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Saint Louis University School of Law
St. Louis, MO

The Editors' Page

This issue begins a new volume of the *ABA Journal of Labor & Employment Law* with a new group of student editors. The faculty co-editors also saw some transitions. We said goodbye to Professor Miriam Cherry, thanking her for her terrific contributions to the *Journal* during her tenure at SLU, and welcomed Professor Michael Duff, one of the country's leading experts on workers' compensation and an expert in labor law, as well.

To kick off the new volume, the issue begins with **The Supreme Court's 2021–22 Term in Review**, by the 2022–23 Labor and Employment Law Section Secretary Louis Lopez, Chief of the Policy and Strategy Section in the Civil Rights Division at the U.S. Department of Justice. In the review, Mr. Lopez focuses on cases in five major areas: COVID-19 vaccine mandates, mandatory arbitration, state sovereign immunity, public employee First Amendment rights, and employee benefits. The three vaccine mandate cases involved the Court's emergency docket: *Biden v. Missouri*,[1] concerning the Health & Human Services mandate for healthcare workers, *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*,[2] about OSHA's vaccine-or-test mandate, and *Austin v. United States Navy Seals*,[3] over the Navy's vaccine mandate for service members. The mandatory arbitration cases considered several exceptions to enforcement of arbitration agreements. They included *Morgan v. Sundance, Inc.*,[4] *Southwest Airlines Co. v. Saxon*,[5] and *Viking River Cruises, Inc. v. Moriana*.[6] *Torres v. Texas Department of Public Safety*[7] concerned Eleventh Amendment immunity under the Uniformed Services Employment and Reemployment Rights Act. And the First Amendment case was *Kennedy v. Bremerton School District*,[8] where a public school football coach had been asked not to pray on the field after games. Lastly, the article summarized the five cases about work-related benefits decided by the Court: *Marietta Memorial Hospital Employee Health Benefits Plan v. DaVita,*

1. Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam).
2. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).
3. Austin v. U.S. Navy Seals, 142 S. Ct. 1301 (2022).
4. Morgan v. Sundance, 142 S. Ct. 1708 (2022).
5. Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022).
6. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).
7. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022).
8. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

Inc.,[9] *United States v. Washington*,[10] *LeDure v. Union Pacific Railroad Co.*,[11] *Babcock v. Kijakazi*,[12] and *Hughes v. Northwestern University*.[13] Mr. Lopez concluded by highlighting several cases set to be decided in the current term.

The second article is written by Assaf Harel, Ph.D. in Law, Peres Academic Center in Rehovot, Israel. In **First Amendment Protection of Hybrid Personas Speaking in the Course of Their Employment: An Israeli Perspective**, Dr. Harel critiques "the rigid binary approach of the Supreme Court that differentiates sharply between speech in the course of employment and private speech," exemplified by the Court's *Garcetti v. Ceballos* decision. He argues that every person operating in the public sphere has a public/private hybrid persona, a reality recognized by Israel's approach to public employee speech. The article describes how the law in Israel balances the private and public aspects of hybrid personas and protects all types of statements on private and public issues as long as the statement does not harm public trust, moral rectitude, and the proper functioning of public administration.

Following that article is **The Misuse of the Business Judgment Rule in Employment Discrimination Cases**, authored by Robert S. Mantell, partner at Powers, Jodoin, Margolis & Mantell LLP in Boston, Massachusetts. Mr. Mantell's article argues that the business judgment rule in employment discrimination cases has evolved to improperly limit scrutiny of an employer's asserted nondiscriminatory reason to the point that it effectively grants employers immunity simply because they characterize their decision as a business judgment. He argues that courts ought to examine that judgment as part of a pretext analysis where the reason given by an employer for an adverse action is irrational. Finally, Mr. Mantell concludes that the extreme form of business judgment rule should be rejected because no policy arguments justify the rule.

Next is one of the winners of the annual writing competition sponsored by the ABA Section of Labor and Employment Law and the College of Labor and Employment Lawyers, **The Health and Safety of Incarcerated Workers: OSHA's Applicability in the Prison Context** by Megan Hauptman. Adding to the scholarship on prison inmate workers and employment law, Ms. Hauptman focuses on the safety of their workplaces and argues that they ought to be protected by the Occupational Health and Safety Act (OSHA). Unpacking the term "employee" as it has been applied to incarcerated workers and looking

9. Marietta Mem'l Hosp. Emp. Health Benefits Plan v. DaVita Inc., 142 S. Ct. 1968 (2022).
10. United States v. Washington, 142 S. Ct. 1976 (2022).
11. LeDure v. Union Pac. R.R. Co., 142 S. Ct. 1582 (2022) (per curiam).
12. Babcock v. Kijakazi, 142 S. Ct. 641 (2022).
13. Hughes v. Nw. Univ., 142 S. Ct. 737 (2022).

at how courts have carved out a "prisoner exception" from federal protective legislation. Ms. Hauptman suggests how OSHA coverage could be achieved and engages with how courts might distinguish OSHA's definition of "employee" from more restrictive definitions in other federal legislation.

Lastly, the issue contains a note authored by former Note Editor for the *Journal*, Hannah E. Wissler. In **Overlooked and Undervalued: Ex-Offenders in the Employment Market**, Ms. Wissler focuses on employment problems faced by those with criminal records and catalogues state laws on the issue, some of which exacerbate these problems. The article rates those laws by how likely they are to help ex-offenders gain employment. It concludes with recommendations for best practices, including Clean Slate Laws, collateral consequence training, and Fair Chance Laws.

We hope you enjoy this issue and join us in thanking the *Journal*'s student board, staff editors, and authors in bringing this issue to our readers.

Professor Marcia L. McCormick
Professor Matthew T. Bodie
Professor Michael Duff
Faculty Co-Editors

1

The Supreme Court's 2021–22 Term in Review

Louis Lopez*

Introduction

The 2021–22 term became one of the most momentous in the Supreme Court's 233-year history. The Court decided blockbuster cases on a wide range of issues such as abortion, gun rights, religious freedom, and climate change. For the first time in history, a draft opinion in a groundbreaking case leaked to the public. Dissatisfaction with the Court's decisions led to protesters showing up at Justices' homes in some instances to intimidate them. And Justice Stephen Breyer announced his retirement, paving the way for the historic nomination (and eventual confirmation) of Justice Ketanji Brown Jackson as his replacement.

The sixty-six cases resolved in the 2021–22 term included significant decisions affecting the workplace as well as other vital aspects of everyday life.[1] This term's labor and employment cases addressed distinct yet sweeping issues ranging from the COVID-19 vaccine mandates to mandatory arbitration. The Court considered complex constitutional questions spanning topics from sovereign immunity to the ostensible clash between the Free Exercise and the Establishment Clauses in the First Amendment. And the decisions provided practical guidance to both employers and employees across a broad spectrum of workplace benefits issues involving health plans, workers' compensation laws, and pension and retirement payments.

In the 2021–22 term, the number of unanimous decisions declined sharply compared with past years. Majority-making coalitions made up only of "conservative" Justices increased, as did the dissents issued by the "liberal" Justices.[2] Perhaps relatedly, polls conducted over this

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1. While some of the Court's other opinions published this term could affect workplace laws and policies, this article focuses only on cases raising a question directly implicating a labor and employment statute or rule.

2. *See* Angie Gou, Ellena Erskine & James Romoser, SCOTUSBlog, Stat Pack for the Supreme Court's 2021–22 Term (2022), https://www.scotusblog.com/wp-content

time period revealed a decrease in public confidence in the Court's ability to issue apolitical opinions—a development that could have lasting ramifications in homes and workplaces across the country.[3]

I. COVID-19 Vaccines—To Mandate or Not to Mandate

Three Supreme Court cases decided in the 2021–22 term involved the Biden administration's attempts to address the COVID-19 pandemic through vaccine-related mandates. These efforts were met with mixed success.

In the first case, *Biden v. Missouri*, the Court considered whether the Department of Health and Human Services (HHS) could enforce an interim final rule requiring that healthcare staff at facilities participating in federal Medicare and Medicaid programs be fully vaccinated against COVID-19 unless they qualify for a medical or religious exemption.[4] HHS issued the rule in November 2021 after finding that such vaccinations were "necessary for the health and safety of individuals to whom care and services are furnished."[5] But two federal district courts—in Missouri and Louisiana—put the mandate on hold.

In the second case, *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, the Court pondered whether the Department of Labor (DOL) could enforce an emergency temporary standard requiring that employers with at least 100 employees ensure that their workforces were fully vaccinated against COVID-19 or show a weekly negative test and wear masks while at work.[6] DOL issued the standard in November 2021 arguing that it was necessary to protect employees from grave danger resulting from the pandemic.[7] Many states, businesses, and non-profit organizations initially challenged DOL's standard in federal courts of appeals across the country. After the U.S. Court of Appeals for the Fifth Circuit temporarily put the mandate on hold, the challenges were

/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/527CS3CP]; Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBlog (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided [https://perma.cc/2AQ87ED3].

3. Amanda Savage, *Americans' Respect for the Supreme Court Has Dipped. That Might Affect the Justices' Decisions This Term*, Wash. Post (Oct. 4, 2021), https://www.washingtonpost.com/politics/2021/10/04/americans-respect-supreme-court-has-dipped-that-might-affect-justices-decisions-this-term [https://perma.cc/R8SH-YUPN]; Carlie Porterfield, *Public Confidence in Supreme Court Sinks to 25%, Poll Says*, Forbes (June 23, 2022, 6:05 PM EDT), https://www.forbes.com/sites/carlieporterfield/2022/06/23/public-confidence-in-supreme-court-sinks-to-25-poll-says [https://perma.cc/LUW2-N55T].

4. Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam).

5. *Id*. at 651.

6. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).

7. *Id*. at 668 (Gorsuch, J., concurring).

consolidated in the U.S. Court of Appeals for the Sixth Circuit, which reinstated DOL's standard.

Both cases came to the Supreme Court in December 2021 via emergency-stay appeals.[8] The Court opted to expedite the actions and held oral argument on whether the vaccine mandates could remain in place while the challenges proceeded in the lower courts. After hearing nearly four hours of arguments on the cases, the Court issued a pair of unsigned opinions just six days later, on January 13, 2022.

In *Biden v. Missouri*, the Court held in a per curiam opinion that HHS was authorized to enforce the rule requiring healthcare workers be vaccinated against COVID-19. In reaching its decision, the Court emphasized that one of HHS's core functions is "to ensure that the healthcare providers who care for Medicare and Medicaid patients protect their patients' health and safety."[9] To do so, HHS has routinely required those providers to comply with various conditions to receive federal funding.[10] Finding that "the COVID-19 virus can spread rapidly among healthcare workers and from them to patients . . . [who] are often elderly, disabled, or otherwise in poor health," the Court ruled that HHS determined that a vaccine mandate was "necessary to promote and protect patient health and safety in the face of the ongoing pandemic."[11] Such a rule, the Court found, "fits neatly within the language of the statute" and the authority given to HHS by Congress.[12]

Justice Clarence Thomas authored a dissenting opinion joined by Justices Samuel Alito, Neil Gorsuch, and Amy Coney Barrett. After concluding that the Biden administration failed to make "a strong showing that the hodgepodge of provisions authorizes a nationwide vaccine mandate," Justice Thomas asserted that HHS lacked the congressional authority to enforce the vaccine mandate.[13] Justice Alito also filed a dissenting opinion joined by Justices Thomas, Gorsuch, and Barrett. Building on Justice Thomas's opinion, Justice Alito further reasoned that even if the Biden administration had the authority to require the emergency vaccine mandate, it was improper because HHS failed to "comply with the commonsense measure of seeking public input" through established and routine notice-and-comment procedures.[14]

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8. Emergency stays or applications are filed with a particular Justice based on the federal judicial circuit in which the matter is litigated. SUP. CT. R. 22. The assigned "circuit" Justice may act on an application alone or refer it to the full Court for consideration. *Id.* R. 22–23. If the full Court acts on an application, five Justices must agree for the Court to grant a stay. *Id.* R. 23.

9. *Biden*, 142 S. Ct. at 650.

10. *Id*. at 650–51, 653.

11. *Id*. at 651–52 (internal quotations omitted).

12. *Id*. at 652.

13. *Id*. at 656 (Thomas, J., dissenting).

14. *Id*. at 659 (Alito, J., dissenting).

The Biden administration's policy approach did not fare as well in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*. Describing DOL's vaccine-or-test mandate as a "significant encroachment into the lives—and health—of a vast number of employees," the Court asserted that Congress must speak clearly when "authorizing an agency to exercise powers of vast economic and political significance."[15] Here, according to the majority, Congress did not.[16] The Court found that although "COVID-19 is a risk that occurs in many workplaces, it is not an occupational hazard in most."[17] And while DOL may "set workplace safety standards," it may not issue "broad public health measures."[18]

In a separate concurring opinion, Justice Gorsuch (joined by Justices Thomas and Alito) posited that the vaccine mandate was improper under the "major questions doctrine" because Congress did not clearly indicate its intention to assign to DOL—or any federal agency—the authority to issue a vaccine mandate."[19]

Justices Breyer, Sonia Sotomayor, and Elena Kagan filed a joint dissenting opinion, finding that DOL had already been granted sufficient authority by Congress to issue the vaccine mandate.[20] Relying on DOL's substantial evidence that COVID-19 presented a "grave danger to millions of employees," the dissenting Justices found that the vaccine mandate was "necessary" to address the dangers of the "new hazard."[21] They also questioned the Court's decision to "displace the judgment of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions."[22]

The third case, *Austin v. United States Navy Seals*, involved the Biden administration's emergency application for a partial stay of a federal district court judge's ruling in a case challenging the Navy's

15. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022).

16. *Id*.

17. *Id*.

18. *Id*. DOL officially withdrew the emergency temporary standard, effective January 26, 2022. 87 Fed. Reg. 3928 (2022). On remand, the Sixth Circuit dismissed the case as moot on February 18, 2022. Order at 2, *In re: MCP No. 165, Occupational Safety & Health Admin. Rule on COVID-19 Vaccine and Testing*, 86 Fed. Reg. 61,402, 21 F.4th 357 (6th Cir. 2021) (No. 21-7000).

19. *Id*. at 667–68 (Gorsuch, J., concurring). Interestingly, the Court invoked the "major questions doctrine" two additional times this term—over dissents by the liberal bloc—to limit federal agency power. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (finding that Centers for Disease Control and Prevention exceeded its authority in issuing nationwide moratorium on evictions of tenants living in counties experiencing high levels of COVID-19 transmission); West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607–09 (2022) (holding that Congress did not give Environmental Protection Agency authority to devise carbon emissions caps related to climate change).

20. *Id*. at 670 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

21. *Id*. at 672.

22. *Id*. at 676.

vaccine mandate for its service members.[23] In a one-paragraph order, the Court put the judge's order on hold insofar as it forbade the Navy from making changes to deployment, assignment, and other operational decisions of the Navy's elite special forces community.[24] Justice Brett Kavanaugh issued a concurring opinion in which he expressed his agreement, stating simply that "the President of the United States, not any federal judge, is the Commander in Chief of the Armed Forces."[25]

Justice Alito penned a ten-page dissenting opinion, joined by Justice Gorsuch, expressing concern that the Court's order would give the Navy "*carte blanche* to warehouse respondents for the duration of the appellate process, which may take years."[26] Professing to be "wary . . . about judicial interference with sensitive military decision making," Justice Alito indicated that he would limit the order to "the selection of the Special Warfare service members who are sent on missions where there is a special need to minimize the risk that the illness of a member due to COVID-19 might jeopardize the success of the mission or the safety of the team members."[27] While not authoring a dissenting opinion, Justice Thomas simply stated that he would deny the partial stay application.[28]

Taken together, these pandemic-related cases shed light on the Court's views regarding the scope and limits of federal agency actions and authority. For example, the Court explained that if DOL expects its workplace-related COVID-19 safety measures to be upheld, the regulator must narrowly tailor its mandates to specific hazards in certain jobs. Second, the Court's decisions clarify that broader pandemic-related mandates—whether they relate to vaccines or testing—must come from Congress or the states, absent clear statutory language that grants a federal agency the ability to issue such directives. The evolution and application of the "major questions doctrine," in particular, portend an ongoing churn in administrative law.

II. The Evolving Jurisprudence of Mandatory Arbitration

In the 2021–22 term, the Supreme Court focused on mandatory arbitration once again, issuing five decisions on the topic. Three of these rulings dealt with workplace disputes. While two of the cases resulted in unanimous decisions on arguably narrow interpretations of the Federal Arbitration Act of 1925 (FAA), the third case delivered a fractured

23. Austin v. U.S. Navy Seals, 142 S. Ct. 1301 (2022).
24. *Id*. at 1302.
25. *Id*. at 1302 (Kavanaugh, J., concurring).
26. *Id*. at 1304 (Alito, J., dissenting).
27. *Id*. at 1306.
28. *Id*. at 1301 (Thomas, J., dissenting).

opinion that could have broader ramifications for both employers and employees.[29]

In *Morgan v. Sundance, Inc.*, Robyn Morgan sued Sundance, her employer and a Taco Bell franchisee, for unpaid overtime wages allegedly owed to her and other similarly situated employees.[30] For months, Sundance defended against the collective action lawsuit "as if no arbitration agreement existed."[31] It moved to dismiss the case, answered the complaint and asserted defenses (but none mentioning arbitration), and even engaged in joint mediation.[32] And then, nearly eight months after the suit's filing, Sundance moved to compel individual arbitration.[33] Morgan opposed the motion, alleging that Sundance had waived its right to that forum.

The Supreme Court posed the question before it as whether "the defendant's request to switch to arbitration [has] come too late?"[34] The lower courts in the case applied precedent from the U.S. Court of Appeals for the Eighth Circuit to decide the waiver issue. Under that precedent, a party can only be found to have waived its contractual right to arbitration if it "prejudiced the other party by its inconsistent actions."[35] Writing for the unanimous Court, Justice Kagan concluded that the appellate court was "wrong" to require such prejudice to show waiver in the arbitration context.[36] The FAA's policy favoring arbitration "does not authorize federal courts to invent special, arbitration-preferring rules."[37] Accordingly, the Court instructed the Eighth Circuit on remand to apply "the usual federal procedural rules, including any rules related to a motion's timeliness" to the defendant's motion to compel arbitration in this case.[38]

The next case, *Southwest Airlines Co. v. Saxon*, also dealt with allegations of unpaid overtime wages.[39] Latrice Saxon, an airline ramp supervisor, filed suit arguing that her employer Southwest Airlines had failed to pay overtime wages to her and a class of airline ramp supervisors.[40] Saxon's work frequently required her to load and unload baggage, air mail, and commercial cargo on and off airplanes that travel

29. The FAA generally provides for the judicial facilitation of private disputes through arbitration. *See* 9 U.S.C. §§ 1–16.

30. Morgan v. Sundance, 142 S. Ct. 1708, 1709 (2022).

31. *Id*. at 1711.

32. *Id*.

33. *Id*.

34. *Id*.

35. *Id*. at 1712. Nine circuits have invoked the strong federal policy (embodied by the FAA) favoring arbitration in support of an arbitration-specific waiver rule demanding a showing of prejudice; two circuits have rejected that rule. *Id*.

36. *Id*. at 1712–13.

37. *Id*. at 1713. "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id*.

38. *Id*. at 1714.

39. Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1783 (2022).

40. *Id*. at 1787.

across the country.[41] Southwest moved to dismiss Saxon's lawsuit based on the arbitration agreement contained in her employment contract.[42] Opposing that motion, Saxon responded that airline ramp supervisors, like her, comprise a "class of workers engaged in foreign or interstate commerce" and, thus, were exempt from the FAA's coverage.[43]

Siding with Saxon, the Court unanimously held that airline ramp supervisors like her fell into the FAA's transportation worker exemption.[44] Authoring the opinion for the Court, Justice Thomas analyzed the FAA's exemption language using its "ordinary, contemporary, and common meaning."[45] After finding that Saxon belonged to a "class of workers" who physically load and unload cargo on and off airplanes, the Court evaluated whether that class was "engaged in foreign or interstate commerce."[46] Relying in part on decisions issued close to when the FAA was enacted in the 1920s, the Court reasoned that cargo loading and unloading has long been understood to be "intimately involved" with the interstate transit of such cargo.[47] In addition, Justice Thomas observed that the FAA's transportation worker exemption's reference to "wharfage" serves as further evidence that Congress saw workers who load or unload cargo—whether on ships docked at a wharf or on airplanes parked on a tarmac—as engaged in matters of "foreign or interstate commerce."[48]

Viking River Cruises, Inc. v. Moriana, the final arbitration case of the term, was less straightforward.[49] Angie Moriana filed a state court action against her employer Viking River Cruises under California's

41. *Id*.

42. *Id*.

43. *Id*. Specifically, the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id*. (citing 9 U.S.C. § 1). This is sometimes referred to as the FAA's transportation worker exemption.

44. *Id*. at 1793. Justice Barrett took no part in the consideration or decision of the case.

45. *Id*. at 1788.

46. *Id*. at 1789. Justice Thomas rejected Saxon's contention that the relevant "class of workers" should include virtually all employees in the airline industry because other categories in the FAA's transportation worker exemption, such as "seamen," did not include the entire maritime industry, but only those who "work on board a vessel." *Id*. at 1790–91. He also rejected Southwest's three arguments asserting that the class should be limited to only those workers who accompany the transported goods. First, Justice Thomas found that another category in the FAA's exemption—"railroad employees"—was not restricted to workers who traveled across state lines. *Id*. at 1791–92. Second, he dismissed as flawed the airline's analogies to other categories of workers more distantly related to interstate commerce. *Id*. at 1792. And last, Justice Thomas concluded that there was no reason to elevate the FAA's generally pro-arbitration purpose over the actual words Congress chose to exclude cargo loaders from the FAA's reach. *Id*. at 1792–93.

47. *Id*. at 1790.

48. *Id*.

49. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022).

Private Attorneys General Act (PAGA).[50] In the lawsuit, Moriana alleged wage-and-hour violations of the California Labor Code sustained by her as well as other Viking employees.[51] Viking moved to compel arbitration of Moriana's individual employment claim and to dismiss her PAGA claims involving other Viking employees.[52] Notably, Moriana's arbitration agreement contained a "class action waiver" providing that she could not bring any dispute as a class, collective, or representative action under PAGA. It also contained a severability clause stating that if aspects of the waiver were found unlawful, any remaining valid portions would be "enforced in arbitration."[53]

Under PAGA, individuals may initiate an action against a former employer for alleged state labor violations affecting them as well as "other current or former employees" to obtain civil penalties that previously could have been recovered only by the state.[54] California precedent holds that a PAGA suit is a "representative action" where the plaintiff may sue as an agent or "private attorney general" of the state.[55]

Relying on state law precedent, including *Iskanian v. CLS Transportation Los Angeles, LLC*, the California courts denied Viking's motion to compel arbitration of Moriana's individual claim and dismiss her PAGA claims, holding that "categorical waivers of PAGA standing are contrary to state policy."[56] The courts also found that "PAGA claims cannot be split" into arbitrable individual claims and non-arbitrable representative claims.[57] The Supreme Court granted certiorari to decide whether the state courts erred in reaching these conclusions.

In an 8–1 opinion authored by Justice Alito, the Court addressed these two discrete lower court arbitration holdings as they relate to the FAA. First, the majority found that the FAA does *not* preempt *Iskanian*'s prohibition on wholesale waivers of PAGA claims.[58] Rejecting both parties' arguments, the Court stated that "[n]othing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals."[59] The majority acknowledged that non-class representative actions where a single agent litigates on behalf of a single principal necessarily depart from the strict norm of bilateral dispute resolution (a norm that Viking urged

50. *Id*. at 1916.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*. at 1914.
55. *Id*.
56. *Id*. at 1916 (citing Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 149, 151 (Cal. 2014)).
57. *Id*.
58. *Id*. at 1922.
59. *Id*.

should be the rule).[60] Nonetheless, as the Court reasoned, the Court has "never held that the FAA imposes a duty on states to render all forms of representative standing waivable by contract" or that such suits "are inconsistent with the norm of bilateral arbitration."[61] The Court concluded that "nothing in our precedent suggests that, in enacting the FAA, Congress intended to require states to reshape their agency law to ensure that parties will never have to arbitrate in a proceeding that deviates from bilateral arbitration in the strictest sense."[62]

At the same time, the Court held that the FAA *does* preempt *Iskanian*'s rule insofar as that California precedent precludes division of PAGA actions into individual and non-individual claims through an arbitration agreement.[63] While acknowledging that Congress adopted the FAA "in response to judicial hostility to arbitration," the Court honed in on the "equal-treatment principle," which may be used to preempt "any state rule discriminating on its face against arbitration."[64] Here, PAGA permits a party "to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate."[65] The Court determined that this built-in joinder mechanism in the arbitration context conflicts with the FAA.[66] Indeed, *Iskanian*'s prohibition on the "contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate, and does so in a way that violates the fundamental principle that arbitration is a matter of consent."[67] According to the Court, *Iskanian*'s "indivisibility rule effectively coerces parties to opt for a judicial forum rather than forgo[ing] the procedural rigor and appellate review of the courts to realize the benefits of private dispute resolution."[68]

Based on the Court's holding, Viking was entitled to compel arbitration of Moriana's individual claim, which left open only the question of what to do with her PAGA claims on behalf of other employees. On that issue, the Court noted that "PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual has

60. *Id*. at 1921. Viking posited that an arbitration proceeding is "bilateral" only if it involves two and only two parties and is "conducted by and on behalf of the individual named parties only." *Id*. Disagreeing, the Court noted myriad examples of non-class representative actions in which a single agent litigates on behalf of a single principal, including "shareholder-derivative suits, wrongful-death actions, trustee actions, and suits on behalf of infants or incompetent persons." *Id*. at 1922.

61. *Id*.

62. *Id*. at 1923 (internal quotations omitted).

63. *Id*.

64. *Id*. at 1917.

65. *Id*. at 1923.

66. *Id*. at 1924.

67. *Id*. at 1923 (internal quotations and citations omitted).

68. *Id*. at 1924 (internal quotations omitted).

been committed to a separate [arbitration] proceeding."[69] And under the Court's understanding of PAGA's standing requirement, a plaintiff has standing to maintain non-individual PAGA claims in an action "only by virtue of also maintaining an individual claim in that action."[70] As a result, the Court found that "Moriana lacks standing to continue to maintain her non-individual claims in court, and the correct course of action is to dismiss her remaining claims."[71]

Justices Sotomayor and Barrett filed separate concurrences. Justice Sotomayor agreed with all of Justice Alito's opinion and wrote to explain that she especially approved of the discussion in Part II regarding the "important limitations on the preemptive effect of the . . . FAA" and invited California to "have the last word" through the courts or the legislature.[72] Justice Barrett, on the other hand, joined Part III of the opinion only and thought it "unnecessary to . . . address[] disputed state law questions as well as arguments not pressed or passed upon in this case."[73]

Justice Thomas was the lone dissenter. Maintaining the view that the FAA does not apply to state court proceedings, he would find that "the FAA does not require California courts to enforce an arbitration agreement that forbids an employee to invoke the state's [PAGA]."[74]

Collectively, these cases underscore once again the ongoing central role that arbitration plays in our legal system to resolve workplace disputes. The decisions also suggest that, while the Court may adhere to precedent as it continues to shape arbitration law, it also may seek to ground more cases in the FAA's statutory text rather than in a more general policy favoring arbitration.

III. State Sovereign Immunity—"Sacrifice . . . for the Good of the Common Defense"

In *Torres v. Texas Department of Public Safety*, the Supreme Court considered whether states have waived their sovereign immunity to private suits for damages under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[75] While serving as an Army Reservist in Iraq, Le Roy Torres "was exposed to toxic burn pits" and "returned home with constructive bronchitis" that "left him unable to

69. *Id*. at 1925.
70. *Id*.
71. *Id*.
72. *Id*. at 1925–26 (Sotomayor, J., concurring).
73. *Id*. at 1926 (Barrett, J., concurring in part and concurring in the judgment, with whom Kavanaugh, J. joins, and with whom Roberts, C.J. joins except as to the footnote).
74. *Id*. (Thomas, J., dissenting).
75. Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455 (2022). USERRA safeguards servicemembers' rights to return to their civilian jobs after military service and not be harmed because of their present, past, or future military service. *See* 32 U.S.C. §§ 4301–4335.

work at his old job as a state trooper."[76] After Texas refused to accommodate Torres's request for reemployment, he filed suit in state court alleging that Texas had violated USERRA.[77] Invoking sovereign immunity, Texas moved to dismiss Torres's lawsuit. After a state trial court denied the motion, a state intermediate appellate court reversed, finding that Congress could not authorize private suits against nonconsenting states in this context.[78]

After the state intermediate appellate court's decision in this case, the Supreme Court decided *PennEast Pipeline Co. v. New Jersey*, where it recognized that states had waived sovereign immunity as to the exercise of the federal eminent domain power under the structure of the Constitution pursuant to the "plan of the Convention."[79] The Court then granted Torres's petition for certiorari to decide whether, in light of the intervening *PennEast* decision, "USERRA's damages remedy against state employers is constitutional."[80]

In a 5–4 decision authored by Justice Breyer, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, and Kavanaugh, the Court held that states had waived sovereign immunity to private suits for damages under USERRA.[81] According to the majority, Congress enacted USERRA pursuant to the nation's war powers in Article I of the Constitution. Relying on the legal analysis in *PennEast*, the Court reasoned that states—upon entering the Union—had "agreed to sacrifice their sovereign immunity for the good of the common defense" and yield to federal policy to build and keep a national military.[82] Building on this framework, the Court found that USERRA's legislative history recognizes a veteran's "right to return to civilian employment without adverse effect on . . . career progress" with a federal, state, or private employer, and authorizing suits if any of those employers refuse to employ them.[83] Citing USERRA's clear statutory language, the Court held that Congress used its federal power "to authorize suits against state employers" for damages.[84]

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76. *Torres*, 142 S. Ct. at 2461.
77. *Id*.
78. *Id*.
79. *Id*. (citing PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2258 (2021)).
80. *Id*.
81. *Id*. at 2460. Before this decision, sovereign immunity—either by statute, case law, or both—had been recognized as a basis for blocking USERRA lawsuits against nineteen states (Alabama, Arkansas, Delaware, Florida, Georgia, Illinois, Kentucky, Maine, Massachusetts, Michigan, Nevada, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, West Virginia, and Wyoming).
82. *Id*. at 2460, 2469. Relying on *PennEast*, the Court found that "the states ultimately ratified the Constitution knowing that their sovereignty would give way to the national military policy." *Id*. at 2464.
83. *Id*. at 2460–61 (citing H.R. Rep. No. 105-448, at 2 (1998)).
84. *Id*. at 2466.

Justice Kagan concurred in the majority opinion, noting that the Court's "sovereign immunity decisions have not followed a straight line."[85] Finding that "the war powers . . . were complete in themselves" and "given by the States, entirely and exclusively, to the Federal Government," she agreed that the states had "waived their sovereign immunity to any suit Congress authorized under the war powers."[86]

Justice Thomas filed a dissenting opinion, joined by Justices Alito, Gorsuch, and Barrett, reasoning that the issue in question had already been decided by another case, *Alden v. Maine*.[87] Rejecting the *PennEast* legal analysis, he believed that the *Alden* decision better demonstrated how the states "did not implicitly consent to private damages actions," filed in either federal or state court, "whether authorized by Congress['s] war powers or any other Article I power."[88]

The *Torres* decision is significant in the complex jurisprudence of sovereign immunity. Under Chief Justice William Rehnquist, the Court often sought to return power to the states at the expense of the federal government. During his tenure, the Court issued several "new federalism" decisions preventing individual damages suits against states under several federal labor and employment laws.[89] While the Court has generally adopted a standard of limiting waivers of state sovereign immunity, *Torres* demonstrates a growing trend that, under Chief Justice Roberts, the Court may be more willing to allow exceptions to this rule.[90]

IV. Faith, Football, and the First Amendment

In the last week of the 2021–22 term, the Supreme Court issued two decisions about religion and schools. Both dealt with complex and sometimes confusing First Amendment jurisprudence and were decided along the same 6–3 ideological lines; one squarely dealt with employment.[91]

In *Kennedy v. Bremerton School District*, the Court considered the ostensible tension between the Free Exercise and the Establishment Clauses in the First Amendment.[92] Joseph Kennedy, a public high school football coach, prayed on bended knee on the football field's fifty-yard

85. *Id*. at 2469 (Kagan, J., concurring).
86. *Id*.
87. *Id*. at 2470 (Thomas, J., dissenting) (citing Alden v. Maine, 527 U.S. 706 (1999)).
88. *Id*.
89. *See* Alden v. Maine, 527 U.S. 706, 759–60 (1999) (overtime pay); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91–92 (2000) (age discrimination); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (disability discrimination).
90. *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (bankruptcy); PennEast Pipeline Co. v. New Jersey, 1414 S. Ct. 2244, 2263 (2021) (eminent domain).
91. In the other case, *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022), the Court struck down a Maine state law that banned the use of public funds to enable students to attend a private school that provides religious instruction.
92. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

line after each game.[93] Sometimes he prayed alone; other times student players joined him.[94] His employer, the Bremerton School District, asked that he discontinue the practice to avoid the perception that the school was endorsing religion and to prevent the school from running afoul of the Establishment Clause.[95] Kennedy refused, indicating that his religious beliefs compelled him to offer post-game prayers on the football field.[96] Bremerton placed Kennedy on paid administrative leave and then declined to renew his employment contract the following season.[97]

Kennedy, a public employee, sued Bremerton for violating his rights under the Free Speech and Free Exercise Clauses in the First Amendment. On the Free Speech claim, both courts found that Kennedy's speech qualified as "government [or public] rather than private speech" given the timing and location of his prayers at the public school's football games.[98] As such, it was not protected by the First Amendment. Even if Kennedy's speech were private in nature—and thus protected under the First Amendment—the lower courts held that Bremerton had permissibly suppressed it to avoid violating the Establishment Clause by arguably endorsing Kennedy's religious speech. Relying on *Lemon v. Kurtzman* and its progeny for the proposition that "the Establishment Clause is implicated whenever a hypothetical reasonable observer could conclude the government endorses religion," the district court found for Bremerton, and the U.S. Court of Appeals for the Ninth Circuit affirmed.[99] For similar reasons, both courts rejected Kennedy's Free Exercise claim. Specifically, they found that, even if Bremerton's actions restricting Kennedy's sincere religious exercise were not neutral or generally applicable, it had pursued a narrowly tailored approach of restricting his prayers at the public school's football

93. *Id*. at 2416.
94. *Id*.
95. *Id*. at 2416–17.
96. *Id*. at 2417.
97. *Id*. at 2418–19.
98. *Id*. at 2420. Under the Court's precedents, there is a two-step process for assessing the interplay between free speech rights for public employees like Kennedy. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., 391 U.S. 563, 568 (1968); Garcetti v. Ceballos, 547 U.S. 410, 423 (2006). First, there is a threshold question as to whether the speech at issue is "pursuant to [the employee's] official duties" or private in nature. *Kennedy*, 142 S. Ct. at 2423 (quoting *Garcetti*, 547 U.S. at 421). When the public employee engages in private speech, i.e., "speaks as a citizen addressing a matter of public concern," the First Amendment is implicated, and courts should proceed to the second step. *Id.* (citations omitted). At this step (i.e., where there is private speech by a public employee), courts should "engage in a delicate balancing of the competing interests surrounding the speech and its consequences." *Id*. at 2425 (citations omitted).
99. *Kennedy*, 142 S. Ct. at 2420 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

games to serve its compelling state interest in avoiding an Establishment Clause violation.[100]

In a 6–3 decision written by Justice Gorsuch, the Court reversed the Ninth Circuit. According to the majority, Kennedy had met his burden under the Free Speech and Free Exercise Clauses to "demonstrate an infringement of his rights," which then shifted the burden to Bremerton to show that its actions were "justified and tailored" consistent with the Court's precedents.[101] On the Free Speech claim, the Court found that Kennedy had demonstrated that his prayers were private speech not performed as part of his "duties as a coach" and thus protected by the First Amendment.[102] On the Free Exercise claim, the majority determined that Kennedy had shown that his desire to pray was sincere and that Bremerton's actions targeted the "religious character" of his conduct and thus were neither neutral nor "applied in an even-handed" manner.[103]

By contrast, the Court found that Bremerton failed to meet its burden to show its actions passed First Amendment muster. Specifically, Bremerton could not prove that its actions toward Kennedy were justified under the requisite constitutional balancing principles.[104] Rejecting the Ninth Circuit's analysis, the Court noted that it had "long abandoned *Lemon* and its endorsement test."[105] The proper analysis instead, the Court explained, requires courts to interpret the Establishment Clause by "reference to historical practices and understandings."[106] Here, the Court found no evidence to support Bremerton's argument that Kennedy's religious activity would cause the school to "coerc[e] students to pray."[107] In the end, the Court held that Bremerton's actions

100. *Id*. A plaintiff may prove a Free Exercise violation by showing that a government entity has burdened his sincere religious practice pursuant to a policy or practice that is neither "neutral" nor "generally applicable." To avoid liability, the government entity must satisfy "strict scrutiny" by showing that its course of action was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Id*. at 2421.

101. *Id*. at 2421.

102. *Id*. at 2424–25.

103. *Id*. at 2423. According to Justice Gorsuch, Bremerton "permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls." *Id*.

104. *Id*. at 2426. The Court concluded that whether one views the case "through the lens of the Free Exercise or Free Speech Clause"—and applies "strict scrutiny" or the second step of the *Pickering-Garcetti* test—Bremerton could not "sustain its burden under any [standard]." *Id*.

105. *Id*. at 2427 (citing two earlier decisions in *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (plurality opinion) and *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (plurality opinion)).

106. *Id*. at 2428 (internal quotations omitted). While the Court failed to provide a deep analysis of the application of the appropriate test to the specific facts in this case, it generally asserted that "the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Id*. at 2416.

107. *Id*. at 2429.

"rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech."[108]

Justice Sotomayor offered a robust dissent joined by Justices Breyer and Kagan. Using photographs of Kennedy praying on the public school's football field, she argued that the majority opinion "misconstrues the facts" of the case by depicting Kennedy's prayers as "private and quiet" when in actuality they caused "severe disruption to school events."[109] On the law, Justice Sotomayor noted the "twin Establishment Clause concerns of endorsement and coercion," particularly in elementary and secondary schools, and lamented the majority's rejection of the *Lemon* test in favor of what she argued is a new "history and tradition" test.[110] Under her reading of the precedents, Justice Sotomayor would find that Bremerton's "directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation."[111]

The Justices were greatly divided on this case. The majority and dissenting opinions could not even agree on whether this decision reflects a "mere shadow of a conflict" between the Free Exercise and Establishment Clauses (as the majority reasoned) or whether the decision erodes "our Nation's longstanding commitment to separation of church and state" (as the dissent warned).[112] Thus, states will continue to grapple with how best to balance religious expression in public schools with constitutional requirements and the day-to-day need for effective supervision of teachers and coaches in public schools.

V. Employee Benefits . . . from Health to Wealth

During the 2021–22 term, the Supreme Court heard five cases about workplace benefits implicating virtually every major phase in the employment lifecycle. The Court addressed disputes as varied as the extent of coverage in health plans, the application of workers' compensation laws, and post-employment pension and retirement benefits under the Employee Retirement Income Security Act of 1974 (ERISA).[113]

In *Marietta Memorial Hospital Employee Health Benefits Plan v. DaVita Inc.*, the Court considered how to properly allocate medical care costs for outpatient dialysis between private health plans and

108. *Id*. at 2433.
109. *Id*. at 2434 (Sotomayor, J., dissenting).
110. *Id*. at 2442, 2449.
111. *Id*. at 2446.
112. *Compare id*. at 2432 (majority opinion), *with id.* at 2434 (Sotomayor, J., dissenting).
113. ERISA sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protections for participants in such plans. *See* 29 U.S.C. §§ 1001–1461.

Medicare.[114] The Marietta Memorial Hospital Employee Health Plan was an employer-sponsored group health plan that offered outpatient dialysis benefits to individuals with end-stage renal disease (ESRD).[115] While Marietta's health plan offered the same terms of coverage for outpatient dialysis to all of its participants, it provided relatively low reimbursement rates for such services.[116] DaVita, one of two major dialysis providers in the country, provided costly treatments to people suffering from ESRD who were enrolled in Marietta's health plan. After DaVita received only a fraction of the requested reimbursement for claims related to outpatient dialysis, it sued Marietta for alleged violations of the Medicare Second Payer Statute (MSPS).[117]

The MSPS makes Medicare a "secondary" payer to a participant's existing health plan for certain medical services, including outpatient dialysis, when the health plan already covers the same services.[118] To prevent health plans from circumventing their primary-payer obligation for ESRD, the statute imposes two constraints. First, a health plan "may not differentiate in the benefits it provides between individuals having [ESRD] and other individuals covered by such plan on the basis of the existence of [ESRD] . . . or in any other manner."[119] Second, a health plan "may not take into account that an individual is entitled to or eligible for Medicare due to ESRD."[120]

In a 7–2 opinion written by Justice Kavanaugh, the Court held that a health plan that uniformly provides limited benefits for outpatient dialysis to all participants does not violate the MSPS.[121] Here, Marietta's health plan "provides the same benefits, including the same outpatient dialysis benefits, to individuals with and without [ESRD]" and thus did not "differentiate in the benefits it provides [to] individuals."[122] While DaVita argued that the MSPS authorizes liability even when a health plan limits benefits in a uniform way if the limitation has a disparate impact on participants with ESRD, the Court held that "the statute cannot be read to encompass a disparate-impact theory."[123] Moreover, because the health plan provides the same outpatient dialysis benefits to all participants—whether or not they are entitled to or eligible for Medicare—the plan cannot be said to "take into account" whether its participants are entitled to or eligible for Medicare.[124]

114. Marietta Mem'l Hosp. Emp. Health Benefits Plan v. DaVita Inc., 142 S. Ct. 1968 (2022).
115. *Id*. at 1972.
116. *Id*.
117. *Id*.
118. *Id*.
119. *Id*. (internal quotations omitted).
120. *Id*. (internal quotations omitted).
121. *Id*.
122. *Id*. (internal quotations omitted).
123. *Id*.
124. *Id*. at 1975.

Justice Kagan filed a dissenting opinion, joined by Justice Sotomayor, in which she noted that, because ninety-seven percent of people diagnosed with ESRD undergo some form of dialysis, "[o]utpatient dialysis is an almost perfect proxy for ESRD."[125] She thus argued that Marietta's health plan violated the MSPS because "singling out dialysis for disfavored coverage differentiates in the benefits it provides between individuals having ESRD and other individuals."[126] Because the MSPS's provisions on ESRD were "designed to prevent [health] plans from foisting the cost of dialysis onto Medicare," Justice Kagan called on Congress to provide a remedy.[127]

This term the Court also reviewed two cases raising relatively discrete issues involving workers' compensation laws. In the first case, *United States v. Washington*, the Court analyzed whether a Washington state workers' compensation law violated the Constitution's Supremacy Clause.[128] Under established doctrine, the federal government is immune from state laws that seek to "directly regulate or discriminate against it."[129] Absent congressional consent, states generally have limited authority to enforce their laws at federally owned facilities and on federal land. In 1936, Congress enacted a law to fill gaps in coverage for work-related injuries sustained by federal contractors engaged in work at federally owned facilities and on federal lands. This federal law waived sovereign immunity by permitting state authorities charged with enforcing workers' compensation laws to "apply" those laws to work performed at federally owned facilities and on federal lands "in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the state."[130]

Here, the state workers' compensation law at issue affected only federal contractors who worked at the "Hanford site," a large 500-square mile tract of land in Washington state used to develop and produce nuclear weapons during World War II.[131] To ease the burden of proof in workers' compensation claims filed by federal contractors at the Hanford site, the state created a "causal presumption" that certain diseases and illnesses were caused by cleanup work at the Hanford site, thereby greatly increasing workers' compensation costs for the federal

125. *Id*. at 1975 (Kagan, J., dissenting). Justice Kagan also noted that 99.5% of DaVita's outpatient dialysis patients have or developed ESRD. *Id*.

126. *Id*. at 1976.

127. *Id*. Within weeks of the decision, Congress introduced bipartisan legislation entitled the "Restore Protections for Dialysis Patients Act" in both houses. *See* S. 4750 (2022); H.R. 8594 (2022).

128. United States v. Washington, 142 S. Ct. 1976 (2022).

129. *Id*. at 1982. This concept is also known as "intergovernmental immunity." *Id*.

130. *Id*. (citing 40 U.S.C. § 3172).

131. *Id*.

government.[132] The question in this case is whether *this* state workers' compensation law falls within the scope of the congressional waiver.

Delivering the opinion for a unanimous court, Justice Breyer found that the Washington state workers' compensation law "singl[ed] out the Federal Government for unfavorable treatment" by explicitly treating federal contractors at the Hanford site differently than state or private workers generally.[133] By imposing costs on the federal government that state and private entities did not have to bear, the law violated the Supremacy Clause. The Court also rejected the state's arguments for a broad reading of the relevant waiver provision. Instead, the Court favored "a narrower waiver of immunity, namely, as only authorizing a State to extend its *generally applicable* state workers' compensation laws to federal lands and projects within the State."[134] According to the Court, the waiver did not "clearly and ambiguously authorize Washington's discriminatory [workers' compensation] law."[135]

The Court's second workers' compensation case, *LeDure v. Union Pacific Railroad Co.*, involved an injured railroad worker's claims under the federal Locomotive Inspection Act and the Federal Employers' Liability Act.[136] Together, these two worker injury statutes regulate the safe "use" of locomotives and provide for "negligence" claims in circumstances "a reasonable person would foresee as creating a potential for harm."[137] In this case, Bradley LeDure was a conductor employed by Union Pacific.[138] In 2016, while servicing a train, LeDure fell on the locomotive's exterior walkway and sustained multiple injuries.[139] LeDure claimed that "Union Pacific failed to maintain the walkway free of hazards," as required by the Locomotive Inspection Act.[140] The district court granted Union Pacific's motion for summary judgment and dismissed LeDure's claims with prejudice.[141] The U.S. Court of Appeals for the Seventh Circuit affirmed a finding of no liability because the locomotive at issue was stationary on a sidetrack and thus not "in use"

132. *Id*. at 1982–83.

133. *Id*. at 1984.

134. *Id*. at 1985 (emphasis added). For example, the waiver requires states to apply workers' compensation laws "in the same way and to the same extent" as if the premises were under the state's exclusive jurisdiction. *Id*. (quoting 40 U.S.C. § 3172).

135. *Id*. at 1986 (internal quotations omitted). In addition, while Washington argued that the case was moot because it had amended the workers' compensation law at issue, the Court disagreed, finding that a decision in the federal government's favor might allow it to recoup or avoid workers' compensation expenses. *Id*. at 1983.

136. LeDure v. Union Pac. R.R. Co., 142 S. Ct. 1582 (2022) (per curiam).

137. LeDure v. Union Pac. R.R. Co., 962 F.3d 907, 910 (7th Cir. 2020) (internal quotations and citations omitted). Certain background facts detailed here were taken from the Seventh Circuit's decision because pertinent information was not included in the Court's per curiam opinion.

138. *Id*. at 909.

139. *Id*.

140. *Id*.

141. *Id*.

or operable at the time of LeDure's injury.[142] The appellate court also determined there was insufficient evidence to show that Union Pacific "knew or should have known about the . . . hazard."[143]

In a single sentence per curiam opinion, the Court held that the Seventh Circuit's "judgment is affirmed by an equally divided Court."[144] As is customary in these circumstances, the Court revealed only that the vote was evenly split but not the identities on each side. Notably, the split occurred because prior to her appointment to the high court, Justice Barrett had served on the Seventh Circuit panel that decided the case and thus had recused herself from participating in the proceedings before the Court.

This term, the Court also evaluated another rather distinct issue related to the Social Security pension benefits available to a small group of federal workers in *Babcock v. Kijakazi*.[145] Dual status military technicians are defined as federal civilian employees who provide technical or administrative assistance to the National Guard.[146] These technicians are "required as a condition of that employment to maintain membership in the [National Guard] and must wear a uniform while working."[147] For their full-time civilian work, "they receive civil-service pay and, if hired before 1984, . . . pension payments from the Office of Personnel Management."[148] At the same time, as part-time National Guard members who engage in military training and drills, "they receive military pay and pension payments from a different arm of the Federal Government" (i.e., the Defense Finance and Accounting Service).[149]

David Babcock worked as a dual status military technician for over thirty-three years.[150] Babcock retired from his dual status military technician position in 2009, at which time he began receiving both his civil-service and military pension benefits. In 2014, he fully retired and applied for Social Security retirement benefits. Based on his civil-service pension, the Social Security Administration (SSA) reduced his retirement benefits.[151] Babcock asked for reconsideration, noting that he qualified for the "uniformed-services exception" from the reduction because he had served as a dual status military technician. SSA did not change its determination.[152] The district court entered judgment

142. *Id*. at 910–11.
143. *Id*. at 911.
144. LeDure v. Union Pac. R.R. Co., 142 S. Ct. 1582 (2022) (per curiam).
145. Babcock v. Kijakazi, 142 S. Ct. 641 (2022).
146. *Id*. at 643.
147. *Id*. at 644 (quoting 10 U.S.C. § 10216(a)(1)(B)).
148. *Id*.
149. *Id*.
150. *Id*.
151. *Id*. at 645.
152. *Id*.

against Babcock, and the Sixth Circuit affirmed, concluding that "Babcock's civil-service pension payments were based on service in a civilian capacity and therefore did not fall within the uniformed-services exception."[153]

Generally, retirees eligible to receive Social Security retirement benefits earn such benefits according to a progressive formula that awards percentage points based on average past earnings.[154] Originally, the formula did not count earnings from jobs exempt from Social Security taxes and in which they might receive separate pensions.[155] Congress responded to this possible "'windfall' by modifying the formula to reduce benefits when a retiree receives a separate pension payment."[156] But Congress exempted several categories of pension payments, including "a payment based wholly on service as a member of a uniformed service."[157] In short, in certain circumstances, workers receiving pension payments for "service as a member of a uniformed service" can receive greater Social Security retirement benefits than other similarly situated workers.[158]

In an 8–1 opinion authored by Justice Barrett, the Court held that dual status military technicians, like Babcock, were not entitled to the uniformed-services exception for the civil-service pension they received because it was not "based wholly on service as a member of a uniformed service."[159] Recognizing that dual status military technician positions are unique in that they condition civilian employment on membership in the National Guard, the Court nevertheless found a "condition of employment is not the same as the capacity in which one serves."[160] Here, the decision ultimately rested on the statutory scheme where Congress clearly classified dual status military technicians as civilian employees for purposes of pay and pension benefits.[161]

Justice Gorsuch alone dissented. Based on the unique work attributes of dual status military technicians, he would have held that they "serve as members of the National Guard in all the work they perform" and, as such, are entitled to the uniformed-services exception (i.e., higher Social Security retirement benefits).[162]

In *Hughes v. Northwestern University*, the Court considered allegations made by April Hughes and other affected employees that administrators for Northwestern's defined-contribution retirement plan

153. *Id*.
154. *Id*. at 643–44.
155. *Id*. at 644.
156. *Id*.
157. *Id*. (quoting 42 U.S.C. § 415(a)(7)(A)(III)).
158. *Id*.
159. *Id*. at 645.
160. *Id*. at 646.
161. *Id*. at 646–47.
162. *Id*. at 647 (Gorsuch, J., dissenting) (internal quotations omitted).

violated ERISA's duty of prudence.[163] Under Northwestern's retirement plan, a participant chooses how to invest funds from a menu of options selected by the plan administrators. The performance of chosen investments, coupled with the deduction of associated fees, determines the participant's amount of retirement income.[164] Here, Hughes and the affected employees specifically alleged that Northwestern failed to monitor and control recordkeeping fees resulting in higher costs to plan participants, offered mutual funds and annuities as "retail" share classes that carried higher fees than those charged by otherwise identical low-cost plans with the same investments, and caused plan participant confusion and poor investment decisions by offering too many investment options.[165] After the district court granted Northwestern's motion to dismiss, the Seventh Circuit affirmed, concluding that Hughes and the affected employees' allegations failed as a matter of law because Northwestern provided other low-cost investment options.[166]

Writing for a unanimous Court, Justice Sotomayor held that the Seventh Circuit erred in relying on the retirement plan participants' ultimate choices over their investments to excuse Northwestern's allegedly imprudent decisions.[167] Relying on earlier precedent, the Court found that Northwestern failed to comply with ERISA's requirement that plan administrators fulfill their continuing duties to monitor all plan investments and improve imprudent ones.[168] Here, Northwestern—like all plan administrators—should have conducted its "own independent evaluation to determine which investments may be prudently included in the plan's menu of options."[169] Failing to remove an imprudent investment from the plan within a reasonable time was a "breach their duty."[170] The Court noted that the Seventh Circuit's "exclusive focus on investor choice elided . . . the duty of prudence."[171] Ultimately, the Seventh Circuit's decision was vacated and the case was remanded for further proceedings.[172]

This collection of cases demonstrates the variety of employee-benefits disputes that can garner the Court's attention, even within a single term. Some holdings will undoubtedly reverberate more broadly. For example, *Hughes* may cause legal practitioners to advise their clients to revisit fiduciary responsibilities to limit and regularly curate

163. Hughes v. Nw. Univ., 142 S. Ct. 737 (2022).
164. *Id*. at 740.
165. *Id*. at 741.
166. *Id*. at 740.
167. *Id*. (Barrett, J., took no part in the consideration or decision of this case).
168. *Id*. at 741.
169. *Id*. at 742.
170. *Id*.
171. *Id*.
172. *Id*.

investment options under covered retirement plans. However, other cases—like *LeDure*—resolved more discrete worker injury issues that will likely have a much more limited workplace impact.

Conclusion

The Supreme Court's 2022–23 term already comprises more labor and employment law cases across a broad spectrum, including:

- *Glacier Northwest v. International Brotherhood of Teamsters*, No. 21-1449, involves allegations of whether the National Labor Relations Act impliedly preempts a state court claim against a union for intentionally destroying an employer's property. Here, sixteen cement truck drivers went on strike and engaged in a work stoppage. Unable to transport the cement that had been mixed, the company had to dump it. Oral argument was held on January 10, 2023.
- *Helix Energy Solutions Group v. Hewitt*, No. 21-984, will address whether highly paid employees who receive compensation on an hourly, daily, or shift basis are entitled retroactive overtime pay under the Fair Labor Standards Act. The Court decided the case on February 22, 2023.
- *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168, is primarily about personal jurisdiction, but was filed under the Federal Employers' Liability Act. The issue before the Court is whether a Pennsylvania court can hear a lawsuit brought against a Virginia-based railroad company by a Virginia man who worked for the company in Virginia and Ohio. The impetus for the case is a Pennsylvania state law that imposes general jurisdiction on any company doing business in the state. Oral argument was held on November 8, 2022.
- *The Ohio Adjutant General's Department v. Federal Labor Relations Authority*, No. 21-1454, involves dual status military technicians—the subject of the *Babcock* case, discussed *supra*. This case involves whether, for purposes of labor negotiations, these workers are considered federal civilian employees or members of their state National Guards. In this case, the Ohio National Guard ended its forty-five-year bargaining relationship with a public sector union, prompting the instant lawsuit. If dual status military technicians are deemed federal workers for labor negotiation purposes, the Federal Labor Relations Authority can continue to regulate their labor practices pursuant to the Civil Service Reform Act. Oral argument was held on January 9, 2023.

While we likely will see more labor and employment cases added to the Court's docket next term, we *won't* be seeing additional opinions by

Justice Breyer. In the speech announcing his retirement after twenty-seven years on the high bench, Justice Breyer reflected upon how "this is a complicated country . . . more than 330 million people . . . it's every race, it's every religion . . . it's every point of view possible."[173] And yet, Justice Breyer emphasized, "[I]t's kind of a miracle . . . [to] see all those people . . . so different in what they think" agree to come before the Court to "to help solve their major differences under law."[174]

Echoing the past sentiments of Presidents George Washington and Abraham Lincoln, Justice Breyer noted that this country's steadfast dedication to democracy, equality, and liberty is an untested "experiment."[175] It is "still going on," he said.[176] This generation and the ones that come afterward, he observed, must play a role in determining whether the great American experiment will continue to work. And in his parting words, Justice Breyer shared his sincere belief and hope with all of us . . . that it will.[177]

173. *Read Justice Breyer's Remarks on Retiring and His Hope in the American "Experiment,"* NPR (Jan.27, 2022), https://www.npr.org/2022/01/27/1076162088/read-stephen-breyer-retirement-supreme-court [https://perma.cc/WVL2-HCBE].

174. *Id*.

175. *Id*.

176. *Id*.

177. *Id*.

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First Amendment Protection of Hybrid Personas Speaking in the Course of Their Employment: An Israeli Perspective

Assaf Harel*

Introduction: The Anomaly of the *Garcetti* Case

The First Amendment protects, among other rights, the freedom of expression from government interference. The most basic element of freedom of expression is the right to freedom of speech, which allows individuals to express themselves without government interference. The Supreme Court demands substantial justification on the part of the government for interfering with the right of free speech. Individuals cannot be held liable for what they write or say if it is truthful or based on their honest opinion.

Nevertheless, the ability of private citizens and organizations to limit speech is not affected by the First Amendment. Private employers cannot be barred from dismissing an employee for controversial speech, unless statutory and common law remedies are available to the employee. This is because private employers cannot be told how to manage their employees.

When it comes to government employees, the situation is more complex. Like any other employer, the government has a legitimate interest in efficient operation of its offices and agencies. To do so, it may have to exercise control over its employees' speech. The unacceptable result appears to be that the First Amendment extends less protection to government employees than to individuals employed by private employers. American law must balance these two interests. In a 5–4 ruling in *Garcetti v. Ceballos*,[1] the Supreme Court formulated a triple test to decide whether a government employee's speech is protected by the First Amendment. Justice Anthony Kennedy wrote for the majority.

First and foremost, government employees are protected by the First Amendment only when they are speaking as citizens. If their

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1. Garcetti v. Ceballos, 547 U.S. 410, 422 (2006).

expression is pursuant to "official" job duties, they are not shielded from employer discipline.[2] According to the majority in the *Garcetti* ruling:

> [R]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.[3]

Justice Kennedy was concerned about the negative effects of permitting employees to bring First Amendment claims regarding speech made as part of the official duties in their jobs. Allowing such claims, in his opinion, "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[4] Therefore, the Court distinguished speech that the government has paid its employees to deliver from speech delivered by the same individuals in their private capacities. The meaning of this ruling is dramatic: when the government acts as an employer, it has greater powers than when it acts as a sovereign.[5] According to this test, many government employees who report on misconduct are not protected by the First Amendment.

Second, to receive constitutional protection, government employees speaking as private citizens must address a matter of public concern; otherwise, the First Amendment does not protect their expression. The reason is that federal courts are not expected to intervene in personnel decisions regarding employee speech that involves a matter "only of personal interest."[6] Speech is considered to regard a matter

2. For the analysis of the meaning of "pursuant to official duties," see Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts* 262 Educ. L. Rep. 357, 357–59 (2011). This broad principle was readily transferable by the Supreme Court to public employment cases that concern rights other than free speech. For a complete discussion, see Cameron Atkinson, *A General Sovereign/Public Employer Distinction: Should* Garcetti v. Ceballos *Govern Public Employment Cases Concerning off-Duty Sexual Conduct Instead of* Lawrence v. Texas*?*, 38 Quinnipiac L. Rev. 325, 360 (2020).

3. *Garcetti*, 547 U.S. at 421–22.

4. *Id.* at 423.

5. "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Id.* at 418. In *Lane v. Franks*, 573 U.S. 225, 240 (2014), the Supreme Court limited *Garcetti*'s preliminary inquiry, holding that

> the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.

Consequently, the Supreme Court found that, because truthful testimony was not ordinarily within the scope of an employee's duties, it satisfied *Garcetti*'s preliminary inquiry. *Id.* at 240–41.

6. Connick v. Myers, 461 U.S 138, 146–47 (1983).

of public concern if it relates to a social, political, or community issue. The Supreme Court ruled that the question of "whether an employee's speech addresses a matter of public concern should be determined by the content, form, and context of a given statement, as revealed by the whole record."[7] Complaining about work is unlikely to pass the public concern test, unless the speech presents broader issues of public importance, such as "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[8] Relevant criteria of the public concern test may include whether the speech is directed to a public or private audience and whether it calls for a concrete change in the employee's working conditions (speech that is merely of personal interest to the employee) or invites a broader public debate concerning a government entity (speech that is of public interest).[9]

Finally, if a government employee speaks as a private citizen on a matter of public concern, the last test balances public services and free speech. According to this test, the court must evaluate whether the employee's interest in speaking freely and the value of the speech outweigh the interest of government in restricting it.[10] To analyze the interest of the government as employer, the court must consider the following set of factors: whether the speech interfered with the employee's responsibilities; the nature of the working relationship between the speaker and those at whom the criticism was directed; whether the relationship between the speaker and the person criticized was sufficiently close that the speech created disharmonious relations in the workplace;[11] whether the speech undermined an immediate superior's discipline over the employee; and whether the speech compromised the loyalty and confidence required of employees. After considering each factor, the court must weigh them against the employee's interest in speaking freely. Therefore, under U.S. law, the freedom of expression of

7. *Id.* at 147–48. For a complete discussion of *Connick* and the confusion surrounding the public concern inquiry, see Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 BYU L. Rev. 2117, 2125–27.

8. City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam) (characterizing the plaintiff's sexually explicit website as failing to address a matter of public interest).

9. Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. Rev. 1597, 1613–14 (2012).

10. The interest balancing test was first established by the Supreme Court in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968). The *Pickering* ruling formulated a balancing test between "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *See* Connick v. Myers, 461 U.S. 138, 151–52 (1983) ("When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

11. *Connick*, 461 U.S. at 151–52 (1983).

public servants acting in the course of their job is sweepingly denied, except for statements on matters of public concern made in their capacity as private citizens.

This is what the Supreme Court ruled in the *Garcetti* case, in 2006, and the ruling stands to this day, despite extensive criticism in the literature.[12] In the present critique of American law, I offer a different point of view, inspired by Israeli law. I argue that public employees have a hybrid status by virtue of which they enjoy freedom of expression even in their capacity as public employees. Although the right to freedom of expression is not absolute under Israeli law, and it may be withdrawn if the expression is liable to result in imminent harm to public service, a chasm separates the American and Israeli approaches. I argue that even people operating in the public sphere are entitled to the protection of freedom of expression, whether they speak as public figures or as private citizens, and whether they address an issue of public controversy or a private matter.

I do not disagree with the basic assumption that public employees are public servants and that they do not act for themselves but for the public. Yet, the status of an administrative authority is not the same as that of a person appointed to serve as its organ. Unlike the authorities, public servants are both "their own" and "the public's." A sweeping denial of the freedom of expression of public servants in the exercise of their jobs severely impairs the autonomy of their private will and their ability, as individuals, to say what is on their mind. It also severely damages the public interest because the immediate consequence of this approach is silencing. Consequently, public servants will be likely to refrain from criticizing the public authority and pointing out failures in its conduct. Therefore, granting freedom of expression to public employees is essential both for the protection of their private aspects and of the public interest.

This is not to say that the freedom of expression of an ambiguous entity can always be protected against competing public interests. At the very least, however, such an entity deserves a fair chance against conflicting public interests. As trustees of the public, public servants are required to act for the benefit of the public and not for their private interest. But as long as the realization of their private desires does not undermine public trust, moral purity, or the proper functioning of the public administration, I propose demarcating a private space in which their freedom of expression is protected within the public expanse in which they operate. I propose a middle ground that bridges the gap between their loyalty to the public and the realization of their

12. *See, e.g.*, Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 Duke L.J. 1 (2009). The author emphasizes the public interest involved in protecting the expression of public employees within the field of their public activity.

autonomous private will in a way that does not infringe on their duty to act both fairly and honestly. More broadly, I argue that every person operating in the public sphere has a public/private hybrid persona (hereinafter, a hybrid persona).[13]

This article proceeds as follows: Part I is devoted to the presentation of the characteristics of the hybrid persona. In this part, I propose to adopt a theoretical approach, according to which individuals operating in the public sphere are "hybrid personas" who enjoy a certain space of privacy in their activities in the public sphere. In this space, hybrid personas occupy both a private and a public space. hybrid personas are not expected to completely shed their private aspects when serving as public figures or to completely divest themselves of their public aspects when acting within their private sphere. Part II describes how the law in Israel balances the private and public aspects of hybrid personas. Part III focuses on the advantages of the Israeli approach over the American one. In this part, I critique the rigid binary approach of the Supreme Court, which differentiates sharply between speech in the course of employment and private speech. As an alternative, I propose the flexible Israeli approach, which protects all types of statements, on private and public issues, whether the speaker wears a private or a public hat, as long as the statement does not harm public trust, moral rectitude, or the proper functioning of public administration. The last part briefly concludes.

I. The Hybrid Persona: A Dual Legal Entity

A human being, created in the image of God, is the ultimate individual person. Persons do not have to form an association for recognition of their right to act in accordance with their conscience. But when serving as an organ of an artificial legal entity, created by law, and enjoying the prerogative to exercise governmental powers, the individual should be classified as a hybrid persona.[14]

This persona embodies a dual legal entity, as an individual who is a private legal entity that is not a product of the law, and as a public

13. I do not address here ambiguous personas who do not play a public role. It may be argued that every individual who wears several hats, in different contexts of this person's life, is a hybrid persona. According to this approach, all employees, regardless of the nature of their work and the identity of their employer, are dual legal entities: private personas in their home, and trustees of the interests of his employer at work, where they are subject to the labor laws that shape the relationship between them and their employer. Here I focus strictly on freedom of expression of government employees, but, in principle, an ambiguous persona in Israel can be also an employee of a private enterprise enjoying economic power, links to the government, public status, or a public role (hybrid bodies). Discussion of this issue exceeds the scope of this article.

14. For an extensive description of hybrid personas, see Assaf Harel, Hybrid Bodies and Officeholders 559–618 (2d ed. 2019) (in Hebrew); Assaf Harel, *Hybrid Persona*, *in* Elyakim Rubinshtein Book 1067 (Ahron Barak, Miriam Marcowitz-Bitton, Ayala Procaccia & Rinat Sofer eds., 2020) (in Hebrew).

figure, who is a separate legal entity stemming from its public status. For the most part, it is easy to distinguish between these two legal entities and apply legal norms of different kinds to them, respectively. In the public sphere, hybrid personas serve as the long arm of the authorities and, as such, they have no rights, powers, or immunities *unless explicitly granted by law*. In the private sphere, hybrid personas are entitled to act in accordance with the dictates of their conscience and are authorized to do anything *unless prohibited or restricted by law*.

Yet, at times the private aspects of individuals in a public office cannot be easily separated from their public aspects. In the process, a symbiosis emerges between the two legal entities, producing a hybrid persona that must balance its private and public aspects. This is not a pathological condition but part of reality. It is not possible to surround hybrid personas with virtual walls that would completely separate their various actions.

In an age when the walls between private and public have been breached, a certain space of privacy must also be allowed in the activities of public employees in the public sphere, and their freedom of expression must be protected, whether they express themselves as public figures or as private citizens. In this space, employees must be allowed to be both "their own" and "the public's" and should not be expected to entirely shed their private aspects. Conversely, when occasionally public servants act in the private sphere, they cannot completely cast off their public aspects, and their public status follows them also in their private sphere.[15]

The role of the law is to look at reality and produce arrangements that balance the private and public aspects of a hybrid persona. American law, which categorically denies the protection of the freedom of expression of officeholders in their capacity as public figures and/or when they speak on private issues, disrupts the delicate balance between the private and public aspects of hybrid personas.

The law recognizes every human being as a natural legal entity that is not a product of law. The private aspects of human beings are not the result of the autonomous private will of a corporation, but of the human beings themselves. These aspects were born with the human being, not created by law. The most salient feature that distinguishes humans from a corporation is their humanity, which allows them to feel anger, frustration, outrage, compassion, pity, and disgust. In the words of Aharon Barak, former Chief Justice of Israel, the right to personality

15. This condition becomes increasingly relevant in the modern age when public servants can fulfill their role anywhere and anytime, without being bound to a particular space.

> expresses human dignity—that is, his free will, autonomy, power to weave the story of his life and humanity—in the special aspect of protecting his personality. This aspect is reflected in the self-definition, self-expression, and personal integrity of the person.[16]

The erosion of the private aspects of a hybrid persona may lead to an infringement on the autonomy of a person appointed to serve as an organ of a public authority.[17]

To minimize this harm, or at least ensure its proportionality, we must respect the constitutional rights of hybrid personas and consider their feelings even when they operate in the public space. Therefore, as policymakers, we must highlight the place of the human being in the activity of hybrid personas and secure for them a private space within the public province in which they operate. Like the justice system, public authorities need a soul, and those who breathe life into the system are none other than the human beings who hold public office. Alongside their duty to act fairly and honestly, it is necessary to exalt their personality, culture, values, inclinations, beliefs, and customs. In this way, hybrid personas can fuse their inner self with their public activity. This approach is consistent with Kant's moral doctrine whereby humans should be seen as a goal, not merely as a means.[18]

Nevertheless, American law denies persons operating in the public sphere, whatever their function in the public system, the constitutional right to freedom of expression when expressing themselves in their capacity as public figures, when expressing themselves on private matters, or both. In doing so, American law seeks to create uniformity between public and private employees, both of whom have the protection afforded by general civil law to expression in the workplace, but not the constitutional protection.[19] On the face of it, this distinction makes sense. Why should public-sector employees receive greater protection

16. Aharon Barak, *On the Constitutional Right to Personality*, *in* Strasberg-Cohen Book: A Collection of Articles in Honor of Judge Tova Strasberg-Cohen 165, 171 (Aharon Barak, Yitzhak Zamir, Avner Cohen, Moran Savorai, Elad Afari eds., 2017) (in Hebrew).

17. In addition to the infringement of freedom of expression, other constitutional rights of the public employee are violated, such as the right to dignity and to privacy.

18. *See* Michael J. Sandel, Justice: What's the Right Thing to Do? 109–11 (2009).

19. See, for example, section 1102.5 of the California Labor Code, which applies to both private and public employers:

> (a) An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

than those in the private sector? According to this argument, the civil protection to which both are entitled should not be confused with constitutional protection in accordance with the First Amendment. Any other result would improve the status of the public employee over that of the private one, simply because the former works for a public employer. Below I show that reality is more complex. Working in a public place can lead to restrictions on public employees that do not apply to private employees, such as dismissal due to statements that are not consistent with the status of a public employee. For example, public employers, as opposed to private ones, can prevent employees from engaging or participating in politics.[20] Because there is greater fear of infringing upon the freedom of expression of a public than of a private employee, there is no symmetry between the two. Quite the opposite: a special law must be enacted to distinguish public employees from private ones.

Erosion of the private aspects of the public servants may harm the public interest. First, it may cause a chilling effect that prevents a hybrid persona, who knows the public system better than anyone else, from exposing its injustices, failures, and shortcomings. The protection provided by law to whistleblowers in some states does not necessarily help if public employees criticize their supervisors, for example, in a private conversation, or if they make statements about facts that are publicly known already. As dissenting Justice Stevens made clear in the *Garcceti* case:

> Speech addressing official wrongdoing may well fall outside protected whistle-blowing, defined in the classic sense of exposing an official's fault to a third party or to the public . . . . In any event, the combined variants of statutory whistle-blower definitions and protections add

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> (b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.

Cal. Lab. Code § 1102.5 (West 2022).

20. See, for example, Section 1101 and 1102 of California Labor Code, which does not apply to public employers. "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees." Cal. Lab. Code § 1101. "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." *Id.* § 1102.

> up to a patchwork, not a showing that worries may be remitted to legislatures for relief.[21]

This incomplete protection is liable to harm the public service and impair the ability of the public employee to advance the public interest through constructive criticism based on professional knowledge and experience gained. As a result, we lose one of the most important means of criticism of the public authority in a democratic society: the ability to bring about change through exposure of injustices, failures, and shortcomings by public servants who know better than anyone else the failures of the public system.[22] It might also lead to the exclusion from the public service of talented people, who may prefer to maintain their privacy and shun public positions, undermining the ability to recruit the best professionals for public positions.

I do not intend to set clear boundaries that distinguish between one aspect of a hybrid persona and another. Doing so would reduce the most notable advantages of the Israeli approach, which is flexibility. According to Israeli law, the scope of the private aspects of a hybrid persona is examined in each case on its own merits, in view of the concrete public role the officeholder fulfills. The more an officeholder's public aspects are the result of fulfilling an important and sensitive public role and the more senior the officeholder's public status is, the more its private space is reduced, although it never completely disappears. Conversely, the softer the public aspects of the hybrid persona are, the greater expression is allowed to its private aspect. This flexibility grants the court the tools to achieve a just result that balances the private and public aspects of a hybrid persona.

II. The Law in Israel: Balancing the Private and Public Aspects of Hybrid Personas

Israeli law grants hybrid officeholders a constitutional right to freedom of expression in their public practice as well.[23] This right is not

21. Garcetti v. Ceballos, 547 U.S. 410, 440 (2006) (Souter, J., dissenting).

22. *See* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 Sup. Ct. Rev. 301, 302 (2016); Ronald J. Krotoszynski, *Whistleblowing Speech and the First Amendment*, 93 Ind. L.J. 267 (2018).

23. The right to freedom of expression has been recognized in Israel as a fundamental right since the beginning of the establishment of the state. *See* HCJ 73/53 Kol Ha'am Co. Ltd. v. Minister of the Interior, PD 7/871. In 1992, with the enactment of the Basic Law: Human Dignity and Liberty, the right has gained constitutional status, enshrined in section 2 of the Basic Law: Human Dignity and Liberty: "There shall be no violation of the life, body or dignity of any person as such." § 2, Basic Law: Human Dignity and Liberty, 5752-1992, SH 1391 150 (Isr.). For a discussion of the constitutionality of the right to freedom of expression in Israel, in particular political freedom of expression, see HCJ 10203/03 "Hamifkad Haleumi," Ltd. v. Attorney General, 62(4) PD 715 (2008), https://versa.cardozo.yu.edu/opinions/hamifkad-haleumi-v-attorney-general [https://perma.cc/4XQZ-E2EN]; Aharon Barak, Human Dignity—The Constitutional Value and the Constitutional Right 296 (Daniel Kayros trans., 2015) (2014). In Israel, like in the United States, human rights apply directly only to the relations between the individual and the

unlimited, however. Section 1 of the Civil Service Law (Classification of Party Activities and Fundraising), 1959, authorizes the government to determine the types of civil servants who are not allowed to be members of a party; to participate in a demonstration or procession of a political nature; to participate in election propaganda; or to publish criticisms of the policies of their or other government ministries.[24] These restrictions are intended to protect the clean image of the civil servant as impartial and to conceal their political preferences.[25] Violation of these provisions is a disciplinary offense.[26]

The provisions of the Civil Service Law allow disciplinary action to be taken against employees who act in a manner that is inappropriate for their position as a civil servant or in a manner that has harmed the image of the State. Is a private statement of a public servant that contradicts the official policy of the government authority that employs the officeholder considered as inappropriate conduct? In principle, it is not appropriate for a public servant to expound publicly against the policy pursued by a competent public authority operating by virtue of the mandate given to it by the electorate and entrusted with the policy implementation.[27] At the same time, we cannot overstate the importance of protecting the free expression of an officeholder for eradicating corruption and irregularities in the workplace.

Freedom of expression, which is at the highest level of human rights, is intended to ensure, as part of individuals' personal autonomy, their right to freely express their opinions and feelings. There are four main reasons why freedom of expression is important both at the personal and public levels: self-realization, the discovery of truth, preservation of the democratic process, and balancing stability and change.[28]

As part of their freedom of expression, hybrid personas, like other persons, are entitled to say in public, without fear, things that may upset, insult, and offend. In the words of the Supreme Court of Israel, "Those who need special constitutional protection are . . . those who

government. Unlike in American law, however, a person working for a private employer also enjoys the constitutional right to freedom of expression. Human rights are not applied directly to relations between individuals but indirectly, through the norms of private law.

24. §1. Civil Service Law, 5719-1959 (Isr.).

25. Section 537.42 of the Civil Service Regulations repeats these restrictions and adds to them. For example, "[E]mployees of any degree are prohibited from criticizing, in an insulting or offensive manner, the current government and its ministries, and/or any government that has previously served and/or the previous policy of government ministries." § 537.42 Civil Service Regulations (Isr.).

26. Disciplinary appeal 5/86, Spiro v. Civil Service Comm'r, PD 40(4) 227, 244 (1986).

27. *Id.* at 238–39. Spiro, a civil servant who served as head of a department at the Information Center, was subject to disciplinary action for publishing articles criticizing government policy regarding the treatment of Palestinians by the State. The court upheld his dismissal in light of the harsh words he used to attack government policy.

28. HCJ 73/53 Kol Ha'am Co. Ltd. v. Minister of the Interior, 7(2) PD 871 (1953).

say 'unusual,' 'dangerous' things, outrageous, insulting, jarring and angering . . . ."[29]

Similar to other human rights, however, freedom of expression is not an absolute right. The scope of protection is derived from the nature and weight of the value it is confronting. This raises the question of the limits of the freedom of expression of a hybrid persona.

Israeli law distinguishes between expression within the professional arena and expression outside of it. In general, a statement that is outside the professional realm in which the speaker operates, which may harm an important public interest, is received with less sympathy. The Israeli law is aware of the danger of conducting public debates in the workplace, disrupting the proper functioning of public managers, and damaging the fabric of labor relations. Furthermore, expressing public opinions about political issues on the public agenda may identify employees with their political views in a way that undermines public trust in the employees' impartiality. Naturally, this does not prevent the public servants from expressing their views to family or personal friends, but as long as they are in office, their freedom of expression must be restricted. For example, public confidence may be undermined if judges, who decide people's fates, are involved in public discourse and express positions on issues subject to public controversy. A judge who comments publicly on political issues harms public trust in the judiciary, even if acting in an individual capacity; therefore, Israeli law prohibits such expression.[30] It follows that the second condition of the American triple test, according to which a threshold condition for constitutional

29. HCJ 7150/15 Reform Center for Religion and State v. Minister of Justice (published in Nevo, Sept. 21, 2021), para. 32 (Stein, J.).

30. In Israel, the prohibition is enshrined in Article 18 of the Code of Ethics for Judges, 2007: "A judge shall refrain from publicly expressing an opinion on a matter that is not essentially legal and is in public debate." Unlike Israel, the code of ethics for judges in the United States applicable to federal judges does not prohibit a judge from speaking out on an issue of public controversy, but prohibits them from participating in activities that harm the dignity of the judge's office. *See* Canon 4 to Code of Conduct for United States Judges:

> A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality . . . .

CODE OF CONDUCT FOR U.S. JUDGES Canon 4 (2019). In contrast to controversial statements, which are not prohibited for judges in the United States, political statements are explicitly prohibited in Canon 5:

> A judge should not: (1) act as a leader or hold any office in a political organization; (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate,

protection of freedom of expression is an expression concerning an issue on the public agenda, is not appropriate in all cases. At times, especially when we are dealing with judges, it is appropriate to deny constitutional protection for an officeholder's statement on an issue on the public agenda, even if the statement is made in the capacity of a private citizen. This result is in contrast to expression on private issues that do not provoke public controversy, which in general raises less concern about harming public trust in the public system.[31] Moreover, public employees are the representatives of the public authority, and their remarks must not include statements that offend some group or other.[32] Unlike elected officials, who are identified with certain sections of the public, employees are required to provide service to the public as a whole, in all its shades and streams, without discrimination or bias. These obligations are derived from being loyal to the entire public. It becomes even more critical when their statements are closely related to the service they render to individuals because their clients become de facto a captive audience of the public employees, depriving the citizens of the basic right to ignore the employees' statements. Naturally, public servants who desire to elude these limitations, can resign their commissions and express themselves freely, like any other individual.[33]

In contrast to American law, Israeli law attaches great importance precisely to the expression of a hybrid persona within the professional field in which it operates.[34] The reason for this is clear: a public servant, more than anyone else, can point out failures in the public system and expose injustices in the public service. A sweeping check on these statements may harm the public interest, in addition to violating the autonomy of the public employee. Therefore, despite the inconvenience involved in public servants publicly objecting to the policy adopted by the authority to which they belong, the Israeli Supreme Court has ruled

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or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

Id. Canon 5.

31. For a proposal to exempt teachers working in the public system from the second test, according to which a threshold condition for protecting teachers' freedom of expression is an expression of an issue of public concern, and for a review of judgments that object to the second test and suggest abandoning it and going straight to the third test, see Papandrea, *supra* note 9, at 1620–22, 1634–35.

32. At the same time, statements expressed within the confines of the family, before a small circle of personal friends, or in the context of internal discussions of the authority raise fewer difficulties.

33. For an analysis of the doctrine of the captive audience, see HCJ 7150/15 Reform Center for Religion and State v. Minister of Justice (published in Nevo Sept. 21, 2021), para. 21 (Stein, J.).

34. For the public interest involved in protecting the expression of public employees within the public field of their activity, see Norton, *supra* note 12, at 31–33 ("[P]ublic entities frequently hire workers specifically to flag dangerous or illegal conditions, yet *Garcetti* empowers the government to punish them for delivering just 'what the employer itself has commissioned.'").

that a statement can be prohibited only if there is a near-certain harm to the public service.[35] For example, when a public service psychologist expressed satisfaction at the killing of Israel Defense Forces soldiers during Operation Zuk Eitan, the Labor Court refused to order her return to work following her dismissal.[36] The Supreme Court adopted a similar approach when it qualified the dismissal of a school principal who took part in a demonstration during which he called for disloyalty to the state and government.[37]

An example of a legitimate expression in the professional field in which a hybrid persona operates is the harsh criticism voiced by public attorneys in Israeli in 2017 (and later referred to as the "attorneys' protest"). The wave of protests arose following a legal position presented to the Supreme Court by the State Attorney's Office. The state, which represented the Ministry of Labor, Welfare and Social Services, argued for rejecting a petition demanding that the state be required to allow same-sex families to adopt children.[38] The main reason for rejecting the petition was that it needed to amend legislation, so that same-sex couples could adopt, given the unambiguous the language of the law: "There is no adoption except by a man and his wife together."[39] The attorneys' anger was aroused with reference to the position of the professionals in the Child Welfare Services, according to whom a child adopted by same-sex parents would face an "additional burden."[40] For these reasons, without blaming same-sex parenting, it has been argued that professionals in the Child Welfare Services are not currently recommending a change in legislation. These remarks provoked a rare wave of protest from attorneys working for the state. As part of the

35. Disciplinary appeal 5/86, Spiro v. Civil Service Comm'r, 40(4) PD 227 (1986).

36. "A public employee whose essential role is psychological and educational, is expected to be an example for anyone who needs his services. Expressing joy in the fall of IDF soldiers, and wishing for the fall of more soldiers, is an action that is difficult for the employer to forgive." CivC (DC TA) Gara v. City of Lod. 2793-08-14 (2014).

37. [E]ven if some of the things attributed to the appellant fall within the scope of his fundamental right to freedom of expression, and even if some of the acts were committed during the period when the appellant was suspended, a fact that perhaps softens but only slightly their severity, the conviction at the last two levels is well founded because the content of some of the statements is so serious that it can in no way be reconciled, and even more so when things are said by a teaching employee of the Ministry of Education, from whom one can expect a great deal of restraint regarding his statements . . . .

CivA (Disciplinary appeal) Agbaria v. Civil Service Comm'r, 1945/94 (1994).

38. *Government Will Not Allow Gay Couples to Adopt in Israel*, Times of Isr. (July 16, 2017, 8:05 PM), https://www.timesofisrael.com/government-will-not-allow-gay-couples-to-adopt-in-israel.

39. Lee Yaron, *Israel's New Adoption Law to End Discrimination Against LGBT Parents*, Haaretz (Aug. 1, 2018), https://www.haaretz.com/israel-news/2018-08-01/ty-article/.premium/new-adoption-law-to-end-discrimination-against-lgbt-parents/0000017f-e81a-d62c-a1ff-fc7bf1950000.

40. Stuart Winer, *Welfare Minister Asks Court for More Time to Examine Gay Adoption*, Times of Isr. (July 18, 2017, 3:48 PM), https://www.timesofisrael.com/welfare-minister-asks-court-for-more-time-to-examine-same-sex-adoption.

wave of protests, many attorneys sent emails to all their colleagues and expressed their displeasure with what was stated in the position of the Child Welfare Services professionals.[41]

For example, one of the attorneys sent an email to all his colleagues entitled "I am also exceptional and different," which stated, among others:

> Sometimes a protest must also come from inside. As someone who has loved his workplace for 13 years, and is daily proud to represent the state's position in the courts, this week I was ashamed of my country, and no less of my workplace. Because my workplace has decided to turn its back on me . . . . It is possible to argue legally about the language of the adoption law, about the proper way to change it, all of which are legitimate arguments, but this is a case of a clear and unequivocal expression of a value position. The State Attorney's Office that I discovered is a State Attorney's Office that is not willing to represent or sign any position. I'm also an exception. Embarrassing. Shameful. Black flag.[42]

In the end, apart from criticizing the bluntness of the speech, the Attorney General and the State Attorney did not reprimand the attorneys for the criticism itself. On the contrary, they explicitly stated that attorneys were allowed to disagree with the position of the state based on its merits.[43] Professional criticism can enrich the public debate and may lead to public discussion about its content, which is a good thing. But not to undermine public trust in the State Attorney's Office, the criticism should be respectful.[44] Criticism of the position of the state

41. Leel Revital Haval Yaron, *Protest at the Prosecutor's Office: The Opposition to Adoption by LGBT People Is Insulting and Shameful*, Haaretz (July 18, 2017), https://www.haaretz.co.il/news/education/2017-07-18/ty-article/0000017f-e143-d804-ad7f-f1fbe5ec0000 [https://perma.cc/EX54-DDQY] (in Hebrew).

42. *Id.*

43. *Id.*

44. The Attorney General and the State Attorney sent a notice to the attorneys stating, in part:

> We are aware of the intense feelings that the issue aroused and understand them. From the start we said that the State Attorney's Office and the Ministry of Justice have always been and always will be an accepting home for all segments of the population, and it is clear that the LGBT population employed in the Office is an integral part of us . . . . As to the question of whether it is appropriate to allow adoption by same-sex couples, it is clear that every citizen, including every attorney, is entitled to hold any opinion on this matter. However, it was certainly not right to attack the Attorney General and the High Court division, which brought before the Court the position of the government and the professionals, as it was their obligation to do.

With regard to style and content, it was noted that the statements were harsh and unacceptable:

> Regardless of the debate over the position, the way in which some of the attorneys chose to express their views in e-mails to their members is, in our opinion, strident and unfriendly, and therefore unacceptable to us. A distinction must be made between our personal positions on valuable social issues, and

in court, even if it is sharp, deserves to be heard, as long as the attorneys indicate that they are expressing their personal opinion. Although Israeli law ascribes great weight to expression within the professional field in which the hybrid persona operates, such expression does not always receive full protection. For example, it is clear that an attorney appearing in a case, who is supposed to argue in court in favor of the position of the state, is not allowed, as an individual, to argue against that position. Such expression of opinion can severely damage public trust in the State Attorney's Office and may harm the chances of the state to prevail. Similarly, judges cannot make statements in the media even if they seek to respond substantively to harsh criticism leveled against their judgments. This is because public trust in judges would be undermined if judges abandoned their lofty position and responded over the pages of newspapers to criticism leveled at them. Therefore, it is more appropriate for them to have their say in their verdicts, not in the media. Nevertheless, to minimize the infringement of the judge's freedom of expression, Israeli law finds creative solutions, which, on one hand, do not completely prevent expression, but, on the other, create a mechanism that ensures that such expression does not harm public trust. Therefore, when judges wish to respond to criticism, they do so through the court spokespersons. A direct statement to the media by a judge requires prior approval from the President of the Supreme Court. This mechanism infringes on the freedom of expression of the judges, but, given their unique status, the infringement appears to be proportionate.[45]

> our professional duty as attorneys to bring before the court the position of the state, including the full factual picture, including the position of the professionals. The legal counselors for the government and the State Attorney's Office carried out their duty and acted flawlessly. As stated, it is permissible to disagree with the position of the state, but this has nothing to do with the way in which the State Attorney's Office acted in this context. As we have said at the outset, we are aware of the strong feelings that the topic evokes and understand them. We, the Attorney General and the State Attorney, will continue to seek to protect and promote human rights and to protect the dignity of all people everywhere.

Id. (translation by author); *see also* Tova Raisin, *Mandelblit and Nitzen to the Attorneys: "We Understand the Anger About the Adoption, but We Must Represent the State"*, YNET (July 18, 2017, 8:55 PM), https://www.ynet.co.il/articles/0,7340,L-4991192,00.html [https://perma.cc/BH42-ZB9H] (in Hebrew) (translation by author).

45. According to section 40 of the Rules of Ethics, if

> a judge's response is requested for information regarding which the absence of an immediate response may cause irreversible damage, and according to the judge an unequivocal response may bring the matter to an end, the judge may deliver his reaction. A judge who submits his response in these exceptional circumstances is required to notify the court spokespersons immediately, and further action will be through the spokespersons.

§ 40, CODE OF ETHICS FOR JUDGES (2007) (Isr.) (translation by author).

Note that expanding the freedom of expression of a hybrid persona entails the extension of the freedom of expression of a group seeking to voice its opinion against such expansion. In the modern age, many hybrid personas, and in particular elected officials, tend to use social networks to convey messages, share information with the public about their public roles, and "talk" to them about their actions in the course of their job. The uniqueness of social networks, in contrast to traditional media, lies in the two-way discourse that they allow.[46] But although private users can block others with whom they do not want to communicate, the reality is more complex for a hybrid persona who enjoys freedom of expression and uses the social platform for public needs. It is inconceivable that hybrid personas would enjoy freedom of expression in their public role, and in the same breath that they would block the expression of a public seeking to speak out against them and criticize their actions, even if the expression may harm the hybrid persona's good name. For that reason, Israeli law generally prohibits hybrid personas from arbitrarily blocking a user whose entire "sin" stems from legitimate criticism, however harsh, expressed against the officeholder. A report issued by the Ombudsman in 2016 in Israel made specific reference to restricting public figures from blocking users on their social network accounts.[47] From the file, it appears that as part of balancing the freedom of expression of the public with the protection of the hybrid personas' reputation, additional weight must be ascribed to a free exchange of opinions criticizing the officeholder's work.[48]

Unlike Israeli law, American law is much less flexible when it comes to defining a hybrid persona's social network account as a "public account" that is subject to constitutional restrictions.[49] Nevertheless,

46. Jack M. Balkin, *Free Speech Is a Triangle*, 118 Colum. L. Rev. 2011, 2032 (2018).

47. Comm'r of Pub. Complaints, Annual Report No. 43, at 39 (2016). As stated in the report,

> A public body or public figure who operates a public Facebook page must publish a policy regarding the use of the page and establish procedures that regulate reasonable and appropriate use of the public responses appearing on the Facebook page, to maintain respect for the page and users, taking into account the public nature of the page. The practices of usage must be consistent with the right to freedom of expression and include proportionate measures to be taken against the infringers of the page usage policy, such as prior warning of deletion or blocking for a limited time in response to the first violations.

48. This interpretation is consistent with the balance point established by the legislature in the Prohibition of Defamation Law, 1965, according to which even if a publication constitutes defamation, the publisher is granted protection if it is true and there is a public interest in its publication. Defamation (Prohibition) Law, 5725-1965, LSI 19 254 (1965), as amended (Isr.).

49. In *Biden v. Knight First Amendment Institute at Columbia University*, the U.S. Supreme Court was asked to take certiorari in a case where the Second Circuit had held that President Trump's Twitter account was a public forum and that blocking users violated the First Amendment. *See* 141 S. Ct. 1220 (2021) (mem.) (granting certiorari, vacating and dismissing the case as moot); Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019). Concurring in the dismissal, Justice Thomas would

even American law recognizes the need to limit the power of social networks to block users arbitrarily, including when it comes to hybrid personas who use their account to speak in their official capacity. The U.S. Supreme Court stated:

> Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms. . . . If the analogy between common carriers and digital platforms is correct, then an answer may arise for dissatisfied platform users who would appreciate not being blocked: laws that restrict the platform's right to exclude.[50]

III. Advantages of the Israeli Approach over the American One

As far as legal certainty is concerned, both approaches require the application of complex tests, some of which are subjective and do not lead to one clear answer, such as the seniority of the public employee; whether the statement was made at the workplace or outside; whether the statement created the impression that it expresses the position of the officeholder to whom the hybrid persona belongs; whether the statement was within the specialized professional field of the hybrid persona; whether the topic was one of public controversy; and whether the statement was likely to severely damage the image of the public service.

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have held that President Trump's Twitter account was not a public forum and that he did not violate the First Amendment by blocking a user from accessing the comment threads. 141 S. Ct. at 1221–22 (2021) (Thomas, J., concurring). In the words of Justice Thomas:

> On the surface, some aspects of Mr. Trump's Twitter account resembled a public forum. A designated public forum is "property that the State has opened for expressive activity by part or all of the public." Mr. Trump often used the account to speak in his official capacity. And, as a governmental official, he chose to make the comment threads on his account publicly accessible, allowing any Twitter user—other than those whom he blocked—to respond to his posts.
>
> Yet, the Second Circuit's conclusion that Mr. Trump's Twitter account was a public forum is in tension with, among other things, our frequent description of public forums as "government-controlled spaces." Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account "at any time for any or no reason." Twitter exercised its authority to do exactly that.
>
> Because unbridled control of the account resided in the hands of a private party, First Amendment doctrine may not have applied to respondents' complaint of stifled speech. . . .

Id. (citations omitted).

50. *Knight First Amend. Inst.*, 141 S. Ct. at 1221, 1225.

These parameters, most of which have also been adopted by Israeli law, are important for balancing the private and public aspects of hybrid personas. Ultimately, even according to the Israeli approach, the extent of the consideration shown for the private aspects of a hybrid persona is determined on a case-by-case basis, taking into account the balance between the content of the expression and the public role played by the officeholder. The more important the officeholders' public aspect is, the more senior their public status, and the greater the fear of harming public trust as a result of the expression, the more the private space will be reduced, albeit never to zero. Conversely, the narrower the officeholders' public aspects are and the lower the fear of harming public trust, the greater the scope that will be granted to the private space.

The complexity can be illustrated by the following example: Is a minister allowed, in a discussion in a Knesset committee to which he is invited, to express a position that disagrees with that of the government? According to the position of the Attorney General in Israel, a minister is not allowed to disagree with the government position in Knesset debates. This position was approved by the Supreme Court of Israel.[51] The scholarly literature in Israel, however, expressed a different opinion:[52] although a statement intended to prevent the implementation of the government decision should be prohibited, a statement intended to present a critical position should be permitted. This distinction reflects the proper balance between the minister's duty of trust toward the Knesset and the public, and the prohibition imposed on a member of a collegiate body to thwart the decisions of that body, of which he is a part.

I agree with this approach. While it is important to speak with one voice, the public interest in hearing an expression of a hybrid persona on issues related to the core of its public role should not be underestimated. Public criticism of the organization's policy, to which the hybrid persona belongs, can shed light on considerations that the public is unaware of and enrich the democratic public discourse. Utterances of a hybrid persona, within the professional field in which it operates, will ensure a better understanding of the public controversy and improve the critique of the activities of the public body to which it belongs. However, as stated, the freedom of expression of a hybrid persona is not absolute. A critique that might undermine its core role should not be allowed. In addition, no attempt should be made to prevent the implementation of a lawfully made decision. A minister, who wishes to act

51. HCJ 4374/15 The Movement for the Quality of Government in Israel v. Prime Minister of Israel, para. 61 (published in Nevo, Mar. 27, 2016) (Rubinstein, V.P.) ("The government cannot speak with two voices, once its decision has been made, otherwise lawlessness will prevail and damage will be caused.").

52. Barak Medina & Uriah Beeri, *Minority Position and Collective Responsibility: On the Freedom of Speech of Cabinet Members*, 8 Ma'asei Mishpat 81, 81–82 (2016) (Isr.).

in this way, may do so only after he has resigned from the government. This example illustrates the need to apply a variety of tests in order to achieve the correct result, even at the cost of uncertainty in the balance result. In this respect, there is no difference between the Israeli and the American approaches. Both rely on complex parameters and are liable to lead to inconsistency in case law and uncertainty regarding the prevailing legal situation.

Yet, the salient disadvantage of American law lies in the binary and artificial result of the application of the first two tests adopted by the majority in the *Garcetti* case. This result, to which Justice Souter referred as "winner-take-all" in the dissenting opinion, impairs the ability to balance all the conflicting values. As Justice Souter noted, "When constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake."[53]

This is where the superiority of the Israeli approach over the American one is manifest. The Israeli approach leads to a variable, flexible, and precise result, designed to find the proper balance in each case between the private aspects of hybrid personas and their public role. By contrast, the American approach categorically denies the protection of freedom of expression to a hybrid persona when speaking as a public figure and/or on private issues. For example, if it is decided that a minister's statement during a discussion in the Knesset committee to which he was invited was made as part of his official duties, it would be automatically banned, even if there was clearly in the interest of the public to hear it. This reflects the main limitation of the American approach, which upsets the delicate balance between the private and public aspects of a hybrid persona and may lead to unrealistic results.

To begin, the first test, which sweepingly denies constitutional protection of any expression in a public capacity, does not distinguish between expressions made as part of internal discussions within the public authority, such as internal memoranda to an employer about system failures, and those that expose the information to the general public through direct contact with the media, such as a press conference at the workplace. The importance of protecting freedom of expression is greater in the first case than in the second because it makes possible an open dialogue within the authority, aimed at resolving disputes and maximizing the public interest.[54] (Note, however, that at

53. Garcetti v. Ceballos, 547 U.S. 410, 434 (2006) (Souter, J., dissenting).

54. See, for example, Section 6-2104 (1) (a) of the Idaho Code, which limits protection from any action against the employee only to employees who tell their employer about improper conduct before they speak out on it to the public:

> An employer may not take adverse action against an employee because the employee, or a person authorized to act on behalf of the employee, communicates in good faith the existence of any waste of public funds, property or

times it is important to speak through the media, especially when the officeholder had doubts about obtaining a proper hearing within the authority.) Professor Orly Lobel described these situations with reference to lawyers' obligations to report, internally, inappropriate behavior they encounter while handling a case:[55]

> Internal channels of reporting misconduct to supervisors or boards strike the best balance between new governance approaches to regulation and client-attorney privileges. Consequently, the law should support such reporting structures and discourage other forms of more disruptive disloyalty. Within organizational practices that rely on self-regulation, lawyers must take a broader perspective than merely their client's immediate requests. At the same time, emphasizing internal communication within the corporation or government agency allows the organization to localize the investigation and to build an environment of trust and ethical conduct.[56]

Despite the important distinction between utterances made through internal channels and those made to the media, neither type enjoys constitutional protection when they are made in the public capacity of the officeholder.[57]

> manpower, or a violation or suspected violation of a law, rule or regulation adopted under the law of this state, a political subdivision of this state or the United States. Such communication shall be made at a time and in a manner that gives the employer reasonable opportunity to correct the waste or violation.

IDAHO CODE § 6-2104(1)(a) (2022).

On federal employees who have no protection only because their disclosures were made to their immediate supervisors, see *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998):

> WPA is designed to protect employees who risk their own personal job security for the benefit of the public. . . . Because Willis's disclosures were not made to persons in a position to correct the alleged abuse, and because the disclosures did not evidence an intent to raise the issue with higher authorities who were in a position to correct the alleged wrongdoing, Willis's disclosures to his immediate supervisors are not protected disclosures for the purposes of the WPA.

This lack of clarity illustrates why the constitutional protection of freedom of expression of hybrid personas is required, and why ordinary legislation is not sufficient.

55. Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1246 (2009).

56. *Id.*

57. *See* Norton, *supra* note 12, at 40 (citations omitted):

> A rule that requires employees to raise their concerns to an entity other than their employer is both unrealistic and perverse. First, it assumes, with little foundation, that workers will be brave enough to risk their livelihoods to reach out to outside entities that may or may not be responsive to their reports. Second, forcing workers to air their concerns to outsiders may create substantial inefficiencies of its own, raising the public stakes in a way that may lead agencies to harden their positions and adopt a defensive posture. This might lower the possibility that the agency will simply respond with quick and quiet internal corrections.

Second, according to the first test, although officeholders' expression in their public capacity at the workplace and during working hours does not enjoy constitutional protection, the same expression may be protected if published in the media, outside the workplace and not during working hours, as long as it passes the second and third tests. This artificial result may create two distortions: (a) public servants may prefer to speak outside rather than within the authority, in the hope that the court would deem their expression to have been made in a private capacity and therefore entitled to protection[58] (at the same time forfeiting the benefits inherent in a free and open internal discussions within the authority); (b) the attempt to separate the public and private capacities of hybrid personas is doomed to failure. According to Mary-Rose Papandrea, "[p]ublic employees do not cease to be citizens even when they are performing their jobs, and they do not cease to be employees when they are away from work."[59]

Because of the dual status of hybrid personas, it is not possible to create a barrier between their public and private roles.[60] Although at times statements made by public servants at home may pass the first test (if they are deemed to have expressed themselves in their capacity as private citizens and not as public servants), the formal aspects do not necessarily sever the Gordian knot between the statement and the officeholder's public role. Therefore, what is the benefit of the first test, given that the question of the constitutional protection of expression is in any case examined by means of the third test (for, as noted, even if they expressed themselves at home in their capacity as private citizen their words may harm public trust)? Clearly, the first test is not only unnecessary, but its harm outweighs its benefit. We reached a similar conclusion with respect to the second test. Third, under the second test, the expression of public servants in their private citizens' capacity on private matters does not enjoy constitutional protection despite the lowered fear of harming public trust. At the same time, the expression of the same public servants on an issue of public importance may enjoy constitutional protection, as long as it is made in the capacity of a private citizen and passes the third test, despite the heightened fear of harming public trust. The second test may, therefore, lead to a false result: a private expression, which on the face of it deserves the protection of freedom of expression, would not even pass this test and

58. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.").

59. Papandrea, *supra* note 9, at 1632.

60. *See* Norton, *supra* note 12, at 41. Professor Norton describes First Amendment claims of public employees disciplined for off-duty speech because the government considered its workers to be speaking as employees even when they were away from work, asserting that employees who engage in certain off-duty expression undermine its credibility in communicating its own views that contradict those of such employees.

therefore would not be subjected to the third test, whereas a public expression, which on the face of it raises greater difficulties than the private expression, may easily pass the hurdle of the second test and be examined by the third test.

Fourth, the first and second tests treat all public employees as one and do not distinguish between various types. This rigid approach may create further distortions. For example, although it is relatively easy to justify the rationale of the first and second tests regarding the expression of a senior public servant speaking in an official capacity, it is more difficult to justify it in relation to the expression of a junior public servant. Should the utterance of a teacher in a public school, expressed on social media on a disputed public issue, be treated the same way as the statement of the Attorney General on social media on the same issue? The distinction should be made in the third test (benefit-damage), not through a rigid, binary, and artificial distinction in the first and second tests.[61]

These artificial distinctions, which are intended to prevent judicial intervention in labor relations between the state as an employer and its employees, can lead to serious harm to both the hybrid persona and the public interest. At the individual level, a sweeping erosion of the private aspects of a hybrid persona, especially when speaking on issues that are not on the public agenda, may infringe on the autonomy of a person appointed as an organ of public authority, and deny such a person the right to express anger, frustration, outrage, compassion, pity, or disgust.[62]

The lack of protection for utterances of a hybrid persona in an individual capacity may harm many public interests. For example, this approach may harm the public interest of open discourse in the performance of public office, exposing corruption and correcting the ways of public service, despite the fact that hybrid personas know the public

61. Justice Souter, joined by Justices Stevens and Ginsburg in a dissent, warned that the decision could "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'" *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting). In response, the majority agreed to leave open whether *Garcetti* affects the constitutional protection of academic freedom: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425 (majority opinion).

62. Papandrea, *supra* note 9, at 1634–35 ("A threshold public concern inquiry potentially chills valuable speech without requiring any showing that the expression affects the government's ability to conduct its mission. The unfairness of *Connick*'s threshold requirement is most apparent in cases involving non-work-related expression, which is frequently what appears in social media cases. . . . The courts that are unwilling to extend the public concern test in off-duty cases correctly recognize that the First Amendment has always protected much more than simply expression about political and governmental affairs. Although speech on matters of public concern is generally regarded as having high First Amendment value, speech on matters of private concern can be equally as valuable to the speaker and listener.").

system better than anyone else and have the ability to expose injustices and failures of the public system. A sweeping denial of freedom of expression of hybrid personas in their public capacity, consolidates mediocrity and has a chilling effect on bringing vital information to the public.[63]

The importance of defending these statements from a utilitarian point of view was addressed by dissenting Justice Souter, in the *Garcetti* case:

> The judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually do disrupt government if its officials are corrupt or dangerously incompetent.[64]

This clearly highlights the advantage of the Israeli approach, which grants priority to the freedom of expression of hybrid personas precisely in the professional field in which they operate and examines each case individually to determine the benefit to freedom of expression or public trust of such prioritizing. For example, in a recent case, the Israel Supreme Court ruled as follows:

> Not a statement whose degree of harm to other people is relatively small, but a harsh and offensive statement; not a one-time unintended utterance, but as a series of forbidden statements that are interpreted over a long timeline; and not a statement made by a relatively junior public servant, which has no real effect on the image of the public service and its employees, but an abusive statement or other forbidden statement uttered by a senior public figure, who holds power, and who colors the entire service as biased or prejudiced . . . .[65]

This case dealt with statements by a city rabbi, a public servant who provides religious services to the public and exercises halakhic powers that include commentary on people's way of life according to the Jewish religion. Justice Stein argued that although statements that include "curses, insults, ridicule, or hatred towards certain people or groups of people" should be rejected, they can be acceptable if they are intended to convey a "halakhic message" to a large audience.[66] In his view, statements expressing contempt toward the phenomenon of assimilation of Jews and the LGBT community; propose a halakhic ban on the sale and rental of Jewish property to Arabs; or condemn the service of women in the Israel Defense Forces, are acceptable as long as they are intended to convey a "halakhic message" and as long

63. *See* Nancy M. Modesitt, *The* Garcetti *Virus*, 80 CIN. L. REV. 137, 162–76 (2011).
64. *Garcetti*, 547 U.S. at 434 (Souter, J., dissenting).
65. HCJ 7150/16 Reform Center for Religion and State v. Minister of Justice (published in Nevo, Sept. 21, 2021), para. 57 (Stein, J).
66. *Id.* paras. 76–79.

as they are uttered "from the rabbi's religious-national perspective."[67] This approach stems from the weight that must be attached to the protection of freedom of expression of a hybrid personas concerning issues that are within the professional field in which they operate. In Justice Stein's view, a city rabbi's freedom of expression should not be curtailed beyond what is required to fulfill his duties, lest it produce a chilling effect on religious-halakhic activity within the purview of the city rabbi.

This fundamental approach, which strengthens expression within the professional field, contradicts the first of the triple test used in American law, which categorically denies protection of a public employee's freedom of expression when speaking as part of their "official" duties. Indeed, not every statement of a public servant, in a private or public capacity, deserves protection. At times, damage to the public interest and to the public's trust in the public system as a result of the statement can be decisive. To this end, there is the third test in the American triple test. I propose to forgo the first two binary tests in the American triple test, and similarly in Israeli law, by default granting public employees freedom of expression in any capacity they choose. In this way, all weight is transferred to the third test, which balances between the public employee's freedom of expression and the fear of harming public trust as a result of the statement.[68]

As part of this test, it is appropriate to review all the considerations addressed in the first and second tests, including the seniority of the public employee, the content of the statement, and so on. These are not to be given binary status, however, but must be balanced within the overall set of considerations to reach the appropriate result in any given case and the most precise balance between the private and public aspects of a hybrid persona. In the words of the dissenting Justice Souter in the *Garcetti* case:[69]

> I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives and in demanding competence, honesty, and judgment from employees who speak for it doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and

67. *Id.*

68. For a similar approach, see *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir. 1994) ("The First Amendment protects entertainment as well as treatises on politics and public administration."). Judge Posner suggested that, in cases involving off-duty expression, courts should skip *Connick*'s public concern test and simply conduct a *Pickering* balancing test, where the value of the speech could be taken into account. *See also* Norton, *supra* note 12, at 30. Professor Norton criticizes the rejection of government workers' First Amendment claims in a growing number of cases that undermine workers' free speech rights as well as the public interest in transparent government. Therefore, she proposes to replace the *Garcetti* rule with an approach considerably less deferential to government, which attends to the public's interest in transparent government.

69. *Garcetti*, 547 U.S. at 428 (Souter, J., dissenting).

> safety can outweigh the government's stake in the efficient implementation of policy, and when they do, public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.[70]

In my opinion, applying this flexible test was intended to lead to denying the protection of the freedom of expression of a city rabbi who positively calls on the public not to lease Jewish property to Arabs or to the LGBT community, even if it was made within the rabbi's professional purview and even if it was intended to convey a halakhic message. I do not propose to trample on the private aspects of a city rabbi, because we are dealing with a hybrid persona. Therefore, within the framework of freedom of expression, he should be allowed to interpret the halakhic sources in accordance with his religious understanding. At the same time, in his role as a city rabbi, who receives his salary from the public, he must represent the general public and act in accordance with the basic criteria of public administration, first and foremost, with his duty toward equality. Therefore, I propose to distinguish between a theoretical halakhic interpretation of sources, which may imply a discriminatory or degrading message toward different groups (such as the LGBT community, women, or Arabs), and a positive call for discrimination or contempt against these groups. Although the theoretical message may be shielded by the defense of the rabbi's freedom of expression, this is not the case with regard to the call for operative acts, which, in my opinion, are beyond the pale.

This approach, which denies the legitimacy of racist expressions, is consistent with the American approach. For example, section 3604 of the Fair Housing Act prohibits a refusal to sell or rent dwellings on the grounds of race, color, religion, gender, family status, national origin, and disability.[71] The only way to avoid determining that the law has been violated is if it turns out that the matter falls within the scope of one of the exceptions set out in the law. One of the exceptions, which appears in section 3607(a), allows religious organizations to sell or rent dwellings they own only to persons of the same religion.[72] But a religious organization that seeks to exclude others on the grounds of race, color, or national origin, cannot benefit from this exemption. Although exclusion from housing based on religious affiliation enjoys considerable protection, exclusion based on race is perceived as illegitimate. In these cases, attempts to hide behind religious motivation will not succeed.[73] Based on the same rationale, despite all consideration of the freedom of expression of public employees in the area of

70. *Id.* at 429.
71. 42 U.S.C. § 3604.
72. *Id.* § 3607(a).
73. Gershon Gontovnik, Housing Discrimination and Cultural Groups: Between Legal Walls and Social Fences 53 (2014) (in Hebrew).

their professional work, it is not possible to countenance speech that includes a positive call for racist action against a group in the population. A positive call by a rabbi who receives his salary from the public for discriminatory preference of one group over another is far more than a violation of "good taste," in the words of Justice Stein. I prefer, in this case, the position of Justice Amit, in the same case:

> Things that may provoke controversy and animosity between different currents and audiences in Israeli society, among its tribes and shades, are not a necessary part of the respondent's role as a city rabbi, and should not be seen as a "halakhic message" directed at his audience. . . . As a public servant, the respondent is an emissary of the state, and like any emissary owes the state and the entire public a duty of loyalty.[74]

Without relation to the criticism of Justice Stein's remarks, the approach of Israeli law, which provides hybrid personas with the right to express themselves in any capacity and on any subject they choose, but limits its protection based on an overall examination of the circumstances, is greatly preferable to the American legal approach, which sweepingly denies the freedom of expression to public servants who express themselves in their public capacity, and/or on private matters.[75]

Admittedly, the proposed approach, which advocates granting constitutional protection to all types of public servants' utterances, also has disadvantages. The main concern is flooding the courts with lawsuits aiming to drag the judiciary into intervening in the prerogative given to the State to exercise independent discretion in managing its working relationship with its employees. There is also concern that granting First Amendment protection to every statement of a public servant can lead to uncertainty and inconsistency in the application of the law because, after canceling the first two tests, all claims would be

74. HCJ 7150/16 Reform Center for Religion and State v. Minister of Justice (published in Nevo, Sept. 21, 2021), para. 2 (Amit, J).

75. For the advantages inherent in a flexible test over the American binary test, see Norton, *supra* note 12, at 33–34:

> [R]ather than identifying a theoretically principled approach for capturing the value created by empowering government to control its own speech, *Garcetti* instead formalistically imposed a bright-line rule to avoid the often-challenging but entirely commonplace task of balancing constitutional interests. . . . That . . . does not mean that that worker's First Amendment claim will necessarily prevail. Public employee expression that does not meet this demanding test for government speech should continue on to the traditional *Pickering*/*Connick* balancing of its value against its impact, if any, on government efficiency. Public employee claims that involve speech on matters of public interest should fail under this balancing inquiry when the speech is intemperate or inaccurate, or when it distracts the employee from performing her job. Indeed, speech delivered pursuant to a public employee's official duties carries significant potential to undermine governmental efficiency—for example, when the boorish tone or factual inaccuracy of that speech disrupts workplace operations.

decided according to the third one, which is amorphous and difficult to apply in the absence of objective parameters.

Although these concerns should not be underestimated, they are outweighed by the benefits of the proposed approach over the current situation. The application of the triple test in all cases leads the courts to lengthy litigation that exacts many resources from the judicial system in the implementation of the complex and artificial procedures carried out in the first two tests. In other words, the cancellation of the first two tests would not necessarily consume additional valuable judicial time, and it has the potential to bring the parties and judges closer to a substantive discussion of the issues. This is highly preferable to the existing situation, where judges and parties waste precious judicial time discussing purely technical matters in the hallway. Although this result may exacerbate the inconsistency and uncertainty in case law because of the subjective criteria of the third test, its advantages outweigh the disadvantages.[76]

First, as mentioned before, this approach prevents the chilling effect of silencing public officeholders and encourages them to speak out. As they know better than anyone else the failures of the public system, it is for the public good that they express themselves within the professional field in which they operate to expose injustices, failures, and deficiencies.

Second, in addition to protecting the public interest by exposing injustices, this approach leads to the realization of the autonomy of public employees. The abolition of the second test, which confers constitutional protection only for issues on the public agenda, strengthens the rights of public employees as human beings and enables them to bring their private world to their workplace, where they spend most of the day. In doing so, we convey an important message that will encourage talented people to seek positions in the public service.

Third, this approach obviates the need to make artificial distinctions between officeholders expressing themselves in their public and private capacities and between speaking out on issues on the public agenda and on private matters. Eliminating these distinctions will also do away with the need to use artificial criteria that lead to inconsistent

76. For an argument that the lack of clarity created as a result of the *Garcetti* case exceeds the lack of clarity that existed before this rule, see Norton, *supra* note 12, at 34:

> A return to *Pickering* balancing in most of these cases, as I have proposed, means that outcomes cannot be forecast with certainty. This may dismay free speech advocates who fear that the unpredictability of balancing may chill public employee speech. But this uncertainty is greatly preferable, in my view, to workers' all-too-certain losses as a result of *Garcetti*. Under *Pickering*, government employers were free to ignore internal whistleblowing, but had to think twice before punishing, and thus also deterring, it. After *Garcetti*, supervisors can discipline such speech with impunity, thus chilling valuable expression altogether to the public's detriment.

results, will increase public confidence in the legal system, and will send a clear message to potential public employees that they will retain their constitutional right to freedom of expression in both public and private capacities, regarding both public and private affairs. As noted, this does not mean that their freedom of expression in their public capacity will be fully protected, but only that at the very least, it will be given a fair chance.

Conclusion

A human being, created in the image of God, is the ultimate individual. Human beings need not initiate a process of incorporation in recognition of their constitutional rights. My main argument in this article was to show that at a time when the walls between private and public have been breached, it is appropriate to provide hybrid personas a constitutional right to freedom of expression whatever hat they may be wearing, and on whatever subject they may be discussing.

To this end, I propose that American law adopt the Israeli starting point, according to which every person operating in the public sphere is a hybrid persona that enjoys a certain space of privacy in all activities in the public sphere. In the same space, public personas are both "their own" and "the public's" and should not be expected to entirely shed their private aspects in the exercise of their function as a public figure. Conversely, they should not be expected to completely disembarrass themselves of their public aspects in their private sphere.

I suggest abandoning the rigid binary approach of the U.S. Supreme Court that differentiates sharply between speech in the course of employment and private speech. As an alternative, I propose the flexible Israeli approach, which protects all types of statements, on private and public issues, whether the speaker wears a private or a public hat, as long as the statement does not harm public trust, moral rectitude, and the proper functioning of the public administration.

This approach would allow the court, like a constitutional tailor, to fit a hybrid persona with the suit that best balances the private and public aspects. Under this arrangement, the court will be furnished with tools that it needs to examine whether or not to protect the expression of public employees, based on the nature of the statement, on the one hand, and of the fear of harming public trust and the proper functioning of the public administration, on the other.

All this will be accomplished without abandoning the parameters formulated over decades of U.S. case law for the application of the triple test; without abandoning the principle that places human beings at the center; and without renouncing the flexibility needed to find the optimal balance between protecting constitutional rights and competing public interests.

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The Misuse of the Business Judgment Rule in Employment Discrimination Cases

Robert S. Mantell*

Introduction

Employees alleging discrimination sometimes argue that an employer's justification for an adverse action is so irrational that a jury could find such explanation to be pretext. In response to such arguments, the courts respond in a varying and highly contradictory fashion. On the one hand, some courts assert that a factfinder is free to infer that an employer's reason is pretextual if the reason is irrational. "The reasonableness of the employer's reasons may of course be probative of whether they are pretexts."[1] On the other hand, many courts—often the same ones—claim they are not to evaluate the reasonableness of an employer's decisions. "Courts may not sit as super personnel departments, assessing the . . . rationality . . . of employers' business decisions."[2]

Both principles cannot be true.

The notion that a court must not assess the rationality of an employer's decisions—an extreme form of the business judgment rule—is "of course" erroneous.[3] The pretext inquiry requires the factfinder to determine whether an employer's reasons are unworthy of credence.[4] "[T]he reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation."[5]

Juries are supposed to evaluate the rationality of an employer's justification for signs that it is not the actual reason that motivated the employer. "[T]he honesty of an employer's statement is often revealed by analyzing its reasonableness; the more objectively reasonable the

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1. Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).
2. Meuser v. Fed. Express Corp., 564 F.3d 507, 519 (1st Cir. 2009).
3. *See Loeb*, 600 F.2d at 1012 n.6; Fuentes v. Perskie, 32 F.3d 759, 765 & n.8 (3d Cir. 1994).
4. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).
5. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 577 (6th Cir. 2003).

explanation, the more likely it honestly motivated the challenged employment action."[6]

However, the extreme business judgment rule has the effect of granting employers immunity from scrutiny simply because they characterize their decision as a business judgment—it is horrible public policy and an invitation to lawlessness.[7] This judicially created safe harbor for discriminatory businesses affords undue deference for which there is no statutory basis and disrupts the enforcement of civil rights laws, which in large part depends upon proof that an employer's reasons are pretextual. This sense of lawlessness is verified by the fact that rejection of irrationality evidence is contrary to multiple Supreme Court precedents.[8]

The business judgment rule leads to an intolerable asymmetry, whereby employers are free to explain their decisions as fair and reasonable, but employees are precluded from contesting that characterization.[9] The error is compounded when the business judgment rule is applied during summary judgment proceedings, ignoring evidence of irrationality when all proof and legitimate inferences should be considered in a manner favoring the employee.[10] Jurors are the appropriate arbiters of these issues, as they are often called upon to evaluate the reasonableness of employers' discretionary business decisions under various employment laws.[11]

The business judgment rule arose from the legitimate notion that an irrational job decision is not necessarily discriminatory. However, through decades of limiting gloss and parsed quotations, the rule has congealed into an extreme version that restricts the ability of factfinders to scrutinize an employer's asserted explanations to determine if they are pretextual.[12] It prevents plaintiffs from getting to a jury and fairly trying their cases.

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6. Duncan v. Fleetwood Motor Homes, 518 F.3d 486, 492 (7th Cir. 2008).

7. The business judgment rule, as applied in employment discrimination cases, is different from a rule with the same name that applies to lawsuits brought by shareholders challenging the decisions of a company's board of directors involving day-to-day corporate governance. The corporate law version of the rule presumes that boards of directors act with due care, in good faith, and in honest belief that actions are taken in the best interest of the company. City of Ft. Myers Gen. Emps. Pension Fund v. Haley, 235 A.3d 702, 717 & n.48 (Del. 2020). No court appears to claim that the same presumption applies to employment discrimination law. However, the fact that both rules share the same name raises concerns that the doctrines may be confused for one another.

8. *See infra* part II.

9. *See infra* part V.

10. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

11. *See infra* part IV.

12. *See infra* part III (examining First Circuit decisions, showing the transition from an accurate principle to an extreme, unprincipled exclusion of otherwise competent evidence).

This article concludes that the extreme form of the business judgment rule should be rejected. There is no justification for courts to declare that employers are free to act irrationally, either in jury instructions or court decisions, unless the courts also affirm that an employer's irrational explanation may support a finding of pretext. A description of the employer's freedoms is misleading unless it is combined with an acknowledgment that the exercise of such freedom may raise a suspicion of bias.[13]

I. At-Will Employment and Proof of Pretext

As a general rule, employment is presumed to be at will.[14] An employer is free to fire an at-will employee for almost any reason or no reason—even if the reason articulated by the employer is unfair, arbitrary, or untrue.[15] Employers with an at-will workplace have significant discretion to choose among job applicants and establish workplace conditions and policies.[16]

Against this background, legislatures have granted employees, including at-will employees, various statutory protections. For example, the law prohibits an employer from terminating employees because of race or gender.[17] Employers are not free to exercise their usual discretion in establishing terms and conditions of the workplace if their motive is discriminatory.[18]

In the course of litigating discrimination claims, employers are afforded the opportunity to explain their decisions and offer supporting evidence.[19] When an employer's asserted reason for an adverse action

13. *E.g.*, *In re* Lewis, 845 F.2d 624, 633–34 (6th Cir. 1988) (instructing the jury both that "[y]ou are not to substitute your judgment for Sears' business judgment," and "you may consider the reasonableness or lack of reasonableness of Sears' stated business judgment . . . in determining whether Sears discriminated against [the plaintiff]").

14. Day v. Staples, Inc., 555 F.3d 42, 58 (1st Cir. 2009).

15. *See* Engquist v. Ore. Dep't of Agric., 553 U.S. 591, 606 (2008); White v. Blue Cross & Blue Shield of Mass., 809 N.E.2d 1034, 1039 (Mass. 2004); Richey v. Am. Auto. Ass'n, 406 N.E.2d 675, 678 (Mass. 1980).

16. *See* Carroll v. Xerox Corp., 294 F.3d 231, 242 (1st Cir. 2002); Kolodziej v. Smith, 412 Mass. 215, 221–222 (1992).

17. 42 U.S.C. § 2000e-2(a)(1); Mass Gen. Laws ch. 151B, § 4(1) (2022).

18. Hishon v. King & Spaulding, 467 U.S. 69, 75 (1984); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

19. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993).

is not the real reason,[20] that is evidence of pretext that can, in turn, support a finding of discrimination.[21]

Pretext constitutes "affirmative evidence of guilt," and a jury may "infer the ultimate fact of discrimination from the falsity of the employer's explanation."[22] Pretext evidence can be "quite persuasive."[23] "Resort to a pretextual explanation is like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct."[24] Evidence of a minimal prima facie case, and proof of pretext, by themselves, are generally sufficient to permit a reasonable jury to find discrimination.[25]

Evidence of pretext takes many forms, and plaintiffs are not restricted to proving pretext in any particular way.[26] Evidence of pretext is probative, even though it does not explicitly address the presence of discriminatory bias.[27] For example, pretext for age discrimination can be found where an employer blames an employee for things the employer knows are not the employee's fault.[28] While proof of pretext

20. Plaintiff-employees need not provide proof of a knowingly false or sham reason in order to prove pretext. Reasons driven by internalized stereotypes, implicit biases, or mythology may lead an employer to articulate reasons for an adverse action that it "believes," yet are not the actual reasons for the action. Thomas v. Eastman Kodak, 183 F.3d 38, 58 (1st Cir. 1999); Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 756 (2005) ("An employer who had acted with unconscious bias would have no motivation to cover up her reasons for acting.").

21. Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003).

22. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (quoting Wright v. West, 505 U.S. 277, 296 (1992)).

23. *Id.*

24. Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1069 (3d Cir. 1996) (quoting Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (2d Cir. 1995)); *see also* Bronston v. Rees, 773 F.2d 742, 745 (6th Cir. 1985) (guilt may be inferred from a criminal defendant's improbable alibi).

25. *Reeves*, 530 U.S. at 147–48 (a plaintiff's "prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"); Lipchitz v. Raytheon Corp., 751 N.E.2d 360, 368 (Mass. 2001).

26. Patterson v. McLean Credit Union, 491 U.S. 164, 217 (1989); Watkins v. Tregre, 997 F.3d 275, 284 (5th Cir. 2021) (quoting Brown v. Wal-Mart Stores E., L.P., 571 F.3d 571, 578 (5th Cir. 2020)) (plaintiff may rely on "any evidence that casts doubt on the credence" of the employer's asserted reason).

27. Thomas v. Eastman Kodak Co., 183 F.3d 38, 57–58 (1st Cir. 1999) (rejecting the district court's requirement that, to survive summary judgment, a plaintiff must allege "at least one piece of evidence that explicitly referred to the plaintiff's membership in a protected class," quoting Thomas v. Kodak, 18 F. Supp. 2d 129, 138 (D. Mass. 1998)); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 50 N.E.2d 778, 794 (Mass. 2016) (evidence of pretext proves discrimination, "even if that evidence does not show directly that the true reasons were, in fact, discriminatory"); Abramian v. President & Fellows of Harv. Coll., 731 N.E.2d 1075, 1085 (Mass. 2000).

28. *Reeves*, 530 U.S., at 144–47.

is not required in every case, it is an important type of circumstantial evidence that can establish discrimination.

II. Pretext May Be Found where the Reason Given by an Employer for an Adverse Action Is Irrational

One of the primary ways in which we determine whether an explanation is truthful is whether it makes logical sense. That is how employers evaluate the truthfulness of their employees, and it is only fair that the explanations of employers be likewise examined. We are permitted to assume that businesses will generally not act in an arbitrary manner.[29] Thus, when an employer, faced with reasonable choices, opts for a ridiculous one, that properly raises a suspicion that other hidden motives are in play.[30]

Even though employers have the right to provide an at-will employee with a false or irrational reason for an adverse employment action, that very act can establish pretext.[31] The Supreme Court has acknowledged, on multiple occasions, that irrational decisions may be scrutinized as evidence of discrimination. The Supreme Court has recognized that an employer's "illogic" can prove pretext.[32] "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[33] A jury can, and should, examine whether an employer's reason is "unworthy of credence."[34]

Justice O'Connor asserted, "Reliance on an unreasonable [nondiscriminatory] factor would indicate that the employer's explanation is, in fact, no more than a pretext for *intentional* discrimination."[35] Justice Alito wrote, "Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder *may* infer that the employer's asserted reason for its action is a pretext for unlawful discrimination."[36]

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29. Furnco Constr. Corp v. Waters, 438 U.S. 567, 577 (1978) ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."); *see also* Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990) ("[I]rrational employers . . . are rare.").

30. DeJesus v. WP Co. LLC, 841 F.3d 527, 534 (D.C. Cir. 2016) ("[A] jury could properly conclude that the [employer's] proffered reason is so unreasonable that it provokes a suspicion of pretext.").

31. *Id.* at 147; Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 259 (1981) (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)) (stating that while it may be lawful for an employer to misjudge an applicant's qualification, doing so may nevertheless be probative of pretext); Cort v. Bristol-Myers Co., 431 N.E.2d 908, 911, 911 n.6 (Mass. 1982).

32. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 284 (1976).

33. Purkett v. Elem, 514 U.S. 765, 768 (1995).

34. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

35. Smith v. City of Jackson, 544 U.S. 228, 253 (2005) (O'Connor, J., concurring) (emphasis in original).

36. Young v. United Parcel Serv., Inc., 575 U.S. 206, 233 (2015) (Alito, J., concurring).

Circuit courts, echoing Supreme Court precedent, recognize that pretext may be found where the employer's reason for discharge is irrational, such as when the reason is:

- foolish or unfair,[37]
- riddled with error,[38]
- unreasonable,[39]
- idiosyncratic,[40]
- implausible or incoherent,[41]
- lacking good cause,[42]
- incompetent by comparison to usual operation,[43]

37. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 169 (1st Cir. 1998) ("[D]oubts about the fairness of an employer's decision . . . may be probative of whether the employer's reasons are pretexts for discrimination."); Wichmann v. Bd. of Trs. of S. Ill. Univ., 180 F.3d 791, 804–05 (7th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000) ("[A] defendant cannot escape the fact that a jury must use its good common sense in addressing how much, if at all, the foolishness or unfairness of the employer's decision weighs in the evidence of pretext."); Fuentes v. Perskie, 32 F.3d 759, 765 & n.8 (foolish or imprudent decisions can be found pretextual).

38. *In re* Lewis, 845 F.2d 624, 633 (6th Cir. 1988) ("Lewis has the burden of demonstrating that Sears' stated reasons are pretextual. One way for Lewis to do this is to show that Sears' asserted business judgment is so 'ridden with error that defendant could not honestly have relied upon it'" (quoting Lieberman v. Grant, 630 F.2d 60, 65 (2d Cir. 1980))); Duncan v. Fleetwood Motor Homes, 518 F.3d 486, 492 (7th Cir. 2008) ("We are mystified, then, that Fleetwood would say Duncan could not perform the job of material handler when he was doing exactly that on a daily basis without incident or criticism."); Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1116 (2d Cir. 1988) ("The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was so lacking in merit as to call into question its genuineness.").

39. Velez v. Thermo King de P.R., Inc., 585 F.3d 441, 452 (1st Cir. 2009) ("[P]laintiff has made a showing . . . that Thermo King's stated explanation for firing Velez and not the others so lacks rationality that it supports the inference that the real reason for firing Velez was his age."); Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("[T]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts."); *Duncan*, 518 F.3d at 492 ("We have explained that the honesty of an employer's statement is often revealed by analyzing its reasonableness; the more objectively reasonable the explanation, the more likely it honestly motivated the challenged employment action."); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 577 (6th Cir, 2003) ("[T[he reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation.").

40. *Loeb*, 600 F.2d at 1012 n.6 ("The more idiosyncratic or questionable the employer's reason, the easier it will be to expose as a pretext, if indeed it is one.").

41. Taite v. Bridgewater State Univ., Bd. of Trs., 999 F.3d 86, 94 (1st Cir. 2021).

42. Bullard v. Sercon Corp., 846 F.2d 463, 466 (7th Cir. 1988) ("The fact that a black worker is fired or laid off without good cause does not establish racial discrimination. It may in some cases be evidence of discrimination.").

43. *Fuentes*, 32 F.3d at 765 & n.8 ("Of course, a decision foolish, imprudent, or incompetent by comparison to the employer's usual mode of operation can render it implausible, inconsistent, contradictory or weak [as to establish pretext].").

- an excuse to blame the plaintiff for matters not in her control,[44]
- an overreaction,[45]
- a suspicious "misjudging."[46]

These holdings apply the common-sense notion that an irrational explanation may be a cover-up for a hidden, unlawful reason. The necessary corollary is that juries are positioned to assess the rationality of an employer's justification and determine the issue of pretext using this information. Indeed, this principle is foundational for our civil rights laws. If a jury is precluded from assessing the reasonableness of an employer's decisions to discern pretext, it is improperly hamstrung in its duty to ferret out and remedy discrimination.

III. The Business Judgment Rule Has Evolved to Improperly Limit Scrutiny of the Employer's Reason

Despite the fact that the Supreme Court and many circuit courts have stated that factfinders should scrutinize the reasonableness of employer's reasons for evidence of pretext, some courts have acted to preclude such scrutiny. It is instructive to see how the business judgment rule has evolved over time, from clarifying gloss involving the at-will doctrine to an extreme form that precludes all inquiry into the rationality of the employer's personnel decisions. Perhaps the best example of this evolution is the First Circuit, whose decisions have adopted more restrictive versions of the rule over time, without explanation or justification.

A. An Irrational Reason Is Not Necessarily a Discriminatory Reason

An early expression of the business judgment rule made the simple point that an employer is free to terminate employees for any reason except a discriminatory reason. In *Mesnick v. General Electric Co.*, the Court stated:

> The [Age Discrimination in Employment Act of 1967 (ADEA)] does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, *so long as the decision to fire does not stem from the person's age*. Courts may not sit as super personnel departments,

44. Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 140–42 (1st Cir. 2012); *Wexler*, 317 F.3d at 576–77 (employer knew that its store's declining sales were not plaintiff's fault).

45. Kelley v. Corr. Med. Servs., 707 F.3d 108, 118 (1st Cir. 2013) (jury could consider a termination based on failure to obey an instruction to be a calculated, and thus pretextual, overreaction); Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 291 (7th Cir. 1999) (employee's termination for eating chips from an open bag in an employee common area found to be too trivial to justify termination).

46. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 169 (1st Cir. 1998) ("[A]n employer's 'misjudging' of an employee's qualifications, while not necessarily dispositive, 'may be probative of whether the employer's reasons are pretexts for discrimination.'" (quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992))).

> assessing the merits—or even the rationality—of employers' *nondiscriminatory* business decisions.[47]

As the complete quote shows, *Mesnick* limits inquiry into the rationality of an employer's decisions only if that decision is "nondiscriminatory."[48] It was making the point that an irrational reason is not necessarily a discriminatory one.

The *Mesnick* formulation, properly understood, has no bearing on the question of what evidence is admissible or sufficient to permit a reasonable jury *to find* the existence of discrimination. It simply stands for the basic principle that, assuming no discrimination has occurred, an employer's irrational decision will not render it liable under the anti-discrimination laws.[49]

Other First Circuit decisions parrot a version of the business judgment rule that applies only to employment actions already established to be nondiscriminatory. "Whether a termination decision was wise or done in haste is irrelevant, *so long as the decision was not made with discriminatory animus*."[50] Likewise, "an employer is free to terminate an employee for any *nondiscriminatory reason*, even if its business judgment seems objectively unwise."[51] Again, these statements assert the uncontroversial idea that, where the employer's actual reason for termination is non-discriminatory, it does not matter if the asserted reason is irrational.[52] An irrational decision is not necessarily discriminatory.

However, confusion arises from these many statements, because a disconnect arises when court decisions considering *whether* there is evidence of discrimination, appear to rely on principles that *assume* there is no discrimination. This disconnect, repeated in many decisions over many years, leads to the impression that courts are placing their thumbs on the scale in favor of employers—implying that irrationality evidence is not evidence of pretext, without actually saying so. As will be shown, later decisions make this point overtly.

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47. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) (emphasis added and internal citation and quotation marks are omitted) (quoting Freeman v. Package Mach. Co., 865 F.2d 1331, 1341 (1st Cir. 1988).

48. *Id.*

49. *Id.*

50. Rivera-Aponte v. Res. Metropol #3, Inc., 338 F.3d 9, 11 (1st Cir. 2003) (emphasis added).

51. Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005) (emphasis added).

52. Yet another example of this analysis is *Smith v. Stratus*, which held that a Title VII remedy will not be afforded "to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision." Smith v. Stratus Comput., Inc., 40 F.3d 11, 16 (1st Cir. 1994) (emphasis added); *see also* Brandt v. Fitzpatrick, 957 F.3d 67, 79 (1st Cir. 2020) ("Even the most blatant unfairness cannot, on its own, support a Title VII claim . . . unless facts and circumstances indicate that discriminatory animus, or bias, was the reason for the decision." (internal quotations omitted)).

B. Assuming the Employer Is Motivated by an Earnest Reason

In a similar vein, the First Circuit has held that once it is determined that an employer actually thought it had just cause to fire an employee, then, at that point, it is not appropriate to second-guess that employer's judgment.

> *[A]s long as the [employer] believed that the [employee's] performance was not up to snuff* . . . it is not our province to second-guess a decision to fire him as a poor performer. That is true regardless of whether, to an objective observer, the decision would seem wise or foolish, correct or incorrect, sound or arbitrary.[53]

But once again, this puts the cart before the horse. It is incongruous to cite to a principle that assumes an employer has an earnest belief in a legitimate reason for termination in a summary judgment decision intended to ferret out what the employer believed in the first place.

At summary judgment, it is incumbent on the court to disregard the testimony of the employer's witnesses regarding what they "believed," as a jury would be free to discredit that evidence.[54] "[M]otivation is itself a factual question."[55] A jury need not believe the decision-maker's self-serving, exculpatory, and purely subjective description of his/her state of mind, and so, such evidence is accorded no weight at summary judgment.[56] Therefore, it is not ordinarily possible at the Rule 56 stage to establish the employer's predicate "belief" in its own reason, in order to apply the business judgment rule to that context.

Even if an employer's genuine belief could be established at the summary judgment stage, this iteration of the business judgment rule then wrongly assumes, for at least two reasons, that an employer's earnest belief in poor performance insulates it from liability. First, it is possible for an employer to harbor an unlawful, discriminatory motive,

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53. Dávila v. Corporación De P.R. Para La Difusión Pública, 498 F.3d 9, 17 (1st Cir. 2007) (emphasis added).

54. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150–51 (2000); Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1243–44 (1st Cir. 2016) (refusing to credit decisionmakers' self-serving testimony that they terminated an employee based on legitimate reasons and that they would have done so even in the absence of discriminatory motive).

55. Hunt v. Cromartie, 526 U.S. 541, 549 (1999); *see also* Lewis v. U.S. Steel Corp., No. 2:18-CV-00428-RDP, 2019 U.S. Dist. LEXIS 214849, at *11 (N.D. Ala. Dec. 13, 2019) ("So while [a]n employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct, the jury must decide if that is what occurred; *i.e.*, that Defendant held a good-faith belief as opposed to constructing a false narrative to mask a discriminatory motive." (internal quotations and citations omitted)).

56. *Reeves*, 530 U.S. at 151; Sartor v. Ark. Nat. Gas Corp., 321 U.S. 620, 628 (1944) ("[T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." (quoting Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 408 (1889))).

even if it is also motivated by other legitimate factors.[57] Therefore, an employer's belief in one cause for an adverse action does not preclude the finding of another, illegal, contributing cause, which may be evidenced by a ridiculous justification.[58]

Second, an employer's truly held belief in an employee's poor performance may actually be the result of unlawful bias or stereotype, which has the effect of falsely elevating the significance of an employee's weaknesses.[59] Stereotypes warp decision-makers' perspectives, and impair their ability to evaluate subjective and even objective information.[60] Where an employer's reason is irrational, a jury must be permitted to use that fact to assess whether the employer's perceptions are skewed by bias, even if the employer's belief is honestly held.[61] Consequently, this version of the business judgment rule contains blind spots and doctrinal contradictions that render it unusable for summary judgment analysis in most scenarios.

C. Choice between Reasonable Alternatives

Some expressions of the business judgment rule appear to stand for the principle that there is no evidence of discrimination when an employer chooses among reasonable courses of action.[62] Indeed, the term "business judgment" itself seems to imply that the employer has selected among two or more business-viable alternatives.[63]

However, this characterization ignores the whole point of irrationality evidence, whereby a jury may conclude that the employer had reasonable alternatives and instead, opted for a ridiculous one. An irrational choice is not properly considered a business judgment. While

57. Bostock v. Clayton County, 140 S. Ct. 1731, 1739, 1745 (2020).

58. *Id.*

59. Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36, 251 (1989) (plurality and concurring decisions) (employer's assessment of female employee's workplace demeanor was colored by unlawful gender bias, where she was told to act, dress, and present herself more femininely, and she needed to go to charm school); *id.* at 258 (White, J., concurring) (same); *id.* at 272–73 (O'Connor, J., concurring) (same); Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998) (noting, in an ADA case, honest belief doctrine will not be used to insulate a good faith decision of the employer that is based on stereotype and not facts).

60. Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014).

61. Given that bias itself can be irrational, it should come as no surprise that a discriminatory decision will reflect that irrationality. Healy v. N.Y. Life Ins. Co., 860 F.2d 1209, 1218 (3d Cir. 1988) ("[B]ias is irrational.").

62. Daumont-Colón v. Cooperativa de Ahorra y Crédito de Caguas, 982 F.3d 20, 32–33 (1st Cir. 2020) ("[M]ere questions regarding the employer's business judgment are insufficient to raise a triable issue as to pretext." (quoting Acevedo-Parilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 140 (1st Cir. 2012))); Vélez-Ramírez v. Puerto Rico, 827 F.3d 154, 159 (1st Cir. 2016) ("[T]he ADA does not regulate merely unwise employment decisions and federal courts are not 'super-personnel departments' overseeing the American economy." (quoting Collazo-Rosado v. Univ. of P.R., 765 F.3d 86, 95 (1st Cir. 2014)).

63. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1203, 1205–07 (11th Cir. 2013) ("And it is by now axiomatic that Title VII is not designed to make federal courts sit as a super-personnel department that reexamines an entity's business decisions." (quoting Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1244 (11th Cir. 2001)).

businesses are free to make irrational decisions, juries should be free to find that discriminatory bias has caused the employer to act in a way that suspiciously deviates from its business interests.[64]

D. An Employer's Judgment May Be Questioned if the Plaintiff Has Otherwise Provided Clear Evidence of Discrimination

In the next step on the business judgment rule's downward trajectory, some courts claim they do not consider the rationality of a personnel decision unless there is otherwise evidence of a "clear discriminatory motive." For example, the First Circuit stated that, where courts are "*faced with employment decisions that lack a clear discriminatory motive*, we may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions."[65]

By implication, then, the rationality of an employer's decision may only be considered when there already is "clear" evidence of discrimination.[66] Under this rubric, courts and jurors would never consider irrationality in deciding whether discrimination has occurred as an initial matter.[67] In this peculiar iteration, the only time an employer's decision can be scrutinized is when other evidence already exists that clearly establishes the existence of discrimination. Given that summary judgment must be denied where the evidence raises even a minimal inference of discrimination, this formulation precludes the opportunity to ever *consider* irrationality at summary judgment; irrationality is relevant only when the employer's discriminatory motive is already "clear," and, if such evidence is otherwise present, then a court would deny summary judgment without ever considering irrationality evidence. Thus, irrationality is finessed into a non-issue under this version of the business judgment rule, in that it cannot be used to help establish discrimination as an initial matter.

E. The Rationality of the Employer's Reasons May Not Be Questioned

In the final step, the First Circuit drops all pretense and reaches its apparent ultimate goal of asserting that examining the rationality of an employer's decision is simply off-limits, or not probative of discrimination. Recall the *Mesnick* formulation, which says courts will not sit as super personnel boards assessing employers' "nondiscriminatory"

64. Even where there is a choice between two reasonable business choices, the employer's selection can still be evidence of bias if the selection is reasonably seen as a manipulation to disfavor someone based on protected traits. *See* Mulero-Rodríguez v. Ponte, Inc., 98 F.3d 670, 677 (1st Cir. 1996) (change in bonus structure to a merit-based system could be seen as a strategy to hurt the employees loyal to the plaintiff).

65. Brader v. Biogen, Inc., 983 F.3d 39, 57 (1st Cir. 2020) (emphasis added) (quoting Rodríguez-Cardi v. MMM Holdings, Inc., 936 F.3d 40, 48–49 (1st Cir. 2019)); *see also* Theidon v. Harv. Univ., 948 F.3d 477, 499 (1st Cir. 2020).

66. *See Theidon*, 948 F.3d at 499.

67. *See id.*

decisions.[68] Now courts are quoting the *Mesnick* principle, *while omitting the part that explains that it applies to nondiscriminatory decisions*. For example, the case of *Meuser v. Federal Express Corp.* states:

> Further, even if we disagree with FedEx's personnel or business decisions, a matter on which we take no view, "[c]ourts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' . . . business decisions."[69]

The *Meuser* court eliminated the word "nondiscriminatory" from the phrase "nondiscriminatory business decisions," thereby dramatically altering the meaning of the *Mesnick* formulation and creating an extreme version of the business judgment rule that precludes all irrationality evidence.[70] Yet, *Meuser* fails to acknowledge, explain or justify the profound change wrought by its incomplete quotation of *Mesnick*.[71] Other courts have adopted the extreme form of the business judgment rule, sometimes using different words.[72]

The courts' failure to explain or validate the extreme business judgment rule in a principled fashion or square it with binding precedent suggests that the rule may itself be unprincipled. The fact that the business judgment rule is currently described by the same courts in various evolving, contradictory versions also suggests that the rule lacks grounding.

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68. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991).

69. Meuser v. Fed. Express Corp., 564 F.3d 507, 519 (1st Cir. 2009) (alteration in original) (quoting *Mesnick*, 950 F.2d at 825).

70. *Id.*

71. Some cases purporting to quote *Mesnick* omit its condition that the business judgment rule applies only "so long as the decision to fire does not stem from [discrimination]." *Compare Mesnick*, 950 F.2d at 825, *with* Villeneuve v. Avon Prods., Inc., 919 F.3d 40, 48 (1st Cir. 2019), *and* Johnson v. Univ. of P.R., 714 F.3d 48, 54 (1st Cir. 2013), *and* Goncalves v. Plymouth Cnty. Sheriff's Dep't, 659 F.3d 101, 107 (1st Cir. 2011). The courts which so truncate the language of *Mesnick* never explain how the underlying principle remains accurate.

72. Woodward v. Emulex Corp., 714 F.3d 632, 638–39 (1st Cir. 2013) ("We are not concerned with whether the stated purpose is unwise or unreasonable.") (internal quotes and citation omitted); Brandt v. Fitzpatrick, 957 F.3d 67, 78–79 (1st Cir. 2020) (the idea that the employer was "just unreasonable . . . doesn't cut it"); Crim v. Bd. of Educ. of Cairo Sch. Dist. No. 1, 147 F.3d 535, 541 (7th Cir. 1998) ("It is not sufficient to prove that the [employer's] reason was doubtful." (citing Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995)); Pagel v. TIN, Inc., 695 F.3d 622, 630 (7th Cir. 2012) ("[T]his court does not sit as a super-personnel department that reexamines an entity's business decisions."); Meehan v. Med. Info. Tech., Inc., 177 N.E.3d 917, 924 (Mass. 2021) ("We also disagree with the motion judge and the Appeals Court that recognizing this right would provide just cause protection for at-will employees or transform the courts into 'super personnel departments, assessing the merits—or even the rationality—of employers'. . . business decisions.'") (alteration in original) (citations omitted)).

IV. No Policy Arguments Justify the Extreme Business Judgment Rule

The business judgment rule is sometimes explained as a mechanism for distinguishing an untrue reason from a good-faith, but mistaken reason.[73] But this distinction provides no justification to exclude irrationality evidence. An employer's unreasonable or outlandish misfire should be considered as evidence that a claimed "mistake" is actually a feigned or calculated type of ignorance utilized to hide the true, unlawful motive.[74]

If an employer errs in good faith, one would assume that its earnest decision would be reasonable, given the facts it knew at the time and the resources it had to uncover the truth. That is what a good-faith error looks like: it is reasonable.[75] However, when a decision is irrational when made, it no longer looks like a good-faith decision. At that point, a jury should be free to find that the decision is pretextual. Thus, it is impossible at summary judgment to distinguish between an illogical "mistake" and a subterfuge to cover up discrimination.[76] At this point, Rule 50 and 56 standards require the court to assume pretext.[77]

Perhaps judges are wary of the notion that jurors can evaluate business decisions—assuming that they are not qualified arbiters of rationality in the area of human resources.[78] However, anti-discrimination laws routinely contemplate that jurors will assess the rationality of employers' otherwise discretionary business decisions. For example, jurors must determine:

- whether the employer has acted based on a bona fide occupational qualification that is "reasonably necessary to the normal operation of that particular business";[79]
- whether a factor considered by the employer in age discrimination cases is "reasonable";[80]

73. *See* Dávila v. Corporación de P.R. para la Difusión Pública, 498 F.3d 9, 17 (1st Cir. 2007).

74. *See* Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB, 414 F.3d 158, 162–64 (1st Cir. 2005) (inadequate investigation can show a "rush to judgment" caused by unlawful animus).

75. Furthermore, a mistaken employer acting in good faith would likely be anxious to correct an error brought to its attention. An employer's failure to correct an alleged good-faith mistake should be deemed strong evidence that it was not actually a mistake, but a disguise for something else.

76. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–56, 258–59 (1981).

77. *See id.*

78. *See* Pagel v. TIN, Inc., 695 F.3d 622, 630 (7th Cir. 2012) ("We have little expertise in evaluating the merits of business and personnel decisions, and we see no need to make an exception here.").

79. 42 U.S.C. § 2000e-2(e); *see also* 29 U.S.C. § 623(f)(1).

80. 29 U.S.C. § 623(f)(1).

- whether employers have reasonably accommodated the needs of employees based on their religion or disability;[81]
- whether employers have taken reasonable care to prevent and promptly correct harassing behavior;[82] and
- whether neutral workplace conditions challenged under the disparate impact theory are consistent with "business necessity."[83]

Jurors are commonly called upon to scrutinize employer conduct in this fashion, and it is well within their ken to do so. There is no reason to believe that staffing issues would be a particularly opaque issue for a jury panel, which, collectively may well have centuries of workplace experience. Reasonableness is a quintessential issue for jury determination.

On the other hand, juries routinely address complex questions about the reasonableness of defendants' "business" judgment on matters on which they have no expertise, such as in medical malpractice and product liability cases.[84] Thus, no persuasive public policy supports the extreme business judgment rule in the employment setting.

V. The Extreme Business Judgment Rule Should Be Rejected

If juries may not assess the rationality of an employer's staffing decisions, then a crucial pathway to proving pretext is obliterated. The extreme version of the business judgment rule "should play no role in employment discrimination cases."[85] It is an awful and flawed public

81. 42 U.S.C. § 2000e(j); 42 U.S.C. § 12112(b)(5)(A).

82. Faragher v. Boca Raton, 524 U.S. 775, 807 (1998).

83. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see* Pullman-Standard, Div. of Pullman v. Swint, 456 U.S. 273, 279–80 (1982) (considering the rationality of a defendant-employer's organizational structure as compared with general industry practice). In a disparate impact case, the plaintiff may show that an ostensibly neutral policy is unlawful and that the employer's practice is a pretext for discrimination by identifying some other practice without discriminatory effect that would serve the employer's legitimate interests equally well. EEOC v. SS Clerks Union, Loc. 1066, 48 F.3d 594, 602 (1st Cir. 1995). Thus, jurors evaluate both "legitimate interests" and whether alternate practices would satisfy those interests.

84. Paiva v. Kaplan, 169 N.E.3d 1318, 1225 (Mass. App. Ct. 2021) (discussing jury instruction in medical malpractice case that physicians are allowed a "range in the reasonable exercise of professional judgment"); Evans v. Lorillard Tobacco Co., 990 N.E.2d 997, 1012 (Mass. 2013) (in products liability cases, a jury must assess whether the defendant failed to adopt a "reasonable alternative design" that could reduce foreseeable harm); Dubuque v. Cumberland Farms, Inc., 101 N.E.3d 317, 330–31 (Mass. App. Ct. 2018) (where a patron was killed when a car crashed into a convenience store, the store may be held liable for its failure to install bollards where the store reasonably should have known the risks and could have employed reasonable preventative measures).

85. Elaine Luthens, *Racial Discrimination or Valid Business Judgments: Employment Discrimination and the Business Judgment Rule*, 20 J. Gender Race & Just. 381, 401 (2017).

policy to grant an employer immunity from scrutiny simply because it characterizes its decision as a business judgment.[86]

The extreme rule is without statutory basis. The anti-discrimination statutes do *not* require deference to an employer's "business" decisions. In fact, the laws were established to operate in opposition to the discretion typically afforded at-will employers.

The extreme rule is contrary to Supreme Court precedent on irrationality evidence and contradicts the Court's directive that employees may prove pretext in *any manner*.[87] The rule is also contrary to some First Circuit precedent, which remains good law.[88]

The rule improperly curtails the ability of jurors to make natural, reasonable inferences.[89] For this reason, retired Judge Gertner has spoken out against the business judgment rule for preventing juries from doing precisely what they are supposed to do—analyze an employer's asserted reason to determine if it is the actual reason.

> These are "rules" that turn the employment laws on their head, in which the court refuses to second-guess an employer's decisions and defers to its business judgment. The employment laws necessarily require second-guessing an employer when the plaintiff makes out a prima facie case, or, at the very minimum, the laws permit a jury to do so.[90]

The rule ignores the fact that stereotypes can warp an employer's perceptions,[91] and that its unreasonable explanations may expose such bias.

The business judgment rule leads to a disturbing asymmetry, whereby employers are free to present evidence that their decisions were fair, reasonable, and made in good faith, but employees will not be heard to contest these self-serving arguments.[92] There are no effective limits to an employer's ability to trumpet the alleged rationality of its decision-making, while the employee who suffered the adverse employment action is denied the chance to establish inferences of bias from the employer's irrational, hyperbolic, or ridiculous explanation. This one-sided rejection of pretext evidence is utterly wrong and runs

86. *See* Wexler v. White's Furniture, Inc., 317 F.3d 564, 577 (6th Cir. 2003) (en banc); Weiss v. JP Morgan Chase & Co., 332 F. App'x 659, 663 (2d Cir. 2009).

87. *See supra* part II; Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253, 259 (1981); Patterson v. McLean Credit Union, 491 U.S. 164, 166, 187–88, 217–18 (1989).

88. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

89. FED. R. EVID. 401(a).

90. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 122 (2012), https://www.yalelawjournal.org/forum/losers-rules [https://perma.cc/J3PX-W29S].

91. *See* Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014).

92. *See, e.g.*, Brandt v. Fitzgerald, 957 F.3d 67, 78–79 (1st Cir. 2020) (assuming that decisionmaker, in good faith, believed a supervisor's false report—even though the plaintiff was never given a chance to refute the falsehood).

counter to bedrock ideas of fairness, due process, and the adversarial process.

The notion that an employer's decisions may not be reviewed for rationality constitutes a type of categorical evidentiary rule that the Supreme Court has rejected. Evidence is relevant if it "has any tendency to make a fact more or less probable."[93] Assessing evidence under this standard requires a weighing of factors, taking into account the specific circumstances and theory of the case.[94] Consequently, use of a categorical rule that *per se* excludes evidence of irrationality while bypassing such searching review is improper.[95] A rule preventing a court from examining the rationality of a business judgment is a blunt instrument that impermissibly avoids careful examination of relevance in particular cases.

The use of the extreme business judgment rule at the summary judgment stage highlights its impropriety. Courts considering an employer's motion for summary judgment must assume all facts and reasonable inferences in the employee/non-moving party's favor.[96] This process requires the court to leave it to "the jury to weigh the credibility of conflicting explanations" of the adverse action.[97]

For example, if an employer states, in its summary judgment brief, that it terminated the plaintiff for failing to discipline employees, but the plaintiff establishes that the employer knew she never had authority to discipline others, two inferences are possible: (1) that the employer made a rash mistake; or (2) that the purported reason for termination was not the actual reason, but a pretext.[98] In a Rule 56 analysis, it should not be a close call. The court should accept *as true* that the employer's reason was pretextual because that is a reasonable inference in the non-moving party's favor.[99] Consequently, the extreme version of the business judgment rule should have no place in employment discrimination law at all—but especially at the summary judgment stage.

A more moderate approach to the business judgment rule would be to state that employers are entitled to make irrational decisions and that irrational decisions do not necessarily violate anti-discrimination laws. However, to the extent this principle is recognized—either in jury instructions or in a summary judgment decision—it must be

93. Fed. R. Evid. 401(a).

94. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384, 387–88 (2008).

95. *Id.* at 383, 385–88 (where district court may have applied a principle that employees under different supervisors may never be compared to determine the existence of bias, this was an improper *per se* rule).

96. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

97. Blare v. Husky Injection Molding Sys. Boston, Inc., 646 N.E.2d 111, 114 (Mass. 1995).

98. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 145–47 (2000).

99. *See id.* at 150–51.

accompanied by the equally true assertion that an irrational reason may trigger an inference of pretext. Asserting the first principle, without the second, is misleading.

Conclusion: Hope for the Future

There is a way forward—away from the clear error of the extreme business judgment rule. In decisions where courts have confronted *both* the business judgment rule and the validity of irrationality evidence, irrationality evidence is often accepted as probative.[100] When courts fairly consider the choice between the two competing doctrines, courts tend to correctly embrace evidence of irrationality.

The Sixth Circuit has found it to be legal error to reject irrationality evidence based on the business judgment rule.[101] The Tenth Circuit has explained that "the business judgment rule does not immunize an employer where its proffered reasons have been shown to be unworthy of belief."[102] When employers demand a business judgment jury instruction, courts sometimes reject it as unnecessary or misleading, as it would falsely indicate that the employer's conduct should not be scrutinized or that jurors are not competent to engage in such scrutiny.[103] Thus, judges and commentators tend to support the admissibility of irrationality evidence when they expressly address the tension between the two doctrines. That is because the support for the probative value of irrationality evidence is strong and grounded, while the extreme business judgment rule is doctrinally unsupported.

On the other hand, as a general matter, neither *Meuser* nor other like cases attempt to harmonize the extreme rule with the precedent endorsing irrationality evidence, or validate it based on sound public policy or evidentiary rules.[104]

Plaintiff's lawyers should continue to fight the extreme business judgment rule by relying on the Supreme Court's repeated endorsement

100. *E.g.*, Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 140–42 (1st Cir. 2012) (plaintiff prevailed where the court considered both the business judgment rule and irrationality evidence); Velez v. Thermo King de P.R., Inc., 585 F.3d 441, 450, 452 (1st Cir. 2009) (same).

101. *See* Wexler v. White's Furniture, Inc., 317 F.3d 564, 576–77 (6th Cir. 2003) (district court reversed for its "unwarranted deference" to employer's "business judgment"); *In re* Lewis, 845 F.2d 624, 633–34 (6th Cir. 1988) (rejecting objection to jury instruction stating that the jury could "consider the reasonableness or lack of reasonableness" of the employer's reason for acting).

102. Stroup v. United Airlines, Inc., 26 F.4th 1147, 1161–62 (10th Cir. 2022) (quoting Beaird v. Seagate Tech., 145 F.3d 1159, 1169 (10th Cir. 1998)).

103. *See* Kelley v. Airborne Freight Corp., 140 F.3d 335, 350–51 & n.6 (1st Cir. 1998); Varlesi v. Wayne State Univ., 643 F. App'x 507, 518 (6th Cir. 2016); Wichmann v. Bd. of Trs. of So. Ill. Univ., 180 F.3d 791, 804–05 (7th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000); Carrion v. Hashem, No. 13-P-993, 2014 Mass. App. LEXIS 1225, at *8 (Dec. 9, 2014) ("[T]he judge . . . was not required to give the 'business judgment' instruction requested by the defendants.").

104. Meuser v. Fed. Express Corp., 564 F.3d 507, 519 (1st Cir. 2009).

of irrationality evidence, by highlighting the business judgment rule's absurd asymmetry that only permits rationality evidence when it favors employers, and by arguing that scrutiny of an employer's decision is essential for claims that so often rely on pretext. Courts should recognize that the bar on irrationality evidence improperly interferes with the plaintiff's right to show that the reasons advanced by the defendant were pretextual.[105] Discrimination law is far too important to accept rules of evidence that are irrational.

105. *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1193 (10th Cir. 2000).

The Health and Safety of Incarcerated Workers: OSHA's Applicability in the Prison Context

Megan Hauptman*

Introduction

In the early months of the COVID-19 pandemic, as states competed for a limited supply of face masks, prison factories in California produced more than 1.4 million masks for state agencies.[1] Robbie Hall—a fifty-eight-year-old grandmother working for the California Prison Industry Authority (CALPIA)—stitched masks for twelve hours a day, making sixty cents for every hour she worked.[2] For the first few weeks of this work, Hall and other women in the prison factory were told they would face disciplinary sanctions if they wore the masks they were making.[3] Workers in prisons and detention facilities across the country experienced similarly unsafe conditions and disciplinary threats.[4]

During the COVID-19 pandemic, incarcerated workers in both prison factories and institutional work assignments have faced some of the most high-risk work scenarios: crowded, congregate environments with poor ventilation and inadequate sanitation, lack of personal

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1. Kiera Feldman, *California Kept Prison Factories Open. Inmates Worked for Pennies an Hour as COVID-19 Spread*, L.A. Times (Oct. 11, 2020, 5:00 AM), https://www.latimes.com/california/story/2020-10-11/california-prison-factories-inmates-covid-19 [perma.cc/8QHF-MDFA].

2. *Id.*

3. *Id.*

4. *See, e.g.*, Cary Aspinwall, Keri Blakinger & Joseph Neff, *Federal Prison Factories Kept Running as Coronavirus Spread*, Marshall Project (Apr. 10, 2020, 6:00 AM), https://www.themarshallproject.org/2020/04/10/federal-prison-factories-kept-running-as-coronavirus-spread [perma.cc/YW4P-CMPV]; Samantha Michaels, *New York State Has Prisoners Making Hand Sanitizer. It's Unclear if Prisoners Can Use It*, Mother Jones (Mar. 9, 2020), https://www.motherjones.com/crime-justice/2020/03/new-york-state-has-prisoners-making-hand-sanitizer-its-unclear-if-prisoners-can-use-it [perma.cc/6DG6-PK2M]; Julia Ainsley & Jacob Soboroff, *Detained Migrants Say They Were Forced to Clean COVID-Infected ICE Facility*, NBC News (June 10, 2020, 7:58 AM), https://www.nbcnews.com/politics/immigration/detained-migrants-say-they-were-forced-clean-covid-infected-ice-n1228831[perma.cc/S2SM-ZWAN].

protective equipment (PPE), and social distancing.[5] But many incarcerated workers with concerns about the risk of COVID-19 infection from their work conditions were reluctant to miss days of work because they feared disciplinary action that could jeopardize a release date or result in placement in solitary confinement.[6]

The COVID-19 pandemic highlights both the extreme vulnerability of prisoners to infectious diseases and the coercive nature of prison work, underscoring incarcerated workers' lack of control over their dangerous workplace conditions. Incarcerated workers are often reluctant to complain about poor conditions for fear of retaliation, a situation that is further exacerbated by the fact that they are functionally exempted from coverage under occupational health and safety standards.

This article documents how current occupational health and safety regulations and enforcement mechanisms fail to protect incarcerated workers, who are especially vulnerable to both unsafe working conditions and arbitrary retaliation. After first examining why we should be concerned about this gap in coverage, this article then argues that the Occupational Health and Safety Act (OSH Act) and its state analogues should be interpreted to provide more substantial coverage to those working in prisons. Situating this argument in a larger debate about statutory labor protections for incarcerated workers, I argue that precedent excluding incarcerated laborers from coverage under other federal protective legislation should not be applied to the health and safety context.

In Part I, this article provides a brief overview of the history of prison labor and current practices, focusing on the coercive and unsafe conditions that incarcerated workers often face. In Part II, this article reviews the function of the Occupational Health and Safety Administration (OSHA) and its various enforcement mechanisms and then discusses which workers are considered to be "employees" covered under OSH Act's protections. Part III unpacks the term "employee" as it has been applied to incarcerated workers, looking at how courts have carved out a "prisoner exception" from federal protective legislation. In Part IV, the article provides an overview of how OSH Act and other health and safety regulations currently operate in the prison work

5. *See, e.g.*, Agence France-Presse, *US Prisons Called a Coronavirus "Tinderbox,"* Courthouse News Serv. (Mar. 19, 2020), https://www.courthousenews.com/us-prisons-called-a-coronavirus-tinderbox [perma.cc/S35U-DGG5]; *see also A State-by-State Look at Coronavirus in Prisons*, Marshall Project (July 1, 2021, 1:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [perma.cc/HLK5-5CY7] (documenting the disproportionately high rates of COVID infection in detention facilities).

6. *See, e.g.*, Feldman, *supra* note 1 (workers threatened with disciplinary action that would jeopardize parole); Ainsley & Soboroff, *supra* note 4 (workers who refused to clean facility placed in solitary confinement).

setting, detailing how agency interpretations have excluded most incarcerated workers from health and safety protections. The article then presents a normative argument for why incarcerated workers should be included in OSHA coverage, suggests ideas for how this coverage could be achieved, and engages with how courts might distinguish the question of who qualifies as an employee under the OSH Act from more restrictive interpretations of other federal protective legislation. This article concludes by discussing some of the potential ramifications of extending OSHA coverage to incarcerated workers.

I. Prison Labor

Prison labor has served as a linchpin of the American carceral system since the nation's inception. Colonial penitentiaries promoted prison labor programs as a crucial element of the reformation of the prisoner, who would develop the skills to contribute to the economy upon release.[7] Hard labor performed in public—primarily in the form of the chain gang—was intended to serve as a strong deterrent to the public.[8] Prison labor (and the accordant practice of convict leasing) expanded rapidly in the wake of the abolition of chattel slavery, as Southern states enacted laws to criminalize and incarcerate emancipated Black men and women and then leased their labor out to plantation owners and private companies.[9] These convict leasing programs served as a source of profit for both private companies and the state lessors, as prisoners were paid little to no wages and worked long hours, under unsafe and often deadly work conditions.[10] Northern states did not lease out prisoners in the same manner, but instead built out a "contract" system, in which prisoners worked at factories within the prisons' walls.[11] The system was overseen by private firms who provided the raw materials and sold the prison-produced goods.[12] The lack of wages, long hours, and unregulated working conditions made for a profitable system—a system that was opposed both by prison reformers and labor unions because it sanctioned poor working conditions and fostered unfair

7. *See* Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, 15 J. Lab. & Soc'y 327, 332 (2012); Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. Civ. Rts. & Econ. Dev. 679, 685–86 (2015); Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 Stan. L. Rev. 339, 348 (1998).

8. LeBaron, *supra* note 7, at 332.

9. *Id.* at 337; *see also* Michelle Alexander, the New Jim Crow 28 (2010); Garvey, *supra* note 7, at 355–56.

10. *See* LeBaron, *supra* note 7, at 337–40 (detailing how convict laborers were frequently worked for fifteen to seventeen hours daily, fed below subsistence amounts, whipped for falling behind in work, and often died before their sentence was completed).

11. *Id.* at 336; Fulcher, *supra* note 7, at 685.

12. Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 Idaho L. Rev. 953, 957–58 (2019).

competition with free labor.[13] In response to pressure from organized labor, most states had phased out their contract and convict-lease systems by the mid-1900s, moving to a "state-use system" in which the state was the only authorized buyer of prison-made goods.[14]

Today, most prisoners work in some capacity, in either voluntary or mandated jobs.[15] The majority are engaged in "prison housework," performing institutional jobs within the prison, including maintenance, food service, custodial, and grounds work.[16] A much smaller number of prisoners work in "prison industries," that is, prison factories or labor programs that produce goods and services for government agencies and private corporations.[17] Some states also provide opportunities for prisoners near the end of their sentence to work for outside employers through prison work-release programs.[18]

Incarcerated workers today are paid almost nothing for their work, even when that work is dangerous and life-threatening. For example, prisoners who work for the state of California fighting wildfires are paid between two and five dollars per day, plus one dollar per hour when they are actively fighting fires.[19] Incarcerated workers in New York made sixty-five cents per hour bottling hand sanitizer in a congregate factory setting in response to the COVID-19 shortage,[20] while women in a California prison made thirty-five cents to one dollar per hour making masks that they were not allowed to wear.[21] In

13. Fulcher, *supra* note 7, at 686.

14. *Id.* This transition was advanced by the 1929 Hawes-Cooper Act, which prevented states from selling goods made by state prisoners in other states. *Id.* at 688.

15. This article focuses on work performed by sentenced prisoners, who comprise the majority of incarcerated workers. However, in most pretrial facilities (jails) and immigration detention centers, many detainees work in "prison housework" positions. *See, e.g.*, Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. Times (May 24, 2014), https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html [perma.cc/4ZNW-9YLW]. The majority of the cases below pertain to sentenced prisoners; when cases discuss labor protections as they apply to pretrial and immigration detainees, I will note that in the footnotes.

16. *See* Fink, *supra* note 12, at 953; Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 Vand. L. Rev. 857, 868–69 (2008).

17. *See* Fink, *supra* note 12, at 953; Zatz, *supra* note 16, at 869–70. In recent years, a privatized "contract system" has reemerged, in which private sector entities operate prison factories and/or purchase prison-produced goods. *See* Zatz, *supra* note 16, at 869–70.

18. *See* Stanley E. Grupp, *Work Release in the United States*, 54 J. Crim. L. & Criminology 267, 267–68 (1963) (describing the history of work release in the United States).

19. Maanvi Singh, *Pandemic Sidelines More Than 1,000 Incarcerated Wildfire Fighters in California,* Guardian (July 10, 2020, 4:35 PM EDT), https://www.theguardian.com/us-news/2020/jul/10/california-wildfire-coronavirus-prison-incarcerated-firefighters [perma.cc/4KGM-VLZP].

20. *See* Michaels, *supra* note 4.

21. *See* Feldman, *supra* note 1. As of 2017, the wage for a prisoner working in a "prison housework" position ranged from nothing to two dollars per hour. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, Prison Pol'y Initiative (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages [perma.cc/9HAU-HYXR].

all of these low-paid positions, workers are subject to the supervision of prison authorities, who wield almost absolute control over their charges. Incarcerated workers recount that prison authorities often threaten disciplinary sanctions—such as solitary confinement, loss of good time credits, or immediate termination—to coerce workers into working against their consent.[22] Despite increasing media coverage of these issues, workers have little legal recourse to challenge their low pay, dangerous working conditions, or any retaliation they might face for raising concerns to supervisors.

II. The Occupational Safety and Health Act

A. The Statute and Its Enforcement

The preamble of the OSH Act (or the Act), passed in 1970, declares the statute's purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."[23] The OSH Act authorizes the Department of Labor to effectuate this goal by both implementing explicit statutory protections and promulgating complementary regulations and standards.[24] The Supreme Court has held that the OSH Act, along with other health and safety legislation, should be "liberally construed to effectuate the congressional purpose" of providing safe working conditions and protecting public health.[25] In line with this principle, the Court has upheld interpretive regulations that create additional rights for workers when those regulations "conform to the fundamental objective of the Act" and are not contradicted by the Act's language or legislative history.[26]

The average wage across the states was sixty-three cents per hour. For prison industry jobs, workers were paid slightly more: up to $5.15 per hour, with an average hourly wage of $1.41 across the states. *Id.* None of these wages come close to the federally mandated minimum wage of $7.25, a complaint that was central to prison work strikes in 2016 and 2018. *See* German Lopez, *America's Prisoners Are Going on Strike in at Least 17 States*, Vox (Aug. 22, 2018), https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018; Tom Kutsch, *Inmates Strike in Prisons Nationwide over "Slave Labor" Working Conditions*, Guardian (Sep. 9, 2016), https://www.theguardian.com/us-news/2016/sep/09/us-nationwide-prison-strike-alabama-south-carolina-texas. These wages are possible because courts have overwhelmingly interpreted FLSA to exclude prison workers from the statute's protections, which is discussed in Section III.A, *infra*.

22. *See, e.g.*, Feldman, *supra* note 1 (workers were threatened with losing their factory jobs or facing discipline if they refused to work because of COVID fears); Ainsley & Soboroff, *supra* note 4 (workers threatened with solitary confinement for refusal to work); *The Uncounted Workforce*, NPR (Jun. 29, 2020), https://www.npr.org/transcripts/884989263 [https://perma.cc/46FG-VZPC] (recounting use of disciplinary sanctions and solitary confinement to coerce people to work even when they were sick).

23. Whirlpool Corp. v. Marshall, 445 U.S. 1, 11–12 (1980) (citing the OSH Act's preamble at 29 U.S.C. § 651(b)).

24. *Id.* at 11–13.

25. *Id.* at 13 (citing United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969)).

26. *Id.* at 11.

The Occupational Safety and Health Administration (OSHA) sets workplace safety standards and provides education and training to ensure that those standards are met.[27] In addition to standard-setting, OSHA has enforcement powers to receive worker complaints, conduct inspections, and issue citations to employers for safety violations.[28] Importantly, the Act's remedial orientation is "prophylactic in nature," which means that the Act does not require that an injury occur before the agency is authorized to promulgate health and safety standards and issue citations.[29] The Secretary of Labor has broad enforcement discretion to decline to promulgate standards,[30] conduct inspections,[31] and issue citations.[32]

The OSH Act provides no private right of action for workers to bring suit against their employers in court.[33] Instead, the OSH Act allows employees to file complaints with the agency when they believe that their workplace is in violation of a health or safety standard, or that working conditions present an imminent danger.[34] If OSHA determines that there are reasonable grounds to believe that a violation or danger exists, the agency "must initiate an inspection 'as soon as practicable, to determine if such violation or danger exists.'"[35] If the agency believes that the employer has violated OSHA requirements, it will issue a citation, which is reviewable by the Occupational Safety and Health Review Commission (OSHRC).[36] OSHRC's decisions are then reviewable by a federal court of appeals via a petition for review.[37] If the agency is concerned that an employer is engaged in dangerous practices that could "reasonably be expected to cause death or serious physical harm" before the danger can be eliminated through the OSHA enforcement procedures outlined above, the agency can petition

27. Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 368 (E.D.N.Y. 2020).

28. *Id.* at 369.

29. *Whirlpool Corp.*, 445 U.S at 12.

30. *See, e.g.*, *In re* Am. Fed. of Lab. & Cong. of Indus. Orgs., 2020 WL 3125324 (D.C. Cir. June 11, 2020) (OSHA's decision not to issue an emergency temporary standard for COVID-19 workplace standards entitled to deference).

31. *See* 29 U.S.C.§ 658; *see also Federal OSHA Complaint Handling Process,* OSHA, https://www.osha.gov/as/opa/worker/handling.html [https://perma.cc/BS63-AJER].

32. *See, e.g*, Patrick Kapust & Scott Ketcham, *Memorandum for Regional Administrators State Plan Designees*, OSHA (Apr. 16, 2020), https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during [https://perma.cc/P7JX-3F2L]. *But see* 29 U.S.C. § 659 (if the Secretary believes an employment has violated the OSH Act, he "shall" issue a citation to the employer).

33. *See* Michael C. Duff, Thomas O. McGarity, Sidney Shapiro, Rena Steinzor & Katie Tracy, *OSHA's Next 50 Years: Legislating a Private Right of Action to Empower Workers,* Ctr. for Progressive Reform 5 (2020), https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf [https://perma.cc/LG8Y-PB25].

34. Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 369 (E.D.N.Y. 2020) (citing 29 U.S.C. § 657(f)(1)).

35. *Id.*

36. *Id.*

37. *Id.* (citing 29 U.S.C. §§ 660–661).

a federal district court and request a temporary restraining order or injunction against the employer.[38] If the agency "arbitrary or capriciously" fails to seek injunctive relief against an imminent danger, a worker can file a writ of mandamus to compel the agency to seek such an order.[39] This mandamus procedure is the only explicit statutory mechanism for an individual to invoke the protections of OSHA in court without first exhausting the administrative enforcement process.

The failure by OSHA to promulgate standards or enforce existent standards has significant implications for workers' ability to seek judicial remedies for workplace safety violations. In the COVID-19 context, where OSHA repeatedly refused to issue binding health and safety standards,[40] workers sought to remedy workplace safety issues by bringing common law breach-of-duty and public nuisance claims against their employers in court, asking the courts to order employers to comply with public health guidance.[41] In several of these cases, federal district courts dismissed workers' claims in part based on the doctrine of primary jurisdiction, noting that OSHA's expertise on workplace safety issues and an interest in uniform decisions requires that the agency make the primary determination on these issues before a plaintiff is able to bring any claim for relief to a court.[42] As discussed previously, the OSHA enforcement process is lengthy: the agency must respond to a complaint, conduct an investigation, make findings, and issue a citation before any possibility of administrative or judicial review is available.[43] In addition, OSHA has broad enforcement discretion in deciding to respond to complaints, conduct investigations, and issue citations.[44] The delays inherent in this administrative process—exacerbated by former President Trump's recalcitrant administration[45]—combined with the primary jurisdiction doctrine left vulnerable workers without a means of seeking timely relief for COVID workplace safety violations.

38. Rural Cmty. Workers Alliance v. Smithfield Foods, 459 F. Supp. 3d 1228, 1241 (W.D. Miss. 2020) (citing 29 U.S.C. § 662).

39. *Id.* (citing 29 U.S.C. § 662(d)).

40. *See, e.g.*, Kate Gibson, *OSHA Has Failed to Protect Workers from COVID-19, Unions Say*, CBS News (Oct. 9, 2020), https://www.cbsnews.com/news/osha-covid-19-guidlines-protection-failed-unions-accuse [https://perma.cc/4E6X-T8Z3]; *In re* Am. Fed. of Lab. & Cong. of Indus. Orgs., 2020 WL 3125324 (D.C. Cir. June 11, 2020).

41. *See Palmer*, 498 F. Supp. 3d at 359; *Rural Cmty. Workers Alliance*, 459 F. Supp. 3d at 1241.

42. *Palmer*, at *5–6; *Rural Cmty. Workers Alliance*, at 1240–41.

43. *See supra* notes 34–39 and accompanying text.

44. *See supra* notes 30–32 and accompanying text.

45. Eyal Press, *Trump's Labor Secretary Is a Wrecking Ball Aimed at Workers*, New Yorker (Oct. 26, 2020), https://www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers [https://perma.cc/L86B-3J77].

B. OSHA's Applicability to State Employees

Though the OSH Act federalized workplace safety and health regulations and purports to offer broad coverage to employees across the country, state and local government employees are statutorily exempted from coverage under the federal act.[46] Further, the OSH Act provides that states can opt out of any regulation by federal OSHA by designing their own state health and safety plans, as long as the state plan is at least as effective as the federal program.[47] In the twenty-seven states that have opted to create a state health and safety administration to cover public employees, state workers receive the benefits of standard-setting and access to government enforcement of said standards. [48] However, this gap in mandated OSHA coverage in the twenty-three other states has raised concerns that public-sector employees who witness or experience workplace safety hazards are left without recourse to file complaints and pressure employers to improve their workplace safety, resulting in higher workplace injury rates.[49] In response to these concerns, members of Congress have repeatedly introduced the Protecting America's Workers Act, which, among other expansions of OSHA's coverage, would include state employees in the Act's purview.[50]

III. The Prisoner Exception to Federal Protective Legislation

Importantly, the standards promulgated by OSHA and the enforcement mechanisms available under OSH Act only cover workers who are classified as "employees."[51] The term "employee" is defined by the Act in self-referential and circular terms: an employee is "an employee of an employer who is employed in a business of his employer which affects

46. 29 U.S.C. § 652(5); *see also Standard Interpretation: Federal OSHA Has No Jurisdiction over State, Municipal, or Volunteer Fire Departments*, OSHA (Oct. 11, 2006), https://www.osha.gov/laws-regs/standardinterpretations/2006-10-11-1[https://perma.cc/6B3W-WFY4] (stating that federal OSHA has no authority over state and local government employees).

47. 29 U.S.C. § 667(b)–(c).

48. *See State Plans*, OSHA, https://www.osha.gov/stateplans [https://perma.cc/D9SH-FP7Q].

49. *See Protecting America's Workers Act: Modernizing OSHA Penalties: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 111th Cong. 12 (2010) (statement of Hon. David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor), https://www.govinfo.gov/content/pkg/CHRG-111hhrg55302/pdf/CHRG-111hhrg55302.pdf (state government and local government injury and illness incident rates were twenty-one percent and seventy-nine percent higher than injury rates in the private sector).

50. *Id.*; *see also House Lawmakers Reintroduce Protecting America's Workers Act*, Safety & Health Mag. (Feb. 13, 2019), https://www.safetyandhealthmagazine.com/articles/18039-house-lawmakers-reintroduce-protecting-americas-workers-act [https://perma.cc/8WDA-VNTX].

51. 29 U.S.C. § 645(5)(a)(1) ("Each employer shall furnish to each of his *employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.") (emphasis added).

commerce."[52] This definition, similar to definitions of employee in many other federal statutes, gives little clear guidance on who the statute is intended to cover. The question of which workers qualify as employees and thus receive the panoply of statutory work protections is a controversial and important threshold question in most areas of employment and labor law.[53] Employers have an incentive to misclassify employees as independent contractors to avoid liability under protective legislation, including minimum wage laws, overtime requirements, and payroll taxes for Social Security and workers compensation.[54]

Though much scholarship and case law has focused on the "independent contractor" exemption to legislation intended to protect workers, misclassified independent contractors are not the only workers who are excluded from protective legislation. Congress has amended federal protective legislation to exempt certain classes of workers from coverage.[55] Even where Congress has not explicitly exempted certain classes of workers from coverage under protective legislation, courts have interpreted the term "employee" to exclude certain workers based on a determination that Congress could not have intended such coverage.

Most relevantly to this article, courts have repeatedly read a judicially created "prisoner exception" into statutes to exclude incarcerated workers from coverage by federal protective legislation.[56] Instead of applying the traditional "economic realities" test,[57] courts have fashioned new, often convoluted analyses specifically for determining the applicability of employment protections to incarcerated workers, utilizing inferred legislative intent, contract theory, and penological concepts

52. 29 U.S.C. § 652(5). The OSH Act, along with many other federal statutes, uses the "right-to-control test" to determine if an employee has been misclassified as an "independent contractor" by their employer. Kenneth Dau-Schmidt, *The Problem of "Misclassification," or How to Define Who Is an "Employee" Under Protective Legislation in the Information Age*, *in* The Cambridge Handbook of U.S. Labor Law for the Twenty-First Century 140, 143 (Richard Bales & Charlotte Garden eds., 2020).

53. Dau-Schmidt, *supra* note 52, at 141–42.

54. *Id.* at 146.

55. *See, e.g.*, 29 U.S.C. § 213 (amended in 2002) (exempting school teachers, outdoor salesmen, and babysitters from coverage under FLSA).

56. *See, e.g.*, Bennett v. Frank, 395 F.3d 409, 409 (7th Cir. 2005) ("[P]risoners are not employees of their prison . . . . Oddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA."); *see also* Vanskike v. Peters, 974 F.2d 806, 807 (7th Cir. 1992) (inferring congressional intent to exclude prisoners from FLSA coverage from the passage of other legislation, not from discussions of FLSA itself). The conclusion of the *Vanskike* court runs counter to Supreme Court precedent, where the Court took the position that all individuals within the general category of "employees," if not specifically excluded, are presumed to be covered by protective legislation. *See, e.g.*, Powell v. U.S. Cartridge Co., 339 U.S. 497, 516–17 (1950).

57. *See Vanskike*, 974 F.2d at 809 (conceding that an application of the economic reality test might result in a finding of employee status and choosing not to apply it); Hale v. Arizona, 993 F.2d 1387, 1393–94 (9th Cir. 1993) (stating that the economic reality test is inappropriate in the prison-work context).

to categorize incarcerated laborers as not-employees and remove them from the reach of protective legislation.[58]

A. The Fair Labor Standards Act

The "prisoner exception" has developed primarily in the context of Fair Labor Standards Act (FLSA) litigation. Most courts have denied incarcerated workers coverage under FLSA at the threshold inquiry by determining that they are not employees for purposes of the statute.[59] There is no statutory exemption of prisoners and no demonstrated congressional intent to exclude people working in prison from FLSA's protections, so courts have had to engage in more in-depth analysis of how employee status maps onto those working in prison.[60]

A handful of courts have determined prison workers can be classified as employees,[61] but only in certain work arrangements: when they are performing non-compulsory labor for private employers on work release in locations outside the prison.[62] When a prisoners' work is compelled, the prisoner is not covered by FLSA because he is "truly an involuntary servant to whom *no* compensation is actually owed."[63]

The vast majority of incarcerated worker claims for protection under FLSA fail because courts find that incarcerated workers are not part of the economy and cannot engage in true economic or market relationships with their employers.[64] Imprisonment "take[s] [workers]

58. *See* Zatz, *supra* note 16, at 885 (discussing how courts have excluded incarcerated laborers from FLSA protections in part by relying on contract theory and a "penological justification" for prison labor that obviates an employment relationship).

59. *See* Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 193–97 (2002) (detailing how courts have evaluated whether prison workers are employees for the purpose of coverage under the FLSA); *see also Vanskike*, 974 F.2d at 807 n.2 ("FLSA lists specific exceptions to its coverage of "employees" but does not list prisoners as an exception. This framework does suggest that all individuals within the general category of "employees," if not specifically excluded, come within the statute's scope. . . . The argument does not take us anywhere, however, because it assumes that prisoners plainly come within the meaning of the term 'employees.'").

60. *See, e.g.*, *Bennett*, 395 F.3d at 409 ("[P]risoners are not employees of their prison. . . . Oddly, this is so only because of presumed legislative intent and not because of anything in the actual text of the FLSA."); *Vanskike,* 974 F.2d at 807 (inferring Congressional intent from the passage of other legislation, not from discussions of FLSA itself). The conclusion of the *Vanskike* court runs counter to Supreme Court precedent, where the court has taken the position all individuals within the general category of "employees," if not specifically excluded, are presumed to be covered by protective legislation. *See Powell*, 339 U.S. at 516–17.

61. *See* Zatz, *supra* note 16, at 883 n.103 (collecting only seven cases in which courts found that there *could* be an employment relationship at the motion to dismiss or summary judgment stage; no reported cases have ever been decided for the incarcerated worker at the final judgment stage).

62. *See, e.g.*, Watson v. Graves, 909 F.2d 1549, 1556 (5th Cir. 1990); Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 12 (2d Cir. 1984); Henthorn v. Dep't of Navy, 29 F.3d 682, 686–87 (D.C. Cir. 1994).

63. *Henthorn*, 29 F.3d at 686 (emphasis in original).

64. *Id.*

out of the national economy" and places them in "a separate world of the prison."[65] When courts segregate prisons from the economy, it then becomes easy to presume that Congress intended to exclude those incarcerated from statutory coverage: since incarcerated workers are "removed from American industry," they "are not within the group that Congress sought to protect."[66]

Further, courts' reasoning in denying incarcerated workers protection under FLSA hinges on their characterization of the principal-agent relationship as fundamentally different than a traditional employment relationship. The analysis of whether incarcerated workers are employees by necessity turns both the "economic realities" and "right to control" tests upside down. As put by one court: "[T]he problematic point is that there is *too much* control to classify the relationship as one of employment."[67] As such, the economic reality test elucidates only one "boundary of the definition of 'employee'"; in the prison context, courts "are concerned with a different boundary."[68]

Courts further demarcate the separate world of the prison from the economic realm of employment by highlighting the lack of contractual freedom in the penal labor sphere.[69] As Professor Noah Zatz explains, the penal sphere's inherent "inhospitab[ility] to contract" consists of three components: there is no free contract when prison labor is involuntary; there cannot be a contract when there is no exchange between the parties; and any exchange that does exist lacks the "bargained-for exchange of labor for consideration."[70] Courts treat incarcerated workers' inability to engage in freely formed contractual relationships as obviating any possibility of workers engaging in economic or market relationships.[71]

Assumptions about the experiences of incarcerated workers characterize courts' reasoning and determination that FLSA should not be read to cover incarcerated laborers. When a court opines that FLSA's goal to ensure a minimum standard of living for workers is inapplicable because "prisoners' basic needs are met in prison, irrespective of their ability to pay,"[72] the court is defining basic needs narrowly and ignoring

65. *Vanskike,* 974 F.2d at 810, 812 & n.5; *see also* Zatz, *supra* note 16, at 885.

66. Alvarado Guevara v. INS, 902 F.2d 394, 396 (5th Cir. 1990) (discussing immigration detainees).

67. *Vanskike*, 974 F.2d at 810 (denying coverage to incarcerated workers under FLSA) (emphasis in original)

68. *Id.*

69. Zatz, *supra* note 16, at 885.

70. *Id.*

71. *Id.* at 882

72. *Vanskike*, 974 F.2d at 810–11; *see also* Hale v. Arizona, 993 F.2d 1387, 1396 (9th Cir. 1993) (holding that the problem of substandard living conditions does not apply to prisoners); Harker v. State Use Indus., 990 F.2d 131, 133 (4th Cir. 1993) (stating no need to protect the standard of living for prisoners because they do not have to purchase food, shelter, or clothing).

the reality of day-to-day life inside a prison. Prisons often contract with private vendors to provide daily meals to inmates; these private vendors often seek to cut costs by eliminating fresh fruits and vegetables and serving low quality food that does not meet individuals' nutritional needs.[73] Individuals can supplement the food the prison provides by buying food from the commissary; the average amount of money spent on commissary purchases far surpasses the typical amount a prisoner can earn from an in-prison job.[74] Prisons are often poorly heated and cooled, and individuals have to buy additional clothes at their own expense to stay warm, or fans to keep cool.[75] People incarcerated may have previously been the sole provider for family members who are left without support upon the person's incarceration.[76] Phone calls from prison—also handled by private contractors—are often prohibitively expensive, making staying in touch with family difficult for those with fewer outside resources.[77] Basic nutrition, warmth, support, and connection with family are necessary to a minimum standard of living, and courts' disregard of the true economic reality of incarceration is illustrative of a larger devaluation of those incarcerated as both workers and people.

B. Title VII

Though courts have consistently found that incarcerated workers are not employees for purposes of FLSA, some courts are open to the idea that Title VII non-discrimination protections should apply to incarcerated workers because of the different policy motivations behind each act.[78] Specifically, some courts have allowed for the possibility of Title

73. *See* David M. Reutter, *Prison Food and Commissary Services: A Recipe for Disaster,* Prison Legal News (Aug. 4, 2018), https://www.prisonlegalnews.org/news/2018/aug/4/prison-food-and-commissary-services-recipe-disaster; Kevin Bliss, *Summit Food Services Provides Inadequate Nutrition at Missouri Jail*, Prison Legal News (Oct. 7, 2019), https://www.prisonlegalnews.org/news/2019/oct/7/report-summit-food-services-provides-inadequate-nutrition-missouri-jail.

74. *See* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Pol'y Initiative (May 2018), https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/5QPM-CRKQ].

75. Roxanna Asgarian, *Why People Are Freezing in America's Prisons*, Vox (Dec. 13, 2019, 9:20 AM), https://www.vox.com/identities/2019/12/13/21012730/cold-prison-incarcerated-winter [https://perma.cc/J97P-YBXP]; Feldman, *supra* note 1.

76. *See* Lang, *supra* note 59, at 194–95.

77. Bonita Tenneriello & Elizabeth Matos, *The Telephone Is a Lifeline for Prison Families. And Calls Are Outrageously Expensive*, WBUR (Jan. 27, 2020), https://www.wbur.org/cognoscenti/2020/01/27/cost-of-phone-calls-prison-bonita-tenneriello-elizabeth-matos [https://perma.cc/E7WK-28L9].

78. Vanskike v. Peters, 974 F.2d 806, 810 n.5 (7th Cir. 1992) ("Prison is in many ways a society separate from the outside world. Discrimination, however, maintains the same invidious character within the world of the prison and outside it. Given the broad policies behind Title VII, there would appear to be no reason to withhold Title VII's protections from extending inside the prison walls. The policies underlying the FLSA, in contrast, are tied to the national economy, and those policies have limited application in the separate world of the prison.").

VII claims by incarcerated workers, but have limited coverage to only incarcerated individuals who engage in voluntary (rather than prison-mandated) work.[79]

Contrary to this slightly more prisoner-friendly approach, the Equal Employment Opportunity Commission (EEOC) has interpreted Title VII to preclude a finding of employee status for prisoners based on the idea that the "primary purpose" of the relationship between prisoner and prison is "incarceration, not employment."[80] Some courts have relied on the EEOC's "primary purpose" reasoning to establish a per se ban on Title VII coverage for incarcerated workers."[81] This "primary purpose" analysis presupposes a mutual exclusivity between being a prisoner and being an employee.[82] Under this reasoning, the indicia of employment relationship as considered under the traditional employee tests are irrelevant.[83]

As courts carved out a prisoner exception to FLSA, some courts have asserted that a prison's high level of control over its workers operates as a definitionally limiting factor, necessitating a unique analysis of employee status that diverges from the traditional coverage tests.[84] In contrast, at least one court in the Title VII context has focused on the fact that a prison's near-total ability to control "the means and manners of the worker's performance" may in-and-of-itself justify the application of statutory non-discrimination protections, even if other traditional indicia of an employment relationships are lacking.[85]

Courts' tests to determine when prisoners are employees for purposes of protective legislation are convoluted and contradictory. In most of these cases, courts have drawn lines between compelled and voluntary labor, and work inside the prison versus work for outside

79. Jackson Taylor Kirklin, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons,* 111 COLUM. L. REV. 1048, 1068 (2011); *see also, e.g.*, Castle v. Eurofresh, Inc., 731 F.3d 901, 907 (9th Cir. 2013).

80. EEOC Dec. No. 86-7 (1986), 1986 WL 38836, at *3. This initial guidance has since been interpreted by the EEOC to permit individuals employed on work release to be covered under Title VII. *See* EEOC, Informal Discussion Ltr. (Mar. 26, 2016), https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-315 [https://perma.cc/2ESD-SSBS]; *see also* Baker v. McNeil Island Corr. Ctr., 859 F.2d 124, 128 (9th Cir. 1988) (citing 1986 EEOC guidance).

81. Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991). One Ninth Circuit case has also utilized this "primary purpose" analysis, contravening clear circuit precedent. *See* Kirklin, *supra* note 79 at 1073–74 (discussing Wade v. Cal. Dep't of Corrs., 171 F. App'x 601 (9th Cir. 2006)).

82. This "primary purpose" analysis has also been operationalized in the FLSA context. *See, e.g.*, Wilks v. District of Columbia, 721 F. Supp. 1383, 1384 (D.D.C. 1989) ("[I]nmate labor belongs to the penal institution and inmates do not lose their primary status as inmates just because they perform work."); Burleson v. California, 83 F.3d 311, 314 (9th Cir. 1996) (holding that "fundamentally penological character" of prison work arrangements precludes the finding of an employment relationship).

83. *Meese,* 926 F.2d at 997.

84. *See supra* notes 68–69 and accompanying text.

85. *Baker*, 859 F.2d at 128.

entities, finding that voluntary workers—especially those in work release positions—most resemble "free employees," and thus are more likely to merit the benefits of protective employment legislation. These attempts to reason through the employee status of incarcerated workers have resulted in counterintuitive categorizations that leave out the workers most vulnerable to discrimination and abuses: those compelled to work within the prison walls.

IV. OSHA in Prisons

Incarcerated workers are regularly subject to coercive, unsafe, and unhealthy workplaces and have little recourse to raise complaints and improve their work conditions. This Part analyzes how health and safety regulations currently apply in the prison setting, identify concerning gaps in coverage, and argues that federal and state OSHA agencies should provide more substantial coverage to those working in prisons. The prisoner exception courts have carved out from other protective statutes should not be repeated in the health and safety context.

A. OSHA's Current Coverage of Prisoners

Though there is no statutory exemption for prisoners, OSHA has long interpreted its authorizing statute to exclude most incarcerated workers from its protections. This exclusion has been achieved primarily through agency interpretations of the term "employee." The question of whether and which incarcerated workers the OSH Act covers does not appear to have ever been considered in any depth by a court.[86] This subpart provides a descriptive account of how OSHA and its state analogues fail to include incarcerated workers in their purview and catalogues the deficiencies of prisons' existing health and safety oversight mechanisms.

First, OSHA has issued an agency directive interpreting the OSH Act to exclude federal prisoners from employee status.[87] In the same directive, OSHA advised that, although no prisoners are statutorily protected as "employees," incarcerated workers working in prison industry positions are entitled to OSHA's applicable protections, including the

86. A few courts have considered, and rejected, the idea that the Eighth Amendment requires complete compliance with OSHA safety regulations, without considering the applicability of OSHA to the prison setting. *See* Anderson v. Kernan, 2018 WL 9986805, at *1 (E.D. Cal. Aug. 10, 2018), *appeal dismissed*, No. 19-16062, 2019 WL 3916603 (9th Cir. June 27, 2019) ("In addition, nothing about the OSHA statutes cited by Plaintiff indicates that they can serve as the basis for a claim by a prisoner of a violation of his constitutional rights, and "complete compliance with the numerous OSHA regulations" has not been found to be required under the Eighth Amendment") (citing French v. Owens, 777 F.2d 1250, 1257 (7th Cir. 1985)).

87. OSHA Dir. FAP 01-00-002 (1995), https://www.osha.gov/enforcement/directives/fap-01-00-002 [https://perma.cc/A6T7-FVD8].

right to file hazard reports.[88] This directive suggests that the agency's jurisdiction categorically does not extend to the large number of workers who perform "prison housework," such as cooking, serving food, and janitorial duties. Complicating the coverage question, at least one court has found that OSHA safety standards in the federal prison industries context are advisory, rather than mandatory.[89]

Though federal prison industry jobs are ostensibly subject to OSHA supervision, the agency directive also sets significant limitations on OSHA's supervisory powers. For instance, OSHA must give prison administrators advance notice of any inspections and get approval from Board of Prison (BOP) officials before talking to any prisoners, measures which threaten to severely minimize the effectiveness of the inspections.[90] Additionally, prison industries workers facing reprisals by prison authorities for reporting safety violations are not covered by whistleblower protections but rather must submit administrative grievances complaining of staff retaliation directly to prison authorities, raising concerns about further retaliation.[91]

Second, OSHA has interpreted the statute's exclusion of state employers and employees from OSHA's jurisdiction to include state prisoners and detainees.[92] In its interpretation letter on this matter, OSHA appears to presume that incarcerated workers are covered under state health and safety regulations, to the extent that said regulations exist for state employees.[93] Since twenty-three states do not fill the state and local government gap in federal OSHA's coverage with their

88. *Id.* OSHA appears to have conducted some investigations into federal BOP prison industries. *See* Office of the Inspector General, *A Review of Federal Prison Industries' Electronic-Waste Recycling Program*, Dep't of Justice (Oct. 2010), https://oig.justice.gov/reports/BOP/o1010_appendix.pdf [https://perma.cc/67U8-Z8ML] (cataloguing a number of OSHA inspections conducted of BOP prison industry sites). Additionally, a search of the OSHA Establishment database returned five cases involving the federal prison industries. *See Establishment Search Results for "Federal Prison Industries,"* OSHA, https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=federal+prison+industries&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=12&startday=09&startyear=2015&endmonth=12&endday=09&endyear=2020 [https://perma.cc/5Z5W-EMW3].

89. *See* Bagola v. Kindt, 131 F.3d 632, 635 (7th Cir. 1997) ("While UNICOR industries are not required by law to comply with the Occupational Safety and Health Administration's (OSHA) safety standards, OSHA officials inspect federal prison industries and advise prison officials regarding perceived safety problems.").

90. OSHA Dir. FAP 01-00-002, *supra* note 87.

91. *Id.*

92. OSHA Std. Interp. No. 1975 (Dec. 16, 1992), https://www.osha.gov/laws-regs/standardinterpretations/1992-12-16-1 [https://perma.cc/EN34-ZHJ7]. OSHA has also issued a non-binding legal opinion stating that courts would likely find a non-profit private corporation that manages Florida's prison labor system to be a "political subdivision" of the state and thus exempted from OSHA. *See* Memorandum from Jaylynn K. Fortney, Regional Solicitor to Davis Layne, RA/OSHA (May 15, 1996), https://www.osha.gov/laws-regs/standardinterpretations/1996-07-18 [https://perma.cc/D9GA-YX5Z].

93. Memorandum from Jaylynn K. Fortney, *supra* note 92.

own health and safety plan,[94] state prisoners and detainees in those states are presumably also not covered by any state-issued health and safety standards. For states that do cover public sector workers, correctional officers and staff are covered,[95] but most state agencies do not appear to directly respond to complaints by incarcerated workers.[96] Some state agencies offer limited coverage to incarcerated workers in prison industry positions,[97] or cover only individuals on work release.[98]

Some states have devised intermediary regulatory mechanisms to channel incarcerated workers' health and safety complaints through the correctional facilities themselves. California's state agency (Cal/OSHA) has created a specific committee and procedure to review

94. *See State Plans Frequently Asked Questions*, OSHA, https://www.osha.gov/stateplans/faq [https://perma.cc/A876-JPYH].

95. *See, e.g.*, *Establishment Search Results for "correctional,"* OSHA, https://www.osha.gov/pls/imis/establishment.search?p_logger=1&establishment=correctional&State=all&officetype=all&Office=all&sitezip=&p_case=all&p_violations_exist=all&startmonth=12&startday=09&startyear=2015&endmonth=12&endday=09&endyear=2020 [https://perma.cc/8SDU-MURX] (collecting 116 OSHA incident records for correctional facilities). Almost all of the pending investigation notices by state agencies that reviewed through OSHA's establishment database noted that the workers were unionized, a status that would only be applicable to outside staff.

96. Arizona and Wyoming legislatively exempt incarcerated workers from coverage under state protective statutes, including health and safety regulation. *See* ARIZ. GEN. STAT. 23-615(B)(6) (2022) (work performed by inmates of custodial and penal institution is not employment); WYO. STAT. ANN. 27-3-105(b)(xii) (2022) (same).

No information was available online on how state health and safety agencies in the following states treat coverage under state OSHA for those incarcerated: Connecticut, Illinois, Maine, New Jersey, New York, Virgin Islands, Hawaii, Iowa, Kentucky, Maryland, Minnesota, Nevada, New Mexico, Puerto Rico, South Carolina, Tennessee, Utah, Vermont.

One state agency—Oregon—conditions its coverage of incarcerated workers on the extent of prisoners' coverage under a given city or states' workers compensation insurance policies. *See* Letter from Donald Arnold, Chief Counsel for Ore. Dep't of Justice to Barry Jones, Manager of Enforcement for Ore. Occupational Safety & Health Div. (Jan. 5, 2004), https://www.doj.state.or.us/wp-content/uploads/2017/06/op2004-1.pdf [https://perma.cc/TBF3-RCV7].

97. California, Michigan, and Washington's state agencies cover incarcerated workers when working in "prison industry" positions. *See* Cal. Occupational Safety & Health Reg. ch. 3.2, art. 9, § 344.42; Michigan Dep't of Corrs. Pol'y Dir. 04.03.101 (2016), https://www.michigan.gov/documents/corrections/04_03_101_Final_538901_7.pdf [https://perma.cc/RG5F-XYGW]; Wash. Indus. Safety & Health Act, Reg'l Dir. 1.40, 2-3 (2006), https://www.lni.wa.gov/dA/e7f0fac8e3/DD140.pdf [https://perma.cc/4PDC-W9MX] (incarcerated workers in industry positions are covered by WISHA but institutional support positions not covered).

98. North Carolina and Virginia's agencies cover incarcerated workers on work release only. *See* N.C. GEN. STAT. 148, art. 3, § 18-33.1 (2022) (Department of Labor shall exercise same supervision over conditions of employment for prisoners on work release as the department does over conditions of employment for free persons.); Va. Occupational Safety & Health, VOSH Program Dir. 02-009B (2014), https://townhall.virginia.gov/l/GetFile.cfm?File=C:%5CTownHall%5Cdocroot%5CGuidanceDocs%5C181%5CGDoc_DOLI_5491_v1.pdf [https://perma.cc/PT2C-LD7A] (VOSH only has jurisdiction over prisoners employed by public employers on work release).

complaints by incarcerated workers in prison industry jobs.[99] This procedure first requires the committee to issue a notice to the facility recommending changes and give the facility time to comply before the complaint is passed on to the relevant agency division for further action.[100] In addition, prisoner complaints can be dismissed outright if filed anonymously.[101] Other states, such as Indiana, ostensibly require correctional agencies to comply with federal and state health and safety regulations but provide no real enforcement mechanisms, placing full supervisory power in the hands of the state department of corrections, rather than with the state's health and safety agency.[102] This compliance arrangement is made even more toothless by exempting facilities from annual inspections by the state department of health if they are accredited by a nationally recognized accrediting organization.[103]

Other state, federal, and private prisons also point to accreditation by outside, private organizations as establishing that their correctional facilities comply with health and safety standards.[104] The primary accreditation agency is the American Correctional Association (ACA), which publishes authoritative standards for correctional operations and conducts triennial reaccreditations of state, federal, and

99. Cal. Occupational Safety & Health Reg. ch. 3.2, art. 9, § 344.42. Recently, detained workers incarcerated at a privatized immigration detention facility in California successfully utilized this process to obtain a Cal/OSHA investigation and fines against private prison-behemoth Geo Group for unsafe working conditions. In December 2022, Cal/OSHA issued six citations and assessed $104,500 in fines against Geo Group for unsafe working conditions for detained workers. *See Inspection Detail 1609228.015—The Geo Group, Inc. Dba Golden State Annex*, OSHA, https://www.osha.gov/ords/imis/establishment.inspection_detail?id=1609228.015 [https://perma.cc/994G-YWCG]; *see also* Farida Jhabvala Romero, *Immigrant Detainees Strike over Working Conditions, California Regulators Investigate,* KQED (Jun. 22, 2022), https://www.kqed.org/news/11917597/immigrant-detainees-strike-over-working-conditions-california-regulators-investigate [https://perma.cc/2LRN-67MG].

Michigan has established a similar procedure, in which incarcerated workers are covered under health and safety standards but complaints are submitted to and handled by an internal prison committee. *See* Mich. Dep't of Corrs. Pol'y Dir. 04.03.101.

100. Cal. Occupational Safety & Health Reg. ch. 3.2, art. 9, § 344.42.

101. *Id.*

102. *See, e.g.*, Ind. Code Ann. § 11-11-6-2 (West 2022) (no mechanism for prisoners to file complaints); *see also* French v. Owens, 538 F. Supp. 910, 921 (S.D. Ind. 1982), *affirming in part, vacating in part on other grounds*, 777 F.2d 1250 (7th Cir. 1985) (discussing this statute in the context of a challenge to a prison's double-celling practices).

103. Ind. Code Ann. § 11-11-6-2.

104. *See, e.g.*, N.Y. Assemb., Public Hearing on Healthcare in New York Correctional Facilities 74–75 (Oct. 30, 2017), https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_ddfafda03ce23b2164f9bfb016dd70f1.pdf&view=1 [https://perma.cc/D25F-X7SZ] (discussing ACA accreditation standards regarding healthcare); Letter from Elizabeth Warren to James A. Gondles Jr., Exec. Dir. of Am. Correctional Ass'n 2 (May 31, 2019), https://www.warren.senate.gov/imo/media/doc/2019-05-30%20Letter%20to%20ACA%20on%20Accreditation.pdf [https://perma.cc/2E8M-W9CT] (accreditation by ACA presented by private prisons as a stamp of legitimacy that they are complying with federal health and safety standards).

privately operated correctional and detention facilities.[105] For a facility to become accredited, it must comply (at the time of accreditation) with a certain percentage of ACA's mandatory and non-mandatory standards.[106] Though the ACA standards may overlap at times with federal OSHA standards, the ACA accreditation system is not a sufficient stopgap for the absence of coverage by state and federal agencies. The ACA accreditation system relies on self-evaluation, paper audits, and on-site inspections for which the facility is given three months' notice to prepare.[107] Critics of the accreditation system cite the deficiency of the accreditation process, the lack of more frequent compliance investigations, and the "perverse incentives" arising from ACA's attempts to serve as both an objective accreditor and the primary trade association for the corrections industry.[108]

In addition to these critiques of the ACA accreditation as a "rubber-stamping process" that fails to provide actual oversight and prevent unsafe conditions, the standards are toothless when it comes to enforcement. ACA's most powerful sanction is denying accreditation to a facility, an action it has not taken in over six years, even when government investigation has revealed serious health and safety issues at accredited facilities.[109] There is also no mechanism for those incarcerated to raise health and safety concerns and file complaints about non-compliance with the accreditation standards.

B. Incarcerated Workers Should Be Covered under the OSH Act

The statutory purpose of the OSH Act—to protect working men and women—is a broad mandate. Furthermore, the Supreme Court has held the Act should be "liberally construed to effectuate the congressional purpose" of ensuring safe working conditions and protecting public health.[110] Despite the absence of a statutory exemption for prisoners, OSHA and its state corollaries have interpreted the Act to not cover most prison workers.[111] Even for the small number of incarcerated workers covered by federal OSHA—federal workers in prison industry

105. *See History of Standards & Accreditation*, Am. Correctional Ass'n, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us [https://perma.cc/AL3Y-AP83].

106. *See What Are ACA's Standards*, Am. Correctional Ass'n, http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards_and_Accreditation/StandardsInfo_Home.aspx?New_ContentCollectionOrganizerCommon=1#New_ContentCollectionOrganizerCommon [https://perma.cc/2FNV-2KKT].

107. Letter from Elizabeth Warren, *supra* note 104, at 4–6.

108. *Id.* at 3, 4–6.

109. *Id.* at 6–8; Dan Spinelli, *Elizabeth Warren Grills Pentagon About "Toothless" Oversight of Military Prisons*, Mother Jones (June 10, 2020), https://www.motherjones.com/crime-justice/2020/06/elizabeth-warren-grills-pentagon-about-toothless-oversight-of-military-prisons [https://perma.cc/5T2X-9UTW].

110. Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980) (citing United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969)).

111. *See supra* Section III.A.

jobs—the enforcement regime is whittled down by restrictions on surprise inspections and a lack of protection from reprisals for submitting complaints. This significant gap in coverage under the OSH Act leaves some of the most vulnerable workers—often working in dangerous settings with little agency—at high risk for workplace accidents, illness, and death.

It is important to note that there is no other effective mechanism for incarcerated workers to raise concerns about dangerous workplace conditions and hold prison administrations accountable, which also means there is little incentive for prisons to take incarcerated worker safety seriously. The ACA accreditation standards that some states accept as a substitute for state health and safety inspections do not provide a mechanism for prisoners to raise complaints. Any grievances filed with the prison must go through layers of bureaucracy and can result in unlawful retaliation against a complainant by staff.[112] Prisoners are excluded from most state workers' compensation statutes,[113] and prison worker injuries are often not found to reach the level of a constitutional violation.[114] Finally, sovereign immunity and other doctrinal hurdles preclude most tort claims against prison administrators.[115]

Given this concerning gap in coverage, OSHA should interpret its authorizing statute more broadly to cover all incarcerated laborers, including those that work in institutional "prison housework" assignments. The regulatory interpretation exempting state prisoners should be reconsidered—or congressionally amended—in light of states' failure to fill in this large gap in coverage. OSHA standards should be mandatory in the prison context, with additional standards specific to prison work promulgated as necessary. Importantly, a mechanism should be designed so incarcerated workers can file complaints directly with an outside agency (rather than going through the prison administration), and an anti-retaliation provision should be introduced to protect workers from internal prison discipline for filing complaints.

This expansion in coverage could be achieved in part administratively: OSHA could issue new federal directives and interpretations that cover prison housework and make clear the mandatory nature of the regulations. States that already operate state OSHA plans could incorporate detainees and prisoners (including those performing prison

112. *See, e.g.*, Brunson v. Nichols, 975 F.3d 275, 276 (5th Cir. 2017) (prison retaliated against prisoner with disciplinary action when he filed complaint about safety concerns).

113. *See* Colleen Dougherty, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States*, 10 U. Pa. J. Bus. & Emp. L. 483, 502–07 (2008).

114. *Id.* at 491–501.

115. *See* Alexander Volokh, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 Akron L. Rev. 287, 299–311 (2013) (outlining the difficulties inherent in suing prisons).

housework) explicitly into their regulations.[116] Both federal and state agencies should devise grievance mechanisms to make it easy for incarcerated workers to file complaints and requests for inspections directly with an outside body, without prison oversight. In addition, members of Congress have repeatedly introduced the Protecting America's Workers Act which would expand OSHA coverage to state and municipal employees;[117] this bill could be amended to incorporate protections for workers incarcerated in state and local correctional facilities.

A possible counterargument is that prisons are already subject to health and safety regulation and supervision by departments of correction and the ACA and that the unique challenges correctional management support deference to this specialized regulatory regime. But allowing correctional departments to manage their own compliance with safety standards inhibits transparency and accountability and leaves incarcerated workers vulnerable to retaliation for raising complaints. In addition, the ACA's privatized accreditation scheme is insufficiently independent, as explained above.[118]

An explicit expansion of OSHA standards to incarcerated workers might prompt more extensive legal debate about whether incarcerated workers are "employees" for the purpose of the OSH Act. First, the rationale for carving out a prisoner exception under FLSA and Title VII is inconsistent with statutory language and purpose, creates concerning policy outcomes, and should be reconsidered.[119] However, even if one accepts the logic of the courts' exclusion of prisoners from coverage under FLSA and Title VII, this precedent does not translate well into the occupational health and safety context. The OSH Act's purpose—to ensure safe and healthful working conditions for all workers—should neither hinge on whether that labor is voluntary, nor on where the labor is performed.

To claim that safety regulations should not apply to penologically useful labor suggests that unsafe conditions, injuries, or death suffered by incarcerated workers should be regarded as part-and-parcel of an individual's punishment. Further, the mandatory nature of many prison labor programs counsels in favor of external regulation: if workers cannot opt out, prison employers exercise almost total control over their workers. This control is particularly concerning in the health and safety context, where prisoners are liable to be subject to disciplinary sanctions for refusing to work based on perceived safety risks.

116. This could be modeled after the CAL/OSHA provisions, ideally with a more streamlined review process and anti-retaliation provisions.

117. *See supra* note 50.

118. *See supra* notes 105–10 and accompanying text.

119. *See generally* Zatz, *supra* note 16; Kirklin, *supra* note 79; Lang, *supra* note 59; *see also* Fink, *supra* note 12 (discussing applicability of NLRA to incarcerated workers).

Finally, courts examining the reach of other protective legislation have been preoccupied with the distinction between work done inside the prison and work done outside the prison for private employers. This distinction rests on the idea that work done inside a prison, for the prison, should remain within the exclusive purview of the prison administration. This insulating rationale reflects remnants of the "hands-off" approach to prison administration that courts utilized through the 1960s.[120] The distinction between inside and outside work does not hold up in the health and safety context: an individual should enjoy safe working conditions, no matter whether they work in the prison kitchen, in a prison factory, or for an outside employer through work release. Indeed, prisoners who work for the prison directly are more likely to face disciplinary sanctions for refusing to work because of safety concerns, and these safety concerns are most fully obscured from any outside scrutiny by the insularity of the prison.

C. Ramifications of OSH Act Coverage for Prisoners' Rights Litigation

In addition to increasing independent oversight of dangerous workplaces, an increased OSHA presence in correctional facilities could assist prisoners in seeking damages or other judicial remedies for egregious health and safety violations. Though courts have been clear that a violation of an OSHA regulation in a prison factory does not establish a constitutional violation,[121] OSHA inspections and citations could still provide a useful support for Eighth Amendment deliberate indifference claims for incarcerated workers who experience sickness or injury based on poor working conditions.[122] Deliberate indifference claims under the Eighth Amendment require both an objective component (an objectively substantial risk of serious harm) and a subjective component (a demonstration that officials knew of and disregarded an excessive risk to inmate health or safety).[123] It is often extremely challenging for prisoners to adequately document the objective risk component and to show that prison officials knew of and disregarded the risk.[124] More regular OSHA inspections and possible citations would

120. *See* Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 Ala. L. Rev. 100, 104–05 (2020).

121. *See* Anderson v. Kernan, No. 118CV00021LJOBAMPC, 2018 WL 9986805, at *1 (E.D. Cal. Aug. 10, 2018), *appeal dismissed*, No. 19-16062, 2019 WL 3916603 (9th Cir. June 27, 2019) ("In addition, nothing about the OSHA statutes cited by Plaintiff indicates that they can serve as the basis for a claim by a prisoner of a violation of his constitutional rights, and "complete compliance with the numerous OSHA regulations" has not been found to be required under the Eighth Amendment." (citing French v. Owens, 777 F.2d 1250, 1257 (7th Cir. 1985)).

122. *See* Collins v. Derose, No. 3:CV-14-2425, 2016 WL 659104, at *3 n.2 (M.D. Pa. Feb. 17, 2016) (holding that OSHA does not create a private right of action but "if Plaintiff was to establish an OSHA violation it would be relevant to the merits of his Eighth Amendment claim.").

123. Farmer v. Brennan, 511 U.S. 825, 834, 837–38 (1994).

124. *See* Dougherty, *supra* note 113, at 491–501.

provide objective proof of excessive risk and would serve as a type of notice to prison officials to establish knowledge of risk for the subjective inquiry.

Conclusion

The current lack of remedies for incarcerated workers facing unsafe conditions or suffering from work-related injuries disincentivizes prisons from investing resources into maintaining safe working conditions. Expanding coverage under the OSH Act to include all workers inside correctional and detention facilities would allow incarcerated workers to file grievances with outside agencies, request inspections, and utilize the administrative appeals and mandamus procedures under the Act.

This expansion of coverage would not only provide access to important independent enforcement mechanisms, but would also signal to prison administrators that the government takes prisoner health and safety seriously. This signaling, and the increased risk of fines and litigation, would, it is hoped, have a deterrent effect and improve prisons' general accountability for the health and safety of those they incarcerate, affirming the inherent dignity, value, and humanity of incarcerated workers.

Overlooked and Undervalued: Ex-Offenders in the Employment Market

Hannah E. Wissler*

Introduction

Let's think about a hypothetical for a moment: Joe is a thirty-five-year-old man with a finance degree looking for work. Unfortunately, Joe is having trouble finding employment because he has a felony conviction. When Joe was twenty-eight, he accidentally hit and killed a small child after the child ran out from behind a truck and into the street. Joe pled guilty to involuntary manslaughter and was sentenced to three years in prison. Joe has been out of custody for almost five years now, six months of which has been completely free of supervision. During his time on supervision, Joe was never cited for a parole violation. Although this conviction is the only mark on Joe's record, he has found it difficult to find gainful employment. Based on an amalgamation of real-life situations,[1] Joe's story will be used to show the hurdles that ex-offenders face when looking for employment.

The stark reality is that individuals with criminal records are disproportionately rejected from the employment market due to the lack of state-level legal protections preventing employers from discriminating against applicants based on their prior criminal convictions. The stigma surrounding a criminal conviction leads to disproportionate unemployment rates for those with criminal convictions, especially applicants of color. Even with common legislation in place, like the so-called "Ban-the-Box" legislation, research shows that when minority applicants do not disclose their conviction status, they are being rejected at least in part because of race-based assumptions about

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1. Charisse Jones, *"You Just Want to. . . Have a Chance": Ex-Offenders Struggle to Find Jobs Amid COVID-19*, USA Today (Feb. 3, 2021, 3:53 PM), https://www.usatoday.com/story/money/2021/02/03/unemployment-ex-offenders-among-many-struggling-find-work/6656724002 [perma.cc/35E8-NHMV]; Les Lovoy, *Life After Prison: Ex-Felons Often Struggle to Find a Job*, WBHM (June 24, 2014), https://wbhm.org/2014/life-after-prison-ex-felons-often-struggle-to-find-a-job [perma.cc/6MHS-M6Z8].

their criminal conviction status.[2] Ex-offenders are faced with numerous obstacles during their employment search, and state legislatures are contributing to the hardships that these individuals face through strict licensing limitations, ineffective Ban-the-Box statutes, and their failure to protect ex-offenders from discrimination in the employment market. This lack of protection results in higher recidivism rates, lower economic production, both individually and nationally, and has long-lasting effects. And this is unfortunate because hiring ex-offenders not only benefits those with convictions, but employers and society as a whole. Employers that hire ex-offenders actually experience less turnover in their staff and are able to take advantage of tax credits for hiring qualified ex-offenders.[3]

Meanwhile, state legislatures have been experimenting with different statutory solutions to the problems ex-offenders experience in the employment market. The most popular legislative solution is Ban-the-Box, which limits an employer's ability to ask about an applicant's conviction or arrest history during the hiring process. States have also begun to experiment with automatic record clearing laws and training judges and prosecutors about the collateral consequences that accompany a criminal conviction, presumably to shape solutions in individual cases to avoid convictions if possible. Some states have gone so far as to explicitly prohibit discrimination against ex-offenders, treating them as a protected class, similar to those classes protected by Title VII of the Civil Rights Act of 1964.[4] Several of these solutions have some promise, but to best encourage change in the employment market and improve the treatment of ex-offenders after release, state legislatures should pass "Fair Chance Laws" to mitigate the negative effects of a criminal conviction. Fair Chance Laws delay when an employer can ask about convictions until later in the hiring process, require employers to consider the time passed since a conviction, whether the offense is relevant to the job position, and evidence that the applicant is rehabilitated.[5] They also adopt standards to strengthen the reliability of background checks.[6] Because of their comprehensive design, these laws could also mitigate the adverse effects of Ban-the-Box legislation and other discriminatory practices in the employment market. This paper will discuss the prominence and scope of the problems faced by those with criminal records, the relevant state practices in place that perpetuate these problems, the policies that states are implementing to

2. *See infra* notes 37–45.

3. *See infra* notes 170–74.

4. *See infra* notes 146–56.

5. Nat'l Emp. L. Pol'y, Fact Sheet: "Ban the Box" Is a Fair Chance for Workers with Records 2 (2017), https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf [https://perma.cc/D8XB-DTDM].

6. *Id.*

attempt to address these issues, and which practices are most likely to help those with convictions who are trying to enter the employment market.

I. Background

A. The Problem

Based on data collected in 2018, the incarceration rate in the United States has increased almost threefold since 1980.[7] The current incarceration rate is about 698 per 100,000, or slightly less than one percent of the population.[8] At any given time, there are about 6.9 million people in jail, prison, or under supervision in the United States.[9] Even though the incarceration rate has fallen slightly since 2005,[10] about 600,000 individuals are released from state and federal prisons each year.[11] In total, about seventy million people living in the United States have criminal records.[12]

The employability of these seventy million people is greatly affected by their criminal records. According to research, individuals with criminal records are fifty percent less likely to receive a callback from a potential employer.[13] When surveyed, about sixty percent of employers said they "probably wouldn't" or "definitely wouldn't" hire someone

7. *Is the Criminal Justice System Working? Is the Country Getting Safer?*, USA Facts, https://usafacts.org/state-of-the-union/crime [https://perma.cc/PJN2-B296].

8. Peter Wagner & Wanda Bertram, *"What Percent of the U.S. Is Incarcerated?" (And Other Ways to Measure Mass Incarceration)*, Prison Pol'y Initiative (Jan. 16, 2020), https://www.prisionpolicy.org/blog/2020/01/16/percent-incarcerated [https://perma.cc/NZA2-BVGH].

9. *Incarceration & Reentry*, U.S. Dep't of Health & Hum. Servs., https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0 [https://perma.cc/3AXE-QYJG].

10. Steven Raphael, *The Employment Prospects of Ex-Offenders*, Focus, Winter 2007–08, at 21, 21.

11. *Incarceration & Reentry*, *supra* note 9.

12. Michael Smallberg, *"Ban the Box" on Criminal History Records: BGOV Closer Look*, Bloomberg L. (Dec. 18, 2019, 1:26 PM), https://news.bloomberglaw.com/daily-labor-report/ban-the-box-on-criminal-history-records-bgov-closer-look [https://perma.cc/UW6R-MQSC]; Sheena Meade & Jabari Paul, Opinion, *Americans with Criminal Records Will Be Left out of Recovery If We Don't Fix these Policies*, CNN (Oct. 9, 2020, 11:23 AM EDT), https://www.cnn.com /2020/10/09/perspectives/criminal-records-covid-economic-recovery/index.html [https://perma.cc/YQ3E-QR2B].

13. Lucius Couloute & Daniel Kopf, Prison Pol'y Initiative, Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People (2018), https://www.prisonpolicy.org/reports/outofwork.html [https://perma.cc/C8PN-9WMF]; Christina Stacy & Mychal Cohen, Urban Inst., Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations 1, 3 (2017), https://urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination.pdf [https://perma.cc/8X7H-YDKN]; Andrew Elmore, *Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring*, 64 DePaul L. Rev. 991, 1005 (2015); Raphael, *supra* note 10; Adam Looney & Nicholas Turner, Urban Inst., Work and Opportunity Before and After Incarceration 1, 4 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/8RS4-Q9LZ].

with a criminal record.[14] These discriminatory practices in hiring have resulted in an unemployment rate for ex-offenders that is almost five times higher than that of the general population.[15] The unemployment rate for individuals with criminal records is about twenty-seven percent, compared to just over five percent for the general population.[16] Over sixty percent of people who have previously been incarcerated are still unemployed a year after being released.[17] Among thirty-year-old men who are not working, thirty-three percent are in jail, are in prison, or have a criminal record.[18] Additionally, researchers have been able to separate the effects of having a criminal record from other factors that have been shown to affect someone's chances of being hired, like race and gender, which suggests that the applicant's criminal record acts as an independent reason for denial.[19]

Despite what might be assumed, individuals with criminal records are looking for jobs at rates higher than the general population. Among twenty-five to forty-four-year-olds, over ninety-three percent of those with criminal records are employed or actively looking for employment, compared to almost eighty-four percent of those in the general population.[20] Additionally, the number of open jobs has been trending upward for the last eight years, and predictions show a continued upward trend through 2022.[21] As the number of individuals being released from custody continues to increase, the number of individuals in search of jobs will also increase to fill the growing number of jobs available. These facts show that the disproportionate unemployment rate is not caused by job availability or ex-offenders being unwilling to work; they are just being systematically excluded from the employment market.

B. Why Does This Problem Matter?

Remedying this inequity will have benefits, like lowering offender recidivism rates, giving a greater number of people the ability to contribute to the economy, and preventing the problem from worsening

14. Raphael, *supra* note 10.

15. Couloute & Kopf, *supra* note 13.

16. *Id.*

17. Lottie Joiner & Nat'l J., *How Families Pay the Never-Ending Price of a Criminal Record,* Atlantic (Dec. 15, 2015), https://www.theatlantic.com/politics/archive/2015/12/how-families-pay-the-never-ending-price-of-a-criminal-record/433641 [https://perma.cc/5T2E-YYNG]; Am. Bar Ass'n Crim. Just. Section, Collateral Consequences of Criminal Convictions: Judicial Bench Book, The National Inventory of Collateral Consequences of Criminal Confictions 2, 4–5 (2018), https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf [https://perma.cc/Z82R-BVMS].

18. Adam Looney & Nicholas Turner, Brookings Inst., Work and Opportunity Before and After Incarceration 1, 2 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/8RS4-Q9LZ].

19. Couloute & Kopf, *supra* note 13.

20. *Id*.

21. *United States Job Openings: 2000-2020 Data*, Trading Econs., https://tradingeconomics.com [https://perma.cc/3LCD-DGKT].

with the increased availability of criminal record information through technological advances.

Recidivism refers to the likelihood or tendency to relapse back into a particular behavior, especially criminal activity.[22] Numerous studies have found a negative correlation between employment and recidivism.[23] While recidivism rates can be linked to multiple factors,[24] the lack of stable employment is a sizeable factor connected to an increase in recidivism.[25] Giving ex-offenders access to employment has been found to have a positive effect on recidivism rates and the long-term success of those individuals.[26] One theory for this effect is that the lack of financial resources due to unemployment increases the likelihood that the individual will turn back to crime because they are desperate and perceive crime to be a necessity.[27] Employment provides greater economic stability, which lessens an offender's desperation and perception that crime is necessary to make a living.[28] Further, research has found that having only a short-term job does not have a positive effect on recidivism rates; only employment longer than six months has been found to impact an offender's chances.[29] For example, a study done on a program called Exodus Transitional Community, an organization in East Harlem, New York, that offers employment training and support for ex-offenders, found that seventy-eight percent of the participants were able to secure employment at the end of the program.[30] Even more impressive, the recidivism rate of those that finished the program was only four percent.[31] This low rate becomes even more impressive when it is compared to the national recidivism rate, which is sixty-eight percent within three years of release, seventy-nine percent within six years, and eighty-three percent within nine years.[32] Similar success has been seen at Concordance Academy in St. Louis, Missouri.[33] Concordance

22. *Recidivism*, Black's L. Dictionary (11th ed. 2011).

23. Adiah Price-Tucker, Amy Zhou, Andrew Charroux, Choetsow Tenzin, Emma Robertson, Hoda Abdalla, Jeffrey Gu, Jordan Barton, Maria Keselj, Owen Bernstein, Paul Alexis, Sethu Odayappan & Tabitha Escalante, Harv. Univ. Inst. of Pol., Successful Reentry: A Community-Level Analysis 1, 8–9 (2019), https://iop.harvard.edu/sites/default/files/sources/program/IOP_Policy_Program_2019_Reentry_Policy.pdf [perma.cc/P34D-5L7R]; *Recidivism: The Ultimate Guide*, Prison Insight (2021), https://prisoninsight.com/recidivism-the-ultimate-guide [perma.cc/E9VX-H5W3]; Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*, 85 Temp. L. Rev. 921, 921–22 (2013).

24. *Recidivism: The Ultimate Guide*, *supra* note 23.

25. *Id.*

26. Price-Tucker et al., *supra* note 23, at 1, 4.

27. *Recidivism: The Ultimate Guide*, *supra* note 23.

28. Price-Tucker et al., *supra* note 23, at 10.

29. *Id.* at 9.

30. *Id.*

31. *Id.*

32. *Recidivism: The Ultimate Guide*, *supra* note 23.

33. Bureau of Justice Assistance, *Concordance Academy of Leadership—Wholistic Substance Use Treatment Service for Justice-Involved Adults Pre- and Post-Release*,

Academy provides a whole host of services to its participants, including mental health treatment, substance use training, education and job readiness training, and more, all with the goal of placing participants in full time employment and reducing recidivism in St. Louis.[34] Since its inception in 2015, Concordance boasts that recidivism rates among its participants have been reduced by fifty-six percent.[35] Studies have found that other factors, such as education level, the job local market, and the community, impact someone's ability to obtain gainful employment after release, which, in turn, directly impacts recidivism.[36] A study done in Honolulu, Hawaii, found a "sharp reduction" in recidivism, which showed that alleviating some of the social stigmas associated with a criminal record successfully reduced the chance of an ex-offender recidivating.[37]

C. The Exaggerated Impact on Minority Applicants

Although Ban-the-Box laws have been viewed as a good way to increase employment of Black applicants who may be more likely than white applicants to have criminal records because of racial disparities in the criminal justice system, research suggests that policies like Ban-the-Box may increase racial discrimination against minority applicants.[38] There is a large disparity in the employment rates between white men and men of other races, which is worsened when Ban-the-Box policies are implemented.[39] While the unemployment rate of white men between sixteen and nineteen years old was only 15.6% in the fourth quarter of 2016, the unemployment rate was 29.4% for black men and 22.7% for Hispanic and Latino men in the same age group.[40] Unfortunately, this disparity does not disappear as the sample ages. For white men between twenty and twenty-four, the unemployment rate was 7.9%, compared to 15.3% for Black men in the same age range.[41] Studies have shown that Ban-the-Box laws actually make minority applicants less likely to be hired.[42] Researchers speculate that this decrease in hiring

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Bureau Just. Assistance (Dec. 7, 2021), https://bja.ojp.gov/funding/awards/15pbja-21-gg-04046-scax [https://perma.cc/9QPR-WQ6N].

34. *Our Re-Entry Model*, Concordance, https://concordance.org/our-program [https://perma.cc/M79Y-NCUW].

35. *Id.*

36. Price-Tucker et al., *supra* note 23, at 9–10.

37. Stacy & Cohen, *supra* note 13, at 14.

38. *Id.* at 12–13.

39. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 1 (U. Mich. L. & Econ. Res. Paper Series, June 2016).

40. Stacy & Cohen, *supra* note 13, at 4.

41. *Id.*

42. *See* Jennifer Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. Lab. Econ. 321, 321 (2020); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991, 997–98 (2004).

is a result of potential employers "guessing" who the ex-offenders are, based, at least in part, on racial stereotypes.[43] In a study done by Marianne Bertrand and Sendhill Mullainathan, fictitious applicants were given "distinctly black and distinctly white" names, which resulted in a discrepancy in the callback rates.[44] In that study, white-sounding applicants only had to send out ten applications to receive a call back, but black-sounding applicants had to send out fifteen applications to receive the same result.[45] A study done by Amanda Agan and Sonja Starr found that white-sounding applicants were forty-seven percent more likely than minority applicants to receive a callback after Ban-the-Box legislation was implemented, compared to only seven percent before the policy.[46] Agan and Starr's study concluded that Ban-the-Box policies "encourage racial discrimination" in employment and hiring.[47] This type of racial discrimination in the hiring process is directly contrary to the main goal of Ban-the-Box policies, which is to provide a more even playing field for those with criminal records trying to find employment.[48]

D. Economic Consequences

Individuals with criminal records are severely hindered from contributing to the economy long after they are released. Because employers are less likely to hire people with criminal records, those individuals are frequently unable to successfully reenter the job market, creating a significant wealth gap. According to research by Stephen Raphael, professor of public policy at the University of California, Berkeley, the employment rate of twenty-three-year-olds does not recover to pre-incarceration rates until five years after release.[49] Additionally, those that had been incarcerated before turning twenty-three years old earned approximately one-and-a-half times less than those who had not been incarcerated.[50] This results in ex-offenders losing on average approximately $179,000 in wages by the time they are forty-eight years old.[51] In addition, researchers estimate that the economy lost between 1.5 and 1.9 million workers in 2008 because employers were unwilling to hire applicants with criminal records.[52] Another study estimates that those who have been incarcerated or convicted of a crime

43. Doleac & Hansen, *supra* note 42, at 323.
44. Bertrand & Mullainathan, *supra* note 42, at 992.
45. *Id.* at 998.
46. Agan & Starr, *supra* note 39.
47. *Id.* at 33.
48. Stacy & Cohen, *supra* note 13, at 10.
49. Raphael, *supra* note 10, at 23.
50. *Id.*
51. Am. Bar Ass'n Crim. Just. Section, *supra* note 17, at 2, 5.
52. John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, 14 WorkingUSA 1, 1 (2010); *see also* Nick Sibilla, Inst. for Justice Barred from Work: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders (2020), https://ij.org /wp-content

lose approximately $372.3 billion per year as a group.[53] There is a significant gap in earnings between those that have been convicted of a crime and spent time in prison and those who did not. And individuals who have spent time in prison lost about $55.2 billion more per year compared to those that have a conviction but didn't serve any prison time.[54] This amounts to a decrease of over fifty-one percent in earnings after someone has spent time in prison.[55] The effects are felt even more harshly in Black and Latino communities.[56] Whites with conviction records suffered an average lifetime earnings loss of $267,000, while Blacks suffered an average loss of $358,900, and Latinos suffered an average loss of $511,500 over their lifetimes.[57] Researchers have found these inequities to be persistent throughout the lives of ex-offenders, which is one of the factors contributing to inter-generational poverty and inequality.[58]

Almost fifty percent of children in the United States have at least one parent with a criminal record,[59] which can lead to disruptions in the child's education and housing stability and have a long-term negative impact on the child's success.[60] Studies have found that growing up in poverty increases the chance that a child will experience poverty as an adult.[61] For children that experienced poverty for eight to fourteen years of their childhood, forty-six percent of them were poor at twenty years old, and forty percent were poor at twenty-five.[62] Those rates are especially shocking considering that only five percent of adults that never experienced poverty as a child were poor at twenty and twenty-five years old.[63] Additionally, children that grow up in poverty are less likely to finish high school and go on to obtain a postsecondary education.[64] Evidence suggests that education reduces the likelihood of criminal activity, but debate exists about whether that correlation is

/uploads/2020/08/Barred-from-Working-August-2020-Update.pdf [https://perma.cc/JN8V-7C2D].

53. Andrea Cipriano, *Criminal Justice System Deepens Economic Inequality: Study,* Crime Rep. (Sept. 16, 2020), https://thecrimereport.org/2020/09/16/criminal-justice-system-deepens-economic-inequality-study [https://perma.cc/4H4C-28P4].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Sheena Meade & Jabari Paul, *Americans with Criminal Records Will Be Left out of Recovery If We Don't Fix These Policies*, CNN Bus. (Oct. 9, 2020, 11:23 AM), https://www.cnn.com/2020/10/09/perspectives/criminal-records-covid-economic-recovery/index.html [https://perma.cc/XJ7P-LDGS].

60. Joiner & Nat'l J., *supra* note 17; *see also* Meade & Paul, *supra* note 59.

61. Priyanka Boghani, *How Poverty Can Follow Children into Adulthood*, PBS (Nov. 22, 2017), https://www.pbs.org/wgbh/frontline/article/how-poverty-can-follow-children-into-adulthood [https://perma.cc/B22S-PBD7].

62. *Id.*

63. *Id.*

64. *Id.*

a result of the other benefits of education, like higher wages or less time to commit crime.[65] The apparent connection between poverty and education and between education and crime suggests an indirect correlation between poverty and crime rates. The research indicates that children that grow up in poverty are less likely to complete high school or postsecondary education and as a result, may be more likely to be incarcerated.[66] As a result of their incarceration, and lack of education, they will likely have a much harder time finding gainful employment after release.[67]

E. The Consequences of Technological Advances

As technology continues to develop and improve, the problems that previously incarcerated individuals face will persist, if not worsen.[68] Studies have found that labor market outcomes have gotten worse for individuals with criminal histories since records have become publicly available on the Internet.[69] As of 2018, eighty-seven percent of employers conduct background checks at some point in their hiring process.[70] When looking at clerical, sales, or service positions, ninety percent of employers conduct a background check before hiring a candidate.[71] Besides the number of background checks increasing, private companies, like ClearChecks and Identogo, have made a business out of collecting, aggregating, and forwarding personal information, including criminal records, about candidates to potential employers.[72] Some of these screening companies claim to have access to ninety million criminal records.[73] One company claimed to have done over 3.3 million background checks between 2002 and 2015, almost all of which included a criminal history check.[74] As criminal record information becomes more public, and screening companies continue to profit from employer background checks, the negative effects on ex-offenders will only increase.

II. Why Are Ex-Offenders Not Being Hired?

A. The Stigma Associated with Criminal Convictions

One of the largest reasons employers shy away from hiring applicants with a history of convictions stems from social stigma. Stigma is "the general labeling, stereotyping, separation, status loss, and discrimination"

65. *See generally* Lance Lochner, *Education and Crime, in* The Economics of Education 109 (Steve Bradley & Colin Green eds., 2d ed. 2020).
66. *Id.*; *see also* Boghani, *supra* note 61.
67. *See supra* notes 13–19
68. Elmore, *supra* note 13, at 1003.
69. Stacy & Cohen, *supra* note 13, at 3.
70. Am. Bar Ass'n Crim. Just. Inst., *supra* note 17, at 4.
71. Elmore, *supra* note 13, at 1002.
72. ClearChecks, ClearChecks.com [https://perma.cc/QQP2-SQVA]; Identogo, identogo.com [https://perma.cc/GQ79-669E].
73. Elmore, *supra* note 13, at 1004.
74. *Id.*

that comes along with having a criminal record.[75] According to Dallas Augustine's research at the University of California-Irvine, the negative characteristics that are typically associated with a criminal record tend to be very broad, which leads employers to associate those characteristics with all ex-offenders, even if the characteristic is not applicable to a particular person or situation.[76] A study done at University of California-Los Angeles examined whether employers were more influenced by the reputational risk that came with hiring an ex-offender, or if their aversion was driven more by stigmas.[77] Their first main finding was that employers were less likely to hire someone with a drug conviction than someone who had posted on social media about drug use.[78] This finding suggests that employers were not worried about the reputational risk of hiring someone that may use drugs. Rather, it suggests that employers were influenced more by the conviction itself and the accompanying stigma.[79] The study also found that employers were less likely to hire those with criminal convictions to positions in customer service or office work.[80] The team's second test looked at employers' expectations for future employees based on whether they had a conviction or just showed drug activity on social media. Similar to their first finding, the researchers found that the employers expected more negative outcomes and behaviors from those with convictions, which suggests that criminal convictions are more highly associated with negative expectations than just engaging in an illegal activity on social media.[81] Finally, the researchers found that the fear of a negligent hiring lawsuit did not explain the aversion to hiring those with criminal convictions because an employer is less likely to hire an ex-offender in both customer service and office positions, which present different levels of risk to negligent hiring suits.[82] After their tests, the researchers concluded that the stigma surrounding a criminal conviction plays an important role in an employer's decision or willingness to hire someone with a criminal conviction.[83]

75. Dallas Augustine, Noah Zatz & Naomi Sugie, UCLA Inst. for Rsch. on Lab. & Emp., Why Do Employers Discriminate Against People with Records? Stigma and the Case for Ban the Box 3 (2020), https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf [https://perma.cc/N83V-892J].

76. *Id.*

77. *Id.* at 4.

78. *Id.* at 5.

79. *Id.*

80. *Id.* at 6.

81. *Id.* at 5.

82. *Id.* at 7. Augustine, Zatz, and Sugie explain that if employers were worried about negligent hiring liability, they would discriminate against applicants with criminal histories at different rates depending on the position. Since customer service workers have more contact with the public, employees in those positions present a higher risk to the employer.

83. *Id.*

B. The Risk of Negligent Hiring Liability

So what role does the possibility of a negligent hiring lawsuit play in an employer's willingness to hire an ex-offender? In a tort action for negligent hiring, an individual seeks to place legal liability upon an employer for the actions of an employee.[84] An employer can be held liable if the employer "knew or should have known of the employee's potential risk to cause harm, or if the risk would have been discovered by a reasonable investigation."[85] When a plaintiff files a negligent hiring suit, the employee's criminal history becomes relevant evidence for the purpose of proving that the employer did not exercise proper care in hiring the ex-offender.[86] This possibility exposes the employer to the risk of being required to pay punitive damages, which could cost the employer millions of dollars.[87] With the possible legal liability and the stigma surrounding those with prior convictions, it is no wonder why ex-offenders struggle to find employment. Ironically, however, employers can be held liable for negligent hiring for anything that should have alerted them to an elevated risk of wrongdoing by an employee, not just criminal records.[88]

III. Hurdles to the Employment of Ex-Offenders

Ex-offenders face many obstacles when they are attempting to find employment after release. As if the stigma alone wasn't enough of a hurdle for these individuals, many states have placed legal barriers between an ex-offender and employment opportunities. These legal barriers include the lack of, and the resulting negative effects of, Ban-the-Box statutes, licensing restrictions that prevent ex-offenders from becoming licensed in certain fields, and a lack of statutory protections against discrimination based on a prior criminal conviction.

A. Ban-the-Box

Ban-the-Box is a movement pushing for the removal of criminal history questions on job applications, as a way to encourage employers to look at an applicant's qualifications without the stigma that accompanies having a criminal record.[89] Ban-the-Box statutes are aimed at

84. Margaret M. Clark, *How to Address Negligent Hiring Concerns: Exercise Due Diligence to Avoid Negligent Hiring Nightmares*, SHRM (Feb. 27, 2019), https://shrm.org/hr-today/news/hr-magazine/spring2019/pages/how-to-address-negligent-hiring-concerns.aspx [https://perma.cc/XU5Y-G6BE].

85. *Id.*

86. Mark Minuti, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 Del. J. Corp. L. 501, 507 (1988).

87. *See* Corona v. Orange Unified Sch. District, 2020 LexisNexis 198; Willis v. Short, 17 Ky. Trial Ct. Rev. 8 (2013).

88. Augustine, Zatz & Sugie et al., *supra* note 75.

89. Elizabeth McLean, *Ban the Box*, GoodHire (Aug. 28, 2020), https://goodhire.com/blog/ban-the-box [perma.cc/77VP-D8F5].

preventing discrimination and increasing employment opportunities for ex-offenders after release.[90] The movement began after state and local legislatures were unsatisfied with the protections for ex-offenders offered under the Civil Rights Act of 1964.[91] The first statute was passed in Hawaii in 1998, and the statute limited an employer's ability to inquire into applicants' criminal histories.[92] Since then, thirty-five other states, and many more cities, have implemented some type of Ban-the-Box legislation.[93] As this movement gained popularity among state legislatures, changes were made at the federal level, too. In 2016, under the direction of President Obama, the Office of Personnel Management proposed and finalized a policy prohibiting federal agencies from inquiring into applicants' criminal backgrounds until a conditional offer had been made.[94] While this movement may seem very beneficial on its face, there are quite a few problems with the statutes states have enacted across the country, including very narrow protections, if any at all, and statistical discrimination that results.

To get an idea of how state statutes compare to each other, I compiled a number of articles, allocated points to state statutes based on the language contained in the statute, and placed statutes into one of three categories:[95] highly protective (9+), moderately protective (4–8), and low-protective states (<4). Points were allocated as follows:

90. Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current Ban the Box Legislation*, 85 Temp. L. Rev. 921, 924 (2013).

91. *Id.*

92. McLean, *supra* note 89; James McWilliams, *How Ban the Box Can Lead to Even More Racial Discrimination by Employers*, Pac. Standard (Mar. 11, 2019), https://psmag.com/social-justice/how-ban-the-box-can-lead-to-even-more-racial-discrimination-by-employers.

93. McLean, *supra* note 89.

94. Angela Hanks, *Ban the Box and Beyond: Ensuring Individuals with a Criminal Record Have Access to the Labor Market*, Ctr. for Am. Progress (July 27, 2017, 9:03 AM), https://www.americanprogress.org/issues/economy/reports/2017/07/27/436756/ban-box-beyond [https://perma.cc/3A7E-AEHQ].

95. McLean, *supra* note 89; *List of States and Municipalities with Ban the Box Laws*, AccuSource, https://accusource-online.com/list-of-states-and-municipalities-with-ban-the-box-laws [https://perma.cc/TC9G-H8M2].

Restrictions on the Timing of Inquiries: No inquiries...	**Applicable Employers**
• On initial application (1 pt) • Until after initial interview offer (2 pts) • Before initial interview (3 pts) • Until after initial interview (4 pts) • Until after conditional offer if there is no interview (5 pts) • Until applicant has been deemed qualified (6 pts) • Until a conditional offer after an interview (7 pts) • Never w/ exceptions (8 pts) • Never (10 pts)	• Less than all public (1 pt) • Less than all private (1 pt) • Less than all (no distinction) (2 pts) • All public (2 pts) • All private (2 pts) • All employers (4 pts)
Other Protections	**Exclusions/Exceptions**
• Criminal record is not an automatic bar to an interview (1 pt) • Criminal record is not an automatic bar to employment (2 pts) • No questions about certain crimes ever (1 pt/crime)	• Employers may ask if the crime is an automatic bar to employment (-2 pts) • "Unless permitted by state law" (-3 pts) • Specific fields are excluded from the ban (-1 pt/field)

In the "highly protective" category, there were eight states, and Hawaii (eleven points) was the highest ranked state. Hawaii's statute is the only one that applies to all employers and prohibits criminal history questions until after a conditional offer is made.[96] Of the states that ranked in the highest category, five out of eight states' statutes applied to all employers in the state. These eight states consistently showed prohibitions against asking about criminal records until after the initial interview, but a majority of the states extended that prohibition until the applicant was either deemed qualified, made a finalist, or extended a conditional offer.[97] Under Hawaii's statute, all employers, public and private, are prohibited from inquiring into an applicant's criminal history until the applicant has been given a conditional offer, unless the conviction record "bears a rational relationship to the duties and responsibilities of the position."[98] Under Hawaii's statute, employers are not able to consider felony convictions more than seven years old or misdemeanors from more than five years ago, but there are exceptions.[99]

When applying Hawaii's statute to Joe's situation from the introduction, Joe would likely face few issues when applying to jobs. It is true

96. Haw. Rev. Stat. § 378-2.5(b) (2022).
97. McLean, *supra* note 89.
98. Haw. Rev. Stat. § 378-2.5.
99. *Id.*

that, under Hawaii's statute, employers that are hiring for a position at a federally insured financial institution are not limited by the time restrictions on how far back an employer can consider a conviction.[100] Notwithstanding this exception to the time limits, Joe's employer would still only be able to ask about convictions that are rationally related to the job's duties and responsibilities, and Joe's conviction for involuntary manslaughter would likely not qualify.[101] Additionally, Joe's potential employer would not be able to ask about any conviction record until after Joe had been given a conditional job offer,[102] which means Joe would have already been deemed qualified for the position. Under Hawaii's current statute, Joe's conviction record would be unlikely to affect his employment prospects in a significant way.

Almost forty percent of states fall into the "moderately protective" category. Three states—Illinois, Nebraska, and Wisconsin—fall right at the top of the group with eight points. The key reason that these three states fall into the moderate group instead of the high group was their lack of universal protection. All three states limit their statutes to cover only a portion of employers. States in this category also tend to allow employers to ask criminal history questions earlier in the hiring process. The most common timing restrictions found in the statutes prohibited asking criminal history questions before the initial interview or simply prohibited the inquiry during the initial application.

If Joe from the introduction were to apply for a job in Illinois, he would likely face at least a few more issues during the application process than if he were to apply in Hawaii. Illinois's statute prohibits employers from inquiring into an applicant's criminal history until either (1) the applicant has been deemed qualified and offered an interview or (2) if there is no interview, the applicant has been given a conditional offer of employment.[103] Under Illinois law, "employer" refers to any person or entity that employs more than fifteen people.[104] Although Illinois does not require that the conviction be related to the position, this would not necessarily be a hurdle for Joe. He would likely not be asked about his conviction until later in the process. With the possibility of employers falling under a different combination of the statutes, though, Joe's situation is very dependent on each employer. On one end of the spectrum, the employer could be very small and not covered by the statutes at all. But any business with over fifteen employees would have to wait to ask about a conviction record until he had been deemed qualified or given a conditional offer. Applying to a larger employer, Joe would likely have an easier time getting a job than if he were to apply

100. *Id.* § 378-2.5(d)(9).
101. *Id.* § 378-2.5(a).
102. *Id.* § 378-2.5(b).
103. 820 Ill. Comp. Stat. 75/15 (2015).
104. *Id.* § 10.

to a smaller employer, because the larger employer would have to focus solely on his qualifications until later in the process.

At the low end of the moderately protective group are states like Arizona. Arizona's Ban-the-Box law comes from an executive order signed by the governor in 2017. Under Arizona law, state agencies are prohibited from asking about an applicant's prior convictions during the initial application process.[105] While the order does encourage other employers to provide the same protections to applicants, compliance is only required by state agencies.[106] The precise application of Arizona's executive order to state agencies is also unclear, though. One section prohibits state agencies from disqualifying an applicant due to a criminal record, but that statement is contradicted two paragraphs later when the order states that particular crimes may automatically preclude an applicant from employment.[107]

When applying Arizona's statute to Joe's situation, it quickly becomes clear that he may face some significant issues when applying for jobs in the state. If Joe doesn't apply for a job at a state agency,[108] nothing prevents a potential employer from asking about his felony conviction on the initial application and then throwing Joe's application in the trash. Under this law, Joe's qualifications and the circumstances of his conviction may never be considered because employers are not required to provide applicants with the opportunity to explain themselves during an interview. Joe may find a private employer that doesn't ask about conviction history right away, or he may be applying for a job that is covered by the statute, but more likely than not, Joe will probably have some challenges finding a job in Arizona.

Finally, the last group of states, the "low-protective" category, contains twenty-three states. Of those twenty-three states, fourteen received zero points, because none of those states has a statute. The states in this category that do have statutes seem to have early-process restrictions similar to the "moderately protective" group, but these states tend to cover fewer employers under their statutes. These states also have more exclusions than higher ranking states. For example, Maryland excludes employers with less than fifteen employees, and its statute does not apply if the employer is permitted to inquire into an applicant's background by another statute.[109] Maryland's restrictions also don't apply to applicants for positions that involve work with children or vulnerable adults.[110] Kansas is in the group of low-protective states because its law, created through Executive Order, like in Arizona,

105. Ariz. Exec. Ord. 2017-07 (Nov. 6, 2017).
106. *Id.*; Ariz. Rev. Stat. § 41-741(15) (2022).
107. Ariz. Exec. Ord. 2017-07 (Nov. 6, 2017).
108. Ariz. Rev. Stat. § 41-741(15).
109. Md. Code Ann., Lab. & Empl. §§ 3-1502–1503 (West 2022).
110. *Id.* § 3-1502.

is narrow and only covers a very select group of employers. Under Kansas's Executive Order, an employer is prohibited from asking about an applicant's criminal record on the initial application.[111] The order also prohibits applicants from being automatically denied an interview because of a criminal history.[112] While those prohibitions seem fairly protective, the order contains some very large exceptions and narrow clauses, which is why Kansas falls under the low-protective category. Kansas's Ban-the-Box Executive Order only applies to positions in the executive branch of the state government.[113] Additionally, the employer is allowed to inquire about convictions that would automatically bar the applicant from employment.[114] The order is also clear that the language is not meant to limit the employer's ability to conduct a background check or inquire into an applicant's criminal record after the initial application.[115]

In Joe's case, if he were applying for jobs in states that are in the low-protective category, unless he was applying to a covered position in the state government, his potential employer would likely ask about his conviction history on the initial application or during the initial interview. Under Kansas law, Joe would likely face significant hardships during his employment search. Even more problems would come for Joe in any of the fourteen states that do not have a Ban-the-Box law or executive order on the books. In a state like Iowa, nothing prevents an employer from asking about an applicant's criminal history on the initial application and subsequently refusing to call the applicant back for an interview. In Iowa and the other thirteen states, applicants with criminal histories are significantly disadvantaged in the hiring process because they are likely to face judgment from the beginning of the process.

The Ban-the-Box movement took off quickly, and, on its face, it seemed promising to protect individuals with criminal histories from employment discrimination. However, the lack of uniformity in these statutes and varying levels of protection mean that some ex-offenders will find protection lacking, especially in low-protective states. Individuals in low-protective states are more likely to see their rejection only delayed until later in the hiring process, and not prevented.[116] Additionally, research suggests that Ban-the-Box statutes may actually increase discrimination based on race, or other class associated with stereotypes of criminality.[117] It is clear that Ban-the-Box statutes,

111. Kan. Exec. Ord. 18-12 (May 2, 2018).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. Hanks, *supra* note 94.
117. *See supra* notes 37–43.

especially low-ranking ones, are likely doing more harm than good. These statutes are either simply delaying an employer's discriminatory decision based on the applicant's conviction status, or worse, causing an increase in racially motivated hiring decisions based on assumptions about applicants that don't provide their criminal history.

B. Licensing Restrictions

One of the clearest barriers to employment for ex-offenders is state statutes that completely bar employment in certain fields through licensing restrictions. Almost twenty percent of working Americans need a professional license to work,[118] which often means that ex-offenders are excluded from many fields of work. Additionally, the average license in the United States requires almost a year of education, passing an exam, and paying close to $300 in fees, which is nearly impossible for some ex-offenders.[119] States also do not treat ex-offenders uniformly; there is a wide variety of laws across the country relating to occupational licensing restrictions for ex-offenders.[120]

Nick Sibilla, a legal analyst for the Institute for Justice, studied the effects of these licensing laws, using ten different criteria to grade and organize states based on their professional licensing limitations on ex-offenders.[121] Under Sibilla's criteria, Indiana ranked the most protective of ex-offenders at an "A."[122] Indiana's statute ranked so highly because its law governing licensure for ex-offenders is fairly narrow, requires a specific and direct relationship between the crime and the job, has mandatory factors for consideration so each case is evaluated separately, and includes a strict review process similar to that of a criminal appeal.[123] However, Indiana's statute does not apply to jobs in law enforcement, the probation office, or the community corrections department.[124] Indiana law also prohibits licensing boards from using general or vague language, such as "moral turpitude," in their disqualifications.[125] Even if the applicant is deemed to be disqualified under the licensing requirements for a particular field, the reviewing board is required to consider certain factors when making a final decision.[126] Finally, with specific exceptions, applicants cannot be barred from obtaining a license for longer than five years after their release or conviction, whichever is later.[127]

118. Sibilla, supra note 52, at 3.
119. *Id.*
120. *See id.*
121. *See id.* at 5–7.
122. *Id.* at 39–40.
123. *Id.*; Ind. Code § 35-38-9-10 (2022); *id.* § 36-1-26-4; *id.* § 36-1-26-5.
124. Ind. Code § 35-38-9-10(a).
125. *Id.* § 36-1-26-4(a).
126. *Id.* § 36-1-26-4(c).
127. *Id.* § 36-1-26-4(d).

In Indiana, Joe would likely be able to get a license in most fields because the decision maker would be required to consider the nature of his crime, the relationship between his crime and the job for which he is applying, and evidence of his rehabilitation.[128] Additionally, since Joe was released from prison almost five years ago, his crime is almost out of the time limitations placed on which crimes can be considered.[129] Even if Joe were to apply within five years after his release, the review board must consider how long it has been since his conviction.[130] Indiana also requires that the applicant's position be "specifically and directly related" to the occupation or profession the applicant is applying for or holds a license for,[131] which is unlikely to be the case in Joe's situation.

The average score for states in the Sibilla study was a dismal "C–," and includes Nebraska, New Jersey, Wyoming, and five other states.[132] Nebraska ranked lower because it has very few exclusions in its application for specific offenses, but the law does include some factors that must be considered during the review and appeal process should the applicant be denied.[133] New Jersey's ranking resulted mostly because the statute only required that the crime be adversely related to the job in order to be considered, which provides the licensing board with excessive discretion.[134] Additionally, the New Jersey statute has an extremely weak review and appeal process.[135]

Joe would likely have a more difficult time getting an occupational license in a state like Nebraska. Nebraska does not have a time limitation on what crimes can be considered, but the licensing board is required to consider the time that has passed since the conviction, rehabilitation, employment history, and testimonials.[136] Nebraska's statute also allows for the applicant to appeal an adverse decision by the board, so in the unlikely event that Joe's application were denied, he could get a second review after a denial.[137] Like in Nebraska, Joe's situation would be more difficult in New Jersey but for different reasons. New Jersey's statute requires only that the applicant's criminal history "relate adversely" to the job or occupation for which the applicant is applying.[138] New Jersey's statutes also allow for the board to refuse to issue a license for crimes involving "moral turpitude."[139] This

128. *Id.* § 36-1-26-4(c).
129. *Id.* § 36-1-26-4(d).
130. *Id.* § 36-1-26-4(c).
131. *Id.* § 36-1-26-4(b).
132. Sibilla, *supra* note 52, at 9.
133. *Id.* at 65–66; Neb. Rev. Stat. § 84-947 (2021).
134. Sibilla, *supra* note 52, at 71–72.
135. *Id.*
136. Neb. Rev. Stat. § 84-947(2)(b).
137. *Id.* § 84-947(5).
138. N.J. Stat. Ann. § 2A:168A-1 (West 2022).
139. N.J. Stat. Ann. § 45:1-21(f).

vague language can result in arbitrary decisions and qualified applicants being denied a license for crimes that aren't closely related to their prospective employment field. New Jersey's statute also does not provide for the right to an appeal, so applicants have no way to get their decisions reviewed should their license be denied.[140]

Seven states, including Alabama and Alaska, received an "F," and six of those seven states received zero points.[141] Sibilla's research found that Alabama and Alaska both "generally lacked protections for ex-offenders seeking licenses to work."[142] Massachusetts was given an "F," but scored some points.[143] Massachusetts's statute includes a ban on considering dismissed or sealed records[144] and includes the right to appeal the denial and written notice,[145] but there are virtually no other protections for ex-offenders applying for occupational licenses in the state.[146]

Finally, if Joe were to apply for an occupational license in Massachusetts, he would likely have a difficult time getting that license approved. Unlike the states mentioned earlier, Massachusetts does not have an overarching state law regulating the admission or denial of occupational licenses. Rather, each agency gets to set its own regulations.[147] Additionally, there are no mandatory factors to consider when reviewing a case, and there are very few due process protections. In a state like Massachusetts, Joe's chances of obtaining a professional license are left completely up to the discretion of the professional board to which he is applying. And, in states like Alabama and Alaska, Joe's application process has no oversight from the state legislature. The vast differences in the statutes throughout the country create uncertainty and inconsistency in the experiences of ex-offenders trying to get professional licenses after release.

C. Fair Chance Laws

In April 2012, the Equal Employment Opportunity Commission (EEOC or Commission) issued *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, which is designed to provide covered employers with information about the possibility of liability under Title VII for discriminating against protected classes of people through

140. *See id.*
141. Sibilla, *supra* note 52, at 9–10.
142. *Id.* at 11–14.
143. *Id.* at 53–54.
144. Mass. Gen. Laws ch. 127 § 152 (2022); Mass. Gen. Laws ch. 276 § 100C.
145. Mass. Gen Laws ch. 6 § 171A.
146. Sibilla, *supra* note 52, at 53–54.
147. Mass. Gen. Laws Ann. ch. 6 § 172N.

hiring practices involving arrest and conviction records.[148] While the EEOC does not have the power to prevent employers from obtaining arrest and conviction records, the Commission can hold employers accountable for using the information in a discriminatory way.[149] The EEOC's guidance, along with the Obama administration's "Fair Chance Pledge," is aimed at getting ex-offenders back into the workforce after they are released.[150] While these actions are nonbinding, a number of states have introduced binding legislation that protects applicants with criminal records by limiting the ways an employer can consider an applicant's arrest and conviction records during the hiring process. To analyze the state statutes, I assigned each state statute points based on the following criteria:

Connection to employment	Bans	Time Limits
"Job related"- 1	Questions about arrest- 1	Nothing over 10 years- 1
"Reasonable relationship"- 2	expunged/sealed/pardons- 1 (each)	Nothing over 5 years- 2
"Objectively unfit"-3		
"Direct relationship"-4		
Public jobs- 2		

Considerations	Other
Mandatory considerations (<5)- 1	Encouraged to hire ex-offenders- 1
Mandatory considerations (= or >5)- 2	Requires consent by applicant- 1
	Written notice of denial based on conviction- 1
	Written explanation- 1
	Not an absolute bar- 1

After the points were assigned, the states were classified as "highly protective" (6+), "moderately protective" (2–5), or "low-protective" (<2). Five states fell in the highly protective group, and the highest-ranking state was Wisconsin. The moderately protective group had fifteen

148. EEOC, EEOC-CVG-2-12-1, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (2012), https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions.

149. *Id.*

150. *Id.*; Take the Fair Chance Pledge, Obama White House Archives, https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge (last visited Jan. 29, 2023).

states in it, and Pennsylvania ranked the highest with five points. The lowest category had the last thirty states in it, and twenty-two of those states had no legislation relating to the use of an applicant's criminal history during the hiring process.

Wisconsin ranked the highest because it is the only state that expressly includes those with arrests and convictions in its discrimination statute.[151] Along with sex, religion, race, and other protected classes, Wisconsin includes those with criminal convictions in its statute.[152] Under Wisconsin's prohibited discriminatory actions, an employer may not refuse to hire or promote someone on the basis of their conviction or arrest record.[153] The state legislature did provide for some exceptions in certain occupations or with certain convictions.[154] Under Wisconsin law, an employer may refuse to hire an applicant because of their criminal or arrest record if the record is substantially related to the job for which the applicant is applying.[155] Not only does Wisconsin provide clear legal coverage, wronged individuals have clear redress through the court system to prevent the discrimination from continuing and to hold employers accountable because it is a part of the state's anti-discrimination law.

New York has a similar statute, but individuals with criminal records are not protected under the state's overarching discrimination statute. New York law states that no applicant should be denied employment for the sole reason of having a conviction, unless there is a direct relationship between the conviction and the job or if hiring the applicant would bring about unreasonable risk to members of the public or property.[156] Additionally, New York doesn't allow employers to deny employment based on a "lack of good moral character," which prevents a more subjective application of the statute.[157] Just like Wisconsin, New York provides applicants with a clear way to seek redress in the case of discrimination.[158]

When applying Joe's situation to Wisconsin and New York, Joe would likely face very few problems. Joe's involuntary manslaughter charge is unlikely to be sufficiently related to any job in finance to warrant disqualification based solely on his conviction. Similarly, in New York, Joe's conviction would likely not be deemed directly related to the job for which he is applying, which means a potential employer could not refuse to hire him based solely on his criminal record. Joe would be protected by strong language and clear standards in both

151. Wis. Stat. § 111.321 (2022).
152. *Id.*
153. *Id,* § 111.322.
154. *Id.* § 111.335.
155. *Id*. § 111.335(3)(a)(1).
156. N.Y. Correct. Law § 752 (McKinney 2007).
157. *Id.*
158. *Id.* § 755.

states. Additionally, Joe would be able to sue a potential employer if he thought he was denied employment on the basis of his criminal history.

Pennsylvania ranked the highest in the moderately protective group with five points. While Pennsylvania does not consider ex-offenders a protected class like Wisconsin, the state still offers fairly strong protections for individuals with convictions during the hiring process. Pennsylvania's statute provides that an applicant's convictions can be considered only to the extent that they relate to the applicant's suitability for the job for which they applied.[159] Covered employers are also not permitted to consider records that have been properly expunged under state law, which, considering Pennsylvania's new Clean Slate law, applies to a much larger number of people.[160]

When applying Joe's situation to the Pennsylvania statutes, he is still pretty well covered. However, the phrase "relate to the applicant's suitability" is fairly subjective and could lead to arbitrary decisions by employers during the hiring process. It is possible that an employer would consider Joe's conduct sufficiently related to the position to disqualify Joe, especially if the position involves frequent contact with the public. In my opinion, however, it is unlikely that Joe's conviction from five years ago would be sufficiently related to his job to warrant consideration or denial, especially if the employer took the time to ask questions about the circumstances of his conviction.

Delaware is one of thirty states that fell into the low-protective category, but one of only eight in that category that scored any points. Under Delaware law, employers are permitted to disqualify an applicant if their criminal history is "job related" and "consistent with business necessity."[161] A previous section the state's code defines the phrase "business necessity" as "render[ing] the individual unable to perform the essential functions of the position."[162] The statute also expressly includes situations in which the applicant is perceived to be a threat to health or safety in the workplace, which would allow employers to deny an applicant under situations in which public safety is a concern.[163] The subjectiveness of the language included in Delaware's statute allows a great deal of discretion in employers' decisions during the hiring process.

Under Delaware law, Joe would likely have a harder time getting a job. Even though the employer is required to consider the type of offense, the time that has passed since, and the job being sought,[164] if the employer does not ask the right questions about Joe's situation, it

159. 18 Pa. Cons. Stat. § 9125(b) (2022); *infra* notes 177–88.
160. *Id.* §§ 9122–9122.2, 9122.5(b).
161. Del. Code. Ann. tit. 19, § 711(g)(3) (2022).
162. *Id.* § 710(12).
163. *Id.*
164. *Id.* § 711(g)(3)(a–c).

would be easy for the employer to disqualify Joe based on his felony conviction. If the employer did not ask about or consider the circumstances that led to Joe's conviction, which they are not required to do, Joe's felony conviction for involuntary manslaughter carries enough weight that it might lead an employer to believe he would be a danger to those around him.

The other twenty-two states in the low-protective category received zero points because they have no statute limiting the use of criminal conviction or arrest information during the hiring process. Alabama is one of the states that falls into this category. Because Alabama does not have any regulations about the use of conviction records in hiring decisions, any Alabama employer would be free to consider an arrest or conviction in any way that they felt appropriate, even if that meant automatically disqualifying any person that has ever been arrested or convicted of a crime.

For Joe, this will likely not bode well. Most likely, Joe will be asked about his conviction, or it will come up in a background check later in the process, and his application will be thrown out. As mentioned above, over sixty percent of employers say they would "probably not" or "definitely not" hire someone that had a criminal conviction on their record.[165] Statistically, Joe will have a much harder time finding gainful employment in a state like Alabama that doesn't have any limitation on how employers can consider an applicant's criminal convictions during the hiring process.

As we have seen, Joe's outcomes differ significantly depending on where he is looking for employment, what type of position he is applying for, and the employer reviewing his application. Additionally, Joe's chances of getting a job are affected by the state's Ban-the-Box policy. Ten states across the country, including Alabama, do not have a Ban-the-Box statute or a statute regarding the use of criminal conviction or arrest information. In these states, applicants with convictions are especially likely to struggle because employers will probably ask them on the initial application whether they have a conviction, and then these employers have no limitations on how that information is considered if the applicant answers "yes." Because no statute prohibits them from doing so, employers in these states likely disqualify potential employees by throwing out any applications that mark "yes" on their criminal conviction questions. These applicants do not get a second chance, they are judged based on the box they are mandated to check, and they have no redress.

165. Raphael, *supra* note 10.

IV. Why Should Employers Hire Ex-Offenders?

A. Avoiding Liability under Discrimination Statutes

Even though ex-offenders are not officially included under Title VII of the Civil Rights Act, there are ways in which an employer could be found liable under Title VII if they refuse to hire people with criminal records. The EEOC has recognized the possibility that an employer could be held liable for racial discrimination under a disparate impact theory if an employer's refusal to hire applicants with criminal histories has a statistically significant negative impact on racial minorities.[166] Under a disparate impact cause of action, an employer would be liable if the plaintiff could demonstrate that the facially neutral policy—the employer's refusal to hire applicants with criminal histories—disproportionately excludes a protected class, such as members of a particular race or national origin.[167] Minority populations, especially African-American men, are disproportionately impacted by the criminal justice system. Studies have found that Black Americans are over five times more likely to be incarcerated than their white counterparts.[168] Latinos are incarcerated at almost one-and-a-half times the rate of whites.[169] These racial disparities in the criminal justice system make it more likely that applicants with criminal histories will also be racial minorities. These racial inequities create the possibility that facially neutral hiring policies that prohibit the hiring of ex-offenders will create a disparate impact on minority applicants.

To avoid this liability, the EEOC recommends that employers consider the nature of each applicant's offense, the time that has elapsed since the conviction, and how each conviction relates to the specific job the applicant applied for.[170] Additionally, employers could provide a denied applicant with an opportunity to explain why they do not think denial is appropriate.[171] However, with generalized policies that do not provide for individual decisions or a rebuttal opportunity for the applicant, employers run the risk that their hiring policies will disproportionately affect minority applicants, which will expose them to liability under Title VII. Implementing laws regarding the use and consideration of convictions records during the hiring process could help employers avoid creating a disparate impact on minority applicants.

166. EEOC, *supra* note 148.
167. *Id*.
168. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, Sentencing Project 1, 3 (June 14, 2016), https://www.sentencingproject.org [https://perma.cc/VKS7-FKLN].
169. *Id.*
170. EEOC, *supra* note 148.
171. *Id.*

B. Ex-Offenders Tend to Be Better Employees

Even if the law does not require it, employers should hire ex-offenders because it makes good business sense to do so. Hiring individuals with convictions has more advantages than just avoiding legal liability. Research done at John Hopkins University found that employees with criminal records had a lower rate of turnover than those without.[172] Contributing to that finding, the researchers found that workers with criminal records are less likely to quit.[173] Workers with criminal records have been found to get promoted more quickly and to higher positions than their coworkers without criminal records.[174] Additionally, research done on military enlistees has shown that soldiers with criminal records are "no more likely to be discharged for negative reasons."[175] Finally, researchers at Harvard University have found that employees with criminal records are more productive at work than their co-workers without criminal histories.[176] All of this research suggests that employees with criminal records tend to be better and more loyal employees compared to those without convictions. If an employer is looking to decrease turnover or increase productivity, this research shows that hiring this group may provide an advantage.

C. Tax Incentives

Additional incentives exist, as well. Few employers know that the federal government offers tax benefits to businesses that hire qualified ex-offenders. The Work Opportunity Tax Credit provides employers with up to $9,600 in credit for each ex-felon that is hired, and there is no limit on the number of credits an employer can receive.[177] While this can be a good incentive to encourage employers to hire ex-offenders, employers do not seem to be taking advantage of the credit. Between 2009 and 2013, only 5.8% of ex-offenders who were working were claimed by their employers for this credit.[178] The credit applies equally to employers that hire felons on parole and those that were convicted but sentenced to other punishments, which actually suggests that employees are claiming a mere three percent of eligible ex-felons.[179] These tax breaks do not just help the employers; research has shown that ex-felons certified under the Work Opportunity Tax Credit make

172. Couloute & Kopf, *supra* note 13.

173. *Id.*

174. *Id.*; Stacy & Cohen, s*upra* note 13.

175. Kali Holloway, *Employees with Criminal Records May Be Better Employees*, AlterNet (May 16, 2016), https://www.alternet.org [perma.cc/HT3J-Y65E].

176. *Id.*

177. *Id.*

178. Adam Looney & Nicholas Turner, Brookings Inst., Work and Opportunity Before and After Incarceration 3 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/GZ29-LVSW].

179. *Id.*

ten percent more than those that are not.[180] The economic benefits that are passed on to the employees provide additional economic stability and can contribute to a reduction in recidivism rates.[181]

V. Solutions

There are a number of policy changes that states can make to help eliminate, or at least reduce, the struggle to find employment for those with convictions. As thirty-six states have already, passing strong Ban-the-Box laws, like Hawaii[182] could lessen the effect of criminal convictions during the hiring process. At a minimum, Ban-the-Box laws like Hawaii's prevent employers from immediately screening out applicants with conviction histories by requiring that the applicant be given a conditional offer of employment prior to disclosing any information about their conviction or arrest record.[183] However, these Ban-the-Box laws provide little protection if there is no accompanying statute that explicitly limits the ways in which employers can use and consider an applicant's conviction history.[184]

It is my belief that the best way to combat this issue is to pass anti-discrimination laws that include those with conviction and arrest records. Wisconsin would be the model state for this approach because it explicitly protects those with prior convictions and arrests in the same ways as those of different races, sexes, or religions.[185] The state also provides a clear remedy for those that are a victim of discriminatory practices when trying to gain employment. Even without a strong Ban-the-Box statute, Wisconsin provides extremely strong protections for those trying to get back into the labor market after a conviction or arrest. States have been experimenting with other forms of legislation to encourage employers to hire ex-offenders, such as Clean Slate laws and training programs about the collateral consequences of convictions. These solutions, for various reasons, however, do not adequately address the needs of ex-offenders in the employment market.

A. Clean Slate Laws

Many states have statutes and procedures that allow certain offenders to petition for expungement or sealing of certain records, but this petition-based system leaves some number of people out.[186] This realization has led to what are now called "Clean Slate Laws," which began

180. *Id.*
181. *See supra* notes 22–33.
182. *Supra* notes 94–96.
183. *Id.*
184. *See* Hanks, *supra* note 94.
185. Wis. Stat. § 111.321 (2022).
186. *Clean Slate Toolkit: Unlocking Opportunity Through Automated Record-Clearing,* Ctr. for Am. Progress, https://www.americanprogress.org/issues/poverty/reports/2018/11/15/460907/clean-slate-toolkit [perma.cc/AB8Y-2LRN].

in Pennsylvania.[187] In 2018, Pennsylvania's state legislature passed Act 56, which streamlined and automated the process of expunging and sealing the criminal records of almost thirty million people in that state.[188] This collection of statutes lays out numerous offenses and types of offenders that are automatically entitled to expungement and sealing if their case meets certain criteria under the statute.[189] For example, under the statute, a person whose case has not reached a disposition within eighteen months of arrest shall have their record expunged of that case if the proper court certifies that no disposition is available and no action is pending.[190] Additionally, persons are entitled an expungement if they have been completely acquitted at trial of all charges based on the same conduct or criminal incident.[191] While some offenses do not fall under this statute,[192] more situations are covered by limitations on what police can disseminate to noncriminal justice organizations and people upon request.[193] Under Pennsylvania's statute, a police agency must redact any indications of an arrest, indictment, or other information if (1) the arrest was three or more years ago, (2) no disposition is included in the record, and (3) nothing on the record indicates that a proceeding is still pending on the charge.[194] There are sometimes requirements that must be fulfilled before a record is sealed, like having all fines paid, but Pennsylvania's legislation is expected to seal or expunge over half of the charges in the courts' databases.[195] These efforts will prevent sealed records from appearing on employee background checks and allow applicants to tell employers that they do not have a criminal record at all.[196] Research suggests that one year after a criminal record is cleared, affected people are eleven percent more likely to have a job and earn twenty-two percent more than those without cleared records.[197] While these Clean Slate laws have only been passed in a few states, legislation has been introduced at the federal level and is predicted to increase in popularity over the coming years.[198]

While initial statistics and research show Clean Slate laws are promising, these laws also come with challenges. Most of these laws

187. Faith Karimi, *Pennsylvania Is Sealing 30 Million Criminal Records as Part of Clean Slate Law*, CNN, (June 28, 2019, 4:46 AM EDT), https://www.cnn.com/2019/06/28/us/pennsylvania-clean-slate-law-trnd/index.html [perma.cc/U5CT-C62D]; 18 Pa. Cons. Stat. §§ 9121–9122.3 (2022).

188. Karimi, *supra* note 187; 18 Pa. Cons. Stat. §§ 9121–9122.3.

189. 18 Pa. Cons. Stat. Ann. §§ 9121–9122.3.

190. *Id.* § 9122(a)(1).

191. *Id.* § 9122(a)(4).

192. *Id.* § 9122(b.1).

193. *Id.* § 9121(b).

194. *Id.* § 9121(b)(2)(i).

195. Karimi, *supra* note 187.

196. *Id.*

197. *Clean Slate Toolkit*, *supra* note 186.

198. *Id.*

are fairly narrow, so they will not have an impact on that many people. Additionally, the statutory language used by some states is confusing, so it can be difficult to understand when the statute applies to specific people and offenses. This strategy might also create issues similar to Ban-the-Box laws. If Clean Slate laws become more mainstream, employers may start to make assumptions about the applicant's criminal history based on protected characteristics, such as race. If the employer is aware that the applicant could have had their record erased, they may be less likely to hire someone of a minority race because stereotypes and statistics would suggest that the applicant is more likely to have a record that was subsequently expunged. Still, these laws seem like a good starting point because they are at least better than the status quo of having an official criminal record attached to the job applicant' name.

B. Collateral Consequence Training

In addition to formal legislation, judges and members of the courts have begun to emphasize the importance of considering the collateral consequences that accompany a criminal conviction when sentencing someone.[199] Collateral consequences are "legal disabilities imposed by law as a result of a criminal conviction regardless of whether a convicted individual serves any time incarcerated."[200] These consequences create barriers for convicted individuals who are trying to reenter society by restricting their access to benefits or opportunities that would otherwise be available.[201] Collateral consequences can affect housing, employment, immigration, and many other things.[202] Although these collateral consequences can severely impact someone's life, courts are not required to warn defendants about any consequences other than possible immigration consequences, when they are accepting a plea or after a conviction.[203] The American Bar Association has encouraged prosecutors, defense attorneys, and judges to consider collateral consequences at various stages during a prosecution in order to make sure that the defendant is fully aware of all the possible consequences of having a conviction on their record.[204] Actively considering and discussing collateral consequences could also result in an outcome that does not punish the offender for the rest of their life for a minor crime.[205] If they were to consider all the possible collateral consequences, prosecutors and judges may be more likely to reduce charges or work out some other arrangement like those in diversion courts so that the

199. *See* Am. Bar Ass'n Crim. Just. Section, *supra* note 51.
200. *Id.* at 4.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 8–10.
205. *Id.* at 9.

punishment is more proportional to the crime being charged.[206] To help solve this issue and assist the legal community in this endeavor, the American Bar Association encourages its members to use the National Inventory of Collateral Consequences of Conviction (NICCC), which provides access to all the sanctions, disqualifications, and other consequences of a criminal conviction that don't appear in the actual judgment filed after a criminal case is disposed of.[207] Education can be a great tool to effect change, but, just like Clean Slate laws, strictly relying on educating members of the criminal justice system about collateral consequences comes with challenges that would make it less effective in practice.

Relying on education about collateral consequences presents three main issues. First, there is no guarantee that judges or prosecutors would take this education seriously or apply it in a meaningful way. Simply providing the courts with information about possible collateral consequences does not mean that those consequences would be changed or avoided when the charge is brought, or the sentence is imposed. Second, there are many situations in which the collateral consequences are built into the penal code or other state legislation. Specifically regarding licensing restrictions, there is nothing a judge or prosecutor can do if a conviction would automatically exclude the offender from getting licensed in certain fields. The only hope for the offender would be for the prosecutor to find a different offense to charge that would not result in such harsh consequences, but that option is not always available or appropriate. Lastly, acknowledging the collateral consequences that accompany certain convictions does not prevent employers from discriminating against the ex-offender based simply on their conviction status. Even if certain restrictions or consequences are avoided, the offender still has a conviction on their record, which greatly affects their employment prospects, regardless of whether other potential consequences were avoided. Educating members of the criminal justice system about the challenges that offenders face after release is important and could definitely help put things into perspective, but this approach isn't going to prevent employers from discriminating against ex-offenders.

C. Fair Chance Laws

As mentioned above, Fair Chance laws limit the ways in which employers can consider an applicant's criminal history during the hiring process.[208] These laws prevent, or at least limit, the discriminatory effects that come with having a criminal background.[209] By limiting the ways

206. *Id.*
207. *Id.* at 2.
208. Nat'l Emp. L. Pol'y, Fact Sheet, *supra* note 5, at 2.
209. EEOC, *supra* note 148.

in which employers can use criminal record information, there would be little need to enact laws that automate expungements or require the members of the court to delve deeply into the possible collateral consequences of each case they deal with.

By treating those with criminal convictions as a class protected under Title VII[210] or other similar state legislation, many of the problems that accompany other possible solutions can be avoided. Unlike Ban-the-Box or Clean Slate laws, Fair Chance laws would prohibit employers from refusing to hire those with convictions based on their conviction status alone. Fair Chance laws would also avoid the confusion and complications involved in Clean Slate laws because the effects of the legislation would cover all ex-offenders equally, and coverage would happen automatically; there would be no need to opt in or file a petition. Perhaps most importantly, including individuals with conviction records within legislation like Title VII[211] would provide individuals with remedies when they are discriminated against. Including these protections under a structure similar to Title VII would mean causes of action for discriminatory employment practices that could provide the plaintiff with remedies like damages, specific performance, injunctive relief, or other court ordered remedies. Adding individuals with criminal convictions to the list of protected classes would be the most effective way to bring about meaningful change in the employment market and ensure that employers are providing ex-offenders with the opportunity to paid employment.

Conclusion

Individuals with criminal records face many challenges when applying for employment after their conviction. To alleviate some of the lifelong negative consequences associated with having criminal convictions, a number of solutions have been proposed. As the country begins to acknowledge the struggles that these individuals face in the job market and work to help them effectively reintegrate into society, the most popular policies have not necessarily had the effects that they were intended to have.[212] Ban-the-Box policies, which were intended to alleviate some of the negative consequences that come with having to divulge a criminal arrest or conviction early in the hiring process, have led to greater possibilities of racial profiling in employment,[213] or simply pushing the discrimination later into the hiring process.[214] While Clean Slate laws and training members of the criminal justice system about collateral consequences present some benefits, those solutions

210. 42 U.S.C. § 2000e-2.
211. *Id.*.
212. *Supra* notes 37–64.
213. *Supra* notes 37–45.
214. Hanks, *supra* note 94.

are not likely to be completely effective in alleviating the issues that ex-offenders are facing. Fair Chance laws present the best protection against discrimination in the employment market. Expressly prohibiting employers from denying employment based on an applicant's criminal history almost completely eliminates the need for supplemental policies. With strong limitations on how employers can use and consider criminal records, it does not matter when in the hiring processes the record is disclosed or discovered. Additionally, the need to expunge or seal low-level offenses becomes less prominent if employers cannot legally discriminate against the applicant. While these additional policies provide extra support for applicants during the hiring process, strong Fair Chance laws have the ability to carry most of the burden in protecting individuals with criminal histories. Implementing strong Fair Chance legislation is the best way for applicants like Joe to be able access the labor market.