unsupervised-learning [https://perma.cc/3V38-FL54].

145. *See* Matthew Scherer, *AI in HR: Civil Rights Implications of Employers' Use of Artificial Intelligence and Big Data*, 13 SCITECH L. 12, 14 (2017) (discussing "seed sets" and how this data demonstrates the rise and increasing sophistication of machine learning); *see also* GERALD E. ROSEN ET AL., FEDERAL EMPLOYMENT LITIGATION, CHAPTER 4-A. AMERICANS WITH DISABILITIES ACT (ADA) [4:929.2] (2023) (providing key pointers regarding the data used to train an artificial intelligence algorithm used for employment purposes.); *In Quest To Reduce Bias In Hiring, AI May Help and Hurt*, 31 NO. 7 CAL. EMP. L. LETTER 6 (2021) (noting that that "Any AI tool can only be as good—and as impartial" as the training data its provided).

146. *See* Scherer, *supra* note 145, at 13 (describing the techniques and information programmed into artificial intelligence); *see also* Daryl Lim, *AI & IP: Innovation & Creativity in an Age of Accelerated Change*, 52 AKRON L. REV. 813, 821 (2018) (explaining the foundational process by which predictive artificial intelligence works).

147. *See generally* Lim, *supra* note 146, at 821–22 (describing how machine learning algorithms operate).

generally is referred to as "machine learning."[148] The expectation is that successive iterations will converge on an algorithm that yields maximum predictive accuracy.[149]

## B. *Constrained Maximization*

Algorithms aid in numerous situations, such as when AI decides whether to reject or extend offers to applicants. Another example where algorithms aid is to confront issues such as when AI decides whether a shipment of goods will sell more quickly in Store A or B. But the difference between the examples is that job applicants have rights that must be respected by the algorithm. For example, it would be unacceptable if an algorithm relied on an applicant's race or gender to determine a candidate's chances of success or failure on the job. As a result, the developer must exclude certain features from finding their way into the algorithm, regardless of their predictive accuracy. These considerations naturally "constrain" the features the model may include, and the model, therefore, is charged with maximizing its accuracy subject to excluding those features.

However, there is general agreement that "debiasing" an algorithm merely by omitting protected characteristics is ineffective in wringing bias from the system.[150] The problem is the algorithm is adept at finding correlates of these traits. For example, eliminating race as a potential feature could result in attendance at a historically Black college capturing the same demographic.[151] Analogizing the attempt to debias music auditions by having contestants perform behind a screen, one study examining this issue notes that contestants subsequently were instructed to remove their shoes before walking out onto the wood floor of the performance hall.[152] Judges were too perceptive to be debiased by a mere screen.

As these simple examples illustrate, debiasing an algorithm by rejecting features, both protected characteristics *and their correlates*, may not be feasible. But as the list of features may be constrained, the output or selections similarly may be constrained. For example, if an algorithm designed to select a baseball team existed, the developer would

148. *See generally id*; Harry Surden, *Machine Learning and the Law*, 89 WASH. L. REV. 87 (2014) (discussing the concepts underlying machine learning and its impact on the practice of law).

149. *See generally* Lim, *supra* note 146, at 821–22.

150. *In Quest To Reduce Bias In Hiring, AI May Help and Hurt*, *supra* note 145 (discussing "AI at its worst" and how bias can infuse artificial intelligence algorithms, pointing to an example of an AI recruiting tool that, purportedly neutral to gender biases, still found a way of "rejecting more women that it should have."

151. *See* BRIAN CHRISTIAN, THE ALIGNMENT PROBLEM: MACHINE LEARNING AND HUMAN VALUES 38–50 (2020).

152. *Id*. at 39.

want to constrain the output so that it identifies a group capable of playing each of the various positions on the team. Given the focus of this Article, one type of constraint is paramount: *What if the algorithm were constrained to identify female candidates at a rate no less than their representation among the incumbent workforce?* In other words, in assessing all possible algorithms, the computer could only consider those that selected this minimum percentage of females. Said otherwise, algorithms could be identified as "most accurate" only if, in addition to its accuracy, it represents an LDA to previous methods.[153] In effect, this constraint does not result in "unbiased" selections but only those less "biased" than those produced by previous selection procedures.

It is important to note that this proposed method differs from a quota. Unlike a quota, it does not mandate a minimum percentage of women, for example, among those selected. Rather, this minimum constraint is limited to the development (or estimation) process and does not require that when applied to any group of applicants, the same minimum percentage of women will be selected. Begging the reader's indulgence for another analogy, this equates to a golfer who seeks to perfect her swing by trying alternatives and then honing the one that results in hitting the longest ball. This method, of course, does not guarantee that this swing will be equally effective in every round of golf. The constrained algorithm, therefore, is a means of selecting among alternative *methods*, not outcomes.

But the expectation is that the algorithm selected by this method will be an LDA relative to the prevailing selection procedure. By design, algorithms that produce lower selection rates are not considered, and there is no ceiling on the ultimate representation of women among those selected. Further, there is no assurance the algorithm will find an LDA. That is, if the current complement of female employees is thirty percent, perhaps no algorithm will yield at least this percentage when estimated on seed and subsequent data, subject to the requirement that the algorithm is a significant predictor of success. But worst case, the employer will have exhausted the search for an LDA and may be reasonably sure none exists.

153. An important qualification is that there is no assurance.

## IV. CAN AN EMPLOYER UNILATERALLY ADOPT AN LDA?

### A. *The Guidelines Require Employers to Consider LDAs*

The Guidelines describe the employer's obligation to employ an LDA as follows:

> Consideration Of Suitable Alternative Selection Procedures.
>
> Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines.
>
> ********
>
> Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines.[154]

Title VII provides that an employer who fails to adopt an LDA that equally serves the employer's legitimate interests is liable to the plaintiff.[155] One of the remedies includes an injunction mandating the employer to adopt the LDA.[156] Yet, notwithstanding the Guidelines' requirement that employers search among LDAs, the Supreme Court has recognized the employer's pursuit of an LDA as a defense in only a narrow class of justified cases—when it may be a "voluntarily affirmative action plan," adopted as a remedial measure.[157] The paradoxical result is that an employer is obligated to adopt an LDA when proposed by the plaintiff but legitimately may fear liability for "reverse discrimination" were it to adopt unilaterally the very same selection procedure. Because constrained AI exists to sort among alternative methods according to

154. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3B (1978).

155. Allen v. City of Chicago, 351 F.3d 306, 312 (7th Cir. 2003).

156. Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 161 (2d Cir. 2001).

157. United Steelworkers v. Weber, 443 U.S. 193, 206 (1979); Johnson v. Transp. Agency, 480 U.S. 616, 639 (1987).

prescribed criteria, it is essential to understand the objectives Title VII condones and prohibits.

### B. Ricci v. DeStefano *and the Employer's LDA*

The only case concerning an employer's unilateral pursuit of an LDA to come before the Supreme Court since the Civil Rights Act of 1991 was *Ricci v. DeStefano*.[158] *Ricci* concerned the city of New Haven's decision to disregard the results of a selection exam used to promote firefighters.[159] Because few Black firefighters were among those who scored highest, the city was concerned it might be liable for disparate impact discrimination against the Black firefighters whose low scores made them ineligible.[160] As a result, the city refused to certify any of the test results, believing that, with more time, it ultimately would find an LDA.[161] The city was encouraged in that decision by outside experts who opined that such alternatives were available.[162] But rather than substituting an LDA prospectively, the city failed to certify the current results, depriving high-scoring white and Hispanic candidates of the promotions they otherwise would have received.[163] As a result, these firefighters sued the city for engaging in intentional racial discrimination, alleging that because of their race and ethnicity, they intentionally were denied promotions they otherwise would have received.[164]

The Supreme Court found in favor of the firefighters who had their promotions effectively rescinded, explaining:

> But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial preference that Congress has disclaimed, § 2000e-2(j) and is

158. 557 U.S. 557 (2009).

159. *Id.* at 574.

160. *Id.* at 587.

161. *Id.* at 563. Note that no firefighter was subject to a test that allegedly was less discriminatory. Although the city proposed alternatives, the Court found the evidence regarding the validity of these tests and their less-discriminatory impact to be largely speculative. *Id.* at 589–92.

162. *See id.* at 570–71 (explaining alternatives given by a psychologist who spoke with the New Haven Civil Service Board).

163. *See id.* at 592 ("Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City's discarding the test results was impermissible under Title VII.").

164. Ricci v. DeStefano, 557 U.S. 557, 562–63 (2009).

> antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race.[165]

Although the Court recognized that fear of disparate impact liability was a legitimate concern, it made clear that a numerical disparity, standing alone, was not a strong basis in evidence that justified that fear.[166] In effect, proof of a racial disparity was just one element of a disparate impact claim, and the city could avoid potential liability by demonstrating that the challenged selection procedure was job-related and consistent with business necessity. Because the city could not prove this defense would be unavailing by adducing a solid basis in evidence to that effect, it was impermissible for the city to engage in race-conscious actions. The Court stated, "[t]he City rejected the test results solely because the higher-scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action."[167]

When the challenged practice is a formal test, courts have required employers to prove the test is "valid," as that term is generally used by industrial organization psychologists and described in the Guidelines.[168] In *Ricci*, the city used a professionally developed test and could have relied on the assurances from the evidence provided by the test developer regarding the test's validity.[169] Instead, the city credited the contrary and disparaging statements of an expert who was a business rival of the test developer and more general concerns expressed by an academician regarding tests of this type.[170] These experts advised that the city should consider disregarding the written test in favor of an "Assessment Center,"

---

165. *Id*. at 585. The Supreme Court failed to characterize the quantum of proof corresponding to a "strong basis in evidence;" however, that issue was addressed by lower courts. The Second Circuit elaborated its views on the standard of proof, stating:

> [W]e hold that, under *Ricci*, a "strong basis in evidence" of non-job-relatedness or of a less discriminatory alternative requires more than speculation, more than a few scattered statements in the record, and more than a mere fear of litigation, but less than the preponderance of the evidence that would be necessary for actual liability. This is what it means when courts say that the employer must have an objectively reasonable fear of disparate-impact liability.

United States v. Brennan, 650 F.3d 65, 72 (2d Cir. 2011).

166. *Ricci*, 557 U.S. at 592.

167. *Id.* at 580. However, Justice Ginsburg's dissenting opinion, questions whether the city's actions are correctly described as discriminatory. *Id.* at 625 (Ginsburg, J., dissenting) ("A reasonable endeavor to comply with the law and to ensure that qualified candidates of all races have a fair opportunity to compete is simply not what Congress meant to interdict.").

168. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.5, 1607.14.

169. *See Ricci*, 557 U.S. at 564 ("[T]he City hired Industrial/Organizational Solutions, Inc. (IOS) to develop and administer the examinations.").

170. Ricci v. DeStefano, 557 U.S. 557, 570–72 (2009).

which grades candidates on how they react to events that simulate actual scenarios firefighters are likely to confront.[171] However, these experts suggested deploying this alternative prospectively and did not advocate disregarding the results of the current test. In any event, the Court found this testimony failed to provide a strong basis in evidence of the test's invalidity.[172]

Among the lessons from *Ricci* is that liability for disparate impact discrimination does not turn solely on the adverse impact associated with a selection procedure.[173] There are additional elements to the claim that also must have a strong basis in evidence to justify an employer's fear of liability. *Ricci* concerns the second element—whether an employer is likely to falter in proof that the selection procedure is valid.[174] But an employer also is liable if it fails to adopt an LDA of which it learns.[175] Identifying these viable alternatives is critical in the domain of AI.

An LDA developed algorithmically would derive from a process that differs dramatically from the facts of *Ricci*. Rather than relying on intuition, or common knowledge, as the Court described the less-than-scientific evidence adduced by the city,[176] AI can evaluate specific alternative criteria (supervised learning) and those no one has yet

---

171. *Id.* at 570–71.

172. *Id.* at 592. Although not particularly pertinent to our argument, it should be noted that the city may have fared better had it acted solely with regard to prospective exams., as noted by the Court:

> Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race. And when, during the test-design stage, an employer invites comments to ensure the test is fair, that process can provide a common ground for open discussions toward that end. We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.

*Id.* at 585.

173. *See id.* ("[B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.").

174. *See id.* at 589–91 (detailing why Respondents lacked a strong basis in evidence of an equally valid, less-discriminatory testing alternative that the City would have necessarily refused to adopt).

175. *See id*. at 578 ("[A] a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.").

176. *See Ricci*, 557 U.S. at 585 (finding no support that the employer had an objective, strong basis in evidence to find the tests inadequate).

suggested (unsupervised learning) and determine whether any is an LDA relative to the current method. Just as the city attempted in *Ricci*, an employer steeped in AI could engage in its own search for an LDA and assess whether failing to adopt this alternative would expose it to liability. Nothing in Title VII prohibits an employer from acting preemptively to defeat a disparate impact claim premised on an LDA, so long as there is a strong basis in evidence that the LDA exists.

An AI solution avoids the pitfalls identified by the *Ricci* majority. First, the LDA is developed based on seed data and other available information before the administration of the exam.[177] As such, no *ex-post* modification of an exam or questioning of its results is contemplated. Second, although exam administrators could develop the test with the intention of selecting *no less* than the same proportion of minorities and women who are currently employed, the proportions that actually pass the test are unconstrained and may, in fact, be below historical levels. Third, no individual is identified as a potential promotee before selecting the optimal LDA. As a result, no applicant can legitimately rely on the prospect of promotion before the algorithm decides the most accurate method of predicting success on the job, subject to the constraint that it must be an LDA.

Further, requiring an employer to wait and see if a plaintiff will come forward with its own LDA makes no sense. Just as it behooves an employer to assess for itself whether its selection procedure adversely impacts any demographic group, it also is sensible for an employer to act unilaterally in determining whether there is an LDA that might provide a trump card to a plaintiff who challenges the current selection procedure, despite its validity.

Not only must the algorithm identify a selection procedure yielding at least the same proportion of a particular demographic group as among incumbent employees, but this same algorithm must also do so with a degree of accuracy regarding predicted performance that is substantially equal to the current method. This requirement imposes an additional constraint on AI's search for an LDA. Yet, there appears to be no authority that explicates the standard by which an LDA would be "equally valid and less discriminatory."[178] The lack of authority is an important omission because employers are obligated to adopt only LDAs that are "substantially equal,"[179] yet no court has opined just how close is

177. We acknowledge that an AI approach likely is not helpful in choosing among alternative written tests because a sample of candidates must first take each alternative. AI would be most valuable when selections exist on data already in hand, whether these are prior performance ratings or data created by employees in the course of performing their jobs or living their lives.

178. *Ricci*, 557 U.S. at 592.

179. *See id.* at 632 n.11 (Ginsburg, J., dissenting) (citation omitted) (stating that employers

close enough. In terms pertinent to *Ricci*, an employer would be justified in abandoning its current selection procedure, for fear of losing a case to an LDA, only if it found an LDA that was "substantially equal," yet there is no guidance as to what is "substantial."

Two measures of numerical equality are prevalent in Title VII case law. One is a purely statistical standard. For example, one could determine whether the constrained AI method's predictive accuracy yields results within the margin of error associated with the current method. This translates to the "p-values," or "standard deviations" commonly referenced in the case law.[180] If the accuracy of the LDA is within "two standard deviations" of the current selection procedure, then by this criterion, the LDA would be deemed "substantially equal."[181]

However, that standard has a flaw. As sample sizes increase, other things remaining equal, the difference between alternative models deemed "substantially equal" diminishes.[182] Thus, two companies that differ in size by an order of magnitude could have the same difference in the accuracy of the LDA in terms of a common percentage of successes. Still, this same difference could be statistically significant in the case of the larger but not the smaller company. As a result, the larger company would lack a strong basis in evidence for adopting the LDA because the difference between the accuracy of the current method and the proposed alternative would be statistically significant.

An alternative criterion derives from the Guidelines. The Guidelines provide that government agencies generally will not investigate claims of disparate impact when the selection rate of the disfavored group is within eighty percent of the selection rate of the favored group.[183] Although this would permit a large employer to escape liability when the probability that the two groups receive equal treatment is negligible, it is a measure of "practical significance" and many courts have required evidence of

---

have an obligation to explore and implement alternative procedures that have less adverse impact and are substantially equally valid).

180. *See, e.g.*, Stagi v. Nat'l R.R. Passenger Corp., 391 F. App'x 133, 137 (3d Cir. 2010) ("There are two related concepts associated with statistical significance: measures of probability levels and standard deviation. Probability levels (also called 'p-values') are simply the probability that the observed disparity is random . . . . A standard deviation is a unit of measurement that allows statisticians to measure all types of disparities in common terms.").

181. *Id.*

182. Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 305, 318 (3d ed., 2011).

183. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.").

both statistical and practical significance to find a violation of Title VII.[184]

Because an employer can successfully defend a claim of disparate impact if the alternative selection procedure is "valid," as the Court instructed the city of New Haven in *Ricci*,[185] it is well to consider whether an AI algorithm is likely valid under the Guidelines. In important respects, AI procedures lie beyond the Guidelines, which is hardly surprising given the latter are nearly forty-five years old. The scientific discipline reflected in the Guidelines is industrial organizational psychology. Foundational to that discipline's methodology is a careful identification of the skills, effort, and responsibility required of a particular job by means of a "job analysis." The selection tool is developed to accurately identify candidates with those qualifications. In contrast, a job analysis is not included in most AI protocols.

Instead, AI seeks to identify *correlates* of successful job performance, whether these correlates bear a superficial relationship to what the job entails. This focus is consistent with "criterion validity" defined by the Guidelines.[186] Criterion validity does not rest on a job analysis but seemingly accommodates correlational methods. This method only asks whether the criterion measure is job-related but does not require proof that the *correlates* are job-related.[187] In principle, if left-handedness were correlated with the ability to perform a job-related mental task, "left-handedness" would pass muster in terms of criterion validity, although no one would know why the two were related.[188]

Although it is common to regard relationships based on understandings of causation as the gold standard and to be skeptical of merely correlative and often spurious connections, it is easy to understate the extent to which we rely on merely correlative relationships. Medicines have long been prescribed because they "work" without fully

184. *See, e.g.*, Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812, 818 (5th Cir. 1980) ("[T]he court found that there is a statistically significant correlation between test scores and experimental ratings, but that the correlation is of very low magnitude and lacks practical significance."); Hamer v. City of Atlanta, 872 F.2d 1521, 1525 (11th Cir. 1989).

185. *See* Ricci v. DeStefano, 557 U.S. 557, 587 (2009) ("That is because the City could be liable for disparate-impact discrimination only if . . . or if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt.").

186. Courts that have assessed the validity of a selection procedure regularly rely on the Guidelines for instruction. *See, e.g.*, Erdman v. City of Madison, 615 F. Supp. 3d 889 (W.D. Wis. 2022); Lopez v. City of Lawrence, No. CV 07-11693-GAO, 2014 WL 12978866, at *18 (D. Mass. Sept. 5, 2014), *aff'd sub nom.*, Lopez v. City of Lawrence, 823 F.3d 102 (1st Cir. 2016).

187. 29 C.F.R. § 1607.15.

188. *But see* Michael Selmi, *Algorithms, Discrimination and the Law*, 82 OHIO ST. L.J. 611, 641 (2021) ("In no case has the defendant defended against a disparate impact challenge by arguing that even though we cannot explain our process, we know it works, and the reason we know it works is because that is what it was designed to do.").

understanding why and how they alleviate pain or affect a cure.[189] Confidence comes from repeated instances of similar and predictable results that attend their use. Why a rooster crows when the sun rises may be beyond our understanding, but that lack of knowledge might not inhibit us from accurately setting our watches according to rooster time. We regularly rely on connections we do not fully understand, guided by their predictable nature.[190] As it relates to AI, the issue is whether the correlations discovered by the algorithm are persistent and reliable.

For example, we previously hypothesized that computer programmers who visit certain websites seem to excel. These websites do not teach programming but rather are places programmers prefer to visit, much like their favorite bars. But like bars, these favored websites go in and out of fashion. If an algorithm continues using visits to a now unfashionable website to index the best programmers, it will soon target the wrong people. Although the feedback loop inherent in machine learning would recognize that fact and search for a more reliable index, if preferences change rapidly, the algorithm may lag behind reality and be in error systematically. This potential issue illustrates that the *persistence* of a correlation may be vital to determining the usefulness (i.e., reliability of an AI-based selection process).

One potential solution is to constrain further the criteria considered by the selection algorithm. Just as administrators can instruct an algorithm to ignore a candidate's zip code for fear it is too highly correlated with race or ethnicity, so too can the algorithm be constrained to consider features that are more likely to reflect job performance rather than the idiosyncrasies of employees. For example, administrators can instruct the algorithm to ignore data regarding recreational behavior. Although this nudges the algorithm towards factors that might emerge from a job analysis, the critical point is that algorithms and AI are not *per se* suspect because these methods can accommodate wide-ranging concerns. Instead, the evaluation of selection procedures should be addressed in

189. Carolyn Y. Johnson, *One big myth about medicine: We know how drugs work*, WASH. POST (July 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/07/23/one-big-myth-about-medicine-we-know-how-drugs-work/ [https://perma.cc/A3MQ-2K3Z] ("Knowing why a drug works has historically trailed the treatment, sometimes by decades. Some of the most recognizable drugs -- acetaminophen for pain relief, penicillin for infections, and lithium for bipolar disorder, continue to be scientific mysteries today.").

190. This tendency, of course, may feed into superstitious behavior. For example, an athlete may believe wearing a "lucky" pair of socks leads to exceptional performance. Although nothing about the socks directly affects performance, lengthy literature regarding placebo effects suggests the correlation nevertheless may be meaningful. *See, e.g.*, Ted J. Kaptchuk, & Franklin G. Miller, *Placebo Effects in Medicine*, 373 N. ENGL. J. MED. 8–9 (2015); Karin Meissner et al., *Introduction to Placebo Effects in Medicine: Mechanisms and Clinical Implications*, NAT'L LIBR. OF MED. (June 27, 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3130411/ [https://perma.cc/T9Y9-63P9].

terms of a particular objective and any unique issues that arise in pursuing that objective utilizing AI.

## V. VOLUNTARY AFFIRMATIVE ACTION PROGRAMS AND AI

In some respects, voluntary affirmative action programs lie at the opposite end of the spectrum from LDAs. In searching for an LDA, the goal is to maximize the representation of a minority group among those most qualified and selected for hiring, promotion, etc.[191] There is little concern that the LDA will result in the overrepresentation of minorities, regardless of how it is measured. In contrast, the overrepresentation of minorities is a primary concern in setting goals that apply to a voluntary affirmative action plan.

The Supreme Court's decision in *United Steelworkers v. Weber* permits employers to set explicit but temporary goals as part of a voluntary affirmative action program for hiring women and minorities.[192] The purpose of the program must be to remedy the "conspicuous imbalance" of these groups in particular jobs.[193] The rationale lies in the Court's reading of § 703(j) of the Civil Rights Act.[194] The Court focused on the statute's prohibition against *requiring* employers to eliminate racial imbalances instead of prohibiting employers from acting *voluntarily* to eliminate racial imbalance.[195] But even voluntary programs are severely constrained in how they pursue racial balance.

The Court set out these constraints in *Johnson v. Transportation Agency*.[196] Courts must consider whether (1) the program's numerical goals are justified by a manifest imbalance that (2) reflects under-representation in traditionally segregated jobs, and if so, (3) whether the plan unnecessarily trammels the rights of third parties or creates an

191. *Section IV Legal Manual*, JUSTIC.GOV, https://www.justice.gov/crt/fcs/T6Manual7 [https://perma.cc/YWV2-76MP] (last visited Mar. 26, 2023).

192. United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979). Scholars have also noted that *Ricci* may leave "ample room" for employers' voluntary compliance with Title VII. *See* Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L.J. 803, 832 (2020) ("The *Ricci* Court emphasized the importance of voluntary compliance as integral to Title VII's statutory scheme and clarified that its ruling left 'ample room' for employers' voluntary compliance efforts."). The author here posits that algorithmic affirmative action may be "justified" under this language found in dicta in *Ricci*. *Id*. However, while that "ample room" encompasses race-neutral methods with a race-aware goal of enhancing diversity or avoiding disparate impact, it "may not encompass voluntary efforts by an employer that include race-based methods." *Id*. at 834. The author nevertheless proceeds to posit that current Title VII affirmative action doctrine *already* "permits some uses of race-aware algorithmic fairness constraints, and that a clarification or modification to update the doctrine could justify algorithmic affirmative action more broadly." *Id*. at 834.

193. *Weber*, 443 U.S. at 209.

194. 42 U.S.C. § 2000e-2(j).

195. *Weber*, 443 U.S. at 205–06.

196. 480 U.S. 616 (1987).

absolute bar to their advancement.[197] In addition, the plan must exist to attain but not maintain greater representation of disadvantaged groups.[198]

A "manifest imbalance" is less onerous to prove than a *prima facie* statistical case of discrimination for at least two reasons. First, the comparison that establishes the imbalance need *not* be between those immediately eligible for hiring or promotion and those actually selected, as would be required for a *prima facie* case of discrimination. Instead, a comparison may exist between the incumbents and those in the labor force who possess the relevant qualifications. Although "statistical significance" is not necessary to establish a manifest imbalance, it appears sufficient.[199]

Second, an employer "need not point to its *own* prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part" to establish a manifest imbalance in traditionally segregated job categories.[200] This second reason reflects the reality that "[a] corporation concerned with maximizing return on investment, for instance, is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit."[201]

The "manifest imbalance" requirement and the "historically segregated jobs" requirements—the first two elements of the *Johnson* test—seem to have merged into one. For example, an Illinois district court approved a broad-brush comparison between the racial composition of flight attendants on dates 12 years apart, and in each instance, differences existed between the composition of incumbents and the general workforce.[202] This comparison rarely would be considered probative of discrimination in a suit alleging discriminatory hiring.[203]

In *Mackin v. City of Boston*, the district court compared the racial composition of the fire department in 1974 to the composition of the general population in that year and found evidence of historical segregation.[204] But these are quite close to the evidence establishing a manifest imbalance. As the Seventh Circuit observed:

---

197. *In re* Birmingham Reverse Discrimination Emp. Litig., 20 F.3d 1525, 1537 (11th Cir. 1994) (citing *Johnson*, 480 U.S. at 632, 637).

198. *Johnson*, 480 U.S. at 639.

199. *See id.* at 633 n.11 ("Of course, when there is sufficient evidence to meet the more stringent '*prima facie'* standard, be it statistical, nonstatistical, or a combination of the two, the employer is free to adopt an affirmative action plan.").

200. *Id.* at 630 (emphasis added).

201. *Id.* at 633.

202. Dix v. United Air Lines, Inc., No. 99 C 2597, 2000 WL 1230463, at *2–*4 (N.D. Ill. Aug. 28, 2000).

203. *See, e.g.*, Tagatz v. Marquette Univ., 861 F.2d 1040, 1045 (7th Cir. 1988) (holding that failure to control for other explanatory variables makes an expert's table "essentially worthless").

204. Mackin v. City of Boston, No. CIV. A. 89-2025-S, 1991 WL 349619 (D. Mass. June 21, 1991), *aff'd*, 969 F.2d 1273 (1st Cir. 1992), *opinion corrected* (July 20, 1992).

> the Supreme Court considered the degree to which statistical proof reflecting an underrepresentation of women in traditionally segregated jobs could justify an affirmative action plan. Specifically, the Supreme Court held that an employer need only show a "manifest imbalance" in order to adopt a voluntary affirmative action plan under Title VII. The Court noted further that the "imbalance need not be such that it would support a prima facie case against the employer [under Title VII]."[205]

Thus, proof of a "manifest imbalance" also may suffice to identify a "traditionally segregated job."[206]

An affirmative action plan avoids trammeling the rights of third parties when the remedial measures are temporary: intended to attain but not maintain a balanced workforce, and its goals regarding highly-skilled positions reflect the necessary qualifications. For if a plan fails to take differing qualifications into account in employment decisions, "it would dictate mere blind hiring by the numbers, for it would hold supervisors to 'achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants…'"[207] More specifically, courts consider three questions in determining whether a plan "unnecessarily trammels" the interests of the majority group:

> (1) Does it require their discharge and their replacement with new hires in the protected groups?
>
> (2) Does the plan create an absolute bar to their employment?
>
> (3) Is the plan a temporary measure designed to achieve balanced employment or is it intended to *maintain* a balanced workforce?[208]

Applying those principles, the *Johnson* court approved the voluntary plan at issue and summarized its reasons:

> The Agency in the case before us has undertaken such a voluntary effort, and has done so in full recognition of both the difficulties and the potential for intrusion on males and nonminorities. The Agency has identified a conspicuous

205. Shidaker v. Tisch, 833 F.2d 627, 630 (7th Cir. 1986) (citing Johnson v. Transp. Agency, 480 U.S. 616, 631 (1987)).

206. *Johnson*, 480 U.S. at 620.

207. *Id.* at 636 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986)).

208. *See* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (holding that the plan in question did not unnecessarily trammel the rights of white employees for these three reasons).

> imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, however, that employment decisions may not be justified solely by reference to this imbalance, but must rest on a multitude of practical, realistic factors. It has therefore committed itself to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position. As both the Plan's language and its manner of operation attest, the Agency has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.[209]

But as the dissenters in *Weber* cautioned, permissible goals often are indistinguishable from impermissible quotas.[210] For example, the Eleventh Circuit found that what an affirmative action plan described as a goal had in practice become a quota: "[h]ere, by contrast, the annual appointment 'goals' have been applied as rigid quotas. In the early 1980s, the city mechanically appointed equal numbers of Blacks and whites to fire department positions without any consideration of relative qualifications in order to meet the stated fifty-percent 'goal.'"[211] Whether a goal is a quota may differ in the eyes of the beholder. Thus, in *Local 28 of Sheet Metal Workers' International Association v. EEOC*, Justice O'Connor unhesitatingly labeled as a quota what the plurality characterized as a goal.[212]

Using AI, an employer can assure the court that its selections are not quotas and will not morph into quotas, intentionally or not. The constraints embedded in an algorithm are *ex-ante*—exist before the actual selections are determined. Accordingly, the minimum representation of disfavored groups—the goal of the affirmative action plan—is specified in the *development* of the algorithm and is not used to adjust selections *post hoc*.

## CONCLUSION

As interpreted by the Supreme Court, Title VII recognizes two instances in which employers may engage in minority-conscious

209. *Johnson*, 480 U.S. at 640–41.

210. *Weber*, 443 U.S. at 254–55 (discussing the difficulty the Court's holding will have on distinguishing what is permissible and impermissible under Title VII).

211. Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1576 (11th Cir. 1994); *see also* Middleton v. City of Flint, 92 F.3d 396, 411 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (examining a racial quota system that mandated fifty percent of police officers needed to be in specified minority groups).

212. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 489 (1986). Note, as well, the distinctions she draws between a "goal" and a "quota." *See generally id.*

decision-making. The first derives from *Ricci v. DeStefano*. It permits employers to engage in intentional acts that otherwise would be judged discriminatory when there is a strong basis in evidence that had it failed to do so, it would be liable for disparate impact discrimination. The *Ricci* decision turned on the finding that the city of New Haven lacked a strong basis in evidence that its promotional exam was invalid. Therefore, it was impermissible to engage in intentional discrimination to avoid what would have been an insubstantial claim of disparate impact discrimination. Although the Court further considered the merits of alternative selection procedures, nothing suggested the plaintiffs proffered a viable alternative that the city should have adopted.

This Article suggests that an employer should not have to await a proposal from a plaintiff to learn whether an LDA exists. The Guidelines and various lower court decisions support this preemptive search. Upon identifying an LDA, an employer would have a strong basis in evidence that it could be liable under Title VII should it refuse to adopt it. AI provides a mechanism that should prove effective in searching for an LDA that satisfies the employer's legitimate needs.

We also considered the Supreme Court's parameters on voluntary affirmative action plans under Title VII. AI may be well-suited to this purpose because it can potentially identify a selection procedure that intrudes most lightly on the legitimate expectations of favored groups and does not establish quotas or require the alternative selection procedure to persist once there is parity.

Yet, AI is not a panacea. There is no guarantee that AI will identify an LDA in all circumstances—no equally efficient selection procedure may exist. However, if there is such a method, then AI may be the best means to find it.

# YOU BELONG WITH ME: THE BATTLE FOR TAYLOR SWIFT'S MASTERS AND ARTIST AUTONOMY IN THE AGE OF STREAMING SERVICES

*Kylee Neeranjan*[*]

"I think artists deserve to own their work. I just feel very passionately about that."[1]

Abstract

Taylor Swift released six chart-topping albums during the tenure of her first recording contract with Big Machine Records, LLC. Upon expiry of the initial contract, Swift made a new home with Republic Records and contracted for her retained ownership of the masters for future works. Soon after, the masters to Swift's first six albums were sold to an investment fund, preempting Swift from ownership. In an effort to regain control over her life's work, Swift launched an initiative to re-record each of her first six albums. This note argues that copyright laws enforce a pervasive power dynamic between musicians and record labels, preventing artists from meaningful ownership over their creative accomplishments. Just as the methods for music production and consumption have evolved over time, the laws governing music copyright should evolve accordingly.



---

* Kylee Neeranjan graduated *cum laude* from the University of Florida Levin College of Law with her Juris Doctorate in May 2023. During law school, she was an Associate Justice on the UF Supreme Court, the Fall 2022 President of Florida Blue Key, and inducted into the UF Hall of Fame. She is currently an associate at Holland & Knight, LLP in Fort Lauderdale, Florida. This note was written in the Spring of 2021, predating Taylor Swift's Midnights album, The Eras Tour, and re-recordings subsequent to Red (Taylor's Version). Neeranjan thanks Professor Sabrina Lopez, her faculty advisor, and the members of the Journal of Law and Public Policy for their feedback and hard work. A final thank you to Neeranjan's mentors, Samantha Schosberg Feuer and Taylor Swift for always being there during law school. This note is dedicated to Neeranjan's parents because no thanks will ever be enough.

1. Interview by Robin Roberts with Taylor Swift, in New York, N.Y. (Aug. 22, 2019).

## I. I WROTE DOWN OUR SONG: A HISTORY OF MASTER RECORDINGS AND RELATED RIGHTS

"What do you sing on your drive home?"[2]

### A. *The History of Recorded Sounds*

Thomas Edison, the man of a thousand patents, laid the foundation for music recording and reproduction with the advent of the phonograph in 1877.[3] Edison wrapped tinfoil around a cylindrical, rotating drum.[4] As it rotated, the drum made contact with a metal stylus, which moved in response to an operator speaking into a diaphragm on the other end.[5] The movement of the stylus on the tinfoil vibrated the diaphragm, driving air in and out of the mouthpiece, recreating the inputted sound.[6] Though the resulting "Mary had a little lamb" was barely audible, Edison *technically*

2. TAYLOR SWIFT, *Mad Woman*, *on* FOLKLORE (Republic Records 2020).

3. Roger Beardsley & Daniel Leech-Wilkinson, *A Brief History of Recording to ca. 1950*, CHARM, https://charm.rhul.ac.uk/history/p20_4_1.html [https://perma.cc/KA37-BPRC].

4. *Id.*

5. *Id.*

6. *Id.*

managed to be the first to reproduce a recorded sound with this tinfoil contraption.[7] Alexander Graham Bell and Charles Tainter upgraded Edison's tinfoil materials with a hard-wax phonograph, improving sound quality tremendously.[8]

The technology evolved over the next few decades when Emil Berliner developed the gramophone in the late 1880s.[9] Simpler to playback and capable of cheap mass production, the gramophone played sound through the creation of metal discs with etched grooves, which could be easily copied and reproduced by creating a negative version with ridges mirroring the original grooves.[10] The first "celebrity" gramophone recordings featured the voices of the Imperial Russian Opera at the start of the 20th century.[11] The use of the hard-wax masters became popular with American recording studios shortly after and remained the preferred method until the early 1920s when two engineers at Bell Telephone Labs developed a method for recording that used purely electronic components.[12] This method of recording, capable of producing clearer sound than the aforementioned mechanical varieties, enabled record companies to capture more of the musician in the studio.[13]

The age of vinyl commenced in the 1950s and dominated through the 1980s until CDs replaced vinyl LPs.[14] In the midst of this, sound recordings first entered into copyright law in the 1970s.[15] Prior to February 15, 1972, individual state laws dictated copyrights for sound recordings.[16] The Copyright Act of 1976 provided the basic framework for modern copyright laws.[17]

---

7. *Id.*
8. *Id.*
9. Beardsley & Leech-Wilkinson, *supra* note 3.
10. *Id.*
11. *Id.*
12. *Id.*
13. Stewart Hilton, *The History of Recorded Music*, MUSICAL U, https://www.musical-u.com/learn/history-of-recorded-music/ [https://perma.cc/KJV7-M9MZ] (last visited Mar. 2, 2023).
14. *Id.*
15. Amanda Jenkins, *Copyright Breakdown: The Music Modernization Act*, LIBR. OF CONG. BLOGS (Feb. 5, 2019), https://blogs.loc.gov/now-see-hear/2019/02/copyright-breakdown-the-music-modernization-act/ [https://perma.cc/NH7T-Y9SA].
16. *Id.*
17. *Copyright Law of the United States (Title 17)*, U.S. COPYRIGHT OFF., https://www.copyright.gov/title17/ [https://perma.cc/K8M3-2TEU] (last visited Mar. 28, 2023).

## B. *Music Recordings Today*

Today, every song has two copyrights: one for the sound recording and one for the composition.[18] A "master recording" is a song or performance's official, original sound recording.[19] Music critic Dan DeLuca opined that masters are "the most authentic superior sonic account of the song. Everything else is a copy, and after that, in the digital world, a copy of a copy."[20] These master recordings are commonly referred to as "masters" and can be played back and reproduced.[21] Ownership of an artist's masters furnishes legal rights to license the recordings to third parties and collect royalties on any such licensing.[22]

When signing recording artists, music labels will leverage the master rights to recordings for a finite time period with the opportunity for a full-time career as a musician.[23] In exchange for the rights to the artist's master recordings, music labels will provide the artist with an advance payment, recoupable against the royalties earned from sales.[24] The allure of the advance, and the potential for a promising career, often overshadow the negative and restrictive implications that come with signing away the rights to an artist's masters. Once under contract, artists cannot release records with another label and forfeit ownership of the recording made under contract to the record label.[25] Often, the reassignment of master recording rights accompanying recording contracts lasts perpetually.[26]

Generally, a copyright grants authors the rights to reproduce the work, prepare derivative works, distribute copies of the work, publicly perform the work, and publicly display the work.[27] The owners of master

---

18. Evie Bloom, *What Does It Mean to Own Your Masters?*, AMUSE, https://www.amuse.io/content/owning-your-masters?cn-reloaded=1 [https://perma.cc/SED3-7C6D] (last visited Mar. 28, 2023).

19. *Id.*

20. Seraphina DiSalvo, *What Is a Master Recording And Why Is Taylor Swift So Mad Hers Just Got Sold?*, PHILA. INQUIRER, https://www.inquirer.com/entertainment/music/taylor-swift-master-recordings-scooter-braun-20190702.html [https://perma.cc/W7ED-KF98] (last updated July 2, 2019, 10:33 AM).

21. *What Is the Difference Between Master Recordings and Music Publishing?*, SONGTRUST, https://help.songtrust.com/knowledge/what-is-the-difference-between-master-recordings-and-music-publishing [https://perma.cc/CNY4-R8X2] (last visited Mar. 28, 2023).

22. Bloom, *supra* note 18.

23. *Why Owning Your Master Recordings Means Everything*, AWAL (Sept. 19, 2018), https://www.awal.com/blog/maintaining-ownership-rights-as-an-artist [https://perma.cc/9P4A-M964].

24. *Id.*

25. *Id.*

26. *Id.*

27. U.S. COPYRIGHT OFF., HOW SONGWRITERS, COMPOSERS, AND PERFORMERS GET PAID 3 (2020), https://www.copyright.gov/music-modernization/educational-materials/musicians-income.pdf [https://perma.cc/MC9P-TKVV]; 17 U.S.C. § 106.

recordings have no public display rights and a limited public performance right.[28]

Master recording rights are distinct and separate from the publishing rights accompanying the musical work, including the notes, lyrics, and melody.[29] These composition rights are vested in the songwriters, producers, and publishers of a given song.[30] These stakeholders have the exclusive right to control the reproduction and redistribution of the work, as well as the right to perform the work publicly.[31] Record labels and music publishers typically favor the master recording rights to the detriment of the author's publishing rights because these entities make more money from the recordings than the publishing.[32]

The copyright for a master recording cannot be used in substitution for the copyright of the musical work.[33] Similarly, composition rights protecting the underlying musical work cannot protect the recorded performance of a given composition.[34]

## II. THERE'S NOTHING LIKE A MAD WOMAN: TAYLOR SWIFT'S DECISION TO RE-RECORD HER FIRST SIX ALBUMS

"He's got my past frozen behind glass, but I've got me."[35]

### A. *The Fallout*

The love story between Taylor Swift (Swift) and music executives like Scott Borchetta of her former record label, Big Machine Records, LLC (Big Machine), was tainted by bad blood during the summer of 2019.[36] In 2005, at the start of her career, Swift signed a contract with Big Machine, stipulating that the record company would retain ownership of

28. U.S. COPYRIGHT OFF., *supra* note 27.

29. *Id.*; Bloom, *supra* note 18; Jenkins, *supra* note 15.

30. Lisa A. Alter, *Protecting Your Musical Copyrights*, WIXEN MUSIC (2012), https://www.wixenmusic.com/copyright/protecting-your-musical-copyrights [https://perma.cc/M2JC-H3Z3].

31. Camille N. Anidi, *The Difference Between the Underlying Composition and the Master Recording*, ANIDI L. (Nov. 16, 2020), https://www.anidilaw.com/blog/the-difference-between-the-underlying-composition-and-the-master-recording [https://perma.cc/M77V-WZM7].

32. *Music Streaming and Its Impact on Composers & Songwriters*, ECSA (May 6, 2021), https://composeralliance.org/news/2021/5/music-streaming-and-its-impact-on-composers-songwriters/ [https://perma.cc/DJ3A-FZBR].

33. Anidi, *supra* note 31.

34. *Id.*

35. TAYLOR SWIFT, *It's Time To Go*, *on* EVERMORE (DELUXE VERSION) (Republic Records 2020).

36. *See* Nicholas Hautman, *Taylor Swift's Fallout with Big Machine Records, Scooter Braun and Scott Borchetta: Everything We Know*, U.S. WEEKLY (June 23, 2021), https://www.usmagazine.com/celebrity-news/pictures/taylor-swift-big-machine-records-fallout-everything-we-know/ [https://perma.cc/9DNW-HB46] (explaining the conflict over the acquisition of Swift's master recordings).

the master recordings for the length of a thirteen-year term, an ode to Swift's favorite number.[37] The contract also contained an "original production clause," which essentially prohibited Swift from making any future songs sound *exactly* like the original master recordings that Big Machine owned.[38] The full contract remains private.[39]

During her tenure with Big Machine, Swift released six studio albums: *Taylor Swift*, *Fearless*, *Speak Now*, *Red*, *1989*, and *Reputation*; Swift is credited as a songwriter or co-songwriter on each album.[40] Swift won ten Grammys and earned thirty Grammy nominations for the work she authored and recorded during this time.[41]

Upon the expiration of the thirteen-year term of the Big Machine contract, Swift opted against renewing with Big Machine and instead made a "new home" at Republic Records and Universal Music Group.[42] The new agreement provided that Swift would "own all of [her] master recordings . . . from now on"[43] and reflected the shift in audience consumption mechanisms with an intentional focus on revenues from streaming services.[44] For example, Swift specifically negotiated for the distribution of money to her when Spotify sells shares.[45]

---

37. Brittany Spanos & Amy X. Wang, *Taylor Swift 'Absolutely' Plans to Re-Record Catalog After Big Machine Deal*, ROLLING STONE (Aug. 21, 2019), https://www.rollingstone.com/music/music-news/taylor-swift-absolutely-plans-to-re-record-catalog-after-big-machine-deal-874173/ [https://perma.cc/EX3M-9WRJ]; Jocelyn Vena, *Taylor Swift Explains Why 13 Is Her Lucky Number*, MTV (May 7, 2009, 1:18 PM), https://www.mtv.com/news/1610839/taylor-swift-explains-why-13-is-her-lucky-number/ [https://perma.cc/8F23-LXN4]. The article quoted Swift, stating "[b]asically whenever a 13 comes up in [her] life, it's a good thing." *Id.* Swift elaborated that "[e]very time [she'd] won an award [she'd] been seated in either the 13th seat, the 13th row, the 13th section[,] or row M, which is the 13th letter." *Id.*

38. Starr Bowenbank, *Exactly How Can Taylor Swift Rerecord All Six of Her Old Albums?*, COSMOPOLITAN (Nov. 12, 2021), https://www.cosmopolitan.com/entertainment/music/a35491914/how-taylor-swift-will-rerecord-old-albums-explained/ [https://perma.cc/B3S3-HMMN].

39. Jeffrey H. Brown, *The Legal Take on the Taylor Swift Rerecording Dispute*, BEST LAW. (Dec. 5, 2019, 8:00 AM), https://www.bestlawyers.com/article/taylor-swift-recording-contract-controversy/2747 [https://perma.cc/M9ST-7F98].

40. Emma Nolan, *Does Taylor Swift Write Her Own Songs? Full List of Her Songwriting Credits*, NEWSWEEK (Jan. 25, 2022), https://www.newsweek.com/does-taylor-swift-write-own-songs-full-list-songwriting-credits-damon-albarn-1672546 [https://perma.cc/7LZQ-N3T2].

41. *Taylor Swift*, RECORDING ACAD. GRAMMY AWARDS, https://www.grammy.com/artists/taylor-swift/15450 [https://perma.cc/8VWY-3424] (last visited Aug. 04, 2023).

42. Taylor Swift (@taylorswift), INSTAGRAM (Nov. 19, 2018), https://www.instagram.com/p/BqXgDJBlz7d/ ; Nicholas Hautman, *Taylor Swift Changes Record Labels 13 Years After Signing with Big Machine: 'My New Home'* (Nov. 19, 2018), https://www.usmagazine.com/entertainment/news/taylor-swift-changes-record-labels-after-13-years-my-new-home/ [https://perma.cc/XBT5-6HQ9].

43. Hautman, *supra* note 42.

44. *See id.* ("[Swift] pushed for Universal to agree that "any sale of their Spotify shares [will] result in a distribution of money to their artists" and it is "non-recoupable" against what those performers owe the label.").

45. *Id.*

On June 25, 2019, Big Machine notified all its shareholders of a pending deal with Ithaca Holdings, LLC (Ithaca), an "investment holding company focused on the media and entertainment and consumer brand sectors" founded by music executive Scooter Braun.[46] Swift's father, Scott Swift, was among the shareholders of Big Machine, who met on June 28, 2019, and ultimately approved the deal with Ithaca.[47] The sale transferred ownership of the master recordings of Swift's first six albums to Ithaca and Braun.[48]

The deal went public on June 30, 2019, and Swift took to Tumblr, a blog platform she used to connect with fans ("Swifties"), to express her immense dissatisfaction with the deal; in fact, the sale of her masters to Braun was Swift's "worst case scenario."[49] A very public scuffle ensued, and other well-known artists defended either Swift or Braun on social media, including Cher and Justin Bieber.[50]

The complications from the deal with Ithaca had only just begun. Because Swift did not own the rights to her masters, she could not perform a medley of her old songs as she planned to celebrate winning the "Artist of the Decade Award" at the 2019 American Music Awards (AMAs).[51] Swift again took to Tumblr pleading with Swifties to "let Scott Borchetta and Scooter Braun know how [they] feel about this."[52] Days before the performance, the executives announced they had "come to terms on a licensing agreement that approves their artists' performances

---

46. *Ithaca Holdings*, CRUNCHBASE, https://www.crunchbase.com/organization/ithaca-holdings [https://perma.cc/W7W3-S7FD] (last visited Mar. 29, 2023).

47. Scott Borchetta, *So, It's Time for Some Truth...*, BIG MACH. LABEL GRP. (June 30, 2019), https://www.bigmachinelabelgroup.com/news/so-its-time-some-truth [https://perma.cc/ 2FTQ-5PAH]. *But see* Taylor Swift, TUMBLR (June 30, 2019), https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my [https://perma.cc/8UXA-RJ6A] (explaining that Swift "learned about Scooter Braun's purchase of [her] masters as it was announced to the world).

48. Talia Smith-Muller, *3 Lessons Taylor Swift's Rift with Big Machine Can Teach Us About Record Contracts*, BERKLEE ONLINE (Dec. 20, 2019), https://online.berklee.edu/takenote/3-lessons-taylor-swifts-rift-with-big-machine-can-teach-us-about-record-contracts/ [https://perma.cc/3YM3-XUHP].

49. Swift, *supra* note 47.

50. Ellie Woodward, *Here Are All the Celebs Who've Spoken Out in Support of Taylor Swift After She Exposed Scott Borchetta and Scooter Braun Again*, BUZZFEED (Nov. 15, 2019), https://www.buzzfeed.com/elliewoodward/celebs-taylor-swift-scott-borchetta-scooter-braun-drama [https://perma.cc/U8GA-GF7P]; Madison Feller, *Here Are All the Celebrities Who Have Defended Taylor Swift and Scooter Braun so Far*, ELLE (July 1, 2019), https://www.elle.com/culture/celebrities/a28242033/celebrities-defending-taylor-swift-scooter-braun/ [https://perma.cc/ARY3-AYXD].

51. Taylor Swift, TUMBLR (Nov. 14, 2019), https://taylorswift.tumblr.com/post/189068976205/dont-know-what-else-to-do [https://perma.cc/A828-QZRS] ("I'm not allowed to perform my old songs on television because [Scott Borchetta and Scooter Braun] claim that would be re-recording my music before I'm allowed to next year.").

52. *Id.*

to stream post-show and for re-broadcast on mutually approved platforms," including the AMAs.[53] Swift took the AMAs stage, donning a white shirt etched with the titles of the six albums she did not own the masters for.[54]

## B. *The Re-Recordings*

The terms of Swift's original contract with Big Machine stipulated that she could not re-record any of her first five albums until November 2020.[55] Swift's sixth album could not be re-recorded until November 2022.[56] Swift repeatedly and publicly expressed her genuine intent to re-record and re-release her original works once it was legal.[57] Coincidentally around October 2020, seventeen months after acquiring them from Big Machine, Braun sold the six masters to an investment fund for over $300 million.[58]

Shortly thereafter, Swift officially announced she was "rerecording all of [her] old music" on November 22, 2020, during a virtual acceptance speech at the AMAs as she was declared the 2020 "Artist of the Year."[59] However, the "original production clause" from Swift's 2005 agreement with Big Machine provided that the re-recordings must sound distinguishable from the original masters.[60]

On February 11, 2021, Swift announced that her "new version" of her second album, *Fearless (Taylor's Version)*, was finished.[61] In the Instagram post's caption, Swift added that her version of the album

---

53. Neha Prakash, *2019 AMAs: Taylor Swift Shut Down Feud over Music Rights with Career-Spanning Medley*, GLAMOUR (Nov. 24, 2019), https://www.glamour.com/story/taylor-swift-performance-2019-amas [https://perma.cc/Q48U-DX3Z].

54. *Id.* (noting that Swifties call these coy references to other Taylor Swift works "Easter Eggs").

55. Smith-Muller, *supra* note 48.

56. Jessica Derschowitz, *So...Where Are We At With the Taylor Swift Rerecordings?*, VULTURE, https://www.vulture.com/2023/08/taylor-swift-rerecorded-albums-which-album-is-next.html [https://perma.cc/YM8S-BW48] (Aug. 10, 2023).

57. Spanos & Wang, *supra* note 37.

58. Shirley Halperin, *Scooter Braun Sells Taylor Swift's Big Machine Masters for Big Payday*, VARIETY (Nov. 16, 2020), https://variety.com/2020/music/news/scooter-braun-sells-taylor-swift-big-machine-masters-1234832080/ [https://perma.cc/JD4P-ZDWV]; *see* Taylor Swift (@taylorswift13), TWITTER (Nov. 16, 2020), https://twitter.com/taylorswift13/status/1328471874318311425 [https://perma.cc/L2PF-E887] (discussing Swift's negotiations with Scooter Braun and the sale to Shamrock Holdings).

59. Sarah Curran, *Taylor Swift Announces That She's Re-Recording All of Her Old Music While Accepting Artist of the Year at AMAs*, ET CANADA (Nov. 22, 2020), https://etcanada.com/news/716392/taylor-swift-fans-share-their-theories-about-her-not-a-lot-going-on-post/ [https://perma.cc/34M5-Q7W7].

60. Bowenbank, *supra* note 38.

61. Taylor Swift (@taylorswift), INSTAGRAM (Feb. 11, 2021), https://www.instagram.com/p/CLJzk9MjcCe/ [https://perma.cc/BHE7-CEU7].

included "6 never before released songs from the vault," and she released *Love Story (Taylor's Version)* later that same night.[62] The full album, *Fearless (Taylor's Version)*, dropped on April 9, 2021.[63] The release was Swift's third number-one album in under nine months.[64]

On June 18, 2021, Swift announced that *Red (Taylor's Version)* would drop on November 12, 2021.[65] Again, Swift teased on Instagram that the re-recording would contain never-before-released songs "from the vault," this time nine tracks, including a ten-minute version of *All Too Well*, a song many Swifties claim as one of Swift's best works.[66] *Red (Taylor's Version)* became Swift's fourth number-one album in sixteen months.[67]

Swift still has four original albums for which she has yet to release a *Taylor's Version*. Swifties have speculated about which release is next, making expert utilization of the many "Easter egg" hints Swift herself has seemingly dropped along the way.[68] Swift's sixth studio album, *Reputation*, seems the least likely for re-release as recording contracts often require artists to wait at least five years after a project's release date before even beginning to re-record.[69] As such, *Reputation*'s November

62. *Id.*

63. Taylor Swift (@taylorswift), INSTAGRAM (Apr. 9, 2021), https://www.instagram.com/p/CNbnuyojgrZ/ [https://perma.cc/8S9S-2N4U].

64. Ben Sisario, *Taylor Swift's Rerecorded 'Fearless' Is the Year's Biggest Debut So Far*, N.Y. TIMES (Apr. 19, 2021), https://www.nytimes.com/2021/04/19/arts/music/taylor-swift-fearless-taylors-version-billboard-chart.html [https://perma.cc/WWW9-228B]. Swift released albums *folklore* and *evermore*, under the new contract with Universal and Public, on July 24, 2020 and December 11, 2020, respectively. Jonathan Ponciano, *Taylor Swift Announces Surprise Release of 9th Album 'Evermore' on Friday*, FORBES (Dec. 10, 2020), https://www.forbes.com/sites/jonathanponciano/2020/12/10/taylor-swift-announces-surprise-release-of-9th-album-evermore-on-friday/ [https://perma.cc/CL7J-8F8B]. *folklore* won Album of the Year at the Grammys and *evermore* was nominated for the same award. Daniela Avila, *Taylor Swift Celebrates 'Evermore' 2022 Grammy Nomination: 'No Problems Today Just Champagne'*, PEOPLE (Nov. 23, 2021), https://people.com/music/grammys-2022-taylor-swift-celebrates-evermore-nomination/ [https://perma.cc/WYV8-FKF7].

65. Taylor Swift (@taylorswift), INSTAGRAM (June 18, 2021), https://www.instagram.com/p/CQRUBXtjZXT/ [https://perma.cc/63CW-CR8G].

66. Taylor Swift (@taylorswift), INSTAGRAM (Aug. 6, 2021), https://www.instagram.com/p/CSPEsteMmE5/ [https://perma.cc/E6BV-FX8S]; Ashley Boucher, *Taylor Swift Has a 10-Minute Version of Fan-Favorite Song 'All Too Well'*, PEOPLE (Nov. 19, 2020), https://people.com/music/taylor-swift-has-a-10-minute-version-of-fan-favorite-song-all-too-well/ [https://perma.cc/J6D2-LC5T].

67. Ben Sisario, *Taylor Swift Earns Her Fourth No. 1 in 16 Months with New 'Red'*, N.Y. TIMES (Nov. 22, 2021), https://www.nytimes.com/2021/11/22/arts/music/taylor-swift-red-taylors-version-billboard-chart.html [https://perma.cc/8YWG-2W7B].

68. *See* Eliza Thompson, *Which Taylor Swift Album Will Be Rerecorded Next? The Wildest Fan Theories and Speculation*, US WKLY., https://www.usmagazine.com/entertainment/pictures/which-taylor-swift-album-will-be-rerecorded-next-fan-theories/1989-2-13/ [https://perma.cc/JWD4-BMDR] (Apr. 14, 2023) (providing that "fans are already thinking about which one of her early albums she'll rerecord next").

69. *Id.*

2017 original release precluded Swift's ability to re-record it any time before November 2022.

## III. I PROMISE THAT YOU'LL NEVER FIND ANOTHER LIKE ME: COPYRIGHT TERMINATION LAW

"I've come too far to watch some namedropping sleaze tell me what are my words worth."[70]

### A. *Copyright Law Origins*

Copyright law has roots in the United States Constitution, specifically in Article I, Section 8, Clause 8.[71] The Founding Fathers reserved to the Legislature the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[72] Enactment of the United States' first Copyright Act was even on the agenda of the U.S. Congress' first convention in 1789.[73] Accordingly, the Copyright Act of 1790 furnished copyright protections for "maps, charts, and books."[74]

Since 1897, the owner of a copyrighted musical composition has retained the exclusive right "to perform the work publicly for profit."[75] By 1914, the number of performers and performances showcasing copyrighted music was so burdensome that, negotiation for licensed use of the copyrighted materials was practically impossible.[76] In response, the American Society of Composers, Authors, and Publishers assembled to serve as a "'clearing-house' for copyright owners and users to solve [the] problems" associated with the widespread performance of licensed music.[77]

The United States Copyright Office (USCO) provides that "[i]t is a principle of American law that an author of a work may reap the fruits of his or her intellectual creativity for a limited period of time."[78] The USCO also provides, in relevant part, that "in the case of sound recordings, [the owner of copyright has the exclusive right] to perform the work publicly

---

70. TAYLOR SWIFT, *The Lakes*, *on* FOLKLORE (DELUXE VERSION) (Republic Records 2020).

71. U.S. CONST. art. I, § 8, cl. 8.

72. *Id.*

73. Anandashankar Mazumdar, *Historic Court Cases That Helped Shape Scope of Copyright Protections*, LIBR. OF CONG. (Sept. 9, 2020), https://blogs.loc.gov/copyright/2020/09/historic-court-cases-that-helped-shape-scope-of-copyright-protections/ [https://perma.cc/84VB-WX9M].

74. *Id.*

75. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 4 (1979).

76. *Id.* at 4–5.

77. *Id.* at 5 (citing CBS v. Am. Soc'y of Composers, 400 F. Supp. 737 (S.D.N.Y. 1975)).

78. *A Brief History of Copyright in the United States*, U.S. COPYRIGHT OFF., https://www.copyright.gov/circs/circ1a.html [https://perma.cc/VT49-FAKM].

by means of a digital audio transmission."[79] Copyright claims are registered, and the USCO has recorded copyright-related documents.[80] Despite the long-recognized importance of copyright protections, protection for sound recordings under federal copyright laws was not recognized until 1971.[81]

Section 101 of the Copyright Act provides many relevant definitions for copyright law terms.[82] Sections 102 through 105 of the Copyright Act shed light on the subject matter of copyright.[83]

Exclusive rights afforded by copyright exist under Section 106 of the Copyright Act.[84] Specifically, this section provides the music copyright owner with the rights to reproduction,[85] adaptation,[86] public distribution,[87] public performance,[88] and public display.[89]

### B. *Theories of Copyright Law*

Several theories justify copyright law protections. Two, in particular, are geared specifically toward creators and authors of works.

Incentive theory, for example, serves as a utilitarian justification for copyright law.[90] Under incentive theory, one believes copyrights are necessary to solve the problem of public goods.[91] Public goods are "'non-rivalrous' (meaning that they can be enjoyed by an unlimited number of people) and 'non-excludable' (meaning that once they are made available to one consumer, it is challenging to prevent other consumers from gaining access to them)."[92] Music on a streaming platform would qualify as a non-rivalrous and non-excludable good. Incentive theory is purely consequentialist, believing that creators must receive intellectual

79. *Id.*
80. *Id.*
81. Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).
82. 17 U.S.C. § 101.
83. *Id.* §§ 102–105.
84. *Id.* § 106.
85. *Id.* § 106(1).
86. *Id.* § 106(2).
87. *Id.* § 106(3).
88. 17 U.S.C. § 106(4).
89. *Id.* § 106(5).
90. *See* JEANNE C. FROMER & CHRISTOPHER JON SPRINGMAN, COPYRIGHT LAW CASES AND MATERIALS 10 (Jeanne C. Fromer & Christopher Jon Springman, eds., vol. 5 2023) (stating that the utilitarian justification for copyright provides "that copyright contributes to the 'progress of Science' by maintaining adequate incentives to engage in the production of new artistic and literary works.").
91. *See* William Fisher, *Copyright Theory*, BERKMAN KLEIN CTR., https://cyber.harvard.edu/copyrightforlibrarians/Introduction [https://perma.cc/N9RM-LLZF] (last visited Aug. 7, 2023) (explaining how copyright law incentivizes people to continue producing works that would serve as public goods).
92. *Id.*

property protections to incentivize them to create their works.[93] An incentive-minded individual would think that a potential author might not spend all the time and money required to write a book or make a movie if others could freely make and sell copies.[94]

Personality theory, on the other hand, views creative works as personal manifestations of an author's personhood.[95] Under personality theory, authors have a continuing relationship and bond to their works and should be able to prevent any unapproved changes.[96] With this frame of mind, "[t]he originator of ideas should then be entitled to personal and [sic] control over their reputation and dignity under the joint forces of law and creativity. Essentially, an individual's personality traits are further 'materialized' as visual or tangible creative property."[97] Moral rights derive from personality theory, including "an author's rights to be credited for her work, to protect the integrity of her work, to determine when to publish a work, to demand that a work be returned, to be protected from excessive criticism[,] and to collect a fee when a work is resold."[98]

### C. *The Judiciary and Copyright Law*

The Supreme Court has addressed many copyright-related questions, opining that copyright law aims to "stimulate artistic creativity for the general public good."[99] In 1879, the Court set forth the "Idea/Expression Dichotomy" principle in its *Baker v. Selden* ruling, which provided that copyright only protected the expression of an idea rather than an idea itself.[100] The sentiment translates to Section 102(b) of the Copyright Act, which states, "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in

93. *Id.*

94. *See id.* ("To maximize social welfare, the government must somehow create an incentive for the novelist to write novels.").

95. *Id.*

96. *See* FROMER & SPRINGMAN, *supra* note 90, at 15 ("[B]ased on the view that 'to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment.'") (citation omitted).

97. Lily Yuan, *Personality Theory and Intellectual Property*, PERSONALITY PSYCH. (Feb. 3, 2020), https://personality-psychology.com/personality-theory-intellectual-property/ [https://perma.cc/66ZN-F6C7].

98. Jessica Meindertsa, *Theories of Copyright*, OHIO STATE UNIV, (May 9, 2014), https://library.osu.edu/site/copyright/2014/05/09/theories-of-copyright/ [https://perma.cc/Y3V9-6DRA].

99. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

100. Baker v. Selden, 101 U.S. 99, 107 (1879).

which it is described, explained, illustrated, or embodied in such work."[101]

The Court clarified that a copyright's originality level requires independent creation and a modicum of creativity because copyrights intend to protect "the fruits of intellectual labor."[102] This sentiment is reflected in Section 102(a) of the Copyright Act, stating that the protections are for "original works of authorship."[103] The elements of originality, notably, do not require *novelty*, just that the idea originated with the author.[104]

In *Eldred v. Ashcroft*, the Court upheld that the constitutional authority of Congress to "prescribe the duration of copyrights" for a "limited time" permitted enactment of the 1998 Copyright Term Extension Act (CTEA), which extended the term of copyrights to "life [of the author] plus 70 years" from the previous life plus fifty years standard.[105]

### D. *Copyright Termination*

The termination of a transferred copyright, made pre-January 1, 1978, is governed by Section 304 of the Copyright Act.[106] The section provides that:

> [T]he exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it . . . may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.[107]

For more modern creations, the language governing the termination of a transferred copyright made after January 1, 1978, is found in Section 203 of the Copyright Act.[108] Section 203 of the Copyright Act provides that:

> [T]he exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author . . . [may be terminated] at any time during a

101. 17 U.S.C. § 102(b).
102. *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879).
103. 17 U.S.C. § 102(a).
104. *Trade-Mark Cases*, 100 U.S. at 94.
105. Eldred v. Ashcroft, 537 U.S. 186, 193–94 (2003).
106. 17 U.S.C. § 304(c).
107. *Id.* § 304(c)(3).
108. *Id.* § 203.

> period of five years beginning at the end of thirty-five years from the date of execution of the grant.[109]

Essentially, authors who assign a copyright after 1978 can reclaim the copyright, terminating the assignment after thirty-five years have passed since assignment. Authors have a five-year window from assignment to do this, meaning from thirty-five to forty years after assignment. Notice of such termination shall be executed, in writing, "not less than two or more than ten years before" the thirty-five-year mark,[110] meaning from twenty-five to thirty-eight years after assignment. The USCO must have a record of the copy of notice before the effective date of termination.[111]

Termination rights are not alienable, as specified in Section 203(a)(5), which says "[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."[112]

Congress created a termination right for copyright law intending to protect creators against "unremunerative transfers . . . resulting in part from the impossibility of determining a work's value until it has been exploited."[113] The right of termination empowers recording artists and songwriters to regain control of their works by renegotiating contracted agreements or entering into entirely new agreements.[114] Such an opportunity effectively gives creators a second chance at a better deal.[115]

109. *Id.* § 203(a)(3).

110. *Id.* § 203(a)(4)(A).

111. *Id.*

112. 17 U.S.C. § 203(a)(5).

113. Ray Charles Found. v. Robinson, 795 F.3d 1109, 1112 (9th Cir. 2015) (citing H.R. REP. NO. 94-1476, at 124 (1976)).

114. Kenneth Abdo et al., *Termination of Music Copyright Transfers: The Renegotiation Reality*, ABA, https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/november-december/termination-music-copyright-transfers/ [https://perma.cc/5ARH-AQ3K].

115. Brittany L. Kaplan-Peterson, *Copyright Termination: A Primer*, CDAS (Jan. 18, 2017), https://cdas.com/copyright-termination-prime/ [https://perma.cc/CGG4-QARK].

## IV. ARE YOU READY FOR IT?: MASTER RECORDING RIGHTS DURING THE AGE OF STREAMING SERVICES

"Is it romantic how all my elegies eulogize me?"[116]

### A. *The Streaming Revolution*

Revenue from sales of recorded music increased each year from 2015 to 2021.[117] This recent growth can be attributed to a number of things, including a rise in piracy in the 2010s as consumers moved away from physical record consumption and the resulting popularity of streaming services for music consumption, like Spotify and Apple Music.[118]

A comparison of the statistics of Taylor Swift's studio album sales reflects the popularization of streaming services. Swift's 2006 debut album, *Taylor Swift*, sold 39,000 hard copies in its first week.[119] The 2008 release, *Fearless*, sold 592,300 hard copies.[120] Released in 2010, *Speak Now* sold 1.047 million copies.[121] The 2012 album, *Red*, sold 1.208 million copies.[122] *Reputation* sold around 1.2 million copies during its first week in 2017, and Swift kept the album off streaming services upon its release.[123] *Lover* saw 679,000 album sales and 226 million streams in its first week in 2019.[124] *Fearless (Taylor's Version)* brought 179,000

---

116. TAYLOR SWIFT, *The Lakes*, *on* FOLKLORE (DELUXE VERSION) (Republic Records 2020).

117. *See* Oscar Heanue, *Streaming Services Are the Future of the Music Industry, but They're Leaving Musicians Behind*, ON LABOR (Jan. 25, 2022), https://onlabor.org/streaming-services-are-the-future-of-the-music-industry-but-theyre-leaving-musicians-behind/ [https://perma.cc/2V6Q-TLPA] (outlining the resurgence of revenues from recorded music sales following decades-long lows in the early 2010s).

118. *Id.*; Katie Allen, *Piracy Continues to Cripple Music Industry as Sales Fall 10%*, GUARDIAN (Jan. 21, 2010), https://www.theguardian.com/business/2010/jan/21/music-industry-piracy-hits-sales [https://perma.cc/C8R7-9PCD].

119. Chris Harris, *Taylor Swift Scores First Chart-Topping Debut with Fearless*, MTV (Nov. 19, 2008), https://www.mtv.com/news/1599721/taylor-swift-scores-first-chart-topping-debut-with-fearless/ [https://perma.cc/Q2QT-VQH8].

120. *Id.*

121. Ben Sisario, *Taylor Swift Album Is a Sales Triumph*, N.Y. TIMES (Nov. 3, 2010), https://www.nytimes.com/2010/11/04/arts/music/04country.html? [https://perma.cc/EK6U-GW6U].

122. Keith Caulfield, *Taylor Swift's 'Red' Sells 1.21 Million; Biggest Sales Week for an Album Since 2002*, BILLBOARD (Oct. 30, 2012), https://www.billboard.com/music/music-news/taylor-swifts-red-sells-121-million-biggest-sales-week-for-an-album-since-2002-474400/ [https://perma.cc/4X8H-XT9R].

123. Andrew Flanagan & Sidney Madden, *First-Week Sales of Taylor Swift's 'Reputation' Vary Widely, Depending Who You Ask*, NPR (Nov. 21, 2017), https://www.npr.org/sections/therecord/2017/11/21/565761702/first-week-sales-of-taylor-swifts-reputation-vary-widely-depending-who-you-ask [https://perma.cc/NJD6-N482].

124. Brittany Hodak, *Why Taylor Swift's First-Week 'Lover' Sales Total Is a Big Deal*, FORBES (Sept. 1, 2019), https://www.forbes.com/sites/brittanyhodak/2019/09/01/why-taylor-

pure album sales and 142.98 million on-demand streams during its first week in 2021.[125] Swift also released *Red (Taylor's Version)* in 2021, which sold 369,000 copies and racked up 303 million streams in its first week.[126]

Globally, streaming services accumulated $13.4 billion in revenue in 2020, most of which attributes to paid monthly or annual subscriptions.[127] Spotify operates using a "freemium" business model, characterized by two different tiers of users; the first tier allows users to consume music on Spotify at no cost with advertisements, and the second tier requires a paid subscription for advertisement-free streaming.[128] Spotify generates revenue from the advertisements viewed by first-tier users and subscription payments made by second-tier users.[129]

The number of subscribers to streaming services grew by 109.5 million in 2021.[130] The ever-expanding audience of streaming services demands a catalog that grows accordingly. To keep up with the needs of its consumers, Spotify sees a new track uploaded to its platform every 1.4 seconds, meaning Spotify adds roughly 60,000 new tracks every day.[131] An evolving understanding of the law that governs music copyright should mirror this robust evolution of music consumption.

### B. *The New Value of Music*

The shift in the method of music consumption has fundamentally changed how music is valued. While in the past, album sales were the leading indicator of a particular album's success, the current metrics

swifts-first-week-lover-sales-total-is-a-big-deal/?sh=3f33264b749c [https://perma.cc/JQB5-6RSZ].

125. chart data (@chartdata), TWITTER (Apr. 18, 2021, 4:06 PM), https://twitter.com/chartdata/status/1383874683397840899 [https://perma.cc/8GNM-RX73].

126. Sisario, *supra* note 64.

127. Heanue, *supra* note 117.

128. *Premium,* SPOTIFY, https://www.spotify.com/us/premium/ [https://perma.cc/9BTM-KJK4] (last visited Feb. 27, 2023).

129. *See* E. Jordan Teague, *Saving the Spotify Revolution: Recalibrating the Power Imbalance in Digital Copyright*, CASE W. RESERVE J.L. TECH. & INTERNET 207, 222 (2012) (discussing Spotify's revenue which is funded through advertising and subscriptions).

130. Chris Willman, *Streaming Music Subscriptions Grew 26% in 2021, with YouTube Music as Fastest Growing DSP in the West*, VARIETY (Jan. 18, 2022), https://variety.com/2022/music/news/streaming-music-growth-worldwide-youtube-spotify-apple-1235156594/ [https://perma.cc/A4JQ-2HXV].

131. Tim Ingham, *Over 60,000 Tracks Are Now Uploaded to Spotify Every Day. That's Nearly One Per Second*, MUSIC BUS. WORLDWIDE (Feb. 24, 2021), https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second/ [https://perma.cc/B8TX-J44D].

emphasize repeat streams or downloads to popular playlists.[132] Today, a stream counts only when the listener has consumed the track for at least thirty seconds, regardless of the total time duration of the track.[133] This tracking mechanism may disadvantage genres and creators with longer works or works with longer introductions.[134]

Spotify and Apple Music use a "pro rata" model for determining monetary payout from their streaming services.[135] This model pays right-holders according to market share—how their streams stack up against the most popular songs in a given time period.[136] It follows, then, that the most revenue is available for the stakeholders with the rights to the most listened-to tracks.[137] Spotify's Chief Economist, Will Page, notes that the model, while perceived as "inherently objective and fair," does not account for "different user behaviors."[138] While the model values each stream in the same way, the model also provides a significant advantage to the most popular music stars.

### C. *Legislative Reform*

In response to the digital revolution of music, Congress has considered over 120 proposed amendments to the Copyright Act[139] and ultimately adopted the 1995 Digital Performance Rights in Sound Recordings Act (DPRSRA), the 1998 Digital Millennium Copyright Act (DMCA), and the 2018 Music Modernization Act (MMA).

The 104th Congress enacted the DPRSA as an amendment to Title 17, the Copyright Act, that "provide[s] an exclusive right to perform sound recordings publicly by means of digital transmissions."[140] A great deal of debate surrounded H.R. 2576 and S. 1421, the proposed bills from Representatives Hughes and Berman and Senators Hatch and Feinstein,

---

132. David Curry, *Music Streaming App Revenue and Usage Statistics (2023)*, BUS. OF APPS (last updated Feb. 1, 2023), https://www.businessofapps.com/data/music-streaming-market/ [https://perma.cc/3P96-DA3Y].

133. *Music Streaming and Its Impact on Composers & Songwriters*, *supra* note 32.

134. *Id.*

135. Paula Mejía, *The Success of Streaming Has Been Great for Some, but Is There a Better Way?*, NPR (July 22, 2019), https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way [https://perma.cc/29AZ-VL2S].

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* U.S. COPYRIGHT OFF., COPYRIGHT LEGISLATION: 109TH CONGRESS, http://www.copyright.gov/legislation [https://perma.cc/R96L-LH9D] (listing proposed bills from 2005 to 2006); *see also* U.S. COPYRIGHT OFF., COPYRIGHT LEGISLATION: ARCHIVE, http://www.copyright.gov/legislation/archive [https://perma.cc/PJ4H-PMWA] (listing proposed bills from 1997 to 2004).

140. Digital Performance Right in Sound Recordings Act, H.R. 1506, 104th Cong. (1995).

respectively, that would later become the DPRSA.[141] In an effort to come to an agreement, Representative Hughes hosted a roundtable with music industry representatives for songwriters, performers, unions, performing rights societies, music publishers, and record companies.[142]

The roundtable of stakeholders drafted a consensus agreement that prioritized the creation of "a compensation system for performance of sounds recordings that are distributed by commercial subscription audio services."[143] The consensus agreement also included an exclusive right to authorize digital performance by subscription services.[144] The DPRSRA was formed after review of the consensus agreement, and it serves two main purposes: to create a right to perform sound recordings publicly "by means of a digital audio transmission"[145] and to confirm that certain digital transmissions, known as digital phonorecord deliveries, implicate copyrights in musical works and sound recordings and are subject to the compulsory mechanical license.[146] Phonorecords, as defined by the Copyright Act, are "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[147]

President Clinton enacted the DCMA in 1998, which amended existing copyright law to address the relationship between copyright and the internet that was developing at the time.[148] The DMCA contained three main updates, and most notably for music in the streaming age, "encourage[d] copyright owners to give greater access to their works in digital formats by providing them with legal protections against unauthorized access to their works."[149]

In 2018, Congress signed the MMA into law in an attempt to overhaul outdated legislation and address the modern needs of sound recording

141. Marybeth Peters, *Digital Performance Right in Sound Recordings Act of 1995 (H.R. 1506)*, COPYRIGHT (June 28, 1995), https://www.copyright.gov/docs/regstat062895.html [https://perma.cc/R7Z5-F5PM].

142. *Id.*

143. *Id.*

144. *Id.*

145. 17 U.S.C.A. § 106(6) (West Supp. 1996).

146. *See id.* § 115(1)(A) ("A person may by complying with the provisions of this section obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work, including by means of digital phonorecord delivery.").

147. 17 U.S.C. § 101.

148. *The Digital Millennium Copyright Act*, COPYRIGHT, https://www.copyright.gov/dmca/ [https://perma.cc/TU2R-EVJA].

149. *Id.*

rights.[150] The MMA addressed the impact of streaming services on publishing royalties by creating a new collection society, the Mechanical Licensing Collective, Inc. (MLC), which issues licenses to streaming services, collects royalties from those services, and distributes those royalties to artists.[151] The MLC also creates a public database that logs information for musical works and their owners.[152]

### D. *Judicial Interpretation*

The shift to the use of streaming services has also prompted litigated issues. In *Yoakam v. Warner Music Group Corp.*, Warner Brothers Records (WBR) removed Dwight Yoakam's, a country artist's, earliest tracks, approaching the thirty-five-year termination benchmark, from streaming services because they did not want to run the risk of distributing music recordings they did not control.[153] In doing so, Yoakam argued that WBR prevented him from earning on those tracks because he could not partner with another label or distributor in the meantime.[154] In his complaint, Yoakam contended that:

> Every hour that Mr. Yoakam's works are absent from the marketplace, as a result of Mr. Yoakam's inability to exploit the works due to Defendants' false ownership claim and Defendants' refusal to exploit Mr. Yoakam's works, Mr. Yoakam is financially damaged. Mr. Yoakam is unable to earn royalties on these works, his fans are unable to listen to these works, and his streaming count, a quantifier that directly impacts the known value of a song, is detrimentally impacted.[155]

## V. THESE THINGS WILL CHANGE: RECOMMENDATIONS FOR COPYRIGHT TERMINATION REFORM

Holding musicians to copyright transfers, made at the conception of their career, for decades until their statutory termination rights mature does not advance the aim of copyright law in allowing "an author of a

150. *What is the Music Modernization Act?*, TUNECORE, https://support.tunecore.com/hc/en-us/articles/360051524372-What-is-the-Music-Modernization-Act- [https://perma.cc/4YP3-DFVU].

151. *Id.*; *The Music Modernization Act*, COPYRIGHT, https://www.copyright.gov/music-modernization/ [https://perma.cc/8YDY-949T].

152. *What is the Music Modernization Act?*, *supra* note 150.

153. Second Amended Complaint & Demand for Jury Trial at 15, 92, Yoakam v. Warner Music Grp. Corp., No. 2:21-cv-01165-SVW-MAA, 2021 WL 7907790 (C.D. Cal. July 26, 2021).

154. *See id.* at 17 (stating that the plaintiff was precluded from earning from his works because WBR was essentially holding the works hostage).

155. *Id.* at 92.

work [to] reap the fruits of his or her intellectual creativity";[156] especially when the exercise of the termination rights as they exist is unduly burdensome. Further, the payment schemes for streaming platforms like Spotify have cheated creators and artists out of their fair share of profits.[157]

Termination rights were enacted to protect authors and their heirs against unprofitable or inequitable agreements by allowing authors and their heirs to share in the later economic success of their works.[158] The rapid growth in popularity of streaming services has significantly changed the way artists receive compensation for music consumption, and their rights to terminate agreements entered pre-success should change accordingly.

### A. *Termination Rights Are Too Complicated to Exercise*

Attempting to exercise termination rights, as they currently exist, often poses complications for musicians. The many eligibility and timing requirements imposed by Section 203 create significant hurdles to overcome.[159] These hurdles lead musicians to "lengthy and expensive litigation" in pursuit of the rights to their own work.[160]

A class action complaint, for example, filed in the Southern District of New York, alleged that:

> [W]hile the Copyright Act confers upon authors the valuable "second chance" that they so often need, the authors of sound recordings, in particular, who have attempted to avail themselves of this important protection have encountered not only resistance from many record labels, they have been subjected to the stubborn and unfounded disregard of their

156. *A Brief Introduction and History*, U.S. COPYRIGHT OFF., https://www.copyright.gov/circs/circ1a.html [https://perma.cc/F36X-HA9L]; *see also* Dylan Gilbert, *It's Time to Pull Back the Curtain on the Termination Right*, PUB. KNOWLEDGE (Dec. 5, 2019), https://publicknowledge.org/its-time-to-pull-back-the-curtain-on-the-termination-right [https://perma.cc/ZE8U-QWKH] ("Many artists enter into deals . . . [that] involve [them] granting or licensing the copyright in their work to these business partners for lengthy periods of time; sometimes these transfers are legally binding forever.").

157. *See* Gabriela Tully Claymore, *Spotify Explains Royalty Payments*, STEREOGUM (Dec. 3, 2013), http://www.stereogum.com/1587932/spotify-explains-royalty-payments/news/ [https://perma.cc/LUD9-LMQK] (explaining how Spotify distributes royalties and why some artists are upset with this process).

158. *See* Gilbert, *supra* note 156 ("[T]he termination right offered artists and their heirs a fair shot at ending unfair contracts by reclaiming their rights.").

159. *See generally* 17 U.S.C. § 203 (detailing the conditions and effects of an author's termination of transfers and licenses).

160. Gilbert, *supra* note 156.

> rights under the law and, in many instances, willful copyright infringement.[161]

The notice element required for termination under Section 203, in particular, has prompted litigation. In *Yoakam v. Warner Music Group Corp.*, Dwight Yoakam (Yoakam), a successful country music singer and songwriter, served notice of termination for several singles on his record label, WBR, exactly thirty-five years from the date of the work's publication.[162] The notice was served on February 5, 2019, which proved problematic as the earliest eligible date for termination service for the notice mistakenly listed the singles provided by Yoakam as January 31, 2021.[163] Because Section 203(a)(4)(A) of the Copyright Act requires a two-year minimum notice period, the service fell five days short according to Yoakam's own listed "effective date of termination" provided in the notice.[164] Yoakam alleged that the error in listing the effective termination date was "inconsequential and harmless" under the harmless error doctrine in 37 C.F.R. § 201.10(e) as he intended effective termination to be the correct date of February 5, 2021.[165] The District Court for the Central District of California ultimately applied the harmless error doctrine to the issue and excused Plaintiff's error in communicating the effective date in the notice of termination.[166]

Artists have also encountered disputes over ambiguity in the meaning of "work for hire" in the music industry context.[167] In *Johansen v. Sony Music Entertainment Inc.*, plaintiff David Johansen (Johansen) released five albums with Sony Music Entertainment Inc. (Sony) after entering a recording agreement on or about 1978.[168] Johansen served a notice of termination to Sony on June 15, 2015, and two years later, on June 14, 2017, Sony sent a letter of refusal to Johansen.[169] The letter cited that:

---

161. Class Action First Amended Complaint & Demand for Trial by Jury at 3, Waite v. UMG Recordings, Inc., 450 F. Supp. 3d 430 (S.D.N.Y. Jan. 27, 2023) (No. 19-CV-01091 (LAK)).

162. Yoakam v. Warner Music Grp. Corp., No. 2:21-cv-01165-SVW-MAA, 2021 WL 3774225, at *1–2 (C.D. Cal. July 12, 2021).

163. *Id.* at *2.

164. *Id.*

165. *Id.*

166. *Id.* at *3.

167. *See generally* Kyle Jahner, *Musicians Attack Sony's Refusal of Copyright Termination Rights (1)*, BLOOMBERG L. (Feb. 6, 2019), https://news.bloomberglaw.com/ip-law/musicians-attack-sonys-refusal-of-copyright-termination-rights-1 [https://perma.cc/72YS-5SU8] (summarizing the class action dispute between musicians and Sony Music Entertainment Inc. for declaratory judgment and copyright infringement).

168. Johansen v. Sony Music Ent. Inc., No. 1:19-cv-01094 (ER), 2020 WL 1529442, at *1 (S.D.N.Y. Mar. 31, 2020).

169. *Id.*

> (a) "the Works are works made for hire," and thus not subject to termination; (b) "the [n]otice does not adequately identify the specific grant David Johansen seeks to terminate, as the [n]otice broadly makes reference to all grants or transfers of copyright in and to certain sound recordings 'including, without limitation to the grant dated in or about 1984 between the recording artist David Johansen and Blue Sky Records/CBS, Inc.'"; (c) Sony is unaware of any grant made in 1984, and "to the extent that any grant was made," the grant was made before 1978 and thus 17 U.S.C. § 203 does not apply; and (d) to the extent there was a grant in 1984, termination could not be effected before 2019.[170]

In his demand for trial by jury, Johansen argued that the term "work for hire" could not encompass sound recordings, citing the defined terms of Section 101 of the Copyright Act.[171] If an artist were deemed an employee of the music publisher, all of the rights to the work created by the artist would be under the ownership of the employer.[172] The definition in Section 101, according to Johansen, did not include sound recordings as being one of the types of works that can be made for hire.[173] The section instead defines "work made for hire" as work either:

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[174]

Music publishers have, however, argued that because Section 101 lists compilations as one of the categories, music albums qualify accordingly.[175] Section 101 defines a "compilation" as "a work formed by the collection and assembling of preexisting materials or of data that

---

170. *Id.*

171. First Amended Class Action Complaint & Demand for Trial by Jury at 23(A), Johansen v. Sony Music Ent. Inc., No. 1:19-cv-01094 (ER), 2020 WL 1529442 (S.D.N.Y. Mar. 31, 2020).

172. Jeanne Hamburg, *The Real-Life Consequences of Copyright Termination*, NAT'L L. REV. (Nov. 1, 2021), https://www.natlawreview.com/article/real-life-consequences-copyright-termination [https://perma.cc/7J8N-A54K].

173. First Amended Class Action Complaint & Demand for Trial by Jury at 23(A), *Johansen*, 2020 WL 1529442.

174. 17 U.S.C. § 101.

175. Jahner, *supra* note 167.

are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[176]

The statute of limitations has also been a litigated dispute related to copyright termination rights. In *Scorpio Music (Black Scorpio) S.A. v. Willis*, Victor Willis (Willis), the lead singer of the Village People, was challenged by his music publisher, Scorpio Music S.A. (Scorpio), after serving Scorpio with a Notice of Termination in January of 2011 of post-1977 grants of copyright on some of Willis's works.[177]

One of the issues that Scorpio alleged in their complaint was that Willis's claim to the copyright in the compositions was somehow time-barred by the statute of limitations.[178] Nevertheless, the District Court for the Southern District of California rejected this argument because Scorpio failed to explain why Willis should have been time-barred from asserting his rights under the law.[179]

Contributing to the financial burden of copyright litigation, the Supreme Court has interpreted the phrase "full costs" as it appears in Section 505 of the Copyright Act expansively.[180] The section reads:

> In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.[181]

In *Rimini Street, Inc. v. Oracle USA, Inc.*, the Supreme Court found that the best interpretation "[was] that the term 'full costs' meant in 1831 what it mean[t] now: the full amount of the costs specified by the applicable costs schedule."[182] This interpretation means that "copyright cases will [be] longer and be more expensive to litigate" and that "it will be more difficult for victorious litigants to recover their non-increased costs."[183]

---

176. 17 U.S.C. § 101.

177. Scorpio Music (Black Scorpio) S.A. v. Willis, No. 11cv1557 BTM(RBB), 2013 WL790940 at *1 (S.D. Cal. Mar. 4, 2013).

178. *Id.* at *2.

179. *Id.* at *4.

180. *See* Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 879 (2019) (holding that "full costs" are all costs generally available under the federal costs statutes).

181. 17 U.S.C. § 505.

182. *Rimini*, 139 S. Ct. at 880.

183. Scott Alan Burroughs, *Copyright Litigation: Now More Expensive and with More Delay than Ever Before!*, ABOVE THE LAW (Mar. 13, 2019), https://abovethelaw.com/2019/03/copyright-litigation-now-more-expensive-and-with-more-delay-than-ever-before/ [https://perma.cc/AM8M-N6H4].

Another noteworthy ownership battle, similar to Swift's, took place between Prince and WBR, who released Prince's first eighteen albums.[184] In 1993, in an act of defiance against WBR, as Prince began to feel he was losing artistic control over his work, Prince changed his name "in order to signal a fundamental severance from an identity he saw as a wholly owned commodity of Warner."[185] The name change ultimately failed to make Prince's contracts unenforceable, but Prince nevertheless continued his very public campaign against WBR.[186] Prince especially emphasized the power dynamics implicating his "freedom and his own artistic agency" as a black man in a recording contract with white executives.[187] Prince wrote "Slave" on his face in protest of his WBR contract and is quoted to have said "[i]f you don't own your masters, your master owns you."[188]

In 2019, a class action suit was filed on behalf of music artists and their estates against Universal Music Group (UMG), seeking $100 million for damages from the destruction of masters in the 2008 fire on the Universal Studios lot.[189] This fire is often referred to as "the biggest disaster in the history of the music business" because an estimated several thousand master recordings burned.[190] Many master recordings of unreleased material and outtakes were completely lost.[191] The Plaintiffs proffered that UMG attempted to minimize their error by "concealing the loss with false public statements."[192]

UMG defended with the notion that because the label had full ownership over the master recordings, it had no obligation to split any of the insurance proceeds gained from the fire with the artists whose music

184. Chris Eggertsen, *What Are Masters and Why Do Taylor Swift & Other Artists Keep Fighting for Them*?, BILLBOARD (July 3, 2019), https://www.billboard.com/articles/business/8518722/taylor-swift-masters-artists-ownership-labels-rights-prince [https://perma.cc/N6Y9-VLKH].

185. *Id.*; August Brown, *What Today's Artists Learned from Prince's Approach to the Industry*, L.A. TIMES (Apr. 22, 2016), https://www.latimes.com/entertainment/music/posts/la-et-ms-prince-imaginative-legacy-music-business-20160422-story.html.

186. *See* Eggersten, *supra* note 184 ("Once it became clear that his ploy wouldn't work, the singer-songwriter began appearing in public with the word "slave" written on his cheek.").

187. Brown, *supra* note 185.

188. Eggersten, *supra* note 184; Kory Grow, *Prince Releasing Two New Albums this Fall*, CNN (Aug. 26, 2014), https://www.cnn.com/2014/08/26/showbiz/music/prince-new-albums/index.html [https://perma.cc/Y3UL-YKMM].

189. Soundgarden v. UMG Recordings, Inc., No. LA CV19-05449 JAK (JPRx), 2019 WL 10093965 (C.D. Cal. Dec. 2, 2019)

190. Jody Rosen, *The Day the Music Burned*, N.Y. TIMES MAG. (June 11, 2019), https://www.nytimes.com/2019/06/11/magazine/universal-fire-master-recordings.html [https://perma.cc/AF86-ZJDC].

191. *Id.*

192. *Soundgarden*, 2019 WL 10093965, at *4.

the fire destroyed.[193] UMG also argued that it did not breach their contracts with artists under an alleged bailment agreement, as UMG was not "bound to return the identical thing deposited."[194] UMG maintained a position that ownership of the masters provides full control over the masters and the ability to do anything with the recordings, even destroy them as UMG was under no "obligation to return the master recordings."[195] This position ultimately undermines the fact that artists can terminate the transfer rights bestowed upon the creator of the content after thirty-five years, as provided by the Copyright Act.[196]

### B. *Artists Are Unfairly Compensated and Unable to Reap the Fruits of Their Intellectual Creativity*

Many aspiring artists wield much power to the will of one of the three major American record labels: Universal Music Group, Warner Music Group, and Sony Music Entertainment.[197] These three powerhouses made up 62.4% of global music revenue in 2016.[198] The bargaining power record labels have over artists at the start of their careers may rise to the level of undue influence.

Undue influence occurs "when a fiduciary or confidential relationship exists in which one person substitutes his own will for that of the influenced person's will."[199] Undue influence typically takes place behind closed doors with no witnesses.[200] Major record labels wield immense power over the artists they are recruiting to sign because the labels have the resources and expertise to bring an artist's creative dreams to fruition; contracting with one of these major labels increases the

193. *See* Defendant UMG Recordings, Inc.'s Memorandum of Points and Authorities in Support of its Motion to Dismiss Plaintiffs' Class Action Complaint at 2, *Soundgarden*, 2019 WL 10093965 ("[N]othing in the underlying contracts at issue (or Plaintiffs' broad-brush generalizations thereof) even remotely entitles Plaintiffs to any such proceeds.").

194. *Id.*

195. *Id.* at 16.

196. 17 U.S.C. § 203.

197. *See* Paul Resnikoff, *Two-Thirds of All Music Sold Comes from Just 3 Companies*, DIGIT. MUSIC NEWS (Aug. 3, 2016), https://www.digitalmusicnews.com/2016/08/03/two-thirds-music-sales-come-three-major-labels/ [https://perma.cc/T9ZK-CP7S] ("The three major labels—Sony Music Entertainment, Warner Music Group, and Universal Music Group—are currently enjoying a surge in streaming revenues from companies like Spotify and Apple Music.").

198. *Id.*

199. Mary Joy Quinn, *Defining Undue Influence*, ABA (Feb. 1, 2014), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_35/issue_3_feb2014/defining_undue_influence/ [https://perma.cc/NC69-8YP4].

200. *Id.*

chances that an artist will become successful by helping them achieve creative and commercial success and building a long-term career.[201]

The three major record labels received partial ownership in Spotify in exchange for licenses to their sound recordings; combined, the three major record labels own about 18% of Spotify stock, while Merlin, the conglomeration of independent labels, owns about 1%.[202] This transfer of equity seemed to be negotiated to account for a lower royalty rate for payments to artists based on Spotify streams, which Spotify itself is licensed to set.[203]

Multiple recording artists, including Gwen Stefani, Radiohead, and Taylor Swift herself, have spoken out against Spotify and their low royalty payments by withdrawing their music from Spotify, at least temporarily.[204] Swift said, "I'm not willing to contribute my life's work to an experiment that I don't feel fairly compensates the writers, producers, artists and creators of this music."[205] As evidenced in Figure 1 below, the complicated payout scheme Spotify employs resulted in an average monthly earning of $145,000 for the top ten most streamed albums in 2013.[206] According to Spotify, it compensated Taylor Swift over two million dollars during the year leading up to her withdrawal from the app, although her record label contended she received less than $500,000.[207]

---

201. *See Driving Long-Term Creative and Commercial Success*, INT'L FED. OF THE PHONOGRAPHIC IND., https://www.ifpi.org/our-industry/investing-in-music/ [https://perma.cc/U3Y4-NQWF] ("When artists choose to partner with a record company they benefit from the support of agile, highly responsive global teams of experts dedicated to helping them achieve creative and commercial success and building their long-term careers.").

202. Helienne Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, GUARDIAN (Aug. 17, 2009), https://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify [https://perma.cc/Y68Q-Y45R].

203. *See* Teague, *supra* note 129, at 221 ("In other words, the labels may have been happy with lower-than-fair royalty rates, since they stood to earn money from Spotify through other avenues.").

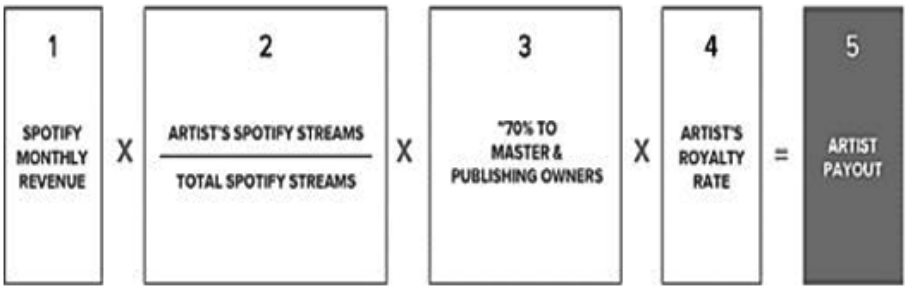
204. Iris Lee, *Are Musicians Really Making Less Money Now?*, IMONEY (Dec. 4, 2014), https://www.imoney.my/articles/are-musicians-really-making-less-money-now [https://perma.cc/4LK4-8N2P].

205. Lisa France, *Taylor Swift to Spotify: You Belong with Me*, CNN (June 9, 2017), http://money.cnn.com/2017/06/09/media/taylor-swift-streaming-spotify-tidal-amazon/index.html [https://perma.cc/YL68-3LA5].

206. Gabriela Tully Claymore, *Spotify Explains Royalty Payments*, STEREOGUM (Dec. 3, 2013, 4:55 PM), http://www.stereogum.com/1587932/spotify-explains-royalty-payments/news/ [https://perma.cc/J4UF-KMAG].

207. David Johnson, *See How Much Every Top Artist Makes on Spotify*, TIME (Nov. 18, 2014, 1:19 PM), http://time.com/3590670/spotify-calculator/ [https://perma.cc/BK2T-RYBM].

Figure 1[208]




In modern recording contracts, record labels fund the recording and promotion processes.[209] In consideration for taking on those responsibilities, record labels become the sole owner, co-owner, or licensee of the copyrighted sound recording.[210] The record label can distribute physical and digital albums for profit as an owner or licensee.[211] Labels hold even more power because of the "360 deal" development that has swept the industry, as streaming services have replaced physical record sales as the "dominant revenue source for recorded music."[212] A 360 deal permits the label to share in *all* the revenue a signed artist generates, including concert ticket and merchandise sales and motion-picture acting.[213] These 360 deals, also known as multiple rights agreements, have become the industry standard among major and independent record labels.[214]

### C. *Proposed Solutions*

While the challenges faced by artists wishing to terminate transferred copyrights have no clear solution, the music industry ought to take steps

208. Claymore, *supra* note 206.

209. *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 61–63 (7th ed. 2009) (diagramming the many functions of a major record label including, but not limited to, production, finance, sales, promotion, and marketing).

210. *See* Estate of Brown v. Arc Music Grp., 830 F. Supp. 2d 501, 513 (N.D. Ill. 2011) (holding that the publishing agreement between Frederick Music Co. and artist, Lawn, gave Frederick Music licensing rights as a co-owner of Lawn's song).

211. *See* Teague, *supra* note 129 (explaining how Spotify required permission of the major labels to license their recordings); Molly Hogan, *The Upstream Effects of the Streaming Revolution: A Look into the Law and Economics of a Spotify-Dominated Music Industry*, 14 COLO. TECH. L.J. 131, 145 (2015) ("The second scheme for triggering royalties under § 106(4) and § 106(6) grants the rights of public performance to publishers (on behalf of songwriters) and labels (on behalf of artists).").

212. PASSMAN, *supra* note 209, at 9 (10th ed. 2019).

213. Douglas Okorocha, *A Full 360: How the 360 Deal Challenges the Historical Resistance to Fiduciary a Fiduciary Duty Between Artist and Label*, 18 UCLA ENT. L. REV. 1, 12 (2011).

214. *Id.* at 12–13.

to "restore fairness and functionality to the system for artists and licensees alike."[215]

The advent of streaming services has certainly revolutionized the method of music consumption by the consumer. The advent of streaming services has not, however, revolutionized the amount of creative effort and time put into conceptualizing today's most popular music compared to that of twenty years ago. As such, artists should not suffer because technology has increased their reach and fan base.

In an ideal world, in order to rectify the financial exploitation of artists by streaming platforms, the three largest record labels should turn over their equity shares to artists. The distribution of the ownership shares to these record labels has directly impacted the amount of money that artists receive for the popularity of their music from royalties.

Other artists should follow in Taylor Swift's re-recording footsteps. Swift's decision to re-record her first six albums effectively devalues the third-party ownership of her original master recordings. It follows that the profits that had been accumulating from the streams of her original six albums are now hindered, as Swifties lean away from streaming the "stolen version" of the songs and loyally stream "Taylor's Version," encouraging others to follow suit.[216] This move by Swift will hopefully encourage other artists facing similar battles for control over their masters to reclaim their music and produce re-recordings, where possible.

One would be remiss in failing to acknowledge the immense capital Swift needed to record, produce, market, and distribute entirely new recordings of her previous albums. Such an opportunity is not a realistic option for smaller artists stripped of master recording rights by a record label.

Therefore, I recommend that Congress amend the current procedures governing copyright termination in the Copyright Act to account for the impacts of the modernization of the music industry on smaller artists. Reframing the time period for termination rights should be a priority for legislators wishing to address this issue. The thirty-five-year waiting period required by the Copyright Act is too long for today's music industry, especially considering how quickly streaming services revolutionized music consumption.

---

215. Gilbert, *supra* note 156.

216. *See* Sophia Cardone, *Sounds with Sophia: Steam "Taylor's Version" and not the "Stolen Version"*, THE POST (Dec. 2, 2021), https://www.thepostathens.com/article/2021/12/taylor-swift-music-industry-scooter-braun-stolen-music-taylors-version [https://perma.cc/C8MJ-EFAY] (encouraging the audience to stop listening to Swift's old recordings because of the conflict with Scooter Braun).

Daniel Elk and Martin Lorentzon launched Spotify as a small start-up in 2008 in Stockholm, Sweden.[217] Since its founding, Spotify has amassed 406 million users, including 180 million subscribers across 183 markets, making it the world's most popular audio streaming subscription service.[218] This transformation took place in just fourteen years. A record label's legal hold over an artist's transferred copyright can last more than twice as long a time period as this transformation. Artists should be able to make decisions in this digital age within a time frame shorter than thirty-five years because the entire industry could, theoretically, revolutionize several times during this period.

A significant period of time should still be attached to the transfer of copyright because record labels often assume great risks when signing new artists for music deals. It logically follows that not every artist signed to a record label will make huge profits for the label and succeed in album sales or streaming. Therefore, the termination of the transfer of copyright to a record label should not be able to happen instantly. Instead, record labels and artists should reach a compromise in formulating a new time period for copyright termination. Inspiration for this compromise should come from other areas of intellectual property law which serve the same or similar goals in advancing and protecting creativity.

Congress should consider an approach for copyright termination that more closely aligns with the time period for the expiration of patents. Patents grant "the patent holder the exclusive right to exclude others from making, using, importing, and selling the patented innovation for a limited period of time."[219]

The aim of granting exclusive rights to an inventor through a patent is to "encourage the investment of time and resources into the development of new and useful discoveries."[220] Patent protection serves to advance the same purpose as the copyright protection from Article I, Section 8, Clause 8 of the U.S. Constitution.[221] Patents expire twenty years after the filing date and then the patented material is available for public use.[222]

Amending the copyright termination term to twenty years, like patents, instead of the current thirty-five-year term, provides an acceptable compromise for record labels who take risks when signing

217. *How Spotify Came to be Worth Billions*, BBC (Mar. 1, 2018), https://www.bbc.com/news/newsbeat-43240886 [https://perma.cc/8AS5-S8Y7].

218. *About Spotify*, NEWSROOM, https://newsroom.spotify.com/company-info/ [https://perma.cc/574H-KA4L] (last visited Mar. 4, 2021).

219. *Patent*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/patent [https://perma.cc/9MK3-6P2K] (last visited Mar. 2, 2023).

220. *Id.*

221. U.S. CONST. art. 1, § 8, cl. 8.

222. *Patent*, *supra* note 219.

new artists. Additionally, the shortened time period advances both the incentive and personality theories of copyright law explored earlier.

The twenty-year-period would further advance the incentive theory because it still serves to deter unlawful distribution of public goods and would incentivize production because protections would still exist for creative works.

This period would also more significantly advance the personality theory. Seemingly, at the root of Swift's discourse with her former record label and Scooter Braun over the rights to her masters was the personal connection she felt to the music she created and performed over her entire career. Permitting an artist like Taylor Swift to terminate the transfer of master recording rights, which she contracted for many millions of streams and dollars ago, sooner restores artists' relationship with their works. The termination would also serve to alleviate the sense of exploitation Swift, and other artists felt with Spotify when paying out lower royalties in exchange for equity shares for the large record labels.

## VI. LONG STORY SHORT, IT WAS A BAD TIME: CONCLUSION

"Long live the walls we crashed through. I had the time of my life with you."[223]

Taylor Swift's decision to re-record her first six studio albums did much more than showcase the growth of the singer's vocal range since her teens and provide Swifties with nostalgia. The re-recordings shed light on just how tough it is for even one of the world's most popular and wealthiest artists to regain the rights to her master recordings. No exorbitant amount of money offered would enable Swift to reclaim her life's work. The personal connection artists feel to their work serves as justification for reform in this field of copyright termination law.

The advent of streaming services has completely revolutionized the music industry and the way society consumes music. Just as music consumption has changed, the laws governing music copyright should change accordingly.

The power struggle will continue to pervade labels and artists in negotiating recording contracts. Protections must be implemented for artists who begin their careers by signing away the rights to their masters. Moreover, a balance must be struck among giving artists free rein to reclaim their masters, protecting record labels who make large expenditures, and taking risks on artists who do not ultimately return large profits.

Copyright termination law provides a getaway car for artists to reclaim their work after everything has changed, a reality Taylor Swift

223. TAYLOR SWIFT, *Long Live*, *on* SPEAK NOW (Republic Records 2010).

knows all too well. To avoid spilling teardrops on their guitar, artists should fearlessly fight for their wildest dreams. Taylor Swift chose to speak now and begin again with "Taylor's Version."

# "WHAT'S IN A [DEAD] NAME?": TITLE VII PROTECTIONS AGAINST MISGENDERING AND DEADNAMING OF GENDER DIVERSE INDIVIDUALS[*] [**]

*Mackenzie O'Connell* [***]

## Abstract

The Supreme Court's 2020 holding in *Bostock v. Clayton County* monumentally altered the availability of employment discrimination claims under Title VII to individuals identifying as members of the LGBTQ+ community. The Court did so by finding that the meaning of Title VII's prohibition of workplace discrimination "because of sex" includes discrimination against individuals on the basis of their homosexual or transgender statuses. The effects of this decision on other aspects of employment litigation are still uncertain.

Pre-*Bostock*, transgender and non-binary individuals were largely left without a legal remedy under Title VII for hostile work environment sexual harassment claims. One novel claim developing post-*Bostock* is a hostile work environment sexual harassment claim brought by transgender or non-binary employees on the basis of intentional misgendering and deadnaming. Although various federal courts have heard sexual harassment claims involving misgendering and deadnaming of gender diverse individuals post-*Bostock*, due to the contemporary nature of the holding, there is a paltry amount of relevant federal case law and little uniformity amongst these courts' handling of such claims.

To better address the proven detrimental effects of intentional misgendering and deadnaming in the workplace, and to satisfy Title VII's purpose, Courts should:

> (1) use a reasonable gender diverse person standard (rather than applying a reasonable person standard) when determining

---

* Content Warning: This Note discusses potentially triggering topics, such as discrimination, verbal and physical abuse/violence, and mental health crises, such as self-harm and suicide. Additionally, the language used in this Note attempts to succinctly discuss the usage of identity terms used throughout the LGBTQ+ community, and in no way implies limits on ways individuals can identify themselves. It is important to recognize that individuals can self-identify in numerous ways, varying based on cultural, communal, and individual preferences in terminology.

** *Editor's Note*: This Note won the Barbara W. Makar Writing Award for the best Note submitted to the *Journal* among the editors of the Class of 2023.

*** Acknowledgements to Professor Stephanie Bornstein of University of Florida Levin College of Law for her assistance in producing this Note. Thank you to the *University of Florida Journal of Law and Public Policy* for choosing to publish this Note and awarding it the Barbara W. Makar Writing Award. Thank you to Simone Chriss (Director of Southern Legal Counsel's Transgender Rights Initiative), Meredith Moore, Cynthia Diamond, and Abby O'Connell for their ongoing feedback and willingness to share their knowledge. Last, but certainly not least, thank you to my mother and fifth-grade teacher, Michelle O'Connell, who not only taught me to write, but to love writing, and encouraged me throughout writing this Note.

whether conduct toward gender diverse individuals is sufficiently severe or pervasive under Title VII;
(2) defer to Equal Employment Opportunity Commission (EEOC) guidance and adjudicative decisions regarding intentional misgendering and deadnaming in the workplace; and
(3) reduce the burden of proof for plaintiffs in hostile work environment sexual harassment claims at both the federal and state levels.

## INTRODUCTION

*"What's in a name? that which we call a rose*

*By any other name would smell as sweet . . . ."*[1]

–Juliet Capulet

A soliloquy delivered by William Shakespeare's star-crossed lover, Juliet Capulet, implies that a name is just that—a name—with little value and no greater meaning. In other words, an individual's internal character matters most, not what they are called. But studies, philosophical accounts, and linguistic research show that Juliet, or Shakespeare rather, might have missed the mark with this sentiment.[2] While internal character does matter, the ways in which individuals are addressed have the potential to both negatively and positively impact views of self-worth, the deepest concept of self, and the ability to authentically express identity. The power of naming extends to the workplace and can contribute to a productive or disadvantageous work environment for employees and employers alike. This power rings true in the context of workplace sexual harassment, specifically when naming takes the form of intentional misgendering and deadnaming of transgender and non-binary individuals. The proven devastating effects of such conduct should not go unregulated in the workplace, and gender diverse individuals most vulnerable to naming abuses deserve protections under Title VII of the Civil Rights Act of 1994 (Title VII).

The Supreme Court's recent holding in *Bostock v. Clayton County*[3] monumentally altered the availability of employment discrimination claims under Title VII to individuals identifying as members of the LGBTQ+[4] community. The Court did so by clarifying the meaning of Title VII's prohibition of workplace discrimination "because of sex" to include discrimination against an individual on the basis of their homosexual or transgender status.[5] As *Bostock* was decided in 2020, the effects of this decision on other aspects of employment litigation are still uncertain. Pre-*Bostock*, transgender and non-binary individuals were largely left without a legal remedy under Title VII for hostile work

1. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

2. *See* Robin Jeshion, *The Significance of Names*, 24 MIND & LANGUAGE 370, 373–74 (2009) (emphasizing the feelings and conveyance of significance and individuality through proper naming).

3. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020).

4. LGBTQ+ is the "[a]cronym for lesbian, gay, bisexual, transgender, and queer," and "+" is "added in recognition of all non-straight, non-cisgender identities." *Glossary of Terms: LGBTQ*, GLAAD, https://www.glaad.org/reference/terms [https://perma.cc/US2U-739Z] (last visited Mar. 18, 2022).

5. *Bostock*, 140 S. Ct. at 1737.

environment sexual harassment claims. One novel claim developing post-*Bostock* is a hostile work environment sexual harassment claim brought by transgender or non-binary employees on the basis of intentional misgendering and deadnaming. Although various federal courts have heard sexual harassment claims involving misgendering and deadnaming of gender diverse individuals post-*Bostock*, due to the contemporary nature of the holding, there is a paltry amount of relevant federal case law and little uniformity amongst these courts' handling of such claims.

Part I of this Note will first discuss relevant definitions pertaining to sex and gender identity, followed by an examination of the historical and legal background of harmful discrimination against transgender and non-binary individuals within the employment sphere. Part II will dive into the purpose and operation of Title VII hostile work environment claims, as well as identify binding federal case law and non-binding federal agency guidance regarding protections for transgender and non-binary employees. Part III identifies specific problems with Title VII's current severe or pervasive standard and the courts' application of this standard in cases of intentional misgendering and deadnaming of gender diverse employees. Lastly, Part IV of this Note offers solutions to enhance workplace protections of gender diverse individuals without opening employers up to unnecessary liability and ultimately better serving anti-discrimination employment legislation goals.

More narrowly, this Note offers solutions to better address the detrimental effects of intentional misgendering and deadnaming in the workplace, and to better satisfy Title VII's purpose. First, courts should use a reasonable gender diverse person standard, rather than applying a reasonable person standard, when determining whether conduct toward gender diverse individuals is sufficiently severe or pervasive. Additionally, courts should defer to Equal Employment Opportunity Commission (EEOC) guidance and adjudicative decisions regarding intentional misgendering and deadnaming in the workplace. They're the experts. Lastly, regardless of whether intentional misgendering and deadnaming meet the severe or pervasive standard under Title VII, the burden of proof for plaintiffs should be lowered. This is necessary on both the federal and state levels to ensure uniform protection of gender diverse persons.

A call for less stringent hurdles for plaintiffs filing suit in both federal and state courts with regard to proving sexual harassment claims is not a novel concept.[6] Nor is the argument for greater employment

6. *See generally* Christina Sabato, Note, *Hearing the Calls for Change: Examining the Pervasive or Severe Standard in a Hostile Work Environment*, 42 WOMEN'S RTS. L. REP. 134, 135 (2020) (arguing that the severe or pervasive standard under Title VII should be less burdensome); Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*,

discrimination protections for gender diverse individuals.[7] Building off of these ideas, this Note emphasizes the need for uniform legislation and legal precedent that limits intentional misgendering and deadnaming of gender diverse individuals in the employment context. This legislation would also put employers on clear notice of what constitutes severe or pervasive sexual harassment in a post-*Bostock* world.

## I. BACKGROUND

### A. *Important Definitions*

Throughout this Note, familiar-looking terms will be used in narrow, technical ways to describe relevant individuals and actions. It is important to grasp the narrow meaning of these terms before delving into the present issues harming transgender and non-binary individuals. Additionally, this Note uses the terms "transgender and non-binary individuals" and "gender diverse individuals" to efficiently discuss issues affecting both gender identities, but not to insinuate that these two identities are the same or interchangeable in use.

#### 1. Sex, Gender, Gender Identity, and Gender Expression

"Sex" "refers to one's biological status as male, female, or intersex."[8] One commonly receives sex assignment at birth via inspection of the genitals and corresponding sex determination of male or female sex based on this inspection.[9] Although frequently erroneously used interchangeably with the term sex, "gender" is the behavioral, cultural, or

---

AM. BAR ASS'N (May 8, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/ [https://perma.cc/5YHP-4YR2] (discussing the arguments for and against softening the federal severe or pervasive standard).

7. *See generally* Erin E. Clawson, Note, *I Now Pronoun-ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN ST. L. REV. 247, 248, 274–75 (2019) (discussing remedies for misgendering in the workplace and suggesting transgender status be included under Title VII's definition of sex pre-*Bostock*); Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 44 (2020) (suggesting that "bar associations can [best] address the practice of misgendering as attorney misconduct"); Noelle N. Wyman, Note, *Because of* Bostock, 119 MICH. L. REV. 61, 62–64 (2020–2021) (arguing for a softer *prima facie* burden-shifting framework than McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) currently requires for single motive disparate treatment claims brought by gender diverse individuals).

8. AARON DEVOR & ARDEL HAEFELE-THOMAS, TRANSGENDER: A REFERENCE HANDBOOK 5 (2019); *see also Sex*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/sex [https://perma.cc/37YG-G3K4] (last visited Jan. 22, 2022) (defining sex as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures").

9. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 5.

psychological traits typically associated with one's sex,[10] commonly composed of "assigned gender, legal gender, gender identity, gender expression, and gender attributions."[11]

"Gender identity" is one's "innermost concept of self" as female, male, neither, or a blend of numerous identities.[12] Importantly, gender identity is not always static but can be fluid or change over time.[13] Additionally, gender identity encompasses many more identities than the two most commonly used genders, male and female, and individuals can hold more than one gender identity at a time.[14] For example, a 2015 U.S. Transgender Survey of over 27,000 people found that participants used more than five hundred unique gender identities when reporting how they identified.[15] Popular social media sites, like Facebook, offer users a choice of nearly sixty gender identity options when setting up a profile, including the ability to identify as a non-listed gender identity.[16]

"Gender expression" refers to an individual's external display of their gender identity.[17] Gender identity tends to be "expressed through behavior, clothing, body characteristics or voice, and . . . may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine."[18] Expressions of gender identity can be affected by whether an individual feels safe and

---

10. *Gender*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gender [https://perma.cc/H527-ZJWQ] (last visited Jan. 22, 2022).

11. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 6.

12. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN FOUND., https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/SJX4-X37C] (last visited Jan. 23, 2022).

13. Sabra L. Katz-Wise, *Gender Fluidity: What It Means and Why Support Matters*, HARV. HEALTH PUBL'G (Dec. 3, 2020), https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544 [https://perma.cc/6WCL-4NZF].

14. *See* DEVOR & HAEFELE-THOMAS, *supra* note 8, at 7–8; *see also* Katy Steinmetz, *Beyond 'He' or 'She': The Changing Meaning of Gender and Sexuality*, TIME MAG. (Mar. 16, 2017), https://time.com/magazine/us/4703292/march-27th-2017-vol-189-no-11-u-s/ [https://perma.cc/62D3-V54P] (finding that "[a] growing number of young people are moving beyond the idea that we live in a world where sexuality and gender come in only two forms").

15. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 7.

16. Russell Goldman, *Here's a List of 58 Gender Options for Facebook Users*, ABC NEWS (Feb. 13, 2014), https://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users [https://perma.cc/JX5X-NJ2C].

17. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12.

18. *Transgender and Non-Binary People FAQ*, HUM. RTS, CAMPAIGN FOUND., https://www.hrc.org/resources/transgender-and-non-binary-faq [https://perma.cc/NS2X-KSV5] (last visited Jan. 23, 2022); *see also* Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq [https://perma.cc/Z8E5-CV8C] ("Gender expression is how a person presents gender outwardly, through behavior, clothing, voice or other perceived characteristics. Society identifies these cues as masculine or feminine, although what is considered masculine or feminine changes over time and varies by culture.").

supported in their expression.[19] Additionally, gender expression includes preferred pronouns an individual would like to be addressed by.[20] Traditionally, the pronouns she/her/hers are used for feminine identities, he/him/his for masculine identities, and they/them/their, or many other variations like ze/zim and xe/xim, for gender neutral identities.[21] This Note refers to transgender and non-binary individuals by the pronouns they/them/their to be succinct but recognizes that some gender diverse individuals prefer other pronouns. It is important to note that sex, gender, gender identity, and gender expression differ from sexual orientation, which is one's "inherent or immutable enduring emotional, romantic or sexual attraction to other people."[22] Examples of sexual orientation are homosexuality, bisexuality, or asexuality.[23]

### 2. Transgender, Non-Binary, and Cisgender

Prevalent since the 1990s, "transgender" is an umbrella term for people whose "gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth."[24] Through a compilation of population surveys and CDC data, a 2016 report estimated that around 1.4 million, or 0.6%, of United States adults identify as transgender.[25] According to Pew Research Center, thirty percent of adults in the United States know someone transgender.[26] Being transgender in no way implies an individual's sexual orientation.[27]

---

19. Natalee Seely, *Reporting on Transgender Victims of Homicide: Practices of Misgendering, Sourcing and Transparency*, 42 NEWSPAPER RSCH. J. 74, 76 (2021).

20. *E.g.*, Clawson, *supra* note 7, at 255.

21. *Id.*; Devin Norelle, *Gender-Neutral Pronouns 101: Everything You've Always Wanted to Know*, THEM (May 22, 2022), https://www.them.us/story/gender-neutral-pronouns-101-they-them-xe-xem [https://perma.cc/6DSX-ZW75] ("Third-person pronouns like "xe/xem" or "ze/zim" are growing increasingly popular. Likewise, it is becoming more common for people to avoid using pronouns altogether, and instead just use their name in all circumstances.").

22. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12.

23. *Frequently Asked Questions Sexual Orientation and Gender Identity*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/ofccp/faqs/lgbt#Q19 [https://perma.cc/LQ4J-NZQC] (last visited Oct. 29, 2023).

24. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12 (defining transgender); *see also* DEVOR & HAEFELE-THOMAS, *supra* note 8, at 8 ("Transgender or trans are both umbrella terms used to describe a range of people who share the feature of not feeling that the sex and gender assignments made for them at birth were correct.").

25. ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016).

26. *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RSCH. CTR. (Sept. 28, 2016), https://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/ [https://perma.cc/6ABM-Z4KG] ("A large majority of Americans (eighty-seven percent) say they personally know someone who is gay or lesbian. A much smaller share—only three-in-ten—personally know someone who is transgender.").

27. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12.

"Non-binary" individuals do not identify with any singular gender identity and reject a male/female binary but can fall under the category of transgender.[28] Non-binary individuals can identify as "being both a man and a woman, somewhere in between, or as falling completely outside of these categories."[29] 1.2 million LGBTQ+ people in the United States identify as non-binary, making up eleven percent of the LGBTQ+ community.[30] Most transgender individuals identify as male or female, but forty-three percent of the transgender community identifies as non-binary.[31] In contrast, individuals whose gender identity aligns with their assigned sex at birth are considered "cisgender."[32] This Note focuses on transgender and non-binary individuals only but recognizes that these two identities make up only a portion of the gender diverse population.

### 3. Discrimination: Misgendering and Deadnaming

Generally, discrimination is negative and unfair behavior directed at individuals or groups of individuals because of their voluntary or involuntary membership in a social group.[33] Negative stereotypes and

---

28. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 8; *see also Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Jan. 12, 2023), https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive [https://perma.cc/2NCA-J5TX] ("[S]ome people have a gender that blends elements of being a man or a woman, or a gender that is different than either male or female. Some people don't identify with any gender. Some people's gender changes over time.").

29. *Transgender and Non-Binary People FAQ*, *supra* note 18.

30. BIANCA D.M. WILSON & ILAN H. MEYER, NONBINARY LGBTQ ADULTS IN THE UNITED STATES 2 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf [https://perma.cc/YWU4-HKVP].

31. *Id.* at 6.

32. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 5–6; *see also Cisgender*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cisgender [https://perma.cc/2JK5-ZTMM] (last visited Jan. 23, 2022) ("[B]eing a person whose gender identity corresponds with the sex the person had or was identified as having at birth.").

33. CHARLES STANGOR & GRETCHEN B. SECHRIST, THE CONCISE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE 291–93 (W. Edward Craighead & Charles B. Nemeroff eds., 3rd ed. 2004). These social groups include both visible and invisible groups, but are not limited to age, race, religion, national origin, disability, sexual orientation, gender, and gender identity. *See id.* While the forms of discrimination can vary, two main forms are explicit and subtle discrimination. *See id.* Explicit discrimination can range from direct negative comments about someone or the social group they belong to, to "verbal and sexual abuse or physical harm." *Id.* Subtle discrimination is more challenging to detect than explicit discrimination due to its tendency to take a nonverbal form and includes staring at or ignoring someone, or sitting far away from a person due to the social group they belong to or appear to belong to. *Id.* Within the employment sphere, studies on workplace discrimination on the basis of sex have focused on two categories of discrimination: formal and informal sex discrimination. *See* MADELINE E. HEILMAN & BRIAN WELLE, FORMAL AND INFORMAL DISCRIMINATION AGAINST WOMEN AT WORK 28–29 (2005), https://dspace.mit.edu/bitstream/handle/1721.1/55933/CPL_WP_05_02_HeilmanWelle.pdf

implicit biases towards specific groups can both contribute to discriminatory thoughts and actions against such groups.[34] Misgendering and deadnaming are forms of demoralizing and detrimental discrimination against gender diverse populations.[35] Being misgendered and deadnamed are recurrent traumatic experiences for many transgender and non-binary individuals.

There are three relevant types of misgendering: negligent misgendering, accidental misgendering, and intentional misgendering.[36] Negligent misgendering "applies to misattributions of gender that occur due to a failure to take the proper care" by assuming an individual's gender identity rather than asking them how they would prefer to be addressed.[37] Picture this: a transgender woman who identifies as she/her/hers, but has a gender-neutral name, arrives for a job interview where the secretary calls her "sir" and the interviewer uses the pronouns he/him/his. Here, the secretary and interviewer have assumed the woman's gender identity and preferred pronouns based on their perceptions of her appearance. Although unintentional, negligent misgendering can still have extremely negative consequences on the misgendered individual, regardless of their gender identity.[38]

Accidental misgendering refers to a situation where "by force of habit, a speaker uses the wrong pronoun, label, title, or name."[39] Unlike negligent misgendering, accidental misgendering is automatic and "largely uncontrollable."[40] For example, imagine a coworker of fifteen years comes out as transgender and explains that the appropriate pronouns to address them by are he/him/his. Due to the habit of addressing the coworker by the pronouns she/her/hers, it's highly likely

---

[https://perma.cc/88FC-UZZW]. Formal sex discrimination refers to "the biased allocation of organizational resources such as promotions, pay, and job responsibilities" in the workplace. *Id.* at 28. Informal sex discrimination is focused on "interactions that occur between employees and the quality of relationships that they form" and the "verbal and nonverbal behaviours [sic] limiting the respect, credibility and psychological well-being of sexual minorities" in the workplace. *Id.*; Priola et al., *The Sound of Silence. Lesbian, Gay, Bisexual and Transgender Discrimination in 'Inclusive Organizations'*, 25 BRITISH J. OF MGMT. 488, 490–91 (2014).

34. GABBRIELLE M. JOHNSON, AN INTRODUCTION TO IMPLICIT BIAS: KNOWLEDGE, JUSTICE, AND THE SOCIAL MIND 20–22 (Erin Beeghly & Alex Madva eds., 2020).

35. *See generally* Sabra L. Katz-Wise, *Misgendering: What It Is and Why It Matters*, HARV. HEALTH PUBL'G (July 23, 2021), https://www.health.harvard.edu/blog/misgendering-what-it-is-and-why-it-matters-202107232553 [https://perma.cc/XKZ2-5WT8] ("When people are misgendered, they feel invalidated and unseen. When this happens daily, it becomes a burden that can negatively impact their mental health and their ability to function in the world.").

36. Chan Tov McNamarah, *Misgendering*, 109 CAL. L. REV. 2227, 2261–63 (2020).

37. *Id.* at 2261–62.

38. *See id.* ("[A]ssumptions based on another's appearance can have devasting consequences.").

39. *Id.* at 2262.

40. *Id.*

that one will accidentally call their coworker by these old pronouns "particularly early in the transition or shortly after the acknowledgment."[41] Like negligent misgendering, accidental misgendering remains harmful regardless of its lack of intent.

In contrast, intentional misgendering "involves the conscious refusal to use the correct gendered language or designations."[42] In this situation, the individual misgendering another person is informed of the person's preferred pronouns and "deliberately chooses not to use it or chooses to use language at odds with it."[43] Due to its deliberate nature, intentional misgendering is "more morally culpable than accidental or negligent misgendering,"[44] although any form of misgendering can be injurious to the misgendered individual, as discussed in further detail below.

Deadnaming is a form of misgendering.[45] Deadnaming is the action of calling an individual by their assigned name at birth, or a past chosen name, that the individual no longer wishes to be addressed by.[46] Intentional deadnaming, much like misgendering, is a common form of discrimination transgender and non-binary individuals face on a daily basis and can be negligent, accidental, or intentional.[47] Examples of deadnaming are prevalent in media coverage of violence against transgender individuals.[48] In these cases, the media refers to transgender individuals by their birth-assigned name rather than their actual name corresponding to their identity.[49]

---

41. *Id.*

42. McNamarah, *supra* note 36, at 2263–64.

43. For example, imagine a case where an employee who was previously addressed by he/him/his has told management ze identify as non-binary and would like to be addressed by ze/zir/zeir. If management refuses to call the employee by their identifying pronouns, because management honored the employee's previous pronouns of he/him/his, management is most likely intentionally misgendering the employee. *See id.* at 2263.

44. *Id.* at 2264.

45. *Id.* at 2255.

46. *Id.*

47. *See id.* at 2261–64.

48. *See* Chase Strangio, *A Transgender Person's Deadname Is Nobody's Business. Not Even a Reporter's.*, NBC NEWS (May 14, 2020), https://www.nbcnews.com/think/opinion/transgender-person-s-deadname-nobody-s-business-not-even-reporter-ncna1206721 [https://perma.cc/6S84-94NX] (discussing how media use of transgender individuals' deadnames "perpetuates the false notion that women who are trans are not 'real' women, that men who are trans are not 'real' men and that no one could have a gender that is nonbinary[,]" and emphasizing that writing about the deadname of a transgender woman "actually evokes the image of a man for readers and contributes to the insidious social understanding that 'this person claimed to be a woman but was really a man.'").

49. *Id.*; *see also* Morgan Sherm, *Deadnaming and Misgendering of Trans People Puts Trans Lives at Risk*, CHI. SUN TIMES (Nov. 29, 2021), https://chicago.suntimes.com/2021/11/29/22807775/what-i-learned-about-news-media-law-enforcement-transgender-murders-morgan-sherm-op-ed [https://perma.cc/ABA7-ZNWV] (offering solutions to the problem of deadnaming in the media).

## B. *Discrimination Against Gender Diverse Individuals in the Workplace*

Discrimination against transgender and non-binary individuals, characterized as a "crisis of hate"[50] and an "epidemic,"[51] runs rampant through society and has for quite some time.[52] Discriminatory actions taken against gender diverse individuals range in form from non-verbal micro-aggressions to anti-gender diverse legislation,[53] even to deadly

50. EMILY WATERS ET AL., A CRISIS OF HATE: A REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HATE VIOLENCE HOMICIDES IN 2017 5 (Nat'l Coal. of Anti-Violence Programs ed., 2018), http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release.pdf [https://perma.cc/C79S-657Y] (reporting on the "crisis of hate" facing the LGBTQ+ community).

51. *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, HUM. RTS. CAMPAIGN FOUND., https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-confirming-people-in-the-united-states-in-2021 [https://perma.cc/5HBA-QQFX] (last visited Mar. 18, 2022) (shedding light on the "epidemic of violence taking the lives of transgender and gender non-conforming people.").

52. In the 1950's, anti-masquerading laws made dressing in clothing that did not correspond with one's sex assigned at birth illegal. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 27. These laws gave police immense unchecked power, leading to police raids of bars frequented by the LGBTQ+ community. *Id.* During raids, police officers would force people to strip their clothing and undergo a search for the requisite number of gender-specific clothing items. *Id.* Later, the names of those violating the law would be published in the newspaper, often leading these individuals to lose their families, friends, and jobs. *Id.* For a brief discussion of the history of discrimination against transgender individuals and the transgender activism throughout history that served as a precursor to the appointment of the first openly transgender judge, Phyllis Randolph Fry, *see* Deborah Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015), https://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html [https://perma.cc/3F2R-4K9L].

53. In 2021 alone, twenty-five "anti-LGBTQ bills" were enacted, including thirteen "anti-transgender laws across [eight] states." *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51; *see also* Grant Gerlock, *Transgender Girls and Women Now Barred from Female Sports in Iowa*, NPR (Mar. 3, 2022), https://www.npr.org/2022/03/03/1084278181/transgender-girls-and-women-now-barred-from-female-sports-in-iowa [https://perma.cc/SE3U-WHMW] ("Iowa Gov. Kim Reynolds has signed a law that bans transgender girls and women in the state from competing in sports according to their gender identity. The measure applies to public and private K-12 schools and community colleges as well as colleges and universities affiliated with the NCAA and NAIA."); J. David Goodman, *How Medical Care for Transgender Youth Became 'Child Abuse' in Texas*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-transgender-youth-medical-care-abuse.html [https://perma.cc/7TDM-DHV7] ("The abuse investigations ordered by Mr. Abbott, the first of their kind, represent the peak of a new round of action in state capitals aimed at transgender Americans, the most significant push by groups opposed to transgender rights since the national campaign to limit bathroom access foundered in 2017 and 2018."). Although not enacted, more than "130 anti-transgender bills were introduced across 33 states." *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51; *see also* Betsy Z. Russell, *House*

physical violence.[54] While this Note discusses discrimination against transgender and non-binary individuals generally, it is important to emphasize that discrimination against these individuals is intersectional in nature. Race, class, national origin, disability status, and other demographic factors contribute to discrimination against gender diverse persons.[55] Specifically, transgender women of color live with numerous marginalizations and experience violence, and even death, "in epidemic numbers."[56] Transgender individuals with disabilities have the highest rate of lifetime suicide attempts.[57]

---

*Passes Anti-Trans Youth Treatment Bill*, IDAHO PRESS (Mar. 8, 2022), https://www.idahopress.com/news/local/house-passes-anti-trans-youth-treatment-bill/article_ebb0623c-6df9-5a94-8beb-16d5c7688834.html [https://perma.cc/JC8Y-NETD] (describing Idaho legislation that, if passed by the Idaho Senate, would make it a felony, punishable by life in prison, to provide gender care to transgender youth); Elizabeth Bibi, *Florida Senate Passes "Don't Say Gay or Trans" Bill, Legislation Heads to DeSantis' Desk for Signature or Veto*, HUM. RTS. CAMPAIGN FOUND. (Mar. 8, 2022), https://www.hrc.org/news/florida-senate-passes-dont-say-gay-or-trans-bill-legislation-heads-to-desantis-desk-for-signature-or-veto [https://perma.cc/Z4MT-PPJA] (explaining a Florida bill that once enacted, "would block teachers from talking about LGBTQ+ issues or people, further stigmatizing LGBTQ+ people and isolating LGBTQ+ kids… [and] also undermin[ing] existing protections for LGBTQ+ students.").

54. In 1996, the National Coalition of Anti-Violence Programs (NCAVP) began reporting on national violence against the LGBTQ+ community. WATERS ET AL., *supra* note 50. Beginning in 2013, the Federal Bureau of Investigations (FBI) began reporting on hate crimes "motivated by anti-transgender bias." *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51. Both reports consistently revealed similarly disturbing trends of violence against gender diverse persons, demonstrating an increase in violence against transgender and non-binary individuals. WATERS, *supra* note 50, at 6 (reporting an eighty-six percent increase in hate violence related homicides of LGBTQ people between 2016 and 2017); *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51 (analyzing FBI data of hate crimes motivated by anti-transgender bias collected since 2013 and characterizing the results as a disturbing trend in increased violence). In 2021, more gender diverse individuals were killed in a single year than ever before. *Id.*

55. Jefferson et al., *Transgender Women of Color: Discrimination and Depression Symptoms*, NIH PUB. ACCESS, 2 (2014), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4205968/pdf/nihms594631.pdf [https://perma.cc/MV8Q-MKPZ] ("While trans women of color share experiences of transphobia and cisnormativity with other transgender people, experiences of sexism with other women, and experiences of racism with other people of color, these experiences interact and cannot be separated: trans women of color experience discrimination uniquely as trans women of color."); Nadine Ruff et al., *Hope, Courage, and Resilience in the Lives of Transgender Women of Color*, 24 THE QUALITATIVE REP. 1990, 1991 (2019) (explaining the intersectionality of the oppression transgender individuals face).

56. Jefferson et al., *supra* note 55, at 2, 8–10 (discussing data that shows a statistical significance between transgender individuals of color experiencing transphobic and racist events with increased likelihood of depression symptoms).

57. ANNA P. HAAS ET AL., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 7 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-

In addition to experiencing discrimination in nearly all aspects of daily life,[58] gender diverse individuals experience disproportionately high levels of discrimination in the workplace compared to cisgender coworkers.[59] In 2020, over half of surveyed transgender individuals reported that discrimination "moderately or significantly affected their capacity to be hired, with four in ten saying that their ability to be hired was negatively affected to a significant degree," and almost half reporting at least a moderate impact on their ability to retain employment.[60] A staggering ninety percent "of transgender workers report some form of harassment or mistreatment on the job."[61] Gender diverse individuals also

---

GNC-Suicide-Attempts-Jan-2014.pdf [https://perma.cc/7FZJ-7NPM] ("The highest prevalence of lifetime suicide attempts (65%) was found among those on disability.").

58. In 2020, sixty-two percent of transgender respondents and sixty-nine percent of non-binary respondents to a Center for American Progress (CAP) survey reported experiencing discrimination within the last year. LINDSAY MAHOWALD ET AL., THE STATE OF THE LGBTQ COMMUNITY IN 2020 4 (2020), https://americanprogress.org/wp-content/uploads/2020/10/LGBTQpoll-report.pdf [https://perma.cc/S34A-VMT7]; *see also* Clawson, *supra* note 7, at 255–57 (describing generally the discrimination transgender individuals face daily). More than half of transgender and non-binary respondents experienced this discrimination "in a public place such as a store, public transportation, or a restroom," and many experienced it in school, apartment complexes, and "through interactions with law enforcement." MAHOWALD ET AL., *supra* note 58, at 4 (reporting that specifically twenty-one percent experienced discrimination in school, twenty percent in apartment complexes, and fifteen percent through interactions with law enforcement). Over one-third of gender diverse individuals reported discrimination having at least a moderate impact on their ability to rent or buy a home. *Id.* at 7. Some gender diverse individuals are even intentionally misgendered and deadnamed throughout the legal process as part of disturbing tactics of opposing counsel. *See* McNamarah, *supra* note 36, at 42–43 (explaining the use of intentional misgendering and deadnaming by attorneys in the legal process in order to harass opposing parties who are transgender).

Gender diverse individuals also face ongoing discrimination in accessing health care. Close to one-third of transgender respondents to a CAP survey indicated that a health care provider refused to see them due to their gender identity, or saw them, but fondled, sexually assaulted, or raped them, and many reported having been intentionally misgendered or deadnamed by a health care provider. *See* Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/ [https://perma.cc/SB3M-FUQ9]. Sexual violence against gender diverse individuals is far from uncommon, with roughly half of transgender individuals experiencing sexual violence at some point in their lifetime. *See* SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf [https://perma.cc/S5XM-VEUQ].

59. *See generally*, Dan Avery, *Half of LGBTQ Workers Have Faced Job Discrimination, Report Finds*, NBC NEWS (Sept. 8, 2021), https://www.nbcnews.com/nbc-out/out-news/half-lgbtq-workers-faced-job-discrimination-report-finds-rcna1935 [https://perma.cc/TP2Y-UE8V] (discussing the discrimination LGBTQ persons face in the workplace).

60. MAHOWALD ET AL., *supra* note 58, at 9–10.

61. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AMERICAN PROGRESS 1, 2 (June 2, 2011),

report numerous other forms of employment discrimination based on their transgender or non-binary status, such as being: denied a job they applied for; removed from direct contact with clients, customers, or patients; denied a promotion; forced to present a gender they did not identify with to keep their job; denied access to the proper restroom; asked inappropriate questions about their genitalia; micromanaged more than cisgender employees; and subjected to improper release of information about them by supervisors that should not have been released, amongst other actions.[62]

For instance, Aveda Adara, a transgender woman, describes being "laughed out of interviews" for many years and "constantly misgendered by managers, supervisors, and employees."[63] Olivia Hill, the first employee at Vanderbilt University to transition while employed, describes being called a "trans freak" by her direct supervisor, who also inappropriately discussed Hill's transition with other university employees.[64] Similarly, Patrick Callahan, a transgender man and criminology consultant for the federal government, was denied a job at a police department and later told by a friend who worked there that after the department received Callahan's background check and saw previous female names (Callahan's deadname) on the reports, it became a "joke around the department, that some 'it thing' wanted to work there."[65] These are just a few instances of routine workplace discrimination that gender diverse individuals face.[66]

It comes with no surprise that the relentless degrading and horrific experiences of discrimination toward transgender and non-binary individuals face result in grave consequences for the gender diverse community. A research study of the effects of misgendering on transgender individuals showed that misgendering left individuals feeling

---

https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/workplace_discrimination.pdf [https://perma.cc/CHG5-JXXY].

62. MAHOWALD ET AL., *supra* note 58, at 10–11; HAAS ET AL., *supra* note 57, at 11.

63. Julie Moreau, *'Laughed Out of Interviews': Trans Workers Discuss Job Discrimination*, NBC NEWS (Oct. 6, 2019), https://www.nbcnews.com/feature/nbc-out/laughed-out-interviews-trans-workers-discuss-job-discrimination-n1063041 [https://perma.cc/PJ44-VUCR].

64. *Transgender Woman Files Discrimination Lawsuit Against Vanderbilt University*, NEWS CHANNEL 5 NASHVILLE (Sept. 30, 2021), https://www.newschannel5.com/news/transgender-woman-files-discrimination-lawsuit-against-vanderbilt-university [https://perma.cc/ALX3-VVLL].

65. Jo Yurcaba, *Transgender Recruit Sues New Orleans Police Department for Alleged Hiring Discrimination*, NBC NEWS (June 29, 2021), https://www.nbcnews.com/feature/nbc-out/transgender-recruit-sues-new-orleans-police-department-alleged-hiring-discrimination-n1272488 [https://perma.cc/J5TA-D7XT].

66. *See* Burns & Krehely, *supra* note 61, at 1–2 (discussing the staggering number of transgender people who face some form of discrimination at work based on their gender identity).

stigmatized.[67] Additionally, it found "a positive association between [this] felt stigma and stress and depression" and that "[b]oth perceived frequency [of misgendering] and feeling stigmatized were positively associated with psychological distress."[68] Misgendering and deadnaming alike can bring gender diverse individuals back to a distressful or traumatic time in their life before they were able to take steps to acknowledge or express their gender identity, leading to psychological anguish.[69] Compared to five percent of the general United States population, nearly half of the respondents to the U.S. Transgender Survey reported experiencing severe psychological distress due to experiencing discrimination in just a month prior to participating in the survey.[70]

Gender diverse individuals often report feeling the need to take extensive measures to avoid future discrimination, such as hiding a personal relationship, avoiding public places, changing the way they dress or their mannerisms around others, and making difficult decisions about where to work.[71] Additionally, workplace discrimination has a "ripple effect" that "contributes to a crisis of homelessness, poverty, and violence" for gender diverse individuals.[72] This fact is not shocking, as many transgender and non-binary individuals frequently call out sick or quit to avoid deadnaming and misgendering in the workplace, which can lead to discipline and unemployment.[73] Notably, transgender individuals experience especially high rates of poverty and homelessness compared to that of cisgender straight persons.[74]

---

67. Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 STIGMA AND HEALTH 53, 54 (2013).

68. *Id.* at 53.

69. For example, Chase Strangio, a transgender activist, describes the feeling of being deadnamed as follows:

> It does not represent who I am but rather a painful past that I worked hard to move beyond; it is as mean-spirited and useless for you to try to seek this information out as it would be for me to go in search of some painful experience of your childhood to define who you are for others.

Strangio, *supra* note 48; *see also Why Deadnaming Is Harmful*, CLEVELAND CLINIC (Nov. 18, 2021), https://health.clevelandclinic.org/deadnaming/ [https://perma.cc/CGZ7-CUQL] (explaining that deadnaming is harmful because "[i]t can remind them of that period in their lives before they could take steps to affirm who they are.").

70. JAMES ET AL., *supra* note 58, at 5.

71. MAHOWALD ET AL., *supra* note 58, at 11–13.

72. Moreau, *supra* note 63.

73. *See id.* (discussing multiple transgender individuals' stories about the discrimination they faced at work).

74. *See* M.V. LEE BADGETT ET AL., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 39 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf

The compounding effects of feeling stigmatized, psychological distress, poverty, and violence are reflected in the devastatingly high suicide attempt rates in the gender diverse community. Forty percent of Transgender Survey participants reported having attempted suicide at some point during their life.[75] In the same year, the attempted suicide rate amongst United States adults was four percent,[76] making the national rate of gender diverse attempts at least ten times that of the general population. Notably, those experiencing verbal discrimination and violence at work, or unemployment due to their gender identity, experienced an even higher suicide attempt rate.[77] In particular, transgender individuals who were: unemployed had an increased attempted suicide rate of fifty percent, harassed by someone at work had an increased rate of fifty-one percent, victims of violence by someone at work had an increased rate of sixty-five percent, victims of sexual assault at work had an increased rate of sixty-four percent, denied access to appropriate bathrooms at work had an increased rate of fifty-nine percent, and misgendered repeatedly and intentionally by someone at work had an increased rate of fifty-six percent.[78]

## II. CURRENT LEGAL PROTECTIONS IN THE WORKPLACE

Although discrimination can take place in every stage of the employment process for gender diverse individuals, this Note focuses on discrimination in the form of sexual harassment within the workplace. Federal legal protections exist for gender diverse individuals in the employment sphere, but their application to transgender and non-binary persons is relatively new. Some states have created legislation that protects these employees from discrimination, but as indicated in Part I, many other states have or are in the process of adopting discriminatory legislation against gender diverse individuals and their family members. Such measures lead to increased stigma and fewer protections in all

---

[https://perma.cc/Z6BX-QRXF] (finding the rate of poverty for transgender persons to be 29.4%, while the rate for cisgender straight persons is 15.7%); Moreau, *supra* note 63 ("Almost one third of respondents to the 2015 survey reported living in poverty, compared to 14 percent of the general U.S. population.").

75. JAMES ET AL., *supra* note 58, at 5; *see also* Ruff et al., *supra* note 55, at 1991 (showing that a study of transgender women in California found that sixty-one percent of participants had attempted suicide at least once).

76. *See* Kathryn Piscopo et al., *Suicidal Thoughts and Behavior Among Adults: Results from the 2015 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (Sept. 2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-DR-FFR3-2015/NSDUH-DR-FFR3-2015.pdf [https://perma.cc/D524-UELE] ("The estimated 9.8 million adults aged 18 or older in 2015 who had serious thoughts of suicide in the past year represent 4.0 percent of adults aged 18 or older.").

77. *See* HAAS ET AL., *supra* note 57, at 7, 11.

78. *Id.* at 11.

aspects of life for gender diverse persons, ultimately escalating the need for further safeguards in the workplace for these individuals.

### A. *Title VII Generally &* Bostock

Title VII was enacted "to improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace, [as workplace] conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life."[79] Title VII applies to private employers of fifteen or more employees "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" and protects employees from employment discrimination based on their membership in a recognized protected class.[80] Specifically, Title VII, employers are prohibited from failing or refusing to hire, discharging, or otherwise discriminate against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]"[81] Employers are also forbidden from limiting, segregating, or classifying employees and applicants from employment "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex[.]"[82]

Before the *Bostock*[83] decision, whether discrimination "because of sex" under Section 703 of Title VII applied to discrimination and harassment based on one's gender identity or sexual orientation was uncertain.[84] Traditionally, sex discrimination and harassment under Title VII only protected from such behavior because of biological sex and did not include discrimination against employees based on their sexual orientation or gender identity. In its 1989 *Price Waterhouse v. Hopkins*[85] decision, the Supreme Court held that discrimination and sexual harassment "because of sex" was not limited to being on the basis of biological sex but also encompassed discrimination and harassment on the basis of sex stereotypes.[86] *Price Waterhouse* involved a situation in which a female employee was denied partnership due to her employer's

79. 29 C.F.R. § 1608.1(b) (2022).
80. 42 U.S.C. § 2000e.
81. 42 U.S.C. § 2000e-2 (a)(1).
82. 42 U.S.C. § 2000e-2 (a)(2).
83. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).
84. *See generally* 42 U.S.C. § 2000e-2.
85. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
86. *See id.* at 250–52 (holding that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender" because Congress intended to strike discrimination based on sex stereotypes).

gendered criticisms of her demeanor, which was similar to the demeanor of many male colleagues who had become partners in the office.[87] The Court found these sex stereotype-based statements and the adverse employment actions taken on such a basis to be discrimination because of sex and therefore prohibited under Title VII.[88] The Court's opinion produced no further clarification on whether harassment or discrimination on the basis of an employee's sexual orientation or gender identity fell under Title VII's reach. Following *Price Waterhouse*, years of disagreement amongst federal courts about Title VII's protections of gender diverse persons, and more specifically whether discrimination on the basis of gender identity and sexual orientation were prohibited, plagued the legal field.[89] That was until the Supreme Court's monumental *Bostock* decision in 2020, which had a release so highly anticipated and viewed that it crashed the Court's computer system.[90]

The *Bostock* decision rested upon the combination of three unfortunate yet common cases where an employer discharged an employee after the employee revealed they were homosexual or transgender.[91] All three employees filed suit under Title VII, arguing that their employment termination was on the basis of their sexual orientation or transgender status, which was prohibited sex discrimination "because

87. *Id.* at 234–36; *see also* Meredith Rolfs Severtson, Note, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74 VAND. L. REV. 1507, 1517 (2021) ("[A]n accounting firm refused to elevate a high-performing woman associate to partner status because firm leadership found her to be too abrasive and insufficiently feminine. The partners reviewing Ms. Hopkins for potential partnership criticized her in gendered terms, calling her 'macho,' suggesting that her demeanor was an 'overcompensat[ion] for being a woman,' and suggesting that she take 'a course at charm school.'").

88. *Price Waterhouse*, 490 U.S. at 250–52, 255–57.

89. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020) (finding that an employer firing someone simply for being homosexual or transgender is forbidden by Title VII); *see also* Clawson, *supra* note 7, at 261–62 (explaining conflicting statements on Title VII protections between the Obama and Trump Administrations); *compare* Ulane v. Eastern Airlines, Inc. 742 F.2d 1081, 1084–86 (7th Cir. 1984) (finding that transgender individuals were not protected under Title VII), *and* Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that discrimination based on a person's status as "transsexual" was not discrimination "because of sex" under Title VII), *overruled by* Bostock, 140 S. Ct. 1731, *with* Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) (finding there is not "any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is [transgender]," as "discrimination against a plaintiff who is [transgender]—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.").

90. Linda Greenhouse, *What Does 'Sex' Mean? The Supreme Court Answers*, N.Y. TIMES (June 18, 2020), https://www.nytimes.com/2020/06/18/opinion/supreme-court-sex-discrimination.html [https://perma.cc/UAS3-CL9M].

91. *Bostock*, 140 S. Ct. at 1737–38.

of [their] sex."[92] Finally, the time for the Supreme Court to further clarify whether Title VII's "because of sex" provision applied to discrimination and harassment on the basis of gender identity and sexual orientation had arrived. Generally, Justice Gorsuch's majority opinion further elucidated Title VII's "because of sex" language to prohibit harassment and the taking of adverse employment actions against employees on the basis of their homosexual or transgender status.[93]

The Court reasoned that in these types of discriminatory employment actions against gender and sexual orientation diverse individuals, sex plays a "but for" cause.[94] Specifically, the Court explained that by firing employees "for actions or attributes it would tolerate in an individual of another sex," the employers had intentionally treated homosexual and transgender employees worse on the basis of their sex, constituting discriminatory action against them.[95] For example, if an employer fired a woman for dating women, the employer would terminate that employee's employment for an action that it allows male employees to partake in.[96] Therefore, sex played "a necessary and undisguisable role in the [adverse] decision" and constitutes an actionable claim under Title VII.[97]

It is important to note that *Bostock* uses the language "homosexual and transgender" to describe the type of gender and sexual orientation diverse individual that Title VII protects.[98] The Court did not engage in discussion regarding non-binary individuals, which has led to some discussions regarding whether non-binary individuals would be protected under *Bostock's* interpretation of Title VII.[99] Based on the Court's logic in *Bostock* and EEOC guidance, it is likely that non-binary individuals would be protected under Title VII for discrimination on the basis of their

92. Brief of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees at 2, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623 & 18-107) ("But for Zarda's and Bostock's male sex, their employers would not have objected to their dating men. But for Stephens' sex assigned at birth, her employer would not have objected to her sex presentation."); *see also* Brief for Petitioner at 10–12, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) ("Sexual orientation discrimination is discrimination 'because of sex' because sexual orientation is a sex-based classification within the meaning of Title VII, and it is disparate treatment of an employee that would not occur 'but for' his sex.").

93. *Bostock*, 140 S. Ct. at 1737.

94. *Id.* at 1739.

95. *Id.* at 1740.

96. *Sexual Orientation and Gender Identity (SOGI) Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination [https://perma.cc/RK57-XR25] (last visited Apr. 15, 2022).

97. *Bostock*, 140 S. Ct. at 1737.

98. *Id.*

99. *E.g.*, Severtson, *supra* note 87, at 1524–30 (discussing *Bostock*'s implications on nonbinary employees).

gender identity, but further developments in the law could prove otherwise.[100]

### B. *Title VII Hostile Work Environment Sexual Harassment Claims*

Although *Bostock* primarily dealt with cases involving discriminatory employment termination, *Bostock*'s definition of "because of sex" to include sexual orientation and transgender identity applies broadly to other protections guaranteed by Title VII, such as the prohibition against sexual harassment in the workplace.[101] In 2020 alone, 11,497 sexual harassment charges were filed with the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal laws prohibiting employers from discriminating against an applicant or employee on the basis of their sex.[102] Notably, it is estimated that only a small fraction of employees who have faced workplace sexual harassment have reported the conduct to the EEOC due to fear of retaliation from their employer.[103] The EEOC defines sexual harassment as: "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."[104]

There are two forms of prohibited workplace sexual harassment under Title VII. The first form is quid pro quo sexual harassment, which occurs

---

100. *See Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96 ("It is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity.").

101. *See generally* Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) ("Very recently, in [*Bostock*,] the Supreme Court held that Title VII's language protects homosexual and transgender individuals from discrimination . . . It naturally follows that discrimination based on gender stereotyping falls within Title VII's prohibitions."); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.").

102. 42 U.S.C. § 2000e-4; *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview [https://perma.cc/9EC4-MH8N] (last visited Apr. 15, 2022); *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020 [https://perma.cc/2RH8-N6GW] (last visited Apr. 10, 2022).

103. Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017), https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts [https://perma.cc/S3UM-9UY3].

104. *Fact Sheet: Sexual Harassment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination [https://perma.cc/R76F-G4ZL] (last visited Mar. 26, 2023).

when an individual explicitly or implicitly conditions a job, benefit, or absence of a job or benefit upon an employee's acceptance of sexual conduct.[105] This Note focuses on the second form of prohibited sexual harassment: hostile work environment sexual harassment. Generally, to successfully bring a *prima facie* hostile work environment claim, an employee has the burden of showing that: (1) they were subjected to unwelcome harassment; (2) the unwelcome harassment was on the basis of their sex;[106] (3) the harassment was sufficiently severe or pervasive (or both) as to alter the terms and conditions of employment and create a work environment that was hostile or abusive; and (4) there is a basis for holding the employer liable for the misconduct.[107] This Note focuses on the third prong of the hostile work environment *prima facie* case requirement.

When showing that alleged harassment was severe or pervasive so as to alter the conditions of employment and create a hostile or abusive working environment, a plaintiff can show that the conduct was *either* severe, pervasive, or both.[108] To analyze whether harassment is sufficiently severe or pervasive to make out a *prima facie* sexual harassment claim under Title VII, courts look through both an objective and subjective lens.[109] More specifically, courts ask whether a reasonable person would find the conduct harassment and whether the employee found it to be so.[110] Courts look at the totality of the circumstances throughout this analysis by considering the frequency of the conduct, the severity of the conduct, whether the conduct unreasonably interfered with work performance, and how it affected the employee's psychological

105. *The Law and Your Job*, A.B.A. (Mar. 18, 2013), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/sexualharassment_quidproquo/.plk [https://perma.cc/57S4-CQ5P].

106. Regardless of the sex of the harasser, an employee plaintiff must show the harassment would not have taken place but for their sex. *See* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78 (1998).

107. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (holding that a hostile work environment is a valid claim under Title VII and to prove this claim the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'") (citation omitted); Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998) (determining whether the work environment was hostile by looking at all the circumstances of the conduct); Vance v. Ball State Univ., 646 F.3d 461, 469 (7th Cir. 2011) ("Ball State, however, is not liable to Vance under Title VII for a hostile work environment unless Vance can prove (1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; and (4) that there is a basis for employer liability."), *aff'd*, 570 U.S. 421 (2013).

108. *E.g.*, *Vance*, 646 F.3d at 469.

109. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

110. *Id.*

well-being;[111] although an employee plaintiff does not need to show psychological injury.[112] "Simple teasing . . ., offhand comments, and isolated incidents (unless extremely serious)" do not amount to "discriminatory changes in the 'terms and conditions of employment.'"[113]

Notably, there is a slight circuit split on "whether the severity or pervasiveness of alleged sexual harassment in the workplace should be looked at from the perspective of a reasonable person or a reasonable woman."[114] But a majority of circuits follow a reasonable person standard that is arguably more difficult for plaintiffs to satisfy than the reasonable woman standard.[115] The Supreme Court has been silent regarding the use of the reasonable woman standard, but in *Oncale* elaborated that the perspective from which harassment should be judged is from "that of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[116] Some proponents of the reasonable woman standard saw the Court's *Oncale* decision as both a protection of the standard and an implicit encouragement of its use.[117] Conversely, others found Scalia's *Oncale* decision to hold the potential to chill hostile work environment claims within certain industries. These opponents of *Oncale* argue, amongst other problems, that the case implied that under the reasonable person standard, considering the totality of the circumstances, employees in certain industries might be desensitized to certain behaviors that would

111. *Faragher*, 524 U.S. at 787–88 ("We directed courts to determine whether an environment is sufficiently hostile or abusive by "looking at all the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.") (quoting *Harris*, 510 U.S. at 23).

112. *Harris*, 510 U.S. at 22.

113. *Faragher*, 524 U.S. at 788 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

114. V. Blair Druhan, *Severe or Pervasive: An Analysis of Who, What, and Where: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VANDERBILT L. REV. 355, 361 (2013).

115. Currently, only the Ninth and Third Circuits have adopted the reasonable woman standard while the Fifth, Eighth, and First Circuits have rejected the standard. *See* Ellison v. Brady, 924 F.2d 872, 879–80 (9th Cir. 1991) (adopting the reasonable woman standard); Hurley v. Atl. City Police Dep't, 174 F.3d 95, 115–16 (3d Cir. 1999) (finding that the reasonable woman standard "recognize[s] and respect[s] the difference between male and female perspectives on sexual harassment."); *see also* Ford v. Cty. of Hudson, 729 F. App'x 188 (3d Cir. 2018) (applying a form of the reasonable woman standard); Christian v. Umpqua Bank, 984 F.3d 801, 811 (9th Cir. 2020) (applying the reasonable woman standard); Druhan, *supra* note 114, at 357–58 ("To date, only the Ninth and Third Circuits have adopted this theory, and the Supreme Court has not resolved this circuit split.").

116. Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 539 (2007) (quoting *Oncale*, 523 U.S. at 81).

117. *Id.*

constitute sexual harassment in other industries.[118] Critics have called *Oncale* "a clever way to limit sexual harassment suits generally" for this very reason.[119]

### C. *Current EEOC Guidance and Recent Adjudications*

Following the *Bostock* decision, the EEOC released new guidance resources "to educate employees, applicants and employers about the rights of all employees, including lesbian, gay, bisexual and transgender workers, to be free from sexual orientation and gender identity discrimination in employment."[120] Although *Bostock* primarily dealt with cases involving discriminatory employment termination, *Bostock*'s defining "because of sex" to include sexual orientation and gender identity applies to hostile work environment claims under Title VII as well.[121] The EEOC delineates harassment against gender diverse individuals as including offensive or derogatory remarks regarding someone's sexual orientation, offensive or derogatory remarks about someone's transgender status, as well as intentional misgendering or deadnaming.[122]

---

118. *See Oncale*, 523 U.S. at 81–82 ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances' . . . In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.") (internal citation omitted).

119. Catherine J. Lanctot, *The Plain Meaning of Oncale*, 7 WM. & MARY BILL RTS. J. 913, 915–17 (1999) ("Much of the analysis has highlighted *Oncale*'s call for 'common sense,' in evaluating sexual harassment claims 'in context,' as evidence that Justice Scalia intentionally sowed the seeds of destruction in his opinion; rather than being viewed as a victory for plaintiffs, *Oncale* has been characterized as a 'Trojan horse.'").

120. *EEOC Announces New Resources about Sexual Orientation and Gender Identity Workplace Rights*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 15, 2021), https://www.eeoc.gov/newsroom/eeoc-announces-new-resources-about-sexual-orientation-and-gender-identity-workplace-rights [https://perma.cc/UHF9-UPJA].

121. *See Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96 ("It is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity.").

122. The EEOC also provides guidance that "[o]ffensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats,

EEOC adjudications regarding intentional misgendering and deadnaming of employees have found that "inadvertent and isolated slips of the tongue,"[123] or one intentional instance of misgendering, is not severe or pervasive enough to rise to the level of a hostile work environment.[124] But, notably, the EEOC has cautioned employers on repeated intentional misgendering, as the conduct "[has] the potential to create a hostile work environment,"[125] due to the harm it can cause a gender diverse employee.[126] The EEOC has also encouraged employers to "advise its managers and employees about what behavior is appropriate in the workplace" with regards to misgendering.[127] Specifically, the agency states that "supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with in employee records and in communications with and about the employee."[128]

## III. LEGAL ANALYSIS

### A. *Satisfaction of the Severe or Pervasive Standard*

From the time that the *Bostock* decision opened an avenue for hostile work environment claims to gender diverse individuals, courts have varied in their determinations of whether intentional misgendering and deadnaming are severe or pervasive enough to create a hostile work environment. While few hostile work environment claims brought by gender diverse individuals have yet to see their day in court since *Bostock*, as of the time this Note was composed, a handful of cases, like

---

intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance." *Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96.

123. Lusardi, EEOC DOC 0120133395, 2015 WL 1607756 at *11 (Apr. 1, 2015).

124. *See* Royce O., EEOC DOC 2021001172, 2021 WL 5890398 at *6 (Nov. 15, 2021) (holding that the supervisor's actions were not severe or pervasive enough to rise to the level of a hostile work environment because the wrong pronoun was only used once and the supervisor apologized for using it).

125. *See id.* ("While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. We do not condone the statement made by S1 in reference to Complainant and caution the Agency against any future similar statements or conduct. We find that S1's statement regarding claim 2 may have the potential to create a hostile work environment.").

126. *See* Jameson, EEOC DOC 0120130992, 2013 WL 2368729, at *1 (May 21, 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.").

127. *Royce O.*, 2021 WL 5890398, at *6.

128. *Jameson*, 2013 WL 2368729, at *2.

*Doe v. Triangle Doughnuts, LLC*,[129] *Grimes v. County of Cook*,[130] and *Membreno v. Atlanta Restaurant Partners, LLC*,[131] have been heard by federal district courts.

Additionally, in January 2022, *Eller v. Prince George's County Public Schools*[132] was heard by a federal court; here, the plaintiff employee was subjected to five years' worth of severe verbal harassment on the basis of her transgender status while in the workplace.[133] Specifically, the employee "was repeatedly misgendered, including being deliberately referred to as 'he,' 'it,' 'sir,' 'mister,' 'guy in a dress,' and her former name."[134] "She was also called, both behind her back and to her face, a wide range of derogatory terms referring to her transgender status," and based on sex stereotypes, terms associated with being a pedophile or child

129. In *Triangle Doughnuts*, the United States District Court of the Eastern District of Pennsylvania found that a transgender employee showed sufficiently severe and pervasive harassment to bring a hostile work environment claim. Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020). Over a three-month span, the plaintiff experienced repeated intentional misgendering and deadnaming, threats of physical violence, and being subjected to a stricter dress code than other employees. *Id.* at 122–23. Although the alleged harassment occurred over a shorter span than in *Grimes* and *Membreno*, the court found the treatment severe enough to make out a prima facie case. *Id.* at 129–30.

130. In *Grimes*, the Northern District of Illinois denied an employer's motion to dismiss of a sexual harassment claim from a transgender employee, concluding the employee made a showing of pervasive alleged harassment. Grimes v. Cty. of Cook, 455 F. Supp. 3d 630, 645 (N.D. Ill. 2020). In *Grimes*, the employee's complaint alleged that based upon his transgender status, his "[c]o-workers . . . shunn[ed] [him] and would not communicate with him . . . on a daily basis" over several months and described three specific instances of harassment. *Id.* at 645. The harassment included a co-worker telling the employee, "You really do have a big ass, don't you?", a coworker referring to him as a "girl," and another co-worker "referring to an unidentified individual who appeared to be female," remarking to the plaintiff, "You see that. That's a man. People ought to tell who they really are. That's how people get killed." *Id.* The court found that these instances, given their daily occurrence over several months, were sufficiently pervasive conduct to state a hostile work environment claim. *Id.* While the court followed EEOC guidance in this case, it is unclear how the court would have ruled if the plaintiff had experienced misgendering alone, without other forms of discrimination.

131. In *Membreno*, the plaintiff, a transgender woman, was subjected to almost ten years of "inhumane" treatment from coworkers and supervisors at the restaurant she worked at. *See* Membreno v. Atlanta Rest. Partners, LLC, 517 F. Supp. 3d 425, 431–34 (D. Md. 2021) (describing the pervasive history of harassment and discrimination the plaintiff faced on the basis of their gender identity). The General Manager repeatedly misgendered and deadnamed her, both publicly on the work schedule and in front of other employees and in private. *Id.* at 431. Other coworkers called her offensive slurs and threatened to hit her. *Id.* at 431–32. The United States District Court of Maryland found that "a reasonable factfinder could conclude that the persistent 'personal gender-based remarks that single out individuals for ridicule' were sufficient to create a hostile work environment." *Id.* at 442 (citing EEOC v. Fairbrook Med. Clinic, 606 F.3d 320, 328–29 (4th Cir. 2010)).

132. Eller v. Prince George's Cnty. Pub. Schs., 580 F. Supp. 3d 154 (D. Md. 2022).

133. *See id.* at 176–77 (referring to the negative comments made by parents at the school and stating that the school took no action concerning this harassment).

134. *Id.* at 173.

molester.[135] The plaintiff was subjected to threats of physical violence and three assaults in the workplace and was able to provide medical evidence that the harassment she endured resulted in complex post-traumatic stress disorder.[136] Emphasizing that "[n]ames can hurt as much as sticks and stones," the United States District Court of Maryland held that the conduct the plaintiff faced was severe and pervasive enough to create a hostile work environment.[137] Notably, the court collectively considered all of the conduct alleged in the claim but did not address whether the intentional misgendering and deadnaming were sufficient on their own to satisfy the severe or pervasive standard requirement of a hostile work environment claim.

Although the importance of cases like *Eller*—where the court not only found in favor of a transgender employee bringing a hostile work environment claim, but also acknowledged the deeply harmful nature of misgendering and deadnaming—should not be understated, *Eller* is only *one* district court case and provides no binding precedent on other circuits or higher-level federal courts. To avoid uncertainty for employers on what conduct creates a hostile work environment and to protect gender diverse individuals in the workplace, courts should recognize that intentional misgendering and deadnaming satisfies the severe or pervasive standard for hostile work environment claims. This could be a reality if courts (1) adopted a reasonable gender diverse person standard comparable to that of the reasonable woman standard used in some circuits, and (2) deferred to EEOC guidance and adjudications regarding sexual harassment, which finds that intentional misgendering and deadnaming in the workplace are sufficient to satisfy the severe or pervasive standard for hostile work environment claims under Title VII.

### 1. Reasonable Gender Diverse Person Standard

The analysis of whether conduct is severe or pervasive enough to alter the terms and conditions of employment is highly dependent on the court's view of the alleged harassment. This makes the perceptive standard the court applies determinative of the claim's livelihood. Specifically, the analysis can be impacted by judges' and juries' own biases, religious beliefs, gender identity, and personal behavioral practices.[138] With less than *one percent* of sitting judges identifying as

135. *Id*.

136. *Id*.

137. *Id*. (*citing* EEOC v. Sunbelt Rentals, 521 F.3d 306, 318 (4th Cir. 2008)).

138. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998) ("[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."); *see also* Noguchi, *supra* note 103 (discussing judges' biases and lack of uniformity in analyzing whether conduct is severe

LGBTQ,[139] the overall composition of the federal judiciary being exceptionally nondiverse, and an ongoing epidemic of discrimination against gender diverse individuals, the notion of a reasonable person standard is concerning. This standard is further problematic because the average person, judge, or jury has not experienced the hardships of being a transgender or nonbinary person in a cis-normative world.

Thus, due to the uniquely oppressive and discriminatory nature of the experiences transgender and non-binary individuals face in and outside of the workplace, the severity or pervasiveness of alleged sexual harassment against such individuals should be viewed through a lens comparable to that of the reasonable woman standard.[140] It should be noted that a reasonable gender diverse individual standard would not imply that transgender women are not women, but rather acknowledges the heightened forms of oppression and harassment transgender women face compared to that of cisgender persons and particularly, cisgender women.

The argument for adopting a reasonable gender diverse person standard follows a similar line of thought to that in favor of a reasonable woman standard, but is arguably more persuasive due to the ongoing minority status and discrimination gender diverse persons face daily. Proponents of the reasonable woman standard support their stance with numerous studies that show women are more likely than men to believe certain actions constitute harassment, as women have different experiences with and reactions to sexual harassment than men.[141] For example, in *Ellison v. Brady*,[142] a case where the Ninth Circuit adopted the reasonable woman standard in hostile work environment claims, the court discussed how "women are more likely to experience sexual

---

or pervasive enough); Alexia Fernández Campbell, *How the Federal Courts Have Failed Victims of Sexual Harassment*, VOX (Dec. 14, 2018), https://www.vox.com/policy-and-politics/2017/12/24/16807950/sexual-harassment-courts-lawsuit [https://perma.cc/BA7R-VBBN] ("In the past 40 years, they say federal judges across the country (who are mostly men) have developed an extremely narrow interpretation of what sexual harassment is under the law[.]").

139. *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AMERICAN PROGRESS (Feb. 13, 2020), https://www.americanprogress.org/article/examining-demographic-compositions-u-s-circuit-district-courts/ [https://perma.cc/TMF9-L5PD].

140. *See* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."); *see also* Christian v. Umpqua Bank, 984 F.3d 801, 809–11 (9th Cir. 2020) (applying the reasonable woman standard to evaluate whether the alleged harassment a woman experienced amounted to that of severe or pervasive harassment).

141. A female employee is 13.8 percentage points more likely to report that sexually suggestive looks from a coworker constitute harassment and 12.9 percentage points more likely to believe sexual jokes and teasing from a coworker constitute sexual harassment. Druhan, *supra* note 114, at 374.

142. *Ellison*, 924 F.2d 872.

harassment, including sexual assault, making them more likely to be concerned with sexual harassment and more likely to believe certain conduct constitutes harassment."[143] As recognized by the court, the implications of the above differing perceptions of conduct combined with a male-biased judicial system and society, "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[144] Although *Oncale* requires the court to view alleged harassment through a lens of that of "a reasonable person in the plaintiff's position, considering 'all the circumstances,'"[145] proponents of the reasonable woman standard, such as the Ninth Circuit, argue that most courts' reviews of alleged harassment will likely be inherently male-biased, in line with much of American jurisprudence.[146]

Similarly, under the reasonable person standard (and even the reasonable woman standard), gender diverse individuals' experiences and perspectives can easily be ignored, as these standards are inherently cisgender-biased forms of review. For example, transgender and non-binary individuals are intentionally misgendered *outside* of the workplace, arguably making even a few instances of intentional misgendering in the workplace more severe due to its compounding nature. For the same reason, gender diverse individuals are likely more aware of such offenses in the workplace than their cisgender colleagues.

Additionally, like the Ninth Circuit's emphasis on the heightened likelihood of women experiencing sexual harassment, gender diverse individuals are more likely to experience harassment, discrimination, and assault on the basis of their sex and gender identity compared to cisgender individuals. Furthermore, intentional misgendering and deadnaming are largely harassment tactics used against gender diverse persons only, making it unlikely that a cisgender judge, or a reasonable cisgender person, would understand the gravity of intentional misgendering and deadnaming.[147]

Regardless of the predominately cis-normative perceptions of misgendering and deadnaming within courts, extensive data paints a picture of the destructive effects of intentional misgendering on gender diverse individuals, and the perceived severity of even just a few

143. Druhan, *supra* note 114, at 365 (describing *Ellison*).

144. *Ellison*, 924 F.2d at 879.

145. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

146. *See* Newman, *supra* note 116, at 542 (quoting *Oncale*, 523 U.S. at 81).

147. *See generally* Sam Killermann, *30+ Examples of Cisgender Privileges*, IT'S PRONOUNCED METROSEXUAL, https://www.itspronouncedmetrosexual.com/2011/11/list-of-cis gender-privileges/ [https://perma.cc/E4RK-ZDDA] (last visited Mar. 22, 2023) (providing a general list of privileges cisgender people enjoy that transgender and non-binary individuals do not).

instances of such conduct.[148] Comparable to the premise of the reasonable woman standard, a reasonable gender diverse individual standard would provide a perspective for courts to adopt that reflects the heightened discrimination transgender and non-binary individuals face. Such a standard would also better capture subjectively severe or pervasive discrimination in the eyes of those experiencing and suffering from it most.[149]

The harm of a cis-normative reasonable person perception of the severity or pervasiveness of harassment is apparent in the *Teeter v. Loomis Armored US, LLC*[150] decision. In this Eastern District of North Carolina case, the plaintiff-employee transitioned to a male while employed by the employer.[151] After transitioning, a colleague told other employees about the plaintiff's transition, was overheard misgendering the plaintiff, and made derogatory comments about the plaintiff behind his back "quite often."[152] The plaintiff reported that the colleague's behavior was getting "worse and worse" to management and that "nobody would talk to [him]" because of a rumor spread that he had reported all of his coworkers for discriminating against him.[153] Based on this treatment, the Eastern District Court of North Carolina concluded that the colleague's intentional "eight or nine uses of feminine pronouns and single profane insult" toward the plaintiff employee were not sufficient to satisfy the severe or pervasive burden needed for a hostile work environment claim.[154] Specifically, the court viewed the above instances of intentional misgendering—which the plaintiff felt disturbed enough by to report to management—as simply "incivility and callous mistreatment" that is to be expected in the modern workplace.[155] Further, the court characterized the misgendering as "personalized and offensive" but overall "comparatively benign" in light of other Fourth Circuit hostile work environment claims alleging "unwanted touching, propositions, or other physically threatening or humiliating conduct."[156] Ultimately, the

148. *See* McLemore, *supra* note 67, at 54 (discussing the detrimental effects that misgendering has on transgender individuals' identity).

149. One method of implementing a reasonable gender diverse individual standard is through introducing social framework evidence from expert testimony to provide background information on the experiences unique to transgender and non-binary individuals. *See* Anna I. Burke, Note, *"It Wasn't That Bad:" The Necessity of Social Framework Evidence in Use of the Reasonable Woman Standard*, 105 IOWA L. REV. 771, 797–98 (2020) (discussing the cost and practicality of applying a reasonable gender diverse individual standard).

150. Teeter v. Loomis Armored US, LLC, No. 7:20-CV-00079, 2021 WL 6200506 (E.D.N.C. Nov. 23, 2021).

151. *Id*. at *3.

152. *Id*. at *3–4.

153. *Id*. at *4.

154. *Id*. at *13–14.

155. *Id.* at *13.

156. *Teeter*, 2021 WL 6200506, at *13–14.

court found that no reasonable person would find the plaintiff's treatment severe or pervasive, granting the employer's motion for summary judgment.[157]

With a heightened attempted suicide rate almost thirteen times that of cisgender adults in the United States due to experiences of discrimination in the workplace, the characterization of intentional and repeated misgendering as benign is an outrageous slight to gender diverse individuals and a free pass for unlawful behavior to those intentionally misgendering individuals in the workplace.[158] The *Teeter* court (comprised of all cisgender judges) erred in its review of the conduct by viewing it from the perspective of the average *cisgender* individual. To this type of reasonable person, the conduct may not seem severe or pervasive. But if the court had viewed the harassment from the perspective of a reasonable gender diverse person who had faced similar intentional misgendering, likely for most of their life, it very well may have found the harassment sufficiently severe or pervasive.

Opponents of the reasonable woman standard argue that "a separate reasonableness standard for women is actually a legal setback because it sends the message that women are inherently unreasonable," making it contrary to principles of equality pushed by Title VII.[159] Additionally, some have argued that the standard has made no difference in whether a claim is more likely to succeed at the summary judgment stage than those claims where it is not applied.[160] Similar critiques of a reasonable gender diverse person standard likely exist with opponents potentially arguing that the standard further stigmatizes and creates less equality for gender diverse persons by implying that they are unreasonable or in need of a special standard different from that of cisgender persons.[161]

But a reasonable gender diverse person standard would apply to all gender diverse individuals equally without detracting from a court's review of the conduct at issue from the perspective "of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" as instructed by *Oncale*.[162] For instance, some transgender and non-binary persons, like those of color or living in poverty, are likely to face more

157. *Id*.

158. *See* HAAS ET AL., *supra* note 57, at 2 (stating that the prevalence of suicide attempts found by the National Gay and Lesbian Task Force and National Center for Transgender Equality is 41%, which vastly exceeds the 4.6% of the U.S. population who have attempted suicide and that fifty to fifty-nine of the respondents experienced discrimination at work).

159. Newman, *supra* note 116, at 540.

160. Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. UNIV. J. OF GENDER, SOCIAL POL'Y & L. 633, 669–70.

161. *See* Newman, *supra* note 116, at 540 ("[A] a separate reasonableness standard for women is actually a legal setback because it sends the message that women are inherently unreasonable.").

162. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

discrimination than others with the same gender identity, like those who are white or upper class. While both gender diverse individuals would be negatively impacted by intentional misgendering and deadnaming in the workplace, the former may be more deeply (or easily) impacted, as they have likely faced more frequent harassment or discrimination in other aspects of their life. The intersectional nature of the human experience is essential to understanding whether a person experienced severe and pervasive behavior.

Another potential quibble with a reasonable gender diverse person standard is that it leaves one asking the question: why can't transgender and non-binary persons be included under the current reasonable person standard? After all, *Oncale*'s current reasonable person standard claims to be a neutral, genderless individual that considers the totality of the circumstances in a situation. Is this not intersectional enough? In theory, a truly neutral reasonable person standard is ideal. But the reasonable person standard is constrained by reality—where cisgender males dominate the demographics of the judicial field. Gender diverse persons remain a significant and vulnerable minority and require a standard that views conduct through their eyes. Therefore, a reasonable gender diverse person would not create more inequality for transgender and non-binary persons, but rather, it would level the playing field of opportunities to succeed in the workplace, as Title VII was intended to do.

A reasonable gender diverse person standard is essential to better fulfilling Title VII purposes of access to equal employment opportunities, regardless of one's sex. As *Harris* recognized, "[a] discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[163] Transgender and non-binary individuals who face intentional misgendering and deadnaming at work can be adversely impacted by even one instance of such discrimination, and are often derailed from successful careers due to such discrimination. This impact ultimately leads to the above-average rates of unemployment and poverty, further contributing to the marginalization of already severely marginalized gender diverse individuals.

### 2. Deferring to EEOC Guidance and Adjudications

Courts should defer to EEOC guidance and decisions when determining whether alleged harassment is severe or pervasive enough to withstand summary judgment in a hostile work environment claim. Limited deference to EEOC guidance can lead to inaccurate interpretations and applications of anti-discrimination statutes, giving

163. Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).

them meaning less than the "full remedial scope Congress intended."[164] Evidence of this error can be seen "[o]n at least three occasions [where] the Supreme Court's decision to disregard EEOC interpretation of federal antidiscrimination laws . . . led Congress to reverse the Court's decisions and essentially to enact the EEOC's interpretation directly into law."[165]

Although courts are not required to follow EEOC guidance or adjudication decisions, they give varying levels of deference to agency interpretations and actions.[166] When Congress created Title VII, it did not "confer upon the EEOC authority to promulgate substantive rules."[167] Accordingly, the Supreme Court has modeled a reluctance to defer to the EEOC's guidance regarding Title VII, finding that "[EEOC] guidelines construing statutory meaning or legislative intent were not entitled to the same weight as rules that Congress had declared to carry the force of law."[168] Additionally, the Court has stated that "policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," warrant even less deference.[169] Although not guaranteed, a court can defer to the EEOC's guidance or adjudications in varying degrees. Under this form of deference, often characterized as *Skidmore*[170] deference, the weight a court places on EEOC guidance or adjudications can alter depending "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"[171]

Interestingly, the EEOC's role under Title VII was expanded in 1972, as Congress "recognized a need for an administrative agency with

---

164. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1938 (2006).

165. *Id.* at 1950.

166. *See generally*, Skidmore v. Swift & Co., 323 U.S. 134 (1944) (finding that administrative rulings are not controlling but may be used for guidance); *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

167. James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 505 (2014) (citing Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976)).

168. *Id.* (citing *Gilbert*, 429 U.S. at 141–43); *see also* Hart, *supra* note 164, at 1942 ("Much of the time, whether it agrees with the agency or not, the Court has simply declined to decide what standard of deference it should apply to an EEOC interpretation, even when the interpretation at issue is made pursuant to the agency's explicitly delegated authority."); Laura Anne Taylor, Note, *A Win for Transgender Employees: Chevron Deference for the EEOC's Decision in* Macy v. Holder, 15 UTAH L. REV. 1165, 1187–88 ("The EEOC's guidelines, unlike its more formal proceedings, have routinely been given *Skidmore* deference.").

169. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

170. Taylor, *supra* note 168, at 1187.

171. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (describing the Skidmore factors).

acknowledged expertise in the area of discrimination."[172] Not only did House and Senate Committee Reports to the amendment recognize the EEOC as *the* experts on employment discrimination issues, but they also explained that it would be expected "that through the administrative process, the Commission [would] continue to define and develop the approaches to handling serious problems of discrimination that are involved in the area of employment."[173]

The EEOC expressly states that intentional misgendering and deadnaming can "contribute to an unlawful hostile work environment."[174] Additionally, the EEOC repeatedly states that intentional, persistent misgendering and deadnaming create a hostile work environment.[175] For instance, in *Lusardi*, the EEOC adjudicated a case in which a supervisor persistently intentionally misgendered and deadnamed a transgender female employee both over e-mail and in the workplace.[176] Specifically, the supervisor called the employee "sir" on "approximately seven occasions," as well as referred to the employee by male names and their deadname.[177] Citing *Oncale*'s standard, the EEOC stated that "[p]ersistent failure to use the employee's correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when 'judged from the perspective of a reasonable person in the employee's position.'"[178] In this case, the EEOC Commission found that the "repeated and intentional conduct was offensive and demeaning to [the employee] and would have been so to a reasonable person in [the employee's] position."[179] In particular, because the employee had clearly communicated "that her gender identity is female and her personnel records reflected the same . . . [y]et [the supervisor] continued to frequently and repeatedly refer to [the employee] by a male name and male pronouns," the supervisor's actions and demeanor made it clear that

172. Hart, *supra* note 164, at 1952.

173. *Id.* (citing S. Rep. No. 92-415, at 19 (1971)); *see also* H.R. Rep. No. 92-238, at 10 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 2146 ("Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases.").

174. *See Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96.

175. Lusardi, EEOC DOC 0120133395, 2015 WL 1607756, at *11 (Apr. 1, 2015); *see also* Royce O., EEOC DOC 2021001172, 2021 WL 5890398, at *6 (Nov. 15, 2021) ("While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful."); Jameson, EEOC DOC 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.").

176. *Lusardi*, 2015 WL 1607756, at *10–11.

177. *Id*.

178. *Id.* at *11 (citing Oncale v. Sundowner Offshore Services, 523 U.S. 75, 81 (1998)).

179. *Id*.

their misgendering and deadnaming of the employee "was not accidental, but instead was intended to humiliate and ridicule" her.[180]

Post-*Bostock*, not many hostile work environment sexual harassment claims by transgender and non-binary individuals have made it to trial. So, courts have had minimal opportunities to defer, or decline to defer, to the EEOC's guidance. Some of the cases that have ended up in court, like *Triangle Doughnuts*, *Grimes*, and *Membreno*, have resulted in holdings that conform with EEOC guidance on what behavior constitutes severe or pervasive harassment towards gender diverse persons.[181] But others, like *Teeter*, have declined to do so by permitting repeated, intentional misgendering directly in conflict with EEOC guidance.[182] The lack of deference granted to the EEOC's guidance in cases like *Teeter* results in inconsistent applications of the law and inadequate protections of gender diverse individuals in the workplace compared to those upon which the EEOC has provided guidance and adjudications. The contrast between *Teeter* and EEOC guidance and adjudications also creates uncertainty for employers on whether intentional misgendering and deadnaming of gender diverse persons creates a hostile work environment for liability purposes.

In applying the *Skidmore* factors (which can garner more deference to EEOC guidance and adjudications from courts than traditional *Skidmore* deference), there is a strong argument that courts should defer to EEOC guidance and adjudications on intentional misgendering and deadnaming in their decisions.[183]

First, "an administrative interpretation is particularly persuasive when the administrative agency has demonstrated 'thoroughness evident in its

---

180. *Id*.

181. *See* Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (concluding that plaintiff plead sufficient facts for a hostile work environment based on the intentional discrimination she faced including being misgendered, asked about her anatomy, and subjected her to a stricter dress code than other female employees); Grimes v. Cnty. of Cook, 455 F. Supp. 3d 630, 645 (N.D. Ill. 2020) (holding that the constant harassment of the employee, which occurred for several months, was severe and pervasive); Membreno v. Atlanta Rest. Partners, LLC, 517 F. Supp. 3d 425, 442 (D. Md. 2021) (finding sufficient evidence of a hostile work environment because employee was repeatedly ridiculed, mocked, and assaulted).

182. *Compare Lusardi*, 2015 WL 1607756, at *11 (finding that intentional misgendering and deadnaming on at least seven occasions was sufficient to create a hostile work environment), *with* Teeter v. Loomis Armored US, LLC, No. 7:20-CV-00079, 2021 WL 6200506, at *13 (E.D.N.C. Nov. 23, 2021) (finding that eight or nine instances of intentional misgendering and deadnaming was not sufficient to make a hostile work environment).

183. *See* Eirhart v. Libbey-Owens-Ford Co., 616 F.2d 278, 281–82 (7th Cir. 1980) (finding that a district court erred by not giving deference to an EEOC determination because the *Skidmore* factors had all been satisfied, signifying that courts should give greater deference to EEOC determinations when they meet these factors); Skidmore v. Swift & Co., 323 U.S. 134 (1944) (explaining the *Skidmore* factors).

consideration' of the issue."[184] Years of EEOC expertise and work have aimed to understand and better protect transgender and non-binary individuals. Arguably, the EEOC has a much better grasp on how gender diverse persons perceive and are affected by intentional misgendering and deadnaming than primarily cisgender heterosexual courts and juries. Additionally, like in the *Lusardi* case, the EEOC released multiple-page adjudications, signifying the depth of its thoroughness regarding its determination of intentional misgendering and deadnaming as severe or pervasive.[185]

Second, the "'validity of [an agency's] reasoning' can make its interpretation more persuasive."[186] Extensive data from various reliable sources show that the EEOC's reasons for classifying intentional misgendering and deadnaming as harassment are valid.[187] These forms of harassment deeply impede transgender and non-binary individuals' equality of opportunity in the workplace, directly conflicting with the purpose of Title VII.[188] Additionally, the EEOC found that even under the reasonable person standard of *Oncale*, being on the receiving end of intentional misgendering and deadnaming is sufficient to create a hostile work environment.[189]

Third, the consistency of agency decisions can contribute to the weight in favor of deference.[190] In its 2012 adjudication of *Macy v. Holder*,[191] the EEOC acknowledged that "claims of discrimination based on transgender status, also referred to as claims based on gender identity, are cognizable under Title VII's sex discrimination prohibition."[192] Since 2012, the EEOC has also held steady in its determination that persistent,

184. Taylor, *supra* note 168, at 1188 (*citing Skidmore*, 323 U.S. at 140).

185. *See Lusardi*, 2015 WL 1607756, at *11; *see also* Taylor, *supra* note 168, at 1188 (describing the thoroughness of the EEOC's *Macy v. Holder* decision and arguing for heightened *Skidmore* deference for the decision before *Bostock*).

186. Taylor, *supra* note 168, at 1188 (*citing Skidmore*, 323 U.S. at 140).

187. *See supra* notes 50–78 (describing the severe effects of misgendering and deadnaming within the workplace on transgender and nonbinary individuals).

188. *See generally* 29 CFR § 1608.1(b) (2022) ("Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place."); *see also* McMenemy v. City of Rochester, 241 F.3d 279, 284 (2d Cir. 2001) (finding an EEOC interpretation of Title VII persuasive because it was consistent with a primary purpose of Title VII's retaliation clause).

189. *See Lusardi*, 2015 WL 1607756, at *11 ("[U]nder the facts of this case, [the supervisor's] actions and demeanor made clear that [their] use of a male name and male pronouns in referring to [the employee] was not accidental, but instead was intended to humiliate and ridicule [her]. As such, [the supervisor's] repeated and intentional conduct was offensive and demeaning to [the employee] and would have been so to a reasonable person in [the employee's] position.").

190. *Skidmore*, 323 U.S. at 140.

191. Mia Macy, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

192. *Id.* at *4–6; *see also* Complainant, EEOC DOC 0120133080, 2015 WL 4397641, at *4 (July 16, 2015).

intentional misgendering and deadnaming can create a hostile work environment.[193] Lastly, *Skidmore*'s fourth factor—"all those factors which give it power to persuade"[194]—serves as a catchall for additional circumstances that make the EEOC's judgment more persuasive to courts.[195]

Fortunately, EEOC guidance and adjudications, although not binding on courts, can still alter employers' actions, as an agency hearing is something many employers likely want to avoid. Additionally, warnings from EEOC hostile work environment hearings may chill further allowance, or impartiality, towards intentional misgendering and deadnaming in the workplace by employers.[196] Thus, there is hope that the EEOC's recognition of intentional misgendering and deadnaming as forms of harassment against gender diverse individuals will push employers to include education on such discriminatory conduct in workplace trainings and take reports of the conduct seriously. But the ultimate question is whether the courts will catch up in correcting such discriminatory conduct or remain complacent, in conflict with EEOC guidance and adjudications.

### B. *Reform of the Severe or Pervasive Standard in Hostile Work Environment Claims*

Additionally, regardless of whether intentional misgendering and deadnaming can satisfy the present severe or pervasive standard, a better solution to inconsistencies amongst courts would be to reform the burden on plaintiffs bringing hostile work environment claims. The unduly restrictive severe or pervasive burden should be lowered to that of proving an employee was subjected to inferior terms, conditions, or privileges of employment because of their sex. While federal reform would be the gold standard of rectification, it has proven unlikely.[197]

---

193. *See Lusardi*, 2015 WL 1607756, at *11; Royce O., EEOC DOC 2021001172, 2021 WL 5890398, at *6 (Nov. 15, 2021); Jameson, EEOC DOC 0120130992, 2013 WL 2368729, at *2 (May 21, 2013).

194. *Skidmore*, 323 U.S. at 140.

195. Taylor, *supra* note 168, at 1189.

196. *See* Royce O., 2021 WL 5890398, at *6 ("We do not condone the statement made by S1 in reference to Complainant and caution the Agency against any future similar statements or conduct. We find that S1's statement regarding claim [two] may have the potential to create a hostile work environment so we caution the Agency to advise its managers and employees about what behavior is appropriate in the workplace.").

197. For example, The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act of 2021 has been introduced in both the U.S. Senate and U.S. House of Representatives multiple times but has yet to succeed. *See Congress Reintroduces BE HEARD Act That Covers All Workers, Regardless of Size of Workplace*, NAT'L WOMEN'S L. CTR. (Nov. 17, 2021), https://nwlc.org/press-release/congress-

Thus, state reform is more realistic, evidenced by the recent adoption of such standards in numerous states. These measures benefit both gender diverse employees and employers. Specifically, parties are put on clear notice of conduct that constitutes hostile work environment sexual harassment, employers avoid crippling liability, and employees are better safeguarded against potentially deadly abuses rooted in misgendering and deadnaming that cause inequality of employment opportunities on the basis of sex to linger in the employment sphere.

Regardless of whether intentional misgendering and deadnaming can satisfy the present severe or pervasive standard, a better solution to inconsistencies amongst courts' applications of the standard would be reform of the burden on plaintiffs bringing hostile work environment claims. Hostile work environment claims have been recognized for over thirty-five years, yet a staggering ninety percent of gender diverse individuals report having faced employment discrimination in the form of workplace harassment.[198] Additionally, the number of filed sexual harassment claims with the EEOC has remained relatively steady since 2010.[199] Clearly, something within the Title VII hostile work environment scheme needs adjustment to account for prevalent modern-day issues. As one of the documented hurdles for plaintiffs bringing claims, the severe or pervasive standard is an exceptional starting point for hostile work environment claim requirement revisions.[200]

Proof of the severe or pervasive standard-rooted hardships in bringing a successful *prima facie* hostile work environment claim lies in the minimal percentage of claims that make it to trial and the frequent awarding of employer summary judgments in those claims that do survive.[201] The severe or pervasive standard is challenging for plaintiffs

---

reintroduces-be-heard-act-that-covers-all-workers-regardless-of-size-of-workplace-2/ [https://perma.cc/A6U3-R9MH]; *see also* Sabato, *supra* note 6, at 155 ("BE HEARD refines the [severe or pervasive] standard by articulating multiple factors to determine whether conduct amounts to harassment. The factors include: 1) frequency and duration of the conduct; 2) location where the conduct occurred; 3) number of individuals engaged in the conduct; 4) whether the conduct was humiliating, degrading, or threatening; 5) any power deferential between the alleged harasser and the person allegedly harassed; and 6) whether the conduct involves stereotypes about the protected class involved. By providing a more comprehensive set of factors to consider, the courts may be better positioned to rule more consistently and effectively.").

198. Burns & Krehely, *supra* note 61; *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (recognizing hostile work environment claims as discrimination under Title VII for the first time).

199. Since 2010, the number of sexual harassment claims filed with the EEOC has ranged between 11,497 (2020), and 13,055 (2018). *See Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96.

200. *See* Christiansen, *supra* note 6 ("The new state laws soften this standard, which has frequently resulted in employer summary judgments in federal court.").

201. *See* Noguchi, *supra* note 103 ("Nielsen's random sampling of cases showed half of cases settle out of court and another 37 percent were dismissed pretrial.").

to satisfy, as what is considered severe or pervasive has narrowed over time, leaving employees asking whether they have been "harassed *enough*" to bring a claim.[202] The narrowing of what conduct meets the standard is often cited as a preventative measure by courts to ensure Title VII does not become a "general civility code."[203] To better protect all employees, especially those most marginalized, like gender diverse individuals, the unduly burdensome severe or pervasive standard should be lowered to that of proving an employee was subjected to inferior terms, conditions, or privileges of employment on the basis of their sex. Even though the current severe or pervasive standard is enveloped by critical discourse, no movement towards a lower standard has been successful on a federal level yet.[204] On a state level, this reform is entirely possible, indicated by its recent adoption in some state employment anti-discrimination statutory schemes.[205]

While after *Bostock*, gender diverse persons can now seek remedy for employment discrimination experienced in any state on a federal level, many states have laws that explicitly prohibit discrimination on the basis of sexual orientation, gender identity, or both.[206] Some of these states provide no further protections for gender diverse individuals than what Title VII provides.[207] Others, like New York and California, provide more extensive safeguards against employment discrimination on the

---

202. Sandra Sperino, a University of Cincinnati professor, describes reading through thousands of sexual harassment cases involving situations where a person was groped at work, just to then have their case dismissed before going to trial due to a judge finding the conduct insufficiently severe or pervasive to satisfy Title VII sexual harassment standards. *See* Noguchi, *supra* note 103; *see also* Rachel Ford, *Sure, You Were Harassed at Work. But Were You Harassed Enough? A Look at the Supreme Court's 'Severe or Pervasive' Standard Under Title VII*, UNIV. CIN. L. REV. (2021), https://uclawreview.org/2021/06/30/sure-you-were-harassed-at-work-but-were-you-harassed-enough-a-look-at-the-supreme-courts-severe-or-pervasive-standard-under-title-vii/ [https://perma.cc/9B55-4BFE] ("[A] massive number of victims still have no actionable claims under federal discrimination statutes due to the 'severe or pervasive standard.' Before bringing suit, an employee must ask herself, 'Have I been harassed enough to reach the 'severe or pervasive' standard for a hostile work environment claim?'").

203. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

204. *See* Sabato, *supra* note 6, at 153 ("[S]tates applying federal law continue to employ the existing standard from case law, where the lower courts have required treatment that is pervasive or severe as the standard of a hostile work environment.").

205. The Movement Advancement Project has compiled a list of federal, state, and local laws that protect transgender and nonbinary persons in the workplace. *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality_maps/employment_non_discrimination_laws/state [https://perma.cc/PM7D-45SK] (last visited Mar. 29, 2022).

206. *See id.*

207. As of March 20, 2022, Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Montana, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming had "[n]o explicit prohibitions for discrimination based on sexual orientation or gender identity in state law." *Id.*

basis of an employee's sex, gender identity, or sexual orientation in the workplace for transgender and nonbinary individuals.[208]

In 2019, in response to the "#MeToo" movement, New York enacted legislation to "explicitly remove the restrictive severe or pervasive standard for establishing a hostile work environment claim."[209] The new standard defines harassment as an "unlawful discriminatory practice when it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's [sex],"[210] regardless of whether such harassment is severe or pervasive.[211] Although, employers "may still raise a defense if the actions were not more than 'petty slights or trivial inconveniences.'"[212]

In 2018, California legislators expanded state anti-discrimination statutes to include harassment that not only creates a hostile work environment, but also offensive, oppressive, or intimidating environments as well.[213] Additionally, California law now defines this actionable level of harassment as "conduct [that] sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being."[214] Finally, the state's law clarifies what the severe or pervasive standard means, explaining that a "single incident of harassment is sufficient to create a hostile work environment if the harassment has unreasonably interfered with the employee's work performance or created an intimidating, hostile or offensive working

208. *See* ANDREA JOHNSON ET AL., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 16–17 (2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020 States_Report.pdf [https://perma.cc/VX2X-4UYC] (stating that both New York and California made changes to the severe and pervasive standard); *see also* Robert H. Bernstein et al., *Attention New York Employers: When It Comes to Workplace Harassment, Times Are Changing*, NAT'L L. REV. (Aug. 20, 2019), https://www.natlawreview .com/article/attention-new-york-employers-when-it-comes-to-workplace-harassment-times-are [https://perma.cc/Q4ZW-RNTJ] (discussing the new legislation amending the New York State Human Rights Law); Janine Dayeh, *"Locker Room Talk" or Sexual Harassment? The Push for a Federal Modification of the Severe or Pervasive Standard*, 46 SETON HALL LEGIS. J. 375, 376–77 (2022).

209. JOHNSON ET AL., *supra* note 208, at 16; *see also Governor Cuomo Signs Legislation Enacting Sweeping New Workplace Harassment Protections*, N.Y. STATE DIV. HUM. RTS. (Aug. 12, 2019), https://dhr.ny.gov/newworkplaceharassmentprotections [https://perma.cc/8NN7-H8NN].

210. The Human Rights Law (HRL), N.Y. EXEC. LAW § 296 (2022); *Sexual Harassment Is Against the Law*, N.Y. STATE DIV. HUM. RTS., https://dhr.ny.gov/system/files/documents/2022/05/nysdhr-sexual-harassment.pdf [https://perma.cc/WHZ7-GH9D] (last visited Apr. 15, 2022); JOHNSON ET AL., *supra* note 208, at 16.

211. N.Y. EXEC. LAW § 296(h).

212. Sabato, *supra* note 6, at 151 (citing *New Workplace Discrimination and Harassment Protections*, N.Y. DIV. HUM. RTS., https://dhr.ny.gov/new-workplace-discrimination-and-harassment-protections [https://perma.cc/2HK3-D78A] (last visited Mar. 22, 2023)).

213. CAL. GOV'T CODE § 12923 (West 2018).

214. *Id*.

environment."[215] A California victim must only show that the harassment made it more difficult to do their job and not that their productivity decreased due to the harassment.[216]

Both of these state standards provide more employee protections than the current severe or pervasive requirements for Title VII hostile work environment claims and recognize the need for better access to remedies for victims of employment discrimination.[217] The benefit of both standards is that they lower the burden on plaintiffs bringing state hostile work environment claims, which ultimately allows employees facing harmful intentional misgendering and deadnaming in the workplace to forego enduring multiple months, or even years, of such treatment before bringing a claim. Rather than asking whether the harassment they have endured is enough, transgender and non-binary employees could seek redress more expediently.

A downside of legislation like that of California's is its broad nature. Although the legislation only applies to discrimination based on membership in a protected class, conduct that "sufficiently offends"[218] someone is a vague prohibition. Imposing employer liability based on offensive conduct arguably veers away from Title VII's purpose in that it has the potential to operate as a "general civility code for the American workplace."[219] Paired with the legislature's clarification that one instance of harassment could be sufficient to satisfy the severe or pervasive standard, employers may face more liability than necessary for their employees' actions that happen once, or infrequently. Such behaviors are better off being prohibited through post-harassment measures like reprimand, suspension, or termination, than litigation. Further, while state law can exceed the maximum protections afforded under Title VII, unpredictable employer liability is a major disadvantage of implementing a legally enforced civil code of conduct in the workplace.

Additionally, the California legislation has the potential to raise issues when determining the intention of the alleged harasser's conduct, such as misgendering or deadnaming, if one instance is sufficient to create a

---

215. Kristy D'Angelo-Corker, *Severe or Pervasive Should Not Mean Impossible and Unattainable: Why the "Severe or Pervasive" Standard for a Claim of Sexual Harassment and Discrimination Should Be Replaced with a Less Stringent and More Current Standard*, 50 HOFSTRA L. REV. 1, 32 (2021) (citing S.B. 1300, 2018 Legis. Counsel (Cal. 2018)); JOHNSON ET AL., *supra* note 208, at 17.

216. *See* JOHNSON ET AL., *supra* note 208, at 17.

217. *See* D'Angelo-Corker, *supra* note 215, at 32–33, 37 (noting that it is "manageable, as it lowers the bar for victims of sexual harassment and discrimination as to what will constitute actionable conduct and gives those victims a viable path to justice"); *see also* Sabato, *supra* note 6, at 153 (noting that "the implemented state laws from both California and New York demonstrate the prevalence of sexual harassment and the need for a response").

218. S.B. 1300, 2018 Legis. Counsel (Cal. 2018).

219. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

hostile work environment. Oftentimes, whether misgendering and deadnaming were intentional or accidental is determined by assessing whether the alleged harasser had misgendered or deadnamed the gender diverse individual before, was instructed the naming was incorrect based on the individual's identity, and then continued to refer to the individual with the wrong terms.[220] But, one could foresee a situation in which it may be uncertain whether the alleged harasser would act similarly in the future after being disciplined or educated.

For these reasons, a standard like that of New York is more appropriately tied to protecting gender diverse individuals while also avoiding creating a civil code of conduct by which employers can be held liable for their employee's violations. New York's legislation prohibits conduct that "subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's [sex]."[221]

This standard does not go so far as California's to prohibit offensive behavior in the workplace, but it does remove the traditional severe or pervasive burden for plaintiffs. New York's standard also removes the need for a reasonable gender diverse person standard, as intentional misgendering and deadnaming are clearly inferior conditions within the workplace that for the most part, only gender diverse persons will face. Most importantly, this standard protects transgender and non-binary employees who bring state employment discrimination claims for work conditions faced like that of the employee in *Teeter*[222]—who was denied protection under Title VII. This state safeguard is important, as federal courts like that in *Teeter*[223] have demonstrated a readiness to leave gender diverse individuals who have been intentionally misgendered and deadnamed in the workplace without a legal remedy under Title VII as it stands today.

## CONCLUSION

Transgender and nonbinary individuals have been thrust into the center of an epidemic of hate and violence that doesn't stop at the office entrance. This Note has shown the dire need for a heightened and tailored application of workplace protections for transgender and non-binary individuals under Title VII and similar state schemes. Intentional misgendering and deadnaming in the workplace causes significant

220. *See* McNamarah, *supra* note 36, at 2263 (stating that intentional misgendering occurs when "a speaker knows and is fully aware of the referent's gender-appropriate language and deliberately chooses not to use it or chooses to use language at odds with it. Intentional misgendering is perhaps most obvious with respect.").

221. The Human Rights Law (HRL), N.Y. EXEC. LAW § 296 (2022).

222. *See* Teeter v. Loomis Armored US, LLC, No. 7:20-CV-00079, 2021 WL 6200506, at *1 (E.D.N.C. Nov. 23, 2021).

223. *See id*.

impacts on the lives and careers of gender diverse individuals. To better satisfy Title VII's purpose of creating equal employment opportunities for all, regardless of one's gender identity or sexual orientation, courts should first use a reasonable gender diverse person standard rather than a reasonable person standard when determining whether alleged workplace conduct is sufficiently severe or pervasive to create a hostile work environment. Second, courts should defer to EEOC guidance and adjudicative decisions prohibiting intentional misgendering and deadnaming in the workplace. And third, plaintiffs' burden of proof for showing severe or pervasive harassment under Title VII should be lowered to a standard like that of New York, requiring proof that the plaintiff was subjected to inferior terms, conditions, or privileges of employment because of their sex. This is necessary on both the federal and state levels to ensure uniform protection of gender diverse persons nationwide.

Not only would these three proposed measures further protect gender diverse individuals, but they would also serve as notice for employers that intentional misgendering and deadnaming are prohibited within the employment sphere, and will result in consequences if allowed to occur. While a rose called by another name would smell just as sweet, employers, colleagues, and society at large should stick to addressing individuals by their preferred identifiers, as "[w]hat's in a [dead]name" is far from sweet.